

# ISLAMIC LAW STATES AND THE AUTHORITY OF THE INTERNATIONAL COURT OF JUSTICE: TERRITORIAL SOVEREIGNTY AND DIPLOMATIC IMMUNITY

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## I

### INTRODUCTION

The principal judicial organ of the United Nations (UN)—the International Court of Justice (ICJ)—adjudicates interstate disputes and issues advisory opinions on legal questions referred to it by authorized UN organs and specialized agencies.<sup>1</sup> The Court has contributed to the peaceful resolution of disputes by delivering justice in a variety of issue areas including territorial sovereignty, maritime delimitation, and diplomatic relations. Throughout its history, the ICJ has strived to transform its formal authority, as established in its Statute,<sup>2</sup> into authority in fact. Hypothetically, such transformation would occur if countries not only recognized the Court’s jurisdiction, but also acknowledged that the ICJ’s rulings impose an obligation to comply.<sup>3</sup> However, distinct features of the ICJ’s jurisdiction make it almost impossible for the Court to establish authority over the entire zone of its jurisdiction. Additionally, perhaps more so than other international courts (ICs) addressed in this issue, the ICJ operates in an environment with attractive litigation alternatives that siphon cases away from it. Finally, the ICJ is not always accepted as an authoritative adjudicator by its potential audience, especially if one considers the broad range of substantive areas of law that might be seen as falling under the ICJ’s formal jurisdiction.

This article considers Islamic law states (ILS) as a least likely case for ICJ authority. The Court—already constrained by its specific jurisdictional design

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1. *The Court*, INT’L COURT OF JUSTICE, <http://www.icj-cij.org/court/index.php?p1=1> (last visited Feb. 21, 2015).

2. “The Statute of the International Court of Justice is annexed to the Charter of the United Nations, of which it forms an integral part. The main object of the Statute is to organize the composition and the functioning of the Court.” *Statute of the Court*, INT’L COURT OF JUSTICE, <http://www.icj-cij.org/documents/?p1=4&p2=2> (last visited Mar. 19, 2015).

3. See generally SARA McLAUGHLIN MITCHELL & EMILIA JUSTYNA POWELL, DOMESTIC LAW GOES GLOBAL: DOMESTIC LEGAL TRADITIONS AND INTERNATIONAL COURTS 205–20 (2011).

and choice of forum options—faces additional hurdles in building up its authority vis-à-vis ILS. This article asks: Why and under what conditions are ILS willing to accept the ICJ’s authority? This question is considered in the context of two substantive areas of the ICJ’s jurisdiction: territorial sovereignty and diplomatic immunity. In territorial sovereignty cases, despite the conflict between Islamic law’s edicts regarding territorial ownership and international law, ILS sometimes use the ICJ and respect its rulings. Yet although the ICJ is able to attain narrow authority in the territorial disputes it adjudicates, the Court encounters a number of constraints that preclude it from reaching intermediate authority. In diplomatic immunity cases, despite the consistency between Islamic and international law regulating diplomatic protection, ILS are not particularly willing to accept the ICJ’s authority. The role of strategic considerations is evident across all ILS cases that make it to The Hague—regardless of the relationship between Islamic and international law.

Part II situates the ICJ vis-à-vis other ICs and analyzes the Court’s distinctive features and their ramifications for the Court’s authority. Part III discusses the category of ILS, highlighting two factors that can impact the ICJ’s authority in relation to ILS: the distinctive doctrines of Islamic international law (*siyar*), and ILS’ preference toward nonconfrontational dispute settlement. Part IV explores two issue areas in which the relationship between the ICJ and ILS can potentially vary: territorial sovereignty—in which international and Islamic law are at odds—and diplomatic immunity, in which Islamic law and international law coexist without conflict.

## II

### THE ICJ’S DISTINCTIVE JURISDICTION

The ICJ was created as a successor of the Permanent Court of International Justice. The UN Charter defines the ICJ as “the principal judicial organ of the United Nations” and declares that “[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.”<sup>4</sup> Notably, the UN Charter requires the peaceful settlement of disputes, identifying a number of means to this end, including seeking “a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”<sup>5</sup> Most of the Charter’s discussion about the peaceful settlement of disputes is focused on the Security Council.<sup>6</sup> Indeed the discussion of the ICJ’s rule makes clear that “[n]othing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be

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4. U.N. Charter art. 92, 93.

5. U.N. Charter art. 33–38.

6. Chapter VI of the U.N. Charter includes articles 33–38, each of which focuses on the Security Council’s role in settling disputes through peaceful means.

concluded in the future.”<sup>7</sup>

There are several distinctive features of the ICJ that, together, directly affect its ability to acquire authority in fact: (1) dual jurisdiction, that is, jurisdiction in advisory and contentious cases; (2) a subject matter scope that potentially includes all of international law, both custom and treaties; (3) an extensive practice of reservations by states that recognize the Court’s compulsory jurisdiction; and (4) attractive alternatives to ICJ litigation. These distinctive characteristics differentiate the ICJ from the other ICs in this symposium and create particular challenges for the ICJ in building up its authority in fact.

#### A. Dual Jurisdiction

Unlike most other ICs, the ICJ has a dual jurisdiction. The Court’s primary purpose is to adjudicate contentious disputes between states, although it can also give advisory opinions on legal questions referred to it by authorized UN organs and specialized agencies. Recognizing this duality is important in assessing the ICJ’s ability to acquire authority, for decisions issued within each domain can potentially affect different audiences. The Court’s judgments in contentious cases are legally binding only on the state parties to a dispute. In principle, there is no legal obligation for other states facing like situations to comply with these rulings. This reality makes it challenging for the ICJ to establish intermediate authority, defined in the symposium’s introduction as an authority that extends to similarly situated litigants.<sup>8</sup> The situation is different when the ICJ is asked to interpret international law under its advisory jurisdiction. Although advisory opinions are not legally binding, they can have an indirect influence in shaping international law, including an influence on states that have ratified the treaties the Court interprets but that have not consented to the ICJ’s compulsory jurisdiction.<sup>9</sup> These rulings do not have proper parties, and are thus not really addressed to specific disputes between countries in the same way as judgments in contentious cases.<sup>10</sup>

#### B. Wide Subject Matter Jurisdiction

Whereas other ICs with global geographic reach—the International Criminal Court, the International Tribunal for the Law of the Sea, or the World Trade Organization Dispute Settlement system—have jurisdiction over specific predefined sets of legal rules, the ICJ potentially has adjudicative jurisdiction

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7. U.N. Charter art. 95.

8. Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 *LAW & CONTEMP. PROBS.*, no. 1, 2016, at 10.

9. See MAHASEN M. ALJAGHOUB, *THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE 1946–2005*, at 116–17 (2006); see also Pieter H.F. Bekker, *The World Court’s Ruling Regarding Israel’s West Bank Barrier and the Primacy of International Law: An Insider’s Perspective*, 38 *CORNELL INT’L L.J.* 553, 564 (2005).

10. IAN HURD, *INTERNATIONAL ORGANIZATIONS: POLITICS, LAW, PRACTICE* 194 (2011).

over “all legal disputes.”<sup>11</sup> A legal dispute is defined as “a disagreement on a question of law or fact, a conflict, a clash of legal views or of interests.”<sup>12</sup> States may file declarations recognizing the ICJ’s compulsory jurisdiction for all or some legal disputes through acceptance of the Optional Clause in Article 36(2) of the ICJ Statute. Alternatively, states can confer ICJ jurisdiction in bilateral and multilateral treaties. These compromissory jurisdiction clauses appear in international agreements pertaining to a variety of issue areas, such as the environment, organized crime, corruption, and air services.

Jurisdiction over contentious cases and advisory opinions in combination with wide subject matter jurisdiction may suggest that the ICJ has far-reaching authority, because *all* states are potential future litigants, and *all* legal disputes may fall within the Court’s contentious or advisory jurisdiction. However, the next two institution-specific contextual factors—states’ ability to customize their ICJ commitments as well as attractive alternatives to litigation—cast doubt on the scope of that authority.

### C. Reservations

The ICJ has jurisdiction only with respect to states that have expressly consented to its jurisdiction, and the specific boundaries of consent may be limited. Nearly all countries have customized their ICJ commitments via reservations in declarations under the Optional Clause in Article 36(2). These restrictions may pertain to specific states (reservations *ratione personae*), time periods (*ratione temporis*), and areas of international law (*ratione materiae*).<sup>13</sup> For states that file an optional declaration accepting the Court’s compulsory jurisdiction, the Court has compulsory jurisdiction only with respect matters involving other states that have similarly filed such a declaration. Thus, the designation “compulsory jurisdiction” is somewhat of a misnomer in the context of the ICJ.

### D. Alternatives to International Litigation

The ICJ operates in an environment with attractive alternatives to litigation, unlike some other ICs, especially those with limited subject matter jurisdiction.

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11. Statute of the International Court of Justice, art. 36, [http://www.icj-cij.org/documents/?p1=4&p2=2#CHAPTER\\_II](http://www.icj-cij.org/documents/?p1=4&p2=2#CHAPTER_II).

12. *Contentious Jurisdiction*, INT’L COURT OF JUSTICE, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1> (last visited Feb. 24, 2015).

13. Reservations *ratione temporis* guard against cases originating from the past. For example, several countries place reservations excluding World War I (Declaration of Poland 1931), or World War II (Australia 1940, United Kingdom 1940) from the Court’s jurisdiction. *Ratione materiae* are the largest group of reservations. The United Kingdom’s 1957 Optional Clause declaration excluded the ICJ’s jurisdiction from any question that could affect the national security of the United Kingdom or its dependent territories. The most common *ratione personae* reservation is the one used by British Commonwealth countries. It excludes from the ICJ’s jurisdiction disputes among these states. MITCHELL & POWELL, *supra* note 3, at 170. See also S.A. ALEXANDROV, RESERVATIONS IN UNILATERAL DECLARATIONS ACCEPTING THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 91 (1995).

These alternatives siphon cases away from the ICJ and diminish its ability to build authority in fact in many issue areas. Several disputes can be, and often are, resolved through arbitration and mediation, or litigated before other ICs with subject-specific jurisdiction, such as the International Tribunal for the Law of the Sea. In comparison to these alternatives, ICJ litigation can be more expensive and time-consuming, limit the parties' control over procedures, and result in a legally binding judgment that states may prefer to avoid.<sup>14</sup>

Although in theory the ICJ can be consulted for any issue of concern to states, its *de jure* subject matter jurisdiction is limited and varies across issues and states. ICJ rulings are considered to be legally persuasive, even authoritative.<sup>15</sup> But reservations, persistent objections, and lawful exits are also seen as valid limits to the Court's power.<sup>16</sup> Thus, even those who see the ICJ as legally authoritative perceive its extensive authority as limited by virtue of the many exceptions to its jurisdiction.

Also, the fact that the ICJ can only adjudicate cases involving states that have expressly consented to its jurisdiction in some form or fashion prevents the ICJ from developing intermediate authority across the full range of its subject matter jurisdiction and across all countries. In essence, the ICJ's institutional design accentuates the "exceptional nature of international adjudication" by giving states "de facto veto power" over the Court's jurisdiction.<sup>17</sup> These structural limitations coupled with forum shopping not only make it very difficult for the ICJ to establish narrow and intermediate authority; they also limit the ICJ's extensive authority.

### III

#### ILS AND THE ICJ

My focus on ILS comes from my deeper interest in understanding the relationship between Islamic law and international law in the context of peaceful resolution of disputes.<sup>18</sup> The ICJ, as the principal judicial organ of the UN, would seem to be an important venue for resolving such disputes. Before that issue is analyzed, three preliminary concerns warrant up-front clarification: defining the category of ILS, accounting for the internal variations among those

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14. Emilia Justyna Powell & Krista E. Wiegand, *Strategic Selection: Political and Legal Mechanisms of Territorial Dispute Resolution*, 51 J. PEACE RES. 361 (2014).

15. See generally J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* (2011); CONSTANZE SCHULTE, *COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE* (2004); Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT'L L. 815 (2008).

16. See Mitchell & Powell, *supra* note 3.

17. Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT'L L. 73, 78 (2009).

18. See generally Emilia Justyna Powell, *Islamic Law States and the International Court of Justice*, 50 J. PEACE RES. 203 (2013) [hereinafter Powell, *International Court of Justice*]; Emilia Justyna Powell, *Islamic Law States and Peaceful Resolution of Territorial Disputes*, 69 INT'L ORG. J. 777-807 (2015) [hereinafter Powell, *Territorial Disputes*].

states, and reconciling the dogma-versus-practice issue associated with Islamic international law.

Previously, I have defined an ILS as a state a substantial part of whose *official legal system is directly* based on the Koran.<sup>19</sup> This definition does not depend on the religion or political preferences of citizens, but rather on whether a country officially and directly applies sharia as a substantial part of personal, civil, commercial, or criminal law. The ILS category differs from other seemingly similar definitions, such as “Islamic states,” “Arab states,” or “Muslim states,” all of which place emphasis on some defining feature of being Islamic. For example, the category “Muslim states” usually denotes countries with a majority Muslim population. According to Berger, there are about fifty states meeting this criterion.<sup>20</sup> Some scholars prefer the term “Islamic” to “Muslim” to describe “Muslim countries that are distinctively religious.”<sup>21</sup> The reliance on *domestic legal features* and not on other characteristics of a society or its governance is particularly crucial in the context of this article’s focus: consonance and dissonance between domestic and international laws.

As with any category imposed on a collectivity of states, there are considerable gray areas at the edges of ILS. Laws move across borders, and domestic legal systems change over time. Few countries officially identify themselves as “Islamic”; thus, there is no agreement in the literature on how much traditional Islamic law must be incorporated into the legal system for a country to be considered “Islamic.” As Berger suggests, labelling a state Islamic “depends on various factors, and is mostly in the eye of the beholder.”<sup>22</sup> Keeping these important caveats in mind, for the purpose of this article the ILS category is less noisy than other alternatives because it is based on the formal law of the domestic legal system rather than the presence or absence of other indicators of “Islam-ness.” This focus on formal law means that I exclude countries like Turkey, where Muslims constitute the majority of the population yet where the legal system has intentionally distanced itself from the creeds of sharia. Figure 1 offers a geographical display of all ILS, and Figure 2 provides a listing of ILS’ Muslim population (raw numbers and percentages). India, Bangladesh, and Turkey, three non-ILS with large Muslim populations, are included in Figure 2 for the purpose of comparison.

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19. Powell, *International Court of Justice*, *supra* note 18; Powell, *Territorial Disputes*, *supra* note 18.

20. Maurits Berger, *Islamic Views on International Law*, in *CULTURE AND INTERNATIONAL LAW* 105, 109 (Paul Meerts ed., 2008).

21. *Id.* at 110.

22. *Id.*

Figure 1: Map of Islamic Law States

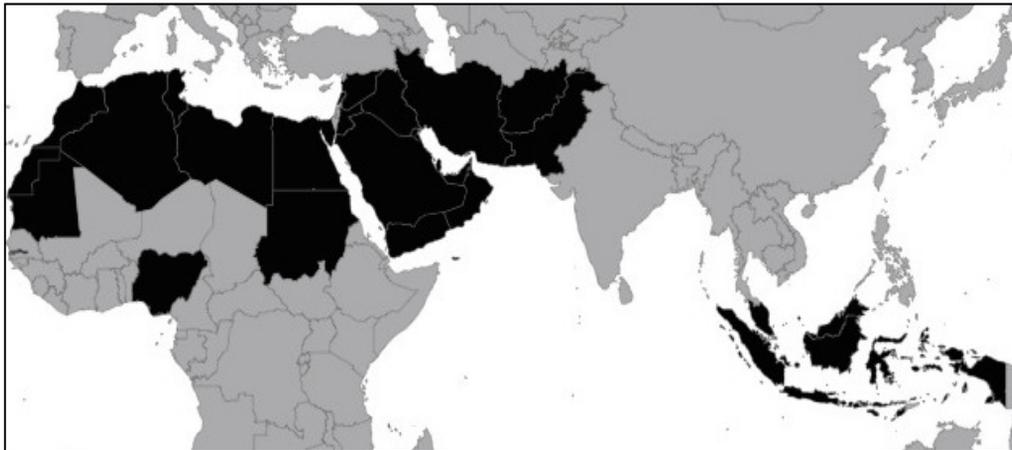
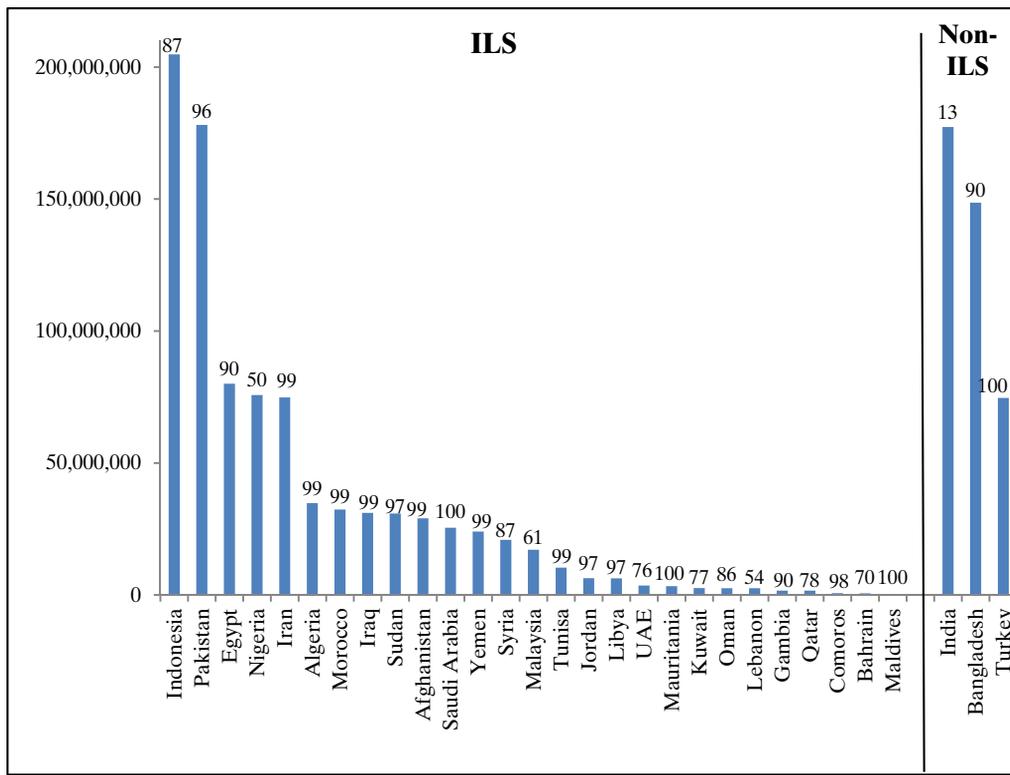


Figure 2: Muslim Population (Raw Numbers and Percentages) in ILS and Non-ILS<sup>23</sup>



23. See CIA, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/> (retrieved Dec. 10, 2014); PEW RESEARCH CENTER, THE FUTURE OF THE GLOBAL MUSLIM POPULATION, <http://www.pewforum.org/files/2011/01/FutureGlobalMuslimPopulation-WebPDFFeb10.pdf>.

Today's ILS differ from their historical predecessors for whom sharia was justified as a divine plan and provided an absolute basis for state law. Included in my definition of ILS are states where sharia applies only to certain legal domains. Today's ILS also differ from their predecessors in that domestic legal authorities often interpret sharia moderately, acknowledging socioeconomic developments and recognizing that certain domains such as modern business transactions, criminal law, and legal matters of non-Muslims require secular governance. Many of the contemporary ILS follow a well-established trend of limiting the sharia courts' jurisdiction to personal cases dealing with property, inheritance, and marriage. Important parts of legal systems are regulated by secular laws, and secular courts constitute a crucial part of the legal landscape.<sup>24</sup> The reach of Islamic law may be attenuated, but this evolution does not change the reality that in ILS, more than in other countries, religious laws are part of the official legal system. Indeed, as my previous research demonstrates, ILS' constitutions mention sharia and Islam on average 16.6 times, ranging from 0 (Indonesia) to 93 (Iran).<sup>25</sup>

The ILS category is internally diverse, especially at the level of doctrine, legal interpretation, and legal theory. Schools of Islamic law (*madhahib*) have historically offered differing interpretations of sharia. This reality has fundamentally shaped Islam. In no other legal system is there such a diversity of opinion between different schools of law and individual scholars. As Vikør succinctly put it, "There is no such thing as a, that is one, Islamic law, a text that clearly and unequivocally establishes all the rules of a Muslim's behavior."<sup>26</sup> For example, there are currently three Shi'a and four Sunni legal schools widely acknowledged that provide diverging interpretations of law.<sup>27</sup>

The formal incorporation of sharia into domestic law differentiates ILS from states where a religion such as Christianity, Buddhism, or Hinduism plays an important societal role. Religion may be a feature of public and political life in these countries, but law and religion are not as interconnected in a tangible way via a domestic legal system, constitutions, official codifications, and courts. A degree of skepticism exists among scholars as well as policymakers about whether and how sharia is relevant to ILS' behavior.<sup>28</sup> In the modern international system, a plurality of political, strategic, and legal factors affects how any government operates. International behavior of any country emerges

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24. See Powell, *International Court of Justice*, *supra* note 18, at 209.

25. *Id.* at 212 (data as of 2006).

26. KNUT VIKØR, *BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW* 1 (2005).

27. The Shi'a schools are Ja'fari, Isma'ilis, and Zaydis, and the Sunni schools are Hanafi, Maliki, Shafi'i, and Hanbali. There is also the Ibadhi madhab, which has a limited reach in the Islamic world. See WAEL B. HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* 150–77 (2005).

28. See generally Maurits S. Berger, *Islam and Islamic Law in Contemporary International Relations*, in *ISLAM AND INTERNATIONAL LAW: ENGAGING SELF-CENTRISM FROM A PLURALITY OF PERSPECTIVES* 393 (Marie-Luisa Frick & Andreas Th. Müller eds., 2013).

as an outcome of an intricate balance of these factors' convergence. To be sure, in the case of ILS, sharia constitutes only one of these multiple forces. Most importantly, in some ILS there is a real difference between the dogma of Islamic law and the actual state practice. Although Islamic ideals are practiced differently by different actors in ILS, the reality is that ILS citizens expect religion to play a role in all aspects of life, including domestic and international legal politics.<sup>29</sup>

The notional commitment some governments repeatedly make to Islamic law, and the expectation of many citizens that religion will play a role in all aspects of life, combine to create constraints on ILS. Two factors in particular have the potential to pull these countries away from the ICJ: Islamic international law (*siyar*) and ILS' preference toward nonconfrontational dispute settlement. ILS are likely to embrace Islamic international law, *siyar*, as a competing authoritative legal system.<sup>30</sup> *Siyar* can be defined as a branch of Islamic law that regulates the behavior of Islamic states and individuals in the international arena.<sup>31</sup> It is a system of norms that parallels the Western concept of international law. *Siyar* is believed to derive from God's eternal will, and its origins lie in the Koran and the Sunna. Just as adherents to the Muslim faith are to abide by sharia, so are Islamic tribes, nations, and states.<sup>32</sup>

There are considerable doctrinal divergences between *siyar* and international law. According to traditional Islamic law, judges should be devout adherents of the Muslim faith. Additionally, under strict interpretation of sharia, a Muslim may not be judged by non-Muslim judges. This behavioral norm stems from the following Koranic jurisprudential rule: "And Allah will by no means give the unbelievers a way against the believers."<sup>33</sup> According to some Islamic jurists, this verse proscribes the domination of non-Muslims over Muslims in *any* area, including domestic and international adjudication. The position of a judge is associated with holding authority over disputants; thus a Muslim person or collectivity (such as an ILS) should not refer a dispute to a non-Muslim judge. This Koranic rule "is the reason that Islamic governments often refuse to go to the international courts, whose judges are usually not Muslim."<sup>34</sup>

Alter, Helfer, and Madsen note that IC rulings "may conflict with, and seek to displace, well-established or assumed interpretations of legal rules or social

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29. Anver M. Emon, *Shari'a and the Modern State*, in ISLAMIC LAW AND INTERNATIONAL LAW: SEARCHING FOR COMMON GROUND? 52 (Anver M. Emon, Mark Ellis & Benjamin Glahn eds., 2012).

30. See William Samuel Dickson Cravens, *The Future of Islamic Legal Arguments in International Boundary Disputes Between Islamic States*, 55 WASH. & LEE L. REV. 529, 532 (1997).

31. Mohd Hisham Mohd Kamal, *Meaning and Method of the Interpretation of Sunnah in the Field of Siyar: A Reappraisal*, in ISLAM AND INTERNATIONAL LAW, *supra* note 28, at 64.

32. Interview with Mohammed Al-Qasimi, Vice Dean, College of Law, United Arab Emirates University, in Al-Ain, U.A.E. (Nov. 2013).

33. KORAN 4:141.

34. E-mail from Seyed Masoud Noori, Research Director, Center for the Study of Islam & the Middle East (CSIME), Washington, D.C., to author (Jan. 2014) (on file with author).

norms.”<sup>35</sup> The juxtaposition of *siyar* and international law is a prime example of this process. *Siyar* and international law, however, do not always provide conflicting solutions to legal questions. For example, Islamic principles of maritime law have historically converged with modern international law of the sea. This convergence extends to such important principles as the freedom of navigation and the status of high seas.<sup>36</sup> Similarly, there is a considerable overlap in the area of diplomatic immunity, environmental, and fresh-water law.<sup>37</sup> Part II explained how the ICJ, perhaps more so than other ICs, operates in an environment with attractive litigation alternatives that siphon cases away from the Court and diminish the ICJ’s ability to establish its authority in fact. Islamic international law, *siyar*, creates an additional reason for ILS to prefer alternatives to international adjudication.

Another reason ILS prefer alternatives to international adjudication is Islamic law’s prioritization of brotherly settlement and nonconfrontational methods over Western-style formal approaches to conflict resolution. *Sulh*—a simple settlement between the disputants with help from a third-party—was the Prophet Muhammad’s preferred method of resolving disagreements. Islamic scholars propose that out-of-court reconciliation is religiously and ethically better than in-court proceedings.<sup>38</sup> Additionally, “the preferred ‘third party’ in the Arab Islamic approach is an unbiased insider with ongoing connections to the disputants, a strong sense of the common good, and standing within the community.”<sup>39</sup> Traditional Islamic law incorporates brotherly settlement into court proceedings. The goal of a *qadi*—an Islamic law judge—is to encourage disputants to denominate the solution on friendly terms.

In the process of building authority, the ICJ has to contend with litigation alternatives such as conciliation, mediation, and arbitration. All states, Islamic or not, have the option to resolve disputes via a variety of means across the entirety of the ICJ’s jurisdiction. Yet, while Western legal systems embrace or even promote courts, Islamic law legitimizes nonconfrontational dispute resolution. With these methods, ILS may solicit help from an Islamic third party and base the resolution process on sharia.<sup>40</sup> Thus, the ICJ may receive fewer cases from its Islamic audience and must struggle twice as hard to establish authority vis-à-vis ILS. However, the attractiveness of these alternatives for ILS does not remain constant across all substantive issue areas of international law.

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35. Alter, Helfer & Madsen, *supra* note 8, at 4.

36. See generally HASSAN S. KHALILIEH, *ISLAMIC MARITIME LAW* (1998).

37. See generally Thomas Naff & Joseph Dellapenna, *Can There Be Confluence? A Comparative Consideration of Western and Islamic Fresh Water Law*, 4 *WATER POL’Y* 65 (2002); Lisa Wersal, *Islam and Environmental Ethics: Tradition Responds to Contemporary Challenges*, 30 *ZYGON* 415 (1995).

38. Aida Othman, “*And Amicable Settlement Is Best*”: *Sulh and Dispute Resolution in Islamic Law*, 21 *ARAB L.Q.* 64, 65 (2007).

39. George E. Irani & Nathan C. Funk, *Rituals of Reconciliation: Arab–Islamic Perspectives*, 20 *ARAB STUD. Q.* 4, 53, 63 (1998).

40. Powell, *International Court of Justice*, *supra* note 18; Krista E. Wiegand & Emilia Justyna Powell, *Past Experience, Quest for the Best Forum, and Peaceful Attempts to Resolve Territorial Disputes*, 55 *J. CONFLICT RESOL.* 361 (2011).

ILS are surely a “hard case” for the ICJ to establish its authority.<sup>41</sup> Many countries have conflicting domestic legislation, but ILS are often more reluctant to shed conflicting domestic law that is based on sharia. In addition, because Islamic law puts a premium on mediation and conciliation over litigation, choosing an alternative dispute settlement forum is especially likely for ILS. For this reason, it is all the more remarkable that the ICJ has, in fact, been embraced to some extent by ILS. Several ILS recognize the ICJ’s compulsory jurisdiction, and more than fifty percent are part of over a hundred treaties with compromissory clauses.<sup>42</sup>

The next part considers the practice of ILS with respect to two issue areas: territorial sovereignty and diplomatic immunity. In the territorial-sovereignty area, *siyar* and international law have historically diverged. In contrast, there is a well-established agreement in how *siyar* and international law regulate diplomatic immunity. This article refers to judgments in contentious cases and advisory opinions to illustrate the Court’s authority. During advisory proceedings, states are under no obligation to officially submit oral or written arguments; they may simply choose to do so. Neither the organizations requesting an opinion nor states are required to comply.<sup>43</sup> Behavior that conforms to advisory opinions despite their nonbinding nature provides important clues on ILS’ view of the Court.

#### IV

#### THE LEGAL PRACTICE OF ILS IN FRONT OF THE ICJ: TERRITORIAL DISPUTES AND DIPLOMATIC IMMUNITY<sup>44</sup>

This part evaluates whether conflicts between international law and *siyar* affect the ICJ’s legal authority vis-à-vis ILS. It does so by examining two issue areas in which ILS have approached the ICJ: disputes about territory and disagreements between Islamic and non-Islamic states about diplomatic immunity. Consonance or dissonance between *siyar* and international law does not necessarily determine whether ILS accept the ICJ’s legal authority. The Court seems to have narrow legal authority and perhaps even intermediate authority in territorial dispute cases. In the diplomatic immunity issue area,

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41. See GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY* (1994); Jason Seawright & John Gerring, *Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options*, 61 POL. RES. Q. 294, 301 (2008).

42. Mitchell & Powell, *supra* note 3.

43. SCHULTE, *supra* note 15, at 15.

44. The focus of this article is distinctly on diplomatic immunity laws, which deal with diplomatic privileges and immunities of diplomatic missions. See MALCOLM N. SHAW, *INTERNATIONAL LAW* (2003). This is not a reference to a wider concept of sovereign immunity: these rules regulate the magnitude to which a state may be free from the jurisdiction of a foreign state’s courts. This contribution’s focus is on the convergence between Islamic law and international law. Islamic laws of diplomatic immunity, specifically, exhibit remarkable similarity with modern international law. The degree of convergence is much smaller in the context of sovereign immunity. For more discussion of diplomatic immunity law versus sovereign immunity law, see Michael A. Tunks, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651 (2002).

where *siyar* and international law coexist without conflict, ILS often push back against the Court and challenge its decisions.

*Siyar* conceives of land ownership differently than international law, and this difference has been a sore spot for ILS. International law, and Western law more generally, suggests that land is owned by an individual or a state. By contrast, Islamic notions of land ownership and sovereignty have a religious nature. Land and water are considered to be sanctified trusts for the use of individuals and collectivities such as tribes or states. Because God is the ultimate owner of the land, states are merely overseeing the use of land, but they have to do so in a just way.<sup>45</sup> Sovereignty is, therefore, not absolute, but conditional. *Siyar* and international law diverge in how they regulate territorial concessions and acquisitions. Whereas international law's approach to territorial concessions is based on a zero-sum framework, *siyar* emphasizes collective responsibility and collective gains.

In contrast to the laws relating to territory, Islamic laws of diplomacy have historically resembled international law, as expressed in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations,<sup>46</sup> both of which grant to diplomats absolute immunity from arrest, detention, and prosecution. As several scholars argue, Islamic conceptions of diplomatic immunity have influenced the development of international law in this domain.<sup>47</sup> According to Bsoul, the concept of diplomatic safety originated in the Muslim world.<sup>48</sup> Current Islamic regulations of diplomatic immunity are firmly grounded in norms developed in the pre-Islamic Arab era.<sup>49</sup> Of particular interest is the concept of *Amān* that originated during this time. As described by Bsoul, *Amān* indicated a “pledge of security given to non-Muslims upon entering to *dār al-Islām* for a fixed period of time.”<sup>50</sup> This promise of protection was equivalent to the modern concept of diplomatic immunity. The Koran and the Sunna, as well as the practice of the Caliphate that developed over time, indicate that diplomats, their staff, and accompanying persons were endowed with an elaborate set of immunities.

The rest of this part compares the legal practice of ILS across territorial sovereignty and diplomatic immunity issue areas. First, this part addresses three territorial cases: the *Western Sahara* advisory opinion,<sup>51</sup> the *Bahrain–Qatar*

45. IRAJ SAIT & HILARY LIM, *LAND LAW, AND ISLAM: PROPERTY AND HUMAN RIGHTS IN THE MUSLIM WORLD* 8 (2006).

46. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261.

47. Khaled Ramadan Bashir, *Treatment of Foreigners in the Classical Islamic State with Special Focus on Diplomatic Envoys: Al-Shaybānī and Amān*, in *ISLAM AND INTERNATIONAL LAW*, *supra* note 28, at 153–58.

48. LABEEB AHMED BSOU, *INTERNATIONAL TREATIES (MU'AHADAT) IN ISLAM: THEORY AND PRACTICE IN THE LIGHT OF ISLAMIC INTERNATIONAL LAW (SIYAR) ACCORDING TO ORTHODOX SCHOOLS* 39 (2008).

49. *Id.*

50. *Id.*

51. *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12 (Oct. 16).

dispute,<sup>52</sup> and the *Wall* advisory opinion.<sup>53</sup> Addressed next are diplomatic immunity cases including *Diplomatic and Consular Staff in Tehran*—the ICJ’s ruling on the immunity of American diplomats taken hostage by students in the aftermath of Iran’s Islamic revolution,<sup>54</sup> the *Lockerbie* dispute regarding international jurisdiction,<sup>55</sup> and the *Special Rapporteur of the Commission on Human Rights* advisory opinion.<sup>56</sup>

#### A. ILS’ Territorial Cases at the ICJ

My previous research shows that in the context of territorial disputes, ILS prefer nonbinding, third-party methods.<sup>57</sup> This is particularly true for those ILS that directly incorporate traditional sharia laws into their official legal system. As Figure 3 shows, ILS’ preferences lean toward the nonbinding resolution venues at a higher rate than that prevailing among the non-ILS (twenty-nine percent versus nineteen percent). A considerable number of ILS’ attempts at peaceful resolution involve binding venues, such as international courts and arbitration panels (sixteen percent), which are considered more amenable to non-Islamic states.

The three cases discussed below highlight ILS’ preferences in the context of territorial disputes and illustrate why in some instances these countries use the ICJ. Overall, despite the conflict between *siyar*’s edicts regarding territorial ownership and international law, in some instances ILS use the ICJ and respect its decisions. However, although the ICJ achieves narrow authority in the territorial disputes it adjudicates, the Court faces a number of challenges that prevent it from reaching intermediate authority. ILS often work with the ICJ only on their own terms and limit the Court’s involvement by avoiding litigation. As is true with non-ILS, disputes reach the ICJ only when litigation alternatives fail to provide solutions, and disputants mutually agree to adjudicate and comply with the Court’s decision. It seems that perhaps at times ILS may use the ICJ when convenient but rely on *siyar* if necessary to question ICJ authority. The disjuncture between *siyar* and international law thus limits the ICJ’s ability to establish intermediate or extensive authority with respect to ILS in the context of territorial sovereignty.

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52. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment, 2001 I.C.J. 40 (Mar. 16).

53. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Advisory Opinion), Advisory Opinion, 2004 I.C.J. 136, (July 9).

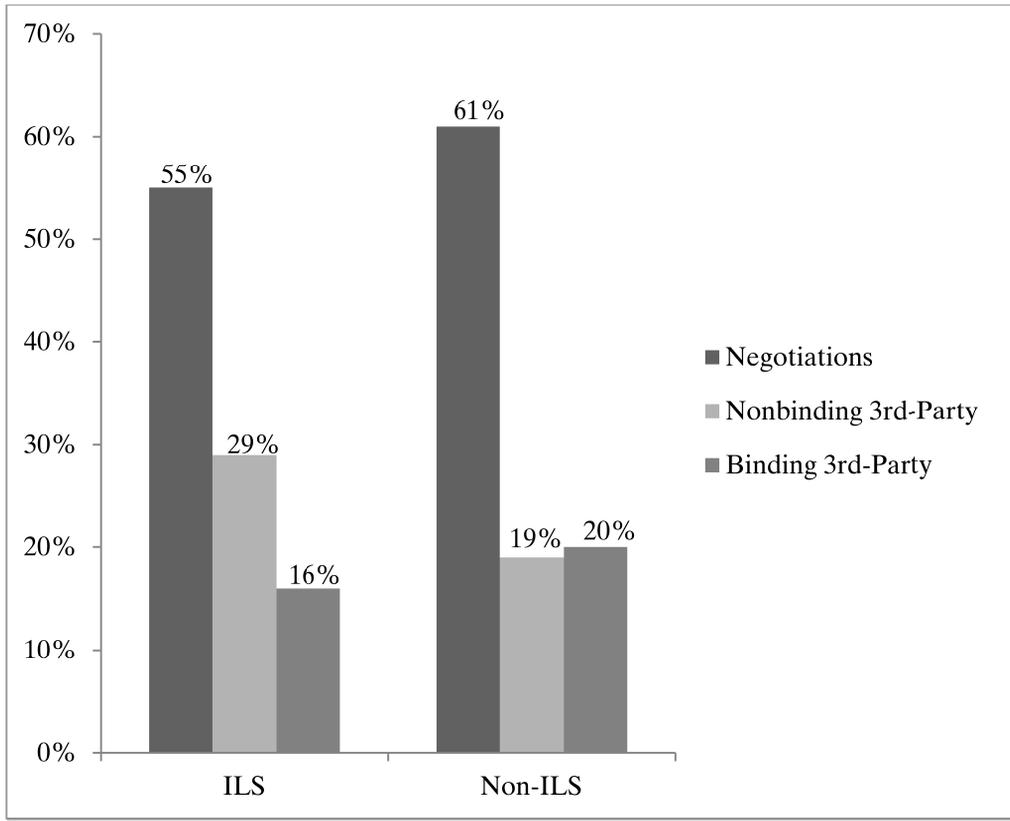
54. Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment 1980 I.C.J. 3 (May 24).

55. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), Judgment, 1988 I.C.J. 115 (Feb. 27).

56. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62 (Apr. 29).

57. Powell, *International Court of Justice*, *supra* note 18.

Figure 3: ILS and Non-ILS Attempts at Peaceful Resolution in Territorial Disputes (1945–2006)<sup>58</sup>



### 1. The *Western Sahara* Advisory Opinion

Western Sahara, composed primarily of desert, fell under Spanish rule in 1884. As a part of the process of decolonization, in 1974, the Spanish government proposed to hold a referendum on Western Sahara's independence. This move was criticized by Morocco and Mauritania, both of which had claims of sovereignty over Western Sahara, as negating the right of the *Sahrāwīs*—the people inhabiting the disputed territory—to self-determination.<sup>59</sup> To delay the plebiscite, Morocco proposed the case be referred to the ICJ.<sup>60</sup>

The Court ruled unanimously that at the time of Spanish colonization, Western Sahara did not constitute *terra nullius*, a territory belonging to no one, and that neither Morocco nor Mauritania had valid territorial claims to Western

58. Powell, *Territorial Disputes*, *supra* note 18.

59. JOHN DAMIS, *CONFLICT IN NORTHWEST AFRICA: THE WESTERN SAHARA DISPUTE* (1983).

60. MICHELLE L. BURGIS, *BOUNDARIES OF DISCOURSE IN THE INTERNATIONAL COURT OF JUSTICE: MAPPING ARGUMENTS IN ARAB TERRITORIAL DISPUTE* 197 (2009).

Sahara based on historic title.<sup>61</sup> The Moroccan response was quite astounding: its leadership came to the conclusion that the ruling had validated Morocco's historic and legal claims to the territory.<sup>62</sup> In other words, to legitimize its own actions, Morocco distorted the opinion's meaning to suggest that Moroccan territorial claims have been "recognized by the legal advisory organ of the United Nations."<sup>63</sup> Additionally, the Moroccan government declared that it would march 350,000 "unarmed civilians" into Sahara to ensure the recognition of its territorial claims.<sup>64</sup> Shortly after the ICJ handed out the opinion, Spain, Morocco, and Mauritania held tripartite negotiations, and it seems that Spain agreed to a decolonization formula in which Western Sahara was to be partitioned between Morocco and Mauritania.<sup>65</sup> This agreement led to many years of stalemate.<sup>66</sup>

Does the *Western Sahara* case suggest that, at that time, the ICJ had some authority in fact vis-à-vis Morocco and Mauritania? Despite the fact that both of these countries actively participated in the ICJ proceedings and advanced impressive legal arguments in the Court, it is clear that political interests trumped any regard for the ICJ. Furthermore, neither country needed the ICJ's authorization to claim control over Western Sahara. The Alter, Helfer, and Madsen framework of authority assumes the actual filing of cases.<sup>67</sup> Regardless of their motives, that Mauritania and Morocco did in fact agree to, or even pressed for, the case reaching the ICJ suggests that the Court had perhaps was perceived by the disputants to have some authority. It is also interesting that Morocco's initial preference was for the case to be heard under the ICJ's contentious jurisdiction,<sup>68</sup> and the request for an advisory opinion by the UN General Assembly came as a direct result of a compromise between Spain and Morocco. Even more telling is the fact that Morocco intentionally twisted the ICJ's decision to legitimate its eventual occupation of Western Sahara. There was "a consequential response"<sup>69</sup> from all parties involved, but not toward compliance. This suggests the conditions for narrow legal authority were not met.

The ICJ's proceedings in this case featured a discussion of an important difference between *siyar* and traditional international law. While arguing its

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61. Thomas M. Franck, *The Stealing of the Sahara*, 70 AM. J. INT'L L. 694, 710 (1976).

62. Samuel J. Spector, *Western Sahara and the Self-Determination Debate*, MIDDLE E.Q., Summer 2009, at 33, 7.

63. Press Release of the Permanent Mission to the United Nations on 16 October 1975, quoted in UN Doc. S/PV.1849, 11 (1975) in Franck, *supra* note 61, at 711.

64. Letter from the Permanent Rep. of Morocco to the United Nations to the President of the Security Council, UN Doc. S/11852 (1975) (Oct. 18, 1975).

65. Franck, *supra* note 61, at 715.

66. Spector, *supra* note 62, at 7.

67. Alter, Helfer & Madsen, *supra* note 8.

68. Minister for Foreign Affairs of Morocco, Letter dated Sept. 23, 1974 from the Minister for Foreign Affairs of Morocco addressed to the Minister for Foreign Affairs of Spain, UN Doc. A/9771, Annex (1974).

69. *Id.*

case in the ICJ, Morocco equated the Western Sahara peoples' religious allegiance to the Moroccan Sultan with territorial sovereignty. The ICJ's opinion adhered to the territorial ties-based, Western model of sovereignty grounded in political authority.<sup>70</sup>

## 2. *Bahrain-Qatar* Dispute—Appealing to the ICJ Because an Islamic Solution Was Unattainable?

The *Bahrain-Qatar* dispute is the first instance in which two ILS used the Court in a contentious case over territory. The protracted contention was over five territories: the Hawar Islands; the island of Janan/Hadd Janan; the shoals of Quit'at Jaradah and Fasht ad Dibald; as well as Zubarah—a townsite on the northwest coast of Qatar.<sup>71</sup> For many decades, the conflict kept surfacing: whenever Qatar would raise its claim to the contested Hawar Islands, Bahrain followed with restating its territorial claim to Zubarah.<sup>72</sup> The contention was finally settled by the ICJ in a 2001 decision that awarded each side a part of the disputed territory. Bahrain kept the Hawar Islands and Quit'at Jaradah. The Court determined that Qatar had sovereignty over Zubarah Janan/Hadd Janan, and the Fasht ad Dibald. The ICJ judgment resolved a longstanding territorial dispute between two ILS.

Islamic law's preference toward nonconfrontational modes of resolution, strategic considerations, and substantive disagreements between *siyar* and international law regarding territory explain why both parties forum shopped before handing the dispute over to The Hague. Qatar's decision to submit the dispute to the ICJ in 1991 came many years after the dispute erupted. While Britain held strong influence in the Persian Gulf, the dispute was contained. Settlement attempts by the British, however, were seen as biased toward Bahrain and tainted by the British concern about the rich oil reserves in the region.<sup>73</sup> The first official resolution attempt was made by the Sheikhdome of Qatar requesting arbitration by Britain in 1965. It took a considerable amount of time after Qatar's initial proposal until Bahrain agreed to use the ICJ in 1996. The subsequent joint agreement to adjudicate in the ICJ came as a result of repeated failure of Koran-supported informal reconciliation efforts.

The costs of continuing the dispute were also much higher than settling it via any means. The Gulf Cooperation Council pressured both disputants to settle their disagreements, which were stalling cooperation within the Gulf region. Importantly, “[d]espite high hopes for the institution's ability to mediate using a framework of Islamic law and brotherly cooperation,”<sup>74</sup> the Gulf Cooperation Council was ultimately ineffective in helping to settle the contention. Faced

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70. Cravens, *supra* note 30, at 531.

71. SCHULTE, *supra* note 15, at 234–35.

72. *Id.* at 235.

73. KAREN ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* 177 (2014).

74. Krista E. Wiegand, *Bahrain, Qatar, and the Hawar Islands: Resolution of a Gulf Territorial Dispute*, 66 MIDDLE E.J. 79, 88 (2012).

with political tensions, economic repercussions of the enduring dispute, and repeated, failed attempts at resolution, the parties resorted to the ICJ. In the words of one international advocate, the *Bahrain–Qatar* dispute is a prime example of disputants calling upon the ICJ as a last resort venue, *precisely* because prior attempts at mediation had failed.<sup>75</sup>

Some regional actors, especially Saudi Arabia, which preferred informal settlement venues, expressed their dissatisfaction with Qatar’s resort to the ICJ. Because of the instability that the dispute brought to the Gulf region, Saudi Arabia repeatedly offered its good offices from 1976 until the final settlement at the Court. Sheikh Khalifah bin Salman al-Khalifah, Bahrain’s cabinet chairman, favored Saudi mediation, suggesting that “a brotherly solution was best, particularly between brothers.”<sup>76</sup> In 1990 during a GCC meeting, the disputants’ Foreign Ministers signed Minutes—a set of rules, according to which the conflict was to be resolved.<sup>77</sup> This document mandated continuation of “the good offices of the Custodial of the Two Holy Mosques, King Ben Abdul Aziz” of Saudi Arabia, even after the submission of the dispute to more formal venues.<sup>78</sup>

The ICJ’s ruling triggered compliance from both disputants, fulfilling Alter, Helfer, and Madsen’s condition for narrow authority.<sup>79</sup> According to Schulte, “[t]he judgment was praised by both sides; each one considered itself as a winner.”<sup>80</sup> Both parties sent a letter of appreciation to the ICJ’s Registrar.<sup>81</sup> With clear territorial demarcation lines in place, Bahrain announced plans to begin oil drilling and exploration in the Gulf of Bahrain and almost instantly offered concessions to foreign investors.<sup>82</sup> Qatar began awarding exploration rights in the area in late 2002 to Maersk, Chevron, and Occidental, large gas and energy companies with a regional foothold.<sup>83</sup> The decision improved the relations in the entire region. It is definitely too early to gauge whether the *Bahrain–Qatar* decision influenced behavior of the entire Islamic audience, but as Burgis notes, the case “sends a clear signal to Arab states in the Gulf to be mindful of what agreements they enter into.”<sup>84</sup>

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75. Interview with Anonymous, an international lawyer who has appeared repeatedly in the ICJ’s cases as a state advocate, in the United Kingdom (Oct. 2013).

76. *Summary of World Broadcasts (Source Gulf News Agency, Manama, 19 February 1995, in Arabic)*, BRITISH BROADCASTING CORP. (Feb. 21, 1995).

77. Minutes signed by the Ministers of Foreign Affairs of Bahrain, Qatar, and Saudi Arabia signed at Doha on 25 December 1990, Bahraini formula, as discussed by BURGIS, *supra* note 60, at 155.

78. *Id.*

79. Alter, Helfer & Madsen, *supra* note 8, at 10.

80. SCHULTE, *supra* note 15, at 238.

81. *Id.*

82. Wiegand, *supra* note 74, at 89–91.

83. *Id.* at 91.

84. BURGIS, *supra* note 60, at 157–58.

### 3. The *Wall* Advisory Opinion

In 2004, the ICJ was asked by the UN General Assembly to give an advisory opinion regarding the legal consequences arising from the construction of a wall by Israel in the Occupied Palestinian Territory. The Palestinian authority argued that the wall constituted an attempt to annex the Palestinian territory in violation of international law. Israel maintained that the wall was a temporary means to combat terrorist attacks from the West Bank.<sup>85</sup> The ICJ found that the wall violated international law in more than one way: it hindered the rights of the Palestinian people to self-determination, violated human rights provisions, and went directly against the prohibition of the acquisition of territory by force.<sup>86</sup> Israel was asked to make reparations for any damages caused by the wall's construction.<sup>87</sup>

In contrast to contentious cases, advisory opinions grant considerably more opportunities for the participation of nondisputant states as well as international organizations. For the sake of obtaining information, the ICJ has discretion to permit oral or written statements by any states entitled to appear before the Court.<sup>88</sup> Many ILS, the League of Arab States, and the Organization of the Islamic Conference (OIC) heeded this opportunity and submitted statements during the proceedings. Israel did not address the merits during the written phase of the proceedings and did not participate in the oral phase.<sup>89</sup>

The above discussion raises the question of why ILS wanted the ICJ to weigh in on the *Wall* case. It further raises the issue of whether ILS' unprecedented participation in the Court's deliberations can tell us something about the ICJ's authority. The Arab-Israeli conflict, tarnished by several violent military confrontations, remains unresolved despite numerous attempts at peaceful resolution. It produces severe local tensions and regional animosities between Israel and its Arab neighbors. The complexity and severity of this conflict explain why the Arab Group at the UN cosponsored the General Assembly resolution requesting the ICJ's opinion. The OIC was invited to participate in the Court hearings, because Palestine is one of the OIC's members. Additionally, the OIC's Charter mandates the organization "to coordinate efforts for the safeguarding of the Holy Places and support of the struggle of the people of Palestine, to help them regain their rights and liberate their land."<sup>90</sup> In fact, the OIC has instituted a committee charged with

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85. ALJAGHOUB, *supra* note 9, at 193.

86. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Advisory Opinion), Advisory Opinion, 2004 I.C.J. 136, (July 9).

87. *Id.* at 194-95.

88. Statute of the International Court of Justice, art. 66.

89. Bekker, *supra* note 9, at 566.

90. The Organization of the Islamic Conference Charter included these words before the 2008 revisions. For this language from the previous charter, see BURGIS, *supra* note 60, at 246. For the present charter, see Charter of the Organization of the Islamic Conference, <http://www.oic-oci.org>.

overseeing the implementation of this Article.<sup>91</sup> Similar motivations stood behind the League of Arab States' participation.<sup>92</sup>

There are two possible reasons for ILS' use of the ICJ in this situation. ILS' strategy of engagement with the ICJ may be interpreted to indicate the expansion of the ICJ's authority. Saudi Arabia, for instance, participated for the first time in ICJ legal proceedings in the *Wall* case. Burgis notes that Islamic organizations "need not have given international law, and its embodiment in the form of the ICJ, such attention . . . . However, their choice to support the legal process suggests a commitment to legal institutions as well as a faith in international legal principles."<sup>93</sup> To be sure, Islamic audiences seem to have recognized that the ICJ is a useful venue to present their arguments. The political situation surrounding the case, however, may suggest an alternative explanation. It is possible that ILS' support for the ICJ had not much to do with the Court's increased authority, but was instead motivated by strategic considerations. Hurd notes that advisory opinions can constitute "as much political moves as [] legal ones."<sup>94</sup> He argues that the Court's involvement in the Israeli–Palestinian conflict was indeed largely political; initiating advisory proceedings at the ICJ was an effective way for some countries to continue their protests to the Israeli wall. This view suggests that ILS used the ICJ—a resource readily available and strongly endorsed by the international community—as leverage against Israel.<sup>95</sup>

The design of ILS' submissions suggests that their governments took the ICJ proceedings seriously. Whereas the documents submitted by the West were relatively short, ILS' submissions were lengthy; gave careful attention to international law; and invoked previous ICJ decisions, the UN Charter, the Geneva Conventions, and other relevant treaties. Many of these submissions emphasized the legitimacy of the ICJ and highlighted the importance of the Court's deliberations.<sup>96</sup> For example, the OIC's written statement expressed hope that the advisory opinion "[would] help produce a precise legal characterization of all aspects of the situation and thereby facilitate settlement."<sup>97</sup>

Many ILS viewed the Court's ruling as a victory, both a political and a legal one, despite its nonbinding nature.<sup>98</sup> At the same time, the opinion made no

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91. BURGIS, *supra* note 60, at 246.

92. Written Submission of the League of Arab States, Wall Advisory Opinion (Jan. 28, 2004).

93. BURGIS, *supra* note 60, at 246–47.

94. HURD, *supra* note 10, at 195.

95. See Ian Hurd, *The Strategic Use of Liberal Internationalism: Libya and the UN Sanctions, 1993–2003*, 59 INT'L ORG. 495, 500 (2005).

96. BURGIS, *supra* note 60, at 245–47; see also Written Statement of the Kingdom of Saudi Arabia, Wall Advisory Opinion (Jan. 30, 2004); Written Statement of the Hashemite Kingdom of Jordan, Wall Advisory Opinion (Jan. 30, 2004); Written Statement of Malaysia (Jan. 30, 2004); Written Statement of the League of Arab States, Wall Advisory Opinion (Jan. 28, 2004).

97. Written Statement of the Organization of the Islamic Conference, Wall Advisory Opinion at para.1, 4 (Jan. 30, 2004).

98. Fr. Robert J. Araujo, S.J., *Implementation of the ICJ Advisory Opinion Legal Consequences of*

palpable demands on ILS; thus, they had to undertake no meaningful steps to realize the Court's wishes. During the General Assembly debate of the *Wall* advisory opinion, Ambassador Nasser Al-Kidwa, the UN Permanent Observer for Palestine, declared that the ICJ's opinion was "a watershed event . . . based on international law and the ideals of peace and reconciliation."<sup>99</sup> Anis F. Kassim, a member of the Palestinian defense team at the ICJ, pointed out that in the face of many failed resolution attempts, including diplomatic means and power-based solutions, "[I]t is time to utilize law as set out by this decisive and daring opinion."<sup>100</sup> Israel recognized that it had international obligations arising out of the opinion but argued that the ICJ's involvement in the issue had inappropriately politicized the Court.<sup>101</sup>

### B. ILS' Diplomatic Immunity Cases at the ICJ

The three cases discussed below reveal that, despite the consistency between Islamic and international law regulating diplomatic protection, ILS are not particularly willing to accept the ICJ's authority. The *Diplomatic and Consular Staff in Tehran* case and the *Special Rapporteur* advisory opinion provide examples of how ILS resist any involvement of the Court in their disputes. The general unwillingness to file cases and the lack of compliance in disputes that reach The Hague indicate that the ICJ had no authority in fact over ILS involved in these contentions. By contrast, Libya's conduct during the *Lockerbie* case may be interpreted as a strategic use of the ICJ as leverage against the United States and the United Kingdom.<sup>102</sup> It was precisely the perception that the ICJ had authority that led Libya to champion legal resolutions by the Court. The question remains, however, whether Libya's commitment to the ICJ was sincere, or if it simply used the ICJ's authority to achieve desired goals. Although diplomatic immunity law theoretically provides a supportive environment for the ICJ to establish authority in fact among ILS, the Court faces opposition from domestic courts and national governments. From the cases described below, it is doubtful that the Court has achieved extensive, or even intermediate legal authority, as defined by Alter, Helfer, and Madsen. In fact, from this definition, the Court has no authority over these diplomatic immunity cases. Overall, it is unclear whether in the future the ICJ will find itself able to overcome strategic considerations shaping ILS' attitudes toward the Court.

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*the Construction of a Wall in the Occupied Palestinian Territory: Fences [Do Not] Make Good Neighbors?*, 22 B.U. INT'L L.J. 349, 350 (2004).

99. Press Release, General Assembly, General Assembly Meets in Emergency Session to Debate World Court's Decision on Israeli Security Barrier, UN Doc. GA/10246 (July 16, 2004).

100. Anis F. Kassim, *The Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Significance and Implications*, 10 Y.B. ISLAMIC & MIDDLE E. L. 457, 461 (2003-2004).

101. *Id.*

102. Hurd, *supra* note 95.

### 1. U.S. Diplomatic and Consular Staff in Tehran

The nexus of international law and *siyar* came to the surface when the ICJ analyzed the seizure and detention of U.S. diplomats and consular staff in Tehran. In fact, this case spurred considerable discussion about the Islamic law of diplomacy and its relation to the 1961 Vienna Convention on Diplomatic Relations, and the 1963 Vienna Convention on Consular Relations, both of which grant diplomats immunity from arrest, detention, and prosecution.<sup>103</sup> In 1979, the building of the U.S. Embassy in Tehran was attacked by several hundred armed revolutionaries, supporters of Ayatollah Khomeini. The aggressors proclaimed that their captives were guilty of espionage. Upon assuming official power, Khomeini and the Revolutionary Council officially endorsed anti-U.S. sentiments and the hostage-taking. The international community repeatedly called for the release of the hostages. The United States adopted many economic as well as diplomatic sanctions, including freezing Iran's governmental assets. Despite these measures, Iran failed to release the hostages.<sup>104</sup>

On November 29, 1979, the United States instituted proceedings against Iran in the ICJ and filed a request for the indication of provisional measures. Iran did not participate in the proceedings, claiming that the contention was “a matter within the national sovereignty of Iran,” and that international law champions the interests of powerful states.<sup>105</sup> The United States, on the other hand, had nothing to lose by involving The Hague and viewed the ICJ as a convenient stage in the political process, “while doubting prospects for actual compliance.”<sup>106</sup> Resorting to the ICJ also garnered international support for the United States and placed more pressure on Iran.

In May of 1980, the Court rendered its decision, which declared Iran's violation of international law and ordered release of the hostages, restoration of the premises, and reparations to the United States. U.S. fears of noncompliance came true. Iran finally released the hostages in January 1981, but the release was not prompted by the ICJ's judgment. Rather, it was prompted by the Algiers Accords—a 1981 amicable resolution steered by Algeria.<sup>107</sup> Iran's conduct conformed partially to the judgment but did not result from Iran's push to give effect to the ruling. Algeria proved to be an effective mediator: its trade connections with the United States were strong, and as an ILS, it had the trust of Iran. Although the Algerian negotiators were Sunni and Iran's representatives were Shia, the fact that all participants were Muslim played a crucial role in Iran's decision to settle.<sup>108</sup> The head U.S. negotiator, Warren

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103. See *supra* note 46 and accompanying text.

104. SCHULTE, *supra* note 15, at 166.

105. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3 (May 24, 1980) (citing Letter from Iraq to the ICJ (Mar. 16, 1980)).

106. SCHULTE, *supra* note 15, at 167; see also Jonathan Greenberg, *Algerian Intervention in the Iranian Hostage Crisis*, 20 STAN. J. INT'L L. 259 (1984).

107. *Id.* at 171.

108. Greenberg, *supra* note 106, at 278.

Christopher, noted that “[t]he Algerians served an indispensable function interpreting two widely disparate cultures and reasoning processes to each other.”<sup>109</sup> Despite the ICJ’s decision, Iran continues to occupy the U.S. Embassy, which now serves as an Islamic cultural center with exhibitions on the Islamic Revolution.<sup>110</sup>

There was a wide-reaching agreement in the Islamic scholarly community that Iran was in violation of international law and Islamic law.<sup>111</sup> For example, Gamal Moursi Badr declared, “What happened in Tehran was an aberration and indeed a clear violation of Islamic law as well as conventional and customary international law.”<sup>112</sup> Although recognizing the convoluted nature of the contention, Algeria, the successful mediator, condemned the embassy seizure.<sup>113</sup> The ICJ’s decision refers to Islamic law, pointing to Islam’s contributions to the development of the principle of inviolability of diplomats.<sup>114</sup> Iran’s strategy of defying the ICJ—noncompliance with the provisional measures and the belated release of the hostages—suggests that the Court had no authority in fact over Iran. The ICJ had a relatively minor role in ending the crisis, and the parties reached an agreement only when Iran’s revolutionary government decided to take a less stringent stance regarding the dispute.<sup>115</sup> To other ILS, the hostage crisis impacted the power balance between the Shia and the Sunni, weakened the Persian Gulf, increased the region’s vulnerability to foreign intervention, and made the settlement of the Iran–Iraq war less likely. ILS also feared that Iran’s actions hurt the political image of all ILS.<sup>116</sup> The OIC expressed some of these concerns in two 1980 resolutions that urged the United States and Iran to resolve the contention amicably and appealed to Iran to “continue to work towards the solution of the question of the hostages in the spirit of Islam.”<sup>117</sup> The Muslim community hoped for a peaceful settlement of the crisis via any means and did not endow the ICJ with any special position or authority. Before the successful Algerian mediation, other intermediaries tried to help end the crisis. These intermediaries included UN Secretary General Kurt Waldheim, Pope John Paul II, officials from West Germany and Turkey, and several ILS policymakers, including Yassir Arafat and officials from Syria, Pakistan, and Libya.

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109. DAVID FARBER, *TAKEN HOSTAGE* (2005).

110. Jennifer Rizzo, *Former U.S. Embassy in Iran: Mistrust Endures Where Hostages Held*, CNN NEWS, Jan. 30 2014, <http://www.cnn.com/2014/01/30/politics/iran-embassy-mistrust/>.

111. M. Cherif Bassiouni, *Protection of Diplomats Under Islamic Law*, in *INTERNATIONAL LAW AND ISLAMIC LAW* 243 (Mashood A. Baderin ed., 2008).

112. Gamal M. Badr, *A Survey of Islamic International Law*, 76 *AM. SOC’Y INT’L L. PROC.* 56, 60 (1982).

113. SCHULTE, *supra* note 15, at 169–70.

114. *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 *I.C.J.* 3, 40, para. 86 (May 24).

115. SCHULTE, *supra* note 15, at 171.

116. Greenberg, *supra* note 106, at 281.

117. *Security of Muslim States and their Solidarity*, OIC Resolution (May 1980).

## 2. Aerial Incident at Lockerbie

In 1998, a Pan-American, New York-bound airplane crashed in Lockerbie, Scotland. After a joint U.S.–U.K. investigation revealed that Libyan agents were responsible for the bombing, both countries insisted on holding a legal trial of the suspects. To ensure Libya's cooperation, the UN Security Council imposed the following sanctions: air travel to and from Libya was prohibited, some Libyan assets were frozen, and many governments shrunk the size of Libyan diplomatic missions.<sup>118</sup> Libya refused to extradite the suspects for trial, arguing that by investigating the agents on its own, Libya has fulfilled its obligation arising from the Montreal Convention.<sup>119</sup> Asserting that the sanctions regime violated international law as well as domestic rules of procedural justice, Libya requested international arbitration and then ICJ adjudication. According to Libyan government, the dispute was of legal nature; thus, legal methods rather than the Security Council were appropriate for the issue.<sup>120</sup> In 1992 Libya brought the case to the ICJ, asking for provisional measures to stop the United States and the United Kingdom from coercing Libya into handing over the suspects.<sup>121</sup> The request was denied. On the sixth anniversary of the bombing, Libyan leader Moammar Gadhafi, in an advertisement in *The Washington Post*, proposed that a Scottish court conduct a trial of the suspects at the ICJ.<sup>122</sup> To add legitimacy to its stance, Libya reproduced in the advertisement a resolution accepted by the League of Arab States supporting its proposal. Finally, in 1998, after the sanctions regime continued to erode, the parties agreed that the suspects would be tried in the Netherlands, at Camp Zeist, according to Scottish law. Upon a joint request of the disputants, the *Lockerbie* case was removed from the ICJ's docket in 2003.

The *Lockerbie* case provides several important indications about the ICJ authority. Libya called on the Court in a clear effort to undermine the legitimacy of the Security Council and its resolutions.<sup>123</sup> Libya's two opponents, it is interesting to note, preferred the issue not to be framed as a legal dispute. Libyan government was aware that calling on the ICJ and championing an international law-based solution would provide effective leverage against the United Kingdom and the United States. This strategy paid off; the final settlement largely reflected Libya's preferences. Regardless of its true motives, Libya's persistence in suggesting a resolution by The Hague indicates that the country perceived the Court as authoritative. Libya knew that publicly

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118. Hurd, *supra* note 95.

119. See Convention for the Suppression of Unlawful Acts against Civil Aviation, 974 U.N.T.S. 177 (1971).

120. HURD, *supra* note 10.

121. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Provisional Measures, Order of 14 April 1992, 1992 I.C.J. 114 (Apr. 14, 1992).

122. Ad., *The Proposal of The Arab League to Solve the Problem of Pan-Am Flight 103*, WASH. POST, Dec. 21, 1994, at A10.

123. HURD, *supra* note 10.

juxtaposing a legal solution, the ICJ, and a more political venue, the Security Council, would work precisely because of the ICJ's authority. After the incident, several other ILS violated the sanctions regime and embraced the idea of a legal solution championed by Libya.<sup>124</sup>

### 3. The Special Rapporteur of the Commission on Human Rights Advisory Opinion

In 1998, the UN Economic and Social Council requested that the ICJ render an advisory opinion concerning one Param Cumaraswamy—a Malaysian lawyer appointed as the UN Special Rapporteur on the Independence of Judges and Lawyers of the Commission on Human Rights. The issue was whether the Convention on the Privileges and Immunities of the UN<sup>125</sup> applied to Cumaraswamy, who in 1995 gave an interview to *International Commercial Litigation*, a London magazine widely circulated in Malaysia, in which he complained about powerful corporate influence on Malaysian judicial decisions. Several plaintiffs—recipients of these favorable rulings—sued the Special Rapporteur in Malaysian courts for defamation. Malaysian courts refused to uphold Cumaraswamy's immunity despite the UN Secretary General's assurances that the Convention did apply.<sup>126</sup> After a series of unsuccessful negotiations between the UN and Malaysia, the contention was referred to the ICJ. The Court ruled that the Convention applied to the Special Rapporteur, and that he was entitled to immunity from legal process for the words spoken during the interview.<sup>127</sup>

In terms of assessing the ICJ's authority, Malaysia did not support the UN Economic and Social Council's request for advisory proceedings, arguing that the transfer of the dispute to the ICJ "cannot change the nature of the difference or alter the content of the question."<sup>128</sup> After the opinion was rendered, the Malaysian government refused to comply, ignoring the UN's request to reimburse the expenses borne by the organization on behalf of Cumaraswamy. The ICJ ruling did not end the defamation suits in Malaysian courts, however; the last case was dropped two years after the ICJ issued its opinion. Senior Assistant Registrar of the High Court in Malaysia, Wan Shaharuddin bin Wan Ladin, asserted that, as to "the issue whether the Court in

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124. *Id.* at 516.

125. Convention on the Privileges and Immunities of the United Nations, 1946 U.N.T.S. 15, UN Doc. A/64 (Feb. 13, 1946).

126. Peter H. F. Bekker, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights Advisory Opinion*, 93 AM. J. INT'L L. 913, 913–14 (1999).

127. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, 1999 I.C.J. 62 (Apr. 29).

128. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Oral Statements*, I.C.J. Doc. CR 98/17, at 48, also quoted in Charles N. Brower & Pieter H. F. Bekker, *Understanding "Binding" Advisory Opinions of the International Court of Justice*, in LIBER AMICORUM JUDGE SHIGERU ODA 351, 358 (Nisuke Ando, Edward McWhinney & Rüdiger Wolfrum, eds., 2002).

Malaysia should follow the Advisory Opinion of the ICJ, . . . I find that the said Convention is not a final and binding authority.”<sup>129</sup> The High Court also decided that the appropriate laws and facts of the *Special Rapporteur* case should be determined by the Malaysian courts. The lack of cooperation from the Malaysian judiciary shows disregard for the ICJ ruling: the opinion explicitly addressed the domestic courts, highlighting their role in ensuring compliance.<sup>130</sup> Further, the lack of consequential response to the ICJ opinion by Malaysian courts indicates that the ICJ does not even have narrow legal authority, as captured in the Alter, Helfer, and Madsen framework.

It is important, however, to acknowledge the limits of this analysis. The finding of “no authority” extends neither to all diplomatic immunity cases nor to the entire Islamic audience. First, the Court’s authority in the area of diplomatic immunity cannot be assessed solely on the basis of the three disputes addressed in this article. The focus in this article has been on hard cases—cases that were litigated, resulted in advisory proceedings, or at least involved the ICJ in some form or fashion. For example, although the *Lockerbie* case was eventually removed from the ICJ’s list in 2003, Libya filed for provisional measures and pressed for the ICJ’s participation. All of these contentions are essentially the most difficult, not random, type of case, in which the disputants do not come to an amicable solution without help from an adjudicator. But many disagreements do not reach The Hague. Countries frequently settle via other means because important out-of-court effects are associated with the sole presence of the ICJ as a venue for resolution.<sup>131</sup> Keeping this caveat in mind, it is possible that the ICJ has intermediate or even extensive authority in diplomatic immunity disputes that are not litigated.

Second, the conclusion that the ICJ has no authority in diplomatic immunity area has been reached strictly within the Alter, Helfer, and Madsen framework of authority. They argue that narrow authority is associated with the actual filing of cases to an IC and subsequent compliance.<sup>132</sup> But this framework does not account for the possibility that countries accepting the Court’s authority choose not to file cases but instead settle in the shadow of the Court.<sup>133</sup> As research shows, states that recognize the ICJ’s compulsory jurisdiction—that is, states that essentially bargain in the shadow of the Court—are less likely to engage in militarized conflict and are more likely to form agreements resolving

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129. GAIL DAVIDSON, TAMI FRIESEN & MICHAEL JACKSON, Q.C. FOR LAWYERS RIGHTS WATCH CANADA, *LAWYERS AND THE RULE OF LAW ON TRIAL: SEDITION IN MALAYSIA*, <http://www.lrwc.org/ws/wp-content/uploads/2013/02/Lawyers-and-the-Rule-of-Law-on-Trial-Sedition-in-Malaysia.pdf> (citing *Insas Berhad & Megapolitan Nominees Sdn. Bhd. v. Cumaraswamy*, Grounds for Judgment, Unofficial English Translation (Oct. 29, 1999)).

130. See *Special Rapporteur Advisory Opinion*, 1999 I.C.J. 62, 30, 31–32.

131. See Richard B. Bilder, *International Dispute Settlement and the Role of International Adjudication*, in *INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS* 233 (Charlotte Ku & Paul F Diehl eds., 1998).

132. Alter, Helfer & Madsen, *supra* note 8, at 10.

133. See Bilder, *supra* note 131.

the disputed issues.<sup>134</sup> Thus, the ICJ has important pacifying effects on countries' behavior whether the countries file cases or not. Arguably, the Court has authority as to these states.

The role of strategic considerations is evident across all cases analyzed in this article, regardless of the relationship between *siyar* and international law. One can argue that behavior seemingly supportive of the Court, as in the *Western Sahara* and *Lockerbie* cases, emerged as a result of underlying strategic manipulation. A closer look at ILS' arguments advanced during the ICJ's deliberations may suggest that these states use Islamic law-based arguments in a calculated way to achieve desired outcomes at the Court. At times, ILS appear willing to deemphasize the issue of whether Islamic or international law takes precedence. As one scholar observes, Islamic policymakers "will try to justify the acceptance of international law concepts by invoking certain Islamic tradition, Islamic law ideas."<sup>135</sup>

Cases analyzed in this paper may seem to debunk expectations regarding the importance of a synergy between Islamic law and international law. But such conclusion is not warranted beyond these specific disputes and specific ILS. As demonstrated elsewhere, convergence between *siyar* and international law shapes ILS' attitudes toward international law and international adjudicators.<sup>136</sup> As such, one cannot set aside *siyar* as unimportant. For ILS, sharia provides core values, but at times—especially in the most challenging cases that end up at the ICJ—strategic and material interests may prevail over Islamic law's edicts. Finally, behavior of ILS parties to disputes reviewed in this article is not always reflective of the entire Islamic audience. The *Diplomatic and Consular Staff in Tehran* case is a good example of this: many ILS disapproved of Iran's actions.

## V

### CONCLUSION

This article has introduced nuance into any blanket claim about ILS and the ICJ. There actually are a large number of ICJ cases involving ILS, which is more than can be said for some other non-Islamic countries such as China, Russia and the former Soviet Union, Argentina, or Poland. Islamic law discourages adjudication and favors brotherly, less-formal means of settlement.<sup>137</sup> Thus, ILS are a hard case for the ICJ and are less willing to accept IC authority in general. Alter, for example, demonstrates that the Middle East is an exception to the regional trend of submitting to the compulsory

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134. MITCHELL & POWELL, *supra* note 3, at 221.

135. Interview with Adnan Amkhan Bayno, Head of Chambers, MENA Chambers, in Brussels, Belg. (July 2014).

136. See generally Powell, *International Court of Justice*, *supra* note 18; Powell, *Territorial Disputes*, *supra* note 18.

137. Powell, *International Court of Justice*, *supra* note 18; Powell, *Territorial Disputes*, *supra* note 18.

jurisdiction of ICs.<sup>138</sup> It is also interesting to note that ILS are reluctant to create even sharia-based supranational adjudicators. For instance, the Islamic International Court of Justice, fashioned during the 5th Islamic Summit of 1987 is not yet in operation. According to Burgis, this Court will most likely “remain little more than a dream in the minds of Arab states when seeking the assistance of the ICJ.”<sup>139</sup> It is also plausible that because different schools of Islamic jurisprudence offer diverging interpretations of law, any supranational courts have small prospects of realization.

Like several courts addressed in this symposium, the ICJ faces many obstacles that limit its ability to build authority in fact. Some of these constraints—especially those inherent in the Court’s design—are unlikely to change in the future. Forum shopping, which curbs the ICJ’s ability to attract cases, will likely increase as new adjudicative forums, such as the International Tribunal for the Law of the Sea, strengthen. Mediation, conciliation, and arbitration may reduce demand for the ICJ’s adjudication in some issue areas. These less formal venues offer disputants a degree of flexibility and control over the dispute that is unattainable at the Court.

The ICJ does not fit well into any specific cone as portrayed in figure 2 in Alter, Helfer, and Madsen’s introduction to this issue.<sup>140</sup> The Court does not have extensive authority over the entire zone of its jurisdiction. In fact, it is hard to know the full range of the ICJ’s jurisdiction *ex ante*. Countries that accept the Court’s adjudicative powers deliberately shape and mold the extent to which they agree to its jurisdiction. ILS are a vivid example of this process. It is possible the ICJ’s influence can only ever be an “island” within a wider subject matter jurisdiction. The ICJ’s levels of authority vary not only across issue areas, but also across types of jurisdiction, audiences, and specific countries. In reality the ICJ’s authority resembles Swiss cheese.

The focus on the ICJ in the context of ILS sheds light on IC authority more generally. The Court is able to garner some authority even when there are strong domestic counternorms that leave little space and role for the ICJ. Islamic law’s edicts are grounded in religious beliefs and are thus hard for any secular court to topple. Yet the Court managed to adjudicate and render advisory opinions at the request of its Islamic audience. Nonetheless, looking to the future, it is clear that the ICJ will continue to face challenges *vis-à-vis* ILS. The ICJ judges’ typical unfamiliarity with *siyar* limits the Court’s ability to expand its authority. During a 2013 meeting with the ICJ’s President, Prince Bandar bin Salman bin Mohammed of Saudi Arabia suggested to the Court training courses in Islamic law that are offered by the Saudi Custodian of the Two Holy Mosques, should the Court be interested.<sup>141</sup> This is an unquestionable signal of Saudi apprehension toward any IC with judges either unfamiliar with

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138. ALTER, *supra* note 73, at 197.

139. BURGIS, *supra* note 60, at 93.

140. Alter, Helfer & Madsen, *supra* note 8, at 34, fig. 2.

141. Sharif M. Taha, *Need for Translating ICJ Provisions Urged*, ARAB NEWS, Apr. 1, 2013.

sharia or reluctant to apply sharia rules in the international arena. Even if at times ILS appear willing to fudge the issue of whether Islamic or international law is decisive, knowledge of *siyar* at the level of the ICJ would increase the Court's ability to acquire authority.