The Women's Foreign Policy Group

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"Islamic International Law and Public International Law: Convergence or Dissonance?"

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PATRICIA ELLIS:

Good evening everyone and welcome. I'm Patricia Ellis, Executive Director of the Women's Foreign Policy Group. We promote women's leadership and women's voices in international affairs. Our speaker tonight is part of our Carnegie Scholar Series focusing on the role of Islam. We're so excited about it and have completed one program so far. The first was about European Muslims and the freedom of expression. It was a great program and we know this one will be a great as well.

We have a great turnout, a great mix of people from government. We have a colleague from the Office of Public Diplomacy at the Department of State, WFPG board member Gail Kitch, and people from think tanks, non-profits and embassies. I will not mention everyone's name, but we do have a great group here and I am sure there will be a wonderful discussion afterwards because that is what we're all about. We focus on important issues that really need to be discussed in an intelligent, unemotional fashion. We want to get information out, particularly in the area of Islam, because we all need to know more. We hope that after these six programs, we will be able to do more. We have an attorney here who has been living in Doha, which is wonderful. Also, some people here are from the Middle East. Thank you so much for coming.

We are lucky tonight to have Professor Sohail Hashmi. He's an Associate Professor of International Relations and the Alumni Foundation Chair in Social Sciences at Mount Holyoke College. His research and work has focused on comparative international ethics, concepts of just war and peace, religion and politics, and particularly Islam in domestic and international politics. He is the editor of some very important works, two recent publications, *Islamic Political Ethics, Civil Society, Pluralism and Conflict* and *Ethics and Weapons of Mass Destruction, Religious and Secular Perspectives*. Also, as I mentioned, he is a Carnegie Scholar. This is a major honor. Fifteen are selected each year from around the country to do serious research on important issues of the day. Presently, they are focusing on the issue of Islam. Dr. Hashmi is working on a book concerning the compatibility of Islamic conceptions of

world order with public international law and looking at how universal perceptions of international law correlate with Muslim concepts and values. Tonight he will talk about the relationship between Islamic and public international law. He was educated at Harvard, where he received his Ph.D., and has an M.A. from Princeton University.

Please join me in welcoming Professor Hashmi.

PROFESSOR HASHMI:

Ms. Ellis, thank you very much for your very kind introduction and thank you all for coming tonight. It's really quite an honor for me to have been invited to speak to such a distinguished group and I can't say enough about how important your series is. I hope you will have a number of speakers, both Carnegie-related and non-Carnegie-related, on the topic of Islam and its role in our current international society.

I feel very much at home here tonight. This is like one of my classrooms at Mount Holyoke, dominated by the ladies with a few gentlemen sprinkled in from one of the brother institutions of Mount Holyoke. As Ms. Ellis mentioned, I'm working on the question of Islamic international law and its compatibility with public international law.

Let me start by posing a very difficult and complex question: Are Islamic theories of world order compatible with international law or is Islamic law, in principle, opposed to the norms of international law? For centuries, as the European law of nations evolved, European writers vexed over these two questions. The debate surrounding these questions was re-invigorated after the collapse of Soviet Communism left Islam in the eyes of some analysts as the last great ideological obstacle to the construction of a liberal world order. A string of events, including the 9/11 attacks, have all contributed to the idea that somehow, Muslims claiming to act on Islamic principles operate on a set of principles fundamentally at odds with basic norms of our international society.

Now on one side of the debate are those who argue that Muslims are still motivated to act on the basis of Islamic law and that according to classical Shari'ah notions of world order, classical Islamic legal notions of world order, Muslims cannot accept or accommodate international law. The critics charged that the principle of state sovereignty and the peaceful resolution of interstate disputes cannot be reconciled with classical Islamic notions of an expansionist Jihad aimed at bringing the entire world under Islamic sway. According to this argument, public international law as it evolved among western states and then as it was universalized through the United Nations and its affiliated bodies after World War II, is generally perceived by Muslims as nothing more than a vestige of imperialism.

On the other side of this debate are those who argue that Muslims have either renounced or marginalized the classical Islamic theory of world order and they have fully embraced the principles of international law. They point to the fact that all Muslim states, including those states that officially profess to be based on and to apply Islamic ideology in their institutions, have officially acceded to the international legal regime. All of the approximately fifty Muslim majority states are members of the United Nations. Seven states were among the original 51 charter members including the Kingdom of Saudi Arabia. As

for the other Muslim states, they rushed to join the United Nations, petitioning for membership within the first two years of independence. In addition, the overwhelming majority of these Muslim states are signatories to all the principal international instruments enumerating the laws of war and diplomacy, economic relations, environmental policy and with great reservations, human rights.

I would like to suggest to you that although both of these very general viewpoints that I've just outlined contain important insights, neither side in the debate is entirely accurate. While there is a small fraction of Muslim theorists and activists who deny the compatibility of Islamic law and public international law, the vast majority of Muslim scholars and all Muslim majority states, or the elites who run these states, generally accept prevailing international norms in both theory and practice. This acceptance is qualified, however. The consensus is that Muslim states can and should abide by international law in their relations with non-Muslim states. In this regard, the classical Islamic legal theory, known as Sier, is now obsolete and the Shari'ah has in fact evolved on this point, *de facto* if not *de jure*. A significant number of contemporary Muslim theorists and political leaders though, argue that Muslim states should abide by Shari'ah principles in their mutual relations with each other. In other words, a Muslim international society ought to be created according to this view as a subset within the broader international society.

Now having made this claim, I need to make two immediate and important qualifications. First, the details of an Islamic international subsystem and the legitimate means to bring it about remain at best only vaguely defined in the works of those who espouse it. With regard to Shari'ah in particular, there is no clear consensus today on what exactly the Shari'ah enjoins for a Muslim community divided into some 50 states, each claiming to be sovereign. Second, there is no clear consensus on the legal principles today and it is unlikely that there will be such a consensus anytime in the near future because there is no authoritative body to move in that direction.

What we are left with is a truly wide-ranging debate on how to interpret and who should interpret for the modern age, a theory of world order that was devised, literally, more than a millennium ago. Before we proceed any further, I think it would help to look briefly at the main points of this classical theory. Classical Islamic civilization developed a rich body of laws intended to govern the Islamic state relations with non-Muslim peoples and powers. Shortly after 9/11, I was sitting in my office and I got a phone call from a journalist asking me to give him a short primer on Islamic international law, and whether I could point him to a few representative works. When I mentioned to him that it's truly a voluminous field, he seemed genuinely quite surprised. It is though, a very extensive body of literature.

This legal theory of international relations, if I could summarize its main points, was developed by Duris or Olema (?) working from roughly the second to the sixth Islamic centuries. These correspond to the eighth through the twelfth centuries of the Christian era. They were working, of course, on international relations or international law as part of the broader legal corpus that came to be known as Shari'ah. The theory that these early scholars propounded rested on the division of the world into two opposing realms. The first they dubbed Dar-al-Islam which we could loosely translate as "the abode or territory of Islam." Then, Islam was the area where Islamic law was enforced, where it was sovereign. It was enforced by the unitary Islamic state ruled by the just ruler, the Imam or the Caliph. Opposed to it was a realm that they dubbed Dar-al-Harb, the abode of war or the territory of war where non-Islamic laws prevailed and presumably fostered moral turpitude and anarchy. Now, according to the majority of the classical jurists,

the Kalif's duty was to reduce the Darul Harp by incorporating it into Darul Islam through peaceful means if possible, through forceful means if necessary. The goal of this expansionist Jihad was to bring non-Muslims under Islamic law, not to convert them by force because they are very clear Puranic verses that prohibit such forceful conversions, one which explicitly states, let there be no coercion in religion.

So long as the non-Muslims accepted Muslim sovereignty, their communities were granted the so-called Vemi status whereby they retained a great deal of their communal autonomy including the right to live by their own communal laws and to appoint their own communal leaders, so long that these laws and leaders do not challenge the sovereignty of the Islamic state. The jurists also elaborated rules for the proper conduct of Jihad including restrictions on who may be targeted for attack, what types of weapons may be used in the fighting and what types of damage could be inflicted on the enemy's property. Even though the classical theory rested on the proposition that Darul Islam and Darul Harp were fundamentally at odds with one another, the theory did acknowledge the existence of a rudimentary natural law, what the Romans called the usegentium that applied to relations between the two spheres. According to this rudimentary conception of a natural law, the idea of an international society was allowed to be very much a part of Islamic conceptions of international law or world order. This rudimentary conception of a natural law made possible diplomacy and the conclusion of treaties, travel and commerce and rules regulating warfare.

One of the most important aspects of the classical theory was the guarantee of free passage or security, Aman as it was called, which any Muslim could give to a visitor from Darul Harp. The conference of this provision was the obligation of Muslims travelling or residing in Darul Harp to obey local laws unless, of course, they contravened essential aspects of Islamic worship.

The classical Islamic theory of world order was formulated at a time when Islamic civilization was ascendant, the dominant civilization of the Mediterranean matoral, the successor to both the Eastern Roman Empire and the Persian Sussan Empire. The rise of European nation states and the imperial expansion of many of these states in Muslim territories from the 16th century through the early 20th century created an entirely novel situation from the one in which the Seer had first been elaborated. Notions of an expansionist Jihad gave way to calls for defensive Jihad against foreign interventions. At the same time, Muslim scholars and statesmen became gradually aware of the emerging European Law of Nations that was being propagated through imperialism as the basis for a global international law. The practice of Muslim states, most importantly the Ottoman Empire, reflected a progressive acceptance of the terms of the European Law of Nations based on awareness of the Muslims' relative military weakness. This acceptance of European international law was not reflected in systematic or official revisions of Islamic international legal theory. Because Muslim scholars had adopted a conservative attitude toward reform of Shari'ah in general after the 12th century of the Christian era, no concerted effort was undertaken to reform the Seer in particular, that aspect of Shari'ah that dealt with international law. The lingering influence of the classical theory into the 19th and indeed into the early 20th century can be seen in the bitter disputes that divided Indian Onema on whether British India was or was not part of Darul Islam. They were still arguing over this issue long after this large Muslim population had passed under the sovereignty of her Majesty Queen Victoria.

What is the status of the classical theory today? If formal Muslim exception for the prevailing

international legal regime were to determine the answer to this question, then the Seer would have to be considered totally obsolete. Apart from the evidence that I gave earlier, the evidence about all Muslim states being members of the United Nations, for example, we can also point to the charter of an organization known as the Organization of the Islamic Conference. Has anyone studied this organization here or is familiar with it at all? Just curious if you know. It's actually one of the largest ideas in existence and yet there's very little known about it in the United States, the Organization of the Islamic Conference. In 1969, 24 Muslim states voted to establish an international organization to further mutual cooperation on the basis of quote "the immortal teachings of Islam."

The immortal teachings of Islam (1972) were adopted in their charter for the OIC, a list of principles to guide member state relations. All of these principles are derived from the U.N. Charter, some of them verbatim. They include the principles of sovereignty and equality of states, non-interference in the domestic affairs of sovereign states and prohibition of the use or the threat of force. We might be justified in asking where the putative Islamic revolt is that we hear so much about in the media? Some analysts would point to the rhetoric and the violent challenges posed by radical Muslim groups, not just the leaders of Al-Qaeda, but most extremist groups have long expressed their contempt for the United Nations and for international law which they dismiss as tools for western hegemony. In 1993, the same group that planned and executed the bombing of the World Trade Center, was plotting as you all know, to bomb U.N. headquarters. In 2003, one of the first targets of the Iraqi insurgency was the newly established U.N. headquarters in Baghdad, not just once, but twice.

I don't think the answer to the question of the so-called Islamic revolt lies in the rhetoric or even in the violence of terrorist groups. I think it lies in scholarly arguments and mainstream Muslim activism. We can divide Muslim political thought on this question, on the compatibility of Islamic law with international law, into three very broad categories. The first of these categories we may call the Muslim assimilationist view because it fully embraces the legitimacy of the current international system and advocates a complete Muslim embrace of the norms of international society. Its proponents tend, by and large, to be secularist and maybe further – and these secularists may be further divided into two groups. One strand of Islamicly-sensitive secularists attempt to appropriate, co-opt or co-exist with Islam in mutually supportive but distinct or separate spheres. Islam for them is a key source of national identity, but devoid of practical political significance. Another strand of secularists sees organized Islam as a threat to national integration or modernization and thus this strand quite openly attempts to suppress or eliminate Islam altogether from public life. The secularists have so far failed to disentangle the theoretical linkage of religion and politics that is so central to Islamic political theory over the many, many centuries. Even though one could argue that the realities of Muslim political life today conform by and large to the secular assimilationist vision, this secular vision has not been entirely assimilated into Islamic international theory or practice.

A second group of theorists we could call the Islamic internationalists. Advocates of this group tend to be modernists aiming to reconcile Islamic ethical ideals and prevailing international norms. Their argument tends toward acceptance of separate Muslim states as the best way of meeting the needs of different Muslim peoples. Yet they're quick to assert that their vision of nationalism or acceptance of state sovereignty doesn't eliminate the existence of international obligations that transcend the interests of these individual states. Several key modernist thinkers including the great poet of the Indian

subcontinent, Mohamed Idval, and two leading Egyptian lawyers, Oftharasal Kasakahure and Mohamed Delakahumene have all suggested that the concept of a united Muslim community, the concept of the Uma, requires at least some degree of trans-national cooperation or confederation, a Muslim league of nations to borrow Mohamed Idval's characterization. The existence today of a host of Islamic IGOs, the OIC being the most important, and Islamic NGOs is testimony to the influence of these Muslim internationalist ideas.

Finally, we may call the third school Islamic cosmopolitanism. Its proponents tend to be drawn from the ranks of so-called fundamentalist thinkers. They argue openly that the division of Muslims into sovereign, territorially delimited states has no legitimacy in Islam because first it violates the Koran's ethics of Islamic universality and Muslim solidarity. Second, because it is a vestige of European imperialism intended to perpetuate the weakness of the Muslim community. In this regard, Obulana Muldude, the finder of the most important Islamic party in South Asia, the Jamaat–e-Islami, actively campaigned against the creation of Pakistan during the 1940s. On this point, he was supported by a broad spectrum of religious opinion in India who opposed the creation of a would-be Islamic state. Why? Because they feared that the Muslim league-like demand for the creation of a separate state for Muslims in the subcontinent would do nothing but divide and fragment. Had Pakistan not been created, the Muslim population of united India would be the largest in the world. Likewise, Iatola Kumani once famously described the territorial state system as "the product of the deficient human mind." For him, Iran was to be the center for the propagation of the universal Islamic revolution that would sweep away un-Islamic regimes everywhere.

Now, as we all know, Muldude and Kumani eventually reconciled themselves to existing realities. Muldude settled in Pakistan and played a significant role once the country had been created, especially in Pakistani politics. Kumani's later speeches, particularly those from the Iran/Iraq war periods, extol the unique virtues of the Iranian nation. Even though both men proved willing to accommodate themselves to political conditions, they were politicians as much as they were Muslim thinkers, I would submit that it would be fundamentally incorrect to assume that they altered their normative conceptions of Islamic political order and that they ended their lives as some sort of Pakistani or Iranian nationalists.

In short, there is general consensus among scholars and politicians, that Muslims can and should abide by international law in their relations with non-Muslims. Muslim states can and should conform to international law in their relations with non-Muslim states. But there is still a very live current of thought that holds that Muslim states should abide by Shari'ah principles in their mutual relations with each other. In other words, there are widespread calls and there are actual institutions in place that testify to the belief that a Muslim international society should be formed as a subset within the broader international society.

The Organization of the Islamic Conference is a prime example of such institutions and I'd like to end my comments by focusing on it for a little while. Ever since its founding the OIC has been repeatedly assailed by many Muslims and particularly the so-called fundamentalists for failing to act as an instrument for the collective Muslim community, for the Uma, rather than the assortment of 56 states who are today its real constituents. The OIC actually has 57 members, the 57th member being Palestine. As the first truly universal Muslim organization ever, really since the demise of the Kalif with the sack

of Baghdad one could say, the Organization of the Islamic Conference has come to be viewed by some as a proto-Kalifette. The potential embodiment of a distinct Islamic subsystem within the international system. Despite the vociferous attacks upon it in recent years for its dismal performances in the Gulf War and the conflicts in Bosnia, in Chechnya, in Kashmir and a host of others that we could list, it continues to be the object of hope for many Muslim activists and it may yet evolve into a political manifestation of the United Muslim Uma once the Islamic revolution triumphs in other Muslim states.

The most concrete manifestation of the argument that Islamic international law is still relevant is the decision by the OIC in the year 1981 to create something called the International Islamic Court of Justice, the IICJ. This institution emerged out of popular concerns with the inability of the OIC to find some way to resolve the deadliest conflict involving Muslims since the end of World War II, that is the Iran/Iraq war. Trouble arose soon after the decision to create the court was taken. The statute of the IICJ wasn't approved until the year 1987. According to the statute, the court has jurisdiction over disputes referred to it by any OIC member state. It is also to render advisory opinions on legal questions referred to it by any of the organs that are part of the OIC framework.

To all intents and purposes, this court is to operate as the Islamic counterpart or the Islamic version of the International Court of Justice. A defining characteristic of this court, however, is that the sole source of law for the court would be the Shari'ah. Its eleven judges are envisioned as being the leading experts in Shari'ah provisions on international law. This court has somewhat of a surreal existence because everything is in place to begin its operations, even its headquarters in Kuwait City. Yet, it has never convened because the court statute has yet to be ratified by the requisite two-thirds majority of the OIC member states. The failure of most states to ratify, the very decision to set the ratification numbers so high and the earlier disputes over the statute itself all point to a stark reality of the OIC. It's an idea founded on the rhetoric of Islamic universals, but mired ever since in the politics of its squabbling and ideologically divided member states. The member states who created the IICJ realize now that should the court ever sit and adjudicate, it could very well open up a Pandora's box for them because the court might pronounce rather unsavory decisions on such pressing issues confronting Muslims as the question of collective security – why it is that Muslims are never able to solve conflicts involving their member states without some kind of foreign intervention? The famous overthrow of Saddam Hussein being one of the most important examples recently. They might also pass rather unsavory and unacceptable opinions when it comes to cross-border migration issues which are very pressing, especially when it comes to the poor versus the richer Muslim states and a whole host of distributive justice claims. The vast oil wealth that has flowed to many of the oil-producing countries – is it the property of these oil-producing countries or is it the property of the Muslim Uma? Of course, there's the whole range of issues involving human rights, the rights of women in contemporary Muslim societies and the rights of non-Muslims in Muslim states. Unfortunately, because the IICJ is not likely to meet any time soon, we lack the presence of an authoritative body that may not only apply Shari'ah to the international relations of Muslim states, but we also lack a body that would tell us what exactly is the Shari'ah on contemporary international relations. Thank you for your attention.