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The Future of Islamic Legal Arguments in International Boundary Disputes Between Islamic States

William Samuel Dickson Cravens

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The Future of Islamic Legal Arguments in International Boundary Disputes Between Islamic States

William Samuel Dickson Cravens*

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I. Introduction

In 1975, the International Court of Justice (ICJ) issued an advisory opinion on the question of the "legal ties" existing between Western Sahara and Morocco and between Western Sahara and the Mauritanian entity.¹ In its memorials to the ICJ, Morocco advanced several arguments based on traditional Islamic legal principles and Islamic concepts of sovereignty.² Morocco's Islamic legal arguments found their source in the traditional body and principles of Islamic international law: the *Siyar*.³

1. *Western Sahara*, 1975 I.C.J. 12 (Oct. 16). In a resolution dated 13 September 1974, the General Assembly of the United Nations asked the ICJ to issue an advisory opinion on the following questions:

- (I.) Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?
- (II.) If the answer to the first question is in the negative, what were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?

Id. at 14. For a detailed discussion of the historical background to the dispute and Morocco's Islamic arguments before the ICJ, see *infra* notes 101-37 and accompanying text.

2. See Matthew M. Ricciardi, *Title to the Aouzou Strip: A Legal and Historical Analysis*, 17 YALE J. INT'L L. 301, 418 (1992) (discussing Morocco's Islamic legal arguments).

3. See Majid Khadduri, *Translator's Introduction to AL-SHAYBANI, THE ISLAMIC LAW OF NATIONS: SHAYBANI'S SIYAR* 1, 19-20 (Majid Khadduri trans., 1966) (explaining that *Siyar* is plural form of noun *sira*, which carries root meaning of "movement"). The plural form has a general meaning of "behavior" or "way of acting." See HANS WEHR, A DICTIONARY OF MODERN WRITTEN ARABIC 447 (J. Milton Cowan ed., 1961). The specific meaning of the conduct of the state in its relationships with other communities developed during the second century of the Islamic era and was first popularized by Islamic jurists of the Hanafi school. See 'ABDUR RAHMAN I. DOI, SHARI'AH: THE ISLAMIC LAW 421-22 (1984).

Specifically, Morocco argued that it had established ties of sovereignty over Western Sahara, under Islamic legal concepts of sovereignty, at the time of Spanish colonization.⁴ Morocco attempted to persuade the ICJ that the people of Western Sahara owed religious allegiance to the Sultan of Morocco and that this religious allegiance amounted to territorial sovereignty.⁵ Relying on the special character of the Sherifian State, Morocco maintained that "anyone who was a religious subject of the Sultan was ipso facto a political subject as well."⁶

In its advisory opinion, the ICJ noted the special character of the Sherifian State at the time of Spanish colonization of the Western Sahara.⁷ It also recognized the religious ties between the inhabitants of Western Sahara and Morocco.⁸ The Court even acknowledged the allegiance of various Western Sahara tribes to the Sultan of Morocco.⁹ However, it determined that such an allegiance, "if it is to afford indications of the ruler's sovereignty, must clearly be real and manifested in acts evidencing acceptance of his political authority."¹⁰ This conclusion illustrates the ICJ's adherence to the traditional Western legal concept of territorial sovereignty and its unwillingness to give real consideration to arguments based on traditional principles of Islamic international law.

The ICJ's unwillingness is hardly surprising. The *Siyar* developed over one thousand years ago to govern the relations between the unitary Islamic State and the non-Islamic world.¹¹ Also, the *Siyar* relies on a concept of sovereignty that is inherently personal rather than territorial.¹² These two

4. See Ricciardi, *supra* note 2, at 420 (analyzing Morocco's Islamic legal arguments).

5. See *Western Sahara*, 1975 I.C.J. at 42-44 (summarizing Morocco's Islamic arguments); Ricciardi, *supra* note 2, at 420 (analyzing Morocco's Islamic legal arguments).

6. Ricciardi, *supra* note 2, at 420 (analyzing Morocco's Islamic legal arguments). The term "Sherifian" indicates descent from the family of the Prophet Muhammad. See *infra* note 115 and accompanying text (defining term "Sherifian"). The Moroccan Sultans since the sixteenth century have claimed Sherifian descent, which strengthens their claim to legitimate religious and political leadership. See *infra* notes 113-16 and accompanying text (addressing Moroccan claim of sovereign ties between Sherifian state and inhabitants of Western Sahara).

7. See *Western Sahara*, 1975 I.C.J. 12, 44 (Oct. 16) (addressing and reacting to Morocco's arguments).

8. See *id.* (discussing common bond of Islam existing between people of Western Sahara and Morocco).

9. See *id.* (noting loyalties of tribes in Western Sahara).

10. *Id.*

11. See Christopher A. Ford, *Siyar-ization and Its Discontents: International Law and Islam's Constitutional Crisis*, 30 TEX. INT'L L.J. 499, 505 (1995) (discussing unitary state concept); *infra* notes 30-38 and accompanying text (same).

12. See Ford, *supra* note 11, at 506 (discussing personal sovereignty under traditional principles of Islamic international law); Khadduri, *supra* note 3, at 6-7 (same); see also *infra*

characteristics make the *Siyar* inapplicable in a world comprised of independent nation-states and governed by concepts of territorial rather than personal sovereignty.¹³ The central importance of the *Siyar* in the larger body of Islamic law, however, causes an understandable reluctance among Muslim jurists to abandon the traditional Islamic legal approach to international relations.¹⁴ Apologists attempt to show common ground between some of the general principles found in the *Siyar* and the generally accepted principles of Western international law.¹⁵ This attempt at reconciliation ultimately fails for two reasons. First, the common ground it offers is not substantively and legitimately Islamic.¹⁶ Second, the general principles it offers are too ambiguous to offer any real guidance to Islamic states seeking to structure their international relations.¹⁷

This does not necessarily mean that Islamic law has no role to play in modern international relations between Islamic states. It does, however, indicate the need for a new Islamic approach to international relations that is compatible with the world of nation-states. The scope of this Note is not so ambitious as to attempt to offer a solution to all of the issues raised by the *Siyar*'s inapplicability. Instead, this Note addresses only the specific issue of international boundary disputes between Islamic States.

Part II of this Note describes the origins, sources, and principles of the traditional body of Islamic international law: the *Siyar*. To illustrate the inapplicability of the *Siyar* in modern international relations, Part III examines the traditional Islamic legal arguments in two modern boundary disputes, as well as the ICJ's reaction to those arguments.¹⁸ Finally, Part IV provides a doc-

notes 39-48 and accompanying text (providing more detailed discussion of personal sovereignty under traditional principles of Islamic international law).

13. See Ford, *supra* note 11, at 506 (noting that, under classical formulation, "Islam found the idea of legitimate independent legal-territorial units — let alone a nation-state on the modern model . . . — wholly anathema").

14. See *id.* at 531-33 (discussing unwillingness of ordinary Muslims and Muslim jurists to abandon traditional principles of Islamic international law).

15. See *id.* at 518 (mentioning Majid Khadduri as being especially representative of apologist approach); see also David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA. J. INT'L L. 819, 829 (1993) (describing several ways in which Islamic scholars "attempt to reconcile Islamic authority and Western category," including "adoption of the Western solution, the secularization of international legal authority, and reconsideration of the traditional Islamic position, which cannot be maintained in the contemporary world.").

16. See Westbrook, *supra* note 15, at 821 (criticizing attempts at reconciliation).

17. See *id.* (asserting that attempt to define Islamic international law and to reconcile such definition with secular notions of public international law fail due to lack of substantively Islamic analysis).

18. See *generally* Case Concerning the Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6 (Feb. 3) (providing illustration of ICJ's reaction to Islamic legal arguments); Western Sahara,

trinal basis and justification for a new Islamic approach to boundary and territorial disputes between Islamic nation-states.

Several key doctrines of Islamic jurisprudence suggest that it may be possible for Islamic nation-states to import principles and arguments from the Islamic law of property into the international arena.¹⁹ Part IV discusses selected principles from the Islamic law of property and derives several concepts from this body of private Islamic law that may prove useful in resolving boundary and territorial disputes between Islamic states. The analysis concludes by applying these principles to the facts of the *Western Sahara* case.

In addressing only this specific issue among the many issues raised by the modern inapplicability of the *Siyar*, this Note achieves two purposes. First, and most directly, using substantively Islamic principles, it offers a pragmatic approach and solution to a problem facing many Islamic states seeking to resolve boundary disputes with other Islamic states.²⁰ Second, it demonstrates that although seeking to replace the now inapplicable *Siyar* all at once may seem an impossible task, approaching it on an issue by issue basis may hold real promise for scholars seeking to develop a workable, modern Islamic law of nations.

II. The *Siyar*: Traditional Islamic International Law

A. The Sources and Principles of Traditional Islamic International Law

Although the concept of an Islamic State began with the Prophet's flight to Medina in 622 A.D., the need for an Islamic law of nations did not become readily apparent for another century.²¹ After a century of rapid territorial expansion, the emerging Islamic empire faced the question of how to govern relations between itself and the non-Islamic world.²² In the mid-eighth cen-

1975 I.C.J. 12 (Oct. 16) (same).

19. See *infra* notes 178-99 and accompanying text (providing basis for Islamic doctrines of jurisprudence).

20. See Jacques deLisle, *Disquiet on the Eastern Front: Liberal Agendas, Domestic Legal Orders, and the Role of International Law after the Cold War and Amid Resurgent Cultural Identities*, 18 FORDHAM INT'L L.J. 1725, 1725 (1995) (discussing future impact of resurgent cultural and religious identities on international law). The end of the Cold War and the resurgence of non-Western cultural identities have posed "unfamiliar transnational problems . . . calling for innovative legal solutions." *Id.* Islamicism is part of a broader phenomenon in which non-Western societies are beginning to demand a religious and cultural basis for international relations. *Id.* at 1728-30. In the face of this movement, governments of Islamic nation-states now feel compelled to defend the religious legitimacy of their domestic and international decisions. *Id.* at 1736.

21. See Khadduri, *supra* note 3, at 19 (providing historical context for development of classical theory of Islamic law of nations).

22. See MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 52 (1955) (providing historical background for establishment of principles for relations with non-Muslim states).

ture, the Islamic State entered its golden age under the Abbasid Caliphate, and Muslim jurists began to address this question directly.²³ These eighth-century jurists developed the *Siyar* as a "systematic discipline" that describes and governs relations between the Islamic State and the non-Islamic world.²⁴

Although scholars often discuss the *Siyar* as if it were distinct from the body of municipal Islamic law, no such distinction in fact exists.²⁵ All Islamic law is based on four sources. The Quran and the Sunna form the two primary sources.²⁶ The two secondary sources, *ijma'a* (societal consensus) and *qiyas* (analogical reasoning) are really means of interpreting the two primary sources.²⁷ Because the Quran and Sunna contain few direct and explicit references to international legal issues, the *Siyar* relies more heavily on *qiyas* and *ijma'a* than do some other areas of Islamic law.²⁸ The treatises on interna-

23. See Khadduri, *supra* note 3, at 19 (describing Abbasid period).

24. See HUSAIN KASSIM, SARAOKSHI—HUGO GROTIUS OF THE MUSLIMS: THE DOCTRINE OF JURISTIC PREFERENCE AND THE CONCEPTS OF TREATIES AND MUTUAL RELATIONS 4 (1994) (defining the *Siyar*). Sarakshi noted that the *Siyar*

describes the conduct of Muslims with the unbelievers of enemy territory as well as the ones who enjoy the promise of security from the Muslims (*musta'min*) or the *dhimmis* in the territory of Islam and with the apostates and the rebels

Id.

25. Cf. KHADDURI, *supra* note 22, at 46-47 (explaining that Islamic law of nations is not separate body of Islamic law); see also Ford, *supra* note 11, at 500-01 (same).

26. See C.G. WEERAMANTRY, ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE 31 (1988) (discussing sources of Islamic law). For Muslims, the Quran is the literal and unchangeable word of God as revealed to the Prophet Muhammad. *Id.* at 32. The Sunna is the example of the Prophet, as represented by his combined teachings and sayings, or *hadiths*. *Id.* at 34. The *hadiths* were not collected until almost a hundred years after the death of the Prophet. *Id.* at 35. Compilers of *hadiths* followed a very systematic process in order to determine the authenticity of each individual saying. See *id.* at 35-39 (describing compilation of *hadiths*).

27. See Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 AM. J. COMP. L. 199, 199-200 (1978) (discussing Islamic jurisprudence). Although Islamic law governs all interaction between God and Man, and between Man and Man, very few specific rules are actually spelled out in the primary sources. *Id.* at 199. Instead, Man must derive the law from the appropriate sources through interpretation. *Id.* at 200; see also WEERAMANTRY, *supra* note 26, at 32 (noting that only approximately eighty verses in Quran "deal with legal topics in the strict sense of the term." (quoting N.J. COULSON, ISLAMIC SURVEYS: A HISTORY OF ISLAMIC LAW 12 (1964)).

28. See Ford, *supra* note 11, at 501 (noting that *Siyar* relies more heavily on secondary sources of Islamic law than most other areas of Islamic jurisprudence); Khadduri, *supra* note 3, at 19 (noting that *Siyar* was formed less from primary sources and more from "Islamic juridical speculation at the height of Islamic power"); see also KASSIM, *supra* note 24, at 45 (noting influence of doctrine of juristic preference in Sarakshi's treatise on *Siyar*). For an example of an area of Islamic law that relies more heavily on primary sources, see THE QURAN 4:11-13, which provides explicit instructions regarding the laws of inheritance.

tional law that emerged during the eighth century provided broad principles and rules derived from the two primary and the two secondary sources.²⁹

The classical formulation of the *Siyar* expresses two of its most important characteristics. First, the *Siyar* is based on the concept of a unitary Islamic State.³⁰ Second, the *Siyar* relies on a concept of sovereignty that emphasizes personal rather than territorial ties.³¹ These same two characteristics create the biggest obstacle to the modern application of the traditional Islamic law of nations.

The Muslim jurists who wrote the first treatises on the *Siyar* relied on a polarized model of international relations. They viewed Islam as both religion and State (*din wa dawla*).³² The *Siyar* contrasts this unitary Islamic State (*dar al-Islam*) with the entire remaining non-Islamic world (*dar al-Harb*).³³ Moreover, Islam's early universalist tendencies caused jurists to view the unitary Islamic State as the only legitimate State.³⁴ The jurists found support for this concept in specific Quranic verses, such as: "Had your Lord pleased, He would have united all mankind. They are still at odds, except for those to whom your Lord has shown mercy."³⁵

29. See WEERAMANTRY, *supra* note 26, at 130-31 (describing sources and characteristics of *Siyar*).

30. See Khadduri, *supra* note 3, at 53-54 (same); Ford, *supra* note 11, at 502 (discussing theory of unitary state).

31. Cf. Khadduri, *supra* note 3, at 6-7 (describing Islam's personal concept of sovereignty).

32. See Ford, *supra* note 11, at 506 (describing religious and political monism in traditional theory).

33. See Khadduri, *supra* note 3, at 52-53 (describing division between *dar al-Harb* and *dar al-Islam*); Ford, *supra* note 11, at 502 (same). But see HASAN MOINUDDIN, THE CHARTER OF THE ISLAMIC CONFERENCE AND LEGAL FRAMEWORK OF ECONOMIC COOPERATION AMONG ITS MEMBER STATES 21 (1987) (arguing that there is no basis for division between *dar al-Islam* and *dar al-Harb* in Quran and Sunna). Moinuddin argues instead that the division is a product of juridical innovation during the Abbasid Caliphate. *Id.* at 21.

34. See KHADDURI, *supra* note 22, at 51 (introducing topic of *jihad*). Khadduri explains that Islam's early followers on the Arabian peninsula "were determined to embark on a ceaseless war of conquest in the name of Islam." *Id.* These universalist aspirations continued until the first major defeats of the Muslim armies at Constantinople in 717-18 and in the west at the battle of Tours in 732. *Id.* at 52 & n.2. According to Khadduri, the end to Islamic territorial expansion marked the beginning of the permanent conceptual division between *dar al-Islam* and *dar al-Harb*. *Id.* at 52. Khadduri admits that Islamic jurists recognized a permanent state of war between the two realms. See Majid Khadduri, *Islam and the Modern Law of Nations*, 50 AM. J. INT'L L. 358, 359 (1956) (describing early relations between *dar al-Islam* and *dar al-Harb*). However, he explains that this "state of war" really amounted to Islamic "non-recognition" of *dar al-Harb* as a legitimate State. *Id.* at 359-60; see also Ford, *supra* note 11, at 505 (describing notion that *dar al-Islam* was only legitimate state).

35. THE QURAN 11:120.

When the halt of Islamic territorial expansion tempered Islam's universalist ambitions, the *Siyar* evolved largely to govern the relations between this unitary Islamic State and the *dar al-Harb*.³⁶ For example, Shaybani's famous treatise on the *Siyar* contains sections on peace treaties, trade between *dar al-Islam* and *dar al-Harb*, safe conduct, spoils of war, and the treatment of prisoners.³⁷ However, the regulation of relations between *dar al-Islam* and *dar al-Harb* did nothing to change the concept of *dar al-Islam* as a single, unitary state.³⁸

The *Siyar's* concept of sovereignty relates closely to the concept of the unitary Islamic State. First, it should be noted that under Islamic law, God is the source of all sovereignty – personal, national, and international.³⁹ Therefore, any sovereignty that Man exercises is limited, as opposed to absolute, sovereignty.⁴⁰ Islamic law places this limited sovereign power in the hands of the single leader of the Islamic community – the Caliph.⁴¹

Islamic law is thus inherently personal rather than territorial.⁴² Theoretically, the only relevant tie of sovereignty is Islam, and all Muslims owe

36. See Khadduri, *supra* note 34, at 359 (explaining development of *Siyar*). Khadduri explains that "[i]n theory the *Siyar* was designed to be only a temporary institution, on the assumption that Islam was ultimately to correspond to the then known world, but failure to achieve this rendered the *Siyar* a permanent and an integral part of the sacred law." *Id.*; see also KHADDURI, *supra* note 22, at 44 (same).

37. See Khadduri, *supra* note 3, at xvi-xviii (providing table of contents showing headings of Shaybani's treatise on *Siyar*).

38. See Ford, *supra* note 11, at 506 (discussing unitary State concept).

39. See THE QURAN 67:1 (referring to God's absolute sovereignty). The Quran states: "Blessed be He who in His hands holds all sovereignty (*mulk*): He has power over all things." *Id.*; see also Westbrook, *supra* note 15, at 862 (stating that in Islamic theology, God is absolute sovereign).

40. See MUHAMMAD HAMIDULLAH, MUSLIM CONDUCT OF STATE 86 (1988) (discussing Islamic concepts of sovereignty); MOINUDDIN, *supra* note 33, at 53 (same).

41. See THE QURAN 4:59 (providing legal basis for Caliphate). The Quran states: "O believers, obey God and obey the Prophet and those in authority over you." *Id.*; see also ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 142 (1991) (noting interpretation of this verse by eleventh century jurist al-Mawardi); Ford, *supra* note 11, at 505 (discussing classical Islamic jurisprudence of governance). Ford notes that "the Islamic community is, or should be, not only a religious unity but also a political unity governed by a single Islamic government, headed by the caliph" *Id.* at 505 (quoting Fred M. Donner, *The Sources of Islamic Conceptions of War*, in JUST WAR AND JIHAD: HISTORICAL AND THEORETICAL PERSPECTIVES ON WAR AND PEACE IN WESTERN AND ISLAMIC TRADITIONS 31, 51 (John Kelsay & James Turner Johnson eds., 1991)). Ford also explains the distinctions between the orthodox Sunni view of the Caliphate, and the Shi'i view of a Caliphate which depends on direct descent from the fourth Caliph, 'Ali, for legitimacy. *Id.* at 505. However, this distinction is of little importance for the purposes of this Note for, as Ford points out, "Shi'ite Islam is no more capable of acknowledging Islam in multiple nations than is Sunni Islam." *Id.* at 506; see also KHADDURI, *supra* note 22, at 11-13 (discussing caliphate generally); MOINUDDIN, *supra* note 33, at 53 (same).

42. Cf. Khadduri, *supra* note 3, at 6-7 (describing Islam's personal concept of sovereignty).

allegiance to the Caliph. Territorial, racial, ethnic, class, linguistic, cultural, and tribal ties are irrelevant for the purpose of determining sovereignty.⁴³ However, the limits of Islamic territorial expansion did force a recognition of certain territorial issues.⁴⁴ First, jurists needed the ability to determine the territorial limits of *dar al-Islam* and *dar al-Harb*. The issue proved contentious, but the classification of territory as part of *dar al-Islam* generally was defined according to the freedom of Muslims living within the territory to follow Islamic law.⁴⁵ In the early days of Islam, this boundary coincided with Islamic political authority exercised by the Caliph.

The recognition of the Islamic State's territorial limitations also raised the issue of the status of non-Muslims living within the territorial limits of *dar al-Islam*. The *Siyar* generally recognized that non-Muslims who entered into an alliance with the Islamic State and lived within its territorial boundaries were under the sovereignty of the Islamic State to some extent.⁴⁶ They were subjects of the Caliph and enjoyed a right to internal security as well as a right to protection from foreign attacks.⁴⁷ The *Siyar* thus contains rules regarding the behavior of Muslims residing within the territory of *dar al-Harb* and rules regarding the treatment of non-Muslims living within the territory of *dar al-Islam*. Still, in theory, all Muslims remain under the sovereignty of the one Islamic State, even those Muslims living outside the territorial limits of *dar al-Islam*.⁴⁸

B. Historical Development

During the golden age of Islam, this traditional formulation provided a workable basis. From the mid-eighth century A.D. until the beginning of the tenth century (750-900), a truly unitary Islamic State existed.⁴⁹ The Caliph held all political and religious power.⁵⁰ Beginning in the tenth century,

43. See Ford, *supra* note 11, at 505 (discussing irrelevance of these ties in comparison to common bond of Islam).

44. Cf. Khadduri, *supra* note 3, at 7, 11 (explaining recognition of territorial issues and limitations).

45. See Ford, *supra* note 11, at 502 n. 8 (discussing definition of *dar al-Islam*).

46. See Khadduri, *supra* note 3, at 11 (describing status of non-Muslims living within borders of *dar al-Islam*).

47. *Id.*

48. See KHADDURI, *supra* note 22, at 44-45 (discussing Islamic legal concept of sovereignty).

49. See Khadduri, *supra* note 3, at 19-21 (providing historical background concerning golden age of Islam).

50. See Majid Khadduri, *The Islamic Theory of International Relations and Its Contemporary Relevance*, in ISLAM AND INTERNATIONAL RELATIONS 24, 31-32 (J. Harris Proctor ed., 1965) (describing Caliph's authority in Islamic State).

however, the Islamic world entered a long process of decentralization and fragmentation.⁵¹ In 1258, the Mongol army sacked Baghdad and destroyed the last Abbasid Caliphate.⁵²

As the empire splintered into distinct political entities, Muslim jurists had to re-examine the basic tenets of the *Siyar*.⁵³ One group of scholars argued for a new pluralist approach that would legitimize the political reality by recognizing separate religious authorities for separate political territories.⁵⁴ However, the pluralists were defeated by more orthodox jurists who were willing to ignore the reality of decentralized political power as long as the political leaders of the various regions continued to recognize the religious authority of a single, central caliphate.⁵⁵

This orthodox view permitted the creation and rise to power around 1300 of a Sunni Caliphate represented by the Ottoman Empire.⁵⁶ For several centuries, the Ottoman Sultans maintained a degree of political authority throughout the empire.⁵⁷ They issued religious decrees based on Islamic law and even entered into treaties with European powers.⁵⁸ However, the growth of European power in the seventeenth century signaled the decline of Ottoman political power throughout its empire.⁵⁹ Political authority again became decentralized, and local leaders paid mere lip service to Ottoman religious authority.⁶⁰

51. See HOURANI, *supra* note 41, at 142-43 (describing decentralization of power under Abbasid Caliphate); Khadduri, *supra* note 3, at 20-21 (providing historical background concerning Abbasid period).

52. See Ford, *supra* note 11, at 506 (discussing fragmentation of unitary Islamic State).

53. See HOURANI, *supra* note 41, at 142-43 (describing impact of political fragmentation); Khadduri, *supra* note 3, at 21-22 (same).

54. See Khadduri, *supra* note 3, at 21-22 (discussing pluralists' reaction to political decentralization and fragmentation).

55. See *id.* (addressing leading jurists' rejection of pluralist approach and acceptance of modified monistic theory).

56. See Khadduri, *supra* note 34, at 360-61 (discussing development of Muslim law of nations during rise of Ottoman empire).

57. See *id.* at 360 (describing rise of Ottoman empire).

58. *Id.* at 360-61 (discussing political and religious role of Ottoman Sultan-Caliphs). *But see* HOURANI, *supra* note 41, at 220-21 (discussing Ottoman Caliphate). Hourani argues that Ottoman use of the title did not indicate a claim to "the kind of universal or exclusive authority which earlier Caliphs had been acknowledged to possess." *Id.* at 221. He maintains instead that—at least initially—the title implied that the Caliph was "more than a local ruler" and that he "used his power for purposes sanctioned by religion." *Id.*

59. See Khadduri, *supra* note 34, at 364-65 (analyzing impact of fall of Ottoman empire on Islamic international law).

60. See YILMAZ E. ALTUG, TURKEY AND SOME PROBLEMS OF INTERNATIONAL LAW 114 (1958) (discussing gradual devolution of Ottoman authority). The dissonance between Western and Islamic concepts of sovereignty appears in the attempts of Western scholars to define the status of the Ottoman provinces during this process of devolution of authority in the nineteenth

With the collapse of the Ottoman empire following the First World War, even the fiction of a centralized religious and political authority could no longer survive.⁶¹ In 1924, Turkey abolished the Caliphate, and Muslim jurists faced a new dilemma in determining the applicability of the *Siyar*.⁶²

C. Apologists and Critics

Twentieth century scholars have addressed this dilemma in different ways. Some have argued for Islam's complete abandonment of international relations in favor of secular international legal principals.⁶³ Other scholars have tried to reconcile the fundamental concepts of the *Siyar* with the principles of Western international law.⁶⁴ Still others have advocated a wholly new Islamic approach to international law that will be discussed in the final sections of this Note.⁶⁵ The following subpart will discuss the views of the apologists and critics preparatory to a discussion of the modern application of the traditional theories in two recent international boundary disputes.

I. Apologists

In several articles and books, Majid Khadduri – one of the foremost modern scholars of Islamic international law – attempts to reconcile elements

and twentieth centuries. *Id.* In the early nineteenth century, Western scholars resurrected the term "suzerainty" to describe certain limited rights exercised by a suzerain State over a vassal State. *Id.* at 110. In fact, the term suzerainty "has been little used elsewhere than in connection with the moribund Empire of the Near East." EDWIN DEWITT DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* 239 (1920). Still, the international community was willing to recognize even this extremely limited authority as amounting to sovereignty in the Western sense in some circumstances. *See* Lighthouses in Crete and Samos (Fr. v. Greece), 1937 P.C.I.J. (ser. A/B) No. 71, at 103 (Oct. 8) (finding that although Ottoman Sultan had restrictions on his rights of sovereignty over Crete, "that sovereignty had not ceased to belong to him"). The Permanent Court of International Justice found that through this sovereignty, the Ottoman empire maintained a recognizable political link to Crete and Samos. *Id.*

61. *Cf.* HOURANI, *supra* note 41, at 315 (discussing collapse of Ottoman empire).

62. *See id.* at 313-16 (discussing end of Ottoman Caliphate); Khadduri, *supra* note 34, at 369 (same).

63. *See* Khadduri, *supra* note 34, at 369 (explaining arguments of early twentieth century Egyptian scholar Ali Abd al-Raziq). Raziq argued that Islam was not originally designed as a political system. *Id.*; *see also* Westbrook, *supra* note 15, at 829 (describing various twentieth century responses to conflicts between traditional Islamic principles and Western international legal system).

64. *See* Ford, *supra* note 11, at 518 (describing these efforts at reconciliation); Westbrook, *supra* note 15, at 821 (same); *see also* KHADDURI, *supra* note 22, at 47-48 (discussing traditional Islamic law of nations in terms of non-Islamic legal doctrine); Khadduri, *supra* note 3, at 7 (same).

65. *See* Westbrook, *supra* note 15, at 842 (describing views of Abd al-Hamid Abu Sulayman).

of the *Siyar* with Western international law.⁶⁶ First, Khadduri maintains that "[t]wentieth century Islam has reconciled itself completely to the Western secular system."⁶⁷ He also rejects as completely unrealistic any attempt to resurrect the polarized system of the traditional *Siyar*.⁶⁸ However, Khadduri believes that the *Siyar* can nonetheless make a real contribution to "the development of a peaceful and more stable world order."⁶⁹

Khadduri does not detail exactly *how* the traditional Islamic principles can contribute to such a development.⁷⁰ Instead, he speaks in terms of three very broad contributions. First, he contends that the Islamic community's historical experience with the problem of maintaining a stable public order can serve as a useful example and model to modern nations.⁷¹ Second, Khadduri argues that the Islamic concept of the individual as a subject of international law can help promote the adoption of international declarations on human rights and other personal issues.⁷² Finally, he argues that Islam as a way of life emphasizes moral principles that can serve as a useful guide to international policy makers.⁷³

Khadduri also struggles to reconcile the sources and broad principles of the *Siyar* with the sources doctrine of Article 38 of the ICJ statute.⁷⁴ First,

66. See generally KHADDURI, *supra* note 22 (attempting to reconcile *Siyar* with Western international law); Khadduri, *supra* note 3 (same); Khadduri, *supra* note 34 (same).

67. Khadduri, *supra* note 3, at 67.

68. See *id.* (stating that no Islamic scholars have "advocated the restoration of the traditional Islamic system of external relations").

69. *Id.* at 68.

70. See *id.* at 68-69 (discussing general contributions to world order, but failing to provide specific details).

71. See *id.* (stating that diverse ideologies such as Islam and Christianity can coexist if they evolve with changing circumstances).

72. See *id.* at 69 (noting that need exists for protection of individual in modern law of nations).

73. See *id.* (asserting that system of public order must reflect moral principles to some degree in order to retain its meaning). Khadduri is careful to note that this does not entail an introduction of actual religious doctrine. *Id.*

74. See *id.* at 9 (stating that "the sources of the Islamic law of nations conform generally to the same categories defined by modern jurists and specified in the Statute of the International Court of Justice"); see also Ford, *supra* note 11, at 518 (describing and analyzing Khadduri's argument). Article 38 provides that in resolving international disputes the Court 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) subject to the provision of Article 59, 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.

Khadduri attempts to show that Article 38(1)(a)'s emphasis on the sanctity of international treaty law is analogous to a similar Islamic formulation of the principle *pacta sunt servanda*.⁷⁵ Second, he argues that Islamic law's reliance on Sunna and local practice is equivalent to Article 38(1)(b)'s acceptance of custom as a source of law.⁷⁶

This attempt to reconcile the sources of the *Siyar* with Article 38 illustrates one of the key characteristics of the apologist argument: it is essentially reactive.⁷⁷ The apologists seek to reconcile traditional Islamic legal doctrines with modern Western legal principles.⁷⁸ Critics of this approach have been quick to point out its basic flaws.

2. Critics

Critics find two key faults with the apologists' attempts to reconcile the *Siyar* with Western international law. First, the attempts fail to provide any specific guidance in actually resolving international disputes.⁷⁹ Second, the attempts fail to be "substantively Islamic."⁸⁰ The attempts fail because it is

Statute of the International Court of Justice art. 38 (June 26, 1945), in 4 ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT 59, 77 (1978) [hereinafter ICJ Statute].

75. See Ford, *supra* note 11, at 518 (quoting KHADDURI, *supra* note 22, at 204) (describing Khadduri's argument regarding replication of the doctrine of *pacta sunt servanda* in Islamic law). *Pacta sunt servanda* is a traditional Western doctrine requiring the fulfillment of treaty obligations. *Id.*

76. See Khadduri, *supra* note 3, at 9 (stating that "[t]he Sunna and local practices are equivalent to custom"); see also Ford, *supra* note 11, at 522 (discussing Khadduri's argument that "traditional Muslim doctrine accepts custom as a source of law in much the same way as does Article 38(1)(b)"). Continuing this comparison, Ford has also analyzed the degree to which the *Siyar* is analogous to Article 38(1)(c) and Article 38(1)(d). See *id.* at 526-30 (discussing similarities between these articles and principles of traditional Islamic law). Article 38(1)(c) recognizes "general principles of law recognized by civilized nations," which some scholars have argued is equivalent to *Qiyas* (analogical reasoning). *Id.* at 525-27. Article 38(1)(d) permits reliance on case law as a means for determining rules of law. See ICJ Statute, *supra* note 74, art. 38(1)(d) (providing text of Article 38(1)(d)). Ford examines whether Islamic international law recognized an equivalent source despite its traditional refusal to permit reliance on judicial precedent. See Ford, *supra* note 11, at 527-30. Ford concludes that this last comparison is particularly problematic and that, despite some modern tendency among Muslims to rely on the works of publicists, "the doctrinal legacy of Islamic unitarism and universalism clearly bars turning to non-Islamic publicists of any variety." *Id.* at 530.

77. See Westbrook, *supra* note 15, at 831-35 (describing views of Khadduri and his contemporary, Muhammad Hamidullah, on reconciling of Islamic and Western international law).

78. See *id.* at 835 (stating that "Khadduri and Hamidullah both work for the convergence of Islamic international law on public international law").

79. See *id.* at 821 (arguing that apologists "fail to address the concerns of public international law").

80. See *id.* (noting that apologists "fail to locate legal authority in Islam").

impossible to reconcile the *Siyar*'s concept of the unitary Islamic State with the modern system of nation-states.⁸¹

As noted above, Khadduri's apologist reconciliation provides no specific guidance for *how* Islamic nation-states should or could structure their international relations.⁸² Scholar David Westbrook points out that the *Siyar* is "topically incomplete" for purposes of modern international relations.⁸³ The most important omission for the purposes of this Note is the *Siyar*'s absolute failure to provide any guidance for structuring relations between Islamic nation-states.⁸⁴

Westbrook also criticizes the apologist approach to reconciliation for its failure to be "substantively Islamic."⁸⁵ The apologists resolve the difficult issues of the unitary Islamic State and the illegitimacy of non-Islamic states by simply ignoring them. By ignoring or dismissing all of the elements of the *Siyar* that conflict with Western international legal concepts, Khadduri and other apologists advocate an Islamic international law that is, in fact, secular.⁸⁶

The attempts to reconcile the sources of the *Siyar* with the sources doctrine of Article 38 confront similar difficulties. Christopher Ford's thorough analysis of this particular issue reaches the conclusion that "Islamic approaches to the law of nations are much less congruent with secular international law than many have supposed."⁸⁷ For example, Ford points out that the Islamic version of *pacta sunt servanda* is far less absolute than its Western

81. Cf. Ford, *supra* note 11, at 530-33 (asserting that *Siyar* remains incongruent with modern international law). Ford concludes that "rules specifically provided to govern the conduct of the unitary Islamic theocracy have nothing to say about the conduct of secular territories." *Id.* at 531.

82. See *supra* notes 70-73 and accompanying text (describing Khadduri's arguments regarding contribution of traditional Islamic principles to international law).

83. See Westbrook, *supra* note 15, at 857 (noting problems arising from *Siyar*'s polarized approach). Westbrook mentions several issues that the *Siyar* fails to address, including: "resource extraction by a technologically sophisticated state from a poor state;" the protection of intellectual property; relations between "Islamic states and the rest of the developing world;" and the regulation of "affairs among Muslim states." *Id.*

84. See MOINUDDIN, *supra* note 33, at 15 (stating that "[t]he scope of the *Siyar* . . . did not include the external conduct of the Muslim State *vis-a-vis* other Muslim States").

85. See Westbrook, *supra* note 15, at 821 (asserting that scholars who have attempted to reconcile *Siyar* with secular international law have failed to provide Islamic legal basis for their arguments). In fact, Westbrook argues that Khadduri's attempted translation of the *Siyar* into Western idiom is so complete as to be virtually indistinguishable from Western public international law. *Id.* at 832.

86. See *id.* at 835 (summarizing Khadduri's and Hamidullah's views as to *Siyar* and public international law). Not surprisingly, Westbrook finds this conclusion extremely problematic. *Id.* Posing the question: "what is a secular Islamic polity?" Westbrook responds that according to many scholars it is anathema. *Id.*

87. Ford, *supra* note 11, at 530.

counterpart.⁸⁸ First, under the Islamic doctrine, non-Muslims possess only a temporary power to make treaties.⁸⁹ Second, the Islamic concept does not contain principles of equality and reciprocity because of the belief that the only legitimate State is the unitary Islamic State.⁹⁰ Finally, only the Caliph may enter treaty obligations with non-Islamic states and then only on behalf of the *entire* unitary Islamic State.⁹¹ Ford provides equally convincing criticisms of the other attempts to reconcile the sources of the *Siyar* with Article 38.⁹²

Ford attributes the inability of scholars to reconcile the *Siyar* with Western public international law to the *Siyar*'s fundamental constitutional crisis.⁹³ It is a crisis that has lingered since the initial fragmentation and decentralization of the Islamic State.⁹⁴ For much of the nineteenth and twentieth centuries, the crisis remained out of the limelight because jurists removed the debate to "the ivory tower of legal scholarship."⁹⁵ During this period, jurists and Muslims in general simply deferred to the judgment of secular, national leadership.⁹⁶

However, the growing resurgence of Islamism during the second half of the twentieth century has made it impossible to ignore the issue any longer.⁹⁷ Leaders of Islamic nation-states now feel compelled to show that their actions

88. See *id.* at 518-22 (discussing role of precedent in Islamic jurisprudence).

89. See *id.* at 520 (discussing nature of obligations in treaty law under *Siyar*). Ford points out that according to the traditional Islamic doctrines, treaties made with non-Muslims were only temporary, "subject to dissolution the moment Islam's conquest could profitably be resumed." *Id.*

90. See *id.* (addressing recognition of non-Islamic states in treaty law under *Siyar*). According to Ford, the fundamental basis of Western treaty law is the assumption that treaties take place "between sovereigns on the basis of equality and reciprocity." *Id.* The universalist aspects of the *Siyar* simply cannot permit such a basis for treaties between non-Muslims and the Islamic State. *Id.*

91. See *id.* (discussing treaty law in Quran and Sunna). Ford examines the Sunna and Quran and concludes that the treaties in the primary sources were "clearly predicated upon Muhammad's captaincy of all Islam." *Id.*

92. See *id.* at 518-33 (discussing generally compatibility of *Siyar* with sources doctrines of Article 38).

93. See *id.* at 530-31 (addressing conflict between classical Islamic legal traditions and modern international principles). This constitutional crisis is the inability of Muslim jurists to reconcile the essential teachings of Islam with the actions of a given region's secular rulers. See *id.* at 530 (describing *Siyar*'s constitutional crisis).

94. See *id.* at 530 (describing origins of Islam's constitutional crisis).

95. See *id.* at 525 (analyzing jurists' response to Islam's constitutional dilemma).

96. See *id.* at 524-25 (arguing that *Siyar* has "renounce[d] any ability to second-guess the legitimacy of the actions of those in authority").

97. Cf. deLisle, *supra* note 20, at 1725-30 (discussing impact of Islamicism and other cultural and religious movements on international law).

and leadership have religious legitimacy.⁹⁸ A growing group of Muslim jurists has called for the reintroduction of Islamic legal principles in the regulation of international relations.⁹⁹ However, the traditional Islamic legal principles governing international relations simply are not workable in the modern world of nation-states. The *Siyar* cannot address the issue of relations between distinct Islamic nation-states because it does not admit the possibility of distinct Islamic nation-states.

Nonetheless, Islamic nations have formed arguments using elements and principles of the traditional Islamic law of nations in boundary and territorial disputes during the past two decades.¹⁰⁰ Part III of this Note describes two such disputes before the ICJ in which parties used Islamic legal arguments based on concepts from the traditional Islamic law of nations. It also shows that in both cases the Court demonstrated an unwillingness to accept these traditional arguments.

III. *The Siyar Applied: Traditional Islamic Arguments and the ICJ*

A. *Western Sahara*

The Western Sahara is a piece of territory at the western edge of the Sahara desert roughly half the size of France.¹⁰¹ It borders Morocco to the north, Mauritania to the east and south, and the Atlantic to the west.¹⁰² Spain first established control over the region by proclaiming a protectorate over Rio de Ora in 1884.¹⁰³ At the time of Spain's colonization, Muslim nomads inhabited the region, pastured their animals, and grew crops "as and where conditions were favourable."¹⁰⁴ In the 1960s and early 1970s, Spain still controlled the Western Sahara, but both Morocco and Mauritania had made legal claims

98. *See id.* at 1736 (describing efforts of governments in Islamic world to appear religiously legitimate); *See also* HOURANI, *supra* note 41, at 452-58 (discussing growing impact of Islamic political movements on regional politics since 1967).

99. deLisle, *supra* note 20, at 1736.

100. *See infra* notes 112-20, 164-67 and accompanying text (describing traditional Islamic arguments in two territorial disputes).

101. JOHN DAMIS, *CONFLICT IN NORTHWEST AFRICA: THE WESTERN SAHARA DISPUTE I* (1983) (describing territory).

102. *See id.* (describing geography of Western Sahara). The territory also borders Algeria to the northeast for approximately 26 miles. *Id.*

103. Western Sahara, 1975 I.C.J. 12, 38 (Oct. 16). Spain established the borders of the territory in agreements with Mauritania, Morocco and Algeria between 1886 and 1912. *See* Tony Hodges, *Introduction to WAR AND REFUGEES: THE WESTERN SAHARA CONFLICT 1, 2* (Richard Lawless & Laila Monahan eds., 1987) (discussing creation of borders and roots of conflict). However, Spanish troops did not establish full control over the entire region until 1934. *Id.* In fact, Spain never had a substantial presence in the territory and only established a formal administration in 1963. *See* DAMIS, *supra* note 101, at 12 (providing historical background of Spanish control of Western Sahara).

104. *See Western Sahara*, 1975 I.C.J. at 41 (detailing characteristics of territory's inhabitants at time of Spanish occupation).

to the territory.¹⁰⁵ Also, in 1973, the Algerian-backed Polisario Front began a movement for independence in the region, and Spain announced its intention to decolonize the territory.¹⁰⁶

In a letter dated 17 December 1974, the United Nations (UN) General Assembly asked the ICJ for an advisory opinion on the Western Sahara question in order to assist the UN General Assembly in forming its policy regarding decolonization of the territory.¹⁰⁷ The United Nations requested an answer to two questions:

- I. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?
- II. If the answer to the first question is in the negative, what were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?¹⁰⁸

105. See *id.* at 26 (describing prelude to conflict).

106. See DAMIS, *supra* note 101, at 50-56 (recounting historical background to dispute).

107. *Western Sahara*, 1975 I.C.J. at 13, 27, 36. Unfortunately, the ICJ advisory opinion did not lead to a peaceful decolonization of the territory. After the ICJ announced its decision, King Hassan of Morocco proclaimed the decision a vindication of Moroccan claims. DAMIS, *supra* note 101, at 60. The King organized the famous "Green March" in which 350,000 Moroccan volunteers crossed the border into Western Sahara. *Id.* at 60-61. This bold move prompted the Spanish government to enter into negotiations with Morocco and Mauritania for the transfer of Western Sahara. *Id.* at 65-66. Spain agreed to withdraw from Western Sahara by February 28, 1976. *Id.* at 67. The parties completed the transfer on January 12, 1976. *Id.* at 70. By separate agreement in 1976, Mauritania and Morocco agreed to divide the territory. *Id.* at 76-78. Morocco occupied the northern two-thirds of the territory, and Mauritania occupied the southern third, consisting of the southernmost province. *Id.* The Polisario rebels continued their struggle for independence against both the Moroccan and Mauritanian forces. *Id.* at 82-85. In 1979, Mauritania concluded a peace treaty with the Polisario and withdrew from the southernmost province. *Id.* at 84-89. Morocco then occupied the entire territory of the Western Sahara. *Id.* at 84-89. Fighting between the Polisario rebels and Moroccan troops has continued sporadically since that time. See Stephen Hughes, *Western Sahara Settlement Still out of Sight After Fifteen Years*, REUTERS, Nov. 6, 1990, available in LEXIS, News Library, Arcnws File (alluding to fighting between Polisario and Moroccan forces until 1988). In 1986, after many unsuccessful attempts to mediate a solution to the sovereignty question, Morocco made new efforts to reach a solution and asked the United Nations to administer a referendum on the issue. *New U.N. Bid to End Dispute Over Western Sahara*, REUTERS, Apr. 9, 1986, available in LEXIS, News Library, Arcnws File. After many preliminary negotiations, the Secretary General presented a plan for the referendum in April 1991, in which the inhabitants of the region would choose between integration with Morocco and independence. See Thomas Lippman, *Western Sahara's Long Stalemate*, INT'L HERALD TRIB., Dec. 5, 1995, at 1 (discussing efforts to develop plan for referendum). Disputes over registration of eligible voters in the region and other issues continue to delay the administration of the referendum. See *Press Digest*, REUTERS WORLD SERVICE, Feb. 1, 1997, available in LEXIS, News Library, Curmws File (reporting announcement by U.N. chief Kofi Annan that referendum process in Western Sahara has stalled). Meanwhile, when Algeria ceased funding the Polisario Front in the early 1990s, the group dwindled to a mere handful of fighters operating from a single base across the Algerian border. See Philip Finnegan, *Terrorism Changes North African Spending Priorities*, DEF. NEWS, Jan. 20, 1997, at 3 (noting that, after Algeria cut funds to Polisario rebels, Morocco effectively won war).

108. *Western Sahara*, 1975 I.C.J. at 14. The ICJ interpreted "legal ties" to mean "such 'legal

The letter asked the governments of Spain, Morocco, Mauritania, and any other interested parties to submit information that could help the Court to clarify the question.¹⁰⁹ Morocco and Mauritania both submitted arguments claiming sovereignty over the territory. Algeria also submitted arguments in favor of self-determination as the governing principle in the decolonization process.¹¹⁰ Of these three Islamic states, Morocco put the most emphasis on traditional Islamic concepts regarding sovereignty and international law.¹¹¹

Morocco argued that the territory of the Western Sahara was not *terra nullius* at the time of Spanish colonization because Morocco had established ties of sovereignty over the territory at the time of Spanish colonization under Islamic legal concepts of sovereignty.¹¹² Specifically, Morocco attempted to persuade the Court to recognize the sovereign ties between the Sherifian State of Morocco and the inhabitants of Western Sahara – ties of sovereignty based not on the Western concept of territorial sovereignty, but on the Islamic concept of the personal, religious allegiance of the inhabitants to the Sultan of Morocco.¹¹³

First, Morocco argued that the people of the Western Sahara had come under Islamic control around the time of the Islamic conquest of North Africa during the seventh century A.D.¹¹⁴ The inhabitants of the region had therefore been Muslims since the seventh century, and the territory belonged to *dar al-Islam*. Morocco then advanced arguments regarding the special character of the Sherifian State.¹¹⁵ The Kingdom argued that by nature of the Moroccan royal family's direct descent from the Prophet Muhammad, the Sherifian State was founded and based on the common religious bond of Islam and on the

ties' as may affect the policy to be followed in the decolonization of Western Sahara." *Id.* at 41.

109. *See id.* at 14 (quoting letter from UN General Assembly).

110. *See id.* at 30 (summarizing Algeria's argument).

111. *See Ricciardi, supra* note 2, at 418-19 (discussing Islamic legal arguments in Western Sahara dispute).

112. *See id.* at 420 (analyzing Morocco's Islamic arguments in *Western Sahara* case).

113. *See* George Joffé, *The International Court of Justice, and the Western Sahara Dispute*, in WAR AND REFUGEES: THE WESTERN SAHARA CONFLICT, *supra* note 103, 16, 21-23 (discussing various concepts of sovereignty in *Western Sahara* case); *see also* Ricciardi, *supra* note 2, at 420 (discussing Morocco's invocation of "Islamic concept of the State"). The Moroccan sultanate was somewhat of an anomaly in Islamic history. The first Moroccan Sultan claimed the Caliphate upon the collapse of the Ummayyad Caliphate. Joffé, *supra*, at 26. It maintained a separate territorial sphere of influence in western North Africa and remained independent of the Ottoman empire. *Id.*

114. *See* *Western Sahara*, 1975 I.C.J. 12, 42 (Oct. 16) (summarizing Morocco's arguments in support of its claim to sovereignty over Western Sahara).

115. *See id.* at 43-44 (discussing Morocco's claim that "the Court should take account of the special structure of the Sherifian State"). The term "Sherifian" signifies descent from the family of the Prophet Mohammad. *See* HOURANI, *supra* note 41, at 115 (defining term "Sherif").

religious allegiance of the people, including the people of Western Sahara, to the Sultan of Morocco.¹¹⁶

Under traditional principles of Islamic law, these arguments should have sufficed to establish sovereignty.¹¹⁷ The territory in question was part of *dar al-Islam*, and the Sultan of Morocco was the legitimate religious leader to whom the inhabitants of the region pledged and owed their religious allegiance.¹¹⁸ In the Islamic State, religion unifies all people under one sovereign authority.¹¹⁹ Even those areas of Western Sahara in which the Sultan did not exercise direct political authority were still under Moroccan sovereignty by nature of the Sultan's religious legitimacy.¹²⁰

The Court noted the special significance of the Sultan's religious authority and descent from the Prophet, but it refused to recognize such religious authority as a tie amounting to sovereignty.¹²¹ The Court rejected Morocco's arguments because they did not coincide with the traditional Western interna-

116. See *Western Sahara*, 1975 I.C.J. at 44 (describing "special character" of Sherifian State at time of Spain's occupation of Western Sahara); see also HOURANI, *supra* note 41, at 115 (noting that, from sixteenth century onwards, ruling dynasties in Morocco "have based their claim to legitimacy" on their Sherifian descent).

117. See Joffé, *supra* note 113, at 26 (noting that under Islamic law allegiance of inhabitants of Western Sahara to Sultan "did provide a basis for political sovereignty—through control of community, rather than territory").

118. See *supra* notes 39-48 and accompanying text (discussing Islamic concept of sovereignty); see also DAMIS, *supra* note 101, at 19-20 (discussing Islamic concept of sovereignty). The tribes of Western Sahara offered formal pledges of allegiance to the Sultan of Morocco before and during Spanish occupation of the territory in the nineteenth and early twentieth centuries. *Id.* at 19. This pledge signified Moroccan sovereignty over the inhabitants and the territory: "The Moroccan sultan was commander of the faithful, the steward of God on earth for all matters, religious or secular. Since the sultan personified both state and church, Moroccans argue that ties of personal allegiance from certain tribes to the sultan cannot be differentiated from ties of territorial sovereignty." *Id.*

119. See *supra* notes 32-48 and accompanying text (discussing concept of unitary Islamic State).

120. See Joffé, *supra* note 113, at 26-27 (discussing Islamic concepts of sovereignty in Morocco's arguments). Joffé points out that even in the regions outside the Sultan's direct control (*bilad al-siba*), the Sultan provided legitimization for local authorities and played a limited role as an arbitrator. *Id.* at 27. According to Islamic doctrine, this delegation and legitimization of local political authority in no way lessened the Sultan's sovereignty and was especially appropriate in those areas of *dar al-Islam* that bordered on *dar al-Harb*. *Id.*; see also DAMIS, *supra* note 101, at 20 (noting tribes' recognition of Moroccan Sultan's authority in *Siba* land, but rejection of Sultan's various administrative controls).

121. See *Western Sahara*, 1975 I.C.J. 12, 44 (Oct. 16) (responding to Morocco's arguments and discussing difference between allegiance and sovereignty). The Court even concluded that there was a "legal tie of allegiance" between the Sultan and some of the Western Saharan tribes but that it did not amount to a "legal tie of territorial sovereignty." *Id.* at 56-57; see also DAMIS, *supra* note 101, at 59-60 (discussing ICJ's opinion in *Western Sahara* case).

tional legal principle of territorial sovereignty.¹²² According to the Court, territorial sovereignty requires a showing of effective political control over the territory in question.¹²³ This political control must be real and manifested in acts that demonstrate its acceptance by the inhabitants of the territory.¹²⁴ Under this more demanding and objective Western test, the Court determined that Morocco failed to establish evidence sufficient to support its claims of sovereignty.¹²⁵

Individual judges expressed more decisive views on the issue. In his separate opinion, Judge De Castro rejected Morocco's Islamic arguments outright and openly criticized Morocco for failing to frame its arguments according to traditional Western legal theories regarding the acquisition of territory.¹²⁶ However, two judges on the Court asserted that Morocco's Islamic arguments should have received more attention. Judge Ammoun, in his separate opinion, argued that Ireland, Pakistan, and Bangladesh all provided examples of nation-states built on the strength of religious ties.¹²⁷ In another separate opinion, Judge Boni – the ad hoc judge appointed by Morocco – recognized the Sultan's dual religious and political authority over the people of Western Sahara, but despite this belief, voted with the majority because he agreed that the inhabitants of the region should be consulted on the matter of their own sovereignty.¹²⁸

122. See Joffé, *supra* note 113, at 27 (providing explanation of ICJ's decision).

123. See *Western Sahara*, 1975 I.C.J. at 44 (explaining requirements of territorial sovereignty).

124. See *id.* (stating that, although "[p]olitical ties of allegiance to a ruler . . . have frequently formed a major element in the composition of a State," such ties "must clearly be real and manifested in acts evidencing acceptance of his political authority").

125. See Ricciardi, *supra* note 2, at 421 (discussing ICJ's test for determining ties of sovereignty).

126. See *Western Sahara*, 1975 I.C.J. at 153 (separate opinion of Judge De Castro) (questioning Morocco's refusal to frame its argument in terms of conquest, cession, or occupation). Judge De Castro maintained that, if Morocco wanted to demonstrate that Western Sahara was incorporated in the Sherifian State of Morocco, it should have shown that its occupation of the territory was effective. *Id.* (separate opinion of Judge De Castro). Moreover, he noted that this required "more than a vague *animus possidendi*, and 'right of proximity' or the fact of belonging, like Morocco, to the Dar al-Islam." *Id.* at 154 (separate opinion of Judge De Castro).

127. See *id.* at 98 (separate opinion of Judge Ammoun) (recognizing some validity in Morocco's Islamic arguments). Judge Ammoun even quoted a turn of the century French ambassador to Spain who said:

It has always been recognized that the territorial sovereignty of the Sultan [of Morocco] extends as far as his religious suzerainty, and as it is beyond doubt that the peoples of Cape Juby are subject to him from the religious point of view, we could consider his sovereignty as indisputable.

Id. at 98-99 (separate opinion of Judge Ammoun) (citing Paul Cambon, *Documents Diplomatiques Français*, 1871-1914, first series, Vol. VIII).

128. See *id.* at 173-74 (separate opinion of Judge Boni) (arguing that Court gave insuffi-

The Islamic legal arguments probably appeared foreign to many of the judges on the Court, and it is possible that they failed to understand them fully.¹²⁹ It is also possible that the Court rejected the Islamic concept of sovereignty because it felt that "reliance upon subjective perceptions of sovereignty would create insurmountable problems of proof."¹³⁰ Some scholars also believed that the Court made a decision to endorse an "unimpeachable right of self-determination."¹³¹

The presence of the Western legal principle of self-determination complicates an analysis of the Court's reaction to Morocco's Islamic arguments. Self-determination has enjoyed a paramountcy over historical, cultural, and religious claims in the UN since 1960.¹³² Two policy considerations underlie this preference for self-determination.¹³³ First, an assumption exists that any other policy might lead to endless conflicts, especially in former colonial territories.¹³⁴ Second, it is assumed that even nation-states with arbitrarily delimited boundaries will "soon develop a cohesive logic of their own."¹³⁵

Recent events in Africa call into question the validity of these two underlying assumptions.¹³⁶ Yet, many disputes regarding the delimitation of

cient attention to religious ties between Western Sahara and Sultan of Morocco). Judge Boni noted that for the inhabitants of Western Sahara,

the Sultan was Commander of the Faithful, that is to say, the Steward of God on earth for all matters, whether religious or not. He was thus regarded not only as religious leader but as director of their temporal affairs. The legal ties between them were thus not only religious – which no one denies – but also political, and had the character of territorial sovereignty.

Id. at 173 (separate opinion of Judge Boni).

129. See Ricciardi, *supra* note 2, at 421 (discussing Court's opinion and concluding that "[f]or all the Court's professed willingness to consider special conditions and accept non-European models of the State, the Court adhered to the existing dual requirement of the intention to act as sovereign and the display of outward, objectively observable signs of sovereign authority").

130. *Id.* at 422.

131. See DAMIS, *supra* note 101, at 60 (discussing reaction to *Western Sahara* opinion).

132. See Thomas M. Franck, *The Stealing of the Sahara*, 70 AM. J. INT'L L. 694, 697-98 (1976) (criticizing UN's approach to Western Sahara dispute and detailing UN self-determination policy prior to Western Sahara dispute).

133. *Id.* at 698.

134. *Id.*

135. *Id.*

136. See Scott Straus, *Zaire's Rebels Change Region's Calculus*, HOUS. CHRON., Dec. 1, 1996, at A1 (discussing recent developments in central Africa). Almost all of Africa's current national boundaries were delimited artificially by the European powers at the end of the nineteenth century. *Id.* Many political scientists fear that recent secessionist and tribal uprisings in central Africa will lead eventually to a complete breakdown of the continent's current national boundaries. *Id.*

disputed boundaries may not even raise the issue of self-determination. Clearly, self-determination played a significant role in the Western Sahara dispute. The question whether a comparable concept exists within Islamic law goes beyond the scope of this Note.

It may be more likely that the Court simply recognized the inherent contradiction in Morocco's arguments. Morocco argued in a forum of nation-states—a system based on the concept of territorial sovereignty. Yet Morocco used arguments based on a system that recognized only one legitimate state and ties of sovereignty based on personal religious belief.¹³⁷ This contradiction, and the Court's reaction to it, reappeared almost two decades later in a boundary dispute between Libya and Chad.

B. *Libya and Chad*

The Aouzou strip is a 45,000 square mile strip of land on Chad's northern border with Libya.¹³⁸ As in the *Western Sahara* case, the dispute over ownership of the territory arose after Western decolonization of the region. French forces in Algeria began expanding French control into the Sahara around 1851.¹³⁹ An 1890 Anglo-French declaration paved the way for French occupation and control over Chad by the beginning of the First World War.¹⁴⁰ Chad became a member of the French community in 1958 and an independent state in 1960.¹⁴¹

Italian troops invaded and occupied Libya in 1911, hoping to establish their own North African colonial possession.¹⁴² Resistance by Libyan free-

137. See Joffé, *supra* note 113, at 27 (describing contradiction inherent in Morocco's argument). Joffé states that

the Moroccan argument rested on a necessary contradiction in that the reality it attempted to describe was a historical situation defined originally and given legal force under Islamic law through constructs related to communal links, but the terms in which it did this were those of a legal justification relating to territorial control, as international legal practice demands.

Id.

138. See Roger Cohen, *Chad Wins World Court Decision in Territorial Dispute with Libya*, N.Y. TIMES, Feb. 4, 1994, at A6 (discussing boundary dispute between Chad and Libya). Although the strip itself is only 45,000 square miles, Libya claimed an additional 310,000 square miles of territory in Chad south of Aouzou strip itself. *Id.*

139. See JOHN WRIGHT, LIBYA, CHAD AND THE CENTRAL SAHARA 112-13 (1989) (describing French expansion in region).

140. See *id.* at 114-17 (describing French advances in Africa prior to World War I).

141. See Case Concerning the Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6, 17 (Feb. 3) (describing Chad's accession to independence).

142. See WRIGHT, *supra* note 139, at 119 (providing historical background concerning Italian occupation of Libya).

dom fighters continued through the early 1930s.¹⁴³ After the Second World War, Allied forces administered the former Italian colony until it became a sovereign state in 1951.¹⁴⁴ In 1955, Libya concluded a treaty with France delimiting the boundary between Libya and what was to become Chad and placing the Aouzou strip under Chad's control.¹⁴⁵

In 1973, a Libyan army crossed the southern border into Chad and occupied the Aouzou strip, claiming it and additional territory in Chad extending south to the Fifteenth Parallel.¹⁴⁶ After an unsuccessful invasion of Chad's territory south of the Aouzou strip in 1979, Libya remained in occupation of the Aouzou strip, and fierce fighting between the two countries continued throughout the 1980s.¹⁴⁷ In August of 1990, Chad and Libya agreed to take the dispute before the ICJ for a binding decision.¹⁴⁸

In an exhaustive analysis of the dispute written shortly before the ICJ decision, Matthew Ricciardi examined Libya's possible Islamic legal claims to the Aouzou strip.¹⁴⁹ In fact, Libya did raise Islamic legal arguments. However, the arguments were even broader and less focused than those raised by Morocco in the Western Sahara dispute.¹⁵⁰ Perhaps this lack of clarity was partly due to Libya's weaker claim to legitimate religious authority over the people of the Aouzou strip. Whereas the Moroccan government could point to the legitimacy of the Moroccan Sultan by reason of his Sherifian descent, the Libyan government had to rest its claims on the authority of the Sanusi brotherhood and through it the much more remote and questionably legitimate religious authority of the Ottoman Sultan-Caliph at the turn of the century.¹⁵¹

143. *Id.*

144. *See Libya v. Chad*, 1994 I.C.J. at 17 (discussing Allied administration of Libya); WRIGHT, *supra* note 139, at 122-24 (same).

145. *See Libya v. Chad*, 1994 I.C.J. at 19-28 (discussing 1955 boundary agreement).

146. *See Key Events in Recent Libyan History*, REUTERS, Aug. 29, 1994, available in LEXIS, News Library, Arcnws File (describing Libyan invasion of territory).

147. *See Cohen*, *supra* note 138 (discussing military conflict between Libya and Chad).

148. *See Case Concerning the Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6, 8-9 (Feb. 3) (providing details of submission of dispute for resolution); *see also Chad Awarded Disputed Aouzou Strip, Libya Silent*, AGENCE FRANCE PRESSE, Feb. 3, 1994, available in LEXIS, News Library, Arcnws File (noting that both Chad and Libya agreed to honor ICJ's ruling).

149. *See generally Ricciardi*, *supra* note 2.

150. Memorial Submitted by Great Socialist People's Libyan Arab Jamahiriya, Sept. 26, 1991, vol. 1, at 7 (arguing for non-Western concept of sovereignty). For example, Libya asked that the Court consider the meaning of their claims to the territory in light of "the rather different concepts of the Ottoman empire based on Muslim precepts from those of the European Powers as to sovereignty and territorial boundaries." *Id.*

151. *Id.* at 473 (making arguments based on Ottoman sovereignty over disputed territory). Libya argued that

Islamic influence in what is now Libya began as early as the seventh century A.D. By the mid-sixteenth century, Tripoli was one of three Ottoman capitals in the Maghrib.¹⁵² After only half a century, however, the central Ottoman government lost direct political control of Tripoli to local military leaders.¹⁵³ In response to growing European involvement in North Africa, the Ottomans reasserted direct political and military control of Libya in 1835. They maintained direct control of Tripoli from 1835 until the Italian invasion in 1911.¹⁵⁴

In 1843, as the Ottomans reasserted control over Tripoli and the Libyan coastal regions, an Islamic reform movement called the Sanusi brotherhood (*Sanusiyya*) emerged in the Cyrenaica region of what is now Libya.¹⁵⁵ The *Sanusiyya* expanded its influence south into the disputed territory of the Aouzou strip, spreading the message of Islamic reform and establishing political control.¹⁵⁶ An uneasy relationship existed between the Ottomans in Tripoli and Istanbul and the Sanusi leaders in Cyrenaica and southern Libya. The rise of the *Sanusiyya* coincided with the Ottoman Sultan's increased emphasis on his role as the defender of the Islamic State.¹⁵⁷ Many scholars saw this renewed emphasis as an attempt to reassert political control over the dissolving empire by waving the banner of pan-Islamism.¹⁵⁸ It served the Ottomans' purpose, therefore, to accede to Sanusi political control over the region and to allow Sanusi leaders to strengthen Islamic feeling in southern Libya as a means of combating French encroachment from the south.¹⁵⁹

a parallel and compatible title resided in the Ottoman empire, since the borderlands lay within the territories claimed by the Ottoman empire on the basis of religious, legal, cultural and commercial ties, going back a long time, and confirmed by their presence and understandings with the indigenous peoples.

Id.

152. See HOURANI, *supra* note 41, at 228 (discussing Ottoman control in Maghrib). Tunis and Algiers were the capitals of the other two provinces in the Maghrib under Ottoman control.

Id.

153. See *id.* (discussing Ottoman control in Maghrib).

154. See WRIGHT, *supra* note 139, at 112 (describing reassertion of Ottoman political control over Tripoli).

155. See *id.* at 81 (discussing rise of *Sanusiyya* in Libya); see also HOURANI, *supra* note 41, at 312 (same).

156. See Ricciardi, *supra* note 2, at 341-42 (explaining that *Sanusiyya*'s move southward was attempt, in part, to avoid direct political control of Ottomans in Tripoli).

157. See HOURANI, *supra* note 41, at 313-14 (discussing Ottoman reaction to European encroachment). Hourani argues that this renewed emphasis on the Sultan's religious role as Caliph served "both as a rallying cry to Muslims in the empire and outside to gather around the Ottoman throne, and a warning to European states which had millions of Muslim subjects." *Id.*

158. See *id.* (noting political motives and political impact of these attempts).

159. See Ricciardi, *supra* note 2, at 344 (discussing interaction between Ottoman govern-

The Ottoman Sultan-Caliph remained the nominal religious authority for the entire region, although "spiritual supremacy was about the limit of the allegiance" that the Sultan could exact from the Saharan tribes.¹⁶⁰ The *Sanusiyya* and the southern tribes paid lip service to the Sultan's religious role as Caliph.¹⁶¹ However, they rejected the Ottoman Sultan's attempts to reassert imperial political control through increased emphasis on his pan-Islamic religious role as Caliph. In fact, the Sanusi leadership was at times openly hostile to Ottoman claims of universal Islamic religious authority.¹⁶² The fact that the founder of the Sanusi movement claimed Sherifian descent further complicated the question of legitimate religious authority in the disputed region.¹⁶³

Before the ICJ, Libya argued that, at the time of the Italian invasion, the inhabitants of the disputed territory owed allegiance to the *Sanusiyya*.¹⁶⁴ Libya further argued that the *Sanusiyya* fought French and later Italian encroachments on that territory and that they carried out this struggle on behalf of the Ottoman Sultan-Caliph and under his sovereignty.¹⁶⁵ In some ways this claim is analogous to Morocco's claim in the Western Sahara dispute.¹⁶⁶ The Moroccan Sultan enjoyed religious allegiance from the people of Western Sahara, but left direct political control in the region to local leaders. Similarly, the Ottoman Sultan received nominal religious allegiance from the people of the Aouzou strip while the *Sanusiyya* exercised direct control and played an active role in opposing European encroachment on the Sultan's behalf.¹⁶⁷ As Ricciardi points out, this argument did not succeed for Morocco in the Western Sahara dispute.¹⁶⁸ On its face, Morocco's claim appeared stronger than Libya's both because of the Moroccan Sultan's stronger claim

ment and *Sanusiyya*).

160. See WRIGHT, *supra* note 139, at 112 (noting limits of Ottoman control over tribes). Wright also states that this respect for the Ottoman Caliph's religious authority "in no way implied acceptance of his imperial sovereignty." *Id.* at 116.

161. See *id.* (describing extent of allegiance of southern tribes to Ottoman Sultan-Caliph).

162. See Ricciardi, *supra* note 2, at 342 (analyzing interaction between *Sanusiyya* and Ottoman authority). Ricciardi attributes the *Sanusiyya*'s hostility to the Ottomans at least in part to the Sanusi belief that the Ottomans were not pious Muslims. *Id.*

163. Cf. *id.* at 341 (explaining Sanusi leader's Sherifian descent).

164. See Case Concerning the Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6, 13 (Feb. 3) (summarizing Libya's arguments in support of its claim to Aouzou strip).

165. See *id.* at 13, 16 (outlining Libya's claim to disputed territory through inhabitants' allegiance to *Sanusiyya*).

166. See Ricciardi, *supra* note 2, at 424 (comparing Libya's arguments in support of its claim to Aouzou strip with Morocco's arguments in *Western Sahara* case).

167. See *id.* (discussing religious allegiances and political control of people in Western Sahara and Aouzou strip).

168. See *id.* (noting ICJ's rejection of Morocco's Islamic argument).

to legitimate religious authority and because of the stronger ties between the Moroccan Sultan and local authorities in Western Sahara.¹⁶⁹ Ricciardi raised the possibility, however, that the changed composition of the Court since the Western Sahara dispute might provide a more receptive forum for arguments based on non-Western concepts of sovereignty.¹⁷⁰

In fact, the ICJ gave Libya's Islamic arguments much less attention than it gave Morocco's Islamic arguments in the Western Sahara dispute. Perhaps this was due to the weaker Libyan claim to legitimate religious authority through the Ottoman Caliph. More likely, however, the decreased attention was due to the existence in the Aouzou strip dispute of an explicit boundary agreement, made in accordance with Western principles of international law.¹⁷¹ The Court focused almost exclusively on the legitimacy and interpretation of the 1955 boundary agreement between France and Libya, concluding that the parties to the 1955 agreement intended to define their common frontier by the treaty.¹⁷² After interpreting the treaty, the ICJ delimited the boundary in favor of Chad.¹⁷³

The existence of the 1955 treaty, however, was not the only reason that the Court did not accept Libya's Islamic legal argument. In a separate opinion, Judge Ajibola noted that even absent the 1955 treaty, Libya's Islamic arguments would not have led to a decision in its favor.¹⁷⁴ Judge Ajibola concluded that the nature of state formation in Africa would not permit consideration of religious ties.¹⁷⁵

169. *See id.* (comparing strength of Moroccan Sultan's religious authority and connection to local authorities with Libya's similar ties).

170. *See id.* at 424-25 (noting possible impact of increased proportion of judges from non-Western States).

171. *See* Case Concerning the Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6, 20 (Feb. 3) (discussing relevance of 1955 treaty to dispute). Even Libya agreed that the 1955 treaty should be the "logical starting-point for consideration of the issues before the Court." *Id.* Libya recognized the treaty's validity, but argued that at the time of the agreement "it lacked the experience to engage in difficult negotiations with a Power enjoying the benefit of long international experience." *Id.* On this basis, Libya suggested that the treaty should be construed strictly in its favor. *Id.*

172. *See id.* at 28 (interpreting 1955 boundary agreement).

173. *See id.* at 37-40 (interpreting 1955 boundary agreement in favor of Chad).

174. *See id.* at 60 (separate opinion of Judge Ajibola) (discounting Libya's Islamic arguments). Judge Ajibola reasoned that it would have been difficult "to find in favor of Libya on the basis of the historic, religious, economic, geographic and security considerations it placed before the Court." *Id.* (separate opinion of Judge Ajibola).

175. *See id.* (separate opinion of Judge Ajibola) ("It is no longer either possible or desirable to modify the frontiers of nations in the name of racial or religious criteria . . . if we were to take as a criterion of our frontiers either race, tribe, or religion certain states in Africa would be wiped off the map." (quoting President Tsirana, former Head of State of Madagascar)).

The ICJ's reaction to the Islamic legal arguments in these two disputes underscores the inapplicability of traditional Islamic legal arguments to modern boundary and territorial disputes between Islamic states. The arguments in both cases derived from an international system that disappeared forever with the fall of the Abbasid Caliphate.¹⁷⁶ Still, there must be a way for Islamic states to resolve such disputes using principles and arguments that *are* substantively Islamic.¹⁷⁷

IV. *New Islamic Legal Approaches to International Boundary Disputes*

In examining the modern inapplicability of the *Siyar*, legal scholars David Westbrook and Christopher Ford conclude that a new approach is possible, albeit somewhat optimistic.¹⁷⁸ Ford suggests that Islamic law should recognize that secular governments of Islamic nation-states do not succeed to full Islamic legal sovereignty in the traditional sense.¹⁷⁹ This recognition paves the way for the consideration of Islamic nation-states as "juridical 'individuals' under private Islamic law."¹⁸⁰ Ford acknowledges that the importa-

176. See *supra* notes 49-62 and accompanying text (describing historical development of *Siyar*); see also Ford, *supra* note 11, at 531 (discussing religious implications of *Siyar*'s modern inapplicability). Ford points out that the abandonment of the *Siyar* does not mean that an entire body of divine law must be declared invalid. *Id.* Rather, the rules governing the unitary Islamic State do not apply to the current international structure. *Id.* Ford states:

Could such large portions of the classical *siyar* simply have lapsed with the collapse of the caliphate and the fragmentation of the *dar al-Islam*? There need be no question of human alteration or even desuetude of God's Law, merely its inapplicability to the question at hand. Rules specifically provided to govern the conduct of the unitary Islamic theocracy have nothing to say about the conduct of secular territories.

Id.

177. See *supra* notes 79-86 and accompanying text (discussing criticisms of Apologists' efforts to reconcile *Siyar* and modern international law).

178. See Ford, *supra* note 11, at 531-32 (discussing feasibility of new approaches to Islamic international law); Westbrook *supra* note 15, at 884-86 (same).

179. See Ford, *supra* note 11, at 531 ("There is no doctrinal reason why the multitude of secular rulers must each inherit the power-legitimizing mantle of the Caliphate. Indeed, simple logic might suggest that they cannot."). Ford is not the first scholar to propose this approach. During the early twentieth century, a Muslim scholar named Abd al Razzaq al-Sanhuri suggested the formation of an "irregular caliphate" compatible with the reality of an Islamic world divided into distinct Islamic nation-states. See ABDAL-RAZZAQ AL-SANHURI, LE CALIFAT: SON ÉVOLUTION VERS UNE SOCIÉTÉ DES NATIONS ORIENTALES [THE CALIPHATE: ITS EVOLUTION IN THE DIRECTION OF A SOCIETY OF ORIENTAL NATION-STATES] 570 (1926). Sanhuri stated:

Comme il est impossible, aujourd'hui, d'envisager le rétablissement du Califat régulier, un régime du califat irrégulier s'impose et se justifie par l'état de nécessité où le monde musulman se trouve actuellement. [[A]s it is today impossible to imagine the reestablishment of the traditional Caliphate, a system of irregular Caliphate is called for and is justified by the state in which the Muslim world finds itself in fact].

Id.

180. Ford, *supra* note 11, at 531.

tion of principles from private Islamic law to the international arena is an ambitious and perhaps overly optimistic solution.¹⁸¹ Yet no other solutions exist that are both substantively Islamic *and* capable of offering real legal principles useful in solving international disputes.¹⁸²

The approach outlined in the remainder of this Note takes a small first step toward the solution Ford suggests by addressing the specific issue of international boundary disputes between Islamic states. First, Subpart A discusses an Islamic doctrinal basis that could serve to permit the importation of principles from private Islamic law to the international arena. Subpart B then explains some basic principles from Islamic property law. Finally, Subpart C describes several broad principles from this area of private Islamic law that Islamic states could use in resolving boundary disputes with other Islamic states.

A. The Doctrinal Basis: Juristic Preference

Contrary to the popular conception that exists in the West,¹⁸³ Islamic law is not a static and inflexible corpus containing specific rules of behavior and

181. See *id.* at 532 (noting barriers to implementation of this solution). Addressing the limitations of his argument, Ford stated:

Such radical reformism would certainly be optimistic. An approach of this kind would have to throw off an astonishing weight of historical baggage, even if it merely needed to persuade the *mujtahids* [Muslim jurists] themselves. More difficult still would be to persuade governments who, over the centuries, have accrued dramatic benefits from the legitimacy afforded them by juristic docility. Convincing ordinary Muslims would be the greatest challenge.

Id.

182. See Westbrook, *supra* note 15, at 821 (stating that any new approach to Islamic international law must "address the concerns of public international law" and "locate legal authority in Islam").

183. Unfortunately, the Western press reinforces already existing stereotypes regarding Islamic law by mentioning Islamic law almost exclusively in the context of the *hadd* punishments. These are the specific punishments mentioned in the Quran for crimes like murder, adultery and theft. See THE QURAN 5:37 (specifying *hadd* punishment for theft). For example, a brief survey of recent newspaper articles yielded dozens of articles regarding the *hadd* punishment for theft in various Islamic countries. See, e.g., *Gadhafi Facing Militant Islamic Opposition; North Africa's Unrest may be Spreading into Secular Libya*, ASSOCIATED PRESS, Sept. 27, 1995, available in LEXIS, News Library, Arcnws File (describing attempts by Libyan government to introduce *hadd* punishment for theft); Alistair Lyon, *Taleban Bring Islamic Hope and Force to Kabul*, REUTERS WORLD SERVICE, Sept. 27, 1996, available in LEXIS, News Library, Arcnws File (describing attempts by Taleban to introduce *hadd* punishments in Afghanistan); Neil MacFarquhar, *After War and Blockade, Crime Frays Life in Iraq*, N.Y. TIMES, Oct. 18, 1996, at A3 (describing introduction of "traditional Islamic punishment" for theft in Iraq); *Pakistani to Have Hand Amputated for Theft*, AGENCE FRANCE PRESSE, Apr. 2, 1995, available in LEXIS, News Library, Arcnws File (regarding punishments in United Arab Emirates); Michael Richardson, *Elections Pit Malaysia's Secular Regime Against Islamic Party Religionists*, INT'L HERALD TRIB., Apr. 24, 1995, at 4 (reporting on government attempts to introduce *hadd* punishments in Malaysia); *Thief's Fingers Chopped Off in Tehran*, AGENCE

punishment.¹⁸⁴ In fact, Islamic law is an extremely flexible and adaptable system of interpretation. This flexibility exists despite the fact that Islamic law stems from two immutable sources of law: the Quran and the Sunna.¹⁸⁵ As discussed in Part II, Islamic law relies on four sources.¹⁸⁶ The Quran and the Sunna form the two immutable primary sources, whereas *ijma 'a* (societal consensus)¹⁸⁷ and *qiyas* (analogical reasoning) provide the two secondary sources.¹⁸⁸

In addition to *qiyas*, some Sunni jurists¹⁸⁹ throughout history have endorsed the doctrine of *istihsan* (juristic preference),¹⁹⁰ which legitimizes the use of *ra'y* (individual opinion) in solving disputes in accordance with Islamic law.¹⁹¹ Although *istihsan* is a flexible and pragmatic doctrine, it is not, as

FRANCE PRESSE, Nov. 6, 1996, available in LEXIS, News Library, Arcnws File (describing implementation of new "Islamic penal code" in Iran); Habib Trabelsi, *Saudi Arabia Defends Legal System Against Foreign Critics*, AGENCE FRANCE PRESS, July 27, 1995, available in LEXIS News Library, Arcnws File (describing penal elements of Saudi legal system).

184. See Weiss, *supra* note 27, at 199-200 (discussing sources of Islamic law). Weiss notes that, although Islamic law governs all interaction between God and Man and between Man and Man, very few specific rules are actually spelled out. *Id.* Instead, man must derive the law from the appropriate sources through interpretation. *Id.*

185. See A.J. Wesnick, *The Importance of Tradition for the Study of Islam*, 11 MOSLEM WORLD 239, 239 (1921) (describing the *Sunna*). The *Sunna* is the example of the Prophet as evidenced by his collected sayings, or *hadiths*. *Id.*

186. See *supra* notes 26-27 and accompanying text (discussing sources of Islamic law).

187. See George F. Hourani, *The Basis of Authority of Consensus in Sunnite Islam*, 21 STUDIA ISLAMICA 13, 13 (1964) (defining *ijma 'a*). *Ijma 'a* is the unanimous opinion of the Sunni community on a religious matter in a given generation. *Id.*

188. See WEERAMANTRY, *supra* note 26, at 31 (defining *ijma 'a* and *qiyas* as "dependent sources"). According to Weeramantry, *ijma 'a* and *qiyas* are "not sources *stricto sensu* but are rather means for discovering the law." *Id.*

189. See *id.* at 47-54 (describing four main schools of Sunni Islam). Throughout this subpart of the Note there will be references to the various schools of Islamic law. Within Sunni Islam there are four principal schools of jurisprudence: the Maliki school (most prevalent in North and West Africa); the Shaf' ai school (most prevalent in East Africa, Malaysia and Indonesia); the Hanafi school (prevalent in Central Asia, Turkey, Afghanistan, Egypt, Syria and Lebanon); and the Hanbali school (prevalent throughout the Arabian peninsula). *Id.* at 49-54. The majority of the world's Muslims adhere to Sunni Islam, and jurists of the four schools recognize and respect the legitimacy of all four schools. *Id.* at 47-49. Within Shi'i Islam there are also various schools of jurisprudence, including the Ithna 'Ashari (or Imami), the Zaydi, and the Ismaili schools. *Id.* at 48. The primary distinction between Shi'i and Sunni Islam involves the Shi'i belief that the descendants of the Prophet continued to provide divine inspiration and interpretation of Islam after the death of the Prophet. *Id.* at 48. Although significant, the theological distinctions between Sunni and Shi'i Islam do not play a major role in the issues discussed here.

190. See KASSIM, *supra* note 24, at 22 (describing *istihsan* generally). According to Sarakshi, *istihsan* is "the abandonment of the opinion to which reasoning by the doctrine of *qiyas* (systematic reasoning) would lead, in favor of a different opinion supported by stronger evidence and adapted to what is accommodating to the people." *Id.*

191. See *id.* at 14 (describing historical development of doctrine of *istihsan* within Maliki school, primarily by Abu Hanifa and Abu Yusuf). Other similar doctrines supporting the use

some scholars have maintained, reasoning based on equity.¹⁹² Rather, *istihsan* is independent reasoning based on specific references to the two primary sources of Islamic law, with consideration of the material facts and the best interests of the Islamic community.¹⁹³ Although it is controversial,¹⁹⁴ the doctrine of juristic preference finds significant support in both the Quran and the Sunna.¹⁹⁵

The concept of *istihsan* provides a pragmatic approach to solving the real problems not addressed specifically in the Quran or the Sunna.¹⁹⁶ Despite its

of limited independent reasoning appeared in the other Sunni schools. *Id.* at 60. Maliki jurists adopted the doctrine of *istislah* (what is preferable). Hanbali scholars turned to the more limited concept of *istishab* ("the presumption of continuity of judicial of legal situation as it had existed previously, so long as there does not exist any evidence for its discontinuity"). *Id.*; see also John Makdisi, *Legal Logic and Equity in Islamic Law*, 33 AM. J. COMP. L. 63, 67-68 (1985) (discussing concept of *istihsan*).

192. See Makdisi, *supra*, note 191, at 67, 97 (stating that "*istihsan* has never been maintained by Islamic jurists as reasoning based on an equity independent of the Koran and the Sunna"). Makdisi concludes that the doctrine is therefore close in meaning to "reasoned distinction of precedent" and rejects the interpretation of *istihsan* as reasoning by equity. *Id.* But see DOI, *supra* note 3, at 82 (contending that "equitable considerations may override the results of strict *Qiyas* taking into consideration the public interest"). These opposing views demonstrate that the debate over the precise meaning of *istihsan* is not closed.

193. See KASSIM, *supra* note 24, at 22 (providing definition of *istihsan*).

194. See HOURANI, *supra* note 41, at 166-67 (discussing trend in Islamic jurisprudence). By the eleventh century, orthodox jurists had successfully repressed the more radical forms of Islamic legal interpretation. *Id.* at 166. It was not until the late nineteenth century that progressive Muslim jurists began to re-examine the more flexible doctrines. *Id.* The most famous of the modern proponents of independent reason in Islamic jurisprudence was the Egyptian, Muhammad Abduh. *Id.* at 307. Writing at the turn of the century, Abduh advocated a return "in the acquisition of religious knowledge, to its first sources, and to weigh them in the scale of human reason." *Id.* at 308 (quoting Muhammad Abduh). Abduh advocated a return to reasoned interpretation in order to allow jurists to "relate changing laws and customs to unchanging principles, and by so doing to give them limits and a direction." *Id.*

195. See WEERAMANTRY, *supra* note 26, at 31 (providing famous prophetic tradition in support of *istihsan*). Weeramantry recounts:

[W]hen the Prophet appointed Muadh Ibn Jabal as a governor and judge in Yemen, the Prophet asked him 'According to what will you judge?' He replied, 'According to the Book of Allah.' 'And if you find nought therein?' 'According to the Sunnah of the Prophet.' 'And if you find nought therein?' 'Then I will exert myself to form my own judgement.' The Prophet's response was, 'Praise be to Allah who has guided the messenger of his Prophet to that which pleases His Prophet.'

Id.; see also DOI *supra* note 3, at 81 (citing another Quranic verse in support of *istihsan*: "[t]hose who listen to the word and follow the best meaning therein, they are they ones whom Allah has guided, and they are the ones who possess understanding" (quoting THE QURAN 39:18)); KASSIM, *supra* note 24, at 23 (citing another famous prophetic tradition in support of *istihsan*: "it is better that there is ease in your religion"); THE QURAN 2:185 (providing that "God intends every facility for you and not hardship").

196. See KASSIM, *supra* note 24, at 23 (describing key goals of *istihsan* as "convenience,

continued controversy, many leading figures in the Islamic world have turned to the doctrine of juristic preference as a possible answer to many of the problems facing Muslims in the modern world.¹⁹⁷ From its inception, juristic preference had and continues to have particular significance in the realm of international relations.¹⁹⁸ The doctrine of juristic preference has significance even in resolving disputes between two Islamic states within the Islamic world.¹⁹⁹

The following Subpart of this Note examines basic Islamic doctrines of property law. These doctrines have roots in the two primary sources of Islamic law, the Quran and the Sunna. Under the pragmatic and flexible doctrine of juristic preference, these principles could be transferred to the arena of boundary disputes between Islamic states. Such a transfer could provide for the reasoned resolution of international boundary disputes in the Islamic world using principles grounded in the primary sources of Islamic law. These transferred principles would thus fill the void left by the now largely irrelevant *Siyar* after the disappearance of the traditional caliphate.

B. The Sources and Arguments

In Islamic law, all determinations of ownership of real property must trace the land in question back to the point in time at which it came under Islamic control. Determinations begin at that point by reference to a well-developed system of categorization. The first important category in making determinations of ownership concerns the *quality* of the land. In this category, one asks if the land was fertile or barren at the time it came under Islamic control.²⁰⁰ If the land was barren, certain legal consequences follow; this Note

facilitation and what is accommodating to the people").

197. See WEERAMANTRY, *supra* note 26, at 43-44 (quoting speech given by King Fahd of Saudi Arabia in July 1983). King Fahd supported a return to Islamic legal interpretation as a solution to modern problems:

Today, my brothers, you see a multitude of new events and many unanswered questions and accumulated problems despite the abundance of theologians (*ulema*). The problems are enormous and the responsibility we have before God is larger than any one man's *ijtihad* of the events of life unless that *ijtihad* is acceptable to *ulema* who have thoroughly researched and examined old and new Islamic jurisprudence.

Id. at 43-44 (citing ASIaweek, July 1, 1983, at 13); see also KASSIM, *supra* note 24, at 102 (endorsing application of principles of juristic preference to modern problems facing Muslims).

198. See KASSIM, *supra* note 24, at 28 (noting that doctrine of juristic preference is particularly relevant to issue of international relations). Even Sarakshi, one of the earliest proponents of the doctrine of juristic preference, recognized that the doctrine's greatest significance is in the arena of international relations. *Id.*

199. See *id.* at 29 (quoting Sarakshi regarding relevance of juristic preference in disputes involving two territories within territory of Islam).

200. See ABD AL-MUKHTAR YUNUS, AL-MULKIYYA FI AL-SHARIA AL-ISLAMIYYA WA DAWRIHA FI AL-IQTISAD AL-ISLAMI [OWNERSHIP UNDER ISLAMIC LAW AND ITS ROLE IN THE ISLAMIC ECONOMY] 221-23 (1987) (introducing system of categorization).

discusses these later in this section. If the land was fertile, there is a second important question: *how* the land initially came under Islamic control.²⁰¹ Islamic jurists have identified three basic methods by which land can come under Islamic control: (1) by conquest or subjugation, (2) by submission of the inhabitants to Islam, and (3) by nonsubmissive treaty.²⁰² Each of these three main categories contains further subcategories. This system of categorization determines not only who owns the land, but what type of ownership is involved: private, communal, or ownership by the Islamic State.²⁰³

This section outlines the basic system of categorization. It also examines briefly the related but distinct Islamic legal principles regarding ownership of natural resources. The following section then provides specific arguments based on this system of categorization that could apply to current international boundary disputes.

1. Fertile Land

a. By Conquest/Subjugation

When an Islamic army occupies land by military force after an armed struggle or war, that land comes under control by conquest or subjugation.²⁰⁴ Muslim jurists disagree, however, over the type of ownership of land indicated by this category. Jurists of the Shaf'ai, Zahiri, and some scholars of the Hanbali and Maliki schools believe that land from conquest becomes the private property of the Muslims who took part in the conquest.²⁰⁵ Under this minority approach, the land is divided among the conquering Muslims as spoils of war. To support this position, the minority cites several Quranic verses.²⁰⁶ In addition, several Prophetic traditions (*hadiths*) offer more specific support for the spoils position.²⁰⁷

201. *Id.*

202. *Id.*

203. *See id.* at 221 (explaining that ownership of real property under Islamic law is of three types: private (*mulkiyya khasa*), community (*mulkiyya 'ama*) and ownership by Islamic state (*mulkiyya al-umma*)).

204. *See* MUHAMMAD MAHDI AL-ASAFI, *MULKIYYAT AL-'ARD W'AL THARWAT AL-TABI'YYA FI AL-FIQH AL-ISLAMI [LANDOWNERSHIP AND NATURAL RESOURCES IN ISLAMIC JURISPRUDENCE]* 33 (1992) (defining conquest); YUNUS, *supra* note 200, at 225-38 (same).

205. *See* AL-ASAFI, *supra* note 204, at 35 (discussing this view); *see also* YUNUS, *supra* note 200, at 248-49 (same).

206. *See* THE QURAN 8:41 ("Know that when you have taken from anything as spoils, one fifth of it shall belong to God and his Prophet and his Prophet's family, the orphans, the destitute and those who travel the road."); THE QURAN 33: 27 ("He made you masters of their land, their houses, and their goods, and of yet another land on which you had never set foot before, Truly God has power over all things."); *see also* YUNUS, *supra* note 200, at 228 (explaining that jurists focus on phrase "from anything" (*min shay'*), holding that its breadth is meant to encompass property of any sort).

207. *See* ABUDAUD, *KITAB AL-KHARAJ W'AL-'AMARA* 244-49 (reporting following *hadith*

The spoils position, however, is the minority view.²⁰⁸ The majority view, to which the Imami Shi'i and most Maliki and Hanbali²⁰⁹ jurists subscribe, holds that such land is communal property, owned by all Muslims and administered by the head of the Islamic community. In refuting the minority Shaf'ai view, the majority points out that several Quranic verses distinguish between real property and other property. The majority argues that spoils include livestock, personal property, money, and weapons (but not real property).²¹⁰ In support of its position, the majority cites a selected passage from the Quran:

As for those spoils of theirs which God has assigned to His apostle, you spurred neither horse nor camel to capture them: but God gives his apostles authority over whom he will. God has power over all things. The spoils taken from the town-dwellers and assigned by God to His apostle shall belong to God, to the Apostle and his kinsfolk, to the orphans, to the destitute and to the traveler in need; they shall not become the property of the rich among you. Whatever the Apostle gives you, accept it; and whatever he forbids you, forbear from it. Have fear of God; God is stern in retribution.²¹¹

The majority contends that this verse shows that God is responsible for all conquests. If God is responsible for all conquests, it is inappropriate to

related by Abu Harira). The *hadith* is as follows: "Any village that God and his Prophet subjugate will belong to God and his Prophet. Any village that the Muslims subjugate by force will belong in one fifth share to God and his Prophet and the remainder will belong to those who took part in the conquest." *Id.*; see also SAHIH MUSLIM, KITAB AL-JIHAD W'AL SIYR 1374-76 (reporting another applicable *hadith*). Another *hadith* states: "Any village that you carry away and occupy and in which you participate, any such village that resists God and his Prophet, one fifth of it will belong to God and his Prophet and the rest belongs to you." *Id.*

208. See YUNUS, *supra* note 200, at 249 (noting that another minority position exists within Hanafi school). Some Hanafi jurists believe that land acquired by conquest or subjugation remains the private property of the original owners as long as they continue to pay the property tax assessed by the Islamic state. *Id.* However, they also hold that such land reverts to the Islamic State if the owner dies without an acceptable heir under Islamic law. *Id.* at 251.

209. *But see* AL-ASAFI, *supra* note 204, at 48 (distinguishing Hanbali position). Hanbali jurists hold that the Imam may choose between dividing such land as spoils or declaring it to be communal property belonging to all Muslims. *Id.*

210. See *id.* at 38 (addressing Quranic verse used by minority). The minority cites Chapter 33, Verse 27: "He made you masters of their land their houses, and their goods, and of yet another land on which you had never set foot before, Truly God has power over all things." *Id.* The majority points out that the phrase "he made you masters of . . ." (*awriithakum*) does not mean private ownership because the same word is used with reference to the Quran where it certainly does not mean private ownership. *Id.* The majority also refutes the minority's interpretation of the *hadith* that reads: "Any village that you carry away and occupy and in which you participate, any such village that resists God and his Prophet, one fifth of it will belong to God and his Prophet and the rest belongs to you." *Id.* at 39. The majority interprets the final phrase "to you" (*lakum*) to mean "to all Muslims" as communal property and not to the muharibun as spoils. *Id.*

211. THE QURAN 58:6-8.

divide conquered land as spoils to reward those who have taken part.²¹² To do so would suggest that Man and not God is responsible for the conquest. Also, the majority interprets the references to orphans and the destitute as evidence that God intended any land conquered in the name of Islam to be the property of all Muslims.²¹³

The majority view – that such land is the communal property of all Muslims – is somewhat misleading. Jurists also hold that individual Muslims may gain limited property rights in land assigned to this category.²¹⁴ Individuals can acquire such rights by receiving a grant from the leader of the Islamic community or simply by occupying and using the land for any useful purpose.²¹⁵ A Muslim holding these limited property rights may not sell the land itself, but he may transfer the same usufruct rights by sale, gift, or devise.²¹⁶ The property rights continue as long as the individual owner continues to use the land for some beneficial purpose.²¹⁷

Within this subcategory of fertile land gained through conquest, a further distinction exists between actively cultivated fertile land and naturally fertile land. Examples of naturally fertile land include pastures and forests.²¹⁸ According to most jurists, the majority rule discussed above applies to both actively cultivated and naturally fertile land.²¹⁹ The Imami Shi'i jurists, however, believe that the Islamic State, not the Muslim community in general, owns the naturally fertile land.²²⁰

b. By Submission to the Call of Islam

Land that comes under Islamic control by the submission of the inhabitants to the call of Islam, without armed struggle or resistance, is considered the private property of the original inhabitants.²²¹ Numerous examples of this

212. See YUNUS, *supra* note 200, at 231-33 (describing majority's interpretation of verse).

213. See *id.* (discussing usufruct rights on communal property).

214. See AL-ASAFI, *supra* note 204, at 100-05 (discussing acquisition and transfer of usufruct rights on communal property).

215. *Id.*

216. *Id.* at 106-07.

217. *Id.* at 106.

218. See YUNUS, *supra* note 200, at 239 (providing examples of naturally fertile land).

219. *Id.*

220. *Id.* at 250 (providing argument in support of this view). The argument is that naturally fertile land has no owner before it comes under Islamic control. *Id.* Under Shi'i doctrine, all unowned land is the property of the Islamic state. *Id.* (citing MUHAMMAD BAQIR AL-SADR, IQTISADUNA 321).

221. See ABU YUSUF, AL-KHARAJ 58-59 (providing following prophetic tradition: "I asked the leader of the faithful what the law was regarding those non-Muslims who submitted themselves and their lands, and he replied: truly, they are protected, and whatever wealth they submit shall be theirs and also their land shall be theirs"); see also YUNUS, *supra* note 200, at 240-42 (same).

type of property exist throughout the history of Islamic expansion, such as the cultivated areas of Yemen and Bahrain in the early period of Islamic expansion on the Arabian peninsula.²²² Indonesia provides a later example that is further removed from the birthplace of Islam.²²³ All of the jurists of the various schools agree that land in this category becomes the private property of the original inhabitants.²²⁴

c. By Nonsubmissive Treaty

The category of land coming under Islamic control by nonsubmissive treaty includes land held by non-Muslims in the face of unsuccessful attempts at subjugation and conquest.²²⁵ In such cases, the terms of the specific treaty determine the ownership of the land. Muslims must respect the terms of the treaty and may take no more property rights in the land than those granted by the treaty.²²⁶ This is the majority position among virtually all Muslim jurists.²²⁷ If the treaty so provides, the non-Muslims have full rights to sell, give, or devise the land that they owned before it came under Islamic control.²²⁸ Moreover, most jurists hold that non-Muslims in such cases may sell and devise their land according to their own religious laws.²²⁹

Some disagreement persists among the jurists, however, concerning property taxes assessed against non-Muslim landowners. Two questions cause the disagreement: First, must the owner continue to pay the tax if he converts to Islam? Second, if the non-Muslim owner sells the land to a

222. YUNUS, *supra* note 200, at 240 (providing examples).

223. *Id.*

224. See AL-ASAFI, *supra* note 204, at 267 (discussing this unanimous position); YUNUS, *supra* note 200, at 248 (same).

225. See YUNUS, *supra* note 200, at 241 (defining category).

226. See ABU ABID, AL-AMWAL 211 (providing following *hadith* in support of this view: "If you make war against a people and they give up their wealth to your protection but without submitting themselves or their sons, and they negotiate a peace with you, then take nothing from them more than that, for verily more than that is not permitted you"); see also YUNUS, *supra* note 200, at 241-42 (explaining that such treaties could be of two general types). First, the treaty could provide that the non-Muslims would retain only a possessory interest in the land they owned before it came under Islamic control, with actual title belonging to all Muslims as communal property. *Id.* Such a possessory interest would remain as long as the possessor or his descendants remained on the land, but neither the possessor nor any other individual – Muslim or non-Muslim – could purchase the land as private property. *Id.* The second type of treaty would provide that the land would remain the private property of the non-Muslims who held it before it came under Islamic control. *Id.* In this case, the non-Muslim owners would have full title to the land, subject only to the tax assessed by the Imam. *Id.*

227. See AL-ASAFI, *supra* note 204, at 254 (discussing majority view); YUNUS, *supra* note 200, at 249 (same).

228. See YUNUS, *supra* note 200, at 242 (describing extent of rights under such treaties).

229. AL-ASAFI, *supra* note 204, at 255.

Muslim, what happens to the property tax?²³⁰ The majority view maintains that the tax ceases if the non-Muslim owner converts to Islam or if he sells the land to a Muslim buyer.²³¹

2. Barren Land

The majority view holds that barren land initially belongs to no one.²³² Therefore, most scholars maintain that considerations of *how* barren land came under Islamic control are largely irrelevant in determining ownership.²³³ Under Islamic law, the support for this view derives from the absence of any explicit prohibition against taking barren land for private ownership.²³⁴

However, most schools of thought also hold that a Muslim can obtain private ownership of land by revitalizing and cultivating it.²³⁵ Considerable and specific support for this position lies largely in the form of prophetic traditions.²³⁶ This interpretation also finds strong support in the commentary of prominent Muslim jurists from several different schools.²³⁷

230. See *id.* at 256-58 (discussing these two dilemmas).

231. See *id.* at 257 (describing majority position as set out by Ibn Qudama Al-Mukadisi and Ibn al-Qayim al-Jawziyya, two famous Hanbali jurists). Most Maliki scholars believe, however, that under certain circumstances the tax may pass to the non-Muslim seller personally if he sells the land to a Muslim buyer. *Id.* at 260. Most Imami jurists also believe that if a non-Muslim sells land to a Muslim buyer, the tax passes from the land to the seller personally. *Id.* at 261.

232. See *id.* at 139 (describing this basic assumption); YUNUS, *supra* note 200, at 243 (same).

233. See YUNUS, *supra* note 200, at 243 (discussing majority view). *But see* AL-ASAFI, *supra* note 204, at 143 (noting minority view). According to a small minority of early scholars, there is an exception for barren land taken by force, which is considered the communal property of all Muslims. *Id.*

234. See AL-ASAFI, *supra* note 204, at 139 (discussing underlying support for majority position). *But see id.* at 134 (noting minority Shi'i view that *all* unowned property belongs to Islamic State). The support for this minority position comes from several Prophetic traditions which mention that "all the wasteland" and the "dry river valleys" belong to "God's Prophet, and to the Imam after him, to do with as he pleases." *Id.*

235. See YUNUS, *supra* note 200, at 244 (expounding on majority opinion). *But see* AL-ASAFI, *supra* note 204, at 147-53 (explaining minority Imami view also held by small number of Hanafi scholars that barren land of any sort belongs to Islamic state). However, even this minority view allows individual Muslims to obtain usufruct rights by means of revitalization or cultivation. *Id.* at 147. This possessory interest is exclusive and includes full rights to use and profit from the land. *Id.* at 144. The right continues as long as the possessor maintains the land's fertility, although title remains permanently with the Islamic State. *Id.*

236. See AL-ASAFI, *supra* note 204, at 145 (providing numerous traditions in support of this view). Four of the most frequently cited *hadiths* are as follows: (1) "Whoever revitalizes barren land, the land shall belong to him;" (2) "Return the land to God and His Prophet and it shall be yours;" (3) "Whatever tribe revitalizes some land and makes it fertile, they will have a right to it, and it will be theirs;" and (4) "Whoever cultivates land that belongs to no one, then that will belong to him." *Id.*

237. See *id.* (stating that "the general opinion of the jurists of all the major cities is that

This interpretation raises the question of what happens to barren land that is acquired through revitalization and then allowed to revert to its barren state by the initial owner. If a subsequent possessor revitalizes the land, can he then acquire ownership? The majority says that he cannot.²³⁸ Their rejection of such a transfer of ownership reflects Islamic law's historic unwillingness to accept the notion of adverse possession.²³⁹ Once initial ownership by revitalization has been established, it can end only by sale, grant, or devise.²⁴⁰ Still, a minority holds that ownership depends upon the owner's continued cultivation or beneficial use and maintenance of the land.²⁴¹

3. *Natural Resources*

The law governing ownership of natural resources is related to the categories discussed above. It is, however, a distinct area of Islamic law and merits some individual attention. Determinations of ownership of natural resources depend to some degree on the type of ownership of the land in which the resources are located and on the type of resources involved.²⁴²

a. *Mineral Resources*

Almost all jurists agree that mineral resources located on State property belong to the Islamic State.²⁴³ More specifically, the head of the Islamic State should exploit and administer the mineral resources for the benefit of all Muslims.²⁴⁴ Jurists disagree, however, on the issue of ownership of mineral resources located on land *not* owned by the Islamic State.²⁴⁵

Maliki jurists maintain the majority view that all mineral resources on communal *or* private property are the communal property of all Mus-

ownership of barren land comes through revitalization" (citing TATHKIRAT AL-FUQAHA 400)).

238. See *id.* at 154-55 (explaining this majority view held by jurists of Shaf'ai school as well as some jurists of the Maliki and Hanafi schools).

239. See S.H. AMIN, *WRONGFUL APPROPRIATION IN ISLAMIC LAW* 3 (1983) (discussing respect for property in Islamic law). Amin notes that:

Respect for property in Islam is so unconditional that the concept of negative prescription and limitation has never been received in Islamic law at all. Indeed when this concept was for the first time introduced to Iranian law in the Civil Procedure Code, the Islamic jurists branded the concept as un-Islamic and strongly opposed it.

Id.

240. See AL-ASAFI, *supra* note 204, at 155 (quoting famous jurist al-Kasani).

241. See *id.* (explaining minority view held by some Maliki and Hanafi jurists).

242. See YUNUS, *supra* note 200, at 253 (describing categorization in law of natural resources).

243. See *id.* at 253 (supporting majority opinion).

244. See *id.* (detailing role of head of Islamic State).

245. See *id.* at 254 (noting widespread disagreement among jurists on this issue).

lims.²⁴⁶ According to the Maliki view, the head of the Islamic State should administer and exploit these resources in the best interests of the Islamic community. The majority view relies in part on the Quranic verses:

He is the One who created for you everything that the earth contains, even up to the sky, and He fashioned it into seven heavens. He has knowledge of all things.²⁴⁷

The majority view also relies on Man's absolute need for mineral resources.²⁴⁸ Man cannot do without these resources, so their equitable distribution is extremely important. The ruler (*hakim*) has the power (*sulta*) to distribute and exploit the resources according to the needs of the Islamic community.²⁴⁹ Therefore, the head of the Islamic community must bear the responsibility of exploiting and distributing mineral resources.²⁵⁰

Some jurists have created a further distinction between mineral resources that are easy to extract and exploit and those that are difficult to extract and exploit.²⁵¹ The general principle holds that an individual can obtain ownership of minerals that are difficult to exploit, but not of easily exploited mineral resources.²⁵² Al-Asafi gives oil, coal, and salt as examples of easily exploited resources.²⁵³ Iron, gold, and silver are examples of mineral resources that are difficult to extract and exploit.²⁵⁴ This distinction appears to rely rather heavily on policy rather than religious grounds. There is no need to encourage people to exploit resources that are easy to extract.²⁵⁵ The possibility of

246. See *id.* (discussing Maliki view). Yunus notes that a minority Maliki view holds that minerals on private land are the private property of the owner. *Id.* at 255.

247. THE QURAN 2:29; see also YUNUS, *supra* note 200, at 255 (discussing Quranic verse). The majority interpretation holds that the phrase "for you" (*lakum*) means for all Muslims communally. *Id.* The phrase "everything that the earth contains" (*ma fi al-'ard jam'iyyan*) refers *inter alia* to mineral resources. *Id.*

248. See YUNUS, *supra* note 200, at 255 (explaining Man's need for mineral resources).

249. See AL-ASAFI, *supra* note 204, at 303 (detailing responsibilities of head of Islamic State regarding distribution and exploitation of mineral resources).

250. See *id.* at 299-303 (supporting this conclusion); YUNUS, *supra* note 200, at 255 (same).

251. See AL-ASAFI, *supra* note 204, at 319 (discussing distinction in detail). The actual terms for this distinction are *zahira*, which means "apparent" or "obvious," and *batina*, which means "concealed" or "internal." *Id.* at 319-20. However, jurists use them in this context to refer to the amount of human labor necessary to extract or exploit the resources. *Id.* at 319-20; see also YUNUS, *supra* note 200, at 255 (discussing further distinctions). Some Hanbali and Zaidi jurists make a further distinction between solid and nonsolid minerals. *Id.* They maintain that tar, petroleum, water, and other nonsolid resources cannot be private property—they belong to everyone. *Id.* According to these same jurists, however, solid minerals (hard metals, for example) belong to the owner of the land on which they are located. *Id.*

252. See AL-ASAFI, *supra* note 204, at 319-21 (discussing this distinction).

253. *Id.* at 319.

254. *Id.* at 319-20.

255. *Id.*

ownership, however, creates a useful incentive to encourage the extraction of more inaccessible mineral resources.²⁵⁶

b. Water Resources

Given the birthplace of Islam, it is not surprising that Islamic law contains many specific rules regarding the ownership of water and water rights. These rules depend on an even more elaborate system of classification. Jurists specify various rules with respect to underground water, lakes, rivers, well water, water extracted from underground sources on private property, and water on barren land.²⁵⁷ However, the general principle is the same: water is the communal property of all Muslims.²⁵⁸ This principle relies on a very well-known prophetic tradition: "Man shares in three things: water, fire, and pasture."²⁵⁹ The more specific rules regarding possessory and usufruct rights to various water resources are interesting and could certainly have a bearing on some international boundary disputes. However, they are also extremely complicated and a full discussion of the specific rules is beyond the scope of this Note.²⁶⁰

c. Naturally Occurring Pasture

Naturally occurring pasture (*al-kila'*) refers to vegetation that does not depend on active human cultivation or irrigation and is sufficient to support grazing.²⁶¹ Pasture that depends on active human cultivation or irrigation is the property of the owner of the land itself.²⁶² The vast majority of jurists hold that naturally occurring pasture is the communal property of all Muslims.²⁶³ This rule applies whether the pasture is on State land, communal land,

256. *Id.* This distinction may not be particularly useful today because the categorization of minerals as difficult or easy to extract is ambiguous and subject to change. For example, AL-Asafi first lists oil as an example of a mineral resource that is easy to exploit. *Id.* at 319. However, he later admits that in today's world this example is no longer true. *Id.* at 321. Oil exploitation now imposes significant costs in both the extraction and refining processes and so it has become a mineral resource that is difficult to exploit. *Id.*

257. See YUNUS, *supra* note 200, at 261-63 (discussing various categories and rules).

258. See *id.* at 261 (supporting general principle).

259. See AL-ASAFI, *supra* note 204, at 292 (discussing famous prophetic tradition); see also YUNUS, *supra* note 200, at 256 (same). A further interpretation of this *hadith* emphasizes the fact that the three resources mentioned "are not part of the land, and one does not own them with the land." *Id.*

260. See AL-ASAFI, *supra* note 204, at 329-40 (providing discussion of rules governing ownership of water); YUNUS, *supra* note 200, at 261-63 (same).

261. See YUNUS, *supra* note 200, at 264 (defining term "naturally occurring pasture").

262. *Id.*

263. See *id.* (describing majority position).

or private property.²⁶⁴ The support for this position stems from the same prophetic tradition that supports communal ownership of other natural resources: "Man shares in three things: water, fire, and pasture."²⁶⁵

This position presents a problem because communal use of naturally occurring pasture entails a severe infringement on the rights of the land's owner, especially in the case of privately owned land. Some jurists avoid this problem by holding that the owner of land on which there is naturally occurring pasture may fence the land off.²⁶⁶ However, if someone requests the use of the pasture, the owner must cut the vegetation and bring it to that person as an alternative to allowing the person to come onto the land to use it.²⁶⁷ Some Maliki scholars hold that naturally occurring pasture on privately owned land that is fenced in or otherwise clearly marked belongs to the owner of the land.²⁶⁸

C. Principles for Application to International Boundary Disputes

The Islamic law of property yields several broad principles that Islamic states could use in resolving international boundary disputes with other Islamic states. The final sections of this Note outline three of these principles and examine the ways in which each principle might apply to the facts of the Western Sahara dispute. The first broad concept is the doctrine of ownership through beneficial use.²⁶⁹ The second is the concept of State stewardship of communal land and natural resources.²⁷⁰ The third concept is absolute respect for the terms of agreements by which property is transferred.²⁷¹

1. Beneficial Use

The previous subpart described the principle that individuals can acquire ownership of barren land by revitalizing it, cultivating it, or making some other beneficial use of it.²⁷² An Islamic nation-state could use this principle

264. *Id.*

265. See AL-ASAFI, *supra* note 204, at 292 (discussing famous prophetic tradition); see also YUNUS, *supra* note 200, at 256 (same). A further interpretation of this *hadith* emphasizes the fact that the three resources mentioned "are not part of the land, and one does not own them with the land." *Id.* at 256. There is extensive debate surrounding the meaning of the term "fire" (*al-nar*) in the *hadith*. *Id.* at 264-65. Some jurists hold that it refers literally to fire itself. *Id.* Others hold that it refers to the *means* of fire including dead wood and even live trees. *Id.*

266. See YUNUS, *supra* note 200, at 264 (providing various interpretations of general rule).

267. *Id.*

268. See *id.* (discussing Maliki view).

269. See *supra* notes 235-41 and accompanying text (outlining beneficial use doctrine).

270. See *supra* notes 209-17, 246-50 and accompanying text (discussing ownership of communal land and mineral resources).

271. See *supra* notes 225-31 and accompanying text (describing obligations of Muslims under treaties).

272. See *supra* notes 235-41 and accompanying text (providing basis for this principle).

in a two-pronged argument in support of a sovereignty claim. First, the state would have to show that the territory in question was barren at the time it came under Islamic control. Barren land for the purposes of this argument is land that is agriculturally barren and sterile.²⁷³ Land that is agriculturally barren but that contains valuable natural resources still is considered barren land because natural resources are not *part* of the land for the purpose of determining ownership.²⁷⁴

Second, the State would have to show that it entered the land while it was barren and put it to some beneficial use. Again, beneficial use for the purpose of determining ownership probably is limited to beneficial *agricultural* use. It would *not* show beneficial use for the government to extract and exploit natural resources in the disputed territory. It is possible that a State could satisfy this requirement by providing agricultural subsidies, funding agricultural development by local people in the region, funding agricultural development by its own nationals in the region, or by directly cultivating land through government-owned model or experimental farms.

One issue that could arise with respect to this argument is a change in sovereignty. If one state (or nationals of that state) puts the disputed territory to beneficial use and later abandons it and a second state then occupies the territory and puts it to beneficial use, which state has the stronger claim? The majority opinion holds that the original party retains title despite subsequent abandonment of the land.²⁷⁵ Still, there is a substantial minority position holding that ownership depends upon the owner's continued cultivation or beneficial use and maintenance of the land.²⁷⁶ A given Islamic state's ability legitimately to argue one of these two positions may depend on the dominant school of jurisprudence in the region.

2. State Stewardship of Communal Property

A second argument that could prove useful in international boundary disputes involves the concept of communal ownership of certain land and natural resources. A majority view holds that all fertile land that comes under Islamic control through conquest or armed subjugation is communal property owned by all Muslims and administered by the head of the Islamic community.²⁷⁷ This rule applies both to naturally fertile land and to land that is fertile due to active cultivation or irrigation by non-Muslims at the point of subjugation.²⁷⁸

273. See YUNUS, *supra* note 200, at 243 (defining barren land for property law purposes).

274. Cf. *supra* notes 246-68 and accompanying text (illustrating this distinction).

275. See AL-ASAFI, *supra* note 204, at 154-55 (explaining this majority view held by jurists of Shaf'ai school as well as some jurists of Maliki and Hanafi schools).

276. See *id.* at 155 (explaining minority view held by some Maliki and Hanafi jurists).

277. See *supra* notes 209-17 and accompanying text (analyzing property rights in land acquired by conquest or subjugation).

278. See *supra* note 219 and accompanying text (noting majority view of ownership of

As discussed above, the majority view also holds that most natural resources – most importantly, mineral resources – are communal property.²⁷⁹ As with communally owned land, the ruler of the Islamic State is responsible for the administration and exploitation of the resources for the benefit of the Islamic community.²⁸⁰ In the traditional Islamic system, the Caliph bore this responsibility. However, in the world of nation-states, a different interpretation is necessary.

An Islamic state seeking to use this principle before the ICJ or in arbitration could make two related arguments. First, the state should point to its cultural, historical, and religious ties of allegiance to any Muslims living in the disputed territory. The state with the closest ties to the local Muslims would seem to be in the best position to administer the resources of that territory on their behalf and for their benefit. Second, the state should point to its technological and infrastructural *ability* efficiently to exploit and administer the resources. The state most *able* efficiently to exploit and extract the resource should have control of the land and administer it on behalf of those people living on it or near it.

The unitary Caliphate is gone, and a system of nation-states has replaced it.²⁸¹ In the modern system, Islamic nation-states must administer these communal resources on behalf of the entire Islamic community. This solution fulfills the purpose behind the Islamic law of natural resources. By providing efficient and religiously legitimate stewardship of communal property, the nation-state will work for the benefit of the entire Islamic community.

3. *Respect for Territorial and Boundary Agreements*

Many scholars have addressed the issue of Islamic concepts of *pacta sunt servanda* in Islamic law, even in traditional Islamic international law.²⁸² However, the general concept in Islamic law lacks the breadth of its Western counterpart.²⁸³ The Islamic law of property provides a much stronger statement of the principle *pacta sunt servanda* with specific reference to agreements concerning the transfer of territory.

cultivated and fertile land).

279. See *supra* notes 246-68 and accompanying text (describing communal property view of natural resources).

280. See *supra* notes 248-50 and accompanying text (describing ruler's responsibility to use resources for good of Islamic community).

281. Cf. SANHURI, *supra* note 179, at 569 (discussing replacement of traditional Caliphate with irregular Caliphate compatible with system of nation-states).

282. See *supra* notes 88-91 and accompanying text (discussing Ford's analysis of Islamic version of *pacta sunt servanda*).

283. See *supra* notes 88-91 and accompanying text (discussing Islamic version of *pacta sunt servanda*).

In Islamic property law, the principle appears in absolute terms. In interpreting property rights transferred by agreement, the terms of the agreement determine the rights of the parties absolutely.²⁸⁴ Muslims must respect the terms of the treaty and may take no more property rights in the land than those granted by the treaty.²⁸⁵ This is the majority position among virtually all Muslim jurists.²⁸⁶

This principle suggests that when a boundary agreement that is valid under international law exists between the parties, its terms will determine the territorial rights of the parties. This concept may seem somewhat self-evident. However, Libya's arguments against the terms of the 1955 boundary agreement suggest that the concept needs reinforcement.²⁸⁷

D. Application to the Facts of the Western Sahara Case

Applying these principles to any specific territorial dispute requires two preliminary steps. First, it requires a determination of whether the land in dispute was fertile or barren at the time it came under Islamic control and thereafter. Second, if the land was fertile at the time it came under Islamic control, one must examine *how* it came under Islamic control.

1. Classification

Classification of the land encompassing the territory of Western Sahara is a fairly straightforward task. A French visitor to the area in the seventeenth century described it as a desolate desert "[i]nhabited only by Wild Beasts."²⁸⁸ Little has changed since the seventeenth century to question the veracity of that description.²⁸⁹ For the most part, the territory is a sandless desert.²⁹⁰ The land consists of dry, rocky plains rising gradually to the coast.²⁹¹ Near the coast, the territory is characterized by dry, alluvial plains and in the interior by "sterile rocky plateaus."²⁹² The coastal regions receive two to eight inches

284. See *supra* notes 225-31 and accompanying text (describing laws governing non-submissive treaties).

285. See *supra* notes 225-31 and accompanying text (discussing laws governing non-submissive treaties).

286. See AL-ASAFI, *supra* note 204, at 254 (discussing majority position); YUNUS, *supra* note 200, at 249 (same).

287. See *supra* notes 171-73 and accompanying text (discussing Libya's arguments in dispute with Chad).

288. See DAMIS, *supra* note 101, at 1-2 (quoting *ŒUR LE MAIRE, VOYAGES AUX ISLES CANARIES, CAP-VERD, SENEGAL (1695)*).

289. See *id.* at 1 (noting that region "has never been an inviting area").

290. *Id.* at 2.

291. *Id.*

292. *Id.* at 3.

of rainfall per year, while the interior receives almost none.²⁹³

Generally, the entire region is totally unsuited for agriculture.²⁹⁴ The *Sakiet al-Hamra* is the only river in the region, and it only provides irrigation sufficient for year-round cultivation of date trees along its banks.²⁹⁵ The region also exhibits a strong cultural barrier to agriculture. For centuries, local tribes delegated any agricultural tasks to slaves from sub-Saharan Africa. The local Sahrawis associate agriculture with slavery and remain extremely disdainful of it.²⁹⁶ As a result of this cultural legacy, the Western Sahara has seen none of the private land ownership disputes "that plagued many other Third World countries."²⁹⁷

The slopes and depressions "that punctuate the rocky plains are relatively fertile" and nurture some wild vegetation including acacia, jujube, gum trees, scattered scrub brush, thorn trees, esparto grass, clover, and small flowers.²⁹⁸ In the southern region, there is enough of this naturally occurring vegetation to support some game animals including hare, gazelle, antelope, and ostriches.²⁹⁹ The naturally occurring pasture also supports considerable migrant grazing.³⁰⁰

293. *Id.*

294. See VIRGINIA THOMPSON & RICHARD ADLOFF, *THE WESTERN SAHARANS: BACKGROUND TO CONFLICT* 123 (1980) (discussing geography of Western Sahara). The authors note that "[i]n the Spanish Sahara, agriculture lacks everything it needs in sufficient quantity for its development except sunshine." *Id.* Barriers to agriculture include: poor and scanty soil; limited and highly saline water; wind and sand storms; locusts; droughts; extremely high temperatures; and an unwilling and unskilled workforce. *Id.*

295. DAMIS, *supra* note 101, at 3; see also THOMPSON & ADLOFF, *supra* note 294, at 123 (noting that *Sakiet al-Hamra* is main water source in area).

296. See JOHN MERCER, *SPANISH SAHARA* 167 (1976) (describing cultural barrier to agriculture among nomads in region); THOMPSON & ADLOFF, *supra* note 294, at 123-24 (stating that only descendants of former slaves (called *herratín*) farmed land).

297. THOMPSON & ADLOFF, *supra* note 294, at 124; see also *Western Sahara*, 1975 I.C.J. 12, 41 (Oct. 16) (discussing landownership in region). The ICJ noted that "the right of pasture was enjoyed in common" but that "some areas suitable for cultivation, on the other hand, were subject to a greater degree to separate rights." *Id.*

298. DAMIS, *supra* note 101, at 3; see also MERCER, *supra* note 296, at 39 (describing local vegetation); THOMPSON & ADLOFF, *supra* note 294, at 123 (same). These bowl-like depressions are called *grara* and are generally no more than 300 meters in diameter. MERCER, *supra* note 296, at 39.

299. See DAMIS, *supra* note 101, at 3 (describing local wildlife). *But see* MERCER, *supra* note 296, at 39-40, 46-47 (noting that Spanish and nomads had hunted game animals to near extinction by 1970s).

300. See DAMIS, *supra* note 101, at 3 (discussing animal husbandry and migratory grazing). In 1973, for example, the land supported 76,000 camels and 120,000 goats. *Id.*; see also MERCER, *supra* note 296, at 165 (providing slightly different but roughly comparable figures for domesticated animal population from 1952-1971); THOMPSON & ADLOFF, *supra* note 294, at 124 (discussing animal husbandry in area).

This description accounts for both the current condition of the land and the condition at the time it came under Islamic control.³⁰¹ Spanish and later Moroccan intervention did little to change the nature of the land.³⁰² Agriculture simply is not viable in the conditions of the Western Sahara. The local people from the time of Spanish occupation through the present have had to import food for their survival.³⁰³ The local economy relies on animal husbandry, crafts, coastal fishing, and mining.³⁰⁴ Western Sahara was, and remains, one of the most barren regions in Africa. Given this classification, the second question – *how* Western Sahara came under Islamic control – is irrelevant.³⁰⁵

2. Beneficial Use Applied

The classification of the land as barren at the time it came under Islamic control leads to the conclusion that it is unowned.³⁰⁶ Anyone could have established ownership over the land by revitalizing it or cultivating it.³⁰⁷ If, for example, Morocco had launched a significant program supporting and funding irrigation and cultivation of large parts of the region, such actions might have established ownership through the doctrine of beneficial use. However, Morocco launched no such programs. Indeed, given the severity of the conditions, it is possible that no amount of money or water could change the barren status of Western Sahara.³⁰⁸

301. See MERCER, *supra* note 296, at 10 (discussing conditions in region).

302. See THOMPSON & ADLOFF, *supra* note 294, at 123-24 (discussing agriculture in the region). The Spanish made several relatively unsuccessful attempts at setting up experimental model farms between 1950 and 1975. *Id.*; see MERCER, *supra* note 296, at 270-71 (discussing Spanish experimental farms). These farms encountered the same problems agriculture had always faced in the region – saline water, poor soil and an ambivalent source of labor. *Id.*

303. See THOMPSON & ADLOFF, *supra* note 294, at 123 (discussing food imports). Thompson and Adloff note that even in the best years for local agriculture the inhabitants must import large amounts of food. *Id.*

304. See *id.* at 122-26 (discussing local economy of Western Sahara).

305. See *supra* note 233 and accompanying text (noting that Islamic law does not consider how barren land came under Islamic control when determining ownership). Arabs led the Islamic expansion into Morocco in 680 A.D. MERCER, *supra* note 296, at 71. The local Berber people, having converted, then spread Islam south into the Sahara in the course of trans-Saharan trade with the people of the Upper Niger and Senegal. See *id.* at 71-72 (describing spread of Islam in region).

306. See *supra* notes 232-34 and accompanying text (discussing classification of barren land).

307. See *supra* notes 235-37 and accompanying text (describing requirements for obtaining ownership of barren land).

308. See TONY HODGES, WESTERN SAHARA: THE ROOTS OF A DESERT WAR 122 (1983) (quoting Admiral Carrero Blanco, vice-president of Spanish government in 1966). Admiral Blanco remarked of the region: "We will never extract the slightest material benefit here." *Id.*

Given the sterility of the land, there must have been some reason that Morocco, Spain, and Mauritania all showed such interest in the region. One possible explanation lies in Western Sahara's mineral resources. These natural resources also provide a possible argument for Morocco's sovereignty claim on the basis of state stewardship of communal property.

3. *State Stewardship of Communal Property Applied*

In 1961, Spanish geologists discovered one of the world's largest deposits of phosphate rock at Bu Craa near El-Ayoun in Western Sahara.³⁰⁹ In 1975, the Spanish extracted 5.6 million tons of phosphate from the Bu Craa vein.³¹⁰ Under Islamic law governing natural resources, these minerals are communal property.³¹¹ The leader of the Islamic community bears the responsibility of exploiting them in the best interests of all Muslims.³¹²

In the modern world of nation-states, this means that the leader of the Islamic nation-state best able to manage the resources for the benefit of the local Muslims should have control over exploitation of the minerals. To make this argument, Morocco would have to show two things. First, it would have to argue that by reason of its close historical, cultural, and religious ties to the people of Western Sahara, Morocco occupies the best and most legitimate position to administer the resources on the behalf of the inhabitants and for the good of the entire Islamic community. These arguments would resemble closely the arguments Morocco put before the ICJ in support of its legal ties to the territory.³¹³

Second, Morocco would need to argue that it is best equipped technologically to exploit the resources on behalf of the local Muslims and the Islamic community. Within its own internationally recognized borders, Morocco holds the largest phosphate reserves in the world.³¹⁴ Estimated at 16.2 billion tons, Morocco's reserves constitute approximately half of total world reserves.³¹⁵ Morocco's Office Cherifien des Phosphates (OCP) has mined

(quoting LE MONDE, Jan. 22, 1980).

309. DAMIS, *supra* note 101, at 4.

310. *Id.* There is some evidence of other minerals in the region including iron, titanium, vanadium, zinc, uranium, potassium, copper, gold, natural gas, magnetite and petroleum. *Id.* However, these other minerals remain unexploited if they in fact exist. *Id.*

311. *See supra* notes 246-50 and accompanying text (discussing stewardship of mineral resources).

312. *See supra* notes 247-50 and accompanying text (noting head of Islamic State's authority to control mineral resources).

313. *See supra* notes 112-20 and accompanying text (discussing Morocco's arguments in Western Sahara dispute).

314. DAMIS, *supra* note 101, at 25.

315. *Id.*

phosphates since 1921, and it has operated as a state-owned monopoly since Moroccan independence in 1956.³¹⁶ In 1981, the OCP produced 19.7 million tons of phosphates.³¹⁷ Moreover, Morocco was able to export 15.6 million tons of this total due to low domestic demand.³¹⁸ The OCP plans eventually to expand production of Western Sahara's Bu Craa phosphate mine to somewhere between five and ten million tons per year.³¹⁹

Given its position as a major world producer and exporter of phosphates, Morocco stands in an excellent position to revitalize Western Sahara's own phosphate industry – which virtually collapsed after Spanish decolonization³²⁰ – through the OCP. As an Islamic state with close religious and cultural ties to the Muslims in Western Sahara, Morocco is also the most legitimate Islamic authority to oversee the exploitation and distribution of this communally owned natural resource.

4. *Respect for the Terms of Property Agreements Applied*

No significant treaties exist between Morocco and other states that might provide a useful argument under this principle. The 1975 Madrid accords between Morocco, Mauritania, and Spain cannot reasonably qualify as valid international boundary or territorial agreements. The accords themselves were secret, and the only public agreement was a declaration of principles which stated that Spain would withdraw from the territory by the end of February 1976.³²¹ In reference to Morocco and Mauritania, the declaration mentioned a temporary administration "in which Morocco and Mauritania will participate" along with the Spanish authorities.³²² The declaration contained no reference to the permanent division or sovereignty of the territory.³²³

316. *Id.* at 25-26.

317. *Id.* at 27 tbl.1.

318. *See id.* at 27, 28 tbl.2 (discussing Moroccan exportation of phosphates).

319. *Id.* at 29.

320. *See id.* at 27 tbl.1, 28 tbl.2 (providing figures showing virtual non-existence of Western Sahara's import or export of phosphates). Even before Spanish decolonization, Western Sahara's infrastructure was wholly incapable of exploiting the region's minerals. *See* HODGES, *supra* note 308, at 128 (describing primitive infrastructure in 1960s). Problems included insufficient water and electricity, lack of an administrative system, lack of any adequate ports or roads, and an insufficient labor force. *Id.* Spain launched a development program to build the required infrastructure in 1966. *Id.* Soon after fighting broke out between Morocco and the Polisario, the infrastructure collapsed and phosphate production in Western Sahara stopped. *See id.* at 284 (describing damage to Bu Craa's power lines and conveyor belt that caused paralysis of phosphate mining).

321. *See* HODGES, *supra* note 308, at 223 (discussing Madrid accords).

322. *See id.* at 223 (quoting "declaration of principles" that accompanied secret Madrid accords).

323. *See id.* at 223-24 ("Nothing was said about what would happen at the end of the

The Libya-Chad case, however, offers a useful illustration of how such an argument could work. Following an armed struggle over the boundary issue, the Libyan government negotiated and signed the 1955 agreement with France.³²⁴ That agreement specifically delimited the boundary between Chad and Libya.³²⁵ According to the principles of the Islamic law of property, the terms of the specific treaty determine the ownership of the land. Libya was bound to respect the terms of the treaty and to take no more land than that granted by the treaty.³²⁶

V. Conclusion

The end of the Cold War and the resurgence of non-Western cultural and religious identities have called into question the validity and legitimacy of an exclusively Western approach to international law. Governments and people in the Islamic world now seek new Islamic solutions to international problems. However, the traditional principles and concepts of the *Siyar* are simply incompatible with the modern system of nation-states built on territorial sovereignty. The principles discussed in this Note fill a small part of the void left by the *Siyar*'s inapplicability. They are compatible with the modern international order in that they recognize the reality of independent, sovereign nation-states. Moreover, the principles are also substantively and legitimately Islamic because they derive from the primary sources of Islamic law. This approach offers a model for an issue by issue replacement of the outdated *Siyar*. By addressing international issues as they arise, scholars eventually may succeed in reconstructing a complete, workable, and modern system of Islamic international law.

transitional period."). The declaration did not mention plans for permanent partition. *Id.*

324. See *supra* note 145 and accompanying text (describing history of 1955 agreement).

325. See *supra* notes 171-73 and accompanying text (discussing ICJ's interpretation of 1955 agreement).

326. See ABU ABID, *supra* note 226, at 211 (providing following prophetic tradition: "if you make war against a people and they give up their wealth to your protection but without submitting themselves or their sons, and they negotiate a peace with you, then take nothing from them more than that, for verily more than that is not permitted you.").