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# ЮРИСТ АХБОРОТНОМАСИ

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ҲУҚУҚИЙ, ИЖТИМОИЙ, ИЛМИЙ-АМАЛИЙ ЖУРНАЛ



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# ЮРИСТ АХБОРОТНОМАСИ

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# ЮРИСТ АХБОРОТНОМАСИ ВЕСТНИК ЮРИСТА LAWYER HERALD

## ХАЛҚАРО ҲУҚУҚ ВА ИНСОН ҲУҚУҚЛАРИ

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### CONTRIBUTIONS OF CENTRAL ASIAN SCHOLARS TO THE DEVELOPMENT OF ISLAMIC SCIENCES: SARAKHSI – FOUNDER-FATHER OF INTERNATIONAL LAW

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#### ANNOTATION

This article is dedicated to contributions of Central Asian scholars to the development of islamic sciences, including Muhammad ibn Ahmad Abu Bakr Sarakhsi's legacy in international law doctrine. Author gives an authoritative statement that Central Asia, namely Uzbekistan, is, apparently, the homeland of International Law thanks to works of formidable scholar Muhammad ibn Ahmad Sarakhsi, so-called as "Hugo Grotius of the Muslims". According to him, by interpreting Arabic scholar Muhammad Shaybani's book "Kitab al-Siyar al-Kabir", Sarakhsi was first to set forth the "Siyar" – "International Law" as an autonomous and legitimate discipline within the framework of law. Author firmly maintains that Sarakhsi was a leading scientific authority who was credited by all islamic scholars as being one of the greatest scholars of Islamic jurisprudence of his time. According to author's preliminary research results, he was one of the real founder-fathers of international law.

**Keywords:** Islamic international law, doctrine of international law, treaties, judicial practice, diplomatic immunity and privileges, the principle of reciprocity, proportionality, territory, territorial diversity, religious beliefs, civilization.

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**МАРКАЗИЙ ОСИЁЛИК ОЛИМЛАРНИНГ ИСЛОМ ФАНИ РИВОЖИГА ҚЎШГАН  
ҲИССАСИ: САРАХСИЙНИНГ – ХАЛҚАРО ҲУҚУҚ АСОСЧИСИ**

## АННОТАЦИЯ

Мазкур мақола Марказий Осиёлиқ олимларнинг ислом фани ривожига қўшган ҳиссасига, шу жумладан, Муҳаммад ибн Аҳмад Абу Бақр Сарахсийнинг халқаро ҳуқуқ таълимотига оид илмий меросига бағишланади. Муаллифнинг баралла баёнот беришича, Марказий Осиё, хусусан, Ўзбекистон “Муслмон дунёсининг Гуго Гроцийси” деган ном олган забардаст олим Муҳаммад ибн Аҳмад Сарахсий асарлари туфайли халқаро ҳуқуқ туғилган ватандир. Муаллифга кўра, Сарахсий араб олими Муҳаммад Шайбонийнинг “Халқаро ҳуқуқ” китобига шарҳлар ёзиш асносида биринчи бўлиб “сияр” – “халқаро ҳуқуқ”ни ҳуқуқ фанларининг алоҳида ва мустақил соҳаси сифатида таърифлаган. Муаллифнинг таъкидлашича, Сарахсий барча ислом олимлари томонидан ўз даврининг энг йирик ҳуқуқшуносларидан бири сифатида эътироф этилган. Муаллиф тадқиқотларининг дастлабки натижаларига кўра, у халқаро ҳуқуқнинг ҳақиқий асосчиларидан бири бўлган.

**Калит сўзлар:** ислом, халқаро ҳуқуқ, халқаро ҳуқуқ таълимоти, шартномалар, суд амалиёти, дипломатик дахлсизлик ва имтиёзлар, ўзаролик тамойили, мутаносиблик, ҳудуд, ҳудудий хилма-хиллик, диний эътиқод, тамаддун.

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## ВКЛАД УЧЕНЫХ ЦЕНТРАЛЬНОЙ АЗИИ В РАЗВИТИЕ ИСЛАМСКИХ НАУК: САРАХСИ – ОСНОВОПОЛОЖНИК МЕЖДУНАРОДНОГО ПРАВА

## АННОТАЦИЯ

Данная статья посвящена вкладу ученых Центральной Азии в развитие исламских наук, в том числе наследию Мухаммада ибн Ахмада Абу Бахра Сарахси в доктрине международного права. Автор уверенно заявляет, что Центральная Азия, а именно Узбекистан, является родиной международного права, благодаря трудам выдающегося ученого Мухаммада ибн Ахмада Сарахси, так называемого “Гуго Гроция - мусульманского мира”. По его словам, интерпретируя книгу арабского ученого Мухаммада Шейбани “Китаб ас-Сияр аль-Кабир”, Сарахси первым сформулировал “сияр” – “международное право” как автономную и легитимную дисциплину в рамках права. Автор утверждает, что Сарахси был ведущим научным авторитетом, которого все исламские ученые признали одним из величайших ученых в области исламской юриспруденции своего времени. По предварительным результатам исследования, Сарахси был одним из основателей международного права.

**Ключевые слова:** международное исламское право, доктрина международного права, договоры, судебная практика, дипломатический иммунитет и привилегии, принцип взаимности, соразмерность, территория, территориальное разнообразие, религиозные верования, цивилизация.

Central Asia and, particularly, Uzbekistan is frequently referred to as “Homeland or grew-up place of sciences and civilization”. Our ancestors highly proved it. The names of more than 2,700 scholars originated from Central Asia were mentioned in the different sources [1]. Of course, on the top of the list is always the name of Ibn Sina, known as “Avicenna” in the West, enormously contributed to the development of medical sciences with “al-Qanun fi-t-Tibb”. His book was reprinted in Rome as late as 1593, was used at Löwen University for 600 years, until 1650, and Thomas Aquinas quoted Ibn Sina more than 400 times. Al-Farabi, interpreted Aristotle and Platoon’s philosophy making it

easy to understand and that is why was called as the “Second teacher” (after Aristotle), immensely contributed to the development of the Islamic philosophy as well. The book “Al-Hidayah” of the legal scholar Burkhaniddin Marghinani has been the most popular chef-de-oeuvre in the entire Islamic legal literature. American jurist-scholar Roscoe Pound says that “Al-Hidayah” is the beginning of the case study method of studying law [2]. Abu Rayhan al-Biruni discovered America long before Turkish sailors and Christopher Columbus theorizing the existence of a landmass along the ocean between Asia and Europe in his “Codex Masudicus” (1037). He was given the title “founder of Indology” for his remarkable description of India in early 11th century in his “Kitab al-Hind”. He is also regarded as the “father of geodesy” for his important contributions to that field.

And, finally, Central Asia is, apparently, the homeland of International Law thanks to formidable scholar Muhammad ibn Ahmad Sarakhsi, so-called as “Hugo Grotius of the Muslims” who by interpreting Arabic scholar Shaybani’s book “Kitab al-Siyar al-Kabir” and through application of juristic preference (istihsan) doctrine, sets forth the “Siyar” – “International Law” as an autonomous and legitimate discipline within the framework of law.

Muhammad bin Ahmad Abu Bakr al-Sarakhsi was a leading Islamic lawyer who as an original thinker discussed and inquired into the principles of Islamic jurisprudence. He was credited by all Islamic scholars as being one of the greatest scholars of Islamic jurisprudence of his time.

Not much is known about his life. Sarakhsi was born in Sarakhs, city which his family name came from, is presently located in Central Asia, at the border between Iran and Turkmenistan. He died in 1096 in Ferghana city of Uzbekistan. He spent 17 years in famous Bukhara (located in Uzbekistan) studying law. Then he went to Ferghana valley (Eastern Uzbekistan) to practice law. It is said that Sarakhsi was imprisoned due to his opinion on a juristic matter concerning a ruler. He spent around fifteen years in prison. While he was imprisoned, he wrote his most important works such as “Al-Mabsut” (The Broade Scope), “Usul al-Fiqh” (Legal methodology) and “Sharh al-Siyar al-Kabir lil-Shaybani” (Interpretation of Shaybani’s International Law). It is also interesting to note that all biographers of Sarakhsi, show a great admiration for his memory. It is said that famous Imam Shafi’i (died in 204 A.H./820 A.D.) committed three hundred quires, while it is believed that Sarakhsi had committed one thousand and three hundred complete quires to memory. In those days, great importance was given to the memory of course because of less-development of writing and printing infrastructure. Sarakhsi was detained in the pit and gave dictation from his memory, without having any reading material at hand, while being confined below in the pit and his companions (students) could take dictation standing above.

Generally, scholars of Islamic jurisprudence maintain that Sarakhsi (483 A.H./1090 A.O.) was a follower of Shaybani (died in 189 A.H./804 A.D.) and, at most, an expounder and commentator of his works, although his stature is raised said that he reached the stature of Abu Bakr al-Khassaf (291 A.H./903 A.D.), Abu Khasan al-Karkhi (340 A.H./951 A.D.), al-Pazdawi (482 A. H./1089 A.D.), and others.

However, such statements are not based on any systematic analysis of his works. It becomes evident from last investigation that Sarakhsi, in fact, derives his material from all these sources, including Abu Yusuf whom Muhammad Shaybani, does not like to refer to in his works because of the enmity which took place between them and Imam Shafi’i who launched a great rebuttal against the upholders of the doctrine of juristic preference. Sarakhsi is not concerned with such trivial matters. He states the opinion of Abu Yusuf whenever he finds it necessary and brings it in support of his opinion when it differs from the opinion of Shaybani and, in spite of Shafi’i’s opposition to the doctrine of juristic preference, Sarakhsi occasionally cites and accepts his opinion in order to support his own opinion against Shaybani, or others [3, P.17].

One of Sarakhsi’s most important works is the “Sharh al-Siyar al-Kabir” (2 volumes) to which not enough attention has been paid so far. In this work, Sarakhsi discusses at great length almost all aspects of international law and emphasizes the importance and significance of the siyar in the mutual relations with other nations.

The introduction parts of “Sharh al-Siyar al-Kabir” are dated from the prison in the years 466 A.H. / 1084 A. D. When Sarakhsi reached the fourth part of his book, he was released from the prison. He completed it in Ferghana in the year 480 A.H. /1090 A. D. Despite the fact that Sarakhsi

is very eloquent, in many parts of the “Sharh-Siyar al-Kabir”, one can notice the poor diction, long sentences and negligence in their grammatical structure. Some scholars maintain that this is due to the fact that later scholars of Islamic jurisprudence did not concern themselves as much with language and diction as did earlier scholars and also because Sarakhsi dictated most parts of his “Sharh al-Siyar al-Kabir” while he was in the prison and did not revise it. It would be more appropriate to say that the latter is the case.

In fact, the first fundamental book on international law entitled “Kitab al-Siyar al-Kabir” was written by famous Arabic scholar Muhammad Shaybani in the 9<sup>th</sup> century A.D. That is why some scholars consider him founder-father of International Law or “Hugo Grotius of the Muslims”. But, unfortunately, Shaybani’s “Kitab al-Siyar al-Kabir” whose original text seems to have been lost and is known to us through the elaborate commentary of Sarakhsi’s book “Sharh al-Siyar al-Kabir”, which virtually amounts to a new book and represents the Hanafi doctrines as they were understood in the fifth century of the Islamic era (11<sup>th</sup> century A.D.). At first sight, Sarakhsi’s work is considered generally as the commentaries on Shaybani’s work and as the exposition of his works. But latest investigations led to a different conclusion. There are striking differences between siyar (international law) of Shaybani and Sarakhsi in spite of the fact that both deal with the same matter. Although it may be regarded as an exposition of Shaybani’s siyar as Sarakhsi understood him, in fact, it was Sarakhsi’s own presentation of siyar [3, P.48]. Now scrupulous content analysis is required to identify what belong to Sarakhsi himself, and what belong to famous Shaybani. Therefore, there is no way than going through content analysis of the text of the book.

The clear definition of the siyar (International Law) is given first by Sarakhsi in the history of international law stating its concise subject matter, conceiving of it as an extension of the sharia law. In other words, he singled out international law from sharia as an autonomous field of law taking into account a multilateral nature of it. He bravely underlined that all sharia rules cannot be applied in the international relations which require flexible approaches assuming reciprocal benefits and concessions.

Sarakhsi considers the siyar as an autonomous branch of the Islamic law and attempts to establish the relevance of the doctrine of juristic preference (istihsan) with the relations of Muslims with other nations in 11<sup>th</sup> century. For that Sarakhsi employs the method of “extension” (tawassu’) which enables him to broaden the scope of Islamic jurisprudence including mutual relations (mu’amalat) with other nations. Sarakhsi is the one who conceives of the siyar (international law) as being a systematic discipline by defining it as “that which describes the conduct of Muslims with the unbelievers of enemy territory as well as the ones who enjoy the promise of security from the Muslims (musta’min) or the dhimmis (inhabitants of the territory protected by a treaty surrender) in the territory of Islam and with the apostates and the rebels” [4, P.2].

The Islamic international law (siyar) began operating just after establishment of the first Islamic state headed by Prophet Muhammad (pbuh). Initially, it was initiated to develop the regulations for concluding the treaties, their terminations and suspensions and the rules concerning the movements of individuals from one territory to another, the exchange of captives, diplomatic immunity and levying of taxes on the grounds of mutual reciprocity and commensurability. The siyar, thus, gradually began to evolve as a separate branch of Islamic law based on the Sunna and local practices, which are equivalent to customs; the Qur’an, the utterances of the Prophet and Caliph’s decisions and instructions which represent authority; the principles and rules enshrined in treaties with other nations which fall under the category of agreements; and, finally, the juristic writings which are considered as based on the analogical deduction (qiyas) and other forms of reasoning, such as ra’y (personal discretion) and istihsan (juristic preference), in accordance with the Islamic legal methodology.

Sarakhsi is the first to establish clearly that the disparity of territory is more than disparity of religions. Even the rulings with regard to marriage and inheritance are to be dealt with not by the congruity of religion, but on the basis of contract. The inviolability of religion becomes established only for the one who believes in it, not for the one who does not. The laws of Islam are not applicable to other territories and, equally, they are under no obligation to Muslims, as in the first place they make treaties with Muslims on the condition that the laws of Islam do not apply to them.



According to Sarakhsi, all mutual relations between Muslims and non-Muslims' territories are conducted according to their own laws and rules, and they vary from one territory to another, as the different territories have their own sovereignty and sovereign power and thus are to be ruled according to their laws. With the acceptance of the concept of disparity of territories, their laws are also recognized. If there is a dispute between two parties from those territories, it is ruled not according to the laws of the territory of Islam, but according to their local laws. The famous idea of Sarakhsi was that international law can be established by mutually recognizing local law, only.

Now, let us proceed from a general overview to the more specific aspects of Islamic international law as such as described in the book of Sarakhsi which delves into the details of the history of Islamic thoughts and summarizes and highlights the main contributions of Sarakhsi to the legal thoughts, the areas which deserve more attention by lawyers, Muslims and non-Muslims alike.

Sarakhsi in his book "Sharh al-Siyar al-Kabir" elaborates on the concept of an international treaty, the duration and date of treaties, the scope of conventional rights and obligations, the criteria for the invalidity or validity of treaties, and other issues.

Imam Sarakhsi was the first to give a classical definition to the treaty in Islamic international law. According to him, "treaty" ("muhadana" or "muwada'a" in Arabic) is a form of "aqd" (agreement, consent), which means an agreement aimed at creating a legal effect". He considers the date and duration of the agreement to be an important condition of the treaty [5, P.28-43].

The meaning of the treaty referred to here is broader than the contract in Western sense of international law. In Islam, an agreement means the compatibility or harmony of the intentions and goals of the parties. In other words, its essence is not limited to the concept of interest. Regardless of the extension of the interest, the agreement was viewed as the impartial consent of the parties.

As far as diplomatic law is concerned, it should be noted that diplomatic relations as the means of foreign policy and international relations have been playing an important role in Islamic statehood since its first day. Therefore, in accordance with the principles of Islamic law, diplomatic law was also developed. Admittedly, diplomatic representation was one of the first and foremost institutions of Islamic international law. Islamic scholar Muhammad Hamidullah, based on the works of historian Sayyid Amir Ali's History of Saracens, emphasizes that permanent embassies in Islam appeared 200 years before Europe [6, P.116].

Ambassadors, couriers and diplomatic representatives at all levels are provided with the necessary immunity and privileges in all circumstances. This shows the diplomatic tolerance of Islam. Sarakhsi explains: "The safety of (diplomatic) envoy must be secured on both sides. Without ambassadors, decisions on war and peace cannot be made, so the ambassador must be able to deliver his message" [5, P.358-361].

In his works, every detail of diplomatic law is clearly explained. The rights and responsibilities of the rulers and imams in relation to the ambassadors are also indicated. According to Sarakhsi, the imam is equally responsible for both the Muslims and non-Muslim foreigner (musta'min) under the label of aman (protection). Hence, the imam is obliged to protect the ambassador of another country [5, P.358-361].

According to Sarakhsi, Muslims are obliged to provide foreigners arriving on embassy missions with foods, shelters and transportation means. Sarakhsi repeatedly emphasizes that ambassadors are under the protection of the head of state, that it is also the duty of local rulers and all Muslims to ensure their safety and protect them from thieves and robbers. "It is his (the head of state's) duty to prevent them from being oppressed. He cares about their safety as much as he cares about the safety of Muslims" [5, P.358-361].

Even from today's standpoint, one must admit that all these circumstances (respect for and protection of the honor of the ambassadors, provision of the ambassador with additional funds and means of transport and protection of personal safety) described in Saakshi's works are fully in line with the dispositions of Article 22 (2) and Article 44 of the Vienna Convention on Diplomatic Relations of 1961 [7].

In the field of international humanitarian law, Sarakhsi's works detail the rules of warfare and the protection of war victims. Due to humanistic nature of Islamic law, women, children, the aged people and priests were given a special protection during the war. The hadiths of Imam Bukhari state that "it

is not permissible to kill women and children” and that “priests and ascetics should not be killed” [8]. Adding to that Sarakhsi urges not to kill the blind and the sick people [4, P.69]. Undoubtedly, these dispositions are in line with the provisions of the Geneva Conventions of international humanitarian law adopted on August 12, 1949 and their Additional Protocols I and II on the Protection of Victims of Armed Conflicts, signed on June 8, 1977 [9].

Another issue raised by Sarakhsi is the concept of the principle of mutual reciprocity (“Muzaja” in Arabic) in international law. In fact, there are principles of Islamic international law that can be found in the same context in several areas of law. One of the most important such principles of Islamic international law and law enforcement practice is the principle of reciprocity that apply in interstate relations in international law.

This principle especially plays balancing role in international legal relations, in particular, in trade relations. In the time of the Prophet Muhammad (pbuh), customs duties were introduced on the basis of reciprocity for goods entering the territory of Islam. Among the rulers, the principle of reciprocity was also observed in the exchange of gifts.

Islamic jurists have also paid special attention to this principle. In particular, Imam Sarakhsi also commented on this principle in detail. Sarakhsi writes: “Our relations with non-Muslims are based on reciprocity” [10, P.154-167]. By advancing the concept of reciprocity, Sarakhsi promoted the ideas of tolerance and good neighborhood between peoples belonging to different religious beliefs and cultures from the highest rostrum.

To conclude, “Sharh al-Siyar al-Kabir” written in XI century A.D. by our compatriot Muhammad ibn Ahmad Abi Sahl Abu Bakr Shams al-Aimma al-Sarakhsi is the alphabet of international law, the basic guide to the concept of Islamic international law. This work was written as a commentary on Muhammad al-Shaybani’s “Siyar al-Kabir” on the soil of ancient Fergana in Uzbekistan and reflects the basic concepts and principles, categories and institutions, almost all the areas and topics of international law.

Sarakhsi is our compatriot, the founder-father of international law. It means adequately that Uzbekistan is the birthplace of international law. Sarakhsi’s legacy was the start-point of the doctrine of international law not only in Uzbekistan or Central Asian or Muslim countries, but also in all countries around the world.

We must admit that over the last decades the research interest towards Sarakhsi’s legacy has increased significantly in the world. Dozens of doctoral research carried out on the different aspects of Sarakhsi’s scientific heritage at the University of Utah in the United States, McGill University in Canada, the University of Exeter in the United Kingdom and other universities of the world [11]. More systematic and successful research has been completed by American scholar Husain Kassim [12] from Central Florida University (Orlando, USA) and John Hopkins’s professor Majid Khadduri [13].

Sarakhsi’s views on international law have not escaped the attention of the classic German scholars of Islamic law, Joseph Schacht [14] and Carl Brockelmann. Well-known English orientalists such as Christopher Melchert, Jonathan Brown, and Wael Hallaq have also frequently referred to Sarakhsi’s work in their research in the field of Islamic law [15].

In particular, Sarakhsi’s “Sharh al-Siyar al-Kabir” has been recognized by the UNESCO as the first doctrinal work on international law. Given the importance of the book, under the auspices of this organization, the work was fully translated into French in 1989-1991 and published in 4 volumes [5]. In addition, Sarakhsi’s book has also been translated into Turkish in full, English, German, Spanish, Urdu, Persian and other languages in the scattered text. However, his compatriots are still deprived of the Uzbek version of this priceless work.

Nevertheless, unfortunately, Sarakhsi’s contribution to the formation of international law is still far from universally considered. Although Sarakhsi’s position in the history of Islamic sciences is highly well-known, the real significance of his works and his treatment of the subject matter of international law have not yet reached world-wide recognition. Further scrupulous investigation is needed to analyze the much-ignored contributions of Sarakhsi’s works with regard to the development of international law.

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