

THE ROLE OF *FIQH AL-SIYAR* IN INTERNATIONAL LAW-MAKING Escaping the Lethargy¹

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Abstract

*International law has developed since its pre-20th century consent-based positivistic framework to 'international law-making' where the role of state sovereignty is seen to have eroded. This development, however, still reproduces its pre-20th century colonialist features against non-European (including Islamic) legal thought, pushing them to the peripheries of relevance. Recently, countering that, stronger voices have demanded international law to generally include non-European and specifically Islamic international legal scholarship. However, while having a very rich body of classical scholarship, contemporary literature of *fiqh al-siyar* (Islamic international law) suffers from lethargy. It neither mentions nor responds to the trend of international law-making. This article, employing a literature-based research approach, bridges the gap of that lethargy so that *fiqh al-siyar* could develop to properly respond to the current trend of international law-making. It is found that *fiqh al-siyar* must critically adopt and respond to the features of international law-making, and all actors must utilize all channels to participate in its process.*

[Hukum Internasional telah berkembang jauh sebelum abad 20 dalam

¹ This article was written with research funded through the “Hibah Penelitian Jurnal Internasional” program under the Research and Publication Unit, Faculty of Law, Universitas Gadjah Mada. The authors are grateful for the opportunity to receive this grant, and thanks all who have assisted and provided feedback in the process of completing this research

kerangka dasar isi yang positivistik dalam pembentukannya, dimana peran kedaulatan negara mulai terlibat berkurang. Hal ini terus berkembang sampai berwujud kolonial yang mengabaikan dan meminggirkan hukum non Eropa, termasuk hukum Islam. Namun akhir-akhir ini muncul suara yang menginginkan bahwa hukum internasional harus mengakui secara umum hukum non Eropa dan khususnya pemikiran hukum Internasional Islam. Alib alib memberikan kontribusi dalam pemikiran klasik, literatur kontemporer hukum internasional Islam (fiqh al-siyar) justru mengalami kelesuan. Bukan hanya tidak disebut tapi juga tidak merespon perkembangan hukum internasional. Dengan pendekatan kajian literatur, tulisan ini berusaha menjembatani kesenjangan kelesuan tersebut agar hukum internasional Islam (fiqh al-siyar) dapat berkembang dan merespon dengan baik trend saat ini. Selain itu, fiqh al-siyar harus secara kritis dalam mengadopsi dan merespon perkembangan hukum internasional, serta semua aktor harus mendayagunakan semua saluran untuk terlibat dalam proses tersebut.]

Keywords: Islam, siyar, international law-making, TWAIL

A. Introduction

In the 8th century AD, there was compelling evidence that the Islamic civilization produced literature of *fiqh al-siyar* (Islamic international law) which was original,² richer in depth and scope compared to the Western ‘fathers of international law’ i.e., Grotius, Gratian, Gentili, De Vitoria, Aquinas in the 12th-15th century AD.³ In fact, there are strong arguments that *fiqh al-siyar* may have influenced the said ‘fathers of international law.’⁴ Hence, the *Oxford Handbook of the History of International Law* lists Imam Muḥammad ibn al-Ḥasan al-Shaybānī, instead of Grotius,

² Khaled Ramadan Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani’s Siyar* (Cheltenham: Edward Elgar Publishing, 2018).

³ *Ibid.*

⁴ Marcel A. Boisard, “On the Probable Influence of Islam on Western Public and International Law”, *International Journal of Middle East Studies*, vol. 11, no. 4 (1980), pp. 429–50. Note that ‘western public and international law’ is what shaped the current state of international law: see *ibid.*

as the first important scholar of international law.⁵

Today, Islamic scholars lament on how the role of Islam in the formation of international law has been pushed to the periphery.⁶ If Muslims were alone in this lamentation, one may think that this is perhaps product of ‘sore loser syndrome’. However, even some non-Muslim scholars argue similarly, and have voiced the potential and need for an Islamic representation in international law,⁷ although there are others who suggest otherwise.⁸

In reality, marginalization is not only faced by Islam. There are various critics of the making of international law. Superficial and false sense of universality is allegedly assumed by an ‘elite few’ and imposed upon the rest of the world through colonialism which continues to neo-colonialism. The scholars who voice this criticism suggest that there have (major) voices excluded from contributing to international law whether through political, ideological, or even educational hegemony.⁹ They usually call for stronger participation and involvement in the making of international law.

⁵ Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2013). See, in particular, the “People in Portrait” section.

⁶ Salim Farrar, “The Organisation of Islamic Cooperation: Forever on the Periphery of Public International Law?”, *Chinese Journal of International Law*, vol. 13, no. 4 (2014), pp. 787–817.

⁷ See 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. by Julie Fraser and Brianne McGonigle Leyh (Rochester, NY: Edward Elgar, 2020); Clark Lombardi, “Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis”, *Chicago Journal of International Law*, vol. 8, no. 1 (2007), p. 85. \

⁸ See Christopher A. Ford, “Siyar-ization and Its Discontents: International Law and Islam’s Constitutional Crisis”, in *International Law and Islamic Law*, ed. by Mashood A. Baderin (London: Routledge, 2017), p. 499.

⁹ See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge; New York: Cambridge University Press, 2005); Benoît Mayer, “The ‘Magic Circle’ of Rights Holders: Human Rights’ Outsiders”, in *Critical International Law: Postrealism, Postcolonialism, and Transnationalism*, ed. by Prabhakar Singh and Benoît Mayer (Oxford: Oxford University Press, 2014), pp. 198–219; Wan Mohd Nor Wan Daud, *Islamization of Contemporary Knowledge and the Role of the University in the Context of De-Westernization and Decolonization* (Johor Baru: UTM Press, 2013).

However, Muslims must also take a reality check. As enthusiastic as the Muslim world may be with such proposition to have more ‘Islamic representation’ in international law scholarship, one must question the current state of Islamic scholarship. Does Islamic law scholarship even address the reality of international law today?

After thousands of years of international law history and development, the 20th century brought very significant changes, not only in a shift in scope, i.e., from only regulating inter-state relations to also regulating how states conduct its own internal affairs.¹⁰ Also, international law seems to be more inclined towards ‘universalization’ through international law making *via* various international forums, most notably the United Nations (UN) and the World Trade Organization (WTO)¹¹ usually referred to as ‘international law-making.’ This process is described as the construction of “*rules with a statutory function, above and beyond rules governing voluntary legal relations between equal subjects.*”¹²

One may view that the major problem when considering the concept of sovereignty of an Islamic state and legal system: the highest power of legislation and sovereignty lies with Allah. Humanity is the *khalifah* (representative) of Allah in conveying His laws.¹³ Meanwhile, the description above of international law-making suggests putting all states and subjects of international law—including Islamic legal systems—underneath a legal regime of international law. Consequently, this means a great deal of possibilities for international laws to be made in contravention with Islamic teachings while at the same time binding towards Islamic nations.

Therefore, this article attempts to bridge the gap in scholarship. This article endeavours to propose how Islamic law, particularly *fiqh al-siyar*, should perceive, react, and contribute to international law-making.

¹⁰ Most especially, international human rights law has this character. See: Malcolm N. Shaw, *International Law*, 6th edition (Cambridge: Cambridge University Press, 2008), pp. 270–1.

¹¹ See Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford ; New York: Oxford University Press, 2007).

¹² Catherine Brölmann, “Law-Making Treaties: Form and Function in International Law”, *Nordic Journal of International Law*, vol. 74, nos. 3–4 (2005), p. 386.

¹³ Wahbah Zuhaili, *Fiqh Islam wa Adillatuhu*, vol. 8 (Jakarta: Gema Insani Press, 2011), pp. 267–8.

The approach taken is not limited to any sub-field of *fiqh al-siyar* or international law-making, rather it observes the general construct of the two laws. For this purpose, we combine the *Third World Approaches to International Law* (TWAAIL)¹⁴ and a traditional Islamic legal scholarship framework.¹⁵

B. International Law-Making

In laymen's terms, 'international law-making' might be misunderstood to include any acts from which arises binding international law. However, in contemporary discourse, the term 'international law-making' refers to "the constitutive process of contemporary international law."¹⁶ Meaning, it covers the formulation and promulgation of legal rules governing the international community. Danilenko explains how the current trend of international relations calls for a "new global law-making and further progressive development of the law."¹⁷

This seems to mark a shift from the traditional way of perceiving international law, which must be understood first before explaining the shift brought by this 'international law-making' trend. In its traditional setting (up until the mid-19th century), international law was primarily dependant on voluntary consent of sovereign states either in form of consenting towards treaties or participating or consenting to customary international law.¹⁸ However, in its contemporary development Catherine Brölmann explains that a more public dimension (as opposed to private) is emerging in international law, meaning that there should be an aspect of international law regulating beyond voluntary legal relations which, according to Brölmann, is in accordance with the aim to establish an

¹⁴ Antony Anghie et al. (eds.), *The Third World and International Order: Law, Politics and Globalization* (Leiden: Brill, 2021); Makau W. Mutua, 'What is Twail?', in *Proceedings of the ASIL Annual Meeting*, vol. 94 (Cambridge: Cambridge University Press, 2000).

¹⁵ Yusri Mohamad, *Contemporary Ijtihad: An Analysis of Individual and Collective Approaches* (Kuala Lumpur: Islamic and Strategic Studies Institute, 2010), pp. 54–5.

¹⁶ Boyle and Christine Chinkin, *The Making of International Law*, p. 1.

¹⁷ G.M. Danilenko, *Law-Making in the International Community* (Leiden: Martinus Nijhoff, 1993), p. 5.

¹⁸ Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 43–4.

‘international community’ with a unified legal system.¹⁹ Additionally, as eloquently explained by Martti Koskeniemi, the concept of Westphalian sovereignty is increasingly eroded and irrelevant.²⁰

Applied to the law of treaties, international treaties usually only make legal obligations between the parties who consent to be bound by them. However, a new type of treaty has emerged which would generally contain the general features of treaties, but they are shaped and intended for a different purpose, international law-making. These kinds of law-making treaties aim to create, in the words of Sir Gerald Fitzmaurice, “... obligation towards all the world rather than towards particular parties,”²¹ In other words, the effects of legal rules under the notion of ‘international law-making’ treaties is “statutory rather than contractual.”²²

It may seem that, although there may be evidence of attempts to make international law-making treaties since the 19th century (such as the Geneva Convention 1864), the process became exceptionally rapid soon after the establishment of the United Nations. Since then, the process of international law-making has dominated the international community either through treaties or various other means currently in operation. There are various channels which include international organizations and other institutions considered as authoritative, inter alia the organs of the United Nations and others.²³

There are some scholars who lament how this process of international law-making is not all inclusive, rather they are exclusive for a few and excluding towards others. Among them are those who blame this on colonialism and the process of ‘other-ing’ by a few states unfairly placing an unjust hegemony on the others.²⁴ Others, particularly in an Islamic context, blame it on the inability of the Organisation of Islamic

¹⁹ Brölmann, “Law-Making Treaties”, p. 386.

²⁰ Martti Koskeniemi, “What Use for Sovereignty Today?”, *Asian Journal of International Law*, vol. 1, no. 1 (2011), pp. 61–70.

²¹ G.G. Fitzmaurice, “Law of Treaties (agenda item 2)”, in *Yearbook Of The International Law Commission 1958*, vol. II (New York: United Nations, 1957), p. 54.

²² Brölmann, “Law-Making Treaties”, p. 384.

²³ See generally Boyle and Christine Chinkin, *The Making of International Law*.

²⁴ See Anghie, *Imperialism, Sovereignty and the Making of International Law*; Mayer, “The ‘Magic Circle’ of Rights Holders”

Cooperation (OIC) to push ‘Islamic participation’ in the process of international law-making.²⁵ Further, on a more fundamental level, some others blame the problems of the Muslims on *inter alia* how distorted their worldview is,²⁶ which has resulted in a plethora of other problems (surely including leadership and all that comes with it).

C. Islamic Law and *Siyar*: From Pioneer to Lethargy

In Islamic teaching, law is fundamentally a manifestation of the Muslim’s obligation to worship and obey Allah.²⁷ Further, Allah is believed to be the only Lawmaker and believing in such is part of tawhid (Islamic monotheism) which is the most fundamental teaching in Islam.²⁸ There are various verses indicating how only Allah is The Lawmaker, including Qur’an, 6: 57; *إِنَّ الْحُكْمَ إِلَّا لِلَّهِ* (The decision [*hukm*] is only for Allah). Likewise, there are many other verses indicating the seriousness of believing in laws other than what is revealed by Allah, such as Qur’an, 5: 44; *وَمَنْ لَمْ يَحْكَمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الْكَافِرُونَ* (And whoever does not judge by what Allah has revealed, it is those who are the disbelievers). These verses illustrate the gravity of having only divine revelation (i.e., the Qur’an and Sunnah) primary source of Islamic law, and therefore the Islamic legal scholars are unanimous that those who believe in a better law than what Allah has revealed is a *kafir* (disbeliever) even if they claim to be a Muslim.²⁹

Accordingly, the true primary sources of Islamic law are the Qur’an

²⁵ Farrar, “The Organisation of Islamic Cooperation”.

²⁶ See Syed Muhammad Naquib Al-Attas, *Risalah Untuk Kaum Muslimin* (Kuala Lumpur: ISTAC, 2001).

²⁷ Umar F. Abd-Allah, “Theological Dimensions of Islamic Law”, in *The Cambridge Companion to Classical Islamic Theology*, ed. by Tim Winter (Cambridge: Cambridge University Press, 2008), pp. 237–57.

²⁸ Syaikh Muhammad bin Shalih Al-Utsaimin, “Menganggap Tauhid Hakimiyyah Merupakan Tauhid Keempat, Ia Adalah Muftadi”, *Majalah Ilmiah Islamiy: Salafiy*, vol. XXI (1997), pp. 17–8.

²⁹ Imam ibn Katsir, *Shahih Tafsir Ibnu Katsir*, vol. 3, trans. by Safurrahman Al-Mubarakfuri (Jakarta: Pustaka Ibnu Katsir, 2006), p. 149; ‘Alī Ibn Abī Al-‘Izz Al-Hanafī, *Sharḥ al-‘Aqīdah Al-Ṭahawīyyah*, vol. 2 (Beirut: Mu’assasah al-Risalah, 1997), p. 446; Hamka, *Tafsir Al-Azhar*, vol. 3 (Singapore: Pustaka Nasional, 1982), pp. 1758–60.

(i.e., the verbatim words of Allah to Prophet Muḥammad)³⁰ and the Prophetic Sunnah, as indicated in Qur'an, 4: 59. From that, jurists develop legal rulings by derived from the Qur'an and Sunnah to only deal with matters not explicitly specified in the Qur'an and Sunnah.³¹ These legal rulings are very diverse in topic, discussing matters of ritual worship such as *Salat* and *Taharah* until matters of governance such as *jinayat* and *jihad*.³²

Foremost among these sub-topics is *fiqh al-siyar* (today often translated as 'Islamic international law') which discusses rules regulating how the Islamic nation should relate with other peoples and nations.³³ War seems to be a major theme in *fiqh al-siyar*, which some scholars see that *fiqh al-siyar* is basically equal with the laws of war.³⁴ The most famous pioneers of *fiqh al-siyar* such as Al-Shaybani and Al-Faziri in their works seem to emphasise war, however various other aspects of international relations are discussed including diplomatic relations, marriage, trade, and others.³⁵

As explained in Part A, classical Islamic scholars of *fiqh al-siyar*, to some extent, have historically contributed to the development of Western international law. This is both by influencing the Muslim leaders of various caliphates and sultanates throughout the ages, shaping practice and reciprocity with the Europeans, and arguably through exchange of scholarship as well. For example, Bashir explains how Western founders

³⁰ Ahmad Von Denffer, *Ulum al-Qur'an: An Introduction to the Sciences of the Qur'an* (Leicester: The Islamic Foundation, 2009), pp. 6–7.

³¹ Abu Ameenah Bilal Philips, *The Evolution of Fiqh (Islamic Law and the Madhabs)* (Riyadh: Tawheed Publication, 1990), p. 60; Imran Ahsan Khan Nyazee, *Islamic Jurisprudence: Uṣūl Al-Fiqh* (Selangor: Other Press, 2003), pp. 20, 214, 263.

³² For breadth of topics, there are major compilations written by scholars. A classic example would include: Ibn Rushd, *The Distinguished Jurist's Primer Volume II: Bidayat Al-Mujtabid Wa Nihayat Al-Muqtasid*: 2, vols 1–2, trans. by Imran Ahsan Khan Nyazee (Reading: Garnet Publishing, 1996). A contemporary example would include: Wahbah Zuhaili, *Fiqh Islam wa Adillatuhu*, vol. 8 (Jakarta: Gema Insani Press, 2011).

³³ Muhammad ibn Ahmad al-Sarakhsi, *Al-Mabsūṭ Fī al-Fiqh*, vol. 10 (Beirut: Dar al-Ma'rifah, 1986), p. 5.

³⁴ Yahya ibn Sharaf Al-Nawawī, *Tahdhīb al-asmā' wa-al-lughāt*, vol. 3 (Beirut: Dār al-Kutub al-'Ilmiyah, 1977), p. 159.

³⁵ See Muhammad ibn Ahmad al-Sarakhsi, *Sharh al-siyar al-kabir* (Cairo: Al-Shirkah al-Sharqiyyah li l-I'lānāt, 1917); Abu Ishaq Al-Fazari, *Kitab al-Siyar* (Beirut: Muassasat al-Risala, 1987).

of international law (Grotius, Vitoria, Gratian, *etc*) may have borrowed material from the works of Imam Muhammad ibn Hasan Al-Shaybani who lived hundreds of years earlier.³⁶ It was no secret that the Muslim world was a very strong and worthy competitor of the Europeans and affected them in many ways.

However, since the advent of international law-making, ‘Western’ international law scholars have written extensively on the very subject of law-making.³⁷ Hence, the development of international law by the actual actors of international law seemed to be heavily accompanied by the scholars, to some extent affecting each other.³⁸ On the other hand, it seems very difficult to find Islamic scholarship writing about this phenomenon.

Contemporary Islamic scholars seem to perceive and construct *siyar* (Islamic international law) in a manner all too similar to the classical scholars. The systematics of these modern works tend to be more “modern reader-friendly,”³⁹ but generally they touch on only the same subjects *inter alia* war, peace, trade, as done by the classical scholars.⁴⁰ It may be interesting to note that the discussion of conflict of laws discussed by classical scholars is usually missing in contemporary discussion of *siyar*.

Consequently, the scholarship of *Siyar* currently seems to be missing important subjects discussed in contemporary international law. For example, there is scholarship regarding the Islamic notion of environmental preservation,⁴¹ but barely anything on how to perceive the issue on an international law level, responding to existing international frameworks such as the United Nations Framework Convention on Climate Change of 1992 with its derivative protocols. Similarly, while the

³⁶ See Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani’s Siyar*.

³⁷ See Arnold D. McNair, “International Legislation”, *Iowa Law Review*, vol. 19, no. 2 (1934), p. 177.

³⁸ Shaw, *International Law*, pp. 112–3.

³⁹ See Muhammad Hamidullah, *Muslim Conduct of State* (Lahore: Sh. Muhammad Ashraf, 2011); Ali Ali Mansur, *Syari’at Islam dan Hukum Internasional Umum* (Jakarta: Bulan Bintang, 1973); Ahmad Azhar Basyir, *Ikhtisar Hukum Internasional Islam: (Yogyakarta: UII Press, 2010)*.

⁴⁰ See al-Sarakhsi, *Sharh al-siyar al-kabir*, Al-Fazari, *Kitab al-Siyar*.

⁴¹ Yūsuf Al-Qaraḍāwī, *Ri’āyat al-Bī’ah fi Shari’ah al-Islām* (Beirut: Dar Al-Shurūq, 2001).

subject of international trade has been discussed by Islamic scholars for over a thousand of years, it is very difficult to find an Islamic analysis of the General Agreement on Tariffs and Trade (1994).

There are more examples, but in summary the problem is that literature of *siyar* still perceives international law through the lens of the past positivistic regime. That the international community is moving towards a law-making trend, making statutory-like global-universal norms instead of contractual, may have escaped much of the existing literature. This is not to suggest that no scholars have discussed how Muslims should respond to the constructions of international norms, which are manifested in international law. There are some who do so, particularly in context of specific areas such as human rights and armed conflict. They manifest different approaches to this.

Some contemporary Islamic scholars seem to take the “Islam has something similar too” approach. Meaning, that there are Islamic teachings that coincide with international law, such as Wahbah Al-Zuhayli pointing out that Islam also recognizes the common heritage status of celestial objects which is similar to the international law of outer space.⁴² However, this approach occasionally tends to be ‘selective’ or too general in a way that unjustly and dishonestly portrays Islam as ‘conforming to modern standards.’ An example of this is in the approach of some Islamic scholars towards the laws of armed conflict, as per Nesrine Badawi’s critic.⁴³

Arguably similar (to some extent) to the previous type of scholarship but at a different level of extremity, some scholars argue that Islamic law should submit (whether partially or entirely) to the newly established standards of international law. Scholars of this type include Ebrahim Afsah and Abdullahi An-Na’im, writing on Islam and human rights.⁴⁴ Some appreciate their works as Islamic reformers in adapting towards

⁴² Zuhaili, *Fiqh Islam wa Adillatuhu*, 8: 433–4.

⁴³ Nesrine Badawi, “Regulation of Armed Conflict: Critical Comparativism”, *Third World Quarterly*, vol. 37, no. 11 (2016), pp. 1995–7.

⁴⁴ Ebrahim Afsah, “Contested Universalities of International Law. Islam’s Struggle with Modernity”, *Journal of the History of International Law / Revue d’histoire du droit international*, vol. 10, no. 2 (2008), pp. 259–307; Abdullahi An-Na’im, “Islamic Law, International Relations, and Human Rights: Challenge and Response”, *Cornell International Law Journal*, vol. 20, no. 2 (1987), pp. 317–36.

modernity, while others criticize them as transgressing the boundaries acceptable to Islamic standards.⁴⁵ After all, they do seem to be uncritical towards the notion of universality, especially in context of human rights, while legitimate criticism exists.⁴⁶ In the end, especially in the case of Afsah, the means for Islamic law to adapt to modernity is practically to forget Islamic law and just follow whatever secular developments arise.

Regardless, these approaches --to varying degrees--would construct Islam in the international level as 'good followers.' This does not sit well with the fundamental teachings of Islam. While having details which may be subject to interpretation, the belief that there is any law aside from or even higher to the laws of Allah contradicts core tenets of Islamic faith.⁴⁷ This is why some works of literature come out strongly against the approaches by the previous scholars as they are seen as falling into such a mistake.

Islamic scholars who criticise the previous approaches would usually provide something new. For example, after criticising various approaches of Islamic scholars,⁴⁸ Umar Ahmad Kasule offers 'human dignity and justice' as an Islamic alternative to human rights.⁴⁹ In various other sciences, Muslim scholars have suggested various 'Islamic solutions' to many other global problems such as the aforementioned environmental

⁴⁵ See Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani's Siyar*; Fajri Muhammadin and Mohd Hisham Mohd Kamal, "The Western Universalism v. Cultural Relativism Debate on Human Rights and Islam - An 'Aqidah-Based Approach'", *Afkar: Jurnal of Aqidah and Islamic Thought*, vol. 21, no. 2 (2019), pp. 175–216; Zara Khan, "Refractions Through the Secular: Islam, Human Rights and Universality", Ph.D. Dissertation (New York: City University of New York, 2016). 2019

⁴⁶ Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights", *Harvard International Law Journal*, vol. 42, no. 1 (2001), pp. 201–45; Antony Anghie, "International Human Rights Law and a Developing World Perspective", in *Routledge Handbook of International Human Rights Law* (New York: Routledge, 2013), pp. 109–25.

⁴⁷ Shalih bin Fauzan Al-Fauzan, *Syarah Nawaqidhul Islam* (Jakarta: Akbar Media, 2017), pp. 122–41.

⁴⁸ Umar Ahmad Kasule, *Contemporary Muslims and Human Rights Discourse: A Critical Assessment* (Kuala Lumpur: IIUM Press, 2009).

⁴⁹ Umar Ahmad Kasule, *Pursuit of Human Dignity and Justice: Islamic Alternative Values to Human Rights* (Kuala Lumpur: A.S. Noordeen, 2008).

preservation, and Islamic finance,⁵⁰ asylum seekers,⁵¹ etc. This position not only makes more sense in building a more all-inclusive international law-making. Rather, this also seems to be the one more in line with Islamic theology. The problem with these works in the present day is that most of them do not present themselves as a *syiar* issue, and do not usually include relevant international law. This makes Islamic teachings rather foreign on an international plane as explained in a later section of this paper.

D. Positioning Islam Towards an International Law-Making Regime

1. International Law-Making as a Regime of Subordination

As highlighted in Part A, perhaps the main problem in *syiar* and how it relates to international law is the subordination of all participants within it. As explained in previous sections, since the advent of colonialism, a ‘Eurocentric’ version of international law has been constructed and preserved until today. Atip Latipulhayat acknowledges this but submits that international law is becoming more inclusive. Among his arguments is that the decisions of the ICJ have started to include “...ancient laws of Hinduism, Islam, and Buddhism...” and “... no more simply a ‘Western’ construct.”⁵² As he notes, ‘Western’ here refers to a secular ideological-worldview, and Al-Attas explains deeper about the worldview of what one usually refers to as ‘Western.’⁵³ Anghie suggests that this is a question of ‘culture,’⁵⁴ but all of these positions point to the same fact, that ‘Western’ is not merely a geographical notion.

However, Latipulhayat’s position is, to some extent, disagreeable.

⁵⁰ Daud Vicary Abdullah and Keon Chee, *Islamic Finance: Why It Makes Sense* (Singapore: Marshall Cavendish Corp/Ccb, 2010).

⁵¹ Ahmad Abu al-Wafa, *Hak-Hak Pencarian Suaka dalam Syariat Islam dan Hukum Internasional (Suatu Kajian Perbandingan)*, trans. by Asmawi (Jakarta: UNHCR Indonesia and Fakultas Syariah dan Hukum UIN Syarif Hidayatullah, 2011).

⁵² Atip Latipulhayat, ‘New Face of International Law From Western to Global Construct’, *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)*, vol. 7, no. 1 (2020), pp. 55–6.

⁵³ Syed Muhammad Naquib Al-Attas, *Islam and Secularism* (Kuala Lumpur: ISTAC, 1993).

⁵⁴ Anghie, *Imperialism, Sovereignty and the Making of International Law*.

In fact, former ICJ Judge Weeramantry as quoted by Latipulhayat said that there is a problem of neglect of other cultures.⁵⁵ In fact, the TWAIL (Third World Approaches to International Law) movement is not subsiding but rather growing. More works of literature keep being published in this area, such as the upcoming 2023 book by Edward Elgar publishing.⁵⁶ One may argue whether there is an improvement or not, but as it stands today ‘Eurocentrism’ remains strong and mainstream, while subordinating other voices.⁵⁷

Weeramantry and, as cited earlier, Al-Khasawneh, Julie Fraser, Salim Farrar, and many others, have noted how little representation there is of Islamic law in the current international law. This is despite the purported various channels of participation in international law-making, as Boyle and Chinkin elaborates⁵⁸ which are mostly within the purview of international organizations especially the United Nations.

Ali Ali Mansur, writing one of among the very few contemporary *Fiqh al-Siyar* textbooks, suggests without reservation that Islamic law should accept the idea of international organizations due to the need for global cooperation.⁵⁹ What may have slipped by the attention of Ali Ali Mansur is that such a regime is inevitably a law-making one, above and beyond the direct consent of the states.

For example, it is common knowledge that UN Security Council resolutions under Chapter VII of the UN Charter are binding to all members of the UN and has become the authoritative interpretation of the UN Charter.⁶⁰ This is despite, as per Article 27 of the UN Charter, resolutions are passed only within a small council of 15 members requiring a minimum positive vote from only nine members including

⁵⁵ Latipulhayat, “New Face of International Law From Western to Global Construct”, pp. 55–6.

⁵⁶ Antony Anghie et al. (eds.), *The TWAIL Handbook* (Forthcoming) (Cheltenham: Edward Elgar Publishing, 2023)

⁵⁷ Prabhakar Singh and Benoît Mayer, “Introduction: Thinking International Law Critically One Attitude, Three Perspectives”, in *Critical International Law: Postrealism, Postcolonialism, and Transnationalism*, ed. by Prabhakar Singh and Benoît Mayer (Oxford: Oxford University Press, 2014), pp. 1–26.

⁵⁸ Boyle and Christine Chinkin, *The Making of International Law*.

⁵⁹ Mansur, *Syari’at Islam dan Hukum Internasional Umum*, pp. 128–32.

⁶⁰ Boyle and Christine Chinkin, *The Making of International Law*, p. 110-111.

the five permanent members. Additionally, other works by other small bodies are increasingly seen as authoritative source of law, including ICJ Judgements,⁶¹ treaty bodies,⁶² and other operational activities of international organizations.⁶³

Surely there is a path for all actors to participate as Boyle and Chinkin thoroughly elaborates. However, even setting aside the previously mentioned strong critics towards this ‘participation opportunity’ from the TWAIL scholars, even the ‘best case scenario’ has problems. It is inevitable in any organizations that not all members would agree on the same thing, and sometimes decisions must be made by a minority of people. What the contemporary international law-making trend has brought to the world to something more than just global cooperation, subordination. Hence, international law has become, in the words of Catherine Brölmann, “... *above and beyond...*,”⁶⁴ In other words, subordination.

2. *The Islamic Problem with Subordination*

In a general sense, the above is not necessarily wrong in itself. Naturally, any legal system treats its subjects as ‘subordinates.’ However, from an Islamic perspective there is a major problem with this. As mentioned in Part A, in the Islamic system, sovereignty lies with Allah.⁶⁵ As mentioned also in the Qur’an, 12: 40; *إِن الْحُكْمُ إِلَّا لِلَّهِ* (Legislation is not but for Allah). Therefore, believing that only Allah has the right to legislate is an essential part of Islamic faith, and those who put other laws above the laws of Allah are considered as disbelievers and ruled as apostates if they previously claimed to be Muslims.⁶⁶

Hence, theologically and therefore structurally, subordination does not sit well with Islamic law. Al-Zuhayli also explains how an Islamic state

⁶¹ Boyle and Christine Chinkin, *The Making of International Law*; Ian Johnstone, “Law-making through the Operational Activities of International Organizations”, *George Washington International Law Review*, vol. 40 (2008), p. 87.

⁶² Boyle and Christine Chinkin, *The Making of International Law*, p. 213.

⁶³ Johnstone, “Law-making through the Operational Activities of International Organizations”.

⁶⁴ Brölmann, “Law-Making Treaties”.

⁶⁵ Zuhaili, *Fiqh Islam wa Adillatuhu*, 8: 267–8.

⁶⁶ Al-Fauzan, *Syarab Nawaaqidbul Islam*, pp. 122–41; Katsir, *Shahih Tafsir Ibnu Katsir*, 3: 149; Hamka, *Tafsir Al-Azhar*, 3: 1758–60.

model (*Al-Dawlah Al-Islamiyah*) should have an ‘external sovereignty’, meaning that no foreign power should attempt to demean the *Al-Dawlah’s* sovereignty to rule itself.⁶⁷ It is noted that such a condition has been an actual reality for most Muslims and Islamic legal systems today due to colonialism and other factors. However, the point is that this is not a state of ideal and there is a religious obligation for Muslims to do their best, to the extent that it is possible, to do something about it.

As an analogy, Islamic teaching indicates that there is an obligation to make *hijra* (emigration). The Prophet Muhammad said: **لَا تَنْقَطِعُ الْهَجْرَةُ حَتَّى تَنْقَطِعَ التَّوْبَةُ، وَلَا تَنْقَطِعَ التَّوْبَةُ حَتَّى تَطْلُعَ الشَّمْسُ مِنْ مَغْرِبِهَا** (*hijra* will not end until repentance ends, and repentance will not end until the sun rises in the west).⁶⁸ Among the various understandings of *hijra* is to emigrate from the lands of the non-Muslims to the lands of the Muslims.⁶⁹ Ibn Qudamah explains that such *hijra* is obligatory for those who are unable to reveal and perform her/his Islamic obligations.⁷⁰

The Islamic response to such a situation cannot be *hijra* considering how the subordination is a world-wide phenomenon. The only plausible destination for emigration is to a different planet, and it is perhaps unnecessary to elaborate why this is such an amusing but ridiculous option. The point of using the analogy of *hijra* is merely to show how subordination is such a serious problem, as is explained in the context of international law-making below.

As has been explained earlier, the current construct of modern international law provides lesser and lesser room for state sovereignty. Some Muslim scholars like Al-Zuhayli have noticed this, although not really explaining completely what to do about it.⁷¹ That, coupled with the ‘other-ing’ of practically any non-Western intellectual products, structurally suppresses the ability of Muslim nations –now ‘stuck’ with

⁶⁷ Zuhaili, *Fiqh Islam wa Adillatuhu*, 8: 439.

⁶⁸ Abu Dawud Sulaymān ibn al-Ash‘ath Al-Sijistānī, *Sunan Abu Dawud*, vol. 3 (Riyadh: Darussalam, 2008), no. 2479.

⁶⁹ el-Tigani Mohd Amin, “Kitab al-Ta`rifat of al-Jurjani: An Annotated English Translation and Evaluation Study”, PhD. Dissertation (Kuala Lumpur: International Islamic University Malaysia, 2005), p. 382.

⁷⁰ ‘Abd Allāh b. Aḥmad ibn Qudāmah Al-Maqdīsī, *Al-Mughni*, vol. 10 (Cairo: Maktabat al-Qāhirah, 1968), p. 514.

⁷¹ Zuhaili, *Fiqh Islam wa Adillatuhu*, 8: 421–2.

the nation-state model—to fully apply the Shari‘ah.

Therefore, even non-Muslim scholars like Wael Hallaq⁷² and Ford⁷³ admit that such construct of the nation-state model has no space for a proper Islamic nation. Added to that is Ebrahim Afsah who explains that the way current international law is developing contradicts Islamic law,⁷⁴ hence his solution which has been criticized in Part C. The bottom line is that such a situation is not ideal, and something must be done about it.

E. *Fiqh Al-Siyar* Responding to The Influence of International Law-Making

Sub-Section D.2. makes an analogy towards the Islamic rulings related to hijra. As explained, the purpose of that is to illustrate how being subordinated does not sit well with Muslims in a way that makes them unable or difficult to perform their obligations. It is suggested that the situation is very similar to Muslims in general and Islamic nations specifically living in an international law-making world. On the level of *fiqh al-siyar*, the following approaches are recommended to engage with international law-making.

1. *Responding to Subordination: The Correct Mindset*

Therefore, one may resort to the hadith of Prophet Muhammad who said: *مَنْ رَأَى مِنْكُمْ مُنْكَرًا فَلْيُغَيِّرْهُ بِيَدِهِ. فَإِنْ لَمْ يَسْتَطِعْ فَبِلِسَانِهِ. فَإِنْ لَمْ يَسْتَطِعْ فَبِقَلْبِهِ وَذَلِكَ أَضْعَفُ الْإِيمَانِ* (He who amongst you who sees something abominable should modify it with the help of his hand; and if he has not strength enough to do it, then he should do it with his tongue, and if he has not strength enough to do it, [even] then he should [abhor it] from his heart, and that is the least of faith).⁷⁵

This hadith signifies the obligation to face evil to the extent of

⁷² Wael Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University Press, 2012).

⁷³ Ford, “Siyar-ization and Its Discontents: International Law and Islam’s Constitutional Crisis”.

⁷⁴ Afsah, “Contested Universalities of International Law. Islam’s Struggle with Modernity”.

⁷⁵ Muslim ibn al-Ḥajjāj Al-Naysābūrī, *Sahih Muslim*, vol. 1 (Riyadh: Darussalam, 2007), no. 177.

one's capabilities. Applied to the case of the subordination of the Muslim world by the current international law regime, it seems that the only way the first option (removing evil by 'hand,' meaning action) can manifest itself is by physically seizing control. As mentioned in the Qur'an, 2: 193 reads; *وَقَاتِلُوهُمْ حَتَّى لَا تَكُونَ فِتْنَةٌ وَيَكُونَ الدِّينُ لِلَّهِ* (Fight them until there is no [more] *fitnah* and [until] worship is [acknowledged to be] for Allah). Prophet Muhammad صلی اللہ علیہ وسلم also said: *أُمِرْتُ أَنْ أَقَاتِلَ النَّاسَ حَتَّى يَشْهَدُوا أَنْ لَا إِلَهَ إِلَّا اللَّهُ وَأَنَّ مُحَمَّدًا رَسُولُ اللَّهِ* (I have been ordered [by Allah] to fight against the people until they testify that none has the right to be worshipped but Allah and that Muhammad is Allah's Messenger).⁷⁶

The aforementioned hadith and verse and the interpretation thereof is ripe for discussion. However, at the very least, to literally fight the whole world militarily is objectively a ridiculously impossible feat at this point. Even scholars who are proponents of offensive warfare would refrain from such an option at least for two reasons: first, such an option must consider based on *maslahat*⁷⁷ whether there is any benefit or detriment for Muslims to wage war, and second, it is unlawful to attack those nations who are in peace agreement with the Muslims, which all nations are in at this time (i.e. the UN Charter).⁷⁸

Hence, the only true way to start is at the lowest level according to the hadith, which is that Muslims should detest the evil that they cannot change.⁷⁹ In this context, the 'evil' is the current state where the Muslim nations are subordinated by the current regime of international law that renders the full application of the Shari'ah is very difficult. It must be clear that this current state of affairs is not ideal and must, in time, change. Any further Muslim response, especially in this case by the

⁷⁶ Muḥammad ibn Ismā'īl Al-Bukhārī, *Sahih Al-Bukhari*, vol. 1 (Riyadh: Darussalam, 1997), no. 25.

⁷⁷ Yusuf Qardhawi, *Fiqh Jihad* (Bandung: Mizan, 2010), pp. 13–33.

⁷⁸ There can be debates regarding the validity of the UN Charter as a treaty under Islamic law. However, even those who believe the UN Charter to be Islamically invalid, they must also consider the first reason as mentioned above. See: Fajri Matahati Muhammadin, *Mukadimah Fikih Siyar: Pokok-Pokok Hukum Internasional Islam Kontemporer* (Yogyakarta: Bentala Tamadun Nusantara, 2021), pp. 44–5.

⁷⁹ Imam Al-Hafizh An-Nawawi and Syaikh Muhammad Shalih al-Utsaimin, *Syarah Hadits 40 Arba'in An-Nawawi*, trans. by Muhyiddin Mas Rida (Yogyakarta: Media Hidayah, 2006), p. 268.

fujaha, must always be derived from this state of mind.

With that in mind, the second level of ‘doing it with the tongue’ may be done. Al-Uthaymin explains that this is to inform the evildoers to stop taking such actions,⁸⁰ meaning that this includes all processes of conveying the message whether literally through the ‘tongue’ (i.e., speech) or with written or other media. In context of *fiqh al-siyar*, this would mean that Muslims who have the capacity should endeavour to undo the subordinating regime brought into being by modern international law-making.

2. *Cautious Observance of the Development of Law-Making Treaties*

It is important to discuss how the traditional sources of international law as indicated in Article 38 of the ICJ Statute would translate into the *siyar* context. In that context, it may be essential to start with international agreements since it is usually considered as the ‘most important source of international law.’⁸¹

Such agreements are classic. In fact, *siyar* recognized the *pacta sunt servanda* principle way before the Europeans ever did.⁸² However, there are certain issues that may have so far eluded the eyes of scholars as they do not seem to have thoroughly examined the developments of the international law of treaties and how it affects the Muslim nations and *fiqh al-siyar*.

The first problem may be treaties which contradict the Shari’ah. In Islamic treaty law, agreements are binding if their content does not violate the Shari’ah.⁸³ It is clear that ideally the Muslim states should not enter such kind of agreements in the first place so a system must be set in place. The tricky part is if Muslim states enters the agreement anyway for whatever reason, despite being against the Shari’ah (or if the government only found out later).

Article 27 of the Vienna Convention on the Law of Treaties

⁸⁰ *Ibid.*, pp. 268–9.

⁸¹ Shaw, *International Law*, p. 94.

⁸² Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani’s Siyar*, pp. 64–5.

⁸³ Aḥmad ibn `Abd al-Ḥalīm Ibn Taymiyyah, *Majmu‘ Al-Fatāwa*, vol. 31 (Cairo: Dar al-Wafa, 2005), p. 19.

maintains that national laws cannot be a justification to be excluded from legal obligations, and there are limitations on whether a party of an agreement can pull out from it as per article 54. Consequently, Article 44 of the VCLT would also be against the Shari'ah and therefore also non-binding upon the Muslims to the extent that it forces the Muslims to be legally bound by treaty provisions which go against the Shari'ah. It seems difficult to reconcile this matter and will perhaps forever be among the (hopefully few) incompatibilities between international law and Islamic law.

A second issue is law-making treaties. This issue may be trickier especially regarding those that meddle with internal state affairs, including human rights treaties. Therefore, in this regard, strong negotiations, modifications or reservations is needed, and *fiqh al-siyar* must address these issues. For example, numerous Muslim nations or even non-Muslim ones who have significant Muslim populations make reservations based on the Shari'ah. There are critics towards this, and of course critics towards those critics.⁸⁴ Regardless, this is among the ways Muslims can protect their interests from being bound by provisions which are against the Shari'ah. It is difficult to find this in literature on *siyar*, so something must change there.

Another issue one must consider is the effect of these to the Muslims if their government ratified a treaty with contents contradicting Islamic teachings. Different from the previous sub-section discussing this from an inter-state perspective, this is a concern towards the individuals. This becomes an issue of Muslims being obliged to obey their leaders only in matters that are good, and not when they are commanded to violate the Shari'ah.⁸⁵ Likewise, Muslims not living in Islamic lands must respect the laws of the land to the extent that they do not require them to violate the Shari'ah. Therefore, for example, if a state decriminalizes religious blasphemy as part of freedom of expression, this does not mean

⁸⁴ Fajri Matahati Muhammadin et al., "Lashing in Qanun Aceh and the Convention Against Torture; A Critical Appraisal", *Malaysian Journal of Syariah and Law*, vol. 7, no. 1 (2019), pp. 11–24.

⁸⁵ Muḥammad ibn 'Alī al-Syaukānī, *Fatḥ al-Qadīr*, vol. 5 (Beirut: Dar al-Ma'rifah, 2007), p. 308; Yaḥya ibn Sharaf Al-Nawawī, *Ṣaḥīḥ Muslim Sharḥ Al-Nawawī*, vol. 12 (Damascus: Dar al-Khayr, 1995), p. 229.

that Muslims may slander Islam⁸⁶ or any other religion.⁸⁷

3. *Active Participation in Law-Making Treaties: Da'wah Bi al-Ilm*

The content of *siyar* relevant towards disseminating knowledge, in classical Islamic literature, is usually related to *da'wah* (Islamic propagation). Classical scholars mention this in at least two instances. First, that *jihad* can be waged to remove obstacles of *da'wah*,⁸⁸ which may suggest that *da'wah* is among the things that Muslims can fight for. Second, before attacking an enemy, albeit some differences of opinion, the Muslims must first offer them to accept Islam or at least make sure that Islam has been offered to them.⁸⁹

Additionally, while not necessarily found in classical scholarship of *fiqh al-siyar* specifically, it has become the practice of Islamic scholars to propagate Islam in various other lands and on many occasions this is facilitated by their respective Islamic rulers. Therefore, the notion of *da'wah* and relations with foreign nations is not something entirely unfamiliar in the history of Islam. It must be noted that Islam includes metaphysics as an important part of its epistemology of knowledge, relevant to the notion of truth and reality,⁹⁰ which is why a call to Islam is also an issue of knowledge in an Islamic context.

Having that said, facing a world which now provides various forums and channels participation in international law-making, this provides an opportunity. On the contrary, failing to participate will result in nothing but a hegemony imposed upon Muslims, which unfortunately seems to be the current reality. Given this situation, it is imperative for contemporary *siyar* literature to start including how Islamic nations respond and participate in international law-making.

Other than simply being 'defensive,' meaning just the avoidance

⁸⁶ See the Qur'an, 9: 66. Also: Imam ibn Katsir, *Shahih Tafsir Ibnu Katsir*, vol. 4, trans. by Safiurrahman Al-Mubarakfuri (Jakarta: Pustaka Ibnu Katsir, 2006), p. 251.

⁸⁷ See the Qur'an, 6: 108. Also Katsir, *Shahih Tafsir Ibnu Katsir*, 3: 395–6.

⁸⁸ Sayyid Quthb, *Tafsir Fi Zhalalil-Qur'an Di Bawah Naungan Al-Qur'an*, vol. 12 (Jakarta: Gema Insani Press, 2002), p. 260.

⁸⁹ See further Zuhaili, *Fiqih Islam wa Adillatuhu*, 8: 32–4.

⁹⁰ See Syed Muhammad Naquib Al-Attas, *Prolegomena to the Metaphysics of Islam: an Exposition of the Fundamental Elements of the Worldview of Islam* (Kuala Lumpur: ISTAC, 1995).

to being bound by rules violating the Shari'ah, it is essential that the Muslims promote Islamic teachings and law. The Qur'an mentions that the Muslims are supposed to be the best of all peoples, an example for others in inviting what is good and speaking against what is bad (*inter alia* Qur'an, 3: 110), and that Islamic teachings should be *rahmah* for all creation (*inter alia* Qur'an, 21: 107).

Awn Al-Khasawneh, former ICJ judge, noted how there has been very few references to Islamic law in the international jurisprudence.⁹¹ Even non-Muslim commentators have said as much, including Julie Fraser⁹² and the late ICJ Judge Christopher Weeramantry.⁹³ One of the ways to help correct this is to actively have Islamic law contribute towards the formulation of legal norms in the law-making treaties.

The reality is that some treaties have been from through contributions from Islamic countries, including the ICCPR and ICESCR. Susan Waltz has elaborated how several Muslim states and their diplomats have contributed to the drafting of these conventions.⁹⁴ The Delegate of Saudi Arabia (albeit himself a Christian) during the negotiations of socioeconomic rights, for example, put forth Islamic instruments of social security such as Zakat (compulsory alms) and Waqf (similar to endowments). However, the Islam-specific proposal was eventually rejected⁹⁵ which strongly speaks to the strength (or lack thereof) of Islamic diplomacy.

However, most importantly, as explained in different subsections herein, there are various issues in Islamic law which are not yet treated on a *siyar* level by scholars while state representatives are not necessarily aware of this literature. Therefore, it is important that future *siyar* literature should address these issues. An initial step is to acknowledge that such kinds of treaties exist together with all its consequences, continued by

⁹¹ Awn S. Al-Khasawneh, "Islam and International Law", in *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives*, ed. by Marie-Luisa Frick and Andreas Th. Müller (Leiden: Brill Nijhoff, 2013), pp. 29–42.

⁹² Fraser, "Exploring Legal Compatibilities and Pursuing Cultural Legitimacy".

⁹³ C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (Houndmills: Palgrave Macmillan, 1988).

⁹⁴ Susan Waltz, "Universal Human Rights: The Contribution of Muslim States", *Human Rights Quarterly*, vol. 26, no. 4 (2004), pp. 799–844.

⁹⁵ *Ibid.*, p. 826.

ruling on the necessity of conveying Islamic solutions throughout law-making treaty negotiations. It is fundamental towards Islamic teachings to believe that knowledges derived from Islamic teachings are true knowledge beneficial for all, and that it should be spread out to bring mercy for all. It must be noted that this does not mean Muslims may not take knowledge from non-Muslim sources altogether. Rather, as per Al-Attas's notion of 'Islamization of knowledge,' knowledge produced by non-Islamic sources can be utilized if it does not contain elements of non-Islamic worldview, or if such elements can be isolated and replaced by elements consistent with the Islamic worldview.⁹⁶ For example, Muslims need their food to be tayyib and the Codex Alimentarius issued by the Food and Agriculture Organizations and the World Health Organization can assist in providing food safety standards.⁹⁷

4. *Responding to the Development of Customary International Law*

Customary international laws are basically acts of reciprocity among multiple states which then develops into a widespread practice due to the collective of interests of each state.⁹⁸ International law literature usually explains that there are two elements of international law, uniformity of state practice, and *opinio juris* i.e., the belief that such a practice is a legal obligation.⁹⁹ However, contemporary development of customary law becomes very sophisticated, as it can be codified and developed through international treaties or 'soft laws' e.g., resolutions of international organisations.¹⁰⁰

Contemporary scholars have generally discussed customary laws as

⁹⁶ Further explanation on the Islamic worldview and development of knowledge, see 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: International Institute of Islamic Thoughts and Civilization, 2003).

⁹⁷ Food and Agriculture Organization - World Health Organization, "About Codex Alimentarius", *Codex Alimentarius: International Food Standards*, <https://www.fao.org/fao-who-codexalimentarius/about-codex/en/#c453333>, accessed 26 Jul 2022.

⁹⁸ Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford ; New York: Oxford University Press, 2006), pp. 40–2, 56.

⁹⁹ Shaw, *International Law*, pp. 72–93.

¹⁰⁰ Boyle and Christine Chinkin, *The Making of International Law*, pp. 190–1, 233–62.

a source of *siyar*, such as Hamidullah, Zahid and Rohimi.¹⁰¹ They explain how, even in classical scholarship, reciprocity specifically or customary international law generally has always been part of consideration in *fiqh al-siyar*. Following reciprocity and customary laws usually maximises the benefits one state can gain from international relations,¹⁰² although in an Islamic context one must only follow those that don't contradict Islamic teachings.

Considering the previous subsection, in theory it is possible that a successful *da'wah bi al-'ilm* could take part in the shaping customary international law. This was precisely what happened when, as explained in earlier parts, how the Islamic civilisation has had some influence on the early European international law. Or, at the very least, through the doctrine of persistent objection¹⁰³ Muslim nations could exclude themselves from general customary international law that is deemed to be 'un-Islamic,' making a special customary law applying only to Muslim nations.

However, as it stands, the above may remain only theoretical. A big problem in this regard is how the actual development of theories of customary international law are very Eurocentric and trumps the participation of developing nations as is the problem of international law generally.¹⁰⁴ Hence, the current predicament of customary international law specifically and international law generally has become problematic and 'colonialist.'

Having that said, all this is very difficult to be done by the Muslims, at least in the current state of affairs. There are at least three reasons why this is so.

First, going against the mainstream-Eurocentric view is usually shunned. Scholars note that dissenting views from the mainstream international law is usually naturally misunderstood and too easily

¹⁰¹ Hamidullah, *Muslim Conduct of State*, p. 33-37; Anowar Zahid and Rohimi Shapiee, "Considering Custom in the Making of Siyar (Islamic International Law)", *Journal of East Asia and International Law*, vol. 3, no. 1 (2010), p. 123.

¹⁰² Oona Hathaway and Scott Shapiro, "Outcasting: Enforcement in Domestic and International Law", *Yale Law Journal*, vol. 121, no. 2 (2011), p. 302.

¹⁰³ Shaw, *International Law*, pp. 91-3.

¹⁰⁴ B.S. Chimni, 'Customary International Law: A Third World Perspective', *American Journal of International Law*, vol. 112, no. 1 (2018), pp. 1-46.

dismissed through various terrible labels such as ‘radical’ or ‘leftist.’¹⁰⁵ Chimni even strongly writes: “...if decision-makers and scholars of weak states are not vigorously contesting the idea of ‘modern’ CIL it is because the rules embody hegemonic ideas and beliefs.”¹⁰⁶ This is made worse by case law, including the ICJ *Fisheries Case: UK vs Norway* (1951) stating that persistent objection is only recognized if other states do not protest towards this differing practice.

Second, state practice of Muslim nations do not necessarily represent Islam. To assume that Muslim governments necessarily represent the Islamic view of matters –even when they claim to do so—makes little sense. As explained by Al-Dawoody, most Muslim states’ legal systems are Westernized, sometimes except their family laws, making every other field including Islamic international laws very foreign to that nation.¹⁰⁷ Even the OIC is not doing a good job¹⁰⁸ in organising Muslim nations or otherwise pushing for a more Islamic influence towards the making of international law throughout state practice or, at the very least, *opinio juris*.

Third, Islamic law is very foreign to the current state of international law, making it quite hard to be proposed as ‘customary.’ In the drafting UNCLOS, for example, Powell and Mitchell describes: “Although several Islamic law states such as Algeria, Iraq, and Lebanon participated in the UNCLOS negotiation process, Islamic legal precepts are largely absent from the Convention and from all formal venues for settlement...”¹⁰⁹ Meanwhile, Islam has a rich body of literature on the law of the sea.¹¹⁰ The same goes for the Vienna Convention on Diplomatic Relations of

¹⁰⁵ Singh and Mayer, “Introduction”, p. 4.

¹⁰⁶ Chimni, “Customary International Law”, p. 45.

¹⁰⁷ A. Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (New York: Palgrave Macmillan, 2011), p. 125.

¹⁰⁸ Farrar, “The Organisation of Islamic Cooperation”.

¹⁰⁹ Emilia Justyna Powell and Sara McLaughlin Mitchell, “Forum Shopping for the Best Adjudicator: Conflict Management and the United Nations Convention on the Law of the Sea”, presented at the UNCLOS (Department of Political Science, University of Northern Illinois, Oct 2011), p. 9.

¹¹⁰ Hassan Khalilieh, *Islamic Law of the Sea: Freedom of Navigation and Passage Rights in Islamic Thought* (Cambridge ; New York: Cambridge University Press, 2019).

1963, albeit a strong ground of its existing in Islamic law too.¹¹¹ Only later was it ‘nudged’ by the ICJ in the *Hostages Case: USA v Iran* (1980).

Hence, it is imperative that the Muslim jurists and leaders, whether within nations or in the OIC, push for more consistent practice of Islamic law to either help shape the general customary international law. Or, if that is not possible, to at least form a strong persistent objection to exclude the Muslims and form their own Islamic customary practices.

5. *Pumping Up the Role of Islamic Non-State Actors*

Among developments in contemporary international law is the role of non-state actors, after previously only involving states and then international organisations. While previously only subjects, whether directly or indirectly, there is more and more of a place for them in the making of international law.¹¹² As the name implies broadly, non-state entities encompass inter-governmental organizations or IGOs, non-governmental organizations or NGOs, academic bodies, and autonomous corporate bodies. Other than organizations, transnational networks also are becoming an influential part of international law making. This also includes transnational networks,¹¹³ or ‘transnational regulatory cooperation,’ which is a model of a horizontal system incorporating people working in sub-state sectors of a state that share professional and technical expertise with those in similar positions across the countries.¹¹⁴ They can offer their expert perspectives to assist the government heads or relevant ministries as representatives of a state in case of facing common problems arising from transnational cooperation. Boyle and Chinkin drew a bigger picture of transnational network being a considerably more flexible and facilitative in ways that IGOs may lack thereof. Non-state actors may gain access with much more ease with transnational network’s

¹¹¹ Muhammad-Basheer A. Ismail, *Islamic Law and Transnational Diplomatic Law: A Quest for Complementarity in Divergent Legal Theories* (New York: Palgrave Macmillan, 2016).

¹¹² Cedric Ryngaert and Math Noortmann (eds.), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Farnham: Routledge, 2010).

¹¹³ See Boyle and Christine Chinkin, *The Making of International Law*.

¹¹⁴ Anne-Marie Slaughter, “Governing the Global Economy through Government Networks”, in *The Role of Law in International Politics: Essays in International Relations and International Law*, ed. by Michael Byers (New York: Oxford University Press, 2001), p. 177.

flexible membership requirement, and they are open to bypassing formal diplomatic meetings with electronic communications as their facilities.¹¹⁵

In the context of the United Nations, they have acknowledged non-Member States, entities and organizations and have enabled them to participate in their law-making agenda, albeit with strict conditions (see list in the UN Secretarial Note: UN A/INF/60/4 30 November 2005). While being denied full participation in UN conferences and other multilateral law-making activities, they may exercise limited participation through applying for observer status.¹¹⁶

Non-state entities have been generally accepted as able and active participants within international law-making since the emergence of ECOSOC's consultative status in virtue of their Resolution 1996/31.¹¹⁷ In a preeminent manner, non-state entities exert their existing participation rights through answering the invitations to an expert input for careful deliberation when an international law was in the making. Such instances can be seen from, to number a few, their involvement in the UN Economic and Social Council's consultation framework, the UN Human Rights Council on 1998 BAPEDAL Denpasar institutional strengthening project, and the UN Security Council by way of the 1993 Arria formula.¹¹⁸

Identifying non-state entities which may contribute as 'assets' to international Muslim community as a whole require a standard of characteristics. In the case of supporting promotion of *fiqh al siyar* into the international law-making, potential assets should fulfil (1) having any available peaceful and diplomatic channels to access present international law-making forums, and (2) it has exercised, or should exercise, endeavours of advocating Islamic law an international scope.

First and foremost among such bodies that represent Islam is

¹¹⁵ Boyle and Christine Chinkin, *The Making of International Law*, p. 51.

¹¹⁶ Excluding UNGA which upstands standing invitations, each UN conference may allow application for an Observer Status, e.g. UNFCCC and UNCTAD.

¹¹⁷ Hanan A. Sharfeddin, "Examining performance variables of nongovernmental organizations with Consultative Status with the United Nations", PhD. Dissertation (Arizona, United States: University of Phoenix, 2008), p. 8.

¹¹⁸ Jean d'Aspremont, "International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?", in *Non-State Actor Dynamics in International Law*, ed. by Cedric Ryngaert and Math Noortmann (Farnham: Routledge, 2010), p. 176.

the OIC, the members of which are numerous (57 States so far) and is in the UN lists of standing invitations. Unfortunately, as Salim Farrar notes the OIC has managed to achieve very little in pushing Islamic law forward to contribute to the development of international law.¹¹⁹ This is such a shame because not only the OIC has such political potential having such an number of states and current recognition in the UN, but it has subsidiary organs with strong academic potential such as the International Islamic Fiqh Academy.

The Cairo Declaration of Human Rights in Islam of 1990 is an indication of some success in their endeavour, considering its very recent recognition by the International Law Commission as among the “...in other applicable instruments” of international human rights,¹²⁰ albeit some critics pointing out that this Declaration basically contains mostly Western notions of human rights with only minor modifications but major addition of Islamic-sounding terminology.¹²¹ This shows that the OIC has real potential of spearheading efforts to push Islamic law into the discourse of general international law-making. It should be an important part of the OIC agenda to participate in this.

Additionally, the International Islamic Fiqh Academy has issued several important fatwas regarding medical ethics and procedures¹²² as well as other fields which are widely used, which is a strong asset that the OIC has. Other fatwa bodies such as Saudi’s Al-Lajnah Al-Da’imah li al-Buhuth al-Ilmiyyah wa al-Ifta, Egypt’s Dar al-Ifta Al-Misriyyah, Indonesia’s Majelis Ulama Indonesia, and various other fatwa committees and research have issued fatwas for various issues. This too is a very strong asset to conduct more research on *fiqh al-siyar*.

¹¹⁹ Farrar, “The Organisation of Islamic Cooperation”.

¹²⁰ General Assembly, *Report of the International Law Commission*; General Assembly Official Records, no. Supplement No. 10 (A/74/10) (New York: United Nation, 2019), p. 99, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/243/93/PDF/G1924393.pdf?OpenElement>, accessed 1 Mar 2020.

¹²¹ Kasule, *Contemporary Muslims and Human Rights Discourse*:

¹²² Mohammed Albar, “Organ Transplantation: a Sunni Islamic Perspective”, *Saudi Journal of Kidney Diseases and Transplantation*, vol. 23, no. 4 (2012), pp. 817–22; Ghiath Alahmad and Kris Dierickx, “What Do Islamic Institutional Fatwas Say About Medical and Research Confidentiality and Breach of Confidentiality?”, *Developing World Bioethics*, vol. 12, no. 2 (2012), pp. 104–12. 2012

The fact that numerous influential fatwa committees are affiliated to or even funded by governments are usually cited as a negative point, considering how it may affect the independence of the fatwas issued.¹²³ However, it may also be considered that such a relationship can provide the said fatwa committees closer links to push a more Islamic contribution towards international law-making through the government representatives towards international organisations or law-making treaties.

As for NGOs, there are also several large pan-Islamic ones such as the Saudi Arabia-based Rabitah al-‘Alam Al-Islami which is currently known for combatting extremism¹²⁴ and smaller functional-based ones such as Islamic Relief and other Islamic humanitarian aid NGOs. Some authors such as Marie Juul Petersen have noted how Islamic humanitarian NGOs may engagement in the area of human rights.¹²⁵

To a large extent, especially in support of the role of fatwa committees, there are numerous individual scholars and jurists who can also participate in the effort to contribute to international law-making. Although individual *ijtihad* is usually argued to be less powerful than collective *ijtihad* by fatwa committees according to some contemporary literature,¹²⁶ the role of individual *ijtihad* has been a long-standing core of the Islamic legal literature throughout the centuries since the advent of the Islamic civilisations.¹²⁷

Scholars like Muhammad Hamidullah and Shaykh Wahbah Al-Zuhayli (both of whom have passed away) were among the first big figures who have tried to bring forth a modern version of *fiqh al-siyar*, although there are still many shortcomings. At the present time there are even more numerous scholars, such as Jordan’s Awn al-Khasawneh and Malaysia’s Mohd. Hisham Mohd. Kamal, who are continuing good comparative work endeavouring to push *fiqh al-siyar* to the center of

¹²³ Mohamad, *Contemporary Ijtihad*, p. 198.

¹²⁴ “Muslim World League chief praised for global efforts to combat extremism”, *Arab News* (8 Nov 2018), <https://www.arabnews.com/node/1401631/saudi-arabia>, accessed 11 Oct 2020.

¹²⁵ Marie Juul Petersen, “Muslim NGOs, Aid, and Human Rights”, *OpenGlobalRights* (17 Apr 2014), <https://www.openglobalrights.org/muslim-ngos-aid-and-human-rights/>, accessed 11 Oct 2020.

¹²⁶ Mohamad, *Contemporary Ijtihad*, p. 164.

¹²⁷ *Ibid.*, p. 91.

international law discourse. This is in addition to non-Muslim academics, as mentioned earlier, who have contributed to such a discourse.

F. Concluding Remarks

Muslims are just one among many others who are lamenting Eurocentrism in international law and ending up only at the receiving end of international law-making. However, it may be that the Muslims are the only ones who have such a rich body of Islamic scholarship which is *fiqh al-siyar* which is potential to be pushed to become a strong part of said international law-making. Nonetheless, such a rich body of scholarship is difficult to apply in the current state of international law without developing it further.

As explained throughout this article, there are at least two general areas that needs to be worked on. The first is how *fiqh al-siyar* literature should be developed to incorporate and respond towards the current contemporary trend of international law-making, which is something which seems to really lack in the existing scholarship. Existing scholarship either does not capture the reality and effects of international law-making or has yet to treat various issues as a *fiqh al-siyar* issue. The second is how Islamic actors from Muslim nations, international and non-international organisations, and especially the scholars and jurists both individually and through fatwa committees should do their part in pushing *fiqh al-siyar* into the center of international discourse.

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