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REALIZE SHARED IDEALS

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ISLAM AND INTERNATIONAL LAW: TOWARD A POSITIVE MUTUAL ENGAGEMENT TO REALIZE SHARED IDEALS

by Abdullahi Ahmed An-Na'im*

Muslims constitute about one-fifth of the total world population; they live in every continent and region, though predominantly in Africa and Asia and are the clear majority of the population in forty-four states.¹ These facts suggest the reality of linkages between Islam and international law but do not define them or specify their terms:

- Are they cooperative or confrontational, to what ends and through which means?
- Why and how is this relationship being examined, and not that of Christianity, Judaism, Hinduism or any other religion?

I believe that all such relationships should be critically examined, properly framed in relation to each community of believers in their specific context. In all cases, however, the discussion can be meaningful when it is about Muslims not Islam, Jews not Judaism, and so forth. The question is the same for all religious traditions, namely, *how do human beings negotiate the relationships between their religious beliefs and practice, on the one hand, and mundane concerns with security and well-being, on the other?* One deals always with people's understanding or practice of their religion, not with religion as an abstract notion.

Casting the general subject of this lecture in these terms is necessary in order to focus on Muslims as human beings and on Islamic societies as human societies in their internal and external relationships, like all other persons and societies. But since the question is about what difference does being a Muslim person or an Islamic society make to the person's or group's relationship to international law, it is necessary to deal with what is believed to be distinctive about being Muslim or Islamic, as opposed to being Christian, Hindu, Marxist, or Buddhist.

But unless one is suggesting that all Muslims understand and practice Islam in the exact identical way—which is obviously not true—it is necessary to speak of the Islamic *traditions*, in the plural, to indicate the diversity of Islamic perspectives. That diversity reflects contextual and historical factors as well as theological or legal differences among Islamic traditions.

Whatever being Muslim or Islamic means, it is neither the same for all Muslims at any one time nor retains the same meaning for local Islamic society over time. To say that terrorist attacks are justified, let alone required, by particular views of the Islamic principle of *jihad* explains neither why such views prevail at a specific time and place, nor why some Muslims in that particular society act on them and others do not. It is not that Islam is irrelevant as a factor in these considerations; what we need to understand is *how* Islam, and other factors, are relevant, and how all factors interact.

Thus, how different Islamic societies are likely to interact with international law will probably be influenced by the same sort of factors and conditions that affect other human societies. The "Islamic factor" is only one among others in this process. Outcomes also tend to be affected by factors like which actors are engaging in the name of the Islamic side and of the international law side. Other questions can be raised: Are Muslims being required to prove their allegiance to international law while others are not? Who speaks for Islam and who speaks for international law, and which positions are they asserting? What are the institutional framework

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¹ CIA, *The World Fact Book*, available at <<http://www.cia.gov/cia/publications/factbook/geos/xx.html>>; *select World* (last updated Dec. 18, 2003).

and the range of practical possibilities of their encounters? Moreover, given the likelihood of the reactions of Muslims to international law being influenced by the reactions of other religious or ideological communities, how is that reciprocal behavior monitored and assessed, by whom and according to which criteria? That is, how and by whom is information about the attitudes and practice of various societies regarding international law collected and assessed?

FRAMEWORK AND THESIS

My purpose here is to affirm and promote the legitimacy and efficacy of international law as the indispensable means for realizing universal ideals of peace, development, and the protection of human rights, everywhere. Thus the issue cannot be about the “West” being the primary author of international law and fully conforming to its principles and underlying values versus the rest of the world struggling to subscribe to and comply with them. The basic thrust of my argument is that for international law to play its role in realizing shared ideals of justice and equality under the rule of law for all human beings, it must be both truly *international* and legitimately *law*. It has to be equally accepted and implemented by all of humanity, not a rule of law that some may choose to ignore while others must observe.

Although there were several parallel systems for regulating interstate relations throughout human history until the midtwentieth century, there can now be only one system of international law in the present globally integrated and interdependent world. But it cannot simply be the same as the European system of interstate relations that had evolved since the eighteenth century. That was simply a regional system, like the Chinese, Hindu, Roman and Islamic systems that preceded it. The fact that European powers managed to extend the domain of their regional system further and more completely than any of the earlier imperial powers does not make it truly international.

The parochial nature of that European system, commonly called “traditional” or “public” international law, is reflected in how it justified the military conquest and control of local populations throughout Africa, Asia, the Americas, and Australia by deeming them all to lack “sovereignty” and “legal title” to the land they lived on, according to European definitions of these concepts. The vast majority of the peoples of Africa and Asia had no possibility of being subject of international law until the decolonization process after World War II. Native Americans and Aboriginal Australians are unlikely to ever have that possibility because they are not allowed “sovereignty,” in European terms.

From this perspective, by international law I mean the legal system that has evolved since the end of World War II, especially under the influence of the United Nations and the de-colonization process of the second half of the twentieth century. International law is surely not condemned or limited to its earlier history, but it cannot simply erase or ignore that history. The basic theme that I will keep raising throughout this lecture relates to how inclusive the system is of all its appropriate subjects in defining and implementing its objectives.

This does not mean that relevant principles and institutions that evolved earlier no longer apply simply because they were part of the European system. Rather, I am emphasizing that all principles, institutions, and processes must be judged by the same criteria of consistency with the underlying premise and purposes of the system as a whole. These include securing international peace and security, protecting the right of peoples to self-determination, and generally promoting trade and peaceful cooperation among the peoples of the world.

From this perspective, I take the Charter of the United Nations of 1945 to be the most authoritative normative framework of international law we have so far, though it is certainly not sufficient for addressing some of the fundamental challenges facing international legality today. The UN Charter is the best framework so far because it is the most widely binding treaty that

establishes a viable institutional framework for realizing the fundamental purposes and rationale of international law.

It would clearly follow that the use of military force is not allowed except in accordance with the Charter of the United Nations, namely, in strict self-defense or when sanctioned by the Security Council under Chapter VII. There cannot be any possibility of lawful use of force beyond those two exceptions, whether in the name of “preemptive self-defense,” “just war” theory, or Islamic *jihad*.

The point I am making here is stronger than simply that it is illegal as a matter of international law to use military force beyond the strict limits of the UN Charter. My point is that it is *theoretically incoherent and practically impossible* to prohibit or prevent any use of military force beyond those boundaries without doing so for any and every actor, whether a state or private person. It is incoherent and futile to prohibit aggressive Islamic *jihad* without doing the same for any use of force outside the ambit of the UN Charter.

The question I raise from this perspective is what is the moral, political, or practical difference between international terrorism in the name of Islamic *jihad*, on the one hand, and the preemptive self-defense or humanitarian intervention claimed by the United States in Iraq, on the other? Both are instances of self-regulated use of force outside the institutional framework of the United Nations that is so inherently arbitrary and unaccountable that it undermines the very possibility of international law.

The primary limitation of the Charter’s framework, however, is that it is limited to states, although the United Nations has managed to include civil society organizations, especially in the human rights field. There is therefore an urgent need for an *imaginative* approach that would include other types of international actors as subjects of international law, indeed an imaginative approach to international law reform more generally. Such an inclusive approach is particularly urgent in the present context of intensified globalization, which is diminishing state sovereignty, and the mounting role of nonstate actors in international relations.

Globalization, it would seem, has accelerated and intensified the complexities of social identities and social interactions as much as it has created new frameworks of internationality that are different from the international law model of nation-states.² The emerging international law principle of universal jurisdiction and the establishment of the International Criminal Court illustrate this more inclusive approach by bringing more subjects, such as perpetrators of crimes against humanity and their victims.

The necessary qualities of being *both* “international” and “law” therefore relate to the system’s normative underpinnings or guiding principles and its objectives. They also pertain to the relationship between international law and its subjects: how its subjects are identified and how they contribute to the making and implementation of the law. Without the inclusion of all its subjects in these processes, international law will not have their allegiance and cooperation, which are critical for the legitimacy and efficacy of the system. The exclusion of other subjects besides states denies those other social agents the possibility of contributing to the making of the law and enhancing its legitimacy through broader democratic participation and accountability.

INTERNATIONAL LAW: REALITY AND PROSPECTS

The term international law is used here to refer to the international legal system as it has evolved since World War II, especially through the decolonization process that enabled the majority of the peoples of the world to be full subjects of international law for the first time. It is only during this phase that international law has become the legitimate legal framework

² ARJUN APPADURAI, *DISJUNCTURE AND DIFFERENCE IN THE GLOBAL CULTURAL ECONOMY IN THE CULTURAL STUDIES READER* 220–30 (1993).

for recognition of national sovereignty and territorial jurisdiction throughout the world, including all Islamic countries. It is also the legal framework for international relations in matters ranging from international peace and security to countless routine yet essential daily transactions in such fields as health, postal services, trade, travel, and the environment.

The impressive record of daily success of international law in this wide range of fields is often overlooked, due to understandable concerns about a few highly visible apparent failures in securing international peace and security. This concern with peace and security cannot be addressed except through strict compliance with international law by all states, without exception. In fact, compliance by the most powerful states is a stronger indication of the legal authority of international law; the practice of weak states is likely to be dismissed as more motivated by fear of retaliation or opportunistic calculations than a sense of legal obligation.

Paradoxically, this point is clearly illustrated by two apparently contradictory episodes that may superficially be taken as instances of the failure of international law. The first case is the terrorist attack of September 11, 2001 in the United States. The crude and reckless manner in which a small group of determined individual persons were able to perpetrate such a devastating attack on the most powerful and highly developed country clearly demonstrate that national security cannot be maintained solely through military might or technical resources.

The second related episode is the global crusade by the United States, especially the military invasion and colonization of Iraq since March 2003, in the name of an inherently extralegal notion of “preemptive self-defense” and unaccountable claims of humanitarian intervention. The invasion and occupation of Iraq is colonization, which can be legally defined as the usurpation of sovereignty of a people through military conquest.

The fact that the United Kingdom and several countries participated or otherwise supported this action does not make it legal under international law. After all, the almost total colonization of Africa in the late nineteenth and early twentieth centuries was agreed among eight western powers at the Berlin Conference of 1884–85, outside any legitimate institutional framework except that of their own conspiracy. In addition to eroding the legitimacy of international law, the colonization of Iraq will only reinforce the skepticism of postcolonial states, and non-Western societies about the invocation of universal ideals, such as human rights.

It is equally clear that the ability of international law to achieve its objectives is contingent on the willingness and ability of a wide range of actors to comply voluntarily with its dictates. The total and continuous coercive enforcement of any legal system is not only impossible in practice, it also assumes high levels of political commitment and institutional capacity that may not necessarily be forthcoming. Since no enforcement regime can cope with massive and persistent violations, any legal system must assume a high level of voluntary compliance if it is to have the will and ability to enforce its rules in the exceptional cases when that is necessary.

This is not to suggest that coercive enforcement is immaterial, but only to emphasize that its role is both limited and contingent. Direct use of force or the threat of it may ensure compliance with rules in the short term, but it is not sustainable over time. The limited though important role of coercive enforcement should be understood in the broader context of the other factors that make a legal system work. It is therefore important to understand what motivates or encourages the subjects of a legal system to voluntarily comply with its dictates enough to make coercive enforcement possible, when necessary.

As a general rule, states do in fact comply with the vast majority of international law norms, for the same sorts of reasons people have for obeying any legal system, such as self-interest and fear of retaliation by others. In particular, the clear limitations of the military or economic power of all states, including the United States, the so-called sole superpower, mean that all of them have to rely on international legality for their own survival. Events like the terrorist attacks of 9/11 clearly show that even the most powerful states are vulnerable to the arbitrary action of individual international terrorists, for whose crimes no state can be held accountable

under traditional notions of state responsibility. I would therefore conclude that it is both dangerously unrealistic and unnecessarily limiting to focus exclusively on state practice as the primary source of international law. For example, it is dangerous to emphasize traditional notions of exclusive territorial jurisdiction when national boundaries are being violated by many unaccountable, sometimes undetectable, actors.³

I conclude this section by strongly emphasizing the importance of the normative underpinnings of international law as the system has evolved during the era of decolonization and self-determination since World War II. In particular, no principle of the pre-1945 Eurocentric regional system or of any national law is to be accepted as part of international law if it is inconsistent with the latter's essential function and rationale. This would exclude, for instance, any claim by the United States to exercise an alleged right of preemptive self-defense, or to hold foreign nationals as "enemy combatants." Failure to apply this principle consistently against all states would seriously undermine any possibility of international law.

ISLAMIC PERSPECTIVES ON INTERNATIONAL LAW

The main premise of my argument here is the *contingency* of the nature and consequences of Islamic perspectives (as explained below) on international law, depending as they do on a variety of internal and external factors and their dynamic interaction. Since this is probably true of other societies or regions of the world, part of my point is that Islamic societies are not exceptional or unusual, in either a positive or a negative sense—but how an Islamic perspective can play either of those roles is specific to the understanding and practice of Islam by each society, in its particular context of time and place. In other words, Muslims, like other people everywhere, prefer their own ways of being themselves, which is the object and rationale of the fundamental international law principle of self-determination.

We are concerned here, as I said, with how Muslims understand and practice Islam, rather than with the religion in an abstract sense that is independent from the human agency of the believers. This dynamic and diffused sense of what is "Islamic" is better indicated by the term "tradition" to signify a gradual process of consensus-building, led by scholars who worked completely independently of the state, though with due regard to the circumstances and concerns of their communities and political institutions.

Reference to *Shari'ah* as Islamic law also requires some clarification, because it does not indicate the sort of content, institutions, and actors that one would associate with "law" in the modern sense of the term. The scope or subject matter of *Shari'ah* is much broader than "legal" subject matter, ranging from ritual religious practices, ethical principles, and social relations to positive legal rules. Whatever elements or qualities of the system can be seen as somehow corresponding to law in the modern sense of the term are in fact an integral part of a vast and complex tradition of competing, often conflicting, interpretations of the Qur'an and *Sunnah* (normative statements and practice of the Prophet) according to a particular set of interpretative principles (*usal al-fiqh*).⁴

Thus, any Islamic perspective is always the view of one scholar or another and is necessarily the product of its own specific context:

Although the law is of divine provenance, the actual construction of the law is a human activity, and its results represent the law of God *as humanly understood*. Since the law does not descend from heaven ready-made, it is the human understanding of the law—the human *fiqh* [literally meaning understanding]—that must be normative for society.⁵

³ Jonathan I. Charney, *Universal International Law*, 87 AJIL 529 (1993).

⁴ See, generally, BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* (1998); DEVIN J. STEWART, *ISLAMIC LEGAL ORTHODOXY: TWELVERS SHIITE RESPONSES TO THE SUNNIA LEGAL SYSTEM* (1998); and WAEL B. HALLAQ, *AUTHORITY, CONTINUITY AND CHANGE IN ISLAMIC LAW* (2001).

⁵ WEISS, *supra* note 4, at 116.

Moreover, the unavoidable human understanding and practice that defines an Islamic perspective on any issue is also deeply contextual and contingent on a variety of factors, both internal and external to Islamic societies throughout history.

This view of Islamic traditions or law is critical for mediating an apparent quandary: How can such religious or theological concepts or systems positively interact with an inherently secular international law? Since the Islamic dimension of traditions and law are the product of the *human agency* of Muslims in the specific historical context of their societies, they can fully engage international law as an integral aspect of the context and experience of those societies.

The difficulties facing this engagement are more to do with the dynamics of power relations than their apparent normative and epistemological differences. These difficulties are due more to a failure of political will and imagination than to the inherent nature of Islamic traditions and law in contrast to international law. Thus, the fact that it is always people who act in the name of any Islamic tradition or any view of Islamic law, and international law, rather than the religion or legal system acting for itself as such is part of the solution. Yet, the realities of power relations, as well as the possibilities of legal imagination, are missed by western scholars when they examine the relationship between Islam and international law, as can be seen from the following brief review of two fairly representative articles.

The premise of David Westbrook's analysis of the relationship between what he calls Islamic international law and international law straddles the paradox of asserting that, while the legal culture that has shaped international law is strictly Western, the system it produced is genuinely universal.⁶ From this problematic perspective Westbrook criticizes a number of scholars who attempted to define Islamic international law on the ground 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 Islam."⁷

This assertion is problematic in my view on both counts. First, why should a strictly Western legal culture have a monopoly on defining the concerns of public international law? Second, how can one identify or determine what is "substantively Islam"?

Westbrook distinguishes what he calls Islamic authority and Western category in equally problematic terms. To him, "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."⁸ In addition to my earlier point that it is always Muslims, not Islam, that do anything or believe in any view, all the concepts and categories Westbrook lists have always been profoundly problematic from the very beginning of Islamic history. What did "a triune identification of peace, belief, law" mean when Muslims were fighting a civil war within three decades of the Prophet's death?

He also asserts that

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. . . . For Islamic scholars, international law is a continual attempt to reconcile Islamic authority and Western category The arguments they make within Western categories are not authoritative to a Muslim.⁹

On the one hand, it is not true that international law seeks to achieve order without belief, unless one limits the realm and scope of belief to doctrinal religious belief, which was never

⁶ David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA. J. INT'L L. 819 (1993).

⁷ *Id.*, at 821, 826.

⁸ *Id.*, at 828.

⁹ *Id.*, at 829.

true of Muslims anyway. International law is indeed based on shared belief, such as belief in the rule of law, in liberal values of equality and justice, or at least in the desirability and possibility of peace. On the other hand, it is not clear to me how can one definitively affirm that an argument is not authoritative to a Muslim, except when one is a Muslim saying that he or she does not find an argument convincing or persuasive.

James Cockayne begins his comparative analysis of Islamic and international humanitarian law (IHL) with the promising observation that studies of the subject tend to “reduce both legal traditions (the Islamic and the Western) to static monolithic constructs. . . [and] to exhibit a subtle orientalism, taking the Western system as a yardstick against which the adequacy or compatibility of the oriental Islamic “other” is measured.”¹⁰ Yet Cockayne also begins his analysis of the history of this interaction with the period “since the acceptance of the Ottoman Empire as a sovereign state within the European State system, usually identified with its accession to the Treaty of Paris in 1856.”¹¹ Thus, to this author, too, it is a question of the European regional system reaching out to incorporate, rather than include on equal terms, an Islamic perspective, that of the Ottoman Empire in this case. For instance, a central controversy for the Red Cross in the Balkan Crisis of 1875 related to the Christian origins of the Red Cross movement, even as it was presented as “not simply a universal, but also a *secular* organization.”¹² Despite the universalizing tendencies of humanitarian law, and its secular modernism, the tension remained because the entire framework of humanitarian law was based upon the European notion of the sovereignty of the nation-state.

Yet, Islamic states began to adapt to and contribute within that European paradigm. Interestingly, as a result of the interventions of the two Islamic delegations, from the Ottoman Empire and Persia, at the 1899 and 1907 Hague Peace Conferences the conferences “officially confirmed the principle of religious non-discrimination as a central tenet of IHL.”¹³

Cockayne also argues that, while it may have appeared that the nation-state system increased the power of Islamic states to participate as equals in shaping IHL, the reality was quite different. “The ‘integration’ of Islamic States into the modern community of nations in fact amounted to a form of ‘subjugation,’ a kind of Europeanization predicated upon the reconstitution of the Islamic *umma* in distinct nation-State units.”¹⁴ This set the terms of interaction during the inter-war IHL conferences.

Yet Islamic scholars drew on Articles 9 and 38 of the Statute of the Permanent Court of International Justice¹⁵ to emphasize that international law is a universal system reaching across multiple civilizations, placing Islam on a level footing with European civilization. But that process also

. . . represented two significant concessions: first, an apparent abandonment of any objection to the validity of the public international law system in Islamic States based on its cultural, historical and religious specificity (an argument which was to arise again in the context of human rights); and a recognition of the normative superiority of a system of secular law above Islamic law, at least between States.¹⁶

As the interaction continued after 1945, nonstate entities, like the Palestine Liberation Organization (PLO), contributed to formulating Article 1 of Additional Protocol 1 to the Geneva

¹⁰ James Cockayne, *Islam and International Humanitarian Law: From a Clash to a Conversation Between Civilizations*, 84 INT’L REV. RED CROSS 597 (2002).

¹¹ *Id.*, at 599.

¹² *Id.*, at 604.

¹³ *Id.*, at 608.

¹⁴ *Id.*, at 611.

¹⁵ Article 9 emphasizes that the Court as a whole should represent the main forms of civilization and the principal legal systems of the world; Article 38 (3) provides that the International Court of Justice should apply, inter alia, “[t]he general principles of law recognized by civilized nations.”

¹⁶ Cockayne, *supra* note 10, at 612.

Conventions, which extended the protections of IHL to those fighting colonial domination, foreign occupation, or racist regimes. It is in light of developments like this that I suggested earlier that international law has really become more relevant and legitimate for African and Asian peoples during the struggle for self-determination.

At the same time, the interacting entities and the terms of interaction were also being transformed. Those who acted in the name of Islamic societies based their identities primarily on nationalism, not Islam. They were not only using the nation-state system but were also employing a deliberately secular, humanist discourse as a means of justifying their actions to the community of nations.¹⁷ By the end of the 1970s, however,

The Islamic Revolution in Iran signaled a revival of theocratic Islamic ideology and politics which fundamentally changed the relationship between Islamic players and the public international legal system, including IHL. Islam and humanitarian law are increasingly treated as competing normative systems.¹⁸

It is clear that those developments defy simple characterization or categorical classifications, as Cockayne himself notes. For instance, during the Iran-Iraq war of the 1980s, Iran was asserting an Islamic humanitarian law against the then-supposedly both Islamic and secular nationalist Iraq. At the same time, some Islamic states and Catholic powers, including the Holy See, jointly contested the definition of “forced pregnancy” in the Rome Statute of the International Criminal Court.

In conclusion, I agree with Cockayne that IHL, and international law more broadly, should be seen as “a *conversation between civilizations*,” where the Islamic *traditions*, in the plural, are part of the jurisprudential sources that may be tapped in the quest to identify “general principles of law recognized by civilized nations.” This process of deliberate nonviolent dialogue and negotiation between competing sources of international law norms seeks to find common normative ground and institutional resources to achieve shared ideals, “but each participant in the process remains free to perceive as they wish the source of the normative force of the obligations the process produces.”¹⁹

As a Muslim scholar committed to this process on these terms, I have attempted to develop an Islamic critique of historical notions of *jihad* as aggressive war and to propose reform methodologies to reinforce principles of equal sovereignty, nondiscrimination, and so forth.²⁰ But I must confess that I am neither motivated to present such contributions here, nor believe my argument to be persuasive for the general Muslim public under the present circumstances. The views I have elaborated elsewhere are conceptually incoherent and politically unviable when the United States colonizes Iraq with apparent impunity, and the Palestinian people continue to suffer horrendous violations of human rights and humanitarian law without any prospects of relief in sight. In the final analysis, if the system fails to address my fundamental concerns as a Muslim advocate of international legality, then it is not international law at all for me.

The failure of colonization of Iraq at the time this was written (April 2004), which is forcing the United States to resort to the United Nations for help in mitigating the political difficulties of the situation on the ground, is a hopeful sign that Islamic and other societies may yet forge a positive mutual engagement to realize shared ideals of international law. It is therefore clear to me that genuine and legitimate international law is indeed possible, if not imperative. Yet that promising prospect cannot be realized without creative scholarship to formulate alternative approaches to international law and appropriate action to implement such policies in practice.

¹⁷ *Id.*, at 615.

¹⁸ *Id.*, at 616.

¹⁹ *Id.*, at 624.

²⁰ See, generally, ABDULLAHI AHMED AN-NA’IM, *TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS AND INTERNATIONAL LAW* (1990).

LECTURE COMMENTARY BY LAMA ABU ODEH*

As an Islamic legal scholar, I think of myself as a fan of Professor An-Na'im's scholarship and consider myself his ally. I share with him the idea that religious law, while law, is not exactly religious because it is necessarily mediated through the human agency of interpretation. Since the interpreters are many, so are the interpretations, rendering fundamentally suspect the move that a particular interpretation is attributed to God unequivocally and then used to silence other competing interpretations.

This is an important point to make in the context of Islamic law because it seems to me to go against the grain of two positions that seem to permeate scholarship on Islamic law: The one affirmatively embraces the radical difference of a religious legal system, its sensibility, its consciousness in the name of cultural relativism, asking us to tolerate and understand this fundamental difference. The other adopts an Orientalist attitude towards such difference, which it sees as radical, unbridgeable, and inferior.

I also share Professor An-Na'im's sense of outrage at the injustice inflicted on "Muslims" by the international order, which seems to endlessly subject them to its selective interpretation of the legal, tolerating violation of its doctrine when it comes from a powerful entity, seemingly always Western, while using a heavy hand of recrimination and sanction when the violator is identified as Islamic.

It is this sense of injustice, An-Na'im seems to suggest, that consolidates among some Muslims the sense of their otherness—an otherness that they use to object to the unfair order through disruption, sometimes violent and self-destructive. It is this dialectic of injustice and self-reifying otherness as response that I believe Professor An-Na'im wants to draw our attention to in his talk.

I also applaud An-Naim's impulse to humanize Muslims by asserting that after all is said and done, Muslims share with the rest of the world the liberal universal norms of peace, equality, and justice that characterize the post-World War II international order, just as they share, indeed demand, of that order the equal enforcement of the norms of sovereignty and self-determination. If I proceed now to critique some of Professor An-Na'im's postulates, it is not because I disagree with his political and normative project. Rather it is because I see room for tightening up his analysis to make it more coherent and less contradictory. My critique is one of an ally and a long-term fan.

An-Na'im as I read him is postulating a process theory when it comes to the relationship of Islamic law to international law. He is advocating a bargaining relationship in which the Islamic side and the international side meet as equals in negotiating their contributions to the universal international. This process-based equality can only be achieved if, first, the international eschews its Westernness and the Islamic retains its internal sense of diversity, indeed secularism. The international abandons its Westernness when it abandons its pre-World War II impulse to colonize, imperialize, and hegemonize, acts which at heart render equality in the bargaining process meaningless. The Islamic preserves its internal diversity by reminding itself and the world that there is an other to Bin Laden and aggressive *jihad*, that other being a liberal Islam that could join the table of negotiations with the Western quite comfortably and with ease. In other words, the world and Muslims need to understand that for every Bin Laden there are millions of An-Na'ims.

The problem with An-Na'im's postulates as I see it is that they seem to render the Islamic too indeterminate and the international too determinate, and to approach the idea of process in too formalist a way. Let me explain.

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While it is methodologically important to assert the internal difference of Muslim perspectives, the danger lies in sliding so much into difference that one is left at the end of the day wondering whether there is anything there. In other words, if Muslims must contribute to the international order as equals, they need to have something to contribute. If they do have something to contribute, then that needs to be determinate enough to be described. An-Na'im unfortunately does not give us much that we can grapple with as an Islamic contribution to the international order. He hints that Islam shares essentially the liberal humanist norms of the international order, while at the same time asserting that there are Muslims who hold views that are very distinct from that set of ideas.

An-Na'im can get out of this muddle by proposing yet another process theory, this time not between the international order and the Islamic but the internally Islamic. Such process theory would have us imagine Muslims sitting around a table among themselves trying to figure out which perspective among the multiple ones conceivably Islamic can be contributed as the Islamic perspective: a process theory upon a process theory.

An-Na'im postulates that the only trouble with the international is its tendency to exclude other identities and to be selective in implementing its norms. It excludes non-Western contributions to its norms, and it implements liberal norms selectively to weak states while allowing strong ones to get away with "murder" (example: U.S. invasion of Iraq). At the heart of this assumption is that, cured of these problems, the international can return to its nonbiased, all-inclusive liberal humanist self.

To make this assumption, An-Na'im has to assume the determinacy of the rules of the international—an odd thing to do, having insisted on the indeterminacy of the Islamic. I see no coherent reason to assume that there is something fundamentally different between the Islamic and the international in this way: all legal systems have their multiple interpreters and multiple interpretations, and human agency bedevils both.

An-Na'im puts his faith in process as a way to include the excluded. But we all know, don't we?, that all aspects of the process—which process we pick, who determines the rules of process, who gets in and who gets out of the process—are all, again, tainted by human agency. And human agency is always tainted by politics. This brings us back to square one.