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ARABISKA

The concept of *'amān* in classical Islamic legal texts

An analysis of the *siyar* of Al-Shaybānī and Al-Sarakhsī

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Abstract

This essay analyses how the two medieval scholars Al-Shaybānī and Al-Sarakhsī used the concept of *'amān* in two works of Islamic international law. *'Amān* was a concept which was used already in the 8th century to facilitate trade and create stable and non-violent relations between the Islamic and the non-Islamic world. It was however constantly re-defined by the jurists through interpretation and the use of legal tools and reasoning.

In classical Arabic, the root to which *'amān* belongs had two meanings, one related to safety and one related to trust. The Arabic root system makes it possible to derive several words from one single root, and in the case of *'amān* and its related terms, they could theoretically be related to any one of the two meanings. This opens for many different interpretations of the terms and makes it difficult for modern-day scholars to translate them with precision.

This essay argues that in classical Islamic legal terminology, the concept *'amān* was considered a contract between a person granting a guarantee of safety and a person seeking to be protected from harm when travelling. Most of the time, the jurists discuss *'amān* given by Muslims to non-Muslim travellers, but the reverse was possible. *'Amān* could be granted upon certain conditions, which are discussed by the jurists, and could be granted by any person provided they did so by free will and in the interest of Islam and the Islamic community.

Many of the terms related to *'amān* have been translated and explained by modern scholars. In those cases, the essay attempts to critically evaluate those explanations. In some cases, the findings confirm the previously established definition. In other cases, the results show that previous translations have been incorrect or lacking in detail.

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1 Introduction

1.1 Statement of purpose

Like many other linguistic studies of concepts used in politics and religion, this essay aims to contribute to a debate, in this case a debate on the nature of Islam. The debate on whether the nature of the Islamic religion is one of peace or violence has most likely been present since the rise of Islam in the time of its prophet Muhammad (570 - 632 A.D.). Some modern important additions to this highly relevant debate are Esposito & Voll (1996), El Fadl (2001), Moaddel & Talatoff (2000), Amanat & Griffel (2007), Kelsay & Turner Johnson (1991), Al-Zuhili (2005), and An-Na'im (1987).

Despite the fact that the debate on the nature of Islam is very much alive in what is popularly called the Western world, many have argued that the understanding of Islam in general and Islamic law in particular remains mediocre in this part of the world (see e.g. Dawoody, 2009). The heritage of orientalism, which Edward Said so powerfully explained in his 1978 book *Orientalism*, may play a significant role in contributing to a picture of Islam as a religion of war and violence.

It is possible that Western prejudice towards Islam has a disproportionately large impact on areas of Islamic law which are concerned with international relations, and therefore with questions of war and peace. One example of a frequently criticised work of Western scholarship on the nature of Islam as a violent entity, necessarily in opposition to a mainly Christian West, is Samuel Huntington's *Clash of Civilizations* (1996).

Specifically, the view of Islam in the West seems to be highly influenced by notions of Islam as based on holy warfare and aggressive expansion (Dawoody, 2009: 4). This stands in direct contrast to many of the messages of its most foundational texts as well as the opinion of many modern Muslim scholars. Al-Zuhili (2005) has highlighted values of freedom, dialogue and tolerance in the Islamic message, and many others have questioned the view of jihad as aggressive warfare aiming to spread the Islamic religion (see An-Na'im 1987: 325).

The aim of this study is thus to highlight one of the tools used by Muslim jurists to stabilise Muslim relations with non-Muslims, after the initial period of establishment of the Islamic religion and state, and to transform it into a state of peace and prosperity.

By doing so, we may partly disprove the generally accepted theory that jihad [in the meaning war] is the default state of affairs and thus refute the claim of those who think that by going back to Islam's basic values, Islam would be a religion of expansion through religious war and conversion.

1.2 Research questions

An attempt has been made to answer the following research questions:

- What was the general meaning of *'amān* at the time of the source texts?
- What is the technical meaning of *'amān* and its derivatives in the source texts?
- What was the place and function of *'amān* and its derivatives in classical Islamic law?

- Has the term *'amān* and its derivatives been correctly interpreted and translated by modern scholars?

1.3 Materials

The text of Al-Shaybānī used is the original text of *kitāb al- 'aṣl* as presented by Majid Khadduri in his *Al-qānūn al-duwalī al- 'islāmī* (Khadduri, 1975). In the literature, *Kitāb al- 'aṣl* is sometimes referred to as *kitāb al-mabsūṭ* or just *Al-mabsūṭ*. From this book, 48 pages (A5) of Arabic text have been selected and analysed.

From the works of Al-Sarakhsī, his commentary *Šarḥ al-siyar al-kabīr* has been used. This is a commentary on another of Al-Shaybānī's texts, *al-siyar al-kabīr*. From this five-volume work, which extends over almost 1,500 pages, only some of the chapters directly concerning *'amān* have been analysed. This includes 74 pages of text.

It is important to note that Professor Khadduri has also published an English translation of *Al-mabsūṭ*, called *The Islamic Law of Nations* (Khadduri, 1966). Notwithstanding Khadduri's expertise in the field, the reported over-reliance on his works in previous research made it important to take a critical stance towards this translation. Therefore, an effort has been made to translate and explain Al-Shaybānī's original text in the Arabic language by the use of dictionaries, intra-textual clues and Al-Sarakhsī's commentary on the same topic. In a few cases, Khadduri's translation is referred to. Unless it is clearly sign-posted, all translations are my own.

1.4 Methodology

The analysis is a linguistic analysis of Arabic in the language of the scholars Al-Shaybānī and Al-Sarakhsī in general, and of their use of the term *'amān* and its derivatives in particular.

The study is based mainly on library research, i.e. books, magazine articles, and online sources such as *Index Islamicus* and the *Encyclopaedia of Islam*. It relies heavily on a few dictionaries, primarily *Lisān al- 'arab* by Ibn Manẓūr (referred to as *Lisān al- 'arab*) and Edward William Lane's 19th century dictionary of classical Arabic (referred to as Lane). The well-known Hans Wehr's dictionary (Cowan 1980) and *Al-Mawrid* (2006), which are both intended for translating modern Arabic, have been used as complementary translation tools when searches in Lane and *Lisān al- 'arab* rendered no or few results.

The analysis itself is organised according to the following structure: The first section forms a general linguistic analysis of the root and some of its derivatives, based on information in and about classical Arabic lexicography. This provides the basis for further analysis, which attempts to elaborate on the technical meanings of the root in Al-Shaybānī's and Al-Sarakhsī's texts. In the analysis, a combination of contextual clues and explanations or translations made by modern interpreters of classical Islamic international law is used.

1.5 Limitations

The study has been limited to chapters directly mentioning the concept of *'amān* or one of its derivatives (such as *musta 'min* or *'āmin*) in the two works of Al-Shaybānī and al-Sarakhsī. This necessarily means that the literature surveyed is limited to only two writers,

belonging to the *ḥanafī* school of Islamic theology as it stood in the 8th century (Al-Shaybānī) and the 11th century (Al-Sarakhsī) respectively. As will be discussed later, they have both had a great impact on Islamic law of international relations, but are only a minuscule part of the legal literature of Islam and cannot be made to represent the legal tradition as a whole. Any conclusions drawn can never be said to represent Islamic tradition or Islamic law as a whole. Nevertheless, it is my view that the opinions of these two writers can in some way indicate general features of Islamic law and the Arabic language of the time.

It is also important to note that the analysed texts almost exclusively include situations where *ʿamān* is discussed in relation to warfare or trade. One important source of potential errors in this essay is thus the fact that Al-Shaybānī and Al-Sarakhsī may have used the term differently in other contexts.

Furthermore, the study leaves aside plenty of other concepts pertaining to safety, security, trust, confidence and other things associated with *ʿamān*, which may have given a fuller picture of Al-Shaybānī's and Al-Sarakhsī's thoughts.

1.6 Previous research

The areas of research connected to this essay are multiple, and include for instance international law, Islamic law, Islamic international law, war, jihad, prisoners of war, *ḍimmiyya*, Islamic human rights, legal translation and biographical research about Al-Shaybānī and Al-Sarakhsī.

Majid Khadduri's *War and Peace in the Law of Islam* and *The Islamic Law of Nations: Shaybānī's Siyar* (in Arabic: *Al-qānūn ad-duwalī al-ʿislāmī. Kitāb as-siyar liš-šaybānī*) are some of the main sources for Western researchers on the subject of Islamic international law, and they have had a decisive influence over Western literature on the topic. According to Dawoody it is “quite easy sometimes to trace the influence of his ideas, and even his vocabulary, in current Western literature” (2009: 12). His texts have however not survived without criticism. Dawoody has said that Khadduri has neglected the diversity of the opinions of the classical jurists whose texts he translates, and Abu Sulayman and Zawati criticise him for his hostile and stereotyped conclusions on jihad (in Dawoody, 2009: 13).

1.7 Transliteration and stylistic remarks

To increase readability, Arabic words that exist in an established form in English have been written without phonetic markers, e.g. Islam, Sunna, Qur'an, jihad and Shari'a. Those without an accepted form in English are written phonetically according to the transliteration table (section 1.7.1) and have been italicised, e.g. *dār al-ʿislām*.

Names of authors in Arabic are written as in the original text or, in the case of classical Islamic scholars, in the form which is most commonly occurring in modern literature on the topic.

1.7.1 Transliteration table

Consonants							
ا	a	د	d	ض	ḍ	ك	k
ب	b	ذ	ḏ	ط	ṭ	ل	l
ت	t	ر	r	ظ	ẓ	م	m
ث	ṯ	ز	z	ع	‘	ن	n
ج	ǧ	س	s	غ	ǧ	ه	h
ح	ḥ	ش	š	ف	f	و	w
خ	x	ص	ṣ	ق	q	ي	y
						ء	’
Short vowels		Long vowels		Diphtongs			
<i>fatha</i> َ	a	<i>ālif</i> (ا)	ā	اَـو	aw		
<i>kasra</i> ِ	i	<i>yā</i> (ي)	ī	اِـي	ay		
<i>damma</i> ُ	u	<i>wāw</i> (و)	ū				

2 Context

2.1 Introduction

The following chapter will explain the system of Islamic law from its foundations and general characteristics to the sub-discipline which we may call Islamic international law, which is Al-Shaybānī's interest in his work *kitāb al-ʿaṣl* and which is where the technical aspect of the term *ʿamān* developed.

First, this chapter will explain the distinction between Shari'a and *fiqh*, notions which are impossible, yet for many tempting, to translate directly with one word or another into English. This essay makes an attempt at looking deeper than the shallow understanding of Shari'a as "Islamic law" and *fiqh* as "Islamic jurisprudence". Secondly, an overview of the sources of Islamic law is given, the main message being that scholars tend to agree on what sources are available in the interpretation of the law but not to agree on how they are to be categorised or placed in a hierarchical order. A third and fourth section take a deeper look into the tools of Islamic law that are considered subordinate to the main sources of the Qur'an and Sunna, while a fifth section outlines the relationship between Islamic law and the Arabic language. A sixth section turns to Islamic international law, in order to explain its place in the system as a whole. Putting all of this together, a seventh section attempts to explain the roles of Al-Shaybānī and Al-Sarakhsī in that system as a result of their work and the time in which they compiled their works on Islamic international law, as well as the results of the close relationship between law and language for the analysis of the terms they used. An eighth paragraph sums up the chapter and draws some general conclusions on Al-Shaybānī's and Al-Sarakhsī's influence on the development of Islamic law.

In any attempt at describing Islamic law, the risk of over-simplification is ever-present. This is partly because of the sheer mass of legal knowledge, which is a result of more than 1400 years of thought. Naturally, this has given rise to a multitude of interpretations. Some scholars have suggested that up to 500 separate schools of law, all interpreting the law slightly differently, developed in the early years of Islam because of its expansion (Baderin, 2009: 189). After four centuries, this number had probably been reduced to nineteen separate schools (Abdal-Haqq, 1996: 12). Today, there are four main Sunni schools of jurisprudence.

The immense diversity is recognised and respected by Islamic scholarship by the name of *ixtilāf*, a principle signifying difference of opinion. Most Muslims, at least among scholars of law, tend to think of this diversity as one of the strengths of Islamic law. Abū Ḥanīfa, the founder of the Hanafi school of jurisprudence, wrote in *al-fiqh al-ʿakbar* that "[d]ifference of opinion in the Community is a token of divine mercy" (in Kabbani, 9). This diversity must always be kept in mind when writing and reading about Islamic law. In many questions of law, it remains difficult to find one specific opinion or answer which is accepted by the whole Muslim community.

2.2 Islamic law, Shari'a and *Fiqh*

As highlighted above, there is a danger of over-simplification in attempting to translate the two terms “Shari'a” and “*fiqh*” into one or two words each in the English language. They are often, as Baderin (2009: 186) and Abdal-Haqq (1996: 5) observe, synonymously translated and interchangeably used as “Islamic law” even though they are different not only linguistically but also technically. The term “Islamic law”, in this paper, is used to designate the system as a whole and thus encompasses both Shari'a and *fiqh*. Interestingly, Abdal-Haqq (1996: 5) reports that the expression “*al-qānūn al-islāmī*” has become established in some Arabic countries, perhaps as a result of what we may call “re-translation” from English to Arabic. This clearly has the potential of creating a certain amount of confusion.

Shari'a, it is reported, originally meant “the path to water”, i.e. the way to the source of life (Abdal-Haqq, 1996: 7). Via other meanings, such as “the path to be followed” and “a clear way to be followed”, it has come to take on its modern, religious meaning, which can be expressed as “the path upon which the believer has to tread” (Abdal-Haqq, 1996: 7). (The Qur'an itself in several places tells the believers to follow the clear and right way, e.g. in sura 45:18.) Baderin (2009: 186f.) explains how the term can be used to designate several things. One meaning is Shari'a as the ideal Islamic way of living as a whole, covering everything from how to greet people you meet to questions pertaining to pilgrimage and inheritance (Baderin, 2009: 186f.). In this sense, it “embraces all aspects of human activity” (Abdal-Haqq, 1996: 3).

However, Shari'a can also be used to designate that part of Islamic law which is divine and thus unchangeable. This immutable nature of the Shari'a should be seen in contrast to the human understanding and interpretation of it, which is what is called *fiqh*. *Fiqh* carries the meaning of the root *fa-qa-ha* “to comprehend”, and thus could be translated as “comprehension” (Abdal-Haqq, 1996: 11) It is a human process, marred by the potential errors of limited human understanding of God's intention and message. It is normally translated as “[Islamic] jurisprudence” (Abdal-Haqq, 1996: 10). (*Al-fiqh*, however, with the definite article *ālif-lām*, usually refers to the works of established Muslim jurists rather than the process of analysis used to produce those works.) The goal of *fiqh* is to produce *aḥkām aš-šarī'a*, or legal rulings, which can be applied to real-life situations. It follows from the fallibility of the process that *aḥkām aš-šarī'a* should be changeable by time and circumstances.

2.3 Sources of Islamic law

The system of Islamic law is traditionally depicted as having two primary sources, the Qur'an and the Sunna of the Prophet, and two secondary sources called *ijmā'* and *qiyās*. (See for instance Baderin, 2009: 186.) Some scholars also include in their descriptions of Islamic law some or many of the legal techniques used by Muslim jurists in their interpretation of the four main sources, labelling them “subordinate” or “secondary” (Abdal-Haqq, 1996: 5). It is my aim to present a picture of Islamic law which is as diverse as possible, so as not to exclude techniques that may have been significant in the work of scholars like Al-Shaybāni and Al-Sarakhsī.

The two primary sources, the Qur'an and the Sunna, are part of what we have described

above as Shari'a distinct from *fiqh*, i.e. they are what Muslims believe to be the unchangeable divine message as laid down by God and his Prophet in the 7th century A.D. Because they are the foundation of the religion, Islamic law cannot be studied without reference to these two sources (Abdal-Haqq, 1996: 19).

2.3.1 Qur'an and Sunna

The Qur'an is considered by Muslims to be the actual word of Allah as revealed to the Prophet over a period of almost 23 years. That it is a divine text is unquestionable in Islamic tradition (Abdal-Haqq, 1996: 19f.). All other sources of law are derived from the Qur'an, but the Qur'an by itself is not sufficient to understand the legal system as a whole (El-Awa, 1991). We must see its divine revelation as one piece of the puzzle which forms the complete system of Islamic law.

Because the Qur'an, despite its legal content and all-encompassing nature, does not directly cover all legal situations, it requires interpretation in order to form a functioning system of law. The need to interpret the Qur'an has existed since its first revelation, but then, the Prophet was present to provide clarification of the revelation. This is why his sayings, deeds and approvals of certain actions in his community is considered the second fundamental source in Islamic law (Baderin, 2009: 187). Even his physical attributes and personality traits are considered part of this source of law, which is called the Sunna of the Prophet (Hasan, 2000: 6). Sunna is conveyed by *ḥadīṭ* (pl. *'aḥādīṭ*), stories of how the Prophet acted or spoke in certain situations (Baderin, 2009: 188). It is important to distinguish between the two terms. Sunna means the "rule of law, practice, or model conduct ... contained in a *ḥadīṭ*" (Hasan, 2000: 11). Because of the hierarchy between the sources, most jurists agree that the Sunna never contradicts the Qur'an, only explains or supplements it.

It is generally accepted in the scholarly community that the Sunna was not recorded in writing until after the Prophet's death, perhaps because the Prophet himself forbade it in order to avoid confusing it with the divine message of the Qur'an (Abdal-Haqq, 1996: 23). Instead, the *'aḥādīṭ* remained in the memories of those who had experienced them or heard them retold, and were transmitted between generations. When collection of the *'aḥādīṭ* began, the Muslim community was already widespread and divided into legal schools with their differences and conflicts. There is therefore a possibility that some *'aḥādīṭ* were fabricated during this time to support one school's interpretation over another's. It is thus accepted in the scholarly community, both Muslim and non-Muslim, that not every *ḥadīṭ* is authentic. Prominent scholars like Goldziher and Schacht were proponents of the stance that no *ḥadīṭ* whatsoever can be accepted as going back to the Prophet, while later scholars have been more accepting towards the *'aḥādīṭ*. Coulson, for instance, took an approach where he accepted any *ḥadīṭ* as authentic as long as there was no evidence against its authenticity. (El-Awa, 1991: 154f.). The schools of jurisprudence differ much in what *'aḥādīṭ* they accept and in how much legal weight they afford them, but as we will see, Al-Shaybānī and Al-Sarakhsī both make extensive use of *'aḥādīṭ*.

2.3.2 Tools, methods and principles of Islamic law

The mentioned sources of Islamic law are followed in the hierarchy by several 'supplementary' or 'secondary' sources. The ranking or acceptance of these among the sources of law are among the main points of difference between the Islamic schools of jurisprudence.

During the Prophet's lifetime, there was no need for supplementary sources because the Prophet was there to give a direct interpretation of the divine message whenever questions or new situations arose. After his death, the Muslim community found itself in need of methods to solve new problems and the first few centuries saw vivid activity in the field of Islamic law.

The Prophet had encouraged his followers to use reason in their interpretation of the primary sources. One example is the *ḥadīth* of *Mu'ādh bin Jabal*, who before being sent by Muhammad to become a judge in Yemen asked the Prophet how to judge in his new role in the absence of the Prophet's guidance. The Prophet approved *Mu'ādh's* methodology, which included using the Qur'an, the Sunna and his own reason, in that order (Bassiouni and Badr, 2002: 5, Abdal-Haqq, 1996: 30). Individual reasoning in this form is often referred to as *ijtihād*, literally 'exerting oneself' (Abdal-Haqq, 1996: 10). The immediate successors of the Prophet continued this practice. There is, for instance, a Qur'anic provision under which booty obtained by Muslim fighters is to be shared with nomadic tribes who have not adopted Islam. During the emergence of the Islamic state on the Arabian peninsula, this rule was followed rigorously, as the neutrality of some powerful tribes was crucial to the safety of the Muslims. Later, when the power of the Islamic state over the land increased, the first caliph, Abu Bakr, re-interpreted this provision in light of the changing circumstances and chose not to pay any of the booty to such tribes as the rationale for doing so had disappeared (Bassiouni and Badr, 2002: 5). This shows that reason and interpretation were part and parcel of the law already in the earliest years of Islam.

In the three centuries directly after the death of the Prophet, legal activity flourished in the Islamic world, mainly in the two centres *Kūfa* and *Baṣra* in modern-day Iraq. In the 10th century A.D., however, this activity seems to have decreased. There appears to be a consensus among scholars that jurists of that time actually thought that all legal questions had been exhaustively solved (Hallaq, 1984). It is a classic question among scholars of Islamic law whether this signifies that legal activity ought to have stopped – and did stop – after that generation of scholars, giving way to an era of *taqlīd*, 'rigid conformity' or 'blind following' (Abdal-Haqq 1996: 37). The scholars, according to this view, shifted from individual reasoning to conforming to the books of *fiqh* which had been written in the first few centuries of Islamic thought.

The issue of whether the so called 'gate of *ijtihād*' was closed or kept open, i.e. whether jurists were allowed to continue using their individual reasoning in finding solutions to legal problems or were forced to continue along the lines of their predecessors, continues to be of immense importance today. Muhammad Iqbal, one of the most important reformative scholars of the 20th century, has said that the closing of the gate of *ijtihād* is "pure fiction" which resulted in "a state of immobility" in Islamic jurisprudence and that modern scholars were never bound by the rulings of their predecessors (Iqbal, 1951: 148). Hallaq (1984) has shown that the gate was not closed in either theory or in practice, mentioning important

scholars such as Al-Ghazali as examples of proponents of *ijtihād* and innovative reasoning even after the alleged closing of the gate of *ijtihād*.

The Islamic legal institution of *ijmā'*, or consensus to resolve a legal matter, crystallised from a *ḥadīth* reporting the Prophet saying that “my community shall never agree on an error” (Baderin, 2009: 188). Generally, the schools of Islamic jurisprudence rank *ijmā'* high among the legal sources supplementary to the Qur'an and Sunna, so that a ruling by *ijmā'* is as authoritative as a ruling of the Sunna or a legal injunction in the Qur'an.

Ijmā', however, remains problematic. For instance, scholars differ in their opinion of who is permitted to participate in forming consensus – only the religious experts or all Muslims, including women – and whether consensus has to be unanimous to be valid (Abdal-Haqq, 1996: 31). Despite its ambiguities, *ijmā'* has been the focus of efforts among some scholars in establishing democratic institutions in the Islamic world.

Qiyās, or analogy, is the term for extending a rule in the Qur'an or Sunna to a new situation based on a logical similarity of the situation, or of the rationale of the rule, with a novel situation (Baderin, 2009: 188). Some find support for the use of *qiyās* in the Qur'an 59:2, where the Muslim community is asked by Allah to infer analogically from the example of the treacherous members of the *Banū Nadir* tribe. A common example of modern-day *qiyās* is how narcotics have been prohibited by use of analogy with the prohibition of alcohol in verse 5:90. *Qiyās* is recognised by all four sunni schools of jurisprudence as a legitimate tool of law, but it is ranked lower than a ruling by *ijmā'*, since it involves only one person and not a larger body of people (Abdal-Haqq, 1996: 33).

In all legal systems, there is sometimes a need of avoiding the result that a literal application of a legal rule might lead to. In Islam, this together with the emergence of differences between scholars and schools of jurisprudence, created a need to ensure that the application of legal provisions was logical and fair (Baderin, 2009: 189). For this, several legal tools were devised by the jurists, sometimes based on pre-Islamic legal techniques which had been preserved and used in the communities (Coulson, 1969: 4). Among the most important are *maṣlaḥa*, or consideration of public welfare or larger interest, and *istiḥsān*, juristic preference in a given case (Bassiouni and Badr, 2002: 1). They refer to processes of choosing alternative solutions or rules, even if they are technically weaker (e.g. based on a *ḥadīth* of weaker grade) than other interpretations in order to foster common welfare or do what is fair and equitable (Abdal-Haqq, 1996: 33). Sometimes, the choice between different legal solutions may take place between the schools, so that a judge in a specific case may find it more equitable to apply a rule from another school of law than his own. This is called *taxayyur*, or 'eclectic choice'.

There is also a recognition that local custom or customary law (*urf*) may play a role in the law where there is no established rule of law or room for interpretation. This has become important in the Hanafi school, to which Al-Shaybānī and Al-Sarakhsī belong (Habachy, 1962: 471).

The following excerpt from Al-Sarakhsī's commentary provides an example of how some of the legal tools mentioned above were used. It occurs in a discussion of who is to be given the protection of an *ʿamān* when the head of the household or another family member has asked the Muslims for protection:

وأهله امرأته وولده الذين كانوا في عياله من الصغار والكبار من النساء والرجال، وفي القياس

أهله: زوجته فقط، لأنه في العرف يقال لمن له زوجة متأهل وللمن لا زوجة له غير متأهل، وإن كان يقوله جماعة، ولكنه استحسن فقال: اسم الأهل يتناول كل من يعوله الرجل في داره وينفق عليه، ألا ترى في قوله - تعالى - في قصة نوح عليه السلام: <إني ابني من أهلي> هون الآية [٤٠] وقد استثنى الله الزوجة عن الأهل في قصة لوط عليه السلام قال - تعالى - : <فأنجيناه وأهله إلا أمراة> [النمل: ٥٧]، وفي قصة نوح: <قلنا احمل فيها من كل زوجين وأهلك إلا من سبق عليه القول> [هود: ٤٥] يعني زوجته، فعرفنا أن اسم الأهل يتناول غير الزوجة ويقال: فلان كثير الأهل: إذا كان ينفق على جماعة وهذا لأن بين الأهل والعيال مساواة في الاستعمال عرفاً

(Al-Sarakhsī, 218f.)

His family is his wife and his child who were sustained by him, both young and old and both male and female, and by analogy (*qiyās*) his family is: only his wife, because in customary law (*urf*) it is said that the person who has a wife is married and the person who does not is unmarried, and so they said collectively, but he [most likely, this refers to Al-Shaybānī] chose the preferable option (*istahsana*) and said: the name of the family comprises all whom the man supports in his household and provides for, do you not see that in His – the Exalted's – speech in the story of Noah, peace be upon him: <Indeed my son is one of my family> *Hūd* verse [40] and Allah has excluded the wife from the family in the story of *Lūt*, peace be upon him, when He – the Exalted – said: <So We saved him and his family except for his wife> [*An-Nahl* (sic)¹: 57], and in the story of Noah: <We said, load upon the ship of each creature two mates and your family, except those about whom the word has preceded> [*Hūd*: 45] that is his wife, and so we knew that the family name excludes the wife and so it is said: a person who has a large family [is]: if he provides for all of them and this is because in customary law (*urf*) the family and the people of the household are considered equal (My translation, Qur'anic verses following the translation by Sahih International).

This example shows how legal scholars of the time used their reasoning to reach a legal result they considered suitable through a discussion of sources and tools. In this case, Al-Sarakhsī draws his conclusions from verses in the Qur'an, customary law (*urf*), as well as opinions of Al-Shaybānī and the Hanafi school of jurisprudence, which in themselves are results of analogical reasoning (*qiyās*) and juristic preference (*istihsān*). Clearly, the law during this time was not set in stone but rather a result of constant re-interpretation.

2.3.3 Contracts in Islamic law

Without doubt, contracts in some forms are the basis of any prospering economic system. On a market where contracts are not respected, traders cannot trust that they will be paid for their goods and no trading will take place. It is well-known, writes Bonner (2001: 412) "that the early Islamic period was an age of economic expansion, in which markets and

¹ Here, both consulted versions of Al-Sarakhsī's book refer to the verse *An-Nahl* (verse 16), when in fact the quoted *āya* is part of the verse *An-Naml* (verse 27).

production flourished across a larger unified economic space than had ever existed before." The Arab peoples at the time of the Prophet relied for their subsistence on the caravan trade on the Arab peninsula, and the Prophet himself took part in many trading journeys. It is natural, therefore, that the sanctity of contracts should be an important part of Islamic law.

Al-Habachy (1962: 459) has stated that a primary rule of Islamic law is that any agreement between people is valid and binding unless it contradicts a specific prohibition in the Shari'a. The most basic rule relating to this is the Qur'an 5: 1: "O ye who believe! Fulfil (all) obligations". The rule that "Muslims are bound by their stipulations" (*Al-muslimūn 'inda šurūṭihim*) and that 'the contract is the Shari'a of the contracting parties' (*Al- 'aqd sharī'atu l-muta'āqidīn*) are "unanimously recognised in all schools of Muslim law" (Habachy, 1962: 459 and 465). That Al-Shaybānī and Al-Sarakhsī were equally aware of the sanctity of contracts is clear from the following excerpt from *šarḥ al-siyar al-kabīr*:

فقال عليه السلام: "المسلمون عند شروطهم"، وقال عمر رضي الله عنه الشرط أملك، أي:
يجب الوفاء به

(Al-Sarakhsī, 195)

He (the Prophet Muhammad) said, peace be upon him: "Muslims [stand by] their stipulations", and Umar said, may God be pleased with him, "the stipulation is expected of you", that is: its fulfilment is required.

Some scholars have even posited that the Shari'a itself is a kind of contract between Allah and man and there are several verses in the Qur'an which indicate that God has made a promise to the believers (Habachy, 1962: 460, see e.g. Qur'an 13: 31 and 14: 47). Similarly, the relationship between the ruler of the Muslim community and his subjects is traditionally considered to be a contract, whose respective obligations had to be honoured equally by both citizens and ruler (Habachy, 1962: 463). The sanctity of contracts was to be equally respected even where the parties were non-Muslims, as the agreement was still considered to have been made with Allah as its witness (Habachy, 1962: 460 and 466).

2.4 Islamic law and the Arabic language

The relationship between law and language is an important one in all legal systems. To think that Arabic is less clear or precise than other languages with legal terminology would be a misconception, as Bernard Lewis (1977: 45) has shown. In fact, legal Arabic has been characterised by precision throughout Islamic history (Lewis, 1977: 45).

Islam and Arabic have always been closely connected, because Arabic is the language of the Qur'an and of the Prophet. Many Muslims consider Arabic the only language in which the Qur'an can be rightly reproduced. Despite this, Carter (2007: 26) has argued that it was clear to the Muslim community from the beginning that the religious truths had been revealed to them not in a divine tongue but in the human language of the time. Therefore, the same need of interpreting the legal injunctions of the Qur'an which led to the creation of *fiqh* also led to the construction of elaborate theories of grammar, or *tafsīr*, 'interpretation'. Carter (2007: 26) reports that the first Islamic jurist to afford proper weight to the importance of language to the law was Al-Shāfi'ī, the scholar who is regarded as

having mediated most between the schools of *fiqh*, contributing to a unification of Islamic law in the 8th and 9th centuries AD and founding the Shafi'i school of jurisprudence. Since then, Carter argues that the two sciences of grammar and law were mutually reinforcing so that “advances in one made further progress possible in the other” (Carter, 2007: 25). First in modern times have scholars moved away from the norm that knowledge of the Arabic language and its grammar is a prerequisite to become a scholar of Islamic law (Abdal-Haqq, 1996: 27).

Because of the close relationship between law and language, linguists have found not only that language changes depending on what legal norms are expressed, but also the extent to which legal norms can be affected by language (Edzard, 1997: 69). One example, taken from the realm of international relations, is that of the term *ṣulh*, which, although rarely used, is sometimes translated as 'treaty'. The Arabic word *ṣulh*, however, is problematic in this context because one of the most important instances of its use is the so called treaty of Hudaybiyya, concluded between the two cities Mecca and Medina during the Prophet's stay in the latter. The peace treaty was restricted in time to ten years (but was considered broken after only two years following an attack by a Mecca-aligned clan on allies of Medina) (Bsoul, 2008: 108). Some scholars have set even lower time-limits to such a treaty (Holt, 1980: 67). It is possible that this has led the term *ṣulh* to become charged with notions of time limitation. Edzard (1997: 81) finds that the treaty of Hudaybiyya is considered the source for the 'ten year rule', i.e. a rule defining peace with non-Muslims as only temporary. This may have significant consequences for international co-operation and lead to misinterpretation of modern international agreements.

One problem for translators of classical Arabic legal language is the lack of tools to interpret the highly technical and specialised language used by scholars like Al-Shaybānī. There is, as Lewis (1977) says, no adequate historical dictionary of classical Arabic as it was used at that time. This is for three reasons. First, some dictionaries aiming to reflect classical Arabic were compiled by scholars more than thousand years ago and are thus not always suited for modern research. Second, even those scholars aimed to explain the meaning that words had before their time, not the meaning which was in use at the time of compilation of the dictionaries, and so both meaning and legal-social context had changed. Therefore, many dictionaries are replete with errors. Third, most dictionaries focused on poetry and literature, and so explanations of legal language are rare and may not recognise the legal-technical meaning of a given term (Lewis, 1977: 45).

2.5 Islamic international law

2.5.1 Introduction

Already in the Prophet's time, the newly founded Muslim community had interactions, both peaceful and non-peaceful, with other groups. Islamic international law as a legal discipline thus developed out of these interactions; to deal with the problem of "how to conduct relations with non-Islamic states and with the religious communities within its own territory” (Khadduri, 1966: 3). As such, it deals in great detail with questions of war and peace, territory, captured persons and their property. These issues are however rooted in more general legal questions, for instance questions of property rights and choice of law.

Therefore, despite its specialised concern, Islamic international law was driven by similar developing mechanisms as the body of *fiqh* in general, to which it is normally considered to belong as a sub-discipline rather than a separate field (Bassiouni and Badr, 2002: 2, Abdal-Haqq, 1996: 40). This also means that Islamic international law may be considered binding upon all Muslims to the same extent as, for instance, Islamic rules for marriage or inheritance (Khadduri, 1966: 6, Bsoul, 2008: 12).

2.5.2 Islamic international law – *siyar*

The most common denomination in Arabic for the field of Islamic international law is *siyar*, plural of the word *sīra*. *Sīra* occurs in the Qur'an in six verses and is interpreted by Khadduri (1966: 39) to mean 'travel', 'to move', or 'form'. Other non-technical, non-legal meanings are 'path' or 'way of walking'. In a more specific sense, it was also used early on to denote a life or a biography. Ibn Ishāq, the famous biographer of the Prophet, wrote the first work of *sīra* and thereafter, most scholars have used the term to denote the life of the Prophet (Bsoul, 2008: 1). Its plural later came to mean the conduct or behaviour of a whole community.

Al-Shaybānī never defined the term *siyar* in his text but Al-Sarakhsī chose to do so in the following way. This particular translation is from Khadduri (1966: 40):

The *siyar* is the plural of *sīra* and this book is called after this term. It describes the conduct of the believers in their relations with the unbelievers of enemy territory as well as with the people with whom the believers had made treaties, who may have been temporarily (*musta'mins*) or permanently (*Dhimmīs*) in Islamic lands; with apostates, who were the worst of the unbelievers, since they abjured after they accepted [Islam]; and with rebels (*baghīs*), who were not counted as unbelievers, though they were ignorant and their understanding [of Islam] was false.

It is important to remember that there is no indication that classical jurists viewed rules pertaining to inter-community affairs differently from other rules. It seems correct to see *siyar* as the works in which a certain category of rules, namely those pertaining to inter-community affairs, were discussed, and not as those rules per se (see e.g. El-Bakry, 1987: 115). As we have seen, there is no natural distinction within the body of rules itself, as they arose from the same sources of law and plenty of jurists did not see them as separate from the rules governing relations within the Muslim community.

Like the general *fiqh*, many foundational concepts and norms of *siyar* are found in the Qur'ān. The relationship between Muslims and non-muslims, for instance, became partly defined upon revelation of verse 9:2-14, where treaties with other peoples are discussed. One may also point to verse 5:1, which calls on the believers to fulfil their contractual obligations. Nevertheless, the importance of the Sunna as a source of Islamic international law is immense. It was through the Prophet's conduct as a leader and statesman, making decisions on behalf of his state, that this law crystallised (Bsoul, 2008: 12).

2.5.3 The division of the world in classical Islamic law

The political circumstances of Islam's early years dictated that the field of *siyar* should

become during this period to a large extent concerned with issues related to warfare. Therefore, the laws of war became a central topic of study for the jurists (Khadduri, 1966: 5). This is clearly reflected in the way in which they divided the world into territories. The Hanafi school, which rose to prominence under the Abbasids and Ottomans, devised the terms *dār al-islām* (literally: 'realm/house of Islam' sometimes also seen as a kind of "Pax Islamica" [Khadduri, 1966: 11]) and *dār al-ḥarb* (literally: 'realm of war'), the territories where Muslim law was not enforced (Abel, 2013). This division of the world into territories created a dichotomy between "two necessarily and perpetually hostile domains" (Holt, 1980: 67). This dichotomy, despite being based on war, does not mean that actual hostilities were ever-present, necessary or even frequent. Instead, one might see it, as does Professor Khadduri (1966: 14) as a rough equivalent to the modern concept of non-recognition.

It was first more than 400 years after Al-Shaybānī's death that prominent scholars began disassembling these territorial categories, recognising that the accepted terms did not cover the immense diversity of relations within and without the Islamic communities. Nevertheless, it was only in the 16th century that the majority of the scholarly community departed from the view that the basis for outside relations was one of war, perhaps interrupted by periods of intermittent peace. Instead, they advocated permanent peace (Khadduri, 1966: 22; El-Bakry, 1987: 119). In modern times, the division has been fervently criticised by some scholars, mostly on the basis of it being an innovation, lacking support in the foundational sources of Islamic law. Al-Zuhili (2005: 278) has written that it is merely "a transient description of what happens when war flares up between Muslims and others. It is a narration of facts, similar to those confirmed by scholars of international law, namely that war splits the international community into two parties". Other jurists regard it as founded on a misconception of jihad as an aggressive kind of war against unbelievers (El-Bakry, 1987: 87). Nevertheless, the division into territories is alive in the Muslim community. Chinese Muslims, for instance, have been reported to consider themselves inhabitants of *dār al-ḥarb* (An-Na'im, 1987: 317).

2.5.4 Legal tools to decrease hostility

Despite consensus among classical legal scholars that the division between *dār al-Islām* and other territories existed, practical concerns made constant warfare with the outside world impossible and therefore, several legal mechanisms were used by the Muslims to manage their relations with non-Muslims. Some of the most important ones were agreements, truces or pacts (*mu'āhada*, *ṣulḥ*, *ʿahd*) and the acceptance of non-believers in Islamic lands under the label *ḍimmī*. This essay also argues that *ʿamān*, i.e. a granting of a temporary guarantee of security, was one such tool.

The Muslims entered into agreements with other communities ever since the time of the Prophet (Khadduri, 1966: 10). For instance, after the revelation of the Qur'anic verse which ordered that *jizya*, a form of tax, should be collected from non-Muslims living in Muslim territory (verse 9: 29) he collected *jizya* from the Christians of Najran and the Jews of Yemen but not from the Jewish tribe at Khaybar. This was because he had already concluded a treaty with the Khaybar tribe (Bsoul, 2008: 43). This shows that Islamic law affords great importance to pacts, contracts and treaties in an international context.

The Shafi'i school of law proposed a third territorial concept, *dār al-ʿahd* or *dār al-ṣulḥ*

(literally: “realm of truce”) to denote the territories whose inhabitants had concluded a peace treaty with the Muslims and paid tribute (Khadduri, 1966: 13; El-Bakry, 1987: 128). Al-Shaybānī, despite being a follower of the Hanafi school of law, used and described all three terms extensively (Bsoul, 2008: 13, Edzard, 1997: 71).

2.6 Al-Shaybānī and Al-Sarakhsī in Islamic international law

2.6.1 Al-Shaybānī

This section aims to put Al-Shaybānī in relation to the topics which have been discussed above. Muḥammad Ibn Al-Ḥasan Al-Shaybānī, as his full name was, was born in 749 or 750 A.D. in Wasit in modern Iraq (Salaymeh, 2008: 522, El-Bakry, 1987: 117). He was brought up in Kufa, also in Iraq (El-Bakry, 1987: 117). He seems to have been a talented student and quickly ended up studying with some of the most important Islamic scholars of the time, notably Abū Ḥanīfa (699-767 A.D.) and his disciple Abū Yūsuf (d. 768 A.D.), but also the founders of the Awza'i and the Maliki schools of jurisprudence, who were active in Medina (El-Bakry, 1987: 117f.). The substance of Al-Shaybānī's texts are however most likely to reflect opinions held by the founding figures of the Hanafi school of law (Salaymeh, 2008: 530).

Al-Shaybānī died in 804 or 805 A.D., after having spent several years as *qāḍī* (judge) of Raqqa in Syria under the caliph Harun al-Rashid (Salaymeh, 2008: 522). He was dismissed from his position, which was probably a position to which respect and authority was attached, only a year or two before his death. The reason for his dismissal seems to have been the caliph's dissatisfaction with a legal opinion issued by Al-Shaybānī over an *'amān* issued by the caliph to a zaydi Imam. The caliph eventually sought to ignore the *'amān* and declared it invalid, which Al-Shaybānī refused to accept (Khadduri, 1966: 33). Not only does this show the famous vulnerability of classical Islamic judges to their rulers (see e.g. Coulson 1956), but also, most importantly, that the *'amān* was a legal tool which was used in the real world during Al-Shaybānī's lifetime.

Al-Shaybānī's relationship to his teacher Abū Yūsuf, although sometimes strained, was also one of respect, which could explain why many of Al-Shaybānī's early works are thought to be mere recorded opinions, most likely Abū Ḥanīfa's, as dictated by Abū Yūsuf (Khadduri, 1966: 37). Other books, called the *kabīr* books, were written by Al-Shaybānī himself but have been lost over the years and are known in substance only through other works, such as the commentary (*ṣarḥ*) by Al-Sarakhsī which is analysed in this essay. It does not reproduce the original text by Al-Shaybānī—perhaps because Al-Sarakhsī was in prison at the time of compiling his commentary and so was writing from memory (Khadduri, 1966: 38ff.). *Kitāb al-ʿaṣl*, the source material used in this dissertation, therefore, is the only original Al-Shaybānī text thought to be still in existence. It also goes under the label *kitāb al-mabsūṭ*.

Al-Shaybānī also wrote *kitāb al-kaṣb*, 'the book of acquisition', where he discusses the advantages and vices of commerce and recommends not accumulating wealth beyond one's basic needs (Bonner, 2001: 411). According to Bonner (2001), it is almost certain that this book has been significantly altered by other authors who have made commentaries on it. Perhaps there is a risk that the same applies to his works of *siyar*.

Even though other early jurists, such as Said bin Jubayr (665-714 A.D.) and Hasan al-Basrī (642-728 A.D.), wrote on similar questions, it is thought that none had written texts especially on the *siyar* before Al-Shaybānī (Salaymeh, 2008: 528). Al-Shaybānī was also, as Bsoul (2008: 170) highlights, a skilful jurist in combining the approaches of the legal schools of Medina and Kufa, which contributed to his status as a scholar. This, we must remember, took place before the alleged closing of the gate of *ijtihād*, and so his opinions may have been criticised by other scholars but not, his right to express them. Therefore, Al-Shaybānī's opinions have become respected and authoritative in modern times, so that they often are cited in modern-day fatwas (Arabic: *fatwā* pl. *fatāwā*, a formal legal opinion issued by a scholar, a so called mufti, to muslims seeking advice).

Al-Shaybānī's style in *kitāb al-ʿaṣl* is one Khadduri (1966) likens to a 'case method' which uses dialogue to discuss different scenarios. He does not always provide a precedent or legal opinion in order to legitimise his own opinion, which, as Salaymeh (2008: 530) points out, reminds us of the style of earlier scholars such as Abū Ḥanīfa, to whom *ra'y* (considered opinion) and *ijtihād* were certainly more important than following *ḥadīth*. However, Al-Shaybānī's work shows a larger consideration of the traditions than his predecessors of the Hanafi school.

2.6.2 Al-Sarakhsī

Muḥammad bin Aḥmad bin Abī Sahl Abū Bakr Al-Sarakhsī, as his full name was, was also a follower of the Hanafi school of law. He lived and worked in 11th century central Asia, but no exact dates of his birth and death are known to biographers. He was influenced not only by his own school of jurisprudence but also by the customs and traditions of the region (Calder, 2011). Some of his works seem to have been motivated by antagonism towards the Karrāmiyya movement, which gained force in Transoxiana at that time (Bonner, 2001: 415). Little is known of Al-Sarakhsī's life but some of his works have been preserved, most important of which are the *Mabsūt*, the *Šarḥ al-Siyar al-kabīr* and the *ʿUṣūl al-fiqh*. There are indications in the *Mabsūt* that Al-Sarakhsī dictated it to some of his students from a prison cell, but the reason for his imprisonment is not clear (Calder, 2011).

In the *Šarḥ al-Siyar al-kabīr* Al-Sarakhsī not only reproduced and reorganised texts of Al-Shaybānī, but also provided an extensive commentary concentrated upon questions of *ixtilāf*, difference of opinion between the jurists. In doing so, he also included plenty of information about local practices and opinions from other Islamic schools of jurisprudence. His achievements as a jurist earned him the name *Šams al-ʿaʿimma* (lit. "sun of the leaders") (Calder, 2011). As Calder points out, his texts, not least the *Šarḥ al-Siyar al-kabīr*, "remained a point of reference for the developing Hanafi *furūʿ* tradition till the 19th century" (Calder, 2011).

It is true for all of Sarakhsī's commentaries that it is not an easy task to distinguish where the original opinion ends and Sarakhsī's commentary begins (Bonner, 2001: 413). Unlike Al-Shaybānī, he did not use dialogue but instead referred to scholars, authorities and sources in flowing text, making his text considerably harder to read than Al-Shaybānī's. Some indications that the opinion is Al-Shaybānī's have however been found. Some examples of these are:

1. where a sentence begins *qāl*, 'he said',

2. when the name Muḥammad is mentioned, as this refers to Al-Shaybānī's full name, Muḥammad Ibn Al-Ḥasan Al-Shaybānī,
3. when a verb such as 'he said', 'he added' or 'he commented', or a verbal noun related to them, is combined with the formulas *raḍiya Allāhu 'anhu* ('May God be pleased with him') or *raḥimahu llāh* (may God have mercy upon him), unless it is clear that Al-Sarakhsī is referring to someone other than Al-Shaybānī, such as one of the companions of the Prophet. When such a verb is followed by *ṣallā llāh 'alayhi wa sullam* 'peace be upon him' (pbuh), it is taken to mean that Al-Sarakhsī is referring to the Prophet.

3 Analysis

3.1 Introduction

'*Amān* and terms related to it are among the most central and most common of the terms discussed in Al-Sarakhsī's and Al-Shaybānī's texts; of the 226 chapters of Al-Sarakhsī's extensive commentary, about 13 % focus directly on the concept of '*amān*', and many others discuss it indirectly.

That '*amān* is a difficult topic, full of intricate details, is indicated by both Al-Shaybānī and Al-Sarakhsī. In *al-siyar al-kabīr*, as Al-Sarakhsī quotes Al-Shaybānī:

اعلم بأن أدق مسائل هذا الكتاب وألطفها في أبواب الأمان

(Al-Shaybānī in Al-Sarakhsī, 175)

Know that the finest and most intellectually refined problems of this book are [to be found] in the chapters on '*amān*.

Adding to this, Al-Sarakhsī himself wrote:

وقيل: من أراد امتحان حفاظ الرواية من أصحابنا فعليه بباب الأذان من كتاب الصلاة, ومن أراد امتحان المتبحرين في الفقه فعليه بأيمان الجامع, ومن أراد امتحان المتبحرين في النحو والفقه فعليه بأمان السير

(Al-Sarakhsī, 175)

It is said: the one who seeks to test [his skill in] the memorisation of narration from our companions must [study] the chapter of announcement in the book of prayer, and the one who seeks to test [his skill] as an expert of jurisprudence must [study] the faith of the mosque, and the one who seeks to test [his skill] as an expert of [both] grammar and jurisprudence must [study] the '*amān* of the *siyar*.

Despite its common appearance in the texts, translators rarely investigate the actual meaning of this root and it is common to see the terms derived from it transcribed but not translated. Khadduri, for instance, has chosen not to translate many of the derivatives of the root '*a-ma-na*, instead relying throughout his English translation of Al-Shaybānī on the reader having observed the following explanation from the introductory chapter to his book:

He [the enemy, *ḥarbī*] could attain a state of temporary peace by means of an *amān* (safe-conduct), which he could obtain from an official or from a private person before entering Islamic lands and becoming a *musta'min*. The *musta'min* enjoys a status of temporary peace for a period not exceeding one year, while in the *dār al-Islām*. (Khadduri, 1966: 47)

When Khadduri does translate the term he chooses “pledge of security” or “safe-conduct”.

3.2 The general meaning of the root 'a-ma-na

3.2.1 Introduction

There seems to be three different patterns of vocalization of the root 'a-ma-na in verb form I (*fa'ala*), as Al-Mawrid (2006) mentions 'amuna, 'amana and 'amina. Wehr's dictionary (Cowan 1980) does not include 'amina, while Lane's leaves out 'amuna. In Al-Mawrid, 'amana is said to mean "to trust in" (*waṭiqa bi*), 'amuna "to be or become faithful, loyal, reliable, trustworthy, honest" and 'amina "to be (become, feel) safe, secure, peaceful". Similarly, Wehr writes that 'amuna means "to be faithful, reliable, trustworthy", and 'amina "to be safe, feel safe". *Al-Muḥīṭ* (Entry: 'a-ma-na) explains one meaning as "against fear" (*ḍidd al-xawf*) and one as "against treachery" (*ḍidd al-xiyāna*). Lane (entry: 'amina) does not distinguish between the vocalisation patterns but does explain both meanings. From the dictionaries, we may discern that the root 'a-ma-na carries one meaning related to trust and one related to safety. The meanings are related and may of course overlap, but it may be beneficial to discuss them separately.

The fact that the root 'a-ma-na carries two distinguishable meanings may have consequences for the analysis of many of the words derived from this root. Often, the logic of the Arabic root system makes it possible to discover the meaning of a word by the form which it takes. For instance, one may say that generally, the form *maf'ūl* is a passive participle of the first form of the root, and so usually means "the one to whom the act of the verb is done". When the root has different meanings related to different vocalisation patterns, however, it becomes impossible to say from which of the patterns a particular word has been derived. The mentioned passive participle may in that case carry with it any (or all) of the meanings from the different patterns. In the case of 'a-ma-na, this makes it difficult to know simply from knowledge of the Arabic root system which meaning a derived term has.

3.2.3 'a-ma-na related to trust and confidence

Both 'amuna and 'amina, Lane says, signify that "[h]e was, or became, trusted in, or confided in ... or he was, or became, trusty, trustworthy, trustful, confidential, or faithful". Lane further explains that the verbs 'amina (أَمِنَ), 'amana (أَمِنَ), 'amma (أَمِنَ), i'tamana (أَتَمَّنَ, also ittamana (أَتَمَّنَ and itamana (أَيَمَّنَ) and ista'mana (اسْتَأْمَنَ) are transitive verbs which signify "[h]e trusted, or confided, in him; he entrusted him with, or confided to him, power, authority, control, or a charge; he gave him charge over a thing or person" (Lane, entry: 'a-ma-na). Some of them may also take the preposition *bi* (بِ), similar to the English "to trust in".

Form VIII, *i'tamana* (أَتَمَّنَ), also occurs in the passive, such as in "*u'tumina fulān*" (أُؤْتَمَّنَ فُلَانٌ), which, according to Lane, means that "[s]uch a one was trusted, or confided, in". The same form may also take the preposition 'alā (عَلَى) and thus form *i'tamanahu 'alayhi* (أَتَمَّنَ عَلَيْهِ), which means "[h]e trusted, or confided, in him with respect to such a thing; he entrusted him with, or confided to him, power, authority, control, or a charge over it ... he made him, or took him as [*'amīn*] أمين over such a thing" (Lane, entry: 'a-ma-na).

3.2.4 'a-ma-na related to safety and security

Lane describes the meaning of the verb *'amina* as “He was, or became, or felt, secure, safe, or in a state of security or safety; originally, he was, or became, quiet, or tranquil, in heart, or mind ... he was, or became, secure, or free from fear ... he was, or became, or felt, free from expectation of evil, or of an object of dislike or hatred, in the coming time; originally, he was, or became, easy in mind, and free from fear” (Lane, entry: *'amina*). Lane's explanation is in accordance with (if not completely copied from) *Lisān al-'arab* (entry: *'a-ma-na*). The verb is transitive in itself and through the preposition *min*.

The safety-related meaning of the root *'a-ma-na* can also be found in the Qur'an (9:6):

وَأِنْ أَحَدٌ مِنَ الْمُشْرِكِينَ اسْتَجَارَكَ فَأَجِرْهُ حَتَّىٰ يَسْمَعَ كَلَامَ اللَّهِ ثُمَّ أَبْلِغْهُ مَأْمَنَهُ ذَٰلِكَ بِأَنَّهُمْ قَوْمٌ لَا يَعْلَمُونَ

And if any one of the polytheists seeks your protection (*istajāraka*), then grant him protection (*'ajirhu*) so that he may hear the words of Allah. Then deliver him to his place of safety (*ma'man*). That is because they are a people who do not know. (Translation: Sahih International)

The 'place of safety' is the word *ma'man*, which is derived from the root *'a-ma-na*.

3.3 The legal-technical meaning of 'a-ma-na in the siyar

3.3.1 Introduction

We have seen that Khadduri considers *'amān* “a state of temporary peace, valid for one year, which can be given by either an official or a private person, which applies in dār al-Islām and is possible to translate with the English word safe-conduct” (Khadduri, 1966: 47, my emphasis). According to the Oxford English Dictionary, safe-conduct is “[t]he privilege, granted by a monarch or other authority, of being protected from arrest or harm while making a particular journey or travelling within a certain region” (OED, entry: safe-conduct). Occasionally, Khadduri also translates *'amān* with “pledge of security” (Khadduri, 1966: 193). This is a view of *'amān* which he shares with many other prominent scholars of Islam (e.g. An-Na'im 1987, El-Bakry 1987). The *musta'min*, he says, is the person enjoying this safe-conduct in *dār al-islām* (Khadduri, 1966: 47).

This essay aims to scrutinise this established interpretation of *'amān* in the *siyar*. This will be done in five parts. A first section discusses whether *'amān* entails obligations for both the person granting it and the person receiving it or only one of them, so as to see if it is more like a contract or a promise. This section is concluded with an explanation of so called conditional *'amān*. A second section discusses the agents of *'amān*, i.e. who could grant *'amān*. A third section, by far the longest, investigates the two terms *musta'min* and *'āmin*, which are both derived from the root *'a-ma-na*. The section finds that the translation by Khadduri in fact has overlooked important distinctions between the two terms. A fourth section discusses the temporary nature of *'amān* and its relation to more permanent instruments of Islamic international law.

3.3.2 'Amān as contract or promise

Throughout the introduction to the Arabic version of Al-Shaybānī's *siyar*, Khadduri clearly prefers to use 'amān together with 'ahd ("contract, agreement", so as to make 'ahd 'amān), perhaps to clarify that it is some sort of contract or agreement that is referred to (Khadduri, 1975). Yet neither Al-Shaybānī nor Al-Sarakhsī seem to have had any restraints in using 'amān by itself. Perhaps, Khadduri considers 'amān, written on its own, to be unilateral, i.e. a promise, or pledge, of security, and thought that he needed to compliment it with the word 'ahd in order to clarify that in some situations, the 'amān is bilateral, i.e. more like a contract, which carries with it obligations to both parties. In the following, an attempt is made to clarify whether the 'amān was unilateral or bilateral in the *siyar* with the help of excerpts from Al-Shaybānī's and Al-Sarakhsī's texts.

The following excerpt can be found on page 196 of the Arabic version of Al-siyar:

رَأَيْتَ أَهْلَ الْحَرْبِ الَّذِينَ فِيهِمُ الْمُسْلِمُونَ الْمُسْتَأْمِنُونَ إِذَا اغَارُوا عَلَى دَارِ الْمُسْلِمِينَ فَأَصَابُوا
غَنَائِمَ وَسَبَايَا كَبِيرَةً أَحْرَلُوا مُسْلِمِينَ فَادْخَلُوهُمْ دَارَ الْحَرْبِ فَصَرُّوا بِهِمْ عَلَى أَوْلِيَّتِكَ الْمُسْلِمِينَ
الْمُسْتَأْمِنِينَ، أَتَرَى لَهُمْ أَنْ يَنْقُضُوا عَهْدَهُمْ وَيَقَاتِلُوا عَلَى فَرَارِيِّ الْمُسْلِمِينَ؟

(Al-Shaybānī, 196)

What do you think about the people of the realm of war, among whom are Muslims seeking protection (*al-muslimūn al-musta'minūn*), if they attacked the realm of Islam and took bounty and many captives from the free Muslims, then brought them to the realm of war and passed by those Muslims seeking protection, do you think that they ought to renounce their protection (*'ahdahum*) and fight to free the children and women of the Muslims?

It should be noted, that the translation of the word 'ahd (عَهْدٌ), which occurs here in the form of 'ahdahum (عَهْدُهُمْ), as "contract [of protection]" rests on the hypothesis that the word 'ahd is used by Al-Shaybānī to refer to the 'amān, under which the Muslims in the text are protected and can travel freely in the realm of war. This relation between 'ahd and 'amān could help us explain whether 'amān is unilateral or bilateral. Lane (entry: 'ahd) states that 'ahd means a "compact, a contract, a covenant, an agreement, a confederacy, a league, a treaty, an engagement, a bond, an obligation, or a promise". Some of these are one-sided, such as obligation and promise, while others, such as compact, contract and agreement, consist of at least two parties. We cannot conclude from this excerpt whether Al-Shaybānī by 'amān means a contract between the Muslims and the people of war, a promise by the people of war to not harm the Muslims, or an obligation on the Muslims to behave peacefully in the realm of war. It does show, however, that 'amān in the *siyar* was not restricted to safe-conduct given to people from the realm of war travelling in Muslim lands, but also could be given to Muslim travellers.

In the following examples from the source texts, 'amān is used as a synonym to the word 'aqd. It is clear from the dictionaries, including Lane (Entry: 'aqd), Wehr (Entry: 'a-qa-da), *Lisān al-'arab* (Entry: 'a-qa-da), al-Mawrid (Entry: 'aqd) that the word 'aqd has had the meaning 'contract' or 'agreement' since classical times. However, it not only has this bilateral meaning, but also a meaning more related to *ḍamān*, i.e. "[r]esponsibility,

accountableness, or suretiship” (Lane), which is unilateral. Yusuf Ali in his translation of the Qur'an (1946: 238) translates *'aqd* as 'obligation' and explains that it includes everything from a believer's obligations to God and promises made unilaterally, as well as commercial contracts and contracts of marriage.

In a chapter about the status of an *'amān* given by a *ḍimmī*, Al-Sarakhsī mentions a situation where the *ḍimmī* has been ordered by a Muslim to deliver a message of *'amān* to a person from the realm of war. Where the *ḍimmī* delivers the message by telling the *ḥarbī* that “a person has granted you safe-conduct” (Al-Sarakhsī, 201), the *'amān* will be valid. In the case where the *ḍimmī* instead chooses to say “I have granted you safe-conduct” (Al-Sarakhsī, 201), the *'amān* would be invalid (*bāṭil*). The reason, Al-Sarakhsī writes, is that “this is not transmitting the message, but creation (*ʾinšāʾ*) of a contract or obligation (*'aqd*) by him, which pertains to himself (*muḍāf ʾilā nafsih*)”. Al-Sarakhsī continues by saying that this particular *'amān* is invalid because a *ḍimmī* is not among the people capable of making such contracts or obligations (Al-Sarakhsī, 201).

Just like the term *'ahd*, it is unclear whether *'aqd* is rightly translated as 'contract' or as 'obligation'.

One chapter of Al-Sarakhsī's commentary bears the title 'conditional *'amān*' (*'amān ʿalā š-šart*). The following passage occurs in the text:

قال: وإذا آمن المسلمون رجلاً على أن يدلهم على كذا ولا يخونهم، فإن خانهم فهم في حل من قتله، فخرج عليهم من مدينته أو حصنه على ذلك حتى صار في أيديهم، ثم خانهم، أو لم يدلهم فاستبانتم لهم خيانتهم، فقد برئت منه الذمة، وصار الرأي فيه إلى الإمام إن شاء قتله وإن شاء جعله فيئناً؛ لأن الشرط هكذا جرى بينهم، فقال عليه السلام: "المسلمون عند شروطهم"، وقال عمر رضي الله عنه الشرط أملك، أي: يجب الوفاء به

(Al-Sarakhsī, 195)

He (Al-Shaybānī) said: if the Muslims granted protection (*'amana* or *'amma*, depending on the version of Al-Sarakhsī's text) to a man on [the condition] that he shows them [the way] to something and does not betray them, and if he betrays them then they are at liberty to kill him, so he exits with them from his city or fortress upon that [condition] so that he comes in their hands, then he betrays them, or does not show them [the way] and his betrayal becomes clear to them, then he becomes free of the protection and the decision whether he should be killed or made into booty lies with the imam; because this type of condition took place between them, and he (the Prophet, Muhammad) said, peace be upon him: “Muslims [stand by] their stipulations”, and Umar said, may God be pleased with him, “the condition/stipulation is expected of you”, that is: its fulfilment is required.

My hypothesis is that Al-Sarakhsī and Al-Shaybānī accepted an *'amān* as legally binding whether it was unilateral, i.e. made as a promise without conditions, or bilateral, i.e. made as a contract between two parties. This is supported by the fact that Al-Sarakhsī accepted as valid an *'amān* made upon a condition.

3.3.3 The agents of 'amān

On page 175-178 in Al-Sarakhsī's commentary, the author discusses who is qualified to grant 'amān. This discussion is an interesting example both of *ixtilāf*, i.e. accepted differences in opinion between the legal scholars, and of some legal methods used by such scholars. Al-Sarakhsī begins by quoting Al-Shaybānī, stating that:

ثم أمان الرجل الحر المسلم جائز على أهل الإسلام كلهم عدلاً كان أو فاسقاً

(Al-Sarakhsī, 175)

“Also, the 'amān of the free Muslim man is valid to the whole community of Islam, whether he [i.e. the one granting 'amān] is righteous or nefarious” (My translation).

About the capacity of free Muslim women to give 'amān, Al-Sarakhsī writes that their 'amān is valid, even though they do not have the capacity or physical composition to partake in battle. He supports this through the use of a *ḥadīth*:

والدليل على صحة أمانها أن زينب بنت رسول الله صلى الله عليه وسلم أجارت زوجها أبا العاص بن الربيع، فأجاز رسول الله صلى الله عليه وسلم أمانها، وعن أم هانئ قالت: أجزت حمويين لى من المشركين، أى قريبين فدخل على بن أبى طالب رضى الله عنه فتغلت عليهما ليقتلهما. أى قصدهما فجأة وقال: أتجيرين المشركين؟ فقلت: والله لا تقتلهما حتى تبدأ بى قبلهما، ثم خرجت وقلت: أغلقوا دونه الباب، فذهبت إلى رسول الله صلى الله عليه وسلم فى أسف الثنية، فلم أجده ووجدت فاطمة فقلت: ماذا لقيت من ابن أمى على، أجزت حمويين لى من المشركين فتغلت عليهما ليقتلهما، فكانت أشد على من زوجها، إلى أن طلع رسول الله صلى الله عليه وسلم وعليه رهجة الغبار، فقال: مرحباً بأم هانئ فاخته، فقلت: يا رسول الله، ماذا لقيت من ابن أمى على، ما كدت أنفلت منه، أجزت حمويين لى من المشركين فتغلت عليهما ليقتلهما، فقال: ما كان له ذلك، فقد أجرنا من أجزت وأمنا من أمنت، ثم أمر فاطمة رضى الله عنها فسكبت له غسلاً فاغتسل [...] وذلك ضحى فتح مكة، فقد صحح رسول الله صلى الله عليه وسلم أمانها، وبين أنه ما كان لعلى أن يتعرض لهما بعد أمانها

And the proof of the soundness of her 'amān is that Zainab, the daughter of the Prophet (pbuh) protected (*'ajārat*) her husband Abū l-ʿĀṣ bin al-Rabīʿ, and the Prophet of God (pbuh) approved her 'amān, and from [i.e. following the narration of] Umm Hani she said: I have protected (*'ajartu*) two of my husband's people who are unbelievers, that is relatives, but Ali bin Abi Talib – may God be pleased with him – seized upon them both to slay them – that is he headed for them suddenly – and he said: Do you protect (*'atujīrīna*) the unbelievers? And I said: By God do not kill them two but begin with me before them, then I exited and said: lock the door for him, and I went to the Prophet of God (pbuh) in the lowest part of the mountain, but I did not find him but instead found Fatima and I said: what do you think about Ibn 'ummī Ali, I protected (*'ajartu*) two of my husband's people, who are unbelievers, and he seized upon them both, and she was almost driven away by her husband, until the Prophet appeared, upon him dust was raised, and He said: Welcome Umm Hani, his sister,

and I said: Oh Prophet of God, what do you think of Ibn 'ummī Ali, I was almost driven away by him, I protected (*'ajartu*) two of my husband's people of the unbelievers then he seized upon them to kill them both, and He said: that was not up to him, we protect (*'ajarnā*) whomever she has protected (*'ajarat*) and we give safe-conduct to (*'ammaṇa*) whomever she has given safe-conduct to (*'ammanat*). Then he ordered Fatima, may God be pleased with her, and she poured a bath for him and he washed himself [...] and that morning he conquered Mekka, and the Prophet of God (pbuh) confirmed her *'amān*, and demonstrated that it was not up to Ali to confront them two after her *'amān* (My translation).

Slaves seem to have been permitted to grant *'amān* under certain conditions, but the following excerpt from Al-Sarakhsī shows that there was disagreement among the scholars:

فأما العبد المسلم فلا أمان له إلا أن يكون يقاتل، وهذا قول أبي حنيفة رحمه الله وهو إحدى الروايتين عن أبي يوسف رحمه الله، وفي الرواية الأخرى وهو قول محمد رحمه الله: أمانه صحيح قاتل أو لم يقاتل، لأنه مسلم من أهل نصرته الدين بما يملكه، والأمان نصرته بالقول، وهو مملوك له بخلاف مباشرة القتال

As for the Muslim slave, no *'amān* for him unless he is fighting, and this is what has been said by Abū Ḥanīfa, may God have mercy upon him, and this is one of the two stories from Abū Yūsuf, may God have mercy upon him, and in the other story, and this said Muḥammad [Al-Shaybānī], may God have mercy upon him: His *'amān* is valid whether he fights or not, because he is a Muslim of the people who support the religion with what he owns (or 'is allowed to do'), and the *'amān* is such support in speech, and this is a capacity [which is] separate from the practice of fighting (My translation).

لكن أبا حنيفة رحمه الله يقول: معنى النصرته فى الأمان مستور فلا يتبين ذلك إلا لمن يكون مالكا للقتال، والعبد المشغول بخدمة المولى غير مالك للقتال، فلا تظهر الخيرية أمانة بخلاف ما إذا كان مقاتلاً بإذن المولى

But Abū Ḥanīfa, may God have mercy upon him, says: the meaning of support in the *'amān* is hidden and thus does not reveal itself except to those who are capable of fighting, and the slave who is occupied with the service to his master is not capable of fighting, and so the benevolence of the faith does not show except if he fights with the permission of his master ... (My translation)

In the opinion of Al-Sarakhsī, *ḍimmīs* could not grant *'amān*.

Furthermore, Al-Sarakhsī did not accept an *'amān* granted by a Muslim who is captured by non-Muslim fighters. Where a Muslim prisoner tells his captives he grants them *'amān*, the *'amān* is not binding upon other Muslims according to Al-Sarakhsī (and according to Al-Shaybānī, whose opinion he refers to), because the *'amān* is not granted with a view to benefit the Muslim community but rather to help the prisoner himself. This lack of communal interest means that the contract or obligation will be invalid.

3.3.4 The protected and those seeking protection

Joseph Schacht writes that the *musta'min* is “the person who has received an *amān*” (Encyclopaedia of Islam, *Amān*). Khadduri translates *musta'min* as a [person] “under an *amān*” (Khadduri, 1966: 193). El-Bakry seems to agree with this definition (El-Bakry, 1987: 311). Khadduri also says that a *musta'min* is “a person who is clothed with security as long as he remains in Islamic lands” (Khadduri, 1966: 18). A Muslim could, as we have seen above, be given the status of *musta'min* in non-Islamic lands, making him “under obligation to respect the authority of that territory and observe its laws as long as he remained in that territory, enjoying the benefits of security granted him by a safe-conduct or a treaty with Muslim authorities. The Muslim was in the meantime under obligation to observe his own law, except perhaps certain rules not strictly obligatory in enemy territory” (Khadduri, 1966: 14).

My hypothesis about the term *musta'min* differs from Khadduri's. For practical reasons, it is highly unlikely that traders, messengers and the like were always able to obtain an *'amān* before they entered *dār al-islām*. This would have required meeting Muslims, preferably Muslims in positions of power, before every trade journey into Islamic lands, to be granted the *'amān*, and even if this could be arranged, the Muslims who granted *'amān* might not be on their way back to Muslim-controlled territory to inform officials there about their granting *'amān* to these specific non-Muslim travellers, making the journey ridden with the risk of being attacked by other Muslims unaware of the *'amān*. Therefore, it seems logical that many travellers in fact moved freely between territories and sought *'amān* first when meeting officials at their destination in *dār al-islām*. That this is not compatible with Khadduri's view of how an *'amān* was granted is implicit from how Khadduri states that “[i]nhabitants of the realm of war who entered into a peace treaty with the Muslims did not need to obtain an *'amān* before entering the realm of Islam (Khadduri, 1966: 48). The important point here is that the statement indicates that Khadduri takes for granted that the normal procedure, i.e. when no peace treaty had been agreed, was that non-Muslim traders asked for and obtained *'amān* before they entered *dār al-islām*, most likely a cumbersome and perhaps dangerous task.

This theory of how an *'amān* was obtained makes it reasonable to search for a term conveying the state of such travellers, i.e. coming not under an *'amān* but in search for one. It is important for this theory that we look back on the dual meanings of the root *'a-ma-na* as outlined above (section 3.2). Travellers who have not yet been granted *'amān* (as in 'protection') come, obviously, in a state of trust and confidence, convinced that once at their destination, they will be given protection. If it was not so, surely no non-Muslim trader would take the risk of entering *dār al-islām* no matter the potential profit.

The word *musta'min* is the active participle of the tenth verb form of the root *'a-ma-na*. The tenth verb form of the Arabic verb commonly has the meaning of asking for something or seeking something (Wightwick & Gaafar, 2008: 57). In the words of Schramm (1962: 362), it is “desiderative” in meaning. This is so both in modern and classical Arabic. (Even if several examples exist of the tenth verb form carrying a meaning of a received status, such as *musta'jir*, 'tenant', or *istatamma* 'to be complete', they seem to be exceptions and the general tendency is that form ten is desiderative.) The primary places to search for a term for travellers who seek protection is therefore in form ten of the root verb *'a-ma-na*, i.e. in

the form *ista'man* and *musta'min*.

The term *'āmin* is the active participle of the verb *'amana* in its first form. The normal meaning of such a participle is someone doing the act conveyed by the verb, or in case the verb means to be in a certain state, the one being in that state. Following this and the root meaning explained above, *'āmin* should have the meaning 'the one being secure and safe'. My hypothesis is thus that the place to look for a term for the person actually under an *'amān* is in the term *'āmin*. This hypothesis finds support in the dictionaries. Lane writes that *'āmin*, at least partly, carries the same meaning as the related *'amīn*. Both mean “[s]ecure, safe, or free from fear” (Lane, entry: *'amīn*). In the Qur'an, *'amīn* occurs in *sūra* 95, where Mekka is referred to as “this city of security” (Yusuf 'Ali, *sura* 95).

A few examples from the source texts will now be analysed to determine the correct meaning of *'āmin* and *musta'min* in classical Islamic international law. The first is from *kitāb al-aṣl*:

قلت: رأيت الرجل المستأمن من اهل الحرب يخرج مستأمناً في تجارة الى دار الاسلام
فيشتري عبدا مسلماً ثم يدخل به في ارض الحرب، ما حال ذلك العبد؟

(Al-Shaybānī, 168)

Khadduri's translation of this excerpt goes as follows:

I asked: If a *musta'min* from among the inhabitants of the territory of war enters the territory of Islam under an *amān* of trade and purchases a Muslim slave and thereafter returns with the slave to the territory of war, what would the status of the slave be? (Khadduri, 1966: 160)

Khadduri chooses not to translate the first occurrence of the word *musta'min*, and to translate the second occurrence, which is followed by *fī tijāra^{im}* (في تجارة), with “under an *amān* of trade”.

Is it possible that Al-Shaybānī, in writing this sentence, could have been referring not to a trader under *'amān* but a traveller seeking *'amān* in order to trade safely? Contextually, such an interpretation seems possible, because there is nothing in the sentence that indicates that the man has already been granted protection when beginning his journey. The following translation, which follows the hypothesis that *musta'min* refers to a traveller seeking safe-conduct, thus becomes possible:

I said: What do you think when a man who seeks protection exits from the realm of war to the realm of Islam to trade, seeking protection, and buys a Muslim slave with whom he enters the realm of war, what is the status of that slave? (My translation)

The hypothesis must also be tested on the commentary by Al-Sarakhsī:

ولو أن عسكر المسلمين في دار الحرب وجدوا رجلاً أو امرأة، فقال حين وجدوه: جئت أطلب الأمان فإن لم يكن لهم علم به حتى هجموا عليه فهو فيء ولا يصدق في ذلك؛ لأن الظاهر يكذبه فيما يقول، فإنه كان مختفياً منهم إلى أن هجموا عليه، وإنما يليق هذا بحال من يأتيهم مغيراً لا مستأمناً، فالظاهر أنه يحتال هذه الحيلة بعدما وقع في الشبكة فلا يصدق [...] فهو فيء، وللإمام أن يقتله، ولا يقبل قوله إنني جئت أطلب الأمان

(Al-Sarakhsī, 205)

If the Muslim army in the realm of war find a man or a woman, who when they find him says: I came to seek protection (*al-ʿamān*) and if he did not have knowledge of it until they captured him, then he is booty and does not speak the truth about this: because it is clear that he is lying in what he says, and if he was hidden from them until they captured him, however it is fitting to the situation that he came to them as one who is prone to change and not to seek protection (*mustaʿminan*), then it is evident that he achieved this solution by tricks after he fell into the snare and should not be trusted, and [...] he becomes booty, and it is for the Imam to kill him, and his talk that I came to demand protection (*ʿamān*) is not accepted (My translation).

Here, it is unreasonable to translate *mustaʿmin* with 'under safe-conduct' like Khadduri has done, because the enemy is not granted safe-conduct at all if he tries to fool the Muslims in order to save his life and avoid capture. Al-Sarakhsī continues:

فالظاهر أنه أقبل راداً لقصد المسلمين فحين لم يتمكن من ذلك احتال بهذه الحيلة وإن لم يعرض له المسلمون بقتل ولا أسر فأقبل إليهم حتى أتاهم فهو آمن؛ لأن إقباله إليهم دليل المسالمة، فهو بمنزلة النداء بالأمان بخلاف الأول

(Al-Sarakhsī, 205)

... it is evident that he approached as an answer to the Muslims' intention and when he did not succeed he invented this trick, and if the Muslims did not deal with him by killing [him] and did not make him a prisoner of war, then he approached them in order to come to them, and so he is under protection (*ʿāmin*); because approaching them is evidence of his peaceful intentions and equal to a call for protection (*ʿamān*) contrary to the first [case].

Here, the fighter is granted safe-conduct, and therefore, Al-Sarakhsī switches from using the term *mustaʿmin* to the term *ʿāmin*. This supports the theory that *mustaʿmin* should be interpreted as 'seeking safe-conduct or protection' and not as already 'under protection'. It is however still possible that Al-Sarakhsī uses the word *ʿāmin* simply in its general meaning, i.e. 'safe' and not in a legal-technical meaning to indicate the person's legal status. The following quote however provides further evidence that the terms *mustaʿmin* and *ʿāmin* were indeed directly contrasted to each other as legal-technical terms:

وإن كان في منعة حيث لا يسمع المسلمون كلامه ولا يرونه، فانحط من ذلك الموضع ليس معه أحد ولا سلاح حتى أتى المسلمين، فلما كان حيث يسمعون نادى بالأمان وهو في ذلك الموضع غير ممتنع من المسلمين، فهو آمن؛ لأنه أتى بما في وسعه من مفارقة المنعة والنداء بالأمان إذ كان بحيث يسمع المسلمون، وألقى السلاح، فالظاهر أنه جاء طالباً للأمان، فهو آمن، أمنوا أو لم يؤمنوا، لأن الشرع أمن مثله، قال تعالى: "وإن أحد من المشركين استجارك فأجره" التوبة:6، وقال تعالى: "وإن جنحوا للسلم فاجنح لها" الأنفال:61

(Al-Sarakhsī, 205f.)

And if he was in an inaccessible place where the Muslims did not hear him talking and did not see him, and he came down from that place without anybody and without weapon in order to come to the Muslims, and he called for protection (*'amān*) when he was where they could hear him and he is in that place not constrained by the Muslims, then he is under protection (*'āmin*); because he did all in his power to depart from that inaccessible place and call for protection (*'amān*) when he was where the Muslims could hear him, and threw his weapon, and it is clear that he came to demand protection (*'amān*), then he is protected (*'āmin*), whether they granted protection (*'ammanū*) or not (*lam yu 'amminū*), because the divine law grants protection to those like him, He – the Exalted – said: “And if any one of the polytheists seeks your protection (*stajāraka*), then grant him protection (*fa- 'ajirhu*)” Al-Tawba: 6, and He – the Exalted – said: “And if they incline to peace, then incline to it [also]” Al-' Anfāl: 61 (My translation, verses from the Qur'an translated by Sahih International).

Not only does this excerpt give yet another example of how Al-Sarakhsī prefers the term *'āmin* when the state of the enemy has been established. It is also important to note that in the first of the two Qur'anic verses, verb form ten of the root *ja-wa-ra* (*stajāraka*) means 'to seek protection', i.e. it carries the desiderative meaning that *musta 'min* potentially carries as well. This gives further weight to the argument that *musta 'min* means 'to seek safe-conduct'. The following example shows that where the enemy comes to the Muslims on other preconditions he may not be given *'amān*:

وإن كان أقبل سالماً سيفه ماداً رمحاً نحو المسلمين، فلما كان في موضع لا يكون ممتنعاً
منهم نادى الأمان فهو فيء؛ لأن الظاهر من حاله أنه أقبل مقاتلاً

(Al-Sarakhsī, 205f.)

And if he approached with his sword drawn and his spear pointed forward towards the Muslims, and when he is in a place where he is not constrained by them he calls for protection (*'amān*) then he is booty; because it is clear from his state that he approached them as a combatant (My translation).

In the following, a few instances where Al-Shaybānī uses the term *'āmin* will be analysed. In the first example, Al-Shaybānī has spoken about the conditions on which traders could enter the *dār al- 'islām*. He then says:

قلت: رأيت ان دخل منهم الى دار الاسلام تاجر بغير امان الا الموادة التي كانت لهم؟
قال: هو آمن بتلك الموادة

(Al-Shaybānī, 166)

This, Khadduri translates as follows:

I asked: If one of them entered the territory of Islam as a merchant without an *amān*, except the peace agreement they had made [with the Muslims, what would be the ruling]?

He replied: He would enjoy an *amān* by virtue of that agreement.
(Khadduri, 1966: 157).

Khadduri's translation in this case thus follows my hypothesis in that he considers *āmin* to be a person enjoying *'amān*.

قال: وإذا نادى المسلمون أهل الحرب بالأمان فهم آمنون جميعاً، إذا سمعوا أصواتهم بأي لسان نادوهم به

(Al-Sarakhsī, 199)

He (Al-Shaybānī) said: if the Muslims shout an *'amān* to the people of war then they are all protected (*āminūn*), if they heard their voices, in whichever language they shouted (my translation).

This is one instance where it is unlikely that Al-Sarakhsī used the word *āmin* as a non-technical term with the general meaning 'safe', because it is written as the direct result of the Muslims' *'amān*. It is also a good example of a unilateral *'amān*, because the only requirement for the *'amān* to be valid is that it is heard, and there is no condition that the people of war reply with an acceptance of the *'amān*. This applies no matter what language the Muslims speak or how they express their promise:

قال: وإذا قال المسلمون للحربي: أنت آمن، أو لا تخف، أو لا بأس عليك، أو كلمة تشبه هذا فهو كله أمان

(Al-Sarakhsī, 200)

He (Al-Shaybānī) said: if the Muslims said to the enemy: you are protected (*āmin*), or do not fear, or no harm [will come] to you, or a word that resembles this, then it is all *'amān* (my translation).

فأما قوله: تعال، مطلقاً فكلام موافقة وكذلك إشارته بالأصابع إلى السماء فيه بيان أنني أعطيتك ذمة إله السماء، أو أنت آمن مني بحق رب السماء، فهو بمنزلة قوله: أمنتك

(Al-Sarakhsī, 200)

And as for him (the Muslim) saying: come, without any exception then [his] speech is analogous [to the mentioned ways of granting *'amān*], and so is him pointing with his fingers to the sky; in this there is a message that I have given you the protection of the God of the sky, or you are safe from me in the name of the Lord of the sky, and this is a substitute for him saying: I have granted you protection (*'ammantuka*) (my translation).

Here, it is even clearer that *āmin* refers to an enemy *ḥarbī* who is protected by the *'amān*. This is because the three phrases 'you are protected', 'do not fear' and 'no harm will come to you' all refer to things said by the Muslims, who are the protectors. The fact that the term *musta'min* is not used in either of the two excerpts further indicates that it has the meaning 'seeking protection' as posited above, and not 'under protection'.

وإذا انتهى عسكر المسلمين إلى مطمورة أو حصن فأقاموا عليها فناداهم قوم من أهلها، أمنونا

على أهلينا ومتاعنا على أن نفتحها لكم، ففعلوا ذلك وفتحوها لهم، فالقوم الذين سألوا ذلك
آمنون وإن لم يذكروا أنفسهم بشيء

(Al-Sarakhsī, 217)

And if the army of the Muslims came upon a house or a fortress, and attacked it, and people of its inhabitants called them – protect our people and our property upon [the condition] that we open it for you, and they did that and they opened it for them, then the people who asked that are protected (*āminūn*) even if they did not say anything themselves (my translation.)

Here, Al-Sarakhsī states that if the people inside the fortress open their gates they become protected (*āminūn*). This shows that Al-Sarakhsī does not use the term *musta'min* when the legal status of the protected people is not in question. It is clear to him that in this case, the people of war have a right to receive protection.

In the following example, the term *āmin* is instead used in contrast to the word *fay'*, which means booty, i.e. property captured in war.

وإن ادّعى بعض السبي رجلان منهم، فقال كل واحد منهما: هذا من أهلي، فإن صدّق
المدّعي به أحدهما فهو من أهله وكان آمناً، وإن كذبهما جميعاً كان فيئاً؛ لأن السبب الذي
رتبنا عليه الأمان لم يثبت بينه وبين واحد منهما

(Al-Sarakhsī, 218)

And if two of their men claim [ownership, relationship to] some prisoner of war, and both of them say: this one belongs to my family, and if the one who is claimed agrees with one of them then he is of his family and is protected (*āmin*), and if he denies them both he is booty (*fay'*); because the reason upon which we founded the protection (*amān*) did not become established between him and one of the two of them (my translation).

Again in the following excerpt, the term *āmin* is used in contrast to *fay'* (booty), but here, we may also note the use of the term *musta'min*. The situation which is discussed is similar to the previous one in that it is after a battle and the Muslims are dividing the spoils of war. Some of the captured people claim that they belong to the same family so that if one of them is granted *amān* the other should too:

فإذا تصادقوا على ذلك كانوا آمنين، وأيهم ادّعى ذلك وكذبه المستأمن أو ادّعى المستأمن
وكذبه المدّعي فهو فيء

(Al-Sarakhsī, 219)

And if they are in agreement on this they are protected (*āminīn*), and whichever of them claims that and the protection-seeker (*musta'min*) disproves him or he claims the protection-seeker (*musta'min*) and the claimer disproves it, then he is booty (*fay'*) (my translation)

This statement by Al-Sarakhsī is an example of how a *musta'min* can become either booty

or *ʿāmin* depending on the circumstances. It lends further support to the hypothesis that *musta ʿmin* is the preferred term when a person is seeking protection but his legal status is not yet determined.

3.3.5 The temporary nature of *ʿamān*

Bsoul (2008) argues that *ʿamān* is a temporary form of the *ʿaqd al-ḍimma*, i.e. the compact under which non-Muslims could live in Islamic lands permanently and enjoy certain rights and freedoms. An-Naʿim (1987: 329) also highlights the temporary nature of the *ʿamān* (An-Naʿim, 1987: 329). Khadduri explains that if the *musta ʿmin* “[s]hould decide to remain for a longer span, he would be required to become a Dhimmī and pay a poll tax as non-Muslim subject of the Islamic state. Dhimmīs ... were originally inhabitants of occupied territories who agreed to pay the *jizya* (poll tax) and to observe certain rules embodied in peace agreements made after they passed under Islamic rule” (Khadduri, 1966: 47).

The relation between *ʿamān* and *ḍimmiyya* is touched upon by Al-Sarakhsī in the following passage, which is part of a chapter named 'Chapter on the woman from the people of war who exits with a Muslim man who says: I have captured her, and she says: I came seeking protection (*musta ʿmina*)' (p. 235). Al-Sarakhsī discusses a situation where a Muslim man comes from the realm of war, perhaps having fled from captivity among the enemies, and brings with him a woman who he says is his wife but meets other Muslims who seek to capture the woman. Al-Sarakhsī argues that:

وإذا ثبت النكاح كانت حرة ذمية؛ لأنه حين خرج بها بناء على النكاح الذي بينهما فقد
أمنها، وأمان الواحد من المسلمين بعدما خرج من قهر أهل الحرب كأمان جماعتهم ثم هي
مستأمنة تحت مسلم، فتصير ذمية بمنزلة المستأمنة في دارنا فتصير هي من أهل دارنا تبعاً
له

(Al-Sarakhsī, 235)

If the marriage is established she is a free *ḍimmīya*; because, based on the marriage between them, when he exited with her he granted her protection (*ʿammanahā*), and the protection (*ʿamān*) of one Muslim after he left the captivity of the enemies is like the protection (*ʿamān*) of them all, [so that] thereafter she is a protection-seeker (*musta ʿmina*) under the Muslim, and she becomes a *ḍimmīya* in the position of (*bi-manzilat*) a protection-seeker (*musta ʿmina*) in our territory and following this she becomes one of our people (my translation).

The result of this reasoning is thus similar to Khadduri's conclusion. The woman indeed becomes a *ḍimmīya* if her relationship with the Muslim is established. Because of the phrasing of Al-Sarakhsī's original, it has not been possible to conclusively say whether the woman loses her status as *musta ʿmina* when she becomes a *ḍimmīya* or whether there is a more complicated relation between the concepts *ʿamān* and *ḍimmīya*, so that she could retain both statuses in Islamic lands. This depends on the meaning of *bi-manzilat* (بمنزلة), which has been translated as 'in the position of' but whose exact legal meaning would need further investigation. That the woman loses her status as a *musta ʿmina* (or *ʿāmina*, if her status as protected has been conclusively established, see previous section) would however

be in line with the view among scholars that *'amān* is only temporary.

As a side-note, *'amān* is a temporary institution in a second sense, because it relies on dividing the world in the way the classical scholars did, into the realms of war, peace and truce. As El-Bakry explains, there will be no need for *'amān*, or for *siyar* as a field of law, if the whole world is *dār al-islām* (El-Bakry, 1987: 121).

4 Conclusion

Concepts related to *'amān* have been a part of Arabic legal discourse already since the foundation of the Islamic religion in the 7th century A.D. This essay has sought to show that *'amān* was a legal tool used to decrease the number of hostile encounters with the outside world and facilitate trade. Even though the world was divided according to the jurists into a realm of war and a realm of Islam, there was not necessarily any ever-present violence between the two.

We have seen (in chapters 2.2 and 2.3) how the law at the time of Al-Shaybānī and Al-Sarakhsī constantly developed through re-interpretation. This re-interpretation took place with the use of legal methods and principles together with vivid intellectual effort. In the analysed materials, we can see how Al-Sarakhsī discusses the views of Al-Shaybānī and his predecessors in relation to the sources of law, to eventually find a solution which in some cases is not in agreement with that of the previous scholars. In the material analysed in this essay, several examples of *qiyās* and *istihsān* have been shown. *Ixtilāf*, the differences in opinion in the scholarly community, was definitely an accepted and even encouraged phenomenon and opinions do not seem to have been in any way streamlined.

Both Al-Shaybānī and Al-Sarakhsī seem to have afforded great importance to this in the context of *'amān*. This must certainly have rested on the great respect given to contracts and obligations in general in the Qur'an and Sunna. It is also possible that it was the sanctity of contracts that made Al-Shaybānī protest when the *'amān* of the zaydi imam was questioned by the caliph shortly before Al-Shaybānī's death.

That *'amān* is an intricate subject was noted by Al-Shaybānī and Al-Sarakhsī. Therefore, the authors and translators who have chosen not to translate it and its related terms clearly take a big risk of missing information contained in the word. It has been demonstrated that *'amān* as an Arabic root contains two meanings, one related to trust and one related to safety. This creates further difficulties when translating its derived terms.

Some conclusions could be drawn on whether *'amān* at the time of the classical jurists was an agreement between two parties or whether it was a promise by the 'protector' to give safety to the 'protected'. The most important indicator that *'amān* was a contract rather than an unconditional promise is the fact that Al-Sarakhsī writes about conditional *'amān*. The instances in the source texts where *'amān* was connected to or used as a synonym with the words *'ahd* and *'aqd*, which in modern Arabic mean 'contract' rather than 'promise', could not show that *'amān* meant contract, because both words also had the meaning 'obligation' during classical times.

Al-Sarakhsī permitted both women and men, if they were free and Muslims, to grant *'amān* to non-Muslims in *dār al-islām*. Women, he wrote, forward the aims of Islam in other ways than fighting, which is what previous scholars had considered to give the Muslim men their legal capacity to grant *'amān*. In general, Al-Sarakhsī seems to have stressed the

free will of the individual as a prerequisite for granting *'amān*, rather than for instance gender or status within the Muslim community. It is the free advancement of the interest of Islam and the Islamic community which is required for an *'amān* to be valid. This is perhaps the reason a *ḍimmī* cannot legally grant *'amān*. Similarly, a Muslim man who has been captured by the enemy cannot grant his captors *'amān* because such an *'amān* would clearly only benefit him individually, not the community as a whole. Consequently, the rest of the community is not bound by the *'amān* given by a *ḍimmī* or a captured Muslim. Free will is required also in the applying for *'amān*. The enemy *ḥarbī* who seeks *'amān* only when he is in the hands of the Muslims is not considered to have the right to protection and the Muslims are not obliged to grant him *'amān*.

This essay has also critically evaluated Majid Khadduri's translation of the word *musta'min* as “a person who is clothed with security as long as he remains in Islamic lands” (Khadduri, 1966: 18). It has been demonstrated that it is more likely that *musta'min* referred to a traveller applying for *'amān* than one already under *'amān*. This is for the following reasons: to take for granted that traders had to seek *'amān* before they arrived in Muslim lands would be to underestimate the flow of trade between lands at the time. It would also be to adopt a view of Islam as inherently violent, because to require traders to seek *'amān* before they entered Islamic territory would mean that traders not given *'amān* beforehand were constantly insecure in Islamic lands. It is also my view to confuse the terms *musta'min* and *'āmin* would also be to underestimate the precision of classical Arabic as a legal language. Moreover, there are indications in Al-Sarakhsī's text that Muslims were not only able to but also obliged to give *'amān* when certain conditions were met, such as when a man approached them without weapons. In those cases, Al-Sarakhsī uses the term *'āmin* instead of *musta'min*. Interestingly, a person who approaches the Muslims in that manner is characterised by the second meaning of the root *'a-ma-na*, that of trust and confidence, rather than security. The theory is also supported by the theoretical basis of the Arabic root system, because the form *musta'min* belongs to form ten, which is commonly desiderative in meaning. To translate *musta'min* with 'seeking protection/'*'amān*' is also contextually possible in the excerpts analysed, and it is contextually unreasonable in some of the cases analysed to translate it with 'under *'amān*' or 'protected', such as when a *musta'min* approaches the Muslims to ask for *'amān* but is instead taken as booty. It has also been shown that Al-Shaybānī and Al-Sarakhsī considered Muslims in non-Islamic lands to be able to be granted protection as well, in contrast to Khadduri's explanation of the term *musta'min*.

Some modern scholars of Islamic law consider *'amān* to be one aspect of the *ḍimmiyya*, i.e. the protection given to non-Muslim resident in Islamic lands in exchange for taxes. It has been demonstrated that such a view is compatible with Al-Sarakhsī's view on the relation between *'amān* and *ḍimmiyya*, as he writes that a non-Muslim woman who is brought to Islamic land under an *'aman* becomes a *ḍimmiya* if she stays there permanently as the wife of a Muslim.

5 Final remarks

Lastly, it is tempting to point out the many similarities between the system of *'amān* in the *ṣiyar* and the modern laws of travel and migration. It is for instance not too far-fetched to

see *'amān* as a form of visa. Visas are today a common way to apply and receive a permit to travel to a foreign country. The laws and regulations surrounding visas are of similar complexity as those related to *'amān*. Moreover, it is well-known that visa rules are the objects of changing political will, economic circumstances and diplomatic relations, so that the visa policy of one country towards another can change overnight. For instance, people from the European Union generally have little difficulty obtaining visas to countries in Africa and Asia, but many citizens from those two continents may not be allowed to travel legally to the EU and, if they do, must go through rigorous examination before eventually doing so. Even longer and more thorough procedures apply to the obtaining of a residence permit, i.e. the permit to stay and work in a foreign country for a longer time than the visa. One may possibly see the residence permit as a modern form of *ḍimmīya*.

It is also possible to argue that the complexity and constant variability of the migration rules may also tell us something about the concept of *'amān*. The world in Al-Shaybānī's and Al-Sarakhsī's time was of course very different to ours and the wave of global movement and networking that have followed what we call globalisation did not exist on today's global scale. Nevertheless, the social and economic incentives to travel or migrate permanently are likely to have existed. Two such incentives that we have touched upon in this essay are trade, another is the effects of war, which must have uprooted many people. Both factors contribute to modern global migration. Perhaps, the rules of *'amān* were affected by similar mechanisms then as migration is today. We have seen that scholars in general agree that Islamic law, i.e. at least the *fiqh* as distinct from the immutable shari'a, was an ever-changing, re-interpreted project already in the first years after the Prophet's death. As an important part of this law, *'amān* was most likely the object of similar constant re-interpretation. To leave such room for interpretation must have been important for the jurists of classical Islamic law, because the political sensitivity of the topic of migration was just as high as today. As an indicator of this political sensitivity we may point out that Al-Shaybānī was dismissed from service as judge after a discussion on the interpretation of an instance of *'amān*.

Combined together, this leads us to the paradoxical conclusion that the explanations of different aspects of *'amān* which have been presented in this essay may teach us about the system of Islamic law, the way the jurists thought about the system, as well as the political reality of that time. It is of less use, however, for drawing conclusions about the concept of *'amān* which could apply today if the concept were to be used as a modern tool of law. For future research, a study of such modern uses would be highly interesting.

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