

The Process of Drafting Treaties in Islamic Jurisprudence: A Comparison of the Views of Classical Jurists

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This article examines the process of drafting treaties between Muslims and non-Muslims, both theoretically and historically. I demonstrate the process of the consummation of treaties and their importance in Islamic jurisprudence. Treaties formed part of *siyar* (foreign relations). This field, a branch of Islamic public law, covers the range of mutual relations between Muslims and non-Muslims. The aim here is to survey the work of prominent jurists and scholars from different schools of thought in general and these jurists' interpretations of treaties, especially in the classical era, as a guide to modern scholarship for further research.

1. INTRODUCTION

Modern scholarship in Islamic studies focuses on all aspects of theology, philosophy, and Qur'anic studies yet neglects – with some exceptions – to consider the many individual areas of Islamic law and especially the field of *siyar*. The works of W. Hallaq, D. Powers, S. Jackson, B. Weiss, N. Calder, and many others do indeed deal with the overall legal aspects of the issue,² while, admittedly, more

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I would like to thank David Powers, Emad Bazzi, and Shadi Balawi for their valuable comments on an earlier draft of this paper.

² Wael Hallaq, *A History of Islamic Legal Theory: An Introduction to Sunnī Uṣūl al-Fiqh* (Cambridge: Cambridge University Press, 1999), as well as many articles in the works of Professor Hallaq; David Powers, "Fatwās as a Source for Legal and Social History: A Dispute over Endowment Revenues from Fourteenth-Century Fez," *al-Qanṭara* 11 (1990): 295-340; David Powers, "On Judicial Review in Islamic Law," *Law and Society Review* 26 (1992): 315-41; Sherman Jackson, "From Prophetic Actions to Constitutional Theory: A Novel Chapter in Medieval Muslim Jurisprudence," *International Journal of Middle East Studies* 25/1 (1992): 71-90; Bernard Weiss, "Exotericism and Objectivity in Islamic Jurisprudence," in *Islamic Law and Jurisprudence*, ed. N. Heer (Seattle: University of Washington Press, 1990), 53-71; Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993); George Makdisi, "The Judicial Theology of Shāfi'i: Origins and Significance of Uṣūl al-Fiqh," *Studia Islamica* 59 (1994): 5-47; S.D. Goitein, "The Birth Hour of Islamic Law," *Muslim World* 50/1 (1960): 23-29; Herbert Berg, ed., *Method and Theory in the Study of Islamic Origins* (Leiden: Brill Academic Publishers, 2003).

specific studies have been produced by other scholars in this field. Here we may cite articles such as Shaheen Ali's "Resurrecting Siyar through Fatwas? (Re)Constructing 'Islamic International Law' in a Post-(Iraq) Invasion World,"³ and the work of Elizabeth Shakman Hurd, particularly her monograph *The Politics of Secularism in International Relations*,⁴ written with Islamic law in mind. Other works include Michael Bonner's *Jihad in Islamic History: Doctrines and Practice*,⁵ Rudolph Peters' *Jihad in Classical and Modern Islam: A Reader*,⁶ Robert Gleave's *Islamic Law Theory and Practice*,⁷ Reuven Firestone's *Jihad: The Origin of Holy War in Islam*,⁸ M. J. Kister's *Society and Religion from Jâhiliyya to Islam*,⁹ and Uri Rubin's *The Eye of the Beholder: The Life of Muhammad as Viewed by the Early Muslims*.¹⁰ Many offer possible reference points for the areas discussed in this article. Where they and others fall short when dealing with the Islamic law of nations (*siyar*), however, is in their concentration on the theoretical underpinnings of Islamic international law¹¹ rather than the specific aspects of treaty-making in Islamic jurisprudence.¹² The process of drafting treaties and their legal and juristic interpretation will be examined in the present article from its theoretical and historical standpoints, as well as in terms of its relevance to the contemporary world.

In this article, I will discuss the views of classical Muslim jurists on the process of drafting treaties, incorporating the opinions of prominent jurists and their disciples. In addressing the literature on this subject I will pose a number of questions, such as: What aspects of the earliest treaties between Muslims and non-

³ *Journal of Conflict Security Law* (2009) 14/1: 115-44.

⁴ (Princeton: Princeton University Press, 2008).

⁵ (Princeton: Princeton University Press, 2008).

⁶ (Princeton: Princeton Series on the Middle East, 2008).

⁷ With E. Kermeli, editor of *Islamic Law: Theory and Practice* (London: I B Tauris, 1997).

⁸ (New York: Oxford University Press, 1999).

⁹ (Aldershot: Variorum; Brookfield: Gower Pub. Co., 1990).

¹⁰ (Princeton: The Darwin Press, 1995).

¹¹ Hans Kruse, "The Foundations of Islamic International Jurisprudence." *Journal of the Pakistan Historical Society* 3/4 (October 1955): p. 231; Majid Khadduri, *The Islamic Law of Nations* (Baltimore: The Johns Hopkins Press, 1966), 1; Hosny M. Gaber, *The Early Islamic State with Special Reference to the Evolution of the Principle of Islamic International Law*, pp. 632-750 (Dissertation, The American University of Washington D.C., June 1962), p. 24; Ja'far Abd al-Salâm, *Qawâ'id al-Ilâqa.t al-Duwalîyya fî al-Qânûn al-Duwalî wa Shari'â al-Islâmiyya* (Cairo: Maktabat al-Salam al-'Alamiyya, 1980), p. 31; Subhi Mahmassani, *The Philosophy of Jurisprudence in Islam*, trans. Farhat Ziadeh (Leiden: E. J. Brill, 1961), p. 25; 'Abd al-Karîm Zaydân. *Majmû'at Buhûth Fiqhiyya* (Baghdâd: Maktabat al-Quds, 1981), pp. 12-16; Labeeb Bsoul, "Historical Progress of Islamic law of Nations/*Siyar*: Between Memory and Desire," *The Digest of Middle East Studies*, 2/17 (2008): 48-67; Muhammad Hamidullah, *The Muslim Conduct of the State* (Lahore: Islamic Research Institute, 1953).

¹² See, for example, Labeeb Ahmed Bsoul, "The Concept of Treaty in Islamic Jurisprudence: A Comparative View of Classical Jurists," *Journal of Islam in Asia* 7/1 (2010): 55-86.

Muslims continued to apply in later years? What was the nature of these treaties? What evidence, procedures, and sources did jurists consult when drafting them? Much of the information used in this article was obtained from primary sources, while modern studies and scholarship on Islamic law served for comparison.

Some classical jurists consider the relationship between the Muslim and non-Muslim communities to be one of natural hostility. Other jurists insist that a peace treaty concluded with the enemy, whether for expediency or because Muslims have suffered a setback, is inconsistent with Islam's ultimate objective. Nevertheless, Muslims are encouraged by divine legislation to conclude treaties with non-Muslims, especially when opportunities arise to avoid tensions, animosity, and hostility. Explicit Qur'anic verses enjoin Muslims to seek accords with non-Muslims in order to eliminate conflict. A treaty contains articles that oblige both parties to respect its letter and spirit. The practice of drafting treaties is modeled on the example of the Prophet Muḥammad, in particular, by the terms of the treaty of Ḥudaybiya (6/628).

The model Islamic treaty possesses the same legal validity as any contract and agreement in Islamic law. A contract demands the fulfillment of all preconditions and insists on the same formalities found in other forms of legal undertaking. In the eyes of the law, these obligations and sanctions guarantee a treaty's status. Strict adherence to the treaty is ensured, on the Muslim side, by the full force of Islamic law. Violating any condition is tantamount to violating the law as set down in the Qur'ân and *Sunnah*. The jurists who are generally in agreement on this make exceptions only in cases where the non-Muslim party violates a treaty's conditions.

In order for a treaty to be valid, it must pass through a process. Prior to the conclusion of the treaty, the parties must exercise a certain measure of caution and make careful calculations.

2. NEGOTIATION PROCESS

In this section I will analyze elements of the treaty, such as the preparatory negotiations, the writing of the draft, its verification or consent, the exchange of verifications, and the implementation of the agreement. Negotiation, or *murâwadha* (to habituate or accustom),¹³ is the first step in establishing the

¹³ *Murâwadha* means to humor or comply with someone's moods or willingness to please him and eventually deal with him in terms of trade or negotiating a contract of any kind. For further detail, see Abu al-Fatiḥ Nâṣit al-Dîn Muṭarrîzî, *al-Mughrib fî al-Tartîb al-Mu'arib*, vol. 1 (Aleppo: Maktabat Usâma ibn Zayd, 1979), p. 353; 'Alî b. Muḥammad Ibn al-Athîr, *al-Nihâya fî Gharîb al-Ḥadîth wa'l-*

grounds on which to conclude a treaty (*mu'âhada*). It is at this stage that a willingness to interact and express opinions vis-à-vis the subject of the treaty/*mu'âhada* and its conditions is most evident. The final product or treaty can help the parties reach agreement on all prerequisites, whether the negotiation takes a long or a short period of time or is easy or hard.

Some jurists devote an entire chapter to negotiation of the safe conduct (*murâwada 'alâ al-amân*). In his *al-Siyar al-Kabîr*, Shaybânî (d. 189/804) describes the case in which a Muslim army conquers the subjects of an enemy territory (*ahl al-harb*), leading to an agreement to negotiate a pledge of security/*amân* under certain conditions.¹⁴ Shaybânî also lists the conditions for the temporary peace agreement (*muwâda'a*) preceding the negotiations leading to the Treaty/*Sulh* of Ḥudaybiya following the Battle of the Trench (5/627).¹⁵

The negotiations undertaken following the Battle of the Trench were conducted carefully. They followed a procedure that included delaying tactics and carefully avoided any contractual elements that might embed the process or favor one party over another. The Prophet personally oversaw many issues, such as awarding privileges and recognition to the Meccans for the sake of peace. In the long run, the Prophet's indulgence gave him an advantage. In the case of the Treaty of Ḥudaybiya, the Prophet's opponents officially recognized him as the leader of the Muslim community. This eased the way for Muslims to preach the message of Islam without the interruptions and persecution that had hindered them before.¹⁶

Shaybânî indicates that when a treaty is negotiated, the Muslim leader must anticipate what compromises may be offered. That is to say, the Muslim leader must demand more in order to obtain less than what he expects to receive.¹⁷ The writer of the treaty (*mu'âhada*) should begin by identifying the most important demands made by the other party that may be subject to negotiation. This is because it is much easier to lift a condition during negotiations than to add something after the treaty has been completed. If the subjects of enemy territory (*ahl al-harb*) are not prepared to accept any but the most extreme conditions, the writer should be aware of this. If they readily accept the conditions offered, the

Âthâr, vol. 2 (Cairo: al-Maṭba'a al-Khyriyyah, 1904), p. 276; Abu al-Faḍl Ibn Manẓûr, *Lisân al-'Ara*, vol. 7 (Beirut: Dâr al-Şadir, 1992), p. 164; Muḥammad b. 'Abd al-Bâqî b. Yûsuf Zarqânî, *Sharḥ al-Zârqânî 'ala al-Muwaṭṭa'*, vol. 3 (Beirut: Dâr al-Ma'rifa, 1977), p. 282.

¹⁴ Abû Bakr Muḥammad b. Aḥmad Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 2 (Cairo: Maṭba'a Sharikat al-'Ilânât al-Sharqiyya, 1971), pp. 461-63.

¹⁵ *Ibid.*, vol. 5, pp. 1780-1881.

¹⁶ Najîb Armazânî, *al-Shar' al-Duwali fî al-Islam* (Damascus: Maṭba'at ibn Zaydûn, 1930), p. 146; Ja'far 'Abd al-Salam. *Qawâ'id al-'Alâqât al-Duwaliyya*, pp. 386-88.

¹⁷ Ahmad Abû al-Wafâ, *al-Mu'âhadât al-Duwaliyya fî al-Sharî'a al-Islâmiyya* (Cairo: Dâr al-Nahḍah al-'Arabiyyah, 1990), p. 29.

Muslims can drop whatever conditions they wish.¹⁸ The negotiation process is based on the model of the Prophet's behavior during the talks leading to the Treaty of Ḥudaybiya, the negotiations following the Battle of the Trench, and the discussions that took place between the Prophet and 'Uyayna ibn Ḥiṣn al-Fazârî (d. 23/644), who demanded the entirety of the produce of Medina for the year 9/630. The Prophet negotiated a reduction of that demand by offering only one-third. Eventually, al-Fazârî agreed to accept half of the produce.¹⁹

2.1 Writing and Editing a Treaty/*Mu'âhada*

The writing of a treaty is not, strictly speaking, subject to the conditions for making a valid contract in Islamic law, nor is it obligatory; but the treaty is a valuable attestation, reference, evidence, and assertion of the terms of a dispute in which two or more parties are involved.²⁰ It is, however, true that many of the rules affecting contracts also apply in the case of treaties, as will be seen below.

Shaybânî emphasizes that it is important to put the treaty and all of its conditions in writing. Should Muslims conclude a treaty with non-Muslims for a fixed time, they should put it in writing since some conditions of the contract may be subject to extension or renewal.²¹ The recording of conditions for a fixed-term treaty is ordained by Q. 2:282, which begins:

O you who believe! When you contract a debt for a fixed period, write it down.

Putting a treaty into writing is acknowledged to be useful, especially in view of the fallibility of memory. The verse continues:

You should not become weary to write it (your contract), whether it be small or big, for a fixed term, that is more just with Allah; more solid as evidence, and more convenient

¹⁸ Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 5, p. 1798.

¹⁹ Ibn Sa'd, Muḥammad ibn Sa'd, *Ṭabaqât al-Kubrâ*, vol. 2 (Beirut: Dâr S{âdir, 1958), p. 73; Ibn Ishâq, Muhammad b. Ishâq b. Yasâr al-Muttalibî, *Sîrat Ibn Ishâq al-Mubtada' wal-Mab'ath wal-Maghâzî*, vol. 2 (Morocco: Ma'had al-Dira.sât wal-Abḥath lil-Ta'rib, 1976), p. 223; Abû Yûsuf Ya'qûb b. Ibrâhîm b. Ḥabîb al-Anṣârî, *Kharâj* (Medina: al-Maṭba'ah al-Salafiyyah, 1972), p. 225; Abû 'Ubayd, al-Qâsim b. Sallâm, *Amwâl* (Doha: al-Shaykh 'Abdallah al-Anṣârî, 1987), pp. 189-90; Abu 'Abdalah Muḥammad Wâqidî, *Maghâzî*, vol. 2 (London: Oxford University Press, 1966), pp. 477-78; Muḥammad ibn Ḥasan Shaybânî, *al-Siyar al-Kabîr*, vol. 5 (Cairo: Maṭba'a Sharikat al-'I'lanât al-Sharqiyya, 1971), pp. 1693-94.

²⁰ Abû Bakr Aḥmad b. 'Alî al-Râzî Jaṣṣâs, *Aḥkâm al-Qur'ân*, vol. 1 (Cairo: Dâr al-Fikr, 1980), p. 484.

²¹ The 'aqd or contract that is conditioned by a time period includes leasing, where the gain of benefits is established throughout the length of the time period and the process of implementation is subject to continuity, renewal or rotation. See Muḥammad Yûsuf Mûsâ, *al-Amwâl wa-Nazariyat al-'Aqd* (Beirut: Dâr al-Kitâb al-'Arabî, 1952), p. 485; Badr al-Dîn Muḥammad Zarkashî, *al-Manthûr fî al-Qawâ'id*, vol. 1 (Kuwait: Wizarat al-Awqâf wal-Shu'ûn al-Islâmiyyah, 1981), p. 240; Suyûṭî, Jalâl al-Dîn 'Abd al-Raḥmân b. Abû Bakr, *al-Ashbâh wa al-Nazâ'ir* (Cairo: Maṭba'at Muṣṭafâ al-Ḥalibî, 1958), pp. 282-83.

to prevent doubts among yourselves, save when it is a present trade which you carry out on the spot among yourselves, then there is no sin on you if you do not write.

This verse implies that any contract that is subject to extension or renewal must be put in writing.²²

Sarakhsī (d. 483/109) indicates that the Prophet instructed Muslims to conduct their affairs with one another and with non-Muslims in writing, since there is an advantage to having the terms set down in writing. This is beneficial because the written document provides a record of the dispute, should any misunderstanding or conflict arise. The document will be particularly useful in any attempt to judge or arbitrate between parties. It ensures justice for all and protects against infractions of the agreement, whatever its nature, since some may not understand the legal causes that can nullify a contract. By spelling out the rights and obligations that each side must honor and fulfill, e.g., in the case of sudden death, written documents help to allay fears.²³

The majority of jurists agree on the importance of writing down a treaty. Nawawī (d. 676/1277-8) explains that it is obligatory for the imam, at the time of concluding a contract of truce (*'aqd al-hudna*), to write it down and to have it witnessed so that his successor will understand what the contract requires of him.²⁴

It is not obligatory for the treaty to be written in any particular language. Safe conduct is valid no matter what language it is expressed in, but Muslims have traditionally preferred Arabic as a vehicle for addressing people or dealing with matters of mutual concern, because it enjoys high prestige.²⁵ Usually, the first draft of a treaty would be written in Arabic. If a non-Muslim party spoke another language, the treaty would be translated into the language of the latter and certified by a notary public (*kâtib 'adl*).²⁶ If Muslims granted non-Muslims who were *ahl al-ḥarb* (subjects of enemy territory) safe conduct, they were automatically protected (*dhimmis*), whatever language they spoke – Arabic, Persian, Greek, or Coptic.²⁷

²² Shaybānī, *al-Siyar al-Kabīr*, vol. 5, p. 1780.

²³ Sarakhsī, *Mabsûṭ*, vol. 30, pp. 167-68.

²⁴ Abu Zakariyya Muḥyī al-Dīn Nawawī, *Rawḍat al-Ṭālibīn*, vol. 10 (Damascus: al-Maktab al-Islāmī, 1984), p. 337; Muḥammad ibn Idrīs Shāfi'ī, *Umm*, vol. 4 (Cairo: Maṭba'at al-Sha'b, 1903), pp. 103-04, 118; Abū Muḥammad Muwaffaq al-Dīn Ibn Qudāma, *al-Mughnī*, vol. 10 (Beirut: Dār al-Fikr, 1983), pp. 610-11.

²⁵ Aḥmad b. 'Abd al-Salām 'Abd al-Ḥalīm b. Ibn Taymiyya, *Majmû' Fatâwâ Ibn Taymiyya*, vol. 29 (Ribât: Maktabat al-Ma'ârif, 1979), p. 12; Ibn Qayyim al-Jawziyya, *A'lâm al-Muwaqqi'în*, vol. 2 (Beirut: Dâr al-Sa'âdah, 1954), p. 4; Muḥammad b. Aḥmad al-Minhâj al-Asyûṭī, *Jawâhir al-'Uqûd wa-Mu'în al-Quḍât wa'l-Muwaqqi'în wa'l-Shuhûd* vol. 1 (Cairo: Maṭba'at al-Sunnī al-Muḥamadiyya, 1954), p. 12.

²⁶ Najib Armazānī, *al-Shar' al-Duwalī fī al-Islam*, p. 148.

²⁷ Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, vol. 1, pp. 283-84; Abū Yūsuf, *Kharāj*, pp. 222-23.

Care in writing the treaty and its editing has a significant impact on its outcome and implementation. Shâfi'î (d. 204/820) emphasizes that the precise formulation of a document is as important as its content.²⁸ The importance of careful writing is reflected in the notaries' concern to prevent any misunderstanding on the part of either party. This too is based on Q. 2:282:

Let a scribe write it down in justice between you. Let not the scribes refuse to write as Allah has taught him, so let him write. Let him who incurs the liability dictate, and he must fear Allah, his Lord, and diminish not anything of what he owes. But if the debtor is poor, or weak, or is unable himself to dictate then let his guardian dictate in justice and he must fear Allah his Lord and diminish not anything that he owes.

The scribe should write down the terms of the treaty in a manner that will not cause injustice to anyone.²⁹ Al-Jaṣṣāṣ (d. 370/980) emphasizes that the purpose of putting the treaty correctly in writing is to avoid any misinterpretation or misconception: justice is achieved when all of the conditions are listed and applied according to Islamic law (*sharī'a*). Furthermore, the treaty must be written in a language that expresses all the obligations and rights in a way that is understandable to both parties. The language of the treaty should be precise so as to prevent jurists from questioning its content. Furthermore, the writer or the scribe should be trustworthy and learned and must write down faithfully all of the conditions clearly and soundly. If the scribe leaves out any condition, the treaty is void.³⁰ The treaty should include all of the conditions and their clarifications as discussed and negotiated and agreed to by the parties.³¹

The treaty must also include a specification of its period of application, i.e., its starting and end dates. According to Shaybânî, the dates should specify at least year and month – the starting date by month and then year, and the end date by month, followed by the year.³² The dates must follow the Hġjrġ/Muslim calendar, which begins with the year of the Prophet's migration to Medina and whose first month is Muḡarram.³³ The date of the treaty is to be recorded at the bottom of the document. The signatures of witnesses furthermore guarantee that the provisions

²⁸ Shâfi'ġ, *Umm*, 4: 118-19; al-Asyštġ. *Jawâhir al-'Uqšd*, vol. 1, p. 12; for modern scholars who emphasize the accuracy of putting *mu'âhada* in writing, see Maḡmšd Shaltšt, *al-Islam 'Aqġda wa Sharġ'a* (Beirut: Dâr al-Shuršq, 1980), p. 457; Wahbġ al-Zuḡaylġ, *al-'Alâqât al-Duwalġyya fġ al-Islâm* (Beirut: Dâr al-Fġkr, 1984), pp. 141-42; Aḡmad Abš al-Wafâ, *al-Mu'âhadât al-Duwalġyya*, pp. 39-41.

²⁹ Shaybânġ, *al-Siyar al-Kabġr*, vol. 5, pp. 1781, 1785.

³⁰ Jaṣṣâṣ, *Aḡkâm al-Qur'ân*, vol. 1, p. 484.

³¹ Sarakhsġ, *Sharḡ al-Siyar al-Kabġr*, vol. 5, pp. 1782-83, 1798.

³² *Ibid.*, vol. 5, p. 1784; Abš Ja'far Muḡammad ibn Jarġr Ṭabarġ, *Târġkh al-Umam wa al-Mulškġ*, vol. 2 (Beirut: Dâr al-Ma'ârif, 1979), pp. 389-92; Abu al-'Abbâs Aḡmad b. 'Alġ Qalqashandġ, *Subḡ al-A'shâ*, vol. 6 (Beirut: Dâr al-Kutub al-'ilmiyya, 1987), pp. 240-42.

³³ *Ibid.*

are known to all of the parties. This helps to avoid any dispute regarding the duration of the treaty.³⁴

The treaty must also specify: (1) the name of the imam or caliph who was responsible for the conclusion of treaty or truce (*mu'âhada, muwâda'a, or hudna*); (2) the individuals with whom he is associated; and (3) any others accompanying him.³⁵ At Ḥudaybiya, the Prophet appointed 'Alî to compose the treaty "in the Name of God the Merciful" and His Prophet Muḥammad b. 'Abdullah. But when the Meccan representative, Suhayl ibn 'Amr, objected to the designation of Muḥammad as prophet, the Prophet ordered 'Alî to rewrite the agreement without his title of Prophet. Then he wrote the year and the month in which the agreement would come into effect, specifying that each party had to fulfill its obligations and honor its commitments.³⁶ He also listed the names of the witnesses: Abû Bakr, 'Umar b. al-Khaṭṭâb, 'Abd al-Raḥmân b. 'Awf, 'Abd Allâh b. Suhayl b. 'Amr, Sa'd b. Abî Waqqâs, Muḥammad b. Maslama, and Mukraz b. Ḥafṣ to witness the agreement.³⁷ The Prophet followed the same procedure in his treaty with the people of Najrân.³⁸

2.2 Verification or Endorsement and the Exchange of Copies

In the final stage of the treaty process, each party is expected to endorse the content of the treaty, rendering it binding. Once this endorsement is final, neither party may back out of the treaty.³⁹ The imam and his deputy are in charge of the process of exchanging the final copies.⁴⁰ When the Treaty of Ḥudaybiya was drawn up, the Prophet ordered two copies to be made, one for himself and the other for the people of Mecca.⁴¹ This was common practice, because each party

³⁴ Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 5, pp. 1782-84.

³⁵ Abû Bakr Muḥammad Sarakhsî, *Mabsûṭ*, vol. 30 (Beirut: Dâr al-Ma'ârif, 1906), pp. 168-79.

³⁶ Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 5, pp. 1783, 1798; and idem, *Mabsûṭ*, vol. 10, p. 8.

³⁷ Ibn Sa'd, *Ṭabaqât al-Kubrâ*, vol. 2, p. 97; 'Alî Taqî al-Dîn Aḥmad b. Maqrîzî, *Imtâ' al-Asmâ'*, vol. 1 (Doha: al-Shu'ûn al-Dîniyyah, 1981), p. 298.

³⁸ Kamâl al-Dîn Muḥammad Ibn Humâm, *Fath al-Qadîr*, vol. 5 (Beirut: Dâr Iḥyâ' al-Turâth al-'Arabî, 1986) p. 296; Muḥammad Ḥamidallâh, *Majmû'at al-Wathâ'iq al-Siyâsiyya* (Beirut: Dâr al-Irshâd, 1969), p. 75.

³⁹ Al-Wafâ, *al-Mu'âhadât al-Duwaliyya*, p. 44.

⁴⁰ Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 5, p. 2180.

⁴¹ Ibn Sa'd explains that 'Alî wrote one copy for the Prophet and the other for Suhayl b. 'Amr. See *Ṭabaqât al-Kubrâ*, vol. 2, p. 97; Maqrîzî, *Imtâ' al-Asmâ'*, vol. 1, p. 298.

had to have its own copy to prevent misunderstandings.⁴² The exchange of treaties became common practice, and each party received its own copy.⁴³

The implementation of a treaty is binding in Islamic law. Each party is held responsible by the other for enforcing and honoring every condition or article. Once the treaty (*mu'âhada*) becomes binding, no violation is tolerated. If either party breaks a condition, the treaty is automatically void. If there are any hostilities just prior to the conclusion of the treaty, the treaty's implementation may be delayed unless an explanation or compensation is made for a violation by the offending party.⁴⁴

2.3 Reservation (*Taḥaffuz*)

A reservation (*taḥaffuz*) is a precautionary measure taken while negotiations on the treaty (*mu'âhada*) are in progress, designed to prevent any disadvantage accruing to one of the parties. Jurists usually deal with the issue of reservation in their chapter on the conditions of the contract, as in the case of the contract of protection (*'aqd al-dhimma*),⁴⁵ where the concept of reservation is applied to conditions under debate (*shurūṭ al-ja'liyya*), i.e., negotiated conditions.⁴⁶ The subjects discussed are the legally valid conditions that determine what is acceptable in a treaty and what is not. In the *Siyar al-Kabîr*,⁴⁷ Shaybânî outlines the conditions that may be included in a treaty and the responsibility to fulfill these obligations, as well as those conditions that are not appropriate for a covenant, treaty, or contract (*'aqd al-mu'âhada*) as imposed by the participants. This is quite similar to the concept of reservation in modern international law.⁴⁸

⁴² Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 5, pp. 1780-81.

⁴³ Najîb Armazânî, *al-Shar' al-Duwalî fî al-Islam*, p. 148.

⁴⁴ Sarakhsî, *Mabsûṭ*, vol. 13, p. 25; and idem, *Uṣûl al-Sarakhsî*, vol. 2, p. 310; Abû Ḥâmid Muḥammad ibn Muḥammad al-Ṭûsî Ghazâlî, *al-Mustaṣfâ min 'Ilm al-Uṣûl*, vol. 1 (Cairo: al-Maṭba'a al-Amîriyya, 1906), pp. 93-94; Abû Ishâq Ibrâhîm Shâṭibî, *Muwâfaqât fî Uṣûl al-Aḥkâm*, vol. 1 (Cairo: Maṭba'at Muḥammad 'Alî Subayḥ, 1970), p. 143; Bukhârî, *Kashshâf al-Asrâr*, vol. 4, p. 171.

⁴⁵ Ibn Manẓûr, *Lisân al-'Arab*, vol. 7, p. 441; Abu al-Qâssim Jaruallah Zamakhsharî, *Asâs al-Balâgha*, vol. 1 (Beirut: Dâr Sâdir, 1965), p. 184.

⁴⁶ Aḥmed Ibn Fîâris al-Qazwînî, *Mu'jam Maqâyîs al-Lughâ*, vol. 3 (Cairo: Maktabat al-Khânjî, 1981), p. 260; Ayyûb b. Mûsâ al-Ḥusaynî Kaffawî, *Kulliyât*, vol. 3 (Cairo: Dâr al-Kitâb al-Islâmî, 1992), p. 64; al-Sayyid 'Alî b. Muḥammad b. 'Alî al-Sharîf Jurjânî, *Ta'rîfât* (Beirut: Dâr al-Kitâb al-'Arabî, 1984), p. 166; 'Alâ' al-Dîn Abû Bakr Muḥammad Samarqandî, *Mizân al-Uṣûl* (Doha: Maṭabi' al-Doha, 1983), pp. 616-17.

⁴⁷ Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 5, p. 1780.

⁴⁸ 'Abd al-Ghanî Maḥmûd, *al-Taḥaffuz 'alâ al-Mu'âhadât al-Duwalîyya*, (Cairo: Dâr al-Nahḍa al-'Arabiyya, 1988), p. 17; Muḥammad Ṭal'at Ghunaymî, *Qânûn al-Salâm fî al-Islâm* (Alexandria: Mansha'at al-Ma'ârif, 1988), pp. 522, 526, and 530; idem, *Aḥkâm al-Mu'âhadât fî al-Sharî'a al-Islamiyya*

A term or condition (*shart*) imposed in a contract may be valid (*ṣaḥīḥ*), voidable (*fâsid*), or void (*bâtil*). According to Abû Yûsuf (d. 182/798) and Shaybânî, valid conditions are those essential to making a contract certain and that contribute to its viability. As long as these conditions are in conformity with the treaty, they are valid. Void conditions are those not connected or related to the contract (*'aqd*), and that are not anticipated by either party. Such a condition might benefit one party but harm the other. If such a condition is included in a contract of compensation, it renders the contract void; if it is part of a contract that does not deal with compensation, the contract may still be valid despite the condition itself being void. A condition that is voidable (*fâsid*) is one that is neither required nor necessary for the final shape of the contract and which entails no benefit to either party. For example, if someone sells a camel and imposes a condition upon the buyer not to use it, this condition is voidable, but it has no effect on the contract as a whole or its validity.⁴⁹

The jurists of the various schools disagreed regarding the authority of imposing conditions on the contract in terms of its validity or voidable conditions. The Ḥanbalîs were more tolerant and rational in their approach, while the Zâhirîs were the strictest and most firmly opposed to placing conditions in contracts.⁵⁰

According to Shaybânî, if a temporary peace agreement (*muwâda'a*) happens to incorporate any irregular conditions,⁵¹ these will not have any effect on the

(Alexandria: Mansha'at al-Ma'ârif, 1977), pp. 109, 111-12; Aḥmad Abû al-Wafâ, *al-Mu'âhadât al-Duwalîyya*, p. 89; 'Abd al-Ghanî Maḥmûd, *al-Taḥaffuẓ 'alâ al-Mu'âhadât*, pp. 136-39.

⁴⁹ Sarakhsî, *Mabsûṭ*, vol. 13, p. 13; Ibn Humâm, *Fath al-Qadîr*, vol. 5, pp. 215-16; Zayla'î, *Tabyîn al-Ḥaqâ'iq*, vol. 4, pp. 57-59, 131-34; *Ḥâshiyat Ibn 'Âbidîn*, vol. 5, pp. 84-88; Ibn Qâḍî Samâwinâ, *Jâmi' al-Fuṣûlayn*, vol. 2 (Cairo: al-Maṭba'a al-Azhariyya, 1882), p. 4; Ibn Nujaym, *al-Baḥr al-Râ'iq*, vol. 6 (Beirut: Dâr al-Ma'ârif, 1893), p. 194; *al-Fatâwâ al-Hindiyya*, p. 396.

⁵⁰ See the opinions of the school given in the following: Ibn Shâshim, *'Iqd al-Jawâir al-Thamîna*, vol. 2, p. 422; Muḥammad ibn Aḥmad ibn Rushd, *Bidâyat al-Mujtahid wa Nihâyat al-Muqtaṣid*, vol. 2 (Beirut: Dâr al-Ma'ârif, 1986), pp. 116-64; Muḥammad ibn Aḥmad ibn 'Arafâ Dasûqî, *Ḥâshiyat al-Dasûqî 'alâ al-Sharḥ al-Kabîr*, vol. 3 (Cairo: Maṭba'at 'Issa al-Ḥalibî, 1800), p. 65; (Mâlîkî school) Manjûr, *Sharḥ al-Manhaj al-Muntakhab ilâ Qawâ'id al-Madhhab*, p. 313; (Shâfi'î school) Nawawî, *al-Majmû' Sharḥ al-Muḥadhdhab*, vol. 9, pp. 404-20; idem, *Rawḍat al-Ṭâlibîn*, vol. 3, pp. 403-10; Ibn Qudâma, *Mughnî al-Muḥtâj*, vol. 2, pp. 33-36; (Ḥanbalî school) *al-Mughnî* and *Sharḥ al-Kabîr*, vol. 4, pp. 309-12, vol. 10, pp. 517-19; Manṣûr b. Yûnis Bahûtî, *Kashshâf al-Qinâ'*, vol. 3 (Mecca: Maṭba'at al-Ḥukûmiyya, 1974), pp. 177-84; (Zâhirî school) Abû Muḥammad 'Alî b. Aḥmad Ibn Ḥazm, *al-Muḥallâ*, vol. 8 (Beirut: Dâr al-Turâth, 1972), pp. 412-20; (modern scholars) Muḥammad Abû Zahra, *al-Milkiyya wa Naẓariyyat al-'Aqd* (Beirut: Dâr al-Fikr, 1977), pp. 272-83; Muḥammad Yûsuf Mûsâ, *al-Amwâl wa-Naẓariyyat al-'Aqd* (Beirut: Dâr al-Kitâb al-'Arabî, 1952), pp. 410-33; Ḥaṣan al-Shâdhilî, *Naẓariyyat al-Shart fî al-Fiqh al-Islâmî* (Cairo: Dâr al-Itihâd al-'Arabî, n.d.), p. 177.

⁵¹ An example of that is Article 5 of the Ḥudaybiyya, which reads:

And whereas whoever comes to Muḥammad from the Quraysh without the permission of his guardian, he (i.e. the Prophet) will hand him over to them; and whoever comes to the Quraysh from amongst those who are with Muḥammad, they will not hand him over to him.

validity of the treaty. Similarly, Shâfi'î jurists holds that an agreement that does not deal with financial matters from the point of view of the participants is treated as *'aqd al-hudna* (a contract of cessation or truce), as long as both parties agree to honor the principles they have agreed upon.⁵² Should the contract come under the heading of *'aqd al-mu'âwada* (compensation contract), it may be affected by any irregular condition, possibly leading to its termination.⁵³ The bottom line is that conditions must be directly related to the contract/treaty in order for them to be effective.⁵⁴ If an irregular condition is proposed prior to the conclusion of the contract, but the contract is nevertheless established, the validity of the contract will not be affected.⁵⁵

Valid conditions must be honored and fulfilled by all the participants. For example, a Muslim who offers safe conduct to a person from the abode of the enemy (*ḥarbī*) upon his entrance into the abode of Islam (*dâr al-Islâm*) can expect that the same offer be extended to a Muslim upon his entrance into the abode of the enemy (*dâr al-ḥarb*).⁵⁶ If this condition was agreed upon by the parties prior to the conclusion of the contract, it must be honored and fulfilled. Similarly, if the signatories agree to release the prisoners of both parties, they must respect this condition and release them. But if one party requests the release of its prisoners and proposes keeping the prisoners of the other party, the condition would not be valid. The condition must be reciprocal in order to make the treaty effective and sound.⁵⁷

For further details see Ibn Qudâmâ, *al-Mughnî*, vol. 10, pp. 522; Ibn Humâm, *Fatḥ al-Qadîr*, vol. 5, p. 466; al-Ramlî, *Nihâyat al-Muḥtâj*, vol. 8, p. 102; Ibn Ḥajar al-'Asqalânî, *al-Iṣâbâ fî Tamyîz al-Sahâbâ*, vol. 1 (Cairo: Maktabat al-Nahdha, 1983), p. 94; Wâqidî, *al-Maghâzî*, vol. 2, pp. 61-112; Ibn Sa', *Ṭabaqât*, vol. 2, p. 95; Ibn Hishâm, *Sîra*, vol. 3, p. 332.

⁵² Zarkashî, *al-Manthûr fî al-'Uqûd*, vol. 2 (Kuwait: Waizarat al-Awqâf wal-Shu'ûn al-Islâmiyya, 1981), p. 402.

⁵³ Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 2, pp. 584-85.

⁵⁴ Jaṣṣâs, *Aḥkâm al-Qur'ân*, vol. 3 (Cairo: Dâr al-Fikr, 1980), p. 214.

⁵⁵ Ibn Qâḍî Simâwna, *Jâmi' al-Fuṣūlayn*, vol. 2, pp. 221-22; *Ḥâshiyat Ibn 'Âbidîn*, vol. 5, p. 84; Nawawî, *al-Majmû'*, vol. 9 (Beirut: Dâr al-Fikr, 1975), p. 18; and idem, *Rawḍat al-Ṭâlibîn*, vol. 10 (Damascus: al-Maktab al-Islâmî, 1984), pp. 410-11; Bahûtî, *Kashshâf al-Qinâ'*, vol. 3, p. 177; Ibn Miḥliḥ al-Maqdisî, *al-Furû'*, vol. 4 (Beirut: Dâr 'Ālam al-Kutub, 1981), p. 56.

⁵⁶ Shaybânî, *al-Siyar al-Kabîr*, vol. 5, p. 1790.

⁵⁷ Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 5, p. 1690.

3. THE EFFECTS OF TREATIES (ÂTHÂR AL-MU'ÂHADÂT)⁵⁸

The effects of treaties on their signatories, in terms of their having to honor and fulfill their obligations toward one another, may be divided into two categories:

The fulfillment and honoring of a contractual obligation and precautions against treachery;

The principle of honoring and fulfilling a contractual obligation (*'ahd*)⁵⁹ is derived from Q. 5:1, which commands Muslims to honor their covenants: "O you who believe! Fulfill [your] obligations."

The term "obligation" here applies, among other things, to the contract and what has been agreed upon in the contract. This obviously involves all types of contracts, such as partnership, sale, purchase, or lease, as well as pacts of protection (*'aqd al-dhimma*) and pledges of security (*al-amân*).⁶⁰

In addition to the precise obligations imposed by the treaty, Q. 9:4 insists that the contractual obligation be respected to the fullest and warns of the consequence of any violation of this principle:

Except those of the polytheists or idolaters (*mushrikân*) with whom you have a treaty, who have not subsequently failed you in ought, nor have supported anyone against you. So fulfill their treaty to them to the end of their term. Surely God loves the pious.

Despite the hardships endured by the first Muslims, the Qur'ân urges believers to obey its commandments with regard to fulfilling contractual obligations, as we have seen in Q. 16:91-92 and Q. 17:34.⁶¹ These verses equate fulfilling contractual obligations with the spirit and principles of how to conduct oneself correctly in society and in the world, and in matters relating to trade and business transactions. The Qur'anic verses include explicit commands, reports on ideal behavior, and warnings about the consequences of failing to fulfill such obligations. Indeed,

⁵⁸ *Âthâr* is the plural of *athar*, which means "effect" or "influence." It refers to something that affects the *mu'âhada* and its soundness. See Jurjânî, *Ta'rifât*, p. 23; Tahânawî, *Kashshâf Iştlâhât al-Funûn*, vol. 1 (Beirut: Dâr Sâdr, 1962), p. 95; Râghib al-İsfahânî, *Gharîb al-Qur'ân* (Cairo: Maṭba'at Muşṭafa. Al-Ḥalibî, 1961), p. 9.

⁵⁹ The term used for fulfillment is usually *wafâ'*, which means "to honor fully what has been agreed upon, without any violations." See Ṭabarî, *Tafsîr*, vol. 9, p. 455; Raghîb al-İsfahânî, *al-Mufradât fî Gharîb al-Qur'ân*, p. 528; Fayrûzâbâdî, *Başâ'ir Dhawî al-Tamyîz* (Cairo: Maṭba'at al-Nahḍa, 1984), vol. 5, pp. 244-45.

⁶⁰ Jaşşâs, *Ahkâm al-Qur'ân*, vol. 2, pp. 293-94; Ibn Jarîr Ṭabarî, *Gâmi' al-Bayân'an Ta'wîl ay al-Qur'ân*, vol. 9 (Beirut: Dâr al-Ma'ârif, 1980), pp. 449-54; Abu 'Abdallah Muḥammad b. Aḥmad Qurṭubî, *al-Jâmi' li-Ahkâm al-Qur'ân, Tafsîr al-Qurṭubî*, vol. 10 (Beirut: Dâr al-Kitâb al-'Arabî, 1997), p. 169; Muḥyî al-Sunna Abu Muḥammad al-Haysayn b. Mas'ûd Baghawî, *M'âlim al-Tanzîl*, vol. 3 (Riyâdh: Dâr Ṭibah, 1993), pp. 5-6; Ibn Kathîr, *Tafsîr Ibn Kathîr*, vol. 3, p. 4.

⁶¹ See also Jaşşâs, *Ahkâm al-Qur'ân*, vol. 2, p. 190.

these verses characterize those who fulfill a contractual obligation as ideal believers.⁶²

The Qur'ân also warns Muslims against betraying, breaking, or violating contracts, breaches of trust and lack of observance. Q. 8:55-57 reads:

Verily, the worst of moving (living) creatures before God are those who disbelieve, so they shall not believe. They are those with whom you made covenant every time and they do not fear God. So if you gain mastery over them in war, punish them severely in order to disperse those who are behind them, so that they may learn a lesson.

Other verses refer to the consequences of violating a contractual obligation:

Is it not (the case) that every time they make covenant, some party among them throw it aside? Nay! The truth is most of them believe not. (Q. 2:100)

But if they violate their oaths after their covenant, and attack your religion with disapproval and criticism then fight (you) the leaders of disbelief (chief of Quraysh-pagans of Mecca) – for surely their oaths are nothing to them – so that they may stop (evil action). Will you not fight a people who have violated their oaths and intended to expel the Messenger, while they did attack you first? Do you fear them? God has more right that you should fear Him, if you are believers. (Q. 9:12-13)

The Prophet himself adopted a broader perspective in terms of the obligation to fulfill contractual obligations and the prohibition of betrayal and violation of the same. Many traditions (*ḥadīths*) deal specifically with the duty to fulfill a contractual obligation.⁶³ In one of these traditions, narrated by Abû Hurayra, the Prophet is reported to have said: "Carry out the conviction with respect to those who trusted you, even if they betray you."⁶⁴

Muslims should not demand anything from non-Muslims above and beyond what they agree to have included in a covenant of peace (*'aqd al-ṣulḥ*). Both Muslims and non-Muslims are required to fulfill and obey contractual obligations. If one party violates its obligation, this is an act of treachery, which is expressly prohibited by the Qur'ân and the Prophet's teaching.⁶⁵

Abû Yûsuf (d. 182/798) reports that when Abû 'Ubayda b. al-Jarrâḥ (d. 18/639) concluded a truce with the people of Syria, each party imposed conditions on the other. One of these conditions was that the Syrian Christians be al-

⁶² Nâsir Sulaymân al-'Umar, *al-'Ahd wa'l-Mithâq fi al-Qur'ân al-Karîm* (Riyadh: Dâr al-'Âsimâh, 1992), p. 153; Sayyid Quṭb, *Fî Zîlâl al-Qur'ân*, vol. 4 (Beirut: Dâr al-Shurûq, 1967), pp. 2190-93.

⁶³ See, for example, Ibn al-Athîr, *Jâmi' al-Uṣûl*, vol. 2, pp. 647-56 and vol. 8, pp. 458-59; al-Mundhirî, *al-Tarḥîb wa'l-Tarhîb*, vol. 4 (Beirut: Dâr al-Kutub al-'Ilmiyya, 1986), pp. 3-13; Baghawî, *Maṣâbiḥ al-Sunna*, vol. 3 (Beirut: Dâr al-Ma'ârif, 1986), pp. 92-94.

⁶⁴ *Ibid.*

⁶⁵ Shawkânî, *Nayl al-Awṭâr*, vol. 8 (Cairo: Maṭba'at Muṣṭafâ al-Ḥalibî, 1971), p. 69; Ibn 'Abd al-Barr, *al-Tamhîd*, vol. 2 (Morocco: Wizârit al-Awqâf, 1967), p. 124.

lowed to celebrate a feast with their crosses displayed in the street on one day of the year. This condition was honored. The Muslim fulfillment of this contractual obligation and the respect they gained from the non-Muslim subjects of the abode of Islam (*ahl al-dhimma*) in the long run, in the form of assistance to Muslims as interpreters, educators, and physicians, especially during their long conflict with Byzantium, showed the practical value of this faithfulness.⁶⁶

Muslim jurists emphasize the nobility of fulfilling contractual obligations and the importance of avoiding treachery. Shaybânî insists that Muslims are obligated to fulfill every contractual obligation (*'ahd*) or covenant (*mîthâq*) with non-Muslims in all situations. Should there be a contractual obligation between Muslims and non-Muslims, the Muslims should honor it to the fullest, as long as it is in effect.⁶⁷ Q. 8:72 states:

But if they seek your help in religion, it is your duty to help them except against a people with whom you have a treaty of mutual alliance, and Allah is the Seer of what you do.

A Muslim must fulfill all of the conditions imposed in a contract. For example, if a treaty with a people in the abode of the enemy (*ahl al-ḥarb*) stipulates that Muslims not drink from their river, the Muslims must respect this condition.⁶⁸ Shaybânî also holds that if the non-Muslim parties to an agreement stipulate that Muslims not eat from their crops or that they not to have access to their fodder, the Muslims are, by extension, prohibited from burning or ruining the non-Muslims' cultivated land. Similarly, if they stipulate that Muslims not take prisoners from them, Muslims should neither violate that condition nor kill any non-Muslims, since killing people is a more grievous act than taking prisoners.⁶⁹

The consensus of jurists is that all of the conditions imposed within the treaty must be fulfilled so long as it is in force.⁷⁰ Ibn Ḥazm (d. 456/1064) indicates that

⁶⁶ Ya'qûb b. Ibrâhîm Abû Yûsuf, *Kharâj* (Medina: al-Maṭba'ah al-Salafiyyah, 1972), pp. 149-51; Aḥmad ibn Yahya Balâdhurî, *Futûḥ al-Buldân*, vol. 1 (Beirut: Dâr al-Kutub al-'Ilmiyyah, 1977), p. 162; Muḥammad Ḥamidallâh, *Majmû'at al-Wathâ'iq al-Siyâsiyya*, p. 470; Muḥammad Rashîd Riḍa, *Tafsîr al-Manâr*, vol. 10 (Cairo: Maktabât al-Qâhira, 1953), p. 349; Thomas Arnold, *Preaching of Islam* (Cairo: Maktabat al-Nahḍa al-Islâmiyya, 1970), p. 73.

⁶⁷ Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 4, p. 1667; Jaṣṣâs, *Aḥkâm al-Qur'ân*, vol. 3, pp. 75-76; Ibn 'Arabî, Abû Bakr Muḥammad b. 'Abdallah ibn 'Arabî al-Ishbîlî, *Aḥkâm al-Qur'ân*, vol. 2 (Cairo: Maṭba'at 'Isâ al-Ḥalibî, 1974), p. 875; Ṭabarî, *Tafsîr al-Ṭabarî*, vol. 14, pp. 82-83; Muḥammad ibn Muḥammad al-'Amâdî Abî Su'ûd, *Tafsîr Abû Su'ûd: Irshâd al-'Aql al-Salîm elâ Mazâyâ al-Qur'ân al-Karîm*, vol. 2 (Beirut: Dâr Iḥyâ' al-Turâth al-'Arabî, 1960), p. 377.

⁶⁸ Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 1, p. 299; *al-Fatâwâ al-Hindiyya*, vol. 2, p. 303.

⁶⁹ Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 1, pp. 302-04; vol. 2, pp. 499, 582-83, vol. 4, pp. 1520-21, and vol. 5, pp. 1856-58; *al-Fatâwâ al-Hindiyya*, vol. 2, p. 203.

⁷⁰ Jalâl al-Dîn 'Abdullâh Ibn Shâsh, *Iqd al-Jawâhir al-Thamîna*, vol. 1 (Beirut: Dâr al-Gharb al-Islâmi, 1994), p. 498; Muḥammad ibn Aḥmad b. 'Arafa Dasûqî, *al-Dasûqî 'ala Sharḥ al-Kabîr*, vol. 2 (Cairo:

jurists were in agreement on the fulfillment of contractual obligations that respect what the Qur'ân defines as obligatory. They also agreed that it is incumbent upon Muslims to fulfill the conditions of the treaty and to respect them as long as they are in effect.⁷¹

3.1 Basic Protection of the Rights of the *Mu'âhidûn* (Parties to a Covenant)

One of the duties of the imam is to provide protection and safety to non-Muslims and to prevent any injustice from being inflicted upon them so long as they reside within the abode of Islam (*dâr al-Islâm*). The imam should protect them from oppression in the same way that protection is provided for the non-Muslim subjects (*ahl al-dhimma*) of the abode of Islam.⁷²

The signatory of a treaty (*mu'âhada*) is automatically granted an *amân* (pledge of security), i.e., protection of the wealth, family members, and personal well-being of the *musta'min* (person who enjoys a temporary pledge of security), as well as protection of his spiritual practices and sacred places.⁷³ If a Muslim kills a *musta'min*, the Muslim must pay blood money. This is explicitly indicated by Q. 4:92:

If the deceased belonged to a people at war with you and he was a believer; the freeing of a believing slave (is prescribed), and if he belonged to a people with whom you have a treaty of mutual alliance, compensation (blood money -*Diya*) must be paid to his family, and a believing slave must be freed.

Moreover, a treaty remains in force despite changes in the status of either side. For example, if Muslims give an *amân* (pledge of security) to a segment of a people dwelling in the abode of the enemy (*ahl al-ḥarb*) in return for payment of 500 dinars, and a second segment subsequently joins the first, the Muslim party to the pledge cannot do battle with either group unless they first return the money

Maṭba'at 'Isâ al-Ḥalibî, 1800), p. 206; Abû Ḥâmid ibn Muḥammad al-Ṭûsî Ghazâlî, *al-Wajîz*, vol. 2 (Damascus: Dâr al-Albâb, 1989), p. 204; Naṣîr al-Dîn Abu Kahyr 'Abdullah b. 'Umr al-Shîrâzî Bayḍâwî, *al-Ghâya al-Quṣwâ fî Dirâyat al-Fatwâ*, vol. 2 (Dammad [Saudi Arabia]: Dâr al-Iṣlâḥ, 1982), p. 962; Muḥammad ibn Aḥmad Ramlî, *Nihâyat al-Muḥtâj*, vol. 8 (Beirut: Dâr al-Fîkr, 1984), p. 108; Nawâwî, *Rawḍat al-Ṭâlibîn*, vol. 10 (Damascus: al-Maktab al-Islâmî, 1975), p. 337; Abû 'Abdallah Muḥammad b. Muḥammad al-Mâlikî Ḥaṭṭâb, *Tahrîr al-Aḥkâm* (Beirut: Dâr la-Gharb al-Islâmî, 1983), p. 233; Abû Muḥammad Muwaffaq al-Dîn 'Abdallah Ibn Qudâm, *al-Mughnî*, vol. 10 (Beirut: Dâr al-Fîkr, 1983), p. 513; Abû Ishâq Burhân al-Dîn Inrâhî Ibn Muflîḥ, *al-Mubdî*, vol. 3 (Beirut: Dâr al-Kutub al-'Ilmiyya, 1997), p. 401.

⁷¹ Ibn Ḥazm, *Marâtib al-Ijmâ'* (Beirut: Dâr al-Kutub al-'Ilmiyya, n.d.), p. 123.

⁷² Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 5, pp. 1853-54, 1856-57.

⁷³ Shaybânî, *al-Siyar al-Kabîr*, vol. 5, p. 1786; Kâsânî, *Badâ'i' al-Sanâ'i'*, vol. 9, p. 4325; Sarakhsî, *al-Mabsûṭ*, vol. 10, p. 89; Abû Yûsuf, *Kharâj*, p. 42.

given by the first segment. Since amnesty was granted for a specific time and under specific conditions, Muslims are obligated to fulfill this pledge of security (*amân*).⁷⁴

If the imam or his deputy is replaced for any reason, his successor is obligated to fulfill any agreement that he concluded. A treaty thus continues to function in spite of changes in leadership.⁷⁵ This was the practice of the four Rightly Guided Caliphs, and it was applied by the fifth 'Abbasid caliph Hârûn al-Rashîd (reigned 170/723-193/809), who consulted Shaybânî on just such a question regarding the Christians of Taghlib. Since the Rightly Guided Caliphs had concluded a treaty (*ṣulh*) with Taghlib, Hârûn al-Rashîd adopted the policy of his predecessors.⁷⁶ Other jurists agree that a new caliph must honor and fulfill a treaty concluded by his predecessors.⁷⁷

The Qur'ân is also explicit about the necessity of attestation and registration in the case of contracts and treaties.⁷⁸ The process of administering a treaty consisted of four elements: writing, the testimony of witnesses, security (*rahn*) and the trust or deposit (*amânah*). Since the first two elements have been discussed already, we discuss here the remaining two.

⁷⁴ Shaybânî, *al-Siyar al-Kabîr*, vol. 2, pp. 481-82; *al-Fatâwâ al-Hindiyya*, vol. 2, p. 197; Aḥmad Abû al-Wafâ, *al-Mu'âhadât al-Duwalîyya*, p. 156.

⁷⁵ Abu Yûsuf, *Kharâj*, pp. 77-81; Aḥmad ibn Yahyâ Balâdhurî, *Futûḥ al-Buldân*, vol. 1 (Beirut: Dâr al-Kutub al-'Ilmiyya, 1977), pp. 76-81.

⁷⁶ For details see al-Khaṭîb al-Baghdâdî, *Târîkh Baghdâd*, vol. 2, p. 174; Jaṣṣâs, *Aḥkâm al-Qur'ân*, vol. 3, p. 95.

⁷⁷ Shâfi'î, *al-Umm*, vol. 4, pp. 103-04; Nawawî, *al-Muhadhdhab*, with the *Takmilat Majmû'*, vol. 18, p. 226; idem, *Rawḍat al-Tâlibîn*, vol. 10, p. 337; Ibn Qudâma, *al-Mughnî*, vol. 10, pp. 513, 611; Mardâwî, *al-Inṣâf*, vol. 4, p. 217; Bahûtî, *Kashshâf al-Qinâ'*, vol. 3, pp. 103-04; Abû al-'Abbâs Aḥmad b. Idrîs Qarâfî, *al-Aḥkâm fî Tamyîz al-Fatâwâ 'an al-Aḥkâm* (Rabât: Wizârat al-Awqâf wa-l Shu'ûn al-Dîniyya, 1974), pp. 18-20.

⁷⁸ Q. 2:282:

O you who believe! when you deal with each other in contracting a debt for a fixed time, then write it down; and let a scribe write it down between you with fairness; and the scribe should not refuse to write as Allah has taught him, so he should write; and let him who owes the debt dictate, and he should be careful of (his duty to) Allah, his Lord, and not diminish anything from it; but if he who owes the debt is unsound in understanding, or weak, or (if) he is not able to dictate himself, let his guardian dictate with fairness; and call in to witness from among your men two witnesses; but if there are not two men, then one man and two women from among those whom you choose to be witnesses, so that if one of the two errs, the second of the two may remind the other; and the witnesses should not refuse when they are summoned; and be not averse to writing it (whether it is) small or large, with the time of its falling due; this is more equitable in the sight of Allah and assures greater accuracy in testimony, and the nearest (way) that you may not entertain doubts (afterwards), except when it is ready merchandise which you give and take among yourselves from hand to hand, then there is no blame on you in not writing it down; and have witnesses when you barter with one another, and let no harm be done to the scribe or to the witness; and if you do (it) then surely it will be a transgression in you, and be careful of (your duty) to Allah, Allah teaches you, and Allah knows all things.

3.1.1. Trust or Deposit (*Amânah*)

According to the Qur'ân, Muslims are obliged to honor their commitments, and Islamic legal doctrine extends this by commanding Muslims to respect treaties of every kind and never to breach a trust.⁷⁹ According to Khadduri, in the past, Muslim authorities considered keeping faith with treaties as part of their religious obligation; there was no option to do otherwise. As long as the treaty (*mu'âhada*) stood, it had to be honored and implemented until the end of its term.⁸⁰ To symbolize this commitment, the parties engaging in such an agreement were expected to seal it with oaths such as "the covenant of God" (*'ahd Allâh wa mîthâqihî*), "the protection of God and His Prophet" (*dhimmat Allâh wa Rasûlih*), or "the protection of Jesus son of Mary" (*dhimmat al-Masîh Ibn Maryam*). These oaths confirm a temporary peace agreement (*muwâda'a*) using different expressions of commitment.⁸¹

3.1.2. Pledging and Hostages (*Rahâ'in*)⁸²

It was a custom in pledging fidelity to a treaty for a hostage (*rahîna*) to be offered by both parties or by only one of them. This practice of hostage exchange was known to ancient civilizations prior to Islam, and is preserved in Islamic law. Honor likewise dictates that each party to a treaty return the hostages (*rahâ'in*) without their having suffered any harm.⁸³

The concept of pledge/*rahn* itself was also known to the peoples of the region where Islam took root, i.e., the Persian and Byzantine empires.⁸⁴ Islam had to deal

⁷⁹ See, for example, Abû Ishâq Ibrâhîm b. Mûsâ al-Ghîrnâfî Shâhibî, *Muwâfaqât fi Uşûl al-Shâri'â*, vol. 2 (Beirut: Dâr al-Ma'ârif, n.d.), pp. 58-62; Ibn Hâzim, *al-Ahkâm fi Uşûl al-Ahkâm*, vol. 4, p. 453; Zârqânî, *Manâhil al-'Irfân fi 'Ulûm al-Qur'ân*, vol. 1, pp. 289-337.

⁸⁰ Majîd Khaddûrî, *War and Peace in the Law of Islam* (Baltimore: The Johns Hopkins Press, 1955), pp. 293-94.

⁸¹ Sarakhsî, *Sharh al-Siyar al-Kabîr*, vol. 5, pp. 1782-83.

⁸² *Rahn* (pl. *rahâ'in*) refers to a valuable that can be deposited as surety for a debt. According to the jurists, *'aqd al-rahn* is the amount of money to be deposited as a guarantee that some task be completed. In the discussion above, *rahn* refers to a hostage on whom the parties might impose conditions in order for the treaty/*mu'âhada* to be respected, such as by giving individuals from both sides a guarantee or surety to fulfill the *mu'âhada* on the understanding that, as soon as the period is over, the parties will give these hostages (*rahâ'in*) back. See further *Tartîb al-Qâmûs al-Muḥîṭ*, vol. 2, pp. 403-04; Ibn Manẓûr, *Lisân al-'Arab*, vol. 13, pp. 188-90; Râghîb, *al-Mufradât fi Gharîb al-Qur'ân*, p. 204; Jurjânî, *Ta'rîfât*, p. 150; Kaffawî, *Kulliyât*, vol. 2, p. 394.

⁸³ Majîd Khaddûrî, *al-Ḥarb wa'l-Silm fi Shari'at al-Islâm* (Beirut: Shirkat al-Fajr al-'Arabî, 1970), p. 291; Najîb Armazânî, *al-Shar' al-Duwalî*, p. 141; Muḥammad Ṭal'at al-Ghunaymî, *Qânûn al-Salâm fi al-Islâm*, p. 515; Subḥî Maḥmaşânî, *al-Qânûn wa'l-'Alâqât al-Duwalîyya*, p. 148.

⁸⁴ Muḥammad Ṭal'at al-Ghunaymî, *Qânûn al-Salâm fi al-Islâm*, p. 515.

with it as an existing practice as well as a principle of mutual treatment. Since the *rahn* is not an original Islamic legal ruling, it is interesting to see how Muslim scholars dealt with this subject.

Shaybânî, for instance, explains that it is prohibited for Muslims to give a pledge (*rahn*) to polytheists, because it violates the principle of the protection of Muslims and invites harm or humiliation to their persons. For example, if the non-Muslim party in a treaty were to stipulate that Muslim men be given as hostages in exchange for some of their own men, this would not normally be permissible, and Muslims should not accept such a request, except in a case of dire necessity.⁸⁵ Sarakhsî (d. 483/1090) explains that this is because polytheists do not respect the rights and obligations of Muslims.⁸⁶ The prohibition also derives from the fear that hostages might be killed.⁸⁷ It does become permissible, however, if the non-Muslims guarantee to treat the Muslims as Muslims would treat them, on the condition that whoever violates the condition will be punished. The imam must provide for the protection of Muslims wherever they are; therefore, he should emphasize and discuss this matter with the non-Muslims when negotiating the treaty.⁸⁸ The only case in which the imam is permitted to accept the stipulation of giving Muslims as hostages is if it can benefit the Muslim community or if the imam has no choice but to conclude the truce to prevent a further threat to Muslims. This is permitted on the grounds that it is considered a lesser evil to compromise the hostages' safety.⁸⁹

There is a consensus that if non-Muslims betray a pact by killing a hostage, Muslims are prohibited from doing the same to their hostages. Despite the condition of mutual treatment, Muslims should not treat their hostages with disrespect. The jurists cite Q. 35: 18 to justify specific rulings and practices:

And no bearer of burdens shall bear another's burden, and if heavily laden calls another to (bear) his load, nothing of it will be lifted even though he be near of kin.

Any condition that contradicts or violates Islamic law is void.⁹⁰ The imam cannot take revenge and he must treat prisoners with dignity and respect. He

⁸⁵ Shaybânî, *al-Siyar al-Kabîr*, vol. 5, p. 1750.

⁸⁶ Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 5, p. 1758. As, Gustave Le Bon points out in his *The World of Islamic Civilization*, history records many instances of the killing of Muslim prisoners (New York: Tundor Pub. Co., 1974), pp. 330-31; Muḥammad 'Abdallâh 'Anân, *Dîwân al-Taḥqîq wa 'l-Muḥâkamât al-Kubrâ*, p. 23. The situation for Muslims in Spain under Ferdinand (1452-1516) and Isabella (1451-1504) was particularly dire in this regard.

⁸⁷ Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 4, p. 1663 and vol. 5, p. 1750.

⁸⁸ *Ibid.*, vol. 4, pp. 1663-64; vol. 5, p. 1758.

⁸⁹ Ibn Nujaym, *al-Ashbâh wa 'l-Nazâ'ir*, 87-88; Suyûṭî, *al-Ashbâh wa 'l-Nazâ'ir*, p. 87; Aḥmad al-Zarqâ, *Sharḥ al-Qawâ'id al-Fiqhiyya*, pp. 147, 149.

⁹⁰ Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 4, pp. 1664, 1753.

should keep prisoners within the abode of Islam (*dâr al-Islâm*) as *musta'mins*, although they may be prevented from returning to their own territory. Furthermore, those persons within *dâr al-Islâm* can become subjects of the Islamic state (*ahl al-dhimma*) and, should they agree to this condition, they will have to pay the poll tax (*jizya*).⁹¹

Above all, Muslims are forbidden to kill their hostages in retaliation. This holds true even if the treaty specifies that the hostages may be killed if one side violates the treaty conditions. This principle obtains even if the non-Muslims kill their Muslim hostages in accordance with a treaty's conditions.⁹² This ruling emerged in response to an event that took place during the reign of the 'Abbasid Caliph al-Manşûr (reigned 137-159/754-775), who consulted legal scholars on the matter.⁹³ When the Byzantines violated their truce with Mu'âwiya (reigned 41/661-61/680), a second truce was concluded, according to which the Byzantines were given money in exchange for hostages. When the Byzantines violated the second truce, Mu'âwiya refused to kill the prisoners. Instead, he released them, reminding Muslims to be loyal and to fulfill their obligations rather than repay disloyalty with disloyalty (*wafâ' bi 'l-'ahd khayr min ghadr bi ghadr*).⁹⁴

Furthermore, if a Muslim kills a hostage for any reason, the Muslim *umma* must pay blood money out of the public treasury, and this latter should be kept as an endowment in order to compensate Muslims in the event that a non-Muslim kills a Muslim.⁹⁵ This was the opinion of Awzâ'î (d.157/774), Mâlik (d. 179/795), Shâfi'î (d. 204/819), and Ibn Ḥanbal (d.241/855).⁹⁶ They agreed that a Muslim should not kill a hostage in response to betrayal by polytheists, justifying this with the principle of fulfilling and honoring a contract and of keeping faith, as shown in the example of Mu'âwiya.⁹⁷

In the event that non-Muslims propose paying blood money to the imam, he should accept it; this is an act of fair dealing on their part. The imam should choose what is in the best interests of the Muslim community.⁹⁸ If both the non-

⁹¹ *Ibid.*, vol. 5, pp. 1769-70; vol. 4, pp. 1664-65; Sarakhsî, *Mabsûṭ*, vol. 10, p. 129.

⁹² Shaybânî, *Aṣl "Kitâb al-Siyar"*, p. 232.

⁹³ Shaybânî, *al-Siyar al-Kabîr*, vol. 4, pp. 1664-65; Sarakhsî, *Mabsûṭ*, 10: 129; see also Abû Ya'lâ, *al-Aḥkâm al-Sultâniyya*, pp. 48-49; Abû 'Ubayd, *Amwâl*, 190; Muṣṭafâ Sa'id Suyûṭî, *Maṭâlib ulû al-Nuhâ* (Damascus: al-Maktab al-Islâmî, 1961), vol. 3, p. 589.

⁹⁴ Qâsim ibn Sallâm 'Abû 'Ubayd, *Amwâl* (Doḥa: al-Shaykh 'Abdallah al-Anşârî, 1987), p. 190; Balâdhurî, *Futūḥ al-Buldân*, vol. 1, p. 188; Mâwardî, *al-Aḥkâm al-Sultâniyya*, p. 51.

⁹⁵ *Ibid.*

⁹⁶ 'Abû 'Ubayd, *Amwâl*, p. 190; Muḥammad ibn al-Ḥusayn b. Muḥammad al-Farrâ' Abû Ya'lâ, *al-Aḥkâm al-Sultâniyya* (Cairo: Maṭba'at Muṣṭafa. Al-Ḥalibî, 1937), pp. 48-49.

⁹⁷ *Ibid.*

⁹⁸ Shaybânî, *al-Siyar al-Kabîr*, vol. 4, pp. 1762-64.

Muslims and the Muslims agree in advance to pay blood money for the hostages but do not arrange to provide for their expenses, the Muslims are nonetheless obligated to cover the non-Muslims' expenses from the public treasury, as long as they remain hostages.⁹⁹

The imam should safeguard the hostages' interests as long as they are under his authority. When the treaty ends, he is obligated to return the hostages to the other party.¹⁰⁰ If war breaks out between Muslims and polytheists, the Muslims should release their hostages first and return them to their territory, even if the other party refuses to release the Muslim hostages upon commencing hostilities.¹⁰¹

In some cases, Muslims are under no obligation to return hostages. For example, if a hostage converts to Islam and becomes part of the Muslim community but then asks to be returned as a non-Muslim to the abode of the enemy (*dâr al-ḥarb*), the imam should not permit him to go back, even if the non-Muslims threaten to kill the imam's Muslim hostages in return.¹⁰² Even if a hostage chooses to stay within the abode of Islam (*dâr al-Islâm*) while remaining a non-Muslim subject (*dhimmî*), the imam may not return him unless he himself requests this. Nevertheless, if non-Muslims demand the return of hostages who choose to stay in the abode of Islam (*dâr al-Islâm*) and threaten to kill hostages in retaliation, the imam cannot accept the hostages as *dhimmîs* but must return them to their own territory in exchange for the Muslim hostages and their safe return. From the Muslim perspective, this practice is valid as long as the imam has not concluded a contract granting *dhimmî* status (*'aqd al-dhimma*) to the hostages. If he has concluded such a contract, he will be committing a violation of the *'aqd al-dhimma* by returning them, which is forbidden by Islamic law.¹⁰³

If the non-Muslims refuse to return their Muslim hostages after the treaty has expired, the imam should not return his hostages until the other side complies by returning theirs. In this event, the imam should write to the non-Muslims and demand the release of the hostages. If they refuse, he is permitted to keep the hostages in his possession and offer them the chance to become *dhimmîs*. If they

⁹⁹ *Ibid.*, vol. 5, p. 1777.

¹⁰⁰ *Ibid.*, vol. 5, p. 1778.

¹⁰¹ *Ibid.*, vol. 4, p. 1666; Abû al-Ḥasan 'Alî ibn Muḥammad ibn Ḥabîb al-Baṣrî Mâwardî, *al-Aḥkâm al-Sulṭâniyya* (Cairo: Maṭba'at Muṣṭafâ al-Bâbî al-Ḥalibî, 1973), pp. 51-52; Muḥammad ibn al-Ḥusayn ibn Muḥammad al-Farrâ' Abû Ya'lâ, *al-Aḥkâm al-Sulṭâniyya* (Cairo: Maṭba'at Muṣṭatâ Bâbî al-Ḥalibî, 1937), p. 49.

¹⁰² Shaybânî, *al-Siyar al-Kabîr*, vol. 5, Pp. 1753-54; Ibn Shâsh, *'Iqd al-Jawâhir al-Thamîna*, vol. 1, p. 498; Dasûqî, *Ḥâshiyat al-Dasûqî 'alâ al-Sharḥ al-Kabîr*, vol. 2, pp. 206-07; *al-Karashî 'alâ Khalîl*, vol. 2, p. 449; Jaṣṣâs, *Mukhtaṣar Ikhtilâf al-'Ulamâ'*, vol. 3, p. 449.

¹⁰³ Shaybânî, *al-Siyar al-Kabîr*, vol. 5, pp. 1753-56.

refuse to become subject to the abode of Islam (*dhimmi*s) he should return them to their own territory, but only with their consent.¹⁰⁴

4. THE TERMINATION OF TREATIES/MU'ÂHADÂT

4.1. By Consent

The consent of the participants makes a treaty an official agreement, binding each party to fulfill and apply the conditions accordingly. There are circumstances, however, in which a treaty may be terminated. I am not referring to the expiration date,¹⁰⁵ since this is largely straightforward, nor am I referring to the question if the treaty is valid, since, according to the authorities, if it is not valid and not based on Islamic law, it should never have been concluded in the first place.¹⁰⁶

According to Kâsânî (d. 587/1191), a treaty may be terminated for two reasons: first, because its period of effectivity has expired and, second, for other reasons. The latter category admits of two main types of reasons: *naṣṣ* (explicit text) and *dalâla* (sign). Termination on the basis of a text is usually caused by the violation (*naqḍ*) of any of the conditions agreed upon by both parties, although the violation must be evident to both parties. The other type of justification, *dalâla* (sign), relates to cases where both parties have consented to the termination of a treaty without either having committed a violation of its terms. If the treaty was concluded for a fixed time period, it terminates on the expiration date without the need of any explanation.¹⁰⁷ If members of the people of the covenant (*ahl al-'ahd*), however, enter the abode of Islam (*dâr al-Islâm*) by virtue of a temporary treaty and the term of the treaty expires while they are still in *dâr al-Islâm*, their safety is automatically guaranteed under safe conduct until they return to their territory. This is because interference with people of the covenant (*'aqd ahl al-'ahd*) may be perceived as treachery. Therefore, Muslims should be careful about determining the duration of a treaty's effectiveness and should avoid any violation of the truce

¹⁰⁴ *Ibid.*, vol. 5, pp. 1778; vol. 4, pp. 1666-67.

¹⁰⁵ On *ibtâl* or *ilghâ'* see *Lisân al-'Arab*, vol. 15, p. 186; *al-Mu'jam al-Wasîṭ*, vol. 2, p. 743.

¹⁰⁶ Many scholars consider "null" and "void" to mean the same thing, whether it concerns *mu'âmalât* (mutual relations) or *'ibâdât* (ritual practices). al-Jaṣṣâṣ, *Uṣûl*, vol. 2, p. 169; Samarqandî, *Mizân al-Uṣûl*, pp. 39-40, 223-48; Sarakhsî, *Uṣûl al-Sarakhsî*, vol. 1, p. 18; Bukhârî, *Kashshâf al-Asrâr*, vol. 1, p. 258; Muḥammad Amîr b. Maḥmûd Amîr Bâdishâh, *Taysîr al-Taḥrîr*, vol. 2 (Cairo: Maṭba'a y al-Bâb al-Halabî, 1931), p. 376; Ghazâlî, *al-Mustaṣfâ*, vol. 2, p. 24; *Sharḥ al-Kawkab al-Munîr*, vol. 3, pp. 84-95; Maḥmûd ibn Aḥmad Zinjânî, *Takhrîj al-Furû' 'alâ al-Uṣûl* (Beirut: Muasasat al-Risâli, 1978), pp. 168-71.

¹⁰⁷ Kâsânî, *Badâ'i' al-Sanâ'i'*, vol. 9, p. 4327.

while it is in progress;¹⁰⁸ as long as the contract remains in effect, mutual respect should obtain.¹⁰⁹

Abû Su'ûd (d. 982/1574-5) reminds his readers of the command to be true to the provisions of a treaty in Q. 9: 7:

Except those with whom you made covenant near al-Masjid al-Ḥarâm (at Mecca) So long, as they are true to you, stand you true to them. Verily, God loves the pious.

Compliance with rights granted by contractual obligation (*'ahd*) is obligatory, so long as the time period specified has not expired. According to Q. 9: 4:

Except those of the polytheists with whom you have a treaty, and who have not subsequently failed you in aught, nor have supported anyone against you. So fulfill their treaty to them to the end of their terms.

The above verses make it clear that there is an obligation to respect the time period imposed by the treaty, without any restriction.¹¹⁰

4.2. Termination of the Treaty by the Consent of Both Parties

The treaty (*mu'âhada*) is subject to termination by the consent of both sides, as stated by Kâsânî. The treaty must indicate the reason for termination,¹¹¹ such as in the case of the annulment (*iqâla*)¹¹² of a contractual agreement. Scholars distinguish between *faskh* and *mufâsakha* (both meaning cancellation): *faskh*/cancel is cancellation by one party without the consent of the other,¹¹³ while *mufâsakha* is cancellation in accordance with the mutual consent of both parties.¹¹⁴

¹⁰⁸ *Al-Fatâwâ al-Hindiyya*, vol. 2, p. 197.

¹⁰⁹ Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 1, p. 304.

¹¹⁰ Tafsîr Abî Su'ûd Abî Su'ûd, *Irshâd al-'Aql al-Salîm 'alâ Mazâyâ al-Kitâb al-Ḥakîm*, vol. 2, p. 386.

¹¹¹ Kâsânî, *Badâ'i' al-S{anâ'i'*, vol. 9, p. 4327.

¹¹² *Iqâla* is dismissal or discharge, as when one aims to forgive or to treat someone's offense or lapse as undone, or to raise someone from a fall. According to the jurists or *fuqahâ'*, *iqâla* is the dismissal of the contract with the consent of both parties. See Kaffawî, *al-Kuliyyât*, vol. 1, p. 259; Tahânawî, *Kashshâf Iṣṭilâḥât al-Funûn*, vol. 3, p. 1211; 'Abd al-Ra'ûf b. Tâj al-Ârḥîn Manâwî, *al-Tawqîf 'alâ Muḥimmât al-Ta'ârîf* (Cairo: 'Âlam al-Kutub, 1990), p. 81; Nazîh Ḥammâd, *Mu'jam al-Muṣṭalahât al-Iqtisâdiyya fî Lughat al-Fuqahâ'* (Herndon: al-Ma'had al-'Âlamî lil-Fikr al-Islamî, 1993), p. 64.

¹¹³ According to Ibn al-Subkî and Ibn Nujaym, *faskh* is the breaking of the contract (*'aqd*). See Zarkashî, *al-Manthûr fî al-Qawâ'id*, vol. 3, p. 42; Ibn Nujaym, *al-Ashbâh wa 'l-Nazâ'ir*, p. 338.

¹¹⁴ The cancellation/*mufâsakha* is the agreement of both parties to cancel the contract (*'aqd*). Some contracts are subject to cancellation with the agreement of both parties. See Fayyûmî, *al-Miṣbâḥ al-Munîr*, vol. 2, p. 472; Ibn Manzûr, *Lisân al-'Arab*, vol. 3, pp. 44-45; Nazîh Ḥammâd, *Mu'jam al-Muṣṭalahât al-Iqtisâdiyya fî Lughat al-Fuqahâ'*, p. 218.

According to Shaybânî, if one of the two parties proposes to the other that they make a truce, and the other party lays down its arms in exchange for a thousand dinars and abandons war, the Muslim party cannot resume hostilities until it has fulfilled its part of the agreement. This may be illustrated by the case of exchanging safe conduct. Should one party want to change its commitment to the safe conduct, it cannot do so until the other party is reimbursed the money it paid or the weapons it surrendered. As long as both parties agree to return what they took from each other, the termination is valid, although, if the non-Muslims refuse to give back what they took, it is permissible to terminate the truce without being obliged to return what was taken from the non-Muslims.¹¹⁵

4.3. Termination of the Treaty when It is Violated by the Other Party

A treaty can be considered terminated if one of the parties violates its provisions or conditions or if one of them fails to fulfill a condition. Should non-Muslims break their contractual obligations, it is permissible for Muslims to resume fighting without breaking their contractual obligations or giving advance notification. Since annulling or renouncing the contractual obligation may be interpreted to mean violating it, the difference between these two actions must be made clear. If non-Muslims violate a contractual obligation by committing treachery, Muslims may have no recourse except to terminate the treaty.¹¹⁶ Muslims are in fact commanded by Q. 9:7 to terminate their contractual obligations once these have been violated by non-Muslims:

How can there be a covenant with Allah and with His Messenger for the polytheists, idolaters, pagans, unbelievers in the Oneness of God (*Mushrikûn*).¹¹⁷

Shaybânî explains that non-Muslims can violate the treaty either by sending soldiers to fight Muslims or by sending a messenger to convey the termination of their contractual obligation to the imam.¹¹⁸ The reaction of the Muslims to a violation of the Treaty of Hudaibiya provided a model: the Meccans, after agreeing not

¹¹⁵ Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 5, pp. 1712, 1715.

¹¹⁶ Kâsânî, *Badâ'i' al-S{anâ'i'*, vol. 9, pp. 4362-27; Ibn Humâm, *Fatḥ al-Qadîr*, vol. 4, p. 294; Zayla'î, *Tabyîn al-Ḥaqâ'iq*, vol. 3, p. 246; Ibn Nujaym, *al-Baḥr al-Râ'iq*, vol. 5, p. 86; Ibn 'Abdîn, *Ḥâshiyat Ibn 'Âbidîn*, vol. 4, p. 134; *al-Fatâwâ al-Hindiyya*, vol. 2, p. 197; Dâmâd Afandî, *Majma' al-Anhur*, vol. 1, p. 638; Jaṣṣâs, *Aḥkâm al-Qur'ân*, vol. 3, p. 85.

¹¹⁷ Q. 9:7.

How can there be an agreement for the idolaters with Allah and with His Apostle; except those with whom you made an agreement at the Sacred Mosque? So as long as they are true to you, be true to them; surely Allah loves those who are careful (of their duty).

See Ibn 'Arabî, *Aḥkâm al-Qur'ân*, vol. 2 (Cairo: Dâr al-Ma'ârif, 1988), p. 600.

¹¹⁸ Sarakhsî, *Sharḥ al-Siyar al-Kabîr*, vol. 5, pp. 1698, 1708.

to help the enemies of the Muslims or their allies, assisted the tribe of Bakr against that of Khuzâ'a, which had formed an alliance with the Prophet. The Prophet retaliated without giving any notification.¹¹⁹

The consensus of the jurists is based on similar examples. Shâfi'î explains that the Prophet retaliated against the Banû Qurayza after the latter had violated the truce that had been concluded with them.¹²⁰ The same opinion is voiced by both al-Layth ibn Sa'd (d. 175/791) and Sufyân ibn 'Uyayna (d. 198/813) with regard to the violation of a contractual obligation by the people of Cyprus during the time of Caliph Uthman.¹²¹

Muslims can terminate a treaty on their own initiative out of fear of treachery, as ordained by Q. 8:58:

If you [Muḥammad] fear treachery from any people, throw back [their covenant] to them [so as to] be on equal terms (that there will be no more covenant between you and them). Certainly Allah likes not the treacherous.¹²²

According to al-Jaṣṣāṣ (d. 370/980), Muslims can break or terminate a treaty ('*ahd*') prior to its expiration date so long as they first notify the other parties of the forthcoming termination of the contractual obligation. This is permissible in the case of fear of treachery or betrayal, especially if the non-Muslims plan their treachery in secret. In such cases, Muslims should retaliate openly, or, if there is a condition to this effect in the contract, it is up to Muslims to break the contractual obligation if they feel there is a need to do so. This is not an act of treachery or a failure to meet an obligation on the part of Muslims, since it is not a violation of

¹¹⁹ Ibn Ishâq, *Sira*, vol. 2, pp. 394-95; Ṭabarî, *Târîkh*, vol. 3, pp. 43-45; Wâqidî, *Maghâzî*, vol. 3 (London: Oxford University Press, 1966), pp. 795-96; Ibn Qayyim al-Jawziyya, *Zâd al-Ma'âd*. Vol/ 3 (Beirut: Dâr al-Fikr, 1972), p. 394; Maqrîzî, *Imtâ' al-Asmâ'*, vol. 1 (Doḥa: al-Shu'ûn al-Diniyyah, 1981), p. 357.

¹²⁰ Shâfi'î, *al-Umm*, vol. 4, p. 107; 'Imâd al-Dîn b. Muhammad (known as Kiyâ Harâsî 'Alî b. Muhammad) al-Ṭabarî, *Aḥkâm al-Qur'ân*, vol. 3 (Cairo: Dâr al-Kutub al-Ḥadîthah, 1975), p. 412; Baghawî, *Sharḥ al-Sunna*, vol. 11, p. 167; *Tahrîr al-Aḥkâm fî Tadbîr Ahl al-Islâm*, p. 233; *Mughnî al-Muḥtâj*, vol. 4, p. 262; Ibn Qudâm, *al-Mughnî*, vol. 10, p. 513; Mardâwî. *al-Inṣâf*, vol. 4, p. 216; Ibn Qayyim al-Jawziyya, *Zâd al-Ma'âd*, vol. 3, pp. 136-38; Nawawî, *Rawḍat al-Ṭâlibîn*, vol. 10, p. 337; Sham al-Dîn ibn 'Abbâs Aḥmad ibn Ḥamzâ ibn Shihâb al-Dîn Ramli, *Nihâyat al-Muḥtâj*, vol. 8 (Cairo: Maktabat Muṣṭafâ al-Ḥalibîm 1967), pp. 109.

¹²¹ See the opinion of these scholars in the works of Abû 'Ubayd, *Amwâl*, pp. 200-04; Balâdhurî, *Futûḥ al-Buldân*, vol. 1, pp. 184-86.

¹²² Q. 8:58.

And if you fear treachery on the part of a people, then throw back to them on terms of equality; surely Allah does not love the treacherous.

See Ṭabarî, *Tafsîr al-Ṭabarî*, vol. 14, p. 25; Abû al-Faraj 'Abd al-Raḥmân b. 'Alî Ibn al-Jawzî, *Zâd al-Masîr fî 'ilm al-Tafsîr*, vol. 3 (Damascus: al-Maktab al-Islâmî, 1964), p. 373; Jaṣṣâṣ, *Aḥkâm al-Qur'ân*, vol. 3, p. 77; Ibn 'Arabî, *Aḥkâm al-Qur'ân*, vol. 2, pp. 871-72; Kiyâ Harâsî al-Ṭabarî, *Aḥkâm al-Qur'ân*, vol. 3, p. 412; *Tafsîr al-Qurtubî*, vol. 8, pp. 31-32.

loyalty or failure to fulfill a contractual obligation. Only if Muslims terminate the contractual obligation without previous notification is it considered treachery.¹²³

Muslims may terminate a treaty for one of two reasons: (1) the impracticability of fulfilling it or certain conditions of the treaty; or (2) a change in circumstances, such as a change in the factors that originally favored the conclusion of the treaty.

4.4. Termination of a Treaty Because of the Impracticability of All or Some of its Conditions under Islamic Law

Normally, a treaty cannot be concluded with the presence or occurrence of conditions that constitute a violation of Islamic law. But should such a treaty be concluded in spite of these strictures, it is necessary for Muslims to terminate it. Shaybânî offers the following illustration. If the representatives or messengers of non-Muslims have Muslim prisoners and offer to hand them over in exchange for a concession, trying to impose a condition that if the concession is not met fully, the released prisoners must once again be returned to them, then Muslims cannot conclude the treaty, even if they agree to this condition. This is because non-Muslims were allegedly cruel in their treatment of prisoners and there was no justice in returning prisoners once they had been released. This explanation is based on the Prophet's Sunna: "Any condition that has no basis in the Kitâb Allah¹²⁴ [the Qur'ân] is invalid."¹²⁵

4.5. The Termination of a Treaty/*Mu'âhada* Due to Changes in Circumstances

One of the basic elements for determining the validity of a treaty is that it should be in accordance with the interests of Muslims. The consensus of the scholars was that, in order for a treaty to be valid, it must meet this basic condition. Some jurists explained that Muslims' interest must be met at the time the treaty is concluded. Other jurists, including those of the Ḥanafî school, indicated that Muslim interests must be respected for the duration of the treaty.¹²⁶

¹²³ Jaṣṣâs, *Aḥkâm al-Qur'ân*, vol. 3, p. 77

¹²⁴ For further information see Ibn Qutayba, *Ta'wîl Mukhtalif al-Ḥadîth*, p. 94; Ibn Athîr, *al-Nihâya fî Gharîb al-Ḥadîth*, vol. 4, p. 147; Râghib al-Iṣbahânî, *al-Mufradât fî Gharîb al-Ḥadîth*, p. 423.

¹²⁵ Sarakhsi, *Sharḥ al-Siyar al-Kabîr*, vol. 5, p. 1788; Shâfi'i, *Umm*, vol. 4, p. 114.

¹²⁶ Sarakhsi, *Sharḥ al-Siyar al-Kabîr*, vol. 1, pp. 190-91 and vol. 5, p. 1689; Ibn Rushd, *Bidâyat al-Mujtahid*, vol. 1, p. 388; Ibn Juzayy, *al-Qawânîn al-Fiqhiyya*, p. 163; Ibn Shâsh, *'Iqd al-Jawâhir al-Thamîna*, vol. 1, pp. 496-97; Shâfi'i, *al-Umm*, vol. 4, pp. 110-12; Ghazâlî, *Wajîz*, vol. 2, p. 203; *al-'Azîz*

The contract is not a necessary element of a treaty, and it can be revoked. If the contract is revoked by the non-Muslim party, the imam may break the treaty out of fear of treachery or breach of trust.¹²⁷ As noted in relation to Q. 19: 58,¹²⁸ Shaybânî argues that if a treaty does not suit the interests of the Muslims, it is not valid. He bases this opinion on Q. 47:35: "So be not weak and ask not for peace (from the enemies of Islam) while you have the upper hand."

Unless the treaty promises an outcome that will benefit Muslims, it has the potential to lead to injustice. It is permissible in such an instance, therefore, to break it. If the injustice appears towards the end of the period covered by the treaty, the obvious result would be its termination without renewal.¹²⁹ Of course, it is not permissible for Muslims to retaliate unless the non-Muslim parties to the treaty inform them in advance of the treaty's termination. Otherwise, if the Muslims retaliate, their conduct will be treated as an act of treachery, which is prohibited by both the Qur'ân and the *Sunnah*.¹³⁰

4.5. The Significance of Termination of the Treaty by the Muslim Side

Muslims should not terminate or break a treaty unless this intention is made known to everyone with whom they concluded the treaty in the first place. After breaking the treaty, the Muslims are prohibited from fighting against or raiding their non-Muslim enemies before they have acknowledged the termination of the treaty. If some of their fellow Muslims are outside their territory, the rest should wait until all of them have returned, and should give them extra time to get settled. This conduct on the part of Muslims is viewed as necessary in order to avoid treachery, especially in the case of those who were granted amnesty within *dâr al-Islâm*. Nor should Muslims harass these non-Muslims; they should be allowed to

Sharḥ al-Wajîz, vol. 13, p. 554; Nawâwî, *Rawḍat al-Ṭâlibîn*, vol. 10, p. 334; Mâwardî, *al-Aḥkâm al-Sultâniyya*, p. 52; Ibn Jamâ'a, *Tahrîr al-Aḥkâm*, p. 231; Ibn Taymiyya, *al-Muḥarrar fî al-Fiqh*, vol. 2, p. 182; Ibn Qudâma, *al-Mughnî*, vol. 10, p. 509; Bahûtî, *Kashshâf al-Qinâ'*, vol. 3, p. 103; Mardâwî, *al-Inṣâf*, vol. 4, p. 212; Majmû' Fatâwâ Ibn Taymiyya, vol. 15, p. 174; Sharḥ al-Nawâwî 'alâ Şaḥîḥ Muslim, vol. 11, p. 135; Shawkânî, *al-Sayl al-Jarâr*, vol. 4, p. 564; Bayḍâwî, *al-Ghâya al-Quṣwâ*, vol. 2, p. 961; Ibn Murtaḍâ, *al-Baḥr al-Zakḥkḥâr*, vol. 6, pp. 446-47.

¹²⁷ Kâsânî, *Badâ'i' al-Sanâ'i'*, vol 9, p. 4326.

¹²⁸ Q. 9:58.

If you (Muḥammad) fear treachery from any people, throw back (their covenant) to them (so as to) be on equal terms (that there will be no more covenant between you and them). Certainly Allah likes not the treacherous.

¹²⁹ Dabûsî, *Ta'sîs al-Nazar*, p. 49.

¹³⁰ Sarakhsî, *al-Mabsûṭ*, vol. 10, pp. 86-87; idem, *Sharḥ al-Siyar al-Kabîr*, vol. 2, p. 499; Ibn Humâm, *Fatḥ al-Qadîr*, vol. 4, p. 294; Zayla'î, *Tabyîn al-Ḥaqâ'iq*, vol. 3, p. 246; Alî ibn Sulṭân al-Qâri', *Mirqât al-Mafâtîḥ*, vol. 8 (Mecca: al-Maktabah al-Tijâriyya, 1992), p. 21.

make their way easily and be certain of their safe departure and arrival in their own territory. If the treaty was concluded in exchange for compensation, the Muslim side should return that amount in full at the time of termination. The termination of the treaty should conform to the interests of the Muslims and should be conducted openly. Finally, the breaking of the treaty by the imam should not be considered permissible, and this conduct is judged in accordance with what is an acceptable act.¹³¹ This procedure is insisted on not only by Ḥanafī jurists but is also shared by Mālikī jurists such as Ibn Mājishūn (d. 238/852), Ibn Abī Zayd al-Qayrawānī (d. 386/966), Abū Bakr Ibn 'Arabī (d. 543/1148), as well as by Shāfi'ī jurists such as al-Khaṭṭābī (d. 338/942) and Suyūṭī (d. 911/1505).¹³²

Scholarly consensus regarding the conclusion of a treaty characterizes this issue as a necessary act. The obligation to fulfill the terms of a treaty, as ordained by the Qur'ān and the Prophetic tradition (*ḥadīth*), is important, but in certain situations, and under certain circumstances, this does not always hold. It is up to the imam to publicize the breaking of the treaty, although in the case of a proven act of treachery, notification is not obligatory, since the other party committed the treachery.¹³³

5. CONCLUSION

Early Muslim scholars and jurists set the pattern for later jurists and rulers to follow, stipulating the conditions that are needed to conclude any type of treaty with non-Muslims. The consensus of Muslim jurists throughout Islamic history was that the Treaty of Ḥudaybiya should be the model for all later treaties. In order for a treaty to be finalized, however, it has to pass through certain stages, beginning with the determination by one of two or more parties involved in a dispute or a related matter to pursue a treaty. Once they have agreed to talk, the process of determining the conditions of that treaty forms the subject of their negoti-

¹³¹ Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, vol. 2, pp. 287, 499; vol. 5, pp. 1697-1713; and idem, *Mabsūṭ*, vol. 10, pp. 86-87; Abū Yūsuf, *Kharāj*, p. 224; Ibn Humām, *Fatḥ al-Qadīr*, vol. 4, p. 294; Zayla'ī, *Tabyīn al-Ḥaqā'iq*, vol. 3, p. 246; Ibn 'Abdīn, *Ḥāshiyat Ibn 'Ābidīn*, vol. 4, p. 133; *al-Fatāwā al-Hindiyya*, vol. 2, p. 197.

¹³² See, for example, Ibn al-'Arabī, *Aḥkām al-Qur'ān*, vol. 2, p. 876; Muḥammad 'Alish, *Fatḥ al-'Alī al-Mālik*, vol. 1, p. 392; Suyūṭī, *al-Ashbāh wa'l-Nazā'ir*, p. 527; Khaṭṭābī, *Ma'ālim al-Sunan*, vol. 4, p. 64; Ibn Qayyim al-Jawziyya, *Aḥkām Ahl al-Dhimma*, vol. 2, p. 478; Khawārizmī, *Mufīd al-'Ulām wa-Mubīd al-Humām*, p. 344.

¹³³ Ibn Shāsh, *Iqd al-Jawāhir al-Thamīna*, vol. 1, p. 498; *al-Sharḥ al-Kabīr* by al-Dardīr with *Ḥashiyat al-Dasūqī*, vol. 2, p. 206; Shāfi'ī, *al-Umm*, vol. 4, p. 107; Nawawī, *al-Muḥadhdhab* with *Takmilat al-Majmū'*, vol. 18: pp. 225-26, 232; idem, *Rawḍat al-Ṭālibīn*, vol. 10, pp. 338-39; Ibn Qudāma, *al-Mughnī*, vol. 9, pp. 513-14; Mardāwī, *al-Inṣāf*, vol. 4, p. 216; Bahūtī, *Kashshāf al-Qinā'*, vol. 3, p. 103; Ibn Hubayrā, *al-Iṣṣāḥ*, vol. 2, p. 296; Dimashqī, *Raḥmat al-Umma fī Ikhtilāf al-'A'immā*, p. 398; Sha'rānī, *al-Mizān al-Kubrā*, vol. 2, p. 185.

ations. If they are able to agree on the conditions, then the two parties proceed to the actual drafting of that treaty. Finally, signatures, the date, and the name of witnesses should be affixed, after which both parties must strive to implement the treaty. This process must be pursued in a spirit of reconciliation; and if any of its terms is based on compulsion or inequality, the treaty will be rendered void.

Muslim jurists stated that the core of making a treaty is a proper sense of honor. The fulfillment of all of the clauses in the treaty to their fullest is imperative. This is an attitude that is needed in today's world, since many recent treaties lack any balance between the parties involved; indeed, the more powerful party will determine the conditions and the role for the other party. Therefore, the treaties concluded in the modern world should benefit from some aspects of the conception of Islamic treaties, especially in terms of redress of balance in this domain.

The Qur'ân and the *Sunnah*, as always, are the ultimate references to which Muslim jurists look for guidance. Therefore, let the final words in this study be the Qur'anic passage that embodies the core purpose of this study: "But if they incline to peace, you also incline to it, and [put your] trust in Allah" (Q. 8:61).

I hope this study contributes to a new understanding of the conduct of treaties in early Islamic history and that it may shed some light on the nature of treaties among nation-states in the contemporary period. It is to be hoped that it will lead to deeper reflection on the ongoing disputes and hostilities in many regions of the world.