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International law in general in the medieval Islamic world

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1. Islamic international law

This chapter gives an overview of the fundamental doctrines of Islamic international law as expressed in the writings of prominent Sunnī Muslim jurists in the first six centuries of Islamic history along with some relevant historical case illustrating these principles in action. This chapter introduces the reader to how Sunnī Muslim jurists understood the law's capacity to regulate interactions between and among individuals, communities, and polities, whether Muslims or non-Muslims. It explores the fundamental analytical categories Muslim jurists used to develop this body of law, and some of the principal doctrines Muslim jurists developed in solving legal questions arising in an international context in the period under consideration. It begins with a discussion of the sources jurists relied on to develop their legal doctrines, and the primary juristic works consulted in preparing this chapter. It does not attempt to determine systematically the extent to which Muslim political authorities complied with juristic doctrines, although occasional references to historical events are made.

2. Sources of Islamic International Law

Islamic law (*fiqh*) has been called a "jurists' law" because of the central role legal specialists played in articulating its rules.[1] Sunnī Muslim jurists relied on a combination of revealed sources and rational inferential techniques to articulate legal doctrines, including, those of international law. In the fourth Islamic century (10th century CE), jurists began to distinguish theoretical questions regarding the origin of the law, its relationship to God, the sources from which it may be derived, and the inferential techniques proper to it (*uṣūl al-fiqh*, "jurisprudence"), from the rules of substantive law (*fiqh*) itself. Most secondary scholarship reads Sunnī jurisprudence as relying on four sources (*aṣl* (s.)/*uṣūl* (pl.)) of the law: the Quran – the written record of the Arabic revelations of divine speech given to Muḥammad during his 23 year prophetic mission (610-32 CE); the normative practice of the Prophet Muḥammad (the *sunna*); consensus (*ijmāʾ*); and, analogy (*qiyās*). The last, however, is properly understood as an inferential technique, not a source (*aṣl*) of the law.

There were also ancillary sources of law, which, depending on the jurist, were also authoritative, such as the binding character of decisions made by the Prophet

[1] Joseph Schacht, *Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 5.

Muḥammad's closest followers (*ṣaḥāba* (companions)) and his "upright successors" (*al-khulafāʾ al-rāshidūn*), i.e., the first four caliphs to rule the Muslim community following the Prophet's death. Furthermore, different sections of the Muslim community – having spread far from their original home in western Arabia to the Iberian Peninsula in the west and to China in the east – preserved different collections of precedents. Differences regarding the content of the sunna and consensus, as well as disagreements regarding ancillary sources of the law and interpretive differences regarding the proper reading of the sources, often led to sharply divergent legal conclusions. This ultimately led to the formation of the four different Sunni "schools" of law, the Ḥanafīs, the Mālikīs, the Shāfiʿīs, and the Ḥanbalīs.

There were other, non-Sunnī, movements in this period of Islamic history, such as the Shīʿa, and the Khawārij and the Ibāḍīs, whose theological and legal doctrines developed along lines distinct from what would become the majority Sunni approach to questions of theology and law. Their teachings are beyond the scope of this chapter's coverage, and in any case, it is doubtful they had distinctive legal views during this early period in Islamic history.[2] This chapter

[2] Broadly speaking, the Shīʿa were a group of Muslims who believed that leadership of the Muslim community passed from the Prophet Muḥammad after his death to a designated member of the Prophet's family. Although

focuses primarily on the views of the Ḥanafīs and the Mālikīs, and their predecessors, the Iraqis and the Hejazis, in view of their the outsized contributions to Islamic international law in the first six hundred years of Muslim history. They were particularly influential because of their proximity to the halls of power in the Muslim east, i.e., Iraq, Persia and Central Asia, in the case of the Ḥanafīs, and in the Muslim west, i.e., Egypt, North Africa and Muslim Spain, in the case of the Mālikīs.

3. Quranic legislation and Islamic international law

The Quran includes numerous verses related to war and peace, prisoners, immigration, and jurisdiction.

there were numerous historical divisions within the Shīʿa regarding which male member of the Prophetic household was the legitimate leader of the Muslim community, today the overwhelming majority of the Shīʿa adhere to what is known as the Twelvers, so-called because they recognize a line of twelve leaders, called "imams," after the Prophet Muḥammad, beginning with ʿAlī b. Abī Ṭālib, the Prophet Muḥammad's first cousin, passing through al-Ḥasan and al-Ḥusayn, the sons of ʿAlī, and concluding with Muḥammad al-Mahdī, who, according to Twelver belief, went into hiding to return at the end of time. As long as the Shīʿa recognized a living imam, they had no need for a formal legal system. The Khawārij were a group of Muslims known to their opponents by the disparaging term "secessionists." They earned this dubious label for their decision to withdraw from the Muslim community and set up their own communities. Typically denounced as extremists, they were accused of deeming the great majority of Muslims to be apostates. Most of these sects died out with the exception of the Ibādīs, who were considered moderate secessionists insofar as they did not anathematize the rest of the Muslim community. The Ibāḍīs established states in the hinterlands of the Muslim community in remote portions of what is now Algeria and Oman.

While Quranic legislation on these matters is hardly comprehensive, neither is it insubstantial. Several verses authorized warfare between the Muslim community and different non-Muslim groups. It authorized the nascent Muslim commonwealth (*dār al-islām*) in Medina to engage in organized hostilities, initially, against its pagan foes, and later, against the "People of the Book," i.e., Christians and Jews, until they paid a poll-tax that was collected from able-bodied men (*jizya*) (*al-Ḥajj*, 22:39); (*al-Baqara*, 2:190); (*al-Tawba*, 9:1-5); and (*al-Tawba*, 9:29). Other verses spoke of an obligation to grant enemies security so that they may "hear God's words," and obliged the Muslim community to convey them to a place of security at the expiration of the grant of security (*al-Tawba*, 9:6). It also prohibited Muslims from pretextually attacking anyone offering them peace on the grounds that they were not believers, simply out of a desire for plunder(*al-Nisāʾ*, 4:94).

The Quran also laid out rules for dealing with enemy property. Enemy property seized on the battlefield (*ghanīma* (s.)/ *ghanāʾim* (p.)) was distributed among the soldiers, but only after deducting one-fifth for the public treasury (*al-Anfāl*, 8:41). Real property surrendered by the enemy to the Muslims became public property (*fayʾ*) to be used for various public purposes (*al-Ḥashr*, 59:7).

The Quran also mentioned the obligation to make peace among different groups of believers who engage in armed conflict, and the obligation to fight the wrongdoing group if it refused to submit to the law's demands (*al-Ḥujurāt*, 49:9).

The Quran also made numerous references to the binding character of treaties and the wickedness of breaching them (*mīthāq*, *ʿahd*), e.g., *al-Anfāl*, 8:56; *al-Tawba*, 9:3; *al-Nisāʾ*, 4:90, 92; and *al-Anfāl*, 8:72, but it authorized the open and formal renunciation of treaties in circumstances where Muslims reasonably feared that the other party would not abide by the treaty's terms (*al-Anfāl*, 8:58).

It also laid out rules for the treatment of enemy captives. It prohibited Muslims from sparing the lives of enemy captives in exchange for property (*al-Anfāl*, 8:67), at least until the enemy had been completely subdued. Upon the conclusion of hostilities, however, it authorized Muslims to release their captives, either as an act of grace (*mann*), or to exchange them (*fidāʾ*) for Muslim captives (*Muḥammad*, 47:4).

It also laid out principles of territorial jurisdiction and affirmed the superiority of duties arising out of treaty commitments – at least from a legal and political perspective – to duties arising out of common belief in Islam. Accordingly, the political rights and duties that actualized the moral solidarity of the Muslim

commonwealth were conditioned on immigration (*hijra*) to Medina and the creation of a *political* relationship with the Muslim commonwealth. At the same time, it stated that the Muslim commonwealth had a duty to offer military support to Muslims suffering from religious persecution, but only if doing so would not violate a treaty commitment (*al-Anfāl*, 8:72). It also affirmed that women, in their individual capacity, could join the Muslim commonwealth just as men could, i.e. through immigration and a pledge of loyalty (*al-Mumtaḥana*, 60:12).[3]

The Quran implicitly endorsed the territorial principle of law while at the same time affirming the universality of religious obligations when it limited the duty to compensate the next-of-kin in a case of accidental homicide to victims who were either (1) part of the Muslim commonwealth, or (2) part of a people at peace with the Muslim commonwealth. If the victim, however, belonged to a people at war (*ʿaduww*) with the Muslim commonwealth, only the religious duty of penance (*kaffāra*) applied (*al-Nisāʾ*, 4:92).

[3] Mālik ibn Anas, *Al-Muwaṭṭa': The Recension of Yaḥyā b. Yaḥyā al-Laythī (d. 234/848)*, trans. Mohammad H. Fadel and Connell Monette, Harvard Series in Islamic Law 8 (Cambridge, Massachusetts: Program in Islamic Law, Harvard Law School, 2019), 775 (describing an incident involving Umayma bt. Ruqayqa, a Meccan woman, who, along with a group of other women, came from Mecca to Medina and pledged loyalty to the Prophet by saying "We pledge our loyalty to you, promising not to associate any deity with God, not to steal, not to fornicate or commit adultery, not to kill our children, not to engage in false and malicious calumny and not to disobey you in any matter that is good.").

4. Prophetic Legislation and Islamic International Law

The sunna provided more specific rules than the Quran. For example, the Prophet Muḥammad is said to have (i) prohibited killing women, children and servants (Ibn Mājah, 2:948) and mutilating enemy corpses (al-Bukhārī, 3:135); (ii) excused the incidental killing of women and children in the context of legitimate military operations (Muslim, 3:1364); and, (iii) recognized the validity of battlefield "conversions," even if apparently motivated to avoid death in battle (Muslim, 1:96). Prophetic legislation in these cases functions to give specific content to the Quran's limits on violence, e.g., *al-Baqara*, 2:190 ("Fight in way of God those who fight you, but do not transgress limits (*wa lā taʿtadū*)").

Early Muslim scholars sometimes devoted particular chapters in their historical works to reports concerning the history of the Prophet's preaching, his conduct of military campaigns, and his diplomatic missions, under the title of *al-siyar* or *al-maghāzī* (expeditions). For example, Muḥammad b. Ismāʾīl al-Bukhārī's (d. 256/870) famous collection of Prophetic traditions, *al-Jāmiʿ al-Ṣaḥīḥ*, included a chapter titled *Kitāb al-Maghāzī*. Other early scholars, e.g., Muḥammad b. ʿUmar al-Wāqidī (d. 207/823) and Ibn Isḥāq (d. 151/769), gained fame for their

collections of historical reports that focused on the Prophet's biography, his preaching, his expeditions, his military campaigns, and his diplomatic missions.

While Prophetic precedents were an important source of law for Muslim jurists, the precedents were often ambiguous and lent themselves to multiple interpretations. Whatever these ambiguities, however, they seemed to affirm clearly that Islamic law, as a system of positive law, was territorial, but as a religion, it was universal. Accordingly, Muslim jurists had to face the crucial question of the legal status of what happened beyond the frontiers of the Muslim commonwealth. This made the development of an Islamic international law inevitable.

5. Periodization of Islamic Law

This chapter divides Islamic legal history into two broad periods. The first, which this chapter refers to as the "foundational era," begins with the first quarter of the second Islamic century (mid-eighth century of the Common Era) and lasts until the fourth/tenth century of the Common Era. During this period, Islamic law can be conveniently thought of in terms of geographical traditions, the three most important being the Levantine tradition associated with Abū ʿAmr ʿAbd al-Raḥmān al-Awzāʾī (d. 157/773-74), the Hejazi tradition, associated with Mālik b. Anas (d.

179/795), and the Iraqi tradition, associated with Abū Ḥanīfa al-Nuʿmān b. Thābit (d. 150/767). Muḥammad b. Idrīs al-Shāfiʿī (d. 204/820), eponym of the Shāfiʿī school, also lived and wrote during this period. Shāfiʿī represented the beginnings of the break from the geographically-based tradition of law to one rooted more directly in substantive and methodological doctrinal commitments. Although he authored a very sophisticated and lengthy work of positive law,[4] and is usually identified as the first Muslim jurist to devote an independent work to jurisprudence, *al-Risāla*,[5] his influence in the foundational era was relatively minor. Accordingly, this chapter references his views only incidentally. Awzāʿī, despite his prominence in the foundational era, did not have a *lasting* influence on Islamic law, and so this chapter, aside from discussing sources for his views, does not discuss his substantive positions.

The second period, the "classical period," begins with the fourth/tenth century and is characterized by the professionalization of the study of law and the emergence of the four Sunnī doctrinal schools of law, the Ḥanafī, Mālikī, Shāfiʿī,

[4] Muhammad ibn Idris Shafi`i, *al-Umm*, ed. Muhammad Zahri Najjar (Bayrut, Lubnan: Dar al-Ma`rifah, 1973).
[5] Muḥammad ibn Idrīs Shāfiʿī, *al-Risālah* (Cairo: sn, 1939); Muhammad ibn Idris al-Shafi'i, *The Epistle on Legal Theory*, Library of Arabic Literature 48 (New York, NY: New York University Press, 2013), https://doi.org/10.18574/9780814729311.

and Ḥanbalī. Relatively little is known about Khārijī/Ibāḍī law in this period,[6] and it would not be until the last third of the period under consideration that one can begin to speak of Shīʿī law as such,[7] although there is no doubt that at least some Sunni doctrines, such as the validity of military campaigns led by an unjust ruler, were responses to the distinctive views of the Shīʿa and the Khawārij. It is also a period characterized by the *relative* paucity of executive law-making as compared to both the foundational period and later periods of Muslim history. Indeed, during the foundational and classical periods, international law was one of the most important domains in which executives made law insofar as treaties with non-Muslim powers not only established positive rules regulating the interaction between states, but also had a direct impact on Islamic domestic law.

6. Sources for al-Awzāʿī's Views

The Levantine jurist Awzāʿī's views survived indirectly through accounts of his scholarly rivals, such as the Iraqi jurist and student of Abū Ḥanīfa, Abū Yūsuf (d. 182/798), who wrote *al-Radd ʿalā siyar al-Awzāʿī* ["A Reply to Awzāʿī's

[6] Ersilia Francesca, "Ibāḍī Law and Jurisprudence," *The Muslim World* 105, no. 2 (2015): 209–23, https://doi.org/10.1111/muwo.12089; Knut S Vikør, "Ibadism and Law in Historical Contexts," *Oñati Socio-Legal Series* 10, no. 5 (2020): 960–84.
[7] Najam Haider, *Shi'i Islam: An Introduction*, Introduction to Religion (Cambridge: Cambridge University Press, 2014), https://doi.org/10.1017/CBO9781139381710.

'International Law'"],[8] or works of comparative jurisprudence, such as Abu Jaʿfar Muḥammad b. al-Jarīr al-Ṭabarī's *Kitāb Ikhtilāf al-Fuqahāʾ* ["The Disagreements of the Jurists"] (d. 310/923).[9] The 4th/10th century North African Mālikī jurist Ibn Abī Zayd al-Qayrawānī's (d. 386/996)) encyclopedic collection of the views of early Hejazi authorities, *al-Nawādir wa'l-Ziyādāt* ["The Rarities and Additions"], also mentions Awzāʿī's views on some questions of international law.[10] Another important source for Awzāʿī's views is *Siyar al-Fizārī*, a second century work of Abū Isḥāq al-Fazārī who spent much of his life on the Byzantine-Syrian frontier region, where he died in 186/802.[11]

7. Sources for the Views of Abū Ḥanīfa and the Iraqis

Although Abū Ḥanīfa did not author any books of law that have survived, his two most prominent students, Abū Yūsuf and Muḥammad b. al-Ḥasan al-Shaybānī (d.

[8] Abū Yūsuf Yaʿqūb, *Al-Radd 'alá Siyar al-Awzā'ī*, ed. Abū al-Wafā' al-Afghānī, Silsilat Al-Maṭbūʿāt (Madīnat Naṣr, [Cairo]: Maktabat Dār al-Hidāyah, 198-). I am translating the Arabic term "*siyar*" in this chapter as "international law." Other scholars have instead used the term "law of nations." Some scholars, e.g., Majid Khadduri, have questioned whether the siyar actually constitute international law, or are instead just a particular topic within Muslim domestic law. For reasons I articulate elsewhere, I believe the *siyar* are international law proper because, as will be seen in later sections of this chapter, Muslim jurists clearly distinguished between rules that take their force from the normative sources of Islam from rules arising out of agreements with non-Muslims.

[9] Muhammd b. Jarir al-Tabari, *Kitab al-jihad wa-Kitab al-jizyah wa-Ahkam al-muharibin min Kitab ikhtilaf al-fuqaha'*, ed. Joseph Schacht, Veröffentlichungen der "De Goeje-Stiftung" ;; no. x; Variation: Publication of the De Goeje Fund 10 (Leiden: Brill, 1933); Ṭabarī and Yasir S. Ibrahim, *Al-Tabari's Book of Jihād: A Translation from the Original Arabic* (Lewiston, N.Y: Edwin Mellen Press, 2007).

[10] 'Abd Allāh ibn 'Abd al-Raḥmān Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt 'alá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, ed. Muḥammad Bū Khabzah et al. (Beirut: Dār al-Gharb al-Islāmī, 1999).

[11] Ibrāhīm ībn Muḥammad Fazārī, *Kitāb al-siyar: riwāyat Muḥammad ibn Waḍḍāḥ al-Qurṭūbī 'an 'Abd al-Malik ibn Ḥabīb al-Maṣīṣī*, ed. Fārūq Ḥamādah (Beirut: Mu'assasat al-Risalah, 1987).

189/805), authored several works that preserved their teacher's doctrines and their own views. Abū Yūsuf and Shaybānī were close to the newly established ʿAbbāsid caliphate (132-655/750-1258), and each served for a time as head of the ʿAbbāsids' judiciary. The teachings of these three scholars would form the core of the Ḥanafī school of law. The Ḥanafī school found its greatest number of adherents in Iraq, and Islamic lands to the east in Iran, the north in Central Asia and in the Indian Subcontinent.

While Abū Yūsuf clearly had an interest in international law, his other work on public law, *al-Kharāj* [*The Land Tax*],[12] only had an incidental relationship to international law. Shaybānī is the towering figure of Muslim international law in the foundational period. He earned this position in view of his extensive writings on international law. Not only did his comprehensive work on positive law, *al-Aṣl* (also known as *al-Mabsūṭ*), include a chapter on international law,[13] he wrote two specialized works on international law, *al-Siyar al-Ṣaghīr* ["The Shorter Book of International Law"],[14] and *al-Siyar al-Kabīr* ["The Longer Book of International

[12] Abū Yūsuf Ya'qūb, *Kitāb Al-Kharāj*, Al-Ṭab'ah 3 (Cairo: al-Maṭba'ah al-Salafīyah wa-maktabatuha, 1962); Abū Yūsuf Yaʻqūb, *Abū Yūsuf's Kitāb al-Kharāj: Translated and Provided with an Introduction and Notes by A. Ben Shemesh*, trans. A. Ben Shemesh, Taxation in Islam, v. 3 (Leiden: E.J. Brill, 1969).
[13] Muḥammad ibn al-Ḥasan Shaybānī, *Al-Aṣl*, ed. Mehmet Boynukalın (Beirut: Dār Ibn Ḥazm lil-Ṭibāʻah wa-al-Nashr wa-al-Tawzīʻ, 2012); Muhammad ibn al-Hasan Shaybani, *The Islamic Law of Nations: Shaybani's Siyar*, trans. Majid Khadduri (Baltimore, Johns Hopkins Press, 1966).
[14] Muhammad ibn al-Hasan Shaybani, *al-Qanun al-dawli al-Islami: Kitab al-siyar*, ed. Majid Khadduri (Beirut: al-Dar al-Muttahidah lil-Nashr, 1975); Muhammad ibn al-Hasan Shaybani, *The Shorter Book on Muslim International Law*

Law"]. The Longer Treatise of International Law survives in the commentary of the fifth/eleventh century Central Asian Ḥanafī jurist, Muḥammad b. Aḥmad al-Sarakhsī (d. 490/1096), *Sharḥ al-Siyar al-Kabīr*.[15] Despite some questions regarding its attribution to Shaybānī, I have relied it on as my primary source for Iraqi doctrines of Islamic international law, largely because, as its name suggests, the range of topics it covers is much broader than either the stand-alone chapter of *al-Aṣl* or the shorter treatise, *al-Siyar al-ṣaghīr*.

8. Sources for the Views of Mālik and the Hejazis

Unlike Abū Ḥanīfa, Mālik authored his own legal treatise, *al-Muwaṭṭaʾ*, the first written treatise of law in Islamic history.[16] That work includes a short chapter on international law called *Kitāb al-Jihād* [The Chapter of War with Non-Muslims]. Numerous other sources, however, also claim to preserve Mālik's legal teachings. The first is *al-Mudawwana al-Kubrā* ["The Great Register"], which records Mālik's views, and the views of his students as presented in dialogues between Saḥnūn b. Saʿīd (d. 240/854), a North African jurist from Qayrawān in present day Tunisia,

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= *Kitab Al-Siyar al-Saghir*, trans. Mahmood Ahmad Ghazi, One Hundred Great Books of Islamic Civilization ;; No. 39; Variation: One Hundred Great Books of Islamic Civilization ;; No. 39. (Islamabad: Islamic Research Institute, International Islamic University, 1998).

[15] Muḥammad ibn Aḥmad Sarakhsī and Muḥammad ibn al-Ḥasan Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, ed. Muḥammad Ḥasan Muḥammad Ḥasan Ismāʿīl Shāfiʿī (Beirut: Manshūrāt Muḥammad ʻAlī Bayḍūn : Dār al-Kutub al-ʻIlmīyah, 1997).

[16] Mālik ibn Anas, *Al-Muwaṭṭa'*, ed. Muḥammad Fu'ād ʻAbd al-Bāqī (Cairo: Dār Iḥya' al-Kutub al-ʻArabīyah, 1986); Mālik ibn Anas, *Al-Muwaṭṭa'*, 2019.

and Ibn al-Qāsim (d. 191/806), an Egyptian jurist and Mālik's most prominent student.[17]

The second is *al-Mustakhraja*. Originally compiled by the Andalusian jurist Muḥammad al-ʿUtbī (d. 255/869), it consists of the lecture notes of several of Mālik's students covering a wide range of topics, and often their own views on the same topics. IIt was preserved for later generations largely through the efforts of the Cordoban Mālikī judge and jurist, Ibn Rushd the Grandfather (d. 520/1120), who edited the text and wrote an extensive commentary on its materials, calling it *al-Bayān wa'l-Taḥṣīl* ["The Clarification and Explication"].[18] The most comprehensive source for the views of Mālik and his students, however, is *al-Nawādir wa'l-Ziyādāt* ["The Rarities and Additions"], the work of Ibn Abī Zayd al-Qayrawānī, who collected opinions of Mālik and his students found in early Hejazi sources other than the *Mudawwana*.[19] This chapter relies on all three sources for Hejazi doctrine in the foundational period.

[17] Sahnun ibn Said, 'Abd al-Rahman Ibn al-Qasim, and Malik ibn Anas, *Al-Mudawwana al-Kubra*, 16 vols. (Kingdom of Saudi Arabia: The Ministry of Islamic Affairs, Preaching and Guidance of the Kingdom of Saudi Arabia, 1906), http://archive.org/details/FP144241.

[18] Ibn Rushd al-Jadd and Muḥammad ibn Aḥmad 'Utbī, *Al-Bayān Wa-al-Taḥṣīl Wa-al-Sharḥ Wa-al-Tawjīh Wa-al-Ta'līl Fī Masā'il al-Mustakhrajah*, ed. Muḥammad Ḥajjī (Bayrut: Dār al-Gharb al-Islamī, 1984).
[19] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt 'alá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*.

The teachings of Mālik formed the basis for the Mālikī school of law in the classical period. The Mālikī school predominated in Muslim Spain, and North and Sub-Saharan Africa.

9. Non-Legal Sources for Foundational Era Legal Practice

Given the importance of historical reports for the development of legal doctrine in the foundational period, it is difficult to make a bright-line distinction between purely historical and legal sources. Nevertheless, the aforementioned legal sources are generically different from historical works insofar as the former are organized largely around theoretical questions (*masāʾil* (pl.)/*masʾala* (s.)) designed to elicit the applicable legal principle or to test the boundaries of a theoretical legal principle. Historical sources, by contrast, report precedents without necessarily attempting to extract a more general rule or applying it to a broad range of hypothetical cases. The *Siyar* of Fazārī was one such work that straddled the line between law and history. A similar work is the *Kitāb al-Amwāl* of Abū ʿUbayd al-Qāsim b. Sallām.[20] It too includes reports involving important legal precedents but without systematic legal reasoning.

[20] Abū ʾUbayd al-Qāsim ibn Sallām, *Kitāb al-amwāl* (Cairo: Maktabat al-Kullīyāt al-Azharīyah, 1968); Abū ʻUbayd al-Qāsim ibn Sallām, *The Book of Revenue = Kitāb Al-Amwāl*, 1st ed., Great Books of Islamic Civilisation (Reading, UK: Garnet Publishing, 2002).

10.Sources for Classical Era Doctrine and Muslim Diplomatic Practice

Both Sarakhsī and Ibn Rushd the Grandfather are major jurists of the classical period in the Ḥanafī and Mālikī traditions, respectively. Sarakhsī's commentary on Shaybānī's "The Longer Book of International Law," and Ibn Rushd's "The Clarification and Explication" both clarify the meaning of foundational texts, synthesize early positions, and abstract from particular cases more general rules. Neither can be taken to represent the final word for each of their respective traditions for the period under consideration, but given their respective stature in their respective schools, their interpretations are representative of Muslim legal doctrine in the classical period. The most important sources for Muslim diplomatic practice are the archives of non-Muslim parties to some of these treaties, such as the Italian city states of Venice and Florence,[21] and Arabic literary sources which preserved the texts of many of the treaties executed between Muslim rulers and non-Muslim polities, such as al-Qalqashandī's *Ṣubḥ al-Aʿshā* and al-ʿUmarī's *al-Muṣṭalaḥ al-Sharīf*,[22] and works which described the duties of

[21] John Wansbrough, "A Mamluk Letter of 877/1473," *Bulletin of the School of Oriental and African Studies* 24, no. 2 (February 1961): 200–213, https://doi.org/10.1017/S0041977X00091412; John Wansbrough, "Venice and Florence in the Mamluk Commercial Privileges," *Bulletin of the School of Oriental and African Studies* 28, no. 3 (October 1965): 483–523, https://doi.org/10.1017/S0041977X00071421; John Wansbrough, "The Safe-Conduct in Muslim Chancery Practice," *Bulletin of the School of Oriental and African Studies* 34, no. 1 (February 1971): 20–35, https://doi.org/10.1017/S0041977X00141552.

[22] Aḥmad ibn 'Alī Qalqashandī, *Subh Al-a'sha*, Turāthunā (Al-Qāhirah: al-Mu'assasah al-Miṣriyah al-āmmah lil-ta'līf wa-al-tarjamah wa-al-ṭibā'ah wa-al-nashr, 1963); Aḥmad ibn Yaḥyá Ibn Faḍl Allāh al-'Umarī, *Al-Ta'rīf Bi-al-Muṣṭalaḥ*

ambassadors, such as the 10th century work of al-Ḥusayn b. Muḥammad Ibn al-Farrāʾ, *Kitāb rusul al-mulūk*.[23]

11. Summary on the Sources for the Foundational and Classical Periods

Principles of Islamic international law during the foundational era were developed at the hands of these and other scholars, and their students, often through a dialogic, case-by-case process where the jurist would answer a question posed to him by an anonymous questioner. The context of the questions strongly suggest that they reflected the practical realities faced by soldiers, officials, and civilians stationed or living along the frontiers, particularly, the Muslim-Byzantine frontier in northern Syria, or the Mediterranean coast, both of which were sites of intermittent warfare throughout the foundational period.

While these materials make occasional references to Persians,[24] the Byzantine Greeks – *al-rūm* – appear much more frequently than other ethnic groups in these materials.[25] There are occasional references to other ethnic groups, including,

al-Sharīf, ed. Samīr Maḥmūd Durūbī, al-Ṭabʻah 1, Manshūrāt Jāmiʻat Muʼtah (al-Karak: Jāmiʻat Muʼtah, ʻImādat al-Baḥth al-ʻIlmī wa-al-Dirāsāt al-ʻUlyā, 1992).

[23] Maria Vaiou, "Diplomacy in the Early Islamic World : A Tenth-Century Treatise on Arab-Byzantine Relations," accessed June 11, 2021, https://web-b-ebscohost-com.myaccess.library.utoronto.ca/ehost/ebookviewer/ebook?sid=fcfc63af-3920-40db-881d-6991d7e29c06%40sessionmgr101&vid=0&format=EB.

[24] See, for example, Mālik ibn Anas, *Al-Muwaṭṭa'*, 2019, 360.

[25] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:15; Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 4:28.

Franks,[26] blacks (*sūdān*),[27] Slavs (*al-ṣaqāliba*),[28] and Nubians (*nūba*)[29] in the Hejazi material, and Turks[30] and Daylamites (a Persian-speaking people that inhabited the mountains near the Caspian Sea),[31] in the Iraqi material.

Classical-era jurists did not strike out in radically new directions but instead consolidated and systematized the achievements of the foundational period jurists. On the other hand, the classical period also witnessed the rise of increased diplomatic and commercial ties between the Muslim world and their non-Muslim neighbors which gave greater importance to formal diplomacy than the foundational-era rules that were developed largely in lieu of formal diplomatic agreements. Accordingly, for the classical era and the periods thereafter, treaty relations between Muslim and non-Muslim powers are evidence of the rise of a body of positive, written international law that was absent in the foundational era. The legal principles articulated in the foundational era, however, anticipated the rise of such a phenomenon.

12.The Scope of Muslim international law

[26] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:132.
[27] Ibn Abī Zayd al-Qayrawānī, 3:325.
[28] Ibn Abī Zayd al-Qayrawānī, 3:379.
[29] Ibn Abī Zayd al-Qayrawānī, 3:218.
[30] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 4:83.
[31] Sarakhsī and Shaybānī, 5:34.

Already by the second and third Islamic centuries (8th -9th centuries of the common era), Muslim jurists had set out separate chapters in their legal works for issues of international law. These chapters in the first instance dealt with the norms governing Muslim relations with hostile non-Muslims (*ḥarbī*), especially during times of armed conflict. Jurists, however, also discussed the rules of making peace with the enemy, the fate of enemy captives, and the legal consequences of peace. As a secondary matter, they also discussed questions of Islamic public law, such as the legal status of enemy property captured on campaign. They also discussed questions of private international law, such as the title to property seized by the enemy from Muslim territory, and the rights of the Muslim or non-Muslim vassal (*dhimmī*) "true owner" to that property. Discussion of other forms of armed conflict arose derivatively in these chapters, including, armed hostilities against Muslim rebels (*bughāt* (sing. *bāghī*) or *khawārij* (sing. *khārijī*)), bandits (*muḥāribūn* (sing. (*muḥārib*)), apostates (*murtaddūn* (sing. *murtadd*)), and private, unauthorized cross-border raiding (*talaṣṣus*).

13.Sovereignty in the Juridical Thought of Muslim jurists

For Muslim jurists, the sovereignty of a polity is derived from the sovereignty of natural persons, male or female, free or slave, Muslim or non-Muslim. This is

because Muslim jurists recognize that the natural individual, possessed of ordinary capacity, has the capacity to enter and destroy legal relations. This capacity, known as *dhimma*,[32] is a distinctively human capacity that enables them to undertake and repudiate obligations, whether to God or to one another. A person can burden his *dhimma* with an obligation in various ways, including, by binding it to a system of rule (*iltizām al-aḥkām*). Until a person binds his *dhimma*, however, his interactions with others are *not* subject to law and each is "sovereign" with respect to his or her interactions with all other similarly situated persons. This natural *absence* of legal obligations between and among natural persons is a consequence of the Muslim jurisprudential doctrine of *barāʾat al-dhimma*.[33] It therefor follows that the natural the relationship between persons and polities is one of war (*ḥarb*). An individual with whom one lacks peaceful relations is presumed to be hostile or an enemy (*ḥarbī*). The jurists called the geographical space in which such non-relations prevailed, *dār al-ḥarb*, the territory of war, presumably because the absence of a common, substantive norm

[32] Chafik Chehata, "Ḏhimma," *Encyclopaedia of Islam, Second Edition*, April 24, 2012, https://referenceworks-brillonline-com.myaccess.library.utoronto.ca/entries/encyclopaedia-of-islam-2/dhimma-SIM_1824?s.num=0&s.f.s2_parent=s.f.cluster.Encyclopaedia+of+Islam&s.q=dhimma+.

[33] R. Brunschvig and R. Rubinacci, "Barāʾa," *Encyclopaedia of Islam, Second Edition*, April 24, 2012, http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/baraa-COM_0098?s.num=0&s.f.s2_parent=s.f.book.encyclopaedia-of-islam-2&s.q=bara%27at+al-dhimma. For a discussion of Muslim moral thought and its relationship to the presumption of non-obligation, see A. Kevin Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought*, SUNY Series in Middle Eastern Studies (Albany, N.Y: State University of New York Press, 1995).

to regulate interactions between parties, meant that only brute force could resolve any disputes.

While some scholars have suggested that the category of *dār al-ḥarb* was an empirical category,[34] it is more plausibly understood as a rational category, a necessary incident of sovereignty, for the reasons stated above. The abstract character of the juridical actors that Muslim jurists recognize further supports the conclusion that *dār al-ḥarb* is a rational category. Muslim jurists adopted the view that until the relevant legal person – natural or corporate[35] – binds his, her or its *dhimma*, it is free – from a legal perspective (if not a moral one) – to act as it sees fits.

The law's presumption of non-obligation renders the idea of the *dār al-ḥarb* primordial: because legal persons do not owe one another any duties, everything is "permitted" to them. Some legal texts make this notion explicit, using the term *dār al-ibāḥa* (the "territory of permissibility" or in more familiar terms, "the

[34] Majid Khadduri, "The Law of War and Peace in Islam: A Study in Muslim International Law" (London, Luzac, 1940), 44; Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, 1st ed., Palgrave Series in Islamic Theology, Law, and History (New York, NY: Palgrave Macmillan, 2011), 92–94.

[35] The idea that Islamic law recognizes corporate personhood is controversial, but as the cases discussed in this chapter make clear, foundational and classical era Muslim jurists clearly distinguished between the capacities of natural persons and the collective capacities of groups of individuals, such as families and polities, which could be both bearers of rights and obligations. For a detailed overview of various rules in Islamic law that treat the Muslim community as a legal person with bearing rights and obligations, see Mohammad Fadel, "Islamic Law Reform: Between Reinterpretation and Democracy," *Yearbook of Islamic and Middle Eastern Law* 18, no. 1 (2017): 44–90, https://doi.org/10.1163/22112987_01801005.

commons"), rather than the term *dār al-ḥarb*, to emphasize the absence of recognized legal entitlements in such a territory.[36] The juridical category of *ḥarb* is conceptually similar to a Hobbesian state of nature, where justice, for want of a common judge, is non-existent and the natural right of each to appropriate and use things in the commons leads to conflict.[37] Individuals, by associating with one another, whether by agreement or subjugation (*qahr*), effectively create a corporate person – a polity (*dār*) – that has its own capacity. This allows it to establish legal entitlements internally and interact both with other polities and foreigners. Unless it contracts peace with such third parties, however, it remains in a relation of war with *them*.

The same capacity to undertake obligations to others, however, enables natural persons and corporate persons to repudiate their obligations. When such ties are repudiated, the primordial relationship of war is restored.

Finally, sovereignty is both formal – in the sense that it is expressed through some system of law (*ḥukm*), even if that law is the arbitrary command of a single individual – and sociological – in the sense of the existence of effective power over a particular territory, described as *qahr* or *manaʿa*. Its sociological

[36] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:130.
[37] Thomas Hobbes, *Leviathan*, 1st ed., The Clarendon Edition of the Works of Thomas Hobbes ; v. 3-5 (Oxford: Clarendon Press, 2012). See Chapters XIII and XIV.

dimension both enables the creation of legal order and its destruction through the irresistible social fact of power.

Muslim jurists recognize at least three associations that possess a corporate capacity to undertake binding legal commitments. The first is the household, represented by the husband, who can bestow upon both his wife and minor children the benefit of the political relations he establishes in the context of immigration. He lacked authority, however, to destroy the legal personality of his wife or adult children, and so could not sell them into slavery without their consent, in contrast to his minor children, over whom, at least according to Hejazi authorities in the foundational era, he seemed to exercise plenary power in the natural state.[38]

The second is an association of natural persons possessing the capacity for self-defense (*manaʿa*). Such an association is not subject to another's law, but does not have inherent law-making powers. As described below, their effective independence allows them to repudiate legal obligations (in contrast to merely

[38] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:153; Ibn Rushd al-Jadd and ʻUtbī, *Al-Bayān Wa-al-Taḥṣīl Wa-al-Sharḥ Wa-al-Tawjīh Wa-al-Taʻlīl Fī Masā'il al-Mustakhrajah*, 3:77.

violating legal obligations) and to make peace in a corporate capacity with polities.[39]

The third is a polity. A polity is an association of a group of people, possessing the capacity to engage in self-defense, who have exclusive control over a determinate piece of territory. When these two conditions are satisfied, law (*ḥukm*) is manifest, and individuals lawfully present on that polity's territory enjoy security (*iḥrāz*) of person and possessions in accordance with that polity's law. If someone is deprived of a possession in violation of the polity's law, or loses his liberty, the victim can enforce his right to possession or liberty by appeal to the law – rather than self-help – and thereby obtain redress, if the law so provides.[40]

The polity enjoys the fullest range of capacities to enter (and destroy) legal relations with other persons, groups, and polities. But, before a person, natural or corporate, can enter or destroy legal relations, the sociological reality of capacity must be present.

14. The Contingency of legal personhood

[39] See, *infra*, n. 205.
[40] See, *infra*, n. 59.

Legal personhood was not synonymous with natural personhood, despite the assumption that all persons of ordinary capabilities enjoyed the natural capacity to enter legal relations with others. Although natural persons of ordinary ability had the natural capacity to enter legal relations with others, this freedom could be overcome by the brute fact of subjugation.[41] Just as a free person can become a slave and lose his capacity through violent subjugation, a slave can regain his status as a legal person through self-help, either by physically escaping his master's subjugation – if he and his master are in the state of nature – or by fleeing to the territory of another polity where the law of the enslaving polity is not recognized. Finally, A can regain his legal personhood if B (or any successor to B) manumits A.

The existence of polities is also precarious: they face the risks of internal dissolution through secession, and external subjugation through conquest. Accordingly, even though Muslim jurists understand polities to come into existence as a result of the free choice of a group of persons to submit to a common ruler for purposes of defense and the resolution of their internal

[41] Sarakhsī, Shaybānī, and Shāfi'ī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī,* 4:232.

conflicts in accordance with a system of law,[42] they also recognize that their continued existence is contingent on maintaining their capacity for self-defense..

It follows that all rights enjoyed by a legal person are secured only in the context of a polity that protects those rights such that even if someone is subjugated to the will of another, or someone's property is misappropriated (*ghaṣb*), the law will invalidate these acts, *and* intervene to liberate the subjugated person, and return the misappropriated property to its rightful owner. The territorial logic of sovereignty means that this security extends only to persons and property under the polity's jurisdiction. There remains the looming threat that the polity that grants security to property and persons could disappear, either through internal defections, or because of invasion and conquest, and with it, all the rights the polity secures.

15.The Founding of Medina as the Paradigmatic Model of Sovereignty

The Prophet Muḥammad founded the Muslim commonwealth when he immigrated from his hometown of Mecca in the Hejaz to the oasis settlement of Yathrib (which then came to be known as Medina). Shortly after his arrival, the Prophet drew up a document between and among those in Medina who had

[42] Sarakhsī and Shaybānī, 5:7-8, 37.

embraced Islam, those who immigrated with Muḥammad from Mecca to Medina, the unconverted Arab tribesmen of the oasis, and the Jewish tribes that had settled there.[43]

This document, alternatively known as the "Charter of Medina" or the "Constitution of Medina" (*ṣaḥīfat al-madīna*), expressly created a new polity through the agreement of its people. Its first sentence names the parties to the document – the Muslims who immigrated to Medina from Mecca, the Medinese who had converted to Islam, and those who come after them, who join them and wage war with them. It declares them to be a "single commonwealth, to the exclusion of all other people (*umma wāḥida min dūn al-nās*)."[44] The document then sets out several clauses dealing with principles of internal governance, including, recognizing the Prophet Muḥammad as the final arbiter of disputes among the parties to the document,[45] and obliging the believers to submit to a general system of law in lieu of the system of self-help that prevailed in pre-Islamic Arabia.[46]

[43] Muhammad Hamidullah, *The First Written Constitution in the World: An Important Document of the Time of the Holy Prophet*, 2nd rev. ed (Lahore: Sh. Muhammad Ashraī, 1968).
[44] Hamidullah, 41.
[45] Hamidullah, 48.
[46] Hamidullah, 47.

The document pre-empted the pre-existing tribal system and replaced it with a new order based on the unity of the Muslim commonwealth.[47] It declared the peace of the believers indivisible.[48]

The Charter also mentions Medina's Jewish tribes, a fact that has led some contemporary Muslim authors to argue that the Prophet's state was not based on religion. This interpretation of the Charter, however, seems to contradict the text's structure, its plain terms and its reception in Muslim historiography. Ibn Hishām (d. 213 or 218/828 or 833), author of an early biography of the Prophet Muhammad, reported that Ibn Isḥāq (d. 151/769), compiler of the oldest biography of the Prophet, described the text as an agreement between the believers, but one which included a treaty and covenant with Medina's Jews.[49] This implies that the Charter understood the Jewish tribes of Medina to be independent allies of the nascent Muslim commonwealth, but not a constituent element of the "people," albeit allies with substantial rights in the new order.

[47] Hamidullah, 45–46.
[48] Hamidullah, 46.
[49] `Abd al-Malik Ibn Hisham, *al-Sirah al-Nabawiyah* (Beirut: Dar al-Kitab al-`Arabi, 1990), 2:143.

Several features of the document deserve special mention in the context of understanding the Muslim juridical understanding of sovereignty. First, Muslim jurists seem to take the founding of the Muslim commonwealth as paradigmatic for the founding of all polities. While it is not clear whether they actually thought that all polities were founded through some initial act of agreement, it is clear that this assumption plays an important role in legitimatizing the idea of collective responsibility that distinguishes international law from domestic law whose organizing principle is individual responsibility. For Muslim jurists, because the ruled authorize the ruler to govern, his actions, from a legal perspective, are *their* actions, and they are therefore bound by those decisions.[50]

Second, by virtue of creating this political community, the believers acknowledge the Prophet as the head of that community, with final authority to resolve disputes among themselves. After the Prophet's death, the early Muslim community resolved conclusively that the Muslim commonwealth established in Medina would endure after the Prophet's death. The leaders of the Muslim commonwealth acted decisively to protect the unity of the Muslim commonwealth against would be secessionists. Accordingly, Muslim jurists, when

[50] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt 'alá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:102.

they articulated doctrines of international law, wrote from the assumption that there was one executive authority (*imām* or *khalīfa*) which all members of the Muslim commonwealth recognized or were under a legal obligation to recognize.

The legal unity of the Muslim commonwealth had important consequences for interactions between all persons lawfully present in the Muslim commonwealth. Because all such persons are legally at peace, the common law of Islam regulates all their interactions. Violence, therefore, between persons lawfully present within the Muslim commonwealth, never alters property entitlements, although it gives rise to duties of compensation for loss of life and property and possible criminal liability. Violence, when undertaken to vindicate a general principle of law, is regulated by the law of rebellion. The law of rebellion immunizes both the rebels and loyalists from duties of compensation arising out of losses of life, limb, and property they inflict on the other side. Neither, however, may seize the property of the their rivals except temporarily for the purpose of preventing them from obtaining a military advantage, and upon cessation of hostilities, all property, including personal weapons, seized by both sides must be restored to their true owners.[51] Apostasy (*ridda*), because it

[51] Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge, UK ; New York: Cambridge University Press, 2001).

amounts to the open repudiation of the legal tie to the Muslim polity, reintroduces the primordial state of war and justifies treatment of the apostate as an enemy who is subject to death unless he repents.[52]

Third, the Muslim commonwealth is a legal person, having its own capacity (*dhimma*) to enter legal relations with other legal persons – corporate or natural – based on the terms of an agreement. Non-Muslim communities, when they make peace with the Muslim commonwealth, may do so as individuals, in a corporate capacity, or both. The text of the Charter, for example, while it mentions only the various Jewish clans in Medina as parties, affirms that Jews, as individuals, have rights and obligations that are distinct from their rights and obligations as members of their clans. Accordingly, the Charter affirms that individuals' violations of the undertakings of the Charter result only in punishment of the guilty party, and is not a repudiation of the Charter by the legal person of which the offending party is a member.[53] In Muslim juridical thought, therefore, individuals from polities at peace with the Muslim commonwealth, at least when they are on the territory of the Muslim commonwealth, become bearers of both

[52] Intisar A. Rabb, *Negotiating Speech in Islamic Law and Politics: Flipped Traditions of Expression*, *Islamic Law and International Human Rights Law* (Oxford University Press), 146–47, accessed June 11, 2021, http://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199641444.001.0001/acprof-9780199641444-chapter-9.
[53] Hamidullah, *The First Written Constitution in the World*, 49.

rights and obligations under Islamic law. The Muslim conception of international law, therefore, is monist, and valid international agreements are automatically incorporated into domestic law.

Fourth, although the Prophet was the head of the community, and in that capacity could bind them all, each individual Muslim *also* had the capacity to create a provisionally binding obligation on the rest. This last concept, embedded in the text's declaration that "the word of the lowest of them binds them all (*yujīr ʿalayhim adnāhum*)," is reported in numerous sources of Muslim tradition, albeit with slight differences in wording, such as "the Muslims' pledge [of security] (*dhimmat al-muslimīn*) is indivisible, even the lowest of them bears it (*yasʿā bihā adnāhum*)," or "the lowest of them bears their pledge [of security] (*yasʿā bi-dhimmatihim adnāhum*)." This meant that individual Muslims had the authority to grant a degree of protection to enemies that all other Muslims were obliged to respect, at least provisionally, including the head of state. The right of individual Muslims to offer security to enemies was certainly important in containing violence on the battlefield. It also provided a framework in subsequent centuries for understanding the exercise of sovereignty in a context in which a plurality of Muslim states existed within a legal framework that deemed them to be coordinate jurisdictions of one Muslim commonwealth.

16.Jurisdictional categories

In Muslim juridical thought, a polity's legal order might consist of a composite set of communities, each with a different legal relationship to the polity. Accordingly, there is the core of the polity which, despite the anachronism of the expression, consists of its core group of citizens. But polities also have vassal relationships with other communities. These are generically known as a polity's *dhimma*, its vassals.[54] In Islamic law vassals retain certain rights of self-government and pay taxes (not tribute) to the Muslim commonwealth, and are therefore entitled to its protection, both from violation of their domestic legal rights and from the aggression of external enemies. The territory in which the *dhimma* dwell is called *dār al-dhimma*, but for international law purposes, it is deemed part of the territory of the annexing state.[55]

Polities that are at peace with one another are called *dār al-muwādaʿa* (also called *dār al-amān*) a "jurisdiction of non-aggression." In this case, each polity retains full control over its domestic law, unless a specific term in the peace

[54] This distinction is broadly analogous to Hobbes' distinction between commonwealth by institution and commonwealth by acquisition. The "core" consists of those who contracted among themselves to institute the sovereign state, while the vassals are those who join it through conquest or to avert conquest, but in exchange for their freedom, are granted liberty and protection. Thomas Hobbes, *Leviathan*, 1st ed., The Clarendon Edition of the Works of Thomas Hobbes; v. 3-5 (Oxford: Clarendon Press, 2012) (Chapters XVIII and Chapter XX).

[55] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:12.

agreement between the two polities authorizes the extra-territorial application of the other polity's laws. In certain cases, it was not clear whether a territory was a vassal of the Muslim commonwealth or merely at peace with it, as was the case with Cyprus during the foundational period.[56]

Finally, polities between which no peace exists are the *dār al-ḥarb*, and their interactions are governed by the default international common law of war.

The international law status of individuals was determined by an individual's domicile (*muqām*). A foreigner, therefore, could not stay on the territory of the Muslim commonwealth longer than one year without either converting to Islam or becoming a vassal.[57] The legal relationship of one polity to another, and by extension, the relationship of individuals from a particular polity to those of another, were derivative of the legal relationship existing between the two polities. Accordingly, if polity A and polity B were at peace, then their nationals were at peace. If no peace agreement was in force between A and B, their nationals were also in a relationship of war.[58] In most cases the law of the domicile (*ḥukm al-dār*) aligns with the subjective rights of the individual, such as

[56] Abū 'Ubayd al-Qāsim ibn Sallām, *Kitāb al-amwāl*, 220.
[57] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:55.
[58] Sarakhsī and Shaybānī, 5:9.

religion (*ḥukm al-dīn*), but sometimes they may conflict. In such cases jurists must determine whether the law of the domicile should prevail or that of the person.

17. "Law" in a state of nature

Muslim jurists rejected the idea that prior possession created a legal entitlement against the rest of the world. Ownership (*milk*) can only come into existence within the territory of a state (*dār*) that guarantees the possessor *secure possession*, *iḥrāz*, over his possessions. The specific contours of property rights, however, are always determined by reference to the ruler's positive law.[59] If the law of the polity, for example, recognizes the right to acquire the possessions of others by force, then Muslim jurists recognize that rule when adjudicating property interests arising within that polity.

The only partial exception to the absence of stable legal entitlements in the state of nature applies to interactions between two Muslims (or a Muslim and a non-Muslim at peace with the Muslim commonwealth). Muslims, jurists assert, are bound by the norms of Islamic law wherever they may be (*al-muslim multazim bi-ḥukm al-islām ḥaythu yakūn*).[60] Interactions between Muslims that take place in a state of nature are therefore *potentially* governable by the secular legal order of

[59] Sarakhsī and Shaybānī, 5:34-5.
[60] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:129-30.

the Muslim commonwealth, if the parties are able to present their claims before a Muslim court.

Even in this case, however, the rules of Islamic law apply incompletely to their interactions. The Iraqi jurists held that the more tenuous the relationship of the Muslim to the Muslim commonwealth, the less robust the legal remedies. Accordingly, while Muslims sojourning abroad retained the right to ask Muslim courts to enforce their property rights and rights to reimbursement for tortious conduct upon their return to Muslim territory (albeit incompletely in the case of intentional and non-intentional killing),[61] individuals who converted to Islam outside the Muslim commonwealth's territory could never seek vindication of their claims arising out of unlawful acts of other Muslims taking place prior to their immigration to the Muslim commonwealth.[62] A fortiori, enemy nationals who embrace Islam, become vassals of the Muslim commonwealth, or receive a grant of security, are not entitled to have a Muslim court settle their disputes that occurred prior to their conversion or entering into peace with the Muslim commonwealth.[63]

[61] Sarakhsī and Shaybānī, 5:130.
[62] Sarakhsī and Shaybānī, 5:130.
[63] Sarakhsī and Shaybānī, 5:37.

Sarakhsī explains this rule by arguing that legal inviolability (*ʿiṣma*) is a consequence of open and secure possession, something only shared polity, not shared religion, can guarantee. Shared religion provides inchoate grounds for a remedy because its effect is limited to those who believe in that religion. The effectiveness of a polity's legal system does not depend on subjective recognition: open and secure possession is an objective empirical fact that *compels* recognition.[64]

18. Establishing peace

Law, in the sense of an enforceable remedial system, arises only with the creation of political order. Law, peace, and political order are therefore inter-related in Muslim juridical thought. The Muslim commonwealth is the most secure basis for establishing peace, and therefore the security of persons and things, because it unites the subjective beliefs of its individual members who recognize the inviolability of the entitlements of others, with the irresistible coercive power of the state. Muslim jurists, however, also imagined possibilities for peace in the absence of universal adherence to Islam or a universal Muslim commonwealth. The next two sections discuss the two most important means for the

[64] Sarakhsī and Shaybānī, 5:130-31.

establishment of peace with non-Muslims: the grant of security/non-aggression pact and vassalage.

19.The grant of security (*amān*) and the non-aggression pact (*muwādaʿa*)

The most basic means by which peace can be established is the mutual commitment of two individuals to respect the inviolability of each other's lives and possessions. Such a pact goes by various terms, including *amān* (grant of security or safe passage); *muwādaʿa* (non-aggression); *ʿahd*, and related cognates, e.g., *muʿāhada*, *taʿāhud* (covenant); and, *hudna*, and related cognates, e.g., *muhādana* (truce).

Jurists typically use the term *amān* and its cognates to refer to a grant of security given to a particular person or a delimited group of persons. They applied the other terms to agreements between polities. Conceptually, however, they are similar insofar as they describe contractual commitments to respect the property and the person of the parties to the agreement as sacrosanct.[65]

In the formative period, sometimes the term *ṣulḥ* would also be used to refer to agreements between the Muslim commonwealth and non-Muslim

[65] Qalqashandī, *Subh Al-a'sha*, 13:322.

polities.[66] In the classical era, however, jurists restricted this latter term to agreements between different rulers within the Muslim commonwealth, on the theory that Muslims are legally at peace by virtue of their common adherence to Islam, so their agreements are "reconciliations," not grants of security.[67]

If the Muslim commonwealth entered a non-aggression pact with another polity, that non-aggression pact could be for a term of years, or it could be for an indefinite term, although al-Shāfiʿī limited the terms of treaties to ten years.[68] Despite the general understanding that the Muslim commonwealth should continually seek to expand its jurisdiction, foundational era jurists permitted the Muslim commonwealth to make peace agreements with non-Muslim states in situations where it was impractical to campaign against a particular group of non-Muslims, or they were non-hostile (*bihim intiṣāf*), and the terms of the agreement were consistent with Muslim interests (*al-naẓar*).[69]

The principle legal effect of peace is that a person's possessions and status at the time he or she makes peace with the Muslim commonwealth – whether through an individual grant of security or indirectly through peace with his or her

[66] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 2:3.
[67] Qalqashandī, *Subh Al-a'sha*, 13:329; 14:79.
[68] Shafi`i, *al-Umm*, 4:189.
[69] Shafi`i, 4:177.

polity – become recognized and protected by Islamic law. Indeed, the inviolability of their persons and properties becomes, by virtue of the covenant of peace, as inviolable as the religious inviolability of Muslims' persons and properties (*dhālik al-ʿahd fī ḥurmat al-taʿarruḍ li'l-amwāl wa'l-nufūs bi-manzilat al-islām*).[70] Muslims were to adhere to the terms of peace treaties scrupulously to avoid the appearance of treachery (*al-taḥarruz ʿan al-ghadr*).[71]

For the Hejazis and the Iraqis, this meant that even if the national of the other party, prior to the peace, had plundered property of Muslims or non-Muslim vassals, or taken them prisoners and enslaved them, and in each case, successfully carried the plundered property and captives back to his polity, establishing secure possession, the true owner, whether Muslim or a vassal, could not reclaim his or her plundered goods after peace was contracted.[72] Shāfiʿī, however, dissented strongly from this position.[73] As for Muslim and vassals that had been enslaved prior to the peace, if a national of the contracting party takes

[70] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 1:95.
[71] See, for example, Sarakhsī and Shaybānī, 4:238.
[72] Sarakhsī and Shaybānī, 4:82-83, 113; Ibn Rushd al-Jadd and 'Utbī, *Al-Bayān Wa-al-Taḥṣīl Wa-al-Sharḥ Wa-al-Tawjīh Wa-al-Ta'līl Fī Masā'il al-Mustakhrajah*, 3:65-66.
[73] Shafi`i, *al-Umm*, 7:387.

them to Muslim territory, he or she would be compelled to free them, but he would be entitled to fair compensation for their value.[74]

Personal promises of security made by a Muslim to a non-Muslim, while insufficient to create a legal order, were sufficient to create a moral obligation. Accordingly, if a Muslim is in enemy territory pursuant to a personal grant of security, he is morally prohibited from breaching that grant of security. If he does so, whether by means of violence or deception, to obtain property from the enemy, he is under a moral obligation to return it, or provide compensation if its return is impossible. A Muslim court, however, because the transaction took place on enemy territory, will not order him to do so for want of jurisdiction.[75]

If the Muslim commonwealth was a party to the non-aggression pact, then the foreigner could enter Muslim territory securely and enjoy the protections of Islamic law as though she were a member of the Muslim commonwealth until she returned home. If the agreement were with a polity, all the nationals of the

[74] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:32.
[75] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:39.

contracting party could also enter and stay in Muslim territory securely for up to one year.[76]

Nationals of the other party in this case could seek to enforce their domestic law in Muslim courts if a national of the Muslim commonwealth wrongfully obtained property from a national of the other party while on foreign territory. In this circumstance, subjects of the Muslim commonwealth are breaching an undertaking (*dhimma*) of the Muslim commonwealth, which gives the Muslim court jurisdiction to compel its national to return the wrongfully obtained property – or its value in money – to its foreign true owner.[77]

The structure of a non-aggression pact, however, entails that the contracting party retains a separate legal identity from the Muslim commonwealth. Islamic law therefore only applies to interactions that take place on the territory of the Muslim commonwealth. Interactions that take place on the contracting party's territory are governed by the contracting party's own law.[78]

In some circumstances, however, because Muslim jurists understood a non-aggression pact as endowing the nationals of the contracting party with individual

[76] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:55.
[77] Sarakhsī and Shaybānī, 5:39.
[78] Sarakhsī and Shaybānī, 5:28.

rights against the Muslim commonwealth, Muslim courts had to intervene in disputes among nationals of the contracting party if non-intervention would lead to Muslims committing an act of aggression against a foreign national. Muslims who purchased slaves from subjects of the non-Muslim party had a duty to ensure that such persons had either been enslaved prior to the treaty, or were not nationals of the contracting party, even if the domestic law of the contracting party permitted the enslavement of free persons.[79]

A non-aggression pact did not obligate the Muslim commonwealth to come to the aid of the contracting party if a third-party committed aggression against the contracting party's territory, its nationals, or their property. Even if aggression by third-parties took place on the territory of the Muslim commonwealth, there was no duty to intervene unless the agreement expressly obligated the Muslim commonwealth to come to their as if they were Muslims or vassals.[80] Shāfiʿī, however, argued that if there were Muslims, or Muslim-owned property present on the territory of the non-Muslim party, and the non-Muslim party is attacked by an enemy, the Muslim commonwealth must come to the aid of the non-Muslim party because doing so is necessary to protect the Muslims and their property.[81]

[79] Sarakhsī and Shaybānī, 5:26-7.
[80] Sarakhsī and Shaybānī, 5:113.
[81] Shafi`i, *al-Umm*, 4:207.

Iraqis recognized one exception to the limited duty of protection offered by a non-aggression pact: if non-Muslims are lawfully present on the territory of the Muslim commonwealth, pursuant to a grant of security or the terms of a non-aggression pact, and they lack the capacity to defend themselves (*lā manaʿata lahum*), their helplessness renders them, as a matter of domestic Islamic law, under the protection of the Muslim commonwealth. Accordingly, if they are taken captive or their property is plundered, the Muslim commonwealth must liberate them and return to them their plundered merchandise, as if they were Muslims or vassals.[82]

Because Muslim jurists understood peace treaties as bilateral undertakings, the Muslim commonwealth might be at peace with two different non-Muslim polities, A and B, who are at war with each other. Accordingly, if each raids the other's territory, taking property from the territory of the other, and enslaving their nationals, it is permissible for the Muslim commonwealth to permit the import into its territory property and persons captured by A (or B) from the territory of B (or territory of A).[83]

[82] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:113.
[83] Sarakhsī and Shaybānī, 5:34.

On the other hand, Muslim jurists also imagined the possibility of a "chain" of peace treaties pursuant to which a person from a polity that did not have a peace treaty with the Muslim commonwealth could obtain the benefits of another polity's peace treaty if that third person lawfully entered the territory of the polity at peace with the Muslim commonwealth, or if that third polity made peace with the polity at peace with the Muslim commonwealth.[84]

Non-aggression and recognition of the inviolability of life and property, while representing the minimum content of a non-aggression pact, were only a floor – parties could add additional stipulations which could increase the depth and breadth of the obligations undertaken pursuant to the peace agreement. Indeed, the Charter of Medina's provisions with respect to the Jewish clans of Medina could be read as going beyond a mere pledge of non-aggression to include obligations of mutual defense, and the agreement that the Prophet Muḥammad would be the ultimate arbiter of disputes among parties to the Charter.[85] Muslim diplomatic practice in the Middle Ages relied on the flexibility

[84] Sarakhsī and Shaybānī, 5:9-10.
[85] Hamidullah, *The First Written Constitution in the World*, 48.

inherent in the form of the non-aggression pact to negotiate numerous treaties with non-Muslim powers with provisions that went well-beyond non-aggression.[86]

Non-aggression pacts, however, suffered from important limitations. First, some schools of Islamic law, e.g., the Shāfiʿī's, did not permit a non-aggression pact to exceed ten years.[87] Even though other jurists did not limit the term of non-aggression pacts, the ephemeral nature of political authority in late antiquity and the Middle Ages meant that it was impractical to expect non-aggression pacts to last meaningfully beyond the lifespans of the rulers who negotiated them. There were some notable exceptions, specifically the peace that the early Muslim rulers of Egypt made with Nubia which lasted for centuries,[88] and a treaty that the fifth caliph, Muʿāwiya b. Abī Sufyān (r. 41-60/661-80), made with the Cypriots,[89] which

[86] For an example of a Crusader-era treaty, see Qalqashandī, *Subh Al-a'sha*, 14:31. For exemplars of medieval treaties between Muslim and Christian powers in the Mediterranean region, see John Wansbrough, "A Mamluk Letter of 877/1473," *Bulletin of the School of Oriental and African Studies* 24, no. 2 (February 1961): 200–213, https://doi.org/10.1017/S0041977X00091412; John Wansbrough, "The Safe-Conduct in Muslim Chancery Practice," *Bulletin of the School of Oriental and African Studies* 34, no. 1 (February 1971): 20–35, https://doi.org/10.1017/S0041977X00141552; P. M. Holt, "The Treaties of the Early Mamluk Sultans with the Frankish States," *Bulletin of the School of Oriental and African Studies* 43, no. 1 (February 1980): 67–76, https://doi.org/10.1017/S0041977X00110547; P. M. Holt, "Qalāwūn's Treaty with Acre in 1283," *The English Historical Review* 91, no. 361 (1976): 802–12; John Wansbrough, "Venice and Florence in the Mamluk Commercial Privileges," *Bulletin of the School of Oriental and African Studies* 28, no. 3 (October 1965): 483–523, https://doi.org/10.1017/S0041977X00071421.

[87] Shafi`i, *al-Umm*, 4:189.

[88] Jay Spaulding, "Medieval Christian Nubia and the Islamic World: A Reconsideration of the Baqt Treaty," *The International Journal of African Historical Studies* 28, no. 3 (1995): 577–94, https://doi.org/10.2307/221175.

[89] Abū ʾUbayd al-Qāsim ibn Sallām, *Kitāb al-amwāl*, 194. According to Abū ʿUbayd's report, this was a "permanent peace (*ṣulḥan dāʾiman*)," whose terms included an agreement that the Cypriots would pay the Muslims and the Byzantines each an annual tribute of 7,000 gold pieces, that they would display "sincere friendship to the Muslims (*naṣīḥa li'l-muslimīn*)," and warn them of Byzantine movements.

remained in force at least into the reign of Hārūn al-Rashīd (r. 170-93/786-809).[90] Second, non-aggression pacts according to most jurists could be repudiated upon due notice (*nabdh*) by either party before their expiry date, with only Shāfiʿī holding the view that that the Muslim ruler could only repudiate a treaty for cause.[91]

20. Vassalage (*dhimma*)[92]

Vassalage offered an intermediate solution between conversion to Islam and the instability of a non-aggression pact. It substituted for conversion to Islam because the non-Muslim undertook to abide by the secular rules of Islamic law (*al-dhimma khalafʿan al-islām fī'-ltizām aḥkām al-islām fī'l-dunyā*), thus achieving *political*, if not religious, integration into the Muslim commonwealth.[93] Unlike a non-aggression pact or grant of security, the Muslim commonwealth could not

[90] Abū 'Ubayd al-Qāsim ibn Sallām, 220 (noting that Muʿāwiya's treaty with the Cypriots was still in force during the time of ʿAbd al-Malik b. Ṣāliḥ (d. 196/811), governor of the Byzantine border region during the reign of Hārūn al-Rashīd).
[91] Shafi`i, *al-Umm*, 4:185; Qalqashandī, *Subh Al-a'sha*, 13:23.
[92] Use of the term *dhimma* for the relationship of vassalage is a specialized case of the more generic concept of *dhimma* in the sense of "capacity to undertake obligations" discussed above. Muslim jurists used the term *dhimma* for this relationship because it entailed an obligation that bound the entire Muslim community as a collective body to treat vassals as though they were Muslims with respect to Islam's secular rules, in contrast to peaceful foreign nationals whose rights were limited to what was set out in treaties.
[93] See, for example, Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 4:315.

repudiate the relationship of vassalage once contracted. Unlike grants of security, which any Muslim could grant to any non-Muslim, only the head of state (*imām*), or his duly authorized representative, can contract a relationship of vassalage.[94]

The head of state could grant vassalage to individual non-Muslims, or to a non-Muslim polity through an agreement with its ruler, but only if the latter agreed to abide by Islamic law. Accordingly, while the Muslim commonwealth could legitimately enter a non-aggression pact with a non-Muslim king who arbitrarily confiscates the property of his subjects, and kills or enslaves them at will, the Muslim ruler is not allowed to take such a ruler as a vassal. Because a vassal state is part of the Muslim commonwealth, it is legally under the power (*manaʿa*) of the Muslim commonwealth, and the Muslim commonwealth cannot permit, on a prospective basis, the non-Muslim ruler to continue enslaving and killing his people, and arbitrarily seizing their properties.[95]

Vassalage also entailed an undertaking by the vassals to pay an annual poll-tax (*jizya*) that was levied on able-bodied adult males to the Muslim commonwealth. In exchange, the Muslim commonwealth obligated itself to protect its vassals, and their properties, to the same extent, and on the same

[94] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 1:256.
[95] Muḥammad ibn Ahmad Sarakhsī, *Kitāb Al-Mabsūṭ*, ed. Muḥammad Rāḍī, Al-Ṭab'ah 2 (Bayrūt: Dār al-Ma'rifah, 1972), 9:85.

terms, that it did Muslims.[96] Accordingly, if an enemy polity raided the territory of a non-Muslim vassal polity, and carried off free persons, their property, or both, the Muslim commonwealth was under an obligation to rescue the free persons from captivity, and whatever property belonging to them that the enemy plundered. Just as Muslims, by virtue of their adherence to Islam, are bound to respect the norms of Islamic law anywhere they may be, the same principle applies to vassals: their possessions are perfected as against Muslims wherever they may be, as if they are Muslims.[97]

For the Iraqis, all non-Muslims, except for Arab pagans, were eligible to become vassals of the Muslim commonwealth.[98] The Hejazis admitted the possibility that even Arab polytheists could become vassals of the Muslim commonwealth.[99] Shāfiʿī, however, limited eligibility to scripturalists, i.e., Christians, Jews, and Zoroastrians.[100]

[96] Shafi`i, *al-Umm*, 4:207.
[97] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 4:83.
[98] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 1:132.
[99] Ibn Rushd al-Jadd, *Al-Muqaddimāt al-Mumahhidāt: Li-Bayān Mā Iqtaḍathu Rusūm al-Mudawwanah Min al-Aḥkām al-Sharʿīyat Wa-al-Taḥṣīlāt al-Muḥkamat al-Ummahāt Masā'ilihā al-Mushkilāt*, ed. Muḥammad Ḥajjī, al-Ṭabʻah 1.-- (Bayrūt: Dār al-Gharb al-Islāmī, 1988), 1:377. For Mālikīs, however, vassalage was not an option for non-Muslim Qurayshites (Arabs of the Prophet Muḥammad's tribe) or apostates. Ibid. 376.
[100] Shafi`i, *al-Umm*, 4:172-74.

According to most jurists, vassalage requires mutual consent; however, al-Shāfiʿī obliges the Muslim ruler to accept an offer by non-Muslims who wish to enter this relationship.[101] In some extraordinary cases, such as if the enemy treacherously kills Muslim hostages under its control, the Imam – because he cannot retaliate in kind against the foreign hostages under his control, who are themselves beneficiaries of a grant of security from theMuslim commonwealth – can instead impose on them vassal status .[102] If he does so, the Imam could not then unilaterally strip them of their new status and deport them later, even to obtain the return of Muslim prisoners from the enemy. Even if the non-Muslim party threatens to kill their Muslim hostages unless the Imam agrees to return the former hostages, the Imam may not force them to do so, nor can he permit them to return if he reasonably fears for their safety.[103]

There are other cases in which Islamic law prohibits vassals from voluntarily exposing themselves to the dangers of non-Islamic legal systems. The Imam, for example, must refuse the enemy's demand to deliver minors of vassals to serve as

[101] Shafiʿi, *al-Umm*, 4:176.
[102] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:44.
[103] Sarakhsī and Shaybānī, 5:45-46.

hostages, regardless of the consent of the children and their parents, on account of the legal duty to protect the well-being of the child.[104]

Muslims were also under an obligation to risk their own lives, when necessary, to rescue vassals from captivity just as they would to rescue Muslims. Accordingly, if a group of Muslims who have the capacity to engage in self-defense (*ahl manaʿa min al-muslimīn*) are present in enemy territory pursuant to a grant of security, and they encounter a group of captives, whether vassals or Muslims, they must seek to liberate them, even if this requires them to repudiate their grant of security and fight.[105]

In the formative period, whether a particular territory was a vassal or merely at peace with the Muslim commonwealth was unclear, as was the case with Cyprus. Although a treaty had been in force between the Muslim commonwealth and the Cypriots for well-over a century, Hārūn al-Rashīd's governor along the Byzantine frontier, ʿAbd al-Malik b. Ṣāliḥ (d. 196/811), sought legal advice whether he could declare them to be in breach of the peace. The governor solicited the views of the leading jurists of the day and received responses from at least eight jurists, including Mālik b. Anas, al-Layth b. Saʿd, and

[104] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:46.
[105] Sarakhsī and Shaybānī, 5:112.

al-Awzāʿī. Although a majority of them advised the governor against terminating the treaty, some of them understood the Cypriots to be vassals while others thought of them as an independent people at peace with the Muslims. Ibn Sallām himself described the Cypriots as being vassals of both the Muslims and the Byzantines.[106]

It was not uniformly recognized at the beginning of the formative period that vassals enjoyed the same protection against enslavement by the enemy as did Muslims. During the reign of the Umayyad caliph Hishām b. ʿAbd al-Malik (r. 105-125/724-43), the enemy captured some vassals and sold them into slavery to Cypriots, who in turn sold them to Muslims. The captives asserted their freedom, but the caliph ruled they should be treated as the slaves of the Muslims who purchased them. The prominent Egyptian jurist al-Layth b. Saʿd (d. 175/791), a follower of the Hejazi tradition, later criticized that decision, saying "It is my opinion that the Muslims' treasury is obliged to ransom them [from their captors] and that they be restored to their status as [free] vassals."[107]

21. Islam, Peace and Expansion of the Muslim Commonwealth

[106] Abū 'Ubayd al-Qāsim ibn Sallām, *Kitāb al-amwāl*, 220.
[107] Abū 'Ubayd al-Qāsim ibn Sallām, *Kitāb al-amwāl*, 168.

From the premise that the Muslim commonwealth is the most secure foundation for enduring peace, Muslim jurists of the foundational period deemed the expansion of the frontiers of the Muslim commonwealth to be an unqualified good. Accordingly, they deemed campaigning against non-believers (*jihād*) to be an obligation of the Muslim commonwealth, albeit one that did not apply to individual Muslims unless they were needed for a campaign.[108] While only Shāfiʿī included a systematic theological argument for the universality of the Muslim commonwealth,[109] both Iraqi and Hejazi jurists assumed the desirability of expanding the Muslim commonwealth's territory, including by means of armed conflict if necessary. Accordingly, peace with enemy states should be made only when the Muslim commonwealth had reason to fear attack from the enemy, and it was not feasible to incorporate them peaceably into the Muslim commonwealth, whether by conversion to Islam, or by making them vassals.[110]

Sufyān al-Thawrī (d. 161/778), a prominent Iraqi scholar, was a notable dissenter to this proposition. He believed that offensive operations were only obligatory in response to the enemy's aggression.[111]

[108] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 1:131.
[109] Shafi`i, *al-Umm*, 4:159.
[110] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:25.
[111] Sarakhsī and Shaybānī, 1:131.

By the sixth/twelfth century, Muslim jurists like the Andalusian Ibn Rushd the Grandfather reformulated the Muslim commonwealth's obligation to expand its frontiers to one that emphasized defense of the frontiers. If the ruler maintained well-fortified defenses along the frontier to protect the Muslim community from the aggression of non-Muslims, he discharged the collective obligation of *jihād*. *Jihād* became an individual obligation only in circumstances where the enemy attacked a town or garrison, in which case everyone in the vicinity of the attack was obliged to muster to repel the invaders.[112] Ibn Rushd's Ḥanafī contemporary, Burhān al-Dīn al-Marghīnānī (d. 593/1197), writing at the other end of the Muslim world in Central Asia, interpreted the obligation to conduct *jihād* as being fulfilled through peace treaties that secured the lives, persons and freedom of Muslims.[113]

Although Muslim jurists also discussed the duty of fighting against the enemy in defense of Muslims, vassals, and Muslim territory,[114] the majority of the rules Muslim jurists discussed concerning fighting, including, limitations on warfare and targeting, were all in the context of offensive operations. Muslim

[112] Ibn Rushd al-Jadd, *Al-Muqaddimāt al-Mumahhidāt*, 1:347.
[113] Youcef L Soufi, "From Conquest to Co-Existence: Burhān al-Dīn al-Marghīnānī's (d. 593/1197) Re-Interpretation of Jihād," *Journal of Islamic Studies* 32, no. 2 (May 1, 2021): 203–36, https://doi.org/10.1093/jis/etab009.
[114] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt 'alá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:21.

jurists do not seem to have been equally concerned with regulating how Muslims engaged in defensive operations, except to say that Muslims should not submit to the enemy unless they lack the capacity to resist effectively.[115]

Because of the religious element entailed in *jihād*, Muslim jurists imposed, in principle, on Muslim forces the obligation first to invite the enemy to become Muslims (*daʿwa*).[116] This obligation paralleled reports in Muslim tradition that the Prophet Muḥammad sent letters to neighboring rulers, such as the Byzantine emperor Heraclius (r. 610-641), and the Sasanian ruler, in which he invited them to become Muslims.[117] For many of the jurists of the foundational period, however, the duty of calling non-Muslims to Islam lapsed if the enemy had already been invited to become Muslim and had been offered the chance to become vassals.[118] For those that continued to insist on the obligation of an invitation to become Muslim, the invitation no longer served the religiolus function of calling people to Islam but rather the legal function of giving the enemy notice (*taḥdhīr*) that the Muslims intended to initiate hostilities to ward off potential accusations that Muslims waged war against their enemies

[115] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:3.
[116] Sarakhsī and Shaybānī, 1:56-57; Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:41.
[117] Ahmad ibn `Ali Ibn Hajar al-`Asqalani, *Fath al-bari sharh sahih al imam Abi Abd Allah Muhammad b. Ismail al-Bukhari / Ibn Baz, `Abd al-`Aziz ibn `Abd Allah.* (Beirut: Dar al Kutub al-'Ilmiyya, 1989), 6:135-37 and 8:159.
[118] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 1:57.

treacherously. For this latter group, the duty varied depending on the nature of the campaign: a small raiding force – assuming a state of war existed – had no such obligation, while a great army did. The second function associated with an ongoing duty to invite the enemy to become Muslim was apologetic: to defend Muslims against the charge that they went to war seeking plunder and power (*ghalaba*), and indeed, according to one report, to make clear to Muslims themselves that the motive for fighting was religion, not power.[119] The religious motivation behind offensive *jihād* operations also explained the disagreement regarding whether non-Muslim forces could participate in these campaigns against the enemy.[120] Enemy territory could be incorporated into the Muslim commonwealth either by force of arms (*ʿanwa*) or via treaty (*ṣulḥ*). If via the latter, the properties and status of the persons in the annexed territory were confirmed by the treaty, whereas in the former case, their property and persons would be forfeited to the Muslim commonwealth.

[119] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:40-42; Ibn Rushd al-Jadd and ʻUtbī, *Al-Bayān Wa-al-Taḥṣīl Wa-al-Sharḥ Wa-al-Tawjīh Wa-al-Taʻlīl Fī Masā'il al-Mustakhrajah*, 2:546-47, 3:85.

[120] The Hejazis categorically prohibited non-Muslim participation in Muslim offensive operations. Ibn Rushd al-Jadd and ʻUtbī, *Al-Bayān Wa-al-Taḥṣīl Wa-al-Sharḥ Wa-al-Tawjīh Wa-al-Taʻlīl Fī Masā'il al-Mustakhrajah*, 3:6; the Iraqis permitted it provided the non-Muslims were under Muslim command authority. Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 4:191.

The legal effect of conversion to Islam – whether voluntarily or by operation of law, as could take place in the case of minors in certain circumstances (see below) – was to endow that person with moral inviolability as against other Muslims and vassals in conditions of war, and political inviolability upon immigration to the Muslim commonwealth. Any enemy national who converted to Islam while in enemy territory automatically received amnesty for acts committed prior to his conversion, including, absolution from any duty to reimburse or provide restitution to Muslims or vassals for losses they caused to their property or lives while they were enemy nationals.[121] Furthermore, all of a convert's possessions at the time of conversion immediately became legitimate (and therefore inviolable) property entitlements, including their slaves, even if they were obtained using means that would have been invalid under the norms of Islamic law.[122] The only the exception was the convert's real property: real property was deemed to be, ultimately, the property of the ruler, and accordingly, the land owner's status as a Muslim did not endow his land holdings with any inviolability in the event that Muslims conquered that territory.[123]

22. Restrictions on Targeting in Islamic Law

[121] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:57.
[122] Sarakhsī and Shaybānī, 5:240-41.
[123] Sarakhsī and Shaybānī, 5:242-43.

Once in the field and on campaign, Muslim jurists generally interpreted the law to prevent wanton violence, but not to prevent the successful prosecution of the campaign. An outstanding example is in their interpretation of the instructions the first Muslim caliph, Abū Bakr (r. 11-13/632-34), gave to the Muslim army before it set out on what its successful campaign against the Byzantines in the Levant: despite his categorical order prohibiting the army from destroying the orchards and vines of the enemy, and from slaughtering their livestock except to eat, the foundational era jurists took these limitations either as non-binding,[124] or particular to the Levantine campaign.[125] Even al-Shāfiʿī, who prohibited Muslims, while on campaign, from destroying the enemy's animals solely to deprive the enemy of their use (al-Shāfiʿī, *al-Umm*, 4:141)),[126] qualified the other restrictions found in Abū Bakr's instructions in light of military necessity.

While it was illegal to target non-combatants – principally women, children, the insane and old men[127] – this prohibition was interpreted to mean "intentionally."[128] The incidental deaths of non-combatants resulting from indiscriminate weapons such as catapults (*majānīq*) and incendiary weapons were

[124] Sarakhsī and Shaybānī, 4:221.
[125] Sarakhsī and Shaybānī, 1:31-33.
[126] Shafi`i, *al-Umm*, 4:141.
[127] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 4:186.
[128] Shafi`i, *al-Umm*, 4:239.

tolerated,[129] relying in part on a widely transmitted report in which the Prophet did not condemn a nighttime raid against the enemy which resulted in the unintentional death of women and children,[130] another report that he used a catapult in the siege of al-Ṭāʾif, a town in the Hejaz,[131] and military necessity.[132] The Hejazis distinguished between the use of catapults against enemy fortresses – which was permitted even if it accidentally hit non-combatants – and the use of incendiary weapons in closed spaces where women and children might be. In this latter case they should only be used in naval encounters, where military necessity required it, despite the threat to non-combatants.[133]

While the Iraqis were more willing to endorse tactics that would give the Muslims a military advantage over their foes, such as poisoned weapons and incendiary weapons,[134] the Hejazis were more reluctant to authorize the use of these weapons unless the enemy did so first.[135] Saḥnūn, a leading Hejazi scholar

[129] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 4:221; Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:66.
[130] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 4:222.
[131] Muḥammad ibn ʿĪsā Tirmidhī, *Al-Jāmiʾ al-ṣaḥīḥ*, 2nd Ed. (Cairo: Muṣṭafa al-Bābī al- Ḥalabī, 1975), 5:94, hadith no. 2762.
[132] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 4:221-22; Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:66.
[133] Ibn Rushd al-Jadd and ʻUtbī, *Al-Bayān Wa-al-Taḥṣīl Wa-al-Sharḥ Wa-al-Tawjīh Wa-al-Taʻlīl Fī Masāʾil al-Mustakhrajah*, 3:29.
[134] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 4:227.
[135] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:66, 68–69.

from North Africa, suggested a principle of proportionality in the use of indiscriminate weapons, prohibiting the use of incendiary weapons against enemies in a closed space when it was possible to drive them out using a less deadly tactic, such as smoke.[136] The Umayyad caliph, ʿUmar b. ʿAbd al-ʿAzīz (r. 717-20/99-101), reportedly had wished to come to an arrangement with the Byzantines prohibiting the use of incendiary devices.[137]

Likewise, Abū Bakr's prohibition against killing old men and monks was diluted by the requirement that they be wholly removed from fighting, including in advisory capacities.[138] Women and old men, too, if they participated in fighting, could be killed.[139] Shaybānī made clear that targeting was not based on unbelief, but only for participation in fighting, actual in the case of women, the chronically ill, the blind, amputees, and old men, and potential, in the case of fighting-age men (*muqātila*). The definition of "fighting men" excluded males under the age of 15, provided they had not reached puberty, even if they fought.[140]

[136] Ibn Abī Zayd al-Qayrawānī, 3:67.
[137] Ibn Abī Zayd al-Qayrawānī, 3:67.
[138] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 4:196-97.
[139] Sarakhsī and Shaybānī, 4:186.
[140] Sarakhsī and Shaybānī, 5:80-81; Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:74.

Muslims were to avoid killing Muslims who might be present in enemy territory, particularly if the enemy had taken them captive. Whether that risk was sufficient to foreclose the use of tactics that imposed a substantial risk of killing non-combatants, including Muslim prisoners, such as catapults, incendiary weapons, and cutting off supplies, was a point of contention between the Hejazis and the Iraqis, with the former being more reluctant to authorize such tactics than the latter.[141]

23.Treatment of Prisoners

Upon defeat of their enemy in battle, the Muslim ruler (or his duly authorized representative), had to decide the fate of the enemy's surviving fighting men. Most jurists believed the ruler was free to put the captured fighting men who were subdued by force of arms – rather than surrendering when they still had fight left in them – to the sword, although a minority of jurists did not permit executing prisoners in any circumstances.[142] Hejazi teachings on the treatment of prisoners depended on the circumstances of their capture: if they surrendered

[141] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt 'alá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:66-68.

[142] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 3:124-25; Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt 'alá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:71. For a contrary reading of the early cases, see Lena Salaymeh, "Early Islamic Legal-Historical Precedents: Prisoners of War," *Law and History Review* 26, no. 3 (2008): 521–44, https://doi.org/10.1017/S0738248000002558.

when they still had fight in them, they could not be enslaved or put to the sword, but if they surrendered only after their resistance was substantially but not completely overcome, they could be enslaved but not killed. Only those captured after being completely overpowered could be put to the sword.[143] Iraqi jurists recognized a similar distinction.[144]

Jurists, however, discouraged the Imam from putting the enemy's fighting men to the sword, except in circumstances where the prisoner represented a continuing threat to the Muslims.[145] Once the ruler (or his authorized representative, such as a battlefield commander) decided to spare their lives (*istiḥyāʾ*), the decision was irreversible, and the captive soldiers were, by operation of law, enslaved.[146] The decision to spare their lives could be implied from the actions of their Muslim captors. For example, if they chose to make use of the prisoners– such as for intelligence (*dilāla*), their labor, or their practical skills (*ṣanʿa*) – or if their lives were spared in anticipation of a possible exchange

[143] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:71.
[144] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 1:245.
[145] Sarakhsī and Shaybānī, 3:125; Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:74.
[146] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:72; Ibn Rushd al-Jadd and ʻUtbī, *Al-Bayān Wa-al-Taḥṣīl Wa-al-Sharḥ Wa-al-Tawjīh Wa-al-Taʻlīl Fī Masāʾil al-Mustakhrajah*, 3:78; Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 3:127.

of prisoners, the Muslim captors were deemed to have made the legal decision to spare their lives.[147]

While male captives could avoid execution if they embraced Islam, they could avoid enslavement only if they could prove that they had become Muslims *prior* to their capture.[148] Muslims were not allowed to pressure their captives into adopting Islam but they could place them in chains to prevent them from escaping.[149] Muslims could not torture their prisoners to obtain information, and if the Imam decided to put them to death, it should be done through a swift-blow to the neck, without unnecessary suffering.[150]

Captives, along with the enemy's moveable property seized while campaigning on enemy territory, were property of the Muslim commonwealth until the military returned to Islamic territory. Upon returning to Muslim territory, the ruler was to divide the captives and the booty between the state – which took a one-fifth share (*khums*) of the spoils – and the soldiers on the campaign, who divided the remaining four-fifth of the captured property and prisoners.[151] Women

[147] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt 'alá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:72.
[148] Ibn Abī Zayd al-Qayrawānī, 3:71.
[149] Ibn Abī Zayd al-Qayrawānī, 3:76.
[150] Ibn Abī Zayd al-Qayrawānī, 3:72-73.; Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 3:127.
[151] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 3:136.

and children, because of their immunity from killing, legally took the status of property from the moment of their capture, and they, along with male captives who were not fit for combat, could be exchanged for property as long as they were on enemy territory, or if the army had already returned to Muslim territory, they had not yet been divided among the soldiers.[152]

Jurists in the foundational period frowned upon exchanging enemy prisoners – particularly their fighting men – for property, and many prohibited it outright.[153] The ruler was under a general duty to seek the return of all Muslims held as captives by the enemy, even if that came at tremendous cost to the treasury.[154] This duty probably explains why foundational-era jurists insisted that the ruler should exchange enemy prisoners only for Muslim captives.[155]

The importance of ransoming Muslim prisoners from the enemy in the foundational era is well-expressed in a report attributed to the Umayyad caliph, ʿUmar b. ʿAbd al-ʿAzīz. When he dispatched an ambassador to redeem Muslim prisoners, the ambassador asked whether he should ransom Muslims, free and

[152] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:326.
[153] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 4:298.
[154] Ibn Rushd al-Jadd and ʻUtbī, *Al-Bayān Wa-al-Taḥṣīl Wa-al-Sharḥ Wa-al-Tawjīh Wa-al-Taʻlīl Fī Masāʼil al-Mustakhrajah*, 2:581, 3:80.
[155] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 4:296.

slave, who voluntarily fled to enemy territory. According to Ibn Sallām, "ʿUmar b. ʻAbd al-ʿAzīz that day was asked about the various classes of people constituting the Muslim garrison (*wa lam yudhkar lahu ṣinf min al-nās min jund al-muslimīn*), and ordered that they all must be ransomed."[156] Indeed, prisoner exchange during the formative period was the most significant catalyst for the increased, and increasingly elaborate, diplomatic exchanges between the Muslim commonwealth and the Byzantines.[157]

Prisoners in the state's possession were the first source for exchanges of prisoners, but the ruler could also compel individual Muslims who held enemy captives as slaves to return them, upon payment of compensation, for purposes of effecting a prisoner exchange. This power extended to female slaves as well as the enemy's fighting men.[158] If, however, between the time of capture and the proposed prisoner exchange, the enemy prisoner had converted to Islam, the ruler could not exchange him or her for a Muslim prisoner, even if the prisoner was still a slave. Similarly, if the enemy prisoner had been manumitted, but

[156] Abū 'Ubayd al-Qāsim ibn Sallām, *Kitāb al-amwāl*, 169.
[157] Nicholas Drocourt, *Christian-Muslim Diplomatic Relations.An Overview of the Main Sources and Themes of Encounter (600-1000)*, *Christian-Muslim Relations. A Bibliographical History. Volume 2 (900-1050)* (Brill, 2010), 64–65, https://doi.org/10.1163/9789004216181_004; Hugh Kennedy, "Byzantine-Arab Diplomacy in the Near East From the Islamic Conquests to the Mid Eleventh Century," in *Arab-Byzantine Relations in Early Islamic Times* (Routledge, 2004), 137; Vaiou, "Diplomacy in the Early Islamic World : A Tenth-Century Treatise on Arab-Byzantine Relations."
[158] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 4:311-13.

remained in Muslim territory as a vassal, the ruler could not compel him or her to return to her former state.[159]

If, however, after the captives were distributed among the soldiers, an individual Muslim in possession of an enemy captive agreed with an enemy national to release him for a sum of cash or other property, Hejazi jurists enforced the terms of the agreement, even if the Muslim later discovered that his prisoner was a nobleman or a leading officer.[160] By the sixth/twelfth century, however, Mālikī jurists had come to view the payment of cash for enemy prisoners, even if they were known to be mighty warriors, to be an acceptable option for the Muslim ruler.[161]

There was a presumption against exchanging the enemy's fighting men – the most dangerous threat to the Muslim community – without receiving Muslim prisoners, or some other clear benefit, in return.[162] Indeed, the Iraqis in the foundational era counseled the ruler that returning the enemy's fighting men should be the last resort in securing the return of Muslim prisoners, it being

[159] Sarakhsī and Shaybānī, 5:55.
[160] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt 'alá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:326.
[161] Ibn Rushd al-Jadd and 'Utbī, *Al-Bayān Wa-al-Taḥṣīl Wa-al-Sharḥ Wa-al-Tawjīh Wa-al-Ta'līl Fī Masā'il al-Mustakhrajah*, 2:562-63.
[162] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 2:238.

preferable to provide the enemy with money or even war material such as armor and weapons – if they were willing to accept them – over returning to them their soldiers.[163] Conversely, the obligation to liberate prisoners in the custody of the enemy – whether Muslims or vassals – must have provided a strong incentive to spare the lives of the enemy's fighting men despite the legality of putting them to death. Even after control of prisoners was given to private persons, Hejazi jurists emphasized that their masters were not allowed to kill them if they attempted to escape, even if enemy forces were nearby, or even abandon them to their fate if the prisoner, for example, lost the strength to keep marching.[164] The practical incentive to preserve the lives of the enemy's fighting men in order to exchange them for Muslim captives was also reflected in the advice given by Hejazi jurists to Muslim soldiers to surrender to the enemy rather than fight to the death if the enemy was known to exchange prisoners.[165]

As for small groups of enemy nationals captured on Muslim territory, Muslim jurists disagreed on their treatment. The majority of the Hejazis held that if they claimed a peaceful purpose, such as trade, or that they came to arrange a

[163] Sarakhsī and Shaybānī, 4:337.
[164] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:74.
[165] Ibn Abī Zayd al-Qayrawānī, 3:54.

prisoner exchange or to learn about Islam, and the circumstances of their capture did not cast doubt on their claim, their statements were to be credited, and they could not be treated as captives. In this case, the ruler could choose to give them a formal grant of security, offer them the status of vassals or deport them. If the ruler had made a declaration to the enemy that he would grant vassalage to anyone who crossed the border and settled in the Muslim commonwealth, he was not free to threaten them with a choice between deportation and enslavement.[166] If, on the other hand, the circumstances of their capture contradicted their claim of a peaceful intent, e.g., they claimed they came for commerce, but were well-armed and lacked commercial goods, they were taken captive, and the ruler would determine their fate as he would with any enemy prisoner captured on the battlefield.[167]

If they were captured beyond the frontier *en route* to Muslim territory, their claim of peaceful intent was credited. Accordingly, the ruler or his authorized representative would decide whether to grant them safe passage to Muslim territory, or turn them back, but they could not be taken prisoner.[168]

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[166] Ibn Abī Zayd al-Qayrawānī, 3:125; Ibn Rushd al-Jadd and ʻUtbī, *Al-Bayān Wa-al-Taḥṣīl Wa-al-Sharḥ Wa-al-Tawjīh Wa-al-Taʻlīl Fī Masāʼil al-Mustakhrajah*, 2:607.
[167] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:127-28.
[168] Ibn Abī Zayd al-Qayrawānī, 3:125.

24.Truces, Ceasefires and Grants of Security

Not all encounters with the enemy, however, concluded in a decisive military outcome. The enemy was entitled to make peace with the Muslim community as long as it possessed the capacity for self-defense. Likewise, an individual enemy soldier could negotiate terms of surrender until the moment he was overcome in battle. Muslim jurists generally interpreted ambiguous communications between the Muslims and the enemy in favor of the enemy and in favor of establishing a truce, even if the truce was only provisional.

Grants of security could be explicit, whether or not in a language understood by the enemy, or implicit, based on conduct, such as a wave of the arm. If a Muslim soldier, for example, called out to an enemy soldier, or gestured to him, the enemy was entitled to treat it as an offer of security.[169] Although the second Muslim caliph, ʿUmar b. al-Khaṭṭāb (r. 634-44/13-23) reportedly threatened Muslim soldiers with execution if they lured enemy soldiers into surrendering with promises of security only to kill them, Mālik interpreted it as a stern warning to Muslim soldiers in the field.[170] Mālik, however, obliged the ruler

[169] Ibn Abī Zayd al-Qayrawānī, 3:75; Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 1:250.
[170] Mālik ibn Anas, *Al-Muwaṭṭa'*, 2019, 360.

to instruct soldiers on their duty to respect the lives of enemy soldiers who surrendered in reliance on an apparent offer of security.[171]

If there was factual ambiguity whether a group of enemy nationals had been overpowered militarily or had laid down their arms in reliance on an offer of security, jurists preferred to err on the side of the latter. This principle was especially pronounced in naval warfare.[172] Saḥnūn stated that in his day a claim that the enemy had surrendered unconditionally in a naval battle had to be documented in a writing (*musajjal*). Accordingly, while grants of security conditioned upon enslavement (rather than execution) or being granted the status of vassals were theoretically binding, unless these terms were duly recorded, enemy sailors were deemed to have surrendered under an unrestricted promise of security that required the Muslim commonwealth to deport them to a place of safety.[173]

25. Who is Authorized to Grant Security?

A fundamental principle of Islamic international law, with its roots in the Charter of Medina, is that individual Muslims had *prima facie* authority to offer peace

[171] Mālik ibn Anas, 360; Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:75.
[172] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:75-76.
[173] Ibn Abī Zayd al-Qayrawānī, 3:78.

terms to the enemy which, if accepted, were provisionally binding on the Muslim community until formally repudiated by the ruler. Mālik also reported that the Prophet Muḥammad ratified a grant of safe passage given by Umm Hāniʾ b. Abī Ṭālib to a pagan that her brother, ʿAlī b. Abī Ṭālib, had threatened to kill.[174]

All free Muslims, male and female, therefore, had this authority, as well as intellectually mature minors. Whether a Muslim slave could do so was a disputed point among the jurists, with some Iraqis permitting it if the slave was part of the Muslims' fighting men.[175] Most foundational-era jurists did not authorize vassals to give binding grants of security to the enemy with the exception of the Hejazi authority, Ibn al-Qāsim.[176] Once a foreign national received a grant of security from a Muslim, if he then suffered an injury to his person or property at the hands of a Muslim or a vassal, he or she could bring a claim directly in Muslim court against those who caused him or her the injury.[177]

The crucial condition for the exercise of this inherent authority according to the Iraqis is that the Muslim offeror of security did so to further the well-being of

[174] Ibn Abī Zayd al-Qayrawānī, 3:78; Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 1:175-77; Mālik ibn Anas, *Al-Muwaṭṭa'*, 2019, 162, no. 418.
[175] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt 'alá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:78-79; Sarakhsī, *Kitāb Al-Mabsūṭ*, 1:177-78.
[176] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt 'alá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:80; Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 1:178.
[177] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 179–80.

the Muslim community (*nuṣrat al-dīn*/*al-naẓar li'l-muslimīn*).[178] For the Hejazi jurists, the validity of a grant of security turned on its voluntariness.[179]

Muslims were therefore under no categorical obligation to respect grants of security given by Muslim captives to the enemy. According to the Hejazis, if a Muslim was on enemy territory, his promise of security to enemy nationals was provisionally valid only if the enemy had given him a promise of security, even if it was conditioned on the Muslim reciprocating. Individual grants of security were valid until such time as the ruler formally repudiated them and conveyed the enemy to a point of security, even if the promise was given in contravention of the ruler's orders.[180] For the Iraqis, any promise of security a Muslim gives to enemy nationals while on their territory is void (*bāṭil*) *ab initio* insofar as it is conclusively presumed that he can only be acting to further his private interests in such circumstances.[181] In exceptional circumstances, however, a promise of security made by a captive would nevertheless be honored. Shaybānī gives the

[178] Sarakhsī and Shaybānī, 1:176, 178.
[179] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt 'alá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:83.
[180] Ibn Abī Zayd al-Qayrawānī, 3:83; Ibn Rushd al-Jadd and 'Utbī, *Al-Bayān Wa-al-Taḥṣīl Wa-al-Sharḥ Wa-al-Tawjīh Wa-al-Ta'līl Fī Masā'il al-Mustakhrajah*, 2:593, 3:74; Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 2:108.
[181] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 2:90.

example of a captive Muslim who gives a promise of security to enemy soldiers who are besieged by Muslim forces, leading them to surrender.[182]

If the Muslim ruler or his duly authorized representative wished to escape the prima facie validity of private offers of security, he was under an obligation to communicate expressly to the enemy that only specific individuals were authorized to offer terms on behalf of the Muslim commonwealth. The ruler could also promulgate general policies to the enemy informing them that any enemy national found on the territory of the Muslim commonwealth who did not have a grant of security from the ruler would be made a vassal and not allowed to return home, or that he would be enslaved.[183]

Muslim rebels also could exercise the residual sovereignty that individual Muslims could exercise by making offers of peace to the enemy.[184] Accordingly, if a group of Muslim rebels ally with non-Muslims who are at war with the Muslim commonwealth, their alliance with the Muslim rebels – provided they are under the command structure of the Muslim rebels – is treated as a valid grant of

[182] Sarakhsī and Shaybānī, 2:75.
[183] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:79.
[184] Ibn Abī Zayd al-Qayrawānī, 3:84.

security,[185] with the result that the non-Muslim allies of the Muslim rebels could not be treated any worse upon capture than Muslim rebels. If the Muslim rebels fought under the non-Muslims' command, however, the non-Muslims were treated as enemy nationals.[186]

26. The Household, Immigration and Captivity

An enemy national could become a national of the Muslim commonwealth (i) voluntarily, by immigrating, either as a Muslim convert or a vassal, or (ii) involuntarily, as a result of captivity and forcible relocation to the Muslim commonwealth. In either case, foreign nationals could arrive either as individuals or as a household. Whether they arrived as an intact nuclear family or as individuals had a material effect on their rights.

Conversion, combined with immigration, was the most direct route to becoming a national of the Muslim commonwealth because the ruler – as a general rule – was obliged to allow all Muslims entry to Muslim territory, with a few exceptions. The Muslim commonwealth should not permit ambassadors who converted in the course of a diplomatic mission to stay in Muslim territory

[185] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 2:217-18; Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt 'alá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:85; Ibn Rushd al-Jadd and 'Utbī, *Al-Bayān Wa-al-Taḥṣīl Wa-al-Sharḥ Wa-al-Tawjīh Wa-al-Ta'līl Fī Masā'il al-Mustakhrajah*, 3:10-11.

[186] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 2:227.

because to do so would amount to a breach of the sanctity of ambassadors.[187] Likewise, the Muslim commonwealth could agree with a non-Muslim polity that it would turn away converts from its territory, but only with respect to fighting men. There was an absolute obligation to offer asylum to all female converts and other powerless individuals, including the enemy's slaves (whereupon they are deemed free upon their arrival).[188] Immigration as a vassal, by contrast, required the ruler's consent.

Immigrants could arrive either as individuals or as families, which Muslim jurists understood to consist of a husband, wife, and their children. If an intact family unit arrived at the border and sought entry to the Muslim commonwealth, the wife and children took the status of the husband based on the principle that the wife's status is derivative (*taba'*) of the husband.[189] The husband thus served as a representative of the household, provided they accompany him. Accordingly, if a male enemy national converted to Islam, became a vassal, or obtained a promise of security, the benefits he obtained from this change in status also

[187] Ibn Rushd al-Jadd and 'Utbī, *Al-Bayān Wa-al-Taḥṣīl Wa-al-Sharḥ Wa-al-Tawjīh Wa-al-Ta'līl Fī Masā'il al-Mustakhrajah*, 3:45-46.
[188] Shafi`i, *al-Umm*, 4:191.
[189] See, for example, Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:11 (if a woman who is of a people at peace with the Muslim commonwealth marries a man from a people not at peace with the Muslim commonwealth, and leaves her people's territory to live with her husband, she is treated as an enemy national).

extended to his wife and children, if they accompanied him. The reverse, however, was not true: if a married female foreign national converted to Islam, became a vassal, or obtained a promise of security to enter the Muslim commonwealth, her change in status did not transfer automatically to her husband, even if he accompanied her.[190] Likewise, if a foreign national entered Muslim territory, and while there, converted to Islam, neither his wife nor his minor children obtained a change in their legal status under Islamic law until they joined the husband in Muslim territory.[191]

The wife could always reclaim her independent legal status, however, by abandoning the household. If she arrived without a husband but with her minor children, whether as a Muslim or as a vassal, she was entitled to bring her minor children with her, in which case they took her legal status.[192]

If a married female enemy national entered Muslim territory either as a Muslim or a vassal, her marriage was provisionally dissolved. Accordingly, she was free to remarry upon completion of her waiting period (in the ordinary case, three months), unless her husband joined her before her waiting period expired and (i) if she had become a Muslim, he also converted to Islam, or (ii) if she became a

[190] Sarakhsī and Shaybānī, 2:98.
[191] Sarakhsī and Shaybānī, 5:124.
[192] Sarakhsī and Shaybānī, 5:121-22.

vassal, he accepted that status for himself. In these two cases, their marriage would be retroactively validated.

While minors took the status of a father or a mother, a different rule applied if they arrived in the care of a non-parent. If a minor entered Muslim territory pursuant to a grant of security in the company of an uncle or a brother, and the uncle or the brother, while on Muslim territory, converted to Islam or became a vassal, the minor's legal status did not change; rather, he retained his status until he reached majority, at which point he could choose either to stay in the Muslim commonwealth as a Muslim or a vassal, or return home.[193]

The principle that permanent residence in a territory entailed exclusive political affiliation to that polity also applied to captives. Captivity transferred political affiliation from the prior domicile to the new one. Again, the captive's status depended on whether she was taken captive as an individual, or as part of an intact household. Accordingly, the marriage of a female captive captured in enemy territory, and brought back to Islamic territory without her husband, was dissolved unless her husband appeared to make a claim for her within one month of her arrival in Muslim territory. If he failed to do so, she could become the

[193] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:121.

legitimate concubine of her master. If, however, she was taken prisoner along with her husband and minor children, Islamic law affirmed the foreign marriage and the parents' rights to their children. Although they were slaves, they could not be separated from one another. Even if the female captive's husband later fled, her marriage remained intact and she could not become her master's concubine.[194]

The treatment of minors taken captive turned on whether they were alone when captured, or in the company of one or more parents. According to the Hejazis, children taken captive without their parents could be exchanged, but only for Muslim captives.[195] If they were captured in the exclusive company of their fathers, they could be exchanged for Muslim prisoners without returning the father, but if the mother was present, she had to be included in any prisoner exchange.[196]

According to the Iraqis, only minors taken captive with their parents could be exchanged for Muslim prisoners. Because the Iraqis assign to parentless minors the religion of the territory, parentless minor captives were legally

[194] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt 'alá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:154.
[195] Ibn Abī Zayd al-Qayrawānī, 3:326.
[196] Ibn Abī Zayd al-Qayrawānī, 3:381-82.

Muslims immediately upon their arrival in the Muslim commonwealth.[197] Their lives, therefore, could not be risked for the sake of Muslim captives. By contrast, the Hejazis were divided about the religious status of parentless minor captives, with some assigning them their parents' religion, if they were scripturalists, while others agreed with the Iraqi analysis. They all agreed, however, that the child retained the father's religion, if the child and the father were taken captive together. In this case, the minor could not be separated from his father by sale.[198]

27.International trade

During the foundational period, Muslim jurists placed no restrictions on what its nationals could import into the Muslim commonwealth. Foreign merchants, too, were generally free to export whatever they wished to the Muslim commonwealth, subject to applicable customs duties. According to the Iraqis reciprocity (*mujāza*) was the basic principle animating Islamic law's approach to customs. If the foreign ruler collected a customs duty of 15% on the merchandise of Muslim merchants entering its territory, the Muslim commonwealth should collect a like amount from the merchandise of that party's merchants when they come to the Muslim commonwealth. If the ruler did not know how much was

[197] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 4:297.
[198] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt 'alá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:380-81.

collected from the Muslim commonwealth's merchants as customs duties, he was to charge foreign merchants 10%.[199] Both foreign and domestic merchants, however, were prohibited from exporting slaves, weapons, beasts of burden, and other "strategic" goods that could be used to make war against the Muslim commonwealth.[200]

The Muslim ruler was generally not permitted to grant foreign merchants immunity from suit in local courts arising out of prior commercial dealings with Muslim and vassals.[201] The Hejazis, however, permitted the ruler to grant the foreign merchants immunity from such suits if the customs duties collected from them would be sufficient to satisfy the outstanding claims against them. In this case, the ruler would use the revenue to settle the private claims of the local merchants against the foreign merchants.[202]

28.The Repudiation of Peace

The same capacity that endows human beings with the power to make peace empowers them to repudiate it. *How* peace was repudiated depended on the kind of the peace involved. Grants of security or non-aggression pacts were by their

[199] Sarakhsī and Shaybānī, 5:68-69.
[200] Sarakhsī and Shaybānī, 4:284-96.
[201] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:122.
[202] Ibn Abī Zayd al-Qayrawānī, 3:123.

nature fragile, and so most easily repudiated. By contrast, repudiating the peace of the Muslim commonwealth by a Muslim was substantially more difficult. Repudiation of vassalage occupied a median position between the peace of a non-aggression pact and the peace of Islam. All three kinds of peace raised similar conceptual problems, specifically, how should the law distinguish between a mere *breach* of the peace and a repudiation of the peace that restores the primordial relationship of war?

In the ordinary case non-aggression pacts typically lasted only for a specific term of years, and unless renewed, the relationship between the parties reverted to war upon expiration of the agreement. Even during the term of the agreement, all Muslim jurists agreed that the non-Muslim party was always entitled to renounce the treaty, provided it duly gave notice to the Muslim party. Most Muslim jurists, except for Shāfiʿī, believed the Muslim ruler had the same right.[203]

A non-aggression pact could also be repudiated *de facto* by conduct. The possibility of de facto repudiation of a treaty required jurists to distinguish between private violence and violence properly attributed to the foreign state. This was precisely the issue raised in connection with the status of Cyprus during

[203] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:8.

the reign of Hārūn al-Rashīd: were the violations of the treaty attributable to the group, or just individuals? Ibn Sallām reported that most of the jurists consulted were of the view that whatever violations of the peace took place, they amounted to breaches of the peace, not its repudiation.[204]

For jurists, violence contrary to the terms of the peace was either open and manifest, attributable to a group having the capacity for self-defense, or surreptitious. Accordingly, foreign nationals, at peace with the Muslim commonwealth, who killed and plundered on Muslim territory, if they acted surreptitiously, were subject to criminal law, not the law of war. On the other hand, if the foreign nationals engaged in their violence openly, and had a capacity for self-defense, they were deemed to have repudiated the peace, and the Muslim state could treat them as enemies under the law of war.[205] Whether their conduct amounted to a breach of the peace between the Muslim commonwealth and the foreign party depended on whether they acted pursuant to the knowledge of their ruler. If they were acting under the authority of their ruler,

[204] Abū 'Ubayd al-Qāsim ibn Sallām, *Kitāb al-amwāl*, 220 (stating that he believed that "most of them [i.e., the jurists] confirmed the treaty, and prohibited waging war against them [i.e., the Cypriots] until such time as they made a collective decision to repudiate the treaty (*ḥattā yujmiʿū jamīʿan ʿalā al-nakth*). That is the best view to be followed and the majority should not be held culpable for the actions of a few (*lā yuʾakhadh al-ʿawāmm bi-jināyat al-khāṣṣa*) unless they manifest agreement and contentment with the actions of the few (*illā an yakūna dhālika bi-mumālaʾa minhum wa riḍā bi-mā ṣanaʿat al-khāṣṣa*).").

[205] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:7-8.

explicitly or implicitly, their conduct could be attributed to the foreign party, and Muslims would be free to wage war against the enemy polity in response, with no requirement to provide notice to the enemy.[206]

Muslim jurists applied the same conceptual framework they developed in the context of nonaggression pacts to vassals: surreptitious acts of violence against property and persons in Muslim territory were violations of criminal law, not a repudiation of the peace.[207] According to the Iraqis only violence committed openly, pursuant to a capacity to act in self-defense, or abandonment of Muslim territory for the enemy's, amounted to a repudiation of vassalage.[208]

The Hejazis, however, distinguished between vassals who repudiated the relationship of vassalage and those who fought the Muslim community claiming unjust treatment. The former were treated as enemy nationals, but the latter were rebels who could resume their previous status upon conclusion of hostilities. Some Hejazi authorities were of the view that even a vassal who fled to enemy territory and fought with enemy forces against the Muslim commonwealth could

[206] Sarakhsī and Shaybānī, 5:7.
[207] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:20-21; Shafi`i, *al-Umm*, 4:188.
[208] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:170.

not be treated as an enemy national because no one whose inviolability Islam had secured could ever lose that protection.[209]

Jurists could not always compel rulers to follow their rules. In one widely reported incident, the ʿAbbāsid caliph, al-Maʾmūn (r. 198-218/813-833) set out to Egypt in 216/831 to crush a local rebellion involving both Arabs and elements of the local Coptic population. While there, he asked the Mālikī jurist al-Ḥārith b. Miskīn (d. 250/864) about the rights of the Coptic rebels. He told the caliph that if they rebelled because of ill-treatment, their lives and properties could not be violated, to which Maʾmūn reportedly replied,

> "You are indeed presumptuous, and Mālik even more so! These are unbelievers living as our vassals (*dhimma*). If they suffered injustice, they can bring their complaint to me, but they have no right to brandish arms in rebellion and shed the blood of Muslims in their own territories."[210] Needless to say, al-Maʾmūn gave effect to the Iraqi rule, despite the objections of the Hejazi jurists in Egypt.

[209] Sahnun ibn Said, 'Abd al-Rahman Ibn al-Qasim, and Malik ibn Anas, *Al-Mudawwana al-Kubra*, 3:121.

[210] أحمد بن أبي يعقوب [Yaʿqūbī يعقوبي Aḥmad ibn Abī Yaʿqūb], *Ibn-Wādhih qui dicitur Al-Ja'qubī, historiae*, vol. 2 (Leiden: E. J. Brill, 1883), 569, http://tinyurl.gale.com/tinyurl/DczRh9.

Although the internal peace of the Muslim commonwealth with respect to Muslims was permanent, apostasy threatened this guarantee. The logic of Islamic law entailed that an apostate, by renouncing Islam, reverted to a relation of war with the Muslim commonwealth. Even so, apostates who fled to enemy territory held a liminal status that in some ways rendered them worse off than an enemy national who had never embraced Islam and in other ways gave them a privileged position. First, most (but not all) jurists held that grants of security did not protect apostates.[211] Second, apostates continued to be held liable under norms of Islamic law despite their apostasy and their decision to join the enemy.[212] Accordingly, if a Muslim apostatized, fled to enemy territory, and fought with the enemy, he was criminally and civilly liable for any destruction of lives and properties of Muslims and vassals for which he was responsible, as well as continuing to be liable for any unlawful conduct he committed prior to his apostasy. By contrast, enemy nationals were never criminally or civilly liable under Islamic law for the destruction of the lives or properties of Muslims and vassals.

[211] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt ʻalá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:137.
[212] Shafi`i, *al-Umm*, 4:187; Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 4:164.

Unlike enemy nationals who had never been Muslim, however, an apostate was entitled to quarter: he had a legal right to be spared for three days to give him an opportunity to repent, i.e., reaffirm his status as a Muslim, before being put to death for apostasy. The status of an apostate's children was disputed, with Hejazi jurists deeming them to be Muslims, at least for so long as they are minors,[213] while the Iraqi jurists treated them as apostates.[214] According to the Iraqis, children born to Muslim males in enemy territory who follow the non-Muslim religion of the enemy upon reaching majority are treated as apostates – not enemy nationals – on account of their father's religion, but they cannot be executed for their apostasy.[215]

Apostasy was not established by conduct contrary to the law,[216] even if that included waging war against the Muslim commonwealth in the military forces of the enemy. Accordingly, a Muslim captured fighting with enemy forces – provided there was no evidence that he had renounced Islam – was treated as a brigand, liable criminally and civilly for any losses he inflicted to persons and property under Muslim jurisdiction, but not otherwise excluded from the

[213] Ibn Abī Zayd al-Qayrawānī, *Al-Nawādir Wa-al-Ziyādāt 'alá Mā Fī al-Mudawwanah Min Ghayrihā Min al-Ummahāt*, 3:349.
[214] Sarakhsī and Shaybānī, *Sharḥ Kitāb Al-Siyar al-Kabīr Lil-Imām Muḥammad Ibn al-Ḥasan al-Shaybānī*, 5:152.
[215] Sarakhsī and Shaybānī, 5:103, 105.
[216] Sarakhsī and Shaybānī, 1:110.

protections of Islamic law, including, the right not to be treated as an enemy prisoner of war.[217]

[217] Ibn Rushd al-Jadd and ʻUtbī, *Al-Bayān Wa-al-Taḥṣīl Wa-al-Sharḥ Wa-al-Tawjīh Wa-al-Taʻlīl Fī Masāʼil al-Mustakhrajah*, 3:42.

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