

1. Introduction

Al-Shaybani's book *Al-Siyar Al-Kabīr* deals with every conceivable aspect of international law relevant to his time. In fact, the reader would be able to locate it within today's texts and specialized books on international law. While some think that his book is based on sources of Islamic law and was intended to regulate the international affairs of a Muslim state and is therefore irrelevant to the 'secular' world order we live in today, others observe that such a comprehensive legal work written in the eighth century is undoubtedly a great asset to those specializing in the field of international law. They argue that the contribution of Al-Shaybani to this field is too great to be ignored. By exploring *Al-Siyar Al-Kabīr*, I set as this book's target an investigation of the latter claim and highlighting to what extent Al-Shaybani contributed to the field of international law and relations. Noticeably, as this work was being completed, the *Oxford Handbook of The History of International Law* presented Al-Shaybani as the earliest among 21 names of the most important contributors to this field throughout history.¹ However, although there have been several attempts, the English library is still poorly equipped as far as the contribution of Al-Shaybani is concerned. This book will be the first attempt to offer the reader a genuine and deep insight into the original 'grand'² book of Al-Shaybani on international law.

As far as the history of international law is concerned, 'writers habitually begin with the Greek City-States, describe the Roman period as immediately following, and then all of a sudden talk about modern times, neglecting the gap of almost a thousand years'.³ For example, Oppenheim held 'that there was no international law in Europe during

¹ Mashood A Baderin, 'People in Portrait' in Bardo Fassbender et al. (eds), *The Oxford Handbook of the History of International Law* (1st edn, Oxford University Press 2012) 1081.

² Al-Shaybani has two main books on international law and relations, the shorter book and the grand book. This study confirms that, so far, only the former is available in English.

³ Muhammad Hamidullah, *The Muslim Conduct of State* (5th edn, SH Muhammad Ashraf 1968) 63.

the Middle Ages, that there was no need of such at that time, and that there was no intermediary link between the Roman Period and Modern Times'.⁴ Oppenheim and most legal historians failed to recognize the almost 1,000-year gap, thus overlooking the very existence of *Siyar* or Islamic international law⁵ as some would now call it. This is alleged despite the fact that *Siyar* contained great principles on international legal relations.⁶ In fact, *Siyar* is a proper system of international law, which governed the international relations of Muslim states for many centuries. Yet it has been marginalized and neglected by legal historians.

Moreover, some question whether great European jurists coming centuries later, like Vitoria and Grotius, had knowledge of *Siyar* and whether they ever drew on it. It is equally important to consider whether the European founders of modern international law were exposed to the great amount of Islamic literature translated into Latin and introduced to most of European centres of knowledge⁷ before Vitoria and Grotius. In this regard, the I.C.J. Judge, Weeramantry argues that:

[i]t is sufficient to note that the Spaniards such as Victoria [sic] (1483–1548) who antedated Grotius' *De Jure Belli ac Pacis* of 1625 by nearly a century were too close in time and space to the recent Islamic civilisation in Spain to have been totally unaware of the relevant portion of Islamic learning.⁸

These speculations are particularly important when, especially in the modern period, Western scholars present themselves in such a way that their perspective can hardly be attributed to Rome or Greece alone. Meanwhile, Wheaton, writing in 1845, arrived at the following significant conclusions:

[i]n respect of the mutual intercourse between the Christian and Mahommedan⁹ Powers, the former have sometimes been content to take the law from the Mahommedans, and in others to modify the International Law of

⁴ Ibid.

⁵ Hereafter *Siyar*, or *Al-Siyar* as some would write it, would mean Islamic international law.

⁶ Ali Ali Mansour, *The Islamic Sharia and Public International Law [Al-Shari'ah Al-Islamiah Wa Al-Qanoon Al-Dawli Al-A'am]* (Al-majlis Al-a'ala Li Al-shu'on Al-islamiyah 1971) 23.

⁷ Christopher G Weeramantry, *Islamic Jurisprudence: An International Perspective* (Macmillan 1988) 94–111.

⁸ Ibid 110.

⁹ A term sometimes used to refer to Muslims.

Christianity in its relations to them. Instances of the first may be found in the ransom of prisoners, the rights of ambassadors, and many others.¹⁰

If this is the case, what is the reason then for the clear failure of most writers working in the field to recognize the contribution of *Siyar* to the history of international law? Some people believe that it is the lack of materials and lack of original studies. Regarding this, Janis maintains that ‘Islamic jurists have the duty of making their legal system better known to make an effort at reaching a better understanding of Islamic law’.¹¹ From this perspective, this book will, no doubt, help in making *Siyar* better known. Relevantly, Abū al-Wafā (2007) asserts that ‘we have noticed a shortage if not lack of attention paid to Arab and Muslim jurists and their impact on international law and international relations. This was despite the fact that their contribution in this area is massive and their ability cannot be underestimated.’¹² In fact, in a recent study, Koskenniemi explains that the history of international law has been polemic and Eurocentric. Most authors dealing with the history of international law were mainly Europeans and they neglected any other contribution to the field from any other part of the world. Legal historians have been dealing with international law as though it was born and bred in Europe and Europe alone, neglecting other contributions.¹³

Nevertheless, this book highlights the contribution of one of the most distinguished scholars of *Siyar*. It will focus on the contribution of Al-Shaybani and highlight his individual, as well as the general, contribution of *Siyar* to the field of international law. This is because Al-Shaybani was one of the most significant writers of *Siyar* and his book *Al-Siyar Al-Kabīr* was the most striking work of his time in the area. By analysing the text of Al-Shaybani’s book, an essential contribution to the history of international law will be made.

¹⁰ Henry Wheaton, *History of the Law of Nations in Europe and America: From the Earliest Times to the Treaty of Washington, 1842* (Gould, Banks & Co 1845) 555.

¹¹ Gamal M. Bader, ‘A Survey of Islamic International Law’ in Mark W. Janis and Carolyn Evans (eds), *Religion and International Law* (Martinus Nijhoff Publishers 1999) 101.

¹² Aḥmad Abū al-Wafā, *Kitāb Al-I‘lām Bi-Qawā‘id Al-Qānūn Al-Dawlī Wa-Al-‘alāqāt Al-Dawlīyah Fī Sharī‘at Al-Islām* [A Book of International Law and Relations in Islamic Shari‘a], vol 14 (al-Ṭab‘ah 2, Dār al-Nahḍah al-‘Arabīyah 2007) 3.

¹³ Martti Koskenniemi, ‘Histories of International Law: Dealing with Eurocentrism’ (2011) 2011 *Rechtsgeschichte – Legal History* 152, 152–76.

1.1 *SIYAR (AL-SIYAR/ISLAMIC INTERNATIONAL LAW)*

Islamic civilization, like any other one, needed laws to establish order in society. Accordingly, ‘there came into being Islamic Laws or codes of conduct that govern not only inter-personal relations, but also communal and inter-civilizational relations.’¹⁴ As was the common attitude, ‘Muslim powers dealt with their neighbors in a way that served their interests and represented their system of values and what they deemed to be acceptable behavior.’¹⁵ Nevertheless, relying on divine sources, the Islamic legal systems introduced to the first millennium many humanistic aspects domestically as well as internationally – aspects that were not familiar at that time.¹⁶

With the expansion of the Islamic territory through the spread of Islam, Muslim jurists realized the need for regulating many new legal occurrences.¹⁷ Many non-Muslims had become subjects of the Islamic territories – the Abode of Peace – where Islam ruled; many new territories came under the control of the Muslim state. Yet it should be emphasized that peace was not the norm at that time; the world was governed by war. This Muslim expansion had ‘a significant influence and effect on the *tadwīn* (recording) of the rulings on international relations with non-Muslims’.¹⁸ This regulation of all non-Muslims applied both in the Islamic territory and beyond, ‘whether these qualified as *harbis* (aliens, those belonging to *dār al-harb*¹⁹), dhimmis (non-Muslim subjects of the caliph ...) or free non-Muslims within *dār al-Islam*’.^{20,21} The task was urgent and prompted many Muslim scholars to embark on generating and compiling rules to govern the Islamic inter-personal, inter-religious and inter-state affairs, an area which was later to be known as ‘*Siyar*’. Their common interest, Bsoul asserts, was:

¹⁴ Labeeb Ahmed Bsoul, ‘Historical Evolution of Islamic Law of Nations/Siyar: Between Memory and Desire’ (2008) 17 *Digest of Middle East Studies* 48, 57.

¹⁵ *Ibid.*

¹⁶ Prohibiting the killing of elderly, women, children in wars; giving women rights and considering them as subjects of law rather than objects; it went as far as to giving animals rights. These among many other newly introduced concepts were the result of having divine law as a source of legal norms, as these concepts were not known to the Arabs (if not to the world) before Islam.

¹⁷ Bsoul (n 14) 57.

¹⁸ *Ibid.*

¹⁹ A territory that has no peace agreement with the Muslim State.

²⁰ The abode of Muslims where Islamic law applies.

²¹ *Ibid* (emphasis added).

to determine the rulings of *siyar*, drawing on the Prophet's²² conduct and relations with non-Muslims in matters of conquest and peaceful agreements. Some approached the subject from a chronological, historical aspect, while others strove to study the principles of Shari'a as they applied to the situation.²³

Accordingly, Muslim jurists 'produced a vast amount of literature and treatises, which acquired great significance with the passage of time'.²⁴ Nevertheless, 'the first jurist to compile a treatise on *Siyar* was Abu Hanifa al-Nu'man ibn Thabit (d. 150/767).'²⁵ Abu Hanifa is the founder of the Hanafi School²⁶ of thought and he had two main disciples who conveyed his teachings and recorded his thoughts. These were Abu-Yusuf and Al-Shaybani, who both contributed greatly to the field of *Siyar*. Moreover, the teachings of these disciples and their master (i.e. the Hanafi School) were adopted by the leaders of the Abbasid Dynasty (approximately 750–1517 AD). As a result, Bouzenita stated that '[t]he most important contribution in *siyar*-related matters came from the Hanafi School. The Abbasid Caliphate's affiliation to the Hanafi School gave more political weight and relevance to legal rulings of the Hanafite scholars.'²⁷

However, it is commonly agreed among scholars of his time as well as those throughout the ages that by far the most dedicated of Islamic scholars to this task was Al-Shaybani, who wrote his book *Al-Siyar Al-Kabīr* in the eighth century, which contained what we would term international law topics. In the field of *Siyar*, some suggest that this book 'serves as a standard work of reference to-date'.²⁸

While this is true, it is important to highlight that although Al-Shaybani was the most dedicated he was neither alone nor the first to write on the topic. As Bouzenita puts it, 'al-Shaabī, Sufyān al-Thawrī, Abū Hanīfah, al-Awzāī and many others in the deduction of legal rules,

²² Referring to Prophet Muhammad peace be upon him. On every occasion that this book mentions Prophet/Messenger Muhammad, reference to the terminology (Peace Be upon Him) shall be assumed.

²³ Bsoul (n 14) 57.

²⁴ Ibid.

²⁵ Ibid 58.

²⁶ The largest of the main four Sunni Islamic schools of jurisprudence.

²⁷ Anke Iman Bouzenita, 'The *Siyar* – An Islamic Law Of Nations?' (2007) 35 Asian Journal of Social Science 19, 25.

²⁸ Ibid.

teaching, jurisdiction, oral and written discussions with other scholars have largely contributed to the formulation of *siyar*.²⁹

In fact, Farouq Hamadah thinks that it was not Al-Shaybani who first compiled a complete *Siyar* book, but Alfazari.³⁰ This shall not be discussed in detail; however, two points are worth considering. First, in that age, no contemporary book on *Siyar* comes close to that of Al-Shaybani in its comprehensive detail and scope. Second, great as it is, the book by Alfazari is in no way as in-depth as that of Al-Shaybani's work. Thus, even Hamadah admits that the method used (casuistic style) by Al-Shaybani was not employed by Alfazari, who had no intention of going beyond explaining the legal rules on existing practical matters. This, Hamadah argues, was probably the reason why minimal details of what Alfazari wrote have reached us, in contrast to the works of Al-Shaybani, which are overflowing with analysis and hypothetical cases.³¹

From the above, and as will be demonstrated in this book, Al-Shaybani's work is outstanding and pioneering. While Al-Shaybani is truly one of the great writers of international law, he cannot be said to be the only founder of this field, nor can his thoughts be taken as a representation of this subject. What distinguishes him is the fact that his book was a pioneering achievement. It is the first book, thus far known to us, that has treated international law as a separate field of study and in such a comprehensive manner.

1.1.1 Definition of *Siyar*

The term *Siyar* in terms of its etymology is the plural of the Arabic noun *sirah*,³² 'which means literally a "path", or "way of walking"'.³³ Bsoul explains its historical evolution as follows:

[e]ssentially, the concept of *siyar* evolved from its lexicographical meaning – in particular, from its connotation of behavior or conduct. *Siyar* is *Sira* in the

²⁹ Ibid (footnotes omitted).

³⁰ Abi-Ishaq Al-Fizari, *The Book of Siyar of the Sheikh of Islam the Imam Abi-Ishaaq Alfazari, Narrated by Mohammad Ibn Waddaah Alqortobi according to Abdulmalik Ibn Habib Al-Mesyri [Kitab Al-Siyar Li Shaykh Al-Islam Al-Imama Abi Ishaq Al-Fizari: Riwayat Muhammad Ibn Wadaah Alqortobi A'an Abdu-Al-Malik Ibn Habeeb Al-Masisis A'anho: Dirasat Watahqqeeq Farooq Hamadah]* (Farouq Hamadah ed., Mo'asat Al-Risalah 1987) 80.

³¹ Ibid 35–6.

³² This term could also refer to the biography of someone.

³³ Bsoul (n 14) 48.

singular [and] came to be used by chroniclers in their narrative accounts to mean life or biography, i.e., the conduct of an individual.³⁴

Al-Siyar (the *siyar*) or *Siyar* (in its indefinite form) is the term Islamic scholars used to indicate the rules and regulations concerning topics related to what is called today international law.³⁵ Hamidullah for his part has defined it as '[t]hat part of the law and custom of the land and treaty obligations which a Muslim *de facto* or *de jure* state observes in its dealings with other *de facto* or *de jure* states'.³⁶ Yet this definition is lacking as it excludes individuals as being subjects of *Siyar*. Rather, *Siyar* is a branch of *Shari'ah* that regulates the relations involving a Muslim state or between Muslims and non-Muslims, domestically as well as internationally, both in times of peace and war.

As an integral part of *Shari'ah*, *Siyar* or Islamic international law looks to its roots as sources. *Shari'ah*, while being flexible, flows from unalterable general principles with divine origins. In general, Islamic jurists have constructed their reasoning on the major principles derived from the Holy Qura'an³⁷ and the prophetic traditions. Hence, Islam has 'fostered an attitude of mind which prompted the Muslims to judge matters primarily in light of their religious norms. The questions which they faced in the field of international relations were no exception to this.'³⁸ However, we must not overlook the fact that other tools of Islamic jurisprudence are always utilized in the law-making process, while relying on those general fixed principles.³⁹ This last point has sparked heated debate between those who believe that *Siyar* is an international law of Muslims and those who argue that international law is a different concept from *Siyar*, and therefore *Siyar* should not be called international law. This is because they believe that contemporary international law does not rely on divine law as a main source, that *Siyar* is different as contemporary '[i]nternational law operates between independent and

³⁴ Ibid (footnotes omitted).

³⁵ It is important to stress that although *Siyar* can be called international law, the former is far more sophisticated and comprehensive than contemporary international law.

³⁶ Hamidullah (n 3) 3.

³⁷ On every occasion that the study mentions the Qura'an, reference to the terminology (the Holy Book) shall be assumed.

³⁸ Muḥammad ibn al-Ḥasan aš-Šhaybānī, *The Shorter Book on Muslim International Law* (Mahmood Gazi, tr., ed., Adam 2007) x.

³⁹ These are mainly *qiyas* (analogical reasoning) and *ijma'a* (consensus). Looking at the writings of *Siyar* scholars, it can be said that reciprocity is also a source of Islamic international law.

sovereign states; it deals with relations between nations. Each nation possesses its own internal law and exercises an authority subject to no restrictions save those imposed by the law of nations.⁴⁰ Nevertheless, if we were to deny *Siyar* as Islamic international law because of its nature and subjects, we would be weighing *Siyar* with one scale while using another for the European 'international' law. This is so as what we today call international law was, until the nineteenth century, a law of the Christian European nations. Other nations at the time were not only prevented from being subject to this law; they were also considered and treated as barbaric and uncivilized.⁴¹ This was reflected even in the writings of the Western jurists of the Enlightenment period such as Gentili and Grotius, who advocated discriminatory treatment against others, especially against non-Christians.⁴² In addition, while the European-based international law lacks many elements of what might be termed law today, the '*Siyar* as it was called was accepted as law in every sense of the term from the very beginning'.⁴³ Unlike European international law, *Siyar* 'never faced the problem of lacking proper sanction and judicial forum to adjudicate disputes'.⁴⁴ Moreover, while the European conception of international law treated others as barbaric and uncivilized and thus undeserving of inclusion as subjects of this law, *Siyar* had already adopted the principle of reciprocity centuries before European international law even existed.⁴⁵

Consequently, the fact that *Siyar* was designed to govern a Muslim state's international relations and is derived from divine sources does not make it wrong to call it international law. This is because contemporary international law is based on the European international law. The latter did not differ much from *Siyar* in these respects.

Yet, in an attempt to prove that contemporary international law is distinct from any religious or philosophical legal systems, some commentators reject any attempt to recognize religiously based systems as international law just because they are based on religion. For example, Afsah⁴⁶ argues that 'international law is primarily a modern phenomenon

⁴⁰ Bsoul (n 14) 50.

⁴¹ Majid Khadduri, 'Islam and the Modern Law of Nations' (1956) 50 *The American Journal of International Law* 358, 362–7 (footnotes omitted).

⁴² *Ibid* 362.

⁴³ Šhaybānī (n 38) 2.

⁴⁴ *Ibid*.

⁴⁵ *Ibid* 3.

⁴⁶ Ebrahim Afsah is an Associate Professor of Public International Law at the Faculty of Law, University of Copenhagen. The *European Journal of the*

serving functional needs not attainable by pre-modern precursors'.⁴⁷ He argues that the Westphalian system has no place for such divine law sourced systems as that of *Siyar*. This claim is normally built on unfounded claims such as that states are equal in contemporary international law.⁴⁸ No objective reader of the current state of contemporary international law could accept this as mere truth.⁴⁹

On the other hand, Afsah questions the validity of 'Muslim claims for a particularistic Islamic law of nations'. He thinks that '[s]uch claims include the normative rejection of current international law in whose creation and continued development colonised peoples had little active role'.⁵⁰ Afsah argues that resorting to *Siyar* by Muslim states is both a reason and a cause of the Muslims' inability to reach modernity, which

History of International Law published a controversial article of his arguing that the Muslim world is unable to advance merely due to using Islamic law. The article is poorly referenced and the arguments were built on prejudice rather than knowledge. Having been published in such an influential journal reflects how common the spread of unestablished claims is, and therefore inevitably there seem to be some common misunderstandings and misinformation in this field. This is why I decided to discuss his thoughts here to highlight the importance of this book for the library on the one hand and to help better inform international lawyers about the subject area of Islamic international law.

⁴⁷ Ebrahim Afsah, 'Contested Universalities of International Law. Islam's Struggle with Modernity' (2008) 10 *Journal of the History of International Law/Revue d'histoire du droit international* 259, 259.

⁴⁸ *Ibid* 260.

⁴⁹ For example, only five states in the world have the final say in the Security Council over matters that concern the whole world's peace and security, whereas other countries can just be subservient to one or more of those five. This system of law, for which Afsah seeks acceptance by all without questioning, is dubious especially for small and weak states. In fact, the entire contemporary international legal system is questionable especially 'the pretence of a universal international legal order, as represented by the United Nations and its Charter. The latter is replaced by a coalition of the international community committed to the forceful implementation of the human rights of liberal democracy and the rule of law. While these legal values are represented as cosmopolitan or universal ('Who wants to be tortured by a vicious dictator?' etc.) they are also entirely compatible with the expansion of Western economic interests. What needs the closest scrutiny is the relationship between the two – cosmopolitan values and economic interest. Can the result still be characterized in any sense as a global legal order?' Anthony Carty, *Philosophy of International Law* (Edinburgh University Press 2007) 211.

⁵⁰ Afsah (n 47) 259.

he explains as the inability to catch up with the modern world technologically as well as institutionally.⁵¹ He proposes a Japanese-style method for Muslims to be able to modernize their states. This should be done through borrowing, accepting and implementing Western ideologies, philosophies, laws and methods in all occupations. This is because, he thinks, the West is dominant and you can only draw near to modernity by accepting the Western way of life without question, as did the Japanese, enabling Japan to become part of the modern world.⁵² Mainly, he thinks that Islamic law has been and continues to be the main obstacle to modernity in these states. He accepts that Japan did, to an extent, differentiate between what it needed to accept and what it did not to become modern but he thinks that this is inapplicable in the case of Muslim states.⁵³ He is eager to blame Islamic traditions for being different from those of the Japanese that they managed to retain while acquiring ‘modernity’ from the West. Meanwhile, he accepts that the history of European international law has not been very attractive to non-European states because of the bad image it had acquired. This was due to bad practice. For example, breaches of this law are punished and/or ignored based on who the perpetrator is, relying on double standards.⁵⁴ What Afsah did avoid conceding is the fact that Western international law is still nakedly self-serving for certain Western powers, both structurally as well as in practice, and that is the main reason for the failure of many nations to develop. This is the cause of the dissatisfaction with such a system of law. This is why prominent scholars such as the Japanese international lawyer Yasuaki Onuma reject the Western hypocritical system of law, which Western powers seek to impose on others in pursuit of their own interests.⁵⁵ Some Western scholars, such as Carty, have also voiced concerns about the deficiency of contemporary Western international law.⁵⁶ Thus, Islamic law should not be blamed for the failures and faults of the Western system, which has earned distrust and dissatisfaction even from Japan, which Afsah takes as a model that he

⁵¹ Ibid 260–264, 287.

⁵² Ibid 268.

⁵³ Ibid 272.

⁵⁴ Ibid 274.

⁵⁵ Onuma Yasuaki, ‘When Was the Law of International Society Born?’ (2000) 2 (1) 65 *JHIL* <<http://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/jhintl2&div=6&id=&page=>> (accessed 6 October 2009).

⁵⁶ Anthony Carty, ‘The Yearning for Unity and the Eternal Return of the Tower of Babel’ (2007) 1 *European Journal of Legal Studies* 1 <<http://cadmus.eui.eu/handle/1814/6841>> (accessed 6 June 2018).

encourages Muslims to follow. This discourse, adopted by many like Afsah, can never lead to solving contemporary issues apparent in the international legal system. This is because instead of treating the disease, it diverts both the attention and the blame towards those who have been suffering from it.

In addition, Afsah thinks that *Siyar* puts limits on rationality in the process of law making, as it is sourced from divine law. When he discusses this reason, however, he fails to produce evidence to support his opinion. He misquotes Weal Hallaq by highlighting the latter's assertion that there are some divine limitations to the usage of rationality in the interpretation process of Islamic legal norms.⁵⁷ What Afsah did not offer is an honest reflection that *Siyar* has a lot of scope for both rationality and reciprocity. From what we will see in this work, such a claim cannot be sustained and can only expose a lack of honesty or of knowledge on the part of Afsah.

Ironically, one of the reasons why Muslims should accept Western international law as it is, according to Afsah, is that *Siyar* poses some linguistic and cultural 'difficulties'. One other reason why, in the opinion of Afsah, *Siyar* should not be accepted is because to engage 'in a jurisprudential discourse with adherents of a system of a sacred law requires approaches quite at variance with those familiar to Western lawyers'.⁵⁸ This approach leads to absurdity. This is because there are three scenarios: to impose Western international law on all; to impose *Siyar* on all; or to say that both should coexist. Afsah would, it seems, choose the first option. He rejects all rules derived from divine sources in favour of complete implementation of one system, that of the West. Today there are some people who think that God exists and others who think that He does not. Going by the theory of Afsah, only one of these views should be followed and the others must be abolished or converted, even by force. He would not, it seems, suggest that they should both coexist, each living by their own rules, so long as there are clear sets of rules governing the peaceful coexistence of both. This is the inference from his writings. One fact that Afsah and those from his school of thought are unable to recognize is that there is only one way out of this dilemma, that is that all nations must be accepted and taken into account as living peoples represented, but not replaced, by the abstract notion of the state.

⁵⁷ Afsah (n 47) 279.

⁵⁸ Ibid.

Unlike Afsah, after careful consideration of the theoretical background of the European system of international law, Carty asserts that:

[i]t is not possible, to separate ..., what is belief and what is reason. It is not possible to banish belief, whether religious or secular, from international life. Some way has to be found to negotiate what people regard as non-negotiable, without having to deny the non-negotiability of their positions.⁵⁹

Afsah, while criticizing the bright picture of *Siyar* (as a system) drawn by the ICJ Judge Weeramantry, addressed other writings criticizing some Muslim states' practice. Thus, Afsah compared a practice to a system in order to satisfy a pre-destined outcome of his comparative approach. Methodologically, this is wrong. Consequently his outcome is unfounded. In addition, the fact that Western international law is built on state practice does not necessitate that any other system of international law be studied from such a perspective. Hence, Afsah fails to recognize the difference between the two systems he is comparing.⁶⁰ What is more, Afsah was not able to admit that the difference between theory and practice exists in Western international law as well, which sets the two legal systems on an equal footing.

Afsah falls into contradiction once again when he asserts that the two main parts of Islamic law, *fiqh* and *siyasa*, dominating private and public life, respectively, are man-made: 'Despite purporting to implement the divine will and using revelation as source, both are ultimately man-made.'⁶¹ This statement came after pages in which he was explaining that the main issue with *Siyar* is that it is based on divine law and thus different from Western international law, which, he suggests, is man-made. This is fundamentally at odds with his claim that the reason why Muslim states have not been 'modernized', whatever that may mean, is that they have not relinquished the system based on divine law and replaced it with the man-made Western methods.

In terms of content, he thinks that the barrier between Muslim states and modernity are twofold. First, he claims that *Siyar* clashes with Western international law on issues such as human rights and good governance standards, democracy and equality. Second, he argues that the

⁵⁹ Anthony Carty, 'The Moral Theologian, Oliver O'Donovan and International Law' (2008) 9 Political Theology 339, 355.

⁶⁰ Afsah (n 47) 278.

⁶¹ Ibid 287.

‘universal aspiration’ of *Siyar* prevents peaceful coexistence and does not permit permanent peace deals.⁶²

The first point can be dismissed as reality dictates, because most (if not all) Muslim states have not been practising *Siyar* and thus it could not have been the reason that stopped them from reaching ‘modernity’.⁶³ Moreover, many non-Muslim countries are still underdeveloped and would probably be considered by Afsah as unmodern. Thus, not only practising Islamic law, but also being a Muslim itself is not the reason for not reaching ‘modernity’.

As for the second reason – that the ‘universal aspiration’ of *Siyar* prevents peaceful coexistence and permanent peace deals – it can only reveal one of two facts: either that Afsah does not know that *Siyar* permits unrestricted (timewise) peace deals or that he generalized one juristic view over the entire rich body of *Siyar*. This is not the only occasion when he has demonstrated a lack of understanding of the *Siyar* he is criticizing. He repeats exactly the same mistake when he talks about the concept of *siyasa*⁶⁴ and the concept of *jihad*.

If there is one point where Afsah was right, this can only be the fact that the body of *Siyar* needs to be revisited in order to answer the needs of today’s world,⁶⁵ which *Siyar* is both capable of doing and not opposed to.

While one would expect that supporters of divine rules would suggest that the whole world should fall under their legal system, those (such as Afsah) who claim that such thinking belongs to religious people and think that they are supporting freedom, rights and respect seem to be the eager party to impose their way of life on others.

Many honest and open-minded Western thinkers oppose such polemic discussion led by supporters of the Western hegemony. The contemporary state-centred Western-sponsored concept of international law, as put by Carty, ‘has an inherent tendency, which O’Donovan highlights, to ground

⁶² Ibid 294–6.

⁶³ This debate is indebted to the full article at: Khaled Ramadan Bashir, ‘Article Review, Ebrahim Afsah, “Contested Universalities of International Law. Islam’s Struggle with Modernity”’, *Journal of the History of International Law* 10 (2008) 259–307 (July 2008) <http://www.islamic-laws.com/articles/universality_article.htm> (accessed 19 February 2018).

⁶⁴ For more about *siyasa* (*siyasa*) in Islamic international law, see Haniff Ahamat and Mohd Hisham Mohd Kamal, ‘Modern Application of *Siyar* (Islamic Law of Nations): Some Preliminary Observations’ (2011) 25 *Arab Law Quarterly* 423, 426–7.

⁶⁵ Afsah (n 47) 304.

international order in the hegemonic claim of one or two countries to represent the values of the whole of humanity'.⁶⁶ In the continued search for alternatives to the decayed Western international law, O'Donovan proposes a different, richer and more coherent system to replace it. According to Carty, he argues that '[w]ith a theory of political legitimacy which rests upon representation of national identity, O'Donovan points the way to an international order based upon mutual respect among nations under natural law, in the classical medieval sense finally represented by Grotius and Suarez'.⁶⁷

The contemporary international law, which faces crises of acceptance due to the many faults inherent in its structure, dictates the need for an alternative. The fact that it has been predominantly no more than a tool of suppression in the hands of the United States and other powerful countries makes it unworthy of support and raises the alarm indicating the need for alternative. This is probably why Carty (2007) suggests that 'international lawyers have to address the society, which they cannot simply do through authoritarian appeals to their own legal dogmatics. They have to find a language, which others can speak.'⁶⁸ Both the problem and the future risk were highlighted by him when he asserted that:

international lawyers frequently aspire to affirm the existence of an international community and the presence of authority to speak on its behalf. However by forcing a hierarchical representation of legal values upon nations, which have not accepted them, international lawyers, and the politicians whom they advise, risk unleashing a whirlwind of violence.⁶⁹

Be that as it may, it is worth mentioning that one of the greatest scholars of *Siyar*, Hamidullah,⁷⁰ commenting on a compulsory course he had to take at Osmania University at the beginning of the twentieth century, asserts that 'it struck me at once that what was taught to us as international law was identical in many respects with the teachings of the books of *fiqh* and Muslim history'.⁷¹ For those who learn about either of

⁶⁶ Carty, 'The Moral Theologian, Oliver O'Donovan and International Law' (n 59) 339.

⁶⁷ *Ibid.*

⁶⁸ Carty, *Philosophy of International Law* (n 49) ix.

⁶⁹ Carty, 'The Yearning for Unity and the Eternal Return of the Tower of Babel' (n 56) 1.

⁷⁰ He is no doubt one of the most renowned authorities of the last century on the topic.

⁷¹ Hamidullah (n 3) x.

the two systems and then are exposed to the other, this feeling will certainly be familiar.⁷²

Furthermore, regardless of whether or not *Siyar* has a unique nature, no one can deny its function as a law that is designed to regulate international legal relations in times of both peace and war. For historical clarity, it should be recorded that *Siyar* existed long before international law was known as a separate field of study in Europe. This might have motivated some of those who cannot accept calling *Siyar* international law to distinguish their historical differences. This may also have been motivated by the fact that *Siyar* is wider and more comprehensive; it also enjoys more features that are advanced and mechanisms that are lacking in contemporary international law. In this book, however, I use the term international law to mean *Siyar* in the context of language. This is the same as when we use the term jurisprudence rather than the Arabic term *fiqh*. In order to address the English reader, the translation of terminology should always be used as much as possible to avoid having half of the work written in a different language to the research. Consequently, the linguistic connotation of the term international law when it is used to indicate rules that govern the relations between states and individuals in their cross-border relations is no doubt befitting of *Siyar*. Moreover, Hamidullah observes that:

[i]nternational Law means rules of the conduct of states in their mutual dealings. Obviously, it is not necessary that there should be only one set of rules, or one system of international law at a time, for the conduct of all the states of the world. And several systems of international law could, and in fact did, exist simultaneously in different parts of the globe. Even the modern, so-called European, International law is not a collection of unanimously approved rules.⁷³

Similar to this was the opinion of Grotius, who is normally referred to when some people want to exclude regional, religious or ethnic perceptions of international law and argue that they are not part of the latter. He had clearly held a different view when he said:

[t]he law which is broader in scope than municipal law is the law of nations; that is the law which has received its obligatory force from the will of nations, or many nations. I added, ... [Grotius said], ... 'of many nations' for the reason that, outside of the sphere of the law of nature, which is also frequently called the law of nations, there is hardly any law common to all

⁷² Personal experience.

⁷³ Hamidullah (n 3) x.

nations. Not infrequently, in fact, in one part of the world there is a law of nations which is not such elsewhere.⁷⁴

Nevertheless, whether contemporary international law is different, compatible, incompatible or even similar to *Siyar* is a heated debate among scholars, and it will not be my aim to embark on it in this work. What is more important here is to emphasize the importance of studying *Siyar* in general and the contribution of Al-Shaybani in particular.⁷⁵ In this regard, James Crawford acknowledges that although Grotius is a regional thinker, we treat him as an international lawyer; therefore, there is no reason why we should not treat Al-Shaybani in the same way.⁷⁶

1.1.2 Importance of *Al-Siyar*

Today, we live under rules that embody, mainly, Euro-American values as a law for all nations to abide by. Yet these rules are commonly branded as international law and/or the law of nations. In fact, international law is accepted by most non-Western nations, who, although they suffered from its misuse by the West,⁷⁷ found tremendous advantages in practising it. However, having failed many of its own tests, international law is under scrutiny. Some thinkers believe that for international law to be accepted and practised in the four corners of the world, other nations' views of international law have to be taken into consideration: this could reveal some of the differences and will certainly help in developing an international law that could truly be called the law of nations (all nations). The search for an alternative or at least an altered version of international law is imminent. The massive use of force, contrary to international law by powerful states, the clash of values and the conflict of interests have emphasized the urgency of such a search.

Furthermore, Gaber emphasizes that *Siyar*:

[i]n contrast to the modern concepts, international law was respected and observed, and due to the presence of the coercive force which compelled rules

⁷⁴ Hugo Grotius, *Hugo Grotius. The Law of War and Peace: De Jure Belli Ac Pacis Libri Tres* (Francis W. Kelsey tr., Indianapolis 1925) 44 (footnotes omitted).

⁷⁵ As we shall see later, the aim of this study is to discuss the contribution of one of the writers of *Siyar* to international law and not to assert whether the latter is compatible with the former or not.

⁷⁶ J. Crawford, personal communication, 19 May 2012.

⁷⁷ This term will be used to indicate that part of the West that dominates the course of international affairs.

and peoples to its obedience, it was rarely violated. Its binding force was not merely the ‘consent’ of the states, which is the basis of treaties, nor was it obeyed because it was the alternative to anarchy. Since it was part of religion, Islamic International Law was purely of a subjective character. It was a divine law, the violation of which would invoke the divine punishment. Thus it implied, of necessity, the principle of the good faith of treaties.⁷⁸

Moreover, many would argue that in reality *Siyar* is the true international law of Muslims. This is to say that it is of key relevance to the populations of around 57 countries and these are strongly connected with its teachings. Today, over 1.5 billion people from the world’s population of 6 billion believe in Islam⁷⁹ and are more likely to admire, respect and practise *Siyar* even if their states do not formally adopt it. Moreover, the vast majority of Muslims attending Friday ceremonies every week around the globe are more likely to follow the teachings of *Siyar* regarding their international affairs than to follow international law.⁸⁰ In addition, in her attempt to measure the attitude of Muslims towards the 2003 Iraq war, Professor Ali has noticed that Muslims from all parts of the world have sought consultations based on *Siyar* on what they should do and how they should react to the invasion.⁸¹ This is yet another indication that people even in secular Muslim states still wish to live under Islamic laws (domestic or international). In addition, many significant empirical studies show that without an appreciation of *Siyar*, we will never have an international law that could be both practical and effective. For example, Ali and Rehman (2005) asserted that ‘[o]ur study has established that it is not possible to ignore rules developed in the Islamic legal system as regards conduct of inter-state relations including laws of war, which even

⁷⁸ Mohammad Hosny Mohammad Gaber, ‘The Early Islamic State with Special Reference to the Evolution of the Principles of Islamic International Law, 632–750 A.D.’ (PhD Thesis, American University of Washington 1922) 24–5.

⁷⁹ Source: <<http://www.pewresearch.org/fact-tank/2017/01/31/worlds-muslim-population-more-widespread-than-you-might-think>> (accessed 15 May 2018).

⁸⁰ Friday prayer is an obligation upon every Muslim male. They are required to attend it in a mosque and the vast majority of them do attend it. Friday ceremonies normally contain the most up-to-date Islamic view on how Muslims should deal with matters of their day-to-day life, and this includes international affairs.

⁸¹ S. S. Ali, ‘Resurrecting *Siyar* through Fatwas? (Re) Constructing “Islamic International Law” in a Post-(Iraq) Invasion World’ (2009) 14 *Journal of Conflict and Security Law* 115.

today form a coherent body of rules comparable with any legal system of the world'.⁸²

For these reasons, recognizing the Islamic perspective on international law is undeniably vital to the study and development of international law, especially in our day and age. Furthermore, in an age that is marked by a highlighting of the diversity between Islam and the West along with the claim of a clash of civilizations, the study of *Siyar* has become more and more important.

1.1.3 *Siyar* and Western International Law

Gazi⁸³ has offered a point-by-point account of the comparison between *Siyar* and international law. In light of his study, I offer the following comparisons:

1. While the very nature of international law as a law is contested due to a purported lack of some elements, thus preventing us from calling it a law, the nature of *Siyar* as a law has never been subject to disagreement.
2. *Siyar* is the creation of independent jurists, unlike contemporary international law which is mainly created by political entities acting in accordance with their interests. Furthermore, in *Siyar* law creates political authority as well as the state and not the other way around. This is evident from the fact that law was enacted first and there was never a legislative body in the Muslim State's structure. Thus, in this regard, 'the entire concept of Muslim international law is basically different from that of the Western international law which not only stems from the will of the rulers but also remains contingent upon it'.⁸⁴ Similarly, Bsoul agrees that 'Islamic international law was not the product of an attempt to discover the rules actually observed and practised by states in their mutual intercourse, as is the case generally with modern systems of international law'.⁸⁵ He also adds that 'its origins lie in what are perceived to be infallible religious sources, so that its application

⁸² S. S. Ali and Javaid Rehman, 'The Concept of Jihad in Islamic International Law' (2005) 10 *Journal of Conflict and Security Law* 321, 342.

⁸³ Šhaybānī (n 38) 17–21.

⁸⁴ *Ibid* 18–19.

⁸⁵ Labeeb Ahmed Bsoul, *International Treaties (Mu'āhadāt) in Islam: Theory and Practice in the Light of Islamic International Law (Siyar) according to Orthodox Schools* (University Press of America 2008) 11.

and observation had to operate in accordance with the spirit of those general rules'.⁸⁶

3. On top of this, unlike the case in Western international law, municipal law and *Siyar* are not in contradiction, because they come from the same source.⁸⁷
4. While the universal character of Western international law is disputed from the very beginning, *Siyar* from its inception to date bears a universal one. Gazi argues that Western international law considered those outside the European circle as uncivilized and unworthy of its application. Conversely, 'Muslims never raised the question whether someone was civilised or uncivilised, a question on which no clear and commonly accepted criterion could ever be laid down.'⁸⁸ In fact, *Siyar* 'adopted a criterion which was much more clear and precise in its application, namely the religious and political affiliation of the person concerned'.⁸⁹ In this regard, Bsoul (2008) argues that *Siyar* places great emphasis on 'the universal brotherhood of mankind'.⁹⁰ The significance of this brotherhood is that it annuls all racial and material differences between human beings.'⁹¹
5. From the very beginning, *Siyar* recognized individuals as well as groups and states as subjects of its domain. Western international law, conversely, still struggles to accept individuals or even groups as subjects except in very limited and non-unanimously agreed upon cases. *Siyar* 'has never deprived individuals of seeking redress available to them under the rules of Muslim international law'.⁹² On the contrary, to date no individual can raise an issue with the

⁸⁶ Ibid.

⁸⁷ See also Gaber (n 78) 25.

⁸⁸ Šhaybānī (n 38) 19–20.

⁸⁹ Ibid.

⁹⁰ Bsoul notes: '[t]his is made clear in two verses of the Qura'an; chapter 49:11 and 13, which read: 'O you who believe! Let not a group scoff at another group, it may be that the latter are better than the former, nor defame one another, nor insult one another by nicknames ... ; O mankind we have created you from a male and female, and made you into nations and tribes, that you may know one another.'

⁹¹ Bsoul (n 85) 3.

⁹² Šhaybānī (n 38) 20.

majority of the contemporary international legal bodies.⁹³ In addition to this difference, '[n]ot only the citizens of the Muslim state but also the members of a belligerent army and their compatriots had the right to move a Muslim court, invoking a relevant rule of Muslim international law'.⁹⁴ Gazi argues that only some Western international law scholars have recently considered this.⁹⁵

6. When some scholars dispute the universality of *Siyar* because it rests upon divine sources, they ignore the historical accounts of the contemporary system (international law) they deem universal. However, they will never be able to draw the line between international law of today and religion. In fact, even the individuals whom they consider to be fathers of international law did not attempt to claim what they are claiming. Grotius, for example, concluded his introduction of *The Law of War and Peace* by saying: 'if anything has here been said by me inconsistent with piety, with good morals, with Holy Writ, with the concord of the Christian Church, or with any aspect of truth, let it be as if unsaid.'⁹⁶ Moreover, he also unequivocally stated that:

[r]eligion is of ever greater use in that greater society than in that of a single state. For in the latter the place of religion is taken by the laws and the easy execution of the laws; while on the contrary in that large community the enforcement of law is very difficult, seeing that it can only be carried out by armed force and the laws are very few. Besides, these laws themselves receive their validity chiefly from fear of the divine power; and for this reason those who sin against the law of nations are everywhere said to transgress divine law. Therefore, the Emperors have well said that religion corruption affects all to their hurt.⁹⁷

In conformity with this, in Stumpf's great work *The Grotian Theology of International Law* (2006), he concluded that:

Grotius certainly is to a great extent indebted to the Christian theological and legal traditions: his theory of Natural Right follows lines parallel to those of the Salamancan School; his just war doctrine mostly

⁹³ Mohamad Gazi Janaby and Khaled Ramadan Bashir, 'The Right of Individuals to Take Judicial Action Against International Persons: The Case of NATO's Intervention in Libya' (2012) 1 Cambridge Journal of International and Comparative Law 162.

⁹⁴ Šhaybānī (n 38) 20.

⁹⁵ Ibid 21.

⁹⁶ Grotius, *The Law of War and Peace* (n 74) 30.

⁹⁷ Ibid 510.

pursues the path already paved by medieval canon law, and in his understanding of function of Christ's sacrifice for the redemption of mankind Grotius adheres to orthodox Patristic theology.⁹⁸

7. Gazi argues that '[t]he Western international law, as conceded by several Christian and Jewish writers, is an offshoot of the Christian civilization prevalent in Christendom'.⁹⁹ He further stresses that:

[t]he Christian component of Western international law becomes more striking in areas where a rule of international law is disputed by one of the parties. In such a situation, according to a recent but highly respectable authority, Oppenheim, it lays down that the principles of Christian morality should be applied. On the other hand, in a similar situation Muslim international law does not invoke any principle of Muslim morality. It invokes the principles of natural justice, particularly the principle of *tamathul, mujazah* or reciprocity ensuring an equal footing to both the parties.¹⁰⁰

From another perspective, one can also add to the above comparison the fact that while modern international law feeds on states' interest as the main source of life which can be diverted from serving the human cause to the fulfilment of the cause of the state and its leaders, *Siyar* feeds on ethical and moral standards as principles of law. This is why, 'in the eyes of Muslim jurists, any system of human relations not based first and foremost on ethical principles loses all significance'.¹⁰¹

In addition to the abovementioned features of *Siyar*, international law as it is taught today inevitably includes *Siyar* as a source of law both implicitly and explicitly. It does so when it recognizes customary practices of nations as a source of international law.¹⁰² This is because *Siyar* was the practice of Muslim dynasties and states until the beginning of the twentieth century. Likewise, the Statute of the International Court

⁹⁸ Christoph A. Stumpf, *The Grotian Theology of International Law: Hugo Grotius and the Moral Foundations of International Relations* (De Gruyter 2006) 242.

⁹⁹ Šhaybānī (n 38) 21.

¹⁰⁰ Ibid (footnotes omitted).

¹⁰¹ Bsoul (n 85) 13 (footnotes omitted).

¹⁰² Interestingly, custom is also seen as a source of *Siyar* itself. For more about this, see Md Anowar Zahid and Rohimi B. Shapiee, 'Considering Custom in the Making of *Siyar* (Islamic International Law) Notes and Comments' (2010) 3 *Journal of East Asia and International Law* 123.

of Justice, particularly article 38, accepts *Siyar* as a source of international law by recognizing the teachings of great scholars and great civilizations as a source of law. Thus, such writings of great scholars from a great civilization as that of Al-Shaybani should undoubtedly sit well in such a category.

Additionally, it is undeniable that ‘many of the most modern concepts of contemporary public international law, such as the principle of humanitarian treatment of prisoners of war, had been anticipated by Islamic law’.¹⁰³ Indeed, the treatises of *Siyar* ‘on this specific subject had anticipated by several centuries the first emergence of organised writing in the West on the subject of Public International Law’.¹⁰⁴ Moreover, it should be emphasized that ‘[a]long with principles now incorporated in the Geneva Conventions, Islamic law books contained other principles not yet incorporated in modern conventions’.¹⁰⁵ Referring to international law, the ICJ Judge Weeramantry adds that ‘the eighth-century treatise of Shaybani had been the subject of a four-volume commentary by Shamsal-Aimma Sarakhsi long before the topic became the subject of western juristic writing’.¹⁰⁶

Despite all these facts about the importance of *Siyar*, it is only recently that some scholars in the West have recognized that *Siyar* is an integral part of the history of international law and that it is very important and complementary to today’s international law.¹⁰⁷ Thus, An-Na’im went as far as suggesting that *Siyar* should be borne in mind when nations agree a law according to which they would interact. In this regard, he stresses that:

the relationship between Islamic law and International Law should be seen in terms of a more inclusive approach to the latter, rather than conflict or competition between the two. In my view, there can only be one International law, but it has to be truly international by incorporating relevant principles

¹⁰³ Weeramantry (n 7) 109.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid 135.

¹⁰⁶ Ibid 109.

¹⁰⁷ As mentioned above, the *Oxford Handbook of the History of International Law* (Oxford Handbooks in Law) in its ‘People in Portrait’ part, which explores the life and work of the prominent scholars and thinkers of international law, presents Al-Shaybani as the earliest contributor and concludes with Sir Hersch Lauterpacht. Mashood A. Baderin, ‘People in Portrait’ in Fassbender et al. (n 1) 1081.

from different legal traditions, instead of the exclusive Euro-centric concept, principles and institutions of international law as commonly known today.¹⁰⁸

Furthermore, in the same line some scholars think that *Siyar* should be used effectively to develop and improve the current version of international law. For example, Gamal Bader asserts that:

[c]ontemporary Islamic legal thought has no trouble subscribing to all current principles of International Law. Beyond that it aspires to enrich International law with its own contributions. What contemporaneous legal systems can contribute to each other and to international law is a different emphasis on values, a particular pattern of juridical reasoning and a distinctive methodology in the search for solutions to common problems. In all these areas Islamic law has much to offer to the ongoing process of development of international law.¹⁰⁹

What is more, today ‘a balanced and equitable relationship can only come about once Islamic values are understood and accommodated in the international political order’.¹¹⁰ In fact we must always bear in mind that ‘[i]gnoring them in favour of strictly European ideas will only lead to continued misunderstanding between Muslim and non-Muslim states’.¹¹¹

It must also be pointed out that *Siyar* is also capable of recognizing the developments in the international legal system. Therefore, *Siyar* scholars need to make it available for international lawyers to be better informed when dealing with Muslim communities, they must also exert efforts to update *Siyar* in light of the developments international law has seen. While there are some attempts to carry out the first task, there are barely any to fulfil the second. This book will offer international lawyers an unprecedented (in its width) opportunity to learn about *Siyar* in its original form.

¹⁰⁸ Abdullahi Ahmed An-Na'im, 'Islamic Law and International Law' (2004) <<http://www.aals.org/am2004/islamiclaw/international.htm>> (accessed 29 January 2010).

¹⁰⁹ Gamal M. Bader, 'A Survey of Islamic International Law' in Janis and Evans (n 11) 100–101.

¹¹⁰ Bsoul (n 85) 2.

¹¹¹ Ibid.

1.2 AL-SHAYBANI

Many prominent scholars of his time, especially those working in the field of *Siyar*, attested that Al-Shaybani¹¹² was one of the greatest jurists.¹¹³ This remains true today. Thus, Abū al-Wafā (2007), writes: ‘it is possible to say that Imam Al-Shaybani influenced and still today influences the development, re-shaping and crystallizing of the principles of international law and international relations in Islam in particular and in the world in general.’¹¹⁴ Moreover, Al-Shaybani has been described as ‘the chief architect of *siyar*’.¹¹⁵ His books were clear evidence that he was a ‘prolific writer who set down the Hanafi Doctrines, as well as those of other jurists, as his version of Malik’s *Muwatta*’¹¹⁶ attests’.¹¹⁷ He is also recognized as the founder of *Siyar*¹¹⁸ as an independent field of study.¹¹⁹

His book *Al-Siyar Al-Kabīr* was adopted by the Caliph of the time and by many other Muslim rulers after him. The power of this book reached even the Ottoman Empire and was used to regulate Islamic international relations. Furthermore, Al-Shaybani was appointed by the Caliph as a

¹¹² In Western literature, his name is written in a number of different ways including: Šaibānī, aš-Šaibānī, al-Šaibānī, Shaybānī, Ash-Shaybānī, al-Shaybānī, Shaybani, Ash-Shaybani and al-Shaybani. The most accurate in English is aš-Šaibānī. However, some would transliterate it letter by letter and write the Arabic (L) and some would drop it, as it is silent in Arabic. Probably the simplest method, as not all English readers are familiar with Š (sounds like sh), is to use sh instead. Thus, I used Al-Shaybani.

¹¹³ Muhammad Ibn Ahmad As-Sarakhsī, *Explanation of Al-Siyar Al-Kabīr of Muḥammad Ibn Al-Hasan Al-Shaybānī [Sharīh Kitāb Al-Siyar Al-Kabīr Li-Muhammad Ibn Al-Hasan Al-Shaybani – Imla Muhammad Ibn Ahmad Al-Sarakhsī]*, vol 1 (Salah Al-Deen Al-Munajjid ed., Ma’had Al-Makhtu’tat 1971) ix–x.

¹¹⁴ Abū al-Wafā (n 12) 3.

¹¹⁵ Bsoul (n 85) 14.

¹¹⁶ *Muwatta* is one of the most authentic and authoritative books in Islamic jurisprudence. The book contains a record of traditions of Prophet Muhammad as heard in Imam Malik’s circles. There are two versions of this book, one of which was prepared by Al-Shaybani. His version further records the opinions of the Iraqi jurists on the prophetic sayings that were reported by Imam Malik.

¹¹⁷ Muḥammad Ibn-al-Hasan aš-Šaibānī, *The Islamic Law of Nations: Shaybānī’s Siyar* (Majid Khadduri tr., Johns Hopkins Press 1966) 36.

¹¹⁸ As mentioned above, some scholars have used this term as a translation of *Siyar* whereas others have completely rejected this, claiming that *Siyar* is separable from the term Islamic international law.

¹¹⁹ As-Sarakhsī, *Explanation of As-Siyar Al-Kabīr* (n 113) ix–x.

judge before and after he was dismissed by him. Upholding justice was his enduring character and the cause for his dismissal when he ruled against the wishes of the Caliph himself.

According to the Islamic calendar,¹²⁰ Muhammad Ibn Al-Hasan Al-Shaybani was born in the year 130 (747 AD).¹²¹ He grew up in one of the most significant centres of learning at the time, Al-Kufah.¹²² Having inherited a large amount of money from his father, Al-Shaybani dedicated his time and wealth to learning. He studied with the greatest scholars of his time, some of whom became the greatest scholars of Islamic law. He followed Abu-Hanifa, the head of the Hanafi School, for four years. Although he studied with many great scholars, ‘the foundation of his scholarship was laid and his legal and juridical understanding was sharpened by Abu Hanifah whose academy he joined at the age of fourteen’.¹²³ After the death of Abu-Hanifa, Al-Shaybani continued his education with the most outstanding disciple of the former, Abu-Yusuf.¹²⁴ Al-Shaybani and Abu-Yusuf ‘constitute the nucleus to which goes the credit of laying the foundations of the largest school of Islamic law and jurisprudence. Almost ninety percent of the rulings given by Abu Hanifah have been reported to us by Shaybani’.¹²⁵ However, not only had Al-Shaybani learned in the school of Abu-Hanifa which used *istinbat* (elicitation) as a source of law, he also travelled to learn in the circles of Imam Malik, the founder of the Maliki School, and Al-awzai. Both of the latter upheld different styles of reasoning in Islamic jurisprudence.¹²⁶ They used to build their opinions mainly on the traditions and narrations of the Prophet, his companions and the practice of the ‘people of Al-Madinah’¹²⁷ as well as the Qura’an. As his study with Abu-Yusuf did not last for long, Al-Shaybani travelled seeking knowledge across the Muslim land, but only settled in Medina for some time with Imam Malik. Thus, ‘[t]he impact of the Madinan¹²⁸ School on Shaybani’s writings is

¹²⁰ Hereafter this will be AH.

¹²¹ Henceforth where years are in the form of (130/747), this indicates 130 by the Islamic calendar and 747 AD.

¹²² A well-known city in Iraq.

¹²³ Šhaybānī (n 38) 22.

¹²⁴ As-Sarakhsī, *Explanation of As-Siyar Al-Kabīr* (n 113) ix–x.

¹²⁵ Šhaybānī (n 38) 21–2.

¹²⁶ As-Sarakhsī, *Explanation of As-Siyar Al-Kabīr* (n 113) ix–x.

¹²⁷ The term refers to the Muslims residing in the Prophet’s city (sometimes written as Medina, currently in Saudi Arabia).

¹²⁸ Referring to the School of Madina, the Maliki School of thought.

evident from his mastery over the science of *Hadith*.^{129,130} The fact that he had studied with two founders of different schools of thought, and his travel in pursuit of knowledge, helped him to become one of the greatest scholars of Islamic Law. His readers note that '[h]is writings represent a unique combination of rational interpretation of early precedents and a profuse citation of authorities, particularly the sayings and practices of the Prophet (peace be on him) and his Companions'.¹³¹ Yet, in general, in his writing style Al-Shaybani was no different from his contemporaneous Islamic scholars as he too 'employs a dialogue form in some of his writings, especially when he compares his arguments with those of other jurists. This form not only keeps the discussion lively but also greatly helps the reader, in most cases, to follow the line of argument adopted by the jurist concerned.'¹³²

When Al-Shaybani was only 20, he started teaching in Al-Kufah and his circles were always full. Not only did many of his students become popular scholars and sources of knowledge drawn upon to this day, Imam Al-Shafi'i was also among his students. Al-Shafi'i is the founder of the Al-Shafi'i School, which is one of the four main schools of jurisprudence in Sunni Islamic thought.¹³³ Thus, Al-Shaybani studied with the heads of two of the main Islamic schools and he was the master of the head of another.

The most distinguished student of his, Imam Al-Shafi'i, has praised Al-Shaybani on several occasions and once told his audience that 'the notes he had prepared in the company of Shaybani were equal to the load of a he-camel. He would then explain that he was referring to a he-camel "because it can carry more weight than a she-camel"'.¹³⁴ Furthermore, Imam Al-Shafi'i once confessed 'that he never saw a person more knowledgeable about what is lawful and what is unlawful and the niceties of law than Muhammad ibn al-Hasan al-Shaybānī'.¹³⁵ Later, Al-Shaybani was often consulted by the Abbasid Caliphate on various legal issues. He then was appointed as a judge by the famous Caliph Harun A-Rasheed.¹³⁶ Al-Shaybani died when he was 58 in the year 189 AH. The Caliph

¹²⁹ *Hadith* refers to the second main source of Islamic Law, which is the Prophetic traditions.

¹³⁰ Šhaybānī (n 38) 23 (footnote added).

¹³¹ Ibid (footnote added).

¹³² Ibid 30.

¹³³ As-Sarakhsī, *Explanation of As-Siyar Al-Kabīr* (n 113) x.

¹³⁴ Šhaybānī (n 38) 23.

¹³⁵ Ibid.

¹³⁶ Ibid 24.

himself led the funeral and addressed the crowds stressing that 'they were not burying the earthly remains of a mortal; they were rather burying the science of law and jurisprudence itself'.¹³⁷

As one of the most prolific writers in Islam and by far in the field of *Siyar* at the time, Al-Shaybani left a great amount of books. Historians have related to him many valuable works¹³⁸ some of which, unfortunately, have been lost. In the field of international law, the first book he wrote was *Al-Siyar Al-Saghir* or 'the Shorter Book of International Law'.¹³⁹ This was after his Master Abu-Hanifa's death. He wrote it under the supervision of his new Master, Abu-Yusuf. Gazi, who translated this book, refutes Khadduri's claim that this book was Abu-Hanifa's *Siyar*. He strongly believes that it was the brainchild of Al-Shaybani. He completely rejects Khadduri's analysis that because it mostly contains the opinion of Abu-Hanifa it must have been what was known as Abu-Hanifa's *Siyar*, to which Al-awzai had written his rejoinder. Thus, Gazi stresses that:

Khadduri's remarks on the subject seem to be mutually contradictory. He denies the popular contention that Shaybani had written this book before 157 AH in which case this cannot be considered to be the *Siyar* of Abu Hanifah of which a refutation was written by Awza'i. He also conjectures that the *Siyar* attributed to Abu Hanifah might have been written by Abu Yusuf and might not have reached us. On the other hand, Khadduri declares a chapter from Shaybani's *Kitdb al-Asl* as his *Siyar* and embarks upon its translation without even perhaps trying to check whether the real *al-Siyar al-Saghir* was in existence or not.¹⁴⁰

An examination of Khadduri's book reveals that his translation is replete with Abu-Hanifa's opinions pertaining to *Siyar* questions. If having mainly relied on the opinion of the latter is a sign of any work to be his, then even the work translated by Khadduri should not be called Shaybani's *Siyar*; he should have rather called it Abu-Hanifa's *Siyar*. Furthermore, no one else questions the fact that *Al-Siyar Al-Saghir* was written by Al-Shaybani. Therefore, and since it contains the opinion of the latter as well as Abu-Hanifa's, it will always be more appropriate to call it Al-Shaybani's *Siyar*.

Luckily, *Al-Siyar Al-Saghir* is preserved as it was written and it has reached us in its original shape. In fact, now it is available even in

¹³⁷ Ibid (footnotes omitted).

¹³⁸ Ibid.

¹³⁹ As Gazi, the translator of this book, calls it.

¹⁴⁰ Šhaybānī (n 38) 31.

English entitled *Muhammad al-Hasan al-Shaybani, Kitab Al-Siyar Al-Saghir*, or *The Shorter Book on Muslim International Law*, translated by Mahmood A. Gazi and published in New Delhi by Adam Publishers in 2005.¹⁴¹ The translator asserts that:

al-Hakim al-Shahid Muhammad ibn Muhammad al-Marwazi had prepared a summary of Shaybani's six books of *Zahir al-Riwdyah* which included his two works on *Siyar* as well. In this summary, Hakim had adopted the entire text of *al-Siyar al-Saghir* of Shaybani in the original form instead of attempting to make his own summary of the two *Siyars*. This assertion has not only been verified by its most popular and authoritative commentator, al-Sarakhsi, but is also supported by the fact that most of the extant manuscripts of *al-Kafi* use the title *al-Siyar al-Saghir* for the relevant chapter in *al-Kafi*.¹⁴²

As mentioned earlier, Al-Shaybani wrote this book while in Iraq, far from the borders of the Muslim State where one would expect the need for *Siyar* to govern interactions with others. This prompted Al-awzai, the great scholar based in Syria at the time, to offend Al-Shaybani by his famous statement when he questioned 'what has Mohammad (Al-Shaybani) to do with this', referring to *Siyar*. He uttered this statement when he read *Al-Siyar Al-Saghir*. Bouzenita recalls Al-awzai's statement that '[t]he people of Iraq are not entitled to a composition (*tasnif*) in these legal fields, as they have no knowledge in *siyar*. The military campaigns of the Messenger of Allah took place in Shām and the Hijāz, not in Iraq, as the latter has been opened to Islam only recently.'¹⁴³ When this proclamation reached Al-Shaybani, he embarked upon improving *Al-Siyar Al-Saghir* (the small *Siyar*) to produce *Al-Siyar Al-Kabir* (the major or grand *Siyar*). This new book was and is indeed a great achievement and a magnificent contribution to the field of *Siyar*. In fact, when a copy of it reached him, even Al-awzai admitted that it was a unique and valuable book. On this occasion it is reported that he even said, '[h]ad it not been evidenced by *ahādīth*, I would have said that he has taken the knowledge out of himself, and that Allah has destined the correct answer in his legal opinion (*rahy*).'¹⁴⁴

¹⁴¹ One of the most recent and useful reviews of this book is that of my friend Jean Allain. See Jean Allain, 'M. A. Gazi (Ed.), the Shorter Book of Muslim International Law Reviews' (2016) 1 *Jus Gentium: Journal of International Legal History* 183.

¹⁴² Šhaybānī (n 38) 33–4 (footnotes omitted).

¹⁴³ Bouzenita (n 27) 25–6.

¹⁴⁴ *Ibid* (footnotes omitted).

Clearly, Al-Shaybani was the most significant Islamic scholar in the field of international law in terms of his voluminous writing. Although, as we have seen above, he was not the first to write in this field, but writing his sophisticated book on international law (*Al-Siyar Al-Kabīr*) made him deserve the title.¹⁴⁵ Moreover, Al-Munajjid (1971) argues that Al-Shaybani was ahead of many prominent scholars such as Vitoria, Suarez and Vasquez. He thinks that Al-Shaybani was ahead of his time even compared to Grotius (1583–1645).¹⁴⁶ Meanwhile, Johnson (1997), commenting on the likening of Al-Shaybani to Grotius, suggests that:

a better comparison is with another major figure in Western moral tradition on war, the Spanish Dominican schoolman Vitoria, who after spending the majority of his career as a teacher, lecturer, and writer, concluded it as a consultant to his monarch, the emperor Charles V, on matters pertaining to the just use of force by the Spanish against the Indians in the New World.¹⁴⁷

Related to this, Robert Flint, one of the masters of philosophy of history, stresses that ‘the man of genius who is called the founder of a science merely brings together its already existing elements; he confines himself to uniting its *disjecta membra* and breathing into them the breath of life’.¹⁴⁸ Although Al-Shaybani had some precursors, none of them dealt with the subject of *Siyar* in its entirety in one book as he did. Thus he, I conclude, with no doubt deserves the title of the father of *Siyar*. Furthermore, many scholars deem him to be the pioneering author of international law, both public and private.¹⁴⁹ Nonetheless, the question of whether he is the father of international law is outside the scope of this book. Yet it must be noted that he is now increasingly regarded to be one of the foremost contributors to the field of international law.¹⁵⁰

¹⁴⁵ Šaibānī (n 117) 22.

¹⁴⁶ As-Sarakhsī, *Explanation of As-Siyar Al-Kabīr* (n 113) xiv.

¹⁴⁷ James Turner Johnson, *The Holy War Idea in Western and Islamic Traditions* (Pennsylvania State University Press 1997) 69.

¹⁴⁸ Ernest Nys, ‘Introduction’ in Francisco de Vitoria, *De Indis De Ivre Belli Relectiones, Text of 1696* (Ernest Nys ed., John Pawley Bate tr., The Carnegie Institution of Washington 1917) 55.

¹⁴⁹ See, for example, the author of ‘The Imam Mohammad Ibn Al-Hasan Al-Shaybani and his Impact on International Relations’ (PhD Thesis at Al-Azhar University: Faculty of Law and Sahri’a in 1997), Authman Juma’a Dmeriyah, ‘The Imam Mohammad Ibn Al-Hasan Al-Shaybani and His Book Al-Siyar Al-Kabir (2-2) [Al-Imam Muhammad Ibn Al-Hasan Al-Shaybani Wa Kitabuho Al-Siyar Al-Kabir 2-2]’ (*Midad*, 29 December 2007) <<http://www.midad.me/arts/view/aut/10691>> (accessed 27 November 2011).

¹⁵⁰ Mashood A. Baderin, ‘People in Portrait’ in Fassbender et al. (n 1) 1081.

Nevertheless, Al-Shaybani wrote *Al-Siyar Al-Kabīr* in the eighth century and it has been consistently consulted by Islamic governments ever since. However, this original work on the Islamic law of nations is not available in its entirety today.¹⁵¹ Nevertheless, Muhammad Ibn Ahmad Al-Sarakhsi in the eleventh century made a valuable attempt to rewrite it while adding his own comments.

Al-Sarakhsi's book *Sharih Kitab Al-Siyar Al-Kabīr Li-Muhammad Ibn Al-Hasan Al-Shaybani* was combined and republished by Salaah Al-Deen Al-Munajjid (5 vols, Cairo: Ma'had Al-Makhtu'tat 1971). The book is in Arabic and its title reads: *Explanation of Al-Siyar Al-Kabīr of Al-Shaybani by Al-Sarakhsi, edited by Al-Munajjid, 1971*. This book is extremely valuable; first, because it contains the original book by Al-Shaybani on international law (*Al-Siyar Al-Kabīr*), and second, because Al-Sarakhsi critically analysed Al-Shaybani's rules in it.

Al-Sarakhsi's commentary on Al-Shaybani's book has reached us in its entirety. However, some scholars argue that it is very difficult to distinguish the original text of Al-Shaybani from the opinion of the commentator, Al-Sarakhsi. For example, Gazi points out that '[t]he text and the commentary are so interwoven that it is extremely difficult to separate the two. Any effort to distinguish the two is bound to be arbitrary.'¹⁵² He adds that '[t]he editors of the Hyderabad edition of the commentary have tried to identify the text placing them in parentheses. But their identification differs in several places to the text identified by Salāh al-Din al-Munajjid.'¹⁵³ While this may be true in some editions, in the Cairo edition (Al-Munajjid's) it is not impossible to distinguish the opinion of Al-Shaybani, as it is always attributed to him. Any opinion in the book is normally attributed to its holder. Therefore, this is no great cause for concern. In fact, even Gazi states in the same book that 'in spite of the conjectural nature of the text identification by the learned editors of the two editions, the text can be distinguished with a fairly high degree of certitude in most cases'.¹⁵⁴

I shall now first introduce the author of this masterpiece, Al-Sarakhsi. Following that, I will address Al-Shaybani's book as found in the latter's work and relate it to this study.

¹⁵¹ There are only few scripts that are kept in some museums around the world.

¹⁵² Šhaybānī (n 38) 32–3.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

1.3 AL-SARAKHSI

Muhammad Ibn Ahmad Abu-Baker Shamsu Al-imam Al-Sarakhsi,¹⁵⁵ who died at the end of the fifth century AH (483/1090), was one of the great scholars of *fiqh* (jurisprudence) and language.¹⁵⁶ He was imprisoned because he ruled that the marriage of the local governor with his emancipated woman was unlawful, as it happened before a required legal period.¹⁵⁷ He served 15 years, during which period he taught his disciples from his cell. It is said that he dictated his book *Sharīh Kitāb Al-Siyar Al-Kabīr* by heart while his students wrote outside his cell. When they reached the chapter of *al-shoroot* (the conditions), he was released and completed this work as a free man (480/1087).¹⁵⁸ It is worth noting that Al-Sarakhsi dropped some chapters of the original work of Al-Shaybani. He confesses this without referring to them specifically.¹⁵⁹ It is unfortunate that the original work of *Al-Siyar Al-Kabīr* is only available in this book; therefore, we have to accept the narration of Al-Sarakhsi and rely on his memory and sincerity, as Al-Munajjid comments.¹⁶⁰ Gazi speculates that it is difficult to assert whether Al-Sarakhsi had a copy of *Al-Siyar Al-Kabīr* at hand while he was dictating his commentary. He further argues that in case he did not:

... It is difficult to determine as to how much of the original he was able to incorporate in his commentary by dint of his extraordinary memory, even though that was something not unusual among the Muslim scholars of the early centuries of Islam. However, it may well be probable that the students sitting around the pit possessed copies of the original and read out to the imprisoned teacher the passages of the original which Sarakhsi set out to elaborate and explain. Recitation of the text by the students in order that it be explained by the teacher was, and still is, a prevalent practice in the traditional centres of Islamic learning.¹⁶¹

Some people would claim that ‘Sarakhsi’s works are considered generally as the commentaries on Shaybani’s works and to that extent only as

¹⁵⁵ In Western literature, his name is written in a number of different ways including Sarakhsī, As-Sarakhsī, al-Sarakhsī, Sarakhsi, As-Sarakhsi and Al-Sarakhsi. The latter is adopted in this book.

¹⁵⁶ As-Sarakhsī, *Explanation of As-Siyar Al-Kabīr* (n 113) iv.

¹⁵⁷ Ibid xvi.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid xvii.

¹⁶⁰ Ibid.

¹⁶¹ Šhaybānī (n 38) 32.

exposition of his works'.¹⁶² However, Kassim (1994) disagrees with this claim and points out that Al-Sarakhsi further contributes to the various fields in a great way. For example:

1. 'Sarakhsi systematizes the doctrine of juristic preference to its fullest and seeks its justification directly from Shari'a sources.'¹⁶³
2. He 'shows the relevance of the doctrine of juristic preference and its application to the muwada'a (treaties), mu'amalat (mutual relations) of Muslims with other nations concerning the ahkam al-dunya (worldly affairs)'.¹⁶⁴

To be just to both, Al-Shaybani had offered the first comprehensive book on *Siyar* and Al-Sarakhsi thereafter had offered us that book together with his valuable commentary. Therefore, in our age, neither of them can be mentioned with regard to the field of international law without mentioning the other. This is because, as shown above, today, the work of Al-Shaybani can only be traced through that of Al-Sarakhsi, and the work of Al-Sarakhsi is greatly indebted to that of Al-Shaybani.

1.4 AL-SIYAR AL-KABĪR

As we have noted above, *Al-Siyar Al-Kabir* by Al-Shaybani is only available through reading Al-Sarakhsi's commentary book on it (*Sharih Kitab Al-Siyar Al-Kabir*). This book in its original form is only available in a few museums and institutions around the world. Two key attempts have been made to revive it: one version was published in Hyderabad and the other in Cairo. Some other attempts were also made to revive this book such as the version by Mohammad Hassan Ismail Al-Shafi'i, published in Beirut (1417/1997).¹⁶⁵ Furthermore, an attempt to produce

¹⁶² Husain Kassim, *Sarakhsi, Hugo Grotius of the Muslims: The Doctrine of Juristic Preference and the Concepts of Treaties and Mutual Relations* (Austin & Winfield 1994) 4.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Mohammad Hassan Muhammad Ismael Al-Shafi'i, *Explanation of Al-Siyar Al-Kabir of Muhammad Ibn Al-Hasan Al-Shaybani; Dictated by Muhammad Ibn Ahmad As-Sarakhsi [Sharih Kitab Al-Siyar Al-Kabir Li-Muhammad Ibn Al-Hasan Al-Shaybani – Imla Muhammad Ibn Ahmad Al-Sarakhsi]* (Dar Al-kutob Al-ilmiyah 1997).

another copy of this book was made at the University of Cairo, resulting in the production of one volume only, edited by Mohammad Abu-Zahra in 1958.¹⁶⁶

In addition, a further copy of the commentary on the book of Al-Shaybani (*Sharīh Kitāb Al-Siyar Al-Kabīr Li-Muhammad Ibn Al-Hasan Al-Shaybani*) was discovered. This commentary was produced by Mohammad Al-muneeb Al-e'itabi Al-Istanbuli and was handwritten. This copy is retained in Aarif Hikmat's library in Medina. The book is called *Tayseer Al-maseer fī Sharīh Al-Siyar Al-Kabīr [The Book of Facilitating the Understanding of the Commentary on the Grand Siyar]*.¹⁶⁷ This book adds yet another extraordinary work to the works of both Al-Shaybani and Al-Sarakhsi, for it further elaborates on the *Explanation of Al-Siyar Al-Kabīr* written by Al-Sarakhsi.¹⁶⁸

However, as I am content with its inclusiveness, significance and reliability, I shall work with the Al-Munajjid edition. This edition seems to be both complete and preferred by many of the great scholars working on the subject such as Abū al-Wafā. Thus, in this book I will be working with the Cairo version in particular, as it has been possible to authenticate it by comparing it to an original script held in Leiden.

1.4.1 Al-Munajjid's Edition

The Institute of Arabic Manuscripts¹⁶⁹ and the League of Arab Nations successfully unearthed, translated and combined the work of Al-Sarakhsi.¹⁷⁰ By this great work, these institutions and Salaah Al-Deen Al-Munajjid in particular have saved the only book containing most of Al-Shaybani's 'grand *siyar*'. Al-Munajjid combined the book and forwarded it to the aforementioned institutions to be published in 1971 in five volumes.¹⁷¹

¹⁶⁶ Dmeriyah (n 149).

¹⁶⁷ Ibid.

¹⁶⁸ Muḥammad Munīb ibn Abd Allāh Aynatābī al-Istanbūlī, *The Book of Facilitating the Understanding of the Commentary on Al-Siyar Al-Kabīr: [Tayseer Al-Maseer Fi Sharīh Al-Siyar Al-Kabīr Istaktabahu Muallifahu Al-Sayed Mohamad Muneeb Ibn Al-Haj Al-Intabi Alistanbuli]* (handwritten in 1215 Hijri, 1800).

¹⁶⁹ 'The Institute of Arabic Manuscripts' <<http://www.malecso.org/institute/who-we-are>> (accessed 31 December 2017).

¹⁷⁰ Al-Munajjid travelled from Cairo to Damascus, Paris, Beirut, Istanbul and many other cities wherever a copy of this book or part of it was saved in museums, universities or libraries.

¹⁷¹ As-Sarakhsi, *Explanation of As-Siyar Al-Kabīr* (n 113) iv.

The book contains rules governing the relationship between Muslims and non-Muslims both as individuals and as polities in a comprehensive manner. It discusses *jihad* (use of force), *ama'an*¹⁷² (safe conduct), prisoners of war, the rules of ransom, spoils of war, war crimes, the rights of those granted asylum, delegations and envoys and their rights, international and transnational property law, treaty law, international trade law and rights of religious minorities. In addition, the book deals with hundreds of other rules governing the relationship between Muslim and non-Muslim states, as well as individuals,¹⁷³ in times of both peace and war at home and abroad.

The first volume deals with defence and war in *Siyar* in a comprehensive manner. It even discusses what should people wear and eat during war. Not only does the volume contain rules to protect diplomatic envoys, it also provides civilians with the right to move and trade freely after being granted the state of *ama'an*. In the second volume, the book continues to deal with conduct of *ama'an* whereby a foreigner[s] is granted pledge of security over his/her life and property with permission to enter the country. Almost half of the volume is concerned with this topic. The second main topic discussed is the characterizations of spoils of war and the rules regulating the practice.

The third volume is mainly concerned with the regulation of spoils of war. It also deals with property acquisition, conveyancing and possession. It goes as deep as to regulate even renting and hiring equipment in a foreign land. Following this, the writer clarified the rules for what the army should obtain or use and what they should not within foreign lands. The book then goes on to deal with the rules on prisoners of war and whether they should be freed, ransomed, distributed or executed. A major part of the fourth volume contemplates the position of merchants and trade regulations internationally. It also deals with various other topics such as the position of subjects in a foreign land. The position of religious minorities as subjects of a Muslim country was also given a great deal of attention by Al-Shaybani. For example, he discussed their right to freedom of belief and their right to maintain their places of worship. He also explained the rights and duties of visitors and traders as well as inhabitants in Muslim lands.¹⁷⁴ In contrast, the following chapter explained the status of Muslims in a non-Muslim land.

¹⁷² Khadduri describes it as safe conduct, pledge of security.

¹⁷³ Individuals are considered subjects of international law according to *As-Siyar*.

¹⁷⁴ Muhammad Ibn Ahmad As-Sarakhsī, *Explanation of Al-Siyar Al-Kabīr of Muḥammad Ibn Al-Hasan Al-Shaybānī [Sharīh Kitāb Al-Siyar Al-Kabīr*

Shifting the focus, the first chapter in volume five deals with peace agreements between Muslim and non-Muslim entities. This peace agreement is called *mowada'ah*¹⁷⁵ and the writer explicitly considered all possible terms and conditions that such an agreement could contain. The rest of this volume delves into what we know today as matters of private international law. It is concerned with matrimonial legal issues in both Muslim and non-Muslim lands. It also considers succession law and many other issues regulating the position of foreigners in a Muslim territory and the position of subjects in foreign territories.

It is noteworthy that Al-Sarakhsi debates the teachings of Al-Shaybani and rejects them whenever he thinks it is appropriate to do so, which makes his book a very valuable work. As was the trend, whenever an opinion of another scholar is mentioned/discussed, acknowledgement would follow. Thus, we can easily distinguish the opinion of Al-Shaybani from the author's as well as opinions of others or other opinions mentioned.

Al-Munajjid published this book after being examined by three prominent Hanafi scholars and the old copy of Al-Sarakhsi's book at the American University in Beirut was selected to be the main source, especially in the second volume.¹⁷⁶ In addition, Al-Munajjid stated that 'after the publication of the first volume we managed to view another copy of the original book *Sharih Kitab Al-Siyar Al-Kabir Li-Muhammad Ibn Al-Hasan Al-Shaybani*'.¹⁷⁷ This copy is still retained in Leiden University today. It 'dates back to the year eight hundred of the Islamic calendar (i.e. 1422 A.D.). It was copied by hand by Mohammed Ibn Hussein Ibn Ali Al-Ameeli.'¹⁷⁸ The fact that Al-Munajjid used many copies held at different institutions around the world highlights the authenticity of his work.

Furthermore, *War and Peace in the Law of Islam* (The Johns Hopkins Press, Washington 1955) and *Law in the Middle East* (The Middle East

Li-Muhammad Ibn Al-Hasan Al-Shaybani – Imla Muhammad Ibn Ahmad Al-Sarakhsi, vol 4 (Salah Al-Deen Al-Munajjid ed, Ma'had Al-Makhtu'tat 1971) 1689.

¹⁷⁵ Ibid 1528–53.

¹⁷⁶ Muhammad Ibn Ahmad As-Sarakhsi, *Explanation of Al-Siyar Al-Kabir of Muhammad Ibn Al-Hasan Al-Shaybani* [*Sharih Kitab Al-Siyar Al-Kabir Li-Muhammad Ibn Al-Hasan Al-Shaybani – Imla Muhammad Ibn Ahmad Al-Sarakhsi*], vol 2 (Salah Al-Deen Al-Munajjid ed., Ma'had Al-Makhtu'tat 1971) iii.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

Institute, Washington 1955), both written by M. Khadduri, were used as secondary sources by Al-Munajjid. Coinciding with these, Hans Kruse's article in the Journal of the Pakistan Historical Society, *Al Shaybani on International Instruments*,¹⁷⁹ was also consulted.¹⁸⁰

Nevertheless, the reader might be confused by the discovery that the book covers of volumes four and five have Al-Munajjid as an editor but the name mentioned on the first page is Abd-Al-Azeez Ahmad. Even so, as the book covers stated the same publisher as for the past three volumes, I decided to keep citing Al-Munajjid to avoid confusion.

The editor of this book (Al-Munajjid) affirmed that the original book written by Al-Sarakhsi was divided into two volumes only. Nevertheless, it seems that the original book was structured by way of topic-based chapters, as the connection between the chapters is obvious even if they are about different fields of law.¹⁸¹

The page numbering is consecutive throughout the five volumes. This raises the question of whether the five-volume division was merely a necessity dictated by the amount of unearthed work of Al-Sarakhsi. Whatever the case is, the continuity of the page numbers across all the volumes is a sign of the connectivity, originality and reliability of this work, which claims to present Al-Sarakhsi's book in its original form. Moreover, as chapters and pages were chronologically related and in consecutive order, Al-Munajjid's statement that the original work was divided into two volumes seems likely to be true.

1.4.2 The Leiden Manuscript

To reaffirm the authenticity of the version of the book I am using, I accessed a copy of the manuscript held at Leiden University and compared it to Al-Munajjid's edition of *Sharīh Kitāb Al-Siyar Al-Kabīr*. Just as Al-Munajjid stated, this copy testifies that it was written in the year 800 according to the *Hijri* calendar, which is the year 1422 AD. It was handwritten by Al-Ameeli, as mentioned above. Moreover, the Leiden copy was handwritten and bears a signature which I cannot verify. This copy of Al-Sarakhsi's work was almost identical to the book I am

¹⁷⁹ Vol I (1953) 90–100.

¹⁸⁰ As-Sarakhsī, *Explanation of As-Siyar Al-Kabīr* (n 176) ix.

¹⁸¹ For example, although he treatment of spoils of war in volume III is very extensive, in volume IV, whenever Al-Shaybani felt the need or the connection to the topic, he tackled it again.

using. Al-Munajjid, the editor of the latter, did, as mentioned above, refer to the Leiden copy in his book.¹⁸²

The table of contents is also almost identical in the two versions. However, some sub-headings or subdivisions are not mentioned in Al-Ameeli's version. For example, on page 89 Al-Munajjid has a subheading called (raising the voices) between the subheadings 'the detestation of bells' and 'fighting in sacred months'; this subheading 'raising the voices' is not found in the Leiden version.¹⁸³ However, the text of the two books is exactly the same if we take out this subheading which appears in Al-Munajjid's version. On the other hand, from the Leiden version I can now say that the original book, just as Al-Munajjid stated, was unlikely to have been in five volumes as divided by him. This is because Al-Ameeli produced it in two volumes. Nevertheless, it must be emphasized that topics, chapters and the text are still the same in both versions.

Also worth mentioning is the fact that even when Al-Shaybani had used two different words to convey the same meaning on two separate occasions, this was still conveyed by Al-Sarakhsi. An example of this is the point at which Al-Sarakhsi writes 'Chapter of War: How to Prepare for it', and in another version 'How to Enter it'.¹⁸⁴ This means that Al-Sarakhsi not only was drawing on the original book of Al-Shaybani but he also mentioned any differences between the original copies he (seems to have) had of it. This is further support for the fact that Al-Sarakhsi was citing the original book of Al-Shaybani in great detail and with identical wordings. Meanwhile, Al-Munajjid's version has also proved to be very authentic because we see exactly the same original (additional¹⁸⁵) comments in the main body of the book in his edition too.¹⁸⁶

The various minor differences between the two versions are not easy to locate. For example, some added words in Al-Ameeli's version are not

¹⁸² As-Sarakhsi, *Explanation of As-Siyar Al-Kabir* (n 176) xix–xxi.

¹⁸³ Mohammed Ibn Hussian Ibn Ali Al-Ameeli and Muhammad Ibn Ahmad Al-Sarakhsi, 'Explanation of Al-Siyar Al-Kabir of Muhammad Ibn Al-Hasan Al-Shaybani; Dictated by Muhammad Ibn Ahmad Al-Sarakhsi Written 800 Hijri. [Sharih Kitab Al-Siyar Al-Kabir Li-Muhammad Ibn Al-Hasan Al-Shaybani – Imla Muhammad Ibn Ahmad Al-Sarakhsi; Tama Sanat 800 Hijri] (Microfilm, Leiden University Library 2009, OR 373)'.

¹⁸⁴ Ibid 29.

¹⁸⁵ These comments would not have been essential if Al-Munajjid wanted to convey the mere thoughts and comments of As-Sarakhsi; however, he proved that he has committed himself to conveying the text of the book exactly as it was.

¹⁸⁶ As-Sarakhsi, *Explanation of As-Siyar Al-Kabir* (n 113) 116.

present in Al-Munajjid's. These are, for example, the words 'he said' (referring to Al-Shaybani) at the beginning of one of the chapters of the former version,¹⁸⁷ which are not found in the latter.¹⁸⁸ In addition, some additional words such as ending a chapter by saying 'Allah knows best', found in Al-Ameeli's version,¹⁸⁹ were slightly different from those in the version I am working on, as it said: 'and Allah is the one who helps us to successes.'¹⁹⁰ Another example is when Al-Munajjid wrote 'and said Mohammad may the mercy of Allah be upon him ...',¹⁹¹ whereas Al-Ameeli wrote 'and said Mohammad, may Allah confer mercy on him ...'.¹⁹²

Considering the above, it can be confidently said that the book presented by Al-Munajjid is the same as the original copy held at Leiden, which was presented by Al-Ameeli. The minor differences are inconsequential. Unless one reads and compares them both word by word and letter by letter, it is difficult to spot the minor differences in some usages of words. The differences could also rightly be likened to the difference between using the term 'in addition' in one copy and using 'moreover' in the other. Thus, the meaning and the main body of the text in both remains the same.

On the other hand, this copy kept at Leiden University since the seventeenth century raises the question of whether early European international law scholars could have learned about Al-Shaybani's writings. Furthermore, was there any link between Grotius, a graduate of Leiden who was very familiar with the international law writings in its library in that era, and Al-Shaybani's works?

¹⁸⁷ Al-Ameeli and Al-Sarakhsi (n 183).

¹⁸⁸ As-Sarakhsi, *Explanation of As-Siyar Al-Kabir* (n 176) 546.

¹⁸⁹ As is found in the chapter discussing the case when a foreigner becomes *dhimmi*.

¹⁹⁰ Muhammad Ibn Ahmad As-Sarakhsi, *Explanation of Al-Siyar Al-Kabir of Muhammad Ibn Al-Hasan Al-Shaybani [Sharih Kitab Al-Siyar Al-Kabir Li-Muhammad Ibn Al-Hasan Al-Shaybani – Imla Muhammad Ibn Ahmad Al-Sarakhsi]*, vol 5 (Salah Al-Deen Al-Munajjid ed., Ma'had Al-Makhtu'tat 1971) 2243.

¹⁹¹ Ibid 2244.

¹⁹² This too was in the chapter 'when does a foreigner become *dhimmi* (subject)'.

1.5 MAIN WRITINGS IN THE AREA

Although there are quite a few works on *Siyar* in other languages, especially in Arabic, in this area there are only few authorities available in English today. One of the main and most recent works in Arabic is the work of Abū al-Wafā, head of the international law department at Cairo University. One of his works is an encyclopaedia entitled *A Book of International Law and Relations in Islamic Shari'a*, published by Dar A-Nahdah Al-Arabiah in Cairo, 2007/1428, in 17 volumes. It is a magnificent contribution to knowledge.¹⁹³ It is probably the most up-to-date Arabic text on the topic of *Siyar*. In English, although there are few works available on the general topic, the works of Hamidullah¹⁹⁴ and Al-Ghunaimi¹⁹⁵ are among the most recommended ones. However, on the contributions of Al-Shaybani, there are fewer authorities such as Gazi, the translator of *Al-Siyar As-Saghir*, Husain Kassim and his book *Sarakhsi-Hugo Grotius of the Muslims*, and Khadduri the author of *The Islamic Law of Nations*. In addition, a few articles (see bibliography) have embarked upon studying some of the works of Al-Shaybani. However, at least in English, there is no trace of any work that has comprehensively addressed the latter's contribution to international law. Moreover, there is a lack of thorough investigation of the position of Al-Shaybani among other international law authors in history.

Nevertheless, after a deep reflection on Khadduri's book *The Islamic Law of Nations Shaybani's Siyar*, one might conclude that while this book might only be categorized as 'a sample of classical' Islamic law of nations, it is hard to relinquish thinking about the advisability of the rest of the title. Although Khadduri's work contained a large portion of Al-Shaybani's writings on international law, his book goes further to encompass the opinions of both Al-Shaybani's masters Abu-Hanifa and Abu-Yusuf. For example, more than half of the translation consists purely of discussions held by Al-Shaybani's teachers.¹⁹⁶ This point indicates that not all of the book consisted of Al-Shaybani's *Siyar*. It is also clear that

¹⁹³ The book title in Arabic is *kitab alaa'lam biqawaa'd alqanoun aadouli wala'laqat aadouliah fi shria'ah al-islamiyah*.

¹⁹⁴ Especially his works *The Muslim Conduct of State and Battlefield of the Prophet*. The vast majority of writers in the area cite his works.

¹⁹⁵ His *The Muslim Conception of International Law and the Western Approach* is one of the very few major sources for an English reader on the relations between Western international law and *Siyar*.

¹⁹⁶ From page 96 until page 253, Khadduri's book mainly contains questions by Abu-Yousf answered by Abu-Hanifa.

Khadduri (1966) did not literally translate the original book *Al-Siyar Al-Kabīr* as it was offered by Al-Shaybani. Instead, he tried to collect some of Al-Shaybani's writings on the law of nations, to construct the latter's *Siyar*. Hence, the translation by Khadduri, although containing some of the writings of Al-Shaybani on *Siyar*, does not necessarily signify a translation of *Al-Siyar Al-Kabīr* of the latter.¹⁹⁷ Khadduri did not rely on Al-Sarakhsi's explanation of *Al-Siyar Al-Kabīr*. Instead, he relied on his own work through importing Al-Shaybani's writings on *Siyar* from other sources that were not always even other works of Al-Shaybani himself.¹⁹⁸

Khadduri justifies this approach in his book by claiming that 'Sarakhsi's commentary amounts virtually to a new book; he failed to reproduce Shaybani's original text, to which access was denied him in the prison, although it may be regarded as an exposition of Shaybani's doctrines on the *siyar* as he understood them'.¹⁹⁹ He further argues that the original text of *Al-Siyar Al-Kabīr* failed to reach us even through Al-Sarakhsi's commentary, as it is hard to distinguish from the overall text. For this reason, Khadduri thinks that Al-Sarakhsi's commentary symbolizes *Siyar* according to the Hanafi School in the eleventh century and not in the eighth century of Al-Shaybani.²⁰⁰

Notwithstanding this claim, the allegation that the original text is difficult to distinguish from Al-Sarakhsi's commentary is easily countered after the re-publication of *Sharīh Kitāb Al-Siyar Al-Kabīr* in 1971. Further to our earlier argument, in Al-Sarakhsi's commentary book, republished five years after Khadduri's, the original text of *Al-Siyar Al-Kabīr* can easily be distinguished. Al-Sarakhsi clearly separated Al-Shaybani's arguments by saying: 'Mohamed said'; 'and he stated'; 'and he narrated' (referring to Al-Shaybani) so as to keep it as it was in the original book *Al-Siyar Al-Kabīr*. However, Al-Sarakhsi also added his own explanations.²⁰¹

Furthermore, throughout Khadduri's book, Al-Sarakhsi's *Sharīh Kitāb Al-Siyar Al-Kabīr* is consulted as a primary source of Al-Shaybani's

¹⁹⁷ This discussion builds on my previously published article: Khaled Ramadan Bashir, 'Reconsideration of Khadduri's The Islamic Law of Nations Shaybani's *Siyar* by Majid Khadduri, The Johns Hopkins Press, 1966, ISBN 978-0801869754' (2013) 9 *Journal of Islamic State Practice in International Law* 9.

¹⁹⁸ Šaibānī (n 117) 44.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Bashir (n 197).

Siyar. As for the credibility of Al-Sarakhsi, it was never a subject of suspicion even by Khadduri.

From the above, it follows that if we are to choose between the credibility of a writer who commented on *Al-Siyar Al-Kabīr* in the eleventh century (three centuries after the original text was written) and between a twentieth-century scholar who tried to infer the original text from more than one source including the one produced by the writer in our first choice, it is obvious that the text of the eleventh century by Al-Sarakhsi is the worthy one. In fact, Gazi, who is credited with combining and translating *Al-Siyar Al-Saghir*, stressed the point that:

[i]n his effort to make his readers believe that both the *Siyars* of Shaybani had been lost, Khadduri arbitrarily picks up a chapter from *Kitdb al-Asl* and presents it as Shaybani's *Siyar*. The material included by him in this book does contain Shaybani's ideas on the *Siyar*, but it can in no case be called *al-Siyar al-Saghir* of Shaybani or Shaybani's *Siyar*.²⁰²

Nevertheless, it is worth mentioning that Khadduri's book *The Islamic Law of Nations Shaybani's Siyar*, which was published in 1966, involved a huge amount of work to unearth, collect and translate old scriptures that embodied the rules of *Siyar* in Al-Shaybani's era.²⁰³ As stated above, Khadduri has offered the English reader insights into classical Islamic international law in general; he also provides the reader with the opportunity to learn about some of the writings of Al-Shaybani in this field. Nonetheless, Khadduri's work being different from the work of Ma'had Al-Makhtu'tat (Arabic Institution of Manuscripts) means that the latter would, with no doubt, be evaluated differently: as a specialized institution offering the best available account of Al-Shaybani's work by providing the aforementioned work of Al-Sarakhsi.²⁰⁴

Thus from the above, Al-Sarakhsi's work *Sharīh Kitāb Al-Siyar Al-Kabīr Li-Muhammad Ibn Al-Hasan Al-Shaybani* represents the best available version of the first (known) book written on international law separately from all other fields of law. The fact that this work encompasses the book²⁰⁵ of Al-Shaybani, independently, makes it worthy of preference.

²⁰² Šhaybānī (n 38) 33.

²⁰³ I.e. the eighth century.

²⁰⁴ Al-Munajjid (1971) stated that the only available copy of *Al-Siyar Al-Kabier of Al-Shaybani* is the one that could be inferred from As-Sarakhsi's *Sharīh Kitāb Al-Siyar Al-Kabier Li-Muhammad Ibn Al-Hasan Al-Shaybani*.

²⁰⁵ This fact is only restricted by the fact that As-Sarakhsi has admitted omitting some of the original work of Al-Shaybani in his commentary.

1.6 THE BOOK'S OBJECTIVE

The above facts on 'the contribution of Shaybani in the systematization and codification of the international law of Islam has invited the attention of a number of Western scholars'.²⁰⁶ In addition, Al-Shaybani's work was published in Turkish translation in 1825. This had prompted Hammer Purgstall, the well-known Austrian historian examining Al-Shaybani's work, to call him 'the Hugo Grotius of the Muslims'.²⁰⁷ However, Gazi, who is familiar with the writings of Al-Shaybani and the translator of one of his books, argues that Al-Shaybani (d. 804 CE) came centuries before Hugo Grotius (d. 1645 CE); thus some credit should go to the former scholar who pioneered in this field.²⁰⁸

In addition, a group of international law scholars who were impressed by Al-Shaybani's work founded the Shaybani's Society of International Law in 1955 in Germany.²⁰⁹ In addition, the UNICCO translated one of his books into French.²¹⁰

Al-Shaybani's book *Al-Siyar Al-Kabīr* was far more precise and firm than one could imagine, considering the time in which it was written. It dealt comprehensively with international legal aspects of the eighth century. This led Al-awzai²¹¹ to confess: 'had this book contained no clauses from Quran or Sunnah, I would have said that it is an invention of Al-Shaybani.'²¹² Abū al-Wafā has also stressed that 'Al-Shaybani did compile a comprehensive and conclusive work on the rules of international law especially those that must be followed in war times'.²¹³ Indeed, Abū al-Wafā, who studied the rules of international law in Al-Shaybani's writing in light of those of contemporary international law, went on to say that 'what Al-Shaybani introduced in the eighth century is not less, if not more, than what the practice is now'.²¹⁴

Although Khadduri has offered the English reader some account of classical *Siyar*, it cannot be considered as Al-Shaybani's *Siyar*, as I pointed out before.²¹⁵ However, Al-Shaybani's short *Siyar* was translated

²⁰⁶ Šhaybānī (n 38) 33.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Abū al-Wafā (n 12) 3.

²¹¹ A great scholar who lived in the time of Al-Shaybani.

²¹² Al-Munajjid, vol 1 (n 113) 277.

²¹³ Abū al-Wafā (n 12) 4.

²¹⁴ Ibid 5.

²¹⁵ Bashir (n 197) 9.

by Gazi as shown above and it is truly a great loss not to have Al-Shaybani's grand *Siyar* (as in Al-Sarakhsi's book) in English. Even if we may not agree with every rule in it, it is far from being just a simple textbook on international law. The book went as far as to discuss what a person should eat and what should not be done in a foreign land. Furthermore, an easy comparison can be seen between rules contained in the Geneva Conventions and a major part of this work in particular and between this book and contemporary international law in general.

Furthermore, today, 'it is being increasingly realized that Shaybani played an exceedingly impactful role on the development of international law as such, so much so that he merits to be considered one of the founders of this branch of law'.²¹⁶ Besides, as we have seen above, '[a]part from dealing with questions of international law in quite a few of his works, two of Shaybani's works are exclusively devoted to this subject'.²¹⁷ In a relevant vein, Baron de Taube went so far as to speculate that 'the modern public International law of declarations of war was a direct descendant of Islamic doctrine'.²¹⁸ Christopher Weeramantry has also offered evidence of 'the influence of Islamic doctrine in the writings of Hugo Grotius on the law of combat'.²¹⁹

Despite the above, there are not enough studies of the extent to which Al-Shaybani has contributed to the advancement of international law. There is no study that has considered his contribution compared with those of other renowned contributors to the field. This book takes filling this lacuna as its goal, focusing on *Al-Siyar Al-Kabīr* as it is Al-Shaybani's main international law work. Studying this work of Al-Shaybani in a historical context, as will be explained next, should allow us to explore the extent to which his contribution helped further and develop the field of international law.

²¹⁶ Šhaybānī (n 38) xi.

²¹⁷ Ibid.

²¹⁸ James Cockayne, 'Islam and International Humanitarian Law: From a Clash to a Conversation between Civilizations' (2002) 84 *International Review of the Red Cross* 598 <<https://www.icrc.org/eng/resources/documents/article/other/5fld2f.htm>> (accessed 5 September 2017).

²¹⁹ Ibid.

1.7 METHODS OF STUDY

The aim is to study *Al-Siyar Al-Kabīr* as a textbook on international law of the eighth century as well as the texts of some of other scholars who came before and after Al-Shaybani regardless of the sources of their law.

When examining this work of Al-Shaybani, it must be borne in mind that it was written in a different time at a different stage of human history. This is why I will discuss matters that are different to contemporary international law within their historical context. I intend to focus on some of the main topics discussed in Al-Shaybani's book in order to be able to evaluate his contribution to this field. Nevertheless, the research shall not be a historical analysis of events – where law, I believe, might be respected or might be abused – for in this research I will not be comparing a system to a concept. I will only refer to events where they are important to understand the law or to interpret it. This means that relevant events will mainly be earlier practices. The fact that contemporary international law takes the practice of states as a source of law cannot affect my approach. This is because contemporary international law is not necessarily a yardstick to measure other civilizations' view of international law. In fact, limiting ourselves to the notion that any legal norm to be considered as part of international law must be a practice of states is a very narrow approach.

In order to ensure a high standard in dealing with historical texts such as this book, I have looked at some works where similar old living works are considered, for example, the works of Khadduri on the texts of Al-Shaybani and Abu-Yusuf, the work of Gazi on Al-Shaybani's *Al-Siyar Al-Saghir* and the work of Ra'afat Abdulmutalib on *Al-um of Al-Shafi'i*. My method of understanding the text, analysing its contents and authenticating its narrations will largely conform to their conventional approaches.

Nevertheless, I will aim to study Al-Shaybani's thoughts and methods in *Al-Siyar Al-Kabīr* in a historical context. This will be done through comparing him to some of the renowned historical contributors to international law, namely Augustine, Gratian, Aquinas, Vitoria and Grotius. In my opinion, this must be done before any attempt to establish the relationship between our contemporary international legal order and the writings of this great eighth-century jurist, because '[t]he Islamic contribution to the development of international law has to be evaluated in an historical perspective that takes into account the situation which

existed before the birth of Islam'.²²⁰ This is because *Siyar* could change according to the change of time and circumstances.

1.7.1 Sources and Materials

This study was mainly library-based. However, this did not prevent discussions with eminent scholars in rare fields where necessary. I have relied on both Arabic and English language sources. I should establish the relationship between Al-Shaybani's work and the work of other selected thinkers first, and then through this examine the contributions of Al-Shaybani to the field of international law.

It has already been explained that *Sharīh Kitāb Al-Siyar Al-Kabīr* is the most authentic book containing the original work of Al-Shaybani of *Al-Siyar Al-Kabīr*. However, I will still compare its text to that of *Al-Siyar Al-Saghir* by Al-Shaybani translated by Gazi. Moreover, I will also consult the authentic copy held at Leiden University.

1.7.2 Augustine, Gratian, Aquinas, Vitoria and Grotius

Dolezalek argues that comparing Al-Shaybani to European scholars of the Middle Ages is not fair because European scholars like Augustine and Gratian were not in a position to write on international law in such sophisticated terms.²²¹ Nevertheless, this claim, in my view, should be thoroughly tested. Furthermore, these scholars were carefully selected. For example, Augustine was by far the most cited authority on 'just war' throughout the Middle Ages and beyond. 'The die for medieval just-war was cast by St Augustine, who combined Roman and Judaeo-Christian elements in a mode of thought that was to influence opinion throughout the Middle Ages and beyond.'²²² Therefore, even if Dolezalek was right and Augustine did not write as prolifically or as eloquently as Al-Shaybani, he is comparable to the latter, as he played a significant role in reshaping war in international law as perceived in the West.²²³ Another reason for selecting Augustine is to look for any similarities

²²⁰ S. Ahmed El-Kosheri, 'Islam' in R. Bernhardt (ed.), *Max Planck Encyclopedia of Public International Law* (1981) 229.

²²¹ Interview with Gero Dolezalek, Professor of Civil Law, School of Law, University of Aberdeen (Aberdeen, 11 May 2009).

²²² Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge University Press 1979) 16.

²²³ I am aware of the fact that Augustine is not a Western scholar by birth; he was born in North Africa in 354 AD. However, we may still use the description

between him and Al-Shaybani who succeeded him. I will also, for many of these reasons, consider the teachings of Gratian, who is by far one of the most important figures of canon law in the Middle Ages. Another motive for drawing a comparison with him is that unlike Augustine, Gratian came centuries after Al-Shaybani; thus comparing Gratian to the latter would be fairer from a Western perspective. Furthermore, the appearance of his *Decretum (Concordia Discordantium Canonum)* 'marked a watershed in the history of canon law, for it climaxed the development of early medieval canon law collections and inaugurated the period of systematic canonical jurisprudence'.²²⁴ Russell stresses that '[f]or centuries Gratian reigned as the foremost *auctor* in the jurisprudential speculation about war'.²²⁵ Furthermore, Johnson (1975) adds that in the West, '[b]oth the theological and the legal streams of thought on justice in war in the late Middle Ages seem ultimately to flow from Gratian'.²²⁶ Gratian is also 'celebrated as the founder of the science of canon law'.²²⁷ In addition, 'Gratian's *Decretum* was in fact a valid law book, the oldest and most voluminous part of the so-called *corpus iuris canonici*, in catholic ecclesiastical courts until 1917'.²²⁸ Thus, Winroth (2000) stresses that 'Gratian's *Decretum* was one of the cornerstones of canon law'.²²⁹

However, I will also consider some of the most outstanding authors of the modern world. Thus along with Augustine and Gratian I will consider Aquinas, Grotius and Vitoria. Both Vitoria and Grotius referred to Aquinas, heavily relied on his work in many cases and cited him almost everywhere in their texts just as they did with Augustine. I have thus selected him because of this and because he is a prominent post-medieval scholar who was very close to the Islamic world, and therefore to Al-Shaybani, through Italy and Spain as we shall see later. The selection of Grotius is self-explanatory. As for Vitoria, I have intentionally selected

'Western scholars' to include him and the other Western scholars I intend to compare with Al-Shaybani.

²²⁴ Russell (n 222) 55.

²²⁵ Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge University Press 2005) 85.

²²⁶ James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200–1740* (Princeton University Press 1975) 26.

²²⁷ R. W. Dyson, *Aquinas' Political Writings* (Cambridge University Press 2002) 286.

²²⁸ Anders Winroth, *The Making of Gratian's Decretum* (Cambridge University Press 2000) 2.

²²⁹ *Ibid.*

him among the other outstanding scholars related to this research because I noticed that it is widely held that his writings were revolutionary in that they added a much more humanistic flavour to international relations than others such as Gentili²³⁰ and other contemporary scholars.²³¹

Knowing the outstanding level of humanism in the treatment of Al-Shaybani made Vitoria another obvious selection in this study. Furthermore, Grotius acknowledged that he greatly benefited from Gentili. Hence, Nussbaum comments that 'with respect to organization and documentation, Grotius owes much to Gentili'.²³² 'Grotius,' he adds, 'even borrowed several of Gentili's miscitations.'²³³ Thus, knowing that they both had much in common and that Grotius' work would have included Gentili's,²³⁴ I decided to select Vitoria instead of the latter. Grotius had access to Vitoria too, for he was mentioned by him in more than one work and as early as 1604.²³⁵ Nevertheless, it will still be worthwhile to examine the thoughts of the latter in contrast to the former for the reasons mentioned above.

1.7.3 Translations and Citations

As I am working on an Arabic text as the main source of Al-Shaybani's writings, I will offer my own translations into English. However, I will seek support by consulting translations of some of the passages in books by other scholars where these are available. In many cases, I will be able to do this with regard to passages included in the *Al-Siyar As-Saghir* of Al-Shaybani translated by Gazi. As for the translation of the Holy Qura'an, I will be using different translations, in each case selecting the translation closest in meaning to the actual interpretation of a verse. This is because most translations aim at translating the meaning, which cannot always be contained in one concise translation, as the original words normally bear wide meanings.

Despite objections by some scholars who think that using international law terms to indicate *Siyar's* is an abuse of the latter,²³⁶ I will use English terms wherever it is possible to establish that there is no harm to the

²³⁰ Vitoria (n 148) 61.

²³¹ Ibid 61–9.

²³² Arthur Nussbaum, *A Concise History of the Law of Nations, Revised Edn* (Macmillan 1954) 108.

²³³ Ibid 331.

²³⁴ Vitoria (n 148) 61.

²³⁵ Ibid.

²³⁶ Bouzenita (n 27) 31.

general meaning. I believe that using too many Arabic terms in this work would turn it into a compulsory language course. However, I will use Arabic terms when equivalent terms are hard to find in English and when the only way to translate a term will be through using multiple-word terms.

Sometimes I had to omit footnotes included in quoted texts for various reasons. For example, in some cases the footnote is in a language other than English or Arabic. In addition, sometimes the quoted text itself is in another language. In all cases, however, the quoted text is the words of the quoted author and therefore the author of the quoted text is always cited even if we are unable to trace the sources they used. This was necessary, as the wording was the cited author's and because I was not able to trace the footnotes included in the quoted passage in most cases. For scientific purposes, I have noted that footnotes are omitted whenever I had to omit them.

In the following chapter, I shall undertake the task of reading through and comparing the methodologies of the above selected scholars in comparison to Al-Shaybani. Prior to this, I will try to relocate Al-Shaybani's historical position by explaining the historical pattern of international law scholarship throughout the civilizational phases that his work could have passed through. Following that, I will embark on comparing his work to that of the other selected scholars. This shall be done by selecting some major topics: the law of peace and the law of war along with consequences of war. I shall conclude my work by establishing the degree to which Al-Shaybani participated in the furthering of the cause of regulating international relations in accordance with the outcome of this comparative study. The reason why I have selected these topics is that they were the most popular topics in the works of the scholars compared in this book.