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Analyzing Post-Conflict Justice and Islamic Law

Summary

- Post-conflict justice mechanisms such as truth commissions, war crimes tribunals and reparations programs have emerged as a fundamental building block of durable peace settlements in Latin America, Africa and Asia. They are relatively rare, however, in Muslim countries recovering from conflict—despite the fact that social and criminal justice is a fundamental principle of Islamic law.
- While much scholarship has been devoted to explaining the legal basis for transitional justice and studying its implementation and impact in the West, little if any scholarly attention has been paid to these issues in the Islamic legal context—a significant gap in light of recent popular uprisings against authoritarian regimes in the Middle East.
- To address this gap—and to stimulate thinking about how post-conflict justice issues can be better incorporated into peace processes in Muslim countries like Afghanistan, Sudan and Somalia – USIP sponsored a workshop involving 35 scholars and practitioners in international and Islamic law to address whether there are any fundamental incompatibilities between the Shari’a and related texts and established international law (often viewed as “Western”) concepts of post-conflict justice.
- Participants largely agreed that broadly speaking, the principles of Islamic law align with international legal norms of truth, accountability and compensation for victims of mass crimes and human rights abuse—though what constitutes the Shari’a and why many Muslim governments fail to implement these norms were the subject of robust debate. More scholarship is needed, however, to explore specific Islamic legal issues such as the applicability of international treaties, justifications and humanitarian rules for armed conflict, and the obligation of states to pursue justice on behalf of its citizens.
- Given the essential compatibility of Islamic law and post-conflict justice norms, the explanation for why victims of atrocities in Muslim-majority countries seldom see justice after conflicts owes more to problems of poor governance, a general absence of the rule of law in affected countries and human development deficits than to Islamic legal thinking.
- Participants agreed it would be important for interdisciplinary scholars and practitioners from across the Muslim world to establish an authoritative set of basic Islamic legal principles that support institutional approaches to truth seeking, accountability and justice as relevant to post-conflict justice demands in Islamic societies.

Islamic Law and Post-Conflict Justice

Post-conflict justice, also known as transitional justice, refers to the complete set of responses to mass crimes and human rights violations occurring during periods of armed conflict and authoritarian rule, including prosecutions, truth commissions, reparations, reconciliation, memorialization and legal and policy reforms. These mechanisms have been well-established through a variety of international instruments and have been applied to post-conflict peacebuilding processes in countries throughout the developing world. However, there has been little experience with post-conflict justice mechanisms in Muslim-majority nations, particularly those committed to elements of the Shari'a.¹ Given a number of recent examples of atrocities committed against Muslims in nations that apply some degree of Islamic law—including Iraq, Afghanistan and Sudan—it bears questioning why justice for victims of these conflicts has been so elusive.

Islamic law—and its emphasis on social and criminal justice—is a cornerstone of transnational Muslim identity and thus offers a potentially powerful platform for implementing post-conflict justice in Islamic societies. Yet the perpetrators—including countries where violence has occurred—often complain that calls for justice for particular atrocities are in some way “Western” or are otherwise being imposed on subjects in violation of the principles of Islam. Therefore, USIP, ISISC and INSCT have begun an exploration with Islamic scholars and leading jurists of whether there is, in fact, a divergence between Islamic legal principles—many embodied in the Shari'a—and the post-conflict justice mechanisms and standards which have become part and parcel of the international human rights and peacebuilding toolkits.

Moreover, we have sought to understand whether Islamic law had critical lessons to teach the international community with respect to justice, peace and stability processes more generally that have not been incorporated into typical post-conflict justice mechanisms. To initiate this discussion, USIP, ISISC and INSCT sponsored a workshop to explore a variety of classical criminal and humanitarian Islamic underpinnings for modern post-justice conflict norms.² The workshop's aim was to convene Islamic and international legal scholars, officials within government, and practitioners within the human rights field, and explore how classical and contemporary Islamic law addresses issues underlying post-conflict justice, including truth-seeking, accountability, compensation and forgiveness of mass abuses during times of war.

The discussion focused on three essential questions:

1. Is Islamic law fundamentally compatible with contemporary conceptions of post-conflict justice?
2. If so, why have Islamic legal norms not been better implemented in Muslim countries seeking reconciliation after conflict?
3. And in either case, what can be done to facilitate greater discussion of and adherence to Islamic legal requirements for dealing with mass crimes and human rights abuse?

Compatibility of Islam and Post-Conflict Justice

First, interdisciplinary scholars and practitioners discussed a concept paper produced by conference co-chair M. Cherif Bassiouni which argued that there is no fundamental incompatibility between classical Islamic jurisprudence and current concepts of post-conflict justice. Bassiouni further asserted that justice serves as a well-known core principle of Islamic law, and believers have an obligation to see that justice is achieved to the extent of their capacity. Discussants substantially agreed with the premise of fundamental compatibility between international and Islamic legal principles, and that that truth, accountability and compensation are owed to victims

of mass crimes under Islamic law. They found that Islamic legal principles lent substantive support to current international and domestic laws for redressing past crimes. As Bassiouni stated in his conference position paper: “Like contemporary post-conflict justice, the *Shari’a* requires the prosecution of persons who commit crimes corresponding to what has become known as *jus cogens* international crimes, precludes governmentally-granted amnesties for these crimes, provides for the legal protection of victims’ rights, and requires Muslim states to observe their international legal obligations which are not incompatible with the *Shari’a*.”

However, the dearth of Islamic jurisprudence specifically addressing contemporary international criminal and humanitarian laws and standards, and particularly scholarship applying Islamic law to post-conflict justice in diverse Muslim communities, led to a number of definitional and conceptual questions. There was significant discussion over whether the breadth of material that comprises the two principal sources of Islamic law, the Qur’an and the Hadith (*nass*), and the totality of Islamic jurisprudence (*fiqh*), could lead to a common understanding among scholars and citizens about what are valid rules for implementing post-conflict justice. From a practical perspective there are limited contemporary examples of Islamic jurists developing rulings on international crimes and matters of post-conflict justice. Therefore, international and Muslim scholars, lawyers and practitioners invested in bridging Islamic and international norms must engage in novel research to identify appropriate sources and support for addressing current justice needs.

While the basic principles of Islamic justice are clear, applying them to the specific circumstances and complexities of a post-conflict situation is not. In fact, this problem of legal lacunae in post-conflict settings—whether humanitarian, occupation, criminal, domestic, human rights and/or other legal regimes apply—is a challenge cross-cutting both Islamic and international law. One approach in Islamic law has been to choose appropriate analogies to different precedents. For example, Islamic law offers different rules for dealing with insurrections as it does for brigandage or for jihad. The need for justice is the same, but the mechanisms may differ according to the circumstances of the conflict and the identity of the perpetrators. Additional questions that arose—are fodder for future papers and discussion—include who has an affirmative duty to raise justice issues after conflict: must it be the victims, or should it include the state? What justifications may there be for committing acts of violence during conflict that mitigate demands for justice? What is the binding nature of international treaties and legal doctrine on an Islamic state (i.e., are definitions of genocide and related rules of evidence superior to Islamic criminal procedure within current Muslim nations)?

Failures to Implement Post-Conflict Justice

Second, conference participants discussed why, given the strong justice narrative in Islamic law, more has not been done to account for mass crimes and human rights violations in the Islamic world. There was broad agreement among regional experts that the reasons have far more to do with failed governance and the lack of political will than religion or law. Post-conflict justice inherently affects the balance of political power in a country, often at a time when national institutions are weak. Under these circumstances, even small ambiguities or perceived conflicts between Islamic values and international norms may be exploited by perpetrators to imply their own accountability is somehow excused by Islamic law. This does not alleviate the practical and legal obligation to offer innocent victims a realistic opportunity for redress, however. Therefore, one value of studying Islamic justice principles is in helping to more clearly establish where legal gaps exist and where denunciations of “un-Islamic justice” is really just a furtherance of underlying political objectives.

Participants also noted that noncompliance with legal norms in the realm of post-conflict justice is hardly surprising when Islamic states often fail to uphold the rule of law under 'normal' circumstances (noting that Islamic states are not alone in this regard). It was argued that in countries ruled by authoritarian regimes, with low levels of literacy, and weak justice institutions, the finer points of Islamic jurisprudence will not have much material effect on state justice policy or practice. In other words, unless basic benchmarks of institutional competence and legitimacy are met, neither Islamic law nor any other law will be sufficient to provide victims with adequate remedies for atrocities that occurred, or offer a means for long-term rebuilding of justice institutions. The challenge, therefore, is to address development and justice deficits simultaneously, so that they complement each other rather than provide mutual excuses for failing to address past abuses.

In countries with citizens that have strong Muslim identities, aspiring to the justice ideals at the core of Islam can, however, offer an antidote to the cynicism which often develops in countries recovering from conflict where state institutions have historically failed to provide justice or the rule of law. In these cases, using the teachings of Islam in designing and implementing post-conflict justice may better accommodate victims' demands and lead to more politically-practicable solutions to post-conflict justice dilemmas.

In Egypt, for example, some clerics are asserting—following the fall of Hosni Mubarak—that just, democratic reforms are in fact a fulfillment of Islamic principles. The goal therefore should be the creation of post-conflict justice mechanisms that are instigated and owned by domestic constituencies rather than approaches that are translated and then imposed by outside actors.

Next Steps: A Declaration of Principles of Post-Conflict Justice in Islam

Given the large number of conflicts producing mass human rights abuse within the Muslim world, and given the centrality of Islamic principles among the lives of most Muslims, there is an increasing need for addressing post-conflict justice in countries governed by Islamic law (not least in countries like Egypt and Tunisia, where repressive regimes have now fallen). There is general compatibility between contemporary notions of post-conflict justice in international law with classical Islamic jurisprudence. However, participants stressed the need for further study and discussion to identify and resolve potential discrepancies between classical Islamic jurisprudence and contemporary issues.

In the months ahead, papers on key topics will be commissioned from experts in Islamic law to set the framework for a declaration of relevant, flexible, equitable standards which enshrine Islamic principles and values that will be agreed to and inaugurated in the Middle East. Topics for further research include:

- Binding legal effects of international treaties under Islamic law;
- Retaliation and reprisals under Islamic law;
- Applicability/enforceability of International Humanitarian Law in Islamic contexts; and
- States' obligations with respect to victims' rights after serious crimes.

The goal of this research will be to establish an authoritative set of basic Islamic legal principles that support institutional approaches to truth seeking, accountability, and justice as relevant to post-conflict justice demands in Islamic societies. These basic Islamic principles will involve contributions from Islamic scholars in the Muslim world, representatives from Muslim governments, and practitioners from the human rights community.

ABOUT THIS BRIEF

This brief summarizes the first of its kind workshop on Post-Conflict Justice and Islam held in Washington, DC on November 5, 2010, which was jointly sponsored by the United States Institute of Peace (USIP), the International Institute of Higher Studies in Criminal Sciences (ISISC) and Syracuse University's Institute for National Security and Counterterrorism (INSCT). This conference explored the legal basis for transitional justice in the Islamic context and how post-conflict justice issues can be better incorporated into peace processes in Muslim countries like Afghanistan, Sudan and Somalia. Scott Worden is a senior rule of law adviser for the U.S. Institute of Peace. Shani Ross and Whitney May Parker are research fellows at the Institute for National Security and Counterterrorism (INSCT) at Syracuse University. Sahar Azar is a juris doctor candidate at Syracuse University College of Law.

Ultimately, the purpose of this work is to raise the visibility of this important rapport between Islamic and international law over post-conflict justice issues, advance the public discourse on this critical need area in national and international contexts, and to provide guidelines and networks of understanding for professionals and practitioners, including those in the aid, development, diplomatic and military communities.

Endnotes

1. Exceptions include a truth commission convened in Morocco and the trials of Saddam Hussein and other Baathist leaders in Iraq.
2. The workshop took place on November 5, 2010 in Washington, DC. The conference agenda, additional papers, and participant list are available on the conference website here: <http://insct.syr.edu/events/postconflict-justice-and-islam>.



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