REMEMBERING THE OTHER’S OTHERS:
THEORIZING THE APPROACH OF
INTERNATIONAL LAW TO MUSLIM
FUNDAMENTALISM

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ABSTRACT

Muslim fundamentalist movements pose major challenges to international law. Yet, the field of international law has failed to offer a significant response. Seeking to provide simple counter-narratives to the admittedly problematic narratives of some governments in the context of the “war on terror,” international lawyers have often omitted discussion of Muslim fundamentalism altogether. While Edward Said’s notion of Orientalism may manifest in stereotypical approaches to fundamentalism, it may also surface in the refusal to address the question at all because it is deemed to be embedded in Muslim culture.

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1. For a discussion of the meaning of this term, see infra text at notes 25–41. For an overview of such movements, see infra text at notes 53–78.
The silences of international law with regard to Muslim fundamentalism speak volumes about the discipline. There are a number of explanations for such lacunae. These include decreasing confidence in universality, the misapplication of legitimate concerns about discrimination, and narrow discourses about victimhood. Whatever their causes, the result of these silences is that international legal scholarship and the human rights policy it informs may misrepresent significant global controversies. For example, the admittedly flawed “war on terror” becomes solely a misguided assault on an undifferentiated Muslim population (which it sometimes has been, sometimes not), while the existence of an organized jihadist international, the “other” side of the “war on terror,” is disappeared. Such narratives undercut opponents of fundamentalists in Muslim populations.

Why does any of this matter? Consequently, the very governments that international lawyers seek to constrain may cease to take us seriously. Potential allies among anti-fundamentalists of Muslim heritage (whose projects are critical to the success of international law) may be further disempowered. Worse still, international law may be misused to the benefit of social movements antithetical to its goals. To better respond to the challenges posed by Muslim fundamentalism, international lawyers must apply their discipline’s universalist principles with scrupulous consistency. Moreover, they need to confront the complexity of international law and construct a non-discriminatory, yet unashamedly critical, human rights account of Muslim fundamentalism.

Ultimately, international lawyers need to reconceptualize international law’s world. They must cease opposing Samuel Huntington’s problematic paradigm of the “clash of civilizations” with what is simply a post-colonial inversion of this same construct. By accepting his basic binary dividing “the West” and “Islam,” even in the name of “difference,” this approach actually reifies Huntington’s notion of immutable inter-cultural fault lines that delimit the contemporary moment. The only way to refute Huntington is to recognize that the clashes about international law and human rights within civilizations, such as those between fundamentalists and their opponents, are as determinative as those between civilizations.

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In the period after September 11 the extremist interpretation of jihad has undergone yet another metamorphosis, degenerating into a cult of suicide bombing against which there is often no plausible defense.²

—Ahmed Rashid, Pakistani journalist

If we bow down to the Islamists, then I think everything is going to be rolled back and they will always have their way, and then there will be nothing. We'll be just sitting in a dark corner.³

—Faizan Peerzada, Pakistani arts promoter

People of the world must know that the Iranian people are very different from the government. We all want religion to be separated from government and we want some air to breathe freely.⁴

—Iranian student and opposition supporter

We don't want Taliban Law.⁵

—Afghan women demonstrating against Shia Family Law

I. INTRODUCTION

Muslim fundamentalist movements—both in and out of government—today pose significant challenges to international law.⁶

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These threats to international law arise in the areas of human rights and humanitarian law—as the quotes above underscore—but also in relation to broader concepts in the field like the *jus ad bellum*, the role of the United Nations, and the very notion of the international community. Such movements sometimes carry out suicide bombings on civilian targets and take hostages in clear opposition to international humanitarian law and human rights values. They are often committed to an aggressive conception of jihad in contradistinction to the conflict prevention language and spirit of the

6. For a thorough discussion of terminological questions, see infra text at notes 25–52. For an overview of these movements, see infra text at notes 53–78.

7. This term refers to the body of international law that governs the recourse to force, key portions of which are found today in the U.N. Charter. See Thomas Franck, *Recourse to Force* (2002).


9. For further exploration of these challenges, see Warning Signs of Fundamentalisms (Ayesha Imam et al. eds., 2004), available at http://www.wluml.org/node/224.

10. Most recently, on December 25, 2009, a young supporter of jihadist movements attempted to blow up an airliner en route from Amsterdam to Detroit, an act that could have deprived some 300 people of their the right to life. See *Al-Qaeda Wing Claims Christmas Day US Flight Bomb Plot*, BBC News Online, Dec. 28, 2009, http://news.bbc.co.uk/2/hi/middle_east/8433151.stm. Other recent examples include Jemaah Islamiah attacks on hotels frequented by Westerners in Indonesia on July 17, 2009. See *Fatal blasts hit Jakarta hotels*, BBC News, July 17, 2009, http://news.bbc.co.uk/2/hi/asia-pacific/8155084.stm. While attacks on Western targets have received considerable media coverage, analogous acts have also more routinely targeted other Muslims or local people in countries including Afghanistan, Algeria, Iraq, Pakistan, Somalia and beyond, but have garnered less international attention. These atrocities include the Armed Islamic Group’s widespread kidnapping and sexual abuse of ordinary Algerian women in the 1990s. See John Esposito, *Unholy War: Terror in the Name of Islam* (2002); Leila Hessini, *From Uncivil War to Civil Peace: Algerian Women’s Voices* 23–28 (1998). Recent events include the July 2009 campaign against local schools in Northern Nigeria, carried out by some Nigerian Islamist groups, leading to the deaths of hundreds of local people. See *Nigerian Islamist attacks spread*, BBC News, July 27, 2009, http://news.bbc.co.uk/2/hi/africa/8169966.stm. As part of their ongoing assault against civilians, on January 1, 2010, Taliban militants are thought to have carried out an attack on a volleyball court in the Pakistani village of Shah Hasan Khel killing 100. See Riaz Khan and Nahal Toosi, *Gloom and fury as Pakistan attack toll nears 100*, Assoc. Press, Jan. 2, 2010, http://news.yahoo.com/s/ap/20100102/ap_on_re_as/as_pakistan.
U.N. Charter.\textsuperscript{11} Unfailingly, such movements purvey systematic discrimination against women and religious minorities, and advocate other violations of human rights (also contrary to the U.N. Charter and human rights norms).\textsuperscript{12} When manifested in non-governmental form, they frequently seek to construct states that would implement this same agenda, a strategy which aims to create international legal persons designed to undermine international law.

Clearly then, international law scholars need to take Muslim fundamentalism seriously, to recognize its related movements as a specific set of threats to basic principles of international law, and to find a thoughtful way to talk about them, no matter how difficult it is to do so in the contemporary moment. Put simply, we need to theorize a response to the phenomenon of Muslim fundamentalism. Faced with the recent polarized global environment, this enterprise is unquestionably a daunting task. Muslim fundamentalists—and those confused with them—have also themselves been the targets of a range of grave violations of international law by states in recent years, including arbitrary detention, torture and ill treatment, and extraordinary renditions.\textsuperscript{13} In fact, the straw man of the Muslim

\textsuperscript{11} Article 2(4) of the Charter requires that U.N. member states “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the U.N. Charter.” U.N. Charter art. 2, para. 4. Classically, this prohibition “only protects and is only addressed to States.” The Charter of the United Nations: A Commentary 121 (Bruno Simma et al. eds., 2d ed. 2002). However, Security Council resolutions passed in response to the September 11 attacks have been argued, even by judges on the International Court of Justice, to have brought “large-scale attacks by non-State actors” within the remit of at least the Charter’s rules on self-defense. See Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168 (Dec. 19) (separate opinion of Simma, J., ¶ 11).

\textsuperscript{12} Equality and non-discrimination are the only substantive human rights issues specifically referenced in the U.N. Charter. According to its text, the U.N. is to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.” U.N. Charter art. 55(c); see also U.N. Charter art. 1, para. 3. For further discussion of the policy agenda of Muslim fundamentalist movements, see infra text at notes 53–78.

fundamentalist has been used in the West to justify everything from launching armed conflicts to opposing the nomination of Harold Koh to be the State Department Legal Adviser.\footnote{Koh’s opponents have, inter alia, claimed inaccurately that he has made “favorable reference” to Sharia, or Islamic law, and had said it could be used to “govern a controversy in an American court.” Eric Lichtblau, \textit{After Attacks, Supporters Rally Around Choice for Top Administration Legal Job}, N.Y. Times, Apr. 2, 2009, at A17. Rule by their own version of Islamic law is a key fundamentalist aim.} Racialized discourses and policies directed against people of Muslim heritage have indeed proliferated since September 11, 2001.\footnote{See, e.g., Margaret Chon & Donna Arzt, \textit{Walking While Muslim}, 68 Law & Contemp. Probs. 215 (2005) (analyzing the religious elements of racial profiling in the post-9/11 era).}

Despite these difficulties, offering a critical perspective on the contemporary problem of Muslim fundamentalism remains an essential project for international human rights law scholars, who for too long have—in the main—engaged critically with only the (admittedly problematic) responses to Muslim fundamentalism, but not the phenomenon itself. This may be an auspicious time for such an enterprise in light of the new approaches to Muslim majority countries put forth by the Obama Administration during its first year in office.\footnote{See \textit{Obama Reaches Out to Muslim World}, BBC News, Apr. 6, 2009, \url{http://news.bbc.co.uk/2/hi/europe/7984762.stm}; \textit{President Barack Obama, Address to Turkish Parliament} (Apr. 6, 2009) (notable for the President’s assertion that “the United States is not at war with Islam”). A critical approach to fundamentalism is also especially warranted in light of recent suggestions, embraced by U.S. Secretary of State Hillary Clinton, of negotiating with elements of the Afghan Taliban. \textit{See Bridget Kendall, \textit{Taking politics to the Taliban}, BBC News, July 27, 2009, \url{http://news.bbc.co.uk/2/hi/uk_news/politics/8170764.stm}. For a feminist caution about such initiatives, see Rachel Reid, \textit{Afghanistan: Shades of Fundamentalism}, The Guardian, July 27, 2009, \url{http://www.guardian.co.uk/commentisfree/2009/jul/27/taliban-david-miliband-women/print}.} Yet, for fear of getting it wrong, for fear of displaying the all-too-common discriminatory attitudes they correctly critique, those legal scholars and practitioners who speak the language of
international human rights too often say nothing about this issue. Seeking to offer a simple counter-narrative to the problematic narratives of some governments in the context of the phenomenon formerly known as the “war on terror,” human rights lawyers have downplayed or omitted discussion of Muslim fundamentalism altogether. Meanwhile, they have still proceeded to address topics such as the regulation of headscarves in public education and human rights abuses in the context of the “war on terror,” topics which make sense only if one speaks also of the reality of Muslim fundamentalism’s many current and powerful manifestations. The fact of sophisticated, transnational Muslim fundamentalist networks certainly does not justify serious violations of basic norms of international law in response or make international law obsolete as some have argued, but it must be factored into any meaningful analysis of the current moment.

Many experts and advocates in the field of women’s human rights, and others who oppose fundamentalisms, have roundly criticized Western international lawyers, human rights theorists, and human rights organizations for failing to recognize and respond to

17. Note that the terminology here is in flux. In spring 2009, Secretary of State Hillary Clinton announced a suspension of the use of the term “war on terror.” Jay Solomon, U.S. Drops War on Terror Phrase Clinton Says, Wall St. J., Mar. 31, 2009, at A16. The ubiquitous phrase was seen as inflammatory in Muslim majority countries and has been criticized by legal scholars. However, prior attempts to switch to “global struggle against violent extremism” failed to catch on. See Matthew Davis, New Name for War on Terror, BBC News, July 27, 2005, http://news.bbc.co.uk/2/hi/americas/4719169.stm. For now, this Article will continue to employ the term “war on terror” in quotes.


the unique challenges posed by fundamentalist movements.21 While nearly all of these movements push agendas that undermine human rights, not all of them engage in violence or terrorism. Ultimately, however, both these ideologies and the tactic of terror that their proponents sometimes employ must be addressed if international lawyers are to rise to the set of major international law challenges that they together pose.

Otherwise, international law scholarship risks misunderstanding and misrepresenting a range of significant global problems. Here are just a few examples:

- The admittedly flawed “war on terror” becomes solely a misguided assault on an undifferentiated Muslim population (which it sometimes has been, sometimes not), while the existence of an actual international jihadist movement that targets civilians from Casablanca to Bali and beyond, the “other” side of the “war on terror,” is disappeared.

- The debate about the regulation of headscarves in public education—whether in France or Turkey—in international human rights law is reduced to a mere question of personal choice (which it sometimes is, sometimes not) or of “tradition”; the debate has no sense of the powerful movements of the Muslim far right that seek to deploy this symbol—and ever increasingly “modest” garments—on the bodies of Muslim women and girls as a flag of authenticity and theocratic values.

- Current struggles at the United Nations over banning the “defamation of religion” are framed simply as an East-West debate about “cultural sensitivity,” flushing all relevant political context out of the picture and masking the contestation of this issue among Muslims themselves.22


• With regard to national battles between fundamentalists and rights-violating or failing governments like those in Afghanistan, Algeria, Egypt, or Pakistan, the human rights project becomes one primarily of critiquing responses by governments (and sometimes some offenses by fundamentalists), without addressing the human rights meaning of the struggle against fundamentalism itself.

Such simple narratives can contribute little to the real legal and policy debates that need to be had about some of the toughest international law and human rights questions of our time. In fact, these accounts can actually produce policy agendas that have a harmful effect on human rights in the aggregate.

Moreover, such uni-directional narratives and the human rights policy based on them undercut those in Muslim populations engaged in human rights struggles against Al Qaeda and its ilk. They are not recognized as human rights defenders or even as protagonists in an international law narrative. A central aspect of this project then, and one that can help to overcome some of its potential pitfalls, involves considering the voices of the many Muslim critics of fundamentalism, like those whose words opened this Article, in international legal discourses. Local critics of Muslim fundamentalism sometimes find themselves caught between repressive or failing states on the one hand and extremist social movements on the other, or between a fundamentalist state at home and hegemonic Western powers abroad. An international law approach that only captures one horn of these dilemmas is of limited utility.

Doc. A/HRC/10/L.2/Rev.1 (Mar. 26, 2009). This resolution has drawn sharp criticism from a coalition of NGOs, including Muslim groups. The groups fear the resolution will be used to justify blasphemy laws, and to censor women’s rights advocates and opponents of fundamentalism. The Network of Women Living Under Muslim Laws has argued that it “effectively place[s] the tenets of religion in a hierarchy above the rights of the individual.” Women Living Under Muslim Laws Demands the U.N. Resolution on Combating Defamation of Religions be Revoked, Apr. 7, 2009, http://www.wluml.org/english/newsfulltxt.shtml?cmd=157=x-157-56422.

23. For a discussion about the implications of using this label, see infra text at notes 51–52.

Consequently, this Article will recount the ways in which the impact of Muslim fundamentalism has been left out of the international law story and suggest ways it can be re-inserted. To start, it will discuss the contentious terminology used to describe Muslim fundamentalist movements and offer a brief descriptive overview of these forces. Next, it will demonstrate how international law as a discipline has failed to engage with questions arising from fundamentalism and review explanations for why international lawyers have overlooked these issues. The first such reason is what might be called the universality piece, relating to a broader problem of capitulation to cultural relativisms in international human rights law theorizing. The second is the anti-discrimination piece, in which critical discussion of these phenomena is equated with what is called Islamophobia or “defamation of religion.” Finally, the third factor is the simplistic discourse about victimhood that has come to predominate in international human rights law in particular. Subsequently, the Article explains how the neglect of the international impact of Muslim fundamentalism, whatever its causes, can undercut the work of its Muslim or local opponents. Finally, the Article suggests ways forward toward an improved international law account of Muslim fundamentalism.

II. WHAT IS MUSLIM FUNDAMENTALISM?

A. Questions of Terminology

Even the terms used in any discussion of Muslim fundamentalism in the West today are fraught with controversy. This Article uses the terms “fundamentalisms” and “fundamentalists.” Many opponents of such movements from within what is called the Muslim world prefer these labels. Nevertheless,


26. “Fundamentalist” is seen as more accurate than the commonly used term, “Islamist,” which is both potentially derogatory of Islam itself and privileges “Islamist” claims of authenticity. Karima Bennoune, “A Disease Masquerading as a Cure”: Women and Fundamentalism in Algeria: An Interview with Mahfoud Bennoune, in Nothing Sacred: Women Respond to Religious Fundamentalism and Terror 75, 76 (Betsy Reed ed., 2002). On the role of
some object to the use of the term “fundamentalism” in relation to these movements on historical and other grounds.\textsuperscript{27} Notwithstanding the critiques, the choice to employ it here in line with the usage in some international women’s human rights scholarship and advocacy\textsuperscript{28} is deliberate.

Though not without its own set of difficulties, the importance of the terminology of fundamentalisms stems from the fact that it also speaks across religious boundaries about movements within many traditions—Christian, Hindu, Jewish, and others—that today pose a variety of significant human rights problems.\textsuperscript{29} Marieme Hélie-Lucas, an Algerian sociologist who founded the Network of Women Living Under Muslim Laws, has defined fundamentalisms (note the “s”) as “political movements of the extreme right, which, in a context of globalization . . . manipulate religion . . . in order to achieve their political aims.”\textsuperscript{30} There are many other definitions,\textsuperscript{31} but

\textsuperscript{27} The most common historical complaint is that this was a term first used in Protestant Christianity, and is therefore inappropriate in this context. \textit{See} discussion in Steve Bruce, Fundamentalism 11 (2000); Ayesha Imam, \textit{The Muslim Religious Right (Fundamentalists) and Sexuality}, in Women and Sexuality in Muslim Societies 121, 127 (Pinar Ilkkaracan ed., 2000).

\textsuperscript{28} \textit{See}, e.g., Association for Women’s Rights in Development (AWID), Religious Fundamentalisms on the Rise: A case for action (2008) (emphasis added) (explaining the global rise in fundamentalisms across religions and its impact on women’s rights).


\textsuperscript{31} Noting the plethora of definitions, and the difficulty of defining the concept, AWID has instead sought to identify the “similar characteristics between different manifestations of religious fundamentalisms.” AWID, \textit{Shared Insights: Women’s rights activists define religious fundamentalisms} 4 (2008). According to
this one is especially useful here. In particular, it specifies the nature of these movements as essentially political, rather than religious. Such a description most accurately captures the character of Muslim fundamentalist movements since they usually articulate public governance projects. They often seek to impose their interpretation of religious doctrine (which they deny to be an interpretation at all) on others as law or public policy. Thus, they are understood to have political aims, but to exhort achievement of those aims by using a religious discourse. Sadia Abbas has described this as “the radical politicization of theology.”

Though protected by international norms when they do not conflict with human rights, religion and religious practices are indeed subject to scrutiny and limitation under international law on human rights grounds (a significant fact whose implications should not be underestimated). However, in both doctrine and practice, political ideologies simply do not receive the same deference as religious claims, a reality that renders important the categorization

AWID, these include “scripturalism, radicalism, extremism, exclusivism, militancy and . . . the idea of a ‘radical patriarchalism.’” Id. at 4 n.3.

32. Such projects are not inherent in Muslim understandings of the relationship between religion and society. Prominent Muslim scholars like Ali Abd al-Raziq have long argued that Islam is entirely compatible with a separation of religion from politics. See Fatou Sow, Gender and Secularism: History of a concept, in S. Correa and G. Sen, The Remaking of a Social Secular Contract (forthcoming) (manuscript at 4, on file with the author).

33. AWID, supra note 31, at 9–10.

34. Louisa Ait Hamou, Women’s Struggle Against Muslim Fundamentalism in Algeria: Strategies or a Lesson for Survival?, in Warning Signs of Fundamentalisms, supra note 9, at 118. Note that this is not to dispute what may indeed be religious motivations on the part of some individual adherents of fundamentalist movements.

35. Sadia Abbas, Other People’s History: Contemporary Islam and Figures of Early Modern European Dissent, 6 Early Mod. Culture 49 (2007), http://emc.eserver.org/1-6/abbas.html. Contrary to frequent stereotypical assumptions, this is not necessarily an inherently Muslim approach or one to which Islam or Muslim societies naturally tend. See the copious Arabic language literature on secularism in Ghassan F. Abdullah, New Secularism in the Arab World, 3 Ibn Rushd Forum (2002), http://www.ibn-rushd.org/forum /Secularism.htm.

of Muslim fundamentalism. For example, freedom of religious belief is a non-derogable human right allowing for no suspension even in emergency, while freedom of opinion is derogable. Few international lawyers would brook the rationalization of women’s subordination based openly on the requirements of an obviously political opinion. However, they might yield—or at least hesitate—in the face of a purportedly religious justification, notwithstanding the clear international law pronouncements against tolerating such rationalizations. In the era of the “war on terror,” when what is claimed to be civilizational conflict and polarization has replaced the obviously political divides of the Cold War, this discomfort with criticizing what is understood as “religion” magnifies.

Thus, it is no accident that, similar to the approach of Christian fundamentalists in the West, one of the main strategies used recently by Muslim fundamentalists to advance their agenda and shield themselves from scrutiny “is to disguise [themselves] through a wide range of organizations and hide [their] political aims by claiming to be representative of ordinary Muslims.” Often these movements claim to speak in the name of the faith itself. However, fundamentalists do not represent most ordinary people of Muslim heritage, and instead embody a specific set of discrete political groupings.

39. See, e.g., Wing & Smith, supra note 18, at 774–77. This differentiation seems to happen because international lawyers often view religion as immutable, but accept political ideology as a human construction. Hence, religion justifies “difference”: politics does not.
40. See the references in international law to religion not affording an excuse for discrimination or violence against women cited supra note 36.
42. See, e.g., Osama Bin Laden, Moderate Islam is a Prostration to the West, in The Al Qaeda Reader 17, 19–20 (Raymond Ibrahim ed. and trans., 2007).
43. Of course, there are indeed instances when those who might be termed fundamentalists have garnered considerable popular support, sometimes concretely demonstrated at the ballot box. See Q & A: Hamas election victory, BBC News Online, Jan. 26, 2006, http://news.bbc.co.uk/2/hi/middle
In fact, rather than representing local Islams, as is sometimes suggested to be the case, fundamentalist agendas often conflict with them. While MIT international law professor Balakrishnan Rajagopal, in a commonly held romantic view, considers what he calls “Islamic revival movements” to be local actors standing up to the menace of globalization, those movements are often, in reality, consummate transnational entities. Moroccan anthropologist Hassan Rachik explains that Muslim-majority societies currently face two kinds of globalization simultaneously: “Western globalization,” and “Islamic globalization,” by which he means transnational Muslim fundamentalist networks and ideology. These groups often seek to impose a politicized version of Islam entirely alien to local communities. They may cross borders physically and virtually. They may recruit, fundraise, train, and act in many countries. Thus, a transnational response, beyond the frame of a single state alone, to this transnational phenomenon of Muslim fundamentalism is essential.

Returning to questions of terminology, the word “fundamentalism” is not the only difficult verbiage. Another problem is what to call the broader group of people who live on the front lines of this international law discussion and the places they live. Although almost no academic would think of referring to the diverse

_east/4650300.stm. However, this may often be explained by political context (e.g., histories of military occupation and armed conflict in Gaza and Lebanon) instead of full endorsement of this social agenda, and remains the exception rather than the rule. Robert Malley, Making the best of Hamas’ Victory, Common Ground News Service, Mar. 2, 2006, http://www.commongroundnews.org/article.php?id=1508&lan=en&sid=0&sp=0.


swath of human civilization from the Americas to Europe and beyond as “the Christian world,” the terms “the Muslim world” and “the Muslim community” have come to occupy the field here. Saleh Bechir and Hazem Saghieh have problematized the term “the Muslim community,” deeming it a European invention that collapses all of the diversity found in a population originating in countries from Indonesia to Morocco and beyond. This same deconstruction can be applied to the all-too-common term “the Muslim world” as well. In fact, ironically, this term echoes the concept of the umma, or monolithic transnational community of Muslims, championed so strongly by fundamentalists.

Inspired by the writing of Chetan Bhatt, this Article will instead use the term “Muslim population,” which allows for heterogeneity, rather than “community,” which suggests a unitary, organized entity. However, even the term “Muslim population” is rejected by some of the same people it seeks to describe. Those who are secular may not wish to be denoted by their religious identity alone. The very common usage of the term “Muslim,” rather than ethnic, national, or geographic identifiers, to characterize all these people in an undifferentiated way itself exemplifies how fundamentalists have successfully shifted the frame of debate since the 1960s and 1970s. Religion and identity have thereby been constructed as one and the same, coterminous. Hence, the term “people of Muslim heritage” is another option, albeit imperfect, that will at times be utilized. This expression acknowledges that not all individuals of that heritage are in fact practicing Muslims or would choose religion as their sole identifier.

49. Id.
51. See Bechir & Saghieh, supra note 48.
B. A Brief History of Muslim Fundamentalism

In Muslim contexts, fundamentalist movements have proliferated and grown in recent years, especially since the late 1970s with the ascent of fundamentalist forces in the Islamic Revolution in Iran. These movements comprise a diverse set of entities, including everything from NGOs to political organizations to armed groups (and their sympathizers), found both in Muslim majority countries and in the Diasporas. In some instances, such as in Iran, these movements are in government. Often, however, they are found in oppositional roles. In either case, they may pose...

53. See, e.g., Islamic Fundamentalism 250 (Abdel Salam Sidahmed & Anoushirvan Ehteshami eds., 1996) (“It was . . . the Iranian revolution of 1979 that gave the Islamist movement[s] . . . throughout the Arab and Islamic worlds, a decisive boost. The event was seen as heralding a new phase of a militant and assertive Islamism . . . .”).

54. See, e.g., Harsh Kapoor, The Religious Right on the World Wide Web, in Warning Signs of Fundamentalisms, supra note 9, at 163 (detailing the Internet presence of Muslim fundamentalist groups).


56. Many Muslim fundamentalist movements are non-state actors, such as opposition political parties or armed movements or even NGOs. Though not states, such actors may still be “capable of waging destruction at a level hitherto thought to be only the province of states . . . .” Seyla Benhabib, Unholy Wars, in Nothing Sacred, supra note 26, at 397 (Betsy Reed ed., 2002). International law, which classically focused on the state, has evolved into a transnational law that attempts to regulate a broader range of global actors. See David Bederman, International Law Frameworks 52 (2006). However, in the context of discussions of terrorism and extremist social movements or armed groups, there has been a surprising rigidity in international human rights law approaches. In this domain, some continue to insist that non-state actors are not legally capable of violating international human rights law. See Amnesty Int’l, Amnesty International Response to Andrés Ballesteros, Jorge A. Restrepo, Michael Spagat, Juan F. Vargas, The Work of Amnesty International and Human Rights Watch: Evidence from Colombia, CERAC, Colombia, February 2007, AI Index AMR 23/006/2007, Feb. 21, 2007. This document states that “AI’s position . . . . is that non-state actors ‘abuse’ human rights . . . while state actors ‘violate’ human rights (because only states are party to human rights treaties) . . . .” Id. at 2–3. There has been some important work done by human rights organizations on specific abuses by fundamentalist groups. See, e.g., Human Rights Watch, They Want Us Exterminated: Murder, Torture and Sexual Orientation & Gender in Iraq, Aug. 17, 2009. However, those important works still typically shy away from the human rights meaning of fundamentalist ideologies themselves and how they contribute to the human rights violations documented.

Of course, tackling Muslim fundamentalism does not always raise the non-state-actor dilemma, as it is sometimes a governmental phenomenon, like in Iran or Sudan. Moreover, governments are often involved in supporting...
particular threats to the human rights of freethinkers, women, religious minorities, LGBT persons, and also to international rules on the use of force.

fundamentalist groups, thus implicating state responsibility. The non-state issue remains one methodological stumbling block to addressing some manifestations of Muslim fundamentalism, but still does not fully explain international law’s failures in this area. Notably, even where states like Saudi Arabia are purveyors of the fundamentalist agenda, international law and human rights discourse has still failed to vigorously challenge this aspect of state action and ideology. See, e.g., Amnesty Int’l, Saudi Arabia—Human Rights Abuses in the Name of Fighting Terrorism, AI Index: MDE 23/009/2009, July 22, 2009 (cataloguing Saudi government abuses in the “war on terror” without referencing the role of fundamentalism on either side of this “war”).

57. A famous example is the case of Nasr Abu Zayd, the Egyptian scholar who was involuntarily divorced from his wife at the instigation of fundamentalists who considered him insufficiently Islamic and therefore ineligible to be married to a Muslim woman. See Mona Eltahawy, Lives Torn Apart in Battle for the Soul of the Arab World, The Guardian (U.K.), Oct. 20, 1999, at 17, available at http://www.guardian.co.uk/world/1999/oct/20/1.

58. This problem transcends religious boundaries. Christine Chinkin and Hilary Charlesworth assert that “religious extremism” in general is one of the two leading obstacles to the advancement of women’s human rights in the contemporary era. Hilary Charlesworth & Christine Chinkin, The boundaries of international law: A feminist analysis 249 (2000). Muslim and Christian fundamentalists collude at the international level to oppose women’s reproductive and sexual rights. Michelle Goldberg, The Means of Reproduction: Sex, Power and the Future of the World 112–13 (2009). In particular, Muslim fundamentalist movements may push to further constrain women’s rights, or oppose reforms like the lifting of reservations to human rights treaties that limit women’s rights, or openly advocate or practice violence against women. See Charlesworth & Chinkin, supra, at 105–06.

59. Muslim fundamentalists sometimes engage in discrimination against adherents of other religions, including Christians, Hindus, and Jews, and also against minority groups within Islam like Shiites and Sufis. See, e.g., Sara Hossain, “Apostates,” Ahmadis and Advocates: Use and Abuse of Offences Against Religion in Bangladesh, in Warning Signs of Fundamentalisms, supra note 9, at 83.

60. See, e.g., Human Rights Watch, supra note 56.

61. Fundamentalists may call for uses of force under their own interpretations of jihad that are in stark opposition to the international humanitarian law rules on the conduct of hostilities or the rules on the recourse to force. Anne Elizabeth Mayer, Islam and Human Rights 231 (4th ed. 2007). They sometimes threaten and attack women, human rights defenders, intellectuals, journalists, artists, and musicians. Flora Lewis, The War on Arab Intellectuals, N.Y. Times, Sept. 7, 1993, at A19. As Lewis recounts, in the trial of the murderers of the Egyptian writer Farag Foda, a fundamentalist cleric claimed that “[a] secularist represents a danger to society and the nation that must be eliminated. It is the duty of the Government to kill him.” Id.
This short descriptive aside cannot begin to offer a comprehensive overview of Muslim fundamentalism or its impact on international law and human rights (nor can it offer a comprehensive account of the reasons for the rise of these movements62). That is readily available in the journalistic or social science literature and from the documentation collected by human rights defenders organizing against such movements.63 One of the best references

62. The problem of fundamentalist movements in Muslim majority societies and Muslim Diaspora populations has both endogenous and exogenous causes. Initial support for such ideological movements from many of the governments that are now fighting terrorism greatly exacerbated the situation. Western powers long believed, whether in the context of colonialism or of the Cold War, that they could nourish fundamentalists in Arab and Muslim majority countries as a counterbalance to secular nationalists and communists whom they perceived to pose a greater threat to their interests. See, e.g., Richard Sale, Analysis: Hamas History Tied to Israel, United Press Int'l, June 18, 2002; Human Rights Watch, Backgrounder on Afghanistan: History of the War (2001), available at http://www.hrw.org/backgrounder/asia/afghan-bck1023.pdf. The classic example of this is the now-infamous arming and training, supported by the U.S. (with significant British, Pakistani and Saudi involvement), of anyone willing to fight the Soviet Union in Afghanistan—no matter how extreme their ideology. The Afghan war is crucial to understanding how this problem metastasized so quickly. Many of those founding or leading terror cells from the Philippines to Morocco in the 1990s had fought in Afghanistan, where they built a sophisticated and dangerous network, and then took their training home with them. See Godfrey Jansen, The “Afghans”—an Islamic Time Bomb, Middle E. Int'l, Nov. 20, 1992, at 16.

Another significant external factor which contributes to recruitment and sympathy for Muslim fundamentalist armed groups, and the apologetics on their behalf from various quarters, stems from some Western policies toward Muslim majority countries. Examples include 2003’s illegal invasion of Iraq and failure to resolve equitably the Israeli-Palestinian conflict. On the role of the Israeli-Palestinian conflict, see Nahda Younis Shehada, The Rise of Fundamentalism and the Role of the ‘State’ in the Specific Political Context of Palestine, in Warning Signs of Fundamentalisms, supra note 9, at 135. However, these causes are latched on to by fundamentalist movements that seek to advance their own agendas. For a description of this dynamic, see, e.g, Haideh Moghissi, Feminism and Islamic Fundamentalism: The Limits of Postmodern Analysis 64–76 (1999). Additionally, endogenous causes of fundamentalism in the Muslim world must not be forgotten; those causes include poor governance, discriminatory attitudes about women and non-Muslims, as well as lack of enjoyment of many human rights. Marc Saghie, Un Siècle d’Islam Politique, Courrier Int’l (Fr.), June 15, 2003, http://www.mafhoum.com/press5/150822.htm.

63. See, e.g., AWID, Religious Fundamentalisms Exposed: Ten Myths about Religious Fundamentalisms (2008); Peter Bergen, Holy War Inc.: Inside the Secret World of Bin Laden (2001); Abdelwahab Meddeb, La maladie de l’islam (2002); Muslim Women and the Challenge of Islamic Extremism (Norani Othman
from the latter category is the typology prepared by the secular U.K. South Asian network Awaaz, entitled “The Islamic Right – Key Tendencies.” According to Awaaz, the shared ideological themes of these movements include: a belief in the imposition of Sharia—and their version of it—upon all Muslims everywhere; the aim to sharply limit women’s rights; a commitment to a militaristic jihad; and an ultimate goal of creating what they deem to be Islamic states ruled by their version of religious law.

Despite fundamentalist claims of return to a mythical salaf or past, this is not a “traditional” menu of claims, but a very radical program. Such programs challenge both recently dominant dogmas including secular nationalisms, as well as more traditionally conservative regimes. Common misperceptions notwithstanding, most Muslim majority societies are not currently governed by Islamic law—as fundamentalists demand—except in the family law area.

While many Muslim fundamentalists share the theocratic goals outlined above, there are different strands within these movements, and one needs to be careful of assuming a unified monolith. Still, there are common threads and some cautious generalizations are warranted. Many of these groups are linked to or inspired by the Muslim Brotherhood, an organization founded in Egypt by Hassan al-Banna in the 1920s, or the Jamaat-i Islami,

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64. Awaaz, supra note 41. Awaaz works to counter Hindu and Muslim fundamentalism in South Asia and the U.K. The mission statement of Awaaz appears at http://www.tmg-uk.org/?page_id=279.
65. Awaaz, supra note 41, at 2.
66. Many of these ideologies and governments themselves pose difficulties for human rights and international law. Abbas, supra note 35, at 14.
67. Raymond Charles, Le Droit Musulman (1979). The Persian Gulf region is a stark exception to this rule. Moreover, the use of Muslim laws in the family law area as a gender-based derogation from constitutional and civil law frameworks in most Muslim majority countries itself poses significant human rights problems. See Women Living Under Muslim Laws, Knowing Our Rights: Women, family, laws and customs in the Muslim world 35–36 (2006).
69. Furthermore, Scottish sociologist Steve Bruce has written that “fundamentalisms rest on the claim that some source of ideas, usually a text, is inerrant and complete.” Bruce, supra note 27, at 13–14.
founded in South Asia in the 1940s. Examples of such movements include everything from armed groups with political aims based in and around a single country like the Afghan or Pakistani Taliban, to political parties like the transnational Hizb-ut Tahrir or Algeria’s now-defunct Islamic Salvation Front, to influential NGOs like the Muslim Council of Britain or the Conseil Européen des Fatwas et de la Recherche. While a distinction may be made between those entities that use or advocate violence and those that do not, nevertheless, they share many ideological aims and may be characterized as part of a broader fundamentalist spectrum.

Of course, the subset of fundamentalist movements most disruptive to international law includes those that make up the transnational network of salafi jihadists located across the world, from the U.S. to the Philippines and beyond. Salafi jihadis reject the four main schools of Islamic legal interpretation. Awaaz describes these forces as “[m]ilitant armed religious right groups . . . mostly engaged in . . . conflict with real or allegedly occupying state military forces.” Examples include Al Qaeda in the Islamic Maghreb in North Africa, Al Qaeda in the Arabian Peninsula in Yemen, and Jemaah Islamiyah in Southeast Asia.

Some of these salafi jihadi groups are fond of takfiri practices in which they “excommunicate” insufficiently pure Muslims, making them legitimate targets for killings. Irhabi groups are another sub-

70. Awaaz, supra note 41, at 2–3.
72. This translates as the European Council of Fatwas and Research. For further discussion of these groups, see Awaaz, supra note 41, at 3, and Karima Bennoune, The Law of the Republic Versus the “Law of the Brothers”: A Story of France’s Law Banning Religious Symbols in Public Schools, in Human Rights Advocacy Stories 155, 175 (Deena Hurwitz et al. eds., 2008).
73. Awaaz, supra note 41, at 6.
74. Those four schools within Sunni Islam are the Shafi‘i, the Hanafi, the Maliki, and the Hanbali schools. Herbert Liebesny, The Law of the Near & Middle East 19–22 (1975).
75. Awaaz, supra note 41, at 6.
group of salafi jihadis, and their modus operandi consists of deliberate attacks on civilians at as massive a scale as possible, with September 11 serving as the revered blueprint. Undoubtedly, each of these sub-movements threaten core international law norms and values, a challenge to which international lawyers have not yet offered a sufficient response.

III. The Silences of International Law

Literature searches in the field of international law reveal a litany of articles accurately cataloguing widespread violations of human rights, international humanitarian law, and other norms in the context of the “war on terror,” the military component of the fight against Muslim fundamentalist armed groups. However, those searches also reveal a very limited literature on terrorism itself, and display an even more limited œuvre relating specifically to Muslim fundamentalist groups, their ideologies, and their violence. Almost nothing has been written about these social movements—some of the most influential and prolific in the world—in the discipline of international law. Why? This is as if with regard to the issues arising from transnational corporations (TNCs), international lawyers wrote only about the actions of states seeking to regulate such corporations,

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78. Id.
80. A few notable exceptions to this rule are to be found in Abdullahi An-Na'im, Islamic Fundamentalism and Social Change, in The Freedom to Do God's Will: Religious Fundamentalism and Social Change 25 (Gerrie ter Harr and James J. Busuttil eds., 2003); and M.H.A. Reisman, Islamic Fundamentalism and Its Impact on International Law and Politics, in Religion and International Law 357 (Mark Janis & Carolyn Evans eds., 1999).
but nothing about the role and impact of the TNCs themselves.\textsuperscript{81}

The output of the United Nations (U.N.) system has, to some degree, evidenced the same lacuna. Former U.N. Secretary General Kofi Annan did note in a 2006 report to the General Assembly that “[t]he politicization of culture in the form of religious ‘fundamentalisms’ in diverse . . . religious contexts has become a serious challenge to efforts to secure women’s human rights.”\textsuperscript{82} However, due to political sensitivities, the U.N. system has said little else of substance about fundamentalisms more broadly, or about Muslim fundamentalism in particular, and has done even less about the issue.\textsuperscript{83}

One exception to this rule is to be found in the work of the former U.N. Special Rapporteur on Religious Intolerance, the Tunisian Law Professor Abdelfatah Amor, who in his 1999 report to the U.N. Commission on Human Rights noted the rise of religious extremism and its negative impact on the rights protected by his mandate.\textsuperscript{84} He argued that “[e]xtremism . . . must be given no quarter.”\textsuperscript{85} Further, he called for the elaboration of a “minimum set of standard rules . . . in respect of religious extremism,”\textsuperscript{86} a recommendation that has never been heeded.

The U.N. has developed numerous standards and mechanisms to combat terrorism that are of tremendous import, and at least some of these have been responses to various atrocities


\textsuperscript{82} The Secretary-General, \textit{In-Depth Study on All Forms of Violence Against Women}, ¶ 81, delivered to the General Assembly, U.N. Doc. A/61/122/Add.1 (July 6, 2006).


\textsuperscript{85} \textit{Id.} ¶ 125(a).

\textsuperscript{86} \textit{Id.}
authored by Muslim fundamentalist groups. However, in practice the sub-fields of international law function somewhat separately at times. Hence, human rights obligations have been seen as only minimally relevant to the ongoing work of the U.N.’s Counter-Terrorism Committee, and other counter-terrorist bodies, while counter-terrorism norms and concerns have often been seen as peripheral in the area of human rights law and practice. Taken together, this has precluded the development of an integrated international law and human rights response to Muslim fundamentalist groups and the terrorism in which some of them may engage.

Moreover, in addition to its lapses on human rights issues, the U.N.’s counterterrorism system has also rarely dared to address the question of Muslim fundamentalism in precise, substantive


In part, this is due to an appropriate desire not to single out certain kinds of terrorism, seemingly, on the ground of religion. On the other hand, in the face of contemporary patterns of international terrorism by non-state actors, there is something vaguely absurd about such an approach. The counterterrorism machinery is thus constructed to battle an enemy whose name we dare not speak. Given the recent push by the governments represented in the Organization of the Islamic Conference (OIC) to get the U.N. Human Rights Council to express “deep concern . . . that Islam is frequently and wrongly associated with human rights violations and terrorism,” it is highly unlikely that the U.N. system will venture further onto this contested terrain any time soon.

Some regional organizations have engaged with questions of Muslim fundamentalism. For example, in Şahin v. Turkey, the European Court of Human Rights afforded Turkey a margin of appreciation, and accepted the justification offered for its ban on headscarves at Istanbul University based, inter alia, on the need to

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89. One concrete exception is the Taliban and Al Qaeda Sanctions Committee. Set up in the wake of the embassy bombings in Kenya and Tanzania, the Committee oversees the imposition of a travel ban, an asset freeze, and an arms embargo on members of these organizations. See Eric Rosand, The Security Council’s Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions, 98 Am. J. Int’l L. 745 (2004). However, this committee’s mandate is framed in terms of discrete terrorist atrocities aimed at U.S. interests, and the relevant resolutions only address these groups’ treatment of Afghan civilians in scarce preambular language. See, e.g., S.C. Res. 1267, pmbl., U.N. Doc. S/RES/1267 (Oct. 15, 1999).

90. At least 25 of the 44 Foreign Terrorist Organizations currently designated by the U.S. State Department could be considered to be within the broader Muslim fundamentalist camp. They represent the only such bloc within the listed organizations, and are among the list’s most active groups. Of course, the list itself may be subject to some critique, but it provides one piece of evidence as to the global pattern of terrorism by non-state actors. See U.S. State Dep’t, Foreign Terrorist Organizations: Fact Sheet (Dec. 30, 2009), http://www.state.gov/s/ct/rls/other/des/123085.htm.

91. For example, in a New York Times editorial after the 9/11 attacks, Annan notes that, “[t]he United Nations must have the courage to recognize that just as there are common aims, there are common enemies.” However, he does not elaborate further as to what forces might fit into this latter category. Kofi A. Annan, Fighting Terrorism on a Global Front, N.Y. Times, Sept. 21, 2001, at A35.

92. Human Rights Council, Resolution 10/22, supra note 22, ¶ 7. As this lobbying by OIC member governments shows, ironically, even governments on the frontlines of the battle against fundamentalist opponents conflate criticism of Muslim fundamentalism with stereotyping about Islam.

Such discounting recurs regularly. For example, faced with the grim reality of widespread and systematically organized salafi \textit{jihadist} groups carrying out waves of terrorism against their co-religionists and others, whether in Afghanistan or Iraq, most Western international lawyers have stayed true to the classical mantra of their discipline.\footnote{See, e.g., Georges Abi-Saab, Introduction: The Proper Role of International Law in Combating Terrorism, in Enforcing International Law Norms Against Terrorism xiii, xiv–xv (Andrea Bianchi ed., 2004).} Terrorism is a purely criminal justice matter and needs to be handled solely within the domain of international criminal law.\footnote{See Michael Bothe, Terrorism and the Legality of Pre-emptive Force, 14 Eur. J. Int’l L. 227 (2003); Marjorie Cohn, Obama’s Af-Pak War is Illegal, Huffington Post, Dec. 21, 2009, http://www.huffingtonpost.com/marjorie-cohn/obamas-af-pak-war-should_b_398728.html.} This chorus is repeatedly rehearsed without offering a convincing reply to those who point out that criminal law strategies have been pursued against Muslim fundamentalist armed groups in the past (most notably by the United States during the 1990s) without preventing further acts of terrorism.\footnote{See Madeleine Morris, Arresting Terrorism: Criminal Jurisdiction and International Relations, in Enforcing International Law Norms Against Terrorism, supra note 95, at 63–66. This point should not invalidate the criminal law as a vehicle for addressing terrorism, but rather suggests that it is not necessarily the only appropriate means of doing so.}

On the other side, the framing of the boundless, endless “war on terror” and the inclusion in that frame, in contravention of international law, of the invasion of sovereign nations (like Iraq) with neither a self-defense basis nor a legitimate basis in Security Council resolutions, made international lawyers cling all the more rigidly to their formalist position.\footnote{For an example of such a broad framing of the “war on terror,” see Abraham Sofaer, On the Necessity of Pre-emption, 14 Eur. J. Int’l L. 209 (2003).} This binary opposition—offering either a
strict formalist reading of the U.N. Charter blind to context or an attempted effacing of the *jus ad bellum* altogether—has been unhelpful in the real world. The needed responses to armed fundamentalism often lie somewhere in the middle. Most international lawyers have not been willing to concede that there may sometimes be no effective criminal justice response to the organized forces of *salafi jihadism* and that an armed response may be necessary under international law itself in certain contexts to protect the human rights of civilian populations. Yet, armed conflict fought outside the strictures of the international legal framework for use of force—either in terms of the *jus in bello*\(^99\) or the *jus ad bellum*—has clearly been a great boon to jihadist groups in terms of increased recruitment, while also leading to numerous violations of human rights.\(^100\) Striking the appropriate balance with regard to use of force is so difficult that international lawyers have at times shied away from engaging with both sides of the debate.

In fact, the desire to avoid the sensitive discussion of Muslim fundamentalism, and fundamentalisms generally, is becoming something of a disciplinary hallmark. When this author chaired a panel at the American Society of International Law centennial annual meeting in 2005, entitled “Human Rights and Fundamentalisms,” a striking aspect of the intellectual gathering was the desire of most panelists to proceed directly to a critique of the response to fundamentalism and their unwillingness to address the topic itself.\(^101\) Can we ever offer an accurate or useful commentary on the many realities grounded in Muslim fundamentalist movements if we overlook their existence and impact in the first place? Of what use is our critique of the “war on terror” if we are largely silent about one side of that “war”?

\(^99\) In contradistinction to the *jus ad bellum*, defined *supra* at note 7, the *jus in bello* regulates the conduct of hostilities rather than the recourse to force. Its precepts are primarily found in international humanitarian law, and increasingly also in human rights law. Frits Kalshoven, *Constraints on the Waging of War* 10 (1987).

\(^100\) Sidney Jones, *Asking the Right Questions to Fight Terror*, Jakarta Post, Jan. 6, 2006, at 17. In any case, armed force can only ever be a part of the larger political struggle against fundamentalism.

IV. READING THE SILENCES OF INTERNATIONAL LAW

What then can these silences of international law with regard to contemporary Muslim fundamentalism tell us about the limitations and possibilities of the discipline itself? There are a number of explanations for the failure of Western international legal scholarship to engage with these issues, each of which can reveal areas where international law needs rethinking and development. This Article will focus on several such contributing factors in turn, beginning with the increasing capitulation to fashionable cultural relativisms in the field of international human rights law.

A. The Universality Piece: Responding to the Claims of “Culture” and “Religion”

One reason for the anxiety about addressing the issue of Muslim fundamentalism directly has been a misreading of these movements as “cultural,” as embedded in Islam. Of course, this accepts fundamentalists’ own claims at face value. In light of decreasing confidence in international law’s assertions about universality, even among its own practitioners, and increasing capitulation to various cultural relativisms, the idea of interrogating such “cultural” or “religious” movements with international law has discomfited Western international lawyers. This difficulty has been magnified by the understandable desire of many international lawyers to transcend the perceived colonial past of their discipline, and by the incorrect, but widely shared, perception that theirs remains a purely Western project. Yet, the posited cure to these

102. For further discussion of Muslim fundamentalist movements as essentially political movements grounding political claims in religious discourse, see supra text at notes 30–40.
104. The Global North has used international law as a sword against the Global South. However, Third World states have also used international law as a shield (such as in Nicaragua’s case against the U.S. in the I.C.J., Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 14 (June 27)). In fact, U.S. neo-conservatives read international law as an inopportune attempt to constrain U.S. power. See, e.g., Samantha Power, Comment: Boltonism, The New Yorker, Mar. 21, 2005, at 23. Many anti-fundamentalist Muslims deploy international law precisely as a universal set of norms equally relevant in their own contexts. See Shirkat Gah, Talibanisation & Poor Governance: Undermining CEDAW in Pakistan (2007), available at http://www.shirkatgah.org/CEDAW%20report
historical problems—shying away from unequivocal assertions of universality—is perhaps most undermining to human rights defenders in the Global South itself.

1. Universality, Cultural Relativism, and Muslim Fundamentalism

The foundational principle of universality in international human rights law holds that all human beings qualify for equal human rights simply by being human, wherever they live and whoever they are. However, responding to post-colonial and other criticisms of notions of universal human rights, some human rights theorists have themselves increasingly critiqued universality as being a Western construct, inappropriate elsewhere. While some criticism of the ways universality can be misused and misapplied are entirely legitimate, this new trend of undercutting universality concedes important points of principle and paradoxically dovetails with fundamentalist claims that rights should be limited by identity. In fact, some of universality’s most ardent defenders, and those who have risked the most to defend it in the face of extremism, are located in what is called the Muslim world. Universality of human rights is often (though not always) a critical tool in the toolbox of anti-fundamentalists.

For example, Iqbal Haider, director of the National Human Rights Commission of Pakistan, lambasted the Pakistani government

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107. See, e.g., the critical views expressed by a range of voices from Muslim majority societies in “Honour”: Crimes, Paradigms, and Violence Against Women (Lynn Welchman & Sara Hossain eds., 2005).

108. Id.
for violating human rights by conceding rule by Sharia in the Swat region.\textsuperscript{109} Prior to the summer 2009 military campaign in the area, the Pakistani government made this agreement with the local Taliban to try to curb the group’s violence in the province. A number of Pakistani human rights defenders labeled the agreement a “defeat for democracy and the rule of law,”\textsuperscript{110} seeing it as an extension of what has been decried as “the ‘Talibanisation’ of Pakistan.”\textsuperscript{111} They argued that the application of the agreement led to discriminatory policies against women, girls, and religious minorities.\textsuperscript{112} Even as Westerners might be tempted to think this move by the Pakistani authorities was a nod to “tradition,” it was clearly an option that the local electorate had rejected in the most recent voting in Pakistan, and many local human rights advocates like Mr. Haider repudiated on universal human rights grounds.\textsuperscript{113}

Similarly, in July 2009, a group of Sudanese women human

\begin{itemize}
  \item \textsuperscript{111} Shirkat Gah, supra note 104, at 7. According to this Pakistani women’s NGO, “Militant campaigns launched by armed groups have denounced contraceptives, polio vaccination, and girls’ education as un-Islamic; girls’ schools and NGOs have been attacked; health workers have been murdered, women compelled to don Taliban-prescribed veils . . . . The capital city, Islamabad, is currently under siege by local Taliban-style leaders who demand that the government enforce their misogynistic ‘Islamic revolution’ failing which they will take matters into their own hand.” Id. at 1. This view was confirmed in Ali Dayan Hasan, Living with the Taliban, The Guardian, Apr. 29, 2009, at 28, available at http://www.guardian.co.uk/commentisfree/2009/apr/29/pakistan-taliban-human-rights-india.
  \item \textsuperscript{112} See Fear of Death Stalks Women in Swat, Daily Times (Pak.), Mar. 8, 2009, http://www.dailytimes.com.pk/default.asp?page=2009\03\08\story_8-3-2009_pg7_15. Reports of the public flogging by the Taliban of a young girl in Swat for “illicit relations” with a man confirmed these fears. This event provoked widespread condemnation in Pakistan, including by the women’s movement, and an investigation by the reinstated chief justice of the Supreme Court. See Flogging Probe Begins in Pakistan, BBC News, Apr. 6, 2009, available at http://news.bbc.co.uk/2/hi/south_asia/7984958.stm.
rights activists issued a widely circulated public statement condemning the sentencing of women diners at a Khartoum restaurant to flogging for the crime of wearing trousers.\textsuperscript{114} Notably, rather than making reference to Islamic legal arguments or making any nod to “cultural” or “religious” particularity, the activists situated their critique in an international law matrix, citing instruments like the International Covenant on Civil and Political Rights, and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.\textsuperscript{115}

These examples remind us how claims made in the name of culture, religion, and tradition against the application of universal human rights always require careful unpacking.\textsuperscript{116} Fundamentalist movements and their adherents assume the posture of speaking for and in the name of these categories.\textsuperscript{117} In the era of the “war on

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\begin{enumerate}
\item \textsuperscript{114} Statement by Sudanese women activists, \textit{supra} note 104.
\item \textsuperscript{115} Id.
\item \textsuperscript{117} See Mary R. Habeck, Knowing the Enemy: Jihadist Ideology and the
terror,” well-meaning Western international lawyers often accept such assertions made in Muslim contexts at face value. They do so despite the fact that such claims are almost all heavily contested within Muslim populations—often, though not always—on the grounds of the universality of human rights.\footnote{118} Indeed, such contestation was visible almost daily on the streets of Tehran during the summer of 2009.\footnote{119}

Nevertheless, a large part of the nervousness about addressing Muslim fundamentalism in the international law lexicon has resulted from the fact that the adherents of such movements couch their very justifications of violations of international law in terms of culture and religion.\footnote{120} To some, this suggests a potentially legitimate departure from universal ideas of human rights, to be absorbed by one of the fashionable cultural relativisms that beleaguer human rights theory (the “world traveling method,”\footnote{121} “plural mono-culturalism,”\footnote{122} “Asian values,”\footnote{123} and so on).

Religious and cultural claims of particularity do raise a range of significant methodological questions as we try to apply international law norms. However, we must avoid the bizarre privileging and freezing of what is meant by culture and religion that occurs so often in these debates, wherein reified notions are accepted as a singular “Muslim view” or Muslim reality. In this universe, the

\footnotesize{War on Terror 41–55 (2006).}

\footnote{118. See id. at 54.}

\footnote{119. See Fareed Zakaria, \textit{Theocracy and Its Discontents}, Newsweek, June 29, 2009, at 30.}

\footnote{120. For diverse examples, see The Al Qaeda Reader, \textit{supra} note 42.}

\footnote{121. See Isabelle Gunning, \textit{Arrogant Perception, World-Traveling and Multicultural Feminism: The Case of Female Genital Surgeries}, 23 Colum. Hum. Rts. L. Rev. 189 (1992). This approach favors deference to what may be deemed “culturally challenging practices in an "Other's" culture,” like female genital mutilation. \textit{Id.}}

\footnote{122. See Amartya Sen, Identity Goes to War, The New Republic, Feb. 27, 2006, at 27. This is the term that Sen uses to describe a certain brand of contemporary thinking about multiculturalism that tends toward “the maintenance of ethnic and cultural separateness through the encouragement of faith schools, community leaders’ and identity politics.” Andrew Anthony, Universalist or relativist? These are the U and non-U of modern manners, The Observer, Apr. 9, 2006, at 11.}

\footnote{123. See the discussion of this problem in The East Asian Challenge for Human Rights 27–103 (Joanne R. Bauer & Daniel A. Bell eds., 1999). Trumpeted in the 1990s by various Asian heads of state, and rejected by most human rights defenders across Asia, this theory suggested that international human rights are anathema to shared notions of traditional Asian values.}
veiled woman has become the trope of “the Muslim.” There are many questions to ask about such understandings. Why do only some peoples seem to have culture? Why are fundamentalists so often allowed to speak for culture? For example, why in the way that U.S. human rights discourse frames the debate over headscarves in French schools, does what is called “Muslim culture” mean Iranian scarves worn by (or imposed by fundamentalists) on the daughters of North African immigrants? Why does this manifestation of “culture” take center stage while French secularism, to which many in France’s Muslim population also adhere, and which is based on hundreds of years of tradition and struggle against the power of the Catholic Church, is not seen as “culture”? What stance should we adopt when political actors claim to speak for religion? And what does it mean when, in the face of such assertions, we concede international legal rights claims?

There is, of course, a politics to all of this, although it is often overlooked. Mohamed Sifaoui, a Paris-based Algerian journalist known for his opposition to Al Qaeda and other fundamentalist groups, says he always has to explain to French “droits de l’hommeistes” that “the Muslim fundamentalists are our extreme right.”

As Tunisian born sociologist Jeanne Favret-Saada acerbically notes, “the Islamists are happy to meet Europeans who


126. The non-state actors problem has further transmogrified the way international law scholarship has conceptualized the issue of headscarf regulation in schools. Given the emphasis on the state, the mainstream human rights position is prone to respond only to one dress code (the state’s restrictions on the headscarf) but not the other (pressure to cover from community and social movements). While the former dress code is, at least in part, a response to the latter, the latter dress code is largely invisible to international lawyers because it is purveyed by non-state actors. For further discussion of this problem, see Bennoune, supra note 72, at 169. For the dominant position on this question in U.S. human rights theory, see Leti Volpp, The Culture of Citizenship, 8 Theoretical Inquiries L. 571 (2007).

127. Bennoune, supra note 72, at 169.
are so naïve . . . and talk only about [religious] discrimination.”

It is perhaps logical that the particular political matrix is more visible to critics of Muslim, North African, or South Asian heritage, than to Western international lawyers, post-colonial theorists, and human rights advocates. As *beur* community organizer Mimouna Hadjam explains, “We did not discover Islamic fundamentalism on September 11, 2001. We have been living with it for 20 years.”

The Muslim opponents of Muslim fundamentalism often argue that fundamentalist groups have exploited the lack of knowledge of their ideology and strategy in Western critical, international law, human rights, and other circles.

2. The Clash [Within] Civilizations

When considering the weight international lawyers should accord to what are termed “the claims of culture and religion” as we speak in the West about human rights in Muslim majority countries or populations, we need to be careful of opposing the problematic paradigm of the “clash of civilizations” with our own human rights version of this construct. Of course, the human rights version rejects the pejorative connotations of Samuel Huntington’s thesis—at least the most obvious ones—but it is actually often a simple inversion of his paradigm. Ironically, the critical version is based similarly on a notion of immutable, absolute, unchallengeable difference. Huntington’s framework suggests that the West is inherently friendly to the international law project, while the East is naturally opposed to it and should be left to other realms like culture and religion.

This is, of course, an oversimplification on both

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128. *Id.*


131. *Id.* at 168.

132. Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (1997). Huntington’s basic argument is that in the post-Cold War era the essential cleavage in the world is that which exists between something called the West and something called Islam. For Huntington, the West generally champions liberal values and human rights, while Islam generally opposes them. Fundamentalists provide a convenient foil for this argument as they claim to represent an “essential Islam.” See Fouad Zakariya, *Laïcité ou islamisme: Les Arabes à l’heure du choix* 149 (1991).

133. While for Huntington this is proof of the West’s superiority, for some of Huntington’s human rights critics it is mainly proof of “difference,” sometimes
counts. As the post-Bush denouement unfolds, it must be obvious that some Western constituencies embrace international law and attendant values to varying degrees, while others reject them to varying degrees, all across a broad spectrum. Precisely the same thing is true of what is called the Muslim world.

Fundamentalist-inspired claims invoking static notions of culture and religion can fulfill the human rights version of the clash of civilizations, and can erase the differences within the “difference,” as it were. Such claims are sometimes then seen as more tantalizingly authentic in the Western international legal academy than demands inspired by universality or international law emanating from within Muslim populations. This is in part due to a disciplinary fascination with a narrow concept of difference and of identity politics. These concepts and those associated with post-colonialism correctly remind us to worry about how we portray the “other” in international law. But international lawyers must also

even of the superiority of Islam which is deemed, in contrast to international law and universal human rights, to be “local,” “authentic,” and socially oriented rather than individualistic. The basic global divide envisaged is, however, roughly the same. See, e.g., Sally Engle Merry, Human Rights Law and the Demonization of Culture (And Anthropology Along the Way), 26 Pol. & Legal Anthropol. Rev. 55, 71–72 (2003) (suggesting that “human rights law demonizes culture” and thereby “the moral principle of tolerance for difference is lost”; this favors instead an inauthentic “transnational modernity”); Joan W. Scott, Symptomatic Politics: The Banning of Islamic Head Scarves in French Public Schools, 23 French Pol., Culture & Soc'y 101 (2005) (asserting that the “Islamic headscarf” is a superior recognition of the power of sexuality than Western women’s dress).


135. See, e.g., Joan W. Scott, Multiculturalism and the Politics of Identity, 61 October 12 (1992). Scott sets up “individualism” and “multiculturalism” as opposites and political opponents. For Scott, “[i]ndividualism is the language of the conservatives’ critique of multiculturalism . . . and of the identity politics of minority groups.” Id. at 17. The opposition she constructs has profound consequences for human rights, many of which are indeed conceptualized as individual rights. To claim one’s individual rights is then to undercut groups to which one may belong. Note, in contrast, Pakistani feminist Farida Shaheed’s sharp rebuttal of identity politics: “Unlike ideological agendas that aim to change underlying structures and systems, identity politics simply promise a better deal for a particular group . . . but only if you give up your agency and let them appropriate your voice, and only if you divest yourself of all other markers of identity . . . .” Shaheed, supra note 124, at 6.
remember the other's others.\textsuperscript{136}

There are many ways of dividing the world, each of which alters how we understand it and shifts our view of claims made against international law in the name of culture and religion. As a group of dissident anti-fundamentalist intellectuals of Muslim heritage, including Salman Rushdie, wrote in 2006 in response to the controversy regarding Danish cartoons of the Prophet Mohamed\textsuperscript{137}: “It is not a clash of civilisations nor an antagonism of West and East that we are witnessing, but a global struggle that confronts democrats and theocrats.”\textsuperscript{138} Of course, these anti-fundamentalist intellectuals too were generalizing—but theirs is perhaps a generalization that may help us to see some of ours in a different light and to remember that there is a multiplicity of fault lines in the world. The clashes and claims about international law and human rights \textit{within} civilizations and cultures and religious traditions, such as those between fundamentalists and their opponents, are as determinative as those \textit{between} civilizations. Given the move from international to transnational legal approaches, the intra-cultural debates are as legitimate a topic of international legal analysis as the inter-cultural.\textsuperscript{139}

Fundamentalists claim an authenticity that negates critical or unorthodox voices.\textsuperscript{140} International lawyers seeking multicultural legitimacy have at times been swayed by such claims, but should not replicate this approach. As is true for all religious or cultural groups, there are many ways of being Muslim or choosing not to be, all of which might be termed “authentic.” This reality is reflected in the lyrical prose of the Saudi writer Rajaa Alsanea. In her recent novel, “Girls of Riyadh,” which was a sensation in the Arab World, she

\textsuperscript{136} The Egyptian philosopher, Fouad Zakariya, has underscored the reality that “the binary division of the world between ‘us’ and ‘the other’ is a universal trait . . . . Islam also divides the world . . . .” Zakariya, supra note 132, at 143 (translated from French by the author).

\textsuperscript{137} For a definitive description of the cartoon controversy, including an analysis of the role of Muslim fundamentalists in contributing to making this an international \textit{cause célèbre}, see Jeanne Favret-Saada, Comment produire une crise mondiale avec douze petits dessins (2007).


\textsuperscript{139} Andrew Clapham, Human Rights Obligations of Non-State Actors 59–83 (2006).

\textsuperscript{140} See Bruce, supra note 27, at 98 (noting that a basic characteristic of fundamentalisms is that fundamentalists present themselves as “the true guardians of orthodoxy”).
recounts the travails of four young Saudi women.\textsuperscript{141} (Time Magazine described the book as “Sex in the City, if the city in question were Riyadh.”\textsuperscript{142}) Frustrated by criticism she has received, Alsanea’s narrator e-mails the following rejoinder to her fictional Yahoogroup’s subscribers:

The Qu’ran verses, hadith of the Prophet—peace be upon him—and religious quotations that I include in my e-mails are, to me, inspirational and enlightening. And so are the poems and love songs that I include. Are these things opposite to each other, and so is that a contradiction? I don’t think so. Am I not a real Muslim because I don’t devote myself to reading only religious books and because I don’t shut my ears to music and I don’t consider anything romantic to be rubbish? I am religious, a balanced Saudi Muslim and I can say that there are a lot of people just like me. My only difference is that I don’t conceal what others would call contradictions within myself or pretend perfection like some do. We all have our spiritual sides as well as our not-so-spiritual sides.\textsuperscript{143}

In a similar pluralist vein, the progressive anti-fundamentalist network in France known as Le Manifeste des Libertés—an organization of Muslim/North African/Middle Eastern activists and intellectuals that came together around an erudite manifesto in 2004—found a nice open formula to describe this multiplicity when they painted themselves as a diverse group, “linked by our own individual histories, and in different manners, to Islam.”\textsuperscript{144}

One must concede the need to strategically essentialize to be able to talk about virtually anything. However, too much essentializing, even in the quest to recognize what we call “difference” in human rights and international law, conceals the very vital heterogeneity that Le Manifeste des Libertés and Alsanea’s narrator both tried so carefully to reflect. Instead, this narrow way of conceptualizing difference privileges voices like fundamentalists that claim to represent a singular and monolithic reality. Unfortunately,

\begin{itemize}
\item \textsuperscript{141} Rajaa Alsanea, Girls of Riyadh (2005).
\item \textsuperscript{142} Richard Corliss et al., Downtime, Time, July 16, 2007, at 69.
\item \textsuperscript{143} Alsanea, \textit{supra} note 141, at 137 (emphasis in original).
\end{itemize}
such voices have often gone unchallenged in Western civil society and the academy, including in international law. Sometimes such “tolerance” has been afforded in the name of combating discrimination.

B. The Anti-Discrimination Piece

The impulse to be consciously non-discriminatory in one’s approach to the issue of Muslim fundamentalism is understandable and important and in line with vital international law norms of equality. Part of what has kept international lawyers out of this field are concerns about what is called “Islamophobia,” a term increasingly used to characterize a general notion of “hostility towards Islam and Muslims.” However, many anti-fundamentalists of Muslim heritage express unease with both the concept and the uses of Islamophobia. Their discomfort emanates from the fear that such a notion may conflate legitimate criticism of a religion or of political movements that deploy religion with actual discrimination against (real or assumed) adherents of the religion. Soheib Bencheikh, the former Mufti of Marseille, describes the problem as follows: “We must preserve the debate on religion itself, but protect Muslims from attacks.”

While religious discrimination is a very real problem, so too are spurious allegations of such prejudice made to disable critique of what are claimed to be religious movements when they violate international law or human rights. According to their internal

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147. Mimouna Hadjam has argued for using the concept of discrimination, rather than “Islamophobia,” which for her represents a hallmark of the fundamentalist strategy. “When one confronts the fundamentalist agenda, they say that what you are doing is against Islam.” Interview with Mimouna Hadjam, in Paris, France (June 12, 2007) (notes on file with the author).

148. Bencheikh studied at Al Azhar, one of the most prestigious centers of Islamic learning in the world.

149. Cited in Bennoune, supra note 72, at 173.

150. For diverse examples of this practice, see The Al Qaeda Reader, supra
critics, Muslim fundamentalist movements have become adept at manipulating such claims, a reality which in no way vitiates the very real need to tackle the actual prejudice against Muslims that has flourished in the post-September 11 period. Ordinary Muslims or the Muslim religion as a whole must not be confused with specific fundamentalist movements and their adherents. Yet, the mere critique of Muslim fundamentalist movements themselves is not per se an expression of anti-Muslim bias. In fact, Muslim fundamentalist armed groups’ primary victims, as the U.S. National Strategy for Combating Terrorism acknowledges, are often other people of Muslim heritage.

Finding the right balance for addressing the issue of Muslim fundamentalism in international law in the contemporary moment is incredibly difficult and requires one to tightrope-walk over perilous waters, making use of a vocabulary heavily laden with unfortunate political meaning. One must somehow find a space for a human-rights-based critique of both Muslim fundamentalism and Western racism—but after all, that is what a vigorous and principled universality should be about. In today’s world, it is perhaps convenient for those seeking to take critical perspectives to adopt a uni-directional critique. However, such an approach cannot reflect the actual, lived complexities.

151. Louisa Ait Hamou argues that Muslim fundamentalists have learned “how to use the language of human rights and how to portray themselves as victims of repression.” Hamou, supra note 34, at 122.

152. See, e.g., Commission on British Muslims & Islamophobia, supra note 146, at 15–21. Switzerland’s new right-wing inspired law banning the construction of minarets represents the most recent example. See Hui Min Neo, Switzerland votes to ban new minarets, AFP, Nov. 28, 2009, http://www.google.com/hostednews/afp/article/ALeqM5iDDsYuOT2JORXFSh1H4dZbOeYRIQ.

153. See, e.g., the sharp critique of the impact of such movements on Muslim youth in France in Mahnaz Shirali, Entre islam et Démocratie: Parcours de jeunes Français d’aujourd’hui 192–97 (2007).

It is true that some Western responses to Muslim fundamentalist groups suffer from what Indian international lawyer B.S. Chimni has called a kind of hegemonic construct of human dignity. Some use their critique of Muslim fundamentalist violence and ideology as a springboard for racist discourses about Muslims, or as a justification for violations of non-derogable international law norms, like torture. Such an approach to Muslim fundamentalism narrows the space for legitimate human-rights-based critiques of these movements. And in the United States we were reminded every day during the 2008 presidential campaign that we live in an environment where “Arab” and “Muslim” may be epithets to hurl at politicians one “does not trust.”

Thus, one certainly wants to offer a counter-narrative to events like “Islamo-fascism Awareness Week,” organized on U.S. college campuses in 2007 by conservative activist David Horowitz in which the subject of the critique slipped easily and mistakenly from fundamentalist terrorists to “Islam” writ large. However, to critique such an event should not necessarily lead us to deny that there are some Muslim fundamentalist groups that could be labeled fascist in their ideology and are sometimes so labeled in the Arabic-language press. Unfortunately, the absence of a systematic and

155. B.S. Chimni, International Law and World Order: A Critique of Contemporary Approaches 120 (1993). For an example of this sort of flawed critique of Muslim fundamentalism, see Ruth Wedgwood, Countering Catastrophic Terrorism: An American View, in Enforcing International Law Norms Against Terrorism, supra note 95, at 110.

156. See generally Yoo, supra note 20.


159. “Fascist” is a word with powerful historical connotations. Nevertheless, some Arab critics of fundamentalist movements have been using this adjective to describe such movements. For example, in the wake of the July 2005 London bombings, the Arabic-language international media, like Asahq Al-Awsat and the website Elaph, published articles by Arab writers about “Islamic fascism.” See Un Fasciste Musulman ? Un Tabou est Tombé, Courrier Int’l (Fr.), July 13, 2005, at 12. Note that some other ardent critics of Muslim fundamentalist movements have disputed the utility or accuracy of the application of this term. See, e.g., Fred Halliday, The Left and the Jihad,
principled analysis of fundamentalist movements in Western international law scholarship and human rights narratives has left the terrain vacant, to be filled by highly problematic discourses like those associated with Islamo-fascism Awareness Week. In fact, the failure of learned U.S. discourse—including in the field of international law—to name and thoughtfully explain the problem of Muslim fundamentalism actually risks facilitating discrimination against Muslims in general. This omission obscures the fact that contemporary terrorism and the “war on terror” revolve around a very specific set of politics and political actors, not around broader religious denominations or religious claims.\textsuperscript{160}

While Edward Said's foundational critique of what he termed “Orientalism” is a useful rejoinder to problematic Western responses (including in and with international law) to what is called the Muslim World, it is not itself a blueprint for an alternative response to real problems in that part of the world.\textsuperscript{161} Too often in academic circles today this critique substitutes for meaningful analysis of the actual, diverse, lived “orient.” Orientalism may be found in stereotypical approaches to the question of Muslim fundamentalism.\textsuperscript{162} But it may equally be found in a sort of negative of this manifestation, in the international lawyer’s refusal to address fundamentalism at all, because it is deemed to be embedded in Muslim culture and therefore immune to the inquiry of international law.\textsuperscript{163}


161. Said’s influential work Orientalism argues that European cultural practice commonly divided the world between West and East, civilized and uncivilized. For Said, classical Western scholarship about Muslim-majority societies or “the Orient” was biased and designed simply to bolster imperialism. Edward W. Said, Orientalism (1971).

162. Mayer, supra note 134, at 380.

163. See the critique of the uses of Said’s Orientalism from an Arab intellectual’s perspective in Zakariya, supra note 132, at 119–66. Zakariya demonstrates that under the rubric of Orientalism an amalgamation is sometimes made between actual neo-colonial discourses, and legitimate critiques of real difficulties in Arabo-Muslim societies. “[T]he secularist would judge the representation of the Orient given by the fundamentalist even more deformed than the Orientalist representation, apology having simply taken the place of intolerance.” Id. at 121 (translated from French by the author).
It is a strange irony that the very notion of Orientalism is sometimes deployed in Western civil society and the academy to silence dissident Muslim voices. It is sometimes used to write away the right of those we call Muslims to think and act critically within their own societies and populations, including against fundamentalists, and still be deemed “authentic.” The space for such voices is already constricted. Sadia Abbas has written that, paradoxically, “[t]hat would be the final triumph of imperialism—a complete evisceration of the language of dissent which deprives the colonized of even the dignity of dissidence.”

Moreover, shaped by concerns about Orientalism, in the era of the “war on terror” many read solely the inter-cultural aspects of the debates in international law over fundamentalism, not the intra-cultural aspects. This is a mistake and can be yet another kind of Orientalism. For example, what is called the law banning the headscarf in French schools is often cited as an example of Western Islamophobia in the context of the “war on terror.” In human rights and critical discourse, such citations have become a standard way of censuring the inappropriate behavior of Western governments in the contemporary moment. Yet again, the discourse surrounding the headscarf disregards the problem to which governments are responding (in however imperfect a fashion). In reality, some

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164. See Ann Elizabeth Mayer, Debating the Universality of Human Rights: A Plea for Critical Perspective 17–19, http://lgst.wharton.upenn.edu/mayera/Documents/hamudps3.pdf (last visited Mar. 24, 2010). Mayer criticizes what she terms “the selectivity in demands that cultural consensus should precede endorsements of international human rights, these demands being made with regard to certain regions and cultures and not with regard to others.” Id. at 18. She gives the example of how the authenticity of Eleanor Roosevelt is never questioned on such grounds, notwithstanding her contribution to the codification of non-discrimination norms in the Universal Declaration of Human Rights at a time when a significant portion of the United States practiced—and was culturally committed to—racial segregation. Id.

165. Abbas, supra note 35, ¶ 34.

166. For example, note the repeated one-sided references to the issue of headscarf regulation, in (En)Gendering the War on Terror (Krista Hunt & Kim Rygiel eds., 2006).

French anti-racists of Muslim heritage staunchly support the French law banning religious symbols in public schools, in the context of rising fundamentalism and the pressures such forces place on women and girls in the Muslim population. Some even claim that the majority of the Muslim population in France supports the law, a contention rarely reflected in the international law debate.

By the same token, there are significant movements among human rights practitioners in places like Algeria, Bangladesh and Iran, and in Muslim Diaspora populations, seeking to hold fundamentalists and jihadists accountable for their transgressions of human rights principles. In other words, human rights enters at both sides in these debates, a fact that is too often overlooked, and with which international law scholars must come to terms.

Indeed, the ultimate paradox of the mistaken anti-discrimination reasoning for not attending to the international legal effects of Muslim fundamentalism is that fundamentalism's own dogmas often evince a variety of types of discrimination. Fundamentalist groups may foster discrimination among Muslim sects, against religious and ethnic minorities, against sexual

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171. For example, this has been a key strategy used by Al Qaeda in Iraq. See Jomana Karadsheh, *Sectarian Violence Continues with More Bombings in Iraq*, CNN, Feb. 12, 2009, http://www.cnn.com/2009/WORLD/meast/02/12
minorities, and of course a defining discrimination against women. In fact, Muslim fundamentalist forces systematically foster a discrimination against women so egregious that international law’s treatment of these movements should be a measure of progress toward mainstreaming women’s rights in the discipline. Adherents of social movements that adopted a similar stance toward any of international law’s other protected groups (like racial, ethnic, or religious groups) would be instantly denounced as international law outcasts. But women, the ultimate other’s others, are instead often swallowed by what is considered “culture” or disappeared by what is called “religion.”

Given this reality, the accusation of Islamophobia then sometimes occludes a genuine policy debate about religion and human rights, including women’s rights, highlighting one set of discriminations while concealing another. One must seek out ways to surface both sets of prejudiced discourses: the Orientalist and the fundamentalist. Otherwise, the anti-discrimination prongs of international law serve but to shield the purveyors of discrimination, a result anathema to the object and purpose of those norms. Just as international lawyers must move beyond a simplistic paradigm of discrimination, so too must we complexify the way we understand those we label “victims.”

C. The Victimhood Piece

When the news came in early 2009 that France would accept some Guantánamo detainees if they are to be released, many

/iraq.main/index.html (describing attacks by the Sunni Muslim militant group al Qaeda in Iraq against Shiite Muslim religious pilgrims).

172. See, e.g., Hossain, supra note 59, at 86.

173. See, e.g., Human Rights Watch, supra note 56; Stasa Zajovic, Religious Fundamentalisms and Repression of Reproductive and Sexual Rights, in Warning Signs of Fundamentalisms, supra note 9, at 158–59.


175. See, e.g., Shirkat Gah, supra note 104.

Western human rights groups lauded this move, without qualification, as a purely positive one that would protect victims of human rights abuses.\(^{177}\) France’s move was of course very positive in some respects in terms of closing Guantánamo and protecting its long-suffering detainees from refoulement.\(^{178}\) However, the detainees are not the only victims potentially implicated by this set of facts.\(^{179}\) Given the struggle against extremism waged by individuals and organizations within France’s Muslim population, international lawyers must also consider this move’s potential impact on that human rights issue as well.\(^{180}\)

Moreover, characterizing all Guantánamo detainees only as “victims” is an oversimplification and raises questions about the very meaning of the term in international legal discourses. Just as we must consider the vital human rights concerns facing these detainees, including those who may be adherents of fundamentalist or jihadist movements, we must also consider the threats to human rights and international law some of them may themselves pose. Of course, one must be extremely careful of making unjustified assumptions about these individuals.\(^{181}\) On the other hand, it is clear that at least some of the remaining detainees are (or have become) committed salafi jihadists.\(^{182}\) One does not have to be John Yoo to recognize this problem.\(^{183}\)


\(^{179}\). See Christopher Hitchens, When the Extreme Becomes the Norm, Slate, June 8, 2009, http://www.slate.com/id/2220000/ (“If it is an offense to justice to hold people who may have been victims of mistaken identity... then it is also an offense to justice to release psychopathic killers who believe that they have divine permission to throw acid in the faces of girls who want to attend school.”).

\(^{180}\). See, e.g., Association du Manifeste des Libertés, supra note 144. Of course, the way the United States conducted detention at Guantánamo has itself undermined the work of these anti-fundamentalists. See Gerard P. Fogarty, Is Guantanamo Bay Undermining the Global War on Terror?, Parameters, Autumn 2005, at 54, 65–66.


\(^{182}\). A leading example would be Khalid Sheikh Mohammed, alleged
Though the factual claims in this arena are subject to great debate, it seems reasonably clear that at least one former detainee was subsequently involved in a terrorist attack in Yemen that killed, among others, a young Arab-American woman.\textsuperscript{184} Another has gone on to head Taliban operations in Afghanistan’s Helmand Province, and is thought responsible for a “deadly surge in bombings . . . since spring 2008.”\textsuperscript{185} This is not necessarily a justification for the ongoing arbitrary detention of other detainees who have not committed a mastermind of 9-11, who reportedly confessed to killing Daniel Pearl, and to participating in 29 other terrorist acts in a hearing before a military tribunal in Guantánamo. Mike Mount, \textit{Khalid Sheikh Mohammed: I Beheaded American Reporter}, CNN, Sept. 24, 2008, www.cnn.com/2007/US/03/15/guantanamo.mohammed/index.html. KSM, as he is known, was also reportedly tortured by the U.S. government. \textit{Id.} He is supposed to be transferred to New York City to face trial, however, it is currently unclear whether this will occur or not. See Jane Mayer, \textit{The Trial: Eric Holder and the battle over Khalid Sheikh Mohammed}, The New Yorker, Feb. 15, 2010, at 51–63, available at http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer; \textit{Accused 9/11 plotter Khalid Sheikh Mohammed faces New York Trial}, CNN Online, Nov. 13, 2009, http://www.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed/index.html. Other examples of such victim/perpetrators include Abu Faraj al-Libi and Ramzi Binalshibh. \textit{Id.}; see also Hitchens, supra note 179.

Of course, many other individual detainees may have nothing whatsoever to do with Al Qaeda and related groups, and may have been turned over to the U.S. military by local informants to resolve local disputes or for financial reasons. Some may simply be victims of mistaken identity, grave errors that were not corrected due to the lack of adequate judicial oversight. See Mark Denbeaux et al., \textit{Report on Guantánamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data}, http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf.\textsuperscript{183}

\textsuperscript{183} U.C. Berkeley Law Professor John Yoo is (in)famous for his service as Deputy Assistant Attorney General in the Office of Legal Counsel at the Department of Justice from 2001–03. He was an architect of the Bush Administration’s legal response to September 11, authoring some of the “torture memos.” Glenn Greenwald, \textit{John Yoo’s War Crimes}, Salon, Apr. 12, 2008, http://www.salon.com/opinion/greenwald/2008/04/02/yoo/.


\textsuperscript{185} \textit{See Catherine Philip, Michael Evans & Tom Coghlan, Taleban Chief Released from Guantánamo to Target British Troops}, The Times (U.K.), Mar. 12, 2009, at 1, 8, \textit{available at} www.timesonline.co.uk/tol/news/world/us_and_americas/article5888427.ece.
crime. However, it does mean that, at the very least, the release of some of these individuals may indeed have grave human rights implications for others, especially in the Muslim populations in the areas that receive them. The impact of release may be exacerbated given that the status of former detainees will now be enhanced by their human rights “martyrdom” at the hands of the U.S. authorities. Any thick analysis of international law must account for this dynamic as well.

Admittedly, this kind of thinking is uncomfortable in a human rights framework that has raised “victimhood” to a kind of immutable state. We have mistakenly focused on victimhood as a status, rather than victimization as an experience. One is a victim (or not). A “victim” of violations of international law is somehow always a victim, rather than someone who may also be or become or have been a perpetrator or advocate of violations against others. Lionization has often gone along with this thin victimhood narrative, and it has sometimes been problematic.

For example, the human rights awards and celebrity that

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186. However, it may be important evidence for human rights scholars like David Cole who have made the case that “[r]eleasing all who cannot be convicted criminally is not a realistic option as long as the war is ongoing and they pose a real threat.” David Cole, *Closing Guantánamo: The Problem of Preventive Detention*, Boston Rev., Jan./Feb. 2009, available at http://bostonreview.net/BR34.1/cole.php. Note that Cole’s position has been considered very controversial by some human rights advocates. See also Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 Yale J. Int’l L. 369 (2008).


189. This phenomenon has been helpfully described in the field of critical race theory by Eric Yamamoto’s notion of “simultaneity.” As Yamamoto says, “relational positionality significantly complicates fixed categories of good and evil, of victims and victimizers. Relational positionality acknowledges that ‘the flow of power . . . is not always unidirectional . . . victims can also be victimizers . . . .’” Eric Yamamoto, *Interracial Justice: Conflict & Reconciliation in Post-Civil Rights America* 113 (1999).
have been heaped on Moazzam Begg, a British Muslim former
Guantánamo detainee, have been misguided. While opposing his
arbitrary detention and alleged torture in violation of international
law were clearly essential tasks, one cannot overlook the fact that he
was at least a fellow traveler of jihadists in Pakistan and Taliban
Afghanistan and seems to have frequented fundamentalist training
camps in those countries and elsewhere. Prior to those adventures,
he had long been associated with extremist bookshops in the U.K.
that are an important organizing site for jihadist groups in Britain.
Michael Gove, a columnist and Conservative member of the British
parliament, has said of Begg:

There may well be people who have freely chosen to spend
large stretches of the past 15 years visiting Mujahidin
camps across the globe, who have sought out every
battlefield on which al-Qaeda and its confederates have
fought, from Bosnia through Chechnya to Afghanistan, who
have chosen to set up home in Taleban Afghanistan, and
who have earned a crust along the way selling, among other

190. For a list of Begg's high-profile speaking engagements, featuring
invitations by many leading human rights and peace groups, see Cage Prisoners,
Cage Prisoners, the organization with which Begg works, has invited Anwar al
Awlaki to address its Ramadhan fundraising dinner several times. See Fahad
Ansari, Beyond Guantánamo – Review of Cageprisoners Fundraiser Dinner, Cage
"Fifty Quid For Dinner?!?!", Cage Prisoners, Aug. 30, 2008,
Awlaki's website still appear on the Cage Prisoners website without comment.
See Book Review 3: In the Shade of the Quran by Sayyid Qutb, Cage Prisoners,
suspected by the U.S. government of links to the Christmas Day 2009 attempted
airliner bombing and has openly justified this attack. See Interview: Anwar al-
2010/02/20102710747767870.html. The Quilliam Foundation has charged that
Cage Prisoners has "acted as a conduit between convicted extremists such as
Abu Hamza [a well-known Al Qaeda and Armed Islamic Group supporter
currently imprisoned in the United Kingdom] and their supporters and
sympathisers outside prison.” James Brandon, Unlocking Al-Qaeda:
note 215.

191. See Michael Gove, A Curious Road that led to Guantánamo, The
Times (U.K.), May 17, 2006, at 7.

192. See Chetan Bhatt, The “British Jihad” and the Curves of Religious
works, jihadi textbooks who are, in every sense of the word, innocents abroad. Mr. Begg may well be one of them. But in the understandable desire so many feel to condemn what has gone on in Guantánamo, I fear something is being missed.\footnote{193}{Gove, \textit{supra} note 191.}

Across the U.K. political spectrum from Gove, the liberal British press also carried some critical information about Begg—even months prior to his arrest. However, this information has been ignored in the subsequent human rights narrative of Begg as victim.\footnote{194}{A similar attitude surfaces in the vigorous defense of virtually any charity accused of involvement in terrorist financing. Of course, most charity groups are entirely legitimate and their efforts are essential for humanitarian reasons, as well as for alleviating socio-economic conditions that may foster further fundamentalism. However, some fundamentalist groups have used charities as a cover for fundraising activities, a difficult reality that must also be tackled, however inconvenient. \textit{See} Maajid Nawaz, \textit{Charity or Extremist Group?}, The Guardian (U.K.), Mar. 31, 2009, http://www.guardian.co.uk/commentisfree/belief/2009/mar/30/religion-islam-green-crescent-bangladesh.} For example, the Guardian reported in November 2001 that a “photocopy of a money transfer in sterling asking a London branch of the Pakistani firm Union Bank to credit an account in Karachi held by a man named Moazzam Begg,” was among the documents discovered when “a secret toxins and explosives laboratory operated by Arab fighters at an al-Qa’ida military training camp near the eastern Afghan city of Jalalabad” was raided during the U.S. invasion of Afghanistan.\footnote{195}{\textit{See} Rory McCarthy, \textit{Inside Bin Ladin’s Chemical Bunker}, The Guardian (U.K.), Nov. 17, 2001, http://www.guardian.co.uk/world/2001/nov/17/afghanistan.terrorism9. Such reports should at least be investigated and considered by human rights actors that continue to support and partner with Begg now that he is no longer a detainee.} Even if true, this does not necessarily mean that Begg deserved to be detained in Guantánamo, and is certainly no excuse whatsoever for his torture or ill-treatment. However, given the practices of the Taliban and Al Qaeda, this information should at least raise questions about his status as a “human rights defender,”\footnote{196}{This is now a term of art in human rights law and practice. \textit{See}, \textit{e.g.}, United Nations High Comm. on Human Rights, Res. 2000/61, Human Rights Defenders (Apr. 26, 2000); \textit{see also} Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 53/144, U.N. Doc. A/RES/53/144 (Dec. 9, 1998).} and about the broader impact of alliances...
made by international lawyers and human rights advocates with Begg to oppose practices associated with the “war on terror.”

Begg says that he is “conservative on family values,” which in Muslim contexts can mean anything from justification of women’s subordination in general terms to support for gender apartheid or honor crimes. Hence, ratifying his human rights credentials also impacts women human rights defenders in Muslim populations in Britain and beyond. This does not imply that Begg deserved to have his human rights violated. The question is: what does it mean for the human rights movement to give Begg the kind of platform he has received? How have we oversimplified our international law

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199. For discussion of links between “community discourse” and violence against women, see Abdullahi An-Na’im, The Role of “Community Discourse” in Combating “Crimes of Honour”, in Honour, supra note 107, at 64–77.
narrative as a result of our innocent stance toward people like Begg.\footnote{200}

For example, when Begg spoke via video link at the Annual General Meeting of Amnesty International-USA in 2008, he was introduced simply as someone who had gone to Afghanistan to undertake water projects.\footnote{201} The suggestion seems to be that Begg has been a victim of discrimination, targeted for arrest simply because he is a Muslim, a frequent fundamentalist refrain (which is of course true in some cases\footnote{202}). This naïve scenario is one the human rights movement has repeatedly embraced, perhaps because it is easier than trying to do the hard work of scrutinizing the human rights agenda of those whose own human rights also clearly need defense. It is as if we can only concentrate on the rights of one victimized group and one form of victimization at a time.\footnote{203} To be fair, these blinders are in part a result of the overwhelming threats to international law and human rights from governments leading the “war on terror.”

One of the greatest failures of the Bush Administration was its inadvertent success in casting Muslim fundamentalists like Begg, in the role of victims through the Administration’s own violations of

\footnote{200. For example, the U.K. Section of Amnesty International has confusingly characterized Begg as having been “[i]mprisoned for a crime he didn’t commit and whose precise nature has never been determined.” Amnesty Int’l, Talk: Moazzam Begg (May 19, 2008), http://www.amnesty.org.uk/events_details.asp?ID=748.}


\footnote{202. The case of Maher Arar, notably, seems to fit in this category. See Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc); see especially id. at 589 (Sack, J., concurring in part and dissenting in part).}

\footnote{203. Bhatt, supra note 192, at 46–50.}
international law. These violations have famously included the use of torture, such as waterboarding, protracted arbitrary detention, and extraordinary rendition. This real experience of victimization was often misconstrued by Western international lawyers and intellectuals to mean that these individuals were only ever victims, that they were all “innocent” (a confusing claim often made about those who had not been charged), that they all shared a commitment to vindicating substantive human rights and international law, and that there is not a legitimate human rights and international law critique to be made of some of them. Both the human rights violations associated with the “war on terror,” and the simplistic responses to them by some international lawyers and human rights advocates, have reified dangerous victim narratives used by Muslim fundamentalists: i.e., that Muslims are always and only victims and must be vindicated.

Moreover, the polarizing nature of the Bush administration in international law and politics often meant that the paradigm of the-enemy-of-my-enemy-is-my-friend governed. Too many human rights critics of the Bush administration were too soft on jihadist movements as a rebuke. In this context, some international lawyers conceived of Muslim fundamentalist movements as “counter-hegemonic strategies” that “offer . . . a critique of the dominant model of development.” Such a characterization indicates a view of international law that only recognizes or cares about certain manifestations of hegemony and dominance. In the immediate period, this model has led human rights actors to claim that closing

204. See Int’l Comm’n of Jurists, supra note 13; Mayer, supra note 13, at 8–9, 107–08, 115.

205. Of course, the Bush Administration offered fertile ground for the planting of this claim in the first place by failing to charge or try most detainees. See Denbeaux et al., supra note 182.

206. See, e.g., (En)Gendering the War on Terror, supra note 166; Rajagopal, supra note 44. International lawyers were not alone in this. Another stark example from the U.S. academy is Mahmood Mamdani, Saviors and Survivors: Darfur, Politics and the War on Terror (2009). Mamdani, an anthropologist who directs Columbia University’s Institute of African Studies, minimizes international crimes in Darfur, and attributes human rights advocacy about them in the United States simply to chauvinism in the service of the “war on terror.” See the critique of Mamdani’s work in Nicholas D. Kristof, What to Do About Darfur, N.Y. Rev. Books, Vol. 56, No. 11, July 2, 2009, at 32, available at http://www.nybooks.com/articles/22771.

207. Rajagopal, supra note 44, at 245, 249.
Guantánamo is a relatively easy project, a dubious claim at best.208 A crucial part of constructing an international law response to Muslim fundamentalism, then, will involve developing new, dynamic understandings of the meaning of victimization in international law, and a willingness to remember our chosen victims’ victims.

V. DISSIDENT VOICES: MUSLIM OPPONENTS OF FUNDAMENTALISM

Contemporary scholarship and practice in international human rights law relies increasingly on partnering with local human rights defenders who are important sources of information and agenda-setting.209 This methodology makes universality meaningful, avoids discrimination, and assists in identifying victims in need of support. However, questions remain as to whether all relevant actors at the local level are included in these crucial networks. Inclusion depends on who is defined as a human rights defender, and how the concept of human rights itself is understood. Difficult issues can arise and return us to the problem of the other’s others. For example, what happens when one category of people we have routinely labeled human rights defenders (e.g., the defense lawyers of fundamentalists in many contexts where they are in non-state roles) are at odds with another, often overlooked constituency that should be seen as human rights defenders (e.g., those in civil society working to counter fundamentalism)?

International lawyers should not make easy assumptions about attitudes and priorities in Muslim and Arab populations. Many people of Muslim heritage are ardent opponents of fundamentalism,210 and have looked to the international community to recognize the threats that they themselves face from such movements.211 Iran’s recent post-election protests underscore this stark reality.212

211. See Nabil Charaf Eddine, A force de louer la “résistance irakienne,” Elaph, reprinted in Courrier Int’l (Fr.), July 13–20, 2005, at 32 (detailing shock of Iraqis traveling abroad at the failure to universally condemn armed group violence against civilians in Iraq because of these same groups’ opposition to the U.S. occupation); Anissa Hélie, The Crisis – Open Forum, The U.S. Occupation
Often one finds a common theme in the words of anti-fundamentalists of Muslim heritage, academics and advocates alike. This recurring theme is a frustration with some Western academics and advocates, including in the fields of international law and human rights, for failing to acknowledge the opposition voices of those anti-fundamentalists.\(^{213}\) These particular Western theorists and advocates are seen to ignore two problems: that the Muslim fundamentalist project is first, antithetical to their own international law and human rights projects and second, central to debates like those on regulation of headscarves and the intersection of terrorism and human rights.\(^{214}\) This oversight is particularly demoralizing to anti-fundamentalists of Muslim heritage who often feel quite isolated. International human rights law and practice has offered them little comfort.

It is imperative for international law and human rights actors to find thoughtful ways to engage with and depict those who are working democratically to expose and oppose Muslim fundamentalism within Muslim majority countries and...
populations—especially those whose human rights have been imperiled as a result of their work. Their endeavors represent one of the most important—and often ignored—human rights struggles of our time, and one that is essential to the success of a variety of international law projects, from equality to conflict prevention and beyond. In universality debates, the only way we can grasp the complexities of mediating what are called the claims of culture and religion on universal human rights is by paying attention to people like these who force us to complicate not only our narratives, but also our counter-narratives.

One example of such an advocate is Cherifa Kheddar, the president of Djazairouna, an association of Algerian victims of Islamist terrorism. Ms. Kheddar’s brother and sister were both murdered by Algerian fundamentalist armed groups during the 1990s conflict in that country. Since then, she has worked in one of the most dangerous parts of Algeria to obtain justice for victims of terrorism. In addition to the ongoing threat posed to people like Ms. Kheddar by Al Qaeda in the Islamic Maghreb, which seeks to rekindle the horrors of the 1990s conflict, she has also been

215. For a sophisticated academic critique of Muslim fundamentalism from a scholar of Muslim heritage, see, e.g., Abderrahman Moussaoui, Entre violence et djihad: ou la question de l’autorité, Paper presented at Conference: From Colonial Histories to Post-Colonial Societies: Placing the Maghrib at the Center of the Twentieth Century,” Apr. 6–7, 2009 (on file with the author). Note also the work of the Quilliam Foundation, a “counter-extremist think tank” that is run by self-styled former extremists in Britain. Quilliam Foundation, http://www.quilliamfoundation.org/ (last visited Mar. 24, 2010).


penalized by the Algerian government for her opposition to an amnesty given to both non-state and government perpetrators (a reflection of her commitment to universality). She was demoted in her civil service job and lost her government housing.219

There are also a range of NGOs seeking to tackle these issues. For example, Muslims for a Secular Democracy, a group based in India, organized a massive protest march of Indian Muslims against the jihadist terror attacks in Bombay in November 2008.220 Similarly, Manifeste des Libertés fosters debate inside France’s Muslim population about extremism, and seeks creative ways to compete with fundamentalist propaganda on the Internet that targets young people.221 Unfortunately, such actors receive less airtime in international law debates than their fundamentalist opponents. Why is it that Begg is so easily painted a “human rights defender,” a victim of violations of international law, and one with whom human rights groups are clamoring to be associated, while the same is not true for Kheddar and her NGO colleagues?

Counterterrorist policies, which many international lawyers have correctly critiqued as violating international law, undermine the endeavors of people like Kheddar. But a critical response that focuses solely on the impact of counterterrorism on international law, and not of fundamentalism and terrorism themselves, hinders their work as well. Clearly then, international law needs to take a new and holistic approach to these issues.

VI. TOWARD AN INTERNATIONAL LAW APPROACH TO MUSLIM FUNDAMENTALISM

As one considers reconstructing international law’s approach to Muslim fundamentalism, it is worth pondering a May 2009 Newsweek article that describes Tony Kushner as the consummate

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21st-century playwright because, in a clearly anti-fundamentalist manner, he “captur[es] the sensation that there are no answers anymore: that modern life means feeling your way instead of relying on one big theory, trying to keep a handle on an . . . overwhelming world.” In contrast, contemporary academic legal writing continues to seek a paradigm that will solve a particular problem. Given that fundamentalisms tend themselves to be in the business of offering seemingly clear-cut solutions (along the lines of “Islam is the solution”), an academic article about this topic confronts a particular prescriptive conundrum. Faced with fundamentalism in the Kushnerian era, it seems counterproductive and somewhat paradoxical to suggest “one big theory” that can solve this problem. Nevertheless, losing ourselves in a morass of complexity is not satisfying either.

What then might be some ways forward for international law in tackling the challenge of Muslim fundamentalism? How can the discipline overcome the numerous related dilemmas that fundamentalism presents? The defense of the universality of human rights would require us to face up to fundamentalist movements, yet we have decreasing disciplinary vigor about defending universality.

Discrimination against Muslims post-September 11 has been a serious problem, but so, too, is the reality of Muslim fundamentalist movements and the discriminations they purvey. Anti-fundamentalist forces need to find a place in the international law story, but our narrative has most often focused on fundamentalists as victims. How might international lawyers better respond?

Most basically, to confront the challenge of Muslim fundamentalism, and to support its local opponents, international lawyers need to apply their discipline’s norms to fundamentalism’s attendant ideology and practices. They must do so without relativism or deference justified by religion, and sans embarrassment. When Muslim fundamentalist ideology and practices are violative of international law and human rights norms, their purveyors need to be openly “named and shamed,” as would be the case with other political movements and their adherents. They should be held accountable in accordance with international law norms for harms that result, not afforded excuses based on “tradition,” “culture,” histories of colonialism or racism, or claimed victim status. Of course,

223. See supra text at notes 106–108, 116-123.
the way the criticism is made and the manner in which these accountability processes take place must themselves respect international law. The approach must be carefully considered, giving heed to the views of internal or local opponents of fundamentalists whose leadership and expertise is critical to success.\textsuperscript{224} Those opponents are the most important international law actors in this regard. However, they cannot accomplish their goals without concrete support from international lawyers and institutions.

As Cherifa Kheddar said at the International Conference against Terrorism on Sept. 11, 2007, “neither the cowardice of institutions, nor their simple condemnations of terrorist acts, will end fundamentalist violence, in the absence of a courageous politics, both at the regional and international levels.”\textsuperscript{225} The “courageous politics” needed to deal with this grave set of challenges to the very framework of human rights and international law will require international lawyers to develop what Gita Sahgal has called a “human rights account”\textsuperscript{226} of fundamentalisms—both in the Muslim contexts discussed here, and in the many others in which they arise. We need to tackle the international crimes that some of these movements’ adherents commit, but also to assess how their substantive agendas are anathema to international law. Any such analysis must be free from discrimination against Muslims—but not by pretending that the particular challenge to international law from these fundamentalist movements does not exist.

A prerequisite for writing such an account is an unequivocal reaffirmation of international law’s commitment to universality, a notion that has never been so timely. The concept that certain norms protect all, simply by virtue of being human, may be one of the ideas most antithetical to fundamentalism. International lawyers must act

\textsuperscript{224} Hence the challenge that faced President Obama in how he criticized the fundamentalist government of Iran over its handling of post-election protests. If he remained silent, he abandoned protestors to their fate and emboldened the regime. If he too bellicosely attacked the Iranian government, he would undermine the protestors as “foreign agents.” See Karim Sadjadpour, Iran; Recent Developments and Implications for U.S. Policy, House Committee on Foreign Affairs, July 22, 2009, http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=23419&prog=zgp&proj=zme. Sadjadpour calls on the U.S. government to avoid making military threats against Iran, but also to vigorously criticize its human rights abuses. \textit{Id.}

\textsuperscript{225} Kheddar, \textit{supra} note 170 (translated from French by the author).

\textsuperscript{226} Gita Sahgal, Address at the AIUSA Meeting Roundtable: Navigating Between Scylla and Charybdis: Confronting Terrorism as a Human Rights Issue, at 3 (Feb. 16, 2007) (transcript on file with the author).
with scrupulous honesty in applying this universalist regime. At the same time, they must continue to apply the tools of their trade to protect the basic human rights of fundamentalists, and those confused with them, from abuses like extraordinary rendition and torture, while also addressing the root causes of fundamentalism itself.\footnote{227}{For an overview of the root causes of Muslim fundamentalism, see supra note 62.} In the current moment, this requires a willingness to deal in complexity, rather than simplicity.

To make up for their discipline’s colonial past, international lawyers are now justifiably concerned with how international law treats “the other.” And yet to update the colonial paradigm with a simple, equally binary worldview made up of “the West” and “the rest,” or “the international lawyer” and “the Muslim,” is unhelpful. To do so only inflicts other injuries while failing to grasp the contemporary realities in which international law must operate. It risks essentializing as gravely as did colonizers and disappears the other’s others, like those Muslim critics of fundamentalism whose words opened this article.

In the contemporary period, Western discourse, including in the field of international law, has sometimes seemed to offer only two choices: the openly discriminatory or flawed characterization (Islam is inherently fundamentalist, all Muslims are fundamentalists and so on), and the one that is too politically correct to even broach the topic of fundamentalism.\footnote{228}{An international law scholar recently told this author that when she was publishing an article on detention practices in the “war on terror” with one of the most prestigious international law journals in the United States, the student editors suggested that she should not use the term “jihadist” as it is offensive.} Instead, the human-rights-based critique would be actively non-discriminatory, in line with international law’s norms. However, it would be unashamed about tackling fundamentalists’ own discriminations. In our polarized times, this third way—neither an apology for Muslim fundamentalism nor a problematic smearing of Muslims or Islam—could be a significant contribution made by international law discourse. This approach would afford much needed constructive support to the other’s others and could offer a concrete tool that would be useful to human rights defenders engaged in a just struggle against fundamentalism.

Furthermore, in this process of rebuilding international law’s approach to Muslim fundamentalism, international lawyers must face up to the letter of the law we use. For example, in human rights
law, derogation precepts allow states to limit the exercise of certain human rights, like the freedom from arbitrary detention, to deal with severe threats. Derogation is subject to vital constraints such as non-discrimination and proportionality, and is meant to be truly exceptional and of limited duration. Depending on their scale, the activities of some jihadist groups may rise to the level where certain limited derogations would be permitted, subject to the rules of international law. While derogation has often had problematic consequences for human rights, and has been abused by states, it may also sometimes be necessary as a way of battling jihadist movements and protecting populations from them.

This does not mean that states should have automatic recourse to derogation in the face of fundamentalism. Indeed, derogation may still be a very bad idea in many circumstances. It may be practiced in a way that violates international law and core values and may foster grievances that cause more people to turn to

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229. For example, the International Covenant on Civil and Political Rights provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.


231. Note, however, the very high threshold for derogation set by the U.N. Human Rights Committee. Id.

232. Moreover, if states do not avail themselves of the formal derogation process by informing the Secretary-General of the United Nations, they remain bound by the full panoply of human rights protections. See, e.g., ICCPR, supra note 38, art. 4(3) (containing the ICCPR’s requirement that a State Party notify the Secretary-General “immediately . . . of the provisions from which it has derogated and of the reasons by which it was actuated”). For example, the United Kingdom formally derogated from certain human rights obligations related to Article 9 (arbitrary detention) in the wake of September 11, 2001, while the United States did not. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar. 24, 2010). As such, the United States continued to be bound by the full set of obligations it undertook when ratifying the Covenant.
fundamentalist movements. Furthermore, derogation can facilitate abuses of non-derogable rights that deserve unqualified defense. However, international lawyers cannot summarily reject all arguments for derogation if we take seriously the very body of law we claim to practice and theorize. To defend an absolute approach to non-derogable rights like freedom from torture, we must recognize that international law sets up a different regime for derogable rights.

Moreover, by the very terms of international law, the exercise of human rights may sometimes be limited to protect the fundamental rights of others. Many of the core international law instruments in the field, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention Relating to the Status of Refugees, all explicitly prohibit the misuse of their categories of protection to the end of threatening the purposes of the United Nations and human rights themselves. In other words, if one has participated in a terrorist

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234. Non-derogable rights, like the prohibitions on torture and the right not to be arbitrarily deprived of life, are those core rights that are not subject to suspension even in time of emergency. See ICCPR, supra note 38, art. 4(2).


236. This author completely supports the maintenance of an absolute ban on torture and ill-treatment, and the arguments made here should be understood in light of that commitment. See Bennoune, supra note 88, at 36–37. Torture is not only a grave and heinous violation of a jus cogens norm of international law, but also bolsters fundamentalists’ victim narratives. See Jones, supra note 100; Wright, supra note 77, at 28.

237. UDHR, supra note 105, art. 30 (“Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”); ICCPR, supra note 38, art. 5(1) (“Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”); Convention Relating to the Status of Refugees art. 1(F), adopted July 28, 1951, 19 U.S.T. 6259, 6263–64, 189 U.N.T.S. 137, 156 (entered into force Apr. 22, 1954) (“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that . . . he has committed a crime against peace, a war crime, or a crime against humanity . . . he has been guilty of
attack, one cannot claim refugee status as a means of escaping accountability (though one may certainly still claim *non-refoulement* protection in the face of fears of torture and persecution). 238 Another example is that the human right to political participation is not to be exercised toward the end of establishing totalitarian systems that seek to deny rights to others (such as women). 239

Recently, experts like the International Commission of Jurists’ Wilder Tayler have urged human rights lawyers to give serious consideration to the issue of limitation clauses. 240 A 2001 NGO shadow report to the U.N. Human Rights Committee regarding the human rights situation in Algeria did take up this approach. The report urged the Committee, when formulating its concluding observations, to consider the ways that fundamentalist armed groups battling the government were undermining a range of human rights, from the right to life to the right to gender equality. 241 Otherwise, human rights theorizing and practice has tended to view limitation in a largely negative light, and has at times seemed to willfully ignore the existence of the general limitation clauses.

While states have often misused the concepts of derogation and limitation to justify grave abuses, limits are written into international law for good reason. They recognize the very multi-directionality of threats to human rights. They acknowledge that part of a state’s responsibility under international law is to protect the rights of its population from other actors. Perhaps most of all, they indicate that human rights commitments are not only formal and procedural, but also substantive. Hence, when theorists do not acknowledge the limitations clauses, they are collapsing significant layers of meaning out of international law.

Beyond derogations and limitations in human rights law, an
improved international law approach to Muslim fundamentalism may sometimes simply be a question of accounting for fundamentalist movements in our narratives about relevant international legal questions where we have thus far failed to do so (e.g., documenting the abuses committed by both sides of the “war on terror”; recognizing state and non-state forms of coercion of women, such as through dress codes; acknowledging the real threats that fundamentalist movements may pose to international law norms, values, and institutions, just as the actions of governments that combat them sometimes do). Policy recommendations could be better formulated in light of these multivalent accounts. For example, in approaching the current situation in Afghanistan, international lawyers need to address violations of international humanitarian law and human rights law by international forces in the conduct of hostilities, but must also center the threats to international law and the human rights of Afghans posed by the Taliban those forces battle.\textsuperscript{242} This remains true in light of the new U.S. policy on Afghanistan announced in December 2009.\textsuperscript{243}

Otherwise, we let ourselves off the hook much too easily. A simplistic stance is easier to compose than a complicated stance—Kheddar’s “courageous politics”\textsuperscript{244}—that defends international law values from multiple sides at the same time. However, uncomplicated approaches can have paradoxical effects. The very governments international lawyers seek to constrain may simply cease to take us seriously at all. Important potential human rights allies among anti-fundamentalists of Muslim heritage may be written out of our stories and further disempowered. Worse still, international law may be


\textsuperscript{244} See supra text at notes 225–226.
misused to the benefit of social movements, and even armed groups, antithetical to its principles.

Recognizing and criticizing global and inter-cultural patterns of dominance is an important part of what international lawyers do. In such a framework, Muslim fundamentalists may be read as less powerful than the Western governments they are seen to oppose.\textsuperscript{245} However, that engagement with global architecture must not erase equally harmful regional, local, and intra-cultural patterns of subordination in which fundamentalists may be significantly more powerful than both the populations they target and their local civil society opponents.\textsuperscript{246} Muslim fundamentalists, in and out of government, may benefit from criticism of their more powerful global adversaries, like the Western governments some of them sometimes battle in the “war on terror.”\textsuperscript{247} That criticism may make the record of their own international law violations and dominance projects evaporate. Of course, the reverse is true as well. The critique of Muslim fundamentalisms in this Article can be harnessed by Western (and other) governments as a justificatory discourse for policies that have violated international law in the name of fighting fundamentalism or terrorism, a truth that narrows the space for the critique in this Article considerably.

Still, the risk of misuse does not vitiate the fact that crucial points of universalist principle are at stake. When regional or local power-holders (state or non-state) like fundamentalists are characterized by international lawyers simply as counter-hegemonic in relation to dominant international actors, those demanding local accountability for such regional or local power-holders are effaced. International law must find ways to surface and challenge the violations of both global, and local or regional power-holders, fundamentalists and their governmental foes, to find a way out of this maze.\textsuperscript{248} A multi-directional approach is a prerequisite for addressing the predicament of the other’s others.

\textsuperscript{245} Note that Muslim fundamentalist movements have sometimes been clearly supported by Western governments. See discussion supra note 62.

\textsuperscript{246} A recent example of this is Mamdani’s work that aims to surface anti-Arab racism in U.S. criticism of atrocities in Darfur, but simultaneously obscures local patterns of discrimination as practiced against those deemed Africans in Darfur itself. Mamdani, supra note 206.

\textsuperscript{247} The same is true of criticism of their local governmental opponents.

\textsuperscript{248} Here Yamamoto’s concepts of simultaneity and “relational positionality” may be especially relevant, and remind us of the need to consider multiple tracks of accountability, culpability, and victimhood at the same time.
VII. CONCLUSION: “A MORE COURAGEOUS POLITICS"

In the wake of September 11th, political philosopher Seyla Benhabib encouraged intellectuals to rethink their approach to Muslim fundamentalism.249 In Benhabib’s words, this is the task at which much of the intelligentsia has:

[F]ailed us by interpreting these events along the tired paradigm of an anti-imperialist struggle by the “wretched of the earth.” Neglecting the internal dynamics and struggle within the Islamic world and the history of regional conflicts in Afghanistan, Pakistan, India, and Kashmir, these analyses assure us that we can continue to grasp the world through our usual categories . . . . These analyses help us neither to grasp the unprecedented nature of the events unfolding since September 11, 2001 nor to appreciate the internal dynamics within the Arab-Muslim world which had given rise to them.250

Yet, in recent years, the international legal academy has struggled to meet Benhabib’s challenge. Faced with the Bush Administration’s frequent attacks on international law, we have sometimes responded with defensive, formalist, even relativist approaches, perhaps understandably. As we move beyond the Bush years, it is a timely moment to reflect on how we might better avoid the recent global polarization that has inevitably affected international law scholarship itself. It is a mature global law and practice that can come to terms with the reality that sometimes the-enemy-of-my-enemy-is-also-and-at-the-same-time-my-enemy. In so doing, international law becomes a tool, when appropriate, both for criticizing fundamentalists and contending with their governmental adversaries, simultaneously and equally vigorously.

In any case, new theorizing on Muslim fundamentalism and related questions is a disciplinary imperative. If international lawyers do not engage in this project, we risk making our field unnecessarily irrelevant in the face of some of the most significant international law questions of our time.

Yamamoto, supra note 189.
249. Benhabib, supra note 56, at 398.
250. Id.