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I. INTRODUCTION

Professor Lori Damrosch has long been interested in the role that Islamic law[1] has played in shaping the evolution of international law.[2] This Article is an attempt to answer a question she once asked me. Knowing that I was interested in the way that contemporary legal professionals, particularly judges, interpret Islamic law, Professor Damrosch suggested roughly ten years ago that I examine opinions from the UN's International Court of Justice ("ICJ" or "Court") and ask how judges on the ICJ used Islamic law to help resolve disputes or advance the work of the Court. At the time, I thought her proposal quixotic. In my limited reading of ICJ cases, I had never noticed Islamic law being mentioned

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1 In discussing Islamic legal norms, one always runs into problems of terminology. The classical Islamic tradition distinguished between the rules God had laid down (in their totality, the Shari`ah), those rules as understood by qualified Islamic jurists (*fiqh*), and state laws that were legitimate under Islam because they were deemed consistent with the Shari`ah (*siyasa shar`iyya*). For a discussion of this issue, see Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari'a into Egyptian Constitutional Law* 47–58 (Brill 2006). Fortunately, I think these issues can be avoided in this Article. I will use the term "Islamic law" to refer to any legal norm that a jurist cites because he believes it to be part of the Islamic legal tradition. It includes at least norms of *fiqh* and norms imposed by (or respected by) a Muslim state because the state considers them to be *siyasa shar`iyya*.

2 Consider Lori Fisler Damrosch, *The "American" and the "International" in the American Journal of International Law*, 100 Am J Intl L 2, 9–10 (2006) ("Islamic influence on international law has received less attention than it undoubtedly deserves.").

except in a tangential way.[3] My impression that the ICJ did not cite Islamic law was, I knew, shared by others.[4] Professor Damrosch, however, pointed to several separate (concurring or dissenting) opinions going back to 1969 in which ICJ judges referred to Islamic law. These suggested, she thought, that ICJ judges were aware of Islamic law and the role that it might play in creating or legitimizing the international legal order. There had never been a systematic study of Islamic legal references in Court opinions—who was citing Islamic law and why. Someone, she thought, should carry out such a study. And that someone, she suggested, was me. She asked me to get back to her when I had an answer.

Now, almost ten years later, I am finally getting back to her. I have no excuse for the delay except the usual. Other projects beckoned. But after finishing the latest of those projects, it struck me that the time might be ripe to look at Professor Damrosch's questions. The world has still seen no systematic study of the sort that Professor Damrosch proposed.[5] Furthermore, my recent research suggests these questions may be relevant to issues being debated in both the academy and policy circles. Constitutional reforms around the Muslim world have led to the appearance of constitutions that require states to conform both to Islamic law and international legal norms (and often specifically international human rights norms).[6] Academic observers have debated whether these commands are coherent and whether a modern court could actually

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3 It would have been easy to assume that the Court was not citing Islamic law. In the previous years, a number of articles had been written in US law reviews arguing that Islamic notions of international law to date were fundamentally incompatible with the basic premises of the Western international legal tradition. See generally Christopher A. Ford, *Siyar-ization and Its Discontents: International Law and Islam's Constitutional Crisis*, 30 Tex Intl L J 499 (1995); David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 Va J Intl L 819 (1993).

4 A few years after Professor Damrosch's question, Antony Anghie published an article in which he commented in passing that, based on his impressionistic reading of ICJ cases, the judges of the ICJ had largely ignored non-Western legal traditions. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 Harv Intl L J 1, 76 (1999) ("[T]he International Court of Justice may theoretically draw upon 'the general principles of law recognized by civilized nations,' where 'civilized' must now be understood to mean all nations. But an examination of the recent jurisprudence of the Court suggests that little effort has been made to draw upon the legal traditions and systems of non-Western peoples in the administration of international justice. International law remains emphatically European in this respect, regardless of its supposed receptivity to other legal thinking.") (citation omitted).

5 Anghie's article, for example, did not count the number of ICJ judgments or separate opinions in which Islamic law was mentioned or analyze how Islamic law was being used.

6 See Clark B. Lombardi and Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 Am U Intl L Rev 379, 381–83 (2006).

develop a body of law that respects both of these norms.[7] If judges on the ICJ have identified a productive role for Islamic law in their own articulation of international law, then we should consider what they have to say.

This Article asks whether ICJ opinions to date suggest that judicial consideration of Islamic legal norms has played, can play, or *should* play a role in the ICJ's resolution of international legal disputes or in establishing the legitimacy of the results that it has reached. It is structured as follows. Part II gives an initial overview of the ICJ to help us understand how and why judges on the ICJ have reached the answers they have. Part III describes how the ICJ's enabling statute permits the Court, at least in theory, to look at Islamic legal norms. As I will show, the Court's Statute allows it to consider Islamic law in a number of different ways. It could use Islamic law as a source of legal norms, as a factor dictating how norms will be applied in particular circumstances, or it could use references to Islamic law as a tool of legitimation. That is to say, the Court might argue that even if international legal rules do not derive from Islamic sources, they are consistent with Islamic legal norms, and thus they bind all Muslim states. Part IV demonstrates that Islamic law is rarely referred to in ICJ judgments or in separate concurring or dissenting opinions. Part V details the different ways in which those few judges who refer to Islamic law have used the Islamic legal tradition. It provides a close reading of the ICJ opinions that do refer to Islamic law, which are almost entirely separate concurring or dissenting opinions. This discussion will make clear that different judges use the tradition for different reasons. Some argue that it should be used as a source of international legal norms; and some suggest that it should inform the Court's application of international legal norms—particularly in resolving disputes between majority Muslim states. Part VI concludes by noting some interesting issues of theory and policy that the ICJ opinions raise and asks if they give us any indication of how often, and for what purpose, Islamic law will be cited in the future.

II. THE INTERNATIONAL COURT OF JUSTICE AND ITS ROLE IN THE PRODUCTION OF INTERNATIONAL LEGAL NORMS

One public international lawyer has said that "the International Court of Justice stands at the apex of international legal development."[8] Whether or not that statement can be accepted uncritically, the ICJ is an important institution at the frontline of the move to develop a workable body of international legal

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7 See id.

8 Thomas M. Franck, *Fairness in International Law and Institutions* 318 (Clarendon 1995). But see Malcolm N. Shaw, *The International Court of Justice: A Practical Perspective*, 46 Intl & Comp L Q 831, 849–50 (1997) (citing Franck).

norms that will constrain state behavior. Admittedly, the ICJ is not the only tribunal issuing final decisions in cases arising under international law.[9] Thus, an examination of the jurisprudence of the ICJ cannot, by itself, tell us what role, if any, Islamic legal norms are playing in contemporary international law because even if the ICJ were not using Islamic norms, other international legal forums could be. Nevertheless, studying the ICJ's jurisprudence gives us a data point as we try to determine whether Islamic legal norms are playing a role in shaping public international law and, if so, how those Islamic legal norms are being identified and applied.[10]

The ICJ is formally an organ of the United Nations. In 1944, the Allied Powers began to think seriously about what the world should look like if they were to win the Second World War. They thus began to plan for an international organization that would help promote global peace. The organization would include, among other things, a court to help resolve international disputes according to the principles of international law.[11] When the United Nations Charter was finally promulgated, Article 33 provided that member nations should first seek peaceful resolution of any disputes between them through, *inter alia*, "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement."[12] Attached as an annex to the Charter was a statute creating an "International Court of Justice" that would serve as the judicial organ of the United Nations and would, as contemplated in Article 33, provide a forum for the judicial settlement of disputes.

The ICJ is staffed by fifteen judges who are elected by member states of the United Nations. To be elected, a judge must garner a majority of votes in

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9 Other tribunals include the Permanent Court of Arbitration and other arbitral tribunals, the International Tribunal for the Law of the Sea, and the newly formed International Criminal Court.

10 Consider Shaw, 46 Intl & Comp L Q at 843–44 (cited in note 8) (discussing the great practical impact of ICJ decisions). For the formal rules limiting the precedential value of the ICJ's opinions, see the Statute of the International Court of Justice (1945), arts 38, 59, 60, 59 Stat 1055, available online at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (visited Apr 21, 2007).

11 The Court's own official history recounts that at a preliminary conference held in 1945, a draft statute was developed which outlined the basic structure of the Court. The structure was modeled on that of an earlier institution, the Permanent Court of International Justice, which had been created by the League of Nations. The draft statute was submitted to the San Francisco Conference, which in 1945 was working to develop the Charter for the new United Nations. The International Court of Justice 18 (ICJ 5th ed 2004) ("The ICJ"), available online at <http://www.icj-cij.org/icjwww/igeneralinformation/ibleubook.pdf> [Editorial note: The ICJ has introduced a new website as this article goes to print. The cited document is not yet available on the new website. Both Dr. Lombardi and the Chicago Journal of International Law have retained copies of the document used in preparing this article.]

12 Charter of the United Nations (1945), art 33, 59 Stat 1035.

both the General Assembly and the Security Council.[13] Any member state can nominate a judge. No member state may ever have more than one national serving on the ICJ at any one time. Article 9 of the Statute instructs that, in voting for candidates, electors should strive to ensure that "in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."[14] There are, however, few effective mechanisms in place to help ensure that this happens.[15]

The ICJ's Statute allows it to resolve disputes brought before it by consenting member states.[16] It also allows certain international bodies to request advisory opinions on questions of international law.[17] The ICJ's judgments are thus divided into contested cases and advisory opinions. Article 38(1) of the Statute of the International Court of Justice lists the sources of international law to which the judges of the ICJ should look as they try to find rules of decision in both contested cases and advisory opinions. It provides that

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13 See *The ICJ* at 23 (cited in note 11). It is worth noting that when the Security Council considers the nomination of a judge, the permanent members do not, interestingly enough, have their usual veto. Id.

14 Statute of the International Court of Justice, art 9 (cited in note 10).

15 The drafters believed that regional diversity was a trustworthy device for ensuring representation of diverse civilizations and of diverse legal systems. When the diversity and representativeness of the Court is described, it is almost always in terms of regions rather than cultures. In the ICJ's official history, the Court proudly notes that the judges of the Court come from Africa, Latin America and the Caribbean, Asia, "Western Europe and other States," and Eastern Europe. *The ICJ* at 24 (cited in note 11). One might plausibly question whether the presence of judges from these regions can give us confidence that the diversity of the world's legal cultures is being adequately represented since these regions each comprise numerous states which represent different legal cultures. Obviously, for example, the region of "Asia" contains a number of different legal cultures. In some cases, a single state will itself contain different legal cultures. Thus, including judges from diverse regions could not, by itself, guarantee that representatives of, say, Islamic, Confucian, Roman Catholic, Communist, or other great legal cultures are represented. Furthermore, judges must be selected from a pool nominated by the governments of member states and acceptable to a majority of nations sitting in the General Assembly. As it turns out, the ICJ has always included judges from Muslim countries. But this only points to another problem. During the period that the ICJ has been in existence, a significant number of Muslim states have not been fully subject to the rule of law. Governments in some of these states have been dominated by elites that do not share the culture of the majority of citizens in their country—indeed they may be threatened by it. It would not be surprising if Muslim countries occasionally nominated judges without a strong familiarity with (or commitment to) Islamic law as it is understood by the majority of people in the Muslim world.

16 Statute of the International Court of Justice, art 36 (cited in note 10) ("The jurisdiction of the Court comprises all cases which the parties refer to it . . . ."); id, art 34(1) ("Only states may be parties in cases before the Court."); id, art 35(1) ("The Court shall be open to the states parties to the present Statute.").

17 Id, arts 65–68.

> The [ICJ], whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[18]

The drafters of Article 38(1)(a)–(d) intended to list the sources of applicable law in order of importance.[19] As we will discuss in the next section, the Statute has been applied in accordance with this original understanding.

After a case has been submitted to the ICJ and a majority of judges determine that the ICJ has jurisdiction, the judges decide on the merits of the questions before them and the ICJ issues its official "judgment."[20] The judgment gives the ICJ's answer to the question and includes a statement of its reasoning. If any judges disagree with the result reached by the majority or with some aspect of the majority's reasoning, they are free to add "separate" opinions which will be appended to the ICJ's formal judgment.[21] I will refer to "separate concurring opinions" as those that concur in result but disagree with one or more aspects of the ICJ's reasoning. I will refer to "separate dissenting opinions" as those that disagree with both the result and with one or more parts of the reasoning.

Since the judgment of the ICJ is as a formal matter only binding on the parties before it, the reasoning proposed in a separate concurring or dissenting opinion might be adopted by later courts. In practice, however, the ICJ tends to obey its own precedents, meaning that its jurisprudence has tended to evolve in a fairly linear fashion. "In formal terms, a decision of the [ICJ] will be binding upon the parties to the case in question and in respect only of that case, but the reality is that the impact of any decision will range far and wide."[22]

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18 Id, art 38.

19 See Statute of the International Court of Justice (cited in note 10).

20 For the formal process of issuing judgments, see generally *The ICJ* at 67–77 (cited in note 11).

21 Id at 72–75.

22 Shaw, 46 Intl & Comp L Q at 843 (cited in note 8) (citation omitted). For the formal rules limiting the precedential value of the Court's opinions, see the Statute of the International Court of Justice, arts 59, 60, 38(1)(c) (cited in note 10).

III. How Might the ICJ Use the Islamic Legal Tradition?

Theoretically, the International Court of Justice could use the Islamic legal tradition in a number of ways.

To begin, the Statute of the ICJ leaves open the possibility that the ICJ will look to Islamic norms indirectly by suggesting that they are a source of generally accepted international legal norms. As one example of an indirect turn to Islamic law, the Statute makes clear that the ICJ is supposed to look for international legal norms in the "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states."[23] International conventions might incorporate norms derived from the Islamic legal tradition or, alternatively, states signing on to international conventions might express reservations that reference Islamic legal norms. States might say, for example, that they accept certain treaty norms only to the extent that they do not contravene the norms of God's law, the Shari`ah.[24] If so, the ICJ would theoretically be required to engage with the Shari`ah. In order to properly determine what parties agreed to and thus the obligations to which they should be held, the Court would need to look at questions of Islamic law—asking whether Muslims agree on what God commanded in this area or, since it is unlikely that they do agree, asking what the reserving state thinks God has commanded in this area.

The ICJ might also look indirectly to Islamic law as a source of international legal norms insofar as Islamic legal considerations may have helped to define state practice. If treaties do not provide a rule of decision for the case at bar, Article 38(1)(b) requires the ICJ to look to "international custom, as evidence of a general practice accepted as law."[25] Theoretically, at least, one might argue that international custom is shaped by the behavior of states, some of which are controlled by Muslim elites whose behavior is, whether implicitly or explicitly, controlled by an Islamic understanding of international law. Thus, to

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23 Statute of the International Court of Justice, art 38(1)(a) (cited in note 10).

24 For a definition of Shari`ah, see note 1. For a discussion of reservations that Muslim countries have actually made to conventions and the legal questions they raise, see, for example, Alison Dundes Renteln, *Cultural Bias in International Law*, 92 Am Socy Intl L Proc 232, 239–40 (1998) (discussing generally the issues raised by reservations of Muslim nations to international conventions); Geraldine A. del Prado, *The United Nations and the Promotion and Protection of the Rights of Women: How Well Has the Organization Fulfilled Its Responsibility?*, 2 Wm & Mary J Women & L 51, 70 (1995) (discussing reservations by Muslim nations to the Convention on the Elimination of All Forms of Discrimination Against Women (1980), 19 ILM 33). See also Anna Jenefsky, Comment, *Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 15 Md J Intl L & Trade 199, 213–19 (1991).

25 Statute of the International Court of Justice, art 38(1)(b) (cited in note 10).

understand the true extent of international consensus on a point (and thus the contours of "custom"), one would need to consider Islamic law. The extent to which state behavior is affected by Islamic norms would, however, be hard to gauge.[26]

There is even a direct route by which the ICJ could use Islamic law as a source of international legal norms. If treaties and/or state custom do not provide the ICJ with a rule of decision, Article 38(1)(c) states that the Court should fill any gap in international law by considering "the general principles of law recognized by civilized nations."[27] The term "civilized nations" was once thought (and indeed was probably thought by the drafters of the Statute) to refer to European nations.[28] Nevertheless, as Thomas Franck has put it, "that was then" and today the ICJ draws the boundaries of the "civilized" world more broadly.[29] Thus, it would seem that Article 38(1)(c) opens a door through which the Court could walk if it wished to integrate into its jurisprudence the perspectives of highly developed, non-European legal cultures, such as Islamic legal culture.[30] As we shall see, however, it is only in rare cases, that a judge on the ICJ has stated that non-Western legal systems are an indirect or direct source of the international legal norms that are relevant to a case before the Court.[31]

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26 It is true that Islamic religious scholars explored God's answers on questions that we would think of as falling in the category of public law. Nonetheless, many jurists believed that states were not necessarily obliged to follow their particular interpretations of God's law, but needed only to ensure that their rules did not force officials or subjects to violate the unambiguous and generally accepted commands of God and that these state laws did not pursue policies that promoted ends that the religious law unequivocally declared to be evil. In practice, this left governments considerable leeway to act in a manner that the government determined to be in the public interest. When examining state practice, one would need to disentangle the degree to which states acted because they felt that they were compelled by God's command to act in a certain way and the degree to which they instead acted in a particular way because they felt constrained by practical considerations of public welfare. For the doctrine of *siyasa shar'iyya*, which declared that governments had discretion within a sphere bounded by a few absolute religious commands and a few general principles, see Lombardi, *State Law as Islamic Law* at 49–54 (cited in note 1).

27 Statute of the International Court of Justice, art 38(1)(c) (cited in note 10).

28 See Thomas M. Franck, *The Legal Culture and the Culture Culture*, 93 Am Socy Intl L Proc 271, 271–72 (1999) (discussing the "hoary" concepts that denigrated non-European legal cultures as uncivilized). See also the complaints of Judge Ammoun in his separate opinion in *North Sea Continental Shelf (Fed Rep Ger v Den; Fed Rep Ger v Neth)* 1969 ICJ 3 at 132–40 (Feb 20, 1969).

29 Franck, 93 Am Socy Intl L Proc at 271–72 (cited in note 28).

30 Id. See also Christopher A. Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(c) and "General Principles of Law,"* 5 Duke J Comp & Intl L 35, 65–66 (1994).

31 Since its inception, a majority of judges on the ICJ has always resisted reading Article 38(1)(c) to require the ICJ to consider Islamic law and other non-Western bodies of law as norms that should be taken into account as the ICJ develops its interpretation of international law. At the time it was drafted, Article 38(1)(c) was generally understood to make the general principles of law simply a subsidiary source of law—a sort of "gap filler"—that could be used when treaties and state

Even if judges do not look to Islamic law for guidance as to the existence of an international legal norm, judges could look to Islamic law to help them determine how an existing legal norm should be applied. That is to say, the Court might determine that, whether or not a principle such as "equity" derives from the Islamic legal system, the discovery of an equitable solution to a dispute involving a majority Muslim state (or an Islamic state) might require the Court to consider Muslim assumptions about fairness—assumptions that may be rooted in Islamic legal culture.

Finally, even in cases where no judge has asserted either that Islamic law has helped to shape an international legal principle or that the ICJ's application of that principle should be influenced by consideration of Islamic law, judges might nevertheless turn to Islamic law as a way of legitimating their decisions. By demonstrating that the result they reached is not inconsistent with Islamic legal norms, judges might try to stifle or blunt the effectiveness of Court critics. It would be particularly useful in rebutting any accusation that the Court and its interpretation of international law are inescapably biased towards a "Western" world view and that they cannot legitimately claim the right to bind non-Western states.

As should be clear by now, if a majority of the judges on the ICJ wanted to do so, the ICJ could consider Islamic legal norms as it tried to find or justify its rules of decision. This brings us to the next questions: Have they ever done so, how often, and for which of these possible purposes?

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practice did not indicate a clear norm that could be applied as a rule of decision to resolve a particular case. See the discussion in Ford, 5 Duke J Comp & Intl L at 63–65 (cited in note 30). Thus, if the ICJ wanted to use Article 38(1)(c) regularly as a broad excuse to consider Islamic legal norms it would not only have to concede that Islamic nations should be recognized as inherently "civilized," but also that treaties and state custom together often fail to provide sufficient guidance to answer many legal questions. While the ICJ has been willing to admit the first point, it has been reluctant to admit the second. The resistance to using Article 38(1)(c) is quite noticeable. Indeed, in the ICJ's own official history and handbook, one sees evidence of its disdain for this provision. On pages 91–94, the handbook reprints Article 38(c) listing the sources to be used and then purports to give readers the information that they need to understand how the Court uses the sources to develop rules. *The ICJ* at 91–94 (cited in note 11). It dutifully describes the international instruments that the Court must look to pursuant to Article 38(c)(1)(a). Id at 91–93. It explains what types of custom the Court looks to when looking for rules of decision pursuant to 38(c)(2). Id at 93–94. It skips over 38(c)(3) which instructs the Court to consider as a source of law the "general principles of law recognized by civilized nations," and moves on immediately to discuss the types of "judicial decisions" and writings of "qualified publicists" whose interpretations of international law can guide the ICJ. Id at 94.

IV. HOW OFTEN HAVE JUDGES ON THE ICJ USED ISLAMIC LAW IN THEIR OPINIONS?

From its inception through 2006, the Court issued eighty-three judgments in contested cases.[32] In two of the cases, the official judgment itself mentioned Islamic law—although, as we shall see, neither of these two judgments discussed Islamic law in any meaningful way. In seven other cases, judges filed separate opinions concurring with or dissenting from the judgment and mentioning Islamic law. Thus, the ICJ's judgments in contested cases seldom mention Islamic law. In a little over ten percent of the cases where the ICJ issued a judgment, some judges thought that Islamic law was relevant in some way to resolving the issue.

Arguably, this number underestimates the frequency with which a judge in contested cases writes a separate concurrence or dissent and refers to Islamic law. The first reference to Islamic law in an ICJ opinion appears in Judge Ammoun's separate opinion arising from the contested *North Sea Continental Shelf* case in 1969.[33] From that time forward, the ICJ issued fifty-five judgments in contested cases. There were nine instances where at least one judge felt that Islamic law was relevant, in some way, to the resolution of the dispute. During this period, the percentage of cases where at least one judge mentioned Islamic law rises to sixteen percent.[34] If we look at advisory opinions, a similar pattern holds.[35] Even accepting the higher numbers, however, the fact remains that

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32 On its official website, the ICJ maintains an up-to-date list of the cases that have been placed on its docket over the years and a list of the decisions issued in these cases. See International Court of Justice, *List of Cases Brought Before the Court Since 1946*, available online at <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> (visited Apr 21, 2007). Updated lists and summaries of cases and decisions are also included in each edition of the Court's official history. *The ICJ* at 103–212 (cited in note 11).

33 *North Sea Continental Shelf*, 1969 ICJ 3.

34 If we look at history that is even more recent, say from 1980 through 2006, we find that the ICJ has issued twenty-nine judgments in contested cases, and that seven of them might be lumped together because they dealt with largely similar issues arising out of military attacks by allied European nations against Yugoslavia during the Balkan wars of the 1990s. During this period, official ICJ judgments mentioned Islamic law only once (and, it must be admitted, tangentially). In five of the other cases, one finds appended to the judgments concurring or dissenting opinions that refer to Islamic law. Depending on whether one lumps the Yugoslav cases together as a sort of single judgment, it seems that one or more judges found Islamic law a useful source of law in at least seventeen percent or twenty-three percent of cases—a slight increase over the 1969–2006 period as a whole.

35 From the time of its founding until July 2004, the ICJ was asked twenty-four times for advisory opinions and issued twenty-five opinions. References to Islamic law appear in the judgment in one advisory case decided in 1975, but they do not play any role in the Court's reasoning. See Advisory Opinion, *Western Sahara*, 1975 ICJ 12, 42 (Oct 16, 1975). In another case decided in 1996, the judgment does not mention Islamic law, but a dissenting judge insists that a

judges on the Court have only occasionally found a reason to refer to Islamic law, and those few judges who have argued that references to Islamic law should be discussed have only twice been able to convince a majority on the Court to follow their lead. Bearing this in mind, it is interesting to look at the references they make. What role do these judges think Islamic law can and should play in the opinions of the ICJ and, by implication, in the ongoing evolution of international law? Why have they been unable to convince their colleagues?

ICJ judges who refer to Islamic law seem to do so in subtly different ways. As noted already, the Court's Statute and practices would seem to permit Islamic law to enter Court discourse through several avenues. Among others, Islamic law could be cited (i) as a source of international legal norms, (ii) as a consideration when determining how an international legal norm should be applied, or (iii)as a reference point to demonstrate that, whether or not Islamic legal norms were taken into consideration when the ICJ decided a case, the ruling it reached cannot be dismissed by Muslim states as un-Islamic and illegitimate. Different judges at various times have opted to use Islamic law in each of these ways.

V. How Have Judges on the ICJ Used Islamic Law?: A Survey of the ICJ Cases in Which One or More Judges Cite to Islamic Law

A. Islamic Law in ICJ Opinions: Inception–1988

From its inception in 1946, the ICJ had on its bench a number of distinguished judges from non-Western countries, including Egypt[36] and Pakistan.[37] Prior to 1969, however, no ICJ judge argued in any opinion that the Islamic legal tradition provided norms that were relevant to the resolution of a case before the ICJ. It would appear that during this period, all the judges on the ICJ, both European and non-European, were heirs to a conservative culture of international law in which there was little room to look beyond state treaties and state practice. To the extent they did look beyond these sources, judges by training and temperament seemed more comfortable looking to European legal norms than to the non-Western ones. Judges from Muslim countries apparently shared the preference for finding norms, wherever possible, in the European

consideration of Islamic law along with a consideration of many other bodies of law reveals the general principle that must be employed to resolve the case. See Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226, 380–381 (July 18, 1996). See the discussion of these cases at notes 50–56 and 86–97, respectively.

36 A.H. Badawi of Egypt served from 1946–1965. *The ICJ* at 221 (cited in note 11).

37 Muhammad Zafrulla Khan served on the ICJ from 1954–1961 and from 1964–1973. Id at 223.

international legal tradition. Indeed, the distinguished Egyptian jurist Ibrahim Shahata argued in 1965 that the judges appointed by non-Western nations were, if anything, more "conservative" in their judging than were the judges appointed by Western nations.

> Judges from new states have been much more conservative in their attitude toward the [ICJ's] jurisdiction and the law applied by it than many Western judges. And, indeed, because of their Western education and their age, the African and Asian judges on the Court can hardly be said to represent the ideologies at present prevailing in their countries.[38]

Starting in 1969, however, it seemed that the uniform conservatism of judges might be weakening—at least with respect to the possible use of Islamic law as a source of international legal norms.

1. *North Sea Continental Shelf*[39]

The first judicial reference to Islamic law in an ICJ opinion appeared in a multi-party case delimiting the continental shelf of the North Sea between Denmark, the Netherlands, and the Federal Republic of Germany. When the ICJ's judgment was issued in 1969, Judge Fouad Ammoun of Lebanon wrote a separate opinion. Although he agreed with the result announced in the ICJ's official judgment, he suggested that the ICJ had erred by failing to realize that a reference to Islamic law would have strengthened the opinion and given it more legitimacy.

One question at issue in the case was whether the ICJ should employ a rigid principle of equidistance—as would have been required under the 1958 Geneva Convention on the Continental Shelf ("Convention"). Noting that Germany had not ratified that Convention and that the law was not one of customary international law, the ICJ instead said that international law recognized a principle that boundaries should be drawn according to "equitable principles."[40]

In defining the equitable principles that should be applied, the ICJ's judgment did not mention Islamic legal theory or Muslim theories of equity. Judge Fouad Ammoun argued that the Court could (and probably should) have. Equity, Ammoun insisted, was a principle that filled "gaps" in the law. As such, the Court was free to look to general principles such as "equity," but in so doing, it was commanded by Article 38(1)(c) to apply these principles in a way that was

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38 Ibrahim F.I. Shihata, *The Attitude of New States toward the International Court of Justice*, 19 Intl Org 203, 220–221 (1965).

39 *North Sea Continental Shelf*, 1969 ICJ 3.

40 Id at 53.

consistent with the legal philosophies of all the civilized nations of the world.[41] The ICJ should have paid particular attention to the Islamic legal tradition, which he argued had seriously considered the role of equity in the law.[42] That tradition, he argued, "is placed on the basis of equity (and more particularly on its equivalent, equality) by the Koran and the teaching of the four great jurisconsults of Islam."[43] Judge Ammoun seemed also to imply that the Muslim understanding of equity in border drawing could be studied by looking at the practices of Muslim states (such as Saudi Arabia, Iran, and various Gulf states) when they had drawn their own maritime boundaries.[44]

But what role did Judge Ammoun envision for Islamic law in the process of developing international law? He commented with some bitterness on the ICJ's failure to apply an equitable principle without looking at non-European notions of equity..[45] However, Judge Ammoun did not seem to think that using Islamic law in the way that he proposed would lead to any departure from settled understandings of international law or that it would lead to significant change in the direction of international legal development in the ICJ. Indeed, it needs to be stressed that Judge Ammoun did not seem to disagree with the idea that, when selecting rules of decision, the ICJ should first apply the rules to which states had agreed in treaties and then the rules with which states had demonstrably complied. If such treaty rules or customary rules were derived

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41 Id at 131–34. In particular, he says:

> [I]t cannot be accepted, as the Governments of the Kingdoms of Denmark and of the Netherlands maintain, that the rule in Article 6 of the [1958] Geneva Convention concerning the delimitation of the continental shelf has acquired the character of a general rule of international customary law or that of a regional customary rule.
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> . . .
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> Contrary to the opinion of the [ICJ], there is a lacuna in international law when delimitation is not provided for either by an applicable general convention (Article 38, paragraph 1 (a)), or by a general or regional custom (Article 38, paragraph 1 (b)). There remains subparagraph (c), which appears to be of assistance in filling the gap. The question which arises is therefore as follows:
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> 33. Does there exist a general principle of law recognized by the nations, as provided for by Article 38, paragraph (c), of the Statute of the Court, from which would follow a rule to the effect that the continental shelf could, in case of disagreement, be delimited equitably between the Parties?

Id at 131–32.

42 Id at 135–39.

43 Id at 139. In his discussion of Islamic law, Judge Ammoun cites three passages from the Qur'an and the Ottoman *Majllat al-Ahkam*—which is an Ottoman code rooted in the Hanafi law and requires recourse to equity. See note 48.

44 Id at 140–41. Ammoun cites proclamations declaring that equity was used to resolve disputes and dismisses one instance of contrary practice as not voiding earlier declarations.

45 Id at 132–34.

from the Western legal culture, so be it. When these sources of law left gaps, however, and failed to provide a sufficient rule of decision, the ICJ would have to fashion its own rule. And in so doing, it should look to the legal philosophies of the civilized world.

Furthermore, there is no indication that Judge Ammoun thought incorporating Islamic law into the ICJ's analysis of general principles would lead to any radical shift in the evolution of international law. One wonders whether Ammoun was adamant that the Court should look to Islamic law in part because he believed that integrating Islamic legal norms into the ICJ's jurisprudence (at least in the limited way he proposed) would not lead to any dramatic changes in international law. He seemed to feel that, if the Court used Islamic law as a "gap-filler," it would come up with rulings that were largely consistent with international law as it had been developing but it would express and apply these rulings in a way that would take account of Muslim sensibilities. Without evolving in any radical way, then, international law would gain increased force and legitimacy.[46]

It is not clear exactly why Judge Ammoun had such confidence in the essential compatibility of modern international legal norms and Islamic legal norms. Ammoun's command of Islamic legal sources seemed less sure than his command of traditional European sources of law. Given his criticism of the ICJ's eurocentrism, it is ironic that Judge Ammoun's opinion seems to show more familiarity (and comfort) with the European than the Islamic legal tradition. He discussed in considerable detail the Greco-Roman origins of Western notions of equity and the evolution of the concept in the West.[47] In contrast, when arguing that Islamic law has much to add to the Western understanding of equity, the sole citations are to the Qur'an, a text that is extremely difficult to interpret and can only serve as the starting point for any analysis of Islamic law,[48] and then to a text that he refers to as "*Majallat el Ahkam*," which is probably the Arabic version of the Ottoman *Mecelle*.[49] This

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46 *North Sea Continental Shelf*, 1969 ICJ at 136 ("In a renewed effort by Romano-Mediterranean legal thinking, breaking the chrysalis of outgrown formalism which encompasses it, international law at the same time tears apart its traditional categories, though it be slowly and bit by bit, in order to open the door to political and social reality in a human society which no longer recognizes any exclusive domains.").

47 Id at 137–38.

48 For the difficulties of using the Qur'an as a source, see, for example, Bernard G. Weiss, *The Spirit of Islamic Law* 38–65 (Georgia 1998); Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* 3–7, 42–58 (Cambridge 1997).

49 The term "*Majallat el Ahkam*" could theoretically refer to any number of sources. But in this case it probably refers to the Arabic version of an Ottoman civil code drafted in the late nineteenth century—a code that was based, in large part, upon Sunni Islamic law as interpreted by the Hanafi school of Islamic law and which had a great influence on the evolution of law in the Arab Middle

latter represents a distinctive text based on Hanafi Islamic law. Ammoun did not explain why he found it particularly insightful, particularly authoritative or representative of the Islamic tradition as understood in regions of the Islamic world where the majority of Muslims historically have not followed (or today do not follow) Hanafi interpretations of Islamic law. He did not seem to grapple with the possibility that Muslims would reject an interpretation of Islamic law performed by an ICJ judge who did not have strong Islamic legal training. This is not to say that Judge Ammoun's conclusions about Islamic law were wrong, but he did not make a strong case for them.

2. Advisory Opinion, *Western Sahara*[50]

In the early 1970s, there was a serious international dispute about the status of the territory of Western Sahara. After Spain gave up its colonial control over the territory, it was claimed by both Morocco and Mauritania. At the same time, however, some in the territory itself wanted to exercise a right of self-determination.[51] As tensions grew, the United Nations General Assembly sought an advisory opinion from the ICJ. It posed two questions. First, "Was Western Sahara . . . at the time of colonization by Spain [in the nineteenth century] a territory belonging to no one?" If the answer was "yes," it would have had clear legal consequences under settled principles of international law. Since the answer might be "no," the General Assembly asked a second question as well: "What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian Entity [a quasi-state to which Mauritania was the successor]?"[52]

As it transpired, the ICJ *did* answer the first question in the negative. Turning to the second question, the ICJ had to consider the arguments of Morocco that, in determining whether it had sovereignty over the Western Sahara in the nineteenth century, the ICJ should analyze the question from the perspective of the inhabitants. The inhabitants were Muslim, Morocco argued, and they would have recognized their religious ties to the Sultan of Morocco as tantamount to ties of sovereignty.[53] The ICJ disagreed. It found that there were

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East. This was a source used by lawyers from the Levant (such as Ammoun himself) and would be familiar to comparative and international lawyers—including most judges on the ICJ. See C.V. Findley, *Medjelle*, in P. Bearman, et al, *The Encyclopedia of Islam* (Brill Online ed 2007), available online at <http://www.encislam.brill.nl/subscriber/entry?entry=islam_SIM-5107> (visited Apr 21, 2007).

50 *Western Sahara*, 1975 ICJ at 12.

51 For background to the case, see William Samuel Dickson Cravens, Note, *The Future of Islamic Legal Arguments in International Boundary Disputes between Islamic States*, 55 Wash & Lee L Rev 529, 544–45 (1998).

52 See *The ICJ* at 198–99 (cited in note 11).

53 *Western Sahara*, 1975 ICJ at 42–44 (summarizing and analyzing Morocco's arguments in support of its claim).

historic legal ties between the territory of the Western Sahara and both the Kingdom of Morocco and the Mauritanian Entity. However, these ties were not sufficient to suggest that Morocco or Mauritania had territorial sovereignty over Western Sahara.

While noting Morocco's arguments, the official judgment did not address them directly and ultimately ruled against Morocco's claim to sovereignty. In an article analyzing the ICJ's resolution of border disputes between Muslim states, William Cravens expressed uncertainty about whether the ICJ had seriously considered Morocco's arguments. Alternatively, he thought, the Court might have been signaling an implicit rejection of the claim that when dealing with border disputes between Muslim states, the ICJ could (and sometimes should) depart from the criteria that the Court, following the European international legal tradition, had traditionally used for establishing sovereignty.[54]

Two judges were apparently also unsure about the implications of the judgment. They each wrote separately to criticize the ICJ's unwillingness to engage more deeply with Morocco's argument and thus, implicitly, suggested that the ICJ should have considered more seriously the premise that a Muslim people's religious ties to the Sultan of Morocco might have been conceptualized by Muslims as a recognition of territorial sovereignty.

Judge Alphonse Boni, an ad-hoc judge appointed by Morocco, not surprisingly argued that the ICJ should take more seriously Morocco's claim that the Sultan's religious role implied a degree of political control.[55]

Judge Ammoun also wrote separately to argue that Morocco's contention should have been taken more seriously. He pointed out that the international community had in the twentieth century recognized a number of territorial states whose identity was defined to some extent in religious terms. Thus, religion and even religious allegiance seems to be considered in at least some circumstances a marker of national identity. Implicitly, he seemed to suggest that a Muslim people's recognition of religious authority might be more relevant than the ICJ's majority admitted.[56] Judge Ammoun's reference in this case to Islamic law and the role that consideration of Islamic legal concepts could play in deciding questions of sovereignty was short and elliptical, and it provided little clear guidance about his larger views on the role that consideration of Islamic law might play in the application of international legal principles.

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54 See Cravens, 55 Wash & Lee L Rev at 549 (cited in note 51).

55 *Western Sahara*, 1975 ICJ at 173 (separate opinion of Judge Boni).

56 Id at 98–99 (separate opinion of Judge Ammoun).

3. *Aegean Sea Continental Shelf*[57]

In 1976, Judge Ammoun left the ICJ and Judge Salah El Dine Tarazi of Syria joined the bench.[58] One year later, Judge Tarazi wrote separately to dissent in a contested case. In this case, the ICJ issued a judgment asserting that it did not have jurisdiction to hear a dispute between Greece and Turkey over the continental shelf in the Aegean Sea. Greece had argued that the ICJ did have jurisdiction as a result of a joint communiqué issued in May 1975. The ICJ's judgment did not mention Islamic law at all. Judge Tarazi dissented and briefly mentioned Islamic law. Judge Tarazi argued that the ICJ had read the joint communiqué too formalistically and not in a way sufficiently sensitive to the intents of the parties. A less formalistic reading was required, he suggested, by the 1969 Vienna Convention on the Law of Treaties. With that point made, he noted in a single passing sentence that reading documents so as to give effect to the intents of the parties is a practice accepted not only by the European-inspired modern international legal tradition, but also by Islamic law. Islamic law provided that "in conventions one must consider the intention of the parties and not the literal meaning of the words and phrases employed."[59] He quoted this proposition from a colonial translation of an Ottoman Code.

Judge Tarazi's opinion might plausibly be distinguished from Judge Ammoun's earlier opinions invoking Islamic law, which had suggested that Islamic law should play a substantive, if small, role in the evolution of the ICJ's jurisprudence.[60] Tarazi did not seem to be asserting that this principle had entered into international law *because* Islamic law recognized it.[61] Nor did Judge Tarazi suggest that one should consider Islamic law to understand the parameters of a norm, or to understand how it should be applied in a particular case. Rather, Judge Tarazi's use of Islamic law seems gratuitously to defend the legitimacy of the principles that he thought the Court should apply and to support the claim that decisions based on international legal principles are binding on all nation states—even majority Muslim states. Even if they were derived by the Court from European sources, the principles that underlay the

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57 *Aegean Sea Continental Shelf (Greece v Turkey)*, 1978 ICJ 3 (Dec 19, 1978).

58 See *The ICJ* at 221–22 (cited in note 11).

59 *Aegean Sea Continental Shelf*, 1978 ICJ at 56 (separate opinion of Judge Tarazi, quoting George A. Young, 6 *Corps de Droit Ottoman* 178 (Clarendon 1906)).

60 It must again be stressed that Ammoun did not seem to think that it would necessarily lead to any marked change in the outcome of cases, and one is left to wonder whether he would have been as sanguine about referring to Islamic law in his opinion if he thought that it would do so.

61 The operative norm that Judge Tarazi would apply comes from a treaty, a source recognized as primary by Article 38(1)(a) of the ICJ's Statute. Judge Tarazi does not suggest that the parties to the treaty at issue had considered Islamic law when signing their treaty.

ICJ's opinions could not be dismissed by Muslim states as contrary to principles recognized by Islamic law. Similarly defensive invocations of Islamic law were seen a year later in both the judgment and in a separate opinion by Judge Tarazi—each appearing in a case arising out of the seizure by Iranian militants of the US embassy in Tehran.

4. *United States Diplomatic and Consular Staff in Tehran*[62]

After the seizure of the US Embassy in Tehran in 1979, the United States sought censure and reparations from the Iranian government for violation of the US right to protection of its diplomatic and consular personnel. The ICJ agreed that the US had such rights pursuant to rules of general international law enshrined in multilateral conventions and pursuant to bilateral treaties with Iran.

Given the nature of the case and the fact that Iran seemed to question the legitimacy of the ICJ and of the rules that it would use to resolve the dispute, the ICJ may have felt more pressure than usual to argue for the legitimacy of the international legal regime of which it was a part. In its official judgment, the Court held that the applicable rules were to be found in conventions and state practice. Though this obviated the need to look for general principles recognized by civilized nations, the ICJ noted, in passing, and without citation, that "the traditions of Islam" substantially contributed to the development of international conventions and principles protecting diplomatic missions.[63] This is one of the only times that the ICJ has mentioned Islamic law in an official judgment of the Court. Almost surely, this unusual and defensive reference was driven by the fact that the Court was speaking to a revolutionary Islamic government. Even if the Court did not convince the Islamic Republic of Iran to comply, it must have felt an unusual need to legitimize its decision in the eyes of the Muslim world.

In his separate opinion, Judge Tarazi also used Islamic law in a defensive fashion. He agreed that Iran had violated the ambassadors' rights that were created by treaties and state practice. He made a point to reiterate and underscore the judgment's implicit claim that the ICJ's command could not be rejected in a facile fashion by an Islamic Republic on the grounds that it was inconsistent with Shari`ah norms. Islamic law, he repeated, had traditionally demanded that the states respect the rights of diplomats. His discussion of Islamic law is marginally longer than that found in the judgment. Furthermore, he improved on the judgment insofar as he provided some citations to support the agreed-upon point.[64] But the reference to Islamic law was not essential to

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62 *United States Diplomatic and Consular Staff in Tehran (US v Iran)*, 1980 ICJ 3 (May 24, 1980).

63 Id at 40.

64 Id at 58–59 (separate opinion of Judge Tarazi).

Judge Tarazi's conclusion. It was neither necessary to demonstrate the existence of the rule that he wanted to apply, nor essential to understand how it should be applied.

Furthermore, the robustness of Judge Tarazi's Islamic legal analysis should not be overstated. That Islamic law did not play more than a marginal role in Tarazi's determination of the correct outcome in this case can be inferred from the offhand manner in which he supports his claims about Islamic law. To prove that the judgment is correct about Islam's historical respect for diplomats, he does not cite any primary sources or even a significant secondary source studying Islamic law's treatment of the issues in the case. He merely cites a lecture published in French in the 1930s in the proceedings of the Hague's Academy of International Law and a brief excerpt on Islamic law taken from a Soviet work on international law.[65] Citations to such texts seem unlikely to persuade a government run by classically-trained Islamic scholars. In fact, it is hard to see Tarazi's discussion as particularly compelling to any observer. In both the Court's judgment and in Tarazi's separate opinion, one senses again that the ICJ's desire to legitimize its ruling in Islamic terms had outstripped its judges' limited familiarity with Islamic law.

B. ISLAMIC LAW IN ICJ OPINIONS: 1989–1999

After Judge Tarazi's departure from the ICJ in 1980, the ICJ went over ten years without citing Islamic law for any purpose whatsoever. When, after a decade, judges again began to make passing mention of Islamic law in their separate opinions, a new judge sat on the bench. This was Christopher Weeramantry. It was no coincidence that references to Islamic law began to reappear in the ICJ reporter at roughly the same time that Judge Weeramantry ascended to the bench. Prior to his appointment to the ICJ in 1991, Judge Weeramantry had written a book, *Islamic Jurisprudence: An International Perspective.*[66] In it, he had tried to raise awareness among international lawyers about the sophistication of the Islamic legal tradition and about the ways in which a study of Islamic law might help enrich the body of international law.[67] This did not

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65 Id.

66 Christopher Weeramantry, *Islamic Jurisprudence: An International Perspective* (St. Martin's 1988). At the time he wrote his book, Weeramantry had completed a term as a justice of the Supreme Court of Sri Lanka and was serving as a professor at Monash University in Australia. He had already published a number of scholarly works, including books on the classical tradition of comparative law, on human rights, and on nuclear weaponry.

67 Weeramantry argued that greater attention to Islamic legal norms was long overdue on the part of international lawyers and had "potential for assisting towards a juster world in the future." Id at xv.

mean, however, that he envisioned courts like the ICJ looking to Islamic law on a regular basis to clarify unclear points of international law.

In his book, Professor Weeramantry suggested that, if international lawyers took the time to understand the Islamic legal tradition, they would be surprised by the degree of intercommunication between Islamic and European legal cultures over the years and by their mutual influence on each other and by the congruence of the two legal cultures on important principles of international law. By demonstrating that Islamic law was consistent in many respects with international law, international lawyers familiar with the Islamic legal tradition would be able to promote compliance with international law by Islamic states.[68] Second, Weeramantry argued that a study of the Islamic legal tradition helps to substantiate the claims of human rights theorists (claims with which he was deeply sympathetic) and thus would help legitimize a more aggressive use of human rights in international jurisprudence.[69]

Given the impression that some have about Judge Weeramantry's expertise in Islamic law and commitment to integrating Islamic law into international law, there are two points that need to be made about his book.[70] First, on close

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68 Weeramantry argued that a failure to consider the Islamic view would cause the increasingly important states and peoples of the Muslim world to question the legitimacy of international legal norms. See id at 166–69. ("It is not often sufficiently appreciated, especially in the Western world, that many of the current rules of international law are regarded by a large segment of the world's population as being principles from the rule-book of the elite club of world powers which held sway in the nineteenth century. In the midst of this general attitude of mistrust the worthy rules are tarred with the same brush as the self-serving."). This is particularly dangerous, he argued, because the Islamic world is becoming ever more powerful and assertive. Id at 166–67. The solution was to demonstrate, as he believed he could, that the Islamic tradition recognized principles that were consistent with international legal norms—proving that the modern international legal tradition, whether or not it drew directly on Islamic legal norms as it evolved, was not inconsistent with these norms and should be respected by Muslim states and peoples. For his elaboration of this argument, see id at 134–49.

69 According to Weeramantry's understanding of it, the Islamic legal tradition supports his belief that there are universally recognized human rights norms which should play a very important role in defining states' legal obligations. But it is not only the legitimacy of international law in its current form that most concerns him. Weeramantry's conviction that international lawyers should recognize the importance, sophistication, and legitimacy of Islamic law seems to be rooted in large part in his belief that the Islamic legal tradition provides crucial support for the thesis that there are universal human rights norms that are accepted in all civilizations. Consider id at 168 ("In the contemporary world, when the Islamic influence is so powerful, there is a danger that if sufficient heed be not paid to Islamic attitudes and modes of thought, the Universal Declaration and human rights doctrine in general may run into rough weather.").

70 As evidence of Weeramantry's reputation as an expert, one need only look at the number of times he is cited as an expert on some point of Islamic law relevant to international legal decisions. As for public views about his commitment to incorporating non-Western, and particularly Islamic, law into international law, see, for example, Anghie, *Finding the Peripheries*, 40 Harv Intl L J at 76 & n 270 (cited in note 4) ("[T]he recent jurisprudence of the Court suggests that little effort has

inspection, his method of interpreting Islamic law may not be as fully developed as it might at first appear. To judge from the bibliography, it is dependent on English translations, some of questionable accuracy, or on secondary sources written in English.[71] Perhaps because of the limited sources to which he looked,[72] Weeramantry also seems to make the possibly unwarranted assumption that a method of interpreting texts, which is heavily shaped by Western notions of epistemology, authority, and interpretation, would be uncritically accepted as correct by Muslims—and thus that if Islamic law, as he understood it, were integrated into international legal reasoning, it would automatically increase the legitimacy of international legal rulings in the eyes of Muslim skeptics.[73]

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been made to draw upon the legal traditions and systems of non-Western peoples in the administration of international justice. . . . Certain notable exceptions to this are evident. Judge Weeramantry's decisions, in particular, have made far-reaching attempts to incorporate non-European legal traditions into the jurisprudence of the Court.")

71 The bibliography shows that Weeramantry had read English translations and English secondary sources but had not read any material in Islamic languages or even leading French or German secondary sources on Islamic law. Within the English literature, his selection seems unsystematic and apparently uncritical. For example, he used translations that have been criticized by leading Islamicists as untrustworthy. For example, see Weeramantry, *Islamic Jurisprudence* at 196 (cited in note 66) (citing in bibliography "Al-Nawawi's, *Minhaj al-Talibin* London, 1914"). This surely refers to E.C. Howard's translation of Nawawi which should have been cited as Nawawi, *Minhaj-at-Talibin; A Manual of Mohammedan Law according to the School of Shafi'i* (Thacker, 1914) (E.C. Howard, trans from the French Edition of A. W. C. van den Berg, trans). That is, it is a translation of a French translation that was criticized as highly inaccurate by the eminent Orientalist Joseph Schacht in J. Schacht, *Introduction to Islamic Law* 262 (Oxford 1964). Similarly, see Weeramantry, *Islamic Jurisprudence* at 196 citing to the work "Qutb, S., *Social Justice in Islam* . . . (Octogon 1953)" translated by John B. Hardie. This is a translation of Qutb's *al-Adalat al-Ijtima'iyya* that was criticized by Hamid Algar in, Sayyid Qutb, *Social Justice in Islam* 15–17, (Islamic Pub Intl 2000) (John B. Hardie, trans, Hamid Algar, rev trans) (introduction by Hamid Algar). When it comes to modern authors, Weeramantry did not explain how he determined which of the diverse modern writers he cited were to be considered authoritative representatives of the contemporary Islamic legal tradition. Again, of course, only English books are cited, which means that his selection may have been based on their availability in English rather than their authority within the Muslim world.

72 The reliance entirely on English sources is problematic given that classical Islamic law was elaborated almost entirely in Arabic and the leading European scholarship was as likely to be in French or German as in English. Indeed, Weeramantry's failure to look at Arabic and French literature seems to have led him to overlook the work of one of the leading modern Arab thinkers on the relationship of Islamic law, European law, and international law: Sanhuri's. This is ironic because Sanhuri might have provided support for some of his contentions. For an overview of Sanhuri's life, work, and influence, see generally Enid Hill, *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of `Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895–1971* (Am U Cairo 1987); Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* 58–59 (Brill 1999); Amr Shalakany, *Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise*, 8 Islamic L & Socy 201, 224 (2001).

73 The description of Islamic jurisprudence found in Weeramantry's chapters on "Islam and Human Rights" and "Islamic International Law" shows some of these problems. The book did not engage with important, much debated, and very difficult questions about how we can draw a

Second, it is not clear from his book how much Weeramantry thought international judges trying to interpret and apply overarching international legal principles or human rights principles should look to the Islamic legal tradition in order to resolve concrete disputes that implicated these principles. Weeramantry argued that Islamic law helped to shape some important and non-controversial principles of international law and that Islamic legal writing also provided some support for some controversial principles of international human rights law. However, most of the principles that Weeramantry believes to be supported by (among other things) Islamic legal texts are very general. To reach results in international legal disputes about the legality of state practice, one would need to move from these general principles and distill more specific rules, which tell us how to apply these principles in the types of case that we are likely to encounter. It is not clear how exactly Weeramantry saw this being done.[74] His book leaves open the possibility that he thought that citation to Islamic law would be useful for judges who wanted to legitimize basic principles of international or human rights law but that he expected international law judges to look primarily to the traditional sources of modern international law—treaty and state practice—to understand the implications of these principles.

When Judge Weeramantry came to the bench, he predictably began to write opinions that mention Islamic law. But his discussions of Islamic law reflected all the ambiguities that were latent in his book. Judge Weeramantry primarily cited Islamic law and other non-Western bodies of law to support his claims about the existence (and legitimacy) of highly general principles of law,

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single set of norms that we accept as authentic "Islamic" legal principles from the highly pluralistic interpretations of Islamic law. For a description of the problem as it was addressed by pre-modern Islamic states trying to develop a homogenous body of "Islamic" state law, see Lombardi, *State Law as Islamic Law* at 47–58 (cited in note 1). Judge Weeramantry seems to accept, as if it were uncontroversial, an impressionistic method of interpreting classical sources with which classical jurists and some modernist Muslims might be uncomfortable. See, for example, his discussion of the ways that one can induce general principles of law from either the sources of Islamic law or the practice of Muslim states. Weeramantry, *Islamic Jurisprudence* at 120–21 (cited in note 66). Assuming that one were to accept his approach to identifying essential Islamic norms, one would still want to know why he chose as valid the Islamic sources that he did and how he thought one should integrate information derived from one source with information derived from another.

74 When it discussed how Islamic legal norms can productively shape the international community's interpretation of broad principles and thus define the contours of the binding rules of international law, Weeramantry's book did not argue that judges have considered (or that they should consider) texts from the Islamic legal tradition. Rather, he suggested that Islam informs the attitudes of Muslim states when they enter into treaties or when they establish the policies that will result in a pattern of state practice. The implication is that he still assumed that international law would be derived primarily from these sources. See Weeramantry, *Islamic Jurisprudence* at 125–27 (cited in note 66) (discussing the influence of Islamic states on the Universal Declaration of Human Rights and other related measures).

whose nuances and implications depended, in practical circumstances, entirely upon analysis of the traditional (non-Islamic) sources of modern international law.

1. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*[75]

After the terrorist bombing of Pan Am flight 103 over Lockerbie, Scotland, Libyan nationals were indicted in both the United States and Scotland. Libya, which had no extradition treaty with the United States or Great Britain, took jurisdiction over the indicted Libyans. It then sought provisional measures from the ICJ: first, preventing the United States and Great Britain from taking coercive measures designed to compel Libya to hand over the indicted Libyans and, second, preventing the two nations from taking steps that would prejudice the rights of Libya as it determined whether to try the indicted Libyans. The ICJ declined to issue the provisional measures and proceeded to set a schedule for resolving the basic question of whether Libya had an obligation to hand over the suspected bombers.

The case involved questions of treaty interpretation, and the treaty did not purport to apply Islamic law. Not surprisingly, given the ICJ's long practice of ignoring Islamic law in its official judgments, the judgment did not mention Islamic law. Islamic law was mentioned, however, by the ad hoc judge appointed by Libya. Judge Ahmed Sadek El-Kosheri argued that the decision whether to grant the provisional measures was an equitable one. Even if the ICJ could not grant the precise measures requested by Libya, it could have created ad hoc provisional measures that, though they would not permit Libya to retain custody of the defendants, might nevertheless allow the defendants to be held in a neutral country until the parties agreed upon a method of trying them. To support this position, he argued that the proposition "derive[d] logically and necessarily from the legal traditions of the major systems, particularly Islamic law."[76] In support for his position, which he alone had taken, Judge El-Kosheri cited five pages from *Islamic Jurisprudence*—by Weeramantry, then one of the ICJ's newest judges.[77]

Judge Weeramantry also dissented. Interestingly, however, he took a very different approach—one that did not require him to cite Islamic law.[78] One year later, however, Judge Weeramantry would write separately from the Court in an

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75 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v US)*, 1992 ICJ 114 (Apr 14, 1992).

76 Id at 217 (separate opinion of Judge El-Kosheri).

77 Id.

78 Id at 160–81 (separate opinion of Judge Weeramantry).

important opinion, and in support of his position, would invoke Islamic law and his own book on Islamic jurisprudence.

2. *Maritime Delimitation in the Area between Greenland and Jan Mayen*[79]

In 1988, the ICJ was asked to delimit certain continental shelf and fishing zones between Denmark and Norway. Rejecting each of the delimitations proposed by the contending states, the Court followed its precedent in the *North Sea Continental Shelf* cases and delimited the area using equitable principles. The official judgment in this case did not mention Islamic law. Judge Weeramantry, however, wrote separately, agreeing with the result.

Picking up where Judge Ammoun had left off in *North Sea Continental Shelf*, Judge Weeramantry critiqued what he took to be the ICJ's continuing misuse of the term "equity." In an involved opinion, Judge Weeramantry discussed the different types of "equity" that have been recognized in European legal systems and insisted that as the ICJ develops equitable principles in the modern era, it should draw upon non-European legal systems. Citing Ammoun, he suggested that, at the very least, recourse to Islamic law in cases demanding equitable solutions to disputes might increase the perceived legitimacy, and thus "authoritative force," of international law.[80] But Weeramantry added that Islamic law provided support for independent universal moral principles that should help shape *all* questions of international law—including questions about how to develop boundaries. For example, Weeramantry cited his own book for the proposition that Islamic law recognized an overarching principle that humans must be environmentally sensitive.[81] This in turn provided strong support for the claim that international law needed to recognize a principle of sustainable development. "In such equitable principles may lie a key to many of the environmental concerns which affect land, the sea and the air space of the

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79 *Maritime Delimitation in the Area between Greenland and Jan Mayen (Den v Nor)*, 1993 ICJ 38 (June 14, 1993).

80 Id at 273. To support his arguments, Weeramantry cites extensively from Judge Ammoun's earlier opinion in *North Sea Continental Shelf*, but supplements Ammoun's own fairly sparse footnotes with a few more recent and important writings in English about the Islamic attitude towards "equity." Id at 276 nn 1–2 (citing John Makdisi, *Legal Logic and Equity in Islamic Law*, 33 Am J Comp L 63 (1985)).

81 Weeramantry argues both in his book and in this opinion that this proposition is necessarily implied by the statement found in some Islamic legal texts that, in theory, "land cannot be the subject of outright ownership as is the case with movables, but [that land is] the subject of trusteeship for the benefit of all future generations." Id at 278. In his opinion, he says that this principle, discussed at greater length in his book, "dictates the principle that such resources must be treated with the care due to the property of others and that the present must preserve intact for the future the inheritance it has received from the past." Id.

planet."[82] Weeramantry did not explain, however, how the recognition of broad principles such as these would resolve such concerns, nor did he explain what methods one would use to interpret and apply such principles to come up with answers. His later opinions would suggest that he felt that beyond justifying some basic moral principles that underlie international law, a study of Islamic law might play only the most limited role in helping the ICJ determine how to resolve concrete disputes.

3. *Territorial Dispute (Libya v. Chad)*[83]

In an ICJ case from the 1990s, Islamic law appears in an entirely tangential fashion. In the 1990s, Chad and Libya submitted a boundary dispute to the ICJ.[84] Its judgment recapitulated Libya's arguments before rejecting them. At the time of colonization, the area was controlled by the Sanusiyya, who, according to Libya, recognized the ultimate religious authority of the Ottoman Sultan. Recasting the argument of Morocco in the *Western Sahara* case, Libya argued that recognition of such religious ties would have been conceptualized in Islamic terms as analogous to recognition of Ottoman territorial sovereignty. Building on this, Libya argued that it should be seen as heir to the Ottoman governors of Libya. In its judgment, however, the ICJ argued that the issue was disposed of by a treaty that Libya had signed with France establishing a boundary. Working from the treaty, the ICJ established a boundary largely as requested by Chad.[85] The implications of this opinion for the question of the role of Islamic law in ICJ jurisprudence (if any) are not readily apparent.

4. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*[86]

In 1995, the General Assembly requested an advisory opinion from the ICJ on the following question: "Is the threat or use of nuclear weapons in any

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82 Id.

83 *Territorial Dispute (Libyan Arab Jamahiraya v Chad)*, 1994 ICJ 6 (Feb 3, 1994).

84 For background to the case and a summary of the arguments made to the court, see generally, Matthew M. Ricciardi, *Title to the Aouzou Strip: A Legal and Historical Analysis*, 17 Yale J Intl L 301 (1992).

85 See also the discussion in Cravens, 55 Wash & Lee L Rev at 553–54 (cited in note 51). In one dissenting opinion, the Italian judge Sette-Camara suggested that Libya's argument deserved greater consideration, but it is not clear that he based this opinion primarily on Libya's quasi-religious arguments. *Territorial Dispute*, 1994 ICJ at 102 (dissenting opinion of Judge Sette-Camara) ("I believe that the titles . . . asserted by Libya are valid."). In a separate concurrence an African judge argued that it would be extremely dangerous to recognize religious ties as a recognition of territorial sovereignty on the grounds that it would destabilize much of Africa. Id at 58, 87–88 (separate opinion of Judge Ajibola).

86 *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226.

circumstance permitted under international law?"[87] One year later, the ICJ issued an equivocal opinion. Noting that it was hard to imagine a threat or use of nuclear weapons that would be consistent with international rules governing the use of force or with international humanitarian law, the ICJ held that it could not reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a state in extreme circumstances—and particularly if the very existence of the state was threatened. Among the many dissenting opinions were two that cited Islamic law to support their contention that the ICJ could, in fact, find an operative international legal rule that barred the use of nuclear weapons under any circumstances.

In the course of his separate dissenting opinion, Judge Mohamed Shahabuddeen looked at the question of whether states can take action that could lead to the destruction of the whole world. He argued that this question is not merely political, but legal as well. The ultimate purpose of a legal system, he argued, is to preserve civilization.[88] To achieve the long-term goal of preserving civilization, courts may sometimes decide that it makes sense not to resolve particular types of disputes. But a court may not refuse to hear a case if the preservation of civilization (its ultimate responsibility) is at stake. As evidence in support of this position, he cited the Islamic jurist and proto-sociologist Ibn Khaldun.[89]

Judge Weeramantry, in a passionate dissent, agreed with Judge Shahabuddeen that international humanitarian law, properly understood, contains principles that prohibit absolutely and in all circumstances the use of nuclear weapons.[90] To support this proposition, he used Islamic law to identify general principles that might be relevant to the question. In the course of a broad-ranging but reductive survey of the laws of war in a vast range of traditions, Judge Weeramantry focused some attention on Islamic law. He stated that Islamic jurists at various points in history forbade the use of certain types of weapons.[91] The Qur'an, he asserted, prohibited the destruction of crops and the ill-treatment of civilians or captives.[92] He also cited a secondary source for the proposition that prisoners of war were to be "well treated"[93] and referred to a

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87 Id at 228.

88 Id at 380–81 (separate dissenting opinion of Judge Shahabuddeen).

89 Id.

90 Id at 443 (separate opinion of Judge Weeramantry).

91 Id at 481 (citing Nagendra Singh, *India and International Law* 216 (S Chand 1969)).

92 Id (citing Qur'an 2:205, 77:8).

93 Id (citing Syed Riazul Hassan, *The Reconstruction of Legal Thought in Islam: A Comparative Study of the Islamic and the Western Systems of Law in the Latter's Terminology, with Particular Reference to Islamic Laws Suspended by the British Rule in the Sub-Continent* 177 (Law Pub Co 1974)).

treatise on Islamic laws of war by Majid Khadduri and his own book *Islamic Jurisprudence* for the proposition that the conduct of soldiers during wars was to be regulated.[94] If this principle had been recognized by significant numbers of people across cultures, he suggested, it could be counted as one of those overarching human rights principles that he believed should be identified and then taken into account by the ICJ in deciding questions of international law.[95]

There may be less to Weeramantry's discussion of Islamic law than initially meets the eye. His opinion does not contain a comprehensive look at the Islamic materials dealing with the laws of war.[96] Furthermore, in understanding how to apply the principle that the conduct of war must be regulated, Judge Weeramantry moved his focus away from the Islamic tradition and focused on how the principle seemed to be concretized in humanitarian treaties and ICJ opinions. Reading treaties and court cases as attempts to elaborate upon a general principle of morality in war, Judge Weeramantry concluded that a specific rule of international law could be deduced—that any use of nuclear weapons must be prohibited.[97]

In sum, Judge Weeramantry apparently considered a reference to Islamic law to be essential to establish the legitimacy of the ICJ's inquiry into the laws of war. Still, the reference to Islamic law was only used to justify the basic proposition that the conduct of war and the weapons used by belligerent states was subject to regulation. The operation of the principle—and thus the rule to which it gave rise in this case—was dictated entirely by subsidiary principles that had been articulated in the sources of modern international law. Islamic law and other non-Western sources of law validated important underlying principles, but the traditional sources of international law still dictated the way in which those very general principles were to be interpreted and thus the ways in which they would actually constrain state behavior.

5. *Case Concerning the Gabcikovo-Nagymaros Project*[98]

In a case decided by the ICJ in 1997, Judge Weeramantry again used classical Islamic law to justify a broad principle that was then interpreted and applied through a process that did not rely on an analysis of the Islamic (or any

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94 Id (citing generally Majid Khadduri, *War and Peace in the Law of Islam* (Johns Hopkins 1955) and Weeramantry, *Islamic Jurisprudence* at 134–38 (cited in note 66)).

95 Id at 478, 482. See also Weeramantry, *Islamic Jurisprudence* at 169–70 (cited in note 66).

96 Selective use of materials is not problematic by itself. Weeramantry, however, did not explain why he found the sources he selected to be authoritative.

97 *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226 at 553. See generally id at 429–554 (separate opinion of Judge Weeramantry).

98 *Case Concerning the Gabcikovo-Nagymaros Project (Hung v Slovk)*, 1997 ICJ 7 (Sept 25, 1997).

other non-Western) tradition of international law. In the 1970s, Hungary and Czechoslovakia had entered into an agreement to develop a series of dams on the Danube River. In the 1990s, Hungary had come to fear the environmental consequences of the project. Thus it sought (i) to terminate the treaty, (ii) to renounce its obligations under the Treaty, and (iii) to prevent the Slovak Republic (successor to the rights of Czechoslovakia under the Treaty) from continuing with its own work on the dams. The dispute was submitted to the ICJ, which determined in 1997 that Hungary had not had a legal right to renounce its obligations and owed Slovakia compensation. The ICJ argued further that Slovakia had the right to continue with some, but not all, of its own damming and that the parties should try to negotiate an amicable way forward, bearing in mind, among other things, the emerging international principle that nations had a right to "sustainable development."[99]

The ICJ's official judgment did not mention Islamic law. Judge Weeramantry, however, mentioned Islamic law, in passing, in his separate concurring opinion. Weeramantry argued that Islamic law and other non-Western legal systems should play a role in this context, similar to the role they had played in his separate dissent to the ICJ's Advisory Opinion concerning *The Legality of the Threat or Use of Nuclear Weapons*.[100] He suggested that by using comparatist methods, one can induce from non-Western legal systems basic principles that are binding but of enormous generality. He applauded the ICJ's belated recognition of the concept of sustainable development.[101] By reasoning from the principles accepted by legal systems around the world and from the pronouncements in modern international law documents, Weeramantry argued that one could identify principles that might be considered subsidiary and more specific elements of the right to sustainable development.[102] For example, he argued Islamic law holds that all land belongs to God and can never be fully owned by any human.[103] Even assuming that Islamic law contains such a principle, it is aphoristic and its legal import for specific cases is unclear. Intriguingly, in order to understand how broad principles such as this one apply in concrete cases, and to understand what they require of states in modern times, Judge Weeramantry turned his gaze away from the non-Western legal tradition. Instead, he looked to the primary sources of international law as identified in Article 38(1) of the ICJ Statute—treaties and state practice. That is to say, having identified an "Islamic" legal principle that is relevant to international legal

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99 Id at 77–79.

100 See id at 110.

101 Id at 88–90.

102 Id at 97–110.

103 Id at 108.

questions, he seems to feel that it is binding in specific cases only insofar as it has been accepted by states through treaty or customary practice.

C. ISLAMIC LAW IN ICJ OPINIONS: 2000–PRESENT

Judge Weeramantry left the ICJ in 2000. Since then, the use of Islamic law has remained sporadic and, when it occurs, marginal. Individual judges have occasionally cited Islamic law in separate opinions. In so doing, they have tended to speak more or less in the tone of Judge Ammoun, seeking to use Islamic law either to come up with rules of decision in specific cases where the traditional sources of international law do not provide an unequivocal solution or (which might really be the same thing) to understand how accepted principles should be applied—particularly in cases involving one or more majority Muslim states.

1. *Case Concerning the Aerial Incident of 10 August 1999* [104]

Asked by Pakistan to resolve a dispute with India over a destroyed airplane, the ICJ ruled in 2000 that it did not have jurisdiction over the case. In seeking to assert the ICJ's jurisdiction, Pakistan had cited a treaty with India. In seeking to defeat jurisdiction, India had argued that the treaty included a reservation that precluded jurisdiction in this type of dispute. The ICJ found that the reservation was non-separable and defeated jurisdiction. Although the judgment did not mention Islamic law, the newly-appointed Judge Awn Shawkat al-Khasawneh of Jordan wrote a separate dissenting opinion that did. He argued that, with respect to treaty reservations of the type at issue in this case, the ICJ's jurisprudence was not clear-cut and should have been informed by an analysis of the world's traditions as required under Article 38(1)(c) of the ICJ Statute.[105] He analyzed a few sources of contemporary international law and pointed out that the conclusions he reached about the severability of this provision seemed to be supported by principles found in a number of legal systems—including the Islamic legal system.[106] It is unclear what one is to take from this. That is, it is unclear whether he meant to imply that his confidence in his conclusion was heightened by the fact that it was consistent with Islamic law or whether he was merely commenting, in the vein of Judge Tarazi, that before ignoring the rule, Muslim states should consider whether it was consistent with Islamic legal principles.

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104 *Case Concerning the Aerial Incident of 10 August 1999 (Pakistan v India)*, 2000 ICJ 12 (June 21, 2000).

105 Id at 53–54.

106 Id at 57.

2. *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*[107]

In 1991, Qatar asked the ICJ to resolve a dispute with Bahrain over disputed islands and waters in the Persian Gulf. After resolving jurisdictional questions and reviewing the evidence, the ICJ in 2001 finally issued a judgment in the case. On the basis of its determination of historic ties of sovereignty, it assigned the islands to Qatar. It then drew a maritime boundary between the states. In the process of determining who had sovereignty over the disputed islands, the judgment mentioned Islamic legal institutions, but only in passing. Insofar as the judges had to consider what indications of sovereignty Bahrain and/or Qatar had established over the lands and waters that were in dispute, the ICJ noted that disputes on one of the contested islands had been resolved in the Shari`ah courts of a predecessor to one of the disputing states.[108]

The ICJ itself did not seem to think that the result in the case should depend in any way upon the fact that the parties to the case were Muslim countries—and certainly not because Islamic law might be a useful source of information about how general principles should be applied in a dispute between Muslim states. However, in a separate opinion dissenting in part from the judgment, Judge Pieter Kooijmans suggested that, in cases where the ICJ is trying to apply equitable principles and interpret the actions of Muslim states or the acceptance by Muslim peoples of a particular ruler's sovereignty over their territory, the ICJ should inquire into Muslim notions of international and public law.[109]

Since that comment in 2001, the ICJ has issued numerous judgments and has not mentioned Islamic law in any of them. Nor has any judge cited Islamic legal norms for any purpose in a separate opinion.

VI. CONCLUSION

The International Court of Justice could theoretically make use of Islamic law in its opinions—and could do so in a number of ways. In practice, however, references to Islamic law rarely appear in ICJ judgments or even in separate opinions. When they do appear, judges seem to use Islamic legal references in different ways. Some use Islamic law to help establish the existence of international legal norms. Others use it to determine how international legal

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107 *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, 2001 ICJ 40 (Mar 16, 2001).

108 Id at 80.

109 See id at 228 (citing *Award of the Arbitral Tribunal in the First Stage of the Proceedings (Eritrea-Yemen)* ¶ 525 (Perm Ct Arb 1996)).

norms (that may have been derived in the first instance from non-Islamic sources) should be applied in the contemporary world—particularly in cases involving majority Muslim states. Finally, some refer to Islamic legal sources to establish that a ruling reached entirely by non-Islamic reasoning cannot be dismissed as contrary to Islamic law.

Whatever the utility they see in citations to Islamic law, it is worth noting that no judge on the ICJ has dealt with Islamic law confidently. References are always brief, never supported by substantial explanation or citation, and show little reflection on the thorny question of how modern judges with little or no formal training in Islamic law can speak convincingly about the meaning of the Shari`ah. It is unclear whether passing references to Islamic law by legal professionals with no sustained training or recognized authority in Islamic law could ever do much to convince skeptical Muslim or Islamic states that the Court's opinions are actually rooted in (or consistent with) God's Shari`ah.

Given the paucity of Islamic legal references in ICJ opinions, their marginality and their less than confident style, one wonders why judges continue to make them. If there is a common underlying theme to the judges' use of Islamic law, it seems to involve legitimation. At some level, the ICJ caselaw suggests that the judges who have drawn upon Islamic legal sources in their opinions have done so out of concerns about the legitimacy of the Court's opinions in the eyes of the Muslim world. Some have tried to establish the legitimacy of underlying principles of international law by demonstrating that these principles are rooted, at least in part, in the Islamic tradition. Alternatively, others have tried to establish that the rule can be applied in conflicts involving Muslim states in a manner that respects the Islamic culture and legal assumptions of a Muslim people. Finally, others have tried to establish that, even if the principles or rulings of international law that apply in a case were derived without reference to Islamic law, they can be shown to be consistent with the principles of Islamic law, with the result that Muslim or Islamic states cannot disobey an ICJ judgment on the grounds that it is inconsistent with Islamic law.

Past performance is no guarantee of future results. One might ask whether the Court will start to cite Islamic law more often, in a more consistent fashion and in a more confident and compelling way. It is quite possible that it will. One reason is that there may be increased incentive for the Court to do so. Judges may feel increasing pressure to legitimize the judgments of the Court in Islamic terms. The only ICJ case in which a majority of the ICJ decided to refer to Islamic law in an official judgment (albeit in passing) was *United States Diplomatic and Consular Staff in Tehran.* In that case, the ICJ had ruled against a self-styled

Islamic state, which had implicitly challenged the legitimacy of the ICJ itself.[110] The reference seems to be a response to an ideological challenge framed in Islamic terms and to the distinct possibility of non-compliance by the state against whom the judgment ran. It is increasingly likely that the ICJ will face challenges and potential non-compliance of this sort in the future. In the modern world, ever more states are declaring themselves to be "Islamic" and requiring that their governments act in accordance with Shari`ah norms.[111] Judges on the ICJ are thus increasingly likely to *want* to refer to Islamic law to legitimize their decisions—so long as they can do so convincingly and the costs are not too high.

Notwithstanding the likely *desire* of ICJ judges to harness Islamic law in the service of legitimizing the Court's judgments, one might ask whether they will be able successfully to do this. Recent academic commentary, at least in the US, has suggested that attempts to reconcile modern concepts of international law as applied by the ICJ and Islamic concepts of international law are doomed to fail.[112] This recent commentary arose in response to the work of international legal scholars such as Majid Khadduri, who argued that classical Islamic views of international law are consistent with modern views of international law as expounded in institutions such as the ICJ.[113] In response, commentators have repeatedly challenged what they consider to be Khadduri's apologetic reading of the classical tradition. They suggest that international legal decision-making cannot integrate classical Islamic legal norms into its jurisprudence without seriously disrupting the linear evolution or internal coherence of international law.[114]

It is not clear that either Khadduri or his critics are asking the questions necessary if we are to opine convincingly as to whether the ICJ can come up with a theory that will convince Muslims today that Islamic legal norms are consistent with contemporary international law as applied in the ICJ. Most important, it is far from clear that the average Muslim's understanding of Islamic law depends entirely upon classical views—or even that most Muslims believe

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110 See text accompanying notes 62–65 for a discussion of the ICJ's opinion. That the Islamic Republic of Iran held the ICJ in some suspicion is clear from the fact that it refused to participate in a meaningful fashion in the proceedings—a point that the ICJ noted in its judgment.

111 See Lombardi and Brown, 21 Am U Intl L R at 381–83 (cited in note 6).

112 For examples, see Ford, 30 Tex Intl L J 499 (cited in note 3); Westbrook, 33 Va J Intl L 819 (cited in note 3). Other commentary has been noted in Abdullahi Ahmed An-Na'im, *Islam and International Law: Toward a Positive Mutual Engagement to Realize Shared Ideals*, 98 Am Socy Intl L Proc 159 (2004).

113 See, for example, Majid Khadduri, *Islam and the Modern Law of Nations*, 50 Am J Intl L 358.

114 See Ford, 30 Tex Intl L J at 518, 530–31 (cited in note 3); Westbrook, 33 Va J Intl L at 831–34 (cited in note 3).

the legitimacy of an Islamic legal interpretation depends upon its consistency with classical Islamic legal norms. An ICJ wishing to legitimize its jurisprudence in Islamic terms may not need to demonstrate that the legal principles it applied (or the decisions it reached) are consistent with *classical* Islamic legal norms—the norms that Khadduri and his critics discuss.[115] Nor, to address a concern of David Westbrook, is it clear that Muslims believe that modern judges trained in "secular" law schools cannot legitimately develop binding interpretations of Islamic law.[116]

With this in mind, it is important to point out that new types of thinkers in the Islamic world, many trained in Western-style legal institutions, are today using non-traditional methods of interpretation to develop influential new interpretations of Islamic law. Some judges have argued that Islamic law, properly understood, is consistent with many contemporary international legal principles—and particularly with internationally recognized human rights principles. This development is seen most clearly in recent opinions from constitutional courts interpreting constitutional amendments that require national law to conform to Islamic legal principles.

In most Muslim states today, the national legal system evolved from colonial era legal systems based on European models, and judges are trained to operate in what is, for all practical purposes, a civil or common law legal system. In an increasing number of these countries, however, constitutions have been amended to require that state law henceforth conform to Islamic values.[117] Constitutional courts in these nations have struggled to develop a method of interpreting Islamic law that the majority of people will accept as legitimate but that will not lead to interpretations that destabilize the legal system or threaten its protection of human rights. In a number of these nations, the courts have worked hard to meet this challenge. They have developed novel, modernist approaches to Islamic legal interpretation that manage to justify contemporary "European" laws and international legal principles in Islamic terms, and their opinions are apparently acceptable to both the courts and the public at large. Studies of constitutional Islamization in Egypt provide one example of this process.[118] Martin Lau's studies of the role of Islamic law in Pakistani

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115 This point is made eloquently in An-Na'im, 98 Am Socy Intl L Proc at 159 (cited in note 112).

116 See Westbrook, 33 Va J Intl L at 833–34 (cited in note 3).

117 See Lombardi and Brown, 21 Am U Intl L Rev at 381–83 (cited in note 6);

118 See generally Lombardi, *State Law as Islamic Law* (cited in note 1); Lombardi and Brown, 21 Am U Intl L Rev 379 (cited in note 6); Nathan J. Brown and Clark B. Lombardi, *The Supreme Constitutional Court of Egypt on Islamic Law, Veiling and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)*, 21 Am U Intl L Rev 437 (2006). As noted in these works, the Egyptian constitution has been interpreted to require Egyptian law to conform to international legal norms (including human rights norms). See

constitutional law suggest a more equivocal one.[119] In any case, the experience of judges on constitutional courts trying to reconcile legal systems based on European models with Islamic legal principles might provide useful lessons for judges on the ICJ.

In conclusion, the ICJ clearly *can* cite Islamic law. To date, it has rarely done so, and it is hard to characterize the references to date as well-informed or particularly compelling in demonstrating either that Islamic legal norms helped give rise to international legal norms or even that Islamic legal norms are consistent with international legal norms. The question is whether the time is ripe for the ICJ to engage more regularly and more deeply with the Islamic legal tradition. The Court is likely to feel more pressure in the future to integrate references into Islamic law into legal opinions. Fortunately, judges in constitutional courts around the Muslim world are developing modes of Islamic legal reasoning to which the ICJ might look in the future as it tries to do this effectively.

Lombardi, *State Law as Islamic Law* at 153–57 (cited in note 1). It has also been interpreted to require that state law enacted or amended after 1980 conform to the principles of Shari`ah. See id at 159–64. Employing a modernist form of reasoning, the Supreme Constitutional Court of Egypt has suggested that for the purpose of constitutional adjudication in their countries the Shari`ah can and should axiomatically be interpreted to be consistent with international legal norms. See id at 178–200. Without opining on the merits of the SCC's theory—a subject far beyond the scope of this Article—it has to date been taken seriously in Egypt. Egypt is currently at a moment of imminent political change. It is still unclear whether the SCC's theory in its current form will survive a change in administration in Egypt. Depending on the outcome of the experiments in countries like Egypt, it seems, the ICJ *could* at some point adopt a similar theory. If so, it could cite Islamic law more frequently and more robustly than it has heretofore done—albeit entirely for the purpose of legitimizing decisions rather than coming up with them.

119 See generally Martin Lau, *The Role of Islam in the Legal System of Pakistan* (Martinus Nijhoff 2006).