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# Islamic International Law and Public International Law: Separate Expressions of World Order

DAVID A. WESTBROOK\*

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## I. INTRODUCTION

Writing at the end of the thirteenth century, the Christian prince Don Juan Manuel distinguished cold wars from hot wars.<sup>1</sup> Cold wars do not involve open hostilities and are not resolved by treaties. During the prosecution of a hot war, however, society is defined by violence, the vital line between friend and foe. At the end of a hot war, the bounds of the polity are defined by treaty. Hot wars are thus both more visceral and more definite than cold wars. Even a cold war, however, divides "us" from "them," mainly by reference to expected violence. By dividing peoples, the prospective violence of a cold war fulfills the same political function as the actual violence of a hot war, albeit far less dramatically. Cold war societies relate to one another in terms of allegiance, and understand themselves in contrast to prospective enemies. Islam expresses this division between friend and foe, and its political results, by dividing the world into the *dar al-harb*—the domain of war—and the *dar al-islam*—the domain of Islam, where war is forbidden. The actual

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\* Ford Fellow in Public International Law, Harvard Law School; Chercheur Libre, Département de Droit International, Université Catholique de Louvain. This Article could not have been written without the help of Harvard Law School Professor Frank Vogel. I have relied on his scholarly work, and he has graciously reviewed my many drafts, providing invaluable editorial advice. Of course, I alone am responsible for the radical simplifications employed and for any mistakes that may remain.

1. Don Juan Manuel actually refers to cold war as "lukewarm war." See Don Juan Manuel, *Libro de los Estados* at xxvii (R.B. Tate & I.R. Macpherson eds., 1974).

presence of violence is not dispositive: it is the possibility of violence, and the formation of identity in response to that possibility, that informs the world of politics.

Don Juan Manuel had the Spanish Muslims—the “Moors”—in mind when he thought about “them,” the other that defined his society and gave Christian Spain a sense of purpose. For the last century, we in the liberal West have had a similar purpose and a similar identity. We have defined ourselves simply and militarily as the enemies of an array of avowedly non-liberal states, chiefly the Soviet Union and Germany.<sup>2</sup> In the last few years, such conflict has ceased to be available to us. The poet Cavafy told us that we need our barbarians, real or imagined. “Those people were a kind of solution.”<sup>3</sup> Now, for the liberal Western intellectuals who have worked to build public international law, “those people” are gone. The “triumph” of the liberal West over the Marxist East has brought confusion, a sense of aimlessness, and introspection.<sup>4</sup> With the end of the Cold War, the aims and significance of public international law have become unclear. In the hope that international law can be established on a self-sufficient foundation, many publicists are turning to Kant and other luminaries of the liberal tradition, thinkers whose work has for too long been the stuff of cursory footnotes. While reexamining the philosophical foundations of our legal tradition can certainly be fruitful, we may also learn about our commitments, and thereby articulate our identity, by comparing our legal culture with another.

It can be argued that Islam provides the sole coherent, non-lib-

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2. When we defined ourselves in terms of communism, the differences between Islam and the West seemed less significant. U.S. Supreme Court Justice and U.S. Chief of Counsel at Nuremberg Robert H. Jackson provides a striking example: “Today the anxious countries of the West find in the Islamic world some of their most bold and uncompromising allies in resisting the drive for world supremacy by those whose Prophet is Marx.” Robert H. Jackson, Foreword to *1 Law in the Middle East: Origin and Development of Islamic Law* at viii (Majid Khadduri & Herbert J. Liebesny eds., 1955).

3. C.P. Cavafy, *Waiting for the Barbarians*, in *Collected Poems* (E. Keeley & G. Savidis eds., 1975). To establish context, I reproduce the close of the poem:

Why this sudden bewilderment, this confusion? (How serious people's faces have become.) Why are the streets and squares emptying so rapidly, everyone going home lost in thought? Because night has fallen and the barbarians haven't come. And some of our men just in from the border say there are no barbarians any longer. Now what's going to happen to us without barbarians? Those people were a kind of solution.

4. This sense of aimlessness is heightened, not alleviated, by the current widespread acceptance of classical liberal virtues, both political and economic, in the developing world.

eral world view of any political significance, and consequently the only vital external perspective on the liberal project of public international law.<sup>5</sup> I do not think we should learn from the Muslim world in the time-honored way of meeting our cultural other through warfare. I prefer a degree of aimlessness and theoretical ambiguity to the certainty of violence. Regrettably, much of the recent florescence of articles and books about the Islamic world locate themselves in relation to fundamentalist Islam's potential for violence. Islam is substituted for communism or fascism as the ideology of the barbarians. Despite the belligerent sources of my Introduction, I think it time to turn to Islam because we are confronted by peace. I do not think tutelage is in order—I am neither an apologist for public international law nor a convert to Islam. I do believe, however, that in examining Islam we who work toward an international legal order, and particularly those of us with a Western background, deepen our self-understanding.

Over the years, a number of scholars have attempted to define Islamic international law, and to square Islamic understandings of international law with the secular, and generally Western, edifice of public international law. In this Article, I examine several of these attempts to articulate Islamic international law. I argue that these attempts either fail to address the concerns of public international law or fail to locate legal authority in Islam—fail, that is, to be substantively Islamic. This analytical problem has a political corollary: how are Islamic nations to comport themselves in an essentially un-Islamic legal regime, a regime whose legality they suspect? Secularized participation in the international legal regime—participation by actors who also happen to be Muslim—appears to be inadequate to the profound need in Muslim countries for the law, including public international law, to have what we in the West generally understand as religious legitimacy. I conclude this Article by outlining the requirements of a law that responds to the concerns of public international law and is yet Islamically authoritative. To render that possibility real is beyond me; I leave that task to an Islamic voice.

Writing comparative law is always difficult because communica-

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5. See Francis Fukuyama, *The End of History and the Last Man* 45 (1992). I do not think it necessary to defend "sole," or even to articulate a definition of "coherent." In any event, Islam provides a non-liberal jurisprudence in contradistinction to the Western liberal scheme of public international law.

tion is largely about shared meanings, and comparative law explores the difference of meanings. Even for comparative law, however, this Article contains an inordinate number of self-conscious, and certainly questionable, choices (beginning with the title!). Alphabet, language, legal culture, and general culture—all are different in Islamic law, and communicating those differences (often only dimly understood) to a Western audience poses great difficulties. The most basic difficulty is vocabulary. For those unfamiliar with the Arabic legal terms used here, I have appended a brief glossary. More problematically, I have numerous methodological objections to the usual approaches to Islamic international law, and have therefore made a number of decisions, ranging in importance from the merely linguistic (the conscious use of Islamic legal terms) to the fundamental (the nature of law). Were my objections fewer, I would have briefly explained my decisions here, in the Introduction. Given the number and length of my objections, however, I have decided to explain many of my choices in an Afterword. I trust the Article is comprehensible without prior explanation of my method; the troubled specialist or the irate critic may draw some comfort from my *post hoc* justification.

Alongside my effort to describe and analyze Islamic approaches to international law, I attempt to show, albeit in tentative and fragmentary fashion, the attraction that Islamic law holds for those who think in terms of public international law. Whether due to its creation myth, born out of the wars of religion, or its philosophical heritage of liberalism and its jurisprudential heritage of positivism, or a diplomatic commitment to neutrality, or some other reason or combination of reasons, public international law is silent on much of great legal significance. For instance, the relationship between conscience and the legal obligation of public officials, or the legal nature of truth, for another, are topics which are oft-discussed in Islamic law and on which public international law is virtually mute. In expressing these things Islamic law does not simply fill lacunae in Western systems. Islamic law provides a different framework for viewing the world, an external perspective from which we can examine the beauties and the failings of our own legal ideals. I conclude that Islamic law, at least as imagined by the scholars surveyed here, cannot provide a legal articulation of the world order. The discourses are separate: Islamic international law does not address the concerns, or remedy the failings, of public

international law. As a professional matter, I find this separation both disconcerting—a cause of legal misunderstanding—and interesting—a rich source of problems for the comparativist. As a human matter, the distance between the discourses is sad, and in understanding that sadness, I hope to shed some light on the possibility that each law holds forth.

## II. A BRIEF SURVEY OF ISLAMIC INTERNATIONAL LAW

The Arabic word for Islamic law is *shari'a*. *Shari'a* is a difficult concept, quite different from Western notions about law, but a preliminary understanding of it is necessary in order to grasp much of the motivation behind and the problems confronting the attempt to articulate an Islamic international law. Abstractly, *shari'a* is the path revealed by God through the Prophets which God intends humanity to follow. *Shari'a* both articulates the transcendent will of God, and provides an opportunity for righteous action in every occasion faced by humans. Not merely a framework in which life is conducted, nor solely a bound for permissible action, the *shari'a* itself is an expression of divine truth. Sovereignty is divine, and therefore the will of God, even regarding daily matters, is what lends legal authority to power. Submission to *shari'a*—following the path of God—is Islam. The law sets forth the integuments of belief and so defines the righteous life and makes salvation possible. Vogel defines *shari'a* through exegesis of the *Qur'an*:

Through revelation man is given the boon of an explicit way of life, a plain road, following which one can achieve one's good here and beyond. Again, the *Qur'an* declares that God has "perfected your religious law [*din*] for you" [5:3]. This revealed paradigm, by which man's conscious life is shown its place in the cosmic order, is the divine "law." The Arabic term for this law is the *shari'a*, literally, "a path to water." The name has its origins in the *Qur'an*:

And finally, [O Muhammad,] We have set thee on a way of [God's] Command [*shari'atin min al-amr*]: so follow thou this [way], and follow not the whims [*ahwa*] of those who do not know. [45:48]

The revelation gives man indispensable "guidance,"

teaches “what he did not know,” and gives specific commands—such as the prescribed ritual prayer—that he could never intuit.

Thus, then, have we bestowed from on high this (divine writ) as an ordinance [*hukm*] in the Arabic tongue. And, indeed, if thou shouldst defer to men’s likes and dislikes after all the knowledge that has come to thee, thou wouldst have none to protect thee from God . . . . [13:37]

. . . .

Since the Qur’an is a “clear book,” in “clear Arabic,” making all “clear,” one now *knows* God’s commands. Absolved of all doubts and uncertainties, one’s dilemma is now perfectly sharp: the fatal choice between submission [*islam*] and rebellion (*kuf*r, denial of the truth, infidelity). If one does not willingly uphold God’s order, it is not for lack of knowledge, but because one willfully, perversely, denies clear signs. If one’s acts are inspired by futile self-will, one rebels, foolishly, vainly, against God’s order; if one’s acts conform to God’s commands, then one fulfills God’s order as viceregent. In either case, God’s commands are ineluctable, vindicated in the unseen.

No knowledge is more vital or urgent, therefore, than knowledge of the shari’a, God’s revealed law, which guides man in all actions and thoughts. By knowledge of it, one attains, deep within one’s individual conscience, unity of the “is” and the “ought.” By such knowledge, and not faith alone, mankind enters into utter reality, and into harmony with nature and fate.<sup>6</sup>

For the Muslim, the problem of right action is resolved by acquiring knowledge of *shari’a*, God’s plan, which would inform

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6. Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* 53-55 (1993) (unpublished Ph.D. dissertation, Harvard University) (citations omitted). Vogel’s use of Luther is intriguing, if perhaps a bit misleading. Faith alone, *sola fide*, is a question of salvation, not harmony. Luther did not expect in this world, and does not seem to have experienced, much unity between the is and the ought, much harmony with his nature or faith. Because for Luther salvation is grounded in faith, it requires only a modicum of knowledge, specifically openness to the word of God. Cf. *infra* text accompanying note 80 (relating the aims of a present-day reformer An-Na’im).

and justify action and is the foundation of Islam itself.<sup>7</sup> But the *shari'a* is complex. While the *Qur'an* is made up of direct revelations, few are explicit legal commands. The *Qur'an* does not constitute a legal code. The text of the *Qur'an* is supplemented by reports (*ahadith*) of the speech and actions of the Prophet and his companions. Collectively these reports form the second body of revelation and the second source of Islamic law, the *sunna*. Unfortunately, the opinions of scholars vary regarding both the authenticity and the meaning of individual *hadith*. Moreover, subtleties of meaning abound, as do questions of application. In short, organizing the material of the Muslim tradition so that it expresses the command of God and not the faulty understanding of men is an enormous—and vitally important—intellectual task.

Establishing the content of *shari'a* required the development of a complex methodology, a science, called *usul al-fiqh* (*fiqh*).

*Usul al-fiqh* is conceived as the science of methods by which God's ultimately unknowable law, transcendent, *batin*, unseen, may be approached with the greatest epistemological security; or it is the science of gleaning from the revealed texts every shred of guidance, every indication or hint, towards God's pure will, while quelling arbitrary human guesswork and willfulness.<sup>8</sup>

So while knowledge is the road to salvation, and knowledge is available to humanity, knowledge is not easily accessible. *Fiqh* works by establishing algorithms for judgment, hierarchies of knowledge. The most basic hierarchy is of the sources of Islamic law itself. As organized by al-Shafi'i in the second century of the Islamic era, there are four sources of Islamic law: *Qur'an*, *sunna*

7. Joseph Schacht, *An Introduction to Islamic Law* 1 (1964) ("Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself.").

8. Vogel, *supra* note 6, at 75-76; see also Schacht, *supra* note 7, at 1:

The very term *fikh* [*fiqh*], 'knowledge,' shows that early Islam regarded knowledge of the sacred Law as the knowledge *par excellence*. Theology has never been able to achieve a comparable importance in Islam; only mysticism was strong enough to challenge the ascendancy of the Law over the minds of the Muslims, and often proved victorious.

For a highly, perhaps overly, objective account of the technical development of *fiqh*, see also Schacht's chapter entitled *Early Systematic Reasoning; Lawyers of the Second Century*, in *id.* at 37-48.



(tradition), *ijma* (consensus), and *qiyas* (analogy).<sup>9</sup> The *Qur'an* informs the understanding of the *sunna*; *sunna*, in turn, determines the scope and stuff of consensus; and scholarly consensus, *ijma*, constrains the scope of analogy. More complicated hierarchies are built on this framework. Hierarchies are used to judge the potency of truth in a variety of situations, including the authenticity of a text, the scope of a teaching, and the validity of a ruling.<sup>10</sup> *Usul al-fiqh* erects an immense conduit of authority, stretching from God through text and scholarship to concrete judgment. Ultimately, divine sovereignty is organized by exegetical methodology.

*Fiqh* aspires to discern the path of *shari'a*. In finding divine authority, *fiqh* solves, indeed dissolves, what the West often regards as separate and conflicting desires, the aspirations to the true and to the good. Islamic legal authority rests on divine sovereignty; and

9. For a more complete explanation of al-Shafi'i, see N.J. Coulson, *A History of Islamic Law* 53-61 (1964); see also Schacht, *supra* note 7, at 45-48. Schacht's assertion that al-Shafi'i's thought, and by extension the *fiqh*, separated law and religion is unbelievable:

We therefore find him [Shafi'i] hardly ever influenced in his conscious legal thought by material considerations of a religious or ethical kind, such as had played an important part in the doctrines of Awza'i, Malik, Ibn Abi Layla, and Abu Hanifa. We also find him more consistent than his predecessors in separating the moral and the legal aspects, whenever both arise with regard to the same problem.

*Id.* at 46. *Contra* Coulson, *supra*, at 55-56:

In particular, the repeated command to "obey God and his Prophet" established the precedents of Muhammad as a source of law second only to the word of God himself.

. . . Expounding, for the first time consistently, a notion which before him had been but vaguely mooted, he insisted that the Prophet's legal decisions were divinely inspired. For ash-Shafi'i this was the inescapable significance of the Qur'anic command to obey God and his Prophet and the similar injunction to follow "the Book and the Wisdom (*hikma*)"; for this last term could mean only the actions of Muhammad. The recognition of the Traditions (*hadith*, precedents of the Prophet) as a source of the divine will complementary to the Qur'an is the supreme contribution of ash-Shafi'i to Islamic jurisprudence. His arguments proved irrefutable, and once they were accepted Traditions could no longer be rejected by objective criticism of their content; their authority was binding unless the authenticity of the report itself could be denied.

The religious and legal authority of the Sunna is one and the same, and Schacht's attempt to discuss Shafi'i in terms of a positivist notion of legal development, i.e., a historically progressive separation of law from religion, is comprehensible only in terms of Schacht's, and not Shafi'i's, intellectual milieu.

10. *Fiqh* differs from Western notions of law not least in its attention to problems of judgment. In the West, very little is said about judgment. Judges, we are often reminded, inevitably have discretion, but Western legal culture has concentrated on the limits to discretion, and spent relatively little energy on articulating its substance.

for God, truth and will are one. The righteous exercise of power requires not just mundane authority and the intention to do right, but the deep-seated knowledge that one is absolutely correct. "Islamically, all issues of power—God's power over man, man's power over himself, man's power over others—can be resolved only by *knowledge* of God's truth. Knowledge is an urgent necessity; on it depends whether acting one securely does justice, or instead arrogantly risks injustice, defying the ineluctable."<sup>11</sup>

As approached through *fiqh*, *shari'a* poses questions of ultimate truth as revealed by concrete texts and as occasioned by specific situations. *Fiqh* confronts mundane politics, action in the world of petty desires and apparent variety of paths, with ultimate questions.<sup>12</sup> How can one know that a particular decision, in a world of confusion, is right, is what God wills? The relationship between knowledge and righteousness "instills in the exercise of power a mortal epistemological anxiety, and bequeaths to *fiqh* an epistemological obsession."<sup>13</sup> Whether such an anxious vision of legal authority can serve to construct international law is the topic of this Article.

Within the framework of the *shari'a* as a whole, the Islamic tradition of international law is informed by its own narrative, the *siyar*. *Siyar* is the plural of *sirat*, the conduct of the ruler. *Sirat*

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11. Vogel, *supra* note 6, at 392-93.

12. Vogel's work is devoted to exploring the ways in which Islamic legal reality differs from that of the West. To do so, he uses a variety of oppositions, notably "metaordering" and "panordering." *Id.* at 61-72. Metaordering is the aspiration to link banality with ultimate truth, illustrated by *fiqh's* obsession with direct revelation. Panordering is the aspiration to offer a meaning for the breadth of existence, illustrated by *siyasa*. Vogel's thesis is that metaordering aspirations have dominated Islamic legal theory, particularly the theory of the *usul al-fiqh* developed by the *ulama*. *Id.* at 68-72. These metaordering aspirations impose a particular structure on the law, often at considerable cost. Many of the difficulties with metaordering, e.g., an obsession with history, hostility to institutions, and a delegitimization of normal politics, will emerge in the course of this Article. Vogel argues that Islamic law need not commit itself so completely to metaordering, and that panordering aspirations, particularly *siyasa*, are equally legitimated within the Islamic tradition (that is, insofar as the tradition is considered by someone other than the '*ulama*'). *Id.* at 61-78.

13. *Id.* at 393. Other streams of Islamic thought do not argue the exclusivity of *usul al-fiqh* in establishing truth. "For example, Shi'ism, mysticism [Sufism, *tasawwuf*], Islamic philosophy [*falsafa*] recognize respectively continuation of divine guidance (in the Imams), mystic inspiration, and reason, as complementary, alternative or overriding avenues to truth." *Id.* at 67 n.39. The question is the extent to which these, or still other streams of Islamic thought devote themselves to the problem of legal authority.

“acquired later the restricted sense of the conduct of the Prophet in his wars, and later still the conduct of Muslim rulers in international affairs.”<sup>14</sup> The *siyar* is thus a specialized set of traditions and commentary on the conduct of war and affairs of state by the early, and—by virtue of their proximity to the Prophet—the rightly guided, Muslims. The most influential compilation of the *siyar* is that of Shaybani, a jurist who died circa 804 CA, but whose work continues to inform Islamic international law.<sup>15</sup> The primary source of Islamic international law, then, is preoccupied with the conduct of state during wartime.

While there are great differences among them, the scholars surveyed here share this preoccupation, which can be expressed more fully in terms of three related oppositions: peace and war, *dar al-islam* and *dar al-harb*, and Islamic authority and Western category.<sup>16</sup> Islam classically identifies the realm of peace with the realm of shared belief, the *dar al-islam*. Because the realm of law and the realm of belief are identical, a triune identification of peace, belief, law—and its converse, war, unbelief, chaos—is conceptually unproblematic. But historically, in a world of peoples trying to live together without slaughter, insistence on agreement on matters of belief as a precondition for lasting peace is highly problematic. As the Introduction suggested, when similar oppositions have shaped the Western political identity, the results have often been violent. The solution that public international law offers is the idea that

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14. Muhammed Hamidullah, *The Muslim Conduct of State* 13 (1973); see also *The Islamic Law of Nations: Shaybani's Siyar* 39 (Majid Khadduri trans., 1966) [hereinafter Khadduri] (Khadduri spells the word *sira*, and notes “[t]he term literally meant motion.”).

15. Khadduri, *supra* note 14, at 22. Other scholars produced their own versions of the *siyar*. For a listing of other treatises on the *siyar*, without publication data, see Mohammed Bedjaoui, *The Gulf War of 1980-1988 and the Islamic Conception of International Law*, Address at the 1990 Asser Colloquium on International Law (Nov. 1990), in *The Gulf War of 1980-1988*, at 277, 294 n.20 (Ige F. Dekker & Harry H.G. Post eds., 1992). I concentrate on Shaybani because he has been translated into English, and so can be read as a primary source, and because the publicists examined here, with the exception of Bedjaoui, focus on him.

16. By “category” I mean conceptual entities with which the law works. The “nation” is an obvious example of a category important to international law. Another example is the idea of international law itself. Certain, but not all, constellations of people, land, and government are nations; certain, but not all, affairs on the international stage are global. Great debate exists over the definition and contents of these and other categories important for a discourse on political relations. The very language of this debate, and ultimately of the categories themselves, is Western. Rephrased, the phenomena of global politics are understood in Western fashion, if not always in ways consonant with Western interests.

peace arises not from shared belief, but from an order that allows for different beliefs. The basic categories in which Western public international law traffics do not purport to represent the substantive beliefs of the nation: Marxist, Christian, and Islamic nations are all equally nations, each legally bound to do their part in maintaining international order. The resolution of issues of war and peace, legal order and disorder, does not require adversaries to share belief.

Islamic scholars, who locate legal authority with God, cannot so easily separate law and belief. The public international law solution of order without shared belief is not available to Islamic scholars, insofar as their work is informed by Islam. Still, the solution remains attractive, on its merits and because it is the framework used by the non-Islamic world to articulate large-scale political arrangements. For Islamic scholars, international law is a continual attempt to reconcile Islamic authority and Western category. They vacillate between adoption of the Western solution, the secularization of international legal authority, and reconsideration of the traditional Islamic position, which cannot be maintained in the contemporary world. The arguments they make within Western categories are not authoritative to a Muslim. The arguments they make from Islamic authority do not confront the political organization of the contemporary world. A truly Islamic international law would still this vacillation, and the categories of contemporary politics, despite their Western heritage, would be legitimated—that is, rendered Islamically authoritative.

The emphasis on war in the Islamic tradition of international law scholarship is oft-remarked. For example, “[i]t should be noted that the Islamic tradition today seems most alive in the area of the *jus ad bellum*,”<sup>17</sup> and “a traditional connexion is traced between war and Islam by interested writers.”<sup>18</sup> The *siyar* provides a great deal of discussion of a rather limited number of issues, and because each scholar surveyed here either finds his position on an exegesis of the *siyar*, or is preoccupied with responding to the orthodox exegesis of the *siyar*, it is this limited set of issues which dominates each of these discussions of international law. Even the scholars

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17. Ann E. Mayer, War and Peace in the Islamic Tradition of International Law, in *Just War and Jihad* 195, 197 (John Kelsay & James T. Turner eds., 1991).

18. Hamidullah, *supra* note 14, at 165.

who appear most sophisticated to my eyes, 'AbuSulayman and An-Na'im, take their examples almost exclusively from texts dealing with military problems. For instance, how badly must a Muslim force be outnumbered in order to be permitted to withdraw honorably? The relevance of these texts to a broad discourse on international law is open to question; and where the *siyar* is silent, it is difficult to see what these texts, or these scholars, have to say about international law. To exaggerate: rather than being an area of difficulty and divergence, *jus ad bellum*, and its less developed sibling, *jus in bello*, seem to be the only areas where the disciplines of public international law and Islamic law converge.<sup>19</sup>

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19. The relationship between human rights law and Islamic law is examined by Ann E. Mayer in *Islam and Human Rights: Tradition and Politics* (1991). As a Westerner, Mayer reports on rather than expounds Islamic thinking on international law. While that suffices to remove her work from analysis in the text, the breadth of her bibliography and range of her political discussion warrant attention. Mayer sees conflict rather than convergence between Islamic law, at least as the term is currently used, and international human rights law. She contends that Islamic rhetoric has been deployed by political elites for self-interested ends. "As this assessment has indicated, these Islamic human rights schemes are products of the political context in which they emerged. Their Islamic pedigrees are dubious." *Id.* at 207. Similarly, "[a] skeptic could propose that official Islamization policy is no more than a strategy adopted by beleaguered elites in an attempt to trump growing Muslim demands for democratization and human rights." *Id.* at 31. By the end of her book, Mayer has revealed herself to be just such a skeptic. Her concluding sentence reads:

All this draws one to conclude that the patterns of diluted rights in Islamic human rights schemes should not be ascribed to peculiar features of Islam or Islamic culture but should be seen as part of a broader phenomenon of attempts by beneficiaries of undemocratic and hierarchical systems to legitimize their opposition to human rights by appeals to supposedly distinctive cultural traditions.

*Id.* at 215. Although Mayer contends that political abuse does not vitiate the religious authority of true Islam, *id.* at 211 ("However often the terminology and references invoke religious sources and authority, the stakes in the battle over human rights standards are ultimately political."), she offers no real discussion of Islamic legal authority. Mayer presents no Islamic view of international law, but, at best, suggests that Islam may be able to accommodate essentially Western notions of human rights. Despite a superficial resemblance, Mayer's substantive concerns fundamentally differ from those taken up by this Article. Where Mayer's book is programatically concerned with Islamic rhetoric as a bar to progress, this Article attempts to learn about legal traditions, including "progressive" ones, through comparison. Methodologically, Mayer regards both Islamic law and international human rights from an external perspective, in which the law, in its political, historical, and religious context, is an object fit for rather clinical analysis. So when she speaks of distortions of Islamic doctrines or of a betrayal of Islamic principles by political elites, one is skeptical. To judge betrayal one must understand allegiance, and that is a subjective, not an objective, stance. The present Article, in contrast, treats both Islamic law and public international law (and hence human rights law) as *expressions* of world order; that is, from a subjective, internal perspective. For more on my methodology and comparative law, see

Mohammed Bedjaoui, Judge of the International Court of Justice, analyzes the Gulf War of 1980-1988 in terms of "some other key, some other possible reading of the War, another system of references drawn from Islamic international law," and asks "whether that legal order can provide some elements enabling the situation to be understood and dealt with in a coherent and effective way."<sup>20</sup> Bedjaoui thus suggests the thesis of the present Article, that public international law and Islamic international law are different discourses or, in his words, different keys, to ordering international affairs. In the core of his remarks, Bedjaoui translates many of the issues raised by public international law scholarship into the idiom of the *siyar*, discusses their legality in Islamic terms, and then concludes that "one arrives at virtually the same legal analysis of the 1980-1988 Gulf War whatever 'key' be used, whether that of public international law or that of Islamic law."<sup>21</sup> For Bedjaoui, both Islamic international law and public international law, at least when regarding the use of force, seem to have the same ultimate concerns.<sup>22</sup>

Shaybani's *siyar*, the root of Islamic international law, has been translated into English by Majid Khadduri.<sup>23</sup> With great diffidence, Khadduri reads Shaybani as an Islamic Hugo Grotius.<sup>24</sup>

the Afterword. For a review of Mayer's book, see Abdulaziz Sachedina, Book Review, 34 J. of Church and St. 614 (1992).

20. Bedjaoui, *supra* note 15, at 278. Although substantively interesting, the circumstances of Bedjaoui's remarks limited their scope, so I do not respond to Bedjaoui at length. I have the same problems with his article, in its Islamic law moments, that I have with the other publicists of Islamic international law. At the same time, of the publicists surveyed here, Bedjaoui unsurprisingly has the most powerful understanding of public international law. Because he operates within both Islamic and public international law, Bedjaoui illustrates within small compass the difficulties of translation, the space between the cultures. He is a near-perfect interlocutor for the concerns of this Article, and is therefore cited frequently in the notes. Finally, Bedjaoui relies almost exclusively on French sources, and so provides some bibliography for French scholarship.

21. *Id.* at 298-99.

22. But see *infra* note 126 (for Bedjaoui's suggestion that Islamic international law might be something different in kind from contemporary public international law).

23. Khadduri, *supra* note 14.

24. Khadduri writes:

In designating Shaybani as the Hugo Grotius of Islam, it is questionable whether Joseph Hammer had more in mind than to call the attention of scholars to the master's works. Shaybani (d. 804) preceded Grotius (d. 1645) by some eight centuries and composed his works on a system of law whose appeal to students of the history of law is greater than to students of the modern law of nations. But a study of the Islamic law of nations would certainly be of interest to all who seek

For example, "a notice to the enemy demanding denunciation of . . . [the treaty] must first be sent, together with the reason for it. The principle of *rebus sic stantibus* seems to be applied here; otherwise, the Imam must abide by the treaty on the strength of the principle *pacta sunt servanda*."<sup>25</sup> Consistently expounding his idea of Islamic international law in articles as well as books, Khadduri repeatedly equates Islamic concepts with the concepts of public international law. *Jihad*, for example, is just war.<sup>26</sup> For Khadduri, the *siyar* provides the Western law of war from Islamic sources. Khadduri's translation of the Islamic law into the Western idiom attempts to be so complete that, were it to be successful, actually reading the *siyar* would be unnecessary for the Westerner who has an adequate understanding of public international law.<sup>27</sup>

In presenting an answer where there is no obvious question, Khadduri assumes the characteristically reactive stance of the Islamic publicist. The form of the reactions to public international

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to broaden the scope and subject matter of the modern law of nations. Shaybani will always be remembered as the most eminent Muslim jurist who wrote on Islam's legal relationships with other nations and may well be called the father of the science of the Islamic law of nations. But to identify the name of Shaybani with Grotius, even though the latter is the most illustrious writer on the modern law of nations, will not necessarily add laurels to a classical author whose place in the history of jurisprudence is assured, notwithstanding the fact that he is insufficiently known to students of comparative jurisprudence.

Id. at 57. Khadduri's focus on Grotius as a *vibrant* source of authority sounds strange to Western ears. Nobody in the West actually reads Grotius, whereas Shaybani is a primary source for Islamic scholarship. Grotius, like the Peace of Westphalia, is a mythic beginning for contemporary public international lawyers. Our self-understanding of public international law "goes back" to Grotius, and no further. Publicists hardly speak of a modern international law prior to Grotius and the Peace of Westphalia. Similarly, English constitutional law "goes back" to Magna Carta. But creation myths need not be detailed; few international lawyers could say much about either Grotius or the Peace of Westphalia. Shaybani, in contrast, is a point of reference and an object of discussion. Each of the scholars surveyed here discusses his work at length.

25. Id. at 55.

26. Majid Khadduri, *Islam and the Modern Law of Nations*, 50 *Am. J. Int'l. L.* 358, 359 (1956) [hereinafter Khadduri, *Modern Law of Nations*]; see also Majid Khadduri, *The Islamic System: Its Competition and Co-Existence with Western Systems*, 1959 *Am. Soc. Int'l L. Proc.* 49 (1959) [hereinafter Khadduri, *The Islamic System*] ("Thus the *jihad* was the Islamic *bellum justum*."); see also Bedjaoui *supra* note 15, at 287, 288 n.7.

27. Khadduri does think there are specifically Islamic contributions to be made to public international law. See Khadduri, *supra* note 14, at xii-xiii ("To draw on the experiences of an increasing number of nations is as logical as it is pragmatic . . . [T]he public law of Islam . . . played an important role in the past and produced a system of law that was no less significant than the Roman.").

law vary, including blanket assimilation,<sup>28</sup> reform and revision,<sup>29</sup> claims that the Islamic view of international law is prior to the Western view that dominates public international law,<sup>30</sup> claims that Western law willfully ignored Islamic international law,<sup>31</sup> the excuse that Islamic international law was prevented from developing by the political subjugation of Muslim nations,<sup>32</sup> and fundamentalist declarations of open hostility to Western ideas of international law.<sup>33</sup> The common awkward thread among these positions is their self-definition vis-à-vis the West:

Unlike Western writers on international law, who appear uninterested in the Islamic tradition and how it may differ from the *siyar*, Muslims who write on international law do so with an awareness that public international law, a product of Western culture, is universally entrenched as the normative standard and will be used to judge Islamic legal doctrines, which will be deemed defective if they violate the international norms. Muslims may adopt a defensive stance when comparing Islamic rules on war and peace with their international counterparts, so that apologetic preoccupations rather than scholarly ones ultimately inform their work.<sup>34</sup>

“Apologetic preoccupations” perhaps too narrowly characterizes the reactions of Islamic publicists to public international law.<sup>35</sup> Still, the responses of Islamic scholars are reactive: international law is perceived as something outside (traditional) Islam, which

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28. *Id.*

29. 'AbdulHamid 'A. 'AbuSulayman, *The Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought* (1987).

30. Hamidullah, *supra* note 14, at 68-75; see also Marcel A. Boisard, *On the Probable Influence of Islam on Western Public and International Law*, 11 *Int'l J. Middle E. Stud.* 429, 447 (1980).

31. Bedjaoui, *supra* note 15, at 294.

32. *Id.* at 295-296.

33. For example, the hostility expressed through the rhetoric of Khomeini and Quadaffi. But see Sarvenaz Bahar, *Khomeinism, the Islamic Republic of Iran, and International Law: The Relevance of Islamic Political Ideology*, 33 *Harv. Int'l L.J.* 145 (1992) (discussing Khomeini's approach to international law).

34. Mayer, *supra* note 17, at 221 n.8.

35. I also do not think one can claim that “apologetic preoccupations” should be read in the classical sense, that is, as “defenses” that actually set the standard, and are consequently defenses merely in form.



Islam needs to account for, respond to, explain, or make useless.<sup>36</sup> For the Islamic scholar, public international law is foreign.<sup>37</sup> As a consequence, the authority of public international law over Muslims, its legal quality, is inherently problematic.<sup>38</sup>

A contemporary of Khadduri, Hamidullah, in his oft-reprinted and influential *The Muslim Conduct of State*, attempts to construct a full-fledged political theory from the *siyar*. However, despite its aspirations to self-sufficiency, Hamidullah's theory remains vexed by its problematic discourse with Western tradition. Part I, Introductory, has two concerns. The first is the definition of terms. Arabic terminology, e.g., *siyar*, must be made available for non-Arab speakers. Furthermore, the Arabic words need to be located within the grammar of public international law, i.e., sources, sanctions, subjects, and so forth. The second concern is to relate a global history of international law, a history in which Islam plays a critical role.

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36. "Islam can pass yet another moral test of democracy, which although being of a formal nature is indispensable to its functioning, namely, the requirement that a government should not only rule by law, but also reckon in all its decisions with the wishes of the ruled" and "[t]he Muslims' record, over the whole span of history, on this rare civic virtue in inter-cultural relationships is decidedly superior to that of Westerners." Hamid Enayat, *Modern Islamic Political Thought* 129 (1982). It is difficult to imagine similar sentences, in which Western practices are judged by Islamic "moral tests," coming from a Western pen.

37. Bedjaoui writes:

With a few rare exceptions, jurists from the newly independent Muslim countries have succumbed to the easy temptation of lazily imitating the West instead of meeting the more demanding needs of creativity. From the Atlantic to the Sunda Islands, the great majority of treatises and manuals of international law published in the Muslim world are western works translated into the local language by those jurists, who are thus reduced to the role of translators and copyists.

Bedjaoui, *supra* note 15, at 296.

38. The problematic authority of public international law in the Muslim world can be interestingly contrasted with two kinds of authority problematic for many in the West, religious law and international law. The issues might be stated as follows. First, does Islamic law exist? More crudely, is it law and not religious despotism? Second, does public international law exist? If so, to what extent is it binding and enforceable? Is it law or just vacuous idealism or power politics? The Western problems can be traced to the same source, a world-view (positivism, realism) that assigns law-making power exclusively to the nation-state and asserts that nations are self-interested. Virtually no one—at least within the discourse of international law—takes these positions as stated in their extreme and abstract form; i.e., as claims that public international law has no validity in the Muslim world, or that Islamic law does not exist, or that public international law does not exist. Nevertheless, a challenge to authority, once made, is not easily excised. All three challenges are durable, and vex attempts to construct a more inclusive vision of public international law.

In Part II of his book, *Peace*, Hamidullah turns to the substance of Islamic international law. The language of Hamidullah's account of state conduct, like Khadduri's, recalls Western legal doctrines, and he entitles the sections "Preliminary Survey," "Independence," "Property," "Jurisdiction," and "Diplomacy." *Peace*, Part II, is dwarfed by Part III, *Hostile Relations*, with twenty six sections, and Part IV, *Neutrality*, with five sections. Hamidullah's emphasis on war is captured by his subtitle: "Being a Treatise on *Siyar*, that is Islamic notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, Together with Precedents from Orthodox Practice." While the language could well be from a Western international law text, the substance of the various parts, together with their relative proportions, reveals Hamidullah's conceptual reliance on the *siyar*.

Khadduri and Hamidullah both work for the convergence of Islamic international law on public international law, for the Islamic accommodation with a liberal legal regime, aspirationally neutral, procedural, rational, universal, and, most problematically, secular. They thus present the odd position that Islamic law will ultimately be secular law: "The historical experiences of Islam and Christendom in introducing a religious element in politics, on the international no less than on the domestic plane, can be very dangerous indeed."<sup>39</sup> But what is a secular Islamic polity? Anathema, answer many, and since Khadduri wrote, his idea that "[t]wentieth century Islam has reconciled itself completely to the Western secular system"<sup>40</sup> has become ridiculous.<sup>41</sup>

Hasan Moinuddin takes a somewhat different approach to the relationship between Islamic international law and public interna-

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39. Khadduri, *Modern Law of Nations*, supra note 26, at 372.

40. Khadduri, supra note 14, at 67.

41. For sociologists who talk about relatively objective interests, spiritual conflict between nations does not exist, or can be minimized. See James Piscatori, *Islam in the International Order*, in *The Expansion of International Society* (Hedley Bull & Adam Watson eds., 1984). I have three disagreements with this work. First, Piscatori's putatively objective approach makes his references to "unfairness" rather incoherent. Second, an objective approach to Islamic questions obscures crucial political reality. The participants see their actions as arising out of profound belief, not as the result of mechanistically calculated objective interests. Third, and more generally, because legal authority is grounded in belief, any discussion of law that assumes an objective approach is ultimately sterile.

tional law.<sup>42</sup> For Moinuddin, Islamic states are those states that are members of the Organization of the Islamic Conference (OIC).<sup>43</sup> Islamic international law is nothing more than the juridical relationships among those states. In order to reach this conclusion, Moinuddin confronts the orthodox explanations of Islamic international law, the *siyar* and its explicators. By parsing article 38 of the Statute of the International Court of Justice, Moinuddin denies Khadduri's assertion that the Islamic international law of the *siyar* and public international law operate with the same categories under different names.<sup>44</sup> Having stressed the cultural differences that underlie the *siyar*, Moinuddin argues that the *siyar* itself is hardly relevant to modern Islamic international law. The *siyar* is restricted in scope to the confrontation between Islam and its enemies. Indeed, few modern relations among Islamic states are carried out under the legal principles of the *siyar*, and Islamic states have not relied on the *siyar* as a basis for external legal relations with the West:

Islamic states have joined the UN and have accepted international law as the basis of relations between States in the contemporary world . . . . In the sphere of international relations, however, the "re-assertion" of Islamic values does not necessarily mean the reintroduction of classical doctrines of *Siyar*; it is, rather, the reinforcement of general principles of law with ethical content.<sup>45</sup>

Having dismissed the *siyar* for practical purposes, Moinuddin oddly discusses the well-trod ground of the *siyar*'s validity for contemporary international relations. He argues that the *siyar* is the construction of Abbasid jurists, is not consonant with the *Qur'an* and *Sunna*, and is therefore invalid for contemporary relations.<sup>46</sup> As a result, Moinuddin can ignore whatever arguments might be drawn from the *siyar* and claim both that *jihad* is highly limited and that the normal external relations of Muslim states are peaceful.

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42. Hasan Moinuddin, *The Charter of the Islamic Conference and Legal Framework of Economic Co-Operation among its Member States* (1987).

43. *Id.* at 11.

44. *Id.* at 16-17.

45. *Id.* at 18.

46. *Id.* at 20.

The most appropriate argument, however, harmonizing the Koranic message and the spirit of the Jihad injunction, was offered by Ibn Taymiya who held that unbelievers who made no attempt to encroach upon the *Dar al-Islam* would not have Islam imposed upon them by force for he said "if the unbeliever were to be killed unless he becomes a Muslim, such an action would constitute the greatest compulsion in religion" which would run contrary to the Koranic rule: "There is no compulsion in religion."<sup>47</sup>

Moinuddin then plunges into a lengthy discussion of the misinterpretation of the doctrine of *jihad*. He argues that classical interpretations of the doctrine are wrong and that the doctrine much more closely approximates classical Western ideas of the *bellum justum*.<sup>48</sup> *Jihad* is now to be interpreted in light of the U.N. rules on the use of force and the developing country views about wars of liberation from colonial oppressors.<sup>49</sup> By this point, the differences between Moinuddin and Khadduri are not so obvious.

Moinuddin argues that relations between Muslim states and Christian states in the Middle Ages and since were not solely bellicose.<sup>50</sup> Treaties existed, as did numerous other inter-state relations, and the practice of states is a source, or at least an indication, of public international law. Moinuddin argues that this practice should be taken to demonstrate the adherence of Muslim states to bilateral relations and, hence, the bilateral character of Islamic international law. In an argument of similar tenor, Moinuddin argues that Islam influenced Western conceptions of law and, therefore, that contemporary public international law should be viewed as substantively Islamic.<sup>51</sup>

Some of these arguments are simply bad. For example, the quotation from the *Qur'an* which begins "There is no compulsion in

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47. Id. at 21 (citation omitted).

48. Id. at 22-28.

49. Id. at 28-34.

50. Id. at 36-37, 40-42.

51. Id. at 42-45. Moinuddin relies heavily on a truly odd article, or more accurately, narrative and bibliographical speculation, Boisard's *On the Probable Influence of Islam on Western Public and International Law*, *supra* note 30. As with so many of these works, the palpable desire of the author to vindicate Islam somehow makes the reader both suspicious and uncomfortable.

religion," continues, "Distinct has now become the right way from error."<sup>52</sup> For Islam, as indeed for Christianity in most times and places, the inward quality of belief does not make belief a private, individual matter. Belief is a matter of revealed and generally available truth. The true path<sup>53</sup> is visible, distinct. Thus, although Islam acknowledges an inner experience of religion, visible conformity with God's law, with the public truth, can be compelled. The *shari'a* is enforced. For example, a Muslim woman can be forced to wear the veil; and even non-Muslims, to whom only parts of the *shari'a* apply, can be compelled to dress appropriately, irrespective of their private beliefs. Such compulsion, however, cannot make the truly recalcitrant, those bent on straying from the path of righteousness, holy. The law has its limitations. *Shari'a* can demand formal obedience, create social conditions for the righteous life, and even teach the way of God; but actually choosing that path is a matter for the individual, not the law. In this limited sense, there can be no compulsion in religion.<sup>54</sup> To quote half a line of *Qur'an* as if it restated the contemporary Western doctrine that the domains of law and belief are essentially distinct, in the face of centuries of self-conscious and contradictory practice, is at best disingenuous.<sup>55</sup>

The deployment of Moinuddin's various arguments is more interesting than the arguments are themselves. Each of these examples demonstrates an inconclusive obsession with history, a topic to which I shall return. Islamic scholars appear to believe that international law must be grounded in history to be authoritative. After

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52. Vogel, *supra* note 6, at 398.

53. Recall the etymology of *shari'a*. See *supra* notes 6-7 and accompanying text.

54. Vogel, *supra* note 6, at 398-400. For an example of Christian thinking along interestingly similar lines, see Thomas Aquinas, *Summa Theologica*, Treatise on Law, Question 96, Article 2 ("Whether it belongs to human law to repress all vices").

55. In other places, Moinuddin is badly inconsistent. As noted above, he claims that the *siyar* can be dismissed, but also states that "[t]he *Siyar* is part of the *Shari'ah* and hence rules pertaining to the *Siyar* are part of Islamic law." Moinuddin, *supra* note 42, at 46. Still other arguments are suggestive, but radically underdeveloped. For example, the practice of the Ottoman empire may well be a source of Islamic political wisdom, *id.* at 41-42, but how is it authoritative? How is law to be distinguished from politics in Ottoman practice? Assuming this can be done, could the same categories be applied to contemporary relations? The Ottoman empire could, perhaps, provide an exemplar of substantively Islamic political and legal sophistication, and may thus serve to make Islamic politics more legitimate in the eyes of its own practitioners. Nonetheless, an exemplar requires a genus, and Moinuddin does not provide an account of how Ottoman practice should inform contemporary judgment.

dismissing the importance of the Islamic tradition for the contemporary understanding of Islamic international law, Moinuddin spends a good portion of his book trying to reformulate that same tradition. He does not provide, however, a thorough discussion of how Islamic conceptions of international law are to relate to Islamic history, or of how the Islamic tradition is going to create legal authority in the international realm. Indeed, the only sustained discussion of authority merely flogs the dead horse of the nature of obligation at public international law.<sup>56</sup> As do Khadduri and Hamidullah, Moinuddin loses sight of the project of articulating an Islamic international law. He concludes his general discussion of Islamic international law by essentially asserting that contemporary public international law is simply, already, and unproblematically Islamic.

[W]e have tried to show the underlying theoretical basis of external relations in Islam which later enabled a substantial number of 'new' Asian and African Islamic States to accept a universal community of nations based on universally recognized principles of international law . . . .

It would, therefore, be appropriate to conclude,

- (a) that the theory of Jihad cannot be recognized as the 'sole' basis of external relations in Islam as it is neither warranted by any provisions contained in the Koran nor was it explicitly recognized as such in the practice of the Holy Prophet;
- (b) that acceptance of adherence to general principles of international law by Islamic States is not contradictory with the legal basis of external relations in Islam;
- (c) that on the other hand acceptance of general principles of law by the Islamic States does not provide any evidence of their Europeanization, Westernization, or secularization as similar general principles of law are common to Islam and other legal systems, religions, and philosophies.<sup>57</sup>

It is difficult to imagine a more diffident, and less Islamically authoritative, statement of legal principles. Every single statement is negative; not one statement expresses anything Islamic.

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56. Moinuddin, *supra* note 42, at 45-53.

57. *Id.* at 65-66.

Moinuddin proceeds from his general overview to an account of the charter of the Islamic Conference.<sup>58</sup> Here too, we find nothing which is both Islamic and legal: “[T]he Charter contained no extraordinary obligations purporting to compel any State to apply the Islamic Shari’a or take up arms for the sake of justice and right. Its duties and obligations were no different from any other international organization.”<sup>59</sup> Islam serves, not as the ground for legal obligation, but rather as a source of solidarity: “The formal reiteration of Islam as constituting a strong factor for rapprochement and solidarity is kept within a general framework of mutual consultation and co-operation to achieve the objectives of the Charter.”<sup>60</sup> In the end, it is unclear whether Moinuddin discusses Islamic law in any substantive way. He discusses law among Muslim states.

Although secular Islamic law—Islamic law without Islam—is nonsensical, it is not clear what the resurgence of religious fundamentalism means for public international law. Islamic fundamentalists are often outspoken in their rejection of Western values, often explicitly including international law as an element of the foreign culture to be rejected. While religion and public international law may be seen to conflict, public international law, in general and by design, attempts to elide conflict with religion by avoiding substantive questions of belief in favor of procedural questions. Thus both Islamic fundamentalists and public international lawyers would seem to insist that Islamic law and public international law cannot be conflated. Nonetheless, Islamic legal notions have on at least one occasion been discussed within the lexicon of public international law. During the International Court of Justice litigation over the Western Sahara, Islamic legal arguments were advanced that statehood was a *de facto* matter within the context of the *dar al-islam*. Assertions of Moroccan control of the territory were belied by the existence of the Polisario, and consequently, the inhabitants had a right of self-determination, a right determined at public international law.<sup>61</sup>

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58. Id. at 69-112.

59. Id. at 100-01.

60. Id. at 108.

61. See *Western Sahara*, 1975 I.C.J. 12, 40-49 (Oct. 16); see also Mayer, *supra* note 17, at 213-15 (discussing *Western Sahara*). In general, however, issues that one might expect to be phrased in terms of an Islamic international law have been phrased in the language of the West, public international law. Perhaps the most remarkable example of the willingness of “Islamic revolutionaries” to speak the language of public international law

The arguments over Palestine are often conducted in religious terms, including *jihad*, holy war. But what is the substance of this *jihad*? "The deconfessionalization of the *jihad* concept as it relates to the Palestinian cause is demonstrated by a call for *jihad* made by the rector of al Azhar in 1973, asserting that *jihad* against Israel was an obligation incumbent on Egyptians, regardless of whether they were Christians or Muslim."<sup>62</sup> And, of course, the objective of the Palestinian *jihad* is statehood, not the restoration or expansion of the *umma*, the community of believers. Even the Ayatollah Khomeini's position on *jihad* may be ambiguous. "Khomeini's positions do not correspond precisely to the classical theory of *jihad*, the condemnation of war in public international law, or Third World support for struggles to throw off the yoke of super-power domination. Instead, one sees reflections of all three."<sup>63</sup>

For 'AbdulHamid 'A. 'AbuSulayman, Islamic thought in general, not just fundamentalist thought, is handicapped by the conflicting and untenable attitudes Muslims adopt toward both the structure of modernity and their own history.

Muslims are trapped in a single position decided by an  
accident of a course of actions that took place some time

were the arguments before the Iran-U.S. Claims Tribunal, treated by Ted Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal*, 78 Am. J. Int'l. L. 1 (1984). See, e.g., *Espahanian v. Bank Tajarat*, 2 Iran-U.S. Cl. Trib. Rep. 157 (1983). Finally, see Bedjaoui, *supra* note 15, at 298:

When the Security Council took the war [the Gulf War of 1980-1988] onto its agenda, one of the belligerents, it is true, showed some mistrust towards it, in a manner corresponding to its usual line of conduct. But on either side, what was invoked, both within the Council and outside it, was international law, not Islamic law.

For documentary support of this summation, see *Resolutions and Statements of the United Nations Security Council (1946-1989)* 353-76 (Karel C. Wellens ed., 1990).

62. Mayer, *supra* note 17, at 217.

63. *Id.* at 207. In a recent article, Sarvenaz Bahar similarly argues that Khomeini and Iran draw on several sources to create a distinctively Islamic approach to international law. Bahar, *supra* note 33. What Bahar means by "Islamic" is difficult to discern. Her own imagery and argument draw on a variety of resources available to Muslim intellectuals, ranging from a vaguely Marxist suspicion of hegemonic Western colonial powers, in which ideology is a mask for political reality, through Yale Realism, in which ideology is a rather mechanical expression of national interests, to Islam (in her case *Shi'ite*), in which religion is the reality underlying the constitution of the nation, and, even more profoundly, the ground for politics itself. With ideology so broadly defined, I could not assess how Bahar thinks Islam shapes the Iranian view of international law, beyond providing a rhetoric in which to voice a passionate, perhaps understandable, but generally unfocused discontent with the status quo.



back in history. . . . [C]ontemporary jurists and scholars are in a state of confusion. They either speak in general, vague terms, divorced from the actual problems and challenges facing the Muslim peoples and authorities, or they speak from a position of idealistic fantasy, assuming a powerful, established society and authority. . . . Muslim authorities need Islamic political thought and scholarship comprehensive enough to respond creatively to the new realities and challenges of the contemporary world.<sup>64</sup>

'AbuSulayman presents Muslim thought as a glorious enterprise gone astray, and like a tree whose disease is revealed only when it falls, the weaknesses of medieval Islamic thought only became apparent when Islam came in conflict with the West.

[T]he Western attack revealed and uncovered rather than caused the decay of Muslim thought, and it was only a matter of time for it to collapse, leaving the Muslim people with nothing but the Qur'an, the *Sunna*, and glorious memories of Muslim achievements. The attacks were fatal because of the state of Muslim thought. Europe, armed with dynamic ideas and efficient methods, based on an empirical and rational approach, confronted the static and rigid Muslim frame of mind, which rested on textual deduction within the limits of the early Muslim model. The Muslim's thinking had lost touch with reality, and they were incapable of regeneration and reorientation in the light of new developments and demands.<sup>65</sup>

Both of these passages end by requiring a better way of thinking Islamically. Classical thought has collapsed; Islam must begin anew with the Islamization of knowledge. In particular, international relations must be translated, or transmuted, into a specifically Islamic intellectual enterprise.

The book begins with an introduction by another author, al-Shahid Dr. Isma'i R. al-Faruqi,<sup>66</sup> who situates the development of Islamic international law against a backdrop of the prevailing and

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64. 'AbuSulayman, *supra* note 29, at 107 (citation omitted).

65. *Id.* at 44.

66. The title *al-Shahid* means that he is a martyr; his introduction is visionary in both style and substance.

impoverished Western formulation of international relations and international law.<sup>67</sup> Acknowledging inadequacies in current Muslim practice, al-Faruqi envisions a truly Islamic world order. 'AbuSulayman's daunting task is to articulate the legal visage of this Islamic international order, to provide aspiration with methodological rigor and the beginnings of doctrinal detail. 'AbuSulayman begins this undertaking with a discussion of the classical *fiqh* as applied to the *siyar*, the method of deriving the law from the sacred texts. He finds four basic flaws with the practice of *fiqh*: (1) excessive use of *naskh* (abrogation); (2) failure to realize the impact of space-time in the interpretation of *hadith*; (3) lack of empiricism; and (4) lack of a systematic approach to the *usul al-fiqh*. Remedying these four failings should make the *shari'a* both broader and more flexible, and therefore more applicable to modern life, including contemporary international relations.

The first two flaws result from the misapprehension of the Islamic texts that are the concern of *fiqh*. Taken together, these flawed approaches to *fiqh* tend to narrow the scope of possible interpretation, thereby increasing the determinacy of legal judgment, but at the price of creating a rather rigid and narrow structure of rules. Because the rules of *fiqh* are the main avenue to the *shari'a*, 'AbuSulayman maintains that Islamic law itself is overly limited in the scope and flexibility of its application. By changing the rules of legal interpretation, 'AbuSulayman hopes to make the law broader, more flexible, and therefore more suited to the changed circumstances in which the Muslim world finds itself.

The first flaw in *fiqh* is the excessive use of *naskh*.<sup>68</sup> Generally translated as abrogation, *naskh* is the mode of understanding by which a succession of texts narrows, or even repeals, an earlier, broader ruling.<sup>69</sup> God's revelation did not occur all at once, but

67. Isma'i R. al-Faruqi, Introduction to 'AbuSulayman, supra note 29, at xiii-xxix. All the scholars surveyed here tend to conflate international law and international relations, disciplines which have sometimes been held apart.

68. 'AbuSulayman, supra note 29, at 35-36.

69. The common lawyer may think of the way a line of cases is progressively narrowed. This analogy is misleading because *naskh* is a way of understanding revelation—God's message, which is atemporal—in the sequence in which it was received by humanity. Therefore, Islamic law denies the notion of *stare decisis* altogether—human judgment does not bind later human judgment. But see infra note 71 and accompanying text (discussing 'AbuSulayman's lawyerly—in a Western sense—narrowing of the legal obligation imposed by the *siyar*).

over the lifetime of the Prophet. Earlier revelations must, therefore, be understood in light of later ones. The effort of determining what God, through *naskh*, had declared the law to be is one of the major tasks of *fiqh*. In this way, a relatively determinate body of rules was created, but at the cost of flexibility. 'AbuSulayman maintains that *fiqh* has tended to read more *naskh*, more narrowing, into later revelations than was necessary or correct, therefore producing an overly restrictive Islamic law. By restricting the scope of *naskh*, 'AbuSulayman presents, or, more accurately, represents various possibilities foreclosed by the incremental process of specification which centuries of Islamic scholarship had undertaken.

The second flaw that 'AbuSulayman finds with *fiqh* is the failure to consider context in the interpretation of *ahadith*, the reports of the sayings or doings of the Prophet.<sup>70</sup> *Ahadith* fall into two periods, those which took place when the Prophet and his companions were in Mecca, and those which took place after the flight to Medina. The *ahadith* vary in tone, character, and content; the problems confronted by Muhammed as leader of the Muslim community in Mecca were different from those confronted by the Prophet in Medina. In Mecca, the Muslims were a relatively small community, and the *ahadith* are concerned primarily with problems of the faith and internal relations. During the Medinan years, the Muslim political and military expansion began, and Muhammed was confronted by problems of rule. In interpreting the Meccan and Medinan periods in terms of the different political needs faced by the Muslim community, 'AbuSulayman emphasizes the context of decisions taken by the Prophet or the companions. By focussing on the context, 'AbuSulayman limits the applicability of the texts. Each decision does not represent a general rule, but a particular response to a specific set of circumstances. The general result of this method is that the *ahadith* of the Meccan period, many of which could not serve the requirements of the Muslim imperium in Medina and were hence eschewed, are again made available.

Both of these intellectual reformulations, the restriction of *naskh* and the insistence on context, make *shari'a* generally, and the *siyar* in particular, both a more flexible and less binding legal tradition.

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70. 'AbuSulayman, *supra* note 29, at 66-69, 92-105.

To the Western observer, the reforms proposed by 'AbuSulayman may seem rather unobjectionable, no more than a broadening of interpretive modes and a sensible examination of the facts of a situation. But the *ahadith* are a form of revelation; their authority is second only to the direct revelation of the *Qur'an*. At the same time, the *ahadith* are also human reports, and as such, are fallible. Stories are mistold, misremembered, misunderstood, and so forth. The science of *fiqh* exists in order to separate the truth—God's message—from human error and misleading circumstance. God has provided guidance; man's task is to discern the path among the tangle of his own confusion. Similarly, 'AbuSulayman's willingness to reinterpret in light of context, and, particularly, to limit the authority of *ahadith* to historical circumstances that no longer exist, may be seen to verge on a denial of the atemporal, and hence a denial of the contemporary authority of the *ahadith*. The flexibility and range of application for *shari'a* sought by 'AbuSulayman come dear; the price is the diminution of the sense that human law is directly connected with divine sovereignty. 'AbuSulayman's attempt to reform *fiqh* and so broaden *shari'a* is a confinement of one of the major aspirations of Islamic thought.<sup>71</sup>

Third, 'AbuSulayman claims that *fiqh* is flawed because it is insufficiently empirical; he believes that *fiqh* must become empirical if it is to respond to modern circumstances.<sup>72</sup> 'AbuSulayman uses "empirical" in at least two senses. First, he alleges that the practitioners of *fiqh* have traditionally ignored the present and focused exclusively on the past. An empirical approach would validate contemporary experience, and thereby palliate the unease many Muslims feel with modernity. Second, however, 'AbuSulayman intends *fiqh* to be empirical in the scientific sense: inducing general truths from the accumulation of particular data. Again, 'AbuSulayman seeks to create an Islamic modernity. He hopes to place modern science within the ambit of Islamic culture. If Islamic scholarship and scholarship in the natural world were both empirical, then the idea that science and its product—the West's technological modernity—are Western would be defeated, and with it, its corollary—the idea that Muslims are unable to join wholeheartedly the modern world.

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71. This is the aspiration that Vogel calls metaordering.

72. 'AbuSulayman, *supra* note 29, at 76-81.

Islam is a this-worldly religion, but like all religions, Islam requires sensitivity to ultimate questions, to the purposes and ends of things. Since Galileo, modern science has declared such questions outside its purview, and has defined itself in large part through a renunciation of teleology. It is difficult to imagine an Islamic empiricism that renounced all consideration of purpose; it is difficult to imagine a rapprochement between Islam and scientific empiricism any closer than that between Christianity and scientific empiricism. In fine, to shift religious emphasis from past to present experience does not suffice to make religion scientific.

The lack of a systematic approach to Islamic law is the fourth and final failing of *fiqh*.<sup>73</sup> To remedy this failing, 'AbuSulayman proposes to weld the fruits of this empiricism and a more flexible historical exegesis into a rational system. 'AbuSulayman attempts to render *shari'a*—a collection of narratives—a social science.<sup>74</sup> Unfortunately, 'AbuSulayman does not explain, much less detail, how he expects the narrative understanding of *shari'a* to become the schematic understanding of contemporary social sciences. 'AbuSulayman also fails to help the Western reader to resolve the enormous epistemological problems entailed in his proposals to make Islamic law more empirical and more systematic. In short, the third and fourth flaws, and 'AbuSulayman's remedies, do not seem as deeply considered as the thoughts on the appropriate treatment of *usul al-fiqh*. Taken as whole, 'AbuSulayman's program is unconvincing.<sup>75</sup> Yet its basic impulse, to redirect the focus of Islamic legal thought from the past to the present, is centrally important, and will be discussed in greater detail below.

Having established his method, in the final part of his work 'AbuSulayman moves "From Legalistic to Political Thought."<sup>76</sup> He tackles several traditional, albeit difficult, problems of Islamic international law, including treatment of prisoners and extreme actions (terror). Each problem was confronted and resolved in the *siyar*. Traditionally, the resolution reached in the *siyar* was binding

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73. Id. at 81-83.

74. If one focuses on aspiration rather than diction, this project is reminiscent of the American Legal Realists.

75. Perhaps no rational program, nothing shy of a new revelation, could be convincing. However, if 'AbuSulayman frames the problem in terms of rationalistic discourse, he must confront rationalistic quibbles.

76. 'AbuSulayman, *supra* note 29, at 91-148.

on future generations—it represented Islamic teaching on the matter. For 'AbuSulayman, however, each solution is revealed to be a particular instance, understandable only in the context of political contingency, not of legal obligation. The areas of conflict between *siyar* and the modern law of war and human rights are thus explained away. Free of legal obligation, Muslims are at liberty to implement pragmatic and humane politics.

'AbuSulayman closes with a lengthy discussion of the way in which implementation of the new Islamic approach can lead to a just world order.<sup>77</sup> To simplify, he claims that politics (associated with the cultural flexibility necessary for participation in the modern world) can and should replace law (associated with the constraints of tradition). For 'AbuSulayman, politics denotes freedom to act, and law entails restraint, the imposition of authority. His move from law to politics is thus a liberation intended to free Muslim societies to assume their place in the modern world.

'AbuSulayman elides rather than articulates the problem of authority. On one hand, the transition from traditional to modern societies does not entail the replacement of law by politics. Contemporary societies, including the international one, frequently require the relative determinacy and stability of law. The need for law entails the need for authority; law without authority is meaningless. On the other hand, politics requires authority just as much as law does. The political realm must have authority in order to issue law, and to shape future political action. In fine, the need for law, and hence the need for authority, is perennial, and the realm of freedom suggested by 'AbuSulayman, politics, also requires authority. The problem of authority is thus inescapable. The problem is sharpened for the Muslim because politics, no less than law, is an exercise of temporal power in a world of divine sovereignty; therefore political action, no less than legal action, is accountable before ultimate authority.

'AbuSulayman's book fails to provide an accounting of Islamic authority; it does not construct legal or political prescriptions on substantively Islamic ground. 'AbuSulayman sticks with the Islamic source, and in that sense remains Islamic.<sup>78</sup> But having undercut the practical authority of Islamic scholarship, if not the

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77. Id. at 116-48.

78. He also remains limited to the subjects handled within the traditional sources.

*Qur'an* itself, he provides no substitute source of legitimacy. While 'AbuSulayman's efforts are undoubtedly clever, one is left wondering how compelling this project could be to an audience that demanded an Islamic polity.

For Muslim intellectuals confronting public international law, the devil's choice is posed: either adopt the culture of the West, and lose one's culture and thus oneself, or renounce the culture of the West, and lose one's role in the modern world. The Muslim is placed at a crossroads. To take one road is to abandon the other.

An-Na'im grasps the nettle of modernity in another way.<sup>79</sup> Modernity and Islam are truths that require one another, are complements rather than alternatives. An-Na'im attempts to understand modernity in a religious fashion, and to make his religion, Islam, modern:

The aim of this book is to contribute to the process of changing Muslim perceptions, attitudes, and policies on *Islamic* and not secular grounds. Unless a religiously acceptable case for genuine modernist reform is established, present and future Muslims face only two alternatives: either to implement the public law of Shari'a, despite its inadequacies and problems, or to abandon it in favor of secular public law. I find neither alternative satisfactory, and I hope to reconcile Muslim commitment to Islamic law with the achievement of the benefits of secularism within a religious framework.<sup>80</sup>

The attempt to reinvent Islam requires a critical endeavor: the introduction of doubt into current structures of belief. An-Na'im

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79. Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation* (1990).

80. *Id.* at 10. As a friendly commentator remarks, An-Na'im attempts to resolve the dilemma facing contemporary Muslims by restructuring their understanding of Islam itself: [This book] represents a radical departure from both the Islamic modernist and the Islamic fundamentalist positions which dominate contemporary thought in the Muslim world. It is neither an attempt to integrate Western and traditional Islamic thought (as is usually the case with modernist positions) nor a fundamentalist effort to return to pristine principles. An-Na'im is attempting to transform the understanding of the very foundations of Islamic law, not to reform them.

John O. Voll, Foreword to An-Na'im, *id.* at x. While An-Na'im's project is obviously grounded in deep belief, Voll's foreword makes its heterodox character clear. I cannot speak to how widely An-Na'im diverges from the main currents of Islamic thought, or the extent to which the heterodox character of his effort precludes its political success.

thus begins by adopting a strategy familiar from 'AbuSulayman and other modernists:

Shari'a is not the whole of Islam but instead is an interpretation of its fundamental sources as understood in a particular historical context. Once it is appreciated that Shari'a was *constructed* by its founding jurists, it should become possible to think about reconstructing certain aspects of Shari'a, provided that such reconstruction is based on the same fundamental sources of Islam and is fully consistent with its essential moral and religious precepts.<sup>81</sup>

In this passage, *shari'a* is identified with *fiqh*, an interpretive, and hence backward looking derivation of authority from legal texts to answer contemporary questions. *Fiqh*, then, is identified with a scholastic class, the "founding jurists," whose work has been overtaken by history. An-Na'im thus recharacterizes *shari'a*, and produces an idea of Islamic law much more akin to Western positivist ideas of law as a juristic structure, formulated to meet certain social exigencies.

Once *shari'a* has been demoted from its status as the path of God, as the social reality of the whole of Islam, then it is possible to counterpoise *shari'a*, as a social system, with other social systems:

In order to demonstrate the need for drastic reform of Shari'a in these fields [including international law], I explain what may be taken to be imperative principles in the particular field, contrasting them with the corresponding principles and rules of Shari'a, and highlighting the prospects of reconciliation, whether within or from outside Shari'a, but always in accordance with Islamic precepts.<sup>82</sup>

The "drastic reform of Shari'a" is thus to be guided by two sets of standards, the "imperative principles in the field" and "Islamic precepts." The tension between the two sets of standards is considerable. Why should the imperative principles of a field be privileged over the teaching of *shari'a*? God orders *shari'a*, but who

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81. An-Na'im, *supra* note 79, at xiv.

82. *Id.* at xiv-xv.



gives these other orders?<sup>83</sup> From literally the first sentence of the book, An-Na'im posits two sources of authority, Islam and, for lack of a more precise term, what might be called secular modernity. *Toward an Islamic Reformation* can be understood as an attempt to build a politics that will accommodate both authorities:

Muslim peoples of the world are entitled to exercise their legitimate collective right to self-determination in terms of an Islamic identity, including the application of Islamic law, if they wish to do so, provided that they do not violate the legitimate right of self-determination of individuals and groups both within and outside the Muslim communities.<sup>84</sup>

The tension between Islam and secular modernity within An-Na'im's proposal for reform of *shari'a* also appears in his discussion of the self-determination of Muslim communities. What is the relationship between Islam and the legitimacy that underlies the "collective right to self-determination"? For Muslim peoples, the legitimacy of the collective right to self-determination lacks the divine legitimacy endowed by Islamic identity. Muslims have not only a right but an obligation to live according to Islam. However, An-Na'im suggests that the legitimacy of the collective right to self-determination is prior to Islamic identity, both because it is possessed by peoples who do not (yet) recognize Allah, and because even Muslims must respect the right to self-determination of non-Muslim peoples.

A similar tension between Islam and the concerns of modernity arises in the application of *shari'a* to contemporary societies. *Shari'a* cannot simply be imposed on the conditions of modern life; to attempt to do so would only result in massive human suffering. "[T]he application of the public law of Shari'a today will be counterproductive and detrimental to Muslims and to Islam itself" because "the public law of Shari'a is fundamentally inconsistent with the realities of modern life."<sup>85</sup> Nonetheless, An-Na'im firmly maintains that pure secularism is neither possible nor desirable. "[I]f we are to understand anything at all about what has happened in the past and is happening today in the Muslim world, we must

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83. One might also ask, what are Islamic precepts as distinguished from *shari'a*?

84. An-Na'im, *supra* note 79, at 1.

85. *Id.* at 187.

appreciate the universality and centrality of religion as a factor in the lives of the Muslim peoples."<sup>86</sup>

The topics touched on here, An-Na'im's proposal for a reform of *shari'a*, the self-determination of Muslim communities, and the application of *shari'a* to modern life, all illustrate the profound and multi-faceted tension between the two authorities, Islam and secular modernity. An-Na'im tries to restructure the authority of Islam, by "evolv[ing] an alternative and modern conception of Islamic public law that can resolve"<sup>87</sup> the tensions between (traditional) Islam and modernity. If Islam can be reformed, reimagined, then perhaps it will serve as a complement, rather than an opponent, to secular modernity.

An-Na'im makes two basic choices at the outset of his legal reformation. First, rather than redefine secular modernity, An-Na'im attempts to change Muslims' approach to Islam. An-Na'im thus eschews fundamentalism, which holds fast to a pure and therefore stable Islam, and reforms society within the mold offered by eternal Islam. He also avoids secularism, which asserts that Islam is irrelevant for the tasks of modernity.<sup>88</sup> 'AbuSulayman believes those tasks should be undertaken by the inhabitants of Muslim countries. An-Na'im asserts that life in Muslim countries is essentially Islamic, but he also assumes modernity, and attempts to reform Islam.<sup>89</sup> Second, and more technically, An-Na'im limits the scope of *shari'a* in order to create the space within which to rearticulate an Islamic vision of contemporary social arrangements.<sup>90</sup> *Shari'a* is a juristic construct distinct from revelation, a construction legally valid for, and understandable only in terms of, the circumstances of its creation. In restricting the scope of *shari'a*, An-Na'im turns away from the intellectual tradition of reformers, including 'AbuSulayman and stretching back through Muhammad ibn Abd al-Wahab to Ibn Taymiyya, who tend to make *shari'a* more applicable to daily life by increasing its scope and flexibility.<sup>91</sup> For An-

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86. Id. at 3.

87. Id. at 2.

88. Id. at 48.

89. Id. at 67-68.

90. Id. at 68.

91. For a vivid, if not very enthusiastic, short review of the importance of Ibn Tamiyya and Muhammad ibn Abd al-Wahab, see Ignaz Goldziher, Introduction to Islamic Theology and Law 240-45 (Andras and Ruth Hamori trans., 1981) (1910). The work of these reformers illustrates, *inter alia*, that many of the concerns that emerge in regard to

Na'im, *shari'a* is to be narrowed in its authority, not broadened in its application. In the space uncovered by *shari'a*, a modern Muslim way of life may germinate and flourish.

Even though they reach opposite conclusions regarding the scope of *shari'a*, An-Na'im's and 'AbuSulayman's arguments share a crucial similarity: an emphasis on the present nature of religious experience. In so doing they hearken to the tradition of Islamic reform stretching back to the Hanbali reformer Ibn Taymiyya. "Ibn Taymiyya, even more than other Hanbalis, waged open war on *taqlid*. To him blind adherence to the views of men, rather than fresh resort to the wellsprings of God-given truth in the *Qur'an* and *sunna*, was vital error."<sup>92</sup> In the same vein, 'AbuSulayman argues that the practitioner of *fiqh* must take account of history, of politics, and of particular circumstances before a teaching may be derived. To the essentially secular Western view, 'AbuSulayman may seem to be simply substituting the views of contemporary men for the traditions of dead men. But these reformers are all pious men, and believe that Islam must take account of the present, and cannot continue to locate authority and righteousness solely in the past. Contemporary Islamic life requires present interpretational rigor, combined with an iron-willed fidelity to its results.<sup>93</sup>

An-Na'im stresses the present quality of religious experience, and hence Islamic authority, more than 'AbuSulayman does. An-Na'im is more sensitive than 'AbuSulayman; An-Na'im explicitly acknowledges the "exceedingly delicate" nature of his undertaking.<sup>94</sup> The proposals of both 'AbuSulayman and An-Na'im are delicate because they concern the basis for legal authority, the mainspring of the law. Stated theologically, both arguments touch on the object of piety itself. 'AbuSulayman's argument draws

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international law can also be discussed under other rubrics. A more compendious approach than the one I have undertaken would attempt to relate Muslim thinking about international law to Muslim thinking about law generally, about modernity, about democracy, and so forth. For a discussion of 'AbuSulayman's broadening of *shari'a*, see supra notes 68-71 and accompanying text.

92. Vogel, supra note 6, at 166.

93. A reformer who calls for religious renewal is inevitably vulnerable to charges that he disregards established authority, and that in denouncing the false authorities between the reformer and the well-springs of the faith, the reformer is only demonstrating his own ego. Al-Wahab was executed as a heretic. While certainly not heterodox, neither Ibn Taymiyya nor 'AbuSulayman is in the orthodox mainstream.

94. An-Na'im, supra note 79, at xiii.

much of its authority from implicit reliance on the power of modernity, lent teeth by technology, that is inevitably understood to be Western and hence foreign to Muslims. In order to respond to the new world, 'AbuSulayman would redefine *shari'a* as politics. But he does little to legitimate politics Islamically other than to assert its necessity for Muslims.

In contrast, An-Na'im's argument is more pious. It draws much more of its authority from Islamic sources, the *Qur'an* and *sunna*. An-Na'im leaves *shari'a* with the status of law insofar as it is based on the *Qur'an* and *sunna*. The activity of the jurist is to interpret *shari'a*, and to study *Qur'an* and *sunna*, in light of historical context. Because it was written for an entirely different world, the *siyar* does not need to be reinterpreted, but largely abandoned as a guide to the conduct of international affairs. Today's Muslims must look not to the *siyar*, but to Islam itself for guidance:

Rather, since the use of force was justified by the historical context of violent intercommunal and international relations, it must cease to be so justified in the present context, in which peaceable coexistence has become a vital necessity for the survival of humanity. Besides the growing trend toward an enlightened view of human relations and in favor of peace, modern means of nuclear warfare have made hostile international relations unthinkable. It is true that limited use and threat of force are still practiced in international relations. The question is whether they should continue to be the basis of international law. I think it cannot possibly be.<sup>95</sup>

An-Na'im is not merely arguing from mundane necessity or utility, *maslaha*. His argument is that historical context is the way in which Muslims live Islam, and that Islam is not opposed to history, but rather suffuses history. Consequently, Islamic thought must take place in the context of historical understanding:

[F]or Muslims the historical context, as such, can neither be the source of Shari'a in the past nor its source in the future. . . . Islamic law in the past, present, and future must be based on the Qur'an and Sunna. I fully accept this position and only wish to suggest that the historical

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95. Id. at 143.

context is merely the framework for the *interpretation and application* of these basic sources of Islam. . . . [I]t is not suggested here that Islamic law should simply follow the developments in human history regardless of the provisions of the Qur'an and Sunna. . . . [T]he Qur'an and Sunna have been the source of Shari'a as the Islamic response to the concrete realities of the past and must be the source of modern Shari'a as the Islamic response to the concrete realities of today.<sup>96</sup>

An-Na'im argues that contemporary circumstances require a Meccan version of Islam, and provides an internally authoritative argument for the Meccan authorities. The *ahadith* of the Meccan period, for An-Na'im, are a series of testaments, revelations of teachings for which the *umma* and the world—mired in continual violence—were not yet ready. Such a world, and the expansion and rule of the Islamic empire, required a sterner code. That code was provided by the Prophet's teachings at Medina. But throughout and ever since the years of empire, the teachings of Mecca have stood in wait for a civilization that could be more gentle.<sup>97</sup> We have now achieved a level of civilization that has the potential to fulfill the commands of Mecca, and in so doing, to be truly humane. At international law, asserts An-Na'im, we should abandon the power politics of imperial Islam discussed in the Medinan tradition and return to the Mecca which provides the model for a humane international polity.<sup>98</sup>

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96. Id. at 143-44.

97. Abdulaziz Sachedina disputes the dichotomy drawn between Meccan and Medinan tradition, and argues that at least one of the strands of Islamic thought generally regarded as progressive (e.g., the verse, "there is no compulsion in religion") are Medinan, not Meccan in origin. Abdulaziz Sachedina, Review of Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, 25 *Int'l J. Middle E. Stud.* 155, 156 (1993).

98. I am in no position to comment on how persuasive this argument is to Muslims, other than to say that it is the *kind* of argument, because openly purposive, that is required. Abdulaziz Sachedina argues that the epistemology of An-Na'im is unlikely to persuade devout Muslims, and is unlikely to be understood by Westerners. Id. at 157. Still, An-Na'im is operating with far and away the most sophisticated epistemology of the scholars surveyed here. He is also operating with a true religious vision, which I have stated here a bit more explicitly than he does, no doubt at the cost of oversimplification. The title of An-Na'im's book, *Toward an Islamic Reformation*, is intriguing. Although differences abound, the analogies between his project and Luther's (such as the rediscovery of basic texts, *Qur'an*, *sunna*, and *sola scriptura*; radical reductions of the binding quality of the old law; and radical revitalization of the religious quality in contemporary life, including law)

I introduced this survey of Islamic perspectives on international law in terms of three oppositions: peace and war, *dar al-islam* and *dar al-harb*, Islamic authority and Western category. Each of the scholars cursorily surveyed here points out, in more or less explicit fashion, that the acceptance of warfare which characterized Islam at certain periods in its history cannot be maintained in the present. Similarly, the violent intolerance of non-Muslim views, the desire to spread the faith by the sword if need be, and the aspiration to overrun the *dar al-harb* and establish the universal *umma* cannot be maintained in the contemporary world. The publicists of Islamic international law, like their counterparts in public international law, begin with a preoccupation with warfare and a desire to use law in order to achieve peace. In public international law, warfare is consigned to the past; law ignores history and hopes to establish, through negotiation, a better future. In Islamic law, where history is both legally authoritative and violent, the relationship between law and history is much more problematic. If the Muslim tradition is simply accepted, a great deal of violence must be accepted as well. But insofar as the tradition is distanced, legal authority—revealed to the Prophet, and the tool with which peace is to be achieved—seems to be weakened. To schematize the problem: there can be no peace for Islam without Islamic law; there can be no Islamic law without history; and Islamic history is largely the history of a people at war.

For all of these scholars, the result of this quandary is an obsession with history, an attempt to show that, although it is steeped in violence, Islamic history does provide authority for a peaceful

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are powerful. Cf. Harold J. Berman & John Witte, Jr., *The Transformation of Western Legal Philosophy in Lutheran Germany*, 62 S. Cal. L. Rev. 1575 (1989) (remarking that Lutheran legal philosophy is an important source of both natural law theory and legal positivism, two competing schools of contemporary Western legal philosophy). These scholars suggest that Luther provides, at least conceptually, the possibility of a Western political vision different from, and perhaps more deeply meaningful than, rationalist liberalism. By showing us elements of Western culture that have been obscured by the glare of the Enlightenment, revisionist thinking about Martin Luther may make two contributions to the concerns of this Article. It may help Westerners understand Islamic attitudes toward international law. As interestingly, re-asking the questions so important to Islam, and apparently to Luther also, about the relationship between belief and politics may give shape to the widespread and rather inchoate discontent among Western commentators with contemporary liberalism, including the liberalism that informs public international law.

world order.<sup>99</sup> Each scholar is concerned with the basic problem of the *siyar*: the relationship of the state to warfare as defined by the *siyar*. Each scholar attempts to refute claims, derived from plausible readings of the *siyar*, that Muslims are obliged to violence in the name of the faith. Each insists, conversely, that Islamic tradition provides some authority for peaceful relations between the *dar al-harb* and the *dar al-islam*. Most of these scholars devote considerable energy to developing methodologies that allow such conclusions, conclusions different from those reached by a simple reading of the *siyar*. These methodologies, however, are partial rather than compelling justifications. Each scholar seems satisfied to refute a claim that Shaybmani's *siyar* should apply. Each makes essentially negative arguments, presumably directed against a Muslim orthodoxy and perhaps also the Western Orientalists, who both generally hold that the Islamic law of nations is contained in the orthodox reading of the *siyar*.

For those of us outside the Muslim world, for whom Shaybani is anything but an obvious source of law, a more affirmative approach to legal argument is necessary. Most of these scholars tell us little about how or why their own conclusions are reached. What is Islamic international law? Why is it Islamic? The scholars surveyed here do not answer these basic questions. In order to move from war to peace, and to avoid conflict between the *dar al-harb* and the *dar al-islam*, the third opposition, Islamic authority and Western category, is essentially left unconsidered. Where the law is substantive, and clearly Islamic—for instance in discussions of the applicability of the *siyar*—Muslim commentary rests upon Islamic authority. But where the law deals with Western categories, the scholars make no effort to establish Islamic authority, beyond arguing that their position is not forbidden by the *siyar*. These scholars produce a modern theory of international law, i.e., one not much different from public international law, by rendering conceptual categories increasingly Western and by failing to locate authority in

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99. This is the root of the odd, yet common, comparisons between Islamic history and the history of violence, injustice, and lawlessness in the West. See, e.g., Enayat, *supra* note 36. The argument is that if the West, with its bloody history, can have international law, then so can Islam. The argument fails, and attracts almost no attention, because the West does not use history as a self-conscious mode of legal justification. The U.N. is justified in spite of, as a response to, World War II, not through World War II. For a discussion of history as a source of justification see *infra* notes 139-46 and accompanying text.

a specifically Islamic reality. The Islamic discussion of international law is radically incomplete because it fails to be substantively Islamic.

Islamic international law is also topically incomplete. If international law is conflated with the law in and of war, how does one deal with a trade question?<sup>100</sup> The binomial world of the *jus ad bellum* engenders (and is engendered by) the division of humanity into friends and foes, into the *dar al-harb* and the *dar al-islam*. The binomial world of the authors surveyed is generally revealed through copious discussion of "The West." This preoccupation is simple, alien, and, at worst, violent. What about peaceful relations with non-Muslim states? The most these texts argue is that such relations are possible. However, merely to show that relations are possible, or permitted, does not constitute a theory of law. Consider, for instance, resource extraction by a technologically sophisticated state from a poor state. What obligations to share or to protect intellectual property, if any, arise from such a relationship? What is the Islamic position on relations between Islamic states and the rest of the developing world, which it cannot see within the neo-colonial lexicon with which it often describes relations with developed nations? Most obviously, how are the affairs among Muslim states to be regulated? What do any of these texts say about the problem of Egyptian migrant labor in Kuwait?

An Islamic theory of international law must confront these questions. A body of law, whether considered as an academic corpus or as the web of actual application, need not be able to answer all the questions that arise within the frame of its discourse. Law has its limitations. But a doctrinally adequate structure can locate concerns within the context that gave them voice, and can respond to those concerns. While definitive answers may not be possible, plausible arguments should be. What these authors present as a theory of international law is a fragmentary description of certain international relations. The drama of the tensions in which Islamic international law takes place—the horror of war, the radical separation of the world into the *dar al-harb* and the *dar al-islam*, and the unhappily inchoate relationship between Western categories and Islamic authorities—blinds scholars of Islamic international law to

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100. Moinuddin, *supra* note 42, at 113-83, does discuss the economic relations among Islamic states. While his discussion is interesting, it does not seem Islamic.



the complexity of the world they discuss. Islamic international law is, at present, incapable of fulfilling its own theoretical imperatives, of delivering a legalistic account of those aspects of its universe that are ill-defined by the oppositions of peace and war.

Perhaps my criticism unfairly judges Islamic international law within the context of public international law. Perhaps the project of Islamic law is not a legal articulation of relationships appropriate to the international environment. If so, one is driven to ask what the project of Islamic international law is. One answer arises from an external view of the tensions I have tried to explore from an internal perspective, as live questions confronting Muslim jurists: the publicists of Islamic international law exhibit an obsession with the world of Islam and a monolithic world outside; a tendency to explain "Islamic law" within the categories of Western international law (even using Latin); a predilection to apologize for the practice of Muslim states, combined with often harsh critiques of the practice of Western states; the desire to adopt superficially understood conceptions of Western politics; and the tendency to give elaborate and tenuous historical arguments for the priority of something "Islamic" in existing public international law, however hegemonic and loudly un-Islamic it may currently be. Taken together, these motifs powerfully suggest to the outside observer that the project of Islamic international law is nothing more than an attempt at accommodation, an attempt to articulate an identifiable Islamic response—even if is not Islamically authoritative—to the public international law regime. To oversimplify for the sake of clarity: there is no Islamic international law, only Islamic commentary on international law.

Although tempting, such a view is too simple: Islamic commentary on international law is not difficult to provide. Like any great religious, moral, and intellectual tradition, Islam affords a perspective from which one may comment on politics. The scholars surveyed here seem to be searching for something much deeper and more difficult than a perspective from which to comment. They search for the authority with which commentary, cultural opinion, becomes law. They seem to have accepted the categories of international law. The task is to provide an Islamic content for those categories. Perhaps the need for Islamic authority reflects the devout Muslim's belief that only God is sovereign, and so only Islam is authoritative. And perhaps the categories of public inter-

national law are recognized as empty, and therefore in need of authority.

### III. ISLAMIC LAW AND INTERNATIONAL LAW: COGNITIVE DIFFICULTIES

My argument thus far claims that (1) Islam views public international law as a foreign entity, to which a response is necessary, and (2) Islam has set itself the task of, but as yet has failed in, articulating an international law. Is an Islamic international law possible?

To approach this difficult and open-ended question, I will examine the aspirations of both Islamic international law and public international law. Although Islamic international law and public international law share a superficially similar desire for global justice, the constitutive elements of the two discourses are different. Islamic international law focuses on the individual, the believer, and public international law is built around institutions, principally the state. The ways in which these constitutive elements relate, the structures of what both cultures call law, are also profoundly different. Finally, the way in which law is pronounced—the ossification of cultural authority into the skeleton of politics—is conceived of in profoundly different ways.<sup>101</sup>

The Islamic authors surveyed here understand international law in absolute terms, as a justifiable universal public order of relations among states. The current international order may therefore only aspirationally be understood as legal, since it only aspires to justice. In actual practice, so-called international law is revealed to articulate the will of the powerful. For example, “[t]he Western tradition of thought in the field of international law or world order is extremely poor,” and “[t]here is a great need of the world today for an international order which would establish a just and permanent peace without tyranny.”<sup>102</sup> True international law would be uni-

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101. By “different” I do not mean simply different from the views held by Western theorists of international law. I mean a difference more profound than that between developed and developing states, or between capitalist and Marxist states. While anti-colonial and Marxist views have influenced the Islamic discourse on international relations, I believe that specifically Islamic thinking on international law is radically different from, and not to be compared with, the relatively internal critiques of international law so prevalent in the days of the New International Economic Order and a viable Marxism.

102. al-Faruqi, *supra* note 67, at xxi-xxiii; see also Hamidullah, *supra* note 14, at 17 (“Muslim International Law would aim at the justest possible conduct of the Muslim ruler in his international intercourse.”).

versal as well as just. Although public international law claims to be potentially universal, limited only by the accession of states, Islam is already universal as God's revealed truth.<sup>103</sup> There can be only one set of universal explanations, and so the only true international law is Islamic. The universalism of Islamic international law is deeper as well as broader than that of public international law. Islamic international law, like all Islamic law, has a substantive aspiration: to realize the command of God, *shari'a*. The *shari'a* is addressed to, expressed by, and lived through the *umma*, the community of believers. Unlike the aggregate of individuals presumed by liberalism, and so by public international law, the *umma* is a community, held together by shared belief. Islamic international law thus ultimately aspires to global community, aspires to be the vehicle through which Islam becomes the world, through which the babble of humanity becomes the *umma*.<sup>104</sup>

This millenarian vision is hardly useful for the non-Muslim, and provides little sense of what, short of the establishment of the universal *umma*, Muslims expect from international law. Islamic law's millenarian vision itself impedes answers to more limited questions. As in the application of the *shari'a* to municipal law, which many Muslims insist has never really been tried, the failings of the international legal regime can always be excused as the failures of an imperfect realization of Islam. The prevalence of such failures, from the death of the Prophet on (the right-guided Caliphs seemed to have had problems with just this issue of violence and the state), is irrelevant. Even among reformers, a frequent response to failure is a more perfect Islam, indeed, the Islamization of

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103. But see Schacht, *supra* note 7, at 199 ("Islamic law does not claim universal validity; it is binding for the Muslim to its full extent in the territory of the Islamic state, to a slightly lesser extent in enemy territory, and for the non-Muslim only to a limited extent in Islamic territory."). Schacht claims that "Islamic law is conscious of its character as a religious ideal," *id.*, but, considered as an ideal, Islamic law is already universal.

104. Lest I be read as alarmist, let me quickly add that public international law has similarly boundless aspirations to mass conversion. Such aspirations may not even be consciously held, but appear to be built into the structure of relations among liberal states. See Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch* (1795), in *Perpetual Peace and Other Essays* (T. Humphrey trans., 1983). This thesis has received considerable attention of late among international law scholars. See Fernando R. Tesón, *The Kantian Theory of International Law*, 92 *Colum. L. Rev.* 1573 (1992); Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 *Colum. L. Rev.* 1907 (1992).

knowledge itself,<sup>105</sup> or a return to the true Islam of *Qur'an* and *Sunna*.<sup>106</sup> Islamic international law works directly towards the ideals of justice, the universal *umma*, and the realization of divine will; these are its predicate, its justification, and its desire. The task—the hard work—of creating an Islamic international law is thus deferred, and Islamic international law remains necessary but unstarted. Each of the works surveyed here is highly preliminary, a defense of the idea of Islamic international law rather than an explanation of Islamic views of a particular, relatively focused topic.<sup>107</sup>

Khadduri, who tends to minimize conflicts between Western international law and Islamic international law, provides a few more modest Islamic hopes for international law. He expects the Islamic law of nations to make certain contributions to a truly international law. The substance of those contributions is revealing: "Since Islam recognizes the individual as a subject of its international law, Muslims would welcome the adoption of such a principle in the modern law of nations. . . . [I]n a shrinking world the individual's claim to a modern law of nations has become a pressing necessity."<sup>108</sup> In public international law, as most formally and austere defined, the relation between the state and the individual is irrelevant. Although it may have served heuristic purposes, this hard line has probably never been an adequate description of international law, and the utility of the definition has been eroded by twentieth century developments, notably the establishment of human rights law. Nonetheless, the position of the individual at public international law has always been and remains ambiguous. Sovereignty rests with states, and only states have an inherent, non-derivative power to bind themselves internationally. International legislation is thus the purview of states. More generally, although public international law increasingly recognizes a

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105. 'AbuSulayman, *supra* note 29.

106. An-Na'im, *supra* note 79. I am being a bit unfair to An-Na'im, because he is right in insisting that reform must be both pious and active.

107. Moinuddin, *supra* note 42, is a partial exception. The first section of his book is a general defense of the possibility of Islamic law. After that, however, he narrows his attention to a single document, the charter of the Organization of the Islamic Conference (OIC).

108. Khadduri, *The Islamic System*, *supra* note 26, at 52. Khadduri is correct in maintaining that public international law needs to account for the individual as the emergence of human rights law testifies; but the extent to which the particularistic concerns of classical Islamic learning can facilitate that effort requires more than suggestion.

wide range of actors, in a profound sense it remains the discourse of states, and those actors appear on the international legal stage as the result of agreement among states. The legal role of individuals at international law is thus derivative, like the light of the moon. For Islam, however, God is sovereign, and the legal position of individuals is no more derivative than that of states. Islamic international law therefore has no conceptual difficulty with an international law regarding human rights, or the nationalization of private assets, to name two areas where public international law theorists have had difficulty articulating the role of the individual on the international plane.

“The second point which Muslim jurists might stress is that moral principles, apart from religious doctrine, should not be completely divorced from the system of law governing nations.”<sup>109</sup> The alignment of politics with a moral order has two aspects, an institutional and a personal. Institutionally, if God is sovereign, if justice is universal, then the morality that applies to individuals could also apply to states. By providing a standard with which to judge states, Islam could remedy an oft-remarked failing of public international law, its moral sterility.<sup>110</sup> Individually, even personally, the provision of a moral order might also provide public international law with a sense of authenticity. Islamic authority is based on God’s plan. Because the source of authority is always the same, Islam locates the individual vis-à-vis all temporal authorities in the same way. In contrast, liberal political structures like public international law, in which political authority is based on the consent of the governed, have difficulty maintaining their authority as the size of the polity increases, so that the myth that the individual has somehow willed the *status quo* becomes impossible to sustain. In the West, this lack of authority is usually expressed as alienation from politics, a lack of authenticity. The Muslim, however, does not will the *status quo*; he recognizes the plan of God. Although

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109. Id. Again, I find Khadduri’s contention substantively correct but perhaps technically naive. Khadduri goes on to attempt to show, somewhat unconvincingly in an Islamic context, that “moral” does not imply “religious.”

110. The sterility of public international law to which I refer is essentially a malaise in modern political thought which is frequently expressed as an attack on liberalism. For examples in the context of public international law, see David Kennedy, *A New Stream of International Legal Scholarship*, 7 *Wis. Int’l L.J.* 1, 133 (1988); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

the plan of God, even as revealed in the right international order, may be vast, it is not alienating.

The articulation of a role for the individual and the provision of a moral experience of law are different aspects of Islam's constitution of legal meaning. Meaning, human significance, is the promise that Islam holds for public international law. Islamic international law unifies global law and individual conscience, legal obligation and moral imperative, by viewing the entire political structure through a unifying moral vision. Islam bids to dissolve the bounds between form and content, process and substance, theory and experience, which so characterize public international law and so disappoint.

Like Islamic international law, public international law aspires to global order. However, the two laws deploy profoundly different strategies for the realization of their aspirations. As with all liberal structures, consent is the central source of authority in public international law. The substance of public international law is the accretion of institutional consent, and the vital activity in international law is the structuring of consensual processes—processes which will give rise to law. Public international law thus derives its legitimacy, its quality as legal, not from its concordance with the right order of things, but from its production by appropriate processes.<sup>111</sup> Definition in terms of process liberates public international law from many demands imposed both by the world (efficacy) and by aspiration (justice). The speakers in the conversations that comprise international law are mediating structures, institutions, most importantly, nation-states.<sup>112</sup> Consensual discourse is about its speakers, and only tangentially about the topic at hand.<sup>113</sup> Rather than speak to the particular facts of social reality, or to some universal notion of justice, international law is primarily the discourse of institutions with each other about each other. Public international law is institutionally self-contained, the

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111. Positivists hold this is the definition of law *per se*, an understandable overstatement. I would argue that the ideology, and identity, of public international law remains essentially positivist. Although positivism is increasingly unfashionable in United States and European jurisprudential circles, it remains the jurisprudential core of actual legal training in Europe, and, perhaps to a lesser extent, in the United States.

112. The whole importance attached to whether or not the Palestine Liberation Organization has national status—that is, can represent and bind the Palestinians—presumes exactly this point.

113. This is the standard critique of liberalism, that it is perpetually condemned to dither over process, and is unable to speak of substantive matters.

legal discourse of the global culture with itself. This self-referential quality provides the great resilience of public international law. We see this in practice. The ubiquitous examples of the failure to achieve global justice do not result in exhortations to ignore public international law and mediate directly between particular condition and universal aspiration. Instead, the failure of international legal process gives rise to exhortations for institutions to repeat and refine the process. Each round of peace talks in the Middle East occasions more talks; international law is a self-sustaining discourse, impervious to the demands of the world or of its own ideals. Despite its universal aspirations, public international law is a discourse locked into the mediate level of politics.<sup>114</sup>

One might assert, in radical contrast, that Islam is basically suspicious of the exercise of power and attempts to excise the mediate level of politics that is the environment and concern of public international law. The exercise of politics is likely to be willful and to involve men in untruth, or rebellion against the divine will. Certainly a profound discomfort with the business of politics (writ large) emerges from the following *ahadith* on judging.<sup>115</sup>

The just qadi will be brought on the Judgment Day, and confronted with such a harsh accounting that he will wish that he had never judged between any two, even as to a single date.

...

One who is appointed judge [qadi] is as slaughtered without a knife.

...

Judges are three: two in the fire, and one in Paradise.<sup>116</sup>

If politics itself is suspect, it is difficult to see how political legiti-

114. I do not deny that public international law, for all its claimed devotion to neutral process, is often suffused with Western substantive values—witness International Monetary Fund conditionality. But such values are not the terms of discourse, and language is the matter at hand.

115. Islam often seems to equate politics with judgment. This makes sense: if Islam understands legitimacy as the congruence of truth and power, it is the act of judgment that most clearly poses the tension between knowledge and decision.

116. These *ahadith* are from various sources, reprinted with bibliography in Vogel, *supra* note 6, at 138-39 (citations omitted).

macy could ever arise. As a political enterprise within a culture hostile to politics, Islamic international law is doomed from the outset.

While superficially appealing, and containing a core of truth, this argument is overstated.<sup>117</sup> These *ahadith* are prefatory to an enormous body of wisdom on the practice of judging, on the appropriate conduct for a *qadi*. The *ahadith* serve not to discourage or disparage judges, but to make them aware of the moral gravity of their task. Furthermore, both the *Qur'an* and *ahadith* can be quoted to show the virtue and necessity of politics.<sup>118</sup> "The dearest of people to God on the Day of Judgment, and seated the closest to Him, is the just ruler; and the most hateful to God and seated the furthest from him, is an unjust ruler."<sup>119</sup> On the other hand, a moral awe of politics, even among those intimately associated with politics, is certainly not unknown in the West.<sup>120</sup>

Although both Islam and the West are suspicious of political

117. The rest of this Article is an attempt to refine this basic point.

118. I only quote *ahadith*, reports of the sayings and doings of the Prophet and his Companions, not the *Qur'an*. The *Qur'an* itself refers only to the *umma*, not the state. On examination, the *Qur'anic* attitude toward power is the same as that revealed more directly in the *ahadith*. As quotation from the *Qur'an* would have required lengthy discussion of the lessons which have been drawn from the passage, I have limited myself to citing an *hadith* in order to show that Islam does not simply condemn or avoid politics.

119. Vogel, *supra* note 6, at 397 (citation omitted).

120. One might recall the third paradox of Plato's Republic, the philosopher who has no desire to be king, as well as Christ's injunction to judge not, lest ye be judged. But even practicing judges can be wary of their office. In his diary, the great English judge Sir Mathew Hale kept a list of Bible quotations that spoke to his vocation. Among them was 2 Chronicles 19:6, "And he said to the judges, take heed what ye do; for ye judge not for man but for the Lord, who is with you in the judgment." Reprinted in Maija Jansson, Mathew Hale on Judges and Judging, 9 J. Legal Hist. 201, 204 (1988). Hale noted in his diary,

[T]he great consideration of all is that which Jehoshaphat puts his judges in mind of: that they judge not for man but for God, and therefore the heart that does most entirely fear God and love justice is under the greatest and most solicitous care lest he should injure the God he fears, as well as man whom he loves, by any oversight or mistake in his act of judicature. . . . And certainly if an invincible mistake be so full of trouble to an honest mind, how much ought a man to be incomparably solicitous that he do not either willfully or by any gross neglect pervert that judgment wherein he does or should act as almighty God's substitute and . . . consequently should, with all imaginable care and industry, endeavor that his judgment be conformable to the justice of him whose person he sustains in that office so that he may reasonably persuade himself that his judgment and sentence is such as would be approved by the God of righteousness, wisdom, and justice.

*Id.* at 206 (citation omitted).



power, wary of its potential for evil, that suspicion has different implications for the conduct of politics. Public international law, and liberal political thought generally, has looked to institutional mediation to neuter the potential of political power to realize the evil will.<sup>121</sup> Islamic law, in contrast, itself mediates between the particular and the general and so pays scant attention to mediating structures. "The Qur'an although it is the eternal Word of God, was, nevertheless, immediately addressing a given society with a specific social structure."<sup>122</sup> Islam thus holds both a universal message and particular resolutions of problems; the various *ahadith* contain not only general moral prescriptions but also specific technical resolutions. By drawing both universal and particular significance from the *shari'a*, the Islamic legal imagination overlooks the mediating levels of societal life, and not inconsequentially, political thought.

Because Islam is the universal that matters, and the believer with the book is the site of meaning, the status of social life as distinct from belief is uncertain within Islam. This uncertainty extends to the nation itself:

The nation-state . . . has never been definitively reconciled with Islamic theory, which in its traditional formulation recognized only the umma, or community of believers. There have been Muslims who, despite the entrenched character of the system of nation-states in the modern world, still adhered to the traditional opinion that any political subdivisions of the Islamic umma were inimical to Islam. Others have accepted these divisions or tolerated them on the assumption that they are a temporary phenomenon.<sup>123</sup>

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121. Power corrupts, and absolute power corrupts absolutely, runs Lord Acton's famous aphorism. The liberal response is institutional entanglement: the rule of law, including *pacta sunt servanda*, federalism, separation of powers, and so forth. An interesting question is the extent to which the turn toward institutions in the West is based on the Western experience with the church, and the Islamic reluctance to engage in institutional discourse is based on the Islamic experience of God unmediated by a church.

122. An-Na'im, *supra* note 79, at 65 (quoting Fazlur Rahman, *Islam* 232 (1979)).

123. Mayer, *supra* note 17, at 212. See also the 1985 Muslim Institute Conference's statement that

modern nationalism is a peculiar product of western political development and has been introduced to the lands and people of Islam through colonialism. . . . [T]he major goal of the ummah in the next phase of history is to abolish and

The legitimacy of institutionalized power is thus profoundly compromised within Islam:

The state itself exists only to uphold God's sovereignty. No other claim to domination is legitimate. To determine right and wrong, to adjudicate, to rule, according to other than the law of God, is unbelief.

[F]or they who do not judge . . . in accordance with what God has bestowed from on high are, indeed, deniers of the truth . . . ! [5:44]

To turn from the law in asserting authority over one's equals is to follow mere *hawa*, or arbitrary, willful passion, caprice or whim, and thus to practice injustice, oppression and wrongdoing toward one's fellow man (all included in the concept of *zulm*, the doer thereof called *zalim*):

(And We said:) "O David! Behold, We have made thee a (prophet and, thus, Our) viceregent on earth: judge, then, between men with justice, and do not follow vain desire . . . , lest it lead thee astray from the path of God. . . . [38:26]

. . .

And they who do not judge in accordance with what God has revealed—they, they are the evildoers [*zalim*]! [5:45]

. . .

But nay—they who are bent on evildoing [*zulm*] follow but their own desires [*ahwa'*, pl. of *hawa*] without having any knowledge (of the truth). . . . [30:29]

Thus all forms of authority and submission—whether moral or legal, whether those of individual conscience, of mutual exhortation, of community solidarity and opinion, or of secular command and sovereignty—must derive

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dismantle the nation-states that now govern the Muslim areas of the world and to create a unified dar al-Islam.

1985 Muslim Institute Conference, quoted in Tamara Sonn, *Irregular Warfare and Terrorism: Asking the Right Questions*, in *Cross, Crescent, and Sword* 129, 139 (James T. Johnson & John Kelsay eds. 1990).

from ultimate truth, righteousness and justice.<sup>124</sup>

In contrast, public international law is compromised from the outset, and cannot plausibly claim to derive from righteousness. In the view of the West, were righteousness available, international law would be unnecessary. It is only because the international environment is characterized as the state of nature that states seek to order politics through treaties, through the webs of their own consent. States consent because it is in their own self-interest to do so. Law is thus derived from evil, the human proclivity to violent self-interest, rather than from righteousness.<sup>125</sup>

As internationalists, the scholars surveyed here regard the nation-state as a permanent facet of social life.<sup>126</sup> In company with

124. Vogel, *supra* note 6, at 60-61 (citations omitted). Vogel has a polemical adversary, the traditional claim that the justice dispensed by Islamic judges—*qadi*-justice in Weber's phrase—is essentially unfettered, and the related belief that Islamic government is Oriental despotism. Vogel argues that the law of the professional scholars of *shari'a*, the '*ulama*', constrains the justice meted out in the institutions, usually by *qadi* who are also *alim*, members of the '*ulama*'. But the '*ulama*' possess no obvious temporal power; indeed, they are dependent on the state. Finding no institutional checks on the power of the state, Orientalists long ago concluded that Islamic governance was inherently despotic. Vogel's claim is that, in a religious society, the checks on governmental excess may be religious. The '*ulama*' were often able to constrain the state because they, and not the state, were (and are, in places like Saudi Arabia where *shari'a* law is still applied directly) the sole arbiters of legitimacy. The state and its policies may be necessary, but they do not partake of the higher orders of justification afforded by the *shari'a*. Throughout most of history, the state required the legitimation conferred by the '*ulama*', and the '*ulama*' were able to oppose and to some extent limit the exercise of power by the state by withholding, or threatening to withhold, legitimacy. While the '*ulama*' were thus able to secure their own social position, and perhaps restrain what else would have been despotic power, this arrangement had an unfortunate aspect: the exercise of power was bereft of authority, suspect in the eyes of the governed. The illegitimacy of the state—at least for the '*ulama*'—had to be emphasized. The dubious quality of Islamic governance left Muslim countries ill-equipped to cope with the vicissitudes of modernity. Vogel hopes for a relegitimation of governance that draws on the tradition of *siyasa*. He disperses this argument throughout his text, but states most of it in small compass. *Id.* at 122.

125. This is of course a gross simplification. Public international law has always had a strong element of natural law and a sense of cultural superiority epitomized in the phrase "the practice of civilized nations." Both may be associated with righteousness; but neither captures the direct, participatory element of righteousness. Moreover, as important as natural law and cultural superiority have been and are to public international law, I think the primary creation myth of international law is and has been Hobbesian.

126. Bedjaoui suggests a more interesting relationship between the discourses when he speaks of a law of nations as opposed to a law of community:

Up to now, peoples who have won their freedom have sought to exercise their right of self-determination by endowing themselves with a state corresponding on paper to the standards of the twentieth century. The decolonization process has

those who believe in the nation's impermanence, however, not one of these authors evidences the slightest interest in nations. But it is nations, or more generally institutions, that speak international law. Without attending to institutions, one cannot hear international law. Institutions must be legitimated to hold an authoritative discourse (and legal discourse must by definition be authoritative), but under current Islamic belief, institutions are not legitimate. Where they are not expressly illegal, they are ignored, or at best, necessary (*maslaha*). With no Islamic authority vested in institutions, there is no way for Muslims to structure the discourse of international law. Without speakers, the vocabulary that details their inter-state relationships—the substance of international law—cannot develop. International Islamic law scholarship is thus left to explain subjects defined in and presented by public international law, to accept the categories of the West.<sup>127</sup> The discourse is informed by categories located outside any specifically Islamic experiences, and is therefore suspect.

Although he is not explicit, Khadduri seems to suggest that Muslims simply accept certain elements of public international law as authoritative, such as the existence and legitimacy of the state, and devote their attention to other, more obviously Islamic, concerns. Examination of these concerns reminds us of and illumines the failings of public international law, but Khadduri's concessions do nothing to provide public international law with Islamic legitimacy. The vocabulary for the discourse of international law, a discourse dependent on authoritative institutional utterances, does not exist within Islam, which locates authority elsewhere. My earlier conclusion, that there is no Islamic international law, is not a his-

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thus flowed into this familiar mould of the state, in accordance with a sort of 'universality principle' applied to the contemporary organization of state power, when in fact the state is a 'historic product' of an entire civilization and the Muslim States had been organized in accordance with the model of a *community*. And so the state as we know it has been the form assumed by all the successful examples of national liberation. But was that the only form? Was there no other way in which self-determination could be realized at the institutional level? I cannot say.

Bedjaoui, *supra* note 15, at 296. Bedjaoui thus poses, but does not answer, a question that an Islamic international law would have to pursue in order to respond to the concerns of public international law.

127. Or, from within the resources of the *siyar*, to discuss questions of conduct during warfare, an institution transformed nearly beyond recognition by the introduction of Western technology.

torical accident, but rather a result of the inability to phrase the institutional concerns of international law within the current lexicon of *shari'a*.

The inability of each discourse to articulate concerns of supreme importance to the other is not the result of conceptual lacunae in either one, but instead reflects deep differences in the way the discourses themselves are structured. Islamic law, and hence Islamic international law, simply holds a different conception of law than does Western law, and hence public international law.<sup>128</sup> In the West, law is a general and abstract body, a corpus, in which each part relates to the whole and to every other part of the law. The law is separate both from the facts, the individual circumstances of the social order, and from the transcendent purposes of the social order, which I will collectively call justice. Judgment consists in applying law to facts, in using the structure of the law to organize somewhat unruly social phenomena. This process of subsuming the particular under the general will, we Western lawyers hope, contribute to bringing about a more just social order. Law is thus both different from, and related to, the most lofty and the most mundane of our social concerns.

Professor Vogel contrasts this idea of law, which he calls rule-law, with the Islamic ideal of law, which he calls instance-law:

[The Islamic conception of law] is epitomized, not in systems of objective, formal, general, public, compulsory rules, but in a unique decision of individual conscience issued in evaluation of a concrete act.

The idea of law inhering in a unique event is conceivable if the lawgiver is God, since, conceivably, true unique judgments for all events reside "with God" . . . . But to man, in contrast, God's law is revealed only in revealed

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128. At certain points, Western law has shared more with the conceptual structure of Islamic law than does contemporary public international law. Ideas of natural law, for instance, may be closer to *shari'a* than more positivist notions of law. See J.N.D. Anderson, *Islamic Law in the Modern World* 8 (1959). Conscience and equity, which have in different times and in different ways been important to Western jurists, are also vital concerns of Muslim jurists. Comparing the Islamic legal tradition with the Western legal tradition is a complex matter; both similarities and differences abound. For the sake of simplicity and proximity to my argument, I simplified the comparative problem by focusing on conceptions of law held in public international law. In the ensuing passage, my use of "Western" means conceptions of law exemplified by contemporary public international law.

texts, to be augmented by his own powers of reasoning and perception; man's *fiqh* must make shift with language and processes of reasoning, and therefore also abstract meanings of words and general categories of thought. Yet, as shown by the way the aspirations to meta-ordering and to pan-ordering together define its legal world, *fiqh* did not relent from understanding that the shari'a—any less than the perfect divine will itself—minutely, universally, evaluates all events. *Ijtihad* is precisely the effort to attain this knowledge: to draw near God's true evaluation for each particular event by applying *usul al-fiqh* to concrete reality. God's shari'a may be unknowable in either its infinity or its certainty, but it is not for all that either metaphysical, inscrutable, or relativistic.<sup>129</sup>

One might object that Islamic law is, in fact, rule-like: Islamic judges reach predictable decisions; Islamic jurisprudence discusses general issues; Islamic law is, after all, the law (in a Western sense). Islamic law applies to all, it strains to achieve regularity,<sup>130</sup> and it aspires to justice.<sup>131</sup> This objection misunderstands the nature of the characterization of Islamic law as instance-law. Instance-law describes the self-image, the conscious ideal, of law, not the actual practice of law itself. Conversely, Western systems of law are sur-

129. Vogel, *supra* note 6, at 233-34 (citations omitted).

130. A more technical objection is that the sciences of *usul al fiqh*, particularly the doctrine of *taqlid*, have in fact sought to create a closed structure of rules, under which, in Western fashion, particular phenomena must be subsumed. Vogel's, and hence my, conceptual reliance on Ibn Taymiyya, a radical reformer and a Hanbali, who, though certainly orthodox, is hardly mainstream, has led to an excessive focus on the role of the individual, and uncharacteristic exaggeration of the role of conscience, and therefore a diminution of the importance of rules. In fine, Islam has an orthodoxy, and an orthodoxy, by definition, is a system of rules. While powerful, I do not think this objection sustainable. First, *taqlid* is necessary but hardly justified. "[S]chool *taqlid* . . . [was] by its own admission . . . a falling off from the high standards of the *fiqh*'s origins, justified only by necessity." *Id.* at 238. Second, *taqlid* is an addition to Islamic law, a recognition of the need for rules, but it is not a source of authority *per se*. To draw an analogy, many Western practices could hardly be justified in terms of our rule-like conceptions of justice, but while we consciously recognize that law without such practices is unimaginable, we still define law in terms of rules. Finally, *taqlid* applies only to rule *ijtihad*, which hardly comprises all of judgment. Fact *ijtihad*, which is still considered law, is outside the scope of *taqlid*.

131. My hypothetical interlocutor does not take the all-too-frequent attitude toward Islamic law, epitomized by Weber's phrase "*qadi* justice," that Islamic law is no more than the will of the judge, made palatable by divine sanction. See Bryan S. Turner, *Weber and Islam* 109 (1974).

rounded by particular instances without which the law could not function, but which one is loath to characterize as "legal." If one examined an actual conflict in a Western legal system, from the opening salvos fired by lawyers, through the costs and aggravation associated with discovery and pre-trial procedure, through the discretion of the judge and the findings of fact by the jury, or the process of settlement, one would find very little "law" in the ideal sense in which we conceptualize law.<sup>132</sup> Myriad aspects of Western legal systems are not ruled, and yet we generally describe our law in terms of rules. In converse fashion, Islamic law contains regularities which might be phrased in terms of rules. But they are more often imagined as instances.<sup>133</sup>

One might also object that Muslims have rule-law, but that its order is found at a higher level than in Western systems, at the level of divine will rather than doctrinal consistency. The order of Muslim law makes itself clear not when one considers the relationship of one judgment to another, or of one rationale to the next, but when one considers the whole. Muslim law may thus be imagined as an image of Islamic art, built up of myriad, minute geometric forms, and comprehensible from a distance. A pointillist painting provides an explicitly Western image.<sup>134</sup> Upon examination, this objection to the claim that Islamic law is instance-law reveals itself

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132. Other examples of this are easy enough to find. In criminal law, think of prosecutorial discretion, plea bargaining, sentencing, and probation. In social life generally, think of "legal advice" given between friends, or personal actions taken with regard to the ends held forth by law. Think also of the activity in the environment inhabited by international law.

133. Vogel summarizes:

Together these observations suggest that, in both legal systems, the two forms of law may exist, each performing characteristic functions, without this being fully acknowledged in either's ideal legal theory; each system may cherish a special blindness for the alternative to its favored type of law. Exploring how in either system—for us here the Islamic—both forms of law are used and interact will shed light on what unites and what separates the Western and the Islamic legal systems; it may also instruct us on the nature of instance-law and rule-law, including the issues whether, when considered across the two legal systems, each of the two types operates in characteristic ways on legal behavior, or fulfills certain essential tasks.

Vogel, *supra* note 6, at 243.

134. A more technical version of this objection would be that the enormous effort of medieval Islamic learning was the construction of a body of learning, an interconnected web of doctrine. Here again translation is misleading. The medieval enterprise, in the West, was the creation of a corpus; the medieval enterprise in Islam was the distillation of a science of decision.

to be an explanation. Instance-law does not mean that the legal universe is chaotic. As suggested by the pointillist painting, the universe is ordered in the mind of God, and that order is perceptible by the mind of the jurist.

The order in instance-law, however, is different from the order of rule-law perceived by the Western jurist, who understands legal problems in terms of abstract doctrinal relationships among abstractly conceived parts. In rule-law, the categories that order social phenomena are imagined to order themselves, in turn, through mechanisms called doctrine. Not Albania and Bulgaria, but A and B have a treaty. Although disagreements about doctrine exist, rule-law attempts to judge like cases alike, to be a standard, a rule. So the doctrines that apply to Albania and Bulgaria also apply to Yemen and Zimbabwe. The establishment of this order requires the characterization of facts within legal categories, and the treatment of these categories as legal entities. Here, all three webs of people, land, and governance are regarded simply as states. Doctrine may be understood as the way these abstract legal entities are manipulated and organized. To use mathematical imagery, legal entities are to the elements of a set what doctrine is to the operations. If Islamic art is the token of instance-law, a matrix is the token of rule-law.<sup>135</sup>

Rule-law, the matrix, has a closed quality. Western law aspires to be coherent, a closed system. The ultimate jurisprudential expression of this desire for closure, for coherence—an expression that for many served to reveal the limitations of the aspiration—is Kelsen's positivism. Western law is a language that mediates between abstract purposes, justice, and particular facts, but law itself is neither the impulse nor the object of speech. In contrast, instance-law does not communicate, but is itself the figure of justice. Islamic law is open where rule-law is closed; Islamic law reaches upwards towards and including God, and downwards towards and including the particular facts of each decision. Instance-law stretches seamlessly from God to the facts.

The nature of instance-law is made more concrete by Islamic ideas of judgment:

[C]ourt judgments are seen as momentary, atomistic

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135. The abstract character of Western law and indeed political thought may be what 'AbuSulayman was trying to articulate under the heading of the systematization of *fiqh*.



events, with no precedential effect, even for the judge who issued them. . . . 'Umar, in his instructions to his qadi, says,

Do not let a judgment . . . that you judged yesterday and then reconsidered, and that you were guided to a wiser opinion about, prevent you from returning to the truth, for verily truth is not voided by anything . . . .

Thus, 'Umar is reported to say, "I adjudged in the matter of the grandfather [a much vexed issue of inheritance law] various judgments . . . , in each of which I did not desist from [seeking] the better." A persistent striving for truth should not be inhibited by any secondary considerations, here consistency with one's own, or another's, past holdings. . . . Necessity compelling the determination of the indeterminate, God has ordained judging. The judgment is not thereby made religiously true; it may still be in God's eyes a wrong *ijtihad*; but it is the religious justification for compelling, and performing, action in the *zahir*.<sup>136</sup>

Instance-law is profoundly problematic for the creation of international law for two reasons: the relationship between law and his-

136. Vogel, *supra* note 6, at 220-21 (citations omitted). Vogel discusses instance-law finding in the Saudi court, a digression perhaps illuminating for present purposes:

This is an apt point to digress to build on our instance-law, rule-law distinction in order to give a name, "microcosmic interpretation," to the ideal that we find here pushing adjudication toward instance-law forms. This ideal is that the qadi strive, by penetrating to the concrete reality of the case before him, and then appraising that reality holding it against the divine command of revealed texts, to attain to God's true, transcendent law for that concrete case. "Microcosmic interpretation," then, is an instance-law finding drawn from the transcendental, or it is the finding, in the substratum of an individual conscience, of the true, unique law for the concrete event. We use the term "microcosmic" to suggest the monadic lawmaking sought; to capture how a unique act of individual conscience fuses the concrete event and the revealed law together into a ruling somehow all at once concrete and abstract, secular and transcendent, inner and outer, *batin* and *zahir*, individual and universal. We use the term "interpretation" to remind us of the vital fact that, despite the central function of conscience, the divine law derives, not from sources within the mind or from some sort of immanent intuition or inspiration, but from material textual sources approached through the science of *usul al-fiqh*.

*Id.* at 332-33 (citation omitted).

tory, and the relationship between instance-law and legislation. As the foregoing passage indicates, no instance-law finding of the law is religiously true; the law is constantly reviewable. Each judge must strive to apply the law. Law does not progress, but is rather eternally the same.<sup>137</sup> The legal tradition, considered as a tradition, is not authoritative.<sup>138</sup> The mere fact of Islamic law's ongoing quality lends it no special authority. Each occasion for judgment is a new instance of *shari'a*, a fresh chance to realize the will of God, or, conversely, to fall into error. The Islamic legal tradition, therefore, does not conceive of itself as building on itself, as organic. The passage of time is not the context of legal development, but rather poses the risk of forgetfulness, the danger of losing sight of the true meaning of *shari'a*. So although the scholars surveyed here are obsessed with locating authority in history, with the derivation of law from the time of the Prophet, history as such—the change and development of affairs—is antithetical to legal authority. The open-ended search for truth informs the practice of Islamic law.

Public international law, in contrast, is largely constructed through processes of political calcification. Legal obligation grows over time. Courts publish opinions, refer to prior cases, and so forth, so that even where there is no formal doctrine of precedent, an expanding body of case law develops. Theories become the desiderata for judgments and non-binding statements of law. Similarly, practice becomes custom, is perceived as binding, and becomes law. An issue becomes a concern, a bureaucracy is established, a struggle over competence and legitimacy ensues, and over time, a monopoly of authority is gained. The rule of public international law is not the rule of truth but rather of habit (and hence perhaps cultural truth). Habit, legal obligation, accretes. Where Islamic law struggles against the ossification of habit and strives to return to divine authority, public international law self-consciously builds on the authority of continuity.<sup>139</sup>

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137. See Anderson, *supra* note 128, at 3 ("But Islamic law (and to a lesser extent many other legal systems of the Orient) is essentially different, for it is regarded fundamentally as divine law—and, as such, as basically immutable.").

138. The *Qur'an* says, "And when it is said to them: 'Come towards what God has sent down and towards the messenger,' They say: 'Sufficient unto us is what we have found our fathers acting upon.' But what about it, if their forefathers knew nothing and were not guided?" [5:104].

139. Public international law does so without a formal doctrine of precedent. See, e.g., Statute of the International Court of Justice art. 59. Perusal of any International Court of

The nature of Islamic law creates another disjuncture with public international law: instance-law precludes the intentional creation of international law. Many people—for want of a better name I will call them internationalists—have self-consciously worked to create public international law, to establish a fabric of legal obligation that would bind states, and, more generally, would inform the global polity. These efforts are inconceivable without the constitutional faith, that is, without believing that some degree of happiness can be achieved through appropriate political structures, and that political structures can be consciously constructed. To have such a faith, one must also conceive of law as something on which a polity can build. Counterintuitively, political construction requires that law be abstract, not concrete. Law must apply across time and space, must separate itself from the individual conscience and the *ad hoc* tailoring of justice to particular facts.

This objection may be clarified by trying to imagine the creation of an international instance-law. An international instance-law could be no more than a collection of just happenings and decisions in international affairs. In the case of disagreement, how could one define just? How could one create, or extend, such a law? Each moment of legal utterance would simply replicate the previous and anticipate the next occasion when justice was demanded. Under instance-law, the would-be internationalist could only hope that her successor was good; she could not hope that his problem would be any more legal than hers, that his world would be more ordered because of her work, that, in short, she was legislating a better tomorrow.<sup>140</sup> The problem of justice is always the same; law does not progress. The belief in a pure instance-law and the belief in constitutionalism are thus incompatible.<sup>141</sup> Again, public interna-

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Justice opinion, however, reveals the attention the ICJ pays to prior decisions. More generally, even though the myth of consent may seem a somewhat ahistorical location for authority—each state may consent to some or all of the law anew—prior consent is authoritative until changed. Through the doctrine of implied consent, which holds that a state's consent may be assumed absent a protest, prior consent converges on custom, and custom is the legislative function of history.

140. She may be able to hope that she can serve as a good example to her successors. This possibility raises the issue of the transmission of Islamic political virtue, a philosophical question on which I cannot speak.

141. Needless to say, there is no such thing as a pure instance-law, a law which establishes no rules, and exists only in the present. Conversely, a pure rule-law is hard to imagine, except perhaps as a logical game. But constitutionalism, in its American sense,

tional law is a constitutional enterprise, an endeavor to create and order a world polity. As participants in this endeavor, we believe that law is something on which we can build; we hope to have heirs rather than merely successors.

Not surprisingly, these vital differences about the nature of law are reflected in equally essential differences in the way it is spoken, in the way power is believed to be legitimate. At least as a matter of logical coherence, *pacta sunt servanda* resolves the core problem of public international law: the establishment of authority without community, without a shared notion of good, shared experiences, or shared interests. International law poses and answers, in short compass, the central problem of political philosophy since Hobbes: the organization of a polity without the assumption of a common ethos. How is law possible among immoral men, or as the question has been asked from Grotius to Kissinger, among nations which act in their own interests? *Pacta sunt servanda* resolves this question for public international law.

There have been numerous attempts to argue that *pacta sunt servanda* is also a doctrine of Islamic law.<sup>142</sup> Most of these attempts draw an analogy between treaty and contract, and argue that since the *shari'a* clearly supports the keeping of contracts, it also supports the keeping of treaties. But presumably none of those who argue that Islam also maintains *pacta sunt servanda* would go so far as to argue that consent is the source of authority for Islamic law. Islamic law draws its legitimacy from God, not from agreement.<sup>143</sup>

the desire to create a polity on the basis of law, presumes that the law is something which is both durable and artificial.

142. See, e.g., Moinuddin, *supra* note 42, at 48. Revisionist historical analysis can be deployed to explain away the express prohibitions on treaties lasting over ten years.

143. Similar arguments are made in the context of debates over the Islamic character of democracy. In his book, *Radical Islam*, Emmanuel Sivan notes that certain fundamentalists have argued that democracy and Islam are essentially antithetical. For example, Sa'id Hawwa has argued that:

Democracy is a Greek term which signifies sovereignty of the people, the people being the source of legitimacy; it is the people who legislate and rule. As for the *shura*, it denotes consultation [by the ruler] with a person or persons with regard to the interpretation of a certain point of Islamic law. In Islam, the people do not govern themselves by laws they make on their own, as in a democracy; rather the people are "governed by a regime and a set of laws imposed by God, which they cannot change or modify in any case."

Emmanuel Sivan, *Radical Islam* 74 (1985) (discussing Sa'id Hawwa). Sivan goes on to discuss another fundamentalist:

Dannawi summed it all up in a lapidary formula: "The state in Islam obeys

Therefore Islam cannot adduce consent, as does public international law, as the justification for public order.

Legal authority is derived from God's utterances and his will as revealed in the life of Islam. The believer finds authority within the framework of the Islamic narrative, the cumulative account of the revelation. The details of legal obligation incumbent on the believer are the fruits of narrative exegesis of that account. The believer is thus located within a narrative frame; conversely, that narrative frame is common ground for all believers.<sup>144</sup> The most important source of Islamic international law is the *siyar*, which recounts events in the wars for the faith. The narrative history of religious wars is legally authoritative today. Stated abstractly, it seems odd that the reading of old war stories should produce legal results. But perhaps the oddity is more pronounced for a contemporary Westerner, who, when thinking theoretically, tends to make a sharp distinction between descriptive and normative speech. If history serves as theology, or more generally, authority, then we should not understand it as factual history, but rather as allegory.

Despite the emphasis that publicists of public international law have placed on consent, a narrative attitude is hardly unknown in

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Divine Law, not the people," which he explicates as an emancipatory mechanism—"liberating the state from subservience to human passions, whims and fancies . . . be they of the majority or the minority."

Id. (citation omitted). Yet another voice discussed by Sivan is that of Sayyid Qutb: "From refusal to call Islam democratic, he [Qutb] moved in the 1950s to outright negation: democracy is, as a form of government, already bankrupt in the West; why should it be imported to the Middle East?" Id. at 73 (citation omitted). Democracy thus has no particular moral authority; indeed, it is but another form of *jahiliyyah*, ignorance of divine guidance. Needless to say, it would be misleading to present the view of Qutb or Hawwa as *the* Muslim position; other Muslims see little or no insurmountable conflict between Islam and democracy. See, e.g., Enayat, *supra* note 36, at 129 (asserting that Islam is compatible with democracy). For a non-Muslim argument that Islam and democracy can coexist, see John L. Esposito & James L. Piscatori, *Democratization and Islam* 45 *Middle E. J.* 427-40 (1991). Like most accounts of the situation by social scientists, the article fails to confront the question of authority at the heart of the fundamentalist argument. Similarly, see Piscatori, *supra* note 41. At the very least, the fundamentalists convincingly demonstrate that Islam and consent are different sources of authority, and hence each must be related to the other. One might well argue that democracy does not work, that there cannot be a purely consensual polity. While this may be true, my point is more modest: the liberalism that informs both public international law and Western notions of democracy relies on consent in ways different from Islam.

144. This is not to deny that the scope of technical *ijma* is very restricted. Still, everyone agrees that much that is not *ijma* is incumbent on the Muslim. The lack of *ijma* only reveals failure to reach complete unanimity on a particular aspect.

public international law. Custom is an ancient and still valid source of law. Custom has often been treated as evidence of consent, rather than as authoritative in its own right. Such treatments, however, tend to reflect an a priori definition of law, i.e., that which must be formed by consensual processes, and are therefore somewhat disingenuous. Similarly, within United States municipal law, both precedent and constitutional exegesis vest the past with ongoing legal significance. The legal quality of our history is frequently (and highly problematically) associated with some sort of consent, such as the Constitutional Convention or the existence of voting. Upon examination, however, the actual situs of authority is impossible to determine, and we credit a story, "the Founding," or less obviously, "a fair election," with legal authority. International law also tells its own narratives, chronicling the development of the international legal order.<sup>145</sup>

Although narrative is not completely foreign to public international law, it is certainly not the primary source of legitimacy. The narratives intended to be authoritative are stories in which consent was given and governance was thereby empowered. A treaty was signed, a law was passed, or an election was won. It is consent, not the mere fact of history, that legitimizes politics, and there are limitations to the ability of consent to legitimate international politics. The borders of nation-states, for example, are usually taken as given, without scrupulous examination of their origin. The point at which civil unrest indicates that a regime no longer represents the people it governs is similarly unclear. These and other examples are recognized as problems in international legal theory precisely because they are problematic for a theory of legitimation based on consent.

There are good reasons why Islamic narrative cannot serve to order international relations, cannot be the grammar of international law. First, the history of Islam, to be compelling, must be accepted as one's own. The legitimacy of *shari'a* rests on its existence as an expression of Islam. For the individual believer, Islam is the religious/historical/mythical structure that informs the self. For the infidel, however, this edifice offers no shelter. Since its authority rests on individual belief, the structure of Islamic law is

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145. See Kennedy, *supra* note 110, at 12-28.

personal.<sup>146</sup> For the non-believer, Islamic law is merely an articulation of an Islamic polity, and the sense of authenticity offered by Islamic international law is unavailable. Islamic law thus fortifies the converted, but only the converted. Without an (unlikely) wave of mass conversion to Islam, it is difficult to see how Islam could expand to form the basis of a new world order.<sup>147</sup>

The second reason why Islamic narrative cannot serve as a foundation for public international law is that Islamic traditionalists—and in this the scholars surveyed here are traditionalists—look backward to find authority, whereas public international law is essentially a prospective enterprise.<sup>148</sup> For the Muslim, public international law is radically incomplete. There has never existed a time of the right-guided globe, a time when truth was available to international politics. Public international law has always structured itself as an aspiration, a hope, or at best a plan, for the state of nature to be replaced by the civilized interaction of states.<sup>149</sup> International law aspires to create, as opposed to rediscover, justice. Islamic international law and public international law recount two antithetical narratives: the one tells of revealed truth abandoned, the other of Utopia regrettably postponed. None of the reformers surveyed realize the forward-looking (legislative) nature of public international law, and the backward-looking (adjudicatory) character of their own programs.<sup>150</sup>

Even the most advanced (to my eyes) of the writers surveyed here, 'AbuSulayman and An-Na'im, do not provide an Islamic account of the construction of international law. 'AbuSulayman recognizes the demand for an Islamic vision of present and future

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146. Liberal legal systems would seem to be equally personal, resting as they do on the consent of the individual. Liberal ideology evades this issue through the notion of implied consent. But implied belief, beyond the submission to the caliph by the *dhimmi*, seems impossible.

147. Public international law must also require a minimal nexus of shared beliefs, essentially in the ability to covenant. The beliefs are so minimal, however, that common ground is often in fact reached among strikingly diverse groups.

148. A partial exception is An-Na'im, who attempts to locate present Islamic authority.

149. I cannot resist noting the aspirational parallels between this notion and the triumph of the *umma* over the *dar al-harb*.

150. Adjudication can of course be used for legislative purposes. Indeed, a fecund source of contemporary international law is dispute resolution through some sort of adjudicatory proceeding, whether adjudication, arbitration, or structured negotiation. But the legislative capability of such proceedings requires some mechanism by which resolutions accrete, some notion of precedent.

need. However, in attempting to liberate Islamic understanding from what he views as the restrictive doctrines of the past, he undercuts the authority of Islamic history. The delegitimation of history is problematic because his primary approach to Islamic authority remains exegesis. Although he is unable to rely on history as a source of law, 'AbuSulayman does nothing to legitimate, Islamically, a prospective approach, to provide a way to make new Islamic law. For his part, An-Na'im provides an alternative period of history, so that the Meccan resources of the Islamic tradition may be utilized. As with 'AbuSulayman, his mining of Islamic tradition requires a certain delegitimation of the tradition, and, again like 'AbuSulayman, An-Na'im remains tied to exegesis as the primary method of legal construction. While An-Na'im does insist on contemporary life through Islam, modern questions that are not fully answered by reference to Islamic texts are to be answered politically, in non-Islamic terms, by a Western modernity.<sup>151</sup> At best, both scholars provide a call for Islamic politics, but no Islamic principle of legislation. For them, Islamic law, as law and as opposed to politics, still looks backward, but their own works seek to deny that the past can serve the present.

Third, the Islamic narrative, at least as traditionally understood, cannot supply the justification required for both Islamic politics and the construction of an international legal order. Islam reveals the way, and if men would only comply, then true Islamic politics would be assured. But for all its richness, Islam does not reveal much of the way, and textual exegesis is difficult when ends are so unclear. In particular, Islamic narrative pays little attention to the issues of institutional structure essential to international law. In Islam, when substantive detail cannot be found by the most creative *fiqh*, recourse is had to *siyasa*: the politics of administration and legislation, the art of governance and rule, the methods of guarding the *umma*. From the perspective of the '*ulama*', necessity (*maslaha*) explains or excuses but does not affirmatively justify *siyasa*.<sup>152</sup> Politics inevitably compromises aspiration, and *siyasa*

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151. An-Na'im, *supra* note 79, holds out the possibility that Islamic law will be defined by an Islamic polity. However, he provides only the suggestion and no detail on how this is to happen.

152. Insofar as it is founded on *maslaha*, *siyasa* is of highly limited authority, tainted by its utility (literally), like the clothes of a Muslim corpse or the carrion flesh of a camel. The '*ulama*' vision, in which *siyasa*, the authority of political institutions, is delegitimized, is not



constructions, like all political designs, fall short. However, the failures of *siyasa* are more devastating than political failures in other cultures. Where the only justification is utility, there can be no noble failures, no good faith efforts. Muslims often greet political shortcomings with a vague and impassioned call for a more Islamic politics, a return (or even revolution) to a more pristine state, in which the *fiqh* suffices and the foreign questions which require *siyasa* do not arise. Radical fundamentalism is compelling because frustration, a sense of working in bad faith, is entailed in Islamic political ideology.

Even for fundamentalists, politics is obdurately imperfect. But if the politics of *siyasa* itself is tainted—a necessary evil to be avoided whenever possible—political critique is an unlikely enterprise. Fundamentalist political critique, or more precisely, fundamentalist characterization of politics, oscillates between two modes: exhortation toward a more pure Islam, the long awaited establishment of an Islamic state, and condemnation of the corruption responsible for the failures, observed throughout all but the earliest history, to achieve Islam.<sup>153</sup> Non-fundamentalists also tend to see *siyasa* as necessary but not legitimated, as the best that can be hoped for an evil world; non-fundamentalists who undertake *siyasa* often adopt a certain self-loathing world weariness, in which good politics is a pious hope. “Modernists” and “realists” who argue that *siyasa* is insufficient for current conditions repeat the fundamentalist refrain in muted tones. Unsurprisingly, both the supporters and the abolitionists of *siyasa* find themselves frustrated. Short of achieving justice, or at least finding a scapegoat, their political theory allows them little satisfaction and no practical criterion with which to judge actual politics. As a result, sustained political critique, and hence political reforms of any kind, are difficult. Islamic political theory is thus ill-disposed to solve the problems of institutional ambit and competence that comprise international law.

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the only Islamic vision. The *'ulama'* vision, however, is the dominant vision of *fiqh*, and, hence, legal authority. The *'ulama'* have captured the legal theoretical imagination; when each of the scholars here writes, he writes with regard to the *'ulama'* theory of law. This is true, particularly of the more radical reformers, whose very radicalism is defined by their distance from *'ulama'* orthodoxy. Several of these writers mention the need for a larger role for *siyasa*—the logical result of a more restrictive notion of *fiqh* such as that held by An-Na'im—but none has made it the core of an Islamically authoritative program.

153. One might recall Marxist rhetoric, where the only explanation for failure was a deviation from the way. This may be the price of total systems of political explanation.

The grammar of Islamic law, the structure of its narrative meaning, therefore seems inherently inadequate for the articulation of public international law. To recapitulate: (1) Islamic law is only authoritative for believers, and much of the globe does not believe; (2) Islamic law draws authority from narrative exegesis, and international law requires a legislative rather than an adjudicative method; and (3) traditional understandings of the substance of the Islamic narrative have bifurcated between *fiqh* and *siyasa*, and have delegitimized *siyasa*. The discussion of grammar, the mechanism of legal authority, has recapitulated the discussion of vocabulary, the fundamental notions of what the law is. As interesting as Islamic law is, its grammar and its vocabulary are too different from their Western counterparts to be easily integrated into the structure of public international law, which is founded on a Western legal imagination.

To summarize the argument of this entire section on the cognitive differences between Islamic international law and public international law: Islamic law has no authoritative place for institutions, particularly nations, and institutional authority is basic to public international law. Islamic law has no constitutional myth, and public international law is a constitutional enterprise. Islamic law takes meaning from certain narratives, and those narratives are inapposite to public international law. Islamic international law, in the sense used by the scholars surveyed here, cannot speak to an international environment composed of institutions, and so cannot address the business of public international law.

The Islamic perspective does speak, however, to the core malaise of public international law—a sense of meaninglessness and alienation, a certain lack of substance. Theology, the *umma*, and a narrative of shared belief are such compelling possibilities for international law because public international law is defined by a notion of politics as exile. For both Grotius and Hobbes the state of nature out of which law arises—the Western myth of legitimation—is a world without community. The positivism that even in decline dominates the identity of public international law, and the realism that still structures much of our thinking about politics, similarly eschew any form of solidarity, at least as regulative principles. For all its strengths, consent is the recourse of those who have little else to bind them together. As moderns, we are lonely, defined outside a community. Islam speaks to that loneliness. Per-

haps Islam does not speak so persuasively that many of us on the outside convert, but it does speak powerfully of our failure to endow law with a sense of its own significance.

#### IV. POSSIBILITIES FOR AN ISLAMIC INTERNATIONAL LAW

So far, the argument of this Article as a whole runs as follows: (1) Islam views public international law as a foreign entity, to which a response is necessary; (2) Islam has not articulated an international law; and (3) the failure to articulate an international law is not accidental, or the result of a lack of vision, but results from the structure of Islamic law, even as radically reformulated by 'AbuSulayman and An-Na'im. May we conclude that there can never be an Islamic international law? If these conclusions are true, are Muslims to comport themselves in the international arena as if they were not Muslim? I think the answer to both these questions is no.

'AbuSulayman is right to argue that an Islamic international law requires a re-creation of the methods with which Muslims think about politics. Islamic political and legal method, however, needs to do more than generate a sense of historical exigency, which may be able to excuse, but can never justify, contemporary legal activity. Excuse, necessity, or utility can never provide good politics, can never legitimate Muslim participation in the regime of international law. As long as utility, pure politics, is the only source of authority for Muslim activities in public international law, then Muslim participation on the international plane is at best another example of cultural submission in a world structured by the foreigner—an unhappy conclusion likely to breed unhappy politics.

By sacrificing law to politics, 'AbuSulayman takes the obvious solution, the solution Christianity has taken in the West. For 'AbuSulayman, belief becomes an essentially private concern. 'AbuSulayman gives every appearance of being a pious man, and while the substance and structure of his own thought are no doubt Islamic, there is no reason to believe the social science he has generated will remain Islamic. 'AbuSulayman has freed Muslim politicians from the constraints of Islam, and, at least *arguendo*, he has provided them with a science. Unfortunately he has not located this science within Islam. We presume that 'AbuSulayman's politicians are believers, but the faith is not the root of their authority.

The project demanded of Islamic legal theorists, for whom belief

cannot be private, is to develop a sacral vision of modernity. An-Na'im powerfully confronts this task by struggling to speak through Islamic authority. "It may seem like a contradiction in terms to speak of achieving the benefits of secularism within a religious framework because secularism is, by definition, the relegation of religion to the domain of private faith."<sup>154</sup> An-Na'im establishes the need for piety in politics, the sense that Islam is to be lived. He does not, however, say how the diffuse faith of the community of believers is to determine itself and issue law. An-Na'im argues that Muslims must participate in international legal structures as Muslims, but the substance of his discussions of that participation has nothing Muslim about it other than the personnel.<sup>155</sup> Where is the Muslim expression of human rights, self-determination, and the other doctrines of international law on which he touches? By what authority are such concepts Islamic?

Each of the scholars surveyed here perform a useful service: they locate contemporary Islamic international legal discourse vis-à-vis the *siyar*. Significantly, each scholar provides a sense of the *siyar's* inapplicability to contemporary problems and thereby serves to undermine *fiqh's* monopoly of the legal imagination of Muslims. Under any guise, *fiqh* cannot provide international legal authority. Its content and structure are simply at odds with the structure of international law; they are discourses with radically different concerns. *Fiqh* and international law each speak of matters on which the other is silent. *Usul al-fiqh*, and particularly the *siyar*, should therefore be abandoned as a source of legal prescriptions in areas of the international arena to which it does not speak. This does not mean that *siyar* should have no legal effect: it should be studied as a source of wisdom, and where it can be followed in good faith, it should continue to form the basis of Islamic law.

Analysis of the last section may provide the outline of a prescription. In order for Islamic law to confront the issues posed by international law, there must be a way within the discourse of Islam (1) to discuss the legitimacy and authority of institutions, particularly the nation; (2) to view law as a progressive enterprise, the construction of a polity; and (3) to see Islamic politics as morally legitimate

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154. An-Na'im, *supra* note 79, at 10.

155. An-Na'im thus eventually makes the same move as the other reformers, but at a more advanced stage in the discourse.

and legally authoritative, even if it does not attain ultimate truth. In short, Islam needs to develop a theory of political authority before it can have a theory of international law. *Fiqh* does not have the resources necessary for a theory of politics. Because law has been more or less consciously identified with *fiqh* by all the publicists of Islamic international law examined here, their theories of international law either fail to encompass the international environment, fail to be substantively Islamic, or both. Within the conceptual complex of *fiqh*, this failure is inevitable. Like Western notions of law, and certainly public international law, *fiqh* is a limited discourse. Each discourse is limited in its own way; what can be said in one may be inarticulable in the other. The task confronting Islamic internationalists is to discover, within the resources of Islam, legally authoritative ways of categorizing the actors and articulating the concerns of the global polity. This requires Islamic law to mean something more than it has throughout this discussion, something Islamic but not *fiqh*.

Here I am overtaken by my ignorance of things Islamic. It is time for me to stand aside. Insofar as Muslim scholars address public international law, I feel a response is appropriate. I have argued that their theories cannot be Islamic and at the same time speak to the questions of public international law most broadly defined. Now my argument has carried me to the substance of their beliefs. For that, I presume no authority, but await an Islamic voice.<sup>156</sup>

For the benefit of fellow non-Muslims, however, I note that the Islamic tradition is rich, heavy with the possibility of political authority. To merely name some examples: *siyasa*, or administration, can be understood as a noble enterprise, the attempt to realize an Islamic entity. If Islam is in the past, as *fiqh* emphasizes, it is also in the future, and the future has traditionally been the province of *siyasa*. The honest effort of the individual, *ijtihad*, can be a guide to the true path. *Ijma*, the community of belief, offers legislative

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156. Bedjaoui, for example, has written:

And I can restrain myself no longer from *appealing to all jurists in the Muslim world to take greater personal responsibility and mobilize more efficiently in a decisive effort of creativity, instead of confining themselves to an attitude of slavish imitation which often results in strapping lifeless artificial limbs of foreign legal origin on living human communities.*

Bedjaoui, *supra* note 15, at 296 (emphasis in the original).

possibility, particularly if it can be understood in terms less absolute than has classically been the case.<sup>157</sup> Similarly, the efforts of a council of believers, *shura*, to decide on behalf of others, is an essentially legislative conception.<sup>158</sup> The question is whether or not Islam can vest the activities of believers with moral and ultimately legal legitimacy, so that Muslims feel their politics, including their international politics, to be an effort in good faith and therefore legally authoritative.<sup>159</sup> I see no reason why not, and I therefore await an Islamic international law.

To the West, Islam seems to offer the possibility of discussing a public notion of the good within a public notion of peace. Liberalism, in contrast, has declared notions of the good to be unavailable for public discourse, has bought order by sacrificing truth, and has substituted process for substance. In consequence, liberal political life hungers for that which it cannot have, a vision of its own significance. As a liberal discourse, public international law settles for peace. But peace, in and of itself, is only the context for fruition. Human possibility demands more, something spoken to by the *Qur'an*:

157. Vogel, *supra* note 6, at 108-10, cautions:

The Western mind finds the *ijma'* doctrine at first glance very appealing. The doctrine seems to allow the Muslim community to make its own law, even after the death of the Prophet, and thereby free Muslims from eternal servitude to a fixed body of revelation. It would seem to provide a potentially all encompassing method to render the divine law positive in two senses of the term: clearly knowable, and susceptible to change. But, according to its theoretical formulation, *ijma'* must disappoint such hopes.

First, no *ijma'* can deviate from, or have any force on, a matter already determined in the *Qur'an* or *sunna*; and every *ijma'* ought to have a support in an argument derived from these prior two sources. . . .

Second, if one attempts to apply *ijma'* strictly in conformity with theory, it proves extremely elusive, indeed metaphysical: it could be held to fix with certainty hardly any rule not already established by a text or age-old universal practice (such as certain rules of prayer or pilgrimage). . . .

. . . [I]t is best initially to understand *ijma'* as not a primary but a secondary source of law, a post-hoc support for views already strong.

But Muslims can speak of a consensus of a people for whom God cares, a people who will not be allowed to go far wrong, even if they differ on details. Both the English and the Jews have traditionally associated legal authority, history, and God in this fashion.

158. At the risk of sounding like Khadduri, do we do much else when we refer to "We the people"? The quotation from Enayat, *supra* note 36, is a statement referring to *shura*, not democracy.

159. In this vein, 'AbuSulayman argues that Muslims should see Ottoman governance as an example of Islamic politics, and not merely the decadence of the Turks. 'AbuSulayman, *supra* note 29, at 135.

And hold fast, all together, unto the bond with God, and do not draw apart from one another. And remember the blessings which God has bestowed upon you; how, when you were enemies, He brought your hearts together, so that through His blessing you became brethren; and [how, when] you were on the brink of a fiery abyss, He saved you from it.

In this way God makes clear His messages unto you, so that you might find guidance, and that there might grow out of you a community [of people] who invite unto all that is good, and enjoin the doing of what is right and forbid the doing of what is wrong; and it is they, they who shall attain to a happy state! [3:103-04]

## V. AFTERWORD ON METHOD

A few words about some of the choices I made in writing this Article may be helpful.

Beginning with the title and throughout the Article, "public international law," is contrasted with "Islamic international law." As a result of this choice, "public" exists in uneasy tension with "Western international law," or perhaps a "Western view of international law." I have chosen "public" to stand in contradistinction to "Islamic" for three reasons. First, although Western in its lineage, public international law has entered global culture, and is no longer a specifically Western enterprise. Second, public international law conceives of itself as public and, more generally, as a liberal political enterprise which values toleration, and consequently avoids antagonism between cultures.<sup>160</sup> Third, and most importantly, many Muslims use "the West" to mean a cultural framework which is antithetical to Islam. Considered as cultures, "the West" and "Islam" are conceptually equivalent; they are names for the spaces where meaning is found. The unavoidable inference of Islamic versus Western international law is that the two legal regimes are fundamentally equivalent, as apples and oranges are both fruits. I maintain that this is wrong, and that the Islamic scholars surveyed here, and the publicists of public international law, are engaged in profoundly different pursuits. Hopefully

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160. I make no claims about the extent to which liberalism is in fact tolerant.

the incommensurate quality of "Islamic" and "public" will serve as a reminder of this thought.<sup>161</sup>

The common use of "Western" among Muslim scholars has merit. Certainly public international law imposes Western values more often than it achieves neutrality. In such situations, "Western" may well be appropriate. More generally, I use "Western" to indicate those elements of our conceptual framework essential to an understanding of our legal system, yet understood to be outside of legal discourse. Moral or religious conception cannot be fit easily within public international law, in large part because public international law defines itself as a discourse different from morality or religion. In such instances, I have generally used "Western." Even more difficult to phrase are conceptions that are not only assumed by, but are central to, public international law, such as the nature of legislation or of authority. These conceptions also draw on common Western understandings. In such cases, I have used either "Western" or "public" in an *ad hoc* manner. (If nothing else, these struggles with nomenclature serve to illustrate some interesting ways in which public international law, and law in the West, have been imagined.)

I spend little textual space developing, and no time defending, the perspective on public international law from which I discuss Islamic international law. Such an endeavor must await another forum. More importantly, I have chosen to limit my focus to the difficulties of Islamic international law. Consequently, I rely on the reader's general familiarity with public international law. (Perhaps this reveals that my argument is addressed, ultimately, to the West.) I try to be sufficiently explicit about my perspective on public international law, however, for the reader who knows little of public international law to follow the argument.

Any discussion of Islamic law requires the use of several Arabic words. Arabic words used in the text are defined, in somewhat discursive fashion, in a glossary appended to the text. I use the Arabic because translation of words inevitably connotes the culture of the language into which one translates, here the legal culture of the United States. To say "*shari'a*" instead of "Islamic law" will hopefully remind the reader that the very concept of law is different in

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161. My conclusion, however, calls for an Islamic international law which would be directly comparable to public international law.



the two cultures, and that a reader in one culture will have to suspend beliefs and assumptions about law in order to understand the other culture. The suspension of critical judgment, however, cannot be complete.<sup>162</sup> The problems of Islamic articulations of international law cannot be understood without a critical grasp of the issues. In contrast to most law review articles, which tend to be written from a single perspective, the inquiry undertaken here requires a shifting succession of perspectives. Wherever possible, I have tried to be both inside and outside of an argument, to fathom why it was made and to object. The sustained adoption of different perspectives—critic and student, outsider and insider, reformer(s) and orthodox, Islam and the West—renders this Article inconsistent. But no consistent perspective could begin to make the range of views in the discourse understandable. Rather than consistency, I have striven after coherence.

I am an outsider to this discussion in two senses. I am neither Muslim, nor am I what used to be called an Orientalist, a Westerner who specializes in understanding the East.<sup>163</sup> My ignorance of matters Islamic is no doubt apparent to those in a position to judge. What knowledge of Islamic law I do have, however, I owe largely to my friend and teacher Frank Vogel. Specifically, I owe him my interpretive framework, and many of the deep or structural characterizations of Islamic law on which my argument relies. To be candid, this intellectual debt was acquired circumstantially: Vogel taught me Islamic law while I was a student at Harvard, where I read, and was profoundly influenced by, a draft of his doctoral dissertation. After I had left Harvard, however, and had begun working on this Article, I found I could not supplant the work of Professor Vogel with mainstream Western Islamic law scholarship. The classics of Islamic law were of little use to me.

Islamic law scholarship has tended to be Orientalist. This tradition regards Islam as an object of study, a topic of scientific conversation.<sup>164</sup> In its modern guise, this tradition reaches back to Ignaz

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162. Where I am critical, I tend to write Islamic law, to imply current understandings of Islamic law, not the ultimate law that is *shari'a*. In so doing, I hope both to respect Muslim sensitivities and to make my point.

163. Orientalist is usually capitalized. Perhaps polemically, I will also capitalize it here.

164. Jurisprudence in the West has also been hampered by attempts to see itself as a descriptive/objective/scientific enterprise, an attitude Dworkin ridicules as the desire for either a "plain fact" or a "semantic" theory of law, depending on the extent to which a

Goldziher, a Hungarian Orientalist of deep and wide reading, who wrote the highly influential *Introduction to Islamic Theology and Law*.<sup>165</sup> In it, he argued that Islam is the result of a historical process, and spent the bulk of the book offering that historical process as an explanation for the "facts" of Islam. Over half a century later, this tradition was updated by Joseph Schacht's canonical (to the English speaking world) *Introduction to Islamic Law*,<sup>166</sup> and by Coulson, in his explicitly historical *A History of Islamic Law*.<sup>167</sup> The problem with Orientalism is that Islamic law is external to its intellectual apparatus. Orientalism makes no attempt to participate in Islamic law, but is content to describe Islamic law as if it were to remain, despite great scholarship, utterly foreign to the reader. If one has only a limited curiosity about other cultures, this perspective is unproblematic.

However, law is more fruitfully understood as a practice than as a fact; law is an endeavor engaged in by fellow people rather than aliens. Understanding a practice requires participation, if only the virtual participation of the sympathetic intellectual who suspends judgment and listens to another's argument. To understand law, one must be given some sense of what it means to think like a law-

particular attempt to define law recognized law as a linguistic structure. See generally Ronald Dworkin, *Law's Empire* (1986).

165. Goldziher, *supra* note 91.

166. Schacht, *supra* note 7.

167. Coulson, *supra* note 9. There is another reason why the Orientalist tradition has fallen on hard times. From the perspective of Orientalism, the Muslim countries were engaged in an essentially linear, if perhaps only gradual, progress to Western secular modernity. Orientalism was thus ill-equipped to handle the Islamic revival. See, e.g., Anderson, *supra* note 128, at 96 ("There can be little doubt that the secularization of the law . . . is here to stay."); Norman Anderson, *Law Reform in the Muslim World* (1976). David Pearl concludes:

Writing in 1976, Sir Norman Anderson commented on the possibility of a revival of orthodoxy and fervour, although he doubted whether this would be more than a temporary phase, at least in so far as the law is concerned. . . . As in the first edition of this book published in 1979, it is no part of the brief to speculate on the future. But the changes in Pakistan discussed in the last few pages have brought about a radical change in the legal framework for the Muslim community in that country. . . . The debate however has really only just begun, and the conflicting tensions apparent in the Muslim legal world will be resolved by the Muslim communities themselves drawing upon their remarkable legal traditions and history.

David Pearl, *A Textbook on Muslim Personal Law* 244-45 (2d. ed. 1987) (citations omitted). My Article is informed by Pearl's doubt that the Orientalist method—his own method—suffices to treat Islamic politics.

yer. To understand Islamic law, one must be given some sense of what it means to think like a Muslim practicing *shari'a*. The Orientalist tradition is unwilling to do this; it rests secure in its own explanatory apparatus. This security can lead to substantive mistakes, often due to the Orientalist's refusal to recognize the presence of cultural elements underrated by their own political scheme. So, for example, religion figures surprisingly seldom, and usually as a mask for power politics, in the accounts of Islamic law offered by Orientalists.

The adoption of a rigorously external view of law also creates a false sense of precision. A quote from Schacht illustrates:

In Shafi'i, who considered himself a member of the school of Medina although he made the essential thesis of the Traditionalists prevail in Islamic law, legal reasoning reached its zenith. Explicit legal reasoning, most of it of a superior quality, occupies a much more prominent place in Shafi'i's doctrine than in that of any of his predecessors.<sup>168</sup>

On a cursory reading, this makes sense. But on a closer reading, the meaning dissolves altogether. Taking the first few clauses on faith, as conclusory sentences which a great scholar is entitled to make without support, what is the "zenith" of legal reasoning in Islam? I am not making a skeptical argument that any judgment of the quality of legal reasoning is nonsensical. I would be willing to opine on the quality of legal reasoning in the context of, say, appellate jurisprudence in United States courts. But what does Schacht—of Leyden and Oxford universities—mean? Are we to assume that legal reasoning is the same thing for Dutch, British, and Islamic law? How does legal reasoning relate to whatever else is in Shafi'i's doctrine? Shafi'i apparently saw fit to displace the material found in his predecessor's work (what was it? religion? flattery to a patron? philosophy?) and replace it with "legal reasoning." Schacht implies that we can conclude that legal reasoning was (and is) distinct from other activities that might be carried on in legal writings. This seems odd, given that Islamic law is self-consciously a sacred law. What is the relationship between legal reasoning and religious belief in second century Islamic doctrine?

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168. Schacht, *supra* note 7, at 45-46.

Reading Schacht, I do not know, and I conclude that I have learned almost nothing important about Islamic law.

Perhaps Schacht himself could answer these questions; he spent a great deal of time reading Islamic law. In order to answer these questions, however, he would have to adopt a position internal to Islamic law, a position from which Islamic value judgments could be made. Whether a given argument is hopelessly heterodox, merely persuasive, or represents the zenith of Islamic legal reasoning is not a matter of objective fact, as the Orientalist view implies, but a matter of an Islamic thinker's regard for the argument. Schacht, and the Orientalist tradition in general, are unwilling to write from an Islamic perspective. As a result of its external view of Islam, the Orientalist tradition finds itself absolutely unable to evaluate, indeed, to take seriously, Islamic arguments. Responding to an argument requires that the argument be entertained on its own terms, that is, requires the respondent to see himself in the terms of the argument. Because it refuses to enter Islam even in the imagination, and indeed regards such a move as illegitimate, as bad science, and as subjective interference with the object of study, the Orientalist tradition is conceptually incapable of responding to Islamic legal arguments. Consequently, the Orientalist perspective has been nearly useless to me in trying to respond seriously to Islamic thinking on international law.

While giving a fair hearing to Islamic authors requires an internal perspective, an internal perspective on Islam is admittedly hard to come by. Islamic culture is very different from mine, and, I presume, different from the culture of most readers of this Article. Moreover, simple translation does not suffice to provide one with the internal perspective. In order to hear and respond to Islamic arguments one has to acquire (as opposed to just describe) some of the belief structure of Islam. One has to learn how concepts hang together. To my knowledge, Vogel's work is the only sustained effort to make Islamic patterns of thought available to English-speaking minds—hence my conceptual reliance on Vogel's book. This Article attempted to consider two problems simultaneously. First, I attempted to evaluate subjectively two legal regimes that are usually presented objectively: public international law and Islamic international law. Simultaneously, I tried to evaluate the extent to which the languages of these legal regimes have similar

and dissimilar concerns.<sup>169</sup>

I may have failed to capture what is essential about Islamic international law; consequently, I may have misstated the relationship between the modes of discourse. Vogel's work is based largely on his experience in Saudi Arabia observing the justice administered by men of the Hanbali/Wahabi strand of the Sunni faith. It may be that Vogel's explicitly limited characterizations of this doctrinally circumscribed practice cannot serve to describe Islamic law generally, and therefore cannot serve as a guidepost in the study of Islamic international law. Perhaps a different stream of Islamic life would better inform my understanding, or better address the needs of public international law. Perhaps a yet more pure application of Islam by the Saudi judges, or deeper understanding on the part of Vogel or myself, would clarify the difficulties of Islamic international law.

I would certainly like to hear such arguments. However, my critique of contemporary Islamic international law is basic. I think my characterizations of Islam are very general, much more general than the differences among the schools, or among the authors I survey. And if I nonetheless fail to grasp something essential, if my understanding is faulty, I can only invite Muslim scholars to explain themselves again in terms more cognizable in the West. My argument does not rely on a sophisticated or a fine-grained understanding of Islam. Therefore, unless I have missed something absolutely basic, the numerous failings in my understanding are unlikely to change my conclusions.

Despite my limited understanding, I make bold to write about Islamic international law because of the political importance of a vision of international law among Islamic societies, and because of the claim made by Islamic international law that it speaks both to Muslims and to citizens of the non-Muslim world. So, although my appropriation of Islamic concepts is likely to be clumsy, and the generalizations which I draw about both Islamic international law

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169. Readers interested in the differences in participatory and objective understanding of different cultures might find the discussion and bibliography in Stanley Tambiah, *Magic, Science, Religion, and the Scope of Rationality* (1990), an illuminating place to start. It should be apparent by this point that I find all law, not just Islamic law, to be a structure of belief, a way of ordering the universe. Harold Berman, with whom I have studied, has pioneered this approach to Western legal systems. See, e.g., Berman & Witte, *supra* note 98.

and public international law are more than a little graceless, I have tried to outline the relationship between these two visions of world order, and in so doing, to suggest paths that the adepts of each law might take in their search for common ground.

#### GLOSSARY<sup>170</sup>

*Ahwa*: desire, whim.

*Batin*: inward, hidden, deep, significant, both transcendent and immanent.

*Dar al-islam*: territory of the Islamic state.

*Dar al-harb*: territory of the enemy, non-Muslims who have not recognized Muslim suzerainty.

*Dhimma*: covenant, responsibility, situs of obligations and rights in the individual. This word refers to the "protected" status of Christians and Jews under the Islamic political order.

*Dhimmis*: non-Muslims protected by a treaty of surrender.

*Fatwa*: the judgment of a *mufti*. See also *ifta*.

*Fiqh*: the science/method of the divine law; the body of human knowledge of divine law. Where *shari'a* considers law in light of divine omnipotence, *fiqh* considers law in light of the human aspiration to understand, fulfill, and realize the *shari'a*. *Fiqh* is a science; *shari'a* is the truth.

*Hadith* (pl. *ahadith*): a tradition, an account of an action or statement of the Prophet, and technically, an authenticated text within the *Sunna*. People of the *hadith*: school which focuses on problems of authenticating *hadith*, and whose proponents tend to argue that God's revelation, even when only probable, is superior to human reason as a source of law.

*Ifta*: a giving of authoritative advice on *shari'a*; contrasted with *qada'*, which is a public arbitration of *shari'a*. The *alim* who gives *qada'* is a *qadi*; the *alim* who provides *ifta* is a *mufti*.

*Ijma*: adjudication under consensus, unanimity. Technically, the unanimous agreement of all qualified legal scholars of an age upon a legal rule. The third source of law in the classical scheme.

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170. This glossary is by no means complete, and the definitions given are not compendious, but are written to make the text intelligible. For a more complete glossary of Islamic legal terms, see Schacht, *supra* note 7, at 297-304; Vogel, *supra* note 6, Glossary and Index of Arabic Terms.

*Ijtihad*: literally, to strive, labor, exert effort. Technically, the attempt to craft legal judgment in accordance with God's law in cases where the law is uncertain. *Ijtihad* is a problem for scholars and rulers as well as judges. Generally, the effort to fulfill God's design. Used generally, *ijtihad* can be seen as a task for all Muslims in areas of moral uncertainty. See *jihad*.

*Jahiliyyah*: ignorance of divine guidance.

*Jihad*: literally, striving. Usually translated as holy war, crusade.

*Masalih mursala*: unrestricted utility, acts not enjoined or excluded by revelation, and therefore presumed legal.

*Maslaha*: interest, utility, public interest.

*Mujtahid*: one with the qualifications—learning and piety—required in order to find the law through *ijtihad*. Although one must be pious to discern the law, one need not be charismatic.

*Naskh*: abrogation or repeal of a prior revelation of *Qur'an* or *sunna* by a later revelation.

*Qada*: the art of adjudication.

*Qadi*: Islamic judge.

*Qiyas*: analogy used in legal reasoning.

*Qur'an*: the holy book of Islam. The record of God's revelations to Muhammed.

*Shari'a*: divine law.

*Shura*: consultation.

*Siyar*: Islamic law regarding the use of force.

*Siyasa*: policy, administration.

*Siyasa shari'a*: *siyasa* which is performed within the limits prescribed by *shari'a*.

*Sunna*: literally, beaten path. The tradition of examples set by the Prophet, and derivatively, by his closest companions. As the Islamic world extended in time and space, the transmission of the tradition shifted from the direct assimilation of example (imitation), to the recounting of stories about the Prophet and those near to him (verbalization), and ultimately, to the construction of a body of authenticated texts (dogmatization). Although not revealed, *sunna* is a divinely sanctioned source of law: the *Qur'an* commands obedience to the Prophet; God undertook to correct the Prophet's errors. In the classical scheme, *sunna* was the second most authoritative source of law.

*Taqlid*: method of decision which relies upon another's authority, as opposed to practicing *ijtihad*.

'*Ulama*' (sing. *alim*): the learned. Usually used in the plural to denote the class of religious scholars who, from the Abbasid dynasty forward, and in return for cooperation with the state, held exclusive control over all arbitration of *shari'a* rights.

*Umma*: the nation, usually Islamic nation.

*Usul al-fiqh*: roots or sources of *fiqh*.

*Zahir*: literally, obvious, apparent, evident. The opposite of *batin*.

*Zalim*: evildoers, in the sense of "unjust," the antonym being *adil*: just.

*Zulm*: evildoing, injustice.



