

# The Legacy of Jihad

Islamic Holy War and the Fate of Non-Muslims

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Foreword by Ibn Warraq



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**PART 4**  
*Jihad—Overviews from  
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Scholars*

**27**

**THE JIHAD OR HOLY WAR  
ACCORDING TO THE  
MALIKITE SCHOOL**

**Edmond Fagnan**

**1. THE NATURE OF THIS DUTY;  
CASES OF EXEMPTION**

The holy war<sup>2</sup> conducted each year on the most dangerous front, even if there is risk of an attack by bandits, constitutes, just like the visit of the Ka'ba [i.e., being stationed at 'Arafat], a duty of showing solidarity,<sup>3</sup> which is incumbent on every free male who has attained the age of puberty and is of sound mind and body.

It is likewise a duty of solidarity to devote oneself to the religious sciences, to render judicial opinions; to ward off what might cause harm to Muslims, to fulfill the responsibilities of a judge; to act as a witness; to accept the position of imam [whether that of the supreme imam or for the purposes of prayer]; to com-

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Edmond Fagnan, *Le djihad ou guerre sainte selon l'école malikite* (Algiers, 1908).<sup>1</sup> English translation by Michael J. Miller.

mand what is good; to carry on the basic, indispensable trades; to respond to a greeting; to pay one's last respects to the dead; and to free captives.<sup>4</sup>

In the case of a sudden invasion, holy war becomes a personal duty, even for a woman or for the neighbors [of the believers who are being attacked], if they (i.e., the latter) are too weak, as well as for those who hold the title of imam.

A person is exempted by sickness, extreme youth (i.e., not having attained puberty), insanity, blindness, lameness, sex (i.e., being a woman), the inability to obtain what is needed in order to participate, being in a state of servitude, the existence of a demandable debt, the refusal of the father and mother [or of one of them]—but not of a grandparent—to give permission to fulfill a duty of solidarity.

## 2. HOW CONQUERED INFIDELS ARE TREATED

Infidels living in a place where there is nothing to fear from their bad faith are invited to embrace Islam, or else to pay the head tax. If they refuse, they are to be fought and can be killed, except for: a woman, provided that she does not participate [armed] in the fight; a child or someone who is weak-minded; and also—provided that they do not interfere by stating their opinions—an old man who is bald, someone who is infirm, a blind man, and a monk who lives secluded in a monastery or a hermitage. To these [individuals whose life or freedom is respected] one should leave only something to live on. The believer who [unduly] kills an enemy [other than a monk] has only to repent [without paying the price of blood], just as for the murder of someone who [even outside of a holy war] has not received the invitation to convert; if he kills one of those who have fallen into our hands, he owes the value of that individual [which is added to the sum total of the booty]. As for the monk and the nun, they remain at liberty.

## 3. PERMISSIBLE AND FORBIDDEN METHODS OF FIGHTING

Let those who fight employ flooding (*l'interception de l'eau*), any and all sorts of weapons, and, when all else fails, and when there are no Muslims among the enemy, let them use fire, even at sea.

In attacking a fortress containing children [or women], recourse is not had to burning or flooding. If the enemy shields himself behind his children, leave him alone, unless he is too dangerous; if he uses Muslims in this way, [fight him] without aiming at this (human) shield, provided that there is not too great a risk for most of the Muslims.

It is forbidden to use poisoned arrows, to ask polytheists to assist except in rendering auxiliary services, to send them the Qur'an or to take it on a journey in

an enemy country, and also to take a woman there except in an army that provides complete safety; to flee if the Muslims are outnumbered only two-to-one by the enemy or if there are more than twelve thousand of them, unless it is a question of a feigned flight or of a regrouping at a perilous juncture;<sup>5</sup> to inflict [undue] punishment [on those who are conquered] by way of example; to carry the enemies' heads to another country or to the general.

It is also forbidden for a captive [Muslim] to betray the trust of his infidel master which he has freely accepted, be it with regard [to the master's material goods or] to his own person.

Likewise forbidden is the misappropriation of a portion of the booty that has not yet been divided up—an action which, once proven, makes the guilty party liable to an arbitrary punishment [unless he repents].<sup>6</sup>

#### 4. LIBERTIES THAT ARE TOLERATED IN TIME OF WAR; REPLACEMENT; SINGLE COMBAT

It is permissible for a combatant who needs them to take shoes, belts (or "straps"), needles, or food, even in the form of livestock and fodder; provided he intends to make restitution, clothing, weapons, or a mount (e.g., horse, donkey) may be taken as well. Anything of value [be it a half dinar] that is left of all these objects is returned [to the local inhabitants]; if that is too difficult, it is given as an alms.

Combatants may exchange these objects with one another.

In enemy territory [the imam] can establish written penal law.<sup>7</sup> Dwellings may be destroyed, palms [and other trees] may be cut down and burned, if that harms the infidels or if there is no hope of dominating them; in the absence of that hope, destroying these things is recommended, according to Ibn Rushd (Averroes, d. 1198), just as it is recommended to refrain from destruction if such hope exists.

The Muslim who has been taken captive can cohabit with his wife or his slave woman [who have also been captured], provided that they have not cohabited with the infidel.

It is permissible to slaughter animals [belonging to the enemy for which one has no use] or to hamstring them and then finish them off. As for bees, if [they constitute a valuable resource because they are] numerous, and one does not intend to seize their honey, there are two versions.<sup>8</sup> These creatures should be burned afterward, if the enemy eats such dead animals. Similarly, one can also destroy objects that cannot be carried off.

The imam can set up a *diwan* [or registry of enlisted soldiers arranged by country of origin], and, by paying him a price, one believer can remain (at home) while another replaces him in battle, as long as both men are part of the same *diwan*.

Soldiers [who are on guard duty] can say the "*Allah akbar*" in a loud voice, but it is blameworthy to intone it. It is permissible to kill a spy, even one who is

welcomed under safe conduct, and a Muslim is treated in this regard as an atheist. The imam can accept gifts from the enemy, which become his when someone presents them to him, for instance, because they are neighbors; these gifts, on the contrary, are placed in the public treasury when they are sent to him by the king of the infidels and he has not set foot on their territory.

It is permissible to fight against the Nubians<sup>9</sup> and the Turks, to argue against them with the help of the Qur'an, to send them a letter containing one or more verses.

One Muslim can, according to Ibn Rushd, break ranks in order to fight several infidels alone, provided that he is not motivated by the [sole] desire to show his bravery.<sup>10</sup>

One can choose one sort of death rather than another, and he is obliged to do so if he hopes thus either to save or to prolong his life.

## 5. THE FATE INTENDED FOR THE CONQUERED; *AMAN*

The imam must also investigate, with regard to combatants taken prisoner, whether he should put them to death, or set them free, or ransom them, or impose the head tax (*jizya*) upon them, or reduce them to slavery.

Pregnancy caused by a Muslim man does not prevent the [infidel] mother from becoming a slave, and the child is born a slave if the father was an infidel when it was conceived.

One must fulfill the conditions according to which an enemy has made it possible for us to conquer, and keep absolutely the promise of clemency made by the imam. [The same good faith is obligatory] vis-à-vis the adversary for someone who engages in single combat;<sup>11</sup> if the adversary receives help and he consents to it, he is to be killed, along with his helper. It is permissible for one Muslim in a group fighting against an equal number of enemies to come to the aid [of a comrade] when he himself has dispatched [his adversary].

Infidels who leave their city when it is besieged [or who come among us to trade] and rely upon the decision [of a Muslim] are required to abide by it if that arbiter is a respectable person acquainted with the interests of Muslims; if not, the imam will be the judge, just as he is also in the case where someone other than he grants the *aman* to an entire region.

But if it is not a question of a region, is the *aman* valid—this is the majority opinion—or is it acceptable, since it comes not from a tributary or from someone acting out of fear, but rather from an individual endowed with discernment, even a minor or a slave or someone of the female sex, or someone in rebellion against the imam? There are two interpretations [of the text of the *Modawwana*].

The right to put to death is withdrawn by the grant of the *aman*, even if the

agreement is made after military victory. [The *aman*, which is manifested] by the use of a verbal expression or of an intelligible sign, must not be injurious to Muslim interests. If an enemy, believing that there is an *aman*, presents himself to us, or if the imam's prohibition against granting it is violated or forgotten by his men or unknown to them, or if the enemy does not know whether the one whom he is addressing is Muslim—as opposed to the case where he knows him to be non-Muslim but is unaware that this *aman* would therefore require ratification—then either the *aman* is ratified [by the imam] or else the enemy is sent back to his country. If he is captured on his territory while advancing upon us and he says, “I am coming to ask you for the *aman*,”—or on our territory and he says, “I thought that you did not arrest merchants,”—or somewhere between the two territories, then he is sent back to a safe place. If there is some circumstance [that would indicate his intentions], one acts accordingly.

Someone who, having obtained the *aman*, is driven back by (adverse) winds [or by some other obstacle] enjoys this right until he arrives home.

## 6. INFIDELS AUTHORIZED TO TAKE UP RESIDENCE; QUESTIONS OF PROPRIETY

If a domiciled infidel [i.e., who has been admitted under safe conduct]<sup>12</sup> dies on our territory, his goods belong to the treasury if he has no heir and did not come among us in order to settle some business matter. Otherwise [i.e., if he is not a permanent resident—*Derdir*], these valuables are sent back to his heir and [if there is reason for it] the price of blood, as well as any deposits belonging to the deceased. Does [this return of deposits] take place even if the foreigner is killed while fighting believers, or is the sum put into the treasury? There are two opinions. In the case where this authorized foreigner is taken captive [for violating his obligations] and then put to death, his goods devolve on the one who kills him.

[If he imports spoils that had been taken from believers], it is blameworthy that the purchase of them should be made by anyone other than the original owner, but the latter loses these goods when they are sold or given [to any Muslim or tributary]. According to Ibn Rushd, objects stolen [by an authorized foreigner] and [later] reimported are to be confiscated, but not Muslims who were originally free [but were taken captive] who are reimported.

By his conversion, an infidel becomes the full proprietor [of everything that he was able to gain by pillage], except from a free Muslim, with the following reservations: a concubine-mother must be redeemed [by her former master]; a slave who is to be freed posthumously must be redeemed with the help of the available third part of the estate of his former master; the indentured servant [*l'af-franchi à terme*] must be set free upon the completion of the term, and no one shall have any reason to be troubled about it. [If the slave who is supposed to be

freed after his master's death comes to be owned in this way by another, and is freed only partially or not at all at the death of his former master,] the heir does not have a choice [between losing all his rights over this freed man and paying the sum necessary to make up the slave's value].

The written penal law<sup>13</sup> is applied to the believer who, after the sum total of the booty has been established, has illicit relations [with a captive woman] or steals some part of the booty.

## 7. OWNERSHIP OF THE LAND; BOOTY; ADDITIONAL SHARES OF THE BOOTY

The land [except for unproductive lands] is converted into real estate [for the benefit of the Muslim community], following the example of what Umar b. al-Khattab did with the land of Egypt, Syria, and Iraq,<sup>14</sup> and the remainder of the things that have been seized is divided into five shares [in either case], if dominion over them has been acquired by means of hostilities.

The income from the land tax, from the fifth, from the head tax, [etc.,] is used for the needs of the Prophet's family and then for those of the community, providing first for those in the country from which these sums have been appropriated; after that, the lion's share goes for those of a more needy country.

The imam can, for a pragmatic reason, give up an additional share deducted from the fifth. He is not permitted to say, while the fight is not yet finished, "The one who kills [an enemy] will receive his spoils"; nevertheless this promise, [although illicit,] is valid if he does not revoke it before the booty is seized. [In that case] only a Muslim can take the usual spoils [of a warrior], which do not include a bracelet, cross, or precious metal, or mount [other than the one that belonged to the dead man]. It is possible that the beneficiary has not even heard about this promise, and [the spoils can be those of] several enemies, if the leader did not address one combatant individually; whereas, if he was speaking to a particular warrior, the latter has a right only to the spoils of the first of his victims. The spoils in question cannot be those of a woman, [of an old man, etc.] if she does not fight. The imam himself can also [have a right to the spoils of a dead man] if, in his promise, he did not say "anyone among you" or (even) if he has not reserved that right for himself.

The conquering warrior has a right to the mule [or the camel, etc. of his victim] if the imam has spoken [about an enemy mounted] upon a mule, [a camel, etc.]. The mount that is in the hands of a servant is not [regarded as being part of the spoils].

## 8. DIVIDING THE SPOILS

The imam divides the four[-fifths remaining] among the Muslim men who are free, endowed with the use of reason, postpubertal, and present at the battle, and also among the merchants and journeymen who have fought or made a sortie with the intention of going to war. Those who do not have all these qualifications, even if they did fight, have no share in the division (of the spoils); however, there is a difference of opinion as to a minor who was authorized to fight and actually did so. They receive nothing from the reserved fifth, either. Similarly [the following have no share either in the spoils or in the distribution of the fifth:] anyone who dies before the battle, is blind, lame, or one-handed; anyone who remains behind for a reason unconnected with military service, or loses his way, even as a result of a contrary wind, within a Muslim country. On the contrary, the following do have a share in the spoils: someone who goes astray in enemy territory, the sick man who helps [in combat and makes himself useful], the wounded horse, [any man or horse] that has fallen sick at the time when the booty is gathered. In the case of an illness that began at some other moment, there are two opinions.

## 9. PROPORTION OF THE SHARES OF BOOTY

A horse has twice the share allotted to his rider, even if it was on board a ship or is a draft horse, a half-breed, or a young animal, provided that it can be used to charge and retreat; [this same proportion is allotted] to the sick horse with a hope of recovery, to one that is the object of a *wakf*, to one that was set apart in advance from the spoils or seized from someone outside the army, or even taken from a military man, though in this last case the double share goes to the horse's master.

Nothing is allotted to a horse that is gaunt and weak, or too old to be of any use, to a mule, a camel, or the spare horse [of the same cavalier].

[The double share that goes] to a horse that is owned jointly is paid to the combatant, who pays the reward or hire (in French, *loyer*) for the animal to the coowner.

[Booty amassed by detachments] that rely on the main body of the army is treated like the booty taken by the latter; otherwise, it belongs to the one who seizes it, to the plunderer, for example. However, even then, according to Ibn el-Kasim, he owes the fifth if he is a Muslim, even a slave, but not if he is a tributary—nor is the Muslim obliged if he makes a saddle or arrows [with material from the booty].



## 10. THE PLACE OF THE DIVISION; OBJECTS RECOGNIZED AS BELONGING TO MUSLIMS

The [traditional] way of doing it is to go ahead and divide the spoils in enemy territory. If it is necessary to sell in order to make the division, there are two opinions. According to Ibn Younos, various sorts of objects are divided, if possible, into portions.

A known individual, even a tributary, can take back, before the division and without cost, what is known to belong to him, provided that he declares on oath his right of ownership. [When he is absent,] the object is forwarded to him or is sold and the profits given to him, depending on which alternative is the more advantageous for him.

The act of including an object [whose owner is known] in the spoils to be divided is not valid, unless it is based upon an interpretation of documents,<sup>15</sup> according to what Ibn ‘Abd es-Selam says. But an object whose owner has not been determined is included in the spoils to be divided—contrary to what happens in the case of an unclaimed object [bearing a suitable inscription and found among the enemies; such an object is sequestered].

## 11. SLAVES INCLUDED IN THE BOOTY AND RECOGNIZED AS MUSLIM PROPERTY

The services of a slave with a term of indenture or of one who is supposed to be freed posthumously [whose master has not been determined and who is found among the enemies] can be put up for sale, as well as the contract of enfranchisement, but not the services of a concubine-mother. After the distribution, the owner [once he is discovered] can take back his property by depositing the price that was paid, or the first price, if there have been several sales in succession. As for the concubine-mother [unwittingly included in the spoils to be divided, her former master] is compelled to take her back at the price [of the sale or of her appraisal] and, if he is poor, he is prosecuted under law to this effect; this obligation ceases at the death of the slave or of the master. As for the indentured servant and the slave to be emancipated posthumously [who has unwittingly been included in the spoils], their former master can choose either to pay their ransom so as to bring them back to their former status, or else let them go, relinquishing their services to their new master.

If the first master of the slave to be emancipated posthumously dies before the latter has paid off [the price of his redemption or of his appraisal], this slave goes free if the available third of the estate is sufficient, but he is prosecuted [by the second master] for the portion that he still owes. Legal action is brought in the same way against the Muslim or the tributary [mistakenly] included in the spoils to be divided and who have no good excuse for having remained silent.

[If, in the case under consideration, the available third is sufficient to buy] in part [the freedom of the slave to be emancipated posthumously], he remains a slave for the remainder (of the time). The heir then has no choice [between redeeming or relinquishing said slave], whereas he does have a choice in the case [where the testator relinquished the slave because] of damages that were done.

The contract servant (*l'affranchi contractuel*) who [having been sold or included in the division of the spoils by mistake or unwittingly] pays his purchase price, reverts to his previous status; if he cannot pay it, he is a slave pure and simple, regardless of whether he is handed over [to his purchaser] or redeemed [by his former master].

Anyone who receives an object that comes from the booty and knows that it belongs to a certain person must not dispose of it, in order that the latter may have the choice [of paying for it or relinquishing it]. But if he does dispose of it, his act is valid, and the same goes for someone who buys something from an enemy [in a Muslim country] and, for example, impregnates a slave woman, if he did not buy that object with the intention of restoring it to its master. If he did have that intention, there are two opinions. There is doubt as to the validity of freeing an indentured servant (*d'un affranchissement à terme*).

Either a Muslim or a tributary can, without indemnity, recover an object given [or sold] by the enemy on his territory, by means of a reimbursement of the amount that was given in exchange, before this object is sold again. [If there was a sale], it is valid, and the former owner receives the price or the surplus [over and above what was given in exchange for the object, as the case may be]. The best thing to do about an object recovered from a thief by means of a ransom, is for the owner to reimburse the amount to the one who paid the ransom.

When a slave who is to be freed upon his master's death or the like is relinquished [by his master] to someone who has paid what was necessary to set him free, his services in their entirety are acquired by the latter (master). But [if by the time of the death of the one who manumitted him he has not worked off the amount] that would set him free, will he be prosecuted for the entire sum, or for what remains to be paid off? There are two opinions.

## 12. SLAVES OF INFIDELS; BREAKUP OF A MARRIAGE AS A RESULT OF CAPTIVITY

The slave of an infidel becomes free, whether [or not] he converts, when he flees to our territory or when he [having converted] remains in enemy territory until he is taken as booty—but not if he flees after his master's conversion or by the simple fact that he himself, the slave, converts.

The fact of being taken captive annuls marriage [between infidels], unless the wife who has been taken prisoner converts after her husband.

The child and the belongings of a converted captive are, in any case, consid-

ered as booty, but not the minor child of an enemy by a Jewish, Christian, or Muslim wife who was born free.

But do the children of this Muslim woman who was born free become part of the booty when they grow up, or does that happen only in the case where they fight? There are two interpretations.

The child of a slave women [who has been taken captive and has fallen again into our hands] belongs to her [Muslim or tributary] owner.

### 13. RATE AND MANNER OF LEVYING THE HEAD TAX

The obligation to pay the head tax results from a grant made by the imam to an infidel—who has been taken captive legitimately, who has attained puberty, is a free man, capable of paying, leading a secular life, and has not been set free by a Muslim [in a Muslim country]—of permission to live in a place other than Mecca, Medina [or the surrounding territories] or Yemen—places through which he may travel, however—in return for a payment once every lunar year which consists, for someone who is subdued by main strength, of four dinars or forty dirhems [in legal currency]. This payment, according to Ibn Rushd, is made at the end of the year. The poor man is relieved of the tax in proportion to his circumstances, and his tax is not raised [if he becomes richer].

For someone who surrenders militarily, the rate of the head tax is the one stipulated or, if there was no discussion of it, the same as in the preceding case. According to Ibn Rushd, if the taxpayer pays this last-mentioned rate, the imam can no longer fight against him.<sup>16</sup>

The collection of the head tax should be done in a degrading manner. But this tax and these degrading methods cease once an individual has converted; the same goes<sup>17</sup> for the supplies of food provided to Muslims and the three-day hospitality that is to be offered to a traveling Muslim, because they are by nature unfair.<sup>18</sup>

### 14. THE STATUS OF THE TRIBUTARY

The infidel, whether he was subjected by main strength [or by surrender, pays the head tax, but] is free. When he dies or is converted, his land alone belongs to the Muslims [and not his movable goods].

For those who subjected themselves by surrendering [there are four cases]: 1. If the head tax is one fixed lump sum [without distinction as to persons or real estate], the ground belongs to them, and they can dispose of their goods by testament and inherit land; 2. If the head tax is reckoned per capita, the ground belongs to them [with full ownership], but in the case of death without an [infidel] heir, it

reverts [along with the movable goods] to the Muslims, and it can be disposed of by testament only by the third party; 3. and 4. If the head tax is reckoned by parcels of land, or both by parcels and per capita, the land can be sold, but the amount of the head tax is owed by the seller.

The infidel who has been subjected by force can build a church if that is stipulated (in the *dhimma* contract); if not, then he cannot. The same goes for restoring a church that has fallen into ruins. Someone who has surrendered can erect a church and sell the site on which it stands or the lands belonging to it. This is not permitted [in either case] in a country which is Muslim, strictly speaking, unless it is done to avoid a greater evil.<sup>19</sup>

It is forbidden [for any tributary] to ride a horse or a mule, to use a saddle, to take the middle of the road; he must wear distinctive clothing.<sup>20</sup> He is punished if he fails to wear his characteristic belt, if he makes a public display of himself in a drunken state, if he manifests his religious opinions, if he speaks in a disrespectful manner; let the wine be poured out [which is displayed publicly] and let the rattle [used to call people to religious services] be broken.

## 15. BREACH OF THE HEAD TAX CONTRACT

The protection agreement is breached in the following cases: when the tributary fights against the Muslims, when he refuses to pay the head tax, when he opposes legal decisions, when he kidnaps a free Muslim woman [and has relations with her], when he deceives her [by posing as a Muslim so as to marry her], when he informs the enemy of the weak points in Muslim territory, when he insults a prophet using expressions permitted by his faith, such as the following that has been reported: “He is not a prophet, God did not send him—the Qur’an was not revealed to him—he’s the author of it—Jesus created Muhammad—Muhammad is a poor man: he tells you that he is in paradise, but why, then, could he not defend himself from the biting dogs?”<sup>21</sup> The guilty party [in this last case] is put to death if he does not convert.

The fate of the tributary who flees to an enemy country and is recaptured [is determined by the imam]; more particularly, he can be reduced to slavery, as long as his flight was not provoked by abusive acts, since in this case he is regarded as being guilty of highway robbery. If a band [of converted infidels] apostatizes and indulges in highway robbery, the individuals who make up the group are treated as [Muslim] apostates.

## 16. TRUCES

To the imam alone belongs the right to declare a truce, provided that it is for a useful purpose and there are no conditions such as keeping Muslims in cap-

tivity. A payment can be stipulated. But fear [of a greater evil] precludes these considerations.

There is no limit to the duration, but it is recommended that it not exceed four months. If he foresees treachery on the part of the enemy, he denounces the treaty and advises him of it.

The stipulated conditions must be carried out, even that of returning hostages who have meanwhile become Muslim, as well as [that of returning] those who converted [and fled to our territory], even if they come as envoys; all of this being understood of males only.

## 17. REDEMPTION OF CAPTIVES

The ransom [of a Muslim captive] is paid from the public treasury or, by default, from the property of believers [while taking into account ties of blood and of dwelling place] or, as a last recourse, from his personal property. [When a certain individual], not acting out of charity, pays a ransom, given that redemption is only possible at that price, he has legal recourse against the captive who has been freed, whether the latter is well-off or not, for the equivalent of the fungible items given in payment for him, or else, if it is a question of nonfungible items, for their value. However he cannot exercise this right of recourse against a relative of a specified degree of consanguinity, or against a spouse, when their status is known to him [at the time of the redemption], nor can he do so against someone whom he would be obliged to deliver, unless the captive demanded this redemption and declared that he would be responsible for it. The right to this sort of debt has precedence over all others, and the amount is recovered [whatever Ibn el-Mawwaz may say] even from the goods of the freed man, other than those of which he is the bearer.

[Ransom paid in a lump sum to redeem several captives is divided equally among them and] per capita if [the enemy] does not know their respective worth. The statement [under oath] of the liberated captive is proof of the total or partial amount of the ransom, even if, [despite the opinion of Sohnoun], the freed man is still in the hands of his redeemer.

The ransom can consist of infidel captives who are fit for combat or, according to Ibn 'Abd es-Selam, of wine, pigs, etc. In this case, the redeemer, if he is Muslim, has no legal recourse [except for the amount that he has devoted to the purchase of these things].

On the question as to whether or not it is permissible for the ransom to consist of horses or military gear, there are two opinions.

## 18. HORSE RACES AND MILITARY COMPETITIONS<sup>22</sup>

Speed races can be organized between horses, between camels, or between animals of these two sorts, or shooting matches, offering a prize consisting of an object that can be sold legitimately.

The following things must be determined: the starting point and the point of arrival, the mount, the marksman, the number of times that the target must be hit and the manner of hitting it, whether the arrow must pass through it without remaining fixed therein, or otherwise.

The prize consists of a gift given gratuitously by a third party, or else it is assigned by one of the two contestants; in the latter case, if the challenger is victorious, he receives the prize, which on the other hand is distributed to the spectators if the donor wins. It is not permissible for two contestants to assign one prize each and for the winner to take all, even if there were a third contestant who could win, in order to lend an appearance of legitimacy to the contest.

There should be no specifications as to the arrow or the bowstring to be used, each one being free in this regard, nor is it necessary that the speed of the mount or (the identity? the skill? of) the rider be known.

A boy who has not reached puberty must not compete; [that is reprehensible].

It is not necessary that the prize be of equal importance [to each of the two contestants], nor that the target to be hit be the same, nor that both contestants have the same distance to cover or the same number of successful hits to make.

If some obstacle stops the arrow, or if it breaks, or if the horse is, [for example], struck in the face, or if the whip is wrested from the rider, the contestant who is handicapped in that way is not declared the loser; the contrary is so in the case where the whip is lost [or broken], or the horse is shy.

Contests other than the aforementioned are permitted, but without stakes.

While shooting arrows, one may speak in praise of himself, recite verses, pronounce his own name, or cry out; the best thing is for the shooter to declare the name of God, without saying anything else.

The contest is an indented deed (i.e., a reciprocal contract), just like hiring or renting.<sup>23</sup>

## NOTES

For clarification of any citations, the reader is referred to the original text, Edmond Fagnan, *Le djihad ou guerre sainte selon l'école Malikite* (Algiers, 1908), English trans. Michael J. Miller.

1. This subject has been dealt with repeatedly by European authors, and I will limit myself to citing the work by Haneberg, "Das muslimische Kriegerrecht," *Bayerische Akten der Wissenschaft* 12 (1871), which consists of a commentary on the chapter from the Wikâya, with the text and a translation. For the Malikite rite, we must refer principally to

Sidi Khalil (who died in 767 H/1365–1366 AD), using the French version by Perron, a monumental work which needs to be retouched somewhat for the sake of a little more clarity. This is what I have tried to do by translating, with the help of several commentaries, the chapter dedicated to holy war by the author of the *Compendium*—a work which, ever since its appearance, has been authoritative for adherents of the Malikite rite. Thus we will be able to appreciate, based on the texts themselves, what the theory of this “holy war” entails, which is so often discussed in relation to current events [as of 1908] in Morocco. We must not overlook the fact that the Muslim jurists, whose thought is subtle and even hair-splitting, divide and subdivide the matter at hand almost to infinity, and quite often devote themselves to discussions which are scarcely more than intellectual games or intramural academic controversies.

Because it was meant to be learned by heart, Khalil’s text is extremely dense; it could almost be compared to a series of algebraic formulas, and it becomes intelligible only with the help of commentaries. The words added in brackets come from those commentaries, and the succinct character of my translation makes the addition of these glosses indispensable for the Western reader. (Words within parentheses in the body of the text have been added by the English translator for the sake of clarity.)

2. So it is defined by Ibn ‘Arafa (according to the commentary by Kharachi): “It is the Moslem’s act of fighting the infidel with whom there is no treaty, for the purpose of exalting the word of Allah, or else the act of assisting in this war or of penetrating enemy territory to this end.” This is the proper meaning of jihad, a word which is also used to express the following actions: combating one’s passions, preaching good and dissuading from evil, the repression by leaders of forbidden acts by means of blows and chastisements (cf. the same commentary; also Ismail Hakkl’s commentary on the Qur’an, etc.).

3. This expression, for lack of a more precise one, designates the duties incumbent upon the faithful as a whole; the fulfillment of these duties by some of them suffices to dispense the others from them. They are contrasted with individual or personal duties, such as prayer, fasting, etc., which are incumbent on each believer individually.

4. This new paragraph, which is unrelated to the subject of the chapter, enumerates duties of solidarity other than the jihad, which, however, are suggested by it. The comparison drawn by the text, therefore, is purely a formality, something that happens frequently in the works of the writer we are considering and of others as well.

5. Cf. Qur’an 8.16.

6. Arbitrary punishment consists in any punishment, be it a simple reprimand, left to the discretion of the imâm or the judge. It is in contrast with a punishment determined by law, which is referred to as h’add, literally “limit,” i.e., a case where the judge does not have to weigh options, where his power is limited by the legal texts.

7. See the preceding note.

8. This expression and others with an analogous meaning that will be found further on (“statements,” “doubt,” etc.) are conventionally used by our author [i.e., Sidi Khalil in the Perron translation] to refer to the opinion of certain jurists or of certain classes of jurists.

9. This reading is certainly preferable to the reading Roûm given by Derdir and the author of the gloss of Kharachi.

10. See a few lines further on.

11. It is a question here of battles waged on the front line of two opposing armies,

following challenges issued by one side or the other, between two champions or two groups of champions. The name of Cid Campeador evokes the memory of these chivalrous contests.

12. This word *mosta'min* is defined in this way in Bianchi's *Dictionnaire turc*: "every foreigner who finds himself in the Ottoman Empire under the terms of treaties or of the law of nations, whether as a traveler or as a resident." The word is not used by Khalil but has been supplied by the commentators. According to its grammatical form it signifies "one who requests or solicits the *amân*," as Ça'ldi points out, but the term has acquired a special technical meaning.

13. That is, the *h'add* discussed above, by virtue of which a thief, for example, is punished by amputation.

14. On this question of the ownership of land conquered by storm, see Van Berchem, *La propriété territoriale et l'impôt foncier*; compare the commentaries on Khalil d'Abd el-Baki, MS 1178 of Algiers, 1. 41 v., and especially the one by Derdir, I, 268.

15. According to Awza'i, the founder of a legal school of thought which did not develop and about which we know little more than the name, the infidel can validly become the owner of a thing belonging to a Muslim. Malik himself shared this opinion, according to Ibn Wahb (Derdir and Desouki).

16. These rates are not fixed and represent a maximum. The taxpayer's financial situation at the time of the payment is taken into account, and no mention is made of the tax from the preceding year in the case of someone who at that time was insolvent. The payment is reckoned in dinars, or gold coins, and by dirhems, or silver coins, according to whether one is dealing with men of gold or men of silver, expressions that are found frequently and which Van Berchem (*Propriété territoriale*, p. 60) translates as "people of great or moderate wealth," a meaning that I can hardly accept. However we read in Derdir (*Commentaire*, vol. 1, p. 274, line 13: "The inhabitants of Egypt are men of gold, although silver is used in their transactions"; and the same thing is repeated by Ça'ldi in his glosses upon Aboû 'l-Hasan, *ad Risala*, vol. 1, p. 341, line 24. In Kharchi (vol. 4, p. 381, line 2 below) the men of gold are contrasted with the men of camels, which is to say that, for the peoples which make little or no use of coinage, the camel serves as a sign representing worth.

17. An allusion to the abrogation of the additional levies that are discussed further on, through obsolescence or some other reason, since the commentaries set no date.

18. According to Malik, the commentaries report the following: "'Omar ben el-Khattab had imposed, besides the head-tax in silver, additional monthly per capita contributions of two modd of grain and three kist of oil for the tributaries of Syria and Hira; for those of Egypt, of one ardeh of grain and of some quantity, unknown to me, of grease, honey, and clothing. Besides that, they all had to provide three days of hospitality to traveling Moslems. In Iraq he imposed 15 ça of dates per capita per month, besides certain garments, I do not know how many, which he would use to clothe people." The author of the gloss of Kharachi adds: "Instead of two modd, Tatâ'l says one ça, and Mawwak, two mody, a measure equivalent to 17 [or 17.5] ça. The kist is made up of three ritl or Syrian pounds, or, according to other sources, nine ritl." On these equivalences, see Perron's translation of Sidi Khalil, vol. 1, p. 561. These supplementary contributions have also been mentioned by Kremer, *Culturgeschichte*, vol. 1, p. 61.

But Lakhmi (died 478 H/1085–1086 AD), who is cited by Ibn 'Arala, could already



say: “I do not see that people in the West today are surprised by these levies, since no violence is used in their regard” (Hattab, MS 1175 of Algiers, l. 113 v.). Derdir (died 1201 H/1786–1787 AD) says for his part: “The governors of Egypt have strengthened their influence by taking in the scribes that they need, and they have entrusted to them their own goods and wives” (vol. 1, p. 274). The commentaries, supplementing the text of this passage by Khalil, add that tributary merchants who import merchandise into a Muslim land must pay a duty of one tenth of its value.

19. Here is how Derdir puts it—an author who rarely misses an occasion to display his orthodox rigidity (Akrab el-mesalik, vol. 1, p. 205): “The infidel who has surrendered can construct or repair a religious building, whether he has stipulated this or not, upon his territory, but not in a city founded by Moslems, such as Cairo, unless, however, there is good reason to avoid a greater evil. But the rulers in Egypt, thanks to the tepidity of their faith, have authorized them to do so, and no learned man has been able to show his disapproval except in his heart or in his words, and not by force. The emirs of our era have done even more: they have exalted the infidels and have given them superiority over the Moslems. Would to heaven that something like the tenth of the tributaries were levied upon them (i.e., those Moslems)! One frequently hears the believers exclaim: How we would like to see the emirs impose the head-tax upon us, like the Christians and the Jews, and then have no more to do with us than with these infidels! But those who have mistreated others will find out what treatment they will have to undergo (Koran 26.228).”

20. The chroniclers recall on more than one occasion the sorts of harassment that the Christians and Jews were subjected to; see for example my partial translation of En-Nadjoûm ez-Zahira, p. 103; Merrakechi, *Histoire des Almohades*, p. 264 of the French translation, etc.

21. One might be led to believe that there is an allusion here to some episode from the life of the Prophet; but it seems quite clear from the commentaries, which at any rate are not very explicit on this point, that it is a simple recollection of words that had been pronounced publicly, the insulting nature of which had prompted a request for a juridical consultation or fetwa.

22. Horse-races and other military exercises, because they serve as preparation and training for the holy war, are considered to be connected with it.

23. The text Aeoll p. 1, is explained as follows: “That is to say that the contract, by the mere fact that it comes into being, becomes idzim (indissoluble), by the same title as the rental contract, in such manner that it can be dissolved only with the agreement of both parties at once.”