

Legal Pluralism, Cultural Defenses, and the Islamic Legal Tradition (*Shari'a*): Towards a Truly International Criminal Court

MOHAMED ELEWA BADAR[†]

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[†] Professor of Comparative and International Criminal Law & Islamic Law, Head of Subject (PG Studies), Northumbria Law School, Northumbria University at Newcastle, U.K. Legal Consultant for Mr. Al Hassan's Defense Team before the International Criminal Court (Dec. 2021–May 2023). Email: mohamed.badar@northumbria.ac.uk. The views and opinions expressed here are those of the author in his personal capacity and do not necessarily reflect the views or position of Mr. Al Hassan's Defense Team. An earlier version of this Article was presented at the Texas International Law Journal Symposium, February 24, 2024, on "Current Challenges to the Effectiveness and Future of the International Criminal Court: The Problem of Prosecutorial Discretion within the International Criminal Court."

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INTRODUCTION

Much like the rest of international law, international criminal law has been shaped by the preferences of the major powers, their intellectual traditions, and legal scholarship, leading to the neglect of concepts of crime and justice of other cultures. This has proven to be a major hindrance when judges are faced with defendants from different legal traditions and world views, yet their application of the provision of international law largely remains free from their considerations, including at the International Criminal Court (ICC). This is despite Article 21 of the Rome Statute providing the latter with the ability to interpret the Statute in accordance with general principles of law derived from national laws of legal systems of the world including the national laws of States that would normally exercise jurisdiction over the crime.

Utilizing a cultural relativism approach can facilitate the Court’s proper engagement with legal pluralism by allowing it to acknowledge and understand the broader socio-cultural context in which the defendant is accused of committing international crimes. This article provides a critique of the ICC’s lack of engagement with the principles of legal pluralism and cultural relativism and argues that this prevents it from becoming a truly universal international criminal court. It further proposes an alternative approach for the Court to adopt when dealing with Muslim defendants and the application of Islamic law.

Section I critiques the inherent Eurocentrism of international criminal law as it was devised and has since developed. It explores the principle of legal pluralism and, in particular, highlights that the relationship between the international criminal legal regime and the domestic legal framework needs to be clarified. While it shows that a friction exists between the secular western legal tradition and religiously rooted norms such as Islamic law, it does not view these as insurmountable and ultimately advocates for legal pluralism as the way forward in the development of a truly universal international criminal law.

Section II interrogates whether there is a place for considerations of cultural context in international criminal justice and seeks to demonstrate that there is. It outlines the difficulty in defining culture and the tension that exists between universalism and cultural relativism and posits the latter as essential to the evolution of a more legitimate system of international

justice. It explains the impact of culture, and particularly religion, on the formation of a person's worldview and morals, which ultimately informs their decision-making. It advocates for the embrace of cultural defenses in international criminal trials, not to use culture to absolve a person of accountability for committing atrocities but rather to provide a lens through which the Court can try to understand the rationale behind their actions and judge them accordingly.

Section III outlines cultural factors that arise in the legal process, in particular the opportunities for a defendant to introduce their culture at different stages of the trial process. It argues the relevance of culture to due process, the inclusion of cultural evidence in international criminal trials, and the importance of cultural awareness of judges and prosecutors.

Section IV explores cultural defenses as they could be raised before the ICC, either as a stand-alone defense or as part of existing defenses. It provides an objective assessment of both sides of the argument for and against the use of cultural defenses in the international criminal trial process. It argues that irrespective of the criticisms when dealing with cultural defenses in the context of international criminal law the main rationale should be that the law ought not to be an instrument of cultural imperialism.

Section V seeks to rationalize the arguments made in the previous sections by demonstrating them practically through the case study of three judgments before the ICC: *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* ("Al Hassan Case"),¹ *The Prosecutor v. Ahmad Al Faqi Al Mahdi* ("Al Mahdi Case"),² and *The Prosecutor v. Dominic Ongwen* ("Ongwen Case").³

The prosecution of Al Hassan arose from his role in the rule of Timbuktu in Mali by the religiously motivated militant group, Ansar Dine, of which he was a member. It argues that Islam itself was put on trial in this case by the Prosecution and laments the opportunity wasted by both Pre-Trial Chamber I and Trial Chamber X to engage with Islamic legal tradition in the Document Containing the Confirmation of Charges and the judgment respectively. It also argues the case for the application of legal pluralism and cultural relativism in the interpretation of international criminal law and offers an alternative approach to be taken by the above Chambers in demonstrating a practical application of Islamic law principles to this matter. This is evident by the very recent judgment delivered on June 26, 2024 that showed little to no consideration to legal pluralism by Trial Chamber X in its interpretation of the Rome Statute which will be critically evaluated in this Article. The second case that will be discussed is arising from the same situation in Timbuktu involving Ansar Dine, where the ICC missed the opportunity to engage in legal pluralism in order to consider the validity of cultural defense based in the Islamic legal tradition. Thirdly, cultural elements played a prominent role in the arguments presented by the Defense team during the trial in Among the grounds of appeal, the Defense alleged errors in the Trial Chamber's conclusions involving cultural elements, which disregarded important cultural defenses. Moreover, the Defense submitted that the Trial Chamber erred and failed to objectively consider the Acholi traditional justice system as complementary to international criminal justice. While the

1. *Prosecutor v. Al Hassan*, ICC-01/12-01/18-2594-Red, Trial Judgment (June 26, 2024) [hereinafter Al Hassan Trial Judgment], <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1808b650c.pdf>.

2. *Prosecutor v. Al Mahdi*, ICC-01/12-01/15-171, Judgment and Sentence (Sept. 27, 2016) [hereinafter Al Mahdi Judgment & Sentence], https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_07244.PDF.

3. *Prosecutor v. Ongwen*, ICC-02/04-01/15-1762-Red, Trial Judgment (Feb. 4, 2021) [hereinafter Ongwen Trial Judgment], https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01026.PDF.

Islamic legal tradition played no part in the *Ongwen* Case, it provides a useful illustration of how the ICC has dealt with cultural defenses.

Our analysis of the case studies demonstrates that it is essential that international judges at the ICC embrace cultural diversity in their interpretation of the provisions of the Rome Statute so that it is the accused individual, and not his culture or religion, that is in the dock. In order to achieve this, we urge the Assembly of States Parties to take the necessary actions to set out a designated training curricula to educate judges before their appointment on matters related to legal pluralism and cultural relativism. We submitted that this judicial training is crucial to the efficient and impartial administration of international criminal justice, and ultimately to the ICC's legitimacy.

I. LEGAL PLURALISM AND ITS SIGNIFICANCE TO THE WORK OF THE ICC

Traditionally, States, their legislators, and domestic courts have the power to legislate, criminalize and adjudicate crimes, and maintain legal order.⁴ In today's globalized world, this has changed and in recent years we have seen the development of the fields of international human rights law and international criminal law, which have emerged as international legal regimes by themselves.⁵ Those international legal regimes together with their enforcement mechanisms have a variety of sources, stemming from different legal traditions and different world views. This is the case of international criminal law, where different rules apply simultaneously, and have the potential to clash and create problems during the adjudication process.⁶ Therefore, there is a need to address the plurality of rules that might be applicable in relation to a single international criminal case, as well as their relationship and hierarchy.

"Legal pluralism" could be defined as "that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs."⁷ Legal pluralism was used for many years in countries that have Indigenous populations, e.g., Australia, Canada, New Zealand and the United States though its positive impact on the settler societies is still under question.⁸ This practice predates "legal globalization."⁹ "Legal globalization" was used for describing the diversity of laws that have origins in different legal systems and orders, and which at times have an intricate relationship between each other.¹⁰ Therefore, "global legal pluralism" encompasses the "existence of a plurality of legal orders created both by states and non-state communities."¹¹ It aims to contextualize the effects that globalization has on the development of legal norms, as well as the fact that the conduct of someone could simultaneously be

4. Malcom Shaw, *The Nature and Development of International Law*, ENCYCLOPEDIA BRITANNICA (2024), <https://www.britannica.com/topic/international-law/Historical-development> (last accessed Dec. 27, 2024).

5. *Id.*

6. *Id.*

7. John Griffiths, *What is Legal Pluralism?*, 18 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 2 (1986).

8. Morad Elsana, *Legal Pluralism and Indigenous Peoples Rights: Challenges in Litigation and Recognition of Indigenous Peoples Rights*, 87 UNIV. CIN. L. REV. 1043, 1043–75 (2019). See also Kirsty Gover, *Legal Pluralism and Indigenous Legal Traditions*, in THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM (Paul Schiff ed., 2020).

9. See Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 1, 1–35 (2009).

10. Elies van Sliedregt & Sergey Vasiliev, *Pluralism: A New Framework for International Criminal Law*, in PLURALISM IN INTERNATIONAL CRIMINAL LAW 9 (Elies van Sliedregt & Sergey Vasiliev eds., 2012).

11. *Id.*; see also Ralf Michaels, *The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209, 1211 (2006).

regulated by numerous norms derived from different legal sources.¹² In other words, “global legal pluralism” refers to the overlapping laws and regulations within a single normative space.¹³ One of the most prominent examples of such a normative space is international criminal law, and the place where a potential conflict between those overlapping laws could occur is the ICC. When we discuss the potential scenario of trying Islamist militants before the ICC, it is important to also look into the discussion of legal pluralism in international criminal law and the prevalent criticism related to the hesitance on the part of international courts to engage with domestic laws, and in particular with Islamic law. As Su-Wan Yang explains:

“[N]ot all state parties use Western laws, and Western laws are not always the most suitable in every context and situation. In certain instances, such as conflicts fueled by non-Western religious ideologies in non-Western territories by non-Western actors, non-Western perspectives and approaches may prove to be more effective and appropriate.”¹⁴

Legal pluralism in the context of international criminal law can generally be divided into: (i) “horizontal pluralism” relating to the plurality of international criminal courts and hybrid tribunals and their corresponding legal regimes, and (ii) “vertical pluralism” which addresses the different interpretations of international criminal law norms internationally and domestically, as well as the potentially overlapping international and domestic jurisdictions.¹⁵ Pluralism from a horizontal perspective can result in uncertainty regarding the issue of which contradictory international criminal law rules should apply.¹⁶ From a vertical perspective, the biggest difficulty arises from the hierarchy of international and domestic laws and the problem of applying the international legal framework in domestic prosecutions, or *vice versa*.¹⁷ Additionally, “vertical pluralism” is of utmost relevance within the ICC’s complementarity principle, which prioritizes national prosecutions and leaves the ICC as a last resort option when domestic courts prove to be unwilling or unable to prosecute.¹⁸ Therefore, it becomes evident that the issue with the relationship between the international criminal law regime and the domestic legal framework needs to be clarified.

The use of different legal regimes simultaneously is not unknown to international courts, and is to be considered as a normal phenomenon in a space where those different normative regimes exist side-by-side.¹⁹ International courts have relied previously on secondary regimes, such as domestic laws, as gap-fillers.²⁰ This was particularly evident in the ad hoc tribunals which used domestic norms in order to make use of the open-ended procedural rules in a practical manner.²¹ A good example of this mindset is Judge Cassese’s *Erdemović*

12. Slidregt & Vasiliev, *supra* note 10, at 9.

13. *Id.* at 10.

14. JUSTIN SU-WAN YANG, DOMESTIC LEGAL PLURALISM AND THE INTERNATIONAL CRIMINAL COURT THE CASE OF SHARI’A LAW IN NIGERIA 34 (2022).

15. Slidregt & Vasiliev, *supra* note 10, at 20–21.

16. *Id.*

17. *Id.*; see Iraqi High Tribunal, No. 29/c/2006, Decision (Dec. 26, 2006); Iraqi High Tribunal, No. 1/C Second/2006, Decision (Jun. 24, 2007).

18. Rome Statute of the Int’l Crim. Ct. [ICC] arts. 1 & 17, July 17, 1998, 2187 U.N.T.S. 91 [hereinafter Rome Statute].

19. See Slidregt & Vasiliev, *supra* note 10, at 20.

20. *Id.*

21. *Id.* at 19.

opinion, where he described the direct use of the national legislation of the accused as a “last resort” measure in case of ambiguities and gaps in international criminal law.²² Where the application of national laws has proved difficult, their use has been reduced to the minimum with international judges preferring earlier case law from international tribunals over domestic laws.²³ In that regard, the ICC provides more clarity on the applicable law. However, even the comprehensive legal regime of the Rome Statute requires judicial interpretation.²⁴ An issue arises with regard to Article 21 of the Rome Statute, which limits the consideration of domestic law only to the identification of general principles of law and practically renders as irrelevant the domestic laws of States which would typically exercise jurisdiction.²⁵ In this regard, the fact that *Shari’a* law is a fundamental part of Islam renders the question of cultural relativism more important if we see religion (law) as culture. Su-Wan Yang points out that Article 21 allows only for the formal consideration of states and their official laws when considering the relationship between Court and States, which he says, runs “the risk that the Court may fail to see the complex and context-specific circumstances, such as cultural, religious, social, historical, and ethnic factors, underlying international situations of large-scale violence.”²⁶ Some scholars argue that “Article 21 was included in the ICC Statute to create a solid, transparent and predictable legal regime equipped to deal with legal collisions and lacunae, while at the same time avoiding or diminishing the risk of judicial law-making.”²⁷ More specifically, “Article 21(1)(c) seeks to avoid situations of *non liquet*,”²⁸ therefore avoiding situations in which there would be no applicable law. In that regard, an argument similar to Judge Cassese’s “last resort” has been advanced, suggesting that in cases in which other sources of law could not provide an answer, the Court can examine the domestic laws of the State which would normally exercise jurisdiction over the crime.²⁹ Indeed, in the early jurisprudence of the ICC there are examples of the use of general principles of law derived from domestic jurisdictions,³⁰ with the Chamber in *Lubanga* also taking into account the Islamic legal tradition in its analysis.³¹ Furthermore, due to the emerging case law related to international crimes adjudicated at the domestic level, domestic law could be said to have emerged as a distinguished source of international criminal norms and interpretations, which would go beyond the status of a subsidiary source of law.³² This

22. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Dissenting Opinion of Judge Cassese, para. 49 (Oct. 7, 1997), <https://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf>.

23. Alexander K. A. Greenwalt, *The Pluralism of International Criminal Law*, 86 INDIANA L.J. 1064, 1078 (2011).

24. *Id.* at 1080 (citing Claus Kreß, *The International Criminal Court as a Turning Point in the History of International Criminal Justice*, THE OXFORD COMPANION TO INT’L CRIM. JUST. 143, 146 (2009)).

25. Rome Statute, *supra* note 18, at art. 21; Greenwalt, *supra* note 23, at 1083.

26. YANG, *supra* note 14, at 18–19.

27. Sergey Vasiliev, *Proofing the Ban on ‘Witness Proofing’: Did the ICC Get it Right?*, 20 CRIM. L. F. 193, 210 (2009).

28. Mohamed Elewa Badar & Noelle Higgins, *General Principles of Law in the Early Jurisprudence of the ICC*, in THE INTERNATIONAL CRIMINAL COURT IN SEARCH OF ITS PURPOSE AND IDENTITY 263, 275 (Triestino Mariniello ed., 2015).

29. Benjamin Perrin, *Searching for Law While Seeking Justice: The Difficulties of Enforcing Humanitarian Law in International Criminal Trials*, 39 OTTAWA L. R. 367, 400 (2008).

30. See generally Badar & Higgins, *General Principles of Law*, *supra* note 28.

31. Prosecutor v. Lubanga, ICC-01/04-168, Appeals Judgment on Application for Review of Decision Denying Leave to Appeal, paras. 25 & 31–32 (July 13, 2006), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2006_01806.PDF.

32. See Cassandra Steer, *Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law*, in PLURALISM IN INTERNATIONAL CRIMINAL LAW 39, 42 (Evan Slidregt & Sergey Vasiliev eds., 2014).

approach is endorsed by Greenwalt, who argues that “[international criminal law] should not automatically take precedence over conflicting domestic laws in every case by virtue of their internationality.”³³

International criminal law was not created in a vacuum, and it can confidently be said that it has been largely influenced by domestic legal regimes. Van Slidregt and Vasiliev rightfully commented that “[n]either the substantive nor the procedural limb of [international criminal law] emerged as a result of divine creation; instead, they evolved in the process of ‘reinventing’ domestic legal concepts drawn from pre-dominant legal traditions of common law and civil law, with other traditions having played a lesser (arguably insufficient) role.”³⁴ This argument leads us to one of the biggest critiques of international criminal law: the ‘Western justice’ or ‘Western bias’ critique, which arises from the fact that international law was originally created as a Western-centric set of rules, having at its core the two major (post-) colonialist legal systems, namely civil and common law, and which has historically largely disregarded non-Western legal cultures.³⁵ This exclusion of non-Western post-colonial states from participating in the development of international law underpins these states’ suspicion of international institutions, viewed as arbitrarily established and strictly derived from the Western European common and civil law traditions.³⁶ Mutua traces the evolution of the superior colonial administrator back through history from “the Bible-carrying missionary come to save the heathens, the commercial profiteer, the exporter of political democracy, and now the human rights crusader.”³⁷ This history has created undercurrents in international law “of superiority and supremacy ubiquitous in the relationship between ‘the West and the Rest.’”³⁸ Bedjouni delves into further detail, explaining that “classical international law . . . consisted of a set of rules with a geographical bias (it was European law), a religious-ethnic aspiration (it was a Christian law), an economic motivation (it was a mercantilist law), and political aims (it was an imperialist law).”³⁹ This critique did not skip international criminal law and the ICC. International criminal law has been qualified as a “distinctly Western venture,”⁴⁰ and the Special Court for Sierra Leone’s Chief Prosecutor has commented on his function as “imposing white man’s justice upon third world conflicts.”⁴¹ Furthermore, in relation to the notion of culture in the Special Court for Sierra Leone, Tim Kelsall has argued that the perception of the Western approach as universal and value-neutral was a “pernicious fiction,” as the approach is in reality “deeply culturally contingent.”⁴² This has led to a legitimacy crisis within the international criminal law sphere, as the system itself was called into question by States who had less involvement in its creation.⁴³

33. Greenwalt, *supra* note 23, at 1064.

34. Slidregt & Vasiliev, *supra* note 10, at 30.

35. See generally Salvatore Caserta, *Western Centrism, Contemporary International Law and International Courts*, 34 LEIDEN J. INT’L L. 321 (2021) (discussing the western centrism inherent in international law and how that centrism is based on different manifestations of colonial ideals and systems).

36. PETER MALANCZUK, *AKEHURT’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 28 (1997).

37. Makau Mutua, *What is TWAIL?*, 94 PROC. OF THE ASIL ANN. MEETING 31, 36 (2000).

38. YANG, *supra* note 14, at 43.

39. Mohammed Bedjaoui, *Poverty of the International Order*, in RICHARD FALK, *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* 153 (1985).

40. John Reynolds & Sujith Xavier, *The Dark Corners of the World: TWAIL and International Criminal Justice*, 14 J. INT’L CRIM. JUST. 959, 962 (2016).

41. David Crane, *White Man’s Justice: Apply International Justice after Regional Third World Conflicts*, 1683 CARDOZO L. REV. 1683, 1684 (2006).

42. TIM KELSALL, *CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT OF SIERRA LEONE* 8–9 (2010).

43. Steer, *supra* note 32, at 48.

This Western justice critique is illuminated under the lens of Third World Approaches to International Law (“TWAIL”).⁴⁴ TWAIL has been described as a ‘movement’ or ‘project’ that, broadly speaking, constitutes those scholars and practitioners concerned with international law relating to the ‘Global South.’⁴⁵ TWAIL gained momentum as a distinct body of scholarship in the 1990s and saw the first convening of TWAIL scholars in 1997.⁴⁶ Since then, TWAIL has built on its own scholarship, as well as others, to continue the critical engagement with international law from the perspective of the Third World.⁴⁷ TWAIL is seen as an alternative lens through which to engage more meaningfully with legal pluralism, one which recognizes that international law “is shaped by the lasting colonial legacies in international affairs.”⁴⁸ As a distinct intellectual approach in its own right, TWAIL “challenges a view of international law that fails to engage in its complicity in histories of colonization, plunder and enslavement whose legacies continue to date.”⁴⁹

Criticisms from Islamic States have been especially prominent. This is mostly due to the fact that Islamic law has little to no reflection within the international criminal law regime and, more specifically, within the Rome Statue.⁵⁰ Yasuaki observes that “[s]ome [Muslims] still claim that the Islamic law of nations rather than international law of European origin should regulate relations among Muslim nations.”⁵¹ He also notes that “[n]ot only Muslims but almost all Asian and African nations, who occupy an overwhelming majority of the world population, have certain reservations to today’s international law partly because of its original tenets and partly because of its inevitable nature as an ideological tool of Western powers.”⁵² Su-Wan Yang highlights an apparent double standard in employment of domestic laws from Western versus non-Western legal traditions in international justice:

For example, while Kok proclaims Dutch laws as the starting point to any pluralist conflict, would this still be the case for Islamic, Asian, or African systems? More likely, their starting points would be assessing the compatibility of their domestic laws to various international frameworks and standards, including the complementarity regime . . . It does not consider the potential existence and relevance of other legal systems within the state. While this presumption may be

44. See Antony Anghie & Bhupinder S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT’L L. 77 (2003); Bhupinder S. Chimni, *Third World Approaches to International Law: A Manifesto*, in THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION 47 (Antony Anghie et al. eds., 2003); see also James Thuo Gathii, *International Law and Eurocentricity*, 9 EUR. J. INT’L LAW 184; Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both? Theory, Methodology, or Both?*, 10 INT’L CMTY. L.R. 371 (2008).

45. Usha Natarajan et al., *Introduction: TWAIL – On Praxis and the Intellectual*, 37 THIRD WORLD Q. 16 (2016).

46. *Id.*

47. See Antony Anghie, *Foreword: Welcoming the TWAIL Review*, 1 THIRD WORLD APPROACHES TO INT’L L. REV. 1 (2020) (launching the inaugural *Third World Approaches to International Law Review*, featuring a diverse body of scholars and scholarship in international law).

48. See YANG, *supra* note 14, at 4.

49. James Thuo Gathii, Twenty-Second Annual Grotius Lecture: The Promise of International Law: A Third World View (June 25, 2020), in 114 AM. SOC’Y INT’L L. PROC. 165, 166 (2020).

50. See Michael J. Kelly, *Islam & International Criminal Law: A Brief (In) Compatibility Study*, 1 PACE INT’L L. REV. (Online Companion), 28–29 (2010) (chronicling the lack of historic participation by Islamic states in the international criminal law regime and the associated factors that have led to this tension and lack of participation).

51. Onuma Yasuaki, *When Was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective*, 2 J. HIST. INT’L L. 1, 65.

52. *Id.* at 65.

appropriate for Western societies, the TWAIL scholarship . . . illuminates its inadequacy in capturing the reality of post-colonial states.⁵³

Polymenopoulou points out that *Shari'a* law, for example, has a rich jurisprudence to offer; however, it is equally rich in contradictions, which, overlaid by fears of extremist interpretations, results in a hesitancy among international bodies to draw upon it as a source of law.⁵⁴ Acknowledging that the multi-cultural composition of international benches prime them to consider and apply diverse legal traditions, Polymenopoulou elaborates with a list of reasons that could explain their reluctance to engage with the Islamic legal tradition, namely: (i) the complexity of its “rich and diverse literature” creates a lack of uniformity in the legal solutions it provides which “necessarily leads to disunity in the formulation and application of the law, which is especially visible in criminal matters;” (ii) its flexibility to modernize and to adopt “novel approaches to contemporary matters” remains hotly debated; (iii) the variety of schools and doctrines underpinning Islamic law creates the potential for interpretational conflicts, and issues arise from the hierarchy and co-existence of conflicting Islamic rules and State laws—the existence of tribal or customary laws within a State adds another layer of complexity (as was the case in *Al Mahdi*, discussed later in this Article) as does that of Western laws; (iv) finally, “the problem of fundamentalism and the confusion between mainstream and non-mainstream approaches of Islamic law.”⁵⁵

In recent years, we have seen more and more cases and situations being brought before the ICC which originate from Muslim majority countries or regions, such as Mali, Libya, South Sudan (Darfur), Palestine, Afghanistan and Democratic Republic of Congo.⁵⁶ For Muslims around the world, the belief in Islam dictates their culture, the composition of their society, and is the source of their legal regime and judicial structures.⁵⁷ In the majority of Islamic States, the *Shari'a* criminal code, which has as its normative origins the *Qur'an*, provides the legal regime which Muslims are supposed to follow.⁵⁸ Those types of rules which have divine origins can potentially cause concern and perplexity to the predominantly secular Western views⁵⁹ on human rights and international criminal justice.

Commentors have already suggested that domestic law needs to be the initial point of consideration for any pluralist conflict.⁶⁰ However, it is yet to be seen if this would apply to non-Western legal systems, and more particularly to Islamic law. Therefore, it is of utmost importance that the question is posed as to (1) whether these fundamental differences can be reconciled, and (2) whether legal pluralism can actually be discussed in the development of

53. YANG, *supra* note 14, at 38.

54. Eleni Polymenopoulou, *Caliphs, Jinns, and Sufi Shrines: The Protection of Cultural Heritage and Cultural Rights under Islamic Law*, 36 EMORY INT'L L. REV. 743, 747 (2022).

55. *Id.* at 764–69.

56. ICC Situations and Cases, COAL. FOR THE ICC, <https://www.coalitionfortheicc.org/explore/icc-situations-and-cases> (last accessed Dec. 27, 2024).

57. KAMARI MAXINE CLARKE, FICTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA 153 (2009).

58. *Id.* at 154.

59. *Id.*

60. See, e.g., Ruth Kok, *National Adjudication of International Crimes: A Dutch Approach*, in PLURALISM IN INTERNATIONAL LAW 211, 223 (Elies van Sliedregt & Sergey Vasiliev eds., 2014) (“[C]ustomary international law, the case law of international criminal courts and tribunals, and doctrine may serve as a guideline in interpreting domestic law [with regard to international crimes]. However, domestic legal provisions are the starting point in each case in establishing a defendant’s individual criminal responsibility”); see, e.g., Elies van Sliedregt, *International Criminal Law and Legal Pluralism*, in THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM 575, 586–89 (Paul Schiff Berman ed., 2020).

international criminal law when the system is inherently antagonistic towards non-Western values, culture, and morality.

In certain cases, a foreign concept of justice might be so alienated and unrecognizable to the local actors that it is met with rejection.⁶¹ This highlights the challenge of pluralistic legal systems, and gives the additional task to the ICC to consider with more caution and in detail the local legal regimes. Burke-White views the strength of legal pluralism in how it offers supplementary interpretational sources to the Court without binding it to any.⁶² The main problem of these diverging laws is how they influence the duties, obligations, morals, and actions of people under their umbrella.

Ultimately, there seems to be a lack of dialogue between national and international legal systems which results in potentially polarized views on what is right and what is wrong, with each actor following their own legal tradition and values. For instance, local leaders in Uganda have commented that the accountability mechanisms provided by the ICC are foreign to the local populations and if Dominic Ongwen's ICC trial ends up with a conviction, this would not necessarily mean that justice will be rendered as the concept of justice in different societies is interpreted diversely.⁶³ Another example could be the right to Islamic rebellion enshrined in *Shari'a* law.⁶⁴ A call on Muslim believers to defend their leader or faith could be seen as a legitimate defense strategy by some and as a religiously motivated civilian terror by others (especially within jurisdictions with contrasting religious or secular laws).⁶⁵ From the viewpoint of international criminal justice, including the ICC regime, the application of Islamic rules, even within the recognized legal domain inside the State, can potentially result in an act that could qualify as a crime under international criminal law which is punishable with up to a life imprisonment in cases of grave violations.⁶⁶ These fundamentally different views raise a series of logical questions, such as:

- ❖ How can it be determined which social and cultural practices should be considered legitimate or illegitimate?
- ❖ What conduct should be criminalized?
- ❖ How can people be punished within an inherently pluralistic system based on different legal traditions and cultures?
- ❖ And who can decide on these matters—elected officials following a divine revelation, or independent international judges relying on “universal” laws?⁶⁷

Stemming from these considerations, we need to ask ourselves whether we can have an international court such as the ICC adjudicating on matters related to different cultures and legal systems if the Court does not tailor its process and evaluation to the cultural and legal

61. See CLARKE, *supra* note 57, at 156–57 (outlining the reactions of locals to the imposition of western ideals of justice in contrast to their local ideas of justice).

62. William Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963, 964 (2006).

63. Fiona McKay, *A Delicate Mosaic: The ICC, Culture and Victims*, in INTERSECTIONS OF LAW AND CULTURE AT THE INTERNATIONAL CRIMINAL COURT 288, 300 (Julie Fraser & Brianne McGonigle Leyh eds., 2020).

64. See Mohamed Elewa Badar, Ahmed Al-Dawoody & Noelle Higgins, *The Origins and Evolution of Islamic Law of Rebellion: Its Significance of the Current International Humanitarian Law Discourse*, in INTERNATIONAL LAW AND ISLAM: HISTORICAL EXPLORATIONS (Ignacio de la Rasilla del Moral & Ayesha Shahid eds., 2018).

65. See CLARKE, *supra* note 57, at 159.

66. *Id.*; Rome Statute, *supra* note 18, at art. 77(1)(b).

67. CLARKE, *supra* note 57, at 27.

context in which the crimes were committed. Polymenopoulou contends that a demonstration by the Court of its willingness to engage with and better understand other legal traditions (such as Islamic law) could not only reinforce the cultural and religious legitimacy of the claim at an individual level (i.e., for the alleged perpetrators and victims who are of Islamic faith) but also increase Muslim states' engagement with the Court and even that of non-state actors acting in the Muslim world who "are not bound by humanitarian law—yet may be keen to act upon Islamic law."⁶⁸

Even though uniform international norms might be essential for the principles of legality and of equality of arms, scholars such as Greenwalt have asserted that "the law applicable to international crimes should not be the same in all cases, and . . . those guilty of like crimes should not always receive like sentences."⁶⁹ Furthermore, he suggests in place of "one-size-fits-all justice," a model of international criminal law which takes into consideration the domestic laws of the State which would normally exercise jurisdiction over the case and which takes into consideration "(i) truly universal principles of [international criminal law], (ii) tribunal-specific rules, (iii) rules constraining the acceptable range of domestic discretion, and (iv) default rules."⁷⁰ Finally, he suggests that the ICC should:

[E]nsure that any application of national law conforms to evolving international human rights standards, does not frustrate core purposes of international criminal law, and maintains consistency with the national law's general approach to criminal culpability. Thus, international criminal law must not operate to endorse cruel and unusual punishment or violate core principles of individual responsibility and fair notice. It must also ensure that applicable domestic law would not operate to deny the special gravity of the offense at issue.⁷¹

This could indeed aid the inclusion of domestic laws into the international criminal law process, where the scope of international crimes, the divergence of legal cultures at play, as well as the specific evidence would require a customized approach to case handling and the assurance of the fair trial rights of the accused.⁷² Concerning the latter, the gravity of the offences in an armed conflict and the nature of atrocity crimes may result in a more diverse application of defenses (both justifications and excuses) than is permitted at the domestic level.⁷³ This would be particularly relevant when an accused raises arguments related to his culture during an international criminal trial. That being said, even though the implementation of national legal norms in international trials could not singularly ensure the legitimacy and efficiency of the process, it serves as an important step toward their achievement.⁷⁴ Finally, the tension produced within the legally pluralistic world of international criminal law could be used as a catalyst for development and progress in the field, as long as it does not escalate into "clashes of legal cultures," which can ultimately obstruct the evolution of the field.⁷⁵

Consequently, the actors involved in the adjudication of mass atrocities at the international level should review the criticisms presented to them and should ensure that no

68. Polymenopoulou, *supra* note 54, at 770.

69. Greenwalt, *supra* note 23, at 1064.

70. *Id.*

71. *Id.*

72. Slidregt & Vasiliev, *supra* note 10, at 25.

73. See Steer, *supra* note 32, at 48.

74. Greenwalt, *supra* note 23, at 1103.

75. Slidregt & Vasiliev, *supra* note 10, at 25.

legal tradition plays a predominant role in the construction and application of international criminal law. This would leave room for the consideration of non-Western legal cultures such as the Islamic legal tradition. In that way, the pluralistic nature of the field could be presented as a benefit, rather than a critique. This would in turn allow for a more locally and culturally relevant perception of the international justice project as truly communal⁷⁶ and would guarantee that defendants are not tried on the basis of a different world view. There are clear benefits to a more meaningful engagement with legal pluralism—from enriching the corpus of international criminal law, to strengthening cooperation and enforcement amongst State Parties, to projecting “a greater sense of collective participation in the shared pursuit for international justice.”⁷⁷

II. IS THERE A PLACE FOR CULTURE IN INTERNATIONAL CRIMINAL JUSTICE?

Since the dawn of human civilization, culture has been at the center of society and has dictated the customs, beliefs, and attitudes of persons, as well as their relationship with the world. The question of what exactly culture is has been the subject of debate in social sciences. The term ‘culture’ has proven to be extremely hard to give a comprehensive definition to in the abstract. Culture could mean and encompass different aspects of individuals’ lives in different societies, or even within the same society, and furthermore has the ability to change with time.⁷⁸ For this exact reason, there is still not an agreed definition of culture throughout the different fields of social studies that deal with cultural considerations, including the legal field.

Thus far, a variety of international actors have noted the difficulty in defining culture, and in academic literature endless numbers of definitions exist,⁷⁹ each of them expanding on a distinct aspect of culture and each pertaining to a different context.⁸⁰ In his study of the relevance of culture in framing international law, Thilo Marauhn has noted that, despite the persistent reference to culture in international politico-legal discourse, the term still lacks clarity and its use “seems to reflect conflict rather than convergence.”⁸¹ Culture is described by Abdullahi An-Na’im as “a primary force in the socialization of individuals and as a major determinant of the consciousness and experience of the community. The impact of cultural context on human behavior is often underestimated precisely because it is so powerful and deeply embedded in our self-identity and consciousness.”⁸²

One might suggest following the words of the Committee on Economic, Social and Cultural Rights (CESCR) and acknowledge that there exists “multifaceted content implicit in

76. YANG, *supra* note 14, at 12 & 42–43.

77. *Id.* at 34.

78. Alison Dundes Renteln, *Cultural Defenses in International Criminal Tribunals: A Preliminary Consideration of the Issues*, 18 SW. J. INT’L L. 267, 269 (2011); NOELLE HIGGINS, CULTURAL DEFENSES AT THE INTERNATIONAL CRIMINAL COURT 9 (2018).

79. See Hanna Schreiber, *Intersections of Law and Culture at the International Criminal Court*, 40 POLISH Y.B. INT’L L. 319, 320–21 (2020).

80. See Abdullahi Ahmed An-Na’im, *Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 19, 23 (1995).

81. Thilo Marauhn, *The Relevance of Culture in Framing International Law*, in UNIVERSALITY AND CONTINUITY IN INTERNATIONAL LAW 45, 45–59 (Thilo Marauhn & Henihard Steigr eds., 2011).

82. See An-Na’im, *supra* note 80, at 23.

the concept of culture,”⁸³ with the possibilities for its definition being infinite, as well as case- and time-specific. Regardless of the difficulty in defining culture, some comprehensive definitions have been laid down thus far, such as the one stipulated in UNESCO’s Universal Declaration on Cultural Diversity, which provides that “culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group [which] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”⁸⁴ The Fribourg Declaration on Cultural Rights further adds that culture “covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and meanings that they give to their existence and to their development.”⁸⁵ Even though these definitions do not claim to encompass every single aspect of culture, they provide us with a comprehensive understanding of the core concepts and considerations behind the notion of ‘culture’ and the importance of culture for the person’s formation and world view. Therefore, for the purposes of the present enquiry, the above-mentioned definitions will be used as a starting point for the discussion on the place of culture in the courtroom and the subsequent analysis of the potential use of cultural defenses by jihadists.

A. *Right to Culture*

Culture, in its diverse formulations, and more specifically, the right to culture, has been protected in various human rights treaties, international law documents, and instruments.⁸⁶ Most importantly, the decision by an individual to exercise their right to participate in cultural life has been described by the CESCR as a “cultural choice, [which] as such should be recognised, respected and protected on the basis of equality.”⁸⁷ As such, the right to take part in cultural life is a freedom, and States have both positive and negative obligations to protect that right.⁸⁸ Accordingly, the obligation on States under international human rights law to respect, protect, and uphold the culture of persons within their jurisdiction has been presented as a core argument in favor of the use of cultural defenses during criminal trials.⁸⁹ Some authors have gone as far as to suggest that a broad interpretation of CESCR’s General Comment 21 could advance an argument supporting the existence of a right to raise a cultural defense, stemming from the Committee’s stance regarding judicial matters and judicial remedies.⁹⁰ Perhaps Renteln’s view that “the right to culture should, at the very least, be construed to allow individuals to present information concerning their cultural background in

83. U.N. Comm. on Economic, Social and Cultural Rights [CESCR], General Comment No. 21, Right of Everyone to Take Part in Cultural Life, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009).

84. U.N. Educational, Scientific and Cultural Org. [UNESCO], 31st Sess., Records of the General Conf., *UNESCO Universal Declaration on Cultural Diversity*, pmbl., UNESCO Doc. 31C/Res. 25 (Nov. 2, 2001).

85. UNESCO, Fribourg Declaration on Cultural Rights art. 2(a), *adopted* May 7, 2007.

86. Renteln, *Cultural Defenses in International Criminal Tribunals*, *supra* note 78, at 270; G.A. Res 2200A (XXI), International Covenant on Economic, Social, and Cultural Rights [ICESCR] art. 15(1)(a) (Dec. 16, 1996); G.A. Res. 217 (III) A, Universal Declaration of Human Rights [UDHR] art. 27 (Dec. 10, 1948); G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW] art. 13(c) (Dec. 18, 1979) 1249 U.N.T.S. 13; G.A. Res. 44/25, Convention on the Rights of the Child [CRC] art. 31(2) (Nov. 20, 1989) 1577 U.N.T.S. 3; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights [ICCPR] art. 27, Dec. 16, 1966; Restatement (Third) of Foreign Relations Law Index I260, 999 U.N.T.S. 171.

87. CESCR, General Comment No. 21, *supra* note 83, at para. 7.

88. *Id.* at para. 6.

89. See HIGGINS, *supra* note 78, at 10.

90. *Id.* at 13.

a court of law”⁹¹ presents the strongest argument in relation to the right to culture being introduced and manifested in the courtroom. At the same time, if put into the perspective of criminal law proceedings, it hints at the interrelation between the right to culture and the right to a fair trial.

Indeed, as with all human rights, the right to culture should not be viewed in the abstract and should be weighed against the presence of other human rights that are at stake. When dealing with the right to culture in international criminal justice, and especially the cultural considerations of the accused, such a right needs to be weighed against the human rights of the victims. Most frequently in a conflict setting, victims’ right to life, freedom from torture, and degrading treatment, as well as women’s and children’s rights, are at stake.⁹² Therefore, at trial, a dilemma is posed: how can one balance the accused’s right to culture and to a fair trial against the violations of the victim’s rights? Stemming from the right to a fair trial, an accused should be allowed to invoke culture and present cultural evidence as part of their defense, even if the argument does not ultimately prevail and the evidence does not affect the final outcome.⁹³ Additionally, it should be ensured that courts have an accurate understanding of both human rights and culture so as to make the proceedings as fair as possible for both the accused and the victim, and to ultimately ensure that the right to culture is protected unless it is in conflict with other human rights that supersede it.⁹⁴

B. Cultural Relativism

Accurate cross-cultural understanding is crucial when we deal with an accused’s right to culture in the courtroom. One of the main obstacles to the definition of culture and the acceptance of the right to culture, as well as the admittance of cultural defenses before international courts, is the notion of cultural relativism.⁹⁵ As Higgins describes it, cultural relativism entails that “all beliefs, customs, and practices should be understood as being specific to an individual within his / her own social context and culture, rather than being judged against the culture of another.”⁹⁶ Thus, in practice, because of the lack of a universal understanding of morals, it becomes impossible to assess what is ‘right’ and what is ‘wrong,’ as what is considered an appropriate cultural practice in one society might constitute a taboo or an offence in another.⁹⁷ Those inclined to cultural relativism raise the question, “how can one who belongs to their own culture judge another from a different culture without any due regard for that person’s cultural background?”⁹⁸

Despite the absence of a universal standard of morality, there is a split of opinion regarding the universalism and cultural relativism of international human rights.⁹⁹ According to Donnelly, rather than being self-excluding, these two views on human rights represent a spectrum: on the one side are ‘radical’ universalists who completely disregard the role of

91. Alison Dundes Renteln, *What Do We Have to Fear from Cultural Defense?*, in CRIMINAL LAW AND CULTURAL DIVERSITY 177, 180 (2014).

92. Renteln, *Cultural Defenses in International Criminal Tribunals*, *supra* note 78, at 273.

93. *Id.* at 285; Alison Dundes Renteln & Rene Valladares, *The Importance of Culture for the Justice System*, 92 JUDICATURE 194, 196 (2009).

94. Renteln & Valladares, *supra* note 93, at 201.

95. HIGGINS, *supra* note 78, at 14.

96. *Id.*

97. *Id.*

98. Ida L. Bostian, *Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda*, 12 ILSA J. INT’L & COMPAR. L. 1, 3 (2005).

99. *Id.* at 4.

culture in human rights protection, and on the other side are ‘radical’ cultural relativists who claim that culture is the source of validity of human rights, with everything in between these two positions representing a spectrum of ‘weak’ to ‘strong’ cultural relativists.¹⁰⁰

From a historical perspective, the argument that current human rights principles have universal legitimacy is rather weak due to lack of engagement of many cultural traditions in the process of formulating these principles.¹⁰¹ As a general rule of thumb, An-Na’im suggests people are more inclined to “observe normative propositions if they believe them to be sanctioned by their own cultural traditions.”¹⁰² Therefore, according to him, “observance of human rights standards can be improved through the enhancement of the cultural legitimacy of those standards.”¹⁰³ He further notes that even though “it can be argued that human rights should be founded on the existing least common denominator among these cultural traditions,” due to the multiplicity of cultures around the world, “restricting international human rights to those accepted by prevailing perceptions of the values and norms of the major cultural traditions of the world would not only limit these rights and reduce their scope, but also exclude extremely vital rights.”¹⁰⁴ An-Na’im’s argument is particularly valuable in the overall discussion about universalism and cultural relativism, as it spotlights the important issue of striking a balance between the two as well as the significance of cultural legitimacy in the context of human rights protection. Another important point that he raises is the ‘Western’ formulation of human rights standards and its problematic nature from a legitimacy perspective. A way forward, he proposes, would be a cross-cultural understanding of human rights which would “[accept] the existing international standards while seeking to enhance their cultural legitimacy within the major traditions of the world through internal dialogue and struggle to establish enlightened perceptions and interpretations of cultural values and norms.”¹⁰⁵

A similar argument advocating for an “inter-civilizational” approach to human rights has been advanced by Yasuaki, who suggests that “[f]or international law to be truly global in the sense that its legitimacy is voluntarily accepted by peoples all over the world, it must be accepted not only by existing states . . . but also by peoples with diverse civilizational backgrounds.”¹⁰⁶ Therefore, it is essential that efforts are made to prevent people having sentiments of frustration, dissatisfaction, and victimization in respect of the human rights regime, and that international law continues to “reorganize and reconceptualize” itself.¹⁰⁷ Polymenopoulou elucidates the significance of cultural legitimacy in the specific context of violations of cultural rights and the destruction of heritage. In the context of Islamic law, she argues that better engagement with its “position on arts and cultural heritage, including its pitfalls, could contribute to inhibiting extremism in the cultural sphere and fostering collaboration with governmental and non-governmental entities in the Arab Muslim world”¹⁰⁸ which in turn would provide “more effective protection of cultural heritage and the arts in the Arab-Muslim world.”¹⁰⁹

100. *Id.* at 90.

101. An-Na’im, *supra* note 80, at 20.

102. *Id.*

103. *Id.* at 20.

104. *Id.* at 21.

105. *Id.*

106. Yasuaki, *supra* note 51, at 66.

107. *Id.*

108. Polymenopoulou, *supra* note 54, at 747.

109. *Id.* at 771.

Coming back to the universalist *versus* cultural relativist approach debate, Roestenburg-Morgan notes that in the field of international criminal law, “paradigms of culture feature overtly, but ironically are often overlooked or ignored because they threaten to undermine the legitimacy of the international criminal order.”¹¹⁰ This, she continues, “is particularly the case where the law as a normative ‘rationalist tradition’ comes up against what are considered by some as ‘unfamiliar and illogical’ beliefs and practice of some cultures that do not fit within the framework of [international criminal law].”¹¹¹

Cultural relativism can furthermore be seen as a two-faced coin. From a “positive” point of view, the notion of cultural relativism has emerged in response to colonialism and the imposition of a “moral imperialism” by the West on the local communities in their now former colonies.¹¹² From a “negative” point of view, more often than not cultural relativism is employed as an argument aimed at escaping accountability for human rights abuses, especially by regimes trying to avoid scrutiny for their own repressive practices.¹¹³ The application of such ‘positive’ and ‘negative’ views of cultural relativism to human rights abuses perpetrated in times of conflict results in a two-fold outcome: on the one hand, it is ensured that close attention is paid to the effect of atrocities on the victims and their local communities; on the other hand, it leaves the door open for terrorist groups such as AQIM, Boko Haram, and ISIL to legitimize their own radical views on human rights. Nevertheless, regardless of any attempt to justify violence through arguments related to the beliefs and customs of a particular group, universal *jus cogens* norms must prevail. These include, *inter alia*, a prohibition of acts such as genocide, crimes against humanity, slavery, war crimes, and torture, derogation from which is not permissible.¹¹⁴

Furthermore, in the context of human rights violations, the UNESCO Universal Declaration on Cultural Diversity has established that “[n]o one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.”¹¹⁵ Therefore, coming back to the debate regarding universalism and cultural relativism, one might ask why would cultural disparities have any impact on how international criminal trials are conducted if certain crimes are universally considered impermissible by the international community?¹¹⁶ If viewed from a cultural relativism perspective, however, one cannot avoid taking into consideration that international courts adjudicate on the culpability of the accused, who are from a different cultural background, are tried in a foreign language, and are ultimately found guilty or not guilty based on a set of rules derived from different legal cultures,¹¹⁷ oftentimes different from the ones adopted in their home country. Both these views have their merits, nevertheless, it needs to be kept in mind who are the ultimate beneficiaries of international justice—the victims of international crimes and, even though mostly overlooked, the perpetrators themselves. Criminal processes conducted in a foreign country, with rules and procedures that might seem logical and fair to Western-educated

110. Ingrid Roestenburg-Morgan, *The Quest for Cultural Legitimacy at the ICC: A Third-Way Approach as an Appropriate Response to African Cultural Paradigms*, in INTERSECTIONS OF LAW AND CULTURE AT THE INTERNATIONAL CRIMINAL COURT 312 (Julie Fraser & Brianne McGonigle Leyh eds., 2020).

111. *Id.*

112. Julie Fraser & Brianne McGonigle Leyh, *Introduction*, in INTERSECTIONS OF LAW AND CULTURE AT THE INTERNATIONAL CRIMINAL COURT 4 (Julie Fraser & Brianne McGonigle Leyh eds., 2020).

113. *Id.* at 5.

114. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 737-38 (1964); Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63, 68 (1996).

115. UNESCO Universal Declaration on Cultural Diversity, *supra* note 81, at art. 4.

116. Bostian, *supra* note 98, at 4.

117. *Id.* at 4.

lawyers and human rights activists, can be alienating and incomprehensible for the community of the victim as well as the accused.¹¹⁸ Therefore, even though having universal human rights standards makes it easier to have a fair process and equal treatment, one must always keep in mind who are the ultimate receivers of the justice process and strive to make the process as culturally relevant as possible to the local societies and victims at stake.

C. Impact of Culture on Persons and Enculturation

People's actions and beliefs are very closely related to their culture and traditions, which play a significant role in shaping the individual's interaction with society, as well as their choices. When the discussion shifts towards the impact of culture on persons, it is appropriate to consider the process of enculturation through which "an individual learns the traditional content of a culture and assimilates its practices and values."¹¹⁹ As Higgins suggests, "these assimilated practices and values exert a significant, and sometimes, subconscious influence on people," and logically, in relation to the potential use of cultural defenses, an assessment needs to be made as to what is the real impact of culture on a person's actions and motives.¹²⁰ Moreover, An'Na'im comments, "[t]he impact of culture on human behavior is often underestimated precisely because it is so powerful and deeply embedded in our self-identity and consciousness."¹²¹

In this regard, Renteln and Valladares make it clear that it is crucial to understand the importance of culture and the "subtle pressure it exerts on individuals," as "culture is pervasive and all-encompassing" and "shapes perceptions and affect behavior . . . even though individuals are largely unaware of these processes."¹²² On a communal level, it can be said that "culture is a primary force in the socialization of individuals and a major determinant of the consciousness and experience of the community."¹²³ Nevertheless, even if cultural background exerts such an influence, it cannot be said that it dictates the individual's behavior.¹²⁴ Rather, it makes the person predisposed to react in a certain way as a consequence of their culture.¹²⁵ This is a very important point when it comes to the presentation of cultural evidence and cultural defenses at trial. On the one hand, it needs to be taken into account that people do not operate outside of their cultural context, and at their core they remain cultural beings.¹²⁶ On the other hand, however, people are responsible for their actions and cultural defense cannot be considered an absolute defense.¹²⁷ In practice, the issue does not seem so polarized. As Parekh explains, "[c]ultural defense or an appeal to an individual's culture is not intended to absolve the agent of her responsibility for her action [but] rather is to clarify the nature and meaning of her action, explain why she did it, and in some circumstances to provide a defense of it."¹²⁸ Therefore, culture can provide for clarity with respect to the underlying motivations for a person's actions, as well as the influence of deeply rooted beliefs

118. See generally *id.*

119. Renteln & Valladares, *supra* note 93, at 195.

120. HIGGINS, *supra* note 78, at 15.

121. An'Na'im, *supra* note 80, at 23.

122. Renteln & Valladares, *supra* note 93, at 195.

123. An'Na'im, *supra* note 80, at 23.

124. HIGGINS, *supra* note 78, at 15.

125. *Id.*

126. Bhikhu Parekh, *Cultural Defense and the Criminal Law*, in *CRIMINAL LAW AND CULTURAL DIVERSITY* 108, 108–09 (Will Kymlicka et al. eds., 2014).

127. HIGGINS, *supra* note 78, at 15.

128. Parekh, *supra* note 126, at 109.

and traditions in one's thinking and decision-making process. As the next section will show, one of the very powerful manifestations of culture, which can have a direct influence on a person's lifestyle and convictions, is religion.

D. Religion as Culture

The right to freedom of thought, conscience and religion is an internationally protected human right codified by Article 18 of the International Covenant on Civil and Political Rights (ICCPR).¹²⁹ However, it also influences other human rights, the effectiveness of which largely depends on the degree of religious freedom afforded to individuals. This is the case with the right of individuals to participate in the cultural life of their own community, as protected under Article 27(1) of the Universal Declaration on Human Rights (UDHR).¹³⁰ This is because religion and culture share an indissoluble bond and are closely intertwined.¹³¹ In James Frazer's words, "[s]ociety has been built and cemented to a great extent on a foundation of religion, and it is impossible to loosen the cement and shake the foundation without endangering the superstructure."¹³² Societies are indeed constituted in the form of ideas, which serve as pillars around which their identity and self-perception are built,¹³³ and may not be understood without exploring a society's religious and cultural background. Accordingly, depending on the circumstances, belief in a religious source of public power may either contribute to "the ideal self-constituting of societies"¹³⁴ or degenerate into "the source of the most extreme abuses of public power."¹³⁵ Such religious foundations persist in contemporary societies, although "only in vestigial form in those . . . which have a legally constituted separation of religion and political authority."¹³⁶ They nonetheless re-emerge in the legal categories resulting from the interaction of social reality and the ideas deeply rooted in the concerned community. In this way, "social reality develops . . . in accordance with society's ideas as they are enacted in the law and they are expressed through its day-to-day interpretation and application."¹³⁷ Against this background, having considered that practices generally accepted as culture often find their roots in religious beliefs, an argument can be made that freedom of religion is a core element of the human right to culture.¹³⁸ In this view, the former becomes a necessary part of the analysis when dealing with cultural defenses,¹³⁹ serving as a legal basis for allowing defendants to present evidence outlining their religious beliefs and customs during the proceedings.¹⁴⁰ This applies not only to defendants from religious minorities, but also to those coming from national or ethnic minorities, as well as Indigenous Peoples.¹⁴¹ It follows that the role played by religious freedom in creating the

129. ICCPR, *supra* note 86, at art. 18.

130. UDHR, *supra* note 86, at art. 27(1).

131. ELSA STAMATOPOULOU, CULTURAL RIGHTS IN INTERNATIONAL LAW: ARTICLE 27 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND BEYOND 199–200 (2007).

132. JAMES FRAZER, 1 THE BELIEF IN IMMORALITY AND THE WORSHIP OF THE DEAD 4 (1913).

133. PHILIP ALLOTT, THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE 359 (2002).

134. *Id.* at 357.

135. *Id.*

136. *Id.* at 356.

137. *Id.* at xi.

138. STAMATOPOULOU, *supra* note 131, at 199–200.

139. HIGGINS, *supra* note 78, at 16.

140. Renteln, *What Do We Have to Fear from Cultural Defense?*, *supra* note 91, at 179.

141. HIGGINS, *supra* note 78, at 16 & 19.

conditions for the effective enjoyment of the right to participate in culture—and thus in societal life—cannot be underestimated.

The jurisprudence of authoritative human rights bodies embedded in the United Nations system supports this view, providing corroboration as to the existence of a strong link between religious freedom and cultural rights.¹⁴² In particular, the CESCR has found that the provision of subsidies for the construction of religious sites “contributes to the realization of the right to participate in cultural life.”¹⁴³ Additionally, the Special Rapporteur on the Rights of Indigenous Peoples has stressed that the destruction of sacred sites and cultural artefacts goes hand in hand with the destruction of indigenous communities, due to the crucial role played by these elements in the formation and preservation of their identities.¹⁴⁴ Furthermore, the Special Rapporteur on Freedom of Religion or Belief elaborated on the relationship between religion and culture, stating that religion plays a substantive role in shaping the culture of a society, as well as human civilization, regardless of historical and geographical circumstances.¹⁴⁵ The Special Rapporteur’s reports and correspondence with States provide further insight into the matter, suggesting that States share this view.¹⁴⁶ Finally, in a 2002 report addressed to the Commission on Human Rights, the Special Rapporteur clarified that, in the event of conflict between considerations of religious or cultural nature and the human rights of an individual, the latter must prevail.¹⁴⁷

It is worth recalling that human rights Special Rapporteurs entrusted with monitoring country-specific crises have rarely elaborated on cultural rights. However, between 1999 and 2001, the Special Rapporteurs on Yugoslavia, Bosnia and Herzegovina, Croatia, and Northern Macedonia have engaged more thoroughly in such considerations by assessing the degree of freedom of expression and religion afforded to minorities, reporting instances of discrimination, and considering the publication of textbooks analyzing the perception of minorities within the societies concerned.¹⁴⁸ In addition to the above, in his 2002 Report to the Commission on Human Rights, the Special Rapporteur for Sudan elaborated on the acts of religious intolerance carried out by the Sudanese Government, further condemning policies of forced assimilation, “not only in terms of religion . . . but also of [cultural] values,”¹⁴⁹ leading to widespread human rights violations committed against individuals belonging to ethnic, religious, linguistic, or racial minorities, and the criminalization of cultural manifestations perceived as not in line with dominant morals.¹⁵⁰

142. STAMATOPOULOU, *supra* note 131, at 199–200.

143. *Id.*; see also Comm. on Econ., Soc. & Cultural Rts. [CESCR], *Rep. on the 18th and 19th Sessions*, para. 175, U.N. Doc. E/1999/22 (1999) (regarding the Netherlands).

144. STAMATOPOULOU, *supra* note 131, at 201; see also Rodolfo Stavenhagen (Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People), *Mission to Colombia*, para. 31, U.N. Doc. E/CN.4/2005/88/Add.2 (Nov. 10, 2004).

145. STAMATOPOULOU, *supra* note 131, at 62; see also Abdelfattah Amor (Special Rapporteur on Freedom of Religion or Belief), *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, para. 21, U.N. Doc. E/CN.4/1995/91 (Dec. 22, 1994); Abdelfattah Amor (Special Rapporteur on Freedom of Religion or Belief), *Visit by the Special Rapporteur to the Islamic Republic of Iran*, para. 97, U.N. Doc. E/CN.4/1996/95/Add.2 (Feb. 9, 1996).

146. STAMATOPOULOU, *supra* note 131, at 62–63.

147. *Id.* at 62; see also Abdelfattah Amor (Special Rapporteur on Freedom of Religion or Belief), *Study on Freedom of Religion or Belief and the Status of Women in the Light of Religion and Traditions*, U.N. Doc. E/CN.4/2002/73/Add.2 (Apr. 24, 2009).

148. STAMATOPOULOU, *supra* note 131, at 62.

149. *Id.* at 64; see also Gáspár Biró (Special Rapporteur on the Situation of Human Rights in the Sudan), *Rep., Situation of Human Rights in the Sudan*, paras. 67 & 78, U.N. Doc. E/CN.4/1994/48 (Feb. 1, 1994).

150. STAMATOPOULOU, *supra* note 131, at 64; see also Biró, *supra* note 127, at paras. 67 & 78.

III. CULTURAL FACTORS IN THE LEGAL PROCESS

In the recent years, domestic and international courts have recurrently faced issues arising from the introduction of cultural considerations in the courtroom.¹⁵¹ Therefore, the assessment of the cultural background of a defendant has become crucial to the accurate determination of his/her culpability and the degree of the criminal sanctions to be applied.¹⁵² Most recently, the defense in the *Al Hassan* Case before the ICC, which will be further analyzed below, presented arguments related to his cultural beliefs and the significance of culture and religion to his actions.¹⁵³

In this regard, it is important to engage with the way in which courts address arguments related to the accused's cultural background.¹⁵⁴ Cultural considerations can be present throughout the whole criminal process, from investigation to sentencing of the accused.¹⁵⁵ In the context of the ICC, a defendant has the opportunity to introduce their cultural background and present cultural evidence at three stages of the criminal case: (i) at the pretrial stage when the charges are to be confirmed;¹⁵⁶ (ii) at trial when the accused can present evidence towards the impact of culture on their state of mind by means of the grounds excluding criminal responsibility on grounds codified in the Rome Statute, such as mental disease or defect, duress, self-defense, mistake of law and mistake of fact;¹⁵⁷ (iii) and during the sentencing stage¹⁵⁸ when cultural considerations might be presented as possible mitigating factors.¹⁵⁹ Therefore, there is a clear opportunity for a defendant to engage their cultural beliefs in the criminal process, thus furthering their right to fair trial.

A. *Relevance of Culture for Due Process*

To further understand the movement promoting the admittance of culture in criminal proceedings,¹⁶⁰ the importance of culture for an effective due process needs to be examined. Since individuals enjoy a right to culture under international law, it is claimed that they should be afforded a chance to introduce cultural evidence in the course of a criminal trial.¹⁶¹ Such an argument has a twofold legal basis that and relies on: (i) a person's right to participate in cultural life, and (ii) the fundamental human right to fair trial. In particular, Article 14 of the ICCPR provides all persons with a right to "be equal before the courts and tribunals" hearing their case.¹⁶² Article 67 of the Rome Statute further provides that, in determination of the

151. Carolyn Choi, *Application of a Cultural Defense in Criminal Proceedings*, 8 UCLA PAC. BASIN L.J. 80, 80 (1990).

152. Renteln & Valladares, *supra* note 93, at 194.

153. Julie Fraser, *Al Hassan Symposium – "Islam itself is not on trial": Culture and Religion in Al Hassan*, LIEBER INST. W. POINT (July 31, 2023) (last accessed Dec. 6, 2024); *see generally* Prosecutor v. Al Hassan, ICC-01/12-01/18-461-Corr-Red, Decision on Confirmation of Charges (Nov. 13, 2019) [hereinafter *Al Hassan Confirmation of Charges*], <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1808354d8.pdf>.

154. Renteln & Valladares, *supra* note 93, at 195.

155. *Id.* at 97.

156. Rome Statute, *supra* note 18, at arts. 31–32.

157. *Id.*

158. *Id.* at art. 76(2).

159. Renteln & Valladares, *supra* note 93, at 197.

160. *Id.* at 196.

161. *Id.*

162. ICCPR, *supra* note 86, at art. 14.

charges against them, the accused shall be afforded a set of guarantees “in full equality.”¹⁶³ However, there is no consensus as to the interpretation of what equality entails. On the one hand, those rejecting the consideration of culture in criminal proceedings contend that “if we are to accept that a person’s specific culture religion is responsible for their actions, then we would not be treating everyone equally.”¹⁶⁴ On the other hand, those furthering the idea of substantive equality argue that the introduction of cultural evidence might be instrumental to the realization of a fair trial in jurisdictions characterized by legal pluralism, albeit modelled after a majoritarian legal system,¹⁶⁵ such as the ICC.

Despite the absence of a provision explicitly allowing for the presentation of cultural evidence in the Rome Statute,¹⁶⁶ one can argue the acceptance of such evidence would be central to the safeguarding of the defendant’s right to fair trial. In cases when a defendant is claiming that they were unaware that their actions were violating the law, some commentators have furthered an argument that not allowing the introduction of cultural evidence would go against the fair notice obligation of due process, therefore violating the defendant’s fair trial rights.¹⁶⁷ In addition, if taken together, the right to fair trial and the right to culture ultimately provide to individuals the right to advance a cultural defense in relation to their conduct, and subsequently be aided with arranging the presentation of expert evidence on notions of culture during their trial.¹⁶⁸ Nevertheless, while fair and just proceedings should recognize the cultural background of the accused and the cultural context in which they were acting, they do not ultimately require that this cultural evidence will have an impact on the final judgment of the actions of the perpetrator.¹⁶⁹ In other words, regardless of cultural information not having a detrimental impact on the disposition of a case, it is crucial that it is considered during the international criminal process. This consideration allows defendants to present their views on the context and rationales behind the offenses they have committed. Therefore, it can both safeguard their rights as an accused and could provide a valuable insight for the litigants who might not be familiar with the cultural beliefs and perceptions in a given tradition.

B. Cultural Evidence

In the context of international criminal law proceedings, there is a strong argument arising from the right to culture and the right to fair trial to use cultural evidence to assess the accused’s actions and determine the impact of the offences on the individual victims and the affected societies.¹⁷⁰ Guidance on how to tackle cultural arguments are imperative as the ICC is tasked with prosecuting individuals coming from various parts of the world. Each of these defendants come from distinct cultural backgrounds and operate in different legal systems, which means there will be more and more cases have the potential to involving cultural arguments defenses. Therefore, guidance as to how to tackle such arguments would be

163. Rome Statute, *supra* note 18, at art. 67(1).

164. HIGGINS, *supra* note 78, at 16 (referring to the critique of Kumaralingam Amirthalingam, *Culture, Crime, and Culpability: Perspectives on the Defense*, in MULTICULTURAL JURISPRUDENCE 35, 43 (Marie-Claire Foblets & Alison Dundes Renteln eds., 2009)).

165. Barbara Truffin & César Arjona, *The Cultural Defence in Spain*, in MULTICULTURAL JURISPRUDENCE 85, 118 (Marie-Claire Foblets & Alison Dundes Renteln eds., 2009); Higgins, *supra* note 78, at 16.

166. Rome Statute, *supra* note 18.

167. Renteln & Valladares, *supra* note 93, at 196.

168. Renteln, *Cultural Defenses in International Criminal Tribunals*, *supra* note 78, at 284–85.

169. Renteln & Valladares, *supra* note 93, at 196.

170. Renteln, *Cultural Defenses in International Criminal Tribunals*, *supra* note 78, at 285.

imperative.¹⁷¹ As mostly seen in international trials, customs and culture have the potential to affect the behavior of a witness on the stand, which could in turn affect the assessment of their credibility.¹⁷² Similarly, customs and culture can strongly affect the conduct of the accused, and if properly assessed, could reveal the rationales behind their actions that can differ from the norms, values, and beliefs of Western society from which the majority of ICC norms are derived.

If international law indeed guarantees the right to culture, and cultural evidence is presented, then a logical concern arises as to the veracity of a claim based on culture.¹⁷³ This issue has both normative and political considerations as it is feared that it cultural defenses can open the door for individuals to present false cultural claims order to evade justice and avoid punishment.¹⁷⁴ Therefore, when during the proceeding cultural information is presented during the proceeding, it is essential to assess its accuracy in order to avoid deceptive cultural evidence.¹⁷⁵ To address these concerns, a three-tier test has been proposed with the aim of detecting potential false cultural claims. In particular, the court seized of the case should examine the following points: in first place, whether the claimant is a member of the group alleged to possess the invoked cultural tradition; second, whether a link exists between such group and the concerned tradition; and, finally, whether the claimant was actually influenced by the cultural elements at hand.¹⁷⁶

C. *Cultural Awareness of International Judges and Prosecutors*

With the advancing of criminal investigations and trials regarding conflicts in different parts of the world, it will be more and more common for the ICC cases to include cross-cultural considerations¹⁷⁷ and to tackle local traditions and norms. In order to be ready to effectively assess such cultural issues, it would be crucial for international judges, prosecutors, and defense lawyers to develop cultural sensitivity¹⁷⁸ and gain more knowledge on social sciences, anthropology, and cultural studies.¹⁷⁹ This relates back to the issue of legal pluralism at the ICC, as international judges and lawyers need to recognize the cultural context in which certain crimes were committed and refrain from judging facts, witnesses, and the accused's actions on the basis of their own world view and convictions.¹⁸⁰ Disregarding cultural differences can further result in miscarriages of justice due to underestimating the strong bonds that people have with their beliefs and traditions and the way these bonds shape the way they perceive their actions. Therefore, such a 'cultural education' and the effect that culture can have on the mind of an offender will ensure that attention is given to the cultural background underlying the accused's mental culpability¹⁸¹ and will aid the consideration of a potential cultural defense on the side of the defendant.

171. *Id.*

172. See Teresa Doherty, *Foreword to INTERSECTIONS OF LAW AND CULTURE AT THE INTERNATIONAL CRIMINAL COURT*, at xvii–xxiii (Julie Fraser & Brianne McGonigle Leyh eds., 2020).

173. Renteln, *Cultural Defenses in International Criminal Tribunals*, *supra* note 78, at 271.

174. Renteln & Valladares, *supra* note 93, at 196.

175. *Id.* at 196–97.

176. *Id.*

177. Renteln, *Cultural Defenses in International Criminal Tribunals*, *supra* note 78, at 282.

178. Bostian, *supra* note 98, at 2.

179. Renteln, *Cultural Defenses in International Criminal Tribunals*, *supra* note 78, at 282.

180. Bostian, *supra* note 98, at 14.

181. Choi, *supra* note 151, at 90.

Indeed, the cultural background of a judge sitting on a bench looking into an international criminal case “can play a role in their determination, application and interpretation of the sources of international law.”¹⁸² A case in point regarding this issue is from the Special Court for Sierra Leone, where, in *Fofana and Kondewa*, the international judges were confronted with the issue of raising of cultural defenses as a justification for cultural practices not criminalized under the applicable domestic legal framework, such as the recruitment and enlistment of child soldiers.¹⁸³ Judge Winter, in her partially dissenting opinion on appeal, stated that since the Court was not a domestic one, “it cannot . . . accept any cultural consideration as excuses for criminal conduct.”¹⁸⁴ This reasoning was not left without criticism, with Tim Kelsall arguing that such a conclusion clearly disregards cultural practices which are firmly established in the local traditions.¹⁸⁵

This discussion becomes even more relevant when put into the context of potential cases involving the local use of *Shari’a* law. Presently, before the ICC there are a number of States under investigation which employ *Shari’a* law within their domestic system to a certain degree, namely, Mali, Libya, Sudan (Darfur), Afghanistan, and Nigeria.¹⁸⁶ Therefore, in addition to being culturally sensitive, the participants in an international trial need to be familiarized with the legal traditions underpinning the actions of the accused. Legal systems based on religion, and particularly *Shari’a* law, need to be approached with understanding and caution by judges, prosecutors, and defense counsel alike because of the different socio-cultural context that they bring to the conduct of the perpetrator and the atrocities at stake. This context can be completely alien to Western-educated legal professionals; hence, if a more just and locally relevant justice is to be promoted in the ICC legal process, due regard needs to be paid to the different cultural and legal context in which the perpetrator has acted and which influenced their perception of what is right and what is wrong, and ultimately their choices.

IV. CULTURAL DEFENSE

While no provision exists in the statutes of international criminal tribunals expressly providing defendants with a right to invoke cultural considerations in criminal proceedings,¹⁸⁷ the cultural background surrounding their actions has often been taken into account in the determination of their criminal responsibility and the most appropriate sentence.¹⁸⁸ This

182. See Gregor Maučec, *The Power of Culture and Judicial Decision-Making at The International Criminal Court*, in INTERSECTIONS OF LAW AND CULTURE AT THE INTERNATIONAL CRIMINAL COURT 190–208 (Julie Fraser & Brianne McGonigle Leyh eds., 2020).

183. *Id.* at 194.

184. Prosecutor v. Fofana, Case No. SCSL-04-14-A, Partial Dissent of Judge Winter, para. 4 (Special Ct. for Sierra Leone May 28, 2008).

185. KELSALL, *supra* note 42, at 170.

186. See Cases, ICC, <https://www.icc-cpi.int/cases> (showing the pending cases in the ICC, including those against Mali, Libya, Darfur, Afghanistan, and Nigeria) (last accessed Dec. 27, 2024).

187. See Karima Bennouna (Special Rapporteur in the Field of Cultural Rights), Rep. of the Special Rapporteur in the field of cultural rights, para. 27, U.N. Doc. A/HRC/31/59 (Feb. 3, 2016) (“[C]ultural rights . . . are not an excuse for violations of other human rights. They do not justify discrimination or violence. They are not a licence to impose identities or practices on others or to exclude them from either in violation of international law. . . . [I]mplementation of human rights must take into consideration respect for cultural rights, even as cultural rights themselves must take into consideration respect for other universal human rights norms”).

188. HIGGINS, *supra* note 78, at 7.

phenomenon is destined to recur more and more frequently in the near future,¹⁸⁹ especially before courts intended to serve a global legal community, such as the ICC.

A. Definition

In the context of the globalization of criminal justice, a central role has been played by the notion of *cultural defense*, which refers to any argument employed by defendants claiming that “their culture is so engrained that it predisposes them to actions that may conflict with the law,”¹⁹⁰ namely the set of prohibitions and values shaping modern international criminal law. In practice, cultural defenses take the form of any defensive argument seeking the introduction of cultural evidence in the proceedings with the end of excusing the defendant, mitigating their punishment, or affecting the computation of reparations.¹⁹¹

When looking into the matter of culture in the criminal process, there is a distinction in the literature that becomes evident, between civil law writers focusing on the concept of “cultural offenses,” and common law writers who are mostly looking into the concept of “cultural defense.”¹⁹² A careful distinction and potential similarities between the two can also prove important when assessing the possibility of presenting cultural evidence or elements in a criminal case.¹⁹³ At the core of culturally motivated offenses is “the fact that a cultural offense is caused by the adherence to a differing legal or moral norm.”¹⁹⁴ Such a cultural offense can only materialize when there are diverse legal and moral concepts applicable, and there is a conflict between different cultures.¹⁹⁵ Therefore, the actions of the perpetrator have a direct link to his cultural tradition.¹⁹⁶

The understanding of cultural defenses remains limited, and there seems to be no consensus as to its legal nature and role in the context of criminal proceedings. In the first instance, some scholars contend that, where international procedure allows for the consideration of cultural elements, cultural defense should be regarded as a “separate, self-contained defense”¹⁹⁷ countering the charges; in this view, a cultural defense would result in the negation or mitigation of criminal liability for conducts held “under a reasonable, good faith belief in their propriety, based upon the actor’s cultural heritage or tradition.”¹⁹⁸ Conversely, others argue that cultural defense should fall within the traditional defense categories available to the defendant.¹⁹⁹ However, on closer inspection, the notion of cultural defense reveals a far more pervasive role: in fact, its impact is not limited to that of a defense *strictu sensu* but rather encompasses cultural factors raised by the defendant at all stages of

189. See JÚLIA PALIK ET AL., PEACE RSCH. INST. OSLO, CONFLICT TRENDS IN THE MIDDLE EAST, 1989-2021 11 (2022).

190. Renteln, *Cultural Defenses in International Criminal Tribunals*, *supra* note 78, at 274.

191. *Id.*

192. Jeroen Van Broeck, *Cultural Defence and Culturally Motivated Crimes (Cultural Offences)*, 9 EUR. J. CRIME CRIM. L. & CRIM. JUST. 1 (2001).

193. *Id.* at 2.

194. *Id.* at 21.

195. *Id.*

196. *Id.*

197. HIGGINS, *supra* note 78, at 7.

198. Choi, *supra* note 151, at 81.

199. See, e.g., Lillian Mobley, *American Kaleidoscope: An Intersectional Approach to the Cultural Defense*, 53 LOY. U. CHI. 623 (2022).

the proceedings with the purpose of mitigating their penal liability, including but not limited to excuses, plea bargaining, and circumstances affecting punishment.²⁰⁰

B. *Cultural Defenses Before Domestic and International Courts*

It is increasingly evident that the fact that the defendant's actions may be shaped by a different worldview should be afforded due consideration in the equation of the proceedings. This emerges clearly in the context of criminal proceedings taking place before domestic courts, where judges and officers are likely to share a homogeneous legal background and cultural lens;²⁰¹ on the other hand, national jurisdictions often prove hesitant in accepting cultural differences, and therefore the notion of cultural defenses, as a derogation to the *ignorantia legis non excusat* ("ignorance of the law excuses not") principle.²⁰²

Yet, the practice of international and hybrid courts has also shown a growing reliance of parties on cultural arguments and defenses. Early examples of this trend emerged at the Special Court for Sierra Leone, where cultural considerations influenced the case strategy of both the prosecution and the defendants.²⁰³ Cultural considerations may have played a crucial role in shaping the decision not to prosecute child soldiers, but rather those responsible for their enlistment, for instance.²⁰⁴ On the other hand, the defendants consistently maintained that they could not easily detect the recruits' minority, as the concept of childhood is not interpreted and applied uniformly across the globe, and that in some communities the parents themselves sought the recruitment of their children based on local beliefs.²⁰⁵ Cultural defenses were further invoked by defense counsels in relation to other crimes, particularly related to sexual abuses targeting 'bush wives,' women who are married against their will.²⁰⁶ A recent example of the growing use of cultural defenses emerged before the ICC, in the *Al Mahdi* Case, where the defendant claimed that he genuinely thought he was acting in the best interest of his community when committing the crimes he was charged with.²⁰⁷

In this context, the pluralist composition of benches in international criminal jurisdictions may give a voice to different nationalities, cultures, and legal systems, thereby granting more flexibility compared to domestic jurisdictions. However, it is exactly here, before international courts, that the necessity to explore cultural and social rules and understand their impact on the presentation of evidence is likely to emerge dramatically.²⁰⁸

200. HIGGINS, *supra* note 78, at 9.

201. Doherty, *supra* note 172, at xvii.

202. Julia P. Sams, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behaviour*, 16 GA. J. INT'L & COMPAR. L. 335, 337 (1986).

203. Beth Van Schaack, Ambassador-at-Large for Glob. Crim. Just., U.S. Dep't of State, Keynote Address on the Legacy of the Special Court for Sierra Leone (Feb. 25, 2024), <https://www.state.gov/keynote-address-on-the-legacy-of-the-special-court-for-sierra-leone/>.

204. Ana Paula Podcameni, *The Contribution of the Special Court for Sierra Leone to the Law on Criminal Responsibility of Children in International Criminal Law* (June 12, 2017) (unpublished Ph.D. dissertation, Florida International University) FIU Electronic Theses and Dissertations 3358.

205. Renteln, *Cultural Defenses in International Criminal Tribunals*, *supra* note 78, at 280–82.

206. *See id.*

207. *See Al Mahdi Judgment & Sentence*, *supra* note 2, at para. 80 (finding Al Mahdi, the head of *Hisbah*—a body set up to uphold public morals and prevent vice—in Ansar Dine guilty of war crime for the attacking of mausoleums and religious buildings in Timbuktu); Mohamed Elewa Badar & Noelle Higgins, *Discussion Interrupted: The Destruction and Protection of Cultural Property under International Law and Islamic Law - the Case of Prosecutor v. Al Mahdi*, 17 INT'L CRIM. L. REV. 486 (2017).

208. *See generally* Doherty, *supra* note 172.

C. *Invocation of Cultural Defenses in Court*

Cultural defenses may be raised in international criminal proceedings as part of another recognized defense. This may take the form of a defense of insanity, mistake of law, mistake of fact, or diminished responsibility. In the first place, the accused may claim to have acted based on a divine command to draw attention to the alleged cultural and religious motivations underlying their crime, as part of an expedient aimed at devising the application of the insanity defense.²⁰⁹ This stratagem, also known as *deific decree* or *deific prophecy*, may at first sight look coherent with the classical use of insanity as a defense in criminal trials. However, upon closer inspection it presents itself as unacceptable, insofar as it relies on religion as part of a strategy to escape or mitigate punishment for core crimes.²¹⁰ Second, counsel may rely on cultural or religious considerations to argue that, upon committing the offense, the accused was not able to fully understand the negative consequences of his or her actions.²¹¹ This *diminished responsibility defense* is closely related to insanity, since both affect the perpetrator's ability to correctly develop the psychological element required for incrimination.²¹² This concept has gained traction in the Islamic legal tradition due to the importance attached to intentions in the Hadith, according to which "actions are to be judged by intentions."²¹³ Conversely, diminished responsibility remains controversial in jurisdictions centered on the *ignorantia legis non excusat* principle.²¹⁴ However, even in this context, courts may still afford consideration to cultural conflicts by resorting to other defense theories, especially those relying on the perpetrator's personal characteristics, to exclude or mitigate their criminal responsibility. In this respect, the *Kimura Case*²¹⁵ illustrates the use of the plea-bargaining system to afford consideration to the perpetrator's culture before American courts.²¹⁶ The *Fumiko Kimura Case* is an illustration of a Japanese cultural phenomenon called "*oyaku Shinju*" (parent-child suicide).²¹⁷ The husband of the defendant admitted to having an extra-marital affair.²¹⁸ Kimura felt betrayed, and believed it rendered her existence, and by implication, her children's existence, useless.²¹⁹ As per her Japanese cultural beliefs, she attempted to drown herself along with her children as a way to "rid herself of the shame."²²⁰ During the trial, fearing the cultural implications, Kimura's defense attorney chose temporary insanity as her defense strategy.²²¹ His reasoning posed an ethically problematic parallel which suggested that actions clearly motivated by cultural beliefs can fall under the notion of insanity. As controversial as his approach may have been, it was partially successful, as the charges were reduced to voluntary manslaughter and Kimura received a sentence of only one year.²²²

209. Renteln, *Cultural Defenses in International Criminal Tribunals*, *supra* note 78, at 278.

210. *Id.*

211. ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* 187–89 (2004).

212. Choi, *supra* note 151, at 86. It is to be noted that under the ICC Statute, diminished responsibility is not an explicit defence—but can be used in mitigation of sentence.

213. Mohamed Elewa Badar, *Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court*, 24 LEIDEN J. INT'L LAW 411, 426–27 (2011) (quoting *Qur'an* 33:5).

214. Choi, *supra* note 151, at 85.

215. *People v. Kimura*, No. A-091133 (L.A. Super. Ct. 1985).

216. Sams, *supra* note 202, at 340–43.

217. Choi, *supra* note 151, at 82.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. See Rashmi Goel, *Can I Call Kimura Crazy? Ethical Tensions in Cultural Defense*, 3 SEATTLE J. SOC.

Therefore, several avenues remain open to defendants willing to introduce cultural and religious considerations in criminal proceedings with a view to avoid or mitigate punishment for their crimes. Regarding international criminal proceedings, Article 31(1) of the Rome Statute provides a list of criminal defenses available before the ICC.²²³ However, such list is not exhaustive since the Court has the faculty to consider criminal defenses other than those listed in the Statute.²²⁴ Therefore, a defendant willing to raise cultural defenses may do so either as part of a defense codified by Article 31(1) or, in the alternative, by notifying the Prosecutor in advance and obtaining permission from the Chamber to raise an uncoded defense pursuant to Article 31(3) of the Statute and Rule 80 of the Rules of Procedure and Evidence (RPE).²²⁵

D. Misuse of and Limitations to Cultural Defenses

The introduction of cultural defenses in criminal proceedings inevitably entails a risk of misuse, thereby requiring the domestic and international courts concerned to devise mechanisms to mitigate such risk. For this purpose, scholars have proposed the establishment of a *cultural defense test* empowering judges to scrutinize the key elements of the defendant's argumentation.²²⁶ Therefore, in the presence of a defendant invoking cultural defenses, the judge should first assess whether the defendant is a member of a specific ethnic group; second, the judge should verify whether such group has a link to the tradition invoked by the defendant; finally, the judge should assess the degree of influence exerted over the defendant by the tradition at the time the crime was committed.²²⁷

Furthermore, international tribunals should impose limits on the defendant's faculty to invoke cultural defenses. Scholars maintain that such defense should never serve as a justification for crimes causing irreparable damage to victims (e.g., those resulting in loss of life), in case of failure to meet the cultural defense test, or in the event of conflict with human rights which override the right to culture (e.g., right to life, freedom from torture and cruel and degrading treatment, children's and women's rights).²²⁸

Consideration of the perpetrator's cultural background may be crucial in gaining a complete understanding of the circumstances of the crime. Moreover, the right to culture codified by several international legal instruments provides defendants with a chance to seek the introduction of cultural evidence in the proceedings. However, the impact of such information on the outcome of the proceedings shall be determined on a case-by-case basis.²²⁹

JUST. 443 (2004).

223. Rome Statute, *supra* note 18, at art. 31(1).

224. *Id.* at art. 31(3).

225. *Id.*; RULES OF PROCEDURE AND EVIDENCE (2019); *see also* Noelle Higgins, *Defending Culture: The ICC and Cultural Defence*, CRIM. JUST. IN IRELAND (Nov. 17, 2017), <https://criminaljusticeinireland.wordpress.com/2017/11/17/defending-culture-the-icc-and-cultural-defence/> (last accessed Dec. 27, 2024).

226. Alison Dundes Renteln, *The Use and Abuse of the Cultural Defense*, 20 CAN. J.L. & SOC'Y 47, 49 (2005).

227. *Id.* at 49–50.

228. Renteln, *Cultural Defenses in International Criminal Tribunals*, *supra* note 78, at 278.

229. *Id.* at 274.

E. Arguments for and Against Cultural Defenses

More than ever cultural defenses are at the subject of debate among scholars and practitioners from different legal traditions. Therefore, it is no surprise that arguments have been raised for and against their recognition in international proceedings, which will be outlined briefly below.

Prior to mentioning the arguments in favor of such recognition, it should be recalled that cultural defenses do not impede the qualification of the perpetrator's conduct (*actus reus*) as wrongful, but rather consider the perpetrator excused due to absence of the psychological element required by the offence (*mens rea*). Having considered this, some scholars contend that the present lack of procedural safeguards for the event of a defendant presenting a cultural defense results in the inconsistent application of cultural factors from case to case, making their adoption urgent to avoid discrepancy and unfair treatment.²³⁰ Second, they maintain that "[w]hen the defendant did not have the same opportunity as an individual who was raised in the cultural majority to know or learn the law, it is unfair to impute knowledge of the law to the defendant."²³¹ It follows that cultural factors must be considered to attain justice in a way that is meaningful to the accused. Third, individuals who tend to comply with the legal framework governing their own native society may engage in a criminal offence because their set of values coerced them to do so.²³² In this perspective, the recognition of cultural defenses becomes crucial to ensure the effectiveness of criminal law, which is optimal when individuals see it as understandable and closer to their own culture.²³³ Finally, a further argument in favor of the recognition of cultural defenses stems from the principles of cultural pluralism and individualized justice, which require the interpreter to assess any unlawful conduct through the prism of the cultural values underlying it, and to balance the latter with the maintenance of public order.²³⁴

On the other hand, criticism towards the recognition of cultural defenses has emerged from a number of scholars and practitioners, mostly in relation to its application within the American judicial system.²³⁵ In the first place, those against the recognition of cultural defenses emphasize the *ignorantia legis non excusat* principle as the cornerstone of the criminal justice system, claiming that the introduction of cultural defenses would create a dangerous exception to impunity and recalling that "no custom may excuse a criminal act where the effect is adverse to the foundational principles of the law itself."²³⁶ They further argue that this defense would be available only to a specific niche of society, thereby jeopardizing the expectations of many individuals to whom it would not be available.²³⁷ Second, scholars emphasize the absence of a universally accepted definition of culture, as well as the broad spectrum of factors susceptible of being labelled as cultural, which in their view undermine the argument for the recognition of cultural defenses.²³⁸ Third, it is often stressed that, instead of perceiving culture as a concept *in fieri* (i.e., subject to continuous evolution), cultural defense theorists rely on an inaccurate view of it as a static and final

230. Choi, *supra* note 151, at 86.

231. *Id.*

232. *Id.*

233. *See id.*

234. *Id.* at 86–87.

235. Sams, *supra* note 202, at 353.

236. Choi, *supra* note 151, at 87; *see also* Sams, *supra* note 202, at 351.

237. Choi, *supra* note 151, at 87–88.

238. HIGGINS, *supra* note 78, at 9.

notion.²³⁹ Fourth, some scholars contend that the introduction of cultural defenses would have the side effect of shifting the blame for the crime in question from the individual to his culture as a whole.²⁴⁰ It is further noted that prosecutorial discretion should suffice to mitigate the charge and the sanction where appropriate and include a consideration cultural factors.²⁴¹ A further problem has emerged in relation to potential abuses and the impact that the recognition of cultural defense could have on the maintenance of the deterrent effect of criminal law.²⁴²

Irrespective of the criticisms, when dealing with cultural defenses in the context of international criminal law and international criminal offenses, as Kelsall notes, the main rationale should be that “[t]he law ought not to be an instrument of cultural imperialism.”²⁴³ Stemming from that, the “representatives of one culture ought not to take punitive action with a view to changing the practices of another.”²⁴⁴ Nevertheless, this is a real risk when we speak about the adjudication of crimes at the international level. A case in point would be the Special Court for Sierra Leone, which by convicting perpetrators on charges of enlisting child soldiers and forced marriage, practically criminalized aspects of local culture which were not necessarily unlawful from the viewpoint of the locals.²⁴⁵ Therefore, in order to refrain from impositions on local societies emanating from applying regulations that are alien to the local actors, international norms which are locally understood and relevant should instead be applied. Furthermore, the moral outrage and the prospective retribution should be from the point of view of those affected and their societies,²⁴⁶ rather than from the perspective of ‘Western morality’ and based on norms potentially formulated outside of the context of local customs and regulations.

V. THE POTENTIAL OF CULTURAL DEFENSES BEFORE THE ICC IN PRACTICE

The respective prosecutions of *Al Hassan*, *Al Mahdi* and *Ongwen* at the ICC presented an opportunity for the Court to endorse legal pluralism in its administration of international criminal justice. In *Al Mahdi* and *Ongwen*, the Court was confronted with this in the specific context of cultural defenses; both times it refused to properly engage with them through a culturally sensitive pluralistic legal lens which included relevant local legal traditions.²⁴⁷ In *Al Hassan*, the Court has not only failed to engage with the Islamic legal tradition but has accepted the Prosecution’s pre-trial submissions that the Islamic legal norms at play constitute evidence of an international crime—in this way Islam appears to be on trial.²⁴⁸ While the type and extent of impact culture had on the conduct of each of the defendants varies, these cases are bound by the thread of a failed opportunity for the ICC to adequately engage with cultural

239. Renteln, *Cultural Defenses in International Criminal Tribunals*, *supra* note 78, at 273.

240. Choi, *supra* note 151, at 87–88.

241. *Id.* at 87.

242. Sams, *supra* note 202, at 346 & 348.

243. KELSALL, *supra* note 42, at 258.

244. *Id.*

245. *Id.*

246. *See id.*

247. *See* Prosecutor v. Al Mahdi, ICC-01/12-01/15-84-Red, Decision on Confirmation of Charges (Mar. 24, 2016) [hereinafter *Al Mahdi Confirmation of Charges*], www.icc-cpi.int/CourtRecords/CR2016_02424.PDF; *see also* Prosecutor v. Ongwen, ICC-02/04-01/15-2022-Red, Appeals Judgment (Dec. 15, 2022), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_07146.PDF.

248. *See* Al Hassan Confirmation of Charges, *supra* note 153.

considerations—including cultural defenses—and draw upon the relevant alternative legal traditions to determine their legitimacy. All three cases present the challenge of reconciling differing world views to arrive at a judgment of the defendant's conduct which delivers justice based upon both traditional Western international criminal law and the locally relevant legal tradition, increasing its legitimacy in the eyes of those impacted. A challenge, this section submits, the ICC has thus far failed to rise to.

As mentioned above, the ICC can adopt legal pluralism through the mechanism of Article 21(1)(c) of the Rome Statute, which declares its universality by opening itself up to interpretation in accordance with “general principles of law derived . . . from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crimes.”²⁴⁹ Thus, when a defendant is brought before the ICC from an alternative legal jurisdiction, as were Al Hassan, Al Mahdi, and Ongwen, the opportunity arises to employ the Article 21 provision to take into account the local legal tradition from which the defendant and the alleged victims hailed when adjudicating on the matter.²⁵⁰ Yet time and time again, the ICC has chosen instead to prioritize Western, secular legal traditions over more relevant local legal traditions of non-Western countries.²⁵¹

A. Mali: Islam on Trial Before the ICC in The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Al Hassan Case)

On September 30, 2019, charges of war crimes and crimes against humanity were confirmed by Pre-Trial Chamber I against Al Hassan Ag Abdoul Aziz, following the republic of Mali's referral of the situation in its territory to the ICC in July 2012.²⁵² The charges alleged that Al Hassan was a member of an armed religious group called Ansar Dine—meaning “defenders of the faith”—and *de facto* chief of police in the cities controlled by Ansar Dine and al-Qaeda in Islamic Maghrib (AQIM).²⁵³ Inter alia, simply for implementing *Shari'a* punishments, as mandated by a *Shari'a* court, Al Hassan was accused of religious persecution and torture of the local population of Timbuktu.²⁵⁴ Despite many experts presenting opposing views, Trial Chamber X adopted the Prosecution's view vis-à-vis the *Shari'a* punishments, which included light floggings and a single instance of amputation, by classifying them as torture.²⁵⁵ Trial Chamber X denied the applicability of Article 7(2)(e) of the Rome Statute which exempts from the definition of torture any pain or suffering which arises from lawfully

249. Julie Fraser, *Exploring Legal Compatibilities and Pursuing Cultural Legitimacy: Islamic Law and the International Criminal Court*, in INTERSECTIONS OF LAW AND CULTURE AT THE INTERNATIONAL CRIMINAL COURT 387 (Julie Fraser & Brianne McGonigle Leyh eds., 2020); Mohamed Elewa Badar & Noelle Higgins, *General Principles of Law in the Early Jurisprudence of the ICC*, in THE INTERNATIONAL CRIMINAL COURT IN SEARCH OF ITS PURPOSE AND IDENTITY 263–81 (Triestino Mariniello ed., 2015).

250. See U.N. Diplomatic Conf. of Plenipotentiaries on the Establishment of an Int'l Crim. Ct., U.N. Doc. A/CONF.183/13 (Vol. II), *Summary Records of the Plenary Meetings*, para. 83 (2002), https://legal.un.org/diplomaticconferences/1998_icc/docs/english/vol_2.pdf (noting that during the Rome negotiations, the Libyan delegate emphasized that “Western values and legal systems should not be the only source of international instruments. Other systems [are] followed by a large proportion of the world's population”).

251. See Shaheen Ali & Satwant Kaur Heer, *What Is the Measure of “Universality”? Critical Reflections on “Islamic” Criminal Law and Muslim State Practice Vis-à-Vis the Rome Statute and the International Criminal Court*, in ISLAM AND INTERNATIONAL CRIMINAL LAW AND JUSTICE 175–99 (Tallyn Gray ed., 2018).

252. Al Hassan Confirmation of Charges, *supra* note 153, at para. 2.

253. *Id.* at paras. 27–45.

254. See generally *id.*

255. *Id.*

sanctioned punishments.²⁵⁶ The Chamber further considered a number of policies imposed by Ansar Dine to amount to persecution,²⁵⁷ including prohibition of mixed-gender classes,²⁵⁸ the closure of secular public schools,²⁵⁹ the imposition of restrictions on freedom of association and freedom of movement (such as banning on public gatherings and the ban on unmarried or unrelated men and women from travelling together),²⁶⁰ as well as the prohibition of alcohol and cigarettes.²⁶¹ At the outset, the charges against Al Hassan drew from the religious principles that dictated the rule of Ansar Dine in Timbuktu and thus his own actions. Islam itself appeared to be in the dock. As Fraser notes, this case is remarkable as it is the ICC's first contentious case at trial that directly raises the question of Islam and the application of Islamic criminal law and thus there is a "plethora of cultural norms, values, and practices that must be understood in order to deliberate the facts in context and deliver 'justice.'"²⁶² The judgment delivered on June 26, 2024 reflects the Court's negligence to properly engage with the nuances of the *Shari'a* law and its cultural implications and by large adopts the reasoning coined by the Prosecution.²⁶³

In their opening and closing statements the Prosecution declared the following:

[T]he trial we are in today, allow me to solemnly state and repeat that this is not a trial about religion. Religion is not on trial here. Islam is not on trial here. It is true, however, that religion can be used, any kind of religion can be used, as the ideological basis and a justification for perpetrating mass crimes.²⁶⁴

However, "[d]espite this repeated claim, the case is very much about religion and specifically Islam, which is evident from the Prosecution's own submissions."²⁶⁵ Religion pervades this case: the allegedly criminal conduct occurred in the Muslim-majority State of Mali by a religiously motivated group, their Islamic police and Islamic court (*Hisbah*) against Timbuktu's Muslim population.²⁶⁶

B. *The Impact of Culture on Al Hassan*

The Prosecutor presented Timbuktu before Ansar Dine's arrival as a "cosmopolitan city" integrating a variety of "communities, cultures and religions, the majority of whom were Muslim believers. A city where people were free to practice their religion as they wished. A city where in one word they could exercise their fundamental rights and traditions in

256. Al Hassan Trial Judgment, *supra* note 1, paras. 1140–142.

257. *Id.* at para. 1523.

258. *Id.* at para. 163.

259. *Id.* para. 1532.

260. *Id.*

261. *Id.*

262. See Fraser, *Al Hassan Symposium*, *supra* note 153.

263. Prosecutor v. Al Hassan, ICC-01/12-01/18-2594-OPI3, Partial Dissent of Judge Mindua, para. 84 (June 28, 2024), <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1808bdb3a.pdf> [Fr.] (noting that a fundamental question being asked more frequently in the West is whether Shar'ia law is compatible with human rights, which the Chamber deliberately chose not to answer even though the alleged conduct warrants examination under Shar'ia rules).

264. Prosecutor v. Al Hassan, ICC-01/12-01/18-T-213-ENG, Prosecution Closing Statements, at 5 (May 23, 2023).

265. Fraser, *Exploring Legal Compatibilities*, *supra* note 249, at 131.

266. *Id.*

accordance with the secular Malian constitution.”²⁶⁷ By implication, the arrival of Ansar Dine hailed the end of cultural diversity and religious freedom, concepts presented by the Prosecutor as secular legal principles that are incompatible with *Shari’a* law. This implication, however, is undermined by the experiences of Islamic societies across the world, past and present.

The Prosecution went further, declaring that the policy to ban alcohol and cigarettes in Mali fell within the scope of “persecution as a crime against humanity.”²⁶⁸ By equating the prohibition of alcohol to one of the highest crimes under international law, the Prosecution reveals its ignorance at best, and condemnation at worse, of anything other than a secular, Eurocentric conception of international criminal law. Article 5 of the Rome Statute, which reiterates a phrase already used in the fourth paragraph of the Preamble, limits the jurisdiction of the Court to the most serious crimes “of concern to the international community as a whole.”²⁶⁹ The prohibition of alcohol is prevalent throughout the Islamic world, from Saudi Arabia to Indonesia to Malaysia, on grounds of public health, morality,²⁷⁰ and the prevention of crime.²⁷¹ Cigarettes are notoriously harmful, and the World Health Organization considers there to be no safe amount of alcohol consumption either.²⁷² Yet if we are to believe the Prosecution, their prohibition is among the gravest of crimes.

In confirming the charges, the Pre-Trial Chamber characterized the application of certain *Shari’a* punishments as torture, cruel treatment, and outrages upon personal dignity as well as evidence of an organized policy to commit crimes against humanity which involved widespread or systematic violence against a civilian population.²⁷³ In a damning indictment of Ansar Dine’s governance of the local population, it endorsed the language of the Prosecution and accused their policies of aiming to impose societal control “through violence, under the pretext of applying an ideology portrayed as being guided by [*S*]h^hari’a.”²⁷⁴ This endorsement of “radical universalism”²⁷⁵ over cultural relativism is, according to Khaliq, a wasted opportunity to strengthen the development of international law with the diverse principles of global cultures and faiths.²⁷⁶ This is notwithstanding the strong case made by

267. Prosecution Closing Statements, *supra* note 264, at 10.

268. *Id.* at 13–15.

269. Rome Statute, *supra* note 18, at art. 5.

270. MOHAMMAD HASHIM KAMALI, CRIME AND PUNISHMENT IN ISLAMIC LAW: A FRESH INTERPRETATION 276 (2019).

271. See Caryl Beynon, *New Evidence on Alcohol-Related Harm to People Other than the Drinker*, U.K. HEALTH SEC. AGENCY (June 12, 2019), <https://ukhsa.blog.gov.uk/2019/06/12/new-evidence-on-alcohol-related-harm-to-people-other-than-the-drinker/> (discussing data linking alcohol to violent and sexual crimes) (last accessed Dec. 27, 2024).

272. *No Level of Alcohol Consumption Is Safe for Our Health*, WORLD HEALTH ORG. (Jan. 4, 2023), www.who.int/europe/news/item/04-01-2023-no-level-of-alcohol-consumption-is-safe-for-our-health (last accessed Dec. 27, 2024); Anya Topiwala et al., *Moderate Alcohol Consumption as Risk Factor for Adverse Brain Outcomes and Cognitive Decline: Longitudinal Cohort Study*, BMJ (June 6, 2017), <https://www.bmj.com/content/357/bmj.j2353> (last accessed Dec. 27, 2024); Natalie Grover, *Any Amount of Alcohol Consumption Harmful to the Brain, Finds Study*, THE GUARDIAN (May 18, 2021), www.theguardian.com/society/2021/may/18/any-amount-of-alcohol-consumption-harmful-to-the-brain-finds-study (last accessed Dec. 27, 2024).

273. See Helen Poulsen et al., *Toxicological Assessment of the Role of Alcohol and Drugs in Drug-Facilitated Sexual Assault Cases in New Zealand*, 45 J. ANALYTICAL TOXICOLOGY 44 (2021).

274. Al Hassan Confirmation of Charges, *supra* note 153, at para. 182.

275. Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 400 (1984); Nana Kwame Agyeman & Alfred Momodu, *Universal Human Rights ‘versus’ Cultural Relativism: the Mediating Role of Constitutional Rights*, 12 AFR. J. LEGAL STUD. 23, 23–46 (2019); Urfan Khaliq, *The International Court of Justice and its Use of Islam: Between a Rock and a Hard Place?*, 2 OXFORD J.L. & RELIG., 98, 118 (2013).

276. Khaliq, *supra* note 275, at 117.

the defense for the Court to allow cultural considerations to shape its judgment, in demonstrating the impact of Al Hassan's religion in guiding his actions. As head of the Islamic police in Timbuktu and as a Muslim, his mission was to enact justice for his Muslim brethren in accordance with Islamic criminal justice as interpreted by an Islamic court. Dr. Gerry notes that Timbuktu throughout time has never fit the Western cosmopolitan descriptor, but has always been a socially conservative society rooted in traditional values under the rule of religious clerics.²⁷⁷ In its final brief, the Defense described Islam as the "soul of Mali"²⁷⁸ and outlined Timbuktu's history as an Islamic society ruled by the principles of *Shari'a* law,²⁷⁹ something which was merely continued rather than imposed by Ansar Dine, who applied *Shari'a* rules in accordance with the Maliki school, which the local population predominantly accepts and practices.²⁸⁰

The Defense highlighted the similarities of life in Timbuktu pre- and post-Ansar Dine: "[f]loggings and beatings occurred in tribal communities before 2012, either through rulings issued by the *Qādī* or by family members enforcing the prohibition on *Zina*. Before 2012, there were groups performing similar functions to [*Hisbah*], including the Malian police in Timbuktu."²⁸¹ The Defense therefore contended that Al Hassan "served his fellow people as a low-level subordinate to whom the governance of Timbuktu through customary Islamic law and principles was lawful, including the punishments according to [*Shari'a*]" and in this "customary Islamic situation and context" it was conceivable neither to himself nor the local population that the implementation of *Shari'a* punishments handed down by the Islamic Tribunal in accordance with customary Islamic law could be anything other than lawful, not least amount to a crime against humanity.²⁸² By contrast, the "proceedings reflected a genuine intent to provide justice for the local population."²⁸³ The Defense implored the Chamber to consider the cultural context in which Al Hassan lived, in particular the important "impact of his religious beliefs" and the evidence that "interpretation was the bedrock of judicial decision making and Islam was the core of governance by Ansar Dine in Timbuktu in 2012."²⁸⁴ As a follower of Islam, he had no willingness, nor the authority, to interpret or question the

277. IntlCriminalCourt, [*FLOOR*] *Al Hassan case: Closing statements, 25 May – 1st session*, YOUTUBE (May 25, 2023), <https://www.youtube.com/watch?v=uZ4S7ciHi8I>, at 56:02–56:13 ("Timbuktu has never been a Western cosmopolitan city. It was socially conservative and controlled by religious notables where traditional values were preferred"); Prosecutor v. Al Hassan, ICC-01/12-01/18-2485-Conf, Final Defense Brief, para. 3 (Apr. 17, 2023) [hereinafter *Al Hassan Final Defense Brief*], <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd180549620.pdf>.

278. *Id.*

279. It is to be noted that *Shari'a* and Islamic law are distinct from one another. The term 'Islamic law' covers the entire system of law and jurisprudence associated with the religion of Islam. It can be divided into two parts, namely, the primary sources of law (*Shari'a* in the strict legal sense) and the subordinate sources of law with the methodology used to deduce and apply the law (Islamic jurisprudence or *fiqh*). *Shari'a* literally means the pathway and in its original usage it meant the road to the watering place or path leading to the water, i.e., the way to the source of life. It rules and regulates all public and private behaviour as well as legal aspects.

280. Prosecutor v. Al Hassan, ICC-01/12-01/18-T-172-Red-ENG, Defense Opening Statements, at 37 (May 9, 2022), https://www.icc-cpi.int/sites/default/files/Transcripts/CR2022_06281.PDF.

281. Al Hassan Final Defense Brief, *supra* note 277, at para. 530; MOHAMMAD HASHIM KAMALI, FREEDOM OF EXPRESSION IN ISLAM 28 (Islamic Texts Society, Cambridge, 2010) ("The concept of *hisbah* is derived from the Qur'anic verse 3:104 which instructs Muslims to command good and forbid evil (*al-amr bi'l-ma'ruf wa'l-nahy 'an al-munkar*) and is considered as a cardinal Qur'anic principle which lies at the root of many Islamic laws and institutions").

282. Prosecutor v. Al Hassan, ICC-01/12-01/18-T-215-Red-ENG, Defense Closing Statements, at 25 (May 25, 2023), <https://www.icc-cpi.int/sites/default/files/Transcripts/0902ebd1804b5c42.pdf>.

283. Al Hassan Final Defense Brief, *supra* note 277, at para. 364.

284. *Id.* at paras. 406–09.

decisions passed by the religious leaders therefore he merely acted as a functionary in an Islamic country.²⁸⁵ While the Prosecution's case may not relate ideologically or culturally to the Islamic forms of justice imposed by Ansar Dine, the population of Timbuktu did not perceive Ansar Dine as criminal in itself. The Defense advised the Court that "the fact that *Shari'a* punishments are lawful sanctions must . . . inform the Chamber's assessment as to whether Mr Al Hassan could have appreciated that such sanctions were manifestly unlawful," an argument buttressed by the testimony of witnesses who testified that they were themselves "unaware that the application of *Shari'a* violated international law or constituted torture."²⁸⁶

Having established the pre-existing Islamic foundation of law and order in Timbuktu, the Defense explained how Islamic legal procedure dictated Al Hassan's actions. As a member of Ansar Dine, Al Hassan was appointed to work with an Islamic Tribunal, composed of local *qadis* and *sheihks*.²⁸⁷ The Islamic police, of which he was a low-level clerk, were "obligated by law to implement *Hudud* punishments" and "it would be *Haram* (forbidden) to interfere with the justice process."²⁸⁸ As one witness explained "as a Muslim believer, it is not possible to disagree with the prohibitions imposed by Islam."²⁸⁹ According to the Defense, this constituted evidence of the degree of compulsion Al Hassan faced overlaid by the particular emphasis placed on *Shari'a* in the *Qur'ān* as the law to be obeyed by every Muslim.²⁹⁰ Within this belief system, it is inconceivable for Al Hassan to question his superior orders; the "sole area of discretion afforded to the Islamic Police under *Shari'a* was to dissuade locals from filing a complaint through mediation and reconciliation, which he did. He also helped locals avoid more serious penalties by assisting them to find witnesses."²⁹¹

Moreover, there is a genuine cultural and religious rationale argument for traditional forms of punishment. Consequences of ignoring traditional Islamic judicial punishments (in favor of Western sentencing practices) has the potential to inflict more pain and suffering on the individuals and community in question.²⁹² Imprisonment of the convicted person can exacerbate the economic and social burdens on their family potentially far more than traditional punishments, such as light floggings.²⁹³ In the specific context of Islam, the application of *Shari'a* punishments can cleanse the offender in the eyes of God, something a secularly determined punishment cannot achieve.²⁹⁴ Kamali considers a key principle of Islamic justice is the right of offenders to a punishment that begets repentance and reform.²⁹⁵

The *Al Hassan* Case provided a golden opportunity for the judges at the ICC "to acquaint themselves with the cultural context of the situation before them," including the religion of Islam and the philosophy of its system of justice."²⁹⁶ As outlined above, the Islamic legal system already prevailed in Mali, adherence to which was merely more consistently

285. *Id.*

286. *Id.* at para. 530.

287. *Id.* at paras. 6–8.

288. Prosecutor v. Al Hassan, ICC-01/12-01/18-T-203-Red-ENG-T-203, Trial Hearing Witness P-0202 Transcript 40:15–17 (Sept. 22, 2022).

289. Al Hassan Final Defense Brief, *supra* note 277, at para. 530.

290. *Id.* at para. 423.

291. *Id.* at para. 529.

292. Melanie Schwartz, *Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Representation*, 14 AUST. IND. L. REV. 2, 5 (2010).

293. Carlos Simmonds, *Sistemas Jurídicos Paez, Kogi, Wayuu y Tule* [Paez, Kogi, Wayuu, and Tule Legal Systems], 32 REVISTA COLOMBIANA DE ANTROPOLOGÍA [Colom. J. Anthropology] 313, 313 (1995).

294. MAJID KHADDURI, *THE ISLAMIC CONCEPTION OF JUSTICE* 179 (1984).

295. KAMALI, *supra* note 270, at 339.

296. Fraser, *Al Hassan Symposium*, *supra* note 153.

applied by Ansar Dine when it came to power. Indeed, Islamic law is the applicable law in States across the Islamic world, many of whom are party to the Rome Statute.

C. *An Alternative Approach to Legal Pluralism*

At the time of writing, Trial Chamber X has decided upon the fate of Al Hassan, rendering him guilty for the most of the charges and sentencing him to ten years of imprisonment.²⁹⁷ Having outlined the centrality of the Islamic legal tradition to this case, this section will demonstrate an alternative approach to determining Al Hassan's guilt or innocence, one which employs the Islamic legal principles under which Al Hassan, Ansar Dine, and the population of Timbuktu have historically lived and continue to live, in other words, the cultural context of the situation. Instead of simply *ab initio* declaring *hudud* punishments to amount to crimes against humanity and torture, the Court could have instead scrutinized the application of *hudud* in this specific context under widely recognized principles of Islamic Law. Then they could decide whether the punishments as mandated by the Islamic court in Timbuktu went so blatantly against the evidentiary rules and/or due process in Islamic criminal justice that a member of the police, tasked with implementing them, could have understood such implementation to amount to no less than an international crime.²⁹⁸

This approach is referenced in the above section as the *cultural defense test* and has previously been advanced by this author in the context of examining the legitimacy of *jihad* as exercised by the terrorist group ISIL under principles of Islamic international law (*siyar*).²⁹⁹ ISIL claim their terrorist actions to be permissible under Islamic law, which they regard as a legal system distinct and parallel to international criminal law, a belief which has garnered support for their actions in a minority, but substantial part, of the Muslim world. A ruling by a Court regarding their actions grounded solely in Eurocentric international law "would thus provide only an external claim to their illegitimacy, one which they and their many supporters would disregard as meaningless, since it could never be above divine commands."³⁰⁰ In light of this, it is important to examine their actions from within the norms of Islamic law and the use of Islamic experts would be of significance in this regard. Moreover, scholars make the compelling argument that greater engagement with Islamic law within international criminal law is a necessary deterrent for such "contemporary extremist and instrumentalist uses of Islamic norms to justify political violence."³⁰¹ In other words, "people are more inclined to observe normative positions they believe to be endorsed by their own cultural traditions and not imposed by others."³⁰² According to Yang, this will create "greater shared ownership of the international criminal justice project which will only strengthen the global fight against impunity."³⁰³

297. Al Hassan Trial Judgment, *supra* note 1. Al Hassan was acquitted of the war crimes of rape, sexual slavery, and attacking protected objects, as well as the crimes against humanity of rape, sexual slavery and other inhumane acts in the form of forced marriage. *Id.*

298. See generally ISLAM AND INTERNATIONAL CRIMINAL LAW AND JUSTICE (Tallyn Gray ed., 2018).

299. See Mohamed Elewa Badar, *The Self-declared Islamic State (Da'esh) and Jus ad Bellum under Islamic International Law*, 1 THE ASIAN YEARBOOK OF HUMAN RIGHTS. & HUMANITARIAN LAW 35 (2017) (situating this argument within the Law of war (*jus ad bellum*). However the arguments may equally apply in the context of ICL).

300. *Id.* at 35.

301. Corri Zoli et al., *Justice in Post-Conflict Settings: Islamic Law and Muslim Communities as Stakeholders in Transition*, UTRECHT J. INT'L & EUR. L. 38 (2017).

302. Fraser, *Exploring Legal Compatibilities*, *supra* note 249, at 392.

303. YANG, *supra* note 14, at 1 & 43.

This approach to adjudication, which incorporates a test of legitimacy of the alleged offence under Islamic law and after taking that into account determines the criminality of the act under traditional international criminal law, would represent huge progress in opening the ICC to Islamic societies and moving it closer to becoming a truly universal court of criminal justice. It would also indicate to the various non-Western cultures and religious societies across the globe that the ICC and international criminal law are genuinely for all cultures and creeds, and not just those belonging to Western societies.

D. Islam as a Cultural Defense in The Prosecutor v. Ahmad Al Faqi Al Mahdi (Al Mahdi Case)

The *Al Mahdi* Case is another example of a lost opportunity for the ICC to embrace legal pluralism and engage with the Islamic legal tradition in the prosecution of a case whose legal and factual circumstances were rooted in Islamic law and culture—the same substantive circumstances as the *Al Hassan* Case.³⁰⁴ This is the first case where an accused submitted to the ICC that his actions were based on an Islamic legal tradition,³⁰⁵ namely the Islamic legal concept of *Hisbah*. Al Mahdi, a member of Ansar Dine in Mali, was prosecuted for his role in overseeing and performing the destruction of cultural property in the city of Timbuktu between June 30, 2012 and July 11, 2012, in his capacity as leader of the group's morality brigade *Hisbah*.³⁰⁶ Conceptually, *Hisbah* is a cardinal Qur'anic principle which "instructs Muslims to command good and forbid evil"³⁰⁷ and is codified in terms of both rights and obligations in the Universal Islamic Declaration of Human Rights, under Article 4 on the right to justice.³⁰⁸ In the context of the *Al Mahdi* Case, the group was mandated "to prevent apparent vice and to promote virtue as well as to carry out charitable tasks."³⁰⁹

E. The Influence of Islam and Islamic Law

Al Mahdi's whole life experience was rooted in, and therefore shaped by, Islam. Having received a Qur'anic education from childhood, he followed his family tradition and became a well-regarded expert in the field of Islam, eventually joining Ansar Dine in Timbuktu as the head of the *Hisbah* from its foundation in April 2012 until September 2012. His Islamic expertise also saw him consulted on religious issues contributing to the Islamic tribunal.³¹⁰ During a pre-trial hearing, the Defense sought to explain Al Mahdi's conduct as his interpretation of his religious duty as the leader of the *Hisbah*, to whom it had fallen to decide the fate of the religious sites which were subsequently attacked in Timbuktu, under the duty of the *Hisbah* to prevent "anything that can be considered as worshipping the tombs, such as building the dome over the tomb."³¹¹ It was the Defense's submission that Al Mahdi was merely "seeking the means to allow his conception of good over evil to prevail"³¹² and that

304. Polymenopoulou, *supra* note 54, at 762.

305. Badar & Higgins, *supra* note 207, at 488.

306. Al Mahdi Confirmation of Charges, *supra* note 247, at paras. 45 & 49.

307. Badar & Higgins, *supra* note 207, at 494.

308. *Universal Islamic Declaration of Human Rights: Adopted by the Islamic Council in Paris on 19 September 1981*, 2 INT'L J. HUM. RTS. 102, 105 (1998).

309. Al Mahdi Confirmation of Charges, *supra* note 247, at para. 46.

310. Badar & Higgins, *supra* note 207, at 494 & 505.

311. Al Mahdi Confirmation of Charges, *supra* note 247, at para. 47.

312. Al Mahdi Judgment & Sentence, *supra* note 2, at para. 98.

these acts of destruction were performed “under the banner of *Shari’a*.”³¹³ This, it was submitted, was demonstrated by the fact that Al Mahdi had conducted research into Islamic law upon which he concluded that mausolea were prohibited and wrote a “sermon on the destruction . . . which was read at the Friday prayer, on the eve of the launch of the attack.”³¹⁴ In this way, the Defense framed the acts as a clash of Western and Islamic world views and “part of a broader struggle over the meaning of Islam.”³¹⁵ As this author has wondered before, with such context, “the question arises if membership of the *Hisbah* could have been seen as a justification for the attacks on cultural property in Mali under Islamic law?”³¹⁶ It is worth noting, however, the ICC’s opposition to this line of argument, who viewed the religious perspective of right and wrong as irrelevant in the determination of guilt of the defendant under international criminal law.³¹⁷

F. *Legal Pluralism and Cultural Defenses*

The point of contact here between international criminal law and Islamic law arises in the question as to whether *Hisbah* could provide justification, arising from Islamic law, for the destruction of such cultural property, a crime against humanity under international criminal law. The answer to this is rooted in the determination as to whether Al Mahdi’s employment of *Hisbah* was legitimate under Islamic law. As explained previously by this author, this question of legitimacy of the *Hisbah* arises in the context of problematic interpretation by Ansar Dine of this legal principle.³¹⁸ Put simply, the latter’s overly broad interpretation of the notion of “evil,” beyond the Qur’anic stipulation of the concept, combined with an interpretation “which turns use of the hand into a strict ideology of *hisbah* applied to all spheres of life, especially public piety,”³¹⁹ resulted in an arguably unlawful interpretation of Islamic legal principle, rendering Al Mahdi’s employment of such justification of his actions illegitimate under Islamic law, and thus his actions in contravention of international criminal law.

Ultimately, Al Mahdi plead guilty to the offense before the matter went to trial, yet the Court failed to seize upon the opportunity to engage with international criminal law from an Islamic law perspective³²⁰ and to give judicial legitimacy to the contention that the two traditions can operate collaboratively in the ICC. Using this approach could well have led the Court to the same conclusion that Al Mahdi was guilty of a crime against humanity for the destruction of cultural property. Disappointingly, this represents another missed opportunity to advance international criminal law jurisprudence in a manner that better incorporates Islamic law perspectives and to demonstrate the compatibility of these legal traditions in the context of international criminal law. As Polymenopoulou notes, the “Chamber could have opted for a more elaborate discussion on the Islamic law standpoint, while the experts could

313. Polymenopoulou, *supra* note 54, at 763.

314. Al Mahdi Confirmation of Charges, *supra* note 247, at paras. 19–20; Al Mahdi Judgment & Sentence, *supra* note 2, at para. 37.

315. Badar & Higgins, *supra* note 207, at 488.

316. *Id.* at 494.

317. Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336, 387 (2016).

318. Badar & Higgins, *supra* note 207, at 496.

319. Seth H. George, *Commanding the Right Islamic Morality and Why It Matters*, MILITARY REV. 63 (2016) https://www.armyupress.army.mil/Portals/7/military-review/Archives/English/MilitaryReview_20161031_art011.pdf.

320. Fraser, *Exploring Legal Compatibilities*, *supra* note 249, at 387.

have shed light on the broader question of targeting cultural property by Islamic fundamentalists.”³²¹

This author has previously lamented the lost opportunity for the ICC to address the neglected area of cultural defenses in international criminal law in the *Al Mahdi* Case, however it is likely that these unaddressed questions will arise in future cases brought before the ICC around “whether the defendant had any justifications for the attacks under Islamic law, and how these should be dealt with by the Court?”³²² Renteln argues that the option to raise a cultural defense form part of a defendant’s right to a fair trial and of their right to culture under international law.³²³

The possibility of raising the concept of *Hisbah* by way of defense to *Al Mahdi*’s destruction of cultural property would invite the Court to engage, but not necessarily accept, this concept of Islamic law and in doing so enrich the ultimate judgment with the perspectives of an alternative legal tradition.³²⁴ While *Al Mahdi*’s guilty plea aborted this opportunity, the Court could have employed a pluralistic approach to its interpretation of the law by first examining if and how *Al Mahdi*’s actions violated Islamic law and then, international criminal law. As this author has previously noted, the “many legitimate condemnations of the western origins and nature of international (criminal) law and its application by international criminal courts and tribunals, [in] particular the ICC” raise the question of whether there is a way other legal systems can be recognized by the Court, and further, how the knowledge within these systems can contribute to the international legal community.³²⁵ “Unfortunately, the answer to this question is still pending, as the discussion of the protection and destruction of cultural property by *Al Mahdi*” remains incomplete.³²⁶ However, the increasing instances of requests to domestic courts to consider a defendant’s cultural background in the adjudication of their criminal culpability³²⁷ coupled with the open-ended list of permissible defenses in the Rome Statute suggests it is only a matter of time.³²⁸

G. *The Role of Culture in The Prosecutor v. Dominic Ongwen (Ongwen Case)*

Dominic Ongwen was convicted by Trial Chamber IX of 61 charges involving crimes against humanity and war crimes³²⁹ and sentenced to 25 years in prison.³³⁰ In 2022, both the verdict and the sentence were confirmed by the Appeals Chamber of the Court.³³¹ The *Ongwen* Case is the first case at the ICC to raise an affirmative defense of Article 31(a) of the ICC Statute and cultural elements played a prominent role in the arguments presented by the

321. Polymenopoulou, *supra* note 54, at 764.

322. Badar & Higgins, *supra* note 207, at 513.

323. See Renteln, *Cultural Defenses in International Criminal Tribunals*, *supra* note 78, at 267.

324. Badar & Higgins, *supra* note 207, at 515.

325. *Id.* at 516.

326. *Id.*

327. See Sams, *supra* note 202, at 335–54; Marie-Claire Foblets, *Cultural Delicts: The Repercussion of Cultural Conflicts on Delinquent Behaviour*, 6 EUR. J. CRIME CRIM. L. & CRIM. JUST. 187, 187–207 (1998); Choi, *supra* note 151, at 80–90.

328. Badar & Higgins, *supra* note 207, at 513–14.

329. Ongwen Trial Judgment, *supra* note 3, para. 3116.

330. Prosecutor v. Ongwen, ICC-02/04-01/15-1819-Red, Sentence, para. 404(b) (May 6, 2021) [hereinafter Ongwen Sentence], https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_04230.PDF.

331. Prosecutor v. Ongwen, ICC-02/04-01/15-2022-Red, Appeals Judgment, paras. 1685–686 (Dec. 15, 2022) [hereinafter Ongwen Appeals Judgment], https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_07146.PDF.

Defense team during this trial. Among the grounds of appeal, the Defense alleged errors in the Trial Chamber's conclusions involving cultural elements, which disregarded important cultural defenses. Moreover, the Defense submitted that the Trial Chamber erred and failed to objectively consider the Acholi traditional justice system as complementary to international criminal justice.

H. Cultural Defenses Grounded in Mental Incapacity and Duress

The Defense invoked Article 31(1)(a) and (d) as grounds for excluding criminal responsibility and acquitting Ongwen, based on a combination of incapacity to appreciate the unlawfulness of his conduct for mental disease or defect, and alleged extensive threats posed by Joseph Kony and the spirits possessing him.³³² Culture was at the foundation of arguments concerning Ongwen's mental incapacity and distress,³³³ in what has been defined as "the first case in history . . . steeped in spiritualism."³³⁴ However, scholars claim that spiritual and cultural factors in assessing Ongwen's mental state were not fully understood by the Trial Chamber, thus considered as contradictory and unreliable for the determination.³³⁵ According to his Defense team, it would have been necessary to consider past experiences and the effects of being a child soldier in the mitigation of the sentence or exoneration from criminal responsibility.³³⁶ Ongwen was abducted at a very early age and educated solely on the ideology of the Lord's Resistance Army (LRA) and military skills.³³⁷ Growing up in the coercive environment of the LRA, the only laws he knew were those imposed by spiritualism and indoctrination under its leader Kony's orders.³³⁸ Moreover, as it was common knowledge that Kony was possessed with spirits and institutionalized the practice of magic, Ongwen's beliefs and his fear of being possessed by Kony's spirits should have been acknowledged,³³⁹ especially due to the fact that he had not undergone any cleansing rituals required by his culture to become free of those spirits.³⁴⁰

Hence, the Defense asked the Court to disregard the principle of *ignorantia legis non excusat* in this specific case to acknowledge that Ongwen's capacity to appreciate the nature of his conduct was devastated by his past experiences.³⁴¹ Some scholars maintain that the ICC legal framework has proven insufficient to assess the coercive environment as a ground for excluding criminal responsibility.³⁴² Given the interplay between socio-political aspects and international criminal law in the Ongwen Case,³⁴³ the proportionality test conducted by the Court for sentencing should have considered not only Ongwen's culpable conduct and the

332. Prosecutor v. Ongwen, ICC-02/04-01/15-T-267-ENG, Appeals Hearing Transcript, at 21 (Feb. 18, 2021) [hereinafter Ongwen Appeals Hearing Transcript], https://www.icc-cpi.int/sites/default/files/Transcripts/CR2022_01626.PDF.

333. *Id.* at 32.

334. *Id.* at 28.

335. See Adina-Loredana Nistor, *Culture and the Illusion of Self-Evidence: Spiritual Beliefs in the Ongwen Trial*, 24 INT'L CRIM. L. REV. 3 (2024).

336. Ongwen Appeals Hearing Transcript, *supra* note 332, at 77–78.

337. *Id.* at 16.

338. *Id.* at 7–8.

339. *Id.* at 16–19.

340. *Id.* at 10.

341. *Id.* at 7–8.

342. Juan-Pablo Perez-Leon-Acevedo & Fabio Ferraz de Almeida, *Ongwen and the Legitimacy of the ICC*, 24 INT'L CRIM. L. REV. 81, 82 (2024).

343. Demetra Fr. Sorvatzioti, *Proportionality and Moral Blameworthiness in Ongwen's ICC Sentencing Decision*, 23 INT'L CRIM. L. REV. 755, 781 (2023).

suffering of the victims, but also that being a child soldier is not a personal issue but rather a “social and international criminal law phenomenon,” involving a cycle of violence and other relevant social facts.³⁴⁴ Despite the confirmation of the guilty verdict and the related sentence by the majority of the Appeals Chamber, Judge Luz del Carmen Ibáñez Carranza in her Partially Dissenting Opinion argued that the sentence should have given higher consideration to Ongwen’s past experience as a child soldier within the coercive environment of the LRA in mitigation, since these experiences “impacted on his personality, brain formation, future opportunities and the development of his moral values.”³⁴⁵

Another problematic issue faced by the Trial Chamber was dealing with “[i]rreconcilable differences” that emerged between “different worldviews [and] methodologies employed” by experts to assess the accused’s mental state.³⁴⁶ For instance, when evaluating eyewitness testimonies, the Chamber did not take into account the communicative language of psychological distress used within the local Acholi culture.³⁴⁷ Ugandan experts stressed that there is no Acholi word for “feeling blue,” therefore, people in Uganda somaticize psychological distress, often describing irrational behavior as spirit possession.³⁴⁸ The different approaches on culture adopted by the experts appear evident in the Appeals Chamber’s analysis about alleged errors by the Trial Chamber in its decision to dismiss cultural evidence presented by the Defense’s experts, in favor of the assessment lacking cultural acknowledgement provided by the Prosecution’s experts.³⁴⁹ The former advanced the cultural interplay of Acholi culture with traumas and Post-Traumatic Stress Disorder as evidence of Ongwen’s mental defect in a general context of unprecedented mass trauma.³⁵⁰ On the other hand, the Prosecution’s experts observed contradictions in the Defense experts’ evidence and stated that, although culture may influence diagnostic instruments, it does not affect “the standardization of such instruments or internationally valid criteria.”³⁵¹ The Appeals Chamber upheld the latter view, stressing that while cultural context is important for the assessment of a person’s mental health, there are universally applicable criteria to determine mental disorders that do not impair the diagnosis by psychiatrists from different backgrounds.³⁵²

According to Nistor, these examples show the challenges in “intertwining culture into the legal submissions made before the judges” as “objective evidence” or “direct cause for actions or situations,” since the courtroom environment leaves no space for differences in social and legal methodologies.³⁵³ Overall, failure to acknowledge cultural differences may lead to misunderstandings and unrecognition of a traumatized person, simply due to unfamiliarity with the person’s cultural background.³⁵⁴ Defense Co-counsel Ms. Lyons concluded that, in the case of Ongwen, the Chamber was disproportionately affected by racial

344. *Id.* at 763.

345. Ongwen Appeals Judgment, *supra* note 331, Partial Dissent of Judge Ibáñez Carranza, paras. 111 & 196(c) (Dec. 15, 2022), https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2022_07151.PDF.

346. Adina-Loredana Nistor, *Culture and the Illusion of Self-Evidence: Spiritual Beliefs in the Ongwen Trial*, 24 INT’L CRIM. L. REV. 3, 15 (2023).

347. Ongwen Appeals Hearing Transcript, *supra* note 332, at 8.

348. *Id.* at 8.

349. Ongwen Appeals Judgment, *supra* note 331, at paras. 1290–340.

350. *Id.* at para. 1291.

351. *Id.* at paras. 1321 & 2461.

352. *Id.* at 1325.

353. Nistor, *supra* note 346, at 3.

354. *Id.* at 16.

and cultural biases which had a direct impact on its legal errors.³⁵⁵ That cultural bias was grounded in “failure to appreciate the interplay of the universality of symptoms with the specifics of the cultural context.”³⁵⁶ Moreover, if the LRA were a white cult and the Ugandan experts or Ongwen himself were white, the Trial Chamber would have recognized mental health and duress as affirmative defenses and the accused would have been acquitted.³⁵⁷ Hence, the conviction decision conveyed the prevalence of a “rather superior Western approach that perceives arguments related to spiritualistic control and fears . . . as scientifically untested by Western methods.”³⁵⁸

I. Contextualization of Sexual and Gender-based Crimes as Cultural Defense

Ongwen was found guilty of sexual and gender-based crimes, including forced marriage and forced pregnancy. In this context, the Defense called for a contextualization of these crimes, taking into account the coercive environment of the LRA, but also defining the concepts of forced marriage and forced pregnancy according to the framework of Ugandan law and the Acholi culture.³⁵⁹

Concerning forced marriage, the Defense Counsel challenged the definition of marriage given by the Trial Chamber, which did not consider the reality of the case and the Acholi culture.³⁶⁰ In fact, they maintained that unions celebrated under Kony’s rules were imposed not only to women and girls but also to the men, with the only aim of producing a new generation for his army. Hence, it would not be possible to recognize them as marriages under the Acholi tradition, since they did not respect the customary requirements.³⁶¹ As the Court is called to establish jurisprudence based on the facts of the particular case and not on abstract principles, the Defense invoked the principles of specialty, consumption, and subsidiarity, which form the core analysis of concurrences in civil law systems,³⁶² in favor of Ongwen, following the precedent in the *Bemba et al.* case.³⁶³ On the contrary, the Appeals Chamber confirmed the charge of forced marriage, defining it for the first time as inhumane act constituting a crime against humanity.³⁶⁴

Regarding forced pregnancy, the Defense relied on a similar interpretative approach of the concept based on cultural elements, as it did for forced marriage. The Counsel claimed that the Trial Chamber did not consider that Ugandan laws and Acholi tradition do not recognize or even tolerate the right to reproductive autonomy.³⁶⁵ Condemning Ongwen for this crime on the basis of a right to abortion or reproductive autonomy would be a denial of Acholi women’s cultural rights as well as the spiritual and cultural values associated with pregnancy which regulate Acholi peoples’ lives.³⁶⁶ This approach raised a question by Judge Alapini-Gansou on whether, according to the Defense, it would be possible to violate

355. BETH S. LYONS, RACE, CULTURE AND MENTAL ILLNESS IN THE INTERNATIONAL CRIMINAL COURT’S ONGWEN JUDGMENT: BIASES AND BLINDSPOTS 76 (2024).

356. *Id.* at 51.

357. *Id.* at 6.

358. Sorvatzioti, *supra* note 343, at 764.

359. Ongwen Appeals Hearing Transcript, *supra* note 332, at 79.

360. *Id.*

361. *Id.* at 88–89, 92.

362. ICC, *Informal Note on Concurrence of Offences*, at 3–4, <https://www.legal-tools.org/doc/114bb2/>.

363. Ongwen Appeals Hearing Transcript, *supra* note 332, at 79.

364. Ongwen Trial Judgment, *supra* note 3, at para. 3026.

365. Ongwen Appeals Hearing Transcript, *supra* note 332, at 37.

366. *Id.* at 37–38.

international human rights in the name of a particular culture.³⁶⁷ The Counsel replied that culture does not condone human rights violations, but human rights themselves respect cultural rights to regulate the offence; hence, it is necessary to take into account cultural traditions in the related assessment.³⁶⁸ In the end, the Court rejected the cultural arguments presented and confirmed the guilty verdict.

J. Incorporation of Traditional Justice Systems

According to the Defense, the Trial Chamber failed to apply the principle of complementarity between the ICC and national criminal jurisdictions in the *Ongwen* Case by refusing or neglecting evidence related to the Acholi traditional justice mechanisms.³⁶⁹ This “biased view of traditional justice mechanisms” by the Chamber ultimately resulted in a “disproportionate sentence”³⁷⁰ and a “miscarriage of justice.”³⁷¹ The Counsel presented Article 17, Article 1, and paragraph 10 of the Preamble of the Rome Statute as the legal bases for complementarity,³⁷² claiming that this principle constitutes a mitigating circumstance in sentencing pursuant to Rule 145(1)(b) of the Rules of Procedure and Evidence.³⁷³ Accordingly, admitting evidence concerning Acholi traditional justice mechanisms would advance the implementation of cultural sensitivity in criminal proceedings, which is a living issue in international criminal law.³⁷⁴

The Defense requested the Court to allow the suspension of the sentence and the application of the *mato oput* process to Ongwen in the case of conviction.³⁷⁵ *Mato oput* is a traditional voluntary ritual within the Acholi justice system where the perpetrator shows remorse in front of an arbitrator, admits responsibility, and offers compensation to the victims, while the community decides on his forgiveness.³⁷⁶ This process would allow Ongwen to “save his life so that he’s cleansed” by reconciling with his own society,³⁷⁷ noting that some Ugandan communities resort to traditional justice mechanisms for former child soldiers.³⁷⁸ However, the Prosecution and the victims’ representatives stressed that the use of *mato oput* in this case was strongly opposed by the victims, who preferred a conviction before a court of law.³⁷⁹ The Appeals Chamber rejected the Defense’s submission, confirming that the Trial Chamber correctly applied the principle of legality and *nulla poena sine lege* enshrined in Articles 23 and 77 of the Statute; therefore, it could not incorporate a penalty not provided for in the Rome Statute.³⁸⁰ It additionally noted that incorporating the Acholi traditional judicial system into the Court’s framework does not raise any issue of complementarity, and considering that the complementarity argument was raised by the

367. *Id.* at 84.

368. *Id.* at 85.

369. Ongwen Appeals Judgment, *supra* note 331, at para. 89.

370. *Id.*

371. Ongwen Appeals Hearing Transcript, *supra* note 332, at 6–7.

372. Ongwen Appeals Judgment, *supra* note 331, at para. 106.

373. Ongwen Appeals Hearing Transcript, *supra* note 332, at 6.

374. *Id.* at 7.

375. *Id.* at 15.

376. *Id.* at 67.

377. *Id.* at 69.

378. Linda Mushoriwa, *The Prosecutor v Dominic Ongwen: An Examination of the Role of Traditional Justice Mechanisms in International Criminal Justice*, 23 INT’L CRIM. L. REV. 731, 744 (2023).

379. Ongwen Appeals Hearing Transcript, *supra* note 332, at 55 & 73.

380. Ongwen Appeals Judgment, *supra* note 331, at paras. 96–103.

Defense for the first time on appeal and never during the sentencing proceeding, addressing the substance of this matter would exceed the scope of the review.³⁸¹ Finally, the Court rejected the Defense's argument that the Chamber adopted a biased consideration of the Acholi traditional justice system, giving weight to non-Acholi testimonies and disregarding a rehabilitation and reintegration process based on Ongwen's cultural beliefs and practices.³⁸²

According to Mushoriwa, in the *Ongwen* Case the ICC missed a significant opportunity to enrich its jurisprudence by explaining the role and suitability of traditional justice mechanisms in the context of international criminal justice, and how they could be incorporated in its legal framework.³⁸³ The mere absence of a provision about incorporating traditional justice mechanisms in the Rome Statute itself indicates the Eurocentric nature of international criminal law, whereas the Court should "holistically consider issues brought before it . . . from the Global South" if it wants to be "a truly universal mechanism of justice and accountability."³⁸⁴ Therefore, when dealing with international crimes, traditional justice mechanisms should be incorporated into international criminal justice simultaneously with the retributive system, either by amending the Rome Statute or by applying such mechanisms on a case-by-case basis.³⁸⁵

The cases of *Al Hassan*, *Al Mahdi*, and *Ongwen* demonstrate that complementary considerations of alternative legal traditions, where relevant, can and should be considered by the ICC in its assessment of any case. Rather than operating to allow the accused to hide behind their culture and avoid culpability, assessing the validity of any cultural considerations submitted by the defense against the applicable local legal traditions alongside international criminal law enriches the Court's decision-making. Allowing cultural sensitivity into international criminal justice through the door of legal pluralism under Article 21 of the Rome Statute would lend the ICC and its decisions greater legitimacy in the eyes of those impacted (i.e., victims, their local communities, and those whom the judgment seeks to deter), as well as empower it to deliver justice that is bespoke to the particular cultural circumstances of the case at hand and, therefore, truly universal.

CONCLUSION

Martti Koskeniemi states that "the meaning and application of international legal doctrines, principles, concepts, and treaty provisions are dependent on interpretative priorities and presumptions that reflect larger—but specific and often contested—views and assumptions about the nature and objectives of international law."³⁸⁶ From inception, international law has been constructed on Western foundations and has since failed to develop to encompass geographic and cultural variations,³⁸⁷ ensuring that "deeply entrenched biases are intrinsic to the sources-of-law doctrine" comprising a system which is "stacked against the global South and the rest of the periphery."³⁸⁸ It is important to keep in mind that this

381. *Id.* at paras. 108–09.

382. *Id.* at paras. 111–25.

383. Mushoriwa, *supra* note 378, at 733–34.

384. *Id.* at 734.

385. *Id.* at 752–53.

386. Martti Koskeniemi, *Foreword to* ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?*, at xiii, xv (2017).

387. *See id.* at xv–xvi.

388. Stewart Manley et al., *The (Non-)Use of African Law by the International Criminal Court*, EUR. J. INT'L L. 555, 572 (2023).

disregard is done in the context of an international criminal law that at the same time disregards the criminalization of a plethora of conduct, causing great suffering to the most marginalized people in the global South, due to the core/periphery distinction marking the production of the law and sanctioning the attendant distribution of harm and suffering.³⁸⁹

Cases like *Al Hassan*, *Al Mahdi*, and *Ongwen* offer the perfect opportunity for the development of international law to be embellished and ameliorated with the principles of alternative legal traditions, and thus to become truly reflective of the diversity of culture and thought that makes up our international legal order. It is paramount that international judges embrace cultural diversity in their interpretation of international law so that it is the accused individual, and not his culture or religion, that is in the dock. This could be achieved through setting out a designated training curricula to educate judges before their appointment no matter how well qualified and experienced in their domestic jurisdictions. Judicial training prior to appointment is crucial to the efficient and impartial administration of international criminal justice, and ultimately to the ICC's legitimacy.³⁹⁰

It is not to suggest that culture or religion can be invoked to excuse the culpability of the defendant and become a leeway for the perpetrators to escape responsibility for the commission of international crimes. However, these factors cannot be simply disregarded in favor of the more widely propagated West-sanctioned interpretation of what is right or wrong. In the case studies presented in this Article, all defendants shared a common characteristic, namely their system of beliefs and the societal pressure to abide by the cultural and religious norms. This characteristic left the defendants unaware of the scale or gravity of their conduct. Their actions were not dictated by a malicious intent, but were rather a product of the societal norms that they existed under. It is not the aim of this Article to excuse the defendants or justify their actions or absolve them from guilt but merely to raise awareness regarding the one-sided and universalist interpretation of international criminal law that should have no place at institutions of global importance, especially the ICC.

That said, we cannot lay all the blame for the Western-biased development of international law at the feet of the ICC. It would be remiss to criticize its inaction in embracing alternative legal tradition without also highlighting the lack of effort on the part of Muslim majority states to prosecute international crimes in their domestic courts.³⁹¹ This represents a wasted opportunity for the latter to develop international criminal law jurisprudence in accordance with their Islamic justice regimes. This contrasts starkly to efforts of European states who exercise universal jurisdiction to prosecute jihadists under the Rome Statute, and in so doing provide potential interpretations of (Eurocentric) international criminal law which the ICC can draw upon. A recent example of this wasted opportunity is the reluctance of the Iraqi government to prosecute Da'esh (ISIL) for international crimes and to only prosecute

389. Asad Ghaffar Kiyani, *International Crime and the Politics of International Criminal Theory: Voices and Conduct of Exclusion*, 48 NYU J. INT'L L. & POL. 129, 187 (2015).

390. A similar call for a pre-appointment certification for ICC judges was proposed during a side event at the 21st Session of the Assembly of States Parties titled "Judicial Selection, Evaluation, and Trial Management in International Criminal Tribunals." See Assembly of States Parties [ASP], Journal of the 21st Sess., at 3, ICC-ASP/21 (Dec. 8, 2022), <https://asp.icc-cpi.int/sites/asp/files/2022-12/ASP21.Journal.08Dec22.2020.pdf>; *International Criminal Law Practice Project*, A.B.A. (Dec. 8, 2022), https://www.americanbar.org/groups/human_rights/preventing-atrocities/international-criminal-law-practice-project/ (last accessed Dec. 27, 2024).

391. See Mohamed Elewa Badar, *Laying the Ground Work for Prosecuting IS / Dae'sh for Core International Crimes before an Iraqi Special Tribunal*, 25 INT'L CRIM. L. REV. (forthcoming 2025); see D. Julian Veintimilla, *Islamic Law and War Crimes Trials: The Possibility and Challenges of a War Crimes Tribunal Against the Assad Regime and ISIL*, 49 CORNELL INT'L L.J. 497, 512 (2016).

them for terrorism.³⁹² In failing to take this opportunity, the Iraqi courts have essentially handed the task over to European States to prosecute jihadists for international crimes, allowing their courts to further the Eurocentric development of international criminal law and thus compounding the issue of Western-bias. Should the Court continue to refuse to meaningfully engage with Islamic law and use it as an interpretational tool for the development of ICC jurisprudence, it risks further alienation of Muslim communities globally and continued discouragement of Muslim-majority states from joining the ICC.

392. Alannah Travers, *As UNITAD's Mandate Ends, ISIL Survivors Still Lack Justice*, WASH. INST. (Sept. 11, 2024), <https://www.washingtoninstitute.org/policy-analysis/unitads-mandate-ends-isil-survivors-still-lack-justice>.