USE OF THESES

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Boundaries of Discourse in the International Court of Justice:
Mapping Arguments in Arab Territorial Disputes

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A thesis submitted for the degree of Doctor of Philosophy at the Australian National University
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DEDICATION

To my parents
We rebelled against the English; we rebelled against the French...
We rebelled against those who colonized our land and tried to enslave us...
We repeated the red revolutions many times and we continued with our white revolutions over a number of years...
And for this we endured so much suffering, sustained so many losses, and sacrificed so many lives...
[But]
When we finally gained our liberty, we began to sanctify the borders they had instituted after they had divided our land...
And we forgot that these borders were but the boundaries of the 'solitary confinement' and the 'house arrest' which they had imposed upon us!


‘Nos moyens sont certes limités. Nous le savons. Mais nous avons un moyen extrêmement important, c’est notre bon droit. C’est la foi que nous avons en cette justice même, dont vous êtes, Monsieur le Président, Messieurs les membres de la Cour, le symbole et la personification mêmes. Nous avons foi en cette justice que est égale pour tous et devant laquelle la raison du plus fort n’est pas toujours la meilleure.’

[Our means are certainly limited. We know this. But we have an extremely important resource on our side. It is the faith that we have in justice itself of which you are the very symbol and personification, Mr President and members of the Court. We have faith in this justice which is equal for all and before which the arguments of the strongest do not always prevail.]

*Western Sahara*, Oral Statements, Mauritania, Moulaye el Hassen, 3 July 1975, vol IV, at 309
ABSTRACT

Territorial adjudication before the International Court of Justice (ICJ) goes beyond drawing lines on maps; it is a discursive contest over the limits of law and membership in international society. For Third World states endowed with ‘full’ membership in the postcolonial era, how are narratives of inclusion and exclusion, as well as law and politics, constructed in the courtroom? Within the institutional biases and linguistic parameters peculiar to international law, how can postcolonial experiences be rendered intelligible before the Court?

A close reading of four territorial cases involving Arab states provides a particular site to explore the legal grammars, or rules of argument, that shape international law as a language. The thesis draws on new and Third World approaches to international law (NAIL) and (TWAIL) to examine processes of dialogue between the ICJ bench and bar. By seeing international law as a constraining and yet dynamic discourse, the thesis maps some of the grammars of argument used in contests of selfhood and statehood. Territorial matters between Third World states occupy a prominent place on the Court’s docket, and perhaps more than any other area of law, they require confrontations with international law’s colonial past. The thesis probes the tension between colonial exclusion and postcolonial ‘inclusion’ through the cultural experience of Arab territoriality. Arab statehood is the concept through which the thesis tests the extent of international law’s universal reach and embodiment. Is international law more than a European discourse? How have Arab experiences been listened to or silenced?

A number of common devices and images of international law emerge in the case studies. Drawing on Koskenniemi’s work on normative indeterminacy, the thesis demonstrates how international law is articulated through the law/politics dichotomy. Without the solid ground of normative certainty, international law is instead a discourse framed by ongoing attempts at disciplinary boundary-drawing and defensive postures against politics. Through non-European examples of authority over territory, Arab experiences challenge international law’s porous borders. Historical reappraisals are important tools for expanding the contours of international law’s past and present dimensions. Examples of treaties formed through coercion, colonial bias and the non-recognition of indigenous title over land are offered for examination by participating states, but are rarely translated by the bench in its judgments. The thesis shows how the Court
pursues a narrow, colonial rendering of the past that perpetuates European models of statehood and selfhood in the postcolonial era.

By exploring the domain of territorial adjudication through a critical lens, the thesis demonstrates the value of a discursive reading of ICJ cases. In mapping the grammars of legal argument, the thesis highlights the possibilities and limits of postcolonial membership for Third World states. Discursively, the thesis shows how the Court is a site of only limited linguistic creativity: dialects of politics, emotion and history are all uttered, but such ‘extra-curial’ utterances rarely shape ICJ judgments. That they are spoken at all, however, is significant, and such statements indicate the possibilities for a universalising discourse of international law.
ACKNOWLEDGMENTS

This thesis would not have been possible without the love and support of many people.

At ANU, I was lucky enough to receive invaluable assistance from a number of academics. First and foremost, I would like to thank (without adverbs!) my supervisor, Hilary Charlesworth for her commitment to my project. Her prompt responses to my endless emails, her sometimes painful (but always necessary) comments and her quiet confidence kept me going once I decided to make the move from international relations to international law. Tracking my progress throughout the course of the thesis has been about much more than removing superfluous adverbs and adjectives with Hilary. It has been a journey in self-confidence, particularly through her efforts in organising various seminars and speakers throughout my candidature. I would also like to thank members of my panel, John Braithwaite and especially, Jacinta O’Hagan. Tucked away in my old department, Cindy was a wonderful source of ideas and support. Melissa Perry QC kindly responded to my vague requests early on for ‘chats about the law on territory’ and has been a wonderful mentor of sorts. Nelly Lahoud also agreed to read my draft and offer her expertise on so many levels. Nelly answered many random Islam-related questions on our way to the swimming pool and she has also been a linguistic font of knowledge with her French translations throughout Chapters Three and Five. She was also invaluable for dotting the diacritics in Arabic transliteration. Many other people have helped linguistically along the way: my sister, Alison, and Jim both assisted me in getting my reading of French up to speed. Professor Peter Grabosky, just along the corridor, was also willing to act as a human dictionary, and I would also like to thank Hilary with her assistance with my translations. My occasional Arabic tutor, Muath, tolerated a terrible track record with my homework and has also been a wonderful friend.

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<td>AMU</td>
<td>Arab Maghreb Union</td>
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<tr>
<td>APCO</td>
<td>Anglo-Persian Oil Company</td>
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<tr>
<td>AU</td>
<td>African Union</td>
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<tr>
<td>BAPCO</td>
<td>Bahrain Petroleum Company</td>
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<td>BFSP</td>
<td>British and Foreign State Papers</td>
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<td>CTS</td>
<td>Consolidated Treaty Series</td>
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<tr>
<td>CUP</td>
<td>Committee of Union and Progress (Ottoman Empire)</td>
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<tr>
<td>GCC</td>
<td>Gulf Cooperation Council, or formally Cooperation Council of the Arab States of the Gulf</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>International Court of Justice</td>
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<td>ILM</td>
<td>International Legal Materials</td>
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<td>IGO</td>
<td>Inter-Governmental Organisation</td>
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<td>International Relations, the discipline</td>
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<td>LNTS</td>
<td>League of Nations Treaty Series</td>
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<td>NAIL</td>
<td>New Approaches to International Law</td>
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<td>NAM</td>
<td>Non-Aligned Movement</td>
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<td>OAU</td>
<td>Organisation of African Unity</td>
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<td>OIC</td>
<td>Organisation of Islamic Conference</td>
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<tr>
<td>OPT</td>
<td>Occupied Palestinian Territories</td>
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<tr>
<td>PCA</td>
<td>Permanent Court of Arbitration</td>
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<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<tr>
<td>PCL</td>
<td>Petroleum Company Ltd.</td>
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<tr>
<td>POLISARIO</td>
<td>Frente Popular para la Liberación de Saguia el Hamra y Río de Oro</td>
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<tr>
<td>SADR</td>
<td>Saharawi Arab Democratic Republic</td>
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<tr>
<td>TWAIL</td>
<td>Third World Approaches to International Law</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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UNSCOP  
United Nations Special Committee on Palestine, established
15/05/1947

VCLT  
Vienna Convention on the Law of Treaties
GLOSSARY

À titre de souverain (Fr.): exercise of sovereign powers.

Accord cadre (Fr.): framework agreement.

Ahdname (Turk.): decree of the sultan.

Ahl al-ḥall wa'l-ʻaqd (Ar.) [the people of loosening and binding]: the group of electors of the khalīfa.

Ahl al-kitāb (Ar.) [people of the book, or dhimmīs]: non-Muslims believing in God, Christians, Jews, Sabians and Zoroastrians.

Al-ʻarabiyya al-qawmiyya (Ar.): pan-Arabism

Al-khulafā’ al-rāshidūn: (Ar.) [the rightly guided Caliphs]: Abū Bakr, ʻUmr, ʻUthmān, ʻAlī, who ruled in turn after the Prophet’s death in 632. This period is known as ʻasr al-sāʿa ʿaida (the Era of Felicity)

Al-sharq al-awsat (Ar.) [The Middle East], a term also used regularly in Arabic parlance.

Al-umma al-arabiyā (Ar.): the Arab nation

Amān: (Ar.): protection of life, property and freedom often applying as a writ of safe conduct for envoys and foreigners in Muslim lands.

ʻaqd al-bay‘a (Ar.): contract of allegiance to the caliph or sultan.

Bai‘a (Ar.): oath of allegiance, e.g. for far-flung tribes accepting the spiritual oversight of the Sultan of Morocco.

Bled al-makhzen (Ar.): lands of the government (or literally, storehouse). This term was used in the Western Saharan Advisory Opinion to distinguish those lands over which the Sultan of Morocco had direct control.

Bled al-siba (Ar.): lands of dissidence. This term was used to describe peripheral areas of the Moroccan Sultan’s rule before colonialism, when ties of allegiance through religion existed rather than any real territorial control.

Caid (Ar.): an administrative official of a tribe appointed by the sultan, e.g. in Western Sahara.

Compromis (Fr.): where states in dispute may agree to take that dispute to the ICJ. A treaty will then be negotiated outlining the mutually agreed upon nature of the dispute before it is then taken to the ICJ.

Dār al-ḥarb (Ar.): land of war, or that part of the world not under Muslim rule.
Dar al-islām (Ar.): land of peace, or that part of the world under Muslim rule.

Dar al-ṣulḥ (Ar.): land of reconciliation or treaty between Muslim and non-Muslim powers.

Dawla (Ar.): state.

De lege ferenda (Lat.): law as it should be.

De lege lata (Lat.): law as it currently stands.

Dhimma (Ar.): where non-Muslims accept Muslim rule in exchange for protection and the payment of a poll tax (jizya). Such an agreement cannot be concluded with apostates.

Dirah (Ar.): territory within which a tribe moves.

Dispositif (Fr.): operative paragraph(s) of a judgment.

Effectivités (Fr.): state activities of a sovereign kind.

Erga omnes (Lat.) [against all]: rules applicable and binding on all of the world regardless of consent. For example, the prohibition on genocide is binding on all states whether or not they are party to conventions detailing its prohibition.

Ex iniuria non oritur jus (Lat.): an illegal act cannot produce legal rights.

Fiqh: (Ar.) ['understanding']: the science of Muslim law.

Forum prorogatum (Lat.): where state parties expressly or impliedly consent to the jurisdiction of the ICJ for specific disputes by acts after the initiation of proceedings. This is possible under article 40(1) of the ICJ Statute.

Framework agreement (within the ICJ): where in ill-defined suits, the Court outlines the general aspects of the case and then allows the parties to narrow it.

ḥadīth (Ar.): collections of the sayings of the Prophet, one of the sources of Islamic law.

Hajj (Ar.): the annual pilgrimage to Mecca. One of the five obligations for a Muslim, along with prayer, fasting during Ramadān, the shahāda (the profession of faith in Allah and his prophet, Muhammed), and zakāt, or charity.

Harbī (Ar.): a person from dār al-ḥarb.

Imā‘ (Ar.): one of the four sources of sharī‘a, based on the consensus of legal/religious scholars.

Ijīthād (Ar.): independent human reasoning. This phase in the development of legal doctrine formally ended in 10th century.
Imām (Ar.): teacher, or the title of a scholar adept in Islamic studies.

In personam (Lat.): relating to jurisdiction over an individual person.

Intifāda (Ar.): shaking off, uprising. Usually associated with Palestinian resistance since 1987 against Israel’s occupation of the West Bank and the Gaza Strip from 1967.

Jihād: (Ar.): literally meaning struggle, used to refer to the waging of Muslim war throughout dār al-harb.

Jizya: (Ar.) poll tax imposed on dhimmīs, instead of zakat and/or military service, expected of able-bodied Muslim males.

Jus ad bello (Lat.): rights to wage war, or ‘just war’.

Jus cogens (Lat.) [compelling law]: peremptory norms of general international law.

Jus gentium (Lat.): general principles of law accepted by civilised nations.

Jus in bello (Lat.): the rules applicable once hostilities have commenced.

Jus inter gentes (Lat.): law between nations, i.e. international law.

Jus naturale (Lat.): natural law.

Kaimakam: (Turk.) governor of a kaza.

Kaza: (Turk.) Ottoman administrative district, a unit smaller than a sanjak.

khādim al-ḥaramayn al-sharifayn (Ar.) [servant of the two holy shrines]: A title given to the Caliph as overseer of Mecca and Medina.

Khalīfat rasūl allāh (Ar.): successor of the messenger of God. The full title bestowed on a khalīfa by Sunnis.

Kharaj (Ar.): land tax imposed in Muslim lands on dhimmīs.

Madhhahb (Ar.): jurisprudential school of Islamic fiqh: Malikī, Shāfi‘ī, Ḥanbalī, Ḥanafi.

Mujtahid (Ar.): a practitioner of ijtihād, or independent reasoning.

musta‘min (Ar.): protected person, referring to non-Muslims such as traders and ambassadors who were afforded basic rights and protections within dār al-islām.

Opinio iuris (Lat.): the opinion of jurists; this is one of the sources of international law.

Pacta sunt servanda (Lat.): [agreements must be honoured] agreements are binding and are to be implemented in good faith.
Qawm (Ar.): people.

Qawmiyya (Ar.): pan-Arabism, or Arab nationalism.

Qiyas (Ar.): reasoning by analogy from existing principles. This is one of the four sources of the sharī‘a.

Qur‘ān (Ar.) ['the recitation']: the central text of Islam, believed to be the word of God, revealed to his Prophet and written down after Muhammed.

Res communis (Lat.): not capable of being placed under state sovereignty, such as the high seas and outer space.

Res judicata (Lat.) [a thing that has been judged]: The rule refers to the practice whereby arbitral bodies do not consider a case that has already been determined by another arbitral body.

Res nullius (Lat.): things or land not under the territorial sovereignty of a state, but able to be so.

Res sic stantibus (Lat.) [things standing so, or remaining the same]: agreements entered into on the basis that circumstances will remain unchanged.

Sanjak (or, sancak) (Turk.): an Ottoman subprovince.

Sharī‘a (Ar.) [path to water]: Islamic law.

Sheikh (Ar.): elder man of a tribe; an Islamic authority.

Shi‘a (Ar.): referring to those Muslims who saw Muhammed’s rule being continued through ‘Ali and his descendents. Shi‘as are the second largest group within the Muslim world after Sunnis.

Siyar (Ar.) [the conduct of rulers]: The system of international law developed by Muslim states/empires for their relations with non-Muslim states.

Sultan (Ar.) [deriving from the word for power]: title of a political ruler in contrast to a religious leader or teacher, Imām.

Sunna (Ar.) [manner of acting; rule of conduct; mode of life]: lessons learned from the life of the Prophet, mainly through the hadīth. It is one of the four sources of law.

Sunni (Ar.): deriving from the word sunna, meaning words or actions or the example of the Prophet. Sunnis followed Abu Bakr and are the vast majority of Muslims.

Tanzimat (Turk.): Generally used to refer to the period between 1839-1876 when the Ottoman Empire implemented a number of reforms.
**Taqlid** (Ar.) [imitation]: marks the end of the period of *ijtihād* whereby Muslims were expected to respect the authority of legal scholars of past generations – the personal interpretation of sources was now forbidden.

**Terra nullius** (Lat.): land belonging to no-one.

**Travaux préparatoires** (Fr.): Preparatory work; the preliminary drafts, minutes, conferences etc contributing to the final draft of a treaty.

**Umma** (Ar.): this can be translated as community or nation, but it always refers to the community of Muslims and its boundaries are not defined by territory or state rule, but belief.

**Uti possedetis juris** (Lat.; Roman Law) [as you possess]: A decree of the Praetor that the ownership of property in question should remain in possession of the person. In international law, it is the idea that old administrative boundaries will become international boundaries when a political subdivision achieves independence. Based on the Latin phrase: *uti possidetis, ita possideatis* (as you possess, so may you possess).

**Vali** (Turk.): administrative ruler of a *vilayet*.

**Vilayet** (Turk.): largest administrative unit within the Ottoman Empire.

**Watan** (Ar.): nation.

**Wataniyya** (Ar.): nationalism.

**Zāwīyya** (Ar.) [corner]: used in the Maghreb as the name of a religious school. The term was used in the *Libya/Chad* case in relation to the Senūsī religious order’s outposts in the Sahara.
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2) French translation

Although I had to labour through many untranslated French texts, translations are provided in the thesis for those not comfortable with the language. All translations were the result of my own efforts combined with the help of Hilary, my supervisor, and especially, Nelly. At times, the translations stray a little from their direct meaning in an attempt to convey their nuance better.
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PREFACE

Journeys through Scholarly Quicksands and My Quest for Solid Ground

Writing a PhD is both a personal and an intellectual journey. Parts of this journey are revealed in scholarly statements of the thesis, but many silences remain. Here I want to reflect on some of the agendas informing my research.

When I started out along a path shrouded in fog, few things were clear to me except my interest in all things Arab and a belief that the disciplinary boundaries of law would provide a more solid framework than the field I had abandoned, international relations (IR). I had come to find incessant disciplinary debates within IR tedious; my eyes were tired and sought other horizons. Reading critical and postcolonial international legal material extended my gaze and convinced me that I needed to step outside the IR box and move into another box, international law. International law seemed to provide a neat and easy framework: the simplicity of ICJ cases contained my focus and provided me with much-needed boundaries.

It was surprising then that my intellectual journey has taken me full-circle: after seeking solace in doctrine, I realised that all I could rely on was the knowledge that there was no solid ground. My travels through quicksand has become enduring and after some instability, I have now accepted the (im)permanency of the terrain.

I came to the PhD with only a general knowledge of international law and a deep-seated dislike of real property law. These were not good beginnings, but I sensed that in the collision between the law on territory and the Third World rich material was waiting to be excavated. I was not wrong. At first, when aspects of the law confused me and led me into blind alleys, I maintained a faith in the certainty of doctrine and my own lack of experience: surely if judgments from the ICJ did not explain things clearly, this was about my own gaps of knowledge? Most commentaries on the case law seemed to maintain a faith in law’s certainty, suggesting that all I needed to do was improve my own understanding. Most scholarship on title to territory is removed from sustained critical engagement and many authors writing about territory regard applicable laws as solid and knowable. Commentary and criticism on jurisprudence tend to reinforce the promise of doctrine. In those cases, for example, where the Court’s judgment did not cover the field,
most scholarship readily completes the task; there is a clear body of rules to apply in all instances and normative indeterminacy, or norm conflict, is not countenanced.

It was in the encounter between international law and colonialism, however, that my footsteps started to falter: I needed to put on the sturdiest boots that could withstand much more than the luscious landscapes of Europe, the site where the law on territory had been forged. Three of my four case studies have taken me to some of the world’s most extreme topographies: the Sahara and the Qatari peninsula. Like the rest of the world, these lands are now home to their own cartographic lines, but the law explaining these markings only told part of the story, and I needed to undertake my own expedition to make sense of these cases.

When one first enters the intricacies of a boundary dispute, there is a sense of excitement. Surely I could live out my explorer fantasies and become a legal Freya Stark? The voluminous archival and cartographic materials obligatory in such disputes transport the reader to another time and another location. Legal teams are not only paid handsome sums to convince the Court of their side’s legal merits, but they also partake in storytelling by taking us into a world of diplomatic dealings, tribal intrigues, pearl-fishing and imperial rivalries. Wading through the mounds of paper produced for a case, however, tends to cause confusion rather than clarity, not only in relation to the legal arguments but ‘the’ historical record as well. Even the most simple ‘facts’ are presented in diametrical opposition in contentious disputes, reminding us of the contingency of fact, history and ultimately, law. Mystique was compounded by illegible maps and documents. Could the Court decipher the materials any better than I could, or was this part of the strategy: to wrap the past in mystery and look to law for its clarification?

Once I became comfortable in the unknown worlds of blurry maps and smudged Osmanli (Ottoman Turkish) documents, I tried to find at least some clarity in relation to the law on title to territory. Perhaps the documents were far from pristine, but the law must be better? Yet, the law was always mired in its contested relationship with the past, and, just like the documents themselves, doctrine required interpretation and translation. There was not one law, nor one history. Korhonen reminds us that ‘[n]orms complete with meaning and significance do not exist a priori as independent objects which could be picked up by whomever, whenever.’¹ Thus, once again, I found myself lost in the

quicksands of legal argument: how did law hang together beyond its surface of rules and principles? Why in Third World territorial disputes were colonial practices usually condoned, and did this mean that the law itself was colonial and incapable of moving beyond its racist past?

My answers to these questions are still somewhat tentative, but I can now say at least that international law is never an exercise in resolving rules per se. Instead, it always rests on deeper structures that inform its self-image, make sense of its past and imbue it with its own mix of (usually European) cultural assumptions. In the pleadings I have read, which were largely written by European lawyers, there were times when this underlying discursive framework was expanded, but only in limited ways. Perhaps because of the fear of ensuing chaos, the international system and its legal institutions are too heavily invested in particular narratives of international law’s origins to endow Third World experiences and voices with the status they seek.

Writing the thesis has also clarified my relationship with the Arab world. Over the course of my studies, the most commonly asked question of me has been, ‘what sparked your interest in the Arab world?’ There are many things that roll off the tongue in response: the culture, the food, the music, and my travels there, but none of these explanations went to the core of my interest. Reading about the encounter between the European and non-European world, though, I soon came to realise that the Arab world (and parts of the wider Muslim world like Turkey – I have been there seven times) was my ‘other’. No other part of the globe arouses such interest, such fascination and also such repulsion for me. I constantly renegotiate my relationship with the region and its culture, and in finding out more I have come to realise just how close and yet how far I am from ever being an Arab. When I lived in Jordan this was brought home to me, because I could never, ever, become a local and part of me did not want to: I wanted to observe and yet be part of the milieu at the same time. This is a difficult pose to strike, and it is one requiring constant re-positioning. It has meant that I am forever evaluating my own assumptions, prejudices and conceptions about the region as well as my research. I hope it is helpful in reading the thesis to recognise these background journeys.
INTRODUCTION

1) The Postcolonial Paradox

International law is a discursive practice that both constrains and enables its central actors, states. We can understand the relationship between states and international law as an irresolvable conflict and ask the perennial question, how can sovereignty be constrained? Or we can step into the discursive process and recognise that the relationship between international law and states is one of constant negotiation; international law as a language can only be understood in the context of ongoing conversations about the nature and boundaries of the discipline. When we then look to the international order of contemporary nation-states, postcolonial membership suggests an expansive, inclusive international legal language. States only recently recognised as such now participate in and speak the language of international law through the guarantee of international legal personality. The boundaries of membership, however, are not clearly delimited. How should postcolonial states speak the language of international law? Further, how can postcolonial entities use the law’s lexicon to ensure their selfhood and statehood in a world that denied it for so long? This is the paradox of postcoloniality: non-European states must use a discourse that has both constrained and enabled them. International law is thus premised not so much on the tension between sovereignty and rules, but on its potential for inclusion and exclusion. Who can speak the language of international law and what are its ‘legal grammars’ or rules of speech?

Cultural diversity in a world of nation-states is not synonymous with linguistic plurality at the level of international law. Postcolonial membership offers a way of

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expanding the discourse of international law, but languages evolve slowly, and thus ‘new’ states speaking international law must either leave most of their vocabularies and grammars at the courtroom door or seek the assistance of a translator. What linguistic compromise is reached, for example in adjudication, and how has the language of international law responded to different dialects used in adjudication?

Scholars in the field of international law have confronted the question of disciplinary diversity and renewal in a number of ways. In the postcolonial era, narratives of international law’s progress and multiculturalism abound, but such accounts only tell part of the story. Most scholars advance claims about international law’s potential through a particular understanding of international law that I term ‘mainstream’. The word ‘mainstream’ lacks precision, but it is used to denote approaches to international law that tend to see law as determinate and distinct from other fields of human endeavour. The outcome of such a perspective supports a reified image of law, comprising a set of knowable doctrines and principles. Unlike critical approaches to international law, sometimes termed ‘New Approaches to International Law’ or NAIL, which are alive to international law’s discursive and reflexive qualities, mainstream scholars characterise international law as a body of rules separate and distinct from the politics of speech. By seeing law as doctrine rather than discourse, determinacy is not in issue. Thus, mainstream accounts see no paradox in the postcolonial condition: new states are able to harness the tools of a law that is untainted by its colonial past.

From within the critical fold, a sensibility towards Third World concerns has emerged that challenges mainstream narratives of progress after colonialism. Scholars linked to ‘Third World approaches to international law’, or TWAIL, seek to explore ‘post’colonial continuities rather than ruptures. TWAIL research has focused on historical legacies, suggesting that Third World states and their peoples face a paradox: how can they speak the language of law and remain ‘post’colonial? Resort to self-reflective, sceptical and often historical methodologies by many TWAIL scholars aligns them closely with the research agendas developed within NAIL. Thus, TWAIL scholarship is in sympathy with NAIL, but it is also distinguished by a particular commitment to Third World emancipation.


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This commitment is evident in the use of the term, ‘Third World’. Mickelson sees the Third World as occupying a historically constituted, alternative and oppositional stance within the international system. The “Third World” terminology itself may appear out-of-date, but its very contingency, involving an insistence on history and continuity, may in fact be one of its strengths. Although the term has become much more elastic since its use in the age of decolonisation, Rajagopal argues that it can still serve to rally peoples, states and international lawyers. The nature of this “Third World” engagement with international law – of resistance, allure, exploitation and co-optation – has significantly affected the content and structure of modern international law and raises profound challenges of history, theory and method for the whole discipline of international law. TWAIL scholars regard colonialism as the unifying experience for Third World states, and the thesis responds to this interest by exploring narratives about colonialism in the courtroom.

2) Scope of the Study

The thesis develops both NAIL and TWAIL agendas by focusing on the discursive practices used in International Court of Justice (ICJ) disputes. With its status as the pre-eminent international legal body, the ICJ elicits significant scholarly attention. Mainstream analyses of its doctrinal statements allow us to understand part of ICJ discourse, but they also obscure other aspects. What is the nature of debate between the bench and the bar and what patterns emerge across the cases? Through a critical understanding of law as language, these questions become easier to answer, and yet rarely does critical, and especially TWAIL, attention focus on ICJ discursive structures. Pleadings in particular are overlooked, and yet it is in this space of argumentative contest that a postcolonial law can be developed in detail.

I acknowledge that states do not speak directly in ICJ disputes. Usually foreign legal counsel hailing from a select group of First World institutions represents both First and Third World states. Why do Third World states rely on such counsel? The thesis is not concerned with discovering the position of given Third World states in some reified way.

Introduction

This is not possible and does not assist the broader aims of the thesis. Third World states are instead used as a tool for exploring the extent to which non-European experiences and legacies can be used to transform the language of international law. In its exploration of the arguments used to found title to territory, the thesis tries to straddle the mainstream and critical research agendas by mapping the legal grammars of discourse. With rules that are indeterminate, how do postcolonial states advance their interests and which argumentative strategies and substantive claims are endorsed by the Court?

ICJ territorial disputes are the focus of the thesis because they allow for an extended exploration of the postcolonial paradox. Over the last few decades, the Court’s docket has increased significantly and territorial disputes involving Third World states have been the most numerous. Some of international society’s newest members have come to the Court in a bid to delimit the borders of their statehood through a law shaped by European experience. Thus ICJ territorial disputes are a microcosm of the broader dilemma confronting Third World states in their membership of international society. What language can be spoken in the Court to capture their experiences of colonialism? Can international law be decolonised? What narratives emerge across the cases?

3) Central Research Questions

The many questions raised above touch on some of the basic themes of the thesis. More specifically, the thesis rests on two central research questions. The first asks:

What are the structures of legal argument that emerge in ICJ territorial disputes involving Arab states?

This question requires an account of the strategic and substantive uses of international law as language. It entails an analysis of pleadings and judgments to enable us to map out patterns in the process of adjudication. The second question opens up the postcolonial paradox:

What do these structures suggest about the scope for universalising the discourse of international law?

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Introduction

In a world covered by independent nation-states, international law’s jurisdictional reach is now universal. Geography, however, is not necessarily synonymous with a law or a culture that we can describe as both ‘international’ and ‘universal’. Keal defines a ‘universalising discourse’ as ‘one that either expands, or has the potential to expand, the boundaries of a community to which it refers.’ Territorial disputes showcasing narratives about colonialism and the conferring of membership of international society for non-European entities not only involve boundary delimitation, they display international legal discourse being redefined and redrawn through argument. When postcolonial states choose to speak in the language of international law and offer accounts of statehood at odds with European experiences, international law will either absorb or deny such claims. Within the confines of international law’s grammar and lexicon, international law’s boundary can be challenged. Thus, the thesis asks, are the boundaries to emerge suggestive of a universalising discourse?

The thesis is concerned with international legal discourse in a postcolonial era and the cultural lens it relies on is the Arab experience. Arab states hailing from a rich and distinct cultural and legal tradition serve as a focus. By exploring one part of the geographical, cultural and discursive world, the universality of international law can be interrogated.

4) Why Arab?

What do I mean by ‘Arab’ and ‘Arab world’ in the thesis and why should this term be used instead of others? States straddling the Atlantic Ocean and the Arabian Sea have variously been grouped together under the categories of the ‘Middle East’, the ‘Near East’, the ‘Arab world’ as well as the Muslim or Islamic World. There is little consensus on the exact boundaries of these regions; each evokes a particular set of characteristics along linguistic, cultural or religious lines. At a more conceptual level, Said speaks of the division between the Occident and the Orient, which was imagined by Europe and gave rise to Orientalist discourses. In his study of this European discourse, Said offers a basic definition and geographical location of Orientalism, which is ‘mainly, although not exclusively, of a

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Introduction

British or French cultural enterprise, a project whose dimensions take in such disparate realms as the imagination itself, the whole of India and the Levant, the Biblical texts and the Biblical lands... An awareness of the way in which these lands and their cultures were constructed by European thought and practice highlights the role that both geographical and conceptual indicators can play. European scholarship has tended to place Arab peoples in a number of culturally pre-determined regions; it is important in framing my analysis that such categories be interrogated. No category is value-free, and in choosing to study Arab states, I have singled out a particular cultural and legal grouping that is sufficiently united to serve as a coherent site of study. However, it is important to be conscious of the boundary-drawing involved in such categories, and thus cultural and geographical borders of the Arab world are interrogated throughout this study.

Although the ‘Middle East’ (as well as its rarer variant, the ‘Near East’) is now used as a common point of reference by inhabitants within the region, the term itself is steeped in colonialist and Orientalist overtones and is unhelpful for explanatory purposes. An American naval officer, Alfred Thayer Mahan, apparently coined the term, ‘Middle East’ in 1902, by referring to the area between Arabia and India. The perspective reflected an era when Europe dominated the globe. The term ‘Middle East’ often includes non-Arab states, such as Iran and Turkey, and sometimes Pakistan, largely because of their Islamic composition and geographical proximity to the centres of Islam. For the purposes of my interest in civilizational contributions to international law, the ‘Middle East’ is a term that lacks conceptual rigour and is not used in the thesis.

Arab states have also been subsumed under the umbrella of the Islamic world. Arab states are a part of the Islamic world, but this category is too broad for my aim of using particularism to interrogate universalism. Using the term ‘Arab’ allows us to separate Arab states from non-Arab states, especially as the experiences of Iran, Turkey and Pakistan have all been distinct from those of the Levant, the Gulf and North Africa since the end of the First World War. Equally, although states typically included under the umbrella of the ‘Middle East’, as well as further afield in the Muslim world, have all experienced the civilising influences of Islam, it is too broad a category because it includes states as diverse as the examples of Algeria, Iran, Bosnia and Indonesia.

12 In Arabic, ‘Middle East’ is rendered as ‘al-sharq al-awsat’. For a discussion about the term ‘Middle East’, see N R Keddie, ‘Is There a Middle East?’ (1973) 4 International Journal of Middle East Studies 255.
Both the UN and the ICJ have drawn attention to Arab civilisation in the official use of Arabic and the appointment of Arab judges. The UN’s recognition of cultural diversity is rooted in the Statute of the ICJ itself. Article 38(1) catalogues the sources of international law, to include treaty law, custom and the writings of legal experts. The list also provides for application of ‘the general principles of law recognized by civilized nations’. Arab civilisation falls within this category, particularly in relation to the appointment of judges. Under the Statute, judges are selected not only in relation to their qualifications, they also serve as a ‘representation of the main forms of civilization and of the principal legal systems of the world’. Arab civilisation should be able to contribute significantly to a culturally expansive international law of the future.

Thus I focus on ‘Arab’ states in my analysis, but acknowledge the limitations involved in such boundary drawing. The Arab world is a large and diverse region, but it is at least united in its use of Arabic and politically by the Arab League. The Arab world can be identified as comprising North Africa: Morocco, Algeria, Tunisia, Libya, Mauritania, Sudan and Egypt; the Levant: Jordan, Palestine, Lebanon, Syria; and the Gulf: Iraq, Oman, Abu Dhabi, the United Arab Emirates, Bahrain, Qatar, Kuwait, Saudi Arabia, Yemen. These states can all be understood as Arab, where Arabic is spoken, but they each contain local flavours, divergent practices of Islam, vastly uneven levels of development, as well as radically different forms of political rule ranging from the secular socialist regimes of Tunisia and Algeria, to Libya’s unique form of republic, to the tribal monarchies throughout the Gulf.

Studies focusing on Arab civilisation have been torn between the tendencies of trying to depict Arab specificities while not singling out the region for cultural exceptionalism. In his study of public spheres in Jordan, Lynch is aware of balancing these two concerns. He argues that it is possible to produce research that is sensitive to the Arab

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14 Statute of International Court of Justice.
15 Article 9, Statute of the International Court of Justice.
16 The creation of the Arab League is discussed in Chapter Two at 93-95. The League’s members include: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates and Yemen. For details, see the League’s website: http://www.arableagueonline.org/asi/index_en.jsp.
17 Certain terms in Arabic correspond to these areas as well. Typically, the Arab world has been divided into its Asian and African parts by the expressions, al-Maghreb (for North Africa, excluding Egypt, meaning the eastern place in Arabic) and al-Mashreq (for West Asia, meaning the western place in Arabic). Also, a common term to connote the heart of the Arab World (that is, Lebanon, Palestine, Jordan, Syria, Egypt and the عجم, Saudi Arabia) in Arabic is bilād al-shām. When I was travelling from Jordan to Syria, Syria and/or Damascus (Dimashq) were referred to as al-shām.
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position but not Orientalist in its tone about Arab uniqueness.\(^\text{18}\) Such research cannot rise above specificity unless general theories applied elsewhere are used for the Arab world as well. Thus it is useful to develop an awareness of Arab cultural specificities, but a constant juggling act is required between appreciating regional social institutions on the one hand and local diversity at the political and legal level on the other.

Scholarship about the relationship between the Arab world and international law requires reevaluation, both from the mainstream and the 'Newstream' or NAIL.\(^\text{19}\) Typically, mainstream attention has perpetuated Orientalist discourses through studies constructing the Arab world as especially averse to legalism. Terrorism is the obvious example here.\(^\text{20}\) I use Arab experiences not to exceptionalise them but to highlight that both European and non-European experiences of authority over territory are contingent. Regions and peoples across the globe can contribute to the development of a universalising discourse of international law in their own particular way, and it is important to remember that both European and non-European experiences are particular and not necessarily transferable. Examples drawn more broadly from African ICJ territorial disputes demonstrate that the Arab world should not be treated differently *per se*. International law as a discourse created in Europe has excluded not only Arabs but also most of the world, and continues to do so in more subtle ways in the postcolonial era.

TWAIL scholarship also has overlooked the Arab experience in its project of Third World emancipation. Typically, TWAIL scholars have focused on southern Africa, subcontinental Asia or Latin America in their analyses of the ‘Third World’. Straddling North Africa and West Asia, Arabs are geographically proximate to some of these locations, but are they also culturally? Are Arab states part of the Third World or not? The thesis suggests that we need to examine how Third World experiences – especially pertaining to colonial legacies – are explored in Arab adjudication. Do ICJ cases involving Arab states touch on concerns of the Third World more generally? What are the similarities and differences between Arab and non-Arab Third World states? These questions are particularly pertinent to Chapter Three, with its dispute between Libya and Chad,\(^\text{21}\) and Chapter Six, where a number of Third World submissions are compared in the *Wall*


\(^{19}\) Generally, see Cass, *supra* n 9.


\(^{21}\) *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (1994) ICJ Reps, p. 6.
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Opinion. I suggest that TWAIL scholarship should embrace Arab experiences in its project of interrogating the structures of international law.

5) Case Selection

Over its lifetime, the Court has increasingly come to hear territorial disputes arising from the Third World, including Arab states. Although the Palestinian impasse might suggest a region struggling with international law’s relevance, the Court has examined other issues, such as territorial and maritime delimitation cases. Thus far, the Court has heard two contentious and two advisory territorial cases involving Arab states. This is a small sample, but it is balanced across the Court’s jurisdictions, and provides sufficient scope for comparison within and across the cases. Further, in this thesis discursive analysis of the arguments employed requires detailed analysis. Because two of these cases hail from Africa and two from Asia, the thesis also highlights how Arab states operate in a broader discursive, postcolonial environment.

6) Thesis Structure

The thesis comprises three parts. Part One provides the conceptual and historical tools necessary to appreciate the case studies as boundary-drawing exercises not only between states but also within the language of international law itself. Chapter One introduces accounts of ICJ adjudication as well as critical studies of international legal discourse to highlight oversights in the study of territorial disputes. The tools provided by critical


23 Aside from the case studies of the thesis, other ICJ cases involving Arab states include: Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (1982) ICJ Reps, p. 18; Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) (1985) ICJ Reps, p. 13; Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (1985) ICJ Reps, p. 192; Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya/United Kingdom) (Preliminary Objections) (1998) ICJ Reps, p. 9; Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya/United States of America) (1998) ICJ Reps, p. 115.
sensibilities to language are applied in my reading of the case studies and serve as the basis for the first central research question noted above. The second central research question is also considered in Chapter One, which explores the underlying assumptions about international law and its universality in the literature. To understand the particular heritage of modern Arab states, Chapter Two undertakes a broad historical review and investigates whether the Arab-Islamic tradition contains theories and practices supportive of the postcolonial territorial state. The chapter surveys the interrelationship between public international law and Islamic international law, as well as some themes emerging from state practice across the Arab world. It also explores instances of European engagement with the Ottoman Empire to understand how the Sublime Porte and its Arab subjects were included and excluded in the emerging international system. Finally, the chapter discusses the experiences of modern Arab entities and their struggles with territorially delimited statehood to conclude that Arab history contains both opposition and support for the norm of territorial delimitation.

The analysis in Part Two shifts to the case studies and looks at contentious matters before the ICJ. Part Two begins with an introductory discussion about the nature of the Court’s contentious jurisdiction, as well as some themes that have emerged from ICJ jurisprudence on territory. Chapter Three introduces the first case, the *Frontier Dispute* between Libya and Chad.\textsuperscript{24} The chapter’s discussion showcases the different argumentative strategies available to postcolonial states through the contrasting positions of the parties. While Libya championed non-European title to territory and challenged the colonial record, Chad’s pleadings were reliant on the postcolonial dividends of French rule. Chapter Four’s consideration of the territorial and maritime dispute between Qatar and Bahrain does not rest on such extreme positions,\textsuperscript{25} but similar themes about the impact of consent under colonial rule, the validity of treaties and non-European modes of authority are explored. Both cases contain extensive historical discussion, and so much of Part Two interrogates narratives about the legacies of colonialism on territorial delimitation.

Part Three turns to the Court’s advisory jurisdiction and looks at two cases about territory and self-determination. After an introductory discussion, Chapter Five examines the various argumentative strategies and ideas used at the bar and the bench in the *Western* 

\textsuperscript{24} *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (1994) ICJ Reps, p. 6.
\textsuperscript{25} *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar/Bahrain) (Merits)* (2001) ICJ Reps, p. 40.
Introduction

Sahara Case.\textsuperscript{26} The case shares many themes with contentious territorial matters, but its advisory nature allowed greater participation for states and thus more scope for comparison about their respective positions. The case is renowned for its support for self-determination, but the thesis is more concerned with the way it can reveal discursive patterns about the colonial legacy. The Western Sahara Case contained debates on the legal validity of non-European modes of authority, and its engagement with the Islamic tradition harks back to Chapter Two's historical themes.

The last case study in Chapter Six is most distinct, because it is not a typical title to territory matter dealing as it does with a form of neocolonialism in the UN period. The Wall Opinion included a large number of states from the First and Third Worlds arguing not only about territorial authority over the Occupied Palestinian Territories but also about the role expected of the ICJ and international law in the Israeli-Palestinian conflict. Due to the large number of states participating, the argumentative practices of the earlier cases are highlighted in greater relief. Although this case can be seen as being radically different from classic title to territory cases explored above, the thesis is most interested in the discursive similarities across the cases. The three earlier cases highlight the discursive constraints that postcolonial states face on entering the Court. By 2004, Third World states hold the indisputable majority in the UN and the chapter highlights this with its discussion of debates that took place in the UN over the advisory opinion request. However, to what extent have Third World states been able to shape the discourse of the Court itself? The chapter shows that although Third World states constituted a majority of participants whose arguments generally convinced the Court, the narrow judgment itself indicates that the position of Third World states is not wholly decolonised. Many of the more extreme argumentative gestures adopted by Third World states as well as Arab references to history were overlooked by the bench in its judgment. Thus, the final case study presents a continuum of sorts between colonial and postcolonial discourses of international law. The Wall Opinion is a significant step along the path of linguistic renewal, but the legal lexicon in 2004 was not entirely new.

The interrelationship between selfhood and territory is one of the most significant, underlying themes across the four cases. In a postcolonial world, there is room for some discursive variation in adjudication, but only through membership in international society. The thesis explores how postcolonial states can negotiate the boundaries of modern

\textsuperscript{26} Western Sahara (Advisory Opinion) (1975) ICJ Reps, p.12.
Introduction

statehood through speech. With its emphasis on ICJ territorial adjudication, the thesis echoes Berman’s question, ‘Can international law, written by history’s victors, muster the courage to look painfully, frankly, at the horrors of its own past?’\(^{27}\) A close reading of four postcolonial territorial cases reveals the limits and the possibilities of a universalising international legal discourse. The thesis highlights that the options for retelling and reshaping international law are small, but significant. Language is dynamic and so, within its own conventions and biases, international law too contains the seeds of change. The first step is to understand how to speak the language of international law, and thus my aim is to map out argumentative possibilities of the discipline in a postcolonial era.

PART ONE

THEORETICAL AND HISTORICAL BACKGROUND
Chapter One:
Listening for Silences in and beyond the Courtroom: Methodological Tools for Understanding ICJ Territorial Disputes

CHAPTER ONE

Listening for Silences in and beyond the Courtroom:
Methodological Tools for Understanding ICJ Territorial Disputes

1) Introduction

As a discursive exercise in argument, international adjudication is premised on the interrelationship between speaking and listening within the confines of a courtroom. International lawyers observe and listen to the flow of debate in assessing conflicting claims and their ultimate resolution by the international community’s pre-eminent legal decision-making institution, the International Court of Justice (ICJ). An impressive body of international law scholarship attests to a wealth of devotion to the institution of the ICJ and its associated jurisprudence. A clamour of scholarly voices is never far from the corridors of the Peace Palace in various efforts to dissect and discuss the finest points of legal doctrine. Territorial disputes have been of especial interest to scholars of international adjudication, and with the rise of Third World participation in the Court, it would seem that international law is more inclusive than ever. Mainstream scholars have seized on the example of Third World territorial dispute resolution before the ICJ to illustrate broader claims about the nature of international law in this UN postcolonial era: we can now speak of a law that is universal; indeed, of a law that is truly international.¹

A much rarer scholarly sensibility is the inclination and capacity to listen to the silences in and beyond the practice of territorial disputes. This is understandable: with the many voices of the Court’s judges and regularly-appearing legal counsel, most scholars are

content to focus on the more discernibly ‘legal’ strains resounding in the courtroom. A scholarly sub-discipline has emerged that is dedicated to studying these speech acts and judgments; perhaps the field of international law is served well enough by such efforts. Further, those scholars of a more critical disposition have often perpetuated these silences by failing to develop the explanatory tools required in attuning our ears to less familiar sounds. Although both new and Third World approaches to international law (NAIL and TWAIL) have sought to develop methodologies sensitive to the silences and dark sides of international law, thus far their efforts in relation to territorial adjudication have remained under-developed. Scholarly silences are especially pronounced because of a general tendency to overlook the pleadings phase of proceedings;\(^2\) law becomes judgment, rather than argumentation and debate.

A critical analysis of judgments, pleadings and the gaps in between is vital to an assessment of the extent to which the Court as a forum of international law allows for universalism. Thus, through an appraisal of both mainstream and critical approaches, the chapter aims to highlight the limitations of current literatures on the nature of ICJ adjudication. The chapter will also develop the conceptual tools required for understanding the case studies.

The following analysis is structured around my central research question about the extent to which the ICJ can serve as a site for universalism in the postcolonial era. Rather than simply examining the prevailing materials on territorial adjudication and critical alternatives, this chapter refracts ideas through the prism of universalism: what are the underlying assumptions about international law as well as its universality in these literatures? One of the subsidiary research question about how to understand the relationship between colonialism and international law in Arab territorial disputes can only be considered after a detailed examination of the theoretical and methodological

\(^2\) Most studies of ICJ disputes fail to discuss pleadings in even the most cursory manner. Exceptions, however, are noteworthy and inform readings of the case studies in Parts Two and Three of the thesis. Of particular note is Koskenniemi’s general discussion of territorial pleadings in M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2\(^{nd}\) ed, 2005), at 282-300, 385-387; and his detailed consideration of the Libya/Chad dispute as discussed in Chapter Three: M Koskenniemi, ‘L’Affaire du Différend Territorial (Jamahiriya Arabe Libyenne c. Tchad) Arrêt de la Cour Internationale de Justice du 3 février 1994’ (1994) 40 Annuaire français de droit international 442. Knop also offers a close reading of the pleadings in the Western Sahara Advisory Opinion as discussed in Chapter Five: K Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002). Berman’s insightful consideration of a PCIJ case is exceptional and indicates that much fruitful work remains even with PCIJ jurisprudence: N Berman, ‘The Nationality Decrees Case, or, Of Intimacy and Consent’ (2000) 13 *Leiden Journal of International Law* 265.
foundations of international legal approaches to universalism. Accordingly, this chapter focuses on universalism and then the case studies offer specific instances of purported universalism in their exploration of colonialism and international law.

This chapter both deconstructs and reconstructs an understanding of universalism and a methodology of adjudication in five sections. In section one, I ask whether we can regard increased Third World participation in ICJ disputes as a triumph of universalism or something else. Section two explores critical scholarship on the nature of legal universalism and the mainstream research agenda. Section three examines some critical characterisations of international law and language as a precursor to section four's analysis of the linguistic devices deployed in ICJ scholarship. In particular, section three develops the idea of silence, by suggesting that, rather than there being a lack of argument, it is a lack of capacity to hear other voices – or other dialects - that prevents universalism in the courtroom. Section four brings attention to the recurring narratives underpinning mainstream studies of ICJ disputes to understand how claims of universalism are made as well as how they can be sustained – or undermined. Section five is a return to fundamentals with its summation of my own perspective and position on international law. This chapter concludes on a cautious note by showing that international law contains only limited tools for becoming a universalising discourse. This is a start though. The key is to understand both international law’s speech as well as its silence in advancing the scope of international law’s universalising potential.

4) Problematising Postcolonial Participation: Can We Now Speak of a ‘World Court’?

The mainstream international legal academy places faith in the progressive promise of international law. Past or ongoing weaknesses may be admitted, but vocational training also brings with it the desire to improve and strengthen the principled application of international rules. For Kennedy, no matter how ‘difficult the project will be, international lawyers share an orientation to a past of sovereign states and a future of international law. The discipline looks forward, confident that we will arrive in the future with history at our side.’3 The gaze then of the international lawyer projects itself always into a future guaranteed under a law that is more secure and inclusive in our postcolonial era. A striking

example of this purported progress has been the increased participation of Third World states in ICJ disputes, and this is especially so in the sphere of territorial matters. Various reasons have been offered to explain this development, and they will be explored below in an attempt to investigate whether we can now speak of a court able to listen to and speak for the world’s states. The progressivist narrative of mainstream work is only capable of explaining part of this story of participation; greater consideration is still required as to why Third World states choose to come before the Court.

In the English-speaking world (and especially the United States), the ICJ is often characterised as the ‘World Court’. How is this term commonly understood and what should a world court actually look like? First, it is important to note that the ontology of the World Court is a strange one, as it is populated almost exclusively by states. Allott argues that a ‘court epitomizes the social reality of the society in which it is an institution. A court epitomizes the legal reality whose legal relations it enforces.’ From this, it is possible to extrapolate the nature of the represented society from a given court. As applied to the ICJ, this would suggest that the Court works for a society of states, and yet, as Allott concedes, this is not really the case; the Court operates in a society of many actors, but only allows a select few to speak. Despite this restriction on locus standi, the Court is empowered to hear any matter of international concern, and given that a fabric of independent states now spans

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5 Not only have scholars understudied reasons for Third World participation before the ICJ, Romano argues that this is the case in relation to dispute resolution per se: ‘so far there are no comprehensive, systematic studies of the factors determining the resort by developing countries to international judicial fora.’ C P R Romano, ‘International Justice and Developing Countries: A Quantitative Analysis’ (2002) 1 Law & Practice of International Courts and Tribunals 367, at 370.

6 Abi-Saab points out that the expression, ‘world court’ is peculiar to English: G Abi-Saab, ‘The International Court as a World Court’, V Lowe & M Fitzmaurice (eds), Fifty years of the International Court of Justice: Essays in Honour of Sir Robert Jennings (Cambridge: Cambridge University Press, 1996) 3-16, at 3.

7 Article 34(1) of the Statute of the International Court of Justice states: ‘Only states may be parties in cases before the Court’. There is also some provision for the involvement of international organisations: Article 34 (2-3).


9 Ibid.
the globe, we can see the Court as the pre- eminent tribunal for this geo-political reality.\textsuperscript{10} Having acknowledged this context, we can apply Abi-Saab's definition of 'world court': 'it is expected to be universalist in its composition, outlook and vocation, truly representing and at the service of the international community in its entirety, and not dominated by the legal or social culture or special interests of any segment thereof.'\textsuperscript{11}

Although it is relatively easy to characterise the Court in its more recent manifestation as a universal forum, both Abi-Saab and Elias point out that the jurisprudence generated by its predecessor, the PCIJ, was exclusionary in the way most cases only considered Third World states as \textit{objects}, and not \textit{subjects}, of international law.\textsuperscript{12} Difficulties in denying this heritage are exacerbated by the commonly held view that despite the name change, the ICJ and the PCIJ are one and the same entity. This was felt especially keenly in the earlier period of the ICJ.\textsuperscript{13} Bedjaoui, a former president of the ICJ, enunciates this narrative of institutional continuity: 'the present Court is but the continuation of an international justice born at the dawn of this century in the delicious coolness of this charming tree-lined city of The Hague.'\textsuperscript{14} Other recent members of the

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\textsuperscript{10} Many critical and mainstream scholars, however, question the significance of the Court, indicating that labels like 'world' court are deceptive and misrepresent the power and impact of the Court on the international stage. For example, Kennedy argues that 'the Court is one cultural and political institution among others, crafting its decision to enhance its legitimacy and pull towards compliance, the decision one drop in the ocean of world public opinion'. D Kennedy, 'The Nuclear Weapons case', L Boisson de Chazournes & P Sands (eds), \textit{International Law, the International Court of Justice and Nuclear Weapons} (Cambridge: Cambridge University Press, 1999) 462-472, at 464. Some mainstream perspectives tend to lament the weaknesses of the Court, hoping for a stronger institution. This theme is explored below in section four.

\textsuperscript{11} Abi-Saab, 'The International Court as a World Court, supra n 6, at 3.

\textsuperscript{12} G Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline' (1962) 8 \textit{Howard Law Journal} 95, at 98. Elias was making the point in particularly \textit{vis-à-vis} African states, but the comment applies to the majority of the non-European world: 'Africa has in one aspect or another been before the Court since the days of the League of Nations, though unfortunately more often as the object rather than the subject of international law.' T O Elias, \textit{The International Court of Justice and some contemporary problems: Essays on international law} (The Hague: Martinus Nijhoff, 1983), at 299.

\textsuperscript{13} According to McWhinney, 'The Court's deliberate intellectual orientation towards a technical, analytical, logical approach; its established clientele, from the pre-War and immediate post-War years, of politically and economically stable Western states; and the absence of any compensating political sophistication, on the part of the newly emerging, newly decolonised, Afro-Asian countries, as to the Court's potentiality for political conflicts-resolution and for remarking "old" International Law, meant that it continued to operate and to have the reputation, as a "European" tribunal well after the United Nations proper had begun to undergo fundamental changes in its personality and character as a result of the wholesale admission of new states from 1955 onwards.' E McWhinney, \textit{The International Court of Justice and the Western Tradition of International Law: The Paul Martin Lectures in International Relations and Law} (Dordrecht; Boston: Martinus Nijhoff, 1987), at 67.

\textsuperscript{14} M Bedjaoui, 'Celebration of the Fiftieth Anniversary of the International Court of Justice' (1996) 8 \textit{African Journal of International Comparative Law} 617, at 621. For this narrative of PCIJ/ICJ continuity, see R P Anand, \textit{Studies in International Law and History: An Asian Perspective} (Leiden: Martinus Nijhoff, 2004), at 159; E McWhinney, 'The International Court of Justice and International Law-making: The Judicial
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Court, including Judges Jennings and Weeramantry, disagree with this characterisation of the Court. Irrespective of the relative merit of these divergent perspectives, however, the image of the PCIJ serving European interests was hard to ignore for recently independent states entering international society on the eve of independence.

Given these institutional characteristics of the ICJ, especially in its first few decades, European and Third World scholars have recognised the postcolonial paradox Third World states faced: to use the Court or not to use the Court. The paradox for Third World states is that it could be argued that to protect themselves, they must rely on the very weapons once created by their former colonial overlords. Many reasons have been advanced to account for minimal Third World ICJ engagement, but the main strands running through the literature have tended to focus on the context of the Cold War, the debacle of the South West Africa cases, under-representation of non-European judges and


17 For example, Fatouros points out that in many ways international law is especially useful for Third World states as it can act as a weapon of the weak. A A Fatouros, ‘International Law and the Third World’ (1964) 50 Virginia Law Review 783, at 791.


legal norms, as well as deep-seated Third World cultural (as opposed to political) aversion to third party dispute resolution. In relation to the last point, it is surprising how both Third and First World scholars have readily applied cultural stereotypes to the entire non-European world. Third World scholars such as Sinha and Tieya have suggested that Third World states preferred the avenues of negotiations and mediation; adjudication was not culturally appropriate.21 Pott lends her own European assessment to the ‘problem’ of Third World participation by arguing that only in Western societies had there developed the requisite notion of an independent judiciary divorced from politics. Thus, non-European states expected certain ‘non-legal’ solutions from the Court and were unsure about how to approach it.22 Writing much more recently, and perhaps with the benefit of hindsight, Romano cautions against making such generalisations about the Third World being less culturally inclined toward litigation.23

Although many commentators have avoided cultural stereotypes in their accounts of Third World participation, most have at least identified the importance of diversity on the ICJ’s bench in accounting for initial Third World reticence in using the Court.24 Why would Third World states trust an institution unrepresentative in its officers and the laws they applied? Mainstream scholarship suggests that only once some of these characteristics changed would Third World states be willing to entrust matters before this tribunal. As Third World jurists themselves, both El-Erian and Weeramantry single out Article 9 of the Court’s Statute for discussion:

the matter was denied to Ethiopia and Liberia. With a different bench and condemnation of its 1966 judgment, in 1971 the Court ruled that South Africa’s presence in the territory was illegal. Despite this ruling, Namibia (the name of the territory since 1968) only gained its independence in 1990. For discussion about the cases, see J Crawford, The Creation of States in International Law (Cambridge: Cambridge University Press, 2nd ed, 2006), at 586-598.


22 L V Pott, ‘Role, Consensus and Opinion Analysis at the International Court of Justice’ (1983) 14 Netherlands Yearbook of International Law 69, at 72.


24 It is striking that in reading many discussions about the representation of ICJ judges, never once did a mainstream or Third World perspective express any concern about the gendered nature of the Court; it was worrying to have only European males, but not non-European males. This oversight in understanding the concept of a representative bench is explored in H Charlesworth & C Chinkin, The Boundaries of International Law: A Feminist Analysis (Manchester: Manchester University Press, 2000) at 80-81.
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At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

El-Erian argues that this requirement of civilisational representation is significant and is unique in the UN system, which is otherwise based on equitable geographical distribution of its personnel. 25 Weeramantry regards this provision as fundamental for the possibility of a universal Court, able to speak for and speak to the world’s many civilisations. 26 Weeramantry’s example of inter-civilisational jurisprudence contained in his own separate opinions is testimony to such a possibility. 27 In the words of Anghie, Weeramantry ‘suggests that international law is not alien to the Third World; it is part of the heritage of Third World countries which have contributed to its development.’ 28 Despite Weeramantry’s efforts, however, he has recently doubted the scope for such inter-civilisational dialogue on bench, noting that ‘it has not happened thus far in any significant measure, and such input, has been miniscule.’ 29

Although genuine civilisational representation has yet to be realised, and perhaps can never be, it is clear that the issue of the ratio of European/non-European judges at the ICJ has been a continuing motif in the literature accounting for Third World reluctance especially in the early years of the Court. For Romano, ‘the issue of the distribution of seats in the ICJ has always been highly contentious, notably among the Asian group, which is representative of such a large part of the world’s population but relatively underrepresented on the bench.’ 30 Some useful quantitative studies highlight the continuing discrepancies in the geographical and civilisational composition of the bench. 31

Numbers aside, however, it is difficult to establish any direct link between the ICJ’s bench and its jurisprudence. Anghie reminds us that there are no specific qualities

29 Weeramantry, Universalizing International Law, supra n 26, at 3.
30 Romano, ‘International Justice and Developing Countries (Continued)’, supra n 23, at 579.
possessed by Third World judges, but they do at least bring with them certain personal experiences:

To label a judge as a ‘Third World’ judge based on the positions he [sic] takes on specific issues is a relatively simple, and perhaps simplistic way of characterizing a judge. The more complex issue is the relationship between the Third World judge and international law itself, given that historically, international law has marginalized Third World peoples and legitimized their dispossession and conquest.\(^3\)

Bedjaoui echoes this idea by arguing that the work of a judge is deeply personal; conscience, rather than political factors, influences legal determinations.\(^3\) Other writers have dismissed any relationship between a judge’s nationality and her jurisprudence, especially because most Third World jurists are themselves educated in Europe or North America and often are well-versed in the Peace Palace’s markedly European culture upon arrival.\(^3\)

Despite the fact that there are strong arguments negating a link between Third World judges and structural change within the ICJ, the South West Africa affair has since been explained as being very much about First World judicial bias.\(^3\) Along with the Nicaragua case, these two examples are constructed as polar opposites in accounts of Third World ICJ participation.\(^3\) This narrative of dark and light is part of ICJ literature; no study of the Court is complete without a discussion and comparison between these watersheds.

Time and again, the dark days of the Court’s ‘betrayal’ in its 1966 South West Africa decision are singled out in a bid to distinguish and exceptionalise this episode in the Court’s

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3\(^3\) Bedjaoui, supra n 14, at 622-623. Dupuy also regards the institution of the judge as especially important in advancing the cause of the Court: ‘it seems that the best way for improving the role of the ICJ as a world court rests in the hands of the judges themselves, and in the way they view the true function of the Court within the international legal system. It is more a matter of judicial policy than of technical efficiency improvements, even if it is true that some such improvements could be achieved.’ P-M Dupuy, ‘The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice’, (1998-1999) 31 New York University Journal of International Law & Politics 791, at 802.

3\(^4\) Abi-Saab talks more broadly about the way in which many Third World jurists educated in the West are excessively positivist and incapable of questioning legal rules. Abi-Saab, ‘The Newly Independent States’, supra n 12, at 100.

3\(^5\) For a nuanced and contextual consideration of the South West Africa affair and its roots in European intellectual history, see S N Grovogui, Sovereigns, Quasi-Sovereigns, and Africans: Race and Self-Determination in International Law (Minneapolis: University of Minnesota Press, 1996).

The casting vote of a First World judge gives further weight to this extraordinary affair that prompted profound distrust across the Third World. For example, Munya rejected any notion of universalism after this episode, naming the ICJ as the 'Western Court of Justice'. Rarely do accounts acknowledge the relative unimportance of the Court for Third World states before the **South West Africa** cases or suggest other reasons for its associations with colonial/mandatory rule at the level of international legal discourse itself.

Irrespective of this earlier context, however, narratives lauding the rise of Third World participation must show how Third World attitudes have changed radically since the unfortunate experience of **South West Africa**. The soul-searching prompted by **South West Africa** resulted in a greater awareness of the influence of Third World judges, and commentators have documented the phenomenon of Third World states lobbying for their own jurists. By the time the Court was tested in **Nicaragua**, the typical narrative suggests that Third World interests were vindicated: the Court could now shine for the interests of the majority world. Furthermore, in 1986 with this instance of First World reversal, the ICJ’s Chamber also handed down its *cause célèbre* of later territorial judgements, the **Frontier Dispute**, which demarcated the boundary between two African states, Burkino Faso and Mali. This judgment has served as the blueprint for later Third World territorial disputes, which largely revolve around *ad hoc* agreements seeking the Court’s assistance in solidifying borders. Over a decade later and with unprecedented Court activity, Judge Ajibola noted: ‘This increase in the volume of cases before the Court is obviously a reflection of an increasing confidence that states now have in the Court. It suggests that states are now more amenable to submitting their differences to adjudication."

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37. M Pomerance, ‘The ICJ and South West Africa (Namibia): A Retrospective Legal/Political Assessment’ (1999) 12 *Leiden Journal of International Law* 425, at 430. Adele offers an example of this narrative of exception: he describes how President Judge Spender advised Judge Khan to step down for the 1966 case, thus changing the balance of the Court. Such an account may well be factually correct, but in focussing on these superficial factors, it is easier to distinguish this episode and overlook pervasive structural explanations for why it was possible at all for the Court to reach such a decision. A O Adele, ‘Judicial Settlement in Perspective’, A S Muller, D Raič & J M Thurniszky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (The Hague; Boston: Martinus Nijhoff, 1997) 47-81, at 51-53.


41. Distefano, *supra* n 4, at 1042.

42. *Case Concerning the Frontier Dispute (Burkino Faso/Mali)* (1986) ICJ Reps, p. 554. The case is discussed briefly in Part Two’s Introduction, at 99-117.
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than they were in the past.' 43 Former events and PCIJ memories aside, then, most commentators feel confident in viewing the Court as qualitatively different from its early days, partly as a result of increased Third World participation. Perhaps, in the twenty first century, it is even possible to posit a Court universal in its reach and representation.

Third World participation in the Court is noteworthy, but it does not prove the Court’s universalism or legitimacy. Rarely have scholars celebrating the Court’s ‘relevance’ advanced convincing structural reasons for the seeming shift in Third World proclivities. For example, most mainstream accounts about the work of the Court disregard quotidian realities for Third World decision-making about adjudication.44 Concerns about representation, language, time delays and funding nevertheless are real.45 For example, little attention has been paid to the impact that an almost exclusively European bar must have on the choices available to states.46 Some scholars especially from the Third World are alive to these limitations and biases, but rarely is this feature acknowledged elsewhere. Pellett is a notable exception, when he concedes that ‘in the small world of public international law we may speak of the “mafia” of the International Court of Justice’.47 Reasons for this situation are many, but one factor is the way in which lawyers well-versed in the Court’s languages of English and French will ipso facto feel more at home than some of their counterparts. In a rare discussion about the impact that language restrictions have on participants, Judge Oda described the difficulties he has faced in keeping pace with native English or French speakers on the bench.48 Many Third World lawyers and judges possess the Court’s official languages as mother tongues too, but this is not always the case.49

44 In a discussion about some of the difficulties and drawbacks of ICJ litigation, see G Guillaume, ‘The Future of International Judicial Institutions’ (1995) 44 International & Comparative Law Quarterly 848.
47 Quoted in Romano, ‘International Justice and Developing Countries (Continued)’, supra n 23, at 561, note 79. This point is also made by McWhinney, ‘“Internationalizing” the International Court’, supra n 19, at 288.
49 The relevance of language is rarely noted in the literature, but an exception is Richard Falk, who discusses ‘Western cultural hegemony’ as symbolised by the Court’s location in The Hague working only in French
Of similar neglect is the factor of litigation expenses preventing Third World participation. The ICJ Statute requires states to fund the costs of a case, and these may be prohibitive for many Third World states. On the initiative of the Non-Aligned Movement (NAM) at the UN, the General Assembly introduced the Secretary-General’s Trust Fund derived from the voluntary contributions of member-states to support needy states in covering litigation costs for contentious cases founded on a compromise. Jennings argues that the ‘fund is clearly an important step in enabling poorer countries to take advantage of the Court for the disposal of disputes within its contentious jurisdiction, where the parties are able to make a special agreement.’ Such an initiative – even though limited in its accessibility and future liquidity – is commendable and could serve as another factor in boosting Third World participation before the Court. Bekker, however, laments the lack of scholarly or media attention on the fund’s impact thus far.

Factors such as the increased representation of Third World judges and the Nicaragua judgment have bolstered the Court’s legitimacy, but it remains unclear whether this can account for why Third World states now rely on the Court more than ever before. Many mainstream scholars have praised the Court for its postcolonial progress and now invoke the narrative of universalism, but critical scholarship, introduced in the next section, questions not only the arguments advanced but also the methods used in constructing such a narrative.

5) NAIL and TWAIL on the Politics of Law and the Possibility of Universalism

Mainstream accounts of the Court’s universality rest on assumptions about the nature of international law. This is equally true of those voices questioning and challenging such a

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and/or English. R Falk, Reviving the World Court (Charlottesville: University Press Of Virginia, 1986), at 180.

50 Article 64, Statute of the International Court of Justice.


52 Jennings, ‘The International Court of Justice after Fifty Years’, supra n 15, at 501.

53 P H F Bekker, ‘International Legal Aid in Practice: The ICJ Trust Fund’ (1993) 87 American Journal of International Law 659, at 660. It has been very difficult to access detailed information about the fund’s beneficiaries, but I am aware that the fund was used by Burkino Faso and Mali in the Frontier Dispute in applying the Chamber’s boundary determination, and Chad drew on funds in its dispute with Libya in the Territorial Dispute, discussed in Chapter Three below. In his 2002 survey, Romano notes that since its inception, four requests for assistance have been made. Romano, ‘International Justice and Developing Countries (Continued)’, supra n 23, at 554.

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depiction of the ICJ. Thus, debates about the nature of the Court are part of a broader disciplinary debate about how to study international law. Methodology is an exercise in boundary-drawing and a conscious choice about which knowledges to privilege and which to silence. It is the task of critical scholars to probe these ‘blind spots’ within the discipline to deny the naturalness and inevitability of prevailing power relations, including those constructed through the discourse of international law in and beyond the courtroom. International law is structured by a dynamic of difference and NAIL and TWAIL scholars have highlighted this dynamic in a number of ways. Reappraisals of binary oppositions such as masculine/feminine, colonial/postcolonial, universal/particular and law/politics demonstrate how difficult it is to speak of universalism. By studying the dark side of dichotomies at play in international legal discourse, this section problematises the narrative of universalism and progress as explored in section four’s consideration of some themes in the literature about the ICJ. The section first surveys some basic characteristics of NAIL scholarship before considering TWAIL’s particular perspective on Third World concerns revolving around colonialism.

Summaries inevitably simplify scholarship and this perhaps is especially so in relation to NAIL, which seeks to open up, rather than contain and confine, international legal research. Thus, instead of attempting a survey of NAIL literatures, some relevant

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56 The idea of disciplinary blind spots is invoked by a number of critical scholars, who speak of mainstream methodological oversights. Some examples include: Charlesworth, supra n 55, at 386; and Kennedy, ‘When Renewal Repeats’, supra n 3.


58 The idea of the dark side is noted by Koskenniemi when he discussed the need to deconstruct the promise of liberalism and appreciate those it overlooks in this world of endless consumer choice: ‘Not to fall under the spell of that shopping mall requires focusing on its dangers, discontinuities and mechanisms of exclusion. If “deconstruction” is able to bring out that dark side, the reality of the mall at night, it may provide a means for critical identification and practice.’ M Koskenniemi, ‘Letter to the Editors of the Symposium’ (1999) 93 American Journal of International Law 351, at 361. David Kennedy also explores this image in a number of his writings, the most extensive being: D Kennedy, The Dark Sides of Virtue: Reassessing International Humanitarianism (Princeton: Princeton University Press, 2004).

themes are explored instead so as to problematise the self-image of international law within the discipline as well as to raise questions about universalism. Critical approaches rose to prominence in the eighties especially with the work of David Kennedy and Martti Koskenniemi. Kennedy described his approach, and those of his peers, as ‘Newstream’, and this was a term that encapsulated critical reappraisals of the discipline until its later metamorphosis in the nineties into ‘NAIL’. Critical scholars are concerned with exploring the inner workings of the discipline of international law. Excavations have revealed ‘biased discursive structures,’ usually hidden under the veil of liberalism, which is typically depicted as normatively neutral in a system straddling sovereignty and its constraint. Critical scholars challenge liberalism’s promise of equality by revealing the ‘background conditions and norms’ of international law, which generate not only disciplinary blind spots and biases, but also exclusion for actors on the ground.

Critical approaches are alive to the effects generated by the perpetuation and seeming naturalness of dichotomies and none more so than the tension between law and politics. By separating law from politics, mainstream scholars can construct an image of international law untouched by considerations of power and domination. In so doing, the bulk of international legal scholarship perpetuates ongoing exclusion and silence in a gesture that is – at least covertly – fiercely political. Conversely, critical scholars elide law with politics, showing us that the two cannot be separated; international law is a ‘tradition and a political project’, played out in a special institutional and discursive setting that provides it with particular meaning. Thus for Koskenniemi, law ‘is a surface over which political opponents engage in hegemonic practices, trying to enlist its rules, principles and

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61 Especially see the work of Koskenniemi listed in the bibliography; and D Kennedy, ‘A New Stream of International Law Scholarship’ (1988) 7 Wisconsin International Law Journal 1.


63 See generally, Koskenniemi, From Apology to Utopia, supra n 2; and M Mutua, Keynote Address, Third World Approaches to International Law, Albany Law School, 20-21 April 2007.


Institutions on their side, making sure they do not support the adversary." 66 For international lawyers, the 'point is...not to be ashamed of...underlying choices but to make them in the open, to open them up for critique and rebuttal.' 67 Kennedy suggests that we ask not 'whether politics or where politics, but what politics.' 68

Once law is understood as a discursive political practice, it is impossible to regard rules as objective or to resolve definitively conflicts over competing norms in a horizontal system; international law becomes indeterminate. The consequences of this position have resulted in profound mainstream mistrust. Thus, Skouteris notes that '[d]espite the growth of NAIL writing, engaged scholarly response has been spectacularly absent.' 69 Political ramifications within NAIL are also internally destabilising, as its call for context can also be deconstructed, making it impossible to know which account to favour. 70 The consolation at least is that NAIL is alive to the politics of choice in its methodological schemes. Ultimately, NAIL provides the conceptual tools for exposing structural biases and contingencies at the heart of international law. Whether it can serve as a political platform for progressive change is still to be seen, especially in relation to law as a universalising discourse.

A number of approaches based around identity have taken up the themes of NAIL in various shades of harmony and dissonance. 71 For example, both feminist and Third World concerns have their roots in earlier projects, but they have often combined these along a broader critical trajectory, so that it is possible to note a whole range of critical subfields within NAIL.

TWAIL is one critical approach which shares many similarities with earlier Third World as well as NAIL scholarship in its quest to interrogate the universality of international law. Kennedy identifies the central TWAIL concerns as being:

How is domination and inequality reproduced?
What has international law got to do with it?
How can we fight this domination? 72

67 Paulus, supra n 60, at 753.
68 Italics in the original, Kennedy, 'When Renewal Repeats, supra n 3, at 412.
69 Skouteris, supra n 59, at 419-420.
70 Paulus, supra n 60.
71 As noted in Kennedy, 'When Renewal Repeats', supra n 3, at 391-392 and especially footnote 22.
Chimni echoes this by pointing out that TWAIL’s focus is centred on struggles of Third World peoples; he argues, however, that a NAIL tendency toward rejecting all rules and offering no alternatives is unhelpful. TWAIL began as a movement in the mid nineties, but draws heavily on the consciousness and practice of earlier Third World jurists seeking to advance the rights of the developing world in the context of decolonisation. Gathii notes that these earlier scholars, or TWAIL I scholars, were largely concerned with how to reform international law so that it could fulfil its promise of equality and universality in a postcolonial world. Although a nationalist strand rejected international law altogether, an integrationist strand advanced a multicultural law, built on European and non-European norms. A number of first and Third World scholars therefore focused on an historical account of international law’s pre-colonial origins and many argued and continue to argue that international law was once based on the interaction between European and non-European independent states. Colonialism and its denial of international legal personality cannot be ignored, but with its demise, many scholars were keen to show how international law was also culturally rich and non-discriminatory. Such studies have contributed to our understandings of the history of international legal relations and their contribution is explored in Chapter Two.

‘TWAIL II’ scholarship is more cautious about embracing optimistic narratives of a postcolonial international law: structural biases continue to exclude and silence much of

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76 Ibid, at 273.


the Third World, but in different ways from those of the colonial period. Thus, TWAIL II has channelled its energies in exploring the legacies of colonialism to show that colonialism is a constant and that international law is a ‘medium of conquest and domination’. Particular attention has been paid to understanding how international law is not a practice based on regulating relations between sovereign states; instead, it is structured by an ongoing dynamic of cultural difference. Continuity, rather than change, is highlighted, and so it becomes much more difficult to speak of an era after colonialism. Pahuja captures this idea when she posits that the “‘post” in postcolonial designates a state neither clearly beyond nor after the colonial.' Our consciousness as international lawyers and the experience of Third World peoples cannot escape the reality that ‘first of all there was colonialism’. Although TWAIL is devoted to the interests of Third World peoples (as opposed to Third World states), Mickelson reminds us that colonial legacies are no less important for the First, as opposed to the Third, World, especially regarding the distribution of wealth. More recent European narratives of good governance are remarkably similar to the nineteenth century’s ‘Standard of Civilisation,’ and so current TWAIL research is especially intrigued with the cultural implications of persisting economic inequalities for Third World peoples.

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82 Pahuja, *supra* n 1, at 469.
86 The ‘Standard of Civilisation’ is discussed in more detail below in Chapter Two, at 78-81.
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Perhaps because TWAIL II emphasises economic relations in a bid to expose the public/private dichotomy of liberalism, little attention has been given to territorial adjudication. To date, no TWAIL scholars have offered a close reading of Third World pleadings before the ICJ, confining themselves instead to the Court’s judgments.88

Although we cannot speak of one Third World approach or one Third World,89 both TWAIL I and TWAIL II scholars have used this label as a tool of resistance in working out how to understand the relationship between international law and its universality. Kennedy reminds us that critical approaches encounter a dilemma: ‘frame breakers are generally either interpolated back into the disciplinary vocabulary or placed outside the field’.90 There is thus a distinction ‘between people operating within the disciplinary lexicon and people pursuing criticism and reform outside it.’91 TWAIL scholars cannot be placed in one camp, but it is clear that there is discomfort for some TWAIL scholars about how to work with or work against international law. The structural implications, particularly of TWAIL II scholarship, provide little hope for a law that can transcend its exclusionary dynamics, and yet Anghie argues that TWAIL must continue to ask not if but how to ‘construct an international law that is responsive to the needs and aspirations of the peoples of the Third World.’92

The tension between hope and despair within TWAIL scholarship complicates its approach to universalism. When reading TWAIL accounts of colonialism’s continuing legacy, it is unclear if international law is being abandoned or if there is an attempt to change it. Writers disagree on this, but both Chimni and Anghie, for example, argue that international law cannot be rejected: ‘International law is a field of contestation over meanings, approaches, solutions, remedies, and one that TWAIL cannot surrender.’93 Pahuja has noted this irresolution in the work of Anghie, arguing that ‘the concept of

89 Chimni, ‘Towards a Radical’, supra n 73, at 14.
90 Kennedy, ‘When Renewal Repeats, supra n 3, at 460.
91 Ibid, at 463.
92 Anghie, Imperialism, supra n 79, at 2.
93 Anghie & Chimni, supra n 84, at 101.
universalism is under-theorised. Anghe himself has conceded this point: there is the will for universalism within many TWAIL accounts, but no robust theoretical mechanism advanced about how to move beyond international law’s imperialising structures. It would seem then that especially TWAIL II scholarship has perhaps been too successful in revealing the dynamics of difference. Some of TWAIL’s leading figures have shown us how to understand inequalities at the heart of international law, thus fulfilling the first two questions raised by Kennedy above. They have also made a convincing call to resistance, and Kennedy argues that the way to fight back is in producing new legal maps. Given the persistent tension in TWAIL scholarship over law’s universalism, we need to draw new maps. By considering the specific case of Arab territorial adjudication, this thesis will map out the possibilities for universalism before the Court.

6) Speaking in Tongues: International Law as Language

The most important conceptual tool for the thesis is a critical sensibility towards the discursive qualities of international law. One of the hypotheses informing my research is that the construction of law in the courtroom is a process of argumentation. Such an assumption is just as relevant outside the courtroom in academic discussion: institutional particularities and conventions influence ICJ disputes, but otherwise, they are a part of the discursive practice that is international law writ large. This section reviews NAIL approaches to language so that we can then apply them first in our reading of ICJ scholarly literature in the chapter and then to ICJ territorial disputes in mapping the scope for universalism.

95 Anghe, Imperialism, supra n 79, at 317.
97 Kennedy, ‘Keynote Address’, supra n 72.
Critical international legal scholarship has shown us not only that language matters, but that international law itself is language; there ‘is no escape from language.’ For Cass, ‘[i]f law is a set of arguments generated by language then it is the discussion or conversation about the arguments that creates the concepts themselves, not the actual behaviour of states, their consent, or their beliefs.’ Thus, language does not describe behaviour and rules; it actually constitutes them. In the words of linguist Joshua Fishman:

Language is not merely a means of interpersonal communication and influence. It is not merely a carrier of content, whether latent or manifest. Language itself is content, a referent for loyalties and animosities, an indicator of social statuses and personal relationships, a marker of situations and topics as well as of the societal goals and the large-scale value-laden arenas of interaction that typify every speech community.

This understanding of language is applicable to any form of discourse, including international law, and it is echoed by Boyle’s work on international law. Like Fishman, Boyle denies the possibility of language as something a priori, or as an incontestable representation of social ‘fact’. In relation to the international law debate about sources, Boyle argues that ‘[t]he idea of finding the essence or the real source of law distracts us from the reality that, in a very important sense, it is being created by our categories and definitions rather than being described by them.’

Once we apply this sensibility about language to international law, the result is indeterminacy: there can be no external reference point and no rule that is beyond choice; all rules are rooted in politics. Koskenniemi’s impressive scholarship is particularly intrigued with international law’s discursive indeterminacy. Responding to a request for methodological comment in a special issue of the American Journal of International Law, Koskenniemi reveals his understanding about language and indeterminacy:

Legal styles are styles of argument, of linguistic expression. The accounts of method contained in the symposium readily accept this and seek to establish a

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99 Cass, supra n 60, at 361.
100 Ibid, at 359.
103 Koskenniemi’s work explores the theme of international law as language. For a more detailed list of his work in this regard, please consult the bibliography.
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firm relationship between that language and the world that it is assumed to reflect. In order to describe or assess the relationship between language and the world, however, there should be some way that is independent of language to which the forms of language could be compared. There is, however, no such way. The languages create worlds and do not ‘reflect’ them. Koskenniemi thus shows us that law cannot be separated from its linguistic and political context.

Although NAIL forces international lawyers to grapple with this indeterminacy, it is also reassuring for those lost in this vision of Babel: international law is at least imperfectly structured by a series of conventions and dominant narratives that limit what is professionally preferable. According to Kritsiotis, ‘in the same way as power itself, international law prescribes its own limitations as a language and discipline – in the methods and arguments it allows, in its sources, in the interpretations and principles it accepts, and in its own modus operandi.' International lawyers are political actors, but Koskenniemi recognises that ‘[w]e don’t choose to use the concepts of international law when we enter international legal discourse. Rather we must take a pre-existing language, a pre-existing system of interpreting the world and move within it if we wish to be heard and understood.’ The use of the first person pronoun here is important because international law is necessarily a community-generated discourse. International lawyers are therefore members of an ‘interpretive community’ rewriting the rules of their own success. For Korhonen, international lawyers must be mindful of the socialising function of international law:

In order to be able to make a meaningful argument in international law one has to adapt to the meaning-structures, the already-defined problematic, and the direction of epistemic interest that together amount to the world-view of the discipline.

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105 This idea is also reflected in Chimni’s notion of permissible interpretations of treaties, discussed in Chimni, ‘Towards a TWAIL Theory’, supra n 78.
107 Koskenniemi, From Apology to Utopia, supra n 2, at 12.
108 Both Kennedy and Chimni touch on this idea of interpretive communities. For example: Kennedy, ‘When Renewal Repeats’, supra n 3, at 346; and Chimni, ‘Towards a TWAIL Theory’, supra n 78.
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What are the structures of international legal argumentation and what is the world-view of the discipline? The thesis does not answer these questions comprehensively, but the case studies are a start in this process.

From these observations, it follows that success in legal argument is not founded on the presentation of compelling doctrinal ‘evidence’ but rather on the ability to recognise and perhaps refashion underlying linguistic structures of international law. ‘Therefore, an organized conception of...situational limitations is indispensable for the international lawyer.’

International law is no different from other languages in the way it is built on a set of rules of syntax and grammar, and this is acknowledged by its practitioners. The mistake made by many lawyers, however, is to recognise only those rules expressed at the level of doctrine; instead, doctrine needs to be understood as a malleable tool of argument in the hands of those lawyers fluent in the language of international law. Thus, the ‘politics of international law is what competent international lawyers do. And competence is the ability to use grammar in order to generate meaning by doing things in argument.’

This thesis is a study of international law and not linguistics per se, but it is instructive to set out some definitions of language that are applied in my readings of the case studies. As discussed above, language is both an open and closed system of the communication of and generation of meaning; language is dynamic and adaptive, but it is only comprehensible within certain limits of grammatical and lexical usage. Thus, the language of international law has developed and changed in response to the speech of its interlocutors, international lawyers, but their speech has also been structured and limited by the discipline of international law. The thesis builds on the notion of ‘grammar’ employed by Koskenniemi and it interprets the term to mean those general rules of language that structure how words or phrases gain meaning. For example, in English, with its minimal

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110 Ibid.
111 This idea is also expressed by Koskenniemi, who argues that the key is not so much which argument is used, but ‘what rules govern the production of arguments and the linking of arguments together in such a familiar and conventionally acceptable way and why it is that no definite resolution of standard problems can be attained.’ Koskenniemi, From Apology to Utopia, supra n 2, at 8.
112 Italics in original, Ibid, at 571. Kennedy ‘present[s] international law as a series of professional performances rather than an edifice of ideas, doctrines, and institutions recasting the discipline’s intellectual tools as a lexicon of argument about reform and disciplinary renewal, as well as professional affiliation and disaffiliation. For international lawyers, the performances of renewal, criticism, and reform are central to professional identity and competence...’ Italics added. Kennedy, ‘When Renewal Repeats, supra n 3, at 337.
inflectional endings, syntax or word order fulfils a grammatical function, helping us identify the subject and object of a verb.\textsuperscript{113}

At a more abstract and perhaps less systematic level, international law also has its rules or grammars of usage. The thesis is particularly intrigued by international law’s discursive constraints around the relationship between law and politics. As will be shown in the case studies, a variety of devices are drawn on in adjudication to provide definition and certainty to the field of international law and the ICJ by the separation of law from politics. Because doctrine is indeterminate, determinacy is provided in part by the grammar of the law/politics dichotomy. Specific words forming international law’s lexicon assist this communicative process of limiting international law’s indeterminacy. Thus, words and phrases carry a particular meaning within the language of international law. The case studies also highlight the extent to which new words and new meanings generated by Third World states participating in ICJ adjudication are comprehensible in the Peace Palace. Thus ‘lexicon’ is used to express utterances that are meaningful within the discourse of international law. For example, what does ‘consent’ mean within the context of treaty formation? What incidents and events are permissible in arguing for consent or its absence? In Chapter Three where Libya’s argument about its lack of experience vitiating consent is discussed, is such an idea comprehensible within the disciplinary discourse? Are there words in international law’s lexicon that can capture Libya’s experiences?

Because of linguistic and experiential diversity, the practice of international discourse is about more than speaking in a lawyerly mother tongue; it is also about translation. As international law is a limited language, experiences outside its parameters must be spoken anew in a tongue that is intelligible. According to Koskenniemi, ‘[t]he question of the justiciability of international disputes is then a question about the possibility of translating values and priorities that contestants in a dispute advance, into the idelect of international law as one aspect of such modernity.’\textsuperscript{114} Related to this notion of translation is the question of whether international law is actually capable of speaking for various peoples, ideas and experiences: can all dialects and languages be rendered in legal language? Partly as a result of international law’s reliance on the dichotomy between law

\textsuperscript{113} For example, with its word order, ‘the cat saw the girl’ conveys meaning in English by the speaker knowing that the subject usually precedes the object. Thus, the cat is the subject of the verb, and the girl, its object.

\textsuperscript{114} Italics added, M Koskenniemi ‘The Silence of Law/The Voice of Justice’, Boisson de Chazournes, Laurence & Sands, Philippe (eds), International Law, the International Court of Justice and Nuclear Weapons (Cambridge: Cambridge University Press, 1999), 488-510, at 507.
and politics, speech that upholds this distinction is invoked to portray law as objective and unaffected by (political) indeterminacy. Thus, ‘the translation of the disputants’ languages into the ideolex of formal rules and principles, rights and claims, is expected to produce a distancing effect under which a settlement becomes possible irrespective of the quality and intensity of the passions it triggers.’\(^{115}\) Certain experiences challenge legal language to such an extent that translation is impossible; they are silenced by their situational incomprehensibility.

Aside from the structure provided by its grammar, international law as language is also constrained by the particular institutional biases in which it is articulated. Thus, international law as invoked in ICJ territorial disputes will carry with it particular conventions that are somewhat distinct from international law more generally. A competent lawyer in ICJ disputes accordingly should not only be able to understand the grammar of international law, as well as translate her client’s needs, but also speak in a particular way to suit the sensibilities of the Court. If we apply Korhonen’s scholarship about situationality, we can say that a competent and successful international lawyer engaged in ICJ dispute resolution must be cognisant not only of the general parameters of international legal discourse but of those particular to the ICJ.\(^{116}\)

Shalakany has explored the effect of institutional conventions in the context of Third World arbitration. Shalakany notes that disputes over natural resources could have been decided in a number of ways because ‘the institution and the doctrines [of arbitration] are indeterminate enough to assist either party interchangeably.’\(^{117}\) Why then have Third World states consistently lost when trying to maintain ownership of their resources? Shalakany points to assumptions underpinning arbitration, such as the belief that arbitration is removed from the political sphere because of its structure between equal, consenting parties.\(^{118}\) For example, Shalakany ascribes Libya’s arbitral failures to its refusal to maintain the law/politics divide: ‘Once Libya’s actions were associated with politics and the coercive exercise of sovereign powers in an unequal relationship, Libya was simply

\(^{115}\) Ibid, at 501.


\(^{118}\) Ibid, at 455.
denied access to a whole set of legal interpretations that could have been more favorable to its position."

Arbitration possesses its own distinct set of disciplinary sensibilities, but the basic idea is useful in considering why certain themes for discussion are avoided at the ICJ’s bench, especially in majority judgments. Although territorial disputes are based on the language of sovereign power, international law’s broader quest for separation from politics means that rarely is a court willing to listen to accounts about the effects of power inequalities on the creation of treaties or the importance of natural resources for a party’s case. The case studies in the thesis all present narratives about the struggle over natural resources and it will be shown that Shalakany’s typology of denial applies equally to these disputes: generally, states do not acknowledge the presence of oil, gas or water lying just below the surface of courtroom proceedings.

In another institutional performance of the law/politics dichotomy, Koskenniemi points out that emotion is also shunned in ICJ speech acts. Emotions are hard to render into ‘rational’ speech and thus, many experiences will necessarily remain untranslatable and silenced. For example, in the Court’s Advisory Opinion in the Nuclear Weapons Case, law was simply unable to encapsulate or speak about the horror of such weapons: ‘For a voice of justice to be heard, law must sometimes remain silent.’ The parties and judges of the ICJ in the cases explored in the thesis all display different levels of emotional outburst and restraint in their attempts of limiting and expanding the linguistic parameters of international law.

7) Interrogating Conventions within Mainstream ICJ Literatures

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119 Ibid, at 456.
120 Boyle makes a similar point in relation to the quest for a-political language in international law: ‘The scholars of the Western countries have modelled international law along the familiar lines of liberal state theory. Their utopian vision is that politics can somehow be constrained by (a-political) rules. This vision leads them to attempt to show that language can somehow provide a neutral conduit for power. The state’s consent is to something called “a rule.” This rule is made up of words and the words can be interpreted in a non-political way. Thus, ideological conflict can be separated from legal argument and the nation state can logically give its obedience to the resulting “objective” structure.’ Boyle, supra n 102, at 347.
Section two explored some recent mainstream reactions to the Court’s increased docket, suggesting that this development can be distinguished from the Court’s overly-European past; it is now possible to speak of a World Court upholding universal norms. A number of structural factors, however, challenge such an account. This section explores some contributions from the large body of literature about the institutional and jurisprudential nature of the ICJ, as well as intersecting studies on territory, and juxtaposes these with critical perspectives. Through an application of the tools discussed in sections two and three, the following section will show that despite a voluminous literature, accounts of the Court’s processes of argumentation and the possibility of universalism obscure as much as they reveal. After describing the scholarly conventions of mainstream ICJ and territorial scholarship, this section then explores three inter-related narratives informing the literature: the maintenance of the law/politics dichotomy, particular readings of the relationship between the past and the present, and faith in a progressive international law.

Most writings on the practice of the Court are remarkably similar and can even be described as formulaic. Countless books and articles contain near-identical accounts of the Court’s procedures and summaries of its jurisprudence. Special anniversary volumes or festschriften are regularly produced to mark the latest milestone, and often the themes contained in such tomes differ very little from previous publications. Nostalgic personal


accounts of time spent within the Peace Palace also appear, serving to remind us of the selective authorship typical of this field. Although some authors have questioned the power and role of the Court, the bulk of ICJ scholarship continues to display both optimism and respect for this pre-eminent ‘world’ court. This is partly a result of authorship: writings about the Court tend to come from international law practitioners (often appearing at the Peace Palace), academics or even judges themselves. The ‘decorum’ required of lawyers and judges in the Peace Palace is often mimicked in later appraisals and this is especially so in relation to British scholars. American scholars, on the other hand, permit more policy perspectives in their writings, but even with such concessions, themes addressed usually differ little from those penned across the Atlantic.

Studies devoted to the law on territory differ little from those on the ICJ. Generally, Ratner points out that the ‘equation of international law with international adjudication is nowhere more pronounced as in the area of territorial sovereignty.’ Why then undertake yet another study of territorial disputes when so much literature already exists? The point of the thesis is to show how existing literatures on both the Court and territorial disputes only tell part of the story of universalism and this is especially so in relation to territorial analyses. For example, within the literature on territorial title and disputes, it is surprising how often the jurisprudence of the Court is simply presented for summary and overview, with perhaps some doctrinal additions. Few analyses of territorial adjudication have studied the process of argumentation between the Court and the parties and this is shown by a general lack of attention towards the pleadings. The same is true, not only in relation to recognition of the political context outside the Courtroom, but also inside it: discursive practices are explored only at the level of doctrine and, where criticism is offered, it is almost always within the strict confines of ‘law’ as opposed to ‘politics’. Brownlie also points to a dissonance between territorial scholarship and its subject matter: ‘[m]any of the

*Weapons* (Cambridge: Cambridge University Press, 1999). Cf Forsythe, who argues that there have been very few reviews of the Court on the occasion of its fiftieth anniversary because of its marginal role international relations: D P Forsythe, ‘The International Court of Justice at Fifty’, A S Muller, D Rač & J M Thiránszky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (The Hague; Boston: Martinus Nijhoff, 1997) 385-405, at 385.


standard textbooks, and particularly those in English, classify the modes of acquisition in a stereotyped way which reflects the preoccupation of writers in the period before the First World War.\textsuperscript{128} This is despite the fact that the ICJ does not rely on this typology; it instead usually engages in a weighing up exercise of competing claims to effective control where treaties are less than dispositive.\textsuperscript{129}

\textit{a) Maintaining the Law/Politics Dichotomy}

We saw in sections two and three that law cannot be separated from politics, particularly when we understand international law as a language. Despite this inseparability, both ICJ jurisprudence and scholarship about the Court have often tried to maintain this distinction in various ways. It is easy enough to point to a number of mainstream accounts acknowledging the place of politics in the courtroom,\textsuperscript{130} but the epistemological assumptions informing such accounts are still premised on dichotomy and distinction. We can understand mainstream writings as suggesting that politics and law remain qualitatively different in both their origins and their practice. Critical approaches, however, would question such distinctions and ask why it is necessary to maintain such a division.

Literatures on ICJ jurisprudence and adjudication are replete with repetitive discussions about the law/politics divide, and this is partly a product of the practice of adjudication itself. Coleman details how there emerged a distinction between ‘political’ and ‘legal’ (or justiciable) disputes at The Hague Conventions of 1899 and 1907.\textsuperscript{131} Mosler adds that the ‘need to distinguish legal disputes from disputes of another character – whether called “political” controversies of “interests” or simply “non-justiciable” – arose in connection with attempts to make judicial settlement compulsory.’\textsuperscript{132} Aspirations of compulsory arbitration and adjudication foundered, however, and remain as elusive as ever.

\textsuperscript{128} Brownlie, quoted in Distefano, \textit{supra n} 4, at 1048.
\textsuperscript{130} For a survey of various examples, see A Coleman, ‘The International Court of Justice and Highly Political Matters’ (2004) 4 \textit{Melbourne Journal of International Law} 29, at 30.
\textsuperscript{131} Ibid, at 32-33.
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Under Article 35, ‘The Court shall be open to states parties to the present Statute’ of the ICJ. It may also hear advisory cases that relate to ‘any legal question’. This phrase has encouraged a practice in pleadings, judgments and commentaries about debating the ‘legal’ or ‘political’ nature of the dispute at hand. Kennedy invites us to think not so much about whether disputes are definable as ‘legal’ or ‘political’. Instead when arguments are raised in support or opposition of the Court’s jurisdiction, we need to ask who is making the claim, with what purpose, for what project and to persuade whom. The case studies explore this law/politics tension in discussions over jurisdiction, especially in Chapter Six on the Wall Advisory Opinion.

Commentators have acknowledged that the Court’s choice about whether to exercise its jurisdiction as well as state participation is political, but often there remains the idea that at least some aspects of the Court’s practice and procedure are free from the taint of power politics. Jennings asks whether it is ‘possible to make a clear distinction between legal and political disputes and if so, by what criteria’. In trying to answer this, he harks back to the context of early arbitration, where the ‘classical idea’, that was enunciated by no less an authority than Westlake, that it is possible to classify claims as being either legal or political, was an academic fantasy born of the desire to establish general compulsory court jurisdiction in isolation from the problem of better machinery for political decision.

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133 Article 35(1).
134 United Nations Charter, Art. 96(1); Statute of the International Court of Justice, Art. 65(1).
135 This is discussed further in Part Three’s Introduction, at 193-195.
136 Kennedy, ‘When Renewal Repeats, supra n 3, at 467.
138 ‘[T]here is really no way of escape from the fact that international courts, like domestic courts indeed, will for a good deal of the time find themselves having to decide upon legal questions in respect of which their decision, however technical in form, must have great political significance.’ R Y Jennings, ‘International Courts and International Politics’, D Freestone et al (eds), Contemporary Issues in International Law: A Collection of Josephine Onoh Memorial Lectures (The Hague: Kluwer, 2002) 13-28, at 15. In relation to state participation, Shaw argues that ‘recourse itself to the Court constitutes a political as well as a legal act and as such may add to political and other pressure upon an opponent with the hope that the pressure in total may lead to a resolution of the problem in question.’ M N Shaw, ‘Peaceful Resolution of ‘Political Disputes’: The Desirable Parameters of ICJ Jurisdiction’, J Dahlitz (ed), Peaceful Resolution of Major International Disputes (New York: United Nations, 1999) 49-75, at 55.

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the rubric of ‘legal dispute’ should be understood as indicating not only something about the objective character of a dispute submitted to a court, but much more the highly technical procedure whereby the Court and the parties together reduced their dispute into a form which renders it manageable in an adversarial procedure in a court of law...

Higgins also overlooks the dichotomy in favour of an emphasis on procedure:

there is little reality in any definition of a political, or legal, question; what is relevant is the distinction between a political method and a legal method of solving disputes.

Sugihara cites these authors to strengthen his eventual conclusion in support of a discerning ICJ, occasionally called on to decline its jurisdiction where politics challenges ‘its proper bounds as a judicial body.’

Such accounts seem to differ little from Koskenniemi’s idea of legal language, but in fact they point to an enduring belief that law can detach itself from the realm of particular interest, through neutral procedures. Like critical approaches, the ideas noted above distinguish law from politics through language and practice, but their corollary could not be more different: in limited spaces law can escape politics, and thus, at least the adjudicative performance itself remains pure from interest. Underlying conflicts at the heart of disputes are obscured and silenced to preserve a semblance of legitimacy for the process of legal dispute resolution.

This attempt at quarantine is found also at the level of doctrine in territorial disputes and accompanying academic commentaries. The degree of diversity and complexity generated in this area of international law demonstrates that territorial disputes are often far from easily resolved. Diverging accounts found in both pleadings and commentaries strengthen the observation that practitioners must rally an impressive arsenal of arguments in their quest for success. Oppositional stances therefore are constructed around an elaborate evocation of legal doctrine, and commentaries pointing out weaknesses in litigation reinforce this theme by faithfully suggesting more robust readings of available

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142 Higgins, quoted in Ibid.
143 Ibid, at 137.
rules and precedents. Such an understanding of legal dispute resolution is based on the belief of solid ground: that a rigorous application of the rules will generally result in the ‘correct’ result.\textsuperscript{145} Rather than recognising the indeterminacy underneath, along with the accompanying spectre of political partiality, a resort to doctrine serves to bolster an image of law that is insulated and safe from its other: power.

Faith in the solace of doctrine is not only adopted by lawyers from the privileged European world. A number of Third World academics and pleadings of Third World states are informed by a re-evaluation of colonial title with the help of European-generated laws on title to territory.\textsuperscript{146} These accounts invoke such legal principles in a bid to expose the illegality of the colonial erasure of Third World legal personality. Through such a gesture, these Third World scholars and states suggest that international law can function as a legitimate form of regulation, but only where it is insulated from power politics.

\textit{b) Reading History into International Law}

In contrast with the recurring motif of the law/politics divide, literatures on the ICJ and international law more generally are less likely to delve into the annals of history. Mainstream narratives of progress discussed further below, however, are steeped in particular readings of the historical record.\textsuperscript{147} As in the case of law vis-à-vis politics, mainstream images of current international legal structures rely on a radical rupture with the past, allowing us to speak of the law/history dichotomy as well. Kennedy’s discursive exploration of disciplinary themes shows us, however, that this narrative of change and progress provides only one possible reading of history.\textsuperscript{148} Further, it serves to mask the perpetuation of practices at the heart of the international law project. In his study of the nineteenth century, for example, Kennedy posits how ‘the modernism, pragmatism and progressivism of today’s international law is more rhetorical effect and polemical claim than historical achievement, and more part of the internal dynamic of the field’s

\textsuperscript{145} I also discuss this idea in the Preface.
\textsuperscript{146} Some Third World state perspectives are explored below in my examination of pleadings contained in its case studies. For a recent example of this, see Udombana’s consideration of the Scramble for Africa, N J Udombana, ‘The Ghost of Berlin Still Haunts Africa! The ICJ Judgment on the Land and Maritime Boundary Dispute between Cameroon and Nigeria’ (2003) \textit{African Yearbook of International Law} 13, at 51-52.
\textsuperscript{147} For a critical appraisal of the field’s oversight of history and its under-theorisation (but with some optimism about more recent efforts), see C Miéville, \textit{Between Equal Rights: A Marxist Theory of International Law} (London: Pluto, 2005), at 153-156.
\textsuperscript{148} For example, see D Kennedy, ‘International Law and the Nineteenth Century: History of an Illusion’ (1996) 65 \textit{Nordic Journal of International Law} 385.
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development than artefact of a distant era. In her appraisal of NAIL literatures, Cass suggests that NAIL’s scholarly excavation in pursuit of reinterpreting doctrine has been its most important contribution. This is especially so for TWAIL accounts of the colonial record, which have probed pervasive legal structures of inequality and exclusion.

Despite a general historical sensibility infusing NAIL, TWAIL as well as some IR literatures, comparatively few writers have delved into the rich historical veins of territorial litigation. Yet Merrills reminds us that ‘as the Court’s case law demonstrates, in territorial and boundary cases, the historical record is usually the key to applying the law. For this reason, if for no other, evidence of this type will always be significant.’ This section notes the silences in ICJ scholarship, as well as renderings of the historical ‘background’ found in works on title to territory. It also notes the conceptual tools provided, and yet rarely applied to, territorial disputes by critical perspectives. To fill this gap in approaching the process of historical argumentation at the ICJ, the following section develops a method of how to read history into territorial disputes. I briefly examine the nature of historical inquiry, as well as the scope for interdisciplinary dialogue between international law and IR, before applying these insights to a discussion of narratives of progress in ICJ literatures.

One of the most important themes emerging from the thesis’ case studies is the desire on the part of Third World states to rewrite the historical record, suggesting that there can be no one historical truth informing international law’s self-image. Allott also argues that in relation to the discipline of international law, there are in fact two strains of history: intrinsic history, or accounts of law’s internal development, and extrinsic history, based on international law’s relationship to general histories. Allott acknowledges the role of choice in renderings of the past, but still seems to construe history as

149 Ibid, at 389-390. For another discussion deconstructing the myth of nineteenth century rupture and difference from the present, see S N Grovogui, supra n 35, at ch 1.
150 Cass, supra n 60, at 375. Whereas Paulus is mistrustful of this historical turn, suggesting that critical scholars are in fact escaping into the past. Paulus, supra n 60, at 739.
151 Anghie, ‘Civilization and Commerce’, supra n 87, at 891.
ontologically distinct from the present: we can explore the interrelationship between the past and present in an objective manner. Thus, according to Allott, history is a ‘dream of a past which is not our own, history nevertheless becomes our own, and ceases to be a dream, when we live in the reality it has formed’.\footnote{Allott, ‘International Law and the Idea of History’, supra n 154, at 3.} Once conceived, history can take on a life of its own, structuring consciousness, but not vice versa. This sense of reification in Allott’s typology is also evident in his bifurcation of intrinsic and extrinsic histories, suggesting that practices within international law can be distinguished from their broader context.

Both Berman and Douzinas extend our appreciation of the ‘past’, by showing that like language, there can be no escape from historical and personal preference: what is required is a recognition of the complicity of choice.\footnote{157 Historical narratives necessarily are reductions of the past, but the possibilities for such reduction are open-ended. See C Douzinas, ‘Theses on Law, History and Time’ (2006) 7 Melbourne Journal of International Law 13, at 19.} Douzinas’ general definition of history informs later explorations of historical issues in the cases:

\begin{quote}
[H]istory is not a timeline. It is a modality of time that presses against the present. Memories live not in a historically rigid sequence but in simultaneity in which we may choose from many possibilities to create the present. As in Heidegger, the past is a modality of the present; indeed the past is a potential or the potential of the present in its nearness to the future. But this potential exists not as the ever-present denying and withholding, nor as the inescapable nearness of the past, future and present but as a stain of past and present in the Now.\footnote{158 Footnotes omitted, Ibid, at 25.}
\end{quote}

When we apply these insights to international law, there is no longer one account of international law. In fact, interrogating the place of history in international legal scholarship returns us to the dilemma of the law/politics dichotomy, suggesting that all international law scholarship is shaped by competing claims to ‘past’ and ‘present’, ‘stasis’ and ‘change’. Methodologically, Berman advocates a genealogical reading for international lawyers, which ‘sees international law – its doctrines as well as its participants – as normatively impure, culturally heterogeneous, and historically contingent’.\footnote{159 N Berman, ‘In the Wake of Empire’ (1999) 14 American University International Law Review 1515 (First Annual Grotius Lecture, American Society of International Law), at 1524.} We need to ask how and why history is used and link understandings about international law’s past with the political desires of both participants and judges in ICJ territorial disputes.

Although territorial disputes are steeped in history, ICJ judges are unlikely to become discerning historians;\footnote{160 Douzinas discusses this relationship between the judge and history in trials reviewing the past as a ‘transformation from history as the judge to the judge as historian’. Douzinas, supra n 155, at 15.} their focus is on the ‘law’ and not ‘history’. Merrills is
correct when he argues that we cannot expect the ICJ to engage in all historical material raised: questions of time and resources limit ICJ historical enquiry.161 This thesis is alive to such considerations, but still regards the common practice of historical obfuscation as troubling: what histories are being silenced and why? It is also important to problematise the issue of ‘choice’ by pointing out the seeming irony of post-colonial states presenting an arsenal of evidence formed from an often-uncritical acceptance of colonial records. Is this complicity with colonialism or deference to ICJ conventions requiring voluminous historical ‘evidence’, which is less plentiful in Arab tribal societies?

International Relations (IR) historical work on international law should also be noted. Beginning in the 1990s, a large body of literature in the fields of international law and IR has explored the possibilities of inter-disciplinary collaboration.162 Some of these contributions have developed the research projects of both fields, but a number of interdisciplinary studies follow a standard formula and fall into the trap of stereotype and simplification. Klabbers captures this tendency when he writes that ‘inter-disciplinarity often…presumes a flat, one-dimensional vision of the discipline-to-relate-with, yet such a one-dimensional view will rarely if ever, be persuasive.’163 Diversity within the IR ‘canon’

161 Merrills, supra n 152, at 895.
is simplified so that many international lawyers employing IR tools are often drawing on only a small area of IR, and this is usually the dominant schools of (neo)realism or neo-liberal institutionalism. Such schools offer little in this chapter’s quest for historical awareness, but beyond the ‘neo-neo’ paradigm of IR, contributions from constructivism, and especially the English School, are useful in broadening our understanding about the evolution of international law as an institution within international society. The thesis does not embrace the inter-disciplinary project per se, but it does acknowledge the contribution of IR, especially in Chapter Two in its discussion of debates over the European nature of international society.

c) Narratives of Progress and Untapped Potential

Perspectives on how to approach the past are important when speaking of international law’s progress and development, especially since the establishment of the UN. In relation to the ICJ, we saw in section two how writers noted the moribund state of the Court especially in the sixties and seventies, but that a ‘renaissance’ signalled a significant shift in the fortunes of the Court. This is particularly so in ‘the field of territorial and boundary disputes, [where] the Court has had notable successes’ in the opinion of various mainstream scholars. Further, we also saw how greater Third World participation has been linked to legitimacy and universalism on the part of the Court. How, though, is this conceptual link


For example, Koskenniemi is unnecessarily dismissive of IR’s research agenda and I think this is because of his definition of IR being largely based on American realism or liberalism. See M Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960 (Cambridge: Cambridge University Press, 2002), at 485.


Guillaume, supra n 44.

Schwebel, ‘The Impact of the International Court of Justice’, supra n 4, at 663.
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made, and what assumptions inform such an account? How are images of the Court related to perceptions of international law more generally within the literature? The preceding discussion on history showed us how, in relegating history to the shadows, international lawyers can dissociate their field from earlier practices, which are now regarded with disdain. Thus, although mainstream accounts of the Court and international law more generally overlook historical discussion, a mixed account of progress and untapped potential suggests both a faith in a better Court and a progressivist conception of international law,\textsuperscript{170} able to look to the future, rather than the past. Here, we return to the notion of a Court more universal and legitimate. This literature, based either on the Court's fulfilled or yet-to-be fulfilled potential, cannot grasp the elusive quality of universalism. Instead, approaches beyond mainstream ICJ literature must be developed.

Most scholarship about dispute resolution is characterised by a world-view that places law at the centre of social enquiry. Through its grammar of dichotomy, mainstream international law separates itself from politics and then offers an account of social reality that ascribes substantial weight to legal explanation. Other ‘non-law’ factors are downplayed and overlooked in these scholarly exercises of living in a world through law. Frankenberg captures this analytical tendency in his exposition of the idea of ‘legocentrism’. Legocentrism means that ‘law is treated as a given and a necessity, as the natural path to the ideal, rational or optimal conflict resolutions and ultimately to social order guaranteeing peace and harmony.’\textsuperscript{171} Legocentrism particularly informs many accounts of adjudication, which are noteworthy for the absence of contextual, ‘non-legal’ considerations.

Much of the literature devoted to adjudication has applauded the recent upsurge in Third World participation and the Court’s docket as a whole, because of legocentrism, combined with a deep-seated faith in adjudication. At the level of language, Colson points out that the very term ‘dispute settlement’ suggests that matters have been resolved.\textsuperscript{172} Faith in the dividends of dispute resolution infuses a literature that sometimes displays a vision of peace through adjudication: once states present themselves before the Court, matters will

\textsuperscript{170} Korhonen notes more generally that ‘[i]nternational law has a tradition of enthusiasm, hope, and a longing for positive accounts.’ O Korhonen, ‘Liberalism and International Law: A Centre Projecting a Periphery’ (1996) 65 Nordic Journal of International Law 481, at 484.
improve.\textsuperscript{173} For example, some authors lament comparisons, arguing that fewer Advisory Opinions from the ICJ, as compared to the PCIJ are an unmitigated retrogression: the world needs more law as voiced by the Court.\textsuperscript{174} Others hold up either compulsory arbitration or at least greater accession to the ‘optional clause’\textsuperscript{175} as the answer.\textsuperscript{176} Jennings cautions against such hope, however, pointing out not only that calls for compulsory arbitration have gone unheeded since 1899, but that today’s Court cannot possibly achieve everything; its settlement role is necessarily limited.\textsuperscript{177} Furthermore, in relation to the Court’s increased docket, Jennings suggests that this is partly a product of a world with many more states\textsuperscript{178} and the recognition of the Court’s \textit{limited} parameters: ‘one reason for the recent welcome increase of the resort by governments to contentious jurisdiction of the Court…is precisely that there is already a better realization amongst governments that the adjudication process is an excellent way of dealing with \textit{certain kinds} of disputes.\textsuperscript{179}

Despite Jennings’ sober words, a number of mainstream and Third World scholars hold firm to the notion of peace through law, presenting the Court’s untapped potential as a product of political factors beyond the Court’s reach. Shahabuddeen articulates this theme, when he points out that ‘[t]hrough no fault of its own, the World Court has not realized the more ambitious of the aspirations of some of its well-wishers.’\textsuperscript{180} Other writers’ belief in the Court’s potential suggests a Court and an international law full of progressive promise.\textsuperscript{181} Perhaps it has failed thus far to fulfil this promise,\textsuperscript{182} but there is still ‘enormous

\textsuperscript{173} This faith is expressed by Anand in his dichotomy between the evils of untrammelled sovereignty and the pacification offered by the Court: Anand, \textit{supra} n 14, at 176-179.
\textsuperscript{174} M S M Amr, \textit{The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations} (The Hague; New York: Kluwer, 2003), at 378. Justice Schwebel is more discerning, arguing, ‘However, the question is not whether the Court is busy; it is whether the Court is effective - whether each of its judgments or advisory opinions leaves the world - or even a small corner of it - a better place.’ Schwebel, \textit{supra} n 4, at 668.
\textsuperscript{175} Article 36(2), Statute of the International Court of Justice. On this point, also see Forsythe, \textit{supra} n 124, at 401-402. The basic function of the optional clause is discussed in Part Two’s Introduction, page 99-101.
\textsuperscript{177} Jennings, ‘The Proper Work’ \textit{supra} n 140, at 41.
\textsuperscript{178} Jennings, ‘The International Court of Justice after Fifty Years’, \textit{supra} n 15, at 494.
\textsuperscript{179} Italics in original, ‘The Proper Work’, \textit{supra} n 140, at 45. Guillaume echoes this idea by pointing out that the Court has established itself as particularly adept at hearing ‘middle-range disputes’. Guillaume, \textit{supra} n 44, at 851.
\textsuperscript{181} For example, in his consideration of the Court’s suddenly increased docket, Higet depicts the ICJ as a ‘hot court’ after the Nicaragua episode. K Higet, ‘The Peace Palace Heats Up: The World Court in Business Again?’ (1991) 85 \textit{American Journal of International Law} 646, at 654.
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potential for the use of the Court’. Third World participation in territorial disputes is one example of this potential, serving as a barometer of legitimacy; surely this portends a Court able to act for all states equally in this postcolonial era.

8) Conclusion: Law is Argument and Contestation about the Quest for Universalism

In this section, we return to the search for a place and time lived through a universal international law. From the review above, it is now possible to settle on the basic tools employed throughout the thesis. Most fundamentally, the thesis operates not only on the premise of the situationality of law, but also its (re)construction through the practice of argument. The thesis will explore and interrogate this process of argument through the study of ICJ territorial disputes involving Arab states. How do Arab states depict international law, are there recurring themes, and how are these taken up or rejected by the Court? The thesis also accepts the challenge first raised by Koskenniemi in 1989 of mapping legal grammars. In his recent appraisal of the impact of Koskenniemi’s seminal work, From Apology to Utopia, Kennedy argues that Koskenniemi’s invitation to delineate international legal grammars has yet to be accepted. It is hoped that the thesis makes a small contribution to this task.

Discussion above has shown that scholars are torn about the universalist qualities and potentiality of international law. Some regard the engagement of Third World states with the ICJ as enough, others doubt the ability of existing structures to speak for and from the margins. Still others suggest that international law’s indeterminacy and malleability allows for both optics: international law nurtures imperialist and anti-imperialist tendencies. At the very least, however, universalism must mean the possibility to speak

in many tongues, of many experiences and of contested histories. It must also mean that such narratives can in some way be heard and appreciated, as for example, by the ICJ’s bench. Scholarship lauding the ICJ’s recent record, or even international law’s progressive future more generally, is inadequate for explaining why Third World – and particularly for the thesis, Arab – states come before the Court, how they use it and what the results are. Conversely, despite providing us with an array of conceptual tools, critical scholars have so far failed to expand our knowledge of the grammars of legal argumentation employed at the Peace Palace. The thesis acknowledges the particular discursive contours of the Court, and seeks to explore the nature of dialogue generated about international law’s past, present and future, particularly through the prism of colonialism. Thus, this study embraces the critical call to map out the legal grammars informing Arab ICJ disputes. In so doing, it challenges critical and mainstream scholars alike to expand the research agenda of international law by interrogating spaces and silences where both universalism and particularism lie. Having reviewed the conceptual tools informing the thesis, the next chapter provides the historical tools to the case studies by exploring notions of territoriality in the Arab-Islamic tradition.

Hague: Kluwer, 2002), at 197. Rajagopal echoes this idea when he argues that international law can be both hegemonic and counter-hegemonic: Rajagopal, ‘Counter-hegemonic International Law’, supra n 96, at 768.
CHAPTER TWO

Between Faith and Place:
Arab-Islamic Approaches to Authority and Territory in Theory and Practice

1) Introduction

Chapter One highlighted tensions faced when studying international adjudication in a postcolonial world and it raised the question of whether we can speak of an international law that is universal. Third World states now participate in ICJ matters more than ever before, particularly in relation to territorial disputes. Arab states have mirrored this trend over the last few decades, suggesting that, like the rest of the Third World, they are willing to accept colonialism’s legacy, the nation-state.

The following chapter tries to make sense of the Arab world’s engagement with international law and adjudication in three ways. First, the chapter provides a narrative overview and commentary about the emergence of Arab statehood. In particular, ideas about the link between territory and modes of authority in the Arab-Muslim tradition are explored so that we can appreciate both the similarities and differences between Arab and European trajectories of statehood. Second, the chapter is intrigued with the interplay between the Arab and European world/s for understanding the rise not only of the state, but also, international law and membership in international society. All of the case studies explore the extent to which international law and international legal personality was the privilege of European entities. Here, we can challenge notions of cultural difference, especially in looking at Ottoman-European relations and their combined contribution to the formation of international law. Third, the chapter considers the development of Islamic international law as a practice and as a field of recent scholarship within the discipline of
public international law. How have Islamic legal norms and institutions evolved to reflect changes in international society and models of statehood? What is the role of Islamic law in modern international adjudication and to what extent can Islamic norms inform public international law? We can also ask, are current approaches within the discipline adequate for understanding the link between Islamic and public international law?

The following discussion traces the concept of Arab statehood from the era of the Prophet to the present, but it does not pretend to offer a definitive account of Islamic legal history. Further, Piscatoro asserts that it ‘is nearly impossible to say with authority at any one moment what Islam is and what it is not.’1 The following section explores particular choices and interpretations shaping the chapter’s narrative about Islam, the West and the development of international law. I also interrogate scholarly agendas informing historical accounts to understand how dominant narratives about Islam, international law and Arab states shape research within and beyond the international legal academy. The chapter is therefore concerned far more with the uses and abuses of history than with a quest for historical ‘truth’. After exploring the nature of historical enquiry, the chapter then applies these insights to three historical periods: the origins of Islam and the rise of the Caliphate; Arabs under Ottoman and colonial rule; and finally, Arab forms of statehood and dispute resolution in the modern era since the institution of the Mandates.

2) How Should International Lawyers Study Islamic law and its Contribution to International Law?

Before considering the Arab-Islamic experience of statehood and the rise of international law, it is important to gain an awareness of how Islamic legal and political history has been constructed and how it can be enhanced. While interest in Islamic studies has grown enormously over the last few decades for scholars working in both international relations and international law, much of it is superficial and repetitive. Specialised studies outside international law therefore can assist us in developing an Islamic theory of statehood and international law able to inform public international law. However, it is important to note particular shortcomings and biases of such scholarship. Perhaps because of a real or imagined linguistic and cultural gulf, non-specialist scholars have readily accepted

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dominant narratives about Islamic law and civilisation. In this section, the nature of historical and legal scholarship on Islam is discussed.

We saw in Chapter One that historical understandings play a role in the argumentation and judgment of territorial disputes. We also saw that, although states and judges acknowledge history’s relevance, rarely do they concede the subjectivity of choice or the structuring effects of the law/history dichotomy. Like the law/politics dichotomy, international legal scholarship tends to separate law from history, but with radically different effects. The separation between law and politics allows law to be portrayed as neutral and free from the contingencies of interest. Typically, however, when history is enlisted in international legal scholarship, it is not so much as an ‘other’ but as a one-dimensional ally to arguments founded on law. Like choices informing doctrinal arguments, historical narratives are depicted as unmediated accounts of the past. Rarely are these accounts seen as worthy of comment or criticism; as Korhonen reminds us, it ‘is not common to question the discipline’s sense of history’.2

Despite dominant narratives about international law’s origins, as well as familiar watersheds or ‘critical dates’, international law can never escape scholarly agendas in linking the past with the present. Because the discipline of international law is built on narratives about its progressive development, for example, it is necessary to render particular accounts of the past to support certain readings of the present. Kennedy illustrates this in his study of ‘primitivist’ international law, when he shows that conventional paradigms founded on the origin of 1648 with the Treaty of Westphalia require a body of thought markedly distinct from ‘modern’ examples.3 Simplicity behoves us to focus on certain historical events and forget others, but we should at least be alive to the choices involved when constructing an account of international law that is based, for example, on the familiar milestones of 1648, 1789, 1815, 1856, 1885, 1914, 1918, 1939 and 1945. It is all too easy to project current realities onto the past, thereby obscuring subaltern voices and experiences.4

Dominant narratives about international legal history contain both rupture and stability: the present must be contrasted with the past, but the dynamism of the past must

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also be stabilised into a manageable, ‘frozen’ form. 5 Once history is both compartmentalised and paralysed, it can then be used as an unproblematic tool of legal scholarship. According to Korhonen, a ‘common stance towards history seems to assume that the jurist has some way of reaching the past as it once was, i.e. unmediated by intervening circumstances and undistorted by the accumulation of layers of temporally alternating meanings and lenses of prejudices. 6 Korhonen rejects this approach and instead calls on lawyers to recognise their own relationship with both temporality and international law’s dynamism. 7 Although international lawyers typically strive to ‘minimise outside contamination’ and to ‘appear as impartial and non-predisposed as possible’, this is unattainable. 8 Ultimately, Korhonen suggests that international lawyers abandon the ideal of objective history, because the

International jurist is not situated in any middle ground towards history. She uses and abuses history in different ways, negotiates continuity and change, and works facing a number of schisms – producing reality effects, striking conventions about history and law, and having to let them shift…The international jurist is often in a key position in managing these stabilisations and shifts and she strives to make sense of them. She has to negotiate a convoluted situational web where no uniform solution can last eternally and where she therefore has to understand the various conditions involved. 9

With this sensitivity about the relationship between history and international law, it is now possible to explore the relationship between international law and Islamic history.

Partly in response to the phenomenon of Islamic ‘fundamentalism,’ and partly from a desire to expand the discipline’s universal underpinnings, there is now a growing body of literature devoted to exploring the historical inter-relationship between international law and Islam. Despite this development, Mayer laments its quality, arguing that the ‘existing literature does not always treat problematic issues in an objective and coherent fashion or adequately analyze methodological questions.’ 10 Westbrook also argues that scholarship on Islamic international law has been disappointing because ‘these attempts either fail to address the concerns of public international law or fail to locate authority in Islam – fail,

5 Korhonen, supra n 2, at 136.
6 Ibid, at 129-130.
7 Ibid, at 135.
8 Ibid, at 151.
9 Ibid, at 206.
that is, to be substantively Islamic.'\textsuperscript{11} Some of these difficulties can be attributed to the methodology of comparison,\textsuperscript{12} and Westbrook recognises that writing 'comparative law is always difficult because communication is largely about shared meanings, and comparative law explores the difference of meanings.'\textsuperscript{13} Does the Islamic tradition contain, for example, terms that can be rendered in public international law terminology? How can we find common meanings across different lexicons?

Particularly with so few international lawyers educated in Arabic and the principles of \textit{fiqh} or Islamic jurisprudence, it is perhaps unsurprising that sophisticated comparative frameworks are rare. Problems of translation abound and, beyond this, Strawson points out that ‘English texts do not merely present Islamic law, they construct it.’\textsuperscript{14} The first step required then in appreciating the similarities and differences as well as historical interplay between European international law and Islamic law is for scholars to possess substantial knowledge beyond the confines of European theory and state practice. Without this knowledge, there will not be incentives for international lawyers to develop alternative narratives to the dominant one which suggests the birth of international law exclusively within European domains. This will also assist the project of universalising the discourse of international law. Bedjaoui points out that not only are Western scholars to blame here, though; ‘even Arab and Muslim jurists themselves are completely unaware of the Islamic conception of international law or confine it to the ghetto’.\textsuperscript{15} He appeals to both Western and Muslim lawyers to reverse this oversight by engaging with the rich body of material available.\textsuperscript{16} The recent work of Judge Weeramantry in his inter-civilisational project attests to the potential of such work,\textsuperscript{17} but most scholarship still remains under-developed.

\textsuperscript{13} Westbrook, supra n 11, at 821-822.
\textsuperscript{16} ‘And I can restrain myself no longer from appealing to all jurists in the Muslim world to take greater personal responsibility and mobilize more efficiently in a decisive effort of creativity, instead of confining themselves to an attitude of slavish imitation [\textit{taqlid}] which often results in strapping lifeless artificial limbs of foreign origin on living human communities.’ Italics in original, Ibid, at 296.
Even where detailed accounts are offered, however, much of this scholarship is problematic. For example, a dominant approach, championed by scholars versed in Arabic and the *shari'a* has been to effect a reconciliation between Islam and international law at all costs. These scholars readily acknowledge dissonances such as the doctrine of *jihād* and the issue over enduring peace between the Muslim and non-Muslim worlds. However, their ultimate goal of aligning Islamic and public international law entails that certain elements of Islamic law are purged in this apologist project. Points of difference have to be overlooked, whereas points of similarity are over-emphasised. Westbrook summarises this approach as an obsession with the world of Islam and a monolithic world outside; a tendency to explain ‘Islamic law’ within the categories of Western international law (even using Latin); a predilection to apologize for the practice of Muslim states, combined with often harsh critiques of Western states; the desire to adopt superficially understood conceptions of Western politics; and the tendency to give elaborate and tenuous historical arguments for the priority of something ‘Islamic’ in existing public international law, however hegemonic and loudly un-Islamic it may currently be.

International lawyers illustrative of Westbrook’s criticisms assert that Islam respects *pacta sunt servanda* and has even developed a sophisticated body of international humanitarian law centuries before the Hague Conferences. *Jihād*, just war and humanitarianism are all in vogue.

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18 One striking example of anachronism is Al-Ghunaimi’s classification of seventh century Arabian city-states as analogous to modern nation-states: ‘the city of Medina was possessed of the required elements – population, territory and government – to be classified as a state under the principles of modern international law.’ Given that the nation-state model had yet to emerge anywhere else, it seems forced to make such an anachronistic argument. M T Al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (The Hague: Martinus Nijhoff, 1968), at 55.


20 Westbrook, *supra* n 11, at 858.

21 Cravens argues that although Islam contains a doctrine akin to *pacta sunt servanda*, it lacks the breadth of the meaning contained in public international law. Cravens, *supra* n 19, at 570. Ford also argues that Islamic and public international law definitions are not in complete parity: C A Ford, ‘Siyar-ization and its Discontents: International Law and Islam’s Constitutional Crisis’ (1995) 30 *Texas International Law Journal* 499, 521. For scholars generally supportive of the existence of *pacta sunt servanda* in the Islamic tradition, see Al-Ghunaimi, *supra* n 18, at 212; Mayer, *supra* n 10, at 201; Weeramantry, *supra* n 17, at 141. Boisard goes even further, suggesting that ‘Islam not only reinforced the validity of the axiom, *pacta sunt servanda*, but also introduced it to international relations, making possible the systematic development of conventional law, which became a partial substitute for custom,’ M A Boisard, ‘On the Probable Influence of Islam on Western Public and International Law’ (1980) 11 *International Journal of Middle East Studies* 429, at 441-442.

22 Moinuddin argues that Western scholars have tended to over-emphasize the importance of *jihād* and Islamic supremacy in classical sources. He points out, however, that a number of Muslim scholars have tried to show how the *siyar* is about much more than this narrow focus. H Moinuddin, *The Charter of the Islamic*
Chapter Two: Between Faith and Place: Arab-Islamic Approaches to Authority and Territory in Theory and Practice

Fascination with certain aspects of Islamic law is linked to the way in which the *shari'a* has become confined to particular spheres of society’s regulation. Most Arab legal systems have adopted a hybrid system of law, retaining the *shari'a* for private sphere matters and favouring European, civil law models for public governance. The regulation of personal status, family relations and inheritance has continued to reflect *shari'a* principles. On the other hand, public law, including international law, has lagged far behind.²³ Scholars wishing to acquaint themselves with Islamic notions of international law must therefore grapple with realities on the ground: very few modern examples of Islamic international law are available. Yet, we will see that the Islamic legal tradition contains a wealth of learning about international issues from earlier eras, allowing contemporary research a platform from which to develop and strengthen a body of modern Islamic international legal norms and practices. Studies about the *pacta sunt servanda* norm as well as countless considerations of *jihad* abound,²⁴ but Islamic international law needs concerted invigoration lest it remain an under-developed and somewhat skewed field of study bent on treaty law and the laws of war.

Perhaps the biggest challenge one faces in studying the history of international Islamic law is the tension between theory and practice. For example, it is important to recognise the primacy of early Islam and its enduring legacy on the evolution of Islamic law. The period of the Prophet’s life (d. 632) generated the two main sources of Islamic law: the *Qur’an* and the *Sunna*. Furthermore, for ‘Muslims, the great age of early Islam served as an image of what the world should be’²⁵ Although Islamic polities have never since emulated this golden age, certain scholarship turns to this era for guidance, thus

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²³ According to Bedjaoui, ‘the Islamic law which rose out of the religious revolution of the seventh century has historically suffered from the brake being applied in the public domain and from being kept in leading strings in the private domain. This has resulted in an unbalanced evolution, in that its public (international) law limb has been virtually amputated and its private law limb allowed to develop in a somewhat ingrowing manner.’ Bedjaoui, *supra* n 15, at 296-297. Also, see S Zubaida, *Law and Power in the Islamic World* (London: I B Tauris, 2003), at 2.


overlooking the significance of later state practice and the evolution of certain legal
theories. Hallaq does not regard this fascination with early Islam as innocent, despite its
indisputable significance to Islamic thought: the ‘choice of concentration on one area or
another is a function of relevance’\(^\text{26}\) For example, Hallaq points out that the work of the
Orientalist, Schacht,\(^\text{27}\) has tended to explore either Islam’s early phases or its most recent;
at least half a millennia, and especially the Ottoman era,\(^\text{28}\) remain ‘depressingly a terra
incognita’.\(^\text{29}\) In focusing on the early period in the context of ‘debts and borrowings’, old­
school Orientalists like Schacht are able to portray Islamic law as ‘at best, heavily indebted
to the legal traditions of the cultures that gave birth to Western civilization and, at worst,
little more than a replica of these traditions’.\(^\text{30}\)

Other studies continue this quest for non-indigenous sources of Islamic civilisation
by over-emphasising the impact of European ideas and institutions on the Arab world in the
wake of colonialism. Thus, Hourani opines that scholarship has ‘been wrong in laying too
much emphasis upon ideas which were taken from Europe, and not enough upon what was
retained, even if in a changed form, from an older tradition’.\(^\text{31}\) We can see from the
opinions of Hallaq and Hourani that a fine balance is required in appreciating Islamic
culture within the context of changing internal and external conditions.

Focusing on only certain periods of Islam’s history aids the production of a
distorted and monolithic image of Islamic law and civilisation. As we saw vis-à-vis
comparative scholarship generally, it is difficult to preserve dynamism and diversity when
studying two or more subjects; often one will be reduced to a cliché of its former self.
Boisard questions accounts of Islam’s link with public international law for their tendency
to construct both the West, as well as Islam, as monoliths. Instead, we need to appreciate
the significant interaction and cross-fertilisation that took place, as well as the role of
intermediaries, such as Jews.\(^\text{32}\) Beydoun echoes these sentiments when he characterises
depictions of a cohesive Islamic community as neo-Orientalist simplifications of the

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\(^{26}\) W B Hallaq, ‘The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse’ (2003) 2
UCLA Journal of Islamic and Near Eastern Law 1, at 3.

\(^{27}\) His classic works being: J Schacht, An Introduction to Islamic Law (Oxford: Clarendon Press, 1964); and J

\(^{28}\) This relative lack of scholarship on the Ottoman era is also noted in A Hourani, ‘How Should We Write the
History of the Middle East?’ (1991) 23 International Journal of Middle East Studies 125, at 129.

\(^{29}\) Hallaq, supra n 26, at 4.

\(^{30}\) Ibid, at 5. Here, Hallaq is referring to typical narratives of either Near Eastern or Hellenistic creative
impetus of Islamic civilisation.

\(^{31}\) Hourani, ‘How Should We Write’, supra n 28, at 128.

\(^{32}\) Boisard, supra n 21, at 432-434.
diversity and dissonance within Islamic communities. According to Barakat, Orientalist accounts of the Arab world typically have regarded religion as the central determinative force in social life, thus creating a static and reified conception of ‘Arab society’ as well as ‘Islamic law’. For Piscatori, rather than over-determining the role of culture, and so as to avoid essentialism, ‘even a religious code such as Islam must be accepted as variable and evolving with changing circumstances.’ Historical accounts must probe under-studied periods as well as the pervasive role of political choice, whether in the evolution of Islamic legal norms or scholarly accounts of such laws.

How then can we reconcile the need for historical specificity with conceptual continuity in understanding the link between the historical development of Islamic law in theory and practice? For instance, is it anachronistic to apply concepts such as ‘state’ and ‘secularism’ to Islamic history? First, it is important that particular scholarly agendas be acknowledged honestly when constructing an historical account. Here, in this chapter, my reading of mainly secondary material was framed by a desire to understand how Islamic communities have lived out the relationship between territory and authority. The conceptual framework informing my learning in the subject matter was premised on the desire to locate alternative models of political authority over territory. I also wanted to probe stereotypical accounts of Islamic societies perpetuated in the West. Typically, the Arab-Muslim world has been distinguished from the European experience on account of its tribal structure and the role of religion in society, but is such an understanding accurate? Being already familiar with the fundamentals of Islamic law and Islamic history, I was also interested in tracing the development and evolution of ideas and practices that have allowed Arab states today largely to accept the nation-state model. Aside from surmises of realist explanations about the interests of state elites, are there earlier experiences and theories from the Arab-Islamic tradition sympathetic to and supportive of institutions such as the nation-state

36 Ibid, at 267.
37 It is common for studies of Arab society to amplify the importance of tribalism. Hourani’s scholarship points out that the ‘structure of Islamic thought and society developed, however, not primarily in the Hijaz [the birthplace of Islam, Arabia], but in the great areas of high civilization which were incorporated into the caliphate.’ Hourani, ‘How Should We Write’, supra n 28, at 131. For Hourani’s application of his premise, see A Hourani, A History of the Arab Peoples (London: Faber & Faber, 1991).
model, public international law and dispute resolution? Widespread contact across the Mediterranean world has produced a variety of institutional and theoretical models, and it is on these examples that the chapter will focus while exploring the three points highlighted in the introduction.

Second, the chapter embraces some of the methodological devices developed by Piscatori in his 1986 study, which asked the question, ‘is there something about Islam which makes it incongruous with the idea of nationalism and with the institution of the nation-state?’ 38 Piscatori answers this question in the negative: there is room for compatibility between the territorial state and Islam through an historical approach able to surmount essentialism by marrying Islamic theory and practice. One of the four tenets of Islamic law is *ijmā‘*, or consensus, and Piscatori applies this to his own concepts of *ijmā‘* al-*qawl* (consensus of speech) and *ijmā‘* al-*fa‘il* (consensus of action). 39 Piscatori suggests that it is best to see Islam ‘as the political beliefs and conduct of Muslims, what they say as well as what they actually do,’ 40 rather than holding fast to ahistorical stereotypes. In the following three sections, Islamic law and history will be explored as both a product of speech and action, within and beyond the diversity of *dār al-islām*, the abode of Islam or peace.

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38 Piscatori, *Islam in a World of Nation-States*, supra n 1, at vii.
39 Ibid, at 45.
40 Ibid, at 14.
Chapter Two:
Between Faith and Place: Arab-Islamic Approaches to Authority and Territory in Theory and Practice


3) In the Wake of the Prophet’s Message: Conquests, Caliphs and the Development of Islamic International Law

The purpose of this section is twofold: to introduce some basic aspects of Islamic law and history in the first few centuries of Islam; and from this basis, to discuss classical Muslim notions of authority over territory. Because the thesis is concerned with the process of argumentation at the ICJ, it does not pursue the agenda of effecting some sort of resolution between public international law and Islamic law per se. Secondary scholarship is drawn on only for its work on the international legal dimensions of Islam and the extent to which Islamic practice contributed to international law’s development, which is explored below in section three. Of more importance is an appreciation of Islamic approaches to territory and authority as well as the centrality of the Caliphate because these ideas are drawn on by a number of parties in three of the four case studies of the thesis: Libya in Chapter Three, both Bahrain and Qatar in Chapter Four and Algeria, Mauritania and Morocco in Chapter Five.
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Like any other monumental historical moment, the story of Islam’s birth can be told in many ways. For our purposes, appreciating how a narrative is constructed and applied to legal argument is far more important than isolating an indisputable rendering of the Prophet’s life and the revelation of Islam. Why is it important to return to the Prophet’s life? How can theories of rule and laws emerge out of such an – often idealised – image?

Allah’s message was revealed to his last prophet, Muhammed in Arabian Mecca and Medina in the early part of the seventh century. Although the Islamic message was intended to be the definitive guide for faith into the future, it was also a product of its environment. Thus, Islam draws not only on its Arab, tribal origins, but also on the other monotheistic traditions of Judaism and Christianity. The Prophet acted as Allah’s deputy on earth, combining secular and divine rule over his followers. The community that emerged under Muhammed came to be known as al-umma, or the believers, all united in their commitment to Allah’s message as revealed to his Prophet and later compiled in the Qur’an.

Although Allah’s ultimate authority has remained uncontested, controversies emerged almost immediately as to the nature of rule on earth. Khadduri points out that societies based on religious rule have erroneously been described as theocracies. He argues that a distinction must be made between an authority which is directly derived from and exercised by God, and an authority which is derived from a divine code endowed by God but enforced by His viceregent (or by a secular ruler) which is equally binding upon the latter and the people.41

Thus, Khadduri suggests that it is best to understand the society established by Muhammed as a divine universal nomocracy, grounded in Allah’s revelation, the Qur’an. Foda disputes this account, suggesting that sovereignty on earth resided in the umma, and was expressed through the relationship between the umma and Allah’s law, or shari’ah.42

Despite the primacy of the umma in a theoretical sense, it was the theory and practice of the Caliphate that reveals the interrelationship between religion and politics best and helps explain tensions in Islamic perspectives on authority. Even with over ten wives, Muhammed died in 632 leaving only daughters and a controversy over who should succeed him. The word khalifah, or caliph, derives from the Arabic verb khalafa, meaning to follow.

or succeed. This was expressed by the first Caliph himself, Abu Bakr, who said: ‘I am not a successor to God, I am successor to God’s Messenger [Muhammed’]. There were disputes and political differences following the death of the Prophet, but later Muslims sought to overcome these early differences by depicting the period of the first four caliphs as one of consensus and harmony. Hence it is referred to as the era of al-khulafā’ al-rāshidūn, or the [four] rightly-guided caliphs. On Mu’awiyya’s defeat of ‘Ali, the Prophet’s son-in-law and the figure that would become associated with Shi’ism, the first Muslim empire was established in Damascus: the Ummayyad Caliphate (661-750). Following on from earlier conquests, caliphal rule came to be associated with a ruler’s ability to maintain and extend the Prophet’s message through conquest and empire. Because of its dominance politically and theoretically both in an historical sense and for the cases in the thesis, the rest of this chapter will only explore the Sunni practice of rule.

After rapid territorial expansion, Abbasid caliphs (750-1258) in particular had to confront a world not only far from universally Muslim, but also a Muslim world comprising multiple caliphs and sects. It was therefore during this period that rulers and scholars explored the relationship between territory and authority under the Caliphate in detail. Hourani captures the tension between theory and practice confronting scholars of the period, when he writes:

The caliphate had been one, at least in principle; it had been universal, resting on a formal equality of rights and functions as between all believers; its head had been, by his own claim and general recognition, the successor of the Prophet in his political function, and he had exercised his function in accordance with the Shari‘a. None of this was true of the sultans who had taken over power. Their rule was territorially limited.

Scholars of the classical era laid out the requirements for caliphal rule, and despite its theoretical ilk, it is clear that such work reflected an increasingly splintered and divided

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45 For example, Al-Ghunami illustrates that while the Abassids ruled from Baghdad, the Ummayads in Cordoba, Spain also declared a caliphate under ‘Abd al-Rahman III in 909 and the Fatīmids in Cairo under ‘Ukayd-allah in 929. Al-Ghunaimi, supra n 18, at 67-68. This is also noted by Onuma in his study of Islam in international law, Onuma, supra n 4, at 21.
46 Hourani, Arabic Thought, supra n 25, at 12.
system of governance, both geographically and institutionally. Piscatori concedes that ‘much of classical and medieval theory supports the view that Islam is pre-eminently concerned with the creation of a universal community and is intolerant of those who are not Muslim.’ However, he also suggests that this period contains the germ for the later idea of the nation-state and that we should not confine ourselves to a formulaic interpretation of a universalistic Caliphate. For example, Ibn Taymiyya (1263-1328) argued that religious unity was not synonymous with political unity; separate Muslim entities were permitted. Ibn Khaldun’s (1332-1406) sociological study of the rise and fall of societies also suggests that it was natural for Islamic empires to wax and wane; what should not change, however, was faith in the application of Allah’s message through his law, the shari‘a.

Muhammed’s lifetime had ushered in the two main sources of shari‘a, the Qur’an and the Sunna, or traditions of the Prophet, but it was not until much later that the shari‘a was systematised, especially in its international form of the siyar. Although we can characterise the siyar as somewhat of an afterthought, it still followed shari‘a practices and principles. Rules of a codified kind suitable for application to complex societies were rarely found in Islamic law’s primary sources, the Qur’an and Sunna. In response, usūl al-fiqh (ways of interpretation) were developed, which laid out how to identify rules through the interplay of primary as well as secondary sources, namely ijmā‘ (consensus of legal scholars) and qiṣāṣ (analogical reasoning). Given the relative lack of material found in the Qur’an and Sunna on international issues, the siyar was especially dependent on these secondary sources and it also reflected the political realities of Abassid rule. In addition, because of the gradual shift from ijtihād (innovative reasoning) in the early centuries to taqlīd (imitation), the evolution of legal norms failed to keep pace with international developments. For this reason, the classical siyar as developed by mujtahids, or practitioners of ijtihād, must not be portrayed as the sum total of Islamic internationalism. Instead, it is necessary to factor in state practice in combination with a flexible approach to the evolution of earlier scholarship and shari‘a principles. The importance of state practice

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47 For example, al-Mawardi’s (972-1058) principal work on political theory, al-aḫkām al-sulṭānīyya (On the Ordinances of Government).
48 Piscatori, Islam in a World of Nation-States, supra n 1, at 44.
51 Khadduri, War and Peace, supra n 41, at 47.
and adaptation was especially relevant under the Ottomans, and this is explored in the next section after a brief overview of the *siyar*’s characteristics.

What is the *siyar* and how did it conceptualise the relationship between territory and Caliph in a world containing both believers and non-believers? Although Al-Shaybānī (748-805) developed the *siyar* more than any other scholar in the early centuries of Islam, it was not until Al-Sarakhsi (d. 1101) that a clear definition emerged:

The *siyar* is the plural of *sīra*...It describes the conduct of the believers in their relations with the unbelievers of enemy territory as well as with the people whom the believers had made treaties, who may have been temporarily (*musta‘mins*) or permanently (*Dhimmis*) in Islamic lands; with apostates, who were the worst of the unbelievers...and with rebels... It was understood that the *sharī‘a* applied to Muslims as members of the *umma*, but a different body of law was required for non-Muslim peoples and lands. This bifurcated jurisdiction was a product of the prevailing Islamic worldview, which distinguished *dār al-īslām* (land of peace) from *dār al-barb* (land of war). Many writers have discussed this dichotomy and the implications, not only for separation between Muslims but also for amicable relations across confessional lines. Because this division suggests perpetual conflict, as encapsulated in the concept of *jahād*, many commentators regard the *siyar* as incapable of adapting to a system of nation-states under the norm of sovereign equality. Other authors tend to downplay classical *siyar*’s exclusionary effects through a series of reconciliatory gestures discussed above.

The failure to achieve worldwide conquest and the inability to wage constant wars of conversion had necessitated agreements with non-Muslim powers, for example through treaty. Sunni schools of jurisprudence did not develop a uniform position on this, but it was generally agreed that treaties of peace could be concluded for a period of up to ten years. The resulting regime was called *dār al-ṣulh*, the land of reconciliation or treaty. The

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52 For a discussion of these other theorists, especially in relation to *jahād*, see M Khadduri, *The Islamic Law of Nations: Shaybānī’s Siyar* (Baltimore: John Hopkins Press, 1966), at 38-39; and Mahmassani, *supra* n 43.

53 Khadduri, *The Islamic Law of Nations*, *supra* n 52, at 40.

54 *Jahād* is derived from the Arabic verb, *jahada*, which connotes an action requiring exertion, strain, effort, trouble. *Jihād* is typically translated as ‘holy war’, but can refer to any sort of religious struggle, such as a personal one of the conscience. The word, *ijtihad*, or independent legal reasoning, is derived from the same root.

Prophet himself had entered into treaties, and so at least temporary versions were supported in the centuries to follow.\textsuperscript{56}

This practice of temporary truces, however, did not support treaties between Muslim powers (both operating in dār al-islām) or the notion of permanent peace between Muslims and non-Muslims. Further difficulties arose in relation to treaty relations with non-Muslims because of the issue of territorial dominion: which laws were applicable in lands under treaty? Were Muslims in the land of war able to enforce the shari‘a? What was the status of non-Muslims within dār al-islām?\textsuperscript{57} Some of these questions are explored in relation to Ottoman practice below, and they were also the subject of numerous classical treatises.

Debate continues about the nature of Islamic authority over territory as developed in the classical period. Parvin and Sommer distinguish between legal and territorial rule:

\begin{quote}
Dar al-Islam is not...inherently a territorial concept. Rather, it is a legal construct that has a territorial dimension: a territorial expression of the umma...which itself has a political component. Thus, the dar al-Islam can be considered a political-territorial expression of that community in which the Islamic religion is practiced and where it is protected by a Muslim ruler. Similarly, the dar al-sulh can be described as an area in which the practice of Islam is permitted but not under the protection of a Muslim ruler. In the dar al-harb, though Islam might be practiced, it does not enjoy the protection of the non-Muslim ruler.\textsuperscript{58}
\end{quote}

This passage shows how the relationship between ruler and territory was vital, but many contemporary authors are divided as to the nature of a caliph’s rule: was it territorial or personal? Crone, for example, points out that the word, khālīfah, only refers to the caliph’s office and not his polity or his control over a geographical area.\textsuperscript{59} The authority of the caliph’s office derived from his application of the shari‘a to the umma and not effective territorial control per se. However, under classical doctrine this could also mean that Islamic law followed a community regardless of political authority:

\begin{quote}
\textit{since the concept of territorial sovereignty had not yet developed under Muslim law and since the Muslims were bound by the law regardless of the country or the territory they resided in, it follows, at least in Muslim legal theory, that the}
\end{quote}

\textsuperscript{56} The most famous treaty during the Prophet’s lifetime was ḍu‘l-lū al-ḥudaybiyyah (the Treaty of ḍu‘dahbiyyah), formed between Mo‘āmmad and the Meccans in 628. For a general discussion of treaties, see Zawātī, supra n 24.

\textsuperscript{57} Generally, see Khadduri’s translation of Al-Shaybānī on such issues: Khadduri, \textit{The Islamic Law of Nations}, supra n 52.


Other authors are more flexible in their fusion of theory and practice, arguing that territory was at least a factor in the development of jurisdiction and authority.\footnote{For example, Parvin and Somner argue that ‘Muslim jurisdiction, and therefore the dar al-Islam, was coextensive with secure, nonoppressed Muslim inhabitation and, while the character of Islamic law had a personal rather than territorial cast…the system was nonetheless binding on groups, which perforce, have a territorial distribution, as well as on individuals.’ Italics in original, Parvin & Somner, supra n 58, at 3. See also, Al-Ghunaimi, supra n 18, at 64.} Perhaps part of the difficulty in trying to solve this question of Islam’s territorial nature is the way conceptual tools and assumptions are not static. The Caliphate cannot simply be aligned with the modern state and it does not need to be; it is enough to forge a credible theoretical basis between classical scholarship and modern practice as explored in the next section. It is possible to show that some appreciation of territorally limited dominion emerged during the classical era which could inform later theory and practice. It is also important not to superimpose pre-conceptions on this contested terrain. According to Foda, it ‘seems that the concept of a personal and non-territorial sovereignty of the Muslim State – held by some jurists – is mainly derived from the régime of the capitulations which appeared as a complete system and the régime in the Islamic world towards the end of the 18\textsuperscript{th} century.’\footnote{Foda, supra n 42, at 108.}

The institutions of the Caliphate and capitulations continue to elicit controversy in the quest for Muslim approaches to territorial authority. We saw above that classical theory based on universal personal rule of the caliph increasingly had to accommodate the realities of multiple Muslim and non-Muslim entities. Thus, on their rise to predominance eight centuries after the Prophet’s death, the Ottomans were left a legal legacy far from settled. In their control over much of the Arab world, as well as in their relations with Europe, the Ottomans substantially developed the rules of \textit{siyar}, and this forms the subject of discussion below.
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Map #3 The Ottoman Empire, source: Z Lockman, Contesting Visions of the Middle East: The History and Politics of Orientalism (Cambridge: Cambridge University Press, 2004)

4) Caliphs, Capitulations and Colonialism in Ottoman Lands

An appreciation of the Ottoman legacy is necessary in exploring the chapter’s concerns about traditions of territoriality in the Arab-Muslim world and the reasons for recent Arab resort to the ICJ. Additionally, three of the thesis’ case studies hail from lands at least nominally under Ottoman authority: Libya, Palestine and the Gulf states.63 Although there is an impressive body of historical research as well as a wealth of untapped archival material about Ottoman rule and relations with Europe and management of its Arab populations,64 this knowledge rarely filters down into the field of international law. A number of works accounting for the emergence of international law in Europe tend to treat the Sublime Porte as an occasional interlocutor in an otherwise Christian world. Yet, Faroqhi argues that we must abandon such misunderstandings because ‘there was no “iron curtain” separating the Ottoman elites and their tax-paying subjects from the world outside

63 By the sixteenth century, all Arabic-speaking lands were under Ottoman control with the exception of Morocco, Sudan and parts of Arabia. However, Faroqhi reminds us that ‘Ottoman central control, while substantial in certain aspects of life and also in some geographical regions, in no way covered the entire surface of the Empire in an even and regular fashion.’ S Faroqhi, The Ottoman Empire and the World Around It (London: I.B. Tauris, 2004), at 48.
64 See M M Ilhan, ‘The Ottoman Archives and Their Importance for Historical Studies: With Special Reference to Arab Provinces’ (1991) C. LV Belleten 415.

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the borders of the Empire.\textsuperscript{65} Ottoman-European interaction contributed substantially to the law we now know as international law. International legal scholarship has conceded some role to the Ottomans in standard accounts of international law's 'birth', but usually in historically inaccurate projections of a Power weakened by the late nineteenth century. For example, the regime of capitulations and the Sublime Porte's 1856 'entry' into international law are regularly invoked to bolster narratives advancing an image of European origin: European predominance accounts for Turkish capitulation in both these episodes.

A closer reading of the historical record destabilises such a narrative and suggests a dialogue between multiple cultures and polities. This section's sketch of Ottoman-European relations seeks not only to dispel some common misunderstandings, but also to link classical Islamic conceptions of territory with Ottoman dominion: for example, I ask, were capitulations consistent with the classical siyar and how did they contribute to its evolution? Was international society and international law exclusively European? What was the nature of Ottoman international legal personality? The following section considers Ottoman membership within international society by interrogating the practice of capitulations and the 1856 Treaty of Paris before moving on to the idea of the caliphate and Islamic authority in the late Ottoman period.

We saw above that the nature of Islamic jurisdiction is based on a community of belief, and it was for this reason that practices were devised for regulating relations with non-believers both within and beyond Muslim lands. Islam always permitted a space for peoples of the book, or dhimmis.\textsuperscript{66} In exchange for accepting Muslim dominion and the imposition of the poll tax or jizya, resident Jewish, Zoroastrian, Sabean and Christian communities were able to apply their own laws for communal matters.

Circumstances, however, were very different for non-residents, such as traders. Under classical doctrine, dār al-islām had to secure itself against threats from dār al-harb, including from aliens, or ḥārbīs. For ḥārbīs wishing to enter dār al-islām, it was necessary either to convert to Islam or to secure amān, which was a form of protection.\textsuperscript{67} Any Muslim within dār al-islām could grant amān, which would transform a ḥārbī into a musta'min (or bearer of amān; protected person) for the period of one year. With this device, traders, for

\textsuperscript{65} Faroqhi, supra n 63, at 2.

\textsuperscript{66} Please note that for consistency and lack of confusion, I have chosen to use only Arabic spelling even though many words were often rendered differently in Turkish.

\textsuperscript{67} For a consideration of amān, see M C Bassiouni, 'Protection of Diplomats under Islamic Law' (1980) 74 American Journal of International Law 609.
example, were able to conduct their business deep into Muslim lands, avoid the jizya and, over time, have many legal matters settled extra-territorially. In his study of the origins of international law, Ago shows how there emerged a complex web of relations between three great powers in the Mediterranean from the ninth century, generating the seeds of modern international law, through mechanisms such as inter-state negotiations, treaties and customary law. Thayer echoes this idea in his study on capitulations when he writes that later the ‘Arab, Saracen and Christian nations of the Mediterranean seem to have granted extraterritoriality freely from an early time, in the paramount interest of commerce.’

Particularly with the penetration of merchants from the Italian city-states throughout the Mediterranean, it was necessary to assure a conducive climate for commerce, including those agreements between Muslim and Christian rulers that later came to be known as capitulations. Although the word ‘capitulation’ might suggest to an English speaker the idea of concession, it is actually derived from the Latin word for chapter, capitula, because these agreements were subdivided into sections, or chapters. The first capitulatory agreement was between Morocco and the maritime republic of Pisa in 1133, followed by Valencia in 1149, and then a number of Italian city-states seeking to boost Mediterranean trade thereafter. By the time the Ottomans had engulfed the Byzantines in their capital in 1453, there was already a well-established Muslim-Christian practice of capitulations. It was only under the Sublime Porte, though, that this regime was systematised and fully developed in the centuries to follow.

On their capture of Constantinople, the Ottomans set the tone of their relations with non-Muslims by entering into agreements with dhimmis and gradually solidifying earlier trade links with Italian powers. Especially later Ottoman

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68 These three powers were the Frankish-Lombard Empire of Charlemagne, the Byzantine Empire and the Muslims from Spain to Syria. R Ago, ‘Pluralism and the Origins of the International Community’ (1977) *Italian Yearbook of International Law* 3, at 13.
69 L E Thayer, ‘The Capitulations of the Ottoman Empire and the Question of their Abrogation as it Affects the United States’ (1923) 17 *American Journal of International Law* 207 at 208.
71 Ibid, at 313.
72 For a list of these early agreements, see ibid, at 312-315.
73 Ibid, at 315.
74 For example, in 1453 just after the fall of Constantinople and the birth of Istanbul, Mehmed signed an imperial decree, or ahdname. In this document, he granted the Genoese Council and its people in the neighbourhood of Galata a degree of political and legal autonomy and trading rights in exchange for a surrender of weapons and the muffling of church bells. D Goffman, *The Ottoman Empire and Early Modern*
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siyar indicates that this sizeable part of the umma had abandoned the classical ideal of universal Muslim rule advanced through jihād. By the sixteenth century, or even earlier, conquest continued, but within a limited framework softened by a growing deference to treaties of peace.75 With the collapse of the Abassid Caliphate in the thirteenth century Islamic history first witnessed a number of smaller competing dynasties, out of which emerged two dominant powers: the Sunni Turks and Shi‘ite Persia. In this period, ‘the division of Islam…became permanent and the divisions were consolidated by the trends of political development within Islam as well as by its relationships with the Christian world. The Islamic universal state became transformed into an Islamic state system.’76 Thus, a world once divided strictly into dār al-islām and dār al-ḥarb gave ground to new conceptualizations of space: an enlarged dār al-ṣulh without, and the umma spread across numerous empires and states within.

Initially, for non-believers on Turkish soil, ahdname or decrees of the sultan were unilaterally granted to foreign powers for the protection of their nationals. In keeping with classical doctrine, these instruments were limited to ten-year periods or, later, to the life of the sultan.77 These capitulatory agreements could be renewed on the accession of a new sultan, and so European powers regularly renewed the growing body of treaties to arise from this process.78 From the eighteenth century onwards, there also emerged some treaties of perpetual peace, indicating the rejection of a future world united under Islam.79 Far from being instruments of European domination, however, these treaty regimes can instead be seen as Ottoman largesse in dealing with far weaker powers eager to expand their commercial opportunities. The Islamic theory informing them, however, was not necessarily appreciated by both sides; they ‘signified one thing to the Ottoman mind and quite another to the alien European one.’80

Europe (Cambridge: Cambridge University Press, 2002), at 172. This is also discussed in Liebesny, supra n 70, at 315.
75 For an overview of Ottoman treaties with non-Muslims especially, see V Panaite, ‘The Re’ayas of Tributary-Protected Principalities (the 16th-18th Century)’ (2003) 1 Romano-Turcica 83.
76 Khadduri, The Islamic Law of Nations, supra n 52, at 61.
77 Liebesny, supra n 70, at 327.
78 For a list of such renewals, see Thayer, supra n 69, at 211-212.
79 The first perpetual treaty of peace was between the Porte and Russia in 1711. However, this practice was far from consistent, as Quataert points out that the Treaty of Belgrade between the Turks and Russia and Austria was limited to a period of 27 lunar years. D Quataert, The Ottoman Empire 1700-1922 (Cambridge: Cambridge University Press, 2nd edition, 2005), at 78.
80 Goffman, supra n 74, at 175.
Over time, perceptions of power started to inform the capitulations regime in new ways so that increasing European strength resulted in ever more extensive jurisdictional as well as territorial concessions from Istanbul. Where once ahdnames had been unilateral decrees granted by the sultan, they increasingly took on the shape of bilateral agreements between equal and, later, unequal powers. As communications between Europe and the Porte developed, so too did the number and subject matter of these agreements, which were modeled on treaties covering the juridical rights of foreigners signed by France and the Porte between 1535 and 1740. According to Faroqhi, it was in ‘the eighteenth century [that]...the so-called capitulations...were increasingly turned into a source of privilege particularly by French and English consuls or ambassadors.’

European privilege increased further during the nineteenth century. The gradual loss of Ottoman lands, as well as the spread of nationalist movements in Europe, inspired Christian powers to ‘protect’ co-religionists in lands under Muslim rule. Examples of this include Russia’s many treaties with the Porte regarding its Christian Orthodox populations and France’s connection with the Maronites of Mount Lebanon, which persists to this day. With the advantage of historical hindsight, the gradual relinquishment of territorial control can be traced across the centuries, but such a method would overlook the perspectives of Ottoman rulers during those periods when their power was equal or greater to that of their European counterparts. In fact, it ‘was not until the middle of the nineteenth century that the Sultans seem to have regarded these concessions as a disparagement on their sovereignty.’

It is ironic then that in an age witness to the consolidation of a territorially limited Muslim empire – or Caliphate – that the Ottomans suffered such an assault on their jurisdiction. While the Porte gained formal European recognition of its sovereignty in the 1856 Treaty discussed below, jurisdiction within its territories was emasculated more and more by capitulatory agreements. A related anomaly informs the familiar narrative of international law’s evolution: Europe welcomed the Porte into its exclusive club in an era of unprecedented interference and disregard for the Porte’s

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82 Thayer, supra n 69, at 216.
83 Faroqhi, supra n 62, at 60-61.
84 Piscatori discusses some of these agreements: Piscatori, Islam in a World of Nation-States, supra n 1, at 52-53.
85 Thayer, supra n 69, at 213.
territorial integrity. How can we account for these contradictions, and what do they suggest about the evolution of the idea of statehood within and beyond Arab-Ottoman lands?

Although centuries of accelerated Ottoman-European interaction had generated greater cultural awareness and familiarity, increasing power disparities forged identities ever more in opposition with each other. In the earlier phases of European-Ottoman relations, when only a nascent European states-system existed, intermittent links through trade or war comprised an emerging body of regional custom. Over time, such practices developed, but also conjoined with a European discourse based on cultural superiority and the positivist doctrine of recognition. The construction of identity through ‘othering’ relies on enough knowledge to generate caricatures of one’s other, and this in turn requires a degree of interaction. When we combine this idea with the historical context of increasingly intermeshed European-Ottoman relations and European imperialism elsewhere, then the imposition of cultural norms on Turkey is more explicable. According to Quataert, on ‘each side proximity structured a complex identity formation process of repulsion and attraction. After all, a people comes to perceive of itself as distinct and separate with particular and unique characteristics, often through using the “other” as a means of defining what it is and, equally, what it is not.’

For many scholars, the highpoint of Ottoman ‘othering’ occurred in the mid-nineteenth century with the imposition of the ‘Standard of Civilisation’ on Turkey’s entry into ‘international’ society in 1856. For the thesis, the 1856 episode allows us to consider the place of Arab and non-European peoples within the international legal community. For example, in Chapter Three, Libya draws on Ottoman membership of international society to rebut European control over North Africa. The Ottoman presence is also explored in Chapter Four’s discussion about imperial rivalries in the Gulf. European powers could only dictate boundaries if local Arab and/or Ottoman personality was defeated through argument. Thus is it accurate to conceive of an international society populated exclusively by European or European-invited states?

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86 Quataert, supra n 79, at 6.
87 Wight captures the typical narrative: ‘The orthodox answer, then, to the question about the limits of the states-system, is that it was originally confined to Western Christendom out of which it grew; that the European colonies in North and South America became peripheral members of it when they attained independence; that the first non-European state to be admitted was the Ottoman Empire in 1856; that Persia, Siam, China and Japan (but not Ethiopia or Liberia) were admitted with different degrees of grudging patronage in the later part of the nineteenth century; that this extension of the system beyond Europe and America first received legal recognition in the Hague Conferences of 1899 and 1907; and that the
The controversy over membership of international society has been especially important for raising questions about the universality of international law. Alexandrowicz, for example, rejected the narrative of international law's European origins by offering a counter-narrative of equality between European and Asian powers before the nineteenth century. It was only from the late eighteenth century that the law of nations started contracting into a regional (purely European) legal system, abandoning a centuries old tradition of universality based on the natural law doctrine. Many Third World scholars, especially in the advent of decolonisation, advanced similar arguments to demonstrate that they were not simply citizens of 'new' states; independence was only the latest moment in re-claimed statehood. Such accounts are based on benign assumptions about pre-nineteenth century legal custom and thought. Koskenniemi suggests that such perspectives place too much emphasis on the 'universalism' of earlier writers, such as transformation of the Western European system into a world system was finally performed through the League of Nations and the United Nations.' M Wight, Systems of States: Edited with an introduction by Hedley Bull (Leicester: Leicester University Press, 1977), at 117.

88 According to Alexandrowicz, 'Though the Europeans had sailed to the East Indies since the end of the fifteenth century and though they had at first intended to discover and occupy lands, and where necessary, to establish their territorial possessions by conquest, they had in practice to fall back on negotiation and treaty making in preference to resorting to war. In fact they found themselves in the middle of a network of States and inter-State relations based on traditions which were more ancient than their own and in no way inferior to notions of European civilization.' C H Alexandrowicz, An Introduction to the History of the Law of Nations in the East Indies (16th, 17th, 18th Centuries) (Oxford: Clarendon Press, 1967), at 224.

89 Ibid, at 2. For a similar perspective, see P C Jessup, 'Diversity and Uniformity in the Law of Nations' (1964) 58 American Journal of International Law 341. Grewe refutes this position in articulating the dominant international law narrative of its origins: what 'happened in the nineteenth century was certainly not the narrowing of a universal law of nations to a regional, European law of nations, as Alexandrowicz asserted. On the contrary, the European law of nations gradually grew into a global legal order, the members of which were, it is true, only the «civilised nations». This development cannot be interpreted as a «regionalisation» or «Europeanisation». Rather, the dualism of the Christian-European law of nations and the natural law-based universal law of nations dissolved into a single, universal legal system, albeit one which had been deprived of its natural law foundation by the rise of positivism. This universal legal system introduced a new differentiation through the criterion of civilisation, thus laying the foundation of a new, colonial law of nations separate from the general one.' W H Grewe, The Epochs of International Law, M Byers (trans) (New York; Berlin: de Gruyter, 2000), at 466.

90 Alexandrowicz's 'reversion' thesis distinguishes certain Asian states from African ones. In relation to the former, he suggests that a 'State can hardly drop out of the Family of Nations because of ideological change in the structure of the Law of Nations...[Whereas] unlike the case of countries of the East Indies, there is generally no room for a claim to their [African] classification as original States. Most of the African entities are new States in the present-day meaning of the word, and reversion to sovereignty has no application.' C H Alexandrowicz, 'New and Original States: The Issue of Reversion to Sovereignty' (1969) 45 International Affairs 465, at 471, 473.


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Grotius and Vattel. In his study of Vittoria’s thought, Anghie echoes such sentiments by showing us that the European natural law tradition shared with positivism a rejection of cultural equality. Furthermore, in the pre-nineteenth century world, it is difficult to speak of an international law at all. Instead, Onuma suggests a world comprising multiple regional legal systems only interacting intermittently. One such regional system was that comprising the Sublime Porte and European states.

Given the complexities surrounding questions about the nature of membership in international society, I do not intend to settle on historical ‘truth’ about international law’s origins. At the very least, however, it is important to recognize that narratives about Ottoman ‘entry’ into ‘international’ society can help us interrogate and unsettle the ‘European’ origins of international law. We have seen that Europe and the Sublime Porte forged an extensive network of legal relations, based on treaties relating to peace, trade and the protection of Christian populations. We also saw that these treaties spanning centuries cannot simply be understood as a product of European domination.

Narratives emphasising European domination rely particularly on the centrality of the ‘Standard of Civilisation’ in the nineteenth century. Although it is possible to view the ‘Standard of Civilisation’ as symbolic of an onerous and racist European (international) law, the record is more complex. We must concede some agency to the ‘old man of Europe’, especially at the internal level, where significant domestic pressure contributed to

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95 Onuma, supra n 4, at 8.  
96 For a general discussion about the ‘Standard of Civilisation’, see G Gong, The Standard of “Civilization” in International Society (Oxford: Clarendon Press, 1984). Fidler’s scholarship on capitulations and their links with the present stresses the link between European domination, capitulations and the standard: ‘Capitulations were the primary tool used by the Western countries to implement the standard of civilization, and they were the catalysts for reforms in non-Western countries that would bring such countries closer to membership in the civilized world’; and ‘The economic and legal harmonizations stimulated by capitulations were indicators of the transformation of non-Western countries into Western clones. Capitulations were the epicenter of a radical remaking of the way the world was organized. And international law was a primary instrument in setting up capitulatory regimes and placing the standard of civilization at the center of civilizational customary international law.’ D P Fidler, ‘The Return of the Standard of Civilization’ (2001) 2 Chicago Journal of International Law 137, at 142, 143. Grewe also discusses the relationship between civilisation and capitulations: Grewe, supra n 89, at 457.
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Ottoman reform efforts in the nineteenth and early twentieth centuries. It is also problematic to speak of a clearly defined 'Standard of Civilisation'. For Koskenniemi,

The existence of a 'standard' was a myth in the sense that there was never anything to gain. Every concession was a matter of negotiation, every status dependent on agreement, *quid pro quo*. But the existence of a *language of a standard* still gave the appearance of fair treatment and regular administration to what was simply a conjectural policy.

The 'Standard of Civilisation' was and remains a slippery one, and it is more fruitful to fix our gaze on other historical practices in exploring Ottoman membership of international society.

Accounts about the European nature of international society are never complete without mentioning the 1856 Treaty of Paris, with its reference to Ottoman 'entry' into 'international society'. In this section I ask, does the Treaty of Paris mark a momentous shift in the political and legal position of the Sublime Porte, or is it better to regard the Treaty as only part of the rich fabric of Ottoman-European relations that began many centuries before? If we see Ottoman 'entry' as a product of the Treaty, then we also accept the positivist doctrine of recognition and, therefore, the 'Standard of Civilisation'. Conversely, by seeing the Treaty as simply one of many agreements between the Porte and Europe, the narrative of membership becomes more nuanced: perhaps international law was always more than European. An appreciation of the Sublime Porte’s place in the international system is not only useful for an understanding of the status of its Arab territories discussed later in the case studies. It is also useful in considering whether international law is premised only on European experiences of statehood.

Authors differ as to whether we should regard 1856 as the moment of membership into international society for the Ottoman Empire, and this is a product of their respective positions about international law, positivism, the ‘Standard of Civilisation’ and approaches to history. It is easy enough to locate contemporary sources suggesting European rejection of Turkish civilisation and culture both before and after 1856. These accounts frame

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97 For an overview of this period, particularly the Tanzimat reforms, see, K H Karpat, ‘The Transformation of the Ottoman State, 1789-1908’ (1972) 3 International Journal of Middle East Studies 243.
98 For an overview of the linguistic origins of ‘civilisation’ in Europe, see Grewe, *supra* n 89, at 446-451.
99 Emphasis in original, Koskenniemi, *supra* n 93, at 134-135.
100 This is argued by Alexandrowicz, ‘New and Original States’, *supra* n 90, at 466. It is worth quoting Richard Cobden in 1836 about Turkish 'barbarity': ‘Turkey cannot enter into the political system of Europe; for the Turks are not Europeans. During nearly four centuries that that people have been encamped upon the finest soil of the Continent, so far from becoming one of the families of Christendom, they have not adopted one European custom. Their habits are still Oriental, as when they first crossed the Bosphorus. They
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their enquiry around the role of (European) recognition and the ‘Standard of Civilisation’: here, the Standard is regarded as the gatekeeper, rather than as simply one of many devices available to Powers pursuing their interest in the context of an emerging international system.

Within the European states system, threats to the preservation of the balance of power were managed through treaties and diplomacy, and so the 1856 Treaty should be understood against the backdrop of Russian and Ottoman rivalry over the eastern Mediterranean. Russian attempts to gain access to the Mediterranean via the Bosphorus and Dardanelles, as well as its moves against the Porte more generally, were the basis of the ‘Eastern Question’.

This episode from the Russo-Ottoman Wars of the late eighteenth century illustrates how the Porte was viewed. The Ottoman Empire was no more, and on a wave of secular reform Turkey submissively embraced European models of law and governance. Before the Court, Mahmoud Essat Bey declared, ‘Monsieur le President, Messieurs de la Cour, la Turquie a voulu faire partie de la grande famille des nations; elle en a reclame et obtenu toutes les droits; mais elle a aussi accepte, de grand coeur, toutes les obligations; elle vient de mettre en vigueur le Code civil suisse, le Code des obligations suisses, le Code pénal italien et le Code de commerce allemand. Sa legislation modernisée se heurte, dès les premiers jours, à des obstacles. La Turquie veut bien remplir toutes les obligations qui découlent du droit international; elle ne veut pas qu’on exige d’elle quoi que ce soit au-delà de ces obligations. Vous allez prendre votre décision au nom des principes du droit international, au pays de Grotius. Votre sentence sera respectée par la Turquie; elle ne veut pas séparer son sort de celui de la civilisation européenne.’ [President of the Court, Turkey wanted to be part of the grand family of nations; she sought it and obtained all her rights, but she also accepted, in good faith, all the obligations [attached to her membership]; she implemented the Swiss Civil Code, the Swiss Code of Agreements, the Italian Criminal Code and the German Commercial Code. Yet Turkey’s modern legislation has run up against obstacles from the very start. Turkey is keen to fulfill all the obligations which flow from international law; but it does not want us to ask from it anything beyond these obligations. You will make your decision in the name of the principles of international law, in the country of Grotius. Your verdict will be respected by Turkey; [since] Turkey does not want to separate its destiny from that of European civilisation.] Quoted in M Shahabuddin, ‘The World Court at the Turn of the Century’, A S Muller, D Raić & J M Thurnánszky (eds), The International Court of Justice: Its Future Role after Fifty Years (The Hague; Boston: Martinus Nijhoff, 1997) 3-29, at 10.

Quataert summarises the ‘Eastern Question’ as ‘how to solve the problem posed by the continuing territorial erosion of the Ottoman empire...[which] continued to be addressed over the course of the nineteenth century. On the one hand, many European leaders came to understand the grave risks that total Ottoman collapse posed to the general peace. And so they agreed to seek to maintain its integrity, for example, reversing the potentially devastating results of war at the negotiating table and, in 1856, admitting the Ottoman state into the “Concert of Europe”. Thus, the European consensus that the empire should be maintained, tottering but intact, helped preserve the Ottoman state. On the other hand, through their wars and support of the separatist goals of rebellious subjects, European states abetted the very process of fragmentation that they feared and were seeking to avoid.’ Thus the norm of territorial integrity was far from clear-cut in this period. Quataert, supra n 79, at 56.
century saw other European powers forge various alliances in support of the Porte to deflect Russian encroachment and its threat to the balance of power. European intercessions confirmed Ottoman sovereignty as a counterweight to Russian aspirations. In the 1841 Straits Convention, for example, the Great Powers undertook 'to respect this determination of the Sultan [regarding Ottoman control of the Straits], and to conform themselves to the principle above declared.' A breach of the territorial status quo would not only violate territorial interests of the Porte but European interests as a whole.

A similar undertaking appeared in the Treaty of Paris, which concluded the 1853-1856 Crimean War between Russia and Turkey and their allies. Scholars in particular look to Article 7 for indications of Turkish 'entry' into the fold:

Sa Majesté la Reine du Royaume Uni de la Grande-Bretagne et d'Irlande, Sa Majesté l'Empereur d'Autriche, Sa Majesté l'Empereur des Français, Sa Majesté le Roi de Prusse, Sa Majesté l'Empereur de toutes les Russies, et Sa Majesté le Roi de Sardaigne, déclarent la Sublime Porte admise à participer aux avantages du droit public et du concert Européens. Leurs Majestés s'engagent, chacune de son côté, à respecter l'indépendence et l'intégrité territoriale de l'Empire Ottoman: garantissent en commun la stricte observation de cet engagement: et considèrent, en conséquence, tout acte de nature à y porter atteinte comme une question d'intérêt général.

In his close reading of the Treaty and its wider context, McKinnon Wood argues that this provision did not mark a radical break with the past; we cannot retrospectively deem Turkey to have been outside of international society and international law before 1856. Throughout the record there is no trace that the participants were conscious that Turkey was not already a subject of international law, or that they were proposing to confer that

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102 1768-1774 and 1787-1792.
104 Ibid, at 7.
105 After mounting tensions between Russia and the Sublime Porte as well as Britain, hostilities broke out between Russia and Turkey in late 1853. After Russia failed to back down to their demands, France and Britain declared war in March 1854 alongside the Ottoman Empire.
106 [Her majesty the Queen of the United Kingdom of Great Britain and Ireland, His Majesty the Emperor of Austria, His Majesty the King of Prussia, His Majesty the Emperor of all the Russians, and his Majesty the King of Sardinia declare the Sublime Porte admitted to participate in the advantages of public law and the concert of Europe. Their Majesties each commit themselves to respect the independence and territorial integrity of the Ottoman Empire: jointly guaranteeing the strict compliance of this agreement: and as a consequence, they will consider all acts of such a nature as to undermine it as a question of general interest] Italics added, quoted in H McKinnon Wood, 'The Treaty of Paris and Turkey's Status in International Law' (1943) 37 American Journal of International Law 262, at 262-263. Treaty Guaranteeing the Independence and Integrity of the Ottoman Empire, 15 April 1856, 114 CTS 497.
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status upon her’. He also argues that there was little change in state conduct after the Treaty. Finally, in relation to Article 7, he suggests that the provision was not about international law at all, but rather it was ‘an act of admission to what today might be called a regional understanding’ – the Concert of Europe. We can understand the Treaty as a manifestation of Great Power management more than anything else. ‘Done, il est faux de dire qu’en 1856 la Porte Ottomane ait été admise pour la première fois au droit international en vigueur en Europe.’

There was no radical rupture in 1856; the notion of Ottoman territorial integrity remained contested in the face of supportive and subversive European ‘allies’, and part of the international legal custom informing these actions had evolved over centuries of Ottoman-European relations. International law of the nineteenth century was more than European, but it is difficult to specify this any further given the complex role of culture and positivism in an age of burgeoning empires. Ultimately, conclusions about the nature of international law in the nineteenth century are indeterminate. The combination of doctrine, politics and history cannot produce one law or one account but instead multiple perspectives informing later justifications for international law’s evolution.

Before completing our discussion of the contested Ottoman legacy, this section comes almost full circle by returning to the idea of the Caliphate and its relevance not in classical Islamic thought and practice but in the latter period of Turkish rule. For many Muslims, the Mongol’s destruction of Abassid Baghdad in 1258 had sounded the Caliphate’s death knell, or, at the very least, significant confusion as to the location of any

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107 Ibid, at 267.
108 ‘There seems...to be evidence that governments and political opinion in the contracting countries were quite unaware that the Treaty of Paris had effected a fundamental change in Turkey’s status in international law.’ Ibid, at 269.
109 Ibid, at 274.
110 [Thus, it is incorrect to say that in 1856 the Ottoman Porte was admitted for the first time to the international law in force in Europe] T Toyoda, ‘L’aspect universaliste du droit international européen du 19ème siècle et le statut juridique de la Turquie avant 1856’ (2006) 8 Journal of the History of International Law 19, at 33.
111 According to Moinuddin, ‘It could...be argued that centuries of peaceful contacts and commercial relations between Islamic and non-Islamic states prior to the admittance of the Ottoman Empire to the Concert of Europe in 1856 had led to the emergence of a body of ‘regional’ or ‘Islamic’ customary rules which provided for the underlying basis of such relations.’ Further, in relation to custom, he argues that ‘it could still be argued that regular peaceful contacts throughout the ages, whether on the basis of unilateralism or principles of equality and reciprocity, provided a fertile ground for the eventual development of a consistent legal policy applied by Islamic States in their external relations with other States. This legal policy, which was reflected in treaty relations between Islamic and non-Islamic States and which was based on principles of equality and reciprocity could be said to have become a general and widely accepted practised “customary” policy by 1856.’ Moinuddin, supra n 22, at 39-40.
future, nominally universal, successor. Upon conquering Mamluk Egypt and Syria in 1516-1517, Selim I inherited the title of khādīm al-hāramayn al-sharifayn, or the servant of the two Holy Shrines, and Ottoman control of these sites in Mecca and Medina was confirmed by Süleyman the Magnificent’s seizure of Arabia in 1534. Ottoman sultans were not models of caliphal ideals. They could not trace their lineage back to Muhammed’s tribe, the Quraysh, and neither could they portray themselves as exemplars of the sharī‘a’s strict application. They could, however, lay some claim to the Caliphate as the dominant Sunni power alongside the Mughals in India with control over the Holy Sites and the annual pilgrimage, or ḥajj. The institution of the Caliphate at this time also provided a point of contrast with the Turks’ main Muslim and Shi’ite rival, Safavid Persia.

We have seen that Ottoman rulers combined Islamic principles of siyar with pragmatism in their relations with Europeans, and such flexibility was underwritten during periods of Ottoman strength. Although the Porte’s Islamic identity was never questioned, it was not until its position came under serious international and internal strain that the Caliphate was evoked as a tool of legitimacy and control. According to Deringil, the ‘continuous, indeed almost monotonous, acclamation of the sultan’s caliphal title dates clearly to the period of decline at the end of the 18th century.’ The late eighteenth century did not only witness significant Ottoman international pressures as a result of the Russo-Ottoman Wars mentioned above. During this period, Ottoman legitimacy was also threatened from within, through the efforts of Muhammed ibn ‘Abd al-Wahhab (1703-1792) and his call for a return to ‘pure’ Islam. Both the spiritual claims of the Wahhabi reformers as the heirs of true Islam and their early nineteenth-century seizure of Mecca and

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112 Quataert, supra n 79, at 83.
113 H Kayali, Arabs and Young Turks: Ottomanism, Arabism, and Islamism in the Ottoman Empire, 1908-1918 (Berkeley: University of California Press, 1997), at 17.
114 For an excellent discussion comparing Moroccan and Turkish competing claims to the Caliphate, see A El-Moudden, ‘The Idea of the Caliphate between Moroccans and Ottomans: Political and Symbolic Stakes in the 16th and 17th Century-Maghrib’ (1995) 82 Studia Islamica 103.
115 Hourani quotes Zabidi (1732-1791) on this point, who argued that the sultan’s claim ‘was based not on apostolic succession from the Prophet, but on the divine right of those who had established their effective power and used it in the interests of Islam. The sultan defended the frontiers against Christians and Shi‘is; he protected the Holy Places and organized the Pilgrimage with care; he paid respect to the Shari‘a and its guardians [the ‘ulema].’ Emphasis added, Hourani, Arabic Thought, supra n 25, at 27.
116 According to Faroqhi, ‘Whenever treaties were concluded a position of strength, such as the peace of Amasya (1555/962-3), it was usually demanded that the Iranians cease the ritual cursing of the early caliphs Abi Bakr, ‘Omar and ‘Othman, whom the Shi‘ites considered as usurpers and the Sunnis, by contrast, as “rightly guided”.” Faroqhi, supra n 63, at 36 (footnotes omitted).
Medina seemed to undermine Ottoman legitimacy.  

The Wahhabi threat was felt particularly near its power base in the Arabian Peninsula, providing the Ottomans with another reason to strengthen their presence in the Gulf, as discussed in Chapter Four.

The use of the Caliphate as a tool of legitimacy gained even more importance by the late nineteenth century when the loss of European territories meant that the majority of Ottoman subjects were Muslim and/or Arab. Later on, Arab nationalism’s appeal threatened the Porte’s link with its Arab populace, but this was not because of any deficit in Islamic credentials; it was more an Arab reaction against the policies of Turkification and secularisation instigated especially under the Young Turks administration after 1908.  

Ottoman calls in Arabic for a universal Caliphate were targeted particularly at Arabs across the Empire. Certain prominent Arab intellectuals at this time were supportive of Turkish rule for the very reason that the Caliphate was seen as uniting Muslims against European encroachment. This idea was articulated by the prominent intellectual, Rashid Riḍā, in his 1919 memo to British Prime Minister, Lloyd George, where he contrasted foreign rule unfavourably with Ottoman protection of the Muslim Holy Sites. Even from its earliest days, Islam had straddled faith and power, and thus Ottoman stewardship of the umma and its lands was preferred over non-Muslim dominion. Perhaps the distinction between dār al-islām and dār al-harb had given way to modern realities, but it still served as a powerful device in linking authority over territory, not only through effective control but also through the legitimacy of religious symbolism. After its defeat in the First World War the

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118 Quataert, supra n 79, at 84.
120 Hourani, Arabic Thought, supra n 25, at 106.
121 For an overview of Riḍā’s thought, see ibid, at ch 9.
122 ‘The great minister should know that his government’s declaration which expresses respect for the Islamic holy places in the Hijaz, Jerusalem, and Iraq and continued Muslim control of them has no positive effect on the Muslims whatsoever. Such a declaration is even painful...since it implies that the holy places are under foreign sovereignty and consequently worship there depends upon the will of the foreigner. He [the prime minister] no doubt knows that contrary to British expectations, recognizing the independence of the Hijaz and proclaiming the amir of Mecca a king did not have a positive effect on the Muslims. That was the case because the Hijaz is one of the poorest and weakest Muslim countries. It is not a land of sovereignty and temporal authority, but of worship. Muslims were not concerned that their holy places would be demolished or access to them denied; their real concern was for Islamic [political] sovereignty without which Islam itself and its mosques could not be safe. The preservation of this sovereignty is a desire mixed in the blood of every Muslim who regards the survival of his religion as dependent upon the existence of an independent strong [Islamic] state subject to no foreign influence. This is why most Muslims in the world passionately cling to the Turkish state and consider it as representative of the Caliphate although it lacks all the Caliphate conditions except power and independence.’ Rashid Riḍā translated and quoted (italics and additions in translation) in M Haddad, ‘Arab Religious Nationalism in the Colonial Era: Rereading Rashid Riḍā’s Ideas on the Caliphate’ (1997) 117 Journal of the American Oriental Society 253, at 271.
Ottoman Empire was succeeded by the Turkish Republic and a host of foreign territories that would come under Mandate rule. In 1922, the caliphate was stripped of all its temporal power, and in 1924 it was abolished altogether.\textsuperscript{123} Henceforth, it would serve only as an ideological counterpoint to the rising forces of nationalism and the nation-state across the Arab world.

Despite the demise of the Caliphate and the Ottoman Empire, Islamic and Arab traditions have continued to inform more recent Arab approaches to authority over territory. We saw that although Ottoman personality may have been contested, it was still sufficient \textit{as an idea} to inspire arguments about Ottoman authority and the relevance of the Caliphate in later ICJ pleadings. We also saw that international law was more than a European discourse, but that its exact boundaries are mired in controversies that reflect particular agendas of contemporary international legal scholarship. In the final section, I trace how Arab states have made sense of Ottoman and Islamic legacies in constructing practices of territoriality and dispute resolution in the region.


5) From the Mandate Period to the Present: Independence, the Failure of Regionalism and the Place of Adjudication

\textsuperscript{123} Ibid, at 272, 276.
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In contrast to much of the Third World, the majority of Arabs only experienced European rule in the twentieth century with the establishment of the Mandates under League of Nation auspices in 1922. 124 The case studies of Western Sahara and Libya/Chad remained under direct colonial rule and the Arab Gulf was nominally under a protective rather than colonial regime. Thus although the Mandate period was seminal in the Arab consciousness, it only directly touches on one case in the thesis, Palestine as discussed in Chapter Six. Rather than explore the period for its direct link with the cases, this section considers its symbolic legacy for Arab states on gaining independence. We should see the League of Nations era as a transitionary one along a path towards today’s Arab states and their borders. We should also recognize, however, that the legacies of the Mandate persist, having had lasting effects on the nature of territoriality across the region.

In this final section, the rise of Arab nation-states is depicted against the backdrop of earlier Islamic practice and theory and European colonialism. What legacies of territoriality and international law did Arabs draw on after their independence and why has the nation-state been such a contested model across the region? Aside from Arab experiences under numerous Islamic empires, particularly the Ottomans, it was the encounter with European control, either directly in the form of colonialism or indirectly with the Mandate, that was seminal in shaping the contours of Arab international legal personality. After describing modes of Mandatory rule, this section will explore Arab nationalism vis-a-vis territorial notions of authority before considering Arab regional responses to territorial disputes and international legal fora more broadly. Given the many, interrelated experiences of international legal governance at hand, how have Arab states negotiated their place in international society and the international legal system? Is there a continuing role for Islamic principles, and how can these be realized in a postcolonial era?

Like other moments in international law’s past, the Mandate period has been singled out as a milestone, marking a significant shift for at least some peoples from colonial exploitation to international legal protection. Although self-determination was granted to European peoples of the former German and Ottoman Empires, other territories came under French and British control. These territories were classified into ‘A’, ‘B’ and ‘C’ Mandates, depending on their level of social and political development. In his study which appeared

124 Hourani, A History of the Arab Peoples, supra n 37, at 318-319.
only shortly after the Mandates’ inception, Lauterpacht examined League of Nations provisions and concluded that the regime was radically different from colonialism. He expressed misgivings about C Mandates, but as for the more ‘advanced’ A and B Mandates it was incorrect to speak of annexation.  

Sovereignty lay with the League, and consequentially Mandate territories could not be subsumed under the territory of the Mandatory. Crawford’s discussion of the ‘received view’ reinforces Lauterpacht’s position. Crawford shows that the dominant narrative distinguished colonial rule from the Mandates; France and Britain did not possess sovereignty over these territories. Instead, sovereignty was held ‘in trust’ by the League.  

This narrative is challenged by Anghie, who, in asking whether we should regard the institution as the negation or recreation of colonialism, favours the latter response. Article 22 of the League Charter is reminiscent of nineteenth century colonialist discourses of the ‘Standard of Civilisation’ when it speaks of a ‘sacred trust of civilization’. Under this system, peoples were to be guided along a single trajectory of eventual independence; diversity was not permitted in this schema as, instead, those ‘not yet able to stand by themselves’ were ushered into a system of seeming sovereign similitude. This paradox of enforced ‘freedom’ is captured by Anghie:

126 Ibid, at 49.  
128 Generally, see Crawford, ibid, at ch 13.  
130 The relevant text of Article 22 reads:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances. Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Covenant of the League of Nations, 28 June 1919, 225 CTS 188.
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In seeking to liberate the mandate peoples from the ‘strenuous conditions of the modern world’, the system instead entraps the mandate peoples within those conditions. The peculiar cycle thus creates a situation whereby international institutions present themselves as a solution to a problem of which they are an integral part.\(^\text{131}\)

For Arabs, two mandate(d) legacies are particularly relevant when considering statehood and territoriality. First, it was during the Mandate period that the seeds were sewn for the ongoing conflict over Palestine, as discussed in relation to Arab nationalism later in the chapter and in Chapter Six. Second, it was under French and British rule that lines on maps were drawn, and these borders – despite many challengers – have remained largely unchanged.\(^\text{132}\)

Although ‘the idea of the nation-state has emerged as a veritable Grundnorm in modern Muslim [or Arab] political and religious discourse’,\(^\text{133}\) it has not always been so. Why was territorial integrity so difficult to accept for many Arab states and why did it ultimately triumph? In trying to answer these questions, context must influence any response, because although we can now speak of general Arab acceptance of the bounded nation-state, the Arab world still contains many challengers to the status quo of confined territoriality.\(^\text{134}\) Compared with Europe, for example, Arab states are not nearly as secure in their statehood. Numerous violations of territorial borders, external interference and non-state actor violence all occur on a regular basis.\(^\text{135}\) These phenomena symbolise a shaky system that has been able to survive, thanks largely to modern tools of state repression\(^\text{136}\) along with substantial foreign aid.

Until European rule, most Arabs were content to live under a fragmentary political system; being part of the qawm, or (Arab) people was a belief only carried by a small

\(^{131}\) Anghie, supra n 129, at 178.

\(^{132}\) Some other important factors to note from the Mandate period would be its impact on the shape of Arab legal systems today, languages of instruction and school curriculum, as well as persisting commercial and personal ties.


\(^{135}\) There are simply too many examples to list here, but some deserving attention not discussed below in relation to territorial adjudication include: Jordan’s occupation of the West Bank between 1949 and 1967; Israel’s ongoing occupation of the West Bank, Gaza Strip, Golan Heights and Sheba’a farms; Israel’s former occupation of the Sinai and southern Lebanon as well as its 2006 war against Lebanon; Iraq’s invasion of Kuwait in 1990; the use of Lebanon as a site of regional conflict during its civil war, 1976-1990; Morocco’s ongoing occupation of Western Sahara and its confrontations with Algeria as discussed in Chapter Five; the US invasion of Iraq in 2003; and the use of non-state violence to destabilise the region.


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elite.\textsuperscript{137} We saw above how part of this sense of pan-Arabism or \textit{al-'arabiyya al-qawmiyya} was fuelled in opposition to Turkification within the Ottoman Empire.\textsuperscript{138} Nascent nationalist sentiments were to intensify greatly with the imposition of European rule as well as the arbitrary demarcation of much of the Arab world into French and British controlled spheres. Ayubi argues that it ‘was the colonial encroachment on the Arab East, combined with the accelerating demise of the Ottoman state, which contributed more than anything to the politicisation of Arab nationalist ideas there.’\textsuperscript{139} Although the French and British had tried to mollify Arab interests through the local leadership of prominent Hashemites, such as King Abdullah in Jordan and King Faisal in Iraq, this was not sufficient to stem the tide of growing opposition to European interference. Once independence was gained by most of the Arab world after World War II, Arab heads of state nominally ruled their assigned states but were expected to work in the interests of the Arab people as a whole and not only their citizens.\textsuperscript{140} According to Barnett, if ‘the institution of sovereignty instructed the newly independent Arab states to recognize each other’s borders and authority over its population, the institution of pan-Arabism sanctioned just the opposite.’\textsuperscript{141} Arab states and Arab leaders thus operated in a normative universe pitting visions of state sovereignty against those of Arab nationalism.

The conflict between these competing tendencies up until 1967 highlights how weak the territorial norm was in the Arab world, especially compared with other regions of the non-European world. For example, although Africa remains embroiled in its own struggles over statehood, most of its rulers chose to reject any systematic reevaluation of the colonial legacy from as early as 1964 with the Cairo Declaration.\textsuperscript{142} This was not the case with the Arab world, as instead there took place a veritable ‘cold war’ of ideologies in the first few decades of independence over how to order the Arab system.\textsuperscript{143}

\textsuperscript{138} N N Ayubi, \textit{Over-stating the Arab State: Politics and Society in the Middle East} (London: I. B. Tauris, 1995), at 137.
\textsuperscript{139} Ibid, at 138.
\textsuperscript{141} Ibid, at 283.
\textsuperscript{142} The Cairo Declaration is discussed more in Part Two’s Introduction, at 112.

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failed to produce stabilizing outcomes in the Middle East as in Africa because pan-Arabism assigned to the Arab state a contradictory role and associated behavioral expectations.  

One of the most important events to challenge the territorial status quo in the region was the Arab defeat in the 1948 conflict with Zionist forces, who successfully declared the state of Israel on 14 May 1948. Immediate effects of 1948 produced many Palestinian refugees and the emigration of Sephardic Jews resident in the region for millennia. Politically, the fallout took a little longer to materialise, but it was profound. A combination of shock arising from Arab defeat as well as a rejection of Europe’s legacy of a divided Arab world saw a number of regimes fall in revolutions during the fifties. The most significant shift occurred with the Egyptian Free Officer revolution of 23 July 1952, which after internal struggles saw Nāšir emerge triumphant, not only as Egypt’s leader but as leader of the Arab people as a whole. This revolution deposed Egypt’s King Farouk and challenged the region’s other conservative regimes, such as those of Jordan, Iraq and the Gulf.

Like Barnett, Nahas suggests that we need to view this moment of 1952 in Arab nationalism’s development through the prism of normative institutions vying for predominance. ‘The rise of the Egyptian revolutionary challenge to the dynastic Middle Eastern state-system was more a function of stress in the structure of ideas and norms governing the system than any dramatic shift in the balance of power in the area.’ Especially with the nationalisation of the Suez Canal in 1956, Nāšir and his promise of Arab nationalism stole the hearts of Arabs far beyond Egypt’s borders. Further, in 1958, the ‘apogee of Pan-Arabism’, the Iraqi monarchy was overthrown by pan-Arabist officers and Egypt and Syria formed the United Arab Republic (UAR), suggesting that the dream of Arabs united under one state might be realised. However, this ‘success’ and other attempted unions were bittersweet; rather than indicating that the region’s leaders were willing to abandon parochial interests, it simply confirmed that even in its heyday Arab nationalism was far from the normative default. In his study of the Arab state system, Owen suggests that in fact the territorial state was the main reference point from the colonial

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144 Barnett, ‘Institutions, Roles, and Disorder’, supra n 140, at 290.
146 Gause, supra n 136, at 445.
147 The UAR only lasted until 1961.
period onwards. Further, 'the drive for unity was always more ambivalent than is usually presented. Just as important, any scheme for greater interstate co-operation was underpinned by a basic Arabism, a sense of kinship between the Arabic-speaking peoples, which remained a central fact of Middle Eastern life whatever else might be going on.' It is also important to recognise that many Arab states were, and are, not simply a reflection of colonially determined borders. Harik argues that significant state formation had occurred before the colonial period, and although his suggestion of fifteen precolonial states is overdrawn, it does remind us of the need to acknowledge the vital role of local allegiances and institutions that bolstered the eventual triumph of the territorial state after 1967.

After 1948 Israel’s presence in the heart of the Arab world was the most significant challenge to pan-Arabism, and with the devastating Arab defeat of 1967 died the dream of a united Arab polity. Not only did the Arab world and Nāṣir suffer humiliation; geo-strategic factors were of great concern now that Egypt had lost the Sinai, Syria the Golan Heights and the Palestinians the remainder of their territory to Israeli occupation. Reasons for such a loss were sought and ‘Arabism quickly became the whipping boy for the defeat.’ Nāṣir resigned immediately, and a few months later Arab leaders met in Khartoum to evaluate options for regional rule in the future. By September and the summit’s conclusion, the normative landscape had irrevocably changed: ‘wataniya [state-based nationalism] had been consecrated as the dominant ideology, regulating inter-Arab relations on the principle of state sovereignty.’ The region would no longer be caught between contradictions, and the ‘hitherto destabilizing thrust of pan-Arabism was replaced by a general acceptance of the autonomy and legitimacy of the modern state.’ The promise of pan-Arabism did not simply disappear after 1967, but it is undeniable that never again could it rally such support. Arab leaders and their people continued to nurture a shared Arab identity, but increasingly this identity was grounded within the confines of separate nation-states,

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149 Ibid, at 71.
152 A Dawisha, Arab Nationalism in the Twentieth Century: From Triumph to Despair (Princeton: Princeton University Press, 2003), at 286.
bolstered by repressive tools in the hands of the region’s rulers as well as economic consolidation.

Thus, although we have seen that much of the twentieth century was one of reaction against European models of statehood, it was also a period of the nation-state’s consolidation. Arabs had reacted against the colonial and Mandatory legacies of bounded states by supporting pan-Arabism. Yet we also saw that the Arab world could draw on its own tradition of territoriality that would feed into future models of the nation-state in the region. By considering Islam in the post-1967 environment, as well as regional organisations, the final section evaluates the options available to Arabs in solidifying their selfhood and statehood as well as dispute resolution mechanisms for settling territorial matters.

Once pan-Arabism was tested and defeated in 1967 Islam increasingly became the main source of inspiration for alternative visions to the Arab predicament of statehood. Like Egypt’s revolution in 1952, Iran’s very different revolution of 1979 demonstrated the fragile appeal of secular nationalism, or waqaniyya, across the wider Muslim world. Although Iran was never part of the Arab system, the impact of Khomeini’s success not only terrified authoritarian Arab regimes, but it also provided an alternative transnational, non-territorial vision: unity not through an Arab state or qawm, but through the umma, free from illegitimate, corrupt and ‘un-Islamic’ rulers.\textsuperscript{154} It is simplistic to depict modern Islamic movements in monolithic hues as was the case in our historical overview; modern Islam is manifested in a startling array of political and non-political forms. Many Islamically-inspired groups operate effectively within the postcolonial context of the territorial state partly because it has become so entrenched.\textsuperscript{155} As a result, the vision of an umma united under the Caliphate is often tempered with political realities; if we choose to speak of a modern siyar, we would glimpse many tensions between theory and practice, between universalism and bounded territoriality.

No account of the triumph of Arab statehood would be complete without considering the Arab League, which embodied its participants’ predilections for territorial integrity softened only by pan-Arabist rhetoric and ineffectual responses to regional crises. Studying the League provides a deeper appreciation of regional trends regarding statehood.
as well as mechanisms for dispute resolution. If we cast our gaze back to the League’s origins during wartime meetings in 1944, the institution that emerged a year later promised a great deal. Not only was it older than any other regional institution, it also brought together member states culturally and linguistically closer than most other regions. Despite pan-Arabism’s later appeal, particularly from the fifties onwards, the formation of the League took place in a context where state elites could advance their own interests less hindered by the appeal of transnationalism. Many models of integration were flagged during these years, but only ‘Syria was in favour of full-fledged Arab unity, and was prepared to surrender her sovereignty, as well as to accept compulsory means for the settlement of disputes.’ Eventually, the seven founding members of the League adopted the Arab League Pact on 22 March 1945, which must be seen as a triumph of sovereignty over transnationalism.

Because the League was formed by states unwilling to concede any sovereignty, the institution has contributed little to most of the region’s conflicts, especially those over territory. In 1957, Foda wrote that ‘[b]order disputes are of long standing between the Asian Arab States by virtue of the unnatural partition of this part of the world after the First World War.’ Although we have seen that these borders became more secure, the twentieth century has witnessed a number of Arab territorial disputes. Many of these have since been settled, but very rarely has the Arab League played a decisive role in their resolution. This is despite the fact that by 1950 a Draft Statute for an Arab Court of

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157 Possible models included: 1) the League as a single international person representing all Arab countries; a federation based on the partial cession of Arab sovereignty; or a loose confederation based on co-operation and consent. Foda, supra n 42, at 6-7.


159 The full text of the Pact can be found at the League’s website: http://www.arableagueonline.org/las/index_en.jsp.

160 Italics added, Foda, supra n 42, at 30.

161 For an excellent overview of some of these disputes and their adjudication in the colonial and postcolonial period, see J Allain, International Law in the Middle East: Closer to Power than Justice (Aldershot: Ashgate, 2004), at ch 8.

162 Some examples include: The Buraimi dispute: J B Kelly, ‘The Buraimi Oasis Dispute’ (1956) 32 International Affairs (Royal Institute of International Affairs) 318; Morocco’s 1963 invasion of Algeria as discussed in Chapter Five; the Saudi-Yemen border issue: A H Al-Enazy, ‘“The International Boundary Treaty” (Treaty of Jeddah) Concluded between the Kingdom of Saudi Arabia and the Yemeni Republic on June 12, 2000’ 96 (2002) American Journal of International Law 161; and the Taba Arbitration between Egypt and Israel: Taba Arbitration (Egypt/Israel) (1989) 80 ILR 224. For background to this dispute, see M ElBaradei, ‘The Egyptian-Israeli Peace Treaty and Access to the Gulf of Aqaba: A New Legal Regime’ (1982) 76 American Journal of International Law 532; and R Lapidoth, ‘The Strait of Tiran, the Gulf of
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Justice had been devised by the League, as first suggested by Iraq. The importance of this Court was a product of the League’s own dispute settlement weaknesses, which were enshrined in Article 5 of the Pact:

> Should there arise among them a dispute that does not involve the independence of a State, its sovereignty or its territorial integrity, and should the two contending parties apply to the Council for the settlement of this dispute, the decision of the Council shall then be effective and obligatory.

The Court’s creation was widely supported even though conflict remained over its jurisdiction. ‘In fact, the creation of this Arab court has been the subject of numerous discussions and even more numerous resolutions.’ Foda explains that the League’s failure to realise the Court was a product of Arab attitudes regarding arbitration; Arab states have tended to favour reconciliation over arbitration, even though arbitration is central to the Islamic tradition. Yet, ‘[w]ith the main objective of settling the dispute peacefully, we find that in a single verse in the Quran both methods [arbitration and reconciliation] occur side by side: “And yet fear a breach between the two (man and wife), then send an arbitrator from his people and an arbitrator from her people, if they wish for reconciliation; verily, God is knowing and aware.”’ After over half a century later, the Court’s inception seems less likely than ever. Thus even though the Arab world could draw on planned arbitral institutions, a rich legal tradition as well as at least some support for arbitration, it seems that international adjudication bodies have come to serve as the only viable option for arbitration in the region.

Arab League states straddle a number of regional affiliations and many are members of other organizations. Multiple regional memberships need not necessarily weaken the League, but especially for Arab African states, comparatively greater reliance and success underscore the lack of trust held by certain Arab states for the League’s capabilities. More

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Aqaba and the 1979 Treaty of Peace between Egypt and Israel' (1983) 77 *American Journal of International Law* 84. Some other pertinent disputes, such as the Eritrea/Yemen arbitration, are discussed *vis-à-vis* the thesis’ case studies.

163 Foda *supra* n 42, at 13.

164 This state-centric theme of the Pact was only reinforced in the 1950 Joint Defence and Economic Co-Operation Treaty, available from the Arab League’s website: http://www.arableagueonline.org/ls/index_en.jsp.

165 Boutros-Ghali, *supra* n 156, at 82.

166 Foda, *supra* n 42, at 49-50.

167 Qur’ān 4:35, quoted in ibid, at 54-55.
recently smaller regional groupings have emerged in the Arab world, indicating further gaps in the League’s capacity to fulfill certain, more parochial, aspirations.\textsuperscript{168}

Of greater relevance in our discussion of regional arbitration initiatives is the Organisation of Islamic Conference (OIC) and its support for the creation of an Islamic International Court of Justice.\textsuperscript{169} Although the OIC has a much larger membership than the League, both share an institutional framework endorsing the sovereignty norm and no real mechanisms for dispute resolution.\textsuperscript{170} The OIC was established in Rabat, Morocco, on 25 September 1969 after a ‘Zionist arson attack upon Al-Aqsa mosque complex in occupied Jerusalem on 21 August 1969.’\textsuperscript{171} The OIC was motivated to defend Islam, its Holy Sites and its peoples and so from its inception the OIC was closely associated with the Palestinian issue and anti-colonialism in general, as enshrined in its Charter. Although the OIC can be characterised as the modern manifestation of the umma, the organisation has rejected this radical vision. Thus,

It is incorrect to identify the OIC as operating within the Islamic concept of Unmah...The OIC is an international inter-governmental organization composed of sovereign states therefore working within the common structure of international law where members states are the main subjects.\textsuperscript{172}

This idea is reflected in the Draft Statute of the Islamic International Court of Justice, which seeks to marry the application of shari‘a with optional jurisdiction on the part of its member states.\textsuperscript{173} Although the Court was first suggested in the eighties, few developments have boosted its prospects of realisation more recently. Perhaps like the Arab Court of Justice it will remain little more than a dream in the minds of Arab states when seeking the

\textsuperscript{168} These include the Arab Maghreb Union (AMU) and the Gulf Cooperation Council (GCC). Neither of these bodies is particularly effective and this is especially so regarding the AMU, which has been paralysed by the Algerian-Moroccan stand off over Western Sahara. These organisations are discussed further in Chapter Five and Chapter Four respectively. For a comparative analysis of the two bodies, see M Cammett, ‘Defensive Integration and Late Developers: The Gulf Cooperation Council and the Arab Maghreb Union’ (1999) 5 Global Governance 379.


\textsuperscript{170} According to Moiuddin, ‘The emphasis laid by Member States of the OIC on the principle of sovereignty is an unequivocal and emphatic ‘no’ to supranationalism. Following precedents of the OAS, OAU and the Pact of the Arab League, the OIC Charter underlines the dominant role of the principle of sovereignty, independence and territorial integrity in inter-Islamic relations.’ Moiuddin, supra n 22, at 93. See also S Akbarzadeh & K Connor, ‘The Organization of the Islamic Conference: Sharing an Illusion’ (2005) 12 Middle East Policy 79.

\textsuperscript{171} Rehman, supra n 24, at 27.


\textsuperscript{173} For an overview of the Court’s Statute, see, ibid. I could only find a copy of the draft Statute in Arabic: http://www.islamonline.net/Arabic/doc/2000/10/article32.shtml.
assistance of the ICJ. Territorially bounded states and international, rather than regional, forms of adjudication reflect the dominant approach in the region. Yet within this schema, it is possible for Arab states to introduce their particular heritage and experience of authority over territory, as will be shown in the cases. Is the ICJ a forum capable of sustaining such inter-cultural debates? Are the experiences of Arab territoriality comprehensible inside the Peace Palace?

6) Conclusion

Given the rich and diverse history of the Arab-Islamic world, locating the source of ideas and their application has been a difficult task. This chapter has highlighted that Arab states inherited a number of legacies that were both supportive and dismissive of the nation-state model. We also saw that it is simplistic to elide ‘Islamic international law’ and ‘public international law’; neither should be reified into a body of norms applicable across time and continents. This is especially the case for the legal relations that evolved between and across Christian Europe and its Ottoman ‘other’. Later projections have overshadowed a complex interplay between cultures and faiths, particularly during the Sublime Porte’s slow demise. There can be no definitive historical account of Ottoman international legal personality, but a significant body of material allows contemporary scholars to construct the story of membership in a number of ways. The story of international law’s evolution was more complex than the familiar narrative of exclusive European creation suggests.

Earlier too, despite a classical Islamic theory redolent of faith-based universalism, practice instead suggested a growing acceptance of territorially limited and delimited entities. Thus it is possible to speak of an Arab-Islamic tradition informing modern manifestations of the nation-state in the region. But more importantly for the following case studies, it was shown that Arab states hail from a legal and historical tradition sometimes at odds with European notions of statehood. It will be shown in the following chapters how this heritage has been used as a tool to destabilise as well as reinforce the prevailing international legal models on title to territory.
PART TWO

CONTENTIOUS CASES
Introduction:
Constituting the Self through Territory:
The Law and Practice of Territorial Disputes and Boundary Drawing

We saw in the previous chapter that the relationship between territory and statehood in the Arab-Islamic tradition is complex, both supporting and rejecting European models of authority. Notwithstanding this tradition, the nature of international society today is far less variegated; the nation-state is the only model of membership available to political entities at the international level. It is therefore no surprise that Arab states have largely rejected the alternative of pan-Arabism in preference for well-demarcated nationhood and statehood. This is especially so in relation to natural resources, because defined borders are an ideal way of preserving national wealth. ICJ territorial cases have enabled a variety of Third World states, both Arab and non-Arab, to entrench their interests through the certainty provided by boundary delimitations. The practice of ICJ argumentation requires these states to construct particular narratives about not only their statehood but its relationship with norms relating to international legal personality more generally. Thus, territorial adjudication rests on detailed historical accounts\(^1\) interwoven with the specific law relating to title to territory.

To place the two cases studied in Part Two into this context of historical and legal argumentation, the following discussion aims to provide the reader with an understanding about the nature of ICJ contentious cases as they relate to territory. This introductory

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1 Merrills, for example, argues that ‘the historical record is usually the key to applying the law.’ J G Merrills, ‘The International Court of Justice and the Adjudication of Territorial and Boundary Disputes’ (2000) 13 Leiden Journal of International Law 873, at 895.
section raises themes of relevance for both the contentious and advisory cases explored in the thesis. The following section will explore matters relating to history as well as boundary delimitation, especially the norm of *uti possidetis juris*. The introduction to Part Three, on the other hand, will only explore the nature of self-determination vis-à-vis ICJ adjudication in Advisory Opinions. This might seem counter-intuitive at a conceptual level; the self precedes any relationship grounded in territory. Doctrine and practice, however, have tended to reflect this approach as expressed by Brownlie:

> [T]here is a complementarity between *uti possidetis* and the principle of self-determination. It is *uti possidetis* which creates the ambit of the pertinent unit of self-determination, and which in that sense has a logical priority over self-determination.2

This tension between the self and territory is particularly pronounced across the African continent, as highlighted in Chapters Three and Five below. The choices confronting both African and Arab states at decolonisation are thus explored below in relation to borders and the role of the ICJ in this project. Because territorial adjudication relies on certain legal and historical interpretations, this section also overviews the relevant jurisprudence to highlight how limited the choices are for postcolonial states seeking selfhood. Before opening up the discussion to these broad considerations of history, doctrine and policy, however, the following section will first outline the procedural aspects of ICJ contentious adjudication.

The Statute of the International Court of Justice is based on optional jurisdiction only available to states.3 For parties seeking to found a jurisdictional link between their particular dispute and the capacity of the Court to exercise its mainline jurisdiction, a number of options are available.4 First, states may accede to the Statute through Article 36(2) or the ‘optional clause’,5 which allows states to issue a unilateral declaration, either

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3 Article 34(1) of the Statute reads: ‘Only states may be parties in cases before the Court.’
4 The other main way of conferring jurisdiction not discussed in the text is through a compromissory clause contained in both multilateral and bilateral treaties. None of the case studies or the other cases discussed at length arise from this practice.
5 This provision reads:

The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- the interpretation of a treaty;
- any question of international law;
- the existence of any fact which, if established, would constitute a breach of an international obligation;
- the nature or extent of the reparation to be made for the breach of an international obligation.
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'made unconditionally or subject to reservations which are not incompatible with the purposes of the optional clause.' 6 Although the Court recently celebrated its sixtieth anniversary, the optional clause is still 'underused' by the bulk of the world’s states, especially Third World states. Even amongst Third World states, Arab states are noteworthy for their rejection of the optional clause. To date, Egypt is the only Arab state, out of a possible twenty-two, to have accepted the Court’s jurisdiction.

This Third World, and particularly Arab, aversion to the optional clause is reflected in Part Two’s cases, which both stem from a framework agreement or *accord cadre*. Such agreements are an open-ended form of *compromis*, allowing either unilateral application or a pair of applications outlining the nature of the dispute. The benefit of such an approach is that it allows parties to specify the matters under dispute as well as the law applicable. Where framework agreements are vague, however, the Court can step in, framing the scope of its enquiry as well as determining whether it should exercise its jurisdiction at all. The *Qatar/Bahrain* dispute in Chapter Four demonstrates that, even with framework agreements, consent is far from certain and that a state’s eventual participation in proceedings should not simply be interpreted as its comprehensive acceptance of the Court’s functional legitimacy. Once the practice of territorial adjudication is reviewed below, this section will conclude by returning to the themes of consent, choice and legitimacy for postcolonial parties in a world of nation-states.

It is one of the paradoxes of globalisation that delimiting the territorial confines of the state remains of singular importance – especially for postcolonial states. 8 As more recent members of the international system, Third World states are increasingly supportive of its dictates, which through the juridical support of territorial boundaries provide some protection from increasingly porous economic borders. Challenges to the nation-state are still evident, but usually at the sub-state, rather than the national level, and this is because territory as defined through law ‘constitutes the tangible framework for the manifestation of power by the accepted authorities of the State in question.’ 9 In a world comprising parcelised jurisdiction, territory ‘plays not only a definitional role, but a constitutive one

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historically as well. It is the link between a people, its identity as a state, and its international role. In the wake of decolonisation, Third World states have struggled with this relationship, and adjudication has only been called on occasionally in contests over identity, territory and resources. We saw in Chapter One, however, that Third World states have increased their participation in ICJ territorial matters, highlighting at the very least that other means, such as military conflict, negotiations, or regional institutions, have often failed to achieve the desires of many Third World states.

Recent Third World ICJ territorial litigation forms part of a well-established and largely European tradition of adjudication and arbitration. Although adjudication has never been the default for settling disputes over territory, it has played an important role in a number of contests over boundaries and territorial control. Especially since the nineteenth century, a number of arbitrations have taken place between European powers in relation to their colonies in the Americas, Asia and Africa. Grewe points out that arbitration during this period was typically used for mid-range territorial matters in an institutional setting increasingly juridical, compared to earlier practices centring on diplomacy. During the early twentieth century this trend continued with a number of arbitrations as well as the hearing of many cases – often of a colonial nature – before the Permanent Court of Justice (PCIJ).

Since its inception in 1946, the ICJ has drawn on this jurisprudential heritage and has further developed the law and practice regarding title to territory. There is a clear trend arising from this litigation, which began with intra-European disputes and then gradually embraced intra-Latin American, intra-Asian and lastly intra-African cases. As outlined in

10 Ibid, at 3.
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Chapter One, the 1986 Frontier Dispute marked a watershed for Third World territorial adjudication; the caseload of the Court remains heavily tilted in favour of African, Latin American and Asian states invoking colonial legacies to secure postcolonial statehood. Yet Franck argues that such a quest for certainty is ‘illusory’ because territorial disputes contain competing norms that cannot be resolved by adjudicatory methods.¹⁵

Perhaps in a bid to obscure such norm conflicts, an elaborate practice has emerged in territorial cases, providing the international lawyer with a clear path to pursue when no argumentative deviation is desired. For example, Ratner argues that judicial settlement of territorial matters advantages those about to invoke certain rules and speak in a highly specialised style, or competence.¹⁶ Some of these techniques are showcased later in this section, but here we can at least identify the centrality of doctrine over and above wider contextual concerns. More broadly, we can categorise typical argumentative techniques as perpetuating a ‘legocentric’ approach to history and territory. Such an approach in the courtroom is to be expected, but it has substantive effects. Not only does a doctrinal preference overlook complexities, but it also tends to suggest that conflicts can be settled without resort to ‘lesser’ legal issues. The difficulty with such an approach, however, is the boundary drawing required in defining ‘law’. Time and again, ICJ pleadings and judgments have centred on usually European treaties,¹⁷ thus creating a hierarchy of ‘relevant’ legal evidence and also separating instances of ‘hard’ law from its ‘softer’ variants, like indigenous occupation of the land. In his study of ICJ territorial cases, Sumner confirms this institutional practice – or bias. He points out that the court ‘manifests a hierarchical preference for treaty law, uti possidetis, and effective control, respectively.’¹⁸

Another important instance of such discursive boundary-drawing is highlighted by references to the modes of acquisition as well as the distinction between territorial delimitation and boundary demarcation. Ratner argues that the modes of acquisition, namely, conquest, cession, occupation, prescription and accretion, are often invoked in treatises on territory, but tend to be overlooked in judgments in preference for

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¹⁷ In his separate opinion in the Kasikili/Sedudu Island Case, Judge Kooijmans objects to the majority’s approach in choosing to prioritise a specific treaty under examination above general rules and principles of international law. Kooijmans J (sep. op.) (Botswana/Namibia) (1999) ICJ Rep 1045, at 1144-1152.
considerations of effective control and historical consolidation.\(^{19}\) Although it is correct to depict an adjudicative style more flexible than a set of limited categories,\(^{20}\) these modes of acquisition still provide a powerful framework in guiding and limiting analysis in even the most recent cases. Given their contested nature, especially when applied to the colonial period, such a legal framework cannot be free from scholarly censure. However, they provide both litigants and the bench with a useful and artificial means of clarifying points of contention. The Court took up the opportunity most recently in its 2002 judgment about control over the Bakassi Peninsula. In contrast to Cameroon’s reliance on European treaty law, one of Nigeria’s claims was based on title supported through historical consolidation.\(^{21}\) In retaliation, the majority defended itself through doctrine, declaring that ‘the theory of historical consolidation is highly controversial and cannot replace the established modes of acquisition of title under international law’.\(^{22}\)

The Court has been more flexible with issues of delimitation and demarcation, suggesting that the line between territorial and boundary disputes is not exact; the difference is one of degree rather than kind.\(^{23}\) Again, it would seem that treatises are more formulaic, as shown in Merrills’ categorisation of territorial disputes.\(^{24}\) When contrasting textbook analyses and ICJ judgments, discrepancies soon emerge, suggesting that the Court is less emphatic about the need for such a distinction. Ultimately, however, these controversies and others are of limited importance in trying to understand the dynamics of argumentation in territorial adjudication. Jennings was right in 1963 when he argued that international law is concerned not so much with changes in the occupation of territory but

\(^{19}\) Ratner, supra n 16, at 815. Koskenniemi also makes this point. He argues that it has been difficult to keep the modes of acquisition distinct, and so tribunals have tended to favour effective possession and consolidation. M Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (Cambridge: Cambridge University Press, 2nd edition, 2005), at 283.

\(^{20}\) A clear statement of the preference for effective control is found in the Eastern Greenland Case, which defined title as the combination of ‘the intention and will to act as sovereign, and some actual exercise or display of such authority.’ Legal Status of Eastern Greenland (Denmark/Norway) (1933) P.C.I.J. Series A/B No. 53, at 46.


\(^{22}\) Italics added, (Cameroon/Nigeria; Equatorial Guinea Intervening) (2002) ICJ Rep 303, at 352.

\(^{23}\) (Burkina Faso/Mali) (1986) ICJ Rep 554, at 563.

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rather with changes in the right to territorial sovereignty.\(^{25}\) Thus, ‘where a new State arises the law has looked chiefly at the emergence of the new subject rather than the incidental transfer of territory; it has looked to the sovereign, rather than the territorial element of territorial sovereignty.’\(^{26}\) These observations shift the analysis away from facts or definitional debates and remind us that control over territory is ultimately about the relationship between international rules and the constitution of international legal personality.

Most postcolonial territorial disputes are rooted in colonial practice of the nineteenth century, thus requiring detailed explorations about the link between membership of international society and territorial title. Debate about the treatment and personality of non-European peoples during this period remains fierce. If we adopt an approach like that of Alexandrowicz’s and certain TWAIL scholars,\(^{27}\) we can see this period as exceptional; as an instance of European disavowal of fundamental international legal principles. Such a stance suggests that European states breached established modes of acquisition as well as norms about treaty law and coercion. If we take the view that European practice at this time was part of international law’s evolution, however, colonialism begins to appear as both politically and legally acceptable. This latter perspective is captured by Miéville in his discussion of unequal treaties:

> Let us be clear – these unequal treaties were not ostensibly but really legal, they created the general principles of international law: they are not fraudulent, but the truth of nineteenth-century international law. That is the law we inherited.\(^{28}\)

The following overview of European colonialism thus highlights one of the central themes of the thesis: that doctrine must always be understood in relation to scholarly reconstructions of the past. We cannot determine a pure past or a pure law, only its interpretation and application in ongoing legal controversies.

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\(^{25}\) R Y Jennings, The Acquisition of Territory in International Law (Manchester: Manchester University Press, 1963), at 14.

\(^{26}\) Ibid, at 8.


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With the gradual expansion of European control across the globe in the nineteenth century, a variety of discourses and practices emerged both to explain and regulate territorial aggrandisement. In the preceding centuries expansion had been driven by trading companies, because ‘European states did not want to take on the burdens of colonial rule. There was...no explicit international law of colonies’ after the age of ‘discovery’ and before the rise of imperialism. Whereas the European encounter with the ‘new world’ was framed through the discourse of Christianity and *jus gentium*, nineteenth century explanations centred on civilisation, positivism and recognition. Nineteenth century authors as well as contemporary commentators have contrasted these regimes in a bid to distinguish America’s ‘discovery’ from Africa’s through the trajectory of ‘progress’. Conquest had been the dominant mode of acquisition meted out to the Ameridians. Papal grants in the latter part of the fifteenth century had encouraged the spread of Christianity via conquest secured through territorial dominion. By the nineteenth century, however, Andrews argues that the ‘immorality of acquisition of territory by conquest’ encouraged either cession or occupation of *terrae nullius* instead.

The problem here, however, is that cession and occupation as modes of acquisition relied on understandings of legal personality and therefore the doctrine of recognition. Many entities, especially in Africa, were simply not regarded as worthy of recognition; they were deemed to be *terrae nullius* or non-state entities of some sort. This notion is expressed by Schwarzenberger in stark terms: ‘rights and duties under international law exist only between subjects of international law’; whether ‘communities outside the pale of international law submit peacefully or otherwise is irrelevant.’ Even when non-European societies were recognised for the purpose of cession, this was often exclusively for European interests; cession was used as a factual antecedent for European inter se

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31 J A Andrews, ‘The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century’ (1978) 94 Law Quarterly Review 408, at 410. One notable exception in Africa was the conquest of Madagascar in 1896 as noted by Korman, supra n 30, at 65.
32 G Schwarzenberger, ‘Title to Territory: Response to a Challenge’ 51 (1957) American Journal of International Law 308, at 314. Schwarzenberger draws on the PCIJ’s Eastern Greenland judgment for the idea that conquest is operative between sovereigns and thus in some ways, later practices of colonialism that denied the need for conquest can be seen as regressive, rather than progressive: *Eastern Greenland Case* (1933) P.C.I.J., Ser. A/B, No. 53, at 50.
agreements delimiting respective spheres of influence. Thus these treaties were the tools of European powers able to secure their interests without the need for military conquest. In the words of Herbst, it ‘was boundary creation on the cheap.’

Some modern authors regard treaties of cession as puzzling: how was it possible that European powers could enter into agreements with entities they saw as less than sovereign? To answer this question, it is essential that strict categories of legality be abandoned. It is easy enough to portray European colonial practice today as technically illegal or alegal. What is more difficult is to understand the relationship between legal categories and their application in a given historical context. Anghie suggests that we read this period as one of fluid personality, where non-European powers were sometimes afforded the limited capacity to form contracts at the private law level but not at the international law level:

The non-European states thus existed in a sort of twilight world; lacking personality, they were nevertheless capable of entering into certain treaties and were to that extent members of international law.

Koskenniemi’s analysis of the period, on the other hand, is free from the conceptual constraints imposed by cession. ‘Colonial title was always original [as through occupation of terrae nullius] and never derivative [as through cession]: it followed from European

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36 According to Grewe, ‘the protagonists of colonial expansion in the nineteenth century did not deny non-civilised peoples the *dominium civile*, but rather only political *imperium*; not the capacity to hold private, civil rights, but rather legal personality as a subject of international law. They did not deny that every human being had innate rights which were held independently of the stage of culture and civilisation they had achieved.’ Grewe, *supra* n 12, at 548.
37 Anghie, *supra* n 36, at 76. This sense of twilight is captured by Andrews in his observation of a two-tier international law of the nineteenth century between members and non-members of international society. Shaw further divides the system into three: full members and states in the Concert of Europe, non-European states and non-European peoples not recognised as states. Andrews, *supra* n 31, at 419 and Shaw, *Title to Territory, supra* n 9, at 45.
law’s qualification of the acts of European powers, not from native cession. These views as well as others highlight how difficult is the task of settling on ‘the law’ during the colonial period. For Koskenniemi, the ‘law of territorial acquisition oscillates between basing title on effective possession (and its derivatives) and an external recognition (acquiescence).’ Shifting positions are also evident throughout the cases in the thesis. Thus rather than seeking certainty, it is better to recognise the uses of different doctrinal evaluations in the cases explored throughout the thesis.

No account of colonial expansion would be complete without a discussion of the Berlin Conference of 1885, and yet, as in the case of doctrinal categories, we must see this event less as a milestone and more as a crystallisation of imperial practices that occurred throughout the long nineteenth century. Like Turkey’s ‘entry’ into international society in 1856 discussed in Chapter Two, a simplistic rendering of the Berlin Conference tends to place too much emphasis on this episode, signalling it out for exception. The Conference’s organisers had high hopes for regulating the acquisition of the rest of Africa, free navigation and the status of the Congo, but results were far more modest, and besides, most of coastal Africa was already spoken for. For European powers, Berlin simply required would-be colonisers to inform each other of their intentions. A degree of

39 M Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960 (Cambridge: Cambridge University Press, 2002), at 128. This position is diametrically opposed by Shaw, who suggests that most title in Africa was derivate and resulted from treaties of cession: Shaw, Title to Territory, supra n 9, at 39.
40 Koskenniemi, From Apology to Utopia, supra n 19, at 286.
41 General Act of the Conference of the Plenipotentiaries of Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway, Turkey (and the United States) respecting the Congo, 26 February 1885, 165 CTS 485.
42 Miéville, supra n 28, at 253. Further, Koskenniemi argues that it is unclear whether events after Berlin were qualitatively different or simply the extension of earlier policies. Koskenniemi, The Gentle Civilizer, supra n 39, at 117.
43 Chapter Two, at 76-83.
44 Herbst, supra n 34, at 683.
45 All of the participants at the Conference were from Europe (geographically or ethnically, in the case of the United States which ultimately chose not to be a signatory) or were included within the Concert of Europe, namely the Ottoman Empire. Although the Sublime Porte had been officially recognised as a member of (European) International Society since 1856, it was initially excluded from the list of Berlin participants and had to lobby for its inclusion, and this in the face of widespread and enduring Ottoman title over large parts of the African continent, supra n 41.
46 The key provisions of the General Act of the Conference on this point were:
Article 34 – Any power which henceforth takes possession of a tract of land on the coasts of the African Continent outside of its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own.
terrestrial consolidation was also necessary, but often through the most minimal displays of effective control that were little more than symbolic. Although Berlin was intended to define relations between European states as well as the law applicable to Africa, it only served to confirm the exclusively European notion of sovereignty with little detail as to its content on the continent.\(^47\) It sanctioned a practice which was only to increase after the Conference’s close: ‘allowing a European power to preclude others from contesting a piece of territory that was merely under its sphere of influence.’\(^48\)

The main territorial entity to emerge out of Berlin-style colonialism was the protectorate, which, like treaties of cession, was often based on arbitrary interpretations of sovereignty and personality.\(^49\) According to Andrews, ‘there was an enormous variety in the styles of protectorate, some of which were scarcely dissimilar from colonial status in the extent of control assumed by the protecting power.’\(^50\) Shaw explains the proliferation of protectorates through an account of how the classical ideal of protectorates increasingly gave way to colonial exigencies. Initially, protectorates were based on bifurcated sovereignty: external sovereignty for the protecting power and internal sovereignty for the protégé.\(^51\) This classical notion of protection continued to persist throughout the colonial period, particularly in those parts of the non-European world deemed to possess certain attributes of ‘civilisation’. For instance, the Trucial states of the Gulf, as discussed in Chapter Four, always maintained their internal sovereignty; but we will see how, even in such instances, that the line between internal and external sovereignty became blurred.\(^52\)

The institution of ‘colony protectorates’, which were simply colonies by another name, was much more common in southern Africa. The ICJ recently revisited the controversy over the boundary between ‘colony protectorates’ and ‘proper’ protectorates in the dispute between Nigeria and Cameroon mentioned above. In this case, Nigeria relied on an 1884 treaty of protection between Britain and the Chiefs of Old Calabar to argue that

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\(^47\) Koskenniemi, *The Gentle Civilizer*, *supra* n 39, at 121, 126.

\(^48\) Herbst, *supra* n 34, at 684.


\(^50\) Andrews, *supra* n 31, at 420.

\(^51\) Shaw, *Title to Territory*, *supra* n 9, at 47.

\(^52\) Generally see Chapter Four.
later British alienation of Calabar lands through a treaty with Germany was of no legal effect: *nemo dat quod non habet.*\(^{53}\) Despite strong dissent from some members of the bench on this issue, the Court held that the plain words of the treaty were not really about ‘protection’ at all, but were simply a policy choice on the part of Britain.\(^{54}\) The indigenous peoples in the area lacked international legal personality and so their lands were open to colonisation.\(^{55}\) Judges Ranjeva and Koroma opposed such a finding by relying on the law/politics dichotomy. They both regarded the majority judgment as amounting to the ‘recognition of political reality rather than...an application of the treaty and the relevant legal principles.’\(^{56}\) Ranjeva characterised the Court’s deference to inter-temporality through the ‘following maxim: “in treaty relations with indigenous chiefs, *pacta non servanda sunt”.*\(^{57}\) Judge Al-Khasawneh echoed these thoughts when he argued that the Court had erred in considering the general Berlin practice of protectorates and *Island of Palmas* notions of inter-temporality\(^{58}\) rather than treaty interpretation.\(^{59}\) Although these three judges from the Third World reached different conclusions about Nigeria’s modern claim over the territory, they all strove to apply a law free from politics in the scramble for Africa. Such a

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\(^{54}\) Ibid, at 405-406.

\(^{55}\) Denial of non-European international legal personality also informed Judge Huber’s reasoning the *Island of Palmas Award*, where he stated: ‘As regards contracts between a State or a Company such as the Dutch East India Company and native princes or chiefs of people not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties.’ *Island of Palmas Case 1 RIAA 829; 4 ILR 3 (1928)*, at 858.

\(^{56}\) *Cameroon/Nigeria; Equatorial Guinea Intervening*, Koroma J (dis. op.), at 476.

\(^{57}\) *Cameroon/Nigeria; Equatorial Guinea Intervening*, Ranjeva J (sep. op.), at 470.

\(^{58}\) For example, he argues: ‘support for the contention that treaties of protection in sub-Saharan Africa allowed generally for the transfer of sovereignty to the colonial/protection Power cannot be safely established by reference to the Island of Palmas Award nor to the alleged practice of the Berlin Conference era, a practice from which, at best, no firm inferences can be drawn and which in fact supports retention of a normative distinction between colonies and the so-called colonial protectorates and the consequent upholding of the maxim *nemo dat quod non habet.*’ *Cameroon/Nigeria; Equatorial Guinea Intervening*, Al-Khasawneh J (sep. op.), at 499.

\(^{59}\) ‘Clearly, the crucial factor is the agreement itself, and whilst it is entirely possible that such agreements vested sovereignty in the newcomers it is equally possible that they did not, in which case sovereignty was retained by the local ruler under an agreed scheme of protection or administration. These are questions of treaty interpretation and of the subsequent practice of the parties and cannot be circumvented by the invention of a fictitious sub-category of protectorates termed “colonial protectorates” where title is assumed to pass automatically and regardless of the terms of the treaty of protection to the protecting Power, for that would be incompatible with the fundamental rule *pacta sunt servanda* and would lead to what has been termed “institutionalized treaty breach”, a situation that no rule of intertemporal law has ever excused.’ *Cameroon/Nigeria; Equatorial Guinea Intervening*, Al-Khasawneh J (sep. op.), at 495.
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stance is common amongst TWAIL I scholars as well, who have tended to find solace in law in contrast to ‘political’ acts of the colonial period.⁶⁰

Difficulties of analysis regarding the colonial era are further compounded once the requirement of inter-temporality is factored in, and yet, as in the case of the modes of acquisition, dispute persists as to how past events should be interpreted for determining the present. The classic articulation of this rule was expressed by Judge Huber in the Island of Palmas Award, who considered the competing claims of the Netherlands and the United States over a deserted island:

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.⁶¹

This statement remains seminal for territorial disputes, but it has not always been applied uniformly by even the ICJ itself, as shown above in relation to Nigeria and Cameroon, as well as in Chapter Four. The rule requires a particular reading of the past and the evolution of legal norms and yet such a task is fraught with difficulty when applied to the colonial period. Should we regard colonial treaties, for example, as agreements between equal sovereigns or something else? Further, how should we approach the problem of coercion in the formation of these treaties? Both Shaw and Kaikobad adopt a pragmatic approach when they argue that we must accept colonial treaties and the rights they generated because at the time it was permissible to impose treaties through force.⁶² Kaikobad argues that this position has largely been confirmed through the International Law Commission in its drafting of the Vienna Convention on the Law of Treaties,⁶³ which immunises the rights arising from boundary treaties vis-à-vis jus cogens and the rule of rebus sic stantibus.⁶⁴ Thus in an era when coercion shaping

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⁶⁰ The basic attributes of TWAIL I scholarship are discussed in Chapter One, at 29-33.
⁶¹ Island of Palmas Case 1 RIAA 829; 4 ILR 3 [1928], at 845.
⁶² Shaw, Title to Territory, supra n 9, at 43.
⁶⁴ Thus, according to Kaikobad, ‘a rule of law which does not inhibit the reopening of frontier questions, settled in an earlier period of time, on charges of coercion would not only constitute an invitation for fresh boundary claims, but would be inconsistent with the general underlying notions of continuity of boundaries presented in the context of State succession to boundary treaties and the proviso to the doctrine of rebus sic stantibus. The rule, however, in favour of the continuation of boundary treaties concluded in controversial
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treaties was permitted, the legal ramifications can carry over into postcolonial present.\(^{65}\)

The most important device of temporality for postcolonial, and especially African, states has been the doctrine of \textit{uti possidetis juris}.\(^{66}\) The practice first emerged in nineteenth Latin America in the wake of Spanish withdrawal and the creation of independent states. So as to preserve stability, these new states succeeded from the municipal lines of Spanish administration. More recently, this principle of stability was confirmed in Asia in the \textit{Temple} case as well as the \textit{Rann of Kutch Arbitration}.\(^{67}\) On the eve of decolonisation, African elites soon grasped the value of supporting such a norm, and it was confirmed in the heydays of independence both in the Organisation of African Union’s (OAU) Charter as well as the 1964 Cairo Declaration.\(^{68}\) Despite increasing African dispute settlement reliant on the norm, as epitomised by the \textit{Frontier Dispute} and the \textit{Benin/Niger} case,\(^{69}\) numerous writers question its validity and long-term value.\(^{70}\) Functionally, the virtues of stability are constantly invoked,\(^{71}\) and yet the norm

creates states by establishing new identities within rigid boundaries, the preservation of which are not always feasible, and, as evidenced by modern break-ups, that it transforms internal boundaries to international ones with disregard for circumstances at an earlier period of time emphasizes the view that boundary treaties and regimes have lasting effects and underlines again the importance of the doctrine of finality.\(^{7}\) K H Kaikobad, ‘Some Observations on the Doctrine of Continuity and Finality of Borders’ (1984) 54 British Yearbook of International Law 119, at 136.

\(^{65}\) Ibid, at 134.

\(^{67}\) Brownlie, ‘Boundary Problems’, \textit{supra} n 2, at 189. \textit{Case Concerning the Temple of Preah Vihear (Cambodia/Thailand)} (1962) I.C.J. Reps., p.6; and \textit{Case Concerning the Indo-Pakistan Western Boundary (India/Pakistan)}, Arbitral Award of 19 February 1968, (1968) ILM 633.


\(^{69}\) \textit{Frontier Dispute (Burkina Faso/Mali)} (1986) ICJ Rep. 554; \textit{Case Concerning the Frontier Dispute (Benin/Niger)} (2005) ICJ Rep. 90.

\(^{70}\) Especially, see Castellino, \textit{supra} n 66, at 527; Castellino & Allen, \textit{supra} n 33.

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any viable interconnection between the internal border and the forging or maintenance of national unity.\textsuperscript{72}

Further, the norm not only gives legitimacy to acts ‘purely on the basis that those acts occurred during the colonial era’;\textsuperscript{73} in fact, it aids the interests of contemporary domination, through the consolidation of the ‘territorial state’.\textsuperscript{74} Colonialism and postcolonialism take on unnerving similarities with \textit{uti possidetis}, because it ‘legitimates the action of civil officers, typically situated in foreign officers in metropolitan capitals in the middle of the nineteenth and twentieth century, who have essentially shaped the identities and destinies of colonial peoples.’\textsuperscript{75} Given these problems, it is not surprising that several scholars from Africa suggest that ‘the time for flogging dead paradigms is long past.’\textsuperscript{76} Mutua further asserts that ‘these concepts and principles may have trapped Africa in a detrimental time capsule; they now seem to be straitjackets with timebombs ready to explode.’\textsuperscript{77}

Irrespective of these criticisms, it appears that \textit{uti possidetis} is now firmly grounded in the practice of African states, but is this also true of Arab states? Again, discursive boundary-drawing is required in answering such a question, and here we return to the Introduction of the thesis and its definition of the Arab world.\textsuperscript{78} The Arab world geographically straddles both the Asian and African continents; the cases reflect this division with Chapters Three and Five arising in Africa and Chapters Four and Six from Asia. To an extent, Arab states have been able to pick and choose different regional affiliations and priorities, as shown by Libya in Chapter Three.\textsuperscript{79} Although it is simplistic to speak of Arab-African and Arab-Asian states, it is nevertheless clear that Arab states on the African continent have a much closer connection with the norm of \textit{uti possidetis juris}. It is now possible to hold that \textit{uti possidetis juris} is a regional customary norm in both Latin

\textsuperscript{72} Castellino & Allen, supra n 33, at 21.
\textsuperscript{74} Shaw uses the term, ‘territorial state’ to describe most African states, which were created through territorial lines rather than strong social and cultural bonds usually associated with nation-states. Shaw, \textit{Title to Territory}, supra n 9, at 186.
\textsuperscript{75} Castellino & Allen, supra n 33, at 22. This idea of control from the city in the colonial and postcolonial periods is also noted by Herbst: ‘The resemblance between the rule of control of the capitals of the Europeans’ rule of effective control through protectorates is, of course, not accidental. Indeed, control of the capital is today simply the minimal level of government presence that the Europeans first defined at the Berlin Congo Conference.’ Herbst, supra n 34, at 687.
\textsuperscript{76} Udombana, supra n 21, at 59.
\textsuperscript{78} Discussed at 7-8.
\textsuperscript{79} Discussed at 120-124.
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America and Africa, whereas the matter is unsettled in the case of Asia. Because of African support for the norm, some commentators now argue that it has taken on universal relevance, but we need to look carefully at Arab practice. The dispute between Qatar and Bahrain discussed in Chapter Four explores this issue and suggests that the norm is not applicable in the Gulf. Thus, the arguments sustained in Arab territorial disputes need to be understood in the context of an emerging, but far from settled deference, to the uti possidetis norm.

Before finishing our overview of contentious territorial adjudication, we need to consider the role of equity and the relevance of geography in ICJ jurisprudence. The Court’s docket has included not only territorial but also maritime matters, and many cases actually combine these considerations in adjudication. Through a number of cases, the ICJ has developed the role of equity in maritime delimitations. Given that continental shelf and territorial cases share many similarities, it is surprising how states have shunned all resort to equity in territorial cases. The Award rendered in the Eritrea/Yemen arbitration is an example of equity’s application to mixed maritime and territorial matters, but aside from cautious application of equity infra legem in the Frontier Dispute, the ICJ remains loathe to extend its jurisprudence in such a way. The ICJ is limited by the wishes of the Parties,

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80 According to Ratner, ‘the repeated assumption by the Court that uti possidetis is a norm of international law is probative. Without definitely opining on the issue, one may thus assume some support for regarding uti possidetis as a norm of regional customary law in Latin America and Africa, if not a general norm as well, in the context of decolonization.’ S R Ratner, ‘Drawing a Better Line: Uti Possidetis and the Borders of New States’ (1996) 90 American Journal of International Law 590, at 598-599.

81 For example, see G N Barrie, ‘Uti Possidetis versus Self-Determination and Modern International Law: In Africa the Chickens are Coming Home to Roost’ (1988) Tijdschrift vir die Suid-Afrikaanse Reg 451, at 453.

82 Award of the Arbitral Tribunal in the Second Stage of the Proceedings, Maritime Delimitation (Eritrea/Yemen), 17 December 1999. This arbitration is contrasted with the Qatar/Bahrain dispute in Chapter Four. Klabbers & Lefeber suggest that the norm has now because accepted in the ‘Middle East’ too and they cite the Taba arbitration (especially Arbitrator Lapidoth’s dissent) for this conclusion.

83 Frontier Dispute (Burkina Faso/Mali) (1986) ICJ Rep 554, at 567-568.

84 It is worth quoting the ICJ in the Frontier Dispute at length on this point:

[T]he Chamber can resort to that equity infra legem which both Parties have recognized as being applicable in this case...In this respect the guiding concept is simply that 'Equity as a legal concept is a direct emanation of the idea of justice' (Continental Shelf (Tunisia/ Libyan Arab Jamahiriya), ICJ Reps 1982, p. 60, para. 71). The Chamber would however stress more generally that to resort to the concept of equity in order to modify an established frontier would be quite unjustified. Especially in the African context, the obvious deficiencies of many frontiers inherited from colonization, from the ethnic, geographical or administrative standpoint, cannot support an assertion that the modification of these frontiers is necessary or justifiable on the ground of considerations of equity. These frontiers, however unsatisfactory they may be, possess the authority of the uti possidetis and are thus
and so it would seem that both postcolonial states and the Court have favoured the certainty and stability assured through devices such as European treaty law, *uti possidetis* and effective occupation. Given that territorial cases often involve the apportionment of land with natural resources, there is a compelling argument to raise about the need for shared resources, especially in relation to poor, postcolonial states. Despite this, it would seem that postcolonial states are willing to take a gamble and stake their claims purely on ‘law’, rather than broader, perhaps ‘political’, factors invoked *ex aequo et bono*.

In territorial disputes, extreme geographical and climatic factors can modify the general requirements for effective control, but in its jurisprudence the Court has not been willing to stray far from the familiar strictures of the European nation-state. Both in polar regions and deserts, the Court has acknowledged that evidence of *effectivités* will not be as systematic and widespread as in well-populated, temperate environments. The jurisprudence still favours a particular model of state control, however, so that differences in *effectivités* can only be of degree and not kind. This will be highlighted in the *Western Sahara* case in Chapter Five, where the Court downplayed cultural and geographical factors to hold that instances of Moroccan and Mauritanian control were less than sovereign. Similarly, in the *Kasikili/Sedudu Island* Case Namibian arguments about the presence of indigenous tribes were found to have no bearing on the Caprivi Strip title. In

fully in conformity with contemporary international law. Apart form the case of a decision *ex aequo et bono* reached with the assent of the Parties, it is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law (*Fisheries Jurisdiction*, ICJ Reps 1974, p. 33, para. 78).

*Frontier Dispute (Burkina Faso/Mali)* (1986) ICJ Rep 554, at 633. Cf Koskenniemi, who suggests that adjudicative examples illustrate how tribunals are quite open to the equitable balancing of interests. Koskenniemi, *From Apology to Utopia*, supra n 19, at 262-266.

85 For example in relation to Greenland, the PCIJ pointed out: ‘It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.’ Emphasis added, *Legal Status of Eastern Greenland* (Denmark/Norway) [1933] P.C.I.J., Ser. A/B., No. 53, at 46. For a discussion of the impact of harsh conditions on proving control over territory also see Award of the Arbitral Tribunal in the First Stage of the Proceedings, Territorial Sovereignty and Scope of the Dispute (*Eritrea/Yemen*), 9 October 1998, at paras. 446-454.

86 *Western Sahara (Advisory Opinion)* (1975) ICJ Rep 37.

87 According to the majority, ‘there is nothing that shows...that this presence was linked to territorial claims by the Caprivi authorities. It is, moreover, not uncommon for the inhabitants of border regions in Africa to traverse such borders for purposes of agriculture and grazing without raising concern on the part of the authorities on either side of the border...[75] The Court concludes...that the peaceful and public use of Kasikili/Sedudu Island, over a period of many years, by Masubia tribesman from the Eastern Caprivi does not constitute “subsequent practice in the application of the [1890] treaty” within the meaning of Article 31, paragraph 3 (b), of the Vienna Convention on the Law of Treaties.’ *Kasikili/Sedudu Island*
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dissent, Judge Weeramantry adopted a contextually sensitive approach to this matter when he held that we

must not look for indicia of occupation in terms of settled housing or ordered agriculture...for the very nature of this terrain prevented settled habitation in the manner known to Western jurisprudence and tradition. At best there would have been temporary occupation...from time to time as the rains and the climate determined. 88

Because of these conditions

Concepts of settled occupation, in default of which a territory is deemed unoccupied and even res nullius, which traditional principles of international have led us to expect, must consequently be discarded [in this matter]. 89

Such sensibilities are invoked in the cases below, yet rarely has the Court modified its legal findings to reflect such a perspective.

Although the Court operates within a well-established jurisprudential and institutional framework, there are still a number of ways of determining territorial disputes between postcolonial states, especially when the parties introduce experiences contrary to the European tradition. Successful contentious adjudication rests on a seamless integration of doctrine, history and fact set within the context of ICJ practice and rules. The discussion above has highlighted how territorial cases are about much more than well-informed doctrinal positions and legocentric perspectives. More importantly, they are about a party’s ability to present their arguments in ways that preserve a distinction between law and politics with sufficient reference and deference to the jurisprudential heritage of the Court. This reflects Shalakany’s findings on Third World arbitration as discussed in Chapter One. 90 We can now test these propositions in relation to the African territorial dispute between Libya and Chad in the following chapter.

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89 Ibid, at para. 32.
CHAPTER THREE

Sanctioning Colonial Legacies in the Sahara?
The Construction of Postcolonial Selfhood in the Libya/Chad Territorial Dispute

1) Introduction

On 3 February 1994 far from the mountainous and sandy expanses of the central Sahara, the ICJ brought the protracted conflict between Libya and Chad to an end by ruling that the Aouzou Strip separating the two states was part of Chad. Responses to the ruling were swift; under UN auspices, Libyan troops withdrew from the territory, and aside from occasional flights of rhetoric by Libya’s leader, Qadhafi, it would seem that the Court has resolved a postcolonial conflict of the most complex kind. Many other methods of dispute resolution had failed to quieten neighbourly hostilities, prompting speculation about how and why international law could succeed where military conflict, regional institutions and negotiations had failed. These background factors were overlooked by the Court in its judgment, but they will be revisited throughout the chapter to explore how the parties as well as the Court drew boundaries, not only in the sand, but more importantly, between ‘law’ and ‘politics’. Representations of the relationship between law

1 Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad) (1994) ICJ Reps, p. 6, hereinafter Libya/Chad.

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and politics diverged considerably, and so this Case is an ideal site in which to explore the discursive options available to postcolonial states in the courtroom. Given that the thesis is concerned with mapping legal grammars at play in ICJ territorial adjudication, the main task of this chapter will be to evaluate patterns of argumentation employed by the Court and the parties. What does the grammar of international law proscribe for states speaking about the relationship between ‘law’ and ‘politics’ and which words or lexicon can be used in such an endeavour?

Perhaps more than any other ICJ case, the Territorial Dispute captures the postcolonial paradox confronting Third World states in their resort to international law. Parties in ICJ disputes enter a courtroom where a number of cases about title to territory have already been heard. The law applied in such cases is largely a product of European experiences of statehood; ideas of effective control, international legal personality and the validity of treaties are all framed through the prism of European dominance and predominance during the colonial period as discussed in this Part’s Introduction. For Third World states forged out of the colonial context, a dilemma emerges: to what extent should the postcolonial state be constituted through colonial practice and colonial history? Can postcolonial states escape the structuring device of colonialism? Libya and Chad answered these questions in diametrically opposed ways. On the one hand, Libya sought to subvert colonial legacies through an historical survey that characterised Ottoman and indigenous occupation as having continuing legal relevance for its title over the Aouzou Strip. Libya demonstrated how historical arguments lie at the heart of legal constructions of both personality and territory. Chad’s presentation, on the other hand, is marked ‘par l’absence de toute d’arguments d’ordre historique’. Instead of offering an account of pre-colonial selfhood, Chad relied solely on colonial practice in the hope of succeeding to French title through colonial treaties. The Court fulfilled these Chadian hopes by delivering a judgment confined to questions of treaty interpretation. In fact, the language of limitation is regularly invoked in the judgment, suggesting a bench at pains to defend itself against the disruptive ramifications of Libya’s position.

What were the implications of Libya’s position, and why did the Court reject these ideas so stridently through its silence? The division between successful and unsuccessful
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Adjudicative strategies suggest that the Court did not understand the language spoken by Libya; Libya had transgressed the boundaries of suitable argument and was deemed incompetent for this reason. Libya’s claims challenged prevailing understandings about international law’s past by offering alternative approaches to international legal personality under colonialism. More disturbingly for proponents of postcolonial stability in Africa, it questioned the value of a blind acceptance of *uti possidetis*. Could Libya have succeeded if it had toned down its arguments, or was its failure grammatically pre-determined by a language premised on the law/politics dichotomy and postcolonialism’s rupture with the past? To answer these questions, the chapter will first outline the judgment of the Court and then contrast the competing claims of Chad and Libya to determine why the Court took the position it did. Although the Court focussed on Chad’s claims, the chapter seeks to redress this discrepancy by engaging with some of Libya’s discursive strategies. Ideas about non-European legal personality, Islamic authority over territory and the policy implications of *uti possidetis* were at the heart of Libya’s case, and these themes are also of central importance in Chapters Four and Five. Before exploring the dynamics of discourse at The Hague, however, the chapter begins in the Sahara.

2) Corsairs, Camels and Caliphs: Historical and Geographical Background

The frontier between Libya and Chad not only separates these two modern states; it has also signified divisions between north and ‘sub-Saharan’ Africa as well as between Arab north and ‘black’ southern Africa. These boundaries are fluid and contested, but it is important to recognise that conceptual lines scar the map of Africa as much as the many arbitrary borders that arose out of colonialism. Arab states to the north thus face

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4 Chad covers three climactic zones: desert, savannah and sabel. For a fascinating account of the often artificial construction of racial boundaries in the Sahara, see B S Hall, ‘The Question of “Race” in the Pre-colonial Southern Sahara’ (2005) 10 Journal of North African Studies 339.

5 Lydon attributes the discourse of a divided Africa to colonialism and calls for its end. ‘Still a glaring knowledge gap currently impedes our understanding of African continental history and its place in world history. The African divide, product of division and conquest, is only now being questioned in the context of a current rethinking of African history. Ultimately, new meaning-making terminologies are necessary not only to bring the Sahara back into African Studies, but also to transcend the colonial legacy of ethnographic labels which have divided the continent between “white” or ‘North Africa, and “black” or so-called Sub-Saharan Africa. It is lamentable that most Africanists, like their Middle East counterparts, remain ill-prepared to understand, let alone explain, the so-called ‘Arab-Africa dichotomy’ in situations such as the violent repression of Darfurians in the recent history of the Sudan.’ This ongoing division of Africa is evident in TWAIL scholarship as well which tends to overlook Arab experiences altogether and instead, usually studies
choices about identity and allegiance and nowhere is this better reflected than in Libya, which has supported a number of pan-Arab and pan-African causes. Is it best to consider the Maghreb states as part of the Arab world, or part of Africa, or is it best to do away with such categories altogether? At least in the case of Chad, the answer must be the latter. As an exemplar of Shaw’s African ‘territorial state’, Chad is very much a product of colonialism: comprising over 200 ethnic groups, there is no unified nation to speak of. Further, like its neighbour to the north, Arabic is an official language, and yet it would seem that other Arab states have drawn the boundary of the Arab world to Chad’s north. Chad is not a member of the Arab League and is rarely classified along Arab lines. Like other Third World states, Chad has experienced many teething problems, and its fervent support for colonial boundaries in Africa must be understood within the context of regional affiliations in the African Union (AU).

As we saw in this Part’s Introduction, *uti possidetis* is particularly important in Africa today, but does this encompass Africa *in toto* or is it of greater relevance in states like Chad which came into existence under colonialism? Is the norm less relevant for those Arab states, such as Libya, with a history of state formation, or are the porous borders common throughout the Arab world as amenable to finality as those in central and southern Africa? These answers are useful to consider in the context of Chadian and Libyan identity construction but can only be answered after considering the rest of the cases in Chapters Four, Five and Six below.


6 An example is the Tripoli based Community of Saharan and Subelian States (CEN-SAD), http://www.cen-sad.org/. G Joffé, ‘Libya’s Saharan Destiny’ (2005) 10 *Journal of North African Studies* 605, at 613. Less tangible examples include the many proposals of Libya’s leader, Qadhafi, over the years, including the revival of a Fatimid state across the Maghreb; and the elimination of borders across Africa, as advocated this year in Ghana or earlier efforts at pan-Arabism. Generally, see the Libyan leader’s website: http://www.alqahfa.org/en/index_en.htm.


9 According to Wright, more Chadians speak Arabic than French (the other official language). ‘But Chadian Arabs have not really become part of the political concept of the “Arab World”, or are even generally accepted as such in the way that even the superficially Arabised non-Arab peoples of Somalia and Djibouti have been since they joined the Arab League in the 1970s. For Chad’s Arabs are, for a national minority, perhaps too closely inbred with other, non-Arab neighbours, and at the same time too remote from the mainstream of modern Arab culture, society and politics to be able to claim a recognised place in the “Nasserist” Arab nation, despite Gadafi’s expressed belief in the essential unity of the “Arab” peoples of Chad and Libya.’ J Wright, *Libya, Chad and the Central Sahara* (London: Hurst, 1989), at 137.
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Historically, the Sahara has served as an important source of division, not only for the constitution of ‘Arabness’ but also for the allocation of international legal personality. With its sands criss-crossed by a complex of caravan routes, the Sahara was far from unimportant for African trade and culture. Yet, its harsh conditions precluded widespread communication between Mediterranean and sub-Saharan communities. In the pre-modern era, Europe was more familiar with peoples to the north of the Sahara, and treaties were established with the ‘Barbary’ powers in Algiers, Tripoli, Tunis and Morocco from the sixteenth century. 10 The exact status of the Barbary Powers was unclear; these states were not part of the Concert of Europe in the nineteenth century, but, equally, writers distinguished them at the time from southern African entities. For example, in 1801, Admirality judge, Sir Scott, stated:

Certain it is, that the African states [of the north]...have long acquired the character of established governments, with whom we have regular treaties, acknowledging and confirming to them the relations of legal states...although their notions of international justice differ from those which we entertain we do not on that account venture to call in question their public acts. 11

At the very least, this degree of recognition would preclude later European arguments based on terra nullius that were applied to other parts of Africa.

The exact status of northern Africa was further complicated on the eve of the Berlin Conference in 1885 because of Ottoman claims to the territories. For example, the Ottomans established the Regency of Tripoli in 1551 after defeating the Knights of Malta. 12 Control of Ottoman Libya gradually fell into the hands of a locally-based monarchy, the Qaramans, 13 thus becoming a vassal principality of the Ottomans until Europe began to challenge Ottoman interests across the continent. 14 By the end of the nineteenth century the Ottomans had increased their military and administrative presence in the region, and in 1899 the Sublime Porte also

10 J A Andrews, ‘The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century’ (1978) 94 Law Quarterly Review 408, at 413. See also Libya, Memorial, 26 August 1991, at para. 4.08
11 The Helena (1801) 4 Rob. 3, 5-6; 165 E.R. 515, quoted in Andrews, ibid, at 414.
14 For a discussion of the Barbary states’ relationship with the Sublime Porte, see S Faroqhi, The Ottoman Empire and the World Around It (London: I.B. Tauris, 2004), at 82-84.
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issued a hinterland claim to Tripolitania in a bid to halt European claims to lands north of Lake Chad. Such declarations did not dissuade Italian and French appetites for long, though. By 1912, the Sublime Porte signed the Treaty of Ouchy passing its interests on to Italy, and it lost all territorial claims on its defeat in First World War, as confirmed by the 1923 Treaty of Lausanne.\textsuperscript{15}

As former Italian and French colonies respectively, Libya and Chad were well aware of the colonial rivalries they had inherited as independent states in 1951 and 1960, but confrontation over the Aouzou Strip remained latent for the first few decades after independence. In a context where new African states were eager to solidify colonial borders for the sake of stability, no mention was made of competing claims to the territory; instead, both states faced surmountable problems at home. Chad in particular was wracked by intermittent civil strife,\textsuperscript{16} which was often fuelled by Qadhāfī-lead Libya after its coup of 1969.\textsuperscript{17} The Libya-Chad borderlands were home to a number of largely autonomous Arabic-speaking tribes, and their allegiances and assistance was sought in the various factional struggles that tore at the fabric of the Chadian state.\textsuperscript{18} Partly in response to the instability spilling across these disputed borders, Libyan troops invaded the Aouzou Strip in 1973, and from 1983 until 1987 ‘Qadhafi’s regime conducted a broad intervention ranging from significant financial and military support for various armed factions within Chad to large-scale involvement of Libyan armed forces.’\textsuperscript{19} At various moments, Chad had invoked the support of the UN, France and the OAU (Organisation of African Unity) against Libyan aggression.\textsuperscript{20} Libya was anxious to retain its position in the African regional context, and so it finally ended its ‘most significant external involvement’\textsuperscript{21} by withdrawing its forces in

\textsuperscript{15} Treaty of Ouchy between the Ottoman Empire and Italy, 15 October 1912, Libya/Chad Case, Libya, Memorial, 1991, International Accords and Agreements Annex, vol 2, no. 10; Treaty of Peace with Turkey (Treaty of Lausanne), 24 July 1923, no. 701, 28 LNTS 13.
\textsuperscript{16} M-J Deeb, Libya’s Foreign Policy in North Africa (Boulder: Westview Press, 1991), at 83-84; 129-133.
\textsuperscript{17} For an overview of the 1969 revolution, see R Owen, State, Power and Politics in the Making of the Modern Middle East (London: Routledge, 2\textsuperscript{nd} edition, 2000), at 59-62.
\textsuperscript{18} McKeon, supra n 8, at 155.
\textsuperscript{20} It was not actually until 1977 that Chad raised the issue of Libya’s presence in the Aouzou Strip. ‘Finally, on October 30, 1987, the O.A.U. convened an \textit{ad hoc} committee to determine the nationality of the Aouzou Strip.’ After a failure to resolve the dispute, momentum grew for other options, such as taking the matter to the ICJ. McKeon, supra n 8, at 156-157. For an overview of the OAU peacekeeping role in Chad role, see R May & S Massey, ‘The OAU Intervention in Chad: Mission Impossible or Mission Evaded?’ (1998) 5 International Peacekeeping 46.
\textsuperscript{21} Huliāras, supra n 19, at 6.
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1987. Two years later, Libya and Chad entered into an agreement or Accord-Cadre on 31 August 1989, which built on earlier UN and OAU efforts to resolve the conflict peacefully. The avenue of ICJ adjudication was countenanced as a last resort if the matter was not successfully resolved in ‘approximately one year’, and Libya exercised this right by a letter to the Court on 31 August 1990. Thus, after a century of competing claims by powers near and far as well as rich and poor, a determination was sought to settle territorial claims in a comprehensive, legal manner.

Aside from Libya’s record of aggression towards its southern and much poorer neighbour, other extra-curial factors deserve attention here. As in the case of Qatar v Bahrain, mineral wealth lay at the crux of the dispute’s modern manifestation, but the parties and the Court did not choose to focus their attention on possible uranium deposits and only made passing reference to Libyan intervention in Chad’s civil unrest. Another significant factor influencing Libyan foreign policy at the time was its pariah-status as a result of the Lockerbie incident and UNSC-imposed sanctions, which were only lifted in 2003. On the one hand, it might have seemed strange for Libya to come before the Court in the midst of such difficulties with Western powers. Its alleged connection with international terrorism and its aggression against Chad must have weighed on the minds of...

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23 For a brief sketch of events surrounding Libya’s application to the ICJ, see generally, Huliaras, supra n 19, at 9-10.
24 See the following chapter.
25 Both Huliaras and McKeon discuss the presence of unexploited mineral reserves in the Aouzou Strip, including phosphate and uranium: Huliaras, supra n 19, at 7 & McKeon, supra n 8, at 147. Dunoff et al, on the other hand, argue that there was no economic potential, suggesting either that they are unaware of these uranium deposits (which is possible given that there is such scant mention of this factor in the legal literature) or that they do not regard this as an important resource. J L Dunoff et al, International Law Norms. Actors, Process: A Problem-Oriented Approach (New York: Aspen, 2002), at 3. It is interesting to note that in its opening address to the Court, Libya referred to its participation in other ICJ contentious cases to demonstrate how judicial settlement had formed the basis of natural resource exploitation between Libya and Tunisia: ‘Not only did the Court in that case settle the dispute and restore peace to the region but its decision also opened the way to mutually beneficial development of resources.’ Libya/Chad, CR 1993/14, 14 June 1993, Libya, Mr El-Obeidi, p. 18. Libya’s faith in adjudication over natural resources was in stark contrast to its earlier arbitral experiences, as explored by Shalakany: A A Shalakany, ‘Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism’ (2000) 41 Harvard International Law Journal 419; I discuss Shalakany’s ideas briefly in Chapter One, at 38-39.
the ICJ’s members in reaching their judgment. On the other hand, however, Libya has been one of the most active Third World states at the ICJ, and in two earlier cases of delimitation the Court had ruled in its favour. Perhaps in the Peace Palace, Libya could retreat from political pressures and advance its interests not through military means but through the arguments of its Western legal team.

3) The Need for Certainty and Simplicity: The ICJ on Treaty Interpretation and the Finality of Borders.

Unlike its other successes as an ICJ litigant, Libya’s arguments were dismissed by the Court in preference for Chad’s position when it handed down its judgment in 1994. Although the judgment carefully constructed a legal edifice based on reliable principles and rules, its outcomes and policy motivations extend far beyond the confines of possible legal precedent. The judgment unequivocally endorsed the practices of the colonial past and reinforced colonial continuities by endorsing the sanctity of borders. The lengthy material offered by the parties provided the Court with an excellent opportunity to examine a number of controversial and unsettled areas of law. Chad in particular opined that ‘l’arrêt que rendra la Cour a une importance fondamentale, non seulement pour le Tchad et la Libye, mais aussi pour la région et l’ensemble de l’Afrique.’ The Court was able to provide Chad with the ultimate assurance in confirming its claims over Libya’s. However, the Court failed to respond to many of the issues raised in the pleadings. This section will provide a brief overview of the issues relating to jurisdiction, some of the basic claims of the parties, as well as treaty interpretation, before discussing the wider ramifications of the

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27 According to Koskenniemi, ‘parmi les facteurs qui peuvent avoir influé directement sur le décision de la Cour, on trouve aussi le fait que la Libye était considérée comme un État à l’écart de la société internationale; a joué également un rôle le comportement antérieur de la Libye dans la bande d’Aouzou.’ [Among the factors that could have had a direct influence on the decision of the Court, one also finds that the fact that Libya was considered a pariah state by the international community, the earlier behaviour of Libya in the Aouzou Strip equally played a role.] Koskenniemi, supra n 3, at 457.


30 ‘The judgment that the Court will issue has a fundamental importance, not only for Chad and Libya, but also for the region and Africa as a whole] Chad, Memorial, 26 August 1991, p. 382.
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judgment. Throughout the discussion primary attention will be placed on the majority decision, but the two separate opinions of Judges Shahabuddeen and Ajibola, the declaration of Judge Ago, as well as Judge Sette-Camara’s dissent (ad hoc for Libya) will be used as a point of contrast.

Despite an unusually straightforward acceptance of the Court’s jurisdiction, the parties were divided over the scope of the Court’s enquiry into ‘their territorial dispute’. Jurisdiction flowed from the fact that both ‘Parties accepted the jurisdiction of the Court on the basis of the [1989] Accord-Cadre’. The Accord-Cadre, however, was vague enough to allow Libya to present the dispute as a territorial one requiring delimitation, whereas Chad’s reliance on the dispositive effect of the 1955 Treaty resulting in its call for the Court to demarcate a boundary already determined, attribution of territory was outside of the

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31 The Court quoting Article 2 of the Accord-Cadre, at para 18.
32 Libya/Chad, para 22. It should be noted that Chad had proposed a subsidiary basis for jurisdiction, claiming in its letter to the Court that its jurisdiction ‘is also based upon Article 8 of the Franco-Libyan Treaty of Friendship and Good Neighbourliness of 10 August 1955, 162 BFSP 470, which provides that: “Any disputes arising from the interpretation and application of the present Treaty, and which it has not been possible to settle by direct negotiation, shall be referred to the International Court of Justice at the request of either Party, unless the High Contracting Parties agree on another mode of settlement.” Letter from the Minister for Foreign Relations of the Republic of Chad to the Registrar of the International Court of Justice, 1 September 1990, available from the ICJ website: www.icj-cij.org. On the other hand ‘Libya regards the Accord-Cadre as the sole basis of jurisdiction.’ Libya, Memorial, 26 August 1991, at 20.
33 Libya claimed the following:
That there exists no boundary, east of Toummo, between Libya and Chad by virtue of any existing international agreement.
That in the circumstances, therefore, in deciding upon the attribution of the respective territories as between Libya and Chad in accordance with the rules of international law applicable in the matter, the following factors are relevant:
That the territory in question, at all relevant times, was not terra nullius;
That title to the territory, at all relevant times, vested in the peoples inhabiting the territory, who were tribes or other peoples owing allegiance to the Senoussi Order who had accepted the Senoussi leadership in their fight against the encroachments of France and Italy on their lands;
That these indigenous peoples, were, at all relevant times, religiously, culturally, economically and politically part of the Libyan peoples;
That, on the international plane, there existed a community of title between the title of the indigenous peoples and the rights and titles of the Ottoman Empire, passed on to Italy in 1912 and inherited by Italy in 1951;
That any claim of Chad rests on the claim inherited from France;
That the French claim to the area in dispute rested on ‘actes internationaux’ that did not create a territorial boundary east of Toummo, and there is no valid alternative basis to support the French claim to the area in dispute.
3. That, in the light of the above facts, Libya has clear title to all the territory north of the line shown on Map 105 in Libya’s Memorial…that is to say the area bounded by a line that starts at the intersection of the eastern boundary of Niger and 18°N latitude and continues in a strict south-east direction until it reaches 15°N latitude, and then follows this parallel eastwards to its junction with the existing boundary between Chad and Sudan. Libya, Memorial, 26 August 1991, at 478-479.
34 Chad’s request reads:
La République du Tchad prie respectueusement la Cour internationale de Justice de dire et juger que sa frontière avec la Jamahiriya arabe libyenne est constituée par la ligne suivante:
Court's brief. The Court decided to address this discrepancy through a detailed examination of the 1955 Treaty in keeping with the direction of the pleadings themselves:

It is recognized by both Parties that the 1955 Treaty is the logical starting-point for consideration of the issues before the Court. Neither Party questions the validity of the 1955 Treaty, nor does Libya question Chad’s right to invoke against Libya any such provisions thereof as relate to the frontiers of Chad.35

By starting and ending with this Treaty, the Court confined itself to the narrowest possible examination of the Case and left many issues raised by both Libya and Chad unanswered.

The key provision invoked throughout the pleadings and the judgment was Article 3 of the 1955 Treaty between Libya and France:

The two High Contracting Parties recognize that the frontiers between the territories of Tunisia, Algeria, French West Africa and French Equatorial Africa [comprising Chad at the time] on the one hand, and the territory of Libya on the other, are those that result from the international instruments in force on the date of the constitution of the United Kingdom of Libya as listed in the attached Exchange of Letters (Ann. 1).

This annex listed the following instruments:

- the Franco-British Convention of 14 June 1898;
- the Declaration completing the same, of 21 March 1899;
- the Franco-Italian Agreements of 1 November 1902;
- the Convention between the French Republic and the Sublime Porte, of 12 May 1910 [actually 19 May 1910]
- the Franco-British Convention of 8 September 1919;
- the Franco-Italian Arrangement of 12 September 1919.36

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**Note:**

35 Libya/Chad, at para 36.

36 The Court determined that out of these treaties the 1898, 1910 and 12 September 1919 agreements did ‘not directly concern the frontier between Libya and Chad... [and so found] it unnecessary to take [them] further into consideration’. Libya/Chad, at para 58 & 62. For the other treaties, see Franco-British Convention for the Delimitation of their Possessions west and east of the Niger, 14 June 1898, 186 CTS 313; Convention between France and Great Britain defining the limits of the French zone in Africa, 21 March 1899, 225 CTS 480; Accord Franco-Italiens de 1-2 novembre 1902: Echanges de letiers entre M. Barrère et M. Prinetti, Libya, Memorial, International Accords and Agreements Annex, vol 2, no. 7; Anglo-French Convention, Martens, *Nouveau recueil général de traités*, 34 series, vol 7, at 91-93; the Franco-British Convention, 8 September 1919, Chad, Memorial, Annexes, vol II, annex 7, at 23; Bonin-Pichon Agreement, 12 September 1919, Chad, Memorial, Annexes, vol II, annex 8/9, at 29.
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Libya challenged the validity of many of these agreements, and it further argued that the Court should look to other pre-1955 agreements. Libya also requested the Court to consider the unratified 1935 Laval-Mussolini Treaty. Libya conceded that the Court could not give any binding effect to the Treaty, but it argued that the treaty was illustrative of a context in which Italy and France were in agreement that the extension of Libya’s boundaries was to include the Aouzou Strip. Chad conversely emphasised the unratified nature of the 1935 Treaty and contrasted this treaty with the 1955 Treaty between France and Libya that had definitively determined the boundaries through a complete list of relevant international instruments.

To respond to these opposing positions, the Court undertook a textual analysis of the 1955 Treaty, relying heavily on the customary rules of treaty interpretation laid out in Article 31 of the Vienna Convention on the Law of Treaties (VCLT). Article 31(1) of the VCLT was particularly useful for the majority judgment and separate opinion of Judge Ajibola:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose.

In reading Article 3 of the 1955 Treaty, the Court ‘had no difficulty either in ascertaining the natural and ordinary meaning of the relevant terms... or in giving effect to them.’ The clear intention of the Article and the Treaty as a whole was not only to determine certain boundaries between the parties (as argued by Libya), but all boundaries: ‘no relevant frontier was to be left undefined and no instrument listed in Annex I was superfluous.’ Judge Ajibola invoked the ‘special rule of interpretation of treaties regarding boundaries...that it must, failing contrary evidence, be supposed to have been concluded in order to ensure peace, stability and finality.’ The Court considered the relationship between Article 3 and the annexed treaties in the 1955 Treaty to be cumulative, and that the annex should be ‘taken by the parties as exhaustive as regards delimitation of their

37 Libya, Counter-Memorial, para 3.16; Libya/Chad, CR 1993/15, 15 June 1993, Libya, Mr Sohier, at 63.
40 For Chad’s rebuttal of Libya’s thesis on the 1935 Treaty, see Chad, Memorial, 26 August 1991, ch 7, especially, at 372-373.
42 Libya/Chad, at para 43.
43 Ibid.
44 Libya/Chad (sep. op. Ajibola), at para 53. See also Libya/Chad, at para 51.
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frontiers'; not only was it unnecessary to question the validity of these earlier, colonial treaties, but second no other treaty, such as the 1935 Treaty, was apposite in this instance.

Libya and Chad had both discussed whether Article 3 of the 1955 Treaty could be regarded as constitutive or declaratory in its reliance on the annexed colonial treaties of delimitation. A declaratory position would require determination as to the legal effect of the earlier treaties, whereas a constitutive stance would hold that as a consequence of Libyan and French volition, earlier treaties would serve simply as the reference point and not as pre-existing binding law for delimiting their territories. The key then was not so much whether the 1955 Treaty was seen as constitutive or declaratory, but whether one regarded the earlier treaties as being legally valid in their own right. For Libya, the Article was ‘purely declaratory of the pre-existing boundaries' that had not been shaped by the annexed treaties. In contrast, Judge Ago argued in his declaration that he regarded the 1955 Treaty as constitutive because ‘at the time of [Libyan] independence...the southern frontier...had not yet been the subject of treaty delimitation between the parties then directly concerned.' The Court decided not to enter into this debate about the constitutive or declaratory nature of the 1955 Treaty, and thus the status of the annexed, colonial treaties was left unanswered.

Both the majority judgment and Judge Ajibola found additional support for their initial interpretation by reference to good faith and a narrow understanding of the Treaty’s context. Judge Ajibola discussed good faith in some detail in relation to Libya’s characterisation of Article 3 as failing to delimit its southern frontier conclusively. As Judge Ajibola viewed the object and purpose of the Treaty as being to determine all boundaries, France (or Chad) and Libya were thus under an ‘obligation not to defeat such objects and purposes of a treaty’; ‘[t]hey may not pick and choose which obligations they would comply with and which they would refuse to perform, ignore or disregard.’ Neither the majority nor Judge Ajibola resorted to an examination of the travaux because the

45 Libya/Chad, at para. 48.
46 Libya, Reply, 14 September 1992, at 57.
47 Libya/Chad (dec. Ago), at para 43.
48 For example: ‘As its text clearly states, Article 3 provided that Libya and France recognized (“reconnaisse”) something about certain boundaries; they did not determine or fix anything.’ Libya, Counter-Memorial, 27 March 1992, at 48.
49 Libya/Chad (sep. op. Ajibola), at para 82.
50 Ibid, at para 83.
51 As per Article 32 of the Vienna Convention.
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Treaty was readily cognisable without such assistance.\textsuperscript{52} Although the Court thus rejected Libyan and Chadian discussion about the negotiations between the contracting parties, it regarded the ‘context’ of Article 9 of the 1955 Treaty\textsuperscript{53} concluded between France and Libya as reinforcing its findings about the reach of the 1955 Treaty.\textsuperscript{54}

It is interesting at this point to interrogate the Court’s stance in relation to the context of treaty making, for although the Court was eager to incorporate certain contextual considerations into its judgment, its silence in relation to French coercion and Libyan inexperience surrounding the 1955 Treaty is noteworthy. Customary law on duress as reflected in Article 52 of the VCLT seems to be clear: ‘A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles embodied in the Charter’. In his genealogical study of the development of the norm relating to coercion and duress, however, Craven argues that complexities and contradictions continue to plague this provision. In an attempt to divorce law from politics, lawyers tend to ‘rely upon a presumption of validity as a way of insulating themselves against the possibility that consent might be all too often found defective.’\textsuperscript{55} Thus, according to Craven, it is rare to consider duress when assessing a treaty’s validity, because it ‘comes to operate in such a context…as an independent variable that may (or may not) render an agreement invalid, rather than something that goes to an evaluation as to whether or not there has been an agreement in the first place.’\textsuperscript{56}

Such an approach appeared to motivate the Court, and yet Argüello-Gomez expressed surprise, not so much over the Court’s silence, but Libya’s. It must be remembered that in 1955 France was embroiled in the Algerian civil war and had continued

\textsuperscript{52} Libya/Chad, at para 55; Libya/Chad (sep. op. Ajibola), at para 88.
\textsuperscript{53} This provision reads:
The Government of France and the Government of Libya undertake to grant freedom of movement to nomads from tribes that traditionally trade on either side of the frontier between Algeria, French West Africa and French Equatorial Africa, on the one hand, and Libya, on the other, so as to maintain the traditional caravan links between the regions of Tibesti, Ennedi, Borkou, Mourzouk, Oubari, Ghat, Edri and Ghadamés, on the other.
Quoted in Libya/Chad, at para 53.
\textsuperscript{54} ‘This provision [quoted directly above] refers specifically to (inter alia) the frontier between French Equatorial Africa and Libya; and it is clear from its terms that, according to the parties to the Treaty, that frontier separates the French-ruled regions of Tibesti, Ennedi and Borkou…which are sometimes referred to as “the BET”, on the one hand, and the Libyan regions of Koufra, Mourzouk, etc. on the other.’ Libya/Chad, at para 53.
\textsuperscript{56} Ibid. See also, J Crawford, ‘The General Assembly, the International Court and Self-Determination’, V Lowe & M Fitzmaurice (eds), Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings (Cambridge: Cambridge University Press, 1996) 585-605, at 602.
to maintain its troops in Libyan Fezzan, much to Libya’s chagrin. Libya conceded in its Memorial that ‘the sine qua non of any treaty with France was the withdrawal of French forces’, 57 and yet it never expressed the conviction that this French duress vitiated the 1955 Treaty; indeed Chad provided more information on this in its oral pleadings. 58 At best, Libya was providing some context to the Treaty’s inception. 59 We can only hypothesise as to Libya’s motives for abstaining from a more detailed discussion of the 1955 context, but given the difficulties it faced over the Lockerbie incident during the proceedings, as well as its record of aggression towards Chad, it is possible to suggest that it was wary of bringing attention to the use of force. 60

Despite the reluctance of Libya and the Court to confront the implications of the presence of foreign troops in the shadows of treaty agreements, Libya was more comfortable in discussing inequalities of legal skill and representation vis-à-vis France and Libya in 1955. As was the case for much of Libya’s pleadings, the Court did not engage with this particular idea of Libya’s, but it is useful to appreciate the Libyan position, as it tried to represent the challenges faced by newly independent states in an increasingly postcolonial world. Libya regarded Chad’s assertion that Libya was well-advised and thus on an equal footing with France in 1955, as ‘a preposterous suggestion.’ 61 Libya instead highlighted that at the time it was ‘one of the poorest nations in the world’ 62 and that the ‘Libyan [negotiating] team were hopelessly outclassed by their French counterparts’ 63, whose ‘tactic was to trick’ them. 64 To conjure up the image of two parties able to discuss their grievances on an even-handed basis in the context of the threat of force rang hollow. The challenge of informal inequalities in treaty-making persists and has not necessarily

57 Libya, Memorial, at p. 365. Also see Libya, Counter-Memorial, at 83.
58 For example: ‘L’objection de M. Ben Halim [for Libya] à ce moment là, ne porte pas sur la délimitation des frontières, mais sur sa concomitance avec l’évacuation des troupes françaises du Fezzan.’ [The objection raised by M. Ben Halim of Libya at this point does not have a bearing on the determination of the boundary lines, but on its coincidence of this determination with the evacuation of French troops from Fezzan] Libya/Chad, CR 1993/32, 14 July 1993, Chad, Professor Cot, p. 42.
59 According to Koskenniemi, ‘Bien que la Libya n’ait pas déduit de ces éléments la conclusion que la validité de Traité de 1955 pouvait être mise en cause, elle a néanmoins soutenu que, pour l’interprétation de cet instrument, il y avait lieu de tenir compte de cet ensemble de facteurs.’ [Even though Libya did not infer from these elements the conclusion that the validity of the 1955 Treaty could be put into question, it nevertheless maintained that to interpret this instrument [the 1955 Treaty] there was reason to take into account these factors together.] Koskenniemi, supra n 3, at 449.
60 See also Argüello-Gomez, supra, n 29, at 179.
61 Libya, Counter-Memorial, at 55.
62 Ibid.
63 Ibid, at 56.
64 Libya/Chad, CR 1993/14, 14 June 1993, Libya, Professor Bowett, at 25.
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cased in an era free from acknowledged forms of colonial rule. The Court chose not to explore this conundrum, reflecting international legal doctrine, which has tended to ignore instances of duress save in extreme and glaring cases. It is not surprising that the Court was unwilling to accept Libya’s rather radical argument, but even when presented with the opportunity to offer some guidance about the law on unequal treaties it remained mute.\(^{65}\)

The majority judgment as well as the opinion of Judge Ajibola sought to consider ‘the subsequent attitudes of the Parties to the question of frontiers’,\(^{66}\) as per Article 31 (3) of the Vienna Convention.\(^{67}\) The Court examined a number of treaties and concluded that there is support for the proposition that after 1955, the existence of a determined frontier was accepted and acted upon by the Parties.\(^{68}\) Indeed, a number of provisions contained within treaties signed in 1966,\(^{69}\) 1972,\(^{70}\) 1974,\(^{71}\) 1980\(^{72}\) and 1981\(^{73}\) indicate ‘that both Parties are perfectly aware of the location and establishment of their common boundary.’\(^{74}\) On the flipside, although there were many opportunities after Chad’s independence in 1960, ‘Libya did not challenge the territorial dimensions of Chad as set out by France.’\(^{75}\) Thus, Judge Ajibola invoked the principle of estoppel to hold that as ‘an acquiescent State, Libya is precluded from denying or challenging the validity of the boundary established by the 1955 Treaty.’\(^{76}\) It is undeniable that Libya’s position was weakened by its failure to act within a reasonable time after the 1955 Treaty, but once again, the Court’s oversight in

\(^{66}\) Libya/Chad, at para 66.
\(^{67}\) This provision reads as follows: There shall be taken into account, together with the context: any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; any relevant rules of international law applicable in the relations between the parties.
Cited in Libya/Chad (sep. op. Ajibola), at para 89.
\(^{68}\) Libya/Chad, at para 66.
\(^{69}\) The Treaty of Good Neighbourliness and Friendship between the Republic of Chad and the United Kingdom of Libya, 2 March 1966, Libya, Memorial, International Accords and Agreements Annex, vol 2, no. 33.
\(^{70}\) The Agreement on Friendship and Co-operation, 23 December 1972, Libya, Memorial, International Accords and Agreements Annex, vol 2, no. 34.
\(^{71}\) Agreement between the Libyan Arab Republic and the Republic of Chad, Tripoli, 12 August 1974, Libya, Memorial, International Accords and Agreements Annex, vol 2, no. 35.
\(^{73}\) Accord between Libya and Chad, 6 January 1981, Libya, Memorial, International Accords and Agreements Annex, vol. 2, no. 38.
\(^{74}\) Libya/Chad (sep. op. Ajibola), at para 93.
\(^{75}\) Libya/Chad, at para 68.
\(^{76}\) Libya/Chad (sep. op. Ajibola), at para 98.
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relation to Chad's inaction is no less puzzling. As was briefly discussed above, the Aouzou Strip was occupied intermittently by Libyan troops from the 1970s, and yet, afforded with the ideal opportunity to set the record straight amidst treaty negotiations, Chad did not even attempt to question Libya's presence within its borders:

Il faut alors que nos honorables contradicteurs nous expliquent comment est-ce possible – puisque d'après eux le traité de 1955 délimitait la frontière sud entre la Libye et le Tchad – qu'en décembre 1972, lors de la visite et des discussions des Tchadiens à Tripoli: 1) les Tchadiens n'ont pas protesté contre la présence libyenne dans la bande d'Aouzou; 2) qu'ils aient signé un traité d'amitié, de coopération et d'assistance mutuelle avec un État qui occupait leur territoire? 77

Argüello-Gomez also acknowledges this discrepancy and 'found it astounding that the Court...should have ignored the implications of the attitudes' as reflected in Chad's apparent acquiescence in Libya's presence in the Aouzou Strip. 78

Thus, in a judgment ‘caractérisé par une tonalité positiviste’ and ‘une approche purement textuelle’, 79 the Court examined the specifications of the various annexed treaties in Article 3 of the 1955 treaty to determine the boundary. In its dispositif, the Court held

By 16 votes to 1,
(1)...that the boundary between...[Libya and Chad] is defined by the Treaty of Friendship and Good Neighbourliness concluded on August 10 1955 between the French Republic and the United Kingdom of Libya;
(2)...that the course of the boundary is as...indicated...on sketch-map No. 4 [please find attached]. 80

77 [Our opponents should then explain to us how it is possible – since according to them the 1955 treaty, delimited the southern border between Libya and Chad – that in December 1972, at the time of the visit and discussions of the Chadians at Tripoli: 1) the Chadians did not protest against the Libyan presence in the Aouzou Strip; 2) that they signed a treaty of friendship, cooperation and mutual assistance with a state that was occupying their territory?] Libya/Chad, CR 1993/18, 18 June 1993, Libya, Mr Cahier, at 32.

78 This was also echoed in Libya’s oral submission: ‘Non seulement il y a eu silence de sa part mais il y a eu un comportement qui est en totale contradiction avec ce qu’il soutient aujourd’hui: aucun État ne signe quatre traités d’amitié avec un État qui est censé occuper une partie de votre territoire et je ne mentionne même pas les remerciements d’hommes politiques tchadiens à la Libye.’ [Not only was there a silence on its part, but also a conduct that is in total contradiction with what it maintains today: no state signs four treaties of friendship with a state that is meant to be occupying a part of your territory, not to mention all the [friendly] acknowledgments to Libya made by Chadian political figures.] Libya/Chad, CR 1993/28, 7 July 1993, Libya, Professor Cahier, at 62. Argüello-Gomez also discusses the puzzling attitude taken to the Court in relation to the subsequent conduct of France (on Chad’s request) in failing to register the 1955 Treaty until after ‘the initiation of proceedings’ on Chad’s request. As in the dispute between Qatar and Bahrain, discussed in Chapter Four, the Court decided not to draw any inferences from this conduct. Argüello-Gomez strongly states that this behaviour reflects negatively on the fundamental requirement of good faith in treaty formation. Argüello-Gomez, supra, n 29, at 181-183.

79 [characterised by a positivist one and a purely textual approach] Koskenniemi, supra n 3, at 443.

80 Libya/Chad, at para 77.
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In contrast to the majority’s detached engagement with the past, Judge Ajibola acknowledged some of the Case’s broader themes, even if he chose to cast his vote with the majority. It is worthwhile quoting his poetic opinion at length:

For about a century, perhaps since 1885 when it was partitioned, Africa has been ruefully nursing the wounds inflicted on it by its colonial past. Remnants of this unenviable colonial heritage intermittently erupt into discordant social, political and even economic upheavals which, some may say, are better forgotten than remembered. But this ‘heritage’ is difficult, if not impossible to forget; aspects of it continue, like apparitions, to rear their heads, and haunt the entire continent in various jarring and sterile manifestations: how do you forget unhealed wounds? One aspect of this unfortunate legacy is to be seen in the incessant boundary disputes between African States.\(^1\)

Perhaps overwhelmed in the face of such challenges, the Court decided it was best to take solace in the comforts provided by a dose of strict (if somewhat selective) treaty interpretation coupled with its endorsement of the stability of borders. In deeming it ‘unnecessary to consider the history of the “Borderlands”’,\(^2\) the Court effectively turned away from some of the Case’s most intriguing elements. The evolving arguments of both Libya and Chad, however, offered their own appreciation of the relationship between the past and the present in international law for postcolonial states. Some of these arguments are considered below.

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\(^1\) Libya/Chad (sep. op. Ajibola), at para 7.
\(^2\) Libya/Chad, at para 75.
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Map #5: ICJ Delimitation

4) Listening to the Court’s Silences: The Pleadings of Libya and Chad

As is the case in any contentious case before the ICJ, the primary concern of each Party is to mount as strong a claim
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as possible by rallying all of the ‘legal’ materials at its disposal. Thus the arguments themselves, especially in the hands of foreign lawyers, cannot be regarded as embodying the sentiments of states directly, and it is questionable whether such an endeavour would even be possible. The historical experience and the contemporary positions of the parties simply provide a framework from which to garner the most robust of propositions. Thus, while two states may find their positions diametrically opposed in the Case itself, in many areas of state practice away from the Peace Palace they may often work in concert. To a large extent the participants operate in a tightly circumscribed scenario of storytelling where many of the rules are pre-ordained, and this is especially the case for postcolonial states, which only contributed occasionally to the development of international rules as subjects before their independence. Both Libya and Chad wished to walk away from this matter victorious in their opposing territorial claims. Their pleadings, however, were already framed by their historical experiences of statehood during the colonial period. Parties will always choose certain points to emphasise or obscure. But when states, such as Chad, were constituted with little thought for indigenous patterns of authority and rule, it is understandable that such a state should accept the realities of colonially-determined borders instead of instability and uncertainty. According to Libya, ‘[a]ll Chad had to do was to piece together the already fully prepared, well-articulated French case’, relying on ‘an extreme pro-colonial view of international law’. Libya, on the other hand, was in a much better position to draw on its rich heritage of documented control over the territories.

Thus, out of the practice of European colonialism, Libya and Chad had significantly different experiences of statehood, and consequently advanced contrasting arguments before the ICJ. In this section, some of the discursive strategies used by the parties are explored to try and understand why the Court was so dismissive of Libya’s claims. What was it about Libya’s case that was so unconvincing for the Court and why were Chadian arguments preferred?

a) Discourses on Non-Western Sovereign Control in the Central Sahara

Libya had acknowledged that the 1955 Treaty was of central importance for the Court in determining title over the Aouzou Strip. If the 1955 Treaty were definitive in marking the

83 Libya/Chad, CR 1993/14, 14 June 1993, Libya, Mr Maghur, at 57.
84 Libya/Chad, CR 1993/19, 21 June 1993, Libya, Professor Crawford, at 29.

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Chad/Libya southern border, then there would be no need to examine an account of earlier effectivités. Libya was willing to concede some effect to the 1955 Treaty, but only in demarcating certain parts of its borders, excluding its southern sector.\(^85\) Libya argued that the Treaty was unclear about the status of the Aouzou Strip, and because of this deficit, other arguments had to be explored by the Court. It pointed out that

Determining the territorial extent of these claims, it is evident that effectivités – the situation on the ground and the related conduct of the various participants: the indigenous peoples, the Senoussi Order, the Ottoman Empire, France, Italy, and Great Britain – considered in their broadest aspect will have an important role to play.\(^86\)

Here, Libya was asking the Court to reflect on the historical dimensions of the Case and move beyond the confines of the 1955 Treaty.

One of the central pillars of Libya’s case rested on the idea of indigenous-Ottoman rule over the disputed territories. Libya argued that this precolonial title would defeat any subsequent French or Italian claims where indigenous-Ottoman effectiveness could be proven. Thus not only would the treaties annexed in the 1955 Treaty be invalid, but Libya also characterised its sovereign title over the Aouzou Strip as founded on a direct line from this indigenous-Ottoman or Senūšī-Ottoman title and subsequent Italian succession after the collapse of the Ottoman Empire.\(^87\) As Ricciardi argues in his magisterial study published on the eve of proceedings, this Case raises some perplexing questions about existing understandings of sovereignty’s interrelationship with the contours of the postcolonial state. For although the present system has produced stability in African boundaries…[i]t has failed…to satisfy genuine beliefs of title, such as Libya’s, that rest on notions of sovereignty that Western law traditionally has not appreciated or accommodated. Consequently, the manner in which the Court resolves this conflict will have potentially far-reaching implications for Africa and for boundary law in general.\(^88\)

\(^{85}\) Libya, Counter-Memorial, at para. 3.105.
\(^{86}\) Libya Counter-Memorial, at para. 5.10.
\(^{87}\) "L’Italie succéda à l’Empire ottoman dans le droit souveraineté sur la totalité du territoire libyen, tel que la Porte le contrôlait précédemment, y compris donc la zone qui forme l’objet du présent différend." [Italy succeeded to the Ottoman Empire in its right of sovereignty over the totality of the Libyan territory, as it was previously controlled by the Porte, including therefore the zone that forms the object of the present conflict.] Libya/Chad, CR 1993/16, 16 June 1993, Libya, Professor Condorelli, at 50. For an overview about Ottoman/Senūšī relations, see Ahmida, supra n 13, at ch 2.
\(^{88}\) M M Ricciardi, 'Title to the Aouzou Strip: A Legal and Historical Analysis' (1992) 17 Yale Journal of International Law 301, 308.
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Even though the Court found it ‘unnecessary’\(^{89}\) to respond to Libya’s arguments, the very act of articulation opens up the possibility of an international law informed by much more than the Western experience of state formation.

Libya sought to ground its title within the tradition of Islamic political thought and state practice. Perhaps concerned that the Court was unfamiliar with the lexicon it was using to describe principles about authority over territory within Islam,\(^{90}\) Libya began its presentation by reminding the Court that the ‘Islamic world was not primarily concerned with concepts such as boundaries or territorial sovereignty.’\(^{91}\) We saw in Chapter Two that Islamic authority theoretically is grounded in allegiance between a ruler and the umma, rather than territorial control per se. In Sunni practice after the death of the Prophet, the Caliphate became the central institution of rule in the Islamic community, representing God on earth. Although Ottoman sultans failed to fulfil some of the required attributes of the Caliphate, the Sublime Porte gained significant legitimacy through the idea of the Caliphate. Even in lands not under its direct rule, the office of the Caliph still generated respect for Ottoman rule, and this was especially so during the colonial period when Islam was threatened by Christian powers. Thus, when Chad tried to portray Libya’s predecessor, the Senussi Order, as purely religious, such an argument somewhat missed the point of Libya’s thesis, which relied on the interplay between Senussi and Ottoman rule and the territorial effects of religious authority.\(^{92}\)

As has also been argued in cases such as Western Sahara, Dubai/Sharjah, Qatar v Bahrain and particularly, Eritrea/Yemen,\(^{93}\) authority in Islamic societies (and in most African societies as a whole)\(^{94}\) was often the product of personal allegiances based on religious affiliations. According to Lambton, who was quoted by Libya:

\(^{89}\) Libya/Chad, at para. 75.

\(^{90}\) It should be noted that one of the Court’s members during the case, Judge Weeramantry, is an authority on the subject of Islam and international law. See his book: C G Weeramantry, Islamic Jurisprudence: An International Perspective (Kuala Lumpur: The Other Press, 2001).

\(^{91}\) Libya, Memorial, at 31.

\(^{92}\) ‘[L]a confrérie [i.e. the Senoussi Brotherhood or ikhwān] est, sans aucun doute, sortie du rôle purement religieux que lui avait imparti son fondateur. Il n’en résulte cependant pas qu’elle ait exercé un pouvoir souverain sur le territoire et les populations des régions [of the borderlands].’ [There is no doubt that the Brotherhood went beyond the religious role that its founder intended. This does not however mean that it exercised sovereign control over the territory and the populations of the region.] Chad, Counter-Memorial, 27 March 1992, at 28.


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The basis of the Islamic state was ideological, not political, territorial or ethnical and the primary purpose of government was to defend and protect the faith, not the state... Political boundaries were unknown to Islam except those that separated the dar al-islam, the area inhabited by Muslims from the dar al-harb, the abode of war inhabited by unbelievers.66

The Western Sahara Case was acknowledged by both Libya and Chad in this regard and will be discussed in the following section’s discussion of occupation and terra nullius.

Although territories comprising the Libya-Chad borderlands and beyond were far from the centres of Islamic power, they were still subject to the many – often Islamic – influences that shaped nascent states in North Africa from the sixteenth century onwards. Territories on the periphery of the Ottoman Empire were only ever under its indirect rule, but its influence was significant for this Case through the examples of the nearby ‘Regencies’ of Algiers, Tunis, Tripoli as well as Egypt.67 Also, prior to European colonialism, Libya asserted that ‘there existed in both the Sahara and the Sudan regions of North Africa politically organized societies, closely linked by transaharian trade and cultural contacts.’68 Libya invoked this history not only to highlight its rich and esteemed lineage in contrast to Chad’s, but also to illustrate how indirect Ottoman authority and its international legal personality was an essential ingredient in this process of sovereign consolidation.69 In relation to the above entities, Libya admitted that

All four States enjoyed a wide degree of independence from the Porte; but they accepted the religious supremacy of the Sultan-Caliph in Constantinople as well as Ottoman sovereignty. In fact these states had entered into treaties and consular relations with other Powers and had even made war and peace with the sovereign ‘Christian’ Powers as far back as the 16th Century, clearly evidencing their status as subjects of international law.100

Here, Libya was referring to the concept of dual, or shared, sovereignty that lay at the heart of its case in relation to the Aouzou Strip.

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65 These concepts are discussed further in Chapter Two at 68-69.
67 The Barbary Powers are discussed in Chapter Two, at 122.
68 Libya, Memorial, at 70.
69 ‘...in the early 1800s, questions of nationality and boundaries had little meaning in the Muslim regions of North Africa. What mattered was the common sharing of Islamic beliefs and loyalty to the Caliph.’ Libya/Chad, CR 1993/19, 21 June 1993, Libya, Mr Maghur, at 18.
100 Libya, Memorial, at 73.
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Libya conceded that the Ottoman presence to the south of Tripoli at the turn of the twentieth century was not enough in and of itself to found title in international law; the Senūsī Order’s stewardship of desert tribes provided the vital local link for Libyan claims deep into the Sahara. Conscious of this desert context, Libya pointed out that it was necessary to establish a lower threshold of effective Senūsī control over ‘such barren areas’ as per well-developed case law on the subject. Although the Senūsī Order is best characterised as a reviver of a religious movement established in the 1830s to bring education and purity of faith to Muslims in north and central Africa, its development was intimately connected with the concurrent expansion of European colonialism in Africa. Thus, despite the Order’s disdain for all things non-Muslim, its direct and indirect confrontation with Christian powers provided a coherent reason d’être: resistance against the impending threat to Islam’s presence in the Sahara’s expanses. It was the opinion of the Ottomans by the late nineteenth century that the ‘people of this land are mostly the followers of his Holiness the Sheikh Senusi, there being a large Senusī lodge [or zāwiyya] venerated by many.’ These Senūsī lodges built at tribal centres, or at watering places and junctions on the trade and pilgrim routes, served as monasteries, schools, hostels, sources of advice and mediation and, in due course, as administrative centres.

Thus, in the face of a French ‘crusade against the Orient in general and Islam in particular under the pretext of spreading civilisation’, the Senūsī sought to ‘spread true civilisation

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101 Libya went on to add that ‘[t]he nature of the Sahara Desert must be understood in the context of colonial times; only its oases were places to inhabit; it was a region to pass through’. Libya, Memorial, at 8.
102 See especially, Island of Palmas Case 1 RIAA 829; 4 ILR 3 [1928] The Minquiers and Ecrehos Case (France/United Kingdom) (1953) ICJ Reps, p.47; Status of Eastern Carelia (Advisory Opinion) 1923, P.C.I.J., Series B, No. 5; Western Sahara (Advisory Opinion) (1975) ICJ Rep 12. Later in its Memorial, Libya discusses perceived European double standards on this very point: ‘It was a bit naive and certainly self-serving of the French to maintain that, because evidence of Ottoman sovereignty was sparse by European standards at the time, it did not exist — and to ignore the fact that it had long pre-existed France’s attempt at colonisation. At the time, only sparse control was necessary or possible in such a desert environment; but under Islamic concepts of sovereignty and boundaries it was nonetheless a very real assertion of sovereignty.’ Libya, Memorial, at 32.
103 Al Faruqi argues that the Senoussi Order can be understood as an offshoot of the Arabian Wahhabi movement, as discussed briefly in Chapter Two, at 84. I R Al Faruqi, ‘The Ideal Social Order in the Arab World’ (1969) 11 Journal of Church & State 239, at 243.
106 J Wright, Libya, Chad and the Central Sahara (London: Hurst, 1989), at 84, quoted in Libya, Memorial, at 44.
and true knowledge’ by instructing the ‘savages’ of the Central Sahara.\(^{107}\) Africa was the object of more than one civilising mission, and it was not surprising that Europeans were wary of this threat to their expansion: primary sources cited by Libya engender a deep distrust and demonisation of the Order.\(^{108}\) Libya’s reference to this historical period can thus be appreciated as an attempt to challenge not only dominant legal doctrines but the historical assumptions informing the law as well.

Through a combination of such Senūsī control on the ground and the institution of the Ottoman Caliphate, Libya argued that territories extending even beyond Lake Chad were precluded from European occupation because of the presence of dual sovereignty.\(^{109}\) Essentially, Libya characterised sovereignty as comprising a local and an international dimension:

\[
\text{[I]t was the Senoussi and the Senoussi peoples who held title to these regions and bore allegiance to the Caliph. The territorial rights of the Senoussi peoples were, in turn, represented on the international level by the Caliph to whom they paid allegiance.}\(^{110}\)
\]

Libya tried to prove this title by presenting numerous instances where the Ottoman Empire had publicly rejected French and Italian claims while increasing its own presence in the areas either directly or through its proxy, the Senūsī Order.\(^{111}\) Thus, around the period when spheres of influence were being declared by European states, Libya was at pains to show

\(^{107}\) Letter from the Senoussi Leader, Sayyid Ahmed Sherif Senoussi, published in Il Giornale d’Italia, 6 August 1911, Libya, Memorial, Documentary Annex, vol 6, exhibit 47. The Senūsī ‘civilising mission’ was strongly supported by the Porte as well: ‘The Senusi Shaikhs have rendered undeniable services for mitigating the savagery of the local peoples and for improving their morals.’ Letter signed by the Grand Vizier, 11 April 1884, Libya, Reply, Documentary Annexes, vol 3, Exhibit 8.2.

\(^{108}\) Libya, Memorial, at 53-55. See also Libya’s discussion of European representations of the Ottomans in North Africa in ibid, at 103-104.

\(^{109}\) For a good defence of the concept, see Libya/Chad, CR 1993/19, 21 June 1993, Libya, Professor Crawford, at 50-53; and Libya, Reply, at 223-224.

\(^{110}\) Libya/Chad, CR 1993/20, 22 June, Libya, Mr Dolzer, at 29. In his dissent, Judge Sette-Camara as ad hoc judge for Libya, was in complete agreement with the Libyan line: ‘historic title over the region belonged first to the indigenous peoples, tribes, confederations of tribes, sometimes organized under the Senoussiya, and eventually passed to the Ottoman Empire before the colonial Powers set foot in the area.’ Libya/Chad (diss. op. Sette-Camara), at 94.

\(^{111}\) It must be pointed out here that the nature of Ottoman-Senūsī cooperation is contested. In its pleadings, for example, Libya relied on the thesis of Evans-Pritchard, who coined the expression, ‘Turco-Senussi Condominium’. This idea remains dominant within the literature and is supported by some studies that point, for example, to Ottoman tax exemptions for the Senoussi. However, in his reappraisal of the evidence available, Le Gall questions such a simple account of mutual agreement and highlights ongoing tensions between the Senoussī Order and the Ottomans. Libya chose to overlook these discrepancies in the historical record, and it is no surprise; co-sovereignty would be harder to argue when its co-holders were in dissension. See G Joffé, ‘Qadafi’s Islam in Local Historical Perspective’, D Vandewalle (ed), Qadafi’s Libya, 1969-1994 (New York: St Martin’s Press, 1995), 139-154, at 143; M Le Gall, ‘The Ottoman Government and the Samusiyya: A Reappraisal’ (1989) 21 International Journal of Middle East Studies 91; and Ahmida, supra n 13, at 89.
that such statements could have no legal effect *erga omnes*; they were ‘purely bilateral’ undertakings by European powers.\(^{112}\) For example: ‘the Ottoman presence in the borderlands...was a substantial presence and it was continuous between 1908 and the end of 1912, and it was in direct implementation of a claim of sovereignty. It was also carried on at the invitation of and in conjunction with the Senūsī tribes and...Order.’\(^{113}\) Although the Italians ultimately overran the Ottomans, Libya argued that their title passed to Italy as a consequence of the 1912 Treaty of Ouchy\(^{114}\) and the 1923 Treaty of Lausanne.\(^{115}\) Senūsī rights remained, with Italy acting as the area’s international overlord.\(^{116}\) Thus, Libya somewhat anachronistically sought to demonstrate a direct link between its colonial and postcolonial manifestations: ‘The Senoussi were Libyan: they were the very core of the new State.’\(^{117}\)

Although Chad’s pleadings were primarily concerned with the operation of the 1955 Treaty,\(^{118}\) it still devoted considerable energy to rebutting both the factual and legal claims of Libya’s Senūsī sovereignty thesis. Factually, Chad disputed the existence of a solid Senūsī-Ottoman alliance,\(^{119}\) and it regarded their respective displays of effective control as

\(^{112}\) Libya/Chad, CR 1993/19, 21 June 1993, Libya, Professor Crawford, at 42.

\(^{113}\) *Libya/Chad*, CR 1993/20, 22 June 1993, Libya, Mr Dolzer, at 22.

\(^{114}\) ‘[G]râce à ce traité de cession territoriale, l’Italie acquit le droit d’exercer sa souveraineté sur l’ensemble du territoire libyen que l’Empire ottoman lui cédaît’ *Libya/Chad*, CR 1993/16, 16 June 1993, Libya, Professor Condorelli, p. 45. [thanks to this treaty of territorial cession, Italy acquired the right of sovereignty over all of Libyan territory that the Ottoman Empire had ceded to it.] Treaty of Ouchy between the Ottoman Empire and Italy, 15 October 1912, Libya, Memorial, International Accords and Agreements Annex, vol 2, no. 10.

\(^{115}\) Chad vehemently disputed this interpretation of the treaties, arguing instead that the treaties were simply concerned with the Porte’s renunciation of its territorial interests, rather than about the transfer of such rights to Italy. *Libya/Chad*, CR 1993/23, 29 June 1993, Chad, Professor Cassese, at 47.

\(^{116}\) For a good summary of these arguments, see *Libya/Chad*, CR 1993/20, 22 June 1993, Libya, Mr Dolzer, at 26-27. Examples of treaties forged between the Senūsī Order and Italy recognising ongoing Senūsī rights include: Libya, Memorial, Documentary Annex, vol 2, Exhibit 16 & 19.

\(^{117}\) *Libya/Chad*, CR 1993/20, 22 June 1993, Professor Bowett, at 48.

\(^{118}\) ‘Pour le Tchad, le traité du 10 août 1955 est la clé du différend.’ *Libya/Chad*, CR 1993/21, 25 June 1993, Chad, Mr Dadi, at 13. [For Chad, the Treaty of 10 August 1955 is the key to the dispute]

\(^{119}\) According to the French in 1934: the Ottomans were...in reality prisoners of the Senussi on whom they were entirely dependent, both for their supplies, their mail and their communications.’ Letter from the French Minister for the Colonies to the French Foreign Affairs’, 30 January 1934, Chad, Counter-Memorial, Documentary Annex, vol 3, Exhibit 74, at 212; and see letter from Mr Rais, Head of the Consulate-General at Tripoli to Minister of Foreign Affairs, 5 September 1899, Chad, Reply, Documentary Annexes, vol 2, Exhibit 9, at 16. This questioning of the alliance in Chad’s pleadings has much merit, since by the time Libya presented its Senūsī sovereignty thesis in oral form it had abandoned any sense of historical contingency and characterised Senūsī and Ottoman relations in crude terms, e.g. see *Libya/Chad*, CR 1993/19, 21 June 1993, Libya, Mr Maghur, at 23. There may have been a degree of collaboration between the Senūsī and the Porte, but it was also historically evident that the Senūsī Order regarded the Ottomans themselves as corrupt Muslims who had fallen from the true path of Islam; colonialism forced the two forces to compromise at times, but it is simplistic to speak in terms of a two-headed entity *per se*. See Ricciardi, *supra* n 88, at 342.
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inadequate for the international law of the time. It also characterised Libya’s hypothesis of divided sovereignty between the Ottoman Empire and the Senūsī Order as ‘inventé...pour servir le but irrédentiste actuellement poursuivi par la Libye’. Their summarised argument ran as follows in the oral pleadings:

First that the Ottoman Empire never had title to the B.E.T., neither on the basis of effective control nor on any other basis. Second, that the Senoussi Order was never more than an intermittent source of religious influence, and to some extent political influence, ranging across northern and central Africa. This influence...was weak in the B.E.T. Third, that the failure of the Ottomans and the Senoussi Order to establish an independent source of title is not retrieved by seeking to combine the two into one form of claimed joint sovereignty. Fourth, that the indigenous peoples, whose nature has been misrepresented by the Libyans, were the bearers of rights over the territory but were insufficiently organized to possess territorial sovereignty under international law.

Finally, Chad also rejected Libya’s penchant for anachronism: it was ‘misleading’ to argue that modern Libya was a direct successor of the Senūsī even its first ruler was of Senūsī lineage.

It is not necessary here to weigh up the competing historical assessments offered by Chad’s rebuttal to Libya’s case, but it is significant that Chad’s underlying assumptions about title to territory were radically different from those of its counterpart. Chad’s position

120 For Chad’s rebuttal of the Senūsī thesis, see Chad, Counter-Memorial, 27 March 1992, at 199-238.
121 [Invented to serve the irredentist goal pursued in reality by Libya] Chad, Counter-Memorial, 27 March 1992, p. 174. Its remarks on divided sovereignty include: ‘Mais même en faisant abstraction d’un éventuel accord entre les deux parties, le Mémoire libyen est mal fondé à un autre égard. Si l’on veut parler de “souveraineté partagée” entre deux sujets de droit international, il faut indiquer de quelle manière cette souveraineté était partagé: les deux parties avaient-elles le droit d’exercer les mêmes attributs souverains? Dans l’affirmative, pouvaient-elles le exercer d’une manière concurrente, ou devaient-elles les exercer de façon alternative? Si, en revanche, il y avait une distinction de compétences, quels pouvoirs souverains pouvaient être exercés par une des parties, et quels autres pouvaient être exercés par l’autre?’, [But even apart from a possible agreement between the two parties, the Libyan Memorial is ill-founded in another respect. If we wish to speak of ‘shared sovereignty’ between two subjects of international law, we should indicate the manner in which this sovereignty is shared: did the two parties have the right to exercise the same sovereign characteristics/features? If it’s in the affirmative, were they able to exercise them concurrently, or did they have to exercise them in an alternative manner? If, on the other hand, there was a distinction in the concurrent jurisdiction of competencies, which kind of sovereign powers were exercised by which of the parties?] Ibid, at 173.
122 Libya/Chad, CR 1993/23, 29 June 1993, Chad, Professor Shaw, at 63.
123 Libya/Chad, CR 1993/24, 30 June 1993, Chad, Professor Shaw, at 18. See also Libya/Chad, CR 1993/21, 25 June, Chad, Professor Pelllet, at 21.
124 To summarise: Libya argued that Senūsī-Ottoman was effective until this title was then taken up by Italy. Libya was the later recipient of this title, and France was never successful in the requisite degree of effective control, especially in the face of persistent Senūsī revolt and Ottoman statement to the contrary. Chad, conversely demonstrated that France successfully established its control over the region. In his detailed study of the history, Ricciardi holds that the French second occupation of the B.E.T. in 1929-1930 secured title over the territory. Ricciardi, supra n 88, at 467.

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suggested that the grammar of international law could not support arguments about shared sovereignty or indigenous people endowed with legal personality during the epoch of European colonialism. Such a stance can be understood as illustrative of a more traditional, or realist, discourse about the implications of colonialism’s past, for as Chad reminds us: ‘on ne gomme pas l’histoire; le colonialisme ne peut pas être mis entre parenthèses, les peuples de les États d’Afrique ont pris acte de l’héritage.’

Thus, faced with the postcolonial paradox, Chad chose to use arguments typical of the coloniser to rebut Libyan links with the land. Through its arguments based on European notions of effective control and the characterisation of Senūsī-Ottoman rule as being purely religious, Chad employed grammars of argument familiar to the Court. International law is discursively flexible, but only to a degree, and when arguments are grounded in the ‘hard’ law of treaties, such as the 1955 Treaty, it is not surprising that the Court was convinced by the Chadian perspective.


125 [One cannot erase history; colonialism cannot be bracketed, the peoples of the States of Africa are part of this heritage] Libya/Chad, CR 1993/21, 25 June 1993, Chad, Professor Pellet, at 21.
In Part II’s Introduction, we saw how colonialism occurred within the discursive context of positivism, recognition, and the ‘Standard of Civilisation’. Despite positivism’s fixation on certainty and stability, its underlying assumptions about sovereign capacity and an international legal system based on recognition precluded entities that did not fulfil pre-ordained standards of European civilisation. Thus, rules governing title to territory at the international level only applied to the subjects of international law as perceived at the time. Given that Libya asserted in this Case that the Senūsī Order attained legal personality either directly or through the support of Ottoman oversight, both Libya and Chad spent significant time debating not only whether the Senūsī Order was factually able to fulfil standards of effective control, but whether international law at the time had recognised it as a subject rather than an object of its jurisdiction. Instead of trying to assess the relative cogency of the two arguments, this section sketches some of the different images of international law presented in the pleadings.

In the absence of a treaty of cession, the crucial factor for determining whether the acquisition of territory was lawful rests on the status of the particular territory itself. The question that divided Libya and Chad was, ‘Who was a subject of international law at the time?’ Throughout the development of its submissions, Libya relied on the Court’s decision in the Western Sahara Case to claim that the existence of analogous tribal structures in its borderlands prevented French occupation; occupation was only possible in terra nullius, and as in the Court’s earlier decision, Libya argued that at no time had the disputed territories been terrae nullius. Although there is significant scholarly agreement on the nexus between occupation and terra nullius, there is far less consensus on the definition of terra nullius. This was especially so during the height of European colonialism, when sovereignty was interwoven with the requirements of civilisation; (European) state practice...
often denied the personality of peoples in Africa\textsuperscript{130} except to imbue them with the capacity to cede their territory through highly questionable European-imposed agreements.

Libya championed the rights of indigenous peoples before the Court, holding that international law could now retrospectively deem various non-European peoples the subjects of international law.\textsuperscript{131} Chad contested Libya’s hypothesis by arguing that past norms relating to conquest, as well as \textit{terra nullius}, could not be rewritten:

> Intertemporal law does not allow us to pretend that later, more palatable laws applied in the years before these more acceptable notions had evolved. Libya insists that this must mean that ‘colonial aggression’ remained lawful. But as Libya well knows, this simply begs the question of what \textit{was} regarded as ‘aggression’ at the time. And, palatable or not, colonial conquest and occupation was \textit{not} regarded as ‘aggression’ in 1913, nor in 1919.\textsuperscript{132}

Chad argued that state practice from the time was clear: European occupation of lands inhabited by non-European peoples was permitted in a context of unsettled law over the definition of \textit{terra nullius}. Further, with the demise of the Ottoman presence – irrespective of its effectiveness – the borderlands were open to the claims of any European state willing to substantiate a declaration of its desires with effective control. Once again, Chad chose to rely on the discourse of colonialism to defeat Libya’s expansive approach to legal personality at the end of the nineteenth century.

c) ‘\textit{Closet Colonialism}’ before the Court?\textsuperscript{133} Chad’s Successful Defence of \textit{Uti Possidetis Juris}

We saw in Part Two’s Introduction that the norm of \textit{uti possidetis} has received strong support from most African states since independence, and Chad and Libya are no exception; both states signed the Cairo Declaration of 1964.\textsuperscript{134} The resort to this norm in

\textsuperscript{130} Shaw, \textit{Title to Territory}, supra n 7, at 32-33.
\textsuperscript{131} Libya/Chad, 93/24, 30 June 1993, Chad, Professor Higgins, at 33.
\textsuperscript{132} Libya/Chad, 93/24, 30 June 1993, Chad, Professor Higgins, at 32. The importance of 1913 was that it followed Ottoman withdrawal from the territory. On the other hand, for 1919 Libya sought to argue that as a result of Article 10 of the Covenant of the League of Nations the international community had outlawed conquest as a mode of acquisition. Such an argument is controversial, however, as other opinions (including those of Chad) point to the wording of the provision which was only concerned with preserving the territorial inviolability of League members; it was possible that non-state entities fell outside of its protection. Article 10 reads: ‘The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.’, cited in Libya/Chad, CR 1993/19, 21 June 1993, Libya, Professor Crawford, at 54.
\textsuperscript{133} Libya/Chad, CR 1993/19, 21 June 1993, Libya, Professor Crawford, at 44.
\textsuperscript{134} Only Somalia and Morocco rejected the Declaration’s call for the sanctity of territorial borders. McKeon, \textit{supra} n 8, at 155.
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legal argumentation is intriguing because its discursive practices tend to obscure highly political arguments behind the veil of doctrine; its use aids in the perpetuation of a restricted -international legal lexicon. By accepting colonial borders, both the ICJ and postcolonial states can avoid complex considerations of history and geography by focusing exclusively on the contours of colonial administration. Yet, reliance on *uti possidetis* is also a policy choice, and time and again its use is justified through familiar arguments based on ‘stability’ and ‘certainty’ in the face of threatened anarchy and chaos.135 These preferences can be understood as part of a grammar generative of speech acts producing a conservative worldview, and an international law free from unpleasant memories of the past. In his separate opinion, Judge Shahabuddeen acknowledged the importance of the finality of borders but cautioned against pre-empting boundaries; the policy of *uti possidetis juris* can only be followed when a clear boundary exists.136 Here, Judge Shahabuddeen is perhaps suggesting that more caution is required in the application of *uti possidetis*. The norm (or policy) can only do so much. Also, the norm is a policy choice often hidden behind the rhetoric of law. Libya’s rejection of *uti possidetis* was just as ‘legal’ as Chad’s, but in failing to reflect the dominant discourse employed in postcolonial territorial disputes some of its arguments failed to convince a bench content with established practice.

Chad was an exemplar of *uti possidetis* not only in regard to the 1955 Treaty, but also the various annexed treaties. Through a three-pronged argument, Chad sought to demonstrate that the borders flowing from the 1955 Treaty were permanent, but that even supposing the Treaty’s invalidity, the earlier treaties would be sufficient in their own right to establish French and then Chadian sovereignty over the Aouzou Strip. In the words of Libya, ‘Chad now seeks to derive full benefit from the voracious appetite of the Colonial Power.’137 Chad characterised its support for the stability of boundaries in very different terms: Libya was ‘seeking to promote anarchy,’138 and its claims constituted a threat to its very existence: ‘il s’agit de son intégrité territoriale, de son unité et de son développement economique.’139 Further, Libya’s attempt at boundary revision had implications beyond the immediate Case; Chad saw itself as a defender of

135 *Libya/Chad*, at para 73. Chad Counter-Memorial, at para. 1.01.
136 *Libya/Chad* (sep. op. Shahabuddeen), at 45.
137 Libya, Reply, at 8.
138 Libya, Reply, at 7.

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African stability, and such sentiments resonated with the Court. It is unsurprising that Chad invoked the policy of *uti possidetis juris*; it was an invaluable resource against the Libyan requests for a complete overview of competing indigenous and European interests in the area. Libya’s claim that no boundary was in existence meant that the application of the *uti possidetis* principle was irrelevant for its argument; the doctrine can only apply to boundaries reasonably settled at the time of decolonisation. It is likely that if Libya had access to a treaty favourable to its interests it too would have invoked *uti possidetis juris*.

When we view Libya’s wider approach to the litigation, however, it is clear that at least in this instance, its case was fundamentally sceptical about the extent to which Africa’s borders should remain a product of their colonial past in the face of non-European claims to title. The norm’s entrenched position especially in Africa may well confirm its borders and stave off possible conflicts, but *uti possidetis*’ complicit relationship with European conceptions of authority highlights the effects of colonialism in a ‘postcolonial’ era. In the face of such tensions, Castellino and Allen point to a ‘continuing reluctance of the existing international regime to provide an effective means of redress against the international boundaries forged by the powers in disregard of pre-colonial territorial and ethnographic parameters.’

5) An Historical Afterthought: The Implications of the Colonial Legacy in a ‘Postcolonial’ World

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140 ‘L’affaire d’Aouzou est un enjeu au-delà du Tchad, puisque la Libye conteste radicalement le principe du respect des frontières héritées de la colonisation que les États africains considèrent, à la quasi-unanimité, comme une règle sacrée et un rempart contre des revendications en chaîne.’ [The dispute over the Aouzou [Strip] goes beyond Chad, since Libya is radically contesting the principle respecting inherited borders drawn by colonization that the African states consider, almost unanimously, as a sacred rule and a bulwark against any chain of claims.] *Libya/Chad, CR 1993/21, 25 June 1993, Chad, Mr Dadi*, at 18.

141 ‘Libya’s position is very clear: Article 3 of the 1955 Treaty confirmed the parties’ acceptance of the *status quo* on the critical date based on the application of the principle of *uti possidetis juris* in accordance with the Article’s criteria: “acts internationaux en vigueur” on the critical date. It was not intended to modify the status quo.’ ‘Article 3...achieved only a partial settlement of Libya’s boundary problems.’ *Libya, Reply*, at 48 & 54.

142 The ‘principle cannot be taken to mean that either an unsettled or a contested boundary can be converted into an agreed line simply by way of succession, nor may it preclude subsequent alteration with the consent of the parties concerned. However, it does mean that an agreed boundary established or confirmed in a treaty cannot be challenged simply on the grounds of a succession, and it does in reality and in practice reinforce the principle of territorial stability.’ M N Shaw, ‘The Heritage of States: The Principle of *Uti Possidetis Juris Today*’ (1997) 67 *British Yearbook of International Law* 75, at 91-92. See also *Case Concerning the Frontier Dispute (Burkina Faso/Mali)* (1986) ICJ Reps, p. 554, at 568.

143 Castellino & Allen, *supra* n 65, at 117.
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The Libya/Chad Case was never about pure historical enquiry since proceedings were played out within the confines of available international legal rules and strategies. However, all participants in the matter – the bench as well as the parties - could not ignore the historical record and more importantly, the political implications of historical interpretation. This chapter’s findings endorse those of Simpson, who posits that one can see all the cases on acquisition as an attempt to reconcile the imperatives of law, history and politics. Each of these reconciliations has required the utilization of a number of interpretive techniques in law, and a variety of often conflicting constructions of historical truth.144

We cannot expect the Court to have adjudicated over the historical evidence of the parties per se; its mandate was to pronounce on the law, not the facts. However, territorial disputes in particular require the Court to engage in an intimate journey with the past to make sense of the legal present. Despite the possibility for a serious examination of many unsettled areas of law, the Court’s judgment instead obscured these historical complexities. ‘Une chose paraît claire en tout cas: la Cour repugne à attribuer un poids décisif à des faits historiques éloignés.’145 Thus, in failing to question the colonial record while in relying on colonial agreements and their consequent boundaries, the Court can be seen as a champion of colonialism’s continuing hold over international law. Judge Shahabuddeen articulated the majority’s view of the past as well as its relationship to the dispute:

The case at bar recalls a world now left behind. In telling flashes, it illuminates an age when international law tended to develop as a legal construct supportive of the global projection of the power of a single region; when in important respects it was both fashioned and administered by leading members of a select community; when that community, by itself called the international community, bore little resemblance to the world as it then stood, and even less to the world as it stands today.146

Libya’s case can be seen as an attempt to reveal how the past portrayed by Judge Shahabuddeen can and should be acknowledged in the present; the Court’s construction of a radical separation between past and present reinforced their inseparable bond more than ever.

6) Conclusion

144 Simpson, supra n 128, at 210.
145 [One thing emerges clearly in any case: the Court refused to give decisive weight to distant historical events] Koskenniemi, supra n 3, at 457.
146 Libya/Chad (sep. op. Shahabuddeen), ICJ Reps, at 44.
This Case could have been decided in a more expansive manner. The arguments of Chad and Libya could also have been different from those contained in the oral and written pleadings. Although the possibility of creative licence existed, Libya, Chad and the Court had to operate within the confines of international law’s particular grammar and lexicon. In the case of the parties, they were also compelled to combine their presentation of legal doctrines with a particular interpretation of the colonial experience in the Aouzou Strip. For its part, Libya not only questioned the power relations behind colonial treaty formation but also challenged traditional conceptions of statehood by trying to endow the Senūsī Order with international legal personality at a time when the ‘Standard of Civilisation’ ruled supreme. Libya attempted to convince the Court that the grammar of international law could support more expansive notions of indigenous sovereignty argued on the basis of an Islamically-inspired lexicon. Chad, on the other hand, chose to thwart Libya’s line through the help of a far more traditional set of utterances framed by a grammar supportive of strictly positivist treaty interpretation and the disavowal of historical context. Perhaps as a result of its haphazard and arbitrary experience of state formation, it was more difficult for Chad to construct arguments based on precolonial forms of authority over territory. Even if Chad’s legal team had entertained such an approach though, it was unnecessary. Traditional international legal principles furnished Chad with more than adequate ammunition to stifle Libya’s alternative position, and the Court’s subsequent silence in relation to many of the substantive issues raised testifies to the strength of Chad’s litigation strategy.

Through the devices of non-European legal personality, historical reinterpretation and a challenge to uti possidetis, Libya invited the Court to evaluate the relationship between the colonial past and the postcolonial present. The legal grammars employed on the Libyan side were more expansive in their nature as they sought to show that law should acknowledge historical and political considerations more overtly. The Case raised issues of great importance for international law as a tool of European and non-European nation-states. Koskenniemi suggests that the question asked by Libya, yet overlooked by the Court was

Le droit international doit-il servir à effacer les conséquences négatives du colonialisme sur l’ensemble des structures sociales et politiques de l’Afrique? Ou bien doit-il être considéré comme un instrument destiné à renforcer la stabilité des
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structures existantes, de façon à prévenir, ou à tout le moins à retarder, « des luttes fratricides »

The Court chose to disavow international law’s colonial complicity. Through faith in the mechanisms of strict legalism haunted by the threat of an ‘anarchic’ and borderless Africa, the Court indicated that the scope of legal discourse was a very narrow one. Perhaps the ramifications of Libya’s position were too hard to contain, and so instead the Court barricaded itself behind the law/politics dichotomy through excessive reliance on treaty interpretation that was deaf to the colonial context. Chad’s adjudicative strategy, which typified the postcolonial paradox for Third World states intent on securing their selfhood, served its interests well. In the Case described in the following chapter, the Court was confronted with two parties closer in historical experience than Libya and Chad. Thus it will be instructive to compare Libya’s and Chad’s strategies with those of Bahrain and Qatar.

147 [Should international law be used to erase the negative consequences of colonialism on the many social and political structures of Africa? Or should it be considered as an instrument destined to reinforce the stability of existing structures, so as to prevent, or at least delay, “fratricidal strife”? Koskenniemi, supra n 3, at 456. Here, Koskenniemi is quoting the Chamber in the Frontier Dispute (Burkina Faso/Mali) ICJ Rep, p. 565, at para. 20.]
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CHAPTER FOUR

(De)Limiting the Past for Future Gain:
The Relationship between Statehood, Colonialism and Oil in the Qatar v Bahrain Territorial Dispute

1) Introduction

As in the case of the African continent, the Arab Gulf is home to a number of long-standing border disputes that have only rarely been settled through adjudicative methods. In contrast with much of Africa, however, the Gulf was able to sustain a significant degree of independence during the colonial period, but many of its states continue to confront difficulties in defining their borders in a region particularly unfamiliar with territorial demarcation. The discovery and exploitation of oil encouraged both foreign and local powers to construct regimes of territoriality, but how were such borders determined, and what role have legal arguments played in this endeavour? Three cases are available to answer this question: the two arbitrations between Dubai and Sharjah...
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and Eritrea and Yemen and the ICJ dispute between Bahrain and Qatar. The last case forms the subject of this chapter, but the other two cases serve as useful reference points, in exploring both local approaches to sovereign control and the link between European domination and treaty law. The Qatar/Bahrain dispute was similar to these other cases, and yet in its judgment the Court overlooked this jurisprudence altogether. As in the case of Libya and Chad, the Court was content to adopt a narrow approach to the problems presented, but we should still ask why the Court neglected these more expansive arbitral awards and what this highlights about the discursive avenues available to states seeking redress before the ICJ.

Despite the Court’s truncated response, the proceedings between Qatar and Bahrain was one of the most complex matters on the Court’s docket. Indeed, this Case was procedurally one of the most protracted in the Court’s history, the length of the material presented was unprecedented and it was only the second case to consider both territorial and maritime claims at the merits stage. After the Court rejected Bahraini opposition to the Court’s jurisdiction in two preliminary judgments, the scope of the Case was defined broadly to encompass all matters of contention between Qatar and Bahrain. The main territorial elements in dispute related to the states’ à titre de souverain over the Hawar Islands and Janan Island as well as the region of Zubarah on the western side of the Qatari peninsula. Following the legal principle that the land dominates the sea, the Court used its territorial determination to oblige the parties’ request for it to draw their maritime boundary according to general principles of international law.

5 Ibid, at 204.
6 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar/Bahrain) (Jurisdiction and Admissibility) (1994) ICJ Rep 112; and Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar/Bahrain) (Jurisdiction and Admissibility) (1995) ICJ Rep 6.
7 The Hawar Islands are a series of islands off the Western coast of Qatar. The largest island is simply called Hawar and can be understood as representing the group as a whole. This point was one of some dispute in the case, but for the purposes of this chapter, Hawar and Hawar Islands are synonymous in meaning except where indicated. Please consult the map as well, at 168.
8 This is the maxim that especially grew out of the North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands) (1969) ICJ Reps, p.3.
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Given the scope of the Case, it is not possible to examine the pleadings and the judgments with due regard to all of their discursive elements. This chapter confines itself to aspects of the Case’s territorial controversies, in keeping with the focus of the thesis on territorial disputes and their presentation of the legal grammars employed, for three reasons. First, territorial matters involving issues of local authority are the best avenue through which to explore the underlying interest of the thesis in Arab ideas about sovereignty and colonialism. Comparisons between Arab particularism and the ‘universalism’ embodied by the Court will also help us in answering the thesis’ second central question about international law’s universality. Second, of the three main territorial issues, the chapter will limit its focus to two: the Hawar Islands and Zubarah. Janan does not raise distinct issues and was the least discussed in both the pleadings and the judgment. Third, the pleadings themselves went through many mutations, and so the chapter concentrates on the oral pleadings as expressions of the parties’ final positions. A particularly difficult and novel element of the Case was the matter of 82 disputed Qatari documents. Bahrain first ‘challenged the authenticity of 81 documents’ on 25 September 1996 after memorials had been submitted and shortly before counter-memorials were required. After many detailed reports by Bahrain, as well as an interim report by Qatar, it was agreed that Qatar would withdraw the documents and no longer rely on them in its reply or oral pleadings. Despite this, Bahrain not only argued that Qatar’s arguments did not reflect this change adequately, but that the affair fundamentally tainted the entire legal process. This example of evolving arguments highlights why the chapter has focused on the most recent material, namely the oral pleadings.

Finally and most importantly, rather than survey all of the claims and findings over Hawar and Zubarah, this chapter emphasises those (sometimes central) arguments

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9 Both the Court and the Parties themselves acknowledged the primary role that the territorial claims played in the dispute, and so it is much more important to appreciate this aspect of the Case over and above maritime claims. Scholarly attention has also focused on the maritime aspects of the Case, see, B Kwiatkowska, ‘The Qatar v. Bahrain Maritime Delimitation and Territorial Questions Case’ (2002) 33 Ocean Development and International Law 227; and Y Tanaka, ‘Reflections on Maritime Delimitation in the Qatar/Bahrain Case’ 52 (2003) International and Comparative Law Quarterly 53.

10 Each Party presented weighty memorials, counter memorials and replies as well as voluminous documents at the written pleadings stage amounting to over ten thousand pages. Hearings before the Court accounted for five weeks of testimony, which often differed in emphasis from the earlier written memorials and were sometimes wholly new.

11 Qatar/Bahrain (Merits) (2001), at para 15.

12 For a detailed overview of the forgeries affair written by Bahrain’s Agent to the Qatar/Bahrain case, see J S Al-Arayed, A Line in the Sea: The Qatar v. Bahrain Border Dispute in the World Court (Berkeley, CA: North Atlantic Books, 2003), at 355-393.
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concerned with either the special attributes of Arab sovereignty or the colonial legacy. Both Qatar and Bahrain fell under British 'protection' throughout much of the twentieth century, and since they are only relatively recent 'independent' entities, it is important to understand their own accounts of this process. Competing narratives over colonial histories and Arab practices will not in themselves generate a conclusive record of the past, especially since this Case was contentious. Further, given that strategic interests fuelled much of the argument, led by a largely Western legal team, it is not possible to distil any reified Arab perspective on international law.

Nevertheless, what this Case does provide is a site where two Arab states were able to exchange ideas about their intertwined colonial histories through the prism of international law. Perhaps because of similar colonial lineages and far less pronounced disparities in wealth, the parties played more nuanced roles than the example of Libya and Chad in Chapter Three. Bahrain and Qatar manipulated the colonial record in subtle ways, sometimes favouring and sometimes rejecting the typical 'colonial' perspective. How these arguments were received and thus legitimised by the Court will be relevant in assessing the extent to which international adjudication was able to grapple with and be shaped by non-European approaches to authority. What scope was there for dialogue about non-European modes of authority over territory? Further, how was the relationship between universalism and particularism within international legal discourse resolved?

Although the Case raised many extra-legal and historical issues directly affecting the dispute, both the majority judgment as well as most academic responses overlooked these broader considerations. As the minority judgment argued, the complicated and long-contested dispute warranted a careful examination of the interrelationship between history and law to satisfy both Qatar and Bahrain. The Court, however, fell short of offering a comprehensive decision. Why did the Court fail to confront this 'sordid' colonial past, as revealed especially by Qatar, and did it give adequate attention to the specific regional aspects of authority? More broadly, we can also ask whether the option of international dispute settlement can adequately embrace experiences and perspectives at odds with international law’s largely European origins. The main themes to emerge from this chapter

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13 Qatar/Bahrain (Merits), CR 2000/7, 31 May 2000, Qatar, Sir Ian Sinclair, at para. 3.
14 For convenience, I employ the terms 'colonial' and 'colonialism' in a very loose way because technically the relations between Britain and the Gulf sheikhdoms were neither equal nor colonial. In using the word colonial, though, I am deliberately wishing to emphasise that relations were based on a dynamic of British domination.

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are the context of coercion informing ‘colonial’ agreements, the legal implications of indigenous sovereignty and the uses of historical argument. These themes are similar to those explored in Chapter Three, but methods of argument and presentation produced quite different results for the parties.

The chapter begins with an account of the general history of the dispute and the proceedings as well as the ruling itself. After an overview of the respective positions of the Court and the parties, three separate sections discuss the colonial legacy, the status of Hawar and then the status of Zubarah. The chapter concludes by assessing the implications of the Case for international law in the Gulf as well as the ICJ itself.


2) Background to the Dispute

Although the historical backdrop to this dispute spans almost two and a half centuries, it is possible to identify some themes, including the persistence of tribal allegiances under
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Ottoman and British control, the creation of special treaty relations and the discovery of oil. Bahrain, and particularly Qatar, endeavoured to depict this historical record by inundating the Court with collections of documentary evidence. This material was useful in detailing each party’s claims, but its value was not wholly positive. First, documents were often haphazardly organised, illegible and repeated throughout the course of the three merits stages. Second, documents are never proof per se of an argument, and this is attested by the same documents being relied upon to advance conflicting claims. Second, the rationale for the inclusion of so many documents was often avoided in preference for the tendency to include anything and everything of even the most tangential relevance to the Case. Third, although this dispute concerned contested territorial and maritime claims by two Arab states, there was very little material available from the states themselves. This was explained in the oral pleadings as resulting from the parties’ hailing from an ‘Arab oral culture’. The unfortunate result of this, however, was an excessive deference towards the imperial records of both Britain and the Sublime Porte that arguably – and inevitably - have shaped the pleadings in a particular way. As in the dispute between Libya, and especially Chad, the parties did not acknowledge the problematic aspect of using colonial materials in the assertion of postcolonial personality.

The geographical characteristics of Bahrain and Qatar have served as a curse and a blessing over the last few centuries of regional and international relations. Bahrain’s strategic location along the trade routes between Europe and ‘the Far East’ meant that it was favoured by many foreign powers, including the Portuguese, the Persians, the Ottomans and the British. Fresh water reserves enhanced its desirability in the eyes of neighbouring tribes from the Qatari peninsula and the coastal mainland of modern day Saudi Arabia. To this day, Bahrain traces its roots to the Al-Khalifah tribe, which moved from Kuwait in 1762 to settle on the Western coast of Qatar in 1762. Later, in 1783, a group of Qataris along with the Al-Khalifahs drove out the Persians from Bahrain. This

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15 Or in the words of Bahrain, ‘Some generalization is called for at the present stage of a case [oral pleadings] that has seen the introduction of so much documentary material. Qatar, in particular, has produced four times more pages of annexes than has Bahrain (even though Qatar has only used about 50 per cent of the documents submitted).’ Qatar/Bahrain (Merits), CR 2000/11, 8 June 2000, Bahrain, Sir Elihu Lauterpacht, at para. 16.
16 Qatar/Bahrain (Merits), CR 2000/5, 29 May 2000, Qatar, Ms Pilkington, at para. 9.
18 This characteristic of natural underground springs account for Bahrain’s Arabic name (بحرين), which means two seas.
group of islands became the Al-Khalifah ‘capital’ in 1796, when rule was shifted from Zubarah to Bahrain, but with a continued presence in Zubarah. Despite this Al-Khalifah presence, Bahrain was constantly assailed by foreign and tribal powers.

Britain had first secured a foothold in the region in 1783 with the establishment of the Bushire Regency in Persia as a new commercial outpost of the East India Company. In the interests of mutual British and Bahraini trade relations, a General Treaty was forged between the East India Company and Oman and Bahrain in 1820. Another general treaty with other Gulf powers soon followed. War was not altogether eradicated by this effort and so another treaty was established in 1853 between Britain and what came to be known as the Trucial coast. The independent ruler of Bahrain himself signed ‘a perpetual treaty of peace and friendship’ with Britain in 1861, where Bahraini assurances against piracy were balanced by British security. This relationship was enhanced by the 1892 Exclusive Protection Agreement between the Chief of Bahrain and the British Political Resident of the Gulf in Bushire. The treaty stipulated that neither the Chief nor his heirs were to enter into agreement or communication ‘with any Power other than the British Government’. Also, agents from other powers were denied entry into Bahrain without British permission.

Largely as a result of Qatar’s inhospitable terrain and small population, it was not regarded with as much interest as its Bahraini neighbour from the perspective of the British. Treaty relations were first established in 1868, and as in the case of other Trucial agreements, maritime peace was to be observed. Under this agreement Qatar continued to pay tribute to Bahrain, which in turn passed these monies onto the Wahhābī forces of the mainland. Partly in response to this Wahhābī threat from the Muslim heartland, the

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19 Joffè, supra n 17, at 88.
20 General Treaty between the East India Company and the Friendly Arabs (Oman/Bahrain), 8 January 1820, 70 CTS 463. Also see Preliminary Treaty between the East India Company and Bahrain, 5 February 1820, 70 CTS 481.
21 Preliminary Treaties between the East India Company and Shargah, Ras Al-Khaimeh, Dibai, Abu Dhabi & Zyah, 8-15 January 1820, 70 CTS 471.
22 Treaty of Peace in Perpetuity between the Arab Chiefs of the Arabian Coast, 4 May 1853, 110 CTS 269.
24 Great Britain-Trucial Sheikhdoms, Exclusive Agreements, 6/8 March 1892, 176 CTS 457.
25 Qatar/Bahrain (2001), at para. 44.
26 Agreements between Great Britain and Qatar and Abu Dhabi (Trucial Sheikhdoms of Oman), 12, 16 September 1868, 138 CTS 56.
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Ottoman Empire, as the self-proclaimed protector of Islam’s Holy Sites,\(^{27}\) had reasserted itself in the region from 1871, as was discussed more generally in Chapter Two.\(^{28}\) A Turkish garrison was established at Doha on the Eastern side of Qatar, but it seems from many accounts that the ruling Al-Thani family simply flew the Ottoman flag at convenient moments and were only supportive of the Turks so as to repel the other foreign powers.\(^{29}\)

While the Ottoman Empire retained its largely land-based presence, Britain deepened its relations with the coastal sheikhs by establishing protection regimes.\(^{30}\) With the decline of Ottoman influence in the region, Qatar entered into a treaty of protection in 1916, only three years after the Anglo-Ottoman Treaty of 1913 had guaranteed Qatari independence and with a consequent ban on Bahraini interference in its affairs.\(^{31}\) The motivations behind protection agreements and their exact legal status will be considered below, but they at least set the backdrop to Britain’s involvement in the parties’ disputes over Zubarah and Hawar, which occurred frequently throughout the twentieth century. In the context of the growing demand for oil,\(^ {32}\) the need for clearly defined borders became acute, especially for the British ‘protectors’ as well as British and American oil companies - this in a region where tribes paid little heed to territorial boundaries and the notion of the nation-state had yet to take root.\(^ {33}\)

Independence from Britain in 1971 did not bring about any fundamental change for Bahrain and Qatar regarding their territorial disputes. In the past, Britain had been the sole arbiter in these affairs, but after 1971 regional Arab powers filled this vacuum. Due to turbulence created in the region over the affair, Saudi Arabia offered its good offices from 1976 onwards, and such efforts have continued with varying intensity through to the present.\(^ {34}\) In the course of Saudi-facilitated letter exchanges and meetings, the idea of

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\(^{27}\) Of Islam’s three most holy sites, two are in present-day Saudi Arabia: Mecca and Medina.

\(^{28}\) ‘By 1795 the Wahhabis had taken control of Central Arabia and reached the Hasa coast, and were preparing for further expansion…In 1802 the holy city of Mecca fell to the Wahhabis, and from at least 1803 until 1811 both Bahrain and Qatar were subject to the influence of…the Wahhabi Amir. The extent of this power was an embarrassment to the Ottoman Sultan, who claimed to be the titular overlord of the Hijaz and the leading Muslim sovereign with the right to control the Holy Places.’ Qatar, Memorial, (Qatar/Bahrain) (Merits), 30 September 1996, at para. 3.11, at 20. Also see pages 85 & 141 of the thesis.

\(^{29}\) F F Anscombe, The Ottoman Gulf: The Creation of Kuwait, Saudi Arabia, and Qatar (New York: Columbia University Press, 1997), at 32.

\(^{30}\) Qatar, Memorial, (Qatar/Bahrain) (Merits), 30 September 1996, at para. 3.11, at 20.

\(^{31}\) Schofield, supra n 2, at 32.

\(^{32}\) Oil was first discovered in commercial quantities on Bahrain in 1932. Al-Arayed, supra n 12, at 161.

\(^{33}\) For an overview of approaches to territory and borders in the Gulf generally, see Schofield, supra n 2, at 1-77.

\(^{34}\) Qatar/Bahrain, ICJ Reps (2001), at para. 66.
resolving the dispute before the ICIJ grew in vigour, and after drawing up a mooted framework for the hearing in 1988, Qatar accepted this ‘Bahraini formula’ in 1990.

3) The Jurisdictional Stage of the Case

Although Bahrain had designed the terms for which the parties would bring their claim to the Court, it strongly resisted Qatar’s unilateral application to the Court in 1991, thus creating a complex ‘interlocutory’ phase of the Case, which considered possible bases of the Court’s jurisdiction. Qatar grounded its jurisdictional claim on an exchange of letters between Bahrain, Saudi Arabia and itself in 1987, which included the following points:

All issues of dispute between the two countries, relating to sovereignty over the islands, maritime boundaries and territorial waters, are to be considered as complementary, indivisible issues, to be solved comprehensively together.

And

In case that the negotiations provided for in the fourth principle fail to reach agreement on the solution of one or more of the aforesaid disputed matters, the Governments of the two countries shall undertake, in consultation with the Government of Saudi Arabia, to determine the best means of resolving that matter or matters, on the basis of the provisions of international law. The ruling of the authority agreed upon for this purpose shall be final and binding.

Aside from some disagreement over Zubarah, it was decided throughout the course of discussions that the dispute would be based on the Bahraini Formula. Later in 1990 at a Gulf Cooperation Council (GCC) meeting the Foreign Ministers from Bahrain and Qatar signed Minutes, whose translation was of central importance in the resulting jurisdictional hearings:

(1) to reaffirm what was agreed previously between the two Parties;
(2) to continue the good offices of the Custodian of the Two Holy Mosques, King Fahd Ben Abdul Aziz, between the two countries till the month of Shawwal, 1411 H, corresponding to May of the next year 1991. After the end of this period, the Parties may submit the matter to the International Court of Justice in accordance

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37 For a good overview of the jurisdictional stage of the dispute, see M D Evans, ‘Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility’ (1995) 44 International and Comparative Law Quarterly 691.
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with the Bahraini formula, which has been accepted by Qatar, and the proceedings arising therefrom. Saudi Arabia's good offices will continue during the submission of the matter to arbitration;
(3) should a brotherly solution acceptable to the two Parties be reached, the case will be withdrawn from arbitration.\(^{38}\)

The translation of al-tarf\(\text{\textae}n\) (الطرفان), variously rendered as ‘the Parties’ or ‘both Parties’, was particularly contested as its meaning directly affected whether it was possible for Qatar to show that unilateral seisin had been contemplated in earlier agreements.\(^{39}\) The Court chose not to confuse itself with this debate in any substantive way and confined itself instead to the terms of the agreements.

In its July 1994 judgment, the Court held by fifteen votes to one (Judge Oda dissenting on all four operative paragraphs)\(^{40}\) first, that

the exchanges of letters between the King of Saudi Arabia and the Amir of Qatar dated 19 and 21 December 1987, and between the King of Saudi and the Amir of Bahrain dated 19 and 26 December 1987, and the document headed ‘Minutes’ and signed at Doha on 25 December 1990 by the Ministers of Foreign Affairs of Bahrain, Qatar and Saudi Arabia, are international agreements creating rights and obligations for the Parties.\(^{41}\)

Second, that

by the terms of those agreements the Parties have undertaken to submit to the Court the whole of the dispute between them, as circumscribed by the text proposed by Bahrain to Qatar on 26 October 1988, and accepted by Qatar in December 1990, referred to in the 1990 Doha Minutes as the ‘Bahraini formula’.\(^{42}\)

\(^{38}\) This translation was submitted by Qatar. Bahrain’s translation is slightly different:
1. To reaffirm what was previously agreed between the two Parties.
2. The good offices of the Custodian of the Two Holy Mosques, King Fahd b. Abdul Aziz will continue between the two countries until the month of Shawwal 1411 A.H., corresponding to May 1991. The two Parties may, at the end of this period, submit the matter to the International Court of Justice in accordance with the Bahraini formula, which the State of Qatar has accepted, and with the procedures consequent on it. The good offices of the Kingdom of Saudi Arabia will continue during the period when the matter is under arbitration.
3. If a brotherly solution acceptable to the two Parties is reached, the case will be withdrawn from arbitration.


\(^{40}\) See his separate judgment, International Court of Justice, Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar/Bahrain) (Jurisdiction and Admissibility) (1994), (diss. op. Oda), p. 133.

\(^{41}\) Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar/Bahrain) (Jurisdiction and Admissibility) (1994) ICJ Rep 112, at para. 41(1).

\(^{42}\) Qatar/Bahrain (1994) ICJ Rep 112, at para. 41(2).
Third, that the parties could submit ‘the whole of the dispute’ to the Court within fixed (and very short) time limits, with the possibility of subsequent matters arising for its determination. Essentially, ‘the Court decided that there was a special agreement, and this special agreement was sufficient for the Court to be seised, at least preliminarily.’

Although Bahrain was afforded the opportunity to frame the matter after the July 1994 Judgment, it persisted in rejecting the Court’s jurisdiction and so in its second judgment the Court settled on Qatar’s application for defining the dispute. Thus by ten votes to five, the Court firstly found that

it has jurisdiction to adjudicate upon the dispute submitted to it between the State of Qatar and Bahrain

and second

that the application of the State of Qatar as formulated on 30 November 1994 is admissible. The merits phase would be based on the following matters:

1. The Hawar Islands, including the island of Janan;
2. Fasht al Dibal and Qit’at Jaradah;
3. The archipelagic baselines;
4. Zubarah;
5. The areas for fishing for pearls and for fishing for swimming fish and any other matters connected with maritime boundaries.

Despite Bahraini unease at this outcome, it decided to participate in the merits phase of proceedings so as not to prejudice its interests over the contested sites. Earlier agreements between Qatar and Bahrain had called for preservation of the status quo. In spite of such undertakings, there were a number of alleged breaches of the status quo in relation to the Hawar Islands throughout the nineties.

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43 Qatar/Bahrain (1994) ICJ Rep, at para. 41(3-5).
44 Klabbers, supra n 36, at 362. Here, Klabbers is relying on Judge Oda’s dissenting opinion, supra n 40.
45 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar/Bahrain) (Jurisdiction and Admissibility) (1995) ICJ Rep 6, at para. 50(1-2).
47 For example, the Agreement of December 1987 included the following provision:

Until a final settlement for the disputed matter is reached:

Each party shall undertake from to-date to refrain from any action that would strengthen its legal position, weaken the legal position of the other party, or change the status quo with regard to the disputed matters. Any such action shall be regarded null and void and shall have no legal effect…

Qatar, Memorial, (Qatar/Bahrain) (Questions of Jurisdiction and Admissibility), 10 February 1992, at para. 3.27.
48 For a collection of notes verbales detailing these breaches, see Qatar, Counter-Memorial, vol 5; and Qatar, Reply, vol 5.
Before reviewing the Court’s decision on the merits, it is necessary to comment on the ramifications of its 1994 and 1995 judgments relating to jurisdiction. The Court’s determination that two informal agreements constituted the grounds for consent disturbed a number of commentators, who have suggested that it marked the end of clearly defined parameters of consent.\textsuperscript{49} ‘The creation of commitments [even if only informal], according to the Court, by necessity implies the creation of legal rights and obligations’.\textsuperscript{50} Chinkin points out that this ruling could induce great uncertainty on the part of many states no longer willing to enter into informal agreements, such as the minutes at the centre of the present dispute.\textsuperscript{51} For legal doctrine more broadly, she asks ‘whether the ruling...has undermined certainty in differentiating binding and non-binding agreements’.\textsuperscript{52} On the other hand, Rosenne views the jurisdictional outcome in more positive terms:

The framework agreement as it has developed - spasmodically - does not have the characteristics of the classic special agreement, by which the dispute is defined and the jurisdiction of the Court is established by a single event, the notification of the special agreement to the Court. The framework agreement, a form of agreement covering disagreement, has developed in response to the requirements of diplomacy which has recognized that a dispute should not be permitted to smoulder indefinitely, but which at the same time, for reasons particular to the states concerned, cannot be defined jointly and notified jointly to the Court.\textsuperscript{53}

It is probably too early to tell whether states have altered their behaviour as a result of this ruling, but it sends a clear signal to Arab states in the Gulf to be mindful of what agreements they enter into. Although Bahrain participated in the merits phase, some of its actions outside of the Peace Palace suggest that its faith in the Court was tentative. It also remains to be seen whether the Court’s less than detailed treatment of the substantive territorial claims has assuaged scepticism in the Gulf or the wider Arab world.

4) The Court’s Determination on the Merits

\textsuperscript{49} Generally see also Klabbers supra n 36; and McHugo, supra n 39.
\textsuperscript{50} Klabbers, supra n 36, at 370.
\textsuperscript{52} Ibid, at 225.
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After a series of lengthy pleadings, complicated by the controversy over Qatar’s allegedly forged documents, the Court handed down its decision on 16 March 2001. Qatar had withdrawn the 82 disputed documents and had not relied on them in its later pleadings, and both Qatar and Bahrain submitted new versions of Qatar’s Memorial and Counter-Memorial where they crossed out all discussion based on the disputed evidence.54 The details of the judgment will be analysed in the next section, so here it is only necessary to acquaint ourselves with the central requests of the parties and the Court’s determination. Bahrain claimed sovereignty over all the areas in dispute, whereas Qatar requested the Court to declare the absence of such sovereignty rather than positively find for Qatar in the matter. Thus, Qatar’s application was a negation of Bahrain’s, quoted below:

Bahrain is sovereign over Zubarah.
Bahrain is sovereign over the Hawar Islands, including Janan and Hadd Janan.
In view of Bahrain’s sovereignty over all the insular and other features, including Fasht ad Dibal and Qi’at Jaradah, comprising the Bahraini archipelago, the maritime boundary between Bahrain and Qatar is as described in Part Two of Bahrain’s Memorial.55

After giving fairly equal consideration to the territorial and maritime questions in a relatively brief judgment, the Court:

1) Unanimously...Finds that the State of Qatar has sovereignty over Zubarah;
2) (a) By twelve votes to five...Finds that the State of Bahrain has sovereignty over the Hawar Islands;
(b) Unanimously...Recalls that vessels of the State of Qatar enjoy in the territorial sea of Bahrain separating the Hawar Islands from the other Bahraini islands the right of innocent passage accorded by customary international law;
3) By thirteen votes to four...Finds that the State of Qatar has sovereignty over Janan Island, including Hadd Janan;
4) By twelve votes to five...Finds that the State of Bahrain has sovereignty over the island of Qi’at Jaradah;
5) Unanimously...Finds that the low-tide elevation of Fasht ad Dibal falls under the sovereignty of the State of Qatar;
6) By thirteen votes to four...Decides that the single maritime boundary that divides the various maritime zones of the State of Qatar and the State of Bahrain shall be drawn as indicated in paragraph 250 of the present Judgment.56

Aside from the majority judgment, a joint dissenting opinion was rendered by Judges Bedjaoui, Ranjeva and Koroma as well as a separate dissenting opinion by Judge ad hoc

54 It has been very difficult to determine which versions of Qatar’s memorials are best to read. In the course of researching this chapter I decided to rely on Bahrain’s highlighted version which still allowed me to read Qatar’s crossed out claims. On general impression, the most commonly deleted material centred on regional consensus over the extent of Qatar’s authority over Zubarah and the Hawar Islands.
55 Qatar/Bahrain (Merits), CR 2000/25, 29 June 2000, Bahrain, Mr Al-Arayed, at paras. 19-20.
56 Qatar/Bahrain (2001), at para. 252.
Torres Bernádez (appointed by Qatar). Judges Oda, Parra-Aranguren, Kooijmans, Al-Khasawneh and Judge ad hoc Fortier (appointed by Bahrain) offered separate Opinions. Judges Vereshchetin, Higgins and Herczegh also issued declarations.

In relation to territorial matters, Evans argues that ‘the Court took what might be thought of as the line of least resistance.’ 57 The Court avoided engagement with many of the substantive arguments raised by Bahrain and Qatar in relation to title to territory, the status of various effectivités and the nature of consent for ‘protected’ states. This failure ‘to give a complete ruling’, in the dissenting opinion of Judges Bedjaoui, Ranjeva and Koroma signaled ‘that the Court has...taken the risk not only of rendering an incorrect judgment but also of failing to give a complete ruling.’ 58 The ramifications of such an outcome may well be felt beyond the courtroom in the Arab and non-Arab worlds. When the Court handed down its decision, President Guillaume stated, ‘This judgment is binding, final and without appeal. It brings to an end a long-standing dispute between these two sister-States, thereby inaugurating a new stage in their relations.’ 59 Whether this statement is correct can only be answered with time. However, it is possible to assess whether the criticisms rendered in the dissenting opinion were warranted. Did the Court confront all of the central issues as they related to territory, and what are the possible reasons to explain its reluctance to do so? These questions will serve as a window into our discussion in the following section.

57 MD Evans, ‘Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)’ (2002) 51 International and Comparative Law Quarterly 709, at 712.
59 Quoted in Kwiatkowska, supra, n 9, at 232.
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Map #8: Demarcation of the ICJ decision, source: J S Al-Arayed, *A Line in the Sea: The Qatar v. Bahrain Border Dispute in the World Court* (Berkeley: North Atlantic Books, 2003), at 398
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5) Competing Narratives on Statehood and Colonialism in the Gulf

This section engages directly with the reasoning contained in the parties’ submissions as well as the various decisions of the Court itself. It will focus firstly on depictions of the colonial experience to problematise the historical record. It will then take up the claims advanced over the Hawar Islands and Zubarah respectively, focusing on issues relating to tribal affiliations, the status of protection, communal property rights, the nature of *uti possidetis juris* in the Gulf and the relevance of Islamic norms for international law in such disputes. All of these ideas appeared in the pleadings, but often in radically different ways. A comparison will enable us to draw conclusions about the extent to which international law can be shaped and broadened by the experiences and arguments of Arab states. Harking back to the thesis’s central research question about the scope for international law as a universalising discourse, we can ask here: Is international law open to particular experiences of non-European control over territory? Further, how did Qatar and Bahrain draw the boundaries of international law in their account of colonial practices?

a) Historical Narratives on the Legacy of Colonialism

An understanding of the complex Case between Qatar and Bahrain cannot avoid ‘a long tramp through the sands of history’.\(^60\) The centrality of the historical record was recognised not only by Qatar and Bahrain but also by the Court in its ‘brief account of the complex history’.\(^61\) Despite such recognition, historical facts were usually treated out of context and accepted at face value. This was especially so in relation to the nature of former foreign control in the Gulf. Chapter Three’s discussion about the colonial histories of Chad and Libya demonstrated how there is never one historical record or one interpretation. How did the parties use historical arguments, and how did the Court respond to these accounts? Does the grammar of international law allow for historical complexity or not? This section will sketch out some contrasting historical images to show how history and international law are interdependent, but not through any pre-determined relationship. Instead, the dialectic between the two is shaped by extra-historical and extra-legal perspectives rarely averred to

\(^{60}\) Qatar/Bahrain (*Merits*), CR 2000/5, 29 May 2000, Qatar, Mr Salmon, at para. 9.
\(^{61}\) Qatar/Bahrain (2001), at para. 36.
in the judgment or the pleadings. Yet in drawing boundaries between law and its ‘others’, the centrality of history, politics and culture becomes more apparent than ever.

All historical narratives recognised the influence of the British presence in the Gulf. British motivations, however, were usually described as being simply based on a ‘commercial interest in protecting maritime trade routes to India’. A purported increase in piracy in what came to be known as the ‘Pirate Coast’ ‘led to the first major change in the British role in...[this] area’ of ‘great strategic importance’. No interrogation of this British justification between the illegality of piracy and intervention was carried out by Bahrain or Qatar. Instead, the historical narratives of both Bahrain and Qatar are often uncritical in their reliance on British imperial sources, such as the reports of James Lorimer.

Conversely, in The Myth of Arab Piracy in the Gulf, the Arab historian, Al-Qāsimī clearly states his scholarly agenda: the notion that piracy warranted Britain’s intimate and ‘protective’ involvement in the Gulf is contestable. Al-Qāsimī refutes the claims of certain colonial and contemporary historians, such as Lorimer and Kelly, both of whom were relied upon in the memorials of Qatar and Bahrain. Al-Qāsimī’s argument is forceful but was overlooked by the two states in their submissions:

The indigenous people of the Gulf were normal people with normal human ambitions. Although poor, they were skilful. They were people practicing normal human activities, in particular trade, in which they had been involved for millennia. The only abnormal factor was the introduction of a foreign power whose aim was to dominate and exploit. The intruders were the forces of British imperialism, who knew very well and often testified that the indigenous people of the Gulf were only interested in the peaceful pursuits of pearl diving and trade.

Through an unquestioning acceptance of British imperial material, Bahrain and Qatar failed to appreciate the colonial desires shaping events as well as their later depiction in the Gulf.

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62 Bahrain, Memorial, (Qatar/ Bahrain) (Merits), 30 September 1996, para. 136. Anghie discusses how norms developed in international law that gave support to the European desire for commercial expansion through trading companies. Initial justifications based on the right of free trade later gave way to fully-fledged colonial administrations. This was not the case so much in the Gulf as it was a relative latecomer to this trend, but Anghie’s point does reveal the interrelationship that existed between international law, European trade and later modes of colonial rule. T Anghie, Imperialism, Sovereignty and the Making of International Law (Cambridge, UK; New York, US: Cambridge University Press, 2005), at 67-69.

63 Qatar, Memorial, (Qatar/ Bahrain) (Merits), 30 September 1996, at para. 3.3.


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Al-Qāsimī’s insights are confirmed in some of the Ottoman sources included in the voluminous documentary annexes of Qatar’s Reply. Such inconsistent use of evidence was not only sloppy, but indicates the tendency of the parties to include as much material as possible even where it was discordant. The Ottomans were only too aware of British ambitions in the Gulf and it was partly in reaction to such a threat that they had reasserted their control over certain Gulf territories in the latter half of the nineteenth century. The Sublime Porte’s Ministry of the Interior surmised the situation in 1910 in the following terms: ‘The objective of Britain is to incite the local muslims to take up arms against each other, to impose a status quo on the region and occupy the coastline, claiming that her economic commercial interests are suffering.’

Such British motivations are not only unsurprising; they are to be expected. Some of the implications of colonial policy, however, were overlooked by the parties and the Court when formulating general accounts of British-Gulf relations. Britain was not simply concerned with ‘protecting’ its trade and Trucial partners from other powers, such as the Wahhābīs, Persians and Ottomans. This is clear when we consider the way in which treaty terms between Britain and the Arab sheikhs took on increasingly restrictive qualities, preventing any interaction between local sheikhs and non-British powers.

Britain had maintained that the independence of entities such as Qatar and Bahrain was never compromised. Qatar and Bahrain advanced diametrically opposed positions on this very point and the Court struggled to formulate a clear position on the matter. It is difficult to define the international legal personality of such entities. For example, the pleadings and the judgment differ as to when Qatar became an independent entity, and even then this was under the shadow of either Ottoman or British control. In relation to Qatar, it

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66 Qatar, Reply, (Qatar/Bahrain) (Merits), Annexes, vol 2, at 297. Another example of such sentiments from 1900 reads: ‘it is important to establish an administration which will show the Ottomans to be in complete control; it will prevent the English making their claims elsewhere, interfering on the pretext of a few minor incidents between the sheikhs’. ‘Report on Bahrain’ from Council Chamber, 22 April 1900, Bahrain, Memorial, vol 2, Annex 64(a), at 274.

67 This is detailed in another Ottoman report: ‘Despite Britain’s recognition of the Bahrain Islands’ independence, she considers herself privileged as regards the agreements she has made and continually repeats that she will not let any other government interfere in Bahrain’s internal policy.’ Report of the Foreign Minister, 27 January 1909, Bahrain, Memorial, vol 3, Annex 75(a), at 401.


69 For example, in 1898, Qatar’s ruler pledged his services to the Ottomans: ‘I am not a rebel and have no intention of acting against the Sultan’s will. Until now I have been in the service of the Ottoman state, both with my person and my possessions, without having an ulterior motive.’ Telegram from Bushire by Jassim Al-Thani, Kaimakan of Qatar, 23 January 1898 to the Office of the Grand Vizier, Qatar, Reply, vol 2, at 165.
was common to elide Qatari identity with its imperial master, but the necessary corollary of state succession after Ottoman rule is not developed. The line between Ottoman and Qatari personality is thus very hard to discern.

Despite this confusion, what remained indisputable was the impact of underlying British interests and the significant imbalance of power between such a hegemon compared to the sparsely populated sheikhdoms of the Gulf. This power dynamic influenced the possibility for freely given Arab consent. Like Libya’s discussion of its relations with France in the *Libya/Chad* Case, Qatar questioned the applicability of the notion of sovereign equality in a context of quasi-colonial domination. The law/politics dichotomy upholds the notion of legal relations free from coercion and influence, but Qatar’s argumentative strategy sought to break this schema down. For Qatar, Britain was never a neutral arbiter, administrator or policy advisor in the Gulf, and documentation from the annexes attests to this. For example, internal memos mooting the ownership of contested territories between Qatar and Bahrain do not rely on a rigorous categorisation of title and effectivités. Instead, the future control of various islands or regions was dependent on British strategic concerns, and this was particularly pronounced with the advent of oil when Britain was keen to thwart American penetration in the region. The exploitation of oil made it necessary to establish clear and precise boundaries between the Sheikhdoms. However, the desirability of borders was a recent phenomenon, as previously both the

Although this is only a statement and does not represent the legal status of Qatar *per se*, it suggests that Qatar’s independence was less than complete at the turn of the twentieth century.

70 For example, in its pleadings, Qatar argued, ‘The fact remains that Sheikh Jassim al-Thani ruled the entire province of Qatar, and that he governed the territory both in his own right and as surrogate for the Ottoman Empire.’ *Qatar/Bahrain (Merits)*, 2000/17, 20 June 2000, Bahrain, Mr Bund, at para. 24.

71 An excellent example of this is some correspondence between two British officials in 1905: ‘Captain Prideaux’s studies have brought him to the conclusion that our record places us in a position to modify the attitude hitherto adopted in regard to this part of the Arab Coast, and that in making the change there are three alternative policies to choose from...:

That the suzerainty of the Ruler of Bahrein should be reasserted over the whole of the Katr peninsula, except the Al Bidaa [Doha, modern-day capital of Qatar] Chiefship, the limits of which should be reduced to the narrowest possible limits.

That for reasons stated we should declare the complete independence of the Maritime Arab tribes and maintain a post and Native Agent on the Katr Coast so long as the Turks remain at Al Bidaa.

That we should agree to recognise the sovereignty of the Turks over the whole of the Katr peninsula on certain conditions...

Captain Prideaux favours the last.’

This extract reveals that Britain was willing to create or annihilate the legal titles of states at will. Letter from Capt. Prideaux to Maj. Cox, 16 July 1905, Bahrain, Memorial, vol 3, Annex 71, at 355.

72 *Qatar/Bahrain (Merits)*, CR 2000/7, 31 May 2000, Qatar, Mr. Shankardass, at para. 10.
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Ottomans and the British asserted that to ‘try and sort out boundaries at this point [at end of the nineteenth century] would not be appropriate, but would raise new problems.’

Concerns about future oil concessions were vital in explaining British policy towards its protectorates in the Gulf, including Bahrain and Qatar. If these decisions had had no legal effect, there would have been little need to consider them here. However, the Court’s judgment relied on British decisions without acknowledging the underlying motivations at play. In so doing, the judgment rendered the decisions of a quasi-colonial power valid under international law today. Instead of adopting a critical approach to the historical record, which could have facilitated recognition of the competing interests at play, the Court, and sometimes the parties themselves, overlooked the consequences of quasi-colonialism.

b) Determining Sovereignty over the Hawar Islands

i) The 1939 Decision

The international legal effects of British control were demonstrated most clearly in the Court’s ruling on the Hawar Islands, which were ‘the greatest bone of contention between the two Parties’.

Although the Court focused on the 1939 British award of Hawar to Bahrain, both parties based their competing claims on a number of grounds in addition to the award. Thus treatment of and reliance on the 1939 award will be reviewed first and then compared with some of the parties’ other claims to demonstrate how the Court’s reasoning prioritised colonial practices above evidence of local authority.

In a context framed around the urgent need for demarcated boundaries to facilitate oil exploitation, Britain issued an award in 1939, whereby it determined that Bahrain held title over the Hawar Islands. This finding was beneficial to Bahrain, and so Bahrain relied heavily on certain elements and legal principles relating to the award in its pleadings. Tensions between Qatar and Bahrain over the islands had escalated from 1937 when Bahrain occupied them and asserted its title. These events coincided with Britain’s

73 Ottoman Report on the Zubarah affair, 3 May 1897, Bahrain, Memorial, vol 2, Annex 63(a), at 269. The British echo these sentiments: ‘The question of sovereign and feudal rights over places and tribes on the mainland of Arabia, opposite the Island of Bahrain, is a complicated one, and probably the Government would not deem it practicable or expedient to enter into its merits.’ Letter from Lt. Col. Ross, British Political Resident, to Secretary to Govt. of India, 4 September 1873, Bahrain, Memorial, vol 2, Annex 20, at 174.
74 Qatar/Bahrain (Merits), CR 2000/17, 20 June 2000, Qatar, Mr Salmon, at para. 1.

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admission that ‘the ownership of the Hawar Group is of great importance because it is directly in…the oil “line”.’ In anticipation of competing claims to this resource-rich area, the British had issued a ‘provisional decision’ in 1936 which acknowledged that ‘it might…suit us politically to have as large an area of possible included under Bahrain’ for oil concession purposes. The details of this ‘preliminary’ decision by the British were never relayed to Qatar, and, furthermore, Qatar was never given the chance to rebut claims made by Bahrain, which had become the presumptive beneficiary of the decision.

Notwithstanding this clandestine event, Qatar sought a settlement of the situation and entrusted that the British would confirm its sovereignty over the Hawar Islands. Thus, between 1938 and 1939, both Bahrain and Qatar submitted a series of letters to British agents outlining their respective effectivités and purported title over the islands. Although Qatar had participated in the process, it tried to show the Court how its involvement at the time was flawed because it had not consented to Britain alienating the territory. Qatar also went into detail about British partiality in rendering its decision in the 1939 award. Here, Qatar was trying to uphold its former status as a protected, but still independent state, and so in some ways the law/politics dichotomy was useful. By pointing to the treaty provisions between Britain and the Trucial states, legally the Gulf sheikhdoms were independent. On the other hand, Qatar was trying to show how in the example of the 1939 ‘arbitral award’ that law was inherently linked with politics; the Court had to consider background agendas and not simply take the decision at face value.

Despite such arguments, both the majority judgment and Bahrain characterised Qatar’s consent at the time as unproblematic: the judgment failed to acknowledge the wider context of British oil interests or its undertakings towards Bahrain. Throughout its pleadings, however, Qatar was at pains to show how this episode of British ‘arbitration’ was tainted by self-interest and should not result in permanent consequences for two independent states. This attempt to thwart Britain’s legacy was not simply a product of ICJ litigation, either: Qatar showed the Court instead how it had challenged the British decision on 9 May 1936, Bahrain, Counter-Memorial, vol 2, Annex 73, at 236. This was also the opinion of Loch: ‘[Hawar] may have considerable value now that oil has been found in Bahrain and is hoped for in Qatar’, Letter from Lt. Col. Loch, British Political Agent, to Lt. Col. Fowle, British Political Resident, 6 May 1936, Bahrain, Memorial, vol 5, Annex 247, at 1074.

75 Letter from Captain T. Hickinbotham, British Political Agent (officiating), to the British Political Resident, 9 May 1936, Bahrain, Counter-Memorial, vol 2, Annex 73, at 236. This was also the opinion of Loch: ‘[Hawar] may have considerable value now that oil has been found in Bahrain and is hoped for in Qatar’, Letter from Lt. Col. Loch, British Political Agent, to Lt. Col. Fowle, British Political Resident, 6 May 1936, Bahrain, Memorial, vol 5, Annex 247, at 1074.


77 Qatar/Bahrain (2001), at para. 105.
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on a number of occasions. Bahrain tried to undermine Qatar’s later protests by explaining them away as an instance of disappointment from an unfavourable decision. After hearing these arguments as well as summarising them in its judgment, the Court chose not to engage with Qatar’s challenge to consent and British authority. Although it did concede that the 1939 decision was not an arbitral award per se, the Court was still comfortable in affirming its ‘legal effect’: the 1939 decision was a valid and fair reflection of Bahrain’s ancient title and effectivités.

Bahrain sought to bolster ‘the powerful legal position it enjoyed by virtue of the 1939 decision’ by relying on the principles of uti possidetis and res judicata. Bahrain had portrayed the 1939 award as an ‘arbitral’, or ‘legal’, one, and in the absence of Bahraini consent for its reconsideration by the ICJ, the principle of res judicata precluded reconsideration of the matter; its legal effect was irreproachable. Such a gesture illustrates the use of the law/politics dichotomy well: Bahrain sought to shield British ‘political’ decision-making from scrutiny though resort to legal niceties. Further, in advancing this argument, Bahrain seems to have opted for international legal personality given that the concept of arbitration rests on neutral adjudication between independent entities. This was confirmed when Bahrain argued that any consideration of the matter would seem to bestow on the Court ‘an appellate jurisdiction over the award’ for the first time in the ICJ’s history. Thus, at least in relation to the nature of the 1939 Award, Bahrain claimed that before formal independence both Bahrain and Qatar had been independent, but ‘protected’, states under British care.

In contrast to notions of independence, Bahrain also invoked the idea of uti possidetis juris. Throughout the Case, Bahrain was trying to offer as many arguments as possible even though they were incompatible: res judicata assumes legal independence whereas uti possidetis is necessarily the result of colonial administrative boundaries. In

78 This is noted by the Court: Qatar/Bahrain (2001), at para. 106.
79 Qatar/Bahrain (2001), at paras. 98-109.
80 Qatar/Bahrain (2001), at para. 139.
81 Qatar/Bahrain (2001), at paras. 142-147.
82 For Bahrain’s presentation of the 1939 decision, see generally Qatar/Bahrain (Merits), CR 2000/12, 9 June 2000, Mr Paulsson, at paras. 138-205.
83 Qatar/Bahrain (Merits), CR 2000/12, 9 June 2000, Bahrain, Mr Paulsson, para. 201.
84 Qatar/Bahrain (Merits), CR 2000/12, 9 June 2000, Bahrain, Mr Reisman, paras. 1-14.
86 This inherent contradiction in Bahrain’s ‘à la carte menu’ of possible grounds for claiming the Hawar Islands is discussed by Judge ad hoc Bernádez in his Dissenting Opinion, Qatar/Bahrain (Merits) (2001), at paras. 292, 298.
invoking the latter norm, Bahrain characterised the status of both Qatar and itself as being one of ‘former British protectorates...[until] their independence in 1971.’ From an examination of the treaty provisions, Bahrain asserted that neither sheikhdom was able ‘fully to exercise their sovereignty in domestic and foreign affairs.’ Perhaps aware of its inconsistent reliance on colonial dividends – was Bahrain independent or not before 1971? – Bahrain tried to smooth over its deference to British control by recognising the injustices of colonialism. A critical approach to the past expressed in emotive language was fleeting, however, because Bahrain’s reliance on the legality of the 1939 Award required its general acceptance of British domination. Thus, Bahrain claimed that ‘the 1939 decision is indisputably an integral part of the colonial legacy...facts are facts!’ There was no room for any critical interrogation of colonial practices or the legal results of such ‘facts’. As in the case of Chad in Chapter Three, Bahrain confronted the postcolonial paradox by profiting from a particular, European, reading of the past.

Apart from the contestable characterisation of its colonial status, Bahrain launched a campaign in favour of the application of the *uti possidetis* norm throughout the postcolonial world. It first pointed to the Court’s 1986 decision in the *Frontier Dispute*, which had characterised *uti possidetis* as a ‘general principle...logically connected with the phenomenon of the obtaining of independence, wherever it occurs.’ From this basis, Bahrain went on to argue that *uti possidetis* is a ‘universal rule’ of ‘customary law’ and ‘should be the alpha and omega’ in the present matter. Because of its ‘general scope’, geographical or cultural considerations are irrelevant: ‘The Arab world is no exception.’

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88 *Qatar/Bahrain (Merits)*, CR 2000/21, 27 June 2000, Bahrain, Mr Kemicha, at para. 33.
89 ‘Tens of thousands of miles of grotesque international borders in the developing world were drawn up by powerful intrusive foreigners whose entire attention was on their own political and commercial interests, with very little regard to indigenous populations. Yet these borders survive, not because they appeal to our sense of fair play, but because continued respect for such borders has avoided war.’ *Qatar/Bahrain (Merits)*, CR 2000/12, 9 June 2000, Bahrain, Mr Paulsson, at para. 144.
90 Emphasis in original, *Qatar/Bahrain (Merits)*, CR 2000/21, 27 June 2000, Bahrain, Mr Kemicha, at para. 75.
92 *Qatar/Bahrain (Merits)*, CR 2000/13, 13 June 2000, Bahrain, Mr Kemicha, at para. 16.
93 *Qatar/Bahrain (Merits)*, CR 2000/21, 27 June 2000, Bahrain, Mr Paulsson, at para. 8.
94 In his separate opinion, Judge Kooijmans accepts that in those particular instances where it is applicable *uti possidetis* is a relevant consideration, but it should not outweigh other factors: ‘Generally speaking, to yield too readily to its applicability would be inimical to other legally protected rights, e.g., the right of self-determination (although there is no danger of this in the present case) as well as to the very function of
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As an Arab state itself, not only did Qatar question the general application of *uti possidetis* in the region, but specifically, it challenged Bahrain’s use of the norm through its portrayal of the 1939 award. Although Qatar conceded that both sheikhdoms lacked full independence before 1971, it denied that former treaty relations constituted ‘a colonial-type protectorate’. We saw in Part Two’s Introduction that it was common during the scramble for Africa to describe colonies as ‘colonial protectorates’. These regimes of ‘protection’ rarely recognised local sovereignty and were qualitatively distinct from ‘real’ protectorates that preserved at least internal independence for local powers. ‘Colonial protectorates’ were common in Africa, but not in the Gulf, and Bahrain’s position of asserting colonial protection in the region was rejected by Qatar. The Court confirmed Qatar’s position and held that the *uti possidetis* norm was inapplicable in the present dispute; the norm was only relevant in instances of former colonial administrative decisions or explicit consent by non-colonial entities. More generally, Plant points out that the norm is only applicable in postcolonial, and not post-protectorate, situations. Although doctrinal boundaries were clearly defined in this instance, Qatar’s presentation demonstrated that the line between protection and colonialism in the Gulf was a blurry one.

Arguments based on the absence of consent of a protected state still possessing nominal independence was at the heart of Qatar’s refutation of Bahrain’s claim to the Hawar Islands. As entities that had never assented to Britain’s demarcating of boundaries, or alienating territory more generally, Bahrain and Qatar had to prove their consent before any decision could be binding. This was the *sine qua non* irrespective of the decision’s qualities. Through analogy, Qatar relied on the 1981 Arbitral Award between Dubai and Sharjah for its examination of consent. That case had also considered a British decision delimiting the parties’ borders in the Gulf. The Permanent Court of Arbitration

international courts which is not to declare, in the interests of preventing conflicts, pre-existing de facto territorial situations legal without regard to title and other relevant criterion, but to uphold justice by correcting illegalities where they occur.’, *Qatar/Bahrain (Merits)* (2001), at para. 8.

95 *Qatar/Bahrain (Merits)*, CR 2000/13, 13 June 2000, Bahrain, Mr Kemicha, at para. 81.

96 This lack of conviction about the norm’s relevance to the Arab world is echoed by Judge Al-Khasawneh: ‘it is still very doubtful whether even now it [*uti possidetis*] has any applicability in the Middle East.’, *Qatar/Bahrain (Merits)* (2001), at para. 10. Also see Part Two Introduction, at 114.

97 Emphasis omitted, *Qatar/Bahrain (Merits)*, CR 2000/17, 20 June 2000, Qatar, Mr Salmon, at para. 5.

98 Discussed at 110.

99 *Qatar/Bahrain (Merits)* (2001), at para. 148.

100 Plant, *supra* n 4, at footnote 79, 206.

101 This was also the case in the *Dubai/Sharjah* Arbitration, see Judge Al-Khasawneh, *Qatar/Bahrain (Merits)* (2001), at para. 9.
came ‘to the conclusion that the consent of the Rulers concerned was necessary before any such delimitation could have been undertaken.’102

Qatar challenged the existence of its consent in the context of what it termed Britain’s ‘complex manoeuvring’ over ‘petroleum policy interests’.103 First, Qatar stated that there was no agreement signed between itself and Britain authorising such authority on the part of its ‘protector’. In their dissenting opinion, Judges Bedjaoui, Ranjeva and Koroma argued that any instances of Qatari deference to British actions should have been construed in the light of marked power asymmetries, rather than Qatari authorization for such wide powers.104 Further, for Judge Al-Khasawneh, although Qatar was definitely not a colony, the ‘British Government in fact exercised overwhelming control over the two Sheikhdoms’ in both domestic and foreign affairs.105 The Court overlooked such arguments to determine that consent had been established on 27 May 1938 in an exchange of letters between Qatar and Britain.106

We saw that the Court agreed with Qatar that the 1939 decision could not be construed as ‘arbitral’ between non-colonial entities, but it nevertheless held that it had ‘legal effect’107 and was binding on the parties.108 For many members of the Court in separate opinions, as well as Qatar, however, any type of award was incapable of effect due to Qatari consent being ‘vitiating by the existence of fraud’.109 The Court failed to regard Qatar’s in-depth consideration of the pressures faced from Britain vis-à-vis oil concessions.110 Once again, the Court relied on the legal qualities of the award to avoid a more complex and contentious consideration of the past.

103 Qatar/Bahrain (Merits), CR 2000/7, 31 May 2000, Qatar, Sir Ian Sinclair, at para. 16.
104 ‘In political terms, the nature of the relationship between the protecting Power and the protected State did not permit the use of any language other than the deferential terms in which the local rulers expressed themselves; thus to interpret that language as evidence of consent to the renunciation of territorial jurisdiction is in reality to give the opposite sense to the natural meaning of the words and conduct in 1939.’ Qatar/Bahrain (Merits) (2001), Bedjaoui, Ranjeva and Koroma JJ (diss. op.), at para. 57.
105 Qatar/Bahrain (Merits) (2001), Bedjaoui, Ranjeva & Koroma JJ (diss. op), at para. 19.
106 Qatar/Bahrain (Merits) (2001), Bedjaoui, Ranjeva & Koroma JJ (diss. op), at para. 19.
107 Qatar/Bahrain (Merits) (2001), Bedjaoui, Ranjeva & Koroma JJ (diss. op), at para. 19.
110 ‘[T]he Court has largely disregarded the political context which, in view of what had already been occurring, gave the Ruler of Qatar hardly any choice but to request the Protecting Power to comply with its treaty-based commitments “in light of equity and justice”.’ Qatar/Bahrain (Merits) (2001), (Kooijmans sep. op.), at para. 57.
Chapter Four:
(De)Limiting the Past for Future Gain: The Relationship between Statehood, Colonialism and Oil in the Qatar v Bahrain Territorial Dispute

Qatar’s request for Britain’s assistance in settling the affair over the Hawar Islands had coincided with a very different request made by BAPCO\textsuperscript{111} and PCL\textsuperscript{112} – both oil companies seeking greater access to the Gulf’s natural resources.\textsuperscript{113} Much of Bahrain had already been allotted and companies were eager to secure unassigned areas, including the Hawar Islands. As the provisional decision of 1936 suggests, Britain was mindful of the stakes involved in its decision and was unable to remove itself from the pressures exerted by both Bahrain and the oil companies, who wanted the matter to be resolved with ‘extreme haste’.\textsuperscript{114} In its pleadings, Qatar had presented a significant amount of material to support its account of this ‘flagrant miscarriage of justice committed by the British’\textsuperscript{115} and it thought that the Court would agree:

The Court will no doubt conclude that the British authorities in the Gulf had by this time become so caught up in a spider’s web of their own making that they simply could not render an objective and impartial decision on the issue of title to Hawar. In effect this meant that the provisional decision of 1936 had become a final decision even before the so-called ‘enquiry’ into the question of title had begun.\textsuperscript{116}

Compelling evidence aside, the Court, in what the dissenting Judges describe as a ‘surreal’\textsuperscript{117} gesture, chose to disregard all other arguments offered by the parties (such as proximity, maps,\textsuperscript{118} à titre de souverain and effectivités) to hold that the 1939 award was based on consent and constituted a binding ‘administrative’ decision on the parties.

Despite the confusing nature of the legal and historical arguments presented above, it is clear that the Court’s approach to the 1939 Award was simplistic and lacked critical engagement with prevailing conditions in the Gulf. Furthermore, the Judgment’s unquestioning acceptance of the Award in the face of disputed consent displayed an inability to confront the reality of at least quasi-colonial domination, as well as a predilection for preserving the law/politics dichotomy. Conceding the centrality of

\textsuperscript{111} Bahrain Petroleum Company, an American company.
\textsuperscript{112} Petroleum Concessions Ltd., a largely British-owned subsidiary of the APOC (Anglo-Persian Oil Company).
\textsuperscript{113} In the words of Sir Ian Sinclair, oil was at the root of the whole affair: ‘The problem – the real problem – was the coincidence in time of the pursuit of the oil concession negotiations from 1936 onwards with the beginning of the “enquiry” into the appurtenance of Hawar.’ Qatar/Bahrain (Merits), CR 2000/19, 22 June 2000, Qatar, at para. 25.
\textsuperscript{114} Qatar/Bahrain (Merits), CR 2000/7, 31 May, Qatar, Sir Ian Sinclair, at para. 15.
\textsuperscript{115} Qatar/Bahrain (Merits), CR 2000/8, 5 June 2000, Qatar, Sir Ian Sinclair, at para. 15.
\textsuperscript{116} Ibid, at para. 9.
\textsuperscript{117} Qatar/Bahrain (Merits) (2001), Bedjaoui, Ranjeva & Koroma JJ (diss. op.), at para. 42.
\textsuperscript{118} Qatar in particular discussed map evidence at length, e.g. see Qatar/Bahrain (Merits), CR 2000/7, 31 May 2000, Mr Bundy, at paras.1-78.


'political' motivations in arbitral decisions would render the Court's deference to such practices suspect and open to question. Instead, the Court ignored the political subtext through a textual and legalised reading of the 1939 arbitration which was similar to its handling of the 1955 Treaty in the dispute between Libya and Chad. Judges Kooijmans and Al-Khasawneh, both of whom voted in favour of Bahraini sovereignty over Hawar, still questioned the Court’s ‘excessively restrictive’\(^1\) approach. The Bahrain Formula had provided the Court with the mandate to explore all legally relevant matters relating to control over Hawar, and yet the majority judgment confined itself to a narrow enquiry. In the opinion of Judge Al-Khasawneh, ‘the only way to dispose of the question of sovereignty over the Hawars is to embark on an enquiry into the Sheikhdoms’ diplomatic history’;\(^2\) but this did not happen. Instead, ‘the Judgment seems to give more weight to the position taken by that Protecting Power than to considerations of substantive law, in particular those on the acquisition of territory.’\(^3\) In so doing, the Judgment indicated that international law remains wedded to a past premised on Jess than equal political, and thus legal, capacity between European and non-European peoples.

\(\text{ii) Regional Factors at Play in the Parties' Claims over the Hawar Islands: Communal Property Regimes and Tribal Allegiances}\)

Unlike the truncated decision of the ICJ, both Qatar and Bahrain offered exhaustive – even if not always convincing – accounts of their sovereign links with the Hawar Islands. Bahrain discounted Qatar’s reliance on the norm of contiguity with reference to the Island of Palmas Case.\(^4\) Some of the separate opinions found Bahrain’s depiction of original title and continuing control convincing in itself.\(^5\) Other judgments tended to favour Qatar’s arguments based on a combination of the notion of proximity (with reference to the 1998 Eritrea/Yemen Award)\(^6\) and confirmatory map evidence on the one hand with a

\(^{119}\) Qatar/Bahrain (Merits) (2001), (sep. op. Al-Khasawneh), at para. 4; see also (sep. op. Kooijmans), at para. 4.

\(^{120}\) Qatar/Bahrain (Merits) (2001), (sep. op. Al-Khasawneh), at para. 12.

\(^{121}\) Qatar/Bahrain (Merits) (2001), (sep. op. Kooijmans), at para. 1.

\(^{122}\) (1928) 1 RIAA 829 (Arbitrator Huber) 4 ILR 3. 'In the Palmas case, Qatar leans heavily on Judge Huber’s mention of islands in the territorial sea. Bahrain, on the other hand, points to those passages which stress the need for occupation or the performance of acts of authority as well as the need to maintain continuity of title.' Qatar/Bahrain (Merits), CR 2000/22, 28 June 2000, Sir Elihu Lauterpacht, at para. 62.

\(^{123}\) Such as Judges Kooijmans and Al-Khasawneh.

\(^{124}\) Territorial Sovereignty and Scope of the Dispute Award (Phase I), 9 October 1998, available from the website of the Permanent Court of Arbitration: http://pca-cpa.org/ENGLISH/RPC/#Eritrea. It should be noted
corresponding lack of a better title by Bahrain on the other. Such general arguments presented few difficulties for traditional principles of title to territory in international law and need not be reviewed here.

Discussion about the relationship between tribal allegiances and statehood, as well as the impact of communal property rights on the ability to establish exclusive control, however, was different. These ideas required much greater exploration of the particular conditions of Arab/Muslim authority in the Gulf. Despite their common heritage, Bahrain and Qatar exploited the legal significance of cultural factors in radically different ways, thus highlighting the extent to which local traditions can be invoked for different argumentative purposes. In the following section, this dialogue about the role of legal particularism within the context of international legal universalism will be assessed through the prism of arguments about the nature of authority over the Hawar Islands.

Some effectivités relied upon by Bahrain were historical accounts of fishing activities, as well as judicial intervention in disputes between individuals residing on Hawar. Bahrain discussed these events within the broader context of tribal connections between Bahrain, the Hawar Islands and Zubarah. As outlined above, the Al-Khalifah tribe that hailed from Zubarah (and ultimately Kuwait) ruled Bahrain. It was alleged that a branch of the Dowasir tribe based in the Arabian mainland had petitioned the Qāḍī of Zubarah for permission to settle on Hawar and this request was granted c.1800.125 From this time onwards, the Dowasir resided in Hawar at least intermittently for the purpose of fishing and Bahrain argued that they were Bahraini subjects. Thus, '[a]lthough the Bahraini Dowasir were proud and independent-minded, they lived under the authority of the Rulers of Bahrain.'126

Before considering whether the tribe was under Al-Khalifah authority, it is essential to consider the legal status of fishing for semi-nomadic, Muslim groups both in the Gulf and the Red Sea. Qatar argued that fishing activities could only be construed as the actions of private individuals exploiting a common resource. Bahrain, on the other hand, tried to

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125 Al-Arayed, supra n 12, at 226. This historical fact is countered by Qatar, e.g. CR 2000/8, 5 June 2000, Mr Shankardass, at para. 6.
126 Qatar/Bahrain (Merits), CR 2000/13, 13 June 2000, Mr Volterra, at para. 33.
downplay the regional institutions of communal property rights to advance that its direct connection with the Dowasir along with sustained and constant occupation of the area confirmed its sovereignty over the Islands in contention.

Qatar’s case about communal fishing rights rested on a combination of general historical research as well as strikingly similar analogies from the 1998 Eritrea/Yemen Award. Amin’s treatise on law in the Gulf is particularly pertinent here, and was invoked by Qatar throughout its written and oral pleadings:127

The fishing activities in the Gulf have been traditionally governed by the Shariah/Islamic Law...[it] does not have a comprehensive theory in respect of fishery...all raw material, whether in land or in the sea or space...belong, exclusively, to God and are not, in any way, subject to exclusive rights of persons, individually or collectively.128

The international legal effect of such a similar regime was discussed in the Eritrea/Yemen Award, where it was argued that historical, cultural and geographical particularities did have legal implications. Rather than apply modern, European norms of private property or sovereign control, it was necessary to view the natural resources of the Red Sea lying between the claimant states as a res communis.129 From this, Qatar argued that ‘in the absence of any State control of licensing or enforcement activities, the fishing practices of individuals [would] not amount to effectivités as they were not acts à titre de souverain.’130

Not only did Qatar rely on local customs in relation to fishing but it also distinguished Islamic jurisdiction from Western legal norms to argue that the Bahraini resolution of disputes between ‘Hawari’ individuals was not an act of sovereignty over the Islands. In its pleadings, Bahrain had furnished the Court with decisions rendered by qādīs in Bahrain relating to property disputes about fish traps on the islands. The question for the two parties then was how to characterise the legal effect of such decisions on Bahrain’s claim to effective control over Hawar. Qatar argued that, as in the case of communal fishing rights, it was essential to distinguish qādī-based jurisdiction from typical, European

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127 Whereas Bahrain overlooked these arguments altogether, instead claiming that it was the predominant and recognised pearling power in its vicinity, including the Hawar Islands.
128 Emphasis in the original, Amin, supra n 1, at 193, cited in Qatar, Reply, (Qatar/Bahrain) (Merits), 30 May 1999, at para. 4.181.
129 Territorial Sovereignty and Scope of the Dispute Award (Phase I) (Eritrea/Yemen) 9 October 1998, at para. 126, at 38.
130 Qatar/Bahrain (Merits), CR 2000/17, 20 June 2000, Qatar, Mr. Shankardass, para. 27, This statement echoes the Arbitral Award between Eritrea and Yemen: ‘[such fishing activities] do not constitute evidence of effectivités for the simple reason that none of these functions are acts à titre de souverain.’ Eritrea/Yemen Award, at para. 315.
international legal norms. ‘[I]t was common for Qādis in one Moslem country to settle disputes of Moslem subjects of another country or in regard to property located in another country.’\(^{131}\) As long as none of the litigants involved ‘objects to pleading before him’, a qādī may be deemed competent and he can then rule on matters of property outside of the territory of the decision.\(^{132}\) Thus it was Qatar’s submission that it is inappropriate to apply Western concepts to the authority exercised by a qādī, whose jurisdiction was only exercised in personam over Muslim individuals.\(^{133}\) Qatar was appealing to the Court’s universalist credentials by offering a particular approach to legal authority outside of the European tradition.

While Qatar’s arguments relied on the effect of non-European norms in the Gulf, they established a binary opposition between European practices of sovereignty and local practices seemingly devoid of such significance. Bahrain, on the other hand, presented a long list of (often less than dispositive) effectivités that were reliant on the relationship of sovereign and subject – Bahrain and the Dowasir tribe in Hawar. The respective positions of the two parties over Hawar were summarised in the eyes of Bahrain as being a contest between physical geography (Qatar’s proximity argument) versus human history (Bahrain’s sovereign links with the Dowasir).\(^{134}\) The parties’ treatment of the Dowasir tribe’s status and the implications of its fishing practices could be conceived as being a contest over the relevance of local versus international or Arab-Muslim versus European legal norms.

To begin with, almost none of the facts detailed by either Party remained unchallenged. On Bahrain’s side, Qatar recognised that the Dowasir did visit the islands, but only sporadically and seasonally.\(^{135}\) Irrespective of their length of stay, Qatar argued that the tribe was independent from Bahrain. Qatar also pointed out that the Court’s Western Sahara Advisory Opinion\(^{136}\) had acknowledged tribal allegiances, a claim of sovereignty still requires these allegiances to be ‘real’, supported by ‘acts manifesting

\(^{131}\) Qatar/Bahrain (Merits), Qatar, Reply, 30 May 1999, at para. 4.186.


\(^{133}\) Qatar then concludes: ‘Accordingly, a Qadi sitting somewhere in Bahrain and deciding private or inheritance related disputes between Dowasir Sunni fishermen who seasonally visited the Hawar Islands, though normally resident in Bahrain, is in no sense an example of ‘exercise of authority’ by the Ruler of Bahrain in the Hawar Islands and such practice therefore offers no support whatsoever to Bahrain’s claim of sovereignty over these islands.’ Qatar/Bahrain (Merits), CR 2000/8, 5 June 2000, Qatar, Mr Shankardass, at paras. 33 & 36.

\(^{134}\) Qatar/Bahrain (Merits), CR 2000/13, 13 June 2000, Bahrain, Mr Volterra, at paras. 3-4.

\(^{135}\) Qatar/Bahrain (Merits), CR 2000/8, 5 June 2000, Qatar, Mr Shankardass, at para. 15.

acceptance of political authority.\textsuperscript{137} Thus in this instance Qatar was relying on the Court’s inflexible approach to sovereign ties in the Sahara to defeat similar arguments of statehood by Bahrain. Particularist arguments were useful for defeating the legal validity of Bahrain’s position.

It is not possible to assess the legal validity of the Bahraini and Qatari perspectives on tribal authority and communal property because the Court did not consider these arguments. What can be pointed out from the discussion above, however, is that both Bahrain and Qatar relied on either local or general international legal standards when it was convenient. It is also significant that the parties chose to present these accounts in the first place, and such a move suggests that despite its European beginnings the Court can be a forum for the discussion about non-European legal traditions. Discussions about control of Zubarah presented similar difficulties and will be considered below before this chapter’s conclusion.

c) The Case of Zubarah

Unlike its treatment of the Hawar Islands, the Court entered into a more general, even if somewhat brief, consideration of Bahrain’s and Qatar’s competing claims to sovereignty over this sparsely populated region in the west of the Qatari peninsula, Zubarah. Of interest for the thesis is the way in which sovereignty over Zubarah raised matters of tribalism and private property rights, as in the case of Hawar. The Court chose to focus its attention less on these factors in favour of the effect of certain treaties, purported Bahraini acquiescence to British prohibitions on its rights over the region, as well as instances of more recent Qatari effectivités. First, despite undeniable Al-Khalifah links with Zubarah from its settlement in 1762, the 1868 treaty between Britain and the Sheikh of Bahrain altered any possible pretensions of Al-Khalifah hegemony in the peninsula.\textsuperscript{138} The 1868 treaty reflected earlier agreements regarding maritime peace in the Gulf between Britain and local sheikhdoms. After repeated ‘acts and other irregularities at sea’ by the Bahraini ruler’s brothers, Britain imposed a number of restrictions on Al-Khalifah endeavours

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\textsuperscript{137} Qatar, Reply, Qatar/Bahrain (Merits), 30 May 1999, at para 4.160.

\textsuperscript{138} Agreements between Great Britain and Qatar and Abu Dhabi (Trucial Sheikhdoms of Oman), 12, 16 September 1868, 138 CTS 56.
beyond Bahraini shores. According to the Court, 'the terms of the 1868 Agreement show that any attempt by Bahrain to pursue its claims to Zubarah through military actions would not be tolerated by the British' and that thereafter 'the rulers of Bahrain were never in a position to engage in direct authority in Zubarah.'

Because of these restrictions on Bahrain, Qatar, along with its Ottoman overlord, was able to extend its control over the whole of the peninsula, as evidenced by various maps and treaties from the early twentieth century. The Court paid particular attention to the unratified Anglo-Ottoman Treaty of 1913, which demonstrated the clear position of its signatories, 'Britain and the Ottoman Empire, [which] did not recognize Bahrain’s sovereignty over the peninsula, including Zubarah.' Although the Court did not acknowledge any source for its ability to rely on an unratified treaty, it is probable that its reasoning was founded on Qatar’s use of the Eritrea/Yemen Award. In that case, the Arbitral Tribunal also dealt with an unratified agreement, which it deemed to be of 'diplomatic evidence...[and] of undoubted interest because it reflects what was recorded by both parties as that which they had agreed to.' It should be evident at this point that the Eritrea/Yemen Award shared many similarities with the present Case, and it was relied upon especially by Qatar. Despite these parallels both in relation to the territorial and maritime issues, the Award was not cited at all in the Court’s judgment. This omission is particularly surprising given that the Award was considered in many of the dissenting and separate opinions and gave support to Qatar’s case for Hawar.

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139 Qatar/Bahrain (Merits) (2001), at para. 83.
140 Qatar/Bahrain (Merits) (2001), at para. 84.
141 The Court’s reasoning was as follows:

In view of the role played by Great Britain and the Ottoman Empire in the region in that period, it is significant to note Article 11 of the Anglo-Ottoman Convention signed on 29 July 1913 (see paragraph 45 above). This article described the course of the line agreed to separate the Sanjak of Nejd 'from the peninsula of Al-Qatar', and then went on to state:

The Imperial Ottoman Government having renounced all its claims to the peninsula of al-Qatar, it is agreed between the two Governments that the said peninsula will, as in the past, be governed by the Sheikh Jasim-bin-Sani and his successors. The Government of His Britannic Majesty declares that it will not permit the Sheikh of Bahrain to interfere in the internal affairs of Qatar, to violate the autonomy of that country or to annex it.

142 Qatar/Bahrain (Merits) (2001), at para. 90.
143 Eritrea/Yemen Award, at para. 172, cited in Qatar/Bahrain (Merits), CR 2000/8, 5 June 2000, Qatar, Mr Bundy, at para. 42.
144 It is also interesting to contrast Libya’s arguments in Chapter Three with the Eritrea/Yemen Award. Libya invoked the unratified Laval-Mussolini Treaty of 1935 to support its claims, but unlike the Permanent Court of Arbitration, the ICJ dismissed this argument through its total reliance on the later, ratified 1955 Treaty.
145 Plant, supra, n 4, at 205.
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Due to the Court’s reliance on the above grounds, it did not consider the arguments advanced by Qatar and Bahrain about tribal loyalties in Zubarah. It is useful to examine such arguments here, however, as they can serve as a point of comparison with the preceding discussion on Hawar. Both Bahrain and Qatar depicted the Gulf before the advent of oil exploration as being a region where borders and their supporting norms of sovereignty were culturally and legally irrelevant. For example, in the words of Bahrain: ‘Until well into the 20th Century, the ecology of the Arabian peninsula inhibited the emergence of States or rulers whose territory could be defined by reference to specific borders...Sovereignty over territory did not arise from a meaningless assertion of lordship of the desert.’ Qatar also spoke of nomadic practices, but for opposite reasons: ‘The concept of a boundary, which dictates a precise separation of areas where separate sedentary populations are settled...is alien to the southern coast of the Gulf...The boundaries of State entities are not affected by the movement of tribes, who show a haughty disregard for them in their wanderings.’

As in the case of Hawar, Bahrain wanted to show that its allegiances with the Naim tribe in Zubarah demonstrated an ongoing connection of personal authority that established sovereignty in the region. It was not possible or necessary to demarcate the exact boundaries of control; continuous settlement by the Naim with its intermittent pledges of allegiance was enough. Qatar’s reference to the reality of tribal movements sought to counter Bahraini arguments by showing that, despite possible Naim allegiances and movements, these did not alter the basic sovereign title of Qatar over the peninsula, which had been recognised by other states. Also, Qatar sought to characterise Bahraini arguments as being overly dependent on events in the distant past, arguing that ‘if certain ghosts do linger in the [Zubarah] desert, they remain ghosts, surviving only in the minds of

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146 Bahrain, Memorial, Qatar/Bahrain (Merits), 30 September 1996, at para. 64.
147 Qatar/Bahrain (Merits), CR 2000/5, 29 May 2000, Qatar, Mr Salmon, para. 23. It should be noted that in contrast to this general line of argument, Bahrain included testimony from Naim tribespeople confirming Bahraini control within circumscribed borders in 1937: ‘we [the Naim] are within your (the Ruler of Bahrain) boundaries and we will not let them take your territory.’ Letter from Chief of Naim tribe to Ruler of Bahrain, 25 April 1937, Bahrain, Memorial, vol 3, Annex 121, at 645.
148 ‘[T]ribes moved freely within a sheikh’s territory without this entailing the tribe’s submission to that sheikh or, inversely, transfer of the sheikh’s territory to that tribe. All else being equal, it could hardly be argued that the Naim’s frequenting of the Zubarah area constituted a loss of the Ruler of Qatar’s sovereignty over this area.’ Qatar/Bahrain (Merits), CR 2000/9, 5 June 2000, Qatar, Mr David, at para. 47.
149 Ibid, at paras. 28-38.
those who believe in ghosts.\textsuperscript{150} Qatar’s gesture here was to use international law’s typical disregard for indigenous title to boost its case of sovereignty over the peninsula. Such an adjudicative manoeuvre was a wise one, and we can also see it as another instance of the postcolonial paradox at play in the courtroom: where preferable to their argument, Third World states will readily speak in the language of their former colonisers, or ‘protectors’.

In the more immediate past, while Qatar entrenched its rule over the entire peninsula throughout the mid-twentieth century, Bahrain’s al-Khalifah rulers continued to petition their British ‘protectors\textsuperscript{151} in pursuit of their ‘honour’ vis-à-vis Zubarah.\textsuperscript{152} Since the 1868 treaty Britain had sought to separate Al-Khalifah and Al-Thani/Ottoman claims over Zubarah by stating repeatedly that Bahrain could not challenge Qatar in this matter.\textsuperscript{153} Despite these clear barriers towards any recognition of its sovereignty, Bahrain continued to seek a solution that would encompass its claims at least in relation to private property rights. For example, in 1961, Bahrain’s Ruler suggested to Britain that Qatar could retain sovereign title in exchange for Al-Khalifah rights over immovable property, freedom of movement for its followers and jurisdiction over cases involving its followers in Zubarah.\textsuperscript{154} The British could appreciate the basis of these claims, but could not find a solution that encompassed such competing rights.\textsuperscript{155} Britain’s inability to distinguish private law rights from rights of sovereignty in the context of a sovereign’s personal rule was recognised by Bahrain in its Memorial.\textsuperscript{156} Bahrain suggested that Britain’s handling of the whole affair not only displayed confusion over the relevant facts relating to the claims of Qatar and Bahrain, more disturbingly, it arose from a belief that ‘such rights had no

\textsuperscript{150} Qatar/Bahrain (Merits), CR 2000/9, 5 June 2000, Qatar, Mr David, at para. 55.
\textsuperscript{151} For example: Letter from Ruler of Bahrain to Maj. Hickinbotham, British Political Agent, 3 February 1945, Bahrain, Memorial, vol 4, Annex 177, at 780.
\textsuperscript{152} The pursuit of honour and a corresponding fear about ‘loss of face’ was central to Bahrain’s ongoing claim to Zubarah. In the words of the British Political Resident in 1946: ‘If I understood him rightly he stated that he did not claim sovereignty over Zubarah but only wanted his grass and water. When I remarked that there was no profit for him in Zubarah he replied that it was not a matter of profit as he knew that there was nothing of value in Zubarah but one of prestige.’ Cited in Qatar/Bahrain (Merits), CR 2000/9, 5 June 2000, Qatar, Mr Shankardass, para. 11. Also see Ibid paras. 21-25; Foreign Office minutes by M Man, British Political Resident, ‘Zubarah’, 1 June 1960, Bahrain, Memorial, vol 4, Annex 214, at para.7.
\textsuperscript{153} I emphasised that Her Majesty’s Government had never recognised any claim by Bahrain to territorial sovereignty over Zubarah.’ Transcript of letter from B Burrows, British Political Resident to Foreign Office, 2 May 1954, Bahrain, Memorial, vol 4, Annex 208(b), at 879.
\textsuperscript{154} Letter from Ruler of Bahrain to Sir George Middleton, British Political Resident, 8 February 1961, Bahrain, Memorial, vol 4, Annex 218, at 912.
\textsuperscript{155} Foreign Office Minutes by M Man, British Political Resident, entitled ‘Zubarah’, 1 June 1960, Bahrain, Memorial, vol 4, Annex 214, at 900.
\textsuperscript{156} Bahrain, Memorial, Qatar/Bahrain (Merits), 30 September 1996, at para. 314.
place in the [sic] modern western notions of absolute territorial sovereignty that Britain had been trying to impose on the Middle East.\textsuperscript{157}

The Court’s silence regarding these nuances of Arab territorial control confirmed Britain’s approach to patterns of indigenous authority throughout the Trucial Coast. It is possible that the points raised by Bahrain would have had little effect even if the Court had considered them directly. However, this oversight represents a more general limitation faced by international lawyers when they seek to accommodate and balance multiple interests in territorial regions less than wholly reliant on strictly demarcated borders. In his separate opinion, Judge Kooijmans acknowledged this limitation, but could not offer any real solution:

\begin{quote}
It is difficult to characterize the dispute concerning sovereignty over Zubarah as a dispute over territory or over the location of territorial boundaries. Even in the beginning of the twenty-first century it still carries the nature of contested hegemonic spheres or disputed entitlements to ties of allegiance rather than that of conflicting claims to exclusive spatial authority over a certain piece of land. That peculiar character of this part of the dispute is even today illustrated by the fact that Bahrain neither in the written nor in the oral pleadings defined the extent of the area over which it claimed sovereignty, but simply referred to the Zubarah region.\textsuperscript{158}
\end{quote}

Despite these misgivings, the Court was able to delimit Zubarah’s border through a Judgment devoid of doubt; international law had brought the parties certainty and finality.

6) Conclusion

Although this chapter has confined itself to an overview of the legal relations between Bahrain and Qatar, it must be remembered that the latter part of the dispute occurred within the context of two important regional events. The GCC’s\textsuperscript{159} formation in 1981 ushered in a new era in Gulf relations.\textsuperscript{160} The protracted Bahraini/Qatari disagreement served as the

\begin{footnotes}
\item[157] Ibid, at para. 326.
\item[158] Qatar/Bahrain (Merits) (2001) (Kooijmans sep. op.), at para. 33.
\item[159] The Organisation’s website contains some useful, general information: http://www.gcc-sg.org/.
\item[160] It was hoped in particular that the Council could play a role in resolving disputes between its member-states: ‘The Council stressed that the formation of the Cooperation Council has provided the constitutional framework for settling disputes between member states when their Majesties and Highnesses approved the formation of the Authority for the settlement of disputes.’ Gulf Cooperation Council, Minutes, 8 March 1982, Qatar, Counter-Memorial, Qatar/Bahrain (Merits), Annexes, vol 4, at 205.
\end{footnotes}
Chapter Four:
(De)Limiting the Past for Future Gain: The Relationship between Statehood, Colonialism and Oil in the Qatar v Bahrain Territorial Dispute

GCC’s ‘test case’ in ‘resolving internal conflicts’. Further, in the midst of discussion over the Bahrain Formula for ICJ adjudication, Iraq invaded one of the GCC’s six member states, Kuwait. In neither example did the GCC’s participation in these events contribute in any significant way to their resolution. Regarding Qatar and Bahrain, there was muted support from within the GCC for the adjudicative process. As for the two GCC members participating in the dispute directly, the outcome was less than ideal. Qatar’s ruler described the Court’s 2001 judgment on the merits as ‘painful’, but conceded that it would contribute ‘to the stability of the region’. Bahrain had already anticipated this potential pain and had taken steps before the ruling. Throughout the proceedings it proposed extra-curial options, such as negotiations, and did not arrest its commercial development of the Hawar Islands in the nineties even though it had entered into agreements pledging preservation of the status quo pending final settlement. As for the other four GCC members, the ICJ ruling was welcomed. Heard-Bey muses that the reasons for this support for third party adjudication stemmed from GCC members being too connected with both of the parties to resolve the dispute definitively. ‘Other constraints such as ties based on the traditional affinities of the ruling families and on centuries-old tribal relationships’ explain this preference for a seemingly more neutral approach.

For Qatar and Bahrain, the matter before the ICJ was not the first occasion where a third party had sought to determine territorial and maritime issues of the utmost importance. Further, although it may seem tendentious to equate the earlier motives of Britain in the Gulf with those of the ICJ, the outcomes were similar: an occasion where ‘consent’ was established in the face of significant protest and lingering doubt. Also, the Court’s judgment closely followed the earlier position of Britain in relation both to Hawar and Zubarah. At least in contrast to the flawed and unsatisfying decisions of Britain over its protectorates, some of which were considered above, it was hoped that the ICJ would be able to settle the affair ‘once and for all’. To further this goal, both Bahrain and Qatar issued extensive (even if not always accurate) historical accounts of their connections with the territories in question. Indeed, the proceedings should be appreciated as much for their historical narratives as for their legal exposition.

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162 Ibid, at 212-213.
163 Ibid, at 213.
164 Qatar/Bahrain (Merits) (2001), Bedjaoui, Ranjeva & Koroma JJ (diss. op.), at para. 2.
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Some of the arguments reconstructed from the annals of history, as well as their corresponding acceptance or rejection by the Court, have illustrated broader themes about how to approach international law’s relationship with a less than palatable colonial past. In assessing the Court’s failure to render a socially acceptable judgment, Judges Bedjaoui, Ranjeva and Koroma asked, ‘Why...should anyone be surprised that the taste in the mouths of the crowd, both in Bahrain and in Qatar, is a sour one?’ Particularly in relation to the Court’s denial of underlying British motives and ongoing concerns about natural resources, it is to be expected that this judgment will be viewed partly as an endorsement of European domination over non-Europeans in the Gulf. Moreover, the majority’s ‘curtailed’ treatment of the parties’ various legal grounds and historical arguments indicates unwillingness or even an inability on the part of the ICJ to embrace the legal heritage of non-European litigants. Although there was some scope for discussion about Arab approaches to authority over territory, the silence of the Court suggests that the grammars of international law are inadequate for the task of expressing such ideas. This judgment necessarily (de)limited territorial and maritime boundaries between two small, oil-rich Arab states. On the other hand, the process of legal argumentation between Qatar and Bahrain, as well as the heated dissent from the Bench, shows that the scope of international law need not always be so limited.

Although notions of Arab/Muslim authority were unfamiliar to the Court, the case of Western Sahara had provided an alternative framework for conceptualising international legal personality in cultural and geographical locations far from the cooler climes of the Hague. Arguments about non-European forms of authority over territory received much greater consideration by the ICJ in its Western Sahara Opinion and this case forms the subject of Chapter Five after Part Three’s introductory discussion below.

165 ibid, at para. 7.
166 Qatar/Bahrain (Merits) (2001), (Kooijmans sep. op), at para. 4.
PART THREE

ADVISORY OPINIONS
Introduction:

Determining the Self through the ICJ’s Advisory Jurisdiction: Procedures and Principles

We saw in Part Two that the ICJ has heard a number of territorial disputes for Third World states through its contentious jurisdiction. The Court has also deliberated on a number of advisory cases, which have often dealt with the relationship between self-determination and territory. Because of the more flexible and open-ended nature of the Court’s advisory jurisdiction and its non-binding outcomes, such self-determination cases should not simply be equated with territorial delimitation. Like their contentious counterparts, however, advisory cases about self-determination are an exercise in delimiting the self (and the state) through law. Further, how the self is grounded territorially is of central importance in determining whether a people can gain international legal personality. In the case of former colonial entities, a tension arises as to whether the contours of the territory or the identity of the people form the framework for emerging legal entities. In the following introductory section, an overview of the nature of the Court’s advisory jurisdiction precedes a summary of the interrelationship between self-determination, decolonisation and territory.

Advisory Opinions enable the world community to seek expert legal opinions beyond the Court’s limits on locus standi for states in contentious cases. According to Article 96 of the UN Charter:

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1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on the legal questions arising within the scope of their activities.

This language is also used in Article 65 of the Court’s Statute. Although parties disputing the Court’s jurisdiction in particular cases have focused on the discretionary nature of these provisions, the ICJ has never refused a request for these reasons. Only in the earlier PCIJ matter of Eastern Carelia did the Court choose not to hear the matter on the grounds that it would subvert state consent. Some advisory requests, including the Western Sahara Case, have included inter-state disputes, but the Court has tended to overlook such an issue as an obstacle in exercising its jurisdiction. According to Koskenniemi, ‘giving advisory opinions is a form...of peaceful settlement of disputes, whether between the UN and its member States or between States inter se.’ The Court’s consciousness of its ‘duty-to-cooperate’ in the UN system has meant that advisory opinions have become an important way for UN organs, particularly the General Assembly, to seek the Court’s assistance and expertise in resolving matters of concern.

The nature of the Court’s advisory jurisdiction has elicited criticism for a number of reasons. Of interest for the thesis is the way commentators have tried to define and limit the role of the Court vis-à-vis ‘political’ controversies. We saw in Chapter One that ICJ scholarship is characterised by ongoing negotiations over the influence and place of politics in ICJ matters. A desire to demarcate the boundaries between legal and political concerns is particularly pronounced in advisory cases for two reasons. First, under the Charter and its Statute, the Court ‘may give an advisory opinion on any legal question’. This provision’s inclusion of the adjective ‘legal’ has prompted lengthy, but often repetitive, definitions of legal in contrast to political disputes in both cases and commentaries. On entering the Peace Palace, it has become obligatory to justify adjudication in contradistinction to political partiality. Despite such conventions, we have seen that the Court readily embraces

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advisory requests, indicating that debates over the law/politics dichotomy serve as mere lip-service to the preservation of the ICJ's legitimacy within the international system.

Some commentators regard the Court's acceptance of advisory requests as problematic. Pomerance, for example, bemoans how the Court is 'frequently turned to not for the purpose of genuine law-clarification and problem-solving but for propaganda advantages and judicial legitimation of positions already firmly taken by political organs.'

On the flip-side, there is a strong theme in ICJ scholarship lamenting the untapped potential of the Court's advisory function as discussed in Chapter One. The caseload of the ICJ is lighter than that of the PCIJ, and this is especially so in relation to advisory opinions.

The Court has developed jurisprudence on self-determination in its contentious, and particularly its advisory, capacity. Given that only states can bring contentious matters to the Court, Advisory Opinions are the better option for considering issues about nascent state entities and questions of international legal personality. Such considerations became vital for the UNGA in the fifties, sixties and seventies when increasing Third World membership meant that decolonisation was central to its work.

Although the law and practice on self-determination has grown enormously as a result of decolonisation, a framework of earlier norms and principles helped shape the postcolonial character of self-determination. The idea can be traced back to the French Revolution and was championed - at least for European peoples - by the League of Nations after the First World War. Later in Article 1(2) of the UN Charter self-determination was

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6 For an overview of the literature dealing with advisory opinions and what changes to make, see Koskenniemi, supra n 4; and R Higgins, 'A comment on the current health of Advisory Opinions', V Lowe & M Fitzmaurice (eds), Fifty years of the International Court of Justice: Essays in Honour of Sir Robert Jennings (Cambridge: Cambridge University Press, 1996), 567-581.

7 Emphasis added, Pomerance, supra n 5, at 294. For a strident defence of 'legalism' in the face of 'politics' vis-à-vis the South West Africa cases, see M Pomerance, 'The ICJ and South West Africa (Namibia): A Retrospective Legal/Political Assessment' (1999) 12 Leiden Journal of International Law 425.

8 See Chapter One, at 51. Also see Koskenniemi, supra n 4, at 602.


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enshrined, but only as a principle and not a right. It is only later on in both human rights and decolonization settings that official UN terminology confirms that peoples enjoy a right of self-determination. The UNGA issued a series of declarations linking self-determination and decolonisation. One of the most important of these was Resolution 1514 (XV), which can be read as an endorsement of self-determination within former colonial territories. The provision declared that 'all peoples have the right to self-determination', but it then went on to state that 'any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.' Later in Resolution 1541 (XV), the UNGA set out the procedure for non-self governing territories as covered under Chapter XI of the Charter. This Resolution was relied upon in the Western Sahara Case because it specified the avenues available for non-self governing territories in fulfilling the right to self-determination. Under Principle VI, options included:

(a) Emergence as a sovereign independent State;
(b) Free association with an independent State; or
(c) Integration with an independent State.

Principle VII went on to require the ‘free and voluntary choice by the peoples of the territory’ in settling on one of these outcomes.

For a system based on membership of states, the phenomena of self-determination and decolonisation have presented a challenge to international law. Berman captures this idea in his study of the norm’s evolution, describing it as ‘exceptional’, because it requires ‘a limited suspension of the usual legal norms.’ We have seen above that international

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11 Article 1(2) reads, ‘The purposes of the United Nations are...2. To develop friendly relations among nations based on respect for the principle of self-determination of peoples, and to take other appropriate measures to strengthen universal peace.’
13 The right was confirmed a decade later in UNGA Resolution 2625 (XXV), ‘Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations’, 24 October 1970.
14 Paragraph 2.
16 UNGA Resolution 1541 (XV), ‘Principle which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter’, 15 December 1960.
legal personality attaches to states, but what about peoples? Berman suggests that the law sometimes becomes more flexible when it recognises the legal status of a people before they have achieved statehood. This is ‘the paradox of self-determination – the assertion of a right to become a right-holder’. Procedurally, such a right is difficult to fulfil within the confines of ICJ adjudication. The Court’s contentious jurisdiction only allows other states to pursue the rights of would-be states. Advisory opinions are also restrictive, because we will see that, at least in the first case study, the people seeking their self-determination, the Sahrawis, were prevented from presenting their case before the Court.

Perhaps the biggest obstacle in realising self-determination, however, has been definitional, rather than procedural. What constitutes a valid self-determination unit, or people? Further, what is the relationship between definitions of selfhood and territory? Part Two’s Introduction touched on these ideas through the prism of the uti possidetis juris norm or policy. There we saw that colonialism’s legacy has been enduring because of the way in which former administrative boundaries have often been transformed into international borders. Thus, when trying to balance uti possidetis and self-determination, the most fundamental question to ask is: what should come first, the territory or the people? In his well-known statement in the Western Sahara Case, Judge Dillard declared, ‘It is for the people to determine the destiny of the territory and not the territory the destiny of the people.’ Despite this sentiment, many examples from the Court’s docket as well as UNGA declarations suggest that the ‘static principle’ of uti possidetis has trumped its ‘dynamic’ counterpart of self-determination. Further, although the Court has implicitly favoured uti possidetis, it has failed to acknowledge the inevitable conflict between these two norms. Yet Cassese reminds us that these two approaches are irreconcilable: ‘they can coexist only if self-determination makes way for the political need to respect existing boundaries.’ The quest for stability through colonial legacies has resulted in an approach to self-determination limited and limiting to those wishing to achieve postcolonial

18 Ibid, at 78.
20 See Part Two’s Introduction, at 112-115.
personality. Two examples of the struggle for self-determination form the subject of the following discussion.
Chapter Five: 
Determining the Limits of Law in the Western Sahara Case

CHAPTER FIVE

Determining the Limits of Law in the Western Sahara Case

1) Introduction

The ICJ’s *Western Sahara* Advisory Opinion handed down in 1975 has retained a prominent place within international legal scholarship because of its confirmation of the right to self-determination at least within colonial boundaries. It is ironic then that the territory along with its people, the Šaḥrāwīs, still lack statehood and international legal personality. In spite of jurisprudential notoriety, Moroccan occupation of the territory has rendered the Šaḥrāwīs unable to exercise the right to choose their own form of government as guaranteed by the ICJ over three decades ago. For Castellino, the

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1 The name ‘Western Sahara’ is derived from the great central African desert stretching from the Red Sea to the Atlantic Ocean and covering much of the northern and central parts of Africa. Sahara is derived from the Arabic word for desert, al-šāhraw (مشراف) and šaḥrāwī is the relative adjective used to describe a person from the place. Arabic is broadly divided into colloquial and Modern Standard (fātā) forms and some of the words in this chapter reflect this diversity. Spelling discrepancies are compounded by the fact that there are many differences between French and English transliteration. Wherever possible, the meaning of Arabic words or their English transliteration is given in the fātā/English form except in French quotations.


3 Knop points out though that the judgment is much more than a useful account of self-determination: ‘the court engaged not only the specific challenges made to the account of self-determination as free choice, but also the more general problems of interpretation of a historically Eurocentric international law and the appropriate international legal remedy for colonialism.’ K. Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002), at 116.

4 Technically, the territory is still under the gaze of international legal regulation, but at least in relation to self-determination, the territory’s legal status remains unfulfilled. As a result of Moroccan occupation, the Šaḥrāwīs fall under the international law of occupation as well as human rights law. The ICJ considered how these two bodies of law applied to an occupied territory in the case discussed in the next chapter on the *Wall* Advisory Opinion. For an excellent historical study of the Western Saharan struggle incorporating political and legal perspectives, see T. Hodges, *Western Sahara: The Roots of a Desert War* (Westport: L. Hill, 1983).

5 The case of Palestine could also be classified as a non-self governing territory and shares many similarities with the present Case. The legal status of the current state of Palestine and unfulfilled right to self-determination as discussed in Chapter Six.

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'relevance of this case to general international law of self-determination is enormous since it is one that falls between the two categories of “salt-water” colonialism, and the issue of possibly neo-colonialism.'6

Although it is typical to look beyond the ICJ in understanding this denial of Šahrawī statehood, this chapter turns to a textual analysis of the proceedings to interrogate international law’s constitutive role in the impasse. Many of the reasons for the Opinion’s limited effect cannot be blamed on ‘political’ problems outside the Peace Palace; they lie embedded within the framework of the proceedings and the Court itself. Especially once the reader’s gaze strays from the familiar confines of self-determination rhetoric, it becomes clear that the pleadings and the Opinion represent a debate over what role international law should play in the wake of colonialism. On such considerations no dispositif was rendered; these contested ideas, however, lie at the heart of the various positions taken both at the bar and the bench. Confusion about international law’s purpose in supporting the claims of non-European peoples and cultures pulled the Court between particularism and universalism: should the Court have embraced instances of local Moroccan and Mauritanian rule, or should the ICJ have defeated such claims by upholding the right to Šahrawī self-determination? Although the Court ultimately remained faithful to the principle of self-determination, we should not see the Opinion simply as an endorsement of Šahrawī rights. Rather, it was an ambivalent compromise that employed Western approaches of territoriality to silence the claims of regional powers.7

In the various pleadings and judicial opinions8 competing narratives and strategies vied for credibility within the crucible of legal contestation about (post)colonial possibilities for the territory of Western Sahara. All arguments were structured by both general institutional biases of the Court as well as the nature of the matter at hand,

7 Okere argues that the language used by the Court was more diplomatic than legal because of the way it supported the various States simultaneously. B O Okere, 'The Western Sahara Case' (1979) 28 International & Comparative Law Quarterly 296, at 310.
8 Although there is a large literature devoted to the Western Sahara Opinion, few of these studies have examined the pleadings. Notable exceptions include: M Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (Cambridge: Cambridge University Press, 2nd edition, 2005), at 297-300; Knop, supra n 3, M M Ricciardi, ‘Title to the Aouzou Strip: A Legal and Historical Analysis’ (1992) 17 Yale Journal of International Law 301 and especially M N Shaw, ‘The Western Sahara Case’ (1978) British Yearbook of International Law 119.
especially through the questions raised by the UNGA in its request for the Opinion. Each doctrinal account was much more than an exposition of legal rules, though; strategies employed and the substance invoked were both illustrative of the range of argumentative possibilities within the Courtroom. The success of certain claims helps us map out the legal grammars or competencies of argument in the Case, highlighting those representations of law that are most suited and suitable to their Peace Palace context. Such a focus allows us to explore my concern in the thesis to map the grammars of argument in ICJ territorial disputes. Further, we can also begin to approach the deeper focus of the thesis on universalism, because the Case provides a rich array of material about the harmonies and dissonances between European and non-European approaches to authority over territory.

The chapter discusses a number of themes that have already emerged in Part Two, especially the themes of historical retelling, international legal personality under colonialism and different cultural traditions towards territorial order. Perhaps because of its advisory nature, the Case is richer than those explored in Chapters Three and Four. The larger number of parties allows greater comparison not only along substantive lines, but strategic lines namely, those strategies of discursive delivery employed by the parties. After setting the scene and summarising the Opinion itself, the chapter is divided into two halves. First, through the structuring device of the law/politics dichotomy, argumentative strategies employed by the parties and the Court are reviewed. Ever mindful of the political backdrop of the Case, all speakers constructed differing accounts of law’s relationship with politics to support their respective opinions about the role expected of international law in the matter. Second, the chapter considers some matters of substance pertinent to the thesis’ concern about universalism: patterns of non-Western statehood and the construction of selfhood through international law. In a case renowned for embracing the rights of colonised people, it is easy to overlook how the Court developed such a position. Faced with the competing claims by a number of parties and policies, the Court confirmed the Şabrāwī self through a broader denial of non-European statehood. What patterns of discourse influenced the Court in its decision and how did the Court resolve the tension between law and politics as well as particularism and universalism in its Opinion?
2) Confusion over the Fate of Western Sahara and the Request for an Advisory Opinion

 a) Historical Background

The territory now known as Western Sahara is bordered by Morocco to its North, Algeria to its North East, Mauritania to its East and South and the Atlantic Ocean (along with the Canary Islands) to the West.9 As a result of the Spanish presence, the northern segment, comprising roughly one third of the territory, is known as Saqîyyat al-‘Ijmâ‘ (or red canal, in Arabic) and the bottom two-thirds as Rio de Oro (or river of gold, in Spanish). Much of the land is incredibly dry, receiving very low rainfall throughout the year, except for its thin coastal strip, thus encouraging nomadic as opposed to pastoral habitation.10 Western Sahara is blessed with rich fishing resources and phosphate was also discovered in abundance by Spain in 1947.11

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10 ICJ Reps (1975), at 88.
Chapter Five: Determining the limits of law in the Western Sahara Case

Western Sahara has nourished and been nourished by numerous empires in its history, including the Islamic dynasties of the Alawites (1666-present), the Almohads (1145-1269), the Almoravids (1056-1147), the Idrisids (788-974), the Merinids (1244-1465) and the Saadians (1554-1659). It is incorrect to conceive of the entity of Western Sahara subsisting in its current form before the colonial era; this also applies to the Şahrâwî people themselves. Nevertheless, it is possible at least to point out that the territory was an integral part in the extensive trade networks spanning the Sahara in the region and broadly fell within the zone of Islamic civilisation of North-West Africa. Largely because of its desert topography, social organisation was tribally based, with numerous independent groups forging intersecting alliances across the territory and beyond. Religiously the Şahrâwîs are Sunni Muslims and their speech of the Hassaniyya dialect of Arabic reflects this, but ethnically it is simplistic to define them as Arabs, comprising as they do a rich mix of indigenous peoples as well. It is common, however, to include Western Sahara within the confines of the Arab World by reason of its language and its religion. Thus, the Şahrâwîs can be regarded as African, Muslim, largely Arabo-Berber nomadic tribes with close cultural links to the neighbouring States of Morocco, Algeria and Mauritania – all of which are members of the Arab League.

While the region was well-known within the historical and cultural traditions of the Muslim world with the spread of Islam in the wake of the Prophet’s death in 632 CE, Europe remained largely ignorant of the territory and its people until the Spanish Age of ‘Discovery’ and later, the scramble for Africa in the late nineteenth century. Spain and Portugal were the main European powers to penetrate the region, and Riedel classifies Spanish contact with Western Sahara into three historical periods: between 1385 and 1884 when relations were sporadic and focussed on Spain’s fishing and trade interests in the Canary Islands; Spain’s declaration of a protectorate over Rio de Oro, along with its consolidation in the wake of the Berlin Conference of 1884; and finally, complete Spanish

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12 Damis attributes this dialect to the gradual infiltration of Maqil Bedouin Arabs, originally hailing from the Arabian Peninsula in the fourteenth century. This tribe was joined by other North African migrations so that by the end of the seventeenth century, after intermarriage with Berber tribes and conversions to Islam, local Berber tribes claimed Arab descent and spoke Hassaniyya Arabic. Ibid, at 5-6.


14 In its written memorials, Spain offered a detailed account of the various agreements created to preserve Spain’s fishing interests off the coast, as well as to protect its sailors in the wake of shipwrecks. See especially, Spain, Written Submission, International Court of Justice: Pleadings, Oral Arguments, Documents, Western Sahara, vol I, at 73-425.

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occupation of the inhospitable terrain from 1934.\textsuperscript{15} During the latter half of the nineteenth century and early twentieth century, the Spanish and French along with their British and German counterparts sought to consolidate their territorial claims in the region. Since its invasion of Algeria in 1830, and given its interests in West Africa and Morocco, France was the dominant African partner during this period.\textsuperscript{16} Because of Spain’s earlier connections with the territory of Western Sahara, however, the two European powers entered into a series of relatively amicable treaties, in particular those of 1900, 1904 and 1912, which sought to delineate their respective interests in North West Africa.\textsuperscript{17}

Although France and Spain were both eager to ignore and override the indigenous systems of rule extant in the territory, indigenous tribes, as well as neighbouring powers, maintained connections with Western Sahara. Morocco in particular propounded a policy of ‘Greater Morocco’ after its independence in 1956,\textsuperscript{18} and its most well-known spokesperson was Allal al-Fassi.\textsuperscript{19} This ideological perspective not only justified the inclusion of Western Sahara into Morocco but also laid claim to large parts of Algeria and the whole of Mauritania. In fact, 1963 had witnessed a border conflict between Morocco and Algeria.\textsuperscript{20} Furthermore until 1969, Morocco refused to acknowledge Mauritania’s right to exist as a separate State even in the face of significant regional opposition to such posturing.\textsuperscript{21}

\textsuperscript{15} E H Riedel, ‘Confrontation in the Western Sahara in the Light of the Advisory Opinion of the International Court of Justice of 16 October 1975: A Critical Appraisal’ (1976) 19 German Yearbook of International Law 405 at 408-410. Even in relation to the post-1934 period, it is difficult to characterise Spain’s presence in the area as amounting to comprehensive occupation. Shaw cites Gretton on this point, who argues that the Spanish only established complete administrative and military control in the 1960s. Shaw, \textit{supra} n 8, at 121. This situation was similar to that discussed in Chapter Three, where we saw that Italian occupation of Libya was paltry for decades after the formal creation of the colony.

\textsuperscript{16} In fact, Spain’s limited and essentially insignificant presence in Africa compared with its European neighbour, France, is not dissimilar to Italy’s own position in North Africa and particularly Libya. Like Spain, Italy was anxious to stake a claim over a part of the continent for national glory, and Libya is perhaps the prime example of such ambitions. The nature of Italy’s presence in North Africa during the same period is touched on in Chapter Three.

\textsuperscript{17} Agreement or Protocol between Morocco and Spain, concerning the cession of Ifni, 27 June 1900, 188 CTS 457; Convention between France and Spain concerning Morocco, 3 October 1904, 196 CTS 353; Convention between France and Spain respecting relations in Morocco, 27 November 1912, 217 CTS 288.

\textsuperscript{18} For an overview of Morocco’s regional ambitions, see Hodges, \textit{supra} n 4, ch 8, ‘Greater Morocco’, 85-98.

\textsuperscript{19} Damis, \textit{supra} n 11, at 15. Judge De Castro is the only member of the Court to discuss al-Fassi and the ideology of ‘Greater Morocco’. It must be noted that this concept along with its most prominent defender did not figure in the pleadings themselves. ICJ Repts (1975) (sep. op. De Castro), at 127-128.


Chapter Five:
Determining the limits of law in the Western Sahara Case

Despite the development of the self-determination norm explored in the first few decades of the UN as explored in Part Three’s Introduction, the norm’s application to Western Sahara was complicated by Spanish intransigence\(^{22}\) and competing regional claims and interpretations of its application. Spain had delayed its withdrawal from the territory for some time, thus allowing Morocco and Mauritania to develop stronger claims to the territory on its ‘independence’. According to Shaw, the ‘early Spanish dilatoriness was not in the context of colonial behaviour exceptional, but the claims maintained by neighbouring States were.’\(^{23}\) This situation contributed significantly to the UNGA’s policy difficulties; although the Assembly had placed the situation of Sahara’s decolonisation on its agenda back in 1963, its stance was far from clear on the eve of the Advisory Opinion in 1974. Such ambivalence was indicated by its choice of seeking the ICJ’s assistance in the first place; it was unusual to involve the Court in decolonisation issues, and in this instance the UNGA was partly swayed by the lobbying of Morocco and its supporters. Morocco, Spain, Algeria and Mauritania all had to operate within the context of the UN’s decolonisation policy, but beyond this they all pursued their own agendas. Their positions regarding a mooted referendum and the UN’s role all shifted substantially over the course of the sixties up until 1975.\(^{24}\) Dynamics of diplomacy within the UN, the Arab League and the OAU all influenced the formulation of policies sometimes supporting or sometimes stalling the chance for a UN-led referendum for the territory.

The impetus for the Advisory Opinion request came in the wake of intense Moroccan and Mauritanian lobbying after Spain’s announcement in 1974 supporting a referendum which would have seen the Sahrawīs determining their future in the wake of Spanish withdrawal. Keen to avoid the political fallout from a military invasion and yet mindful of time constraints in securing his hold over the territory, Morocco’s King Hassan supported the Court’s involvement as a stalling tactic. Thus, he ‘would have the Western Saharan dispute submitted to the International Court of Justice at The Hague and thereby persuade the UN to postpone the referendum while the territory’s legal status was under the

\(^{22}\) Mauritania argues that Spain did not comply for a number of years with UNGA requests about Western Sahara’s move towards self-determination. Written Statement, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol III, p. 7. See also Sloua, Morocco, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol IV, p. 120.

\(^{23}\) Shaw, supra n 8, at 122.

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court’s laborious and time-consuming scrutiny. Initially Morocco attempted to bring a case against Spain under the Court’s contentious jurisdiction, but Spain rejected such a move. The UNGA was then called on by Morocco and some other Arab states to invoke the Court’s advisory jurisdiction. Moroccan motivations for such a strategy were easy to determine from statements made at the time and military action that continued both during and after the judgment. For example, Hodges cites King Hassan as declaring: ‘If peaceful means do not produce results, only armed struggle will remain for the Moroccan people...[and in relation to the ICJ Opinion]...whatever the result Morocco will recover its rights over its despoiled provinces no later than the end of [1975].

This deferment of the Assembly’s decolonisation duties in favour of the Court was unusual: typically the Assembly assessed the situation on the ground without the assistance of the ICJ and without reference to historical considerations. It was even more unusual to block planned referenda. Because of widespread misgivings over such an approach, it was difficult to garner sufficient support for resolution 3292 (XXIX) seeking the Court’s assistance. Many Arab States were supportive of Moroccan and Mauritanian claims over the territory, but other non-Arab African States in particular resisted any watering down of the Šahraj right to self-determination. For example, a Kenyan delegate to the UN stated, ‘The people of Spanish Sahara should be the court.’ With Moroccan troops never far from the borders of Western Sahara before and during the Case, it would have been difficult to suspend belief and uphold a clear separation between law and politics. Could the Court be

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25 Hodges, supra n 4, 183.  
26 ICJ Reps (1975), at para. 29.  
27 Franck, supra n 24, at 706; Hodges, supra n 4, at 185.  
29 Quoted in Hodges, supra n 4, at 207.  
31 Franck, supra n 24, at 700-701.  
32 Ibid, at 706.  
33 During oral pleadings, Spain expressed its misgivings to this effect, but missed the irony that it had carried out such policies for almost a century in the same territory: ‘Je dois donc, à ce stade, exprimer l’appréhension avec laquelle nous avons entendu la tenue générale de certaines interventions devant la Cour, qui n’ont pas caché leur conviction qu’un éventuel avis de la Cour aurait une influence décisive dans la résolution de ce qui, sous le masque d’un litige juridique avec l’Espagne, constitue en réalité le but de s’installer souverainement sur ce territoire africain, quelle que soit la volonté de sa population autochtone.’ [At this stage, I must express the apprehension with which we have heard the general tenor of certain interventions before the Court which did not hide their conviction that an eventual opinion from the Court will have a decisive influence in the resolution of this matter which, in the guise of legal dispute with Spain, in fact constitutes the goal of its sovereignty over this African territory, whatever the will of its indigenous population.] Sedo, Spain, Oral
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insulated from the broader context through legal argument alone? Through its request for an Advisory Opinion of an unusually historical nature, perhaps this is what the Assembly was trying to do: maintaining faith in law as separate and distinct from politics. This tactic was also vital for the main participants in the case itself, as will be shown below.

One of the ICJ’s exemplary self-determination cases was initiated in the face of widespread Third World unease about the need for adjudication, and the focus of its consideration, the Šahrāwī people, were silenced through the process.\textsuperscript{34} We mentioned above that such silencing of non-Europeans as objects of adjudication was common to the case law of nineteenth century and PCIJ jurisprudence.\textsuperscript{35} However, with the process of decolonisation all but finished, the Opinion reminds us of continuities, rather than ruptures, with former instances of colonial adjudication and silencing. A number of states would seek to speak for the Šahrāwīs, but the nature of the Court’s jurisdiction permitted no standing or rights to the people themselves.\textsuperscript{36} Such a turn of events was a blow to the aspirations of the recently formed Polisario Front,\textsuperscript{37} which expressed its disbelief over a judgment that would ‘convey the destiny of peoples before the Court of The Hague in our total absence.’\textsuperscript{38} In the words of a prominent Šahrāwī, ‘the Sahrawis will not accept the whole world speaking for them as if they were cattle.’\textsuperscript{39}

\textit{b) A Summary of the Pleadings and the Opinion}

Partly because of Mauritanian and Moroccan claims to the Spanish territory in the pre-colonial period, the advice sought by the UNGA from the Court centred on the legal status of Western Sahara on the eve of Spanish colonisation and the nature of any pre-existing legal ties with neighbouring powers. Thus as per Articles 31 and 68 of the ICJ Statute and

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\textsuperscript{34} Joffe, \textit{supra} n 30, at 16.
\textsuperscript{35} For example, see Part Two’s Introduction, at 102.
\textsuperscript{37} POLISARIO, or Frente Popular de Liberación de Saguía el Hamra y Río de Oro (Popular Front for the Liberation of Saguía el-Hamra and Rio de Oro) was officially established on 10 May 1973 in pursuit of independence from Spain. Once Spain left the territory, it was replaced by Morocco and Mauritania until 1979 and now only Morocco as the occupier. Polisario continues to struggle against the occupation. For general information on the origins of nationalism and Polisario, see Hodges, \textit{supra} n 4, at chs 14 & 15.
\textsuperscript{38} Ibid, at 186.
\textsuperscript{39} Ibid.
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Articles 3, 87 and 89 of the Court’s Rules, the UNGA asked the following questions of the Court:

1) Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (terra nullius)?
2) 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?

The same resolution 3292 (XXV) acknowledged the UNGA’s work in relation to decolonisation, but did not explicitly ask the Court to consider decolonisation or self-determination. Perhaps it was assumed that this would be understood by the Court and other participants and in fact it was: all positions contained some exploration of this relationship. According to the Court, ‘The object of the request is...to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory.’

Some procedural aspects of the Case relating to participating states should be noted. Under resolution 3292, Spain as the ‘administering power’ and Mauritania and Morocco as ‘interested parties’ were called on to submit to the International Court information and documents that would be needed to clarify the two questions. These States all presented lengthy written and oral submission to the Court. Algeria also made an important contribution through its eloquent advocate, Mohammad Bedjaoui, and Zaire made a brief but highly unconventional appearance during the oral pleadings. The Court was furnished with a dossier compiled under the auspices of the Secretary-General as per Article 65(2) of the Court’s Statute, but this document was insufficient for providing the necessary background, and the Court was forced to rely heavily on the materials submitted by the participating States. Finally, a number of mostly Latin American States submitted brief letters to the Court as per Article 66(2) of the Statute, generally urging the Court to be cognisant of the overriding importance of self-determination in the Case.

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40 It should be noted that Mauritania was called the Mauritanian Entity, Bilād Shinqitī [meaning ‘country of the Shinqitī’ in Arabic] or the Shinguitti entity.
41 The text of the resolution is reproduced in the Opinion: ICJ Reps (1975), at 13-14.
42 ICJ Reps (1975), at 27. In his separate opinion, Judge Dillard was relieved the Court had chosen to place potentially non-legal questions within the context of contemporary decolonisation practice. ICJ Reps (1975) (sep. op. Dillard), at 117.
43 International Court of Justice, Pleadings, Oral Arguments, Documents: Western Sahara, vol 1, pp. 24-60.
44 These States included: France, Panama, Nicaragua, Chile, Guatemala, the Dominican Republic, Ecuador, Costa Rica, Colombia. Ibid, at 63-72.
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The contentious nature of the Case was deepened during preliminary hearings about the appointment of *ad hoc* judges. The bench already included the Spanish judge Frederico de Castro y Bravo, and so the question arose regarding the rights of Mauritania and Morocco to appoint their own judges. In seeking such a right, Morocco invoked Article 68 of the Statute, which states, ‘In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognises them to be applicable.’ As Morocco had attempted to bring contentious pleadings before the Court in 1974, it argued that there was ‘une question juridique actuellement pendante’ and that it could rely on Article 31(2) of the Statute.

Mauritania could not rely on the technicalities of the Statute, and instead made reference to the UNGA’s recognition of its status as an interested State.

It is interesting to contrast these two perspectives supportive of the Case’s contentious nature with the views held by Spain and Algeria. Perhaps because its own judge was a member of the Court, Spain tried to dissociate the proceedings from any contentious connotations and reminded the Court of its advisory attributes. Algeria also sought to steer Mauritania and Morocco from the battle lines by stressing the common ties uniting the Maghreb above particular interests. Bedjaoui declared:

> dans cette affaire qui concerne une population arabe et musulmane, je suis sûr que le Maroc, la Mauritanie et l’Algérie trouveront dans leurs fraternelles relations, dans leur solidarité et dans leur génie propre, le moyen de transcender la difficulté actuelle et de dégager une solution commune, l’essentiel étant et demeurant pour tous et pour chacun la décolonisation et la libération du Sahara.

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47 [A legal question currently pending]


51 [In this matter concerning an Arab and a Muslim population, I am sure that Morocco, Mauritania and Algeria will find in their fraternal relations, in their solidarity and in their own character, the means to transcend the present difficulties and to find a mutual solution, its basis being and remaining for all and for each country the decolonisation and liberation of Sahara.] Bedjaoui, Algeria, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol IV, p. 60. Spain took up this rhetoric of Arab solidarity itself immediately after Bedjaoui’s statement, declaring ‘Permettez-moi aussi de manifester notre satisfaction devant la présence de représentants de gouvernements de pays auxquels l’Espagne est reliée par des liens d’affection, ces mêmes liens qui nous rattachent traditionnellement à tous les pays arabes.’ [Permit me also to demonstrate my satisfaction before the presence of the representatives of...
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Ultimately, the contentious nature of the pleadings was acknowledged only up to a point: the Court granted Morocco’s request for a judge ad hoc by ten votes to five to balance Spain’s judge, whereas Mauritania’s claim was narrowly defeated with an eight to seven vote split.52

In contrast to these issues of procedure and jurisdiction, it is harder to identify common themes in argument in relation to the two questions asked by the UNGA. Because of the pleadings’ length, as well as some divergences between the oral and written stages of submission, arguments on the merits were not always clear. However, at least in relation to the first question about terra nullius, most participants and all judges stated that Western Sahara was not a territory sans maître [without a ruler, terra nullius]. It is unfortunate that the Court did not go further in its Opinion and offer its interpretation as to who the territory’s ruler might have been on the eve of Spanish ‘protection’.53 Its support for the self-determination of the territory’s people nearly a century later indicated its recognition for contemporary selfhood, but did the peoples of Western Sahara possess an identifiable legal personality before Spanish colonisation? The Court retroactively imposed the territorial boundaries of the Spanish territory onto the region before its colonisation, but what was the exact status of its people?54 These questions were left unanswered by the Court, but are further examined below in the Chapter’s final section.

In trying to answer the first question, Spain’s position on the status of the territory was slippery and somewhat contradictory. Although it held itself up as a benevolent colonial power intent on self-determination of the Western Saharan people and dismissive of its neighbours’ irredentist claims, it also displayed a degree of contempt for the capacities of the local population, and thus its exact position on the doctrine of terra nullius...
was unclear. In its historical overview of the pre-colonial period, for example, there was very little recognition of an identifiable Western Saharan people constituting a separate entity. Like the Court, Spain seemed to impose boundaries onto its territory, thereby artificially cutting off Saharan tribes from regional connections. As in Chapter Four’s discussion of the Bahrain/Qatar Case in the Gulf, the Opinion highlights the difficulties of applying concepts of bounded territoriality to cultures and places based on nomadic migrations.

Morocco’s answer to the first question was in contrast to Spain’s arguments and the colonial power’s purported actions. In its pleadings, Morocco did not need to explore the doctrine of *terra nullius* as it applied specifically to the Western Saharan territory, because its entire case rested instead on its ability to prove Moroccan sovereignty; *terra nullius* was a *non sequitur*. A degree of compromise between the Moroccan and Mauritanian arguments is evident: Morocco accommodated Mauritanian claims over the south of the territory in what must have been a bid for the two powers to effect a neat division of Western Sahara upon Spanish withdrawal. Events after the pleadings reflected this closely. Thus for Morocco, ‘il n’en reste pas moins qu’aux yeux du Gouvernement marocain il n’existe pas de *no man’s land* entre la souveraineté marocaine et l’ensemble mauritanien.’

Partly because Mauritania’s historical record was so much weaker, it explored the doctrinal implications of *terra nullius* in some detail and the various opinions of the Court were most sympathetic to this line of argument. Algeria offered an even more rigorous and critical account of the doctrine, but the implications for international law were perhaps too radical, and the Court rejected them out of hand; in fact, the Opinion did not refer at all to the perspective offered by Algeria’s counsel, Bedjaoui. Mauritania conceded that the doctrine of *terra nullius* was difficult to characterise because of the many interpretations.

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55 Generally see Written Submission of Spain, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol I.
56 Morocco recognised this complementarity of arguments explicitly: ‘Les mémoires mauritanien et marocain ont été rédigés indépendamment l’un d’autre…Mais…le point de vue marocain et le point de vue mauritanien...sont en réalité complémentaires.’ [The Mauritanian and Moroccan memorials were drawn up independently of one another…but…the Moroccan point of view and the Mauritanian point of view are actually complementary] Morocco, Slouki, Morocco, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol IV, at 118.
57 [It is out of the question as far as the Moroccan government is concerned that there existed a no man’s land between the Moroccan sovereignty and the Mauritanian Entity.] Morocco, Written Statement, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol III, at 204.
58 Judge Ammoun, however, cited Bedjaoui with approval: ICJ Reps (1975) (sep. op. Ammoun), at 85-86.
given to it in theory and practice. Although Mauritania noted that some European perspectives classified many non-European entities as *terra nullius*, it rejected this by showing that state practice had largely supported treaties of cession with local rulers instead of occupation. Mauritania limited the application of *terra nullius* strictly to lands which were uninhabited or without any political coordination. Western Sahara was contrasted with this because it was "très structurées avec une organisation politique complexe même si elles étaient non étatiques." Thus, Mauritania tried to argue that the concept of *terra nullius* in the nineteenth century was only applicable to unorganised societies. What was less clear, however, was whether the complex structures of Saharan society had been endowed with international legal personality as discussed in Part Two’s Introduction. This conundrum is explored at length in the chapter’s final section.

Through the application of inter-temporal law, the Court found by thirteen votes to three that Western Sahara was not *terra nullius* because European state practice during the late nineteenth century had preferred cession over occupation. The Court acknowledged the fierce debate that this concept continues to elicit, but ultimately was convinced that the ‘Standard of Civilisation’ was not the applicable law *per se* at the time. ‘Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terra nullius*.’ Crawford argues that this stance was consistent with the Court’s jurisprudence: earlier cases had recognised the legal personality of entities beyond Europe. Although the Court may have been following its own

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60 [Very structured with a complex political organisation even if it were not a state.] Ibid, at 53.
61 Contrast this position with that of Koskenniemi’s as discussed in Part Two’s Introduction, where he argued that it is best to consider European territorial control in the period as a result of occupation rather than cession. This suggests that many non-European peoples were not recognised as having any international legal personality at the time, at 108.
63 For example, the US Nationals in Morocco Case and the Rights of Passage Case, J Crawford, ‘The General Assembly, the International Court and self-determination’, V Lowe & M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge: Cambridge University Press, 1996), at 597, footnote 52. Roussellier counters this with the PCIJ’s Eastern Greenland Case. According to Roussellier, ‘The PCIJ’s definition implies that *terrae nullius* are lands not claimed by any states, which again is an approach consistent with the Court’s understanding of sovereignty over a disputed land as being derived from international treaties expressing consistent recognition by other states of a state’s claim over a given land.’ Thus, perhaps it was consistent here for the Court to recognise the international legal personality of Morocco, as it has entered into treaties with European powers at the time. However, the status of Saharan tribes was more questionable. J E Roussellier, ‘Elusive Sovereignty - People, Land and the
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Jurisprudence, compelling evidence was brought before the Court indicating that territories such as Western Sahara were not regarded as legal entities at the time of Spanish colonisation, and the Court’s gloss over such an uncomfortable period of international law’s history is troubling. Some of the dissenting positions were uncomfortable with the overly historical and academic nature of the first question on terra nullius. Judges Dillard and Gros regarded the question as ‘loaded’ (read ‘political’) and Petren as ‘pointless and consequently inappropriate’. Despite this, most of the bench seized the opportunity presented to them to define the doctrine of terra nullius in palatable terms for the international community.

The second question about legal ties was even more difficult to determine and it stimulated a whole range of competing perspectives about the extent to which international law can recognise non-European forms of rule over territory. Both Mauritania and Morocco asked the Court to step beyond the borders of traditional international law in trying to imagine the climatic, social, political and religious situation extant in North West Africa on the eve of purported Spanish colonisation. The Court appeared disposed to these perspectives by recognising the presence of legal ties between Morocco (fourteen votes to two) and Mauritania (fifteen votes to one) with the territory. However, as in the words of Judge Gros, the majority’s ultimate decision was ‘enigmatic’; these legal ties were less than sovereign and had no direct bearing on the prevailing legal situation. Roussellier suggests that the basis for the Court’s difficulties stemmed from its failure to articulate ‘what should be considered [as] acts defining the effective exercise of sovereignty’. The Court was aware that its primary function was to assist in the UNGA decolonisation

64 See especially Bedjaoui’s detailed exposition of the idea that terra nullius has developed in three phases: its Roman period where all lands non-Roman were nullius; the era of ‘discovery’ in the fifteenth and sixteenth centuries when all non-Christian entities were deemed as nullius and finally, the age in question, which regarded all the lands inhabited by non-‘civilised’ peoples as nullius. Bedjaoui, Algeria, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol IV, at 455-456. See Shaw’s rebuttal of Bedjaoui’s arguments: Shaw, supra n 8, at 129-130. Okere points out that the jurisprudence of the nineteenth century was heavily supportive of a finding of Western Sahara as terra nullius. Furthermore, this intellectual influence has continued in the writings of such prominent figures as Hall, Oppenheim, Schwarzenberger and Jennings. Okere, supra n 7, at 305.
68 Roussellier, supra n 63, at 61. Further, for a very useful tabulation of the respective arguments of the Parties and the bench regarding effectivité, see Ibid, at 62.
process, and the legal ties it had recognised did not affect this. Thus the Case can best be characterised as a latent conflict between territorial integrity and self-determination. Yet again, however, the Court refused to enter the dispute directly and never ruled on how to resolve this norm conflict: instead, the Court tried to accommodate many perspectives and thus failed to offer a clear position on these issues. There was no determinate position provided by doctrine, but this was just as well for the goal of the Court in affirming self-determination at all costs – even a confirmation of European approaches to authority over territory.

3) Playing with the Rules: Strategies of Argument before the Court

At the heart of all positions presented in the Western Sahara Case was an exploration of the relationship between law and politics as set out in Chapter One. Some substantive examples of this dichotomy are explored below in relation to colonialism and non-European modes of authority over territory. These substantive positions about the place of colonialism within international law, however, can only ever succeed by speaking the language of their context with competence: how arguments are presented is as important as their substance. Because the substance of law is itself indeterminate and requires constant redefinition vis-à-vis politics, a crucial device in advancing substantive claims is the ability to construct a legitimate and authentic account about the relationship between law and its perceived antitheses, such as morality, history, emotion, fact and especially, politics. Although these dichotomies are often inconsistent or are transposed throughout any one narrative, they at least highlight the strategies employed by the various participants. This in turn indicates competing characterisations of law, raising questions such as: can law speak the same language as the social sciences, and what is the role of emotion? This section will evaluate some of the strategies – or legal grammars - employed at the bench and the bar in staking an authentic characterisation of the relationship between law and politics. Such strategies include, but are not limited to, recognition of the institutional rules of the Court; attempts to make law distinct from other forms of social enquiry, especially history; problems of

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69 Shaw, supra n 8, at 149.
70 Koskenniemi, From Apology to Utopia, supra n 8, at 300.
interpretation and language; and the use of European comparisons as a way of making sense of Arab-Islamic culture.

Debate devoted to preliminary questions about ad hoc judges, the Court’s jurisdiction and the procedural differences between contentious and advisory proceedings all displayed different perspectives on the relationship between law and politics in the courtroom. International law as embodied in the practice of the Court rests on a paradox: it is separate from politics, but requires the consent of international society’s pre-eminent political entities, states. The structure of the provisions of the ICJ Statute initiating proceedings is based on a Lotus-esque vision of international law, which is then substantially watered down once States choose to submit to its jurisdiction. Typically, significant energy and time is spent disputing and/or justifying the Court’s jurisdiction vis-à-vis consent. Often these parts of the pleadings and judgments are heavily formulaic and discussions about the Court’s jurisdiction vary very little across the cases. This was acknowledged by Morocco in the Peace Palace: ‘il est certaines questions spécifiques que l’on doit aborder et que la Cour, normalement, se pose à l’occasion de l’interprétation qu’elle doit faire de la demande qui lui est addressée.’ Morocco applied this assessment of the etiquette of exposition in support of the Court’s jurisdiction.

In the Opinion a number of judges tried to confine the Case within the perceived limits of its advisory jurisdiction so that the issue of consent could be put to the side, but in fact many remarks indicate that the Court’s jurisdiction was difficult to define. Spain identified the contentious nature of the pleadings perhaps in a bid to boost its arguments against jurisdiction. Spain characterised the contentious quality of Morocco’s case ‘non seulement par les theses qui ont été soutenues, mais aussi [more importantly for this section’s focus] par l’emploi de certaines expressions de la procédure contentieuse, car on a parlé du «mémoire marocain», pièce écrite qui, selon l’article 44 du Règlement, est

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71 The Case of the S.S. “Lotus” (France/Turkey) (1927) P.C.I.J., Series A, No. 10.
72 See Part Two’s Introduction, at 100-101.
73 [There are certain specific questions which one should address and that the Court usually asks itself in the course of the interpretation it should adopt of the questions addressed to it.] Dupuy, Morocco, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol IV, at 140.
74 These rules are identified as: ‘On se trouve là un domaine juridique très circonscrit car, semble-t-il, deux principes se dégagent de l’examen de votre jurisprudence: les questions, d’une part, doivent avoir été rédigées dans des termes précis et, d’autre part, l’interprétation qui doit évidemment être menée par la Cour ne doit pas aboutir à la formulation de nouvelles questions.’ [This is a very limited legal sphere because it would seem that two principles emanate from the examination of your jurisprudence: the questions, on the one hand, should have been formulated in specific terms and, on the other hand, the interpretation that should self-evidently be guided by the Court should not lead to the formulation of new questions.] Ibid.
présentée par les demandeurs dans la procédure en matière contentieuse; on a parlé de «l'agent» de ce gouvernement. Morocco’s response drew attention to similar postures on the part of Spain, and argued that the Statute does not establish such a neat separation of the Court’s jurisdiction. Judge Petren disagreed on this point by stating that the presentation of evidence was significantly different in the two types of proceedings. Judge De Castro agreed by pointing out that the states in the present Case should have acted as amici curiae in an advisory capacity, and because they did not stricter rules of evidence should have been applied. Thus the Court uncomfortably straddled its advisory and contentious capacities:

we had three States submitting to the Court abundant historical and cartographical documentation the significance of which was the subject of much dispute. The same events, the same treaties, the same legislative and administrative acts, and the same religious, cultural and linguistic phenomena were represented in a variety of ways, which were often contradictory. On many a point the Court was invited to choose between differing contentions.

Judge De Castro regarded this as repugnant to the Court’s advisory role: the bench was not sufficiently empowered to verify the evidence presented and the impact of its ruling was erga omnes rather than applicable only to the participating States.

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75 [Not only by the arguments which have been raised, but also by the use of certain expressions of contentious procedure one has spoken of the ‘Moroccan memorial’ [memorial being a term for] a document which, according to Article 44 of the Rules, is presented by the applicants in the course of the proceedings in a contentious matter, one has spoken of ‘the agent’ of this government.] Arias-Salgado, Spain, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol V, at 46.
76 ‘...le conseil du Gouvernement espagnol tire cette conclusion des termes mémoire, agent, que nous avons utilisés parfois dans nos écrits ou dans nos déclarations orales... l'article 44 du Règlement...lequel énumère les actes de la procédure contentieuse, sans pour autant leur conférer un sens exclusif, opposer les articles 68 du Statut, 87 du Règlement, qui posent le principe général d'une assimilation des procédures contentieuse et consultative... On pourrait tout aussi bien invoquer le lapsus, assez naturel devant une juridiction, d'autant plus qu'il serait tout aussi possible d'en citer des exemples dans la bouche des conseils espagnols, qui ont également parlé notamment de mémoire.’ [The counsel of the Spanish government draws this conclusion from the terms ‘memorial’, ‘agent’, which we have sometimes used in our written submissions and our oral pleadings. Article 44 of the Rules sets out the elements of contentious procedure without giving them an exclusive meaning in contrast to Articles 68 of the Statute and Article 87 of the Rules, which pose the general principle of contentious and advisory procedures... One could as easily invoke the slippage – natural enough before a court – as it could also be possible to cite examples in the words of the Spanish counsel who have equally spoken notably of ‘memorial’.]
77 ICJ Reps (1975) (sep. op. Petren), at 112.
78 ICJ Reps (1975) (sep. op. De Castro), at 142.
79 ICJ Reps (1975) (sep. op. Petren), at 112.
80 De Castro noted that under Article 36 of its Statute, the Court may seek external material: ‘The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.’ He also recognised its general powers under Article 48, which states: ‘The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking
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A number of members of the Court as well as Spain not only queried the advisory parameters of the Case but also asserted that the questions formulated by the UNGA were outside the Court’s mandate; the questions were too academic or ‘un-legal’. 81 These perspectives indicate a division between law and non-law through the medium of the Court: the Court was not fashioned to hear ‘purely academic’ 82 or historical arguments and was not competent to do so. 83 From the various statements about the historical evidence, it is also clear that the Court did not feel competent or confident to handle much of the material. Conclusions, however, should not be formulated solely on the historical nature of the material. Perhaps the Court was also deeply ambivalent about its ability to assess and even redress the wrongs of the past.

Unease about international law’s boundaries is an enduring theme throughout the Case and efforts to allay this sensation by constantly restating dichotomies only entrenched the impossibility of quarantining the Opinion from its political context. Aside from the dichotomies of law/politics and legal enquiry/academic enquiry mentioned above, the extent to which morality should inform law was a prominent consideration among the non-European participants as well as the Lebanese judge, Fouad Ammoun. Because so much of the submissions centred on the colonial record, there was a desire on the part of these speakers to refashion the law by acknowledging and moving beyond the past. For example, in his discussion of secret treaties carving out spheres of influence for European appetites, Judge Ammoun asserted that ‘international morality has always condemned them; and it is the precepts of morality that have justly received the consecration of positive law in this case as in so many others’. 84 For Herman, Judge Ammoun delivered his opinion ‘somewhat emotionally’ and it is clear that this is something to be avoided. 85 Spain conversely prided itself on its dispassionate and ‘neutral’ presentation of ‘pure law’ because such a claim would appear to add to the Spanish position’s authenticity: ‘perspective politique...n’a sa

81 For example, Spain, Written Submission, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol I, at 222.
83 ICJ Reps (1975) (sep. op. De Castro), at 141-142.
84 ICJ Reps (1975) (sep. op. Ammoun), at 90.
place devant une cour de justice.\textsuperscript{86} In contrast, Moroccan representatives were comfortable with ‘d’une certaine émotion’, \textsuperscript{87} and Mauritania even conceded that ‘[l]a délégation mauritanienne a été amenée par la force des choses à s’adresser à l’Espagne avec une certain passion.’\textsuperscript{88}

Despite occasional concessions to emotion, however, most of the parties (with the notable exception of Zaire and occasionally Algeria)\textsuperscript{89} were keen to limit their passions; it was important to preserve at least a veneer of objectivity. Morocco’s representative, Benjelloun, was acutely aware of this requirement:

\begin{quote}
je l’ai fait avec le désir sincère de rétablir la vérité, avec le seule volonté de rappeler les faits avec clarté et de démontrer l’échelonnement des événements avec une totale objectivité. En aucun cas, je n’ai voulu accuser ou émettre des reproches, mon but étant avant tout d’exposer sans passion les mobiles de notre action et les motifs de nos prétentions et de nos réclamations.\textsuperscript{90}
\end{quote}

Members of the Court were also anxious to preserve law’s objectivity. For example, Judge Gros championed the positivist position, declaring ‘It is the duty of a court to establish facts’\textsuperscript{91} \ldots [t]he Court cannot attribute a legal nature to facts which do not intrinsically possess it; a court does not create law, it establishes it.’\textsuperscript{92} Judge Gros, however, failed to

\textsuperscript{86} [a political perspective has no place before a court of justice] González Campos, Spain, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol V, p. 95.
\textsuperscript{88} [Mauritania was compelled by the nature of the case to address Spain with a degree of passion] El Hassen, Mauritania, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol V, at 300.
\textsuperscript{89} Zaire’s brief appearance before the Court in its oral proceedings was both shocking and refreshing: ICJ convention of delivery and subject were thrown to the winds in a radical attempt to upset the framework of the nation-state and private ownership in Africa with an ‘authentic’ language based on nature. Although the Court did not respond to these arguments, they are worth extracting here: ‘le souci constant de garder contact avec la terre est la seule clé qui permette de comprendre la philosophie propre à l’Afrique au sujet de la tenure foncière. Partout en Afrique authentique la terre n’a jamais fait l’objet d’appropriation individuelle. La propriété foncière était toujours et est toujours collective et jamais la terre ne pouvait faire l’objet d’aliénation car, vendre la terre équivaudrait à vendre son âme, ses forces propres, ses forces cosmiques.’ [The constant concern for preserving a connection with the land is the only key allowing us to comprehend the essence of African philosophy regarding the subject of intrinsic tenure. Nowhere in Africa was the land made an object of individual appropriation. Intrinsic ownership was and is always collective and it is never possible to alienate the land, because to sell the earth would be tantamount to selling one’s soul, one’s strength, one’s cosmic power.] Bayona-Ba-Meya, Zaïre, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol IV, at 444.
\textsuperscript{90} Emphasis added. [I did it in the sincere desire to re-establish the truth, with the sole wish of recalling the facts with clarity and to show the unfolding of events with total objectivity. In any case, I did not want to accuse or make criticisms, my goal being above all to outline objectively the motives of our pretensions and the grounds of our claims.] Benjelloun, Morocco, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol IV, at 243.
\textsuperscript{91} ICJ Reps (1975) (dec. Gros), at 76.
\textsuperscript{92} Ibid, at 77.
explain how one could establish such a neutral law, especially in the context of dissension over even the most basic information. Judge De Castro was more alive to these difficulties and pointed out that interpretation of the materials was vital in reaching a decision.93

Different constructions of the law/politics divide are particularly pronounced in an examination of language as a tool of argumentation. Language here refers not only to the type of language employed, such as ‘French’ or ‘emotive’, but also an understanding about the process of how expressions and words within any language are never a priori or pre-discursive;94 instead, we saw in Chapter One that international law as language is constituted by the process of argument within the Peace Palace. The Court was confronted with definitional difficulties almost immediately because the concept of ‘legal ties’,95 contained in the UNGA’s second question, was regarded as a ‘non-legal’ expression requiring legal ‘translation’; it was outside international law’s lexicon. The ICJ was also uncomfortable with the concept of ‘entity’96 in describing Mauritania, because such an expression was not common in legal discourse and its qualities were largely unknown compared with more familiar concepts such as ‘state’ or ‘nation’. These two small examples of interpretative - or rather, constitutive - speech acts serve to highlight the ways in which language is limited and controlled in the continuous process of constructing the law/politics dichotomy. International law’s lexicon is a limited one and it has often been forged out of the European experience of statehood.

93 ICJ Reps (1975), (sep. op. De Castro), at 141.
95 De Castro recognises that it is necessary to define this term within the context of the case and interprets it to mean ties of a sovereign quality. ICJ Reps (1975) (sep. op. De Castro), at 135. Blaydes contrasts the absence of definition for the expression ‘legal ties’ with the clearly known one of terra nullius. However, as Mauritania, Morocco, Algeria and Zaire have demonstrated, terra nullius, like other legal terms, is open to widespread controversy as well. L E Blaydes, Jr., ‘International Court of Justice does not find “legal ties” of such a nature to affect self-determination in the decolonization process of Western Sahara’ (1976) 11 Texas International Law Journal 354, at 362-363.
96 ICJ Reps (1975), at 63. Bedjaoui also conceded that ‘Le terme [ensemble mauritain] n’est certainement pas usuel dans le terminologie du droit international. Sans doute les débats à l’Assemblée générale des Nations Unies doivent-ils permettre d’éclairer la portée et d’indiquer quelle réalité sociologique et quelle structure politique ce terme recouvre.’ [The term ‘Mauritian entity’ is certainly unusual in the terminology of international law. Without doubt the debates in the UNGA should permit us to clarify the scope and to indicate which sociological reality and political structure are encompassed in this term.] Bedjaoui, Algeria, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol IV, p. 485. Shaw further holds that although Mauritania’s use of ‘entity’ represented an attempt to move from ‘the sociological to the legal field and thus establish the existence of a political community’...[he regarded] the facts...[as showing] that no such entity did exist in this sense.’ Shaw, supra n 8, at 138.
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Under Article 39 of the Statute, parties are permitted to work in French or English or another language at their request. All parties chose to speak in French, including the former French colonial, Arabic-speaking countries of Algeria, Morocco and Mauritania as well as Zaïre. Of course, there was no recognition of the colonial legacy by the parties in their choice of language and perhaps this is a moot point, because the Court’s rules are reflective of the international power dynamics extant at the time of the Court’s formation.

Divergences in linguistic frameworks, however, became clearer when various Arab parties attempted to describe the particularities of non-European rule on the eve of colonialism. Many of the agents were native French speakers without Arabic themselves, but Algeria, Morocco and Mauritania also struggled to translate and render intelligible concepts not necessarily analogous to the European experience. This linguistic barrier was evident in occasional differences in Arabic translation97 or Arabic terms, such as ‘umma’ and ‘sultan’, which remained untranslated in the text of the written and oral pleadings. More substantively, European terminology such as ‘state’ and ‘border’ with its particular connotations was necessarily used despite narrative dissonance with local differences. In fact, this resort to European terminology entailed a cooption of Arab experience into the more familiar confines of Western statehood. Especially when trying to explain the concept of overlapping authority in nomadic societies under Islam, the parties evoked European models from feudalism for comparison. Further, Mauritania acknowledged the difficulties of conceptualising the ‘Shinqiti Entity’ (the rough pre-colonial equivalent to modern day Mauritania), and so it assisted the Court through comparison between the territory’s many autonomous tribes and the league of city-states in Classical Greece.98 There was a sense that the particularist discourse of international law could only respond to, and comprehend, non-European experiences through analogy, suggesting a discourse weak in its universalising tendencies.

Of greater significance was the heavy reliance placed on materials from the social sciences, such as ethnography, sociology and cartography. The inclusion of such material in turn required interpretations about the extent to which law as a discipline could accommodate the arguments and assumptions of other conceptual frameworks. Does the grammar of law enable speakers to draw on tools of argument beyond the confines of

97 For example, see ICJ Reps (1975) (sep. op. Ammoun), at 88.
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discipline? Disagreement over the relative value and compatibility of such 'non-legal' evidence reinforces the argument of this section, highlighting the need for constant redefinition of allegiances in the law/politics contest.

The example of cartographic evidence exemplifies the central role of perspective and interpretation in the submission of material. For Spain, more than another other party, the maintenance of law as objective, and thus in contrast with politics, was vital. It chastised other States (especially Mauritania) for their misguided use of subjective or 'non-legal' sociological and ethnographic data.\textsuperscript{99} Mauritania in turn challenged such a distinction between law and non-law by arguing that le 'droit est fait pour servir le social. Le droit n’est qu’une superstructure qui s’adapte au social. Vouloir renverser les ter mes, c’est vivre dans le formalisme et l’illusion.'\textsuperscript{100} Despite such ideas, Spain continued to embrace formalism by arguing that maps were more objective than the social scientific material employed by Morocco and especially Mauritania. Spain conceded that cartographic material 'n’est pas le droit',\textsuperscript{101} but it nevertheless regarded maps as the \textit{sine qua non} in any territorial matter and it never doubted their objective nature. In fact, Spain argued that the maps’ objectivity was irreproachable because, rather than coming from the hands of Spanish geographers, they instead were creations of other Europeans.\textsuperscript{102} Spain failed to

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\textsuperscript{99} 'la méthode qui inspire les arguments de la Mauritanie tout au long de ses exposés pourrait être caractérisée comme l’emprise absolue de la sociologie sur le droit.' [The method inspiring the Mauritanian arguments throughout its pleadings can be characterised as the total domination of law by sociology.] Lacleta, Spain, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol V, at 114.
\textsuperscript{100} [Law should serve the social. Law is not a superstructure which adapts itself to the social. To reverse these terms would be to live in formalism and illusion.] Salmon, Mauritania, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol V, at 293. Salmon also argues that in relation to ‘quel niveau doit s’exercer le droit des peuples à disposer d’eux-mêmes reste une problème pour lequel le droit est pratiquement impotent: de fait, c’est une question d’une histoire, c’est une question de politique, c’est une question de force... Ces réflexions montrent, dès l’abord, la complexité du problème, son opacité, l’importance des données, de fait: culturelles, économiques et politiques, la primauté du politique. Le juriste doit faire preuve de discrétion et d’humilité.’ [At what level the right to self-determination must be exercised remains a problem which the law is incapable of answering: it is a question of history, it is a question of politics, it is a question of might... These reflections show, first, the complexity of the problem, its opaqueness, the importance of facts: of cultural, economic and political facts, the primacy of politics. Thus, the jurist must demonstrate discretion and humility with respect to questions of self-determination.] Salmon, Mauritania, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol IV, at 312. Morocco also accuses Spain of formalism: Dupuy, Morocco, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol V, at 186.
\textsuperscript{101} [is not law]
\textsuperscript{102} ‘Les cartes présentées par l’Espagne ne sont pas l’œuvre de géographes espagnols, mais elles ont été établies par des géographes réputés de nationalité anglaise, française, allemande ou autre. De ce fait, nous sommes en face d’un point important et plusieurs fois relevé dans les décisions arbitrales ou judiciaires, à savoir l’objectivité des données géographiques et les cartes elles-mêmes nous indiquent les références d’après lesquelles elles ont été établies.’ [The maps presented by Spain are not the work of Spanish geographers, but
recognise that the nationalities it cited in support of its argument hailed from most of the main colonial powers at the Conference of Berlin; for Spain, there was no possibility of colonial designs tainting the drawing of maps in Africa.\textsuperscript{103} Nesiah reminds us, however, that the development of geography as a scholarly discipline in Europe directly coincided with the colonisation of Western Sahara.\textsuperscript{104} Moroccan scepticism about such colonially-crafted cartography reflects this fact: ‘Toute la cartographie antérieure présentée par le Gouvernement espagnol repose sur des renseignements fantaisistes, voire legendaires.’\textsuperscript{105}

Maps were used in an attempt to illustrate the nature of territorial control in Western Sahara, but history was an even more useful tool of argument. The flexible uses of history are evident by the way in which each narrative position contained often radically different emphases, nuances and evidence. In the eyes of Spain, history, like maps or law itself, could carry an objective truth through ‘une analyse scientifique’ in contrast with disciplines like sociology and ethnography.\textsuperscript{106} History was vital for the Spanish case, and Spain devoted more energy than any other party in reviewing its own record in the territory of Western Sahara. Detailed examination was offered about the period preceding colonisation when Spanish mariners, pursuing the rich fishing resources off the coast, would enter into agreements with local powers. The colonial period was also surveyed, and the impression that this account produces is one of benevolent interaction between relative equals.\textsuperscript{107}

Although Spain was largely incapable of appreciating the inevitably biased flavour of historical enquiry,\textsuperscript{108} for those states that had lived under European historical ‘realities’ they are the work of reputable geographers of English, French, German and other nationalities. In this regard, we confront an important point raised many times in arbitral and judicial decisions, namely the objectivity of geographical facts and the maps themselves reveal to us the basis on which they were established] Arias-Salgado, Spain, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol V, at 52.

\textsuperscript{103} De Castro also has faith in such maps, but seeks to reinforce his argument by relying on other colonial evidence from the period, such as contemporary written testimony. ICJ Reps (1975) (sep. op. De Castro), at 152-153.

\textsuperscript{104} Nesiah, supra n 94, at 10.

\textsuperscript{105} [All the previous maps presented by the Spanish government are based on fanciful information, or even myths.] Isout, Morocco, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol IV, at 257-258.

\textsuperscript{106} Arias-Salgado, Spain, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol V, at 43.

\textsuperscript{107} This narrative runs throughout Spain’s written pleadings: Written Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol I.

\textsuperscript{108} In an historical study about the region, Lydon details how French colonial administrators in West Africa discounted valuable Arabic sources, choosing to confiscate some of them. G Lydon, ‘Writing Trans-Saharan
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the desire to decolonise and rewrite the historical record was palpable. According to Morocco, it was not enough to rely on European models whether in the past or present because

La portée des titres marocains sur le Sahara occidental doit s’apprécier en tenant compte de l’environnement social et économique maghrébin. S’il est vrai que l’imitation des modèles européen et nord-américain ne permet pas nécessairement au XXème siècle de résoudre les problèmes du tiers monde, à plus forte raison une approche juridique coupée des réalités locales risqué de fausser l’interprétation des faits survenus au siècle précédent.

In their written and oral submissions, Algeria and especially Mauritania and Morocco gave their own interpretation not only of European international law during colonialism but, more importantly, the nature of European control and domination in North West Africa. Colonialism in all its brutality was revealed before the Court, and international law was either contrasted with European avarice (in continuation of the law/politics divide) or shown to be complicit in the scramble for the Sahara.

European historical evidence was critiqued in the pleadings for its failure to appreciate the complex societies of Arab North Africa, and Mauritania and Morocco especially used the forum of the Court to present a richer and more informed account. Greater historical understanding of the region assisted the presentation of their shared central claim: that at the time of Spanish colonisation, Western Sahara was controlled by the Moroccan Sharifian Empire to the North and the Shinqitī entity to the South. In contrast with Spain’s thesis, both Mauritania and Morocco claimed that Western Sahara


110 [The scope of Moroccan title over Western Sahara must be appreciated in light of the Maghreb social and economic context. If it is true that the imitation of European and North American models does not necessarily permit (us) in the 20th century to resolve the problems of the Third World, then there is even more reason to believe that a legal approach removed from local realities runs the risk of distorting the interpretation of facts arising in the past century.] Morocco, Written Submission, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol III, at 170. Also see Benjelloun, Morocco, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol IV, at 213.

111 It is interesting to note that in parts of its historical overview Mauritania uses the chronology of the Hegiran Calendar, a common practice throughout the Muslim world, but unusual before the ICJ: Mauritania, Written Submission, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol III, at 67.
had no separate identity. Nomadic tribal life meant that overlapping allegiances were formed across the territory and beyond.

Spanish, Mauritanian and Moroccan characterisations of the historical record were necessarily simplified, but the reliance on anachronism is startling. Morocco and Mauritania depicted themselves one hundred years earlier as nearly identical to their present form. Morocco even described the people inhabiting Western Sahara in the nineteenth century as Moroccan. Spain countered such claims with an equally ill-conceived construction of the Šahrawī nation as much more distinct and fully formed than the historical record suggests.

Mauritanian and Moroccan historical accounts of Arab rule and the onslaught of colonialism are supported by Judge Ammoun, who devoted attention to this obscured past. For example, Judge Ammoun supported Moroccan arguments about the sovereign nature of the Sultan’s rule extending across western parts of the Sahara and argued that colonialism’s aim was to cut off the territory from these ties of allegiance, religion and rule. Berman characterises Judge Ammoun’s opinion as yet another attempt at narrative authenticity: ‘certain phases of history are valorized as authentic parts of the national heritage, others as mutations by a foreign, specifically European, invader.’ Judge Ammoun regarded colonialism as disruptive to the historical evolution of the territory’s ‘genuine’ development. Instead of embracing foreign influences, such as self-determination, it was possible with such an historical understanding to regard the Opinion’s natural resolution as resulting in Western Sahara’s re/integration with two of its territorial neighbours.

Although all States and judges were aware of the many conventions of competency required of them at the Peace Palace, this did not entail the consistent use of one legal grammar. Competency through language had to evolve in the particular forum; all speakers realised the relevance of distinguishing law from its many others, but they each articulated this boundary-drawing in slightly different ways. All narratives struggled with maintaining a clear line between law and politics: at times emotion and interpretation were vital, but it was difficult to gauge the line, given institutional biases. At the very least, it is clear that the

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112 For a general rebuttal of Spanish Sahara’s separate identity, see Morocco, Written Submission, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol III, at 161.
115 Ibid, at 102.
Court required a semblance of separation between law and politics: facts could not simply speak for themselves, but had to be translated through the medium of relatively dispassionate discourse that displayed a respect for the primacy of the Court and the discipline of international law; pure historical and social scientific arguments were largely feared and ignored by the Court.

4) Constituting Selfhood before the Court: Legal Personality, Identity Politics and the Multicultural Limits of International Law

A diversity of argumentative strategies was also mirrored by the substantive positions of the parties. Spain’s motivations centred on its desire for apology and absolution: it wanted to show that its policies in the Sahara had always reflected its overriding sympathy and support for the territory’s indigenous, regionally autonomous inhabitants, the Sahrawis. Spain characterised neighbouring States’ authority as weak and devoid of legal value. Spain’s wholly European vision of international legal doctrine discounted and denied the validity of non-European modes of governance over the territory. Spain embodied a pure, positivist version of international law, which at times became a caricature of the worst aspects of a narrowly defined European consciousness.

Both Morocco and Mauritania directly challenged the continuing application of exclusively European norms when they asked, ‘Est-ce à dire que seules les théories européennes de l’État, tant pour le passé que pour le présent et pour le futur, soient les seules valables?’ Morrocco countered the European state model with the Sharīfian system of rule, which exhibited a much closer relationship between secular and religious affairs. Mauritania also acknowledged the importance of its membership within dār al-islām as discussed in Chapter Two, but because it could not characterise the Shinqiṭṭī entity as a state in the pre-colonial period, it instead tried to endow this nomadic community with international legal personality directly. Although the Moroccan and Mauritanian positions diverged on legal and factual points, they both championed the cause of particularism: their experiences required specific, European international legal tenets to be

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116 [Are we to say that only European theories of the state – for past, present and future – are alone valid?] Isoart, Morocco, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol IV, at 261.
117 Shaw, supra n 8, at 136-137.
relaxed and expanded so as to become more universal. In invoking the particular, these States were implicitly questioning the universal basis of contemporary international law.

Mauritania and Morocco used the forum of the ICJ simultaneously to rewrite the historical record and to construct a self-image not beholden to colonialism. As in the case of narrative strategies explored above, however, narrative substance was also structured by the inescapable imprint of international law’s past and present. Some of the Moroccan and Mauritanian perspectives on this past as well as their references to non-European law tried to push the boundaries of traditional international law. The bench recognised this call to universalism, but ultimately could do little more than effect an uneasy and legally dissatisfying compromise between these competing approaches to territorial control. In this last section we will explore the Moroccan and Mauritanian reliance on and critique of public international law and concurrently consider the success of such arguments in the eyes of Spain, Algeria and the Court.

a) Allegiances of the Faithful: The Moroccan Sultan and Islamic Rule in the Sahara

Morocco presented the most sustained discussion of Arab-Islamic rule in the pre-colonial and colonial era to support its case of control over Western Sahara both before and during much of Spain’s colonial presence. In advancing such a narrative, Morocco offered an alternative historical account to that of the dominant, colonial version, which saw Africa as open to occupation, or at best, cession. Morocco’s pleadings offer one of the most well developed accounts of Islamic siyar before the ICJ, reminding the Court of Islam’s sophisticated legal tradition. Morocco, however, did not simply invoke Islamic legal principles in contradistinction to dominant international legal narratives. Instead, Morocco, like Mauritania in its discussion of terra nullius, also relied on various international law doctrines relating to the acquisition of territory to offer further support for its claims of immemorial possession. Morocco was covering all bases by trying to expand the cultural boundaries of international law while also applying ‘pure’ rules to the past. For example, Morocco invoked the norm of territorial integrity and a number of treaties between itself

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119 Knop also argues that while ‘Morocco relied on the universal rules for the acquisition of sovereignty, it also sought to persuade the International Court of Justice that the interpretation of the rules should be particularized so as to take account of the special structure of the Sherifian state.’ Knop, supra n 3, at 137.
and European powers. Conversely, it also relied on international law to deny Spanish rights because of ineffective control, the invalidity of secret treaties as well as the inapplicability of the hinterland rule. Morocco’s construction of its statehood through a combination of European and non-European legal norms and the Court’s assessment of the latter is visited after a brief summary of Moroccan depictions of Islamic approaches to authority.

Morocco discounted the first question about terra nullius, because its entire case rested on a demonstration of legal ties of a sovereign nature between the international legal subject of the Sharifian Empire and the tribes of Western Sahara. At the most basic level, Morocco was conscious of reminding the Court of its multicultural mandate; international law can and should abandon its predilection for the European nation-state:

Pour apprécier la nature et la valeur des liens juridiques existant entre le Maroc et le Sahara occidental, il est donc essentiel d’abandonner le schéma constitutionnel de l’État européen du XIXe siècle, car il est le produit d’une situation économique et sociale localisée qui ne trouve pas application sur le territoire du Maghreb extrême.

The argument was that because of its desert environment, political relations in Western Sahara were different from the temperate climes north of the Mediterranean; tribal organisation was the norm. Aridity, low inhabitation rates and nomadic movements across large swathes of land throughout much of the Sultan’s domains further produced a bifurcated system of authority, where relatively centralised control over the bled makhzen...
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(land of the storehouse, or governance)\textsuperscript{125} contrasted with more tenuous connections with the \textit{bled siba} (the land of dissidence).\textsuperscript{126} Although familiar attributes of sovereignty may have been scanty in \textit{bled siba}, which according to Morocco corresponded with southern Morocco and northern Western Sahara, Morocco argued that this was a secondary detail because of the way in which Islam and its overseer, the Sultan or Khalifa, united the faithful in a fusion of divine and human rule as was discussed in Chapter Two.\textsuperscript{127} All the Saharan tribes mentioned the Sultan in their prayers and he was largely responsible for the appointment of leadership positions, such as \textit{qādis} or leaders/judges for the tribes. During the period of heightened European interference in the nineteenth century, Morocco conceded that it ‘était certainement affaibli par les menées étrangères et par des lacunes internes de structures’,\textsuperscript{128} but it remained a united society; resistance to colonialism further supported its thesis.\textsuperscript{129}

The Court was willing to embrace Morocco’s emphasis on personal and religious ties of allegiance, but only up to a point; the familiar concepts of European relations with territory as well as ‘sovereignty’ were hard to displace for long. The nature of the Advisory Opinion question about legal ties was vague enough to elicit a wide range of possible interpretations and a number of judges spent time conflating or distinguishing legal ties \textit{vis-à-vis} ties of ‘sovereignty’. The Court seemed to embrace the particularity of Morocco by

\begin{itemize}
\item \textsuperscript{125} It is useful to conceive of storehouse here as the state’s repository of taxes, because the ability to collect taxes was the main distinguishing feature between the \textit{bled makhzen} from the \textit{bled siba}. J Castellino, ‘Territory and Identity in International Law: The Struggle for Self-Determination in the Western Sahara’ (1999) 28 Millennium: Journal of International Studies 523, at 533.
\item \textsuperscript{126} Morocco, Written Statement, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol III, at 179-180.
\item \textsuperscript{127} Morocco summarizes the nature of the Sultan’s authority in the following terms: ‘dès le début de l’État musulman, s’établit un équilibre entre les autorités tribales qui sont l’expression d’une opinion publique embryonnaire mais qui sont de même l’expression d’une opinion publique de base et l’autorité charismatique du prophète. Naissant alors les deux grandes traditions politiques musulmanes: l’autorité théocratique fondée sur l’obéissance à la parole de Dieu [via the Qur’ān]; l’autorité politique fondée sur l’approbation de la communauté, approbation consignée dans un acte d’allégeance personnelle, d’abord au prophète, puis à son successeur le calife.’ [From the beginning of the Muslim state, a balance was established between the tribal authorities who formed the expression of a nascent public opinion but who were also the expression of basic public opinion alongside the Prophet’s charismatic authority. Thus marking the birth of the two great Muslim political traditions: theocratic authority based on submission to the word of God; political authority based on the approval of the community, approval given in an act of personal allegiance, initially towards the Prophet and then to his successor, the Caliph.] Iisoa, Morocco, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol IV, at 259. Also, see Chapter Two, at 66, 69-70.
\item \textsuperscript{128} [was certainly weakened by foreign attacks and by internal structural gaps] Morocco, Written Statement, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol III, at 177.
\item \textsuperscript{129} Ibid, at 187-194.
\end{itemize}
acknowledging its own mode of rule. Judge Forster regarded these differences as allowing a degree of leeway in a finding of legal ties that could be understood as sovereign.\(^\text{130}\)

The Court, however, adopted a narrower definition that still tried to remain concessionary and culturally aware: Morocco had established some legal ties, but not of a sufficiently sovereign nature. What would have been sufficient in this case? Further, what did the Court mean by ‘sovereignty’? Roussellier compares the ICJ’s position here with some of its earlier jurisprudence, where Moroccan personality had been recognised.\(^\text{131}\) If the basis of Moroccan sovereignty in the earlier case had been its connections with tribes that often inhabited at least the northern parts of Western Sahara, it would seem that the ICJ in its 1975 Advisory Opinion was drawing an artificial and inconsistent line across Moroccan territory.\(^\text{132}\) Roussellier then asks why could not the Court ‘declare some parts of the Territory of Western Sahara…parts of Bled Siba, instead of a mere projection or extension of the limited display of the Moroccan sultan’s authority’?\(^\text{133}\) The Court wanted to stress its support for Western Sahara’s self-determination. However, it also did not want to be seen as disregarding the cultural traditions of Morocco and Mauritania. Indeterminate references to sovereignty aided the Court in its task of effecting a compromise of sorts that in reality gave very little ground: Western standards of the state prevailed so as to support the silenced and still stateless Šahrāwīs. Or in the words of Nesiah, ‘the discussion of self-determination is expressive of the Court’s desire to lay out its own normative commitments by pulling Western Sahara into the normative and jurisprudential framework of international law, a statist or administrative framework of territory.’\(^\text{134}\)

In a similar territorial focus, Judge Ammoun explored the Islamic arguments of Morocco in some detail to hold that there had existed legal ties of a sovereign nature over

\(^{130}\) ICJ Reps (1975) (sep. op. Forster), at 95.


\(^{132}\) ‘[t]he Court is caught in an apparent contradiction. On the one hand, it acknowledged Morocco’s sovereignty as then French Protectorate – including and in particular over the Bled Siba – but, on the other hand, it rejected Morocco’s claim of territorial sovereignty on Western Sahara though it has ascertained that some Tekna tribes from southern Morocco, a [sic] Bled Siba as well, have migrated into the Western Sahara Territory.’ Roussellier, supra n 63, at 63.

\(^{133}\) Ibid.

\(^{134}\) Nesiah, supra n 94, at 15.
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Western Sahara. Judge Ammoun was able to agree with the majority Opinion up to a point in its recognition of legal ties, but ‘[w]ithout sufficiently convincing reasons...it minimizes the nature of those ties by maintaining that they consisted in an allegiance of the Saharan population to the Sultan of Morocco.’ 135 In contrast, Judge Ammoun saw these ties as much more significant because the sultan ‘personified the State’ in its legislative, executive and religious aspects. 136 Judge Ammoun largely agreed with Morocco’s use of treaty evidence and the testimony of geographers from the time to support its case for ‘legal ties of a political character between the territory of Western Sahara and the Kingdom of Morocco.’ 137 Throughout his separate opinion, although Judge Ammoun stressed the particular nature of authority in dār al-islām, he also noted its territorial qualities, thus linking the particular with the ‘universal’ given of territory. Accordingly, the Court should not have discounted the importance of territorial control within the sultan’s domain, because ‘[t]hose people did not live suspended between the sky and the ground.’ 138

Nesiah depicts Ammoun as trapped in the ‘double bind’ of a colonialised international law. His opinion ‘offers an exemplary instance where statist representations of territory continue to be visited and revisited, repeated and transformed, as an ongoing problematic of postcolonial nationhood.’ 139 Although Judge Ammoun tried to expand the narrow confines of a European-based law, he ultimately ended up applying ‘the criteria of statist territory’ for Morocco’s relationship with Western Sahara. 140 Thus Ammoun’s separate opinion as well the Advisory Opinion itself ‘illuminates the ICJ’s adherence to the traditional Western legal concept of territorial sovereignty and its unwillingness to give real consideration to arguments based on principles of Islamic international law.’ 141

b) Nomadic Co-sovereignty in the Bilād Shinqīṭī 142

135 ICJ Reps (1975) (sep. op. Ammoun), at 83.
136 Ibid.
137 Ibid, at 102.
139 Nesiah, supra n 94, at 20.
140 Ibid, at 19.
141 Cravens, supra n 118, at 531.
142 ‘La thèse mauritanienne distingue la partie nord du Sahara occidental de sa partie sud. Le Nord relève du bled siba marocain, c’est domaine de mouvance des Tekna marocains, le Sud fait partie intégrante du pays de Chinguetti.’ [The Moroccan position distinguishes the northern part of Western Sahara from its southern part. The North is part of Moroccan bled siba, it is the area of Tekna Moroccan migration, the South is an integral part of the country of Shinqīṭī.] Salmon, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol IV, at 425.

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Like Morocco, Mauritania invoked the particular conditions of the desert as well as Islamic notions of authority in its attempt to provide a broader definition of international legal personality for the two Advisory Opinion questions regarding \textit{terra nullius} and legal ties.\footnote{For an overview of Mauritanian state/society structures, see Salem, \textit{supra} n 21.} Mauritania, however, was not able to rely on a pre-colonial political entity such as its Sharifian counterpart, because there ‘existait à l’époque dans la région du Sahara occidental, ensemble qui, comme chacun le sait, n’avait pas la qualité d’État et dans lequel allait se créer plus tard la République islamique de Mauritanie.’\footnote{[Existed at the time in the region of Western Sahara, an entity which, as everyone knows, never had the quality of a state and in which was later created the Islamic Republic of Mauritania] Mauritania, Written Statement, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol III, at 58.} The absence of a state did not necessarily undermine the Mauritanian case based on overlapping nomadic co-sovereignty across modern-day Mauritania and Western Sahara. Nevertheless, Mauritania was aware of the conceptual difficulties that the Court would encounter in abandoning statist and legal preconceptions for its preference for social research:

\begin{quote}
les situations que constatent les historiens, les géographes, les ethnologues, les sociologies et politologues et qui traduisent dans les termes de bled siba et Bilad Chinguiti sont certainement difficiles à appréhender pour le juriste qui est habitué à des notions tranchées comme celles d’État, de frontière, etc.\footnote{[The situations which the historians, geographers, ethnologists, sociologists and political scientists note and which are translated in the terms of ‘bled siba’ and ‘Bilad Shinqihti’ are certainly difficult to understand for the jurist who is used to clear-cut notions such as those of the state, frontier etc.] Yedali Ould Cheikh, Mauritania, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol IV, at 423.}
\end{quote}

The challenges of Mauritania’s unconventional material and arguments were exacerbated by the proceedings’ inevitable inter-temporal law focus: not only was Mauritania (as well as Morocco) trying to expand international law in the postcolonial era, but it was inviting the Court to revisit a past little known for its respect for tribal personality. As in the case of Morocco’s exploration of territorial titles, Mauritania presented a number of innovative arguments from this area of law, but the Court’s silence on such matters left their cogency untested.\footnote{\textit{One of the most interesting ideas raised by Mauritania was its characterisation of European domination over tribal peoples. Classical international law determines the mode of territorial acquisition through a combination of legal personality, treaty and the physical act of conquest. Thus for example, where a territory is populated by an internationally recognised people, only cession via treaty or conquest is possible. Many protectorates in Africa were the product of ‘trinket treaties’ that resulted in cession, but the mixture of force as well as the ambiguous status of various signatories blurred the lines between cession, occupation and conquest as was discussed in Part Two’s Introduction. Mauritania adds to this a subtler form of domination, language: ‘Aucune pression militaire quelconque n’accompagne les négociations. Les explorateurs qui s’aventurent dans les régions sous la domination des tribus font figure de héros téméraires. C’est par la}}
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The heart of Mauritania’s case in proving its legal ties over a non-terra nullius entity combined a detailed examination of its former social structure with a call for international law to move beyond its statist assumptions. Mauritania acknowledged that many jurists and other writers in the colonial period had operated within a linear framework of human history, where tribal, Muslim societies were seen as behind those of the West. 147
However, Mauritania was at pains to demonstrate that ‘[l]’absence d’institution étatique ne signifiait pas anarchie, puisqu’on a vu les liens multiples et, en particular, les liens de droit saharien qui répondaient parfaitement aux nécessités de la vie nomade dans une société préétatique.’ 148 Mauritania devoted considerable energy to an examination of non-legal material supporting its claim to an independent, unified and sophisticated model of rule based on the overlapping nomadic movements of interdependent tribes. 149 Studies of wells, cemeteries and the position of women all reinforced the argument that the prevailing model of social organisation was the only sustainable option in the Saharan context. 150 Furthermore, even with its sophistication established, Mauritania claimed that international law’s mandate did not rest on the internal aspects of a territory’s political system. On the eve of Western Sahara’s and Mauritania’s colonisation, jurists could appreciate the primacy of people above the state in recognising legal personality: ‘vers 1880 la notion de people est une notion juridique indéniable.’ 151

Membership in dār al-islām was not only a useful tool for Morocco; Mauritania as well as Algeria invoked the concept to appeal to the universalism of international law. For

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147 '[E]n ignorant la réalité socio-culturelle, des penseurs européens ont purement et simplement nié l’État musulman et ont prétendu que la notion de souveraineté n’y avait jamais dépassé le stade de la tribu.’ In ignoring the social-cultural reality, European thinkers denied purely and simply [the existence of] the Muslim state and they claimed that the idea of sovereignty had never exceeded the tribal stage of development.

148 Generally, see Mauritania, Written Statement, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol III, at 55. Shaw also argues that the shape of the Opinion’s argument placed far too much reliance on the legal effects of trinket treaties, Shaw, supra n 8, at 133.

149 [The absence of a state apparatus does not signify anarchy, since one has seen multiple ties, and in particular, ties of Saharan law, which responded perfectly to the requirements of nomadic life in a pre-state society.] Ibid.


151 [By 1880 the idea of a people was an undeniable legal idea.] Salmon, Mauritania, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol V, p. 297.
Mauritania, an absence of defined borders was of secondary importance because the Bilād Shinqīṭī ‘est reconnu dans tous les pays arabes comme une expression précise.’\footnote{[was recognised in all Arab countries as a precise term.] Mauritania, Written Statement, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol III, at 67.} Within the confines of dār al-īslām, the Bilād Shinqīṭī retained an independent status,\footnote{[L]a culture chinguitienne fait partie de formes similaires du monde arabo-musulman. Mais ce qui est significatif, c’est qu’elle est le fait d’un peuple pasteurs et le seul peuple de pasteurs de la zone aride à être dans ce cas. C’est ce qui lui confère vigueur interne et rayonnement extérieur.’ [The Shinqīṭī culture is a part of similar cultures in the Arab-Muslim world. But it is noteworthy that the culture comprised pastoral people, who were the only farmers in the arid zone. This fact conferred internal strength on them as well as being an external influence.] Ould Maouloud, Mauritania, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol IV, at 367.} especially vis-à-vis its stronger neighbour, the Sharīfian Empire. Algeria’s counsel, Bedjaoui, also considered the impact of membership in dār al-īslām as an alternative approach to European conceptions of terra nullius. According to Bedjaoui, inclusion in dār al-īslām ipso facto entailed the presence of defined authority and the corresponding impossibility of terra nullius:

On peut formuler donc la réponse ainsi: «Non le Sahara n’était pas un territoire sans maître parce qu’il appartenaient à Dar el Islam.» En utilisant une telle approche, non seulement votre haute juridiction accepterait de reconnaître qu’elle est la haute Cour de toutes les nations et de tous les systèmes juridiques qui doivent coexister en bonne entente sur cette terre, mais elle redrait justice à toutes les sociétés bafouées par la colonisation.\footnote{[Thus, it is possible to formulate the following response: ‘Western Sahara was not terra nullius because it was a part of dār al-īslām.’ In using such an argument, your high jurisdiction will not only agree to recognise that it is the high court of all nations and all the legal systems which ought to coexist amicably on this earth, but it will also render justice to all those societies ridiculed by colonialism.] Bedjaoui, Algeria, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol IV, at 489.}

For Bedjaoui, the Court could move beyond its colonial past even within the strictures of inter-temporal law by considering legal systems other than the European version of the late nineteenth century.

The Opinion never explicitly acknowledged Bedjaoui’s suggestion, but the Court’s treatment of Morocco’s and especially Mauritania’s claims suggests that this call for a cosmopolitan international law was ultimately rejected. Indeed, the Court found it even more difficult to appreciate the legal nature of Mauritanian rule than its Moroccan counterpart. Like Spain, the Court was hard-pressed in conceptualising the factual and legal reality of the Shinqīṭī entity and its congruity with modern day Mauritania. The Opinion included a discussion of the legal requirements for legal personality as expounded in the Reparations Case and applied by Mauritania in the pleadings. As per Mauritania’s central
thesis, the ICJ in its 1949 Opinion had observed that the ‘subjects of international law in any legal system are not necessarily identical in their nature or in the extent of their rights and their nature depends upon the needs of the community.’ After an examination of the evidence, however, the 1975 bench could not find any basis ‘for considering the emirates and the tribes which existed in the region to have constituted, in another phrase used by the Court in the Reparations Case, “an entity capable of availing itself of obligations incumbent upon its Members”.

Perhaps in a bid to appear less dismissive of Mauritania’s tribal thesis and its faith in the universal ramifications of its particular experience, the Court’s negation of sovereign ties gave way at least to recognition of some lesser legal rights. In a tribute to Spain’s own dichotomisation of law and fact, Judge De Castro was even more strident in his rejection of Mauritania’s legal existence: ‘To endeavour to deduce from the existence of ethnic, cultural and geographical analogies, the existence of legal ties is like leaping into an abyss.

The Court’s dispositive statement for the second question can now be quoted in full to appreciate the dilemma the Court faced in balancing the Sahrawi right to self-determination with Mauritanian and Moroccan calls to universalism and multiculturalism of (neo)colonial desires:

The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court’s conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.

156 Ibid.
157 ‘To confine the question to ties of sovereignty would, moreover, be to ignore the special characteristics of the Saharan region and peoples...and also to disregard the possible relevance of other legal ties to the various procedures concerned in the decolonization process.’ ICJ Reps (1975), at 64. For a similar perspective, see ICJ Reps (1975) (sep. op. Dillard), at 125-126.
159 ICJ Reps (1975), at 68.
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This passage with its twists and turns belies the Court’s confusion over its role in balancing competing claims of particularism.

5) Conclusion

The Western Sahara Case fell under the Court’s advisory jurisdiction, but through a combination of its subject matter, its participants and its institutional parameters, the arguments delivered at the bar and the bench were in constant contention. The most fundamental point of dispute was not about how to demarcate territorial boundaries or legal personality, but rather the location of law in contrast to politics. Both the strategies used and the narratives evoked all suggested slightly different and shifting interpretations of this relationship at the heart of international law. It has been shown above that this desire for demarcating the law/politics dichotomy structured each judge’s, as well as each state’s, discursive delivery: emotion, language and the use of the social sciences and history were all interpreted differently in quests for authenticity and legitimacy. This observation supports my assumption that the law/politics dichotomy is one of the main structuring devices - or grammars - of international law. A certain flexibility of narrative delivery was also reflected in doctrinal diversity where Mauritania, Morocco and Algeria all attempted to expand the experiential and cultural foundations of international law by inviting the Court to recognise Arab-Islamic systems of governance.

Although mindful of its consultative role in the UNGA’s decolonisation thrust, the Court was also aware of the need to appear receptive to non-European legal traditions. The bench was caught between inclinations to respect self-determination on the one hand, with a desire to embrace Islamic legal traditions on the other. Which vision of the self should triumph in the Peace Palace? The Court’s difficulties were exacerbated not only by the unacknowledged context of colonial and neo-colonial aggression towards Western Sahara but even more so by the indeterminate nature of international law itself. In particular, the bench’s elastic interpretation and application of ‘sovereignty’ destabilised the boundaries of international law. Spain had called on the Court to guarantee the sanctity of a state-based notion of legal personality lest such ill-defined examples of the Shinqîî entity lead
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historical and present realities into chaos. \(^{160}\) Ultimately, the Court responded to such a request in its findings that the ‘legal ties’ of Mauritania and Morocco were less than ‘sovereign’ because they lacked a sufficiently territorial basis. The Court thus prioritised the norm of self-determination for Western Sahara’s people over and above the claims of regional powers. The Court, however, never acknowledged the existence of this norm conflict between self-determination and ‘legal ties’; it was easier to revert to a policy choice rather than offer a detailed analysis of how international law would offer the tools for such conflict resolution.

By failing to settle the conflict between self-determination of non-European legal ties the Court reinforced broader themes at work throughout the hearings, including the relationship between particularism and the universalism as well as European and non-European approaches to rule. These themes, and the underlying tension between law and politics, point to the continuing relevance of exclusion and cultural particularism in international law. Attempts to ignore, rewrite or move beyond unpalatable aspects of international law’s past, present and future were all canvassed, but European colonialism remained one of the only narrative constants for each participant. International law was drawn on as a resource for liberation both by Mauritania and Morocco \text{vis-à-vis} their colonial repression, as well as by Spain and the Court for Western Sahara’s liberation. By invoking international law for this purpose, however, it was inevitable that histories of European control and international legal predilection for the state form should also emerge.

As was the case in Chapters Three and Four, North African states confronted the postcolonial paradox: could international law be used to advance their interests in a way that did not entail an endorsement of a narrative sympathetic to European colonialism? It was both ironic and yet predictable that the Court sought to grant selfhood and statehood to a people whose territory it never defined and whose legal personality remained elusive and unspoken. \(^{161}\) The Peace Palace may well be far from the Sahara, but the Court still managed to dream of sandcastles for the silenced and still-stateless Ṣaḥrāwīs.

\(^{160}\) For example, see Arias-Salgado, Spain, Oral Pleadings, International Court of Justice: Pleadings, Oral Arguments, Documents: Western Sahara, vol V, at 58.

\(^{161}\) Knop captures some of these themes in her work on the case, when she argues that the ‘court throughout used a broad concept of legality to domesticate the exotic relationships of the Sahara, bringing them inside international law by recognizing them as legal. Simultaneously, its narrow concept of sovereignty denied these relationships equal status with the European master’s by refusing to consider them as sovereign. This double movement of acceptance and rejection, legality and sovereignty, was characteristic of the court’s interpretation of legal ties and legal entity, just as it had been of its interpretation of \textit{terra nullius}. The court’s
Morocco and Mauritania presented an impressive range of arguments before the ICJ in their bid to distract world attention from political developments in the Sahara. Both States contributed to producing an Opinion supportive of Western Saharan independence and yet cognisant of their respective ‘legal ties’. In contrast with the Court’s concessionary tones, Moroccan action during and after the proceedings indicated its unabashed designs of re/claiming Western Sahara: it did not need the endorsement of the Court for its eventual occupation of the entire territory, after Mauritania’s withdrawal from the south in 1979. Nevertheless, it is instructive to note that Morocco’s King Hassan recognised the utility of international legal rhetoric and appreciated the way in which he could use the Opinion’s ambiguity to his advantage. Once the Opinion was handed down, the King did not reject the Court’s finding per se. Instead, he distorted its primary support for self-determination:

the opinion of the Court can only mean one thing: the so-called Western Sahara was part of Moroccan territory over which the sovereignty was exercised by the Kings of Morocco and that the population of this territory considered themselves and were considered to be Moroccans...To-day Moroccan demands have been recognized by the legal advisory organ of the United Nations.162

After this speech, the fate of Western Sahara was sealed: Moroccan occupation has brought mass flight by the bulk of Western Sahara’s population, Moroccan settlers and concerted phosphate extraction. Further, in a reflection of Chapter Six’s theme, Morocco’s occupation has also brought the construction of a wall (or berm) dividing the territory between Moroccan control of the coast and its mineral wealth on one side, and Western Sahara’s impoverished people in the desert as well as western Algeria, on the other. After a number of years of UN neglect, numerous policies, including various international and regional diplomatic initiatives and a UN peacekeeping effort, have thus far failed to achieve Šahrāwīs self-determination.163
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One of international law's best-known articulations of the self-determination norm has achieved very little beyond the confines of the courtroom. It remains to be seen in the next chapter how the Court has managed more recently to guarantee self-determination in the face of equally complex and competing arguments on law and politics in its Wall Opinion.

CHAPTER SIX

Discourses of Division?
Law, Politics and the ICJ Advisory Opinion on the
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

1) Introduction

The situations of Western Sahara and Palestine have much in common. Both remain territories under foreign rule in the face of widespread support for their peoples’ self-determination. It is also significant that out of a small list of ICJ Advisory Opinions about self-determination, these two hail from the Arab world. As suggested in the previous chapter, Advisory Opinions are especially useful for exploring the range of legal grammars used in ICJ disputes because of the increased number of participating states. This was particularly so in the 2004 Wall Case. Several states presented either written submissions or oral presentations both supportive and dismissive of the Court’s role in adjudicating Israel’s construction of a wall in the Palestinian Occupied Territories (OPT) and its legal effects. Like Western Sahara, participants expressed their support or opposition towards the exercise of ICJ jurisdiction through the grammar of the law/politics dichotomy. States opposing the ICJ’s jurisdiction characterised the United Nations General Assembly Request (UNGA) for an opinion as politically driven. The Court could not fulfil its role in such a context, and, further, it would hamper other initiatives. Supporters of the Court, on the other hand, were seemingly required to leave their politics at the courtroom door. Once the Court granted jurisdiction, however, many states showed how politics was an integral part of proceedings. The Court itself was also conscious of the political
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significance of the matter, and thus this Case is a valuable site for exploring different characterisations of international law and its relationship with politics.

Unlike the other cases discussed in the thesis, the Wall Opinion is not a classic territorial dispute. The UNGA requested the Court to comment on the legal implications of the wall’s construction for Israel and third states. Boundaries remained ill-defined throughout the dispute, allowing participating states to discuss the legal regime created by the wall in broader terms. Like other cases discussed in the thesis, however, the centrality of territory underlay much of the discussion. The UNGA Advisory Opinion request was circumscribed, but both states and members of the Court touched on broader, ‘political’ considerations of the Arab-Israeli conflict. In particular, the importance of selfhood and territory informed many positions. Thus, the Wall Opinion can be seen as a classic (post)colonial contest over international legal personality: in a world of nation-states, securing territory is vital. This was also seen in the Western Sahara Case where the central characters of the Case, the Šahrawī people, existed in a legal limbo. Because of their unfilled claim over territory as well as their unsecured international legal status, the Šahrawī were not able to speak in the Peace Palace. In the present Case, however, the Court welcomed Palestine’s legal team along with delegations from some inter-governmental organisations (IGOs).

The Chapter is not concerned with most of the substantive aspects of the Case, because doctrinal issues relating to occupation and state responsibility fall outside the scope of the thesis, with its focus on territory. The Opinion did, however, raise some reflections on the relationship between self-determination and territory, and these areas are explored briefly. Of greater significance for the thesis is the way the Case allows us to understand how the law/politics dichotomy, one of international law’s fundamental conceptual structures, functions in adjudication. What relationship was there between the construction of arguments and their portrayal of law and politics? Further, debates about word usage provide us with an opportunity of assessing some of the parameters of the international law lexicon. Which words, expressions, and especially, concepts and feelings are capable of expression within an international legal forum? After surveying the dispute’s background and proceedings, the chapter will map some of these legal grammars along with its lexicon and then appraise the success of such strategies.
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2) Background to the Opinion

a) Brief Overview of the Arab-Israeli Conflict


Chapter Six: Discourses of Division? Law, Politics and the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

After four wars, two peace treaties, innumerable diplomatic initiatives and the Israeli occupation of the Palestinian West Bank and Gaza Strip as well as parts of Syria, Egypt and Lebanon, the Arab-Israeli conflict remains far from resolved. Its complexity and the passions it arouses have prevented international law from playing a central role, and yet the conflict spans a number of seminal international legal issues, many of which were explored in the *Wall* Advisory Opinion.

Despite the fact that Palestine has been under Israeli occupation for forty years, its fortunes have always been linked not only with its occupier but also with international institutions and international law. Further, the narrative of Palestine contains many central themes in postcolonial accounts of international law during the modern period. Although the end of World War I had ushered in a powerful discourse supportive of self-determination, this was only applicable to European peoples. We saw in Chapter Two how ‘Ottoman military defeat by the British and French during the First World War produced a radical change throughout the whole Middle East.’ Secret treaties signed during the war assured French and British interests. The realisation of these agreements did not produce typical colonial administrations, however, but the League of Nations Mandate, which ‘was used to legitimise British and French government of their Middle East possessions.’ During the war, Britain also assured the interests of its national Zionist lobby. Through the efforts of the Zionist Federation in Britain, the Cabinet endorsed a statement drafted by the Federation’s leaders. This document, which came to be known as

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1 Namely, the 1948 War, the Suez Canal Crisis 1956, the Six Day War of 1967 and the Yom Kippur War of 1973.
2 Between Israel and Egypt in 1979 and between Jordan and Israel in 1994.
3 The West Bank and Gaza in Palestine, Syria’s Golan Heights and Egypt’s Sinai Peninsula were occupied after the Six Day War of 1967 and all but the Sinai remain under Israeli occupation. Southern Lebanon was occupied by Israel between 1982 and 2000.
7 Owen, *supra* n 5, at 8.
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the 1917 Balfour Declaration, noted that Britain ‘viewed with favour the establishment in
Palestine of a national home for the Jewish people, it being clearly understood that nothing
should be done which might prejudice the civil and religious rights of existing non-Jewish
communities in Palestine.’ Crawford argues that it remains unclear whether Britain’s
responsibilities under the League Covenant should have precluded its support of Jewish
interests and whether it really was possible to juggle such competing interests. What at
least is clear is that Britain was unable to resolve this tension and that the seeds of conflict
can be traced to the fundamental incompatibility between Mandate responsibilities
contained in Article 22 of the League Covenant and the Balfour Declaration.

Up until Britain’s withdrawal from Palestine in 1948, relations between Jewish and
Arab populations had produced not only serious local tensions but also international
attention from the newly formed UN. As the Arab League remarked in its oral statement in
the Wall Advisory Opinion, the ‘issue of Palestine is the longest-lived problem on the
agenda of the United Nations.’ Despite the formation of dedicated committees about
Palestine’s future as well as the General Assembly-endorsed Partition Plan, disagreement
was so pronounced that war broke out between Zionist and Arab forces soon
after Britain’s flight from Mandatory responsibility. The international consequences of this
war included the creation of the state of Israel; agreement on the 1949 Armistice Line
(often referred to as the Green Line) dividing Israel from the Jordanian-administered West
Bank; a large mass of Arab refugees who would come to rest their hopes increasingly on
the promise of self-determination rather than the luke-warm reception offered by Arab

9 Quoted in Quigley, ibid.
11 Article 22 of the Covenant is discussed in Chapter Two at 88. For an overview of Britain’s difficulties
faced in honouring the Balfour Declaration under the Mandate, see I Papp, A History of Modern Palestine:
One Land, Two Peoples (Cambridge: Cambridge University Press, 2004), at ch 3.
12 Mr Bothe, Oral Statement of the League of Arab States, 25 February 2004, CR 2004/5, at 22. Available at:
13 The Partition Plan was included within Resolution 181(11), 29 November 1947. For a general overview of the
events precipitating the 1948 war, see J Quigley, ‘Sovereignty in Jerusalem’ 45 Catholic University Law
14 Israel also became a member of the United Nations on 11 May 1949 as a result of General Assembly
Resolution 273 (III). The territory comprising the new state of Israel was much larger than that envisaged
under the UN 1947 Partition Plan and so some Arab states in their Wall Case submissions still regarded
Israel’s UN membership as based on its compliance with the territorial plans of the partition. However, UN
membership is not conditional and Crawford points out (‘Israel (1948-1949) and Palestine (1998-1999)’ supra
n 4, at 108-110) that the best explanation for Israel’s formation was as an act of force leading to secession
(requiring stable and effective government). Israel would have been able to demonstrate this capacity by
January 1949.
15 Halliday suggests that the figure was around 1.4 million. F Halliday, The Middle East in International
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states; as well as the seeds of deep-seated animosity between Israel and its Arab neighbours.

Regional tensions came to their climax in the 1967 War. After only six days, the war ended with the Israeli occupation of territories east of the Green Line (including East Jerusalem) as well as the Golan Heights in Syria and Egypt’s Sinai Peninsula. Almost immediately after the occupation of Palestinian lands Israel’s actions were condemned by the UN Security Council (UNSC) in Resolution 242. UN resolutions following the conflict accepted the cease-fire lines (including the ‘Green Line’ delimiting the West Bank) but rejected the ‘conferring of any title to the territory occupied by Israel’. Since 1967 Palestine has remained a central concern of the UN, and yet independence is as elusive now as it was with the creation of the Mandate. Both the UNGA and the UNSC have issued countless resolutions on specific aspects of the conflict. The central themes to emerge from these include the Palestinian right to self-determination, the non-recognition of Israeli sovereignty over the territory and its status instead as a belligerent occupier under the ambit of international humanitarian law (IHL), the importance of regional peace agreements, the illegality of Israeli settlements, and the need for both Palestinians and Israelis to cease the cycle of violence perpetrated by both public and private actors against civilians.

Only a year before the UNGA requested the Court’s assistance, a ‘Roadmap’ was first mooted as a way of ameliorating regional tensions. The Roadmap laid out steps to be followed by Palestine and Israel and it was to be overseen by the UN, the United States (US), the European Union (EU) and Russia. These countries came to be known as the Quartet and they continued their efforts throughout the Advisory Opinion proceedings.

Palestine's occupation is a classic example of neocolonialism in a postcolonial age. In the Wall Case, postcolonial states employed the language of international law in pursuit of the Palestinian cause of self-determination, which suggests that international law was being used as a weapon of the weak in their attempt to solidify a world free of

17 For a comprehensive list of UN resolutions relating to Palestine, see http://www.arableagueonline.org/ias/english/level2_en.jsp?level_id=701.
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...colonialism. Whether international law as a body of norms is capable of supporting such aims is the subject of discussion below.

b) Bringing the Conflict before the Court: The Request for an Advisory Opinion

Although Palestine has been a constant on the agendas of the UNGA and UNSC, it was not until Israel’s construction of a wall that the UNGA sought the assistance of the ICJ. We saw in Part Three’s Introduction that only the UNSC, UNGA or specialised UN bodies acting within the scope of their mandate can request an Advisory Opinion from the Court.

Under the Charter, the power of the UNGA to make a request is further limited by Article 24, which establishes that the UNSC has ‘primary responsibility for the maintenance of international peace and security.’ Although this provision can be read to prohibit all UNGA involvement in affairs under the Council’s consideration, Article 24 only stipulates ‘primary responsibility’. Further, in 1950, the UNGA passed its ‘Uniting for Peace’ resolution, which provides that

if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures...If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor.

The Tenth UNGA Emergency Special Session had been convened in 1997 to discuss Israeli settlements in the Occupied Palestinian Territories (OPT) after a veto by the US in the Security Council. The Tenth Session was reconvened on 20 October 2003 in the wake of another US veto of a Council Resolution, which was partially concerned with the construction of a wall in the OPT.


21 This is discussed by the Court in the Wall Opinion: ICJ Reps (2004), at para. 24.

22 3 November 1950, 377(V).

23 For resolutions passed on this issue in the session, see A/RES/ES-10/2, 5 May 1997; A/Res/ES-10/3, 30 July 1997; A/RES/ES-10/4, 19 November 1997.

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The minutes from the Emergency Special Sessions preceding the Advisory Opinion pleadings indicate that political and legal positions about the Court’s role in the Case and the legal issues raised were already clearly established. Many UN member states that spoke during the 2003 Emergency Special Sessions also went on to present submissions to the Court and there is very little internal discrepancy in their positions. 25 Although stances on legality or illegality and the applicable law used remained relatively constant, there was a significant shift in the language and imagery used in the two settings. Speaking before fellow UN members in a highly charged political setting, speakers were more confident in employing ‘inflammatory’ language. 26 Speakers in the UN setting also appeared more confident about using or abusing international law for their own purposes. 27 The use of legalese was rare. It would seem that the atmosphere of the Court produced a marked difference in the behaviour of parties. These observations suggest that states regard the practice and discourse of international law used in ICJ adjudication as qualitatively distinct from political debate.

After heated discussions, a number of resolutions were passed about the wall’s construction and the scope for requesting an Advisory Opinion. In Resolution ES-10/13 calling for Israel to ‘stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem’ as well as report by the Secretary-General on Israel’s compliance, 28 144 states supported the Resolution with four against and twelve abstaining. 29 Shortly after the Secretary-General’s report was received and after the Security Council veto, Kuwait on behalf of the Arab group and Malaysia on behalf of the Non-Aligned Movement (NAM) sought the reconvention of the Emergency Special Session to respond to the report’s findings. The various references made to the

25 For ease of expression, ‘states’ will be used to denote state, and quasi-state entities (such as Palestine) where I am discussing general UN activities by its member states and permanent observers.
26 In the words of the President of the 26th Emergency Special Session, ‘I really want to caution against the language being used in matters that are ticklish debates which sometimes have the tendency of being inflammatory and not necessarily helping the cause. I really want to make it clear, that for whatever reason – and I do not really care who is upset – I really object to any analogy that is made, particularly from the inside, which may have a tendency to describe as in the Assembly as inmates in an asylum. I think that we can find better language to use in terms of describing the debates that are taking place here.’ E/ES-10/PV.26, 19 July 2004, at 3.
27 For example, ‘it is abundantly clear that the construction of the expansionist annexation wall by the occupying Power is a war crime and, I reiterate, a war crime of such seriousness and intensity that it constitutes a crime against humanity.’ Mr. Al-Kidwa, UN Observer of Palestine, A/ES-10/PV.21, 20 October 2003, at 3.
Arab and NAM positions throughout the meetings suggest a mutual position not only about the wall’s illegality but also the need for an Advisory Opinion. In this vein and after much hyperbole, a resolution requesting the Court’s Advisory Opinion was put to the vote and passed. Like other earlier resolutions, Resolution ES 10/14 condemned the wall’s construction. Its call for the Court’s intercession, however, aroused caution in many – particularly European – states and the resolution passed with a smaller majority (111, with 55 abstentions and 7 against). Despite this, numbers were sufficient in transferring the debate from New York to The Hague.

30 Generally see A/ES/10/PV.23, 8 December 2003.
33 It must be pointed out that this was not the only ICJ case dealing with Palestine. Others include: Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) (1949) ICJ Reps, p. 174; and Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of June 26 1947 (Advisory Opinion) (1988) ICJ Reps, p. 12.
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**ISRAEL’S WALL AND SETTLEMENTS (COLONIES)**
**FEBRUARY 2007**

3) The Decision of the Court

In its resolution, the UNGA had asked the Court to give its advice on the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

The Court provided its response in the form of an Opinion as well as a number of separate opinions and one dissenting declaration. The bench went about answering this question by first considering whether it had jurisdiction and if it was proper to exercise its jurisdiction.

a) Jurisdiction

The Court's jurisdiction was challenged on a number of grounds. First, the Court had to consider whether the Emergency Special Session request was valid. The Court accepted the nexus between the Uniting for Peace Resolution and the UNGA's request to hold that there were no reasons to regard the request as invalid. Second, a number of submissions argued that the UNGA request was insufficiently 'legal' as per Article 96 of the Charter, that the request lacked clarity; and that it was too political. The Court drew on its jurisprudence to show that none of the objections raised constituted grounds for declining its jurisdiction; It held that the request centred on a sufficiently legal matter.

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35 A/RES/ES-10/14, at 3.
36 Judges Koroma, Higgins, Kooijmans, Al-Khasawneh, Elaraby and Owada issued separate opinions; and Judge Buergenthal issued a dissenting declaration.
38 Article 96 states: 'The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.' Italics added.
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was ‘eminently legal’. The Court was not concerned that the wording of the UNGA’s request was somewhat vague, as it pointed out that such a situation simply required ‘clarification in interpretation, and such necessary clarifications have frequently been given by the Court.’ Lastly, ‘the Court cannot accept the view ...that is has no jurisdiction because of the “political” character of the question’. The Opinion relied on ICJ decisions, especially Legality of the Threat of Use of Nuclear Weapons, to rebut this argument. The Court acknowledged the existence of politics in its work, but maintained that politics and many other issues were inherent aspects of international law and did not negate the quality of the legal question under consideration. Accordingly, the Court found it had jurisdiction to give the requested Advisory Opinion. The Court may have acknowledged the political context, but its judgment on the merits demonstrated how it strove to overlook tensions beyond the Courtroom. As is typical, the language of the Opinion was used to avoid many of the complexities highlighted from a reading of the pleadings.

b) Propriety

Although the Court affirmed its jurisdiction, it also considered whether there were elements of the UNGA’s request ‘that would render the exercise of the Court’s jurisdiction improper and inconsistent with the Court’s judicial function’. A substantial body of jurisprudence has grown up around this question, which generally focuses on whether there would be any ‘compelling reasons’ leading to its jurisdiction being declined. The Opinion restated a well-known fact that the ICJ had never declined jurisdiction on these grounds and acknowledged its special responsibility as the ‘principal judicial organ of the United Nations’. One of the most important reasons against its jurisdiction was the proposition advanced in a number of submissions that ‘the request concerns a contentious matter between Israel and Palestine’ lacking Israeli consent. Here, the Court reaffirmed that

43 ICJ Reps (2004), at para. 41.
45 ICJ Reps (2004), at para. 41.
46 ICJ Reps (2004), at para. 42.
47 ICJ Reps (2004), at para. 43.
50 ICJ Reps (2004), at 157, para. 46.
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advisory opinions as opposed to contentious cases do not ipso facto require a state’s consent, and that previous opinions had been rendered in the absence of consent.\(^{51}\) So as to distinguish the PCIJ case of Eastern Carelia,\(^{52}\) the Court relied on Western Sahara’s dictum that jurisdiction could be upheld despite a lack of consent as well as the presence of a bilateral dispute as long as this was not ‘incompatible with the Court’s judicial character’.\(^{53}\) The Court acknowledged that Israel and Palestine had ‘expressed radically different views’.\(^{54}\) It also recognised an aspect of the Case partly comprised a bilateral dispute, however, as in the Western Sahara Case, it chose to focus on the relationship between its advisory jurisdiction and the mandate of the General Assembly. It held that the construction of the wall ‘to be directly of concern to the United Nations’.\(^{55}\) The Opinion would primarily function as judicial assistance to the Charter-determined duties of the General Assembly, rather than act as an alternative forum for a bilateral dispute. By using these arguments the Court could carve out a legal niche for itself within the broader context of the ‘political’ conflict.

The Court considered and refuted four more challenges to its competence: that the Opinion would impede negotiations between the parties; that the Court lacked adequate factual materials on the Case, especially because of the absence of Israeli consent; that the Opinion would serve no useful purpose; and that Palestine did not come to the proceedings in good faith.\(^{56}\) First, with very little investigation of the ensuing negotiations, the Court erred on the side of jurisdiction when it argued that opinions differed as to the possible relationship between an Opinion and negotiations. Ultimately, it did not regard potential interference ‘as a compelling reason to decline’ jurisdiction.\(^{57}\) On the requirement of sufficient information, the Court again distinguished Eastern Carelia to hold that the current Case did not require factual material only available from a non-consenting party.\(^{58}\)

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\(^{51}\) Judge Burgenthal also noted this point, but placed much greater weight on it, arguing that fairness would have been improved if Israel were permitted to appoint a judge ad hoc. ICJ Reps (2004) (sep. op. Burgenthal), at 265-267.

\(^{52}\) Status of Eastern Carelia (Advisory Opinion), 1923, P.C.IJ., Series B, No. 5. Judge Burgenthal in his dissent also pointed out that in the case that as Russia was not a member of the League it had therefore not consented to have its disputes heard by the PCIJ at all. However, in this case, Israeli membership of the UN created a qualitatively different scenario. ICJ Reps (2004) (sep. op. Burgenthal), at 263, para. 9.

\(^{53}\) Western Sahara (Advisory Opinion) ICJ Reps. (1975), at 25, paras. 32-33, in ICJ Reps (2004), at 158, para. 47.

\(^{54}\) ICJ Reps (2004), at 158, para. 48.

\(^{55}\) ICJ Reps (2004), at 159, para. 49.

\(^{56}\) ICJ Reps (2004), at paras. 46-65.

\(^{57}\) ICJ Reps (2004), at 160, para. 53.

\(^{58}\) ICJ Reps (2004), at paras. 55-58.
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Instead, ‘the Court has at its disposal the report of the Secretary-General, as well as a voluminous dossier submitted by him to the Court’, the submissions from the pleadings and, lastly, material available in the ‘public domain’. Third, in relation to the contention that the Opinion would be of no value, the Court held that it ‘cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion’. Both the UNGA and UNSC would be free to ‘draw [their own] conclusions’. Finally, the Court dismissed Israel’s contention that Palestine’s responsibility for acts of violence meant that it came to the Case in bad faith and without ‘clean hands’. This was not a ‘pertinent’ consideration because the Case involved a request by the UNGA rather than a bilateral dispute per se.

Judges Higgins and Kooijmans criticised aspects of the Court’s reasoning in relation to its competence. Their reservations centred on the bilateral and political aspects of the Case as well as the Opinion’s ill-founded reliance on the Namibia decision. Both separate opinions indicate that the Court’s compromise was an awkward one. Nevertheless, there was sufficient agreement for fourteen of its members to accept the UNGA’s request and consider the matter on its merits.

c) Merits

The Opinion’s discussion of the legal principles lacked detail. The Court’s decision has especially been questioned in relation to its ‘somewhat light treatment of international humanitarian law’, human rights law, as well as the requirements of self-defence. These

60 ICJ Reps (2004), at 163, para. 62.
61 Ibid.
63 ICJ Reps (2004), at 164, para. 64.
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factors fall outside of the chapter’s focus, but it is useful to note that the Court adopted its usual approach in obfuscating norm conflict and relying on formalism.\textsuperscript{66} It must also be remembered that a number of states that had made submissions did not address issues of substance because they had requested the Court to decline its jurisdiction. Thus the available material from both the Court as well as various parties was somewhat superficial.

Before the Court could consider the legal consequences of the wall’s construction, it needed to determine what bodies of law applied and whether any breaches had occurred within the OPT. At the outset, it distinguished between those parts of the wall west of the Green Line (in Israel proper) and those in the OPT. It held that only the latter were of relevance because any state was free to construct walls within its own territory.\textsuperscript{67} Before it considered the applicable laws, it discussed the territorial status of the OPT since the time of the Mandate. Although the Opinion did not consider the territorial status of Palestine between 1948 and 1967,\textsuperscript{68} it highlighted League of Nations principles pertaining to the territory: non-annexation and ‘the well-being and development of peoples’.\textsuperscript{69} What was clear for the Court at least was the status of Palestine after the June War in 1967: it was under Israeli belligerent occupation. This recognition of Palestine’s occupied status is confirmed by numerous UNSC resolutions issued since 1967.\textsuperscript{70}

Echoing the Mandate ideals, the Court first identified both the right of self-determination and the prohibition against the use of force as constituting the general legal principles applicable. It cited the \textit{East Timor Case}\textsuperscript{71} in support of the notion that ‘the right of self-determination of peoples today is a right \textit{erga omnes}'.\textsuperscript{72} This right therefore applied to Israeli policies, which included building the wall, transferring its population to

\textsuperscript{66} Judge Higgins characterised the majority’s strict definition of self-defence as only applying between states as ‘formalism of an unevenhanded sort.’ ICJ Reps (2004) (sep. op. Higgins), at 215, para. 34.

\textsuperscript{67} ICJ Reps (2004), at 164, para. 67.

\textsuperscript{68} Judge Al-Khasawneh applauded this approach of the Opinion’s and explained the underlying motives of the Court: ‘The Court followed a wise course in steering away from embarking on an enquiry into the precise prior status of those territories not only because such an enquiry is unnecessary for the purpose of establishing their present status as occupied territories affirming the de jure applicability of the Fourth Geneva Convention to them, but also because the prior status of the territories would make no difference whatsoever to their status as occupied territories except that they were \textit{terra nullius} when they were occupied by Israel, which no one would seriously argue given that discredited concept is of no contemporary application, besides being incompatible with the territories’ status as a former mandatory territory.’ ICJ Reps (2004) (sep. op. Al-Khasawneh), at 237, para. 8.

\textsuperscript{69} Citing ICJ Reps (1950), p. 131, in ICJ Reps (2004), at 165, para. 70.

\textsuperscript{70} Particularly, UNSC Resolution 242 (1967), 22 November.

\textsuperscript{71} \textit{East Timor (Australia/Portugal) (Merits)} ICJ Reps (1995), p. 102

\textsuperscript{72} ICJ Reps (2004), at 172, para. 88.
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settlements in the OPT, and the resulting flight of Palestinians from the territory. These acts
impeded the Palestinian right to self-determination and are discussed further below in this
chapter’s comparison of the pleadings and the Opinion. Although supportive of the notion
of self-determination generally in the OPT, Judges Higgins and Kooijmans argued that
there was no direct relationship between the wall and this right; it could only be appreciated
with regard to the broader context, and this was beyond the scope of the UNGA’s request.73
Judge Higgins pointed out that the wall did not change the territorial status of Palestine:
both before and after its construction Palestine would remain an occupied territory.74 This
view placed too little weight on what the Opinion described as the expansionist aims
embodied by the wall; the Court regarded the walls’ construction as constituting de facto
annexation.75 In such a case, the right of self-determination was being breached. Most of
the Court was unwilling to accept Israeli statements about the ‘temporary’76 nature of the
structure and thus interpreted the right of self-determination in a more contextual and
flexible manner than Judges Kooijmans and Higgins. These difficulties of definition faced
by the bench indicate how international legal discourse is ill-equipped to express
hypothetical, future scenarios with possible legal implications attached.

After examining the various laws applicable and instances of Israeli breaches, the
Court discussed the legal consequences for both Israel and third states. As the Court had
determined that the wall’s construction was in breach of the right to self-determination, IHL
and human rights law, it held that Israel must respect such obligations. Israel was required
to stop and reverse the wall’s construction. Relying on the Factory at Chorzów Case,77 the
Court further held that Israel was required to make reparations or, where this was not
possible, to compensate the victims for the damage suffered during the wall’s
construction.78 As for third states, the Opinion stated that self-determination as well as

75 Cf Kretzmer’s critique on the Court’s unsatisfying treatment of future acts: D Kretzmer, ‘The Advisory
Opinion: the Light Treatment of International Humanitarian Law’ (2005) 99 American Journal of
International Law 88, at 92.
76 According to Israel, the Wall’s construction is ‘a non-violent and temporary measure of last resort.’ Written
Statement of Israel, 30 January 2004, at para. 1.16. Available at http://www.icj-
77 Factory at Chorzów (Merits) (1928) P.C.I.J., Series A, No.17.

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aspects of IHL were ‘of an erga omnes character’ permitting no derogation. Thus, in its
dispositif the Court held:

(3) A. By fourteen votes to one, the Court held:

The construction of the wall being built by Israel, the occupying Power, in the
Occupied Palestinian Territory, including in and around East Jerusalem, and its
associated regime, are contrary to international law;

B. By fourteen votes to one,

Israel is under an obligation to terminate its breaches of international law; it is
under an obligation to cease forthwith the works of construction of the wall being
built in the Occupied Palestinian Territory...to dismantle forthwith the structure
therein situated, and to repeal or render ineffective forthwith all legislative and
regulatory acts relating thereto...

C. By fourteen votes to one, Israel is under an obligation to make reparation for all
damage caused by the construction of the wall in the Occupied Palestinian
Territory...

D. By thirteen votes to two, All States are under an obligation not to recognize the
illegal situation resulting from the construction of the wall and not to render aid or
assistance in maintaining the situation created by such a construction...

E. By fourteen votes to one, The United Nations...should consider what further
action is required to bring to an end the illegal situation...

Judge Buergenthal did not support the Court’s jurisdiction and so he voted consistently
against all dispositive paragraphs. Although Judge Higgins voted for paragraph 3 (D), she
expressed reservations about its operation, because it called for states ‘to ensure compliance
by Israel with international humanitarian law.” Judge Kooijmans also argued that there
was no positive duty for States in the Fourth Geneva Convention regarding breaches and
that it was not practicable for the Court to rule on this anyway. Finally, it was unclear
from the Court’s discussion whether it was eliding the term erga omnes with jus cogens,
especially in relation to the right of self-determination.

Despite the Opinion’s rather sketchy and shallow treatment of many aspects of the
Case, it still provides a useful statement on many international legal principles and needs to
be appreciated for what it is: a difficult compromise reached by fourteen out of the Court’s

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80 ICJ Reps (2004), at 200, para. 159.
81 Judge Buergenthal in dissent to paragraphs 3 A, B & C.
82 Judges Buergenthal and Kooijmans in dissent.
83 Judge Buergenthal in dissent.
84 ICJ Reps (2004), at para. 163.
87 See generally, A Orakhelashvili, ‘International Public Order and the International Court’s Advisory
Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’ (2005)
43 Archiv des Völkerrechts 240.
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fifteen members. For Falk ‘the degree of consensus is rather remarkable, given the controversial subject matter, and the far-reaching and drastic responses given to the General Assembly’s question’.88 Damrosch and Oxman are less forthcoming with praise for the Opinion, because substantial agreement between the judges ‘came at the price of a lowest-common-denominator approach to the reasoning of the opinion’.89 O’Keefe echoes these sentiments, arguing that the Opinion ‘is often unsatisfying in methodological and stylistic terms...[and it] is too prone to bald, ex cathedra pronouncements of law and fact, which give little indication of the Court’s reasoning’.90 At times the Opinion’s ‘certain delphic quality’91 may have been necessary because of the tense legal and political issues the Case straddled, but O’Keefe argues that the Court need not have been so ‘exceedingly spare’ in its approach.92 An opportunity to clarify some particularly pertinent issues, such as the emerging norm relating to self-defence, as well as the finer points of IHL, was wasted. In her separate opinion, Higgins opines that she did not feel compelled to add to the Opinion because of any major discrepancies with what was written; rather, her ‘regrets are...about what [the Court] has chosen not to write.’93

As shown by Higgins, its silences tell us a great deal about international law and its relevance to the dispute. In the following sections, I compare positions taken in the pleadings with both the statements and silences of the Court.

4) Contesting the Court’s Jurisdiction

In contrast with contentious ICJ cases, Advisory Opinions offer much greater scope for the participation of a range of states as well as IGOs and in the case of Palestine, nascent state entities.94 States are under no compulsion to submit written or oral arguments and non-state

91 O’Keefe, Ibid, at 126.
92 Ibid, at 127.
94 Despite significant scholarly attention generated by the Wall Opinion, very little work has considered the pleadings. In cases where authors have looked at the pleadings at all, they have tended to focus excessively on
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entities must first secure the permission of the Court. The prestige, prominence and
authority of the Court may induce states to act, but there are also other considerations such
as resources and priorities to take into account. In the Wall pleadings many states
participated, but many also chose to play no part. Links can be made between the relative
regard for the proceedings among the states participating and their method of engagement.
There was a much greater number of written as opposed to oral submissions, and often
those states requesting the Court to decline its jurisdiction – namely, various EU states, the
US, Israel and some others – only submitted written arguments. There was an
overwhelming consensus among these states on the issue of jurisdiction: negotiations
through the prism of the Roadmap were to take priority over legal proceedings likely to
jeopardise this process. Such a stance suggests that these mostly First World states regarded
the role of the ICJ as of limited value in such a highly ‘political’ matter. It would also seem
that states were strongly influenced by regional and strategic affiliations. The views
espoused in these written submissions indicated a tendency to set clear boundaries between
legal and political spheres in international life with law being deemed as only appropriate in
limited situations. It should also be noted that all states parties to the Roadmap’s Quartet,
namely Russia, the US and the EU submitted that the Court should decline to exercise its
jurisdiction.

While strong agreement existed among mostly First World states in relation to the
ICJ’s minor role, there was a similar pattern for Third World, and particularly Arab, states

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95 Article 66, Statute of the International Court of Justice. In the Wall Opinion, the Court decided to invite
submissions from Palestine, the Organisation of Islamic Conference (OIC) and the Arab League. In the case
of Palestine, it grounded its reasons on A/RES/ES-10/14 (discussed above), the Secretary-General’s report a
well as Palestine’s ‘special status of observer [in the UN] and that...[Palestine] is co-sponsor of the draft
resolution requesting the advisory opinion’. As for the Arab League and the OIC, ‘these two international
organizations were likely to be able to furnish information on the question.’ President Shi, Opening Address,

96 According to Hirsch, regional interests may well be of greater importance for Israeli compliance than any
commitment to the international community as represented in the ICJ as well as the UNGA’s request: ‘This
social influence of international reference groups indicates that the position of states belonging to the Western
group regarding the recent Advisory Opinion is of significance to Israeli decision makers, even if it is not
translated into coherent sanctions.’ M Hirsch, ‘The Impact of the Advisory Opinion on Israel’s Future Policy:
International Relations Perspective’ (2005) 1 Journal of International Law and International Relations 319, at
340.

97 Exceptions included: Palau, Micronesia and the Marshall Islands continued in their strong allegiance with
the US on matters relating to Israel and asked for the Court to decline jurisdiction. This was also the case for

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Chapter Six: Discourses of Division? Law, Politics and the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory regarding the importance and place of international law and the ICJ in resolving the protracted conflict. Many Third World states regarded the Case to be of great importance.98 There were a disproportionate number of Third World states submitting oral (as well as written) statements and a connection can be made between the relative importance that these states placed on the proceedings and their participation. Saudi Arabia declared in the hearings that ‘[t]his is the first time...Saudi Arabia has made an oral presentation to the International Court of Justice.’99 Other Third World states expressed their awareness of the ‘momentousness of the occasion’100 by declaring their reverence for the Court in more florid language than their First World counterparts.101 This was especially so for small states, such as Belize and Cuba, which were cognisant of their minor international influence, but still wanted to make a contribution to the proceedings.

As in the case of the Quartet states and Israel, there were identifiable allegiances and alliances within the pleadings as well as a degree of cross-referencing across submissions.102 The NAM103 along with the Arab Group at the UN (which happens to comprise NAM members) were the co-sponsors of the original UNGA resolution requesting the Opinion, and many submissions acknowledged these links. The Organisation of Islamic Conference (OIC) also submitted both written and oral pleadings and many of its members are both members of the NAM104 and the Arab League.105 It is not surprising then that the OIC was invited to participate in the hearings. Palestine is a member, but also,
more importantly, Article 2 of the OIC Charter lists one of the Organisation’s principal objectives as being: ‘to coordinate efforts for the safeguarding of the Holy Places and support of the struggle of the people of Palestine, to help them regain their rights and liberate their land’. The OIC has a committee overseeing the implementation of this Article ‘on the Arab-Israeli conflict in view of the fundamental connection between the Al-Quds [Jerusalem] question and the conflict.’ At the time of the pleadings, Morocco’s King Mohammed VI was the chair of Al-Quds committee and Morocco listed this as a factor in its participation.

Similarly, the Arab League emphasised its own motivations in the pleadings as being directly ‘at the top of the League of Arab States’ agenda since its creation in 1945. The League’s Pact asserted the right of Palestine to independence. Accordingly, Palestine was granted the full membership in the Arab League. The matter of Palestine led to Egypt’s decade-long suspension as well as the temporary transferral of the League’s headquarters in Cairo after Egypt’s peace treaty with Israel in 1979. Ultimately, the NAM, the Arab League and the OIC need not have given international law, and its embodiment in the form of the ICJ, such attention. Many member states of these organisations have been actively involved in diplomatic efforts regarding both the conflict and the wall in particular. However, their choice to support the legal process suggests a commitment to legal institutions as well as a faith in international legal principles. The link between the language of faith and international law for Third World states is explored further below.

A few observations about the relative quality of the legal teams and statements presented are worthwhile before considering the nature of the pleadings themselves. Written submissions varied dramatically in terms of their quality of style and length and as

106 A copy of the Charter can be found on the OIC’s website: http://www.oic-oci.org/.
107 Al-Quds (القدس) is the Arabic name for Jerusalem, which is the third most holy site for Muslims. This is reflected in the derivation of the name: the word is based on the verb qadasa (قدس) (to be holy) and the literal meaning of quds is holiness, sacredness, sanctity: Cowan, J. M. (ed), The Hans Wehr Dictionary of Modern Written Arabic (Ithaca, NY: Spoken Languages Services, 4th ed, 1994). The use of Al-Quds instead of Jerusalem is a highly symbolic act on the part of Arabs who have come to see ‘Jerusalem’ as signifying a unified Jewish capital, see Y Suleiman, A War of Words: Language and Conflict in the Middle East (Cambridge: Cambridge University Press, 2004), at 175. When I was in Al-Quds/Jerusalem in June 2005, I noticed that the (Israeli-made) Arabic street signs referring to the city used a transliteration of Jerusalem, rather than Al-Quds.
108 This statement can also be found on the OIC’s website, http://www.oic-oci.org/.
110 The members of the Arab League are listed in the Introduction at 7, footnote 16.
well as considered treatment of legal arguments. In instances where states placed great weight on the jurisdiction and substantive findings of the Court, submissions were often detailed and well-polished, as in the case of Saudi Arabia, the the Arab League, the OIC, Malaysia, South Africa and particularly, Jordan and Palestine. In contrast, many states opposed to the jurisdiction of the Court submitted shorter and often perfunctory documents. Israel however had a strong interest in blocking the pleadings and so its written submission was quite detailed, in relation not only to jurisdiction but also, inadvertently, substance. From a quick perusal of both the drafting style and the legal teams employed, it is clear that there were disparities in the time and resources outlaid in the proceedings. Palestine’s legal team in particular comprised a host of eminent international law experts, who were given the liberty to work on the Case as they saw fit; they were not under any instructions from Ramallah. This fact alone is significant; it suggests that Palestine’s faith in the processes of international law - as embodied in the discipline’s finest – meant that no political direction was needed. Instead, international legal principles could speak for themselves.

5) Strategies of Argument

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This section is concerned with two strategic devices employed by the parties in presenting their respective positions: the use of language and the use of history. Both of these strategies reveal underlying Third World normative evaluations about the role of international law in a postcolonial era.

a) Speaking before the Court

States participating in the pleadings did not necessarily share the same vocabulary or understanding of international law. Whether such discrepancies can be explained as simply different dialects or different languages will be assessed in the Conclusion of the thesis. It is also evident from a comparison of the language used in the lead up to the Opinion in the Emergency Special Sessions, that parties were aware of the unique discourse that the Advisory Opinion elicited – language of the pleadings was far less emotive and florid.

Choice of language was of importance for both the parties and the Court in relation to the name of the Case and its focus, the wall. Although, the Court must have been aware of the controversy over terminology, it chose not to delve into this.\footnote{Scobbie also acknowledged this controversy in his discussion of the Opinion. Scobbie, ‘Words My Mother Never Taught Me’, supra n 94, at 76, footnote 1.} In explaining its use of the word ‘wall’ (as opposed to ‘fence’ or ‘barrier’), the Court simply stated that other words ‘are no more accurate if understood in the physical sense.’\footnote{ICJ Reps (2004), at 164, para. 67.} However, the Court did qualify its use of the word later in the Opinion by describing the surrounding circumstances as creating a ‘régime’;\footnote{For example, ICJ Reps (2004), at 191, para. 134.} the wall was more than a simple edifice, it took on complex qualities with legal consequences. This idea can be attributed to a number of submissions from Arab states, such as Palestine and Jordan.\footnote{‘The wall, far from being a simple self-standing security measure, is thus to be understood as a régime serving Israeli policy towards the annexation of the West Bank or substantial parts thereof’ (emphasis added), Written Submission of Jordan, supra n 112, at 97, para. 5.151; ‘The Wall is not a physical structure. It is a whole régime.’ Mr. Al-Kidwa, Oral Statement of Palestine, 23 February 2004, CR 2004/1, at 18, para. 4; Written Submission of Palestine, supra n 112, at 4, para. 11.}

Within the pleadings themselves, there is an unambiguous correlation between Third World support for the Court’s jurisdiction and their use of the term, ‘wall’. Every Arab state and most Third World states (except those not in favour of the request: the
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Pacific states and Cameroon), supported this pattern. Jordan’s Prince Al-Hussein voiced the
Third World position when he argued before the Court that the Case ‘concerns a wall. And
not just “a” wall, but a very specific wall...[that] is not just a simple fence.’¹²⁰ For those
Western states asking the Court to decline jurisdiction, many chose to use the term,
‘barrier’ instead, and this conjures up the image of a structure less total than a wall. The use
of the term ‘fence’ was associated with Israel’s position and is ‘highly symbolic’,
suggesting, as it does, an insubstantial and semi-permanent structure.¹²¹ Israel consistently
used (and continues to use) the term and only a few states followed suit in their
submissions, all of which favoured negotiations over the Opinion.¹²² Israel went into detail
about this:

The use of the term ‘wall’ in the resolution requesting an opinion is neither
happenstance nor oversight. It reflects a calculated media campaign to raise
pejorative connotations in the mind of the Court of great concrete constructions¹²³
of separation as the Berlin Wall, intended to stop people escaping from tyranny.¹²⁴

This notion of the Berlin Wall was explored by the Arab League in its oral statement, and
was the only delegation to do so.¹²⁵ The broader idea of separation, however, was expressed
by some other Arab states, which referred to the ‘apartheid wall’¹²⁶ and the ‘segregation
wall’.¹²⁷

Language choice over ‘wall’ was bolder in the political setting of the earlier
Emergency Special Settings discussed above. During the Emergency Special Sessions,
speakers were more forthright in their language. Prominent parties in the Case also spoke at
the Sessions and followed the Palestinian delegate’s condemnatory language regarding the

¹²⁰ Written Submission of Jordan, supra n 112, at 53.
¹²¹ In the words of Professor Sorel, Belize’s counsel, ‘Like the General Assembly, I shall use the word
“Wall”, not forgetting that other, highly symbolic expressions are used by Israel to describe this construction
referred to as “security fence” then “security barrier”’. Oral Statement of Belize, CR 2004/3, at 15, footnote 3.
¹²³ This statement is directly contradicted by the Arab League, which argued that Israel was denying the
effects of the wall by calling the ‘fence’ a temporary security measure. But this claim veils the true situation.
It is public notice that major parts of the Wall are built in a very solid way, concrete structures, ditches, and so
on.’ Professor Bothe, Oral Statement of the League of Arab States, CR 2004/5, at p. 29. This position is
corroborated by footage on B'Tselem’s (a prominent Israeli human rights organisation) website:
http://www.btselem.org/English/Photo_Archive/List.asp?x_Concatenate=15&z_Concatenate=LIKE,%27%25
%27%27%27.
¹²⁵ Written Submission of the League of Arab States, supra n 111, at 7 para. 1.4.
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wall, using phrases such as ‘expansionist annexation wall’ (Palestine), \(^\text{128}\) ‘expansionist conquest wall’ (Palestine), \(^\text{129}\) ‘Israeli expansionist wall’ (Malaysia speaking for NAM) \(^\text{130}\) and ‘that expansionist wall’ (OIC). \(^\text{131}\) Israel also employed much more inflammatory language to describe the wall: ‘this is the Arafat fence. This is the fence that Arafat built.’ \(^\text{132}\) None of these expressions were employed before the Court; the participants were aware of international law’s particular lexicon and translated their perspectives accordingly.

In both the pleadings and the Opinion itself, ideas of ‘existence’ were touched on through certain linguistic techniques. As in the case of the use of ‘wall’, the Court refused to be drawn into these debates on Palestine’s existence: ‘[a]s regards the principle of the right of peoples to self-determination, the Court observes that the existence of a “Palestinian people” is no longer in issue.’ \(^\text{133}\) However, Palestine was described by Italy as existing ‘still in an inchoate state’, \(^\text{134}\) and Israel was able to demonstrate this idea by always using quotation marks when discussing Palestine; it would seem that for some states Palestine was in a state of limbo. \(^\text{135}\) In a postcolonial context where selfhood is best secured through statehood, Palestine’s unresolved status fitted uncomfortably with international law’s preference for precision and clarity. Perhaps the international legal lexicon was stretched to its limit with such an example, and states exploited this lacuna for their own agendas. Language usage was of such importance for Malaysia that it specifically addressed the issue during the pleadings: ‘Malaysia takes strong exception to the pejorative way in which Israel refers to Palestine throughout its Written Statement, such as the use of inverted commas to refer to Palestine’. \(^\text{136}\) Syria also adopted the technique \(\textit{vis-à-vis} \) Israel by employing quotation marks when referring to anything Israeli including Prime Minister, Ariel Sharon. \(^\text{137}\)

Israel’s existence as a recognised state has been a contested issue for both Arab and Muslim states more generally. Many continue to refuse not only to make peace with Israel

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\(^{128}\) A/ES-10/PV.21, at 3.

\(^{129}\) Ibid, at 9.

\(^{130}\) Ibid.

\(^{131}\) Ibid.

\(^{132}\) A/ES-10/PV.23, 6.

\(^{133}\) ICJ Reps (2004), at 182-183, para. 118.


\(^{135}\) See generally, Written Submission of Israel, supra n 76.


\(^{137}\) However, it should be noted that Syria’s submission was so poorly drafted that occasionally quotation marks were forgotten, but the intention was clear nevertheless.
or enter into diplomatic relations, but even to acknowledge its existence. This dissonance between legal fact and political predisposition was illustrated in parts of the written submission of the OIC, where the presence of Israel remained ambiguous; it was unclear whether the OIC was recognising it or not. This example indicates that choices over language were of primary concern for certain states participating in the Case. Some words and phrases stretched international law’s lexicon, which tends to comprise ‘neutral’, ‘non-emotional’ language so as to preserve the underlying grammar of the law/politics dichotomy.

Many parties employed inflammatory language in the UNGA Emergency Special Sessions and this was carried over to a lesser extent in the advisory pleadings themselves. Chapter One explored some of Koskenniemi’s ideas, including his argument that international law cannot be used as a discourse to express the full range of human emotions; ‘certain values cannot be translated to the idiom of legal reason.’ Did emotional discourses remain within the bounds of legal language and was this discourse understood in the courtroom? This is a question that cannot be answered with any precision, but it would seem from the Court’s rejection of the more extreme phrases employed that their use fell on deaf ears; their meaning was lost on the border between ‘legal’ and ‘non-legal’ language. Words and expressions such as ‘apartheid’, ‘bantustanisation’, ‘racial discrimination’, ‘ghettoisation’, Israel as coloniser and its behaviour towards Palestinians as rendering them in a category of ‘sub-humans’ were used frequently in the pleadings. However, their use was exclusively by Third World states, particularly Arab states. It is possible to argue that Third World states had a more expansive

138 This is also reflected in one of most widespread English/Arabic dictionaries, Al-Mawrid. Under ‘I’, in the English section, it is only possible to find an entry for the adjective, ‘Israeli’. A noun for the place does not exist in this dictionary.
141 Written Statement of the Organisation of Islamic Conference, supra n 112, at para. 42. This idea of ‘sub-human’ conjures up imagery of the Holocaust and this device is quite deliberate on the OIC’s part. In the preceding section the submission makes a direct connection between the European Holocaust and the role of European guilt in the creation of Israel. The OIC is not so subtly reminding readers that Jews were rendered as sub-human in living memory and it is suggesting that the Jewish state is now behaving in a similar fashion towards Palestinians because of Israeli disregard for fundamental human rights principles. Also see Written Submission, at para. 20.
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notion of the role that international law could play in highly contested matters and used a 
lexicon supportive of such ideas. The action of these states echoes Kritsiotis’ supposition 
about international law’s expanding linguistic and participation base: these states were 
trying to refashion the lexicon and grammar of international law and thus the spheres of its 
application.142 Here, Third World states had argued for the Court’s jurisdiction along the 
familiar lines of the matter conforming to a ‘legal’ issue. Once inside the Peace Palace, 
Third World states maintained an awareness of legal niceties in toning down some of their 
rhetoric. However, the debates over word use and occasional flights into inflammatory 
language challenged clear divisions between law and politics. Given the Court’s response, 
it would also appear that much of this language remained on the margins of international 
law, or even outside it.

b) The Use of History

Because historical narratives are mainly related to a case’s substance, it is not surprising 
that those mainly First World states rejecting the jurisdiction of the Court overlooked 
matters from the past. Choices about the relationship between international law as well as 
its ability to confront its own past informed states’ support for or opposition to jurisdiction. 
Although former imperial powers, such as France and Britain, submitted substantial written 
dossiers, neither revisited their own responsibility in the creation of the Mandate system. 
Either they were uncomfortable with their record or wanted it left unexamined because they 
regarded the past as irrelevant to the wall’s construction, starting as it did only a few years 
before the Advisory Opinion proceedings. 

As a strategy of legal argument, the First World position can be contrasted with 
approaches taken by many Arab parties. Although Arab and non-Arab submissions within 
the Third World grouping were quite evenly balanced, only Arab parties (including the 
partly-Arab OIC) discussed the historical record in any detail. This indicates greater Arab 
sensitivity to the past even though many other Third World states had also experienced 
colonial rule. For a number of Arab states, participation in the Wall Case was an 
opportunity not only to revisit the past, but also to offer their own narrative about events 

142 D Kritsiotis ‘The Power of International Law as Language’ (1997-1998) 34 California Western Law 
Review 397. Also see Chapter One, at 34-35.
that are seen to have direct influence today. This desire to rewrite the past also occurs in the
other cases of the thesis, where a Third World desire to decolonise history has been noted.
Jordan’s introductory comment highlighted the central role of historical narrative in legal
proceedings:

In addressing the issues which arise in these proceedings, Jordan is constrained to
note that the substance of the matter which is the subject of these advisory
proceedings raises some very major issues of law and fact, particularly the
historical facts going back more than 50 years. Those facts shape the legal issues
which call for consideration in these advisory proceedings. Moreover, the legal
issues themselves are exceedingly complex and in many respects controversial, and
require the most careful analysis.  

Other Arab parties echoing these sentiments included Palestine, Egypt, Sudan, the Arab
League and the OIC. There was also a degree of reliance between Arab states on each
other’s submissions, such as in the case of Egypt: “Since various memoranda submitted to
the Court by Arab countries and the League of Arab Nations, have elaborately depicted the
historical background of this issue, therefore, the Arab Republic of Egypt would like to
refer thereto in order to avoid repetition.” This statement suggests shared positions on
both the importance of history as well as its content.

All Arab submissions considering the historical record as well as the Court’s
summary of the past began their analysis at the time of the Mandate, thus indicating
consensus about the historical trajectory relevant for the Advisory Opinion. Although both
the Court’s Opinion and Arab submissions highlighted the Mandate ideals of sacred trust
and (eventual) independence, the Court’s ‘neutral’ account of the period obscured
colonialist agendas, such as the role of European powers in the Mandatory system and its
allocation of responsibility and the impact of the Balfour Declaration on Arab inhabitant s
of Palestine.

A thorough investigation of the historical record was not required of the Court; it
was asked to consider the legal consequences arising from recent events. However, many
Arab submissions devoted considerable attention to history because the past was seen as
inextricably linked to the case at hand. Similarly, Judge Elaraby from Egypt distinguished
himself from others on the bench through his emphasis on the historical record:

An historical survey...may appear as academic, without relevance to the present
events. The present is however determined by the accumulation of past event and
no reasonable and fair concern for the future can possibly disregard a firm grasp of

143 Written Statement of Jordan, supra n 112, at 6, para. 1.6.
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past events. In particular, when on more than one occasion the rule of law was consistently side-stepped. 145

In his section on the legal status of the OPT, Judge Elaraby sought to show how the Case for Palestine’s non-annexation by Israel could be bolstered by the historical record; 146 the past and the present were interdependent. Like the deconstruction of the law/politics dichotomy, certain submissions challenged a closely related international legal grammar, the law/history dichotomy.

In their strategic use of history Arab parties and the OIC not only demonstrated their greater reliance on history as a method of international legal argument but also explored some substantive and ongoing themes at work within international law. Neither international law itself nor colonial practice were regarded neutrally; each submission’s narrative was flavoured by a normative evaluation of international society’s characteristics in the past and the present.

We saw in Chapter One that TWAIL in particular is interested in tracing the ongoing relationship between colonialism and the law. Chimni has categorised TWAIL II as having a more critical and structural approach to international law than TWAIL I. 147 TWAIL II authors are sceptical about international law’s capacity to be truly inclusive of non-European, postcolonial peoples. International law is portrayed as structured by its colonial past, and despite Third World participation in the international system as sovereign, independent states, international law continues its colonialist, civilising tendencies in new forms. TWAIL I approaches, however, are generally much more optimistic and are imbued with significant faith in the potentiality of international law as liberator.

Where the historical record is considered in Arab and OIC submissions, there is a strong resemblance to TWAIL I approaches: international law’s relationship with past colonial practices is distinguished from its inclusive and anti-colonialist qualities in the post-1945 world. Many Arab and NAM states described Israel’s actions in the Emergency Special Sessions and pleadings as ‘colonial’, thus trying to demonstrate that colonialism persists in the postcolonial era. However, these accounts also tended to suggest that Israel’s actions were exceptional and contrary to international law; as the Court itself pointed out,

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146 Ibid, at para. 2.5.
the prohibition against the acquisition of territory by force is now a fundamental legal doctrine.\textsuperscript{148} For many Third World states, there was a conviction that international law has qualitatively changed; norms against territorial annexation show that European colonialism is an event of the past, even if it did result in lasting effects on the ground for Palestinian self-determination. Rather than mistrust international law’s capacity for liberation, as many TWAIL II writers do, it seems that Arab historical accounts acknowledged the role of history not so much to remind us about European colonialism \textit{per se} but to make us aware of how similar Israeli practices are with events of the past. Thus the recounting of historical events to highlight themes in legal doctrine was a strategic device for a number of Arab states as well as the OIC. We were made aware of the Arab endorsement of international law’s vital role – as well as its legitimacy – in international society today.

6) The Promise of Doctrine?

Having surveyed some strategic devices of argument, this final section turns to matters of substance. Third World and First World perspectives are contrasted and compared with the Court’s doctrinal position on the issues of conquest, self-determination and human rights norms. The final part of this section comes full circle by looking again at the issue of the Court’s jurisdiction to reflect on the role of the ICJ in resolving even the most ‘political’ of disputes.

The first two interrelated legal principles applicable in the \textit{Wall} Opinion related to the prohibition against the acquisition of territory through the use of force and the right to self-determination. Here, the Court cited Article 2(4) of the UN Charter banning the use of force.\textsuperscript{149} It then linked this general prohibition to the action of territorial annexation – conquest – by referring to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (Resolution 2625(XXV) as well as ICJ jurisprudence to confirm that this rule was customary.\textsuperscript{150} The Opinion then discussed the right to self-determination also by relying on UNGA Resolution 2625 (XXV), its

\textsuperscript{148} ICJ Reps (2004), at para. 117.
\textsuperscript{149} ICJ Reps (2004), at para. 87.
\textsuperscript{150} Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations’, 24 October 1970, ICJ Reps (2004), at 171, at para. 87. Also see Part Three Introduction, at 196

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...jurisprudence ‘on a number of occasions’ and common Article 1 in the two human rights covenants.151 Later, the Court went on to hold that the right to self-determination was *erga omnes*, but it remained unclear whether the Court was actually referring to the notion of *jus cogens* as well.152 This area of law remains unclear and many pleadings reflected this confusion.153

Uncertainty about norm conflict was also evident in submissions from Third World states. Parties generally gave only scanty consideration to the principles of conquest and self-determination, but they were also referred to as constituting the core of international legal norms for a number of states. For example, Palestine regarded the norm against the acquisition of territory to be so well-accepted that it did not need to cite any authorities in its submission; international law was irrefutable here.154 Many states specifically relied on UNGA Resolution 2625 (XXV) and some sought to rely on the Kellog-Briand Pact of 1928.155 Most First World states did not consider the merits of the Case, but even where they did, there was more of a tendency to explore IHL and human rights issues.156 Norms about conquest and self-determination were of far greater concern to Third World states, including Arab states. For states only recently endowed with full international legal personality could appreciate the primacy of statehood more than their First World counterparts.

How did Third World states approach the question of human rights and their application in the OPT? In its Opinion the Court had discussed the scope for human rights derogation in some detail to hold that Israel was still bound by a number of human rights norms.157 No state argued that human rights law was inapplicable in the OPT, because in the words of South Africa, such norms apply to the individual and not the state.158

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152 For a discussion about Judge Al-Khasawneh’s implicit linking of the two concepts, see I Scobbie, ‘Unchart(ed) Waters?: Consequences of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine’ 16 (2005) European Journal of International Law 941, at 949.

153 See for example, Written Statement of Jordan, *supra* n 112, at paras. 5.37, 5.100

154 Written Statement of Palestine, *supra* n 112, at 156, para. 347.

155 The Kellogg-Briand Pact, 27 August 1928, 94 LNTS 57. Written Submissions of Cuba, *supra* n 140; Written Statement of Senegal, [http://www.icj-cij.org/docket/files/131/1643.pdf](http://www.icj-cij.org/docket/files/131/1643.pdf); and Written Statement of Morocco, *supra* n 109. This agreement was not mentioned by the Court.


158 Written Submission of South Africa, *supra* n 112, at 22, para. 55.
Commentary on human rights in general was minimal, but the unquestioning way in which parties recognised provisions as applicable in all contexts is significant. For example, Lebanon stated that human rights treaties ‘now embody unquestionable universal values’. The OIC echoed these sentiments ‘by strongly reaffirming the inalienable and universal nature of human rights regardless of the circumstances in which a particular group finds itself’. Although Gross has argued that the elision of human rights and IHL protections can weaken the position of persons in occupied territories, Third World states overlooked these subtleties in support of ‘the more law, the better’ approach.

Although debate persists within some quarters about the Western biases inherent in human rights norms, Arab states did not subscribe to such views in their submissions. On the contrary, their positions demonstrate support for such norms and sometimes detailed analysis of how human rights norms apply on the ground. For example, Palestine considered in its written statement the ramifications of the wall’s construction on the various human rights of the Palestinian population. It traced the actions of individuals and communities in their daily lives and indicated that human rights guarantees are embedded in all levels of social and political life. In his written statement for Palestine, Professor Vaughan Lowe argued that human rights in the Case fell into two categories: those affected directly by the construction of the wall (such as property seizures), and rights violated as a consequence (such as restrictions on movement). This position indicates how human rights were presented as far more than rigid rules; context and law were interdependent. Thus, Third World states used norms on human rights, self-determination and the prohibition against conquest as a shield in their defence of Palestinian (and postcolonial) interests. The promise of doctrine in the courtroom was embraced, rather than rejected as in the case of most First World states.

Matters of jurisdiction and propriety also reflected normative positions about the role of the ICJ and international law within international society. Overall, most

160 Written Statement of the Organisation of Islamic Conference, supra n 112, 12, at para, 42.
consideration was given by both the Court and the various parties to the matter of jurisdiction. Submissions often relied on very similar material to reach opposite positions. This indicates that international law (especially the jurisprudence of the Court in relation to the exercise of its jurisdiction) was interpreted and applied by actors in different ways to serve different ends. All submissions were informed by a particular reading of the relationship between law and politics and, more specifically, how the ‘peaceful settlement of this dispute’ fitted into such a relationship. In the pleadings, those parties favouring the Court’s jurisdiction also tended to be more supportive of international law’s primary role in resolving international disputes. Both positions also acknowledged current diplomatic efforts in relation to the Road Map. However, there were strong differences over the relationship between the advisory function of the Court and negotiations – that is, law and politics. Submissions from both perspectives highlighted their support for negotiations and also detailed their direct role in such efforts.

Like many First World states, Arab states have participated in negotiations to solve the Arab-Israeli conflict, but they did not see negotiations as precluding international law’s role. Instead, Arab submissions embraced negotiations within the wider context of international law, where the Advisory Opinion was one important legal device in advancing the aim of Israeli compliance with international legal principles. Thus international law and international politics were not regarded as opposites but as mutually interdependent forces within international society.

First World states, on the other hand, typically sought to construct a clear line (or wall) between political, diplomatic processes and international law. The starkest example of this position was provided by the US, which hardly mentioned international law at all. Instead, detailed discussion about diplomatic efforts demonstrated how international law was irrelevant and unhelpful in relation to the wall’s construction and the Arab-Israeli conflict in general. European positions were more nuanced in their approach to the Advisory Opinion. EU states voted en masse for Resolution ES 10/13 calling on Israel to

165 As embodied in the Arab League’s statement: ‘The current request means the General Assembly has recognised the importance of the role of law in the solution of the problem.’ Professor Bothe, Oral Statement of the League of Arab States, CR 2004/5, at 22.
166 For example, both Egypt and Saudi Arabia draw attention to their efforts in previous negotiations to demonstrate that their support for the Advisory Opinion is not about taking sides; they are supportive of both legal and political processes and think that they can rely on each other to an extent. Written Submission of Egypt, supra n 144, at 3; and Oral Statement of Saudi Arabia, CR 2004/2, p. 46, at para. 16.
stop its construction of the wall. However, even though these legal ramifications were clear, the process of seeking Israeli compliance was seen as a political one. A request for an Advisory Opinion was inappropriate, requiring as it would that the Court step into political territory.

Some First World states were more supportive of the Court’s wider role. For example, although it was part of the EU bloc, France’s submission wavered in its support for an Advisory Opinion. It discussed substantive issues of IHL and human rights and deferred responsibility by arguing that questions of jurisdiction should be left to the Court. Other EU states, such as Ireland, Cyprus and Malta were less forthright in their positions, but all supported the Advisory Opinion request and the Court. Although Switzerland had abstained in the UNGA request for an Advisory Opinion, it shifted its position once the resolution was passed; it deferred to the will of the international community as embodied in the UNGA. Similar motivations informed Sweden’s submission in support of the Opinion, despite its EU membership. From their brief statements on the matter, it would seem that First World states supportive of the Court’s jurisdiction respected the Court as an institution of international law. Also, the status of the UNGA was regarded as significant and was seen as being able to straddle the political and legal spheres of international life. In the words of Syria, such First World states also saw the UNGA Emergency Special Session as ‘an expression of the international community’.

Two academic perspectives about the relative weight to ascribe to ICJ Advisory Opinions illustrate First and Third World perspectives about the nature of international society and international law’s place within it. On the one hand, Pomerance criticises the Court’s decision to exercise its jurisdiction in the Wall opinion. She argues that the Court increasingly has come to act under a ‘duty-to-cooperate’ because of its institutional role as

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173 Written Submission of Syria, supra n 113, at 2.
the principal judicial organ of the UN.\footnote{174} Pomerance’s analysis tries to limit the effect of the Court and the UN more generally in international life: there should be no analogy made between the ICJ and international law or the UN and international society. The ICJ has become a UN Court (rather than a World Court) administering UN law (rather than international law).\footnote{175} Falk, on the other hand, tends to concur with the majority of Third World submissions in support of jurisdiction: the UN request for an Advisory Opinion was significant and should be respected. Rather than see the UN in narrow terms like Pomerance, Falk reminds us that it is ‘the embodiment of an inchoate organized international community.’\footnote{176} Although a number of First World submissions relied on the case of Eastern Carelia to argue that jurisdiction should be declined, Falk reminds us that there was not the same relationship between the PCIJ and the League of Nations as is the case with the UN and the ICJ.\footnote{177} From the UN Charter, ‘[j]udicial’ needs to be interpreted to encompass not only...contentious disputes...but also the role of the Court in declaring and developing international law within the scope of the operations of the UN system.\footnote{178} Professor Crawford’s oral statement for Palestine supported these sentiments, when he argued that the Court does ‘not give just another political opinion’.\footnote{179} Instead, it offers a legal perspective sufficiently autonomous and distinct from international political life to act as an ‘authoritative’\footnote{180} source of regulation and legitimacy.\footnote{181}

Submissions seeking the Court’s jurisdiction are indicative of broader faith and reliance on not only the ICJ but also international law itself. Various Third World submissions also made a connection between the UN’s long history of involvement with the Palestinian cause and self-determination more generally to advance their claims about

\footnotetext{174}{M Pomerance, ‘The ICJ’s Advisory Opinion and the Crumbling Wall between the Political and the Judicial’ (2005) 99 American Journal of International Law 26, at 30.} 
\footnotetext{175}{Ibid, at 41.} 
\footnotetext{176}{Falk, supra n 88, at 46, footnote 21.} 
\footnotetext{177}{Ibid, at 46. Palestine also distinguished the ICJ from the PCIJ by arguing that the ICJ is more explicitly connected to the UN as its principal judicial organ. Written Statement of Palestine, supra n 112, at para. 60-61.} 
\footnotetext{178}{Falk, ibid, at 48. Madagascar also advocated greater use of the ICJ advisory function: ‘Madagascar deplores the under-exploitation of the invaluable resource represented by the advisory procedure.’ Mr Alfred Ramboloson, Oral Pleading of Madagascar, CR 2004/4, p. 20.} 
\footnotetext{179}{Professor Crawford, Oral Statement of Palestine, CR 2004/1, at 33, para. 33.} 
\footnotetext{180}{Mr. Albar, Oral Statement of Malaysia, CR 2004/4, at 23.} 
\footnotetext{181}{Belize regarded the ICJ and international law in similar terms: ‘The law is clearly a reflection of politics and its role as a social regulator is rooted in a reality that is at once political, economic and social, since it would otherwise be nothing. The Court is therefore acting quite logically when it detaches the legal aspects from their broader context, as it must do in the present case.’ Professor Sorel, Oral Pleading of Belize, CR 2004/3, at 17, para. 13.}
Chapter Six: Discourses of Division? Law, Politics and the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

the central role of its principal judicial organ, the ICJ. Arab states in particular regarded the Case as of singular importance in affirming their faith in international law. Saudi Arabia was optimistic about the effects of an opinion in quelling violence on both sides, stating that an opinion ‘may give hope that the rule of law will be respected.’ For Palestine, the stakes were much higher. Mr. Al-Kidwa, Palestine’s representative at the UN, and its first speaker in the pleadings, stated that if the wall’s construction and self-determination’s denial continued, it would ‘destroy [the Palestinians’] faith in the rule of international law and the international community’s ability to uphold it in the face of such grievous violations.’ Palestine’s position and its support by Arab states required the ICJ, the UN and international law to play central roles in the particular case pertaining to the wall, as well as the Arab-Israeli conflict. As was the case relating to their concern about the protection of Holy Sites in the OPT, Arab states regarded the Advisory Opinion as being about more than legal doctrine or political negotiations; the Case was a test of their faith in international law itself.

7) Conclusion

This chapter has shown that states and IGOs can operate in legal pleadings with very different perspectives about the strategic qualities of international law as well as its substantive content. The ways in which language was used provided some indication about the relative importance states placed on emotion and legal terminology. I have shown in this chapter that Third World, and especially Arab, states were more comfortable in stretching the lexicon of international law across the boundaries of standard ‘neutral’, non-emotional discourse. This was reinforced by the way in which such states spoke openly about their trust in international law; international law was about more than legal doctrine, it also required a level of faith from the participants in the proceedings. The scope of

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183 Mr. Al-Kidwa, Oral Statement of Palestine, CR 2004/1, at 24.
184 Arab states in particular as well as some other submissions highlighted the importance of preserving Christian, Jewish and Holy Sites for all worshippers in Jerusalem. For example, see Sir Arthur Watts, Oral Statement of Jordan, CR 2004/4, at 56, para. 8; Written Submission of Palestine, supra n 112, at 74, para. 174; Written Submission of Morocco, supra n 109, at 8; Oral Statement of Saudi Arabia, CR 2004/2, at 58-59, para. 55; Written Submission of Sweden, supra n 172, at para. 11; Oral Statement of Bangladesh, CR 2004/2, at 64; Oral Statement of the League of Arab States, CR 2004/5, at 31. The Court (in relative terms) devoted a lot of attention to this issue in its judgment as well: ICJ Reps (2004), at 188-189, para. 129.
international law was extended further in the accounts of various Arab submissions and the Separate Opinion of Judge Elaraby. Arab sensitivities about the relevance of history to present legal matters provided a more contextual narrative about the Case. Images of colonialism in the past and the present also tended to reinforce TWAIL I perspectives, which are supportive of the emancipatory potential of modern international law for non-European peoples.

The ways in which parties participated in the Case and the positions taken on the jurisdiction of the Court demonstrated the relative respect such states placed not only in the ICJ but also, in international law. Third World states tended to demonstrate greater reverence for the Court and its formal function. At the same time, however, they supported the work of the UNGA and viewed the resolution requesting an Advisory Opinion as indicative of international public opinion. Thus the spheres of international politics and international law were distinguished in such submissions but were also seen as interdependent and inclusive of Third World states. For First World states unsupportive of the jurisdiction of the Court, international law tended to garner more formal engagement, as evidenced by less inflammatory language. International law was regarded as being of only limited use in international life. The broader goals discussed by Third World states, such as self-determination and an end to colonialism, were overlooked in most First World submissions, and negotiations were contrasted with international law to indicate a clear demarcation between legal and political spheres.

Reactions to the Wall Opinion were diverse and varied. Once the Opinion was handed down, Palestine and Israel maintained their earlier positions about the value of the ICJ and international law in resolving the conflict. According to Palestine’s representative at the UN

As for the Palestinian people, the advisory opinion has been having a positive – not a negative – impact on Palestinian society. People are seeing that international law can bring them justice. As a result, the law and compliance with it will take in even more importance and prominence within this society. This will be instrumental in developing and ingraining a culture of respect for the law…this advisory opinion provides a tremendous lesson on the primacy of the law and its rules, and everyone, especially in the region, must see this.\(^{185}\)

Israel’s representative, on the other hand, argued that

\(^{185}\) Mr. Al-Kidwa, UN Observer of Palestine, UN GA Emergency Special Session, 24\(^{th}\) mtg (16\(^{th}\) July, 2004), UN Doc A/ES-10, PV.24, at 9.
The Court negotiated a path through these positions to render its judgment, which included as much as it omitted. As in the case of Third World submissions, the ICJ showed that international law could play a role in even the most divisive of issues. To bolster its jurisdiction as well as its contribution to the conflict, however, the Court retreated behind doctrinal defences. In its Opinion the Court employed familiar devices of the law/politics dichotomy: the dispute was sufficiently legal, norm conflict was downplayed, language was neutral and historical legacies were reduced to their most minimal and least political form.

Postcolonial states were comfortable operating in this discursive environment, but their strategic and substantive legal grammars did not simply mimic the tone of the Court. Instead, Third World, and especially Arab, states used the Advisory Opinion to expand the Court’s legal lexicon. These states maintained a faith in international law through the ICJ advisory jurisdiction while also placing the proceedings in a broader context by resorting to historical narratives and emotive discourse. The Court did not respond to most of these devices, but it is significant that they were used. More noteworthy was the fact that both the Court and Third World states showed that international law could play a role in the conflict. Agreement over the centrality of self-determination and conquest indicated that both postcolonial states and the Court were in sympathy about the territorial confines of contemporary international law. International legal personality was the *sina qua non* for Third World states, who in coming to the Peace Palace confirmed their support and acceptance for the Court and much of the law it applied.

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186 Mr. Gillerman, UN representative of Israel, UN GA Emergency Special Session, 27th mtg (20th July, 2004), UN Doc A/ES-10/PV.27, at 7.
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**CONCLUSION**

CJ territorial adjudication is about more than geographical demarcation; it is also an exercise in discursive boundary-drawing. The thesis has highlighted how states and members of the Court engage in an ongoing dialogue about the boundaries of law and its linguistic limitations. On entering the Court’s discursive domain, states bring a number of expectations and hopes about international law. To be heard, though, these aspirations have to be translated into a particular language, with its own grammar and lexicon. The cases have shown that international law contains some linguistic diversity, perhaps allowing us to speak of international legal *dialects*. As illustrated by the Arabic language with its multitude of distinctive articulations, understanding a range of dialects requires sophisticated linguistic capacities. Native speakers of Arabic can understand a range of local lexicons and syntactical forms, but meanings are not always clear. In relation both to Arabic and international law, we can ask, when are the boundaries between dialect and language crossed? When is it necessary to employ a translator? More importantly, can concepts and sensibilities be articulated across linguistic divides?

Koskenniemi’s idea about the silences of international law is relevant here. International law cannot speak of everything and for everyone;¹ it is a limited and limiting discourse. For the International Court of Justice hearing territorial claims in a postcolonial era, this is of fundamental importance. ‘New’ states entering the Court are required to speak a pre-established language structured through a radical division between law and politics and between the past and the present. Some of the arguments employed on behalf of Arab

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states have destabilised dominant approaches to international law, both through strategic and substantive devices. Here, I revisit some of these devices to answer my two central research questions.

The first research question I asked in this thesis was, ‘what are the structures of legal argument that emerge in ICJ territorial disputes involving Arab states?’ Broadly, these patterns were explored through the lenses of strategic and substantive devices. These two devices are not mutually distinct, however. They are both informed by the law/politics dichotomy, which is the main grammar used in international legal discourse. We saw in Chapter One that critical approaches to international law have shown how mainstream accounts of international law, either in the academy or adjudicative bodies, have tried to quarantine law from the indeterminacy of politics. If doctrine can be distinguished from political choice, then its neutrality and legitimacy is easier to preserve. Indeterminacy, however, lies at the heart of the international legal project, which does not gain its structure and stability through normative rules; rather, international law as language is shaped through a combination of institutional biases, legal grammars, and a lexicon built from European experiences of authority over territory.

Throughout the four cases, variations of the law/politics dichotomy shaped the way parties engaged with the Court. In discussions about the Court’s jurisdictional role, for example, it was important to portray the ICJ as separate from the wider context of the case at hand. Questions about the ‘legal’ nature of a case are especially important in advisory opinions, and the Western Sahara Case and the Wall Case illustrated a variety of ways of defining ‘legal’ disputes. Both cases highlighted how Third World states are more comfortable with introducing contextual matters before the Court. These broader considerations, however, did not affect the Court’s ‘legal’ role, because many of these states also displayed a profound faith in the promise of doctrine. Particularly in the Wall Case, postcolonial states seized upon international legal principles in an effort to strengthen their quest for Palestinian selfhood and statehood within the international legal community.

The advisory opinions also allowed a comparison of the argumentative registers used by the parties. Typically, Third World states presented their claims in more emotive and inflammatory language than their First World counterparts. Perhaps the tenor of such arguments was not heard by the Court, because we saw that for much of the time the bench did not engage with such rhetorical flushes. The Court could not respond to all of the needs of these states and it had to retreat to the familiar territory of constrained, neutral language.
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In the case of the Wall Opinion, we could sense that the Court was eager to provide a response to the claims of mostly Third World states. Within the limits set by the request by the UNGA, the Court affirmed that law can play a role even in the most contentious of cases. To preserve the integrity of the Court and the law it applies, however, the Court also showed us that deference to the law/politics dichotomy is vital. States toned down their language before the bench in invoking their cause of law as a weapon to secure Palestinian self-determination.

Questioning the boundaries of law was a constant motif in Chapters Three, Four and Five, where an examination of territorial claims necessitated a journey into the murky practices of colonial domination. Both Libya in Chapter Three as well as Qatar in Chapter Four revealed a record of European intimidation and bias in the construction of treaties and resulting boundaries. These states provided an opportunity for the Court to re-evaluate the ‘legal’ effects of such ‘political’ events. Treaties created in the context of coercion or arbitral awards tainted by the pursuit of petroleum profits undermined the distinction between law and politics. These narratives also questioned the legitimacy of a postcolonial legal order that has rarely delved into its own past. On both occasions, the Court indicated that such probing of the past was outside its remit. Here the Court was caught in a double bind. Should it acknowledge the way politics had infused colonial practice to lend greater legitimacy to certain Third World claims and thus undermine law’s determinacy? Or should the law/politics dichotomy be maintained by depicting colonial acts as simple confirmations of doctrine, thereby weakening the legitimacy of the law for Third World states trying to re-write its past? We saw time and again that the Court opted for the latter option, whose effects were not confined to the past. By confirming colonial practices, the Court also revealed a law less than universal and one that struggles to translate non-European experiences during and after colonialism.

The Court’s denial of historical complexity was a constant throughout the cases, emphasising that the grammars of argument in territorial adjudication require constructions of a past supportive of dominant images of contemporary international law. Yet the Peace Palace witnessed conflicting accounts about the legacies of colonialism as well as the tools of historical analysis. For example, while states like Spain in Chapter Five and Chad in Chapter Three suggested that historical narration was an uncomplicated affair, other states argued that the selection of particular documents and maps and their interpretation produced conflicting historical perspectives. States with minimal archival material to

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bolster their case faced a double bind: should they rely on materials drawn up in the interests of their former colonisers? Or should they try to convince the Court of their claims in a manner radically different from ICJ institutional conventions? Third World states often had no choice but to use material of their former colonisers, but it was surprising how this material was not scrutinised more rigorously by both the bench and the bar. Historical narratives had to be simplified for the task of rendering legal statements, and often this entailed uncritical reliance on European, as well as Ottoman, archival material.

The Court was not capable of adjudicating these historical nuances, but when it did enter the annals of history it displayed an inability to grapple with the contingencies of choice. Further, where the Court was forced to deliberate on contrasting historical accounts, it generally favoured colonial discourses. We saw this most explicitly in relation to the classification of ‘colonial protectorates’ in the Cameroon/Nigeria Case discussed in the Introduction to Part Two.2 There, the Court adopted a European, colonial interpretation of legal title to dismiss the validity of African personality; the politics of colonialism was favoured over a Pandora’s Box of territorial instability and legal uncertainty. This policy choice, also known as uti possidetis juris, has come to dominate African territorial cases, but its reception has been less than total in the Arab world. Regardless of regional practices, however, the Court’s jurisprudence has consistently shown that uti possidetis is the dominant norm to apply in postcolonial territorial matters, and the Court’s motivations are explicable. Both African elites and the majority of international lawyers regard colonial lines across the continent as the price to be paid for more legitimate reappraisals of indigenous effective control and its clash with former colonisers.

Historical narratives also supported positions about the substantive content of international law. Perhaps the most important aim of historical narration for Third World states was based on a desire to decolonise international law. By challenging European accounts of international law, these states were not trying to subvert international law; rather, they were trying to strengthen it. Third World submissions like those of Algeria’s in Western Sahara, Qatar’s in Qatar/Bahrain and Libya’s in Libya/Chad all tried to incorporate Arab-Islamic traditions into the fabric of international law. By detailing cultural particularities, these states could boost international law’s universal reach. If non-European modes of rule were recognised by the Court, territorial adjudication could expand the

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lexicon of international law. We saw, however, that the Court was reluctant to accept these overtures because they would have threatened its foundational grammar of the law/politics dichotomy in revealing international law’s contingent past. Operating in a discourse framed largely by European statehood, the Court had to limit the legal effects of such arguments, and in so doing, it affirmed the centrality of European experiences in international law’s past and present configurations. The rich Arab record provided the Court with a chance to extend international law’s cultural boundaries, but we have seen that it was only prepared to take a few tentative steps into the Sahara or swim a few strokes off the shores of the Gulf.

Many would not be surprised by these findings, as they can be read to support narratives explored in Chapter One about increasing Third World participation in ICJ proceedings and a corresponding acceptance of international rules. Third World states have willingly brought their claims to the Court cognisant of its limited cultural and historical capacities. The story, however, is more complex. Each case demonstrated that Third World states both acknowledged ICJ conventions and also tried to stretch the boundaries of international law through a number of devices. Substantively, non-European approaches to authority challenged dominant European models, but, time and again, the Court rejected the implications of historical revision. Where states like Chad sought stable boundaries, it was ‘paradoxically required by the circumstances to espouse some particularly unacceptable propositions of colonialist discourse.’ These are the words of Judge Rezek in his declaration from the Bakassi Peninsula Case, but the idea is apt here for the way in which it encapsulates the postcolonial paradox. Third World states through their legal counsel seek to secure their statehood, but they must do so in a discourse that is not of their own making.

If we return to debates about reasons for the Court’s increased docket and Third World participation, the findings of Chapter Six contrast with those in the other cases. In Chapter One, I was sceptical about equating increased Third World participation with wholesale acceptance and approval of both the ICJ and international law. I suggested that Third World participation must be understood discursively before trying to explain this phenomenon. Chapters Three, Four and Five have all suggested that Third World participation has come at a price: in many instances colonial legacies have been reinforced so that particular renderings of the past will have significant effects into the future. Perhaps some postcolonial states, like Chad, will be pleased with such an outcome, but from the

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way the Court ignored so much of colonialism’s dark sides, it is doubtful that a service was rendered in enhancing international law’s wider legitimacy. Perhaps litigation is a useful resource and Third World states have now a wealth of evidence to show them what the likely results of territorial adjudication would be: certainty and doctrine as triumphant over historical redress. Unprecedented Third World participation in the Wall Opinion could be construed as acceptance on the part of much of the postcolonial world, indicating that international law’s strengths and weaknesses are now recognised and embraced. In their optimism and faith in the ICJ process, these Third World states followed closely in the footsteps of TWAIL I scholars eager to reap the rewards of membership of international society. Yet the other cases have shown us that ICJ litigation and international legal language can only speak of certain experiences and deliver limited outcomes.

These observations allow us to answer my second research question, which asked, ‘what do these structures of legal argument reveal about the scope for universalising the discourse of international law?’ There is no simple answer to this question because of the tension between inclusion and exclusion within international legal discourse. We have seen that the Peace Palace doors are now open for all states to enter, but at what financial cost, under which rules and in whose language? Third World states seeking to affirm their statehood via adjudication through a language forged in the crucible of colonialism can try to expand the cultural reach of international law, and thus its universalism, but such practices also reveal the limits of inclusion. Adjudicative argument is significant, but it is not enough to generate linguistic renewal per se and we have seen that rarely was the Court willing or able to understand some of the dialects used in the Peace Palace. Non-European histories and experiences were discussed, but were usually rejected by the Court through its silence. The cases have suggested that only the narrowest margin of linguistic change is permitted in most instances, but that at least a number of minority opinions and Third World states were willing to push the boundaries of international legal language. Thus the scope for universalising international law remains a limited one.

I have shown in this thesis that mapping legal grammars in ICJ adjudication is a valuable device in probing linguistic patterns of the discipline. A discursive reading of Arab territorial disputes highlights how critical approaches provide useful tools for interrogating both legal speech and its silences. Although the thesis has revealed that legal discourse has a constricted lexicon and grammar, it has also shown that speech is never static. Thus,
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international law contains within it many dialects with their nascent grammars and lexicons awaiting our appraisal and engagement. We just need to listen.
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