Binding Sources of International Law vis-à-vis *Uṣūl al-fiqh*: Towards Developing the *Turath* on *Fiqh al-Siyar**

Fajri Matahati Muhammadin[1]

Abstract

Some contemporary Islamic scholars often merely regurgitate classical scholarship of fiqh al-siyar (Islamic international law) while oblivious of major shifts in the world order back then versus today. Other contemporary scholars do the opposite mistake: going straight to the Qur'an and Sunnah, ignoring over a millennium worth of turath (Islamic scholarly tradition) and end up cherry-picking verses to support inferiority-complex-infused versions of Islam and subjugated by Eurocentric notions of international law.

Hence, fiqh al-siyar is currently in a state of lethargy in turath requiring major projects for development. My research will touch uṣūl al-fiqh (jurisprudence) specifically regarding the sources of Islamic law and how, from them, ijtihad is conducted when interacting with contemporary international law. This is among the foundational issues upon which many further developments of fiqh al-siyar need to be established.

I apply Al-Attas's "Islamization of Contemporary Knowledge" approach to comprehensively analyze the sources of international law to consider how Islamic law should react and respond to them. For this project, I focus on formally binding sources of international law (treaties, customary international law, general principles of law, and jus cogens). My two findings: (a) most of these sources should not be categorically accepted or rejected (must be carefully considered case-per-case), and (b) jus cogens, in terms of legal status, should be categorically rejected.

Keywords: Islamic Jurisprudence, international law, sources of law, siyar

Abstrak

Beberapa cendekiawan Islam kontemporer seringkali hanya memuntahkan keilmuan klasik fiqh al-siyar (hukum internasional Islam) sementara tidak menyadari adanya perubahan besar dalam tatanan dunia saat itu dibandingkan saat ini. Cendekiawan kontemporer lainnya melakukan kesalahan sebaliknya: langsung mengacu pada Al-Qur'an dan Sunnah, mengabaikan turath (tradisi keilmuan Islam) yang bernilai lebih dari satu milenium dan akhirnya memilih ayat-ayat yang mendukung versi Islam yang mengandung inferioritas dan kompleks serta ditundukkan oleh para ulama. Gagasan Eurosentris tentang hukum internasional.

Oleh karena itu, fiqh al-siyar saat ini sedang dalam keadaan lesu karena membutuhkan proyek-proyek besar untuk pembangunannya. Penelitian saya akan menyentuh uṣūl al-fiqh (yurisprudensi) khususnya mengenai sumber-sumber hukum Islam dan bagaimana ijtihad dilakukan ketika berinteraksi dengan hukum internasional kontemporer. Hal ini merupakan salah satu persoalan mendasar yang perlu dikembangkan lebih lanjut dalam fiqh al-siyar.

Saya menerapkan pendekatan "Islamisasi Pengetahuan Kontemporer" Al-Attas untuk menganalisis secara komprehensif sumber-sumber hukum internasional untuk mempertimbangkan bagaimana hukum Islam harus bereaksi dan meresponsnya. Untuk proyek ini, saya fokus pada sumber-sumber hukum internasional yang mengikat secara formal (perjanjian, hukum kebiasaan internasional, prinsip-prinsip umum hukum, dan jus cogens). Dua temuan saya: (a) sebagian besar sumber-sumber ini tidak boleh diterima atau ditolak secara kategoris (harus dipertimbangkan dengan cermat kasus per kasus), dan (b) jus cogens, dalam hal status hukum, harus ditolak secara kategoris.

Kata Kunci: Fikih Islam, hukum internasional, sumber hukum, siyar

Introduction

In my previous works on contemporary international law, I have raised my concerns regarding the lethargy of scholarship developments in Islamic international law in various fields.[2] What often happens in contemporary scholarship on Islamic international law is

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1 Fajri Matahati Muhammadin, Student at International Law Department, Faculty of Law, Universitas Gadjah Mada, Indonesia, E-mail: fajrimuhammadin@ugm.ac.id

2 See inter alia Fajri Matahati Muhammadin and Shania Dwini Azzahra, "The Role of Fiqh Al-*Siyar* in International Law-Making: Escaping the Lethargy," Al-Jami'ah: Journal of Islamic Studies 60, no. 2 (2022): 509–46; Fajri Matahati Muhammadin, "Fiqh Al-Jihād In The Contemporary World: Addressing The Gaps In The

either (a) simply repeating what classical scholars are saying on certain themes despite the difference of world order they were speaking in, often very general without going into much details[3] or (b) dishonestly and apologetically suggesting compatibility with 'universal international law', often by cherry-picking from the Quran and Sunnah that suits their agenda.[4]

The approaches above end up lacking in depth and relevance compared to the necessities of Muslims living in today's world order. Most especially point (b), inferiority complex is a big problem not worthy of a Muslim[5] and, especially when involving academic dishonesty, is unacceptable in perhaps any civilization.

As should be the case with any academic research, scholarship is a long inter-generational relay of discussion and development. We often refer to this as the Islamic *turath*, legacy of Islamic scholarship developed for over a thousand years.[6] My research therefore highlights a discussion regarding sources of international law, compared to the science of *uṣūl al-fiqh* which includes the discussion of sources of law and how they are applied.[7] I consider how previous classical scholars discuss the international law sources of their time and what it would mean to Islamic law, and attempt to develop that into today's context.

My research applies Al-Attas's notion of Islamization of contemporary knowledge, defined by himself as "the deliverance of knowledge from its interpretations based on secular ideology; and from meanings and expressions of the secular".[8] This Islamization is done by isolating contemporary knowledge from its Western-secular elements and key concepts then infuse it with Islamic elements and key concepts.[9] For this research, I focus on the binding sources of international law, namely international agreements, customary international law, general principles of law, and *jus cogens*.

Discussion and Result

Sources of Law in Islam

Before anything else, it is most important to understand what the term "source of law" means in Islam. The One and Only true Lawmaker in Islam is Allah.[10] It is a

Regulations On The Means And Methods Of Warfare" (Ph.D Thesis, International Islamic University of Malaysia, 2020).

3 See inter alia Ahmad Azhar Basyir, Ikhtisar Hukum Internasional Islam (Yogyakarta: UII Press, 2010); Ali Ali Mansur, Syari'at Islam Dan Hukum Internasional Umum (Jakarta: Penerbit Bulan Bintang, 1973).

4 See critics by Nesrine Badawi, "Regulation of Armed Conflict: Critical Comparativism," Third World Quarterly 37, no. 11 (2016): 1990–2009.

5 See Al-Attas's critic towards this mentality: Syed Muhammad Naquib Al-Attas, Risalah Untuk Kaum Muslimin (Kuala Lumpur: ISTAC, 2001).

6 Khalif Muammar A. Harris, "Pandangan Islam Terhadap Tradisi Dan Kemodenan," Jurnal Hadhari 4, no. 1 (2012): 23–48.

7 See, for example, the themes discussed in Al-Shafi's Kitab al-Risalah, often credited as the first book organizing *uṣūl al-fiqh* into a systematized science, largely concern sources of law. See: Imam Al-Shafi'i, Shafi'is Risalah: Treatise on the Foundations of Islamic Jurisprudence (Translated with an Introduction, Notes, and Appendices by Majid Khadduri), 2nd ed. (Cambridge: The Islamic Texts Society, 1987).

8 Syed Muhammad Naquib Al-Attas, The Concept of Knowledge in Islam: A Framework for an Islamic Philosophy of Education (Kuala Lumpur: The International Institute of Islamic Thought, 1991), 43.

9 Syed Muhammad Naquib Al-Attas, Islam and Secularism (Kuala Lumpur: ISTAC, 1993), 162–63.

10 Wahbah Al-Zuḥaylī, Fiqih Islam Wa Al-Adillatuhu, vol. 8 (Jakarta: Gema Insani Press, 2011), 267.

characteristic of a believer *(mu'min)* to make Allah the source of all laws, and those who believe that any other laws are better than the laws of Allah are disbelievers *(kafir)*.[11]

As Allah says in Surah Al-A'raf (12) verse 40:

إِنِ الْحُكْمُ إِلَّا لِلَّهِ

(Legislation [*al-hukmu*] is not but for Allah).

Read also Surah Al-Ma'idah (5) verse 44:

وَمَنْ لَّمْ يَحْكُمْ بِمَآ اَنْزَلَ اللّٰهُ فَاُولٰٓئِكَ هُمُ الْكٰفِرُوْنَ

(And whoever does not judge by what Allah has revealed - then it is those who are the disbelievers).

Therefore, the only true source of law in Islam is Divine Revelation which can be found in the Qur'an and Sunnah. These are what we can refer to as "primary sources" of Islamic law.

However, the primary sources do not come in form of a systematic and organized statutory regulations and not literally everything is specifically spelled out in details, so it is incumbent upon the *'ulama* to explore these primary sources and make such systematic organization into legal rulings for various specific matters as applied in various different situations. Therefore *ijtihad* (juristic reasoning), which means an effort by a *mujtahid* to seek knowledge of legal rulings from the Shari'ah through interpretation,[12] is necessary and becomes the 'bread and butter' of Islamic law throughout the ages.

There are various methods from which *ijtihad* is done. The first and foremost is *qiyas* (analogy),[13] and there are numerous others such as applying *'urf* (customary laws),[14] *istihsan* (juristic preference) [15] and *maṣlaḥat* (exigency).[16] Here, differences of opinion can occur due to many reasons.[17] However, sometimes the *'ulama* at one point of time reach a consensus *(ijma')*, and this settles any difference of opinion before that point and is binding upon whatever and whoever comes afterwards.[18] *Ijma'* is therefore often cited among the primary sources of Islamic law, providing a legal basis that is *qaṭ'i*

11 Shalih bin Fauzan Al-Fauzan, Syarah Nawaaqidhul Islam (Jakarta: Akbar Media, 2017), 122–41; Haji Abdulmalik Abdulkarim Amrullah, Tafsir Al-Azhar, vol. 3 (Singapore: Pustaka Nasional PTE Ltd, n.d.), 1758–60. Mūsá ibn Aḥmad Al-Ḥajjāwī, Al-Iqnā' Al-Ṭālib Al-Intifā', vol. 4 (Darah Al-Malik 'Abd al-'Aziz, 2002), 297–98; Aḥmad ibn `Abd al-Ḥalīm Ibn Taymiyyah, Majmū' Al-Fatāwā, vol. 27 (Madinah: Mujamma' al-Malik Fahd, 2004), 58; Ḥamūd Al-Ruḥayli, Al-'Alamaniyyah Wa Mawqif Al-Islām Minhā (Madinah: Madinah International University, 1422), 396.

12 Imran Ahsan Khan Nyazee, Islamic Jurisprudence (Selangor: The Other Press, 2003), 62; Muhammad bin Shalih Al-Utsaimin, Ushul Fiqih (Yogyakarta: Media Hidayah, 2008), 128.

13 Nyazee, Islamic Jurisprudence, 214.

14 Mustafa Ahmad Al-Zarqā, Sharh Al-Qawā'id Al-Fiqhiyyah (Damascus: Dar al-Qalam, 1989), 2.

15 There are various definitions of *istihsan* and its status as secondary source of law. See: Muhammad Nahirudin, "*Istihsan* Dan Formulasinya (Pro Kontra *Istihsan* Dalam Pandangan Mazhab Hanafi Dan Syafi'i)," Jurnal Asy-Syir'ah 43, no. 1 (2009): 161–82.

16 Abū Ḥāmid Muḥammad Al-Ghazālī, Al-Muṣtaṣfa Min 'Ilm Al-Uṣūl, vol. 1 (al-Qāhirah: Al-Amiriya Press, 1324), 286.

17 Wahbah al-Zuḥaylī, Fiqih Islam Wa Al-Adillatuhu, vol. 1 (Jakarta: Gema Insani Press, 2011), 72–76; Aḥmad ibn `Abd al-Ḥalīm Ibn Taymiyyah, Raf' Al-Malām 'an Al-Aimmat Al-A'Lām (Riyadh: Dār al-Iftā', 1413), 9.

18 Badr ad-Dīn Muḥammad Al-Zarkashī, Tashnīf Al-Masāmi', vol. 3 (Makkah: Maktabah Al-Makiyyah, 1998), 137.

(definite) not only in terms of 'bindingness' but also certain in terms of meaning in a legal context.[19]

The results of *ijtihad* are various legal rulings pertaining various matters. Often, they are then grouped into certain themes or chapters such as *fiqh al-ṣalāt* (laws of ritual worship), al-ṣaum (laws of fasting) and, relevant to our discussion, *siyar* (international law). These themes or chapters may have their own unique characteristics due to the specific circumstances surrounding said theme. For example, contracts or agreements are not often referred to as a specific source of law in more general *uṣūl al-fiqh* works, but they are often mentioned as a source in the sub-fields of Islamic law, such as commercial law.

Especially in commercial law, the *'ulama* always discuss new types of contracts emerging in commercial practices: criticizing some, allowing others, and innovating new types, all to adapt to current developments.[20] Thus is the case with *siyar*, that also witnesses new types of agreements in international law and various other new phenomena needing further discussion.

Contemporary International Agreements

International agreements are an essential source of international law that binds its parties.[21] For the European law of nations, Hugo Grotius (d.1645 AD) was credited to have first introduced the principle of *pacta sunt servanda*, originally a Roman Law principle applicable domestically and not in jus gentium (the Roman version of 'international law'), into the European modern law of nations.[22]

However, it must be noted that the Muslims have recognized the binding force of contracts since a thousand years before Grotius.[23] This is even before Imam Al-Shaybani, because even the companions of Prophet Muhammad ﷺ have recognized this rule as established in prophetic narrations.[24] It is an established rule in Islam that agreements must be respected, and betraying agreements is a sign of hypocrisy.[25] However, if an agreement's content contradicts the Shari'ah, such an agreement is *batil* (invalid).[26]

19 Muḥammad ibn 'Alī Al-Shawkānī, Irshād Al-Fuḥūl, vol. 2 (Beirut: Dar al-Kitab Al-'Arabi, 1999), 278.This is not to say that the Qur'an and Sunnah are below human opinions, rather often the Qur'an and Sunnah are not always specific and definitive in their wordings and therefore still open to interpretation. Ijmā', on the other hand, are usually specific and definitive.

20 See inter alia: Muhammad Yusuf Saleem, Islamic Commercial Law (Singapore: Wiley, 2012); Wahbah Al-Zuḥaylī, Fiqih Islam Wa Al-Adillatuhu, vol. 5 (Jakarta: Gema Insani Press, 2011).

21 As stipulated in Article 27, the Vienna Convention on the Law of Treaties Between States 1969 (hereinafter, VCLT 1969).

22 John T. Parry, "What Is the Grotian Tradition in International Law?," University of Pennsylvania Journal of International Law 35, no. 2 (2013): 337–39.

23 Christopher G. Weeramantry, Islamic Jurisprudence: An International Perspective (Palgrave Macmillan, 1988), 149.

24 Abu Dawud Sulaymān ibn al-Ash'ath Al-Sijistānī, Sunan Abu Dawud, vol. 3 (Riyadh: Darussalam, 2008), ḥadīth no. 2759; Muḥammad ibn ʿĪsā al-Sulamī Al-Tirmidhī, Jami Al-Tirmidhi, vol. 3 (Riyadh: Darussalam, 2007), ḥadīth no 1580.

25 Muḥammad ibn Ismā'īl Al-Bukhārī, Sahih Al-Bukhari, vol. 1 (Riyadh: Darussalam, 1997), hadith no.33.

26 Aḥmad ibn `Abd al-Ḥalīm Ibn Taymiyyah, Majmu' Al-Fatāwa, vol. 31 (Dar al-Wafa, 1426), 19; Abdul Rahman Ghazaly, Ghufron Ihsan, and Sapiudin Shidiq, Fiqh Muamalat (Jakarta: Kencana and Prenada Media Group, 2010), 54–55.

The classical literature of *fiqh al-siyar* has discussed various types of agreements between nations, such as cease-fire agreements, peace treaties, safe passage (aman), trade, *dhimmi* agreements, trading arrangements, *etc*.[27] A common characteristic across these types of treaties is that they generally stick to regulating the relations between the nations, as is the characteristic of pre-19th century AD international law.

However, the advent of the 20th century contemporary international law, new trends of international law especially affecting the types of treaties emerge:

1) International agreements that meddle with states' domestic affairs: this type of agreement does not directly regulate international relations; instead, it regulates how a state governs its territory and people. Among the first international agreements of this type are human rights treaties, also among the early signs of the erosion of full state sovereignty recognized in the previous era of international law.[28] These kinds of agreements would make foreign laws apply domestically.
2) Law-making treaties: international agreements in this type are intended to construct an international legal regime above and binding to all states, alike statutory regulations and unlike a contract between equal parties.[29] These kinds of international agreements are usually open to being participated in by all states (as opposed to closed agreements, which are usually limited to a closed few states).

Bearing these in mind, although Islamic law generally demands the faithful observance of agreements, extreme caution must be taken through a few steps:

First, each international agreement must undergo a comprehensive critical examination to see the extent to which it brings *maṣlaḥat*. It is possible that law-making treaties which affect domestic laws would bring many benefits to the Muslims. For example, the Agreement on the Application of Sanitary and Phytosanitary Measures.[30] It is essential to understand that international agreements may be neither entirely good nor bad, meaning that parts of them are good and others are bad, necessitating a thorough investigation.

Second, it is essential to bear in mind and take advantage of existing legal technical mechanisms to formulate and implement international agreements. For example, the international law of treaties facilitates reservations (i.e. excluding specific provisions in multilateral treaties) which may or may not be allowed depending on each international agreement, as regulated in Articles 19-23 of the VCLT 1969.[31] If there is *maṣlaḥat* in most of the contents of a multilateral treaty, and it is possible to make reservations towards the non-*maṣlaḥat* minority, then such a maneuver might be a good strategy. Some Muslim-majority states have employed this strategy in some international agreements, including human rights treaties, consenting towards them in general and making

27 See various examples in: Abū Isḥāq Al-Fazārī, Kitāb Al-*Siyar* (Beirut: Mu'assasah al-Risālāh, 1408); Muḥammad ibn Aḥmad ibn Abi Sahl Al-Sarakhsī, Sharḥ Al-Siyār Al-Kabīr (Egypt: Al-Shirkah al-Sharqiyyah li l-I'lānāt, 1971).

28 Malcolm N Shaw, International Law, 6th ed. (New York: Cambridge University Press, 2008), 270.

29 Catherine Brölmann, "Law-Making Treaties: Form and Function in International Law," Nordic Journal of International Law 74, no. 3–4 (2005): 384. This is as was explained in Chapter I earlier.

30 This is one out of many international agreements facilitated by the World Trade Organization.

31 For a deeper discussion on the subject, see: Mark E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Leiden-Boston: Martinus Nijhoff Publishers, 2009), 257–335.

reservations to exclude provisions that contradict the Shari'ah.[32] However, if the international agreement does not allow reservations towards provisions contradicting the Shari'ah, it would be impermissible to consent to the said international agreement.

Third, the Muslims must be careful with the purported 'authoritative' interpreters of international agreements. Some committees or bodies issue documents to provide interpretation towards certain law-making treaties, and contemporary international law literature usually considers them authoritative.[33] For example, the *Convention Against Torture* 1987 (CAT) has the Committee Against Torture with a mandate to monitor CAT implementation. This Committee concluded that the *hudud* in Saudi Arabia (as an implementation of the Shari'ah) should be abolished as it contradicts Saudi Arabia's obligation as a party to the CAT.[34]

The conclusion of the aforementioned CAT Committee in the case of Saudi is based on a strange interpretation of the CAT especially relating to lashing as a form of punishment.[35] To this date, Saudi Arabia has yet to abolish lashing as a form of *hudud*. One may even wonder why Saudi Arabia even joined the CAT in the first place. Nonetheless, the point is that the Muslim-majority states must be cautious of the role of these kinds of committees. It is essential to have a more active and louder voice from the Muslims to delegitimize these committees when they make faulty interpretations, especially those unjustly blaming the Shari'ah. That said, the *turath* should also be developed to discuss and address these issues.

Fourth, especially for the negotiations to formulate law-making treaties, those representing a Muslim-majority state must be a *faqih* and *'alim* while also be a master of negotiations. Or, at least, the *'ulama* must assist Muslim governments through this process.[36] At least this would (a) ensure the agreement's contents do not contradict the Shari'ah and (b) negotiate as much *maṣlaḥat* for the Muslims as possible. It may seem that, generally, most Muslim nations lack in this. Perhaps it is due to the general crisis of knowledge in the Muslim 'ummah, the trend of secularism in the regimes ruling the Muslim-majority nations, or probably a combination of both.

Some Western academics claim that Muslim-majorities have contributed positively to law making treaty negotiations, Susan Waltz in context of international human rights treaties.[37] However, one may strongly question the extent of the quality

32 Oliver Dörr and Kirsten Schmalenbach, eds., Vienna Convention on the Law of Treaties: A Commentary (Berlin: Springer, 2012), 271.

33 See for example: Alan Boyle and Christine Chinkin, The Making of International Law (New York: Oxford University Press, 2007), 213.

34 See documents No. CAT/C/CR/28/5 of 2002 and No. CAT/C/SAU/CO/2 of 2016 issued by this Committee.

35 There are other 'authoritative' bodies also categorically claiming that lashing is an act of torture, also with basing their claims on strange interpretations. See: Fajri Matahati Muhammadin et al., "Lashing in Qanun Aceh and the Convention Against Torture," Malaysian Journal of Syariah and Law 7, no. 1 (2019): 11–24.

36 See my research on this issue in an Indonesian context: Fajri Matahati Muhammadin, "Urgensi Majelis Ulama Indonesia Membersamai Pemerintah Dalam Hukum Internasional," El-Dusturie 2, no. 1 (2023). I have presented this paper to some of the the masha'ikh of the Fatwa Committee of the Indonesian Council of *'ulama*.

37 Susan Waltz, "Universal Human Rights: The Contribution of Muslim States," Human Rights Quarterly 26, no. 4 (2004): 799–844. It must be noted that even the representative of Saudi Arabia, Jamil Baroody, is not a faqih in the Islamic sciences and in fact not even a Muslim (or even a Saudi national! He

of their contributions: do Muslim-states and their diplomats necessarily represent Islam? In human rights treaty negotiations, delegates of these Muslim-states do not reflect a strong understanding of the Islamic sciences, such as Abdul Rahman Pazhwak (Afghanistan) and Abdul Rahman Al-Kayyali (Syria).[38] This is without intending to disrespect their efforts in any way, as some of them were noted to do their best to defend Islam to the extent that they understand it. The problem was that, in the final text, numerous Islamic ideas were not incorporated while many non-Islamic ones were. History reveals that most Muslim nations agree to ratify these treaties (i.e. the ICCPR and ICESCR 1966) while also making reservations. This reservation maneuver is a decent strategy, albeit definitely imperfect.[39] Additionally, other academics have noted how Muslim leaders often represent their own personal interest as opposed to Islam itself during treaty negotiations, such as in the making of the Rome Statute where these leaders were more interested in securing themselves from possible prosecutions.[40]

Continuing the fourth point, there is ample opportunity for the Muslims to contribute to solving global problems using Islamic teachings. Law-making treaties usually discuss humanity's problems such as war, environmental preservation, the law of the sea, and various others.

Too long has it been since the West holds hegemony in knowledge, while the rich body of knowledge embodied in centuries of the Islamic tradition of scholarship has been unfortunately pushed into the periphery, as mentioned in Chapter I. Meanwhile, Allah says in Surah Anbia (21) verse 107:

وَمَآ اَرْسَلْنٰكَ اِلَّا رَحْمَةً لِّلْعٰلَمِيْنَ

(And We have not sent you, [O Muḥammad], except as a mercy to the worlds.).

Allah also says in Surah Ali Imran (3) verse 110:

كُنْتُمْ خَيْرَ اُمَّةٍ اُخْرِجَتْ لِلنَّاسِ تَأْمُرُوْنَ بِالْمَعْرُوْفِ وَتَنْهَوْنَ عَنِ الْمُنْكَرِ وَتُؤْمِنُوْنَ بِاللّٰ

(You are the best nation produced [as an example] for mankind. You enjoin what is right and forbid what is wrong and believe in Allah.).

Islam teaches that Muslims should be at the forefront in providing the best solutions to meet humanity's challenges. Indeed, that was what the world was like before the renaissance. With the emerging and strongly developing movements of

appears to be Lebanese). Nonetheless, Waltz notes that Baroody was very fierce in defending Islamic values (at least to the extent that he understands it) in the formulation of the ICCPR.

38 Pazhwak was a poet and journalist before joining the Afghanistan ministry of foreign affairs, while Al-Kayyali's background was medicine. We did not manage to find any record displaying their understanding of the Islamic sciences.

39 There are various critics towards the human rights and international law regime from an Islamic worldview, but this will require a separate discussion. A good comprehensive study on this subject is: Umar Ahmad Kasule, Contemporary Muslims and Human Rights Discourse: A Critical Assessment (Selangor Darul Ehsan: IIUM Press, 2009).

40 See inter alia: Shaheen Sardar Ali and Satwant Kaur Heer, "What Is the Measure of 'Universality'? Critical Reflections on 'Islamic' Criminal Law and Muslim State Practice Vis-à-Vis the Rome Statute and the International Criminal Court," in Islam and International Criminal Law and Justice, ed. Tallyn Gray (Brussels: Torkel Opsahl, 2018).

'Islamization of knowledge,'[41] it is not unrealistic to aspire to put Islamic teachings as a chief source from which law-making treaties find solutions to global challenges. However, this would require stronger *ikhtiyar* (good effort) by developing more research directed for that purpose, and it would indeed also require *sabr* (patience) with it.

Even non-Muslim scholars have demanded international law to be more inclusive of Islamic law, whether in the International Court of Justice or other 'authoritative' bodies.[42] Their motive seems to be the strengthening (or establishment) of the legitimacy of international law as a 'universal' regime incorporating contributions from all civilizations. Indeed, it is befitting that Muslim scholars should have stronger motives for this.[43] We already have Islamic scholars writing Islamic solutions for world problems, such as Indonesia's Nahdlatul *'ulama*'s *Fiqh* of renewable energy[44] and Yusuf al-Qaradawi's work on environmental preservation.[45] There is no limit to what subjects that Muslims can write on, and the next level is to promote them globally and international law-making is one of the avenues for that. This should be how *turath* is developed today.

Contemporary Customary International Law

Customary international law is among the binding sources of international law. It originates from acts of reciprocity on a large scale and becomes a widespread custom due to the collectivity of interests of the individual states.[46] The classical literature of *fiqh al-siyar* also notes the importance of reciprocity that should be considered in the practice of *siyar*. Meanwhile, reciprocity is the component of customary international law.[47] Conformity towards reciprocity is generally seen to bring benefits (or at least reduces detriments) in international relations,[48] and it seems to also hold true in a large-scale relation of customary international law. However, in an Islamic context, there should be a filter to weed out customary practices violating the Shari'ah.

The literature of international law usually mentions that customary international law has two elements: (a) the uniformity of state practice and (b) *opinio juris* or the

41 For a deeper explanation towards the most authentic meaning of the concept of 'Islamization of knowledge', see inter alia: Wan Mohd Nor Wan Daud, The Educational Philosophy and Practice of Syed Muhammad Naquib Al-Attas: An Exposition of the Original Concept of Islamization (Kuala Lumpur: The International Institute of Islamic Thought and Civilization (ISTAC), 1998).

42 See inter alia: Julie Fraser, "Exploring Legal Compatibilities and Pursuing Cultural Legitimacy: Islamic Law and the International Criminal Court," in Intersections of Law and Culture at the International Criminal Court, ed. Julie Fraser and Brianne McGonigle Leyh (Edward Elgar Publishing, 2020); Weeramantry, Islamic Jurisprudence: An International Perspective.

43 Again, see my proposition in an Indonesian context here: Muhammadin, "Urgensi Majelis."

44 Marzuki Wahid, ed., Fikih Energi Terbaharukan: Pandangan Dan Respons Islam Atas Pembangkit Listrik Tenaga Surya (PLTS) (Jakarta: LAKPESDAM-PBNU, 2017).

45 Yūsuf Al-Qaraḍāwi, Ri'āyat Al-Bī'ah Fi Al-Sharī'ah Al-Islām (Beirut: Dar Al-Shurūq, 2001).

46 Jack L Goldsmith and Eric A Posner, The Limits of International Law (New York: Oxford University Press, 2005), 40–42, 56.

47 Md Anowar Zahid and Rohimi B Shapiee, "Considering Custom in the Making of *Siyar* (Islamic International Law)," JE Asia & Int'l L. 3 (2010): 123.

48 Oona A Hathaway and Scott J Shapiro, "Outcasting: Enforcement in Domestic and International Law," Yale Law Journal 121, no. 2 (2011): 302.

subjective belief that such practice was done out of legal obligation.[49] However, contemporary international law brings new development:

Communication technology. Unlike the 19th century and before, the 20th century witnessed the emergence of settings where states can easily and conveniently gather in one forum, such as international organizations. The rapid advancement of technology, particularly communication and information, perhaps help facilitate the meeting of minds much more conveniently than it ever has been before.

Law-making treaties can codify and make progressive development towards customary international law. For example, the VCLT 1969 not only codifies the pre-existing customary rules relating to written treaties between states but also formulates new rules in some matters, resulting in the emergence of new customary international law on those matters.[50] Thus, there are international agreements whose contents could still be binding to states not participating in the said agreements because these contents are also part of customary international law.

Various 'authoritative' bodies produce documents considered to contain customary international law. Some examples include the UN General Assembly (in some cases), the International Law Commission (ILC),[51] and even the ICJ judgments have taken an essential part in shaping the direction of contemporary customary international law.[52]

Unfortunately, the Muslims are sort of in a pinch here. Especially after the collapse of the Ottomans, disunity has become more and more rampant in the Muslim world. On one side, we have Turkey succeeding the Ottomans as a secular and infamously anti-Islamic state, at least up until Recep Tayyip Erdoğan's regime seems to be gradually re-Islamizing Turkey. On the other side, most Muslim-majority nations struggle to get back on their feet after hundreds of years of colonialism by the Europeans. It is hard to imagine a worse footing from which to face the regime of contemporary international law.

Even worse, until 2023 (when this article is written), the Muslim world is in great turmoil due to much infighting. Libya is facing a second chapter of civil war since 2014, where some Muslim-majority states are supporting the government while other Muslim-majority states are supporting the rebels. This is not to mention the tension between Turkey and Saudi Arabia for quite some time[53] and many other problems. The international organization primarily dedicated to uniting the Muslim-majority states, the Organization of Islamic Cooperation (OIC), is very week and highly criticized for its

49 Shaw, International Law, 2008, 72–93.

50 Boyle and Chinkin, The Making of International Law, 190–91. Lebih dalam tentang fungsi perjanjian internasional dlam international law-making, lihat: hlm 233-262 pada buku yang sama.

51 See for example the ICJ cases: Nicaragua v the United States of America (1968), paras 188-195. See also: Hungary v. Slovakia (1997), paras 50-51.

52 Harris David, Cases and Materials on International Law, Sweet & Maxwell, 7th ed., 2010, 43; Boyle and Chinkin, The Making of International Law, 268.

53 although very recently in early 2021 they seem to be cooling down.

failure to further promote Islamic international law in the global discourse of international law.[54]

These are a few among various factors causing the Muslim-majority nations to have a low bargaining position in the formulation of customary international law. Consequently, most Muslim-majority states, together with other developing states, fall under Western hegemony in the contemporary regime of international law. With this in mind, in a situation far from ideal, there are a few things the Muslim 'ummah will need to do.

First, uniting the 'ummah to the furthest extent that it is possible. If uniting all Muslims under one leader is still unrealistic, at the very least, they should be on the same side in the global political arena. The OIC has good potential to serve this function. While criticizing the existing weakness of the OIC in promoting Islamic international law, Salim Farrar also emphasizes how good a potential the OIC is.[55] Stronger unity will result in a stronger bargaining position.

Second, making good use of the available channels to participate in the negotiations to formulate law-making treaties as explained in the previous sub-chapters. If these international agreements also codify and make progressive development of customary international law, then it becomes more urgent and imperative for the Muslim-majority state representatives to be more creative and persistent in defending and propagating Islamic teachings in these forums. The rulers and *'ulama* must work together for this.

Would this also mean that the Muslims should be involved in 'authoritative' bodies and organizations (such as the United Nations), whether in the interpretation of international agreements or customary international law? Following the logic of the necessity to participate in international agreements above, the answer would typically be 'yes.' Although, one must bear in mind the political imbalance in the UN structure, especially the role of the UN Security Council.

Third, utilizing some lee-ways to avoid constructing hegemonic customary international law rules that contradict the Shari'ah. To do so, Muslim-majority states can become 'persistent objectors' towards customary international law. In theory, this is allowed only during the formulation period of said rule of customary international law.[56] In doing so, when the customary international law rule has crystallized into a solid norm, the 'persistent objectors' will be excluded from that rule.[57]

Saudi Arabia has once set a decent precedent when abstaining from the 1948 Universal Declaration of Human Rights (UDHR), although it would have been much better if they had voted against it instead. This was not because Saudi Arabia rejected the general idea of human rights, but some provisions of the UDHR were deemed to be

54 Salim Farrar, "The Organisation of Islamic Cooperation: Forever on the Periphery of Public International Law?," Chinese Journal of International Law 13, no. 4 (2014): 787–817.

55 Farrar, "The Organisation of Islamic Cooperation: Forever on the Periphery of Public International Law?"

56 Meaning, there is yet to be a solid uniformity of practice on a particular subject, but it is apparent that the international community is moving towards that direction.

57 Shaw, International Law, 2008, 91–93.

against the Shari'ah.[58] The Muslim-majority states, in fighting for an 'Islamic human rights' (which is claimed to be not identical to the Western-secular version of human rights), have issued the Cairo Declaration of Human Rights in Islam in 1990, which the ILC later recognized in 2019 as among the diverse international human rights instruments.[59]

The Cairo Declaration may not be an ideal example, considering the external and especially the internal Muslim critics towards these human rights maneuvers (and also the terrible record of some Muslim-majority states in treating their citizens, even with an Islamic standard). Nonetheless, this can serve at least as an illustration of what the Muslims can do when they are united (to some extent) in their political maneuver when attempting to exclude the Muslim 'ummah from a general customary international law contradicting the Shari'ah.

The ICJ in the case of UK v Norway (1951) has noted an additional requirement for 'persistent objectors.' They say that the other states must acquiesce (i.e. not protest) this persistent objection. Such a requirement is definitely not a desirable one and opens the door towards international pressure upon the Muslims to submit to the mainstream customary international law, which is inconsistent with the Shari'ah. However, a more united 'ummah could withstand this pressure or even further delegitimize this additional requirement as a rule.

The status quo seems to be that, unfortunately, the Muslim-majority states are mostly merely followers (as opposed to pioneers) in the formulation of customary international law. It is more befitting that they should aspire to dominate instead and lead this process. However, it seems that the first step to take is to escape the 'mainstream' that contradicts the Shari'ah. Perhaps, in time, the development of da'wah and Islamization of knowledge would push the Muslims out of the non-mainstream to pioneer a new mainstream customary international law guided by the Shari'ah.

General Principles of Law

General principles of law are those recognized in the various domestic legal systems in the world. In international law, particularly in international dispute settlement, principles of law are used to assist the settling of cases when there is a vacuum in other sources.[60] For example, the ICJ has cited estoppel, a principle taken from the common law system, in the *Temple of Preah Vihear case*.[61] In another case, an

58 Critics have been made against the purported 'universal' regime of human rights such as: Fajri Matahati Muhammadin and Mohd Hisham Mohd Kamal, "The Western Universalism v. Cultural Relativism Debate on Human Rights and Islam: An 'Aqīdah-Based Approach," Afkar: Journal of 'Aqidah & Islamic Thought 21, no. 2 (2019): 175–216; Zara Khan, "Refractions Through the Secular: Islam, Human Rights, and Universality" (Ph.D Dissertation, The City University of New York, 2016).

59 "Report of the International Law Commission: Seventy-First Session (29 April–7 June and 8 July–9 August 2019)," United Nations General Assembly, Supplement No. 10 (A/74/10), 2019, 99, https://legal.un.org/docs/?symbol=A/74/10.

60 Malcolm N Shaw, International Law, 8th ed. (Cambridge: Cambridge University Press, 2017), 72–73.

61 Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Judgement on Merits, ICJ Reports, 15 June 1962.

ICTY dissenting opinion by Judge Ninian Stephens has noted that coercion as an exemption from criminal liability is recognized as a general principle of law.[62]

However, not all domestic law principles are recognized in international law. For example, the *unus testis nullus testis* (two evidence should at least be present) in context of criminal law was flat-out rejected by the ICTY in the *Tadić Case* as 'out-of-date' in the European continental legal system,[63] despite submitted by the defendant in that case (and still applicable today in Indonesia![64].

In Islamic law, the *'ulama* have compiled the *qawa'id fiqhiyyah* (Islamic legal maxims). These are maxims derived from fiqh rulings used to determine other rulings from new cases, which are also not explicitly regulated or detailed in the Qur'an and Sunnah.[65] There are different methods from which to derive the *qawa'id fiqhiyyah*, i.e. deductive and inductive methods.[66] Among the *qawa'id fiqhiyyah*, there are five most basic maxims:[67]

1) *Al-umuru bi maqāsidihā* (all acts are determined by their intentions),
2) *Al-yaqinu la yuzalu bi al-shak* (certainty is not removed by doubt),
3) *Al-mashaqqatu tajlibu taysir* (hardship begets facility),
4) *Al-ḍararu yuzāl* (harm must be removed),
5) *Al-'adātu muhakkamah* (customs can be considered as law).

From the aforementioned basic *qawa'id fiqhiyyah*, more maxims are derived. Some examples include *dar-u al-mafasid muqaddam 'ala jalb al-maṣāliḥ* (the removal of harm takes precedence over the attainment of benefit), *al-ḍaruratu tuqaddira bi qadariha* (necessity is measured proportionally), and many others.[68]

It would be interesting to note that the "dar-u al-mafāsid…" maxim above has been cited by the counsel of Argentina in the *Pulp Mills case* before the ICJ.[69] Therefore, in the same spirit with the previous sections, it would be imperative for the *'ulama* to further popularize the use of Islamic law maxims along with other Islamic teachings in the process of international law-making. As shown in the *Pulp Mills case*, neither party (Argentina nor Uruguay) were Muslim majorities, yet the counsel found an Islamic legal maxim to be applicable.[70]

Important to note is that the counsel for Argentina cited the above Islamic legal maxim because it was available in an ILC Yearbook, that point specifically contributed

62 Prosecutor v. Erdemovic´, Case No. IT-96-22-A, ICTY Appeals Chamber: Separate and Dissenting Opinion of Judge Stephen, 7 October 1997, para 26.

63 Prosecutor v. Tadić, Opinion and Judgment, Case No. IT-94-1-T, ICTY Trial Chambers, 7 May 1997, para.535-539.

64 See Article 185(2) of the Indonesian Criminal Procedural Code.

65 H. A. Djazuli, Kaidah-Kaidah Fikih (Jakarta: Kencana, 2017), 4.

66 Djazuli, Kaidah-Kaidah Fikih, 13–14; Abdul Mu'nim, "Al-Qawa'id Al-Fiqhiyyah: Proses Penalaran Induktif Dalam Kajian Hukum Islam," Jurnal Asy-Syir'ah 43, no. 2 (2009).

67 Djazuli, Kaidah-Kaidah Fikih, 33.

68 Some *'ulama*, such as Shaykh 'Abdul Karim Zaydan have compiled many *qawa'id fiqhiyyah* in one book See: Abdul Karim Zaidan, Al-Wajiz: 100 Kaidah Fikih Dalam Kehidupan Sehari-Hari (Jakarta: Pustaka Al-Kautsar, 2008).

69 Pulp Mills on the River Uruguay (Argentina v. Uruguay), Oral Proceedings, CRT 2009/14, the International Court of Justice, p. 22.

70 It must be noted, however, that the judges did not mention this principle in the final judgement.

by Awn Shawkat Al-Khasawneh (from Jordan) who was an ILC member at the time.[71] After his tenure in the ILC, Al-Khasawneh became judge and later even Vice President of the ICJ. He explained how there is much potential, but very minimum realization, of Islamic law contributing substantively to international law.[72] We long for more "Al-Khasawnehs" in the future. My recent conversation with a current member of the ILC, Keun-Gwan Lee (Republic of Korea),[73] revealed something quite concerning. What I understand from our conversation is that there are virtually no substantive contributions from Islamic teachings, other than the occasional concern that certain subjects might adversely affect Muslims.

Nonetheless, it is what it is. If non-Muslim states are susceptible to have Islamic law principles applied in their situations, then Muslim states are also susceptible to have non-Islamic law principles applied to them. Arguably the latter is overwhelmingly greater, considering the secular-European hegemony dominating contemporary international law. Additionally, colonialism –an integral and central part of said hegemony—has enforced either common law or European continental law systems in the Muslim world, making non-Islamic legal principles very familiar even within the Muslim world.

Outright rejection is not the answer, though. We even have precedence of pre-Islamic poetry by Lubayd used to explain a principle of Islamic theology (a more serious matter than jurisprudence), due to the correct wording used:

زائ ل محالة لَا نَعِيمٍ وَكُلُّ ... بَاطِلٌ اللَّهَ خَلَا مَا شَيْءٍ كُلُّ أَلَا

(Everything other than Allah is false … and every [worldly] pleasures will fade away)[74]

At an operational level, general principles of law may be recognized in Islamic law insofar as they are consistent with or, better, help explain Islamic teachings. Some of these principles can be accepted wholesale, such as the principle of *pacta sunt servanda* since Islamic law also recognizes the same thing as explained in a previous section. Another example is the principle of *actori incumbit onus probandi*[75] (those who claim has the onus to prove), which is also a recognized principle in Islamic law based on the ḥadīth:

مُدَّعِيالْ عَلَى الْبَيِّنَةَ لَكِنَّ

71 International Law Commission, "Yearbook of the International Law Commission of 1989 (Vol I)" (New York, 1989), 126, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1989_v1.pdf.

72 Awn S. Al-Khasawneh, "Islam and International Law," in Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives, ed. Marie-Luisa Frick and Andreas Th Müller (Martinus Nijhoff Publishers, 2013), 29–44.

73 This conversation took place in the Asian Society of International Law Conference held on August, 2023.

74 Prophet Muhammad ﷺ himself acknowledged Lubayb's poem. See: Muḥammad ibn Ismāʿīl Al-Bukhārī, Sahih Al-Bukhari, vol. 8 (Riyadh: Beirut, 1997), hadith no. 6489. Used to explain Islamic theology, inter alia by: ʿUthmān ibn Saʿīd Al-Dārimī, Naqḍ Al-Dārimī ʿAlā Al-Marīsī (Maktabah Al-Rushd, 1998), 356.

75 Kabir Duggal and Wendy W. Cai, Principles of Evidence in Public International Law as Applied by Investor-State Tribunals (Leiden: Koninklijke Brill, 2019), 14–15.

(... But, the onus of proof is upon the claimant ....)[76]

There may be other general principles of law that may be taken with some reservations, such as the principle of legality. Islamic criminal law does not sit well with this principle if understood in its strictest form, i.e. formal legality as applicable in Indonesia (old criminal code) requiring clear legislation for criminalization.[77] Parts of Islamic criminal law do indeed require specific legislation in the Qur'an and Sunnah for its implementation (i.e. the *ḥudūd*), but is also open to discretionary punishments that can be imposed by the ruler or judge to maintain order and achieve *maṣlaḥat* (i.e. *ta'zīr*).[78] Perhaps a more flexible understanding of the principle of legality (i.e. material legality) explains Islamic criminal law better.[79]

As of now, I have not managed to find (or think of) general principles of law that are categorically contradictive towards Islamic law. This may require a bit more thinking. Nonetheless, the above examples show that every principle of law not originating from Islamic teachings need to be considered on a case-per-case basis to examine the extent to which they are compatible with Islamic law, before recognizing them. At the same time, it is necessary to further promote Islamic teachings in the making and conduct of international law. Relevant to this section, we have at least one example how Islamic legal maxims could work even for non-Muslim states.

Jus cogens Norms

The concept of *jus cogens* norms arose in the post-World War II era of international law and is not usually known by those who do not learn international law specifically. The term '*jus cogens*' literally means 'compelling law' and is the highest international law norms in its hierarchy.[80] As mentioned in Articles 53 and 64 of the VCLT 1969, even international treaties will be null and void if their contents contradict the *jus cogens* norms. Among the norms recognized as *jus cogens* are the prohibition of aggression and genocide. However, there are still debates among scholars regarding the extent to which a rule is *jus cogens* and its application and extent of consequence.[81]

Article 53 of the VCLT 1969 captures the elements of a *jus cogens* norm:

1) It is recognized by the international community of states as a whole, and
2) It is recognized as a norm higher than other norms, and no derogation is permitted.

There are various sources from which to find *jus cogens*, including but not limited to: the *opinio juris* of states (the subjective belief by states regarding the status of this norm), strong pronouncements in international agreements (with very high numbers of states being parties to these agreements) indicating a higher status compared to other

76 Yaḥya ibn Sharaf Al-Nawawī, Al-Arbaʿūn Al-Nawawiyyah (Beirut: Dar al-Minhaj, 2009), 99.

77 Ramadan Tabiu and Eddy O.S. Hiariej, "Pertentangan Asas Legalitas Formil Dan Materiil Dalam Rancangan Undang-Undang KUHP," Jurnal Penelitian Hukum-Fakultas Hukum Universitas Gadjah Mada 2, no. 1 (2015): 30.

78 Al-Mawsūʿah Al-Fiqhiyyah, vol. 12 (Kuwait: Wizarah al-Awqaf wa al-Shu'un al-Islāmiyyah, 2003), 254.

79 Tabiu and Hiariej, "Pertentangan." It is however not impossible for rulers to choose to impose ta'zīr via legislations, as is the practice of Indonesia's Qanun Jinayat.

80 M Cherif Bassiouni, "International Crimes: *Jus cogens* and Obligatio Erga Omnes," Law & Contemporary Problems 59 (1996): 67.

81 Bassiouni, "*Jus cogens* And," 68.

norms in international law, breaches are considered as international crimes and others.[82] In addition to that, violations of *jus cogens* norms would usually either threaten international peace and security and/or shock the conscience of humanity.[83] Therefore, it is also important to highlight that, in other words, violation of *jus cogens* is 'morally wrong' according to an international law perspective, most especially those labeled as *jus cogens* crimes (aggression, genocide, *etc.*).

It is one thing to have an international law regime 'above and beyond' the states below it, creating a hegemony of a few over the others. It is another thing, perhaps making it worse, to have a norm of international law hierarchically higher than every other norm. The idea of *jus cogens* in international law has been criticized by some international law scholars,[84] but what really does that do to a very well-established trend of *jus cogens*? This is especially true after a new document issued by the ILC in 2019 comprehensively elaborates various aspects of *jus cogens*.[85]

Here it is very important to recall Surah Al-Ma'idah (5) verse 50:

أَفَحُكْمَ الْجَاهِلِيَّةِ يَبْغُونَ ۚ وَمَنْ أَحْسَنُ مِنَ اللَّهِ حُكْمًا لِقَوْمٍ يُوقِنُونَ

(Then is it the judgement of [the time of] ignorance [-jahiliyyah] they desire? But who is better than Allāh in judgement for a people who are certain [in faith].)

The notion of "jahiliyyah" (ignorance) here should be highlighted. The infamous 'Amr ibn Hisham was known among the Quraysh as Abu al-Hakam (Father of Wisdom), but he was then known in Islamic history as Abu Jahal (Father of Ignorance). "Ignorance", here, does not refer to 'worldly, material knowledge' because 'Amr was called Abu al-Hakam due to his vast knowledge and intellect. Rather, it is important to note that "ignorance" refers to the failure to recognize the proper place Allah and the *din* (true Islamic religion) in that knowledge.[86]

Bearing this in mind, this is why I mentioned earlier how, among the *nawaqid al-Islam* (nullifiers of faith), is the belief that there is any law better than what is revealed by Allah. By its own definition, *jus cogens* is precisely that: a norm higher than other norms, and no derogations are permitted. Such status of *jus cogens* is achieved by "universal recognition of states", not divine revelation. Even by the common sense of any theistic religion, one will find it hilarious for a consensus among politicians to hold a higher status than the Word of God.

Therefore, the very notion of *jus cogens* contradicts the most foundational aspect of *uṣūl al-fiqh* and Islamic teachings and must therefore be categorically rejected. It is not beyond the realms of possibility for certain parts of international law to be *jus cogens* while, at the same time, coinciding with Islamic laws based on divine revelation

82 Bassiouni, "*Jus cogens* And," 68.

83 Bassiouni, "*Jus cogens* And," 69–70.

84 Inter alia: Ulf Linderfalk, "The Effect of *Jus cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?," European Journal of International Law 18, no. 5 (2007): 853–71; Ulf Linderfalk, "Normative Conflict and the Fuzziness of the International Ius Cogens Regime," Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht 69 (2009): 961–77.

85 "Report of the International Law Commission: Seventy-First Session (29 April–7 June and 8 July–9 August 2019)," 141–208.

86 Muḥammad ibn Ṣāliḥ Al-'Uthaymīn, Al-Qaul Al-Mufid, vol. 2 (Dar al-'Ashima, 1415), 119.

(primary sources), such as the prohibition against genocide. In such a case, it is Islamically possible to enjoin in the prohibition of genocide while categorically rejecting the premise of *jus cogens* as a norm "higher than all else".

However, the current international legal order is already like this. The existence of *jus cogens* has already been cemented. In such a situation, there are a few things that need to be done. First, the categorical rejection of the notion of *jus cogens* itself needs to be made in Islamic scholarship, as it is perhaps too late and politically impossible to even expect the Muslim leaders to do anything as drastic as that. Second, considering how *jus cogens* is established through law-making treaties and customary international law, the least that the *'ulama* can do is to participate in international law-making as I have explained in sections D and E. This is necessary to help minimize harm and to infuse Islamic principles as much as possible.

Conclusions

For over a thousand years, the *'ulama* have developed the Islamic *turath* from one generation to the next. As a branch of Islamic law, al-*Siyar* has been part of the 'ummah as a global powerhouse. From the Khulafa al-Rashidin to the Umayyads, the Abbasids to the Seljuks, then the Ottomans, in their own respective times they have contributed so much and, for a long time, became a counterbalance against the European powerhouse. Long has it been since the Muslims could be proud of its position in the global dynamics, when events pass into history and, perhaps, slowly into myth.

However, when leaders are in political shackles, the *'ulama* are not. The lethargy in the current scholarship of *siyar* is nothing, as it is not difficult for the *'ulama* to pick up the 'baton' and continue the scholarship relay race. The baton of *uṣūl al-fiqh* has never dropped, but it needs to proceed to assist the *siyar* scholarship to further develop.

My paper here specifically discusses the binding sources of international law and how *siyar* should respond to them. With it comes many challenges to overcome: international agreements and principles of laws to examine and filter, governments to advise in shaping customary international law and negotiating treaties, and a strong *ṭāghūt* (false God) named *jus cogens* to reject. But with challenges also comes prospects, where Islamic teachings can be propagated through various international channels especially in international law-making.

We have not even started talking about the other sources of international law, such as the subsidiary sources of international law (in Article 38 of the ICJ Statute) and "Soft Law". A discussion on sources of international law serves as an important milestone for most other discussions on Islam and international law, if one were to develop a *siyar* of the 21st century. Such a fertile ground from which Islamic scholarships can grow. I hope more *'ulama* start 'planting'.

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