The Politics of Law

There is always a challenge when addressing questions of "law" and "governance" in the so-called Middle East. Typically, the concept of good governance is understood to have three basic components: a political dimension (which we measure through indicators for voice and democratic accountability and political stability and an absence of major violence), an economic dimension (government effectiveness and regulatory quality), and an institutional dimension (the application of the rule of law and the control of corruption).   Such measurements of good governance are not specific or unique to the Middle East and North Africa (MENA) region but the debates around whether or not states within MENA conform to these indicators have informed how an epistemology of the region has developed.

Of course, such a tool-kit for measuring what we understand to be good governance is framed around a conventional nation-state based understanding of politics where there is a presumption of a presence of effective territorial sovereignty, a state monopoly on the use of organized force, authoritative, centralized decision-making of a cohesive government, and a reasonably coherent "national" identity. The reality, however, is that these constitutive elements do not relate to a substantial number of the states in this world. Thomas Risse and Ursula Lehmkuhl argue that approximately two thirds of states in the world have, at best, limited statehood and multi-level governance.[1] As these indices continue to be used for conceptualizing and measuring democracy, constraining and shaping the outcome, this creates not only theoretical, but also legal, political and practical problems.

Despite the fact that such an approach fails to capture realities on the ground, such language seeks to [pre]inform what we mean by good governance (read, in form, as democratic) and reinforces, rather than reimagine these concepts. It is also true that this disconnect is particularly acute when specifically focussing on the MENA region where there is limited statehood, the proliferation of non-state actors, and identities that are multi-layered, tribal, religious and transnational.[2] This is a region that

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[1] Thomas Risse & Ursula Lehmkuhl, 'Governance in Areas of Limited Statehood: New Modes of Governance?', SFB-Governance Working Paper Series • No. 1 • December 2006, 4.
[2] Thomas Risse & Ursula Lehmkuhl, 'Governance in Areas of Limited Statehood: New Modes of Governance?', SFB-Governance Working Paper Series • No. 1 • December 2006, 4.

comprises not one, but multiple geographies and within states, not one but multiple sites of power, and both informal and formal legal systems. It is not a fixed, immovable space, but one that, through its historical social formation, has been continually transformed.

Although the realities of the MENA region do not align with what we traditionally have understand to comprise a 'democratic' system of governance, Tessler has noted that in the Arab world, '…recent studies report that eighty percent or more of the men and women interviewed in nationally representative surveys believe that democracy would be the best form of government for their country and that, despite its limitations, democracy is better than any other political system.'[3] Yet, as a secular project, support for democracy in the Arab world is also marked by a,

> […] deep division of opinion about the extent to which, and the way in which, Islam should play a role in political affairs. The relationship between Islam and politics is arguably the most important and hotly-debated issue pertaining to governance in the present-day Arab world.[4]

The perimeters of just when faith can pierce the public square ignites debates well beyond the MENA region and is particularly contested when played out within the field of human rights. In much of the rights based discourse, secularism has become inextricably linked to 'what is necessary in a democratic society.' That the secularism of rights is deeply embedded in international human rights law (IHRL) is clear. Even a cursory review of the language and case law of the project reveals that whilst faith in the private sphere is respected, faith in the public square is policed.

That faith must be read out of the rights based discourse (leading some to suggest that human rights itself has become a new religion), is but one of a number of critiques of the human rights project. The hegemonic contestation over the ownership and reading of the rights based discourse is captured in David Kennedy's 'The International Human Rights Movement: Part of the Problem?' Kennedy provides a

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[3] Mark Tessler, 'Religion, Religiosity and the Place of Islam in Political Life: Insights from the Arab Barometer Surveys,' Middle East Law and Governance 2 (2010) 221–252, 223

[4] Mark Tessler, 'Religion, Religiosity and the Place of Islam in Political Life: Insights from the Arab Barometer Surveys,' Middle East Law and Governance 2 (2010) 221–252, 223

wonderfully detailed overview of 'the assertions, worries, [and] polemical charges' of the human rights project, making it unnecessary to replicate these efforts here. Although the 'charges' against the human rights project are many, it is as we turn to the interplay between politics and religion and religion and rights that we enter in to some of the most contested terrain. As with many of the other critiques, the tension between religion and rights is not unique to the MENA region, but the contestations here are particularly acute. Islam's piercing of the public sphere has been read in the wider public narrative, as defining of the region. When it intersects with the human rights project and the rights based discourse at the international level, it has been viewed as a belief system which is intolerant, rigid, and one that cannot be divorced from the political sphere. Therefore, unveiling some of the myths that bind these narratives are an essential first step to adopting, 'a more pragmatic attitude toward human rights.'[5]

Even a cursory review of literature which endeavours to either unpack or marry Islamic law with various international legal norms and prescriptives will unveil contradistinctions, overlaps and, at times, the 'ambient noise' so wonderfully described by Ann Mayer.[6] As Islam is not an actor, the various readings of Islam both depart and arrive at different interpretations of Prophetic revelations.[7] The struggle between what I will call the 'textualist' readings and that of 'contextualists' move between a reading of Islam, which is fixed and immutable, to one that endeavours to read the text within a specific historical context.

Although "there is one Islam, and the fundamental principles that define it are those to which all Muslims adhere,"[8] there are various and differentiated readings of the scriptural sources. The "important margin allowed for evolution, transformation, and adaptation to various social and cultural environments"[9] give rise to these plural readings and respective (and often distinct) "doctrinal and social attitudes." Although the various tendencies within Islam spring from the same normative criteria, these differentiate readings yield differentiated approaches to the interpretation and

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[5] David, Kennedy, 'The International Human Rights Movement: Part of the Problem?' 15 Harv. Hum. Rts. J. 101 2002, 101-125, 102

[6] Mayer, Ann. *Islam and Human Rights*, (Westview 2007), 25

[7] Ramadan has identified 6Ramadan, whilst others have subcategorized further. See Tariq Ramadan. *Western Muslims and the Future of Islam* (OUP 2004), 24

[8] See Tariq Ramadan. *Western Muslims and the Future of Islam* (OUP 2004), 9.

[9] See Tariq Ramadan. *Western Muslims and the Future of Islam* (OUP 2004), 9.

applicability of the norms and principles of Islamic international law. These same dynamics can be found in Public International Law, the primary sources of which are also subject to interpretation and different 'trends of analysis.'

The primary sources of international law (treaty, custom, general principles and judicial decisions) are not contested but competing theories do arise regarding interpretation. The differentiated approaches to interpreting international law are captured in three ways. The first is a textualist approach, in which a restrictive interpretation, based on an "ordinary meaning" of the text is applied. Similar to textualists' readings of Islamic law, this approach places a great deal of weight on the literal meanings of the texts. The second "subjective" approach factors the underpinning of a treaty, the intent of its drafters and reads a treaty 'in its context' when interpreting respective principles. A third approach is interpretative (sometimes called effective interpretation). Here a text is read "in the light of its object and purpose" and is similar to what I have described as a contextualist approach within Islam.

Rather than viewing international law as a "stable set of normative demands opposed to international politics,"[10] this approach understands the politics of law at the international level and blows apart the notion of a neutral arbiter with a fixed and stable set of principles. Such a critical lens has also been applied to interrogate the 'role' of religion; how it is understood and narrated in Muslim based states with similar reflections. When addressing the question of sectarianism, which is so often raised when addressing minority rights issues in the region, Hurd rightly notes that the term itself,

> […] is a modern discourse of religion-in-politics authorized by particular
> authorities in particular times and places. It relies on a fixed and stable
> representation of the shifting roles played by that which is named as "religion"
> or "sect" in politics and society. The complex and often conflicting forces that
> come together in any given episode of violence or discrimination subvert the

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[10] Martti Koskenniemi, "International Law and Hegemony: A Reconfiguration," Cambridge Review of International Affairs, Volume 17, Number 2, July 2004, 197

stable notions of sectarian motivation and causation that form the bedrock in which such accounts rest.[11]

Unmasking the performative elements of both sets of legal norms reveals a constructive ambiguity which, in each case, opens a space where the contestation over the 'what' and the 'whose' reading of *the* law plays out.

That the deeply contextual nature of how legal rules operate is shared within both Islamic and international law is clear. However, the state oriented approach of public international law tends to exclude other forms of social regulation—customs, mores, morality and religion. In particular, the policing of religion is particularly acute in the human rights project and its confinement to the private sphere is one significant area where the compatibility between Islamic and human rights law is contested. As Kennedy summarizes,

> If you thought secularism was part of what is bad about the modern West, you might assert that human rights shares the secular spirit, that as a sentimental vocabulary of devotion it actively displaces religion, offering itself as a poor substitute. You might claim that the enforcement of human rights, including religious rights, downgrades religion to a matter of private and individual commitment, or otherwise advances the secular project. To the extent human rights can be implicated in the secular project, we might conclude that it leaves the world spiritually less well off.[12]

Against this backdrop, this paper challenges the assumption of international law (and related doctrines) as 'a stable set of normative demands opposed to international politics.' In contrast, as Koskenniemi has argued, international law is best understood 'process of articulating political preferences into legal claims' and 'cannot be detached from the conditions of political contestation in which they are made.'[13] Such an approach to understanding international law can also be applied to how we engage with the various readings and interpretations drawn from Islamic law. As

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[11] HURD, Elizabeth Shakman, 'Politics of Sectarianism: Rethinking Religion and Politics in the Middle East' *Middle East Law and Governance* 7 (2015) 61-75, 61.

[12] David, Kennedy, 'The International Human Rights Movement: Part of the Problem?' 15 Harv. Hum. Rts. J. 101 2002, 101-125, 114

[13] Martti Koskenniemi, "International Law and Hegemony: A Reconfiguration," Cambridge Review of International Affairs, Volume 17, Number 2, July 2004, 198.

Emon et al rightly argue, to negate the 'effect of the state on the content, scope and application of Islamic law today,'[14] is to 'address abstract ideas in a vacuum and to turn the risk of pursuing 'red herrings'.[15] Disrupting the idea that these legal regimes are fixed and stable, something that underpins so much of the analysis (academic and other) on Islam and human rights that attempt to pull the 'other' closer to a forensic and fixed truth, moves us beyond the reproduction of rather worn arguments and requires that we emancipate some of the concepts seen as inextricably linked to each.

Erasing these starting points when we examine the relationship between Islamic law and international human rights law allows us to rethink the notion of difference and 'pries open a space allowing us to critique the 'universal,' removing the dichotomy between an essential 'good' of the Truth of universalism and the 'Otherness' of anything that lies outside.'[16]

1. Defining the Space

In assessing what we mean by the law, I suggest that there are two distinct departure points. One finds us on more familiar ground where law is articulated as its factual self (the ontics, if you will), whilst the other seeks to unpack what it is about the "the law" that is distinct from other social orders. To invoke Wittgenstein; the second path invites us to begin from the decisive moment before "the conjuring trick was made."[17] Here we engage in its ontological status; to start our inquiry before the point where we speak of *the* law in order to deconstruct its form.

There are, of course, ways in which lawyers, legal scholars and indeed political actors articulate *the* law (its factual self)—reproducing a particular conception of legality; that of a fixed and stable set of norms and rules that transcends the body politique. The expression of Pubic International Law takes the form of two sets of

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[14] Emon, Anver, Mark Ellis and Benjamin Glahn, 'From Common Ground to Clearing Ground: A Model for Engagement in the 21st Century' in *Islamic Law and International Human Rights Law: Searching for Common Ground?* Emon, Anver, Mark Ellis and Benjamin Glahn (eds), OUP, 2012, p 7.

[15] Emon, Anver, Mark Ellis and Benjamin Glahn, 'From Common Ground to Clearing Ground: A Model for Engagement in the 21st Century' in *Islamic Law and International Human Rights Law: Searching for Common Ground?* Emon, Anver, Mark Ellis and Benjamin Glahn (eds), OUP, 2012, p. 6.

[16] Kathleen Cavanaugh, 'Narrating Law,'in *Islamic Law and International Human Rights Law: Searching for Common Ground?* Emon, Anver, Mark Ellis and Benjamin Glahn (eds), OUP, 2012, p. 26

[17] Wittgenstein, L. Philosophical Investigations.Trans.G. E.M.Anscombe.Oxford:Blackwell. 1963, §308; cf. 1992, p. 43

complementary legal frameworks: international human rights law (HRL), and international humanitarian law (IHL). While both sets of legal rules [ostensibly] govern the conduct and actions of states (and in limited cases, non-state actors) and are designed to protect the individual from violations; they apply to different circumstances and function in different ways.

Humanitarian law applies to situations of armed conflict. Its purpose is to govern the conduct of state actors during times of war and to limit the suffering that is inflicted during war. These 'laws of war' are contained in treaty based as well as customary international law. The body of law that regulates the conduct of hostilities is to be found in a collection of treaties often referred to as the 'law of the Hague', with the modern laws of war found in the 1949 Geneva Conventions and their related Protocols. Although the reach of human rights law extends to times of peace as well as armed conflict,[18] its expressed purpose is to protect the individual—and increasingly the community—from human rights violations and to positively provide an environment in which rights can be enjoyed.

Whilst I will approach the question of what is International law from reading outside the rather narrow space that some argue contains it, it is important to note that the contestations over meaning and application are rife even amongst those who engage a more traditional reading of International law. Those normative developments, to which I have alluded, have pinpricked how we read the law in such a way as the form of law is, even as we write, being reshaped, re-narrated. The differentiated approaches, which I referred to earlier, impact upon how law is read. So when we, as advocates and educators, unpack the meaning of international law, we are adopting a particular approach which may provide either a restrictive interpretation or one that is more permeable to context, depending where we position ourselves. Whilst the next section will detail exactly how this maps out in a human rights and, to a lesser degree,

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[18] Although humanitarian law assumes *lexis specialis* during armed conflict, the Human Rights Committee and other competent legal authorities have noted that a state's human rights obligations (under treaties which they have ratified) extend to territories to which the High Contracting Party exercises effective control; including territories occupied as a result of military action. This final point is important, as IHL remains unspecific with regard to a number of aspects of interpretation. As well, human rights law affords a higher level of protection in a number of areas, especially with relation to detention. Coupling these two frameworks provides protection for civilians not only in the conflict but also in the post conflict stage.

humanitarian law context, there is one further question related to how we understand law that merits review.

If we begin our examination of law by first asking the question, "what makes law distinct from other spheres of authority?" then before we begin to examine how law functions, we must first theorize the space which gives law its form, its narrative. Here we enter some interesting terrain, one occupied by philosophers and aestheticists from Hobbes to Agamben. It is in these writings where we begin to see the contested constitutive point of law emerging. The relationship between law as distinct from other forms of social control (e.g. power/politics) and law as rooted in or separate from morality[19] are both contested narrations in political (and indeed legal) theory. For Plato and Aristole, a theory of natural law was expounded which argues a link between law and morality (something that took root in the human rights discourse of the twentieth century). An alternative reading offered through Austin and refined by Hart suggests that we demarcate the boundaries between law and morality; reading law through a positivist framework; the law is the law because it is obeyed   Hart's union of primary and secondary rules tease out this notion; one which separates regulation and governance.

That law plays a crucial role in regulating social behaviour has, of course, critical political significance. However, it is the desired relationship between law and politics (which includes the very nature of law) that invites controversy.   Conservative theorists from Hobbes to Devlin see law as linked (and sometimes fused) to social order. For Hobbes, his deeply pessimistic view of humanity informs his view of a rule of law that has value in and of itself. For Devlin, it is the belief that social stability is only possible when values and culture (public morality) can be enforced through law[20]. In both cases, it is the social order (not individual freedoms) that has value and therefore must be protected; such a view of law to insure order allows a more expansive (rather than constrained) sphere of law. In contrast, liberal theory which still informs so much of Western thinking on law and remains the dominant legal theoretic paradigm, views law as distinct from power. This way of viewing law, rooted in social contract theory, suggests that the role of law in bringing about social

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[19] Some writers have opted for the term 'ethics' rather than morality to define this space.
[20] This is sometimes referred to in the literature as a social cohesion argument.

order is indivisibly linked to the notion that its sphere is limited; it must protect but not encroach on individual freedoms (Mill's notion of the 'harm principle). Here law is distinct (must be separated) from politics; its role is one of neutral arbiter.

In each reading, whether we understand law as distinct from, or wedded to politics or morality, we return to the notion of social contract. Here through public and enforceable rules, individuals are ordered and protected. Liberal theory views law as an arbiter or gate keeper between state actions and individual liberties. Therefore, if one of the social roles of law is to ensure stability, the other is to ensure that there is no overreach of power by the state. Such a reading suggests that it is at this intersection we come to understand the force of law

There are, of course, those thinkers that endeavour to push open these theoretical boundaries (or erase them entirely); Hart and Agamben spring to mind here. For Giorgio Agamben the question of borders became all the more important after the events of September 11th. It is this event which served as catalyst for Agamben's polemic *States of Exception*. For Agamben, the normative developments that unfolded post 9-11 cannot be read as a juridical problem: the state of exception must be understood as a "paradigm of government" obliterating all notions of law as distinct from power. Here law has no form, no dialogue with morality. The coercive capacity of the state, which takes the form of law, blows apart any notion that the gate keeper is duty. In this space "governmental violence—while ignoring international law externally is producing a permanent state of exception internally"[21] It is here that life and law are fused where law is indistinguishable from power. Law as its factual self continues to replicate a particular conception of legality but it has been severed from (if we believed it to ever have been fused) its ontological roots. In Islamic law, this situation is interpreted in the light of the Qur'an where a person is allowed to eat carrion, which is otherwise unlawful but only as exception. This state of exception is then explained to abide by two provisions: provided that you do not go beyond what is necessary and that you do not make it a habit. Muslim jurists applies to the doctrines of necessity, expediency, and emergency.

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[21] Agamben, p. 87

It may be argued that it is not possible to arrive at what we mean by international law by reading this exception so firmly into the rule. Perhaps. But I suggest an altogether different reading. First, that within the current political landscape, the 'exception' has become the 'rule' and understanding the narratives of international law necessitate that they be read within, not apart from, the discourses of 'necessity' and 'exception'. Secondly, and at a much broader level, the events of September 11th merely highlighted but did not redefine the relationship between law and politics, rights and authority. In reimagining the life-law connection, Agamben opens a space where, I suggest, we can begin to more honestly and critically confront what we mean by international law. As Moyn argues in his deconstruction of historiography of the international human rights law "rights have long existed, but they were from the beginning a part of the authority of the state, not invoked to transcend it."[22]

2. Culture and 'Othering'

Whilst the language of exception captures one aspect of the contest over how we read HRL, the cultural relativity versus universality debate reveals yet another. One approach to reading HRL suggests the universality of rights whilst another contends that culture and context must be necessary to understand, as well as apply international legal norms and principles. For cultural relativists, the hegemony of the West is read into the historical social formation of the international legal system and defines the application of its rules and norms. Universalists counter that this particular reading of the development of the human rights machinery is both selective and incomplete and believe that there are basic and shared normative rights and values, "for all without distinction."

This question of universality versus cultural relativity canvasses some well covered terrain and I do not intend to revisit some of the more familiar arguments here. That said, in much of the legal discourse, cultural relativism tends to be examined in contrast to universality and, in doing so; some of the narrative framework is lost. Cultural relativism is not a legal concept and was not developed for legal application; rather its roots are in anthropology and philosophy and it must, therefore, be understood within these disciplinary frameworks. Cultural relativists do not

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[22] Moyn, Samuel, The Last Utopia: Human Rights in History, (Cambridge: Harvard U Press), 7.

disassociate themselves from the norms of universality, but argue that we reason through a process of enculturation. The lens through which we see the world and shape and receive values and norms is mediated through our experiences and *a priori* concepts.

Despite the significant analytical value, factoring both culture and context into how we understand the interpretation and application of international law requires some consideration. Mayer reminds us that cultural relativism has served a "political usefulness" for "foes of human rights."[23] Asian or Islamic culture-bound values and norms provide a useful tool for governments seeking to deflect attention from a poor domestic human rights record, and there are challenges in wrestling this concept from political agendas.

Some of the more interesting recent scholarship which endeavours to apply a more forensic lens to the questions raised by this debate maps the socio-legal landscape in a postcolonial framework. There is, according to this framework, continuity between the colonial past and the colonial present and fixes on the relationship between culture and power where colonisation is understood as a cultural process. Here culture "involves the production, circulations, and legitimation of means through repetitions, practices, and performance that enter fully into the constitution of the world."[24] Through this analytical lens, the colonial present is articulated through legal constructs.

Whilst this discussion takes place primarily outside of the field of law, situating the application of law in the 'colonial present' opens up several interesting analytical points of departure and suggests a narration of modern international law (the colonial present) that cannot be separated from the historical, cultural, economic and political backdrop of the European colonial project. Its shape and form differs, of course, but the conquest and domination between the "Occident and the Orient" find its contemporary articulation in alternative spheres; that is within a public international law framework – from international economic and trade law to human rights and the laws governing the use of force (jus ad bellum) and international humanitarian law (jus in bello) in the context of the state of exception of the 'global war on terror.'

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[23] Ann Mayer, Islam and Human Rights, 10 (2007)
[24] Derek Gregory, The Colonial Present, (Blackwell, 2004): 8

Rather than framing this 'debate' as between an essentialised [universal] 'truth' and that which lies at the margins of modernity; read through a postcolonial lens, the privileging of the elite human experiences[25] concomitantly creates and subjugates the very real 'Other' human experiences. This approach suggests that far from holding 'relativity' hostage in a Eurocentric read of these margins, we must be willing to deconstruct the very notion that suggests that there is a universal Truth and that alternative voices which do not adhere to this narrative lie on the margins of modernity.

Undoubtedly states do devise culturally specific arguments as a means of subjugating the rights of women, of minorities, and so on. However, this, as I argue, is less about creating a space for the voices of otherness, than as one hegemonic technique. As Ratna Kapur has argued when turning this lens on the narration of women's' rights,

> Culture and cultural diversity have entered into the women's human rights discourse primarily as a negative and subordinating aspect of women's lives and invariably displaced onto a first world/third world divide. In the process colonial assumptions about cultural differences between the West and `the Rest' and the women who inhabit these spaces are replicated. Some cultural practices have come to occupy our imaginations in ways that are totalizing of a culture and its treatment of women, and that are nearly always overly simplistic or a misrepresentation of the practice.[26]

Yet, severed from this particular reading of 'relativism' a space is created allowing us to critique the 'universal,' and re-insert the difference which removes the dichotomy that suggests that there is an essential 'good' of the Truth of universalism and anything that lies beyond it exists as an 'Otherness'.   The almost missionary zeal of some of the advocates of the universal Truth rests on two problematic assumptions. First, the revival of Kantian liberalism replete with its language of human rights and democracy, "invites us to assume that everyone wishes to be treated like we would

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[25] The idea of 'elite' here captures a notion of experiences that are framed from Western liberal ideas of rights and duties.

[26] Ratna Kapur, Un-Veiling Equality: Disciplining the "Other" Woman Through Human Rights Discourse, in Anver Emon, Mark Ellis and Benjamin Glahn, eds, <u>Islamic Law & International Human Rights Law</u> (forthcoming OUP, exp. 2013).

like."[27] Joan Scott has noted, "[t]he only alternative, it seems to me, is to refuse to oppose equality to difference and insist continually on differences -differences as the condition of individual and collective identities, differences as the constant challenge to the fixing of those identities, history as the repeated illustration of the play of differences, differences as the very meaning of equality itself"[28] And second, that states can be ascribed a morality;[29] that is, that there are "genuinely 'non-violative' relations between the Self (the 'West') and its Other."[30]   What is interesting as we turn our lens to Islamic legal tradition is there here, denominations based on legal differences were not considered going beyond the pale of Islam while theological differences created "infidels" and enemies.

3.   Enemies and Allies

International politics still divides the world into zones of enemy and allies. Islamic law uses the terms of dar al-Harb and dar al-Islam. In times of globalisation and International law the other needs to be redefined. We are still using the same categories even in case of other in terms of culture, ethnicity and religion. Apart from the divisive identity of nationalism, we also feel threatened by the religious and cultural other because even national identity is not inclusive in the long run.

It is in the legal narrative of the 'war on terror' that the political resurfacing of international law is so clearly illuminated. That international law is situated within, not apart from political realities is not in question. Koskenniemi reminds us that before we can begin to explain universal international law, we must first clarify "*what* or *whose* view of international law is meant".[31] Political actors narrate the law, articulating political claims in the form of rights. Significantly, it is from within the rhetoric of law that a radical critique of the practices of a society is developed. This *weltanschauung* unpacks the traditional reading of international law and pries open a space within which we can [re]conceptualise law against the backdrop of the

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[27] The author goes on to assert (and I agree) that "This is rubbish". See Martti Koskenniemi, The politics in the Temple, Order, Justice and the UN: I Dialectical View, 6 Eur.J.Int'l L. 325, 343 (1995)
[28] Joan E. Scott, Deconstructing Equality-Versus-Difference: or, the Uses of Poststructuralist Theory for Feminism, 14 Feminist Stud. 33, 43 (1988).
[29] This is perhaps most evident in the discourse surrounding the Responsibility to Protect.
[30] Dipesh Chakrabarty, Marx after Marxism, 52 Meanjin 421, 426 (1993).
[31] Martti Koskenniemi, "International Law and Hegemony: A Reconfiguration," Cambridge Review of International Affairs, Volume 17, Number 2, July 2004,199

hegemonic contestation over its narration. Such a view of international law, as one shaped by interests as opposed to universally shared values and norms, is hardly new; that said, the normative developments which have occurred within the state of emergency "maximally deployed" post 9-11 have brought this particular reading of law into sharp focus. That the boundaries of permissible state action have been reconfigured as a result is unquestionable; where the debate lies is whether the current state of exception has a relation to law or exists outside of it.

Modern theories of state repression suggest that we are likely to find law—both its rhetoric and its rules—at the intersection of the repression/dissent nexus. Repression has been defined as "restrictions placed by governments on citizens' political and civil liberties".[32] A number of political scientists have conceptualized the relationship between a repressive government's behavior and dissent as a two way street—both sets of actors (government and potential dissenters) seek out the most favorable strategies to achieve their goal. Davenport posits five indicators, which are assessed by the state when deciding to repress violence/dissent. Amongst these are questions related to the *feasibility* of various policy responses as well as the State's *ability* to carry out and *enforce* the reactive policy. Whilst the evaluation of these measures will likely take place, as Davenport argues, against the backdrop of the other indicators—the nature and degree of the threat, and the political economy of the state—the repressive tools of the State (particularly liberal, democratic states) both in kind and degree, are defined by the norms of that society and are reflected (indeed find determinacy) in the law.[33] As already discussed, when read in its pure form, law can both empower and limit the State, with the degree and extent to which the state can interfere with a citizen's political and civil rights relative to the State party in question. The argument follows that Western liberal democratic states are, in part, disadvantaged as law can both legitimize state repression whilst, concomitantly, mobilizing civil society against this repression (the image of the state fighting with

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[32] Christian Davenport, "Human Rights and the Democratic Proposition," Journal of Conflict Resolution, Vol 43, No 1, February 1999, 92. Davenport's later work breaks this down to two distinct groupings of repression—civil liberties restrictions and personal integrity violations. See Christian Davenport, Journal of Peace Research, vol. 44, no. 4, 2007, pp. 485–504, 487.

[33] Franks has argued that dissent and state responses can be understood by classifying opposition activity as legal-illegal and legitimate-illegitimate. However, I suggest that these two dimensions allow for evaluation of *both* dissent and State activity. See CES Franks, Dissent and the State 6 (C.E.S. Franks ed.1989)

one hand behind its back). Dissent can find a vehicle in both the national and international courts.

Checking State repressive measures and policing the space for dissent at the international level underpins the human rights framework. International human rights law strives to create universal standards and, "employs the language and the institutions of law to limit the harm the powerful inflict on the vulnerable."[34] The derogation of jurisprudence that has emerged from entrenched emergencies, where state repressive measures are most often deployed, is mixed. International human rights law is not silent on this question. States are, when faced with an emergency that "threatens the life of a nation" allowed to derogate from some (although not all) of their treaty obligations. Art 4 ICCPR, Art 15 European Convention on Human Rights, and Art 27 American Convention on Human Rights codify in international law the notion of derogation. Art 4 of the International Covenant on Civil and Political Rights (ICCPR) provides that "in times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" a state may need to take measures that derogate from certain rights. However, Art 4(2) limits application of this provision by providing a list of non-derogable rights to which no interference, even during states of exception, can be taken.[35]

A reading of the jurisprudence of the various treaty based bodies reveals two other qualifiers to the derogation regime. First, derogations are meant to be "of an exceptional and temporary nature"[36] and second, the extraordinary measures taken are meant to be limited to only that which is necessary to restore normalcy (that is, the means taken must be proportional to the legitimate aim of restoring normalcy). Therefore, "Respect for human rights and fundamental freedoms is the rule; derogations are the exception to the rule"[37]. Yet despite the restrictions on derogations, their place within treaty law is problematic.

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[34] Joan Fitzpatrick, Speaking Law to Power, EJIL, Vol 14, No. 2, 241, 242 (2003)
[35] These are: the right to life; freedom from torture, inhumane or degrading treatment or punishment; freedom from slavery; freedom from imprisonment because of inability to fulfil a contractual obligation; principle of legality in the field of criminal law; right to recognition before the law; and freedom of thought, conscience and religion. See General Comment 29 (CCPR/C/21/Rev. 1/Add. 11, 31 August 2001)
[36] General Comment 29 (CCPR/C/21/Rev. 1/Add. 11, 31 August 2001)
[37] Von Schorlemer p 278.

Whatever the intent of the treaty restrictions, in practice, there are two factors that plague the derogation regime. States are afforded broad discretion to assess their own security circumstance and decide for themselves whether or not there is an emergency threatening the life of the nation.[38] As well, there is no mechanism in place to test the validity of derogations at any stage. Indeed, as Gross has argued that there has been a rollback in the judicial supervision of emergencies.[39] More fundamentally, however, "the language and institutions of law"[40] that has shaped the language of the human rights movement, seemed no longer adequate to address the 'war on terror' discourse. Critics argued that the legalist approach to 'terrorism' burdened the state, but did not sufficiently address the conduct of 'terrorists', which left a gap between the rights discourse and terrorism discourse that States would only too willing to exploit. This lacuna allowed states to develop "rights-free zones"[41] which despite promises of 'change' remain firmly entrenched.

Achieving a radical critique of the counter-terrorism mechanisms and related discourse, unfolding at both the national and international sphere, necessarily confronts the definitional quandaries posed by concepts such as 'terrorism' and the 'war on terror,' which dominates the conflict narrative and courts ambiguity with pernicious effect. There is no fixed meaning in international law of either 'war' or 'terrorism.' The official discourse can (and has) constructed the identity of such terms creating, as Gross has argued, a "normless and exceptionless exception".[42] Underneath this umbrella, we have seen the 're-narration' of certain conflicts to reshape and internationalize territorial/national disputes, blurring the distinction between these 'old' and 'new' wars.[43] This has enabled States to reframe the

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[38] Lawless v. Ireland (1979-80) 1 EHRR 15, para. 28

[39] See Oren Gross, *'Once More unto the Breach': The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*", 23 Yale Journal of International Law 437 (1998).

[40] See Joan Fitzpatrick, Speaking Law to Power, EJIL, Vol 14, No. 2, 242, 241

[41] Fitzpatrick adopts this term originally used originally by Koh to describe the situation that unfolded for asylum seekers at a US Naval base in Guantanamo bay. See Joan Fitzpatrick, Speaking Law to Power, EJIL, Vol 14, No. 2, 242, 241 (2003) quoting Harold Koh, "America's offshore Refugee Camps" 29 Richmond L Review, 139, 140-141 (1994).

[42] Oren Gross, "The normless and exceptionless exception", Cardozo Law Review, Vol 21, New York, 2000.

[43] The distinction between what I refer to as old and news 'wars' refers to the debates within international law as to whether it is possible to apply the Laws of War to the 'war on terror.' As discussed later in the chapter, the use of the term 'war' is in itself problematic and suggests that what formally (old) was dealt with in a law enforcement paradigm (British engagement in Northern Ireland, for example) to an armed conflict framework.

discourse surrounding territorial or national disputes and divert inquiry as to the legitimacy of particular conflicts.

This conflation of territorial or national conflicts (some of which involve recognized self-determination claims) to the 'war on terror' distracts from examining several questions to flow from ethno-nationalist disputes that might radicalize how we conceptualize and legitimize-[de]legitimize the use of violence by both state and non-state actors. On a very practical conflict management level, this endeavour to re-narrate how the international community characterizes these conflicts delimits the deconstruction of violence in these disputes and, it follows, hinders the transitional justice process (the construction of peace). In a number of territorial/national conflicts, the use of political violence may be a tool for insurgent groups; the choice to fight can also be merely a detour back to the negotiation table.[44] Distinct from the rhetoric of 'new' wars, the underpinnings of ethno nationalist disputes can be identified and, importantly, demands by the 'out' or non-state group are made. Partial or full satisfiers may be identified and, therefore, negotiation and transition from conflict to post conflict is feasible.

The imagery, which accompanies the current terrorism discourse, suggests that, in contrast, these 'new' wars are distinct as they are de-linked from the territorial aspect of the 'emergency' As such, the goals of the actors are uncertain and there is little way to empirically measure the efficacy of state repressive measures (save for the absence of attacks and the successful adoption of counter terrorism measures). Whilst the imagery of the 'war on terror' is indeed distinct, the repressive measures adopted to fight the 'war' are similar in kind (but not degree) to those anti-terrorism measures already in place elsewhere and most comparably in Europe. As we have already noted, research undertaken by political scientists and more recently those within law suggest that a State's decision to repress is linked to the coercive capacity of that State; that is a state must, in part, assess what is *legally* permissible and enforceable.[45] It follows, then, that in turn this will shape the repressive measures adopted in both kind and degree and, significantly, their effect.

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[44] For more on this, see Christine Bell, Human Rights and Peace Agreements, 2000.
[45] See Christian Davenport, Regimes, Repertoires and State Repression, Swiss Political Science Review 15(2) 380: 377–85

Inherent in much of the comparative literature on the repression-dissent nexus, which examines the nexus between politics and law, is an assumption that it is possible to locate law in its pre-political self within states of exception. Yet the current legal landscape of exception has uprooted any notion of law as neutral arbiter. Indeed, the "national universalist"[46] approach of the United States (and the hegemonic contestation with Europe) has emboldened those who, in the wake of the events of September 11th, have engaged in a very public unraveling of international law. At the national level, the post 9-11 landscape has been accurately described as an "anti-terrorist legislative wildfire".[47] Anti-discrimination measures are stretched (and may be clarified) as racial profiling is allowing states to classify actors based on preconceptions of relative power, perceived threat and culture. Dissenters who fit this profile can, over time, become suspect communities (an interesting application of image theory)[48].

At the international level, the most critical of legal norms have been replaced by terms that lack legal determinacy, with battles fought against "legal phantoms".[49] The current and pressing needs of international security against "terrorist" threats defy norms codified decades ago. Judicial supervision of extraordinary measures provided by anti-terrorism legislation is often relative to the State party (and human rights culture) in question. The proliferation of emergency measures in the "war against terrorism" has created a temporary permanence of emergency, radically changing the emergency exception-normalcy rule.[50] The suggestion that this is a 'war' moves us from a law-enforcement to an armed conflict paradigm, leaving the international rights regime in a legal dead zone.

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[46] Martti Koskenniemi, "International Law and Hegemony: A Reconfiguration," Cambridge Review of International Affairs, Volume 17, Number 2, July 2004,198.

[47] Joshua D. Zelman, Recent Developments in International Law: Anti-Terrorism. Legislation–Part One: An Overview, 11 J. TRANSNAT'L L. & POL'Y 2, 1-17 (2001).

[48] Whilst I am reimaging the application, Hermann, Fischerkeller and Michael's theory was applied to states and was developed to move away from structuralists theories of state action or policy. They suggested that to understand state action, we must first understand how states perceive other states. These images of each other will produce certain *strategies*, which will result in certain *outcomes*. See Herrmann, Richard K. and Fischerkeller, Michael (1995) 'Beyond the Enemy Image Spiral: Cognitive-Strategic Research after Cold War', International Organization 41(3): 403-433.

[49] Joan Fitzpatrick, Speaking Law to Power, EJIL, Vol 14, No. 2, 242, 242 (2003)

[50] The exception-normalcy rule suggests that during times of peace, the normal rules of international law apply. International legal frameworks are crafted around the presumption that this is the dominant paradigm. A state of emergency is meant to be of a temporary nature and exists only during a time of emergency as defined by derogations; it is truly the exception to the norm. As we enter in to a *permanent* state of emergency, a paradigmatic shift occurs whereas what is now considered a normal state of affairs (a state of peace and therefore full human rights protection) to a state of exception.

The "paradoxical position of being juridical measures that cannot be understood in legal terms"[51] is most evident when we turn to the armed conflict paradigm. The use of the term 'armed conflict' suggests that the laws of war apply. Yet this war is against everyone and no one—it is neither inter-state, nor intra-state. Legally meaningless terms such as unlawful combatant further confuse the discourse. Whereas entrenched emergencies exposed vulnerability in the human rights regime, the current disarticulation between the international law rights regime and anti-terrorism (state of exception) discourse reflects more a chasm than a gap. This space has been occupied by "ambiguity advantageous to avoid legal constraints and to shift policy objectives with minimal accountability".[52]

The particular form of "national universalism" of the United States has been countered by a European "sovereign egoism" with a hegemonic contestation on just which hegemon controls this space. Whilst these divisions in the approach to law are clear, what is shared is the absoluteness within which each reads the law as "distinct from politics."[53] Koskenniemi has argued that the result has been that, depending on which project we refer, international law is then either "celebrated or discarded". This may be the case in effect but what is also clear is that whilst the rules of law may have been sidelined (or indeed discarded entirely), States continued to engage in the rhetoric of law, endeavouring to control the narration on what we mean by international law and therefore controlling the political costs of either adopting or discarding.

3.1. Constructing Narratives

The narratives of HRL which underpin these debates and tender the reconstruction of legal norms are rooted in local and discreet conflicts as disparate as Northern Ireland, Chechnya, and Israel and the Occupied Territories. Questions related to non international armed conflicts, urban warfare, combatant status, and the 'ticking bomb' scenario, can be found in each of these cases and predate the current terrorism discourse. The transnational nature of the "invisible" adversaries suggests a different type of enemy but the counter-terrorism measures used, and the security and necessity

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[51] See Giorgio Agamben, States of Exception, 1, (2005)
[52] Joan Fitzpatrick, Speaking Law to Power, EJIL, Vol 14, No. 2, 248, 241 (2003)
[53] Martti Koskenniemi, "International Law and Hegemony: A Reconfiguration," Cambridge Review of International Affairs, Volume 17, Number 2, July 2004,198

defence language that rationalise these draconian measures are hardly new. What has shifted significantly is the HRL landscape within which these instruments are deployed. As Fitzpatrick has argued:

> Fundamentally human rights standards have not changed since September 11th. But the political atmosphere has palpably altered. The human rights regime is menaced by potentially dramatic alterations in the rules on the use of force in international relations and in the norms of the use of humanitarian law. Human rights institutions largely conduct business as usual but with a sense of dread, defensiveness and political polarization. For many years, skeptical, standoffishness, and self righteous, the United States now exercises its hegemony more corrosively than ever on the human rights regime [with] repressive governments…embolden to pursue their own business as usual with less fear of critical scrutiny by the United Nations [UN] Charter-based bodies.[54]

Fitzpatrick's review of the state of HRL, written in the wake of the events of September 11th, remains relevant. The developments that were taking shape at that time of her seminal writing have now taken root. As we distil the normative arguments that have flowed from (and in many ways shaped) these developments; three different forms of argument take shape; the legal/judicial; extra legal/official disobedience and; the moral absolutist. I will briefly look at each in turn.

The first camp proffers a position that I have referred to as legal/judicial. Those who draw from this argument are likely to adopt one of two approaches. The first approach is that the State act has a legitimate aim, one that is prescribed by law and is not in conflict with international legal responsibilities. The legitimate aim most often produced is the necessity defence. Domestic anti terrorism and security provisions often ensure that the measures adopted are indeed lawful within the domestic context. Evaluation at the international level often involves some degree of legal (linguistic) gymnastics. The second approach may take one of two routes. A State may simply deny responsibility and therefore accountability (action did not take place or did not unfold in the way suggested) and therefore no violation occurred. Or (and

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[54] Joan Fitzpatrick, Speaking Law to Power, EJIL, Vol 14, No. 2, 241, 242 (2003).

increasingly) a State will measure its actions against a third body of 'law' that has accompanied the counter terror/armed conflict paradigm; a lacuna wedged between IHL and human rights obligations (for example the crafting of counter-terrorism as a "new species of international armed conflict"[55]). The State takes its obligations outside the perimeters of both HRL and ICL and situates its actions within an armed conflict paradigm; one that has no legal determinacy but endeavours to derive its legitimacy through the terrorism conflict narrative.[56]

The second option, born of a *real politick* approach, is that the action of the State (armed with a necessity/security defence) has taken place outside of existing (but inadequate) international legal norms. No attempt is made to provide, in advance, legal justification for the particular act but rather to argue a retrospective application of law; if the action does meet a legitimate aim (e.g., in preventing the use of unlawful violence) then an *ex post facto* argument is adduced, one fashioned on civil disobedience. Actions by states that draw on one (or more) of these arguments include 'enhanced' interrogation techniques (e.g. torture), pre-emptive strikes (targeted assassinations), extraordinary renditions, administrative detention, and exclusions from refugee protection.[57]

The moral absolutist position, found both to the left and right of the other two approaches, simply argues the moral urgency or certainty of the State's act itself. Within this camp, two apposite evaluations emerge—the first looks specifically at whether the action itself is morally corrupt (torture, administrative detention, pre-emptive killings), whilst the second rests on a pre-emptive defence argument; that is an action must be evaluated based on what *could* unfold should the action not be taken (unlawful use of violence, killing of innocents, security of state). There is no attempt to locate these arguments within the ambit of the law (although they may

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[55] Joan Fitzpatrick, Speaking Law to Power, EJIL, Vol 14, No. 2, 241, 241 (2003).

[56] The impact of this particular route is that if States invoke this framework often enough, a 'customary' nature emerges that displaces existing legal boundaries.

[57] Commentaries on these extra legal measures will often draw on one or more of these arguments. For example, allegations that 'enhanced interrogation techniques' undertaken by the US in its 'war on terror' constitute torture (and therefore unlawful) have been countered in a number of different ways— by denial; by arguments that the actions taken did not meet the threshold of torture; by invoking the necessity defence or, (and increasingly), an *ex poste factos* argument. There are a number of critical analyses of the discourses emerging in the post 9-11 legal landscape. Of particular note, see Joan Fitzpatrick, Speaking Law to Power, EJIL, Vol 14, No. 2, 241 (2003) and Martti Koskenniemi, "International Law and Hegemony: A Reconfiguration," Cambridge Review of International Affairs, Volume 17, Number 2, July 2004, 199.

attempt to draw on it) or to suggest that justification is possible after the act, but rather to argue that the moral imperative is pre-emptive of any other reasoning.

These positions, in varying degrees, fall vulnerable to critique, based on what are either un-factored variables or points of departure that fail to find legal (or empirical) determinacy. The impression that is left is that once the necessity defence is raised as the 'legitimate aim' of a state practice or policy then the act itself will meet this aim, whether lawful or not under HRL. Questions of proportionality may be raised, but there is an underlying assumption that it is not possible to empirically test the efficacy of a measure (given that is it pre-emptive). Those, like Posner, who proffer this approach, rely on the merits of the necessity defence.[58] That said, any reading of history, even cursory, is quick to reveal the tendency of States to repeat failed initiatives; it is myopic to wed the frequency of practice with success.

Although there have been some attempts to evaluate these arguments through the lens of case studies, a review of the literature suggests a need to empirically fill some of the gaps in the current debate. There are significant questions that extend from the rather broad debates on the inter-relatedness between human rights and humanitarian law, the efficacy (and relevance) of rights-based language in the 'global war on terror' and, related, the ostensible legal lacunae created by the reconceptualisation of counter terrorism as a new form of 'armed conflict.' The necessary imprecision of human rights and humanitarian law, discussed earlier, have left it exposed and vulnerable; its language displaced with new narratives based on security and necessity crafted within a permanency of exception. From within this landscape,

> […]the normative aspect of law can thus be obliterated and contradicted with
> impunity by a governmental violence that—while ignoring international law

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[58] Posner's treatment of emergencies is argued in "Emergencies and Democratic Failure", 92 Va. L. Rev. 1091 (2006) (with Adrian Vermeule) and additionally in "Emergencies and Political Change: A Reply to Tushnet", 56 Stan. L. Rev. 1593 2003-2004. His argument that violations of civil liberties will at first be "bemoaned" by future generations but then embraced when "the hour of emergency comes round again" provides a narrative of emergency that has, at its base, two readings of exception. The first is a Schmittian notion of emergency as that which is inscribed within the law and; second, that emergency can have a mobilizing even cathartic relationship with civil society. Posner argues "Emergencies expand the boundaries of political possibility, often for the better, not worse." (1596).

externally and producing a permanent state of exception internally—nevertheless still claims to be applying the law.[59]

This reading of human rights law, re-imagined in its political self will likely ignite debate.   Yet, as I have argued elsewhere, '...the disquiet in laying law bare is necessary if we, as scholars of Islamic law and of public international law, are to reclaim the narrative, which speaks law to power.'[60]

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[59] See Giorgio Agamben, States of Exception, 87 (2005).
[60] K Cavanaugh, 'Narrating Law' in Anver Emon, Mark Ellis and Benjamin Glahn, eds, <u>Islamic Law & International Human Rights Law</u> (forthcoming OUP, exp. 2013)