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Caliphs, Jinns, and Sufi Shrines: The Protection of Cultural Heritage and Cultural Rights under Islamic Law

Eleni Polymenopoulou

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CALIPHS, JINNS, AND SUFI SHRINES: THE PROTECTION OF CULTURAL HERITAGE AND CULTURAL RIGHTS UNDER ISLAMIC LAW

*Eleni Polymenopoulou**

ABSTRACT

This Article examines the position of the Islamic legal tradition on arts and cultural heritage, including its pitfalls, and argues that a better understanding of Muslim state practice is needed to enhance the protection of cultural rights in the Muslim world. This can further facilitate collaboration between Muslim states and inter-governmental bodies working in the field of culture; implement better accountability mechanisms under international criminal law, as well as; to contribute to the fight against terrorism. In addition, the author submits that Islamic law is not necessarily an appropriate platform to enhance cultural rights and cultural heritage in the Muslim world. This is because of the nature of the Islamic legal tradition, which contains an extraordinary number of legal tools capable of setting aside obscure and anachronistic views in favor of modernization, yet is equally full of contradictions and ambiguities. The high complexity and diversity of possible solutions under Islamic law may inhibit the implementation of appropriate cultural policies on the protection of cultural heritage and the arts. The emphasis therefore should be on Muslim state practice, including in particular the practice of the rightly guided Caliphs whose palaces are evidence of tolerance and broadmindedness; contemporary Muslim state practice of those Muslim states that strive to promote cultural rights; and best practices initiated by Arab-Muslim organizations and institutions.

* Eleni Polymenopoulou is Assistant Professor in Law at Hamad Bin Khalifa University, College of Law, Qatar Foundation; and Adjunct Assistant Professor, Georgetown University, Edmund A Walsh School of Foreign Service. She has received a Bachelor of Laws (University of Athens, 2004); a diploma in Applied Arts (Omerakis School of Art, Athens); a Master in Human Rights Law (University of Grenoble-Alpes, 2004); and a PhD in Human Rights Law (University of Grenoble-Alpes, 2011). Dr. Polymenopoulou has collaborated with several NGOs, including the Greek Council for Refugees (Athens), Article19 (London) and the International Press Institute (Vienna), and is also a children's book author and illustrator. In 2019, she received a honorary research fellowship award at University College London (UCL-Qatar) for her project on cultural heritage and Islamic law. Her monograph on Artistic Freedom in International Law will be published by Cambridge University Press in 2022.

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INTRODUCTION

Twenty years have passed since the decision of the Taliban to demolish the two giant Buddhas of the Bamiyan valley.¹ During these years, the protection of cultural heritage and cultural rights has gained substantial momentum. The damage of Syrian, Iraqi, and Libyan heritage by the Islamic State (ISIS) was arguably a catalyst in making culture a matter of global security.² Images and videos of ISIS propaganda, such as those depicting militants demolishing artifacts in the Mosul Museum,³ the explosion of ancient temples in Palmyra,⁴

¹ Ernesto Ottone R., *Commemorating 20 Years Since the Destruction of Two Buddhas of Bamiyan, Afghanistan*, UNESCO WORLD HERITAGE CTR. (Mar. 11, 2021), <https://whc.unesco.org/en/news/2253> (referring to the Warsaw Recommendation on Recovery and Reconstruction of Cultural Heritage).

² Waseem Ahmad Qureshi, *The Protection of Cultural Heritage by International Law in Armed Conflict*, 15 LOY. U. CHI. INT'L L. REV. 63, 68 (2017).

³ See, e.g., Kareem Shaheen, *ISIS Fighters Destroy Ancient Artefacts at Mosul Museum*, GUARDIAN (Feb. 26, 2015, 4:26 PM), <https://www.theguardian.com/world/2015/feb/26/isis-fighters-destroy-ancient-artefacts-mosul-museum-iraq> (featuring videos of ISIS militants destroying artifacts).

⁴ See *ISIS Releases Images Showing Destruction of Palmyra Temple*, NBC NEWS (Aug. 25, 2015), <https://www.nbcnews.com/nightly-news/video/isis-releases-images-showing-destruction-of-palmyra-temple-512965187705>.

and the destruction of antiquities in Nimrud, Iraq,⁵ have been posted, reposted, and hash-tagged online thousands of times.

Hence, cultural rights and cultural heritage are now part of the agenda not only of UNESCO (the U.N. specialized agency for culture, science, and the arts),⁶ but also of the political bodies of the United Nations. In 2016, the U.N. Human Rights Council adopted a resolution on cultural rights (and the protection of cultural heritage) “[r]ecognizing that safeguarding the enjoyment of cultural rights may form a crucial part of the response to many current global challenges, including the scourge of terrorism” and “call[ing] upon all States to respect, promote and protect the right of everyone to take part in cultural life, including the ability to access and enjoy cultural heritage[.]”⁷ In 2017, the U.N. High Commissioner on Human Rights organized a panel on cultural rights,⁸ and the U.N. Security Council issued Resolution 2347 condemning the destruction and smuggling of cultural heritage by terrorist groups.⁹

At present, there is no doubt about the impact of these incidents on peace and security around the world, especially in the Middle East.¹⁰ The strategic use

⁵ Kristin Romey, *Why ISIS Hates Archaeology and Blew Up Ancient Iraqi Palace*, NAT’L GEO. (Apr. 14, 2015), <https://www.nationalgeographic.com/history/article/150414-why-islamic-state-destroyed-assyrian-palace-nimrud-iraq-video-isis-isil-archaeology>.

⁶ See Irina Georgieva Bokova, *Terrorists Are Destroying Our Cultural Heritage. It’s Time to Fight Back*, WORLD ECON. F. (Jan. 18, 2016), <https://www.weforum.org/agenda/2016/01/terrorists-are-destroying-our-culture-heritage-it-s-time-to-fight-back>. See generally *Responding to Cultural Cleansing, Preventing Violent Extremism*, U.N. EDUC. SCI. & CULTURAL ORG. [UNESCO], <https://en.unesco.org/events/responding-cultural-cleansing-preventing-violent-extremism> (last visited Sept. 6, 2021).

⁷ Human Rights Council Res. 33/20 (alternation in original) (requesting the U.N. High Commissioner for Human Rights “[t]o convene . . . a one-day intersessional seminar on ways to prevent, contain and/or mitigate the detrimental impact of the damage to or destruction of cultural heritage on the enjoyment of human rights, including cultural rights by all, and on best practices in this regard”).

⁸ U.N. High Comm’r for Human Rights, *Intersessional Seminar on Cultural Rights and the Protection of Cultural Heritage: Report of the United Nations High Commissioner for Human Rights*, ¶ 1, U.N. Doc. A/HRC/37/29 (Dec. 27, 2017).

⁹ See S.C. Res. 2347, ¶ 1 (Mar. 24, 2017) (condemning the “destruction of cultural heritage . . . as well as the looting and smuggling of cultural property . . . by terrorist groups”); see also S.C. Res. 2199, ¶¶ 16–17, 23 (Feb. 12, 2015) (aiming at blocking ISIS, ISIL, ANF, and Al-Qaeda’s financial resources). Prior to issuing Resolution 2347, the Security Council had also issued a variety of resolutions on Mali and created the U.N. Multidimensional Integrated Stabilization Mission in Mali, aimed at the protection of heritage, among other things. See generally Qureshi, *supra* note 2, at 81; Lassana Cissé, *The Ratification and Implementation of the (1999) Second Protocol of the 1954 Convention in Mali During Armed Conflict*, in PROTECTING CULTURAL PROPERTY 82–86 (2020).

¹⁰ See generally MARINA LOSTAL ET AL., CULTURE UNDER FIRE: ARMED NON-STATE ACTORS AND CULTURAL HERITAGE IN WARTIME 13–26 (2018); Kristin Hausler, *Culture Under Attack: The Destruction of Cultural Heritage by Non-State Armed Groups*, 2 SANTANDER ART & CULTURE L. REV. 117, 118–41 (2015); Emma Cunliffe et al., *The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations*, 23 INT’L J. CULTURAL PROP. 1, 19–20 (2016) (relating to Da’esh).

of destroying and smuggling cultural heritage is also by now well documented.¹¹ Also, it is well known that the smuggling of antiquities and subsequent art trade has been an essential aspect of ISIS financing.¹² Muslim communities around the world condemn ISIS ideology as an “ideology of oppression[.]”¹³ Even so, these incidents have kindled a negative, popular stereotype about the legitimacy of the arts in the Muslim world.¹⁴ The alleged hostile position of Islam toward the arts and cultural heritage creates confusing representations of Islam in the West, displacing the emphasis from other pervasive security issues as well as the fact that cultural terrorism in the Muslim world primarily targets Muslims themselves.¹⁵ Even worse, stereotypical readings of these incidents and violence perpetrated by extremists nourish the erroneous hypothesis of the supposed “clash of civilizations” suggested by Huntington shortly after the end of the Cold War.¹⁶ In turn, this exacerbates the rise of anti-Muslim sentiment, creating a backlash against Muslim minorities in the West. As a result, an inverse trend has emerged, especially within the United Nations, to fight Islamophobia and hateful representations of Islam. Last but not least, the violence perpetrated by *jihadis*

¹¹ See Matthew Clapperton et al., *Iconoclasm and Strategic Thought: Islamic State and Cultural Heritage in Iraq and Syria*, 93 INT’L AFFS. 1205–31 (2017) (“The destruction of cultural heritage in Syria and Iraq by the group calling itself Islamic State in Iraq and Syria (Islamic State) is neither random collateral damage nor necessarily an exercise in barbarism.”); Benjamin Isakhan, *How to Interpret ISIS’s Heritage Destruction*, CURRENT HIST. 344, 344–49 (2018); Benjamin Isakhan & José Antonio González Zarandona, *Layers of Religious and Political Iconoclasm Under the Islamic State: Symbolic Sectarianism and Pre-Monotheistic Iconoclasm*, 24 INT’L J. HERITAGE STUD. 1, 1–2, 11 (2018).

¹² Cf. Qureshi, *supra* note 2, at 68. In 2015, the U.S. State Department indicatively estimated that ISIS “took in at least \$1.25 million from the sale of items looted from just one archaeological site[.]” Isakhan, *supra* note 11, at 347 (noting that “[t]he funds generated from the looting of antiquities across Iraq and Syria were used by ISIS to finance its state, buy weapons and other equipment, carry out mass attacks on local communities, and strengthen its operational capacity to organize terrorist attacks across the world.”).

¹³ E.g., Linah Alsaafin, *Reclaiming Mosul’s Vibrant Culture After ISIL*, AL JAZEERA (Oct. 15, 2017), <https://www.aljazeera.com/features/2017/10/15/reclaiming-mosuls-vibrant-culture-after-isil>.

¹⁴ Cf. Trinidad Rico, *Heritage Studies and Islam: A Crisis of Representation*, 51 REV. MIDDLE E. STUD. 183, 186. See generally Trinidad Rico, *Islamophobia and the Location of Heritage Debates in the Arabian Peninsula*, in CULTURAL HERITAGE IN THE ARABIAN PENINSULA: DEBATES, DISCOURSES AND PRACTICES 19–30 (Karen Exell & Trinidad Rico eds., 2017).

¹⁵ See, e.g., Qureshi, *supra* note 2, at 65; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2019 Report on International Religious Freedom: Saudi Arabia 16 (2019) (noting attacks against Shia mosques by Da’esh and ISIS); U.N. Office of the High Comm’r, *Intentional Destruction of Cultural Heritage as a Violation of Human Rights in Bahrain and Saudi Arabia*, <https://www.ohchr.org/Documents/Issues/CulturalRights/DestructionHeritage/NGOS/ADHRB.pdf> (noting that “[s]ince 1925, the Government of Saudi Arabia has destroyed about 98 percent of religious and historic sites in the country” and discussing the destruction of Shia minorities’ religious shrines, tombs, and other heritage); Karima Bennoune (Special Rapporteur in the Field of Cultural Rights), *Cultural Rights*, U.N. Doc. A/71/317 (Aug. 9, 2016); Lamy Khalidi, *The Destruction of Yemen and Its Cultural Heritage*, 49 INT’L J. MIDDLE E. STUD. 735, 736; cf. Robert Bevan, *The Origins of Cultural Protection*, in HARM’S WAY 8, 12 (2017) (discussing Da’esh policies that destroy minority cultural sites, especially the Yazidis).

¹⁶ Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFFS. 22, 22–49 (1993).

has been an impediment in finding common grounds between Islam and the West.

This Article suggests that a better understanding of the Sharia is needed to enhance the protection of cultural rights in the Muslim world. A better reading of the Sharia's 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. The Sharia contains a number of elements that could be used to enhance the protection of heritage and enable Muslim countries to assume a better role in fostering and safeguarding arts and culture. At the same time, however, a number of contradictions and the fear of extremist interpretations inhibit international courts and tribunals from referring to Sharia-law sources and their extremely rich jurisprudence when dealing with cultural matters. Thus, emphasis should also be placed on Muslim state practice. For example, the practice of the arts during the great Caliphs' rule of the Muslim world, as will be discussed below, is especially revealing with respect to artistic freedom. In addition, modern Muslim state practice shows extraordinary engagement with all aspects of arts and cultural life, substantial contributions for the enhancement of cultural heritage at the international level, and expansion of cultural tourism and booming art markets. This is the case even for strict Sharia-compliant states such as Saudi Arabia, which is briefly studied in this Article as an example.

In terms of structure, this Article is split into four parts. Part I offers a brief overview of the underpinning elements and principles of Islamic law, detailing its richness, flexibility, and diversity. This general overview may be helpful to the reader who is not familiar with Islamic law, as it details the multiplicity of tools available to contemporary Muslim jurists who face matters related to art, cultural rights, and cultural heritage. Part II provides an examination of the sources of Islamic law, specifically in relation to arts and cultural heritage, referring to concepts and principles that could be relevant in controversies involving the destruction of cultural heritage.¹⁷ In this section, this Article emphasizes the highly complex dialectic between divine sources and human reasoning in Islamic thought, and contrasts both with the practice of the first Caliphs regarding the preservation of cultural heritage. Part III explains that this complex dialectic may be precisely one of the reasons why international bodies

¹⁷ Due to space and language limitations, this section does not aim to provide an exhaustive analysis of the Islamic jurisprudence on cultural heritage, nor detail human-rights or humanitarian-law rules from the perspective of the Sharia. Rather, it aims to establish the astonishing amount of diversity of views, teachings, and schools of Islamic law (which are at times contradictory).

are generally hesitant to refer to Islamic law in the context of international dispute settlement, including disputes pertinent to cultural-rights violations and the destruction of heritage. This part does highlight, however, that taking Islamic law into greater account may have certain benefits for a more effective protection of arts and cultural heritage in the Muslim world, especially in terms of dialogue with Non-State Actors (NSAs). In Part IV, this Article provides alternatives in approaching the Muslim perspective on cultural-heritage law that is based primarily on state practice in matters related to artistic freedom and cultural rights, drawing particularly from the practice of Gulf States, especially Qatar and the Kingdom of Saudi Arabia. This Article concludes that it is important for Muslim writers and organizations to oppose the extremist, fanatic, and archaic interpretations of Islam, and that it is equally important for international bodies and agencies such as UNESCO to refer to modern Muslim state practice.

I. EXPLORING THE NATURE AND DIVERSITY OF THE ISLAMIC LEGAL TRADITION

The Sharia encompasses the totality of human life. It consists of a body of detailed rules that lead Muslims on the path to God.¹⁸ Most of these rules are laid down in the *Qur'an*, which literally means the Word of God, as revealed to Prophet Muhammad. The *Qur'an* therefore is the primary source of the Sharia—the revelation starts with the imperative ‘*ikra*,’ which means “to read.” The *Qur'an* describes itself as a “guidance” for humankind¹⁹ and is itself a piece of literature. It contains a number of stories and parables of theological nature that have been revealed to the Prophet. Amidst these stories, which are primarily of a theological nature, one may also be able to deduce rules of normative content. These rules are generally split into two categories.²⁰ The first, *ibadat*, refers to Muslims’ duties vis-à-vis the community and God (praying, fasting, pilgrimage, etc.) as well as aspects of daily life as precise as greetings, ritual observances, and hygiene.²¹ The second, *mu'amalat*, refers to transactions and other legal issues common in both civil and common law within areas such as family law,

¹⁸ The term occurs only once in the *Qur'an*, designating a “divinely appointed path.” QUR'AN 45:18 (“Now We have set you O Prophet on the Way of faith [*Shari'a*]. So follow it . . .”) (alteration in original); see ABDULLAH SAEED, HUMAN RIGHTS AND ISLAM: AN INTRODUCTION TO KEY DEBATES BETWEEN ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW (2018).

¹⁹ QUR'AN 2:185.

²⁰ Gamal Moursi Badr, *Islamic Law: Its Relation to Other Legal Systems*, 26 AM. J. COMPAR. L. 187, 188 (1978).

²¹ *Id.*

inheritance, contracts, criminal law, and legal procedure.²² From over 6000 verses of the *Qur'an*, only about 200 possess a purely legal content,²³ including rules about *jihad* (*jus ad bellum*) and the use of armed force (*jus in bello*).²⁴ Both types of rules follow the values of Islam, dividing conduct into six categories: (1) forbidden (*haram*); (2) obligatory (*wajib*); (3) permitted (*mubah*); (4) recommended (*muhtasab*); (5) disapproved (*makruh*); and (6) reprimandable, or indifferent/of no legal interest.²⁵

The second source of the Sharia is the *Sunna*. The *Sunna* is based on the exemplary nature of the Prophet's life—what he did, said, or approved. It includes the traditions, sayings, and deeds of the Prophet (*hadiths*),²⁶ arguably also narrations about the Prophet and his companions (*al akhbar*), and Islamic traditions reported by the companions of the Prophet (*al athaar*).²⁷ Six major *hadith* collections were compiled in the third century after the Hijrah, which remain canonical for Sunni Muslims.²⁸ The soundness and validity of a *hadith* is based on the concept of *consensus* of the Muslim *ummah*.²⁹ There is a long and heated debate over the authenticity of *hadiths* and a variety of theories on transmission of *hadiths* have been developed.³⁰

Islamic law, however, is not confined, nor is it based solely upon the divine *Sharia*. Early jurists who lived in the first centuries after the Prophet in the Arabian Peninsula developed a highly complex and sophisticated Islamic jurisprudence known as the *fiqh*. The *fiqh* is based not only on the revealed

²² *Id.*

²³ *Id.*; M. CHERIF BASSIOUNI, THE SHARI'A AND ISLAMIC CRIMINAL JUSTICE IN TIME OF WAR AND PEACE 23–24 (2013); N.J. COULSON, A HISTORY OF ISLAMIC LAW 12–13 (1964) (noting, however, that these verses are eighty in number).

²⁴ BASSIOUNI, *supra* note 23, at 198; see Karima Bennoune, Note, *As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence*, 15 MICH. J. INT'L L. 605, 613–42 (1994); Onder Bakircioglu, *A Socio-Legal Analysis of the Concept of Jihad*, 59 INT'L & COMPAR. L.Q. 413, 416–19 (2010) [hereinafter *The Concept of Jihad*]. See generally ONDER BAKIRCIOGLU, ISLAM AND WARFARE: CONTEXT AND COMPATIBILITY WITH INTERNATIONAL LAW 50 (2014).

²⁵ Wael B. Hallaq, AN INTRODUCTION TO ISLAMIC LAW 20 (2009); Badr, *supra* note 20, at 188.

²⁶ HALLAQ, *supra* note 25, at 16; JOHN L. ESPOSITO, ISLAM: THE STRAIGHT PATH 104 (5th ed. 2016); Anver M. Emon, *Shari'a and the Modern State*, in ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW 52, 54 (Anver M. Emon et al. eds., 2012).

²⁷ Taha Jabir al-Alwani, *Fatwa Concerning the United States Supreme Courtroom Frieze*, 15 J.L. & RELIGION 1, 1, 3 (2000).

²⁸ BASSIOUNI, *supra* note 23, at 33; Khaled Abou El Fadl, *The Shari'ah*, in THE OXFORD HANDBOOK OF ISLAM AND POLITICS 7–26 (John L. Esposito and Emad El-Din Shahin eds., 2013).

²⁹ HALLAQ, *supra* note 25, at 17, 21; ESPOSITO, *supra* note 26, at 107–08; H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 207 (5th ed. 2014) (noting consensus is based on a *hadith* that states “*My people will never agree to error*”) (emphasis added).

³⁰ ESPOSITO, *supra* note 26, at 105–06; HALLAQ, *supra* note 25, at 17–19; Emon, *supra* note 26, at 57–58.

sources (Quranic verses and Prophetic traditions), but also on individual human reasoning (*ra'y*) and non-revealed sources. The non-revealed sources include both methodological tools and juristic principles (*usul al fiqh*). Assuming that Islamic law is a tree, and the *fiqh* its branches, the *usul* therefore is the “roots” of jurisprudence.³¹ The principles of the *usul* “rank[] the sources of law, their interaction, interpretation and application”³² and function as legal formulas conferring authority to offer legal reasoning. Thus, the methodology of the *usul* may give rise to several varieties of construction including the following: *ijma* (consensus of opinion), *qiyas* (analogical deduction/reasoning by analogy),³³ *istihsan* (juristic preference),³⁴ *istihsab* (presumption of continuity), *istislah* (public interest), and *maslaha* (valid ways to serve the public interest).³⁵

The more weight one grants to the *fiqh* and the *usul*, the more possible it will be for teachers, judges, muftis, and imams to use human ability to reason and expand further on contemporary matters with a view toward finding plausible solutions. A good illustration of this is the *ijma*, which is also considered the third *source* of Islamic law in Sunni jurisprudence.³⁶ The exact legal value of the *ijma* is the object of heated debates among Islamic law scholars. Some authors emphasize the role of the *ijma* as acceptable customary practice and eventually also give more space to jurists to minimize the effect of isolated and conservative traditions.³⁷ In fact, even in medieval years, there were authors praising the significance of the *ijma* as human legal reasoning; for example, al-Qarafi (7 AH–13 CE) presumed that the *ijma* prevailed even over the *Qur'an* and the *Sunna*.³⁸ In contrast, Kamali, one of the most influential scholars on the *usul*, argues that “[s]overeignty in Islam is the prerogative of Almighty God alone[,]” that *ijma*

³¹ MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 12 (3d ed. 2005); see also HALLAQ, *supra* note 25, at 16, 22–27. See generally Wael B. Hallaq, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNĪ UṢŪL AL-FIQH (1999); Emon, *supra* note 26, at 58; Bassiouni, *supra* note 23, at 49–50.

³² Bassiouni, *supra* note 23, at 40.

³³ *Qiyas* are secondary compared to the primary sources and are generally acceptable insofar as they are compliant with Islamic fundamental precepts. See Kamali, *supra* note 31, at 197–203, 286 (“Notwithstanding the absence of a clear authority for *qiyās* in the Qur’ān, the ‘*ulamā*’ of the four Sunni schools and the Zaydi Shī’ah have validated *qiyās* and quoted several Qur’ānic passages in support of their views.”).

³⁴ *Istihsan* is accepted primarily by Hanafis and Hanbalis. It is essentially the ability to depart from an existing law, enabling the jurist to prefer one solution over another when he or she feels that the result will be unfair. See *id.* at 6, 363–64 (noting, however, that *istihsan* is only permissible when serving a higher objective and must therefore be given preference over the existing law that is deemed unfair, and also that jurists have been reluctant to perform *istihsan*).

³⁵ *Id.* at 16–17.

³⁶ Glenn, *supra* note 29, at 199–200 (noting this may appear awkward in the eyes of the Western jurist).

³⁷ Coulson, *supra* note 23, at 72, 88–89.

³⁸ Ahmad Hasan, *The Argument for the Authority of Ijmā*, 10 ISLAMIC STUD. 39, 39 (1971).

can never override the *Qur'an* and the *Sunna*,³⁹ and that the difference between revealed and non-revealed sources is precisely that “[t]he legislative organ of an Islamic state . . . cannot abrogate the Qur’an or the *Sunnah*[.]”⁴⁰ Another example is *istihsan* (juristic preference), which is accepted primarily by Hanafis and Hanbalis, and essentially denotes the ability of the jurist to depart from an existing law, enabling the jurist to prefer one solution over another when he or she feels that the result will be unfair.⁴¹ This principle of Islamic law effectively functions in much the same way as the common law concept of *equity*.⁴²

In addition, the *fiqh* seldom provides solutions based on the *Qur'an* or the *Sunna* alone, as legal rules in the *Qur'an* are applied differently in the context of civil and criminal law: as either torts or criminal offenses.⁴³ Furthermore, in the context of public international law analogies may also be found between customary law and the *Sunna*. This is true in respect to treaties concluded between Muslims or non-Muslims as well as the authority of juristic opinions, commentaries, and “utterances . . . of the Caliphs[.]” some of which have been cited by reference to Article 38 of the Statute of the International Court of Justice (ICJ).⁴⁴

Thus, to formulate a legal opinion (*fatwa*) on a certain matter, contemporary Muslim jurists (*fuqaha*), judges (*qadis*), muftis, and imams may refer not only to the revealed sources, but also largely to the *fiqh*. In its early years of formation following the Prophet Muhammad’s death, the *fiqh* was also influenced by factors external to Islam and incorporated a variety of elements of Talmudic, Roman, Roman Provincial, Byzantine Canon, Persian Sassanian, and Arab tribal

³⁹ KAMALI, *supra* note 31, at 16–17 (“[A]though it may abrogate a law which is based on *maslahah* or *istihsan* . . . *ijma*[] is subservient to divine revelation and can never overrule the explicit injunctions of the Qur’an and *Sunnah*.”).

⁴⁰ *Id.* at 16.

⁴¹ *See id.* at 233–34.

⁴² *Cf.* Lawrence Rosen, *Equity and Discretion in a Modern Islamic Legal System*, 15 L. & SOC’Y REV. 217 (1980).

⁴³ Coulson refers to the examples of drinking wine and the prohibition of usury. *See* COULSON, *supra* note 23, at 12–13. Both are considered forbidden (*haram*) under Islamic law in the same terms. *See id.* Among the two, only the first became a criminal offense originally punishable by flogging. *Id.* The other remained a purely civil matter, giving rise to an illegal transaction or an illegal contract. *See id.*

⁴⁴ Bennoune, *supra* note 24, at 613–14 (citing MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM (1955)). References to Islamic law in the jurisprudence of the ICJ, however, have been scarce, save for few noticeable exceptions. *See, e.g.*, Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 40, ¶ 86 (May 24, 1980) (referring to the concept of *aman* (safe passage) under Islamic law and its application to diplomats and emissaries); M. Cherif Bassiouni, *Protection of Diplomats Under Islamic Law*, 74 AM. J. INT’L L. 609 (1980). *See generally* CHRISTOPHER G. WEERAMANTRY, ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE (1988).

and customary laws.⁴⁵ Throughout the first three centuries after the Hegira and until the recording of the *hadiths*, most of what constituted the corpus of Islamic law were circumscribed by reference to the traditions of the Prophet and the practice of his companions. Traditionalists, however, insisted that the primary sources (i.e., the *Qur'an* and the *Sunna*) prevailed and saw references to personal reasoning as unnecessary.⁴⁶ This triggered an opposite reaction; namely, the fabrication of a number of pseudo-*hadiths*. In fact, from about 5000 in total, only six collections of *hadiths* have been considered sound.⁴⁷

Moreover, the proliferation of legal teaching circles allowed for the development and consolidation of the so-called “schools of thought” of Islam. These were formed by eminent jurists who refined legal reasoning in the early years of Islam. Four major schools of thought (*madhabs*) in Sunni Islam were formed under the rule of the Ummayyad dynasty, taking their names from their founders.⁴⁸ These jurists articulated a remarkably detailed theory of law that was based on the “marriage[.]” as stipulated by Hallaq, between reason and revelation.⁴⁹ Given the absence of centralization in legal doctrine after the first four Caliphs, the schools and varieties of legal doctrines flourished.⁵⁰

II. CULTURAL HERITAGE AND THE ARTS UNDER THE SHARIA: A BRIEF OVERVIEW

A. *Does the Sharia Contain Any Provisions on Arts and Cultural Heritage?*

The Holy *Qur'an* does not contain any reference concerning the prohibition

⁴⁵ BASSIOUNI, *supra* note 23, at 8 (noting theological conservatives insisted on “rigid literalism in interpretation”); Badr, *supra* note 20, at 190–98; COULSON, *supra* note 23, at 50–51 (noting the school of Kufa, Iraq [i.e., a Hanafi school] was geographically more open and morally more receptive to foreign legal influences); *see also* ESPOSITO, *supra* note 26, at 55–56; GLENN, *supra* note 29, at 180–81; Ilias Bantekas, *Land Rights in Nineteenth-Century Ottoman State Succession Treaties*, 26 EUR. J. INT’L L. 652–53 (2015).

⁴⁶ ESPOSITO, *supra* note 26, at 110 (discussing conflicting views between the Akhbaris and the Usulis).

⁴⁷ HALLAQ, *supra* note 25, at 16–17. Among these, the most reliable are al-Bukhari’s and Al Muslim’s.

⁴⁸ By chronological order, these include the following: Imam Abu Hanifa who lived and taught in Kufah, Iraq; Imam Malik al-Asbahi who lived in Madinah, Saudi Arabia; Imam ash-Shafi from Egypt who formulated the theory of the *usul*; and Imam Abu Abdullah Ibn Hanbal ash-Shaybani who taught in Baghdad. *See* BASSIOUNI, *supra* note 23, at 45–48; KAMALI, *supra* note 31, at 13–14; HALLAQ, *supra* note 25, at 33; COULSON, *supra* note 23, at 89–90 (noting that, although these are the same *usul* as were laid down by Imam al-Shafi, the composite structure of the classical legal theory is fundamentally different from ash-Shafi’s scheme); ESPOSITO, *supra* note 26, at 109.

⁴⁹ HALLAQ, *supra* note 25, at 16–17.

⁵⁰ BASSIOUNI, *supra* note 23, at 256.

of images and the creation of icons or sculptures.⁵¹ Furthermore, there is nothing in the *Qur'an* specifically relating to cultural heritage. Fatimah Alshehaby argues that the protection of cultural objects belonging to ancient civilizations could be deduced from a verse stating: “Travel throughout the land and see how He originated the creation, then Allah will bring it into being one more time. Surely Allah is Most Capable of everything.”⁵² Furthermore, the Sharia embraces the concept of beauty. In fact, the term *beauty* is encountered manifold in the *Qur'an*⁵³ and penetrates the entire logic of arts and culture in the Arab-Muslim world.⁵⁴ For example, according to a well-known *hadith* narrated by Muhammad al-Bukhari, when the Angel Gabriel came to Prophet Muhammad, He is alleged to have said that “God is Beautiful, and He loves beauty[.]”⁵⁵ and according to another He is also alleged to have said that “God has inscribed beauty upon all things.”⁵⁶ Islamic art, too, is astonishingly beautiful, as any visitor of the Taj Mahal will testify. Generally hinged upon the quasi-sacred role of the Word (*kalam*), it conveys the message of God and is deeply entrenched in spirituality. This might explain why Islam is generally viewed as a “culture of the Word” (or a culture of calligraphy), rather than a “culture of the ‘image[.]’”⁵⁷

This said, the concept of beauty in the sense of the Sharia has significant pitfalls. Firstly, it remains a metaphysical concept bound to the notion of “Truth”

⁵¹ Fatimah Alshehaby, *Cultural Heritage Protection in Islamic Tradition*, 27 INT'L J. CULTURAL PROP. 291, 297 (2020) (“[T]here is no reference to the concept of cultural heritage in Islamic law, but there are several verses that indicate principles that confer protections, such as human dignity and respect for diversity, knowledge, and development.”); al-Alwani, *supra* note 27, at 6 (noting that “[w]hen we read the Holy Qur'an—the only constitutive source of legislation in Islam—we will not find within it a single text that directly addresses the question of whether making or possessing ‘pictures’ and ‘images’ is prohibited”); Modj-ta-ba Sadria, *Figural Representation in Islamic Art*, 20 MIDDLE E. STUD. 99, 101 (1984) (noting, however, that the emphasis on ornamental representations of Islamic art denotes a lack of division between the sacred and the profane); K.A.C. Creswell, *The Lawfulness of Painting in Early Islam*, 11/12 ARS ISLAMICA 159, 159–166 (1946).

⁵² QUR'AN 29:20; see Alshehaby, *supra* note 51, at 298.

⁵³ Alshehaby, *supra* note 51, at 295–96, 296 n.24; Oludamini Ogunnaike, *The Silent Theology of Islamic Art*, RENOVIATIO (Dec. 5, 2017), <https://renovatio.zaytuna.edu/article/the-silent-theology-of-islamic-art>.

⁵⁴ Alshehaby, *supra* note 51, at 296 (referring to Jami' at-Tirmidhi); see also Ogunnaike, *supra* note 53 (“Is the reward for *ihsān* anything other than *ihsān*?”) (referring to QUR'AN 55:60); cf. Muhammad al-Ghazali, *Reflections on Islamic View of Art and Literature*, 35 ISLAMIC STUD. 425, 428 (1996) (finding that manifestations of art and literature in Islam “affirm the Infinite Beauty and Absolute Truth and point to the eternal source of all beauty and truth”).

⁵⁵ al-Ghazali, *supra* note 54, at 429–30; Ogunnaike, *supra* note 53, at 2.

⁵⁶ Ogunnaike, *supra* note 53.

⁵⁷ al-Alwani, *supra* note 27, ¶¶ 1–3 (“The Arabs, who became the first carriers of the message of Islam, valued the Word more than images and statues.”); *id.* ¶ 4 (“The Word—in the view of Arabs and Muslims—is the medium most capable of expressing the culture’s inner characteristics; for its meanings are agreed upon by linguists.”).

of Islam,⁵⁸ containing several limitations. For example, Muhammad al-Ghazali finds that “literary or artistic expressions focus their appeal on the baser instincts and lower passions of man and lead, of necessity, to the distortion of healthy human nature and to the decadence of culture[.]” all of which are rejected in Islam “[w]ithout any reservation[.]”⁵⁹ Secondly, cultural property or arts that incite idolatry or that constitute expressions of infidelity are not necessarily *beautiful*, let alone require preservation under principles of Islamic law. Thirdly, various *hadiths* relating to the permissibility of images and visual representation (i.e., consequently also visual arts) generally add to the complexity of the matter. Some of these *hadiths* aim to emphasize that arts and entertainment might distract from Muslim duties of prayer,⁶⁰ while others may be linked to the hostility toward anything that could be seen as imitating God.⁶¹ It is narrated, for example, that when Prophet Muhammad was ill his wives came to see him and told him about paintings they had seen in a church in Abyssinia (present-day Ethiopia). Rather than sharing their enthusiasm, the Prophet admonished them in the following words: “If any religious man dies amongst those people they would build a place of worship at his grave and make these pictures in it. They will be the worst creature in the sight of Allah on the Day of Resurrection.”⁶² Additionally, according to another, Prophet Muhammad allegedly cursed the image makers in their attempts to imitate God’s act of creation, and he said, “On the Day of Judgement the punishment of hell will be meted out to the painter, and he will be called upon to breathe life into the forms that he has fashioned; but he cannot breathe life into anything.”⁶³ It is noteworthy that most of these *hadiths* are considered generally as non-authentic.⁶⁴ Similar *hadiths* concerning

⁵⁸ al-Ghazali, *supra* note 54, at 431 (“[T]here is the eternal beauty that is real and there is a transient beauty which is merely contingent.”).

⁵⁹ *Id.* at 432.

⁶⁰ al-Alwani, *supra* note 27, at 21.

⁶¹ Creswell, *supra* note 51, at 165 (“[A]s a predisposing psychological basis for the hostility to painting, there was the feeling . . . that the maker of an image or a painting in some way transfers part of the personality of the subject to the image or painting, and in so doing acquires magical powers over the person reproduced.”).

⁶² Book 8, No. 419, in 1 SAHIH AL BUKHARI (narrated by Aysha); Book 23, No. 425, in 2 SAHIH AL BUKHARI (narrated by Aysha); see also JAMAL J. ELIAS, AISHA’S CUSHION: RELIGIOUS ART, PERCEPTION, AND PRACTICE IN ISLAM (2012).

⁶³ THOMAS W. ARNOLD, PAINTING IN ISLAM: A STUDY OF THE PLACE OF PICTORIAL ART IN MUSLIM CULTURE 5 (1965); see Book 48, Chapter 113, No. 5363, in 6 SUNAN AN-NASA’L (narrated by Ibn ‘Umar) (“The makers of these images will be punished on the Day of Resurrection, and it will be said to them: ‘Breathe life into that which you have created.’”); see also Creswell, *supra* note 51, at 162 (referring to Vol. 2, Book 41 and Vol. 4, Book 106 of *Sahih Al Bukhari*); cf. Department of Islamic Art, *Figural Representation in Islamic Art*, METRO. MUSEUM ART (Oct. 2001), https://www.metmuseum.org/toah/hd/figs/hd_figs.htm (noting the *Qur’an* “uses the Arabic term *musawwir* (“maker of forms,” or artist) as an epithet for God”).

⁶⁴ Muhammad Al-Atawneh, *Leisure and Entertainment (Malāhī) in Contemporary Islamic Legal Thought: Music and the Audio Visual Media*, 19 ISLAMIC L. & SOC’Y 397, 401–02 (2012); Alshehaby, *supra* note 51, at 302.

the prohibition of music are also reported, but equally suffer from weak transmission.⁶⁵ As a result of these ambiguities, more elements and concepts are needed for an understanding of the conditions under which the intentional destruction of *infidels'* cultural heritage is justified.

B. *Does the Sharia Contain Any Provisions on the Destruction of Infidel Cultural Heritage?*

The first element underlying the discussion on non-Muslim heritage is the general presumption of a certain dichotomy under the Sharia between what is known as the abode of Islam (*dar al-Islam*) and the abode of unbelief (*dar al-kufr*).⁶⁶ This distinction between Muslims and non-Muslims also entails a second discussion on the validity and limitations of *jihad* under Islamic law. *Jihad* (which means to “exert,” “strive,” “struggle”) is sometimes referred to as the sixth pillar of Islam and is generally divided into violent and non-violent categories.⁶⁷ Yet the very concept of *jihad* is one of the aspects of Islamic law that has given rise to tensions and abuse more than any other, both within the Arab-Muslim world and the West. *Jihad* is commonly understood as concomitant with the concept of warfare and the establishment of Muslim rule against non-Muslims.⁶⁸ As such, it underpins virtually all discussions on the rise of militant Islam and the treatment of non-Muslim minorities in Muslim lands.⁶⁹ According to a popular misconception, the *dar-al-Islam* is the only proper way to live under the guidance of the Sharia, while the lands of disbelief must be ultimately conquered through *jihad*.⁷⁰ A detailed examination of *jihad* falls outside the scope of this study. For the purposes of this Article, the division itself might have been true in the early years of Islam, albeit even then it was widely

⁶⁵ Al-Atawneh, *supra* note 64, at 407.

⁶⁶ See, e.g., M.M. Slaughter, *The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech*, 79 VA. L. REV. 153, 174 (1993) (“In modern times, and despite the fact that they are sovereign states, Islamic nations share a common identity united through submission to Muslim practice and law. This expresses itself in the legal notion of the *dar-al-Islam* (house of Islam) and constitutes itself by the contrast with the disbelievers, the *dar-al-harb* (house of war, land outside Islam)”) (alteration in original).

⁶⁷ See Khaled Abou El Fadl, *Islamic Law, Jihad and Violence*, 16 UCLA J. ISLAMIC & NEAR E.L. 1 (2017).

⁶⁸ See generally John L. Esposito, *What Everyone Needs to Know About Islam* (2002) [hereinafter *What Everyone Needs to Know About Islam*]; John L. Esposito, *Unholy War: Terror in the Name of Islam* 26 (2002) [hereinafter *Unholy War*]; Khaled Abou El Fadl, *Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries*, 1 *Islamic L. & Soc’y* 141 (1994).

⁶⁹ See generally WHAT EVERYONE NEEDS TO KNOW ABOUT ISLAM, *supra* note 68; UNHOLY WAR, *supra* note 68; Abou El Fadl, *supra* note 68, at 141.

⁷⁰ See JOHN L. ESPOSITO, *THE OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD* (1995); *THE OXFORD ENCYCLOPEDIA OF ISLAM AND POLITICS* 370–71 (Emad El-Din Shahin ed., 2014); *The Concept of Jihad*, *supra* note 24, at 431.

debated and significantly nuanced.⁷¹ As pointed out by various authors already, “*jihad* does not include offensive warfare but only permits self-defense . . . the faith is not intended to be spread by force[.]”⁷² and *jihad* is “justified only when nonMuslims threaten Muslims or interfere with their religious practice.”⁷³

Consequently, the destruction of cultural and religious heritage can never be justified under *jihad*. In fact, Islamic law affords substantial protection to religious art, monuments, and sites, including during armed conflict. Such protection stems directly from the *Qur’an*, as various scholars have explained elsewhere.⁷⁴ In addition, Prophet Muhammad appears to have been tolerant with religious and cultural treasures. It is narrated in this respect that when he conquered Mecca, he smashed idols and icons in the Kaaba yet spared an icon of the Holy Virgin enlacing Jesus (it is said that the Prophet “[held] his hands over it for protection while the others were effaced”).⁷⁵

Likewise, the concept of safeguarding cultural heritage was present among Prophet Muhammad’s companions and the first Caliphs, even at the time of the expansion of Islam through *jihad*. For example, prior to the bombing of the Buddhas, a delegation from the Organization of the Islamic Cooperation (OIC) (the main inter-governmental organization of Muslim-majority states based in Jeddah, Saudi Arabia) travelled to Afghanistan.⁷⁶ The OIC, along with religious

⁷¹ Abou El Fadl, *supra* note 68, at 146 (noting some Muslim jurists have gone as far as arguing that Muslims may not reside in non-Muslim lands under any circumstances); *The Concept of Jihad*, *supra* note 24, at 431 (noting that *jihad* has been a specific military doctrine, developed under the reign of the Abbasids and the Umayyads, related specifically to fighting and warfare, and yet “a permanent state of war between Muslim and non-Muslim communities did not necessarily call for the military form of *jihad*”); *see also* Noor Mohammad, *The Doctrine of Jihad: An Introduction*, 3 J.L. & RELIGION 381, 392 (1985) (citing KHADDURI, *supra* note 44, at 64–66); Bantekas, *supra* note 45, at 375 (citing KHADDURI, *supra* note 44) (noting that today it is widely accepted that a third category of lands is possible—the territory of peace (*dar-al-sulh*)); Bennoune, *supra* note 24, at 614–15 (citing KHADDURI, *supra* note 44).

⁷² Bennoune, *supra* note 24, at 617.

⁷³ *Id.*

⁷⁴ *E.g.*, Abdul Hamid Al-Ansari, *Islam and the Preservation of the Human Heritage*, in DOHA CONFERENCE OF ‘ULAMĀ ON ISLAM AND CULTURAL HERITAGE 27–28 (Dec. 30–31, 2001) [hereinafter DOHA PROCEEDINGS]; Sheikh Ayatollah Mohsen Araki, *The Cultural Heritage in Islamic Jurisprudence*, in DOHA PROCEEDINGS, *supra*, 44–45 (citing QUR’AN 22:32) (discussing the protection of religious-ritual sites); *cf.* BASSIOUNI, *supra* note 23, at 181.

⁷⁵ Sadria, *supra* note 51, at 99; JAMES NOYES, *THE POLITICS OF ICONOCLASM: RELIGION, VIOLENCE, AND THE CULTURE OF IMAGE-BREAKING IN CHRISTIANITY AND ISLAM* 73 (2012) (referring to a picture of Jesus in Kabbala that was not spared); *see also* Anis Ahmad, *Islam and Cultural Heritage*, in DOHA PROCEEDINGS, *supra* note 74, at 50; Abd-ur-Razzak Guessoum, *Islam and World Heritage*, in DOHA PROCEEDINGS, *supra* note 74, at 60.

⁷⁶ Al-Ansari, *supra* note 74, at 30–32; Christian Manhart, *The Afghan Cultural Heritage Crisis: UNESCO’s Response to the Destruction of Statues in Afghanistan*, 105 AM. J. ARCHAEOLOGY 387, 387–88 (2001).

leaders and representatives from Egypt, Pakistan, and other Muslim countries attempted to persuade the Taliban not to proceed with this act.⁷⁷ Following the bombing, and under the auspices of the Emir of the State of Qatar, the Doha Conference was organized.⁷⁸ During the conference, religious authorities (*ulemas*) from various Muslim countries came to the conclusion that “the preservation of the human cultural heritage derives from its appreciation of innate human values and from respect for peoples’ beliefs.”⁷⁹ For example, Dr. Hamid Al-Ansari, Dean of the Faculty of Sharia, Law, and Islamic Studies at the University of Qatar, detailed the accommodation of the cultural heritage of different nations and peoples,⁸⁰ pointing to the fact that “[i]n numerous verses of the Qur’ân, attention is . . . drawn to the act of meditating on the antiquities and heritage of those from the past in order to learn lessons . . . since human history is a chain of interrelated events, regardless of religion, nation or culture.”⁸¹ Likewise, the Imam Dr. Yusuf al-Qaradâwi reiterated the practice of the companions of Prophet Muhammad in his statement advising the Taliban to review the decision to destroy the Buddhas, indicating that when Muslims conquered Afghanistan in the first century after the Hijrah, they “left [the Buddhas and other] archaeological remains intact.”⁸²

Another relevant discussion is the eventual prohibition of idolatry in the Sharia. The Sharia generally proscribes polytheism and idolatry (*shirk*). *Shirk* was considered a serious offense and was punished by stoning, at least in the early years of Islam. This conception of *shirk* is deduced from the first pillar of Islam and the *shahada* (and the belief in Oneness, or the *tawhid*) as well as from Quranic verses⁸³ and the *hadith* tradition (i.e., Prophet Muhammad’s deeds and sayings).⁸⁴ This is also why certain Islamic doctrines specifically prohibit the

⁷⁷ Al-Ansari, *supra* note 74, at 30–32; Manhart, *supra* note 76, at 387–88.

⁷⁸ *Doha Statement of the International Symposium of ‘Ulamâ on Islam and Cultural Heritage Doha, Qatar*, in DOHA PROCEEDINGS, *supra* note 74, at 7–8.

⁷⁹ *Id.*

⁸⁰ Al-Ansari, *supra* note 74, at 27–29.

⁸¹ *Id.* at 28.

⁸² *Id.* at 31 (noting that other religious experts issued similar statements; for example, the Mufti of Egypt Dr. Nasr Farid Wâsil found the statues were “simply a historical record and had no adverse impact on the Muslim belief”).

⁸³ *E.g.*, QUR’AN 2:51–54 (reiterating the Abrahamic myth of the Golden Calf and prohibiting the worshipping of all except Allah); QUR’AN 5:90 (prohibiting sacrifice on stone alters). *See generally* NOYES, *supra* note 75, at 3–4 (according to whom “the greatest threat to *tawhid* is *shirk*”); RICHARD ETTINGHAUSEN & OLEG GRABAR, *THE ART AND ARCHITECTURE OF ISLAM: 650–1250* 21 (1st ed. 1987) (noting the term used is *al ansab*, which may also be translated as “statutes” but refers to *idols* made in human form).

⁸⁴ Al-Atawneh, *supra* note 64, at 407 (discussing visual media as *shirk*); al-Alwani, *supra* note 27, at 4; Sheikh Bashir Ghalounji, *Islam and the Preservation of Human Heritage*, in DOHA PROCEEDINGS, *supra* note 74, at 58; Al-Ansari, *supra* note 74, at 32.

visitation of tombs (*ziyara*).⁸⁵ Mohamed Badar and Noelle Higgins, for example, note that “the Wahhabis have consistently denounced the veneration of saints due to its overtones of polytheism, going so far as to destroy these shrines in the 19th century.”⁸⁶ According to them, the prohibition “stems partly from the lack of Quranic sources and partly from ambiguous Prophetic Traditions (*hadiths*) which intermittently condemn and advocate *ziyarat al-qubur* (visitation of graves).”⁸⁷

At the same time, however, the appreciation of art in general (i.e., outside the context of idolatry, paganism, and *jihad*) is present in the *Qur’an*. The most relevant narration is the Quranic version of the parable of the Biblical figure of King Solomon.⁸⁸ In these chapters, Solomon is presented as being granted armies of *jinn*, humans, and birds to make for him a crystal palace.⁸⁹ The *jinn*s made him statues, along with sanctuaries, cooking pots, and other things,⁹⁰ and the Queen of Sheba later visited the palace.⁹¹ The making of sculptures and religious devotion appear to co-exist harmoniously in this passage. As Mustansir

⁸⁵ 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, 500–02 (2017). According to Badar and Higgins, the Wahhabis have accepted the legitimacy of destroying tombs, even including the tombs of the son of Ali (Ali was the son of the Prophet and fourth Caliph) and Husayn ibn Ali (whose tomb was destroyed in the late-nineteenth century). *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ QUR’AN 27:1–93; QUR’AN 34:1–54.

⁸⁹ QUR’AN 27:17–19 (“Solomon’s forces of jinn, humans, and birds were rallied for him, perfectly organized. And when they came across a valley of ants, an ant warned, ‘O ants! Go quickly into your homes so Solomon and his armies do not crush you, unknowingly.’ So Solomon smiled in amusement at her words, and prayed, ‘My Lord! Inspire me to always be thankful for Your favours which You have blessed me and my parents with, and to do good deeds that please you. Admit me, by Your mercy, into the company of Your righteous servants.’”) (alteration in original); QUR’AN 34:12 (“And to Solomon We subjected the wind: its morning stride was a month’s journey and so was its evening stride. And We caused a stream of molten copper to flow for him, and We subjected some of the jinn to work under him by his Lord’s Will. And whoever of them deviated from Our command, We made them taste the torment of the blaze.”) (alteration in original); *see also* al-Alwani, *supra* note 27, at 6 (presenting Solomon as possessing mystic powers over the *jinn*s and “thankful to the Almighty for this power”); Al-Ansari, *supra* note 74, at 32 (“[T]he Qur’ân refers to the graces that God bestowed on His Prophet Solomon, for whom statues of glass, copper and marble depicting living beings were made. In this context, no longer associated with worship, statues are considered to be God-given graces for which He should receive thanks.”).

⁹⁰ QUR’AN 34:13 (“They made for him whatever he desired of sanctuaries, statues, basins as large as reservoirs, and cooking pots fixed into the ground. We ordered: ‘Work gratefully, O family of David!’ Only a few of My servants are truly grateful.”) (alteration in original).

⁹¹ QUR’AN 27:44 (“Then she was told, ‘Enter the palace.’ But when she saw the hall, she thought it was a body of water, so she bared her legs. Solomon said, ‘It is just a palace paved with crystal.’ At last she declared, ‘My Lord! I have certainly wronged my soul. Now I fully submit myself along with Solomon to Allah, the Lord of all worlds.’”) (alteration in original); *see* Mustansir Mir, *The Queen of Sheba’s Conversion in Q. 27:44: A Problem Examined*, 9 J. QUR’ANIC STUD. 43, 43–56 (2007) (discussing the Quranic and Biblical accounts of the story of Solomon and the Queen of Sheba).

Mir explains, the deep devotion of Solomon to God did not prevent him from being interested in the arts, nor from enjoying the marvelous palace the *jinn*s built for him.⁹²

This particular story of the *Qur'an* has been a starting point for the development of Islamic mystic philosophy. Both the Brethren of Purity (an early Muslim fraternity of philosophers active in Iraq in the ninth to tenth centuries) and the Sufis (under the lead of Ibn al Safi) elevated the role of poetic imagination in the Islamic legal tradition. For example, in the Brethren's *Rasā'il* (Epistles), which is inspired by the *Qur'an*, Solomon is represented as both a King and a Prophet; having medical knowledge, magical powers,⁹³ and extraordinary capacities, such as formulating magical circles to capture the *jinn*s that ran away from him;⁹⁴ speaking the language of birds;⁹⁵ and overseeing the competition between human beings and *jinn*s in bringing back the throne of Queen Sheba.⁹⁶

C. Early Muslim State Practice on Arts and the Preservation of Heritage

In the same way that sources of Islamic law can be seen as equivalent to those of public international law,⁹⁷ the practice of the early Caliphs on matters related to the preservation of heritage and the arts may be viewed as evidence of state practice. Historical evidence of Islam's position on iconoclasm, for example, shows that the edict issued by the Byzantine emperor Leo on the destruction of images (726 CE) was not influenced by similar practice of the leaders of the Muslim world.⁹⁸ According to K.A.C. Creswell, "the prohibition against painting did not exist in early Islam, but . . . grew up gradually, partly as a result of the inherent temperamental dislike of Semitic races for

⁹² Mir, *supra* note 87, at 49.

⁹³ See Jules Janssens, *The Ikhwān aṣ-Ṣafā' on King-Prophet Solomon*, in *THE FIGURE OF SOLOMON IN JEWISH, CHRISTIAN AND ISLAMIC TRADITION* 241–53 (Joseph Verheyden ed., 2012) (discussing the representation of King Solomon by Ikhwān aṣ-Ṣafā' [translated as "the Brethren of Purity"]); see also Suzanne Pinckney Stetkevych, *Solomon and Mythic Kingship in the Arab-Islamic Tradition: Qaṣīdah, Qur'an and Qiṣaṣ al-Anbiyā'*, 48 *J. ARABIC LIT.* 1, 1–37 (2017); al-Alwani, *supra* note 27, at 6, ¶¶ 7–8.

⁹⁴ Janssens, *supra* note 89, at 248–49.

⁹⁵ *Id.* at 250.

⁹⁶ *Id.* at 226–27.

⁹⁷ Bennoune, *supra* note 24, at 25.

⁹⁸ Creswell, *supra* note 51, at 161–64 (first referring to treaties written by John, Patriarch of Damascus, in which Muslims are excluded from those who are considered iconoclasts; then referring to treaties written by Theodore Abū Kurra, bishop of Harran, in which Muslims are included "among the people opposed to painting"; then quoting Michael the Syrian; and then referring to another treaty by Tarasius who "remarked that the accusers of the Christians had in their destruction of images [sic] imitated the Jews, Pagans, Samaritans, Manichaeans, and Phantasiasti [or Theopaschites]").

representational art, partly because of the influence of important Jewish converts, and partly because of the fear of magic.”⁹⁹

In fact, almost all arts appear to have been embraced by the Great Caliphs of the Umayyad (661–760 CE) and the Abbasid dynasties (749–1248 CE), the Safavids in Persia (fifteenth century), and the Mughals in India (sixteenth century). This is primarily evidenced by the marvelous iconography found in the Umayyad Caliphs’ palaces; in particular, the murals of the Umayyad’s palaces in *Qusayr Amrah* in Jordan,¹⁰⁰ those in Qasr al-Hayr al-Ghari in Syria,¹⁰¹ and those found in the Abbasid palatine complex of Samarra in Iraq.¹⁰² Modj-ta-ba Sadria writes: “[T]he monarchs were known to have their palaces painted with representational art. They commissioned miniatures for their manuscripts and even portraits which they kept hidden from critical eyes in separate rooms or in their closely guarded *haram*.”¹⁰³

Among the most impressive of such works belonging to the early years of Islamic art are arguably the variations of the so-called *Shāh-namā* (the Book of Kings) and the *Fāl-namā* (the Book of Omens), which includes episodes from *Qisas al-Anbiya* (Tales of the Prophets) in which initial texts date from 732 AD.¹⁰⁴ There were also a few illustrated manuscripts narrating poems, romantic tales, and love stories, such as the tale of *Bayad wa Riyad* produced in Medieval Andalusia.¹⁰⁵ Extraordinary collections of these manuscripts are presently

⁹⁹ *Id.* at 166.

¹⁰⁰ *Quseir Amra*, UNESCO, <https://whc.unesco.org/en/list/327> (last visited Sept. 6, 2021); *see also* ULRIKE AL-KHAMIS & STEFAN WEBER, EARLY CAPITALS OF ISLAMIC CULTURE: THE ART AND CULTURE OF UMAYYAD DAMASCUS AND ABBASID BAGHDAD (650 - 950) 37–38 (2014).

¹⁰¹ *Un Château du Désert : Qasr al-Hayr ach-Charqi*, UNESCO, <https://whc.unesco.org/en/tentativelists/1298> (last visited Sept. 6, 2021).

¹⁰² Eva R. Hoffman, *Between East and West: The Wall Paintings of Samarra and the Construction of Abbasid Princely Culture*, 25 MUQARNAS 107, 107–32 (2008); ETTINGHAUSEN & GRABAR, *supra* note 83, at 124–25; AL-KHAMIS & WEBER, *supra* note 101, at 62–65.

¹⁰³ Sadria, *supra* note 51, at 101 (citing ARNOLD, *supra* note 63, at 47).

¹⁰⁴ *Qisas al-Anbiya*, BRIT. LIBR., <https://www.bl.uk/collection-items/qisas-al-anbiya> (last visited Sept. 4, 2021); *see also* Eva R. Hoffman, *The Beginnings of the Illustrated Arabic Book: An Intersection Between Art and Scholarship*, 17 MUQARNAS 37, 37–52 (2000). *See generally* RACHEL MILSTEIN ET AL., STORIES OF THE PROPHETS: ILLUSTRATED MANUSCRIPTS OF QISAṢ AL-ANBIYĀ’ 27–28 (1999); Ernst J. Grube, *Iconography in Islamic Art*, in IMAGE AND MEANING IN ISLAMIC ART 13–33 (Robert Hillenbrand ed., 2005); THE ARTS OF ISLAM: TREASURES FROM THE NASSER D. KHALILI COLLECTION 262–79 (2011) [hereinafter THE ARTS OF ISLAM].

¹⁰⁵ *See* CYNTHIA ROBINSON, MEDIEVAL ANDALUSIAN COURTLY CULTURE IN THE MEDITERRANEAN: HADĪTH BAYĀD WA RIYĀD I (James E. Montgomery et al. eds., 2007) (reviewing the tale of Baya wa Riyad’s significance in Medieval Andalusian history); *see also* HABIB HASSAN TOUMA, THE MUSIC OF THE ARABS 11 (Laurie Schwartz trans., 2003); *cf.* Eleni Polymenopoulou, *A Thousand Ways to Kiss the Earth: Artistic Freedom, Cultural Heritage and Islamic Extremism*, 17 RUTGERS J.L. & RELIGION 39, 60–62 (2015) (referring in particular to *Representations of the Divine in Arabic Poetry*).

exhibited in collections around the world.¹⁰⁶ Prophet Muhammad also appears in many of these manuscripts, and like other prophets that appear in Islamic iconography, he is usually surrounded by a circular flame halo.¹⁰⁷ However, contrary to other prophets whose faces are visible in depictions, and arguably because of the “invisibility of [P]rophetic beauty[.]”¹⁰⁸ Prophet Muhammad’s face is likely to be blurred or covered by a veil.¹⁰⁹ In some cases, his entire head or his body is covered by a golden aureole,¹¹⁰ while in other manuscripts dating from the eighteenth and nineteenth centuries he is represented by a flame.¹¹¹

It was the Caliphs, therefore, who strove to preserve existing cultural treasures,¹¹² and it is largely thanks to the Caliphs that the arts of the Book, especially calligraphy, illumination, and miniature, have flourished throughout

¹⁰⁶ Cf. Jytte Klausen, *The Danish Cartoons and Modern Iconoclasm in the Cosmopolitan Muslim Diaspora*, 8 HARV. MIDDLE E. & ISLAMIC REV. 86, 97 (2009).

¹⁰⁷ See Christiane Gruber, *Between Logos (Kalima) and Light (Nūr): Representations of the Prophet Muhammad in Islamic Painting*, 26 MUQARNAS 229, 229–62 (2009); Oleg Grabar & Mika Natif, *Histoire des Portraits du Prophète Muhammad*, in DE LA FIGURATION HUMAINE AU PORTRAIT DANS L’ART ISLAMIQUE 89–110 (Hourii Touati ed., 2015). See generally TARIF KHALIDI, IMAGES OF MUHAMMAD: NARRATIVES OF THE PROPHET IN ISLAM ACROSS THE CENTURIES (2009); Grube, *supra* note 105, at 16 n.15; ETTINGHAUSEN & GRABAR, *supra* note 83, at 119–25.

¹⁰⁸ Priscilla Soucek, *The Theory and Practice of Portraiture in the Persian Tradition*, 17 MUQARNAS 97, 106 (2000) (noting that during the Mughal dynasty, an “oral tradition” of pictorial representation called the *hilya* developed, permitting a person to “imagine the Prophet in his ‘mind’s eye’”); see also Oleg Grabar, *The Story of Portraits of the Prophet Muhammad*, 107 STUDIA ISLAMICA 19, 33–34 (2003).

¹⁰⁹ See Gruber, *supra* note 108, at 230 (noting that “[l]uminous paintings adopt the metaphorical language of the golden aureole to convey the Prophet’s sacred, primordial, and creative light, called the ‘light of Muhammad’” and “herald the Prophet as a cosmic entity freed from temporal boundaries and corporeal limitations[.]”); *id.* at 230 fig.1 (illustrating the Prophet Muhammad’s ascension in an anthology of Persian poetry); S. BRENT PLATE, BLASPHEMY: ART THAT OFFENDS 94–95 (2006) (featuring an illustration of Prophet Muhammad before the Kaaba in Mecca from the *Siyer-i Nebi* [a fourteenth-century Ottoman epic poem narrating the life of Prophet Muhammad] as well as an illustration of the Prophet’s ascension from Nizami Ganjavi’s *Khamsa*); see also MILSTEIN ET AL., *supra* note 105, at XXXII [Ms. K.] (illustrating a prophet [most probably Muhammad] in a mosque); THE ARTS OF ISLAM, *supra* note 105, at 274 (discussing the *Siyer-i Nebi*); *id.* at 275 fig.320 (showing the Prophet Muhammad visiting the Kaaba); *id.* at 277 fig.322 (showing the Prophet’s miraculous journey from Mecca to the Al-Aqsa Mosque); Sevgi Kutluay, *Siyer-i Nebi* (*Biography of the Prophet*), MUSEUM WITH NO FRONTIERS: DISCOVER ISLAMIC ART, https://islamicart.museumwnf.org/database_item.php?id=object;ISL;tr;Mus01;30;en&cp (last visited Nov. 4, 2021).

¹¹⁰ See MILSTEIN ET AL., *supra* note 105, at XXXII [Ms. T-4.] (illustrating Muhammad’s return from the Miraj); *id.* at XXXIII [Ms. T-5.] (illustrating soldiers presenting to Muhammad the severed head of Abu Jahl); *id.* at IX [Ms. B.] (illustrating Muhammad on the Miraj); *id.* at XLII (illustrating a monk recognizing Muhammad’s prophetic nature); *id.* at XII [Ms. C.] (illustrating Muhammad praying in the Masjid al-Aqsa); see also B.W. ROBINSON ET AL., ISLAMIC PAINTING AND THE ARTS OF THE BOOK 168, 216 (1976).

¹¹¹ See, e.g., *File: Muhammad Destroying Idols - L’Histoire Merveilleuse en Vers de Mahomet BNF.jpg*, https://commons.wikimedia.org/wiki/File:Muhammad_destroying_idols_-_L%27Histoire_Merveilleuse_en_Vers_de_Mahomet_BNF.jpg.

¹¹² al-Alwani, *supra* note 27, at 5–6.

the centuries.¹¹³ Furthermore, the Caliphs engaged in extensive discussions on the protection of peoples of different faith, buildings of worship, and artifacts of different religions.¹¹⁴ Likewise, in the sphere of music al-Ghazali asserts that there are no authentic traditions specifically banning music but rather that “music was practiced during the lifetime of the Prophet.”¹¹⁵ To claim that cultural treasures are not protected under the Sharia, therefore, is contrary to Islamic practice throughout the centuries. As Dr. Abd-ur-Razzak Guessoum notes at the Doha Conference of the Ulama, “if statues were prohibited by Islam, the scholars of al-Azhar would not have allowed Abu Simbel in southern Egypt’s Nubia, the treasure of Tutankhamun or the solar barques to be saved[.]”¹¹⁶

D. To Refer or Not to Refer to the Sharia?

1. Hesitation to Refer to the Sharia

International bodies are generally hesitant to refer to Islamic law, its sources, and applicable *fiqh*, and they are equally hesitant to clarify the extent to which they are willing and able to consider Islamic law, even in cases involving disputes between Muslim states or involving Muslim individuals.¹¹⁷ The best example of such lost opportunity is arguably the *Al Mahdi* case.¹¹⁸ Al Mahdi was tried by the International Criminal Court (ICC) and charged under Article Eight, Section 2(e)(iv) of the ICC statute to nine years of imprisonment for planning and overseeing the attacks against mausolea and mosques in Timbuktu, Mali.

¹¹³ See generally SHEILA S. BLAIR & JONATHAN M. BLOOM, THE ART AND ARCHITECTURE OF ISLAM: 1250–1800 165–182 (1994); ANTHONY WELCH & STUART CARY WELCH, ARTS OF THE ISLAMIC BOOK: THE COLLECTION OF PRINCE SADRUDDIN AGA KHAN 19 (1982); Stephen Vernoit, *The Visual Arts in Nineteenth-Century Muslim Thought*, in ISLAMIC ART IN THE 19TH CENTURY: TRADITION, INNOVATION, AND ECLECTICISM 19 (Doris Behrens-Abouseif & Stephen Vernoit eds., 2006); JOHN L. ESPOSITO, THE ISLAMIC WORLD: ABBASID CALIPHATE-HISTORIANS 48, 50, 52 (2004); ABDULWAHAB MEDDEB, ISLAM AND THE CHALLENGE OF CIVILIZATION 139 (2013); SHEILA R. CANBY, ISLAMIC ART IN DETAIL 32 (2006); THE GROVE ENCYCLOPEDIA OF ISLAMIC ART AND ARCHITECTURE 182–83 (Jonathan M. Bloom & Sheila S. Blair eds., 2009).

¹¹⁴ al-Alwani, *supra* note 27, at 6–7 (citing SUBHI AL-SALEH 666–69 (Ahkam Ahl al-Thimamah ed., 1961)) (referring to a passage by Ibn Qayyim al-Jawziyyah).

¹¹⁵ Al-Atawneh, *supra* note 64, at 402; see also Lois Ibsen al Faruqi, *Music, Musicians and Muslim Law*, 17 ASIAN MUSIC 3, 3, 9 (1985) (noting a general “apprehension of the effects that music could have on Muslim society in general, on its individual members and even on the performance of Islamic religious duties”) (referring to Ibn Taymiyyah (1966)).

¹¹⁶ Guessoum, *supra* note 75, at 60, 62.

¹¹⁷ See *supra* text accompanying note 44.

¹¹⁸ Prosecutor v. Al Mahdi, ICC-01/12-01/15, Confirmation of Charges (Mar. 24, 2016) [hereinafter *Al Mahdi Charges*], https://www.icc-cpi.int/CourtRecords/CR2016_02424.PDF; Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment (Sept. 27, 2016) [hereinafter *Al Mahdi Judgment*], https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF.

This case has already attracted a lot of commentary as it was the first time that an indictment for war crimes was solely based on attacks against cultural heritage.¹¹⁹ The fact that the crimes were committed under religious motives was never disputed.¹²⁰ Al Mahdi was himself a *jihadi*, recognized as “the most competent and prominent person in Timbuktu when it came to being knowledgeable in religious matters[,]” according to the prosecutor’s charges.¹²¹ He was a member of the local Tuareg *jihadi* organization, Ansar Dine (an organization collaborating with the local Al-Qaeda branch), and appointed head of the local morality brigade (*Hisbah*).¹²² The attacks he oversaw against religious sites in Timbuktu were justified under the banner of the Sharia. As the documents of the ICC proceedings reveal, Al Mahdi conducted research on the permissibility of mausolea under Islamic law and even “wrote the sermon on the[ir] destruction . . . which was read at the Friday prayer, on the eve of the launch of the attack.”¹²³ He provided a response to journalists explaining the necessity of the attacks by reference to religious ignorance and the prohibition of idolatry and heresy.¹²⁴ From a procedural perspective, surely the fact that the defendant pled to the charges from the outset did not allow for more extensive elaboration of Islamic law.¹²⁵ As Badar and Higgins have argued, however, the

¹¹⁹ See Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336, 356–57, 386–88 (2016); Marina Lostal, *The Misplaced Emphasis on the Intangible Dimension of Cultural Heritage in the Al Mahdi Case at the ICC*, 1 INTER GENTES 45, 48 (2017). See generally, Badar & Higgins, *supra* note 82, at 504; Paige Casaly, *Al Mahdi Before the ICC: Cultural Property and World Heritage in International Criminal Law*, 14 J. INT’L CRIM. JUST. 1199, 1212, 1214 (2016); Sebastian A. Green Martinez, *Destruction of Cultural Heritage in Northern Mali: A Crime Against Humanity?*, 13 J. INT’L CRIM. JUST. 1073, 1076 (2015).

¹²⁰ This was recognized by the Chamber of the ICC in the *Al Mahdi* judgment. *Al Mahdi* Judgment, *supra* note 119, ¶ 31 (noting the *Hisbah* planned and executed the destruction of the monuments in collaboration with Al-Qaeda in the Islamic Maghreb [AQIM]); *id.* ¶ 81 (“Lastly, the Chamber notes that the crime was committed for religious motives.”); *cf.* Badar & Higgins, *supra* note 82, at 504–05.

¹²¹ See *Al Mahdi* Charges, *supra* note 119, ¶ 45; *Al Mahdi* Judgment, *supra* note 119, ¶ 9 (“Mr Al Mahdi has a thorough knowledge of the Koran and gave lectures as an expert on religious matters.”); *id.* ¶ 31 (noting Ansar Dine established “a local government, which included an Islamic tribunal, an Islamic police force, a media commission and a morality brigade[.]” and that the *Hisbah* planned and executed the destruction of the monuments in collaboration with the AQIM).

¹²² See *Al Mahdi* Charges, *supra* note 119, ¶¶ 3, 5; *Al Mahdi* Judgment, *supra* note 119, ¶ 31.

¹²³ See *Al Mahdi* Charges, *supra* note 119, ¶¶ 19–20; *Al Mahdi* Judgment, *supra* note 119, ¶ 37.

¹²⁴ *Al Mahdi* Charges, *supra* note 119, ¶ 20; *Al Mahdi* Judgment, *supra* note 119, ¶ 38 (“What you see here is one of the ways of eradicating superstition, heresy and all things or subterfuge which can lead to idolatry.”).

¹²⁵ See Press Release, ICC, *Al Mahdi* Case: Accused Makes an Admission of Guilt at Trial Opening (Aug. 22, 2016), <https://www.icc-cpi.int/test-query1>. The defense team, however, is reported to have said the acts reflected a “clash between two world views” and were “part of a broader struggle over the meaning of Islam[.]” Badar & Higgins, *supra* note 82, at 488 (noting the trial was truncated due to the guilty plea). *But see* Gerstenblith, *supra* note 120, at 387 (noting, however, that the ICC prosecutor found “this case [was] not about determining who was right or wrong from a religious point of view”).

Chamber could have opted for a more elaborate discussion on the Islamic law standpoint, while the experts could have shed light on the broader question of targeting cultural property by Islamic fundamentalists.¹²⁶

At least three possible reasons can be advanced for this hesitation. The first may be the complexity of Islamic law. The rich and diverse literature of the Sharia creates a variety of problems. For one, the lack of uniformity in legal solutions necessarily leads to disunity in the formulation and application of the law, which is especially visible in criminal matters.¹²⁷ Likewise, the “fluidity of . . . concepts, techniques and structures” in Islamic law may lead to judicial instability¹²⁸ as well as legal uncertainty, while the existence of strict hierarchies in assessing which category encompasses particular conduct (*haram*, permissible, neutral, etc.) may also compel jurists to resort to legal tricks to remain within the ambit of formally permissible legal conduct.¹²⁹ It is no wonder that Article 1(1) of the 1980 Rome Convention¹³⁰ does not generally encompass “Islamic law” even though it is the highest law of most Muslim-majority legal systems because of its indeterminate status¹³¹ and because in recent years Islamic finance instruments have been governed by both Islamic and English law.¹³² In addition, while the *fiqh* is flexible enough to embrace novel approaches to contemporary matters,¹³³ the Islamic legal tradition is embroiled in fervent debates as to the extent one can revise the *fiqh* in a manner that allows scholars to impede the effects of modernization.

Islamic law contains sufficient tools (*usul*) that are accepted by all schools and could allow, eventually, modernisation. While all these tools are sanctioned

¹²⁶ Badar & Higgins, *supra* note 82, at 512–13, 515.

¹²⁷ See Ilias Bantekas, *The Disunity of Islamic Criminal Law and the Modern Role of Ijtihād*, 9 INT’L CRIM. L. REV. 651, 651 (2009).

¹²⁸ GLENN, *supra* note 29, at 210.

¹²⁹ *Id.* at 212–13.

¹³⁰ The 1980 Convention on the Law Applicable to Contractual Obligations (Rome Convention) was consolidated several times and then transformed into the Rome I Regulation. See Regulation (EC) No 593/2008 of the European Parliament and of the Council of June 17, 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177/6).

¹³¹ Beximco Pharms. Ltd. v. Shamil Bank of Bahrain E.C. [2004] EWCA (Civ) A3/2003/1952 [¶ 29] (Eng.); Musawi v. R.E. Int’l (UK) Ltd. [2007] EWHC (Ch) 2981.

¹³² See Sanghi Polyesters Ltd. (India) v. Int’l Inv. KCFC (Kuwait) [2000] 1 Lloyd’s Rep. 480 (QB (Comm)) (Eng.); Inv. Dar Co. KSSC v. Blom Devs. Bank Sal [2009] EWHC (Ch) 3545; Ilias Bantekas, *Transnational Islamic Finance Disputes: Towards a Convergence with English Contract Law and International Arbitration*, 12 J. INT’L DISP. SETTLEMENT 1, 1 (2021).

¹³³ Cf. HALLAQ, *supra* note 25, at 115–16 (discussing Islamic law in the age of nation-states, arguing that “the fact of the matter is that even this sphere of law underwent structural and fundamental changes that ultimately resulted in its being severed from both the substance of classical religious law and the methodology by which this law had operated”).

under one or more schools and doctrines, they are deeply contradictory—as in the case of the ability to extract rules by imitating traditions and adherence to established authority (*taqlid*),¹³⁴ and in the case of the opposite ability to engage in novel individual reasoning (*ijtihad*) that allows for constructive reform.¹³⁵ Even in the case of those who agree on at least the permissibility of *ijtihad*,¹³⁶ jurists disagree over the qualifications of those who are actually competent to practice it (i.e., the qualifications of the *mujtahid*). Principles such as the preservation of the public interest (*istislah/maslaha*), for example, confer substantial discretion to jurists¹³⁷ and may be used as arguments either in favor of¹³⁸ or against the need to safeguard cultural heritage.

A second reason may be the fact that any debates on cultural heritage law and limits of acceptable artistic creativity under Islamic law are necessarily concomitant with tensions under international human rights legal standards. Freedom of speech is the obvious area of tension as it affects creative freedom. Indicatively, the Cairo Declaration on Human Rights in Islam, drafted under the auspices of the OIC in 1993, provides that expression is acceptable insofar as it remains within the Sharia's ambit.¹³⁹ These limitations, in turn, are much broader than what is acceptable today under international human rights standards given the persistence of offenses such as blasphemy and apostasy under Islamic law.¹⁴⁰ There are other areas where tensions exist, especially in relation to gender

¹³⁴ See ESPOSITO, *supra* note 26, at 261–62.

¹³⁵ HALLAQ, *supra* note 25, at 27 (providing that *ijtihad* is the process of reasoning in the case of Quranic and Prophetic statements with “inferences, both linguistic and legal” as a “best guess of what . . . might be the law pertaining to a particular case[.]” and noting that “Islamic law is . . . overwhelmingly the result of *ijtihad*”); see ANVER M. EMON, ISLAMIC NATURAL LAW THEORIES 12 (2010) (defining *ijtihad* as “renewed interpretation, on matters already addressed by historical precedent”); see also GLENN, *supra* note 29, at 213; BASSIOUNI, *supra* note 23, at 26–27. See generally TAHA JABIR AL-ALWANI, ISLAMIC THOUGHT: AN APPROACH TO REFORM 11 (2006); ABDULLAHI AHMED AN-NA‘IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW (1990); TARIQ RAMADAN, RADICAL REFORM 22 (2009).

¹³⁶ See ESPOSITO, *supra* note 26, at 258–59; see also F.E. Vogel, *The Closing of the Door of Ijtihad and the Application of the Law*, 10 AM. J. ISLAMIC SOC. SCIS. 396 (1993) (discussing the “closing” of the doors to *ijtihad* in the twelfth century CE).

¹³⁷ Cf. Rosen, *supra* note 42, at 239–40.

¹³⁸ Cf. Alshehaby, *supra* note 51, at 300 (referring to Araki); Araki, *supra* note 73, at 34, 45 (“[T]he items which [are] obligatory to protect and forbidden to neglect include useful antiquities of major moral or material benefit that are conventionally held to be in the public interest in view of the overall benefits they bring.”).

¹³⁹ Cairo Declaration on Human Rights in Islam art. 22, *adopted* Aug. 5, 1990, <http://hrlibrary.umn.edu/instree/cairodeclaration.html> (“Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari’ah. . . . Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari’ah.”).

¹⁴⁰ See Anver M. Emon, *On the Pope, Cartoons, and Apostates: Shari’a 2006*, 22 J.L. & RELIGION 303, 303–21 (2007); Intisar A. Rabb, *Negotiating Speech in Islamic Law and Politics: Flipped Traditions of*

and women's rights, minorities, non-discrimination, and equality.¹⁴¹ Generally speaking, women artists, minority artists, and other vulnerable groups suffer from persistent types of discrimination in the Muslim world precisely because of questions of incompatibility between the states' constitutional laws (providing for equality and non-discrimination) and interpretations of Islamic law that view women as inferior. For example, male-guardianship laws in several Gulf countries, although relaxed in some areas, significantly affect women artists' right to receive education in the arts or become professional artists, curators, musicians, or actresses as official approval by their guardian is still formally needed. It is still difficult today for women to receive fine arts education,¹⁴² open galleries, practice the arts, or send their applications to a film contest if their guardian disagrees, further affecting women's ability to perform. Impeding women and vulnerable groups from taking part in cultural life, even on cultural or religious grounds, is therefore a breach of standards set forth by International Covenant on Economic, Social and Cultural Rights.¹⁴³ These laws, however, are increasingly open to discussion and debate and seen as backwards even within Muslim societies.

A third issue that adds to the complexity may be conflicting interpretations, which are not restricted to the spheres of conflicting doctrines and schools of thought. With respect to Muslim minority rights, problems related to hierarchy and co-existence between conflicting Islamic rules and state laws unavoidably will exist in modern Muslim states¹⁴⁴ as well as non-Muslim states. Furthermore, problems of hierarchy and co-existence may also arise when Muslim laws are applied in parallel with tribal or customary laws. These problems are especially

Expression, in ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 26, at 144–67; Irmgard Marboe, *Freedom of Expression: Theory and Practice in the Islamic Realm*, in RELIGION AND INTERNATIONAL LAW (Robert Uerpman-Witzack et al. eds., 2018); M. Christian Green, *Between Blasphemy and Critique: Freedom of Religion and Freedom of Speech*, 29 J.L. & RELIGION 176, 176–96 (2014). *See generally* ABDULLAH SAEED & HASSAN SAEED, FREEDOM OF RELIGION, APOSTASY AND ISLAM 1–3 (2004); Abdullahi Ahmed An-Na'im, *The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts*, 11 EMORY INT'L L. REV. 304, 304–05 (1997).

¹⁴¹ *See generally* Abdullahi Ahmed An-Na'im, *Islamic Law, International Relations, and Human Rights: Challenge and Response*, 20 CORNELL INT'L L.J. 317, 318; MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW (2003).

¹⁴² *See, e.g.*, Siobhan Hegarty, 'I Am My Own Guardian': Feminist Saudi Street Artist Saffaa Protests Sexist Law, ABC NEWS (Oct. 7, 2017, 6:00 PM), <https://www.abc.net.au/news/2017-10-08/feminist-artist-protests-saudi-arabias-male-guardianship-law/9022770>.

¹⁴³ *Cf.* Sital Kalantry et al., *Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR*, 32 HUM. RTS. Q. 253, 268 (2010) (discussing non-discrimination and equal treatment).

¹⁴⁴ *See* Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379, 388–89 (2006).

visible in Western Africa, central Asia, and South Asia,¹⁴⁵ where local traditions maintain their validity. For example, in *Al-Mahdi*, at the time of the commission of the crimes, tribal laws were also applicable in Mali.¹⁴⁶

Moreover, the application of the Sharia in Muslim states has been set aside in many cases by the transplant of European laws, whether through colonialism¹⁴⁷ or self-imposed processes.¹⁴⁸ For Muslim minorities living in Europe, in particular, the application of the Sharia is mostly optional, even for personal matters.¹⁴⁹ The pure classical version of the Sharia as formed during the times of Prophet Muhammad therefore cannot and does not exist in the context of a modern (Muslim) state.¹⁵⁰ Religious laws, in practice, always interact with state laws to varying degrees. Even official Sharia-compliant states, as is the case with Saudi Arabia and Qatar, have adopted elaborate civil codes¹⁵¹ and common law principles in commercial matters.¹⁵²

A fourth reason for which references are held to a minimum may also be the problem of fundamentalism and the confusion between mainstream and non-

¹⁴⁵ GLENN, *supra* note 29, at 211.

¹⁴⁶ MARINA LOSTAL, EXPERT REPORT – REPARATIONS PHASE: THE PROSECUTOR V. AHMAD AL FAQI AL MAHDI: ICC-01/12-01/15 33 (May 3, 2017); *see also* Lostal, *supra* note 120, at 50 (noting Timbuktu is sometimes called the “City of the 333 (Sufi) Saints” and that “[i]t was the so-called ‘idolatrous’ nature of these mausoleums and mosques that led to the destruction of several of them between May and July 2012”).

¹⁴⁷ COULSON, *supra* note 23, at 149. A concrete example is Section 377 of The Indian Penal Code that makes “unnatural intercourse” a criminal offense. The Indian Penal Code, 1860, § 377.

¹⁴⁸ *See* Ilias Bantekas, *The Globalization of English Contract Law: Three Salient Illustrations*, 137 L.Q. REV. 130 (2021) (explaining how many states, including those in the Gulf Cooperation Council [GCC] and their special economic zones, have adopted English law).

¹⁴⁹ *See* Molla Sali v. Greece, App. No. 20452/14, ¶ 12 (June 18, 2020), [http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-6724322-8964240&filename=Grand%20Chamber%20judgment%20in%20the%20case%20Molla%20Sali%20v.%20Greece%20\(just%20satisfaction\).pdf](http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-6724322-8964240&filename=Grand%20Chamber%20judgment%20in%20the%20case%20Molla%20Sali%20v.%20Greece%20(just%20satisfaction).pdf) (concerning the compulsory application of Sharia law to inheritance matters in Greece until 2018). *See generally* Iakovos Iakovidis & Paul McDonough, *The Molla Sali Case: How the European Court of Human Rights Escaped a Legal Labyrinth While Holding the Thread of Human Rights*, OXFORD J.L. & RELIGION 427, 427–446 (2019).

¹⁵⁰ *See generally* ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 26, at 52–81; BADERIN, *supra* note 142, at 38; BASSIOUNI, *supra* note 23, at 81.

¹⁵¹ *See* ILIAS BANTEKAS & AHMED AL AHMED, THE CONTRACT LAW OF QATAR (forthcoming 2022) (showing that Qatari contract law is not only predicated on the civil law tradition, but is also moving away from its Egyptian influences).

¹⁵² Emon, *supra* note 26, at 68 (“Islamic law today is immersed within a complex, bureaucratic state system, in which Islamic law is a partial source, if even that, for legal systems that are primarily based on European models of civil law and governance.”); BASSIOUNI, *supra* note 23, at 81 (discussing the secularization of modern Muslim states); Eleni Polymenopoulou, *Human Rights in the Six Arab States of the Gulf Cooperation Council (GCC): From Vision to Reality*, 3 INT’L COMPAR., POL’Y & ETHICS L. REV. 929, 953 (2020) (discussing the “[e]mergence of a [p]arallel [l]egal [system]” in the countries of the GCC and noting that the legal system of Gulf States as a whole is *not* governed by the Sharia); Ilias Bantekas, *Transplanting the Unidroit Contract Principles into the Qatar Financial Center: A Fresh Paradigm for Wholesale Legal Transplants?*, 26 UNIF. L. REV. 1, 6 (2021).

mainstream approaches of Islamic law. *Hadiths* on the prohibition of the arts, for example, have been used by conservative movements within Islam to maintain prohibitions of arts and music on purely religious grounds. An example is the religious edict issued by Mullah Omar (i.e., edict allowing destruction of the Bamiyan Buddhas).¹⁵³ In addition to the extreme violence and brutality inflicted upon religious minorities, such as Shi'as, Christians, and Yazidis,¹⁵⁴ ISIS, Al-Qaeda, and other *jihadi* organizations have not spared the right to education nor the right to participate in cultural life in a broader sense. It has been reported, for instance, that in 2014 militants requested schools in Mosul to stop teaching music and the arts¹⁵⁵ and that ISIS also restricted music in weddings, musical events, and traditional ceremonies in Syria.¹⁵⁶ Branches of ISIS in Africa and South Asia also showed themselves capable of targeting culture, including the demolition of Sufi shrines in Timbuktu (as in the case of Ansar Dine)¹⁵⁷ and the closing down of the once-renowned *Festival du Desert*.¹⁵⁸ In Nigeria, cultural lifestyles have been affected because of extreme instability, insecurity, and displacements in the areas controlled by Boko Haram.¹⁵⁹ In Mogadishu, Somalia, Al-Shabab has banned all radio stations from playing music and has mandated the cultivation and display of beards by men;¹⁶⁰ in Peshawar, Pakistan, music is largely seen as forbidden under the Sharia, and

¹⁵³ See Manhart, *supra* note 76, at 387–88 (referring to Mullah Omar's edict and providing a short excerpt); see also Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT'L L. 619, 624 (2003) (citing Kamal Houssain (Special Rapporteur on the Situation of Human Rights in Afghanistan), *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World*, ¶ 48, U.N. Doc. E/CN.4/2001/43 (Mar. 9, 2001)).

¹⁵⁴ Mohamed Elewa Badar, *The Road to Genocide: The Propaganda Machine of the Self-Declared Islamic State (IS)*, 16 INT'L CRIM. L. REV. 361, 361–411 (2016) (noting that ISIS and other *jihadis* have been spreading hateful propaganda about the sanctioning of *shirk* under the Sharia, as well as the practice of *takfir*—the excommunication of a person as a disbeliever, or 'kafir'—under the goal of eliminating other religious groups); Mohamed Badar et al., *The Radical Application of the Islamist Concept of Takfir*, 31 ARAB L.Q. 134, 134–62 (2017).

¹⁵⁵ Sarah Cascone, *ISIS Cuts Art, Music, and History Education in Iraq*, ARTNET (Sept. 16, 2014), <https://news.artnet.com/art-world/isis-cuts-art-music-and-history-education-in-iraq-103714>.

¹⁵⁶ Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, Rep. of the Hum. Rts. Council on Its Twenty-Seventh Session, ¶ 20, U.N. Doc. A/HRC/27/CRP.3 (Nov. 14, 2014); Qureshi, *supra* note 2, at 70 (asserting that “armed conflict destroys traditional festivals and cultural practices and also leaves negative impacts on the emotional, psychological, and cultural aspects of society”).

¹⁵⁷ See Al Mahdi Charges, *supra* note 119, ¶ 34.

¹⁵⁸ Larry Rohter, *Musical Nomads, Escaping Political Upheaval*, N.Y. TIMES (July 30, 2013), <https://www.nytimes.com/2013/07/31/arts/music/musical-nomads-escaping-political-upheaval.html>.

¹⁵⁹ Cf. Chinwe Julie Abara, *The Challenges of Safeguarding and Securing Cultural Heritage Materials During Violent Conflict in Nigeria*, in ACTAS DEL SEGUNDO CONGRESO INTERNACIONAL DE BUENAS PRÁCTICAS EN PATRIMONIO MUNDIAL 375–84 (2015).

¹⁶⁰ FREEMUSE, CHALLENGES AND EFFECTS OF TERROR ON ARTS AND CULTURE: STAKEHOLDER SUBMISSION, <https://www.ohchr.org/sites/default/files/Documents/Issues/RuleOfLaw/NegativeEffectsTerrorism/Freemuse.pdf>.

attacks on Sufi shrines and music occur regularly;¹⁶¹ and even in Karnataka, India, Suhana Syed, a female singer and winner of a music contest, received death threats and warnings by local imams for being “anti-Sharia[.]”¹⁶²

2. *The Benefits of Referring to the Sharia*

Judges and experts within international institutions who deal with accountability for cultural-rights violations and the destruction of heritage may be confronted with a dilemma. Should judges and experts refer to Islamic law in a case involving Muslim cultural heritage, Sharia-based motivations, or Muslim applicants? If they do, is it a good idea? This dilemma is even more prominent since the composition of international bodies is generally multi-cultural in that it includes international judges who represent all legal traditions, therefore encompassing the Muslim legal tradition. Moreover, the statutes of international courts and tribunals render Islamic law directly relevant to transnational adjudication. By way of illustration, the ICJ is bound to apply not only international treaties and customary law, but also “the general principles of law recognized by civilized nations.”¹⁶³ The ICC statute also contains an explicit provision under which the Court is obliged to take into account all legal traditions of the world, especially those more pertinent in a particular case.¹⁶⁴

In matters specifically concerning Muslim heritage and Muslim populations, it is evident that references to Islamic law would also be pertinent. For example, such an eventuality might well arise in the examination of issues related to the destruction of Syrian and Iraqi heritage,¹⁶⁵ and could include an examination of humanitarian law principles in Islamic jurisprudence.¹⁶⁶ Relevant references

¹⁶¹ *Id.* ¶ 40; see also Rohini Swamy, *Radical Islamists Troll, Threaten, Abuse Muslim Woman for Singing Hindu Devotional Song*, INDIA TODAY (Mar. 8, 2017, 3:34 AM), <https://www.indiatoday.in/fyi/story/suhana-syed-muslim-woman-abuse-threaten-hindu-devotional-song-964585-2017-03-08>.

¹⁶² SRIRAK PLIPAT, *THE STATE OF ARTISTIC FREEDOM* 40 (2018).

¹⁶³ Statute of the International Court of Justice, art. 38(1)(c); see also Eleni Polymenopoulou, *Cultural Rights in the Case-Law of the International Court of Justice*, 27 LEIDEN J. INT’L L. 447, 447–64 (2014) (discussing the case of the Bosnian genocide).

¹⁶⁴ Rome Statute of the International Criminal Court, art. 21(1) (“The Court shall apply: (a) In the first place, this Statute . . . ; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law . . . ; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world”); see Mohamed Elewa Badar, *Islamic Law (Sharia) and the Jurisdiction of the International Criminal Court*, 24 LEIDEN J. INT’L L. 411, 411–33 (2011); also EMILIA JUSTYNA POWELL, *ISLAMIC LAW AND INTERNATIONAL LAW: PEACEFUL RESOLUTION OF DISPUTES* 114 (2019).

¹⁶⁵ See Caitlin V. Hill, *Killing a Culture: The Intentional Destruction of Cultural Heritage in Iraq and Syria Under International Law*, 45 GA. J. INT’L & COMPAR. L. 191, 193–215 (2016); see also Gerstenblith, *supra* note at 120, at 372, 385–86.

¹⁶⁶ *Cf.* Bassiouni, *supra* note 23, at 159, 251–52 (noting violations of IHL have been long recognized under

could also be pertinent even where the perpetrators are not Muslim, as in the example of the destruction of Palestinian heritage,¹⁶⁷ the Bosnian Genocide during the war in the former Yugoslavia,¹⁶⁸ and even the Khmer Rouge's destruction of Cham cultural property in Cambodia.¹⁶⁹ In these cases, references to Islamic law could be useful *inter alia* in reinforcing the cultural and religious legitimacy of the claims in a spirit of inter-cultural and inter-religious dialogue.

A better understanding of Islamic law, therefore, could further facilitate better collaboration with Muslim countries and even communication with NSAs who are acting in the Muslim world and are not bound by humanitarian law—yet may be keen to act upon Islamic law.¹⁷⁰ A better understanding of Islamic law could also be among the cultural factors to be considered in heritage management and safeguarding of heritage. In fact, following 9/11, religious and cultural sensibilities are increasingly taken into account, not only in military operations,¹⁷¹ but also in archaeological excavations and operations concerning the preservation or safeguarding of cultural heritage.¹⁷² Inversely, targeted

the Sharia); Bennoune, *supra* note 24, at 606 (arguing “the history of contemporary international humanitarian law must be revised to include the contributions made by Islamic civilization”); James Cockayne, *Islam and International Humanitarian Law: From a Clash to a Conversation Between Civilizations*, 84 INT’L REV. RED CROSS 597 (2002). See generally MAJID KHADDURI, *THE ISLAMIC LAW OF NATIONS: SHAYBANI’S SIYAR* 4 (1966).

¹⁶⁷ See, e.g., Human Rights Council Res., U.N. Doc. A/HRC/RES/10/19, at ¶ 3 (Mar. 26, 2009) (demanding that the occupying power, Israel, stop the targeting of civilians and the systematic destruction of the cultural heritage of the Palestinian people).

¹⁶⁸ See Theodor Meron, *The Protection of the Cultural Property in the Event of an Armed Conflict Within the Case-Law of the International Criminal Tribunal for the Former Yugoslavia*, 57 MUSEUM INT’L 41, 41–60 (2005); see also Micaela Frulli, *Advancing the Protection of Cultural Property Through the Implementation of Individual Criminal Responsibility: The Case-Law of the International Criminal Tribunal for the Former Yugoslavia*, 15 ITALIAN Y.B. INT’L L. 195, 195 (2005).

¹⁶⁹ CAROLINE EHLERT, *PROSECUTING THE DESTRUCTION OF CULTURAL PROPERTY IN INTERNATIONAL CRIMINAL LAW: WITH A CASE STUDY ON THE KHMER ROUGE’S DESTRUCTION OF CAMBODIA’S HERITAGE* 182 (2014); cf. ISLAM AND INTERNATIONAL CRIMINAL LAW AND JUSTICE 1–2 (Tallyn Gray ed., 2018).

¹⁷⁰ See also Alex P. Schmid, *Challenging the Narrative of the “Islamic State”*, 6 TERRORISM & COUNTER-TERRORISM STUD. (2015) (referring to the persuasive letter prepared by a group of 152 leading Islamic scholars and addressed to ISIS leader Abu Bakr al Baghdadi “outlining what they consider to be errors and violations of Islamic and international laws committed by the leaders and followers of ISIS”); cf. Cockayne, *supra* note 167, at 614–15 (discussing interventions by Islamic delegates to clarify the concept of ‘combatant’ in discussions with PLO and Algerian groups); Alessandro Chechi, *Non-State Actors and Cultural Heritage: Friends or Foes?*, 19 ANUARIO DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD AUTONOMA DE MADRID 457, 468–69 (2015) (noting the potentially positive role of NSAs in protecting cultural heritage).

¹⁷¹ See Iran: *Dialogue on Islam and International Humanitarian Law in Qom*, INT’L COMM. RED CROSS (Jan. 12, 2006), <https://www.icrc.org/en/doc/resources/documents/feature/2006/ih1-islam-event-011206.htm>.

¹⁷² See Salam Al Qantar et al., *Responding to a Cultural Heritage Crisis: The Example of the Safeguarding the Heritage of Syria and Iraq Project*, 78 NEAR E. ARCHAEOLOGY 154, 155 (2015) (“[T]he next stage in the archaeological engagement with cultural heritage . . . has embraced a more community-centered approach over the past two decades in sympathy with theoretical developments in human rights law . . .”).

archaeologists, cultural experts, museum experts, and other “cultural heritage defenders”¹⁷³ are seen as victims of cultural rights violations. Ultimately, an approach that takes into account Islamic law could entail better and more effective protection of cultural heritage and the arts in the Arab-Muslim world.

IV. LOOKING AT MODERN MUSLIM STATE PRACTICE

In Muslim-majority states, Sharia is a source of law. In Sharia-compliant countries, in particular, Sharia is recognized in the state constitution as the *primary* legal source.¹⁷⁴ This means that in certain matters, Sharia may, at least in theory, set aside other rules (as is the case especially in personal and criminal laws). Today, Muslim states following Sunni Islam generally adhere to one of the four major schools of thought (Hanafi, Maliki, Shafi, or Hanbali),¹⁷⁵ and Shiites generally adhere to other schools.¹⁷⁶ Adherence to an official school is recognized either expressly or *de facto* as the official state doctrine.¹⁷⁷ In practice, however, movements within Islam as well as local traditions, usages (*urf*), and customs (*adat*) are also influential—for example, Wahhabism in Saudi Arabia.¹⁷⁸ This means that jurists within a Muslim state are usually instructed to resolve issues based on one school of thought, and that the courts, primarily in personal matters, follow in principle the jurisprudence of a specific school.¹⁷⁹

¹⁷³ See Bennoune *supra* note 15, ¶¶ 68–75.

¹⁷⁴ See QATAR CONST. art. 1 (“Its religion is Islam and Shari’a law shall be a main source of its legislations.”); see also SUDAN CONST. art. 5(1) (“Sources of Legislation[:] Nationally enacted legislation . . . shall have as its sources of legislation Islamic Sharia and the consensus of the people.”); Clark B. Lombardi, *Designing Islamic Constitutions: Past Trends and Options for a Democratic Future*, 11 INT’L J. CONST. L. 615, 615–17 (2013) (discussing what he calls “Sharia Guarantee Clauses (SGCs)” in Muslim states’ constitutions and noting that the principle that “state law should be consistent with *sharia*” has a long pedigree in Islamic political thought); Polymenopoulou, *supra* note 153, at 934–37 (discussing Gulf States’ constitutions).

¹⁷⁵ For example, Algeria follows the Maliki school, yet in some regions Ibadī Islam is applied. Emon, *supra* note 26, at 59. Also, some Muslim states follow lesser-known schools—for instance, most Omanis adhere to Ibadī Islam. *Id.*

¹⁷⁶ For example, take the Twelvers, Jafaris, and Zayidis. See COULSON, *supra* note 23, at 103–19.

¹⁷⁷ See generally COULSON, *supra* note 23, at 86, 88–89, 101 (discussing unity, diversity, and “mutual tolerance” among the schools and referring to a ninth-century case, known as the *House of the Elephant*, in which the outcome of litigation at each stage of the process depended on the affiliation of the *qadis* to one school or another); Emon, *supra* note 26, at 62 (noting the authority of the *qadi*’s ruling in a case where the husband and wife belonged to different schools).

¹⁷⁸ ESPOSITO, *supra* note 26, at 119–20, 231; BASSIOUNI, *supra* note 23, at 46; see also Emon, *supra* note 26, at 67; Andrew M. Bennett, *Islamic History & Al-Qaeda: A Primer to Understanding the Rise of Islamist Movements in the Modern World*, 3 PACE INT’L L. REV. 316, 340–43 (2013); DAVID COMMINS, *From Wahhabi to Salafi*, in SAUDI ARABIA IN TRANSITION: INSIGHTS ON SOCIAL, POLITICAL, ECONOMIC AND RELIGIOUS CHANGE 151–66 (Bernard Haykel et al. eds., 2015).

¹⁷⁹ The Family Law, No. 22 of 2006, art. 3 (Qatar) (stating as an example that Courts shall apply Hanbali Islamic law).

However, in matters related to arts and culture, at least in states that are more open to Western influences, the Sharia is usually side-lined. This is also presumably why some Muslim thinkers find that the entire sphere of culture and the arts in the Muslim world overemphasizes Western values, downplaying Islamic art and literature.¹⁸⁰ The complexity of the Sharia and the challenging task of accurately interpreting the *fiqh* (or eventually, arguing on the need to reform the *fiqh*) may be among the reasons that cultural policy makers generally refrain from referring to Sharia law. It may be for this reason that a modern, contemporary art scene is developing even in those countries specifying Sharia law as a source of law in their constitution. Qatar is arguably the best example of this evolution. The Qatar Fund for Development has been continuously supporting the UNESCO with substantial contributions.¹⁸¹ The UNESCO office, which serves as the “Cluster Office for Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates, Yemen[,]” is becoming increasingly more active, including in the field of promoting cultural diversity and preventing radicalization,¹⁸² and a new law on the safeguarding of cultural heritage is currently being drafted.¹⁸³ Saudi Arabia, where the government pours billions into the *art* economy,¹⁸⁴ has also been emphasizing the growth of its art sector and cooperation with cultural institutions and bodies around the world. One cannot but be astonished that conservative *ulemas* are advocating in favor of wholesale prohibitions against images and music in cities as modern as Jeddah and Riyadh, condemning provocative artists on blasphemy and apostasy charges,¹⁸⁵ at the same time that Saudi Arabia is leading other Gulf countries in

¹⁸⁰ al-Ghazali, *supra* note 54, at 426 (noting, for example, that “[o]ften there seems to be a deliberate attempt on their part to deny or disregard the universal and perennial spirit animating the literary and artistic masterpieces produced by Muslims” and that “[m]uch is made of the non-Muslim sources or tools which might have been employed by Muslims in their artistic works”).

¹⁸¹ See, e.g., *The Qatar Fund for Development Boosts UNESCO’s Heritage Emergency Fund with US \$2 Million Contribution*, UNESCO (Mar. 2, 2018), <https://whc.unesco.org/en/news/1791>; *Qatar Development Fund Boosts UNESCO Heritage Emergency Fund*, UNESCO (Dec. 12, 2015), <https://en.unesco.org/news/qatar-development-fund-boosts-unesco-heritage-emergency-fund>; *Qatar Hikes Contribution to Unesco*, GULF TIMES (Oct. 6, 2016), <https://www.gulf-times.com/story/516443/Qatar-hikes-contribution-to-Unesco>.

¹⁸² *Gulf States & Yemen*, UNESCO, <https://en.unesco.org/fieldoffice/doha> (last visited Sept. 7, 2021); see also *Preventing Violent Extremism*, UNESCO, <https://en.unesco.org/preventingviolentextremism> (last visited Sept. 7, 2021).

¹⁸³ *QM, UCL Qatar to Develop New Cultural Heritage Law*, GULF TIMES (Oct. 4, 2018), <https://www.gulf-times.com/story/608233/QM-UCL-Qatar-to-develop-new-Cultural-Heritage-Law>.

¹⁸⁴ Danijel Cubelic, *The Creative Kingdom: Economic Reform and Art as a New Space of Islamic Critique in Saudi Arabia*, 27 ZEITSCHRIFT FÜR RELIGIONSWISSENSCHAFT 27, 29 (2019); see also Maha Abdullah Al Senan, *The Worth of Art: The Future of the Art Market in Saudi Arabia*, 4 INT’L DESIGN J. 193 (2018); Suzi Mirgani, *Introduction: Art and Cultural Production in the GCC*, 7 J. ARABIAN STUD. 1, 9 (2017).

¹⁸⁵ Ben Hubbard, *Artist’s Death Sentence Follows a String of Harsh Punishments in Saudi Arabia*, N.Y. TIMES (Nov. 22, 2015), <https://www.nytimes.com/2015/11/23/world/middleeast/saudi-artists-death-sentence->

boosting its entertainment sector and art market. Promotion of the arts in the Kingdom includes, for example, the proliferation of cultural and artistic events and festivals, including the *Red Sea Festival*; the outstanding growth of the film industry, including nominations at the Cannes;¹⁸⁶ sensational contemporary art sold at astronomic prices at Christies Dubai;¹⁸⁷ an upcoming scene of urban-style street art;¹⁸⁸ and even modern feminist art,¹⁸⁹ including graffiti by female artists.¹⁹⁰ Furthermore, Saudi Arabia alone today has a variety of inscriptions in both the World Heritage list and the list for intangible cultural heritage, as well as a number of tentative nominations.¹⁹¹ These nominations include the murals in *Qurayt Al-Faw* in Saudi Arabia (the large-dimension wall paintings and sculptures created in a style that presents important similarities with the Hellenistic tradition, and mosaics “most likely made by Christian artisans who had gained their skill working on the many mosaic programs adoring Byzantine churches in the eastern Mediterranean”).¹⁹²

It is equally important to look specifically for best practices by regional organizations in the Arab-Muslim world fostering the arts, culture, and letters. For example, the ALESCO (the equivalent of UNESCO in the Arab world and that aims at “[p]roviding propitious conditions for the development of education, culture, sciences, the environment, and communication in the Arab World”)¹⁹³ hosted in December 2020 “a coordination meeting that brought together several directors of Arab film festivals and representatives of film institutions to discuss

follows-a-string-of-harsh-punishments.html (discussing Palestinian artist Ashraf Fayadh). See generally Cubelic, *supra* note 185, at 28 (discussing, based on interviews with artists from Saudi Arabia, the application of these laws on Saudi artists); Laith Ulaby, *Music and Mass Media in the Arab Persian Gulf*, 40 MIDDLE E. STUD. ASS'N BULL. 213, 216 (2006) (“Religious and conservative figures have been especially critical of the *American Idol*-type shows, such as *Superstar* and *Star Academy* that have become extremely popular in the Arab world the last few years.”).

¹⁸⁶ See, e.g., Polymenopoulou, *supra* note 153, at 977–78 (referring to *Wadjda*); Deema al-Khudair, *Cinema Investment in Saudi Arabia Set to Hit SR5bn in 2020*, ARAB NEWS (Jan. 29, 2020), <https://www.arabnews.com/node/1619496/saudi-arabia>.

¹⁸⁷ Al Senan, *supra* note 185, at 193.

¹⁸⁸ Farah al-Sharif, *Streets Come to Life in Saudi Arabia's First Graffiti Project*, ARAB NEWS (Mar. 1, 2018), <https://www.arabnews.com/node/1256736/saudi-arabia>.

¹⁸⁹ Mallika Rao, *These Saudi Women Are Turning Feminism into Art*, HUFFPOST, https://www.huffpost.com/entry/saudi-arabian-women-artists_n_7062722 (Dec. 6, 2017).

¹⁹⁰ Hala Tashkandi, *Artist Interweaves Feminist Ideals with Textiles*, ARAB NEWS (Jan. 1, 2019), <https://www.arabnews.com/node/1428771/art-culture>; Tareq al-Thaqafi, *Writing on the Wall: Saudi Graffiti Artists Make Their Mark*, ARAB NEWS (Feb. 20, 2021), <https://www.arabnews.com/node/1812326/saudi-arabia>.

¹⁹¹ *Director-General Celebrates Inscription of the Madâin Sâlih Site on the World Heritage List During Official Visit to the Kingdom of Saudi Arabia*, UNESCO (Mar. 19, 2009), <https://whc.unesco.org/en/news/495>.

¹⁹² ISLAMIC ART AND VISUAL CULTURE: AN ANTHOLOGY OF SOURCES 1–6, 99 (D. Fairchild Ruggles ed., 2011).

¹⁹³ *In Brief*, ARAB LEAGUE EDUC., CULTURAL & SCI. ORG. (Mar. 7, 2019), <http://www.alecso.org/nsite/en/component/content/article/814-who-are-we-v2?catid=63&Itemid=220> (alteration in original).

strategies for mitigating the impact of the COVID-19 pandemic on the industry.”¹⁹⁴ Similarly, the Islamic World Educational, Scientific, and Cultural Organization (ICESCO) has been calling on the international community “to increase their coordination efforts” in the field of culture and the arts, with the aim of “develop[ing] a mutually agreed global artistic system on the role of art in building human civilization and spreading the values of peace.”¹⁹⁵ The ICESCO has been an immense contributor to the preservation and safeguarding of heritage through the establishment of chairs in the fields of heritage, the arts, and literature,¹⁹⁶ as well as the International Center for Arts, ICESCO’s Cultural and Academic Chairs.¹⁹⁷ To this, one should add other best practices of Muslim states, including not only the ratification of the major UNESCO treaties on cultural heritage and a number of nominations to UNESCO lists by Arab-Muslim countries, but also their increasingly active participation in all spheres of UNESCO’s work.¹⁹⁸

CONCLUSION

Islamic law is based on immutable sources (the *Qur’an* and the *Sunna*) as well as an extremely diverse body of legal jurisprudence, known as the *fiqh*. An examination of the sources of Islamic law related to cultural heritage therefore does not stand without an examination of the relevant *fiqh*. Even so, neither of these sources provides a clear answer as to the permissibility of arts specifically under the Sharia. The *Qur’an* embraces the concept of beauty but does not provide any guidance on arts and the safeguarding of cultural monuments—save for religious sites. Prohibitions related to iconoclasm and idolatry could be relevant, but these have been unanimously rejected by the highest authorities of Muslim scholars. Furthermore, there is a rich body of *hadiths* that prohibit arts and music, yet these appear to be largely fabricated and, in any case, non-authentic. At the same time, the outstanding diversity of religious doctrines and schools of Islamic law has allowed for fierce disagreements and the development of contradictory movements within Islamic legal thinking.

¹⁹⁴ *Regional Perspectives | Arab States*, UNESCO (May 1, 2021), <https://en.unesco.org/news/regional-perspectives-arab-states-2>.

¹⁹⁵ *ICESCO Calls for Global Partnership in Islamic Art*, ISLAMIC WORLD EDUC., SCI. & CULTURAL ORG. (Nov. 26, 2020), <https://www.icesco.org/en/2020/11/26/icesco-calls-for-global-partnership-in-islamic-art>.

¹⁹⁶ *AlMalik: ICESCO Works Toward Reviving Islamic Heritage of Sciences and Arts*, ISLAMIC WORLD EDUC., SCI. & CULTURAL ORG. (Dec. 17, 2020), <https://www.icesco.org/en/2020/12/17/almaalik-icesco-works-toward-reviving-islamic-heritage-of-sciences-and-arts>.

¹⁹⁷ *Vision, Mission & Objectives*, ISLAMIC WORLD EDUC., SCI. & CULTURAL ORG., <https://www.icesco.org/en/vision-mission-objectives> (last visited Sept. 7, 2021).

¹⁹⁸ World Heritage Comm., Rep. on Its Forty-Fourth Session, U.N. Doc. WHC/21/44.COM/10A (2021).

International bodies have good reasons to also refer to Islamic law in matters related to arts, letters, and the safeguarding of cultural heritage. These references, however, should point not only to the *Qur'an* or the *Sunna* alone, but also to the *fiqh* and the practice of tolerance and diversity throughout the centuries of Islamic civilization.¹⁹⁹ This approach of using diverse references has been followed by many religious authorities when arguing about free speech, culture, and cultural rights. By way of illustration, following the Danish cartoons controversy, in which cartoons depicting Prophet Muhammad as a terrorist were published in 2005 by the journal *Jyllands-Posten*, a group of Muslim scholars issued a statement on the cartoons.²⁰⁰ These scholars, however, did not seize the opportunity to refer in detail to Islamic law standards on freedom of speech, but rather confined themselves to a Quranic verse, which states that Muslims should “argue with them [polytheists/disbelievers] in the most courteous way[.]”²⁰¹ State practice equally supports the hypothesis of tolerance and diversity in artistic expressions. A number of illustrated manuscripts and works of art, including representations of Prophet Muhammad, demonstrate that music and the arts have been practiced throughout Islamic history. Moreover, a number of murals demonstrate deep influences by Hellenistic and Byzantine art. In addition, the practice of the Caliphs and leaders of the Muslim world shows that funding for artists, musicians, and performers was available throughout the centuries. These findings could be useful in fostering collaboration between the UNESCO and other organizations working in the field of arts and culture, Muslim organizations, and NSAs based in the Muslim world.

Extremist views of the Sharia and the alleged Sharia practiced by terrorist organizations such as ISIS are rejected by the vast majority of Muslims as being contrary to the Islamic ethos, views, doctrines, teaching, and culture. The position of the most eminent religious leaders and even the OIC also crucially condemn extremism. The best example is the position of the OIC on the bombing of the two Buddhas of Bamiyan; the OIC attempted to persuade the Taliban not to proceed with this act using Islamic law arguments. Following the destruction of the statues, the Doha Conference of the *ulemas* on cultural heritage in Islam was organized, and once more the *ulemas* condemned the act, concluding that such destruction is prohibited under Islamic law.

Last but not least, Wahhabi doctrines and other movements that are hostile

¹⁹⁹ Cf. *Annex to the Doha Statement*, in DOHA PROCEEDINGS, *supra* note 74, at 9–10 (highlighting the values of dialogue, tolerance, and diversity).

²⁰⁰ *Muslim Scholars' Statement on Danish Cartoons Controversy*, ISLAMIC NETWORK GRP., <https://ing.org/muslim-scholars-statement-on-danish-cartoons-controversy> (last visited Sept. 7, 2021).

²⁰¹ QUR'AN 16:125.

toward the arts and the letters also seem to be rejected *de facto* in the Muslim world—at least gradually. Even the Kingdom of Saudi Arabia is eager today to develop a modern and vibrant artistic and cultural scene and is especially active within the UNESCO as well as the ALESCO and the ICESCO. What is clear, therefore, is that the main question in this context is not whether or not the arts are permissible. This question is beside the point. Rather, what is relevant is the relief of artists, performers, and cultural institutions from tight regulation imposed by state laws.²⁰² Questions related to the legitimacy of the arts and the need to safeguard cultural heritage, or even the veneration of shrines, should be examined in the context of the specific circumstances where they appear (as in the case where the Taliban exploded the two Buddhas or where Ansar Dine ruined the Sufi shrines) and should be isolated as acts of terrorism.

²⁰² Cf. Ulaby, *supra* note 186, at 215 (finding, for example, that “larger vertically integrated multi-media companies have signed many singers in the region to exclusive contracts that tightly control what and where the artists can record”); Cubelic, *supra* note 185, at 38 (noting censorship is limiting creativity). See generally Matt J. Duffy, *Arab Media Regulations: Identifying Restraints on Freedom of the Press in the Laws of Six Arabian Peninsula Countries*, 4 BERKELEY J. MIDDLE E. & ISLAMIC L. 1, 6 (2014).