The doctrine of modern law of the sea is commonly believed to have developed from Renaissance Europe. Often ignored though, is the role of Islamic law of the sea and customary practices at that time. In this book, Hassan S. Khalilieh highlights Islamic legal doctrine regarding freedom of the seas and its implementation in practice. He proves that many of the fundamental principles of the pre-modern international law governing the legal status of the high seas and the territorial sea, though originating in the Mediterranean world, are not a necessarily European creation. Beginning with the commonality of the sea in the Qur’an and legal methods employed to ensure the safety, security, and freedom of movement of Muslim and aliens by land and sea, Khalilieh then goes on to examine the concepts of territorial sea and its security premises, as well as issues surrounding piracy and its legal implications as delineated in Islamic law.

Hassan S. Khalilieh is a senior lecturer in the departments of Maritime Civilizations and Multidisciplinary Studies and a senior research fellow in the Leon Recanati Institute for Maritime Studies at the University of Haifa. His publications include: Islamic Maritime Law: An Introduction (1998) and Admiralty and Maritime Laws in the Mediterranean Sea (ca. 800-1050): The Kitāb Akriyat al-Sufun and the Nomos Rhodion Nautikos (2006).

"Over the past two decades, Hassan S. Khalilieh has almost single-handedly revolutionized our knowledge of the Islamic contributions to the law of the sea. In this work, he embarks on what is effectively a genealogical study that shows how the Dutch Grotius and later European jurists have largely replicated, without acknowledgement, the Islamic practices and doctrines pertaining to free navigation in response to the earlier Spanish and Portuguese violent domination of the Indian Ocean. Khalilieh’s meticulous and impressive work is a must read, not only for those who are interested in maritime law and trade, but also for historians and analysts of the rise of modernity at large, where the allegedly new freedom of navigation, central to the modern project, was to be transformed in due course into yet another tool in the unprecedented forms of European colonialism."

Wael Hallaq, Avalon Foundation Professor in the Humanities, Columbia University

"This is an extraordinarily wide-ranging account not of Islamic maritime law (on which Khalilieh has already established himself as a leading expert) but of the Islamic law of the sea, well before Grotius wrote his tract on the Free Sea; the book ranges as far east as Malaka and China and as far west as the Mediterranean—a tour de force."

David Abulafia, Emeritus Professor of Mediterranean History, University of Cambridge

"This is a masterful exposition of Islamic law of the sea, which makes an important contribution to the discourse on the universal application of modern international law of the sea generally. Highly recommended."

Mashood A. Baderin, Professor of Laws, SOAS University of London

Islamic Law of the Sea

The doctrine of modern law of the sea is commonly believed to have developed from Renaissance Europe. Often ignored though, is the role of Islamic law of the sea and customary practices at that time. In this book, Hassan S. Khalilieh highlights Islamic legal doctrine regarding freedom of the seas and its implementation in practice. He proves that many of the fundamental principles of the pre-modern international law governing the legal status of the high seas and the territorial sea, though originating in the Mediterranean world, are not a necessarily European creation. Beginning with the commonality of the sea in the Qur’an and legal methods employed to insure the safety, security, and freedom of movement of Muslim and aliens by land and sea, Khalilieh then goes on to examine the concepts of territorial sea and its security premises, as well as issues surrounding piracy and its legal implications as delineated in Islamic law.

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Islamic Law of the Sea

Freedom of Navigation and Passage Rights in Islamic Thought

HASSAN S. KHALILIEH

University of Haifa, Israel
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Maps

1 The Arabian Peninsula during the Prophetic and early Islamic periods  \( page 111 \)
2 Mawāqit geographical demarcation  113
Legal historians hold that the foundations of the modern law of the sea date to the first decade of the seventeenth century, when the Dutch jurist Hugo Grotius (1583–1645) extracted chapter 12 of his De Jure Praedae (On the Law of Prize and Booty) and published it in a single treatise titled Mare Liberum (The Free Sea), which was published anonymously in 1609. To defend and justify the right of other nations to navigate the seas freely, Grotius contended that, with the exception of limited offshore zones, the seas are not susceptible to appropriation by states. Following his contention, contemporary European lawyers sparked a legal debate, some challenging and others concurring with his position, leading to further scholarly contribution to the law of the sea. Both advocates and opponents of the freedom of navigation were inspired either by the Natural Law enshrined in the Justinianic Institutes and Corpus Juris Civilis, or the Hebrew Bible’s concept of sovereignty on the open sea. British legal theoretician John Selden (1584–1654) mentions both in his 1635 Mare Clausum, Sive de Dominio Maris (The Closed Sea, or the Dominion of the Sea). Astoundingly, whether deliberately or accidently, seventeenth-century European legal scholars overlooked contributions by “infidels” (non-Europeans, especially Muslims) to the evolution of the customary law of the sea, giving the impression that the Law of Nature and Nations governing access to the sea is solely a European establishment.

With the advent of Islam in the Mediterranean world in the seventh century CE, the semienclosed sea, which had been called by the Romans “mare nostrum (our sea)” for a millennium, ceased to be a Roman lake.
From that time onward, the Mediterranean Sea has continued to be shared by Christians and Muslims, and neither party could consider it to be *mare nostrum*; the eastern, western, and southern shores of the Mediterranean Sea were entirely under Islamic control for several centuries, as have been the Red Sea, the Persian Gulf, and vast littorals of the Indian Ocean until the penetration of the Portuguese into the eastern seas. Eventually, on the eve of the great discoveries, Muslims dominated more than half of the world’s maritime possessions. In spite of the importance of the sea in the Qur’an (mentioned 32 times in comparison to the 13 references made to the land), in hadith literature, in theological, jurisprudential, geographical, and scientific literature, and in the daily life of Muslims throughout history, the theme that this study addresses has failed to attract attention in modern scholarship. For this and other reasons, an attempt will be made to fill the gap left by Renaissance and early modern European lawyers and to explore the Islamic contribution to the development of the customary law of the sea, relying heavily on the Islamic Law of Nature and Nations (*siyar*).

This study comprises three chapters, along with an introduction and a conclusion. The first chapter examines the commonality of the sea in the Qur’an, legal methods employed to insure the safety, security, and freedom of movement of Muslims and aliens by land and sea, and the historical genesis of the freedom of navigation and its legal implications for Muslim administrations and judicial authorities in the ensuing centuries. The second chapter analyzes the concept of territorial sea and its religious and security premises, describes the right of innocent passage through territorial waters and straits, and explains how legal pluralism could have positive repercussions on the legal protection of individuals and promote local, interregional, and international trade involving subjects of the same and different religious creeds. The third and final chapter deals with piracy and its legal implications, methods employed to combat and reduce sea robbery, punishment, and its socio-economic and cultural impacts on humankind. However, since the time frame of our discussion does not extend beyond the first decades of the sixteenth century, the topic of the Barbary corsairs remains outside the scope of this study.

This book is a revised and expanded version of my JSD dissertation submitted to the School of Law, Saint Thomas University, in Miami, Florida, written under the supervision of Professor John Makdisi, without whose sincere and careful guidance, thoughtful support, and incredible patience this study would never have seen the light. I also extend
my deepest appreciation to Professor David F. Forte of Cleveland-Marshall College of Law for his constructive critique and insightful comments, which helped me refine and reshape parts of this manuscript. My heartfelt gratitude and sincere reverence go to two remarkable individuals, Professor Siegfried Wiessner and Haydee Gonzalez, respectively the director and program manager at the Graduate Program in Intercultural Human Rights, Saint Thomas University, for their extraordinary support and encouragement. I also express my sincere gratitude and appreciation to my masters’ advisors at Tulane University Law School, Professors Robert Force and Martin Davies, who introduced me to the realm of modern admiralty and maritime law. The Admiralty and Maritime Law Program deeply enriched my legal knowledge and provided me with the academic tools for thoroughly analyzing early and classical jurisprudential literature and international treaties from a wide legal perspective. My sincere appreciation also goes to Professor David Abulafia at Cambridge University and Professor Michael Lobban at the London School of Economics and Political Science for their helpful and invaluable comments on the original draft of the manuscript. I am obliged to express my indebtedness and sincere thanks to the anonymous reviewers, whose thorough reading, insightful observations, and constructive criticism have only strengthened my manuscript. My special thanks go to Professor Chase Robinson, General Editor of the Cambridge Studies in Islamic Civilization, to all the Editorial Board, and to Maria Marsh, Commissioning Editor, Natasha Whelan, Content Manager, Jayavel Radhakrishnan, Senior Project Manager, Integra Software Services, and the publication staff for their efforts to publish this book. I am additionally grateful to Professor François Gipouloux at CNRS, France, and to Dr. Mahmood Kooria and Dr. Sanne Ravensbergen at Leiden University in the Netherlands for inviting me to participate in conferences on trade and law in the Indian Ocean; all of their presentations and discussions shaped my thinking and honed my arguments. My deep sense of gratitude goes to Dr. Helene Furani, Dr. Christina Morris and Cheryl Hutty for their diligent copy-editing and constructive criticism of the manuscript. Warm words of gratitude go to my cousins Doha and Ishraq Khalilieh and to my sincere friends Dirar Bdaiwi and Amer Karkabi for always succeeding in making me feel special. My sincere thanks are also due to the University of Haifa’s Research Authority for its cordial assistance and generous financial aid. I am now and will always be indebted to my former advisors and mentors: Professor Michal Artzy at the University of Haifa, and
Professors Abraham Udovitch, Mark Cohen, and William Jordan at Princeton University. Last, but not least, my affectionate gratitude and deep indebtedness are due to my wife Ranin and to our children, Samuel, Mariam, and Awaise, for their understanding, commitment, and emotional support throughout my six-year journey of researching, organizing, and writing this book.
Glossary of Non-English Terms

AH After the *Hijra*, the migration of the Prophet from Mecca to Medina; the year it occurred, 622 CE, is the base-year of the Muslim era

*actio iniuriarum* action for delict, intentional infringement of a personality right

‘adāla probity, equality before the law

*adat* Malay customary law, probably Persian ‘ādāt, from the Arabic ‘ādah

*admiral* a term derived from the Arabic words *Amīr al-Bāḥr*, literally, “Prince of the Sea,” or the Commander in Chief of the Fleet

amān a temporary safe-conduct, safe passage, promise of assurance of security to be granted to enemies during war, or individual *barbī*, who intend to enter or travel through the Abode of Islam

amīr a prince, also a governor of a province

Amīr al-Mu‘minīn literally, “Commander of the Faithful,” Caliph

‘aqd pl. ‘uqūd, bilateral or unilateral obligations

baghiyy seditious; sexual relationship outside marriage

bailli derived from the generic term *bailiff* to mean the king’s personal agent or administrative representative

bēt din Jewish rabbinical court

cartaz a Portuguese word derived from Arabic *qirtās* or *gartās*, which is originally derived from ancient
Greek χάρτης (chártēs), denoting a writing, book, scroll, document, paper cone, or cornet. It is a trading license issued by a Portuguese commissioner or competent authority to ships sailing in the Indian Ocean; a typical cartaz contains details regarding the place of origin of cargo, a vessel’s destination, types of shipments, identities of crews, shippers, and passengers, etc.

**Corpus Juris Civilis**
Roman compendium of civil law compiled and promulgated by Justinian I (527–565); it consists of four parts, the Institute, Digest, Code, and Novels

**Dār al-ʿAhd**
Abode of Covenant/Truce, territories/countries that have treaties of nonaggression or peace with Muslims, agreeing to protect Muslims and their clients in that territory and often including an agreement to pay (receive) tribute

**Dār al-Ḥarb**
Abode of War, territories/countries that do not have treaties of nonaggression or peace with Muslims and where Islamic law is not in force

**Dār al-Islām**
Abode of Islam, region of Muslim sovereignty where Islamic law prevails; the Hanafi Law School holds that territory conquered by nonbelievers can remain Abode of Islam so long as the qadi administers Islamic law and Muslims and dhimmīs are protected

**Dār al-Kufr**
Abode of Disbelief, synonymous to the Abode of War where the territory is governed by the laws of infidels and the security is upheld by them

**dayyan**
literally, a Jewish judge – a well-versed scholar acquainted with rabbinical law, religious rituals, and theology

**dhimmī**
a Christian, Jew, or Zoroastrian living in the Abode of Islam and acknowledging the domination of Islam

**dhirāʿ**
a measurement of the arm from the elbow to the tip of the middle finger; i.e., a cubit; also the name given to the instrument for measuring it; al-dhirāʿ al-sharʿ iyya equals 0.5465 yards/0.49875 meters

**faqīh**
pl. fuqahāʾ, a jurist or jurisconsult well versed in Islamic theology and jurisprudence
fasāď disturbing peace and spreading evil and mischievous acts on earth; corruption, disorder, turmoil

fatwā pl. fatāwā, an authoritative opinion on a matter of Islamic law

fiqh knowledge of Islamic law derived through legal reasoning

gabella an Old Italian word derived from the Arabic qibā-lah denoting duty, tribute, levy; tax paid to the state for goods bought or sold; rent of land; a contract given to somebody who tills the earth for which he pays an annual tax; tax on the transaction of a real estate

geniza a place for storing unusable books, writings, and ritual objects in order to prevent the desecration of the name of God, which might be found in them, while they await burial in a cemetery

ghazw a military expedition

ghifāra a heavy tribute paid to pirates to protect commercial vessels from other piratical attacks

ḥadd pl. ḥudūd, a punishment fixed in the Qurʾān and hadith for crimes considered to be against the rights of God

Ḥaram literally, “protected/inviolable zone”; the Ḥaram signifies the Holy Sanctuary

ḥarbī a non-Muslim who does not live under the conditions of the dhimma (dhimmī); if he wants to enter the Abode of Islam, he needs to be equipped with a pledge of amān

ḥarīm an inviolable zone or reserved space, within which access is either prohibited or restricted to prevent the impairment of natural resources and utilities

ḥirāba brigandage, banditry, highway robbery, or forcible theft; derived from h.r.b., meaning “to contend or wage war”

hostis humani generis enemies of all humankind; the term may have been first used by the Roman statesman Marcus Cicero (106–43 BCE) “pirata est hostis humani generis (a pirate is the common enemy of humankind).” Historically, it applied to persons whose acts
threatened all societies and took them outside national jurisdiction, such as pirates and slavers.

<table>
<thead>
<tr>
<th>Term</th>
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<tbody>
<tr>
<td>hudna</td>
<td>a temporary truce or armistice</td>
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<tr>
<td>hunarman</td>
<td>a qadi-like official of the Muslims, who judges according to Islamic Shari‘ah</td>
</tr>
<tr>
<td>ʿibādāt</td>
<td>performance of religious duties</td>
</tr>
<tr>
<td>ihram</td>
<td>a state of ritual purity where the Muslim pilgrim dons a special garb consisting of two white unknitted sheets covering the upper and lower parts of the body</td>
</tr>
<tr>
<td>imam</td>
<td>an equivalent to Caliph, spiritual and political leadership of the Muslim nation (ummah)</td>
</tr>
<tr>
<td>imperium</td>
<td>power or dominion; it implies the right of military command and judicial authority; sovereignty of the state over the individual. The term can also be used with a geographical connotation, designating a state’s territorial limits.</td>
</tr>
<tr>
<td>jihad</td>
<td>literally, “struggle” or “effort”; in Qur’ānic contexts it denotes striving and struggling in the Path of God; technically in law, rules regulating conduct of war and peace treaties</td>
</tr>
<tr>
<td>jus ad bellum</td>
<td>a set of criteria that are to be consulted before engaging in war, in order to determine whether entering into war is permissible; that is, justifications for resorting to war</td>
</tr>
<tr>
<td>jus gentium</td>
<td>Law of Nations, the body of law, taken to be common to all civilized peoples, and applied in dealing with the relations between Roman citizens and foreigners</td>
</tr>
<tr>
<td>jus in bello</td>
<td>rules regulating the conduct of war</td>
</tr>
<tr>
<td>jus naturale</td>
<td>Natural Law/Law of Nature, the laws governing men and people in a state of nature, i.e., in advance of organized governments or enacted laws</td>
</tr>
<tr>
<td>kharāj</td>
<td>a tax imposed on agrarian/agricultural land</td>
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<tr>
<td>magḥāzī</td>
<td>a genre of early biographical writings on the Prophet Muḥammad, or the Prophet’s military campaigns</td>
</tr>
<tr>
<td>maḥram</td>
<td>pl. maḥārim, an unmarriageable male kin</td>
</tr>
<tr>
<td>ma’man</td>
<td>a place of safety where a person can feel secure</td>
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<tr>
<td>mażālim</td>
<td>Court of Appeal; a court that serves as a tribunal of administrative law where the public directly appear</td>
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</table>
to the ruler or his deputies against the abuse of or failure to exercise power by other authorities, as well as against decisions made by judges

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td><strong>miḥrās</strong></td>
<td>a watchtower functioning to alert local residents against enemy attack from the sea</td>
</tr>
<tr>
<td><strong>mīqāt</strong></td>
<td>pl. mawāqīt, a stated place or station at which pilgrims on their way to Mecca are required to purify their souls, don the pilgrim’s garb (<em>ihrām</em>), and declare the intention</td>
</tr>
<tr>
<td><strong>muʿallim</strong></td>
<td>literally, “shipmaster” or “pilot/navigator of the vessel”; he was responsible for the appropriate fitting of the ship, inspection of the gear, the stores and the supervision of the loading</td>
</tr>
<tr>
<td><strong>muḥārib</strong></td>
<td>a predator or a highway plunderer</td>
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<td><strong>mujāhid</strong></td>
<td>pl. mujāhidūn, a fighter in the Cause of God</td>
</tr>
<tr>
<td><strong>mustaʿmin</strong></td>
<td>a recipient/grantee of a pledge of safe-conduct; an enemy-alien merchant who is granted an <em>amān</em> pledge to trade and carry out business transactions in the Abode of Islam</td>
</tr>
<tr>
<td><strong>naṣṣ</strong></td>
<td>a foundational text, or an explicit textual ruling; the term refers to a text found in either the Qurʾān or hadith</td>
</tr>
<tr>
<td><strong>nākhūdha/nakhoda</strong></td>
<td>a Persian term meaning “captain”; derived from <em>nāv</em> and <em>khudā</em>, meaning “a master of a native vessel,” or “Lord of the Ship”</td>
</tr>
<tr>
<td><strong>pērahu</strong></td>
<td>a large sailing boat carrying 15–20 crew members</td>
</tr>
<tr>
<td><strong>praeses</strong></td>
<td>a Roman provincial governor</td>
</tr>
<tr>
<td><strong>qadhf</strong></td>
<td>a false accusation of immoral behavior</td>
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<tr>
<td><strong>qaṭʿ al-sabīl</strong></td>
<td>literally, “cut off the highway”; a privately motivated armed robbery</td>
</tr>
<tr>
<td><strong>qitāl</strong></td>
<td>literally, “fighting, armed <em>jihad</em>”; <em>qitāl</em> is viewed as a lesser <em>jihad</em></td>
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<td><strong>res communes</strong></td>
<td>joint property of all humankind; things that are common to all, which cannot be owned or appropriated, such as light, air, and the sea</td>
</tr>
<tr>
<td><strong>res nullius</strong></td>
<td>things that have no owner/s, or have been abandoned by their owner/s so that their first possessors become their owners; things that are capable of ownership</td>
</tr>
</tbody>
</table>
res publica  public things; originally used for common as opposed to private property; it covers property of the Roman Empire such as highways, inland rivers, and harbors
ribâṭ  literally, “fortified monastery”; a coastal defense system that consists of watch stations along the coastal frontiers
ridda  apostasy, rejection in word or deed of one’s former religion by a person who was previously a follower of Islam
Rūm  Byzantines or Italians; in broader contexts, it refers to Europeans
şāhib al-dīwān  a chief financial official
Sharīʿah  God’s eternal and immutable will for humanity, as expressed in the Qurʾān and Muḥammad’s Sunna, considered binding for all believers; the Sharīʿah sometimes applies to all Islamic legislation
shubha  uncertainty about lawfulness in a jurist’s view
shuhūd ʿudūl  trustworthy witnesses
sīra(h)  pl. siyār, Prophet Muḥammad’s life account or biography
stratēgos  a Byzantine governing general
Sufi  a member of an Islamic ascetic and mystical sect, in which the member tries to become united with God through prayer and meditation
şulḥ  treaty, reconciliation, or amicable settlement
tanzîmât  a series of reforms promulgated in the Ottoman Empire between 1839 and 1876; these reforms, heavily influenced by European ideas, were intended to effectuate a fundamental change in the Empire from the old system based on theocratic principles to that of a modern state
terra nullius  a territory not belonging to any particular country
ummah  a common Arabic term denoting a group of people or a nation; it refers to the commitment of the individual to a particular religion and represents a universal world order; the ummah comprises all Muslims throughout the world, regardless of ethnic, racial, and regional origins
Transliteration Scheme

1. CONSONANTS

<table>
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2. VOWELS

<table>
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To my wife Ranin
And my children
Samuel, Mariam, and Awaise
This Book
Is
Affectionately Dedicated
Introduction

GENERAL

The year 1492 signaled a fundamental turning point in global and, more particularly, maritime history. It marked the expulsion of the Nasrīd dynasty (636–898 AH/1238–1492 CE) from Granada, the last Islamic stronghold in Spain, and the beginning of the great age of Christian maritime discoveries across the two shores of the Atlantic and Indian oceans. On August 3, 1492, Christopher Columbus embarked on a westward voyage to the Indian Ocean in search of alternative maritime routes that would circumvent traditional trade passages through Islamic territories to the Spice Islands. On a similar mission, the Portuguese navigator and explorer Vasco da Gama set sail from Lisbon on July 8, 1497, leading a flotilla of four fully equipped vessels; although, instead of following the steps of Columbus, da Gama sailed southward and circumnavigated Africa. After a lengthy journey with various stops in trading centres on African coasts, da Gama landed at Malindi, Kenya, on April 15, 1498; there he managed to secure a well-versed Arab mu'allim, who guided the Portuguese fleet across the Arabian Sea, finally arriving in Kappadu (Kappad), near Calicut, on May 20, 1498.


The Portuguese circumnavigation of Africa and penetration of the Indian Ocean also marked a new chapter in maritime legal history.  

Ahmad ibn Majid (823–914/1421–1509), the famous Arab pilot of the Indian Ocean, witnessed the eventual arrival of the Portuguese in the eastern seas and sensed the beginning of the end of the peaceful oceanic navigation therein. In several places in the Sufāliyya (Sufa la or Sofala, present-day Mozambique) poem he alluded to the prospective serious impacts and adverse effects of the Portuguese on the overseas trade and freedom of navigation, stating:

(27) [And the Franks] arrived at Calicut to acquire profit in the year nine-hundred and six (AH), even later
(28) There they sold and bought, and displayed their power, bought off the Zamorin, and oppressed the people
(29) Hatred of Islam came with them and the people were afraid and anguish
(30) And the land of the Zamorin was snatched away from that of Mecca, and Guardafui was closed to travelers.

See Shihāb, Al-Nūnīyya al-Kubrā, 19; Ibrahim Khoury, As-Sufāliyya: The Poem of Sofala: Arabic Navigation along the East African Coast in the 15th Century (Coimbra: Junta de Investigações Científicas do Ultramar, 1983), 89–90; Edward A. Alpers, The Indian Ocean in World History (New York and Oxford: Oxford University Press, 2014), 69–74; Robert B. Serjeant, The Portuguese off the South Arabian Coast: Hadrami Chronicles (Oxford: Clarendon Press, 1963), 24. Apart from Ibn Mājid’s testimony, foreign merchants in Calicut were alarmed at the first appearance of the Portuguese. With the Portuguese arrival in India, Muslims, who had carried out and mastered the transoceanic trade unchallenged for many centuries, felt threatened by the emerging Christian sea power from the Iberian Peninsula. The Muslims’ suspicious attitude toward the Portuguese was projected in 1498 before Vasco da Gama himself touched the shores of Calicut. When the Portuguese fleet dropped anchor off the coast of Calicut, the first person ashore was the recent Jewish convert and convict Juao Nomez, the expedition’s interpreter, who spoke Spanish, Portuguese, Hebrew, and Arabic. He was taken by two North African merchants from Tunis, who greeted him in Castilian Spanish with the curse: “May the Devil take thee! What brought you hither? They asked what he sought so far away from home, and he told them that we came in search of Christians and of spices.” Álvaro Velho, A Journal of the First Voyage of Vasco da Gama 1497–1499 (London: Hakluyt Society, 1898), 48–49; Bernard S. Cohn, “The Past in the Present: India as Museum of Mankind,” History and Anthropology 11 (1998), 1; Charles R. Boxer, The Portuguese Seaborne Empire 1415–1825 (London: Hutchinson and Co., 1969), 37; Ram P. Anand, Origin and Development of the Law of the Sea (The Hague: Martinus Nijhoff Publishers, 1982), 47. The Portuguese carried with them a deep antipathy to Islam and Muslims, and apparently the two Tunisian traders predicted the prospective consequences of the Portuguese penetration into the Indian Ocean. They envisioned the Portuguese shifting their colonial strategies and ambitions to the Indian Ocean as they
Contrary to the westward explorations, which revealed to the Spaniards hitherto unknown pre-Columbian cultures, da Gama introduced a new maritime passage to the western European nations, which led to the already known sources of spices and other luxurious commodities from Southeast Asia that previously had made their way to the West solely through the Muslim world. The Portuguese incursion into the Indian Ocean, followed by similar intrusions of other European sea powers, undermined the Muslim-run maritime trading system, disturbed the flow of spices from Calicut to the Red Sea, and produced new forms of naval strategies and powers. Commanded by the viceroy Dom Francisco de Almeida, the Portuguese naval fleet surprised its Egyptian-Ottoman rival and defeated it in Diu on February 3, 1509; this engagement is regarded


as one of the most decisive naval battles in the maritime and legal history of the Indian Ocean.\textsuperscript{6}

The Portuguese penetration into the Indian Ocean ended the system of peaceful oceanic navigation that had been such a notable feature of that arena. Prior to this incursion, merchants at sea feared only pirates and natural hazards. Now, however, they were subject also to the threat of these new intruders, who imported the eastern Atlantic and Mediterranean models of trade and warfare and ended freedom of navigation in the eastern hemisphere. The Portuguese encroachment altered certain of the existing networking systems of maritime trade, as attested to by Sheikh Zayn al-Dīn al-Maʿbarī al-Malībārī in 993/1583:

Now it should be known, that after the Franks had established themselves in Cochin and Cannanore (Kannur) and had settled in those towns, the inhabitants, with all their dependents, became subject to these foreigners, engaged in all the arts of navigation, and in maritime employments, making voyages of trade under the protection of passes from the Franks; every vessel, however small, being provided with a distinct pass, and this with a view to the general security of all. And upon each of these passes a certain fee was fixed, on the payment of which the pass was delivered to the master of the vessel, when about to proceed on his voyage. Now the Franks, in imposing this toll, caused it to appear that it would prove in its consequences a source of advantage to these people, thus to induce them to submit to it; whilst to enforce its payment, if they fell in with any vessel, in which this their letter of marquee, or pass, was not to be found, they would invariably make a seizure both of the ship, its crew, and its cargo.\textsuperscript{7}

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Sanctioned by Alexander VI’s papal bull *Inter Caetera Divinae* (May 4, 1493), the Portuguese tried to enforce a royal monopoly on trade in the East Indies by patrolling the ocean from strategic points in Hormuz, Goa, Ceylon, and Malacca, and assuming sovereignty over major trunk routes; ships navigating the main shipping lanes between the Indonesian archipelago and the Persian Gulf were required to obtain *cartazes.*

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9 The “protection of passes” described by Zayn al-Dīn al-Malibārī is known in Portuguese as *cartaz.* The word *cartaz* is derived from the Arabic *qirtās* or *qartās,* which is originally derived from ancient Greek χάρτης (chárte) denoting a writing, book, scroll, document, paper cone, or cornet. Some philologists and linguists argue that the word *qirtās* (Qir-Tās) was borrowed and Arabized by Arab sailors from the Hakka Chinese term Chi-Tan-Qalam, 1410/1990), 529; Abu al-Fadhl Jamāl al-Dīn Muḥammad ibn Mukarram ibn Manẓūr, *Lisān al-ʿArab* (Beirut: Dār Sādār, 2003), 12.73–74; Ary A. Roest-Crollius, *The Word in the Experience of Revelation in Qurʾān and Hindu Scriptures* (Rome: Universitā Gregoriana Editrice, 1974), 87; S. Mahdihassan, “Chinese Words in the Holy Koran: Qirtas, Meaning Paper, and Its Synonym, Kagaz,” *Journal of the University of Bombay* 24 (1955), 149–151, 161; Federico Corriente, *Dictionary of Arabic and Allied Loanwords: Spanish, Portuguese, Catalan, Galician and Kindred Dialects* (Leiden:
The Portuguese monopoly not only affected the indigenous peoples and foreigners, both Muslims and non-Muslims, but it also aimed to deprive


The cartaz was in effect a trading license or navicert issued by the Portuguese commissioner or competent authority to ships sailing in the Indian Ocean in an attempt to control the trade carried out by local people in Asian waters and to finance the Portuguese Empire in Asia. It was used as a means by which a maritime power enforced its jurisdiction and protection of vessels on oceanic routes. According to the Portuguese practice, the process of issuing a ship’s cartaz by a particular maritime power started with a detailed search of the foreign ship in question. If the inquiry carried out in a harbor was satisfactory and the relevant authority concluded that the ship’s intended voyage would be undertaken in good faith, a safe-conduct was granted protecting the vessel from interference on her voyage. Sailing without it gave rise to the risk of being stopped, captured, and deprived of property, freedom, or life. The cartaz also served as a navicert, particularly in times of naval warfare in the Indian Ocean and Arabian Sea. A typical cartaz contains details regarding the name of the vessel and her tonnage, the place of origin of the cargo, the vessel’s destination, types of shipments, identity of crews, shippers, and passengers, the approximate date of departure, the name of the issuing authority and Portuguese writers, and the document’s date of issue. It should be noted that the cartaz was designed solely to protect shippers, crews, and shipowners from the Portuguese themselves, but not from other maritime actors in the Indian Ocean. Charles H. Alexandrowicz, An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries) (Oxford: Clarendon Press, 1967), 71–73; Alexandrowicz, “Freitas versus Grotius,” 176–180; Anand, Origin and Development of the Law of the Sea, 60–62; Heather Sutherland, “Geography as Destiny? The Role of Water in Southeast Asian History,” in A World of Water: Rain, Rivers and Seas in Southeast Asian Histories, ed. Peter Boomgaard (Leiden: KITLV Press, 2007), 38–39; Pius Malekandathil, Portuguese Cochin and the Maritime Trade of India, 1500–1663 (New Delhi: Manohar, 2001), 125–126; Pearson, Merchants and Rulers in Gujarat, 40–43, 70; Dalgado, Influence of Portuguese Vocables, 82; Mohammed H. Salman, “Aspects of Portuguese Rule in the Arabian Gulf, 1521–1622,” (PhD diss., University of Hull, 2004), 132–137; Kuzhippalli S. Mathew, “Trade in the Indian Ocean and the Portuguese System of Cartazes,” in The First Portuguese Colonial Empire, ed. Malyn D. Newitt (Exeter: University of Exeter Press, 1986), 69–84. Nearly a century earlier, King Manuel I (1469–1521) of Portugal promulgated a royal decree ordering the Moors who arrived at and departed from his coastal possessions in Morocco to be equipped with the permission of the Portuguese authorities when traveling by sea. Hendrickson, “Muslim Legal Responses to Portuguese Occupation,” 313. It is plausible to hypothesize that the sixteenth-century cartaz may possibly owe its legal roots to the thirteenth-century Iberian safe-conduct (guidaticum), which apparently emerged from the Islamic amān. However, unlike the amān, which was free of charge, the Iberian guidaticum could be purchased by anyone for a given time, or permanently with an annual fee to ensure the safety of the vessels, their crews, and their shipments. On the basis of legal similarities between the Portuguese cartaz and the guidaticum, it is sensible to contend that the legal roots of the former might be attributed to the Spanish safe-conduct. Daniel J. Smith, “Heterogeneity and Exchange: Safe-Conducts in Medieval Spain,” Review of Australian Economics 27 (2014), 190–192.
the newly arrived European Christian merchants from other states of the highly profitable Southeast Asian trade.10

The late fifteenth-century papal bull, as mentioned, which partitioned the new world between the Spaniards and the Portuguese, also denied other European nations rights of navigation and access to the newly discovered territories and maritime routes in the Atlantic and Indian oceans. In defence of the seizure of the Portuguese cargo vessel Santa Catarina on February 25, 1603, by three ships of the Dutch East India Company (Vereenigde Oostindische Compagnie, VOC) in the Singapore Strait,11 and in response to the unjustified maritime claims of Spain and Portugal, the Dutch lawyer and humanist Hugo Grotius (1583–1645) wrote the De Jure Praedae (On the Law of Prize and Booty), wherein Chapter 12 deals with the freedom of the seas (Mare Liberum/The Free Sea).12 Relying heavily on the Justinianic Institutes and Corpus Juris Civilis, from which he derived his legal references,13 Grotius argued: (a) since the seas are open to all nations by command of the Law of Nations, the Portuguese have no valid title to confine access to the East Indies to themselves;14 (b) the seas are not subject to appropriation by persons or states but are available to everyone for navigation, and therefore neither Portugal nor other nations can have exclusive rights of navigation whether through seizure, papal grant, prescription, or custom;15 (c) non-Christians (“infidels” as termed by the author) cannot be divested of public or private rights of ownership merely because they are infidels, whether on grounds of discovery,

10 Alexandrowicz, “Freitas versus Grotius,” 178. Save for its monopolistic aspect, the cartaz system can be seen as an instrument of the Portuguese jurisdiction assumed in the Indian Ocean under their quasioccupation, and as a navicert assuring safety to vessels at sea during the Portuguese continuous crusade against the Muslim world.


papal grant, or war; and (d) no people can acquire a monopoly on commerce with any overseas country. Following Grotius’s contention, contemporaneous European lawyers sparked a legal debate, some challenging and others concurring with his position, leading to further scholarly contribution to the law of the sea. Both advocates and opponents of the freedom of navigation were inspired either by the natural law enshrined in the Justinianic Institutes and Corpus Juris Civilis, or the Hebrew Bible’s concept of sovereignty on the open sea. British legal theoretician John Selden mentions both in his 1635 Mare Clausum, Sive de Dominio Maris (The Closed Sea, or the Dominion of the Sea).

As mentioned earlier, freedom of navigation in the Indian Ocean was common practice until the arrival of the Portuguese in the eastern maritime arena. By the beginning of the seventeenth century and the appearance of the Dutch East India Company the concepts of mare liberum and freedom of commerce between littoral countries along the Indian Ocean were no longer confined to locals and Asians. The ocean, which was common to the peoples of Southeast Asia and the Near East, was now shared with the European naval powers, so that in 1615, the Makassarese sultan ʿAlāuddin Tumenanga ri Gaukanna (1002–1049/1593–1639) asked the Dutch East India Company not to interfere with the ships of the Makassarese Kingdom of Goa on the high seas, declaring, “God made the earth and the sea, has divided the earth among mankind and given the sea in common. It is a thing unheard of that anyone should be forbidden to sail the seas.” By this statement, the sultan acknowledged that in

contrast to land, Islamic law considers the boundless sea to be the common heritage of mankind. No governing authority or nation could either claim proprietorship over it, or exclusive right of navigation; however, he did not elaborate on how the Islamic Law of Nature entitles human beings to share the sea and enjoy equal rights of exploration and exploitation of its natural resources. It may be assumed that the sultan was referring to the traditional freedom of navigation which had existed in the Indian Ocean on the eve of the European colonial era. Before the appearance of the European navies in the sixteenth century, the polities around the Indian Ocean had enjoyed the natural right to conduct maritime trade and navigate the vast ocean without molestation.

HUMAN RIGHTS AND THE ISLAMIC CUSTOMARY LAW OF THE SEA

Numerous studies have been written on human rights and freedom in Islamic law, few of which have touched on the issue of legal rights and the obligations of shipowners, crews, shippers, and passengers at sea with special reference to private commercial laws. The issue of human rights is best and most succinctly addressed by the fourth Shiite imam and Prophet’s great-grandson Zayn al-‘Abidin ‘Ali ibn al-Husayn ibn ‘Ali ibn Abū Ṭalib (38–95/659–713) in his Treatise of Rights (Risālat al-Ḥuqūq).21 Canonically, Islam does not draw a distinction between


Introduction

rights and obligations on land and at sea, but places them on an equal footing. Human rights, as prescribed by law, are classified into three major categories: the rights of God, the rights of the individual toward himself (al-nafs), and the rights of humans or individuals (‘ibād); each of the three is further divided into subcategories.

Of interest are the rights of individuals and the community at large that define the relationship between individuals of the same or different religions and nationalities inter se, and those that define the relationship between the individual and the community and state. Among these rights ‘Alī ibn al-Husayn counts the rights of superiors,23 rights of dependents,24 rights of relatives,25 rights based on personal relationships,26 and most importantly as far as this study is concerned, rights based on financial, judicial, and social relationships; these latter rights cover, among other things, topics associated with the rights of partners, associates, creditors, wealth, claimants, and defendants.27

Human rights laws cannot be separated from the customary law of the sea because the two overlap in many ways. One may consider, for instance, the right to life. Since time immemorial, rendering assistance to persons or ships in distress or danger on the high seas or in the territorial sea of a coastal state has been accepted as a common humanitarian norm. Providing assistance to ill-fated individuals at sea is considered by Islamic law to be a moral duty and a religious obligation; the law commands Muslims to render assistance insofar as the rescuers do not compromise their own safety.28 The rights of individuals apply to the personal safety of

22 Qurʾān 5:32: “مَن قَتَلَ نَفْسًا يَعْتَدَّ نَفْسَهُ فِي الْأَرْضِ فَكَانَ قَتَلَ النَّاسَ جَمِيعًا وَمَن أَخِيهَا فَكَانَ أَخَاهَا النَّاسَ.” (if anyone slew a person – unless it be for murder or for spreading mischief in the land – it would be as if he slew the whole people. And, if anyone saved a life, it would be as if

23 Ibn Bābawayh, Man lā Yahduruhu al-Faqīh, 2:620–621.
24 Ibn Bābawayh, Man lā Yahduruhu al-Faqīh, 2:622.
28 Qurʾān 5:32.
Muslims and non-Muslims in the Abode of Islam and foreign territories, as they do to foreigners on Islamic soil. Every person is guaranteed safety and protection against physical harm to him and to his property, whether at sea or on land; any person violating these rights is subject to punishment.\textsuperscript{29} In the event of robbery or piracy, for instance, jurists hold conflicting opinions with respect to the punishment of a bandit or a pirate who repents prior to being captured. One opinion rules that the rights of God and individuals are forgiven; another states that God’s rights are forgiven, as are private rights, unless the act involves injury or death, and a third holds that Divine punishments are forgiven, while private rights pertaining to property, injury, or death are not. According to all opinions, compensation must be paid for the damages incurred by the victim.\textsuperscript{30} The state normally carries out the punishment against the offender, irrespective of his creed or nationality.\textsuperscript{31}

Other key issues that link the individual, community, and state to the customary law of the sea are the right to justice and equality in justice. Since the standards of justice in the Qurʾān transcend racial, religious, social, and economic considerations, Muslims are commanded to be just at all levels.\textsuperscript{32} A Muslim acts more virtuously when he does justice to a party whom he disfavors,\textsuperscript{33} or to non-Muslims, as pointed out in Qurʾān 60:8. Here the Qurʾān commands Muslims to deal kindly and equitably.

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\textsuperscript{29} Qurʾān 4:135; Anver M. Emon, “Huquq Allāh and Huquq al-Ībād: A Legal Heuristic for a Natural Rights Regime,” Islamic Law and Society 13 (2006), 373–376. In the case of death, the Qurʾān ordains the judicial authorities to consider crucifixion, or exile from the land. For further details, see Chapter 3, 202–208.


\textsuperscript{31} Qurʾān 5:32–33; Anver M. Emon, “Huquq Allāh and Huquq al-Ībād: A Legal Heuristic for a Natural Rights Regime,” Islamic Law and Society 13 (2006), 373–376. In the case of death, the Qurʾān ordains the judicial authorities to consider crucifixion, or exile from the land. For further details, see Chapter 3, 202–208.


\textsuperscript{33} Qurʾān 5:32–33; Anver M. Emon, “Huquq Allāh and Huquq al-Ībād: A Legal Heuristic for a Natural Rights Regime,” Islamic Law and Society 13 (2006), 373–376. In the case of death, the Qurʾān ordains the judicial authorities to consider crucifixion, or exile from the land. For further details, see Chapter 3, 202–208.
with the unbelievers, since this is an inherent right of all human beings under God’s law. Notably, as shall be comprehensively explained in Chapter 2, the Qur’ān calls for preservation of the earlier revelations and advises Muslims strongly not to intervene in the judicial affairs of the People of the Book (Ahl al-Kitāb), but to grant them legal autonomy to administer justice and to execute judgment pursuant to their own law.34

One way to promote trade, improve diplomatic relations with foreign countries, enhance cultural exchange and, most importantly, propagate religion is through the free movement of peoples.35 Free movement of merchants can enhance trade, create wealth among nations, and improve the living standards of citizens. It is the natural right of human beings to travel within and beyond their countries according to their free will when seeking knowledge, earning a livelihood, or achieving other things.36 Qur’ān 67:15 rules regarding the freedom of travel that: “It is He Who has made the earth manageable for you, so traverse ye through its tracts and enjoy of the Sustenance which He furnishes: but unto Him is the Resurrection.” Islamic law mandates that women, who are forbidden to travel alone, always be accompanied by husbands or unmarriageable male kin (maḥārim).37 Additionally, people are strongly advised not to set off if they might be faced by danger.38

It is generally recognized by the Law of Nature and the Law of Nations that individuals, communities, and nations have an inherent right to navigate the seas freely and to take advantage of their natural resources. These rights are perhaps best stated in Qur’ān 16:14: “It is He Who has made the sea subject, that ye may eat thereof flesh that is fresh and tender, and that ye may extract therefrom ornaments to wear; and thou seest the ships therein that plough the waves, that ye may seek (thus) of the bounty of God and that ye

34 Qur’ān 5:42–49.
38 Khalilieh, Admiralty and Maritime Laws, 121–131.
may be grateful (وَهوَ الَّذِي سَحَرَ الْبَيْحَرُ لِلْكُلِّ أَكْثَرًا مِنْهُ لِحَمَّةٍ وَتَسْهُّلُوْنَهَا وَتَسْتَخْرُجُوْنَ مِنْهُ جَلْبًا).” With the exception of a limited offshore zone, the high seas and associated assets are among the greatest bounties that God has bestowed on human beings; individuals and nations have the right to use and benefit from them, but that right is not exclusive. Neither the high seas nor their natural resources are subject to dominion and appropriation by one nation or another. Indeed, from the dawn of ancient civilization to the present day, the practices and customary law of the sea, together with Islamic law, are not only about the utilization of the natural resources of the seas and oceans, but also about an individual’s rights and liberty to freely navigate and exploit these resources.

CUSTOM AS A SOURCE OF ISLAMIC LAW

Islamic expansion into the former Byzantine and Sassanid territories was not destructive, and so the administrative systems and cultural norms existing in the territories taken over by Muslims were sustained. The early caliphate succeeded by the Umayyad dynasty preserved the governmental system prevailing in the former Byzantine territories along the Mediterranean, and also the Persian administrative counterpart in the eastern provinces of the Islamic Empire. Without the retention of the existing legal, financial, and administrative institutions and practices of the conquered territories, one may surmise that Muslim dominion over a vast, diverse ethnocultural and geographical space would not have survived for such a long period of time. The natural inclination of the peoples who came under Islamic authority or adopted the most recent Divine monotheistic faith, was to maintain the status quo, in their legal relationships, customary practices, and long-standing traditions, and this was merely confirmed and strengthened by the rigidity of Shari‘ah provisions.

40 Khalilieh, Admiralty and Maritime Laws, 18–19.
41 Wael B. Hallaq, An Introduction to Islamic Law (Cambridge: Cambridge University Press, 2009), 8, 11, 61–62; Wael B. Hallaq, The Origins and Evolution of Islamic Law (Cambridge: Cambridge University Press, 2005), 4, 24–25, 32–33; Noel J. Coulson, “Muslim Custom and Case-Law,” Die Welt des Islams 16 (1959), 16–17. The word Shari‘ah is derived from the root sh.r. ‘a., meaning “to start, to enter, or to go”; the noun shāri‘ signifies “road, way, or path”; shara‘a designates “to introduce, to enact, or to prescribe.” Shari‘ah also denotes a non-exhaustive water spring, or the path to the water source since the water is considered as the element vital to life, so is the worldly human life, which cannot exist without the path to righteousness (Qur’an 6:153). If the water is so vital for every living thing, the Shari‘ah is, by the same token, the life for souls of
Islamic maritime achievements in the Mediterranean Sea and the Near Eastern seas did not change the material culture of the occupied countries abruptly: instead, there was cultural continuity in various aspects of life for centuries, in spite of the gradual processes of Islamization and Arabization. The non-Muslim subject populations retained their traditional legal institutions, including ecclesiastical and rabbinical tribunals, whereas the jurisdiction of the qadi extended to Muslims and civil cases involving Muslims and non-Muslims. Until the turn of the eighth century, Umayyad qadis gave judgments according to their own discretion (ra’y), basing them on Qur’ānic regulations, Prophetic traditions, and customary practices that did not contradict Islamic principles.

With the Islamic expansion in the Mediterranean world and Asia from the seventh century onward came the gradual process of mutual acculturation, by which Muslims absorbed and accommodated to themselves local customs that became an inseparable part of social and legal norms. Muslims and humanity (Qur’ān 21:107). The Sharīʿah in the generic religious context designates the straight path to happiness and good life which Muslims cannot achieve without following the Path of God and the Sunna of His Messenger (Qur’ān 59:7). The Sharīʿah is like running water, which remains fresh due to its constant flow. It is dynamic in nature, evolves with human evolution and the changing world, and responds to the challenges and needs not only of the Islamic ummah, but also of all mankind across the universe at all times. The Sharīʿah comprises the final revelation from God (Qur’ān) and the Prophet’s recorded teachings.

In addition to their contribution to the development of Islamic naval activity, the dhimmīs – mainly native Christians of Syria, Egypt, and North Africa – preserved the maritime laws instituted in the Justinianic Digest, as well as local customs, for centuries to come. With the establishment of the madhāhib from the eighth century onward, many canonical regulations and practices were “Islamicized,” as long as they did not contradict the sacred law.

With the Islamic expansion in the Mediterranean world and Asia from the seventh century onward came the gradual process of mutual acculturation, by which Muslims absorbed and accommodated to themselves local customs that became an inseparable part of social and legal norms. Muslims and humanity (Qur’ān 21:107). The Sharīʿah in the generic religious context designates the straight path to happiness and good life which Muslims cannot achieve without following the Path of God and the Sunna of His Messenger (Qur’ān 59:7). The Sharīʿah is like running water, which remains fresh due to its constant flow. It is dynamic in nature, evolves with human evolution and the changing world, and responds to the challenges and needs not only of the Islamic ummah, but also of all mankind across the universe at all times. The Sharīʿah comprises the final revelation from God (Qur’ān) and the Prophet’s recorded teachings.
Both Muslim legal and ruling authorities not only retained pre-Islamic customs and traditions, but also adapted and Islamicized laws and customs so long as they were in conformity with the Qurʾān and Sunna. This may explain why jurists and judges often consulted, in the course of resolving specific legal cases, general custom (urf ṣāmī), specific custom (urf khāṣṣ), jurists’ custom (urf al-fuqahā’), artisans’ custom (urf al-sunnā), merchants’ custom (urf al-tujjār), etc. The influence of custom is tangible in Islamic maritime law. In the introductory chapter of Kitāb Akriyat al-Sufun (The Treatise on the Leasing of Ships), the author Muḥammad ibn Ṣūf al-Andalusī al-Iskandarānī (d. 310/923) emphasized the role of local custom and practices in the conclusion of commercial contracts. The jurist went further by claiming that custom could replace and even supersede an

new dynasty and the first one is much greater than that between the second and the first one. Gradual increase in the degree of discrepancy continues. The eventual result is an altogether distinct (set of customs and institutions). As long as there is this continued succession of different races to royal authority and government, changes in customs and institutions will not cease to occur.” The English translation, which is compatible with the Arabic text, is quoted from Franz Rosenthal, The Muqaddimah: An Introduction to History (Princeton: Princeton University Press, 1967), 25–26; for the electronic version, see: https://asadullahali.files.wordpress.com/2012/10/ibn_khaldun-al_muqaddimah.pdf. The Qurʾān validates customary practices inasmuch as they are consistent with Islamic principles, namely the sacred text and the Prophetic Sunna. Of all the Qurʾānic verses where derivatives of the term ʿurf occur, one āyāt (Qurʾān 7:199) deserves a closer examination: خَذِ الْعُفْوَ وَأَمِّرِ الْعَفْوَ وَأَضْرِعْ عَنَّ الْعَفْوِ “Hold to forgiveness, enjoin ʿurf, but turn away from the ignorant.” The great majority of exegetes argue that the word ʿurf is related to the term maʿrūf, meaning “good, upright, or beneficial.” That is to say, the ʿurf cannot be quoted as textual authority for custom as such. Nevertheless, there are some commentators who contend that the term ʿurf may also signify “custom” in the true sense of the word, arguing that “what the Muslims deem to be good is good in the sight of God,” said ʿAbd Allāh ibn Masʿūd, a prominent Companion of the Prophet. Ayman Shabana, Custom in Islamic Law and Legal Theory (New York: Palgrave Macmillan, 2010), 50–58; Wael B. Hallaq, Authority, Continuity and Change in Islamic Law (Cambridge: Cambridge University Press, 2004), 215–235; Mohammad H. Kamali, Principles of Islamic Jurisprudence (Cambridge: Islamic Texts Society, 1997), 256; Majid Khadduri, “Nature and Sources of Islamic Law,” George Washington Law Review 22 (1953), 3–4; Taiwo M. Salisu, “Uruf/Adab (Custom): An Ancillary Mechanism in Shareʿah,” Ilorin Journal of Religious Studies 3 (2013), 137–142; ʿAbdullāh A. Ḥājj-Ḥasan, “Sales and Contracts in Early Islamic Commercial Law,” (PhD diss., University of Edinburgh, 1986), 18–20; Gideon Libson, “On the Development of Custom as a Source of Law in Islamic Law,” Islamic Law and Society 4 (1997), 131–155.  

explicit stipulation. Citing the prominent North African jurist Sahnūn ibn Sa‘īd al-Tanūkhī (160–240/776–854), the author of the treatise added that “if hiring arrangements are to be admitted solely on the basis of analogy (qiyāṣ), most will be invalidated [only recourse to custom makes them licit].” Accordingly, in the absence of a written contract and explicit stipulations, jurists and judges would normally resort to local custom.

The process of the reception and assimilation of foreign laws, especially Byzantine and Persian laws, is discernible in the realm of Islamic siyar (Law of Nations). Early authors of siyar literature not only recognized custom as a source of law but also endorsed it as a decisive authority so long as it did not contradict or override the naṣṣ. In order to validate custom and make it legally binding, jurists ruled that custom must be: (a) sensible and consistent with the Shari‘ah; (b) implicitly or expressly accepted by the Islamic State; (c) dominantly and frequently practiced in interstate relations; and (d) in use before or at the time of the conclusion of an international treaty. To a great degree, the siyar share similarities with the Roman jus gentium, which regulated relations between Roman citizens and foreigners, with a cardinal difference in that the former addressed legal issues between the ummah and non-Islamic states, as shall be elaborated in due course.

**PURPOSE, STRUCTURE, AND METHODOLOGY OF THE STUDY**

Grotius’s reliance on Romano-Byzantine legal codices leaves the impression that the Law of Nature and Law of Nations governing access to the sea are a European establishment. He advertently or inadvertently tended to

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48 Tāher, Akriyat al-Sufun, 14.
49 Tāher, Akriyat al-Sufun, 15; Khalilieh, Admiralty and Maritime Laws, 277–278.
overlook the contribution of the “infidels,”\(^{54}\) as he called the non-Christian nations and societies, to the development of the customary law of the sea despite his awareness of the long tradition of freedom of navigation that had existed in the Islamic Mediterranean as well as in the Indian Ocean, prior to the intrusion of the European naval powers.\(^{55}\) In response to the widely accepted legal theory that the doctrine of the freedom of the seas was initiated and promoted by early modern European lawyers, this study aims primarily to achieve an understanding of the theoretical and practical concepts of the Islamic customary law of the sea that are absent not only from the writings of the influential Dutch humanist but also from pre-modern and contemporary Western legal literature.

In order to eliminate any possible confusion on the part of the reader, this study will deal solely with the Islamic concept of the “law of the sea,” as opposed to the concept of “maritime law.”\(^{56}\) Despite the fact that the

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54 Grotius (2004), *Free Sea*, 8, 15, 17, 19, 52. He argues that the Portuguese can neither claim exclusive access to the eastern seas by virtue of discovery, nor deprive the infidels, who are partly pagans and partly Muslims, of the right to navigate the sea and carry out commercial transactions.


two terms may appear similar to non-experts, they are actually two distinct fields of law with substantially different connotations. This study investigates exclusively the doctrine of the commonality of the seas and freedom of navigation and right of mobility as established by the Islamic Law of Nature and the siyar. Gaining a comprehensive understanding of the way that Islamic tradition perceives the high sea and offshore marine spaces, both in theory and practice, requires us to address several key issues: first and foremost, how does the Qur’ān view the legal status of the sea? Did naval supremacy and military expansion empower or entitle a state to claim dominion over the sea? How did the Prophet Muhammad contribute to the foundations of the Islamic tradition and customary law of the sea despite the fact that he never experienced the sea? Under Islamic law, did vessels enjoy legal immunity while at sea, in ports, or on navigable rivers? What legal measures were employed to protect aliens in the Abode of Islam and at sea, or Muslim subjects in foreign countries? Why does the Shari‘ah favor legal pluralism as opposed to a unified judicial system? How did legal pluralism have a significant impact on the exercise of the right to freedom of the seas, ultimately promoting commercial activities? What were the circumstances in which a coastal state could claim jurisdiction over waters adjoining its shoreline? Was that claim exclusive? Did the coastal self-ruling or independent entity have a right to deny access or bar foreign vessels from sailing through its territorial sea? If a ship was exposed to man-made or natural dangers, was she granted permission to seek refuge? What were the legal and practical means employed by authorities to fight, suppress, and even eradicate piracy? What was more meritorious, fighting piracy or launching a war against enemies, and why?

Our study does not seek to survey and address Islamic maritime heritage in the western and eastern hemispheres, a subject which has received a fair amount of attention from contemporary scholars. Rather, its aim

is twofold. Its primary purpose, as already stated, is to highlight the Islamic legal doctrine regarding freedom of the seas and its implementation in practice, and to divulge how the rights of individuals are protected within and beyond the maritime boundaries and territorial jurisdiction of the state. The second objective is to prove that many of the fundamental principles of the premodern international law governing the legal status of the high seas and the territorial waters originated in the Mediterranean world, though they are not a necessarily European creation. The fading away of the Byzantine maritime hegemony, the Islamic military expansions along the eastern, southern, and western shores of the Mediterranean, and the Christian–Islamic naval rivalries over the Middle Sea, particularly from the second half of the eleventh century onward, undoubtedly gave rise to the introduction of unprecedented legal norms and rules governing the law of the sea.

This work comprises three chapters, with an introduction and a conclusion. Chapter 1 treats the commonality of the sea in the Qur’ān, the genesis of the freedom of navigation, and the immunity of civilian subjects of the Abode of Islam, neutral countries, the Abode of Covenant, and the Abode of War on land and at sea. In addition, it examines the flag state’s jurisdiction over national ships, their contents, crew, and passengers. Chapter 2 analyzes the Islamic concept of the territorial sea, its seaward breadth, and the state’s sovereignty over offshore zones adjoining the coastal frontiers, with an emphasis on the exclusive jurisdiction over that part of the Red Sea stretching along the coast of the Hijaz (also Hijāz/Hejaz). The chapter describes the regime of passage through international straits, which as in the past plays a vital role today in global trade networks; in addition, the chapter investigates the judicial system in Islam and expounds the reasons why the Qur’ān and judicial authorities favor legal pluralism as opposed to a single unified legal system, and the way that the legal theory has been translated into practice. Piracy and its legal, financial, and social implications are treated in Chapter 3; the discussion revolves around the factors fostering piracy and the methods employed to combat and reduce sea robbery.

Methodologically, coping with the foregoing themes cannot be achieved unless disciplinary boundaries are transcended through an interdisciplinary approach. The primary source upon which this study is based comes from the *Sharī‘ah*, which is composed primarily of the Qur‘ān and the Prophetic Sunna. Even though the Qur‘ān constitutes the cornerstone and foundation of Islamic legislation it should not be approached solely as a book of law, since the majority of it focuses on human moral values and ethics. With regard to the subject matter of this study, however, the Qur‘ānic verses analyzed are confined exclusively to the topic of the commonality of the sea highlighting principles of natural and universal laws. The Qur‘ānic verses will be quoted in the original Arabic, accompanied by an English translation, in order to maintain their true meaning and avoid depriving the reader of the Divine spirit of the original text. Word-for-word translations of the Qur‘ān have traditionally been rejected by Muslim theologians and intellectuals from the eighth century to the present day, the argument being that: (a) the translations could result in a semantic change and therefore ruin the intended meaning; (b) no matter how precise the translation, it can never produce a second original, either in form or in content; (c) the translator’s scholarly background of Islamic theology and tradition and linguistic skills in both Arabic and English may directly affect the quality of the translation; a translator who


59 Qur‘ān 16:89: “وَزَرَّأَتِيَ اللَّهُ الكِتَابَ بِبِيَانٍ لِكُلِّ شَيْءٍ وَهُدًىٰ وَرَحْمَةٰ لِلْمُتَّقِينِ” (and We have sent down to thee a Book explaining all things, a Guide, a Mercy, and Glad Tidings to Muslims).”


61 The English translation of the quoted Qur‘ānic verses relies almost solely on ʿAbdullāh Yūsuf ʿAlī, *The Meaning of the Holy Qur‘ān* (Brentwood: Amana Corporation, 1991), which is considered to be one of the most accurate, authentic, and reliable translations.
lacks the necessary academic background may utterly change the meaning of the verse and provide a totally different translations when the verse itself is very clear; and (d) inaccuracies may occur due to the translator’s sectarian and personal biases or sociopolitical interests. All these and other reasons make the English translation interpretive rather than an equivalent text of the original Arabic. As a consequence, the Qurʾan repeatedly asserts why it was revealed to the “Seal of the Prophets (خاتم النبويين)" “in the perspicuous Arabic tongue (بلسان عربي مبين)." As a supplement to the Qurʾan, the Sunna of the Prophet constitutes the second fundamental and indispensable source of Islamic law.

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63 Qurʾān 26:195; Q 41:3: “كتاب فضل الله عز وجل لقوم يفقعون” (A Book, whereof the verses are explained in detail – a Qurʾān in Arabic for people who understand)’; Q 43:3: “إنا جعلنا قوامًا عربيًا لقوم يفقعون” (We have made a Qurʾān in Arabic that ye may be able to understand and learn wisdom).”

64 Qurʾān 16:44: (And We have sent down unto thee (also) the Message; that thou mayest explain clearly to men what is sent for them, and that they may give thought.” It is clearly evident from this verse that the Prophetic tradition can be viewed as an interpretation and explanation of the Qurʾānic injunctions by God’s Messenger. Its primary purpose is, therefore, to clarify the meaning of the Qurʾānic verses and remove any probable confusion that may arise from the brevity, ambiguity, and hidden meaning/s of these verses.
Many Qur’ānic verses explicitly equate obedience to God with obedience to His Messenger and command all Muslims to hold tight to his tradition and heritage. Most relevant to our study are specific documents and treaties suggested to have been issued by the Prophet, specifically the 9 AH/630 CE guarantee of protection, which the Prophet granted to Yūḥannā ibn Ru’ba, the Patriarch and governor of the port city of Aylah (present-day ’Aqabah). All of the recorded diplomatic treaties, truces, correspondences, and safe-conducts formulated and endorsed by the Prophet reflect his actual attitude and conduct (Sīra), served as the model and basis for later Islamic siyar, and were accepted as a customary practice for over a millennium. The vast majority, if not all, of the international treaties concluded in the post-Prophetic era between Muslim central and peripheral authorities on the one hand, and foreign empires, states, and self-ruling entities on the other, seem to have followed the same legal pattern and format introduced by the Prophetic Sīra. Historically, being part of Islamic law, the siyar was contemporaneously pioneered by early jurists prior to the formation of the madhāhib, namely, by Abū ’Amr ʿĀmir ibn Sharāḥil al-Sha’bī (21–103/641–721), Abū Ḥanīfa al-Nu’mān ibn Thābit (80–150/699–767), Ibn Ishāq (85–151/704–768), ʿAbd al-Rahmān al-Awzāʿī (88–157/707–774), Sufyān al-Thawrī (97–161/716–778), Abū Ishāq al-Fazārī (d. 186/802), Wāqīdī (130–207/747–822), Muḥammad ibn al-Ḥasan al-Shaybānī (131–189/749–805), and Ibn Hīshām (d. 218/833).


67 Sīra(h), of which the siyar is the plural, has two different meanings. First, it signifies a life account or biography; and, second, the behavior and conduct of the ruler during wartime and external and internal affairs of the state. When Muslim jurists use the term sīra, they chiefly refer to the conduct of the Prophet and his Rightly Guided Successors (Pious Caliphs) in their wars, and in their relations with foreign states, rules of dealing with rebels, apostates, and non-Muslim citizens and aliens within the Islamic territory.

covered by the *siyar* are best summarized by Muḥammad ibn Ahmad al-Sarakhsi (d. 490/1096) as follows:

Know that the word *siyar* is the plural form of *ṣīra(h)*. (Imam Muḥammad al-Shaybānī) has designated this chapter by it since it describes the *behavior of the Muslims* in dealing with the Associates (non-Muslims) from among the belligerents as well as those of them who have made a pact (with Muslims) and live either as Resident Aliens or as non-Muslim Subjects; in dealing with Apostates who are the worst of infidels, since they abjure after acknowledgement (of Islam); and in dealing with Rebels whose position is less (reprehensible) than that of the Associates, although they be ignorant and in their contention on false ground.⁷⁰

Islamic law covers all areas of human conduct, rules of ritual purification, and rules governing interhuman relations and dealings (*muʿāmalāt*). What matters for this study are two themes that neither the Qurʾān nor the recorded Sunna has treated in straightforward manner: the division of the world, and the sovereign and jurisdictional rights over the Arabian side of the Red Sea, specifically the offshore marine zone adjacent to the Hijaz. Furthermore, the use of early and classical jurisprudential manuals can shed light on the conduct of war, enemy alien merchants and travelers in the Abode of Islam and at sea, the judicial autonomy of non-Muslims and foreigners in Islamic territories, and issues related to piracy.

Surviving international diplomatic and commercial treaties that have come down to us from the pre-Ottoman Mediterranean world contain the most significant legal details and historical facts regarding the legal status of persons, merchant vessels, and property on the high seas, territorial seas, and inland waters. The vast bulk of the Islamic–Christian international treaties cited or quoted in this study deal with the maintenance of peace and security between the contracting parties, the promotion and facilitation of trade, freedom of navigation, protection of persons, vessels, and properties at sea and in inland waters, the suppression and deterrence of piracy, and above all, the implementation of reciprocal interests and mutual respect for state sovereignty and territorial integrity. Moreover,


a thorough scrutiny of these treaties enables us to learn how classical Islam and medieval Europe theorized the concept of the territorial sea and whether sovereignty over a limited marine zone contiguous to the coastal frontier was awarded international recognition. Familiarity with these sources will contribute significantly to our understanding of how the sea is conceived in the Islamic Law of Nature and the Law of Nations.
I

Freedom of the Seas

PRE-ISLAMIC CUSTOMARY LAWS AND PRACTICES

Right of access to the sea has preoccupied ruling authorities and jurisconsults from the dawn of ancient civilization to the present day. The scant legal evidence reaching us from the biblical and ensuing periods suggests that nations bordering the sea – such as those of the Egyptians, Phoenicians, Minoans, Hittites, Philistines, and Assyrians – codified laws regulating navigation in adjacent waters, on rivers, and on the high seas, in addition to establishing regulations pertaining to fishing and access to ports. Despite their military supremacy on land and at sea, ancient Near Eastern empires neither claimed legal dominion over the high seas, in full or in part, nor denied other nations access to them.¹ Dominion over the sea held a symbolic rather

¹ A letter addressed from the King of Tyre to the King of Ugarit from the thirteenth century BCE reports that a Ugaritic ship heading for Egypt had sunk or had been severely damaged in a rainstorm off the coast of Acco (ʿAkkā/Acre). The ship had been unloaded, and her sailors and their belongings sheltered in Acco until the sea had calmed down. The Tyrian king went on to assure the Ugaritic king that the ship’s cargo was safe. His letter seems to indicate that the Tyrian king had the concept of territorial waters in mind when he wrote to Ugarit. Regardless of nationality, providing assistance to ships in distress sailing within the territorial waters of a coastal state has always been viewed as a humane duty. Jonathan Ziskind, “The International Legal Status of the Sea in Antiquity,” Acta Orientalia 35 (1973), 36–40; Oded Tammuz, “Mare Clausum: Sailing Seasons in the Mediterranean in Early Antiquity,” Mediterranean Historical Review 20 (2005), 148–149; Arno Egberts, “The Chronology of ‘The Report of Wenamun’,” Journal of Egyptian Archaeology 77 (1991), 58–61; James H. Breasted, “The Report of Wenamon,” American Journal of Semitic Languages and Literatures 21 (1905), 103–104; Jan A. Hessbruegge, “The Historical Development of the Doctrines of Attribution and Due Diligence in International Law,” International Law and Politics 36 (2004), 265–266; Alfred Rubin,
than a formal legal standing; it was *de facto* rather than *de jure* sovereignty. However, access of foreign vessels and merchants to internal waters was restricted, falling under the exclusive sovereignty of coastal states.

Those regulations governing access to the sea, freedom of navigation, and maritime trade on the Great Sea (הָיָם הַגָּדוֹל), as expressed in the Bible (Ezekiel 47:20), find far greater documentation in Roman codices. From the beginning of the second century BCE, the Romans, succeeded by the Byzantines, absorbed the independent states of the two Mediterranean basins; they claimed maritime dominion, enforced control with their naval power – which they exercised freely and fully – and came to view the Mediterranean Sea chiefly as their own (*mare nostrum*). Their dominion came to an end only with the appearance of Islam on the shores of the Mediterranean during the middle of the seventh century CE.

As embodied in the *Corpus Juris Civilis* of Justinian I (527–565), Roman law is composed of two parts, *res publica* and *res communes*. *Res publica* addresses the public property of the Roman Empire, such as highways, inland rivers, and harbors, allowing all inhabitants of the empire free use of harbors to navigate, fish, and dock their ships. These structures belonged to the state,
which enjoyed the right of exclusive jurisdiction. *Res communes*, which some sources refer to as *jus gentium* (the Law of Nations), addressed the common properties that are open to all and cannot be appropriated, such as light, air, running water, the sea, and—in later law—the seashore to the highest level of the winter flood.⁴ By law, every Roman citizen or resident was permitted unlimited access to these common endowments.⁵ However, unlike the legal status of seashores and navigable rivers, which granted the state appropriation rights and comprehensive jurisdiction,⁶ the state’s exclusive sovereignty on the high seas was strictly limited to ships flying its flag. Jurisconsults viewed Roman vessels sailing out of sight of the coast as an extension of the land, whereby the imperial law could not be enforced beyond the internal order and human element of the ship since the open sea was legally regarded as *res nullius*.⁷ Every person possessed the right to navigate the high seas, to trade,


⁴ Samuel P. Scott (ed.), *The Civil Law* (Cincinnati: Central Trust Company, 1932), 3:304, Digest VIII, 4, 13, Domitian Ulpianus (d. 228) rules: “Although a servitude cannot be imposed on the sea by private contract, since by nature it is open to all, still, as the good faith of the contract demands that the conditions of the sale should be observed, the persons in possession or those who succeed to their rights are bound by the provisions of the stipulation or the sale.” Identical edicts are established by Islamic law, which considers the big rivers as a common heritage of humankind (*al-anbār al-kībār al-mushtaraka bayna al-nās*), therefore they are not subject to private appropriation. Muhammad ibn Abū Bakr ibn Qayyim al-Jawziyya, *Zād al-Maʿād fi Hady Khayr al-Ībād* (Beirut: Mu’assasat al-Risālah, 1418/1998), 5:709.

⁵ Potter, *Freedom of the Seas*, 32.

⁶ Sandars (ed.), *Institutes of Justinian*, 91–92, Book 2, Title 1; foreigners had the right of innocent passage to navigable rivers to reach a different country inasmuch as its laws were observed.

⁷ Access to the seashore, for instance, was open to all, but no one might build on it. Use of the seashore was connected to use of the sea; one could only erect buildings with the permission of the authorities. Even when the authorities granted such permission, they did not grant ownership of the seashore, but only of the buildings per se. Thus, if a building was ever destroyed, the land would again revert to common ownership. Similarly, nobody could interfere with fishing and navigation on the sea. If a person prevented another from fishing, the latter could obtain an *actio iniuriarum* (action for delict) against the former. The same conditions applied
and to fish at will because the sea is common to all by the Law of Nature (\textit{lex naturalis}). No person should be hindered from exploiting the seas’ natural resources, nor should anyone interfere with maritime navigation and seaborne commerce.\textsuperscript{8}

During the time the Romans promulgated their civil laws in the Mediterranean, no rival power existed along its shores to dispute or jeopardize Roman hegemony and jurisdiction. Although the Romans dominated the land around the Middle Sea politically, their territorial jurisdiction of the sea itself may not have extended beyond a maritime belt adjacent to their coastal territories, where local authorities could legally regulate and control navigation and carriage. The Romans exercised \textit{imperium} over this belt but never claimed exclusive ownership or usage, because the sea, like the air and running water, belongs to all humankind and nations.\textsuperscript{9} The \textit{jus gentium} and \textit{juris civilis} instituted by the Roman \textit{praetors} were designated to protect the welfare of their citizens.\textsuperscript{10} Romano-Byzantine dominion over the Mediterranean was a matter of imperial constitutional law and practice,\textsuperscript{11}


\textsuperscript{8} Ziskind, “International Law and Ancient Sources,” 544. All men have the right to trade and sail the high seas according to their free will; states were not required to protect commercial vessels and traders, particularly those engaged in overseas commerce.

\textsuperscript{9} Sandars (ed.), \textit{Institutes of Justinian}, 91–92, Book 2, Title 1.1: “By the Law of Nature these things are common to mankind – the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings, which are not, like the sea, subject only to the Law of Nations”; Fenn, “Origins of the Theory,” 465–466; Ziskind, “International Law and Ancient Sources,” 542; Philip E. Steinberg, “Lines of Division, Lines of Connection: Stewardship in the World Ocean,” \textit{Geographical Review} 89 (1999), 259.

\textsuperscript{10} Gormley, “Roman Legal Norm,” 570–571.

\textsuperscript{11} Potter, \textit{Freedom of the Seas}, 34–35; Aleksandra E. Thurman, “The Justification of the Law of the Sea in Early Modern Europe,” (PhD diss., University of Michigan, 2010), 60–61; Fenn, in “Justinian and the Freedom of the Sea,” 717, relates phrases regarding the legal status of Roman Mediterranean as follows: “Yet this claim was not expanded into a claim involving any sort of property right in the sea itself, that is, the claim to \textit{imperium} (jurisdiction) was not developed into a claim to \textit{dominium} (possession). Beyond this, positive evidence exists that, in the opinion of men generally, as least during the period of Roman greatness, in other words, at a time when Rome was able to assert effectively the opposite position, the sea, and the fish in it, were open or common to all men, for their use, as to the sea, or for their appropriation, as to the fish.”
which began to fade as early as the second third of the seventh century. From that time on, the sea began to no longer be considered a Roman lake, as Muslims introduced a new monotheistic religion, laws, and cultural norms that overturned the notion.

In contrast, the Indian Ocean and its littoral regions never formed a unified or single sociocultural and geopolitical entity. Ethnocultural diversity characterized this area, comprising five major distinct civilizations: Perso-Arabic, African, Hindu, Chinese, and Indonesian, none of which claimed title over the ocean. The Indian Ocean presented no barrier to commercial or cultural interactions among the civilizations and was characterized by indigenous ruling authorities as a *mare liberum.* The empires and political entities along the coasts of the ocean made no attempt to control or monopolize overseas trade, thereby permitting ships of different nationalities to sail unhindered on the high seas and to frequent foreign ports. With the exception of human and natural hazards, all merchants, shippers, and travelers around the Indian littoral enjoyed its bounties, sailed uninterrupted, engaged in commercial transactions, and recognized and honored local laws and customs. In his *Arthashastra,* the most important book on Hindu statecraft, the fourth-century BCE Indian philosopher and royal advisor Kautšilya emphasizes that international relations are guided strongly by trade considerations but makes no mention of regulation of travel over the ocean. The absence of legal references pertaining to customary law of the sea in the pre-Islamic Indian Ocean undoubtedly reflects the attitudes of the peoples and states toward the free use of the ocean. Furthermore, ancient Hindu and the late fifteenth- and early sixteenth-century Islamic codes include mainly commercial maritime laws.

Water is the source of life for every organism and creature. A Qurʾānic verse (21:30) states: “We have made from water every living thing (وَجَعَلْنَا مِنَ الْمَاءَ كُلَّ شَيْءٍ حيٍّ)” upon which al-Zāhīd al-Bukhārī (d. 546/1151) comments: “Water is the source of all drinks and most abundant (on Earth), but the dearest resource when missed.”\(^{16}\) Only when stranded in the desert or at sea can people appreciate the value of fresh water. Since water is an indispensable resource, it has naturally been considered a common good for all creatures on Earth of which no one shall be denied. A tradition attributed to the Prophet Muhammad states: “Muslims are partners in three things: green pastures, water, and fire.”\(^{17}\) Ibn Qayyim al-Jawziyya (691–751/1292–1349) adds:

Water is inherently created by God for the common good of all creatures and animals. He assigns water to humans for drinking and watering, without favoring any person in preference to another even if that person settles and constructs a building on the water resource.\(^{18}\)

It is evident from these statements that fresh water holds a vital position in the Islamic Law of Nature. Equally, except for a narrow strip bordering coastlands, the open sea commands the status of a common heritage for all humankind, whereby no nation, empire, or state may assert proprietary rights over it.

The sea and its assets are among God’s bounties that must be kept accessible to and shared by all humankind. Since all human beings on the Earth are born free and equal in dignity and rights, all of them, including slaves,\(^{19}\) are supposed to enjoy free access to the boundless seas and vast oceans. Such access implies the right to increase knowledge through

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\(^{16}\) Muhammad ibn ‘Abd al-Rahmān al-Bukhārī, *Mawāṣiṣ al-ʾĪlām wa-Sharāʾī al-ʾĪlām* (Cairo: Maktabat al-Quds, 1357/1955), 106:

\(^{17}\) Abū ‘Abd Allāh Muhammad ibn Yazīd ibn Mājah, *Sunan Ibn Mājah* (Cairo: Dār Iḥyā’ al-Kutub al-ʿArabiyya, 1372/1952), 2:826, hadith no. 2473:


international intercourse, to engage in commercial transactions based on trust, honesty, equity, and mutual respect, and to explore and exploit the sea’s natural resources and treasures. The Qur’an states:

Q 2:164:
Behold! … in the sailing of the ships through the ocean for the profit of humankind.

Q 6:97:
It is He Who maketh the stars (as beacons) for you that ye may guide yourselves, with their help, through the dark spaces of land and sea: We detail Our Signs for people who know.

Q 10:22:
He it is Who enableth you to traverse through land and sea; till when ye even board ships; they sail with them with a favorable wind, and they rejoice thereat.

Q 14:32:
… It is He Who hath made the ships subject to you, that they may sail through the sea by His Command; and the rivers (also) hath He made subject to you.

20 Regarding the way that God has made ships subservient to humans al-Rāzī explains: “If God did not create trees, iron, and the various tools needed to manufacture ships; if He did not make known to people how to use all of these items; if He did not create water as a running body which allows ships to move on it; if He did not create winds with their powerful movement; and, if He did not widen and deepen rivers enough to allow the movement of ships in them; it would have been impossible to benefit from these ships. He is the Manager (Mudabbir) and Subjugator (Musakkhir) of these matters.” Abū ʿAbd Allāh Muhammad ibn ʿUmar ibn al-Husayn al-Rāzī, Al-Tafsīr al-Kabīr (Mafāṭīb al-Ghayb) (Beirut: Dār al-Fikr lil-Tibāʿa wa’l-Nashr, 1401/1981), 19:130; Sarra Tlili, Animals in the Qur’ān (Cambridge: Cambridge University Press, 2012), 96; Robert G. Mourison, “The Portrayal of Nature in a Medieval Qur’ān Commentary,” Studia Islamica 94 (2002), 127–128, 132.
Law of Nature: Commonality of the Sea

Q 16:14:
It is He Who has made the sea subject, that ye may eat thereof flesh that is fresh and tender, and that ye may extract therefrom ornaments to wear; and thou seest the ships therein that plough the waves, that ye may seek (thus) of the bounty of God and that ye may be grateful.

Q 17:66:
Your Lord is He That maketh the ship go smoothly for you through the sea, in order that ye may seek of his Bounty.

Q 17:70:
We have honored dignity on the Children of Adam, provided them with transport on land and sea; given them for sustenance things good and pure; and conferred on them special favors above a great part of Our creation.

Q 22:65:
Seest thou not that God has made subject to you (humankind) all that is on the earth, and the ships that sail through the sea by His command?

Q 23:22:
And on them, as well as in ships, ye ride.

Q 27:63:
Or, who guides you through the depths of darkness on land and sea, and who sends the winds as heralds of glad tidings, going before His Mercy?

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21 Subjugation of all creatures on the Earth, including marine living resources, as food for humans is also manifested in Genesis 9:2: "And every beast of the earth and every bird of the air and every thing that creepeth upon the ground and all fish of the sea; they are given into your hands". The Old Testament recognizes the right of humankind to exploit the resources on land and in the sea to satisfy their own needs.
(Can there be another) god besides Allâh? High is Allâh above what they associate with Him!

Q 29:15:
But We saved him, and the Companions of the Ark, and We made the (Ark) a Sign for all Peoples!

Q 31:31:
Seest thou not that the ships sail through the ocean by the Grace of God.

Q 35:12:
Nor are the two seas alike, the one palatable, sweet, and pleasant to drink, and the other, salt and bitter. Yet from each (kind of water) do ye eat flesh fresh and tender, and ye extract ornaments to wear; and thou seest the ships therein that plough the waves, that ye may seek (thus) of the Bounty of God that ye May be grateful.

Q 36:41:
And a Sign for them is that We bore their race (through the Flood) in the loaded Ark.

Q 43:12:
...and He has created for you ships and cattle on which ye ride.

Q 45:12:
It is God Who has subjected the sea to you, that ships may sail through it by His command, that ye may seek of His Bounty, and that ye may be grateful. 22

The verses above make it evident that the boundless sea neither belongs to any state or nation, nor may it be subject to appropriation because God has subjugated (sakhkhara)23 it just as He has made the sun, the moon,24 “and all things in the Heaven and on Earth”25 serviceable to humans and other creatures.26 This concept of Divine subjugation (taskhīr) consists of three components: (a) authority represented by God, Who has meaningful superiority and subjugates things to certain parties; (b) subjugated elements (musakhkhar) ranging from angels to inanimate objects; and (c) service-ability (musakhkhar labu), i.e., the party that is being served enjoys the source of the benefit. According to the Qurʾān, God is the sole Creator and Subjugator (Musakhkhir) of the cosmic bodies – the sun, moon, and stars – and all that is in Heaven and Earth, including the clouds, mountains, seas, rivers, animals, and birds for His creatures’ sake, benefit, and need.27

Just as the universe is subjugated for humankind and other creatures, humans, as custodians of the Earth, are subjugated not just to each other and to living things, but to the benefit of Earth as a whole also. Having created humankind, made them His khalifah (vicegerent) on Earth,28 and

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23 Derived from the root s.ḥ.ḥ., the verbs sakbara and sakhhara mean “to constrain, coerce, subdue, or bring something into service, or to compel something to be of service to something else, or to make something subservient”; sakhhara denotes assigning or charging work to someone without paying compensation or wage. Abū al-Husayn Ahmad ibn Zakariyyā ibn Fāris, Muḥjam Maqāyis al-Lughā (Beirut: Dār al-Fikr, 1399/1979), 3:144; Ibn Manzūr, Lisān al-ʿArab, 7:144–145; Lane, Arabic–English Lexicon, 1:1324–1325.

24 Qurʾān 13:2; Q 14:33; Q 16:12; Q 29:61; Q 31:13; Q 39:5. Clearly, God has subjugated the sea in the same way He has made the sun and moon subservient to human beings; neither the sun, nor the moon, nor the sea can be commanded by humans, but humans can take advantage of their resources. It is then logically contended that the sea is made available for the benefit of all humans, whom God favors over the rest of His creation, yet definitely not subject to private or national appropriation.

25 Qurʾān 31:20: (Q 50:4): “ذَٰلِكَ ۗ أَلَمْ تَرَ أنَّ اللَّهَ مَكَّنَهُمْ فِي السَّمَاوَاتِ وَأَرْضٍ قُرَّتْ عَلَيْهِمْ جَهَمَّةً ظاهِرَةً (وُسُخِّرْ لَكُمْ مَا فِي السَّمَاوَاتِ وَمَا فِي الْأَرْضِ جَيِّدًا)”; Q 45:13.

26 Al-Rāzī, Al-Tafsīr al-Kabīr, 204; ’Adi Setia, “Taskhīr, Fine-Tuning, Intelligent Design, and the Scientific Appreciation of Nature,” Islam and Science 2 (2004), 8–9, 11, 14; Tlili, Animals in the Qurʾān, 92–93. Even though God has created human beings in the best of nature and most perfect and intelligent of His creation (Qurʾān 95:4), all created in Heaven and on Earth is not only musakhkhbar (subjugated) to them, but this right also extends to other creatures, such as animals and birds.


entrusted them with the Earth, humankind is urged to utilize wealth prudently and manage, develop, and make the Earth prosperous on the condition that God’s Laws are observed. Thus, human beings are held accountable for their actions and are required to preserve the environment, not to abuse the living and nonliving resources of the Earth, or to violate the natural rights of others; they are commanded by God to establish a just social order therein. Therefore, powerful peoples and nations do not possess the privilege to conquer or dominate the universe. On the contrary, all human beings should enjoy equal rights, live in harmony with nature, use His natural bounties wisely, and care for the powerless.

Since God has made the seas subservient to all humankind, it follows that every individual should be free to navigate and trade upon them. Religious, political, and military authorities do not have the right to claim


31 Qurʾān 31:20: “Do ye not see that God has made serviceable unto you (humans/sakb-khara lakum) whatsoever is in the Skies and whatsoever in the Earth”; Zajjāj, Maʿānī al-Qurʾān, 3:361.

32 Abū al-Fidāʾ Ismāʿīl ibn ʿUmar ibn Kathīr, Tafsīr Ibn Kathīr (Riyad: Dār Tibaʾ lil-Nashr, 1420/1999), 1:475: “Shaping the sea in this manner, so that it is able to carry ships from one shore to another, so people benefit from what the other region has, and export what they have to them and vice versa”; Abū ʿAbd Allâh Muhammad ibn Ahmad al-Qurtūbî, Al-Jâmiʿ li-Ahkâm al-Qurʾān (Beirut: Dâr al-Fikr lil-Tibāʾ a waʾl-Nashr, 1414/1994), 2:182–184, in reference to the interpretation of Qurʾān 2:164, al-Qurtūbî writes on page 183: “Gabriel ordered Noah to build a ship whose keel resembles the carina of a bird (juʿuʿ al-ṭayr). Then, Noah, may God’s blessing be upon him, fulfilled Gabriel’s order and built a ship, which resembles an inverted bird, where the seawater below her is like the air over her.” Comparing the sea and the air, the exequy patently denies any exclusive sovereignty of
ownership or exclusive use, or to debar other nations, countries, or groups from using or exploiting the seas’ natural resources. Acknowledging this commonality of the seas, governing Muslim authorities have never claimed exclusive dominion or prevented foreign individuals and vessels from navigating the semienclosed Red Sea or Persian Gulf, except in times of external imminent threat to the Holy Sanctuary in Mecca. In fact, one nation or race over the vast sea. A ship on the sea is like a bird in the sky; just as birds fly freely unhindered in the sky, ships should likewise sail freely over the oceans and seas.

Qur’an 2:142: 26 (Ya, to God belongs the dominion of the Heavens and the Earth; and to God is the final goal of all)”; Haq, “Islam and Ecology,” 154. Clearly, the Qur’an does not entitle Muslims to have exclusive dominion over the natural world, but all human beings, as established in this and other verses, have the right to benefit from God’s bounties because it is God, “Who will inherit the Earth, and all beings thereon; to Us will they all be returned” (Qur’an 19:40).

Due to the maritime conditions and the difficulty of sailing in the Red Sea, foreign vessels normally did not make their way from the Indian Ocean to the northernmost point of the sea. Ships entering the Red Sea generally sailed only in the southern half and anchored in major ports along the two banks. From there, goods were transshipped aboard local vessels operated by qualified pilots to intermediary ports or to final destinations. Despite the hazardous sailing conditions, caliphs, namely ʿUmar ibn al-Khaṭṭāb and Ḥarūn al-Rashīd (r. 170–193/786–809) opposed the idea of digging a canal connecting the Red Sea with the Mediterranean Sea because such a project would open the way for enemy navies to pass through the canal to the Red Sea, posing a threat to the heart of the Muslim world, Mecca and Medina. In 18/639 ʿUmar ibn al-Khaṭṭāb, however, approved the cleaning and redigging of the Trajan’s canal (Canal of the Pharaohs) connecting the Nile Valley with Qulzum (Clysma) on the Red Sea, which was completed within six months. Indeed, the Crusaders and the Portuguese made unsuccessful attempts to establish a foothold in the Red Sea. With the exception of sporadic major events, Muslim naval powers had exercised uncontested hegemony in the Red Sea from the 830s until the decline of the Ottoman Empire, aimed primarily at safeguarding the holy cities from external intrusion, protecting trunk routes, and maintaining the flow of oriental trade through this semienclosed sea. On the proposed Red–Mediterranean canal and the Nile Valley–Qulzum navigable canal, consult Abū al-Qāsim ʿAbd al-Rahmān ibn ʿAbd Allāh ibn ʿAbd al-Hakam, Futūḥ Misr wa-Akhbārāhī (Cairo: Maktabat Madbouli, 1411/1991), 162–169; Taqiyy al-Dīn Ahmad ibn ʿAlī al-Maqṣūrī, Al-Mawāʿīz wa-l-tibār bi-Dhikr al-Khīṭāt wa-l-ʿAḥār (Cairo: Maktabat Madbouli, 1998), 2691–702; Sayyed S. Nadavi, “Arab Navigation,” Islamic Culture 15.4 (1941): 444–445; John P. Cooper, The Medieval Nile: Route, Navigation, and Landscape in Islamic Egypt (Cairo: American University Press, 2014), 95–99; John P. Cooper, “Egypt’s Nile–Red Sea Canals: Chronology, Location, Seasonality and Function,” in Connected Hinterlands: Proceedings of Red Sea Project IV Held at the University of Southampton September 2008, ed. L. Blue et al., British Archaeological Reports (Oxford: Archaeopress, 2009), 195–209; Timothy Power, “Red Sea Region during the ‘Long’ Late Antiquity (AD 500–1000),” (PhD diss., University of Oxford, 2010), 338–344; David Bramoullé, “The Fatimids and the Red Sea (969–1171),” in Navigated Spaces, Connected Places: Proceedings of Red Sea Project V held at the University of Exeter, September 2010, ed. Dionisius A. Agius et al., British Archaeological Reports (Oxford: Archaeopress, 2012), 127–136; Sālim, Al-Bāḥr al-Aḥmar fi al-Tārikh al-Islāmī, 21–29, 81–97; John L. Meloy, Imperial Power and Maritime Trade:
historically, Muslims have deemed it more beneficial to secure maritime traffic and maintain free flow of commerce to the Mediterranean world, and vice versa. Although seaborne commerce between the Indian Ocean and the Mediterranean grew significantly as early as the third century AH/ninth century CE and reached a zenith by the ninth century AH/fifteenth century CE – and despite the Mongol advance in the thirteenth century CE and occurrence of the Black Death in the fourteenth century CE – for over nine centuries the ruling authorities never asserted jurisdictional rights over the semiclosed bodies of water of the Persian Gulf and the Red Sea, despite their location in the heart of the Abode of Islam. The two major threats that occasionally hindered the safe passage of vessels through these waters were piracy and natural perils.

Since “God hath made subject to you (humankind) all that is on the Earth,” then all of humankind possess the right to develop their lives freely,
take advantage of His bounties on Earth, and travel into lands and sojourn there insofar as they refrain from deleterious acts.\textsuperscript{37} Making no distinction between sea and land, the Qur’an considers the universe a common whole for all humankind. On this basis, rules regulating free maritime navigation and those governing free movement on land should be made identical but with one cardinal difference: every part and parcel of land can be appropriated and populated,\textsuperscript{38} while the sea physically “is not susceptible to human occupation,”\textsuperscript{39} though a coastal entity may claim dominion over a limited offshore zone, as shall be discussed in the next chapter.

Moreover, if by the Law of Nature all peoples are the “Children of Adam,” then all humans should theoretically enjoy identical rights and receive equal treatment, regardless of national, ethnic, or religious affiliations.\textsuperscript{40} They should all feel free to “traverse through the land and

\begin{itemize}
\item Authorities asserted jurisdiction over land routes by constructing caravanserais, \textit{ribāt}-fortresses, and watchtowers, official and private, along the coasts and on the overland routes themselves. In addition to armed personnel escorting caravans, soldiers and volunteers manned way stations in order to facilitate the flow of commerce, shelter wayfarers and caravans, and protect merchants and postal systems against highway robbers. Services provided by \textit{ribāt}-fortresses to temporary dwellers extended beyond sleeping accommodation to food, water, protection, and assistance in adversity. Officially, the admiral’s jurisdiction extended to cover coastal fortifications and territorial waters. Garrisons stationed at \textit{ribāts} were instructed to provide assistance in terms of shelter for commercial ships sailing within territorial seas in instances of hostile attack or shipwreck. Abū al-Makārim al-As‘ad al-Muhaddīḥ ibn Minā ibn Zakariyyā ibn Māmātū, \textit{Qawānīn al-Dawāwīn} (Cairo: Maṭba‘at Mīṣr, 1943), 247–248; Ahmad ibn Ṭālib Allāh al-Qalqashandī, \textit{Ṣūb al-‘Ashā Ḟī Ṣīnā‘at al-Inshā} (Cairo: Al-Maṭba‘a al-‘Amīriyya, 1338/1919), 14:398–400.
\end{itemize}
sea,” which includes a state’s territorial sea, seeking to fulfill their needs and benefit from His bounties. Certainly, the Qur’ān does not exclude any specific nation from navigating the seas or from traveling on land for trade purposes or for any other reason. The world is not the possession of any particular nation. Rather, its two masses – the land and the sea – should be free and accessible to all nations.

41 Qur’ān 10:22.
To sum up, subjugation of the sea can take two forms: (a) fishing and exploitation of its natural resources for various purposes; and (b) travel by sea for the sake of acquiring knowledge, facilitating socio-cultural and religious interactions, and engaging in overseas trade. The Qur’an contains no verses bestowing on either Muslims or non-Muslims ownership of the vast seas. On the contrary, it affirms the right of all nations and individuals to exploit the natural resources of the seas and to benefit from free access. The concept of “common heritage of mankind” is deeply enshrined in Islam’s Holy Book. No nations, states, or other entities may exercise sovereignty or jurisdiction over the high seas and oceans.

COMMONALITY OF THE SEA UNDER THE ISLAMIC LAW OF NATIONS

The Prophet Muḥammad’s Doctrine of the Free Sea

During the time of his prophecy, and particularly following his immigration from Mecca to Yathrib (later named Medina), the Prophet Muhammad was recognized by local tribal chiefs, regional rulers, and the prevailing international community as persona jure gentium (international legal personality). On arrival in Yathrib, the Prophet instituted the

God is (He who is) the most righteous of you.” One of the Prophetic traditions says: “لا قُطْسِ لِلَّهِ عَلَى الضَّيِّقِ ولا لَقَطْسِ عَلَى القَبِلِ ولا لَقَطْسِ عَلَى أَخْمِرِ ولا لَقَطْسِ عَلَى أَصِدَأِ ولا لَقَطْسِ عَلَى أَحْمرِ ولا لَقَطْسِ عَلَى أَحْمرِ إلا بالَّدُوُى” (There is no virtue of an Arab over a foreigner, nor a foreigner over an Arab, and neither white skin over black skin, nor black skin over white skin, except by righteousness). Under these circumstances, each and every Muslim and non-Muslim resident of the Abode of Islam has the right to liberty of movement and freedom to choose his residence within it excluding, of course, the dhimmis’ right of taking up permanent residence in the Hijaz. Concerning barbīs, they can immigrate to the Abode of Islam provided that they convert to Islam or become dhimmīs. On the freedom of movement and religion and the right to immigrate to the Abode of Islam, consult Mohammad H. Kamali, “Citizenship: An Islamic Perspective,” Journal of Islamic Law and Culture 11 (2009), 121–153; Nawaf A. Salam, “The Emergence of Citizenship in Islamdom,” Arab Law Quarterly 12 (1997), 125–147; Tazeem Haider, “Universality in the Message of Qurʾān,” Journal of South Asian Studies 4 (2016), 63–65. For further insight into the Qur’ānic concept of ummah, consult Frederick M. Denny, “The Meaning of ‘Ummah’ in the Qurʾān,” History of Religions 15 (1975), 34–70.

world’s first written constitution (Šahīfat al-Madīnah/the Constitution of Medina), reconciled the warring Arab tribes of Aws and Khazraj, sent letters through envoys and diplomats to emperors, kings, and other state rulers, waged wars against the idolaters of Mecca, negotiated and concluded dozens of treaties and truces, and granted pledges of safe-conduct.44

One of the oldest, and the most relevant, comprehensive and succinct pacts (or, more precisely, pledges of safe-conduct) of Islamic heritage that pertains to the law and custom of the sea was granted by the Prophet to Mar Yūhannā ibn Ru’ba, the governor and bishop of the port city of Aylah (Byzantine Ailanē, ‘Aqabah today) on the Red Sea, in Rajab 9 AH/October 630 CE, shortly after the campaign of Tabūk.

Along with the campaign of Tabūk, a new chapter in Islamic military and legal history unfolded. Leading his first military action on Rajab 10, 9 AH (October 23, 630 CE), the Prophet Muḥammad arrived with the largest Muslim army ever at Tabūk (northwestern Hijaz), and commanded 30,000 combatants against Byzantium, then one of the world’s superpowers. Despite outnumbering the Muslims by three to one, the Byzantine army and its northern Arab allies surprisingly opted to avoid confrontation and instead dispersed within their territories. Arguably, the withdrawal of the Byzantines probably constitutes the most brilliant military event in the Prophet’s career as a statesman. This campaign enlarged the territorial domain of the nascent Islamic State, secured its northern border, and generated greater political authority in the Arab and international arenas. Some northern Arab tribes immediately embraced Islam, while others pledged to pay a tribute instead. Before returning to Yathrib, the Prophet camped in Tabūk for about twenty days, during which time he contacted frontier rulers inhabiting southern Syria and the northern Hijaz, aiming to conclude treaties of nonaggression with them. He sent envoys to local leaders and other dignitaries in the region around Tabūk, including Maqnā in northwestern Hijaz,45 and Jarbā’,


45 The pledge of safe-conduct granted to the Jews of Maqnā contains no reference to the pull tax. However, it does stipulate that one quarter of the farmers’ date harvest, of the women’s yarn production, and of the fishermen’s yield (rubʿ ma ṣādat urūkukum) be delivered to the Treasury House in exchange for the security and well-being of the people of Maqnā, as well as for those who travel and sail to the town. Abū ‘Abd Allāh
Adhruh, and Aylah along the Gulf of 'Aqabah's coast – offering these sovereignties payment of an annual jizya and other taxes as stipulated in the truces in exchange for protection on land and at sea. 46


The Prophet addressed a letter to the Governor of Aylah stating: “To Yūhannā ibn Ru’ba and the chiefs of the people of Aylah. Peace be upon you. Praise be to God, besides whom there is no god. I shall not fight you until I have written to you. Accept Islam or pay the jizya, and obey God and His Prophet and the messengers of the Prophet.” The said governor agreed to pay an annual tribute that was fixed at 300 dinars, one dinar per Ayl adult male (*ḥalīm*). In comparison to the city’s wealth, the imposition of such an amount was financially insignificant, but symbolically it reflected an act of submission and acknowledgment of Muslim superiority, not only over Aylah and its residents, but also over other cities entering into a treaty with the Prophet. It is not sensible to claim that this annual payment of a protection tax (*ṣulṭ al-jizya*) was intended to fund Muslim military campaigns, or increase revenue for the Treasury House. Instead, this and other pacts were signed to ensure the territorial integrity of the emerging Islamic State from the north, facilitate access of Muslim merchants to Egypt and Greater Syria, and expand Islamic influence beyond the Hijaz. Territories and principalities that never come under direct Muslim rule are viewed as entities and lands that maintain a tributary relationship with the Islamic State. Earlier covenants concluded between the Prophet Muhammad and the Christians of the world also assured their protection “in the sea and on land,” in the same way that the Prophet “protects himself and his Community (*ahl millati*) among the Muslims.” Morrow, *Covenants of the Prophet Muhammad*, 233–234, 238, 297–298; Liyākat Takim, “Peace and War in the Qur’ān and Juridical Literature: A Comparative Perspective,” *Journal of Sociology and Social Welfare* 38 (2011), 147–148; Maher Abu Munshar, *Islamic Jerusalem and Its Christians: A History of Tolerance and Tension* (London: Taurus Academic Studies, 2007), 47; ‘Abd-'Azīz Dūrī, “Notes on Taxation in Early Islam,” *Journal of the Economic and Social History of the Orient* 17 (1974), 137; Ziauddin Ahmed, “The Concept of Jizya in Early Islam,” *Islamic Studies* 14 (1975), 301–302; Fuadah Johari, “The Dynamism in the Implementation of al-Kharaj during the Islamic Rule 634–785,” *Shari‘ah Journal* 18 (2010), 631; Mahmood H. al-Denawy, “A Reappraisal of Attitudes to the ‘People of the Book’ in the Qur’ān and Hadith, with Particular Reference to Muslim Fiscal Policy and Covenant of ‘Umar,”* (PhD diss., University of Durham, 2007), 167.

On this occasion, it should be clearly pointed out that the institution of the poll/head tax, known in Islam as the jizya, has a long history going back as far as the Biblical period. In Exodus 30:12–16, the Lord instructed Moses to tax each male Israelite above the age of twenty a half-shekel: “קִנֵּאתָ נַחֲלַת (then each shall give a ransom for his life to the Lord).” Another Biblical reference, Proverbs 13:8, states: רָשָׁם וְשֵׁם פָּנֶים (ransom of a man’s life in his wealth). The payment of head tax continued into the Roman period. It is
Freedom of the Seas

Perhaps it was Aylah’s strategic geographical location that led the Prophet to grant an unprecedented amān to Yuḥannā ibn Ru’ba. This scribal covenant reflects the Prophet’s position on access to the sea, freedom of navigation, jurisdiction over a vessel at sea, the legal status of


subjects aboard national and foreign-flagged ships, and the legal status of commercial vessels sailing on the high seas and in territorial waters. It should be noted that the Prophet had issued this guarantee of protection long before Byzantium lost Greater Syria and Egypt to the Muslims, the Persian Empire faded from the international political map, and the Islamic navy was established. The decree reads as follows:

In the name of God, the Most Gracious, the Most Merciful:

This is a guarantee of protection from God and Muhammad the Prophet, the Messenger of God, to Yūhannā ibn Ru’ba and the people of Aylah, for their ships, their caravans by land and sea. They and all that are with them, men of Syria and the Yemen, and seamen are under the protection of God and the protection of the Prophet Muhammad. Should any one of them break the treaty by introducing some new factors, then his wealth shall not save him;

it is the fair prize of him who takes it. It is not permitted that they shall be restrained from going down to their wells or using their roads by land or sea. This treaty is written by Juhaym ibn al-Šalt and Shurahbil ibn Ḥasnah on the authority of the Messenger of God – God’s blessing and peace be upon him.

\textit{Nash’at al-Dawla al-Islamийya} `alā `Abd Rasūl Allāh (Beirut: Dār al-Jīl, 1411/1991), 123–125, 309–310; ‘Ali al-Ahmādī al-Miyanjī, \textit{Makātib al-Rasīl} (Beirut: Dār Ša’b, 2013), 3:97–100; Jamīlī, \textit{Akhbār al-Muḥādāt fī al-Shāri‘ah al-Islāmīyya}, 107–113; `Abd al-ʿAzīz al-ʿUmārī, \textit{Rašīl Allāh wa-Khātam al-Nabīyyīn} (Riyād: Bīsān lil-Nashr wa’l-Tawzī‘, 1432/2011), 3:859; Morrow, \textit{Covenants of the Prophet Muhammad}, 54–55; Francis E. Peters, \textit{Muhammad and the Origins of Islam} (Albany: State University of New York, 1994), 241; Ahmed al-Wakīl, “Searching for the Covenants: Identifying Authentic Documents of the Prophet based on Scribal Conventions and Textual Analysis,” (master’s thesis, Hamad bin Khalifa University, 2017), 75. One may question the authenticity of this covenant, especially since the Prophet Muhammad never experienced life at sea, nor sailing. Even though there is no original copy in existence, this covenant can still be regarded as genuine. It was authenticated by early sīrah biographers, historians, and jurists, some of whom were born and lived in the first and second centuries of the Hijra. They include Ibn Ṣaḥāq (85–151/704–768), Wāqīḍī (130–207/747–822), Ibn Hishām (d. 218/833), Qāsim ibn Sallām (157–224/774–838), and Ibn Zanjāwyah (180–251/796–865). Later commentators and jurists reinforced its authenticity, including Ibn Sayyid al-Nās (671–734/1272–1334), Ibn Qayyim al-Jawziyya (691–751/1292–1350), Ibn Kathīr (700–774/1300–1373), and Taqīṣīyy al-Dīn al-Maqrīzī (766–845/1364–1442), who provide a nearly identical form of the deed as that found in the sīrah of Ibn Ṣaḥāq. Although one cannot deny the fact that forgeries did take place, this “guarantee of protection” is certainly authentic and can be ascribed to the Prophet Muhammad. In his Šaḥīḥ, the Imam al-Bukhārī twice refers to it as a treaty that the Prophet concluded with the “King of Aylāh” allowing him to retain authority over his territory in return for a preestablished collective jizya. Bukhārī substantiates the existence of the treaty but never quotes it in full; however, in his commentary on the Šaḥīḥ Bukhārī, Ibn Ḥajar al-ʿAṣqalānī (773–852/1372–1449), attaches the exact version transmitted by Ibn Ṣaḥāq and others and analyzes it in minute detail. The existence of this Prophetic document is further corroborated by the early Muslim historians Balādhurī (d. 279/892), Tabārī (224–310/839–923), and Maṣʿūdī (282–345/896–956), who highlight its financial ramifications – the imposition of the jizya on able-bodied males of Aylāh – but pay no attention to other legal aspects, namely freedom of movement. Tabārī reports that the drafter had produced two copies, one of which was retained by the Prophet and the other kept by the “King of Aylāh.” In view of the foregoing evidence, it is reasonable to infer that the text at our disposal has been preserved in its entirety, matching in language, content, and format the original as dictated by the Prophet in 9 Ḥ/630 CE. Muhammad ibn Ismā‘īl al-Bukhārī, Šaḥīḥ al-Bukhārī (Damascus: Dār Ibn Kathīr, 1414/1993), 2:539, hadith no. 1411, 3:1153, hadith no. 2990; Ahmad ibn ʿAli ibn Muhammad ibn ʿAli ibn Ḥajar al-
In this scribal pledge, the Prophet gives full recognition to the pacta sunt servanda doctrine, as he does in earlier and later treaties, such as the Treaty of Hudaybiyyah (Dhū al-Qi’dah, 6 AH/March, 628 CE). This pacta bears a Divine nature, which is apparent in the opening line: “This is a guarantee of protection from God and Muhammad the Prophet, the Messenger of God.” God’s presence, anthropomorphically conveyed in the conclusion of the covenant, the adherence of Muslims to Qur’ānic principles, and the personal commitment of the Prophet assured the dignitaries of Aylah that he would honor the provisions of the treaty. Yūḥanna ibn Ru’ba and the residents of Aylah likewise committed to compliance with the truce despite the lack of a specified duration.

In order to more fully convey the sacred character attached by the Islamic faith and legal system to personal commitments, safe-conducts, and treaties, a succinct explanation of the lexical meaning and the Qur’ānic significance of the root for the word designating safe-conduct, *a.m.n.* will follow. *A.m.n.* designates calmness, trust, confidence, safety, security, shelter, protection, and faith, signifying the opposite of fear, danger, treachery, disloyalty, and lack of faith. Appearing in numerous Qur’ānic verses in seventeen derivatives, the forms of the word include *amn, amān, amana*, and *āmin*, all of which denote the sense of becoming secure or feeling free from fear or expectation of evil. The verb *ammana* means “to render someone secure or safe from harm by another person.” *Ista’mana* is “to demand safety or its assurance from another.” The phrase *dakhala fī*...
amānīḥī, connotes “he entered within another’s pale of protection.” The phrase aʿtaytahu al-amān, means that “he granted or gave him promise of security.” Finally, mawdīʾ āmin is “a place of safety or security.”

The term amn ("security" or "safety") conveys two dimensions of sense. The first dimension occurs in the realm of an individual’s peace of mind, psychological tranquility, and spiritual satisfaction, whereas the second dimension relates to a people’s collective social, political, and economic status. On an international level, amn refers to a situation in which superpowers are not supposed to threaten other nations or deprive their residents of their natural rights. In addition, the Qurʾān maintains that foreign affairs should be guided by principle and not by religious or military supremacy. All Children of Adam should enjoy God’s bounties equally and not be deprived of inherent natural rights. Furthermore, Islamic law recognizes every individual’s right to personal safety against all forms of abuse and aggression. In order to remove any possible ambiguity, the Prophet adopted the principle of reciprocity, guaranteeing the safety of all those heading to or from Aylah in return for assuring Muslims undisturbed passage when passing through or near this port city.

Close examination reveals that this treaty, while being succinct, does concur fully with Qurʾānic principles, addressing various issues related to freedom of navigation and movement of people on land, whether explicitly or implicitly. The Qurʾān does not contain even a single verse excluding members of any particular nation from navigating the seas or from traveling by land for any purpose. Qurʾānic principles maintain that the world belongs to no particular nation; the land and sea should be free and accessible to all. Interestingly, the Prophet did not draw a sharp distinction between adjacent offshore zones and the high seas, but rather appears to regard the entire sea as a common right of all peoples, such that no authority whatsoever may deny access to it or hinder navigation and the exploitation of natural marine resources.

54 Qurʾān 4:141.
Another Qur’ānic principle is evident in the Prophet’s promise not to violate Aylah’s territorial integrity. He bound himself to honor the pledge of security and assured protection to the residents of Aylah and all those arriving in or departing from Aylah so long as the provisions of the truce were observed. He promised to protect ships, their crews, passengers, and shipments from Aylah both within and beyond its territorial sovereignty. He pledged not to interfere with the navigation and trade of Aylah’s residents and to ensure maintenance of their commercial and diplomatic ties with local and foreign entities as existing prior to the truce. The lack of any reference to the internal governance of a ship can be explained by the Prophet’s abstention from interference with the management of a vessel, recognizing her as an extension of her flag state’s territory. Thus, as a sovereign principality, Aylah could assert jurisdiction over its flagged vessels, their crews, contents, and passengers, irrespective of nationality, not only within its territorial domain but also while on the high seas and in foreign ports.

The residents of this port city were free to trade with any nation, particularly with the Syrians and Yemenites with whom the local merchants seem to have had strong commercial ties. Notably, the pledge also guarantees the right of foreign individuals to travel to and from Aylah, irrespective of the flag flown by their vessel. Finally, the pledge does not impose any kind of restriction on non-Muslim merchants or voyagers sailing through the Sea of the Hijaz (the Arabian littoral of the Red Sea), whose special legal status would come later.57 Scribal covenants of the same nature that guaranteed the rights to freedom of religion and liberty of movement and mobility were signed between the Prophet Muhammad and the Armenian Christians of Jerusalem (4 AH/626 CE),58 the Monks of Saint Catherine and the Mount of Olives (4 AH/626 CE, renewed in 8 AH/629–30 CE),59

57 Only during the Caliphate of ʿUmar ibn al-Khaṭṭāb has access of non-Muslims to the Province of the Hijaz theoretically been limited.
58 Hamidullāh, Al-Waṭḥāʾīq al-Sīyāṣiya, 557: “No one of them shall be taken captive, be he on land or at sea”; Morrow, Covenants of the Prophet Muhammad, 191; Wakil, “Searching for the Covenants,” 61–65, 75–76.
59 Hamidullāh, Al-Waṭḥāʾīq al-Sīyāṣiya, 561–562, lines 5–19: “That whenever any of the monks in his travels shall happen to settle upon any mountain, hill, village, or other habitable place, on the sea, or in deserts or in any convent, church, or house of prayer, I shall be in the midst of them, as the preserver and protector of them, their goods and effects, with my soul, aid, and protection, jointly with all my national people; because they are a part of my own people, and an honor to me.” In lines 30–31 the Prophet declares: “Moreover, neither judges, governors, monks, servants, disciples, or any others depending on them, shall pay any poll-tax, or be molested on that account, because I am their protector, wherever they shall be, either by land or sea, east or west, north or south;
the residents of Maqna (9 AH/630 CE),\textsuperscript{60} and the Christians of the Province of Najran (10 AH/631 CE).\textsuperscript{61}

It should be remembered that the Aylah scribal covenant was promulgated a decade before the establishment of the first Islamic military fleet in the Red Sea.\textsuperscript{62} Given the nonexistence of a Muslim naval force, it would seem unreasonable to attribute to the Prophet the intention to offer outright physical security in meeting the pledges of the treaty, such as armed personnel or a naval escort for Aylah-flagged ships. Instead, it seems that the Prophet’s “guarantee of protection” meant that Muslims would refrain from harassing, assaulting, or seizing Aylah-flagged vessels or their contents, crews, travelers, or chattels.\textsuperscript{63} The absence of reference to any particular jurisdiction verifies the Prophet’s abstention from interference with the internal affairs and management a vessel and his recognition that she acts as an extension of her flag state’s territory.

The intent of the pledge is closely aligned with Qur’an 9:6, which states “ablighhu ma‘manahu,” commanding believers to bring, convey, escort, because both they and all that belong to them are included in this my promissory oath and patent.” The English translation, which is compatible with the original Arabic text, is extracted from Akram Zahoor, \textit{Muslim History 570–1950 C.E.} (Gaithersburg, MD, 2000), 167; Morrow, \textit{Covenants of the Prophet Muhammad}, 65–98, 205–212; Wakil, “Searching for the Covenants,” 62.


\textsuperscript{62} Fahmy, \textit{Muslim Sea-Power}, 74. The first maritime campaign in Islamic history was launched in 17 AH/638 CE by al-‘A昱 ibn al-Hadrāmi, the governor of Bahrain (also al-Bahrayn), who disobeyed the Caliph’s instructions, crossed the Persian Gulf, landed on the coast of Persia, and advanced to Istakhr (Persepolis). He would have been destroyed had Sa’d ibn Abi Waqqās and ‘Utbah ibn Ghazwān, the governor of Basra, not provided him with reinforcements, which saved him and his army from inevitable defeat. In 20 AH/641 CE, ‘Umar ibn al-Khaṭṭāb dispatched ‘Alqama ibn al-Muqqāzīzīn with a flotilla across the Red Sea toward the Abyssinian coast. With the exception of one vessel, the expedition suffered great losses.

\textsuperscript{63} As a piece of evidence, the second charter of the Covenant of Najran states: “وَأَنَّ أُحِرَّسْ حَتَّى نَعُمَّوْنَهُمْ يَمَّنَالَّاهُمْ أَنَّهُمْ كَانُواَ مِنْ بَرَءَةٍ أَمْ بِجَهَةٍ شَرَّٰفٍ وَغَرَّٰفٍ بِمَا أَحْفَظْتُ هُنَا فِي مَعْالَمِهَا وَأَنْحَلَ إِلَّا مِمَّا مِلَّهُ [the Prophet] will protect their religion and their faith wherever they are found, be on land or at sea, in the East or in the West, with utmost vigilance on my part, whatever belongs to me, and the followers of Islam from my creed.” Hamidullāh, \textit{Al-Wathā‘iq al-Siyāsiyya}, 187; Wakil, “The Prophet’s Treaty with the Christians of Najran,” 277, 316, 337–339; Morrow, \textit{Covenants of the Prophet Muhammad}, 297–298, 307 (Arabic text).
or let a person proceed and attain his ultimate place of safety where he can feel secure.\(^{64}\) A question may be asked about the geographical range at sea wherein a musta’min should feel secure (ma’man). In other words, to what extent should a state provide protection to a musta’min? Ma’man can be defined as a geographical location wherein an alien envoy, trader, or other individual is protected from harm caused by Muslims. Imam Mālik ibn Anas (97–179/715–795) and Ibn Naṣiṣī (d. 225/840) both defined ma’man as a place at sea where ships cannot be sighted with the naked eye from Islamic coastal frontiers. When an amān’s grantee sails to a point at sea where the mountains of his or her native country can be seen with the naked eye, yet the wind drives the ship back to the Islamic port of embarkation, then the pledge remains valid.\(^{65}\) Ibn al-Majishūn (d. 212/827) and ‘Abd al-Malik ibn Ḥabīb (174–238/790–853) also held a similar opinion; that even if after sailing on the vastness of the sea, a ship is hurled back to the port from which she departed or the port’s vicinity, the decree of safe-conduct remains legally valid with respect to the musta’min and his chattels over the high seas until he arrives at a place where he feels secure. However, if a ship is driven into a port or to a coast that is not within the grantor’s sovereignty, then the grantee enters “a place without the degree

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\(^{64}\) Qur’ān 9:6 advocates courteous behavior to all, regardless of their religion, and urges Muslims to protect and escort non-Muslims to safety: 

\[ إِنَّ أَحَدًا مِّنَ الْمُجْرِمِينَ أَسْتَجْزَاهُنَّ فَأَجْرُوهُ عَلَىٰ نَفْسِهِ (If one amongst the Pagans asks thee for asylum, grant it to him so that he may hear the Word of God; and then escort him to where he can be secure, that is because they are men without knowledge). \]

This verse refers to those polytheists who would like to learn and listen to the Word of God. However, jurists of all law schools, both Sunnis and non-Sunnis, apply it to foreigners visiting or traveling through the Abode of Islam irrespective of the purpose of their travel. They shall be granted safe passage through the Islamic domain and escorted back to a place of safety even if they reject Islam. Asma Afsaruddin, *Striving in the Path of God: Jihad and Martyrdom in Islamic Thought* (Oxford: Oxford University Press, 2013), 88–89. It has been suggested that the place of safety is the position from which the harbi had departed to the Abode of Islam; it can be his homeland in the first place; or, secondly, any other area of safety. Tabarī, *Tafsīr*, 14:139–140; Baghawī, *Tafsīr*, 4:15–16; Qurṭūbī, *Al-Jāmi‘*, 8:17–18; Abū Hāyān, *Al-Tafsīr al-Kabīr*, 5:9–12; Ibn Kathīr, *Tafsīr*, 4:113–114; Hamidullāh, *Muslim Conduct of State*, 210; Qalqashandi, *Sub al-A sbā*, 13:321; Arafat M. Shoukri, *Refugee Status in Islam: Concepts of Protection in Islamic Tradition and International Law* (London: I. B. Tauris, 2011), 69 (al-ilbāb = al-tasyir ilā muntahā al-badd/attainment or conveyance means bringing or carrying someone or something to the utmost point), 83.

of *amān.* In other words, as a vessel enters the territorial sea of another state, that state is to assert jurisdiction over the ship and her contents, crew, and passengers, regardless of nationality. Moving inward from the outer limits of the other state’s territorial sea, an *amān* becomes void and unenforceable, giving way to the jurisdiction of the other state. All jurists dismiss equivocally an *amān*’s application simultaneously with foreign laws, such as when a grantee enters his or her homeland, or a third country’s territorial domain. An inquiry with respect to this matter came before the Mālikī jurist Saḥnūn ibn Saʿīd al-Tanūkhī:

Saḥnūn was asked about Byzantine or other subjects who arrive in (Islamic territory) for trade under safe-conduct and then head back to their native country. When are they lawfully subject to capture? At which point at the sea (does their *amān* become void) and can they lawfully be subject to capture? He answered: It is strictly unlawful to capture them until they reach a place at sea where they can feel secure from their enemy and their fear disappears; thus, whenever they reach that point, they can lawfully be taken in possession. People well-versed in naval campaigns and nautical science argue that they are not safe until they reach their native homelands and come out of the sea, because Muslim vessels have multiplied against them and overcome them. For this reason, they can only be subject to capture if they reach a place where they can feel safe, which is when they come out of the sea, as I have elucidated earlier, for God has said: “Make him attain his place of safety.” I further asked him: Is it licit to capture a person who has not obtained an *amān* decree but is in the vicinity of our ports, or far off? He replied: Anyone who is regularly engaged in commercial transactions with

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66 Ibn Abū Zayd al-Qayrawānī, *Al-Nawādir wa‘l-Ziyādāt,* 3:135. Muslim jurists argued that the salt sea (open sea and ocean) should be treated as non-Islamic territory and beyond the control of any nation. Thus, if a non-Muslim alien subject has weighed anchor from some Islamic territory and, after sailing on the high sea, the wind has driven him to a place other than the point from which he departed or its adjacent area, his permit or safe-conduct certificate is no longer valid and will have to be reissued and retaxed. Moreover, if the sea wind drove the ship to a place outside the grantor’s territorial domain, the pledge of *amān* would become null and void. All jurists consensually maintain that the high sea stands beyond the jurisdictional dominion of any ruling authority, belonging neither to Muslims nor to their enemies. Hamīdullāh, *Muslim Conduct of State,* 94–95.

67 Ibn Abū Zayd al-Qayrawānī, *Al-Nawādir wa‘l-Ziyādāt,* 3:134; Khalīlieh, *Admiralty and Maritime Laws,* 125; Shoukri, *Refugee Status in Islam,* 79, 83; Peter M. Holt, *Early Mamluk Diplomacy (1260–1290)* (Leiden: E. J. Brill, 1995), 47, article 11 of the 667/1269 treaty between al-Zāhir Baybars and Lady Isabel of Beirut states: “Provided that if a Frankish merchant goes out from Beirut to the Sultan’s territory, he shall be covered by this truce; and if he returns to another place, he shall not be covered by this truce.”
Muslims may not be captured if he heads to (us) and seeks *aman* upon approaching or after anchoring in the anchorage. It is strictly impermissible to capture him unless he has arrived in his native homeland or sailed to non-Islamic territories. However, those who are not engaged in trade with Muslims, their capture is licit.  

The practices and principles of safe-conduct set by the Prophet are echoed in jurisprudential manuals and official and nonofficial decrees of safe-conduct, as well as in international peace and commercial treaties concluded between Muslim authorities and Christian dignitaries inhabiting the two basins of the Mediterranean. In connection with the expansion of overseas trade, early Muslim jurists advocated in particular the protection of those enemy-alien traders who frequented Islamic ports, even if they did not hold certificates of safe-conduct. Muslims were advised not to seize Christian ships if it had been substantiated without any doubt that they routinely frequented Islamic ports to carry out commercial transactions. As may be expected, the jurists advised that the grantee obtain permission from the *imam* or port superintendent prior to setting sail as an insurance of a safe passage home in spite of the threat that might be posed by Muslim sea raiders.

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69 For example, the pledge of safe-conduct ‘Amr ibn al-‘Āṣ granted to the People of Egypt in 20 AH/641 CE is congruent with the 9 AH/630 CE guarantee of protection giving the Copts the right to freedom of movement and navigation: “بِضَمِّ اللَّهِ الرَّحْمَنِ الرَّحِيمِ، هَذَا نَا (In the name of God, the Most Merciful, the Most Compassionate. This is the covenant that was granted by ‘Amr ibn al-‘Āṣ to the People of Egypt concerning security for themselves, their faith, their possessions, churches, and crucifixes, while traveling by land and sea).” Ibn Kathīr, *Al-Bidāya wa’l-Nihāyah*, 7:215; Jamāl al-Dīn Yūsuf ibn al-Amīr Sayf al-Dīn ibn Taghrībirdī, *Al-Nujūm al-Zāhibī fī Mulūk Miṣr wa’l-Qāhirah* (Cairo: Wizarāt al-Thaqāfā, 1383/1963), 1:24; Qalqashandi, *Ṣuḥb al-Aḥšā‘*, 13:324; Hamidullāh, *Al-Wathbah-iʿiq al-Siyāsiyya*, 502–503; Ryan J. Lynch, “Cyprus and Its Legal and Historiographical Significance in Early Islamic History,” *Journal of the American Oriental Society* 136 (2016), 546. It is admissible to argue that the term *babrihim* applies to the Nile, which is viewed as a sea in the historiographical and documentary sources.

70 Ibn Abū Zayd al-Qayrawānī, *Al-Nawādir wa’l-Ziyādāt*, 3:132: “If a Byzantine (Rūm) vessel making her way to (an Islamic) port, regardless of whether she is in close proximity to or far away from (the destination), is encountered (by Muslims), if she carries merchants known for having close commercial relations with Muslims, it is unlawful to capture them except if they are found in their homeland or other non-Islamic territories”; Picard, *Sea of the Caliphs*, 105.

Freedom of the Seas

The Post-Prophetic Era and Muslim Jurists’ Division of the World

Any discussion of the freedom of navigation and mobility rights of aliens on the high seas or through Islamic territorial seas and mainland would be incomplete without considering issues related to the geopolitical division of the world and the rules governing international treaties. While such a division exists neither in the Qur’ān nor in the Sunna,72 by the second century AH/eighth century CE, Muslim jurists had divided the regions of the world into two major entities, Dār al-Islām and Dār al-Ḥarb, and subsequently added the division of Dār al-‘Ahd.73

As regards the legal definition of the Abode of Islam, jurists held different positions. One group defined it as encompassing the territories

72 Qurʾān 6:127 refers to Dār al-Salām but not in the context of worldly life, rather, with regard to the believers’ eternal life in the Hereafter: لَيْهِمْ نَارَ الْحَلَالَةَ عِنْدَ رَبِّهِمْ وَلَيْهِمْ بِنَاءٌ “(For them will be a Home of Peace with their Lord; He will be their Friend, because they practiced righteousness).” The Abode of Peace is, thus, associated with the eternal life of the believers, who fulfill their religious duties and moral obligations on Earth in accordance with the Divine teachings and principles.


in which Muslims enjoyed peace and security; God's Law is superior and enforced by a Muslim ruler, even if the majority of the population being governed is non-Muslim. A different opinion viewed the Abode of Islam as comprising territories where Muslims practiced their religion freely. A third viewpoint defined it as territory wherein Muslims are protected and cannot be approached by ḥarbīs. A fourth view applied the term to territories where Muslims reside and Islamic law prevails. A fifth perspective included any territory where Islamic law prevails. The final legal opinion ruled that the term pertains to any territory where Muslims, whether in the majority or minority, can practice their religious rituals and apply Islamic law free from external intervention.74

The Abode of Covenant/Truce pertains to territories ruled by non-Islamic governments who pay a tribute to the Islamic states. Such countries normally maintain long-term commercial and diplomatic accords with the Islamic states and grant Muslims within their domain communal, religious, and juridical autonomy to manage their daily affairs.75 The Abode of War is the exact opposite of the Abode of Islam, consisting of territories and communities entirely beyond the borders of the abodes of Islam and Covenant. The local authorities of the Abode of War neither have treaties with Dār al-Islām nor enforce the Shari‘ah, even if the inhabitants are mostly Muslims; the local Muslim residents have no security in terms of tranquility, peace, and freedom. Although hostilities prevail between the two domains, of the Abode of Islam and the Abode of War, the latter cannot be considered "a no-man's-land." Muslims living both outside and within the Abode of War are obliged to respect the rights of non-Muslims as prescribed by Islamic law.76 From a legal point of view, neither is the


Abode of War necessarily in a permanent state of war with the Abode of Islam, nor are negotiations between them prohibited. Rather, Islamic states are permitted to enter into diplomatic negotiations presaged upon recognizing a sovereign within the enemy territory. Thus, the jurists’ division of the world does not denote absolute states of war and peace between the Abode of Islam and other sovereigns, but it does fundamentally underpin and guide international relations between Islamic and foreign entities.

In spite of the jurists’ geopolitical division of the world, human factors occasionally interrupted – but did not halt – overseas trade and shipping among the three domains during times of war and political upheaval. Although the right of maritime navigation features in the Qur’ān, in reality, overseas business and the flow of maritime trade would not have thrived and expanded without international diplomatic and commercial treaties having been drawn up between the Abode of Islam and the Abode of War. In the absence of such agreements, ḥarbī subjects, in particular, would have been able to sail, travel through, or conduct business in the Islamic territories only on the basis of a decree of safe-conduct.

**Amān (Decree of Safe-Conduct)**

Amān (a decree of safe-conduct) and bilateral or multilateral international treaties and truces have explicitly and implicitly defined the juridical status of subjects when traveling to foreign territories. By definition, amān provides temporary safe-conduct, safe passage, or assurance of security to enemies during a time of war, or to individual ḥarbīs who intend to enter, travel through, or reside for a fixed period of time in the Abode of Islam.

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In compliance with the Prophetic tradition, as opposed to amān āmm (general safe-conduct), the grantor of amān khāṣṣ (particular/private safe-conduct) may be any sane, competent, and mature Muslim, male or female, even if poor, sick, or blind. According to some jurists, the grantor may even be a slave who serves as a soldier in a Muslim army. Such a decree is issued upon request by a specific professional community, merchants, political entity, or diplomatic envoy. The mustaʿmin is granted the right to sojourn and stay in the Abode of Islam for a period of at least 82 Gladys Frantz-Murphy, “Identity and Security in the Mediterranean World ca. AD 640 – ca. 1517,” Proceedings of the Twenty-Fifth International Congress of Papyrology, Ann Arbor 2007, American Studies in Papyrology (Ann Arbor, 2010), 263–264; Bashir, “Treatment of Foreigners in the Classical Islamic State,” 148–149.

محمد بن عبد الوهاب (الشافعي) تَمْكَّنَّا وَذَلِكُّم هُمُّمنْ أقْضَامُهُمْ وَهُمْ يُمَيِّزُونَ عَلَيْهِمْ أَفْضَاءَهُمْ وَهُمْ يُبْتَغُونَ ۚ وَهُمْ يَتَّقُونَ عَلَيْهِمْ نُكْرَاءَهُمْ وَلَا يَخْفَفُونَ بَعْضُهُمْ عَنْ أُخْرَىٰ (The blood of the Muslims is equal, the lowliest of them can promise protection on their behalf (bi-dhimmatihim), and the one residing farther away may give protection on behalf of them. They are all united against the others. Those who have quick mounts should return to those who have slow mounts, and those who got out along with a detachment (should return) to those who are stationed. A believer shall not be killed for an unbeliever, nor a confederate within the term of confederation with him).” By saying “the blood of the Muslims is equal,” the Prophet distinguishes between Muslims and non-Muslims, thus denying the dhimmis’ right to grant amān to ḥarbīs even if a dhimmī was authorized by a Muslim to pledge amān. Sunan Abī Dāwūd, Kitāb al-Jihād, bāb 159, no. 2751; Abū al-Tayyib Muhammad Shams al-Haqq Abāḍī, ʿAyn al-Maḥbūd: Sharh Sunan Abī Dāwūd (Beirut: Dār al-Fikr, 1415/1995), 337–338; Abū Bakr Masʿūd ibn Ahmad al-Kāsānī, Badāʾiʿ al-Ṣanāʾiʾ fi Ṭartīb al-Sharāʾiʿ (Beirut: Dār al-Kutub al-ʾIlmiyyah, 1406/1986), 9:414–416; Khalilieh, “Amān,” 1:111; Masri, “Classical Conceptions of Treaty, Alliances, and Neutrality,” 166–167; Mirza, “Dhimma Agreements and Sanctuary Systems at Islamic Origins,” 103–105. With reference to the meaning of dhimmatiḥim, it applies to the security of Muslims with respect to non-Muslims and infidels. It signifies that for any Muslim who provides security to an enemy-alien person, any other Muslim is forbidden from bothering him as long as the guarantee still holds.

Amān āmm is an official pledge whereby the grantor is normally the imām or his deputy, authorized to grant it to an unlimited number of ḥarbīs, or to a territory within the domain of the Abode of War.


four months and up to one lunar year without paying the poll or land tax (kharāj).\(^8^3\)

Certificates of safe-conduct were most commonly issued to ensure the safety of \(ḥarbi\) commercial vessels, their crew members, and their contents. As a commercial decree, a pledge of amān enabled enemy-alien traders to carry on commerce temporarily and in security within the Islamic territorial domain in return for the payment of a trade tax. As with the dhimmī, the musta\(^{\prime}\)min is allowed to travel freely and visit any place, apart from the Hijaz, where he could sojourn for a limited time under de musta\(^{\prime}\)min. As a commercial decree, a pledge of musta\(^{\prime}\)min is changed if a female musta\(^{\prime}\)min marries a Muslim or a dhimmī; if, however, a male musta\(^{\prime}\)min marries a female dhimmī, he does not become a dhimmī but can take his wife to the Abode of War. His status also changes if the must\(^{\prime}\)amin stays longer than a year; in this case, he then becomes a dhimmī and must pay the jizya. Furthermore, his status changes if he purchases kharāj land.\(^8^6\)

**Diplomatic and Commercial Treaties**

Under Islamic law, advancing the ummah’s welfare, spreading peace, justice, and equity, mitigating insecurity, and averting danger are

\(^8^3\) Qur’an 9:2–1:1 (A declaration of immunity from God and His Messenger, to those of the pagans with whom ye have contracted mutual alliances. Go ye, then, for four months, (as ye will), throughout the land).” Law Schools, especially the Hanafi, advocate that although the pledge is limited to a four-month period, the maximum duration should not exceed 355 days. Schacht, *Introduction to Islamic Law*, 131; Hans Theunissen, “Ottoman-Venetian Diplomats: The ‘Ahd-names: The Historical Background and the Development of a Category of Political-Commercial Instruments together with an Annotated Edition of a Corpus of Relevant Documents,” *Electronic Journal of Oriental Studies* 1(2) (1998): 24–26.

\(^8^4\) See Chapter 2, 106–118.


\(^8^6\) Maḥmaṣṣānī, *Al-Qānūn wa‘l-ʿAlāqāt al-Duwalīyya fi al-Islām*, 99–100; Masri, “Classical Conceptions of Treaty, Alliances, and Neutrality,” 171–172; Dawoody, “War in Islamic Law,” 246–247. The Hanafi and Mālikī jurists argue that even if the musta\(^{\prime}\)min is proved to be a spy, he still enjoys the right of protection.
fundamental aims in reaching truces and concluding treaties. As the supreme authority, the imam or his deputy is mandated to conclude, ratify, and abrogate treaties on behalf of the ummah. A ratified truce or treaty can only be nullified by the imam if the other party violates it or commits perfidy, the treaty terms are determined to be contradictory to Islamic law, the other party seizes Islamic lands, or the imam is unable on any specific grounds to implement the terms of the treaty. A treaty may be revoked by the mutual consent of both parties. However, if any of the signatories dies or is removed from office, the participating states are still bound by the treaty until it expires. If the treaty is abrogated for any reason, the cancellation does not take effect immediately. Rather, a grace period of several weeks ensues. All foreign travelers and merchants formerly protected by the treaty, along with their chattels, remain safe during that time and may not be prevented from returning to their homelands.


for a treaty is typically ten lunar years, after which point it is subject to renewal.⁸⁹

Two prominent principles characterize decrees of amān and international treaties: (a) the sanctity of the terms of agreement akin to the Roman pacta sunt servanda; and (b) the norms of mutuality and reciprocity governing relationships between Muslims and aliens. With respect to the former, the Qurʾānic verses bind all Muslims to keep their promises and pledges with all humans,⁹⁰ including infidels, just as if they were made with God.⁹¹ Whereasʿuqūd (obligations) at times define humankind’s spiritual relation to God, includingʿibādāt and obedience before His commands, this term also conveys worldly obligations regarding all sorts of human material and social dealings – promises, business transactions, international treaties and truces, and an individual’s commitments to self, nation, society, community, state, people of the same or different religious affiliation, and aliens from the Abode of Covenant or of War. The Qurʾān considers the fulfillment of all obligations, promises, pledges, truces, and treaties as a solemn religious duty and commands Muslims to abide by them, providing they do not contradict Islamic law.⁹²

The compliance of Muslims with agreements concluded with non-Muslim individuals, communities, and states therefore corresponds with the observation of religious obligations. The Qurʾān enjoins state authorities to abide by the terms of a treaty even if the other party breaches those terms.⁹³ Qurʾān 17:34 states:


⁹⁰ Qurʾān 5:1 (O ye who believe! Fulfill (all) obligations); Q 2:177: “Wa al-fiqūrūn bi-ahdām (and truly pious those who fulfill the contracts which ye have made)” Q 16:91: “Wa ʿaḏawwā bi-ahdām ilāh (Fulfill the Covenant of God when ye have entered into it)” Q 23:8: “Wa al-dīn wāmāna tāmānāhim wa ʿahdīm (Those who faithfully observe their trusts and their covenants).”


... and fulfill (every) engagement, for (every) engagement will be enquired into (on the Day of Reckoning).

Q 9:4:
(But the treaties are) not dissolved with those Pagans with whom ye have entered into alliance and who have not subsequently failed you in aught, nor aided anyone against you. So fulfill your engagements with them to the end of their term: for God loveth the righteous.

Q 16:91:
Fulfill the Covenant of God when ye have entered into it, and break not your oaths after ye have confirmed them; indeed ye have made.

The Treaty of Hudaybiyyah, ratified by the Prophet and the chiefs of Quraysh headed by Suhayl ibn ‘Amr, provides an excellent model of the Islamic pacta doctrine. Although it includes clauses unfavorable to Muslims, the Prophet and his Companions honored its terms, observed the pacta doctrine, and did not react instantaneously to violations by the Qurayshīs. The treaty was discarded only when the Qurayshīs abrogated the provisions mandating that both parties “lay down the burden of war for ten years” during which “each party shall be safe, and neither shall injure the other; no secret damage shall be inflicted, but uprightness and honor shall prevail between them.”

It took persecution of the local Meccan community by the Qurayshīs for the treaty to be fully revoked, after which the Prophet and his followers launched a military campaign that culminated in the liberation of Mecca on Ramadan 20, 8/January 11, 630.

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95 Muhammad ibn Ahmad al-Sarakhsī, Sharḥ Kitiḥ al-Siyar al-Kabīr (Beirut: Dâr al-Kutub al-‘Ilmiyyah, 1997), 1:213–215. The Treaty of Hudaybiyyah was not premeditated, but came into being when the Prophet, accompanied by 1,500 unarmed men, decided to perform an umra (lesser pilgrimage) to Mecca. In order to explain the Muslims’ peaceful mission, he dispatched ʿUthmān ibn ʿAffān as an envoy to convey to the Meccans their intention. In
As did earlier and contemporaneous monotheistic religions and political entities, Islam recognizes the principle of reciprocity and mutual justice, not only among Muslims but also with respect to non-Muslim groups and foreign states and principalities in times of peace and war alike.96 The application by Islam of this principle is evinced by the overwhelming number of bilateral and multilateral treaties concluded between Muslim and Christian states, within which regulations regarding one state were matched by similar rules vis-à-vis another. States and independent principalities generally proposed treaty terms regarding taxation, exchange of envoys and diplomats, ransoming of captives, fighting piracy, and granting judicial sovereignty to foreign communities, in addition to recognizing a state’s jurisdiction over offshore maritime zones and verifying the right to navigate in offshore waters, trade along coasts, and anchor in ports and anchorages in times of duress. In brief, international treaties

response, Suhayl ibn ‘Amr, along with four emissaries, negotiated terms and concluded a treaty with the Prophet. The great majority of Muslim scholars regard this treaty as having served as a model for future diplomatic treaties because: (a) it substantiates the fact that the Islamic State can enter into a relationship and conclude a peace treaty even with sworn enemies; (b) the duration of the treaty was fixed at ten years, a standard duration for subsequent treaties; (c) it defines the rights and obligations of each party to the agreement; (d) as a leader, the Prophet demonstrated concern about the welfare and safety of the Muslim community within his particular jurisdiction; (e) as a statesman, he demonstrated diplomatic ingenuity; and (f) the Prophet displayed utmost respect with regard to his enemy’s emissaries. Cherif Bassiouni, “Protection of Diplomats under Islamic Law,” American Society of International Law 74 (1980), 611; Fiazuddin Shuayb, “Who’s Better than God to Rule? An Inquiry into the Formation of the First Islamic State (622–32 C.E.),” (PhD diss., UCLA International Institute, 2012), 420–426; Muhammad-Basheer A. Ismail, “Islamic Diplomatic Law and International Diplomatic Law: A Quest for Compatibility,” (PhD diss., University of Hull, 2012), 211–218.

96 Qur’an 2:194: (If then any one transgresses the prohibition against you, transgress ye likewise against him); Q 9:7: (As long as these [Pagans] stand true to you, stand ye true to them); Q 16:26: (And if ye punish, let your punishment be proportionate to the wrong that has been done to you: but if ye show patience, that is indeed the best [course] for those who are patient); Q 42:40: (The recompense for an injury is an injury equal thereto (in degree): but if a person forgives and makes reconciliation, his reward is due from God; For (God) loveth not those who do wrong); Q 55:60: (Is there any Reward for Good – other than Good); Gamal M. Badr, “A Survey of Islamic International Law,” American Society of International Law Proceedings 76 (1982), 59; Hamidullah, Muslim Conduct of State, 34, 125, 138, 151–152, 166; Khadduri, War and Peace, 44–45, 278; Khadduri, Islamic Law of Nations, 3, 6, 8, 12, 22, 41, 53, 62; Haniff Ahamat, “The Position of Siyar on Free Trade: A Historico-Legal Analysis,” Journal of the History of International Law 12 (2010), 315–316, 319, 324, 326–327.
engendered freedom of movement and navigation, knowledge, and trade activities among nations and sovereigns.

*The Contested Sea: Navigational Regimes in the Mediterranean*

A significant number of international diplomatic and commercial agreements and truces signed by Christian and Muslim sovereigns and principalities along the Mediterranean contained clauses assuring freedom of navigation on the high seas and along coasts, and of travel on land by foreign civilians, whether shippers, merchants, or voyagers, together with their chattels, in order to enhance interregional and overseas commerce.\(^97\)

Articles 5 and 6 of the 667/1269 treaty concluded between al-Zāhīr Baybars (r. 658–676/1260–1277) and Lady Isabel of Beirut (r. 1264–1282) stipulate that civilian-subjects, servants, ships, and galleys be considered to fall “under the jurisdiction and obedience” of the respective party to the treaty when traveling by land or sailing the seas and also guarantee “safe and secure (passage) in respect to themselves, their chattels, and their goods.”\(^98\)

This freedom of navigation and mutual securing of vessels, crew, traders, voyagers, and their chattels and goods from hostile attacks finds echoes in subsequent commercial and diplomatic treaties. Article 7 of the Treaty of al-Mansūr Qalāwūn (r. 678–689/1279–1290) with Bohemond VII, the prince of Antioch and Tripoli (r. 1275–1287) beginning in 680/1281, stipulates that galleys of each party to the agreement shall be safe from interception by the other while at sea.\(^99\) The same sultan signed other treaties with the Latin Kingdom of Acre (682/1283),\(^100\) Lady Margaret of

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\(^97\) Dominique Valérian, “Ifrīqiyan Muslim Merchants in the Mediterranean at the End of the Middle Ages,” *Mediterranean Historical Review* 14 (1999), 47–66; David Abulafia, “Christian Merchants in the Almohad Cities,” *Journal of Medieval Iberian Studies* 2 (2010), 251–257; Holt, *Early Mamluk Diplomacy*, 5. In addition to freedom of navigation, international treaties address: (a) financial aspects of trade – taxation, customs, and port tolls; (b) the application of the law for travelers when on land, which revolves around the implementation of *Shari`ah* abroad, the judicial autonomy of *dhimmī* and foreigners, the juridical role of Consuls, and means for appealing to Islamic courts; and (c) the territorial integrity and sovereignty of hosting states.

\(^98\) Holt, *Early Mamluk Diplomacy*, 46–47.


\(^100\) Holt, *Early Mamluk Diplomacy*, 81, article 6: “All this territory and the coastlands as specified in this blessed truce shall be safe from the sultan al-Malik al-Mansūr and his son al-Malik al-Sāliḥ, and safe from their soldiers, their troops and their servants. This territory as set forth above being covered by this blessed truce, whether property or condominium, shall be secure, it and its civilians, all nations of people in it, the residents therein and the wayfarers thereto, of whatever nations and religions, the wayfarers thereto from all the lands of the Franks, the merchants, the travelers and the wayfarers
Tyre (684/1285), Genoa (689/1290), and King Alfonso III of Aragon (r. 1285–1291) (689/1290), all of which ensure safety of navigation on the high seas and in coastal waters.

Similar treaties were executed in the western basin of the Mediterranean. On the eve of renewal of the 721/1321 peace treaty originally signed by Sultan Isma’îl I of Granada (r. 713–725/1314–1325) and Jaime (James) II of Aragon (r. 1291–1327), the former’s successor, Muḥammad IV (r. 725–733/1325–1333), authored (on Jumada al-Thani 11, 726/May 15, 1326) an official letter protesting against an Aragonese passing to and fro by land and sea, night and day, plain and mountain. They shall be safe in respect of themselves, their chattels, their children, their ships and their beasts of burden, all belonging to them and everything in their possession of whatever kind, from the Sultan, his son, and all under their obedience.”

101 Holt, Early Mamluk Diplomacy, 114, article 11: “Provided also that ships of either party in passage on the sea shall be safe from the other party, secure at sea and in anchorage, entering and leaving. Every community of the two parties is bound to abstain from damage to the other party.”

102 Holt, Early Mamluk Diplomacy, 147–148. Articles 2 and 3 concern the personal rights and immunities of Muslim and Genoese subjects in all stages of their journey on land and at sea. Article 3 states: “And that all Genoese will honor, respect and protect all Muslims who come to the territory of our lord the Sultan, and who go out and travel from it by land and sea; they will not interfere with them, or enable any interference with them by wrongful acts, harm or hostility, either to their persons or their chattels, either in coming or going. They shall be safe and secure in respect of their persons and chattels and seafaring from all the Genoese, and from those under the jurisdiction of the Commune of Genoa as stated above.” Also Hamāda, Al-Wathā’iq al-Siyāsiyya wa’l-Idāriyya lil-‘Aṣr al-Mamlūkī, 482.

103 Holt, Early Mamluk Diplomacy, 133–134. The third paragraph of article 3 reads as follows: “Whatever the specified territory and the unspecified provinces contain: the cities, ports, coastlands, harbors, routes by land and sea; departure and arrival, residence and travel of soldiers and troops, Turcomans, Kurds and Arabs, civilians and merchants, galleys, vessels, ships, chattels and beasts; of whatever faiths, persons and nationalities; whatever is possessed of all kinds, chattels, arms, military equipment, property, wares and merchandise; little or much, near or far, by land or sea; shall be safe in respect of persons, people, chattels, women and children, from the King of Aragon and his brothers mentioned above, from their sons, knights, horsemen, allies, fleets and men, and from everyone belonging to them. This regulation shall likewise apply to everything that God shall conquer by the hand of our lord the Sultan al-Malik al-Mansūr, and by the hand of his sons, soldiery and armies, whether citadels, fortresses, territory or regions.”

104 Paul E. Chevedden, “The 1244 Treaty: Arabic Text and Analysis,” in Negotiating Cultures: Bilingual Surrender Treaties in Muslim-Crusader Spain under James the Conqueror, ed. Robert I. Burns and Paul E. Chevedden (Leiden: E. J. Brill, 1999), 159–160, 164–165. In the 1235 surrender pact of Abū ‘Abd Allāh Muhammad ibn Hudhayl, known as al-Azraq, to King James I of Aragon and Catalonia, the latter guarantees protection to the Játivans with respect to persons and chattels, while traveling by land and by sea, and within the castles, citadels, cities, towns, coastlands, and harbors under his jurisdiction.
naval raid on Almería – one of the two major port cities of the Emirate of Granada – and the capture of more than a dozen Muslims. In the letter, an appeal was made to the royal envoy of Jaime II, urging him to expedite the release of the hostages and to order his troops to refrain from future attacks on Granadian targets. A few days later, on Jumada al-Thani 15, 726/May 19, 1326, Muḥammad IV dispatched a more detailed letter to Jaime II, reminding him of the terms and provisions of the 721/1321 treaty. He stressed the sanctity of frontiers, of maintaining the territorial integrity of both states, and of freedom of movement of both Muslim and Christian civilian-subjects on land and at sea:

The terms upon which this treaty is established apply to the mainland and the sea. It covers all of our ships that frequent your coastlands, your ships that frequent our coastlands, our civilian-subjects who head for your mainland, and your civilian-subjects who head for our mainland. They shall be safe on land and at sea in respect of their persons and chattels. They shall be safeguarded and secured wherever they arrive and travel. No harm whatsoever shall befall them on land and at sea, secretly or publicly.

Neither our galleys nor yours shall intercept the other party’s vessels be they at sea or in port, irrespective of whether they carry subjects of an enemy or a friendly state.

Should your (galleys) capture a Muslim or a Christian vessel not flying our flag and one of our civilian-subjects is on board, or should your (forces) capture a group of Muslims and one of our civilian-subjects is among them, you shall release our detained civilian-subjects with their chattels instantly; reciprocal actions shall be taken on our part in your favor.

(It is also) provided that you shall not target any of our ports irrespective of the identity of the civilian-subjects therein, be they enemy-alien or friendly subjects.

(It is also) provided that your (military) galleys shall not do harm to any vessel mooring in our ports (marāṣina) or (along) our country’s coastlands (sawābil bilādūnā), or sailing in its territorial sea (bihārihā), regardless of their owners’ religious affiliations – Muslims or Christians – and place of origin. Your galleys shall have no right whatsoever to intercept them insofar as the duration of the peace treaty is in force and has not expired.

(If) you shall render any kind of assistance to our Muslim and Christian enemies on land and at sea; reciprocal actions shall be taken on our part to your detriment.


Muhammad IV reminds Jaime II of their agreement to secure freedom of navigation and movement on land and at sea, and to abide by the principle of extraterritoriality. He argues that both parties had guaranteed the secure passage of civilian-subjects, merchants, and their chattels and ships through both realms, off the coasts, and on the high seas. To further encourage trade, the treaty made no restrictions on the freedom of navigation on the high seas of ships flying Granadian and Aragonese flags, and ordained that the galleys of both parties should refrain from intercepting or hindering those of the other. However, when sailing off the coastal frontiers of either state, or mooring in one of their ports or anchorages, ships were required to comply with local law.

From the birth of Islam in the seventh century up until and throughout the Ottoman period, parties to diplomatic and commercial treaties applied the principle of extraterritorial reciprocity. In the 9 AH/630 CE Prophetic pledge, the grantor declares: “This is a guarantee of protection from God and Muhammad the Prophet, the Messenger of God, to Yūhannā ibn Ru‘ba and the people of Aylah, for their ships, their caravans by land and sea... and all that are with them, men of Syria and the Yemen, and seamen.”

This statement goes beyond a common pledge of security for the people and property of Aylah because it contains clauses concerning the safety of foreign civilians sailing aboard Aylah-flagged vessels. The Prophet assured that such subjects also would enjoy a legal status akin to that of the people of Aylah, whether at sea or within its territorial sovereignty. By doing so, the Prophet extended the quasiterritorial jurisdiction of the flag state not only to the vessels themselves, but also to all their crew and passengers irrespective of nationality. Thus, when a seagoing vessel ventured outside a state’s territorial sovereignty, she and all persons and property on board were subject to the laws of Aylah just as if she were a floating island within the state’s jurisdiction.

Concerning the civilian-subjects of Aylah who sailed on board foreign-flagged vessels, they too were covered by this pledge and enjoyed diplomatic protection. This protection remained in force even if the countries to which the ships belonged were hostile or did not maintain diplomatic or commercial relations with the Islamic State. In this case, the doctrine of diplomatic protection with reference to subjects of Aylah aboard alien ships superseded the flag state’s quasiterritorial jurisdiction. It is clear that, with respect to the pledge of safe-conduct, both the doctrines of

107 See above p. 45:

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\text{هذِهْ أَنْعَمَةُ مَنْ لَهُمْ، وَمَحَمَّدٌ الْذِّيْنِ يُرسَوْلُ اللَّهُ بِهِ إِلَيْهِ بِنَرَةٍ وَأَهْلٍ أَيْتِاهُ، أَطْلُبُهُمْ وَسَيْنَبْنُهُمْ وَأَنْقَلْنِهُمْ فِي الْبَرِّ وَالْبَحْرِ... وَمَنْ كَانَ مَعْمَهُ مِنْ أَهْلِ الشَّامِ، وَأَهْلِ الْيَمَنِ، وَأَهْلِ الْبَحْرِ.}
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quasiterritorial jurisdiction and diplomatic protection grant security to Aylah-flagged vessels and all persons and property aboard, as well as to its civilian-subjects sailing on board vessels flying flags of foreign states, even in the absence of relationships with the newly founded Islamic State.

We can identify in later treaties these same principles as set forth by the Prophet in the pledge of 9 AH/630 CE. For instance, article 4 of the treaty signed by al-Mansūr Qalāwūn and the representatives of Genoa on Jumada al-Awwal 2, 689 AH/May 13, 1290, stipulates:

And that they will protect all Muslim merchants and others who travel in Genoese and other vessels, going and coming, in all places belonging to the Commune of Genoa and others, the territory of the Franks, the territory of the Greeks and the territory of the Muslims. Every Muslim traveling with them and with others shall be protected, safe and secure; no-one shall ill-treat or wrong them during their journey, their abiding or their residence.

If a Muslim should travel in a vessel other than a Genoese vessel, belonging to the enemies of the Genoese or others, there shall be no interference with any Muslim.

If they [Genoese] take their enemy, the Muslims shall be protected and safe in respect of themselves, their slaves and their slave-girls, in going and coming. The Genoese shall not detain them on any pretext; nor shall they take a Muslim as a hostage, or pursue him for debt or bloodshed, unless he is a guarantor or surety.108

The sultan attaches the principle of extraterritoriality to vessels flying the flag of Genoa and those of other states, which under customary law has exclusive jurisdiction over them, not only on the high seas, but also within their territorial seas. However, when merchant vessels moor in foreign ports, local authorities would share jurisdiction over them.109 Since a flag state asserts jurisdiction over its vessels, it is held liable for conduct occurring on board whether within its territorial domain or on the high

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109 Postclassical jurists attach the principle of extraterritoriality to ships anchoring in foreign ports. The Andalusian jurist Ibn Sirāj (d. 848/1444) “was asked about Muslim captives in the hands of Christians, who, while awaiting ransom on board (enemy vessel) anchoring in one of Islamic anchorages, escaped from captivity.” He answered: “Jurisprudentially, it is more likely, may God grant us success, that Muslims shall neither pay ransom nor hand the captives over because the vessels in our days are legally and jurisdictionally akin to their territories and strongholds (*li-anna al-maraʾikib al-yawm tanazzalat manzilat bila dihim wa-maʿāqilihim*).” Abū al-Qāsim Muhammad ibn Sirāj al-Andalusī, *Fatāwā Qāḍī al-Jamʿa* (Beirut: Dār Ibn Hazm, 1427/2006), 223; this *responsum* is fully quoted by Abū al-ʿAbbās Ahmad ibn Yahyā al-Wansharīsī, *Al-Miʿār al-Muʿrib waʾl-Jāmiʿ al-Maghrīb ‘an Fatāwā Abl Iftiqīya waʿl-Andalus waʾl-Maghrīb* (Beirut: Dār al-Gharb al-Islāmī, 1981), 2:118.
seas. Genoa is thus responsible for the well-being, safety, and any maltreatment of Muslim subjects and their chattels sailing aboard its vessels when frequenting Genoese territories, as well as aboard vessels sailing under foreign flags, namely Frankish and Byzantine vessels. Should Genoa attack any enemy vessel transporting Muslims, it will be bound to safeguard the Muslims’ well-being and to set them free. The lack of reference in this treaty to dhimmī citizens should not be interpreted to mean that they were legally distinguished from their Muslim civilian counterparts when traveling abroad. On the contrary, as protected citizens of the Abode of Islam, dhimmīs’ rights were either explicitly or implicitly embedded in all international agreements signed between Islamic and foreign states. Theoretically and practically, all subjects of the Abode of Islam seemed to have enjoyed the same treatment and rights when at sea and on foreign soil.110

Both parties to a treaty or truce were bound not to inflict harm on civilian-subjects of either state, whether traveling by land or sea (allā yuṭra q aḥad bi-sharr fi barr ṣiyā ṣaḥḥa wa-bahr).111 Pursuant to the 721/1321


111 Although the actual meaning of the word barr is “land,” it could also mean “sailing by cabotage.” In an early tenth-century Islamic legal treatise on maritime law we read the following: “idhā safarat al-safina maʾ barr al-barr,” meaning: “if the ship sailed by cabotage within the land sight.” Tāher (ed.), Akriyat al-Siyās, 27; Saḥnūn ibn Saʾīd al-Tanūkhī, Al-Muddawwana al-Kubrā (Beirut: Dār al-Kutub al-Ilmiyyah, 1415/1994), 4:493, 496; Khalilieh, Admiralty and Maritime Laws, 294.

112 Michele Amari, I Diplomi Arabi del R. Archivio Fiorentino (Florence: Dalla Tipografia di Felice le Monnier, 1863), 231–232, 233, 234, the Safar 19, 580/June 1, 1184, bilateral peace treaty (musālaḥa) and covenant (muʾāqāda) signed between jurist (faqīḥ) and governor Abū Ibrāhīm Iḥsāq ibn Muhammad ibn ʿAlī (r. 551–580/1156–1184), of Banū Gāniya, of the Balearics, and Siegiero Guccionello Gualandi, the Ambassador of the Republic of Lucca and Pisa, further stipulates that any Pisàn and Lucchian subject who sails aboard ships belonging to the enemies of the Balearic Islands shall be treated as an enemy of these islands. Three years earlier (Safar 577/June 1181), the same jurist-
Granadian–Aragonese peace treaty (renewed in 726/1326), and the Ḥafsīd–Pisa peace treaties of 713/1313, 754/1353, 767/1366, 800/1397, and 817/1414, joined by Florence in 824/1421 and 849/1445, and the Catalan–Mamluk commercial and peace treaty of 1430, the states agreed on their respective: (a) rights to exercise extraterritorial jurisdiction over their flagged ships; and (b) obligations to avoid hindering an individual’s freedom of movement and navigation on the high seas. The extraterritorial jurisdiction of Pisa over ships flying its flag was manifested by article 14 of the 713/1313 treaty, renewed in 754/1353, within which the Ḥafsīd amir expressly affirmed that every foreign merchant sailing on a ship belonging to Pisa was to be treated as if he were a Pisan subject, and to “enjoy rights equal to theirs, and fulfill the same obligations as theirs (lahum, wa-ʿalayhī maʿ ʿalayhim).” Apart from the time of berthing in foreign ports, the flag state was entitled to claim jurisdiction over foreign passengers sailing on board its ships. Any unlawful act governor signed a peace treaty with Genoa containing an express proviso (article 23) considering Genoese subjects to be enemies if captured while sailing aboard vessels of nations unfriendly to Majorca. The institution of diplomatic protection thereby became irrelevant, and Genoa could not assert its own right in its subjects/nationals who violated the terms of the truce (muhādana). Bauden, “Due trattati di pace,” 50 (articles 23 and 24), 69–70 (articles 16 and 17 of 584/1188 treaty); Amari, Nuovi Ricordi Arabici sulla Storia di Genova, 1–5 and 6–10 (Arabic section); Amar S. Baaj, “The Struggle for North Africa between Almohads, Ayyubids, and Banū Ghāniya (Late Twelfth to Early Thirteenth Centuries A.D.),” (PhD diss., University of Toronto, 2013), 123–124; Nashshār, ʿAlāqat Mamalakaty Qishtāla wa-Aragon bi-Saltanat al-Mamālīk, 296, “fi al-barr waʿl-bahr”; Mercè Viladrich, “Solving the ‘Accursed Riddle’ of the Diplomatic Relations between Catalonia and Egypt around 1430,” Al-Masāq 14 (2002), 26–28. 

Arslān, Al-Hulal al-Sundusiyyya, 2:309; Hamāda, Al-Wathāʾiq al-Siyasiyya wa-l-Idāriyya, 466. 

Amari, Diplomi Arabi, 90, 103, 242; Kathryn Reyerson, “Identity in the Medieval Mediterranean World of Merchants and Pirates,” Mediterranean Studies 20 (2012), 139; Enrica Salvatori, “Corsairs’ Crews and Cross-Cultural Interactions: The Case of the Pisan Trapelicus in the Twelfth Century,” Medieval Encounter 13 (2007), 34, 41. A similar stipulation appears in the twelfth-century bilateral treaties concluded between Pisa and other Italian Communes. The 1171 Pisa–Florence treaty makes the assurance that the Florentines can enjoy the privilege of sailing, along with their shipments, aboard Pisan-flagged vessels as if they were Pisans. Salvatori maintains that this treaty is perhaps the earliest-known instance of foreigners granted the status of nationals aboard ships. However, her assumption is baseless as, 541 years earlier, the Prophet Muhammad had already assimilated foreigners sailing aboard Aylah-flagged ships with nationals of Aylah and granted the former complete security for their persons, private belongings, and commercial commodities. 


113 Arslān, Al-Hulal al-Sundusiyyya, 2:309; Hamāda, Al-Wathāʾiq al-Siyasiyya wa-l-Idāriyya, 466.

114 Amari, Diplomi Arabi, 90, 103, 242; Kathryn Reyerson, “Identity in the Medieval Mediterranean World of Merchants and Pirates,” Mediterranean Studies 20 (2012), 139; Enrica Salvatori, “Corsairs’ Crews and Cross-Cultural Interactions: The Case of the Pisan Trapelicus in the Twelfth Century,” Medieval Encounter 13 (2007), 34, 41. A similar stipulation appears in the twelfth-century bilateral treaties concluded between Pisa and other Italian Communes. The 1171 Pisa–Florence treaty makes the assurance that the Florentines can enjoy the privilege of sailing, along with their shipments, aboard Pisan-flagged vessels as if they were Pisans. Salvatori maintains that this treaty is perhaps the earliest-known instance of foreigners granted the status of nationals aboard ships. However, her assumption is baseless as, 541 years earlier, the Prophet Muhammad had already assimilated foreigners sailing aboard Aylah-flagged ships with nationals of Aylah and granted the former complete security for their persons, private belongings, and commercial commodities.

committed en route or in the vessel’s home port held the wrongdoer liable for the misconduct; the wrongdoer was punished pursuant to the law of the vessel’s flag state. The laws and shipping regulations of the flag state to which a vessel belonged did not exempt alien travelers and shippers from protection; in fact, they may have experienced preferential treatment. The only sensible reason that foreigners may have preferred to sail aboard a vessel flying an alien flag was to take advantage of the protection afforded by the participation of the alien state in bilateral treaties.

The parties to a treaty acknowledged each other’s extraterritorial jurisdiction over its own flagged vessels and asserted that crew, shippers, cargoes, and passengers, regardless of citizenship and denomination, were free and safe to sail in its vessels on the high seas, and to moor in ports and anchorages of the contracting parties. Should enemy travelers sail aboard a ship flying the flag of a state that was party to the treaty, upon arrival at its destination the captain would have to notify the port authorities regarding the identities of these enemy travelers and the purposes of their trip. Once the identification process and clearance of the

Emil T. Gessner, *Freedom of the Seas*, 70

Kingdom of Jerusalem Presented to Joshua Prawer, ed. B. Z. Kedar, H. E. Mayer, and R. C. Smail (Jerusalem: Yad Izhak Ben-Zvi, 1982), 231–232, describes how the Tuscan merchants posed as Pisans when trading between Acre and Aleppo. These merchants, who were active in the Levant, were instructed to return directly from Syria to Pisa apparently aboard Pisan-flagged vessels.

Amari, *Diplomi Arabi*, 145–146, article 19 of the 817/1414 Hafṣid–Pisan treaty: “If one Christian sailing on board a ship belongs to Pisa . . . inflicts harm or annoys Muslims, he will personally be treated commensurate with the act he has committed (yuʿāmal bi-fi liḥi).”

Amari, *Diplomi Arabi*, 22; Ahmed Azzaoui, *Rasāʾil Muwahhidiyya* (Kénitra: Université Ibn Tofayl, 1416/1995), 1:175; Almohads–Pisan long-term treaty (25 years) from Ramadan 1, 582/November 15, 1186, plainly states that “if the fleets of Almohads, may God grant them victory, encounter (Pisan) ships at sea, they shall not inflict harm to them in respect of their persons, chattels, affairs, or anything else”; Baaj, “Struggle for North Africa between Almohads, Ayyubids, and Banū Ghāniya,” 123–124; Amari, *Diplomi Arabi*, 131, article 20 of the 800/1397 treaty: “If one of Pisa’s vessels or galleys sails on the high sea (zahr al-bahr) or anchors in the port of Tūnis or one of its territories and one of the ruler’s galleys sights her, the (Hafṣid) galley shall neither block her way nor cause harm to her; all those on board are safe in respect of their persons, chattels, and galleys.” This peace treaty (ṣulh) was originally drawn up between the Hafṣid amir Abū Fāris ‘Abd al-ʿAzīz ibn Ahmad (r. 796–838/1394–1434) and Pisa, extended in 817/1414, and joined by Florence on Shawwal 7, 824/October 5, 1421.

foreigners was completed by the port of call, they and their chattels obtained a guarantee of safety.119 In the cases of Pisa and Florence, the elders and councilors of the communes expressly guaranteed the protection of all Muslims along with their moveable effects on board vessels flying their flags, and held themselves accountable for pursuing justice and remunerating any ill-fated Muslims exposed to offenses or treacherous acts during the journey. However, if a Muslim preferred to sail on a vessel not flying the flag of the communes, the state in question would assume protection only of those officially permitted to board the vessel.120

According to the customary law of the sea, the captain of a vessel holds exclusive jurisdiction over the craft and all those on board when on the high seas, as the vessel is considered a quasiterritory in relation to her nationality or her owner’s religious affiliation. However, once a vessel enters a port, she becomes subject to a concurrent jurisdiction; the captain’s exclusive jurisdiction gives way to the jurisdiction of the port’s superintendent.121 As the highest-ranking officer on board a vessel, a captain is vested with overriding authority. Apart from being a skillful navigator and professional manager, a captain’s duty is to administer the law of his religion or country. The vessel herself, along with all those on board, regardless of their citizenships and religious allegiances, are thereby subject to the laws and regulations of the vessel’s flag state. The

Arabic see Muhammad ibn Ahmad ibn Jubayr, Riblat Ibn Jubayr (Beirut: Dār Sāder, 1959), 13; Khalilieh, Islamic Maritime Law, 83–85.

119 Amari, Diplomi Arabi, 178. A sultanate unilateral edict (rasm) issued by the Mamluk sultan Qānsūh al-Ghurī (r. 906–923/1501–1517) in Dhū al-Qiʿdah 18, 911/April 12, 1506, guarantees protection to the Florentine merchants’ guild (ṭāʾifa) arriving on Egyptian coastal frontiers aboard non-Florentine-flagged ships; this safe-conduct applies at sea and on land alike. Amari, Diplomi Arabi, 216. Under the terms of the 913/1508 treaty between the amir of the port city of Bādis and Venice, he assures (in article 2) through protection for all “vessels sailing under the flag of the Signoria,” including their passengers and property. By virtue of quasiterritorial jurisdiction, all passengers, regardless of nationality, are treated as if Venetian subjects when on board Venetian-registered vessels. Article 5 refers to the status of Venetian merchants arriving in Bādis on board non-Venetian-flagged vessels. It assures their protection with respect to their persons and chattels. John Wansbrough, “A Moroccan Amir’s Commercial Treaty with Venice of the Year 913/1508,” Bulletin of the School of Oriental and African Studies 25 (1962), 455, 459, 460; Pierre Moukarzel, “Venetian Merchants in Thirteenth-Century Alexandria and the Sultans of Egypt: An Analysis of Treaties, Privileges and Intercultural Relations,” Al-Masaq 28 (2016), 195–196. The Venetian–Mamluk treaty of 1208 guarantees security and protection not only for Venetian subjects, but also for foreign passengers and pilgrims sailing aboard ships flying the Venetian flag heading for the Church of the Holy Sepulchre in Jerusalem or for Alexandria.

120 Amari, Diplomi Arabi, 179, article 29 of the 849/1445 peace treaty.

121 Khalilieh, Islamic Maritime Law, 143.
jurisdiction of the flag state applies to matters of discipline, the safety of
the crew and passengers, and the safe delivery of cargo from the ports of
origin to the destinations, unless leasing contracts or treaties stipulate
otherwise. For this reason, Muslim jurists discouraged their compatriots
from sailing on board foreign-owned vessels, unless: (a) the voyage
was being undertaken for religious or educational purposes; (b) the pas-
sengers would not be harassed or humiliated during the journey; and (c)
the Muslim ruler at the time was sufficiently powerful so as to be held in
high regard by the regime governing the ship.

Nationals sailing on foreign-flagged vessels pose problems for the
application of the law and the need to assure their protection during an

122 In the second century, Emperor Antoninus Pius (138–161 CE) issued an Imperial Edict
adopting the Rhodian Law as the genuine and authoritative reference and an expression
of uniformity in maritime law when judging cases and claims arising within Rome’s
maritime domain and concerning Roman citizens in foreign territories. The Rhodian Sea
Law was incorporated in the Romano-Byzantine legal codices, the Digest and the
Basilika. Antoninus declared: “I, indeed, am Lord of the world, but the law is lord of
the sea. Let it be judged by Rhodian Law, prescribed concerning nautical matters, so far
as no one of our laws is opposed.” Robert D. Benedict, “The Historical Position of the
Rhodian Law,” Yale Law Journal 18 (1909), 233; Khalilieh, Admiralty and Maritime
Laws, 70, 73, 78–81; Khalilieh, Islamic Maritime Law, 42–45; Khalilieh, “Legal Aspects
from a Cairo Geniza Responsum,” 190–193; Samuel P. Scott (ed.), Las Siete Partidas
others with him (admiral) in the fleet or the armada, should obey his commands, and
acknowledge his superiority, just as they would that of the king.”

123 Muhammad A. Bazzâz, “Hawl Naql al-Bahriyya al-Masihiyya li-Hujjâj al-Gharb al-
Islami,” in l’occident musulman et l’occident chrétien au Moyen Âge, ed. Mohammed
Hammam (Rabat: Faculté des lettres et des sciences humaines, Muhammad al-Khâmis
University, 1995), 81–92. Shippers, passengers, and pilgrims of different nationalities
and religions eventually realized that they had to abide by the flag-state shipping
regulations. Nonetheless, this did not prevent them from sailing aboard European
Christian-owned vessels in the Mediterranean arena. The Andalusian judge and traveler
Ibn Jubayr (540–614/1145–1217), as an example, embarked on a Genoese vessel in his
eastbound and westbound passages. During his westbound passage from ʿAkkâ (Acre)
to Sicily, he draws attention to the differences between Islamic and Christian maritime
traditions and laws in reference to the deceased’s property at sea. He reports:
“Throughout all these days we had seen no land – may God soon dispel our cares –
and two Muslims died – may God have mercy on them. They were thrown into the sea.
Of the [Christian] pilgrims two died also, and were followed thereafter by many others.
One fell alive into the sea, and the waves carried him off more quickly than a flash of
lightning. The captain of the ship inherited the effects of the departed Muslims and
Christian pilgrims, for such is their custom for all who die at sea. There is no way for the
[true] heir of the deceased to recover his inheritance, and at this we were much aston-
ished.” Ibn Jubayr, Travels, 329. The European Christian tradition of seizing the
deceased’s property by the shipmaster is also institutionalized in their legal codices. Stanley S.
Jados, Consulate of the Sea and Related Documents (Tuscaloosa: University of Alabama
Press, 1975), 66–68, articles 118 and 121.
entire journey. Regarding the application of the law, a captain is regarded as the paramount authority over a vessel and her contents, crew, and travelers while at sea, irrespective of their nationalities and religious affiliations; all must comply with the captain’s instructions and with the shipping regulations of his flag state. The flag state exercises jurisdiction not merely over the ship, her own nationals, and their property, but also over foreigners and their property while on board. In the event of unlawful acts being committed on board, the captain has the right to imprison the culprits until the ship reaches the nearest port, or her destination, or returns to her home port. However, the captain is not authorized to act as a judge. Roman law dictates that if legal transgressions occur while en route, then the parties involved must be brought before provincial judicial authorities at the port of destination.124

Under Islamic law, if a controversy occurs between a lessee and lessor, local judicial authorities at the destination have the right to prosecute the case on the condition that the qadi be fair and just, and apply Islamic law. However, if a controversy arises among the passengers themselves, it may be settled in any Islamic territory, provided that the judge be evenhanded and the venue be accessible to all parties concerned.125 If Muslim disputants sail for a foreign country, any lawsuit should be brought before a Muslim qadi. In the absence of an Islamic judicial authority, Muslim disputants may appeal to any Islamic court elsewhere. If a dispute arises between a Muslim party and an alien on board a ship that is heading for her home port or to another foreign country, it must be adjudicated at the destination, or as stipulated within any active treaties.126

Human perils – pirates, privateers, or enemy vessels – lurking near ports and major trade routes, could harass commercial ships and prevent them from departing, resulting in financial loss to one or both parties to a shipping contract, and to the relevant state. If a raid were to take place

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124 Scott (ed.), Civil Law, 15:168. Maritime traditions of classical Athens, however, establish that the judicial hearing in cases involving disputants of different nationalities is not determined by the national jurisdiction or the flag of convenience, but by the place where the shipping/leasing contracts have been signed. Kathleen M. Atkinson, “Rome and the Rhodian Sea-Law,” Iura 25 (1974), 58–59.


126 Amari, Diplomi Arabi, 127 (article 5 of the Ḥafṣīd–Pisan peace treaty of 800/1397), 141 (article 5 of the Ḥafṣīd–Pisan peace treaty of 817/1414), 155 (article 5 of the 824/1421 multilateral peace treaty concluded between the Ḥafṣīds, Pisa, and Florence).
against a vessel while within a state’s inland waters, internal waters, or territorial sea, then that state was held liable for the safety and security of the vessel. In order to minimize financial losses and create favorable conditions for overseas trade, sovereigns and political entities negotiated treaties mandating naval escorts for traders, travelers, and their goods, when traveling between regions party to the treaties. Article 9 of al-Zāhir Baybars’s treaty with the Hospitallers (669/1271) stipulates:

(It is) provided also that traveling merchants and wayfarers with merchandise from the territories of the Muslims and Christians shall proceed on leaving the harbors specified above under the escort of the two parties without any fee. Nothing shall be accepted on account of the escort as regards themselves until it has brought them out and produced them safe and secure at the land boundaries of al-Marqab.

When merchants arrive from the Sultan’s realm at the territory and harbors of al-Marqab, both parties are to organize the escort with the headmen being responsible for guarding the routes both on leaving and arriving, so that they may come to the territory of al-Marqab and the harbors of al-Marqab specified above safe and sound in respect of themselves and their chattels, under escort of both parties as we have set forth.

*Uncontested Waters: Navigational Regimes in the Eastern Seas*

Whereas, since the advent of Islam, the regime of navigation, mobility rights, and trade relations in the Mediterranean Sea have been regulated by international treaties and the issuance of safe-conduct pledges, Islamic ruling circles seem to have played only a marginal role in administering

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128 Built by Muslims in 1061–1062 CE as a coastal fortress, the Castle of al-Marqab, located in Syria, south of the port city of Banyās, lies only 2 kilometers from the Mediterranean. Its strategic position enabled regiments to maintain control over the coastal and offshore routes between Tartus and Latakia. In 1116, the Byzantine Admiral Kantakuzenos captured it. From 1116 until its fall in 1285 into Baybars’s hands, the castle remained under the control of the Crusaders. Peter M. Holt, “Mamluk-Frankish Diplomatic Relations in the Reign of Qalāwūn (678–89/1279–90),” *Journal of the Royal Asiatic Society* (New Series) 121 (1989), 280, 287.

129 Holt, *Early Mamluk Diplomacy*, 53. Similar clauses can be found in the 682/1283 treaty of al-Mansūr Qalāwūn with the Latin Kingdom (article 21), and with the 684/1285 treaty between the same sultan and King Leon III of Lesser Armenia (article 4). Both treaties require its signatories to provide escort to merchants and wayfarers to the boundaries of their home territories. Holt, *Early Mamluk Diplomacy*, 86, 99.
navigation in the eastern seas. Instead, they were concerned with creating hospitable environments for facilitating trade locally, regionally, and globally. The navigational rights and freedoms enjoyed in the two semienclosed bodies of water—the Red Sea and the Persian Gulf—paralleled the regime of navigation on the high seas, even though both bodies of water were described as “Islamic lakes.” With the ascendancy of the Abbasid dynasty and the establishment of its capital city in Baghdad, the new caliphate embraced a foreign policy less oriented toward the Mediterranean and more toward the eastern world, namely India, Southeast Asia, and China. Major voyages from chief Persian Gulf port cities reached as far as Guangzhou (Canton). The trade routes by sea, or rivers, and over land made the Persian Gulf’s warm and shallow waters one of the most vital and active shipping lanes in the world at that time.

In order to guard against human threats that existed throughout the Persian Gulf and thereby to enhance the regional, interregional, and overseas trade, generating greater tax and customs revenues, the ruling authorities ceaselessly combatted piracy through a variety of defensive and offensive measures.

A similar maritime policy governed the Red Sea. Following the 358/969 Fatimid conquest of Egypt and the relocation of the capital from al-Mahdiyya in modern-day Tunisia to the newly founded city of Cairo, the Indian Ocean maritime activities gradually shifted from the Persian Gulf to the Red Sea.


133 On the shift of the economic center from Baghdad to Cairo in the late tenth century, the contemporary geographer al-Muqaddasī writes: “Know further that Baghdad was once a magnificent city, but is now fast falling to ruin and decay, and has lost all its splendor, I did not find it a pleasant place or an attractive city; and any eulogy of mine regarding it is merely conventional. The Fustāṭ of Miṣr in the present day is like the Baghdad of old; I know of no city in Islam superior to it.” Abū ʿAbd Allāh Muḥammad ibn ʿAbd al-Muqaddasī, Abṣan al-Taqāṣīm fī Ma rifat al-Aqālīm, ed. and trans. G. S. A. Ranking and R. F. Azoo (Calcutta: Asiatic Society of Bengal, 1897), 51.
stemmed principally from religious ideologies – namely propagation of the Shiite doctrine – and also economic motivations. By the 1030s, the Fatimids – and after them the Ayyubids and the Mamluks – dominated the African and Arabian coasts of the Red Sea, asserting Egyptian hegemony over the Red Sea region. From the early eleventh century onward, most East–West maritime trade passed through the Red Sea and Nile Valley. No ruling dynasty could allow obstruction of the Red Sea trade, as interruption of the flow of coveted commodities to the eastern Mediterranean would have reduced state tariff income. Therefore, it became an essential Egyptian interest to safeguard merchants, shippers, cargoes, and vessels. Each ruling dynasty maintained naval bases in Aden and other port cities, equipped seagoing vessels with armed personnel, provided naval escorts, and established sites for coastal surveillance and refuge along the Red Sea.134

Until the time of Europe’s colonial expansion into the eastern hemisphere and its “ politicization of oceanic space,” a phrase coined by Elizabeth Mancke,135 the Indian Ocean had been shared by three great and diverse cultural traditions, each of which played a predominant role in the world economy. Islam overlooked the Indian Ocean from the Persian Gulf and the Red Sea; India’s influence extended throughout the Indian Ocean; and China bordered the Pacific to the East. Janet Abu Lughod argues persuasively that the boundaries between these major cultures were not established by imperial reach, but by natural forces, namely the monsoon wind patterns that separated the three zones.136 Supporting Abu Lughod’s argument, Françoise Vergès writes:

From early on, the Indian Ocean presented elements of unity: the role of the monsoon winds, the creation of cosmopolitan port cities with a large degree of


autonomy for their hinterland, the kind of ships that sailed the ocean, transcontinental trade, and piracy. It was a world of encounters and flows between the Islamic world and Africa, Africa and Asia, between Asian and African continents, and the islands of the Ocean.\textsuperscript{137}

Ostensibly, as a unique atmospheric phenomenon, the monsoon cycle of the Indian Ocean generated unity along its littoral despite the significant sheer diversity of geography, culture, and religion. Derived from the Arabic \textit{mawsim} (season), the word monsoon identifies a large-scale seasonal wind system, which reverses direction every six months with the change of season, emanating from the southwest in the summer and the northeast in the winter. Both Arab and Persian sailors and traders utilized monsoon routes to establish regular seasonal trade routes. They sailed eastward from their home ports in South Arabia and Persia to all major harbors of South and East Asia from around April to September, and reversed their course westward from October to March.\textsuperscript{138}

Aside from its natural uniqueness, the importance of the monsoon lies in its social and economic impacts on the coastal societies along the shores of the Indian Ocean. Near Eastern mariners and merchants had to stay put in their ports of destination for long periods between the two monsoon cycles. These long sojourns emerged as a crucial facilitator of social, commercial, cultural, and personal interactions between visiting merchants and the indigenous populations, transforming the Indian Ocean into a uniquely harmonious space.\textsuperscript{139}


During the pre-Islamic period, Near Eastern seafarers and traders already played leading roles in transoceanic commerce. However, beginning with the rise of Islam—or more accurately during the early years of the Abbasid caliphate—Muslims not only influenced transoceanic trade more significantly, but also laid the foundations for profound cultural, socioreligious, and economic changes that would take place throughout the Indian Ocean basin. Burgeoning Muslim commercial activities were accompanied by a gradual spread of the new faith due to the profound growth of Muslim communities in coastal trading centers throughout the Indian subcontinent, Southeast Asia, and East Africa. By the late fifteenth century, transoceanic shipping, trade, and markets in the western Indian Ocean as a whole were dominated by Muslim entrepreneurs. Because of Muslim dominance in overseas shipping and trade and the acute impact of Islam on many cultural zones in the Indian Ocean, contemporary scholars do not hesitate to call it the “Arab Mediterranean” and the “Muslim lake.”

Whereas the spread of Islam in the Mediterranean world was generally due to military campaigns, territorial enlargement, and the efforts of missionaries, expansion into the arena of the Indian Ocean arose largely from the growth and development of commercial networks. The propagation here of Islam occurred through trading contacts, peaceful preaching, and the activities of Sufis and missionaries. These endeavors paved the way for voluntary conversion, or more precisely, for the acceptance and adoption of Islam’s doctrine. Diasporic mercantile communities participated actively in the gradual religious conversion to Islam of most of the indigenous coastal populations over the course of a few centuries, from the second half of the seventh century CE onward.

This widespread conversion can be attributed to various factors. First and foremost was the dominance by Muslims of cross-continental trade. Sharing the same faith, the same sacred language (Arabic), and to a great extent many cultural traditions, Muslims controlled almost all ports and trade throughout the littoral of the Indian Ocean. This dominance may explain why a considerable proportion of the populations of port cities adopted the new faith at a faster rate than did those in inland cities and towns. Once a key trading city converted, other port cities and independent polities would quickly follow suit in order to enhance personal ties and install Islamic law to regulate business transactions. Another likely factor contributing to the spread of Islam was its tolerance of local traditions, whereby new converts were not required to cast aside or replace their preexisting customs and beliefs but could simply shift from one defined religion to another. A third driving force for conversion may have stemmed from the egalitarian ethos and universality of Islam. As Islam advocates universal equality among its adherents—regardless of ethnic, racial, geographical, or socioeconomic backgrounds—who comprise a single community (the ummah), the religious, social, and economic cohesion of Muslims grew on local, regional, and transregional levels.145

In summary, by the sixteenth century, the Islamic faith conjoined different oceanic spaces, coastal regions, ethnic groups, cultures, and languages into a unified mercantile system and homogeneous maritime environment.

From a naval perspective, the human and physical unity of the Indian Ocean also owed a significant debt to the relative absence of major naval encounters between the littoral entities within maritime space. In contrast to the Mediterranean world, none of the coastal empires, states, and

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principalities attempted to control or claim sovereignty over the vast ocean. Nonetheless, historical records highlight sporadic naval conflicts, particularly those involving the thalassocratic Kingdom of Srivijaya, the Cholas, and the early fifteenth-century Chinese Muslim Admiral Zheng He (Cheng Ho), who launched seven spectacular maritime expeditions. Founded around 650 CE in the Palembang area of eastern Sumatra, Srivijaya controlled both the Sunda Strait and the Strait of Malacca in its heyday, despite commanding relatively weak fleets. However, the Srivijayan fleets had not been established to pursue naval ambitions; rather, they primarily provided logistical support to the state’s land-based power and suppressed piracy. Most crucially, the fleets maintained a heterogeneous confederation of trade emporia on the island of Sumatra and the Malay Peninsula.146

By the early eleventh century, commercial activities in the Indian Ocean became more contentious, in part because of the attempts by the Srivijayan confederation to dominate commercial exchanges conducted within the Strait of Malacca. The Chola (Cōla) dynasty of Tamil Nadu in southern India (from the eleventh to the thirteenth centuries) simultaneously became interested in expanding its commercial and political spheres in the Indian Ocean and accessing markets in Song dynasty China. Under the successive leaderships of Rajaraja I (r. 985–1014), Rajendra I (r. 1014–1044), and Rajadhiraja I (r. 1044–1054), Chola forces invaded Sri Lanka and sacked a number of neighboring kingdoms. Between 1017 and 1025, the Chola navy took an interest in the lucrative maritime trade of Southeast Asia and launched unprecedented expeditions against Srivijayan towns, seizing the capital city of Palembang and looting key ports in the Malay Peninsula and Sumatra. Chola’s commercially motivated naval campaigns led to the establishment of Tamil-speaking communities in Southern China and Southeast Asia, furnishing the

Tamil merchants with favorable trading conditions throughout the eastern Indian Ocean.\textsuperscript{147}

Another apparent maritime threat emanated from China’s Ming dynasty (1368–1644). Commanding 317 ships – manned by 27,870 sailors, soldiers, clerks, interpreters, physicians, scholars, and artisans – in 1405, Admiral Zheng He (1371–1433)\textsuperscript{148} unleashed an unparalleled armada on the Indian Ocean. It reached Sri Lanka before turning homeward in 1407. Six subsequent expeditions followed, between 1408 and 1433, setting sail toward Southeast Asia, South Asia, Western Asia, and East Africa. The question of what motivated the Ming dynasty to launch such costly and extensive expeditions over a period of almost three decades (1405–1433) has attracted wide speculation. One theory holds that the first expedition was launched to search for traces of the emperor deposed by Yongle in 1402.\textsuperscript{149} However, this would not justify the outfitting and launching of such a massive armada. Another theory suggests that the Ming dynasty intended to outflank and inhibit Tamerlane’s army to the east by cultivating friendships and alliances with other countries. A third argument is that these expeditions were aimed at restoring peace and order and suppressing piracy in the Strait of Malacca. A fourth view suggests that the objective was to aggrandize the Ming dynasty’s reputation and to exert Chinese influence over foreign countries and nations. A fifth explanation proposes that the expeditions simply intended to promote friendship between China and other countries. A sixth motive could have been to procure “treasure” (tribute) for the Ming court. A seventh


\textsuperscript{148} Zheng He is known in Arabic as Ḥājjī Mahmūd Shams, and in Southeast Asia as Cheng Ho.

\textsuperscript{149} Emperor Yongle was the third emperor of the Ming dynasty. He was born in 1360 and ruled between 1402 and 1424. http://afe.easia.columbia.edu/special/china_1000ce_mingvoyages.htm.
proposed aim involved establishing a Chinese commonwealth, whose goal was to maintain the flow of tribute and to pursue alliances with countries friendly with China. Finally, the expeditions may have served as commercial enterprises, aimed at strengthening government control of overseas trade and commerce, promoting Chinese mercantile networks in Southeast Asia and the Islamic western Indian Ocean.\(^{150}\) All of these seven expeditions left their mark, not only on Chinese maritime history but also on world history.

Scholars generally acknowledge that Zheng He’s maritime missions were peaceful in intent,\(^{151}\) although some contend that his voyages stemmed from Ming colonial ambitions.\(^{152}\) Even so, Zheng He’s expeditions bear no similarity to Europe’s maritime ventures, which resulted in control of the world’s oceans from the sixteenth century onward.

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Over the course of three decades, Zheng He journeyed over the western and eastern waters of the Indian Ocean without making any attempt at military conquest. His expeditions never established colonial territories, a fact explaining the abrupt withdrawal of China from the maritime scene shortly after Zheng He’s death in 1433. Furthermore, China never showed any interest in imposing its cultural heritage and religious traditions upon foreign sovereigns, including those who came under its influence or joined its commonwealth. Furthermore, the expeditions established no new shipping lanes, nor trading hubs; no existing seaborne commerce was challenged, nor was there any attempt to monopolize regional or international trade, or to enforce global unity, whether by soft diplomacy or the use of force. However, the expeditions did stimulate maritime trade exchanges and establish friendly ties between China and Southeast Asia, the Indian archipelago, and the Muslim world in the western Indian Ocean.153

In addition to the peaceful purposes of the Ming expeditions, scholars have suggested that Malacca’s conversion to Islam during the Sultanate of Megat Iskandar Shah (r. 817–828/1414–1424)154 can largely be accredited to Zheng He and his fellow Muslim officers, albeit that Chinese historical records contain no conclusive evidence as to their particular role in spreading the Word of God in the Malay Peninsula. Geostrategic considerations, rather than any personal interest of Zheng He, may have propelled China to encourage elites and common populations to convert to Islam. Established around 1400, the independent Sultanate of Malacca became a pivotal Muslim trade emporium circa 1413. The Ming dynasty supported it with the aim of broadening China’s influence in the Strait of Malacca, buttressing a competing power against the Hindus of Java, enhancing the interconnections between China and Southeast Asia, expanding East–West Indian Ocean maritime trade, and combating piracy in the Strait of Malacca.155


The support of the Ming dynasty led the humble coastal village of Malacca to become an independent sultanate, rising to regional prominence in the early fifteenth century. Malacca’s emergence as one of the most vital entrepôts and commercial emporia on the Strait of Malacca stimulated a group of distinguished nakhodas to compile and codify a set of laws known as the Undang-undang Laut Melaka (Maritime Codes of Malacca), which regulated commerce, carriage of goods and passengers by water, and navigation on the high seas and into ports.156 The Undang-


“These rules arise from the rules of Patih Harun and Patih Elias and Nakhoda Zainal and Nakhoda Buri [or Dewi] and Nakhoda Isahak. They were the ones who spoke. Then they discussed it with all the nakhodas; after they had discussed it, they went to Dato’ Bendahara Sri Maharaja [who obtained the sultan’s approval] … Then titles were bestowed on all these nakhodas by Seri Paduka Sultan Mahmud Syah … Nakhoda Zainal was given the title Sang Nayadiraja, and Nakhoda Dewa was given the title Sang Setiadipati, and a third was given the title Sang Utamadiraja.” Raffles, “Maritime Code of the Malays,” 63; Winstedt and De Josselin de Jong, “Maritime Laws of Malacca,” 45–46, 56–57. The English translation is quoted from Anthony Reid, “Hybrid Identities in the Fifteenth-Century Straits of Malacca,” Asia Research Institute Working Paper no. 67 (Singapore: Asia Research Institute, National University of Singapore, 2006), 30. The surviving digest that has reached us is dated from Sultan Mahmud Shah (r. 1488–1510 and 1513–1528). However, the actual date of the first draft remains uncertain though the generally accepted theory is that these laws were promulgated during the reign of Sultan Muhammad Shah (r. 1424–1444) and were completed during the reign of Sultan Muzaffar Shah (r. 1445–1458), when Malacca was at the peak of its splendor. Richard O. Winstedt, “The Date of the Malacca Legal Codes,” Journal of the Royal Asiatic Society of Great Britain and Ireland 1–2 (1953), 32–33; Fang, Undang-undang Melaka, 12, 32–33, 36–38, 178; Yatim, “Development of the Law of the Sea,” 87; Mohd Nor et al., “From Undang-undang Melaka to Federal Constitution: The Dynamics of Multicultural Malaysia,” SpringerPlus 5 (2016), 5, 8; Borschberg, “Another Look at Law and Business,” 492; Nordin, “Undang-undang Laut Melaka,” 15–16; Hall, History of Early Southeast Asia, 310–314; Ayang U. Yakin, “Le droit musulman dans le monde insulindien du XIVe au XVIIe siècles,” (Paris: École des hautes études en sciences sociales, 2005), 53, 58.
"Undang Laut Melaka" addresses a variety of issues related to internal affairs and organization on board ship, including the professional duties of the nakhoda, mu'allim, crew members, and behavioral transgressions that could possibly transpire on board a vessel—adultery, theft, murder, slavery, disrespecting an officer, and so forth. The economic and financial clauses of these laws concern activities taking place in the port of Malacca, payment of taxes and customs, and duties of the harbor master. The "Undang-undang Laut Melaka" also clearly reafirms the primacy of adat, some of which dates back to the pre-Islamic era, while accommodating and assimilating Sharī'ah principles.157 Peter Borschberg suggests that while the Islamic legal provisions applied to Muslims, the adat rules were intended to apply to all other seafarers and merchants.158

Strikingly absent from the Maritime Codes of Malacca is a broad-based discussion of the sea and of the relationship between vessel and sea. Philip E. Steinberg attributes the omission of ocean-specific laws to the perception among the Indian Ocean littoral polities that the sea comprised distances between places, but not territory. As the territory's social space ends at its coastal waters, the sea could not be conceived of "as a space for exercising imperial dominion." However, a ship can be governed, making the universe of governance the conglomerate of all ships on the ocean.160 Thus the Maritime Codes of Malacca equate a ship with a state or kingdom, whereas her nakhoda is assimilated to the "raja (king/ruler) at sea."161


In the absence of clauses addressing the vessel–sea relationship, the Maritime Codes of Malacca draw an analogy between social hierarchies in land-based societies and those on board ship. While at sea, the nakhoda corresponds to the “hakim (ḥākim),” \(^{162}\) “imam,” \(^{163}\) or “caliph” on land, enjoying undisputed jurisdiction over the vessel, her contents, and all people on board. \(^{164}\) This exclusive authority is set aside whenever a vessel enters a hostile marine environment. In such circumstances, the nakhoda must take counsel with, heed, and even obey advice from experienced crew members in order to escape danger. \(^{165}\) As a raja at sea, the nakhoda is the exclusive sovereign, whereas the pērahū (vessel) is regarded as a floating extension of her home port when outside any harbor. Likewise, her senior officers, from the captain downward, correspond to state officials on land. \(^{166}\)

Malacca would not have become a prosperous emporium had its port and strait been treated as mare clausum. \(^{167}\) Arab, Persian, Indian, Chinese, and Indonesian merchants and ships frequented its port and markets freely. Offering a welcoming reception, evidence shows that the Sultan of Malacca never levied tolls on foreign vessels passing through the strait, nor did he compel foreign merchant vessels to call at port. \(^{168}\)

In short, as with the other long-lasting traditions and practices that prevailed across the Indian Ocean at the dawn of the European naval and trade expansion, \(^{169}\) the Undang-undang Laut Melaka reveals a strong

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162 The strict meaning of bakim/bākim is “ruler, governor, or judge.”
163 Muqaddasī, Abṣan al-Taqāsīm, 11. While on the coast of Aden, al-Muqaddasī happened to meet Ābū ‘Alī ibn Hāzīm, a well-versed and prominent captain who, in addition to commanding a commercial fleet of transoceanic vessels, was known at sea as “the chief of merchants (imām al-tujiyār).” The literal significance of imām is ruler, governor, temporal leader of the Islamic community, or worship leader.
concept of the high seas. Charles H. Alexandrowicz succinctly articulates the legal status of the vessel at sea as expressed in such codices:

The reading of these codes brings to our attention the peculiar position of a ship on the high seas beyond the reach of any territorial jurisdiction. She is treated by maritime custom as a piece of quasiterritory sailing in the legally undefined vastness of the sea, which is beyond any Sovereign’s control except for the captain’s powers on board ship determined by her “nationality.”

**WARSHIPS AND NONCOMBATANT IMMUNITY**

Significant scholarship has addressed the Islamic *jus ad bellum* and *jus in bello*. Consequently, the next short discussion will focus instead on two major issues. The first is an examination of how Muslims were asked to deal with enemy ships when sighting them off Islamic coastal frontiers or encountering them on the high seas. The second is to outline the legal status and treatment of the *musta ‘mins* on land and at sea.

The Law of Nature and Nations mandates that the sea be treated as common to all humankind and not susceptible to appropriation by one and Stephen Muecke (Newcastle: Cambridge Scholars Publishing, 2007), 20. A statement ascribed to Sultan Bahadur Shah of Gujarat (r. 1528–1537) states: “Wars by sea are merchants’ affairs and of no concern to the prestige of kings.” Evidently, there is a close connection between merchants and the customary law of the sea. Basic elements of the law of the sea were originated by the communities of merchants along the Indian Ocean rim that fitted well with the overseas commercial networks. The role played by the ruling authorities and jurists was, on the whole, rather marginal. Thus, it was the merchant who in practice laid down the principles of freedom of navigation. The major contribution of the rulers was in providing a hospitable environment – infrastructure, protection against pirates, and fair treatment – to merchants found within the jurisdictional domain of the port cities.


nation or another. Neither Islamic ruling authorities nor jurists could legally claim Islamic dominion over the high seas. Political boundaries and the long-standing enmity between the Abode of Islam and the Abode of War never constituted an obstacle to freedom of navigation; alien merchants frequented Islamic ports, and, in a similar manner, Muslim merchants dropped anchor in enemy territories. In addition to natural hazards, piracy posed a formidable threat to merchant vessels, irrespective of their flag states. Nevertheless, clearing a sea of piracy did not then empower a state with legal dominion over it.

Although divided between Christian and Muslim dominions, the Mediterranean world recovered much of its unity through merchant activity. Neither the Christian North nor the Muslim South could deny freedom of movement to the other. As noted earlier, times of war and political unrest restricted the *harbīs* to visits of only limited duration or certain localities. Neither political issues nor conflicts ever impeded the freedom of movement on land or at sea for individuals or commodities. This freedom owed its workability to three factors. Perhaps the law relating to the person rather than to territory played the most significant role; an individual was judged according to the law of his community, or even his sect, rather than the law of the territory he inhabited at that particular time. In addition, all the countries around the Mediterranean held in common strong and long-standing traditions that had been established centuries before, during the ancient civilizations. Finally, the bourgeois revolution of the eighth and ninth centuries produced a mercantile civilization around the Mediterranean with prominent merchant citizens. It placed a priority on trade, and thus contributed to free movement generally.

Despite the significant social and cultural diversity, the prevailing conditions in the eastern seas – including along the Indian Ocean littoral –

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173 Only during wartime and political disturbance were the visits of foreigners limited in time or confined to certain localities. During his visit to Akkā/Acre in 580/1184, the Andalusian qadi and traveler Ibn Jubayr reports: “The Christians impose a tax on the Muslims in their land, which gives them full security; and, likewise, the Christian merchants pay a tax upon their goods in Muslim lands. Agreement exists between them, and there is equal treatment in all cases. The soldiers engage themselves in their war, while the people are at peace and the world goes to him who conquers.” Ibn Jubayr, *Travels*, 301; for this text in Arabic see Ibn Jubayr, *Rihlat Ibn Jubayr*, 260.

were more hospitable and peaceful even than in the Mediterranean. The carriage of goods by water supplemented the Central Asian caravan routes and created a strong sense of unity. From the ninth century onward, the Abode of Islam constituted far more than just an area of spiritual unity, as its frontiers ran across trade routes. The “Sea of Peace” – the Indian Ocean – experienced free movement of ships, unchecked migration, freedom of trade, and security of merchants and voyagers, motivating merchants and ships to avoid confrontation with commercial rivals, and instead to observe the sanctity of commercial transactions.175

Prior to resorting to the use of force, Muslims were required to verify the other party’s intentions. If Muslims sighted enemy vessels off Islamic shores and realized that their intention was to harass or plunder commercial ships or to attack coastal targets, the Muslim warships could initiate combat engagement with the enemy forces.176 Should any doubt arise concerning an enemy’s intentions, Muslims were advised to be patient and to avoid making hasty decisions that could lead to unnecessary war or other deleterious consequences.177 However, during a state of war, Muslims on warships were permitted to engage enemy war vessels on the high seas, as well as ships carrying supplies to enemy belligerents, without the imam’s permission. Muslim naval warriors were further advised to seize cargo and vessels rather than set them on fire.178 If warriors on an enemy warship decided to surrender on the condition of being granted amān with respect to their souls and their vessel, Muslims were advised to honor this appeal if it was genuine and sincere.179

Before entering the Abode of Islam, every ḥarbī had to be equipped with a safe-conduct decree in order to feel secure, receive good treatment, and safeguard any chattels. In the absence of such a decree, the law empowered the imam or local governor to determine the status of any illegal-alien merchant as seen fit. Under certain circumstances, if alien merchants without an amān were sighted from Islamic shores and halted at sea by a Muslim coastguard, they would be compelled to sail away from

175 Chaudhuri, Trade and Civilization in the Indian Ocean, 21, 34–39, 44; Risso, Merchants and Faith, 43–54; Sheriff, Dhow Culture, 23–25, 239–258; Park, Mapping the Chinese and Islamic Worlds, 159.
177 Kindī, Musānnaf, 11:160 (inna al-ḥarb iḍhā lam yurja nafʿuhā turikat).
179 Sarakhsī, Sharḥ Kitāb al-Siyar al-Kabīr, 1:212–213.
the Islamic territorial sea. If an enemy ship were floating adrift along the coast and the merchants on board had no *amān*, they were entitled to be seized as captives (*fā'y*). The *imām* would thereby hold exclusive jurisdiction over them. The *imām* held the authority to free such enemy aliens without conditions, order their immediate execution, or release them in exchange for the payment of a ransom.180

**SUMMARY**

The Qur’ān declares that the seas with their natural resources are among the endless bounties that God has bestowed upon humankind. Permission to exploit marine resources and the guarantee of freedom of navigation, trade, and movement are probably best expressed in Qur’ān 16:14,181 which states that God has subjugated the seas and ships to the benefit of all of humanity. Consequently, no nation or state has the right to debar or exclude others from making use of the seas’ natural resources or from plying their waves. Most significantly, the universe’s two masses, the seas and the land, are regarded by the Divine Law as one single mass that should be accessible to all nations. However, coastal settlements neighboring the sea are entitled to establish sovereignty over a limited offshore area for the benefit of local residents, as outlined in Qur’ān 7:163.182

Although humankind is permitted by the Qur’ān to take full advantage of the bounties God has endowed on His servants through the seas, access to them has, however, been governed by customary laws, bilateral and multilateral treaties, and safe-conduct decrees in regions of struggle over maritime spaces. Even though the Prophet Muhammad did not personally engage in travel by sea, the 9 AH/630 CE pledge and other documented


181 وَهُوَ الَّذِي سَخَّرَ الْبَحْرَ لِتَأْكُلُوا مِنْهُ أَحْمَا طَرَأً وَتَسْتَخْرُجُوا مِنْهُ جَلِّيَّةً تَبْسِحوُهَا وَتَرْنَى الْفَلَقَ مَوَاعِدُهُ فِيهِ وَتَلْبَغُوا مِنْ فَضْلِهِ وَلَا تَكُونُوا مِنْ ْمَا سَخَّرَهُ (It is He Who has made the sea subject, that ye may eat thereof flesh that is fresh and tender, and that ye may extract therefrom ornaments to wear; and thou seest the ships therein that plough the waves, that ye may seek (thus) of the bounty of God and that ye may be grateful)."

182 وَاِنْسَأْلُوهُمْ عَنِ الْفَزِّ الَّذِي كَانَ حَاضِرًا فِي الْبَحْرِ (Ask them concerning the town standing close by the sea)."
covenants, truces, and safe-conduct certificates reflect the Muslim authorities’ actual position toward freedom of navigation, jurisdiction over ships on the high seas, and the legal status of subjects sailing on board both friend- and enemy-flagged vessels.\footnote{183} Equipped with safe-conduct pledges, enemy- alien merchants and travelers could traverse the seas freely, including those surrounded by Islamic-ruled territories, such as the Sea of the Hijaz, which enjoyed a special status in Islamic law from the reign of ‘Umar ibn al- Khaṭṭāb (r. 12–23/634–644) up until the late nineteenth century. In order to ensure the safety and security at sea and in foreign territories of subjects and their chattels, Islamic and foreign sovereigns concluded treaties and truces. Muslims were required by law to assure the safety of all \textit{musta’- mins} and their property until they reached a place at sea where they felt secure, or arrived at their native country, within the time limits of the relevant pledge. Even during wartime, \textit{barbis} – unlike combatants – should not be denied free access to the sea.\footnote{184}

Whether or not a state of war or peace persisted between states, an \textit{aman} was always issued free of charge and employed as a “sacred peace tool” to reduce hostilities and promote freedom of movement and global interactions among individuals, groups, and nations.\footnote{185} It is quite clear that this legal tool contrasted sharply with the Portuguese \textit{cartaz} system, which challenged the concept of the free sea by obliging every Asian commercial vessel to pay customs duties to the Portuguese authorities in return for protection and safe-conduct. This practice significantly altered the character of seaborne trade in the Indian Ocean by creating an unprecedented and unfamiliar practice in the region. In spite of the Muslim naval supremacy over the Red Sea, the

\footnote{183} God ordains Muslims to comply with the Prophet Muhammad’s tradition. Qur’ān 3:31: (Q 3:32: (Say: If ye do love God, follow me)”; Q 3:32: (Q 4:59: (O ye who believe! Obey God, and obey the Messenger)”; Q 4:64: (We sent not a Messenger, but to be obeyed, in accordance with the will of God)”; Q 24:63: (Let those beware who withstand the Messenger’s order)”; Q 33:21: (Let’s keep what is written in the Book (Q 33:36: (It is not fitting for a Believer, man or woman, when a matter has been decided by God and His Messenger, to have any option about their decision; if anyone disobeys God and His Messenger, he is indeed on a clearly wrong Path).”)

\footnote{184} Ibn Jubayr, \textit{Travels}, 301, in his words: “The soldiers engage themselves in their war, while the people are at peace and the world goes to him who conquers.”

\footnote{185} Bashir, “Treatment of Foreigners in the Classical Islamic State,” 150–152.
Persian Gulf, the Omani and Yemeni littorals, as well as the Levantine, North African, and Andalusian coasts of the Mediterranean, no state could claim sovereignty or dominion over the open sea, so allowing it to remain common to all.186

Also deserving attention is the attribution of certain seas to certain nations, such as Bahr al-Rûm (Sea of the Romans, i.e., the Mediterranean Sea) to the Romans, Bahr al-Hind (Indian Sea) to the Indians, Bahr al-Sîn (Chinese Sea) to the Chinese, Bahr Fâris (Persian Sea/Gulf) to the Persians, Bahr al-Khazar (Caspian Sea) to the Caspians; as well as to provinces, such as Bahr al-Yaman (Sea of Yemen) and Bahr al-Ḥijāz (Sea of the Hijaz); or coastal cities, such as Bahr al-Qulzum (Sea of Clyisma, Suez today), among others. A question arising is whether this attribution might have signaled the appropriation of the sea by a nation or a territorial entity. The Mediterranean Sea can be examined as an example.

With the defeat of the Phoenician colony of Carthage in the Third Punic War (149–146 BCE), the Romans – succeeded by the Byzantines – dominated almost the entire Mediterranean region for over eight centuries and viewed the Great Sea as *mare nostrum*. Rome’s hegemony at sea derived from its territorial management and military administrative system, with imperial troops and flotillas posted at strategic positions along the shoreline to preempt piracy.187 However, from the seventh century CE onward, the Mediterranean ceased to be a Roman lake and became shared by Christians and Muslims.188 Muslim writers challenged the Byzantines’

186 The institution of *amān* drew greater attention in regions that generated conflicts among independent political entities. This may explain why the overwhelming majority of the jurisprudential, historical, and documentary sources that describe in minute detail the security and rights of *mustaʾmins* in various stages of their journeys have reached us from the Mediterranean world. However, the countries around the Indian Ocean rim rarely created conflicts that could hamper overseas trade and freedom of navigation; therefore, the issue of safe-conduct preoccupied jurists and governing authorities to a lesser extent.


188 Ibn Khaldûn, *Al-Muqaddimah*, 1:267: “When God revealed the religion of Islam and His religion has overcome other religions, the Roman/Byzantine Empire had already dominated the two shores of the Roman/Byzantine (Mediterranean) Sea. In the beginning, Muslim took by force all of its southern shores – Syria, Egypt, Ifriqiya, and the Maghrib – crossed the Bay of Tangier and took possession of all Andalusia (Spain) from the Goths and Galicians. . . . (The Muslims) took possession of all the islands that lie in the Rûm Sea, which the Romans had dominated, such as Sicily, Majorca, and Dénia and its sisters . . . .” The author acknowledges that the entire Mediterranean was a Roman/Byzantine possession, which ended with the advent of Islam, whose followers gained control militarily over the largest part of it for several centuries. From the seventh
sovereignty over the Mediterranean Sea, noting: (a) the sea lies along the coastal frontier lines (thughūr), so that what is beyond it is the Land of the Rūm; (b) Muslim naval powers, particularly in the Maghrib, rivaled Byzantine maritime supremacy; (c) ships arriving in Islamic ports from Christian Europe were identified as “Rūm’s ships,” bearing Byzantine sovereignty; and (d) by the early tenth century the Mediterranean came to have other names, including Bahr al-Shām (the Sea of Greater Syria) and Bahr al-Maghrib (the Sea of the Islamic West). The Mediterranean was considered a frontier in relation to all the populations residing along its shores. The same point could be made about all the other seas around the world.

Freedom of the high seas, as enshrined in article 87 of the United Nations Convention on the Law of the Sea (UNCLOS), aligns with Qur’ānic principles and with the Islamic Law of Nations. It reads:

1. The high seas are open to all states, whether coastal or landlocked. Freedom of the high seas is exercised under the conditions laid down in the century onward, the Mediterranean has been divided between the Christian north and Islamic south. Despite the military dominance over the high sea, Ibn Khaldūn does not view the Mediterranean as an “Islamic lake,” meaning that the high sea is not susceptible to appropriation.

189 Tarek Kahlaoui, “The Depiction of the Mediterranean in Islamic Cartography,” (PhD diss., University of Pennsylvania, 2008), 40–48. The author draws our attention to the fact that the word Rūm has more than one meaning. When conjoined with bahr, i.e., Bahr al-Rūm (Byzantines/Greeks Sea), the word would purposely signify the “Land of the Byzantines/Greeks.” However, whenever it is thought of as the Mediterranean, then the word Rūm would roughly mean “Europe.”

190 Ibn Kathir, Al-Bidāyah wa’l-Nihāyah, 1:46: “The seas that branch off from the Western, Eastern, Southern, and Northern Surrounding Seas/Oceans (muhīt) are numerous, some of which are isolated (without exit to other seas). Some of the seas’ names are attributed to the countries bordering their shores such as the Sea of Qurzum (Clysma), a small town situated on its coast and in the vicinity of Aylah, the Sea of Fāris (Persia), Khazar (Caspian) Sea, Warank (Varangian) Sea, Rūm (Roman/Byzantine) Sea, Bantash (Black) Sea, Azraq (Blue) Sea, named after a city on its coast, is also called al-Qarm (Crimea) Sea, which flows in a narrow straits called the Gulf of Constantinople Gulf, to the Rūm (Mediterranean) Sea, south of Constantinople”; Qalqashandī, Ṣubḥ al-Aṣbāḥ, 3:234–242: “Bahar al-Rūm aka al-Bahr al-Rūmī is attributed to the Rūm (Romans/Byzantines) because their nations live to its north. It could be called al-Bahr al-Shāmī (Syrian Sea) too because of the Syrian (Shām) coasts in its eastern part”; Kahlaoui, “Depiction of the Mediterranean in Islamic Cartography,” 47; Predrag Matvejević, Mediterranean: A Cultural Landscape, trans. Michael Heim (Berkeley: University of California Press, 1999), 139–146; Douglas M. Dunlop, “Bahār al-Rūm,” in Encyclopaedia of Islam, 2nd ed., ed. P. Bearman et al. (Brill Online, 2012) http://brillonline.nl/entries/encyclopaedia-of-islam-2/bahr-al-rum-SIM_1065.
by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and landlocked states:

(a) freedom of navigation;
(b) freedom of overflight;
(c) freedom to lay submarine cables and pipelines, subject to Part VI;
(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
(e) freedom of fishing, subject to the conditions laid down in section 2;
(f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all states with due regard for the interests of other states in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.¹⁹¹

Similarly, article 89 states: “No state may validly purport to subject any part of the high seas to its sovereignty.” Other articles of UNCLOS assert that every state, even if landlocked, has the right to send its ships across the high seas unimpeded by other states. As access to the sea and freedom of navigation are enshrined in the Qurʾān, one would be right to infer that Muslim merchants and seafarers, in the first place, and ruling circles and jurisconsults, in the second place, heavily influenced the development of the doctrine of freedom of the seas. However, Muslims were certainly not the first to introduce laws of the free sea. Earlier monotheistic religions and cultures enshrined free access to the sea as a natural right and defended it by initiating regulations and concluding diplomatic and commercial agreements. On the account of the above, one may justifiably ask: did the doctrine of freedom of the seas extend to offshore belts adjacent to coastal states and principalities?

Offshore Sovereignty and the Territorial Sea

Article 2 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) defines territorial waters as follows:

1. The sovereignty of a coastal state extends, beyond its land territory and internal waters and, in the case of an archipelagic state, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

As concerns the outer limits of the territorial sea, article 3 rules:

Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles [22 kilometers], measured from baselines determined in accordance with this Convention.¹

This article establishes that coastal states have the right to claim and exercise sovereignty over a defined maritime belt adjacent to their shores extending seaward up to 12 nautical miles (22 kilometers). It grants such states exclusive rights to explore, exploit, manage, and conserve both living and nonliving natural resources found within this zone.² Under the regime of innocent passage, a coastal state may regulate navigation through its territorial sea and access to its ports. The territorial sea is thus

² UNCLOS, article 56.
considered an inseparable part of the *terra* (land) of a coastal state over which it possesses full sovereignty.

Whereas UNCLOS clearly establishes a standard seaward breadth for a territorial sea, the international community had previously failed to do so, either at the Hague Convention (1930) or the Geneva Conventions (1958 and 1970). Indeed, prior to the twentieth century, every nation held a different view regarding the juridical nature and seaward breadth of a territorial sea.3 In the following discussion, an attempt will be made to: (a) trace the Islamic genesis of the concept of territorial sea and its juridical ramifications; and (b) examine the motives behind the ultimate establishment of an offshore maritime belt. Before proceeding with the Islamic territorial jurisdiction over offshore marine zones, the Roman and medieval European claims over coastal waters is examined briefly.

**THE CONCEPT OF THE TERRITORIAL SEA IN MEDIEVAL EUROPE**

Legal scholars have suggested that claims to jurisdiction, sovereignty, or *dominium* (absolute ownership) over nearshore waters emerged in the latter part of the fifth century with the dissolution of the Western Roman Empire and the rise of the Gothic tribes.4 However, this hypothesis finds no basis in legal documents. Within a century of the final collapse of the western half, the two parts of the Roman Empire were reunited during Justinian's reign,5 yet no solid legislative action appropriating waters adjacent to coasts exists in the sixth century *Corpus Juris Civilis*, or in the later Byzantine codices.6 However, the absence of such a codified law from the Romano-Byzantine digests does not preclude the possibility that ancient, classical, and medieval coastal states asserted jurisdiction over

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offshore maritime belts. On the contrary, economic and security consider-
erations in particular motivated states to claim property rights in gulfs,
bays, and indentations adjacent to their lands, and to exercise some degree
of jurisdiction over them; however, documents describing the precise
seaward breadths of such extensions of sovereignty have not been found.

7 Domenico A. Azuni, *The Maritime Law of Europe* (New York: George Forman, 1806), 1: 186–190; Ziskind, “International Legal Status of the Sea in Antiquity,” 36–37; Egberts, “Chronology of ‘The Report of Wenamun’,” 58–61; Breasted, “Report of Wenamon,” 103–104; Hessbruegge, “Historical Development of the Doctrines of Attribution,” 265–266; Rubin, “Neutrality in International Law,” 354–355; Sasson, “Canaanite Maritime Involvement in the Second Millennium B.C.,” 131–138; Tammuz, “Mare Clausum,” 148–149. A letter addressed from the King of Tyre to the King of Ugarit from the thirteenth century BCE reports that a Ugaritic ship heading for Egypt had sunk or was severely damaged in a rainstorm off the coast of Acco/Akko (Acre). The ship was unloaded and her sailors and their belongings sheltered in Acco until the sea had calmed down. The Tyrian King went on to assure the King of Ugarit that the cargo was safe. This turn of phase would seem to indicate that the Tyrian King had the concept of territorial waters in mind when he wrote to Ugarit. Providing assistance to ships in distress, regardless of nationality, sailing within the territorial sea of a coastal state was and remained a humane duty. Parpola and Watanabe, *Neo-Assyrian Treaties and Loyalty Oaths*, 2:25, articles 15–17 of the treaty concluded between Esarhaddon, King of Assyria (681–669 BCE) and Baʿal, King of Tyre (680–660 BCE), state: “If there is a ship of Baʿal or the people of Tyre that is shipwrecked off the land of the Philistines or within Assyrian territory, everything that is on the ship belongs to Esarhaddon, King of Assyria; however, one must not do any harm to any person on board the ship but one must return them all to their country.”

8 *Institutes of Justinian*, Book 2, Title 1.5: “Of things that are common to all any one may take such a portion as he pleases. Thus a man may inhale the air, or float his ship on any part of the sea. As long as he occupies any portion, his occupation is respected; but directly his occupation ceases, the thing occupied again becomes common to all. The sea-shore, that is, the shore as far as the waves go at furthest, was considered to belong to all men. For the purposes of self-defense any nation had a right to occupy the shore and to repel strangers. Individuals, if they built on it, by means of piles or otherwise, were secured in exclusive enjoyment of the portion occupied; but if the building was taken away, their occupancy was at an end, and the spot on which the building stood again became common.” By virtue of natural law, air, rivers, sea, and seashores are *res communes* and unsuited for private ownership, meaning they are *res nullius*. Despite their commonality, one may acquire ownership and build on the shore to the extent that this act does not interfere with public use. Sandars (ed.), *Institutes of Justinian*, 158; Digest I, 8, 2, 1; Digest I, 8, 4; Fenn, “Origins of the Theory of Territorial Waters,” 469, 471; Thomas W. Fulton, *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters, with Special Reference to the Rights of Fishing and the Naval Salute* (Edinburgh: William Blackwood and Sons, 1911), 538; F. S. Ruddy, “Res Nullius and Occupation in Roman and International Law,” *University of Missouri (Kansas City) Law Review* 36 (1968), 274–277; Ziskind, “International Law and Ancient Sources,” 558–559. Talmudic texts show that Jewish rabbis maintain that the state boundaries are drawn to include part of the sea and the zone lying between the coastline and the state’s offshore islands; Alexandrowicz, “Kautulyan Principles and the Law of Nations,” 310–311.
Whereas Roman law expressly states that by the Law of Nature the sea is common to all humankind (*communes omnium naturali jure*), medieval Italian post-Glossators challenged the public nature of the sea. They argued that parts of the sea can be claimed by applying laws that pertain to land to those waters adjacent to a coast, either by recognizing long-standing custom (*per longam consuetudinem*), or acquisition through possession or use for a fixed time (*longi temporis praescriptio*), or by imposing naval supremacy to subdue piracy and secure shipping lanes. As the feudal system arose in Europe, public authority became fragmented and decentralized, leading to the emergence of local entities. Lawyers of that period applied land laws to the adjacent coastal waters and granted feudal barons the right to retain territorial jurisdiction, not only over their own coastal estates, but also over the span between them and any neighboring islands. The feudal barons asserted wide jurisdiction by granting, restricting, or preventing access to fishing, coastal installations, and ports, through regulating navigation and commerce, and by imposing or exempting from duties people sailing through their waters. Such royal rights (*jura regalia*) and practices led to assertions of sovereignty and the gradual creation of territorial waters.

Although rights of navigation and exploitation of the seas’ natural resources are objective features of natural law, the post-Glossators argued that humans can alter these rights through sea power and treaties, which ultimately establish jurisdiction. Even if the power of a state fades such that it can no longer sustain a claim to sovereignty by military means, recognition of its dominion by other nations remains. On a domestic level – contrary to Digest I, 8 – air, flowing water, sea, seashores, rivers,

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13 Fulton, *Sovereignty of the Sea*, 4; Fenn, “Origins of the Theory of Territorial Waters,” 466; Ryan M. Greenwood, “Law and War in Late Medieval Italy: The *Jus Commune* on
fisheries, and other marine resources are common to all by *jus naturale*. They can neither be possessed nor monopolized by individuals,\(^{14}\) nor may access to these areas and resources be denied or limited, even to bays, gulfs, or coastal indentations claimed as feudal areas, or fall under the exclusive jurisdiction of maritime empires in adherence to long-standing custom.\(^{15}\)

Late medieval and Renaissance European jurists justified a state’s jurisdictional claims over a portion of the sea by reason of naval supremacy. The eminent fourteenth-century Italian jurist Bartolus of Sassoferrato (1314–1357) – founder of the post-Glossator school and considered to be “the father of territorial sea in legal history”\(^ {16}\) – advocated that a coastal state was entitled to assert *imperium* over waters and islands within a distance of up to 100 nautical miles (185 kilometers), provided that this could be traversed within two days’ travel by sea. Baldus de Ubaldis (1327–1400), a student of Bartolus of Sassoferrato, concurred with this principle of proprietary rights, but disagreed with the breadth possible for a territorial sea, arguing that it should not extend beyond a day’s journey and not exceed a distance of 60 nautical miles (110 kilometers) from the coast.\(^ {17}\) The positions held by these jurists were

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16 Sobecki, *Sea and Medieval English Literature*, 143.

promulgated during a time when Christian powers were dominant in the naval arena. With its naval superiority, Venice established sovereignty over the Adriatic Sea and parts of the Aegean and eastern Mediterranean, became a dominant commercial power, and played a pivotal role in seaborne trade between the European and Near Eastern markets. In order to maintain peace in these seas, Venice needed to strengthen its dominance of trunk routes by eliminating piracy wherever possible. Naval endeavors culminated in Venice claiming jurisdiction over the waters under its control. Pope Alexander III (papacy 1159–1181) subsequently sanctioned this sovereignty in the 1177 Peace of Venice.

Documentation from 1269 reveals that ships sailing through Venetian waters in the Adriatic and Aegean seas had to pay *gabella* and taxes at its ports. After Genoa had claimed the sea as its own, similar naval conditions prevailed in the Ligurian Sea. Following naval victories over the Pisans, Venetians, and Muslims, and having eliminated pirates from strategic

belonging to a territory: belonging to a person, when he has a fleet which commands that part of the sea; belonging to a territory, in so far as those who sail in that part of the sea can be compelled from the shore as if they were on land.” Hugo Grotius, *On the Rights of War and Peace: An Abridged Translation*, trans. William Whewell (Cambridge: Cambridge University Press, 1853), 81; Hodgins, “Ancient Law of Nations Respecting the Sea,” 15, 17; Thornton, “Hugo Grotius and the Freedom of the Seas,” 28.


_Gabella* (cabella, cabbella) is a word transmitted from Norman Sicily derived from the Arabic *qibâlah* to denote duty, tribute, levy, or tax paid to the state on goods brought or sold, rent of land, or tax on a real estate transaction. By extension, the term *gabelou* means a tax collector (*employé d’octroi*). See Albert Dauzat, *Dictionnaire étymologique de la langue française* (Paris: Larousse, 1938), 349; Fulton, *Sovereignty of the Sea*, 361; Dionisiu A. Agius, *Siculo Arabic* (New York: Routledge, 2010), 115, 250; Khaled Abou el-Fadl, “Tax Farming in Islamic Law (*Qibâlah* and *Damiân* of *Kharâj*): A Search for a Concept,” *Islamic Studies* 31 (1992), 5–8.

maritime positions, Genoa also asserted sovereignty over shipping lanes in the Mediterranean, Aegean, and Black seas, regulated passage through them, granted or refused ships permission to sail, and demanded fees from vessels using its ports or navigating the sea-lanes it claimed.\textsuperscript{22}

The \textit{Amiratus} (Admiral of the Sea) arose as a special position within these new jurisdictions.\textsuperscript{23} In addition to possessing juridical, administrative, and organizational powers, the \textit{Amiratus} was charged with maintaining good order and securing coastal frontiers, guarding against external intrusions, driving pirates off the sea, and launching military campaigns against enemy targets. As the highest authority at sea, the \textit{Amiratus} also claimed the right to exercise jurisdiction over newly captured territories and properties seized with or without force.\textsuperscript{24}

In the late thirteenth century, when Muslim naval power began deteriorating in parts of the central and western Mediterranean and on the eastern shores of the Atlantic Ocean, Christian European admirals roamed the seas and took over from the infidels (i.e., Muslims) strategic positions and islands. In 1295, shortly after the conquest of Jerba (Djerba) and the Kerkennah islands off the Tunisian coast (in 1284), Pope Boniface


\textsuperscript{23} Agius, \textit{Siculo Arabic}, 115, 248. The term “admiral” is derived from the Arabic words \textit{Amir al-Bahr}, literally, “Prince of the Sea,” or “Commander of the Fleet.” According to the \textit{Oxford English Dictionary}, the word \textit{amiratus} was first found during the second half of the eleventh century in the kingdom of Norman Sicily. It applied to the highest ranking naval officer, the commander of the fleet. Its earliest use was in 1178 as \textit{amiratus stolii}. This title was also used in 1194 by Margaritus of Brindisi, whose fame at the time helped consolidate naval associations. Other forms of the word have also been recorded, e.g., \textit{admiralis}. As a number of native Genoese men commanded the fleet in Sicily from the end of the twelfth century onward, the title \textit{amiratus} was taken to Genoa in the first half of the thirteenth century and spread further from there. The first Englishman recorded as being referred to as admiral is William of Leybourne in 1295. \textit{Oxford English Dictionary}, http://www.oed.com/view/Entry/2558; Frederic R. Sanborn, \textit{Origins of the Early English Maritime and Commercial Law} (New York: Century Co., 1930), 278–279; Reginald G. Marsden (ed.), \textit{Select Pleas in the Court of Admiralty} (London: Bernard Quaritch 1894), 1:xiv–xv.

VIII (d. 1303) bestowed them as a fiefdom to the Aragonese conquistador and admiral Roger de Lauria. This papal donation was perhaps the first assertion of jurisdiction by Christian authorities over non-European territories. The fief in question may subsequently have served as a legal precedent for establishing ownership over territory within the high seas. Fifty years later, in 1344, Pope Clement VI (d. 1352) granted Castilian Prince Luis de la Cerda temporal jurisdiction over the Canary Islands off the Moroccan coast in return for an annual payment of 400 florins to the Vatican. If the prince had violated the papal bull, he would have faced excommunication and the Church of Rome would have reasserted ownership of the islands.

The discussion so far succinctly traces the origins of the territorial sea from a European perspective until the 1648 Peace of Westphalia. Prior to this point, Rome had attained hegemony over the Mediterranean Sea, but had never claimed exclusive proprietorship over it: “The claim to imperium was not developed into a claim of dominium.” Roman authorities, legislators, and jurists, and their Byzantine successors, did not deny access to the sea in either their codices or legal writings; instead, they uniformly stressed its commonality to all nations and the right of all humans to exploit and use the sea without any interference. Only internal waters, lagoons, and small coastal indentations could be claimed by sovereigns. Therefore, European legal precedents for appropriation of the sea derived from Venice’s claims to hegemony over the Adriatic, the papal donation of the Canary Islands, and the 1494 Treaty of Tordesillas between Spain and Portugal that divided the non-Christian world into two zones of influence.

29 Marzano, Harvesting the Sea, 236–237.
With the ascendancy of the Italian commercial empires and the subsequent birth of nation states, the post-Glossators limited access to maritime spaces adjoining the coastline. Although Bartolus fixed the seaward breadth of a territorial sea to a maritime journey of two days, Baldus established that it extended to one day’s sail from a coastal state. Both jurists contended that a state may claim a territorial sea on the grounds of naval supremacy, long-established custom, or regalia (donation or grant of a privilege), with no differentiation between the laws of land and those of the sea, especially regarding the use of force.

When Bartolus wrote his Commentaria in Corpus Juris Civilis (Commentary on the Civil Law) in the first half of the fourteenth century, the Mediterranean Sea was not exclusively Christian, but shared between Christians and Muslims. Surprisingly, the non-Roman concept of territorial sea was overlooked by the post-Glossators as if the Mediterranean Sea were still a Roman lake. Relying almost exclusively on the writings of the post-Glossators, the overwhelming majority of contemporary scholars accept as a historical fact that the modern conception of the territorial sea originated in late medieval Christian Europe, thereby disregarding contributions by other nations.

THE ISLAMIC CONCEPT OF THE TERRITORIAL SEA

Prior to 1492, Muslim ruling authorities, jurists, captains, navigators, crew members, experienced sea travelers, merchants engaged in overseas trade, and coastal residents observed a distinction between the high seas and the territorial sea. The celebrated Arab mu'allim Ahmad ibn Majid writes in the fifteenth century:


Muslims have left an indelible stamp upon many branches of science, including nautical science and the art of navigation. From the ninth century onward, at a time when captains and navigators relied largely on their personal expertise from memory and perhaps personal notes, captains (mu'allims) and navigators (rubbâns) from the Muslim world and Indian Ocean carried with them instruments, such as the angle measure (qiyaṣ), bussola/compass (buqqa or dîra), lodestone (hâjar), lot (buld), lantern (fânis), measurement instrument (kamâl), astrolabes, and most importantly portolan charts (qunbâs, sabifâb, or daftar/booklet) depicting coastlines, bays, capes, shallows, ports of call, and provisioning places. As Ibn Majid writes, through the use of sophisticated nautical instruments in conjunction with portolan charts and mathematical tables, an experienced and learned captain and navigator was expected to be able to establish his global position in relation to his course and distance to his destination; Arab navigators in the Indian Ocean measured the distance by the zam method, a three-hour watch corresponding roughly to 12 nautical miles. This notation suggests that navigators knew precisely the
Know, o seeker, that every man knows his own coast best; the Chinese, China; the people of Sufāla, Sufāla (also Sofala, Mozambique); the Indians, India; the people

of Hijaz, Hijaz; the Syrians, Syria; but the sea is not peculiar to anyone of these peoples, and when you are out of sight of the coasts, you have only your own knowledge of the stars and guides to rely on.34

In saying that the sea “is not peculiar to anyone of these people,” Ibn Mājid plainly precluded the right of any political authority or nation to claim possession of any part of the high seas. He further clearly defined the borders between the high seas and the offshore zones, although he did not delineate the extent of a state’s territorial sea. One may interpret Ibn Mājid’s assertion “that every man knows his own coast best” as bestowing on coastal states exclusive jurisdictional rights over limited maritime belts, the width of which may extend for a limited distance from coastal frontiers.35 When sailing by cabotage (within sight of land), ships normally do not hug the shoreline closely, but sail at a visible distance from the coast in order to avoid manmade and natural dangers.36 Muslim jurists and geographers defined that relatively small part of the sea adjacent to a coastal state – which the Sailors’ Union (bahriyyūn) of Bajjāna (Pechina, Spain) established over limited marine space off the coast of Andalusia37 – as a “place of safety (maʾman),”


34 Tibbetts, Arab Navigation in the Indian Ocean, 215. For the original text in Arabic, consult Ibn Mājid, Kitāb al-Fawāʾid, 286. In support of Ibn Mājid’s claim, Brauer writes: “Sea frontiers, unlike most other kinds, were recognized as sharply defined borders. For this reason the experiences of travelers arriving by ship provide an appropriate basis for comparison with experiences associated with the crossing of zone type boundaries on land. Cargo and passengers carried on ships entering port from stations outside the jurisdiction of a given ruler were inevitably assumed to be coming from abroad.” Ralph W. Brauer, “Boundaries and Frontiers in Medieval Muslim Geography,” Transactions of the American Philosophical Society (New Series) 85 (1995), 33. In fact, boundaries on land are not necessarily fixed and can be relocated and adjusted by military or peaceful means since land can be possessed and inhabited, whereas the sea is not susceptible to ownership and habitation, as asserted by Nawwārī, Rawḍat al-Ṭalībin, 10:308: “li-annahu laysa mawḍiʿ i iqāma.”

35 Qalqashandī, Ṣubḥ al-Aʾshā, 14:41. Defining the territorial sovereignty of the Egyptian Kingdom (al-Mamlaka al-Miṣriyya) in the thirteenth century, al-Qalqashandī includes within its boundaries the state land and the maritime domain. Its sovereignty extends over the external frontiers and the fortresses, provinces, cities, coasts, mainland, territorial sea (bahribā), and citizens within them.

36 Sailing across the high sea was occasionally preferred since hugging the coast could lead to dangerous encounters with pirates, natural hazards, port tolls, and longer routes.

wherein the holders of safe-conduct were to feel secure within the sovereignty of the particular coastal entity.\textsuperscript{38}

If experienced seafarers and maritime voyagers recognized the offshore sovereignty of coastal states, how then has Islamic law deemed the legal status of coastal maritime belts? This question raises a host of component questions: Did early and classical Islamic governments exercise de facto or de jure authority over limited maritime zones adjacent to coastal frontiers, and if so, according to what demarcation? Did states recognize other states’ sovereignty over offshore zones, and what legal justification was there for such claims? Has Islamic law regarded the territorial sea as a \textit{res communes} or \textit{res nullius}? Does Islamic law grant authorities the right to impose taxes and tolls over the use of sea-lanes within a territorial sea? Addressing these and other questions may enable us to gain a better understanding of the religious, juridical, and practical bases for Islamic claims of territorial seas.

**Religious Premises of Offshore Proprietorship: The Sea of Hijaz**

Jurisprudentially, the Abode of Islam divides into three regions: the Ḥaram, the Hijaz, and all other territories. Non-Muslims have limited rights in the Hijaz, and \textit{dhimmīs} and unbelievers presumably are not allowed to ingress the Ḥaram proper, although the status of the environs of Mecca has remained controversial.\textsuperscript{39} While non-Muslims are explicitly prohibited from dwelling in the Hijaz, jurists and theologians all agree that they have the right to sojourn there for up to three nights. Muhammad ibn Idrīs al-Shāfiʿī (150–204/767–820), eponymous founder of the classical Shāfiʿī School, ruled at length on the judicial and legal statuses of the Ḥaram and the Hijaz:

The seaward distance fixed by the \textit{bahriyyūn} was recognized by foreign shippers and shipowners sailing off the coast of Pechina. The territorial sea was particular to that semi-independent coastal colony. The central government of Islamic Spain authorized the \textit{bahriyyūn} to treat the offshore zone as part and parcel of the colony’s maritime frontiers for the purposes of exploitation of marine resources and security.

\textsuperscript{38} Ibn Rushd (al-Jadd), \textit{Al-Bayān wa l-Taḥsīl}, 3:60–61.

God, be He Blessed and Exalted, has said: “The polytheists are impure” (Qur’an 9:28). I have heard some of the people of knowledge saying that al-Masjid al-Harâm (Holy Sanctuary at Mecca) is an inviolate zone.

(Al-Shāfiʿi said): I was told, however, that the Messenger of God – God’s blessing and peace be upon him – has said: “A Muslim shall not pay the land tax (kharāj), and a polytheist shall not enter into the Haram.” Also, he said: I heard a number of renowned scholars narrating in the maghāzı (a genre of Prophetic biography) that in a message attributed to the Prophet – God’s blessing and peace be upon him – says: “A Muslim and a polytheist shall not convene (to perform pilgrimage) in the Haram after this year of theirs.” However, if some jizya payer seeks permission to enter freely into the Haram, the imam shall neither admit him nor allow him to sojourn in the Haram under no circumstance – be he a physician, an artisan, a professional builder, and so forth – due to God’s, the Almighty and Majestic, forbiddance of the polytheists from entering al-Masjid al-Ḥarâm, an act which was subsequently observed by His Messenger. If a jizya payer pays the tribute on the condition to take up permanent residence, he shall not be permitted to live in the Hijaz, Mecca, Medina, al-Yamamah, and their villages; allowing them to live in the Hijaz is abrogated. However, the Prophet – God’s blessing and peace be upon him – made a contract with the Jews of Khaybar, ruled them out, and said: “We allow you (to stay in your land) as long as God allows you.” Other than that, God’s Messenger – God’s blessing and peace be upon him – has ordered to exile them from the Hijaz. It is absolutely impermissible to allow a dhimmī to live in the Hijaz.

(Al-Shāfiʿi) – may God Almighty have mercy upon him – said: “It is preferable to me not to allow a polytheist to enter into the Hijaz at all, as I have clarified as commanded by the Prophet – God’s blessing and peace be upon him. He added: It is not evident to me to deny access for a dhimmī to travel through the Hijaz if his stay, as a sojourner, in any of its towns is no longer than three nights, which is the sojourner’s length of stay; the likelihood is that of the Prophet – God’s blessing and peace be upon him – ordered their evacuation and forbade their permanent residence therein. Probably, if it is proven that he said: “Let there not be two religions in Arabia,” then two religions shall not coexist and remain there. If it were not ‘Umar, who was officially appointed by the Prophet – God’s blessing and peace be upon him – to collect the kharāj tax from a dhimmī merchant arriving in (the Hijaz), and who accorded them to stay in for no longer than three (nights), it would seem to me not to allow them to enter into (the Hijaz), be it as it may. (Al-Shāfiʿi), may God Almighty have mercy upon him, said: A dhimmī shall neither take up residence in the Hijaz nor be permitted to enter into it except if he travels through it on condition that he is given permission; this account is attributed to Yahyā ibn Sulaym ascribed to ‘Ubayd Allāh ibn ‘Umar from Nāfi’ on the authority of Ibn ‘Umar relates from ‘Umar ibn al-Khaṭṭāb.

(Al-Shāfiʿi), may God Almighty have mercy upon him, said: If they are given permission to enter into the Hijaz but their money is taken away (from them), or are offered to carry out business transactions, they have to commission Muslims at their wish as their agents, but they have to be driven out and not stay in longer than three (nights). Concerning Mecca, no one shall enter into the Ḥaram at all, regardless of whether or not they have money there. If one of their men is left
unwatched, enters into Mecca and falls ill, he shall be expelled therefrom in his present state of illness. Furthermore, if he dies, his corpse shall be transferred elsewhere, but not be laid to rest therein. If someone of them dies in some place (in the Hijaz) other than Mecca, the deceased shall be buried wherever he had died. If he is critically ill so that the (patient’s) transport will result in the deterioration and escalation of his illness, he shall be left there until the transport becomes bearable; afterwards, he must be deported. If the imam reconciles a dhimmī on something to be delivered by the year’s end, as I have mentioned, such an amicable settlement is forbidden provided that whatever has been paid is a nonrefundable right; by so doing he has fulfilled the covenant between (the imam) and (the dhimmī). If, after a half year has elapsed, (the imam) realizes that the covenant is unlawful, he shall throw it back to them; you should know that their truce is impermissible. He added that (the imam must say to them): If you are satisfied with a lawful truce, I will renew for you. However, if you are unsatisfied with it, I will collect from you the dues as established by law, that is, half of the annual tax for which you have completed, whereby I return the remainder to you. If they concluded a truce on the condition that they lend him something in advance for a couple of years, he must return to them everything except for the dues correspondent to their stay; he shall throw the remainder to them. I do not know of any dhimmī from Yemen who has been evacuated from there. Dhimmis have been there, but not in the Hijaz. Therefore, no one has the right to expel them from Yemen, and there is no harm in concluding a truce allowing their stay in Yemen.

As regards to all other territories, with the exception of the Hijaz, it is unobjectionable to conclude a truce arranging their stay therein. However, if there is a due belonging to a dhimmī in the Hijaz, he shall authorize a (Muslim) agent (to collect it); I, furthermore, disfavor letting him into (the Hijaz) under any circumstances. He shall not be allowed to enter into it for the benefit of its residents or any other reasons like trade, of which part of its profits goes to charity, or have the right to rent from a Muslim, and so forth. If an evacuation order is issued against him, he shall be prevented from returning back to the place from which he has been turned away. If he observes this rule, he will not be held accountable. If that were the case, they shall evidently not be prevented from sailing in the Sea of Hijaz; they shall, however, be prevented from taking up (permanent) residence on its coasts. Equally, if there are islands and mountains in the Sea of Hijaz that can sustain human habitation, (dhimmīs) shall be prevented from taking up (permanent) residence on them because all of them are part of the Hijazi territory.40

However, if one of them entered into the Hijaz and headed toward (the Haram) under this state, he shall be punished and expelled. If he has not entered into it (Haram), he shall not be punished but expelled only. And, if he returns back, he shall be punished. If one of them dies in Mecca, in such a case the body shall be taken-out from the Haram and buried in the Hill; it shall not be buried in the Haram under any circumstance because God, the Almighty and Majestic, has

40 Emphasis is mine. The Arabic text reads as follows: “وَإِذَا كَانَ هذَا حَكْماً فَلا يُنفِّقُ أَنَّهُمْ يَعْمَلُونَ زَكُوتَهُمْ، وَيَمْتَعُونَ الْحَجَّازَ، وَيَخْرُجُونَ مَعَهُمْ، وَيَمْتَعُونَ لأَنَّهُمْ فِي أَرْضٍ أُرْضَىٰ.”
commanded that polytheists shall not approach al-Masjid al-Harām. If the body starts to decay, it shall be taken-out of the Haram. Were it buried (in the Haram), the grave must be uncovered and the body removed to the degree that it remains intact. If he falls sick in the Haram, he must be taken-out. If he falls sick in the Hijaz, he must be granted some delay until travel becomes bearable; in this case, he must be taken-out. He said: As I have described what taxes shall be levied on their commodities upon their arrival at the Hijaz. May God guide me to the right path. I prefer that they shall not be allowed to carry-out commercial transactions or the like in the Hijaz.41

This exegesis generates more questions than answers regarding the way Islamic law has defined the “Sea of Hijaz.” First and foremost, does the term apply to the entire Red Sea, or only to offshore areas adjacent to the coasts of Arabia and its islands? Which parts of the Sea of Hijaz have been considered by jurists to be sacred? How have these sacred parts been delimited? Were alien sea travelers able to enjoy innocent passage through these sacred passages? What regulations have governed such passage? Have non-Muslim shipowners, seafarers, shippers, and carriers recognized the sovereign right of the Islamic State over the offshore zones of the Red Sea adjacent to the coast of the Hijaz? Have Islamic governments

or judicial authorities ever claimed proprietorship over these zones? Finally, would it be correct to presume that contemporary elements governing the regime of innocent passage of foreign vessels in the territorial sea originated in the Red Sea shortly after the Prophet’s death? In order to address these questions, it is first necessary to understand how the Hijaz and the geographical domain of the Haram have been defined.

Located in the western Arabian Peninsula, the Hijaz consists of the coastal region bordering the Red Sea, extending from the uplands of the Najd plateau to the low-lying coastal plain called Tihámah. Abdullah al-Wohaibi argues that classical Muslim geographers differ in their opinions regarding the demarcation of the Hijaz, some of them even confusing the Hijaz with Najd. Wohaibi’s conclusion is compatible with that of ʿAbd Allāh ibn ʿAbbās (618/9–687 CE), who defines the Hijaz as comprising the mountain range called al-Sarah, which stretches from the borders of Yemen in the south to the Syrian steppes in the north.42 He further demarcates the Hijaz as extending to the north of Mecca as far as Surāgh and Aylah and includes the regions between the Red Sea and Dhāt ‘Irq (al-Daribah), Khaybar, Wādī al-Qurā, Taimā’, and Tabūk.

With regard to southern Hijaz, Wohaibi accepts al-Hamdānī’s definition as the most reliable authority on the political boundary between the Yemen and the Hijaz in the tenth century CE, that is, as stretching from al-Hujairah in the east to Tathlīth, the valley of Jurash, Kutnah, and then Umm Jahdam in Tihámah in the west.43 Some authors refer to the Hijaz as “Arab land,” thus explaining the expulsion of the dhimmīs, beginning with the expulsion of the Jews in 21/642 by the caliph ʿUmar ibn al-Khattāb (see Map 1).44

Within the Hijaz, the Haram consists not only of the central shrine of the Kaaba (Ka’ba; Sacred House), but also of the area lying within the five fixed places (mawāqīt) on the routes leading to it. When en route to the holy sites, pilgrims must stop by one of the mawāqīt to purify their souls,

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MAP 1: The Arabian Peninsula during the Prophetic and early Islamic periods.
don the pilgrim’s garb (ibram), and declare the intention to reach the Kaaba. Three of the mawāqit can be reached only by land, while the other two sites can also be accessed by sea. Dhul Hulaifa (commonly known as Masjid al-Shajarah or Ābār ‘Alī), located about 10 kilometers from the Masjid of the Prophet in Medina and 420 kilometers from Mecca to the north, is the miqāt serving residents of Medina. Situated about 100 kilometers from Mecca, the miqāt of Dhāt ‘Irq serves pilgrims coming from Iraq. The third inland miqāt, called Qarn al-Manāzil, is situated about 80 kilometers to the east of Mecca and serves pilgrims arriving from Yemen. Regarding the mawāqit near the coast, Yalamlam is situated 120 kilometers to the south of Mecca and a few miles from the coast. It serves pilgrims arriving by land and sea from Yemen, India, Southeast Asia, and the Far East. The final miqāt is al-Juhfah, lying 180 kilometers northwest of Mecca and 18 kilometers east of the Red Sea. It serves pilgrims traveling by land and sea from Greater Syria and Egypt, although in recent years its location has apparently been moved to the coastal town of Rābigh (see Map 2).

The coastal strip of the Ḥaram connecting Yalamlam in the south to Rābigh in the north spans a distance of approximately 300 kilometers. Theologians and jurists view its neighboring sea-islands as part of the sacred zone and thereby inviolate places of safety (see Map 2). Every Muslim and non-Muslim is obliged to comply with Shari‘ah within the region of the mawāqit, which includes the adjacent sea and islands, as well as the littoral of the Hijaz and its mainland.

Ingression of non-Muslims into the Hijaz was controversial among classical jurists. Abū Ḥanīfa allowed them to enter even into the Ḥaram, but he forbade them from setting there.45 Ibn Hanbal sanctioned the entering of non-Muslims into the Hijaz to trade, but he barred them from staying for more than three nights (four days). Mālik allowed them to sojourn within the borders of the Haram, but did not permit them to settle in any part of the Arabian Peninsula.46 As for al-Shāfi‘ī, he forbade non-Muslims from trespassing on the grounds of the Haram and from approaching the central shrine proper, but permitted them a provisional stay in the environs of the shrine no longer than three nights for

commercial purposes; this included the Sea of Hijaz and its islands. As a rule, non-Muslims are barred from taking up residence in the Hijaz; however, jurists commonly permitted them to trade in the region of Mecca and to stay no more than three nights in a given place, after which time they were required to leave voluntarily or else would be expelled.\(^{47}\)

Abū Zakariyyā Yaḥyā ibn Sharaf al-Nawawī (631–676/1234–1277) decreed that, if granted the imam’s permission, a non-Muslim could enter the Hijaz provided that his ingestion would benefit Muslims, such as through conveying a message, signing a truce or a treaty, or carrying indispensable goods.\(^{48}\) However, if his purpose was to trade in goods


\(^{48}\) Nawawī, *Rawdat al-Tālibīn*, 10:309–311. The Holy Sanctuary is situated in a hot, arid, and uncultivatable valley as stated in Qur’ān 14:37: رَّبَّنَا إِلَيْكَ اسْتَكْبَرْنَ مِن دَرْوَزِيْنِ يَوَادُ غَيْرَ ذَٰلِكَ ذَٰلِكَ "Rabbanana ilayki astarkar min dawazyin yowad ghair zalaka zalaka [You alone have the exalted sovereignty]"
dispensable to Muslims, he was to be barred; that is, unless some part of his merchandise had been taken from him. In the case of death, the corpses of non-Muslims were to be transferred outside of Mecca because burial there would amount to a continued presence, such that “they had become residents.”

Given the discrepancies in these juristic opinions, clarification is needed of the position of Islamic law with respect to the judicial and legal status of non-Muslims on the Sea of Hijaz, its coasts, and islands. Although the Red Sea was denoted an Islamic inland sea following the death of the Prophet Muhammad in 10/632, his successors never claimed possession either on the grounds of military supremacy or territorial acquisitions. Spanning some 1,126 kilometers, the Hijazi littoral has enjoyed a special legal status. Jurists and theologians have attached sanctity to the Arabian side of the Red Sea, associating it with the Holy Sanctuary in Mecca, and thereby considering it an integral part of the Province of Hijaz. So, as the Sea of Hijaz has been designated a sovereign territory of the state, then sea travelers are to be treated in the same manner as land travelers, simply by applying to the sea those laws that pertain to the land.

When sailing in the Sea of Hijaz for the performance of hajj, pilgrims arrive from Yemen and the lands of the Indian Ocean rim on the coastal mawāqīt of Yalamlam or al-Juhfah/Rābigh. When sailing for the purpose of performing hajj, it is not obligatory to don pilgrims’ garb before the ship reaches a sea point adjacent to either one of the two mawāqīt. On his way to perform hajj by sea in 1854, the Malayan writer Munshi Abdullah (1796–1854) reported that he and the other pilgrims had to don the ihram outfit when the ship drew parallel to the mīqāt of Lamlam (Yalamlam). In the same way, pilgrims coming by sea from Egypt and Greater Syria

(O our Lord! I have made some of my offspring to dwell in a valley without cultivation, by Thy Sacred House; in order, O our Lord, that they may establish regular Prayer: so fill the hearts of some among men with love toward them, and feed them with fruits: so that they may give thanks).” For this reason, pilgrims and local residents have to rely upon food imports from outside the Hijaz through indigenous or foreign proxies, Muslims and non-Muslims alike. Jurists generally tended to grant access to non-Muslims to engage in trade of indispensable goods in Mecca and its surroundings. During the caliphate of al-Walid ibn ‘Abd al-Malik (r. 86–96/705–715), Byzantine Christian artisans were recruited to perform restorations in the Prophet’s Mosque in Medina. Munt, “Non-Muslims in the Early Islamic Hijāz,” 260.

have to don their Ḣabrām when the vessel is adjacent to the miqāt of al-Juhfah/Rābigh. They may either disembark on a nearby island, or else don the Ḣabrām on board ship if there is sufficient space and privacy to do so. For these reasons, the coastal strip between the two mawāqīt – extending over 260 kilometers – its adjacent waters and offshore islands became part of the sanctified zone (see Map 2).

The most relevant point al-Shāfīʿī addresses with reference to the law of the sea is the status of the Sea of Hijaz in the Islamic legal tradition. The Islamic Law of Nature denotes the sea as being common to all nations, with the exception of offshore security and the fishing zone. However, contrary to the Law of Nature, on the basis of religious considerations, Muslims have claimed exclusive de facto and de jure proprietorship of the offshore belt off the Hijazi coast. Similar to the regulations for the mawāqīt, the law does not forbid non-Muslims from sailing within this maritime zone, nor from carrying out commercial transactions. Right of passage and free access to ports are regularly granted to foreign ships either at their request, through diplomatic channels – via treaties or general or private amān52 – or when they are experiencing distress. Passage of ships in the Sea of Hijaz has always been free of charge and not associated with the payment of qibālah (tribute), in contrast to the Venetian practice (gabella) in the Adriatic Sea. Pursuant to general maritime custom, it is morally obligatory to provide safety and security for all ships sailing through the territorial sea of the Hijaz, irrespective of nationality.

As long as a foreign ship does not moor in port, the captain enjoys exclusive jurisdiction over her, her human element, and her contents. As non-Muslims have been permitted to engage in trade in the region of Mecca, it should go without saying that the law would grant them the right to fish for personal consumption in the Sea of Hijaz. The fact that prominent jurists have not addressed this issue perhaps indicates that there is indeed no prohibition against exploitation of the living natural

52 The earliest, as well as most reliable, evidence of the de facto existence of the right of foreign vessels to innocent passage in the Sea of Hijaz is the 9 AH/630 CE guarantee of protection given by the Prophet Muhammad to Yūhannā ibn Ruṣa, the governor and bishop of the port city of Aylah, which deems foreign vessels floating territorial units. The Prophet granted Aylah’s governing authorities the right to apply the territoriality principle not only to vessels flying its flag, but also to its nationals even when sailing aboard non-national vessels. For further details, consult the previous chapter. On the amān granted to Chinese and Indian traders in the Red Sea region during the Mamluk period, see Qalqashandī, Ṣubḥ al-ʾAṣr, 13:339–342; Hamāda, Al-Wathāʾiq al-Siyāsiyya waʾl-Idāriyya lil-ʿĀṣr al-Mamluki, 504–507.
resources of the Sea of Hijaz, at least for private consumption. Finally, regarding the death of a non-Muslim within the maritime domain of the Hijaz, the corpse may be laid to rest at sea, on one of the islets, or on the coast, in order to avoid the spread of disease and possible damage to cargo from decomposition and associated smells. Alternatively, the shipmaster may retain the corpse until either the ship’s destination or the nearest port is reached.53

Extending 2,250 kilometers from Bab el-Mandeb to Suez with a breadth ranging 30–355 kilometers, the Red Sea has been surrounded on all sides by Islamic territories from as early as the second half of the seventh century. Despite a topology that permits it to be viewed as an inland sea, the Prophet, caliphs, and sultans never assumed proprietorship, nor referred to the Red Sea as mare nostrum. Pursuant to Qurʾān 14:3254 and 45:12,55 the earth and its natural resources are common to all humankind; all nations may enjoy free access to the seas, including the Sea of Hijaz, regardless of its sanctity, and by virtue of the fact that the seas are not susceptible to human occupation.56 Only habitable zones may be claimed as a private or communal possession.

Like many natural resources, the seas cannot become the property of any particular nation. However, contrary to other seas around the world, the Sea of Hijaz has been characterized as the “ḥarīm,” whereby access is either restricted or prohibited outright for ḥarbīs and for subjects of countries without commercial or diplomatic truces with the Abode of Islam. However, foreign ships and ships owned or operated by non-Muslim entrepreneurs are not barred outright from sailing through it, or anchoring in any port located on the sanctified coastal zone of Mecca (the zone between the mawāqīt of Yalamlam and Rābigh). Central and provincial governments even encouraged and promoted overseas trade by granting commercial privileges, fighting piracy, and establishing an autonomous judicial system for

54 “وَسَخَّرَ لَكُمْ الْبَحْرَ لِلْبُحْرِ يَأْتِي فِي الْبَحْرِ يَأْتِي (He Who hath made the ships subject to you (humankind) that they may sail through the sea by His Command).”
55 “اللَّهُ الَّذِي سَخَّرَ لَكُمْ الْبَحْرَ لِلْبُحْرِ يَأْتِي فِي الْبَحْرِ يَأْتِي (It is God Who has subjected the sea to you (humankind) that the ships may sail through it by His command, that ye may seek of His Bounty, and that ye may be grateful).”
56 Nawawi, *Raudat al-Tālibin*, 10:308: “...they are not prevented from sailing in the Sea of Hijaz because (the sea) is not susceptible to human occupation (li-annahu laysa mawḍī‘ iqāma).”
The Islamic Concept of the Territorial Sea

dhimmis and non-Muslim foreign subjects. The “maritime harim” of the Hijaz, equivalent to the present-day territorial sea, can be defined as a belt of the sea adjacent to the Hijazi coast, the breadth of which extends to its farthest island and the length of which extends from Tihámah in the south to the Syrian steppes in the north. One may argue that, in fact, the northernmost point of the harim falls within the offshore space opposite Tabūk, the point of the Prophet Muhammad’s most distant expedition in northern Arabia, an area from which non-Muslims were presumably expelled by the second caliph, ʿUmar ibn al-Khaṭṭāb.

It should be emphasized that the concept of religious sovereignty over an offshore zone adjacent to the littoral zone of the Hijaz is universally unique and has no equivalent in legal history. However, despite the religious merits of Palestine in Islam and the geographical proximity of the third Holy Shrine (Al-Aqsā Mosque) to the contested Mediterranean, Muslim jurists did not attach sanctity to the Palestinian territorial sea. Essentially, extension of the state’s jurisdiction over a limited offshore

zone sought to protect the fishing and economic rights, and interests of the locals, and to defend the coastal frontiers from external raids.

**Civil Justifications of Offshore Claims: The Ḥārīm Zone**

Ḥārīm denotes an inviolable zone within which development is prohibited or restricted to prevent the impairment of: (a) natural resources, such as water – seas, lakes, rivers, wells, springs, and waterways; trees growing on barren lands (mauwāt: unused or dead land); woodlands; and other natural resources indispensable to the welfare of a community; and (b) utilities, such as streets, open spaces alongside streets; open areas around markets; artificial waterways and channels; resting places for travelers; and other public spaces crucial to public welfare. The creation of ḥārīms around natural resources was aimed at saving these from overexploitation, damage, abuse, or misuse.

The Prophet placed great importance on conserving, safeguarding, and rehabilitating the natural environment by designating spaces as inviolable in order to protect natural resources. A tradition attributed to the Prophet rules that “every land has its appurtenance forbidden/ḥārīm (to other than the proprietor) (لكل أرض خريمه).” Following this principle, to which the Prophet and his successors abided, spaces adjacent to water sources have been declared as ḥārīm. The ḥārīm boundaries of public and private wells were fixed at a 40-cubit (dhiraʿ) radius (21.86 yards/20 meters); for natural springs, the ḥārīm area extended to a radius of 500 cubits (273.25 yards/250 meters). With respect to rivers, the authority of Abu Ḥanīfa

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60 Ben Shemesh, *Taxation in Islam*, 1:72–74; 2:63–64; Māwardi, *Ordinances of Government*, 260–261. Jurists argued that the reserved area of a well differs from one well to another. A new well maintains a reserved space of twenty-five cubits (13.66 yards/12.5 meters) on all sides, whereas an ancient well is fixed at fifty cubits (27.32 yards/25 meters). As for an agricultural well, it assumes an inviolable zone of three hundred cubits (163.93 yards/150 meters) on all sides.

stated that “there is no reserved public space for rivers” because all people are partners in the water of great rivers. However, other jurists maintained that lands along the riverbanks should be reserved for the maintenance of water and for other activities and so no one may claim these spaces as private property.  

All jurists agreed that the great rivers are akin to public highways and must be traversable, clear, and unobstructed on all sides. The governing authorities had to ensure the removal of any construction, private and public, which may have caused damage or affected the safe passage of vessels. Any person who built a structure which caused damage to rivercraft, their contents, or their human element was held liable for any losses.

Whether or not the seas should have ḥarīm zones was also dealt with in the early jurisprudential compendia. The Mālikī jurist Ashhāb ibn ʿAbd

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63 Ben Shemesh, *Taxation in Islam*, 3:128; ‘Abd ibn Ahmad ibn Saʿīd ibn Hazm, *Al-Muballā* (Amman: International Ideas Home, 1424/2003), 880, answer to question no. 969: “There is no difference between sea coast and river banks in religion; there is no preference for one coast over another (lā ṭar qāy bayn sāḥīl bahr wa-sāḥīl nahr fi al-dīn, wa-lā fādl li-shayʿ min dhālik).” The Qurʾān does not distinguish between the banks of great rivers and the sea coast. For instance, the Nile is frequently referred to as *yam* (sea), as in classical Arabic sources and documents from the Cairo Geniza. Respecting the birth of Moses, Qurʾān 20:39 states: “أَفَذَاهُ فِي النَّارِ وَأَفْتَزَاهُ فِي الْمَيْمََّ فَلَمْ يُؤْمِنُ بِهِ يَأْخُذُهُ عَدُوُّهُ فِي النَّارِ وَأَخْضَمْهُ الْمَيْمََّ فِي الْمَيْمََّ (Throw [the child] into the chest, and throw [the chest] into the sea [Nile], so the sea [river] will cast him up on the shore [river bank], and he will be taken up by one who is an enemy to me and an enemy to him).” For further details on the description and importance of the Nile in Islamic tradition, consult Ahmad Nazmi, “The Nile River in Islamic Geographical Sources,” *Studia Arabistyczne i Islamistyczne* 12 (2004), 28–54. Legally, inland and internal waters were recognized as being under state sovereignty and proprietorship. The government in charge of regulating navigation on rivers and in harbors was held responsible for embanking the rivers and prohibiting private construction within a specific distance from the riverbanks. A space of 200–500 ells/yards (100–250 meters) from the banks of a river was to be kept clear of all buildings. Ibn ʿAbdūn reports that the local governor of a port city “has to be very vigilant against any enterprise that might have a harmful effect on the port, and that the superintendent of the port is under obligation not to permit selling plots of lands in the port.” Muhammad ibn Ahmad ibn ʿAbdūn al-Tujibī, *Séville Musulmane au début du Xlle Siècle*, le Traité d’Ibn ʿAbdūn, ed. Évariste Levi-Provençal (Paris: G. P. Maisonneuve, 1947), 60, 64–65; Évariste Levi-Provençal (ed.), *Thalāṯ Rasāʾil Andalusiyyya fi Ḥaḍāb al-Hisba wa-l-Muḥtasib* (Cairo: L’Institut Français d’archéologie orientale, 1955), 29–30; ʿAbd al-Rahmān ibn Abū Bakr ibn Muhammad al-Suyūṭī, *Al-Hāwī il-Fatāwī* (Cairo: Al-Tibāʾa al-Munīriyya, 1352/1933), 1:133–143; Khamis ibn Saʿīd al-Šiqṣī, *Mushaj al-Tażūbih wa-Balāgh al-Rāshīdīn* (Muscat: Wizārat al-Awqāf wa-l-Shuʿūn al-Diniyya, 1403/1983), 13:6–7; Ṣafāʾ ʿAbd al-Fattāh, *Maʾāwī al-Thughūr al-Miṣrīyya min al-Fatḥ al-Islāmī batta al-ʾAṣr al-Fāṭimi* (Cairo: Dār al-Fikr al-ʿArabī, 1986), 103–111.
al-ʿAzīz al-Qaysī (140–204/757–820) made a clear distinction between property rights on land as distinct to those pertaining to maritime spaces, arguing that – contrary to the sea – land can be occupied. The inquiry reads as follows:

Ashhab was asked about a group of voluntary guards, who arrived in some town, set up boundary lines, and settled therein for the performance of garrison duty (ribāṭ); a woodland area separated their settlement from the sea. Along the coast there were deserted towns occupied by ribāṭ practitioners, too. Since these were exposed to immediate threat and frequent raids of the Byzantines (Rūm), governors refused the practitioners’ appeal to extend their boundaries. Their living conditions have improved in due course and, as a result, they have expanded their woodland zone so that their territorial rights extended to the seacoast. Are they entitled to do so? Do you think that the sea should have a harīm zone on the pretext of repulsing Byzantine (maritime) threat? Or, can their zone be expanded under the pretense of feeding their animals?

He answered: They shall not be forbidden from developing their woodlands as much as they wish, provided that their territorial extension should not get close to populated areas and cause harm to local residents. If that were to happen, they shall be forbidden from doing so. I do not think that the sea should have its own inviolable zone.64

As the Prophetic tradition maintains that every land has its harīm, by extension, the coast must also have its harīm to include part of the maritime space along the shoreline. However, Ashhab offers a different interpretation. As land, the coast can have harīm extending over a limited and clearly visible seaward distance. However, the sea itself does not have harīm. Thus, the sea bordering the coast can be an appurtenant to the coastland, but not vice versa.65 This legal opinion does not suggest that nonlocal residents may exploit marine natural resources off coastal settlements, ribāṭs, or installations other than their own according to their free will. Contrary to the open sea, which is common and openly accessible to all, maritime zones contiguous to populated coastal frontiers enjoy a different legal status, although they still may not be subject to private ownership. Dwellers in coastal settlements, garrisoned warriors, and volunteers at ribāṭs could claim exclusive fishing rights, restrict access, or exclude outsiders from exploiting marine resources.66 Even so, they still

64 Abū Zayd al-Qayrawānī, Al-Nawādir wa’l-Ziyādāt, 10:521: “wa-lā arā lil-bahr(ī) harīm(an).”
65 Hamīdullāh, Muslim Conduct of State, 93–94.
66 An extraordinary example is documented in a royal decree issued by the Fatimid caliph al-Hāfiz (r. 525–544/1131–1149) on Rajab 21, 528/May 17, 1134. According to this caliphal decree, access to Lake Burullus, laying to the west of Rosetta on the Mediterranean, was
could not prevent nonthreatening vessels from freely navigating these waters. Historians have affirmed that ribāt occupants made a living from gathering hay, collecting wood, producing salt, and catching fish.\(^{67}\) Tunisian jurist Abū al-Hasan Muḥammad ibn Khalaf al-Qābisī (324–403/935–1012) was asked about fish vendors purchasing fish from garrisons at the Ribāt of Monastir (Tunisia) and selling them in different towns. He responded with concern that this activity could negatively affect the economy of the ribāt:

In my view, fishing in (Monastir’s Sea) is like collecting hay and wood from its woodland areas; outsiders cannot exploit them, except if harm is not caused to them, or its occupants do not yield benefits from leaving it (marine species) unfish. It is not something attainable, like collecting hay and wood in land, which are always within reach. This means that any resident of Monastir who catches fish in this sea has to sell them in its market; whoever wishes may buy (fish) provided that he neither pays a very low price to the seller nor fixes the rate of sale. They must, however, be sold in conformity with what God has assigned to him at that time, regardless of whether they fetch a greater or lesser price. Whatever is left over from the purchase for the consumption of the residents of Monastir, the catcher (al-ṣāʾid) can dispose of and sell (them) as he wishes and at his own free well.

If the catcher intends to fish in this sea with the intention of selling them in the local market, then no one is eligible to buy the fish at the gateway to the sea, or when heading for the market; they must, however, be sold at the marketplace. Merchants who take-up residence in these strongholds are associates of other occupants. Nevertheless, if they inflict harm on occupants, their affiliation will exclusively restricted to local residents and the dāmin (tax-farmer), who normally paid a sum determined in advance to the treasury in return for keeping tax revenues for himself from a defined district or area, including a limited offshore zone. Save for local residents and the dāmin(s), outsiders were denied access to fishing in Lake Burullus and its adjacent Mediterranean waters. Nonlocals and aliens were required to abide by the rules and regulations of fisheries in every province and coastal zone. The decree reads: “Fishermen from outside of this province living in the province of al-Gharbiyya are fishing along the shores of the Lake (of Burullus) in the said province and all this is causing damage to the dāmins and to the finances of the diwān (custom house). . . . (It enjoins) the prevention of whomsoever of those who are not their tenants encroaches upon the shores of their province. . . . Let the Chosen Amīr, the diligent representative of its diwān – may God save him (and all the amīrs, governors, and employees) ensure that all the commands and prohibitions contained in this decree are carried out; let him stand within the bounds of his office in loyalty and absolute obedience.” Geoffrey Khan, “A Copy of a Decree from the Archives of the Fātimid Chancery in Egypt,” * Bulletin of the School of Oriental and African Studies* 49 (1986), 441–443.

be terminated and their residence revoked because they are disqualified from meeting the ribāt’s religious duties and conditions. Their way of earning a livelihood is equivalent to that of shopkeepers (ahl al-aswāq); therefore, they must be forbidden from residing due to the harm they may inflict. Those who inflict harm in one way or another on practitioners of the strongholds must be expelled. Any merchant who arrives in this place for fishing therein with the purpose of trading them in various places other than Monastir must not be permitted to do so because he inflicts harm on those who fish in Monastir. However, if the residents of Monastir have taken what is sufficient to supply their want, there is no harm, if God wills, in transporting what they caught from this sea on the condition that such an action neither inflicts harm nor straitens their conditions; this is because sea fishing is dissimilar to land hunting, where the land prey (is easier to attain). If someone inclines to leave them unexploited in that place, I do not see any reason why local people be prevented from reaping benefit from fishing! This is what seems to me (is happening) in the case of the Sea of Monastir. May God grant us success!68

A number of legal inferences can be gleaned from this responsum. First, and consistent with the Prophetic tradition, being part of the land, every coast has its own harīm. Second, local residents of coastal settlements enjoyed exclusive rights to exploit marine resources available within a specified distance from the coast. Therefore, access to any offshore harīm was either conditional or denied outright to outsiders. Third, although exact boundaries for the maritime harīms were not fixed, it is reasonable to assume that they ranged up to the seaward distance at which a vessel could be sighted from the coast. Fourth, exploitation of natural resources in the “protected maritime zones” – if such a term is appropriate – required prior approval from local, and at times peripheral, governing authorities. Fifth, in order to conserve the marine ecosystem and not to affect the economies and livelihoods of the local residents, both native and foreign fishermen alike were obliged not to overfish and deplete the resources, since the needs of the community held precedence over those of the individual. Sixth, even though the sea is considered to be the property of no particular person but instead common to all, and although fishermen could freely set sail for any destination, they were not licensed to fish unrestrained within sighting distance of populated coastal areas other than those of their own hometowns. In other words, the maritime spaces bordering coastal settlements may be considered to have had the status of res communes, whereby local residents held exclusive rights over – but could not deny nonlocal vessels from passing through – these

68 Wanshariṣi, Al-Miʿyar, 2:5–6.
natural resources. In sum, while non-Muslims and non-native Muslims were permitted to sail freely through the Sea of Hijaz, it is clear that they were not entitled to exploit its natural resources for commercial purposes.

With the installation of the *ribaṭ* system along the coastal frontiers and the associated increasing number of garrisoned volunteers, the governing authorities and jurists needed to develop regulations providing for the communal and sustainable use of marine resources. In order to encourage people to move to the maritime frontiers as an impediment against enemy raids, the state allocated large tracts of unused land for cultivation and mandated that they be cultivated by *ribaṭ* practitioners. The state also created *harīm* zones for protecting natural resources from abuse, misuse, and exploitation by outsiders. Perhaps when Ashhab ruled that the sea could have no *harīm*, he relied on the absence from Prophetic tradition of such a reference. He may also have relied on the fact that not all of the sea is within sight from the shore, that the sea is not susceptible to occupation, or that it cannot be subject to private ownership. The notion of a “protected maritime zone” was common to the Mediterranean polities for many centuries prior to, and certainly after, the advent of Islam. Since Islamic expansion did not abruptly change the material culture of the indigenous populations, it is plausible to assume that many of the prevailing legal elements survived and were incorporated into early and classical Islamic jurisprudence. Despite such influences, the state held exclusive sovereignty over the maritime spaces adjacent to the coast.

**Military and Security Justifications of Offshore Jurisdiction**

Unlike the Roman *praeses* and the Byzantine *stratēgos*, both of whom enjoyed supreme authority over their subjects and properties at sea, the Amīr al-Bahr’s (Admiral’s) authority was superior. His jurisdiction

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72 Fahmy, *Muslim Naval Organization*, 92; Rana M. Mikati, “The Creation of Early Islamic Beirut: The Sea, Scholars, Jihad and the Sacred,” (PhD diss., University of Chicago, 2013), draws our attention to the fact that classical Arabic sources use different names and titles to denote “admiral”: 42, f. 65 (ṣāhib al-thughūr al-bahriyya/commander of the maritime frontiers); 45, f. 73 (alā al-bahr/governorship of the sea); 47, f. 79 (ṣāhib al-bahr/commander of the seafleet); 49, f. 85 (wilāyat ghāziyat al-bahr/governor of maritime expeditions); 57, f. 108 (wilāyat thaghr al-bahr/governor of the maritime
extended not only to Muslim subjects and properties at sea, but also to the coastal frontiers and adjacent waters of the state.\footnote{Ibn Mammātī, Qawānīn al-Dauwāwīn, 247–248.} Upon his appointment as admiral, Qudāma ibn Jaʿfar (d. 337/948) writes that the Commander of the Faithful (Amīr al-Muʾminīn/caliph) must select for this role a person with distinctive traits. First and foremost, he must fear God, obey Him, be aware of His punishment, please Him, seek justice; keep away from Satan’s path, purify his soul and heart from spiritual sins, and be exemplary in his conduct. As the highest-ranking officer in the navy, the admiral is required to recruit worthy, trusted, and experienced officers, soldiers, seafarers, spies, policemen, shipwrights, and artisans, and provide them with arms, equipment, and nourishment. The admiral must also be well-versed in naval war tactics, knowing how best to maneuver his fleet during naval combat. The fortification of coastal towns and settlements, and establishment of fortresses, watchtowers, and shipyards (dār al-ṣināʿa/al arsenal) were among the most important military duties of the admiral. Since his authority extended to all people traveling along the coast or sailing through the territorial sea, he asserted jurisdiction over these spaces and was authorized to intervene in disputes involving local residents and foreigners, provided that he took a rigorous stance against suspicious individuals.\footnote{Qudāma ibn Jaʿfar ibn Ziyād al-Baghdādī, Al-Kharaǧ wa-Saḥīḥ al-Ḳitaḥa (Baghdad: Dār al-Rashīd lil-Nashr, 1981), 47–51. Also, H. Idris Bell and Frederic G. Kenyon, Greek Papyri in the British Museum (London: British Museum, 1893–1917), 4:64–67, Pap. 1392, Pap. 1393; Jaser Abu Safieh, Bardiyāyat Qurra Ḫan Sharīkh al-ʿAbsī (Riyad: Markaz al-Malik Faisal al-ʿAbsī, 2004), 259, Pap. 1354; 266–269, Pap. 1392, Pap. 1393; Fahmy, Muslim Naval Organization, 107–109; Saif Sh. al-Muraikhi, “Imārāt al-Bahr fi ʿĀṣ al-Khulāfaʾ al-Rashīdīn wa-l-Umāwiyyīn (11–131/632–748),” Majallat Kulliyat al-Insāniyyāt wa-l-ʿUlm al-ʾIjtimaʿīyya 23 (2000), 22–26; Picard, Sea of the Caliph, 81–82.}

As the fundamental principle underlying a territorial sea is the protection of the coastal frontiers against enemy and pirate raids, the commonality of these areas was not affected by the advent of the office of Amīr al-Bahr. As they possessed no navy that could match Christian sea powers, and in view of the mujāhidūn’s land-based culture during the early years of Islam in the Mediterranean, Muslim army commanders and rulers took defensive positions.\footnote{Hussain Mones, Tārikh al-Musālimīn fi al-Bahr al-Muṭawassīṭ: Al-Awdāʾ al-Siyāsiyya, wa-l-ʿIqtisādiyya, wa-l-ʾIjtimaʿīyya (Cairo: Al-Dār al-Miṣriyya al-Lubnāniyya, 1413/1993), 57–60.} They erected ribāṭ-fortresses...
and mihràs along the coast, a practice already widespread within the Roman-Byzantine world. This system sought not only to defend the coast from external attacks, but also to maintain peace, safeguard trade routes on land, and secure navigation channels within the territorial sea. Reporting on the ribāt system along the coastal strip of Palestine from Gaza in the south to Arsuf in the north, the Palestinian geographer al-Muqaddasi (al-Maqdisi) (336–380/947–990) provides the following description:

Along the seacoast of the capital [Ramla] are watch-stations [ribāts], from which the summons to arms is given. The warships and the galleys [shalandiyyāt and shawānī] of the Greeks come into these ports, bringing aboard them the captives taken from Muslims; these they offer for ransom three for a hundred dinārs. And in each of these stations there are men who know the Greek tongue, for they have missions to the Greeks, and trade with them in provisions of all kinds. At the stations, whenever a Greek vessel appears, they give the alarm by lighting a beacon on the tower of the station if it be night or, if it be day, by making a great smoke. From every watch-station on the coast up to the capital [Ramla] are built, at intervals, high towers, in each of which is stationed a company of men. As soon as they perceive the beacon on the tower of the coast station, the men of the next tower above it kindle their own, and then on, one after another; so that hardly has an hour elapsed before the trumpets are sounding in the capital, and drums are beating from the city tower, calling the people down to that watch-station by the sea; and they hurry-out in force, with their arms, and the young men of the villages gather together. Then the ransoming begins. One prisoner will be given in exchange for another, or money and jewels will be offered; until at length all the prisoners who are in the Greek ships have been set free. And the ribāts of this District [Palestine] where this ransoming of captives takes place are: Gaza, Mīmās [Maiuma of Gaza], ʿAsqalān, Māḥūz [the port of] Azdūd, [the port of] Yubnā, Yāfā, and Arsūf.

Muqaddasi does not specify an exact seaward distance at which a vessel can be discerned from the shore, apparently due to variations in regional topography. However, in light of his “whenever a Greek vessel appears,”
it is justifiable to infer that the breadth of the territorial sea was considered to be the distance at which the top of a vessel’s masts could be sighted from the land. Whenever enemy warships were observed from watch-stations and towers, those prepared to fight the enemy were alerted. So far, with the exception of a single reference, classical Islamic literature is silent concerning the exact distance from the shore – should an enemy ship be observed sailing there – that would prompt the alerting of local residents. Describing the Maghrib in 549/1154, Abū ʿAbd Allāh Muḥammad ibn Muḥammad al-Idrīsī (493–560/1100–1164) uniquely reports: “In the village of Bajānīs (Bajañi, Andalusia) . . . there is a stone tower in which a fire is kindled when the enemy is seen approaching by sea from a distance of six miles [10 kilometers].” From this, one can infer that the Andalusian maritime sovereignty extended at this time to about 10 kilometers offshore.

The Andalusians seem to have maintained sovereignty over limited bodies of water along their Mediterranean frontiers. Coastguards were authorized to inspect ships and to interrogate crew members and passengers sailing within a distance of 10 kilometers offshore. Coastguards commonly escorted commercial vessels into Islamic harbors or along the shores. As a rule, a ship’s captain was required to present documentation indicating the purpose of the journey, the contents of the shipment, and the personal identity and citizenship of each passenger. If the relevant documents were lacking, the ship would be escorted into port and her crew and passengers summoned before the authorities. Furthermore, the vessel had to be presented with an official endorsement permitting

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departure. These measures were painstakingly elaborated by the Andalusian geographer Muhammad ibn ʿAbd al-Munʿim al-Ḥimyarī (d. 866/1462):

The motive behind allowing the (Yemeni) sailors (ḥabriyyūn) to reside in Bajjāna (Pechina) was as follows: when Banū Idrīs (Idrisid dynasty 172–363/788–974) became powerful in the Maghrib, the Umayyad caliphs (of Andalusia) ordered the control and fortification of the coasts so that no vessel could sail at sea without a permit and supervision. No vessel could sail out of Andalusia without official documents; likewise, no-one could enter the country from the sea without identifying himself, the country he came from, and the purpose of his journey. In addition, no vessel could sail off (the Andalusian) shore unless she was inspected and her crew investigated. Whenever a vessel sat in the water, her length should not exceed twelve ells, otherwise it would be put ashore unless she would follow the standard (regulation size of ships).

Al-Ḥimyarī’s description substantiates the political and legal sovereignty of the state over a limited zone at sea. Among the rules was the adoption by the Andalusians of the ancient custom of regulating the size of vessels sailing off the coasts. The Sailors’ Union of Bajjāna had imposed a requirement that local shipwrights build vessels that did not “exceed twelve ells.” This regulation helped local coastguards to identify foreign vessels entering their territorial sea.

Similar coastal observation systems also existed along the eastern seas. They served as precautionary guides for captains sailing in coastal waters, as military strongholds protecting vessels against hostile raids, and as observation points for monitoring the movement of ships.

85 ʿAbbās, “Iltihād al-Bahriyyīn fi Bajjāna,” 6; Picard, La mer et les musulmans d’Occident au Moyen Âge, 16–19.
86 Muhammad ibn ʿAbd al-Munʿim al-Ḥimyarī, Al-Rawḍ al-Miṭār fi Khabar al-Aqtār (Beirut: Maktabat Lubnān, 1984), 80; Khalilieh, Islamic Maritime Law, 139; Lirola Delgado, El poder naval de Al-Andalus en la época del Calefato Omeya, 390; Picard, La mer et les musulmans d’Occident au Moyen Âge, 17–18; Picard, Sea of the Caliphs, 252, 254.
87 Similar conditions existed in classical Greece. An agreement concluded between Athens and Sparta stipulated that the latter may not sail along the Greek coasts in vessels exceeding 12 ells. Khalilieh, Islamic Maritime Law, 140.
88 Muqaddasi, Abṣan al-Taqāsīm, 12. He describes stockades/watchtowers (khashabāt) being constructed in the vicinity of the port city of Baṣra in order to guide coastal ships and avoid them being grounded.
sailing within sight of Islamic coasts. They included articles wherein Muslim authorities pledged to capture and try indigenous and foreign pirates who plundered ships within the Islamic maritime domain. In the case of an emergency, these ships could seek refuge in one of the coastal fortresses. Muslims had to then provide them with whatever assistance they needed to repel the enemy. Likewise, Muslims had to render assistance to commercial vessels in the event of enemy attack, inclement weather, or technical problems. A thorough examination of authentic documents patently confirms that foreign governments recognized Islamic sovereignty over coastal waters. Khalilieh, “Ribāṭ System and Its Role in Coastal Navigation,” 214–218; Khalilieh, *Islamic Maritime Law*, 140–141; Nājī, “Mawānī al-Khalīf al-‘Arabī wa’l-Jazīra al-‘Arabiyya,” 177; Amari, *Diplomati Arabi*, 8; John Wansbrough, “Venice and Florence in the Mamluk Commercial Privileges,” *Bulletin of the School of Oriental and African Studies* 28 (1965), 501 (article 12), 505 (article 24); Wansbrough, “A Moroccan Amir’s Commercial Treaty,” 454, 460 (Article 5); Wansbrough, “Safe-Conduct in Muslim Chancery Practice,” 32–33.


91 Michael A. Furtado, “Islands of Castile: Artistic, Literary, and Legal Perception of the Sea in Castile–Leon, 1248–1450,” (PhD diss., University of Oregon, 2011), 188–190. The Castilian *Siete Partidas*, likewise, grants the king de facto power over coastal indentations and a limited breadth of the sea for defending his maritime frontiers against external raids, and for launching wars. Nevertheless, no part of the sea was subject to ownership as it belongs “to the creatures of the world.”

at sea. Ibn al-Mujāwīr (601–691/1204–1291) reports governmental observers stationed in watchtowers on hills along the coast tracking commercial vessels sailing near the coasts of Aden. Upon sighting a vessel offshore, the watchmen transmitted a message by shouting from one station to the next until news of the sighting reached the customs officials at the port. As a ship approached the port, the governor sent officials to meet the vessel at sea and to register all details regarding her port of origin, the type, quantity, and purchase price of her shipments, and the name and citizenship of each passenger.

Although the Islamic law deems the sea common to all nations, a state can claim sovereignty over a belt of water off its coastline in order to secure and protect the coastal frontiers. Indeed, security is perhaps among the most significant raison d’être for a coastal state to claim sovereignty over the portion of sea adjacent to its shoreline. Such sovereignty inherently aligned with a coastal defense system, which tracked the movements of the enemy and pirate seacraft, transmitted warnings of hostile intent, and guided friendly ships to avoid dangerous reefs and shallow waters. When necessary, ships could stop at coastal installations for a rest, to undertake minor repairs, or to take on basic supplies, such as food and water. While al-Īdrīṣī implied that the breadth of a territorial sea is six
miles (10 kilometers), the exact distance remained vague and dependent upon the range of vision from the shore, which would vary naturally with regional topography and climatic fluctuations.

THE RIGHT OF PASSAGE UNDER INTERNATIONAL TREATIES

Offshore Passage

Treaties often expressed the agreements of states concerning rules pertaining to territorial claims over offshore marine zones. Privileges were normally granted to one city or state, and often brought with them exclusive rights of trade and navigation. During the twelfth and thirteenth centuries, the Almohads (r. 515–668/1121–1269) made a series of diplomatic and commercial treaties with Pisa recognizing each other's sovereign rights over a belt of water adjacent to the shoreline of the respective state, albeit that the outer boundaries remained unspecified. An official letter from the governor of Tūnis Abū Zayd ʿAbd al-Raḥmān ibn Abū Ḥafṣ (r. 583–588 or 590/1187–1192 or 1194) to the merchants of Pisa guarantees them personal safety and security be they in Ifrīqiya's "strongholds (maʾāqiliḥā), coastlands (savāḥilīḥā), mainland (barrīḥā), and territorial sea (bahrīḥā)." A close examination of the word bahrīḥā undoubtedly designates the offshore zone off the coastal frontiers of Ifrīqiya. Similarly, the 721/1321 Granadian–Aragonese treaty patently distinguished between inland waters – harbors and anchorages – and the territorial sea, giving the coastal state full jurisdiction over a limited offshore zone:

Provided that your (military) galleys shall not do harm to any vessel mooring in our ports/anchorages (marāṣīna) or our country's coastlands (savāḥil bilādunā), or sailing in its territorial waters (bihārīḥā), regardless of their owners' religious affiliations – Muslims or Christians – and place of origin.

Bilateral and multilateral treaties permitted states and self-ruling entities to exercise jurisdiction beyond the territories of their land and internal waters to include a defined offshore zone adjacent to the shoreline.

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92 Amari, Diplomi Arabi, 30; Azaouï, Rasāʾ il Muwaḥḥidiyya, 1:177.
Additionally, treaties also recognized territorial integrity and sovereignty over internal and inland waters, including ports, anchorages, rivers, and artificial channels, and allowed states to deny access by alien citizens and ships to any of their sovereign waters. Through signing a treaty on Rabi al Thani 13, 689/April 24, 1290, al-Mansūr Qalāwūn and King Alfonso III of Aragon committed themselves not only to observing each state’s existing boundaries and territorial integrity, but also to provide aid in terms of defending each other in the event of external aggression. This inclusion in the treaty of an obligation to provide mutual defense likely contributed to a regional reduction in conflicts and expansion of commercial relations.

Coasting was essential to international and interregional trade as vessels had no choice but to hug the coast and make frequent stopovers. An extraordinary example of coasting can be found in trade treaties signed between the Mamluks and various states from the thirteenth century onward. Article 15 of the 682/1283 treaty signed between the Sultan al-Mansūr Qalāwūn and the Latin Kingdom of Acre stipulates, “if the galleys of the Sultan and his son are commissioned and set sail, they shall not cause harm to the coastlands to which this truce applies.” This provision makes clear that innocent passage can be defined as navigation Greek Studies 32 (2008), 57. As a clear indication of asserting the sovereign rights of a state over offshore marine zones adjacent to its coastal frontiers, in 444/1053 the Fatimid Caliph al-Mustānsir dispatched sailors from the Syrian navy to escort the envoy of the Byzantine Emperor Constantine IX Monomachus (r. 1042–1055) from Cairo to Jaffa so that he could pray at the Church of the Holy Sepulchre in Jerusalem.

95 Bauden, “Due trattati di pace,” 49, articles 12–20 of the Safar 577/June 1181 treaty; on p. 68 the author presents the Jumada al-Thani, 585/August 1188 Banū Ghanīya–Genoese truce, in which articles 14–16 refer to the Balearic Islands’ territorial integrity.

96 Nashshār, ʿĀlāqat Mamlakatay Qishtāla wa-Aragon bi-Saltanat al-Mamālik, 232–234; Holt, Early Mamluk Diplomacy, 133–135, articles 3–6. For instance, article 5 rules: “Provided also that the King of Aragon and his brothers shall be the friends of him who is friendly to our lord the Sultan al-Malik al-Mansūr and of the kings his sons, and the enemies of all who are hostile to him, whether Frankish kings or otherwise. If the Pope of Rome, or one of the rulers of the Franks, crowned or uncrowned, great or small, or of the Genoese, or of the Venetians, or of any nation, whether Franks, Greeks, or the Orders, the Orders of the Brethren the Templars and the Hospitallers, or all the nations of the Christians, should seek to harm our lord the Sultan by warfare or wrongful act, the King of Aragon and his brothers shall prevent and repulse them, shall commission their galleys and vessels, proceed against their territory, and distract them personally from seeking harm to the territory of our lord the Sultan, his harbors, coastlands and ports, whether specified or unspecified. They shall fight them by land and sea with their galleys, fleets, knights, horsemen and foot-soldiers.”

97 Holt, Early Mamluk Diplomacy, 84.
through a maritime belt adjacent to the shoreline of a coastal entity in which vessels do not threaten, cause harm, or violate the coastal state’s laws. This treaty also stipulates that if a Mamluk galley is heading through the territorial sea toward a destination other than the kingdom’s places, then it shall not be granted permission to stop ashore and be provisioned, that is, unless she is bound for one of the kingdom’s allies and suffers damage while en route. Under such a circumstance, the bailli and the masters in Acre will have to guard the vessel, enable the crew to obtain provisions, repair the wreck, and return the vessel to Islamic territory.98

Even though it was considered a custom of the sea, a civil duty, and a moral duty to render assistance to vessels in distress caused by force majeure, technical difficulties, or hostile attack, this practice was also enshrined in international treaties.99 Granting entry to a distressed vessel was generally to save the ship, her crew, passengers, cargoes, and equipment, and prevent plundering.100 Beyond the moral obligation, providing assistance to distressed vessels may have led to strengthened commercial and diplomatic ties among states. Article 13 of this treaty stipulates:

100 Abulafi, “Christian Merchants in the Almohad Cities,” 254–255; M. E. Martin, “The Venetian–Seljuk Treaty of 1220,” *English Historical Review* 95 (1980), 328; Alauddin Samarrai, “Medieval Commerce and Diplomacy: Islam and Europe, A.D. 850–1300,” *Canadian Journal of History* 15 (1980), 15; Maria P. Pedani, *Medieval Commerce and Diplomacy: Islam and Europe, A.D. 850–1300*, *Canadian Journal of History* 15 (1980), 15; Maria P. Pedani, *The Ottoman–Venetian Border (15th–18th Centuries)* (Venice: Università Ca’ Foscari Venezia, 2017), 89–90. International treaties could contain clauses restricting access to certain ports and confining the movements of foreigners, commercial transactions, and lodging to specific places. For instance, the 582/1186 Almohads–Pisan peace treaty limited free access for nationals of Pisa to four major port cities, Sebta (Ceuta), Wahrān (Oran), Bējaia (Bougie), and Tunis, except in the event of a ship in distress. A Pisan-flagged vessel could seek shelter under conditions of rough seas, inclement weather, or technical problems, and anchor in any Islamic port or anchorage. Free access would then be granted to her crew and passengers in the nearest designated port on the condition not “to sell or purchase anything, or even speak to or make contact with the local inhabitants (lām yuḥāb labum al-muzāl bi-ghayrihā wa-lā al-_ADV bi-siwaḥi lala li- ADV li- diarrāt(ADV) min su‘ubat al-bahr tuliḥ hum ilā lā al-irsār bi-sāḥil min al-sawāhib dān an yabi‘u fihi shay (ADV) aw yashtarāh aw yukallimu abad(ADV) min abāhibi fi dhālīk aw yahkāhībāh).” See Azzaoui, *Rasā’il Muwabḥidiyya*, 1:174. Indeed, not all Islamic ports were accessible to foreign-flagged vessels. Access to distressed foreign-flagged ships was usually granted only through treaties between Muslim and Christian sovereigns, as this treaty exemplifies. It not only specifies the places of refuge for distressed Pisan vessels, but also forbids any commercial activities within the four designated port cities. It prescribes the guidelines and rules to which ill-fated Pisans were to abide while their ship was undergoing repairs.
Provided also that if a ship of the merchants of the Sultan and his son, to which this truce applies, or of their subjects, whether Muslims or otherwise, of whatever nations and religions, be wrecked in the harbor of Acre, its coasts or the coastlands to which this truce applies; everyone in it shall be safe in respect of themselves, their chattels, their followers and their stock-in-trade. If the owners of these wrecked ships are found, their ships and chattels shall be delivered to them. If they are missing through death, drowning or absence, their possessions shall be kept, and delivered to the representatives of the Sultan and his son.

Likewise for the ships belonging to the Franks, and sailing from these coastlands to which this truce applies, the same procedure shall be followed in the territory of the Sultan and his son. Their possessions shall be kept in the absence of their owner until they are delivered to the Bailli of the kingdom in Acre or the Master.101

This article provides clear and valuable evidence for our discussion. For one, it explicitly recognizes the coastal sovereigns claiming some ownership rights in maritime zones adjacent to their coastal frontiers. In addition, neither this article, nor similar articles in other treaties and truces, nor any sort of diplomatic correspondences shed light on the exact seaward breadth of such zones. Ultimately, it is rightly assumed that the extent of such a maritime zone was limited to the furthest distance at which a ship can be spotted from the coast. This article also answers the question as to what jurisdiction and laws applied to jetsam, flotsam, and salvage found in a territorial sea. Regardless of sovereignty over offshore waters, this article entitled the flag state to exercise diplomatic protection on behalf of a wrecked vessel. The hosting coastal state did not have legal standing to seize the wreck, her contents, or any unfortunate surviving crew members and voyagers, irrespective of their religious affiliations, nationalities, or citizenships. In short, whereas the coastal state enjoyed exclusive jurisdiction over its adjacent sea, the flag state still retained control and jurisdiction over intact vessels, and wreckage from ships formerly flying its flag.102

101 Holt, Early Mamluk Diplomacy, 83–84; Hamāda, Al-Wathāʾiq al-Siyyasiyya waʾl-Idāriyya lil-ʾAṣr al-Mamlūki, 477, 489; Moukarzel, “Venetian Merchants,” 195, the 1238 treaty stipulates that in case of shipwreck within the Mamluk territorial and maritime domains, the sultan guarantees to restore the Venetians’ goods; Nashshār, Ṭālāʾat Mamlakatay Qishtāla wa-Aragon bi-Saltanat al-Mamlūk, 234–235, the 689/1290 treaty between Sultan al-Manṣūr Qalāwūn and King Alfonso III of Aragon.

102 Martin, “Venetian–Seljuk Treaty of 1220,” 327–329. Comparable provisions coexisted in the Christian world. Apparently, it was common practice among the Christian ruling authorities to include salvage provisions in their diplomatic and commercial treaties. In principle, ill-fated proprietors had a priority right to retain their salvaged goods and personal belongings inasmuch as they did not voluntarily relinquish them, provided that they pay a fixed percentage to the salvager as established by the bilateral treaty of their mother state. The Russo-Byzantine treaties of 911 and 944, for instance, declared that if
Further legal evidence demonstrating the prevalence of this arrangement comes from the 684/1285 treaty signed by the same sultan and Lady Margaret of Tyre. The treaty decrees that when a ship of either party is wrecked, should she belong to a Muslim, then she will be delivered to the rightful owner, if the owner can be located, or else to the sultan’s delegates. If the wrecked ship belonged to a Christian (dhimmī) from the sultan’s territory, then the same process would take place as in the case of a Muslim. If, on the other hand, the rightful owner was a subject of the Lady of Tyre, then the chattels were to be delivered to that owner, if found, or else to the Lady of Tyre’s administration.\(^{103}\)

Maritime property found in Islamic or foreign territorial sea or on coasts was not considered derelict unless the real owners voluntarily relinquished it, or if they failed to claim it during the period designated by international treaties, local custom, or religious law. Civil authorities frequently delivered items that had been salvaged from jetsam or flotsam within their territorial sea to the rightful owners in person.\(^{104}\) In other cases, if it was established with certainty that salvaged maritime property belonged to an alien merchant, the authorities would transfer it to a consul from the owner’s flag state, who would then return the property to the rightful owner.\(^{105}\) Despite the lack of written evidence from earlier times, a Greek ship was cast ashore in the land of Rus, it was to remain safe and inviolate. Should it be plundered, the violator would be liable for the legal consequences. For further details, refer to Daphne Penna, *The Byzantine Imperial Acts to Venice, Pisa and Genoa, 10th–12th Centuries: A Comparative Legal Study* (Groningen: Eleven International Publishing, 2012), 108, 149, 153, 156, 232, 241–253, 280.

\(^{103}\) Peter M. Holt, “The Treaties of the Early Mamluk Sultans with the Frankish States,” *Bulletin of the School of Oriental and African Studies* 43 (1980), 75. An identical provision is stipulated in the treaty signed between Sultan Qalāwūn and King Leon III of Lesser Armenia in 684/1285. Holt, *Early Mamluk Diplomacy*, 84, article 12; Amari, *Diplomi Arabi*, 89, article 7 of the 713/1313 Hāfsid–Pisan treaty stipulates that if a ship is wrecked off the coast of Ifrīqiya, local residents will guard and protect her and her crew, passengers, and contents until she is repaired and again seaworthy.

\(^{104}\) According to the custom of the sea in the Indian Ocean and the Mediterranean Sea, goods driven ashore by tempest or other force must be delivered to their true owners. An edict attributed to Maharaja Ganapati (1199–1262) assures the safety of foreign sea traders whose vessels are wrecked on his coasts. Alexandrowicz, *Law of the Nations in the East Indies*, 78; Khalilieh, *Islamic Maritime Law*, 136.

it is not unreasonable to propose the existence of prior treaties of the same nature between the Christian and Muslim worlds.

**Strait Passage**

The right of a state to exercise sovereignty over its inland seas is also attested to in international treaties. Consider, for instance, the 659/1261 and 680/1281 treaties signed between the Egyptian sultan al-Manṣūr Qalāwūn and the Byzantine emperor Michael VIII Palaeologus. In order to secure the inflow of Crimean slaves of both genders, especially males for military conscription, the sultan was compelled to circumvent an embargo imposed by the Ilkhanate dynasty (654–736/1256–1335) – which primarily ruled regions of Persia and neighboring territories in present-day central Turkey – by signing two agreements with Byzantium.106 Article 6 of the 680/1281 treaty states:

The ambassadors sent from our realm to the land of Berke and his sons, their territory and those parts, the Sea of Südāq (Sudak/Soladia)107 and its mainland, shall be absolutely safe and secure. They shall pass through the territory of the Emperor, Lord Michael, from end to end without let or hindrance. They shall be sent by land and by sea to our realm according to the exigency of the time. They shall proceed to where we shall dispatch them in that territory, and

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107 The “Sea of Südāq” most surely refers to a defined maritime belt on the Black Sea adjacent to the port city of Südāq. In modern legal terms, the “Sea of Südāq” most likely refers to the territorial sea of Südāq, over which the local government enjoyed exclusive dominion and so was able to restrict access to non-residents and foreign individuals and convoys, and forbid or impose restrictions on the exploitation of natural resources. When sailing offshore or approaching a coastal or port city, experienced merchants, voyagers, and sailors normally attached the word bahr to the nearest place by saying, for instance, al-Bahr al-Mālībārī (Sea of Malabar), or Bahr ʿAydhāb (or ʿAydhāb, on the west coast of the Red Sea), or Bahr Berbera (in Somalia), or Bahr al-Mahdiyya (Sea of al-Mahdiyya) and Bahr al-Monastir (Sea of Monastir), in Tunisia. In so saying, there is every reason to assume that they were referring to the territorial sea of the coastal city and its offshore jurisdictional claim. Wanshirisi, *Al-Miʿyar*, 2:5; Tāher (ed.), “*Akriyat al-Sufun*,” 36; Khalilieh, *Admiralty and Maritime Laws*, 308, f. 132; Goitein and Friedman, *India Traders*, 7, f. 18; 599, f. 29.
likewise return to our realm, safely, securely, and without impediment, together with any ambassadors of those parts or elsewhere who may come with them, and all the slaves, slave-girls and others accompanying them.\textsuperscript{108}

The treaty contains two clauses granting the people of Südāq and Egyptian vessels permission to transport slaves through extensive inland Byzantine maritime domain stretching from the Black Sea in the north to the Mediterranean in the south, passing through the straits of Bosphorus and Dardanelles (Çanakkale), the Sea of Marmara, and the Aegean Sea. From its early days as the ancient city of Byzantium (later renamed Constantinople and then Istanbul), its strategic geographical position provided an undisputed sovereignty over vital bodies of water. Byzantium could suspend passage at will through both the straits of Bosphorus and Dardanelles when public peace, good order, and territorial integrity were threatened, or else to bar political entities that had no diplomatic or commercial treaties with the Byzantine Empire. Therefore, in order to secure freedom of passage for ships coming from the Black Sea laden with young slaves, the Egyptian sultan negotiated with the Byzantine emperor the terms of transit for cargo and ambassadors. Article 7 of the treaty states:

If merchants come from the territory of Südāq, and wish to travel to his Majesty’s territory, they shall not be hindered in our territory, but their transit and return shall be without let or hindrance after they have paid the due charge on their wares in our territory. Likewise, if merchants from the people of his Majesty’s territory appear, and wish to cross to the territory of Südāq, they shall cross from our territory without let or hindrance, and likewise if they return; all this after paying the due charge. If these merchants from the people of his Majesty’s territory and from the people of Südāq are accompanied by slaves and slave-girls, they may pass with them to his Majesty’s territory without let or hindrance, unless they [the slaves] are Christians, for our law and religious code do not allow us this in the case of Christians.\textsuperscript{109}

Article 8 further stipulates:

Any merchants coming from Südāq or elsewhere with slaves and slave-girls shall be enabled by the Emperor, Lord Michael, to proceed with them to our realm without hindrance.\textsuperscript{110}

Until the late eighteenth and early nineteenth century, the Ottoman Empire could deny access to ships through the straits of Bosphorus and

\textsuperscript{110} Holt, \textit{Early Mamluk Diplomacy}, 127.
Dardanelles because the right of passage had not yet been established as a customary rule. Only vessels whose countries maintained bilateral agreements with the Ottoman government enjoyed free passage through these bodies of water. This situation explains why the right of transit passage was vested in the 659/1261 and 680/1281 Mamluk–Byzantine treaties. Slaves and other commodities that were in high demand could not be transported from Crimea to Egypt by sea without passing through the inland waters of Byzantium, which extended over 740 kilometers from Constantinople to the southernmost limits of the Aegean Sea. Both parties agreed to pay retribution for damage or loss caused by pirates or privateers to subjects of the emperor or sultan whether sea travelers, shippers, or shipowners.

The question that arises is whether or not the same regime of passage also applied within the Abode of Islam? In fact, until the Portuguese

111 Nihan Ünlü, The Legal Regime of the Turkish Straits (The Hague: Kluwer Law International, 2002), 23–25; Glen Plant, “Navigation Regime in the Turkish Straits for Merchant Ships in Peacetime: Safety, Environmental Protection and High Politics,” Marine Policy 20 (1995), 15–17. Procopius of Caesarea (500–565 CE) draws our attention to the customhouses established on the Bosporus and Dardanelles during Justinian’s reign to collect passage tolls and taxes from ships sailing through the straits. He writes: “There are two straits on either side of Constantinople: one in the Hellespont between Sestos and Abydus, the other at the mouth of the Euxine Sea, where the Church of the Holy Mother is situated. Now in the Hellespontine Strait there had been no customhouse, though an officer was stationed by the Emperor at Abydus, to see that no ship carrying a cargo of arms should pass to Constantinople without orders from the Emperor, and that no one should set sail from Constantinople without papers signed by the proper officials; for no ship was allowed to leave Constantinople without permission of the bureau of the Master of Offices. The toll extracted from the shippers, however, had been inconsequential. The officer stationed at the other strait received a regular salary from the Emperor, and his duty was exactly the same, to see that nothing was transported to the barbarians dwelling beyond the Euxine that was not permitted to be sent from Roman to hostile territory; but he was not allowed to collect any duties from navigators at this point.” Procopius of Caesarea, Secret History, or Anecdota, trans. Richard Atwater (Chicago: P. Covici, 1927), paragraph no. 25, “How He Robbed His Own Official”; C. Richard Baker, “Administrative and Accounting Practices in the Byzantine Empire,” Accounting History 18 (2013), 222; Azuni, Maritime Law of Europe, 1:226–232, reports that imposing tolls on foreign ships sailing across the straits located within the state’s territorial jurisdiction was a common practice among earlier and contemporaneous states.


113 Holt, Early Mamluk Diplomacy, 124–125, 127.
penetration into the Indian Ocean arena in the sixteenth century, the straits of Hormuz and Bab el-Mandeb played a far more significant role in East–West maritime trade than did the straits of Bosphorus and Dardanelles. Interstate trade and the economy of individual states were far more dependent upon the transit passage through these straits, which connect the high sea (Arabian Sea) and inland seas, the Persian Gulf and the Red Sea; historically, all of these seas have been entirely surrounded by Islamic-ruled territories, the access of which to the Mediterranean Sea was by land alone until 1869 when the Suez Canal was officially opened.

Situated at the entrance to the Persian Gulf, the Strait of Hormuz attained great importance as a convenient natural entry point for sea trade between India, Southeast Asia, and the Far East with the Islamic Near East, particularly the Persian Gulf provinces of Iraq, and Greater Syria. From the fall of Baghdad to the Ilkhanate Mongol forces in 656/1258 until its capture in 913/1507 by the Portuguese conquistador Afonso de Albuquerque (1453–1515), the Kingdom of Hormuz ruled over strategic positions in the Persian Gulf and vital sea-lanes for over 200 years; it became a powerful emporium of commerce controlling trade coming from the Indian Ocean. In order to hold sway over domestic and international trade and to manage marine resources efficiently, Hormuz kings and viziers promulgated regulations prohibiting sea travel, trade, and local pearl fishing without an official permit. Weaker sheikhs in the Persian Gulf complied with this unprecedented regime of navigation and trade laws. They were reluctant to defend their right to free navigation and trade and officially succumbed to the new reality, although they passively resisted the new restrictions. However, some of them sought ways to bypass the regulations. For instance, Omani traders opted to develop new commercial hubs and ports in Zhufār (Dhofar) and Mirbāṭ (Mirbat) on the southwest coast of Oman so that by the end of the

fifteenth century they had gained sufficient power to revolt against the Kingdom of Hormuz.\footnote{Ibrāhīm Khoury and Ahmad J. Tadmuri, Saltanat Hormuz al-ʿArabiyya (Ras al-Khaimah: Documentaries and Studies Center, 1421/2000), 1:339–342; Salman, “Aspects of Portuguese Rule in the Arabian Gulf,” 60–61. The author argues that the Portuguese copied the “trade license” in their cartaz system, in that an equivalent system already existed in the Persian Gulf’s trade routes prior to the Portuguese arrival. However, as argued in the Introduction (p. 5, f. 9), it is more appropriate to assume that the cartaz institution might have been developed from the Spanish guidaticum rather than the Islamic amān, although the latter surely owes its origins to the Islamic pledge of security. The Latin word guidaticum (Aragonese guyage, Catalan guiatge) is derived from the Arabic Maghribi īwādā, meaning “a bond of friendship, love, and affection.” Chevedden, “The 1244 Treaty,” 169–170, f. 8.}

The unilateral restriction by Hormuz of access only to licensed shippers, shipowners, and traders and their agents through the straits stood in sharp contradiction to the Islamic custom of the sea. Prior to the fall of the Abbasid dynasty and the fragmentation of the empire into independent political entities, the governing authorities in Hormuz were required to facilitate seaborne trade and were prohibited from taking any action that could hamper freedom of navigation and flow of commodities through the straits. During that time, therefore, mustaʿmins and subjects of the Abode of Covenant could sail unhampered through this strategic waterway. That no references are made in pre-thirteenth century Arabic sources to any imposition of restrictions on transit passage may imply that national and foreign vessels enjoyed free access through the Strait of Hormuz so long as public peace, good order, and territorial integrity remained inviolate.\footnote{Khoury and Tadmuri, Saltanat Hormuz al-ʿArabiyya, 2:115–134.}

As a pivotal passageway for Asian pilgrims traveling by sea and the shortest and fastest waterway for East–West commercial networks, the Strait of Bab el-Mandeb was obviously more vital to the economy of the Red Sea and Mediterranean countries than the Strait of Hormuz. Before the circumnavigation of Africa and discovery of the Cape of Good Hope, the large volume of spices and other luxury items from the East Indies reached Mediterranean and European markets through the Strait of Bab el-Mandeb. Cargo heading for the Mediterranean and European markets had to be transported along overland caravan routes within the Egyptian and Syrian territories. The commercial centrality of Egypt may explain why its rulers attributed great strategic significance to the water passage running through the country. The rulers maintained naval centers and flotillas in major port cities and along trunk routes to protect vessels against pirates, or even to escort them, in order to assure
the flow of trade to and from the Red Sea, and to enable unimpeded access through the strait.\textsuperscript{117} Even so, as the use of force against human threats was not always effective, merchants and shipowners had to pay tribute in exchange for safe navigation and free passage.\textsuperscript{118}

In an attempt to monopolize the supply of fine spices from the East Indies, to drive Muslim trade from the Indian Ocean, and to control the entrance to the Red Sea, in 919/1513 Afonso de Albuquerque launched two attacks on the port city of Aden.\textsuperscript{119} These attacks were unsuccessful, as were raids that he launched against other targets on the Red Sea.\textsuperscript{120} In spite of these regular efforts to block the Strait of Bab el-Mandeb, Muslim pilgrims and goods from the Indian Ocean countries made their way through the strait to the Hijazi and African littorals of the Red Sea. At times, the Portuguese temporarily disrupted the Muslims’ communication patterns, not to mention their cartaz system and naval presence, but never seriously affected the passage of domestic and foreign vessels through the Strait of Bab el-Mandeb.\textsuperscript{121} Save for a single reference from the second quarter of the sixteenth-century Ottoman Yemen,\textsuperscript{122} it appears that ships had been accorded free passage through the Bab el-Mandeb from a time prior to the advent of Islam until later periods.

Maintaining freedom of navigation through the straits of Hormuz and Bab el-Mandeb was an essential Islamic interest. Major port cities located in the vicinity of the two straits prospered as ports of call and intermediate waypoints. Trading vessels coming from the Indian Ocean regularly anchored in major ports located at the entrances to the Red Sea and


\textsuperscript{122} Giancarlo Casale, \textit{The Ottoman Age of Exploration} (Oxford: Oxford University Press, 2010), 44. The Ottomans established a permanent naval base and a customs house on Kamarān, the largest Yemen-controlled island in the Red Sea, so that all ships arriving from India “would be required to stop and pay a transit fee.”
Persian Gulf. From these locales, goods were either transshipped aboard different vessels or transported by the same vessels to different destinations along the relevant littoral. Most of the cargo was then carried by overland caravans to ports on the Mediterranean Sea.

Even though the ruler of Dahlak seems to have first introduced the payment of tolls, the Kingdom of Hormuz – and following them the Ottoman governor of Kamarān – collected tolls in exchange for the safe passage of ships through the straits. One must be careful not to assume that these historic impositions of tolls were justified by Islamic law. On the contrary, Islamic law grants all commercial ships, irrespective of their nationalities, the right to sail through the Near Eastern straits free of charge. Such freedom had been economically vital both for the Abode of Islam and for other nations. Free passage increased the volume of shipping, created job opportunities, and enhanced economic and social developments. Indeed, it can reasonably be assumed that as long as ships sailed directly to Red Sea destinations without anchoring in any of the ports in the straits, then no taxes were due to be paid at the customs houses located at the mouth of the relevant straits.123

PERSONALITY, TERRITORIALITY, AND EXTRATERRITORIALITY

Trade activity, especially long-distance, could involve persons and parties from different territories, nationalities, religions, and sects. In order to secure smooth relations, give impetus to domestic and overseas trade, avoid legal altercations whenever possible, and to protect the rights of all those engaged in commercial transactions, an effective legal mechanism had to be established. While emerging city-states in medieval Europe constituted an impenetrable obstacle to forming common supraterritorial regulations, until the rise of the Ottoman tanzımat in the middle of the nineteenth century, Muslim administrative authorities granted dhimmis and foreign merchants the judicial freedom to adjudicate lawsuits involving parties from the same community, “nationality,” or religion.124 Two cardinal questions must be addressed here. First, why

124 The Qurʿān, the Prophetic tradition, and the writings of eminent scholars all imply that diversity is a natural law for humankind, they endorse pluralism and encourage coexistence among all segments of society irrespective of ethnic, racial, cultural, and religious backgrounds. This perception of juridical sovereignty, which sanctions a pluralistic legal
does Islamic law grant judicial autonomy to dhimmis and aliens? And second, how does legal pluralism enhance freedom of movement, navigation, and the expansion of domestic and overseas trade? To find answers to these and other questions, it is necessary to examine the administration of justice in the Abode of Islam and the position that Islamic law holds on the judicial status of Muslims, dhimmis, and foreign subjects within the territorial sovereignty of a state.

Muslims’ Judicial Status within and beyond the Abode of Islam

As a universal religion, Islam identifies its affiliates around the world, irrespective of their territorial, cultural, ethnic, and linguistic backgrounds, as belonging to one ummah. Muslims uniformly believe that Islam is the last monotheistic religion, acknowledges the oneness of God and the unity of humankind, and share many other tenets of faith. Islam considers the judicial status of a subject as stemming from his/her religious allegiance, regardless of his/her residence in any particular society. In other words, the personal allegiance of an individual to religious doctrine, rather than the principle of territoriality, determines the law by which he/she is to be governed. Membership in the ummah signifies that all believers are bound to observe Islamic principles even if they happen to reside in the Abodes of War (Harb), Peace (Sulh), or Truce (‘Ahd). However, the concept of territoriality can still be implemented under certain circumstances for dhimmis and aliens living within the imam’s jurisdiction. Therefore the application of the law within and outside the Abode of Islam needs to be examined.
Except for under limited circumstances, *Sharīʿah* provisions must prevail in the Islamic territorial domain and exclusively be enforced on all Muslims regardless of their adherence to one denominational school or another. All controversies involving Muslim litigants that take place within the Islamic maritime dominion, including in ports and along navigable rivers, must be heard before the qadi. However, legal disputes arising among Muslims sailing for foreign countries might be tried in either Islamic or in foreign territories on the condition that the presiding judge is Muslim, evenhanded, impartial, and well-versed in Islamic theology and jurisprudence. For this reason, central and peripheral authorities concluded diplomatic and commercial treaties with foreign countries granting Muslims a degree of independence in administering justice. These treaties stipulated that Muslims could set up their own courts in those port-cities most frequented by Muslims so as to expedite judicial proceedings and prevent unreasonable delays.

In spite of the sectarian division and religious differences between Sunnis and Shiites, Muslim mercantile communities saw themselves as part of the global Muslim nation (*ummah*), which contributed to the cohesiveness of diasporic communities of merchants at local, regional, and transregional levels. For instance, writing around 237 AH/851 CE, the Merchant Sulaymān (Sulaymān al-Taṭīr) reports that at Khānfuṣ:

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Canton, present-day Guangzhou – a rendezvous port for Muslim merchants – the appointed Muslim judge was charged with maintaining order and presiding over cases involving his coreligionists, regardless of their sectarian differences.¹³⁰ A century later, when Abū Zayd al-Sīrāfī (died after 330 AH/941 CE) arrived at Khānfu, the office of the qadi continued to exist. He states in his Travel Account that “the merchants of Iraq cannot arise against (the judge’s) decisions” since “he acts with justice in conformity with God’s Book (Qurʾān) and the precepts of Islamic law.”¹³¹ Indian rulers also sanctioned the handling by Muslim merchants and communities of their own civil and religious affairs, the administering of justice and settling of their own disputes in accordance with the Sharīʿah insofar as their actions did not impinge on the peace and order of the state.¹³² The hunarman was selected solely by the community of Muslim merchants and officially recognized as the chief judicial authority, compelling all Muslim litigants to comply with his


decisions. In the early years of the sixteenth century, the Portuguese traveler and official Duarte Barbosa (1480–1521) observed that the Muslim community of Calicut comprised two groups, the locals (known as Mapillas) and the foreigners or Pardesis, Muslims who came from various places including the Red Sea region, Cairo, Arabian Peninsula, Iraq, Persia, Khurasan (or Khorasan), and Asia Minor. Regardless of their religious, sectarian, and juridical school affiliations, Muslims administered their judicial affairs before the same judge according to *Shari’a* without interference from the local ruler. Barbosa describes the Moors as great merchants, who “possess in this place wives and children, and ships for sailing to all parts with all kinds of goods. They have among them a Moorish governor who rules over and chastises them, without the king meddling with them.” The fact that both the Chinese and Indian authorities had granted Muslim communities permission to arbitrate and resolve disputes and legal cases amongst their coreligionists is a conclusive indication of the extraterritorial application of Islamic law outside the Abode of Islam.

International treaties concluded between Muslim and Christian sovereigns called upon each party not to interfere in the judicial affairs of foreign merchants of the other denomination, but rather to let them administer lawsuits autonomously and in compliance with civil and religious laws of their homeland. Article 7 of the 665/1267 treaty signed between al-Zahir Baybars and the Hospitallers stipulates that inter-Islamic legal disputes occurring in the territory of the latter shall be summoned before the sultan’s representative for judgment in conformity

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135 George, “Direct Sea Trade between Early Islamic Iraq and Tang China,” 601.
with the “Holy Law of Islam.” Correspondingly, the Hospitaller’s representatives were designated as presiding over cases involving affiliates of Krak des Chevaliers within the sultan’s territory, that they may judge them according to the “regime of Ḥisn al-Akrād.”

This charter finds echoes in later Mamluk treaties. An identical provision was placed in al-Manṣūr Qalāwūn’s 684/1285 treaty with Lady Margaret of Tyre granting the sultan’s representative authorization to implement Islamic penal law in the Lady’s domain if both the victim and accused are Muslim subjects. Equally, if in the sultan’s domain the perpetrator and victim were both Christian subjects of Tyre, the Lady’s representative was authorized to proceed with judgment in accordance with Tyre’s penal laws. Both parties to the treaty were required to restore the chattels and private belongings of any slain subject from the other’s dominion and to pay a wergild if the perpetrator was not found. If the victim’s booty was not found, “there shall be 40 days of grace for the investigation of the matter,” and, if no information came to light, an equivalent value of the booty was to be paid. Article 10 of the 682/1283 treaty concluded between Qalāwūn and the Latin Kingdom similarly grants the two political entities judicial autonomy in all fields of law to try cases between their citizens regarding disputes arising on foreign soil.

Similar international diplomatic treaties signed between North African Islamic sovereigns and their Christian European counterparts consist of charters empowering each of the contracting parties to apply its religious or statutory laws to its citizens when in foreign territories. Any person arriving in Islamic domains had a duty to obey the laws of his home country and to avoid violating the local laws and interests of the country of sojourn. Article 9 of the Ḥāfspīd-Pisan treaty (dated September 14, 1313) rules that if a controversy arises between a Muslim and a Christian, or between two Christian affiliates from different countries, Islamic law shall prevail; whereas article 36 stipulates that if the disputants are both Pisan citizens, the case shall be settled by the Pisan Consul. If a Pisan inflicted harm on a Muslim found within the territorial jurisdiction of Pisa, the Pisan Governor, Elders, and Consuls were required to “do justice

“– take all necessary legal measures to punish the perpetrator severely and to return any stolen property to the rightful owner.” Appeal to the mażālim by one of the litigants, even if alien, could take place if he believed that justice had not been served in the lower court.

The admissibility of judicial authority from outside the Abode of Islam to the courts within it – decrees and testimonies from qadis, muftis, notaries, and trustworthy witnesses – inspired debates among classical jurists, especially after the loss of Islamic Mediterranean territories to Christian powers from the mid-eleventh century onward. The prominent jurist al-Māzarī (453–536/1061–1141) was asked about the validity of judicial decisions handed down by the chief qadi of Norman Sicily as well as the disposition of trustworthy witnesses (shuhūd ʿudūl) from the island in the Abode of Islam. He ruled that although the trustworthiness of the Sicilian chief qadi was diminished as he lives in the Abode of War, his judgments and legal opinions remain valid provided that he is professionally qualified and his legal probity, expertise, education, and methodology are beyond question. Al-Māzarī adds that five criteria may justify the legitimacy of the qadi. He first explained the value of the qadi’s continued presence by noting that his absence could delegitimize the entire Muslim community of the island and jeopardize its members’ practice of Islam. Second, he noted that, despite the qadi’s illegal investiture by an infidel ruler, the Muslim community needs some form of leadership to represent it before the authorities, rendering an appointed leader better than no Muslim representative. Third, as the chief Muslim judicial authority, the qadi can preside over cases engaging local Muslim merchants and those who sojourn in Dār al-Ḥarb. Fourth, his authority should be obeyed as if he had been appointed by a Muslim amir; his appointment by a Sicilian king was equally valid to that by a Muslim sovereign (kamā law kāna wallāhu sultān Muslim). Finally, the qadi could engage in ransoming prisoners and guiding people away from error. Not far from Sicily, the Muslim community in Lucera (northern Apulia, Italy)

141 Amari, Diplomi Arabi, 94, article 34; 107, article 34 of the 1353 treaty.
142 Amari, Diplomi Arabi, 126–127, articles 5 and 6 of the treaty from December 14, 1397; 140–141, articles 3 and 5 of December 14, 1414 treaty; 154–155, articles 3 and 5 of the 1421 treaty.
was granted judicial autonomy and the right to practice the Sunna of Muhammad’s religion on Christian soil, “so that the qādī is their leader (deo quod primates ipsorum qui Alchadi dicuntur).”\textsuperscript{144}

Islamic judicial sovereignty in non-Muslim domains was revisited during the Spanish Reconquista.\textsuperscript{145} In both Sicily and Spain, the new

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145 In both Sicily and Spain, the new
Christian sovereigns borrowed the Islamic tradition of *dhimmī* and applied this pattern of governance generally to Muslim minorities until the late fifteenth century. Christian officials recognized the exclusive jurisdiction of Muslims in the judicial sphere, in the same way that the Islamic administration had acknowledged the continuing validity of Jewish and Christian judicial sovereignty under the Islamic expansion in Spain. Articles 1, 4, and 5 of the 641/1244 surrender treaty of Játiva between James I the Conqueror, King of Aragon and Catalonia (1208–1278) and Abu Bakr Muḥammad ibn Yahyā, commander of the Castle of Játiva (1237–1278) grants Muslims religious freedom and enables them to preserve their judicial institutions in the full sense of the word. Qadis acted in the name of and under the immediate control of the Christian king, in order to ensure that their decisions were duly executed.

Muslīm were granted the right to administer justice according to *ṣuna* (Sunna, which could mean Prophetic tradition, or Muslims’ local customary law, or both) and *xara* (Sharīʿah). Aqalliyyat’ and Its Critics: An Analytical Study,” *Journal of Muslim Minority Affairs* 32 (2012), 88–107; Hendrickson, “Islamic Obligation to Emigrate.”

The 508/1115 capitulation treaty signed between the Muslims of Tudela and Alfonso el Batallador (1073/4–1134) stipulates that Muslims not only retain their own criminal courts and judges, but they also have ultimate jurisdiction over Muslims even in cases involving Christians. It states that “(Muslims) be and remain in their litigations and trials under the jurisdiction of their qādi and his lieutenants, just as in the days of Muslim rule. And if a Muslim shall have litigation with a Christian, or a Christian with a Muslim, the Muslim qādi shall render judgment to the Muslim, according to Islamic law, and the Christian judge to the Christian, according to [Christian] law.” John Boswell, *The Royal Treasure: Muslim Communities under the Crown of Aragon in the Fourteenth Century* (New Haven: Yale University Press, 1977), 108.

Antoine Fattal, “How Dhimmi was Judged in the Islamic World,” in *Muslims and Others in Early Islamic Society*, ed. Robert Hoyland (Burlington, VT: Ashgate, 2002), 87–88, the Christian magistrate was known as qādī al-naṣārā or qādī al-ʿajam, and in Latin, censor.


Islamic courts outside the Abode of Islam enjoyed exclusive jurisdiction over cases involving solely Muslims, including in the areas of family law,\(^{150}\) criminal offenses (hadd),\(^{151}\) property rights, and commercial transactions.\(^{152}\) Christian sovereigns granted Muslims the authority to independently administer their own legal system with its own courts, qadis, codes, practices, precedents, and judicial procedures.\(^{153}\) However, Christian magistrates would exercise jurisdiction upon a qadi’s request in order to execute sentences, if some members of the disputing parties were


\(^{150}\) Marriage, divorce, succession, breach of contract, and guardianship of minors.

\(^{151}\) Illicit sexual intercourse – premarital sex and adultery – slanderous accusations of unchastity, theft, wine drinking, and armed robbery.

\(^{152}\) Burns, Islam under the Crusaders, 224.

affiliates of other religions, or if one of the parties appealed to the civil court. Finally, as was tradition in the Islamic State, the principle of personality continued to override the principle of territoriality. Qadis heard and judged cases according to Shari’a so long as both disputing parties were Muslims.154

**Judicial Autonomy of Dhimmis**

The Qur’an calls for recognition of the legislative autonomy of dhimmī communities, commanding the Prophet and his fellow Muslims to safeguard and preserve God’s older revelations, which had been corrupted over the course of centuries. As the last Word of God, the Qur’an contains the true teachings of all prior Holy Books, which nonetheless remain holy. Therefore, it is advised that there be no intervention in the judicial affairs of the followers of these Scriptures, but rather they be granted full judicial autonomy to administer justice according to their religions, customs, and civil laws.155 The Qur’an, Prophetic traditions, theologians, and jurists all discouraged dhimmī litigants from appealing to Islamic courts, advising the Islamic judicial authorities to avoid presiding over cases involving solely non-Muslims. Verses 42–49 of the fifth chapter of the Qur’an (Al-Mā’ida) represent the clearest Qur’ānic explanation as to why dhimmī should be granted an independent judicial system and how it should be put into practice:

(They are found of) listening to falsehood, of devouring anything forbidden. If they do come to thee, either judge between them, or decline to interfere. If thou decline, they cannot hurt thee in the least. If thou judge, judge in equity between them. For God loveth those who judge in equity (42) But why do they come to thee for decision, when they have (their own) Torah before them? Therein is the (plain) Command of God; yet even after that, they would turn away. For they are not (really) People of Faith (43) It was We who revealed the Torah (to Moses): therein was the (plain) Command of God; yet even after that, they would turn away. For they are not People of Faith (44) We did bestow on Jesus the Book (45) For he brought to them the plain foundation (46) The Taurah, and We gave him the (plain) Command of God.

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And if any fail to judge by what God hath revealed therein. If any do fail to judge by what God hath revealed, they are those who rebel (47) To thee We sent the People of the Gospel judge by their Book and an admonition to those who fear God (46) Let the People of the Gospel judge by that came before him: a guidance and light, and confirmation of the Torah that had come before him: a guidance and light, and guidance and light. By its standard have been judged the Jews, by the Prophets who bowed (as in Islam) to God’s Will, by the Rabbis and the Doctors of Law: for to them was entrusted the protection of God’s Book, and they were witnesses thereto: therefore fear not men, but fear Me, and sell not My Signs for a miserable price. If any do fail to judge by what God hath revealed, they are Unbelievers (44) We ordained therein for them: “life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal.” But if anyone remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by what God hath revealed, they are wrongdoers (45) And in their footsteps We sent Jesus the son of Mary, confirming the Torah that had come before him: We sent him the Gospel: therein was guidance and light, and confirmation of the Torah that had come before him: a guidance and an admonition to those who fear God (46) Let the People of the Gospel judge by what God hath revealed therein. If any do fail to judge by what God hath revealed, they are those who rebel (47) To thee We sent the Scripture in truth, confirming the scripture that came before it, and guarding it in safety: so judge between them by what God hath revealed, and follow not their vain desires, diverging from the Truth that hath come to thee. To each among you have We prescribed a Law and an Open Way if God had so willed, He would have made you a single People, but (His Plan is) to test you in what He hath given you; so strive as in a race in all virtues. The goal of you all is to God; it is He that will show you the truth of the matters in which ye dispute (48) And this (He commands) judge thou between them by what God hath revealed, and follow not their vain desires, but beware of them lest they beguile thee from any of that (teaching) which God hath sent down to thee. And if they turn away, be assured that for some of their crimes it is God’s purpose to punish them. And truly most men are rebellious (49)
Out of respect for older Divine Revelations, the Qurʾān patently sanctions legal diversity and calls for a pluralistic judicial system within the Abode of Islam, in keeping with recognizing other monotheistic religions as separate nations. In verse 42, God commands the Prophet to refrain from interfering in the judicial affairs of non-Muslims. However, if the parties insist on seeking the Prophet’s justice, he is required not to pervert justice or make any concessions in its implementation, but to judge the parties equitably and in compliance with Shariʿah.156 God next (verse 43) praises the Torah, which He revealed to Moses asking: why should they (Jews) come to you when they have their own Law (Torah), which consists of the commands of God (fihā ḥukm Allāh)? None of these prophets had deviated from the law of the Torah, changed or altered it. Rabbis and renowned religious scholars continued to find in it guidance to higher realms of the spirit. The Qurʾān further declares that whosoever fails to judge by what God has revealed are unbelievers (verse 44) and unjust (verse 45).

Regarding the People of the Gospel, the Qurʾān clearly stresses that later prophets confirmed the messages of their predecessors and sought to promote the same sacred mission. God did not reveal any of the Books in order to repudiate previous ones, rather each confirmed and supported those preceding it. Similar to the Islamic judicio-religious attitude toward the Jews, Muslims are also instructed not to intervene in the judicial affairs of dhimmī Christians, who should administer justice among themselves according to what God has revealed.157 Those who counter God’s Law are unbelievers, transgressors, and wrongdoers (verse 47).

In those cases when Christians call upon the authority of Muhammad, they must accept that his judgment will be made in accordance with the principles of Islam (verses 48 and 49). Since the Qurʾān commands against


a compulsion to embrace Islam,\textsuperscript{158} it follows that it would be optional for non-Muslims to seek justice in Islamic courts and this would take place only if the disputing coreligionists voluntarily chose to bring their lawsuit before the qadi. Before proceeding, the qadi is obliged to ensure that the case had not previously been brought before an ecclesiastical court and to inform the parties that they will be treated like Muslims and judged pursuant to Islamic law.\textsuperscript{159}

\textbf{Christians}

For many centuries, Christians made up the majority of residents in the countries of the Islamic Mediterranean. Islamic military victories did not abruptly change the material culture of the occupied countries. Cultural continuity persisted in various aspects of life for centuries, despite the gradual processes of Arabization and Islamization. Perhaps one of the wisest decisions made by the Arabs shortly after their military advent in the former Byzantine territories and the Sassanid Empire was to retain the prevailing administrative framework and ecclesiastical organizations and tribunals as established by Canon VI of the Nestorian synod of Mar George I, which took place in 57 AH/676 CE.\textsuperscript{160} This canon is generally echoed in the text of the Pact of 'Umar (al- 'Ubdal-Shurūṭ al- 'Umarīyya), the terms of which presumably were laid down by the Christian leaders of Greater Syria immediately following its fall.\textsuperscript{161}

\textsuperscript{158} Qurʾān 2:256: ”la ēn ḍara'ah fi al-dīnī fī dhīn nāṣī'īn, wa al-dīn fī al-dīnī“ (Let there be no compulsion in religion: truth stands out clear from error).


\textsuperscript{160} Fattal, “How Dhimmis were Judged in the Islamic World,” 84–85: “Trials and disputes between Christians must be judged within the Church. They must not be public. . . . They must be judged in the presence of magistrates, designated by the bishop and consented to by the community, chosen among the priests known for their love of truth and their fear of God, with wisdom and sufficient knowledge of the cases. . . . Christians should not follow their impetuous consciences in taking their discussions outside of the Church. If there is something that must be concealed from those designated for the position of judge, they should present their case before the bishop. . . . No believer can . . . have the authority to appoint himself to the function of a judge of the faithful, without the order of the bishop and the consent of the community, as long as he is not obliged by the order of the authorities.”

pact regulated the Christians’ legal status, not only in this particular province, but also across the Islamic world. A thorough scrutiny of the pact reveals that the Muslim governing and religious authorities did not attempt to impose a new legal system upon the Christians. On the contrary – perhaps remarkably – they granted the Christian dhimmīs freedom of religion and authorized them to continue abiding by their own laws free from external intervention.\textsuperscript{162}

Prior to the Islamic expansion in Egypt throughout the fourteenth century, or even later, Alexandria was not only the seat of the Church Patriarch, but also a vital commercial center where the Church maintained dockyards, operated commercial fleets that sailed as far as India to the east and Marseilles to the west, hired sailors, and, above all, regulated river and sea navigation.\textsuperscript{163} The promulgation of the Christian Arabic Ecloga, an Arabic version of the Greek Ecloga – which came into existence in the


twelfth century during the patriarchate of Gabriel ibn Turaik (70th Patriarch of the Church of Alexandria 1135–1145 CE) – appears to attest that, for many centuries of the Islamic State, Christians managed their own communal and religious affairs unhampered by either local or central authorities.¹⁶⁴

The judicial autonomy enjoyed by the Church of Alexandria did not differ from the judicial privileges of Jewish communities. Both “nations” (Scriptuaries/Abū al-Kitāb or Kitābiyyūn) were commanded by the Qur’ān to be treated on an equal footing. While cases involving parties from different religions were to be presided over by qadis and judged in conformity with Islamic law, intracommunal disputes were to be judged by magistrates of the same affiliation as the litigants.¹⁶⁵ Christian clergy, monks, and other judicial authorities did not favor seeking justice in Islamic courts for religious and communal considerations.¹⁶⁶ Nevertheless, Christians turned to Islamic courts when one party was a Muslim, for cases involving dhimmīs from different faiths, at the request of one of the parties, or for crimes committed on Islamic territory by one dhimmī against another that could lead to public disorder (fāṣād fī al-ard).¹⁶⁷ Despite such occasional appeals, Muslim administrations through history gave preference to the principle of personal affiliation by principally emphasizing, in particular, the religious character of the law.¹⁶⁸ Therefore, Christians were almost exclusively governed by


¹⁶⁵ Personal status matters – marriage, divorce, adoption, inheritance, and oaths – and matters Islamic law does not recognize, such as commercial transactions involving swine among Christians and usury among Jews, were almost exclusively left to rabbinical and ecclesiastical tribunals.


¹⁶⁷ Fattal, “How Dhimmīs were Judged in the Islamic World,” 89–90.

¹⁶⁸ Runciman notes that the Ottoman military expansion and capture of Constantinople consolidated the Greek Orthodox Church’s legal system and jurisdiction. He writes: “The integrity of the Orthodox millet was guaranteed by the new powers accorded to the Patriarch. The Muslim conquest had not resulted in the disestablishment of the Church. On the contrary, it was firmly established with new powers of jurisdiction that it had never enjoyed in Byzantine times. With the conquest of the capital and the subsequent conquest of other districts, practically the whole of the Patriarchal territory
ecclesiastical code, even though the concept of territoriality was generally applied to dhimmīs and foreigners in the area of penal law.

Jews

In the spring of 1058 CE, two Jewish merchants, Moshe bar Yehuda ha-Ḥazan of Palermo and al-Ḥasan ha-Cohen ben Salmān of Alexandria, concluded three different commercial contracts at the Jewish courthouse of Fustāt, which provided that the former would escort the shipments and sell them in Sicily. Accompanied by his cousin and another Jew, Moshe bar Yehuda then sailed aboard an Islamic-owned vessel to his hometown of Palermo. While en route he fell ill, died, and his corpse was thrown overboard, following the proper performance of Jewish funerary rituals. In the absence of a rightful heir on board the vessel, the captain – as Islamic law dictates – became the temporary depositary of the deceased’s property. The vessel had intended to sail directly from Alexandria to Palermo, but for an unknown reason, perhaps technical, the captain diverted course following Bar Yehuda’s death and docked at the port-city of Tripoli. In adherence to Islamic maritime law, the captain turned the deceased’s property over to the qadi, who – upon verifying that no Muslim party was engaged in the transaction and that both parties were Jewish – passed the case on to the Jewish judicial authority of Tripoli. Through his agent, the Egyptian merchant Ben Salmān tried to recover his property, but the Jewish court (bēt dīn) in Tripoli refused to deliver it without a fully-fledged lawsuit between the merchant and representatives of the trader’s widow and orphan. To assist their compatriot, the rabbinical court in Old Cairo appealed to the Jewish high court in Jerusalem on the premise that: (a) the Cairene rabbinical court cannot overrule decisions of another court

was united one more, and, though there was an alien power superimposed, it was its own master. . . . The integrity of the Church had been preserved, and with it the integrity of the Greek people.” Steven Runciman, The Great Church in Captivity: A Study of the Patriarchate of Constantinople (Cambridge: Cambridge University Press, 1968), 181–182. Similarly, İnalcık and Merlino argue that the Ottomans unified all Christians living within the empire’s domain – Arabs, Albanians, Romanians, Greeks, Bulgarians, Georgians, and Serbs – under a single millet (Arabic milla, confessional community). While the patriarchs of Alexandria, Jerusalem, Antioch, the Serbian Church, and the Bulgarian Church, lost autonomy to some degree, they retained a measure of independence under the new administrative system and the Patriarchate of Istanbul. The ecumenical patriarch was not just a religious leader, but he was also the temporal leader of the empire’s Orthodox population. Halil İnalcık, “The Status of the Greek Orthodox Patriarch under the Ottomans,” Turcica 21–23 (1991), 413–418; Mark Merlino, “The Post-Byzantine Legal Tradition in Theory and Practice,” (master’s thesis, Bilkent University, 2004), 34–55.
of equivalent authority, and (b) further delay in returning the goods of the Egyptian merchant might lead to their confiscation by the Muslim authorities of Tripoli. In his inquiries to Daniel ben ‘Azarya, head of the Yeshiva of Palestine, the appellant points out that the Tripolitanian dayyan (judge) ruled in favor of the widow and her orphaned daughter, fearing that the governor would confiscate the merchandise under the pretense that its owner was absent, or that part of it belonged to a minor. In so doing, the dayyan at the bêt dîn of Tripoli disregarded the written contracts that had been drafted by a notary and signed by both merchants at the courthouse of Fustât. Ben Salmân’s appeal to the Jewish high court (bêt dîn ha-gadol) in Jerusalem was accepted and the gaon instructed the elders of the Jewish community of Palermo to advocate the acceleration of the judicial process in Tripoli and the release of the property to the Egyptian merchant.169

Eventually, the gaon had the final word in this particular case, as well as in other lawsuits involving the extraterritorial application of Jewish law within and outside the Abode of Islam. Non-Muslim coreligious subjects clearly enjoyed judicial privileges and had the right to administer lawsuits freely in accordance with their own religious code, even if they did not reside in the same territory. Territorial affiliation never constituted an impediment because sovereignty was dictated by religious law in accordance with the religion of each subject.

We find perhaps the most eloquent evidence of freedom of movement via judicial sovereignty as practiced up until the late eleventh century CE in the juristic correspondence between Jewish communities in the diaspora and the three leading yeshivas of Pumbedita and Sura in Iraq, and the Palestinian in Jerusalem. Jews around the world posed countless questions to the gaons seeking appropriate halachic judgment on matters related to faith and civil affairs.170 Many responsa were produced, addressing queries from Jewish merchants, agents, shippers, and, to a lesser extent, shipowners.171


170 Goitein, Mediterranean Society, 1:65, 66. Such relationships among all parts of the Jewish diaspora never posed “an infringement on (the states’) sovereignty,” since a person’s legal standing derived from his religious affiliation.

As a rule, Jewish litigants were to be judged in accordance with the “Law of the Torah,” or “Law of Moses and Israel,” or “of and for the Jews,” or “of the Jews” alone. Nevertheless, prior to the rise of Islam, Jewish halacha did not prohibit Jewish litigants from appearing before non-Jewish courts, but rather expressed some flexibility toward such adjudications. The Babylonian Talmud, Gittin, 9b states: “All deeds which appear in legal courts of the heathen ones, although those who sign them are the heathens, are valid, except for bills of divorce and manumission of slaves.”

Except for the last two categories, Jewish law allows Jews to appear in gentile courts and to engage in business agreements – commenda, partnership, suftaja (banking), sale, lease, transport, and so forth – according to the law of the gentiles.

At times, the Jews turned to the Islamic courts for adjudication in cases when: (a) the Jewish bêt din was limited in enforcing verdicts; (b) the Islamic court was better able to ensure the claiming of debts; (c) the dispute was interreligious; (d) contracts clearly stipulated Islamic authority for enforcement (ex ante); (e) one or both parties refused to appear before the Jewish court, such as when recognizing the Islamic


court as more advantageous;\textsuperscript{180} (f) a litigant had lost a previous lawsuit in a Jewish court;\textsuperscript{181} or (g) Islamic courts seemed to offer more expedient judicial proceedings to resolve disputes and legal cases than Jewish and Christian courts.\textsuperscript{182}

It should be noted that appeal by Scriptuaries to the Islamic judicial courts is not favored in the Qur’ān or by prominent scholars. Qadis, therefore, tried not to interfere in the judicial affairs of non-Muslims and avoided hearing cases before first referring them to their Jewish colleagues.\textsuperscript{183} In order to prevent Jews from appealing to Islamic courts, four methods were employed: (a) proclaiming the litigants excommunicated; (b) resolving disputes by arbitration; (c) the paying of one’s debt;\textsuperscript{184} and most interestingly, (d) gaons attempted to offer juristic solutions similar to those promulgated by Muslim \textit{fuqaha}.\textsuperscript{185} Furthermore, decisions of the Islamic court were final. They could not be appealed or submitted to judicial review, except in cases in which an appellant established beyond the slightest doubt before the \textit{mazālim} or other superior court that a manifest injustice had occurred.\textsuperscript{186}

It is observable from Ben Salmān’s 1058 CE appeal to the Palestinian Yeshiva that although both parties to the lawsuit were from different territories, the qadi in the port-city of Tripoli disregarded the principle of territoriarity to enforce the personal law of both litigants. Once it had been established with certainty that the case was exclusively Jewish, the qadi transferred jurisdiction to the local Jewish \textit{dayyan}. Indeed, judicial precedents and religious writings by prominent scholars were universally applicable to all Jewish communities around the world, including in Christian Europe. Jews in the Abode of Islam and in foreign countries were judged according to the “Law of Moses and Israel,” although particular communities chose to follow either the Babylonian or the Palestinian Talmud.

Consuls and Their Fellow Nationals

One of the earliest documents to establish the consular institution dates from 1082 CE, when Venice was privileged by the Emperor Alexios


\textsuperscript{181} U. Simonsohn, “Communal Boundaries,” 354.

\textsuperscript{182} U. Simonsohn, \textit{Common Justice}, 198.

\textsuperscript{183} Goitein, \textit{Mediterranean Society}, 2:396, 398.

\textsuperscript{184} U. Simonsohn, “Communal Boundaries,” 356.


I Komnenos (r. 1081–1118) to create mercantile headquarters in Constantinople and extend its customary laws (usus) to its nationals residing in the territorial domain of the empire.187 Elected in the early stages of their history by a majority vote of traders, the primary function of the consuls was to stimulate international business between the eastern and western basins of the Mediterranean and to protect Venetian interests in Byzantium. By the turn of the twelfth century, the maritime republics of Christian Europe on the Middle Sea had installed their own consuls and vice-consuls across the Islamic and Byzantine Mediterranean.188

As commissioner of a foreign independent political entity, the consul had to be endorsed by local authorities. He performed a dual role of both political representative and commercial agent. On the political level, he acted as a mediator between his sovereign and the local ruler, protected national interests, and negotiated and enforced commercial treaties.189


188 The judicial privileges and jurisdictional rights of the Communes’ consuls in the Byzantine Empire during the eleventh and twelfth centuries are best addressed by Penna, Byzantine Imperial Acts to Venice, Pisa and Genoa; Daphne Penna, “Venetian Judges and their Jurisdiction in Constantinople in the 12th Century: Some Observations based on Information Drawn from the Chrysobull of Alexios III Angelos to Venice in 1198,” Subseciva Groningana, Studies in Roman and Byzantine Law 8 (2009), 135–146. In 1198, Emperor Alexios III Angelos (r. 1195–1203) granted Venetian magistrates the right not only to settle disputes between Venetian nationals, but also to grant them the privilege to preside over mixed cases involving subjects of the empire and Venetian citizens, namely when the plaintiff is Byzantine and the defendant is Venetian. However, in cases of criminal law, the criterion of the severity of the crime determines the jurisdiction and venue. Cases involving homicide and severe wounding were brought ordinarily before the office of the logothetês tou dromou (acting as the “Minister of Foreign Affairs”), or other competent judicial authority in the absence of the former. For further details on the office of the logothetês tou dromou, consult the article of Dean A. Miller, “The Logothete of the Drome in the Middle Byzantine Period,” Byzantion 36 (1966), 438–470, especially 439. In reference to similar concessions that had already been awarded to Amalfi (1056), Genoa (1098), and Pisa (1110), see Julius I. Puente, “The Nature of the Consular Establishment,” University of Pennsylvania Law Review and American Law Register 78 (1930), 323–325; David Abulafia, “Pisan Commercial Colonies and Consulates in Twelfth-Century Sicily,” English Historical Review 93 (1978), 68–69. For later periods, consult Lucius E. Thayer, “The Capitulations of the Ottoman Empire and the Question of their Abrogation as It Affects the United States,” American Journal of International Law 17 (1923), 208–210; Soosa, “Origin of the Capitulations in the Ottoman Empire,” 362–363.

As a commercial agent, he held vast executive and judicial powers, and was charged with assisting, claiming, and defending the rights, status, and privileges of his fellow nationals before local authorities.¹⁹⁰ He was held responsible for their conduct, protected them and their properties from harm, assisted them in all matters at the customs house, granted special immunity to honorable nationals, ordered the arrest of sailors and fugitives, reported on foreign laws affecting his nationals, and met with the sultan once a month in order to foster friendly relations between states and to further develop commercial ties.¹⁹¹ Concerning the administration of justice, the consul represented his fellow compatriots before local courts, maintained discipline, adjudicated disputes arising among his own nationals, and enforced on his subjects his own nation’s rule of law, as well as that of the host country.¹⁹²

Prior to the establishment of the consular institution, churches – as monastic hospices – functioned as centers for foreign merchants trading far from home.¹⁹³ It appears that foreigners were not then able to adjudicate their controversies in accordance with customary practices and prescribed laws of their native countries, but had to submit to the ecclesiastical judicial system, as well as to local regulations and traditions.


However, with the formation of the consular post, which was made possible by the mutual agreement of both sovereigns, the custom of extraterritoriality became applicable to all persons of the same nation. Did the political entities of the Islamic Mediterranean thereby voluntarily give up their territorial sovereignty? Put another way, is the principle of extraterritoriality represented by the consul institution compatible or incompatible with Islamic law?

Islamic law rules that the rights and obligations of an individual are to be determined on the basis of personal religious law. Until the twelfth century, in places where dhimmis maintained their own religious identity and judicial autonomy, Christian and Jewish musta‘mins appear to have settled their controversies before ecclesiastical and rabbinical tribunals.194 However, once the consular post was founded, through international diplomatic and commercial treaties, sultans and rulers around the Islamic Mediterranean granted European governments – including the Crusaders – judicial privileges authorizing their consular representatives to extend their nations’ jurisdiction to merchants, passengers, masters of vessels, sailors, and others, be they nationals of the accrediting sovereign, or nationals of another state, or nationals of the admitting sovereign.195 A recalcitrant refusing to comply with the jurisdiction of the consul could instead be tried in the local court.196

Typically, Islamic law prevailed on Islamic soil when controversies arose among Muslim disputants, between Muslims and non-Muslims, or between Christians of different sovereigns.197 However, with the

195 Moukarzel, “Venetian Merchants,” 198–199; Puente, “Functions and Powers of the Foreign Consulate,” 70–73; Holt, Early Mamluk Diplomacy, 82: article 10 of the 682/1283 treaty concluded between al-Mansūr Qalāwūn and the Latin Kingdom states that “the Bailli (bailiff/king’s administrative representative) of the kingdom in Acre and the Masters shall have jurisdiction over their subjects who leave their territory as covered by this truce.” On reciprocal, “the Sultan and his son shall have jurisdiction over any of his subjects, of whatever religions and nations, who leave their territory”; Samir al-Khādim, Al-Sharq al-Īslāmī wa-l-Gharb al-Mašīḥī ‘abr al-‘Alāqāt bayna al-Mudūn al-Īlālīyā wa-Sharqiyy al-Baḥr al-Mutawassīt 1450–1517 (Beirut: Mu’assasat al-Rūhānī, 1989), 239, article 14 of the Florentine–Mamluk treaty of 894/1489.
197 Amari, Diplomi Arabi, 89, 102, article 9 of the 713/1313 treaty and article 10 of the 754/1353 treaty: “matā kāna khišām bayna Muslim wa-Naṣrānī aw bayna Naṣrānīyyayn, uṣūriyya ‘alā la-baqq’”; 172, article 5 of the 849/1443 treaty concluded between the Hafṣid amir Abū ‘Umar ‘Uṯmān ibn Muhammad al-Maṣūr and Pisa and Florence stipulates that any legal dispute arising with Muslims, or between these states’ subjects and other
The advent of the consul, cases involving subjects of different nations entailed further consideration. The judicial sovereignty of the consul depended on whether his fellow national was the plaintiff or defendant in a case. The 689/1290 treaty between al-Manṣūr Qalāwūn and Genoa ruled quite clearly that the Genoese consul was to preside over cases in which the plaintiff was a Muslim or a local Christian and the defendant was Genoese. By contrast, should the plaintiff be a subject of Genoa and the defendant a local resident, the case was to be heard in the customs house before the finance officer (milus).\(^{198}\) Clauses with an identical wording are inserted in the 713/1313,\(^{199}\) 754/1353, 800/1397,\(^{200}\) 817/1414,\(^{201}\) and 824/1421\(^{202}\) Ḥāfṣīd–Pisan treaties. These treaties provided that the Pisan Christian nationals shall be tried exclusively by ṣāḥib al-ḍiwa’in and no one may intervene in the matter. Concerning the eastern Islamic countries on the Mediterranean, article 26 of the 833/1430 Florentine–Mamluk treaty decrees: “When there is within the Florentine nation a dispute or quarrel, or one of them has a claim against another of his nation, no one of the viceroy or magistrates [Muslim officers] or merchants shall adjudicate between them except the consul of their nation according to their custom.” Constable, *Housing the Stranger*, 283; John Wansbrough, “A Mamluk Commercial Treaty Concluded with the Republic of Florence, 894/1489,” in *Documents from Islamic Chanceries*, ed. Samuel M. Stern (Oxford: Bruno Cassirer, 1965), 68. Article 5 of a letter (mukātāba) sent by Sultan Qaitbay (r. 872–901/1468–1496) to the Doge of Firenze in Jumāda II 7, 901/February 22, 1496 decrees that “where a litigation, a dispute, or an action for money and other things such as a Muslim against a Venetian, or a Venetian against a Muslim, the adjudication should be brought before the noble portals (al-Abwa’b al-Sharīfa/ high ranking aides of the sultan) if they happened to be in Cairo, or their viceroy, or chamberlain or officials of that province if they (disputants) happened to be in the frontiers.” Amari, *Diplomi Arabi*, 188–189; Wansbrough, “Venice and Florence in the Mamluk Commercial Privileges,” 499, 512, article 34 of the 902/1497 treaty between the Republic of Florence and the Mamluk sultan al-Nāṣir Muḥammad (r. 901–903/1496–1498) used identical wording; Frantz-Murphy, “Identity and Security in the Mediterranean World,” 254, 261, 264; Moukarzel, “Venetian Merchants,” 198–199; Victor O. Pita, “Commercial Litigation across Religious Borders: Rendering Justice for Valencian Merchants in Fifteenth-Century North Africa and Granada,” *Comparative Legal History* 5 (2017), 95, 100, 102–103; Louis Sicking, “Introduction: Maritime Conflict Management, Diplomacy and International Law, 1100–1800,” *Comparative Legal History* 5 (2017), 9–10; Rose, “Personal Status Laws among Christian Dhimmis,” 165–168; Cohen, “Defending Jewish Judicial Autonomy in the Islamic Middle Ages,” 14–17.\(^{199}\) Holt, *Early Mamluk Diplomacy*, 145; Pita, “Commercial Litigation across Religious Borders,” 100. Early fourteenth-century Catalan consuls in the Islamic West (Maghrib) could preside over mixed cases when the defendant was a fellow-national, whereas the plaintiff was a local or foreign Muslim.\(^{200}\) Amari, *Diplomi Arabi*, 94, article 34; 107, article 34 states that if a Muslim subject inflicts harm in a foreign territory party to the agreement, the plaintiff shall bring his lawsuit before the Elders and consuls “to do justice to him (insāf).”\(^{201}\) Amari, *Diplomi Arabi*, 127, article 5. Amari, *Diplomi Arabi*, 141, article 5.\(^{202}\) Amari, *Diplomi Arabi*, 155, article 5.
Consul preside over lawsuits engaging a Muslim and a Pisan party regarding controversies taking place in the territorial domain of Pisa. On the other hand, the same lawsuit was to be judged in accordance with Islamic Holy Law if arising in Hafṣīd territory. However, if the consul showed bias to one party over another, inflicted injustice on his fellow national or anyone else, or neglected his judicial duty, then the šāhib al-diwan was to usurp jurisdiction over the case. Put another way, if one of the litigants was not satisfied with the consul’s decision, he could appeal to the mazālim. Occasionally, some intercolonial lawsuits originating in Islamic territories ended up in the homeland courts of the disputants.

The consul enjoyed exclusive jurisdiction over his fellow compatriots in the host country. However, when cases involved multinational parties, the jurisdiction of the consul depended on whether his fellow national was the plaintiff or defendant. Should the plaintiff be a subject of a third state, the consul could not preside over the case unless this had been stipulated in the bilateral treaty establishing his authority. It was also outside the consul’s judicial capacity to preside over cases where the defendant was the subject of a third state, unless the stranger’s own government endorsed such judicial procedures. In such cases, the courts had to administer justice within a reasonable time. Ultimately, the consul’s sovereignty extended over vessels flying his sovereign’s flag, whether on the high seas or in ports, including over their crew and passengers – even if nationals of different states – their cargoes, wreckage, salvaged properties, and estates of the deceased.

203 Amari, Diplomi Arabi, 126, article 3; Christ, Venetian Merchants and Mamluk Officials, 54; Wansbrough, “Venice and Florence in the Mamluk Commercial Privileges,” 507, 522, article 31 of the 902/1497 Mamluk–Florentine treaty; Constable, Housing the Stranger, 283.


205 Amari, Diplomi Arabi, 94, article 36 (713/1313); 107, article 10 (754/1353); 127, article 5 (800/1397); Holt, Early Mamluk Diplomacy, 35, article 7 of the 665/1267 treaty concluded between al-Zahir Baybars and the Hospitallers); 115, article 13 of the 684/1285 treaty between al-Mansur Qalawun and the Lady Margaret of Tyre; 145, al-Manṣūr Qalāwūn–Genoa Treaty of 689/1290; Frantz-Murphy, “Identity and Security in the Mediterranean World,” 259.

206 Puente, “Functions and Powers of the Foreign Consulate,” 76–79; Constable, Housing the Stranger, 283. Small claims involving parties from different nationalities were generally brought before one of the consuls unless one of the parties chose to appeal to the Islamic courts.

As exclusive judicial authority vested in the consul for adjudicating disputes between his nationals, the Muslim judicial and civil authorities were reluctant to interfere in the consul’s judicial affairs. However, local tribunals could try cases of a commercial nature if foreign nationals of the same country had concluded their business deal on Islamic soil. Furthermore, musta’mins were entitled to appeal to higher local courts – or even the mazālim tribunal – if dissatisfied with their consul’s verdict. In sum, it appears that the significant degree of judicial autonomy enjoyed by foreign consuls in the Abode of Islam did not disturb the territorial integrity of the state nor affect its sovereign jurisdiction and the pluralistic legal system.

**SUMMARY**

The concept of extending the sovereignty of a coastal state over the maritime spaces off its coasts is not a modern notion, but derives from a long history that extends as far back as the dawn of ancient maritime civilizations. However, legal historians tend to date the doctrine of the territorial sea to late medieval Europe, associating its formulation with the rise of the feudal system and naval supremacy of Italian Communes. These historians are strongly inclined to regard the post-Glossators, who espoused the Roman *Corpus Juris Civilis*, as the first to institute the theoretical foundations of the relevant concept in their legal writings and commentaries, paying no heed to contemporaneous non-European practices around the heterogeneous Mediterranean world. This omission likely follows from that of distinguished legal theorists, such as Bartolus of Sassoferrato and his disciple Baldus de Ubaldis, who similarly fail to mention application of the doctrine of the territorial sea in non-European sovereigns in the Mediterranean Sea, starting from the second half of the seventh century. This lack of reference may be derived from a lack of awareness on the part of the jurists of similar practices in non-European maritime traditions, a lack of access to non-Roman legal writings, or an intentional overlooking of the role of non-Christian cultures in formulating this doctrine.

Early and classical jurists categorically divided the Abode of Islam into three geographical domains: the Haram, the Hijaz, and all other territories. Unlike any other place on Earth, Muslim jurists and theologians

attach sanctity to the Hijaz and its littoral, and forbid dhimmis and non-Muslim aliens from taking up permanent residence and exploiting the natural resources found there. However, non-Muslims are allowed to sojourn in the land, sail through the maritime domain, and carry on trade, provided that their stay does not extend beyond three nights in any given place. It seems that non-Muslims also enjoyed the right of transit passage through the Sea of Hijaz so long as good order, public peace, and sanctity of the holy sites were not infringed upon. Although the seaward breadth of the Hijazi territorial sea has never been specifically defined in units of measurement, its width extends from the shoreline of the mainland to the outermost points of the islands and islets off the Hijazi side of the Red Sea, and its length extends from northwestern Yemen to the coastal point parallel to Tabūk. Although Muslims claim exclusive de facto and de jure proprietorship over the Sea of Hijaz due to religious considerations, nonetheless, they never regard it as mare nostrum. Significantly, the proprietorial rights of Muslims over the Arabian side of the Red Sea, which rest solely on religious premises, have never been challenged, but rather are acknowledged by foreign powers. From the early years of Islam until the present day, Muslims have charged no tolls for passage through the Sea of Hijaz.

Pursuant to Qurʾān 20:9 and the Prophetic tradition that “every land has its appurtenance forbidden (to other than the proprietor),” each and every coast has its own harīm, conferring upon local residents priority rights to exploit marine natural resources off their coastlands. Even so, they may not impede the free use of offshore waters for navigation. In addition, harbīs equipped with amān pledges enjoyed the right of passage through maritime harīms of coastal settlements.

The need to protect coastal frontiers from intrusion, provide lodging for caravan traffic, and shelter imperiled vessels, including enemy warships in distress, made sailing in sight of the coast a fundamental factor inducing admirals and governing authorities to exercise sovereignty over limited offshore zones. Save for Idrīsī’s unique fixing of the maritime sovereignty of the coastal village of Bajānis at six miles (10 kilometers), the breadth of a territorial sea varies from one place to another due to topographical differences. Ships sailing within the maritime domain of a coastal city could be subject to inspection, and her crew and passengers

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209 Maqrīzī, Khīṭat, 1:49. During the Fatimid period, the Gulf of Aylah and the Gulf of Suez were an inseparable part of the internal waters of Egypt, over which Egypt held exclusive sovereignty.
States recognized each other’s exclusive rights in their adjoining seas through bilateral and multilateral commercial and diplomatic treaties. A sample of Islamic–Christian treaties concluded from the tenth to the early sixteenth centuries demonstrates that part of the neighboring sea can be subject to the exclusive dominion of a coastal state. As already pointed out, the treaties remain silent as to the seaward breadth of the offshore zone, leading to the assumption that each zone must have been uniquely determined according to the relevant range of vision. Within these narrow bands, states enjoyed absolute sovereignty over resources, mainly fisheries, wrecks, and salvage. They also had the right to regulate passage, protect commercial vessels from hostile and piratical raids, provide aid to distressed vessels, and grant them permission to obtain food supply and drink.

It can safely be deduced that the modern concept of the territorial sea is duly compatible with the Islamic tradition, given that its seaward breadth does not encroach upon the high sea and state sovereignty is limited to a breadth of several miles. Foreign commercial vessels, even those flying the flag of enemy countries, retain the right of innocent passage through territorial seas without the state levying charges upon them. The same right applies to passage through the straits located within the Abode of Islam. When exposed to force majeure or man-made dangers, the local ruling authorities should render assistance to any person or vessel. In the case of a shipwreck, the property cannot be considered derelict and the rightful owners or their heirs enjoy sole salvage rights to wrecks and their contents inasmuch as they do not voluntarily relinquish them. Implicitly, local residents, in the first place, and nationals, in the second, have exclusive rights to fish and exploit the natural resources within the territorial sea.

By contrast, the European doctrine – which was formulated by the post-Glossator commentators – associates sovereignty of the territorial sea with naval supremacy. Eminent Renaissance and early modern legal theorists such as Hugo Grotius (1583–1645), Samuel von Pufendorf (1632–1694), Cornelius van Bynkershoek (1673–1743), and Emer de Vattel (1714–1767) advocate that a coastal state can assert jurisdictional claims over a narrow maritime band adjacent to its coastlands provided that it does not extend beyond the sight of

210 Khalilieh, Islamic Maritime Law, 83–85.
land, a doctrine which is in line with the principle introduced by early and classical Muslim governing authorities, admirals, and jurists. Beyond the offshore maritime belt, the vast ocean/sea is viewed in Islamic jurisprudential, geographical, military literature, and international and interregional treaties and truces as *nullius territorm* as termed by Travers Twiss, being accessible to free navigation and the trade of all nations.

The absence of a formal international legal system never constituted an obstacle to the development of domestic and overseas transactions. On the contrary, domestic and overseas trade would not have prospered significantly had legal pluralism not existed. Until the rise of nation states in early Renaissance Europe, subjects of the Abode of Islam, at the very least, were identified by their own religion, each and every denomination having its independent legal system. The office of consul, which emerged at the beginning of the twelfth century, functioned as a judicial institution for subjects of the same nationality. Parties to a transaction always had the right to choose the application of a particular jurisdiction through contract; however, if they failed contractually to select the law, then the state law would become applicable. The local judicial authorities would then exercise the principle of territoriality over foreign actors if one of the litigants sought recourse to local courts. With the exception of family and personal related matters—marriage, divorce, inheritance, custody, adoption, slavery, and oath—and transactions that Islamic law does not recognize, which were almost exclusively handled by the denominational courts, *dhimmis* and *musta’mins* were entitled to appeal to Islamic courts on the condition that the lawsuit was not brought before the arbitration of the ecclesiastical or consular court. Nevertheless, recourse by minorities to the Islamic courts could stem from contractual obligations, personal and financial considerations, and enforcement of judgments. However, once the non-Muslim plaintiff and the defendant moved the case out of their denominational court of their own free will, they became subject


212 *Terra nullius* signifies a territory not belonging to any particular country.

ultimately to Islamic law. Similarly, Muslim minorities and colonies enjoyed comparable legal privileges in the Christian kingdoms along the Mediterranean Sea and the Indian Ocean littorals; minority communities were normally privileged to choose between two different tribunals, state or denomination. In both situations the principle of personality applied to all actors; this included dhimmis and musta’mins, to whom, in certain cases, the territoriality principle pertained.
Piracy and Its Legal Implications

DEFINITION

From the dawn of ancient seafaring, maritime piracy has continually undermined seaborne commerce, affecting shippers, shipowners, and carriers. Ever since it arose, the subject of piracy has preoccupied jurists around the globe. Roman jurisprudents deemed pirates “hostis humani generis (enemies of all mankind)”¹ and included piracy, along with fire and shipwreck, as the three cardinal adversities that could befall a vessel.² With reference to current legal discourse, article 101 of the United Nations Convention on the Law of the Sea (UNCLOS) (1982) defines piracy as follows:

(a) Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
   (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
   (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;

Definition

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Piracy is thereby defined as encompassing offences taking place on the high seas, outside the territorial sea of any state. This convention grants judicial rights that extend the sovereignty of a state over pirates if they are captured by its emissaries or citizens on the high seas. No reference is made to such attacks occurring on a territorial sea or within internal navigable waters. The International Maritime Bureau (IMB) articulates a broader definition of piracy: “An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in furtherance of that act.” Thus, irrespective of location, whether within or outside a state’s territorial jurisdiction, all acts of piracy are to be treated on an equal footing. The question here is – which of the two legal definitions is more compatible with Islamic law?

The most common colloquial Arabic word for maritime piracy is qarsana. Etymologically, this word derives from a mispronunciation of kursāliyya (corsair), a corrupt Arabic form of the Italian corsale (Old

3 Article 105 of UNCLOS refers to pirates operating within or from the territorial waters of a state, forbidding other states from pursuing pirates into the territorial sea of that state without its expressed permission. Therefore, the limits prescribed by article 101 aim to avoid legal and political chaos among present-day states and to enhance multilateral cooperation in combating piracy by leaving the coastal state responsible for fighting piracy within its maritime jurisdiction.


5 The two terms qursān and qarsana are explicitly stated in article 26 of the peace treaties (sulh) concluded between the Hafsid amir Abū Fāris ʿAbd al-ʿAzīz al-Mutawakkil (r. 797–838/1394–1434) and Pisa on Rabīʿ 1 23, 800/December 14, 1397; article 26 on Jumādā II, 817/September 1414; and article 26 of the treaty that the amir concluded with Pisa and Florence on Shawwal 7, 824/October 5, 1421. Similarly, the words qursān and qarsana appear in articles 8, 22, and 23 of the peace treaty signed between the Hafsid amir Abū ʿUmar ʿUthmān ibn Muhammad al-Mansūr (r. 840–893/1436–1488) and Pisa and Florence on Muḥarram 15, 849/April 23, 1445. Amari, Diplomi Arabi, 133–134, 147–149, 161–163, 173, 177.

6 Qalqashandī, Sulḥ al-Aʿshā, 14:74, 77, the 680/1281 Mamluk–Byzantine treaty concluded between al-Mansūr Qalāwūn and Michael VIII Palaeologus, article 11 of the
Italian corsaro), which itself stems from the medieval Latin cursārius, a derivative of the verb currō, meaning “to run.” Another term identifying pirates in international treaties is barāmiyyat al-babr (literally, “sea thieves or robbers”). The two terms kursāliyya and barāmiyya ostensibly appear synonymous. However, sophisticated international treaties drafted by experienced and learned scribes draw a clear distinction between kursāliyya (corsairs) and barāmiyya (thieves).

Jurisprudential inquiries, compendia, and official and private documents use different terms for highway robbery on land compared with that at sea, without drawing any distinctions on the basis of whether or not the crime includes homicide. Highway robbers are generally referred to as lusūṣ (sing. liṣṣ/thief). In order to distinguish such criminals from maritime robbers, the word babr (sea) was appended: lusūṣ al-babr. For

Arabic version of that treaty refers to licensed sea robbers as kursāliyya. Similarly, article 11 of the treaty of al-Manṣūr Qalāwūn with King Alfonso III of Aragon 689/1290 states: “Provided also that the King of Aragon shall not enable pirates (al-barāmiyya) or corsairs (al-kursāliyya).” Holt, Early Mamluk Diplomacy, 136; Hamāda, Al-Wathāʾ iq al-Siyāsiyya waʾl-Idāriyya lilʾ-ʾAsr al-Mamlūkī, 500; Nashshār, Ḭalāqat Mamlakatay Qishtāla wa-Aragon bi-Saltanat al-Mamlūk, 235.


Article 18 of the 682/1283 truce concluded between al-Manṣūr Qalāwūn with the baillī of the kingdom of Acre and its Masters stipulates that “pirates (barāmiyyat al-babr) shall not be enabled to obtain provisions or take on water from them (Crusaders).” Holt, Early Mamluk Diplomacy, 85; Peter M. Holt, “Qalāwūn’s Treaty with Acre in 1283,” English Historical Review 91 (1976), 807; Qalqashandī, Suhb al-Aʾshā, 8:125, 14:60 (kāšāliyyat al-babr).

Article 11 of the 689/1290 treaty between al-Manṣūr Qalāwūn and King Alfonso III of Aragon states: “Provided also that the King of Aragon shall not enable pirates (al-barāmiyya) or corsairs (al-kursāliyya) to obtain provisions or take on water from his territory.” Legally, the kursāliyya were officially licensed corsairs/privateers whose sponsoring state/s shared the prizes with them. The barāmiyya, on the other hand, operated outside the law, launching their attacks indiscriminately against domestic and foreign targets. Consult Holt, Early Mamluk Diplomacy, 136. An earlier reference to kursāliyya is mentioned in article 11 of the 680/1281 Mamluk–Byzantine treaty. Holt, Early Mamluk Diplomacy, 124; Hamāda, Al-Wathāʾ iq al-Siyāsiyya waʾl-Idāriyya lilʾ-ʾAsr al-Mamlūkī, 512; Nashshār, Ḭalāqat Mamlakatay Qishtāla wa-Aragon bi-Saltanat al-Mamlūk, 235.


pirates on the Indian Ocean and the eastern seas, the terms bawārij al-Hunūd (pirate ships of the Indians),12 bawārij al-Hind (pirate ships of India) are given, 13 which along with lusīṣ al-bawārij (buccaneers),14 are the most frequently cited terms in classical primary sources. The bawārij (sing. bārija) first meant “pirate ships,” but in time became synonymous with pirates.15 Similarly, letters of merchants found in the Cairo Geniza call them aškāb al-shawānī (sailors of the shīnīs).16

Making no distinction in terms of category between land and sea, the Qurʾān refers implicitly to piracy alternatively as qaṭʾ al-sabil (cutting the highway/highway robbery),17 hirāba (brigandage), and fasād (disturbing peace and spreading evil on earth). In one instance, the latter two terms

12 Kindī, Muṣānna, 11:158–164; Alpers, Indian Ocean, 66.
15 Agius, Classic Ships of Islam, 328–329; Averbuch, “From Siraf to Sumatra,” 157–158, 168, 182. It is reported that the pirates’ raids were not confined to ships, but also extended to coastal targets. Muqaddasī writes: “The island of Usqutrah [Socotra] rises like a tower in the dark sea; it is a refuge for the pirates, who are the terror of sailing ships in these parts; and not till the island is cleared do they cease to be a cause of fear.” Muqaddasī, Absān al-Taqāṣīm, 14. Shīnī, shiniyya, or shānī is the model for the Byzantine dromon. It is a type of Islamic galley or warship used in the Mediterranean with a watchtower placed next to the main sail; it is propelled by lateen sails—originally two and later three—and oars, and can carry up to 165 sailors. Vassilios Christides, “Shīnī, Shiniyya, Shānī,” in Encyclopaedia of Islam, 2nd ed., ed. P. Bearman et al. (Brill Online, 2012) http://referenceworks.brillonline.com/entries/encyclopedia-of-islam-2/shini-shiniyya-shan SIM-6949.
17 Amari, Diplomi Arabi, 193–195, sections 11 and 13 of sultan Qāirībāy’s (r. 872–901/1468–1496) letter to the Doge of Florence (Jumādā II 7, 901/February 22, 1496) refers to piracy as “qaṭʾ al-tāriq (sea highway robbery)”; Schacht, Introduction to Islamic Law, 9, 175, 180. Most often commentators and jurists used the term qaṭʾ al-tāriq, which is equivalent to qaṭʾ al-sabil.
appear in the same verse and context. Qur’an 29:29 decrying those who openly and publicly “cut[ting] the highway” (taqta’ān al-sabil) and commit horrible crimes such that they fear neither shame nor God. It states:

Q 29:29:
Do ye indeed approach men, and cut off the highway? And practice wickedness (even) in your councils? But his people gave no answer but this: They said: Bring us the Wrath of God if thou tellest the truth (29)

Armed robbery and the penalties for it are addressed thoroughly in the verse of Hirāba in the Chapter of Al-Mā‘īda (The Table, Q 5),18 which states:

Q 5:33–34:
The punishment of those who wage war (yubāribūna) against God and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter (33) Except for those who repent before they fall into your Power: in that case, know that God is Oft-forgiving, Most Merciful (34)

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18 Al-Mā‘īda is the only Qur’anic Chapter revealed in two different cities. Most of its verses were revealed in Medina, whereas the remainder was revealed in Mecca shortly after the Prophet’s Farewell Pilgrimage on Dhū al-Hijja 9, 10 AH/March 6, 632 CE. The final revelations of the Qur’an coincided with the establishment of the Islamic State by the Prophet Muhammad: “This day I have perfected your religion for you, completed my favor upon you, and I have chosen for you Islam as your religion” (Qur’an 5:3). All of Al-Mā‘īda’s verses revolve around the principles of lawful (halāl) and forbidden (haram) deeds in worldly life with reference to (a) food, drink, and slaughter; (b) family and marriage; (c) faith and expiations (kaffārāt/repentance for an unlawful act); (d) principles of worship, verdicts, judiciary rules, testimonies, and the realization of justice; and (e) organizing Muslim relations with other religions, namely with the Jews and Christians. This chapter urges Muslims to be kind to their wives, to the weak, and to all mankind: “...help ye one another in righteousness and piety, but help ye not one another in sin and rancour” (Qur’an 5:2). It is the only sura in the Qur’an that includes the five Islamic legal intents: the protection of religion (Q 5:54), soul (Q 5:32), mind (Q 5:90), honor (Q 5:5), and money (Q 5:38).
Classical exegetical traditions provide six distinctive commentaries on *Hirāba*, with the overwhelming majority arguing that the intended subject is highway robbery. Etymologically, the term *yubāribūn*, as it appears in the original Qur’ānic text, is the present progressive of *bāraba*, derived from the root *b.r.b.* meaning “to contend or wage war.” *Harb* (pl. *burūb*) means “war,” “fight,” and “battle.” *Harāba* indicates the wealth or property despoiled or plundered, as well as “forcible theft,” “highway robbery,” “brigandage,” and “banditry,” all involving the use of a deadly weapon. The *mubārib* (pl. *muhāribūn* or *barrābala* troop of plunderers) is a person whose life is protected prior to committing *hirāba*, whether Muslim or *dhimmī*, free or a slave, who brandishes a weapon, disturbs free passage on the street and commits robbery, dispossession of property, murder, and intimidation, rendering it unsafe for people to travel.

In interpreting the Qur’ānic excerpt: “الذين يحاربون اللَّه ورسوله” (those who wage war *(yuhāribūna)* against God),” one should consider the metaphorical meaning of the words rather than the literal and metaphysical senses alone. Humankind stands powerless before God and is incapable of fighting Him physically. Man can, however, violate or disobey Divine Revelations by spreading *fasād*, by infringing the Divine and worldly rights of others, including those of his own coreligionists. For

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19 Exegetes hold different positions, alternatively associating this verse’s revelation with: (a) the People of the Book (Jews and Christians), who had concluded a truce but then abrogated it, causing the spread of corruption on earth; (b) Banū Hilāl, who broke their covenant with the Prophet; (c) the punishment to be inflicted on unrepentant idolaters defeated in battle; (d) the Children of Israel; (e) the Hārūrīyya (Khārijites); and (f) highway robbery. Khāled Abou el-Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001), 49–51.


22 Qur’ān 18:29: “وَوَلَّى المَعْلُوْمَ مِن رَبِّكَ فَهْلَا فَلْتَفْيِدُوْمُ وِمَنْ شَاهَ فَلْيَكْفُرْ إِنَّا أَعْقِدَنا لِلظَّالِمِينَ نَارًا” (Say, ‘The Truth is from your Lord; let him who will believe, and let him who will reject (it), for the wrongdoers We have prepared a Fire).”
brigandage, evildoers shall be tried in this life and in the Hereafter, and the earth will testify against them.\(^{23}\)

Derivatives of the term \textit{f.s.d.} (corruption/disorder) occur fifty times in the Qur\’ān, including twice in \textit{Al-Mā‘ida}. In order that they may avoid committing mischief and disruption, Muslims are ordered to obey God’s commands and to maintain high moral standards, ethics, religious values, and norms of behavior.\(^{24}\) They are required, inter alia, to fight against those who wage war against humanity – who seek to spread mischief on earth and destabilize society.

Close examination of the term \textit{fasād} in the Qur\’ān reveals that this act can take many forms to encompass: committing disobedience, vices, and forbidden deeds,\(^{25}\) causing the destruction of nations,\(^{26}\) harming the environment resulting in a loss of water and a decrease in cultivated fields,\(^{27}\) practicing magic,\(^{28}\) taking lives,\(^{29}\) and perpetrating highway robbery against innocent victims. As already noted, the Qur\’ān associates mischief with the \textit{bīrāba}, phrasing both terms in one verse for the same purpose: “those who wage war (\textit{yukāribūn}) against God and His Messenger, and strive with might and main for mischief through the land (\textit{wa-yas‘awna fi al-arḍī fasādan}).” A further link of mischief to brigandage appears in the immediately preceding verse:

<table>
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<tr>
<th>Q 5:32:</th>
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<tr>
<td>if anyone slew a person – unless it be for murder or for spreading mischief in the land – it would be as if he slew the whole people</td>
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\(^{23}\) For whatever a person has done in his life on earth, he is accountable before God. In addition to the traditional commentaries on Qur\’ān 99 (\textit{Al-Zalzala}/The Earthquake) some commentators say that the earth will cast out her treasures, precious minerals, and every kind of wealth lying hidden in her belly and man will see it and realize how he thirsted for these things in the world. The earth will testify against every evildoer who committed murder, theft, piracy, usurped the rights of others, waged war, or devastated populations. On that Day all that will lie heaped up before him, yet of no avail, but will rather become a means of punishment for him.

\(^{24}\) Qur\’ān 28:77: (but do thou good, as God has been good to thee, and seek not (occasions for) mischief in the land: for God loves not those who do mischief.” A sound Prophetic tradition narrated by al-Bukhārī, Muslim, al-Nisā‘ī, and Ahmad states: “There is a \textit{sadaqa} (charity) due on every Muslim; if he cannot give because he has no money, let him work then he can support himself and give charity; if he is unable to work, then let him help someone in need of his help; if he does not do that, let him adjoin good; if he does not do that, then he should not do evil or harm others: it will be written for him as a \textit{sadaqa}.” Bukhārī, \textit{Sahih}, 2:524, hadith no. 1376.

\(^{25}\) Qur\’ān 2:11, 60; Q 7:56, 74, 85; Q 47:22. \(^{26}\) Qur\’ān 17:4; Q 21:22; Q 23:71. \(^{27}\) Qur\’ān 30:41. \(^{28}\) Qur\’ān 10:81. \(^{29}\) Qur\’ān 7:127; Q 40:26; Q 18:94.
Q 2:205: When he turns his back, his aim everywhere is to spread mischief through the earth and destroy crops and progeny. But Allah loveth not mischief.

Thus, birāba, fasād, and qatʿ al-tarīq (sabil in the Qurʾān) can all be defined as privately motivated armed robbery directed against innocent commercial vessels, their contents, crews, and passengers, and against coastal installations and targets, thereby posing a threat to the public peace for the sole purpose of looting movable property for private gain. As robbers who roam various bodies of water to spread evil and cause corruption (fasād) on the earth, muḥāribūn can be seafarers, passengers, or organized brigands from the Abode of Islam, who commit forcible theft within or outside Islamic territorial jurisdiction, on land or at sea.30 Ibn Rushd’s/Averroës’s (520–595/1126–1198) legal definition of birāba, which considers all legal opinions of the founders of the four main Islamic Law Schools (madhāhib), provides conclusive evidence of Sharīʿah applying banditry law to piracy at sea. He writes:

They agreed that birāba is a show of armed force and the obstruction of the highways outside the city. They disagreed about the brigands inside the city. Mālik said that they are the same inside and outside the city. Al-Shāfiʿī stipulated power (shauka), though he did not stipulate numbers. The meaning of shauka, according to him, is the strength to overpower, because of which he stipulated remoteness from settlements, as overpowering is usually from outside the settlements. Likewise, al-Shāfiʿī maintained that if (the political) authority weakens and domination by another is found in the city, it amounts to muḥāraba. In cases other than this, according to him, it amounts to misappropriation. Abū Ḥanīfa said that muḥāraba does not take place within a city.31


From the discussion above it can be deduced that a pirate is simply a “maritime muhārib.” To be labeled a “maritime muhārib,” the perpetrator must be a subject of the Abode of Islam, a Muslim subject of a foreign territory, or a dhimmī, who commits armed robbery indiscriminately against innocent targets on the high seas, or at coastal installations, or in inland waters – ports, rivers, and artificial waterways. A mustaʿmin found guilty of maritime ḥirāba bears a different legal status from that of domestic actor, although jurists hold diverse opinions on this matter.32 The term “innocent targets” refers to private movable and immovable property owned by Muslims, dhimmīs, mustaʿmins, and subjects of those states who hold treaties with central or peripheral Islamic authorities, or are the subjects of states not at war with the Abode of Islam.33 “Combating highway robbers is a religious duty,” says imam Mālik,34 who goes on to explain:

Combating (highway robbers) is the best type of religious duty (jihad) and the most rewarding . . . more preferable to me than launching religious war against the Byzantines. The Prophet, God’s blessing and peace be upon him, said: Whoever is killed defending his wealth is a martyr. Therefore, if someone is killed defending his own and/or Muslims’ wealth, he will be granted a greater reward.35

Unless a perpetrator of piracy repents prior to arrest, those penalties prescribed in the Qurʾān for forcible theft must be enforced. A muhārib must be pursued by the authorities, whether he travels on board ship, rides on horseback, or resides in a port, an impregnable bastion, or an unreachable area. Consider a case in which a muhārib sought refuge in a Byzantine castle, which was under siege by Muslims, and then the occupants asked for safe-conduct (aḥān). The jurists decreed that, except for the muhārib,

33 Ibn Rushd (al-Jadd), Al-Bayān waʾl-Tabsīl, 16:373; Ibn Rushd (Averroës), Bidāyat al-Mujtahid, 4:2279–2280; Burzulī, Jāmiʿ Masāʾ il al-Aḥkām, 6:174–176; Haykal, Al-Jihād waʾl-Qītāl, 73; Mahmood Kooria, “An Abode of Islam under a Hindu King: Circuitous Imagination of Kingdoms among Muslims of Sixteenth-Century Malabar,” Journal of Indian Ocean World Studies (2017), 97–98. In his Qaṣīdat al-Jihādīyya (Poem in Praise of Jihad), Muḥy al-Dīn Māla denounces piracy and warns his fellow Muslim warriors, who participated in the war against the Portuguese, not to engage in sea robbery, which stands in contradiction with the Qurʾānic principles. A legal opinion attributed to him states that when drinking water is scarce, it should be given to animals rather than to pirates.
all of the occupants of the castle were eligible for *amān*. It was considered invalid for an army commander to grant *amān* to a *muḥārib* as it would contradict the Divine ordained laws of God duly prescribed in the Qur’ān. The jurists further added that, even if the armed robbery were committed to collect money to redeem Muslim captives, the punishment should nevertheless be carried out because God alone, not a sultan, an *imām*, or other earthly authority, is empowered to revoke the right of protection from theft.

A pirate is therefore a *muḥārib* who commits armed robbery and spreads evil, and violates the “primordial order and logic existence” set by the Divine Text. Islamic jurisprudence defines a pirate as a predator who targets: (a) subjects of the Abode of Islam – Muslims and *dhimmīs* and their movable properties regardless of their either fixed or varying locations; (b) *mustaʿmins*, holders of a pledge of safe-conduct; (c) subjects of states that are parties to treaties with the Abode of Islam; (d) subjects of states not at war with the Abode of Islam. If an attack does not fall within any of these categories, then it may be assumed that it does not constitute piracy. Even so, this issue remains controversial among contemporary legal scholars. What one group regards as piracy others may view as a legally justified raid. Furthermore, unlike the law of medieval Europe, Islamic law makes no categorical distinction between piracy and privateering.

39 Medieval Europe knew two forms of sea robbery, piracy and privateering, although the two terms have occasionally been used interchangeably. Practically, both terms delineate marine rovers and prizetakers overtly employing threats and violent means to deprive by force their victims of their personal valuables and mercantile commodities, at times also seizing vessels and passengers, at sea, on coasts or on rivers. Theoretically, the two differences between piracy and privateering rest on legitimacy and the division of looted movable property. Pirates operated fully outside the law and solely for their own personal profit, as well as choosing targets indiscriminately, irrespective of religious or ethnic affiliations or maritime venue. By contrast, privateers were raiders commissioned by a sovereign state according to its laws. This sort of commission was known in medieval Europe as a “letter of marque (letter of reprisal).” It was a legal instrument by which a private individual injured by a foreign power or its subjects was authorized to retaliate for his loss. Privateers could pass beyond the state’s frontiers to retaliate for damage done to individuals and domestic commercial vessels and cargo. Concerning a domestic search, a *letter of marque* did not empower a privateer to exceed the authority granted him, except under certain circumstances. Irene B. Katele, “Piracy and the Venetian State: The Dilemma of Maritime Defense in the Fourteenth Century,” *Speculum* 63 (1988),
PIRACY AND THE MISCONCEPTION OF MARITIME JIHAD

A group of Western scholars maintains that independent groups of Muslim pirates randomly organized and undertook many of the major Islamic naval expeditions in the Mediterranean world. Certain of these scholars have further emphasized this viewpoint by describing the Islamic Mediterranean territories as having been a haven for pirates. In doing so, scholars have confused the concept of birāba (piracy/robbery of sea highways) with jihād (striving “in the Cause of God”), ghazw (military expedition), and qīṭāl (military engagement). It is possible that this misconception arose out of a number of factors, including prejudice, an exclusive reliance on non-Arabic sources, a misunderstanding of Arabic terms denoting piracy, a misinterpretation of the relevant Qur’ānic verses.


For example, the reader’s attention is drawn to the publication of an article by Travis Bruce, “Piracy as Statecraft: The Mediterranean Policies of the Fifth/Eleventh-Century Taifa of Dénia,” Al-Masaq 22 (2010), 235–248. Bruce attempts to portray the governor of Dénia and Majorca and founder of the Ṣamarrahid dynasty, Muḥammad ibn Yūsuf ibn ’Alī al-Ṣamarrahid (349/960–1044), as a sponsor of piracy in the western basin of the Mediterranean in the fifth/eleventh century, claiming, “Both Latin and Arabic sources emphasize [Dénia’s] practice of piracy on a grand scale” (p. 238). The author relies heavily on modern Western scholarship and overlooks primary Arabic sources as well as the pioneering and classical work of Clelia Sarnelli Cerqua, Muḥammad al-Ṣamarrahid: Seeraub im Mittelmeerraum: Piraterie, Korsarentum und maritime Gewalt von der Antike bis zur Neuzeit, ed. Mihran Dabag et al. (Brussels: Ferdinand Schöningh, 2013), 204–205.
and Prophetic traditions, and a lack of familiarity with the exegetical literature and jurisprudential inquiries.

While the issue of *jihad* is beyond the current scope, a clarification of the doctrine of maritime *jihad* may allow amelioration of any confusion and misconception regarding the misinterpretation of *jihad* at sea as piracy. The root *j.b.d.* and cognate words occur forty-one times in the Qur’an and can be expressed in personal, verbal, and physical forms. This root frequently appears in the idiomatic expression “striving (*jihad*) in the Cause of God.” Suffice to say that the Qur’an sets forth in detail clear objectives and benefits of *jihad*, directly stating that it does not encompass causing harm to innocent people, even if during a fight against the Abode of War, or the enforcing of Islamic conversion by coercive means.

Notably, hundreds of transmitted hadiths detail the virtues of *jihad*. Those hadiths that are related to military maritime *jihad* and *ghazw*

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42 A hadith attributed to the Prophet Muhammad states: “The best *jihād* (struggle) is (by) the one who struggles against his own soul for the sake of God.” Ibn Ḥajar al-ʿAṣqalānī, *Fatḥ al-Bārī, 2:5*, hadith no. 2630: “Struggle against the soul (*jihād al-nafs*)” is the most virtuous form of *jihād* and falls under the greater (inner) struggle (*al-jihād al-kabīr*) by which one must struggle between the two competing powers of evil and good desires. He who fails in this struggle will be consigned to the legions of the devil. In nine out of forty-one Qur’ānic verses that mention *jihād* in some form, it is specified that Muslims who sincerely strive in the Path of God must sacrifice two beloved things, life/soul (*nafs*) and a portion of their wealth (*māl*). No Muslim is superior to one who properly and earnestly fulfills the duty of *jihād*. Qur’an 4:95; Q 6:11; Q 9:20, 41, 44, 81, 88; Q 8:72; Q 49:15.


44 This idiomatic expression appears in twenty-six of forty-one Qur’ānic verses in which derivatives of the word *j.b.d.* appear. A Latin equivalent to the Islamic *jihād* is *bellum sanctum* (holy war/crusade), a term that emerged in medieval Europe with the advent of the Crusaders. However, neither the Qurʾān nor the Prophetic tradition mentions the term “*harb muqaddasa* (holy war).” The affiliation of *jihād* with holy war is a Western misconception and mistranslation.

45 Qur’an 5:8.

46 Qur’an 2:236.

47 For instance, *Ṣaḥīḥ al-Bukhārī* consists of 282 hadiths under the title of *jihād*, whereas *Ṣaḥīḥ Muslim* consists of 220 on the same topic.
emphasize the merits of naval campaigns and the Divine rewards granted to those who survive them, or suffer from seasickness, or die “in the Cause of God.”\(^{48}\) Obviously, God alone knows the inner intentions of fighters as they join up for naval expeditions. One Prophetic tradition asserts:

> Whoever participates in a military expedition at sea in God’s Cause, and God knows better who really strives for His Cause (\(\text{wa-Allāh a’lam bi-man yujāhidu fi sabīlihi}\)), is like a person who has fully subjugated himself and made himself obedient to God, searched for himself the Paradise from everywhere, and sought refuge for himself from the punishment of the Hell-fire.\(^{49}\)

Every \(\text{mujāhid}\) must comply with military discipline and the laws of war as established by the Qur’ān,\(^{50}\) Sunna, military command, and juristic and governmental authorities. He is required to perform his duty in the best possible manner by refraining from committing evil acts such as shedding blood, plundering, destroying public or private property, or acting independently to achieve personal worldly goals. Violation of these laws and regulations warrants the application of Islamic penal laws,\(^{51}\) such as for the crime of armed highway robbery committed in a foreign territory, whether on land or at sea.

Close examination of the hadith literature affirms without the slightest doubt that there is not even a single Prophetic hadith, whether \(\text{sahīh}\) (sound/authentic), \(\text{ḥasan}\) (good), or even \(\text{da’īf}\) (weak), that relates highway robbery to \(\text{jihad}\). Rather, the Qur’ān and hadith employ the term \(\text{jihad}\) to denote striving “in the Path of God,” along with \(\text{ghazw}\) and \(\text{qital}\), all of which are generally conjoined to the phrase “in the Cause of God.” Furthermore, the two foremost sources of Islamic law, the Qur’ān and the Sunna, never use the word \(\text{h.r.b.}\) and its derivatives to designate fighting “in the Path of God.” In the four Qur’ānic verses where it does appear, \(\text{harb}\) has no bearing on the concept of \(\text{jihad}\).\(^{52}\) Therefore, someone who engages in a religious war is normally referred to as \(\text{mujāhid}\), and less


\(^{49}\) Abū al-‘Qāsim Sulaymān ibn Ahmad ibn Ayyūb al-Ṭabarānī, \(\text{Al-Mu’jam al-Kabīr}\) (Mosul: Maktubat al-‘Ulm wa’l-Ḥikam, 1404/1983), 18:54; Mundhīrī, \(\text{Al-Targhīb wa’l-Tarhib}\), 2:199.

\(^{50}\) Qur’ān 4:59:

\(\text{yā ʿamūnī ʾa’dhā ṣīhū ʾaṭīfiyū ḥannā ʾaṭīfiyū rāʾāsū ʿawāli ʾal-amr ṣīhū}^\text{‘a(h)}\) (O ye who believe! Obey God and obey the Messenger and those charged with authority among you)."

\(^{51}\) Khadduri, \(\text{Islamic Law of Nations}\), 95–105; Haykal, \(\text{Al-Jihād wa’l-Qitāl}\), 1095–1108.

\(^{52}\) Qur’ān 2:279; Q 5:64; Q 8:57; Q 47:4.
frequently as *muqātil* (fighter) or *ghāzī* (raider), but certainly never as *muhārib*, a term bearing the connotation of evil, mischief, and treachery.

After clarifying the meanings attributed to *jihad* and *mujāhid*, it is prudent to discuss the legal significance of the word “pirate” in Islamic jurisprudence. Of foremost importance, Islamic penal law does not differentiate between criminal acts committed on land and at sea. When jurists encountered acts of piracy with no legal precedent, they simply applied land laws to the sea. On many occasions the jurists issued rulings solely on the basis of analogy (*qiyaṣ*), comparing a ship to a camel, and carriage by sea to carriage on land.\(^{53}\) Similarly, in cases of forcible theft at sea, jurists depended on drawing analogies to laws governing land *hirāba*.\(^{54}\)

Given, then, that there is a clear distinction between *jihad* and *hirāba*, how were Muslim maritime adventurers portrayed by Byzantine hagiographies and European historical sources? A plausible answer is provided in the erudite article by Vassilios Christides, in which a differentiation is made between maritime *jihad*, violence, and piracy during the Byzantine–Islamic struggles for supremacy over the Mediterranean. Christides contests that the series of Arab raids that took place in the eastern Mediterranean from the middle of the seventh through until the eleventh century were not razzias who launched their campaigns to plunder, but instead the raids constituted acts of naval warfare between two naval powers. The fact that contemporary European academics consider the naval activities of Muslims to be “aimless sea raids” with no purpose other than to plunder is both prejudiced and without foundation.\(^{55}\) With the conquest of Crete and the establishment of the Arab emirate on the island, trade relations and activities between Byzantium and the Muslim world were strengthened. Equipped with *amān* pledges, a large number of Byzantine and Islamic commercial vessels reciprocally frequented each other’s ports.\(^{56}\) For the purpose of maintaining commercial ties and unhindered business transactions with the Abode of War, the Cretan Arabs rarely carried out attacks against Byzantine merchant vessels on the high seas.\(^{57}\) Coastal installations and maritime trade were affected and exposed to violence only during times of warfare.\(^{58}\) On the basis of the sporadic historical data presented here, the labelling of Muslim naval


\(^{56}\) Christides, “Piracy, Privateering and Maritime Violent Actions,” 203.

\(^{57}\) Christides, “Piracy, Privateering and Maritime Violent Actions,” 204–205.

activities by Byzantine hagiographical sources as acts of piracy and privateering is a “false accusation” and “should be taken into consideration with special care.” From the early twelfth century onward, Muslim–Christian commercial and diplomatic treaties contained provisions aimed not only at combating and reducing piracy and enhancing overseas trade, but also at empowering the contracting parties to prosecute offenders and pirates, irrespective of their religious and national affiliations, as shall be discussed.

**MARITIME VENUES AND FACTORS FOSTERING PIRACY**

Despite maintaining exclusive dominance over the two semienclosed inland seas, the Red Sea and the Persian Gulf, and the coastal frontiers along the Arabian and the Mediterranean seas, neither the central nor provincial Islamic authorities ever claimed to have wiped out the threat of piracy within their littoral and maritime sovereignty. Organized groups and independent communities of marauders never ceased to rove over the various bodies of water, including navigable rivers, arteries, and artificial waterways, or to target coastal ports, anchorages, settlements.

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64 Agius, *Classic Ships of Islam*, 328–329; Wink, *Al-Hind*, 3:111. The *bawārij* (pirate ships) of Sind planted fear in the hearts of people such that the residents of the Islamic coastal frontiers were on constant alert. The *bawaaris* sailed up the Red Sea to the ports of Jeddah (for Mecca) and al-Jār (for Medina), harassing shippers and pilgrims and posing an immediate threat to the two holiest cities of Islam.
or vital sea-lanes in the quest of booty, paying no heed to explicit Divine prohibitions and the severe penalties meted out for forcible theft.

Piracy prospered as the Islamic world fragmented politically into a number of smaller self-ruling dynasties. Local dynasties, former army commanders, and organized groups took advantage of the auspicious political climate to declare autonomy and independence from central governments. Another factor fostering piracy, no less important than political instability, was the proliferation of maritime venues where piracy was conducted. Pirates normally operated in rich and busy shipping lanes, in the vicinity of ports, offshore routes, and vital straits, and rarely operated far out to sea. A third key criterion for fostering piracy was socioethnic affiliation. Organized groups of pirates broadly shared the same cultural heritage, values, beliefs, social norms, and language.

The separation into territories for security reasons of the sea region contiguous to the shores was common practice among garrison commanders and governors of the Islamic coastal provinces. However, with the growth of coastal and port cities, the expansion of trade, and the fragmentation of the empire especially from the tenth century onward, the territorialisaton of adjacent waters and remote sea-lanes by independent and autonomous local principalities also became a major instrument of fiscal policy. In the middle of the eleventh century, Jabbāra ibn Mukhtar


66 Prange, “Trade of No Dishonor,” 1270.
67 Prange, “Trade of No Dishonor,” 1291–1292.
68 Prange, “Trade of No Dishonor,” 1273.
69 Ḥimyārī, Al-Rauḍ al-Miḥfīr, 80; Abbās, “Iṭṭiḥād al-Bahrīyyīn ʾfi Bahjānā,” 3–14; Sālim and Abbādī, Tārikh al-Bahrīyya al-ʿIslāmīyya fi ʾl-Maghrib waʾl-Andalus, 167–171; Muṣṭafā Ahmad, Al-Qābāʾ il-ʿArabīyya ʾfi al-Andalus ḫattā Suqīṭ al-Khiṭāf al-
al-ʿArabī, the governor of Barqa (Libya), became perhaps one of the most notorious “privateers” (in European judicial terms) in the history of the Islamic Mediterranean.\(^\text{70}\)

Strange as it may seem, maritime predation was common in the semi-enclosed seas located in the heart of the Islamic East. Neither the sanctity of the Hijaz nor Divine prohibition against forcible theft were sufficient deterrents to predators,\(^\text{71}\) who were indiscriminately targeting convoys of pilgrims, shippers, carriers, and voyagers sailing in all regions of the Red Sea, including the territorial sea of the Hijaz. As the sole artery for East–West maritime trade, through which vast quantities of lucrative manufactured products and spices flowed to and from the Mediterranean world, the Red Sea was littered with pirate communities, especially the islands and coasts across the Strait of Bab el-Mandeb.\(^\text{72}\)

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\(^\text{70}\) Goitein, *Mediterranean Society*, 1:327–328, docs. TS 16.13v, ll. 22–24; Bodl. MS Heb. a3 (Cat. 2873), f. 26v, l. 28; Ben-Sasson, *Jews of Sicily*, 350–358; Khalilieh, *Islamic Maritime Law*, 72. In addition to his engagement in the shipping business between Barqa and Tunisia, he levied a heavy tribute (*ghifāra*) on nonresident shipowners, shippers, and sea voyagers, irrespective of their nationality, ethnicity, and religious allegiances, and served as protector against the forcible theft he engendered, but not necessarily against other pirates lurking along the coastal strip between the two port cities. Thus, for people willing to pay tribute, the governor served as a protector against potential violence from him, but not always against that threatened by others.

\(^\text{71}\) In addition to the two holy cities of Mecca and Medina and sanctuaries located therein, the Hijaz comprises territory extending from the Gulf of ʿAqabah to Jazān, in northwestern Yemen, as well as the maritime zone adjacent to the land. Khaleda A. Yaseen, “Mawqif al-Rasūl min Yahūd al-Hijāz,” (master’s thesis, An-Najah National University, Nablus, 2009), 21–26. The Sea of Hijaz is legally viewed as part of the sanctity of the region so that non-Muslims can sail through it, but they are not allowed to sojourn for longer than three nights, or to take up residence. This sanctity inspires the question: If the *ʿibrām* (state of ritual purity) of a Muslim pilgrim traveling by sea is to be performed once his ship enters the Sea of Hijaz, how could Muslim pirates apparently overlook this sanctity? Did their pursuit of an easy profit so surpass the relevant human and religious values? On the sanctity of the Sea of Hijaz consult al-Shāfiʿī, *Al-Umm*, 4:187–188; for the English translation, see Chapter 2, 107–109.

\(^\text{72}\) For instance, over the two-and-a-half centuries of the sultanate of Dahlak only a handful of its rulers seemed to have sponsored piracy. However, archeological remains reveal that the Sultan Bahāʾ al-Dīn Abū al-Fādīl al-Mālik ibn Yahyā ibn Abī al-Sadād (d. 567/1172) was known to have “acquired the unenviable reputation of a pirate.” Margariti, “Mercantile
In summary, in their pursuit of easy profits, pirates recognized no territorial restrictions, nor religious prohibitions, nor mercy. They lurked in busy shipping lanes, in the vicinity of ports, on inland rivers and waterways, and even in the territorial sea of the Hijaz, despite its sanctity to all Muslims. Organizationally and communally, these pirates shared common social, ethnic, and religious affiliations.

**METHODS EMPLOYED TO COMBAT AND REDUCE PIRACY**

In response to the question as to why central and provincial governments must combat highway robbery and maritime piracy, the celebrated philosopher and ethnologist Ibn Khaldün (732–808/1332–1406) explains in his classic *Muqaddimah*:

It should be known that attacks on people’s property remove the incentive to acquire and gain property. People, then, become of the opinion that the purpose and ultimate destiny of (acquiring property) is to have it taken away from them. When the incentive to acquire and obtain property is gone, people no longer make efforts to acquire any. The extent and degree to which property rights are infringed upon determines the extent and degree to which the efforts of the subjects to acquire property slacken. When attacks (on property) are extensive and general, extending to all means of making a livelihood, business inactivity, too, becomes (general), because the general extent of (such attacks upon property) means a general destruction of the incentive (to do business). If the attacks upon property are but light, the stoppage of gainful activity is correspondingly slight. Civilization and its well-being as well as business prosperity depend on productivity and people’s efforts in all directions in their own interest and profit.
When people no longer do business in order to make a living, and when they cease all gainful activity, the business of civilization slumps and everything decays. People scatter everywhere in search of sustenance, to places outside the jurisdiction of their present government. The population of the particular region becomes light. The settlements there become empty. The cities lie in ruins. The disintegration of (civilization) causes the disintegration of the status of dynasty and ruler, because (their peculiar status) constitutes the form of civilization and the form necessarily decays when its matter (in this case, civilization) decays.73

In addition to the physical and psychological effects on victims of highway robbery and piracy, Ibn Khaldūn emphasizes the direct destructive impact on domestic and global commerce and the disruption of social norms and public peace, which, in turn, could trigger the decay of civilization. Ibn Khaldūn also suggests that these negative impacts can certainly be curtailed if people defend themselves against them “according to both the religious and the political law.”74 He goes on to add that a highway robber’s greatest asset “is merely an ability to cause fear,” which facilitates his usurping of the property of others.75 In other words, Ibn Khaldūn claims that the fear planted by pirates in the hearts of seafarers, entrepreneurs, travelers, and coastal communities can undoubtedly be contained. People can – and should – protect themselves on an individual and communal level and involve the political authorities in any effort to combat and reduce piracy.

**Individual and Communal Initiatives**

**Vigilance**

As does its Christian counterpart, Islamic law forbids its followers from taking the risk of setting sail during inclement weather or in perilous conditions of security, such as when enemies and pirates are lurking en route, as the “Prophet has ordained against risk-taking.”76 Neither captains nor venturers may divert the course of a ship toward a known pirate-infested region. A fundamental point of law arises here as to the liability of a party to a contract who insists upon taking risks and departs when conditions are not safe. A shipowner is held liable for any losses if he, or

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the captain, jeopardizes the vessel and her contents by sailing in risky situations despite the protests from apprehensive passengers. Equally, if the voyagers and shippers are adamant that they set sail in the face of a tangible threat of pirate attack, then they must bear the financial losses incurred by the shipowner if pirates do in fact seize the vessel. However, if a vessel is exposed to a pirate attack while docked, the captain can justifiably exercise jurisdiction over the craft and her contents. The captain is authorized by both custom and law to sail without delay in order to save the property of passengers and lessee merchants. Anyone who had disembarked and was abandoned by the captain may attempt to file suit, but such a complaint would bear no validity if the captain had acted reasonably in response to an emergency situation. The shipowner is held liable for losses only when acting independently without obtaining the consent of shippers and voyagers so long as there had been sufficient time for proper consultation. Therefore, by law, it is better to risk a little profit by delaying departure or even missing the season of navigation, rather than lose a whole ship with her contents, crew, and passengers. As the Danish proverb says, “better lose the anchor than the whole ship.”

**Bribery and Extortion of Tribute**

Paying tribute in return for sailing unmolested through certain shipping lanes provided another means of reducing piracy, even though such tributes were deemed to be submission to “protectors,” which could both directly and indirectly foster further piracy. Such arrangements indeed stand in diametric opposition to Islamic principles even if undertaken by shippers, merchants, and shipowners on personal or communal levels. The Mālikī jurist ʿAbd al-Malik ibn Ḥabīb emphatically forbade the payment of tribute to highway robbers, even an insignificant amount.

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Paying tribute “will be considered a sign of weakness, submissiveness of Islam, and uncertainty regarding the validity of the religious principles.”

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Despite this explicit prohibition, financial and commercial considerations seem to have adapted to the callous reality dictated by pirate communities. Records from the Cairo Geniza reveal that shippers and shipowners unwillingly overlooked the law and paid protection tribute as a necessary means for conducting commerce. This capitulation meant that their cargoes and ships were left alone, so the number of piracy victims was reduced. The privateer Jabbar ibn Mukhtar al-Arabi offered his protection services for a heavy tribute levied on travelers, shippers, and shipowners when sailing in coastal waters between the port cities of Barqa and Tunis. Both parties to a contract of carriage had to bear protection expenses, which might be referred to as “regional protection,” or “sea/ocean regionalism,” as termed by Lauren Benton.

“Regional protection” services provided by local pirate communities were also well known to the shipping industry in the eastern seas. For example, in the interest of Jewish merchants, the head of the Jewish communities in Yemen (raʾis al-yahūd or nagīd, in Hebrew) – one of the most powerful juridical dioceses of the time – known as “the trustee of all lords of the sea and the deserts,” concluded agreements with sovereigns of maritime domains, including pirates, so that his coreligionists and their cargo ships traveled unmolested. He also negotiated with tribal chiefs along the southern Arabian coast, and perhaps along the

79 Ibn Abū Zayd al-Qayrawānī, Al-Nawādir waʾl-Ziyādat, 14:474.


81 Goitein, Mediterranean Society, 1:327–328, docs. TS 16.13v, ll. 22–24; Bodl. MS Heb. a3 (Cat. 2873), f. 26v, l. 28; Ben-Sasson, Jews of Sicily, 350–358; Khalilieh, Islamic Maritime Law, 72; Khalilieh, Admiralty and Maritime Laws, 109–110; Gil, In the Kingdom of Ishmael, 3:169 [354], TS K 2.32, i, l. 4. In a lengthy account from 1055, Barhun ben Musa Tahertī makes a clear distinction between the freightage and protection: “He had to pay for the freightage and protection in order to sail (from Sfax) for al-Mahdiyya (waʾalayhi mâ yalramahu kiraʾ wa-ghifara īlā al-Mahdiyya)”; 4:86 [629], TS 8 J 26, f. 4r, l. 18: “deducting the freightage, protection, and brokerage”; 4:171–172, TS 16.13, ll. 22–24. The writer Haim ben ʿAmmār Madīnī (i.e., of Palermo) reports to Joseph ben Musa Tahertī of selling two of his own bales of flax to pay tribute to the Jabbar ibn Mukhtar and save the remaining shipment.

Hijaz route, in whose territory caravans, Jews, and their goods travelled.  

**Defensive Measures**

“How similar today is to yesterday,” says the Arabic maxim. In spite of sophisticated technologies, the 86th Session of the International Maritime Organization’s (IMO) Maritime Safety Committee (2009) advises shipping companies to employ on vessels the services of licensed armed security officers and to seek a military escort when traversing pirate-infested waters. These two defensive methods have been used by seafarers since the dawn of maritime civilization.

**Armed Personnel and Naval Escorts**

While this issue has been explored in detail in an earlier study, it is useful to touch briefly upon some key points. Ships sailed in concert for mutual assistance to safeguard against natural or human perils. Carriers and shippers generally had to find their own means of protection. Almost all able-bodied men carried personal arms when on board ship, ready to defend themselves and their wealth against imminent threat. To ensure greater security, lessors commonly hired the services of professional warriors known in sailors’ jargon as “maritime warriors (‘asākir al-bahriyya)” or “ships’ warriors (‘asākir al-marākib).” Referring to Arab merchant

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87 Kindî, *Muṣannaf*, 18:55–56. In the absence of armed personnel, the sailors were required to defend the ship against assaults by enemies and pirates.

vessels sailing in sight of the Omani coast, al-Muqaddāsī reports that they all “are compelled to carry for protection a body of fighting men and throwers of naphtha (a flammable liquid mixture of hydrocarbons).”

Naturally, defending a ship against piratical raids was in the common interest of all consignees and passengers.

The most effective, yet costly, instrument of deterrence was naval escort, hired to convey convoys of merchant vessels on treacherous sea highways. Tangible evidence of such use of armed protection is documented in a 1025 CE merchant letter:

The ships, my lord, are in the last stage of preparations. Not a single soldier charged with their protection has remained on land. They have already loaded their water and provisions and are waiting now for the completion of the warships; they will set it afloat and sail, and the boats (of the merchants) will sail with (the soldiers). The day after the writing of this letter the galleys (qaṭāʾ i’) will be set afloat, for today they have completed their repair.

Naval escorts were used in this way in the eastern seas. For instance, the Rasūlīd dynasty (626–858/1229–1454) of Yemen provided naval galleys and guards known as galley escorts and crossbow bearers (ghilmaʾn al-shawāni waʾl-jarrākhiyya) to escort ships sailing on the trunk routes between Aden and western India. Frequently, shipowners, shippers,

89 Muqaddāsī, Aḥsan al-Taqāsīm, 12; Abū ʿAbd Allāh Muhammad ibn ʿAbd Allāh ibn Battūta, Travels in Asia and Africa, trans. and selected H. A. R. Gibb (London: Broadway House, 1929), 229–230. It should be pointed out that neither the Rhodian Sea Law, nor the Kitāb Akriyat al-Sufūn, nor early fatāwā inquiries include articles demanding that shipowners provide armed protection against pirates and hostile raids, although Byzantine and Muslim jurists warn in their digests and legal literature against sailing in pirate-infested waters. By hiring onboard armed guards, vessels aimed to achieve a safer environment and to attract shippers, although documentary evidence shows that both shippers and voyagers had to pay extra fees for this service. Khalilieh, Admiralty and Maritime Laws, 124; Nāji, “Mawāniʾ al-Khali̇j al-ʿArabi b waʾl-Jazīra al-ʿArabiyya,” 177; Ibn Battūta, Ṣiblat Ibn Batṭūta, 563–564, the vessel he travelled on carried fifty archers and fifty Abyssinian warriors to protect them from Hindu pirates and infidels at sea; Marco Polo, The Travels of Marco Polo, trans. John Frampton (New York: Macmillan, 1937), 115–116; Risso, Merchants and Faith, 52–53; Edward A. Alpers, “Piracy and Indian Ocean,” Journal of African Development 13 (2011), 19–21; Alpers, Indian Ocean, 66–67; Agius, Classic Ships of Islam, 233–236.


91 Goitein, Letters, 312, doc. TS 13 J 17, f. 3.

and travelers took the initiative and hired private mercenaries to protect themselves and their shipments against piracy.\(^93\)

In response to the relentless raids of pirates on Kārimī merchant vessels, the Fatimids assembled a flotilla at the naval base of ʿAydhāb for escorting commercial vessels and preventing acts of piracy.\(^94\) Al-Qalqashandī (756–821/1355–1418) writes:

The Fatimids deployed a flotilla of warships at the naval base of ʿAydhāb to escort and protect the Kārimī commercial vessels traversing the sea lanes between ʿAydhāb, Sawākin, and the surrounding areas, against pirate communities lurking in some islands and attacking these vessels in the Qulzum (Red) Sea. The flotilla which at the beginning consisted of five warships decreased to three. The governor of Qūṣ or some other courtier who was in charge of the flotilla, had to provide it with armaments and provisions for this purpose.\(^95\)

By all accounts, with the advent of escorting missions, those engaged in maritime commerce enjoyed safer voyages. Naval escorts may indeed have been the most efficient method of defense against piracy, significantly contributing to a steady flow of East–West and interprovincial maritime commerce.\(^96\) Some treaties concluded between the Mamluks and the Crusader kingdoms contain clauses imposing upon both parties the obligation to escort vessels and assure their security, free of any charge, when entering and leaving the territories of the treaty parties.\(^97\)

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\(^{93}\) Goitein and Friedman, *India Traders*, 475. Sometimes paying an additional fee to the lessor does not necessarily guarantee the safety of travelers and shipments against piratical attacks. This is what is reflected in a business letter written around 1145 CE from Mangalore, India, by a Jewish merchant called Maḥrūz ibn Jacob al-ʿAdanī to his master Abū Zikrī Kohen, which describes how the soldiers escorting merchant vessels stood helpless against the seizure of a ship by pirates: “(9) I wish to inform you, my lord, that I had previously written to you (10) at Tāna. Meanwhile, the boat escorting the ship arrived, (11) and its soldiers told us that the ship (12) in which your excellency, my lord, traveled had been seized by pirates, (13) and I was very sad about this”; Prange, “Contested Sea,” 20–24.


\(^{95}\) Qalqashandī, *Ṣubḥ al-ʿAṣāh*, 3:524.


\(^{97}\) Holt, *Early Mamluk Diplomacy*, 53, article 9 of the treaty concluded between al-Zāhir and the Hospitallers 669/1271; 86, article 21 of al-Mansūr Qalāwūn’s treaty with the Latin Kingdom of Acre, 682/1283; 99, article 4 of al-Mansūr Qalāwūn’s treaty with King
Coastal Surveillance, Protection, and Refuge

Even though the Romans physically dominated the Mediterranean Sea to a far greater degree than any other state in antiquity, they certainly had no love for the sea. Their dominion consisted largely of territorial management, with imperial troops and flotillas posted at close distances along the shoreline as a preemptive measure against piracy. To maintain their dominion over the sea, the Romans forbade local inhabitants from assembling their own fleets, and over time succeeded in wiping out piracy in nearly all Mediterranean waters, with the exception of the far western region. With piracy largely disappearing from the Mediterranean, trade routes became safe. Pirates could not sail from or land on Roman soil garrisoned by imperial squadrons and naval warriors, who together fought any approaching pirate ships.98

It is of note that Muslims employed a similar defensive approach known as *ribâṭ* or *murábâta*, to protect coastal frontiers, thwart intrusions, provide lodging for caravan traffic, and shelter imperiled vessels.99 The Abbasid Caliphate in the East erected watchtowers and lighthouses along the shores as guides for ships and to secure maritime routes.100 The Persian poet, theologian, philosopher, and traveler Naṣīr-ī Khosraw (395–481/1004–1088) describes the architectural features and purposes of the watchtowers situated between Başra and ʿAbādān:

At dawn something like a small bird could be seen on the sea. The closer we approached, the larger it appeared. When it was about one *parasang* to our left,101

Leon III of Lesser Armenia, 684/1285; 116, article 20 of the treaty that the same sultan signed with Lady Margaret of Tyre, 684/1285; “Qalāwūn’s Treaty with Acre in 1283,” 811.


101 The *parasang* or *farsakh* is a measure of distance used in the eastern provinces of the Caliphate. It was regarded as the equivalent of three miles, as used in the former Byzantine provinces. The mile, of four-thousand cubits, is estimated at about two kilometers.
an adverse wind came up so they dropped anchor and took down the sail. I asked what that thing was and was told that it was called a “khashshāb” (stockades). It consisted of four enormous wooden posts made of teak and was shaped something like a war machine, squarish, wide at the base and narrow at the top. It was about forty ells above the surface of the water and had tile and stone on top held together by wood so as to form a kind of ceiling. On top of that were four arched openings where a sentinel could be stationed. Some said this khashshāb had been constructed by a rich merchant, others that a king had it made. It served two functions: first, that area was being silted and the sea consequently becoming shallow so that if a large ship chanced to pass, it would strike the bottom. At night lamps encased in glass (so that the wind would not blow them out) were lit for people to see from afar and take precaution, since there was no possibility of rescue. Second, one could know the extent of the land and, if there were thieves, steer a ship away. When the khashshāb was no longer visible, another one of the same shape came into view; but this one did not have the watchtower on top, as though it had not been finished.102

Ribāts and mihrāses (watchtowers) functioned as observation points for ships sailing off the Islamic coastal frontiers. In a Geniza letter written in late June or early July in the 1060s, a consignor names merchant vessels commuting between Egypt and the Maghrib and identifies the observation points from which they were sighted.103 In addition to functioning as places of refuge from potential threats, certain observations accommodated vessels for rest, minor repairs, and taking on basic supplies such as food and

102 Nasīr-ī Khosraw, Book of Travels (Safarnāma), 96; Duggan and Akçay, “On the Missing Navigational Markers,” 420. Describing the stockades (khashhabāt) near the port city of Basra, Muqaddasī reports: “This is by far the greatest evil, a strait and a shallow combined. Here small huts have been erected on palm trunks set in the sea, and people stationed therein to keep a fine lighted at night, as a warning to ships to steer clear of this shallow place.” Muqaddasī, Abśan al-Taqāṣim, 12. Similar regulations were in force in Roman law. The Justinian Digest warns provincial governors against hindering coastal navigation and warns them to secure the coastal trunk routes and prevent fishermen from showing lights at night, which might mislead seafarers and endanger a ship with her cargo. Scott (ed.), Civil Law, 10:305, Digest XLVII, 9, 10.

103 Udovitch, “Time, the Sea and Society,” 542–543: “From these letters which I have received and from the passengers on the barge [that has just arrived], it has been confirmed that the following ships have safely moved farther from the coast: Ibn al-Iskander, Ibn Labad, al-Qādī Bū Ṭālib, al-Mufaddal, the vessel of Ibn Madhkūr, the vessel of al-Tarājima and that of al-Jījlānī; … the barge of al-Ghazzāl was sighted at Suḥat Barqa; at Hirāṣat al-Qādī, the ships of Sādaqā ibn al-Sāfrāwī, Ibn Rahmān and Ibn al-ʿUḍī [were sighted] at Raʿaʾs Tīn, the ships of ʿAbd ibn Shīblūn and al-Zaffār were sighted. At Shaqqāt al-Wāʾr, to the west of Tobruk, the ships of al-Lakkī, al-Mursī and Ibn Shābih [were sighted]. The second ship of Ibn Madhkūr and those of Ibn al-Shubnī and ʿAbbās Ashnas, and the vessel of Amīr and of Ibn Abū Qashsh were sighted at Milhā.”
water. Furthermore, regardless of whether a ribāṭ was a state-run or private establishment, it was subject to the jurisdiction of the state. Formally, the admiral’s jurisdiction extended over the length of the coastal frontiers and territorial waters; he was responsible for managing the security arrangements and reinforcing the coasts with an array of fortresses and watchtowers. Garrisons stationed at ribāṭs were instructed to assist and shelter commercial ships sailing by cabotage when encountering hostile threat or suffering damage, including alien vessels that had entered the Abode of Islam under amān.

Bilateral treaties and truces concluded between Islamic and Christian entities contained provisions on the need of merchant vessels to seek shelter from pirates in foreign coastal fortresses. Each party to an agreement gave an assurance that whenever ships sought refuge from pirates in any coastal fortress and port, its garrisoned forces and occupants would provide assistance and attempt to repel the pirates. In order to avoid troublesome incidents, the parties to a treaty guaranteed that when ships approached and departed their maritime domain, the local naval forces would be obliged to escort foreign ships and assure their safety since pirate ships tended to lurk near busy ports. Both parties also pledged to bring captured native and foreign pirates to justice.

**International Collaboration**

Treaties addressing piracy invariably addressed both the domestic and international dimensions. On the domestic level, insofar as a crime of

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106 Wansharīsī, Al-Mīʿār, 8:207–208. A responsum attributed to the Sicilian jurist Muḥammad ibn Ṭal al-Māzarī illustrates how a shipowner, acting as a tractator (labor-investor), was forced to seek protection in an Islamic ḥiṣn/ribāṭ due to an unanticipated hostile attack.
107 For example, article 15 of Qalāwūn’s treaty with the Latin Kingdom of Acre in 682/1283 requires garrisons in the Latin and Islamic frontiers to protect and guard wrecked vessels, enable the crew to have provisions, repair the wreck, and return the vessel to its territory. Holt, Early Mamluk Diplomacy, 84; Holt, “Qalāwūn’s Treaty with Acre in 1283,” 811. Similar conditions were stipulated in bilateral treaties concluded between North African Islamic entities and their European Christian counterparts. See, for instance, article 7 of the treaty of 14/9/1313 between Pisa and the Hāfṣid sultan Abū Yahyā Zakariyyā ibn Yahyā al-Lihānī. Amari, Diplomi Arabi, 89.
piracy was committed within the territorial sovereignty of a state or the victims were its nationals in foreign or international waters, the state bore the natural right to prosecute the offenders. However, legal challenges and jurisdictional issues potentially could arise in the following scenarios: (a) the pirates were subjects of state A, conducted a raid on their conationalists or coreligionists and fled or sought refuge in state B, which was either in a state of peace (ṣulḥ), temporary truce (ḥudna), or at war (ḥarb) with state A; or (b) the act of piracy involved multinational parties, for instance, pirates of state A attacked nationals of state B then fled to state C, which had a peace treaty with A, but was in state of war or temporary truce with state B.

International maritime trade could not have prospered without the legal framework for combating piracy provided by diplomatic and commercial treaties. Islamic–Christian treaties and correspondence show that both societies abided by these treaties and protected foreign nationals against piracy within their own territories, as well as guaranteed the safety and restitution of any redeemed people or chattels plundered by pirates, as these people were their subjects regardless of where the incidents occurred. The parties to the treaties also committed to preventing pirates of all nationalities from anchoring in or departing from their territorial domains, as well as from obtaining provisions. If Muslim or Christian captives were found on their ships, then the authorities must release them and prosecute the thieves. However, the contracting


109 Holt, *Early Mamluk Diplomacy*, 124–125, article 11. Identical rules were incorporated in the Byzantine–Genoese treaties from the twelfth century. The Treaty of Nymphæum from March 13, 1261 concluded between Michael VIII Palæologus and Genoa dictated that the empire is under an obligation to protect Genoese vessels and nationals against piracy and prosecute pirates according to the law if caught in Byzantine waters. The same emperor ratified another treaty with Genoa in 1272 holding the Genoese podestà (chief magistrate of the city-state) liable for damage caused by Genoese pirates to Byzantine nationals at sea. If the culprit was not caught, the Genoese authority had to undertake an investigation and pay reparation to the victim from the aggressor’s property. In the case that the Genoese podestà fails to take measures against the Genoese pirates, the emperor would apply collective liability against the Genoese merchant community in Constantinople. Such a practice of reprisal was adopted by independent and autonomous principalities across the Mediterranean. Daphne Penna, “Piracy and Reprisal in Byzantine Waters: Resolving a Maritime Conflict between Byzantines and Genoese at the End of the Twelfth Century,” *Comparative Legal History* 5 (2017), 42, 48–49; Sicking, “Maritime Conflict Management,” 7.
parties did not take responsibility for piratical actions committed by foreign nationals on the high seas.\textsuperscript{110}

The peace treaty (\textit{sulb}) concluded between the Ḥafṣīd amīr Abū Fāris ʿAbd al-ʿAzīz ibn Aḥmad and Pisa deserves special mention. It was initially signed as a bilateral treaty between the Ḥafṣīds of Tunis and Pisa in Rabī’ I 23, 800/December 14, 1397 and renewed in Jumādā I, 817/September, 1414, with Florence being added to make the treaty multilateral on Shawwal 7, 824/October 5, 1421. Article 26 reads:

If a vessel departs from Pisa or its territories for causing harm and committing robberies against the Muslims, the Pisan authorities shall have to capture the vessel, execute the robbers, and take away their chattels, if they happened to be in Pisa or its territories, and be handed over to the custom-house (in Tunis). However, if they cannot catch the robbers, the Pisans will only have to deliver the chattels to the mentioned custom-house. If the ships of the esteemed Caliph in the lofty Tunis are equipped for pursuing pirates, the Pisans shall likewise have to outfit theirs with arms, provide assistance, and sail with their naval force wherever they are instructed for the duration of the whole pursuit. If a Pisan or any person living within Pisa’s territory equips his vessel with arms, he shall cause no harm whatsoever to Tunisian Muslim subjects or others residing within the Caliph’s dominion. Similarly, a Muslim traveler departing from the lofty capital (Tunis) or other territory of the caliphate shall not be harmed by any Pisan. And, if a Pisan enemy arrives in the port of the lofty capital (of Tunis) or any territory within the caliphate’s domain, those Pisans residing in the lofty capital are required to assist Muslims and get together with them to fight their enemy. When Muslims travel for the Pisan territories as they habitually do, they all shall be guaranteed protection for their souls, chattels, and vessels; they, likewise, shall be protected and honored in all of their matters and affairs.\textsuperscript{111}

This multilateral treaty was extended in 849/1445, appending an article holding the governments of both Communes liable for losses resulting from corsairs who were either nationals or else had departed from their sovereign territories for committing “evil purposes” against Muslim subjects and territories. Article 8 of the same treaty dictates:

If any of their vessels departs from their cities or provinces for evil purposes against Muslims, or enters one of the Islamic anchorages/ports with the intent of mischievous acts, they (Florence and Pisa) have to capture all men on board the vessel, deprive them of their rights, and execute them. If they (Florentines and


\textsuperscript{111} Amari, \textit{Diplomi Arabi}, 132–133, 147–149, 161–163.
Pisans) neither find the corsairs nor being able to reach them, they have to confiscate their properties and deliver the restitution to the lofty capital, Tunis.\textsuperscript{112}

Perhaps one of the most interesting issues is the integration of provisions authorizing the parties to the agreement to pursue pirates into the territorial waters of another contracting state. Article 3 of the 849/1445 treaty stipulates that if an Islamic vessel pursues a Christian vessel – whose flag state is not party to the treaty – into the territorial and internal waters of either one of the two city-states, such pursuit shall face no interference. By the same token, the Hafṣids authorize both city-states to chase enemies and pirates into Islamic territorial seas and internal waters.\textsuperscript{113}

Clearly, in the absence of a universal legal regime to prevent disorder at sea, political entities employed diplomatic mechanisms to enforce bilateral and multilateral treaty terms on nationals and subjects of foreign sovereigns. According to the treaties, state members were held liable for the piratical actions of their subjects, and occasionally of foreign nationals, if committed at sea or against coastal targets of other parties. Furthermore, the state was responsible for restituting the injured party regardless of whether the corsairs were captured or still at large. When caught, pirates were to be brought to justice by judicial authorities and put to death.\textsuperscript{114} Notably, their long-standing and oft-renewed treaty commanded Pisans and Florentines found on Islamic soil to fit out their vessels, join local naval forces, and pursue and fight their corsair nationals “for the duration of the whole pursuit,” had they targeted Islamic maritime installations and properties. Likewise, Pisa was bound to protect Muslim subjects against local corsairs within their territories,\textsuperscript{115} and prevent the sale of stolen goods captured by pirates on its territories.\textsuperscript{116}

That we do not find a similar commitment to combatting piracy in other treaties and truces concluded with Islamic sovereigns can be explained by three factors: (a) the explicit Qur’ānic prohibition against legitimizing brigandage; (b) the safety of foreigners and their chattels was

\textsuperscript{112} Amari, \textit{Diplomi Arabi}, 172–173. \textsuperscript{113} Amari, \textit{Diplomi Arabi}, 172.
\textsuperscript{115} Amari, \textit{Diplomi Arabi}, 324.
\textsuperscript{116} Amari, \textit{Diplomi Arabi}, 94, treaty of 1313, article 35; 107, treaty of 1353, article 35. In order to target the income sources of pirates and discourage their actions, article 22 of the 1445 treaty stipulates that a buyer who purchases a vessel that was known to have engaged in piracy must pay a tax of 10 percent of her purchase price. Amari, \textit{Diplomi Arabi}, 177.
already embodied in the pledge of *amān*; and (c) European piracy was probably far more threatening than the Islamic in the Mediterranean arena, especially during times when most of the European Mediterranean political entities fostered the so-called privateering.117

The sea was not a lawless domain, as some academics appear to assume.118 Combating piracy in the pre-Renaissance era was made possible by a complex of continental and intercontinental treaties. Certainly, Islamic law was territorially enforced on limited offshore zones for security purposes (except for the Hijaz), and on Muslim subjects, their assets, and their vessels, irrespective of geographical location, national affiliation, and the ethnic origin of passengers and crew.

**Military Subjugation**

Only as a last resort did Muslim central governments tend to use military might to subjugate pirates’ dens and eradicate piracy from vital sea-lanes. Two incidents in early Islamic history deserve our attention – the Abyssinian and the Sindhi piratical attacks in the seventh and eighth centuries CE. With reference to the former, it was reported that during the reign of the third caliph ʿUthmān ibn ʿAffān (r. 23–35/644–656), Abyssinian sea robbers attacked Islamic targets on the Red Sea, robbing and enslaving many Muslims. The caliph was profoundly disturbed and consulted some of the Companions about launching a counterattack against Abyssinia. The Companions advised him to be patient and withhold any punitive military campaign until learning from the Abyssinian

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117 A remarkable piece of evidence is found in a 689/1290 treaty, renewed in 692/1293. Concluded by Alfonso III the Liberal of Aragon and al-Mansūr Qalāwūn, this treaty was signed at a time when Muslim naval forces had weakened in the Mediterranean arena, but had flourished in the Syro-Palestinian littoral. European naval powers, privateers, and pirates infested the waters of the eastern basin of the Mediterranean and created a hostile environment for domestic and international trade, which harmed the Mamluk economy. For that reason, it was in the Mamluks’ interest to sign and renew the treaty, in which the Catalans pledged to prevent raids on Islamic vessels, fight piracy, and bring sea robbers to justice irrespective of their national affiliation. Most Europeans expressed great disdain for the two treaties, which lifted the papal embargo on trade with the Mamluks and enabled both political entities to cooperate closely on counter-piracy. Holt, *Early Mamluk Diplomacy*, 136; Albrecht Fuess, “Rotting Ships and Razed Harbors: The Naval Policy of the Mamluks,” *Mamluk Studies Review* 5 (2001), 61–62.

118 Nicholas M. Rodger, “The Naval Service of the Cinque Ports,” *English Historical Review* 111 (1996), 646: “The word piracy has to be applied with caution in the medieval context, when the sea was widely perceived as a lawless realm beyond the frontiers of all nations, where neither law nor truce nor treaty ran.”
king about the circumstances that had motivated the pirates. If he learned
that the assault had been executed in compliance with the king’s instruc-
tions, then the Muslims could launch a military expedition against
Abyssinia. If the caliph were able to establish with certainty that the
king was unaware of that assault and its circumstances, the caliph should
relinquish the military expedition and prepare to reinforce coastal fron-
tiers against future attacks. The caliph sent Muhammad ibn Maslama al-
Anṣārī (d. 43/663),119 a Companion of the Prophet, to the Abyssinian
king, who vigorously denied having any awareness of the assault. He
further denounced the raid and ordered his men to bring him the
Muslim captives and deliver them to the caliph’s envoy.120

Another extraordinary event was the military expansion in Sind
(Sindh). Islam spread throughout the western region of the Indian sub-
continent in part due to perpetual pirate attacks against commercial
vessels sailing off the coasts. Al-Balādhurī (d. 297/892) relates the follow-
ing revealing tale. The king of Ceylon wanted to send by sea the orphaned
daugthers and widows of some Muslim merchants – who had died in
Ceylon – back to their homeland. He wrote a message to al-Hājjāj ibn
Yūsuf al-Thaqafī, then the Umayyad governor of Iraq, informing him that
he was sending the girls and women home by ship. The ship was captured
by Indian pirates operating off the shores of Debal and the orphaned girls
and widowed women were captured. When the news reached al-Hājjāj, he
became infuriated and sent for Dāhir, the king of Sind, demanding that he
set the captives free immediately. The latter mocked al-Hājjāj’s request
and refused to release them, claiming he had no control over pirates at sea.
Enraged by the king’s refusal, al-Hājjāj appealed to Caliph al-Walīd ibn
‘Abd al-Malik, who reluctantly sanctioned a military expedition against
Sind. After two defeats, on the third attempt in 92/711, under the com-
mand of Muhammad ibn al-Qāsim al-Thaqafī, al-Hājjāj’s nephew and
son-in-law, the Islamic fleet succeeded in subjugating the pirates and
capturing the western territories of the Indian subcontinent as an addi-
tional prize.121

Four subtle legal insights can be gleaned from these incidents. First,
hostile acts involving international actors required the parties concerned

120 Abū Muhammad Ahmad ibn A’tam al-Kūfī, Kitāb al-Futūh (Beirut: Dār al-Adwāʾ lil-
to undertake a thorough investigation before states could launch reprisals with possibly irreparable consequences. Second, in order to avoid unnecessary escalation, central and provincial governments were strongly advised to dispatch emissaries to resolve such issues peacefully. Third, the state was only held responsible for actions committed by its nationals if it had been proven without doubt that the state had been aware of its nationals’ nefarious acts. Finally, historically, Muslims resorted to military force for combating piracy only when all other means had failed.

PUNISHMENT

*Sharīʿah* identifies seven major offences that call for severe punishment in the earthly life and the Hereafter: (a) highway robbery/piracy (*muhāraba*) and spreading malevolence and disorder (*fāsād*); (b) murder and injury; (c) theft; (d) adultery; (e) false accusation of immorality (*qadhf*); (f) apostasy (*ridda*); and (g) sedition (*baghy*). Of interest here are the worldly punishments for the crimes of *hīrāba* and *fāsād* as mentioned in Qurʾān 5:33, which have at times been deemed applicable to all highway robbery and piracy regardless of the gender, age, socioeconomic status, or political, ethnic, or religious allegiance of the actors. However, the great majority of exegetes and jurists argued that this verse is subject to various interpretations, thereby raising two fundamental questions. First, shall punishments be applied indiscriminately to all spectrums of society? Second, is there any relationship between the seriousness of the crime and the severity of the punishment?

To clarify, the jurists stipulated that culpability for an armed robbery or piracy could only legally be established by meeting the following legal requirements. The offender must be an adult and sane, the legal qualifications to stand trial. The judge must determine that the offender acted voluntarily and knowledgeably, and had in his possession the lethal weapons used to commit the armed robbery. An additional criterion is *mujāhara* – the brigandage was committed in public and overtly challenged the system of justice. Another factor pertains to the location of the offense. Some scholars suggested that brigandage can only take place in open spaces away from urban centers or residential areas, whereas others argued that, according to the Qurʾān, the crime carries the same legal weight regardless of location. The final element is the identity, religious affiliation, and citizenship of the actor; in other words, he should be
This requirement raises the question as to what law applies to non-Muslim actors, to dhimmis and aliens, who victimize residents of an Islamic state, or commit piracy within the Abode of Islam?

Islamic law regards piracy as a heinous crime, an act against God and His Messenger. In fact, Qur’ān 5:33 ordains the judiciary to consider the “execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land” as punishment for offenders. This verse gives the judicial system flexibility to administer punishments commensurate with the nature, severity, and circumstances of the offense.123 A punishment can only be lessened if the accused repents prior to arrest (Qur’ān 5:34). The death penalty or crucifixion is specified as a punishment for crimes in which the offender kills his victims and absconds with their property. If the offender only commits murder but does not take property, he is to be decapitated, not hanged. If he only steals property, but kills no one, the offender’s opposite hand and leg must be amputated (i.e., right hand and left leg, or right leg and left hand).124 If he terrorizes his victims but does not kill them, nor usurps their property, then the offender is to be exiled for a fixed period.125 Jurists defended


123 Bouhdiba and Dawālībī, Different Aspects of Islamic Culture, 309–310.


125 A controversy prevailed among scholars regarding the concept of banishment. Abū Ḥanīfa interpreted it as imprisonment by arguing that the brigand must be kept behind bars within the territory where the act of forcible theft had taken place. By sending him to isolation in jail, local people will feel safer from criminal acts that might be caused should the offender be merely banished. The great majority of the Mālikī jurists claimed that the bandit must be exiled from his hometown to a different place. The majority of Shāfiʿī jurists and exegetes contended that exile is applicable to Muslim muhāribīs only, who complied with the corporal punishment but subsequently escaped from the Abode of Islam. The Hanbalis and Zāhirīs held that Qurʾān 5:33 refers to banishment and expulsion of the muhārib from all Islamic soil. Some Shāfiʿī scholars authorized the
employment of these harsh punishments both as a deterrent to potential repeat offenders and to dissuade others so as to maintain social and economic order and foster security for the individual and the public.126

Despite meting out strict corporal punishment, the law keeps the door open for repentance for those offenders “who repent before they fall into your power” (Qur’ān 5:34). This possibility raises three questions. First, is the badd for highway robbery and piracy abolished by repentance? Second, would the repentant brigand or pirate be absolved from liability for shedding blood and usurping property? Third, what conditions are required to render repentance legally valid?

In principle, pre-arrest repentance revokes the badd for highway robbery and piracy, but does not absolve the offender from liability if the victims or their heirs seek justice.127 Interestingly, the Shāfiʿīs hold controversial opinions respecting punishment for a repentant bandit who repents prior to capture. One opinion states that all rights of God and individuals are waved, whereas another position maintains that God’s rights fall away with respect to theft but not murder or assault, and all private rights remain. A final view holds that all Divine punishments are waved but private rights are not. The Mālikī, Hanbali, and some Shafi‘i jurists add yet another position, maintaining that repentant pirates are not subject to punishment, but must pay damages for any injuries sustained by the victim.128 In all cases, whoever commits piracy must surrender the judicial authorities to mitigate the penalty to discretionary punishment (taʿzīr) as a substitute for imprisonment and expulsion, which could take one of the following forms: admonition, reprimand, threat, boycott, public disclosure, fine and seizure of property, imprisonment, flogging, or the death penalty in extreme cases. Others as well as learned ancestors approved of an offender’s banishment from his hometown to another at his own discretion on the condition that he promised not to repeat the offense. The banishment was to remain in effect until the offender’s righteousness and sincere repentance became manifest and apparent. Abū ʿAbd Allāh Muḥammad ibn Idrīs al-Shāhī, Aḥkām al-Qurʿān (Cairo: Maktabat al-Khānjī, 1414/1994), 1:313–318; Muḥammad Juraywī, Al-Sijn wa-Maḥbātuḥu fī al-Shariʿah al-Islāmiyya: Muqāṣaran bi-Nizām al-Sijn wa-l-Tawqīf fī al-Mamlaka al-ʿArabiyya al-Saʿudiyya (Riyadh: Idārat al-Thaqāfa wa-l-Nashr, 1990), 616–632; Sharīf, “Concept of Ḥuḍād and Baghī in Islamic Law,” 164–166; Ahmad S. Z. Hemeidah, “Repentance as a Legal Concept,” (master’s thesis, University of Arizona, 2011), 35–38; Awa, Punishment in Islamic Law, 12–13, for the taʿzīr see pp. 100–110. The island of Dahlak was a place of exile during the Umayyad and Abbasid periods. Power, “Red Sea Region during the ‘Long’ Late Antiquity,” 149.

126 Ramadan, “Larceny Offenses in Islamic Law,” 1640.
usurped property to the rightful owner or heirs, who hold the right to either sue or pardon the accused.\textsuperscript{129}

The punishments prescribed for piracy might make Islamic penal law appear excessively cruel. However, to avoid making undue assumptions, we must consider the historical contexts, noting that the punitive laws prescribed by the Qur’an were prevalent also in the ancient Near East and early modern European societies. In his excellent essay, which traces the origins of punitive practices outside the Islamic framework, Andrew Marsham argues that beheading and crucifixion were common practices for public prosecution across the pre-Islamic Near East. Exile, as a substitute for execution and the amputation of limbs, was codified in the Roman and Sassanid legal digests. Identical punitive practices are also attested to in the Hebrew Bible and Judaic tradition.\textsuperscript{130}

Documentary evidence from sixteenth-century England sheds light on the punishment there for piracy. A convicted pirate was hanged on a riverbank or seashore so that his toes “well-nigh” touched the water.\textsuperscript{131} As regards the practice of banishment, it was commonplace for European empires to exile convicts, including dissidents, rebels, political prisoners, and disgraced officials, in addition to criminals, to “penal colonies” located at the distant reaches of the imperial jurisdiction. Great Britain would transport convicts on board “convict ships” to colonies and

\textsuperscript{129} Hemeidah, “Repentance as a Legal Concept,” 14–17, 33, 53–54, 61, 64, 82; Abou el-Fadl, Rebellion and Violence, 144.

\textsuperscript{130} Andrew Marsham, “Public Execution in the Umayyad Period: Early Islamic Punitive Practice and Its Late Antique Context,” Journal of Arabic and Islamic Studies 11 (2011), 101–126. Categorizing pirates as hostis humani generis induced Roman jurists to sanction the most savage penalties against them in order to deter others from performing similar acts. For instance, capital punishment consisted of exposure to beasts, being burnt alive, crucifixion, and beheading. Shaw, “Bandits in the Roman Empire,” 20–21; Ormerod, Piracy in the Ancient World, 54–55. However, a slave who acted under the orders of his master was exonerated from punishment for the reason that he was only an agent of his master. William A. Hunter, A Systematic and Historical Exposition of Roman Law (London: William Maxwell and Son, 1885), 168.

\textsuperscript{131} Ormerod, Piracy in the Ancient World, 54; Clive M. Senior, “An Investigation of the Activities and Importance of English Pirates 1603–40,” (PhD diss., University of Bristol, 1972), 30–31, 35; William M. E. Pitscalthly, “Pirates, Robbers and other Malefactors: The Role Played by Violence at Sea in Relations between England and the Hanse Towns, 1385–1420,” (PhD diss., University of Exeter, 2011), 23; Shaw, “Bandits in the Roman Empire,” 21. Public execution in England was procedurally similar to the Roman practice, whereby bandits’ bodies were impaled on forked stakes at the location where the robbery had been committed.
exploit their labor for public projects. Other examples include that of France, using Devil’s Island (French Guiana) as a penal colony from 1852 to 1946, and the Dutch East India Company’s penal colony on the Cape of Good Hope.

As far as dhimmis who engaged in piracy are concerned, their willingness to live under an Islamic regime meant that they were subject to the social, ethical, and legal principles of the Qur’an. Therefore, the great majority of legal scholars contended that if a dhimmī offender committed piracy, the punishments had to be strictly enforced just as if the offender were Muslim. A dhimmī muḥārib committing aggravated robbery and violence for financial gains violates God’s primordial covenant with all humanity, spreads disorder, and breaches his covenant with the Islamic State. However, as dhimmī communities maintained autonomous judicial systems and institutions, they may have been granted the right to adjudicate court cases pursuant to their own religious laws if both the brigands and victims were their coreligionists. Therefore, a dhimmī brigand who targeted his coreligionists was likely to be tried by a Christian ecumenical council or a Jewish court, even though most Muslim jurists and exegetes maintained that Qur’an 5:33 is applicable to all human beings irrespective of religious allegiances. Thus, the case of every offender found on Islamic soil was generally adjudicated in the Islamic courts, except for that of a musta’min.

If a musta’min committed armed robbery or piracy, he was not to be punished pursuant to the budād penalties prescribed in the Qur’an. The intellectual legal debate that took place between Abū Ḥanīfa al-Nuʿmān, founder of the Hanafi Law School, and his disciple Abū Yūsuf al-Shaybānī may constitute one of the earliest binding precedents for subsequent rulings and juristic decisions on this matter. Abū Yūsuf writes:

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135 Qur’an 5:7: “وَاَذْكُرُواْ نُبُوتَ اَللَّهِ عَلَيْكُمُ وَسِيَاتَهُ الَّتِي وَاتَّقُنُوهَا” (And call in remembrance the favor of God unto you, and His covenant, which He ratified with you”); Marsham, “Public Execution,” 111.

I (Abū Yūsuf) asked: If one (of the mustaʾmins) commits fornication or theft in the Dār al-Īslām, do you think that we should apply the ḥudūd penalties to him?

He (Abū Ḥanīfa) replied: No.

I asked: Why?

He replied: Because they (the persons from the Dār al-Harb) had made neither a peace treaty (with us) nor had they become dhimmīs. Thus, Muslim rulings would not apply to them. However, I should make them responsible for any property they might steal, but I should not impose on them the penalty of amputation (of the hand for theft).

I asked: If one of them killed a Muslim or a dhimmī—intentionally or unintentionally—would his case be judged (by Muslim qāḍī)?

He replied: Yes.

I asked: How do the ḥudūd penalties differ from the latter penalties?

He replied: The ḥudūd penalties are prescribed for (the right of) God, whereas the case in question involves the rights of Muslims and dhimmīs; therefore, they should be procured in their favor.  

The legal rationale behind Abū Ḥanīfa’s opinion is that the mustaʾmin is not a permanent resident of the Abode of Islam. His residence for only a fixed period of time does not require him to comply with the right of God, only to civil and criminal law; the rights of individuals, whether Muslims, dhimmīs, and other subjects, remain inviolable. Thus, victims are entitled to sue non-Muslim alien offenders in civil courts and enforce the domestic rule of law against them; the financial penalty for piracy still stands, but corporal punishment is explicitly forbidden. A mustaʾmin offender must pay wergild to his victims or heirs in the event of injury or death, and return any stolen property, or else property of identical quality and quantity or of equivalent value. The Shāfiʿi School of Law approves of the ruling of the Hanafis as it stands, whereas al-Awzāʿi’s doctrine sanctions administering the

137 Khadduri, Islamic Law of Nations, 172.
hudūd penalties for a mustaʿmin just as if he were a Muslim or a dhimmi actor.\(^{138}\)

The adjudication of cases of piracy was embodied in international treaties and diplomatic correspondence. As a rule, a coastal state was authorized to adjudicate cases of foreign piracy pursuant to the domestic rule of law whenever such acts occurred within its territory or maritime domain. Article 11 of the 689/1290 Mamluk–Catalan treaty stipulates that both parties to it must take legal actions against pirates: “(The Catalan King) shall take any pirate who falls into his power, and deal duly with him.” Reciprocally, the Mamluk sultan is committed to trying any pirate who enters his territory in accordance with his domestic penal codes.\(^{139}\)

Although judicial procedures for trying accused pirates follow the religious code and require due process of law, some international treaties contained provisions demanding the capturing state to execute pirates instantly upon capture, on the orders of the flotilla commander. Article 26 of the 800/1397 Ḥāfsīd–Pisan/Florentine treaty, renewed in 817/1414 and again in 824/1421, requires the two Italian city-states to immediately put captured pirates to death and to return any stolen chattels and property to the customs house in Tunis, providing that the pirate attack had originated from the state’s territories and had launched attacks against Islamic ships. If the pirates escaped capture, Pisa and Florence would have to pay retribution to the victims.\(^{140}\) Such field trials were aimed at apprehending pirates and so reducing armed robbery at sea.

**FINANCIAL RAMIFICATIONS**

Encounters with pirates gave rise to legal and financial claims. Three different kinds of scenarios bore distinct financial consequences: (a) a potentially threatened vessel succeeds in evading pirates lurking on the horizon; (b) a vessel’s captain orders that all or part of the cargo be jettisoned so that pirates are less tempted to attack the vessel; and (c) pirates seize a vessel, her cargo, or both.


\(^{140}\) Amari, *Diplomi Arabi*, 133, 147–148, 161–162.
Neither legal codices nor customary practices call on captains and voyagers to set sail under perilous conditions, such as when enemy or pirate ships are known to be lurking near the ports of call or en route. Both parties to a contract, the lessee and lessor, are advised to wait until the threat has dissipated, on the condition that the delay is not indefinite. Should such a delay appear indefinite, the parties are eligible to seek cancellation of the contract of carriage, in congruence with the Prophetic tradition that “there shall be no harming of one man by another.” Under such circumstances, both parties must appraise and justly divide any losses. Should any loss or damage be caused by pirates to a ship, her contents, or both, it is to be borne by the negligent party.

Incidents of piracy can always occur once a vessel is underway. The best scenario would involve evading pirates and escaping unharmed, while diverting from the original planned course— which may have financial repercussions for the parties to the contract of carriage. Whereas the maritime laws of Rhodes entitle the shipowner to retain one half of the shipping charges paid in advance if the vessel cannot proceed to the port of destination due to pirates, Islamic law introduced unprecedented methods for calculating the freight charges. If, after covering a part of the distance of a voyage, a vessel encounters extreme human peril that causes her to divert course and moor in a region where the shipper cannot profit from the hire, the shipper will be absolved from paying shipping fees. However, if the vessel anchors in a safely guarded place near the port of embarkation, the shipowner is entitled to collect the full shipping charges. If she sails beyond the destination, the shipper will have to pay an additional comparable fee for the increased distance.

Some jurists provide further detail with respect to this issue by decreeing that if the shipowner returns to the port of origin at the passengers’ request, then they must pay the freight charges. The only two circumstances in which passengers are exempt from paying transport costs are: (a) when the shipowner voluntarily hastens back to the embarkation point

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141 Khalilieh, *Admiralty and Maritime Laws*, 146–147 (lā ḍarar wa-lā ḍirār). The only–but nevertheless significant–difference between Islamic law and the Justinian Digest on this matter relates to the sum payable. While Muslim jurists did not entitle the shipowner or carrier to collect freight charges until after the ship had departed, Byzantine jurists provided leeway for him to charge the shipper “in accordance with the contract.”


against their will; and (b) when danger is imminent and unavoidable and either or both parties call for sailing back to the port of origin. These rules are valid so long as the shippers/consignors do not reap any benefits from their journey. Under such circumstances, when the ship’s manager cannot head to the final destination or return to the home port, but instead finds shelter in a third location where the shippers can nonetheless sell their commodities, the shippers must compensate the carrier commensurate with the profits made. However, those who opt not to disembark and return with their cargoes to the port of origin must pay shipping fees commensurate with the distance covered in the outward-bound and return trips. If the shipowner prevents the shippers from unloading their cargoes at the first stopover, then the shippers are exempt from any shipping fees.145

Contention may arise between shippers and carriers when the whole or part of the cargo is jettisoned overboard to evade an encounter with pirates. Jettisoning all or part of a ship’s contents will make her a less tempting target for pirates, also lighter, and therefore more maneuverable, thus improving the chances of escaping attack. A relevant incident took place toward the end of the first half of the twelfth century. A business letter addressed by the Adenese mercantile representative Maɗmūn ibn Hasan to the Tunisian merchant Abraham ben Yījū describes the arrival of imports from India, the jettisoning of part of the cargo en route to avoid a piratical raid, and the distribution of losses among the parties engaged in the venture. An excerpt of the letter reads as follows:

I, your servant, took notice (6) of what you – may God preserve your well-being! – wrote (7) concerning the shipment of 15 bahārs of standard (rasmi – legal or official) iron (8) and seven bahārs of belts (?) of eggs. This is to inform you that the sailors (9) jettisoned some of the ‘eggs’ when the pirates (al-surraq) [approached] (10) the gulf Fam al-Khawr (alt. translation: on the mouth of the gulf). But I, your servant, already distributed it (the loss) (11) according to the freight of the ship, and I collected this for you.146

From this account it can be inferred that piracy in the classical Islamic world gave rise to claims for general average – pro rata – contributions from all parties concerned where the remedy was deemed applicable.147 Like their Roman and Byzantine counterparts, Muslim jurists decreed that the general average rules cannot be enforced unless the sacrifice in

146 Goitein and Friedman, *India Traders*, 370.
question was made, or the expenditure incurred, for the common safety and common good— in order to save the ship, cargo, crew, and passengers. The captain, shippers, and their agents, and passengers on board, who used their combined reasoning to escape potentially dire consequences, shared an understanding that they were all bound by law to contribute proportionately to the value of the goods jettisoned.

The instances where pirates seized the cargo but freed the ship, captured the vessel but released the cargo, or seized the craft with all her contents comprised the most intricate cases, often requiring proceedings in rem. These claims were brought by those who forfeited properties of a greater relative value than did others sailing on board the same ship. The Justinianic Digest ruled that when a commercial ship was captured by pirates, everyone on board had to pay a contribution toward ransoming the ship. However, only the cargo owners had to bear the loss of any property seized by the pirates, and whoever ransomed his own goods could not claim a contribution from other shippers.148 By contrast, Islamic law distinguishes between cases where the ship is redeemed and those in which a shipper redeems his own goods. In the first situation the travelers are obliged to contribute, while in the second, each cargo owner had to personally bear the entire expense of redeeming his commodities. Islamic law further rules that if pirates capture cargo but release the vessel, the cargo owners are to pay the freight costs, nonetheless. On the other hand, if the vessel is seized, they are exempt from paying such costs.149 These principles were implemented on condition that the threat of pirates could not have been anticipated and that the ship traversed standard shipping lanes without deviating from course.150

148 Scott (ed.), Civil Law, 4:209, Digest XIV, 2, 2, 3; Ashburner, Rhodian Sea Law, 87, article III:9.
149 Raṣā’, Shahr Ḥudūd Ibn Ṭarafa, 2:525. A comparable rule, with just a slight difference, is instituted in the Castilian’s Las Siete Partidas, compiled during the reign of Alfonso X (r. 1252–1284). Title 9, Law 12 rules that if the pirates or corsairs captured a ship along with her human element and property on board, and subsequently they were ransomed by peaceful means, whatever is paid shall be proportionately divided among all, each paying his share according to the value and amount of property with him on board. Likewise, persons who have nothing with them on board the ship have to contribute. However, if the pirates captured some property of a certain consignee, liability for the loss is laid solely upon the actual owner. That is to say, other consignees and voyagers whose cargoes remained safe do not have to contribute toward the looted cargo. Scott (ed.), Las Siete Partidas, 4:1081.
150 Raṣā’, Shahr Ḥudūd Ibn Ṭarafa, 2:525; Wansharīši, Al-Mīyār, 8:302; Ashburner, Rhodian Sea Law, 83, article III:4 of the maritime code of Rhodes, which rules that if the captain steers his vessel into a place
Pirate raids occurred most frequently in the vicinity of ports and anchorages. If a vessel arrived at her destination but could not dock due to the presence of hostile warships or pirates, the ship’s manager could divert course to a safer harbor nearby, anchoring there until the threat had dissipated, provided that the contract with the shippers would remain valid. A shipper is at liberty to discharge his cargo upon paying the shipping charges to the carrier. However, the original contract remains valid for shippers intending to wait out the threat and unload their cargo in the original port, owing no additional charges to the carrier.\footnote{Summary}

Once cargo is placed on a ship and entrusted to the captain, the owners become involuntary partners, such that in the event of loss or damage due to human perils, all the shippers become active partners in conveying any remaining shipments. Ill-fated parties can proceed in rem against the remaining cargo and the vessel herself to seek remuneration for the looted property. The judicial authorities can impound the vessel with her contents until losses are calculated and divided proportionately among all the shippers.

**SUMMARY**

As a formidable threat to vessels, piracy has preoccupied jurists over the course of history up until the present day, when Somali pirates threaten safe navigation in Bab el-Mandeb, still a vital and busy strait for East–West shipping. Whereas Roman jurisprudents deemed pirates *hostis humani generis*, their Muslim counterparts viewed maritime *birāba* as an immediate threat to Islamic civilization, culture, and economy, as well as to all of humanity. The founders of all four schools of Islamic law hold

that combating *hirāba* is the highest form of *jihad*, more meritorious than launching wars against ordinary enemies in the Abode of War. Even if a pirate participated in a military expedition along with ordinary troops, the Qurʾān prescribes that punishment must be carried out once the perpetrator has been identified. However, the Qurʾān keeps the door open for repentance prior to apprehension and evasion of corporal punishment.
Conclusion

Contemporary scholars universally regard renowned Dutch philosopher and legal scholar Hugo Grotius, one of the founding fathers of modern international law, as first propounding the doctrine of freedom of the seas at the dawn of the seventeenth century. However, documentary, legal, and literary evidence reveals that this doctrine had already been deeply rooted in non-European cultures and nations. Strikingly, none of Grotius’s contemporaneous or succeeding European thinkers who had commented on this doctrine – British legal theoretician John Selden, the German jurist and philosopher Samuel von Pufendorf, and the Swiss diplomat and philosopher Emer de Vattel – took into account the contributions by non-European such as Muslims who, by the time the European states ventured into overseas explorations, controlled over 60 percent of the world’s shorelines.

During that period, the Abode of Islam stretched from the Indonesian archipelago in Southeast Asia to the Canary Islands in the eastern Atlantic Ocean. Muslim and Arab merchants established colonies along the coastlands from the Horn of Africa to Mozambique.

(Sufála) and Madagascar. As early as the tenth century CE, Muslim merchants had reached the Wãqwãq (Wakoku/UoKuok) territories of present-day Japan. The advent of extensive trade networks across the globe owes its success to the religious tolerance of Muslims towards non-Muslims, advanced trade techniques (such as commenda and partnership), commercial maritime laws that regulated and encouraged trade and shipping, the development of nautical science and the art of navigation, and diplomatic and commercial relationships among foreign countries. In this inviting atmosphere, merchants and seafarers could freely navigate the seas and arrived at foreign destinations hindered only by unanticipated man-made and natural hazards.

According to the Islamic Law of Nature, the commonality of the sea must not be disputed. God has bestowed the boundless sea on all human-kind – to transact business, seek knowledge, and to exploit its natural resources. As all humans are by Divine law the Children of Adam, members of all races and religions should enjoy equal rights of access to the seas for their own benefit, insofar as they inflict no harm. Nowhere does the Qur’ân assert Muslims’ proprietorship over the sea, neither the high seas nor even those located in the heart of Muslim territory. The Abode of Islam’s two semiclosed bodies of water, the Persian Gulf and the Red

5 This subject is comprehensively covered in Khalilieh’s Admiralty and Maritime Laws.
Sea, were fully accessible to all nations provided that the Islamic holy sites in Arabia were not exposed to imminent military threats such as Raynald of Châtillon’s Red Sea campaign in 1183, and Afonso de Albuquerque’s unsuccessful attempt in 1513 to gain a foothold in the Red Sea. When Christian naval powers posed serious threats to the Noble Sanctuaries in Arabia, access to the Red Sea by European merchants was limited and the flow of commerce through this vital artery between the Far East and Southeast Asia and the Mediterranean sphere was temporarily disrupted.

Documentary evidence undisputedly demonstrates how the Islamic customary law of the sea derived from the Prophet Muhammad’s words and deeds through his Sunna generally and most directly through the 9 AH/630 CE pledge of security granted to the Patriarch and the governor of the port city of Aylah. The importance of this pledge rests on several facets: (a) it does not draw a clear-cut distinction between coastal waters and the high seas, but treats all equally; (b) it assures freedom of navigation to those heading for or departing from Aylah, regardless of nationality; (c) it asserts Aylah’s jurisdiction over its flagged ships and all crew and passengers, both while at sea and in ports, and (d) along with others of the Prophet’s practices, it formed a basis for the advent of safe-conducts, treaties, and truces between Muslim foreign authorities.

Moreover, this decree paved the way for entry by alien merchants, albeit for a limited time and scope, even during times of diplomatic crisis and outright war. Freedom of movement at sea and on land was facilitated for non-Muslims by safe-conduct pledges, which temporarily guaranteed protection of persons and chattels to enemy-alien merchants within the Abode of Islam. This institution overrode political boundaries as an

7 Morrow, Covenants of the Prophet Muhammad, 233, 238, 297–298. The concept of freedom of navigation is enshrined in the Islamic Law of Nations as far back as the Prophet Muhammad’s early years in Yathrib (Medina). The Prophet’s covenant with Christians of the World from the last day of Rabi al-Thani, 4 AH/October 10, 625 CE, stresses Christians’ rights of mobility on land and the freedom to navigate the seas: “I grant security to their churches, their places of pilgrimage (siyāḥa) wherever they are and wherever they may be found, be they in the mountains or the valleys, in the caves or the inhabited regions, in the plains or the desert, or in buildings; and that I protect their religion and their property wherever they are and wherever they may be found in land or at sea, in the East or West, the same way that I protect myself, my Companions (khilāt), and the People of my Community (ahl millat) among the Believers and the Muslims.”

8 As in this particular case, the 754/1353 Ḥafṣīd–Pisan treaty rules that “every foreign merchant, who sails aboard ships belonging to Pisa will enjoy equal rights as theirs, and fulfill the same obligations as theirs (labu mā labum, wa-ʿalayhi mā ʿalayhim).” Amari, Diplomi Arabi, 90, 103, 242.
obstacle to foreign nationals’ freedom of movement and mobility right on land and at sea.

Whereas the open sea may not be appropriated, security and economic considerations could dictate that states exercise some degree of sovereign jurisdiction over limited offshore maritime zones, including bays, gulfs, indentations, islands, and islets. However, most significant to global legal history was the introduction by Islamic law of unprecedented principles to jurisprudence respecting that part of the Red Sea adjacent to the Hijazi coast. Following the dhimmis’ expulsion from the Hijaz by the second Pious Caliph ʿUmar ibn al-Khaṭṭāb, the Muslim authorities categorically divided the Abode of Islam into three geographical domains: the Haram (Sharīʿa Sanctuary), the Hijaz, and all other territories. Non-Muslims had been forbidden from taking up permanent residence in the Haram and the Hijaz, including the islands and islets of the Sea of Hijaz. The Hijaz’s maritime domain extends from northwestern Yemen in the south to a point parallel to Tabūk in the north, with its seaward breadth extending from the coast to the outermost points of the islands and islets of the Sea of Hijaz.

In many ways, UNCLOS III establishes legal features for territorial seas akin to those that classical Muslim theologians and jurists ascribed to the Hijaz, by asserting de jure and de facto possessory control over a large portion of the Red Sea bordering Arabia. Non-Muslims, including Hindus and Buddhists, enjoyed the right of innocent passage through the Hijazi territorial waters and access to ports, through treaties, general or private amān, or when exposed to distress, provided that the rule of law remained inviolate. However, they were not granted the right to take up permanent residence, or to exploit the waters’ natural resources other than for the purpose of personal sustenance. Elsewhere in the Abode of Islam, marine areas adjacent to coastal frontiers enjoyed a different legal status. Central and provincial governing authorities claimed de facto proprietorship over a limited offshore zone, not exceeding a few miles from the shoreline, in order to defend their frontiers from seaborne raids, secure coastal

9 Although Chinese vessels rarely made their way to the Red Sea ports, historical records highlight two visits. The first was in 1414, when the Chinese fleet under the command of the Admiral Zheng anchored in the port city of Jeddah, whereas the second took place in 1433, when the Chinese envoys sailing with Indian ships of the Calicut Kingdom anchored in the port of Jeddah. The two incidents show that the port of Jeddah was not exclusively reserved for Muslims only, but was also opened to non-Muslims. Wing, “Indian Ocean Trade and Sultanic Authority,” 65–66; Meloy, Imperial Power and Maritime Trade, 66–80, 249–255.
navigation and trade, collect customs and taxes, and protect the fishing rights of local residents.

Even within the same state, province, or region people may have different languages, customs, habits, ideologies, cultural traditions, social norms, religions, denominations, and so forth. Such factors may constitute major obstacles to the unification of societies embodying people of different backgrounds. The Qurʾān does not classify human affiliation on the basis of nationality or ethnicity, but in accordance with religious conviction. Religion conjoins Muslims around the world as a powerful unifying instrument, with Shariʿah applying to all Muslims irrespective of their denominational schools, whether within or outside Islam’s territorial domain. Shariʿah thus constitutes a uniform flexible legal system with judges primarily trying cases between Muslim disputants in conformity with the sacred law of Islam. Islam grants a parallel legal status to other monotheistic religions. Jews are an ummah based on the Torah, divinely revealed to Moses, and the Christians another ummah based on the Gospel of Jesus Christ. International treaties concluded between Muslim ruling dynasts and foreign principalities empowered the former to apply Shariʿah to Muslim subjects even when in foreign territories.

Respecting previously ordained Divine laws, the Qurʾān enjoins Muslim ruling and judicial authorities not to intervene in dhimmis’ judicial affairs. Qurʾān 5:42–48 sanctions outright the coexistence of a pluralistic judicial system for the dhimmis. However, if dhimmī litigants choose to bring a case before a Muslim qadi, he should apply the Islamic legal principles, since he must adjudicate according to “what Allāh has revealed.” Regarding harbis, their lawsuits historically came before denominational courts until the rise of the consular office at the beginning of the twelfth century, which functioned as a judicial institution. A consul presided over cases involving only his fellow nationals, except for when a governing treaty stipulated otherwise.10

In the concluding remarks of Chapter 2, the advantages of legal pluralism to international trade have been outlined. One important advantage is individuals’ familiarity with their own religious law and their essential equality before the court. Individual rights could be infringed by an Islamic court decision running counter to litigants’ religious law, constituting another reason why the Qurʾān strongly urges qadis to avoid

10 For instance, the 689/1290 treaty signed by the Mamluk sultan al-Mansūr Qalāwūn and Genoa authorizes the Genoese consul to administer cases involving disputes between Genoese and Muslim parties. See Holt, Early Mamluk Diplomacy, 145.
presiding over lawsuits involving non-Muslim coreligionists. Freedom and equality constitute fundamental rights in Islamic law, which come into practice in the Qur’an’s sanctions of a pluralistic judicial system.

The final chapter is devoted to examining the legal implications of piracy in Islamic law. From the dawn of ancient civilization to the present day, piracy has posed a formidable threat to freedom of navigation and movement. The Qur’an, exegetical literature, and jurisprudential sources eliminate ambiguities between jihad and piracy and essentially define the latter as a privately motivated armed robbery, directed against innocent commercial vessels, their contents, crews, and passengers, or against coastal targets, posing a threat to the public peace for the sole purpose of looting properties for private gain. Designating pirates as common enemies of all humankind, jurists urged their fellow Muslims to exercise no tolerance toward their actions. In fact, they commended combating piracy as even more meritorious than fighting in the Cause of God (jihad). A pirate taking part in jihad would not mitigate his Divine punishments or abrogate his victim’s rights. However, jurists held conflicting opinions regarding repentance prior to capture, which for some nullified a pirate’s illegal acts. On the question as to why governments must combat piracy, Ibn Khaldūn emphasized its destructive impacts on the domestic and global economy; it could even precipitate the “decay of civilization.”

At this point, two fundamental questions should be addressed: where did the foundations for the pre-Renaissance European law of the sea find footing? Is the precolonial law of the sea an exclusively European product as many scholars claim? To address the first question, it is incumbent on us to uncover when and how the late antiquity and early medieval empires, states, and principalities de facto exercised the principles underlying the customary international law of the sea. To give a simple answer, naval

rivalries and wars largely induced the international law of the sea, without which it would have been superfluous. In other words, the precolonial international law of the sea likely owed its inception to Islam’s rise in the Mediterranean arena toward the end of the first half of the seventh century, when the Romano-Byzantine mare nostrum ceased to exist. As the Mediterranean world’s political unity fractured into two competing powers, Byzantium and Islam, overseas trade depended upon international diplomatic and economic agreements, and the issuance of private and general safe-conducts. A large number of diplomatic and commercial treaties concluded between Christian and Islamic political entities between the seventh and fifteenth centuries contain provisions governing the freedom of navigation on the high seas and innocent passage through the territorial seas and straits, as well as regulating the status of Christian and Muslim subjects in the various stages of their overland and maritime ventures. It is here in the contested Mediterranean world where the foundations of the early modern law of the sea were laid down. At the dawn of the sixteenth century, European naval rivalries penetrated into


the Indian Ocean and transferred with them the Mediterranean model of freedom of the seas.

Unlike in the Mediterranean world, the Indian Ocean of the pre-European era afforded a more hospitable environment for overseas trade. Until the thirteenth century, the Indian Ocean’s space was divided geographically and culturally into three realms without physical boundaries: the westernmost, connecting the Persian Gulf and the Red Sea with the western coast of India, inhabited by the Arabs and Persians; the middle or Hindu–Buddhist region, stretching from the south Indian coast to the Strait of Malacca, Java, and other Indonesian archipelago; and the easternmost or the Chinese realm.15 For centuries before the rise of Islam, Arab and Persian merchants had uncontestably dominated the trade and shipping in this peaceful ocean. With the founding of the Abbasid Caliphate, the capital’s transfer from Damascus to Baghdad, and the Arabs’ and the Persians’ conversion to the new faith, maritime commerce burgeoned between the Abode of Islam and India, China, and Southeast Asia. Luxury and other commodities from India, Southeast Asia, and the Far East could only reach Christian Europe through Muslim and Jewish merchants.

With the Arabian Peninsula’s Islamization, the Hadrami Arab merchants, who already dominated Indian Ocean trade, carried the new Divine faith by sea to the western coasts of India. The gradual and peaceful spread of Islam across the western coastal strip of the Indian subcontinent derived from trade expansion and Islam’s tolerance of local traditions. Here conversion to Islam did not signify a sudden change in the social order or an abandonment of existing cosmology. Michael Pearson argues to the contrary, that converted indigenous populations maintained existing beliefs by attributing Islamic traits to them.16 Rather than being “substantive,” change was “additive,” with converts preserving local traditions.17 Muslim dominance over the Indian Ocean trade network further resulted from Muslim traders’ structure of commerce. In the Muslim-majority regions, rulers, jurists, and qadis recognized a plurality of legal systems and allowed local communities to govern themselves in accordance with their own adat (traditions and customs).18

15 Abu Lughod, Before European Hegemony, 251–253.
16 It may be assumed that this hypothesis holds true so long as any muḥarramāt (forbidden matters) were annulled.
18 Barendse, Arabian Seas, 87.
During a time when the Mediterranean Sea was a theatre of ongoing naval conflicts between Christian and Muslim powers from the middle of the seventh century onward, use of force in the Indian Ocean, especially the westernmost circuit, was hardly ever recorded. Except for the major overseas expeditions of Rājendra Cola/Chola (1014–1044) and the Ming dynasty’s seven impressive naval expeditions commanded by the Muslim Chinese Admiral Zheng He between 1405 and 1433, armed interventions amounted to sporadic episodes with none aimed at dominating the vast expanse of the oceanic waters. The absence of large-scale naval conflicts contributed to the profusion of regional and international overseas trade, developed by traders without governmental intervention. Indigenous rulers cordially welcomed merchants who traveled freely among sovereign states and principalities without passports. This condition may explain why international commercial and diplomatic treaties did not appear along the shorelines of the Indian Ocean until the Portuguese intrusion into the eastern hemisphere. In support of this hypothesis, a statement attributed to Sultan Bahadur Shah of Gujarat (r. 1528–1537) rules that “wars by sea are merchant’s affairs and of no concern to the prestige of kings.”19 Eventually, the rules governing the freedom of navigation and mobility rights in the Indian Ocean were not laid down by coastal sovereigns and empires, but by merchants and seafarers, who plied freely these peaceful waters hindered only by man-made dangers and unfavorable natural and climatic conditions. However, from the early sixteenth century onward, freedom of navigation carried a different connotation for European naval powers.20

As this monograph comes to a close, I am reminded of the letter of apology addressed by the prominent Palestinian rhetorician, counsellor, and head of Saladin’s chancery Ḥabīb al-Din al-Isfahānī (519–597/1125–1201), a renowned rhetorician and counsellor in Saladin’s court, by which he hoped to calm tensions and

20 Anand, “Maritime Practice in South-East Asia until 1600,” 451–452: “Freedom of the seas was used not only for the perfectly legitimate purpose of navigation, but more often than not it was interpreted by the militarily strong European Powers as permitting them to move across the wide open sea to threaten small states for their own ends, or to subjugate and colonize them. . . . Freedom of the high seas also came to be transformed into a license to overfish, especially near the coasts of other countries, triggering numerous fishery disputes. . . . Freedom of the seas has always meant unequal freedom or freedom for the few.”
settle disagreements that had arisen between them. A paragraph of al-Qāḍī al-Fāḍil’s letter reads as follows:

Something occurred to me, and I do not know whether you have encountered as such, or not! I hereby describe it to you. I have noticed that no one writes a letter (kitāb) on the day before, then on the next day says: “If it were amended, it would have been more effective; if it were expanded, it would have been more desirable; if it were prefaced, it would have been more appropriate; and if this were left unchanged, it would have been more aesthetic.” This is a meaningful example of how the sense of imperfection captures the entirety of humankind.21

This study has begun to grapple with the evolution of the Islamic customary law of the sea and its contribution to the development of international law and relations at a time when Arabic was the world’s lingua franca. While it takes some first steps in filling this gap in Islamic legal history, as yet undiscovered legal texts, treaties, and other documentary evidence may unearth additional and more valuable information offering deeper insights into the way that Islamic law treats the legal status of the high seas and offshore maritime zones. By all indications, congruent with contributions of Muslims to the art of navigation and nautical science, jurists, scholars, siyar authors, pilots, seafarers, central and provincial ruling authorities, and, above all, merchants engaged in regional and overseas trade activities have also left indelible imprints on the development and formation of the customary law of the sea.

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