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Torture and Islamic Law

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Torture and Islamic Law

Sadiq Reza*

One day in the seventh century CE, Muslim sources tell us, some residents of Kila, a region in what is today southern Lebanon, came to suspect a group of weavers of theft. They took the weavers to one of the Prophet Muhammad’s “Companions”—a select and authoritative group of the Prophet’s contemporaries—for adjudication and punishment. The Companion detained the weavers for investigation but released them after a few days, presumably because they denied the charge and there was insufficient evidence of their guilt. The accusers promptly protested the Companion’s freeing the suspected thieves “without flogging or interrogating” them. The Companion’s reply, the sources tell us, was this: “What did you want? Had I flogged them and your goods turned up [from their confession], that would have been fine. But if not, I would have had to take [as much skin] off of your backs as I took off theirs.” “This is your ruling?” the accusers asked. “It is the ruling of God and His Messenger [*that is*, the prophet Muhammad],” replied the Companion.¹

This story and others like it are regularly cited to support the assertion that torture is forbidden in Islamic law. But there are just as many reports in the same sources—the Traditions (*sunna*), which record the statements and actions of Muhammad and his Companions and are the most authoritative source of Islamic law after the Qur’an—that suggest that flogging or otherwise “beating”

* Professor, New York Law School. This Article draws in part on a talk the author gave at the Fifth International Conference on Islamic Legal Studies: “Lawful and Unlawful Violence in Islamic Law and History,” at Harvard University in September 2006. Research on the topic began at the Islamic Legal Studies Program at Harvard Law School, where the author was a Visiting Researcher in 2004–05. The author thanks Asifa Quraishi and Frank Vogel for comments, and Madiha Zuberi for research assistance.

¹ 6 *Mukhtasar Sunan Abi Dawud* 218 (Beirut: Dar al-Ma’rifah 1980) (author translation). For other English translations, see Mohammad Hashim Kamali, *The Right to Personal Safety (Haqq al-Amn) and the Principle of Legality in Islamic Shari’a*, in Muhammad Abdel Haleem, Adel Omar Sherif, and Kate Daniels, eds, *Criminal Justice in Islam: Judicial Procedure in the Shari’a* 57, 80 (IB Tauris 2003); III *Sunan Abu Dawud* 1221–22 (Ashraf 1984) (Ahmad Hassan, trans).

(*daraba*) suspected wrongdoers to extract confessions is permissible.² (There is nothing directly on point in the Qur'an.) Conflicting views on the matter also appear in the vast corpus of jurisprudence derived from the Qur'an and the Traditions by Islam's legal scholars, or jurists, over the fourteen hundred years of Islam. Meanwhile, there is no doubt that flogging and other official practices that would constitute torture under contemporary definitions of the term, or that would at least amount to cruel, inhumane, or degrading treatment, have been employed over the lands and centuries of Islam.³ And today, while the countries of the modern Muslim world forbid torture in their constitutions and criminal codes and have signed international covenants that ban it, many of these states regularly appear on the list of states where government officials reportedly employ torture with impunity, and among these states are several that declare Islamic law to be the very source of their law.⁴ The short answer, then, to the question of whether Islamic law forbids torture is the same as the answer to so many ultimate questions of Islamic law (and of "American" law too for that matter): it depends on whom you ask.

It also depends on the definition of "Islamic law." Possible definitions will be considered both implicitly and explicitly in this Article. First, let me clarify that I address torture as an investigative method—physical or mental coercion by state officers to obtain confessions or other information from individuals in their custody—rather than torture as a punishment upon conviction of a crime. The religious legality of the fixed Qur'anic criminal punishments (*budud*; sing, *badd*), which are few in number but notoriously harsh in nature, is not seriously questioned; nor is there doubt that most if not all of these punishments are irreconcilable with contemporary norms of human rights.⁵ Acts of formal

² See Kamali, *The Right to Personal Safety* at 84–89 (cited in note 1).

³ See Part II; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), art 1, 85 UN Treaty Ser 1465, available online at <<http://www.ohchr.org/english/law/pdf/cat.pdf>> (visited Apr 21, 2007) (hereinafter "Convention against Torture"):

"[I]torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . . when such pain or suffering is inflicted by . . . a public official or other person acting in an official capacity.

See also John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, in Sanford Levinson, ed, *Torture: A Collection* 145, 147–48 (Oxford 2004) (reviewing pertinent jurisprudence under the Convention Against Torture and finding that "severe beatings that do not break bones or cause lesions but cause intense pain and swelling are 'classic' forms of torture," whereas "[p]erhaps beatings that are not severe or sustained . . . would be inhuman treatment but not torture").

⁴ See Part II.

⁵ Scholars count between four and seven such crimes and accompanying punishments. The majority view is that there are six— theft, brigandage, adultery, false accusation of adultery, wine-

punishment, however barbarous, are also typically excluded from contemporary legal definitions of torture.⁶ Also excluded from consideration here are acts of violence, mutilation, and other physical degradation of political enemies and opponents for non-investigative purposes. These horrors too have most certainly occurred in Islamic history, as they have in non-Islamic history, and regrettably they have apparently not entirely disappeared from the Muslim world.⁷ While the religious legality of some of these acts may be asserted,⁸ there can be little doubt that they too violate contemporary human rights norms. But investigative torture is a more complicated matter in Islamic law and practice, just as it has been throughout human history and appears to remain today.⁹ It is also a matter that richly illustrates what modern scholars increasingly identify as an essential dynamic of Islamic law: the interplay between the jurists of Islam, whose doctrines and discourses over fourteen hundred years form the corpus of formal Islamic jurisprudence, and Islam's political authorities, whose rules and actions both depend on the jurists' doctrines for legal legitimacy and constitute a complementary source and measure of Islamic law.

Perhaps better questions than whether Islamic law forbids torture, then, are these: What roles do the jurisprudential norms of Islam's jurists, on the one hand, and the practice of state officials in Muslim lands, on the other hand, play in answering the question of the legality of investigative torture in Islamic law? What role, if any, does the status of torture in Islamic law play in the willingness of Muslim countries to prohibit torture within their borders and to join international covenants that ban it? And what does all of this tell us about Islamic law itself? This Article addresses these questions. In doing so, I hope it

drinking, and apostasy—and the punishments for them include flogging, amputation, and death by crucifixion or stoning. See generally Mohamed S. El-Awa, *Punishment in Islamic Law* (Am Trust 1982).

⁶ John Langbein, for instance, defines judicial torture as “the use of physical coercion by officers of the state in order to gather evidence for judicial proceedings” and insists that “[n]o punishment, however gruesome, should be called torture.” John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancient Régime* 3 (Chicago 2006). See also Convention against Torture, art 1 (cited in note 3).

⁷ For reports from early Islamic history as well as modern-day Saudi Arabia, see generally Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge 2001).

⁸ One of the *hudud* is crucifixion or cross-amputation for those who “wage war against God and His Messenger and strive to cause corruption in the land.” See *The Meaning of the Holy Qur'an* § 5:33 (Amana 11th ed 2004) (A. Yusuf Ali, trans). While the vast majority of Muslim jurists eventually came to read this verse as applying only to armed robbery (“brigandage” or “highway robbery” are common English renderings), a crime that was especially problematic in the early years of Islam, at least a few early Muslim rulers invoked the verse in support of their similar treatment of political opponents. See El Fadl, *Rebellion and Violence in Islamic Law* at 47–60 (cited in note 7).

⁹ See, for example, Karen J. Greenberg, ed, *The Torture Debate in America* (Cambridge 2006).

not only elucidates some of the rules and practices of investigative torture in pre-modern and modern Muslim times but also shines fresh light on the much-debated question of the definition of “Islamic law.” My answer to that question for the purposes of this Article is that Islamic law consists of the doctrines of Muslim jurists and practices of Muslim rulers and other state actors that are ostensibly sanctioned by those doctrines. But even this definition leaves ample room for debate over the questions posed here—the narrower questions of the legality of investigative torture in Islamic law and the relevance of that answer to Muslim adherence to pertinent international norms, and the broader question of what is, or should be, considered Islamic law.

Part I of this Article summarizes the range of pre-modern Muslim juristic doctrines on investigative torture and discusses the relationship between these doctrines and the practices of Muslim state officials in defining and determining “Islamic law.” Part II notes evidence of the practice of investigative torture in pre-modern Muslim times and then focuses on modern practice, considering data on torture in today’s Muslim countries in light of the degree of commitment to Islamic law these countries have professed. Part III considers whether Islamic law influences the decision of a Muslim country to join or abstain from international covenants against torture. Part IV suggests how, in light of this study, to view torture through the lens of Islamic law, and Islamic law through the lens of torture.

I. TORTURE IN ISLAMIC JURISPRUDENCE

At least three different views on the legality of beating suspected criminals to obtain confessions can be identified in pre-modern Sunni Muslim juristic discourses. The first view, and the one that apparently prevailed in the early centuries of Islam, is that such beatings are never permissible. Proponents of this view included the eminent jurists Ibn Hazm (d 1064), of the Zahiri school of law, and al-Ghazzali (d 1111), of the Shafi’i school.¹⁰ The second view is that a suspect who is known for relevant prior wrongdoing—for example, a suspected thief who is already known to be a thief—can be beaten to extract a confession; the suspect’s reputation provides sufficient circumstantial evidence of guilt of the new accusation to justify the beating. The influential Hanbali jurist Ibn Taymiyya (d 1328) suggested this view, and his disciple Ibn Qayyim (d 1351) adopted and expanded on it; Ibn Qayyim’s formulation was in turn copied by the Maliki jurist Ibn Farhun (d 1396) and the Hanafi jurist al-Tarabulusi

¹⁰ See Kamali, *The Right to Personal Safety* at 81, 83 (cited in note 1); Baber Johansen, *Signs as Evidence: The Doctrine of Ibn Taymiyya (1263-1328) and Ibn Qayyim Al-Jawziyyah (D. 1351) on Proof*, 9 *Islamic L. & Society* 168, 192 (2002) (noting “the clear interdiction of judicial torture that characterizes classical Islamic law from the eighth to the twelfth centuries”).

(d 1440).¹¹ The third view is that investigative beatings are forbidden to *qadis*—judges in courts of Islamic law—but permitted to rulers and other executive authorities. The foremost proponent of this view was the Shafi'i jurist al-Mawardi (d 1058), perhaps Islam's most influential political theorist, who said rulers and their agents were authorized to flog suspects to obtain confessions “according to the strength of the accusation” (*ma'a qumvat al-tuhmah*).¹²

The first of these views needs little immediate scrutiny; it is consistent with international human rights norms and, in the end, it has not proven controlling. The second view should sound familiar to students of judicial torture in medieval Europe, where the rules allowed torture upon “half proof” of a suspect's guilt—that is, either a specified quantum of circumstantial evidence or the testimony of one of the two eyewitnesses typically required for conviction.¹³ The third view echoes this theme, but adds a uniquely Islamic twist in drawing a line of demarcation between the powers of *qadis*, on the one hand, and rulers and their agents on the other. It is this view, as I will argue below, that best reflects the actual practice of torture in Islamic history.

But to understand the import and effect of any of these views, we must first understand the role of jurists in determining and articulating Islamic law. Simply put, from the early centuries of Islamic history, jurists have possessed and wielded nearly exclusive authority to articulate rules and norms of Islamic law—God's law; the Shari'ah—on the basis of the divine texts (the Qur'an and the Traditions). Although they could be appointed as *qadis* (and many were), these legal scholars have not typically held state office. Instead, their authority has derived from popular recognition of their proficiency and integrity in interpreting—or, more accurately, deriving or discerning—God's law through recognized methods of textual analysis and reasoning. Jurists' views on points of Islamic law have varied across different periods and places in the Muslim world, and even within the same periods and places, much as judicial decisions in American law vary from state to state and even courtroom to courtroom. But unlike an American judicial decision, a Muslim jurist's view—which typically appears either in a *fatwa* (legal opinion) the jurist issues in response to a question

¹¹ Ibn Taymiyya, 34 *Majmu' Fatawa Shaykh al-Islam Ahmad Ibn Taymiyya* 236–37 (Riyadh: Saudi Arabian Govt 1961) (Abd al-Rahman ibn Muhammad ibn Qasim al-Asimi al-Najdi al-Hanbali, ed); Ibn Qayyim al-Jawziyah, *al-Turuq al-Hukmiyah fi al-Siyasah al-Shariyyah* 89–92 (Cairo: Dar al-Hadith 2002); Ibn Farhun, 2 *Tabsirah al-Hukkam* 128–29 (Beirut: Dar al-Kutub al-Ilmiyah 1995); Mohammad Fadel, *Adjudication in the Maliki Madhhab* 26, 190–92 (1995) (unpublished PhD dissertation, U of Chicago) (on file with the University of Chicago Library).

¹² Author's translation. For another translation, see Abu al-Hasan al-Mawardi, *The Ordinances of Government* 239 (Garnet 1996) (Wafaa H. Wahba, trans) (“in view of the seriousness of the charge”).

¹³ See Langbein, *Torture and the Law of Proof* at 4–5 (cited in note 6).

presented to him by a *qadi* or a party in a specific case, or in a treatise that collects the jurist's views on all subjects—is not binding or directly enforceable. Rather, only when the view is adopted by a *qadi* in an actual court case or implemented via a rule or decision of an executive authority does it become binding and enforceable in the way an American judicial decision is. Until then—and even once it is binding, for that matter—a given view is no more than a particular jurist's best effort to discern God's law—the Shari`ah—from the sacred texts.

The views of Muslim jurists are thus truly opinions rather than judgments; they are approximations or understandings of God's law rather than definitive statements of it. And because every jurist's opinion is by definition a product of human agency, each opinion is considered both (1) a probable rather than a conclusive articulation of the Shari`ah and (2) no more authoritative than the opinions of other jurists, no matter how much these views might differ from each other. In other words, no jurist can (or typically does) claim greater authority in the Shari`ah than another. The views of Muslim jurists are thus no more than persuasive authorities—ideals, aspirations, and normative statements of God's law derived from the sacred texts through analysis and reasoning. In the early centuries of Islam, jurists' views and doctrines coalesced into distinct “schools” of law, four of which survive today in Sunni Islam; Shi'i Islam has three more. These views and doctrines, compiled in hundreds of written volumes that have been maintained over the centuries, constitute the corpus of Islamic jurisprudence (*fiqh*).

The imperatives of daily governance have of course demanded more powerful legal actors and practical institutions than jurists and their schools of thought. These have been provided in Islamic history, and recognized by Muslim jurists, in a second realm of law, *siyasa* (“administration” or “governance”). In the *siyasa* realm, rulers and their agents perform the daily duties of executive authorities—building roads, raising armies and waging war, collecting taxes, keeping the peace, and so forth—under a divine mandate to maintain order and promote public welfare. In theory, *siyasa* is at least partly constrained by the *fiqh*: rulers and their acts should not contravene rules or norms scholars articulated in the *fiqh*. The reality has always been more complicated, for reasons that include the wide variety of opinions that are available in the *fiqh*, the absence of mechanisms in the *fiqh* for checking ruler excess, the elaboration of *fiqh* doctrines that counseled obeying even an unjust ruler, and, perhaps most importantly, the lack of enforcement powers in the hands of jurists. Further complicating matters was a doctrine jurists eventually developed that established a presumption that a ruler's actions in the *siyasa* realm were consistent with the Shari`ah as long as the actions advanced the public welfare and did not violate clear commands of the sacred texts. Perhaps this doctrine—*siyasa shar'iyya*, or “governance in accordance with the *shari`ab*”—was

the jurists' final concession to the realities of state power; perhaps it was their attempt to assert some authority over that power; perhaps it was both of these and more.¹⁴ The practical effect of the doctrine was, however, to bestow religious legitimacy on the broad powers rulers already exercised to promulgate statutes, issue decrees, and perform the duties of everyday governance and law enforcement without specific reference to, or grounding in, the sacred texts.¹⁵

The rulers' *siyasa*, then, can represent "Islamic law" as much as *fiqh* does; *fiqh* and *siyasa* are complementary halves of Islamic law—its *yin* and *yang*, if you will. It is in this context that the third of the juristic views on torture presented above can be understood. In stating that *qadis* were forbidden to torture but rulers and their agents were not, al-Mawardi was distinguishing between the two realms of Islamic law. Torture could be forbidden in the *fiqh*, the realm of jurists and their ideals, as it was until and beyond the time al-Mawardi wrote. *Qadis* were representatives and guardians of the *fiqh* (and might even have been actual jurists, as noted above), even though they were appointed by rulers; torture was therefore properly forbidden to them.¹⁶ But it was equally proper, in al-Mawardi's formulation, to permit the ruler and his agents to torture, since the ruler operated in the realm of *siyasa*—that is, actual governance and law-enforcement—and the exigencies of that realm demanded powers beyond those that jurists might be comfortable locating or formally endorsing in their own realm. Al-Mawardi's formulation, like the doctrine of *siyasa shar'iyya*, thus allows Islamic law to have it both ways when it comes to torture. The *fiqh* contains a theoretical prohibition, consistent with what one would expect in normative statements of a law of divine provenance, but *siyasa* provides a license for practical purposes, allowing torture by those whose temporal duties outweigh—or rather, define—their religious obligations.

It bears noting that Ibn Taymiyya, who suggested the second of the three juristic views listed above (permitting suspects of known bad character to be beaten), rejected the *fiqh/siyasa* distinction in this context; in his view, all state actors were equally responsible for determining and implementing God's law,

¹⁴ These possibilities are presented and considered in Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia 197–207*, 216–19 (Brill 2000).

¹⁵ For more on this conceptual framework, see Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 *Cardozo L. Rev.* 67, 71–75 (2006) (describing the *fiqh/siyasa* divide); Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari'a into Egyptian Constitutional Law* 49–54 (Brill 2006) (discussing the theory of *siyasa shar'iyya*); Vogel, *Islamic Law and Legal System* at 197–207, 216–19 (cited in note 14).

¹⁶ See also Johansen, *Signs as Evidence* at 171 (cited in note 10) ("[T]he dominant doctrine of classical Muslim law regards judicial torture as the sinful and criminal destruction of the trustworthiness of utterances, an act that deprives the qadi, the judge who applies *fiqh* norms, of the most important element on which he may base his judgment.").

and *qadis* and rulers were thus equally allowed to torture.¹⁷ Why each jurist might have reached his particular view is a matter we will return to in Part IV. For now, what is important is that al-Mawardi's view perhaps best reflects the reality of torture, indeed the reality of criminal law-enforcement generally, in Islamic history. From the earliest days of Islam and well into the nineteenth century, criminal matters in the Arab-Ottoman world were reportedly handled more often by executive authorities than by *qadis*. Executive authorities operated in "administrative" courts and quasi-courts alongside, though overlapping with, the courts of *qadis*.¹⁸ These authorities and their courts operated largely free of the constraints of *fiqh* norms, long before jurists formally bestowed legitimacy on that freedom in the doctrine of *siyasa shar'iyya*.¹⁹ The doctrine of *siyasa shar'iyya* thus did little more, in the criminal arena, than to ratify the status quo: the everyday practices of rulers and their agents in criminal law enforcement had long diverged from the norms and doctrines of jurists.

That torture has been among these practices, as the next section shows, especially after it was expressly authorized by al-Mawardi, Ibn Taymiyya, and others, should therefore not be surprising.

II. TORTURE IN MUSLIM PRACTICE

Historical evidence indicates that investigative torture was practiced to some degree or another in various periods and places of the pre-modern Muslim world. Among the Traditions, which are believed to reflect episodes from the earliest decades of Islam, there are at least three reports that a Companion of Muhammad employed force or threats of force to obtain a confession or information from a suspected wrongdoer or witness.²⁰ Moving forward a few hundred years, a tenth-century Baghdad judge reported that flogging suspects was a method of criminal investigation there.²¹ Investigative torture was also reported to be practiced throughout the Ottoman Empire between the fourteenth and twentieth centuries. In fact it was an institutionalized part of criminal procedure in the early Ottoman centuries, expressly authorized by a sixteenth-century criminal code and carried out by *siyasa* authorities with the full

¹⁷ Id at 185.

¹⁸ See generally Farhat J. Ziadeh, *Criminal Law*, in John L. Esposito, ed, 1 *The Oxford Encyclopedia of the Modern Islamic World* 329, 330 (Oxford 1995); Uriel Heyd, *Studies in Old Ottoman Criminal Law* 1, 242–43, 259, 263–69, 274–78 (Oxford 1973); Joseph Schacht, *An Introduction to Islamic Law* 50, 54–55, 76 (Oxford 1964); Noel Coulson, *A History of Islamic Law* 123–34 (Edinburgh 1964).

¹⁹ See, for example, Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* 8–11 (Cambridge 2005).

²⁰ See Kamali, *The Right to Personal Safety* at 84–85 (cited in note 1).

²¹ See Abboud al-Shalji, 2 *Mamsu'at al-'Adbab* 8 (Glebeweald 1980) (citing al-Tanukhi).

knowledge of *qadis* (and at times pursuant to their orders).²² There is evidence of its practice in the later Ottoman centuries as well.²³

In torturing suspected criminals, Muslims have hardly stood alone; beatings, not to mention more imaginative methods of physical coercion such as the thumbscrew and the rack, have been an official feature of criminal investigation at some point or another in virtually every region of the world.²⁴ Nor was the practice entirely unchecked in the pre-modern Muslim context. Judicial approval was reportedly required in some cases, *qadis* intervened to prevent its use in others, and officials who tortured illegally could be subject to punishment.²⁵ But the practice of investigative torture by *siyasa* authorities (with the complicity of *qadis*) in pre-modern Muslim lands, coupled with the general license the *fiqh* gave those authorities and the specific license some jurists gave the practice itself, surely belies any assertion that Islamic law categorically forbids it.

Evidence of modern Muslim practice strengthens this conclusion. In Saudi Arabia, a declared and paradigmatic modern “Islamic state,” investigative beatings were, until recently, expressly authorized in “major crimes,” including murder, rape, theft, and drug crimes.²⁶ Reports that investigative torture is still officially practiced and condoned there, despite domestic laws that forbid it, issue regularly.²⁷ So too with Iran, another declared “Islamic state” that forbids

²² See generally Heyd, *Studies in Old Ottoman Criminal Law* (cited in note 18).

²³ See Eyal Ginio, *The Administration of Criminal Justice in Ottoman Selanik (Salonica) During the Eighteenth Century*, 30 *Turcica* 185, 203 (1998); Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* 63–64, 111 (SUNY 1994) (discussing the practice in the seventeenth and eighteenth centuries); Abraham Marcus, *The Middle East on the Eve of Modernity: Aleppo in the Eighteenth Century* 118 (Columbia 1989); Ehud R. Toledano, *Law, Practice, and Social Reality: A Theft Case in Cairo, 1854*, in Gabriel R. Warburg and Gad G. Gilbar, eds, *Studies in Islamic Society: Contributions in Memory of Gabriel Baer* 153, 163 n 35 (Haifa 1984).

²⁴ See, for example, Bernard Durand and Leah Otis-Cour, eds, *La Torture Judiciaire: Approches historiques et juridiques* (Centre d’Histoire Judiciaire Éditeur 2002).

²⁵ See Heyd, *Studies in Old Ottoman Criminal Law* at 253–54 (cited in note 18); Ginio, 30 *Turcica* at 199 (cited in note 23); Gerber, *State, Society and Law in Islam* at 111 (cited in note 23).

²⁶ Vogel, *Islamic Law and Legal System* at 238–39 (cited in note 14). Ibn Taymiyya, Ibn Qayyim and al-Mawardi were cited as authority for the practice. *Id.* at 239. Today, the Saudi Arabian code of criminal procedure, adopted in 2001, forbids “corporeal or moral harm” and “torture or indecent treatment” of arrestees. Code of Crim. Proc, art 2 (unofficial translation on file with author).

²⁷ See Human Rights Watch, *Saudi Arabia: New Video Confirms Torture in Prison* (Apr 27, 2007), available online at <<http://hrw.org/english/docs/2007/04/27/saudia15774.htm>> (visited May 11, 2007); US State Department, *Country Reports on Human Rights Practices-2006: Saudi Arabia*, available online at <<http://www.state.gov/g/drl/rls/hrrpt/2006/78862.htm>> (visited Apr 21, 2007); US State Department, *Country Reports on Human Rights Practices-2005: Saudi Arabia*, available online at <<http://www.state.gov/g/drl/rls/hrrpt/2005/61698.htm>> (visited Apr 21, 2007); US State Department, *Country Reports on Human Rights Practices-2004: Saudi Arabia*, available online at <<http://www.state.gov/g/drl/rls/hrrpt/2004/41731.htm>> (visited Apr 21, 2007).

torture in its constitution and statutes.²⁸ And these are not the only countries of the modern world that declare fealty to the law or religion of Islam and reportedly employ torture, as we will see in a moment.

Indeed, one measure of the Islamic legal position on torture today is arguably the degree to which the absence or practice of it correlates with a state's professed commitment to Islam as the source and parameters of its law. This measure can be attempted in the modern context by combining data from two sources: a 2005 study of pertinent constitutional declarations in the world's forty-four Muslim-majority countries,²⁹ and the torture "ratings" assigned to most of these countries by Oona Hathaway in a 2002 article on compliance with human rights treaties.³⁰ The 2005 study divides Muslim-majority countries into four categories on the basis of their constitutional declarations: so-called Islamic states (which I will call "Category 1" states), states that declare Islam the state religion (Category 2), states that make no constitutional declaration (Category 3), and states that declare themselves to be secular (Category 4).³¹ It also identifies among these four categories those countries that declare Islamic law, principles, or jurisprudence to be "the basis for," "the principal source of," "a principal source of," or "the source of" legislation in their respective constitutions.³² For the torture ratings, Hathaway, using the information about torture that appears in the US State Department's annual *Country Reports on Human Rights*, assigned ratings on a scale of 1 (no allegations of torture) to 5 (torture is "prevalent,"

²⁸ See Human Rights Watch, *World Report 2007: Iran*, available online at <<http://hrw.org/englishwr2k7/docs/2007/01/11/iran14703.htm>> (visited May 11, 2007); Human Rights Watch, *Iran: Prosecute Torturers, Not Bloggers* (Dec. 12, 2006), available online at <<http://hrw.org/english/docs/2006/12/12/iran14824.htm>> (visited Apr 21, 2007); US State Department, *Country Reports on Human Rights Practices-2006: Iran*, available online at <<http://www.state.gov/g/drl/rls/hrrpt/2006/78852.htm>> (visited Apr 21, 2007); US State Department, *Country Reports on Human Rights Practices-2005: Iran*, available online at <<http://www.state.gov/g/drl/rls/hrrpt/2005/61688.htm>> (visited Apr 21, 2007); US State Department, *Country Reports on Human Rights Practices-2004: Iran*, available online at <<http://www.state.gov/g/drl/rls/hrrpt/2004/41721.htm>> (visited Apr 21, 2007).

²⁹ Ted Stahnke and Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of the Predominantly Muslim Countries* (USCRIF 2005), available online at <http://www.uscirf.gov/countries/global/comparative_constitutions/03082005/Study0305.pdf> (visited Apr 21, 2007).

³⁰ Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L. J. 1935, 1969–72 (2002).

³¹ Stahnke and Blitt, *The Religion-State Relationship* at 7 (cited in note 29). Note that Category 1 is actually a subset of Category 2: states that call themselves Islamic states also declare Islam to be the state religion.

³² Id. at 9, 29–48.

“widespread,” “routine,” “frequent,” etc) for every country for which reliable yearly data was available between 1985 and 1999.³³

The combined data, presented here in Table 1, considers the five most recent years Hathaway coded, 1995 to 1999. This data does suggest some correlation between the degree to which a Muslim-majority country professes a commitment to Islam and the extent to which torture is practiced there. Specifically, Muslim-majority countries that declare themselves to be Islamic states appear to torture more than other Muslim-majority countries: those countries, constituting Category 1, have the highest average torture rating (3.5). But the correlation is not strong. The second-highest rating (3.4) goes to Category 3 countries, which have no pertinent constitutional declaration. None of the four countries that have the highest possible rating (5.0) are in Category 1; rather, three of them are in Category 2 (Algeria, Bangladesh, Iraq) and the fourth is in Category 3 (Syria). The twelve countries that have average torture ratings of 4.0 or higher are distributed evenly across the four categories, three per category. The range of the average ratings for the four categories is relatively narrow, 3.1 to 3.5, and thus the percentage difference between the average ratings for the lowest and highest categories is not great (13 percent). And the average rating for the thirteen countries that declare Islamic law, principles, or jurisprudence to be “the basis for,” “the principal source of,” “a principal source of,” or “the source of” legislation (but do not limit that declaration to certain matters) falls in the middle of the range at 3.3.

The correlation between a professed commitment to Islamic law and the practice of torture in today’s Muslim-majority countries is thus either unclear or somewhat positive, statistically speaking: Muslim-majority countries that officially identify most strongly with Islam (by declaring themselves Islamic states) appear to torture the most, while those that profess a specific commitment to Islamic law fall in the middle of the range of Muslim-majority countries in employing torture. This finding further undermines any assertion that Islamic law forbids torture, at least insofar as the practice of states that profess a commitment to that law is a measure of it.

³³ Hathaway, 111 Yale L J at 1969–72, 2034–36 (cited in note 30). Note that Hathaway’s data includes reports of physical or mental abuse of detainees that might not necessarily have been for investigative purposes, but still excludes acts of formal punishment.

Table 1: “Torture Ratings” of Muslim-Majority Countries (1995–99) and Party Status to 1984 Convention against Torture³⁴

Category 1: Declared Islamic States (and Declared Islam as State Religion)		Category 2: Declared Islam as a State Religion	
Country	Torture Rating	Country	Torture Rating
Afghanistan	4.8	Algeria	5.0
<i>Bahrain</i>	4.0	Bangladesh	5.0
Brunei	n/a	<i>Egypt</i>	4.2
Iran	3.4	<i>Iraq*</i>	5.0
<i>Maldives</i>	n/a	<i>Jordan*</i>	3.0
Mauritania	2.6	<i>Kuwait</i>	2.0
Oman	2.0	<i>Libya</i>	3.0
Pakistan	4.8	<i>Malaysia*</i>	2.6
<i>Saudi Arabia</i>	3.0	Morocco	3.0
<i>Yemen</i>	3.4	<i>Qatar</i>	1.0
		Tunisia	3.0
		<i>United Arab Emirates</i>	1.8
Average Rating =	3.5	Average Rating =	3.2
Category 3: No Declaration		Category 4: Declared Secular States	
Country	Torture Rating	Country	Torture Rating
Albania	2.4	Azerbaijan	4.0
Comoros	2.0	Burkina Faso	2.4
Djibouti	3.2	Chad	3.2
<i>Gambia*</i>	2.6	Guinea	3.6
Indonesia	4.2	Krygyzstan	1.8
Lebanon	3.4	Mali	2.0
Sierra Leone	3.4	Niger	1.6
Somalia	n/a	Senegal	3.0
<i>Sudan</i>	4.4	Tajikistan	3.8
<i>Syria</i>	5.0	Turkey	4.8
Uzbekistan	3.8	Turkmenistan	4.0
Average Rating =	3.4	Average Rating =	3.1

³⁴ Information compiled from Hathaway, 111 Yale L.J. 1935 (cited in note 30); Stahnke and Blitt, *The Religion-State Relationship* (cited in note 29); and Convention against Torture (cited in note 3). Countries for which torture ratings were not available are marked as “n/a.” All countries except those in **boldface** are parties to the 1984 Convention against Torture. The average torture rating of the non-party countries is 3.3. *Italics* indicate countries that declare Islamic law, principles, or jurisprudence to be “the basis for,” “the principal source of,” “a principal source of,” or “the source of” legislation in their respective constitutions; an asterisk (*) indicates that that declaration is limited to certain matters. (The 1925 Iraqi constitution, which was in effect during the years under review here, contained such a limitation, but the 2004 constitution does not.) The average torture rating of the countries that are listed in italics without an asterisk is 3.3.

Another recent study suggests even less correlation between a commitment to Islamic law and the practice or absence of torture. In a 2002 article, Daniel Price presented his study of whether there was any correlation between the protection or violation of human rights in a country and the degree of the country's "Islamic political culture."³⁵ To conduct this study, Price first assigned human rights scores on a scale of zero to six for twenty-three Muslim countries and twenty-three non-Muslim countries using information from the 1980 and 1990 editions of the US State Department *Country Reports* and Amnesty International's annual reports. Torture ratings accounted for one-third (0–2 points) of each country's score, while disappearances and political prisoners each accounted for another third of the score.³⁶ To measure each Muslim country's "Islamic political culture," which was defined as a combination of the "comprehensiveness" and "authenticity" of Islamic political ideologies in a country, Price totaled two separate scores: one for the degree to which Islamic law governs in each of five distinct legal spheres in the country (criminal law, commercial law, etc) (zero to fifteen points), and the other for the degree to which ideas and technologies that originate outside of the Muslim world are accepted by the society without reference to Islam (also zero to fifteen points). The former score was determined by studying the constitution and laws of each country and the latter score was derived from a variety of sources: official texts and statements, media reports, consultations with embassies, and results from a survey of members of the largest academic organization in the US that pertains to the Muslim world, the *Middle East Studies Association*.³⁷ Price ran the comparisons, using regression analysis to control for possible influences on human rights practices in Muslim-majority countries other than "Islamic political culture," including the degree of democracy in each country, the presence of ethnic cleavages or religious minorities, wealth and economic change, and the level of modernization and development.

Price found the relationship between human rights protection or violation and "Islamic political culture" in the Muslim countries he studied to be statistically insignificant. In fact, the relationship between the two scores was curvilinear: the worst human rights records were generally found in countries

³⁵ Daniel Price, *Islam and Human Rights: A Case of Deceptive First Appearances*, 41 J Sci Study Religion 213 (2002).

³⁶ Note that in these scores, zero represents the least human rights protection, or the highest torture rating, whereas in Hathaway's it represented the lowest torture rating. Note too that Price's data also apparently includes physical abuse other than merely investigative torture, and punishment is not expressly excluded. This means that Price's torture ratings are likely higher than Hathaway's, particularly for Muslim countries that apply *hudud* punishments.

³⁷ Price, 41 J Sci Study Religion at 215–17 (cited in note 35).

with either the highest scores of Islamic political culture, for instance Saudi Arabia and Iran (the most “Islamic” countries), or the lowest scores of Islamic political culture, for instance Syria and Libya (the most “secular” Muslim-majority countries in Price’s study).³⁸ Going on to compare the human rights scores of Muslim-majority countries with those of the control group of non-Muslim developing countries, Price again found Islamic political culture a statistically insignificant factor with respect to human rights practices. The data, Price concludes, “provide[s] strong evidence that government rooted in Islam does not facilitate the abuse of human rights.”³⁹

This may be so. But the data provides equally strong evidence that government rooted in Islam does not *prevent* the abuse of human rights. In other words, “Islamic political culture” would not appear to prevent human rights violations any more than the absence of that culture does. And since half the measure of Islamic political culture in Price’s study was a country’s formal commitment to Islamic law, the conclusion that Islamic law does not forbid torture in practice—*siyasa*—any more than it does in theory—*fiqh*—appears inescapable. True, Price did not isolate torture from the other human rights violations (disappearances and political prisoners) in his analysis, so what his data says about the relationship between torture itself and Islamic political culture cannot be stated precisely. But there is certainly nothing in his study, or anything else in the information we have seen about investigative torture in modern Muslim practice, that suggests that a commitment to Islamic law is associated with less torture (or vice versa).

Does such a commitment play a role in the decision of a Muslim country to participate in or abstain from international covenants on torture? This is considered next.

III. ISLAMIC LAW AND INTERNATIONAL COVENANTS ON TORTURE

All but seven of the forty-four Muslim-majority countries are parties to the 1984 Convention against Torture.⁴⁰ That convention not only forbids torture

³⁸ Id at 219.

³⁹ Id at 222.

⁴⁰ The seven non-parties, as Table 1 shows, are Brunei, Iran, Iraq, Malaysia, Oman, Pakistan, and the United Arab Emirates. See Convention against Torture, Ratifications and Reservations (Mar 13, 2007), available online at <<http://www.ohchr.org/english/countries/ratification/9.htm>> (visited Apr 21, 2007); Convention against Torture, art 1 (cited in note 3). All but seven, though a slightly different list of seven, (Brunei, Comoros, Malaysia, Oman, Pakistan, Saudi Arabia, and the United Arab Emirates) are also parties to the International Covenant on Civil and Political Rights (1966), 6 ILM 368 (1967), one article of which includes a prohibition of torture. For a list of ratifying countries, see *International Covenant on Civil and Political Rights, Ratifications and Reservations*

absolutely,⁴¹ but it also requires party states to enact laws to prevent and criminalize it,⁴² to train law-enforcement personnel to comply with and enforce the prohibition,⁴³ to review rules and practices of interrogation and detention in the interest of maintaining the prohibition,⁴⁴ to provide reliable and safe means of complaint and redress for alleged victims of torture,⁴⁵ and to investigate credible allegations of it promptly and impartially.⁴⁶ No Muslim-majority country that is a party to the convention has lodged a reservation with respect to these provisions. Only one of these countries has, moreover, formally suggested that anything about the Convention might be inconsistent with Islamic law (or vice versa). That country is Qatar, a small constitutional monarchy on the Arabian Peninsula, which is not a declared “Islamic state” but has declared Islam the state religion and Islamic law “the main source” of legislation.⁴⁷ Upon its accession to the treaty in January 2000, Qatar declared a reservation with respect to “[a]ny interpretation of the provisions of the Convention that is incompatible with the precepts of Islamic law and the Islamic religion.”⁴⁸

But what interpretations of the Convention might constitute or give rise to such incompatibility? As we have seen, prohibiting investigative torture is supported in the *fiqh*. Observing and enforcing the convention’s provisions is therefore no more incompatible with Islamic law than it is compelled by it. Neither the existence of competing positions in the *fiqh* nor the historical practice of investigative torture in Muslim lands changes this. True, all seven of the Muslim-majority countries that are not parties to the Convention have, like Qatar, declared Islam to be the state religion, as Table 1 illustrates, and four of them have taken the additional step of declaring themselves Islamic states (Brunei, Iran, Oman, and Pakistan). But there are more declared Islamic states

(Mar 13, 2007), available online at <<http://www.ohchr.org/english/countries/ratification/4.htm>> (visited Apr 21, 2007). See International Covenant on Civil and Political Rights, art 7 (“[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”).

⁴¹ Convention against Torture, art 2 (cited in note 3).

⁴² Id, arts 2, 4.

⁴³ Id, art 10.

⁴⁴ Id, art 11.

⁴⁵ Id, arts 13, 14.

⁴⁶ Id, arts 12, 13.

⁴⁷ Stahnke and Blitt, *The Religion-State Relationship* at 35 (cited in note 29).

⁴⁸ Convention against Torture, Ratifications and Reservations (cited in note 40). It bears noting though that most Muslim-country parties to the treaty have, like the US and many others, declined to make the additional declarations needed under Articles 21 and 22 of the Convention to recognize the competence of the United Nations Committee on Torture to hear complaints against them lodged by individuals or other party states, and a few have expressly disavowed that recognition. Id.

that *are* parties to the Convention (Afghanistan, Bahrain, Maldives, Mauritania, Saudi Arabia, and Yemen) than those that are not, and these are among the two-thirds of states that have declared Islam as their state religion that are parties (fifteen of twenty-two). Six of the seven abstaining countries declare Islamic law to be the basis or source of legislation in some or all matters, but ten Muslim countries that make the same declaration without limitation (as well as the remaining two that limit it to certain matters) are parties to the Convention. In other words, notwithstanding Qatar's Islamic-law reservation, there is no obvious correlation between a commitment to the law or religion of Islam and the decision of a Muslim country to join or abstain from the 1984 Convention against Torture.⁴⁹

The endorsement of other international covenants by Muslim countries does, however, suggest a contemporary view that banning torture is consistent with Islamic law, if not compelled by it. This view is apparent in human rights schemes that have originated in the modern Muslim world, most prominently the 1981 Universal Islamic Declaration of Human Rights ("1981 Universal Declaration"),⁵⁰ the 1990 Cairo Declaration on Human Rights in Islam ("1990 Cairo Declaration"),⁵¹ and a 1994 Arab Charter on Human Rights that was revised in 2004.⁵² Each of these documents prohibits torture, and each indicates not only that the prohibition is compatible with Islamic law but that it is in fact grounded in it. The 1981 Universal Declaration states in its preamble that God is "the source of all Law"⁵³ and that one of its goals is to ensure security, dignity, and liberty for individuals "in terms set out and by methods approved and

⁴⁹ That Qatar has the lowest possible torture rating (1.0) and is the only Muslim-majority country with that rating (see Table 1) makes its solo reservation all the more cryptic.

⁵⁰ Universal Islamic Declaration of Human Rights (Sept 19, 1981), available online at <<http://www.alhewar.com/ISLAMDECL.html>> (visited Apr 21, 2007) (hereinafter "1981 Universal Declaration").

⁵¹ Cairo Declaration on Human Rights in Islam (Aug 5, 1990) (trans unknown), available online at <<http://www1.umn.edu/humanrts/instree/cairodeclaration.html>> (visited Apr 21, 2007).

⁵² Arab Charter on Human Rights (May 23, 2004), art 8(a), available online at <<http://www1.umn.edu/humanrts/instree/arabcharter2.html>> (visited Apr 21, 2007). The 1981 and 1990 declarations were endorsed by the foreign ministers of the countries of the Organization of the Islamic Conference ("OIC"), which currently has fifty-seven member states: the forty-four Muslim-majority countries and thirteen others. See Organization of the Islamic Conference, available online at <<http://www.oic-oci.org/>> (visited Apr 21, 2007). The 1994 charter was promulgated and adopted by the League of Arab States, whose members are the world's sixteen Arab-majority countries—Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia, the United Arab Emirates, and Yemen—plus "Palestine" and five countries in which Arabs constitute a minority of the population: Comoros, Djibouti, Mauritania, Somalia, and Sudan. All of these countries (including Palestine) have Muslim-majority populations.

⁵³ 1981 Universal Declaration, Preamble ¶ (a) (cited in note 50).

within the limits set by the Law”⁵⁴; it then goes on to define “Law” as “the *Shari’ah*, ie, the totality of ordinances derived from the Qur’an and the Sunnah [Traditions] and any other laws that are deduced from these two sources by methods considered valid in Islamic jurisprudence.”⁵⁵ It also contains an appendix that lists citations to the Qur’an and Traditions in support of each provision, and among the citations for the provision that bans torture is a reference that appears to be to the Tradition recounted at the beginning of this Article. The 1990 Cairo Declaration is more explicit, stating flatly in its final article that the Shari’ah is “the only source of reference for the explanation of clarification” of its terms.⁵⁶ And the Arab Charter, though less emphatic (and more ecumenical) than its predecessors, grounds itself in “the eternal principles of fraternity, equality and tolerance among human beings imparted by the noble Islamic religion and by the other divine religions.”

True, there are suggestions that Islamic law might serve not only as a source of the guarantees in these documents but also as a limitation on them; the 1990 Cairo Declaration, for instance, states that the rights and freedoms it contains “are subject to the Islamic *Shari’ah*,”⁵⁷ as though Islamic law might somehow qualify its protections. But this language, along with the abstention of the seven Muslim-majority countries from the 1984 Torture Convention, might be better explained by Muslim politics than by Islamic law. Muslim ambivalence about contemporary regimes of international human rights, if not hostility toward them, is no secret. Among the reasons for this ambivalence are the Western origin of these regimes, the commensurate association of them with colonial enterprises, and the perceived inconsistency with which Western powers themselves act in accordance with them.⁵⁸ Seen in this light, a Muslim country’s abstention from an international covenant against torture, or any human rights scheme for that matter, or its insistence on explicitly conditioning participation in such a scheme on compliance with the Shari’ah, says little about Islamic law and everything about that country’s political perspective and calculations, both international and domestic.⁵⁹ Iran, to choose just one of the Muslim countries

⁵⁴ Id ¶ (g)(xiv)(b).

⁵⁵ Id at Explanatory note 1(b).

⁵⁶ Cairo Declaration on Human Rights in Islam, art 25 (cited in note 51).

⁵⁷ Id, art 24.

⁵⁸ See generally Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* 56–75 (Westview 4th ed 2007).

⁵⁹ See also Khaled Abou El Fadl, *A Distinctly Islamic View of Human Rights: Does It Exist and Is It Compatible with the Universal Declaration of Human Rights?*, in Shireen T. Hunter and Huma Malik, eds, *Islam and Human Rights: Advancing a U.S.-Muslim Dialogue* 27, 29–30 (Ctr for Strategic and Intl Studies 2005) (characterizing the engagement of Muslim countries in the international process as a product of “realpolitik and national interests” rather than a definition of “real Islam”).

that has abstained from the 1984 Torture Convention, bars torture in its constitution;⁶⁰ and more than a decade before that constitution was adopted an influential Iranian religious leader had stated that the torture prohibition in Article 5 of the 1948 Universal Declaration of Human Rights “conform[s] fully to Islamic law.”⁶¹ Islamic law, in other words, likely has as little to do with the participation or abstention of a given Muslim country in international covenants against torture as it does with the participation or abstention of any non-Muslim country.

IV. CONCLUSION: ISLAMIC LAW AND TORTURE TODAY

If Islamic law neither unequivocally bans investigative torture nor stands in the way of such a ban, what bearing does it have on the practice of torture in today’s Muslim world? The answer is as much a matter of politics as of law. As we have seen, those who seek justification for investigative torture in the *fiqh* or *siyasa* will find it there; so too will those who seek its prohibition. Competing legal authority, both between *fiqh* and *siyasa* and within each realm itself, is the essence of Islamic law. The result is that Islamic law—without a Pope to issue decisive religious edicts, a legislature to enact religious rules, or a Supreme Court to issue conclusive interpretations of such rules or edicts—ultimately means what Muslims decide it means.

That decision is neither bound by previous interpretations or applications of Islamic law nor limited to them.⁶² Nor can the decision, as a product of human agency, realistically be reached in isolation of the real-world circumstances of those who make it. The three *fiqh* positions on torture listed above arguably illustrate this. Al-Mawardi, who in the eleventh century departed from the long-standing *fiqh* prohibition of investigative torture by deeming it permissible to rulers (while maintaining the prohibition with respect to *qadis*), was a practicing judge who was appointed by Sunni caliphs and uniquely enjoyed their trust and patronage. He served at a time when caliphal rule was threatened,

⁶⁰ Iran Cons, art 38.

⁶¹ Universal Declaration of Human Rights, UN Doc No A/810 at 71 (1948), available online at <<http://www.unhchr.ch/udhr/lang/eng.htm>> (visited Apr 21, 2007); Sultanhussein Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights* 28 (FT Goulding 1970) (Abu’l Fazl Hazeghi, trans).

⁶² See also Khaled Abou El Fadl, *The Human Rights Commitment in Modern Islam*, in Joseph Runzo, Nancy M. Martin, and Arvind Sharma, eds, *Human Rights and Responsibilities in the World Religions* 301, 304 (Oxford 2003) (“One of the powerful attributes of doctrine—especially theological and religious doctrine—is that it does not necessarily have to remain locked within a particular sociopolitical-historical practice. Religious doctrine can be distilled from the aggregations and accumulations of past historical practices, and reconstructed and reinvented in order to achieve entirely new social and political ends.”).

indeed usurped, by a rival Shi‘a power (the Buyids). The work in which al-Mawardi presented his position on torture may have been aimed at strengthening the authority of the caliphs; it may even have been commissioned by one.⁶³ Ibn Taymiyya, who two centuries later sanctioned the investigative torture of suspects who were known for prior wrongdoing (without distinguishing among different state officials), lived and wrote in the very decades judicial torture was introduced in European criminal procedure.⁶⁴ That he would allow torture as a routine investigative method—according to a rule analogous to the “half proof” rule that came to permit it in Europe, no less—seems more than coincidental.⁶⁵ Al-Ghazzali, who wrote before both Ibn Taymiyya and al-Mawardi and deemed investigative torture flatly forbidden, was less concerned with matters of state than either of them; instead he wrote with the aim of integrating law with theology, ethics, and mysticism, and his work was more about religious guidance and his own personal spiritual quest than it was about matters of formal governance.⁶⁶ That al-Ghazzali should maintain the existing *fiqh* prohibition against torture is therefore not surprising.

In other words, Islamic law—*fiqh* norms and *siyasa* applications—is neither a consistent body of rules nor a static one, nor is it unaffected by historical context and circumstances, political realities, and even personal predilections. Instead it is the product of doctrinal interpretations and political applications, both of which are categorically and necessarily human endeavors. That six of the ten countries that consider themselves Islamic states and have declared Islam to be the state religion, nine of the additional twelve countries that have declared Islam to be the state religion, and every one of the remaining twenty-two Muslim-majority countries in the world have joined the 1984 Torture Convention without substantively qualifying that participation appears to be strong evidence that the weight of opinion in the Muslim world today is that banning torture is consistent with Islamic law, if not required by it.⁶⁷ The torture

⁶³ See Wafaa H. Wahba, *Introduction*, in al-Mawardi, *Ordinances of Government* xiii–xv (cited in note 12).

⁶⁴ See generally Langbein, *Torture and the Law of Proof* (cited in note 6).

⁶⁵ See also Johansen, 9 *Islamic L & Society* at 193 (cited in note 10) (finding it “hard to believe that jurists living in Europe and the Near East in the thirteenth century simultaneously introduced . . . judicial torture without there having been any mutual influence or exchange”).

⁶⁶ See Mustansin Mir, *Ghazali, Abu Hamid al-*, in John L. Esposito, ed, 2 *The Oxford Encyclopedia of the Modern Islamic World* 61, 61–63 (Oxford 1995); *Ghazali, Abu Hamid al-*, in John L. Esposito, ed, *The Oxford Dictionary of Islam* 94 (Oxford 2003), available online at <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t125.e714>> (visited Apr 21, 2007).

⁶⁷ Recall that Qatar, the tenth of the 12 Category 2 states that have joined the treaty, added a Shari‘ah qualification, and many Muslim countries have declined to submit to the review procedures of the convention.

bans in the “Islamic” declarations of human rights add further evidence of this. And prominent Muslim legal scholars in both the Muslim world and outside of it have lent the anti-torture position the weight of their analysis and authority.⁶⁸ Thus, whatever Islamic law might have said—or rather, whatever someone might have *said* Islamic law said—about investigative torture a millennium ago, a century ago, or a month ago, and notwithstanding any conflicting position a given Muslim country or jurist might advance today, Islamic law *can* be interpreted to ban torture, and the weight of authority today appears to be that it should be so interpreted.

So there may be sufficient authority to say that Islamic law forbids torture—but that authority has clearly not proven sufficient to eradicate torture in modern Muslim practice. In that respect, the relationship between Islamic law and Muslim practice resembles the relationship between international law and state practice generally: even a state’s commitment to an international norm as unambiguous as a ban on torture does not necessarily reflect or result in state compliance with that norm, as Oona Hathaway has demonstrated through her torture ratings.⁶⁹ Islamic law in fact exhibits this divide between theory (norms) and practice at two levels: internally, in the distinction between *fiqh* and *siyasa*, and externally, in the distinction between *fiqh* and *siyasa* (combined) and the practice of Muslim states, at least insofar as a state’s commitment to a ban on torture internationally or domestically reflects a *siyasa* commitment. The divine provenance of Islamic law does not, in other words, compel state actors in a Muslim country to comply with the dictates of that law any more than the humanitarian ideals of international law compel state actors in any country to comply with that law.

What then governs the future of investigative torture in Muslim countries, if Islamic law is not enough to decide that future? *Domestic* accountability in Muslim countries, and thus democratic government, would appear to be the answer. Hathaway sees “self-enforcement”—the existence of domestic institutions and mechanisms that enable citizens to force state compliance with

⁶⁸ See, for example, Kamali, *The Right to Personal Safety* at 88 (cited in note 1) (concluding that the authority against investigative torture is “more persuasive, and . . . also in harmony with the basic presumption of the Shari’a, which maintains original non-liability (*bara’a al-dhimma al-asliyya*) to be the normal state, unless proven otherwise”); El Fadl, *The Human Rights Commitment in Modern Islam* at 357 n 84 (cited in note 62) (arguing that torture should be considered a categorical moral wrong).

⁶⁹ Oona A. Hathaway, *The Promise and Limits of the International Law of Torture*, in Sanford Levinson, ed., *Torture: A Collection* 200, 201–04 (Oxford 2004) (finding *inter alia* that states with worse torture ratings are slightly more likely to join the 1984 Torture Convention, states that have ratified regional conventions against torture have worse practices on average than those that have not, and states that have ratified the 1984 Convention engage in more torture than those that have not).

legal obligations—as a better means of ensuring treaty compliance than the international legal system in which those treaties operate.⁷⁰ The existence and effectiveness of such mechanisms—a robust and independent media, adequate avenues to challenge government actions and hold state actors accountable, an impartial and independent judiciary—are of course both a product and a measure of democratic government. Democratic government is in fact what Price found to be the key factor in his comparative study: its presence was statistically associated with greater human rights protection, and its absence statistically associated with worse protection, in both the Muslim countries and the entire sample of countries Price studied.⁷¹ The future of torture in the Muslim world will thus not likely be determined by either Islamic law or international law, but by democracy or its absence. The same may be true of any question of law—Islamic, international, or other—in the Muslim world today. And in answering the torture question, Muslims might do well to consider a statement by the most authoritative human in Islam. The prophet Muhammad, the Traditions tell us, said: “God will torture [in the Hereafter] those who torture people in this world.”⁷²

⁷⁰ Id at 206.

⁷¹ Price, 41 J Sci Study Religion at 220–21 (cited in note 35).

⁷² Ahmad Ibn Naqib al-Misri, *Reliance of the Traveller* 685 (Amana 1994) (citing Sahih Muslim (*inna Allaha yu'adhibib alladhina yu'adhibibuna fi al-dunya*)).