The Unique and International and the Imperative of Discourse

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I. BETWEEN INTERNATIONALISM AND PARTICULARISM

When we consider the dynamics between international law and the paradigms of cultural and moral uniqueness or particularity, we ought to think about two distinct aspects of this relationship or dynamic. On the one hand, there is the issue of whether international law ought to care about unique and particular manifestations of culture and morality. This is especially so when talking about the relationship of international law to religion. International law—in particular the human rights tradition within international law—represents a set of normative claims about the way that human beings ought to act, behave, and even, at times, think. As such, international law makes intrusive demands upon the moral space in which human beings function. But this is the same moral space for which claims of moral particularity or religion compete, and the pertinent question is: should the proponents of international law defer, in any fashion, to the competing claims for moral space that are made by the proponents of moral particularity or religion? On the flip side of this equation is the equally compelling consideration: whether particular or unique religious systems or cultural paradigms ought to care about or defer to the competing claims of international law? In essence, the question can be posed with equal force to both paradigms: the paradigm of internationalism and the paradigm of moral uniqueness.

I will be arguing that in fact both paradigms have no alternative but to be concerned with what the other has to offer, and I will do so on the basis of a theoretical exposition. Coherent theoretical stands are often the only safeguard against result-oriented activism. When human rights activists and religious activists act without the restraint of reflective and self-critical pauses, they often end up violating the moral space in which human beings function. Instead of

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presenting claims that could be evaluated and negotiated, their behavior starts to resemble an arrogant and self-absorbed invasion of the moral space of the “other.” But, as we encounter in the doctrine of humanitarian intervention, intrusive invasions of the moral space of others is at times well justified and clearly warranted, but it ought not to be done lightly. At a minimum, any act of moral interventionism, in which internationalists challenge and attempt to deny more particular visions of the right or good life, must be justified in coherent and accountable terms—otherwise, moral interventionism starts appearing whimsical and despotic. I should note that my own expertise comes primarily in the Islamic context and so much of what I am going to say will relate to the context of Islamic law and Islamic tradition, and their interaction with the international context.

II. INTERNATIONALISM, CONSENT, AND FAILURES OF PROCESS

Returning to the main issue on hand, the question this Article poses is in two parts: (i) should international law be concerned with what the paradigm of uniqueness—sometimes referred to as cultural relativism or cultural specificity—has to say; and (ii) should the culturally relative be concerned with what international law has to say? As to the first part, international law is, by its very structure, an amorphous and rather negotiable construct. While it is possible to pretend that international law can be reduced to a positive and particularized set of commands, often what we observe taking place in international law is an implementation of particular commands, within a certain hierarchy structure of priorities, that are based on moral imperatives. These moral imperatives—if international law is to mean anything at all—are supposed to transcend the particular and the unique to reach the general and universal. It would not make any sense if international law created imperatives that simply were bound to each specific context because then, logically, each specific context, if given its full extent, would completely negate international law. The very logic of international law is one of universality and generality. International law cannot be made to defer to specific or particular conditions and at the same time retain its integrity as an international, or multi-national legal system. But at the same time that international law is supposed to transcend the particular and the unique, like all legal systems, international law is founded on the assumption that it has legitimacy. And, in fact, it is reasonable to maintain that international law in particular has a functional need to bolster and deepen its claim to legitimacy. In addition, I would argue that even if one assumes a natural law premise, the legitimacy of international law must necessarily rely on one form of consent theory or another. So, even if per international law, one asserts a right to dignity, the person who exercises the right must consent to being dignified—he must
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desire it, and even, in certain circumstances, demand it. Interestingly, it becomes undignified, or it becomes a negation of dignity, to force someone to be dignified, if they do not wish or desire dignity. Therefore, the legitimacy of international law distills itself in a presumed paradigm of collective consent, not necessarily the consent of each individual person, but some degree of collectivity by which a people relinquish an amount of autonomy in exchange for a regime of rights and duties. In a sense, the collectivity, however it is defined, relinquishes something of its particularity and specificity in return for an international regime of safeguards and protections, whether such safeguards and protections accrue to the benefit of the collectivity or the individuals who constitute the collectivity. To be quite clear about the premises of international law and what international law means: international law is premised on a consensual relinquishing of a degree of autonomy in return for a generalized regime of rights and duties.

Significantly, the age-old presumption often made by international lawyers, that consent is dependent on a state or government, which represents the collectivity, by now has become thoroughly flawed and discredited. There are many reasons for this, but, at a minimum, the state is often an imperfect, and indeed inadequate, conduit for legitimacy and consent. Whether the state binds itself to an international obligation or dissents from it is not particularly informative or telling as to whether the collectivity, which the state is supposed to represent, in fact agrees or disagrees with the position of the state. Put more simply, governments are institutions that develop their own sets of vested interests, and their own mechanics and dynamics of power. Reliance on the state, or the governments that represent states, as the main agency for obtaining legitimacy and consent, effectively means nothing more than dealing with an elite within the state—the elite that claims to represent the state. In other words, the reality is that when we deal with the state, we are not dealing with the collectivity that a government claims to represent, but with a particular set of vested interests within the collectivity, and those interests are often the interests of an elite, and not the collectivity, as a whole. Of course, democratic governments can more convincingly claim to represent the genuine interests of their collectivities than can despotic systems of government, but it would be a mistake to presume that democracies are perfect in this regard. Even democracies do not equally represent the interests of their own collectivities because of social and political imbalances, and economic, racial, and class inequalities that plague most, if not all, democracies in the world. Especially when it comes to matters that implicate international law, democracies do not equally represent the interests of their citizens. From a sociological point of view, in democracies, matters that relate to international law are usually part of the realm of consciousness of only the most educated and privileged classes within society. For the least empowered classes in a democracy, matters that
implicate international relations or the law of nations are usually too remote and intangible to be seriously experienced and engaged. In addition, to the extent that democracies defer to the will of majorities, the interests of minority groups continue to be in a disadvantageous position as far as the processes of international law are concerned.

Accepting the argument that the state is an imperfect representative—an imperfect conduit for legitimacy and consent in international law, and that for international law to be meaningful, one must transcend the traditional dependency on state representation and state consent, we are then left to deal with the actual international collectivity, in other words, human beings. It is important to emphasize what ought to be rather obvious, and that is, it is human beings who are the actual source of legitimacy for the regime of duties and rights under international law. In order, however, for the legitimacy of international law to be effective—if we are going to avoid the age-old problems of majoritarian dictatorships, cultural hegemony, or the autocracy of an elite—we must acknowledge that, as a corollary to the right to consent, and also as a corollary to the process of relinquishing autonomy voluntarily, uniqueness is important. Uniqueness or the freedom to be unique and take exception is not simply a concession made by international law to cultural relativism. Rather, it is a necessary, and inescapable, acknowledgement of the requirements for the legitimacy of international law.

Most importantly, uniqueness is not simply the right to dissent from the imperatives set by an international regime. Often, when international lawyers approach the issue of cultural relativism, they speak in terms of whether international law ought to incorporate a system of uniqueness, and by that they mean, whether international law ought to incorporate a system of dissentions or exceptions. But this is a very limited and partial, and indeed often unhelpful, way of understanding the issue of uniqueness. In fact, uniqueness is not simply the right to dissent in particular circumstances, but it is the right to contribute to the formulation of international imperatives so that this uniqueness becomes the right to shape the ultimate form of international obligations—the ultimate form of the international regime. In this sense, the answer to the question of whether international law ought to care about uniqueness, must inevitably be yes. International law in fact has no choice but to care about the particular and unique. But I think that it is helpful that international lawyers not be focused on the unique as simply a process of dissenting or a paradigm of exceptionalism, but the unique as the process of contributing one’s own identity—one’s particular identity—into the ultimate shape of international law, and the ultimate shape of rights and duties that arise within that paradigm.

Now that I have discounted the state as an appropriate representative of legitimacy and consent, we then get into the problems of international law as it is shaped in the present international context. On this point, I think it is quite right
to say that international law often experiences a failure of process. This failure of process is due to the fact that the ability of the unique to contribute to the formation of international law, like many other things in life, is vulnerable to power dynamics, class interests, patriarchy, and a whole host of other limitations that influence, subvert, and even undermine the process. I would argue that in order for international law to have a meaningful impact, and as a part of grounding itself in legitimacy and consent, while engaging in the process of incorporating the unique, we need to think very particularly and specifically about the means of democratizing the processes of international law, and the means by which it integrates, in its own formation, the views of those who are typically not represented. In this context, unless one has been sleeping through the past few centuries, one must fairly conclude that among the views that have not been represented, nor sufficiently capable of giving consent and legitimacy, are those of women. International law in its historical processes has been a patriarchal institution. Having said that, the failure of process identified here does not create a presumption in favor of particular determinations or conclusions, but such a systematic historical failure does create a particularized burden—for further integration of the voice of women into the formulation of international law. I will return to the idea of failure of process and the burdens of inclusion that such failures generate, but first let’s address the other half of the inquiry regarding the unique and its response to international law.

III. MORAL PARTICULARISM AND ITS RESPONSE TO INTERNATIONAL LAW

Should the unique care about what international law has to say? I will rely on the Islamic context because of my experience, but much of what I will say is generalizable to other religious traditions, and other morally particular paradigms. Most fundamentally, the biggest challenge to the idea that the Islamic ought to care about the international is a rhetorical point, but it is a rhetorical point with a significant amount of persuasive force. If in Islam, God is sovereign and God sets the priorities and imperatives that ought to be followed by the followers of the religion, then in a moral sense what ultimately should matter is God and God alone, and not what the international community thinks or demands. International law relies on the consent or will of those governed, but Islam relies on the will of God, who is the real sovereign and source of legitimacy. On its face, it is as if the religious answers to a different master, and thus, could not possibly be reconciled with any claimed universalism that does not answer to the same source of legitimacy and legality. This is the typical argument one encounters when one speaks about an Islamic uniqueness, and whether it should care about what international law mandates. Typically, the argument is that Muslims—and I believe this can be generalized to other
religious traditions as well—have a different master, a different source that they must answer to—a source that is not interested in international legal obligations, and that is not bound by anything other than itself. Therefore, according to this view, whether international law says: “give ‘x’ more rights” or “give ‘y’ less rights,” ought not to matter to a religious system, or to a system that is not bound by human will and consent as its source of legitimacy.

Although this argument is popular, it is flawed. There are what might be described as external and internal objections to this argument—the external objections have to do with the process of international law, and the internal have to do with the epistemology and hermeneutic processes of religious determinations. The religious argument presented above does not adequately acknowledge the paradigm of consent and legitimacy in international law. Those who make this argument often assume that international law acts as if it is a god, legislating ultimate morality without the involvement of various participants, including the involvement of the religious, unique and particular, into the process of formulating international law itself. In principle, international law could incorporate determinations that are based on God’s sovereignty or religious pietistic views concerning what ought to be binding upon all human beings. Since international law does not need to worry about the doctrine of separation of church and state, unlike American constitutional law for example, religious law could be incorporated into international law, as part of what represents the consent and will of the governed. Conceptually, there is no reason for religious determinations not to become part of the universals of international law. If religious perspectives desire to be included in the paradigm of international law, these perspectives need to be accountable and accessible to the “other”. If a good portion of the world becomes persuaded that a particular determination ought to become binding on all human beings, the fact that this determination was derived from a religious tradition is not in itself disqualifying. There is no reason that the religious should abandon international law, and there is no reason that international law should become the exclusive realm of the secular. If the religious is convinced that what it adheres to is good for and generalizable to humanity, then being involved in the international legal process means that the religious must find ways of making its assertions about good and evil or right and wrong accessible and accountable to the “other.” By accessible and accountable, I mean the ability to make the determinations of the religious coherent and sufficiently convincing, so as to persuade the “other.” For example, the natural law tradition has had a powerful impact upon the field of human rights, and has contributed to the globalization of the paradigm of inherent and fundamental human entitlements. Although the natural law tradition grew out of a Christian religious experience, at the international level, it was forced to find ways of communicating, persuading, and influencing the Muslim, Hindu, Buddhist, theist, and every other convictional system in the
There is no doubt that the process of international engagement led to transformations in the natural law tradition that forced natural law lawyers to revise many of their constructs and arguments. Whether the revising and recasting of the natural law tradition was a worthwhile act to the Christian champions of the doctrine depends on the level of commitment that these champions might have had. Arguably, for example, it is worthwhile for John Finnis, who is an influential committed Catholic and natural law jurist, to modify his arguments for natural law in such a way that his beliefs and convictions might become more accessible and persuasive to those who do not share his religious convictions. In this regard, Finnis might be forced to de-emphasize his references to Catholicism or otherwise downplay the role of his religious convictions in articulating his natural law theory, but at the same time, he is able to make his approach more persuasive to Muslims, Jews, or any other non-Christian group. At the rhetorical level, one might even say that by influencing the international, the religious is able to expand the realm of God’s sovereignty and will on this earth. The more the world follows what would be consistent with the demands of the divine, and incorporates these demands into a system of international obligations, it is difficult to imagine a loss to the idea of divine sovereignty.

But I think the problem goes deeper than that because from a religious perspective, this functional approach is not persuasive. As such, the question is: why should the religious get involved in the process in the first place? Why not simply abstain from the process, because ultimately, the international process is irrelevant to the religious frame of reference and structure of authority? To argue that the unique or religious ought to work through the international paradigm in order to accomplish incremental achievements is not, by itself, compelling for a paradigm of uniqueness. We need to look more specifically both at the internal processes of the unique or religious, and, shifting the gaze, we need to look at the unique or religious as the potential universal.

IV. THE PARADIGM OF UNIQUENESS AND THE FAILURE OF PROCESS

Proponents of cultural relativism, and more specifically Islamic exceptionalism, often ignore the fact that Islam, and most religious traditions, are the product of cumulative interpretive communities. Importantly, the
participants in these interpretive communities have not been primarily divine but human. In other words, we ought not ignore the process that generated Islamicity in the first place, and the pivotal role of the human agent in the formulation of Islamic law. To the extent that the religious demands conviction from its adherents, it necessarily relies on a consensual model for the establishing of orthodoxy and the creation of dogma. Despite the claims of divinity, it is important to think about the socio-historical processes that generated these convictions in the first place. In the case of Islamic law, for example, there is an authorial enterprise behind many of the determinations that are treated as orthodox or as the established dogma of the religion. I am not denying the possible divine origin of many of the legal prescriptions found in Islam. As a believing Muslim, I developed the conviction that much of what Islam asserts is the truth is in fact divine. But I also recognize that although there is a divine core to the religion, much of what defines Islam today is the product of the cumulative efforts of various interpretive communities that constitute the collective authorial enterprise behind many of the determinations associated with the religion. In other words, like international law, the unique or religious is subject to a sociology of process that reflects the power dynamics and social biases that prevailed, or continue to prevail, within the interpretive communities of the religion. As such, the unique or religious is subject to a failure of process, which in this context means a systematic exclusion of the voices of particular groups from the authorial enterprise that formed the determinations of the unique or religious. Importantly, often these failures of process can be pointed out by outsiders to the tradition—those who are not so intimately involved in the tradition itself. Such critiques by outsiders, if done in an arrogant or what might even be called an imperialistic fashion, are most certainly alienating to the unique or religious. But, in principle, we ought to recognize that the participation of outsiders in a discourse with the various traditions of the world offers these traditions an opportunity to notice entrenched failures of process, and to at least consider whether corrective measures are warranted. Examples of this are abundant in the international discourse over the institution of slavery, child labor, trafficking in women, and women's rights. I am not advocating a one-way moral monologue by a party claiming to represent the international to the unique or religious. In fact, the international paradigm is subject to its own failures of process that can benefit enormously from the critiques of those who have traditionally been excluded or under-represented. A participatory and cooperative model that recognizes the right of dissent—not as a right of exception, but as a right of heightened

2 On the authorial enterprises and cumulative interpretive communities in Islamic law, see Khaled Abou El Fadl, Speaking in God's Name: Islamic Law, Authority, and Women 96–133 (Oneworld 2001).
contribution—allows for a strong role to be played by any discourse that impacts upon the consciences of the international and the unique. In this paradigm, any good faith discourse that appeals to the consciences of the interpretive communities that form either the international or the unique is seen as a moral and ethical good—not as an intrusion or a form of interventionism. The insularity and exclusiveness of the unique or religious will only help shelter possible failures of process and will permit whatever hegemonic powers that might have become established within a particular tradition to go unchallenged. This is not a minor point because human experience has shown that ethically troubling practices, such as child marriages, physical abuse of women and children, female genital mutilation, poor health care, exploitative labor practices, or homelessness, flourish behind a veil of secrecy, and that often they are resisted when challenged by outsiders to the culture. Importantly, such practices are rarely sanctified within a particular culture unless there has been a failure of process that has contributed to the desensitization of that culture to the social harm that results from these practices. This is exemplified by the fact that the failures in process are often identified and analyzed by internal voices to the culture, and these internal voices are usually the same individuals who have been the primary victims of this process failure. But if the criticism by outsiders lacks good faith, or are one-sided monologues, such criticisms will fail to persuade insiders to the culture, who are ultimately the ones who have to become convinced that there has been a process failure or that there is a need for reform.

V. THE UNIQUE AS THE UNIVERSAL

The second point to make here relates to the nature of the claim of uniqueness. I have been referring to the universal and unique as if they are objective categories, where one represents the mainstream and the other the exception to the mainstream. But in reality, the claim of universalism can be made on behalf of an international system or by a particular religion or culture. For instance, many religious systems do not claim uniqueness as an individualized exception or particularized prerogative. Rather, such systems present an often comprehensive view of the moral or just life, and whether such a view is presented in the form of a demand upon the world or not, it is not morally or ethically neutral. In other words, often it is not the case that a so-called unique or religious system is simply demanding that it be allowed an exception without further normative implications. In claiming dissent from the larger world context, a system with a comprehensive view of the good and just life is making a normative argument about the nature and value of human beings, and the purpose and meaning of life.

In the Islamic context, this may be called the universalistic imperative of Islam. Islam, like many other religious systems, does not simply claim to regulate
the life of a small group of individuals living out their own particularities—for example, Islam does not limit itself to regulating the life of the Arabs of Saudi Arabia. Instead, Islam is presenting a universal and comprehensive vision of morality, ethical values, and human worth. Therefore, in the very act of dissenting from the international paradigm is an offer of an alternative way of life. If, as in the case of Islam, what we have been, rather inaccurately, calling the unique is actually universal—in the sense that it is making comprehensive and transcendent claims about the good life—then every engagement with the world constitutes an affirmative position. If one universal system claims dissent from another universal paradigm then, in effect, it is clashing or at least competing with the alternative. Put differently, when a universal paradigm seeks to dissent, it cannot simply claim cultural relativism as justification, unless it is willing to relinquish its claim of universalism. Why is this important? Because when looked at from this perspective, for instance, in the case of Islam, the very claim of universality by the Islamic system must come to terms with the fact that the audience is the world at large. It is notable, for example, that the holy text of the Qur'an speaks to humanity at large, and not just a specific race or culture. If Muslims insist on a paradigm of relativism and particularness, and claim Islam as a specific phenomenon unrelated to the rest of the world, this ultimately deconstructs and de-legitimates the universalism of Islam. Muslims cannot ignore the international audience without ultimately deconstructing and marginalizing Islam as a world religion. But a religion, such as Islam, transcends not only territorial boundaries, but also many cultural manifestations. Consequently, Muslims cannot claim that all universalisms are fundamentally false without making the universalisms of Islam false, as well. If Muslims accept the possibility of universalism, and also accept that the audience is the world at large, then even in objecting to an imperative of international law, there is no peaceful alternative to discourse and the attempt to persuade. But if the discourse has integrity then it cannot be based on the dismissiveness of claimed exceptions, or unaccountable entitlements. I will develop this point below.

VI. INTEGRITY OF THE DISCOURSE IN THE PARADIGM OF UNIQUENESS AND INTERNATIONALISM

Thus far, I have argued that the international and unique cannot ignore each other without undermining their own legitimacy, and that failures of process, experienced in each of the paradigms, can be detected and corrected only through a cooperative and participatory paradigm of serious discourse. But there are difficult practical problems that confront us on this point because the discourse, when it exists, is marred with defects and failures. Nevertheless, if I am correct that the international cannot ignore the unique, and the unique cannot ignore the international, failures in the discourse should not determine
whether there ought to be a discourse in the first place. If we recognize the importance of the engagement between the international and unique, discourse failures are only augmented if either the international or unique submit to the unhelpful logic of privileged exceptions or unaccountable entitlements. To be more concrete, entering reservations to human rights treaties where, in effect, a country accedes to the obligations set by the treaty but only to the extent that such obligations conform, for instance, to Islamic law or American law would be an example of the logic of exceptionalism, which undermines the integrity of the discourse. It would be of far greater integrity to refuse to sign the treaty, and justify such a position to the world community, and if the position is not justifiable, to bear the consequences of such an abstention. Similarly, the unaccountable privilege of veto power that some nations enjoy in the Security Council is another example of a practice that is irreconcilable with the integrity of discourse.

The engagement between the unique and international is premised on the assumption that the discourse between the two must be open, accessible, and responsive. In fact, it must meet what I will refer to as the conditions of integrity in discourse, namely: diligence, honesty, self-restraint, reasonableness, and comprehensiveness. I would argue that each of these conditions is necessary for both the integrity of the discourse within the unique, and also between the unique and international. The conditions of integrity in discourse aim to limit the possibilities for abuse and despotism that often result from the failures of process experienced within the unique or the international. I have argued elsewhere that the violation of the conditions of integrity strongly contributes to the legitimating or construction of authoritarian dynamics that undermine and paralyze the process of discourse. The lack of integrity in discourse strongly contributes to de-legitimizing and the breaking down of the authoritativeness of the participants, and ultimately, ending the vitality of the discourse.

In practice, there are many problems that affect the integrity of the discourse within the unique and also between the unique and international. For example, one serious problem that many commentators have already addressed is the problem of hypocrisy in the assertion of international human rights. For example, few are interested in the plight of Palestinian women, in terms of health care and education, under Israeli occupation in the West Bank and Gaza, while a far greater number of people were interested in the plight of women under the Taliban. One can provide endless examples of hypocrisy and very selective levels of sensitivity in the discourses between the unique and international, and in fact, I think that if one had to identify the most difficult

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3 For a justification of these conditions of integrity, see Abou El Fadl, Speaking in God's Name at 53–58 (cited in note 2).
challenge to the necessary integrity in discourse, it would be both the actual and perceived hypocrisy and double standards that plague this field. However, it is important to note that the same type of hypocrisy and selective sensitivity exist in the inner dynamics of the unique as well. For instance, the suffering of women or insular minorities within specific paradigms of the unique does not receive the same level of sensitivity or attention as other more politically empowered groups.

This leads us to another one of the recurrent problems plaguing the integrity of discourse. Many claims of uniqueness are made simply as a point of political empowerment, and not as a point of moral empowerment. The unique itself is frequently hindered by the rampant use of apologetics, primarily as a defensive response to the international. For example, in the Islamic context, claims made within the unique and to the international are often made not to explore or explain Islam, but as a defensive response towards the other. Many claims made within the Islamic context are motivated by the sole desire to prove Islam’s ability to compete morally with every other paradigm. So when some, for instance, say that Islam liberated women, they do not say it as an assertion to be analyzed, disputed, and proven, but simply as a point of cheerleading for the tradition in order to score a point against the other—typically, the West. But the rampant use of apologetics by the unique, or Islamists, does not only lead to the failure of discourses within Islam, but also to the failure of the international to take the claims of the unique seriously. The use of apologetics, and the reaction to such apologetics, leads to a situation where statements made about what Islam is or is not—whether such statements are made by the participants internal to the unique or by the international in response to the unique—are often based on the most impressionistic and politicized pieces of evidence that in fact have nearly nothing to do with the mechanics and realities of the Islamic tradition. Put simply, the use of apologetics and defensive discourses within the unique lead to a denigration of the quality of discourse either within the unique, or between the unique and the international.

On the same theme of exploiting the unique and international to seek political empowerment, one finds the unique is frequently constructed primarily as a means of asserting a separate identity of the other. Importantly, just as frequently the outsiders dealing with a tradition are eager to accept the claim of uniqueness, but primarily as a means of distinguishing and denigrating the other. While we find that some claim an exaggerated sense of uniqueness in search of a separate identity, we also find that the acceptance of these claims is sometimes motivated by the same desire for distinction and autonomous identity. Examples of this process are easily found, for instance, in the assertions of Muslim fundamentalists about Islam’s attitude towards women, and the eager willingness of Western fundamentalists to accept these assertions as true. In this context, Muslims who attempt to find grounds of commonality between Islam and the
West finds themselves accused by both sides—the Islamist and the Western—of lacking legitimacy or genuineness. So, for example, as an Islamic scholar, I can look into biographical dictionaries that were written 600 or even 1,000 years ago, and find that these biographical dictionaries list hundreds of Muslim women jurists. On one occasion, I found a reference about a woman jurist who used to pray in the midst of men—right there in the same line as men prayed. A jurist, named Abu Layla, asked her to move from the men’s prayer rows, and join the women. She said: “They are not more knowledgeable than me, so why should I?” In the midst of rampant apologetics, and in the midst of highly politicized assertions of Islamic authenticity, which are not necessarily vouched for by the actual historical record, it becomes exceedingly difficult to speak about the possibilities that contextual examples, such as this, may offer for curing failures of process within Islam, and finding commonalities with other human beings. My point is that the historical record offers possibilities that could enrich the internal and external discourses, but that such possibilities are inadequately exploited because of the lack of integrity that often plagues such discourses. In the case of Islam, the historical record is often not consistent with the typical assumptions that either insiders or outsiders hold about what Islam is or is not. But engaging the historical record critically, honestly, and rigorously is often hampered by the primacy of political considerations that the derail serious investigations of the tradition. Importantly, the failure of international law practitioners to take the processes of international law seriously, and the use of these processes as a stick to smack people on the head, instead of engaging them, leads to the corruption of the discourse with the unique. Put differently, too many practitioners of international law seek to find a uniqueness or difference when such differences are in fact not compelling, or at least, not inevitable. Similarly, the apologetic and defensive practitioners of the Islamic tradition do not take the Islamic tradition very seriously, but often claim it as a way of affirming a distinctive identity—affirming a perceived uniqueness that does not necessarily exist.

VII. Skepticism and Seeking the Beautiful and Sublime

In studying the arguments of those who have argued that uniqueness is dispositive, and that most universals are false, one is struck by the fact that, especially in the Islamic context, nearly every claim of relativism—and nearly every claim of uniqueness—is expressed on a foundation of cultural arrogance. For example, I recently wrote a review of a book that argues that Muslims have

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4 For an example of this see my essay on tolerance in Islam and the responses to my essay, especially the response by Stanley Kurtz in Khaled Abou El Fadl, The Place of Tolerance in Islam 51–55 (Beacon 2002).
their own sense of reality; they do not really have a Western sense of time, and really do not have the same sense of reality that Westerners do. According to this book, Muslims must be accommodated in their own way because they have a very different way of seeing and understanding life. The most striking thing about this book is the extent to which its ostensible accommodationist approach to Islam masks an undeniably condescending attitude towards Muslims. For accommodationists, such as the book’s author, the claim of deference to uniqueness amounts to nothing more than saying Muslims have a right to be uniquely ugly, uniquely stupid, or uniquely despotic! This surreptitious concession to the integrity and autonomy of the other is actually nothing more than another manifestation of the lack of integrity in discourse. The point is not that every claim of uniqueness must be treated as inherently suspect, but that a healthy dose of skepticism would be advisable when dealing with a claimed uniqueness either by insiders or outsiders to a tradition. Moreover, those who claim established universals ought to be vigorously questioned about the failures in their own processes and the integrity of their own discourses.

I will close with a note about a possible universal that might help establish common grounds for a cooperative and participatory collaborative venture for the international and the unique. When one looks at the tradition of discourse in the international context, and when one looks at the tradition of discourse in many of the unique contexts, particularly those that are religious, one will find that what unifies them is a preoccupation with discovering the aesthetic of the sublime—with discovering beauty in the human condition. I have not yet found in the Islamic context—not in my readings in Judaism or Christianity—a single authority who says: “we particularly cherish the ugly.” And I have not found ugliness cherished by anyone writing on behalf of the international or unique. I would suggest the aesthetic of the sublime—the idea of beauty and the conditions that promote what is beautiful—as a unifying goal of humanity. The sublime is a state of human goodness in which people feel safe, healthy, fulfilled, dignified, and free from suffering. I think that intuitively we sense that suffering, including suffering because of a patriarchal context, is never a beautiful thing. And from the perspective of the Islamic, it would be truly difficult to argue that God finds beauty in the suffering of a human being. Furthermore, I would argue that in direct proportion to the spread of suffering is the regression of the sublime and beautiful in human life. The greater the amount of social and economic hardship and misery, the lesser the ability of human beings to reach for the aesthetic or the sublime, including the ability to overcome the physical

limitations of life and to reach for the transcendent. If a human being does not feel a sense of significance in life, dignity, and safety, the conditions for the creation of beauty, including the transcendent is seriously compromised. I would argue that belief in religion, the generation of folklore, art, thought, fidelity, and love are parts of the aesthetic of the sublime, but that such metaphysical accomplishments without the fulfillment of physical needs, such as safety and health, are very difficult. I think that if we get beyond the failures of process, and the lack of integrity in discourse, we are forced to confront the humanness of human beings, with all their physical, metaphysical, and transcendent aspirations. Whatever quashes the human being and forces him or her to live in a state of mere subsistence, without the ability to think, learn, dream, and hope cannot be considered beautiful. According to this paradigm, it is reasonable to assert that whatever increases the suffering of human beings, and robs them of their physical well-being and transcendental abilities should be subject to heightened levels of scrutiny, and an added burden of explanation and justification. If there is evidence that the members of a society are denied the ability to engage in the aesthetic of the sublime, whoever claims that such a condition is justified, either under the paradigm of internationalism or uniqueness, must be subjected to closer scrutiny, and should shoulder a heavier burden of justification. The aesthetic of the sublime, I think, that might be a good starting point for a discoursive process that can be integrative, legitimate, and ultimately end up in an institution that is collaborative, and that is truly human, with all the sublime qualities that are inherent in the word human.