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BOOK REVIEWS

Islamic International Law: Historical Foundations and Al-Shaybani's Siyar. By Khaled Bashir. Cheltenham: Edward Elgar Publishing, 2018. Pp 320. $143 (cloth). ISBN: 9781788113854.

The history of international law is a much-contested topic, the lineage of which is often traced to certain individuals, who are often either Western male lawyers or politicians and their texts or treaties that founded the field and its subfields. This contestation occurs because of certain uncritical Western-centric views that tend to romanticize Western scholars while ignoring non-Westerners' contributions to international law. At the heart of this history, however, is the universality of the general principles of international law, and claiming that these principles and practices and the individuals who advanced them are all Western demonstrates an ignorance of non-Western contributions to the law and, more importantly, of its colonial origins. Therefore, recent scholarship that is critical of the history of international law should be always welcomed, as it adds substance, robustness, and richness to the field. Also to be welcomed are studies that explore the contributions of non-Western jurists to international law, such as Khaled Bashir's *Islamic International Law*, on Muhammad Al-Shaybani (750–805), an Iraqi Muslim theologian and jurist who authored *Al-Siyar*, a major treatise on international law.

Bashir's book is a valuable addition to the literature of international law, as it can be regarded as the first comprehensive English-language study of Al-Shaybani's *Siyar*. What distinguishes this volume from other works that feature the *Siyar* is Bashir's scholarly comparisons between Al-Shaybani and five European theologians and scholars of international law: Gratian, Saint Augustine, Saint Thomas Aquinas, Francisco de Vitoria, and Hugo Grotius. Although Al-Shaybani's *Siyar*, as Bashir recognizes, primarily concerns the laws of war and peace, Bashir refers to it as an Islamic international law, a term agreed upon by other scholars of Al-Shaybani's work. Al-Shaybani's contributions to international law are summarized by Bashir as the following:

1. Al-Shaybani "held the role of custom in high regard," as evidenced by "his application of the principle of reciprocity in international legal relations" (275).
2. Al-Shaybani espoused a universal notion of international law because, *inter alia*, at his time in the eighth century, human interactions were trans-civilizational and transnational, especially in the Middle East (275–76).
3. Al-Shaybani stipulated legal obligations that can be regarded as common principles of international law. Bashir lists sixteen of these principles, including the following: diplomacy must be prioritized, and war used as the last resort; agreements must be respected; individuals are subjects of international law; and a number of humanitarian rules concerning the conduct of war (276–77).

On the law of war, Bashir says that Al-Shaybani should be recognized for "his sophisticated treatment of the details of both subjects" of *jus ad bellum*, the law in waging war, and *jus in bello*, international humanitarian law, that make him comparable only to Grotius, although Grotius dealt with the former but "offered very little" on the latter (178). However, Bashir argues that it should be regarded as significant in terms of the comparison between the two scholars that in addition to his scholarly contributions, one of Al-Shaybani's significant achievements was "convincing the then very powerful kingdom (the Abbasid) to abstain from using force except in self-

defence or for the cause of freedom of religion (broadly defined)" (176). Bashir regrettably does not provide more detail regarding this achievement.

Although Bashir does not elaborate on how Al-Shaybani advanced the cause of freedom of religion, Al-Shaybani's writings on the law of peace, which was at his time peacemaking with non-Muslims, can be considered pertinent to this cause. Consider, for example Al-Shaybani's writings on the *ama'an*, a safe conduct permit; diplomacy; the law of treaty; and arbitration. Bashir says that Al-Shaybani was unparalleled in elaborating on these constitutive elements of the law of peace. For instance, Al-Shaybani explained in great detail the entry permit, the *ama'an*, which involved an adult Muslim man or woman granting a permit to allow non-Muslims to enter the Muslim state, and to be granted the same legal rights as Muslims, in terms of security over their lives and property, and enjoyment of the freedom to trade and worship (250–51).

It was unprecedented in the eighth century to write, as Al-Shaybani did, on wide-ranging international law topics, and with great sophistication and attention to complex legal issues, such as legal capacity and free will for making agreements. Nonetheless, Bashir's book can be criticized on two interrelated points, one concerning the actual scope of Al-Shaybani's work, and the other concerning Bashir's view about how the *Siyar* should be applied by contemporary Muslims.

First, it is apparent to a reader of the *Siyar* in Arabic that Al-Shaybani primarily espoused Islamic rules for the Muslim state's conduct of war. This is not to say that Al-Shaybani's work should be undervalued because of its religious characteristics. On the contrary: after all, some prominent scholars of international law, including Grotius, were influenced by their religious traditions, expounding, for instance, an international law for "Christendom," or what is now modern-day Europe. However, Al-Shaybani did not engage with his contemporaries, especially non-Muslims, concerning Islamic law, or laws of a transnational nature, such as trade law. Trade has always been transnational. Indeed, Islam became a civilization primarily due to the promotion of non-Islamic and Islamic rules for regulated trade. In this regard, Bashir is correct to note that Al-Shaybani's opinions cannot be considered representative of international law, and therefore, Al-Shaybani should instead be remembered as an outstanding scholar of the Islamic laws of war, and to a lesser extent those of peace, whose writings advanced the theory of international law (6). Claiming, however, that Al-Shaybani's *Siyar* represents Islamic international law in its entirety is a reductionist view of Islamic law itself and of its significant and enduring influence on free trade.

A second, and related, criticism of Bashir's book concerns his claim that the *Siyar* presents an "alternative" to modern international law, especially for Muslims (14, 16–17, 268). His claim is erroneous for two reasons. First, unidirectional application of Islamic law by a state has been criticized for contradicting the freedom of religion in Islamic law and the legal principles of constitutionalism, human rights, and citizenship.[1] Similarly, applying an Islamic law of international relations to states with different traditions and compositions contravenes international legal norms and the principle of self-determination that is conditional upon the states' compliance with these norms. The failure of some of today's Muslim-majority states to agree on, and abide by, a set of Islamic human rights rules is a testament to the constitutional crises that have beset these states since their establishment. This might in part explain why the Organisation of Islamic Cooperation, the second largest intergovernmental organization after the United Nations, with membership of fifty-seven states, has not yet succeeded in creating its proposed international Islamic court of justice.

1 See, for example, Abdullahi Ahmed An-Naʿim, *Islam and the Secular State: Negotiating the Future of Sharīʿa* (Cambridge, MA: Harvard University Press, 2008).

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Furthermore, by arguing for Islamic international law as an alternative, Bashir neglects the progressive secularization of international law, a process that has been highly instrumental to the universality and inclusiveness of international law as it exists today. Major events, such as the Peace of Westphalia of 1648, which arguably marked the end of the European wars of religion, together with the thinking of countless scholars of international law, some of whom are admirers of Al-Shaybani, such as Christopher Weeramantry and Jean Allain, have advanced a secular notion of international law as one that does not ascribe to a particular religion or tradition. Therefore, it is ahistorical to argue that because the history of international law is contested, and some of its current practices are politicized, the *Siyar* presents an alternative theory susceptible of an international application. After all, Al-Shaybani did not intend his *Siyar* to be applied by Muslims and non-Muslims alike; rather, he maintained that it should primarily be honored as a set of Islamic edicts for Muslims' conduct in war. In order to fully deconstruct this matter, special attention should be paid to the common language of international law.

Bashir approvingly quotes Anthony Carty on a number of occasions in order to advance his argument that the *Siyar* represents an alternative to modern international law, for example Bashir draws from the preface to Carty's first edition of the *Philosophy of International Law*, where Carty argues, "There is a crisis of acceptance of international law, which is not confined to a few restless, 'postmodern' legal spirits, but belongs to the widespread refusal of any place for international law in world society. *International lawyers have to address this society, which they cannot simply do through authoritarian appeals to their own legal dogmatics. They have to find a language, which others can speak*. Indeed the point of the title of this book, *Philosophy of International Law*, is that they have to learn to use many languages."[2]

This raises the following questions: Is there a language of international law? Should this language be religious or secular? No legal historian can ignore the inseparable relationship between religion—most prominently Christianity—and international law. However, it could be argued that a religious interpretation of international law engenders the further fragmentation of the law itself, exacerbating the crisis of acceptance of international law. Take, for example, Bashir's argument that Islamic international law should be—and in few places, Bashir ventures to say, is—readily accepted and followed by all Muslims (17–18, 268). If the *Siyar* were to be applied by Muslims for regulating their international relations, and those who wish to deal with Muslims were to accept the *Siyar*, it would potentially present enforcement challenges and cause a proliferation of polemical religious views of international law, such as *my* Islamic international law against *your* Christian international law. This would hardly be conducive to maintaining world peace and security.

In the second edition of *Philosophy of International Law*, Carty engages with a number of scholars to elaborate on the uses and effects of language as a method of communication and functional interpretation (111).[3] It is necessary to learn about the role of legal language in providing shared meaning and purpose for constructing a particular field of study and its practice, such as international law. For instance, Rosalyn Higgins has argued that the study of international law, which depends on the availability of international resources, constructs and promotes "a common language of international law" and "a universal culture shared by all nations that is conducive

2 Anthony Carty, *Philosophy of International Law* (Edinburgh: Edinburgh University Press, 2007), ix. Bashir quotes the italicized portion of Carty's text on page 14 of *Islamic International Law*.

3 Anthony Carty, *Philosophy of International Law*, 2nd ed. (Edinburgh: Edinburgh University Press, 2017), 111.

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to peace, justice, and the rule of law."[4] She elaborates on this culture saying, "International law—through treaties, resolutions, cases, and institutions—has attempted to overcome cultural, religious, and ethnic differences, and create a common culture about appropriate modes of behavior for all."[5]

Furthermore, regarding secularization and international law, Carty says that it is "one of the strongest commonplaces of Western international law that, since Grotius and the Peace of Westphalia, international law is a secular branch of knowledge separate from the Christian Churches and able to unite peoples regardless of religious background."[6] He also acknowledges "the significance of Westphalia as a secularisation process," and warns that humans can "slip into the compulsive stereotyping of self and others to ground themselves in opposition to others."[7] It is therefore necessary to recognize the practical role of the secular language of international law in creating what could be regarded as the most important invention of international law: settling disputes by law. For example, after noting the historical role of conflict resolution in settling interstates disputes, Philip Allott wrote:

> The relevance of the past is that it provides evidence of countless test-tube experiments of conflict-resolution. It is not the *theory* of what would be reasonable and what this or that State might seek to achieve or how it would react. It is the *story* of how the continuing problems have been presented and resolved or circumvented over a long period of time.
>
> The policy-analysis is performed in action and continuously. In this sense, therefore, international law can be regarded as the natural law of international society, not in any religious sense but in a purely secular sense. It is the law by which international society prolongs its existence, and to find that law it is first necessary to discover how international society has managed to prolong its existence in the past.[8]

It is the history of conflict resolution that has led the international society of states to realize one of the essential functions of international law—the settlement of disputes—and to create the obligation of the peaceful settlement of disputes. Overall, the language of international law is the product of millennia of human experience. It can be argued that Carty's philosophical analysis of international law cannot be perceived as an argument for using an alternative religious notion of international law. Carty examines the concept of language as a system of communication, urging international lawyers to (1) be aware of the uses and misuses of this system by, for instance, imposing one's own culture or state power on others; and (2) find a common language for communicating international legal obligations. Therefore, the language of international law, and the resultant culture, should always be examined in order to achieve a better understanding of the values of coexistence and cooperation under international law.

Bashir should be highly praised for his scholarly presentation of Al-Shaybani's *Siyar* to the readership of international law and, more importantly, for locating Al-Shaybani in the list of international law scholars who have made outstanding contributions to world peace and security. With Bashir's book, Al-Shaybani can no longer be reduced to a theologian or dismissed as an international legal scholar: he was both, deservedly and unequivocally.

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4 Rosalyn Higgins, "Teaching and Practicing International Law in a Global Environment: Toward a Common Language of International Law," *American Society of International Law Proceedings*, no. 104 (2010): 196–200, at 200.

5 Higgins, 197.

6 Carty 2017, 183.

7 Carty 2017, 188–89.

8 Philip Allott, "Language, Method and the Nature of International Law," *British Yearbook of International Law* 171, no. 45 (1971): 79–136, at 130.

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Al-Shaybani should be acknowledged for advancing a humanistic language of international law. This contribution is evident, for example, in his rules concerning freedom of religion and the humane treatment of prisoners of war. Some of these rules, which were originally promulgated through the medium of the Arabic language and have now been translated into many languages and presented as universally accepted principles, demonstrate the significance of Al-Shaybani's *Siyar* to the common language of international law. This language can only be secular and used for promoting shared human rights and values.

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