ISLAMIC LAW AND INTERNATIONAL LAW

PEACEFUL RESOLUTION OF DISPUTES

EMILIA JUSTYNA POWELL

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Dla moich córeczek, Scarlett Sophii i Saski Emilii
And for Charles

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1

Introduction

The Importance of Understanding Islamic Law in the Context of International Disputes

There are twenty-nine Islamic law states (ILS) in the world today, and they constitute not only a substantial portion of the United Nations' membership, but a significant voice in today's international relations.[1] The total Muslim population in these countries is over 900 million. Moreover, almost 700 million Muslims live in the non-Islamic parts of the world, coming to a total of over 1.6 billion, or nearly a quarter of the earth's total population.[2] To some extent, each adherent to the Muslim faith is ethically, morally, doctrinally, or politically committed to sharia.[3] Islamic law constitutes an important part of the domestic legal systems in many of the ILS, displacing secular law in state governance.[4] ILS have been and still are engaged in many interstate disputes. A great deal about the Islamic milieu is well known and there has been an upsurge in scholarly interest

[1] In this book, I define an Islamic law state as a state with an identifiable substantial segment of its legal system that is charged with obligatory implementation of Islamic law in personal, civil, commercial, or criminal law, and where Muslims constitute at least 50 percent of the population. This definition does not depend solely on the religious preferences of citizens, but rather fundamentally relies on the characteristics of the official legal system upheld by the state. I elaborate extensively on this definition, its constitutive parts, and potential objections that others may have with regard to the ILS category in the Islamic Law States subsection of chapter 2.

[2] Pew Research Center, Religion & Public Life, April 2, 2015, available at http://www.pewforum.org/2015/04/02/religious-projections-2010-2050/.

[3] I am keenly aware that sharia cannot be reduced to a system of laws. In chapter 2, I present the various definitions and meanings of sharia—as offered by the scholarship. I also elaborate on sharia's characteristics, constitutive elements, and the relationship between sharia, secular institutions, and Islamic law. In addition, I describe the concept of a domestic legal system and a legal tradition.

[4] Hirschl 2010. My book acknowledges a strong debt to Islamic studies, Islamic law, and comparative law scholarly literatures, all of which tackle and map out important aspects of sharia and, more broadly, the Islamic legal tradition (see chapter 2 for more discussion of the relationship between sharia and secular law and governance).

Islamic Law and International Law: Peaceful Resolution of Disputes. Emilia Justyna Powell, Oxford University Press (2020).
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in Islam.[5] Yet, what is much less well understood—especially in the empirical sense—is how these states view international law and international peaceful resolution venues. Do Islamic law states avoid international courts? Is the Islamic legal tradition ab initio incompatible with international law? More specifically, how can we frame, understand, and define the relationship between the Islamic milieu and international law in the context of peaceful resolution of disputes?[6] Historical patterns seem, at first, unhelpful in providing any solid answers in this regard, delivering perhaps little more than underdeveloped spotty hints. In fact, analytically, there seems to be no one easily identifiable attitude shared by all ILS toward the various methods of international conflict management: adjudication, arbitration, mediation, and negotiations. In other words, there is no consistency in how the Islamic milieu tries to solve its contentions. Some disputes over highly salient issues eventually end up at arbitration tribunals or international courts. This was the case in the Pakistan-India disputes over the Rann of Kutch and Kashmir,[7] as well as the Bahrain-Qatar dispute over the Hawar Islands.[8] Apparently, the perceived clash between the Islamic legal tradition and international law does not stop some ILS from submitting their salient feuds to international courts that adjudicate according to Western-based international law. Yet, other ILS, such as Saudi Arabia, seem to avoid international courts even for interstate disputes of relatively low salience, preferring instead bilateral negotiations and mediation. During a 2013 meeting with the president of the International Court of Justice (ICJ), Saudi Prince Bandar bin Salman bin Mohammed mentioned training courses in Islamic law intended for judges inside and outside the Kingdom offered by the Saudi Custodian of the Two Holy Mosques, should the Court be interested.[9] This interaction is a definite indication of Saudi apprehension toward any international court, whose judges either do not understand or choose to pay no attention to sharia.

Can we empirically articulate the relationship between ILS and international conflict management venues? Why do some ILS seem friendly toward international courts and others avoid them? Is it possible to identify general patterns that

[5] For discussion about conceptualizing Islam, see, among others, Ahmed 2016; Asad 2009; Aydin 2017; Hodgson 1974; Voll 1994.

[6] In this book, I will be using the term "Islamic milieu" as a stand-in for the category of Islamic law states. I purposefully avoid the term "Muslim world," recognizing its shortcomings and its simplistic and misleading nature (see Aydin 2017).

[7] The Indo-Pakistan Western Boundary Case Tribunal (Award February 19, 1968).

[8] Maritime Delimitation and Territorial Questions between Qatar and Bahrain (*Qatar v. Bahrain*), International Court of Justice Judgment of March 16, 2001. The dispute concerned several other territories including the island of Janan/Hadd Janan, the shoals of Fasht ad Dibal and Qit'at Jaradah, as well as Zubarah—a townsite on the northwest coast of Qatar (see Schulte 2004).

[9] Taha 2013.

apply to all these states? Interestingly, most Western scholarship does not recognize any variance within the Islamic milieu. Rather, a not uncommon attitude to Islam has often served to create the presentiment of a vast dichotomy between the Islamic legal tradition and international law across the entire Islamic milieu.[10] All ILS are not only frequently considered simply Islamic, but also Islamic in the same way, to the same degree. Sharia carries a distinctive understanding of what governance is, where it comes from, and how it should be: according to Muslims, it is God's perfect will for humanity. Despite its historical connection to the Christian legal thought, modern international law, by contrast, is secular and strives to offer legal solutions that are considered just and optimal within a rational, secularist framework.[11] In the literature, blanket claims are made about the attitudes of all ILS toward international law. As an illustration, some argue that the Islamic milieu or some of its constitutive parts—like the Middle East—have emerged as "the underclass of the international system, wherein law is utilized in an instrumental manner."[12] Whereas the West is portrayed as the main supporter of international law, ILS are from time to time depicted as a threat to secularism and legal reason. Western governments, universities, and political and social movements project their own understandings of sharia, as if there is no diversity within the Islamic milieu.[13] All ILS are oft perceived as being ipso facto unfriendly toward international law, and, specifically, toward international courts.

This expectation of antipathy continues to surface in the scholarly literature on international disputes. Why would any ILS consult international law? The international community—both scholars and policymakers—seems surprised any time ILS decide to use international courts or arbitration tribunals in an effort to solve an interstate contention. Indeed, such attempts are at times met with cynical skepticism. Islamic law has been criticized as being irrational and cryptic. Its deeply religious nature is routinely interpreted as being opposed to secular international law. But, as Awn Shawkat Al-Khasawneh, former vice

[10] See, for example, Westbrook 1992–1993.

[11] Frick and Müller 2013. In this book, I recognize that juxtaposing Islamic law and secular law constitutes inherently an oversimplification. There are important aspects of Islamic law that are ipso facto secular (i.e., do not entail much, if any, reference to religious texts or doctrines). For instance, *nafaqa*, or the husband's obligation to maintain (support) his wife and children during wedlock and for a period after the dissolution of a marriage (alimony), has arguably a purely secular nature. There are many studies that specifically focus on the process of secularization and the definition of religion as a separate aspect of modern societies and its relation to secular institutions of state governance (see Agrama 2012; Asad 2003; Hussin 2016; Lapidus 1996). I elaborate on the relationship between the secular law and religious law in chapters 2 and 3.

[12] Allain 2004, xv.

[13] For an interesting discussion of this topic, see Bassiouni 2014, 2015.

president of the ICJ and former prime minister of Jordan once told me, "So contrary to the perception, Arabs have been going to the International Court of Justice in various forms."[14] In fact, there actually are a number of international adjudication cases involving states of the Islamic milieu, which is more than can be said for some non-Islamic states such as China, Russia, Argentina, or Poland.

This book introduces variance into the Islamic milieu, because the Islamic legal system does not operate in a binary manner: Islamic or non-Islamic. Each domestic legal system in the ILS amalgamates secular law with religious law in a different way, and this reality—I argue—fundamentally shapes these states' views of international conflict management.[15] Whether Islamic law is compatible with international law and whether this relationship is constant for every one of the ILS is an open question. This book tackles it. Sharia continues to be an authoritative symbol in many ILS. Religious laws and practices are intertwined in state governance, customary law, and other aspects of human life.[16] Sharia is woven together with purely secular laws. Islamic non-state actors, governments, political parties, and scholarly and intellectual leaders—despite weighty differences among them regarding the interpretation of sharia—agree that sharia provides a rich legal, anthropological, and cultural background in the Islamic milieu. In fact, the strength of Islam appears to be on the rise. The powerful voice of sharia is particularly apparent in the wake of the recent events of the Arab Spring, when several countries in the Islamic milieu experienced a wave of political protests and turmoil, contesting the overlapping roles of religion, religious authority, and the state.[17] As Hallaq argues, "One of the fundamental features of the so-called modern Islamic resurgence is the call to restore the *Sharia*, the religious law of Islam."[18] However, providing an authoritative symbol is not the same as being incorporated into a state's official legal system. Law has the power to formally structure, shape, and dictate a state's domestic relations. Law has the power to legitimately set the stage for a state's international behavior. Law is an organizing principle for state governance; a structure that can be remarkably resilient in the face of inside and outside pressures. Law can be a state's credible commitment to act in a certain way. Law is powerful. Sharia, however interpreted, if

[14] Author interview with Judge Awn Shawkat Al-Khasawneh, conducted in Amman, Jordan, February 20, 2015.

[15] See Agrama 2012; Asad 2003; Hussin 2016; Lapidus 1996 for excellent discussions of the relationship between the secular and the religious in the Islamic milieu.

[16] Shakman Hurd (2015, 7) proposes that religion, in general, "cannot be singled out from these other aspects of human experience, and yet also cannot simply be identified with these either."

[17] In this context, it is important to emphasize that political Islam as a concept or a movement does not constitute just a simple protest against modern ways of governance with hopes of bringing back the traditional ways of sharia.

[18] Hallaq 2005, 1.

implemented as official law, has a different status than sharia as a symbol.[19] This book studies this power of domestic law in the context of ILS.

Peacefully resolving disputes constitutes an important goal for the international community. In this regard, there is an increasing need for the non-Islamic states to cooperate with ILS on a wide multitude of issues stretching from trade to questions of conflict and peace. For these intercultural dialogues to be successful, a much deeper understanding of Islamic law—including its variance and development—is absolutely crucial. As Bassiouni writes, "For Muslim and non-Muslim states and individuals to address their contemporary public law obligations and challenges, states must understand Islam's theological and legal doctrinal evolution."[20] One cannot explain ILS' behavior without at least a basic comprehension of how secular laws and religious laws amalgamate within domestic legal systems of these states.[21] I argue that it is the balance of secular laws with religious laws in the context of ILS that can explain their preferences for international conflict management methods. Of course, one may argue that in all legal systems—domestic and international—religion and law are somehow connected, albeit in a very subtle way. In one way or another, religion and moral considerations find a way to trickle into the legal system, at least via providing some foundational values. However, in much of the world, religion or religious principles at best motivate certain laws, principles, legal language, or the state's vision of the legal system.[22] That is certainly true for international law. International law has evolved from its religious origins to a largely secular legal system. In contrast, the connection between religion and law is hardly subtle in traditional sharia: law is centered on religion, religious texts, and doctrines. Governments across the Islamic milieu deal differently with this reality by allowing various ways of amalgamating secular laws with religious laws, and this, I argue, has important consequences for ILS' attitudes toward international conflict management.[23]

[19] There is a vast debate in the scholarly literature that addresses the issue of whether any aspects of sharia can be included in state governance (see "Broader Significance of This Project" section that follows for more discussion).

[20] Bassiouni 2014, 25.

[21] The secular-religious dichotomy is problematic in conceptualizing Islam (see Agrama 2012; Ahmed 2016; Asad 2003; Aydin 2017; Hussin 2016; Lapidus 1996; Siddique 1981). I elaborate on this point in chapters 2, 3, and 4.

[22] There is an extensive literature on the historical interaction between political and religious authority in the Islamic milieu (see Eickleman and Piscatori 1996). As Shakman Hurd (2015, 6) notes, "religion is too unstable a category to be treated as an isolable entity, whether the objective is to attempt to separate religion from law and politics or design a political response to 'it.'"

[23] As Otto (2010b, 27) notes, "the modalities of incorporation" differ substantially across time and space in the Islamic milieu.

This book proposes that important insights are lost when we look at ILS' international behavior as detached from their domestic legal systems. Searching beneath materialistic considerations such as power and strategy ensures that other factors do not fall by the wayside. To this end, this work focuses on discovering the key areas of conflict and convergence between Islamic law and international law within the context of each of the ILS, both historically, over time, and geographically, across the Islamic milieu. I identify institutional features of Islamic law that facilitate the ILS' openness to international law and international courts. It should be stressed at the outset that this work is principally about international law and how it is perceived via the lens of the Islamic legal tradition.

The intent of the book is a constructive one. I make the case that the Islamic legal tradition is not ab initio, across the board, in fundamental contradiction with international law. Too often, the scholarship and the policy world have created an artificial division between these two legal systems. Quite the opposite is in fact true: these two inherently dynamic and ever-evolving legal systems share more similarities than they are given credit for by the policy world and by many scholars. This key point, which carries crucial policy ramifications, might be rather surprising news to some. This research has indispensable implications for scholars and practitioners of international law, judges of international courts, and people working for nongovernmental organizations that promote peaceful conflict management. At the most rudimentary level, this book underlines how important it is to incorporate non-Western—in the context of this book, Islamic—understandings of law and justice and modes of legal thinking into international resolution venues. International law is indeed inherently a comparative enterprise, whereby different legal cultures and traditions see international law differently. The need of expanding international law's "plurality," that is, of accepting how various legal traditions interpret international law, has the potential to bring about a more justifiable and legitimate global order.[24] The world encompasses countries that espouse divergent understandings of what law is and how it is to be executed on the domestic as well as international arena. International law's authority can expand if the law itself and its interpretation and practice are increasingly informed by domestic legal systems. The Islamic legal tradition is up to the challenge. In the words of Abou El Fadl, "the Islamic tradition is rich and complex enough to offer flexible paradigms that could be utilized to address the challenges posed to Islam by the modern age."[25] Several of my interviewees described sharia or Islam in a similar way. According to Nawaf Alyaseen, "Islamic sharia rules are very flexible and there is a very large space

[24] See Roberts 2017.

[25] Abou El Fadl 2003a, 179.

to move. It gives us general rules with general meaning: we should be honest, we should be fair, we should not take other people's property or harm them. In other words, it gives us some details but not in all issues."[26] Omar Naas stated that "Islam is a way of life. It is not just rules 'do this, do not do this.' No. You can do anything if it is good for the people."[27]

States within the Islamic milieu, like other states, are to an important extent subject to social mechanisms that promote compliance with widely accepted norms of behavior. ILS largely conform to Western-inspired, classical international law. These are the rules of the game. ILS strategize; they also mimic certain practices of non-ILS to maximize their participation in global politics.[28] At times, ILS may use Islamic law in a strategic way to protect state institutions from criticism. The point is that international rules constitute the existing community standards, and ILS must—to an extent—abide by rules of international law. It is thus not the case that ILS are so peculiar as to be immune from all the other streams of influence that shape the actions of states. Yet the standards set forth in international law, as well as considerations of power and strategy, are not always able to override Islamic norms and values that are deeply embedded in ILS. International law's power of persuasion has limits in the Islamic milieu. Simply put, ILS are less motivated than other states to indiscriminately accept the legitimacy of international law across the board. In a way, certain concepts stemming from the Islamic legal tradition continue to be salient in ILS' global dealings.[29] ILS exist in a world with two normative frameworks: that of international law and that of Islamic law. These states are to an important extent unique in their embeddedness in an additional normative system, that of the Islamic legal tradition, and this is what this book is about.

A Theory of Islamic Peaceful Resolution of Disputes

How ILS view international conflict management methods is at the core of this study. This book introduces nuance into any blanket claim about the relationship between the Islamic milieu and international law and its institutions. This relationship is context specific: it hinges fundamentally on the domestic legal

[26] Author interview with Dr. Nawaf Alyaseen, a Kuwaiti legal practitioner, Future Law Firm; Legal Consultants, Arbitrators and Mediators, Kuwait City, Kuwait, December 13, 2017.

[27] Author interview with Omar Naas, member of Libya's Constitutional Drafting Assembly, Kuwait City, Kuwait, December 11, 2017.

[28] See Goodman and Jinks 2013.

[29] See Fadel 2010 for more discussion.

system of each of the ILS. Different international conflict management methods appeal to different ILS, depending on each one's domestic legal system. I argue that the answer to the "sharia-international law nexus puzzle" lies in the diversity of how secular laws and religious laws fuse in domestic legal systems across the Islamic milieu. In other words, all ILS are not Islamic to the same degree or in the same way. Traditional Islam itself dictates a uniform attitude toward international law. What varies is the extent to which Islamic law is commingled with secular institutions within a domestic legal system. In an important way, the Islamic law/secular law balance as articulated in a domestic legal system provides an institutional space that interacts with international law and its institutions.

The Diversity

Each of the ILS embraces a unique relationship between secular laws and religious laws in its governance.[30] Some states officially rely on, incorporate, and implement Islamic law—however interpreted—to a much higher degree than others.[31] As noted earlier, sharia provides a powerful symbol in some of these states and gets implemented in a fragment of the domestic legal system, while in other states, the principles of sharia regulate extensive parts of domestic law, playing a formative role in most of state governance.[32] For instance, Saudi Arabia claims to follow the ancient sharia in its purest form. The Saudi 1992 Basic Law of Governance declares that "Almighty God's Book, The Holy Qur'an, and the Sunna" are its constitution.[33] In Iran, the Guardian Council consisting of Muslim jurists is the most powerful body in the country, and it has the power

[30] There is also a considerable doctrinal difference within the ILS category, and the Islamic schools of jurisprudence constitute an important part of the legal landscape within the Islamic legal tradition. The Shii schools include Jafari, Ismailis, and Zaidis, and the Sunni schools are Hanafi, Maliki, Shafii, and Hanbali (see Hallaq 2005). There is also the school of law adhered to by the followers of the Ibadi sect. The strand of Ibadi Islam predates the Shia and Sunni sects, but has a limited reach in the Islamic milieu. Various ILS represent different schools of jurisprudence. For instance, Saudi Arabia embraces the Sunni Hanbali school, Oman the Ibadi, Iran the Jafari, Morocco the Maliki, and Malaysia the Shafii. I consider the doctrinal divergence within the ILS category in chapter 7.

[31] As an illustration, as of 2012, the constitutions of Indonesia, Algeria, and Morocco do not even mention Islamic law, while those of Iraq, Iran, and Egypt all do. I address this variation in much greater detail in chapter 2. For an interesting review of the relation between state and religion in Islamic societies, see Lapidus 1996. Lapidus argues that "there is a notable differentiation of state and religious institutions in Islamic societies" (p. 4). For more insights into the concept of the secular, see Agrama 2012; Ahmed 2016; Asad 2003; Aydin 2017; and Shakman Hurd 2015.

[32] The feasibility of including principles of sharia as a part or the basis of modern-day state institutions is debated among laymen, policymakers, and scholars alike. For more discussion, see Ahmed 2016; Hallaq 2013; and Platteau 2017. I address this issue in chapters 2 and 3.

[33] The Basic Law of Governance of the Kingdom of Saudi Arabia, March 1, 1992.

to approve or veto bills passed by the legislature on the grounds of consistency or inconsistency with Islamic principles. At the other end of the spectrum is Malaysia, where the provinces determine how much Islamic law gets incorporated into official local laws. Thus there is not one Islamic law, but many "Islamic laws"—depending on how it is interpreted and amalgamated into a particular domestic legal system within the ILS. Sharia has remade and reconfigured itself over time as well as throughout the Islamic milieu. My view of Islamic law as a living legal system, one that can be—to an extent—incorporated into modern structures of state governance, sets this book apart from a view of Islamic law as an unchanging legal tradition, one that has been calcified in sacred texts and traditions.[34] I believe that in order to appreciate and understand the modern-day Islamic legal tradition, it is crucial to perceive it in the context of contemporary societies and their lived experiences. The effects of colonization and the rise of nation-states were in many ways shattering for the tradition of Islamic law. Nevertheless, elements of Islamic law appear in modern structures of state governance and thus continue to play an influential role in shaping and reflecting the preferences and behavior of modern states, societies, and communities. Islamic law—however interpreted—provides the lens through which ILS see international dispute settlement.

I recognize that sharia is much more than a system of laws. This book attempts to measure the presence of Islamic law in officially recognized state law; these efforts should not be taken as equating sharia merely with a system of laws. Most importantly, I fully recognize that sharia of the past is different from sharia of the present. I conceptualize the Islamic legal tradition as an ongoing, constantly evolving entity. This continuous evolution is reflected in the domestic legal system of ILS on the constitutional as well as sub-constitutional levels. Thus, in trying to understand what sharia is—or perhaps what it is not—it is vital not only to examine Islam's foundational sources and pre-modern jurisprudence, but also to make allowance for change. Put differently, the contemporary study of Islam's foundational sources should be cognizant of the various societal milieus and practices that have historically developed in various places that the Islamic legal tradition is lived.[35] There exists one Islamic legal tradition, but it gets expressed quite differently across states of the Islamic milieu. The ways in which Muslims understand Islamic law, Islamic justice, morality, and ethics have always been diverse. As Abou El Fadl writes, "there is considerable flexibility and variation in how Shari'ah is implemented from one culture to the next, from one country to the next—indeed, from one generation to the next."[36] Societal

[34] See Hefner 2016; Hussin 2016.

[35] See Hefner 2016.

[36] Abou El Fadl 2003a, 201.

engagements with Islam's textual sources and jurisprudence are to a significant degree reflected in ILS' domestic legal systems. Collectively, these engagements reflect what the Islamic legal tradition is now. The ILS category, fundamentally embracing this view as it does, allows me to step away from an idealized understanding of how text works, and instead provides a useful comparative space to articulate the considerable degree of legal and institutional divergence across all these states.[37] I rely on the ILS category, recognizing the imperfect relationship between the societal belief and practice of sharia and the written letter of the law but maintaining that a greater investment in Islamic law's presence in a country's legal system is a signal of a commitment to a specific identity.

Although this project deals with Islamic law, it is first and foremost a study on the workings of modern international law in the area of peaceful resolution of disputes. Taking the diversity of Islamic law into consideration, this project tackles the following research questions: Does the balance between secular law and Islamic law in ILS' domestic laws influence these states' preferences toward specific peaceful resolution venues? What factors can explain that some ILS choose resolution methods that heavily rely on international law, such as international courts and arbitration tribunals? Why, on the other hand, are some ILS drawn to non-binding third-party methods, such as mediation or conciliation? In a more policy-oriented way, I consider whether we should pay sustained attention to the differences between Islamic law and international law as having the power to pull the Islamic milieu away from international law and its institutions, or whether these differences can be mitigated. The main claim of the book is that in many instances Islamic law points in one direction and Western-based, secularized international law points in another direction. Yet this conflict is partially softened by the reality that Islamic law itself has elements fundamentally compatible with international law.

The Argument in Short

There is a variety of conflict management mechanisms available to states, and all states, ILS and non-ILS, are uncertain when choosing a forum to resolve their disputes. In hopes of reducing uncertainty, states look for clues that help them form expectations about the settlement outcome. Uncertainty peaks when a dispute is delegated to a third party, especially to an international court or an arbitration tribunal. Whereas non-legal resolution options do not have to rely on international law, adjudication and arbitration produce binding decisions based

[37] Hamoudi (2010b) discusses the presence of sharia in modern ILS' governance, emphasizing legal "selectivity of state processes in giving voice to *shari'a*" (p. 300).

on law. But in no case can a state be absolutely certain about such a decision.[38] Law is subject to interpretation, and many factors complicate the parties' ability to forecast the court's or the tribunal's legal reasoning. Judges who sit on international courts often come from different legal backgrounds, and litigants cannot be sure which set of principles will provide the basis for the judgment. It is also unclear if a domestic legal system or systems will guide the court in interpreting general principles of international law. All states encounter these hurdles.[39] Faced with uncertainty and at the same time driven to win cases, states engage in strategic behavior when seeking out a resolution venue. States forum shop. The goal is to carefully select a forum that will not only yield the most-preferred outcome for a disputant, but also reduce uneasiness associated with the resolution process itself. The domestic legal system provides a state with clues about what international resolution forum to choose. Similarity between a disputant's domestic legal system and a forum's institutional design increases predictability of an outcome.[40]

The Western-based legal design of international settlement venues elevates ILS' uncertainty associated with settling disputes. For the most part, ILS have not participated in the creation of international law and its institutions. Thus, these states had no chance to embed elements of Islamic law into international conflict management venues. Consequently, issues of uncertainty play a role in how ILS choose among available forums. There is no automatic international equivalent for sharia-based domestic conflict management. The Islamic legal tradition embraces a specific approach to conflict management, a distinct logic of social interaction in dispute resolution. This logic fundamentally shapes the Islamic milieu's venue choices in the international arena. Sharia-led social interaction—in the domestic or international sphere—is characterized by four distinct features: a unique logic of justice, nonconfrontational dispute settlement, collective embeddedness of the third party, and incorporation of Islamic principles in the resolution process. In place of Western formal approaches to conflict resolution, traditional Islamic law uses reconciliation, apology, and constructive dialogue between disputants. Islamic jurisprudence teaches that amicable informal settlement without resort to formal venues such as courts constitutes a righteous and morally superior method of seeking justice.[41] This traditional Islamic logic of conflict management delimits venue options for ILS, at the same time heightening the degree of uncertainty they face in dispute settlement.

[38] Bilder 1981.

[39] See Powell 2013a, 2016; Powell and Wiegand 2010 and 2014; and Wiegand and Powell 2011.

[40] Mitchell and Powell 2007 and 2011; Powell 2018b.

[41] Othman 2007.

But the presence of sharia-inspired features of conflict management on the international level is not equally important to all ILS. I theorize that ILS whose domestic legal systems are highly infused with a version of sharia will most firmly adhere to Islamic law–inspired elements in the international arena. This expectation holds for substantive law as well as procedural law. International non-binding third-party venues such as mediation and conciliation are procedurally similar to sharia-based dispute resolution. Via these methods, Islamic law can potentially constitute the basis for settlement if so desired by the parties. Thus, ILS most committed to the Islamic legal tradition domestically are naturally attracted to mediation and conciliation.[42] This subset of ILS can fulfill its preferences regarding the nature of social interaction by engaging in a brotherly solution approach to settlement and by incorporating principles of sharia in dispute resolution.[43] International legal mechanisms, courts and arbitration tribunals, are unlikely to bring to bear these expectations of ILS about how dispute settlement should be carried out. These legal means of settling disputes yield binding decisions and are firmly anchored in international law that is largely based on the Western legal logic. For ILS whose domestic legal systems incorporate strong secular laws, by contrast, these legal mechanisms constitute acceptable settlement venues. Secular laws embedded in these ILS' domestic laws form a natural bridge with international courts and arbitration tribunals. The central point is this: there are no general patterns that define the Islamic milieu's choices of international conflict management venues. Different ILS are attracted to different international forums. The balance between Islamic laws and secular laws within ILS' domestic legal systems predisposes some of these states to specific international conflict management venues.

Broader Significance of the Project

To my knowledge, this is the first book in the English language to investigate empirically whether similarities and differences between Islamic and international law matter in shaping ILS' attitudes toward international conflict management venues. In the international relations scholarship, there is a daunting lack of empirical studies focusing specifically on the Islamic milieu's view of conflict management venues. There are important works in the law and Islamic studies literatures, but most describe Islamic law in the context of its origins, historical

[42] I am keenly aware that a heightened presence of Islamic principles in a state's constitution or its sub-constitutional legal system does not automatically indicate compliance with sharia across all aspects of governance. See chapter 4 for more discussion of this important issue.

[43] See Powell 2015 and 2016.

development, substantive as well as procedural rules, and specific countries.[44] Furthermore, traditionally, much of this literature has been primarily descriptive, providing insights into the theory and practice of sharia in the domestic and international realms. While the law literature—both comparative and international—has produced scholarship that is rich, enlightening, and theoretically innovative, as well as useful in explaining the details of Islamic law by going beyond the analysis of contracts, obligations, and constitutional and criminal law, it has not engaged in much systematic empirical analysis.[45] In a way, empirical study of these states' international relations is usually considered to fall outside of the law's purview. Granted, there are several pivotal works that tackle Islamic international law, and hence address the issue of international relations, international peaceful resolution of disputes, international treaties, Islamic maritime law, humanitarian law, and so on. Again, however, the approach taken is, in a majority of cases, descriptive and normative, providing a wealth of description of the dynamics and spirit of Islamic law.[46] Intensive case studies on individual ILS abound. What is missing are the questions of *how and why*. The theme of this book is how the variance in Islamic law's presence in ILS' domestic legal systems affects these states' views of international conflict management venues. Thus, this book is not purely about law—international law or Islamic law—in a constricted, narrow sense. I am interested in law as a vehicle and as an expression for ILS' preferences.

The international law scholarship has also been prolific in producing literature on peaceful settlement of international disputes in general and on specific international settlement venues, including the ICJ; its predecessor, the Permanent Court of International Justice (PCIJ); the World Trade Organization dispute settlement; and international mediation.[47] Most writings on the structure and practice of these institutions are similar in nature and provide detailed accounts and explanations of procedural rules and, where appropriate, the substance of international law. Yet, there is a gap between the general international dispute settlement literature and the scholarship on Islamic law. To be sure, there is a fair amount of work that addresses the Islam–international law nexus in the context

[44] Hallaq 2005, 2009b; Mallat 2007; Otto 2010a; Sadeghi 2013; Schacht 1964; Vikør 2005; Weiss 2006. Additionally, there are illuminating works in the comparative constitutional law literature that in detail analyze and ponder constitutional politics, history, and legal structures present in the Islamic milieu. See Brown 2002; Feldman 2008; and Hirschl 2010.

[45] Mallat (2007) chooses to use the term "Middle Eastern Law."

[46] See Baderin 2008; Bsoul 2008; Foda 1957; Frick and Müller 2013; Hashmi 2002a, 2002b; Kelsay 2007; Weeramantry 1988; Yazbeck Haddad and Freyer Stowasser 2004.

[47] Aljaghoub 2006; Brown 1997; Collier and Lowe 1999; Klein 2014; Merrills 2017; Shaffer and Meléndez-Ortiz 2014; Spiermann 2005.

of international courts and other venues for peaceful settlement.[48] Again, although informative, most of these studies descriptively tackle the relation between specific rules of Islamic law and international law, without taking up the question of the underlying logic, mechanisms, causal explanation, and empirical investigation.

I should like to emphasize that there are a handful of studies attempting to quantify certain aspects of Islamic law in the context of peaceful resolution of disputes, such as quantifying sharia's presence in the jurisprudence of the ICJ.[49] Yet, much more empirical work, especially of a quantitative nature, has been done in other substantive areas of international law, primarily with regard to human rights law and constitutional law.[50] The issue of ILS' views of international conflict management venues has largely remained uncharted by empirical investigation. In fact, very few books within the Western international relations scholarship mention Islamic international law, let alone acknowledge it as a factor important to the Muslim world. Additionally, as Glenn posits, "Everybody outside of islam has heard bits and pieces of islamic law. They are usually rather spectacular bits and pieces, viewed from another tradition."[51] This observation is certainly true for Islamic law as a whole, but even more so for Islamic international law. As a result, and with the descriptive/normative approach leading the discourse, a gap has opened between the scholarly portrayal of Islamic law and its application in the international arena.[52]

Furthermore, no study takes into consideration important differences that exist *within* the Islamic legal family, such as the balance between religious laws and secular laws in each of the ILS. The Islamic legal system does not operate in a binary manner: Islamic or non-Islamic. It is, therefore, problematic to capture the presence of sharia in domestic laws via a dichotomous variable. A depiction of any legal system in a categorical way certainly has its merits, but such an approach breaks down specifically in the case of ILS. Numerous legal details and nuances beg attention if one is to paint a complete picture of how Islamic law operates in the domestic context of each of the ILS. One cannot attempt to understand ILS' preferences toward international conflict management without

[48] Brower and Sharpe 2003; Cravens 1998; Khaliq 2013.

[49] Most notably, see Lombardi 2007.

[50] Ahmed and Ginsburg 2014; Kalanges 2012. For an excellent data collection on constitutions, see the Comparative Constitutions Project [website], at http://comparativeconstitutionsproject.org/.

[51] Glenn 2014, 190.

[52] See, however, Hassner (2007) who reminds us that the knowledge of Islamic legal thought is important in formulating policies and political doctrines with regard to the Muslim milieu (see also Hassner 2016, 2009).

taking a deep plunge into the many applications of sharia in the specific local settings of each of the ILS.

Modern discussions regarding the specific character of Islamic law prompt questions about the nexus of religious law and secular law. The more we comprehend and appreciate this practical variation, the better we are able to examine the relationship between ILS and international law, especially in the context of conflict management. To reflect on these issues in an empirical way, the research presented here is based on original data on the characteristics of the legal structures in thirty Islamic law states (1945–2012). These characteristics, or variables, capture the degree of interconnectivity between religious and secular law. To my knowledge, this is the first dataset that contains this important information and goes beyond coding constitutional features.[53] The legal system as a whole—including constitutions and what lies beyond constitutions—may either constrain or sustain sharia's de facto role. It is the amalgamation of constitutions and laws of lower status that fundamentally defines a domestic legal system in ILS. My data capture not only the cross-sectional variation within the ILS category, but also patterns of change over time.[54] Most importantly, my effort to describe Islamic law in a quantitative way allows me to link features of sharia to specific international conflict management venues.

Data on ILS' domestic legal systems required coding information from 172 constitutions and major constitutional amendments. Quantification of Islamic law's presence beyond constitutions was far more challenging and required an in-depth examination of legal practices and institutions across space and time in thirty ILS. Undoubtedly, there are limits to the information that such data can provide.[55] But these data reveal some interesting patterns that slip through the cracks of a purely qualitative case-studies approach. As Simmons notes, "To quantify is hardly to trivialize; rather, it is an effort to document the pervasiveness and seriousness of practices under examination."[56] However, rather than relying solely on abstract knowledge and statistical data, my theoretical argument, as well as empirical implications of the book, are embedded in in-depth qualitative interviews with Islamic law scholars and practitioners of international law, including judges of the ICJ, States' Legal Counsels in the ICJ and international arbitration tribunals, the Legal Advisor of the United Nations, and several policymakers and religious leaders performing various functions in ILS and non-ILS. These interviews greatly enrich the qualitative aspect of the book

[53] See, for example, Ahmed and Ginsburg 2014; Ahmed and Gouda 2015.

[54] See Varol 2016 for an excellent discussion of patterns of change in constitutions over time. See also Elkins, Ginsburg, and Melton 2009.

[55] See chapter 8 for an in-depth discussion of this issue.

[56] Simmons 2009, 11.

and allow me to examine causal factors and mechanisms shaping ILS' attitudes toward international conflict management venues. In-depth conversations with people who practice or write about Islamic law and international law are the backbone of my theory. This is also true for the book's empirical chapters—chapters 5, 6, and 7—where references to these conversations make the theory and statistical results less abstract. Insights from interviews allow me to observe the broader influences of sharia on the Islamic milieu's view of international law, beyond specific cases, issues, and disputes.

References to real disputes involving ILS are the a priori mainstay of this book. I believe that the nexus of Islamic law and international law must be explored scientifically in a dynamic way, one that presents both these legal systems as uniquely rich and vibrant, and as dynamic systems that have changed over time and will continue to evolve. To this end, the incorporation of both quantitative and qualitative methods of scientific inquiry provides a means to understand the strategic interaction between domestic and international legal institutions. Such a multi-method approach is ideal since "social science research should be both general and specific: it should tell us something about classes of events as well as about specific events at particular places."[57] I am able to test hypotheses flowing from my theoretical expectations in a rigorous scientific manner, applying statistical techniques to large datasets, at the same time controlling for a host of confounding factors. The qualitative in-depth interviews, by contrast, allow me to see the general statistical patterns in the context of specific ILS and specific social environments.[58] My hope is that by using quantitative data alongside qualitative examples of causal factors, I will encourage at least some audiences to take this book's findings into consideration when writing about the Islamic milieu's attitudes toward international law.

This book fills the lacunae of the literature by, first of all, going beyond historical and normative description and moving toward developing a generalizable theory. In building my argument, I draw on an amalgamation of my own primary research: novel data on ILS' domestic legal systems and qualitative interviews, as well as secondary sources spanning various scholarly disciplines: political science, international law, comparative law, and Islamic studies literatures. More specifically, within political science, I build upon the international relations scholarship that illuminates the role of domestic institutions in affecting the design/effectiveness of international settlement venues[59] and the literature on institutional

[57] King, Keohnane, and Verba 1994, 43.

[58] See Shaffer and Ginsburg 2012, 3–4.

[59] Alter 2014; Alter and Helfer 2017; Helfer, Alter, and Guerzovich 2009; Mitchell and Powell 2011.

design.[60] My book also advances international relations and international law literatures that elaborate on how international law works in different contexts and different substantive issue areas.[61] Because I embrace the empirical approach to international and comparative law, this research furthers the "empirical turn in international legal scholarship" in the effort to scientifically assess the nexus between ILS and conflict management venues.[62] Rather than bemoaning the theoretical discrepancies between international and Islamic law, I investigate causal factors and ask whether and under what conditions specific ILS use international peaceful resolution venues.

I introduce a theory that constitutes a theoretical leap forward in the study of the Islamic milieu. The theory is broad enough to explain ILS' views of all conflict management venues, including bilateral negotiations and non-binding as well as binding third-party methods. It offers new lines of sight into ILS' specific preferences for nonconfrontational dispute settlement that diverge from the Western-based espousal of litigation. Our knowledge of the Islamic milieu is increased as a result of thinking differently about the ILS category and disaggregating it across space and time. My goal is not, however, to present a grand meta-theory, but a midrange theory about conditions under which international law "has effects in different contexts, aiming to explain variation."[63] My context, of course, is the ILS category. In doing so, I believe that in developing such a theory, one cannot separate law from political considerations, especially when trying to inquire into the reasons standing behind countries' actions in the international arena. Thus, throughout the book, I weave together insights from academic scholarship as well as the policy world to illuminate theoretical as well as more practical dimensions of interstate conflict management. This research as a whole is in no way a conclusive statement on this topic. Though my theory captures important aspects of the behavior of ILS, many dynamics remain unexplored. Indeed, the intricate relationship between law, religion, and politics in the Islamic milieu—and its effect on these states' international behavior—requires further theoretical development. Furthermore, no contribution is without shortcomings and limitations. More data on Islamic domestic legal institutions would perhaps support more comprehensive empirical models of ILS' preferences. The theory and statistical results could be further enriched by additional interviews. Nonetheless, I believe this study constitutes a meaningful primary step to understanding the Islamic milieu's view of international conflict management.

[60] Abbott and Snidal 1998; Goldstein et al. 2001; Koremenos 2016; Koremenos, Lipson, and Snidal 2001.

[61] Diehl and Ku 2010; Huth, Croco, and Appel 2013; Simmons 2009.

[62] Shaffer and Ginsburg 2012.

[63] Shaffer and Ginsburg 2012, 1.

What This Book Is and Is Not Meant to Be

It is crucial to be clear about what this book is not meant to provide or to be. This book is situated in the political science and international law literatures. Most importantly, my intention is not to say all that is important about the Islamic legal tradition or international law, nor to engage with every argument presented recently in the international law, international relations, comparative constitutional law, and Islamic studies disciplines. This book does not aspire to be a textbook on Islamic law. Neither is this book meant to be a detailed historical account of changes in Islamic law or Islamic jurisprudence. There are many scholarly works devoted to the Islamic logic of lawmaking, jurisprudence, and methodology.[64] I purposefully avoid focusing on specific contentious issues or concepts that might come under fire across these disciplines. The number of examples is virtually limitless, including definitions of the terms "sharia," "Islam," "Islamic," "Islamic law," and "secularism," the division between secular law and religious law, and the core question of how meaningful it is to talk about Islamic law's presence in modern state governance.[65] In each of the scholarly disciplines that contribute to this book's genuinely interdisciplinary content, these topics are contested. I deeply acknowledge a strong debt to the literature that addresses these seminal matters, and thus, throughout the book I refer to the existing contentions, while leaving to other scholars the arduous task of providing or questioning definitions. The precise focus of this study is the Islamic milieu's preferences with respect to international conflict management venues. Thus, the workings of international law and how it juxtaposes against the workings of Islamic law remain at the core of this study. I examine "law on the books" in various ILS and translate it to "law in action" in the international arena. Hence my goal is to empirically tackle specific scientific objectives as expressed in my overarching research questions.

My main goal in writing this book is to challenge some long-standing assumptions about the relationship between international law and the Islamic legal tradition. Again, let me stress that this work is principally about international law—and how it is perceived through the lens of the Islamic legal tradition, especially in the context of peaceful resolution of disputes. In practical terms, I hope to assist the international law community—both scholars and policymakers—in acquiring an understanding of how the various countries within the Islamic milieu interpret and view international law and its dispute

[64] Throughout this book, I refer to major works on Islamic law.

[65] I elaborate at length on this important issue in chapter 2, particularly in the context of my discussion of the category of Islamic law states.