

MUSLIM CONDUCT OF STATE

AS EXPOUNDED BY Dr. HAMID ULLAH

by

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CONTENTS

	<i>Pages</i>
<i>PART I</i>	
Introductory 1
<i>PART II</i>	
Peace 23
<i>PART III</i>	
Hostile Relations 56
<i>PART IV</i>	
Neutrality 96
<i>APPENDIX</i>	
1. Islamic Notion of conflict of Laws ...	105
2. Status of non-Muslims subjects and Aliens 107
3. Conflict between Laws 108
4. Muslim citizens in foreign Lands ...	109

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Muslim Conduct of State

PART I

INTRODUCTORY

CHAPTER I

DEFINITION OF NATURE

International Law means rules of the conduct of States in their mutual dealings. Therefore, it is not necessary that there should be only one set of rules, or one system of international law, at a time, for the conduct of all the States of the world. Every State has its own law.

Islam has elaborated its own system of public international law.

Definition of Muslim International Law : That part of the law and custom of the land and treaty obligations which a Muslim *de facto* or *de jure* State observes in its dealings with other *de facto* or *de jure* States.

Muslim International Law depends wholly and solely upon the will of the Muslim State which in its turn is controlled by the Muslim Law (*Shariah*). The obligations imposed by bilateral or multilateral (international) treaties have the same basis ; and unless they are ratified and executed by the contracting Muslim party, they are not binding ; and their non-observance does not create any liability against the Muslim State. Of course it does not matter whether the acceptance is express or tacit.

Definition of terms of Law (*Fiqh*) as defined by classical Muslim jurists. "The knowledge of what is for and upon one", in other words may be rendered as the science of the rights and obligations of man. *Fiqh* embraces practically all the affairs of human life, material as well as spiritual. In view of the definitions given above the rules of State-conduct in times of war, peace and neutrality, form part of the ordinary law of the land, the *Fiqh*.

The law originated from the direct commands of God ; but the power retained by man to interpret and expand Divine Commands, by means of analogical deductions, and other processes, provided all that was required by the Muslims.

Customs are also contributory to Muslim International Law. No system of law can positively provide guidance regarding every detail of every matter. Naturally the prevalent customs, general practice and even innovations hardening in time into usage regulate the relations in such cases. Besides the laws and customs of the land, treaties between two or more States create obligations. This distinct kind of addition to the fabric of the law is tolerated, for shorter, or longer periods, in the interests of the State. The classical Treaty of Hudaibiyah provides us with a precedent of terms even improper in themselves being capable of acceptance with a broader view of the ultimate good of the community.

The distinction between a *de jure* and a *de facto* State is necessary, first because some times special institutions or happenings (for instance a powerful rebellion) although not acknowledged as States *de jure* are yet States *de facto*. It is possible in special cases that a certain State does not simultaneously possess both the attributes of being *de jure* as well as *de facto*. Secondly, the aim of this distinction is to point out that we are concerned with foreign States as such, and not with foreigners resident in Muslim territory regarding their private affairs *e.g.*, inheritance, nationality and the like. These belong to Private International Law or the Conflict of Laws. In this connection, too, it might be recollected that the Private International Law of Islam is also a part of *Fiqh* and derives its authority not from any foreign source but from the sovereign "will" of the Muslim State itself, which "will" is subject to the Divine law of the Quran.

In our definition the words "dealings with other...States" have a special significance. It is intended thereby to convey the idea that Muslim International Law is only that law which is observed by a State which acknowledges Muslim law as the law of its land in its dealings with other States. These other States may be Muslim or non-Muslim. We are not concerned with the laws and usages of non-Muslim States, except in so far as the Muslim residents are concerned, or in so far as those laws and usages have been accepted by the Muslim State to act upon in its international intercourse.

CHAPTER II

EARLY TERMINOLOGY

When Islam came and founded a State of its own, the earliest name given by Muslim writers to the Special branch of law dealing with war, peace and neutrality seems to have been *Sivar*, the plural form of *Sirat*, meaning conduct and behaviour. In order to explain it is better to cite a few quotations :—

(a) Ibn-Hisham (d. 218 H).

I. e. "Then the Prophet ordered Bilal to hand over the banner to him (to 'Abdur-Rahman Ibn 'Awf). He did so. Then the Prophet eulogised God and asked for His mercy upon himself, then said : O son of 'Awf : Take it, Fight ye all in the path of God and combat those who do not believe in God. Yet never commit breach of trust nor treachery nor mutilate anybody nor kill any minor or woman. This is the pact of God and the behaviour of His Messenger for your guidance."

(b) Ibn-Habib (d. 245 H).

"They used to give public feasts there and behaved there according to the behaviour of the kings of Dumatul-Jandal."

(c) Ibn Sa'd (d. 230 H).

"The Muslim garrison shall concede to them a share in the booty, adroitness in Government and moderation in behaviour. This is a decision which neither of the contracting parties may change."

I. e. (After the Prophet) Abu Bakr became caliph and he acted according to his actions and behaved like his behaviour. Then 'Umar became caliph, and he behaved like the behaviour of them both".

These few citations show that the conduct of the ruler, not only in time of war but also in peace, was referred to by the term *Sirat* as early as the time of the Prophet and even in pre-Islamic times. This is in accordance with the authors of the third century of *Hijrah*. The term was adopted for "International Law" at least a century earlier. Thus Abu Hanifah (d. 150 H) is known so far to be the first to designate with the term *Sivar* delivered on the Muslim Laws of War and Peace. This term was also used by Al-Auwzi, Abu Yusuf and Al-Shafi.

As a matter of fact the term *Sirat* was used by historians to designate the life of the Prophet. The analogy has been brought into relief by different authors. Raiyud-Din al Sara-khsiy, for instance, states in his chapter on International Law : "The word *Sirat*, when used without adjectives, meant the conduct of the Prophet more especially in his wars. And for this the Prophet has said 'Every Prophet had some profession (for livelihood), and my profession is *Jihad* ; and in fact my means of subsistence are placed under the shadow of my spear. "The term *Sirat* which linguistically signified conduct in general acquired later the restricted sense of the conduct of the Prophet in his wars and later still the conduct of Muslim rulers in general in international affairs.

CHAPTER III**SUBJECT OF INTERNATIONAL LAW**

To the following are the subjects of International Law :

1. Every Independent State which has some relation or other with other States.
2. Part-Sovereign States which possess at least a limited right to foreign relations.
3. Belligerent Rebels who have acquired resisting power and a territory over which they exercise the ordinary functions of State.
4. Highwaymen and Pirates.
5. Resident Aliens in Islamic territory.
6. Muslim Citizens residing in foreign countries.
7. Apostates.
8. Privileged non-Muslims or the Dhimmis, that is, none Muslim subjects of a Muslim State as distinguished from ordinary Resident Aliens.

Obviously, with some of these relations both pacific as well as hostile are possible. While with others only one of these is possible. For instance, rebellion is possible only with hostile relations as far as the mother country is concerned. And as soon as a peace is concluded between the rebels and their mother country, they are either recognised as an independent State and not mere rebels or are reduced to the position of obedient citizens of the State, regarding whom international law is no more applicable. As far as States other than the mother country of the rebels are concerned, the rebel ones enjoy the same status as ordinary States, yet the very recognition of rebellion and concession of belligerent rights signifies a state of war between the rebels and their country.

In recent times some new subjects have come into existence in Muslim International Law. Muslim States have recognised and joined the League of Nations, in 1919, and also its successor the UNO (United Nations Organisations) as also the International Court of Justice and other similar Organisations. The membership of the (British) commonwealth, the (Russian) Soviet Union and the (French) Community is also worth recalling. This has entailed not only surrender of some sovereign powers to these organisms, but also extension of diplomatic privileges to persons other than ambassadors proper. Further the League of Arab States has acquired a personality, and is recognised by the UNO where its observers are admitted officially. Again, many Muslim States, Egypt, Turkey, Pakistan, etc. have recognised in Pope as a subject of their international relations, and have consented to exchange diplomatic representatives with him.

CHAPTER IV

THE OBJECT AND AIM OF INTERNATIONAL LAW AND ITS SANCTION

The whole fabric of Muslim law was constructed for guiding the faithful in regulating their life in this world. Whatever its ultimate object, its temporal and mundane aim is the ability to lead one's life in the fairest possible way. *Mutatis mutandis*, Muslim International Law would aim at the just conduct of the Muslim ruler in his international intercourse.

SANCTION

The sanction of Muslim International Law is the same as that of the ordinary Muslim law of the land. It is especially so as regards the relations of foreign residents with the State in which they reside. The Government, through its judicial tribunals, administers justice to those to whom wrong is done, As is known, the real sanction of Muslim law is not only the organised will of the sovereign (who being human, may enjoin tyranny), but also, and in a more pre-eminent degree, the belief in the after life and judgment by God. Spiritual and conscientious inducing and deterring factors are more effective than temporal persuasions and prohibitions. For thus one abides by the law, not only under coercion, but even when there is none to oppose one's will except, perhaps, the fear of retaliation or scandal and disrepute.

CHAPTER V

ITS ROOTS AND SOURCES

The following are the sources of Muslim International Law :—

1. The Quran.
2. The *Sunnah* or the traditions of the Prophet.
3. The Orthodox Practice of the early Caliphs.
4. The Practice of other Muslim rulers not repudiated by the jurisconsults.
5. The opinions of celebrated Muslim jurists :
 - (a) consensus of opinion.
 - (b) individual opinions.
6. The Arbitral Awards.
7. The Treaties, Pacts and other conventions.
8. The Official Instructions to Commanders, admirals, ambassadors and other State officials.

9. The Internal Legislation for conduct regarding foreigners and foreign relations.

10. The Custom and Usage.

1. The Quran

The Quran is admitted by the Muslims as the "Word of God" and therefore the basis of all their law. It is in fact collection of Divine Revelations reaching Muhammad through the agency of the angel Gabriel. The Quran was not revealed as a whole, but came down in fragments as necessity arose during the period of about thirty-three years. Whenever a portion of the Quran was revealed to the Prophet he used to order one of his amanuenses to take it down. It was also he who prescribed and pointed out the places to which the verse or verses properly belonged; the verses of the Quran were not compiled in chronological order. Obviously they were not written in the time of the Prophet in book form, but on stray leaves of paper, date leaves, and other handy materials etc. It is further admitted that when some revealed verses were cancelled, naturally on the authority of the Prophet alone, they were omitted and obliterated.

The first successor of the Prophet, the Caliph Abu Bakr, in spite of his short term of office (about two years only) arranged a fair copy of the text of the Quran and made it in the form of a book (*mushaf*); and keeping the order of the verses as prescribed by the Prophet. The unique copy of the official edition remained with the Caliph; later his successor, the Caliph 'Umar, used it after whose murder, it was in the custody of his daughter, Hafash, the widow of the Prophet. It was in the time of the third Caliph, 'Uthman, that difficulties began to arise in the provinces. The Caliph, therefore, ordered seven copies and to be made from the official edition prepared for the first Caliph, these copies were sent to different provincial capitals of the Empire, the original being returned to Hafasah. The Caliph 'Uthman gave orders that even the spelling of the official copies must be followed, and that all those private copies that were found to differ from the official edition had to be collected and destroyed.

2. Sunnah

The second source of Muslim International Law, is the *Sunnah* or the *Hadith* which comprises what the Prophet said, did or tolerated. In quantity, rules of Muslim International Law found in the traditions of the Prophet for surpass those in the Quran. In quality, the *Hadith* is considered inferior to the Quran, it is because the difficulty in proving the genuineness of a tradition. Otherwise the Quran itself has expressly and unequivocally put the work of the Prophet on a par with the Quran on the basis that what the Messenger uttered on behalf of the Sender is taken as the Sender's word.

The compilation of the traditions of the Prophet was begun in his own lifetime by his companions, this besides many official documents, such as treaties, instructions to tax collectors, letters characters, census reports and the like.

3. Orthodox Practice

The jurists have drawn rules of International Law from the practice of the successors. Those are to be found in books of *Hadith*, of history, of biography, of case-law of anthologies and other publications. There is special and exclusive collections of the practice of either the prophet or his Caliphs regarding international intercourse. Even if attempts have been made, they are not exhaustive. The precedents of the time of the Orthodox Caliphs may be accepted in addition to the traditions of the Prophet and not against them.

In Muslim jurisprudence, the companions of the Prophet enjoy considerable veneration. Their piety and their devotion to the Prophet could never have induced them violate deliberately his prescriptions and if one, ignorant of the law, acted in some way contrary to it, others would at once have corrected him. This, however, does not exclude the difference of opinion between them regarding matters for which there was not provision in the *Sunnah* of the Prophet. In such cases preference is given according to the personal eminence of the conflicting authorities, the opinion of any of the first four Caliphs and of Ibn Masud, for instance, prevailing over the opinion of the companions.

4. Practice of other Muslim Rulers

The practice of the Orthodox Caliphs has legal authority. Not so the practice of other and later Muslim rulers. Still it might be useful to refer to it at times, especially when their practice has not been repudiated by the contemporary or later jurists. Some of the Umayyads and Abbasids, Salahuddin the Great (Saladin). Aurangzeb in India and many other Muslim rulers have left may a useful precedent the importance of which cannot be ignored. It must, however not be overlooked that this category of authority for rules of international law is accepted on the condition that it does not contravene the Quran or the *Sunnah* or Orthodox Practice.

5. Opinion of Jurists

Muslim jurists on jurisprudence have divided opinion into two kinds of unequal importance, the *Ijma* (consensus) and *Qiyas* (individual analogical deduction).

(a) *Ijma*

Various sayings of the Prophet are cited below to support the consensus of opinion, as for instance :

- (i) My people will never be unanimous in error.
- (ii) The hand of God is over the collectivity, and whoever quits it, is sent to hell.

(ii) What Muslims agree to be good is also good in the sight of God.

There are also verses of the Quran in support of *Ijma*.

According to Islamic Jurisprudence, whenever unanimity is reached among the Muslim jurists of a time, this consensus has the same validity as "a verse of the Quran or the most reliably proved tradition of the Prophet ; and whoever denies its authority is to be considered an infidel." The jurists, however, agree in theory that a later consensus may abrogate a former.

In spite of the importance of *Ijma*, it is to be noted that no institution of a permanent character was devised to ascertain it. The Prophet always consulted his companions in legal as well as political matters. Again, the Caliph 'Umar seems to have found, in the pilgrimage to Mecca, an easy and convenient annual institution to consult the governors of his wide stretched empire, to hold a general and all-empire appeal session of the Supreme Court, to meet deputations from far off parts of the realm etc. For a generation or two after the Prophet, it seemed that the ascertainment of the best and most expedient opinion of the country was considered to be a Government business. Soon, however, civil wars and schisms ensued, and the rulers contented themselves with the opinions of the official jurisconsults, the *personae gratae* among them, and general consultation fell in desuetude.

(b) *Qiyas*

Individual opinion of jurists and political scientists has had a very subtle division, according to its nature, in Muslim Jurisprudence. Analogy deduction, equity, *responsa prudentium*, judicial decisions, other opinions of individual authorities as expressed in their books or otherwise known—all have different technical names and different grades of precedence. The literature wholly or partly dealing with Muslim International Law is classified as follows :—

(i) Work on *Siyar* or international law proper.

(ii) Works on *Fiqh* or compendia of law (*corpus juris*).

(iii) Works on *Fatawi* and *akdiyah* or collections of judicial decisions, Case-law, *responsa prudentium* and the like.

(iv) Works on political science, sociology and allied subjects.

(v) Works on administrative and public law.

(vi) Works on *Nasaih al-muluk* or textbooks for princes in the art of Government and rulership.

(vii) Works on general or particular history, biography, political poetry and allied subjects.

(viii) Works on tactics, strategy and military sciences in general.

(ix) Proceedings of Conferences.

(x) Modern works on Muslim International Law.

Abu Hanifah seems to have been first in the field of *Siyar* and its literature formed an independent branch of legal science. Books on law, even before Abu Hanifah, have been referred to, which we shall discuss presently; but no monograph on international law (*Siyar*) has to my knowledge been attributed to any jurist before Abu Hanifah.

Codes or compendia of law seem to have come into existence in Islam in the very first century of *Hijrah*. In any case the *كتاب المجموع* or the *corpus (juris)* attributed to Zaid-ibn-Aliy has come down to us and contains chapters on *Siyar* or international law. So also the *Muwatta* of Malik has special chapters on our subject.

The same is true of works entitled *Fatwai* or collections of cases, judicial decisions and *responsa prudentium*. One of the earliest of them is attributed to the Caliph, 'Ally, compiled by some of his pupils though it has not come down to us. Originally such works came into existence either as collections of judicial decisions of individual judges one such is attributed to Rushd also or compilations of the replies of private jurisconsults. The Mughal Emperor Awrangzeb 'Alamgir of India appointed a committee to codify Muslim law, and the result of their labour is known as *Fawat-i-'Alamgiryah*, and is still looked upon as great authority.

As with many other subjects of Arabic literature, the interest of non-Muslim Europeans in Islamic laws of war and peace has preceded the determination of modern Muslim scholars to deal with the subject. There is a vast literature on *Khilafat* in Russian, German, Italian, French, English etc. A useful resume of it was published in the *Revue du Monde Musulman* (now published under the name: *Revue des Etudes Islamique*, Paris) of 1925.

There are various books on the history of modern international law in which the contribution of Islam has been discussed and described. For instance, Walker, in his book *A History of the Laws of Nations* (Vol. 1, Cambridge, 1899), Bordwell, *Law of War between Belligerents*, (Chicago, 1908), Nys. *Etudes de droit international public et de droit politique*, and also in his *Les Origines du droit international* (Paris, 1894), Holtzendorff, *Handbuch des Volkerrechts* (1885, in the first of the four vols.) and othes.

As for Muslim writers, the need was felt as early as the nineties of the last century. Writing a history of international law in general, Ibrahim Haqqi of Istanbul deploras the non-existence of works on Muslim International Law. Mr. Ahmad

Rashid has contributed much in the field of International by giving lectures in the Academy of International Law of Hague. Abdarrahim in his Principles of Muhammadan Jurisprudence (Calcutta, 1911, of Ch. XII) has some penetrating remarks on the subject. But he has not yet found time to devote on some special monograph on the subject.

6. Awards of Arbitrators and Referees

By arbitration, mediation, reference and similar terms we understand the fact that two parties to a conflict agree to abide by the opinion of a third and impartial person. There are cases of this kind not only in international conflicts. Such awards have always been held as useful precedents, and generally have been referred to when similar cases arose. The more so when in such awards there are set forth the principles on which the opinion of the arbiter was based.

7. Treaties and conventions

Another important source of international law comprises treaties. Sometimes they are bilateral and sometimes multilateral, and obviously they bind only the parties thereto. In connection with treaties, it must be recognized once for all, that there are certain rules in Muslim law which are imperatively compulsory and for ever. These cannot lose their binding force except when and so long as, one is in extreme stress and unavoidable necessity. "Except one who is driven by necessity, neither craving nor transgressing, it is no sin for him" is the oft repeated Quranic Provision. And hence the maxim (stress renders the forbidden permissible). Again, there are rules in Muslim law which though not compulsory yet their execution is praiseworthy. Thirdly, there are those whose performance or omission is left to the discretion of individual person. It is regarding only this last category of acts that custom and treaty impositions are upheld and rendered valid by Muslim law. Treaties concluded under stress against the injunctions of Muslim religious law are binding only so long as the necessity remains. It is to be noted that the treaties are sometimes wholly and deliberately law-making between the parties concerned; on other occasions they refer incidentally to legislation in an international sense.

8. Official Instructions

The official instructions to generals, admirals, ambassadors, delegates and representatives, in short to those officials who have some connection or other with the conduct of the State in international affairs is another source of law. These may be published, or confidentially given out and kept secret. They often contain important material for our subject.

9. Internal Legislation and Unilateral Declarations

Although the whole of international law is, in a sense, part of the internal legislation and law of the land, yet there are

some points of instruction between general rules of international conduct and particular rules concerning particular States or particular classes of foreigners. Again, there is a difference between rules correlated and reciprocated and between rules that have no counterpart. For instance the command of the Prophet that non-Muslims should be expelled from Arabia where they can no longer settle, and the Quranic injunction that non-Muslims cannot enter the Grand Mosque of Mecca, for purposes of idolatry.

The custom usage and convention is a source of Muslim Law though a little has been written on it. The Quran constantly commands to follow (good known to and recognized as such by everybody) and to abstain from (evil known to and recognized as such by everybody). This includes custom: What the Prophet tolerated among his companions rendered it valid and lawful. The very "toleration" implies the recognition of custom, no matter old or new, as a source of law. As for later times the all-pervading maxims (every thing that is not prohibited is permissible) and (custom or rule of convention is decisive) leave not the slightest doubt that the custom and usage, with certain qualification, are lawful source of the conduct for the Faithful.

We must, however, not confuse laws of the Muslims and Muslim laws. By the former it is the laws which certain sections of the vast Muslim Community observe, for instance, the customs regarding inheritance, marriage, etc. prevailing among Muslims in the Malay Peninsula, Berberland of North Africa, the Punjab, Bombay and Malabar in India and the like, Customs very much at variance with the tenets of what the Quran and the *Sunnah* have expressly laid down.

The Caliph 'Umar is reported to have adopted *in toto* the Persian revenue laws when that empire was absorbed into Muslim State; that the greatest number of jurists Islam has produced came from Bukhara, Turkistan and adjoining countries where Buddhist and Chinese influence predominated; that the pupils of the companions of the Prophet and their pupils, the teachers of Abu Hanifah, Mali, ash-Shafi'iy, Ibn-Hanbal and others were generally *mawali* of non-Arab origin who could not obviously have forgotten all that they knew of the existing and prevalent conditions or habits of pre-Islamic origin in their countries and even families; that Abu Hanifah himself had a Persian father and an Indian mother; that there are express commands in the Quran to follow the laws of Moses, Jesus, Abraham and other Messengers of God, and it is reliably recorded that the Prophet ordered Muslims to follow the practice of the Jews and Christian in matters in which there was no provision in Muslim Law; that not only were many pre-Islamic Arab customs tolerated by the Prophet, but he went so far as to prescribe in Islam the virtues of the days of Ignorance in Arabia

will be acted upon. No doubt, legal rules of Byzantines, Persians and others did not come into Muslim law with any sanctity attached to them, but simply as a matter of convenience and expedience and because they were not against the injunctions of positive Muslim law. Their infiltration may be traced to a very great extent to the customs and usages of the country occupied by the Muslims, sanctioned by jurisconsults and by the activities of the codification of Muslim law by private jurists.

CHAPTER VI

THE PLACE OF INTERNATIONAL LAW IN LAW GENERAL

Law means the rules which the Government of a State passes or approves for the conduct of its whole gubernatorium and its subjects. Thus the rules of conduct for the part of the gubernatorium which is concerned with foreign relations will be international law. The rules and regulations which a Muslim State has formulated in dealing with the non-Muslims subjects and non-Muslim State in dealing with resident Muslim alien is called Private International Law.

The rules and regulations pertaining to the relations of subject and foreign residents and foreign residents themselves is called as private International Law.

CHAPTER VII

THE CONTRIBUTIONS OF ISLAM TO THE INTER- NATIONALIZING OF HUMAN SOCIETY

No doubt ancient nations did contribution to different sciences and institutions but they were not able to get rid of the narrow vision of their geographical or political nationhoods. Even ancient religions seem to have been national rather than universal and for the whole of humanity. Nevertheless these ancient, national religions also preached in the beginning love and peace. The "chromatic," birth and racial superiority complex which is still such a vital force in some parts of Africa, America and Europe, is a result of commands of the religions they profess. On the other hand Islam has rather discarded differences of race and colour, country and language, and preached for the universal brotherhood of the Faithful.

As Quran enjoins :—

The believers are naught else than brothers. Therefore make peace between two brothers of yours (if they happen to oppose each other), and observe your duty to God that ye may obtain mercy (Quran 49:10).

And hold fast, all of you together, to the cable of God, and do not separate. And remember God's favour unto you: how ye were enemies and He made friendship between your hearts so

that ye became as brothers by His grace; and (how) ye were upon the brink of any abyss of fire, and He did save you from it. Thus God maketh clear His revelations unto you, that ye may be guided. (Idem, 3 : 103).

And obey God and His Messenger, and dispute not one with another lest ye falter and your wind depart (from your sails): but be steadfast ! Lo ! God is with the steadfast (Idem, 8:46).

Lo ! this, your community, is one sole community, and I am your Lord so worship Me. (Idem, 21:92 cf. 23 : 52).

Islam brought unity and safeguards individual rights and liberties and also provides at the same time for collective welfare. Its call is not meant, from for any particular country. It was an advance over what had hitherto been done to internationalize human society.

Brotherhood of Man

A few typical quotations alone from the Quran would suffice to illustrate as to how Islam preached for universal brotherhood.

1. O mankind ! Be careful of your duty to your Lord, who created you from a single soul and from it created its male and from them twain hath spread abroad a multitude of men and women. (Quran 4:1).

2. O Mankind ! Lo ! We have created you from a single male and female, and We have made you nations and tribes that ye may distinguish one another. Lo ! the noblest of you, in the sight of God, is the one who feareth (Him) most. Lo ! God is knower, Aware. (Idem. 49:13).

3. Mankind were but one community; then they differed; and hath it not been for a word that had already gone forth from thy Lord it had been judged between them in respect of that therein they differ. (Idem, 10:20).

4. (Muhammad) thou askest them no fee for it (*i.e.* Islam). It is naught else than a reminder unto all-nations. (Idem, 12:104 cf. 81: 27).

5. And We have not sent thee (O Muhammad!) save as a bringer of good tidings and a warner unto all mankind: but most of mankind know not. (Idem, 34 : 28).

6. And We sent thee not (Muhammad) save as a mercy for all nations. (Idem, 21: 107).

7. And the difference of your languages and colours, lo! herein indeed are portents (of the matery of the Creator) for men of knowledge. (Idem, 30: 22).

8. And We have made you nations and tribes that ye may distinguish one another.....(Idem, 49: 13).

9. Lo! those who believe (in that which is revealed unto thee Muhammad), and those who are Jews, and Christians and Sabeans, whoever believeth in God and the Last Day and doth right,—surely their reward is with their Lord, and there shall no fear come upon them neither shall they grieve. (Idem 2: 62). Lo! those who believe (*i.e.* Muslims), and those who are Jews, Sabeans and Christians whoever believeth in God and the Last Day and doth right there shall no fear come upon them neither shall they grieve. (Idem, 5 : 69).

There are other verses addressed by the Prophet to foreign rulers, together with innumerable sayings of the Prophet and instances of continuous practice all through these fourteen hundred years of Islam, testify to the same effect.

In Islam the differences of men in colour and language are but phenomena testifying to the great mastery of the Creator ; and that not only all human beings descended from the same couple but that even their religions have had the same source. Moreover it shows clearly that if the people of the religions cited therein follow fully all the commands of their original religion, shred of later additions, there is no fear regarding their salvation. It aspires and cultivates harmony between nations.

Hajj or Pilgrimage to Ka'bah :

Islam is *ultra-national* in its ethnological sense. The brotherhood which Islam has inculcated is truly international. In order to achieve this object of Muslim brotherhood the institution of *Hajj* or Pilgrimage to Mecca had been introduced. This institution played very prominent role to bring the Muslim around the world to gather on one Centre and inculcated in them the feelings of brotherhood. It is really cosmopolitan gathering and a complete equality of the children of Adam is nowhere else to be found.

Khilafat :

Another internationalizing institution of Islam is the Khilafat (Caliphate). When the Prophet breathed his last, the Muslims in general of that time came to the conclusion that there could be only one ruler for the totality of the Muslims. Although the Muslim empire soon spread far and wide outside its birth place, Arabia, yet practically for more than a hundred years the Unity of the Muslim empire remained intact. Muslims all over the world, subjects of the Muslim State as well of non-Muslim States, all recognised the Caliph in Madinah, or later Damascus, as the Commander of the Faithful. After the Umayyad dynasty of Damascus, the Muslim world was divided first into two and later even more independent States. Yet the idea of the succession to the Prophet could not be eliminated from the Muslims. The very claim for this by more than one Muslim Ruler at a time supports the contention more than it contradicts it, since

everyone of them aspired to be the ruler of the totality of the country and the totality of powers.

Nomination by the reigning Caliph of his successor, failing which a general election, must obviously have been and was in fact, a matter of course, among the Shiah as well as the Sunnis at all times.

CHAPTER VIII

THE HISTORY OF INTERNATIONAL LAW BEFORE ISLAM

According to Montesquieu all the nations possess an international law, even the Iroquois who eat their prisoners. They send and receive envoys they know the rights of war and peace. Only evil is that this international law is not based on right principles.

The known history of Man is said to begin with the Sumerians. There were facilities of intercourse between the peoples of the valleys of the Tigris and the Euphrates. The people of Syria, however had the greater advantage of utilizing the accumulated experience of past ages along with their own gifts and resources. People of the Mediterranean sea-board possess therefore, peculiar interest. Their intercourse led to the interchange of ideas. Great Civilizations have flourished successively in Egypt, Syria, Carthage, Greece and Rome. The peace treaty between the Egyptian Rames II (Sesostris, who ruled between 1292-1225 B.C.) and the King of the Hittites of Northern Syria, designed in the treaty as Hissar (Chief of Hitai, now the Turkish Hatay) is probably the oldest diplomatic document that has come down to us in the original. It stipulated the end of the great Syrian war and perpetual peace between the two kings under the protection of the duties of both the countries. It provides also an alliance against the enemies of both the contracting parties. Convicts of one country taking refuge in the other had to be extradited with the condition that certain kinds of punishment could not be inflicted on the people so extradited. The Phoenicians gave Greece such an elementary requirement of civilization as the alphabet. The Hebrews or Jews, another Syro-Palestinean people, evolved a peculiar culture of their own under Moses and Divine Pentateuch. The Jews were sworn enemies of some foreign nations, as the Amalekite (Arab tribes inhabiting Palestine at that epoch) for example, with whom they declined to have any peaceful relations whatever. When they went to war with these people, they killed not only the warriors on the battlefield, but also the aged, the women, and the children in the homes. With those nations, however, of which they were not sworn enemies, they used to have international relations. Ambassadors were considered sacrosanct and treaties were faithfully observed. The influence of the Jewish Bible has

continued to exert itself on the world through European nations who embraced Christianity, Jesus Christ himself being born among the Jews.

As regards to the European Countries, the Greeks were greatly influenced by Phoenician culture, but the system of international law they evolved was essentially law between city-States of the Greek Peninsula. The public law of Greek nations was considerably developed, and even a sort of League of Nations was established by and between many of these cities such as the Amphictyonic League of Delphi.

The Romans evolved their own laws. They set a college of priests, called fetials, who managed relations with foreign countries when war was declared, peace was made, treaties of friendship or alliance were concluded, when Romans had an international claim before a foreign State or *vice versa*. The life and property of the citizen of a State, which had no treaty of friendship with Rome were not safe in the Roman territory: such persons could be made slaves and their property seized and ambassadors were exceptions. Citizens of a friendly State had a right to legal protection; and justice was administered to them by the *praetor peregrinus*. The Roman Empire ruled over Syria and Egypt also. The Eastern Empire was more intensely influenced by Greek than its counterpart in Rome. Nevertheless, it was the code of *justinian*, adopted from laws of Rome, that regulated life in countries where the Arabs had direct commercial and other interests. Roman laws of peace, more especially private international law, could be regarded as fairly developed, yet the laws of war were in the main based on the discretion of individual commanders, and we can glean the rules of belligerent conduct in the wars waged against the Persians and others. The Arabian Peninsula had common frontiers with both the Byzantine and the Persian Empires. Both these Empires had carved out for themselves colonies, protectorates and even buffer-States of purely Arab people.

Pre-Islamic Arabia :

At the dawn of Islam Arabia presents itself as a vast congeries of innumerable independent political groupings, based primarily on tribalism. The tribes were either *nomad* or settled. Even members of one and the same tribe were, more often than not, divided into these two kinds. The settled Arabs had generally their own city-States. Each city had its surrounding territory, large enough to allow of the convenient assembly of its free citizens, for the purpose of exercising the rights and discharging the obligations incidental to citizenship. The city-States rendered possible the evolution of law governing the relationships between them in their capacity of sovereign powers. The position of such autonomous communities were alike from

the European States from the point of view, of international law.

The Arabs were divided in different municipalities and to the Arab, his State *i.e.*, his tribe and tribal settlement was no vapid abstraction, but a living reality. He was bound to it by an almost indissoluble tie. The Arabs as Arabs cherished aspiration for unity, but as citizens their constant aim was decentralization; and their claims of citizenship invariably triumphed over those of racial kinship.

In remoter antiquity, especially in Yaman, veritable empire had sprung up but at the dawn of Islam there was chaos the older kingdoms and empires had disintegrated into petty townships. The territories under foreign domination such as 'Uman, Bahrain, were divided into *nomads* and settled.

The large number of wandering tribes were also possessed territory although they lived in different seasons of the year in different parts of it. They also had their own political organization. They administered justice, they waged war and concluded treaties just as any other State.

Bellum omnium contra omnes has so often been pictured as the normal condition of Arabia. It may be true to a certain extent. A man without political nationality and passport cannot expect much better treatment even in our modern times. The perpetual strife of tribes in Arabia, however is no denying the fact that the Arabs managed, somehow or other, how to live a peaceful life also. For example, they evolved the institution of the months of the truce of God which so much mitigated the hardship reserved for unallied tribes. Again they developed the escort system to the pitch of fine art, which was another factor in saving life and property in the midst of hungry Beduins. There are innumerable instances of individual escorts in the pre-Islamic history of Arabia.

Meccans had developed a system of pacts in their inter-State relations. They concluded pacts, or rather obtained charters from the rulers of Syria, Abyssinia, Iran, Yaman, etc., in order to bring caravans of trade to their respective territories in perfect immunity. The Meccan magnates promised many tribes inhabiting on their trade route to these different countries to carry their goods as agents without commission for commercial purposes, or otherwise concluded treaties of friendship and immune transit through their respective territories. The services of this Organization for payment were available even to the people of foreign countries, such as Iran. They develop the trade pacts and immunity by sending embassies.

Tribal alliances for particular purposes of permanent cooperation were also in great vogue, in all parts of the country. Many ceremonies were observed at the time of the "signature,"

interchange of drops of blood in wine before drinking it, be-smearing with scents, lighting fires, cutting tufts from the forehead and cutting the nails of the contracting parties and burying them under the subsoil of some lake, and many such things are recorded at different occasions, besides the more common shaking of hands. Prof. Krenknow once told me that he had read somewhere in classical Arabic literature a way to deposit a treaty in safety. The document of the treaty was simply torn into two pieces, and each contracting party kept half of it, and whenever there was need to refer to its terms, the two pieces were joined.

This leads us to envoys. There are innumerable instances of Arab Chieftains visiting foreign rulers, and foreign ambassadors coming to Arabia. This paves the way towards sending envoys. The Yamnities sent an envoy to Ctesiphon to ask for Persian help against the Abyssinians. Instances of Inter-tribal and inter-Municipal embassies in Arabia are also innumerable. The Meccans twice sent envoys to the Court of Negus against the Muslim refugees. Before his Islam 'Umar was the hereditary ambassador—spokesman of Mecca; and in the words of Ibn-Abd-Rabbihi "whenever there was war, they sent 'Umar as their envoy plenipotentiary; and if and when a foreign tribe challenged the priority of the Quraish it was again he who went and replied, and the Quraish agreed to what he uttered." The person of an envoy was always considered inviolable.

Although there was no unity in Arabia, in the sense that there was no one central authority for the whole of the desert Peninsula. Yet it cannot be denied that strong tendencies were already working, before Islam, for a centralized unity. There was also economic confederation in the sense that there were fairs at different places and the people from far off places took part in these fairs. There was also economic confederation in the sense that there were fairs at different places and the people from far off places took part in these fairs. For instance, the Meccans attended the fairs of Dumatuljandal and Rabiya; or, that Ukaz was attended by Aslam, Gha'afan and others and many of the traders went from one fair to another, naturally not to all.

Another evidence of centripetal tendencies in Arabia was the common arbitrators. These arbiters, soothsayers and other diviners were resorted to by all people irrespective of tribe and clan. Amir-ibn-az-Zarib and others have left many anecdotes of their impartiality, the reason for which they were trusted and respected.

Among other international laws of peace in Arabia, we come across asylum and quarter, refuge, naturalized and domiciled aliens extradition hospitality of foreigners and even laws of shipwreck.

Lastly the famous order of Chivalry, *hilf al-fudul*, inaugurated in the time of the Jurhumites and revived again during the adolescence of Muhammad, the Prophet of Islam. Its adherents swore to side with any one oppressed, be he a co-citizen or a foreigner, within their city limits, and not to give up his cause unless justice was done. Obviously, the laws of war were much more developed. So, declaration of war treatment of enemy person and property, prisoners of war distribution of booty, special privileges of the commander of the expedition, spies, hostages, truce and armistice and parley and a host of other matters, even distinctive uniforms, were treated in a more or less regularized manner, no matter how harsh or lenient.

CHAPTER IX

THE PLACE OF ISLAM IN THE HISTORY OF GENERAL INTERNATIONAL LAW

Modern international law, is in fact originated in Western Europe.

The characteristic feature of the Greek system was that it concerned itself with the limited number of city-States, situated in the Greek Peninsula and inhabited by people of one and the same race, speaking the same tongue, believing in the same religion, and observing the same customs, though independent of each other and jealously guarding this exclusive existence of theirs at no small cost. The Greek States had, in fact, two separate and distinct sets of the rules of international law, viz. one to be observed in relation to Greek people, and the other regarding the rest of the world. This latter set of rules was less developed and scarcely systematized.

The Chief feature of the Roman Period is that their law applied not to people of one race but to subjects of the Roman Empire as a whole. This Roman Empire consisted many States, more or less owing allegiance to Caesars. Every State was enjoying to a great extent internal autonomy and home rule. In case of dispute between the States the matter was referred to Rome and the decision of the Emperor, in accordance with Roman Law, was final. The Roman International Law was set of rules. It may be noted that the Roman International Law of peace was a great advance on the Greek system yet the Roman Law of War remained very much the same, recognizing no right for the belligerent, and using nothing but discretion regarding the non-Roman enemy.

The modern system of international law recognizes that a belligerent has as much right as a friendly State in time of peace. No doubt during war rights are curtailed but there remain many intact. The question arises about the origin of this international understanding.

In Christianity the teaching of love was ill-suited for the development of International Law. No doubt in spite of this preaching by Jesus Christian but as a matter of fact in practice it was quite different. At the time of the formulation of the theories of Modern European International Law, Christianity lacked moral force more than ever. The papacy and clericalism had fallen into disrepute. Grotius, father of European International Law, for instance, mentions in the Preface to his *de jure belli as pacis* that in his time the Christian nations of Europe behaved in their war in a manner that even barbarians would be ashamed of.

The Christian claims that their International Law is based on Christianity but due to sheer need of practical politics that led them to admit the Muslim State of Turkey in the society of the civilized nations under the treaty of 1856. Japan and other non-Christian nations had to wait still further to have the same honour. According to a Papal bull, the Christians were not bound by their pacts with Muslims. Moreover, as Prof. Walker has remarked it was only under the stress of Muslim fear that the Christian Europe learned for the first time, during the Crusades, to unite; and different European nations fought under the same banner, which they had never done before in spite of having embraced Christianity and recognizing in the Pope their common Superior. The earliest European writers on international law, such as Pierre Bello, Ayala, Victoria, Gentiles and others all hailed from Spain or Italy, and they were all the product of the renaissance provoked by the impact of Islam on Christendom. Baghdad in the East and Cordova in the West stood as torch-bearer of Arabian Culture, and in between lay Europe obsessed by the fear of being dominated and subdued by one or the other of the two mighty empires of the Arabs (Muslims).

Among the rare recognitions of the influence of Islam on the Modern Western International law, at least during its formative period, the works of Nys, *Origines du droit international* are self speaking. The lectures delivered by the Russian Jurist Baron de Taube in the Academy of International Law of the Hague, 1926, dealing with the influence of Islam particularly on Russia and the Eastern European countries. The citation below is a sufficient proof :

“the different institutions.....in the civilization of the European Middle Ages carry an indelible mark, if not of their oriental origin, pure and simple at least of their strong dependence on the analagous military institutions of the Muslim Orient.”

He further recognizes that when Arab traders came as far as Sweden and Danmark in the West and China in the East, there was “a passivity on the part of Byzantine Greeks in the

domain of international commerce"; and as proof he refers to the fact that until 1914, "against 38,000 pieces of Arab money found in Sweden, one counted only 200 pieces of Byzantine money in the same country."

The question arises whether the Muslims themselves had cultivated an international law. It is already been noted that *Siyar* (international law) has ever since been taught in all Muslim Schools as part of *fiqh* or Law.

It is clear from this that the Muslims very early developed a science of international law, and made it an independent subject. The early Arabic works on international law and allied subjects give a vivid idea of the relations of the Muslims and the Rum (Byzantines) and others in time of war as well as peace, and we see how interaction was going on not only in the art of warfare but also in the very science of international law. In Muslim law we came across, for the first time, the full-fledged notion of recognizing rights for the enemy in all times, in peace as much as in war, rights endorsed by the Quran and by the practice of the Prophet and his successors.

CHAPTER IX

THE ETHICAL BASIS OF MUSLIM LAW

In the beginning, there was one sole science which occupied Muslim intelligentia, that of the commands of their religion. Soon many sciences had to be cultivated: history, philology, astronomy, etc.; yet they all revolved round and were subservient to the all embracing Quran. When even the branches of law, like our own subject, International Law, acquired the status of independent and full-fledged sciences, they still retained their ethical values; their provisions had to have the sanction from the Quran or the *Sunnah* or the Orthodox Practice. No Muslim science was originally cultivated for its own sake, independent and regardless of others; but all were made subservient to the Shar'ah in order to contribute well being of Man in this world as well as in the Hereafter. Without belief in Resurrection and Reckoning, man may become more devilish than the Devil; and man without enjoyment of what God has created for him would be no man at all. The Golden Mean is the rule in Islam, and this is true of even such an overwhelmingly materialistic science as Muslim International Law. And although divorced from law general and political science, International Law of Islam was not based on human reason to be guided by convenience but continued to retain its ethical basis of the unchangeable Quran and the *Sunnah*.

A matter of fundamental and far-reaching importance is the question of treating aliens. Enemies from among the brothers have in all times and climes elicited some restraint on the

part of the victors, but not so the aliens Genocide was a religious dogma for some (regarding the Amalekites), untouchability for others, and yet others propounded "to violate a pledge is a sin yet to honour the pledge given to the infidel is a greater sin" (as we heard during the Crusades).

But the Muslim authors on International Law are all unanimous on a basic rule of law regarding international relations, and every compendium of Muslim law repeats that, that is, in sufferings of this world Muslims and non-Muslims are equal and aliked. Amongst Muslims law, justice and good conscience as basic fundamental in dealing with non-Muslim; one cannot violate pledge given them on any account. Vicarious reprisals are unlawful in Islam. The Islamic institution of giving quarter to the enemy based on the Quranic command. If any human being asks for asylum and protection, it can on no account be refused. In fact, the entire fabric of the rules of Muslim International Law is intended for the non-Muslims.

The Muslim jurists considered the rules of international behaviour form part of the Muslim Law, and that they do not leave International Law to the discretion of the rulers or to the whims and fancies of the politicians. This recognition of the legal character of the international law dates not from modern times but from the very first.

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PART II
PEACE
CHAPTER I
INDEPENDENCE

PEACEFUL or non-hostile relations of States and their rights and duties may be described under the following heads :—

1. Independence.
2. Property.
3. Jurisdiction.
4. Equality.
5. Diplomatic and Commercial Relations.

States, whether small or big, are either sovereign and independent or part-sovereign or non-sovereign. In international law no notice is taken of the last of these kinds. The first criterion of independence for the purposes of international law is the right to foreign relations. If this right is absolute, it is called sovereign and independent. If the right is qualified and restricted, but not abrogated and extinguished it is called part-sovereign State. If the right does not exist it is treated a non-sovereign State. There are other tests too.

The form of government has nothing to do with independence. A State may be republic with elected heads, or a monarchy with hereditary succession. Even in the hereditary succession, the Islamic institution of (oath of allegiance) which has been in vogue ever since the time of the Prophet, some sort of social contract and expression of popular will is present. The Prophet assumed authority through Divine commission, nevertheless every adherent to his authority had to pay him homage and allegiance either personally or through representatives. After the death of the Prophet, the question of succession arose. Three propositions were made, viz., hereditary succession, popular election, diarchy. The Prophet left no male issue and his nearest kin were a step-uncle and a cousin who was also his son-in-law. As for the proposal of diarchy Medinese said "there should be one ruler from amongst us and another from amongst you, the Meccans and apparently both the rulers had to rule conjointly since it was no possible to divide the territory ; or at best it implied the division of jurisdiction of the two rulers according to persons concerned not to place.

Strict hereditary succession, in the form of the right of the eldest son, does not seem to have ever taken deep root in Islamic policy. The orthodox Caliphate was not hereditary. Among the Umayyads and Abbasids frequently brothers or cousins succeeded even in the presence of sons. The Ottoman Turks had the curious rule of presuming the eldest member of the royal family as heir. In the Mughal empire of India, more often than not, the sword and capability decided the issue. The case of Razia Sultana of India (1236—1240) is quite a unique example. Therefore it can be concluded that either the nomination by the reigning person of his successor or, failing this a general election by the pillars of the State is the rule Islam has accepted whether the nomination is that of the eldest son or not. In short, form of Government and succession to power are immaterial for an independent State. It remains, however, to see what is Independence and what is State.

Independence

Independence is defined by Ibn Khaldun as the non-existence of any external power to enforce its will upon the affairs of Government. In other words there should be no external or internal interference or control of any other power. The right of a State to freedom of action is but a reflection of the original freedom of every man. This freedom to conduct state affairs has never been absolute. There are natural impediments testifying to the omnipotence of God and weakness of man; there are correlative and reciprocal restrictions such as the respect of equal rights of others; there are contractual limitations of one's liberty, no matter whether accepted originally under force or with mutual will; and there are tacit acquiescences of unilateral declarations if there is no power to resist.

International law cannot apply without the existence of more independent States than one at the same time. As a fact several independent States have simultaneously existed since time immemorial yet the right of this co-existence was not easily conceded in the civilizations of bygone days. The Greeks were told by their national philosophers that nature had intended the non-Greeks to be slaves of the Greeks. The Romans, although they never ruled even one-thirtieth of the world, believed that they were the lords of the earth. The world was regarded by them as belonging only to Romans (*orbis Romanus*) and the Romans were designed as the *princeps orbis terrarum populus* (lords of the population of the globe of earth). As religions were national, there was no possibility of conceding equality to others, even when they capitulated. The Jewish Law also reflects the same. Islam believed on the other hand, in the universality of the Divine call with which Muhammad was commissioned. It was this conviction which led the Muslims to aspire to a world order, but we must distinguish between the domination of a

nation based on race or language and between the nation aspiring to establish on earth the kingdom of God, where His word alone, and not human ambition, should reign supreme. Therefore for Islam it makes not the slightest difference whether the ruler is an Arab or a Negro provided he is a Muslim, *i.e.*, submissive to the Will of God. The Muslims considered as their own enemies only the enemies of God: the Polytheists, the Associators or the Atheists. They wanted to conquer the world, not to plunder it, but peacefully subjugate it to the religion of "Submission to the Will of God". After such subjugation they became equal.

It may also be noted they acknowledged the rights of the people outside their jurisdiction. The Quran enjoins peace with those who do not want to fight.

State

States have existed in human society since time immemorial, and not much has changed in the essentials of their functions. The State-officials from the head to the lowest have proportionately exercised more or less authority over the commoners and even the lower State-officials in their private capacity. The question of the origin of authority is disputed in different schools of thought.

The classical authors of Islam have been unanimous that it is a delegation of Divine authority. It may be called a theocracy though not in the same sense as in modern West. A few typical quotations from the Quran will elucidate the point:

(a) Lo! The earth is God's. He giveth it for an inheritance to whom He wills (7 : 128).

(b) And when the Lord said unto the angels Lo! I am about to place a viceroy in the earth (2 : 30).

(c) (And God said unto him) O David! Lo! We have set thee as a viceroy in the earth; therefore judge aright between mankind and follow not desire that it beguile thee from the way of God. (38 : 27).

(d) Say: O God! Owner of Sovereignty (Mulk)! Thou givest sovereignty unto whom Thou wilt, and Thou withdrawest Sovereignty from whom Thou wilt, and Thou abasest whom Thou wilt. In Thy hand is the good. Lo! Thou art able to do all things (3 : 26).

The verses supported by the sayings of the Prophet and orthodox practice tend to show that God is the King of the earth and beyond, and He delegates authority, for administration in trust, to man; and man yields power at His will.

Only a discussion on two points will be sufficient for our purpose, *i.e.*, (1) acknowledgment of more than one independent

State at a time and (2) acknowledgment of more Muslim States than that one.

Abu Yusuf opines that they both maintain : a territory is related to its people on account of their controlling hand over it and their establishing protective authority therein.

As regards the second point the Quran refers to diversity even of Muslim States :

(a) It is not a believer to kill a believer unless it be by mistake. He who hath killed a believer by mistake must set free a believing slave, and pay the blood-money to the family of the slain, unless they remit it as charity. If he (the victim) of a people hostile unto you, and he is a believer, then the penance is to set free a believing slave. And, if he cometh forth of a folk between whom and you there is a covenant, then the blood-money must be paid unto his fold and also a believing slave must be set free. And whose hath not freed must fast two consecutive months. A penance from God. God is Knower, Wise”.

(b) “How should ye not fight for the cause of God and the feeble among men and women and the children who are crying : Our Lord ! bring us forth from out of this town of which the people are oppressors ! Oh, give us from Thy presence some protecting friend ! Oh, give us from Thy presence some defender ! They will ask : In what were ye engaged ? They will say : We were oppressed in the land. They will retort : Was not God’s earth spacious that ye could have migrated therein ?”

Accordingly, the distinguishing factor between the Muslim and non-Muslim territories is the difference of authority and administration. The same is true of the different principalities even within the Islamic territory which are distinguished from one another by the domination and the execution of authority.

After the downfall of the Umayyads, Spain became independent of the East. Later, during the decadence of the Abbasside Empire, its Provincial Governors became hereditary and virtually independent. They could wage war, make peace or conclude other treaties, without reference to the Caliph, and administer all their internal as well as external affairs at their own will. Their allegiance to the Caliph became quite nominal.

Grouping of States

The great majority of lands inhabited by Muslims had fallen one after the other, during last few centuries, to non-Muslim domination, particularly to Dutch, Russian, French and English conquerors. The awakening of political consciousness among the masses and providential aid of circumstances have recently procured to them a gradual emancipation. The Russians have also accorded several important rights to the “nationalities”

under their yoke: the right of secession, foreign relations, separate army, etc. Although these rights are not very real, at the time of writing these lines (1960), the local freedoms may increase in the course of time. The French Community has recognized international sovereignty to most of its Muslim colonies, which have even entered the UNO in 1960, although military bases, economic obligations and other shackles render the independence far from real. The British Commonwealth seems to have ceded most of the substance of independence to its former dependencies, whose right to secession seems to be very real. That some Muslim "sovereign" States voluntarily and in all freedom consent to remain inside a non-Muslim Union, Community or Commonwealth, is a phenomenon unknown to antiquity. Perhaps the headship of the Commonwealth will rotate one day among its component members and not remain vested exclusively in the person of the rule of the United Kingdom. Anyhow these associations may not be confounded with membership of the League of Nations or of the present United Nations. In other words a voluntary "Subordinate" collaboration does not seem to be considered as vitiating the sovereignty of a State.

It means an independent State must be immune from foreign intervention.

Intervention

Independence gives the right of immunity from external interference. But rights and obligations are correlated to each other. Immunity requires abstention also from intervening in other's affairs. There are two circumstances under which intervention is justified:—

1. In self-defence.
2. In preventing an evil worse than meddling into other's affairs.

The self-defence intervention amongst other may be due to retaliation or repudiation of the existing treaty for which sanction is forthcoming both in the Quran and the practice of the Prophet. No doubt it is difficult to distinguish between a punitive act and an intervention. Coercion or threat of coercion, naked or veiled, lies at the root of intervention; and an unwilling submission on the part of the subject of intervention is necessary. Once some Christian subjects had fled from Muslim territory and taken refuge in a Byzantine region. The Caliph 'Umar's intervention was due their repatriation by the Byzantine Emperor.

There are examples of the intervention on the ground of humanity or in the path of God. There are Quranic injunctions

and traditions in support of it as follows :—

“Ye are the best community that hath been raised up for mankind. Ye enjoin right conduct, and forbid indecency ; and ye believe in God.”

“And let there be a people from among you who invite to do goodness, and enjoin right conduct and forbid indecency. Such are they who are successful.”

And several other verses of the sayings of the Prophet I shall quote but one :

“Whoever from among you sees an indecency (*munkar*), let him change it by his hand ; if he cannot, let him do that by his tongue ; if he cannot, let him do that by his heart (through disapproval prayer to to God, etc.) but this last would testify to the extreme weakness of Faith.”

The basis of intervention, however, has been provided in the Quranic dictum “discord is worse than slaughter” and in the legal maxim to the effect is “the lesser of two evils should be preferred.”

Muslim jurists maintain that intervention by a Muslim State even in another Muslim State is necessary if the latter sets aside some significant command of the *Shariah*. Publicly despising of the orthodox Caliphs by some of the *Shi'ites* was also one of the authorised grounds to the *Sunnis* for intervention ; it was considered to amount to apostasy.

We must distinguish between intervention on the one hand and protest, advice, good offices, mediation and arbitration on the other. Mere protest, falling short of any active interference to rectify the act done, is but an expression of feeling. In advice, friendly suggestion is tendered in all good faith without any sanction behind it to carry it out. By good offices and mediation means the act of maintaining contact with both the conflicting parties and providing them both with a means of negotiation and pacific settlement. In arbitration, both the conflicting parties place their cases in the hands of a referee whose award they previously agree to execute. In none of them is there coercion or forceful carrying out of one's will which is so essential to intervention.

CHAPTER II

PROPERTY

The State has its own territory. There is no State without a territory. Even the *de jure* rulers in exile possess defined territories to which they lay claim. Territory means not only the surface of the part of the earth over which a State exercise its jurisdiction, but what is below it and what is above it, comprising thus land, water and air. In ancient times States laid

claim over only so much of the creation of God as they could directly dominate. By the time Islam made its appearance, man had already conquered water as well as the subterranean treasures of nature such as minerals. Regarding the air the Arab jurists believed that every thing above or below a territory belonged to it. It was thus that they prohibited the construction of private buildings over or below public bequests such as mosques, schools, etc.

The theocratic basis of Muslim polity denies a State absolute ownership. It is relative ownership for trusteeship for God. The ultimate ownership of God not only implies that the human ownership of a Muslim State should be a mere trusteeship and administratorship but also Divine origin of the rights of a sovereign. A sovereign authority is declared in the words of the Prophet as the "Shadow of God." In spite of this Divine appointment, the Muslim ruler is not a despot he was subject to rule of law, *i.e.*, *Shariah* as any other commoner from among his subjects; further, the ruler is maintained in power by the collective might of the community. He may even be deposed by the community according to the traditions that "the Hand of God is on the the community" and that "My community cannot agree to a wrong."

Unlike other systems of jurisprudence Islamic jurists have opined that every individual owner has the same Divine authority, and the supervising authority of the State is only a symbol or a manifestation of the collective authority of the community. According to Abu Hanifa all parts of the Muslim territory are under the authority of *Imam* (Ruler) of the Muslims, and his authority is the authority of the community of the Muslims.

A State may and always does own things other than territory, such as buildings, means of transport, money, stores, books, etc. International law applies to them in so far as their acquisition by one from another, through pacific or hostile methods and their disposal are concerned.

Boundaries

Boundaries are defined through prescription as well as express treaties between the neighbouring States. If there is a river or lake on the frontier, the boundaries of the States will extend to meet each other in the middle of the water unless otherwise settled by prescription or express treaty.

It is a principle of Muslim Law that water will be an appurtenant to adjoining land and not *vice versa*. It means a State which possesses a tract of land, bounded by water, will *prima facie* be presumed to possess also the adjoining water—a lake for example; and not that the State which possesses water is entitled to the proprietary rights of the adjoining land.

Open Sea

There exist difference of opinion among the classical jurists on the point that whether it should be considered as no-man's property or non-Muslim territory. The determining factor was the control. Ibn Abidin, while describing the capture of Muslim property by the enemy and rendering it safe through taking it to their territory, analyses the opinions of different jurists on the subject as follow :

"...if they (*i.e.*, enemy) take it to the safety of their territory. The enemy territory includes the Salt Sea (Open Sea) and the like ; for instance, a desert beyond which there is no Islamic territory. This opinion has been attributed to al-Hamawiy (d. 1098). Abus Su'ud, writing notes on the commentary of al-Hamiliy's in verse, says that the surface of sea will be considered as non-Muslim territory. Ash Sharanbilaliy (born 1069 H.) author of *غتيه زوى الاحكام فى بغيته دار الاحكام* records in his chapter on tithes that Siraj ad-Din Umar ibn Aliy Al-Kinaniy, known as the Reader of Al-Hidayah, was asked whether the Salt Sea would be considered as part of Muslim territory or non-Muslim territory? He replied: It belongs to either category since none has control over it. Al-Haskafiy in his *الدار لمنتهى* (compiled in 1080 as a commentary of *سنتى الابد* by Ibrahim al-Halabiy) opines that the Salt Sea should be included in non-Muslim territory. The same author mentions in another place. The author of *النهر* says that all that appertains neither to Muslim territory nor to non-Muslim territory should included in non-Muslim territory ; for instance, the Salt Sea over which no one has control. Apart from this, the Salt Sea will be treated as non-Muslim territory. So, if a non-Muslim subject of Muslim State goes thereto without permission, he will become a subject of non-Muslim State and his allegiance will be cut off. Again, if a subject of a non-Muslim State goes thereto and returns to Islamic territory before reaching home, the old permit will no longer be valid ; his belongings will again be taxed."

It is clear from this discussion that these jurists admit implicitly that Muslim jurisdiction extends to what they can control. For example the Turks have exercised their jurisdiction over the Black Sea, and no Muslim jurists have denied the validity of it.

As regards the territorial waters the Prophet have laid down that "every land has its appurtenance forbidden to other than the Proprietor." This rule has not been extended for International Laws regarding to open sea, but according to Muslim jurisprudence even the sea has been put into man's control :

(a) It is God who hath subjected the sea unto you, that the

ships may sail therein at his command and that ye may seek (advantage unto yourselves through commerce, etc.) of His bounty and that ye may give (Him) thanks. And He hath subjected unto you whatever exists in the heavens and in the earth ; and therein are verily portends unto thinking folk.

(b) And He it is Who hath constrained the sea to be of service that ye eat fresh meat from thence and bring forth from thence ornaments which ye wear. And thou seest the ships ploughing it that ye may seek of His bounty and ye may give (Him) thanks.

It means that if the Muslim State can acquire control over part of it from anybody else, it will become part of Muslim territory. According to Muslim jurists a thing of public utility cannot be given in monopoly to private individual. Abu Yusuf says, "All the Muslims join in the utilization of Tigris and Euphrates and any other big river like them or valley from which they water the soil or use for drinking purposes of man and beast... The maintenance of such big rivers and repairing their banks is on the public treasury. The big rivers are not like particulars rivulets belonging to private persons where others cannot enter...Tigris and Euphrates are not like that, and anybody who likes to water his soil from them can do that at will ; boats pass in them, right of pre-emption does not arise on account of mere joining in the utilization of their water."

The Prophet himself prohibited the giving in jagir (*fief*) of things in which there is common interest.

The waterways in Muslim territories were permitted for all peaceful purposes to foreign countries and they were simply taxed with usual dues.

Modes of acquiring Territory

There are the following modes of acquiring new territory by a Muslim State :

1. Territory not yet occupied by any State owing either to new discovery or for want of being cared for on account of its remoteness or some other reason, may be acquired by occupation.

2. Lands coming newly into existence may be of two kinds : those which came into being by act of nature and those by act and art of man. If natural accretion happens within the territorial limits of one State, and has caused no damage to any other State, it requires no formal occupation. If an island comes up in a place where the imaginary boundary line crosses through it, it must be proportionately divided and distributed between neighbouring States concerned or otherwise the matters should be settled through treaty stipulations.

But if the natural accretion has happened at the expense of another State, Muslim Municipal Law says that the accretion must go to one in whose possession it has happened, yet he must pay compensation to the sufferer in proportion to his gain. This is based on the principle expressed in the maxims that "gain is with sufferance" and "injury must be removed". The same rule applies to international disputes.

Yet if the changing of a river's course is so great that it has become a territorial river instead of a boundary river, the line of boundary must lie in its old bed, for :

"The Lord bringeth to pass what He willeth and chooseth. They (*i.e.*, human beings) have never any choice. Glorified be God and exalted above all that they associate (with Him)."

"And it becometh not a believing man or a believing woman, when God and His Messenger have decided an affair (for them), that they should after that claim any thing in their affairs ; and who is rebellious to God and His Messenger, he verily goeth astray in error manifest."

In recent years there are two instances as follows :

(a) The continental Daily Mail, Paris, dated August 1, 1948, page 2 in article "Persia Peeps", reports to the following effect : "The other ambiguous spot is along the River Atrak, which is the official boundary between Russia and the Persian Province of Gurgan. This river flows into the caspian but lately it has shifted the lower part of its course to the south. The Russians insist that the new bed of the Atrak constitutes the frontier, thus giving them more territory. The Persian view is that the old course of the river remains the boundary. Occasional exchanges of shots result from this difference of opinion, and last March a Persian frontier-guard was killed there.

(b) After the partition of the British India similar differences arose between Bharat and East Pakistan. The frontier was demarcated on old printed official maps, but several rivers had changed their course. An arbitrator in 1950 was appointed who awarded that in case of certain rivers, whose courses had deviated very much, the old bed should born the frontier; and in cases of small fluctuation, the frontier should remain fluid and should change according to the changes of the course of the rivers. In spite of the fact the Arbitrator was not a Muslim nor he was sound by Islamic jurisprudence yet his decision was quite close to Islamic theories.

3. An other mode of acquiring the property is by force. A territory possessed by some other State may be acquire either through war and conquest or even mere occupation without encountering any resistance on the part of the occupied. But a mere conquest does not amount to annexation ; it also requires intention to annex.

4. Territorial acquisition through mutual consent may either be through gift, exchange, sale or inheritance. It is the fourth mode of acquiring the property.

Various kinds of Territories under Power of a State

A State does not always exercise similar powers over all parts of its territory. The following are the instances of such various kinds:

(a) Regular parts of Dominions and condominiums :

Such part of the territory of a State is under its direct control, no matter whether possessed since antiquity or newly added. A State may consist at the same time of all or several of these kinds of lands.

(b) Tributary Independent State :

It means that a Muslim State receives a tribute from non-Muslim States by compulsion. It simply secure non-Muslim State from attack of Muslim State. Apart from this obligation the non-Muslim State remain independent. There is even a case of dual subjection to tribute Caliph Mu'awiyah subjugated Cyprus and concluded peace on the condition that Cyprus should yearly pay a certain tribute notwithstanding the fact that it also paid tribute to the Byzantine emperor. It was further stipulated that the people of Cyprus should remain sincere and well-wishers of the Muslims and should keep them informed of the movements of the Byzantine.

(c) Nominally Dependent :

It means a Muslim State where the control is quite nominal. For example, Muslim Independent State which came into being when the authority of the Abbasid Caliphs could not exert itself. Pre-eminently this is true of the States in the East. They were originally provinces of the empire of the Caliph, and had gradually become independent, became dynasties of rulers. In spite of full independence that they enjoyed, they publicly acknowledged their allegiance to the Caliph of Baghdad in the weekly Friday sermons in the cathedral mosques and also at the Id festivals. The succession was for long considered incomplete without the charter or letter-patent of the Caliph. This is true not only of the provinces of the Caliphate which became independent but also of the Muslim State founded and conquered by private individuals at their own initiative. The king of Bulgars in the year 310. He embraced Islam and he paid homage to the Caliph of Baghdad was more personal and institutional than political and actual. The Caliph no doubt exercise a moral influence over the policies of these Independent States, for example in the year 757 H. The influence of the Caliph was sufficient to prevent Feroz Shah, in such a far off country as

India, from attacking Mahmud Shah Bahmani who had obtained intercession of the Caliph in his favour somehow or other. There are strange cases such as when some of these provincial, independent governors, some times even *Shia's*, captured Baghdad, the very seat of the Caliphate, ruled over it as part of their territory and yet paid homage to the Caliph. The Aiyubid Salahuddin the Great was given the proud title of "The Reviver of the kingdom of the Commander of the Faithful".

(d) Protected States :

It means those part-sovereign or non-sovereign States which obey the dictates of their protector in many matters of the policy, being in return entitled to protection the protecting State. The Protecting State exercises a certain amount of control; yet does not govern directly the protected country where the local prince continues to rule. The Prophet had sent letters to foreign prince in the words "If you submit (*i.e.*, embrace Islam), I shall leave intact the power you exercise. "The rulers of Bahrain and 'Uman accepted the Call, and the Prophet sent to their Courts Residents who exercised certain functions, had exclusive jurisdiction over the Muslims in those countries, and at the same time the local rulers retained their powers in the residuary matters. There are innumerable such examples in the Islamic History.

(e) Sphere of Influence :

It means country which is marked by a State for future domination but which is not considered ripe enough for immediate annexation. Such as in the year 939 H. Nizam Shah and Adil Shah met together on the frontier, and after much negotiation decided that Nizam Shah should subdue and annex the country of Berar, and Adil Shah the dominion of Telenganah, thus dividing Southern India equally between each other. It is agreed in this treaty that one would not interfere if the other conquered the territory allotted to him and would recognize as the sphere of his influence and his interest.

Neutralization and No-Man's Land :

It means such tracts of land especially on the frontiers, where neither of the neighbouring States exercises authority.

We find recognition of the concept in the writings of classical jurists. Such as Rady-Ud-Din as Sarkhsiny says :

"When they both arrived at a place differentiating between the two territories, where the people of neither has authority, they both are relieved of the jurisdiction of the belligerent State and the protection given her by the Muslim becomes valid and she is not subject

to the Islamic territory (*i.e.* jurisdiction) unless she had reached a place where the Muslims find themselves safe (*i.e.* Muslim territory).

CHAPTER III JURISDICTION

During peace many things as well as persons remain under the jurisdiction of a State :

1. Things :

- (a) Property of the Government as well as of its subjects situated within the territory of a State.
- (b) Property within territorial waters.
- (c) Ships etc. belonging to the State or its subjects on open sea or in the air.
- (d) Embassies in foreign countries.

2. Persons :

- (a) Muslim Subjects residing within the State.
- (b) Non-Muslim subjects within the State.
- (c) Subjects residing temporarily in a foreign country.
- (d) Citizens of one Muslim State in another.
- (e) Muslim citizens of a non-Muslim State.
- (f) Resident aliens in Muslim territory.

The cases regarding things are decided according to Shariah. Contracts mortgages will be discussed along with the discussion of persons. The question of no man's land has already been discussed. Therefore, it requires not much discussion.

PERSONS

(a) Muslim subjects at home

We are concerned for the purposes of International those foreigners who have been naturalised. According to the Quranic principle that "The believers are naught else than brothers" it means that as soon as a Muslim migrates from his non-Muslim home and comes to Islamic territory, with the intention of residing there, he at once becomes a full-fledged Muslim citizen of the Muslim State. He has the same rights as the other Muslim citizens and having the same obligations. In this connection the Prophet says "Ask them to embrace Islam. If they comply molest them no more but ask them to migrate to the Territory of Migration. If they do that, they will have the same rights as the migrants (*i.e.*, Muslims) and the same obligations. If they refuse to migrate, inform them that they will be

considered like the non-resident Muslim. They will have, however to observe the Divine Laws even as all the believers; they will not share the booty and spoils captured by the Muslim armies except when they come and join in fight along with them."

If a Muslim travels abroad, he gets a concession regarding the length of his five daily services, yet if he decides to stay in a place for fifteen days, he becomes a settled resident and the concession is withdrawn. This rule, called the rule of *Qasr as-salat*, is based on a Quranic verse. Anyhow the prevalent International condition has brought certain changes and the rules have been framed for obtaining citizenship in a Muslim country.

(b) Non-Muslim subjects at home :

Muslim Law has maintained a considerable distinction between Muslim and non-Muslim subjects. Non-Muslims are exempt from the surplus property tax (*Zakat*). They are also exempt from conscription. They enjoy a sort of autonomy : their cases are adjudicated by the judge amongst themselves and according to their personal law. Their life and property is protected by the Muslim State like the Muslim subjects. In return for all this, they are required to pay annually from 12 to 48 dirhams per head, with several exceptions as under :

"The Capitation tax is exacted only from males. Women and minors are exempted. The rich have to pay 48 drachmas, the man with average means 24, and the one practising handicraft for livelihood, like the peasant, 12 only, which will be collected from them once a year. Instead of cash, they may pay the value. Further the capitation tax is not enacted from the indigent who receive charities, nor from the blind who have no profession and do not work, nor from the chronically sick receiving charities, nor from the crippled—except those chronically sick and crippled but rich—nor from the monks in convents—nor from the very old who can neither work nor have wealth, nor from the lunatic.....And, O Commander of the Faithful ! May God help thee ! It is necessary that thou shouldst treat the people who were protected by the Prophet and thy cousin Muhammad (*i.e.*, the non-Muslim subjects) with leniency, and inquirest about their conditions so that they are neither oppressed nor given trouble nor taxed beyond their capacity, nor anything of their is taken from them except with a duty encumbering them." For it is reported from the Messenger of God who said : "whoever oppressteth a non-Muslim subject or taxeth him beyond his capacity, then I shall be a party to him." And the last words, which the Caliph 'Umar-ibn-al-Khattab uttered at his death-bed, included the following : "I exhort my successor regarding the treatment to be meted out to the people protected by the Messenger of God (*i.e.*, non-Muslim subjects).

They should receive the fullest execution of their life and the fullest execution of their covenant, and their life and property should be depended even by going to war, and they should not be taxed beyond their capacity. Once 'Umar passed along a street where somebody was asking for charity. He was old and blind. 'Umar tapped his shoulder from behind and said: From which community art thou? He replied a Jew. He said: and what hath constrained thee to what I see thee in? He replied: I have to pay the capitation tax: I am poor; and I am old. At this 'Umar took him by the hand and led him to his own house and gave him something from his private coffers. Then he sent word to the cashier of the *Baitul Mal* (State Treasury): Look at him and his like. By God! we should never be doing justice if we eat out his youth and leave him deserted in the old age. The Government taxes are meant for the poor and the indigent (Quran 9:60) the poor are the Muslims, and this one is an indigent from among the scripturaries. And 'Umar remitted the capitation tax from him and his like."

Slaves are also exempted from this tax. If the non-Muslim subjects render military service, at their will they are also exempted from it during the years of active service. There are instances when this tax was remitted during a whole lifetime for meritorious public service for example the Caliph 'Umar did when a non-Muslim subject helped in selecting the site for digging a canal from Cairo to Red Sea.

According to a will of the Prophet, non-Muslims are not to be permitted to settle in Arabia proper, otherwise, there are not restrictions on their movements and domiciles. If non-Muslim foreigners want to settle in Muslim territory permanently or for more than a year, they have to pay this "protection tax".

As regards Mecca there is a verse in the Quran (9:28) declaring that the polytheists being impure, they should not be allowed to approach the holy mosque (of Ka'bah). The non-Muslims were tolerated in Mecca due to necessity or for the services of the nature of public utility.

Ash Shamily records an important incident concerning the rights of non-Muslims: After the defeat of Badr, the Meccan non-Muslims sent a delegation to Abyssinia, to request the Negus to hand them over the Muslim refugees in his kingdom. In order to counteract this mischievous enterprise the Prophet sent Amr ibn-Umayyah ad-Damariy "who had not yet embraced Islam" as his envoy to the Court of the Negus. According to Shafiite, al-Mawardi and the Hanbalite Abu Yala al Farra, non-Muslims could be appointed to any administrative post of the Islamic State, provided the ultimate responsibility is assumed by some Muslims; and he allows their appointment even as

Ministers of State in a form of the Government where the Head of the State is the Chief executive and not a mere symbolic head.

The famous *compendium* of Hanafite law, viz., Bahr'ar-raiq is explicit that the graveyards of non-Muslims should be respected as much as those of Muslims. Both Abu Hanifah and ash-Shafiyy consider that if non-Muslims wish to study the Holy Quran or the Hadith of the Prophet, or the Muslim Law (*fiqh*) cannot be prevented from that. Ibn Sad records that Umar-Ibn-Abdul-Aziz ordered during his caliphate that non-Muslim subject, taken prisoner by an enemy, should as much be ransomed and liberated on Government expenses as any Muslim subject.

Social security in favour of non-Muslim subjects at the expense of the Central Exchequer, was introduced at the time of Abu Bakr, the Commander Khalid Ibn-al-Walid informs the Caliph of the conquest of al-Hirah and says, "I counted the male population. They were seven thousand." On further examination, I found that one thousand of them were permanently sick and invalid. So I excluded them from the imposition of the *Jizyah*; and those susceptible of the tax thus remained six thousand. I have accorded them that any old man who could no more earn his livelihood for his weakness, or who should otherwise be afflicted by a calamity, or one who was rich but became poor to the extent that he requires the charity of his co-religionists, I shall exonerate him from the *Jizyah* and he and his family will be supported by the Muslim Treasury so long as he lives in the Islamic territory. If any of their slaves embraces Islam, he will be auctioned in Muslim markets to the highest bidding, yet without any sales tax and without least haste; and the price will be handed over to the former owner. They have the right to put on any kind of dress except military dress and except making them resemble with Muslims in their dress. At the conquest of Khaibar, the Prophet ordered that all copies of Bible, captured in booty should be returned to the Jewish population, which was conquered.

The law of the capitation tax was originally laid down by the Quran regarding the Scriptuaries. This term was originally applicable to the Jews and the Christians. The Quran is silent regarding other non-Islamic creeds. The practice of the Prophet and that of the Orthodox Caliphs has decided that all non-Muslims may be tolerated as subjects. So 'Uthman accepted capitation tax from berbers and Abdul Malik from Lingayats and Brahmins of India is of the view that all non-Muslims will be considered as one category. As-Sarakhsiy after a prolonged and scholarly discussion, concludes:

"It is clear from this that the mention of the Scriptuaries in the Quran is not to restrict the rule but

only to show that capitation tax may be accepted from the Scriptuaries. Abu Yusuf is very clear on this point. He says 'The capitation tax is accepted from all non-Muslims whether the Magians, the worshippers of idols or fire or stones, the Sabeans, the Samaritans, except the apostates from Islam and the idolaters of Arab origin'."

(i) Naturalization through Application :

In the time of Badr-ud-Din Ibn Jumaah when non-Muslims were granted naturalization. There was a special register in which entries were made. The monitors were appointed to look after their affairs and capitation tax.

The classical jurists have not said any thing about probation and discretion rests with the Government.

(ii) Naturalization through Marriage :

According to Islam, a wife acquires the citizenship of the country of her husband. Thus, if a non-Muslim alien girl marries a Muslim or even a non-Muslim subject of the Islamic State, she becomes a subject of the Muslim State. The same is the case if an alien couple come to Islamic territory and the husband acquires citizenship of the Muslim State, his wife also becomes a subject of the same state. Obviously, if a non-Muslim alien marries a girl who is a subject of the Muslim State, he does not automatically become a Muslim subject. His wife, however, would lose Muslim citizenship.

(c) Muslims in Foreign Territories :

Muslim Law is intensely personal, and embraces all the acts of life. The Prophet ordered the non-resident Muslim to observe Muslim law wherever they might be. According to Abu Yusuf a Muslim is to regulate his conduct according to laws of Islam wherever he may be. No doubt it depends upon the liberty enjoyed by Muslim in foreign countries. Although Muslim jurists insist so much on the personal character of their law, they make a sharp distinction between jurisdiction of a Muslim Court and that of a foreign Court over a Muslim, on the one hand, and moral obligations on the other ; and they do not hold him responsible in a Muslim Court for acts done in a foreign territory. Accordingly, they acquit a foreign non-Muslim from all his acts committed in foreign territory even against a Muslim subject, such as murder or theft. As-Sarakhsiy says :

"If a Muslim enters the territory of non-Muslims by their permission, and lends or borrows money from them, or usurps their property or his property is usurped there, his case will not be heard in the Court of the Muslim territory because they did

that in a place outside Muslim Jurisdiction. As for the Muslim who usurped their property after guaranteeing them not to do that, we hold this because he violated his pledge, not the pledge of the Muslim ruler. Nevertheless, jurisconsults will advise him to return the property through the Muslim Court but will not compel him to do that. And as for the foreigners in their homes who usurped the property of the Muslim, we hold this because they violated their pledge in a place where they were not under the Muslim jurisdiction. So, if they kill him, they will not be held responsible. If they destroy his property or usurp it, the same holds good in a preminent degree. All this because the Muslim took the risk and exposed himself to that when he quitted the Muslim resisting power (*i.e.*, jurisdiction). The same is true of monetary loans, if they come to Muslim territory. If a Muslim has gone by permission to non-Muslim territory and destroyed there life or property, he will not be held responsible in the Muslim Court if the other party comes to the Muslim territory. This is because had they committed the same against him, they would not have been held responsible in the Muslim Court, on the principle that they were not under Muslim jurisdiction. So he when he did that with them; yet it is improper for the Muslim under his religion to violate his pledge with them, for the violation of a pledge is forbidden and the Prophet has said: whoever violated a pledge, a flag will be hoisted over him on the Day of Judgement in order to point out that he was a traitor. It is on account of this that, when he violated with them his pledge and thus acquired some property and brought it over to Muslim Territory, it would not be desirable for another Muslim to purchase it if he knew the fact. For the acquisition was through evil means, and the purchase would be a persuasion to do the like again, and that is not proper for a Muslim. This is based on the tradition that al-Mughirah-ibn-Shubah killed his companions and plundered them and brought their belongings to Madinah, where he embraced Islam and asked the Prophet to treat the plunder as War Booty and tax the fifth of it in favour of the public treasury. The prophet said: As for the conversion to Islam, we accept it; but as for the property, it was acquired by treachery, and we do not require that. This prohibition to

purchase is not absolute but only the purchase is improper.”

In spite of the insistence of Muslim jurist on Muslims being bound by their own laws wherever they are but the fact cannot be denied that Muslims in foreign territories live there on sufferance. They are subject to two-fold restrictions. Firstly, because Muslim Law itself reduces their legal capacity; such as a Muslim cannot give quarter during his stay abroad to a non-Muslim so as to bind the Muslim State. Secondly, such Muslims have to accommodate themselves to the laws of the country where they are living.

During the time of the Prophet, the Muslims had taken refuge for some years in Abyssinia. This was at a time when a Muslim State was not in existence, but on their return from exile a State had been established in Madina. The historians inform us that the Muslims enjoyed in Abyssinia perfect freedom of conscience. The Prophet had recommended that refuge saying that a just ruler governed there. The refugees told that they worshipped there freely according to their rites. They celebrated daily services, and nobody maltreated them nor abused them by unpleasant words. The Negus refused the demand of the Meccan delegates for their extradition, and after hearing both sides assured the Muslims that they were safe in his territory. On the other hand, during the same time of the Prophet the Byzantine Governor of Maan embraced Islam whereupon the Emperor ordered him to abjure his religion and on his refusal beheaded him. If we examine the cases of the treatment with Muslim in foreign territory we could come to the conclusion that it depended more on the whims of the rulers than on any fixed rules based on reciprocity and consistency.

The Muslims in foreign countries gave rise to capitulations. The instances are as follows :

(1) In the year 31 H. a pact was concluded between the Muslims and the King of Nubia in which it was stipulated that no objection would be raised if Muslims visited his country or celebrated their services in the Mosque in Dongola, his capital and provisions for extraditing criminals was also made in the treaty.

(2) During the time of al-Hajjaj-ibn-Yusuf, when many Muslims fled from Iraq and wanted to take refuge in Malabar (India) the local chiefs required of them to wear local dress and observe local customs. Abdul Jabbar Khan says “The persecuted Muslims somehow or other, reached different ports of South India. The Hindus, seeing them of a different nationality, prevented them from landing. After long solicitude and humble petition, however, they let them settle in those

ports. This was on the condition that they would follow Hindu customs and would wear the costume of the country. The poor Muslims were constrained to accept the terms; and "as the country, so the dress," they took to wearing Hindu costume. They took to different professions according to their conditions. They had to be very careful, and they observed extreme scruples. So they performed the adhan and the recitation of the Quran in a way that no Hindu could hear them".

(3) During the period of Caliph 'Umar quite a good number of Muslims settled in Bombay and Sindh. When the Hindus recaptured Sindan, they left the mosque in the possession of the Muslim population. They did not evacuate the region where it could hold its Friday service and pray for the Caliph.

(4) Mas'udiy visited India in the first decade of the fourth century of Hijra. He, writes "In the year 304, I visited Saimur (modern Chaul) which is part of Lar (Gujrat) and is ruled by Balhara. The name of the prince who ruled at that time was Chancha. There were about ten thousand Muslims, including the Bayasirah, natives of Siraj, 'Uman, Basrah, Baghdad and other regions who had married there and settled there permanently. Among them were rich merchants like Musa-ibn-Ishaq as Sandaluniy who occupied at that time the post of HunermahHunermah signifies the post of the Chief of the Muslims. for in this country the king appoints the most distinguished Muslim as the Chief of the Muslim community, to whom he delegates all their affairs. By the term Bayasirah, singular, baisar, they mean those who were born in India of Muslim parents."

He further says: "In the whole of Sindh and Hind, there is no king who respects Muslims more than the Balhara. Islam is strong and protected in his kingdom. There are petty mosques as well as cathedral mosques full of Muslims. Its rulers rule for forty and fifty years and even more, and the people of this country pretend that the length of the age their kinds was due to their justice and benevolence to Muslims."

(5) Buzurg Ibn Shahriyar during 400 H. mentions : Theft is generally punished in India by death. If the thief be a Muslim, he is adjudicated by the Hunarman of the Muslims who judges according to Muslim law. The Hunarm is like the *Qadi* in Muslim countries. He is selected from among the Muslim. He further says that once a newcomer, a Muslim sailor, violated the sanctity of a temple in Saimur. One of the priests caught hold of his hand and took him before the king of Saimur and related to him the whole affair. The sailor confessed that he had done that. That king asked the people around him : "What should we do with him." Some said : Let him be

trampled by elephants. Others said : "Viviseet him." No, said the king this is not permissible, since he is an Arab, and there are pacts between us and them. So one of you should go to al-Abbas-ibn-Mahan, the Hunarman of the Muslims and ask him : What would you do if you found a man in similar conditions in a mosque? And see what he says.

(6) Ibn Haqual tells about India that it is a Muslim who governs the Muslim Colony on behalf of Balhara, who delegates to him the authority over them. This custom I have found in many other countries now under non-Muslim occupation, like Khazar Sarir Lan, Ghanah and Kughah. In all these countries the Muslim community does not accept that its chief, its judge and the witnesses in its disputes be anyone except Muslims, this even when their number is very small. In some of those countries I found Muslims who presented sometimes trustworthy non-Muslim witness. If the other party agrees to it, their evidence is relied upon ; if not they are replaced by Muslim witnesses.

(7) Malabar had contact with Arabs of even pre-Islamic days. Muslim colonies of the South Indian sea coast date back to the time of the Companions of the Prophet. Zain-Ud-Din al-Marbarity states : in the whole country of Malabar, there is no ruler for the Muslims of their own who should rule over them, but it is non-Muslims who rule over them administer their affairs, and fine them when they commit some delict. In spite of their rule the Muslims enjoy in this country great respect and power. It is mostly due to the fact that they think that their country and cities flourish for the presence of Muslims. The Muslims can hold Firday and Id services freely. They pay the salaries of the *Qaids* and the *Muazzins*, help in the enforcement of the rules of the *Shariah* among the Muslims. They furnish the people who interferes in the observation of Friday prayers. They do not enter the houses of the Muslims without their permission, even to arrest a murderer, but surround his house and force him to surrender through constant vigilance and hunger and the like. Barbarosa a Portuguese says "foreign Muslims in Calicut had a governor of thier religion, and that the kind did not meddle with them."

(8) Masudiy about China mentions that once a Chinese official in Khanfu oppressed a Muslim merchant, who, trusting in the justice of the ruler of the country, went at once to the capital. He put on the red uniform of complainants and attended the Court. He was presented before the monarch who, having ascertained the story and permitted him to do the business and live safely. Another author says : "The merchant Sulaiman reports that a Khanfu which is the rendezvous of merchants, a Muslim is charged by the ruler of the country to

adjudicate the disputes that arise between the members of the Muslim community arriving in the country. On day of festival, this chief of the Muslim conducts the service of the Muslims. He propounds the sermon and prays for the Caliph. The merchants of Iraq cannot rise against his decisions because he acts with justice and in conformity with the Quran and the precepts of Muslim law."

(9) Musudiy says, "In the country of Khazar, the Muslims are very much respected because they constitute the army of the king. They are known there as Larshiah. They have settled in his country on conditions they will openly profess their religion and attend the mosques and the service calls (*adhan*). They will select their own minister (*vizier*) from among them; and if the king of Khazar has to fight some Muslim power, they would not be employed; else they would fight against any other nation. They provide the bodyguard of the king. They have Muslim *Qaids*. In the capital of Khazar the custom is that there are seven judges, two Muslims two Khazarites two Christians, one for Slavs and Russains and all the rest of the Ignorant People. If any difficult question arises, they all refer it to Muslim judges and agree to what the Muslim Law provides for it. They have mosques in which there are Quranic schools for children. Similar privileges were enjoyed by Muslims in Lithuania and Poland in 15th and 16th centuries.

(d) Citizens of one Muslim State in another :

There was no difference in the treatment of a Muslim migrated to Muslim States and local Muslims. Zahir points out: Between the old and new Cairo there is a mosque attributed to Abu'l Abbas Ahmad-ibn-Tulun. It is an old mosque, with fine workmanship and grand structure. Sultan Salahuddin who live and study there. He has also sanctioned for them monthly bursaries. The most curious thing which I was told by one of them was that the Sultan has delegated the adjudication of their case to them and nobody is to govern them. So, they elected one from among themselves and obey him and make him to arbitrate in the dispute that may arise between them. They live in comfort and at ease. Barring this there was no instance of distinctive treatment.

At present, owing to Europeanized conceptions of the policies of the Muslim States, there are provisions how to treat foreigners and they apply to Muslims as well. In spite of all such rules, it cannot be denied; that a foreign Muslim feels quite at home in any and every Muslim country of the world, and private he is treated with the affection reserved for the nearest kin. Even Government officials help him, in their private capacity as much as they can.

(e) Muslim Citizens of a non-Muslim State :

So far as the practical implications of law are concerned, there is hardly slight difference between this category of foreign Muslims and the citizens of one Muslim State in another State. The Muslim Law recognizes the existence of independent non-Muslim State in peaceful relations with the Muslim State, having a Muslim minority as their citizens.

According to Quranic injunction a non-Muslim State is free to make laws for its Muslim citizens as it pleases, and the Muslim State has no right to interfere on behalf of its co-religionists. Accordingly, it will be the terms of passport which will apply if they come for temporary purposes to Islamic territory.

During the time of the Prophet a treaty of peace and extradition was concluded between the Islamic State and the city-state of Mecca. The Prophet returned all the Muslims who came to him to seek refuge, in spite of the fact that the Muslim minority was subjected to unbearable hardships and persecution in Mecca.

(f) Resident Aliens in Muslim Territory :

In the early Islam, the law of passports have been the subject of a State with which treaty relations existed needed no extra permission from the Muslim State to enter its territory for a sojourn. Again, those foreigners of third countries who were allowed to enter a State which was in treaty relations with the Muslim, could further safely enter Muslim territory. This was not the case with the enemy State. In the absence of treaty relations, and non-existence of hostilities between his State and the Muslim State, the practice of the Prophet was to spare them unmolested if their *bona fides* were established, and a sort of posterior permit was granted. If however, a subject of a belligerent State entered Muslim territory without previous permit, he could be killed or enslaved or treated otherwise at the option of the authorities. The ambassadors have always been exempted from these rules.

According to early Muslim Jurists status of belligerency or friendliness in personal and not local. A subject of a friendly State found in a belligerent place on its conquest by the Muslims, provided that he did not take part in the hostilities against the Muslims and did not act contrary to his obligations of neutrality, was still safe "just like a non-Muslim subject of the Islamic State found in a belligerent territory when the Muslims conquered it." He was allowed safe return. If, however such a friendly alien was brought there lawfully by the belligerent State, for instance : in the capacity of prisoner of war and was duly enslaved, he was to remain such.

A passport could be annulled under the following conditions :—

1. Expiration of the prescribed period.
2. Breach of conditions expressly mentioned therein annulling the permit, or implied as such in every permit.
3. Forged Passport on discovery.
4. Transmitting secrets of the Muslim State to the enemy.

Under Islamic law non-Muslim resident aliens and other visitors have the same status as non-Muslim subjects of the Muslim State. Ash-Shaibaniy is quite explicit :—

“It is a principle of Muslim law that the sovereign of the Muslims has the obligation to protect foreigners coming with permission, as long as they are in our (Muslim) territory, and to do justice to them-this in the same way as he has an obligation regarding non-Muslim subjects.”

A foreign visitor is under the jurisdiction of Muslim Courts during his stay in Muslim territory. Even then he is free to do certain acts penalized specially for the Muslims, such as wine-drinking. There is some difference of opinion between Abu Yusuf and As-Shaibaniy. The former maintain that a foreigner would be subject to the whole of Muslim penal code with the one exception of wine-drinking, and the latter makes a distinction between the infringement of what are called Rights of God and Rights of men holds that a foreign non-Muslim will not be punished except for what is against the Rights of men, such as defamation, murder and the like.

According not only a delict or crime against a subject of the Muslim State, whether Muslim or non-Muslim, but even against a subject of his own State falls under the juridical competency of the Muslim Court. It depends upon the treaty that whether for certain acts he should be tried according to local laws or according to the laws of his own country. Therefore, a foreign visitor will be responsible to the Muslim Court for all his acts during his stay in the Islamic territory, and not for acts committed outside the boundaries of the Muslim State, even if against a Muslim subject. A foreign visitor will have the right to bring a suit even against a local Muslim in the Muslim Court. This right is not forfeited by the outbreak of war between his country and the Muslim State where he is residing. This is valid even when Muslim residents are deprived of this right. It is because according to Quran one's burden cannot be borne by others, and the Muslims must fulfil their promises.

Extraordinary Cases in Jurisdiction

As a general rule a territory falls under the judicial competency of the State under whose dominions it lies. But there are certain exceptions as described below :

1. Head of the State :

It cannot be denied that heads of States occupy a unique position within the realm but Muslim Law does not make him completely immune from rule of law. Whatever the Muslim ruler does in his capacity of ruler such as in the administration of justice, no suit may be instituted against him. But the ruler does a thing in his private capacity, he is as liable to be tried before an ordinary Muslim Court as any other Muslim subject. Thus it was that even the Prophet heard cases against his proper person. In the time of the Caliphs, complaints were made in the Court of the *Qadi* of the metropolis and Abu Bakr, Umar, Aliy and many and Umayyad and Abbasid Caliphs attended the Court at the summons of the judges. On the same basis if the rulers had any private claim, they instituted a suit in the Court and did not assume the position of judge as well as party to the case.

The following are the instances when the Prophet heard cases against his own person. These are gloaring examples of rule of law :

(a) Ibn Asakir records : Once the Prophet unintentionally injured the skin of a Bedouin and he claimed retaliation. Then the angel Gabriel came to him and said : O Muhammad ! Lo ! God hath not sent thee as either a tyrant or an arrogant. Whereupon the Prophet called upon the Bedouin and said : Take retaliation from me.

(b) Once a companion pressed his way through on the day of Hunain, and on his feet were heavy sandals with which he trampled on the leg of the Prophet. The Prophet whipped him with his hand. The next morning the Prophet caused him to come and gave him eighty goats and said : Take this for that.

(c) Ibn Hibban records : On the day of Badr, the Prophet was inspecting his army, drawn up in files, and dressing the formation of anybody was not in his proper place. He had a baton in his hand with which he struck a soldier on the belly who had pushed a bit forward. The soldier complained and demanded retaliation. The Prophet raised his shirt and offered his belly for treatment in a like manner.

(d) Abdullah-ibn-Abd Umamah al-Bahiliy said : I came to Prophet during his last pilgrimage and saw him on his camel. I clasped and folded his leg with my arms. He whipped me. I said Talion ! O Messenger of God. He handed me the whip whereupon I kissed his leg and foot.

(e) In the closing days of his life the Prophet addressed a public gathering and said :

People ! You may have had claims against me. If I have whipped any body's back, let him retaliate on this my back. If I have condemned or censured any body's honour here is my honour to take revenge upon. If I have taken any body's property, here is my property ; let him take it, and let him not fear higgling on my part, as it is not my habit. In fact, dearest to me is the one who takes his claim from me if he has a right thereto, or forgive me. Thus I shall meet my Lord with clear conscience. A man rose and claimed that the Prophet had borrowed some money from him. This was at once paid to him.

(f) Swad-Ibn-Amr says : One day I put on dress of a gaudy colour, fit only for women. When I went in the presence of the Prophet, he exclaimed dislike and hit me on the belly with his stick. I said O Messenger of God, I shall retaliate. Thereupon he uncovered his belly.

In the time of Caliphs the principle was that party and judge cannot be in one and the same person, not even the Caliph. Hence, however the Caliphs had any suit to file or one was filed against them in their private capacity the judge of local Court heard the case. During this period there are innumerable cases of this kind. This is most remarkable example of separation of judiciary from the executive.

If a person is a sovereign in his dominions and at the same time a citizen in another, he is subject to ordinary jurisdiction in the latter. The cases of Jabalah-ibn-al-Aiham, the ruler of Ghassan was ordered by Caliph 'Umar in Mecca to conciliate a Bedouin whom he had hurt, otherwise retaliation would be taken upon him in the Ordinary process. This is an example of equality before law and equal protection of law.

2. Envoys and Ambassadors :

The position of envoys and Ambassador will be dealt with in a separate chapter.

3. International Judges and Arbitrators :

Two arbitrators were appointed during the War between Ali and Muaviyah. These arbitrators were delegated vast powers. They were granted special privileges by both the belligerents, the least of which was protection of life and property.

4. Public Armed Forces :

When armed forces enter a foreign country in hostility, obviously they are not under the local jurisdiction. But the camps of such armies become for the time being a part of the territory of the State to which the army belonged :

(i) Muslim Army :

(a) "If the Caliph or the Governor of Syria undertakes an expedition.....his camp will be considered as Muslim territory."

(b) "If the Muslim army enters belligerent territory, the Muslim Camp will be treated as Muslim Territory.

(c) "If they retort: Is it not the slave embracing Islam and taking refuge in a Muslim camp becomes emancipated? And according to you the emancipation can take effect only in Islamic Territory. We would reply: If the slave comes to that place when there is no Muslim camp, he will not get freedom. He gets freedom only when he take refuge with the army. And the army possesses the requisite resisting power."

(d) Resident aliens had been afforded complete protection.

(ii) Enemy Army :

(a) "If an army of enemy infidels entered Muslim territory and a Muslim should go to them by permission and contract with them for some transaction, his case would be on the same footing as if he entered their territory. For a military camp possesses a resisting power. And Islamic jurisdiction does not run in their camp just as in their territory....Don't you see that if the Muslim army had entered enemy territory and the transaction had taken place there, it would have been treated as if it has taken place in the Muslim territory."

(5) Neutralized Land and No Man's Land:

This point has already been discussed under the chapter of Property.

(6) Special Privileges, Capitulations Exterritoriality :

The businessmen were granted special privileges from time immemorial. As early as the sixth century before Christ, Pharaoh Amases of Egypt granted to Greeks settling in the Nile Delta the right of adjudicating their disputes by their own judges, according to their own laws and without interference on the part of the local authorities.

The Quran commanded the same to Muslim rulers regarding non-Muslims. The following verse of the Quran makes the position very clear :—

"If then they have recourse unto the (Muhammad), judge between them or disclaim jurisdiction. If thou disclaimest jurisdiction, then they cannot harm thee at all. But, if thou judgest, judge between them with equity. Lo! God loveth the equitable. How come they unto these for judgment when they have the Torah, wherein God hath

prescribed for them commands? Yet even after that they turn away. Such folk are not believers... Say: O People of the Scripture! Ye have naught (of guidance) till ye observe the Torah and the Gospel and that which was revealed unto you from your Lord."

When the Christians of Najran (Yaman) and Ailah (Aqabah) and the Jews of Khaibar, Maqna, etc. submitted to the Muslim State, the Prophet conceded to them judicial autonomy where the parties were of the same community.

Karaleveski records about such affairs: "The most important innovation of the Muslims, which the Jacobites most heartily welcomed, was that each religious community was recognized as an autonomous unit, and spiritual leaders of such communities were accorded temporal and judicial powers in considerable numbers." The version by a Nestorian priest during the time of Caliph Umar is as follows:—

"These Tayites (*i.e.*, Arabs), whom God has accorded domination in these days, have also become our masters; but they do not combat the Christian religion at all; on the other hand, they protect our faith, respect our priests, and saints and make donations to our churches and our convents."

We find the same position during Abbasid period.

Extradition:

There were instances of the conclusion of treaties for extradition. In the year 31 H. a pact was concluded whereby the King of Nubians (Sudan) accepted the condition that: "It will also be incumbent upon you to repulse towards the territory of Islam all fugitive slaves who come to you but who belong to Muslims. Further, you will repulse every Muslim combating Muslims and taking refuge with you. You shall return him from your territory towards the territory of the Muslim. You shall not incline to him nor protect him."

CHAPTER IV

EQUALITY OF STATUS

The strict equality between States has as much been wanting in States as in individual citizens. We do not find equality in titles in addressing different rulers, lavishness or frugality of hospitality and general treatment meted out to them, the power and influence exercised by them.

The following version of the Prophet's reflects something in the manner of treatment :—

“The younger should salute the elder, the one marching should salute the one reposing and sitting, and the party of smaller number should salute the one of large number”. The second part of this rule may also solve the relation of a ship to the coast by which it may be passing.

CHAPTER V

DIPLOMACY

The practice of sending of envoys and posting secret agents existed from the time immemorial. This practice was also found during the time of the Prophet. Apart from spies and scouts sent for military purposes, it is recorded that al-Abbas was the secret agent of the Prophet in Mecca, that Anas-ibn-Abi Murthid-al-Ghanawiy was his agent in Awas and that al-Mundhir-Ibn-Amr-as-Saidiy *alias* “A’naq liyamut was his agent in Najd keeping him informed of all that passed in those countries. In olden times, trade caravans used to stay in a country for longer periods than now. The local chiefs appointed what are known as the Hunarman, Shahbandar and Malik-ut-Tajjar in order to regulate the affairs and disputes of foreign traders. These developed into European consuls during the Crusades. And therefore permanent commercial agents came into existence long before permanent political agents and envoys.

The Prophet himself took the initiative of giving impetus to trade and commerce even at the expense of State income. He abolished all inter-Provincial custom duties within the realm. Many treaties were concluded by him with tribes submitting to his authority expressly stipulate that foreign trade, however, remained subject to the usual tithe or whatever percentage was stipulated for by express treaties and conventions between States. The treaty for levying a tithe on the traders of Manbij (Hierapolis) is said to be the first of its kind in the time of ‘Umar. There is an implied reference in the writings of ash-Shaibaniy that sometimes the goods for trade belonging to minors or women were exempt in Islamic territories from customs duties. Again, goods of less value than 200 drachmas belonging to a person were customs free. Abu Yusuf records an interesting correspondence exchanged between “Umar and his governor, Abu-Musal-al-Ashariy.

Al-Ashariy wrote: some traders of ours go to non-Muslim territory where they are subjected to tithes. Umar replied: Levy thou also on theirs as they levy on Muslim traders.

Although Abu Yusuf has known dumping and dearness in spite of abundance, he still believes in free trade. He supports this based on the injunctions of the Prophet directing not to interfere with prices.

As for diplomatic relations and representations Ameer Ali says however :

“When the Provincial Governor became the feudatories of the empire, and the sovereignty of the Caliph dwindled into more or less effective suzerainty, the confidential messengers were turned into legates of the Pontiffs, and acts as his resident agents in the Courts of Nishapur, Merv, Mosul, Damascus, etc. Like the Papal legates, in the later mediaeval times in Europe, they accompanied the sovereigns to whom they were accredited in their military marches. We find them not only in the camps of Alp Arslan and Malik Shah, but also in those of Nur-Ud-Din Mahmud and Saladin (Salahuddin) ever active and sometime meddlesome; occasionally as under the later Ayubids, reconciling contending princes, and settling fratricidal strifes....(Cf. Abul Fida, the Caliph's envoy settled the dispute between the sons of al-Malik al-Muzaffar)...

“Each sovereign on his side maintained a commissary called Shahna (read : Shihnah) at the Pontifical Court, charged with the duty of keenly watching the moves of the game on the part of his rivals, for the struggle for predominating influence over the source of all legitimate authority was as great at Baghdad as in Papal Rome. Shahnas (read: Shihnahs) were usually stationed, besides the capital, in places like Wasit, Bussorah, Tikrit, etc.”

The same author on another occasion says :—

“The Abbaside sovereigns frequently employed a special envoy to transact confidential business with neighbouring potentates. The office was called the Nizamul-Hadratain.”

Reception of Envoys

In the time of the Prophet, whenever a foreign envoy or delegation came, there was a sort of Master of Ceremonials who instructed the guests previous to their reception by the Prophet in the local formalities. The envoys sometimes disregarded them. There are many incidents in the time of 'Umar when the Muslim envoys disregarded certain local formalities in foreign Courts, especially prostration, and caused umbrage.

The Prophet, when in Madinah, used to receive foreign envoys in the Great Mosque where the Pillar of Embassies still commemorates the place. The Prophet and his companions are said to have usually put on fine dress at the time of the ceremonial reception of envoys. A good example of the contrast of the simplicity of early times as against the grandeur of later times is provided by the Byzantine ambassador to 'Umar, whom he found sleeping on the ground in the sun unattended by any courtiers and the ambassador of the same empire at the Court of al-Muqtadir Billah, at Baghdad.

Envoys generally presented gifts from their senders to the ruler to whose Court they were accredited. Such things went to the State treasury. The wife of the Caliph 'Umar once received, in return for her gift, a gift from the wife of the Emperor of Constantinople, but the Caliph likewise confiscated it in favour of the general exchequer, and only the value of the original gift of the Caliphine was given her. There is a dictum of the Prophet to the effect that he could not be inherited from, and whatever he possessed would go to the general exchequer.

The envoys, too, received gifts from those to whom they were sent. The Prophet has said on his death-bed that his successor should award gifts to envoys as he himself used to do during his lifetime. The Prophet once gave an envoy from 'Uman 500 drachmas, at another occasion gold and silver girdles, and at other times other things, sometimes more sometimes less, depending upon the person. It is generally admitted that, if a Muslim envoy received a gift on the part of foreign rulers, etc., that would go to the State coffers.

The envoys are officially entertained. There were several large houses in Madinah in the time of the Prophet, specially meant for foreign guests. The Prophet took special pains personally to entertain the envoys of Abyssinia for it was in this country that he had found a most friendly State even when he was in extreme danger in Mecca in the early days of his mission. Generally speaking, envoys were treated corresponding to their personal position and that of their sender.

Privileges of Envoys

Envoys, alongwith those who are in their company, enjoy full personal immunity. They should never be killed, nor be in any way molested or maltreated. The envoys of the impostor Musailimah provides us good law addressing him the Prophet said: "Had you not been envoys, I would have ordered you to be beheaded."

Envoys are accorded full freedom of prayer and religious rites. The Prophet allowed the delegation of the Christians of Najran to celebrate their service in the very Mosque of the

Prophet. Moreover the property of the envoys is exempt from import duties in Muslim territory if reciprocated. Envoys may in extraordinary cases be detained or imprisoned. So, the Prophet detained the plenipotentiaries of Mecca until the Muslim ambassador detained in Mecca returned safe to Hudaibiyah where the Prophet was camping.

Peaceful Settlement of International Differences

The object of diplomacy is peaceful solution of international questions and promotion of harmony between different States. Modes of settlement are of various kinds, such as :—

(a) Settlement can be made by mutual negotiation. This is done through permanent or special and extraordinary envoys.

(b) It can be made by conciliation, mediation and good offices. It means that a third party, friend to both the contending States serves as channels for mutual negotiation and tender friendly suggestions and advice to bring the disputants to an amicable settlement of their relations.

(c) The third mode of settling dispute is through arbitrators. This is very important mode of settlement. The most important case in the time of the Prophet is the arbitration as to the treatment to be meted out to the Jewish tribes of Banu Quraizah after their capitulation the condition that a certain person should decide their lot. The Prophet accepted it, and carried out the arbitral award fully. The famous arbitration between 'Aliy and Muawiyah is another classical example, the document containing the terms of reference in this case having come down to us *in toto*. The question was who should succeed to be Caliph 'Uthman who had been murdered. 'Aliy being elected by the people of Madinah, and Muawiyah, who was Governor of Syria, contending its validity and himself standing as a candidate. The arbitrators had agreed among themselves that both 'Aliy and Muawiyah should be deposed, and that the Muslim community should elect a Caliph anew. Accordingly at the fixed time and place the arbitrators came to deliver their award. First the nominee of 'Aliy pronounced that he deposed both 'Aliy and Muawiyah so that a new Caliph might be elected and the Muslim community once more united. After him stood the arbitrator nominated by Muawiyah, who said that the nominee of the other party had no right to decide except for his own client ; and that he, the nominee of Muawiyah, however, would not depose his client ; on the other hand he confirmed him in his position. As the arbitrators had not agreed the award, 'Aliy did not feel himself bound by the award and he did not abide by it. Civil wars would have again ensued had not 'Aliy been assassinated by an anarchist. In an interesting passage, Abu Yusuf says what applied admirably to the case

of 'Aliy :

“If the parties agree on two arbitrators.....who differ in the award, it is void, except when both the parties agree to accept the award of one of them. If only one party agrees to the award of one of the arbitrators and not the other, the arbitration is void. If each of the parties agrees to the award of one of the arbitrators, the arbitration is void.”

Abu Yusuf considers the following categories of people not fit to be selected as arbitrators, viz., Muslims punished for scandalizing respected ladies, minors, women, slaves, blind people, the immoral men of suspected or notoriously had conduct Muslims who are prisoners in the hands of the other party to arbitration, Muslim traders in the territory of the other party, Muslim subjects of the other non-Muslim party, be he in his own home or even in the Muslim camp. According to Abu Yusuf an arbitrator must be :

“A man of insight in affairs, orthodoxy in religion, eminence and trust among the Muslims and profound knowledge of law (*din*) is preferred and aimed at in this matter. And those whose evidence is not accepted in Court.....how can they be selected to arbitrate in such affairs.”

He also maintains that a non-Muslim subject too, is not eligible to the honour of arbitership, but his opinion has not found favour with other jurists.

Abu Yusuf says that awards to the effect to maintain *status quo* being futile and therefore are void. So also awards for returning Muslims into the subjection of non-Muslims are void. But the other jurist disagree with his opinion on the basis of higher authority of the practice of the Prophet who expressly consented to return Muslims under the treaty of Hudaibiyah.

In case the arbitrators die during the course of settlement the arbitration fails and the *status quo* shall be maintained. Similarly, if there is disagreement, the arbitration is deemed as failure and the *status quo* shall be maintained.

PART III

HOSTILE RELATIONS

CHAPTER I

VARIOUS KINDS OF HOSTILE RELATIONS

It may be noted that the hostile relations of two or more States do not always amount to war. Generally they fall short of war; and fighting and bloodshed, or, at least, the mobilization of the whole of the public forces of a State does not take place. It is desirable to deal with these relations first.

1. Reprisals

These are forcible mode of redress by which often a resort is made to the so-called *lex talionis*. It may be the seizure or destruction by one State of the property belonging to another State or its subjects, the detention of ambassadors, temporary occupation of the adversary's territory and the like. The Qur'an lays down :

“The forbidden things are reciprocal. So one who attacketh you, attack him in like manner as he attacked you and fear God. And know that God is with those who fear (Him).”

“The guerdon of an ill-deed is an ill the like thereof. But whoever pardoneth and amendeth, his wage is the affair of God. Lo! He loveth not wrong-doers. And whose defendeth himself after he hath suffered wrong—for such, there is no way of blame against them. The way of blame is only against those who oppress mankind, and wrongfully rebel in the earth. For such there is a painful doom.”

For instance, the plenipotentiaries of the Quraish were detained, after the conclusion of the treaty of Hudaibiyah. There are innumerable cases of such kind in the later history of Islam.

2. Pacific Blockade

It means a blockade of the port or ports of the enemy and to prevent of all ingress or egress, but there should be no bombardment. The object of blockade is to obtain redress.

3. Miscellaneous

The breaking off of diplomatic relations, postponement of the enforcing of treaties, economic pressure are the modern and refined modes of hostile activities falling short of war.

Further, frontier incidents occurring from time to time, and clashes between the forces of States whose tense relations have not yet developed into actual war are also classed in this category of relations.

CHAPTER II

NATURE AND DEFINITION OF WAR

According to Islam the war should be the last recourse. The Quran says : "And if they incline to peace incline thou also to it, and trust in God." And again : "So do not falter, and invite to peace when ye are the uppermost. And God is with you, and He will not grudge (the reward of) your actions." There is a *Hadith* which goes "Do not be eager to meet the enemy, but as God for safety. Yet if you meet them, preserve and have patience ; and know that Paradise is under the shadows of Swords." On another occasion, the Prophet said : "Do not be eager to meet the enemy perhaps you may be put to test by them, but rather says : O God ! Suffice for us, and keep their might away from us ! Hasan-ibn-Abdullah says :

"Wars are accidents among the happenings of the time, just like sicknesses, in contrast to peace and security, which resemble health for bodies. So it is necessary to preserve health by means of political action, and to shun sickness by means of warlike action, and to busy one's self in preserving health.

Definition of War

Al-Kasaniy, defines the war of the Muslims, thus : "*Jihad* in the technology of law is used for expending ability and power in fighting in the path of God by means of life, property, tongue and other than these. The later jurists are also of the same view. So the fact that the *Jihad* is not considered as a personal duty to be observed by each and every individual but it is only a general duty which, if accomplished by a sufficient number the rest will no more be charged with the neglect of that duty. It means that administration of *Jihad* is in the hands of God. The practice of the Prophet also shows that either he himself organized the expeditions or delegated its authority to responsible governors or tribal chieftains. Abu Yusuf, the Chief Qadi of Harun-Ar-Rashid says : No army marches without permission of the Caliph. Al-Mawardi opines that a war cannot be waged without permission of the Caliph (Central Government).

Defence of foreign aggression must naturally be excepted. As-Sarakhsiy, maintains that if a foreign armed force without permission of its Government takes belligerent action against a Muslim State, that does not amount to declaration of existence of war between the two States. In such cases redress may be obtained by diplomatic negotiations and even by direct actions as the occasion may require. Even for the war in the path of God there are certain restrictions. The Quran enjoins :

“Lo ! God hath bought from the believers their lives and their wealth because Paradise will be theirs : they shall fight in the path of God and shall slay and be slain. It is a promise which is binding on Him in the Torah and the Gospel and the Quran and who fulfilleth his covenant better than God ? Rejoice then in your bargain that ye have made, for that is the supreme triumph.”

The Holy Quran and the Prophet treated the military service as an obligatory duty of every Muslim. Ordinarily women and slaves are exempt, but if the rest of the man-power proves insufficient even these are liable to active military service. As regards training and preparations in time of peace the Quran directs :

“And make ready for them all ye can of armed force and of horses tethered, the ye may dismay the enemy of God and your enemy and others beside them whom ye know not : God knoweth them. And whatsoever ye spend in the path of God, it will be repaid to you in full, and ye will not be wronged. And if they incline to peace, incline thou also to it, and trust in God. Lo ! He is the Hearer, the Knower.

CHAPTER III

LAWFUL WARS

Under the following circumstances a Muslim can wage war :—

1. The Continuation of an Existing War

It means the recommencement of a war which has been stopped temporarily. The exhaustion of both the parties or separation without any treaty of peace, the suspension of warlike activities by mutual agreement for fixed period. The Quran lays down “And when the months of immunity (on account of the treaty of peace) have passed, slay the Associators wherever ye find them, and take them (captive) and besiege

them, and prepare for them each ambush. Sarakhsy says : And when the months of immunity have passed, slay the Associators wherever ye find them. And the meaning of the Quranic expression : "When the months of immunity have passed" is that when the period of the truce with someone has ended.

2. Defensive

This can be either when the enemy (a) has invaded Muslim territory, or (b) not so invaded but behaviour is intolerable. The Quran enjoins : "Fight in the path of God against those who fight against you, but do not transgress. Lo ! God loveth not transgressors". Regarding the highhanded behaviour Quran says :—

"Sanction is given unto those who are fought against because they have been wronged ; and God is indeed Able to give them victory."

There are many such instances of danger to war. For example Meccans threatened either to kill the Prophet otherwise they will attack on Medinah. The attack on Khaibar is an instance of nipping war in the bud.

The Quran says : "Will ye not fight a folk who broke their solemn pledges, and purposed to drive out the Messenger and did (attack) you first." The Prophet holds "Whoever fights in defence of his person and is killed, he is a martyr ; whoever is killed in defence of his property, is a martyr ; whoever fights in defence of his family and is killed, is a martyr ; and whoever is killed for the cause of God, is a martyr." This enumerates the kinds of defensive wars.

Regarding the Muslims in non-Muslim State seeks helps the Quran directs :

(a) And those who believe but have not left their homes, ye have no duty to protect till they leave their homes ; but if they seek help from you in the matter of religion, then it is your duty to help (them) except against a folk between whom and you there is a treaty, God is seer of what ye do.

(b) How should ye not fight for the cause of God and of the feeble among men and of the women and the children who are crying : Our Lord ! Bring us forth out from this town of which the people are oppressors ! Oh, give us from Thy Presence some protecting friend ! Oh, give us from Thy Presence some defender ! Those who believe do battle for the cause of God ; and those who disbelieve do battle for the cause of the Devil.

3. Punitive

There are many lawful reasons for waging war such as hypocrisy, apostasy, insisting on the non-binding character of *zakat* or any other religious duty, rebellion, breaking of a covenant by the other party, becoming a Kharijite.

4. Idealistic

By idealistic reasons we mean the war in the path of God. The following quotations from the Holy Quran would be sufficient to explain it :

(a) He it is who hath sent His Messenger (*i.e.*, Muhammad) with the Guidance and the Religion of Truth that He may cause it to prevail over all religions, however, much the associators may be averse.

(b) Ye (*i.e.*, the Muslims) are the best community that hath been raised up for mankind. Ye enjoin right conduct and forbid indecency, and ye believe in God.

The Prophet says :

“Whoever from among you sees an indecency, he must change it by his hand ; if he cannot, he must do so by his tongue ; if he cannot, he must do so by his heart (through disapproval, etc.) but this last would testify to the extreme weakness of Faith.”

As regards to such wars Muslim jurists opine :—

“When a Muslim State has sufficient power to hope for victory in case of resistance, then it is its duty to invite the neighbouring non-Muslim sovereigns to accept Islam. If they do, they will retain their power and the invitation is rejected, the non-Muslim Chief within the Arabian Peninsula has to face the sword. In case the territory is outside Arabia, it has to pay yearly *jizyah* or the protection tax, which will secure his territory against Muslim attack. In case both the alternative is rejected it is the duty of the Muslim State to declare war in the name of God until it conquers or receives the *Jizyah*, or has the gratification to know that the other party has at last embraced Islam.”

CHAPTER IV

ENEMY PERSONS

“Enemy Persons” are of four kinds, *viz.*, apostates, rebels, highwaymen and pirates and non-Muslim belligerents in general. The first three kinds are generally the subjects of the Muslim

State and the last one consists of foreigners. In order to attract International Law it is necessary that the apostates, rebels and highwaymen should be of considerable strength and must be quite in good number.

CHAPTER V

APOSTASY

The waging of war against apostates is justified on the basis of Muslim polity being religious and not ethnological or linguistic. It constitutes a politico-religious rebellion.

According to Muslim Law apostasy means turning from Islam after being a Muslim.

In Islam the punishment prescribed for the act of apostasy is death. In the case of apostasy, no distinction is made between a Muslim born of Muslim parents and a convert; and similarly there is no difference between accepting Judaism or Christianity, atheism or idolworship or any other non-Islamic faith. Muslim jurists hold the view that before penalizing an apostate it is necessary to be sure about the views of apostate. It means sufficient opportunity of being heard should be provided.

Moreover after being sure about his view sufficient time is to be given to him for reflection even for months before finally proceeding with the prosecution. No doubt there are certain exceptions such as an insane person, a delirious, a melancholy and perplexed man, a minor, one intoxicated, one who had declared his faith in Islam under coercion, and a person whose faith in Islam has not been known or established were to become apostate they would not suffer the supreme penalty. According to Hanfi School of thought an apostate woman and a hermaphrodiate would not be condemned to death, but imprisoned and even physically tortured. An old man from whom no offspring is expected is also expected.

Treatment of an Apostate

The apostate has to choose between Islam and the sword. He cannot be given shelter nor will he be allowed to become a *dhimmiy*.

In case an apostate escapes then he is considered *de jure* dead and his property shall be distributed among his Muslim heirs. Moreover the debts due to him will be wiped out if he has reached non-Muslim territory.

Distinction between the Territory of Apostates and the Territory of ordinary non-Muslims

Mawardi distinguishes in the above two in the following manner:—

1. A treaty of peace or alliance is not ordinarily allowed

with apostates ; no such restriction exists in relation to ordinary non-Muslim foreigners.

2. An apostate is not allowed to become a *dhimmiy*.

3. An apostate has either to re-embrace of Islam or the sword.

4. The booty acquired from an apostate is not to be distributed among the capturing troop ; it will go to the general exchequer. However that property of dead apostates, captured during a conflict, at once becomes the property of the Muslim State. But if the apostate is living, his property is to be held in trust to be returned to him on re-embracing Islam or finally to be confiscated to his death.

5. An apostate shall be provided no quarter before be-headed, but a billigerent shall be provided a quarter. There are also certain points of similarities such as an apostate, upon his embracing Islam is not held responsible for the destruction of Muslim life and property during the war. Further, in being fought and pursued, the apostates are the same as other non-Muslim enemy combatants. Their ambassadors, too, will receive the same rights and immunities.

CHAPTER VI

CIVIL WARS AND REBELLIONS

As Islam preaches for the unity of Islam, there is only one verse in the Quran on the subject :

“And if two parties of Believers fall to fighting, then make peace between them. And if one party of them doth wrong to the other, fight ye that which doth wrong till it return unto the Ordinance of God ; then, if it return, make peace between them justly ; and act equitably. Lo ! God loveth the equitable.”

And this solitary command is immediately followed by :

The believers are naught else than brothers. Therefore make peace between your brethren and observe your duty to God that haply ye may obtain mercy.

Muslim Law of rebellion, as exposed in legal compendia, is generally based on the Orthodox Practice of the Caliph 'Ally.

(a) Various kinds of Opposition :

According to the degree and nature of opposition to an established Government, there can be the following classification :—

1. Religious ground—the Kharijism.
2. Political or worldly reasons.

- (i) Insurrection.
- (ii) Mutiny.
- (iii) War of Deliverance.
- (iv) Rebellion.
- (v) Civil War.

1. Opposition on religious grounds :

There is only one solitary example of Kharijites who believed in a sort of anarchy and considered the after Muslims as heresay and even disbelief.

2. Opposition to the Government on political and worldly grounds :

(i) It is called insurrection if opposition is directed against certain acts of government officials, and no revolution is intended. They are punished according to the law of land and in this field International Law does not come into play.

(ii) It is called mutiny if the insurrection is intended to overthrow the legally established Government on unjustifiable grounds.

(iii) On the other hand, if the insurrection is directed against a Government established illegally, or which has become illegal for its tyranny it is termed as a war of deliverance.

(iv) It is called rebellion if the insurgents grow more powerful to the extent of occupying some territory and controlling it in defiance of the home Government. The reluctance of some tribes to pay Government taxes was considered a rebellious act and he ordered to subjugate it by armed forces.

(v) It is treated if the rebellion grows to the proportion of a Government, equal to the mother Government and hostilities continue.

(b) Treatment of Rebels etc. :

According to al-Mawardi the Muslim Law does not provide capital punishment for rebels. They may be killed at the battlefield. According to him night assaults and attacked without warning or notice are to be avoided in order to diminish Muslim bloodshed. But in the actual fight, rebels are treated in the same manner as non-Muslim belligerents. The aim of a fight with rebels is to prevent them for disturbing peace and order and not to kill them and exterminate them. They may be pursued and killed only when they have a strong hold or they are in a position to further fight. A rebel unlike an apostate, may be given a quarter. The judgement of a Court in a rebel State will be regarded as lawful and valid, and will not be upset when that country is subdued, unless it is *ultra vires* to Islamic Law. In

case a subject of the Muslim State commits a crime in rebel territory, no suit may be brought against him in the Court of the Muslim territory, because the jurisdiction of the loyal Court did not extend to that place at the time.

(c) Belligerent Rights of Rebels :

Rights of full belligerency are granted by Muslim Law to rebels. The judgment of their Court is ordinarily not reversed after their submission and if they collect revenue or other taxes, the people will be released from their obligation, and upon reconquest, the Muslim State may not exact the same taxes again. In case a merchant enters the rebel territory and pays customs duties, he will have to pay again on the border of the loyal Muslim territory, as if the rebel State were a foreign State. They may conclude treaties with foreign State. Moreover, for wrongs committed in rebel territory, the culprits cannot be tried in the Court of the loyal Muslim territory.

The mutual loss to life and property caused during a conflict cannot be made good of. This immunity accrues to them on account of their being a *de facto* State. Only the war material captured from rebels ought to be treated as war booty and cannot be returned to the relatives of the rebels other party ought to return to rightful owners of their heirs.

(d) Special Privileges of Rebels :

Unlike a non-Muslim State, no tribute can be taken from rebels if the Muslim State is willing to make peace with them. If anything is taken, it must be ascertained whether it was private property of rebels or the property of the State, collected or captured by them: If it is Government property, then the Muslim State may expend it for purposes for which it was intended; and if it is the private property of the rebels, then the Muslim State has no right to appropriate it, but must return it, sooner or later to its rightful owners.

Weapons unnecessarily destructive are not to be used against the rebel. On one occasion Ali ordered:—

“When you defeat them, do not kill their wounded, do not behead the prisoners, do not pursue those who return and retreat, do not enslave their women, do not mutilate their dead, do not uncover what is to remain covered, do not approach their property except what you find in their camp of weapon beasts, male or female slaves: all the rest is to be inherited by their heirs according to the Writ of God.”

One of ‘Ally’s commanders wrote:

“To the Servant of God, ‘Ally Commander of the Faithful, from Ma’qil-ibn-Qais: Salutation and

Praise to God! We encountered the dissentients who had sought help against us from the Associates. We killed them like the Amalekites yet we did not transgress thy conduct: we did not kill the retreating dissentients, nor the prisoners, nor killed the wounded among them. God has given victory to thee and the Muslims. Praise unto the Lord of all the Worlds.”

Their dead are to be buried. Their prisoners are generally not to be beheaded. In case they promise to be loyal and law-abiding subjects, they should be immediately released. Rebel prisoners, Muslims or non-Muslims, may never be made slaves. A rebel woman can be killed in the battlefield only.

(e) Miscellaneous :

If the rebels attack a country friendly to the Muslim State, and booty so acquired the rebels should be returned to the original owners. The loyal subjects of the Muslim State in the rebel territory may join forces with the rebels against a non-Muslim foreign attack. The rebels so cooperating with the loyal troop must share in the booty with the loyal troop. The non-Muslim soldiers of the Muslim army ordinarily do not share in the war-booty along with Muslim soldiers but are given only a prize approximate to their labours. In the opinion of Ash-Shaibany if they form in themselves a strong force sufficient to act independently, or the Muslim army is not strong enough without them, then they also share booty in common.

(f) Deposition of the Muslim Ruler :

There are possibilities of the deposition of a Muslim who is tyrant or insane or quite weak ruler and due to his rule the sovereignty of State is in danger.

The Prophet has said :

“Everyone of your is a shepherd and everyone of you is responsible for those under his care. So the ruler is a shepherd and is responsible for his subjects; a man is a shepherd and is responsible for his family; a woman is a shepherdess and is responsible for the house of her husband; a servant is a shepherd and is responsible for the property of his master; a boy is a shepherd and is responsible for the property of his father in fact every one of you is a shepherd and is responsible for those in this care.”

On another occasion the Prophet has told :

“If the ruler is just, he will get his reward and you ought to be grateful. If the ruler is a tyrant,

he will get his punishment and you ought to have patience.”

But in spite of all the Prophet had given a clear direction that there should be no obedience to any creature in disobedience to the Creator. This is quite in conformity and the spirit of Islam that God is the only sovereign.

(g) Non-Muslim Rebels :

Rebellion by non-Muslim subjects will be treated as rebellion only in case their territory is surrounded on all sides by the Muslim State. Non-Muslim rebels of a province fronting non-Muslim territory are placed by Muslim jurists in the same position as ordinary non-Muslim belligerents. Non-Muslim subjects will, however, receive the same privileges as ordinary rebels, in spite of their being of a frontier province provided they are not the leaders of the rebellion.

CHAPTER VII

INTERNATIONAL HIGHWAYMEN AND PIRATES

At present we are concerned with the International Pirates and Highwaymen. There is following Quranic verses on the point :

“The only reward of those who make war upon God and His Messenger and strive after discord in the land will be that they will be killed or crucified, or have their hands and feet on alternate sides cut off, or will be banished from the land. Such will be their degradation in the world, and in the hereafter theirs will be an awful doom ; save those who repent before ye overpower them. For know that God is Forgiving, Merciful.”

According to jurists they should be treated as follows :

1. For the offence of murder accompanied by plunder, beheading followed by crucifixion.
2. For committing murder only, beheading.
3. For the act plunder only, without loss to life, the amputation of hand and foot on alternate sides.
4. For getting together with the intent of plunder and murder, but having as yet committed nothing of the kind, discretionary punishment may be inflicted. The discretionary punishments interpreted either as imprisonment, expulsion from the State, externment, or confinement to a border district with all its hazards.

In case subjects of a Muslim State commit highway robbery in a foreign country even against Muslim subjects, their case may not be heard in a Muslim Court. They may be extradited

if there is treaty to that effect. On the other hand, if foreigners enter Muslim territory and commit depredation or passers-by, their case may be heard in the Muslim Court. Ibn-Taimiyah says that even if the highwayman is superior in status to the murdered person the murderer must be sentenced to death. He refers that the Caliph 'Umar inflicted capital punishment upon the watchman of gang of highwaymen.

There are following points of differences in the treatment of the highwayman and the rebels :

1. They unlike rebels may be pursued in every case.
2. The object of the expedition must be to exterminate them.
3. They are held responsible for every act of heirs, whether committed before the encounter with them or during the fight with Government forces itself.
4. During the course of investigation, they may be detained in prison.
5. The taxes collected by them will be considered as usurpation. He may be taxed again. No doubt he will have a right to the property recovered from the possession of the highwayman.

According to above Quranic injunction, if individually or *en masse* the gang submit themselves to the authorities before Government can lay hands on them, and give assurance of repentance and future good behaviour, the members may be pardoned. Under such circumstances no action may be brought against them for their past crimes against life and property.

CHAPTER VIII

WAR WITH NON-MUSLIM FOREIGNERS

War as defined by Muslim jurists is the expending of ability and power in fighting in the path of God by means of life, property, tongue and other than these. In order to achieve this goal the jurists direct :

“First to preserve one’s own power and then to break that of the unbelievers and to subjugate them.”

The main purpose of war in Islam is to establish a true theocracy, a Kingdom of God on earth. The slightest desire for worldly gain pollutes the purity and mars the nobleness of *Jihad*. *Jihad* is to be waged solely for the purpose that “the Word of God shall alone prevail otherwise such soldier would not be rewarded paradise.” Therefore *Jihad* does not mean killing and plundering others but offering one’s own self to be killed. It is a sacrifice both of property and life for the sole purpose of obeying the command of his Creator and Master, God Almighty.

CHAPTER IX

DECLARATION OF WAR

There is no question of declaration of War when Muslim had to react in defence but when Muslim attacks the jurists hold :—

“When Muslims encounter unbelievers to whom Islam is an unknown thing, Muslims must not attack before inviting them to accept the ‘Unity of God’ as an article of faith, or to agree to pay the protection-tax (*Jizyah*)—unless they belong to a nation from whom it is not accepted and who have to choose between Islam and the sword—(this refers to all apostates and idolaters of the Arabian Peninsula regarding whom the Quran lays down :

“Fight them unless they embrace Islam” and if they are fought against and blood is shed no previous warning having been given, the Shafi’ite School of thought holds that the Muslim State has to pay for each human life, destroyed in the fight, as much blood-money as is prescribed for a Muslim killed unintentionally. The Hanfite School, however, leaves the blood of such unbelievers with impunity.

But if such a nation understands fully what Islam means, warning and excuse may again be made.

There are the following three circumstances in which the Prophet have waged war without previous notice :

1. Fresh encounters of an enemy with whom no peace is made. For example the expeditions against Meccans are an instance.

2. Preventive war, *i.e.*, against the threatened aggression of a foreign State with whom no treaty relations exist. For example the wars of Banul Mustaliq Khaibar, Hunain are all of this kind.

3. Punitive and retaliatory war in order to punish a State for a breach of treat. The attack of Banu Qainuqa, Banu Quraizah, Mecca, etc. are such instances.

But in all other cases, previous declaration is necessary and especially so against the threatened violation by a State with whom treaty exist. So the Quran directs :

“And if thou fearest treachery from any folk, then, throw back to them (their treaty) on a par. Lo ! God loveth not the treacherous.

As-Sarakhsiy comments on this verse as follows :

“On a par, that is, you and they are on a par with regard to knowledge. And thus we learn that it is not premissible to fight them before throwing back (the treaty) and before their knowing that.”

CHAPTER X

EFFECTS OF DECLARATION OF WAR

Due to the prevalent practice all enemy persons and property were considered as in a state of war. No doubt treatment differs from one category to the other. Every able bodied man was considered a potential combatant and even women and children could be taken prisoner.

1. General Effects :

All friendly relations come to an end between the belligerent State as well as their subjects. Envoys are recalled. The public forces of the State get the right to fight the enemy and inflict damage according to their law of war. Officials and private citizens, all are warned to give the enemy any help, relief, comfort or information. The case of Hazib who attempted to send information to the enemy regarding Muslim designs, and the consequent trial, is a classical example of the time of the Prophet. The constitution of the city-state of Madinah during the early years of Hijrah also enjoins the same thing. The Quran directs “Let them find you rigorous” and again “Be rigorous with them.” Quran on another occasion directs that there should be co-operation on the matters of righteousness and pious duty.

2. Effects on Commercial Relations :

The following are the few cases on the point :

(a) Abd-ar-Rahman-ibn-Awf says : I concluded a pact with Umaiya-ibn-Khalaf in order that he might protect my belongings in Mecca and I protect his belongings in Madinah. When I wrote my name “Abd-ar-Rahman, he said I do not know this, but write thy pre-Islamic name so I signed “Abd-Amr.” When it was the day of Badr.

(b) Thumamah was a chieftain of Yamamah in the year 6 H., he was taken prisoner by a Muslim detachment, and brought to Madinah. The gentle treatment of the Prophet impressed him so much that he embraced Islam. On return journey, he passed through Mecca and heard some abusive cuts on his conversion. He said : “Not a grain of Yamamah can now be imported into your city, unless the Prophet directs otherwise. A famine is said, consequently, to have ensued in Mecca. The Meccans were constrained humbly to beseech the Prophet to lift the ban, which he graciously did.

(c) The Prophet himself once sent a quantity of the dates of Madinah to the Meccan magnate, Abu Sufyan, and required in return hides. This is an instance when hostilities were continuing between Mecca and Madinah.

3. Effects on Trusts and Debts :

In this regard the following are the few cases which gives us some positive law of those times. No doubt at present the law on the point is quite advanced :—

(a) When the Prophet left Mecca to seek safety in Madinah he bade his cousin 'Ally to return all that was entrusted to the Prophet by his infidel and actually belligerent co-citizens. There is no doubt that the Meccans could be considered at that time as belligerents.

(b) A war broke out, in the time of the Prophet, between Jews and the neighbouring Muslim State in Madinah. After defeating the Jews the Prophet allowed their expulsion from Madinah. They took with them all their movable property. The Prophet regarding the outstanding debts of the Jew owned by the Muslim has said that these shall be paid at the moment when they fall due, they cannot be obliterated on account of war. In case the Jewish bankers want an immediate repayment, they are at liberty to enter into new contracts with their Muslim clients, for instance by foregoing some percentage.

(c) During the war of Khaibar one Aswad a salve of Khaibarite came to the Prophet to embrace Islam. He brought with him the sheep of his master and wanted to give them to the Prophet. But the Prophet ordered to return the sheep to the master first and then come to embrace Islam.

The Quran Commands

(i) Lo ! God commendeth you that ye restore deposits to their owners and if ye judge between mankind, that ye judge justly.

(ii) ...And if one of you entrusteth to another, let him who is trusted deliver up that which is entrusted to him and let him fear God.

The Prophet says :

(i) The sword erases all obligations except the debt.

(ii) Whoever is entrusted with a deposit, let him deliver it up to the one who entrusted it to him.

4. Effects on Treaties :

The mere declaration of war cannot affect all treaties that were concluded between the parties at war with each other. The treaties which have fulfilled their purpose will not be

affected by mere declaration of War. But treaties of friendship and good neighbourliness, alliance and mutual assistance and the like, are rendered null and void if such contracting parties choose to declare war upon each other. There are also treaties which remain suspended during friendship and are enforced only when hostilities involve the contracting parties in battle. For example the treaties of mutual conduct during war.

There are treaties like trade and commerce, import duties which are suspended at the modified or cancelled at the discretion of the parties. There are treaties which though suspended during a war, automatically revive at the conclusion of peace if the ex-belligerents retain their independence. For example treaties for the exchange of post and telegrams and similar things.

The problem of multilateral is complete one. Difficulty arises when some of the parties remain neutral and others join the conflict on one or the other side.

Let us now examine a few classical treaties of the Prophet's time :

(a) When the Prophet migrated to Madinah, he found there chaos and anarchy. He constituted a city-State on a loose confederal basis. The Meccan refugees formed one unit ; Arab tribes of Madinah consisting of Muslim and non-Muslim clans all joined individually ; and the Jewish tribes also entered the federation, each tribe forming a separate entity.

When other Jewish tribes came into bloody conflict with the Muslims, the other Jews of the city either remained neutral or even helped the Prophet against their co-religionist.

During the Prophet's time there is a famous treaty of Hudaibiyah between Mecca and Madinah to which some tribes had adhered on either side. When the Meccans once molested the tribe adhering to the Muslim side, the whole pact of non-aggression and trade facilities was considered by the Muslims null and void.

CHAPTER XI

TREATMENT OF ENEMY PERSONS

At the time of a war, enemy persons might be found either in Islamic Territory. They might have come there by previous permission or in their own territory, or in the war zone. In the treatment of these categories of persons there exists considerable difference.

1. Enemy Resident Aliens :

Musta'min means a person who temporarily resides in a foreign country, by its permission. There is no term to distinguish between a Muslim going to non-Muslim territory and a

non-Muslim coming to Muslim territory nor even between a subject of an allied State or unallied or even belligerent State. All are alike call Must'amin which literally means one who seeks protection. Such a foreign resident in Muslim territory is as safe at the outbreak of war between his State and the Muslim State as before. He might return home whenever he liked; he might even take with him all his property. There is certainly exception to contraband of war. The bought contraband of war has to be sold or otherwise disposed of in Muslim territory itself. A resident was generally to go to his country provided there are no chances of joining the other country at war against Muslim State. Anyhow they will be returned to their country unmolested even when it is at war with the Muslim State. In case a Musta'min acts as a spy, he forfeits his immunity.

2. Enemy at Home :

Every person at Bome had to suffer the severities of the incidents of war. The treatment depends on the terms of surrender and capitulation or general proclamation by the office commanding.

3. Enemy in the War Zone :

In the War Zone the question of safety or security does not arise. Muslim soldiers have to take care that they do not fire directly on neutrals, women and minors and other non-combatants during War, no distinction is made between an enemy subject and foreign allies taking part in fight, against Muslims.

CHAPTER XII

ACTS FORBIDDEN

The following acts are forbidden to a Muslim army as regards enemy persons and property :

1. There should be cruel and tortious ways of killing the enemies. The Prophet has said "Fairness is prescribed by God in every matter; so if you kill, kill in a fair way".

2. Killing non-combatants.
3. Prisoners of War are not to be decapitated.
4. Mutilation of men.
5. Treachery and perfidy.
6. Unnecessary devastation, destruction of harvest, cutting trees.
7. Slaughtering animals other than necessary for food.
8. Excess and wickedness.
9. Adultery and fornication even with captive women.
10. Killing enemy hostages.

11. Severing the head of some fallen enemy.
12. No massacre is allowed after vanquishing the enemy or otherwise occupying a place.
13. Killing parents, except in absolute self-defence, even if they are non-Muslims and in the enemy ranks.
14. Killing peasants when they do not fight.
15. Killing traders, merchants, contractors, if they have not taken part in actual War.
16. Burning a captured man or animal to death.
17. To take shelter behind enemy prisoners.
18. Using poisonous arrows.
19. Acts forbidden under treaties.

CHAPTER XIII

GIVING QUARTER

Quran enjoins "And if anyone of the Associators (Polytheists) seeketh the protection (O Muhammad), then protect him so that he may hear the word of God, and afterwards convey him to his place of safety".

Quarter as defined by jurists means the practice of refraining from opposing them (*i.e.*, the belligerents) through killing or capturing, for the sake of God.

It might be granted to enemy persons when they solicit it individually or *en masse*. Quarter may also be granted to enemy persons without their soliciting it through a general proclamation.

According to the Prophet even the lowest of the Muslims may grant quarter which will be binding on the totality of the Muslim State. This right is possessed not only by the combatants, potential or active, but even by others incapable of fight, by the sick and the blind, and even by slaves. The Prophet rendered the quarter given by women valid. But the non-Muslim soldiers of the Muslim army, allies or otherwise, and even non-Muslim subjects of the Muslim State are denied this right of granting quarter, except when authorized by competent Muslims. The right of giving quarter by any individual can be withdrawn by the Commander on notification.

Quarter might for good reason be revoked provided the enemy concerned must be allowed to return to the same position of safety and resistance as he was in when the quarter was granted. The quarter might be granted temporarily or conditionally. Such as the Prophet accorded Mu'awiyah-ibn-Mughirah there days to quit Madinah. Jews of Khaibar were told that

their quarter would be forfeited if they hid their property. If a quartered belligerent is unwittingly molested right to damages accrues.

CHAPTER XIV

TREATMENT OF PRISONERS OF WAR

This subject comprises two parts :

Muslim soldiers or other subjects made captive by the enemy ; and the subjects and soldiers of the non-Muslim power taken prisoners by the Muslims :

1. Muslim Prisoners :

A Muslim prisoner is bound to observe faithfully his parole and honour. The Quran directs :

The Muslim subject must be released after giving money from public treasury necessary for their release. The Prophet also says, "Manage the release of the prisoner". The Caliph Umar, however, ordered : "Every Muslim prisoner in the hands of non-Muslims must be relieved by means of the Muslim State Treasury. "Finlay says, "Regular exchange of prisoners with the Muslims commenced as early as the reign of Constantine V, A.D. 769". Their wills and testaments, when received in Muslim territory, are to be valid for the property of the deceased Muslim prisoner situate under Muslim jurisdiction.

2. Enemy Prisoners captured by Muslims :

Quran enjoins :—

(i) Now when ye meet in battle those who disbelieve, then it is the smiting of the necks until ye have routed them ; then making fast of bonds ; and afterwards either grace or ransom till the war lay down its burdens.

(ii) It is not for any Prophet to have captive until he hath routed (the enemy) in the land.

The word "*ithkhan*" occurring in the above verses interpreted by al-Maturidiy as follows :—

"Until he makes *ithkhan* in the country, that is he dominates it. So that when he has received the ransom and lets them go free after having dominated the country in order that they return to place where there is no utility and no association (for them).

A prisoner *qua* prisoner cannot be killed. But this does not preclude the trial and punishment of prisoners for crimes beyond rights of belligerency. A prisoner cannot be held responsible for mere acts of belligerency, Muslim jurists held:

“Similarly there is a unanimity that belligerents would not be held responsible for damage they inflicted on Muslim regarding life and property. This would be so even when they embrace Islam or become Muslim subjects. For they did that conscientiously and in accordance with the dictates of their religion and at a time when they were authorized to do that. So they were on the same footing as Muslims. The same is true regarding the capture of property.

The Prophet directed to keep prisoners fairly. Abu Yusuf says that the prisoners must be fed and well treated until a decision is reached regarding them. The Quran lays down : “Lo! the righteous shall...(go to Paradise)...(because they perform the vow and fear a day whereof the evil is wide spreading, and feed with food the needy wretch, the orphan and the prisoner, for love of Him (saying) : We feed you for the sake of God only, we wish for no reward nor thanks from you. It was the protection at the time of Prophet to provide needy prisoners with clothes. If they are in any trouble or discomfiture this is to be done away with as far as possible. Among prisoners, a mother is not to be separated from her child, nor other near relatives from each other.

The Prophet says : “Pay respect to the dignitary of a nation who is brought low”. It means the prisoners should be respected according to their respective positions. A prisoner who became successful in escaping but afterwards anyhow recaptured should not be penalized for the offence of escaping.

It is the Commander to decide whether prisoners of war are to be (a) beheaded, (b) enslaved, (c) released on paying ransom, (d) exchanged with Muslim prisoners, or (e) released gratis.

(a) Beheading of Prisoners :

A prisoner can beheaded only in the interest of Islam. The capital punishment is permissible only in extreme cases.

(b) Enslavements :

There is indirect mention in the Quran :

“O Prophet! Lo! We have made lawful unto thee thy wives unto whom thou hast paid their bride-money, and those whom thy right hand possesseth of those whom God hath given thee as spoils of war.”

The Prophet says that the Arabs cannot be enslaved.

The Caliph ‘Umar issued orders that peasants, artisans and professionals of belligerent countries should not be enslaved. The Quran exhorted liberation of slaves, and provided that the income of the Muslim State should partly be allotted for the manumission of slaves.

It is not obligatory always to enslave prisoners of war, but the Supreme Commander of an army has the choice to accord the prisoners either enslavement or any other treatment. Muslim slave has a right to equality with his master in food, clothing and dwelling. Nevertheless Islam has done much to improve intentional treatment of slaves, and Hob-house (Morals in Evolution) has no hesitation in admitting that the betterment of the treatment meted out to slaves in non-Muslim countries, Christians not excluded is traceable mostly to Islamic influence.

(c) Ransom :

The Quran has legalized releasing prisoners of war on ransom. There are many instances in the life of the Prophet of the liberating prisoners with various kinds of ransom and compensation. It may be in cash kind or work. The Caliph 'Umar II released full one hundred thousand prisoners and acquired the city of Malatiah from the Byzantines.

(d) Exchange of Prisoners :

There are many instances in the life of the Prophet of the exchange of prisoners. It is some times one for one at others one for more. In later times, it developed into a complicated institution involving the release of thousands of prisoners at a time. In certain treaties the value of the ransom of prisoners was fixed in definite sum of money.

(e) Gratuitous Release :

The Quran has recommended this gratuitous release when hostilities have ceased. There are innumerable instances of such release of the time of the Prophet.

CHAPTER XV

CHOICE GIVEN TO INHABITANTS OF ANNEXED TERRITORY

It is a must for the *Ex-Subjects* of enemy in an occupied territory to remain peaceful, law-abiding and in no way hostile to the conqueror. But they are not forced to become subjects of the new State. They are given a year in which to quit the territory or become the subjects of the Muslim State which finally occupied the territory. It is not necessary to accept all the inhabitants as subjects. No doubt some of the inhabitants are to be expelled in the interest of the country. The Caliph Umar deprived the Jews, the Greeks and the *bandits* of the choice of living in Jerusalem. In case they wished to become the subjects of the Muslim State, they are required to pay the Protection Tax. After the act of naturalization is executed, they become ordinary subjects.

CHAPTER XVI
ACTS PERMITTED

During war the following acts are permitted under Muslim Law :

1. Enemy combatants might be killed, wounded, pursued and made captive. Non-combatants should not be killed except in defence. An exception has also made for children, women, and men incapable of fighting through old ages or otherwise.

2. Recourse might be had to ruses.

3. Propaganda is permitted in Islam. A separate allocation of money is made for this purpose. The famous verse of the Quran on the Islamic budget also allots a portion of income for propaganda.

The Quran provides the budget for the following purposes :

I. Those whose hearts are to be won to aid Muslims.

II. To persuade them to abstain from doing harm to Muslims.

III. To induce them to embrace Islam.

IV. To give inducement to others through them.

4. During war all kinds of weapons can be used. But unnecessary bloodshed should be avoided.

5. Assassination is permitted under Muslim Law. We have found such practice at the time of the Prophet. This is for the purpose of reducing greater bloodshed.

6. Night attacks are permitted under Muslim Law.

7. During a night attack, or when catapults or other war machines cause damage from an invisible distance, the unintentional killing of such non-combatants is exempt from punishment.

8. The killing of non-combatants and neutrals is permitted when the enemy soldiers are around them or when they are taking shelter behind them. It is warned that soldier's aim must not be to kill non-combatants.

9. During war enemy property may be destroyed or captured.

10. The water-supply of the enemy may be cut off or in some other way may be made unusable for them.

11. During war food and fodder may be obtained from an enemy country even by force.

12. Individuals or localities may collectively be fined or otherwise punished for indiscipline or hospitality to the occupying forces.

2. Air Warfare :

The material on the subject is quite meagre. Al-Maqqarly has described that in 275 H. Abbas Ibn Firnas had perfected a man propelled airplane. We do not find much material on the subject. Anyhow international conventions are now part of the Muslim Law.

3. Sea Warfare :

In the 9 H. a treaty was concluded by the Prophet with the inhabitants of the Port of Ailah, in which important provisions were explicitly made regarding boats and sea-borne trade. The Quran is full of praise for sea voyage. The Quran considered unjust the practice of pre-Islamic era to prohibit visit of foreign ships, on pain of confiscation, practice. Not only that the Abyssinians had used boats to conquer Yaman, but also the Meccan companions of the Prophet used them for crossing to the sea and migrating to Abyssinia in order to take refuge there. Suhail ibn 'Amr, prevented his co-citizens from apostatizing on the death of the Prophet, oration in which he said : "Mine are the largest in numbers not only caravan camels on land but also ships on the sea.

According to Tabariy, in the campaign of 'Iraq during the Caliphate of Abu Bakr, and in the time of Umar I, the Governor of Uman had taken the initiative of sending a naval expedition against Daibul (Karachi). It was Umar caused the digging of a canal from Fustat (Cairo) to the Red Sea, using it among others for shipping food consignments to Jar, the port of Madinah. Khalij Amiral Muminin linked the Red Sea with the Mediterranean ocean through the Nile, served for the sailing boats of those days, the same purpose at the Suez Canal to modern ships. During Caliph 'Uthman naval expeditions and conquests of islands and ports took great proportions, and his armies had crossed the sea even to penetrate into Spain and stay there.

As early as the time of Muawiyah, the so-called Greek Fire was used by Muslim boats to burn in retaliation the enemy boats. Dinawariy talks us of the process of fabricating vegetable pitch with which to smear the submerged portion of boats. As the position of boat is considered by Muslim Jurists the same as a fort on land therefore no special laws are mentioned by them in connexion with naval sieges and blockades. The same is about prizes or naval booties, which are to be distributed like the spoils of the land warfare. During war with Byzantine Papyrus material of the first and second centuries of the Hijrah describes vividly not only the defending and raiding centres established in Muslim ports, but also ship building and training the seaman.

Maritime insurance was introduced by North-African Muslims in classical times, which testifies to their contribution in another field.

CHAPTER XVII

SPIES

During the time of Prophet precautions were taken to hide news from the enemy. The Prophet on various occasions closed all roads to private persons in order to prevent leakage of news of military importance. All the persons who obtain or attempt to obtain information useful to an enemy, and try to transmit it to the enemy, are considered as spies. If a Muslim does a spying work he will be punishment as an alien. Less formality is observed regarding aliens suspected of fifth column activities. There are two cases of the time of the Prophet.

(a) The treaty of Hudaibiyah became invalid owing to its being violated by the Meccans. Great preparations were secretly undertaken to avenge the infraction of the treaty. A Muslim Hatib-ibn-Abi-Balta'ah, guessed where these preparations were directed. He wrote a letter to his friend in Mecca to the effect that preparations were ahead and that might be they were directed against Mecca, so Meccans should take precautions. It was intended for better treatment of his private property situated in Mecca. The letter was intercepted, and when the Prophet was satisfied that neither was the letter motivated by ill-will to Islam nor had it done any harm, he pardoned Hatib in view of his long meritorious services, and his taking part in the battle of Badr.

(b) Al-Bukhariy and Abu Dawud relate an incident in which the Prophet, during a certain expedition ordered a suspected spy to be pursued and captured, who was later beheaded.

Abu Yusuf opines that non-Muslim spies, no matter whether subjects or aliens, must be given capital punishment, and those who profess Islam might be imprisoned or physically tortured. Ash Shaibaniy regards espionage as less harmful than robbery and therefore the subjects of the Muslim State may not be beheaded for espionage. He agrees with Abu Yusuf as regards to the treatment with alien spies.

As regards the punishment for spying the male and female are equally treated. But the minors were exempted to suffer the supreme penalty.

CHAPTER XVIII

UNIFORMS

The purpose of uniform is two-fold, *i.e.*, Comfort and Distinctiveness.

The Prophet have worn during military marches special cloaks. The Prominent Warriors wear distinctive costumes during a battle. On the day of Badr it was ordered that the Muslims should wear distinctive signs. A sort of woollen crest have been adopted by Muslims on that occasion. Greater uniformity of dress is reported in the time of the Caliph 'Aliy. The Abbasid Mutasim and Mutawakkil have raised uniformly dressed armies.

CHAPTER XIX

FLAG OF TRUCE

In the ancient times the sign of surrender was mere holding up of hands and laying down of arms. In the time of the Caliph 'Aliy we come across the expression "flag of truce." The raising of the copies of the Quran by the troops of Mu'awiyah in the battle of Siffin it was treated as a sign for truce.

CHAPTER XX

ENEMY'S PROPERTY

Preliminary Remarks

All the land within the territory of a State, be it owned by private individuals or by the Government itself, is supposed to be the property of the State. Because a foreign aggression against the property of a private citizen in a State is as much as insult to the State as one committed against the property owned by the State. The reason is that the Quran holds that the world and all that is therein is God's, and He bequeaths it to whom-over He pleases ; and that the ruler of a country functions as an agent of God in that part of the world. The Prophet says :

"The Adite land belongs to God and to His Messenger. And thereafter does it to you. So whoever colonizes a derelict land, it will be his. Yet no one has a right to an enclosure after three years (if he has not developed it).

Qudamah-ibn-Jafar comments on the tradition :

"To resume the matter, all that is owned neither by a Muslim nor a friendly foreigner, will be at the disposal of the ruler who may *enfeoff* it to whom-ever he pleases."

No doubt the property belonging to embassies, to citizen temporarily residing or trading abroad also debts and trusts, are examples thereof.

The guiding principle for the treatment of the enemy property is as follows :

All property capable of being transferred from one ownership to another may be made booty, not otherwise. For, possession by means of occupation is just like possession by means of the other methods which effect ownership. Thus whatever may be owned by virtue of other methods may pre-eminently be so by means of occupation.

The different kinds of property treated in different manners. We will deal them under separate heading.

1. State Property :

(i) **Territory** : After the conquest and occupation of a territory, the sovereignty thereof is transferred to the conqueror. It gives the occupant the right of taxing, administering and otherwise treating the occupied land as a part of his dominions. As regards to the treatment the practice of the Prophet had apparently left the matter undecided. He had sometimes distributed the conquered land among the victorious army as booty, and at others he had not only allowed the freedom of the vanquished but even did not touch their property. The Quran enjoins the administering of personal law to Jews and Christians.

As regards non-Jews, property which is surrendered after fight the following state document gives us certain directions :

With the name of God, the Most Merciful, the All Merciful. This a rescript of Muhammad, the Messenger of God, in favour of Ukaidir at the time of his embracing Islam and for saking the false gods and the idols before Commander Khalid-ibn-al-Walid, the Sword of God, regarding Dumat-ul-Jandal and its environs.

To us all the lands not rich in water, and not having enclosures, the uncultivable and the neglected as also the costs of arms, the armour, the solidungular animals and the fort.

To you the walled palm-groves and the water in cultivated lands. Your beasts will not be prevented from obtaining pasture. Fractions will not be counted in the calculation of taxes. Pastures will not be closed against you. You will observe the daily religious services and pay the *Zakat* tax.

You engage God as your guarantee. In return you will be assured of *bona fides* and scrupulous observance.

It means all the unowned land of the conquered territory and the forts shall be confiscated in favour of the State. The

property owned by the private individual in case their expulsion is not necessary shall not be disturbed. The same is also true regarding territories surrendering without fight.

After the time of the Prophet a dispute arose for the fertile lands of Iraq and Syria which were occupied by Muslim armies and the soldiers clamoured for the distribution among them of the booty, in which they included lands in accordance with the Muslim Law of war booty. The matter was referred to Caliph Umar who replied as follows:—

“Read what you mentioned of the spoils which God had given you and the terms on which you have made peace with the people of towns and cities. I consulted therein the companions of the Prophet, who differed among themselves.”

My opinion follows the Book of God, Who has said:

“And that which God gave as spoil unto His messenger from them, ye urged not any horse or riding camel for the sake thereof, but God giveth His messenger lordship over whom He will. God is Able to do all things. That which God giveth as spoil unto His Messengers from the people of townships, it is for God and His messenger and for the near kin and the orphans and the needy and the way-farer, that it circulate not between (only) the rich among you. And whatever the messenger giveth you, take it, and whatsoever he forbiddeth, abstain from it. And keep your duty to God. Lo! God is stern in reprisal.

“And (this spoil) is for the poor fugitives who have been driven out from their homes and their belongings, who seek bounty from God, and help God and His messenger. They are the loyal.”

He refers to the early Meccan refugees. Further:

“And for those remaining in (their) homeland and in their faith before them, who love those who flee unto them for refuge and find in their breasts no need for that which hath been given them, but prefer (the refugees) above themselves though poverty become their lot. And whosoever is saved from his own avarice—such are they who are successful.”

Surely these are the Ansar (*i.e.*, Madinite Helpers).

Moreover:

“And for those who come (into the faith) after them. These are the sons of Adam, white and black; and God has included them among the recipients of these spoil down to the Last Day.”

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So let what God has given you as spoil remain in the hands of its (Original) owners, yet impose the protection-tax upon them according to their capacity, which you shall distribute among the Muslims, and which will be a source of the prosperity of the country. For they know it better, and master (its exploitation) in a pre-eminent degree. In no way can you or the Muslims who are with you make them part of the spoil and distribute them, since you have made peace with them and taken protection-tax from them in proportion to their capacity. And in fact God has explained his for us and for you, and mentioned in His Book :

“Fight against such of those as have been given the Scripture, who believe not in God nor the Last Day and forbid not that which God and His messenger have forbidden and follow not the religion of truth until they pay the protection-tax (*Jizyah*) according to (their) capacity being brought low.”

As soon as you have taken protection-tax from them, you have no way and no recourse against them. Tell me, if we capture their people and distribute them, what will remain for the Muslims who will come after us? By God! they will not find any body to talk to nor anything to take advantage of. On the other hand (if we do not enslave the vanquished people) they will provide subsistence for the Muslims as long as they live; and when we die and also they, our sons will eat of their sons as long as they live. They are the slaves of all the followers of the religion of Islam so long as the religion of Islam triumphs.

There fore impose upon them the protection-tax and do not enslave them, and prevent the Muslims from oppressing them and doing them harm and appropriating their belongings except in the rightful way, and execute to the full the terms of peace that you have given them.

And as for the procession of the cross in their feasts, do not prevent them there from outside the city, if it is without banners and standards, once a year, as they have requested you. As for the inside of the city between the Muslims and their mosques, no crosses should appear.

Anyhow the Muslim jurists assert in theory that the choice is still left with the Muslim ruler, in case of new conquests of land, to distribute it as booty or to preserve it as State property, the income from which to be spent for the welfare of the whole community. But the jurists are unanimous on the point that whenever any terms are accepted by the Muslims they must be fulfilled in good faith.

(a) **Sacred Lands** : There is one more peculiarity in the treatment of conquered land. Non-Muslims must be transported from Arabia where they cannot settle.

(b) **Crown Lands** : Caliph Umar treated ten kinds of Iranian lands as Crown lands, viz. lands belong to the *ex-ruler* or his households, ownerless of the unreturn fled persons from the country, of postal stations forests and the like.

(c) **Condominium** : There is complication in dealing with lands owned jointly by two States one of them remaining neutral. If the land of the neutral country is used during war it shall be dealt as enemy land. Moreover the mere declaration of neutrality will not suffice.

(ii) **Equipment of the Army** : In the War Zone no distinction is made of private or State property as far as war material is concerned. Men and munitions both have to bear the burnt of the war in the form of capture, destruction and damage.

2. Private property :

There is no difference in the actual War Zone between the property belonging to the enemy State and between the one belonging to private individuals.

3. Distribution of Booty.

A law was fixed by the Quran that the booty captured after a fight should be divided between the members of the army and the State in a ratio of $\frac{4}{5}$ and $\frac{1}{5}$, a horseman getting double the share of an infantryman, without any distinction between the shares of the commander and the private. But the booty acquired without fight, the whole went to the general exchequer and lay at the discretion of the head of the State. This booty is technically called *Fai* as distinguished from *Ghanimah*.

If a place is not stormed but has surrendered peacefully, all that the Muslim Government acquires under treaty is included in *Fai*. The people of Fadak got frightened at the fate of Khaibar, and begged peace of the Prophet on the same conditions as applied to the conquered people of Khaibar. The spoils found in Khaibar were treated as *Ghanimah*, but those of Fadak were considered. Both *Ghanimah* and *Fai* may include not only cattles or movable property but also real or immovable property.

As regards slaves they are usually sold in auction, and the proceeds distributed among the capturing army and the Muslim State in the ordinary proportion of four to one.

Booty is to be distributed in the Islamic territory, which includes the newly conquered place if it is formally annexed to

the Muslim territory even during the course of the war. There is no distinction between those who actually fought and those who were not required to fight. Women, slaves, minors, non-Muslims do not take equal shares alongwith Muslim grown-up soldiers. There is an exception for non-Muslim soldiers when they form in themselves a formidable force. They also share equally with the Muslim soldiers.

Apart from the regular four-fifths of the booty, the soldiers get two more kinds of rewards or prize for their exertion, viz., *tanfil* and *salab*, which we shall now deal :

(i) *Tanfil* means a prize gift given to a soldier or soldiers for doing certain acts generally demanding greater risk of life. This is given out of the share of the State.

(ii) By *Salab* is meant the spoil taken by a victorious combatant from the slain. But it is subject to the wishes of the Commander.

The whole of the *Salab* goes to the victor and one-fifth is shared by the State. But it is a matter of grace and not right.

According to Ibn Jumaah the victor shall have the full share under the following circumstances :

(a) At the risk of life, if fired from a castle or from the backward rows, right to the *Salab* will be maintained.

(b) To kill in combat, not when the enemy is retreating with the defeated army.

(c) To slay in resistance.

(d) To kill the enemy or at least make him harmless by severing both hands and feet or a hand and foot of the same side or make him blind.

(e) According to some jurists those who do not share in full, such as the slaves, also do not get the *Salab*.

The *Salab* includes not only the arms and waring apparel but also the horse, etc.

In pre-Islamic Arabia, the Commanders of the Razzias used to have the right over a fourth of the booty. The fourth part was reduced by the Prophet to only a fifth and that also went to the whole of the people, not to the private coffers of the commander or the head of the State. The choice, or safiy was exercised by the Prophet, and it is now considered by jurists to have been a preogative of the Prophet himself, except Abu Thawr who maintained that the preogative was inherited by the successors the Prophet in political office.

4. Postliminium or Return of Things and persons captured by the Enemy :

Islam recognises that if the enemy captures a thing from the Muslims, he becomes the rightful owner of it and if he is provided a quarter his ownership under no case can be disturbed. It means that same rights are recognised by Muslim law in this respect for the enemy as are possessed by Muslims, and the Muslim jurists admit that "in the sufferings of this world, Muslims and non-Muslims are equal."

In case a member of the Muslim army is taken prisoner by the enemy, no matter whether he is Muslim or non-Muslim, and enslaved, he recovers his freedom as soon as he is out of enemy jurisdiction. The *vice-versa* is also true.

As regards postliminium if anything possessed by Muslims was captured by the enemy and was again taken back by the Muslim army, it had to be handed over to the *ex-owner* upon production of evidence, before the distribution of the booty.

CHAPTER XXI

WOMEN IN THE MUSLIM ARMY

At the time of the Prophet women took part in battles as nurses, transporters of the wounded and the dead, cooks, water-carriers, general servants, sometimes as fighters. Aishah the wife of the Prophet in spite of being quite young alongwith several other lady volunteers supplied water to the wounded. The wives of the Prophet used to accompany him even after the command about veils. There are innumerable instances of women going on sea-warfare, nursing the wounded, transporting the injured to hospitals or otherwise rendering service to the soldiers.

The aunt of the Prophet killed a subject of Jew when he was roaming around the wall of a small fortress where she was sent for safety. The wife and daughters of the Great Khalid-ibn-al-Walid were famous for horsemanship. In the battle of Qadisyah a band of lady volunteers, armed with thick sticks, rendered valuable service in the actual fighting. It is formidable example that Hazrat Aishah commanded the forces against 'Aliy, the Fourth Caliph.

CHAPTER XXII

TREATMENT OF THE DEAD

The mutilation of enemy dead is strongly forbidden by Muslim Law. Dead bodies of the fallen enemy as those of Muslims, are to be buried. If the enemy request the handing over of the body of some dead person of their side it should not

be refused. So the Prophet refused to accept money offered by the enemy in lieu of the handing over of the dead body, during the battle of Khandaq. Abu Hanifah opines that if money is offered in this connection by the enemy, it may be accepted. The arguments advanced by Abu Hanifah are not much appealing. During the time of the Prophet a due respect was given to the dead body.

CHAPTER XXIII

NON-HOSTILE INTERCOURSE WITH BELLIGERENTS

During war situations arise when the belligerents are compelled or persuaded to enter into temporary non-hostile intercourse with each other. At that time hostility continues *de jure*, active operations cease *de facto* on the whole or part of the front. It depends entirely upon the mutual arrangements of the opposing parties.

1. Parley :

The first method of such intercourse is the exchange of messages. When one party desires a parley with the opposite-party it makes some intelligible sign requesting that he may be allowed to approach the opposite commander to deliver message. The persons of message bearers of enemy have been recognized and held inviolable. Islam sanctions this reasonable custom.

A message bearer is given due respect, yet if military necessities require, he may be blindfolded. He may be detained for the time being for the purpose to meet out any urgency. He may even be taken to some other place if need be, but he must be compensated for the expenses of the extra journey; and must be left in or led to a safe place only. If any thing appears treacherous on the part of message-bearer may be dealt with severely, and this would deprive him of his personal inviolability.

2. Exchange of Prisoners :

During war sometimes exchange of prisoners and other captures take place. These are tolerated due to mutual interest. The release of prisoners is of prominent importance. Nowadays special officers are appointed for this purpose. They are sometimes allowed to enter enemy territory and sometimes a place on the border is chosen. The vehicles or other modes of conveyance are allowed. Conveyance parties, cartels, are bound, on point of losing immunity not to take any active part in hostilities nor even to do things not connected with the purpose for which they are employed, such as transporting of foodstuff, etc, unless expressly allowed by the enemy.

3. Permission for Travel, Transportation of Goods and Licences to Trade :

It rests wholly and solely with the Muslim Government whether and to what extent to permit its subjects and those under its jurisdiction to trade with a belligerent State. According to Muslim jurists every thing is permitted except those specifically prohibited.

Every subject were issued licence for trade to specific area and if a merchant was granted permission, it implied permission to his servants and wife and children, without express mention. Unlike the quarter given to a beaten and besieged enemy, where nothing is granted as a right unless expressly provided for, permits to trade or travel render immune both life and property. This also confers the right to sue in Muslim Courts for matters and transactions connected with the permit which occur during the stay in the Muslim territory during the period prescribed in the permit. According to Ash Shaibaniy :

“It is a principle that the rule of the Muslims is bound to protect quartered foreigners as long as they are in our territory, and to do justice to them against those who do (them) wrong. These foreigners are also liable to be sued by the subjects of the Muslim State. They will be under Muslim penal law regarding their criminal acts, and under civil law for their transactions.

4. Contraband of Trade :

Contraband means those articles export of which is prohibited. Such prohibition may be in peace time. According to jurists whatever is utilized for military purposes cannot be allowed to be exported from Muslim territory ; and base their argument not only on the practice of the Prophet, but also upon Quranic verses such as :—

(a) “And let not your hatred of a folk who stopped your going to the inviolable Place of Worship seduce you to transgress; but help ye one another unto righteousness and pious duty. And help not one another unto sin and transgression.”

(b) “O Prophet! strive against the disbelievers and the hypocrites ! Be harsh with them.”

The list of contraband things depends entirely upon Government which may even change and modify it from time to time. For example at the time of Prophet one Thumamah ibn-Uthal, a chieftain of Yamamah, embraced Islam and informed the Meccans. “Not a grain of Yamamah will reach you unless and until the Messenger of God permit that.”

Kasaniy says :

And so also the belligerent, who enters Muslim territory (by permission), will not be allowed to purchase weapon ; and

if he has purchased he will not be allowed to export them to the belligerent country.

Foreign subjects were not allowed to exchange their armaments with better one while they were in the Muslim State. Anyhow, the foreigners were permitted whatever they have brought with them. A citation of an old State document of the time of Prophet is helpful in understanding the law on the point.

With the name of God, the Most Merciful, the All-Merciful.

This is the writ of protection from God and Muhammad, the Prophet and Messenger of God, in favour of John son of Rubin and the people of Ailah.

Their boats and their traders on land and sea shall have the protection of God and Muhammad, the Prophet. This includes also the people of Syria, of Yaman on countries beyond the seas who are with them.

This Ailah was later on 9 H. was subdued.

5. Truce and Armistice :

A truce after war are of four kinds :

The first kind is one in which time and place of truce are fixed and limited. To second kind is for a fixed place but unlimited in time.

The third kind is for fixed period such as the treaty of Hudaibiyah between the Prophet and the Meccans, which brought peace for a fixed period of ten years, at the end of which each party would be at liberty to attack without further notice. Muawiyah concluded a peace for a fixed period with the Byzantines, and had marched with his troops towards their border before the expiry of the term, so that he might attack immediately after the treaty of peace lapsed.

The fourth kind is unlimited period well as in place, is usually at the end of war, when one has vanquished or both are exhausted.

Authority to make truce : The authority to make truce for a limited period in a limited area rests in the commander-in-charge but the other three kinds may only be concluded by the Central Government or its authorised officials.

Effects of truce : During the period of truce there shall be no hostility between the parties to the truce. They cannot do any act which infringes the treaty.

CHAPTER XXIV**END OF WAR**

A war waged by the Muslim State may be brought to an end in one of the following manners :

1. When both the parties cease hostilities without any mutual agreement and without defining the length of the duration of peace. For example the battles of Badr, Uhud and Khandaq of the time of the Prophet, when the belligerents parted without attempting to define or settle their relations. The same is true for Mutah, when the Muslim army had gone to oppose Emperor Heraclius but both parties parted from each other without deciding the issue.
2. When the non-Muslim enemy embraces Islam.
3. When the enemy is defeated and her property is annexed such as the conquest of Mecca, Khaibar and many other places by the Prophet are classical examples of this.
4. When the enemy accepted the suzerainty of the Muslim State.
5. Formally setting the differences in a treaty of peace, while both the parties retain their independence.

Nature of the Treaty of Peace :

It depends upon the terms and conditions of treaty. Sometimes a treaty of peace provides for future friendship. It may also provide for alliance and co-operation. Often it provides for cessation of hostilities and good neighbourly relations. Weaker parties often consent to make reparations and pay tribute. In the unratified provisional treaty with the Ghaafan, the Prophet agreed to hand over to them a third of the produce of the oases of Madinah provided they deserted their allies besieging Madinah, and made a separate and immediate peace with the Muslim State.

In spite of the fact that Islamic policy based on a community of co-religionists, we find treaties of perpetual alliance with non-Muslims. When the Prophet established a city-State at Madinah immediately on his migration to that place agreed to a confederation with the Jews. He also concluded pacts of mutual assistance with pagan tribes around Madinah, especially with those in the direction of Yanbu, through which the Quraishite caravans passed enroute to and from Syria and other northern countries. In these treaties there was no time-limit. The treaty of Hudaibah is the solitary example of a time

limit treaty *i.e.*, for ten years. But after these the Quran laid down :

“O ye who believe ! Take not the Jews and the Christians for friends. They are friends one to another. He among you who taketh them for friends is (one) of them. Lo ! God guideth not wrong-doing folk...Your friends can only be God and His Messenger and those who believe who establish worship and pay the *Zakat* (surplus property tax) and bow down (in prayer). And whose taketh God and His Messenger and those who believe for friend (will see that) the party of God are the victorious. O ye who believe! Choose not for friends such of those who received the Scripture before you, and of the disbelievers, as make a jest and sport of your religion. But keep your duty to God if ye are true believer.”

The Quran further prescribes :

“O ye who believe ! Choose not your fathers nor your brethren for friends if they take pleasure in disbelief rather than faith. Whoso of you taketh them for friends, such are wrong-doers.”

So accordingly the Prophet caused a declaration that all treaties for defined periods should remain operative during the contracted time but all those treaties concluded with pagans for mutual help without time-limit were thereby denounced with a notice of four months.

Therefore Muslim jurists conclude that treaties of friendship should not be concluded with non-Muslims for perpetuity. Anyhow there is difference of opinion amongst the jurists regarding the time limit.

Effects of a Treaty of Peace

The following are the effects of treaties :

1. The subject on which hostilities broke out become settled.
2. The rights of belligerency come to an end.
3. If nothing to the contrary is provided in the treaty the *status quo* before the conclusion of the treaty will be maintained.
4. Prisoners of war are exchanged or otherwise released. Other booty is not exchanged without an express provision.
5. The treaties, suspended during the War, and which require no renewal, automatically revive.

Elements of Treaty

The treaties must be recorded in writing with the specification of the date of coming into effect. The time-limit of the treaty should also be mentioned. Apart from general matters the treaties include solemn promises for the observance and execution of the treaty, the signature of the duly authorized persons and the sanction for execution such as hostages, etc. Sometimes it also happens that along with the main treaty annexes, supplements provisos and even secret sections are to be found.

Ratification of Treaties

Generally, treaties are negotiated and provisionally settled by representatives of State. It is sent for ratification to the supreme Head.

In case of denial for ratification the whole treaty becomes null and void. In the time of the Prophet, when the Prophet himself had concluded a pact with the proviso that it would be ratified after consulting the pillars of the State. They rejected the terms and therefore the parchment was effaced.

Interpretation of Treaties

Shaibany says :

“There are things which may be taken for granted by the Muslims even without express mention of them, but other nations may not imply that. Such thing must be expressly mentioned, otherwise the contracting party may conclude that there is an infringement of the pact. And we have mentioned, the document must be written in a way to bear witness against the contracting parties, and no accusation of perfidy should be possible.”

The same author further opines that if a besieged fortress surrenders on the condition that the free people will not be molested and that the ownership of the slaves will be transferred to the conquering army, and the parties differ regarding the status of certain individuals, the presumption will be that they are free people, since originally every man is free.

Amendment of Treaties

There can be subsequently amendment in the treaty but with mutual consent.

Denunciation of Treaties

A treaty under different circumstances can be revised. Muslim jurists opine that if the Muslim ruler denounced a former treaty, he cannot do so unless he informs the other party,

and he cannot act in any way contrary to the treaty until reasonable time has passed, in which it is expected that the information has reached the Central Government of the other party.

Hostages and Pledge

The hostages used to be exchanged or given by one party as a pledge of good faith in carrying out the conditions of the treaty. If Muslim hostages are treacherously murdered, the enemy hostages shall be murdered in retaliation. The only way out is to compel the hostages to become non-Muslim subjects of the Muslim State, since they could not return before the arrival of the Muslim hostages, and their murder made this impossible, thus rendering the permanent stay of the hostages in the Islamic territory inevitable.

The Classical Treaty of Hudaibiyah

After 6 years of migration the Prophet wished to visit Mecca the House of God. At that time he had enmity relations with Jews in the formidable colony of Khaibar, in the north; and the irritated, though much exhausted, Quraish of Mecca in the south. A Khaibar-Mecca coalition was imminent. Moreover the Iranians had just suffered a decisive defeat at Ninevah at the hands of the Byzantines. The Prophet wanted a free hand regarding Khaibar and Iran and to achieve this purpose he was prepared to concede terms even derogatory to his prestige, this on the one hand. On the other hand the Maccans being cut off from Syria, Iraq and Yamamah and resulted into famine conditions. The Prophet helped them in such bad situation.

The Prophet under the above circumstances entered the treaty of Hudaibiyah for a limited period of ten years. Two copies of treaty were prepared. One was kept by the Prophet and the other was handed over to Suhail, the plenipotentiary of the Quraish. The Prophet detained the Quraishite plenipotentiary until the Muslim envoy, who was wrongfully interned in Mecca, returned home. The Prophet made the treaty into effect before the completion of signatures. This treaty was later on amended on the point of extradition. The main object of the treaty was to get permission to visit the national sanctuary of the enemy. The truce for ten years was agreed upon, with immune transit or stay for religious or commercial purposes in each other's territory. It was mentioned that the adherence of various tribes on either side getting the same rights and obligations as the original contracting parties. The Prophet before affixing his seal made it clear "the rights and duties are equal and reciprocal between you and us."

This treaty was quite silent on the point of property of those migrants who fled from Mecca and took refuge in Medinah. It means there was tacit approval of the *status quo* regarding the validity of every occupation.

2. Army Court:

Army judges for the first time w of Caliph Umar otherwise the comman as judge. These judges must have decide cases of the members of the land and sea booty.

If an act was done at the comman it could not be considered a crime case if an act is committed without H of the higher authority the damages Government to the sufferer.

The Prophet was very liberaP in th He declared that if the slaves of t masters and embraced Islam and came they would at once become free.

3. Religious service in Time of Da

The five daily congerational rel be abandoned even when actual fightin a Muslim fights for the cause of God an the religious duties.

4. When and why the Muslims sho

The following two quotations c position quite clear:

(a) So do not falter and cry out uppermost. And God is with you, and reward of) your action.

(b) And if they incline to peace Muhammad) to it, and trust in God, I Knower.

The Victorious Muslim is requir

5. Effects of Intentional and Mistaken Inter-Muslim Homicide :

The following illustrations will explain the point :

(a) It is recorded that al-Harith-ibn-Suwaid, a hypocrite, had intentionally murdered al-Mujadhdhar-ibn-Dhiyad at Uhud, at the time when a dismay was caused in the Muslim army by the unexpected attack of the enemy. The reason of this murder was to satisfy vengeance. The Prophet ordered after the trial, for beheading the culprit.

(b) Husail-ibn-Jabir was killed by Muslim soldiers during the same dismay at Uhud, quite unintentionally. The Prophet ordered for the blood money to be paid from the general treasury, yet the son of the deceased person waived his rights to this money and exclaimed : 'May God forgive ye !'

(c) During the War of Khandaq, two Muslim detachments met each other in the night, and before ascertainment of the identity, some blood was already shed resulting some were slain from both sides. The Prophet gave them the advantage of mistake and said "The dead of either party are entitled to martyrdom any shall go to paradise ; and the action of either party was in the path of God ; and no right to damages accrues".

6. Debts due to a Defeated Enemy :

The mere outbreak of war does not wipe out the right of the now-enemy persons to debts and deposits ; on the other hand it remains inviolate. Moreover the defeat of the enemy does not deprive them of their right to recover a debt accrued in a lawful manner. The following is the authority of the Prophet :

It has been argued, moreover, on the authority of the tradition regarding the (defeated) Jews of Banu Qainuqa. So when the Prophet ordered their expulsion (from their homes), they said : But we have debts to recollect whose date of payment had not yet arrived. The Prophet suggested : Capitalize them at a discount. Again, when the Prophet ordered the expulsion of Banu-an-Nadir, they said : But different people owe us debts whose date of payment has not yet arrived. The Prophet suggested : Capitalize them at a discount.

You are a mighty and numerous people and you have annihilated this tribe, which was the mightiest and the most numerous among the Arabs. I am prepared to install you in their stead and conclude with you a treaty to the effect that if any Arabs attack you, I shall help you with 40,000 Roman combatants; and, if any Arabs attack us you shall help us with 20,000 combatants; and that you do not mingle in our affairs with the Persians. Thalabah accepted this, and the treaty was concluded.

The Emperor Decius made Thalabah a king. He bestowed upon him a crown.

2. During the famous 40 years, War of Basus, which raged between the tribes of Bakr and Taghlib, we find frequent use of the term of neutrality. Al-Kalliy says:

When Kulaib, the chief of the Taghlib, was murdered by a young Bakrite, a deputation was sent to the Bakrites in order to demand the extradition of either the culprit or the chieftain or any other nobleman of the Bakrites, failing which an ultimatum of war would be given. As the murderer had escaped, the peace negotiations were frustrated. Soon a war began in which most of the branches of the tribe of Rabiah took part on the side of the Taghlibites against the Bakrites. But many branches of the Bakrites themselves remained neutral (*i'tazalat*) and took no part in the war of their kinsmen. Such were the Yashkur, the Ijl, the Banu Hanifah, and the Banu Qais-ibn-Thalabh. Particularly the chieftain of the last-named branch al-Harith-ibn-Abbad, who was a famous knight and poet, guarded his neutrality (*i'tizal*) in spite of the remonstrances of his relatives. This was the prime reason why many other clans kept aloof from the war, and said: O Ye people of Shaiban! Ye have oppressed your brother (Taghlib) and killed your own cousin, the prince (*i.e.*, Kulaib). We shall never help you.

In the course of the protracted war, one of the Bakrite Chiefs, who was born during the war itself, succeeded in persuading most of the tribes, who had remained neutral, to take part in the conflict. Only al-Harith-ibn-Abbad kept back. Yet when his own son was treacherously murdered, he too forsook his neutrality, and it is recorded that he composed the following couplet on that occasion:

I kept back from the Bakr thinking that they would behave reasonably. Yet the Tabhlibites themselves do not want that I remain neutral (*i'tizali*).

On the other hand, many Taghlibite clans had also remained neutral; but slowly all were forced by circumstances to take part in the war, which at last involved all the branches of both the Bakr and Taghlib.

3. When the tribe of Khuza'ah emigrated from Yaman to the North their chieftain 'Amr, sent his son to Mecca with the following request :

Allow us a short stay in your territory until our people, who have gone in search of colonies to 'Iraq and Syria, come back. The Jurhumites of Mecca did not permitted and war broke. One Jurhumite chief, Mudad remained neutral (*i'tazala*). The Khuza'ites had the upper hand. The Ismalitie clans had also remained neutral (*itazalu*) the war of the Jurhum and Khuzaah. They then came to the victorious Khuzaties and asked permission to live in Mecca. This was granted. On hearing this Mudad also sent emissaries to the Khuzzah and requested the same proving his neutrality (*itizalihi*) in war. But the Khuzah refused to grant the request.

The following two *Hadiths* also refer the term "neutrality" :

(a) The Prophet is reported to have said that soon civil wars would ensue among the Muslim community, and the pious believer would be the one who would sit at home during the unrest and would take part with neither faction (*itazala*). The narrator adds, it was owing to this *Hadith* that many a pious Muslim remained neutral during the war between 'Aliy and Muawiyah.

(b) The Prophet is said to have predicted that towards the last days of the world, a terrible fight would breake out between the Believers and the Rumis (Westerners). The Rumis would make this offer to one Muslim group : "Let us fight alone against those Muslims who have captured our wives and children." The Muslim group would reply : "No ! We cannot desert our brethren". This war would seal the end of the power of the Rumis.

(c) Ibn Ishaq reports : When the Prophet sent the expedition against Mu'tah, in Byzantine territory, many a mercenary Arab tribe assembled under the Greek banner, yet the branch of Banu Ghanam, of the tribe of Hadas, remained neutral whereas other branches of the same tribe fought against the Muslims.

CHAPTER II

TEACHING OF THE QURAN ON NEUTRALITY

This chapter as a matter of fact is a collection of relevant verses of Holy Quran on the above topic. The verses are as follows :

(a) Hast thou not observed those who are hypocrites (How) they tell their brethren who disbelieve from among the People of the Scripture : If ye are driven out, we surely will go out with you, and will never obey anyone against you, and if ye are attacked we will verily help you. And God beareth witness

that they verily are liars. (For) indeed if they are driven out they go not out with them and indeed if they are attacked they help them not, and indeed if they had helped them they would have turned and fled, and then would not have been victorious.

The verses warns the Muslims from hypocrites.

In the following passages advise the Muslims to take care of certain tribes who had remained neutral and had not helped the enemies of Islam in their fight against the Muslim.

(b) Excepting those of the idolaters with whom ye (Muslims) have a treaty, and who have since abated nothing of your rights nor have supported any one against you (As for these), fulfil their treaty to them till their term. Lo! God loveth those who keep their duty (unto Him).

(c) God forbiddeth you not regarding those who warred not against you on account of religion and drove you not out from your homes, that ye should show them kindness and deal justly with them. Lo! God loveth the just. God forbiddeth you only regarding those who warred against you on account of religion and have driven you out from your homes and helped to drive you out, that ye make friends of them. Whosoever maketh friends of them (all) such are wrong-doers.

The following verse is the most important on the point :

(d) What aileth you that ye are become two parties regarding the hypocrites, when God cast them back (to disbelief) because of what they earned? Seek ye to guide him whom God hath sent astray? He whom God sendeth astray for him thou (O Muhammad) can not find a road. They long that ye should disbelieve, that ye may be upon a level (with him). So choose not friends from them till they forsake their homes in the path of God; if they turn back (to enmity) then take them and kill them wherever ye find them and choose not friend nor helper from among them, except those who seek refuge with a people between whom and you there is a covenant, or (those who) come unto you because their hearts forbid them to make war on you or make war on their own folk. Had God willed, He could have given them power over you so that assuredly they would have fought you. So, if they remain neutral regarding you (*itazalukum*) and wage not war against you and offer you peace, God alloweth you no say against them. You will find others who desire that they should have security from you and security from their own folk. So often as they are returned to mischief they are plunged therein. If they do not remain neutral regarding you (.....) nor offer you peace nor hold their hands, then take them and kill them wherever ye find them. Against such we have given you clear warrant.

CHAPTER III

CASES AND TREATIES OF NEUTRALITY IN THE TIME OF THE PROPHET AND ORTHODOX CALIPHS

The following are the cases, treaties and state documents during the times of the Prophet and Orthodox Caliphs on the point of neutrality :

1. Cases :

(a) The Banuan Nadir Jewish tribe refused in the year 4 H., to comply with the request of the Prophet, under treaty to contribute towards the payment of the blood money of some of the allies common to them and the Muslims. They were besieged in the fortresses by the Prophet. The Banu Quraizah remained neutral (*itazalat*), and rendered no help to the Banuan-Nadir. And so was for the Ghatafan.

(b) A Yamanite Chief, Qais, sent a message to another chief, Dhual-Kula, as follows :

The Abna (*i.e.*, the Persians domiciled in Yaman) are but intruders in your country, and come to you from a foreign land. If you leave them (at your side), they will dominate you also. Therefore I think it right to kill their chiefs and to expel the rest from our country.

The Dhual-Kula refused saying : We have no concern with all this : do as you like.

(c) Al-Jarud had embraced Islam in Madinah. After the death of the Prophet Jarud's tribe, Abd-al-Qais, also intended defection. He warned his people not to do so, and consequently this tribe remained loyal to Islam and did not take part in the struggle that ensued between the Muslims of Bahrain and the rest of the tribe of Rabiah.

2. Treaties :

(a) After the Prophet migrated to Madinah, and constituted there a city-State, he consolidated Muslim power by entering into alliance with non-Muslim Arab tribes living around Madinah. The following treaty in 2 H. was entered with a chief of Banu Damrah.

He (*i.e.*, the Prophet) will not attack Banu Damrah nor will they attack him nor swell the troops of his enemies nor help his enemies in any way.

(b) Soon after, other families of the same tribe were rallied, and a treaty of mutual aid and neutrality in particular cases was concluded :

With the name of God, the Most Merciful, the All Merciful. This is the writ of Muhammad, the Messenger of

God, in favour of the Banu Damrah, assuring them the security of their persons and their properties ; that they may count on (his) help if anybody takes aggressive action against them, except in case of fight in the name of religion. This assurance is valid so long as a sea wets the shells. Similarly, when the Prophet requires it of them, they will help him ; and they pledge for that God and His Messenger. To help them will depend upon their loyalty and piety.

(c) Another treaty was entered with Banu Ghifar. It provides as follows :

Help is assured them if anybody attacks them aggressively. If the Prophet requires their help, they will help him, and it is incumbent upon them to help him, except in wars waged in the name of religion. This is valid so long as a sea wets a shell.

(d) The many Jewish settlements also adhered to the confederal city-State, and agreed among other things that :

“If they (the Jews) are called upon to join a peace and adhere to it, they will do so and adhere to it. Similarly if they ask it, the same would be incumbent upon the Muslims. But wars waged in the name of religion are exceptions.”

(e) In the year 5 H. the Prophet concluded a treaty of alliance and neutrality with the tribe of Banu Abd-ibn-Adiy as follows :

The Prophet received the deputation of the Banu Abd-ibn-Adiy... They said : O Muhammad! We are the inhabitants of the Holy Circle (around Mecca) and we are the mightiest of all those who live there. We do not want to fight you. On the other hand, we are prepared to help you in your expeditions, except against the Quraish of Mecca. For we would not fight against the Quraish.

(f) In the famous treaty of Hudaibiyah also there is provision for neutrality. In this treaty a word *Islal* was used which signifies the unsheating of a sword as well as violation of neutrality and secret help to the enemy of the contracting party. The relevant section of the treaty of Hudaibiyah is as follows:—

“And they both agree to put down fighting on the part of people for ten years, during which period the people are to enjoy peace and refrain from (fighting) each other...And between us is a tied up breast (*i.e.*, bound to fulfil the terms) and there shall be no secret help violating neutrality, and no acting unfaithfully.”

The two treaties concluded at the time of Orthodox Caliphate also refer to neutrality as follows :

(g) With the name of God, the Most Merciful, the All-Merciful.

This is the writ of Suwaid-ibn-Muqarrin in favour of Farukhan, the Commander of Khurasan, concerning the enemy territories of Tabaristan and Jiljilan.

Thou art assured of the protection of God, exalted is He, provided that thou dost prevent the rapacities of the robbers of thy country as well as of the people adjoining the country and that thou dost not give asylum to any rebel against us. And thou shalt pay the (Muslim) commander on the border of thy country a sum of 500,000 drachmas of the currency of thy country.

If thou doest this, it will not be lawful for us to attack thee or traverse thy country or enter it without thy permission. With permission, however, we shall have a safe passage in thy country and the same shall be observed regarding thy passage.

Thou shalt not give asylum to any rebel against us, shalt not secretly help any enemy of ours and thou shalt not act unfaithfully. Otherwise there will be no pact between us and thee.

(h) This is what Nuaim-ibn-Muqarrin accorded the chief of the province of Raiy :

Provided that you act in good faith, serve as guide (to us) do not act faithlessly, and do not secretly help (our enemy in violation of pledge).

(i) The following clause is taken from the treaty with the ruler of Nubia, concluded by a Muslim Governor of Egypt of the time of the Third Caliph, Uthman.

You, O Nubians, are assured of the protection of God and His Messenger, Muhammad, the Prophet. That we shall not wage war against you, nor prepare for war against you, nor attack you so long as you observe the conditions of treaty between us and you...But it will not be incumbent upon the Muslims to drive away any anemy who may encounter you, nor to prevent him from you, between the limits of the territory of 'Ulwah and Aswan.

(j) During Civil wars Qais-ibn-Sad, the Governor of Egypt, addressed the following letter to the Caliph 'Aliy :

With the name of God, the Most Merciful, the All-Merciful.

I have to inform the Commander of Faithful that there are people here who want to remain neutral (*mutazilin*). They have requested men not to take action against them but to leave them unmolested until the situation clears.

(k) In response Hazrat Ali replied :

Proceed towards the people thou hast mentioned in thy letter. If they obey, as other Muslims, it will be all right. Otherwise punish them.

The Governor replied :

I wonder, O Commander of the Faithful, how couldst thou order me to fight against a people who are keeping aloof from thee and are giving thee a free hand to fight thy enemy. If thou wagest war against them, they shall help thy enemy against thee. So hear me, O Commander of the Faithful, and refrain from taking action against them.

(l) In the year 28 H., the Muslim armies attacked Cyprus. A peace was concluded on the following conditions :

That the Muslims would not attack the people of Cyprus but at the same time they would not defend them if any other power attacked them. There are many other examples of such treaties.

CHAPTER IV

LAWS OF NEUTRALITY ACCORDING TO JURISTS

No doubt the laws on neutrality was not so much developed in the time of Prophet and Orthodox Caliphate as it is developed now. Anyhow the following quotations will assist us to understand the position of law at that time :

(a) A State has contracted a treaty of peace with the Muslims. It is attacked by a third State which made prisoners and enslaved them. Subsequently, the Muslims waged an independent war against this latter State and captured the prisoners of their friendly State, they would be slaves of the Muslims. Because the third State had not violated the jurisdiction of the Muslim State in capturing them. It will not be an infringement of neutrality to appropriate the property of a friendly State if it was duly acquired by a third State from whom it passed lawfully to the Muslims.

(b) In case a Muslim citizen is staying in a foreign country which has purchased the booty captured by a third State from a fourth one, the Muslim citizen may lawfully purchase that property in spite of the fact that his State had remained neutral in that war. Similarly if the country of residence of the Muslim citizen had captured that booty from a third State, he may purchase that booty.

(c) In case Muslim citizen is staying in a foreign country which is attacked by a third State he must not fight against that third State which is at peace with the Muslim State, except when he finds his ownself in danger.

(d) In case the subjects of a foreign country come to the Islamic territory by permission and intend to proceed to a third State war with the Muslims in order to join forces with them against the Muslim State, passage will be denied them.

(e) A case like benevolent neutrality permitting public armed forces of one State to pass through Muslim territory is found in the following quotation :

If they are formidable force, and enter Muslim territory by permission in order to cross another territory to fight their enemies and they were attacked. while in the Muslim territory, by an enemy, the Muslim State is not obliged to come to their rescue even when it is in its power. The case is different when non-Muslim subjects of the Muslim State attacked by foreigners, when it is the duty of the Muslim State to protect them.

(f) As regards the enemyship with neutral goods and neutralship with enemy goods, jurists lay down a general principle that the safety of the owner renders the property safe.

APPENDIX

ISLAMIC NOTION OF CONFLICT OF LAWS

This is a branch of laws which is known as conflict of laws of Private International law. It deals with the problems of nationality, personal status and jurisdiction over the foreigners. Therefore the following shall be dealt with :

1. Nationality, and
2. Status of resident aliens, but also with
3. The Conflict of Laws :—
 - (a) between Muslim and non-Muslim Laws ;
 - (b) between various non-Muslim laws;
 - (c) between various Muslim Laws;
 - (d) on account of change of religion, as also with
4. The status of citizens of the Muslim State in
 - (a) another Muslim State,
 - (b) a non-Muslim State.

Islam preaches for equality of man and the priority of the pious.

The following Quranic verse is the Charter of Nationality :

O mankind ! Lo ! We have created you from a single male and female, and We have made you nations and tribes that ye may distinguish one another. Lo ! the noblest of you, in the sight of God, is one who feareth (Him) most Lo ! God is Knower, Aware.

Islam do not determine nationality on the basis of colour and language. The following Quranic injunction clearly says :

And the difference of your languages and colours lo ! herein indeed are portents (of the mastery of the Creator) for men of knowledge.

They implied nothing more for Islam. In these verses ethnic basis was discarded and linguistic and "Chromatic" differences have been relegated to unimportant position. It emphasizes on the all important aspect of human choice or belief. It even provided for a sort of basic faith, the minimum necessary for a true human being and susceptible of acceptance

by the generality of mankind :

Lo! those who believe (in what is revealed unto thee, O Muhammad, *i.e.*, Muslims) and those who are Jews, and Christians and Sabeans, whoever believeth in God and the Last Day and doeth right surely their reward is with their Lord, and there shall no fear come upon them neither shall they grieve.

It is a fact that the impact of modern European civilization on Islamic populations has had considerable influence and per force these latter are in our days legislating laws of nationality based on birth and domicile. These are political exigencies of the international life. But according to Islamic notion, nationality means common belief, not common birth or colour or language or country.

Islam recognizes complete equality between all the Muslims, and no class or caste distinction is recognized by Muslim Law. All the Muslims belong to one and the same *ummat* (and for the matter : Nation) wherever they might be, and are subjected to same laws.

There are certain difficulties in deciding the *ummat* or nationality of a foundling and of a baby born of Muslim father and non-Muslim mother or of protected non-Muslim father and alien mother. Muslim law lays down a general rule that the baby will follow that *ummat* which is better in his interest. Therefore according to this general rule the foundling discovered in the Islamic territory and baby born of Muslim father will be considered Muslim ; and the baby born of parents one of whom is non-Muslim citizen and the other an alien will become a non-Muslim citizen of the Islamic State.

Islam permits the person of any belief to be treated as subjects. No doubt an exception *nas*, however, been made regarding the habitability of the spiritual centre of Islam, the Arabian Peninsula, where non-Muslims are not to be permitted to settle for permanent stay. Abu Yusuf expressly says that polytheists, associators, whorshippers, of fire or stone, scriptuaries and all the other categories of non-Muslims may be accepted as protected citizens of the Muslim State.

There is some difference in treatment between non-Muslim citizens and non-Muslim aliens. The latter must first obtain permission to enter Muslim territory. This permission can be granted by any Muslim citizen, even slaves and women. During his sojourn in the Muslim territory, such a non-Muslim alien has, subject to the terms of the safeguard permit (*aman*) practically same rights and obligations as ordinary non-Muslim citizens. Now this permit is to be granted by the Government and not by any individual. This declaration or the permit is granted

for limited period. During the early period of Caliphate this period was at the most one year. A longer stay implied intention to domicile, and he was then subjected to same taxation and obligations as the ordinary non-Muslim subject.

2. Status of non-Muslims, subjects and Aliens :

The non-Muslim subjects of the Islamic State are called *Dhimmis*. It is a bilateral contract between the intending non-Muslim subject and the Muslim community. This is called "Dhimfication". If the *dhimmi* owns loyal allegiance and pays the protection tax, called *Jizyah* he gets the freedom of residence, freedom of conscience, and protection of life, property and honour. This contract comes to an end under the following circumstances amongst other :—

1. Rebellion.
2. Denial of the obligation of the Protection Tax.
3. Denial of the obedience to the Government.
4. Fornication with a free Muslim woman.
5. Espionage in favour of and giving asylum to the enemy of the State.
6. Outraging the sanctity of God, His Messenger, and His Books.
7. Causing a Muslim to apostatize.
8. Indugling in brigandage.
9. Publicly acting upon something in contraventions of cherished principles of Islam.
10. Indugling in usurious transactions, and the like.

A non-Muslim citizen can be punished with the capital punishment downwards and he may even be ejected from Muslim territory if he becomes an undesirable person for his pernicious activities. Non-Muslim resident of the Islamic territory enjoys judicial autonomy. They have their own Courts according to their respective belief and faith. Anyhow the non-Muslims are not denied the right to represent themselves before the Muslim Court if they choose this of their own free accord in preference to their communal Court. It is also true if the parties belonged to different communities, a Christian and a Jew for instance. Withot going into the details of the difference of opinion in various schools of thought as regards to conflict of laws, a few characteristics feature are discussed below :—

The jurists hold that the difference of religion as well as the difference of territory constitute a bar to inheritance. For instance a Muslim may lawfully marry a Jewess or a Christian

girl, yet such husband and wife cannot inherit each other. The property belonging to the wife would go to her co-religionist relatives, father, mother, brother, etc., to the exclusion of husband, children and other relatives of Islamic faith. But the testamentary bequests can lawfully be effected in favour of persons of other religion or other territory for lawful purposes. The same is the position for endowment. Surplus property tax (*zakat*) is levied solely on the Muslims, yet its benefits can also be enjoyed by non-Muslims provided they deserve according to the purpose of *zakat*. It can also be distributed to Jews, Christians etc., provided they come into the category of "*masakin*".

The non-Muslims, in the time of Caliph Umar were treated fairly well. Caliph demolished a mosque for the simple reason that it was constructed over a piece of land forcibly acquired from a Jew ; and he returned it to the original owner. This building is famous by the name of Baitul Yahudi and it still exists even today.

The non-Muslims used to come to Umar to Mecca and Madinah and make complaints personally and file petitions without any hesitation or hindrance. Such case were disposed promptly,

3. Conflict between Laws :

(a) Between Muslim and non-Muslim Laws :

As regards to one disputed matter if one of the parties is a non-Muslim and the other a Muslim, and the cause of action has arisen in the Islamic Territory, the case comes before the Muslim Tribunal, then usually Muslim Law prevails. But this is true for civil law only. In penal cases there are certain exemptions and qualifications in favour of non-Muslims. Firstly, certain acts, such as intoxication, marriage within prohibited degree and the like, are not considered crime if committed by non-Muslims. Secondly, regarding homicide certain jurists hold that capital punishment cannot be inflicted upon a Muslim accused of murdering a non-Muslim but that he will have to pay only blood money. But according to Hanafi no distinction can be made between a Muslim and a non-Muslim citizen and they are supported by a saying of the Prophet.

Muslim jurisprudence is very emphatic regarding the difference of jurisdictions. The Prophet is said to have prescribed :

Whoever commits murder or fornication or theft (in our territory) and escapes, and then returns with permission, shall be tried and punished for what he wanted to escape from. Yet

if he has committed murder or fornication or theft in the territory of the enemy and came with permission, he will not be tried for what he committed in enemy territory.

(b) Conflict between two non-Muslim Laws :

In case the parties belong to different communities in the initial stage Muslim Courts have no jurisdiction, because all non-Muslim religions constitute one single community. If the dispute regarding the choice of a particular Court is not resolved between them then the Muslim Law shall have the final say.

(c) Between two Muslim Laws :

In the time of the Prophet and early Caliphate the conflict between Shiah, Sunni, Hanafi and Shafi was practically unthinkable. After the death of the Prophet, differences of opinion between various jurists did come early in existence but the Qadis were not obliged to abide by particular jurists. They themselves formed an independent category, and each judge was at full liberty to decide according to his own personal view. In the 'Abbasid period that the Chief Qadi Abu Yusuf was appointed only the followers of the Hanafiy School as *Qadis*. In later times, according to the evidence of Yaqut, even Zaidi Shias were appointed *Qadis* in Hanafiy States and they administered justice according to Hanfiy jurisprudence. In Egypt in the time of Sultan Sallaudin there were four concurrent judicial establishments with four Chief Justices and necessary sub-judges for each of the four Sunni Schools, viz. 'Shafiy, Hanfiy, Malikiy and Hanbaliy.

(d) Change of Religion :

If a married couple embraces Islam, their pre-Islamic contract of marriage remains valid in so far as it is compatible with Islamic Law. The rest will be annulled. In case only the husband embraces Islam and the wife does not is a more complex problem. For the marriage will remain intact only if the wife belongs to those categories of non-Muslims with whom Islam permit marriage, to wit, scriptuaries or people who claim a Divine Book as their code, such as Christians and Jews. In Mughal India even Hindus seem to have been included in this category and for such Hindu girls even domestic temples were constructed for devotional purposes by their Muslim husbands. If the wife is not a scriptuary, she will be asked to make herself fit to be wife of a Muslim by changing her religion. If she refuses, separation will follow.

4. Muslim Citizens in Foreign Lands:

In another Muslim State :

In classical times much importance was not attached to the

origin of a Muslim. Anyhow, Ibn Jubair, the famous traveller mentions that he saw in Cairo that Sultan Salahuddin had appointed a monitor from among the Marghibis to adjudicate between his compatriots residing in Egypt. Nowadays the political nationality has come into existence due to the needs of the modern time and the presence of similar treatment by other States. Even the Orthodox Saudian Kingdom has passed laws of nationality applicable to Muslim pilgrims and immigrants wishing domicile and naturalization.

(b) In non-Muslim lands :

During the early period of Islam Muslims were granted extra-territorial privileges in many lands but the treatment varied with the whims and interests of individual monarchs of non-Muslim lands.



PART IV
NEUTRALITY
CHAPTER I

TECHNICAL TERM FOR NEUTRALITY

In Modern times Arabs use the word *hiyadah* for neutrality. Pre-Islamic and early Islamic Arabs employed the term *lizzal*. The Mutazilites doctors used this term in the sense of neutrality which was adopted towards both the Sunnis and the Kharijites.

After a long discussion, Prof. Nallino of Rome has also come to the conclusion that :

1. In theological discussions, the name Mutazilah did not originally mean secession from Orthodoxy, and was not therefore excogitated by the Orthodox Sunnis, with the implied sense of blame or contempt as a declaration of heterodoxy. That name was chosen by the early Mutazilites in the sense of neutrals. They meant by those persons who participated with neither the Orthodox nor the Kharijites in the grave politico-religious question as what to consider a sinful man (*i.e.*, whether he nevertheless remained a Believer or the commission of sin rendered him an Unbeliever).

2. Since the above question received its importance on account of the political rivalry and the civil wars of the first century of Islam, it was natural that the term Mutazilah should be influenced by the political language of the time. The later dogmatic Mutazilites were, in the origin, mere continuators of the old political or practical "Neutrals" in the field of theory and speculation.

But the original, legal and philological sense of this term soon fell into desuetude. During Pre-Islamic Arabia the term of neutrality was not unknown. The following quotations will make the position clear :—

1. The Treaty of neutrality and friendship between the Emperor Decius (d. 251 A.C.) and the Ghassanid prince of Syria. The fact was that the Dujumites levied taxes to the immigrants Ghassanids. Due to the reason war broke resulting that the Dujumites were annihilated. The emperor feared the Ghassanids might incline to Persians. So he made this offer to his Chief, Thalabah :