

MUSLIM COMMUNITY
OF STATE

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BY THE SAME AUTHOR

[Born at Hyderabad-Deccan, 16th Muharram, 1326-H./19th February, 1908 ; studied at Hyderabad-Deccan, Bonn am Rhein and at the Sorbonne ; visited libraries of Hijaz, Yemen, Iran, Iraq, Syria, Lebanon, Palestine, Egypt, Turkey, Germany, Holland, England, France, Afghanistan, Morocco, Tunis, Algeria, and India for the preparation of this thesis.]

1. (In Arabic) : الوثائق السياسية في العهد النبوي والخلافة الراشدة, Cairo, 1360 H./1941.
2. (In Hindustāni) : قانون بين الممالك في اصول اور نظيرين Hyderabad-Deccan, 2nd ed. 1364 H./1945.
3. Die Neutralitat im islamischen Volkerrecht, Bonn and Leipzig, 1935.
4. La Diplomatie musulmane a l'epoque du Prophete et des Khalifes Orthodoxes, 2 Vols Paris, 1935.
5. - Les Champs de bataille au temps du Prophete, Paris, 1939.
- 5-a. (Do. enlarged Hindustāni edition) : عهد نبوي کے ميدان جنگ with 8 maps and 34 illustrations, Hyderabad-Deccan, 3rd ed. 1364 H./1945.
6. Some Inscriptions of Madīnah of the Early Years of Hijrah, Hyderabad-Deccan, 1939.
7. (In Hindustāni) : امام ابو حنیفہ کی تدوین قانون اسلامی Hyderabad-Deccan, 1361 H./1942.

and a number of articles in various periodicals. See also appendix C at the end of the book, on bibliography.

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MUSLIM CONDUCT OF STATE

BEING A TREATISE ON SIYAR (السِّيَر), THAT IS ISLAMIC
NOTION OF PUBLIC INTERNATIONAL LAW, CONSISTING
OF THE LAWS OF PEACE, WAR AND NEUTRALITY,
TOGETHER WITH PRECEDENTS FROM
ORTHODOX PRACTICE AND PRECEDED
BY A HISTORICAL AND
GENERAL INTRODUCTION

by

MUHAMMAD HAMĪDULLĀH

Fourth Edition
Revised and Enlarged



SH. MUHAMMAD ASHRAF
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PREFACE TO THE NEW EDITION

Since the last edition, eight years ago, I have been continuously occupied with studies other than those of international law. The Publisher has given me only a few weeks to revise the text. Hence few are the corrections and additions that I could make. The increasing number of Muslim countries which are regaining their independence is apt to attract an ever-increasing number of scholars to study Islam's view of International Law, and to improve upon the work of their predecessors in the field, not excluding my own humble work.

There are many points on which Muslim law is at variance with the modern, Western international practice, and it is upto Muslim States to see if their heritage could not be proposed to others with convincing arguments for universal application. May God forbid a new war, yet the effects of the declaration of war are a case on this point.

I apologize for several avoidable defects. For reasons beyond my control, I have been prevented from correcting the proofs. However I sincerely thank the printer and the publisher for the pains they have taken to produce as nice an edition as practicable.

Paris, Jumāda'l-ūlā, 1380 H.

M.H.

FROM THE PREFACE TO THE THIRD EDITION

There are two methods to deal with our subject: Firstly to treat it as a dead body, and experts as well as amateurs indulge in anatomical operations and dissections,—and that is the fate of our subject generally in the West, where greater importance is attached to discover how the early Muslim international-lawyers plagiarised things European, although these same enthusiasts pass into silence the reverse case in later times regarding Middle Ages and Renaissance; the second method is to treat the subject as a living organism, and the description should be confined to a correct representation only. I have tried to do that to the best of my humble capacities.

It may rightly be reproached to me that I do not distinguish between the various schools of Muslim law: Ḥanafīy, Shāfi‘īy, Mālikīy and Ḥanbalīy, and even non-Sunnis are referred to as authorities for what the author himself believes to be the Muslim law. My only reply is that to me all the *Ahl’al-qiblah* are Muslims, and I am treating the subject as a living organism; I am not writing on the comparative jurisprudence on matters of international law, but on *the* international law in Islam. As far as non-Sunni authors are concerned, it is worth recalling that Prof. A. A. A. Fyzee (Faiḍīy) has just edited the chapter on war of the *Da‘ā’im’ul-Islām* of the Fatimid Qāḍī Nu‘mān. It was a surprise and even an agreeable shock to me to discover that there was practically no difference between the contents of this, supposedly unorthodox jurist and the contents of any Sunni author, be he Ḥanafīy or Shāfi‘īy or else. If there are any differences, they are no greater than those between say Abū-Ḥanīfah and-Abū Yūsuf of the same school.

Nobody, I hope, will reproach me acts of commission; I have also tried, as my duty, not to commit even acts of omission. For instance it is not *a la mode*, even among Muslims today, to assert necessity of death penalty for the apostate, or slavery for prisoners of war. My readers will see that I have

not hidden the viewpoint of orthodoxy ; only I have tried to explain the reasons of these rules. I am not writing on what, according to modern average Muslim, ought to be the Muslim law, but what has always been considered to be the Muslim law. I must remind that one must distinguish between an obligatory rule and an optional rule. Slavery, for instance, is optional, and if Muslims give up that practice, they commit no violation of their religious commands.

Paris,

1 Rabi' I, 1371 H.

M. H.

FROM THE PREFACE TO THE SECOND EDITION

I am thankful to Messrs. Shaikh Muhammad Ashraf of Lahore for including this work in their series. Theirs has now become a national institution and not merely a commercial concern.

The work has had considerable circulation in England and the United States, in spite of war conditions and has been included in the curricula of several Indian universities. The new edition may meet the requirements of the wider circle of the peace time literary world.

*Osmania University,
Hyderabad-Deccan, India,
Muharram 1365 H./1945*

M.H.

PREFACE TO THE FIRST EDITION

There was no *international* law in Europe before 1856. What passed as such was admittedly a mere public *law of Christian nations*. It was in 1856 that for the first time a non-Christian nation, Turkey, was considered fit to benefit from the European Public Law of Nations, and this was the true beginning in internationalising the public law of Christian nations. That, however, does not mean that international law, with its modern connotation, was born then and there; it already existed elsewhere. For, Islam had recognised that all states, irrespective of religion or race, have similar rights and obligations. Unlike any other nation of antiquity, the public law of nations evolved by Muslims was *not* meant to regulate the conduct of a Muslim state with regard to Muslim states alone, excluding all the non-Muslim world.

Even as a separate and independent science, "international law" owes its origin to Arab Muslims of the Umayyad period, who divorced it from political science and law general, though not displacing it from its ethical basis.

With the loss of their empires, average Muslims have forgotten their rich cultural heritage. Over a decade ago, when I began writing these pages, I had not the slightest idea that, to write on Muslim international law meant describing the very first phase of this science after it became a self-contained and independent branch of learning. Nor was I aware at that time that any modern work existed on the subject or was even under preparation.

At the instance of the League of Nations and with the warm support of the Head of the Law Faculty of the Osmania University, Public International Law was introduced in the Osmania LL.B. curriculum as a compulsory subject, and I happened to be in the first batch of students after this decision. It struck me at once that what was taught us as international law was identical in many respects with the teachings of the books of *Fiqh* and Muslim History. When I talked this over with our learned Professor and Head of the Faculty, Husain

'Alī Mirzā, he encouraged me in the idea of writing an article, perhaps to be read in the Law Students' Union.

The bulk of the article, however, daily increased, and in the following year I was permitted to take the same theme for subject as a post-M.A. research scholar. After exhausting the material available in the libraries of Hyderabad, I was allowed to proceed abroad to study in the libraries of Hijāz, Syria, Palestine, Egypt and Turkey. And finally I was permitted kindly by the Osmania University, for which I was preparing the thesis, to proceed to Bonn and submit the same thesis there for a doctorate. This I did in August 1933 after completing only two terms (9 months) in that University. There I selected only the last part of the work, dealing with neutrality, to print and get the degree. My further studies on an allied subject, 'Early Muslim Diplomacy,' for a doctorate of the University of Paris, together with researches in the manuscript libraries of Europe and North Africa, increased my data.

I am not yet satisfied with what I have jotted down, and it is with great diffidence that I venture to publish these few pages.

I take this opportunity of expressing my deep sense of gratitude to the professors under whom I worked or from whom I have profited in the preparation of this monograph :

Prof. 'Abdul-Wāsi', Head of the Department of Fiqh, Osmania University,

Prof. Sher 'Alī, Head of the Department of Kalām and Muslim Philosophy, Osmania University,

Prof. Muḥammad 'Abdul-Qadīr Ṣiddīqī, Head of the Faculty of Theology, Osmania University,

Prof. Ḥusain 'Alī Mirzā, Head of the Faculty of Law, Osmania University,

Prof. Mīr Siyādat 'Alī Khān of the Law Faculty, Osmania University.

These five savants, the first two of whom have since departed this life, were originally appointed to guide me in my researches. Again :

Prof. Paul Khale, Director of Oriental Seminar, Bonn,

Prof. Sālim Fritz Krenkow of the Oriental Seminar,
Bonn,

Prof. Thoma, Director of the Institute of International
Law and Politics, Bonn,

Prof. Snouck-Hurgronje of Leiden,

Prof. Gaudefroy-Demombynes of the Sorbonne, Paris,

Prof. Louis Massignon of the College de France,
Paris,

Prof. William Marcais of the College de France,
Paris.

And I ever remember what I learned from them with
gratitude.

Hyderabad-Dn.
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MUSLIM CONDUCT OF STATE

Being a treatise on Siyar (السِّيَر), that is Islamic notion of Public International Law, consisting of the Laws of War, Peace and Neutrality together with Precedents from Orthodox Practice.

PART I

INTRODUCTORY

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

CHAPTER I

DEFINITION AND NATURE

(1) AS has aptly been said :

“When stable communities—whether Tribes, or City-States, or States of a modern type—are permanently contiguous, customs hardening in time into law never fail to regulate their intercourse. *Ubi societas, ibi jus* ; wherever developed communities are brought in contact with each other, juridical relations must sooner or later be formed not mainly by agreement, tacit or express, but by the very necessity of the case, and partly from the same causes as those which working internally create States.” (John Macdonell in the Introductory Note to C. Phillipson’s *International Law and Custom of Ancient Greece and Rome*.)

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

(3) Islam has elaborated its own system of public international law. Before describing it in detail, it might be useful to define precisely what I mean by the term *Muslim International Law*.

(4) Muslim International Law may be defined as: 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.

(5) A few words of explanation may not be out of place :

(6) We have emphasised the point that what a Muslim State accepts as such is the Muslim International Law. This must be borne in mind from the very outset. Muslim International Law depends wholly and solely upon the will of the Muslim State, which in its turn is controlled by the Muslim Law (*Shari'ah*). It derives its authority just as any other Muslim Law of the land. Even 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.¹ It may be added that the promulgation and execution of International Law with the consent of all the States of the world is an ideal which has never been achieved, even for a short term, in the long annals of Man.

(7) We have, however, recognised in our definition that not only laws and customs of the land, but even treaties, impose obligations upon a Muslim State. Treaties will be dealt with later, but what is *law*?

(8) Law (*Fiqh*) is variously defined by classical Muslim juriconsults. "The knowledge of what is *for* and *upon* one" (معرفة النفس ما لها وما عليها) is a definition attributed to Abū-Ḥanīfah,² which in other words may be rendered as 'the science of the rights and obligations of man.' A late authority, Muḥibullāh al-Bihārīy, introduces this all-embracing subject in the following words³ of his book (compiled 1109 H.):

The science of ascertaining religious commands (regarding practical affairs of life) by means of their detailed guides.

(By *guides* he means authority or source of information.)

1. See further, *infra*, Sources of Muslim Law, Effect of treaties, etc.

2. شرح التوضيحات لمن التوضيحات by Ṣadrush-Shari'ah, p. 9.

3. مسلم الثبوت, p. 5.

(9) A glance at the contents of works on *Fiqh* would reveal that they embrace practically all the affairs of human life, material as well as spiritual. In view of the standard definitions given above and in the face of the contents of works on *Fiqh*, there remains not the slightest doubt that international law, *i.e.*, the rules of state-conduct in times of war, peace and neutrality, form part of the ordinary law of the land, the *Fiqh*. These rules of conduct are generally dealt with in books on *Fiqh* under the heading *Siyar* (سِيَر), *i.e.*, *conduct*, as we shall show in the next chapter.

(10) Here a brief expose of the origin of law according to Muslim jurists profitably be added. They¹ say that man must always do what is good, and abstain from what is evil, and take scrupulous care of the intermediary grades of plausible, permissible and disliked (مكروه، مباح، مستحب، قبيح او حرام، حسن) (او فرض و واجب). It is, however, not easy to distinguish between *good* and *evil*, especially when the matter concerns the subtleties of a complex civilised life beyond the pale of ordinary commonplace things. Practical needs would have required the possession of the power to legislate,—(or, lay down definitely grades of good and evil of each and every matter) in the hands of Man, either individual, as juriconsult, or collectively organised, *i.e.*, a State. Yet mere reason, regarded as the touchstone of good and evil, is not without grave difficulties. For it is possible, and also a matter of fact—so argue Muslim jurists—that different persons opine differently regarding the same things. The belief in Messengers of God is useful even from the point of view of jurisprudence, in so far as the awe and respect due to their persons lead to the acceptance of certain fundamentals without further dispute, wherefrom other and further details may be elaborated. For this reason

1. *E.g.*, توضيح التاويل by at-Taftāzāniy, pp. 173-96 and any book on Muslim Jurisprudence (اصول الفقه) ch *Husn wa Qubh*. Again, Ostrog, *Angora Reform*, ch. Roots of Law ; D B. Macdonald, *Development of Muslim Theology, Jurisprudence and Constitutional Theory* (New York), pp. 73 et seq.

the Muslim savants are very thankful to the generosity of God that He gave men, along with *reason* certain chosen *human Guides* to help them in the conduct of life. These selected and chosen ones pointed out what God commanded, God the real Sovereign and Lawgiver, regarding good and evil. Muḥammad has been acknowledged by the Muslims as the Messenger of God, and whatever he gave them in his lifetime, commands as well as injunctions, in the name of his Sender, God, was accepted by the Muslims as undisputably final and most reasonable. These Divine Commands, known as the Qur'an and the ḥadīth—as we shall see later in detail—served practically all the needs of the Muslim community of that time. But human needs multiplied later in such a manner that no express provision seemed to be available in either the word or the deed of the Messenger, who himself had passed away, disconnecting the link whereby Man could receive Commands from his Lord. The consequent result would have been fatal and the fabric of *Fiqh* would soon have collapsed under the strain, had not there been express provisions in the law itself for further elaboration. Credit must also not fail to be given to the Muslim jurists, after the death of the Prophet, who not only discerned this elasticity of the Divine Law, but also utilised it to its fullest extent. In time there emerged a complete system of law which served all the purposes of the Imperial Muslims, even at the height of their widest expansion from the Atlantic to the Pacific Oceans.

(11) Thus 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. In this way a dual need was served : that of sanctity to inspire awe in the minds of those who were intended to observe it, and that of elasticity or capability of development to meet the needs of times and circumstances.

(12) We have defined international law, first, as a part of the law of the land. The province of the law of the land is therefore, obviously, wider than that of international law ;

and we have no concern here with the portion of the law of the land which regulates internal affairs of the State or its subjects.

(13) We have also acknowledged customs as contributing to international law. No system of law can positively provide guidance regarding every detail of every matter. Completion of a list of obligatory and prohibited things, along with details of a certain number of permitted matters,—that is all any system of law can achieve. Naturally the prevalent customs (عرف), general practice (عادة), and even innovations hardening in time into usage (عموم البإوى) regulate the relations in such cases. We shall discuss this further in the chapter on Sources of Muslim Law.

(14) 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.

(15) Further, the distinction between a *de jure* and a *de facto* state is necessary, first because sometimes 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 as it is also called. In this connection, too, it might be recollected that the Private International Law of Islam¹ is also

1. On Muslim Private International Law, see the recent monograph, *La Conception et la Pratique du Droit International Prive dans l'Islam, etude juridique et historique*, par Choucri Cardahi (Recueil des Cours, 1937, II, pp. 510-650, Academie de Droit International, The Hague).

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 Qur'an. Private international law is in itself a vast subject, and could usefully be treated as an independent science, more so because the application of the public and the private international laws depends with different authorities of the State. However, to give a rough idea of what the private international law of Islam is, I add, in this edition, an appendix on the subject. I am tempted to do so in order mostly to offer my homage to early Muslim international-lawyers who amalgamated the two, and dealt with the details of both in the same works on *Siyar*.

(16) In our definition the words "dealings with other . . . States" have a special significance. We intend thereby to convey the idea that Muslim International Law is only that 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 there 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.

(17) It may be added that, for purposes of illustration, precedents from Orthodox Practice have freely been referred to. Abnormal and temporary abuse or overlooking of certain rules by a certain State cannot render such rules null and void.

(18) To sum up: If the theologians define Islam as belief in and practice of *لا اله الا الله محمد رسول الله* (*i.e.*, there is no divinity except God, and that Muhammad is His messenger), or in a more elaborate form :

آمنت بالله و ملائكته و كتبه و رسله و اليوم الاخر و القدر خيره
و شره من الله -

(*i.e.*, Belief in One God, in His Angels, in His Revealed Books, in His messengers and prophets, in the Last Day and Resurrection, and in the determination of good and evil by God), the same is not less applicable to Muslim law from the point

of view of international jurists. All our conduct of State must be based on the commands of God, received through His messenger Muḥammad. Or, in the detailed form, a Muslim international-lawyer believes that all law he propounds and applies comes from God Almighty, transmitted by means of an Angel to his prophets in all ages, the last of whom being Muḥammad, the renovator of the same eternal divine law revealed to various prophets; that the sanction of this law is the Divine Judgment in the Hereafter; and that the determination whether a thing is good for man to do, or evil for not to do, belongs to God alone; man having no choice but to obey his Master. All else shoots from this basis, and this basis alone, for Islam.

CHAPTER II

EARLY TERMINOLOGY

(19) ALTHOUGH the pre-Islamic Arabs had their own internal usages, yet they could not have elaborated them into a system. 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 *Siyar* (سير), the plural form of *Sirat* (سيرة), meaning conduct and behaviour. A few quotations will support my contention :

(a) Ibn-Hishām (d. 218 H.) (سيرة رسول الله, p. 992) :

ثم امر بلالاً أن يدفع اليه اللواء فدفعه اليه - فحمد الله و
حلى على نفسه - ثم قال : خذ يا ابن أوف، اغزوا جميعاً في
سبيل الله فقاتلوا من كفر بالله - ولا تغاوا ولا تغدروا ولا تمثلوا
ولا تقتلوا وليداً ولا امرأة - فهذا عهد الله و سيرة نبيه فيكم -

I.e.: Then the Prophet ordered Bilāl to hand over the banner to him [to ‘Abdur-Raḥmān 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-Habīb (d. 245 H.) in his كتاب المحابر, p. 265 :
وكانوا يصنعون فيها و يسيرون فيها بسيرة الملوك بدو متالجدل

I.e.: They used to give public feasts there and *behaved there according to the behaviour of the kings of Dūmatul-Jandal.*

(c) Ibn Sa‘d (d. 230 H.) (in his طبقات vol. 2/1, pp.32-33) :

ولهم على جند المسلمين الشركية في الفيثى والعدل في المحكم
والقصد في السيرة، حكم لا تبدل له في الفريقتين كليهما -

I.e. : 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.

(d) Ibn-Ḥanbal (new ed. Hadith No. 1055) :

وانتخلف ابو بكر فعمل بعمله و سار بسيرة ثم انتخلف عمر و سار بسيرة قيسا -

I.e. (After the Prophet) Abū 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.

(20) 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 *sīrat* as early as the time of the Prophet and even in pre-Islamic times. This is according to authors of early in the third century of Hijrah. The term was adopted for “International Law” at least a century earlier. Thus Abū-Ḥanīfah (d. 150 H.) is known so far to be the first¹ to designate with the term *siyar* the set of special lectures he delivered on the Muslim Laws of War and Peace. These lectures were edited and ameliorated by several of his pupils of which the *كتاب السير الكبير* and *كتاب السير الصغير* of ash-Shaibānīy (d. 189 H.) have, in one form or other, come down to us. A contemporary² of Abū-Ḥanīfah, the Syrian Imām al-Awzā‘īy (d. 157 H.) criticised the opinions of the ‘Iraqī Imām Abū-Ḥanīfah. Al-Awzā‘īy’s monograph has not come down to us, but a rejoinder to it by Abū-Yūsuf (d. 192 H.), the famous pupil of Abū-Ḥanīfah, with the title, *الرد على سير الاوزاعي* has been edited. Ash-Shāfi‘iy (born 150 H.) also

1. Cf. Editor’s note in *الرد على سير الاوزاعي* by Abū-Yūsuf. Zaid-ibn-‘Alīy (d. 120 H.) has used the same term in his compendium of *fiqh* *المعجم*; and if the work really originated from him, the priority must go to him.

2. A *كتاب السير* is attributed to another of his contemporaries, the Imām Mālik, cf. ‘Iyād, *ترتيب*, fol. 39b, cited by al-Khūī, *الامام مالك*, p. 760.

refers to this *Siyar* of Al-Awzā'iy in his works *كتاب الام* (cf. vol. vii, pp. 303-336), as also to the *Siyar* of al-Wāqidīy (d. 207 H.). Hence forward the word seems to have become a technical term commonly used by jurists of all times. A typical passage of as-Sarakhsīy (d. 483 H.) will show what he understood by this term, and in fact what Islamic books of international law contained :

اعلم أن السير جمع سيرة و به سمي هذا الكتاب لأذه
بين فيه سيرة المسلمين في المعاملة مع المشركين من أهل
الحرب و مع أهل العهود منهم من المستأمنين و أهل الذمة و مع
المرتدين الذين هم أخبث الكفار بالانكار بعد الاقرار و مع أهل
البغى الذين حالهم دون حال المشركين و ان كانوا جاهلين و
في التأويل مبطلين -

“Know that the word *Siyar* is the plural form of *Sīrat*. We have designated this chapter by it since it describes the *behaviour of the Muslims* in dealing with the Associators (non-Muslims) from among the belligerents as well as those of them who have made a pact (with Muslims) and live as Resident Aliens or non-Muslim Subjects ; in dealing with Apostates who are the worst of the infidels, since they abjure after acknowledgment (of Islam) ; and in dealing with Rebels whose position is less (reprehensible) than that of the Associators, although they be ignorant and in their contention on false ground.”¹

(21) It must, however, be pointed out that the term *Sirat* was used by historians to designate the life of the Prophet. The analogy has been brought into relief by different authors. Raḍiyud-Dīn as-Sarakhsīy, for instance, states in his chapter on International Law : “The word *Sīrat*, 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 *Jihād* ; and in fact my means of subsis-

1. *المبسوط* by as-Sarakhsīy, Vol. X, p. 2.

EARLY TERMINOLOGY

tence are placed under the shadow of my spear.'"¹ In other words, the term *sīrat*² 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.

1. *المكيط* by Raḍīyud-Dīn as-Sarakhīy, Vol. I, fol. 567 a, b (MS. Waliuddīn, Istanbul, No. 1356):

في عرف الشرع متى اطاق يراد به طريقة رسول الله صلى الله عليه وسلم في مغازبه على الخصوص و لهذا قال عليه الصلاة والسلام : لكل نبي حرفة و حرفتى التجهار و انما رزقى تحت ظل رمحى .

2. For a philological discussion of the term see also the glossary of my *الوثائق السياسية في العهد النبوى والخلافة الراشدة* (Cairo, 2nd ed 1956).

SUBJECTS OF MUSLIM INTERNATIONAL LAW

(22) BY subject (موضوع), Muslim jurists understand a thing the intrinsic or essential appurtenances (عوارض ذاتية) of which are under discussion.¹ By subjects of international law, we understand the categories of people regarding whose cases this part of the law is applied. They comprise :

Firstly, every Independent State which has some relation or other with other States.

Secondly, Part-Sovereign States which possess at least a limited right to foreign relations.

Thirdly, Belligerent Rebels who have acquired resisting power (مُدْعَاة) and a territory over which they exercise the ordinary functions of State.

Fourthly, Highwaymen and Pirates.

Fifthly, Resident Aliens in Islamic territory.

Sixthly, Muslim Citizens residing in foreign countries.

Seventhly, Apostates.

Eighthly, Privileged non-Muslims (أهل الذمة) or the *Dhimmīs*, that is, non-Muslim Subjects of a Muslim State as distinguished from ordinary Resident Aliens.

(23) 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

1. شرح التوضيح، p 21.

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. However, we shall deal with it in detail in a subsequent chapter.

(24) It may not be out of place to recall that in recent times some new subjects have come into existence in Muslim international law. Although they do not make in it any basic change, the phenomenon is worth being recorded. 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

(25) ALTHOUGH Islam regards the life of this world as only a transitory stage, a period in which to till the soil for reaping in the Hereafter,—hence the assertion of al-Bihārty¹ that the object of the knowledge of Muslim law is well-being in the eternal next world,—yet unlike many other religions, Islam does not recommend renunciation of the world, but rather enjoying to the full blessings of temporal life. The Qur'ān says :

There are some men who say, O Lord, give us good in this world ; but such shall have no portion in the next world. And there are others who say, O Lord, give us *good in this world and also good in the next world*, and deliver us from the torment of the Fire. They shall have a portion of that which they have gained : God is swift in taking an account.²

And again :

But seek the abode of the Hereafter in that which God hath given thee and *neglect not thy portion of this world*, and be thou kind even as God hath been kind to thee, and seek not corruption in the earth. Lo ! God loveth not corrupters.³

(26) It goes without saying that 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 justest possible conduct of the Muslim ruler in his international intercourse.

1. مسلم الثبوت, p 10. 2. Qur'ān, 2 : 200-202. 3. *Idem*, 28 : 77.

CHAPTER V

ITS SANCTION

(27) TO a certain extent 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 VI

ITS ROOTS AND SOURCES

(28) BY “sources” of a science we mean here the places where its rules are first to be found. Writers on Muslim Jurisprudence have always used the expressive term “Roots” (اصول) from which rules shoot for this purpose. We do not mean the beginning of these rules clad in all authority required to give them binding power. Otherwise the only possible source of international law would be the acceptance of a rule by a government to use in international relations. We shall consider in this connection the following :

1. The Qur’ān.
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 (اجماع),
 - (b) individual opinions (قياس).
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 Qur’ān.*

(29) The Qur’ān is admitted by the Muslims as the Word of God and therefore the basis of all their law. It is in fact a collection of Divine Revelations—more precisely, the selected

compilation of the so-called "recited revelation" (وحي متلو) ¹ reaching Muḥammad through the agency of the angel Gabriel. The Qur'ān was not revealed as a whole, but came down in fragments, as necessity arose, during the prophetic career of Muḥammad, which lasted for about twenty-three years. Whenever a portion of the Qur'ān was revealed to him, 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: ² the verses of the Qur'ān 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, shoulder blades, date leaves, and other handy material. ³ It is further admitted that when some revealed verses were cancelled, naturally on the authority of the Prophet alone, they were omitted and obliterated. ⁴ As a rule, the Companions of the Prophet used to commit to memory as much of the revealed verses as they wished or were able to remember, and also made written copies for themselves. Even as early as the first years of Muḥammad's prophethood, there were extant in Mecca private copies of portions of the then revealed Qur'ān. ⁵ This continued up to

1. According to the Qur'ān (cf 53 : 3-4) whatever the Prophet uttered was based on divine revelation, yet not all that he uttered was ordered by him to be recited in religious services. Hence the distinction between recited and unrecited revelations.

2. *Musnad* of Ibn-Hanbal, I, 69 ; again, at-Tirmidhīy, an-Nasā'iy, etc., as quoted by *Kanzul-'Ummāl*, Vol. I, No. 4778.

3. *Kanzul-'Ummāl* (I, 4759) quoting al-Bukhārīy, at-Tirmidhīy, an-Nasā'iy, Ibn-Sa'd and others.

4. Cf. Ibn-Hishām, pp. 1014-15 ; *Kashful-Asrār* of 'Abdul-'Azīz al-Bukhārīy (Comment, of Pazdawīy), Vol III, p. 188 :

وقال الحسن رحمه الله : ان النبي صلى الله عليه وسلم اوتى قرآنا ثم نسىه فلم يكن شيئا او لم يبق منه شيء لما رفع الله تعالى عن قلبه ذلك او كان هذا جائزا في القرآن في حياة النبي عليه السلام -

I.e., Al-Hasan said : The Prophet used to receive (revelations of) parts of the Qur'ān and then forgot them, as if they were not revealed or nothing remained of them, and this on account of the fact that God took them away from his heart (memory). And this was permissible regarding the Qur'ān during the life-time of the Prophet.

5. Ibn-Hishām (سيرة رسول الله), p. 226 — Ibn Sa'd, 3/1, p. 192.

the very death of the Prophet, when besides the abovementioned documentary material, there were at least four or five persons among the Anṣārītes, including a woman, not to speak of the Muhājirūn, who had committed the whole Qur'ān to memory.¹ The number of those who committed the whole 114 chapters of the Qur'ān to memory (the *ḥāfiẓes*) increased rapidly,² as this brought *inter alia* worldly gain, public honour and official dignities.³ The *ḥāfiẓes* (reciters from memory) and *qārīs* (reciters reading artistically) up to this day give certificates to pupils recording that they had heard the Qur'ān in the very order of verses and chapters, and also the chant and intonation, which they transmitted to their pupils, from their teachers, and they from their teachers,—all named,—linking the chain back to the Prophet himself.

(30) The first successor of the Prophet, the Caliph Abū Bakr, in spite of his all too short term of office (about two years only), arranged that a fair copy of the text of the Qur'ān should be made in the form of a book (*muḥaf*); the order of the verses was to remain as prescribed by the Prophet. The commission entrusted with the work required two authentic written copies⁴ of the fragment dealt with, besides having to tally with what was memorised by the *ḥāfiẓes*. The task was duly brought to a successful end; only regarding one or perhaps two small passages no more than one written evidence was found.⁵

(31) This 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,⁶ Ḥafṣah, the widow of the Prophet. It was in the time of the third Caliph, 'Uthmān, that difficulties began to arise in the pro-

1. Ibn Sa'd, 2/1, pp. 112-113; Bukhārīy, ch. Faḍā'ilul-Qur'ān, § Qur'ān'.

2. Alone in a detachment of Caliph 'Umar, they numbered once three hundred (cf. *Kanzul-'Ummāl*, I, 4030).

3. E.g., cf. *Kanzul-'Ummāl*, I, 4030, on the authority of Ibn-Zanjueh.

4. Ibn Sa'd, quoted by *Kanzul-'Ummāl*, I, 4764. Cf. Bukhārīy, ch. Faḍā'ilul-Qur'ān, § Jam'ul-Qur'ān.

5. Bukhārīy, *ibidem*, also 93 : 37, 75 : 33 (3); Ibn Sa'd, quoted by *Kanzul-'Ummāl*, I, 4772, 4801, 4802

6. Bukhārīy, 66 : 3, 93 : 37.

vinces. The Caliph, therefore, ordered seven copies to be made from the official edition prepared for the first Caliph, and these copies were sent to different provincial capitals of the Empire, the original being returned to Ḥafṣah. The Caliph 'Uthmān gave orders that even the spelling¹ 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 What we now possess is the publication of the Caliph 'Uthmān just referred to. (For other details, see Introduction to my French translation of the Qur'ān, "Le Coran", Paris 1959.)

2. The Sunnah.

(32) The second source of Muslim International Law, in order as well as importance, is the *Sunnah* or the *ḥadīth* which comprises what the Prophet said, did, or tolerated. In quantity, the rules of Muslim International Law found in the traditions of the Prophet far surpass those in the Qur'ān. In quality, the ḥadīth is considered inferior to the Qur'ān, yet this seems to be in view of the difficulty of proving the genuineness of a tradition. Otherwise the Qur'ān itself has expressly and unequivocally put the word of the Prophet on a par with the Qur'ān,³ on the basis that what the Messenger uttered on behalf of the Sender is taken as the Sender's word.

(33) 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, charters, census reports⁴ and the like.⁵ The thou-

1. Qustallānīy, عمدة القارى شرح صحيح البخارى, I, 406.

2. Bukhārīy, 66 : 3 — *Kanzul-'Ummāl*, I, 4799.

3. Cf. Qur'ān, 53 : 3-4, 33 : 21 ; 59 : 7 ; 24 : 63, etc.

4. Bukhārīy, 66 : 181, No. 1.

5. Cf. الوثائق السياسية, and also my *Corpus d. s. Traités et Lettres diplomatiques de l'Islam*. The first collection dates from the time of the Companions. Cf. further my article on the early compilation of ḥadīth, in *The Islamic Review*, Woking, May 1949 ; and *Earliest Extant Work on the Ḥadīth*, Ṣaḥ fā'r Hammām ibn Munabbih, English, Arabic and Urdu editions, especially the introduction.

sands of traditions taken down by the Companions and still more orally transmitted to their pupils (who, or their pupils, wrote them down), have an interesting history of their own. Modern scholars believed for long that the compilation of ḥadīth in written form began two hundred years after the Prophet's death. Many contemporary Muslim savants showed the baselessness of this allegation, such as al-Kattānīy, Shiblī, Sulaimān Nadwī, and more recently Prof. Manāẓir Aḥsan of the Osmania University, in an exhaustive manner, after which it is not necessary for me to discuss the subject any further except to remind my readers that the material on the life of the Prophet is to be found not merely in books on ḥadīth.

3. *Orthodox Practice.*

(34) Just as the practice of the Prophet, so also that of his successors has attracted a variety of authors. It is to be found in books of ḥadīth, of history, of biography, of case-law, of anthologies and other publications. No special and exclusive collections were ever made of the practice of either the Prophet or his Caliphs regarding international intercourse. Even if attempts have been made, they are not exhaustive.

(35) It goes without saying that the precedents of the time of the Orthodox Caliphs may be accepted in addition to the traditions of the Prophet and not against them. It may, however, be observed that if a practice of the Orthodox Caliphs is proved beyond dispute, and it goes against some tradition of the Prophet, there will be strong reason to presume that the Orthodox Caliphs, who knew ḥadīth more thoroughly than any of the later jurists, acted on the authority of some other tradition of the Prophet, abrogating the one against which the practice in question is to be weighed. This is only theoretically possible, for I know no such concrete case.

(36) In Muslim jurisprudence, the Companions of the Prophet, though never considered as infallible as the Prophet, enjoy considerable veneration. Their piety and their devotion to their Leader could never have induced them to violate deliberately the prescriptions of the Prophet; 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 no 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 Mas'ud, for instance, prevailing over the opinion of other Companions.

4. Practice of Other Muslim Rulers.

(37) 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 juriconsults. Some of the Umayyads and Abbasids, Ṣalāḥuddīn the Great (Saladin), Aurangzeb in India and many other Muslim rulers have left many a useful precedent the importance of which cannot be ignored.

(38) The records of this, too, must be sought in a variety of sources. Its reliability must depend upon the reliability of the individual source. 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 Qur'an or the *Sunnah* or Orthodox Practice.

5. Opinion of Jurists.

(39) From the very beginning Muslim writers on jurisprudence have divided *opinion* into two kinds of unequal importance, the *Ijmā'* (consensus) and *Qiyās* (individual analogical deduction).

(a) *Ijmā'*.

(40) Various sayings of the Prophet are cited to bless this consensus of opinion, as for instance :

(i) My people will never be unanimous in error :

لا يجتمع أمتي على الضلالة (الترمذى، ابوداود، ابن ماجه)

(ii) The hand of God is over the collectivity, and

whoever quits it, is sent to hell : يد الله على الجماعة فمن
شذ، شذ في النار (الترمذی)

(iii) What Muslims agree to be good is also good in the sight of God : ما رآه المسلمون حسناً فهو عند الله حسن
(شرح السير الكبير للشيخى، ۲۰۹/۱)

And many more to the same effect. Even verses of the Qur'an are quoted to support the same.

(41) 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 Qur'an or the most reliably proved tradition of the Prophet; and whoever denies its authority is to be considered an infidel."¹ The authors, however, agree in theory that a later consensus may abrogate a former.²

(42) In spite of the importance of *Ijmā'*, it is curious that no institution of a permanent character was devised to ascertain it. Records abound that the Prophet always consulted³ 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. The consequent result was that private students and scholars of law cultivated the science, and the question of *Ijmā'* became a mere fiction, since there are no means of

1. كشف الاسرار على اصول الپزدوی للبیخاری، Vol. III, p. 261.

2. *Idem*, p. 262.

3. Cf. the Qur'anic commands thereto, 3 : 159, 43 : 38, 47 : 21, etc.

collating the data except private research into an imponderable and ever-increasing literature. Again, there are no sanctions to declare individual authors worthy of submitting their opinion for the decision of a case by a consensus, and obviously not every ordinary member of the Muslim community all over the world, now numbering by hundreds of millions, can have a say in any such matter.

(b.) *Qiyas*.

(43) 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. It looks like a logomachy when the Hanbalite Qudāmah (in his *اصول الفقه*), for instance rejects *Qiyās* and substitutes it by *Istiḥāb*. I need not enter into a detailed discussion of them. I would rather classify the literature wholly or partly dealing with Muslim International Law. The more important classes are the following :

- (i) Work on *Siyar* or international law proper.
- (ii) Works on *Fiqh* or compendia of law (*corpus juris*).
- (iii) Works on *-Fatāwī* and *aqdiyah* 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 *Naṣā'ih al-mulūk* or text-books 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.

(44) I need not discuss in detail each class of these works. A selection of the more important of them will be given in the bibliography, at the end of this monograph. However, I may mention that works on *Maghāzi* (battles of the time of the Prophet) have expressly been omitted from this classification, as they, as well as biographies in general of the Prophet, properly belong to the second source, *i.e.*, *Sunnah*, discussed above.

(45) During my studies, I have come to the conclusion that, although there is no dearth of works on political science and practical advice to princes in any civilisation of yore, which incidentally deal also with rules of international intercourse—books of Aristotle, Kautiliya's *Artha Śāstra*, the *Shu-king* and other political writings of Confucius, etc., illustrate the point—yet I found no trace of the divorce of international law from political science or law in general before the Arabs. As has been already mentioned, Abū-Ḥanīfah seems to have been first in the field and the *siyar* literature formed an independent branch of legal science. Books on law, even before Abū-Ḥanīfah, 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 Abū-Ḥanīfah (d. 150 H.)

(46) It is perhaps not unnatural that every nation seems to pay attention first to legal literature. 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-'Alīy (d. 120 H.) has come down to us¹ and contains chapters on *siyar* or international

1. Published under the title: *Kitāb al-Majmū'*, corpus juris di Zaid ibn Ali (VIII S. Chr.) la piu antica raccolta di legislazione e di giurisprudenza musulmana finora ritrovata, testo arabo pubbl. . . . per la prima volta sui mass. iemenici della Bibliotheca Ambrosiana . . . da E. Griffioli, Milano 1919 (Brockelmann mentions in his G. A. L., a fiqh-hadith work, of the kind of Muwaṭṭā', by al-'Amī iy (d. 120 H.), But according to *تاريخ بغداد* of al-Khatib, he died in fact in 159 H. Being a senior contemporary of Mālik, he may have compiled first, yet his work has not come down to us.

law. So also the *Muwattā'* (الموطأ) of Malik (d. 179 H.) has special chapters on our subject. Thenceforward, practically no Islamic *corpus juris* was devoid of chapters on international law, entitled variously *siyar*, *maghāzī* and *jihād*.

(47) The same is true of works entitled *Fatāwī* or collections of cases, judicial decisions and *responsa prudentium*. One of the earliest of them is attributed to the Caliph 'Alī, 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 Ibn-Rushd also—or compilations of the replies of private jurists-consults. In later times, even compendia of law were given this name. The Mughal Emperor Awrangzeb 'Ālamgīr of India appointed a committee to codify Muslim law, and the result of their labour is known as *Fatāwī 'Ālamgīrīyah*,¹ and is still looked upon as great authority.

(48) I may also refer in this connection to learned bodies and academies. Collective deliberations have naturally a greater chance of arriving at the proximity of reason and truth than individual labours. Islamic history has recorded, even in classical times, associations of savants, and they have had a very great influence over Muslim thought. I shall not discuss the famous *Ikhwān'as-Ṣafā*, which, to me, was more of a philosophical concern than juristic. I cannot, however, proceed without referring to the Law Academy founded by Abū-Ḥanīfah, which, though not as yet thoroughly studied, had very great influence on the codification and systematisation of Muslim law. It is said² that there were forty members of it, all legists yet each having special qualifications. Some were philologists, others logicians, still others historians of orthodox times, to elucidate the precedents and their background, and so on.

1. Sometimes also known as *Fatāwī Hinaīyah*.

2. جامع مسانید الامام الاعظم لابی المؤید محمد بن محمود البخوارزمی
امام ابوحنیفہ Vol. II, 179 سیرة النعمان مولفہ شبلی Vol. I, 32-33
کی تدوین قانون اسلامی مولفہ حمید اللہ -

(49) This leads me to international Muslim conferences. I do not know of any instance in classical times of conferences for international law or even purely for law. Yet many social evils are traced to certain laws and conventions, and hence even social and political conferences should not be neglected in this connection. For instance, the usurious habits and transactions of *banyās* in India and Jews elsewhere in ancient times could not be without effect on Muslims, to whom both giving and taking of interest is religiously forbidden, yet unless provision is made in the country for lending money without interest there is much to prevent Muslims in need of money for emergency purposes from falling into the evil of at least giving interest on loans. Thus, a conference of Muslim savants and leaders of all over the world met in Madinah in 973 H., and discussed the problems, political as well as social and moral, affecting the Muslims of those days, and resolved how to deal with them. The minutes and proceedings of this important conference were published by one of the delegates, as-Saiyid Abul-Fath *alias* Shaikh 'Abd al-Mun'im al-Baghdadiy, under the title *Mukhtār al-Kawnain*. Unfortunately there is no trace of the complete work now; only a part of it exists in a private library in India. The original text is not yet edited, but a Hindustani translation was printed some years ago under the title *مہ دیندہ کانفرنسی* which has been analysed and reviewed in *Islamic Culture*, January, 1941.

(50) A few words about modern authors.

(51) 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. These are a few of the more important books or articles by European authors:

(i) H. Reland, *Instituts du droit Musulman relative a la guerre, trad. du latin par Ch. Solvet, 1838.*

(ii) *Institutions du droit Mahometans sur la guerre avec les Infideles, trad. de l'arabe par Ch. Solvet.*

(iii) Haneberg, *Das muslimische Kriegsrecht* (in:

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Abhandlungen der philoso-philolog. Bayrisch. Akademie der Wissenschaft, 1869).

(iv) N.B.E., Baillie. *Jihad in Mohammedan Law and its Application to British India*, J. R. A. S., London, 1871, p. 401 f.

(v) E. Nys, *Le droit des gens dans les rapports des Arabes et des Byzantins* (in : *Revue du droit international et legislation comparee*, 1896, Bruxelles, pp. 461-87).

(vi) C. Huart, *Le Droit de guerre* (in : *Revue du Monde Musulman*, Paris, 1907, pp. 331-46).

(vii) *Idem*, *Le Khalifat et la guerre sainte* (in : *Revue de l'Histoire des Religions*, 1915, pp. 288-302).

(viii) E. Fagnan, *Le Djihad selon l'ecole malekite* (Algiers, 1908).

(ix) Th. W. Juynboll, *Handbuch des islamischen Gesetzes* (1910, Leiden-Leipzig), *in loco*.

(x) F. F. Schmidt, *Die Occupatio im islamischen Recht* (in : *Der Islam*, 1910, pp. 300-353).

(xi) Polemics during the Great War of 1914-18 ; the following may be noted :

(a) Snouck-Hurgronje, *Heilige Oorlog Made in Germany* (in : *De Gids*, January 1915).

(b) C.H. Becker, *Deutschland und der heilige Krieg* (in : *Internationale Monatschrift*, 1915, Sp. 631-662).

(c) Snouck-Hurgronje, *Deutschland und der heilige Krieg, Erwiderung* (in the same, Sp. 1025-1034).

(d) C.H. Becker, *Schlusswort* (in the same, Sp. 1033-1042).

(e) F. Schwally, *Der heilige Krieg des Islam in religions-geschichtlicher und staatsrechtlicher Bedeutung* (in the same, 1916, Sp. 678-714).

(xii) Hatschek, *Der Musta'min ein Beitrag zum internationalen Privat-und Volkerrecht des islamischen Gesetzes*, Berlin, 1919.

(xiii) W. Heffening, *Das islamische Fremdenrecht*, 1925.

(52) Further, there is a vast literature on Khilāfat 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.

(53) We must also not neglect the 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 *A History of the Laws of Nations* (vol. I, 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 others.

(54) As for Muslim writers, the need was felt, so far as I know, as early as the nineties of the last century. Writing a history of international law in general, Ibrahim Haqqī of Istanbul deplures the non-existence of works on Muslim International Law. In a characteristic passage, after discussing the contribution of Islam in about a dozen pages, he says:—

”افادات معروضہ دن مقصد عاجزانہ ام انسانیتہ مدار مفخرت اولہ حق ہر خصوصہ فوق العادہ ترقی ایدن ملل اسلامیہ نک قرون وسطی رہ غریبونہ ہر و جہلہ فائق اولد یغنی و بناء علیہ مدنیتمی بوقدر ایدرولمش ملتدرک بین الملل معاملاتہ رعایتی مقتضی اولان قواعد جہ جہل تام اوزرہ بولنملری و بونا بدہ تدقیقات و تالیفاتہ بولنملری و مجال بولندیغنی گوستر مکدر، فقط نہ چارہ کہ حکمای اسلامیہ نک آثارندن بر چوغی اهل صلیب و تاثرلر معرفتیلہ ماکو و منعدم اولمش و بر قسمیدہ کتبخانہ گوشہ لرنده مستور قالمش اولمغله بوخصوصہ بیان معاملات وسع عاجزانہ مک فوقندہ اولوب بو یولده آثاری بالتحرری قدمای اسلامک حقوق بین الدول خصوصندہ رخی غریبونہ رجحاندی اثبات ایتمک عامای کرام حضراتندہ ایدر بروظیفقہ مقدس در۔“

(تاریخ حقوق بین الدول ص ۳۲-۳۸، مولفی ابراہیم حقی مکتب ملکیہ شاہانہ ساز و نلرندن استانبول قرہ بت و قصبار مطبعہ سی سنہ ۱۳۰۳)۔

That is :

“By these few notes, my humble purpose is to point out that the Muslim peoples have been the pride of humanity. They made extraordinary progress in every walk of life, and surpassed the Westerners in every respect during the Middle Ages. Therefore, they cannot have completely ignored this important branch of civilized life, namely, the rules of international intercourse, and cannot but have made researches into and written works on this subject. Yet what is to be done? The achievements of the great Muslim authors have partly been destroyed by the People of the Cross and by the Tartars, and partly lie hidden in the corners of libraries. Consequently, it is above my capacity to give details in this respect. And, it is a sacred duty of the *‘ulama* to conduct researches and prove the superiority of classical Muslim authors even in respect of international law.”

(55) A co-citizen of this author of ours, Aḥmad Rashīd, cherishes the same notions even in 1937, and asserts :

“En effet, aucun livre n’a paru jusqu’a present qui exposat, dans leur ensemble, les vues de l’Islam en ce qui concerne le droit des gens.”¹

(56) Still Mr. Aḥmad Rashīd has not shirked the task of taking responsibility on his own shoulder as best as he could, hence his lectures in the Academy of International Law of The Hague. I have, however, come to know of the following monographs on the subject before the Hague lectures just referred to :

(i) Negib Armanāzī, of Damascus, *L’Islam et le droit international*, thesis, Paris, 1929.

(ii) The same, Arabic edition with certain additions, *الشرع الدولي في الاسلام لانجيب الارمندازي*, Damascus, 1930.

(iii) Saba, *L’Islam et la Nationalite*, thesis, Paris, 1933 (with acknowledgement to the bibliography of Cardahi ; but I could not identify the nationality of the author).

1. *L’Islam et le droit des gens*, par Ahmed Rechid (in : *Recueil des Cours, Academie de droit international, The Hague, 1937, II, p. 378*).

(iv) M. Chaigān of Teherān, *Essai snr l'histoire du droit public*, thesis, Paris, 1934.

(v) *Die Neutralität im islamischen Volkerrecht*, by the writer of these lines, thesis, Bonn a/R, 1933, (published 1935).

(vi) Abul-A'lā Maudūdī of Delhi, *الجهاد في الإسلام* comprising articles originally contributed to the Hindustani bi-weekly *al-Jam'iyat* of Delhi, published in the series of Dārul-Muṣannifīn, A'zamgarh, 1348 H.

(vii) Aḥmad Rashīd, just referred to above, 1937.

(viii) The present monograph, begun in 1929, submitted in 1933, revised and published first in 1941.

(57) Other monographs, of even earlier date, on modern expositions of *Jihād* will be mentioned in our general bibliography in an appendix. 'Abdarrahīm, in his *Principles of Muhammadan Jurisprudence* (Calcutta, 1911, cf 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.

(58) 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 internal but also in international conflicts. The difference between these various terms will be seen later. It will suffice if we mention here that 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.

(59) Another important source of international law comprises treaties. Sometimes they are bilateral and sometimes multilateral, and obviously they bind only the parties thereto. We shall deal with them in detail later, but it may be pointed

out here that there are no precedents in Islamic history of all the States of the world¹ adhering to a treaty, and the reason is not far to seek. Communications and economic independence, as also restrictions on foreigners, were not so far developed in those days.

(60) 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 (تعبدی و قابدی). These cannot lose their binding force except when, and so long as, one is in extreme stress and unavoidable necessity (اضطرار). "Except one who is driven by necessity, neither craving nor transgressing, it is no sin for him"² is the oft-repeated Qur'ānic provision. And hence the maxim (الضرورات تبيح المحظورات) (stress renders the forbidden permissible).³ Again, there are rules in Muslim law which though not compulsory yet their execution is praiseworthy (مستحب). Thirdly, there are those whose performance or omission is left to the discretion of individual persons (مباح).

(61) It is regarding only this last category of acts that custom and treaty impositions are upheld and rendered valid by Muslim law. And as explained above, treaties concluded under stress against the injunctions of Muslim religious law (شريعة) are binding only so long as the necessity remains. Rules regarding the repudiation of treaties will be discussed in a subsequent chapter.

(62) It is to be noted that 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.

(63) The next source is contained in official instructions to generals, admirals, ambassadors, delegates and represen-

1. In modern times also there are only a very few universal treaties, such as the Postal Convention of Berne; and the Muslim States have adhered to them. 2. Qur'ān, 2 : 173, 5 ; 3, 6 : 120, 6 : 146, 16 : 115.

3. Sarakhsīy, شرح السير الكبير, IV, 479.

tatives, in short to those officials who have some connection or other with the conduct of the State in international affairs. These may be published, or confidentially given out and kept secret. They often contain important material for our subject. From the very time of the Prophet down to our age we find this practice continued. A few of the more typical documents containing such instructions will be given in an appendix.

9. *Internal Legislation and Unilateral Declarations.*

(64) Although the whole of international law is, in a sense, part of the internal legislation and law of the land, yet we must distinguish 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. To illustrate this last point, we may refer to the command of the Prophet that non-Muslims should be expelled from Arabia¹ where they can no longer settle, and the Qur'anic injunction that non-Muslims cannot enter the Grand Mosque of Mecca,² for purposes of idolatry.

10. *Custom and Usage.*

(65) Very little has so far been written, from a scientific point of view, on the place of custom, usage, conventions and the like in Muslim law, although the validity of such things as 'urf, 'ādah, ta'āmul and 'ūmūm al-balawā has been recognized in Muslim jurisprudence without much dispute. Of course much heartburning is caused by indiscreet ways of putting things, and we must not disregard the difference between saying that "all your relatives will *die* before you" and "you will *live* longer than all your relatives," a real difference, which as the story goes, caused one astrologer dishonour and brought to the other untold riches on the part of their royal master.

1. Bukhārīy, 55 : 176, 58 : 6, 64 : 83.—Muslim, Vol. V, p. 75.—Ibn-Hanbal, I, 222.—Ibn Sa'd, Vol. 211, p. 44.—Wensinck, مفتاح كنوز السنة, *in loco*.
2. Qur'an, 9 : 28.

By the utter disregard of these human weaknesses, we shall be doing service to nobody. Modern European writers, for instance, say: Muslim law was greatly influenced by Roman law—and of course this is liable to cause resentment. A great Orientalist of Jewish descent has, for instance, denied any influence of Roman law on Muslim law, still he maintains that Jewish law has influenced it, basing his argument on the presence of Jews in Medinah in the time of the Prophet. All such conclusions and allegations were inspired by objectionable motives; hence they do not give the whole picture, affected as they are by narrow vision.

(66) This is not the proper place to make a thorough study of the question.¹ Yet I may be misunderstood if I do not make it clear why custom is to be considered as one of the sources of Muslim law in general and of Muslim International Law in particular.

(67) The Qur'ān constantly commands to follow معروف (good known to and recognized as such by everybody) and to abstain from منكرو (evil known to and recognized as such by everybody). This applies to, or at least includes custom.

(68) We have seen under source No. 2, that what the Prophet tolerated among his Companions rendered it valid and lawful. The very "toleration" (برداشتت) as it is termed) implies the recognition of custom, no matter old or new, as a source of law. As for later times the all-pervading maxims الأصل الاباحة² (everything that is not prohibited is permissible), and العرف قاض (custom or rule of convention is decisive)³ leave not the slightest

1. See however, the note of a lecture of mine, in *Islamic Culture*, January, 1939, pp. 125-126, and for an article of mine in Bibliography at the end of the book. Further, my article "Influence of Roman Law on Muslim Law," *Hyderabad Academy Studies*, No. 6, 1943; C. A. Nallino's article on the same subject, in his *Raccolta di Scritti*, IV, 85ff; G. H. Bouquet, *Mystère de la formation et des origines du Fiqh*, in *Revue Algérienne*, etc., de Legislation et de Jurisprudence, July to September 1947.

2 Cf. Qur'ān, 4: 24, 6: 120: "Lawful unto you are all beyond those mentioned"; "And He hath explained unto you that which is forbidden unto you."

3. There are some more from ash-Shaibānī's writings: شرح السير الكبير (الثابت بالعرف كالثابت بالنص I, 194): Evidence of

doubt that custom and usage, with certain qualification, are lawful sources of rules of conduct for the Faithful.

(69) We must, however, not confuse laws of the Muslims and Muslim laws. By the former I understand 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 Qur'an and the *Sunnah* have expressly laid down.

(70) Regarding Muslim law proper, we know that Islam began in Mecca, full of pagan Arab traders who constantly travelled abroad. Later its centre of gravitation moved to Madīnah when the Prophet migrated to that place, where Jews also lived in thousands. Not a decade had passed since the Hijrah when the boundaries of the Muslim State crossed with those of the Persian and Byzantine empires. A decade and a half still later, in the year 17 H.,¹ we see the armies of Islam penetrating even into Spain, to remain there until Ṭāriq came many generations later to complete the conquest, when the Islamic State, like a colossal crescent, spread from the Pyrenees to the mountains of China, crossing Persia, Mesopotamia, Syria, Arabia, Egypt, Turikistān, Armenia, and all the coastal countries of North Africa. Thus it came into contact with the Meccans and other Arabs, as well as with Jews, Christians, Greeks, Spaniards, Persians (Magians), Buddhists of Turkistān

المعروف بالمعروف كالمشروط. *idem*, IV, 23-25): To learn through custom is like prescribing in the text. *idem* IV, 16): A general may be rendered a particular by evidence of custom. *idem*, I, 198): Usage is decisive when not prescribed otherwise in the text. *idem*, II, 296): Usage is valid to particularise a general rule.

1. Tabariy, *Annales*, I, 2816-17; Ibn al-Athar, *Kāmil*, III, 72; Abul Fidā', I, 262; Dhahabiy, *at-Tārīkh al-Kabir*, anno 27; cf. Gibbon, *Decline and Fall*, V. 555 (ed. Oxford University Press).

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and Chinese of Sinkiang,—to mention but a few of the more civilized peoples of those times of whom Islam made many converts. Histories mention that not much difference is to be found between the pre-Islamic pagan pilgrimage and the Islamic Ḥajj, which is one of the five basic elements of Islam; that 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 Bukhārā, Turkistān and adjoining countries where Buddhist and Chinese influence predominated; that the pupils of the Companions of the Prophet and their pupils, the teachers of Abū-Ḥanīfah, Mālik, ash-Shāfi‘īy, Ibn-Ḥanbal and others were generally *mawālī* 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 Abū-Ḥanīfah himself had a Persian father and an Indian mother; that there are express commands in the Qur’ān¹ to follow the laws of Moses, Jesus, Abraham and other Messengers of God, and it is reliably recorded that the Prophet ordered² Muslims to follow the practice of the Jews and Christians 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 يعمل في الاسلام بفضائل الجاهلية³ (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 (مفتى)

1. Qur’ān, 6 : 84-91 : (“ so follow their guidance ”); 3 : 95, 16 : 123 ; (“ Follow the religion of Abraham ”).

2. E.g., جامع الترمذی in connection with combing ; Bukhārīy, 77 : 70.

3. Ibn-Ḥanbal, مسند, III, 425.

and by the activities of the codification of Muslim law by private jurists.¹

(71) Thus we see that notwithstanding the fact that many customs and usages, conventions and habits were amended or even abolished by Islam, there is no denying the fact that the very large remainder contributed, to a considerable extent, to Muslim law as one of its sources.² (Cf. also my article "Influence of Roman Law on Muslim Law" in the Journal of Hyderabad Academy, Vol. VI.)

Retrospect.

(72) We can see now that the relevant portions of the Qur'ān and the *Sunnah* form permanent positive law of the Muslims in their international dealings; State legislation and treaty obligations establish temporary positive law; and all the rest provide non-positive or case-law and suggested law respectively.

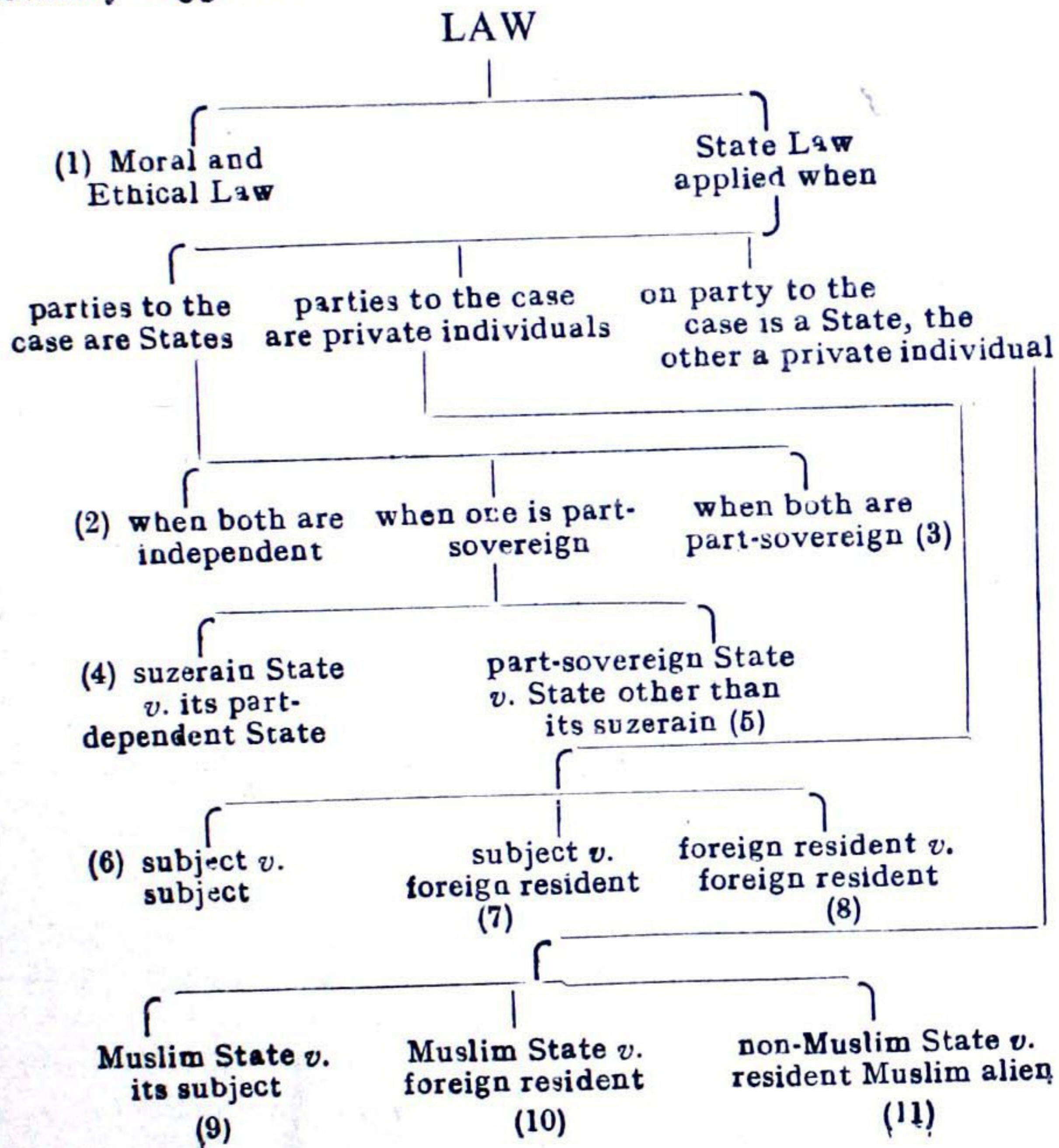
1. See my book *امام ابو حنيفه کی تدوین قانون اسلامی* and my article resuming the same: "Codification of Muslim Law by Abū Hanīfah," in: *Islamic Review, Woking*, Vol. 45/4, April, 1957.

2. For a detailed enumeration see among others *المکبر* of Ibn-Habib (ed. Hyderabad, 1361 H., pp. 309-40). *اسنن التي كانت النجا هلية § سنتها فبقى الاسلام بعضها و اسقط بعضها -*

CHAPTER VII

THE PLACE OF INTERNATIONAL LAW
IN LAW GENERAL

(73) BY law we mean 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 that part of the *gubernatorium* which is concerned with foreign relations will be international law. This may more clearly be appreciated in the following division of law which we humbly suggest :



(74) We have no direct concern in international law with No. 1. Nos. 2, 3, 4 and 5 comprise law governing inter-governmental relations. These along with Nos. 10 and 11 form public international law. Nos. 7 and 8 belong to private international law. And Nos. 6 and 9 comprise law of the land in its narrower sense which is also called civil law and municipal law as distinguished from the international law of a State. It may, more appropriately, be called for our purposes internal law.

CHAPTER VIII

THE CONTRIBUTION OF ISLAM TO THE INTERNATIONALIZING OF HUMAN SOCIETY

(75) THE perplexing complexity of human society is but a reflection of human nature. A mixture of contradictory elements, or, I should rather say, of both good and evil simultaneously,—though of varying grades,—the most rational being, man, at times surpasses the angels and at others even the Devil would look shy before him. Consequently, among other things human society has been the object of two tendencies at the same time. The one centripetal, from independent and self-contained families into tribes, from tribes into citizens of city-States, from city-States into vaster States, empires, commonwealths and even attempts at world order,—such is said to be the one aspect of the chequered history of human society. The other centrifugal, from being relative members and descendants of one and the same family of Adam and Eve,¹ differences of colour, language, country, race and the like have so accentuated the diversity that no insignificant toll of bloodshed has stigmatized the fratricidal society of the human species.

(76) It is no use attempting the impossible, either to change human nature or convert the average being into a rare and exceptional extremist.

(77) It is to be regretted that in spite of such valuable contribution to different sciences and institutions, the ancients 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

1. For ethnological unity of man see O. Ehrenfels : "Ethnology and Islamic Sciences" (in *Islamic Culture*, 1904, pp. 434 f.).

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, to me, the work rather of pagan and irreligious generations than the result of commands of the religions they profess.

(78) Islam has rather been fortunate¹ in discarding, from the very first, differences of race and colour, country and language, in favour of the universal brotherhood of the Faithful.

(79) See for instance :

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. (Qur'an, 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 an 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.)

(80) Islam is a religion of unity and action which safeguards individual rights and liberties and provides at the

1. See further my article in Hyderabad Academy Journal *بعثت نبوی کے وقت کی چند عالمگیر گتھیاں اور ان کا اسلامی حل* reproduced in my *رسول اکرم کی سیاسی زندگی*

same time for collective welfare. I refer to the institutions of zakāt and Baitul-Māl. And as its call was not meant, from its very inception, for any particular country, it was an advance over what had hitherto been done to internationalize human society.

(81) Besides this universality of its call, Islam instituted ḥajj and khilāfat, which I shall consider one after the other.

Brotherhood of Man.

(82) A few typical quotations alone from the Qur'ān would suffice to illustrate my point :

(a) Creation of mankind from the same couple :

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

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)
Other verses to the same effect, cf. 6 : 99, 7 : 189, 39 : 6.

(b) Mankind is one community :

Mankind were one community ... (*Idem,* 2 : 213)

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 wherein they differ. (*Idem,* 10 : 20)

(c) Islam's universal call :

[Muḥammad !] 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)

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

(74) We have no direct concern in international law with No. 1. Nos. 2, 3, 4 and 5 comprise law governing inter-governmental relations. These along with Nos. 10 and 11 form public international law. Nos. 7 and 8 belong to private international law. And Nos. 6 and 9 comprise law of the land in its narrower sense which is also called civil law and municipal law as distinguished from the international law of a State. It may, more appropriately, be called for our purposes internal law.

CHAPTER VIII

THE CONTRIBUTION OF ISLAM TO THE INTERNATIONALIZING OF HUMAN SOCIETY

(75) THE perplexing complexity of human society is but a reflection of human nature. A mixture of contradictory elements, or, I should rather say, of both good and evil simultaneously,—though of varying grades,—the most rational being, man, at times surpasses the angels and at others even the Devil would look shy before him. Consequently, among other things human society has been the object of two tendencies at the same time. The one centripetal, from independent and self-contained families into tribes, from tribes into citizens of city-States, from city-States into vaster States, empires, commonwealths and even attempts at world order,—such is said to be the one aspect of the chequered history of human society. The other centrifugal, from being relative members and descendants of one and the same family of Adam and Eve,¹ differences of colour, language, country, race and the like have so accentuated the diversity that no insignificant toll of bloodshed has stigmatized the fratricidal society of the human species.

(76) It is no use attempting the impossible, either to change human nature or convert the average being into a rare and exceptional extremist.

(77) It is to be regretted that in spite of such valuable contribution to different sciences and institutions, the ancients 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

1. For ethnological unity of man see O. Ehrenfels : "Ethnology and Islamic Sciences" (in *Islamic Culture*, 1904, pp. 434 f.).

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, to me, the work rather of pagan and irreligious generations than the result of commands of the religions they profess.

(78) Islam has rather been fortunate¹ in discarding, from the very first, differences of race and colour, country and language, in favour of the universal brotherhood of the Faithful.

(79) See for instance :

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. (Qur'an, 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 an 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.)

(80) Islam is a religion of unity and action which safeguards individual rights and liberties and provides at the

1. See further my article in Hyderabad Academy Journal بعثت نبوی کے وقت کی چند عالمگیر گتھیاں اور ان کا اسلامی حل reproduced in my رسول اکرم کی سیاسی زندگی

same time for collective welfare. I refer to the institutions of zakāt and Baitul-Māl. And as its call was not meant, from its very inception, for any particular country, it was an advance over what had hitherto been done to internationalize human society.

(81) Besides this universality of its call, Islam instituted ḥajj and khilāfat, which I shall consider one after the other.

Brotherhood of Man.

(82) A few typical quotations alone from the Qur'ān would suffice to illustrate my point :

(a) Creation of mankind from the same couple :

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

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) Other verses to the same effect, cf. 6 : 99, 7 : 189, 39 : 6.

(b) Mankind is one community :

Mankind were one community . . . (*Idem,* 2 : 213)

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 wherein they differ. (*Idem,* 10 : 20)

(c) Islam's universal call :

[Muḥammad !] 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)

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

And We sent thee not [Muḥammad] save as a mercy for all nations. (*Idem*, 21 : 107)

(d) Difference of colour and language explained :

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

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

(e) Toleration par excellence :

Lo ! those who believe [in that which is revealed unto thee, Muḥammad], 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.*, Muslim), and those who are Jews, and Sabeans and Christians—whichever believeth in God and the Last Day and doth right—there shall no fear come upon them neither shall they grieve. (*Idem*, 5 : 69)

And a host of other verses, especially 3 : 64, 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.

(83) I pointedly invite attention to quotations under (b) and (d) that 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. Quotations under (e), which have twice been repeated in the Qur'ān, are very significant, and show 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.

(84) What use of international law if it does not aspire to cultivate harmony between nations ?

Hajj or Pilgrimage to Ka'bah.

(85) Islam is ultra-national in its ethnological and other current senses. So the brotherhood of the Faithful, which Islam has inculcated, is truly international. And for the purpose of fostering this brotherhood and causing greater contact between the members of the Muslim community spread all over the world, the institution of *hajj* or pilgrimage to Mecca, its cradle, has played a prominent role almost from the beginning of Islam. *Hajj* is one of the five "duties for each and every one" (فرض عين), to be observed by the Muslims. Every Muslim, male or female, must perform at least once in life the pilgrimage to the House of God in Mecca, if he or she "can find a way thither."¹ Arabia lies in the midst of the three continents known as the old world. Thus, Mecca is even geographically the centre of the old world, or to adopt the technical term used by the Muslims, it is situated on the "navel of the earth" (ناف زمين). The pilgrim is required to put off his ordinary clothes and every one wears a simple and humble *ihrām*, leads a life of great self-control, abstains from enjoyment or fulfilling passionate desires, during the *hajj* period of his stay in or around Mecca. It is really an awe-inspiring scene to see king and clown dressed alike, standing shoulder to shoulder during the services, and one actually feels the demonstration of the Qur'ānic description of Doomsday: "With whom shall lie the power supreme on this day? With God, the One, the Almighty."² A really cosmopolitan gathering and a complete equality of the children of Adam is nowhere else to be found. Such is the annual *hajj* of Islam.³

Khilāfat.

(86) Another internationalizing institution of Islam is the *Khilāfat* (Caliphate). When the Prophet breathed his last, the

1. Qur'ān, 3 : 97.

2. *Idem*, 40 : 16.

3. See my article on Hajj, in the book *Les Pèlerinages*, ed. Seuil, Paris, 1960.

Muslims of that time came to the conclusion, with the exception of perhaps two or three individuals, that there could be only one ruler for the totality of the Muslims. Although the Muslim empire soon spread far and wide outside its birthplace, 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 Madīnah, 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.

(87) There has been no difference of opinion among the Muslims as to the desirability of the institution of a central caliphate except for the insignificant and now almost extinct sect of the Khārijites. The difference among the Sunnīs and the Shī'ahs is only regarding the person chosen for the purpose immediately after the Prophet. Somehow or other, the rightfulness of 'Alīy, a cousin and son-in-law of the Prophet, and his descendants, to the post has become a part of dogma with the Shī'ahs, while the Sunnīs as a matter of fact say that Abū-Bakr, 'Umar and 'Uthmān were elected by almost the unanimous vote of the community, and succeeded to the temporal power of the Prophet one after the other before 'Alīy himself was chosen for the purpose at the tragic murder of 'Uthmān, and that even 'Alīy did not lag behind in paying homage to cooperating sincerely with his predecessors in the office.

(88) There is, however, still an opportunity of easy disposal of this matter, since neither of these respected figures is now alive. It cannot be denied that the Prophet functioned as a spiritual guide as well as a temporal leader of the Faithful. As far as the spiritual heritage is concerned, there is almost unanimity even among the Sunnīs, except a branch of

the less numerous Naqshbandīyah order of Ṣūfīs, that it was 'Alīy who was the immediate successor of the Prophet. Again, as far as the temporal power is concerned, all agree that it is a transitory thing, and even the Sunnīs do not believe that Abū-Bakr had any right to the post other than the fact that he was elected by the overwhelming majority. Thus the difference resolves itself into the question of fact whether the Prophet had or had not nominated 'Alīy as his immediate temporal successor. Obviously the question is not of any practical importance today, after thirteen centuries have revolved since the demise of the persons concerned. The Sunnīs do not mind 'Alīy's being styled the *وصى رسول الله* (Executor of the will of the Messenger of God), since legally an executor and a beneficiary of a testament are not co-equal.

(89) 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 Shī'ahs as well as the Sunnīs at all times.

CHAPTER IX

THE HISTORY OF INTERNATIONAL LAW BEFORE ISLAM

(90) MONTESQUIEU has rather bluntly remarked :

“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.”¹

(91) But which people has not once been primitive and even savage? I need not dilate here on the causes that led to the early or late appearance of different peoples in the society of civilized nations. Further, I do not need to point out that man is the most receptive of created beings; yet it must not be lost sight of that, given similar circumstances, men, more often than not, think alike; and it will be absurd to conclude that the later in time must unavoidably have borrowed his ideas in all cases from those who lived earlier.

(92) It is not necessary here to refer to the history of international laws of other nations in any detail except in so far as they may have contributed to the development of Muslim International Law. The known history of Man is said to begin with the Sumerians, naturally very hazy. 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

1. *Esprit des Lois*, liver I, ch. 3, p. 7 (Paris 1860): “Toutes les nations ont un droit des gens; et les Iroquois memes, qui mangent leurs prisonniers, en ont un. Ils envoient et reçoivent les ambassades, ils connaissent les droits de la guerre et de la paix: le mal est que ce droit des gens n'est pas fondé sur les vrais principes.”

interest. Their intercourse led not only to interchange of commodities but even of ideas. Great civilizations have flourished successively in Egypt, Syria, Carthage, Greece, and Rome—all situated on the Mediterranean. The peace treaty between the Egyptian Ramses II (Sesostris, who ruled between 1292-1225 B.C.) and the King of the Hittites of Northern Syria, designed in the treaty as Ḫi-āser (chief of Ḫi-ṭai, now the Turkish *Hatay*) is probably the oldest diplomatic document that has come down to us in the original, a silver tablet in this case, inscribed in the Hittite language. It stipulated not only the end of the great Syrian war and perpetual peace between the two kings under the protection of the deities of both the countries, but also an alliance against the enemies of both the contracting parties. The trade and industries of both the nations were to be immune. Convicts of one country taking refuge in the other had to be extradited, but it was expressly provided that certain kinds of punishment could not be inflicted on the people so extradited.¹ 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 the 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 (see Bible, I Samuel XV, 1-3 for instance). 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.² 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.

(93) We now pass on to Europe. The Greeks were greatly

1. Holtzendorff, *Handbuch des Völkerrechts*, I, 168.

2. Oppenheim, *International Law*, I, 55-56 (4th ed.).

influenced by Phoenician culture, but the system of international law they evolved was essentially law between city-States of the Greek peninsula. All non-Greeks were termed barbarians, and Aristotle asserted that "nature intended barbarians to be slaves"¹ of the Greeks. Plato,² although he advised his countrymen to be more lenient in their mutual treatment, never entertained the idea that non-Greeks deserved any share in the milder treatment he proposed. The public law of Greek *nations* (subjects of different city-States are meant thereby), was considerably developed, and even a sort of League of Nations was established by and between many of these cities. The covenant of one such league, the Amphictyonic League of Delphi may be quoted with interest :

"We will not destroy any Amphictyonic town nor cut it from running water in war or peace ; if any other shall do this, we will march against him and destroy his city. If any one shall plunder the property of god or shall be cognizant thereof, or shall take treacherous counsel against the things in his temple at Delphi, we will punish him with foot and hand and voice, and by every means in our power."³

(94) For a detailed study of Greek International Law, *the International Law and Custom of Ancient Greece and Rome* (2 vols.) by C. Phillipson and its admirable bibliography would be useful.

(95) Rome conquered Greece politically yet soon it was reconquered by the Greeks, intellectually. 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 citizens of a State, which had no treaty of friend-

1. *Politics*, bk. I, ch. 7.

2. Cited by Lawrence, *Principles of International Law*, p. 15 (6th ed.).

3. *International Law* by Wilson and Tucker, p. 16 (8th ed.).

ship with Rome, were not safe in the Roman territory ; such persons could be made slaves and their property seized. Only ambassadors were exceptions. Citizens of a friendly State had a right to legal protection ; and justice was administered to them by the *praetor peregrinus*.¹

(96) The Roman Empire ruled over Syria and Egypt also. Thus it had common frontiers with Īrān, and hence the vicissitudinous wars for centuries together between the two rivals. The Roman Empire was later divided into two, and it was the Eastern Roman Empire of the Byzantines with which we are concerned. Obviously 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.

(97) 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 peoples. As we have already seen, what we call Muslim law has not been developed by Arabs only ; people from Syria, Īrān, Egypt, Turkistan, etc., cooperated from the very first centuries of its development. The researcher in the *history* of Muslim International Law will deal with Roman, Persian, Buddhist and other systems of international law. For me it will suffice to describe conditions in Arabia only, from the point of view of international law, since it was the rules prevalent in this country that were in the main utilized by the Muslims with adaptation, amendment, addition and adoption.

1. Cf. Oppenheim, *International Law*, I, 59-61 (4th ed.).

Pre-Islamic Arabia.

(98) At the dawn of Islam, early in the seventh century of the Christian era, 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—but not unnecessarily extensive—to allow of the convenient assembly of its free citizens, for the purpose of exercising the rights and discharging the obligations incidental to citizenship . . . Though the Arabs spoke a common language, took part in common fairs, consulted the same oracles, worshipped the gods in common [and to a great extent observed the same customs], yet their separation into independent 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 cannot be said to be fundamentally different from that, say, of the European States from the point of view of the operativeness and applicability of an international law. It is true that the intrinsic kinship of the Arabs stamps them as practically one nation, even though subdivided into different municipalities. But international law requires for its development the existence of independent *political* communities, not necessarily different in race, language, religion, or anything else . . . The characteristic note of each city was competence and self-sufficiency . . . The intense genealogism of the Arabs prompted an attitude of civic seclusion. The spirit of separateness, of isolation made political unity impossible. To the Arab, his State, *i.e.*, his tribe and tribal settlement (قرية and دار), was no vapid abstraction, but a living reality. He was bound to it by an almost indissoluble tie; he was ready to give up his life for it, since he was indebted to it for his privileges, for his dignity, for his very existence . . . The Arabs as Arabs cherished aspiration for unity, but as citizens their constant aim was decentralization; and their claims of citizen-

ship invariably triumphed over those of racial kinship. Although their genius was so versatile, they found free scope for its exercise within the circumscribed limits of their respective city-States and settlements. They constructed no great works of engineering skill. Their concern was with the conquest of the intellectual dominions (*poetry*, I mean) rather than with the establishment of territorial empires. Their nature is characterized by the love of art,¹ as a contrast, for example, to the love of knowledge attributed to the Greek, and to love of wealth² attributed to the Phoenicians and Egyptians. They may have proved incapable of political unity, but they were possessed of that intellectual unity which marks the true civilization of a people."³

(99) In remoter antiquity, especially in Yaman, veritable empires had sprung up, thanks to the amenities of life that were provided there by nature, yet at the dawn of Islam even there chaos ruled supreme and the older kingdoms and empires had disintegrated into pretty townships. The territories under foreign domination such as 'Umīn, Bahrain, etc., were rather better off, although even there division into nomads and the settled obtained.

(100) Not only the city-States of Arabia, but even the large number of wandering tribes could be doted with the same physic of political personality. In political autonomy they were inferior to none. Territory they did possess, 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.

(101) *Bellum omnium contra omnes* has so often been

1. See further : *The City-State of Mecca* (*Islamic Culture*, July 1938), p 275.

2. Cf. also the pooja (worship) of Lakshmi (i.e. wealth) by the Hindus.

3. Adopted *mutatis mutandis* from what others have written regarding others, yet so true of Arabia also. Regarding the conditions of Mecca, the birth place of the Prophet, see my article, *The City-State of Mecca*, (*Islamic Culture*, July, 1938).

pictured as the normal condition of Arabia. It may be true to a certain extent. But if we concede to the Arab tribes same privileges as are possessed by independent States,—and why not?—the horror vanishes. 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 instance, they evolved the institution of the months of the *truce of God* (أَشْهُرُ الْحُرْمَةِ)¹ which so much mitigated the hardships 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. An interesting and important quotation from a classical author gives a glimpse of this great institution :

“ Every trader who set out from Yeman or Hijāz for Dāmatuljandal (in the extreme north of Arabia), acquired the services of the Quraishite escort as long as he travelled in the country inhabited by the Muḍarite tribes, since no Muḍarite nor ally of the Muḍarites harassed the Quraishite traders. So, the Kalbites never harassed them as they were allied to the Banū-al-Jusham ; and the Ṭayites also never harassed them because of their alliance with Banū-Asad . . . When they intended to go to ‘Irāq, they acquired the services of escorts of Banū-‘Amr-ibn-Marṭhad (of the clan of Qais-ibn-Tha‘labah), which protected them in the whole of the country inhabited by the tribes of Rabī‘ah . . . When going to al-Mushaqqar in Braḥrain, Quraishite escorts were sought . . . Then the fair of Ṣuḥār, in ‘Umān, which assembled on the first day of the month of Rajab and continued for five days. And al-Julandā-ibn-al-Mustakbir taxed them there a tithe. Then the fair of Dabā which was one of the two major ports of

1. Cf. *Islamic Culture* (July 1933), pp. 267-268 ; Proceedings of the 2nd Session of the Idārah Ma‘arif Islāmiyah, Lahore, pp. 98-99 ; *Hyderabad Academy Journal*, V, 96 et seq.

Arabia. It was visited by traders from Sindh, India, China, people of the East and the West . . . When going to the fair of Maharah, in the southern extremity of Arabia, escorts of Banū-Muḥūrib were employed . . . In the fair of Aden, however, no escorts were needed since it was a State-territory and of good order (ارض مملكة و امر) . . . In the fair of Rābiyah in Ḥaḍramawt, the Quraishites were escorted by the Banū-Ākil-al-Murār and the rest of the people were escorted by Āl-i-Masrūq of Kindah. It brought glory and eminence to both these tribes. Yet the Ākil 'al-Murār superseded their rivals on account of the patronage of the Quraishites¹ . . . 'Ukāz was the greatest of the Arab fairs, and was visited by the tribes of Quraish, Hawāzin, Ghāḥafān, Aslam, Aḥābiṣh, 'Adl, ad-Dīsh, al-Ḥayā, and al-Muṣṭaliq."²

There are innumerable instances of individual escorts in the pre-Islamic history of Arabia.³

(102) Another item of the law of nations was the system of "ilāf or pacts" (الايلاف اليهود),⁴ developed by the Meccans. They concluded pacts, or rather obtained charters from the rulers of Syria, Abyssinia, Īrān, Yaman, etc., in order to bring caravans of trade to their respective territories, in

1. Cf. also Olinder, *The Kings of the Family of Ākil-al-Murār* (Lund, 1927).

2. Muḥammad-ibn-Ḥabīb (d. 245 H), *كتاب المسجبر* (ed. Hyderabad), ch. Fairs of Arabia, pp. 263-68.

3. E g., at-Tanūkhīy, *المستنجار من فعات الاجوار* MS. Leningrad), Story No 32, with acknowledgment to my class-mate in Bonn, Dr. Leo Pauly;

"و بعث (مهل) معي خفيراً من ماء الى ماء حتى وردوا الى البحيرة"
i e. "And (Muhahl) sent an escort to accompany me from one watering station to another, until they reached the town of al-Ḥīrah" The work has since been edited in Germany by Pauly, and again in Syria by Kurd 'Alīy.

Again al-Marzūqīy, *كتاب الازمنة و الامكنة*, II, 161:

وكانت هذه الاسواق . . . لا يصل احد اليها الا بخفير ولا يرجع الا بخفير
i e., And these fairs . . . nobody can get there without an escort or return from there without an escort. 4. Muḥammad-ibn-Ḥabīb, *op. cit.*, p 162.

perfect immunity. The Meccan magnates promised the 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.¹ The services of this organization were available even to the people of foreign countries, such as Īrān, on payment of necessary remuneration.² In order to obtain the above-mentioned charters, the Meccans had to send embassies; and the names of the countries of destination in this connection show the vastness of their diplomatic relations as also imagination on the part of the oligarchs of the city-State of Mecca.³

(103) Tribal alliances for particular purposes or permanent co-operation 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,⁴ besmearing with scents,⁵ lighting fires (ذار الحلف)⁶ cutting tufts from the forehead and cutting the nails of the contracting parties and burying them under the subsoil of some lake,⁷ and many such things are recorded at different occasions, besides the more common shaking of hands. Prof. Krenkow 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. Of course

1. Ya'qūbīy, I, 280 ff.; Ibn-Sa'd, I/1, pp. 43, 45, Ṭabarīy, *Annales*, I, 1089; *idem*, *Tafsīr*, Vol. XXX, *Sūrah Īlāf*; *Lisān al-Arab*, s v. *Īlāf*; Lammeus, *La Mecque, a la veille de l'Hegire*, p. 128, etc.

2. Fraenkel, *Aramāisch: Fremdenwörter*, p. 176; *idem*, *Schutzrecht*, p. 296; Lammeus, *La Republique marchande de la Mecque*, p. 25 ff.; Ibn-Sa'd, I/2, p. 32;—cited by Hefening, *Das islamische Fremdenrecht*, p. 89.

3. Cf. my article *Al-Īlāf ou les rapports economico-diplomatiques de la Mecque pre-islamique*, in: *Melanges Massignon*, Vol. 2, pp. 293-311; also my *Le Prophete de l'Islam*, II, 599-609

4. Dīnawarīy, p. 353; Ya'qūbīy, I, 288.

5. Ya'qūbīy, I, 288.

6. Qalqashandīy, *صباغ الاعشى*, I, 409 (cf. *idem*, *نهاية*, *in loco*).

7. Dīnawarīy, p. 353.

there is less possibility of falsifying in this case! The treaty of the social boycott of the family of the Prophet by the Quraish was hung in the sanctuary of Ka'bah.¹ Special formulae also seem to have been in vogue (cf. الدم الدم الهدم الهدم, " (Your) blood-seeking is (my) blood-seeking and (your) blood-remitting is my blood-remitting." Ibn-Hishām, p. 297).

(104) This leads us to envoys. There is a vast literature on the subject of Arab chieftains visiting foreign rulers,² and foreign ambassadors coming to Arabia. The Yamanites sent an envoy to Ctesiphon to ask for Persian help against the Abyssinians.³ The dam of Ma'rib, in Yaman, still preserves the long inscription of Abrahah, who repaired it, stating that on a certain day he received ambassadors of several foreign rulers, including the Byzantine Emperor.⁴ Instances of inter-tribal and inter-municipal embassies in Arabia are innumerable. The Meccans twice sent envoys to the Court of the Negus against the Muslim refugees.⁵ Before his Islam, 'Umar was the hereditary ambassador-spokesman (سفیر و منافر) 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."⁶ The person of an envoy was always considered inviolable ان الرسل لم تنزل آمنة في الجاهلية 7 (I.e. the ambassador have always enjoyed security, be it in the Jāhilīyah or in the Islamic times.)

105. Although there was no unity in Arabia, in the sense

1. Ibn-Hishām, p. 231.

2. Ibn-Hajar, الاصابة s.v. عطار بن حاجب; Ibn-Sa'd, I/1, pp. 43, 45; Tabariy, History, I, 1537; al-Masūdiy, Murūj, IV, 250: "'Umar met many a King before Islam"; al-Iṣbahāniy, Aghāni XII, 48-49, etc.

3. Ya'qūbiy, I, 187.

4. Glaser, Zwei Inschriften (in: Mitteil. vorderasiat. Gesellschaft, Berlin, 1897, 6), cited in my *Le Prophete de l'Islam*, I, 190-191, and Sulaimān Nādwī, ارض القرآن, I, 319.

5. Ibn-Hishām, pp. 217-21, 716-17.

6. العقد الفرید, II, 45.

7. Sarakhīy, المسوط, X, 92.

that there was no one central authority for the whole of the desert Peninsula—so much so that in the words of Wellhausen there was “ein Gemeinwesen ohne Obrigkeit”¹ (a community without superior authority)—yet it cannot be denied that strong tendencies were already working, before Islam, for a centralized unity. We have seen how the escort system had already embraced the whole country, from Mecca to Baḥrain, from Dūmatuljandal to Maḥarah. I can go even so far as to conclude that already an economic—as distinguished from political—confederation had been accomplished in the Arabian Peninsula.² For, when we study the question of fairs in Arabia, we learn a very curious story. Muḥammad-ibn-Ḥabīb³ and al-Marzūqiy⁴ record it on the authority of Ibn-al-Kalbīy that the sequence of the fairs was as follows :

No. of months	Dates	Place
1	10-30	<u>K</u> haibar
3	1-30	Dūmatuljandal
6	1-30	al-Mushaqqar (Baḥrain, now <i>Ḥasa</i>).
7	20-25	Ṣuḥār (‘Umān)
7	30-?	Dabā (‘Umān)
8	15-?	<u>S</u> hiḥr (Maḥarah)
9	1-10	Aden (Yaman)
9	15-30	Ṣan‘ā’ (Yaman).
11	15-30	Rābiyah (Ḥaḍramawt) as well as ‘Ukāz (near Ṭā’if), simultaneously
12	1-8	<u>D</u> hu’l-Majāz (between ‘Ukāz and Mecca)
12	9-11	Minā (place of ḥajj, just outside Mecca).

(106) Looking on the map, one finds at a glance that this means a tour of the whole of Arabia, from North to East,

1. This is the title of a monograph of Wellhausen.

2. Cf. my article in Hyd. Acad. Journal, Vol. V.

3. *Op. cit.*, pp. 263-68.

4. كتاب الازمنة والامكنة, II. 161-70.

from East to South, from South to West and from West to North. Our authors have particularly mentioned that these were not local fairs but were attended by people from far-off parts of the country and even from abroad. For instance, they have mentioned that the Meccans attended the fairs of Dūmatuljandal and Rābiyah; or, that 'Ukāz was attended by Aslam, Ghāfān and others. They also mention that many of the traders went from one fair to another, naturally not to all. Again, these were the all-Arabia fairs (أسواق العرب الكبيرة);¹ otherwise there were many other important though rather provincial fairs like Majannah,² Badr,³ Ḥubāshah, etc.

(107) 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. 'Āmir-ibn-aḏ-Ḍarīb and others have left many anecdotes of their impartiality, the reason for which they were trusted and respected.⁴

(108) Among other international laws of peace in Arabia, we come across asylum and quarter (جوار),⁵

1. *Idem*, p. 161.

2. Al-Marzūqīy, *op. cit.* II, p. 161, footnote; cf. Sa'īd al-Afghānīy, *أسواق العرب* (ed Damascus). 3. Ṭabarīy, *History*, I, 1307, 1460.

4. Cf. my "Administration of Justice in Early Islam," *Islamic Culture*, (April 1937); and *اسلامی عدل گستری اپنے آغاز میں*, *Majallah 'Uthmāniyah*, XI/1-2; *Histoire de l'Organisation judiciaire en pays d'Islam* by E. Tyan, Vol. I, pp. 30-80; criticisms and additions on the above by Gaudefroy-Demombynes in *Revue des Etudes Islamiques*, April 1939; and again an article "Sur les origines de la justice musulmane," in: "Mélanges Syriens offerts à Dussauds," pp. 819-28.

5. E.g., Ibn-Hishām p. 251; Ṭabarīy, *History*, I, 1203. For details, Ibn-Habīb, *op. cit.* pp. 167-68. It is curious to note that the same word *Mawlā* has been used by the Arabs to denote the protector as well as the protected. The word *ḡār*, which is probably older still, has the same dual significance. Cf. the expressions (جارات الله and ان الله له جار). This cannot be due to lack of vocabulary or want of precision for a language like the Arabic which is nothing if it is not extraordinarily rich and precise. Nor can it be a mere accident in words more than one. To me its significance can never be too much exaggerated. For, it imports not a mere equality; it is more than that. It implies an unification, an assimilation, a re-humanization of the human society after its long feudalism. There might we search the background of the fraternity of the Faithful of the days of Islam!

refuge,¹ naturalized and domiciled aliens (موالي، حلفاء) extradition,² hospitality of foreigners,³ and even laws of shipwreck.⁴

(109) Last, but not least, I may mention in this connection the famous Order of Chivalry, *ḥilf al-fuḍūl*, inaugurated in the time of the Jurhumites and revived again during the adolescence of Muḥammad, the Prophet of Islam. Its adherents swore to side with anyone oppressed, be he a co-citizen or a foreigner, within their city limits, and not to give up his cause unless justice was done.⁵ (For other organizations, called زيادة, against the mischief of those who would not observe the months of the *truce of God*, functioning in different fair-centres, cf. *History of al-Ya'qūbīy*, Vol. I, pp. 314-15.)

(110) Obviously, the laws of war were much more developed. So, declaration of war,⁶ treatment of enemy person and property, prisoners of war,⁷ distribution of booty,⁸ special

1. Cf. ديوان الحماسة (ed. Europe, pp. 365-66) verses of Abū-Khirāsh:—

حمدت الهى بعد عروة از نجى
ولم ادر من القى عليه رداءه
خرأش و بعض الشراهن من بعض
على انه قد سل عن ماجد من بعض

I.e., I thanked God, after (the death of) 'Urwab, on the escape of Khirāsh; of course some evil is lighter than some other. I do not know who bestowed his protection on Khirāsh; anyhow he must have been the descendant of a person of stainless nobility.

2. There are innumerable cases when a vendetta was prevented thereby.

3. Wāqidīy (ed. von Kremer), p. 23

4. Al-Azraqīy, اخبار مكة (ed. Europe), pp. 106-107.

5. Ibn-Hishām, pp. 85-86; Suhailīy, الروض الاذف, I, 90-94; Ibn-Sa'd, I I, p. 41; Musnad of Ibn-Hanbal, I, 190; المذهب لابن حبيب, MS. Lucknow, *in loco*, Mas'ūdīy, التنبیه, pp. 209-10; الاغانى, *in loco*.

6. آذن بعضهم بعضا بالحرب *I.e.* they declared war on each other. (cf. كتاب بكر و تغلب MS. Brit. Mus, Or., 6492, fol. 22a, b,).

7. وكانت ربيعة لا تسبى از العرب يتسابون في النجاهلية
XII, 47: Tabarīy, History, I, 2207; كتاب الاغانى

I.e. the tribe of Rabī'ah used not to enslave the prisoners of war, while the rest of the Arabs did that among themselves, before Islam.

8. Cf. any dictionary, s. v. مرباع.

privileges of the commander of the expedition,¹ spies,² hostages (رهائن),³ truce and armistice⁴ and parley⁵ and a host of other matters, even distinctive uniforms,⁶ were treated in a more or less regularized manner, no matter how harsh or lenient.

(111) Even neutrality (اعتزال) was not unknown, and considerable material is available on the subject which we shall deal in Part IV of this monograph.

1 Cf. Abdullah-ibn-Ghanmah :

لك المرواع منها و الصفايا و حكمك والذشيطة والفضول

I.e. "To thee belongs the fourth of the booty, the chosen things from the booty, the command (or power to decide), the things captured from enemy before the general plunder, and the indivisible fractions of the booty"—quoted by the lexicon *العروس* s. v. *مردع* and by as-Sarakhsīy, *al-Mabsūt*, X 9. The commander had a right over (1) a fourth of the booty, (2) any other thing which he chose before the distribution, (3) anything captured before the general plunder, (4) any fraction which was indivisible. For the "fourth" cf. also Tabariy, *History*, I, 1710, *Der Islam*, Vol. 2.

2. They were of two kinds, viz., eye-spy (عين) and ear-spy (سمع) taken notice of even by the Qur'an.

3. *ذخائر جرير والفرزدق*, pp 93, 462 (various kinds).

4. *تاريخ البيهقوي*, I, 314.

5. *Bakr wa Taghlib*, (MS, Brit. Mus), fol 21b.

6. For instance, in the protracted war of Bakr and Taghlib, once all the members of a razzia shaved their heads except one who was proud of his fine hair, and was consequently killed at the hands of his own folk unawares.

CHAPTER X

THE PLACE OF ISLAM IN THE HISTORY OF GENERAL INTERNATIONAL LAW

(112) MODERN international law, in use practically all over the world, is in fact the law originated in Western Europe. Speaking of its history, writers habitually begin with the Greek city-States, describe the Roman period as immediately following, and then all of a sudden talk of modern times, neglecting the gap of almost a one thousand years that intervenes and asserting that during the Middle Ages: "For an International Law there was . . . no room and no need."¹

(113) We do not know much about ancient Phoenicia, which gave Greece such an elementary requirement of culture as script, nor of Īrān which was a rival of hers for centuries together. Otherwise we could have known to what extent the Greek system of international law owed its origin or modification to the influences of the city-States of the East.

(114) Again, the influence of Eastern laws on Roman law has been examined by more than one competent scholar,² and I do not propose to dwell on this topic at this moment. The main object of this chapter is to examine how far the assertion of Oppenheim tallies with facts when he states that there was no international law in Europe during the Middle Ages, that there was no need of such at that time, and that there was no intermediary link between the Roman Period and Modern Times which are separated from each other by almost a thousand years.

(115) As we know, 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

1. Oppenheim, *International Law*, I, 62 (4th ed 1928).

2. For instance, the French savant Collinet has published several monographs on the subject.

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.

(116) The chief feature of the Roman Period, on the other hand, is said to have been this, that their law applied not to people of one race but to subjects of the Roman Empire as a whole. This Roman Empire consisted, in fact, of so many States, more or less owning allegiance to Caesars yet enjoying to a great extent internal autonomy and home-rule. Whenever these different States under the sway of Caesar had some dispute with one another, the matter was referred to Rome and the decision of the Emperor, in accordance with Roman Law, was final. This is what our enthusiastic writers call the successor of the Greek system of international law and the precursor or its namesake of modern times. Perhaps one may be entitled to doubt the correctness of this statement. Why not give the name of Roman International Law to that set of rules which the Romans observed in their dealings with non-Roman countries, in times of war as well as peace? These rules might not have been very elaborate nor greatly developed to the extent of being systematized, yet they alone would legitimately be entitled to be called Roman International Law, and not that set of administrative rules which were applicable only to the component parts of the Empire itself. It would be simply a misnomer. My impression, however, is that the Roman International Law of peace was a great advance on the Greek system (*cf.* Phillipson's work); 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.

(117) The modern system of international law, however,

recognizes that a belligerent has as much right as a friendly State in time of peace; that war does curtail certain rights, nevertheless many a right of an independent State remains intact even when the parties find themselves at war with each other.

(118) How did that come about? The modern European system is said to be based upon the Roman system, and we have seen that there was nothing in the Roman Law which could have suggested this change of attitude. Is it a purely modern achievement or any influence of Christianity or anything else?

(119) Let us take Christianity first. Although the European people began to embrace Christianity very early, yet the teaching of love inculcated by Jesus ill-suited the development of international law. Matthew (v, 39) transmits as the saying of Christ the injunction: "Resist not evil, but whoever shall smite thee on the right cheek, turn to him the other cheek also." Or, (xxii, 21): "Render to Caesar the things that are Caesar's; and to God the things that are God's." And again (xxvi, 52): "Put thy sword into its place, for all that take the sword shall perish by the sword." The Gospel of St. John (xviii, 36) records: "My kingdom is not of this world." And there are similar other sayings to the same effect. The early Christian teaching was, as Prof. Nys of Belgium has so clearly described,¹ that a Christian might not only not defend himself by the use of force, but he might even not ask for the help of the law of the country to protect him against tyranny. And as Prof. Norman Bentwich has recognized: "It was the spirit of the Hebrew against the Canaanite"—and, may I add, also the movement for 'back to Rome'?—"and not the spirit of the Christian Gospel that moved the people that in the end became masters of the Roman Empire."² Further, at the time

1. *Les Origines du droit international*, p. 44: "Les préceptes de renoncement prêchés par le Christ avaient été exagérés; non seulement il avait été défendu aux fidèles de se protéger par la force, mais ils ne pouvaient même réclamer le plus légitime des appuis: ils ne pouvaient invoquer la loi de l'Etat."

2. *Religious Foundation of International Law*, p. 87.

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 ac pacis* (§ 28) as the occasion of his compiling that book (published 1625), that in his time the Christian nations of Europe behaved in their wars in a manner that even barbarians would be ashamed of.

(120) To me it is unthinkable that Christianity should have provided for the necessary change while the civilized Christian nations believed till as late as 1856 that the benefits of their international law were confined to Christian nations only; and it was no philanthropic or Christian impulse but a 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. Many people cherished the same notions even much later, and, in 1889, Woolsey¹ still insisted that international law was what *Christian* nations recognized as obligatory in *their* mutual relations only. According to a Papal bull, the Christians were not bound by their pacts with Muslims.²

(121) As Prof. Nys³ has vividly described, the Muslim occupation of Jerusalem, that cradle of Christianity, followed by the occupation of Alexandria and Antioch, the two seats of Patriarchs, and the repeated defeats of Christians at the hands

1. Th. D. Woolsey, *International Law* (4th ed., New York, 1889), *in loco*, cited by A. Rechid, *op. cit.*, p. 378.

2. For a long discussion and citations, *cf.* A Rechid, *op. cit.*, pp. 426-30; Nys, *Les origines du droit international*, p. 216. Pope Nicolas IV declared pacts with non-Christians as null and void, *cf.* Nys, p. 161. It seems that Christian theologians have never deviated from this immoral doctrine. We know that the papal delegate to the court of Vladislas, king of Hungary, had authorized him to break the treaty concluded with Sultan Murād II (1421-51) of Turkey, saying that كفاره ويريلان سوزك حكى *i.e.* "word given to infidels has no validity". (*Cf.* Ibrāhīm Haqqī, *تاریخ حقوق بین الدول*, ed. Istanbul, 1303, p. 49). Even our contemporary, Prof. L. Massignon of Paris, has found it necessary to criticize this Church doctrine, *cf.* also *infra* § 658.

3. *Op. cit.*, pp. 141-42.

of the Umayyads, the Abbasids, the Turks, and others so embittered the clergy that it led the Christian *church itself to augment the horror of war*. So much so that monks and even Popes organized crusades ; and the orders of Templars, and Hospitalers, the order of St. John and the Teutonic order and others came into being simply for the purpose of waging war against Islam.¹ Moreover, as Prof. Walker² 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.

(122) The cultural reaction of Spain and Southern Europe and of the Crusades cannot be too strongly emphasized. But there is one more aspect which must not be neglected in this connection. The earliest European writers on international law, such as Pierre Bello, Ayala, Vitoria, 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.³ Baghdād in the East and Cordova in the West stood as torch-bearers 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).

(123) Luther was a profound scholar of Arabic even as several Popes and other ecclesiastical dignitaries, not to speak of innumerable commoners that flocked into Arab Universities from all parts of Europe, and studied Arab laws and culture in their curricula. It was the Latin translation of Arabic books that supplied the educational needs of Europe for centuries.

1. Nys, *op. cit* , p. 143 ff.

2. T.A. Walker, *A History of the Law of Nations*, Vol I, p. 89.

3. Grotius, who was born in Holland and had stayed for long years in France, wonders for instance at the discovery that postliminium was known to Muslim law (cf. *De jure belli*, X, § 3, V). This shows that the Muslim International Law was studied by him and his contemporaries. (I am thankful for this reference to Mr Hans Kruse)

(124) Among the rare recognitions of the influence of Islam on the modern Western international law, at least during its formative period, I have already referred to the works of Nys, *Origines du droit international* (which, incidentally, has an Urdu translation published by the Osmania University) and of Walker. I may add to the list the set of 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. To cite him textually :

“les diverses institutions
... dans la civilisation du
Moyen age europeen por-
tent une empreinte indele-
bile sinon de leur origine
purement et simplement
orientale, due moins de leur
forte dependance des insti-
tutions militaires analogues
de l’Orient musulman.”
(p. 384)

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 depen-
dence on the analogous
military institutions of the
Muslim Orient.

He gives examples ; and further (on p. 396) he recognizes that when Arab traders came as far as Sweden and Denmark 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” (p. 395).

(125) The influence of Islam on Europe during the Middle Ages is recognized in fields of commerce, medicine, philosophy, and even certain military practices. But that is not sufficient.

(126) The question remains whether the Muslims themselves had cultivated an international law. This we have already replied to in the preceding chapters, and we know that *siyar* (international law) has ever since been taught in all Muslim schools as part of *fiqh* or Law.

(127) It is clear from this that the Muslims very early developed a science of international law, and divorcing it from political science and general law, made it an independent subject. And when we study the early Arabic works on international law and allied subjects, we have a vivid idea of the relations of the Muslims and the *Rūm* (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 come 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 Qur'ān and by the practice of the Prophet and his successors. Further, it is also to be noted that books on *jura belli* (laws of war) by Ayala and Vitoria, Gentiles and Grotius and others have no counterpart in the Roman and Greek literatures, and they are the product of an age when European erudition was not so highly developed as today. To us, therefore, they are but echoes of these Arabic works on *jihād* (war) and *siyar* (conduct in time of war and peace). There must we seek for the link between the Roman and the Modern Periods, and there must we recognize the origin of the epoch-making change in the concept of international law. And we see the role played by Islam in the world-history of international law.

(128) A retrospect of the general history of international law, in the form of a table, may be of interest :

No.	Period and example	Definite rules for	Discretion for
1	Tribal	relatives	rest of the world
2	Racial (Greek city-states)	States of the same race	”
3	National (Roman)	States in treaty relations	”
4	Religious (Jewish)	whole world excepting Amalekites	—
5	Renunciation of the world (Christian)	—	whole world
6	Golden Means (Islamic)	whole world both in war and in peace	—
7	Secular (early modern Europe)	Christian States	rest of the world
8	Materialist (actual West)	civilized, <i>alias</i> powerful states	uncivilized, <i>i.e.</i> , weak countries

CHAPTER IX

THE ETHICAL BASIS OF MUSLIM LAW

(129) IT must have been clear from the description of the origin, sources, and aim of Muslim Law that it attaches not a small importance to ethical values. In the beginning, there was one sole science which occupied Muslim intelligentsia, 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 Qur'an: history primarily to explain the allusions in the Holy Book, philology (including poetry) to explain the exact sense of the words used in it, astronomy and physical geography to find out the direction of the Ka'bah to turn towards, as also the timing for the daily religious services, grammar to standardize text and diction of the Holy Writ, and so on. This Quranic basis of all sciences controlled the latitude to be exercised by poets and others, and always checked and pruned the morbid growth of un-Islamic morality.

(130) 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 Qur'an 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 *Shari'ah* in order to contribute to the 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 (خير الامور اوسطها), 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 Qur'ān and the *Sunnah*.

(131) 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).

(132) It is true that, for Islam, the followers of all other religions are going astray, yet let us see what do even the most religious and the most orthodox of Muslim authors on international law, during the height of their worldly might, say in this respect. They are all unanimous on a basic rule of law regarding international relations, and every compendium of Muslim law repeats that *المسلم والكافر في مصاب الدنيا سواء* that is, in sufferings of this world Muslims and non-Muslims are equal and alike. One cannot transgress law and justice and good conscience on the pretext that the other party is non-Muslim; one cannot violate pledge given them on any account. Vicarious reprisals are unlawful in Islam; (for practice see later "hostages" under the chapter End of War). Or again, the Islamic institution of giving quarter to the enemy, based on the Quranic¹ command *وان أحد من المشركين استجارك* *فأجره* concerns none else than the polytheists, the most detested of all the non-Muslims by Islam. 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, since for the founders of this science the Islamic world represented one single whole; and what they wanted to codify was to establish how to deal with other, that is non-Muslim, States. Justice, even at

1. 9:6

the detriment of self-interest (Qur'an 4 : 134), such is what Islam enjoins on Muslims in all their conduct, including that in Foreign and War Offices.

(133) It is further to observe that the insistence of Muslim jurists to include the international law in the general compendia of laws as a mere chapter, cannot be emphasized too much. I mean to say, that they think that 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. For we see it included in the *المجموع* of Zaid ibn 'Alīy (d. 120 H.), that earliest extant manual or code of Muslim law. And this practice has never changed in the subsequent ages.

PART II

P E A C E

CHAPTER I

PRELIMINARY SURVEY

(134) PEACEFUL or non-hostile relations of States—in which cessation of belligerents from fighting without treaty or settlement is *not* included—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.

CHAPTER II

INDEPENDENCE

(135) 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 real criterion of independence, as far as international law is concerned, is the right to foreign relations. If this right is absolute, we call it sovereignty and independence ; if the right is qualified and restricted, but not abnegated and extinguished, we have a case of part-sovereign State ; and if the right does not exist, it will be a non-sovereign State. Apart from this real test, there are other requisites of independence which we shall describe presently.

(136) It is, however, to be noted that 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 بَيْعَة (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.¹ When the Prophet died, and the Divine connection, through revelation, ceased to exist, 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 diarchy it was the proposal of some of the original inhabitants of Madīnah, called the Anṣār, who said : Let there be one ruler from amongst us and another from amongst you, the Meccans (بينا أمير و منكم امير)²; and apparently both the rulers had to rule conjointly since it was not possible to divide the territory : or at best it implied the division of jurisdiction of the two rulers according to persons concerned, not places.³

1. Cf Wensinck, *مفتاح كنوز السنة* s.v. بَيْعَة

2. *Ibn Hishām*, p. 1016 ; *Ṭabarīy, History*, I, 1823.

3 The two rulers theory was rejected by the Muslims of that time not only on the ground of expediency but also because of the rivalries of the Awsites and Khazrajites in the Anṣār clans (cf. *Ṭabarīy, History*, I, 1843). Yet Muslim history has left several instances of which one in Ghaznah, in the dynasty of Maḥmūd Ghaznawī :

چو مورود خونهای شان برفشانند
وزان پس ازین کاروان رخت برد
پس از وی علی و محمد به تخت
علی بود فرزند مسعود را
علی و محمد دران تختگاه
نشیدم یکی روز سر لشکران
بنه سال جای پدر ملک راند
کلید جهان دیگران را سپرد
بشركت نشستند از زور بنخت
محمد پسر بود مورود را
بشركت چوراندند ماکی دوماه
ز شاهی بگردند معزول شان
i.e. When Maudūd shed their blood, he ruled in place of his father for nine years.

Thereafter he went away from this world, and handed over the keys (of the rule) of the world to others.

After him, 'Alīy and Muḥammad had the good fortune of ascending the throne conjointly.

'Alīy was the son of Mas'ūd, and Muḥammad was the son of Maudūd.

As 'Alīy and Muḥammad had ruled the country conjointly for two months, It is told that one day the heads of the army deposed them from the rulership.

(137) Strict hereditary succession, in the form of the right of the eldest son, does not seem to have ever taken deep root in Islamic polity. 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 Raḍīyah Sulṭānah of India (1236-1240) is almost unique, a case of succession of the daughter in the presence of several sons.

(138) We may conclude from this and the Orthodox Opinion that either the nomination by the reigning person of his successor or, failing this, a general election by the Pillars of the State (أهل الحل والعقد) is the rule Islam has accepted whether the nomination is that of the eldest son or not.

(139) 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.

(140) Independence is defined by Ibn Khaldūn¹ as ولا تكون فوق يده يد قاهرة (the non-existence of any [external] power to enforce its will upon him, i.e., an independent sovereign). In other words, it is the right of a State to administer all its internal and external affairs in such a way that it is neither controlled nor interfered with by any foreign power.

Futūḥus-Salātīn by 'Iṣmī, couplets Nos. 1220-25 (ed. Agra, 1938). For another, cf. *infra*, § "Regular parts of dominions and Condominiums." Cf. further, (the *Qui'ān*, 20 : 32) for diarchy : *See also ch. رسول اکرم کی سیاسی* in my book *دروشاہان در اقلیم* : مشترکہ حکمرانی زندگی ; and my article "*Le regne conjoint*" in RSO, Rome, 1953. Perhaps I may refer to a temporary modern case. After the resignation of General Najīb, President of the Egyptian Republic, the function of the head of the state was provisionally assumed by the 12 members of the so-called Council of the Revolution (cf. *Le Monde*, Paris, dated 26th Feb. 1954).

1. Prolegomena, ch. 23. *حقیقت الملک*.

(141)) The right of a State to freedom of action is but a reflection of the original freedom of every man¹ (الأصل في الناس الحرية). This freedom to conduct state affairs is only relatively complete. Absolute independence has never existed and is nowhere found in human society. 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.

(142) 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.² 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).³ Obviously, so long as religions were national, there was no possibility of conceding equality to others, even when they capitulated. The Jewish law, for instance, insisted :

When thou comest nigh unto a city to fight against it, then proclaim peace unto it. And it shall be, if it make thee answer of peace, and open unto thee, then it shall be, that all the people that be found therein shall be tributaries unto thee, and *they shall serve thee*. And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it : And when the Lord thy God

1. Sarakhīy, شرح السير الكبير, IV, 71.

2. Aristotle, *Politics*, bk. I, ch. 7.

3. Phillipson, *International Law and Custom*, I, 104.

hath delivered it unto thine hands, thou shalt smite every male thereof with the edge of the sword: But the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take unto thyself; and thou shalt eat the spoil of thine enemies,¹ which the Lord thy God hath given thee.²

(143) Islam believed, on the other hand, in the universality of the Divine call with which Muhammad was commissioned.³ 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,⁴ where His word alone (the Qur'an, in this case), and not human ambition, should reign supreme.⁵ Obviously for Islam it makes not the slightest difference whether the ruler is an Arab or a Negro⁶ provided he is a Muslim, i.e., submissive to the will of God.⁷ The Muslims considered as their own enemies only the enemies of God: the Polytheists, the Associa-

1. Cf on the contrary, the saying of the Prophet, that spoils were legalized to him for the first time, whereas in former religions they were burnt (Bukhārīy, bk *ḡihād*, ch. legalization of booty; Tirmidhīy, bk. *Siyar*, ch. booty; شرح السير الكبير, I, 15; Ṭabariy, *Tafsir*, under verses 8 : 68, 69—Ṭabariy, *Hist*, I, 1710).

2 Deuteronomy, xx, 10-14. For a contrast with Muslim law, see the Prophet's instructions in Appendix A, 1-a *infra*.

3. Cf. *supra*, part I, ch. viii, c.

4. Qur'an, 8 : 39.

5. Tirmidhīy, bk. *Fadā'il al ḡinād*, ch. من يقاتل رياء ولدنيا

”سئل رسول الله عن الرجل يقاتل شجاعة و يقاتل حمية و يقاتل رياء فای ذالك في سبيل الله ؟ قال من قاتل لتكون كلمة الله هي العليا“ -

i.e. The messenger of God was asked : “Some people fight to show their bravery and in sympathy for their relatives, and others fight for show ; which of them is to be considered in the path of God ?” The Prophet replied : “Only the one who fights in order that the word of God should prevail.”

6. Al-Kāsānīy, بدائع الصنائع VII. 99. Cf. also Bukhārīy, etc.,

ولو امر عليكم حبشي احدع *i.e.* “Obey your chief, even if it is a negro with his nose cut.”

7. Cf Qur'an, 4 : 59 “و اولی الامر منکم”

tors or the Atheists. They wanted to conquer the world, not to plunder it, but peacefully to subjugate it to the religion of "Submission to the Will of God,"—in contradistinction to racial religions admitting members only on basis of birth right—religion of which they were not the monopolizers but which was open to all the nations to embrace and become equals.¹ In a word, the Muslim aim was to spread Islamic civilization and to realize a universal *Polity* based on the equality of the Faithful and a system which provided the basic necessities of all the needy in the country, irrespective of religion, property or any other difference (cf. Qur'ān, 9 : 60, 8 : 41).

(144) Yet this did not mean that in the meanwhile they acknowledged no rights to people outside their jurisdiction. The Qur'ān enjoins peace with those who do not want to fight;² the scrupulous respect of treaties concluded with non-Muslims,³ and is emphatic on the point that the world belongs to God and He gives His vicegerency to whomever He wills.⁴

State.

(145) States have existed in human society since time immemorial, and not much has changed in the essentials of their functions ; and 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, however, is a disputed question in different schools of thought. Some trace it to the collective will of the political group, some claim Divine descent or even Divine incarnation.

(146) So far as Islam is concerned, the classical authors have been unanimous that it is a delegation of Divine authority, through the intermediary link of the Messengers or Prophets who receive Divine revelation. It may be called a

1. Qur'ān, 4 : 123, 94 : 10, 3 : 103 ; etc. Cf. also the oration of the Prophet at the Last Pilgrimage in the year 10 H. in *Ibn-Hishām*, pp. 968-70; *Yaqūbī*, II, 122-23; Jāhīz *البيان والتبيين*, II, 24 f.

2. Qur'ān. 8 : 61.

3. *Idem*, 4 : 90, 4 : 92, 8 : 72, 17 : 34, 23 : 8, 70 : 32, 2 : 117, 3 : 76, 5 : 1, 9 : 7.

4. *Idem*, 3 : 26, 6 : 134, 11 : 57, 24 : 55, etc.

theocracy though not in the same sense as in modern West. A few typical quotations from the Qur'ān 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 thy 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, Thou exaltest 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)

And scores of other verses, supported by the sayings of the Prophet¹ and Orthodox Practice, all tend to the fact that God is the King of the earth and beyond, and He delegates authority, for administration in trust, to man ; and man wields power at His will.

(147) As already remarked, States have existed before the philosophers and political scientists. I need not dilate on the minute discussions of what is a State, according to Muslim scholars, what are the essentials of the *Khilāfat* or the vicegerency of God, and allied questions which might more appropriately be discussed in the history of Muslim political thought. Here it suffices to emphasise two points, (1) acknowledgement of more than one independent State at a time and (2) acknowledgement of more Muslim States than one.

(148) Radīyud-Dīn as-Sarakhsīy records the opinion of Abū-Yusūf and ash-Shaibānīy in the following words :

لهما : الدار انما تنسب الى اهلها ثبوت يدهم القاهرة عليها

1. For instance, السلطان ظل الله في الارض i.e., "The sovereign authority (=ruler) is the shadow of God on earth" cited by Sarakhsīy, شرح السير الكبير, I, 15.

وقيام ولا يتهم الحافظت فيها (المحيط لرضى الدين السرخسى
خطبة ولى الدين فى استانبول ورق ٦٠٥ ب)

i.e. They both maintain: a territory is related to its people on account of their controlling hand over it and their establishing protective authority therein.

Regarding the second point, the diversity even of Muslim States, it is to be pointed out that, though essentially Muslims constitute but one "nation,"¹ still not all the Muslims ever lived in Islamic territory, strictly speaking. Even the Qur'an refers to it several times :

(a) "It is not for 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) be 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 folk and also a believing slave must be set free. And whoso hath not the wherewithal must fast two consecutive months. A penance from God. God is Knower, Wise.*" (4 : 92)

(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 ?" (4 : 75, 97)

1. Cf (*Ibn-Hishām*, p. 341), constitution of the Muslim State in the time of the Prophet, § 2 : انهم امت واحدة من دون الناس
i.e. They constitute one single community vis-a-vis the rest of human beings.

(149) This question of minorities is so very old.¹ Apart from the Muslim minority in foreign countries, there was, however, in the beginning no possibility of having more than one Muslim State. When Islam spread far and wide, and the Muslims did not form a compact whole with continuous and contiguous frontiers, the division of Islamic territory into many States was inevitable. As a matter of fact, we have also to admit the division caused by civil wars and successful rebellions. So much so that even classical jurists had to acknowledge this fact. Ad-Dabūsiy (d. 430 H.), for instance, is very explicit on the point :

لان الدارين في الاصل ما امتا زا الا باجراء الاحكام و تنفيذ الولايات
وكذلك الولايات المتخلفتا في دار الاسلام بين ملوك الاسلام لا تمتاز
الا بالغلبة و اجراء الاحكام -

i.e. 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 (i.e. Jurisdiction).*²

(150) With the downfall of the Umayyads, Spain became independent of the East. Later, during the decadence of the Abbasid 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 nominal allegiance to the Caliph will be dealt with in a later chapter. We shall conclude with one more instance of a curious kind. It is recorded that the Caliph Hārūn ar-Rashīd created a buffer-state in North Africa, in a country where three realms met—the Abbasid Empire, the

1. See my article on Muslim colonization, migration, repatriation and allied topics, in the time of the Prophet and his two successors, in the Hindustani quarterly, سياست of Hyderabad, July 1940, under the heading *Hijrat*.

2. Ad-Dabūsiy, كتاب الاسرار, fol. 151b, (MS. Waliuddin, Istanbul, No. 1402).

Idrisite Kingdom and the Umayyad Dominions of Spain ; and handed it over to the family of Aghlabites who exercised full independence with this exception that they recited the name of the Caliph of Baghdād in the Friday Sermons in cathedral mosques.¹

Grouping of States.

(151) A few words seem to be called forth in order to take cognizance of some modern precedents and practices :

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 the providential aid of circumstances have recently procured to them a gradual emancipation. The Dutch policy has proved least successful to retain the confidence of the Indonesians for long, and their separation seems to be complete. 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

1. Fariid Rifā'iy, *عصر الامامون*, I, 128 ff.

one day among its component members and not remain vested exclusively in the person of the ruler 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.

(152) We have seen that an independent State must be immune from foreign intervention. It may briefly be dealt with.

Intervention.

(153) 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 others' affairs. Yet there are times when intervention is justified :

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

(154) To intervene in self-defence may amount to retaliation or repudiation of the existing treaty for which sanction is forthcoming both in the Qur'ān¹ and the practice of the Prophet.² It is sometimes 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 the reason of their repatriation by the Byzantine Emperor.³

(155) Intervention on the ground of humanity, or, *in the path of God*, as the Muslim authors call it, is not unknown ; it

1 Cf. for instance, 8 : 56-58.

2. I refer to the conquest of Mecca as a direct sequence of Meccans' maltreatment of the allies of the Muslims. (*Ibn-Hiṣlām*, pp. 802 ff ; *Ṭabarīy, History*, I, 1621 ff. : and other biographies of the Prophet.)

3. *Ṭabarīy*, I, 3108.

is even upheld as the very first duty of a Muslim :

Ye are the best community that hath been raised up for mankind. Ye enjoin right conduct, and forbid indecency ; and ye believe in God.¹

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.²

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 God, etc.) but this last would testify to the extreme weakness of Faith.³

(156) The basis of intervention, however, has been provided in the Quranic *dictum*, "discord is worse than slaughter"⁴ and in the legal maxim *يختار أهون الشرين* (the lesser of two evils should be preferred.)⁵

(157) 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 *Shari'ah*.⁶ Publicly despising of the Orthodox Caliphs by some of the *Shi'ites* was also one of the authorized grounds to the Sunnis for intervention ; it was considered to amount to apostasy.⁷

(158) We must distinguish between intervention on the one hand and protest, advice, good offices, mediation and arbitration on the other. Mere protest,⁸ falling short of any

1. Qur'an, 3 : 110.

2 *Idem*, 3 : 104

3. *Ṣaḥīḥ* of Muslim, I, 50.

4. Qur'an, 2 : 191.

5. *مجملة الاحكام العدد ليه*, ch. I, maxims ; *Sarakhsīy*, شرح السير الكبير, iv, 46 ; iii, 332, etc.

6. See any law compendium ch. "Authorized grounds for waging war."

7. *فتاوى عالمگیری*, § Apostates.

8. The attitude of the Prophet (*Ṭabarīy*, *History* I, 1572) at the reception accorded to his letter and his envoy by the Emperor of Persia, may not amount to more than a mere protest and expression of disgust at the violation of international comity.

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active interference to rectify the act done, is but an expression of feeling. In advice,¹ friendly suggestion is tendered in all good faith without any sanction behind it to carry it out. By good offices and mediation,² we understand the act of maintaining contact with both the conflicting parties and providing them both with a means of negotiation and pacific settlement. In arbitration,³ both the conflicting parties place their case 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.

1 In modern times, there are more cases of this kind than in classical times.

2. For a case in the time of the Prophet, see Ṭabarīy, *anno* I, p 1265; *Ibn-Hishām*, p. 419.

3. *Ibn-Hishām*, pp. 669-70, 673 (Case of Qurayzah);—*Dīnawarīy*, pp. 169-99; —Ṭabarīy, *History*, I, 3336-38 (case of 'Ālīy and Mu'āwiyah).

CHAPTER III

PROPERTY

(159) LIKE private individuals, States, too, may and do own property.

(160) The first thing a State owns is territory. The relation of State with territory is so close that a State without definite territory is even inconceivable. Even the *de jure* rulers in exile possess defined territories to which they lay claim.

(161) By territory is here meant not only the surface of the part of the earth over which a State exercises its jurisdiction, but what is below it and what is above it, comprising thus land, water and air. Obviously, in ancient times, when science had not developed so much, 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 air, there were neither aeroplanes nor radio broadcasts, much less the sputniks. Nevertheless the Arab jurists believed that everything 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.¹ With water we shall have to deal later on.

(162) No doubt, the theocratic basis of Muslim polity denies a State absolute ownership—as distinguished from relative ownership or trusteeship for God—in territory; nevertheless for all practical purposes, there is no difference between the power of a Muslim State and those of a State which does not believe in God, regarding its territory. In view of the ultimate ownership of God, it not only implies that the human ownership of a Muslim State should be a mere trusteeship and

1. See any law compendium, ch. Waqf.

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," and whoever despises it, despises, so to say, God Himself.¹ It is to be noted, however, that in spite of this Divine appointment, the Muslim ruler is not a despot: he is, first of all, as much subject to the laws of the country, (the *Sharī'at* itself having a Divine origin, and not vaguely but in concrete form of Qur'an and Sunnah), 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 deposed² by the community on the principle that "the Hand of God is on the community" (يد الله على الجماعة)³ and that "my community cannot agree to a wrong" (لا يجتمع امتي على الضلالة)⁴ or *vox populi vox dei*.

(163) Unlike other systems of jurisprudence where the individual owns property in lands as a delegated authority or trustee, all land of a territory being vested in the State, Islamic jurists have opined that every individual owner has the same

1. Cf. Ṭayālīsīy, No. 887; Ibn-Hanbal, V, 42, 48 and especially 165.

2. Saraklīsīy, الميسوط X, 93.

و لا يبي حذيفة . . . تحت يد امام المسلمين و يده يد جماعة المسلمين

i.e. The argument of Abū-Hanīfah is that . . . it was found under the sway of the Imām (caliph) of the Muslims. And all those reasons for which a delegate is deprived of his authority . . . etc. . . . And that is the difference between the deposition and the death.

Kāsānīy : VII, 16 : و كل ما يخرج الوكيل عن الوكالة . . . فهو الفرق بين الخليفة راجعت الى اختيار : Ibn-Khaldūn, Proleg. ch. 26 —العزل و الموت *i.e.* The caliphate depends upon the choice of those people who do-and-undo.

—cf. al-Huṭai'ah (d 30 H) mourning on the murder of 'Umar :

انت الامام الذى من بعد صاحبه القى اليك مقاليد النهى البشر لم يوثروك بها اذا قد موك لها لكن لا نفسهم كانت بك الاثر *i.e.* Thou art the person whom the people confided, after the Comrade of the Prophet (Abu Bakr), with the keys of injunction: They did not give the excellence when they advanced thee, but they themselves got excellence on account of thee.—cf. 'Alīy 'Abd ar-Rāziq. الاسلام و اصول الحكم (Cairo, 1343 H)—cf. the curious opinion of Dirār-ibn-'Amr on the preference of non-Quraishites for the Caliphate, in Naubakhtīy's : فرق الشيعة p. 10.

3. Tirmidhīy, ch. في الامام.

4. *Ibid.*

Divine authority, and the supervising authority of the State is only a symbol or a manifestation of the collective authority of the community. Abū-Hanīfah, for instance, is reported to have said :

All parts of the Muslim territory are under the authority of the *Imām* (Ruler) of the Muslims, and his authority is the authority of the community of the Muslims.¹

(164) We have seen that a State always owns territory²—details of which will be given presently—yet that is not all. 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.

(165) But territory, that essence and cream of a State's property, requires further elucidation.

Baundaries.

(166) Boundaries have always been a very difficult question to settle in international intercourse. They 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.³

(167) It is a general and admitted principle of Muslim law that water will be an appurtenant to adjoining land and not *vice versa*.⁴ That is, a State which possesses a tract of land,

1. As-Sarakhsīy, *Mabsūt*, X, 93.

2 The derelict and unowned land also belongs to the State (*Amwāl* of Abū-'Ubaid, § 674, 690).

3 Muslim jurists recognize this regarding private property (*cf* any compendium under ch *كتاب الشرب*). The same must apply to international cases

4. *Cf.* Kāsānīy, *بدائع* VI, 189-90 ; and other *in loco*.

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.

(168) Obviously open sea cannot be treated as ordinary watercourse or lake. Early writers scarcely mention it in this connection. Post-classical jurists have a difference of opinion whether it should be considered as no-man's property or non-Muslim territory. In either case, they argue on the basis of control that could be exercised. Ibn-'Ābidīn, 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 :

“... 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-Ḥamawīy (d. 1098). Abus-Su'ūd, writing notes on the commentary of al-Ḥāmilīy's in verse, says that the surface of sea will be considered as non-Muslim territory. Ash-Sharanbilālīy (born 1069 H., author of *غنية زوى الاحكام فى* غنية زوى الاحكام records in his chapter on tithes that Sirāj ad-Dīn 'Umar ibn 'Alīy al-Kinānīy, known as the *Reader of al-Hidāyah*, was asked whether the Salt Sea would be considered as part of Muslim territory or non-Muslim territory ? He replied : It belongs to neither category since none has control over it. Al-Ḥaṣkafīy in his *الدر المنتقى* (compiled in 1080 as a commentary of *الدر المنتقى* by Ibrāhīm al-Ḥalabīy) opines that the Salt Sea should be included in non-Muslim territory.”¹ The same author mentions in another place :² “The author of *الذخائر* says that all that appertains neither to Muslim territory nor to non-Muslim territory should be included in non-Muslim

1. Ibn 'Ābidīn, *ردا لمختار شرح الدر المختار* III, 266-67.

2. *Idem*, II, 423-24.

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.”

(169) It is clear from this discussion that the opinion of these jurists was based on the difficulty of exercising power over it with their small sailing boats. They admit implicitly that Muslim jurisdiction extends to what they can control. In later times the Turks, for instance, have exercised their jurisdiction over the Black Sea, and no Muslim jurists have denied the validity of it.

(170) In connection with territorial waters, a saying of the Prophet, in quite general and all-embracing terms, may be referred to. He is reported to have laid down that “every land has its appurtenance forbidden [to other than the proprietor]” (انه صلى الله عليه و سلم جعل لكل أرض حريمها).¹ The rule has been developed regarding municipal law so as to apply to wells, roads, waterways, canals, houses, etc.,² yet it does not seem to have been developed and worked out so as to apply to international law, more particularly to open sea. And probably there was then no need even. 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

1. Abū-Yūsuf, الخراج p. 57; al-Kāsānīy. بدائع الصنائع VI, 195.

2. Abū-Yūsuf, *op cit.*, p. 57.

portends unto thinking folk.¹

(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.²

(171) And if the Muslim State can snatch control over part of it from anybody else, it will become part of Muslim territory. However, it is to be noted that Muslim jurists have always made a distinction between what they consider of public utility and private utility. A thing of public utility cannot be given in monopoly to private individuals :

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 particular 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.³

(172) The Prophet himself prohibited more than once the giving in jagir (fief) of things in which there is common interest.⁴

(173) International waterways and canals were contemplated in classical times, one even to join the Red Sea with the Mediterranean, never though undertaken for fear of strategic complications. I do not hesitate to maintain that, had they been projected and achieved, they would not have been different from ordinary canals and rivers, with full

1. Qur'ān, 45 : 12-13.

2. Qur'ān, 16-14.

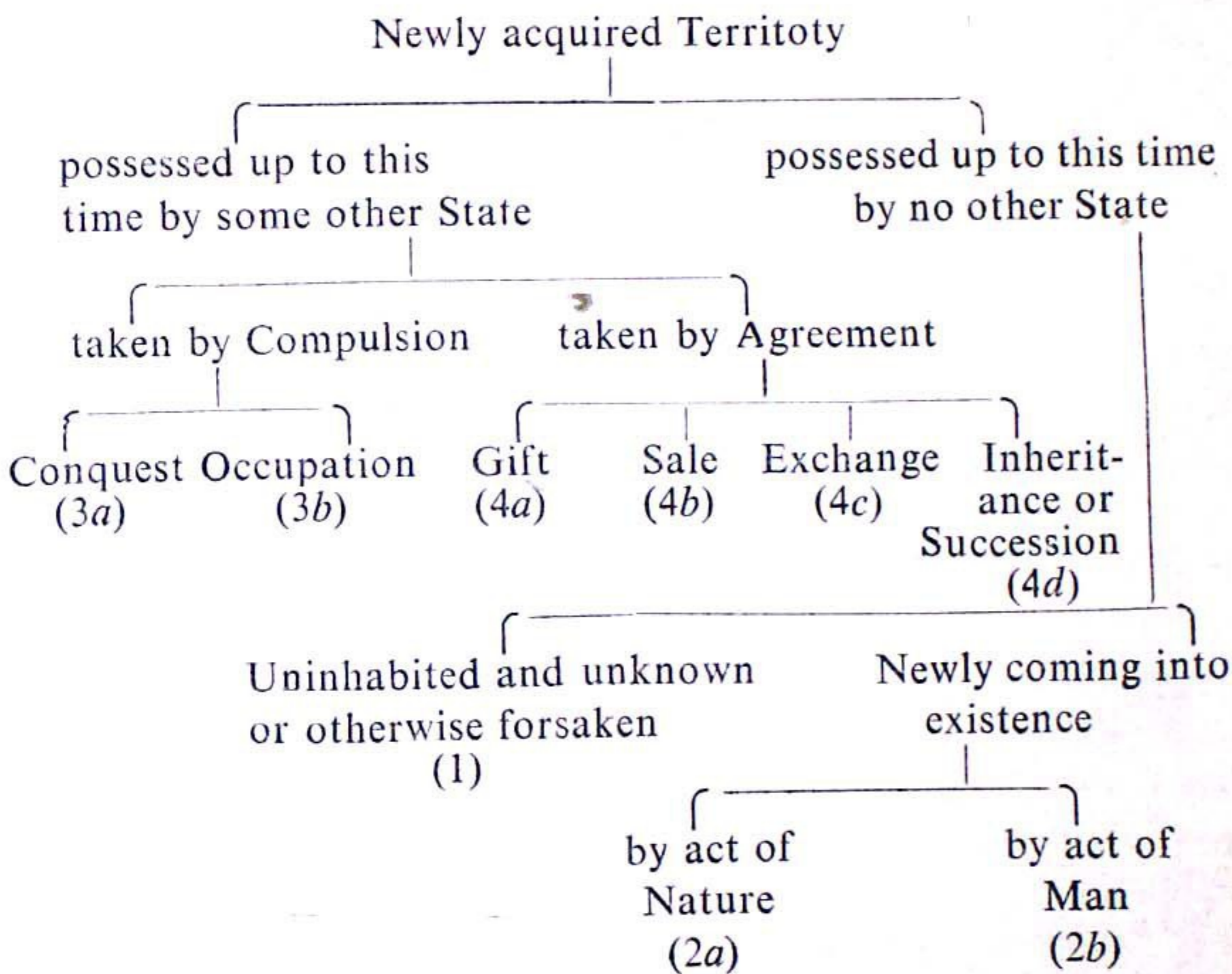
3. Abū-Yūsuf, *Kharāj*, pp. 55-56.

4. For one case cf. Ibn-Sa'd, 1/2, p. 58 and Ibn-'Abd-al-Barr, *كتاب الاموال* § 683, 693. *استيعاب* No 3431 ; for another, Abū-'Ubaid, *كتاب الاموال* § 683, 693.

exercise of jurisdiction and proprietary rights and complete control over traffic. The famous canal from Cairo to the Red Sea constructed in the time of Caliph 'Umar, suggests to us the treatment that would have been meted out to it¹ if it had been extended down to Farama² near Port Sa'id. The canals and rivers and other waterways in Muslim territories were open to all peaceful traffic, and if foreigners brought anything from their country through waterways, they were taxed with the usual dues.³

Modes of acquiring Territory.

(174) Modes of acquiring new territory by a Muslim State may be divided as follows :



1. Ṭabarīy, *History*, I, 2577; Suyūṭīy, *Ḥusn al-muḥādarah*, ch. *Khalīj amīr al-mu'minīn*.

2. Cf. Mas'ūdīy, *مروج الذهب* (ed. Egypt), I, 270; Abu'l-Fidā' *تقويم* p. 106.

3. Abū-Yūsuf, *Kharāj*, p. 78.

(175) (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. There is no case of this kind in early Muslim history except one when some Arabs reached a new and unknown island by stress of weather and afterwards related wonderful stories to the Prophet.¹ Annexation could obviously not be expected. In later travel literature, there are frequent references to discovery of new islands by those hardly Muslim sailors who dared undertake voyages from Persia and Egypt to China in tiny boats to the envy of modern navigators, but no instance of occupation is known to me. Even the discovery of America by the Arabs² has not left anything of interest from the point of view of international law except that colonization had just begun. The history of Muslim occupation of South Seas and the thousands of islands in Oceania is yet to be written to provide us with necessary data.

(176) (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. In the former, we may include islands raised up by convulsion of earth or alluvial deposits of a river or even by the change of a river's course. Artificial reclamations of water-covered areas are old enough to be mentioned by Abū Yūsuf.³

(177) If natural accretion happens within the territorial limits of one State—the nearer half of a boundary river included—and has caused no damage to any other State, it requires no formal occupation in an international sense. If an island comes up in a place where the imaginary boundary

1. *Ṣaḥīḥ* of Muslim, 52 : 119-22.

2. Cf. my article "*L'Afrique découvre l'Amérique avant Christophe Colomb*", in : *Présence Africaine*, Paris, No. 17-18, Feb-May 1958. Also Sulaimān Nadwī, *عرب اور امریکہ* (cf. the *Hindustānī* monthly *Ma'ārif*, A'zamgarh, March and April 1939 ; *Islamic Culture*, July 1939, pp 382-83).

3. *Kharāj*, pp. 52-53 (ch. Islands in Tigris and Euphrates) ; Yahyā-ibn-Ādam al-Qurashīy, *Kharāj*, p. 15.

line crosses through it, it must be proportionately divided and distributed between the neighbouring States concerned or otherwise the matters should be settled through treaty stipulations.

(178) But if the natural accretion has happened at the expense of another State—as, for instance, through change or river's course—Muslim municipal law says¹ that the accretion must go to the 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” (الغنى مع الغرم) and “injury must be removed” (الضرر يزال).² The Muslim jurists will apply the same rule to international disputes.

(179) 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 :

Thy 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).³

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 anything in their affair ; and whoso is rebellious to God and His Messenger, he verily goeth astray in error manifest.⁴

(180) There are many cases in Muslim history of a river's changing its course,⁵ ‘Amūdāryā (Oxus), for example, but whether these events ever produced interstatal complications I am unaware. I do not possess data on classical practice. In recent years there have occurred at least two cases :

(a) The *Continental Daily Mail*, Paris, dated August 1, 1948, page 2, in article “Persia Peeps,” reports to the follow-

1. شرح مجلة الأحكام العدلية Vol. I, *in loco*.

2. مجلة الأحكام العدلية ch. I, Maxims.

3. Qur'ān, 28 : 68.

4. Qur'ān, 33 : 36.

5. *Encyclopædia of Islam*, s.v. Amu-Darya : Barthold, *Turkistan*, *in loco*, (vide index thereto).

ing effect : "The other ambiguous spot is along the River Atrak, which is the official boundary between Russia and the Persian province of Gurgān. 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." I do not know the sequel.

(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 since the publication of those maps. A neutral was appointed as arbitrator in 1950, who awarded that in case of certain rivers, whose course had deviated very much, the old bed should form 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. It is to point out that the arbitrator was not a Muslim, nor did he feel himself bound by the Islamic jurisprudence, yet his decision came very near the theories of Muslim jurists of yore, minus question of compensation to the loser. In 1958, another treaty provided for exchange of territories etc. was concluded to rectify the frontiers in the same region.

(181) Artificial reclamation has nearly the same bearing. If it can be achieved without others' suffering in any way, no right of interference accrues to anybody. Otherwise, it will require previous settlement through express stipulation.

(182) (3) Forcefully acquiring a territory possessed by some other State may be either through war and conquest or even mere occupation without encountering any resistance on the part of the occupied. Mere conquest does not amount to annexation : it requires intention to annex. For it is possible that conquest and occupation were carried out on behalf of some allied and friendly State, or merely temporarily to compel the opponent State to mend some wrong. Secondly, it requires continuous and uninterrupted governance and the exercise of

sovereign rights combined with firm possession.

(183) (4) Territorial acquisition through mutual consent may either be through gift, exchange, sale or inheritance. Gifts, especially as dowries, have left many instances, at least in the history of Muslim India.¹ Exchange of territories has also occurred many a time² mostly for strengthening boundaries. An instance of sale is recorded during the reign of Caliph 'Umar II of the Umayyad dynasty, who purchased Mala iyah from the Byzantines, giving in exchange a hundred-thousand prisoners of war.³ A case of inheritance was provided for in the treaty of cession concluded between al-Ḥasan and Mu'āwiyah, by which the former handed over to the latter all his possessions on the condition that he should be declared heir-apparent to the whole dominions of the latter.⁴

Various Kinds of Territories under Power of a State.

(184) A State does not always exercise similar powers over all parts of its territory. A few instances will illustrate the point :

(a) Regular Parts of Dominions and Condominiums.

(185) Every such part of the territory of a State is under its direct control, no matter whether possessed since antiquity or newly added, whether populated or waste, civilized or nomadic and even barbarous. A State may consist at the same time of all or several of these kinds of lands.

(186) Abul-Fidā records a case of condominium which lasted for a long time (فملاكو معامدة مديدة).⁵

1. In the year 1564 the fort of Sholāpūr was handed over by Nizāmshāh to 'Adilshāh.

2. Abul-Fidā, *History*, (ed Europe), III, 264 464, 608 ; IV, 36, 56. Tippu Sultan had offered the Turks to exchange Manāgalore for Baṣrah. (Cf my paper in the first Deccan History Conference).

3. Abū-'Abdullah Muḥammad-ibn-Salāmah-ibn-Jaffar, *عيون المعارف و فنون اخبار التخلائف* (MS. Topkapsarai Istanbul, No. 2791, copied in 748 from a MS written in 422 H.), fol. 77a :—

”عمر بن عبدالعزيز . . . و اشترى ملطية من الروم بماية الف اسير و بذاتها“

4. This clause of the treaty is recorded by few, Tabariy not included.

5. Abul-Fidā, *History*, under the year 588 A. H. Cf. also *supra*, § “Independence.”

(b) Tributary Independent States.

(187) For want of a better term, we mean by this the non-Muslim States from which a Muslim State received tribute, by the exercise of compulsion. This does not involve protection by the Muslim State of the tributary State against aggression of third powers, but it secures itself from attack on the part of the Muslim State. Apart from this obligation of tribute, the non-Muslim State remains completely independent, the tribute symbolizing only a sort of inferiority and weakness. Thus, for instance, Theodomir agreed to pay yearly tribute to the Arab conquerors of the first century of Hijrah while at the same time retained his independence.¹ So also under the Abbasid al-Manṣūr and all his successors down to al-Mu'taṣim, the Emperors of Constantinople paid tribute more or less regularly to Baghdād. Caliph al-Mahdīy received tribute from the Empress Irene, and Hārūn ar-Rashīd not only received tribute but also capitation tax (*jizyah*) from the Emperor Nicephorus and his family.² Further, the epistolary etiquette of the Byzantine empire required, that the name of the Caliph should precede the name of the emperor, in the address, in spite of the fact that just the inverse order was followed when the Byzantine emperor corresponded with the kings in Europe.³ Yet in all such cases the internal and external autonomy of the tributary State did not suffer.

(188) There is even a case of dual subjection to tribute. Caliph Mu'āwiyah subjugated Cyprus and concluded peace on the condition that Cyprus should yearly pay a certain tribute

1. Gibbon, *Decline and Fall*, V, 566 ; S. P. Scot, *Moorish Empire in Europe*, Urdu trans. I, 263.

2. Gibbon, *Decline and Fall*, VI, 39-40 ; Farīd Rifā'iy, *عصر الامامون*, I, 129 ; Shibli' *الامامون* ch. Contemporary States.

3. Brehier, *Institutions de l'Empire byzantin*, p. 284 : "D'après le protocole epistolaire du *Livre des ceremonies*, le nom du calife precedait dans l'adresse celui de l'empereur, alors que l'ordre inverse etait suivi dans les correspondances avec les rois d'Occident. Le calife, designé par le titre de *diataktor* (chef, moderator) des Agarenes [=sons of Hajar, wife of Ishmael, i.e. Arabs], a droit a trois epithetes de l'honneur et la lettre qui lui est adressee est scellée d'une bulle d'or de la valeur de quatre nomismata."

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.¹ History has repeated itself in 1960, when Turkey and Greece (and in a lesser degree, England) have certain control over Cyprus getting an independent State.

(c) *Nominally Dependent.*

(189) By this we mean the Muslim independent States which came into being when the authority of the Abbasid Caliphs could not exert itself. We may include in this category even the Spanish States until 'Abdar-Raḥmān an-Nāṣir assumed the title of the "Commander of the Faithful,"² reserved for only one person at a time for the whole of the Muslim world. More 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, so much so that they gave birth to dynasties of rulers. In spite of full independence that they enjoyed, they publicly acknowledged their allegiance to the Caliph of Baghdād in the weekly Friday sermons in the cathedral mosques and also at the two yearly 'Id festivals.³ Often the name of the Caliph was struck on the coins of these States.⁴ The succession was for long considered

1. Abū-'Ubaid, كتاب الاموال, § 467; Balādhurīy, فتوح البلدان § Cyprus; cf. ibn al-Athīr, III, 74-5, 107.

2. "In the beginning they were styled as خلائف and not خلفاء" cf. Mas'ūdīy, Murūj, (ed Egypt), I, 70.

3. Ibn Hawqal, المسالك والممالك, pp. 227-28; Ibn-Jubair, رحلة, pp. 50-51. Similar seems to have been the practice of Byzantine empire: "Seul le souverain de Byzance avait droit au titre de *basileus*; seul il legiferaient pour le monde entier, tout au moins pour la cbrétiente, embrasant tout le domaine de l'Église, et son nom devait être prononcé dans les prières de toutes les église." (Brehier, *Institutions de l'Empire byzantin*, Paris 1949, p. 282-3, citing Ostrogorsky, *Byzantinische Staatenhierarchie*, in: *Seminarium Kondokovianum*, VIII, 19 6, p. 41-61.)

4. *Numismatic Chronicle*, 1885, pp. 215-27, coins of the dynasties of Ghulāman, Tughlaq, Khiljī, Lodhī, Jonpūr, Mālwah, Bengal (بھارتی چھوڑ) II, of 924) Cf. also *Catalogue of Coins in Indian Museum*, Calcutta, Vol. II, published 1907, pp. 20 ff.; *Catalogue of Indian Coins in British Museum*, part "Muslim Countries," 1885, etc.

incomplete without the charter or letter-patent of the Caliph.¹ The titles of honour were jealously and eagerly sought after.² This is true not only of the provinces of the Caliphate which became independent but also of the Muslim States founded and conquered by private individuals at their own initiative, and nevertheless they believed themselves bound to pay homage to the Caliph, such as the States in India. To this list we may add the names of States whose sovereigns embraced Islam and paid homage to the Caliph: for instance, the King of Bulgars in the year 310 H.³ In all these cases the dependence, if at all we may term it so, was more personal and institutional than political and actual. It cannot, however, be denied that the Caliph did at times exercise a moral influence over the policies of these independent States, as for instance, in the year 757 H. the influence of the Caliph was sufficient to prevent Feroz Shāh, in such a far off country as India, from attacking Mahmūd Shāh Bahmanī who had obtained intercession of the Caliph in his favour somehow or other.⁴

(190) History has recorded the curious and even paradoxical cases when some of these provincial, independent governors, sometimes even Shī'ahs, captured Baghdād, the very seat of the Caliphate, ruled over it as part of their territory and yet paid homage to the Caliph.⁵ The Aiyūbid Ṣalāhuddīn the Great was rightly and meritoriously given the proud title of "The Reviver of the Kingdom of the Commander of the Faithful" (مسي دولة امير المؤمنين).⁶

1. Muḥammad Ḥabīb, *Sultan Maḥmūd of Ghaznah*, pp. 34.
2. Even by Sulṭān Maḥmūd of Ghaznah, *Siyāsatnāmeḥ*, by Nizamul-mulk, p. 132; etc.
3. Ibn Faḍlān, (رسالة) رحلة, ed. Damascus, 1960; Yāqūt, معجم البلدان s. v. Bulghār. Even Ibn-Faḍlallāh gives in 764 H. the name of the ruler of Bulghār in the list of Muslim kings (cf. his التعريف باطصطابع الشريف, in loco).
4. 'Abdal-Jabbār, محبوب الوطن p. 239. (It is a history of South India)
5. I refer to the Shī'ah Būhids and Sunni Saljuuids.
6. Ibn-Jubair, رحلة pp. 50-51; also an epigraphic monument on the southern side of the Dome of the Rock (قبة الصخرة) in Jerusalem, inscribed by Ṣalāhuddīn the Great, visited by me in 1932.

(d) Protected States.

(191) By this we mean those part-sovereign or non-sovereign States which obey the dictates of their protector in many matters of policy, being in return entitled to protection from the suzerain and 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 addressed missionary letters to many a foreign prince in which this characteristic phrase occurred: "If you submit [*i.e.* embrace Islam], I shall leave intact the power you exercise."¹ Of those who were addressed in this way, the rulers of Bahrain and 'Umān 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. In later history of Islam, however, there are innumerable instances of protectorates with varying grades of powers exercised by the suzerain power, in India as well as elsewhere.

(e) Sphere of Influence.

(192) By this we understand a country which is marked by a State for future domination but, which it does not consider ripe enough for immediate annexation. In such cases, generally, there are either express or tacit agreements with other possible rivals who first disclaim any interest of theirs in the country concerned, and gradually all connections are severed between the sphere of influence and the rest of the world except the dominant State which at last occupies it at a proper time.

(193) There is an instance of this kind in the history of

1. With slight difference in the way of expression the same phrase was addressed to Mundhir-ibn-Sāwā of Bahrain, Hawdhah-ibn-'Alīy of Yamāmah and Jaifar and 'Abd, both of 'Umān. The phrase "Submit and you will be safe," was also addressed to the Emperors Negus, Heraclius and Chosroes. For texts see my Arabic or French *Corpus* or Ibn-Ṭūlūn, Ibn-Sa'd. Qalqashandīy, Ibn-Kathīr, etc. The expression "submit" (اسلم) may also mean *embrace Islam*.

India, probably not the only one of its kind :

در سنه تسع و ثلاثين و تسع مائة در سرحد ملاقات دارند
و بعد از گفت و شنيد بسيار چنان مقرر کردند که نظام شاه
مملکت برار و عادل شاه مملکت تلنگانه را مسخر ساختند و رکن را
میان يکديگر متساوی بخش کنند

[i.e. In the year 939 H. they (i.e., Nizām Shāh and 'Ādil Shāh) met together on the frontier, and after much negotiation so decided that Nizām Shāh should subdue and annex the country of Berar, and 'Ādil Shāh the dominion of Telenganah, thus dividing Southern India equally between each other]¹

(194) The chief point agreed upon, in this treaty, was 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.

(195) That there exist tracts of land, especially on the frontiers, where neither of the neighbouring States exercises authority has been known to classical Muslim jurists. Thus, Raḍ'y-ud-Dīn as-Sarakhsīy writes that a Muslim subject, temporarily residing in a belligerent State, may bring under his protection an enemy person to Muslim territory; and such a person will be considered as *bona fide* resident alien, because, although the protection given by a Muslim, residing in belligerent country, is void yet,

... انما لما وصل الى موضع فاصل بين الدارين لا يد ل احد
عليه فقد خرجا من منعة أهل الحرب و صبح أمان المسلم فيه
اياهما وهي لا تصير ما خوزة بدار الاسلام ما لم تصل الى موضع
يامن فيه المسلمون

[i.e. 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

1. تاريخ فرشتي (printed at Poona, 1274 H.) II, 212.

MUSLIM CONDUCT OF STATE

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).]¹

1. المحيط, Vol. I, fol. 603b (MS. Waliuddīn, No. 1356, Istanbul).

The full text is the following :

If a Muslim subject (temporarily residing in a belligerent State) returns from that country, and a belligerent woman accompanies him, and he declares: "I have given her protection, and brought her (here) under protection", legally (*qiyās*) she must be considered a war booty, because his (Muslim subject's) protection given in the belligerent territory is void, because he is overpowered under the formidable force of the belligerents, and therefore as soon as she arrives in the Islamic territory, she becomes a booty and is subject to the territory, and his protection does not operate in her favour to detriment of the right of the Muslims. Yet under equity (*istihsān*) she is free and under protection, because when he left along with her the belligerent country and continued to protect her and never renounced that protection, it was as if he accorded his protection at the very first beginning of the Islamic territory before the taking place of the right of the Muslims. For when she arrived in security in our territory, the least that can be said is that the protection of that Muslim should benefit her, because every Muslim has rights and privileges inside the Islamic territory, and therefore the right of that Muslim (to give protection) prevents the right of other Muslims (to consider her a booty). We explain: When they both arrived at a place differentiating between the two territories, where the people of neither territory has authority, the two (Muslim man and belligerent woman) 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, and she was still in the no-man's land at the time of obtaining the protection of his Muslim companion). The same would not be the case if he gave her protection (in the belligerent territory) and she came alone to the Islamic territory, for in this case the continuity of the protection and its renewal at that place (in no-man's land) would not take place.

CHAPTER IV

JURISDICTION

(196) IN time of peace many *things* as well as *persons* come 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 jurisdiction is not alike regarding each and every one of them.

THINGS

(197) There is not much to say regarding *things*. Cases arising regarding these *things* will be adjudicated by judges of the Muslim State according to Muslim law. We have dealt with the abnormal no-man's land in the previous chapter. More on the non-Muslim subjects of the Muslim State will be discussed in the following section, under *Persons*. Contracts, mortgages, etc., will also be dealt with there.

PERSONS

(a) *Muslim subjects at home.*

(198) The first category of persons does not belong to our subject except in so far as the naturalization of foreigners is concerned. According to the Qur'ānic principle that "The believers are naught else than brothers,"¹ it implies 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 the same obligations as they. We may refer in this connection to the oft-quoted instructions of the Prophet in which he commanded: "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 same obligations as they. If they refuse to migrate, inform them that they will be considered like the wandering or non-resident Muslims كَأَعْرَابِ الْمَسْجُومِينَ. 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."²

(199) I may refer to a rule which has some bearing on the question. 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 *qaṣr aṣ-ṣalāt*, is based on a Qur'ānic verse³ with many amplifications on the authority of the Prophet. I mean to emphasize that a foreign Muslim required originally only the intention of at least a fortnight's stay to become

1. Qur'ān, 49 : 10.

2. *Ṣaḥīḥ* of Muslim, V, 139-40.

3. Qur'ān, 4 : 101. Cf. also Ṭabarīy, *Tafsīr*, regarding the same verse.

a settled and regular citizen. In quite recent times, however, geographic nationalities are making certain discriminations, and even the orthodox Sa'ūdian Arabia has promulgated laws as to how a foreign Muslim may acquire citizenship in her dominions. Prevalent international conditions have necessitated that.

(b) *Now-Muslim subjects at home.*

(200) Muslim law has maintained a considerable distinction between Muslim and non-Muslim subjects. In many respects the latter are better off. They are exempt from the surplus property tax (*zakāt*)¹ which all the Muslims, male or female, young or old, pay every year at the rate of 2½ per cent on their savings, above the minimum of 200 dirhams or about (£2-10). They are also exempt from conscription,² whereas all Muslims are subject to compulsory military service. They enjoy a sort of autonomy: their cases are adjudicated by their co-religionists in accordance with their personal law.³ Their life and property is protected by the Muslim State even as those of the Muslim subjects.⁴ 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

1. *Ash-Shaibānīy*, كتاب الاصل, ch. الصلح, (MS. Ayā Sofia No. 1076, Istanbul); 'Abdal-'Azīz-ibn-Muḥammad ar-Raḥabīy, شرح كتاب النخراج لابی يوسف fol. 247b (MS Lālelī No. 1609, Istanbul); Abū-Yūsuf, *Kharāj*, p. 70. It is to recall that *zakāt* not at all means a charity, but state-tax imposed on Muslim subjects. For a detailed description, see my article: “Budgeting and Taxation in the Time of the Holy Prophet” in: Pak. Hist. Society journal, Karachi, Vol. III, (1955).

2. Cf *Ṭabarīy, History*, I, 2497, 2665.

3. Qur'ān, 5: 44-48 For practice in the time of Caliph 'Umar, see *dictionnaire d'Histoire et Geographie Ecclesiastique*, s v. Antioche, Col. 594. For rights and duties of such communal chiefs of a later time see Ibn-Fadlallāh al-'Umarīy التعريف بالمصطلح الشريف, pp. 142-46.

4. Commands of the Prophet cited by Abū-Yūsuf, *Kharāj*, p. 71.

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 exacted from the indigent ^{مساكين} 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 and blind who are 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 thy Prophet and thy cousin Muḥammad (*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 theirs is taken from them except with a duty encumbering them. For it is reported from the Messenger of God who said: 'Whoever oppresseth 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-Khaṭṭāb 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 covenant, and their life and property should be defended 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-*

Māl (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' (Qur'ān, 9 : 60)—the *poor* (فقراء) are the Muslims, and this one is an *indigent* (مسكين) from among the Scripturaries. And 'Umar remitted the capitation tax from him and his like.'¹

(201) Again, slaves are also exempted from this tax.² If the non-Muslim subjects render military service, at their will, they are exempted from it during the years of active service.³ There are instances when this tax was remitted during a whole lifetime for meritorious public service, as, for instance, the Caliph 'Umar did when a non-Muslim subject helped in selecting the site for digging a canal from Cairo to Red Sea.⁴

(202) According to a will of the Prophet, non-Muslims are not to be permitted to settle in Arabia proper,⁵ otherwise there are no 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."

(203) The question of Mecca is a bit complicated. There is a verse in the Qur'ān (9 : 28) declaring that the polytheists being impure, thenceforward they should not approach the holy mosque (of Ka'bah). To me personally, it means that the Ka'bah having been reserved as the *Qiblah* of the Muslims, non-Muslims should not be allowed to perform in the same precincts their idolatrous rites ; this and nothing more. Who does not know, that the caliph 'Umar used to receive Christian complainants even when he was delivering the sermon of the

1. Abū Yūsuf, *Kharāj*, pp. 69-72.

2. Ibn-Rushd, *بدایة المجتهد*, I, 371.

3. Tabariy, *History*, I, 2497, 2665.

4. As-Suyūbīy, *خبايع حسن المتحاضرة في اخبار مصر والقاهرة*, امير المؤمنين.

5. Cf. *supra*, part I, ch. vi. § 9.

Friday service in the mosque of the Ka'bah ?¹ Although the classical theoreticians have gone to the extent of forbidding any and every non-Muslim to live in Mecca,—exception perhaps being made in favour of ambassadors if the Muslim ruler happens to be at the moment in Mecca,—I still venture to cling to my interpretation. This for the simple reason, that classical practice is in my support : First there is the permanent possibility that a Muslim inhabitant of Mecca should own a non-Muslim slave, particularly an *Umm-Walad* (a slave girl giving birth to children of her master), and it is unthinkable that the master and the slave could not live in the same place ; secondly, there is a well-known case, of the first century of Hijrah, of a Christian physician Abū-Dīwūd 'Abdar-Rahmān in Mecca, mentioned by Ibn-Sa'd.² He was a *mawlā* (client) of Jubair-ibn Muṭ'im, and practised his profession in a shop on Mount Ṣafā just under the minaret of the mosque of the Ka'bah ; and, thirdly, Ibn'al-Qaiym (*Aḥkām ahl'adh-Dhimmah*, MS. Haiderabad-Deccan, p. 149) records several cases of the time of the Prophet and of his Companions, apparently in Madīnah and Mecca, of Christians buried at their death by their Muslim children.

(204) To expel all non-Muslims from a certain place on political grounds is another thing, and to exclude them from that place on dogmatic grounds is quite another. It was obviously the needs of the essential service of public health that prompted pious Muslims of the age of the holy Companions to tolerate the presence of a Christian physician in Mecca.

(205) In his classical biography of the Prophet, ash-Sha'mīy 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-

1. Abū Yūsuf, *Kharāj*, p. 79.

2. طبقات, V, 365 s.v. داود بن عبد الرحمن; for caliph 'Umar etc., see my article in the book *Les Pelerinages*, ed. Seuil, Paris 1960, pp. 119-20.

ibn-Umaiyyah ad-Damarīy, "who had not yet embraced Islam," as his envoy to the court of the Negus.

(206) Again, it is well-known that according to both the Shāfi'ite, al-Māwardīy and the Hanbalite Abū Ya'lā al-Farrā', 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, (obviously in a form of the government where the Head of the State is the chief executive and not a mere symbolic head having the "honour" of affixing his signature on any and every "advice" of his ministers).

(207) The famous compendium of Hanafite law, viz., *Bahr'ar-rā'iq* is explicit that the graveyards of non-Muslims should be respected as much as those of Muslims ; and just as their life, property and honour are respected in their life, so also their bones after their death.

(208) Both Abū-Hanīfah and ash-Shāfi'iy agree that if non-Muslims wish to study the Holy Qur'an or the Ḥadīth of the Prophet, or the Muslim law (fiqh), they cannot be prevented from that.

(209) Ibn-Sa'd (viii, 260, 272) records that 'Umar-ibn-'Abd'al-'Azīz 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.

(210) Social security¹ in favour of non-Muslim subjects, at the expense of the Central Exchequer, was introduced as early as the time of Abū-Bakr : In a State document (cf. *Kharāj*, Abū-Yūsuf, pp 84-85), the commander Khālid-ibn-al-Walīd informs the Caliph of the conquest of the city of al-Ḥīrah, 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

1. *Social Security in Islam*, by M. Yūsufuddīn, Congress of Orientalists, Istanbul, 1951.

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” Similar was the practice of ‘Umar when he established the famous *dīwān* of pensions.¹

(211) There is a tendency among subjects of non-governing classes to suffer from inferiority complex, and they put on, for example, same kind of dress as their rulers. This kills their own communal culture. Having undertaken to protect non-Muslim subjects, it is a kind of solicitude in their interest, that the Muslim State enjoins them not to imitate the Muslims in dress or other similar social manifestations.

(212) An interesting episode is recorded by al-Maqriziy (*Imtā’*, I, 323) that 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.

(213) The law of the capitation tax was originally laid down by the Qur’ān² regarding the Scriptuaries (أهل الكتاب or أهل الذمّة). This term is interpreted as applying to the Jews and the Christians. The Qur’ān is silent in this connexion regarding other non-Islamic creeds. The practice of the Prophet³ and that of the Orthodox Caliphs⁴ has, however,

1. Ibn Zanjūeh, كتاب الاموال (MS. Burdur, Turkey), *in loco*.

2. Qur’ān, 9 : 89.

3. As-Sarakhsīy, المبسوط, X, 119 ; Abū-Yūsuf, *Kharāj*, p. 74ff ; Ibn-Mājah, 17 : 41 ; Tirmidhiy, 19 : 31 ; Shāfi’iy, الامر, IV, 96. (Order regarding the Majūs, i.e., Parsis, and Berbers).

4. Cited by ash-Shaibānīy, الاصل, II, 141-42, (MSS. Nos. 741-46 in Wafā-Ātif, Istanbul).

decided that all non-Muslims may be tolerated as subjects. So 'Uthmān accepted capitation tax from Berbers and 'Abdulmalik from Lingayats and Brahmins of India. Abū-Ḥanīfah opines *اهل الشرك كلهم ملته واحدة* (all non-Muslims will be considered as one category). Ash-Shaibānī¹ also remarked in similar terms *الكفر مائة واحدة كلهم*—although these remarks were made on occasions other than the discussion of capitation tax. As-Sarakhsīy, after a prolonged and scholarly discussion, concludes :

“It is clear from this that the mention of the Scriptuaries in the Qur'ān is not to restrict the rule but only to show that capitation tax may be accepted from the Scriptuaries.”²

More explicit is Abū-Yūsuf :

“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.”³

(214) *Naturalization through Application*.—If some foreigners come to Islamic territory and apply for naturalization, the authorities may grant the request. In the time of Badr-ud-Dīn Ibn-Jumā'ah, when non-Muslims were granted naturalization, there was a special register in which entries were made as to their names, distinguishing features, age, and religion ; monitors (*عريف*) were appointed from among them to control their affairs and take notice of deaths, travels, returns from abroad, reaching the age of majority, and also to attend them at the time of the annual capitation tax.⁴

(215) There does not seem to be any probation period

1. *Ibid.*

2. *المبسوط*, X, 119.

3. *الخراج*, p. 73.

4. Badr-ud-Dīn Ibn Jumā'ah, *تحرير الاحكام في تدبير اهل الاسلام*, fol. 57a, ch. 17 (MS. Lālelī, Istanbul. The work has since been edited in the German Magazine, *Islamica*, Vol. VI).

suggested by jurists, yet obviously it lay with the government to decide whether to grant the request for naturalization or to reject it just in the same way as it lay with the government to grant temporary permits of sojourn.

(216) *Naturalization through Marriage*.—According to Islam, a wife acquires the citizenship of the country of her husband.¹ 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.² 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.³ His wife, however, would lose Muslim citizenship.

(c) *Muslims in Foreign Territories*.

(217) Muslim law is intensely personal, and embraces all the acts of life, no matter where. We have seen in Section (a) of this chapter that the Prophet ordered the non-resident Muslims to observe Muslim law wherever they might be. Hence the *dictum* of Abū Yūsuf⁴ المسلم ملقنم أحكام الإسلام حيث ما كان (a Muslim is to regulate his conduct according to laws of Islam wherever he may be). It goes without saying that this depends upon the liberty enjoyed in foreign countries.⁵ We shall return to this question presently. Yet it is to be said that although

1. As-Sarakhsīy, السير الكبير، شرح، IV, 115 ff.; al-Kāsānīy, بدائع الضائع VII, 110.

2. As-Sarakhsīy, *ibid.*

3. As-Sarakhrīy, السير الكبير، شرح IV, 115 ff.

4. Cited by as-Sarakhsīy, المبسوط، X, 95.

5. According to the Qur'ān (cf 12: 75). Egypt, of the time of Joseph the Patriarch, administered justice to foreigners, even in criminal cases, according to their own personal laws (and hence the enslaving of Benjamin on the authority of (من وجد في رحله فهو جزاءه كذلك نجزى الظالمين

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. And on the same basis, they acquit a foreign non-Muslim from all his acts committed in foreign territory even against a Muslim subject, such as murder or theft.¹ Dealing with the question, as-Sarakhsīy says :

If a Muslim enters the territory of non-Muslims by their permission, and lends or borrows from them money, 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 though the Muslim court 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 pre-eminent degree. All this because the Muslim took the risk and exposed himself to that when he quitted the Muslim *resisting power* *دولة*, (*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,

1. *Mab. ī t* of as-Sarakhsīy, X, 95.

on the principle that they were not under Muslim jurisdiction. So he when he did that with them; yet it is improper (مكروه) for the Muslim under his religion to violate his pledge with them, for the violation of a pledge is forbidden (حرام), and the Prophet has said: Whoever violates a pledge, a flag will be hoisted over him on the Day of Judgment 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-Mughīrah-ibn-Shu‘bah killed his companions and plundered them and brought their belongings to Madīnah, 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 thy conversion to Islam, we accept it; but as for thy 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.”¹

(218) In spite of the insistence of Muslim jurists on Muslims being bound by their own laws wherever they may find themselves, it cannot be denied that Muslims in foreign territories live there on sufferance and they are subject to twofold restrictions. Firstly, Muslim law itself reduces their legal capacity; for instance, such a Muslim cannot give quarter, during his stay abroad, to a non-Muslim so as to bind the Muslim State, which he could do had he done that in the Muslim territory.² Secondly, such Muslims have to accommodate themselves to the laws of the country where they are living. This requires some discussion.

(219) During the time of the Prophet, the Muslims had

1. As-Sarakhsīy, *Mabsūṭ*, X, 95-97.

2. *Idem*, p. 70.

taken refuge for some years in Abyssinia. This was at a time when a Muslim State was not in existence, though at the time of their return from exile one such had been established in Madīnah. 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 testify to the fact that they worshipped there according to their rites, and 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.¹

(220) On the other hand, during the same time of the Prophet the Byzantine governor of Ma'ān embraced Islam whereupon the Emperor ordered him to abjure his religion, and on his refusal beheaded him.² Muslim historians mention another case of a high church-dignitary who was lynched by the Byzantine mob on his declaration of embracing Islam.³

(221) Cases of good or bad treatment of Muslim minorities in later epochs are innumerable, some of which we shall presently mention. From all these we come to the conclusion that it depended more on the whims of the rulers, in those days, than on any fixed rules based on reciprocity and consistency.

(222) The question of Muslims in foreign countries had given rise to capitulations which require some description. But for want of precise data at present, we shall quote some passages of interest rather than deduce rules from them :

(223) (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

1. Ibn-Sa'd, I/1, p 136 ; Ibn Hishām, p. 217ff , 71ff ; Tabarīy, *History*, I, 1603 ; Ibn Ḥanbal, IV, 198 ; *Rivista degli Studi Orientali*, Vol. X (1923), pp. 90-98.

2. Ibn-Sa'd, Vol 1/2, p. 31—Ibn Hishām, p 958 For texts see my *Corpus*, or الوثائق السياسية.

3. Ṭabarīy, *History*, I, 1567.

or celebrated their services in the Mosque in Dongola, his capital. Some provisions for extraditing criminals was also made in the treaty.¹

(224) (2) In the time of al-Hajjāj-ibn-Yūsuf, when many Muslims fled from 'Irāq and wanted to take refuge in Malabar (India), the local chiefs required of them to wear local dress and observe local customs. Here is what we know about it:²

باعانت باد موافق و مخالف مختلف بنادر میں پہنچے -
 ہندو اس نئی قوم کو دیکھ کر اترنے میں مانع ہوئے - آخر میں
 نہایت عاجزی اور التماس کرنے کے بعد عہد و پیمانے کے کرائے
 کی اجازت ملی - اور وہ بنادر میں قول و قرار نامہ دے کے فروکش
 ہوئے - اقرار نامہ اس بات کا تھا کہ ہندو کی طرز روش میں رہیں
 اور لباس بھی اس دیس کا اختیار کریں - غربائے اسلام نے ہمارے
 لاجاری، بے صدق ضرب المثل "جیسا دیس ویسا بھیس" ہندو
 کا لباس اختیار کیا اور اہل اصنام کے ساتھ مل جل کر شیر و
 شکر کی طرح رہنے لگے اور مقتضائے حال کے موافق ہر ایک نے ہمیشہ
 و جرفہ اختیار کیا اور کمال ہوشیاری سے زندگی بسر کرتے تھے،
 اور اسلامی شعائر نہایت احتیاط سے ادا کرتے تھے - اذان و قرات
 قرآن اس طرح پڑھتے تھے کہ کوئی فرد ہندو نہ سنے -

That is :

[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 (the Muslims) 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 [lest they be detected]. So they performed the *adhān* (call to the religious service) and the

1. Maqrīzīy. *Khīṭat*, ed, Bulaq I, 200, or my *Corpus*.
 2. *Maḥbūb al-waṭan* by 'Abdul-Jabbār Khān, p. 40.

recitation of the Qur'ān in a way that no Hindu could hear them.

(225) (3) Muslims had penetrated in the very time of Caliph 'Umar into the seacoast of Bombay and Sindh.¹ When the Hindus recaptured Sindān, they left the mosque in the possession of the Muslim population which did not evacuate the region, where it could hold its Friday service and even pray for the Caliph.²

(226) (4) Mas'ūdīy visited India in the first decade of the fourth century of Hijra. He writes : "In the year 304, I visited Ṣaimūr (modern *Chaul*) which is part of Lār (Gujrāt) and is ruled by Balharā. The name of the prince who ruled at that time was Chancha. There were about ten thousand Muslims, including the *Bayāsirāh*, natives of Sīrāf, 'Umān, Baṣrah, Baghdād and other regions who had married there and settled there permanently. Among them were rich merchants like Musā-ibn-Ishāq as-Sandalūnīy who occupied at that time the post of *Hunermah* . . . Hunermah 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 *Bayāsirāh*, singular, *baisar*, they mean those who were born in India of Muslim parents."³ (This word *بیسر* is apparently the Arabicization of the Persian word *پسر* i.e. son).

(227) The same author says : In the whole of Sindh and Hind, there is no king who respects Muslims more than the Balharā. 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

1. Al-Balādhurīy, فتوح البلدان ch. "Conquest of Sindh"; Qudāmah-ibn-Ja'far, كتاب الخراج ch. "Conquest of Sindh" (MS. No. 1076, Koprülü, Istanbul).

2. Qudāmah, *op. cit.*, last page of the Istanbul manuscript, ch. VII, section 19.

3. *Murūj adh-Dhahab* (European ed), II, 85-86.

of their kings was due to their justice and benevolence to Muslims.¹

(228) (5) Another very old author, the navigator Buzurg-ibn-Shahriyār (of the middle of the fourth century of Hijrah) 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 *Hunarman* is like the Qādī in Muslim countries. He is selected from among the Muslims.²

(229) The same outhor tells us that once a newcomer, a Muslim sailor, violated the sanctity of a temple in Şaimūr. One of the priests caught hold of his hand and took him before the king of Şaimūr and related to him the whole affair. The sailor confessed that he had done that. The king asked the people around him: What should we do with him? Some said: Let him be trampled by elephants. Others said: Vivisect 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-Abbās-ibn-Māhān, 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 says³ ...

(230) (6) Ibn-Hauqal, too, testifies to the same custom in India as well as in many other countries. He says: Nowadays it is a Muslim who governs them (*i.e.* the Muslim colony) on behalf of the Balharā, who delegates to him the authority over them. This custom I have found in many other countries now under non-Muslim occupation, like *Khazar*, *Sarīr*, *Lān*, *Ghānah* and *Kūghah*. 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

1. *Idem*, I, 382.

2. *Merveilles de l'Inde* (عجائب الهند), pp. 160-61.

3. *Idem*, p. 143.

witnesses. If the other party agrees to it, their evidence is relied upon ; if not, they are replaced by Muslim witnesses.¹

(231) (7) Malabar had had contact with Arabs of even pre-Islamic days. Muslim colonies of the South Indian seacoast date back to the days of the Companions of the Prophet.² Malabar did not change much during the long centuries. A comparatively late author, of the time of Portuguese attacks, Zain-ud-Din al-Ma'barī, 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 that, the Muslims enjoy among the people of this country great respect and power, for it is mostly on account of them that their cities flourish. The Muslims can hold Friday and 'Īd services. They (the local chiefs) pay the salaries of the Qādīs and the Mu'azzins, help in the enforcement of the rules of the *Sharī'ah* among the Muslims, and do not allow that Friday service be suspended ; and if anybody tries to suspend it, they punish him and fine him,³ in most cities. If any Muslim commits a crime which must be punished with death according to their laws, they behead him with the permission of the Muslim chiefs. Then the Muslims take possession of the dead body, bathe it in the ritual manner, clothe it with shrouds, celebrate the death-service over it and bury it in the graveyard of the Muslims . . . They do not tax the Muslim merchants except the usual tithes, or the fines when they commit delict punishable with fines according to their laws. The agriculturists and horticulturists are not at all taxed even when they own big properties.

1. Ibn-Hawqal, *المسالك والممالك*, pp. 27-28, (2nd ed. p. 320).

2. *Revue des Etudes Islamiques* (1938), p. 104.

3. The writer of these lines witnessed similar conditions in 1939 in Aundh, a tiny Hindu (non-Muslim) State on the Western Ghats. There the Rāja functioned as the chief Qādi, and Muslims were fined by him if they neglected the congregational Friday service. For conditions in Cochin, etc., see Qādir Husain Khān's article in the *Christian College Magazine*, Madras, Nov & Dec. 1912, Jan. & Feb. 1913.

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. They do not put obstacles in the way of conversion to Islam ; on the other hand, they pay the same respect to the new convert as to the other Muslims, even when the convert belonged to the lowest caste among them. In olden times, Muslim merchants used to subscribe for the help of such a one.¹

(232) The Portuguese writer Barbarosa too assures us that in his time "foreign Muslims in Calicut had a governor of their own religion, and that the king did not meddle with them." He further assures that there was also a Shāh-Misri (? Egyptian consul). (Cf. the interesting article of W.H. Moreland, *The Shahbandur in the Eastern Seas*, in JRAS, London, 1920, pp. 517-33.)

(233) (8) Regarding China, Mas'ūdīy mentions that once a Chinese official in Khānfū oppressed a Muslim merchant, who, trusting in the justice of the ruler of the country, went at once to the capital, put on the red uniform of complainants and attended the court. In due course he was presented before the monarch who, having ascertained the story from several of his secret service officers, punished the official and, bestowing on the Muslim merchant right royal gifts, told him: If thou likest, sell thy goods to us at bargain price ; otherwise thou hast the right of final decision regarding thy goods. So, stay if thou likest, sell as thou pleasest, and return in safety wherever thou intendest to go.²

(234) (9) Another author (of as early as the third century of Hijrah) is more explicit: The merchant Sulaimān reports that at Khānfū 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

1. *تذكرة المجاهدين في بعض اخبار البرتغاليين* (ed. Lisbon), pp. 35-36/32-33 (end of part iii).
2. *Murūj* (ed. Europe), I, 307-12.

community arriving in the country. Such was the desire of the king of China. On days of festival, this chief of the Muslim conducts the service of the Muslims, pronounces the sermon and prays for the Caliph (سلطان المسلمين) therein. The merchants of Irāq cannot rise against his decisions. And in fact he acts with justice in conformity with the Qur'ān and the precepts of Muslim law.¹

(235) (10) Regarding people near the Caspian Sea, Mas'ūdīy records: In the country of Khazar, the Muslims are the elite because they constitute the army of the king. They are known there as Larshiah. They were immigrants from Khwarizm. Long ago, after their embracing Islam, a famine attacked their country and they migrated to Khazar. They are very fine soldiers and the king Khazar trusts in their prowess in his wars. They have settled in his country on conditions they have contracted, viz., firstly, open profession of their religion and mosques and the service calls (*adhān*); secondly, selection of the minister (*vizier*) from among them . . .; thirdly, 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 Qādis. In the capital of Khazar the custom is that there are seven judges, two Muslims, two Khazarites, two Christians, one for Slavs and Russians 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 Qur'ānic schools for children.² Similar privileges were enjoyed by Muslims in Lithuania and Poland in 15th-16th century.

(236) In general, Muslims temporarily residing in a foreign country are recommended very strongly, in Muslim literature of law and morals, to behave in an exemplary and law-abiding

1. *Relations des Voyages du marchand Soleyman*, (سلسلة التوارينغ) ed. Reinaud, pp. 13 14.

2. *Murūj* (ed. Europe), II, 10-12.

manner: to observe fully the conditions of their permit or passport and to refrain from any act of treachery. So much so that even if war has broken out between their local government and their home government, the Muslim subject must refrain, as long as he is staying in the enemy country, from warlike activities and treacherous deeds.¹ They must observe in all details the conditions of their passport; and avoiding treachery and violation of pledge alone they may, if possible and practicable, remove the wrong done to their co-citizens.² In one particular case, however, Muslim law is emphatic and urges the Muslims abroad to leave no stone unturned. It provides that if women and children of the subjects of the Muslim State, no matter whether Muslims or non-Muslims or even rebels, are captured by the State in whose territory the Muslim now resides, and these captives are brought into the country where he is living, he is entitled, if he likes, to renounce, first, the protection of the local government and then fight in order to relieve women and children of his compatriots.³ The greater importance of women and children lay obviously in the fact that slavery was rampant in those days and their apostatizing was more greatly feared than that of grown-up soldiers. Still two points are to be reminded. Without previous notice of renouncing the protection of the sojourn-permitting State, the act contemplated is not permissible. Secondly, the obligation to protect women and children is not confined to those of Muslims only; it applies as emphatically to all the citizens of the Muslim State irrespective of creed and status.

(237) Muslims abroad are not allowed to join forces with the local government against its foe, except in self-defence or when it is feared that the enemies of their protector State would not respect the neutrality of the resident Muslims.⁴

1. *As-Sarakhsiy, Mabsūṭ*, X, 98.

2. *Ibid.*

3. *Ibid.*

4. *Ibid.*, pp. 97-98.

In case of self-defence, there is no difference whether the State warring against the local government is non-Muslim or rebel Muslim.¹

(d) *Citizens of one Muslim State in another.*

(238) We have seen above, under section (a), that all Muslims belong to one and the same nation. We have also seen that the division of Islam into several States, hostile at times, had to be admitted by jurists by force of facts.² Very little is known, in classical times, of the special treatment reserved for such Muslims as go from one Muslim State to another. Therefore I quote the following interesting passage of Ibn-Jubair which is the only one I have come across so far :

(239) Between the old and new Cairo there is a mosque attributed to Abu'l-Abbās Aḥmad-ibn-Ṭūlūn. It is an old mosque, with fine workmanship and grand structure. Sulṭān Ṣalāḥuddīn has allotted it as the boarding-house for the poor Magharibah (*i.e.*, people of Western North Africa) 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 Sulṭān has delegated the adjudication of their cases to them and nobody is to govern them. So, they elected one of themselves and obey him and make him arbitrate in the disputes that may arise between them. They live in comfort and at ease.³

(240) There are, however, instances of individuals migrating from the 'Abbasid Empire, for instance, to Spain, and *vice versa*, scholars, traders and others, without any hardship and restriction or any privileges. The close watch on suspected spies is beyond our scope here. There are instances also of rulers sending special missions to purchase goods, manuscripts and the like. But they do not seem to have given rise to any legal arrangements for their treatment.

1. Ash-Shaibānīy, الأصل, *in loco*.

2. Cf. *supra*, ch. II, Independence, "States."

3. Ibn-Jubair رحلته, p. 52 (Gibb Memorial Series, 2nd ed.).

(241) In our own times, 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. We need not take notice of them, as they are not rules of Muslim law. In spite of all such rules, it cannot be denied, and my own personal experience testifies to it, that a foreign Muslim feels quite at home in any and every Muslim country of the world, and in 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.*

(242) So far as the practical implications of law are concerned, there is scarcely any difference between this category of foreign Muslims and the one just preceding. We have already seen in chapter 2 of this part, under *State*, that Muslim law recognizes the existence of independent non-Muslim States in peaceful relations with the Muslim State, having a Muslim minority as their citizens. We have also seen there, in the Qur'ānic quotations given, how such 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.

(243) In the time of the Prophet, a treaty of peace and extradition was concluded between the Islamic State and the city-state of Mecca, and the Prophet returned all the Muslims who came to him to seek refuge, this in spite of the fact that the Muslim minority was subjected to unbearable hardships and persecution in Mecca.¹

(f) *Resident Aliens in Muslim Territory.*

(244) Before we begin to discuss the general rules applicable to them, some preliminary remarks may be helpful in understanding the background against which they were originally set.

1. Ṭabarīy, *History*, I, 1547ff., 1551ff.

(245) In the classical times of Islam, the law of passports seems to have been that the subjects of a State with which treaty relations existed (دارالعهد) needed no extra permission from the Muslim State to enter its territory (دارالاسلام) for a sojourn.¹ Again, those foreigners of third countries who were allowed to enter a State which was in treaty relations with the Muslims, could, further, safely enter Muslim territory.² In other words, friends of friends were also considered friends. Obviously this could not apply if the third State was at actual war (دارالحرب) with the Muslim 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. So, al-Bukhārīy mentions that once a foreign non Muslim came to Madīnah with a herd of sheep and goats, apparently without any previous permit. Not only that he was not molested, but even the Prophet bought a goat of him.³ There is mention of the arrival of Nabatean caravans to Madīnah in the time of the Prophet and afterwards,⁴ and obviously they came from beyond Muslim territory, either from Syria or Mesopotamia. 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 last also applied to his belongings. Needless to add that ambassadors have always been excepted from these rules. But this last category, the subjects of a belligerent State entering

1. As-Sarakhsīy, شرح السير الكبير, IV, 133, idem, المطبوع, X, 89, referring to the classical case of Abū-Sufyān's journey to Madīnah during the truce of Hudaibīyah. But he came more as an envoy than in his private capacity.

2. Al-Kāsānīy, بدائع الصنائع, VII, 109.

3. Bukhārīy, bk. البيوع ch. المشركين ; bk. اطعمة ch. الشرى والبيع مع المشركين . من أكل حتى شبع .

4. Mas'ūdīy, تنبيه, p. 248. Abū 'Ubaid, كتاب الاموال, § 1397 ; al-Qastallānīy, المواهب اللدنية, I, 223.

Muslim territory, will be dealt with more properly in Part *iii* of this monograph.

(246) Moreover, to classical Muslim jurists, status of belligerency or friendliness is personal, not local. Thus, 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."¹ And he must be allowed safe return.² 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.³

(247) A passport could be annulled in the following cases :

1. Expiration of the prescribed period.⁴
2. Breach of conditions expressly mentioned therein as annulling the permit,⁵ or implied as such in every permit.
3. Forged passport on discovery.⁶
4. Transmitting secrets of the Muslim State to the enemy.⁷ But the mere committing of criminal acts, even of murder, did not automatically bring the passport to an end. In such cases the criminal was to be tried and punished by a court of law.⁸

(248) Generally speaking, non-Muslim resident aliens and

1. Sarakhṣīy, الميسوب, X, 89. 2. Kāsānīy, بدائع الصنائع, VII, 110.
 3. Sarakhṣīy, الميسوب, X, 88; Kāsānīy, VII, 109; Fatāwī 'Ālam-gīriyah, p. 222. 4. Kāsānīy, VII, 110.
 5. Sarakhṣīy, شرح السير الكبير, IV, 226-27.
 6. Cf Sarakhṣīy, الميسوب, X, 93.
 7. Abū-Yūsuf, Kharāj, p. 117 cf. Raḍiyud-Dīn as-Sarakhṣīy, المحيط fol 361b, (MS. Hyderabad State Library).
 8. Sarakhṣīy, شرح السير الكبير, IV, 226, المحيط لرضى الدين, المحيط السرخسى fol. 361b (MS. Hyderabad).

other visitors have been accorded by Muslim law the same status as non-Muslim subjects of the Muslim State. Ash-Shaibānī explicitly says :

“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.”¹

(249) A foreign visitor is under the jurisdiction of Muslim courts during his stay in Muslim territory,² yet he is free to indulge in certain acts penalized specially for the Muslims, such as wine-drinking. In this respect, however, there is some difference of opinion between Abū-Yūsuf and Ash-Shaibānī : the former maintaining that a foreigner would be subject to the whole of Muslim penal code with the one exception of wine-drinking, and the latter making a distinction between the infringement of what are called Rights of God (حقوق الله) and Rights of Men (حقوق العباد), 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.³

(250) Ash-Shaibānī records :

“Aṭīyah-ibn-Qais al-Kilābī reports, the Prophet has said : 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.”⁴

Sarakhsī adds :

“This is the basis for the savants of our (i.e. Hanafite) school of thought to rely upon.”

1. Sarakhsī, شرح السمعير الكبير, IV, 108, cf. p. 133 also.

2. Sarakhsī, *ibid.*

3. Cited, *ibid.*

4. Cited, *ibid.*

(251) On this basis, 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.¹ Whether for certain such acts he should be tried according to local laws or according to the laws of his own country depends upon treaty stipulations. In short, 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.²

(252) A foreign visitor will have the right to bring a suit even against a local Muslim, in the Muslim court.³ According to classical Muslim jurists, this right is not forfeited by the outbreak of war between his country and the Muslim State where he is residing.⁴ This is valid even when Muslim residents are deprived of this right. For one's burden cannot be borne by others (Qur'an, 6 : 165) and the Muslims must fulfil their promises.⁵

(253) Litigations between foreign visitors and Muslim subjects regarding debts, securities, pledges and mortgages, inheritance, wills and the like, belong perhaps more appropriately to Private International Law—for which see Appendix B—or special treaties rather than to our subject.

(254) Import customs and other taxes levied on foreigners or foreign goods may be governed by Municipal law as well as express treaties. Ash-Shaibānīy, for instance, says, if the property of the minors or women of Muslim citizenship are exempt in a foreign country from customs duties, the subjects of that State will be similarly privileged in Muslim territory.⁶

1. Sarakhsīy, شرح السير الكبير, IV, 109 ; Raḍīyūd-Dīn as-Sarakhsīy, *op. cit.*, ch. *Hukm'ul-Musta'min*, fol. 601a (MS. Walīuddīn, Istanbul)

2. Sarakhsīy, المبسوط, X, 93.

3. *Ibid.*

4. Kāsānīy, VII, 107, II, 15-16.

5. More on this in Part III, War.

6. Ash-Shaibānīy, الاصل, I, 150b, ch. *Zakāt* (MS. Wafā-'Āṭif, Istanbul).

(255) There is an aspect of the jurisdiction of non-Muslims, subjects as well as foreigners, which we shall describe in the following section, under "Special Privileges."

Extraordinary Cases in Jurisdiction.

(256) As a general rule, a territory falls under the judicial competency of the State under whose dominions it lies. But there are exceptions and extraordinary cases which will be described immediately.

(1) *Head of the State.*

(257) It cannot be denied that heads of States occupy a unique position within the realm, yet unlike many systems of law which declare that the king can do no wrong, Muslim law does not give this extreme immunity. Whatever the Muslim ruler does in his capacity of ruler, such as in the administration of justice, no suit may be instituted against him. On the other hand, if 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, for the rulers are as much subject to law as the citizens of a State. Thus it was that the Prophet heard cases against his proper person. In the time of the Caliphs, complaints were made in the court of the Qādi of the metropolis, and Abū-Bakr, 'Umar, 'Alīy and many an Umayyad and Abbasid Caliph 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. Cases of the latter kind, however, are met with during the early classical times, the Orthodox Caliphate; I have not come across such cases in later history of Islam.

(258) As the subject is rather of unusual importance, I should like to give the details of the cases, in order that the reader may have a better perspective :

(259) *The Time of the Prophet.*—All the following cases have been taken from the biography of the Prophet by

ash-Sha'mīy,¹ chapter "His giving retaliation against his own person," if not otherwise stated :

(a) Ibn 'Asākir records on the authority of Ḥabīb-ibn-Maslamah : Once the Prophet unintentionally injured the skin of a Bedouin, who claimed retaliation. Then the angel Gabriel came to him and said : O Muḥammad ! 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) Ibn-Ishāq records the following on the authority of a certain Companion of the Prophet who said : I pressed my way through on the day of Ḥunain, and on my feet were heavy sandals with which I trampled on the leg of the Prophet. He whipped me with a whip in his hand . . . The next morning he caused me to come and gave me eighty goats and said : Take this for that.

(c) Ibn-Ḥibbān records : On the day of Badr, the Prophet was inspecting his army, drawn up in files, and dressing the formation if 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. (The story is also mentioned by Ibn-Hishām, p. 444.)

(d) Ad-Dārimīy, Ibn-Ḥumaid and 'Abd-ar-Razzāq record on the authority of Abū-Hurairah and Abū-Sa'īd (al-Khudrīy) : Once there was an old man among the Meccan Muslims who wanted to have a private talk with the Prophet. The Prophet was about to start on an expedition. On the morn of the start, he mounted on his camel and wanted to go to the camp to lead the morning service before departure, when the old man stopped him and would not let him proceed before attending to him. The Prophet whipped him away and went. After the service, he turned to the assembly with a grave face

1. I have consulted the manuscript in the Qarawīyīn Mosqu, Fās.

and said : Where is the man whom I have just whipped ?— and repeated it several times. The man was terrified and began to apologize but the Prophet said : Let him approach ; and when he did so, he said : Take this same whip and take your revenge. He said : Impossible that I whip the Prophet of God ! The Prophet said : Except that you forgive !

(e) Ibn-Hanbal, Abū-Dāwūd, and an-Nasā'iy record on the authority of Abū-Sa'id al-Khudrīy who said : Once when the Prophet was distributing some booty, a man came and leaned upon him. He struck him with a baton or stick in his hand and hurt his face. Whereupon the Messenger of God said : Stand up and take thy *talion* !

(f) Ibn-Qāni' records on the authority of 'Abdallāh-ibn-Abd (? Abī) Umāmah al-Bāhilīy who said : I came to the 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.

(g) Muḥammad-ibn-'Umar al-Aslamīy records : When the Prophet was proceeding from Ṭā'if to al-Ja'irānah, Abū-Dahm was riding on his camel beside the Prophet and his sandal rubbed the leg of the Prophet and pained him. The Prophet said : Thou hast hurt my leg. Withdraw thy foot. And he whipped my leg. Abū-Dahm says : I was terrified lest something should come in the Qur'an regarding me and I should be scandalized. Although it was not my turn, I went to graze my camels that day fearing lest he should call upon me. In the evening when I collected the beasts and went to the camp, people told me that the Prophet was inquiring after me. Trembling I went to him. He said : Thou didst pain me with thy leg and I whipped thee. So take these goats as a recompense for my blow. Abū-Dahm says : The pleasure of the Prophet was dearer to me than all the world and that therein is.

(h) 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 anybody's back, let him retaliate on this my back. If I have condemned or censured anybody's honour, here is my honour to take revenge upon. If I have taken anybody'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 forgives 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.¹

(i) Swād-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 . . . (Ash-Shifā’, Qāḍī ‘Iyād, p. 311, cited by قاضى محمد سليمان in رحمة للعالمين 4th ed., I, 308.)

(i) Al-Baihaqīy, Ibn-Hibbān, at-Ṭabarānīy and Abū-Nu‘aim record : Once Zaid-ibn-Sa’nah, a Jew, came to the Prophet and claimed the immediate repayment of what the Prophet had borrowed from him, and came to strong words. ‘Umar, who was present, could not tolerate it. But on his interference the Prophet remarked : ‘Umar, you would better have advised him to claim in a proper way, and advised me to repay in a proper way.²—This has the germs of a reference by the Prophet of his own affairs to a third arbiter. However, the position of the Prophet was unique, and to Muslims utterly incapable of committing injustice even when he himself was a party to the case. The Qur’ānic verses (such as 8 : 68, 80 : Iff., etc.) which record Divine reprimand to the Prophet, testify to the same effect, signifying that God would correct him

1. Not quoted by ash-Sha’mīy. Cf. Ibn-al-Athīr, *Kāmil*, II, 241 ; Ibn-Hanbal, *Musnad*, II, 317, III, 33 ; Ṭabarīy, *History*, I, 1801-02.

2. Not in ash-Sha’mīy. I have quoted from *Shibli* سيرت النبي, II, 355-56 (2nd ed.).

at once and not let him persist in error.

(260) *The Time of the Caliphs*.—In the time of Caliphs, immediately after the Prophet, however, the principle was acted upon that party and judge cannot be in one and the same person, not even the Caliph¹ (ان الامر لا يكون قاضيا في حق نفسه). Hence, whenever 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. Cases of this kind have been recorded concerning Abū-Bakr,² ‘Umar,³ ‘Uthmān,⁴ ‘Alīy,⁵ the ‘Abbasid al-Manṣūr,⁶ the Spanish al-Ḥakam-ibn-Hishām-ibn-‘Abd-ar-Raḥmān-ad-Dākhil,⁷ and others up to modern times, all testifying to the same effect. Their details fall out of our scope here. For certain cases and discussion see also al-Māwardīy *in loco*.

(261) There is, of course, not the slightest doubt that when 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 Ghassān, may be mentioned in this connection as a classical example. He 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.⁸ There are, it is to be noted, some obscurities in this particular story, yet the principle holds good and is admitted without question.

(2) *Envoys and Ambassadors*.

(262) These will be dealt with later in a separate chapter.

(3) *International Judges and Arbitrators*.

(263) During the civil wars of the time of ‘Alīy and

1. Sarakhṣīy, *Mabsūt*, XVI, 73.

2. Ibn-Sa‘d, 112, p. 97.

3. *Ibid.* Sarakhṣīy, *Mabsūt*, XVI, 73-74; Abū-Yūsuf, *Kharāj*, p. 65.

4. Sharakhṣīy, *Mabsūt*, XVI, 74.

5. *Idem*, p. 122.

6. Al-Kindīy, *Wulāt Miṣr*, pp. 374ff.

7. Al-Maqqarīy, *نفع الطيب*, I, 557ff. (ed. Europe).

8. Ibn-Sa‘d, 112, p. 20; Shiblī, *الغاروق*, II, 179 (*Life of ‘Umar*).

Muā'wiyah, two arbitrators were appointed, one by each party. These arbiters were granted special privileges by both the belligerents, the least of which was protection of life and property. We shall revert to it in a later chapter.

(4) *Public Armed Forces.*

(264) When armed forces enter a foreign country in hostility, obviously they are not under the local jurisdiction. But the question whether camps of such armies become for the time being a part of the territory of the State to which the army belonged has been answered by Muslim jurists in the affirmative :

(i) *Muslim Army :*

(a) "If the Caliph or the governor of Syria undertakes an expedition... his camp will be considered as Muslim territory."¹

(b) "If the Muslim army enters belligerent territory, the Muslim camp will be treated as Muslim territory."²

(c) "If they retort : Is it not that 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 freed. He gets freed only when he takes refuge with the army. And the army possesses the requisite resisting power."³

(d) The Muslims are bound to protect the resident aliens in their territory. Hence, if some belligerents attack Muslim territory and take the resident aliens prisoners ; "and pass by a place where the Muslims have a 'resistance' in enemy territory, it will be incumbent upon such Muslims to help the resident aliens and relieve them just in the same way as they would do had the prisoners

1. *Kāsānīy*, VII, 132.

2. *Dabūsīy*. دارالسلام, fol. 151b (MS. Walīuddīn, Istanbul).

3. *Idem*, fol. 143a.

been non-Muslim subjects of the Islamic State.”¹

(e) “*Army* affords the same protection as *Territory*.”²

(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 had taken place in the Muslim territory ?”³

(265) But whether the entry into allied lands, with the permission of the allied State, will bring the army under local jurisdiction, is a question the definite answer of which cannot be given on the basis of classical evidence. In any case it would depend largely upon the terms of stipulation by which such armed forces are allowed to enter one’s territory, whether they should be treated as ordinary resident aliens and visitors or should enjoy autonomous jurisdiction.

(5) *Neutralized Land and No Man’s Land*.

(266) This has been dealt with to a certain extent under the chapter on *Property*; and we shall further discuss it under Part IV, *Neutrality*.

(6) *Special Privileges, Capitulations, Exterritoriality*.

(267) For commercial and other purposes of mutual benefit, foreigners have, from time immemorial, been attracted and given special privileges and inducements. It is said that as early as the sixth century before Christ, Pharaoh Amases of Egypt granted to Greeks settling in the Nile Delta the right of

1. Sarakhsīy, شرح السير الكبير, IV, 112.

2. Sarakhsīy, المطبوع, X, 94.

3. Sarakhsīy, شرح السير الكبير, IV, 132.

adjudicating their disputes by their own judges, according to their own laws, without interference on the part of the local authorities.¹

(268) The Qur'ān commanded the same to Muslim rulers regarding non-Muslims.² When the city-state of Madīnah was established with the Meccan Immigrants, Madīnite Arabs and Jews as constituting its confederal units, and with Muḥammad as the supreme chief, the Jews retained their judicial autonomy except that Muḥammad was recognized as the final judge if and when they referred their cases to him at their option.³ History records that in cases where the parties were Jewish and they appealed to the arbitration of the Prophet, he administered them their personal law.⁴ A passage of the Qur'ān may be read with interest in this connection:

If then they have recourse unto thee (Muḥammad), 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 thee 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 (5: 42-43, 68).

(269) When the Christians of Najrān (Yaman) and Ailah ('Aqabah) and the Jews of Khaibar, Maqnā, etc., submitted to the Muslim State, the Prophet conceded to them judicial

1. Cf. *Zeitschrift der Akademie für Deutsches Recht*, Munich, (October, 1926), p. 944, "Die Fremdengerichtbarkeit in Aegypten," by Dr. Walter Simon.

2. Qur'ān, 5: 43, 50, 66-69.

3. For text of the constitution see *Ibn-Hishām* or my *Corpus*, No. 1 § 42, 45.

4. For one case see *Ibn-Hishām*, pp 393-95; *Abū-Dāwūd*, II, 152; *Bukhārīy*, 61: 26, 97: 51; *Mas'ūdīy, Tanbih*, p. 247, etc. For another case see *Abū-Dāwūd*, II, 161; *Ṭabarīy, Tafsir*, V, 127; *Muslim*, 28: 15 ff; *Bukhārīy*, 44: 1; Wensinck, *مفتاح كنوز السنة* s. v. قصاص.

autonomy where the parties were of the same community. Of course when one of the parties to the litigation was Muslim, the case was tried by State courts and not by communal tribunals.

(270) During the time of the Orthodox Caliphs, the system was further developed, and we read, for instance :

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.¹

(271) Another contemporary evidence of the time when only 15 years had passed since the conquest of Syria, in the time of the Caliph 'Umar, is given by a Nestorian priest who wrote to a friend of his in the following terms :

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.²

(272) We possess greater details of the conditions prevailing during the 'Abbasid Caliphate.³ It was the same Qur'ānic principle acted upon all along, even when Sulṭan Muḥammad II conceded some privileges when he conquered Constantinople, privileges later developed into the much abused capitulations in Turkey and elsewhere in Islamic countries.

1. Karalevski, in : *Dictionnaire d'Histoire et Geographie Ecclesiastiques*, s v. Antioche, col. 594.

2. Assemani, *Bibl Orient*, III, 2, p. xcvi ; De Goeje, *Memoire sur la conquete de la Syrie*, p. 106 (2nd ed).

3. See, for instance, the instructions issued to such communal chiefs at the time of their investiture, in Ibn-Faḍlallāh, *التعريف بالمصطلح* and in al-Qalqashandīy, *صباغ الاعشى* in loco.

(7) *Extradition.*

(273) In spite of insistence by each State on its right to exercise jurisdiction over all that is situated within its territory, mutual interest often leads to the conclusion of treaties with other States for extraditing criminals. The extradition is sometimes mutual and rarely one-sided. The earliest example of this latter kind is the pact of Hudaibiyah concluded by the Prophet with the city-state of Mecca in the year 6 H. whereby: "Whoever from among the Quraishites went to Muḥammad without permission of his superior (*mawlā*), Muḥammad shall extradite him to them; yet whoever from among the partisans of Muḥammad went to the Quraishites, they will not extradite him."¹ Another classical example is that of the year 31 H., when a pact was concluded whereby the King of Nubians (*Sudān*) 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 Muslims. You shall not incline to him nor protect him."²

(274) For treaties of mutual extradition see al-Qalqashandī.³

1. For full text, *Ibn-Hishām*, pp. 747-48 or my *Corpus*.

2. For full text, al-Maqrīzī, *Khitāt* (ed. Wiet), tome 3, parti 2, pp. 290-92 or my *Corpus*.

3. صواعق العشي, XIV, 8, on the authority of al-Ghazālī.

CHAPTER V

EQUALITY OF STATUS

(275) AS far as the rights of action accruing to and duties of performance binding upon States are concerned, Muslim jurisprudence recognizes equality between the various States. But apart from this rather theoretical equality of status, real equality between States has as much been wanting in States as in individual citizens. Titles in addressing different rulers, lavishness or frugality of hospitality and general treatment meted out to them, the power and influence exercised by them—in these and a host of other matters, equality cannot be observed.

(276) For modes of addressing foreign rulers in the time of the Prophet see collections of his letters.¹ For later times, Ibn-Faḍlallāh al-'Umarī's work *التعريف بالمصطلح الشريف* (764H.), and later still the classical compendium of al-Qalqashandī, *صباح الا عشي* may be consulted with profit. Similarly the Greek work *Book of Ceremonies* by Emperor Constantine VII will inform us how the Byzantine empire behaved with regard to contemporary Muslim rulers.

(277) I may however refer to a saying of the Prophet regarding general etiquette: "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 larger number"² (يسلم الصغير على الكبير والمار على القاعد والقليل على الكثير). This lays a rule as to who should first salute. The second part of this dictum may also solve the relation of a ship to the coast by which it may be passing.

1. My *Corpus des Traités* or *الوثائق السياسية* (Cairo, 1940-41).

2. Bukhārīy, Book 79, ch. 4.

CHAPTER VI

DIPLOMACY

(278) INSTANCES of envoys temporarily sent to foreign Courts, and of secret agents posted in foreign countries, exist from time immemorial in human annals. Thus, no wonder if both these kinds of persons are found in Muslim history as early as the time of the Prophet. Apart from spies and scouts sent for military purposes, it is recorded that al-'Abbās was the secret agent of the Prophet in Mecca,¹ that Anas-ibn-Abi-Murthid-al-Ghanawīy was his agent in Awās² (near Ta'if), and that al-Mundhir-ibn-'Amr-as-Sā'idīy *alias* "A'naq liyamūt" (لعنق ليهوت) was his agent in Najd³ keeping him informed of all that passed in those countries.

(279) As self sufficiency and self-dependence grew less and less, giving place to interdependence regarding necessities and luxuries of life, States were prompted to have greater international intercourse, commercial as well as political. Classical Arabic literature on diplomacy is very scant. The only work I know is the *رسل الملوك ومن يصلح للرسالة والسفارة* (*i.e.*, envoys of kings, and who is fit to messengership and ambassadorship) by Abū-'Alīy al-Husain-ibn-Muhammad, known as Ibn'al-Farra' published in Cairo in 1947. Question of commercial intercourse has attracted even less attention of classical authors.

(280) I have not yet made any profound study of the commercial agents in foreign countries. My tentative conclusion is that intrepid traders have been used to go to foreign

1. Ibn-'Abdal-Bar, *الاستيعاب*, No. 2034; Kattāniy, I, 363.

2. Ibn-'Abdal-Bar, No. 20 (s.v. Unais); Kattāniy, *ibid*; Ibn-Hajar, *الإصابة* under *Anas*.

3. Mūsā-ibn-'Uqbah, *كتاب المغازي* (Fragment, *Staatsbibliothek*, Berlin, MS. 1554 PM 30).

countries before their own State had any diplomatic relations with them. 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*¹ and *Malik-ut-tajjār* in order to regulate the affairs and disputes of foreign traders. These developed into European consuls, during the Crusades. And thus permanent commercial agents came into existence long before permanent political agents and envoys.

(281) The Prophet himself took the initiative of giving impetus to trade and commerce even at the expense of State income. Thus it was that he abolished all inter-Provincial customs duties within the realm, and the many treaties concluded by him with tribes submitting to his authority expressly stipulate that.² Foreign trade, however, remained subject to the usual tithe or whatever percentage was stipulated for by express treaties and conventions between States.³ 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.⁴ The words *tariff* and *douane* or cognate words in European languages, borrowed from Arabic, have a history in themselves. There is an implied reference in the writings of ash-Shaibānī that sometimes the goods for trade belonging to minors or women were exempt in Islamic territories from customs duties.⁵ Again, goods of less value than 200 drachmas belonging to a person were customs-free.⁶ Abū-Yūsuf records

1. According to Moreland (JRAS, 1920, pp. 517-33) the term "shah-bandar" has had different significances in different countries and different epochs, such as a minister, a president of State, a consul and a harbour master, the first two only in the island of Sumatra and in the Far East, and the harbour masters are confined to the area between Masaulipatam (South East India) and Mocha (Yaman). Tavernier mentions a Shah-bandar even at Golconda (Hyderabad-Deccan), so far away from the sea.

2. Cf. my *Corpus*, index s.v. "dimes, et exemption de."

3. Abū Yūsuf, *Kharāj*, pp. 78, 116 (and generally the whole chapter of *Tithe* in this work as well as any compendium of Muslim law).

4. Abū Yūsuf, *Kharāj*, p. 78.

5. Ash-Shaibānī, *صواعق*, I, fol. 150b. (MS. Wafā-'Ātif, Istanbul).

6. Abū Yūsuf, *Kharāj*, pp. 76-77.

an interesting correspondence exchanged between 'Umar and his governor, Abū-Mūsā-al-Ash'arīy:

Al-Ash'arīy 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.¹

(282) Although Abū-Yūsuf has known dumping and "dearness in spite of abundance,"² he still believes in free trade, and quotes the injunctions of the Prophet not to interfere with prices.³

(283) As for diplomatic relations and representations, we have mentioned that at first they were not maintained on a permanent basis. In his *A Short History of the Saracens*, Ameer 'Ali says, however:

"When the provincial governors 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 acted as his resident agents in the Courts of Nīshāpūr, 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 Arsalān and Malik Shāh, but also in those of Nūr-ud-Dīn Maḥmūd and Salādīn [Ṣalāḥuddīn], ever active and sometimes meddlesome; occasionally as under the later Ayūbids, reconciling contending princes, and settling fratricidal strifes . . . (Cf. Abul-Fidā, the Caliph's envoy settled the dispute between the sons of al-Malik al-Muzaffar) . . .

"Each sovereign on his side maintained a commissary called Shāḥna [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

1. Abū Yūsuf, *Kharāj*, p. 78.

2. *Ibid.*, p. 28.

3. *Ibid.*

predominating influence over the source of all legitimate authority was as great at Baghdād as in Papal Rome. *Shahnas* [read: *Shihnahs*] were usually stationed, besides the capital, in places like Wāsiṭ, Bussorah, Tikrīt, etc.”¹

In an appendix, the same author says :

“The Abbaside sovereigns frequently employed a special envoy to transact confidential business with neighbouring potentates. The office was called the *Nizam-ul-Hadratain*.”²

(284) After the destruction of Baghdād by Mongols in 656 H., there is apparently another gap in the history of permanent embassies in Islamic countries; there were no permanent ambassadors at that time even in Europe.

Reception of Envoys.

(285) In the time of the Prophet, whenever a foreign envoy or delegation came, we find there was a sort of Master of Ceremonials who instructed the guests previous to their reception by the Prophet in the local formalities.³ The envoys sometimes disregarded them.⁴ 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.⁵

(286) The Prophet, when in Madīnah, used to receive foreign envoys in the Great Mosque where the *اسطوانة الوفود* (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.⁶ A good example of the contrast of the simplicity of early times as against the grandeur of later times is provided by the Byzan-

1. *Ameer ‘Alī*, pp. 407-08 (ed. 1921).

2. *Ibid.*, p. 622.

3. *Ibn-Hishām*, p. 916; Ṭabarīy, *History*, I, 1690.

4. *Ibid.*

5. Cf. *Ibn al-Athīr*, *Kāmil*, II, 359; Broomhall, *Islam in China*, p. 17, on the authority of Chinese sources, regarding the envoys of the commander, Quatibah, in 713 A. Ch. to the Chinese Court.

6. *Ibn Sa‘d*, I/1, p. 153; Maqrīzīy, *اممّاع*, I, 509.

tine ambassador to 'Umar, whom he found sleeping on the ground in the sun unattended by any courtiers,¹ and the ambassador of the same empire at the court of al-Muqtadir Billāh, at Baghdād.²

(287) Envoys generally presented gifts from their senders to the ruler to whose court they were accredited.³ 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.⁴ There are cases of the Prophet accepting the gifts of foreign potentates and using them in his official capacity—and there was no private capacity of his as is testified to by his dictum that he could not be inherited from, and whatever he possessed would go to the general exchequer.⁵

(288) The envoys, too, received gifts from those to whom they were sent. The Prophet is recorded to have willed on his death-bed that his successor should award gifts to envoys as he himself used to during his lifetime.⁶ The Prophet once gave an envoy from 'Umān 500 drachmas, at another occasion gold and silver girdles, and at other times other things,⁷ sometimes more, sometimes less, according to individual cases. 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

1. كتاب في التجار والمغازي (MS. 4075, history, Cairo), fol. 113b.

2. Al-Khatīb al-Baghdādīy, تاريخ بغداد, I, 100-05.

3. Sherūeh-ibn-Shahriyār ad-Dailmīy رياض الانس لعقلاء الانس (MS. 48, history, Cairo), fol. 39b; Tirmidhīy, ch. قبول هدايا المشركين; Tabarīy, *Hist.*, I, 2163; Ibn Hishām, p. 958; my الوثائق السياسية No. 24, 28b, 50; Ibn Sa'd, 1/1, pp. 151-2, for presents from Muqawqis and Farwah etc. to the Prophet.

4. Tabarīy, *History*, I, 2822-23; Ibn-al-Athīr, *Kāmil*, III, 74.

5. Tabarīy, *History*, I, 1826.

6. Bukhārīy, 56: 176; Kattānīy, I, 451.

7. *Ibn-Sa'd*, 1/2, pp. 40, 43, 66; Tabarīy, *History*, I, 1574; Kattānīy, I, 390.

coffers.¹

(289) The envoys are officially entertained. There were several large houses in Madīnah, in the time of the Prophet, specially meant for foreign guests. There is often mention of the house of Ramlah-bint-al-Ḥārith in *Ibn Sa'd*, in this connection.² Another house was known as the Guests' House (دارالضيغان).³ No wonder when the Prophet took special pains personally to entertain the envoys of Abyssinia,⁴ 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.⁵

Privileges of Envoys.

(290) Envoys, along with those who are in their company, enjoy full personal immunity: they must never be killed,⁶ nor be in any way molested or maltreated. Even if the envoy, or any of his company, is a criminal of the State to which he is sent, he may not be treated otherwise than as an envoy. The envoys of the impostor Musailimah provide good law to whom the Prophet had said: Had you not been envoys, I would have ordered you to be beheaded.⁷

(291) Envoys are accorded full freedom of prayer and religious rites. The Prophet allowed the delegation of the Christians of Najrān to celebrate their service in the very

1. عن محمد: هدية ملك، فتاوى عاتكيريّة، Vol. III, pp. 265-66. According to al-Marghīnānīy (اهل النجرب يصير فيثا للمسلمين الذخيرة البرهانية) MS. Yanijāmi', Istanbul, ch. 18), however, envoys sometimes were allowed to appropriate what they received as gifts.

2. *Ibn-Sa'd*, ch. *wfūd*; Kattānīy, I, 445ff.

3. Kattānīy, I, 445.

4. 'Abd-al-Bāqī, الطراز المنقوش، pp. 45-46.

5. Ḥasan-ibn-'Abdallah, آثار الاول في ترتيب الدول (compiled 708 H.) كل رسول على مقداره و مقدار مرسله.

6. *Ibn-Hishām*, p. 965; *Ibn-Ḥanbal*, I, 390-91, 396, 404, 406; *Abū-Dāwūd*, I, 275.

7. *Ibid.*, also Sarakhsīy, *Mabsūt*, X, 92.

Mosque of the Prophet. Muslim historians mention as a curiosity that these Christians turned their faces towards the East and prayed.¹

(292) Envoys may only in extraordinary cases be detained or imprisoned.² So, the Prophet detained the plenipotentiaries of Mecca until the Muslim ambassador detained in Mecca returned safe to Hudaibiyah where the Prophet was camping.³

(293) An interesting case is reported by Abū-Dāwūd, (*Sunan*, ch. Jihād, § 162) that once—apparently soon after the battle of Badr in the year 2 H.—the Meccans sent Abū-Rāfi' as their envoy to see the Prophet in Madinah. He embraced Islam and did not want to return to Mecca. The Prophet said: "I do not violate the pledge, nor detain the envoys; so return; and if thy present inclination of mind continues, thou mayst come back. He did so." It is to note that Abū Rāfi' was a slave at that time, as is reported by Ibn Hishām (p. 460).

(294) The property of the envoys is exempt from import duties in Muslim territory⁴ if reciprocated.⁵ So, ash-Shaibānī says,⁶ if the foreign States exempt Muslim envoys from customs duties and other taxes, the envoys of such States will enjoy the same privileges in Muslim territory; otherwise they may, if the Muslim State so desire, be required to pay ordinary dues like foreign visitors.

Peaceful Settlement of International Differences.

(295) The object of diplomacy is peaceful solution of international questions and promotion of harmony between different States. It is immaterial whether the differences between

1. *Ibn-Hishām*, p. 402; *Ibn Sa'd*, I/2, p. 85.

2. For a detailed discussion cf. *Sarakhsīy*, شرح السير الكبير, IV, 320.

3. *Halabīy*, انسان العيون III, 26; *Karāmat 'Alī, Sirah*, ch. *Hūdaiyah*; *Daḥlān, Sirah*, II, 46 فتحيست قريش عثمان (رضه) فتحيست. *i.e.* The Quraishites detained Suhail.

4. *Abū-Yūsuf, Kharāj*, p. 116.

5. *Sarakhsīy*, شرح السير الكبير, IV, 67.

6. *Ibid*

States are legal or political or otherwise. We are concerned here only with the modes of their settlement, which are of various kinds :

(296) *a.* The first and the simplest kind is mutual negotiation. This is done through permanent or special and extraordinary envoys. This need not be discussed in any detail.

(297) *b.* Conciliation, mediation and good offices. By these different terms we understand a third party, friend to both the contending States serving as channels for mutual negotiation and tendering friendly suggestions and advice to bring the disputants to an amicable settlement of their relations. Ibn-Hishām records that in the year 1 H. the first, or at least one of the first expeditions the Prophet despatched against the caravans belonging to the city-state of Mecca—then at war with Islam—was headed by Ḥamzah, who encountered the enemy near the seacoast of Yanbū‘. Abū-Jahl was leading the enemy party. A fight was imminent but Majdīy-ibn-‘Amr, who was an ally of both the States, Muslim as well as Meccan, intervened with mediations ; and both the detachments parted from each other quietly.¹ We may also refer to the case of Ubaīy-ibn-Salūl, who, although a Muslim subject, in his capacity as an old ally of the Jewish tribe of Qainuqā‘, interceded with the Prophet on their behalf, and the Prophet granted him his request.²

(298) *c.* The third and the most important kind is arbitration. This means the determination of a difference between two States through the decision of one or more umpires chosen by the parties *حكمه تحكيمًا : امره ان يتحكم بينهما و اجاز حكمه* ³ *i.e.* To say “he made him a ḥakam (arbitrator)” means, he ordered him to give an award (decision) between them and accepted that his award would be executed as between them. 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 Banū-Quraiẓah after their capitulation

1. *Ibn Hishām*, p. 419.

2. *Ibid.*, p. 688 ; Ṭabarīy, *Hist.*, 1491.

3. See lexicon *Tāj al-‘urūs*, s.v. taḥkīm.

on the condition that a certain person should decide their lot. The Prophet accepted it, and carried out the arbitral award fully.¹ Another case, rather complicated, is the following. The tribe of Banū'l-'Anbar, a branch of the Tamīmites of Eastern Arabia, was politically independent and at the time of the incident under discussion had not yet embraced Islam. Historians report that, owing apparently to lack of rain in its own territory, it came to the territory of the tribe of Khuzā'ah (which was Muslim and lived inside the Islamic State) for purposes of grazing. When the tax collector, sent by the Prophet, came to this region, he exacted from the 'Anbarites same tax as from Muslim citizens. They opposed it with arms, and the tax collector had to flee to Madīnah. The Khuzā'ites thought it prudent to ask their troublesome guests to quit the territory, which they did. Some days later, when they were still on the march, the detachment sent by the Prophet overtook them, made some prisoners and returned to Madīnah while the rest of the 'Anbarites escaped all pursuit. Not long after, a delegation of the 'Anbarites came to Madīnah, and was persuaded to embrace Islam. Then they spoke about their kinsmen who were made prisoners of war by the punitive expedition. The Prophet would have strictly been within his rights if he had refused any clemency for acts committed before their conversion, yet he made a gesture: he left the matter in the hands of one of the members of the delegation, and said whatever award he would give would be executed. This arbitrator decided that half of the prisoners should be freed gratuitously and the rest should be liberated on payment of customary ransom for prisoners of war. (Cf. *Imtā'* of Maqrīzīy, I, 434-39.) The famous arbitration between 'Alīy and Mu'āwīyah is another classical example, the document containing the terms of reference in this case having come down to us *in toto*.² The question was who should succeed to the Caliph 'Uthmān who

1. *Ibn-Hishām*, pp. 688-89; Abū-Yūsuf, *Kharāj*, p. 124.

2. For text see Ṭabarīy, *Hist.*, I, 3336-38; ad-Dīnawarīy, *الأخبار الطوال* pp. 196-99; or my *الوثائق السياسية*.

had been murdered. 'Alīy being elected by the people of Madīnah, and Mu'āwīyah, who was governor of Syria, contending its validity and himself standing as a candidate. The arbitrators had agreed among themselves that both 'Alīy and Mu'āwīyah should be desposed, 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 'Alīy pronounced that he deposed both 'Alīy and Mu'āwīyah so that a new Caliph might be elected and the Muslim community once more united. After him stood the arbitrator nominated by Mu'āwīyah, 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 Mu'āwīyah, however, would not depose his client ; on the other hand he confirmed him in his position. As the arbitrators had no agreed award, 'Alīy did not feel himself bound by the award and he did not abide by it.¹ Civil wars would have again ensued had not 'Alīy been assassinated by an anarchist.² In an interesting passage, Abū-Yūsuf says what applies admirably to the case of 'Alīy :

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.³

(299) According to Abū-Yūsuf, the following categories of people are not fit to be selected as arbitrators, *viz.*, Muslims punished for scandalizing respected ladies (قذف), minors, women, slaves, blind people, the immoral (فاسق), men of

1. Cf. any Islamic History regarding events before 40 H.

2. Abul-Fidā', *Hist.* I, 364, قبيل كان على قبيل موته بايعه اربعون ألفا من عسكرة على الموت واخذ في التجهيز الى معاوية *i.e.* It is said that some time before the death of 'Alīy, forty thousand people swore him to fight till death ; and 'Alīy was preparing to march against Mu'āwīyah.

3. Abū-Yūsuf, *Kharāj*, p. 124.

suspected or notoriously bad conduct (صاحب ريبة و شر), 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.¹ According to our author an arbitrator must be :

انما يتخير في هذا و يقصد اهل الرأي والدين و الفضل و الموضع من المسلمين و من كانت له حياطة على الدين - فاما من لا تجوز شهادته . . . فكيف يتحكم في هذا -

[i.e. 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?] ²

(300) Abū-Yūsuf 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. For al-Kāsānīy³ is explicit that a non-Muslim subject can be accepted as arbitrator, and the trend of his argument bears little doubt that, according to him, even neutral non-Muslims may be accepted as arbiters.

(301) Abū-Yūsuf says⁴ that awards to the effect of maintaining *status quo*, futile in themselves, are void and are equivalent to saying: We do not accept arbitership. So, too, awards for returning Muslims into the subjection of non-Muslims are void. He is so emphatic on the point that, according to him,⁵ if the other party to the arbitration had brought to the Muslim camp Muslim prisoners, slaves of Islamic faith, and Muslim subjects of the other non-Muslim party, these will not be allowed to return to the non-Muslim territory, for "the arbitral award does not allow the return of Muslims to

1. Abū Yūsuf, *Kharāj*, pp. 125-26.

3. الصنائع, VII, 108.

5. *Ibid.*, p. 126.

2. *Ibid.*, p. 125.

4. *Kharāj*, p. 124.

belligerent and infidel territory." But his opinion is not shared by other jurists on the higher authority of the practice of the Prophet who expressly consented to return Muslims under the treaty of Ḥudaibīyah. If for the death of the arbitrators or disagreement between them, an arbitration fails, *status quo* must be restored and no undue advantage be taken of the other party's sense of security and consequent neglect.¹

1. *Kharāj*, p. 124.

PART III
HOSTILE RELATIONS

CHAPTER I

PRELIMINARY REMARKS

(302) A TRADITIONAL connexion is traced between war and Islam by interested savants. It will be interesting to note what Islam has contributed to mitigate the horrors of war and make it more humane. The Prophet of Islam is reported to have said: "I am the prophet of mercy, I am the prophet of battle."¹ (انا نبي الرحمة انا نبي الملائحة) And again: "Both I smile and I fight."² (أنا الضحك القتال) These two *obiter dicta* may be taken as striking the keynote of the whole Muslim law of war.

1. Ibn-Taimīyah, السياسة الشرعية, p. 8; Dhahabīy, التاريخ الكبير, I, fol. 40. Cf. Tabarīy, Hist. I, 1788, (نبي التوبة) والملائحة; Māwardiy, الاحكام السلطانية, ch. IV: "بعثت مرغمة و مرحمة".

2. Ibn-Taimīyah, *ibid.*

CHAPTER II

VARIOUS KINDS OF HOSTILE RELATIONS

(303) BEFORE we begin with the laws of war, it is to be noted that the hostile relations of two or more States do not always amount to war. More often than not 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. These relations must be dealt with first.

1. Reprisals.

(304) These signify a forcible mode of redress by which often a resort is made to the so-called *lex talionis*. Such are 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. In this connexion 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]. (2 : 194.)

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 whoso 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. (42 : 40-42. Cf. 10 : 28, 40 : 40.)

(305) The expedition of Mu'tah¹ was intended for similar

1. Ṭabarīy, *Hist.*, 1, 1610; *Ibn-Hishām* p. 791ff.; *Ibn-Sa'd*, 2/1, 92; Mas'ūdīy, *Tanbih*, 265. (The expedition of Mu'tah was in fact a reprisal for the assassination of a Muslim envoy by a Ghassānid chief.)

purposes. The plenipotentiaries of the Quraish were detained, after the conclusion of the treaty of Ḥudaibīyah,¹ on the same grounds. In later Islamic history such cases abound.

2. *Pacific Blockade.*

(306) This means a blockade of the port or ports of the enemy and the preventing of all ingress or egress, but no bombardment. This blockade has for object the obtaining of redress. This is a later occurrence, and I could not find an earlier instance than 1866-68, when the Turks, during a rebellion, blockaded Crete and thus crushed the insurrection. The note of Muṣṣafā Pāshā may be referred to in this connexion with profit.²

3. *Miscellanea.*

(307) In modern times, other kinds of hostile activities falling short of war are to be noted, for instance, the breaking off of diplomatic relations, postponement of the enforcing of treaties, economic pressure and a variety of other things.

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

1. Ḥalabīy, *Insān*, III, 26 ; Daḥlān, *Sīrah*, II, 46.
2. Holland, *Studies in International Law*, p. 135.

CHAPTER III

NATURE AND DEFINITION OF WAR

(309) I NEED not enter into any philosophical or historical discussion of war. It may, however, briefly be noted that Muslims, too, think of war only as unavoidable, not as desired or to be sought after. The Qur'ān says: "And if they incline to peace, incline thou also to it, and trust in God."¹ 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."² A Ḥadīth of the Prophet goes: "Do not be eager to meet the enemy, but ask God for safety. Yet if you meet them, persevere and have patience; and know that Paradise is under the shadows of swords."³ 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 say: O God! Suffice for us, and keep their might away from us!"⁴

(310) A later Muslim author strikes an interesting note by saying:

الحروب هي العوارض من حوادث الزمان كالامراض كما ان
الامن والسلامة كالصحة للجسار فيجب حفظ الصحة بالامور
السياسية و دفع المرض بالامور الحربية والاشتغال بتحفظ الصحة-

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

1. Qur'ān, 8 : 61.

2. Qur'ān, 47 : 35.

3. Bukhārīy, 56 : 112, 156 ; 94 : 8 ; Ṣaḥīḥ of Muslim, V, 143 ; Abū Dāwūd, 15 : 89 ; Dārimīy, 17 : 6 ; Ibn-Ḥanbal, II, 490, 523 ; IV, 353.

4. Ibn-Qutaibah, 'Uyūn al-Akḥbār, I, 107 (ch. Kitāb al-Ḥarb).

self in preserving health.¹

Definition of War.

(311) An old Muslim jurisconsult, al-Kāsānīy, defines *jihād*, or the war of the Muslims, thus: “*jihād* 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.”² The same thing is repeated in different words by practically all the later Muslim writers on Muslim law, but no one mentions in the definition who it is who will undertake a war: the public or the government? Incidentally, the question is answered in the course of other discussions. So the fact that the *jihād* is not considered as a personal duty (فرض عيّن) to be observed by each and every individual (cf. *cf.* *فلاولا نفر* the Qur’ān, 9 : 122), but only a general duty (فرض كفاية) which, if accomplished by a sufficient number, the rest will no more be charged with the neglect of that duty,—this fact renders the administration of *jihād* entirely in the hands of the government. The practice of the Prophet also shows that either he himself organized the expeditions or delegated its authority to responsible governors or tribal chieftains. —(Cf. *Ibn-Hishām*, p. 954.) As for jurists, Abū-Yūsuf, the Chief Qādī of Hārūn-ar-Rashīd, says: No army marches without permission of the Caliph لا تسرى سرية بغير اذن الامام.³ Al-Māwardīy is also clear about it that a war cannot be waged without permission of the Caliph (Central Government).⁴ Defence of foreign aggression must naturally be excepted. As-Sarakhsīy, commenting on ash-Shaibānīy, goes even so far as to maintain that if a foreign armed force without permission of its government takes belligerent action against a Muslim State, that does not amount to a declara-

1. Hasan-ibn-‘Abdallāh, *آثار الاول في ترتيب الدول* (compiled 708 H.), p. 167.

2. *بدائع الصنائع*, VII, 97.

3. *الخراج*, p. 123.

4. *الاحكام السلطانية*, p. 53.

tion or existence of war between the two States.¹ In such cases redress may be obtained by diplomatic negotiations and even by direct actions as the occasion may require.

(312) As all the acts of life of a Muslim are controlled by the Qur'an, so everything he does with the intention of obeying his Lord are acts religiously held to be meritorious, even his eating and drinking—in order to preserve strength for performing his duties to God—or taking part in a war—in order to establish on earth the Kingdom of God. Without appreciating this background, it will not be easy to understand why even wars of expansion are to be considered as acts *in the path of God*. In a verse of the Qur'an, often referred to, it is stated :

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 Qur'an, and who fulfilleth his covenant better than God? Rejoice then in your bargain that ye have made, for that is the supreme triumph. (9 : 111.)

(313) These and scores of other verses and Traditions of the Prophet render military service 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.² Regarding training and preparations in time of peace we read again in the Qur'an :

And make ready for them all ye can of armed force and of horses tethered, that ye may dismay the enemy of God and your enemy and others beside them whom ye know not: God knoweth them. And whatsoever ye

1. شرح السير الكبير, IV, 226. Cf. Kāsānīy, بدائع, VII, 109-10; Ibn-Farīshah, مجمع البحار, ch. Jihād (my private manuscript).
عاطية كبيرة, ch. Jihād, pp. 221-22.

2. Fatāwī Tātār Kānīyah, (my priv. MS.) ch. Jihād ; etc.

NATURE AND DEFINITION OF WAR

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. (8 : 60-61.)

CHAPTER IV

LAWFUL WARS

(314) THE lawful reasons for Muslims to wage war may fall into the following categories :

1. *The Continuation of an Existing War.*

(315) By this we mean the recommencement of a war which has been stopped for some reason or other. The exhaustion of both the parties or separation of them without any treaty of peace,¹ the suspension of warlike activities by mutual agreement for fixed period,² and such other instances may be examples thereof. The Qur'an lays down in this connection : "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."³ Commenting on this verse, Sarakhsīy says :

And when the months of immunity have passed, slay the Associators wherever ye find them. And the meaning of the Qur'anic expression : "When the months of immunity have passed" is that when the period of the truce with someone has ended.⁴

2. *Defensive.*

(316) This can be either when the enemy (a) has invaded Muslim territory, or (b) has not actually so invaded, but has behaved in an unbearable manner. The former needs no

1. Almost all the wars of the Prophet with the Meccans were of this kind.

2. The peace treaty of Hudaibiyah provided for cessation of hostilities for ten years.

3. Qur'an, 9 : 5.

4. شرح السير الكبير، I, 688 : "فاذا انسلخ الاشهر : 688 : شرح السير الكبير
المكرم" مضى مدة العهد الذى كان لبعضهم -

elaborate discussion. The Qur'ān lays down: "Fight in the path of God against those who fight against you, but do not transgress. Lo! God loveth not transgressors."¹ Regarding the high-handed behaviour of a foreign country, an interesting quotation will explain Muslim law on the point:

Sanction is given unto those who are fought against because they have been wronged; and God is indeed Able to give them victory.²

—This referred to the Prophet and other Muslims who had taken refuge in Madīnah and were still being harassed by the Meccans in many ways. They addressed, for instance, an ultimatum to a Madinite magnate 'Abdullāh-ibn-Uba'iy, either to fight and kill or expel the Prophet, or they would attack Madīnah.³ Many traditions bear witness to the fact that in the early days after the migration of the Prophet, the Muslim community of Madīnah lived such a precarious life that they used to sleep in full war-kit.⁴ Another instance is provided by the expedition against Dūmatuljandal in the year 5 H., where the local chieftain, Ukaidir, was molesting the caravans coming from the north to Madīnah.⁵ The attack on Khaibar is an instance of nipping war in the bud.⁶

(317) We may also refer here to the verse of the Qur'ān (9: 12): "Will ye not fight a folk who broke their solemn pledges, and purposed to drive out the Messenger, and did (attack) you first?" Further, an important and interesting saying of the Prophet enumerates the kinds of defensive wars, and says: "Whoever fights in defence of his person and is killed, he is a martyr (شَهِيد); 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

1. Qur'ān, 2: 190.

2. Qur'ān, 22: 39.

3. *Sunan* of Nasā'iy, II, 67, ch. *Khabar Bani-an-Nadīr*.

4. Bukhāriy, Nasā'iy, Hākim, Dārimīy, etc., quoted by Shiblī *سيرت النبي*, 2nd ed, I, 285-86.

5. Mas'ūdīy, *Tanbih*, 248.

6. *Ibn-Sa'd*, 2/1, 66, 47. Tabarīy, *Hist.*, I, 1556, 1575-76; Mas'ūdīy, *Tanb.h.*, 250; Sarakhsīy, *Mabsūṭ*, X, 86.

of God, is a martyr." (Cf Suyū'īy's alphabetical dictionary of traditions, *جمع الجوامع* vol. 4, s.v. "من", on the authority of 'Abd-ar-Razzaq and others.)

3. Sympathetic.

(318) By this we mean that were the Muslims of a foreign denomination to seek the help of the Muslim State against their (non-Muslim) government, help might be given them. The Qur'an lays down in this connection that each case must be decided on its own merits :

(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. (8 : 72.)

(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. (4 : 75-76.)

4. Punitive.

(319) The following causes constitute lawful reasons for waging war, viz., hypocrisy,¹ apostasy,² insisting on the non-binding character of *zakāt* or any other religious duty,³ rebel-

1. Qur'an, 66 : 9.

2. See *infra*, in a separate chapter.

3. The Caliph Abū-Bakr fought against them. There are *aḥādith* to support that, e.g., al-Baihaqīy in *Sunan al-Kubrā*, Vol. 7, ch. الضرب امرت أن اقاتل الناس حتى يشهدوا : record الثانى من قتال اهل الردة ان لا اله الا الله و انى رسول الله و يتقيموا الصلوة و يوتوا الزكوة فاذا فعلوا ذلك عصوا منى دعاتهم و اموالهم و حسانهم على الله
i.e. I have been ordered to fight people until they attest that there is no God if not God Himself, and that I am the messenger of God, that

lion,¹ breaking of a covenant by the other party,² becoming a Khārijite, because such people say that the rest of the Muslim community is hypocritical and take arms against the established government.³

5. *Idealistic.*

(320) Every nation has its own ideals which constantly inspire it. The deeper a nation is convinced of them, the greater is its effort to realize them. As we have seen above, the Islamic conception of life is based on the Unity of God and the vicegerency of man on earth. This implies that all the Faithful are equal, irrespective of race and clime, and also that the Word of God should rule supreme in the world. It is this mission to uproot godlessness and association with God in His Divinity that is referred to in Islamic literature by the expression: "In the Path of God (في سبيل الله)" which we have translated as "Idealistic" reasons for waging war. Of the scores of Qur'ānic verses in this connection, a few may be quoted :

(a) He it is Who hath sent His Messenger (*i.e.*, Muḥammad) 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. (9 : 33 repeated in 48 : 28, 61 : 9.)

(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. (3 : 110.)

(321) The same selfless Divine mission is most vividly

they establish prayer and pay the zakāt-tax. If they do that, they save from my (attack) their persons and their belongings; and the reckoning of their affairs lies with God.

1. Qur'ān, 49 : 9. Cf. also *infra*, separate chapter.

2. Qur'ān, 9 : 12. Cf. Sarakhsīy, شرح السيرة الكبرى, IV, 65.

3. The Caliph 'Alīy fought against them, for whose interpretation of a tradition of the Prophet in his support, cf. Sarakhsīy, مسود, X, 124.

described in an oft-quoted saying of the Prophet :

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.¹

(322) Islam has recognized a certain amount of latitude in personal judgment, and hence the sharp distinction between the Islamic *rule* and the Islamic *faith*. No one is to be *forced* to embrace the Islamic faith, as we shall see presently, yet Islamic rule is to be established by all means. It was this basic distinction that non-Muslims are tolerated in an Islamic polity as inhabitants, as we have seen in Part II, Chapter IV, (b).

(323) Regarding freedom of conscience we read in the Qur'ān :

(a) There is no compulsion in religion. The right direction has become distinct from error. (2 : 256.)

(b) Unto you your religion and unto me my religion. (109 : 6.)

(c) And strive for God with the endeavour which is His right. He hath chosen you, and *hath not laid upon you in religion any hardship* ; the faith of your father Abraham (is yours). He hath named you Muslims of old time and (also) in this (scripture, *i.e.*, Qur'ān) that the Messenger may be a witness against you, and that ye may be witnesses against mankind. So establish worship, pay the Zakāt-tax, and hold fast to God. He is your Protecting Friend, and what a blessed Friend and a blessed Helper ! (22 : 78.)

And similar other verses.

(324) It is with this background that we ought to read

1. *Ṣaḥīḥ* of Muslim, I, 50.

the Fiqh books which expose Muslim law of war. They say :¹ When a Muslim State is free from internal commotion and strife, and has sufficient power to hope for victory in case of resistance, then it is its duty to invite the neighbouring² non-Muslim sovereigns to accept the unity of God as an article of faith and to believe in Muḥammad as the Messenger of God, in short to embrace Islam. If they do, they will retain their power and will secure themselves against hostility on the part of the Muslim State. If the invitation is rejected, the non-Muslim chief within the Arabian Peninsula has no other choice but to face the sword. If, however, his territory is outside Arabia, the alternative is to pay yearly *jizyah* or the protection-tax, which will secure his territory against Muslim attack. If both these alternatives are rejected and all peaceful persuasion and reasoning fail, then 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.

(325) In subsequent chapters we shall see what are the actual laws which Islam has prescribed for the conduct of war regarding different kinds of enemies.

1. Cf. any compendium of Muslim law, ch. War (*Mabsūṭ*, Vol. 10 ; *Badā'i* of Kāṣnīy, Vol. 7 ; Mawardīy and Abū-Ya'la's *Aḥkām al-Sultānīyah*, Shāfi'īy's *Umm*, Vol. 4, Sarakhsīy's *Sharḥ as-sīvar al-kabir*, Vols. 1-4.

2. Cf. Qur'ān, 9 : 123 (الذین یأونکم).

CHAPTER V

ENEMY PERSONS

(326) ENEMY persons, according to how they are treated, 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.

(327) We shall deal with them *seriatim*. But it is to be noted from the very beginning that apostates, rebels and highwaymen come under international law only when they are of sufficient power or have acquired territory and rule over it.¹ Otherwise they belong to the ordinary criminal law of the land, and the treatment meted out to them has no relation to our subject.

1. Māwardīy, *al-Aḥkām as-Sultānīyah*, pp. 90, 92, 96.

CHAPTER VI

APOSTASY

(328) TO wage war against apostates is justified on the same principle as that on which the punishment of a solitary apostate is based. The basis of Muslim polity being religious and not ethnological or linguistic, it is not difficult to appreciate the reason for penalizing this act of apostasy. For it constitutes a politico-religious rebellion.

(329) Apostasy in Muslim law means turning from Islam after being a Muslim. Not only does it occur when a person declares his conversion to some non-Islamic religion, but also when he refuses to believe in any and every article of the Islamic faith.¹

(330) The sayings² and the doings³ of the Prophet, the decision and practice of the Caliph Abū-Bakr,⁴ the consensus of the opinion of the Companions of the Prophet and all the later Muslim jurisconsults,⁴ and even certain indirect verses of the Qur'ān,⁵ all prescribe capital punishment for an apostate. 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. Nevertheless, Muslim jurists emphasize that before prosecuting and condemning an apostate, it is necessary officially to discuss the matter with him and to remove his doubts regarding the soundness and reasonableness of the Islamic point of view in

1. Māwardīy, p. 89 ; فتاوى عالمگیری، ch. ٥٥٥.

2. Sarakhsīy, *Mabsūṭ*, X, 98.

3. Māwardīy, p. 90, Ṭabarīy, *Hist.* I, 1639ff.

4. Kāsānīy, *Badā'i'*, VII, 134.

5. Qur'ān, 37 : 57, 5 : 54.

the matter concerned. Time is given him for reflection¹ sometimes even for months² before finally proceeding with the prosecution.

(331) In case an insane person,³ a delirious, a melancholy and perplexed man,³ a minor,³ one intoxicated,³⁻⁴ one who had declared his faith in Islam under coercion,⁴ and a person whose faith in Islam has not been known or established⁵ were to become apostate they would not suffer the supreme penalty. So, too, an apostate woman,³⁻⁶ and a hermaphrodite,⁵ according to the Ḥanafīy school of law would not be condemned to death, but imprisoned and even physically tortured. An old man from whom no offspring is expected is also excepted.⁷

Treatment of an Apostate.

(332) The apostate has to choose between Islam and the sword; he cannot be given quarter (امان) nor will he be allowed to become a *dhimmīy*, i.e., a resident non-Muslim subject of the Muslim State on payment of the yearly protection tax.⁸

(333) *De jure* he is dead. So if he does not re-embrace Islam, and escapes to some non-Muslim territory, his property in the Islamic territory will be distributed among his Muslim heirs⁹ as if he were dead. In addition to this, the debts due to him will be wiped out if he has reached non-Muslim territory. This is what Māwardīy says,¹⁰ but I wonder why these

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1. Sarakhsīy, *Mabsūṭ*, X, 98-99.
 2. Abū-Yūsuf, *Kharāj*, p. 110.
 3. Kāsānīy, *Badā'ī*, VII, 134.
 4. Sarakhsīy, *Mabsūṭ*, X, 123.
 5. Ibn-‘Ābidīn, *Raddul-Muḥtār*, III, 326-27.
 6. Abū-Yūsuf, *Kharāj*, p. 111, Sarakhsīy, *Sharḥ al-ūṣūl*, ch. النخبير
بلاحقه التكديب (I have consulted MS. No. 1838, Bāyazīd, Istanbul.)
 7. Ibn-‘Ābidīn, *Raddul-Muḥtār*, III, 246.
 8. Sarakhsīy, *Mabsūṭ*, X, 116.
 9. Ibn-‘Ābidīn, *Raddul-Muḥtār*, III, 328-29; Sarakhsīy, *Mabsūṭ*, X, 100.
 10. *Al-Aḥkām-s-Sultānīyah*, in loco.

debts should not be inherited by the heirs of the renegade just like the rest of his property ?

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

(334) Māwardīy writes that there are five characteristics in the territory of apostates (دار الردة) which distinguish it from the territory of ordinary non-Muslims (دار الكفر), namely :¹

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 *dhimmīy* (non-Muslim subject of the Muslim State) ; not so an original non-Muslim.

3. As an apostate has nothing to choose but the re-embracing of Islam or the sword, he cannot be enslaved and so let alive.

4. The booty acquired from an apostate is not to be distributed among the capturing troop ; it will go to the general exchequer. The different kinds of property captured from an ordinary non-Muslim belligerent will be treated in a subsequent chapter. It is to be noted, however, that property of dead apostates, captured during a conflict, at once becomes the property of the Muslim State ; but if living, his property is to be held in trust to be returned to him on re-embracing Islam or finally to be confiscated at his death.

5. Apostates made prisoners, if they do not re-embrace Islam, will in due course be beheaded—no quarter may be given them as is the case regarding ordinary belligerent prisoners.

(335) So far the differences : yet there are also certain similarities between the treatment² of apostates and that of

1. Māwardīy, *Al-Aḥkām-as-Sultānīyah*, p. 94.

2. Generally for their treatment, Ṭabarīy. *Hist.*, year 11 H. ; *Kitāb-ar-riddah* of Wāqīdīy, MS. of Bānkīpūr ; *Mabṣūṭ* of Saraklāsīy, X, 98-124.

non-Muslim belligerents. So an apostate is not held responsible for the destruction of Muslim life and property during the war, upon his return to Islam. This was actually decided in the time of the first Caliph, and of course his precedent could not be contested. 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. So, during the life of the Prophet, the ambāssadors of Musailimah the Impostor, came to Madīnah ; and, on being asked, replied that they too held the notions of him who sent them. At this the Prophet said : “ But for the fact that ambassadors cannot be killed, by God, I would have ordered you both to be beheaded.”¹ (They were Muslim subjects who had apostatized.) Moreover, an apostate cannot inherit from his Muslim relatives.

1. Ibn-Hishām, 965.

CHAPTER VII

CIVIL WARS AND REBELLIONS

(336) FROM the pre-Islamic point of view, this chapter alone would represent Muslim International Law, that is, public law between Muslim States ; for here is described the treatment reserved for an equally civilized enemy. But Muslim law is based on the conception of the unity of Islam, and no wonder, therefore, that scarcely any provision has been made, in the positive law of Islam, regarding this kind of war. In the whole of the Qur'ān I found only one verse which deals with 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. (49 : 9.)

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. (49 : 10.)

(337) In the traditions of the Prophet also there are only a few sayings in general terms which do not help in constructing a whole system. We shall refer to these presently. The Muslim law of rebellion, as exposed in legal compendia, is generally based on the Orthodox Practice of the Caliph 'Alī though it must be admitted that no later Muslim ruler reached the sublime height of idealism evinced by the pious son-in-law of the Prophet.

(a) *Various Kinds of Opposition.*

(338) According to the degree and nature of opposition

to an established government, the following classification is humbly submitted :

1. Religious grounds—the *Khārijism*.
2. Political or worldly reasons :
 - (i) Insurrection.
 - (ii) Mutiny.
 - (iii) War of Deliverance.
 - (iv) Rebellion.
 - (v) Civil War.

1. *Opposition on religious grounds.*

(339) So far as I know, only one instance is recorded by Muslim history of religious dissentients who were able to resist the whole government forces for any length of time. This refers to the *Khārijites* (literally the *dissentients*) who believed in a sort of *anarchy*, and accused all the rest of the Muslims of heresy and even disbelief. If they do not oppose any armed resistance to the established government, they are tolerated more or less in the same way as any other unorthodox sect.¹ If they are no longer passive and try to disestablish and replace the actual government they will be treated just like political rebels. No special privileges are attached to religious rebellion as distinguished from political rebellions.

2. *Opposition to the government on political and worldly grounds.*

(340) (i) If it is directed against certain acts of government officials, and no revolution is intended, we may call it *insurrection*. Their punishment belongs to the law of the land. International law does not take notice of them.

1. *Sarakhsīy, Mabsūṭ*, X, 125; *Māwardīy*, p. 96. *Muwaffaq* records (in his *Ḥazīfah Abī Ṣāqib*, II, 21) a case of written truce with the *Khārijites*.

(341) (ii) If the insurrection is intended to overthrow the legally established government on unjustifiable grounds, we call it *mutiny*¹.

(342) (iii) On the other hand, if the insurrection is directed against a government established illegally, or which has become illegal for its tyranny, we may term the agitation a *war of deliverance*, no matter whether the government under which the Muslim community is toiling is Muslim or non-Muslim.

(343) (iv) If the insurgents grow more powerful to the extent of occupying some territory and controlling it in defiance of the home government, we have a case of *rebellion*. The reluctance of some tribes, after the death of the Prophet, to pay government taxes was considered a rebellious act, and instructions were issued by the Caliph Abū-Bakr to subjugate them by force of arms. These people had not abjured Islam; only they did not feel themselves bound to pay taxes to the central government.

(344) (v) If the rebellion grows to the proportion of a government equal to the mother government, and hostilities continue, we may term it a *civil war*. There is no difference whether a rebel pretender has acquired power and successes, or, at the death or deposition of a head of the State, two claimants have sprung up and the sympathies of the people are divided. The wars between 'Alīy and Mu'āwiyah may be cited as an instance. Mu'āwiyah had, theoretically speaking, not rebelled against 'Alīy since he had not taken the oath of 'Alīy's allegiance but opposed him ever since the murder of the third Caliph, 'Uthmān.

(b) *Treatment of Rebels, etc..*

(345) According to al-Māwardīy, the punishment of rebels, in Muslim law, is not capital²—they may be killed only on the

1. For further discussion cf. my article on some new researches in international law, in : *مجله طیبلسانیین*, Hyderabad, Oct. 1940, pp. 11-12.

2. *Al-Aḥkām-as-Sulṭānīyah*. p. 97.

battlefield, at the time of combat.¹ Generally this is true, but it cannot be taken strictly. For as-Sarakhsīy is explicit² that on certain occasions, as for example when the rebellion is not yet completely subdued, the rebel prisoners may be beheaded. Of course, this refers only to the case when the rebel remains obstinate, and his repentance is not established.

(346) One should warn the rebels of the consequences of their persistence, and one should excuse oneself before beginning battle.³ According to Māwardīy,⁴ night assaults and attacks 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. Even if a loyal subject who is, somehow or other, in the ranks of the rebels, be killed by the Muslim troops, the latter cannot be held responsible.

(347) The aim of a fight with rebels is to prevent them from disturbing peace and order, not to kill them and exterminate them.⁵

(348) They may be pursued and killed only when they have a stronghold wherein to take refuge and prepare for further fight.⁷

(349) A rebel, unlike an apostate, may be given a quarter.⁸

(350) The judgment 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 proved that a certain decision has been contrary to Muslim law and no school of orthodox Muslims upheld it.⁹

1. *Idem*, p. 100.

2. *Mabsūt*, X, 126.

3. Māwardīy, *op. cit.*, p. 98. (اعذار و انداز).

4. *Ibid.*

5. Ash-Shaibānī, *Kitāb al-'Aṣl*, ch. الخوارج و اهل البغى, (MS. Aya Sofia, No. 1076).

6. Māwardīy, *op. cit.*, p. 98.

7. Ash-Shaibānīy, *op. cit.*, in the same place ; cf. Mas'ūdīy, *Murīj*, IV, 316 for the sayings of the Caliph 'Alīy.

8. Sarakhsīy, *Mabsūt*, X, 129.

9. *Idem*, pp. 130, 135.

(351) If a subject of the Muslim State, whether prisoner, trader or otherwise, commits a crime in rebel territory, no suit may be brought against him in the court of the Muslim territory, not even at the reconquest by the Muslim State of the place where the criminal act was committed.¹ For the jurisdiction of the loyal court did not extend to that place at the time.

(352) As we shall see in the chapter on *Quarter* even the lowest of the Muslims, a slave even, can validly give quarter to a belligerent, and the quarter accorded by rebels to non-Muslims or even a treaty of friendship concluded with them is considered binding on the Muslim State which cannot molest them.² Nevertheless the classical jurists know the subtle difference between quarter and a treaty of amity and an alliance to fight against the Muslim State. So as-Sarakhsīy says :

If the rebels asked for the help of some non-Muslim State in order to fight against the Muslim State, and they did fight, and finally the Muslim State defeated them, they could be enslaved (like ordinary non-Muslim belligerents). — For the asking of help by the rebels is not like giving quarter, since the recipient of quarter enters the Muslim territory for pacific purposes, whereas these did not enter Muslim territory except to fight loyal Muslim subjects.³

(c) *Belligerent Rights of Rebels.*

(353) Rights of full belligerency are conceded by Muslim law to rebels. As we have just seen, the judgment of their court is ordinarily not reversed after their submission. Similarly, 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.⁴ So, too, if a merchant enters the rebel territory and pays customs

1. *Mabsūṭ* of Sarakhsīy, X, 130.

2. *Ibid.*, 133.

3. *Ibid.*, 136.

4. Sarakhsīy and others *in loco*.

duties, he will have to pay again on the border of the loyal Muslim territory,¹ as if the rebel State were a foreign State. That they may conclude treaties with foreign State has already been mentioned in the previous section and their effects too have been described. Moreover, for wrongs committed in rebel territory, the culprits cannot be tried in the court of the loyal Muslim territory.²

(354) The mutual loss to life and property caused during a conflict is to be left without exacting punishment, and no retaliation or damages may be assessed even when the culprits are identified.³ This immunity accrues to them on account of their being a *de facto* State; otherwise if a band of robbers were to attack and plunder a city, their acts are not treated with impunity.⁴ Although Abū-Yūsuf records the opinion of some jurists to the contrary, he is definite that only the war material captured from rebels ought to be treated as war booty and cannot be returned to the relatives of the rebels;⁵ other property ought to return to rightful owners or their heirs as was 'Alī's practice.⁶

(355) The subdued rebels are, however, ordered by Muslim law to return to the rightful owner what they still actually possess of the property captured from loyal Muslim subjects.⁷

(d) *Special Privileges of Rebels.*

(356) Unlike a non-Muslim State, no tribute can be taken from rebels if, for some reason or other, the Muslim State is willing to make peace with them. And if at all 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;

1. Māwardīy, *op. cit.*, p. 101.

2. Sarakhsīy, *Mabsūṭ*, X, 130.

3. *Idem*, pp. 127-28, quoting a precedent of the Caliph Abū-Bakr.

4. *Idem*, p. 135.

5. *Kitāb al-Kharāj*, p. 132.

6. *Ibid.*, also. *cf.* *Murūj* of Mas'ūdīy, IV; Dīnawarīy, p. 213.

7. *Ibid.*

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.¹

(357) Save in defence, weapons unnecessarily destructive are not to be used against the rebels.²

(358) Regarding a rebel force, 'Alīy is reported to have ordered :

و اذا هزمتهموهم فلا تبحطنوا و اعلى جريبع و لا تقتلوا على اسير
ولا تذبخوا موليا ولا تطلبوا مدبرا ولا تنكشوا عورة ولا تمثلوا
بقتيل ولا تهتكوا سديرا ولا تقربوا من اموالهم الا ما تجدونه
فى عسكرهم من سلاح او كراع عبد او امة - و ما سوى ذلك
فهاو ميراث لو رثتهم على كتاب الله -

i.e., 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 weapons, beasts, male or female slaves : all the rest is to be inherited by their heirs according to the Writ of God.³

One of 'Alīy's commanders wrote in a despatch :

لعبد الله على امير المؤمنين من معقل بن قيس - سلام
عليك فانى احمد اليك الله الذى لا اله الا هو اما بعد فاذا لقينا
المارقين و قد استظهر وا علينا بالمشركين فقتلناهم قتل عاد و
ارم مع انا لم نعد فيهم سير تك و لم نقتل من المارقين
مدبرا ولا اسيرا و لم نذف منهم تلى جريبع و قد نصرك الله
و المسامين و الحمد لله رب العالمين -

i.e., To the Servant of God, 'Alīy, 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 *Associators*. We killed

1. Māwardīy, *op cit.*, 100.

2. *Ibid.*

3. *Murūj* of Mas'ūdīy, IV, 316-17 :

الأعلام بالحروب الواقعة فى صدر الإسلام ليوסף بن محمد بن إبراهيم
الأندلسى (d. 653 H.). fol. 86z (MS. Cairo, hist. No. 399).

them like the Amalekites¹ 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.²

(359) Their dead are to be buried.³ Their prisoners are generally not to be beheaded, and if they convincingly promise to behave in future like loyal and law-abiding subjects, they ought even to be immediately released.⁴ No ransom may be demanded for the release of prisoners.⁵ Rebel prisoners, Muslims or non-Muslims, may never be enslaved.⁶ The army of 'Alīy clamoured for the enslavement of their prisoners and 'Alīy bluntly reminded them:⁷ "Well, then who will take 'Ā'ishah, the wife of the Prophet and Mother of the Faithful?"—She was the leader of an army against 'Alīy, and at the time was under his guards.

(360) The servants and followers of their camp may only be killed in battle if they take part in actual combat.

(361) As the killing of a Muslim by the hands of a non-Muslim is religiously not allowed, it is inadvisable to enlist non-Muslims in a campaign against Muslim rebels.

(362) A woman rebel may only be killed in defence.

وإذا قاتلن قتلن للدفع (المبسوط الأسير، خسي ١٣٥/١٠)
i.e., "If women fight, they may be killed."⁸

1. "Amalekite" is a graphic translation for 'Ād in the text. Allusion to a saying of the Prophet recorded by Bukhārīy and Muslim, and quoted by Ibn Taimīyah, *as-S yāsah asli-Shar'iyah*, pp. 25, 60: سيبخرج قوم... يهرفون من الدين... لمن ادر كثرهم لاقتلهم قتل عاد
i.e., A group will come out... going astray from the true religion...
... if I happen to live to their epoch, I shall exterminate them in the manner of the tribe 'Ād.

2. Yūsuf al-Andalus'y, *op. cit.*, fol. 12b; Tabarīy, *Hist.*, anno. 38.

3. Shaibānīy, *الأصل* ch. الخوارج واهل البغي.

4. Māwardiy, *op. cit.*, p. 99.

5. Shaibānīy, *op. cit.*, etc.

6. Sarakhsīy, *Mabsūṭ*, X, 127.

7. *Ibid.*

8. *Ibid.*, 130.

(e) Miscellanea.

(363) If the rebels attack a country friendly to the Muslim State, and acquire booty which is afterwards captured by the loyal troops from the hands of the rebels, it must be returned to the original owners.¹ The loyal subjects of the Muslim State in the rebel territory may join forces with the rebels against a non-Muslim foreign attack.² If the rebels cooperate with the loyal troop in a fight against a common enemy, they share in the booty with the loyal troop.³ Although 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, *ash-Shaibānīy*, in a stray passage, opines that 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* the booty in common.⁴ If hostages are exchanged, and the rebels murder the loyal hostages, the rebel hostages may not be punished even when that had been agreed upon, for the guilt is not theirs personally but of their government.⁵ The captured property of rebels which cannot be made booty, may yet be sold for convenience's sake and the proceeds returned to rightful owners at the cessation of hostilities.⁶

(f) Deposition of the Muslim Ruler.

(364) A passing reference may be made in this connexion to the possibility of deposition of a Muslim ruler by the pillars of the State if he has become unbearably tyrannical or otherwise incapable of discharging his duties, *e.g.*, because of insanity, capture by an enemy, etc. (*cf. k. al-imārah* in any law-book).

1. *Shaibānīy*, *الأصل*, ch. *ibid.* 2. *Sarakhsīy. Mabsūt*, X, 98, 133-34.
 3. *Ibid.*, p. 130. 4. *Shaibānīy, op. cit.*
 5. *Sarakhsīy, Mabsūt*, X, 129, quoting Qur'ān, 6 : 164, also decision of Abū-Hanīfah acquiesced in by Caliph Manṣūr, regarding hostage of a non-Muslim State, applying pre-eminently to Muslim rebels.
 6. *Sarakhsīy*, and others *in loco*.

(365) In general, Muslims are exhorted in the Qur'ān¹ and in the Hadīth² always to obey the authorities. In an oft-quoted tradition,³ the Prophet has observed: "Everyone of you 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 responsible for the property of his father—in fact everyone of you is a shepherd and is responsible for those in his care."⁴ Yet this responsibility is before God in the next world. People are exhorted to obey even tyrants; and in a characteristic tradition, the Prophet is reported to have said: "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."⁵ No wonder that in spite of all this the Prophet has unequivocally said: "No obedience to any creature in disobedience to the Creator."⁶ It is quite in harmony with the fundamental principle of the Muslim polity that God is the real Sovereign of the world, and that man is only His vicegerent. (Cf. also part 2, ch. 3.)

(g) *Non-Muslim Rebels.*

(366) So far we have discussed briefly the position of Muslims as rebels. Some peculiarities of non-Muslim subjects,

1. 4 : 59. Cf. my "Qurānic Conception of State," in *The Qurānic World*, Hyderabad, April 1936.

2. *Ṭawīb* of 'Alīy al-Muttaqīy (my private MS.), ch. Kitāb al-umarā.

3. 'Alīy al-Muttaqīy quoting in his *Ṭawīb* on the authority of Bukhārīy, Muslim, Abū-Dawūd, Tirmidhīy, Ibn Ḥanbal, Tabarānīy and others.

4. Scores of other sayings of the Prophet are recorded by Hadīth books, brought together in *Kanzul 'ummūl*, etc.

5. Abū Yūsuf, *Kharāj*, p. 6; Ibn-Qutaibah, *'Uyūn-al-akhbār*, I, 3, etc.

6. *Ṭawīb* of 'Alīy-al-Muttaqī, from Ibn-Ḥanbal, Tirmidhīy, Abū-Dawūd, etc.

when they rebel, may be profitably added.

(367) Rebellion by purely 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.¹ The reason is, as we have seen before,² that all non-Muslim peoples form one category for Muslim jurists, no matter whether politically they constitute one or several groups. In case of rebels of a frontier province, the supposition is that they may have relations with the adjoining non-Muslim State.

(368) Non-Muslim subjects will, however, receive the same privileges as ordinary rebels, in spite of their being of a frontier province, when they are not the leaders of the rebellion but only join hands with the local Muslim rebels.³

1. *Fatāwī Tātārkhaniyah*, ch. Rebels.

2. *Cf. supra*, part 2, ch. 4, b.

3. *Sarakhsīy, Mabṣūṭ*, X, 128.

INTERNATIONAL HIGHWAYMEN AND PIRATES

(369) IN early Islamic literature there is scarcely any separate mention of pirates. Ibn-Sa'd¹ mentions one piratical incident of Abyssinians in the time of the Prophet, the details of which are lacking. Generally, pirates are included in highwaymen. As Ṭabariy² says, there is no difference between the highwaymen of the county or foreigners, so far as their treatment is concerned. Of course, we are concerned here only with the case of international pirates and highwaymen.

(370) Nearly all the details of the treatment accorded to them are deduced from or based upon the following verses of the Qur'ān, which were originally revealed, it is said,³ regarding some international brigands and highwaymen (of a country allied to the Muslim State) :

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. (5 : 33-34.)

(371) By the unanimity of commentators on the Qur'ān, the warring people referred to in the verses are highwaymen, dacoits and the like. According to law-books, their treatment is :

1. For murder accompanied by plunder, beheading followed by crucifixion.

1. *Ṭabaqāt*, 2/1, pp. 17-18.

2. *Tafsīr*, VI, pp. 132-33 ; *Aṣl* of *Shāibānīy* (MS. *Wafā-'Aṭif*, Istanbul), Vol. II, fol. 40a, ch. *قطع الطريق*. Cf. *Mabsūṭ* of *Sarakhsīy*, IX, 134.

3. *Tafsīr*, VI, 135.

2. For murder only, beheading.
3. For plunder only, without loss to life, the amputation of hand and foot on alternate sides.
4. For only banding together with the intent of plunder and murder, but having as yet committed nothing of the kind, discretionary punishment may be inflicted.

(372) The banishment mentioned above is one of the discretionary punishments. It is interpreted either as imprisonment, expulsion from the State, externment, or confinement to a border district with all its hazards. However, expulsion from the State is never upheld if the culprits are of the Muslim faith, lest they apostatize or join forces against the Muslim State.¹

(373) If 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 court² though they may be extradited if there is treaty to that effect. On the other hand, if foreigners enter Muslim territory and commit depredation on passers-by, their case may be heard in the Muslim court.³ In a learned discussion, Ibn-Taimīyah⁴ says that even if the highwayman is superior in status to the murdered person—if, for example, he is a Muslim, a free man or a Muslim subject, and the murdered person is a non-Muslim, a slave or a foreigner residing in the Muslim territory—the murderer must be sentenced to death. Citing a precedent, Ibn-Taimīyah refers to the fact that the Caliph 'Umar inflicted capital punishment upon the watchman of a gang of highwaymen.

Special Features of their Treatment.

(374) Generally speaking, the treatment of highwaymen

1. Māwardīy, *op. cit.* pp. 102-06; Kasānīy, *Badā'i'*, VII, 94-95; Sarakhsīy, *Mabsūṭ*, IX, 135.

2. Sarakhsīy, *Mabsūṭ*, IX, 203-04; *Aṣl* of Shaibānīy, ch. قطع الطريق fol. 41a.

3. Shaibānīy, *Aṣl*, ch. قطع الطريق (MS. Wāfā 'Atif), fol. 40a.

4. السيادة الشرعية, pp. 36-37.

is the same as that of rebels. Yet the following differences may be noted :

1. They, unlike rebels, may be pursued in every case.
2. The aim of the expedition must be to exterminate them.
3. They are held responsible for every act of theirs, whether committed before the encounter with them or during the fight with government forces itself.
4. Pending result of investigation, they may be detained in prison.
5. The taxes collected by them will be considered as mere usurpation and the tax-payer may again be taxed. Obviously he will have a right to the property recovered from the possession of the highwaymen.

(375) As the Qur'ānic verse quoted above enjoins, 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. In this case, no action may be brought against them for their past crimes against life and property.

1. Māwardīy, *op. cit.*, pp. 104-05.

CHAPTER IX

WAR WITH NON-MUSLIM FOREIGNERS

(376) WAR is defined by Muslim jurists as the expending of ability and power in fighting in the path of God by means of life, property, tongue and other than these.¹ And to realize this, Muslim doctors enjoin: "First to preserve one's own power and then to break that of the unbelievers and to subjugate them."² As war to Islam does not allow any self-seeking aggrandizement at the expense of others, but simply to establish a true theocracy, a Kingdom of God on earth, no wonder at the insistence upon the point of view of the soldiery being quite selfless. The slightest desire for worldly gain pollutes the purity and mars the nobleness of *jihād*. *Jihād* is to be waged solely for the purpose that "the Word of God shall alone prevail (من قاتل لتكون كلمة الله هي العليا).³ Otherwise Paradise would not be the reward of such a soldier.

(377) Thus it will be seen that *Jihād* does not mean killing and plundering others but offering one's own self to be killed. It is a supreme sacrifice required of an idealist, sacrifice both of property and life for the sole purpose of obeying the command of his Creator and Master, God Almighty.

1. Cf. *supra*, ch. 3, "definition of war."

2. Sarakhsīy *السير الكبير*, I, 127: (لان حقيقه التجهار في) حفظ قوة انفسهم اولا ثم في قهر المشركين و كسر شوكتهم.

3. Bukhārīy, 3 : 45, 55 : 10, 57 : 8 and 10, 97 : 28 ; Muslim, 33 : 149-151 ; Tirmidhīy, 20 : 16 ; Nasa'y, 25 : 21 ; Ibn-Mājah, 24 : 13 ; Ṭayālīsīy, No. 486-88 ; Ibn-Hanbal, IV, 392, 397, 405, 417 bis. Cf. Qur'an, 9 : 40, 8 : 39, 5 : 54.

DECLARATION OF WAR

(378) IN a defensive or punitive war, obviously, there is no need of the declaration or notification to the other party of the military action. When otherwise, Muslim jurists hold :¹

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 Qur'ān 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 *Shāfi*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 *Hanafite* 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—though this is not compulsory. For they know why they are attacked, and an ultimatum may hinder the achieving of the aim. With this kind of people, however, the Muslim State may fight without first inviting them to accept Islam or pay protection-tax.

(379) Instructions of the Prophet are quoted to support this view.² Upon careful scrutiny, however, the above exposition of law does not seem to apply except to cases of individual

1. *Sarakhsīy*, شرح السيرة الكبير, I, 57-58.

2. For instance, *Ṣaḥīḥ* of Muslim (ed. Istanbul), V, 139-40.

encounter between bands of two belligerent States. The main question of the general declaration of war upon the enemy government does not seem to have been settled. For this also we may refer to the practice of the Prophet, that safe and perennial source of Muslim law. So, in three kinds of cases, the Prophet seems to have waged war without previous notice in the following circumstances :

1. Fresh encounters of an enemy with whom no peace is made, though the forces of the two parties separated from each other from time to time. The expeditions against Meccans are an instance.

2. Preventive war (against the threatened aggression of a foreign State with whom no treaty relations exist). The wars of Banu'l-Muṣṭaliq, Khaibar, Hunain are all of this kind.

3. Punitive and Retaliatory war (to punish a State for a breach of treaty). The attack on Banū-Qainuqā', Banū-Quraiẓah, Mecca, etc., are instances thereof. If peace is made on the payment of tribute, and later the payment is withheld, there is some divergence of opinion as to the question whether an ultimatum is necessary or attack may be launched without further notice. (*Cf. Māwardīy, op. cit., ch. iv.*)

(380). In all other cases, previous declaration is necessary, and especially so against the threatened violation by a State with whom treaty relations exist. So the Qur'ān lays down :

And if thou fearest treachery from any folk, then, throw back to them (their treaty) on a par. Lo! God loveth not the treacherous. (8 : 58.)

(381) And as-Sarakhsīy comments on this verse in the following terms :

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

before their knowing that.¹

(382) Further discussion will be found in a subsequent chapter on truce and armistice.

1. Sarakhsīy, *Mabsūṭ*, X, 87.

CHAPTER XI

EFFECTS OF DECLARATION OF WAR

(383) PROBABLY due to the practice prevalent in the time of classical jurists in countries adjoining Muslim territory, all enemy persons and property were considered as in a state of war. Although treatment differs from category to category, as we shall see in due course, no one can claim complete immunity. Every able-bodied man¹ was considered a potential combatant, and even women and children could be taken prisoner.

1. General Effects.

(384) Obviously all friendly relations come to an end between the belligerent States 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 laws of war. Officials and private citizens, all are prohibited from giving the enemy any help, relief, comfort or information. The case of Hā'ib,² who attempted to send information to the enemy regarding Muslim designs, and the consequent trial, form a classical example of the time of the Prophet. The constitution³ of the city-state of Madīnah during the early years of Hijrah also enjoins the same thing (vide §20, 43). The Qur'ān also clearly lays down: "Let them find you rigorous"⁴ and again: "Be rigorous with them."⁵ Nevertheless it is characteristic of the Qur'ānic teaching to emphasize the following regarding the Quraish, the bitterest of the enemies of Islam at the time:

"... And let not your hatred of a folk who (once)

1. See *infra*, chapter XIII, 2.

2. Ibn-Hishām, pp. 809-10; Ṭabarīy, *Hist.*, I, 1626-27.

3. For text, see Ibn-Hishām, pp. 341-44 or *Corpus*.

4. Qur'ān, 9:123.

5. *Idem*, 9:73.

stopped your going to the Inviolable Place of Worship (*i.e.*, Ka'bah in Mecca) seduce you to transgress; but *help ye one another* with righteousness and pious duty. Help not one another unto sin and transgression, but fear God. Lo! God is severe in punishment." (5 : 2.)

(385) Far from banning all co-operation with the enemy, this Qur'ānic command urges that there must be co-operation regarding charitable and pious matters. Commentators of this verse refer to cases which were the occasion of the revelation of this command, cases in which Muslims were justified in taking counter-measures against their enemy but were prevented on humanitarian grounds.

2. *Effects on Commercial Relations.*

(386) I have not been able to find much material on this important subject in the compendia of Muslim law. A few cases of classical times may, therefore, be profitably quoted :

(387) (a) Sa'd-ibn-Mū'ādh says that he was a friend of Umaīyah-ibn-Khalaf *alias* Abū-Şafwān. If Umaīyah passed through Madīnah, he stayed with Sa'd, and if Sa'd passed through Mecca, he stayed with Umaīyah. After the Prophet came to Madīnah, Sa'd went to Mecca for the 'Umrah pilgrimage and stayed with Umaīyah, and told him to find some suitable hour for accomplishing the circumambulation of the Ka'bah. So they went out at about noon. Abū-Jahl met them, and asked Umaīyah : O Abū-Şafwān, who is this with thee? He said, Sa'd. Then Abū-Jahl turned to him and said : Don't I see thee circumambulating with peace in Mecca in spite of the fact that ye have given asylum to innovators (*i.e.*, Muslims) and pretend that ye will help them and aid them? By God, hadst thou not been with Abū-Şafwān thou wouldst not have returned to thy people in safety. Sa'd loudly retorted : By God, if thou preventest this, then I shall prevent thee in what is much worse for thee : thy passage through the people of Madīnah.¹

1. Bukhārīy, 64 : 2 (ch. Wikālah).

(388) (b) 'Abd-ar-Raḥmān-ibn-'Awf says: I concluded a pact with Umaīyah-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-Raḥmān," 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 . . .¹

(389) Both these cases refer to very early days of Hijrah, before the battle of Badr, which occurred in the year 2 H. Therefore not much importance must attach to them, the more so on account of the fact that there is no evidence of their having happened with the knowledge and approbation of the Prophet.

(390) (c) Thumāmah-ibn-Uthāl was a chieftain of Yamāmah. Early in the year 6 H., he was taken prisoner by a Muslim detachment, and brought to Madīnah. Here 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 Yamāmah 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.² Although many details of this case lie in darkness, it is sufficient for us to conclude that it all depends upon a government to direct its subjects whether and how far they may trade with an enemy.

(391) (d) The Prophet himself once sent a quantity of the dates of Madīnah to the Meccan magnate, Abū-Sufyān, and required in return hides. This is said to have occurred at a time when hostilities were continuing between Mecca and Madinah.³ This further strengthens our conclusion that it all depended upon State policy what things were to be declared contraband of war and trade, and which not.

1. *Idem*, 40 : 2 (ch. Maghḥāzī).

2. Ibn-Hishām, pp. 997.98 ; Ibn-'Abd al-Bar, No. 278 ; Ibn-Hajar, *Iṣābah* No. 961 ; *Ta'rikh al-Khamīs*, II, 3 ; cf. Ibn-Sa'd, V, 401.

3. Sarakhsīy, *al-Sīr al-Kubrī*, I, 70 ; *Idem*, *al-Masūḍ*, X, 92.

3. *Effects on Trusts and Debts.*

(392) Although international credit of 1400 years ago can scarcely be compared with modern magnitudes, still we may be guided by a few classical cases and provisions of positive law in general terms.

(393) (a) When the excesses of the Meccans had reached their climax, and they had actually plotted against the life of the Prophet and consequently he left Mecca to seek safety in Madīnah, he bade his cousin, 'Alīy, to return all that was entrusted to the Prophet by his infidel and actually belligerent co-citizens.¹ There is no doubt that the Meccans could be considered at that time as belligerents.² We do not think the action of the Prophet would have been different at the height of his power.

(394) (b) A very interesting and important case is that of the Jews of Banu'n-Nadīr, recorded by Sarakhsīy (شرح السير الكبير III, 229): A war broke out, in the time of the Prophet, between these Jews and the neighbouring Muslim State in Madīah. After defeating them, the Prophet magnanimously consented to content with their expulsion from Madīnah. They took with them all their movable property. Then came the question of debts which the Muslims owned them. The Prophet is recorded to have said that these shall be paid at the moment when they fall due, they cannot be obliterated on account of war; yet if the Jewish bankers want an immediate repayment, they are at liberty to enter into new contracts with their Muslim clients, for instance by foregoing

1. Ibn-Hishām, p. 334; Ibn-Sa'd, 3/1, p. 13; Mas'ūdīy, *at-Tanbih*, p. 233.

2. Ibn-Hishām, pp. 323-24, 300:

و عرفوا انه قد اجمع للحرب... والله ما نأمنه على الوثوب علينا
بمن قد اتبعه من غيرنا تبأ يعوة على حربنا

i.e. They knew that the Prophet had decided to fight them... By God we cannot be sure that Muhammad would not fall upon us along with those who may follow him from among those other than ourselves... They have taken the oath to fight us.

Also pp. 296, 299, 300 and 304 for provision in the pact of 'Aqabah; *cf.* Ibn-Sa'd 1/1, pp. 148-50.

some percentage (ضعوا و تعجلوا), i.e., diminish and encash immediately).

(395) (c) During the war of Khaibar, the Prophet ordered Aswad, a slave of a Khaibarite Jew, who had come to embrace Islam along with all the sheep and goats of his master which he tended as a shepherd: Go to a safe distance and then frighten the herd so that it takes its usual way home to its master.¹

(396) (d) During the reign of the Caliph 'Umar, Hims was occupied by Muslim troops and the usual taxes were levied and collected from the inhabitants. Later, military exigencies required the evacuation of the city. Thereupon the Muslim commander ordered all taxes to be returned to the inhabitants, saying: We promised to protect you. Since we can no longer do that, we have no right to your payments.²

(397) The Qur'an commands:

(i) Lo! God commandeth you that ye restore deposits to their owners, and if ye judge between mankind, that ye judge justly. (4 : 58)

(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. (2 : 283)

(398) In the sayings of the Prophet we find:

(i) The sword erases all obligations except the debt.³

(ii) Whoever is entrusted with a deposit, let him deliver it up to the one who entrusted it to him.⁴

1. Ibn-Hishām, pp. 769-70; لا كفاء في مغازي المصطفى by al-Kulā'iy, fol. 75b of Berlin MS.

2. Abū-Yūsuf, *Kharāj*, p. 81, Balādhurīy, *Fūtūḥ*, 173 Azdīy, *Fūtūḥ*, 137-38; De Goege, *Memoire sur la conquete de la Syrie*, 2nd ed., pp. 103-4.

3. Sarakhsīy, شرح السير الكبير, I, 20. السيف منحاء للذنوب. لا الدين, i.e. "The sword effaces all sins, except the debt."

4. Occurring in the oration of the last Pilgrimage, text in my الوثائق السياسية on the authority of Ibn-Hishām, Ṭabarīy, Ya'qūbiy and البيان والتبيين of Jāḥiz., cf. also Blachere's article in *Melanges Massignon*, Vol. I.

(399) No doubt responsibilities and obligations may be renounced on the ground of retaliation,¹ yet one's burden should not be placed upon another who is innocent.²

(400) However, it has not been possible for me to trace any precise practice regarding the subject during the later Muslim empires.

4. *Effects on Treaties.*

(401) Scarcely any book on Muslim law or politics discusses the theoretical aspect of this question. Yet it is obvious that mere declaration of war cannot affect all treaties that were concluded between the parties at war with each other.

(402) Treaties which have achieved their aim, for instance, the fixing of boundaries and the like, are not affected by mere declaration of war. We are not concerned here with changes that the war under discussion may bring about regarding questions previously settled.

(403) On the other hand, 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.

(404) Apart from these two obvious kinds, there are treaties which remain suspended during friendship and are enforced only when hostilities involve the contracting parties in battle. This refers to treaties for mutual conduct during war. Such treaties are old enough to be mentioned by *ash-Shaibānī*³ who gives many fictitious cases of such treaties regarding the treatment of prisoners of war, cutting off of the water-supply, devastation of occupied or evacuated country and the like.

(405) There are treaties which are individually disposed of

1. Qur'ān, 16 : 12, 1 : 38, 40 : 40, 42, 40, 6 : 161 ; etc.

2. Qur'ān, 6 : 165, etc. (ولا تنزلوا ذرة وزر اخرى).

3. Cf. *Sarakhsīy*, *السير الكبير* I, 200-05.

at discretion: they are cancelled, suspended or modified. This refers to treaties of trade and commerce, import duties and the like.¹

(406) In modern times, there are treaties which though suspended during a war, automatically revive at the conclusion of peace if the ex-belligerents retain their independence. Such are treaties for the exchange of post and telegrams and similar things.

(407) So far we have referred to bilateral pacts. Multi-lateral treaties give greater complexity to the problem when some of the parties remain neutral and others join the conflict on one or the other side. A recent case is that of Sudan—a condominium of Egypt and England—during World War II, in which Egypt remained neutral, but not England. There may even be cases when, neutrals apart, all the remaining parties of a former treaty join a war *en bloc* against a country alien to the treaty in question.

(408) Obviously the nature of the convention or the contents of the treaties constitute the decisive factor. We possess no data to rely upon except a few cases of the Orthodox Practice.

(409) The classical treaties require an exhaustive study. Here I content myself with the citation of a few cases of the time of the Prophet.

(410) (a) When the Prophet migrated to Madīnah, he found there chaos and anarchy. It was he who constituted² a city-state there on a loose confederal basis. The Meccan refugees formed one unit; Arab tribes of Madīnah consisting of Muslim and non-Muslim clans all joined individually; and the Jewish tribes also entered the federation, each tribe forming a separate entity. The internecine feuds among Jews as well as Arabs of Madīnah had not yet welded them into solid blocks, and in fact in pre-Islamic days some Arab tribes

1. *Cf. supra*, "Effects on Commercial Relations."

2. Text of the Constitution in Ibn-Hishām, pp. 341-44, etc. Discussion and analysis in my article "*First Written Constitution in the World.*"

had allied themselves with some Jewish ones in order to secure themselves against another block of Arab and Jewish tribes all living within the precincts of a valley about fifteen miles long and as wide. Apparently this separate and individual adherence to the confederation was the reason why the pact remained intact even when some Jewish tribes came to war with the Muslims of the city-state. This refers to the clans of Qainuqā'.¹ Later still, 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-religionists.² After the expulsion of certain Jewish tribes from Madīnah, the Prophet demanded of some of the remaining Jews, on the ground of this very pact which constituted Madīnah into a city-state, to participate in contributing towards the payment of the blood-money for a certain case of homicide.³

(411) (b) Another case of a multilateral treaty in the time of the Prophet is the famous one of Ḥudaibīyah⁴ between Mecca and Madīnah 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.

(412) How to conclude, amend or annul the treaties will be dealt with later.

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1. Ibn-Hishām, pp. 545-46 ; my *La Diplomatie Musulmane*, I, 26.
 2. Sarakhsīy, *Mabsūt*, X, 23.
 3. Ibn-Hishām, p. 652 ; Ibn-Sa'd, 2/1, pp. 40-41 ; Ṭabarīy, I, 1449-50.
 4. Ibn-Hishām, 747-48 and my *Corpus*.

CHAPTER XII

TREATMENT OF ENEMY PERSONS

(413) AT the outbreak of a war, enemy persons might be found either in Islamic territory, having come there by permission previously, or in their own territory, or in the war zone. Treatment of these different categories differs considerably.

1. *Enemy Resident Aliens.*

(414) By *Musta'min* in Muslim legal terminology one means a person who temporarily resides in a foreign country, by its permission. There are, in Arabic, no different terms which 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 (who is otherwise called *Muwādi'*, but for the purpose of this chapter he is also a *Musta'min*) or unallied or even belligerent State. All are alike called *Musta'min* which literally means one who seeks protection.

(415) Such a foreign resident in Muslim territory is as safe at the outbreak of war between his State and the Muslim State as before.¹ According to the terms of the passport he might return home whenever he liked; he might even take with him all his property. Contraband is certainly excepted yet anything he had actually brought with him he might take back.² Newly bought contraband of war has to be sold or otherwise disposed of in Muslim territory itself. Generally a resident alien can go from Muslim territory in whichever direction he chooses, yet a big detachment of them would not be allowed to go to some other country which is at war with the Muslim State when it is feared that they would join forces there against the

1. Kāsānīy, بدائع, VII, 107, ll. 15-16.

2. Sarakhsīy, *Mabsūt*, X, 91-92.

Muslims.¹ They can, however, return to their own country unmolested even when it is at war with the Muslim State.² For to detain them would be violation of pledge. If a *Musta'min* acts as a spy, he forfeits his immunity. This also happens if a *Musta'min* of a belligerent State becomes an ordinary belligerent immediately after leaving Islamic territory, and his immunity that he enjoyed during his stay in the Muslim territory comes to an end.

2. *Enemy at Home.*

(416) Enemy persons living in their homes have to suffer the severities of siege and other incidents of war. When their town is conquered and occupied by Muslim forces, their treatment depends on the terms of surrender and capitulation or general proclamation by the officer commanding. Other details will follow.

3. *Enemy in the War Zone.*

(417) In the actual war zone not only the enemy combatants but even others could not claim absolute security. Of course, Muslim soldiers have to take care that they do not fire directly on neutrals, women and minors and other non-combatants,

1. *Idem*, شرح السير الكبير, IV, 121-22:

ولو ان قوماً من اهل الحرب دخلوا اليها بامان ثم ارادوا ان يخرجوا الى دار حرب اخرى ليكونو معهم يقاتلون اهل الاسلام فلا ينبغي للمسلمين ان يمكنوهم من ذلك و ان كان الداخل و احدا او اثنين لم يمنع من الرجوع الى دار حرب اخرى للتجارة معهم لان بهذا القدر لا يزداد قوة اهل هذه الدار على قتالنا بخلاف ما اذا كانوا اهل منعة -

i.e., If a group of belligerents come to us with permission and afterwards want to go to some other belligerent country in order to be with that people and fight against the Muslims, in such a case they would not be allowed to go to that country. If the one who comes is one or two individuals, they would not be prevented to proceed to some belligerent country other than theirs, for commerce. For with such a number, the forces of that country are not increased to fight us; not so when those who come to us constitute a formidable force.

2. *Kāsānīy*, etc., *in loco*.

yet if any damage is done to them unintentionally, no responsibility is to be placed on the Muslim army.

(418) So far as war is concerned, no distinction is made between an enemy subject and foreign allies¹ taking part in fight, against Muslims. But distinction is made between able-bodied combatants and followers of the army, contractors, traders, physicians, reporters and others who do not take part in actual fighting. The wives and children of enemy combatants also share some of the severities of war, as will be described in the following chapters.

1. There is a difference between the ally of the enemy who actually takes part in the war, and the one who does not do that. For details see my article "*Some New Developments in the British Conception of Neutrality as against Muslim Countries*", in "*Islamic Review*" (Woking), Vol. 39, No. 8, August 1951, pp. 22-23.

ACTS FORBIDDEN

(419) IN actual fight the following acts are forbidden to a Muslim army as regards enemy persons and property :

1. Unnecessarily cruel and tortuous ways of killing. The Prophet has said in this connexion : "Fairness is prescribed by God in every matter ; so if you kill, kill in a fair way."¹

2. Killing non-combatants.² Combatants are only those who are physically capable of fighting (المقاتلة من له بنية للمقاتلة).³ Women,⁴ minors, servants and slaves who accompany their masters yet do not take part in actual fighting,⁵ the blind,⁶ monks,⁷ hermits,⁸ the very old,⁹ those physically incapable of fighting,¹⁰ the insane or delirious¹¹—these are authoritative examples thereof.

3. Prisoners of war are not to be decapitated.¹² Details of their treatment will be given in a separate chapter.

4. Mutilation of men as well as beasts.¹³

5. Treachery and perfidy.¹⁴

1. *Ṣaḥīḥ* of Muslim, (ed. Istanbul), VI, 72.

2. *Mabsūṭ* of Sarakhsīy, X, 64.

3. شرح السير الكبير, IV, 78.

4. *Idem*, I, 59, 34. Exceptions in special cases, المحيط البرهاني, III, 266, on the authority of *Shāibānīy*.

5. شرح السير الكبير, IV, 79-80.

6. *Mabsūṭ* of Sarakhsīy, X, 69.

7. شرح السير الكبير, I, 33.

10. *Idem*, p. 69.

8. *Idem*, III, 190.

11. *Mabsūṭ* of Sarakhsīy, p. 69.

9. *Mabsūṭ* of Sarakhsīy, X, 6.

12. Cf. *infra*, ch. 15.

13. شرح السير الكبير, I, 78 ; *Tirmidhīy*, 19: 48 ; *Abū-Dāwūd*, 15: 110.

14. 'Abd-al-Jalīl, *Shu'ab al-Imān*, p. 558, ch. *Walā'al-'ahd ma'a al-mushrikīn* (MS. *Bashīr Āghā*, Istanbul, No. 366), sayings of the Prophet collected together. Cf. *Qur'ān*, 17 : 34, etc.

ACTS FORBIDDEN

6. Devastation, destruction of harvest, cutting trees unnecessarily.¹

7. Slaughtering animals more than what is necessary for food.²

8. Excess and wickedness.³

9. Adultery and fornication even with captive women. As regards a free enemy woman, the violator is to be stoned to death or whipped according to whether he is married or unmarried. If, however, she is a captive, he is to receive discretionary punishment *and* to be fined as much as a مهر مثل (i.e., what his nearest female relatives would have received as *mahr* or bride-money) which would be added to the general booty.⁴

10. Killing enemy hostages, even if those of the Muslim State have been murdered by the enemy, and even if there is express agreement that hostages may be beheaded in retaliation.⁵

11. Severing the head of some fallen enemy and sending it to higher Muslim authorities is regarded as improper and disliked (مكروه). The first Caliph issued orders forbidding it.⁶

12. There is no instance in the time of the Prophet when a massacre was allowed after vanquishing the enemy or otherwise occupying a place. The conquest of Mecca provides a fine example. After all those innumerable physical tortures and proprietary damages which the Muslims had received at the hands of their Meccan enemy, when the Prophet conquered the city, he declared a general amnesty excluding expressly about half a dozen named persons, who were declared outlaws to be killed wherever found. They were State criminals having committed murder and apostasy or similar offences. Later,

1. شرح السير الكبير, I, 27, 34; Qur'ān, 2 : 205.

2. شرح السير الكبير, I, 36.

3. *Ideam*, I, 37.

4. Māwardīy, *op. cit.*, p. 88.

5. *Idem*, p. 84; *Mabsūṭ* of Sarakhsīy, X, 129; فتوح of Balādhurīy, *in loco*.

6. Sarakhsīy, *Mabsūṭ*, X, 131; شرح السير الكبير, I, 78.

these also were pardoned, except three who were killed by Muslim soldiers without referring again to the Prophet.¹

13. Killing parents, except in absolute self-defence, even if they are non-Muslims and in the enemy ranks. There are more cases than one in which the Prophet forbade persons who had asked for permission to kill their non-Muslim parents on ground of hostility to Islam.²

14. Killing peasants when they do not fight and the result of war is indifferent to them.³

15. Traders, merchants, contractors and the like are to be spared if they do not take part in actual fighting.⁴

16. Burning a captured man or animal to death. Once the Prophet despatched a band with the instruction to arrest a culprit and burn him alive; but he immediately recalled them and ordered them not to burn the criminal, but simply to kill him; for, he said, only the Lord of Fire can punish with fire.⁵

17. It appears that in classical times of Islam, it was a prevalent practice among non-Muslims to take shelter behind enemy prisoners.⁶ I have not found a single instance where Muslims were accused of this cowardly act when they forced their prisoners to fight against their own nation.

1. Ibn-Hishām, pp. 818-19; Ṭabarīy, *Hist.*, I, 1639ff.

2. شرح السير الكبير, I, 75-76, III, 183, 192.

3. *Idem*, IV, 79; for order and practice of Abū-Bakr, cf. Ṭabarīy, I, 2026, 2031; for 'Umar cf. Ibn-Rushd, بداية المجتهد, I, 311, *Kharāj*, of Yahya-ibn-Ādam (ed. Brill), p. 34.

4. *Kharāj* of Yahya, p. 34: عن جابر قال كانوا لا يقتلون تجاراً cf. *Kharāj* of Abū-Yūsuf, p. 122, for similar kind of non-fighting followers in Muslim army.

5. Tirmidhiy, II, 298, ch. شرح السير الكبير; المحرق بالذار III, 214; Bukhārīy, 55: 149; Ibn-Hishām, pp. 468-69.

6. Cf. Abū-Ya'lā السلطانية, p. 27 (MS. Istanbul, Ankara and Damascus). The expression تترس بأسارى المسلمين is met with frequently.

18. The Mālikite jurist, Khalīl, expressly says that poisonous arrows are unlawful (نبيل سم حرام).¹ Jurists of other schools have not referred to the subject, so far as I know, owing apparently to non-employment of similar weapons by enemies in the countries where they lived.

19. Acts forbidden under treaties. Many fictitious cases of this kind are mentioned by ash-Shaibānīy,² which shows that it was common practice in those days to agree what not to do in the conduct of war regarding prisoners, devastation, cutting off the water-supply and the like.

(420) It is to be noted that acts prohibited under treaties are forbidden only so long as the treaties last.³ Other prohibited acts form part of the injunctions of positive Muslim law, and they cannot become allowable even in reprisal; the immediate criminals and not their countrymen are to be considered responsible.⁴ Muslims are not allowed to hold slogans similar to: "We are not bound to keep faith with the Gentiles,"⁵ enunciated, according to the Qur'ān, by Jews and reiterated by Papal bulls during the Middle Ages.⁶

(421) A selection of Instructions to Commanders, issued by the Prophet and later Caliphs, will be found in an appendix at the end of this monograph.

1. ماختصر خليل ch. Jihād ; cf. however, *infra*, ch. XVII, 3.

2. شرح السير الكبير I, 200-05. Contrast with contemporary Christian Practice, Nys, *Origines*, p. 221.

3. فما استقاموا لكم فاستقيموا لهم (Qur'ān, 9 : 7).

4. شرح السير الكبير (a Hadīth quoted by المسلمين عند شروطهم I, 185).

5. Qur'ān, 6 : 164, 17 : 15, 35 : 18, 49 : 7, 53 : 38.

6. Qur'ān, 3 : 75.

7. Cf. *supra*, Part I, Ch. X, paragraph 9.

CHAPTER XIV

GIVING QUARTER

(422) QUARTER, which is based upon a Qur'ānic verse [“And if anyone of the Associators (polytheists) seeketh thy protection (O Muḥammad), then protect him so that he may hear the Word of God, and afterwards convey him to his place of safety”¹], is defined by jurists as :

الامان التزام الكف عن التعرض لهم بالقتل والسبى حقا الله تعالى
i.e., Quarter means the practice of refraining from opposing them (*i.e.*, the belligerents) through killing or capturing, for the sake of God.²

(423) Quarter might be granted to enemy persons when they solicit it individually or *en masse*. If surrender is unconditional, they become prisoners of war, and their property booty. This occurs generally when they are besieged or fought in the open and reduced to great straits. In a conditional surrender, capitulation as it is termed, if conditions were accepted by the conqueror, those conditions must be faithfully observed, and Muslims must abide by their conditions (والمسلمون عند شروطهم).³

(424) Quarter might also be granted to enemy persons without their soliciting it, through a general proclamation. So at the time of the conquest of Mecca, the Prophet made it known that all those persons were safe who entered the courtyard of Ka'bah or the house of their chief, Abū-Sufyān, or who shut up the doors of their houses,⁴ or laid down their arms.⁵ From this general amnesty a few were specifically

1. Qur'ān, 9 : 6. 2. Sarakhsīy, (شرح السير الكبير), I, 189.

3. *Ibid.*, 185 on the authority of the Prophet.

4. *Ibn-Hishām*, p. 814.

5. *Mabsūṭ* of Sarakhsīy, X, 39; *Asrār* of Dabusīy, fōl. 146b (MS. Walīuddīn, Istanbul, No. 1402); *Tanbīh* of Mas'ūdīy, p. 267; *Kharāj* of Abū-Yūsuf, p. 131; *Kharāj* of Qudāmah-ibn-Ja'far, ch. 19, §9 (MS. Istanbul).

excepted for their non-military offences.

(425) The modes and expressions of quarter are discussed in great detail by Muslim jurists,¹ which shows the great importance they attach to the fulfilling of terms accepted in good faith.

(426) According to an oft-quoted *Hadīth* of the Prophet, even the lowest of the Muslims may grant quarter which will be binding on the totality of the Muslim State.² So this right is possessed not only by the combatants, potential or active, but even by others incapable of fight,³ by the sick³ and the blind,³ and even by slaves.⁴ The Prophet, more than once, rendered the quarter given by women valid.⁵ Naturally, the minors, the insane, and those under enemy control (e.g., prisoners, tourists, etc.) are excepted,⁶ so long as they are under non-Muslim jurisdiction. Their incapacity terminates as soon as they reach a place outside non-Muslim jurisdiction: Muslim territory or no-men's-land. (Cf. *supra* Part 2, Ch. 3, last para.)

(427) 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,⁷ except when authorized by competent Muslims.⁸ It is admitted that the commander of the Muslim army might notify that enemy might not be given quarter by an individual Muslim other than the commander himself. Without such previous notification, the enemy might not be deprived of the right of soliciting quarter

1. Sarakhsīy, شرح السير الكبير, I, 189-362; فتاوى عالمگیریه, *in loco*.

2. Do. I, 168-69.

3. *Ibid.*, I, 181; Kāsānīy. VII, 107.

4. Do. I, 171-72, quoting a case of the time of the Caliph 'Umar *re-Jundaisāpūr*. See also Ṭabarīy, *Hist.*, I, 2567-68.

5. Sarakhsīy, شرح السير الكبير, I, 191-92, Tirmidhīy, II, ch. 127. امان الطرارة خراج لابی يوسف

6. Sarakhsīy, شرح السير الكبير, I, 192; *Idem*, *Mabsūt*, X, 71.

7. Sarakhsīy, شرح السير الكبير, I, 172.

8. *Ibid.*, I, 291-92.

from individual Muslims.¹ In the Constitution of the City-State of Madīnah promulgated by the Prophet, (§ 20a, and 43) there are clear exceptions to the general right of granting quarter; and neither the Arab nor the Jewish citizens of the City-State could protect the Quraish or even their allies.

(428) Quarter might for good reason be revoked, but in such cases 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.²

(429) Quarter might even be temporary or conditional. The Prophet accorded Mu'āwiyah-ibn-Mughīrah three days to quit Madīnah.³ Jews of Khaibar were told that their quarter would be forfeited if they hid their property.⁴

(430) Quarter is sometimes granted for persons absent, and necessary assurances are provided in order to create confidence. On one such occasion the Prophet sent his turban.⁵

(431) If a quartered belligerent is unwittingly molested, right to damages accrues.⁶ The case of the two persons from Banū-Āmir may be cited here, as an instance of the time of the Prophet, which happened just before the battle of the Jews of Banū-an-Nadīr of Madīnah.⁷

(432) Generally speaking, quarter is strictly a personal matter, and not transferable. If not expressly otherwise mentioned, it did not protect even the grantee's family, less so his property. This applied, however, only when one was in immediate danger.⁸ On the other hand, when one was safe

1. *Ibid.*, I, 356-359.

2. *Ibid.*, I, 357.

3. *Kāmil* of Ibn al-Athīr, II, 127-28 (after the battle of Uḥud); شرح السير الكبير, I, 328.

4. Sarakhsīy, I, 185-87.

5. Ṭabarīy, *Hist.*, I, 1645.

6. ذخيرة برهانية, ch. XI (مسائل الامان).

7. *Ibn Hishām*, p. 652; *Ibn Sa'd*, 2/1, pp. 40-41; Ṭabarīy, *Hist.* I, 1449f.

8. *Muḥit* by Raḍīyudīn as-Sarakhsīy, I, fol. 602b-603a (MS. Walūddīn).

GIVING QUARTER

in his home, and quarter was solicited, then it automatically included life, property, wives, children of minor age, unmarried daughters and sisters, mothers and grandmothers, and aunts of both the mother and father's side.¹ In case of licence to trade, even the servants and slaves used to be included in the time of classical jurists.²

1. *Ibid.*; Sarakhsīy, شرح السيرة الكبير, 1, 233-38.
2. Sarakhsīy, *ibid.*

TREATMENT OF PRISONERS OF WAR

(433) THIS subject naturally falls into two parts, viz., 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.*

(434) A Muslim prisoner is bound to observe faithfully his parole and honour.¹ If, however, he had given no parole, he is at liberty, if he likes and is able, to escape or otherwise do harm to his captors.²

(435) As regards Muslim subjects, it is the duty of the Muslim State to seek their release by giving money from the public treasury.³ The Qur'an clearly lays down that a portion of the State income is to be allotted for *freeing the necks*,⁴ which is interpreted⁵ as aiding the prisoners and slaves to get themselves freed. There are clear traditions of the Prophet also to the same effect recorded by Bukhārīy and others; for instance: "Manage the release of the prisoner" (فكوا العائى).⁶ As regards practice, I have not found any precedent of the time of the Prophet when ransom was paid for the release of Muslim prisoners. Exchange of prisoners will, however, be dealt with later. The Caliph 'Umar, however, ordered: "Every Muslim prisoner in the hands of non-Muslims must

1. Saraḥsīy *idem*, IV, 223, citing actual cases of the time of the Prophet.

2. *Ibid.*, p. 219ff.

3. *Kharāj* of Abū-Yūsuf, p. 121.

4. Qur'an, 9 : 60.

5. See any commentary on the Qur'an *in loco*. Also Ibn-Taimīyah, *op cit.*, p. 17: (في الرقاب يدخل فيه اعانة المكاتبين و افتداء الاسرى) *i.e.* In the category of "freeing the necks" is included the aid to slaves to get liberated and to the prisoners of war to ransom.

6. Bukhārīy, 56 : 171.

be relieved by means of the Muslim State treasury.”¹ (For the *dhimmis* taken prisoner, see above § 209). Regarding later times, al-Mas‘ūdy and al-Maqrīzy record and describe more than half a dozen general releases of Muslim prisoners by their enemy.² Historians of foreign countries have also recorded it. Finlay, for instance, says: “Regular exchange of prisoners with the Muslims commenced as early as the reign of Constantine V, A.D. 769. In the year 797 a new clause was inserted in a treaty for the exchange of prisoners, binding the contracting parties to release all supernumerary captives on the payment of a fixed sum for each individual.”³

(436) 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.⁴

2. *Enemy Prisoners captured by Muslims.*

(437) As regards taking prisoners, there are two Qur’ānic verses :

(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. (47 : 4)

(ii) It is not for any Prophet to have captive until he hath routed (the enemy) in the land. (8 : 67)

In both these verses the verb *اثخن* occurs which means to route, to dominate, to subjugate. Cf. for this expression

1. *Kharāj* of Abū-Yūsuf, p. 121 :

كل اسير كان في ايدى المشركين من المسلمين ففكاكه من بيت مال المسلمين i.e. The ransom of every Muslim prisoner is upon the government treasury (bait al-māl).

2. *Kitaḥ* of Maqrīzīy. ch. Dār aṣ-Ṣanā‘ah Cf. *Kāmil* of Ibn al-Athīr, VIII, 269, anno. 326 ; Mas‘ūdy, تذييل, pp. 189-90.

3. Finlay, *History of the Byzantine Empire* (ed. 1853), I, 106 ; *Khudā Baksh* in the English translation of Von Kremer’s *Orient*, p. 323, note.

4. *Sarakhsīy*, شرح السير الكبير, IV, 229.

History of Ṭabarī, I, p. 1855, l. 11, and also the *Tafsīr* of the same author *in loco*. Cf. also *تاويلات القرآن* by al-Māturīdīy (d. 333), who commenting on the latter verse gives it similar meaning :

حتى يثخن في الارض، اي يغلب - حتى اذا اخذ الفداء
وسر حكام بعد ما غاب في الارض ليكون رجوعهم الى غير
منفعة و شركة (مخطوطة لا له لي في استانبول)

i.e., Until he makes *ithkhān* (اثنخان) 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 a place where there is no utility and no association (for them).

(438) According to Muslim law, a prisoner *qua* prisoner cannot be killed. Ibn Rushd even records a consensus of the Companions of the Prophet to the same effect.¹ This does not preclude the trial and punishment of prisoners for crimes beyond rights of belligerency. For this we possess the high authority of the practice of the Prophet when two prisoners of the battle of Badr were beheaded by his order² Muslim jurists clearly recognize that a prisoner cannot be held responsible for mere acts of belligerency :

و كذلك اهل الحرب لا يضمنون بالاجماع ما اذلفوا علينا
من الاموال والنفوس و ان اسلموا و صاروا زمة لنا ويلهم و
تدينهم ومنعتهم و كانوا كالمسلمين و كذلك اخذ المال -

i.e., Similarly there is a unanimity that belligerents would not be held responsible for damage they inflicted on Muslims 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 cap-

1. *بداية المجتهد*, I, 351 (ed. Muṣṭafā Bābī Press).

2. Ibn-Hishām, p. 458. Both were inveterate foes of Islam; their release was dangerous for Islam.

ture of property.¹

(439) Treatment during captivity has been the subject of liberal provisions. As regards the prisoners of Badr, the Prophet ordered: "Take heed of the recommendation to treat the prisoners fairly"² (استوصوا بالاسارى خيراً). The consequence was that many Muslim soldiers contented themselves with dates and fed the prisoners in their charge with bread.³ Abū-Yūsuf remarks that prisoners must be fed and well treated until a decision is reached regarding them.⁴ They are not to be charged for their food, the cost of which is to be borne by the capturing Muslim State.⁵ The Qur'an 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.*"⁶ Prisoners are to be protected from heat and cold, and the like. If they have no clothes, these might be provided—as was the practice of the Prophet.⁷ If they are in any trouble or discomfiture, this is to be done away with as far as possible, for which also there is authority of the practice of the Prophet.⁸ He has the right to draw up wills for the property at home.⁹ Obviously these would be communicated to the enemy authorities through a proper channel. Among prisoners, a mother is not to be separated from her child,¹⁰ nor other near relatives from each other.¹¹ The position and dignity of prisoners are to be respected according to individual

1. Dabūsīy, *Asrār*, fol.148a.

2. Ṭabarīy, *Hist.*, I, 1337-38.

3. *Ibid.*

4. *Kharāj*, p. 88.

5. *Ibid.*

6. Qur'an, 76 : 5-9.

7. Bukhārīy, 56 : 142 ; Ibn-Sa'd, 2/1, p. 111.

8. *Kāmil* of Ibn al-Athīr, II, 99. See also *ch.* Prisoners of Badr, etc. in any Seerat-work.

9. Sarakhsīy, شرح السير الكبير, IV, 229.

10. *Ibid.*, 241-43.

11. *Ibid.*

cases.¹ A tradition is also attributed to the Prophet: "Pay respect to the dignitary of a nation who is brought low."² There is no evidence in early Muslim history of exacting labour from prisoners. If they tried to escape or otherwise violate discipline, they might be punished.³ If they succeeded in their attempt to escape and reach safety (مأمن) and are again captured, their previous offence of escaping might not be ground for punishment,⁴ except perhaps the breach of parole.

(440) Muslim law leaves to the discretion of 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. We shall treat them separately.

(a) *Beheading of Prisoners.*

(441) We have already seen, prisoners surrendering on conditions are treated according to the terms of their capitulation. On unconditional surrender, mere past acts of belligerency constitute no ground for inflicting capital punishment. No doubt, crimes other than these might bring punishment on the prisoner. According to Abū-Yūsuf, a prisoner might be beheaded only in the interest of Islam, though he also records many opinions of high authority that their beheading was disliked (*makrūh*).⁵ We have seen that unanimity was reached among the Companions of the Prophet not to behead prisoners of war.⁶ In short, capital punishment for prisoners of war is only permissible in extreme cases of necessity and in the higher interests of the State.

1. For treatment of the daughter of Muqauqis, cf. Maqrīzīy, *خطط*, I, 297; *تاريخ الأحياب* (MS. Berlin); *ان لاولاد الملوک شاندا لیس*; *لغیر هن*, etc.

2. Jāhiz, *البيان والتبيين*, I, 22, (ارحموا عزیز قوم ذل); Ibn 'Asākīr: *إذا اقا کم کریم قوم فاکرموه*.

3. These things fall under the discretionary powers of the commanders.

4. Do.

5. *Kharāj*, p. 121.

6. Ibn-Rushd, *بداية المجتهد*, I, 351. (ed. Muṣṭafā Bābī Press).

(b) *Enslavement.*

(442) There is no verse in the Qur'ān directly permitting enslavement, yet some indirect mention is found in the following:

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 (33 : 50)

(443) In the practice of the Prophet, however, though few, there are instances of it. The females and children of the Jewish tribe of Banū-Quraizah were, by the decision of the arbitrator nominated by themselves, enslaved and distributed as booty.¹ This arbitral award was in conformity with the Jewish personal law.² The captives of the Arab tribe of Hawāzin, in the year 8 H., were distributed among the troops, but later on all of them were set free in answer to the supplication of the Hawāzinites after their conversion to Islam. This manumission was not decreed as a right, but the Muslim soldiers were prompted by the personal example of the Prophet, and those who would not liberate their share, were compensated by the State-treasury.³ A little earlier, the Arabian tribe of Banul-Muṣṭaliq had also incurred the same fate of losing females and children to the Muslim army. This time the Prophet married a girl from among the captives, who happened to be the daughter of the chieftain of the tribe, after liberating her. And the Muslim soldiery was persuaded to free all the enslaved persons.⁴ The prisoners of Banul-'Anbar were set free either gratuitously or on ransom.⁵

(444) The policy of the Prophet reached a climax when, as is said, he decreed that Arabs could not be enslaved (لارق على عربى).⁶ The Caliph 'Umar issued orders that peasants, artisans and professionals of belligerent countries should not be

1. *Ibn-Hishām*, p. 689.

2. Deuteronomy, XX, 10-14.

3. *Ibn-Hishām*, pp. 877-78; Ṭabarīy and others *in loco*.

4. *Ibn-Hishām*, p. 729.

5. *Ibid.*, p. 983.

6. *Mabsūṭ* of Sarakhsīy, X, 118.

enslaved.¹ The Qur'ān exhorted liberation of slaves,² and provided that the income of the Muslim State should partly be allotted for the manumission of slaves.³ Another verse⁴ was interpreted by the Caliph 'Umar⁵ to mean that if a Muslim slave wanted to work and thus pay off his value to his master, the master was not in a position to refuse the offer.

(445) Thus it may be inferred that though Islam has done much to minimize slavery, it has not abolished it altogether. *Certainly* it is not obligatory always to enslave prisoners of war, yet it cannot be denied that the supreme commander of an army has the choice to accord the prisoners either enslavement or any other treatment. A word of caution may not be out of place. *Slave* in Islam does not convey the same idea as in other civilizations. For a slave of a Muslim has a right to equality with his master in food, clothing and dwelling. It cannot be denied that it was an easy method of proselytizing non-Muslims which is the prime policy of a Muslim State.⁶

(446) As we have just seen, to enslave the prisoners of war, male or female, is not at all obligatory. On the other hand, to free gratuitously or on ransom are the two alternatives,—probably in their order of preference,—commanded by the Qur'ān (47 : 4) regarding them. Of course, it is not very

1. *Kanzal-'Ummāl*, Vol. 2, p. 314.

2. Qur'ān, 90 : 13, 2 : 177 ; freeing of slaves is an atonement of many an offence for which cf. Qur'ān, 4 : 92, 5 : 89, 58 : 3.

3. Qur'ān, 9 : 60.

4. Qur'ān, 24 : 33 : (فكاتبوهم ان علمتم فيهم خيرا).

5. *Shiblī*, *al-Fārūq*, citing *Bukhārīy*.

6. In the archives of Pondicherry, that *jāgīr* bestowed by the *Nizām* on the French East India Co., there are still preserved the proceedings disposing of the command of the emperor of France received to the effect that all people in French possessions be forced to baptize their slaves within a short time on pain of arbitrary punishment. Cf. No. 29, Edit du Roy donne a Versailles an mois de Mars, 1724, art. 2: "Tous les esclaves seront instruits dans la religion catholique apostolique et Romaine, et Baptises, ordonnons aux habitants qui achepteront des negres de les faire instruire et Baptiser dans le temps convenable a peine d'amende arbitraire. Enjoignons aux Directeurs generaux de la Compagnie De Indes et a tous ses officiers d'y tenir exactement la main." It is signed by Dupleix and others.

But Islam does not allow compulsion to convert even slaves to Islam.

easy to stop one-sidedly such a practice if the adversaries are not inclined to do likewise. Ibn-Jubair, for instance, has left us in his رحلة graphic and heartrending description of captive Muslim women and children sold as slaves, in most abject conditions, in the markets of Italy, where he had encountered them on his way to Mecca. Nevertheless Islam has done much to improve international treatment of slaves, and Hobhouse (*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.

(447) Not being an obligatory rule of conduct, if Muslims voluntarily give it up, they commit no crime and no violation of their law. In fact it is their own ideal. However it must not be forgotten that waiving the right of enjoyment of a right, by Muslims of a country or a period, does not abrogate the divine law; and if other Muslims find it necessary, for some reason or other, to reinstitute it, they will not be violating their law either.

(448) In fact there are circumstances in which it may be in the interest of humanity to have recourse to enslavement. If, for instance, a people religiously believes that all aliens are untouchable, and treats human beings worse than animals, and at the same time refuses to listen to the counsel of humanitarianism; or if a people of one complexion has an exaggerated prejudice against those created by God with a skin of another colour, and treats them in a disgusting manner,—it is in the interest of humanity to proceed internationally against such unhuman people, to enslave them, and to put them under the mandate of a people which has no prejudices of colour or race or tongue. Let us hope such a need will not press.

(449) For treatment of and laws governing slaves in Islam, I may refer to my monograph رومی اور اسلامی ادارہ غلامی published by the Law Union of the Osmania University, which contains also a bibliography; see also my article "Slavery in Islam," in the Ramadan Annual of the Muslim Digest, Silver Jubilee Number, Durban, March 1960.

(c) *Ransom.*

(450) The Qur'ān has legalized releasing prisoners of war on ransom (*cf.* 47 : 4) and there are many instances in the life of the Prophet of the liberating of them with various kinds of ransom and compensation. So they were required sometimes to teach a number of Muslim boys reading and writing;¹ sometimes money in gold or silver was demanded;² sometimes other goods, for instance spears³ and munition of war, were accepted. It is not our concern whether the ransom was paid by the prisoner from his private purse or he was aided in it by his friends or government. The Caliph 'Umar II released full one hundred thousand prisoners and acquired the city of Malaṭīyah from the Byzantines.⁴

(d) *Exchange of Prisoners.*

(451) Of exchange, a special kind of ransom, there are many instances in the life of the Prophet : sometimes one for one,⁵ at others one for more.⁶ 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.⁷

(452) It is natural that vehicles employed for the purpose of conveying exchangeable prisoners—cartels as they are called—should be immune during their journey to and fro.⁸ It is

1. Ibn-Sa'd, 2/1, p. 14; *Ma'ad* of Ibn-Ḥanbal, I, 246-47.

2. *Ibn-Hishām*, p. 462, etc.

3. Ibn-Ḥajar, *Iṣābah*, No. 8336; Kattānīy, نظام الحكومة النبوية, II, 38.

4. Abū-'Abdallāh Muḥammad-ibn-Salāmah-ibn-Ja'far, عيون المعارف, و فزون اخبار الخلائف (MS. Topkpusarai), fol. 77a.

5. Ṭabarīy, *Hist.*, I, 1345-46, 1862.

6. *Ṣaḥīḥ* of Muslim, V. 150, *ch.* التذليل وفداء المسلمين بالاسرى.

7. *Cf. supra* a few pages above, in the beginning of this section citing Finlay.

8. *Cf.* Sarakhsīy, شرح السير الكبير, III, 327-28 :

لئلا ينسبوا الى الغدر و ليمطئذوا اليهم في مثل هذا في المستقبل

also obvious that during the time of this immune journey they should not take part in hostilities on pain of losing that immunity.

(e) *Gratuitous Release.*

(453) The Qur'ān has recommended this when hostilities have ceased (*cf.* 47 : 4). There are not a few instances of it in the life of the Prophet. From the battle of Badr until his death, one comes across gratuitous releases of prisoners every now and then.¹ There were also cases of release on parole that they would no more take part in hostilities against Muslims.²

(454) Before the booty—in which prisoners according to Muslim law are included—is distributed among the capturers, the commander is free to deal with the prisoners as he likes.³ But after they are enslaved and distributed, the consent⁴ of each recipient is necessary in all those acts of the commander which affect adversely the possessory rights of the owners of the now enslaved prisoners. The prisoners of Hawāzin provide a good precedent, when the Prophet allowed compensation from the public treasury to all those who were not willing to part with their booty of slaves. (Ṭabarīy, *Hist.*, 1675-79.)

1. Ṭabarīy, *Hist.*, I, 1354, for instance.

2. *Cf.* any biography of the Prophet, prisoners of Badr, etc., e.g., *Ibn-Hishām*, p. 471.

3. Māwardīy, *op. cit.*, p. 132.

4. شرح السيرة الكبرى, III, 39.

CHAPTER XVI

CHOICE GIVEN TO INHABITANTS OF ANNEXED TERRITORY

(455) EX-SUBJECTS of enemy in an occupied territory are expected 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 if their district or country is finally annexed; but they are given a year¹ in which to quit the territory or become the subjects of the Muslim State, their new master. It is not necessary to accept all the inhabitants as subjects; some of them might be expelled. The Caliph 'Umar deprived the Jews, the Greeks and the bandits (الروم والاصوت) of the choice of living in Jerusalem.²

(456) If they wished to become the subjects of the Muslim State, they are required to pay the protection-tax (*jizyah*) or whatever might be agreed upon between them and their new government.³ After the act of naturalization is executed, they become ordinary subjects. For certain peculiarities of non-Muslim subjects see *supra*, Part 2, Chapter 4, Section *b*.

1. Māwardīy, *op. cit.*, p. 132.

2. Ṭabarīy, *Hist.*, I, 2405-06.

3. For instance, the famous pact of the Caliph 'Umar with Christians of the tribe of Banū-Taḡhlib who resented the term *jizyah*, and agreed to pay certain other taxes in increased ratio. Cf. Abū-Yūsuf, etc., *in loco*.

CHAPTER XVII

ACTS PERMITTED

1. GENERAL

(457) NOW we will enumerate acts permitted by Muslim Law in the actual conduct of war :

1. Enemy combatants might be killed,¹ wounded,² pursued³ and made captive.⁴ Non-combatants might be killed in defence only and not otherwise. The jurists of the 'Abbasid period made an exception regarding children, women, and men incapable of fighting through old age or otherwise—these might be killed, they say,⁵ if they are rulers, commanders, or advisers in tactics and strategy, and it is expected that their death would produce adverse effects on the enemy. Sometimes the Qur'ānic expression, "then fight with the ring-leaders of Disbelief"⁶ is also referred to for support in this connexion. Kāsānīy explains :

And the principle therein is that all those who are potentially capable of fighting may be killed, no matter whether they actually fight or not. And all those who are potentially incapable of fighting must not be killed except when they fight actually or potentially, such as by means of opinion, influence, inciting and the like.⁷

(458) 2. Recourse might be had to ruses.⁸ The Prophet is reported in his warlike expeditions generally to have given

1. Qur'ān, 47 : 4, 8 : 12.

2. *Ibid.*

3. Qur'ān, 4 : 104, 3 : 172.

4. Qur'ān, 47 : 4, 8 : 12.

5. Sarakhsīy, *Sharḥ as-Siyar al-Kabīr*, I, 34 ; *cf.* also *supra* "Acts Forbidden," No. 2.

6. Qur'ān, 9 : 12.

7. *Badā'i'* of Kāsānīy, VII, 101.

8. Bukharīy, 55 : 157 ; Muslim, V, 143 ; Sarakhsīy, شرح السير الكبير I, 83-86.

currency to apparently misleading things (تورية)¹ using ambiguous expressions² and the like to consternate the enemy. "War is ruse" (الحرب خدعة)³ is a famous dictum in Muslim military literature which is also attributed to the Prophet.

(459) 2a. Propaganda may require a separate treatment. There are cases in the time of the Prophet when secret agents were sent who sowed discord or misunderstanding between the different sections of the enemy and his allies,⁴ and who disseminated false news in order to discourage the enemy,⁵ or to extract some other benefit from the enemy.⁶ Once a famine was afflicting Mecca, and the Prophet sent a handsome contribution of five hundred gold coins towards the relief work. The Meccan magnates, though they dared not refuse and return the contribution, at once discerned in it a powerful weapon "to win the affection of the youngsters of Mecca" (ما يريد محمد بهذا الا ان يخذع شباننا)⁷. The famous verse of the Qur'an on the Islamic budget⁸ also allots a portion of income for propaganda (والمولقة قلوبهم). According to Abū-Ya'la al-Farrā', this Qur'anic term includes four categories :

1. Those whose hearts are to be won to aid Muslims.
2. To persuade them to abstain from doing harm to Muslims.
3. To induce them to embrace Islam.
4. To give inducement to others through them.⁹

1. *Ibn-Hishām*, p. 894.

2. Ṭabarīy, *Hist.*, I, 1302-03.

3. Sarakhsīy, شرح السير الكبير, I, 83.

4. *Ibn-Hishām*, 683-84.

5. Ibn-Hajar, *Iṣābah*, No. 3074.

6. Ṭabarīy, *Hist.*, I, 1586.

7. Sarakhsīy, شرح السير الكبير, I, 69.

8. Qur'an, 9 : 60. Cf. my article in *مجلة نظامية*, Hyderabad, Rabī' 1, 1357 H.

9. Abū-Ya'la al-Farrā', *al-Aḥkām, as-Sullānīyah*, 116, (ed. Egypt, 1357 H). See also my article "Budgeting and Taxation in the time of the Holy Prophet, in *Journal of Pak. Hist. Soc.*, Karachi, 1955, III, 1-11.

Of course most of them will be non-Muslims, and our author has also recognized it explicitly.

(460) 3. The enemy might be attacked with all kinds of weapons.¹ In this matter ships and forts were regarded as the same.² Of course unnecessary bloodshed is to be avoided. In the time of the Prophet, one comes across superior strategy and better tactics in the Muslim army as also new formations, new methods of defence. Ditch warfare was not known in Hijāz before the Prophet. The element of surprise was also included as much as possible, which diminished bloodshed and procured easy surrender.³ The Caliph Mu'āwiyah used incendiary materials (محرقات) in his marine expeditions.⁴ S.P. Scot records that the Muslims of Spain used in the seventh century of Hijrah what might be considered a crude form of cannon.⁵ During the Crusades the Muslims used a kind of marine mine.⁶ During the same time, Ṣalāḥuddīn managed to send his ships to ports besieged by Christians by placing pigs on the deck

1. Qur'ān, 8:60 (وَأَعِدُوا لَهُمْ مَا اسْتَطَعْتُمْ مِنْ قُوَّةٍ), Sarakhsīy, شرح السير الكبير, III, 212:

”ولا بأس للمسلمين ان يمحرقوا حصون المشركين بالناد او يغرقوها بالماء و ان ينصبوا عليها المنجانيق و ان يقطعوا عنهم الماء و ان يجعلوا في ماء هم الدم والعذرة و السم حتى يفسدوه عليهم“

i.e. It is not forbidden to the Muslims if they put the citadels of the infidels to fire or inundate them with water, or erect catapults against them, or cut off water from them, or put blood or dirt or poison in their water to render it unutilizable. Cf. on the contrary the opinion of the Mālikite Khalīl, that poisoned arrows are forbidden, *supra*, “Acts Forbidden,” No. 18.

2. Sarakhsīy, شرح السير الكبير, III, 265.

3. Cf. *Revue des Etudes Islamiques*, 1939: *Les champs de bataille au temps du Prophete*; مجموعه تحقيقات علميه, Osmania University, Vol. VII, عهد نبوى ك ميدان جنگ—both by me.

4. شرح السير الكبير, III, 213.

5. *History of Moorish Empire in Europe*, III, 634 (anno. 1249 of Chr. era).

6. Lawrence, *Principles of International Law*, p. 511.

and clothing the sailors in Christian dress.¹ An author of at least several hundred years ago mentions even poison gases. He says :

و اما المكيدة في الحرب كالنيران و الدخاخين والمياه
المدبرة والروائح المنتنة القايلة لخراب الحصون والقلاع وارهاش
العدو جائزة -

i.e. As for acts of belligerency in war, like fires, smokes, prepared liquids, and ill-smelling deadly odours (? gases), for causing damage to forts and castles and horrifying the enemy, they are permitted.²

The name of the author is not known; the manuscript was copied in 1231 H. Various formulae for the preparation of poison gases are given in another old MS. in Arabic.³ Attacks with smoke are mentioned and upheld by such an old author as Burhānuddīn al-Marghīnānīy (d. 616.)⁴ Ash-Shaibanīy allows surprise attacks, burning forts and flooding them with water.⁵ Instruments for producing terrifying and shrill sounds as a consternater were resorted to by Arabs and other Muslim peoples.⁶

(461) 4. Assassination : It is allowed in Muslim law, and may perhaps be justified on the ground that often it diminishes greater bloodshed and discord, and it is resorted to as the lesser of two evils. In the life of the Prophet there are several clear instances of it. The expeditions dispatched by him against Abul-Huqaiq,⁷ Ka'b-ibn al-Ashraf,⁸ Abū-Rafī⁹ and

1. *Kāmil* of Ibn al-Athīr. XII, 34; Ibn-Shaddād : الزوار السلطانية والمكاسن اليوسفية، p. 178.

2. رسالة في كيفية الحرب والاسرى والمرتدين، MS. Cairo, Fiqh Hanafiy, No. 1080, ch. 27.

3. المكاييد الحربية، MS. Hamidie, Istanbul, No. 189, pp. 308-17.

4. المحيط البرهاني، Vol. III, ch. 23. (MS. Yani Jāmi', Istanbul)

5. Shaibānīy, *Aṣl*, ch. الجيش الذي غزا في اهل الحرب، (MS. Aya Sofia, Istanbul).

6. *Cf. Islamic Culture*, April 1941 : 'A Note on Noise as a Consternater in Islamic Armies,' pp. 240ff.

7. Ṭabarīy, *Hist.*, I, 1379.

8. *Ibid.*, p. 1372 : Bukhārīy, 54 : 15.

9. Ṭabarīy, I, 1375-76 ; Bukhārīy, 54 : 16.

Sufyān-ibn-Anas¹ were successful, and the one against Abū-Sufyān² failed to achieve the desired aim.

(462) 5. Instances of night attacks, too, are not lacking in the history of the time of the Prophet. Muslim historians have recorded even the very watchwords used on these occasions.³ On one such occasion two parties of the Muslims came into clash with each other by mistake, and some blood was shed before it was discovered. The Prophet agreed that it was by mistake, and it was left unpunished.⁴

(463) 6. In a previous chapter it was stated what kind of people might not be killed except in self-defence. In the confusion of 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; but soldiers must be warned not to aim at them.⁵

(464) 7. It is necessary sometimes, in sieges for instance, that an enemy should be fired at from a distance. Often in besieged places are found not only non-combatants but also neutrals and even Muslim subjects such as tourists or prisoners, etc.⁶ Again, sometimes, the enemy takes shelter behind women, children or even Muslim prisoners. In all such cases Muslim soldiers are enjoined simply not to aim at the non-combatants and non-belligerents.⁷

(465) 8. Enemy property may be destroyed or captured. This will be discussed in a separate chapter.

(466) 9. The water-supply of the enemy may be cut off

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1. Sarakhsīy, شرح السير الكبير, I, 79.
 2. Tabariy, *Ikhtilāf al-Fuqahā'*, fol. 18b, (MS. Istanbul); *Ibn-Sa'd*, 2/1, p. 68; *Ibn-Hishām*, p. 994.
 3. *Ibn-Sa'd*, 2/1, 17, *Musnad* of Ibn-Hanbal, IV, 65, *Māwardiy*, p. 60.
 4. *Muḥiṭ Burhāniy*, ch. 23; cf. *infra*, ch. XXVI, 5.
 5. Sarakhsīy, شرح السير الكبير, III, 213; Bukhārīy, 54 : 146.
 6. *Muḥiṭ* of Raḍīuddīn Sarakhsīy, I, 569, citing a case from the time of the Prophet.
 7. Sarakhsīy, شرح السير الكبير, III, 216; Abū-Ya'la, الأحكام السلطانية, p. 2f.

or in some other way may be made unusable¹ for them. The Prophet cut it off from the enemy during the battles of Badr² and Khaibar³ with great effect.

(467) 10. Food and fodder may be obtained from an enemy country.⁴ There was indications to the effect that the Muslim armies sent by the Prophet used to pay for what they obtained wherever practicable. So Tirmidhīy records :

معنى الحديث انهم كانوا ينخرجون في الغزو فيمرون يقومون ولا يجدون من الطعام ما يشترون بالثمن و قال النبي صلعم ان ابوا ان يبيعوا الا ان تاخذوا كرها فتخذوا . . . وقد روى عن عمر بن الخطاب (رض) انه كان يامر نبحو هذا -

Translation: "The meaning of the *Hadīth* is that they used to go in military expeditions and pass by people who would not sell them the requisites for cash. It was for this that the Prophet said: If they decline to sell and will not surrender except by force, then use force . . . It is related of 'Umar that he used to give similar instructions."⁵

(468) On the other hand, there are also indications of food and fodder being obtained by what is termed requisition.⁶ Unlike other captures, food and fodder are not considered booty, *i.e.*, not shared by the government nor divided among the whole army, but the captor becomes the sole owner.⁷

1. *Cf.* No. 3 above, note 2.

2. *Ibn-Hishām*, pp. 439-40.

3. *Sarakhsīy*, شرح السير الكبير, III, 213.

4. *Dīnawarīy*, الاخبار الطوال, p. 120:

كان المسلمون اذا فنيت ازوارهم و اعلافهم جردوا التخييل فاخذت البر حتى هبط على المكان الذي يريدون ويغيرون فينصرفون بالطعام والعلاف والمواشي -

i.e. When the provisions of food and fodder of the Muslims were exhausted, they used to ride their horses and travel in the country, and when they reached the place they wanted they attacked it and returned along with food, fodder and animals. 5. *Tirmidhīy*, I, 301, ed. Bulaq.

6. *Dīnawarīy*, الاخبار الطوال, p. 120. More, *infra*, under chapter "Private Property."

7. *Cf.* any law book, ch. Booty. For instance, *Ibn-Rushd*, "بداية" *in loco*, cites the practice of the time of the Prophet.

(469) 11. Individuals or localities may collectively be fined or otherwise punished for indiscipline or hostility to the occupying forces.

(470) These are but a few cases recording law and practice. It is very difficult to give a comprehensive list of what acts are permitted. The general principle may help to a great extent that everything not prohibited is premissible (الأصل الإباحة),¹ *i.e.* "originally everything is lawful."

2. AIR WARFARE

(471) In his *Nafḥ at-Tīb* (II, 254), al-Maqqarīy has described vividly and in detail how 'Abbās ibn Firnās (d. 275 H./888) had perfected a man-propelled airplane, and how he met his death on descent after the successful flight. Experiments were thereafter not pursued, and the leadership in the air was not maintained, yet there is no doubt that had these gliders been produced in sufficient numbers, and necessary pilots trained, they could have been used against enemies in time of war, as did the European Christians a thousand years later. Naturally we have no classical literature to refer on the laws of air warfare. The general principle, enunciated elsewhere, however, holds good, that Muslims abide by the pacts and conventions they conclude. The international conventions on the laws of air are now parts of Muslim law, even if temporary, in so far as they have been adhered to by independent Muslim States. For these conventions, Oppenheim's or any other modern Western book could be consulted, in order to ascertain the details of these modern laws.

3. SEA WARFARE

(472) Not so meagre is our material on naval warfare. In the year 8 H., the Prophet had used sea communications to transport men, and perhaps also material, to Ailah in connexion with the punitive expedition of Mu'tah, where a Muslim

1. *Cf. supra*, Part I, Ch. VI, § 10.

ambassador had been assassinated.¹ In the year 9 H., he sent a detachment against an island in the Red Sea, where Negro pirates had come to harass inhabitants of the Muslim territory. The Muslim commander was 'Alqamah ibn Mujazziz.² In the same year a treaty was concluded with the inhabitants of the port of Ailah, in which important provisions were explicitly made regarding boats and sea-borne trade.³ The Qur'ān is full of praise for sea voyage, and describes also its dangers. It even refers to a pre-Islamic practice in certain regions to prohibit visit of foreign ships, on pain of confiscation, practice considered unjust by the Qur'ān (18 : 79). Not only that the Abyssinians had used boats to conquer Yaman—thus opening the way for the governor Abrahah to lead an expedition, unsuccessful though, against the very city of Mecca—but also the Meccan Companions of the Prophet used them for crossing the sea and migrating to Abyssinia in order to take refuge there.⁴ One may even refer to the oration of the Meccan, Suhail ibn 'Amr, who 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."⁵

(473) These small beginnings of both pacific and belligerent use of navy in the very time of the Prophet did not take long to convert the camel driver into as efficient a master mariner. Boats were used, according to Ṭabarīy, in the campaigns of 'Irāq during the caliphate of Abū-Bakr. In the time of 'Umar I, the governor of 'Umān had taken the initiative of sending a naval expedition against Daibul (Karachi). Tānah (Bombay), and Barūṣ (Bharoach), as Balādhurīy⁶ reports. It was again he who caused the digging of a canal from Fuṣṭāṭ (Cairo) to the Red Sea, using it among others for shipping food consign-

1. Ibn-'Asākir, *Ta'rīkh Dimashq*, I, 96.

2. Ibn-Sa'd, 2/1, 118 ; *Imtā'* of Maqrīzīy, I, 343-44.

3. Ibn-Hishām, p. 902 ; my *Documents*, II, No. 19.

4. Ibn-Hishām, p. 218.

5. Balādhurīy, *Ansāb*, I, 470 ; Ibn Ḥabīb, *Munammaq*, *in loco* ; both are MSS.

6. *Futūḥ ul-Buldān*, *in loco*.

ments to Jār, the port of Madīnah, as is well-known.¹ This Khalīj Amīr'al-Mu'minīn, which 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. In the time of Caliph 'Uthmān 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.²

(474) Descriptions of the naval warfare of those days do not want us, yet from the point of view of international law one does not remark any appreciable difference between the rules governing land warfare and those observed on sea. We have just seen (under "Acts Permitted," No. 3) that as early as the time of Mu'āwīyah, the so-called Greek Fire was used by Muslim boats to burn in retaliation the enemy boats. Dīnawarīy speaks of the process of fabricating vegetable pitch with which to smear the submerged portion of boats.³ As a boat is considered by Muslim jurists in the same position as a fort on land, no special laws are mentioned by them in connexion with naval sieges and blockades. The same is true of prizes or naval booties, which are to be distributed like the spoils of the land warfare. Whether boats captured from enemy were also divided among the captors or retained by the government, even as lands and other immovable property, we are unable to answer at present with precision. Byzantine people used to undertake sea raids against Islamic territory in Egypt and Syria even in the caliphate of 'Umar I. These raids together with punitive counter raids by Muslims soon developed into a regular state of war on sea, and each party accused the other with piracy. 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

1. Ṭabarīy, Suyūṭīy, etc.

2. Cf. Ṭabarīy, 2817, anno. 27 H. ; Gibbon, *Decline and Fall*, V, 555.

3. Cited by 'Jāmi' of Ibn Samajūn, MS. Br. Museum, § Zift, and by *Saidanah* of Berūnīy, MS. Barusa, § Zift, Qaṭīrān.

shipbuilding, recruiting and training of seamen, etc.¹ If we take into consideration that on the one hand the entire Mediterranean ocean was for long like a Muslim lake where they controlled trade and traffic, and on the other hand the fact that the Arabic language possesses over three hundred names for various kinds of boats and ships, and that it is from Arabic that the words like Admiral, Arsenal, etc., have been taken over by European languages, we have some material to guess with the strides made by Muslims in the mastery of the sea. The Qur'ānic verse (30 : 41, chapter Rūm, *i.e.*, Byzantines): "Disorder has appeared both on land and in the sea for what the hands of men have earned," suggests that already at this epoch of the Prophet seas around Arabia had known great piratical activity. Maritime insurance is said to have been introduced by North-African Muslims in classical times, which testifies to their contribution in another walk of human life.

(475) The material to sift and data of legal interest to glean are too vast, and require specialized study² before we could use them in the present chapter of the Muslim law of naval warfare. We content with these brief remarks for the present.

1. The *Haqā'iq al Akhbār an duwal al-bihār* by Ismā'il Sarhang Bāshā, Cairo, 3 Vols., and *Muslim Sea Power in the Eastern Mediterranean from the Seventh to the Tenth Century* by A.M. Fahmy, 1950, would give details as well as necessary bibliography for further research.

2. One such is A.M. Fahmy's *Muslim Sea Power in the Eastern Mediterranean*, (from the 7th to the 10th century), 1950.

CHAPTER XVIII

SPIES

(476) IN olden times spies could not have done so much harm to the other side as in modern times when spying has developed from an art into a veritable science. Nevertheless, elaborate precautions were taken even in olden times to hide news from the enemy. The Prophet sometimes closed all roads to private persons¹ (حبس الطرق) in order to prevent leakage of news of military importance.

(477) Practically no distinction is made in Muslim law between spies of war and spies of peace. All those persons who obtain or attempt to obtain information useful to an enemy, and try to transmit it to the enemy, are considered as spies. Even a Muslim may play that mean role and incur the same punishment as an alien.

(478) Naturally less formality is observed regarding aliens suspected of fifth column activities. Two cases of the time of the Prophet may be noted with interest :

(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 of old standing, Hātib-ibn-Abī-Balta'ah guessed where these preparations were directed. He wrote a letter to his friends in Mecca to the effect that preparations were ahead and that might be they were directed against Mecca, so Meccans should take precautions. He intended thereby a better treatment of his private property situate 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 Hātib in view of his

1, Abū-Yūsuf, *Kharāj*, p. 131.

long meritorious services, including his taking part in the battle of Badr.¹

(b) Al-Bukhārīy and Abū-Dāwūd quote a few details of an incident in which the Prophet, during a certain expedition, ordered a suspected spy to be pursued and captured, who was later beheaded.² We do not know what opportunity was given him to plead or how he came to be suspected.

(479) Abū-Ysūf is of opinion 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.³ His contemporary ash-Shaibānīy regards espionage as less harmful than robbery, and so he thinks that subjects of the Muslim State may not be beheaded for espionage. Regarding aliens, however, he too has no mercy.⁴

(480) No distinction is made, as far as punishment is concerned, between a male and a female spy.⁵ Yet a minor should on no account be made to suffer the supreme penalty, say Muslim jurists.⁶

1. *Ibn-Hishām*, p. 810 ; *Sarakhsīy*, شرح السير الكبير, IV, 226.

2. *Bukharīy*, 56 : 173 ; *Abū-Dāwūd*, 15 : 110 (expedition of Hawāzin).

3. *Abū-Yūsuf*, *Kharāj*, p. 117.

4. *Cf.* شرح السير الكبير, IV, 226-27.

5. *Ibid.*

6. *Ibid.*

CHAPTER XIX

UNIFORMS

(481) VARIOUS devices have been made to distinguish friend from foe during the frenzy of a battle. Its purpose is two-fold—comfort and distinctiveness.

(482) The Prophet is reported to have worn, during military marches, special cloaks.¹ There is also mention of prominent warriors wearing distinctive costumes during a battle.² Yet there is no evidence of any organized attempt in the time of the Prophet to provide all the members of the expedition with uniforms, except that he is reported to have ordered on the day of Badr that Muslims should wear distinctive signs, adding that the angels who came on that day to the help of the Muslims also wore such signs.³ A صوفة (sort of woollen crest?) is said to have been adopted by Muslims on that occasion.⁴ The life of the Prophet shows that he had an ingenious device which served both during night and day. He instructed watchwords for each campaign, and during a combat the cries of the watchword could fairly easily distinguish friend from foe.⁵

(483) Greater uniformity of dress is reported in the time of the Caliph 'Alī.⁶ The 'Abbasid Mu'tasim and Mutawakkil are reported to have raised uniformly dressed armies.⁷

1. Bukhārīy, 54 : 90.

2. Ṭabarīy, *Hist*, I, p. 1393, II, 14-15 ; *Ibn-Hishām*, p. 448, etc.

3. Ṭabarīy, *Tafsīr*, IV, 54, commenting on verse 3 : 125.

4. *Ibid.* (اول ما كان الصوف ليومئذ يعنى بدر) *i.e.* The first use of wool was on that day, *i.e.* the battle of Badr.

5. *Musnad* of Ibn-Hanbal, IV, 289, also my "Battlefields of the Prophet Muhammad" ; *Ibn-Sa'd*, p. 17.

6. Mas'ūdīy, *Murūj*, IV, 309ff, (ed. Europe).

7. Ameer 'Alī, *A Short Hist. of the Saracens*, p. 431 (ed. 1921) : "all regulars were given light brown cloaks."

CHAPTER XX

FLAGS OF TRUCE

(484) THE sign of surrender in ancient times seems to have been mere holding-up of hands and laying-down of arms. In the time of the Caliph 'Alīy we come across the expression "flag of truce."¹ But the technical branch of Muslim military science has not yet been thoroughly studied.²

(485) Mention may also be made here of the raising of the copies of the Qur'ān by the troops of Mu'āwiyah in the battle of Ṣiffīn on which the opposing army held up their arms.³

* * *

(486) So far we have dealt with enemy persons. In the following we propose to discuss enemy property as affected by war.

1. Yūsuf-ibn-Muḥammad al-Andalusīy, *الأعلام بالحروب الواقعة في صدر الإسلام*, fol. 14a, b.

2. See, however, Fries, *Heerwesen der Araber zur Zeit der Umayyaden*, Kiel, 1920; Wustefeld, *Heerwesen der Muhammedaner*, Gottingen, 1880; *Encyclopædia of Islam*, s.v. Ṭabalkhāna, etc; Lord Munster: *فهرسة الكتب التي نرغب ان بنتاعها*, lithographed 1840; a copy also in the Hyderabad State Library which reads a very interesting and descriptive catalogue.

3. Tabarīy, *Hist.*, I, 3352-53.

CHAPTER XXI

ENEMY PROPERTY

Preliminary Remarks.

(487) PROPERTY may be movable or immovable. It may be owned by private individuals, or by the State. Even if it is unowned by anybody, yet the very fact of its situation within the territorial jurisdiction of a State renders it as belonging to that State. In a broad sense, 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. For, foreign aggression against the property of a private citizen in a State is as much an insult to the State as one committed against the property owned by the State. The notion is based on the idea that the world and all that is therein is God's,¹ and He bequeaths it to whomsoever He pleases;² and that the ruler of a country functions as an agent of God in that part of the world.³ Hence the legal dictum that all the parts of a Muslim territory lie under the authority of the Muslim ruler (ان نواحى دارالاسلام تحت يد (امام المسلمين)).⁴ There is a tradition of the Prophet :

عارى الارض لله و لرسوله ثم لكم من بعده فمن احيا أرضا
ميتة فهي له وليس لمحتج بحرق بعد ثلاث سنين -

i.e. The 'Ādite 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].⁵

1. Qur'ān, 7 : 128.

2. *Ibid.*

3. Qur'ān, 38 : 26, 6 : 165.

4. *Mabsūṭ* of Sarakhsīy, X, 93.

5. *Kharāj* of Abū-Yūsuf, p. 37; *Kharāj* of Qudāmah-ibn-Ja'far, part 7, chapter 5 (MS. Koprulu, Istanbul).

(488) A commentator says :

يقال للشئ القديم "عادي" نسبة الى قوم عاد لقدم
زمانهم سواء كان لهم او لغيرهم - والمراد ههنا ما كان قبل الاسلام
في غير ملك أحد في مكان ليس له مالك -

Translation : An old thing is called 'Ādite, attributed to the people of 'Ād on account of the remote antiquity of their time, no matter whether it really belonged to them or not. Here it means a piece of land which was unowned in the time before Islam, that is, situate in place which had no owner.¹

(489) Discussing the implications of this tradition, Qudāmah-ibn-Ja'far says :

وجملة الامر ما لم يقع عليه ملك مسلم ولا معاهد فان حكم
ذلك الى الامار يقطعه من اختار -

i.e., 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 whomever he pleases.²

(490) It is to be noted that not all the property of a State is always to be found on its own territory, and not an inconsiderable extent may lie in other countries. Property belonging to embassies, to citizens temporarily residing or trading abroad, also debts and trusts, are examples thereof.

(491) The general principle guiding Muslim law in the treatment of property belonging to an enemy has been explained thus :

The principle is that 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

1. شرح كتاب الخراج لابي يوسف by 'Abd-al-'Azīz-bin-Muhammad ar-Raḥabīy, fol. 73a (MS Lālelī No. 1609, Istanbul).

9. *Op. cit.*, part 7, ch. 6 (MS. Istanbul).

which effect ownership. Thus whatever may be owned by virtue of other methods may pre-eminently be so by means of occupation.¹

(492) The different kinds of property described above are treated in different manners, as under :

1. State Property.

(493) It may either be movable, or immovale, and it may either fall under the general exchequer or be reserved for the royal household. For its special importance, we begin with the territory of an enemy State :

(494) (i) *Territory*.—By conquest and occupation of a territory, the sovereignty thereof—with the obligation of protection and right of allegiance—is transferred to the conqueror. The occupation, whether permanent or strategical and temporary, gives the occupant the right of taxing, administering and otherwise treating the occupied land as a part of his dominions.

(495) The question of how to treat conquered territory came in for sharp discussion and disputation very early in Islam. The practice of the Prophet had apparently left the matter undecided. For 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 question requires closer scrutiny before recording the final settlement of the dispute in the time of the Caliph 'Umar.

(496) So far as I have been able to ascertain, the case of the distribution of conquered lands by the Prophet among his soldiers are only those of Banū-an-Nadīr and Banū-Quraiẓah. Both these Jewish tribes of Madīnah had fought against the Prophet and capitulated after a siege. The Qur'ān enjoins the administering of personal laws to Jews and Christians.² It

1. *Muḥīṭ* by Radīy-ud-dīn as-Sarakhsīy, I, 599b (MS. Walīuddīn, Istanbul).

2. Qur'ān, 5 : 44. 48, *cf. supra*, part II, ch. iv, section "Persons," b.

may be that the Prophet was paying these Jews in their own coin.¹ For the Bible commanded :

When thou comest nigh unto a city to fight against it, then proclaim peace unto it. And it shall be, if it make thee answer of peace, and open unto thee, then it shall be, that all the people that is found therein shall be tributaries unto thee, and they shall serve thee. And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it. And when the Lord thy God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of the sword. But the women and the little ones and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take unto thyself; and thou shalt eat the spoil of thine enemies, which the Lord thy God hath given thee. (*Deut. XX, 10-14.*)

(497) In the case of the Banū-an-Naḍīr, the Prophet was content only to expel them, and allowed each person to take with him a camel-load of property.² In the case of the Banū-Quraiẓah, it was the arbitrator of their own choice who awarded exactly what Deuteronomy provided.³ Upon hearing of the decision of the arbitrator, the Prophet made only the comment that God had predestined that from above the seven heavens. Had the Jews appealed to the mercy of the Prophet, they might have received a more lenient treatment; but they chose a former ally of theirs, an ordinary Muslim; and the Muslims had reason to be extremely angry with the Jews at the moment: they had treated the Naḍīrite Jews with leniency, who, instead of being grateful, had arranged the siege of *Khandaq*, and just before the siege caused the Prophet to go, with a small army, to *Dūmat'ul-Jandal*, a place at a distance of two weeks from *Madīnah*, but fortunately the Prophet

1. On hearing the award of the arbitrator, the Prophet is reported to have remarked: لقد حكمت فيهم بحكم الله من فوق سبعة اروقة (Ṭabarīy, p. 1493—*Ibn-S'ad*, 1/2, p. 54).

2. *Ibn-Hishām*, p. 653: *Hist.* of Ṭabarīy, p. 1451; *Ibn-Sa'd*, 1/2, p. 41.

3. Deuteronomy, XX. 5-14.

escaped the trap and returned to Madīnah in time to prepare for the defence against the besiegers ; and during the terrific siege of Khandaq these Jews of Banū-Quraiẓah living in Madīnah tried to stab the Muslims in the back. Even Wensinck, who is otherwise very hostile to the Prophet of Islam, admits (cf. *Der Islam*, Vol. 2, p. 289) that the leniency shown previously to the Jews of Banu'n-Naḍīr had produced the contrary of the desired effect, and no statesman could possibly commit the same mistake of leniency again.

(498) Expulsion was also imposed upon the Jews of Khaibar after they had fought and eventually surrendered ; but later the Prophet agreed to let them stay on the land and work as lessees until further orders.¹ These orders were not issued before the time of the Caliph 'Umar, who, in accordance with a will of the Prophet upon his death-bed,² transported them along with other undesirable elements from Arabia to Mesopotamia.³ The Jews of Fadak and Wadī'l-Qurā also agreed to the same conditions of lease as those of Khaibar.⁴

(499) Regarding non-Jews, surrendering after fight, the following state-document is of interest :

With the name of God, the Most Merciful, the All-Merciful. This is a rescript of Muḥammad, the Messenger of God, in favour of Ukaidir at the time of his embracing Islam and forsaking the false gods and the idols before Commander Khālid-ibn-al-Walīd, the Sword of God, regarding Dūmat'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 coats of arms, the armour, the solidungular animals, and the fort.

To you the walled palm-groves and the water in cultivated lands.

1. *Ibn-Hishām*, p. 764 ; Abū-Yūsuf, *السنن*, p. 29.

2. *Ibn-Hishām*, p. 1021 ; and others. 3. *Ibn-Sa'd*, 1/2, p. 83.

4. *Ibn-Hishām*, p. 764 ; *Futūḥ* of Balādhurīy, pp. 32-35.

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 zakāt-tax.

You engage God as your guarantee. In return you will be assured of *bona fides* and scrupulous observance.¹

(500) The confiscation of all unowned land as well as the fort in favour of the State, and the maintenance of all private owners on their property were terms imposed upon vanquished people whose expulsion was not desirable.

(501) The same seems to be the practice even regarding territories surrendering without fight. For we come across scores of enfeoffments in the time of the Prophet regarding lands situate in different parts of Arabia and Palestine in favour of people rendering useful services to the Muslim State, in spite of the fact that these places had peacefully been won over to Islam. In the documents concerning some such donations of lands, we come across the characteristic phrase "provided the land concerned is not owned by any Muslim citizen."²

(502) Soon after the time of the Prophet, when the fertile lands of 'Irāq and Syria were occupied by Muslim armies, 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 the metropolis of Madīnah where long deliberations ensued. The decision reached was communicated to the commanders of respective armies. Abū-Yūsuf has described the proceedings at considerable length and recorded the despatches addressed to the commanders of 'Irāqi and Syrian armies.³ The translation of the latter document will suffice for our purposes :

1. Abū-'Ubaīd, كتاب الاموال, § 508 ; *Ibn-Sa'd*, 2/1, p. 36; Balādhurīy, p. 61.

2. Cf. *Ibn-Sa'd*, 2/1, p. 45 ; Abū-Dāwūd, II, 32, etc.

3. Abū-Yūsuf, pp. 13-15, 81-82.

ENEMY PROPERTY

Abū-'Ubaidah wrote informing 'Umar of the defeat of the non-Muslims, of the spoil which God had given the Muslims, of the terms of peace which the peoples of the conquered countries had offered, and of the request of the Muslims to distribute among them as war-booty the cities and its inhabitants and lands with their trees and cultivation, adding that he had refused to do so until he had written to him and asked for his opinion.

'Umar replied : Read what you mentioned of the spoils which God has 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 wayfarer, 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.”¹

This 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

1. Qur'ān, ch. 59, verses 6-8.

need for that which hath been given them, but prefer [the refugees] above themselves though poverty become their lot. And whoso is saved from his own avarice—such are they who are successful.”¹

Surely these are the Anṣār (*i.e.*, Madinite Helpers).
Moreover :

“And for those who come [into the faith] after them.”² These are the sons of Adam, white and black ; and God has included them among the recipients of these spoils down to the Last Day.

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 this 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.”³

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 anybody to talk to nor anything to take advantage of. On the other hand [if we do not enslave

1. Qur’ān, ch. 59. verse 9.

2. *Ibid.*, verse 10.

3. *Ibid.*, 9 : 29.

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.

Therefore 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 therefrom 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 betwixt the Muslims and their mosques, no crosses should appear.¹

(503) From that time on there is practically no instance of practice to the contrary, although 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.² There is, however, no difference of opinion that whenever any terms are accepted by the Muslims, they must be fulfilled in good faith.³

(504) (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.

(505) (b) *Crown Lands*.—Muslim jurists and historians mention that the Caliph 'Umar treated ten kinds of Iranian lands as crown lands, *viz.*, lands belonging to the ex-ruler or his household, lands of those who fell in battle and so became ownerless, lands of those who fled from the country and did not return, lands connected with postal stations, forests and

1. *Kharāj* of Abū-Yūsuf, pp. 81-82.

2. *Idem*, pp. 35-36.

3. *Idem*, p. 35.

the like.¹

(506) (c) *Condominium*.—Some complication may arise regarding lands owned jointly by two States one of them remaining neutral.² Yet no belligerent will treat land as neutral if it is placed at the disposal of belligerent joint-owners for purposes of military importance, such as transit of troops, equipping and repairing of armaments and the like. Mere declaration of neutrality would be of no avail if either of the belligerents did not recognize this protestation not borne out by deeds.

(507) (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 brunt of the war in the form of capture, destruction and damage. We have already dealt with the question of prisoners of war. The question of the distribution of booty will be treated in a subsequent section of this chapter.

2. *Private Property*.

(508) 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. If a city or fort is stormed, much depends upon the terms of the surrender. In *Khaibar* the Prophet obtained the condition that the vanquished enemy would surrender everything except the clothes they actually wore—though later he forsook this right as a sign of generosity. Enemy is chased and subdued, but general and indiscriminate

1. *Kharāj* of Abū-Yūsuf p. 32; *Kharāj* of Yahyā-ibn-Ādam, p. 45 (ed. Brill); *Kharāj* of Qudāmah-ibn-Ja'far part 7, ch. 6 (MS. Istanbul; *Hist* of Ṭabarīy, p. 2371. Cf. also Māwardy and Balādhurīy, etc., *in loco*.

2. Cf. *supra* part II, ch. 3, for various historical instances of joint rule. Reference may also be made to the prayer of Moses for the appointment of a sharer of his office (Qur'an, 20 : 32. (و اشركه في امرى)). Among contemporary Muslim States, Sudan was a condominium of Egypt and Britain, and up till 1947, Berar and Northern Sarkārs provinces were a *corregnum* between Hyderabad and Britain (*i.e.*, single sovereignty and joint administration).

plunder of captured towns is nowhere recorded in orthodox practice.

3. *Distribution of Booty.*

(509) The history of Muslim law on the point is interesting. When the Muslims were chased from their Meccan home, and they founded a City-State in their refuge of Madīnah, they had no laws to follow regarding booty. Generally in such cases the Prophet followed the practice of the Scriptuaries. So when Ibn-Jahsh went on an expedition¹ just before the battle of Badr, he took the initiative of allotting one-fifth of the booty to the State and distributed the other four-fifths among the soldiers.¹ The Prophet did not accept the booty and chid the party for fighting without his permission. Three months later, the battle of Badr saw scores of enemy prisoners. The Prophet's council was divided between those who advised the decapitation of the prisoners and those who suggested release on payment of ransom. The Prophet was moved with pity and accepted the latter view.² And regarding general booty, the Prophet used complete discretion.³ It was not until some time later that a law was fixed by the Qur'an that the booty captured after a fight should be divided between the members of the army and the State in a ratio of 4/5 and 1/5,⁴ a horseman getting double⁵ the share of an infantryman, without any distinction between the shares of the commander and the private. As for the booty acquired without fight, the whole went to the general exchequer and lay at the discretion of the head of the State.⁶ This kind of booty is technically called *Fai'* as distinguished from *Ghanimah* or despoliation by force.

(510) If a place is not stormed but has surrendered peace-

1. *Ibn-Sa'd*, 1/2, p. 5; *Hist. of Ṭabarīy*, p. 1275f.

2. *Hist. of Ṭabarīy*, p. 1356; *Ibn-Sa'd*, 1/2, p. 14.

3. *Ṭabarīy*, p. 1334.

4. Qur'an, 8: 41.

5. In fact the practice of the Prophet is reported (*cf. Kharāj* of Abū-Yūsuf, p. 11) to have varied between a double and treble share for horsemen. The divergence in the practice may have been due to the importance of cavalry in individual battles in plains as against mountainous terrains.

6. *Kāsānīy*, VII, 116.

fully, all that the Muslim government acquires under treaty is included in *Fai'*. Recurrent tribute, non-recurrent payments under treaty, ownerless property found in enemy country but not captured during the actual fight—these are other examples thereof.¹ 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 as *Fai'*; and were disposed of by the Prophet at his discretion, for the same reason.

(511) Both *Ghanimah* and *Fai'* may include not only cattles or movable property but also real or immovable property, and also slaves.

(512) We have already discussed Muslim law on the question of lands and prisoners of war. If a slave is taken captive and is not repatriated on ransom or exchange basis or even gratis, then he is disposed of in the ordinary way. In order to overcome the difficulties of fraction, slaves 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.

(513) 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. Muslim jurists describe Badr as simply a place where victory was won over enemy, but the place was not annexed.² On the other hand, they say that Khaibar and the country of Banū-al-Muṣṭaliq were annexed as soon as these places were conquered by the Prophet.³ That is why the booty of Badr and Hunain and other places, not till then annexed to the Islamic territory, was not distributed in those places; and it was distributed on the spot in case of Khaibar, etc.

(514) As said, four-fifths of the booty are allotted as the prize of the capturing army. There is no distinction between

1. Kāsānīy, VII, 116. 2. Kāsānīy, *Badā'*, VII, 121. 3. *Ibid.*

a volunteer and a regular paid soldier, or between a private and an officer, even the commander-in-chief—all receive the same share.¹ Yet infantrymen get half—and according to some only a third—of the share of the cavalry.² The followers of the army, however, who do not fight usually, such as contractors, traders and the like—do not share the booty unless they fight.³ There is no distinction, however, between those who actually fought and those who were not required to fight, although they could have fought had it been found necessary, such as those who occupy strategic positions, guards, etc. In the battle of Badr, the Prophet allowed eight persons to share in the booty in spite of their absence from war-zone. They were employed by the commander for special duties, such as scouting, etc.⁴ Women, slaves, minors, non-Muslim, though given a gift (رضخ) for their meritorious work, cannot have equal shares along with Muslim grown-up soldiers. An exception is, however, made regarding non-Muslim soldiers when they form in themselves a formidable force (لحم مئعة), or without whom the rest of the Muslim army would not be strong enough; then they also share equally with the Muslim soldiers.⁵

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

(516) (i) By *tanfīl* in Muslim law, we understand a prize-gift given to a soldier or soldiers for doing certain acts generally demanding greater risk of life. This is to be given out of the share of the State.⁶

1. *Aṣl* of *Shāibānīy*, Vol. IV, ch. القسمة, and also ch. Zakāt. ما
يوضع فيه الخمس والعشرون لمن تجب
p. 238; *Hist. of Ṭabarīy*, p. 1362, quoting a precedent of the time of the
Prophet.

2. *Ibn-Ruṣhd*, بداية المجتهد, I, 318-19; *Abū-Yūsuf*, pp. 10-11. Cf.
also *supra*, first paragraph of this section, and note thereof.

3. *Ibn-Ruṣhd*, *op. cit.*, I, 316-17.

4. *Ibn-Sa'd*, 1/2, p. 6.

5. *Sarakhsīy*, شرح السير الكبير, IV, 309.

6. *Kāsānīy*, VII, 114-15.

(517) There are many Traditions of the Prophet reporting his rewarding the soldiery with a fourth part of the State-share for captures during the forward march, and with a third of the State-share during the return journey.¹ The reason, as I was assured by a modern military officer, was because a return journey or retreat without conquest is always much more precarious than a forward march and a penetration.

(518) (ii) By *salab* is meant the spoil taken by a victorious combatant from the slain. According to the Hanafite school of thought, this customary rule operates only upon previous declaration on the part of the commander.²

(519) The whole of the *salab* goes to the victor: no fifth is shared by the State, except according to the Mālikite school. There is, however, one instance in which a fifth of the *salab* was acquired for the State by the Caliph 'Umar. It is said that al-Barā'-ibn-Mālik killed a Persian satrap in a hand-to-hand fight, and a fifth of his spoil was worth thirty thousand drachmas; and the Caliph is recorded to have said: "Though usually we did not take a fifth from *salab*, this is worth too big a sum."—And this was the first time when a *salab* was shared by the State.³ This shows that the reward of the *salab* is but a grace of the State.

(520) Ibn-Jumā'ah gives in detail the circumstances in which a person may rightfully claim the property of the persons whom he has slain. He says:⁴

(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.

1. Ibn-Rushd, *op. cit.*, I, 320; Sarakhsīy, *المبسوط*, X, 28.

2. Sarakhsīy, I, *المبسوط*, X, 47.

3. Ibn-Rushd, *op. cit.*, I, 321; Ṭabarīy, *اختلاف الفقهاء*, fol. 52b (MS. Istanbul); ad-Dabūsīy, *الاسرار*, fol. 139, ch. *Siyar* (MS. Istanbul); Qudāmah-ibn-Ja'far, *كتاب النخراج*, part VII, ch. 19.

4. *تحرير الاحكام لبدر الدين ابن جماعة*, fol. 46b-47b, ch. xiv. (MS. Istanbul).

(c) To slay in resistance, not, for example, when the enemy has laid down his arms or is taken prisoner.

(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) Some hold that those who do not share in full, such as the slaves, also do not get the *salab*.

(521) The *salab* includes not only the arms and wearing apparel but also the horse, etc.

(522) *Ṣafīy*—We have seen above,¹ that in pre-Islamic Arabia, the commanders of the *razzias* used to have the right over a fourth of the booty, over the indivisible fractions, over things captured before the defeat of the enemy and general plunder, and over choice things—such as a sword, a slave girl, a horse, etc.—which he could select for himself before dividing the booty among the captors. Of these, as we have just seen, 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 *ṣafīy* as it is called, was exercised by the Prophet,² and it is now considered by the generality of jurists to have been a prerogative of the Prophet himself, except Abū-Thawr, who maintained that the prerogative was inherited by the successors of the Prophet in political office.³ The rest of the pagan customs were abolished by Islam.

4. *Postliminium or Return of Things and Persons captured by the Enemy.*

(523) Muslim law recognizes that if the enemy captures a thing from the Muslims, he becomes the rightful owner of it.⁴ So much so that he may sell it to Muslims.⁵ And if the owner

1. *Supra*, part I, ch. ix, Pre-Islamic Arabia.

2. Ibn-Rushd, *op. cit.* I, 316; Abū-Yūsuf, *الخيار*, p. 13.

3. Ibn-Rushd, *op. cit.*, I, 316.

4. Sarākhṣīy, *bagambl*, X, 54.

5. *Idem*, p. 61.

of such a property is given quarter, no case may be brought against him in the Muslim court regarding such property as he may possess at the time which originally belonged to Muslims.¹— In short, same rights are recognized 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.”²

(524) If 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.³ The same is true of enemy persons taken prisoner by the Muslim army: if they escape and reach a place of security, they regain their freedom.⁴

(525) Regarding the postliminium it is to be noted that 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.⁵ For it was the duty of the State to take care of the interests of its subjects. If it was distributed before the ownership was proved, then the ex-owner had only the right to acquire it from the new owner upon payment of its value, that is, he had the prior right of purchase.

(526) Incidentally I may mention that in his *De Jure Belli ac Pacis*, Grotius has taken notice of at least this practice of Muslims, and even wonders at the “discovery” that similar notions were found even in non-Christian countries and non-European laws.⁶

1. *Idem*, pp. 22, 61.

2. Dabūsiy, الأسرار, fol. 147b, ch. اصابة الكفار.

3. Sarakhsīy, المطبوع, X, 93.

4. *Ibid.*

5. *Ibid.*, 54; for a case of the horse and slave of Ibn-‘Umar, cf. Shaibānīy, *Aṣl*, ch. ابواب السير في أرض الحرب (MS. Aya Sofia).

6. Cf. *supra* § 122 and footnote.

CHAPTER XXII

WOMEN IN THE MUSLIM ARMY

(527) AS early as the time of the Prophet, women took part in battles as nurses,¹ transporters of the wounded and the dead,² cooks,³ water-carriers,⁴ general servants,⁵ and in some emergent cases even as actual fighters.⁶ In the battle of Qadisīyah (in the year 14 H.) women dug graves for the dead.⁷ In the time of Sarakhsīy (d. 483 H.) women were employed in camps even as store-guards.⁸

(528) Although later jurists insist that such female volunteers should be of advanced age,⁹ we come across cases of youthful and even unmarried girls in the expeditions of the Prophet (cf. *Ibn-Hishām*, p. 768). 'Ā'ishah, the wife of the Prophet, was very young when she was present at the battle of Uḥud where she and several other lady volunteers supplied water to the wounded.¹⁰ According to Bukhārīy,¹¹ the wives of the Prophet used to accompany him even after the command about veils. There is a story of a young girl

1. Sarakhsīy, شرح السير الكبير, IV, 206; Bukhārīy, 56; 67: *Ibn-Hishām*, p. 688; 'Umar-ibn-Muḥammad, نصاب الاحتساب, ch. احتساب, fol. 11a, b, (MS. Istanbul); Sarakhsīy, الوجيز, fol. 150a (MS. Fātih, Istanbul).

2. Bukhārīy, 56: 67; Sarakhsīy, شرح السير الكبير, IV, 206.

3. Sarakhsīy, المطبوع, X, 70. 4. Bukhārīy, 56: 68, 64: 22.

5. *Ibn-Hishām*, p. 768, during the expedition of Khaibar.

6. *Ibn-Hishām*, p. 573; Burhānuddin al-Marghīnānīy, المطبوع, III, ch. من يجوز له الخروج الى التجهاد من غير كراهية (MS. Yanījāmi', Istanbul); Sarakhsīy, شرح السير الكبير, III, 207.

7. Ṭabarīy, *Hist.*, p. 2317.

8. Sarakhsīy, الوجيز, fol. 50a (MS. Istanbul).

9. *Fatawī 'Ālamgīriyah*, in loco. 10. Bukhārīy, 56: 65, 67.

11. Bukhārīy, 56: 65, 67.

in the battle of Khaibar.¹ Bukhārīy has several chapters on women going on sea-warfare, nursing the wounded, transporting the injured to hospitals, or otherwise rendering service to the soldiers.² Shaibānīy also allows young women to volunteer in military expeditions if their near relatives had no objection: "A free woman may lawfully go on military expeditions along with near relatives, in order to nurse the wounded; but she should not go without the permission of her near relatives, be she of advanced age or young,"³ textually:

(و النكرة تجوز لها ان تخرج الى الغزومع المنكرم فتداوى النجرحى
وتقوم على المرضى ولا تخرج بغير اذن المنكرم عنجوزا كانت
او شابة)

(529) The aunt of the Prophet killed with her own hands a subject Jew when he was roaming around the wall of a small fortress where she was sent for safety.⁴ The wife and daughters of the great Khālid-ibn-al-Walīd made a name for horsemanship. In the battle of Qādisīyah a band of lady volunteers, armed with thick sticks, rendered valuable service in the actual fighting⁵ and once saved the situation by marching in ranks, giving the impression of the arrival of reinforcements.⁶ In this battle one tribe alone had seven hundred husbandless (widow or otherwise) women,⁷ from which the number of the whole female contingent may be approximated. In the battle of Jamal, 'A'ishah commanded the army to oppose the forces of 'Alīy, the Fourth Caliph.

1. *Ibn-Hishām*, p. 768.

2. *Bukhārīy*, 56 : 63, 67-

3. *Sarakhsīy*, شرح السير الكبير, III, 206.

4. *Hist. of Ṭabarīy*, pp. 1479-80.

6. *Idem*, p. 2387.

5. *Idem*, pp. 2362-63.

7. *Idem*, p. 2363.

CHAPTER XXIII

TREATMENT OF THE DEAD

(530) WE have described above, that mutilation of enemy dead is strongly forbidden by Muslim law. Respect is always to be paid to the dead. So the Prophet used to stand up even if a non-Muslim's body was being borne to burial.¹ Dead bodies of the fallen enemy,² as those of Muslims, are to be buried.³ If the enemy request the handing over of the body of some dead person of their side, it may not be refused. So the Prophet did, and even went so far as to refuse to accept money offered by the enemy in lieu of the handing over of the dead body, during the battle of Khandaq.⁴ Abū-Ḥanīfah is, however, of the opinion that if money is offered in this connexion by the enemy, it may be accepted. For, he argues, the property of the enemy may be captured by the Muslims, and if they offer it willingly, its acceptance cannot be forbidden.⁵ The practice of the Prophet to hand over the dead body freely seems, therefore, to represent piety rather than strict law: *taqwā* and not *fatwā*, or was based on deeper psychological objectives and propaganda purposes far more precious than merely a sum of money.

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1. Bukhārīy, 23 : 50, recording sayings and doings of the Prophet.
 2. Abū-Ya'lā, *الأحكام السلطانية*, p. 34 (ed. Egypt). Also practice of the Prophet recorded in Badr ; cf *Ibn-Hishām, in loco*.
 3. Ṭabarīy, *Hist.* p. 2317.
 4. *Ibid.*, p. 1476 ; *Ibn-Hanbal*, I, 271.
 5. *Shaibānīy, Aṣl.*, ch. ما زاد محمد في آخر كتاب السير.

NON-HOSTILE INTERCOURSE WITH BELLIGERENTS

(531) DURING war occasions often arise when the belligerents are compelled or persuaded to enter into temporary non-hostile intercourse with each other. Although 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.

(532) The first example of such intercourse is the exchange of messages. Thus when one party desires a parley with the adversary, it makes some intelligible sign—nowadays white flags are in general use—to that effect, requesting that its message-bearer be allowed to approach the opposite commander and deliver what he is entrusted and authorized to deliver. Such emissaries are generally accompanied by interpreters.

(533) From time immemorial the persons of message-bearers of enemy have been recognized and held inviolable. Islam sanctions this reasonable custom.¹ Enemy message-bearers may not be made victims of molestation or any other personal injury or insult, even during return journey.² Yet it is not necessary that one should always agree to receive an emissary of the enemy; and in such a case one must notify refusal.

(534) A message-bearer is given due respect, yet if military necessities require, he may be blindfolded; and he is bound in honour not to take advantage of his position for the purpose of obtaining military information, whether or not physical

1. Sarakhsīy, بگرام، X, 92.

2. Cf. *supra*, part II, *Diplomacy*.

means are used to hinder him therefrom. Usually he may not be detained, but in special cases he may even be kept in honourable detention for a while until the urgencies of the situation pass.¹ 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 he must be left in or led to a safe place only.²

(535) Anything approaching treachery on the part of the message-bearer may be dealt with severely, and this would deprive him of his personal inviolability. For, rights of message-bearers, as those of others, correlate obligations. (لا يكلف) الله نفسا الا وسعها لها ما كسبت وعليةا ما اكتسبت)³

2. Exchange of Prisoners.

(536) During war sometimes exchange of prisoners and other captures, interchange of communications, and other such things take place. As they are of mutual interest, they are tolerated and even sought after. Specially is the release of prisoners—on payment of ransom or otherwise as described in a previous chapter—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. They, as also the vessels and other vehicles of conveyance used for that effect, enjoy inviolability in going to and returning from the place where exchange is effected. Obviously such conveyance parties, cartels as they are called, 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. For a description of actual cases see Mas'ūdīy's التنبیه والاشراف, pp, 189-90.

1. Sarakhsīy, شرح السير الكبير, I, 320-22.

2. Ahkām as-Salāṭīn w'al-Mulūk, ch. IV, (MS. 'Ārif-Ḥikmat, Madīnah).

3. Qur'an, 2 : 286.

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

(537) Classical Muslim writers on law make little difference between "quarter given to a besieged and severely beaten enemy" and "permission to travel or trade in the Muslim territory." Further, the non-Muslim of a State allied or otherwise at peace and the non-Muslim of a belligerent State are often styled with the same name. And it is almost impossible to detach the rules of the one from the other except in cases when the authors choose to distinguish by qualifying adjectives. Everything they mention in the general chapter on Giving Quarter (امان). And such foreigners are called *Musta'min*.

(538) We have already seen, in the beginning of this part of our thesis, that 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. And Muslim jurists seem to side with those who opine that everything is permitted unless prohibited.¹ There is no reason to exclude trade from this all-embracing condition.

(539) Enemy subjects might be, and were² granted permission to travel within such part of the Islamic territory, for such a time, and under such conditions as described in the permit papers and passes. We have also seen that in olden times it was customary to suppose as a matter of course that 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. And automatically they confer 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. *Ash-Shaibānī* is

1. Cf. *supra*, part I, ch. VI, § 10.

2. For instance, Abū Yūsuf, *Kharāj*, p. 78.

emphatic that: "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."¹ It is to be taken for granted that such foreigners are pre-eminently liable to be sued by the subjects of the Muslim State. The foreigners will be under Muslim penal law regarding their criminal acts,² and under civil law for their transactions. And even, when they return home, unless their country is conquered by the Muslim State, or they are taken prisoners, debts and trusts due to them are supposed to remain active; and their heirs, if they themselves die, may claim them.³ I wonder, if they subsequently become Muslim subjects, would these rights revive? It has also been mentioned above that foreigners cannot be sued in the Muslim court for acts or transactions entered into before their entering the Muslim territory, even though the interests of Muslim subjects are jeopardized.⁴

4. *Contraband of Trade.*

(540) State interests sometimes require prohibition of the export of certain kinds of goods to foreign countries, not only in time of war but even in time of peace. This, which is technically called *contraband of trade*, is an old thing in Islamic jurisprudence, to be traced even to the time of the Prophet.⁵ The description of later jurists is obviously very elaborate. They say, for instance, that 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 Qur'anic verses like the following:

(a) And let not your hatred of a folk who stopped

1. Sarakhsīy, شرح السير الكبير, IV, 108.

2. *Ibid.*

3. *Āṣl* of Shaibānīy, (MS. of Aya Sofia) Ch.

باب ما يتبرك المستأمن اذا دخل ارض الكفر فيدعه في دار الاسلام
او يموت في دار الاسلام -

4. الجامع الصغير of Shaibānīy, pp. 40-41 (MS. Aya Sofia, No. 1385).

5. *Cf. infra.*

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.* (5 : 2)

(b) O Prophet ! strive against the disbelievers and the hypocrites ! *Be harsh with them.* (9 : 73)

One such writer says :

It is not permissible to a trader to export to an enemy country from which the belligerents may receive help in fighting against the Muslims, such as weapons, horses, non-Muslim slaves and all that is helpful in war.¹

And he excludes as clearly the other things :

And there is no harm in the export of cloths, household goods,² foodstuff, and the like. For they do not come under the meaning of (military) help.³

And he even records practice of the kind :

And such has been the practice from all times that they (*i.e.*, the traders) are used to enter the enemy territory for commercial purposes. And nobody has cast blame or reproach upon them.⁴

(541) It seems certain that the preparation of the list of contraband things depends entirely upon a government which may even change and modify it from time to time. For this we have a decisive precedent of the time of the Prophet when Thumāmah-ibn-Uthāl, a chieftain of Yamāmah, embraced Islam and informed the Meccans : “Not a grain of Yamāmah will reach you unless and until the Messenger of God permit that.”⁵ When the Meccans were reduced to great straits on that account, they besought the Prophet to lift the ban on their foodstuff and cloths (مَجْرَى), which was graciously conceded.⁶

1. Kāsānīy, VII, 102.

2. Household goods, the actual word used is مَتَاع, which (according to شرح السيرة الكبرى, IV, 74) means things which are used while they subsist, *e.g.*, bedding, pots, etc., unlike food.

3. Kāsānīy, *ibid.*

4. *Ibid.*

5. *Ibn-Hishām*, p. 997.

6. *Ibid*, *et seq.*

(542) Naturally, not only are Muslim subjects forbidden to export contraband to non-Muslim countries, but also all persons who are in Muslim territories. So Kāsānīy adds :

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.¹

(543) Although foreign subjects are allowed to bring with them whatever they like of wargear and are free to take it back with them when they return, yet they cannot change one kind of implement with another. If they change, for example, their sword for bows and arrows—as the old writers say—they cannot be allowed to take these newly acquired things with them. Even if they change sword for sword, spear for spear, and others for the same kind, it will be ascertained whether the new things are not better in quality. If they are, then they come under contraband. Otherwise, when equal or worse in quality, no restriction may be imposed. And his own imports, even of the finest quality, can neither be confiscated nor forced to be exchanged with other things, for this would be a violation of pledge.²

(544) In this last category, however, one exception is made. So the Muslim jurists³ say that a slave, professing Islam, cannot be allowed to be owned by foreigners and exported to belligerent territory, even when he was owned by the resident alien and imported by him along with him ; the master will be compelled to leave the slave professing Islam in the Islamic territory through sale or some other way. This lest he may be forced to apostatize. And history shows that these fears are not groundless.⁴

(545) We may conclude this chapter with a State document of the time of Prophet, in which trade with the enemy

1. Kāsānīy, VII, 102 ; cf. *Mabsūṭ* of Sarakhsīy, X, 91 ; *Kharāj* of Abū-Yūsuf, p. 118.

2. Kāsānīy, *ibid.*

3. *Mabsūṭ* of Sarakhsīy, X, 89.

4. Cf. *supra*, part III, ch. xv/2, b, penultimate paragraph and footnote thereto.

was expressly permitted :

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

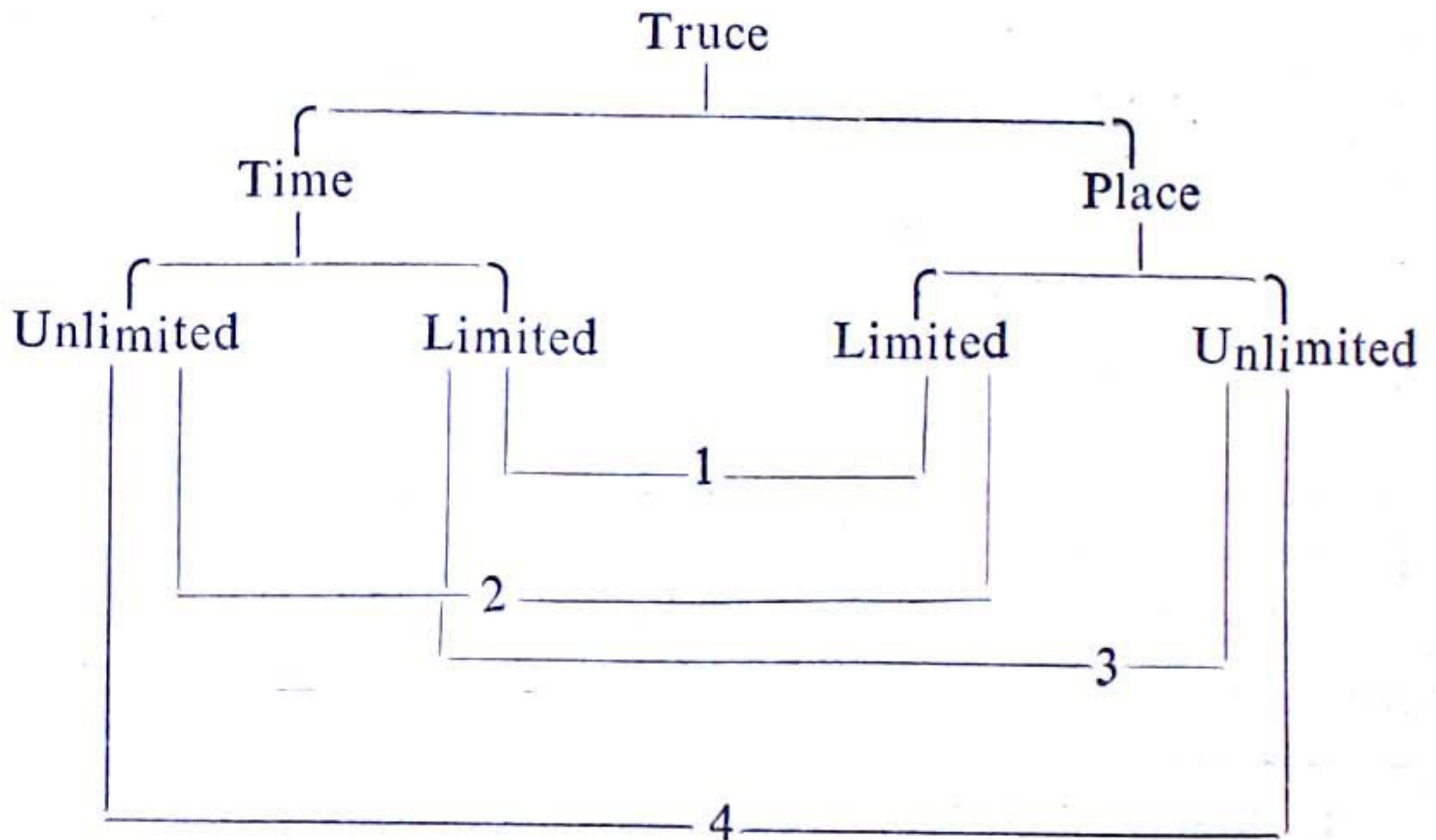
This is the writ of protection from God and Muḥammad, the Prophet and Messenger of God, in favour of John son of Rubin and the people of Ailah.

Their boats and their traders on land and sea shall have the protection of God and of Muḥammad, the Prophet. This includes also the people of Syria, of Yaman, of countries beyond the seas (اهل البحار) who are with them (*i.e.*, the people of Ailah).¹

(546) It is to be noted that Ailah (modern 'Aqabah, on the Red Sea) was subdued and annexed by the Prophet during the expedition of Tabūk, in the year 9 H., when he had set out against the Byzantines. This could not prevent him from permitting his vassal to trade with the enemy.

(5) *Truce and Armistice.*

(547) A truce after war may be of four kinds :



1. *Ibn-Hishām*, p. 902 ; *Ibn-Sa'd* 2/1, p. 37 ; *Abū-'Ubaid*, كتاب الاموال § 513 ; etc.

(548) The first of these is the one in which time and place of truce are fixed and limited. This generally occurs during war on a battlefield, so that the parties may carry on parleys, bury the dead, or take precaution against common danger, such as flood, etc.

(549) The second may be for a fixed place yet unlimited in time. I have not come across a case of this kind in early Islamic history. Modern demilitarization and neutralization, in which Turkey has sometimes been a victim, may perhaps be referred to in this connexion.

(550) The third, general yet for a fixed period, is sometimes an armistice to conclude a treaty of peace. During such truce, all belligerent acts are forbidden. It is also possible that this general peace for a fixed time should be a complete peace and not merely an opportunity for negotiation. A most important instance of this latter kind is the treaty of Ḥudaibīyah 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. We may also cite the case of the Caliph Mu‘āwiyah. He had concluded a peace for a definite 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. But one old soldier chid him, and said that he had heard the Prophet saying :

Whoever has concluded a pact with a nation, he should neither tie a knot nor open it on (that bond) until the time expires.¹

(551) The Caliph ordered his troops to demobilize and return home. But it may be doubted whether this act was anything but one of grace and piety.

(552) The fourth and the last kind, unlimited in time as

1. Abū-'Ubaid, *الأموال*, § 447; Tirmidhīy, Vol. 2, ch. "Treachery" (غدر).

well as in place, is usually at the end of war, when one has vanquished or both are exhausted. We shall revert to this in the next chapter.

(553) *Authority to make truce*—The authority to make truce for a limited period in a limited area rests in the commander-in-charge, as we deduce from practice. The other three kinds may only be concluded by the central government or its authorized officials.¹

(554) *Effects of truce*.—In a word, both the parties thereto are bound to observe the conditions agreed upon by each other: “And the Muslims abide by their conditions.”² During the operation of such a truce, the parties may do whatever they like except the carrying on of hostilities against each other, and actions which amount to infringement of treaty and breach of faith.

1. Cf. Ṭabarīy, *اختلاف الفقهاء*, fol. 7, § 14; Suhailīy, *الروض الانف*, II, 229

2. Saying of the Prophet, cited by Sarakhsīy, *شرح السير الكبير*, I, 185, (والمسلمون عند شروطهم).

CHAPTER XXV

END OF WAR

(555) A WAR waged by the Muslim State may be brought to an end in one of the following ways :

(556) 1. Both the parties cease hostilities without any mutual agreement and without defining the length of the duration of peace. This owing either to the fact that both the parties are exhausted, or even if one of the parties has won the battle but dares not continue or further plans for hostile activities in order to complete the subjugation of the vanquished State. The latter case generally happens when the weak party unexpectedly wins a heroic battle. Hostilities may at any time revive in such a "peace." As examples, we may refer to the battles of Badr, Uḥud and Khandaq of the time of the Prophet, when the belligerents parted without attempting to define or settle their relations. The same thing happened in Mu'tah, when the Muslim army had gone to oppose emperor Heraclius, and in the words of 'Abdal-Qādir, author of *Khizānah* (I, 363 : فانكحاز : وانكحيز عنده), both parties parted from each other, without deciding the issue.

(557) 2. The non-Muslim enemy—generally meant to be their sovereign—embraces Islam. It is not always necessary that the unification of the Muslim State and this new Muslim State should also take place. The letters of the Prophet addressed to the chiefs of Ghassān,¹ Baḥrain² and 'Umān³ expressly pro-

1. Qaṣṭallānīy, *المواهب اللدنيہ*, I, 296, or my *Corpus* :

(Thy kingdom will remain to thee) يبقي لك مملكك

2. Ibn-Ṭūlūn, *اعلام السائلين عن كتب سيد المرسلين*, No. 2 (4) or my *Corpus* : يجعل الله لك ما تحت يديك (God will make thine what is [now] under thy possession).

3. *Idem*, No 10 (1), Qaṣṭallānīy, I, 294, or my *Corpus* :

ان اقر رتما بالا سلام وليتكما وان ابيتما ان تقرا بالاسلام فان ملككما زائل وخيلي تنحل بسا حتكما -

i.e. If you both embrace Islam, I shall employ you both as chiefs; if you refuse to embrace Islam then surely your kingship will vanish and my cavalry will occupy your space (country).

vide for their maintenance in power on the sole condition that they embrace Islam. Muslim traditions bear testimony to the fact that a Negus of Abyssinia embraced Islam.¹ If this is true, we find that not only was his territory not unified with the Arabian State of the Prophet but also we may account partially for the famous order of the Prophet not to attack Abyssinia so long as the Abyssinians themselves did not take aggressive action.²

(558) 3. Defeat of the enemy and annexation of their territory. The conquest of Mecca, Khaibar and many other places by the Prophet are classical examples of this. In such cases negotiations and treaties are not ordinarily needed. In Mecca the Prophet concluded no treaty. In Khaibar, however, terms on which the life and property of the enemy were spared were negotiated and accepted, and probably also taken down in a document.³

(559) 4. Acceptance by the enemy of the suzerainty of the Muslim State. The submission of the city-states of Najrān, Taimā', Fadak, Ailah and others in the time of the Prophet seem to be of this kind only. In some of them no war had preceded though pressure had been brought on them which had implied military action in case of resistance.⁴

(560) 5. Formally setting the differences in a treaty of peace, while both the parties retain their independence.

(561) The contents of the treaty are generally governed by the result of war. Usually a provisional agreement (مراوضة) is first reached settling preliminary points. Immediately afterwards military activities are prohibited from including the right of inflicting loss of life and property, on the enemy. Later other details of the final settlement are discussed and carried out. This we shall now treat.

1. *Hist.* of Ṭabarīy, pp. 1569-70, or my *Corpus*.

2. دعوا الكهنة ما ودعوكم, *i.e.* Do not touch the Abyssinians so long as they do not touch you. Ibn-Ḥanbal, V, 371 ; Abū-Dāwūd, 36 : 8.

3. For details *cf.* my *Diplomatie Musulmane*, I, 50-51.

4. *Idem*, under names concerned, where references will also be found.

Nature of the Treaty of Peace.

(562) Sometimes a treaty of peace provides for future friendship and even alliance and co-operation on conditions agreed upon in treaty. More often it simply provides for cessation of hostilities and correct neighbourly relations. Weaker parties often consent to make reparations and pay tribute. In the unrati-fied provisional treaty with the Ghafān, the Prophet agreed to hand over to them a third of the produce of the oases of Madīnah provided they deserted their allies besieging Madīnah, and made a separate and immediate peace with the Muslim State.¹

(563) Islamic polity being based on a community of co-re-ligionists it is unthinkable to contract a treaty of perpetual alliance with non-Muslims. When the Prophet established a city-state at Madīnah immediately on his migration to that place, he consented, however, to a confederation with the Jews.² Further, he concluded pacts of mutual assistance with pagan tribes around Madīnah, especially with those in the direction of Yanbū', through which the Quraishite caravans passed *en route* to and from Syria and other northern countries.³ In all these treaties of the early days of the Muslim State, there is no time-limit. There are allusions in the Qur'ān⁴ to many other treaties of friendship with non-Muslims without any defined duration. In the treaty of Ḥudaibiyah alone we come across the mention of the term "ten years"⁵ during which the treaty would operate.

(564) During the later years of the life of the Prophet, the Qur'ān laid down :

"O ye who believe! Take not the Jews and the Chris-

1. *Ibn-Hishām*, p. 677; Ṭabarīy, p. 1474; Sarakhsīy, شرح السیر الکبیر IV, 4-5.

2. Cf. *Constitution of the City-state of Madīnāh*, § 25 and § 24-47 in general; *Islamic Review*, Woking, August-November, 1941.

3. For the treaties with Damrah, Ghifār, Ashja', etc., cf. *Ibn-Sa'd*, 2/1, pp. 26-27, etc., or my *Corpus*.

4. Cf. *Tafsīr* of Ṭabarīy for the verses 9: 1-2.

5. For tex, *Ibn-Hishām*, etc., or my *Corpus*; see also *infra*.

tians 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 *zakāt* (surplus-property tax), and bow down (in prayer). And whoso 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 believers." (5 : 51, 55-57.)

And went even so far as to prescribe :

"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." (9 : 23.)

(565) Moreover, in conformity with a Qur'ānic command (9 : 1-2) the Prophet caused a declaration or proclamation to be made that all treaties for defined periods should remain operative during the contracted time, yet all those treaties concluded with pagans for mutual help without time-limit were thereby denounced with a notice of four months.

(566) For all these reasons, Muslim jurists conclude that treaties of friendship should not be concluded with non-Muslims for perpetuity. Generally the jurists agree that ten years should be the maximum period, in view of the treaty of Hudaibīyah. Suhailīy,¹ however, records that "the Jurists of Ḥijāz allow peace for a definite period, even exceeding ten years provided the supreme ruler, and not any lesser authority, agrees to it."

Effects of a Treaty of Peace.

(567) The principal effects are the following :

1. The subject over which hostilities had broken out is settled.

1. الروض الأنف, II, 229.

2. The rights of belligerency, *i.e.*, killing, capturing, plundering, occupying, and other things described before, are brought to an end.

3. Unless otherwise 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, for which there are generally express stipulations. Other booty is not exchanged unless expressly provided for.

5. As soon as a peace is concluded, the treaties, suspended during the war, and which require no renewal, automatically revive; and treaties dealing with behaviour during the war are suspended.

Elements of Treaty.

(568) Basing his argument on the Qur'ānic command: "When ye contract a debt for a fixed term, record it in writing,"¹ and on the practice of the Prophet, *Shaibānīy*² and others say that a treaty must be in writing. The date of the writing of the treaty and the date on which it comes into force, as well as the duration of the treaty, must be precisely mentioned.³ Apart from general matters, such as the cessation of fighting, the settlement of conditions created by war, etc., and special things such as agreement regarding the matters because of which the hostilities broke out and miscellaneous things which have a connexion either with general or special things—apart from all these things—the treaties include solemn promises for the observance and execution of the treaty,⁴ the signature⁵ of the duly authorized persons, and the sanction for execution, such as hostages,⁶ etc. And along with the main treaty, sometimes annexes, supplements, provisos and even secret sections are also to be found.

1. Qur'ān, 2 : 282.

2. *Sarakhsīy*, شرح السير الكبير, IV, 60-61. 3. *Idem*, pp. 62-63.

4. *Sarakhsīy*, شرح السير الكبير, IV, 62.

5. *Idem*, p. 63 mentions seal.

6. *Idem*, pp. 415-60, a detailed description as to their expenses, etc.

(569) In fact there is no limit to the subject matters of treaties.¹ Hence no more than these essential and elementary points of a treaty could here be described.

Ratification of Treaties.

(570) Generally, treaties are negotiated and provisionally settled by representatives of States. For matters *ultra vires*, they referred even in the time of Shaibāny to the central government.² History records a letter of Khālid-ibn-al-Walīd, in which he asked from Yaman for instructions from the Prophet.³ If the supreme chief is not available at hand, the provisional agreement is later ratified by competent authorities. It is possible that ratification may be denied and the whole treaty becomes null and void. There is an instance of this 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. As a matter of fact, they rejected the terms, and the parchment was consequently effaced.⁴

Interpretation of Treaties.

(571) Classical Muslim writers on International Law and "Roots of Law" have given long details of the principles of the interpretation of the terms of treaties. I am tempted to quote a passage of Shaibānīy, which shows the great concern which Muslim jurists at the zenith of their empire had for the scrupulous observance of treaties, and how they feared scandal and disrepute :

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 things must be

1. Qalqashandīy, صباغ الاعشى, XIV, 11.

2. Sarakhsīy, شرح السیر الكبير, IV, 313, etc.

3. *Ibn-Hishām*, p. 959; *Hist. of Ṭabarīy*, pp. 1724-25.

4. *Ibn-Hishām*, p. 676; *Hist. of Ṭabarīy*, p. 1474; Sarakhsīy, شرح السیر الكبير, IV, 5.

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.¹

(572) In another passage, the same author 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.²

Amendment of Treaties.

(573) Treaties may be amended in part at any time by mutual consent of the parties concerned, instead of concluding a new pact. See also *infra*.

Denunciation of Treaties.

(574) It is possible that changes of time render certain conditions of a treaty impracticable, and in view of the changed circumstances they should be revised. Muslim jurists say 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.³

Hostages and Pledge.

(575) In the time of classical Muslim jurists, hostages used to be exchanged or given by one party as a pledge of good faith in carrying out the conditions of the treaty.

(576) Of the very long discussion of the subject by

1. Sarakhsīy, شرح السبير الكبير, IV, 64.

2. *Idem*, p. 80.

3. Sarakhsīy, شرح السبير الكبير, IV, 7.

Shaibānī, I shall refer to one rule which has had the sanction of the practice of generations of later Caliphs. If Muslim hostages are treacherously murdered, the enemy hostages shall not suffer for the guilt which is not theirs personally. The practice of the Caliphs Mu'āwiyah and Manṣūr,¹ as well as a tradition of the Prophet and an oft-repeated verse of the Qur'an,² are cited by our authors in this connexion. The way out, according to Abū-Ḥanīfah, was to force 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.³

The Classical Treaty of Ḥudaibīyah.

(577) The discussion of the subject may be illustrated by the most important treaty of the time of the Prophet.

(578) Having migrated for religious persecution, and militarily harassed for six long years with varying fortunes, the Prophet went on pilgrimage to visit the House of God in his father's town and stronghold of his inveterate enemies, Mecca. At that time, he had the embittered 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. At least this much was certain that, if the Muslims marched towards Mecca, the Jews would storm the empty and undefended Madīnah; and if the Muslims attacked Khaibar, the same was the fear on the part of the Meccans,⁴ and the Muslims at that time were not sufficiently powerful to undertake both the expeditions at once, or at least to spare sufficient force to defend the metropolis of Islam when the expedition against either Mecca or Khaibar had left the city.

1. *Idem*, p. 43; Sarakhsīy, *Mabsūt*, X, 129, Māwardīy, p. 84; Abū-'Ubaid, *كتاب الأموال*, § 445-46.

2. Qur'an, لا تزر وازرة وزر اخرى, 6: 165, 17: 15, 35: 18, 39: 7. Cf. also 53: 38.

3. Sarakhsīy, *المبسوط*, X, 129.

4. *Idem*, X, 86; شرح السير الكبير, I, 201.

(579) Moreover the Iranians had just suffered a decisive defeat at Ninevah at the hands of the Byzantines,¹ and it was just the time for Arabia to postpone its internecine feuds and take advantage of the international situation, and at least to free the Arabian provinces toiling under the Iranian yoke, e.g., Bahrain, 'Umān and Yaman.

(580) The Prophet wanted a free hand regarding Khaibar and Irān, and to that end was prepared to concede terms even derogatory to his prestige. This on the one hand.

(581) On the other hand, cut off from their victual marts of Syria,² 'Irāq,³ Yamāmah⁴ and even Yaman,⁵ surrounded on all sides by Islamicized tribes,⁶ deserted by their friends,⁷ suffering actually by drought⁸ when the Prophet had won the sympathy of many of them by contributing the handsome amount of 500 gold coins towards the famine fund,⁹ by raising the ban on the grain of Yamāmah,¹⁰ and by going to visit the national sanctuary of the enemy during the months of the Truce of God—it was hoped in these conditions that the Quraish would the more easily be prepared to come to terms, provided their *amour propre* was not hurt and face-saving clauses were inserted.

(582) In these circumstances, the Prophet, with a force of 1400 strong, camped at Hudaibiyah, in the outskirts of Mecca. And after protracted negotiations,¹¹ the following treaty was concluded :

1. Gerland, *Die Persische Feldzuge d. K. Heraklius*.

2. *Ibn-Hishām*, p. 547; *Hist. of Ṭabarīy*, p. 1347; *Ibn-Sa'd*, 1/2, p. 63.

3. *Ibid.*, and *Ibn-Sa'd* 1/2, pp. 24-25.

4. *Ibn-Hishām*, pp. 997-98; استيعاب of Ibn-'Abd-ul-Barr, No. 278.

5. For, several Muslim attacks on Nakhlah, etc., had rendered this route also precarious.

6. For instance, Khuzā'ah in the south of Mecca, not to speak of the north and east.

7. *Ibn-Sa'd*, 2/1, p. 48.

8. *Ibn-Hishām*, p. 998; Caetani, *anno*, 6.

9. Sarakhsīy, الميسوط, X, 91-92; *idem*, شرح السير الكبير, I, 69.

10. *Ibn-Hishām*, p. 998.

11. *Ibid.*, etc., *in loco*.

MUSLIM CONDUCT OF STATE

*Text of the Treaty.*¹

With Thy name, O God!

This is what was agreed upon between Muḥammad, son of 'Abdullāh and Suhail, son of 'Amr :

They both agreed to put down fighting on the part of people for ten years, during which period the people were to enjoy peace and refrain from fighting with each other.

And whereas whoever of the companions of Muḥammad comes to Mecca on Hajj or 'Umrah-pilgrimage, or in quest of the bounty of God, (*i.e.*, commerce, *cf.* Qur'ān, 62 : 10), en route to Yaman or Ṭā'if, such shall be in security regarding his person and property. And whoever comes to Madīnah, from among the Quraish, en route to Syria or 'Irāq (variant : Egypt) seeking the bounty of God, such shall be in security regarding his person and property.

And whereas whoever comes to Muḥammad from among the Quraishites without the permission of his guardian (*mawlā*), he (*i.e.*, the Prophet) will hand him over to them ; and whoever comes to the Quraish from among those who are with Muḥammad, they will not hand him over to him.

And that between us is a tied-up breast (*i.e.*, bound to

1. For the original text see ; *Ibn-Hishām*, pp. 747-48 ; *Ibn-Ishāq* (MS, Paris) fol. 170a ; *Maghāzī* of Wāqidīy (MS. British Museum), fol. 140a ; Ibn-Sa'd. *Tabaqāt*, 1/2, pp. 70-71 ; *Hist.* of Ṭabarīy, pp. 1546-47 ; *Tafsīr* of Ṭabarīy, Vol. 26, p. 61 ; *Risālāt Nabawīyah* of 'Abdal-Mun'im Khān, No. 60, citing Ibn-Hanbal ; *Sīrah* of Bakrīy (MS. Aya Sofia), *in loco* ; Ibn-Kathīr, *Bidāyāh*, IV, 168-69.

For extracts from the text and certain variants see ; *Amwāl* of Abū 'Ubaid, § 441-44 ; Bukhārīy, 64 ; 43 ; 64 : 35 (29), 53 : 6-7, 54 : 1 ; *Kharāj* of Abū-Yūsuf, p. 129 ; *Kanz al-'Ummāl* of 'Alīy-al-Muttaqīy, Vol. 5, Nos. 5534, 5536, citing Ibn-Abī-Shaibah ; *I'lām-as-Sā'ilīn* of Ibn-Tūlūn, No. 26 ; for further references see Wensinck, *Miftāḥ-Kunūz-as-Sunnah*, s.v. Hudaibīyah.

For analyses and exposes, see : *Annali dell' Islam* of Caetani, anno. 6 § 34 ; Heffening, *Das islamische Fremdenrecht*, append. 2 ; Sprenger, *Das Leben and die Lehre des Muhammad*, III, 246.

Also my Arabic or French *Corpus* together with *Diplomati Musulmane*, *in loco*, and my Hindustani article in *Siyāsāt* quarterly, Hyderabad, April, 1942.

fulfil the terms), and that there shall be no secret help violating neutrality, and no acting unfaithfully.

And that whosoever likes to enter the league of Muḥammad and his alliance may enter into it; and whoso likes to enter the league of the Quraish and their alliance, may enter it.

—And thereupon upsprang the tribe of Khuzā'ah and said: We are in league with Muḥammad and his alliance; and upsprang the tribe of Banū-Bakr and said: We are in league with the Quraish and their alliance.—

And that thou (Muḥammad) shalt return from us (Quraish) in this year and enter not in our midst; and that when it is the coming year, we shall go out from thee and thou shalt enter with thy companions and stay there three nights, with thee being the weapon of the rider: having swords at the side; thou shalt not enter with what is other than them (swords).

And that the animals of sacrifice (brought by thee) will be slaughtered where we found them (*i.e.*, in Ḥudaibiyah), and thou shalt not conduct them to us (in Mecca).

[Probably Seal of Muḥammad
and Seal of Suhail]

WITNESSES :

Muslims :—Abū-Bakr, 'Umar, 'Abdar-Raḥmān-ibn-'Awf'
'Abdallāh-ibn-Suhail-ibn-'Amr, Sa'd-ibn-Abī-
Waqqās, Maḥmūd-ibn-Maslamah, etc.

Meccans :—Mikraz-ibn-Ḥafs, etc.

SCRIBE AND WITNESS :—'Alīy-ibn-Abī-Ṭālib.

(583) Two copies of the treaty were prepared. One was kept by the Prophet, and the other was handed over to Suhail, the plenipotentiary of the Quraish.¹

(584) The Prophet detained the Quraishite plenipotentiary until the Muslim envoy, who was wrongfully interned in Mecca,

1. Sarakhsīy, شرح السيرة الكبرى, IV, 61; *Ibn-Sa'd* 1/2, p. 71; Lammens, *La Mecque*, p. 136.

returned safe.¹

(585) After the agreement was reached, but before the completion of signatures, a persecuted convert, who happened to be the son of the Quraishite plenipotentiary, fled from confinement by his father, and took refuge in the Muslim camp. Upon demand, the Prophet extradited him, and conceded that the treaty should come into force immediately upon agreement without waiting for formal execution.²

(586) The Prophet interpreted the term of extradition to embrace only men, and excluded women when some cases arose before the departure of the Prophet from Hudaibiyah. The Quraish reluctantly gave way.³ In case of converted women taking refuge in Muslim territory or camp, the Prophet allowed their husbands, if any, a right to what they had paid as nuptial gift—which was credited to their accounts from the general exchequer.⁴

(587) The one-sided extradition proved expensive and inconvenient to the Meccans; and, upon their own request, the Prophet consented to amend the treaty in this respect.⁵

(588) Cases arose to prove that extraterritorial jurisdiction of camps and armed forces was recognized by both the parties.⁶

(589) Extension of three days' limit for the stay of the Prophet in Mecca was requested, but was not granted by the Quraish when the Prophet visited Mecca the following year.⁷

(590) The main object of the treaty was to get permission

1. *Insān* of Ḥalabīy, III, 26; *Sīrah* of Daḥlān, II, 46; *Sīrah* of Karāmat 'Alīy, ch. Hudaibiyah.

2. *Ibn-Hishām*, p. 748; *Hist.* of Ṭabarīy, pp. 1547-48; *Ibn-Sa'd*, 1/2, p. 73.

3. *Ibn-Hishām*, p. 754.

4. *Idem*, pp. 754-55; cf. Qur'ān, 60 : 10-11, and commentaries thereto.

5. *Ibn-Hishām*, pp. 752-53.

6. For several cases, cf. *Ibn-Hishām*, pp. 748-55.

7. *Ibn-Hishām*, p. 790. After three days' stay the Prophet evacuated the city, and did not utilize the opportunity to make treacherously a permanent occupation of the city, from which nobody could oust him, least of all the Quraish, especially when they had left the city.

to visit the national sanctuary of the enemy. Incidentally, a truce for ten years was agreed upon, with immune transit or stay for religious or commercial purposes in each other's territory. As an annexe is mentioned the adherence of various tribes on either side getting the same rights and obligations as the original contracting parties.¹

(591) As a proviso, the Prophet added, before affixing his seal, "the rights and duties are equal and reciprocal between you and us."²

(592) The treaty is silent regarding the property of the Muslim refugees, appropriated by the Meccans,³ as the Muslims had fled to Madīnah, the property of the Prophet not excluded. And tacitly the Muslims accepted the *status quo* regarding the validity of the enemy occupation.

1. Prophet's Letter to Budail, cf. *Ibn-Sa'd*, 2/1, p. 25; Abū-'Ubaid, § 515: اخذت من هاجر منكم مثل ما اخذت لنفسى i.e. I have obtained for those from among you who migrate the same rights as I have obtained for me.

2. *Ibn-Sa'd*, 1/2, p. 74: كتب رسول الله صلعم في اسفل الكتاب: اخذت من هاجر منكم مثل ما اخذت لنفسى i.e. The Prophet wrote at the bottom of the document: For us and upon you will be like that which will be for you and upon us.

3. Cf. Qur'an, 59: 8 للفقراء المهاجرين الذين اخرجوا من ديارهم واماوالهم; Bukhārīy, 64: 84 (3); Sarakhsīy, *Mabsūṭ*, X, 52; *Ibn-Hishām*, pp. 321-22, 339.

MISCELLANEA

1. *Neutral and National Ambulance Service to the Sick and Wounded.*

(593) MEDICAL service is purely humanitarian. Doctors and nurses are never harmed if they did not resist ; they might be captured.¹

(594) The neutral and even non-Muslim ambulance service and medical help for Muslims is mentioned by as early a jurist as Shaibānīy (d. 189 H.) Even Muslim relief work, rendered for non-Muslims, might be upheld on the ground of the Qur'ānic precept: ² “And co-operate regarding charity and piety,” (تعاونوا على البر والتقوى).

(595) Instances abound in the life of the Prophet of arrangements for ambulance service. In the battles of Uḥud, Khandaq and others, history has recorded details of hospitals, nurses, and arrangement for the transport of the wounded, etc.³ The armies of the Caliph 'Umar, too, were provided with medical men.⁴

2. *Army-Court.*

(596) In the time of the Prophet, no special arrangement of judges for the expeditions is recorded, the commander himself functioning simultaneously as a judge also. We come across mention of the post of army-judge (قاضى العسكر) first in

1. Sarakhsīy, شرح السير الكبير, IV, 112-13.

2. Qur'ān, 5 : 2.

3. *Cf. supra*, ch. xxii, “Women in Muslim Army.”

4. *Hist. of Ṭabarīy*, p. 2223 : (و بعثت عمر الاطبة)

the time of the Caliph 'Umar.¹ They must have functioned not only to decide cases of the matters of the Muslim army, but also of land and sea booty. Certain provisions of the Muslim penal code ceased to apply during an expedition, as long as the army found itself in enemy country.²

(597) If an act was done at the command of a superior authority, it could not be considered a crime of the committer; the enemy might not try him for that act. But without knowledge and permission of the higher authority, if any wrongful acts were committed by an officer, even the officer-commanding, the damages had to be paid by his government to the sufferer. The disciplinary punishment of such an officer by his own government does not come under international law. As an instance we may mention the case of the Banū-Jadhīmah in which blood-money was paid by the Muslim government for every life; and even dogs killed were compensated for. A considerable amount of money was added for "unknown damage that may have been done."³

(598) The Prophet had the emancipation of slaves so much at heart that he declared that if the slaves of the enemy deserted their masters and embraced Islam and came to the Islamic territory, they would at once become free. Several cases of the time of the Prophet are also recorded as precedents.⁴

1. *Hist. of Tabariy*, pp. 2225-26: *و بعث عمر الاطبة و جعل على قضاء الناس عبدالرحمن بن ربيعة الباهلي ذا النور و جعل اليه الاقباض و قسمة الفيء و جعل داعيتهم و رادهم سلمان الفارسي - - - والترجمان هلال الهجري والكاتب زياد بن ابي سفيان -*

ie. And 'Umar sent doctors, appointed 'Abd-ar-Rahmān ibn Rabī'ah al-Bāhili Dhu'n-Nūr to be judge and also to receive and disburse the booties; he appointed Salmān al-Fārsīy *dā'iyah* (camp master?) and the one to select the camping places, . . . the interpreter was Hilāl-al-Hajarīy, and the scribe (secretary) was Ziyād ibn Abī Sufyān.

2. *Sarakhsīy*, شرح السير الكبير, IV, 108, citing the traditions of the Prophet.

3. *Ibn-Hishām*, p. 833.

4. See Battles of Ṭā'if and Khaibar, in *Ibn-Hishām*, etc.

3. *Religious Service in Time of Danger.*

(599) The religious polity of Islam and the moral basis of Muslim international law is demonstrated by what every classical work on Muslim International Law mentions and which is also taken notice of in an unusual detail by the Qur'ān.¹ I mean, the five daily congregational religious services should not be abandoned even when actual fighting was going on. Muslim soldiers are reminded thereby so many times daily that they were fighting only in the cause of God, not at all caring for any worldly gain.²

4. *When and why the Muslims should agree to make Peace ?*

(600) One or two quotations of the Qur'ān will explain the point :

(a) So do not falter and cry out for peace when ye are the uppermost. And God is with you, and He will not grudge (the reward of) your actions. (47 : 35)

(b) And if they incline to peace, incline thou also (O Muḥammad) to it, and trust in God. Lo! He is the Hearer, the Knower. (8 : 61)

(601) It will be noticed that the victorious Muslim is required to offer peace, not the annihilation of the enemy. The object of a Muslim war is triumph of the banner of God, and no worldly gain.

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

(602) A few cases of the time of the Prophet would suffice to illustrate Muslim law and practice on the point :

(a) It is recorded that al-Ḥārith-ibn-Suwaid, a hypocrite, had intentionally murdered al-Mujadhhar-ibn-Dhiyād at Uḥud, at the time when a dismay was caused in the Muslim army by the unexpected attack of the enemy.

1. Qur'ān, 4 : 101-103.

2. Cf. *supra*, saying of the Prophet that he alone of the warriors would go to Paradise who fought in order that the word of God may reign supreme, من في الجنة؟ قال من قاتل لتكون كلمة الله هي العليا

The reason of this murder was to exploit the time and avenge an old pre-Islamic feud. The Prophet ordered, after the trial, for beheading the culprit. (Cf. Ibn-Hishām p. 579; Ibn-Ḥabīb, *Muḥabbar*, p. 467.)

(b) Ḥusail-ibn-Jābir was killed by Muslim soldiers during the same dismay at Uḥud, quite unintentionally, though in spite of some warning. Yet the situation was so difficult and out of the control, that such faint protestations could hardly be effective. The Prophet, on hearing the case, 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!" (Cf. *Ibn-Hishām*, p. 607.)

(c) During the war of *Khandaq*, two Muslim detachments met each other in the night, and before the exchange of parole and ascertainment of the identity, some blood was already shed, causing some slain and others wounded. The Prophet gave them the advantage of mistake, and left the matter with impunity and said: "The dead of either party are entitled to martyrdom and shall go to paradise; and the action of either party was in the path of God; and no right to damages accrues." (Burhānuddīn al-Marghīnānīy, in his *adh-Dhakhīrah al-Burhānīyah*, on the authority of ash-Shaibānīy, MS. Istanbul, ch. *Siyar*, § 23.)

6. *Debts due to a Defeated Enemy.*

(603) We have mentioned above (cf. ch. xi, Effects of Declaration of War, 3) that 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.

(604) Now it may be noted that even the defeat of the enemy does not deprive them of their right to recover a debt, accrued in a lawful manner. For this we possess the very high authority of the Prophet:

It has been argued, moreover, on the authority of the tradition regarding the (defeated Jews of) Banū-Qainuqā'.

So when the Prophet ordered their expulsion (from their homes), they said : But we have debts to recollect whose date of payment has not yet arrived. The Prophet suggested: Capitalize them at a discount. Again, when the Prophet ordered the expulsion of Banu-an-Naḍīr, they said : But different people owe us debts whose date of payment has not yet arrived. The Prophet suggested : Capitalize them at a discount.

(III, 180. شرح المسير الكبير للمسرحسى) —

(605) These two important precedents show that monetary rights are not *ipso facto* extinguished if the parties are rendered enemy to each other ; on the other hand such rights remain operative between the creditor and debtor in spite of war and of even defeat and unconditional surrender. The conversion of long-term debts into those payable immediately, at a discount naturally, was only an option which was no denying the validity of the full value of the actionable claims.

PART IV
NEUTRALITY

CHAPTER I

INTRODUCTORY

(606) THE neutrality of a State, in a war between two or more parties, is as old a thing as the co-existence of more than two independent States. Still, judicial conception of it does not seem to have developed, before modern times, to an extent calling for special chapters in law books. Muslim authors mention it incidentally in the discussion of the laws of war or peace, according to whether the Islamic State is or is not a party in the conflagration. Further the data are meagre ; and so far as I know, this is the first¹ attempt to collect and glean relevant points from the dispersed material.

1. Cf. also my article in Z.D.M.G., 1935 : "Die Neutralitaet im islamischen Voelkerrecht."

TECHNICAL TERM FOR NEUTRALITY

(607) MODERN Arabs use the word *ḥiyādah* (حيادة) for neutrality. Pre-Islamic and early-Islamic Arabs employed the term *i'tizāl* (اعتزال). Though this term now applies only to a particular school of Muslim philosophical and theological thought, even its scholastic sense was suggested by the neutral attitude which the Mu'tazilites adopted towards both the Sunnis and the Khārijites.¹

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

1. *Nel campo teologico il nome d'al-Mu'tazilah non ebbe origine dall'idea di secessione dalla ortodossia, e non fu quindi escogitato dagli ortodossi con implicato senso di biasimo o di dispregio come una dichiarazione di eterodossia ; quel nome fu scelto, od almeno accolto, dai Mu'taziliti primitivi nel significato di, neutri', neutri', di, non parteggianti per nessuna delle due fazione contrarie (ortodossi e Harigiti), nella grave questione poltioco-religiosa del modo di considerare il fasiq.*

2. *Poichè la questione suddetta riceveva la sua importanza dalle lotte politiche e dalle guerre civile del I sec., è naturale che il nome di al-Mu'tazilah fosse desunto dal linguaggio politico del tempo ; i nuovi Mu'taziliti dogmatici erano in origine i continuatori, nel campo teorico o speculativo, dei Mu'taziliti politici o pratici.²*

1. "قوم من القدرية" يلقبون المعتزلة زعموا انهم اعتزلوا فيئتى الضلالة عند هم يعنون اهل السنة و الجماعة والنخوارج الذين يستعرضون الناس قتلا" (لسان العرب، ع زل)

i.e. There is a branch of the sect of Qadarīyah, called Mu'tazilah, which pretends having observed neutrality between both the erring sects, in their opinion, meaning thereby : the Sunnīs, and the Khārijīs who put the people to sword.

2. *Rivista degli Studi Orientali*, Roma, 1916, pp. 447 et seq.

Translation :

1. In theological discussions, the name *Mu'tazilah* did not originally mean secession from Orthodoxy, and was not therefore excogitated by the Orthodox (Sunnīs, with the implied sense of blame or contempt as a declaration of heterodoxy. That name was chosen or at least accepted by the early *Mu'tazilites* in the sense of *neutrals*, "those who participated with neither the Orthodox nor the *Khārijites*" 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 *Mu'tazilah* should be influenced by the political language of the time. The later dogmatic *Mu'tazilites* were, in the origin, mere continuators of the old political or practical "Neutrals," in the field of theory and speculation.

(609) The *Mu'tazilite* philosophy occupied Muslim politics so much during the reign of Ma'mūn and his successors, that golden age of Arabic learning, that the original legal and philological sense of this term soon fell into desuetude.

(610) In order to show that neutrality was not unknown even in pre-Islamic Arabia, a few quotations may not be out of place. They will, at the same time, give a historical background to the pre-Islamic Arabic practice, which has substantially influenced Muslim law—as was shown in Part I of this monograph. It will be noticed that at times the term *I'tizāl* or its inflected forms are used, and at others the sense has been rendered in other ways.

(611) 1. The treaty of neutrality and friendship between the Emperor Decius (d. 251 A.C.) and the *Ghassānid* prince of Syria.

(612) Before the migration of the *Ghassānids* from Yaman to Syria, the *Duj'umites* had settled in Syria, and used

to tax every new immigrant, on behalf of the Byzantine emperor according to his means. The refugee Ghassānids at first agreed to this tax, but later they refused to pay. A bloody battle ensued in which the Duj'umites were annihilated. The emperor feared the Ghassānids might incline to Persians. So he made this offer to this chief, Tha'labah :

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.* Tha'labah accepted this, and the treaty was concluded.

(613) The emperor made Tha'labah a king, and bestowed upon him a crown (*mallaka, tauwaja*). The name of the emperor was Decius.¹

(614) 2. During the famous 40 years' war of Basūs, which raged between the tribes of Bakr and Taghlib, there was frequent mention of neutrality. Al-Kalbīy 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 Rabī'ah 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 Banū-Ḥanīfah, and

1. كتاب المسحور by Ibn-Ḥabīb, fol. 131a MS. British Museum ; pp. 371-72 ed. Hyderabad.

the Banū-Qais-ibn-Tha'labah. Particularly the chieftain of the last named branch al-Hārith-ibn-'Abbād, who was a famous knight and poet, guarded his neutrality (*i'tizāl*) 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 Shaibān! 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-Hārith-ibn-'Abbād 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 Taghlibites themselves do not want that I
remain neutral (*i'tizālī*).

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 the Taghlib.¹

(615) 3. When the tribe of Khuzā'ah emigrated from Yaman to the North for fear of the breaching of the dam of Ma'rib, their chieftain, 'Amr, sent his son to Mecca, in order to make their request of its inhabitants:

Allow us a short stay in your territory until our people, who have gone in search of colonies to 'Irāq and Syria, come back.

(616) The Jurhumites of Mecca would not entertain the idea, and a war ensued. One Jurhumite chief, Muḍād, remained neutral (*i'tāzala*), and even left Mecca along with his family, for the time being. The Khuzā'ites had the upper hand. The

1. كتاب بكر و تغلب, by an anonymous author. MS. British Museum.

Ismā'ilite clans had also remained neutral (*i'tazalū*) in the war of the Jurhum and Khuzā'ah. They then came to the victorious Khuzā'ites and asked permission to live in Mecca. This was granted. On hearing this, Muḍāḍ also sent emissaries to the Khuzā'ah and requested the same proving his neutrality (*i'tizālihi*) in war. But the Khuzā'ah refused to grant the request.¹

(617) 4. Quṣaīy, the ancestor of the Prophet, had become the supreme chief of Mecca, with the help of his clansmen of Quḍā'ah. After his death, his functions were distributed among his several sons. But rivalry divided them and each party sought foreign allies. All the local tribes joined with one or the other; only two tribes remained neutral (لم يكو نوا) and sided with neither of the two parties).²

(618) In Hadīth literature also, there are things of interest for the subject. The following two citations have been taken from Bukhārīy (cf. ch. *Manāqib*, II, and Muslim cf. ch. *Imārah*, 51, and concern the practice of the Prophet):

(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 (*i'tazala*). The narrator adds, it was owing to this hadīth that many a pious Muslim remained neutral during the war between 'Alīy and Muā'wiyah. (For instance, Sa'd-ibn-Abī-Waqqās, according to Muslim, 53 : 11, Ibn-Hanbal, I, 168, 177, etc.)

(b) The Prophet is said to have predicted that towards the last days of the world, a terrible fight would break out between the Believers and the Rūmīs (Westerners). The Rūmīs 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:

1. كتاب الاغانى, XIII, 110.

2. *Ibn-Hishām*, pp. 84-85.

“No! We cannot desert our brethren” This war would seal the end of the power of the Rūmīs.

(c) Ibn Ishāq 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 Banū-Ghanam, of the tribe of Ḥadas, remained neutral (اعترضوا), whereas other branches of the same tribe fought against the Muslims.¹

1. *Ibn-Hishām*, p. 792.

CHAPTER III

TEACHINGS OF THE QUR'ĀN ON NEUTRALITY

(619) SO far our data have dealt with matters of more or less historical perspective. For their special importance, the relevant verses of the Qur'ān may be collected in this chapter :

(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 we 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.¹

(620) In these verses it is predicted that the hypocrites among the inhabitants of Madīnah would not help their friends (the Jews of Banū-an-Naḍīr, *cf. Tafsīr* of Ṭabarīy, Vol. 28, p. 29), but would remain neutral in case of fight with the Muslims.

(621) Much more interesting are the following passages, which 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 Muslims; they also advise drastic action against those who violated their neutrality :

(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 anyone against you*. (As for these), fulfil their treaty to them till their term. Lo! God loveth those who keep their duty (unto Him).²

(c) God forbiddeth you not regarding those who warred not against you on account of religion and drove

1. 59 : 11-12.

2. 94 : 4. *Cf.* 58-60.

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.¹

(622) The most important verse is perhaps the following, in which even the term *i'tizāl* has been used :

(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 Muḥammad) canst 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;² 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 to 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 (*i'tazalūkum*) and wage not war against you and offer you peace, God alloweth you no way 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 (*lam ya'tazilūkum*) 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.³

1. 60 : 8-9. 2. That is, migrate to Muslim territory. 3. 4 : 88-91.

CHAPTER IV

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

(623) THE orthodox practice comes only next in importance to the Qur'ānic prescriptions. A few typical cases may be of interest. (Cf. also ch. II above, particularly c.)

1. Cases.

(624) (a) The Jewish tribe of Banū-an Naḍīr was allied to the tribe of Ghaṭafān, and had also secured the promise of help on the part of the neighbouring Jewish tribe of Banū-Quraiḏah. Believing in the aid of these formidable allies, the Banū-an-Naḍīr 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. Consequently they were besieged in the fortresses. The Banū-Quraiḏah, however, remained neutral (*i'tazalat*), and rendered no help to the Banū-an-Naḍīr. And similar was the attitude of the Ghaṭafān.¹

(625) (b) Forced to quit Madīnah, the Banū-an-Naḍīr migrated to and settled in Khaibar. In view of their intrigues² with the Meccans and others, the Prophet took the initiative to nip the danger in the bud, and led an expedition against Khaibar. En route, he sent an envoy to the Ghaṭafān, who were allies of the Banū-an-Naḍīr, bidding them not take part in the affairs of the Muslims and the Jews. The Ghaṭafānids said that they would not desert their friends in this time of need. The tactical march of a detachment of the Muslim army against their settlements, however, persuaded them of

1. *Ibn-Sa'd*, 1/2, p. 41.

2. *Idem*, pp. 47, 66; *Hist. of Ṭabarīy*, pp. 1556; 1575-76; *Mas'ūdīy, Tanbīh*, p. 250.

the necessity of remaining at home and giving the Prophet a free hand in his designs against Khaibar.¹

(626) (c) During the unrest of apostasy in some parts of Arabia, on the death of the Prophet, a Yamanite chief, Qais, sent a message to another chief, Dhu-al-Kulā', to the following effect :

The *Abnā* (i.e., the Persians domiciled in Yaman) are but intruders in your country, and are 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.

Dhu-al-Kulā' and his partisans, however, refused this and neither co-operated with him nor helped the *Abnā'*, but remained neutral (*i'tazalat*), saying : We have no concern with all this : do as you like.²

(627) (d) Al-Jārūd had embraced Islam in Madīnah. When the Prophet died, Jārūd'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 Rabī'ah.³ This neutrality of theirs was of considerable importance.

2. Treaties.

(628) As for treaties which provide for neutrality, or State documents which contain reference to neutrality, they are numerous even in the early days of Islam. A few of the more important may be quoted with interest :

(a) When the Prophet migrated to Madīnah, and constituted there a city-state, he took the initiative of consolidating Muslim power by entering into alliance with non-Muslim Arab tribes living around Madīnah, especially on the caravan-route of the Meccans to and from Syria. The following

1. *Ibn-Hishām*, pp. 757-58 ; *Hist. of Ṭabarīy*, p. 1575 *et seq.*

2. *Hist. of Ṭabarīy*, p. 1990.

3. *Idem*, p. 1958 *et seq.*

treaty with a chief of the Banū-Damrah dates from the month Ṣafar of the year 2 H.

He (*i.e.*, the Prophet) will not attack Banū-Damrah nor will they attack him nor swell the troops of his enemies nor help his enemies in any way.¹

(*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 Banū-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.²

(*c*) Another tribe living near the the sea-coast of the Red Sea was the Banū-Ghifār. They were also rallied about the same time, and their treaty provided :

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.³

(*d*) When the city-state of Madīnah was constituted, there were many Jewish settlements in the eastern suburbs of the Arab city. They also adhered to the confederal city-state, and agreed among other things that :

1. *Ibn-Sa'd*, 2/1, 3; *Sīrah* of 'Alīy al-Qāri (MS. Istanbul), ch. *Ghazawāt*.

2. *Ibn-Sa'd*, 2/1, p. 27; Suhailīy, II, 58-59.

3. *Ibn-Sa'd*, 2/1, pp. 26-27.

§ 45. 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. The wars waged in the name of religion are excepted.¹

(e) It was probably in the year 5 H. that the Prophet concluded a treaty of alliance and neutrality with the tribe of Banū-‘Abd-ibn-‘Adīy, regarding which our historians record :

The Prophet received the deputation of the Banū-‘Abd-ibn-‘Adīy . . . They said : O Muḥammad ! 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.²

(f) In the famous treaty of Ḥudaibīyah also there is provision for neutrality. In fact an expression is used there which according to lexicographers has different significances. I mean the word *islāl*. It signifies the unsheathing of a sword as well as violation of neutrality and secret help to the enemy of the other contracting party. That the word *islāl*, in the treaty of Ḥudaibīyah, has been used in this latter sense, is borne out by two other treaties³ concluded in the early days of the Orthodox Caliphate, and it is conclusively proved that it was a technical term.

(629) The relevant section of the treaty of Ḥudaibīyah is the following :

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

1. For the complete text of the Constitution, see *Ibn-Hishām*, pp. 341-44 ; Abū-‘Ubaid, *Amwāl*. § 517 ; Ibn-Kathīr, *Bidāyah*, III, 224-26 ; etc.

2. *Ibn-Sa‘d*, 2/1, p. 48.

3. *Cf. infra*, under *g* and *h*, which immediately follow ; *cf.* also *سان العرب* c. v., “سئل”.

fulfil the terms), and there shall be no secret help violating neutrality, and no acting unfaithfully.¹

(630) The treaties just referred to are the following :

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

This is the writ of Suwaid-ibn-Muqarrin in favour of Farrukhān, the Commander of Khurāsān, concerning the enemy territories of Ṭabaristān and Jiljilān.

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 thy 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 dost 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 (ولا تساون لنا) and thou shalt not act unfaithfully. Otherwise there will be no pact between us and thee.²

(h) This is what Nu'aim-ibn-Muqarrin accorded the chief of the province of Raīy :

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).³

(i) The following clause is taken from the treaty with the

1. For complete text, *cf. supra*, section XXV.

2. *Hist. of Ṭabarīy*, p. 2659.

3. *Ibid*, p. 2655. *Cf.* treaty of Jurjān, *idem*, p. 2658, for similar provision (لم يبد منهم سبل ولا غل). *i.e.* No secret help (to the enemy) and no open defection has been detected in them.

CASES AND TREATIES OF NEUTRALITY

ruler of Nubia, concluded by a Muslim governor of Egypt of the time of the Third Caliph, 'Uthmān :

You, O Nubians, are assured of the protection of God and His Messenger, Muḥammad, 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 enemy who may encounter you, nor to prevent him from you, between the limits of the territory of 'Ulwah and Aswān.¹

(j) Qais-ibn-Sa'd, the governor of Egypt, addressed the following letter to the Caliph 'Alīy, during the civil wars of the time :

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

I have to inform the Commander of the Faithful that there are people here who want to remain neutral (*mu'tazilīn*). They have requested men of to take action against them but to leave them unmolested until the situation clears.²

(k) 'Alīy 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.³

1. Maqrizīy, *Khitāṭ*, I, 200 (ed. Būlāq).

2. *Hist. of Ṭabarīy*, p. 3244.

3. *Ibid.*

(l) Extract of the open letter of 'Alīy addressed to the rebels and apostates of Banū-Nājiyah :

I invite you to abide by the Book of God and the practice of His Messenger, and to act righteously as God has ordained in the Book. Further: Whoever of you returns home to his people and keeps aloof and observes neutrality (*i'tazala*) vis-a-vis this nihilist and robber (*i.e.*, Khirrīt, the chief of the Banū-Nājiyah), who has come forward to fight against God, His Messenger and the Muslims, and is doing mischief in the land—such will be assured of his person and property. But whoever follows him to fight against us and disobeys our authority, we shall seek help from God against him.¹

(m) In the year 28 H., the Muslim armies attacked Cyprus. A peace was concluded on the condition :

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.²

(n) When Fīmī the ruler of Sicily revolted against his Byzantine overlords and appealed for help to the Aghlabid governor of Tunis, this latter invaded Sicily in 244 H. But the Muslim commander “demanded of Fīmī and his men to remain neutral (*ya'tazilū*)” in the war, and single handed defeated the Byzantines.³

(o) “When there was what there was [of civil war] between 'Alīy and Mu'āwiyah, al-Walīd-ibn-'Uqbah left for Raqqah *in neutral* (*mu'tazilan*) and did not side with either of the two until the affair terminated.”⁴

(631) Such examples may be multiplied, but unfortunately none of them describes the rights and duties emanating from the status of neutrality, which were understood. For these we have to refer to practise. Some such things are collected in the following chapter.

1. *Hist. of Ṭabarīy*, pp. 3435 *et seq.*

2. *Ibid.*, p. 2826.

3. Yāqūt, *معجم البلدان*, صقلية §.

4. *Ibn-Sa'd*, VI, 15, § الوليد بن عقبة.

CHAPTER V

LAWS OF NEUTRALITY ACCORDING TO JURISTS

(632) FROM the foregoing chapters it must have been clear that the notion and the fact of neutrality were not unknown to early Muslims. As the Muslim jurists do not treat the question in a separate chapter, but describe its provisions partly in the laws of peace and partly in the laws of war, it is not easy to glean all that is relevant to our purpose here. It must be admitted that the laws of neutrality had not so much developed in olden times as during the first half of the 20th century, apart from the fact that the mighty onslaught of Nazi Germany had again thrown these laws of neutrality into the melting pot.¹ Still the few passages I came across in the writings of Sarakhsīy, the great commentator of Shaibānīy, may be reproduced here with profit. They were gleaned in a hasty perusal, and can by no means be considered as the only passages to be found in his writings or the writings of other jurists.

(633) It is to be pointed out that these few random quotations cannot be expected to construct a whole system of laws of neutrality, namely, the rights and obligations of neutrals *vis-a-vis* States actually engaged in a war.

(634) (a) If a State has contracted a treaty of peace with the Muslims and is attacked by a third State which made prisoners (and enslaved them), and 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

1. Not to utilize a neutral territory as a base of operation and not to prepare there a warlike expedition—such are the two basic principles of modern international law on neutrality. It is to be noted that even in the presence of the League of Nations, England required mandated 'Irāq and protected Egypt to concede to her the right of maintaining troops in and transit through their territories before she could recognize their independence, in disregard of the basic principle of neutrality. German pressure on neutrals for passage was therefore not a lead but only it followed the precedence of the neutral 'Irāq and Egypt in the World War of 1939. Cf. also the treaty of Īrān and Russia, invoked during the same war.

Muslims. For the third State had not violated the jurisdiction of the Muslim State in capturing them . . . If the third State secures its capture, it will become the rightful owner of the same.¹

(635) That is to say, 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.

(636) (b) If 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). For the ownership did vest in the capturing country, and foreign countries do plunder each other and acquire ownership of persons and properties. Therefore it is lawful for the Muslim resident to purchase this booty just as any other property owned by the country where he is residing.²

(637) Similarly, if the country of residence of the Muslim citizen had captured that booty from a third State, he may purchase that booty. For the ownership was vested in it on account of securing that booty . . . If the Muslims had entered into a treaty of friendship with a non-Muslim country, which was attacked and plundered by a third State, the Muslim citizen residing in the former may lawfully purchase booty from the latter.³

(638) (c) If Muslim citizens are staying in a foreign country which is attacked by a third State, they must not fight against that third State (which is at peace with the Muslim State) . . . except when they find their own selves in danger. In this case they may fight against that third State in self-defence (not in breach of the neutrality of their own Muslim State) . . . The precedence is provided by Ja'far, the cousin of the Prophet.

1. Sarakhsīy, شرح السير الكبير, IV, 134-35.

2. Sarakhsīy, الميسوط, X, 97.

3. *Ibid.*

He had taken refuge in Abyssinia when that country was attacked by a neighbouring monarch. Ja'far was prepared to take up arms in favour of Negus, because he was afraid that the new ruler might not offer him the same asylum.¹

(639) (d) If the subjects of a foreign country come to the Islamic territory by permission and intend to proceed to a third State at war with the Muslims, in order to join forces with them against the Muslim State, passage will be denied them. For the passport secured for them only freedom of stay and freedom of return to their own country. Beyond this, the Muslim State is right in denying them all that is harmful to the Muslims . . . No doubt if one or two of them want to proceed to the third State for commercial purposes, this may not be denied them. But the case is different when they are a formidable force.²

(640) (e) A case of something like *benevolent neutrality*, permitting public armed forces of one State to pass through Muslim territory, seems to be mentioned in the following quotation :

If they are formidable force, and enter Muslim territory by permission in order to cross to 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.³

(641) (f) Regarding the enemy ship with neutral goods, and neutral ship with enemy goods, our authors lay down a general principle that the safety of the owner renders the property safe (حرمة الملك باعتبار حرمة المالك).⁴

(642) (g) I shall briefly refer to my article "Some New

1. Sarakhsīy, الميسوط, X, 97-98.

2. *Idem*, شرح السير الكبير, IV, 121-22.

3. شرح السير الكبير السرخسى, IV, 109.

4. *Idem*, I, 142.

Developments in the British Conception of Neutrality as against Muslim Countries," which appeared in the August 1951 issue of *The Islamic Review*, Woking. Since the other party to the British attitude was some Muslim country or other, the swing to benevolent neutrality, instead of strict impartiality ordained by the Hague Conference, is noteworthy since the treaties under which a partiality during the period of neutrality and non-taking part in the war was contracted, were registered with the League of Nations and thus acquired greater importance than mere coercion of weak powers by a Great Power.

* * * * *

(643) Here ends my humble investigation in the theory and practice of Muslim Public International Law. Although I have spent several years on the subject, yet I, more than anybody else, am conscious of many of its shortcomings; and I know that many more things are to be read before exhausting even the material existing and known to me. In the course of one's daily reading, many important works, not known before, come to one's knowledge, but, alas, seldom is it possible to consult them in our Eastern surroundings, especially when they concern old and out of print Continental works. Diffidence would have prevented me from publishing this monograph even after these dozen and more years of writing, and rewriting but at last the consolation came to my mind, that—

کار دنیا کسی تمام نہ کرے
فالسعی منا والایمان من اللہ

APPENDIX A

INSTRUCTIONS TO COMMANDERS

1. BY THE PROPHET

(a) *General* :

TRANSLATION :

(644) Whenever the Prophet appointed a commander over an army or detachment, he enjoined upon him to fear God regarding himself and regarding the treatment of the Muslims who accompanied him. Then he used to say :

Fight with the name of God and in the path of God. Combat those who disbelieve in God. Fight yet do not cheat, do not break trust, do not mutilate, do not kill minors.

If thou encounterest an enemy from among the Associates (infidels), then offer them three alternatives. Whichever of these they may accept, agree to it and withhold thyself from them :

So call them to embrace Islam. If they accept, then agree to it and withhold thyself from them. Then ask them to immigrate from their territory into the territory of the *migrants*¹ (*i.e.*, Muslim State), and inform them that if they do that they will have same rights as the migrants and same obligations as they. If they refuse to migrate, then inform them that they will be considered as bedouin (wandering) Muslims, the same Divine laws being obligatory on them as on other Believers, except that they will not benefit by booty and other State income unless they join forces and fight along with the Muslims.

1. For its significance and a detailed description of the colonial policy in the time of the Prophet and the Orthodox Caliphs, *cf* my article "هجرة" in the quarterly *سياست*, July 1940, Hyderabad.

If, however, they refuse, then call them to pay the *jizyah* (protection tax). If they accept, then agree to it and withhold thyself from them.

If they refuse, then seek help from God and combat them.

If you besiege the people of a fortress and they agree to submit on the condition that you assure them by the pledge of God and the pledge of His Prophet, then do not do that; but assure them by your own pledge and the pledge of your companions. For it is much less grave if you violate the pledge of yours and of your companions than the pledge of God and that of His Messenger.

If you besiege the people of a fortress and they agree to surrender on the award of God, then do not let them surrender on the award of God but on your own award. For you cannot be sure whether you have acted regarding them in conformity with the award of God or not.¹

(b) *To 'Abd-ar-Rahmān-ibn-'Awf:*

TRANSLATION :

(645) Then the Prophet ordered Bilāl to hand over the banner to him. He did so. Then the Prophet eulogized God and asked for His mercy upon himself, and said: O son of 'Awf! take it. Fight be 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 conduct of His Messenger for your guidance.²

(646) (c) For instructions on other occasions, by the Prophet, cf. *Tirmidhīy*, 14 : 14, 19 : 2 and 48 ; *Ibn-Mājah*, 24 : 38 ; *ad-Dārimīy*, 17 : 8 ; *Mālik*, 21 : 11 ; *Ibn-Hanbal*, I, 300 ; III, 440, 448 bis ; IV, 240 bis ; V, 276, 352, 358 ; *Zaid-ibn-'Alīy* No. 820.

1. Muslim, *Ṣaḥīḥ*, V, 139-40. According to Maqrīzīy (علاء I, 345-6), these instructions were originally given to the expedition of Mu'tah in the year 8 H.

2. *Sīrah* of Ibn-Hishām, p. 992.

2. BY ABU-BAKR

(c) *To Usāmah, while proceeding against Palestine :*

TRANSLATION :

(647) Then Abū-Bakr went and met them (in the camp), ordered them to proceed, and accompanied them on foot while Usāmah (the commander) was riding and Abū-Bakr's camel was being conducted by 'Abd-ar-Raḥmān-ibn-'Awf. Usāmah told him: "O Successor of the Messenger of God, either thou shalt ride or I shall alight." He replied, "Neither shalt thou alight nor I ride. What does it matter if I walk awhile, for every step of the warrior of God merits him seven hundred pious deeds, raises him seven hundred grades and effaces for seven hundred sins." After reaching a certain distance, he said: "If you can spare 'Umar to help me, then do that." And he did. Then Abū-Bakr said:

"People! stop. I enjoin upon you ten commandments. Remember them: Do not embezzle, do not cheat, do not break trust, do not mutilate, do not kill a minor child or an old man of advanced age or a woman, do not hew down a date-palm nor burn it, do not cut down a fruit-tree, do not slaughter a goat or cow or camel except for food. Maybe, you will pass near people who have secluded themselves in convents; leave them and their seclusion. And it may be that you pass near people who will bring to you dishes of different foods. If you eat one after the other, then utter the name of God over them. And you will meet people the dressing of whose hair looks as if the devil has made a nest on the top around which they have something like turbans. So pierce them with swords.

"March, with the name of God. May God reward you by lance and plague!"¹

Another transmission of the same :

(648) Then he stood in the army and said:

"I enjoin upon you the fear of God. Do not disobey, do

1. *Hist. of Ṭabarīy*, pp. 1849-50.

not cheat, do not show cowardice, do not destroy churches, do not inundate palm-trees, do not burn cultivation, do not bleed animals, do not cut down fruit-trees, do not kill old men or boys or children or women . . .”¹

(d) *To the Commander Yazīd-ibn-Abi-Sufyān :*

TRANSLATION :

(649) When Abū-Bakr ordered Yazīd-ibn-Abi-Sufyān to proceed to Syria, Abū-Bakr accompanied him giving him instructions. Yazīd was riding and Abū-Bakr was on foot. Yazīd said :

“ O Successor of the Messenger, either thou shalt ride or I will alight.”

He replied :

“ Neither shalt thou alight nor I ride. I reckon these steps of mine to be in the path of God.

“ O Yazīd ! You will soon arrive in a country where people will bring to you all kinds of food, so utter the name of God at the beginning and at the end. Further, you will come across people who have secluded themselves in convents ; leave them and their seclusion. But you will also come across people on whose heads the devil has taken his abode—that is the *Shamāmisah*—so strike their heads off. But do not kill any old man or woman or minor or sick person or monk. Do not devastate any population. Do not cut a tree except for some useful purpose. Do not burn a palm-tree nor inundate it. Do not commit treachery, do not mutilate, do not show cowardice, and do not cheat. God shall surely give victory to those who help His cause and also to His Messenger, for God is Strong and Powerful.

“ I commit you to the care of God, and bid you farewell.”

Then he returned.²

1. *Kanzul-‘Ummāl* by ‘Alī-al-Muttaqīy, Vol. 2, No. 6261, on the authority of Ibn-Zanjūeh.

2. *Idem*, Vol. II, No. 6259, on the authority of al-Baihaqīy. Regarding the faithful observance of these instructions, cf. De Goeje, *Memoire sur la conquete de la Syrie*, 2nd ed., pp. 104-06.

3. BY 'UMAR

TRANSLATION :

(650) Whenever 'Umar despatched armies, he enjoined upon their commanders to fear God, and then used to say, at the time of handing over the colours :

“ With the name of God and with the help of God ! March with the assistance of God and victory. Persevere in right conduct and endurance. Combat, in the path of God, those who disbelieve in God ; yet do not transgress, because God does not love those who transgress.

“ Do not show cowardice in an encounter. Do not mutilate when you have power to do so. Do not commit excess when you triumph. Do not kill an old man or a woman or a minor, but try to avoid them at the time of the encounter of the two armies, and at the time of the heat of victory, and at the time of expected attacks. Do not cheat over booty. Purify Jihād from worldly gain. Rejoice in the bargain of the contract that ye have made [with God], and that is the great success.”¹

4. BY 'ABBASID CALIPHS.

(651) Qudāmah-ibn-Ja'far (d. 310 H.) gives the forms of instructions issued in his time to the commanders of land and sea forces. I reproduce them from the unique copy of his *Kitāb-al-Kharāj* in Istanbul, without, however, trying to translate them. For, though they are in beautiful language, there are comparatively more words than substance and orders more regarding internal administration of the army than external treatment :

(a) *To the Commander of the Land Forces.*

نسخه عهد بولاية المعونة والحرب

هذا ما عهد به امير المؤمنين الى فلان بن فلان حين ولاء الحرب
والاحداث بذات كذا -

1. Ibn-Qutaibah, *الاخبار*, I, 107-08, ch. “War :” cf. also Abū-Mansūr-ath-Tha'ālibīy. *في سائر آداب*, ch. *آداب الملوك الخوارزم شاهي*. *التحروب و شروطها*, (MS. No. 1808, As'ad Efendi, Istanbul).

امره بتقوى الله و خشية في سر أمره و علانية و الاعتصام به والعمل بطاعته و اصلاح ما بينه و بينه بالعمل الزكى و الخلق الرضى و امره ان يتعهد نفسه في تطهير مذهبه و المحافظة على دينه و امانته و العلم باذنه لا حول ولا قوة الا بالله في جميع تصرفه و سائر تفرقه -

و ان امير المؤمنين لم يوله ما ولاه الا رجاء ان يكون عنده من الضبط و الكفاية و الذب و السياسة ما يراب به اهل العيث و الفساد و تصالح معه الرعية و البلاد -

و امره ان يتجنب مساخط الله و معارمه و يتعدى مراهيه و مائمه و كف من معه من التجند و الكاشية عن الخطى الى ظلم احد من الرعية او مسامحةم بازية - و يحضهم على لزوم الاستقامة و سلوك نهج الطاعة و مقارعة اعداء الله في البلاد و التصالح لهم بافضل العدة و العتار - و امره ان يحسن صحبة من تبعه من التجنود يتعهدهم في البعث و ان يكثر عرضهم و يتفقد دوابهم و اسلحتهم - و اخذهم باستجارتها و النيقة فيها فان ذلك مما يذيد الله اهل السلامة تمسكا بها و اهل الدعارة تذايبا عنها -

و امره ان يعرف لقوار امير المؤمنين و شيعة حقوقهم و ينزلهم منازلهم و يزيد في اكرامهم و رفع مقاديرهم فان ذلك مما يشكذ نياتهم و يزيد في بصائرهم -

و امره بان لا ياخذ احدا بقرص او تهمة دون ان يكون من اهل الريب و الظنة و ان لا يعاقبه بشبهة دون ان تظهر له الدلائل البينة و العلامات الواضحة و ان لا ياخذ اهل التصون و السلامة بجرائم الدعار و زوى المفسدة -

و امره ان يبسط الامان لمن اذاه سلما ولا يجعل ذلك الى الغدر بهم سلما -

و يحذر ان يسمع عنه من استعمال الخيل و الموازنة ما يقابل عليه بالرواغ من واجب المطالبة -

و امره ان يتعهد ثغوره و فروجه و اطرافه و مسالحه و يحترس من اختلال يقع فيها - و يوليها من له الكنكة و التجربة بمثلها - و امره ان يكثر مطالعة اعماله بنفسه و ثقات من تبعه و ان يتيقظ في ذلك تيقظا يزيل الريبة و يمنع الغفلة و يصد عن الغرة -

و امره ان لا يمضى حدا او ينفذ حكما في قود و لا قصاص الا ما استطاع فيه راي امير المؤمنين و انتظر من الاجابة ما يكون عليه عمله و عنده و قوفه -

APPENDIX A

و امره ان يمنع التجند من التنزيل على احد من الرعية في منزله وان يشاركوه فيه مع اهله الا ان يكون ذلك باذنه و طيب نفسه و ان يتخطوا الزروع أن يطأها أحد منهم بدابة او يجعلها طريقة في مقصده -

و ألا ياخذ الاتبان من اهله الا بالاثمان و رضا اصحابها -

و امره ان يتعهد من في حبوسه و يعرضهم و يفاخص عن جرائمهم التي من اجلها وقع حبسهم بمشهد من قاضى البلد و نفر من اهل الثقة والنظر - فمن كان بريئا او جرمه لا يوجب اطالة جسده اطلاقه - و من كان من حقه ان (يكف) بالحبس عن الناس اذاه و شره تعهد في السجن مصلحته - و من اشكل عليه امره انتهى خبره الى امير المؤمنين ليصدر اليه من الراى ما يكون عمله بتحسبه -

و امره ان ينظر فيما لم يكن عهد فيه اليه شيئا مما قبله فليجاريه ويستطاع في ذلك من الراى ما ياتي به الجواب عنه بما يمتثله -

و امره ان يقرأ هذه هذا على من قبله و يعلمهم حسن راى امير المؤمنين فيهم و توخيه صلاحهم و ايثارة الاحسان اليهم والعدل عليهم و رفع الضيم عنهم و المجاهدة لعدوهم و المراماة دونهم -

هذا عهد امير المؤمنين اليك و امره اياك فافهمه -----
(ببياض كلمة بالاصل) عنده و اتبع مواقع الارشاد منه و كن عند ظن امير المؤمنين بك و تقديره فيك و ما رجاء عندك من النصيحة و قارية الامانة و مقابلة الصنيعة - و امير المؤمنين يسئل الله توفيقك و ارشادك و احسان معونتك في جميع ما اسنده اليك من امر حربته و عمله قبلك -

و كتب فلان بن فلان باسم الوزير و ابيه في وقت كذا -

(كتاب الخراج و صنيعه الكتابة لابي الفرج قدامة بن جعفر الكاتب، المنزلة الخامسة من ورق ١٢ ب الى ١٣ من النسخة المحفوظة في مكتبته كو پيرو لو في استانبول تحت رقم ١٠٠٦) -

(b) To the Commander of Sea Forces.

نسخة عهد بولاية ثغر البحر

هذا ما عهد امير المؤمنين الى فلان حين ولاة الثغر الفلانى و بحره و مراكمه :-

امره بتقوى الله و طاعته و التحذر من عقابه و اتباع مرضاته و ايثار

التحق في جميع افعاله - فان التحق احرز عصمة و دزر واحصن مؤئل و
عصر - و امرة بتعهده نفسه حتى يقيم اودها و ينفي بذكر الله
الطوى و زيغ الشيطان عنها و ان يركب ساجيته و بطهرها و يهذب
سيرته و يتفقها و يكون لمن معه من التجند و سائر الاولياء في التخير
اماما و معلما و على سلوك افضل الما هج حاضا و مقوما - و امرة
ان يلين لاهل الطاعة و يشدد على زوى المعصية و يعطى على كل
حال قسطها من النصفة والمعدلة .

و امرة ان يكون الاذن عليه لمن معه من التجند مبدولا والوصول
اليه من زوى الحاجات والظلمات سهلا يسيرا -

و امرة ان يستعمل على شرطته من يرضى عقله و عفافه و يثق
بجزالته و صرامته و شدته على اهل الريب والدعارة -

و امرة ان يديم عرض جنده حتى يعام علمهم و يطاع على حقيقة
امرهم ويلزم مراكبهم و امرة ان يشرف على مراقبه و محارسة حتى
يتكلم امر المرتبين فيها و يدر عليهم ارزاقهم ولا يتاخر عنهم
شئ منها -

و امرة ان يتفقد امرا مراكب المنشاة حتى يتحكمها و يتجود آلاتها
و يتخير الصناعات لها و يشرف على ما كان منها في الموانى و يرفعها
من البحر الى الشاطئ في المشاتى و هيج الرياح المانعة من الركوب فيها -
و امرة ان يكون نواثيره و عيونه الذين يبعث بهم ليعرف
اخبار عدوهم من زوى الصدق والنصيحة والدين والامانة والتخبرة
بالبحر و موانيه و دخلاته ومخايبه حتى لا ياتوا الا بالصدق من
التخبر والصحيح من الاثر - و ان رهقهم من مراكب العدو مالا قوام
لهم به انجازوا الى المواضع التي يعرفونها و يعلمون النجاة بالانكياز
اليها -

و امرة ان لا يدخل في النفاطين والنوائية والقذافين ولا في غيرهم
من زوى الصناعات والمهن في المراكب الا من كان طبا ماهرا حازقا
صبورا معالجا - و ان يكون من يتكلمه معه في المراكب افاضل التجند
و خيار الاولياء اصدق نية و احتسابا و جراءة على العدو و ارتكابا -

و امرة ان ينظر في صناعة المراكب نظرا استكشف به آلاتها من
الخشب والحديد والمشاقة والزفت وغيرها حتى يتحكمها و يتجيد بنام
المراكب و تاليفها قطفها و تركيبها و يستجيد المقازيف و يتخيرها
و يتنقى الصواري والقلوع و ينتخبها و يميز النوائية و يعتمد
من له التحذق والدرية منهم والحنكة والتجربة من جميعهم حتى لا

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يدخل فيهم من لا يصلح دخوله ولا يتخط بهم من يكون غيره احق بالعمل منه -

وامره ان يحترس من ان تنفذ للعدو حيلة اجتناء الاسلحة او شئ من ادوات الحرب والمكيدة من ارض الاسلام او ان يطلق لاحد من التجار حمل شئ اليهم او اقامة الطريق الى بلدهم و من وجده قد اقدم على هذا و ما جانسه من الناس جميعا عاقبة عقوبة موجبة وجعله نكالا وعظة -

وامره ان يضم المراكب في الموانى التى ترسى فيها و يولى مراقبتها من يثق بنصيحته و شهامته حتى لا يخرج منه مركب الا بعلمه ولا يدخل فيها غيرها الا باذنه و امره ان يخصص فى الخزائن من الاسلحة و يشرف عليها فى كثير من الاوقات حتى يكون على هيئتها مجلوة مسنونة مقومة - وضونة متعاهدة مصونة الى وقت الحاجة اليها و العمل بها، و يشرف على ما فيها من النفط والبلسان والخبال وغيرها من سائرالات والادوات حتى يتحاط فى ظروفها و اوعيتها و يامن الفساد والتغيير عليها -

وامره بشدة التحذر من جواسيس العدو و عيونهم و ان يوكل بكل مدينة من يعلم حالها و لا يطاق لاحد من البوابين والحرس ان يدخلها الا من يعلمون حاله و سبيل مدخله و صورته و مغزاه و ارادته -

هذا عهد امير المؤمنين اليك و امره اياك - فافهم و اعمل بما حده و رسمه و كن نذرا أحسن ظنه بك فى جميعه و هو يسأل توفيقك و ارشادك الى ما فيه الخير فى جميع ما اسنده اليك و اعتمد فيه عليك -

و كتب فلان بن فلان -

(كتاب التخرج لتقديمه ايضا)

TRANSLATION OF THE ABOVE TWO DOCUMENTS :

FORM OF INSTRUCTIONS TO THE COMMANDER OF SUCCOURS AND OF WAR

These are the instructions given by the Commander of the Faithful to so-and-so son of so-and-so when he appointed him on the war and the skirmishes in such-and-such region.

He has commanded him to have the fear and dread of God in his inner as well as outward affairs, to act in His

obedience, and to have the best of relations between him and God by means of pure actions and agreeable behaviour. And he has commanded him to take care of his own person in order to have a clean conduct, to observe the religious duties, to justify the trust put in him, and to believe that there is no might and no power except by God in each and every of his actions and movements.

The task with which the Commander of the Faithful has charged him has not been done except in the hope that he has the capacity, the sufficiency, the terror and the discipline to inspire awe in the minds of evil-doers and mischief-mongers, even as causing prosperity for the people and the country.

He has commanded him to abstain from things causing anger of God, from things forbidden by Him, from transgressing His injunctions and things declared by Him as vice; he has commanded him to prevent his troops and his entourage from attempting to oppress any of the subjects or to do him harm through injury, to persuade them to remain always upright, to march on the path of obedience and of striking the enemies of God in the countries; to prepare for them the best of provisions and necessaries.

He has commanded him to behave in the best of manners with regard to his troops and to those who follow him, to be solicitous of them when sending them in detachments, to parade them frequently in order to find out (the condition of) their animals and their weapons; to compel them to keep these things in the best and the finest of conditions. For it is in this way that God makes the well-behaving people to be increasingly mindful of it, and the evil-doers to abstain from the mischief.

He has commanded him to recognize the rights (and privileges) of the friends of the Commander of the Faithful, to treat them in the manner that is becoming of them, to increase in their honour and to elevate their position, since this sharpens their motives and enhances their insight.

He has commanded him not to prosecute anybody on mere accusation or charge unless he be a suspect and a person

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known for bad conduct ; not to punish him on mere suspicion unless clear proofs are adduced and manifest indications are produced ; and not to hold responsible the people of good conduct for the crimes of mischief-mongers and evil-doers.

He has commanded him to give quarter to those who come to him in peace, and not to use it as a means of treachery with regard to them ; and to take care not to have the bad reputation of deceiving and using ruses, for this habit would be countered by evasion even of the rightful duty.

He has commanded him to take care of his frontiers, outlets, surroundings and interesting places, to protect them against any defect that may befall them, to give them in charge of those who have experience and knowledge of similar things.

He has commanded him to study frequently the acts of his own self as well as the acts of his trusted followers, and be so vigilant as to eliminate all doubt, prevent all negligence, and stop all surprise.

He has commanded him not to pass any big penalty (*hudūd*) and not to execute the decisions of decapitation and talion for death before obtaining the opinion of the Commander of the Faithful ; he should wait the reply to act upon and to take cognizance of.

He has commanded him to prevent his troops from staying in the houses of any subject and to participate it along with the family of that (subject), except if it is by his permission and willingness, and also from trampling on the cultivation and making it treaded by animals or rendering it a path to reach his destination. He should not take straw for fodder from those who possess it except on the payment of the price and the willingness of the owners.

He has commanded him to take care of those who are in his prisons, assemble them for inspection, investigate the crimes for which they had been jailed, in the presence of the city magistrate and (the jury of) a certain number of people of trust and knowledge. Whoever is found innocent, or whose crime does not justify the prolongation of imprisonment, should be released. But whoever deserves that people should

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be protected from his mischief and evil, through imprisonment, such a person should be kept in jail on purpose. Yet the one whose affair presents difficulty, report should be submitted to the Commander of the Faithful for issuing his opinion, and action should be taken accordingly.

He has commanded him regarding affairs on which no previous instructions have been issued to get on with and solicit opinion from him (= Caliph) and should act according to anything that may come (from the Caliph).

He has commanded him to read out these instructions to those who are near him, to inform them of the good intentions of the Commander of the Faithful regarding them, wishing their welfare, preferring to do good to them and administer justice to them, taking away injustice from them, combating their enemies and intervening personally to protect them.

These are instructions and directions of the Commander of the Faithful for thee, so understand them ... (blanc of about one word) by him, follow the path he directs, behave in the manner the Commander of the Faithful hopes and expects of thee, thinking that thou wilt have the best of intentions to act according to the confidence and to reciprocate the good treatment. The Commander of the Faithful prays God to enable thee for good, to guide thee in the right path, and graciously help thee regarding all that has been entrusted to thee of the affairs of war and of administration.

Written by so-and-so son of so and-so, on behalf of the minister so-and-so son of so-and-so, on such and such epoch (date).

FORM OF INSTRUCTIONS TO THE COMMANDER OF THE MARITIME FRONTIER

These are the instructions of the Commander of the Faithful given to so-and-so while appointing him on such-and-such a frontier with its sea and boats :

He has commanded him the fear and obedience of God, to avoid the source of His punishment, to follow the source of His pleasure, to prefer the right in all his acts because the

right is the best of defence and aid, the strongest of asylums and protections.

He has commanded him to take care of his own person so that its crookedness is put right, to banish from his spirit through the remembering of God the evil desires and the Satanic deviations, to purify and cleanse his character, to develop and polish his conduct, to be example and teacher for all that is good to his troops and other friends, to persuade and direct them to march in the best of paths.

He has commanded him to be lenient to those who are obedient, and to be harsh to those who are disobedient, and to give to every situation its due of justice and equity.

He has commanded him to give troops free access to him, and make the approach to him simple and easy for those who have needs and complaints.

He has commanded him to appoint on the police a person in whose intelligence and honesty he has confidence, and in whose firmness, severity and harshness to the suspects and the mischief-mongers he has trust.

He has commanded him always to parade his troops to know them full well and to find out their real condition, to constantly accompany their boats; he has commanded him to inspect his watch-posts and guard-posts, so that those who are posted there should be well established: he should pay their salaries and should not retard anything from them.

He has commanded him to inspect the condition of boats afloat, so that they are in good order and their tools and implements are in new condition. He should inspect their manufacturers and see how they are in ports. He should transfer the boats from the open sea to the coast during winter and strong winds which hinder voyage in them.

He has commanded him that his scouts and spies, sent to find out the news of his enemy, be (selected) from among the truthful, the well-wishing, the scrupulous, the trustworthy, the experienced in matters of the sea and its ports, its secrets and hiding places, so that they bring only the true reports

and correct informations. Moreover, if they are overwhelmed by enemy boats to which they cannot offer resistance, they should be able to take refuge in places known to them and where they are sure to find rescue.

He has commanded him not to include in those who throw naphtha, in the sailors, in the oarsmen and members of other profession in the matter of boats anybody except the best, the expert, the skilful, the hardy, those who know how to repair. And those who are to embark boats should be the most excellent soldiers and best of friends, with good intentions, wishing only the pleasure of God, daring against the enemy, and adventurous.

He has commanded him to inspect the construction of boats with an eye to discover their implements of wood, of iron, of *mashāqah* (?), of naphtha etc., so that they are in good order. The construction, the assemblage of parts, the removing and the joining of the parts of boats should be excellent. The oars should be good and selected; the masts and sails should be well-chosen; sailors should be the best, and only such of them should be trusted as have skill, experience, and knowledge and are well-instructed; all of them should be so, and no one should enter in them who is not fit to enter, and none should mix with them if somebody else is more deserving to be actively all with them.

He has commanded him to be on his guard against the possibility for the enemy to infiltrate and acquire arms or any other weapons of war or stratagem in the Islamic territory; or to let any merchant to transport any such thing to the enemy or to establish a way to their country. Whenever he finds anybody having attempted this or any similar thing, from among whatever category of people he may be, should be punished severely and in an exemplary manner, serving as a warning (to others).

He has commanded him to assemble the boats in the ports of anchorage and to give charge of their supervision to one in whose good intentions and daring character he has trust, so that no boat leaves the port without his knowledge,

and none enters it without his permission.

He has commanded him to count the arms and to inspect them frequently so that they are kept polished, in fine condition, well-kept, well-guarded, taken care of, and well-preserved until the time they are required and employed. He should inspect the naphta, the balsam, the cables and other tools and implements, so that they are preserved in their receptacles and pots, and be sure that they do not deteriorate and change for the worse.

He has commanded him to take great care against spies and scouts of the enemy. He should entrust every town to a person who knows it well; and order the gate-keepers and guards not to let anybody enter except the one whom they know, the way of his entry, his face, his motives and his destination.

These are the instructions of the Commander of the Faithful for thee and his directives to thee. Understand them and act according to their prescriptions, and be as he thinks that thou wouldst be in all matters. He prays for thee the enabling power, the guidance towards the good in all that he has entrusted thee with, and confided to thee.

Written by so-and-so son of so-and-so.

APPENDIX B

ISLAMIC NOTION OF CONFLICT OF LAWS¹

(652) There is a branch of law indiscriminately called Private International Law or Conflict of Laws. Its importance is growing with the increase in the interdependence of sovereign nations and their cultural enlightenment. Its main topics in general are Nationality, Personal Status and Jurisdiction over foreigners.

(653) It is to be noted that no hard and fast line can be drawn between the public and the private international laws; and in fact several topics are discussed in both the sciences. It was perhaps due to this fact that the classical Muslim jurists did not treat them separately but in one and the same chapter of the legal compendia. However for our present purpose we shall try, as best we can, to glean relevant data and reconstruct a separate whole.

(654) I have advisedly not chosen the term "Muslim Conflict of Laws," for it may mean only that part of Muslim law which pertains to the conflict between different schools of Muslim law, such as Shī'ah and Sunnī when the parties to a case belong to these different schools. What I mean by Muslim Notion of Conflict of Laws is much wider. I shall treat not only with questions of:

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

1. First published in the Proceedings of the First All-India Law Conference, Hyderabad-Deccan, 1945.

4. The Status of Citizens of the Muslim State in :
- (a) another Muslim State,
 - (b) a Non-Muslim State.

(655) In the short space available in a conference paper like the present one only the broad outlines may be sketched. I shall, moreover, borne myself with the orthodox opinion without going into the practice of several Muslim States, old or new, not warranted by Muslim Law.

1. NATIONALITY

(656) The origin of what we now term *nationality* must have been in blood-relationship. With the progress of human civilization other factors have also contributed to consolidate political units. And in fact we come across geographical, linguistic, ethnic, "chromatic," tribal and other prejudices which in the impressive and imposing academic parlance have in different ages and climes been styled as national consciousness.

(657) In Arabia, the cradle of Islam, too, same must have been the case in the "Days of Ignorance." It is an irony of fate that a member of the most arrogant and self-conceited clan of the tribalistic Arabia, Quraish, was destined, as the Messenger of Islam, to proclaim on behalf of the Almighty :

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.¹

(658) This was a new orientation of human thought on the subject of nationality, and in fact a charter of Muslim Nationality. It was acted upon in the time of the Prophet and was also so in every subsequent age down to our very days. And wherever the "Crescent" has flown high, it has meant Equality of Man and Priority of the Pious.

1. Qur'ān, 49 : 13.

(659) People are many a time misled by the expression that in Islam there is no difference between religion and nationality. Yet they do not mean in this respect by religion exactly what a Muslim understands thereby. Perhaps it would be safer and more exact if we express it by saying that it is not the kinship in ethnological, geographical, linguistic or other similar current senses but it is the participation in the same ideology or outlook on life which constitutes Islamic Nationality. For, if we mean by religion the relation of man with his Creator, Islam is not merely a religion, it is much more than that. Islam provides a code of conduct for its followers in all walks of life, spiritual as well as material and social. In this sense, Islam was a protest against prevalent Brahminism according to which salvation was due only to those who were born among the caste of hereditary Brahmins. It was a protest against the prevalent Christianity according to which man was originally sinful and that he was no more individually responsible for his acts, someone else being sacrificed for his redemption; a protest also against Saint Paul's abrogating the law established by Jesus Christ himself;¹ and the declaration that the word given to and the treaties concluded with non-Christians are not binding.² It was a protest against the prevalent Magism, Mazdaism, Paganism, and all else which took away choice from man.

(660) One cannot change one's ethnic nationality. It is as impossible to change one's "chromatic" nationality. (Indians and Europeans being from the same racial stock, they can best illustrate my meaning in the present-day South African politics.) To change one's linguistic nationality is practically as difficult. If the reunification of the sons of Adam and Eve was intended and their accidentally centrifuged tendencies were to be remedied, it was, according to Islam, necessary to reorientate "nationality" on choice rather than on some fatal accident. The choice selected by Islam was

1. *New Testament*, Letter of Paul to the Romans, X4, against the Gospel of Matthew, V 18.

2. *Cf. supra*, § 120 and fn., and contrast with the Qur'ān 17: 34 and 9: 7.

Belief or Outlook. As to other bases of nationality, it declared:

And the difference of your languages and colours, lo! herein indeed are portents (of the mastery of the Creator) for men of knowledge.¹

They implied nothing more for Islam.

(661) In the verse cited before ethnic basis was discarded. Here linguistic and "chromatic" differences have been relegated to unimportant positions. Emphasizing 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 Muḥammad, *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.²

(662) But I must warn my audience and my readers against something by which one may impute to me ignorance of history. I know, Muslim history has been recording political "subnationalities" among Muslims from quite very early days. It began with the *Shī'ah* and *Sunnī* difference, and other ramifications were only a matter of time. Later still, even among the orthodox Sunnis it was admitted that:

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 (i.e., jurisdiction).*³

(663) All this is, again, a matter of sub-choice and nothing fatal or accidental. Perhaps I may even say that these differences are minor and subsidiary domestic strifes, not separations and alienations.

1. Qur'ān, 30 : 22.

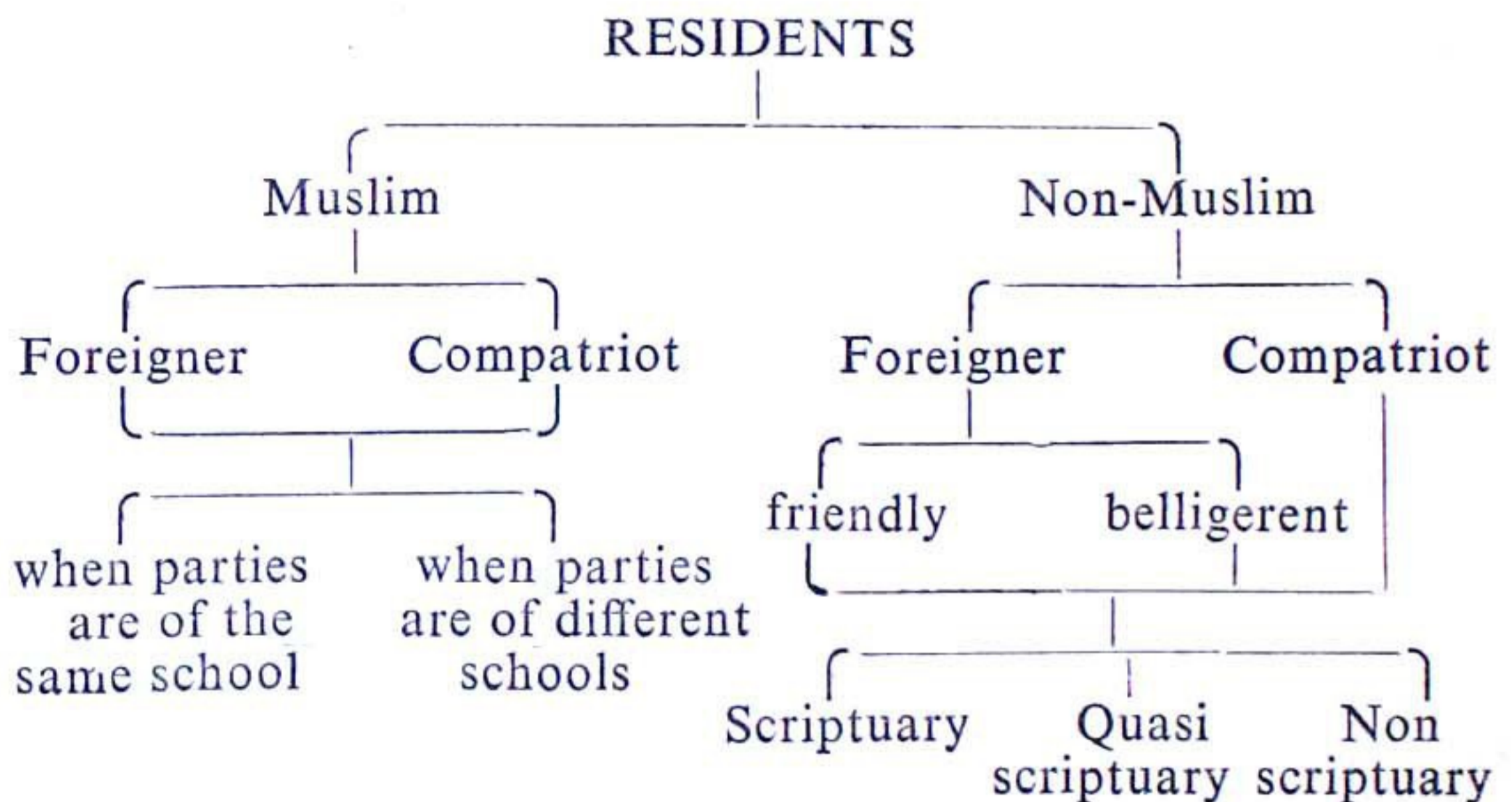
2. Qur'ān, 2 : 62, 5 : 69.

3. *Al-Asrār* of Dabūsīy, fol. 15lb. (MS. Istanbul).

(664) Nor do I deny the 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. Yet these are political exigencies of the international life which have nothing to do with my thesis, that, according to Islamic notion, nationality means common belief, not common birth or colour or language or country.

(665) One will not wonder therefore to see for instance in the Christian England, alien Christians yet citizen Muslims, and in Muslim Afghanistan alien Afghans yet citizen Indians!

(666) It is natural therefore that Muslim jurists have treated at length the question as how to behave the "alien compatriots," when these do not choose to subscribe to the common belief of the ruling community. The detailed description of the treatment of such "alien compatriots," or protected communities (*ahl adh-dhimmah*) as they are called, is beyond the scope of this short chapter. Generally speaking, the inhabitants and residents of an Islamic State fall under the following categories :



(667) There is 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, as has expressly been mentioned by Abū Yūsuf. Yet the Qur'ān lays down that the Muslim State is not responsible to protect Muslims if they choose to reside in non-Muslim lands, and Muslim courts also neither claim nor exercise jurisdiction for the acts or even sufferings of Muslims in foreign lands. To try to protect them, is a moral duty. (Qur'ān, iv : 75)

(668) There is some difficulty 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. In this connexion Muslim law lays down a general rule that the baby will follow that *ummat* which is better in his interest. So, 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. This will however be a *prima facie* presumption which might be rebutted on production of evidence.

(669) Islam tolerates among its subjects all religions. Some exception has, 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. Apart from this rather political and social exigency, Christians, Jews, Magians, idolaters and all else are protected when they decide to reside in the territory of the Muslim State and to obey its laws. So, Abū Yūsuf expressly says (in *Kharāj*, p. 73) that polytheists, associators, worshippers of fire or stone, scriptuaries and all the other categories of non-Muslims may be accepted as protected citizens of the Muslim State.

(670) There is some difference 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.

Originally the right of granting *aman* belonged to every Muslim citizen, yet later jurists have opined that the government has right, by express declaration, to suspend temporarily this general right and prescribe conditions to be abided by the public.

(671) In the early centuries of the caliphate, the duration of the sojourn of an alien non-Muslim in the Islamic territory used to be a year at the most. A longer stay implied intention to domicile, and he was then subjected to same taxation and obligations as the ordinary non-Muslim subject. In later times when resident aliens wanted on political grounds to retain their original nationality, which meant privileged position, especially in Turkey of the capitulatory period, an agreement was reached in 1535 between Turkey and France for extending this period to ten years. As the capitulations were forced on Turkey, Muslim jurists have never taken notice of them and they still continue to mention the traditional one year's limit in this connexion even in our changed times.

2. STATUS OF NON-MUSLIMS, SUBJECTS AND ALIENES

(672) Non-Muslim subjects of the Islamic State are called *Dhimmīs*.¹ The "dhimmification" is, according to Muslim jurists, a regular bilateral contract between the intending non-Muslim subject and the Muslim community. 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.

(673) The contract of "dhimmification" comes to an end in cases like the following:

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,

1. A recent non-Muslim work on the subject is *Le statut legal des non-musulmans en pays d'Islam*, by Antoine Fattal, Beyrouth 1958.

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.

(674) Regarding several of these, however, there is no unanimity among different Muslim schools of law. Those jurists who have had practical experiment of holding high government offices are, as a rule, more lenient than those who theorize from the seclusions of their seminaries.

(675) A citizen Muslim can never be expelled from territory, even in punishment, though internment or externment orders can be passed against him. A non-Muslim citizen, however, cannot only be punished with the capital punishment downwards but he may even be ejected from Muslim territory if he becomes an undesirable person for his pernicious activities.

(676) According to the Qur'ān, Ḥadīth and continuous practice from the time of the Prophet downwards, non-Muslim residents of the Islamic territory enjoy judicial autonomy. Christians, Jewish and other denominational courts are established, with their own laws and their own judges; and are resorted to in cases where both the parties belong to the same community. The non-Muslims are, however, not denied the right to present themselves before the Muslim court if they choose this of their own free accord in preference to their communal court. The same must have been the case if the parties belonged to different communities, a Christian and a Jew for instance. In all such cases the practice of the Prophet was to administer them their personal law even in criminal cases such as homicide and adultery.¹

(677) I need not enter here into the details of the difference

1. Cf. Bukhārīy, Ibn-Hishām, etc., and the *Bible*, Leviticus, XX, 10 etc.

of opinion of the various Muslim schools of thought regarding the different topics of the conflict of laws concerning the personal status of non-Muslim subjects as well as foreigners. A few characteristic features may be brought into relief here.

(678) Muslim jurists maintain that the difference of religion as well as the difference of territory constitute a bar to inheritance. Thus 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. Testamentary bequests, however, can lawfully be effected in favour of persons of other religion or other territory for lawful purposes. Endowments have also the same position as bequests.

(679) Surplus-property tax (*zakāt*) is levied solely on the Muslims, yet its benefits are not bounded by Islam alone. According to the interpretation of such a high authority as the Caliph 'Umar, the *Masākīn*, which according to the Qur'ān are one of the categories benefiting from the *zakāt*, mean Christians, Jews and other non-Muslim citizens of the Islamic territory,¹ yet the taxes collected from non-Muslims by their communal administrations are spent exclusively on particular communities.

(680) The high sense of justice prompted the Ḥanafīy school of jurists, which represents by far the largest group of Muslims of the world today, to maintain that a Muslim must be punished capitally for the homicide of even a non-Muslim. Though some other jurists are reluctant to go to this length yet the Ḥanafīys are fortified by an express saying of the Prophet.

(681) Much capital has been made out of an incident of the time of the Caliph 'Umar, in which he had ordered one of his governors to dismiss the latter's secretary who was a Christian. It is related that his proficiency in the State language

1. Cf. Abū Yūsuf.

was poor.¹ Even if it had been for no other reason than the policy of excluding non-Muslims from key-posts of administration, he would have been justified. Not even a decade had yet passed over the expansion of Islam, and the importance of the post of the secretary of the all-powerful governor cannot too much be emphasized. This same Caliph 'Umar left thousands of non-Muslims in the revenue and finance and other departments undisturbed in posts of trust and responsibility, and went so far as to invite a Greek from Syria and entrust him the finance department in Medinah, as is recorded by Balādhuriy (انساب الاشراف). Even the office work was let to continue in Greek and Persian, not in Arabic, in these departments. It was again this same Caliph who 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. There the famous *Baitul Yahūdī* continued to exist down to our days.²

(682) The non-Muslims could come to 'Umar to Mecca and Madīnah and make complaints personally and file petitions unhindered. Many incidents of their over-prompt disposal have been recorded by history (*cf.* § 203 *supra*).

(683) Islam does not permit compulsion in believing in any particular religion. It is unthinkable in Islam to order in accordance with a royal rescript in Yaman in the Christian Najrān that the Jewish girls cannot be married to Jews but to Christians only.³

3. CONFLICT BETWEEN LAWS

(a) *Between Muslim and non-Muslim Laws :*

(684) If one of the parties to a case 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, and usually Muslim law prevails. Regarding civil suits, there is not much difficulty. In penal cases there are certain exemp-

1. Balādhuriy, *Ansāb*, (MS. Istanbul), II 592-3.

2. *Cf.* Cardahi, *Droit international prive*.

3. *Cf.* Desvergers, *L'Arabie*.

tions 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. Yet the Ḥanafīys hold that no distinction can be made between a Muslim and a non-Muslim citizen ; and they are supported by a saying of the Prophet. Nevertheless, even Ḥanfīys are reluctant to take the life of a Muslim who has committed homicide against a non-Muslim of a foreign country. Shaibanīy, the pupil of Abū Ḥanīfah seems to be the only exception, and he holds that so long as a non-Muslim alien resides in Muslim territory with permission, he has same rights and obligations as a non-Muslim citizen ; and *lex talionis* will apply against the Muslim accused.

(685) Muslim jurisprudence is very emphatic regarding the difference of jurisdictions. So much so that if a Muslim, citizen of the Islamic State, is murdered, robbed or otherwise subjected to illegal handling by a non-Muslim in a non-Muslim territory where the Muslim had gone on lawful avocations with the consent and permission of the foreign government, and later the culprit came to the Islamic territory, no suit can be filed against him in the court of the Islamic territory. For, the jurists argue, the cause of action arose in a place where Muslim jurisdiction did not run.¹ Even 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.²

1. Sarakhsīy, *Mabsūṭ*, X, 95-97.

2. Sarakhsīy, *Sharḥ as-Siyār al-Kabīr*, iv, 108.

(b) Conflict between two non-Muslim Laws :

(686) If the parties to a case belong not to one but different communities, such as Jew versus Christian, the Muslim court does not take cognizance in the initial stage. For, according to Muslim jurists, all non-Muslim religions constitute one single community (*ummat*) vis-a-vis the Islam. But if the parties cannot agree among themselves as to the choice of the tribunal and the law, Muslim law shall have per force the final say, as has been mentioned by the famous jurist Khalil. There is no difference between civil and criminal cases in this respect. I wonder what will be the decision of the Qāḍī if the litigation relates, for example, to a contract of loan with interest or sale of wine, which are prohibited by Islam yet may not be so by the religions of the non-Muslim parties to the case.

(c) Between two Muslim Laws :

(687) The difference between the various schools of law, such as Sunnī and Shī'ah or even Ḥanafīy and Shafi'iy and the like are products of later times. In the time of the Prophet and early Caliphate this kind of conflict was practically unthinkable. No doubt, after the death of the Prophet, differences of opinion between various jurists did come early into existence, yet the Qāḍīs were not obliged to abide by particular jurists but themselves formed an independent category, and each judge was at full liberty to decide according to his own personal view. Nevertheless we have clear references in the 'Abbāsīd period that the Chief Qāḍī Abū Yūsuf, for instance, appointed only the followers of the Ḥanafīy school as Qāḍīs. In later times, according to the evidence of Yaqūt, even Zaidī Shī'as were appointed Qāḍīs in Ḥanafīy States and they administered justice according to Ḥanafīy jurisprudence.

(688) To make me clearer, take for instance a person dying and leaving one nephew (brother's son) and one grandson (daughter's son). According to Ḥanafīy law, the nephew succeeds to the whole of the deceased person's property to the exclusion of the grandson; and according to the Shī'ah law just the opposite. It is quite possible that the deceased person

and his heirs belong to different schools. According to which school should we decide? Of course, where the Qādīs are bound to act according to the State school of law, no matter to which school they personally belong, there will be no difficulty. Yet if the State is more tolerant and every citizen has the right to be administered according to his own school, especially in matters of what are called personal law, a real conflict of law arises. In Egypt in the time of Sultān Ṣalāḥuddīn (Saladin), for instance, we come across four concurrent judicial establishments with four chief justices and necessary sub-judges for each of the four Sunnī schools, viz., *Shāfi'iy*, *Ḥanafiy*, *Mālikiy* and *Hanbaliy*. Yet this did not solve the problem if the litigants belonged to different schools. Classical writers do not seem to mention this. In later times the law of the defendant or the deceased, as the case may be, was decided to prevail. The same has been the rule in *Ḥanafiy*, *Shāfi'iy* and *Mālikiy* States. Even in modern British India the same had been accepted and the same is the rule in Tunis and Egypt.

(689) In India and also in other Muslim countries there have been cases of the conversion of rulers from Sunnī to *Shī'ah* schools and vice versa, yet so far my researches have failed to resolve the problem whether and what effect did this produce on the administration of justice.

(d) *Change of Religion :*

(690) If a married couple embrace Islam, their pre-Islamic contract of marriage remains valid in so far as it is compatible with Islamic law. The rest will be annulled. For instance, Parsīs, practising *Khurvedhvagdas* and marrying their own sisters or daughters, or animists marrying more than four wives, or marrying without bride-money (*Mahr*) or Nairs¹ practising polyandry and the like cannot expect to remain unaffected by Muslim law. The Parsī wife will at once be separated; the polygamous husband will select only four and the rest of his wives will be divorced; the wife without bride-money will get a new right to *Mahr*; and the polyandrous

1. *i.e.* Hindus of Malabar, west coast of South India.

wife will be separated from all of her husbands (except the first one?).

(691) Again, if only the husband embraces Islam and the wife does not, the case is much more complex. For the marriage will remain intact only if the wife belongs to those categories of non-Muslims with whom Islam permits 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.

(692) 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.

(693) The Islamicization of only the wife entails that the husband should also embrace Islam within three months, during which period he cannot continue conjugal relations. If he refuses to convert, separation follows.

(694) Naturally, if the Jewish wife of a Muslim, for instance, becomes Christian, it cannot affect the marriage since in the eyes of Islam both Judaism and Christianity are alike tolerable in a wife.

4. MUSLIM CITIZENS IN FOREIGN LANDS

(a) *In another Muslim State :*

(695) In classical times, not much importance was attached to the origin of a Muslim. The mere intention of stay for a couple of weeks rendered him a local citizen, forfeiting all concession in devotional services, etc., recognized for one on travel.

(696) Ibn Jubair, the famous traveller, however, mentions that he saw in Cairo that Sulṭān Ṣalāhuddīn had appointed a monitor from among the Marghibīs to adjudicate between his compatriots residing in Egypt.

(697) In our present time, political nationality has come into play, largely due to the fact that non-Muslim States of

Europe and others, even if they concede it to Israel and Jews, would not tolerate that their Muslim subjects should be considered in Muslim States anything except citizens of their political denomination. Even the Orthodox Sa'ūdian Kingdom has passed laws of nationality applicable to Muslim pilgrims and immigrants wishing domicile and naturalization.

(b) *Muslims in non-Muslim Lands :*

(698) In classical times, Muslims have enjoyed extra-territorial privileges in many lands. The story begins with Muslim refugees in Abyssinia of the time of the Prophet, and repeats itself in China, in Turkistan, in Malabar (India) and in many other countries.

(699) I have contributed a special monograph¹ on the subject to the Urdu section of the Osmania Magazine (Osmania University) 1943, and I need not give details here. Briefly, however, in those days there was no established legal notion to concede extra-territorial privileges but the treatment varied with the whims and interests of individual monarchs of non-Muslim lands. Muslims have alike seen favours and hardships. A curious story is told by Mas'ūdīy that in a certain Caspian region, the local non-Muslim ruler had employed Muslims in his bodyguard² and had instituted a most elaborate judicial system. Since his subjects consisted of peoples of many communities, there were many "communal courts" with seven communal judges. Whenever there was some difficulty in solving difficult problems, the matter was referred to the Muslim section and they abided by what Muslim law provided for the case.³ I conjecture that intercommunal matters were also one of those difficult matters referred to the Muslim judges for adjudicating, and this for their impartiality and learnedness.

1. Also in English "*Exterritorial Capitulations in favour of Muslims in Classical Times*", in *Islamic Review*, Vol. 38, January 1950, pp. 32-36.

2. Similar was the practice of General Franco, in Spain, before the evacuation of the "Spanish Zone" of Morocco.

3. Cf. *Murūj-udh-Dhahab*, II, pp. 10-12, ed. Europe.

Conclusion :

(700) Thus it will be seen that the question of conflict of law according to Muslim jurists is a very rich field yet quite an untrodden path promising very interesting discoveries for patient researchers.

(701) I conclude with the last remark that a work called *Ahkam ahl adh-Dhimmah* by the erudite savant Ibn al-Qaiyim has been discovered in MS. form in Hyderabad. Its first volume consists of more than six hundred pages. It is incomplete and refers to the succeeding volume or volumes which however are unfortunately missing. The work is very rich in material bearing on our subject. If any of my readers happen to know of the missing volumes and kindly take the trouble of informing me it will be gratefully acknowledged.

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N.B.—The subject requires an exceedingly wide range of sources: all the works on the exegesis of the Qur'ān, on Hadīth or records of the sayings and doings of the Prophet, on Islamic history, political science, law, tactics and strategy, and many other branches of Muslim lore. We give first the more important Arabic manuscripts followed by printed works in Oriental languages, arranged in the alphabetical order:

(a) *Arabic MSS.*

احكام اهل الذمة لشمس الدين ابن القيم (المتوفى ٥١٠) الجزء الاول عند الدكتور محمد غوث (في كتب خانة سعيديه) في حيدرآباد ولم نجد لها اثرًا غير هذه النسخة الوحيدة المكتوبة سنة ٨٦٩ في ٢٨٦ ورق -

احكام السلاطين والملوك لمحمود بن احمد بن محمد المتجاور بمكة (بخط المؤلف) ، خطية عارف حكمت بك في المدينة رقم (١٣) تاريخ -
الادلة الرسمية في التعابى التجريبية لمحمد بن مذكى (تأليف سنة << خطية آيا صوفيا رقم (٢٨٣٩) -

الاسرار في الفروع لابي زيد الدبوسى (المتوفى سنة ٣٣٠) خطيات عارف حكمت بك في المدينة وولى الدين و داماد زاره و سليم آغا في استانبول -

الاصل للامام محمد بن الحسن الشيبانى (المتوفى سنة ١٨٩) ، خطيات آيا صوفيا و عاطف افندى في استانبول و كتب خانة آصفيه في حيدرآباد -

APPENDIX C

اصول الفقه (الحنبلی) موفق الدين بن قدامة خطية قونية
(میکرو فلم عندی) -

الاعلام عن الحروب الواقعة في صدر الاسلام ليوسف بن ابراهيم
الاندلسي، خطية المكتبة الملكية بمصر -

كتاب الاموال لابن زنجويه (مخطوطه بررور في تركيا) وقطعة
منها في دمشق)

البحر المحيط وهو انتخاب كتب الامام محمد الشيباني، خطية
ولي الدين في استانبول رقم (۱۲۰) -

تاريخ الاسلام الكبير لشمس الدين الذهبي (المتوفى سنة ۷۴۸) -
خطية المكتبة الملكية بمصر و آيا صوفيا في استانبول وثلاث مجلدات
عندی قابلها سبط ابن الجوزي -

تاويلات القرآن للامام الماتريدي (المتوفى ۲۳۳) خطية لاله لي في
استانبول -

تخرج الدلالات السمعية على ما كان في عهد رسول الله من
التحرف والصناعات الشرعية لابي الحسن النخعي المولفة سنة
<۸> خطية شهيد على پاشا في استانبول رقم (۱۸۵۳) و خطية ناقصة
في الزيتونة بتونس -

تقييد العلم للمخطيب البغدادي المتوفى ۴۶۳ خطية برلين -
النخاج و صنيعه الكتابة لقدامة بن جعفر (المتوفى ۳۱۰ او ۳۳۰)
خطية ناقصة في كورولو في استانبول و نقل انتخاب هذه الخطية في
باريس و ورقه واحد في بودايان باو كسفورد و هي منسوبة الى قلاقة
هناك سهوا -

الذخيرة البرهانية لبرهان الدين المرغيناني، خطية يكي جامع في
استانبول -

كتاب الردة للواقدي المتوفى سنة (۲۰۰) خطية بانكي پور في الهند
و نقلها عندی -

الرسالة الوجيزة المنخيرة في ان التجارة الى ارض الحرب و بعث
المال اليها ليس مزيل البركة لمحمد بن احمد بن محمد بن يوسف الرهوني
المتوفى ۱۲۳۰ هـ (خطية رباط) -

سيرة ابن اسحاق 'خطية ناقصة في القرويين بفاس' و ترجمتها
الفارسية في باريس والمتحف البريطاني بلندن -

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(میکرو فلم عندی) -

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- غياث الامم لامام الكرمين التجويني (المتوفى ١٢٠٨) خطيتان في
بانكي پور، والنقل المبني عليهما جميعا ندى - و قطعة منه في
الازهر بالقاهرة -
- الفتاوى الثاوار خانبة في سبع مجلدات كبار، خطية ندى و
ايضا في آيا صوفيا و غيرها في استانبول -
- فقه الملوک و مفتاح الرجاج المرصد على خزانتها/ شرح كتاب التخرح
لابي يوسف الفه عبدالعزيز بن محمد الرحبي خطية لاله لي (رقم ١١٦٩) -
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في مكتبه و هبي (افندي رقم ١٠٣٣) -
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بلكهنو في الهند و نقلها في دائرة المعارف بكيدر آباد -
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علي بن محمد بن طولون (ف ٩٥٣) - و في آخرة ضميمه اسمها مجموعة

APPENDIX C

كذب النبي لابي جعفر الديبلي السندهى المتوفى فى القرن الثالث
للهاجرة رواية عن عمرو بن حرم رضى الله عنه عامل رسول الله
صلى الله عليه وسلم على اليمن - طبع دمشق -

اعلام الموقعين لابن القيم (ف ٥١) -

الاسلام واصول الحكم لعلى عبدالرازق (بمبحث فى الخلافة والحكومة
فى الاسلام الطبعة الثانية ١٣٣٢ هـ و ترجم الى الفرنسية ايضا) -

أقدم دستور مسجل فى العالم، وثيقة سياسية مهمة للعهد
النبيوى 'تاليفى' طبع حيدرآباد -

امتناع الاسماع (فى السيرة النبوية) للمقرئى، لم يطبع فى مصر الا
المجلد الاول -

انساب الاشراف للبلازرى (ف ٢٠٩) خظية استانبول والرباط
والمطبوع منه جزء فى ألمانيا و جزآن فى القدس فى الجامعة العبرية و
جزء فى مصر

التاج للتجاحظ (ف ٢٥٥) وله نسخة على الرق فى الكتانية بفاس فلم
يبقى شك فى انه للتجاحظ - وله ترجمة فرنساوية -

التبر المسبوك فى نصيحة الملوك للغزالي (ف ٥٠٥) -

تحفة المجاهدين فى بعض اخبار البرتكاليين لزين الدين المعبرى
(ف ٩٨) طبع فى لشبون مع ترجمة برتكالية و لها ترجمة هندية
وانكليزية -

التعريف بالمصطلح الشرف لابن فضل الله العمري (ف ٣٩) -

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(ف ٢٠٩) و ابن سعد (ف ٢٣٠) -

حجة الله البالغة لولى الله الدهلوى (ف ١١١٣) -

حديث النبي صلى الله عليه وسلم خاصة الصحاح الستة والسنن
الكبرى للبيهقى و كنز العمال لعلى المتقى الهندى والجامع الصغير
والجامع الكبير للامام محمد الشيبانى (ف ١٨٩) -

حقائق الاخبار عن رول البحار لاسماعيل سر هنك باشا
٣ مجلدات طبع مصر -

التخراج لابي يوسف (ف ١٨٢) وله ترجمة تركية و فرنساوية
و طليانية و خلاصة المانية و ترجمة هندية تحت الطبع فى
الجامعة العثمانية -

- التخراج لقدامة بن جعفر (ف ٣١٥) طبع جزء من المخطیة الذاقصة
فی استانبول فترجم الى اللغة الهندیة فی الجامعة العثمانیة -
- التخراج لیبیحی بن آدم القرشی (ف ٢٥٣) طبعه ثانية فی مصر
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- رسل الملوک و من یصلح للرسالة والسفارة لابی علی الحسین بن
محمد المعروف بابن الفراء (من القرن الرابع او الخامس) طبع مصر
١٣٦٦ هـ -
- سراج الملوک للطرطوشی (ف ٥٢٥ او ٥٢٥) -
- السیاسة الشرعیة لابن تیمیة (ف ٨٢) -
- السیاسة الشرعیة او نظام الدولة الاسلامیة فی الشئون الدستوریة
و الخارجیة و المالیة لعبد الوهاب خلاف طبع قاهرة ١٣٥٥ هـ -
- السیر التحثیث فی تاریخ تدوین التحذیث لمحمد زبیر الصدیقی
(فی تقریر مؤتمر دائر المعارف العثمانیة بحیدرآباد ١٣٥٨ هـ) -
- سیرة النبی صلی الله علیه وسلم خاصة لابن هشام (ف ٢١٨)
والسهیلی و التکلبی والدیار بکری و القسطلانی و الزرقانی والشامی
و ابن سید الناس و کرامت علی و موسی بن عقبه (ف ١٣١) المطبوع
فی برلین جزء من مغازیة و أيضا امتاع المقریزی -
- ابواب السیر والنجهان فی کتب الفقه و الفتاوی خاصة بالمجموع
لل امام زید بن الامام زین العابدین (ف ١٢٢) و الموطا للامام مالک
(ف ١٠٩) و المبسوط للسرخسی (ف ٣٨٣) و الام للامام الشافعی
(ف ٢٥٣) و المدونة لسحنون (ف ٢٣٩) و المختصر للقدوری
(ف ٣٢٨) و الهدایة للمرغینانی (ف ٥٩٣) و شرحه فتوح القدير
لابن الهمام (ف ٨٦١) و بداية المجتهد لابن رشد (ف ٥٢٥) و فتاوی
قاضی خان (ف ٥٩٢) و الفتاوی الهندیة العالمگیرية و لها ترجمة
هنديّة و بدائع الصنائع للکاسانی (ف ٥٨٠) - وكذلك فی دعائم الاسلام فی
الفقه القاطمی الا سماعیلى للقاضی النعمان بن محمد (ف ٣٦٣) کتاب
الجهار منه طبع مصر ١٣٠٥ هـ -

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شرح السیر الكبير للامام محمد الشیبانی الفہ السرخسی (ف ۱۳۸۳)
مطبوع فی حیدر آباد فی ۴ مجلدات و له ترجمۃ ترکیبۃ لعینتابی
مطبوع فی استانبول قبل طبع الاصل العربی بمایۃ سنۃ تقربیا -

الشرح الدولی فی الاسلام لنجیب الارمنازی. طبع دمشق ۱۳۴۹ -

صباح الاعشى للقلقشندی (ف ۸۲۱) -

الطرق التحکمیة لابن القيم (ف ۸۵۱) -

کتاب الطہارة لابن مسکویہ (ف ۴۲۱) -

العقد الفريد لابن عبد ربه (ف ۳۲۸) -

عیون الاخبار لابن قتیبۃ (ف ۲۰۰ اور ۲۰۶) فی ۴ مجلدات راجع
ابواب السلطان و ابواب الحرب -

الفخری لابن الطقطقی (الفہ فی سنہ ۷۰۱) -

فکرۃ الاسلام فی العلاقات الدوائیۃ لمحمد عبدالعزیز نصر (فی مجلۃ
کلیۃ الارب، الاسکندریۃ، ج ۸، ۱۹۵۹)

المکبر لابن حبیب البغداری (ف ۲۴۵) طبع حیدر آباد ۱۳۶۱ھ -

المختصر (فی الفقہ الحنفی) للطحاوی، نشرہ جمعیۃ احیاء
المعارف النعمانیۃ بحیدر آباد -

المستطرف من کل فن مستطرف للا بشیوی، مجلدان -

نظام الحکومۃ النبویۃ المسمی بالقرائیب الاداریہ و العمالات و
الصناعات و المتاجر و التحالفۃ العلمیۃ الی كانت علی عهد تاسیس
المدينة الاسلامیۃ فی المدينة المنورة العالیۃ لعبد النحی الکتانی طبع
برباط فی مراکش فی مجلدين و هو شرح تخریج الدلالات للتخزاعی
المذکور فی المصادر النخطیۃ -

الوثائق السیاسیۃ للعهد النبوی و الخلفاء الراشدة (مع خرائط
و فوتو غرافات) لمحمد حمید اللہ نشرۃ لجنۃ الترجمة و التألیف و
النشر بمصر سنہ ۱۳۶۰ھ، طبعۃ ثانیۃ ۱۳۷۶ھ

اجنبی اقوام کو مراعات خصوصی - محمد حمید اللہ (مجلد ۵ عثمانیہ،
حیدر آباد دکن ج ۱۶، ع ۲، سنہ ۱۳۰۲ فصلی) -

اسلام کے معاشی نظریے - محمد یوسف الدین - ۲ جلد - حیدر آباد
دکن ۱۹۵۰ -

اسلامی معاشیات - مناظر احسن گیلانی - حیدر آباد دکن
۱۹۳۰ء -

تاریخ القرآن - اسلام جیراچپوری -

- تاریخ القرآن - مفتی عبداللطیف -
 تاریخ القرآن - عبدالصمد صارم -
 تاریخ صحف سماوی - نواب علی -
 تحقیق الجہار - چراغ علی - حیدر آباد دکن ۱۹۱۳ء -
 تدوین حدیث - مناظر احسن گیلانی - مقالہ اولی مجلہ
 تحقیقات علمیہ جامعہ عثمانیہ - مقالہ ثانیہ ایضاً - مقالہ ثالثہ
 مجموعہ مقالات حیدر آباد اکاڈمی -
 جدید قانون بین الممالک کا آغاز مولفہ ارنیست نیسی
 (فرانسیسی) اردو ترجمہ جامعہ عثمانیہ -
 الجہار فی الاسلام - ابوالاعلیٰ مودودی - دارالمصنفین - اعظم گڑھ
 ۱۹۳۸ء -
 خطبات مدراس - سید سلیمان ندوی (باب تدوین حدیث) -
 رسول اکرم کی سیاسی زندگی - محمد حمید اللہ - لاہور - سنہ
 ۱۳۶۹ھ -
 عہد نبوی کے میدان جنگ - محمد حمید اللہ - طبع ثالث حیدر
 آباد دکن ۱۹۳۵ء -
 عہد نبوی کا نظام حکمرانی - محمد حمید اللہ - طبع ثانی حیدر
 آباد دکن -
 قانون بین الممالک کی تازہ ترقیاں اور جدید تحقیقاتیں - محمد
 حمید اللہ (مجلہ طیلسانین حیدر آباد دکن - ۱۳۵۰ھ فصلی) -
 قانون بین الممالک کے اصول اور نظیریں - طبع ثانی - حیدر آباد
 دکن ۱۳۶۳ھ -
 قانون بین الممالک کا آغاز و ارتقاء - محمد حمید اللہ - (مجلہ
 تاریخ و سیاست، کراچی اپریل ۱۹۵۱ء) -
 باللغة الفارسیة
 ازالة الخفاء عن خلافة الخلفاء از شاه ولی الله دهلوی (ف ۱۱۱۴)
 (ترجمہ اردو ہم دار) -
 باللغة التورکية
 تاریخ حقوق بین الدول، مولفی ابراہیم حقفی، استانبول ۱۳۰۳ھ
 (فصل اول - ۳: اسلامیت) -
 تورکیہ جمہوریتی و سیاست ملیہ و اقتصادیکہ، مولفی دوکتور
 لطفی، استانبول ۱۳۴۰ھ -

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2. WORKS IN EUROPEAN LANGUAGES

N.B.—Just as regards in Oriental languages, so, too, here only a select list is given.

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