

# Shaybānī's Doctrine of Peace (*Amān*): A Comparative Study with the Norms of Contemporary International Law

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By

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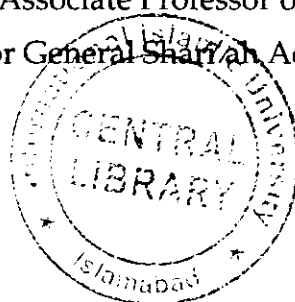
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HAS

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ



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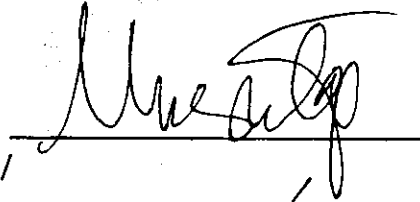
### TITLE OF THESIS:

### **"SHAYBANI'S DOCTRINE OF PEACE (AMAN): A COMPARATIVE STUDY WITH THE NORMS OF CONTEMPORARY INTERNATIONAL LAW"**

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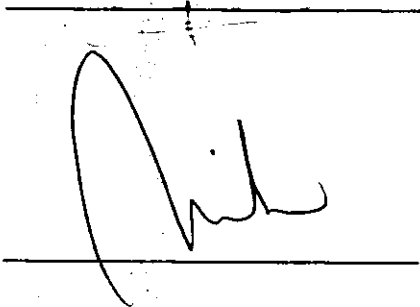
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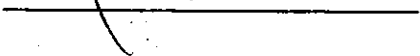
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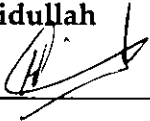


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## DECLARATION

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## ACRONYMS

BOPT	Breach of Peace Treaty
CIL	Contemporary International Law
CUIL	Customary International Law
CMJ	Classical Muslim Jurist
COMJ	Contemporary Muslim Jurist
CILS	Contemporary International Law Scholars
COF	Cause of War
DOW	Division of World
IHL	International Humanitarian Law
ICJ	International Court of Justice
MIL	Muslim International Law
MS	Muslim State
NS	Nation State
POW	Prisoner of War
PT	Peace Treaty
RA	Radiyallah 'anho
ROR	Rules of Reciprocity
TOPT	Termination of Peace Treaty
VC	Vienna Convention
VCDR	Vienna Convention Diplomatic Relations

## ACKNOWLEDGMENTS

Praise be to Allah, the sustainer of the worlds, the Merciful, the compassionate and may his everlasting blessings and peace be on Muhammad, the last of his Messengers!

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May Allah bless them All.

# TRANSLITERATION TABLES

Table 1.1: Consonants Table 1.2: Long Vowels

ب	b	ر	r	ف	f	ھ	bh
پ	p	ز	z	ق	q	پھ	ph
ت	t	ج	z	ک	k	تھ	th
ٹ	t̤	ج	z	گ	g	ٹھ	ṭh
ث	th	س	s	ل	l	جھ	jh
ح	h	ش	sh	م	m	چھ	ch
ج	ch	ص	ṣ	ن	n	دھ	dh
خ	kh	ض	ḍ/z	و	w	ڈھ	ḍh
د	d	ط	ṭ	ہ	h	ڑھ	ṛh
ڈ	ḍ	ظ	ẓ	ة	ah/at	کھ	kh
ذ	dh	ع	ʿ	و	w/v	گھ	gh
		غ	gh	ی	y		

ا		ā
آ		ā
ی		ī
و		ū
و	(Urdu)	ō
ے	(Urdu)	ē

Table 1.4: Diphthongs Table 1.5: Doubled

و	-	(Arabic)	aw
		(Urdu)	au
ی	-	(Arabic)	ay
		(Urdu)	ai

a	-	فتحة
u	-	ضمّة
i	-	کسرة

و	-	uww/uvv
ی	-	iyy

The letter "ء" is transliterated as an elevated comma and is not expressed at the beginning a word

Table 1.6: Initial Vowels

a	أ	همزة بالفتح
u	أ	همزة بالضم
i	أ	همزة بالكسر

Table 1.7: Median or Finial Vowels

'a	أ	همزة بالفتح
'u	أ	همزة بالضم
'i	أ	همزة بالكسر
'i	أ	همزة ساكنة

ع is transliterated as inverted comma (').

ض is transliterated as ḍ for Arabic and for Urdu.

و is transliterated as w for Arabic and v for Urdu.

ة is transliterated as ah in pause form and at in construct form.

ال is transliterated as al-.

## ABSTRACT

The nature of the relations between Muslims and non-Muslims has always been debatable to Muslim and non-Muslim scholars. After the incident of 9/11, the nature of relations between Muslims and nation states once again emerged as burning issue and research is started by Muslim and non-Muslim scholars on the doctrine of Jihād. It is felt that a comprehensive phenomenon of Muslim International Law (MIL), peace is neglected which remained the cardinal rule of MIL with reference to framing relations between Muslims and non-Muslims. Shaybānī is considered the founder of MIL whose work in this respect is considered as fundamental work. There is an enormous need to analyze Shaybānī's doctrine of peace (*Amān*) with Contemporary International Law (CIL).

This study investigates the theory and practice of CIL for its compatibility and viability with the classical work of Shaybānī's doctrine of peace (*Amān*). It is studied for the contrast and agreement with the views of other classical as well as with contemporary Muslim and non-Muslim scholars for finding the nature of relationship of Muslim state with other Nation States.

This study sums up that neither the diversity in faith between Muslims and non-Muslims nor the differences of territorial jurisdiction necessarily create hostility. MIL considers only aggression as a cause of war either caused by the Nation States or group of non-Muslim individuals or Muslims like rebels. The aggression may be either against Muslim state or Muslims individuals who reside even beyond the territorial jurisdiction of Muslim state. Similarly, MIL considers breach of peace treaty or preventing non-Muslims from embracing Islam or compelling Muslims for not following Islam or making them apostates, as an aggression. Any act of Blasphemy against Prophets by non-Muslim state or group of individuals supported by a Nation State is also considered aggression. Other

than the situations mentioned above, all the relationships between Muslim and non- Muslim states are considered as peaceful or friendly. MIL does not believe in perpetual war against non- Muslim states and believes in the co-existence with nation states.



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## INTRODUCTION

The doctrine of *Amān* and its general principles discussed by Shaybānī have their parallels in Contemporary International Law and hence the notion that Muslim International Law is inherently inconsistent with the principles of Contemporary International Law is a misunderstood concept because Muslim International Law is based on divine sources that covers all aspect of human life.

Allah almighty has blessed humanity with Islam as a complete code of conduct.<sup>1</sup> The Prophet Muhammad (peace be up him) was chosen to be a role model in every aspect of life.<sup>2</sup> He practically implemented every divine law that were carried by the revelation. The Prophet Muhammad (peace be up him) practically demonstrated how to establish sustainable relations with allies and opponents. He reshaped the relations that were prevailing before him in such a way that the element of humanity reflected in international discourse of the early Islamic State of Madinah. The covenant of Madinah is the example of international relations with other nations that is known as the first written constitution of the world.<sup>3</sup>

The Prophet (peace be up him) trained his companions on the patterns that every companion was reflecting in his personality. They did preserve the all actions and sayings of the Prophet (peace be upon him). They carried the mission of the Prophet (peace be up him) to maintain and expand the Islamic State through soft relations with neighboring states. Several jurists were always there in era of companions who were guiding in all affairs of state. They always corrected the

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<sup>1</sup> "This day have I perfected your religion for you, completed my favor upon you, and have chosen for you Islam as your religion" Al- Qur'ān:05, 03.

<sup>2</sup> "Ye have indeed in the Messenger of Allah a beautiful pattern (of conduct) for any one whose hope is in Allah and the Final Day, and who engages much in the Praise of Allah" Al- Qur'ān:33, 21.

<sup>3</sup> Muhammad Hamidullah, *The Muslim Conduct of State* (India Lahore: Kashmiri Bazar, 1954), 259.

caliphates of the Muslim state to carry on the spirit of Muslim International Law by their mutual relationships with other nation states.

In the earlier stages of Muslim state, Muslim International Law was not compiled in the present form. This deficiency was filled by Muhammad bin al-Hasan al-Shaybānī by writing and compiling two important books "*al-Siyar al-Saghīr*" and "*al-Siyar al-Kabīr*." *Siyar al-Saghīr* is the compilation of the thoughts and opinions of his teacher Imam Abū Ḥanīfah. Shaybānī is one of the disciples of Imam Abū Ḥanīfah, he used to attend each class of his teacher and used to write down his opinions about *Siyar* and probably reviewed by Imam Abū Ḥanīfah.<sup>1</sup> When *al-Siyar al-Saghīr* was completed by Shaybānī and presented to Imam al-Awzā'ī. He commented on the book: "What concern the people of Iraq have with the Science of *Siyar*?" He meant that the people have no knowledge of *Siyar* because the wars of the Prophet (peace be upon him) and his campaigns took place in *Ḥijāz* and *Syria*. He was of the view that Iraq was conquered later. This satire was communicated to Shaybānī which motivated him in attempting a voluminous compilation on the subject matter in the form of a subsequent book *al-Siyar al-Kabīr*.<sup>2</sup>

Due to this great work of Shaybānī introducing Muslim International Law as a separate science, got the title of founder of International Law. The role of Shaybānī with reference to international law is already discussed by several scholars and researchers before this study. This study focusses only the doctrine of *Amān* and its general principles discussed in *Sharḥ al-Siyar al-Kabīr* in the context of contemporary practices and theory of CIL. The aim of this study is to know the role of *Amān* and its importance in the relationship of Muslim state with other nation states.

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1 Mehmood Ahmad Ghazi, *The Shorter Book on Muslim International Law* (Islamabad : Islamic Research Institute, 1998), 9.

2 *Ibid.*



Literally the term *Amān* is opposite to terror.<sup>1</sup> Legally, it is a kind of guarantee awarded by either Muslim individuals or Muslim state to non-Muslims residing beyond the territorial jurisdiction of Muslim state. *Amān* may also be awarded by non-Muslim or alien state to Muslims. To conclude it legally two contracting parties are needed, the *Amān* giver (*Mu'āmān*) and the *Amān* seeker (*Mustā'min*). *Amān* giver (*Mu'āmān*) may be state or any Muslim citizen of Muslim state. According to majority of the Muslim jurists, a Muslim citizen slave of Muslim state can also award *Amān*. According to Imam Abū Ḥanīfah only a Muslim slave fighter can award *Amān*.<sup>2</sup> *Amān* may be awarded by using any word or gesture explicitly or implicitly indicating *Amān*.<sup>3</sup> It needs not any intentions of awarding *Amān*.<sup>4</sup> Moreover, if an alien or any non-Muslim enters to the domain of Muslim state without seeking formal guarantee being claiming a diplomat will be considered protected subject to providing sufficient proofs.<sup>5</sup> This rule of law is based on precedent of the Prophet (peace be up him) in which two diplomats of Musylmah Kadhhab had entered Muslim state without seeking formal guarantee. In the response of which the Prophet (Peace be up him) said I would had killed both of you if diplomats were allowed to be killed.<sup>6</sup>

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<sup>1</sup> Muhammad Bin Mukarram bin 'ali Abū al- Faḍal Jamal al-ddin Ibn Manzoor al-Afrīqī, *Lesan- al-'Arab*, vol.13 (Beirut: Dār al- Sadir, 1414), 21.

<sup>2</sup> Shams al-āimmah Muhammad bin Aḥmad bin Abi Sahl al-Sarakhsī al-Khazrijī al-anṣārī, *al-Mabsūt*, Vol.10 (Beirut: Dār al-Fikār, 2000), 112.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 273.

<sup>4</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 273.

<sup>5</sup> al-Sarakhsī, *al-Mabsūt*, Vol.10, 157

<sup>6</sup> It was reported from Salamah, meaning Ibn Al-Fal, from Muhammad bin Ishaq, who said: "Musailimah wrote to Allah's Messenger." He said: "And Muhammad bin Isiaq narrated to me, from a Shaikh, from Aja' named Sa'd bin Tariq, from Salamah bin Nu'aim bin Mas'ud Al-Asjja'l, from his father, Nu'aim, who said: 'I heard the Messenger of Allah say to the two of them (the messengers) after he was read the letter from Musailimah: "What do you to believe (in)?" They said: "We believe as he believes." He said: "By Allah! If it

Generally, *Amān* is considered by Shaybānī and Sarakhsī, a kind of guarantee awarded by Muslim state or Muslim individuals without gender discrimination to aliens or non-Muslims. According to them the logic for this rule of law is the responsibility of both (Muslim state and Muslim individuals) to assist Islam. They are of the view that awarding guarantee to aliens or non-Muslims is a kind of assisting Islam.<sup>1</sup> Al-Shāfi'ī also recommends this view point of Shaybānī with reference to awarding guarantee.<sup>2</sup> Imam Al-Shāfi'ī is of the view that Muslim state will never dismiss any guarantee awarded by a Muslim individuals with a condition if such guarantee is not against the general interest of Muslims and Muslim state.<sup>3</sup> From this, it can be concluded that even a Muslim state is also bound to award guarantee to aliens in the general interests of Muslims. Shaybānī gives equal right to Muslim individuals of awarding guarantee to aliens with Muslim state while Al-Shāfi'ī recognizes it as a privilege for Muslim individuals with a condition of being not against the general interests of Muslims and Muslim state. According to him Muslim state has a one-degree preference in awarding guarantee to aliens over Muslim individuals because it has absolute and inherent right of awarding guarantee while the guarantee given by Muslim individuals is subject to the general interests of Muslims and Muslim state.

*Amān* plays a vital role in the international relations of a Muslim state with other alien states. The importance and legality of *Amān* can be understood from the verse of Qur'ān, Allah said "If someone amongst the Pagans asks *Amān*, grant

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wasn't that the messengers are not to be killed, I would have cut off their heads." Abu Dawūd Sulaiman bin al-ashās al-Shabistānī, *Sunan-e-Abi Dawūd*, vol.3 (Riyadh: Dār-al-Salam, 2008), 354.

<sup>1</sup> Al-Sarakhsī, *Shrḥ al-Siyar al-Kabīr*, Vol.1, 252. Muhammad bin Muhammad al-Bābartī, *AL-'nāyah sharḥ al-hidayah*, vol.7 (Beirut: Dār al-fikar, 1988), 465.

<sup>2</sup> Shams ul-din Muhammad bin aḥmad al-Khatīb al-Sharbīnī al-Shāfi'ī, *Mughni al-Muḥtaj ila Ma'rifah Mā'ni al-fāz al-Minhaj*, vol.6 (Beirut: Dār al-Kutub al-'Imiyyah, 1994), 51. Sham ul-din Muhammad bin Al-abbas Aḥmad bin Ḥamza Shahb ul-din al-Ramli, *Nihayat al-Muḥtaj ila Sharḥ al-Minhaj*, vol.8 (Beirut: Dār al-fikar, 1984), 79.

<sup>3</sup> Al-Ramli, vol.8, 81.

it to him, so that he may hear the word of Allah; and then escort him to where he can be secure. That is because they are men without knowledge."<sup>1</sup> Ibn Qudāmah is of the view that if non- Muslims demand the guarantee from Muslim state to know about the qualities of Islam, they must be awarded guarantee.<sup>2</sup> Majority of Muslim jurists make all Muslim individuals capable for awarding *Amān* with Muslim state because the guarantee may also be demanded from Muslim individuals.<sup>3</sup> The notion of Shaybānī about *Amān* is quite comprehensive as compare to other concepts of the CIL like quarter, asylum and refuge. All the rest of the concepts of CIL which come under the chapter of awarding protection is considered sub version of the notion of *Amān* introduced by Shaybānī.

Shaybānī has dedicated a special chapter to the concept of *Amān* and he also discussed the phenomena of *Amān* in chapters' others of *al-Siyar al-Kabīr*. While Imam Sarakhsī has discussed the important role of *Amān* in MIL as:

"اعلم بأن أدق مسائل هذا الكتاب والطفها في أبواب الأمان، فقد جمع بين دقائق علم النحو ودقائق أصول الفقه وكان شاور فيها علي بن حمزة الكاساني رحمه الله، فانه كان ابن خالته وكان مقدما في علم النحو. وقيل من أراد امتحان حفاظ الرواية من أصحابنا فعليه بباب الأذان من كتاب الصلاة، ومن أراد امتحان المتبحرين في الفقه فعليه بإيمان الجامع، ومن أراد امتحان المتبحرين في النحو والفقه فعليه بأمان السير"<sup>4</sup>

According to Sarakhsī, to know the epistemology of *Amān* under Muslim International Law is important for Muslim jurists. Without understanding the notion of *Amān* properly, the epistemology of Muslim International Law (MIL) cannot be understood and recognized for the implementation of peace globally with its wide parameters.

<sup>1</sup> Al- Qur'ān: 09, 06. The translation of the verses of the Qur'ān is taken from Abdullah Yusuf Ali's English translation "THE HOLY QURAN".

<sup>2</sup> Ibn Qudāmah, *al-Mughni*, vol.9, 242.

<sup>3</sup> Abū bakar Muhammad bin Ibrahim bin al-Munzir al-Nisabūri, *Al-Ijmā'* (Riyadh: Dār al-Muslim, 2004), 64.

<sup>4</sup> Al Sarakhsi, *Sharḥ Kitāb al- Siyar al- Kabīr*, vol.1, 252.

On the other hand, Contemporary International Law(CIL) recognizes the legal status of "Quarter". It is a unilateral contract of protection provided to combatants under the rules of International Humanitarian Law (IHL).<sup>1</sup> Quarter under IHL is a narrow down phenomenon which is restricted to war only. *Amān* is a general conduct of Muslim state and Muslim individuals under (MIL) that deals in both situations of war and peace. It is partially a bilateral contract which sometimes needs not legal proceedings like proper demand on the behalf of non-Muslims or aliens which a Muslim state may award on its own discretion. While Quarter is a unilateral contract of protection provided under the rules of International Humanitarian Law (IHL) during war only. Kāsānī and Ibn 'Arafah al-Mālikī have confined *Amān* only to combatants during war.<sup>2</sup> Muhammad Hamidullah considers both the terminologies as inter changeable.<sup>3</sup> The basic conditions that are to be fulfilled for awarding *Amān* or Quarter are overlapping while according to the consequences both have similar impact on the behalf of the protected person and on the guarantor like both provide protection to the life and property of the guaranteed person either by *Amān* or Quarter. While in *Amān*, the concerned persons are not required to be belligerents they may be laymen. But under IHL, Quarter will be given to those fighters who meet the criteria of belligerents. Belligerents must carry a unique symbol like proper uniform and flag or carrying weapons openly, fight under the supervision of a commanders and observing the rules and regulations of IHL. Awarding Quarter is the sole right of the imprisoning state. Individuals have no capability of awarding Quarter.<sup>4</sup>

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<sup>1</sup> Geneva convention 3 relative to the treatment of prisoners of war of 12 august 1949, articles, 25-37.

<sup>2</sup> 'Alā al-ddīn Abu bakar bin Mas'ūd bin Ahmad al-Kasānī al-Ḥanafī, *Bdā' al-Sānā'fī Tartīb al-Sharā'*, vol.7 (Beirut: Dār al-Ktub al- 'Imiyyah, 1986),106. Muhammad bin Muhammad bin 'Arafah al-Mallikī, *al-Mukhtasar al-Fiqhi libn 'Arafah*, vol. 3 (UAE: Muassisah Khalaf Ahmad, 2014), 53.

<sup>3</sup> Muhammad Hamidullah, *Muslim Conduct of State* (India Lahore: Kashmiri Bazar, 1954), 200.

<sup>4</sup> Mohamed Elewa Badr, *Jus in Bello under Islamic International Law*, *International Criminal Law Review* 13 (2013) 593–625.615. Article 40 of the additional protocol 1

According to IHL, individuals will only be capable to award quarter by the appointment of the state in case of using the delegated authority. Under Muslim International Law, *Mustā'min* (guaranteed person) has more rights as compared to a person to whom the Quarter has been given. Under the IHL, a person to whom the Quarter has been given entitles the fundamental human rights like food, shelter, cloths, freedom of thought and expression and medical facilities like hygienic environment.<sup>1</sup> They are considered prisoners of war, they cannot move beyond the territory specified. According to the entitlements, guaranteed persons under *Amān* are dealt equal to either Muslims or non- Muslim citizens mostly.

Similarly, CIL also recognizes the term "Asylum" for the protection on the grounds of diplomacy or politics.<sup>2</sup> It is not a comprehensive protection as awarded by *Amān*. it can be considered that Asylum is the sub part of *Amān*. According to an orientalist law expert Khadduri, the process of *Amān* is very simple and easy. He is of the view that there is no formal procedure for seeking *Amān* by the non-Muslim seeker.<sup>3</sup> It does not require the intention of the guarantor. If guarantors show any gesture which is either known to the persons concerned of *Amān* for awarding guarantee or they consider it as guarantee, in such situation the guarantee will be considered as awarded. The informal communication was acknowledged as awarded guarantee in the case of al-Harmuzān by the Caliph 'Umar RA. Although the Caliph did not award *Amān* in explicitly and nor had intended to award guarantee to Harmuzān. But he claimed the guarantee and it was awarded without the willingness of the Caliph.<sup>4</sup> While asylum is a restricted phenomenon of awarding protection. It is the sole authority of state which is to be

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<sup>1</sup> Geneva convention 3 relative to the treatment of prisoners of war of 12 august 1949, articles, 25-37.

<sup>2</sup> Malcolm N.Shaw, *International Law* ( New York: Cambridge University Press, 2008),76-79.

<sup>3</sup> Majid Khadduri, *War and Peace in the law of Islam* (London: The Johns HopKins, 1960), 163,164.

<sup>4</sup> *Ibid.*, 165.

given on the proper demand by the person/s concerned. Asylum is usually awarded on the bases of diplomatic or political grounds. The rights of a person who gets asylum are to be judged in accordance with the rules of CIL but there are no agreed rules through which the rights of the person who has obtained asylum are to be determined. The rights of the person who got asylum are determined by the International Court of Justice are not unanimously agreed.<sup>1</sup>

The notion of refugee is also different from the legal philosophy of *Amān*. According to the CIL, refugee is a stateless person.<sup>2</sup> According to Geneva Convention 4, refugee is a person who does not enjoy any shelter of any government.<sup>3</sup> Usually, refugee-status is demanded by the persons who have fled from their mother countries in order to seek protection along with fundamental rights.<sup>4</sup> According to IHL, the rights of refugees are to be determined either by Customary International Law (CuIL) or by International Peace Treaty between the states concerned. In the absence of (CIL) and any peace treaty, the rights of refugees are to be determined by the host state.<sup>5</sup> It can be concluded that the notion of *Amān* is a broader phenomenon with respect to legal process of completion, impact on both the parties, consequences, revocation or termination and the rights of *Mustā'minīn* under Muslim International Law as compare to Quarter, asylum and refuge.

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<sup>1</sup> Malcolm N. Shaw, *International Law*, 76-79.

<sup>2</sup> Additional Protocol 1, article 73.

<sup>3</sup> Geneva convention relative to the protection of civilian persons in time of war of 12 august 194, Article 44.

<sup>4</sup> Hans peter Gasser, *International Humanitarian Law* (Haupt: Henry Dunant Institute, 1993), 21.

<sup>5</sup> Malcolm N. Shaw, *International Law*, 675.

## STATEMENT OF THE RESEARCH PROBLEM

Some researchers of the Contemporary International Law are of the view that the principles which are discussed by the Muslim jurists in the context of International relations with reference to the doctrine of *Amān* regarding aliens are insufficient to meet the legal and as well as the political needs of the modern discourses of nation states under the CIL. Besides this they are of the view that Muslim International Law denies the contemporary discourse among aliens in a sense that it does not recognize equal recognition of co-existence of nation states. However, the problem is with contemporary International Law due to its hierarchy. It gives supremacy to super powers only. The focus of criticism is the juristic work of Shaybānī in the context of international relations because the said work plays a cardinal role in re-shaping the conduct of Muslim states with other nation states especially in the context of *Amān*.

Some of the contemporary researchers are also of the view that the work of Shaybānī deviates from the natural discourse of Muslim state particularly with reference to the doctrine of *Amān*. It is believed the work of Shaybānī is unique in its nature and not perfectly applicable to the affairs of nation states.<sup>1</sup>

So, it becomes important to investigate the issues on scientific basis relevant to the work of Shaybānī regarding the aforementioned criticism of the contemporary researchers.

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<sup>1</sup> Majid Al- Khadduri, *The Islamic Law of Nations: Shaybānī, 's Siyar* ( New York: John's University, 1966), 55.

## RESEARCH OBJECTIVES

1. To elaborate the significance of the doctrine of *Amān* and its general principles introduced by Shaybānī in order to check the compatibility of Principles of Contemporary International Law with Muslim International Law focusing on *Amān*.
2. To inquire whether the doctrine of *Amān* and its general principles can meet the 21<sup>st</sup> century legal and political needs among the nation states.
3. To analyze the nature of relationships between Muslims and non-Muslims discussed by Shaybānī, and contemporary International Law.
4. To inquire the role of the *Siyar*'s general principles in the relations with non-Muslims, in war.



## SIGNIFICANCE OF THE STUDY

Many orientalist believe that Muslim International Law has no compatibility with the modern legal needs of nations and nation states. It has unilateral enforcement and lack bilateral or multilateral sanctions. Therefore, it cannot be recognized as International Law at global level. Such misconceptions are needed to be addressed scholarly. Some of the issues are discussed by scholars like Mawdudi, Muhammad Hamidullah and Mehmood Ahmad Ghazi, Muhammad Munir and Muhammad Mushtaq Ahmad but the matter still needs to be investigated with special reference to the doctrine of *Amān*. it benefits those researchers who believe that MIL does not believe in peace and considers the relations of Muslim state with other nation states of perpetual hostility. Some of the researchers are also of the view in that MIL is incompatible with the principles of CIL in a sense that it cannot meet the legal and political needs of the nation states. it also clarifies the misunderstanding of some of the orientalist about the misconception that Islam does not recognize the co-existence of the nation states on equality basis. Regarding the enforcement of MIL, this study clarifies that it has a variety of sanctions to implement and observe it by the Muslims soldiers for maintaining peace and eliminating the evil throughout the globe.

Both the laws have different fundamental sources from which they draw their sanctity, it clarifies that this difference makes the MIL distinct from the CIL regarding its practicality, unilateralism, enforcement and equal transcendence. Not like the CIL which is badly affected by the dominant nation states as the history witnesses, it clarifies that Shaybānī, 's general principles, which have protected the MIL from being affected by any dominancy of a nation from Muslims. This study points out the limitations of the CIL and suggests that how the MIL can fill the gap by implementing its epistemology in the context of war and peace.

## LIMITATIONS OF THE STUDY

This study is limited to the doctrine of *Amān* and the relevant principles formulated by Shaybānī and interpreted by Sarakhsī, in *Shraḥ al- Siyar al- Kabīr*. It is difficult to differentiate between the two views of the scholars because there is no clear line between their opinions. It is clear that Shaybānī has formulated the principles of MIL and considered as the founder of the MIL while Sarakhsī elaborated and extended as more comprehensible and understandable for practice by Muslim state. So, all the Principles' discussed here are dedicated to both the scholars.

This study focuses on the interpretation and compatibility of the Siyar's general principles with the principles of CIL regarding *Amān*. The different opinions of Muslim scholars are analyzed and accounted through their arguments preferred discourse. The opinion which is most preferable on scientific grounds among the Muslim scholars is considered as principle of MIL. In the second phase, the Siyar's general principles (SGP) relevant to the notion of *Amān* are comparatively analyzed with the contemporary notion of peace under CIL. In case compatibility of the SGP with CIL, then the merits and practical enforcement of such principles are discussed in detail. If no compatibility is found, then Shaybānī, 's General Principles relevant to *Amān* are kept upright and analyzed for its inculcation in the International Law.

The principles extracted by this study benefit in the global conduct of nation states if it applied holistically with its spirit. The principles suggested by this study regarding *Amān* are subject to its applicability with reference to the limitations in space time. Researchers have the duty to review it with the passage of time and particularly in the context of the needs of nation states.

## OUTLINE OF THE STUDY

This study comprises of six chapters. The first chapter is literature review which contains introduction of the chapter, work on *Siyar* (Muslim International Law), work on Shaybānī's contribution to *Siyar*, work on *Amān* and conclusion of the chapter.

The second chapter is about the nature of relations between Muslims and non-Muslims: Discourse of the contemporary scholars. It contains introduction of the chapter, cause of war, division of the world, Impact of the division of the world, Peace Treaties, Formation and duration of Peace treaties, Use of Force by Muslim state and the status of Contemporary International Law, Just War Theory, Just war theory, Pre UN Charter Law, Post UN Charter Law, Contemporary issues and Conclusion of the chapter.

The third chapter is about *Amān* in Shaybānī's work. It contains *Amān* in *al- Asl*, *Amān* in *al -Siyar al-Saghīr*, *Amān* in *al -Siyar al-Kabīr* and conclusion of the chapter.

The fourth one is about doctrine of *Amān* and jus ad bellum (cause of war). it contains Introduction of the chapter, *Amān* and peace treaties, Kinds of peace treaties, Nature and duration of peace treaties, Breach of the peace treaties, Termination of peace treaties, International Law on peace treaties and breach of peace treaty, *Amān* and Diplomatic immunity and Conclusion of the chapter.

The fifth one is about *Amān* and jus in bello (Ethics of war). It contains Introduction of the chapter, Ethics of war in Muslim international Law, *Amān* during war, Authority of awarding *Amān* during war, Conditions in *Amān* during war, Violation of *Amān during war*, *Amān* and Ruses of war, *Amān* and International Humanitarian Law: (Giving Quarter, Prohibition of Perfidy, Permission of Ruses) and conclusion of the chapter.

The sixth chapter is about "General Principles of *Amān* in al -*Siyar al-kabīr*: An Analytical and Comparative Study". It contains introduction of the chapter, Authority of awarding *Amān*, Rights of guaranteed persons (*Mustā'min*), Conditions in *Amān*, Kinds of *Amān*. This study also contains conclusion of the research, recommendations and bibliography.

## CHAPTER ONE: LITERATURE REVIEW

### INTRODUCTION

The research gap about the issue of the relationship between Muslims and non-Muslims, compatibility and viability of Muslim International Law (MIL) cannot be comprehended till the work on the notion of *Siyar* and Shaybānī's contribution to (MIL) with special reference to the doctrine of *Amān* is not mentioned which is pointed out by the experts of MIL.

This section of the study explains the work on the doctrine of *Siyar* (Muslim International Law). It elaborates the work of classical jurists on *Siyar* precisely while the work of contemporary scholars in details. This section also explores that MIL is capable the national and international needs of the modern Muslim and non-Muslim states. Muslims are developer of International Law and believes in co-existence of states. This section also explores the different view point of contemporary scholars regarding *Amān*. According to them *Amān* is guarantee given on the demand of aliens being in safe place, in such situation the guarantee will be applicable to their dependents too. Such *Amān* will include protection of their lives, properties, and all their dependents including their wives, children of minor age, unmarried daughters and sisters, mothers and grandmothers. If *Amān* is demanded for trade, then it will include all the servants and helpers who perform trading activities and the necessary equipment and inventories of business. According to them, all Muslim without any danger discrimination are capable to award *Amān* to aliens or non-Muslims. It is not necessary for the awarding of *Amān* to be given only on the demand of aliens, Muslim state or Muslim individual can also declare it. This section of study also contains the research questions.

## 1.1 Work on *siyar* (muslim international law)

*Siyar* is the plural of *Sīrah* that means in the context of Muslim International Law(MIL), the conduct of the Prophet (peace be up him).<sup>1</sup> For the first time the term “*Siyar*” is used for Muslim International Law by Zayd bin Ali.<sup>2</sup> Muslims as well as non-Muslims experts have written on MIL(*Siyar*). In the earlier stages of Muslim state, Muslim International Law was not compiled in the present form. This deficiency was filled by Muhammad bin al- Hasan al- Shaybānī by writing and compiling two important books “*al- Siyar al- Saghīr*” and “*al-Siyar al- Kabīr*.” *Siyar al-Saghīr* is the compilation of the thoughts and opinions of his teacher Imam Abū Ḥanīfah. Shaybānī is one of the disciples of Imam Abū Ḥanīfah, he used to attend each class of his teacher and used to write down his opinions about *Siyar* and probably reviewed by Imam Abū Ḥanīfah.<sup>3</sup> When *al-Siyar al-Saghīr* was completed by Shaybānī and presented to Imam al- Awzā’ī. He commented on the book: “What concern the people of Iraq have with the Science of *Siyar*?” He made some disagreements with the view point of Abū Ḥanīfah regarding MIL. Awzā’ī meant that the people have no knowledge of *Siyar* because the wars of the Prophet ((PEACE BE UP HIM)) and his campaigns took place in *Hijāz* and *Syria*. He was of the view that Iraq was conquered later. The senior fellow of Shaybānī, Abū Yūsuf wrote a rejoinder to Awzā’ī named as *Al-Raad ‘alā Siyar al-Awzā’ī*. On the other side the satire disagreements of Awzā’ī was communicated to Shaybānī which motivated him in attempting a voluminous compilation on the subject matter in the form of a subsequent book *al- Siyar al- Kabīr*.<sup>4</sup> Apart from this Shaybānī had

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<sup>1</sup> Mehmood Ahmad Ghazī, *The Shorter Book on Muslim International Law* (Islamabad: Islamic Research Institute, 1998), XI.

<sup>2</sup> Mehmood Ahmad Ghazī, *Khutbāte Bhāwalpur Islam kā Qānūn Bayn al-Mumālīk*, (Islamabad: Shari’ah Acadmey, IIU,2007), 8.

<sup>3</sup> Mehmood Ahmad Ghazī, *The Shorter Book on Muslim International Law* ( Islamabad : Islamic Research Institute, 1998), 9.

<sup>4</sup> *Ibid*.

also written other essential book named "Asl". Along with this, Imam al-Shāfi'i also contributed in MIL in his substantive book *Kitāb al-Umm*.

Contemporary scholars also written on MIL. The followings scripts may be mentioned as an example.

"*Khutbāte Bahāwalpur Islam kā Qānūn Bayn al-Mumālīk*".<sup>1</sup> A series of lectures on Muslim International Law. It covered the major and core issues of Muslim International Law. The fourth lecture is on the historical analysis of Muslim International Law and it also includes some legal maxims relevant to Muslim and non-Muslim relations which have been taken from the *Sharḥ al- Siyar al- Kabīr*. Ghazi is of the view that every phrase of *Sharḥ al- Siyar al Kabīr* as a legal maxim of Muslim international law but these few maxims are taken as examples. The idea of this study has been taken from the aforementioned lecture.

"*Khutbat e Bahawalpur*"<sup>2</sup>.it covered the rules and regulations of Muslim International Law. This series of lectures was delivered at Islamia University Bahawalpur Pakistan. This series of lectures includes all aspects of Muslim International Law but do not focus on the doctrine of *Amān* with reference to analytical and comparative study with Contemporary International Law.

"*Āthār al- Ḥarb Fi al-Fiqh al-Islamī*"<sup>3</sup>. The author of this book has written on different branches of Islamic law in Arabic language. He has started this book from war and discussed its subsequent impacts on the relation of Muslim and nation states. He further discussed the role and significance of *Amān* in the relationship of Muslim and nation states. He did not compare the rules and regulation of *Amān* with the rules and relation of contemporary international law. My study will include the comparison of general principles related to *Amān* in *Sharḥ al- Siyar al - Kabīr* and principles of contemporary international law.

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1 Mehmood Ahmad Ghazi, *Khutbāte Bhāwalpur Islam kā Qānūn Bayn al-Mumālīk*, (Islamabad: Shari'ah Acadmey, IIU,2007).

<sup>2</sup> Muhammad Hamidullah, *Khutbāte Bhāwalpur*, (Islamabad : Islamic Research Institue,2001).

<sup>3</sup> Wahbah al-Zuhaylī, *Athār al- Ḥarb fi Fiqh al- Islāmī* (Bérut : Dārul Fikar,1998).

“War and peace in the law of Islam”<sup>1</sup> The writer is of the view that there is difference between Contemporary International Law and Muslim International Law. He differentiates between traditional and Contemporary Muslim international law. Moreover he is of the view the traditional Muslim international did not accept the co-existence of other nations states<sup>2</sup>. According to him, Muslim international law does not recognize the other nation states on equal basis and they can be recognized on temporary basis in the form of peace treaties if needed by Muslim state<sup>3</sup>. The principles and practices of Islam in international relations were different from the current principles and practices. Further he is of the view that Muslim international law has gone through different stages and evaluations and become change it adapted itself to peace, harmony and coexistence of other nation states. The presumption of Khaduri regarding MIL is totally based on misconception. These misconceptions of Khadudri are discussed in this study later in details. Khaduri discusses the doctrine of *Amān* precisely but does not make comparative study with CIL.

“*Qawāyid Kulliyah aor ‘Imu al- Siyar*”<sup>4</sup>. This thesis is divided into 4 chapters: The first one is about the introduction and difference of *Qawāyid Fiqhiyyah*, *Qawayd Usuliyyah*, and *Dawābit*. The second one discusses the *Qawāyid* related to Muslim state. The third one points out the *Qawaid* related to Jihād and its subsequent conditions. The fourth one elaborates the *Qawayd* related to International law. He focused only on *Qawāyid* and their relevancy with ‘*Imu al- Siyar* from Islamic perspective. Perhaps due to his study limitation he did not focus on the compatibility of these *Qawāyid* with principles of Contemporary International Law. My study is focused on the translation and interpretation of the Chapter of *Amān*

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<sup>1</sup> Majid Khadduri, war and peace in the law Islam, (London: The Johns Hopkins press, 1966), 1.

<sup>2</sup> Ibid

<sup>3</sup> Ibid

<sup>4</sup> Zulfiqar, *Qawayd Kulliyah aor ‘Imu al- Siyar*, (Islamabad: unpublished AIU, n.d.).



in *Sharḥ al- Siyar al Kabīr* and then the general principles will be taken from the aforementioned chapter and the compatibility of these general principles will be checked with Contemporary International Law.

“*Al- jaw al- Siyāsi baynā aqdi al- Amān fil Fiqh al- Islāmī wal Qānūn al- Duwalī*”<sup>1</sup>. The writer has discussed the concept of *Amān* its rules and regulations from Islamic perspective and also compares these rules and regulations with the general rules and regulations of contemporary international law. My study is focused on the concept of *Amān* and its relevant general principles discussed in *Sharḥ al- Siyar al- Kabīr* and then the compatibility of these principles with the principles of contemporary international law.

“The causes of war in Islam: infidelity or defense of faith”<sup>2</sup> The writer has discussed the relation of Muslim states with other nation states in a very comprehensive manner. In introduction, he has raised some basic questions regarding the relationship of Muslim and nation states. Such as: what is the permanent basis of relations between Muslim and nation states territories. Is the world divided into two parts *Dār al-Islām* and *Dār al- Ḥarb*? What are the main objectives of Jihād? He answered these questions in detail. He also discussed the detail view of Imam Sarakhsī in four stages regarding the verses of Jihād. He has criticized the view point of Sarakhsī and said that the verses of Jihād should not be read in isolation and without context. He has explained the sword verses in Tawbah are for Makki people because they have broken the treaty of Ḥudabiyyah. He also has criticized the viewpoint of Contemporary scholars about the concept of war in Islamic law, like Majid Khudori. He has concluded that the relation between Muslim and nation states is peace not hostile and war may be waged in

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<sup>1</sup>Faris Ali Mustafa, “*Al- jawo al- Siyasi bainā a’qdi al- Amān fil Fiqh al Islāmī wal Qānūn al- Dawali*”, *Journal of Islamic and Human Advanced research* 2 (2012):320-353.

<sup>2</sup>Muhammad Munir, “The causes of war in Islam: infidelity or defense of faith”, *Journal of Islamic and Human Advanced research* 2 (2011):130-180.

especial circumstances only. The aforesaid statement is based on the following grounds:

- The conduct of the Prophet (peace be up him) with infidels, Jews and Christians.
- The Prophet (peace be up him) accepted the poll Tax.
- The Prophet (peace be upon him) released prisoners with and without ransom.
- The killing of civilians like woman, children prohibited in war.
- The non-Muslim cannot be punished in this world on the basis of their Kufr.
- Shari'ah preserves the fundamental rights of every one.

"Islamic International Law (*Siyar*): an Introduction"<sup>1</sup> In this article, the writer has pointed out the origin, sources and evolution of Muslim International Law and has also explained that the word *Siyar* was being used for international law. He has further discussed the viewpoint of different jurists about *Siyar* and considered it a separate legal science. The sources of Islamic international law are also discussed by him. He has concluded this article by the definition of *Siyar* as: the conduct of the Prophet (peace be upon him) and his successors during war and peace in their relations with non-Muslim states, rules of dealing with rebels, apostates, foreigners as well as non-Muslim citizen of a Muslim state.

"Refugee Law in Islam"<sup>2</sup> In this article, the writer has discussed the concept of *Hijarah* and asylum seekers in Islam. He has pointed out that the word *Amān* had been used for asylum in Islamic international law. He has further

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<sup>1</sup> Muhammad Munir, "Islamic International Law (*Siyar*): An Introduction", *Hamdard Islamicus* 4 (2012): 37-60.

<sup>2</sup> Muhammad Muni, "Refugee Law in Islam", *Journal of Social Science* 2 (2011): 1-18.

discussed that who will give *Amān* and to whom *Amān* will be given. The rights and duties of a *Mustā'min* have also been discussed by him.

"The concept of treaty in relation to war and peace in Islam"<sup>1</sup>. The writer has discussed the legal status of treaty in Islam. The legal status of treaty has been proved by Qur'ān and Sunnah. He has further discussed the situations in which treaty will be executed. He has also elaborated that jurists consider a permanent *Amān* as a treaty (*Hudnah*). At the end, he has discussed the current international treaties in the light Islamic law.

The notion of *Dār al- Islām* and *Dār al -Ḥarb* in Islamic Jurisprudence with special reference to the Ḥanafī School.<sup>2</sup> The writer has elaborated that the world is divided into two major domains *Dār al- Islām* and *Dār al- Harb* by Muslim International Law. He has further pointed out that division of the world into two major domains has no directly link to this question, either the relationship of *Dār al- Islām* and *Dār al- Ḥarb* is peace or hostility? He has also quoted the opinion of Ḥanafī, Al-Shāfi'ī, Mālīki and Ḥanbalis school of thoughts. According to Ḥanafī Muslims or even non-Muslims who are living in *Dār al- Islām* will be protected on the basis of *Dār* and those who are living beyond the territorial jurisdiction of Muslim state will not be protected. If anyone violates the rules and regulations of Shari'ah beyond *Dār al- Islām* he will not be punished by the court of *Dār al- Islām* because it does not have the territorial jurisdiction, would only be punished on the Day of Judgment.

According Al-Shāfi'ī, Mālīki and Ḥanbali, there is no concept of territorial jurisdiction in Islamic law. So, if a Muslim violates the rules and regulation of Shari'ah anywhere of world irrespective of *Dār*, he will be punished not only on

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<sup>1</sup>Muhammad Munir, "*The concept of treaty in relation to war and peace in Islam*", *Fikro Nazar* 1 (2009): 215-238.

<sup>2</sup>Muhammad Mushtaq Ahmad, "*The notion of Dār- Islam and Dār -Harb in Islamic Jurisprudence with special reference to the Hanafī School*", *Islamic studies*1 (2008): 5-37.

the Day of Judgment but also by the court of Muslim state. The writer further said that the doctrine of *Dār* represents the principles of territorial jurisdiction. The basis for the principals of territorial jurisdiction in the Qur'ān and Sunnah have also been discussed by this article. The writer has also discussed the nature of relationship between Muslim and non-Muslim. There are two different opinions of *Fuqahā* about the nature of relation between Muslim and non-Muslim. One opinion is the cause of war between Muslim and non-Muslim is disbelief. The other one is the cause of war is an aggression (*Muḥarabah*).

*Jihād Muzāḥamat aor Baghāwat* is a voluminous addition to Muslim International Law which comprises the view point of classical jurists especially Shaybānī and its comparatively has analyzed with Contemporary International Law. It can be said that it is a unique and comprehensive work which includes Muslim International Law and Contemporary International Law with reference to their compatibility and applicability.<sup>1</sup>

## 1.2 Work on shaybānī's contribution to *siyar*

Shaybānī is considered the founder of International Law because of introducing it as a separate science. Classical jurists as well as contemporary Muslims and non-Muslim scholars who have written on Muslim International Law extracted rules from Shaybānī. it can be said that there is no author of Muslim International Law who did not mention Shaybānī as a source of Muslim International Law. There are classical jurists, like al-Shāfi'ī Abū Yūsuf and Sarakhsī have discussed Shaybānī's contribution to International Law. Abū Yūsuf has supported the view point of Abū Ḥanīfah in his book *al-Radd 'ala-Siyar al-*

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<sup>1</sup> Muhammad Mushtaq Ahmed, *Jihad, Jihad Muzāḥamat aor Baghawat* (Gujranwala: Al-Shari'ah acadami, 2008).

*Awzā'i*. He indirectly supported Shaybānī for his work on *Siyar* because the view point of Shaybānī is the view point of Abū Ḥanīfah . Abū Yūsuf responded to Awzā'i who criticized Shaybānī for his writing *al- Siyar al-Saghīr*.<sup>1</sup> Al-Shāfi'i also worked indirectly on the work of Shaybānī by supporting al-Awzā'i and criticizing Shaybānī in some issues regarding *Siyar* particularly the notion of *Amān* with reference to territorial jurisdiction of Muslim state in his book *Kitāb al- Umm*.<sup>2</sup> Sarakhsī, has merged *al- Siyar al-Saghīr* of Shaybānī in his famous book *al-Mabsūt*. Similarly, Sarakhsī added his commentary to *al-Siyar al-Kabīr* in a such way that no one can easily differentiate between the text of Shaybānī and the commentary of Sarakhsī. Contemporary scholars also consider Shaybānī as a source of International Law. It can be said that there no book in contemporary era written in international which does not discuss directly or indirectly the role of Shaybānī. The followings scripts may be mentioned as an example.

"The Shorter book on Muslim International Law."<sup>3</sup> The author has edited and translated *Siyar al- Saghīr* of Shaybānī. He has recognized that Muslims are the founders of International law. He further argued that Muslim International never faced the problems of Modern International law like lacking proper sanction and judicial forum. He also proved that Muslim international law is quite different from Modern International Law.

"*Usūl al- 'Alaqāt al- Dowaliyyah fil Fiqh-Li* Imam Muhammad bin al- Hasan al- Shaybānī,"<sup>4</sup> The writer has discussed the overall role of Shaybānī in international relations. His book is divided into three parts, the first part comprises the life and

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<sup>1</sup>Abū Yūsuf Yaqaob bin Ibrahim al-ansāri, *Al-Radd a'la Siyar al-awzāi* (Beirut: Dār al-Kutub al- 'Imiyyah, n.d), 131.

<sup>2</sup> Muhammad bin Idrees al- Shāfi'i, *al- Umm* vol. 04 (Beirut: Dār al- Ma'rifah, 1990), 263.

<sup>3</sup> Mehmood Ahmad Ghazi, *The Shorter Book on Muslim International Law* ( Islamabad : Islamic Research Institute, 1998).

<sup>4</sup> Usman Juma, *Usool al- 'Alaqāt al- Dowaliyyah fil Fiqh Le Imam Muhammad bin al- Hasan al- Shaybānī*, (Egypt: Dār al- Ma'ālī, al- Sikandariah, 1999).

role of Shaybānī, the second one is Muslim relations with others nation states at peace time and the third one is Muslim relations with others nation states at war time. He has also elaborated the different opinions of Muslim scholars about the important issues related to international relations like the issue of the division of the world. He has tried to argue the opinions of Muslim scholars by Qur'ān and Sunnah. Beside this he talked about major and core issues of International relations but did not focused on in depth like the doctrine of *Amān* and neutrality which are the most important and current issues of International relations, perhaps due to his study limitations he emphasized on the role of Shaybānī in International relations and left the area of comparison and compatibility of Muslim International Law with contemporary International law.

### 1.3 Work on *Amān* in *Siyar*

*Amān* is a guarantee awarded by Muslim individuals without any gender discrimination or Muslim state to aliens or non-Muslims. The authority of awarding guarantee by Muslim can be deprived by Muslim state or not. Contemporary Muslim jurists have different opinions regarding the issue of banning the Muslim authority of awarding guarantee. Some of them are of the view that Muslim state is considered the representative of Muslims and the issue of guarantee is linked to Muslim integrity and security so due to this reasons, Muslim state can deprive the authority of Muslim individual or at least guarantee awarded Muslim Individuals must be ratified by Muslim state. The other view point of Muslim jurists regarding this issue is that this authority of awarding guarantee is given by almighty Allah so no one has the authority to snatch or limited it. The issue of *Amān* plays a vital role in the relationship of Muslims and non-Muslims. it is discussed by every international law expert. There are some

views of contemporary international law experts regarding *Amān* which are mentioned below:

### 1.3.1 *Amān*, according to Muhammad Hamidullah

Muhammad Hamidullah, has used the word "Quarter" for awarding protection to aliens and defined as "practice of refraining from opposing them (e.g. belligerents) through killing or capturing, for the sake of God"<sup>1</sup>. It is concluded from the aforementioned definition that Muslims or Muslim state will neither harm those aliens to whom the Quarter has been given nor they will be made captives. According to him awarding Quarter is the right of Allah which he gives to aliens through Muslims and Muslim state therefore it becomes binding on Muslim individuals and Muslim state to maintain at any cost.

Hamidullah has divided *Amān* into the following three kinds:

According to him an *Amān* given on the demand of aliens being in safe place, will be applicable to their dependents too. Such *Amān* will include protection of their lives, properties, and all their dependents including their wives, children of minor age, unmarried daughters and sisters, mothers and grandmothers. If *Amān* is demanded for trade then it will include all the servants and helpers who perform trading activities and the necessary equipment and inventories of business<sup>2</sup>. According to him, every Muslim individual free or slave is eligible (either capable of fighting or not) to award guarantee<sup>3</sup>. His view point regarding the capability for awarding *Amān* of Muslim slave supports the opinion of Imam Shaybānī and Imam Al-Shāfi'ī.<sup>4</sup> All Muslims without discrimination are

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<sup>1</sup> Muhammad Hamidullah, *The Muslim Conduct of State*, 200.

<sup>2</sup> *Ibid.*, 203.

<sup>3</sup> *Ibid.*, 201.

<sup>4</sup> Al-Shāfi'ī, *Al-Umm*, vol.4, 302.

required to assist Islam as per their faculties.<sup>1</sup> According to Imam Abū Ḥanīfah and Abū Yūsuf, only a Muslim fighter slave can award guarantee to aliens. They are of the view that generally a Muslim slave is not eligible to award guarantee. He is only required to serve his master. A Muslim slave who fights against aliens with the permission of his master makes him eligible to award guarantee.<sup>2</sup>

It is not necessary for the awarding of *Amān* to be given only on the demand of aliens, Muslim state can also declare it by itself.<sup>3</sup> The *Amān* given by the declaration of Muslim state, Muslim army or even given on the demand of aliens while they are being endangered during war, such *Amān* will be applicable only to whom it is awarded and will not be inclusive to the dependents of the guaranteed aliens if not expressed in words otherwise mentioned.<sup>4</sup> This rule of law is based on the declaration of the Prophet (peace be upon him) when he announced on the conquer of Makkah that whosoever enters *Masjide Ḥarām*, or enters into the house of Abū Sufyān and person who closes doors of his house will be considered as protected. The Prophet (peace be upon him) announced protection not on the demand of Pagans but on his own will. If *Amān* is given on the fulfillment of some terms and conditions either by Muslim Army or aliens. On the fulfillment of such terms and conditions *Amān* will be awarded.<sup>5</sup> Muslims are faithfully bound to fulfill their bilateral terms and conditions if they are according to spirit of Islamic Law. While the guaranteed aliens are pledged under the *Amān* given by Muslim individuals or Muslim state. Imam Shaybānī is of the view that conditional guarantee will be considered nullified if mutually agreed conditions are not fulfilled or violated by the aliens. In such cases Muslim state can declare

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<sup>1</sup> al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 255

<sup>2</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 255

<sup>3</sup> Muhammad Hamidullah, *The Muslim Conduct of State*, 201.

<sup>4</sup> *Ibid*, 203.

<sup>5</sup> *Ibid*, 200.



the guarantee as ineffective and may inflict punishment on the aliens that may result killing aliens or make them captives in a situation of war.<sup>1</sup>

According to him, there are some exceptions to the rule of awarding *Amān*. Muslims Minors, insane and those Muslims who are beyond the territorial jurisdiction of a Muslim state or non-Muslim citizens are not capable of awarding *Amān*. According to the right of Muslim individual to award *Amān* may be suspended by the Muslim Army Chief. This exception is based on the provision of the Constitution of the City of Madinah promulgated by the Prophet (peace be upon him). There was a clear exception to the general right of granting *Amān* to Quraish that neither Arab nor the Jewish of Madinah will protect Quraish or their allies<sup>2</sup>. According to Muhammad Hamidullah, Muslim state or Muslim individuals has the right to revoke *Amān* subject to two conditions: Public good. It means that *Amān* will be revoked general interest of Muslims. The second condition is protected aliens must be allowed to return to their previous position and resistance as they were at the time when the *Amān* was awarded to them.<sup>3</sup>

Muhammad Hamidullah did not discuss the doctrine of *Amān* in a comprehensive manner and did not compare with the norms of Contemporary International Law. There is enormous need after the incident of 9/11 to revise the phenomena of Peace(*Amān*) of Muslim International Law. After the incident the doctrine of Jihād is discussed by International Law experts but Peace of MIL is neglected. So it is the need of time to remove the misconception of promoting terrorism and extremism by Islam.

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<sup>1</sup> Al-Sarakhsi, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 266.

<sup>2</sup> Muhammad Hamidullah, *The Muslim Conduct of State*, 202.

<sup>3</sup> *Ibid*.

### 1.3.2. *Amān*, according to Abdul Kareem Zaydān

According to Zaydān *Amān* is a kind of protection given to aliens by Muslim individual or Muslim state for temporary period mutually agreed<sup>1</sup>. According to him, the *Amān* awarded by Muslim individual must be ratified by Muslim state. He is also of the view that the right of Muslim individual to award guarantee may be deprived by Muslim state by declaring publically not to award guarantee to specific aliens or in general.<sup>2</sup> If aliens demand the guarantee from Muslim state to know about Islam and see its features, Muslim state is bound to award the guarantee. If aliens demand guarantee for any personal need, Muslim state in a such situation is not bound to grant it.<sup>3</sup>

According to Zaydān, *Amān* is divided into the following kinds:

By specific *Amān*, he means the protection given to certain number of aliens. According to him, such *Amān* may be given by every adult sane Muslim<sup>4</sup>. By general *Amān*, he means, the protection given to a large number of aliens. such *Amān* must be given by Muslim state only.<sup>5</sup> According to Zaydān Armistice contract with alien's state by Muslim state is a kind of *Amān*. Such contract may only be concluded by Muslim state, Muslim individual has not right for the aforementioned contract.<sup>6</sup> The citizens of alien's state with whom the armistice contract is signed by Muslim state will be treated as guaranteed aliens if they come to Muslim state.<sup>7</sup> According to Zaydān ambassadors and traders are protected by

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<sup>1</sup>Abdul Kareem Zaydan, *Aḥkam al-dhimyyin wa al-Müstā'mīnīna fi al-Islam* (Baghdad: Makābah al-Qūds, 1982), 46.

<sup>2</sup> Zaydan, *Aḥkam al-dhimyyina wa al-Müstā'mīnīna fi al-Islam*, 50.

<sup>3</sup>*Ibid.*, 113.

<sup>4</sup> *Ibid.*, 48.

<sup>5</sup> *Ibid.*, 51

<sup>6</sup> *Ibid.*, 52.

<sup>7</sup> *Ibid.*

custom and tradition of the nation states even they did not get proper *Amān* from Muslim state. They must have sufficient prove to be presumed that they are ambassadors and traders like letter of from alien state or goods respectively.<sup>1</sup> According to Zaydān all dependent relatives of the guaranteed alien will be considered protected even not expressly mentioned during taking the guarantee<sup>2</sup>. There is a slight difference between the view of Hamidullah and Zaydān according to Hamidullah the *Amān* will only be transferred to the dependents of the guaranteed alien either the seeker demanded the guarantee for them or when the seeker of the guarantee applied for the guarantee, he was not in danger but was safe<sup>3</sup>. While Zaydān considers the dependents of the guaranteed alien protected in any situation either the seeker of the guarantee was safe or in danger, applied for their e or not<sup>4</sup>.

According to Zaydān if anyone from alien state is found in Muslim state without having proper guarantee, he will be treated as spoils of war.<sup>5</sup> According to Zaydān the following rights are given to guaranteed aliens in Muslim state: The first right of guaranteed alien is to visit Muslim either to know and see the qualities of Muslims and Muslim state or for any personal need like trade or stats affairs. Zaydān is of the view that if aliens want to visit Muslim state to examine the advantages of Muslims then Muslim state is bound to let them come to Muslim state.<sup>6</sup> The right of guaranteed alien to live in Muslim state is not limited to specific time as classical jurist said. It is not limited to four or twelve months but the

<sup>1</sup> Zaydan, *Aḥkam al-dhimyyina wa al-Müstā'mīnina fi al-Islam*, 53.

<sup>2</sup> *Ibid.*

<sup>3</sup> Muhammad Hamidullah, *The Muslim Conduct of State*, 203.

<sup>4</sup> Zaydan, *Aḥkam al-dhimyyinā wa al-Müstā'mīnina fi al-Islam*, 53.

<sup>5</sup> *Ibid.*, 54.

<sup>6</sup> *Ibid.*, 113.

discretionary power of Muslim state and it varies person to person.<sup>1</sup> Guaranteed alien is also free to go anywhere he wants with in Muslim state except those place which is high secured due to the integrity and security of Muslim state or prohibited for non-Muslims to enter or stay there like *Haram* and *Hijāz*.<sup>2</sup> The life and property of guaranteed aliens are protected as citizens of Muslim state. Muslim state is bound to provide security to the guaranteed aliens if there is any threat to their life. If alien state demands her citizen to be given as in exchange of Muslim prisoner otherwise Muslim prisoner would be killed, in such situation Muslim state cannot exchange the guaranteed alien with Muslim prisoner if the guaranteed alien does not agree.<sup>3</sup> Guaranteed alien has the right to go back to his own country whenever he wants. Going back to his own country on permanent basis terminated the contract of *Amān*.<sup>1</sup> Guaranteed aliens are free to worship according to his faith. Muslim state cannot force them in this regard. They are also free to have any opinion regarding Muslims or Muslim state, they will be forced to change their opinion on the basis that Muslims or Muslim state do object on this opinion. The guaranteed aliens are also free to get together subject to integrity and security of Muslims and Muslims state. They are also free to get any education beneficial for their faith and does not harm any other citizen of Muslim state<sup>4</sup>.

Guaranteed aliens have the right of privacy as citizen of Muslim state. Permission must be taken before entrance to the residence of aliens<sup>5</sup>. Guaranteed aliens have the right to use all public facility provided by Muslim state like communications, transportations, judiciary, executive.<sup>6</sup> All right of family availed

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<sup>1</sup> Zaydan, *Aḥkam al-dhimyyinā wa al-Mustā'mīnīna fī al-Islam*, 116.

<sup>2</sup> *Ibid.*, 121.

<sup>3</sup> *Ibid.*, 118.

<sup>4</sup> *Ibid.*, 125.

<sup>5</sup> *Ibid.*

<sup>6</sup> Zaydan, *Aḥkam al-dhimyyinā wa al-Mustā'mīnīna fī al-Islam*, 126.

by the citizen of Muslim state may be availed by guaranteed alien subject to the certain prohibitions in Islamic law like Muslim female will not marry non-Muslim male.<sup>1</sup> Guaranteed aliens have the right of selling and purchasing with certain limitations. These limitations are like the beast of burden, steel, iron, they should not sell and purchase these goods in Muslim state. Sarakhsi gives logic to the given explanation as: These things empower logistically the aliens. That is why the guaranteed aliens are not given such authority to make a transaction or any contract to make stronger any alien state against a Muslim state.<sup>2</sup> Guaranteed aliens have some duties during their stay in Muslim state. These duties are imposed on guaranteed aliens by their rights availed by them. According to Zaydān guaranteed aliens have to pay all taxes during their stay imposed by Muslim state. Zaydān is of the view that guaranteed aliens were awarded guaranteed either now the qualities of Islam or to fulfill their person need. They will be permitted to disrespect those things which are sacred according to Muslims. Guaranteed aliens are bound not to sell and purchase prohibited goods openly in Muslim market like pork, wine.<sup>3</sup> According to the contract of *Amān* will be either terminated by shifting to alien state on permanent basis or Muslim state feels that it harms the integrity and security of Muslims.<sup>4</sup>

Zaydān does not discuss the doctrine of *Amān* comparatively with Contemporary International Law. My research topic is a comparative study of MIL with CIL with reference to Muslim and non-Muslim relation in the context of *Amān*.

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<sup>1</sup> Zaydan, *Aḥkam al-dhimyyinā wa al-Mustā'mīnīna fi al-Islam*, 131.

<sup>2</sup> Al- Sarakhsī, *al- Mabsūt*, vol. 10, 152.

<sup>3</sup> Zaydan, *Aḥkam al-dhimyyinā wa al-Mustā'mīnīna fi al-Islam*, 210.

<sup>4</sup> *Ibid.*, 55, 56.

### 1.3.3 *Amān*, according to Wahbāh Zuhayli

According to Zuhayli, *Mustā'mīn* is a person who gets proper permission to visit other country for a purpose and the seeker of permission can be Muslim or non-Muslim but usually *Amān* is the mutual agreement between alien and Muslim state<sup>1</sup>. According to him, *Amān* is of two kinds: specific and general. Specific *Amān* may be given by any Muslim individual to certain and limited number of aliens. General *Amān* may only be given by Muslim state or Army chief to uncertain and unlimited number of aliens<sup>2</sup>. According to Zuhayli, *Amān* has the following primary elements: According to Zuhayli, *Amān* is a bilateral and binding contract. He is of view that both parties have to be capable for the contract. One party in the contract of *Amān* is the giver of it. The giver of *Amān* will be either Muslim individual or Muslim state. The giver of *Amān* must be these features otherwise the *Amān* will not be considered. 1-Muslim, 2-adult, 3- sane, 4- willing, 5-no terror.<sup>3</sup> In case of general *Amān* which is given to uncertain aliens must be awarded by Muslim state. Muslim female has also right of awarding *Amān* without ratification of Muslim state.<sup>4</sup> Muslim slave is also capable to give the guarantee while Muslim minor is not capable. Non-Muslim citizens of Muslim state do not have the right to award guarantee, he may only be given power of attorney by Muslim to award guarantee on the behalf of Muslim.<sup>5</sup> The matter of subject of *Amān* means what will be included in *Amān* and what will not. According to Zuhayli, the subject matter of *Amān* will be decided by custom and tradition if not mentioned expressly during taking the guarantee. It may not be decided on basis of the giver of *Amān* or on the basis of the need of the guaranteed aliens. Classical jurists like Imam Al-

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<sup>1</sup> Wahbah al Zuhaylī, *Athār al- Ḥarb fī Fiqh al- Islamī*, (Bruit: Dārul Fikar, 1998), 276.

<sup>2</sup> *Ibid.*, 225.

<sup>3</sup> Al- Zuhaylī, *Athār al- Ḥarb fī Fiqh al- Islamī*, 262.

<sup>4</sup> *Ibid.*, 276.

<sup>5</sup> *Ibid.*, 239-245.

Shāfi'ī are of the view the *Amān* given by Muslim state amounts of the property and all dependents family members of the guaranteed alien<sup>1</sup>. *Amān* given by Muslim individual will include only property which the guaranteed alien needs it physically or otherwise express mentioned during taking guarantee.<sup>2</sup> According to Zuhayli, *Amān* is a binding contract and it has to be concluded without undue influence and coercion. On the basis of the aforementioned rule of law, Muslim minor, insane, forced or prisoner do not have the authority to award guarantee.<sup>3</sup> Second party in the contract of *Amān* is *Mustā'mīn* the one who seeks the guarantee either from Muslim individual or Muslim state. The seeker of guarantee can demand the guarantee for his any personal need like trade or to see the qualities of Muslims. If the seeker of *Amān* demands the guarantee to know the qualities of Muslims, in such situation *Amān* becomes mandatory if the demand of guarantee was for his personal need then *Amān* becomes optional<sup>4</sup>. A prisoner from aliens in Muslim state can also demand *Amān*, in such situation Muslim state only can grant it not every Muslim individual.<sup>5</sup>

No contract is concluded without proper offer and acceptance. Wording of offer and acceptance is not much important in contract but the important thing is willingness of the contractual parties for offer and acceptance. Similarly, in the contract of *Amān*, any wording of any language verbally or in writing expressly or impliedly indicating on the willingness of the contractual parties of *Amān* by custom and tradition, will be considered.<sup>6</sup> Place *Amān* for the guaranteed alien is Muslim state. He is free to live anywhere in Muslim state subject to *Ḥarām* an any

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<sup>1</sup> Al- Zuhaylī, *Athār al- Ḥarb fī Fiqh al- Islamī*, 255.

<sup>2</sup> *Ibid.*

<sup>3</sup> Al-Zuhaylī, *Athār al- Ḥarb fī Fiqh al- Islamī*, 259.

<sup>4</sup> *Ibid.*, 277.

<sup>5</sup> *Ibid.*, 278, 292.

<sup>6</sup> Al- Zuhaylī, *Athār al- Ḥarb fī Fiqh al- Islamī*, 286.

security threat if not otherwise mentioned during taking of *Amān*. According to Zuḥayli , the guaranteed alien may live also in *ḥijaz* if there is no security threat.<sup>1</sup> The duration of *Amān* will be started from the acceptance by Muslim state or Muslim individual. Zuḥayli does consider any time limit for the expiration of *Amān*. He is of the view that expiration of *Amān* is the discretion of Muslim state, it cannot be even decided by custom or the rules of reciprocity.<sup>2</sup> Every contract is concluded for the benefit of the contractual parties. Similarly, in the contract of *Amān*, the guaranteed alien may be impress by the behavior of Muslims or qualities of Islam and Muslim state. Trading and exchanging goods is also from the advantages of the contract of *Amān*. Moreover, peaceful relations between Muslim state and aliens state in case of armistice contract is the voluminous benefit of *Amān*.<sup>3</sup> Usually, proof of awarding guarantee is required in a suspicious situation. *Amān* awarded by Muslim state is not debatable from affirmation point of view. The affirmation of Muslim state is to be considered about awarding *Amān* to aliens while rejection of Muslim state nullifies the *Amān* aliens. while if *Amān* is not awarded by Muslim state and aliens being claiming that they have been award *Amān* by Muslim individuals. In such situation the affirmation of a common Muslim for awarding *Amān* will be accepted subject to two witness while the affirmation of a trusted Muslim regarding the *Amān* of aliens will be considered without demanding him witness.<sup>4</sup>

Zuḥayli does not discuss the doctrine of *Amān* comparatively with Contemporary International Law. My research topic is a comparative study of MIL with CIL with reference to Muslim and non-Muslim relation in the context of *Amān*.

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<sup>1</sup>Al- Zūḥaylī, *Athār al- Ḥarb fī Fiqh al- Islāmī*, 296-302.

<sup>2</sup> *Ibid.* 309.

<sup>3</sup> *Ibid.*, 210.

<sup>4</sup> *Ibid.*, 314.



### 1.3.4 *Amān*, according to abd ul-Aziz

According to Aziz, *Amān* is a contract between aliens and Muslim state or Muslim individual for temporary residence in Muslim state<sup>1</sup>. The view of Aziz and Zuḥayli is almost similar regarding the elements and conditions of *Amān*. *Amān* may be dismissed by the following elements: *Amān* is a binding contract at the same time it gives authority to both parties to dismiss in their personal concern. Muslim state can dismiss if there are any dangers to national security and integrity provided with opportunity to be given to the guaranteed alien to shift his previous position. Guaranteed alien can also dismiss the *Amān* by permanent living in alien state<sup>2</sup>. The contract of *Amān* may also be dismissed by the expiration of the agree fixed time. The guaranteed alien in such a situation will be protected till reached to his country.<sup>3</sup> The contract of *Amān* will be dismissed by committing sever crimes like, adultery, killing, theft, decoity or any other crime amounts to national security and integrity.<sup>4</sup>

Abd ul-Aziz does not discuss the doctrine of *Amān* comparatively with Contemporary International Law. My research topic is a comparative study of MIL with CIL with reference to Muslim and non-Muslim relation in the context of *Amān*.

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<sup>1</sup> Abdul-Aziz bin-e-Mabrook al-aḥmadi, *Ikhtilāf al-Dārayne wa Asārḥū fi al-aḥkam al-Shari'ah al-Islāmiyyah* (Madina: Malik Fahad al-wātāniā āsnā al-Nāshr, 2004), 186.

<sup>2</sup> *Ibid.*, 215-216.

<sup>3</sup> *Ibid.*, 216.

<sup>4</sup> *Ibid.*, 217.

### 1.3.5 *Amān*, According to Mawdūdī

*Amān* is the permission of Muslim state to aliens by their application for trade, picnic, getting education or any other lawful purpose to be fulfilled and they will be allowed for any movement within Muslim state<sup>1</sup>. He supports Ḥanafī school of thought in the maximum duration of *Amān*, if the guaranteed alien spends one year consecutively and notice of expiry has also been given to him, in such situation he will be considered non-Muslim citizen of Muslim state, if he does not leave Muslim state. The *Amān* will not be considered dismissed even by committing severe crimes like killing, decoity, adultery with Muslim female. The contract of *Amān* will also be remaining if the guaranteed alien became spy of alien's state. If the guaranteed alien is found guilty of the aforementioned crimes, he will be punished as others criminals of Muslim state. *Mustā'min*, is a citizen of Muslim state who gets temporary *Amān* in non-Muslims or aliens state<sup>2</sup>. The definition of *Mustā'min* by Mawdūdī is in the context of Muslims while *Mustā'min* may also be the citizen of alien state gets guarantee from Muslim state. According to him Muslim *Mustā'min* will be bound by Islamic law even beyond the limit of Muslim state and his cases occurred in alien state will not be heard by the courts of Muslim state. All Cases of a Muslim *Mustā'min* occurred in non-Muslim state with whom peace agreement signed by Muslim state will be heard by Muslim courts. Mawdūdī differentiate between alien's and non-Muslims state, every non-Muslim state is not aliens state, a state which has hostile relations with Muslim state is aliens state. Consequences of the aforementioned difference between non-Muslim and alien state as under:

Cases of a Muslim *Mustā'min* occurred in a non-Muslim state with whom peace agreement signed by Muslim state will be heard by Muslim courts. Voidable

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<sup>1</sup> Sayed abū al-'Ālā al-Mawdūdī, *Al-Jihād fī al-Islam*, (Lahore: Idārah tarjūman al-Qūrān, 2011), 273.

<sup>2</sup> *Ibid.*, 338.

contracts are not allowed for Muslim *Mustā'min*. The life and property of such non-Muslim state are protected by peace agreement. Any act by Muslim *Mustā'min* contrary to peace agreement will be considered crime and Muslim court will be having the jurisdiction to hear the case even committed beyond the territorial limit of Muslim state<sup>1</sup>. If the act of a Muslim *Mustā'min* is not contrary to the peace agreement but illegal and unlawful in such situation Muslim courts do not have jurisdiction to hear the case although the Muslim will be advised to pay damages if possible or return. According to *Mawdūdī*, aliens are those citizens of a Non-Muslim state whose life and property are not protected. Protection and not protection of life and property is related to either *Eimān*, *Amān* and jurisdiction. Consequences of the aforementioned definition as under:

Voidable agreements are allowed for Muslim *Mustā'min*. Cases of a Muslim *Mustā'min* occurred in alien state will not be heard by Muslim courts. Muslim *Mustā'min* will only be advised legally to pay damages in case of treachery with aliens. According to Imam Abū Ḥanīfah and Shaybānī the contract of interest, win or pork with aliens or even with a Muslim citizen of alien state is also allowed for Muslim *Mustā'min*. These contracts of a Muslim *Mustā'min* occurred beyond the territorial jurisdiction of Muslim state especially in alien state, that is why courts of Muslim state do not have the power to heard otherwise Muslim is faithfully bound to follow Islamic law even beyond the territorial limit of Muslim state<sup>2</sup>. *Mawdūdī* does not differentiate between alien and non-Muslim state from jurisdiction point of view. The property of a Muslim residing beyond the territorial limit of Muslim state is not protected legally as non-Muslim while protected faithfully. If Muslim *Mustā'min* harms or destroy the property of Muslim citizen of alien or non-Muslim state beyond the territorial limit of Muslim state, in such

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<sup>1</sup> Al-Mawdūdī, *Sūd*, 338.

<sup>2</sup> *Ibid.*, 342.

situation, Muslim *Mustā'mīn* will not be compelled by Muslim courts for any consequences. The property of Muslim resides anywhere is protected faithfully. The property of Muslim or non-Muslim or the guaranteed alien is protected legally as well as faithfully by Islam or guarantee with jurisdiction of Muslim state. According to him jurisdiction plays a vital role in the protection of life and property. Non-Muslim resides in a Muslim state is protected while Muslim resides beyond the jurisdiction of Muslim state is not protected legally.<sup>1</sup>

Mawdūdī did not discuss the doctrine of *Amān* comparatively with Contemporary International Law. My research topic is a comparative study of MIL with CIL with reference to Muslim and non-Muslim relation in the context of *Amān*. After, discussing the previous work of Muslim scholars regarding MIL with special reference to the doctrine of *Amān*. It is felt that after the incident of 9/11, researcher again discuss the relationships of Muslim and non-Muslims with special focus on so called war against terrorism and extremism. Muslims and Muslim states are targeted in this so called war.

MIL is accused for meeting not several legal needs of nation states and is held liable for encouraging terrorism and extremism. CIL is claimed as the only solution in the emerging political needs of Nation States at international level. It is said that a secular international law like CIL is more acceptable to all the nation states because a particular religious international law can only meet the political needs of that nation not all the nation states. It becomes important to address these core issues related to both the laws with reference to peace and waging war phenomena presented by the laws. Now, there are more than 55 Muslim states, they have no uniformed policy regarding this issue. There is immense need to revisit the discourse of relationships between Muslims and non-Muslims with special focus on the doctrine of *Amān* discussed Shaybānī; the founder of MIL.

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<sup>1</sup> Al-Mawdūdī, *Sūd*, 347.

This research will be focused on the following questions

#### 1.4 Framing of the issues

1. Are *Siyar's* general principles related to the doctrine of *Amān*, compatible with the principles of Contemporary International Law?
2. Are *Siyar's* general principles related to the doctrine of *Amān*, applicable to the 21<sup>st</sup> century nation states' international affairs?
3. What is the epistemological relationship of the foundations of *Siyar's* general principles related to the doctrine of *Amān* and principles of Contemporary International Law?
4. Whether Muslim International Law of *Amān* can be an effective alternative to the Contemporary International Law or not?
5. How much both the Laws are different from each other with respect to their worldview?
6. What is the nature of relationships of Muslim state with other nation states?
7. How much *Siyar's* general principles related to the doctrine of *Amān*, are important in the relations with other nation states, in war?
8. What is the role of *Siyar's* general principles related to the doctrine of *Amān* in the relations with other nation states, in contracting peace treaty?

## CONCLUSION

This chapter may be concluded that the issue of relationship between Muslim and non-Muslim is debatable since the emergence of Islam. Muslims as well as non-Muslim researchers had discussed and written about this important issue at every century. After reading the different thoughts of classical jurists, there is a need to look the issue of relationship between Muslims and non-Muslims did not remain constant. It is always linked to the dominancy and superiority of nations. Classical jurists never faced the question that the relationship of Muslims and non-Muslims is either peace or war. This was due to the dominancy of Muslim *Ummah* while now this question is being asked. The other issue related to the issue of relationship between Muslims and non-Muslims is the emergence and increasing the number of Muslim states. The issue of demarcation and sovereignty of states is also important in this regard. These issues are needed to be discussed with special reference to the doctrine of *Amān* comparatively and analytically with Contemporary International Law.

## CHAPTER TWO: NATURE OF RELATIONS BETWEEN MUSLIMS AND NON- MUSLIMS: DISCOURSE OF CLASSICAL AND CONTEMPORARY SCHOLARS.

### INTRODUCTION

Nature of relations between Muslim and non-Muslims cannot be understood properly without proper understanding of the different interpretations of the cause of war, division of the world into different states regarding war and peace, nature of the peace treaties between Muslim and non- Muslim states, the use of force for the culmination of tyranny and injustice and the nature of treaties and conventions of International law indorsed by any Muslim states.

This chapter examines the viewpoint of Muslim classical and contemporary scholars regarding the nature of relations between Muslim and non-Muslim states. This section also discusses the juristic issues regarding the cause or causes of war between Muslim and non-Muslim states like infidelity, aggression or culmination of tyranny and injustice or establishing the writ of Allah by inviting non-Muslims to the way of Allah. These kinds of comparative discussions are made understandable to clear the misunderstandings regarding the nature of relations between Muslims and non-Muslim states. This section of the study examines the nature and parameters of the normative relationship between Muslims and non-Muslims. This section answers the question of permanent relationship of Muslim and non- Muslim in situations of hostility and peace. If the relationship of Muslims with non- Muslims is assumed as hostile then what will be the interpretation of the verses of the Qur'ān which induce Muslims to do good with non- Muslims.<sup>1</sup> If the relationship of Muslims with non- Muslims is presumed as peaceful then what

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<sup>1</sup> "Allah forbids you not, with regard to those who fight you not for [your] Faith nor drive you out of your homes, from dealing kindly and justly with them: for Allah loveth those who are just". Al-Qūran: 60, 08.

will be the understanding of the verses of the Qur'ān which invoke Muslims on Jihād.<sup>1</sup> These kinds of discussions are made understandable in this section to clear the view point of different Scholars and Muslim jurists

## 2.1 Cause of war

There are three different views of Muslim jurists about the under discussion topic. Muslim scholar like Imam Al-Shāfi'ī is of the view that the relationship between Muslims and non-Muslims is hostile and he says Muslims will persistently fight against non-Muslims till they accept Islam.<sup>2</sup> If Muslims are weak and have no sufficient power to fight with non-Muslims then Muslim may be peaceful with non-Muslims.<sup>3</sup> According to him, Jihād has undergone through four phases: two phases were before Migration to Madinah and two were after Migration to Madinah. At the first phase when the Prophet (peace be upon him) was in Makkah, was ordered to focus on the worship of Allah and to invite people to Islam.<sup>4</sup> At this phase Allah had instructed the Prophet (peace be upon him) to focus on worship and to be patient on the painful behavior of pagans of Makkah. The second phase was detachment from non-Muslims.<sup>5</sup> At this phase the prophet (peace be upon him) was ordered not to enjoin those people who were

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<sup>1</sup> "O Prophet! rouse the Believers to the fight. If there are twenty amongst you, patient and persevering, they will vanquish two hundred: if a hundred, they will vanquish a thousand of the Unbelievers: for these are a people without understanding" Al- Qur'ān 08:65.

"And fight them on until there is no more Tumult or oppression, and there prevail justice and faith in Allah; but if they cease, Let there be no hostility except to those who practice oppression" "Al-Qur'ān: 02, 193.

<sup>2</sup> Al-Shāfi'ī, *al-um*, vol.4, 182.

<sup>3</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Aḥkam Al-Qur'ān*, vol.2 (Beirut: Dār al-kutub al- 'Imiyyah, 1978), 62.

<sup>4</sup> Al-Shāfi'ī, *Aḥkam Al-Qur'ān*, vol.2, 10. And Allah says "We do indeed know how thy heart is distressed at what they say. But celebrate the praises of thy Lord, and be of those who prostrate themselves in adoration. And serve thy Lord until there come unto thee the Hour that is certain" Al-Qur'ān,15,97,98,99.

<sup>5</sup> "When thou seest men engaged in vain discourse about Our signs, turn away from them unless they turn to a different theme. If Satan ever makes thee forget, then after recollection, sit not thou in the company of those who do wrong".Al-Qur'ān,06:68.



disregarding Islam by their actions. The third phase through which Jihād undergone after the Migration to Madinah when Islamic state was established and Muslims were in a position to defend themselves by fighting against Pagans of Makkah by allowing Muslims to fight against their enemies who had displaced them from their homes and who were presenting hindrance in establishing the divine order of Allah<sup>1</sup>. At the fourth phase Jihād was made obligatory for all Muslims to maintain it till to the dooms day.<sup>2</sup> In the context of phase four Al-Shāfi'i is of the view that Jihād will be fought against Pagans till they embrace Islam while ahl-e-kitab (People of the Book) will be compelled either to embrace Islam or to submit to the writ of Allah and pay the poll tax.<sup>3</sup> If Muslims do not have the power to fight with both of them then peace contract may be signed with them.<sup>4</sup>

According to Imam Sarakhsi and Imam Shawkāni a perpetual war will be continued against non- Muslims till the doomsday<sup>5</sup> or till the culmination of mischief<sup>6</sup> and peace is to be considered in exceptional cases especially when Muslims are incapable to fight Jihād.<sup>7</sup> According to them if war is started by

<sup>1</sup> Al-Shāfi'i, *Aḥkam Al-Qur'ān*, vol.2, 13. Allah says in this regard "To those against whom war is made, permission is given [to fight], because they are wronged;- and verily, Allah is most powerful for their aid;- [They are] those who have been expelled from their homes in defiance of right, - [for no cause] except that they say, "our Lord is Allah". Did not Allah check one set of people by means of another, there would surely have been pulled down monasteries, churches, synagogues, and mosques, in which the name of Allah is commemorated in abundant measure. Allah will certainly aid those who aid his [cause];- for verily Allah is full of Strength, Exalted in Might, [able to enforce His Will]" *Al-Qur'ān* 22,39,40.

<sup>2</sup> Al-Shāfi'i, *Aḥkam Al-Qur'ān*, vol.2, 13. Allah says in this regard "Fighting is prescribed for you, and ye dislike it. But it is possible that ye dislike a thing which is good for you, and that ye love a thing which is bad for you. But Allah knoweth, and ye know not" *Al-Qur'ān* 2,216.

<sup>3</sup> Al-Shāfi'i, *Aḥkam Al-Qur'ān*, vol.2, 62.

<sup>4</sup> Al-Shāfi'i, *Aḥkam Al-Qur'ān*, vol.2, 62. قال الشافعي فرض الله عز وجل قتال غير أهل الكتاب حتى يسلموا وأهل الكتاب حتى يعطوا الجزية وقال لا يكلف الله نفسا إلا وسعها فإذا عجزوا عنه فإنما كلفوا منه ما أطاقوه فلا بأس أن يكفوا عن قتال الفريقين من المشركين وأن يهادنهم

<sup>5</sup> Al-Sarakhsi, *al-Mabsūt*, Vol.10, 3.

<sup>6</sup> Muhammad bin Ali bin Muhammad al-Shaukāni, *Fath al- Qadīr al- Jami' bain fannī al-Riwayah wa al-dirayah min 'ilm al-Tafsīr*, vol.1, 252.

<sup>7</sup> Al-Shāfi'i, *Aḥkam Al-Qur'ān*, vol.2, 62, Abdul wahab khallaf, *Nizām al- Dawlah al-Islamiah fī al- Shaiū'n al- Dastūriah wa al- Kharijīah wa al- Māliyah*, (Egypt: Al-Matbā'a al-Salāfiyah, 1350), 66.

Muslims then every adult and capable Muslim is bound to participate in it and if war is started by non-Muslims then war be optional (Farz Kifā'e<sup>1</sup>). Sarakhsī is also of the view that Jihād is introduced in four phases in Islamic culture<sup>2</sup>. At the earliest stage the Prophet (peace be upon him) was instructed to forgive the Pagans and to observe patience towards them not to take any revenge<sup>3</sup>. The second phase was to invite non- Muslims to Islam with wisdom and beautiful preaching<sup>4</sup>.

According to him the third phase of Jihād is known as defensive war against non- Muslims who fight with Muslims even Muslims are permitted to kill them in Masjid ul Haram but if they surrender and want to be peaceful then Muslims are allowed to make a contract of peace with them.<sup>5</sup> From the arguments

<sup>1</sup> Al-Shāfi'ī, *Aḥkam Al-Qur'ān*, vol.2, 62, Abdul wahab khallaf, *Nizām al- Dawlah al-Islamiah fī al- Shaiū'n al- Dastūriah wa al- Kharijīah wa al- Māliyah*, (Egypt: Al-Matbā'a al-Salāfiyah, 1350), 66.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 ( Bairūt: Dār al-Fikar,2000), 3.

<sup>3</sup> "We created not the heavens, the earth, and all between them, but for just ends. And the Hour is surely coming [when this will be manifest]. So overlook [any human faults] with gracious forgiveness" *Al-Qur'ān* 15,85. { "Nor can goodness and Evil be equal. Repel [Evil] with what is better: Then will he between whom and thee was hatred become as it were thy friend and intimate" *Al-Qur'ān* 41,34., "And no one will be granted such goodness except those who exercise patience and self-restraint,- none but persons of the greatest good fortune" *Al-Qur'ān* 41,35., " Quite a number of the People of the Book wish they could Turn you [people] back to infidelity after ye have believed, from selfish envy, after the Truth hath become Manifest unto them: But forgive and overlook, Till Allah accomplish His purpose; for Allah Hath power over all things" *Al-Qur'ān* 3,109. "Therefore expound openly what thou art commanded, and turn away from those who join false gods with Allah" *Al-Qur'ān* 15,94. }

<sup>4</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 2. Allah says in this context "Invite [all] to the Way of thy Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious: for thy Lord knoweth best, who have strayed from His path, and who receive guidance" *Al-Qur'ān* 16,125.

<sup>5</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 2. Allah says in this regard "To those against whom war is made, permission is given [to fight], because they are wronged;- and verily, Allah is most powerful for their aid;- [They are] those who have been expelled from their homes in defiance of right,- [for no cause] except that they say, "our Lord is Allah". Did not Allah check one set of people by means of another, there would surely have been pulled down monasteries, churches, synagogues, and mosques, in which the name of Allah is commemorated in abundant measure. Allah will certainly aid those who aid his [cause];- for verily Allah is full of Strength, Exalted in Might, [able to enforce His Will" *Al-Qur'ān* 22,39,40. "And slay them wherever ye catch them, and turn them out from where they have Turned you out; for tumult and oppression are worse than slaughter; but fight them not at the Sacred Mosque, unless they [first] fight you there; but if they fight you, slay them. Such is the reward of those who suppress faith" *Al-Qur'ān* 2,191., "But if the enemy inclines towards peace, do thou [also] incline towards peace, and trust in Allah: for He is One that heareth and knoweth [all things]" *Al-Qur'ān*: o8,61.

of Sarakhsi it may be concluded that Jihād is obligatory in situation if Muslims are invaded by non- Muslims which is called defensive Jihād . Moreover, according to Sarakhsi Muslims are only allowed to be peaceful when they're logistically weak. There a question of continuing war arises that how Jihād is to be waged against non-Muslims especially when they want peaceful relations with Muslims. The fourth and last phase of Jihād is aggressive Jihād .<sup>1</sup> Allah commands the Prophet (peace be upon him) to fight with non- Muslims wherever you find them till there remain no persecution on the earth<sup>2</sup>. According to Sarakhsi, Allah has made the war obligatory on Muslims till the culmination of persecution and the establishment of peace and justice. The fourth phase of Jihād (Qital) will be continued till the Doomsday<sup>3</sup>. Sarakhsi argues from the Hadith about war against non- Muslims till the establishment of the writ of *La ilaha illAllah* throughout the globe.<sup>4</sup>

According to Imam Ibn Taymiyyah, Jihād in the first stage was prohibited and was just to invite non- Muslims to Islam<sup>5</sup>. Ibn Taymiyyah is of the view that at first stage the Prophet (peace be upon him) and the earlier Muslims were weak to fight against non- Muslims that is why they were just inviting non- Muslims to

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<sup>1</sup> Al-Sarakhsi, *al-Mabsūt*, Vol.10, 2.

<sup>2</sup> "But when the forbidden months are past, then fight and slay the Pagans wherever ye find them, an seize them, beleaguer them, and lie in wait for them in every stratagem [of war]; but if they repent, and establish regular prayers and practise regular charity, then open the way for them: for Allah is Oftforgiving, Most Merciful" [Al-Qur'ān 09:05.], "And fight them on until there is no more Tumult or oppression, and there prevail justice and faith in Allah; but if they cease, Let there be no hostility except to those who practice oppression" [Al-Qur'ān: 02, 193.

<sup>3</sup> Al-Sarakhsi, *al-Mabsūt*, Vol.10, 3.

<sup>4</sup> "I have been commanded to fight against the people till they testify *La ilaha illAllah* (There is no true god except Allah) and that Muhammad (peace be up him) is His slave and Messenger, and to establish *As-Salat* (*Iqamat-as-Salat*), and to pay *Zakat*; and if they do this, then their blood and property are secured except by the rights of Islam, and their accountability is left to Allah". *Saḥiḥ al-Bukhari*, vol.1, 25.

<sup>5</sup> Taqi al- dīn abū al-Abbas ibnTaymiyyah, *al-Jawāb al-Saḥiḥ le man baddal dīn al-Masīḥ*, vol.1 (Riyadh: Dār al-asimah, 1999), 237.

the way of Islam<sup>1</sup>. When the prophet (peace be upon him) migrated to Madinah and established Islamic state then Allah gave permission to fight against those who were fight with Muslims. This kind of defensive war is known as second phase of Jihād and war<sup>2</sup>. Later on when the Islamic state of Madinah became stronger and capable of offensive war then Allah made *Qital* as obligatory act on Muslims. According to him Muslims were prohibited to fight with those who were not fighting with Muslims. If Allah were ordered them to fight with all non-Muslims then at that time it was impossible for Muslims to fight against all non-Muslims, this was the third phase. When Makkah was conquered by Muslims and huge people accepted Islam then Allah made *Qital* obligatory on Muslims against all non- Muslims. Muslims were ordered to revoke all the peace contracts that were unlimited with respect to time and to maintain only time limited peace contracts with non-Muslims.<sup>3</sup>In addition to the classical view point of Jurists Surah Muhammad verse no.04 can also be quoted in which Allah has ordered Muslims to kill non-Muslims or enslave them wherever they find them till the culmination of *Fitnah*.<sup>4</sup> The classification of the phases of *Qital* by ibn Taymiyyah is a bit different that from the classification of Al-Shāfi'ī and Sarakhsi. According to Imam Shāfi the third phase of *Qitāl* is only to defend Muslim state while Ibn Timiyyah makes the defending Muslim state is obligatory Ibn Timiyyah makes the fourth phase of *Qital* obligatory against all non- Muslims whether they have invaded or not on Muslim state. According to ibn Qayyim al-Jawziyya the

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<sup>1</sup> Taqi al-ddin abū al-abbas ibnTaymiyyah *al-Jawāb al-Sahīh le man baddal dīn al-Masīh*, vol.1 (Riyadh: Dār al-asimah, 1999), 237.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> "Therefore when ye meet the Unbelievers (in fight) smite at their necks; at length when ye have thoroughly subdued them bind a bond firmly (on them): thereafter (is the time for) either generosity or ransom: Until the war lays down its burdens. Thus (are ye commanded): but if it had been Allah's Will He could certainly have exacted retribution from them (Himself); but (He lets you fight) in order to test you some with others. But those who are slain in the way of Allah He will never let their deeds be lost" Al-Qur'ān, 47:04.

Prophet (peace be upon him) was ordered when he was in Makkah to invite the people to Islam and *Qital* was prohibited<sup>1</sup>. When the Prophet (peace be upon him) migrated to Madinah, he was given permission to fight against the invaders to defend the Islamic state. Later on the Prophet (peace be upon him) was ordered to fight against all non-Muslims till the culmination of *Fitnah*<sup>2</sup>. The last stage was the revelation of Surah Tawbah, Allah ordered to fight with ahl-e- Kitab till they accept Islam or pay the poll tax. In continuation Allah ordered to fight with those pagans who had violated peace contract. According to the aforementioned Surah, fighting with pagans with whom Muslims had signed peace contract and who abide by their contract, war was postponed till the expiration of the specified period. Those pagans with whom Muslims had signed a peace contract of unlimited time, Muslims were commanded to give them a time of four months to start fight against them<sup>3</sup>. According to Ibn Qudāmah al-Ḥanbali the permanent relation between Muslims and non- Muslims is hostile not peaceful. According to him the peace agreement with non- Muslims would be legal only if it fulfills three conditions: First when Muslims are weak and they do not have the power to fight against non- Muslims. Second due peace agreement Muslims will become strong logistically. Third peace agreement with non-Muslims should be for limited time because peace agreement for unlimited time suspends the spirit of Jihād .<sup>4</sup>

From the above arguments of the jurists, it is concluded that the relations between Muslims and non- Muslims are built on hostility basis. Peace relations will only be maintained in a situation when Muslims are weak and do not have

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<sup>1</sup>Muhammad bin abi Bakar Shams al-ddin ibne Qayyim al-Jawziyyah, *Zād al-Mu'ād fī Hadye khair al-'Ibād*, vol.3 (Bairūt: Mu'asisah al- Risālah, 1994), 160.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup>Ibn Qudāmah, al-Mughni vol.9, 297.

لا تجوز المهادنة مطلقاً من غير تغدير مذهب؛ لأنه يفضي إلى ترك الجهاد بالكلية

enough power to fight<sup>1</sup>. Furthermore, non- Muslims (other than non- Muslims from Arab) have only two options either to accept Islam or pay the poll tax. While non- Muslims from Arabs were subject to either to accept Islam or to be killed<sup>2</sup>. Moreover, the last phase of *Qital* against non- Muslims is absolute and unconditional. The saying of the Prophet (peace be upon him) regarding *Qital* against non-Muslims till they embrace Islam<sup>3</sup> and the forbiddance of friendly relationships with non- Muslims support the view point of these jurists<sup>4</sup>. Lastly the killing of those non-Muslims is just to whom Islam is been presented to them and who rejected it and who have waged war against Muslims or not.<sup>5</sup>

The viewpoints of these jurist may be accepted on historical grounds that the concept of war has passed through different phases. This is not only special with Jihād and *Qital* but applicable to majority of Shari'ah commandments. The first phase was forgiveness the second was to invite the people to Islam, the third

<sup>1</sup> Ahmad bin abd ul Haleem bin Taymiyyah, *Al-Şarim al-Maslūl 'Alā Shamit al-Rasūl*, vol.1 (Riadh: al-Hars al-watani, n.d)221

<sup>2</sup> khallaf, *Nizām al- Dawlah al-Islamiah fī al- Shaiū'n al-Dastūriah wa al- Kharijīah wa al- Māliah*, (Egypt: Al-Matbā'a al-Salāfiya, 1350), 63.

<sup>3</sup>"I have been commanded to fight against the people till they testify *La ilaha illAllah* (There is no true god except Allah) and that Muhammad (peace be up him) is His slave and Messenger, and to establish *As-Salat* (*lqamat-as-Salat*), and to pay *Zakat*; and if they do this, then their blood and property are secured except by the rights of Islam, and their accountability is left to Allah". *Ṣaḥīḥ al-Bukhari*, vol.1, 25.

<sup>4</sup> "O ye who believe! Take not my enemies and yours as friends [or protectors],- offering them [your] love, even though they have rejected the Truth that has come to you, and have [on the contrary] driven out the Prophet and yourselves [from your homes], [simply] because ye believe in Allah your Lord! If ye have come out to strive in My Way and to seek My Good Pleasure, [take them not as friends], holding secret converse of love [and friendship] with them: for I know full well all that ye conceal and all that ye reveal. And any of you that does this has strayed from the Straight Path". *Al-Qūrā'an*, 60,1.

"O ye who believe! Take not into your intimacy those outside your ranks: They will not fail to corrupt you. They only desire your ruin: Rank hatred has already appeared from their mouths: What their hearts conceal is far worse. We have made plain to you the Signs, if ye have wisdom". *Al-Qūrā'an*, 3,118.

"O ye who believe! Take not the Jews and the Christians for your friends and protectors: They are but friends and protectors to each other. And he amongst you that turns to them (for friendship) is of them. Verily Allah guideth not a people unjust" . *Al-Qūrā'an*: 05,51.

<sup>5</sup> Khallaf, *Nizām al- Dawlah al-Islamiah fī al- Shaiū'n al-Dastūriah wa al- Kharijīah wa al- Māliah*, (Egypt: Al-Matbā'a al-Salāfiya, 1350), 64-66.

was about the permission of war that was to fight those who start fighting you and the fourth was staging war to against all non- Muslims till doomsday. The concept of these scholars regarding the last phase of perpetual war against all non- Muslims till the Doomsday may require to be proved valid in different space and time. There are several verses of the Qur'ān that reveal basis for peaceful relationship between Muslims and non-Muslims. Besides, this the underpinning arguments of the Classical Muslim Jurists (CMJ) may be concluded a result of Muslims dominance in their age and the approach of the Contemporary Muslim Scholars (CMS) may be a result of the contemporary slavery of Muslim Ummah through which it passes. Collective nation's psychology affects nations' worldview. Therefore, it becomes needful that both kinds of verses which are interpreted in supporting war and peace for the relationships of Muslims and non- Muslims may be studied in their contexts, reasons to their revelation (*Asbabe Nuzūl*) and historical backgrounds keeping in view the psychology of the age in which these are interpreted.

## 2.2 View point of Contemporary Muslim Scholars

The contemporary Muslim scholars like Waḥba al-Zuḥailī, Abdul Wahab Khallaf and Abu Zahrah do not accept the view point of hostility of relations between Muslims and non-Muslims. Waḥba al-Zuḥailī is of the view that the relationships between Muslims and non- Muslim are based on peace and harmony and war is exceptional or casual to it and only allowed to restore peaceful relations<sup>1</sup>. According him even war does not suspend peaceful relationships between Muslims and non- Muslims.<sup>2</sup> Furthermore war can only be waged to

<sup>1</sup> Waḥba al-Zuḥailī, *Asār al- Ḥarb fī al- Fiqh al-Islamī derāsah Muqāranah*, (Dimishq: Dār al-Fikar, 1998), 135.

<sup>2</sup> *Ibid.* ووقوع الحرب بالفعل لاينافي مع كون الأصل العام هو السلم

defend Muslim state or to eradicate hindrances from the way of preaching Islam<sup>1</sup>. The following arguments support the peaceful relationships between Muslims and non-Muslim states.

- 1-Muslims have to fulfill their agreements with non- Muslims.
- 2- Islam respects Mankind and does not want to see it being ruined and disgraced through war.
- 3- Rules of reciprocity in the context of peaceful relationships must be adequately implemented by Muslim state
- 4- Islam supports and maintains justice for all humans irrespective of their religion and other discriminations.
- 5- Islam does not supports cruelty and inhumane behavior with aliens even in war but promotes mercy and kindness even in war with all humans<sup>2</sup>.

According to Wahbah al- Zuḥayli, the verses of Surah al-Hajj related to *Qital* give the right of self- defense, to stand against any injustice to Muslims. Before this the right of self-defense was illegal and prohibited for Muslims. The verses have explicitly mentioned reason to fight against Pagans of Makkah because they're persecuted by the Pagans and were displaced from their lands<sup>3</sup>. The verses of Sūrah al-Baqarāh relevant to *Qitāl* make the war obligatory for Muslims against those non- Muslims who fought with Muslims and who were not letting Muslims to practice their faith freely<sup>4</sup>. He further explains that verses of the Qur'ān which invoke Muslims to fight against non- Muslims are situational permissive especially when non- Muslims prevent Muslims from practicing their faith

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<sup>1</sup> Wahba al-Zuhaili, *Asār al- Ḥarb fī al- Fiqh al-Islamī derāsah Muqāranah*, (Dimishq: Dār al-Fikar, 1998), 135.

<sup>2</sup> *Ibid* 141-147

<sup>3</sup> *Ibid.*,114.

<sup>4</sup> *Ibid.*,116.



according to Islamic law or a situation of continued war<sup>1</sup>. The verses of Sūrāh al-tawbāh related to *Qital* of non- Muslims are related to the killing of those non-Muslims have breached a peace contract with Muslims by means of treachery<sup>2</sup>.

According to Abdul Wahab Khallaf, the base of relationships between Muslims and non- Muslims is peace. War is only allowed in case of tyranny by non- Muslims or any hindrance they present in the way of preaching of Islam<sup>3</sup>. According to him, verses related to *Qital* either revealed in Makkah or Madinah which allow Muslim to fight against non-Muslims due reasons they cause to be killed by Muslims. Non- Muslims in Makkah and Madinah were used to torture Muslims. They embargoed Muslims economically and socially and ejected them from their homes and lands. That is why Muslims were ordered to fight with non-Muslims till to eradicate hindrances from the way of preaching Islam and to be restored to their homes from where they were knocked out. Muslims wanted to achieve their goals by peaceful means but non- Muslims were not ready to give them way to be succeeded in the achievement of their goals and targets<sup>4</sup>. Allah allowed Muslims to fight with those pagans who were active in presenting hurdles in their way and who were ready to fight with Muslims. Moreover, all jurists are unanimously agreed that non- combatants will not be killed in war. War is allowed

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<sup>1</sup> "And why should ye not fight in the cause of Allah and of those who, being weak, are ill-treated [and oppressed]?- Men, women, and children, whose cry is: "Our Lord! Rescue us from this town, whose people are oppressors; and raise for us from thee one who will protect; and raise for us from thee one who will help!" *Al-Qūrā'n*, 4, 75.

"Against them make ready your strength to the utmost of your power, including steeds of war, to strike terror into [the hearts of] the enemies, of Allah and your enemies, and others besides, whom ye may not know, but whom Allah doth know. Whatever ye shall spend in the cause of Allah, shall be repaid unto you, and ye shall not be treated unjustly" *Al-Qūrā'n*, 8, 60. Zuhaili, *Āsār al-Ḥarb fil Fiqh al-Islami dirase Muqaranah*, 117.

<sup>2</sup> *Ibid*, 118.

<sup>3</sup> Khallaf, *Nizām al- Dawlah al-Islamiah fī al- Shaiū'n al-Dastūriah wa al- Kharijīah wa al- Māliyah*, (Egypt: Al-Matbā'a al-Salāfiyah, 1350), 70.

<sup>4</sup> *Ibid*, 72.

against those who fight with Muslims. Converting non- Muslims forcefully to Islam is against the spirit of Islam<sup>1</sup>.

Muhammad 'Abdhū is proponent of peace being the base of Muslims and non- Muslims relationships. He is of the view that all battles that had fought by the Prophet (peace be upon him) were defensives<sup>2</sup>. He has mentioned three arguments in his support. The first one that the Pagans of Makkah did eject the Prophet (peace be upon him) from his native land Makkah. Second one that they were continuously torturing the newly converted Muslims. The third one is they were becoming hindrance in preaching Islam.<sup>3</sup> According to him, the verses of Surah ale Imran related to *Qital* were revealed after the battle of *Uhud*. In this war the Pagans of Makkah were the aggressors. The verses of Surah al-anfal related to *Qital* were revealed after the battle of Badar in which the Pagans of Makkah were also aggressors. The verses of Surah al-Tawba related to *Qital* were revealed when the Pagans of Makkah had breached the peace treaty of Hdaybiah<sup>4</sup>. According him the war in Islamic law is only permitted to defend Muslims and Muslim state. He is not of the view that Islam can be preached by means of aggression.<sup>5</sup> Muhammad Rafat Usman also agrees with contemporary view point regarding relationships between Muslims and non- Muslims. He says the objective of Jihād is to seek the guidance of Islam not to kill non- Muslims. Peace is a general rule

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<sup>1</sup> Khallaf, *Nizām al- Dawlah al-Islamiah fī al- Shaiū'n al-Dastūriah wa al- Kharijīah wa al- Māliyah*, , 72.

<sup>2</sup> Muhammad Abduhū and Muhammad Rashid bin Ali Raza bin Muhammad, *Tafsīr al- Manār*, vol.2 ( Egypt: al-haiā'al-Misriya lil kitab, 1990), 173

<sup>3</sup> *Ibid*.

<sup>4</sup> ["Will ye not fight people who violated their oaths, plotted to expel the Messenger, and took the aggressive by being the first [to assault] you? Do ye fear them? Nay, it is Allah Whom ye should more justly fear, if ye believe"] Al- Qur'ān: 09:13

<sup>5</sup> Muhammad Abduhū, *Tafsīr al- Manār*, vol.2, 174. وَجُمْلَةُ الْقَوْلِ فِي الْقِتَالِ أَنَّهُ شَرِيعٌ لِلدَّفَاعِ عَنِ الْحَقِّ وَأَهْلِهِ وَجَمَاعَةِ الدَّعْوَةِ وَنَشْرِهَا

while war is an exception.<sup>1</sup> In addition to the contemporary view point, verses number 8 and 9 of Surah al- Mumtahinah can also be presented which urge Muslims to do good with those non-Muslims who do not displace Muslims and do not fight with them. If perpetual killing is the Divine demand then how Divine orders to do good with non- Muslims.<sup>2</sup> Similarly Surah al-Anfāl and Surah al-Nisa' verse no. 61 and 90 respectively urge Muslims to be kind in contracting peace if non- Muslims tender to it.<sup>3</sup> In this verse Allah says if non-Muslims want to fight you, fight them also and if they tender towards peace and harmony then give them peace and tranquility. There are Hadith which clearly indicate that the relations between Muslim and non-Muslim is peace not hostile.<sup>4</sup> They clearly prohibit Muslims from wishing fight with non- Muslims. This prohibition indicates that relationships between Muslims and non- Muslim are based on promoting peace and not hostility. The third view is of Ibn Taymiyyah and Ibn Qudāmah h which is quite unique in its nature. He is of the view that if Muslims are weak in deterrence then relations between Muslim and non- Muslims will be built on the doctrines of peace and harmony that is to get strengthen against aliens and

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<sup>1</sup> Muhammad Rafat Usman, *Al-Huqūq wa al- Wājibāt wa al- 'elaqah al-dūwliyyah fī al-Islam*, (Al-Qahira: Dār al-zia, 1991), 189.

<sup>2</sup> "Allah does not forbid you, with regard to those who do not fight you on account of your religion nor drive you out of your homes, to treat them with goodness and to be just to them; truly, Allah loves those who are just. Indeed, Allah forbids you (only) with regard to those who fight you on account of religion and drive you out of your homes, and assist (others) in driving you out, that you turn to them (in friendship); and whoever turns to them (in friendship), they are wrong-doers" Al-Qur'ān 60,8,9.

<sup>3</sup> "If the enemy inclines towards peace do thou (also) incline towards peace and trust in Allah: for He is the one that heareth and knoweth (all things)" Al-Qur'ān 8,61. and "Except those who join a group between whom and you there is a treaty (of peace) or those who approach you with hearts restraining them from fighting you as well as fighting their own people. If Allah had pleased He could have given them power over you and they would have fought you: therefore if they withdraw from you but fight you not and (instead) send you (guarantees of) peace then Allah hath opened no way for you (to war against them)" Al-Qur'ān,4,90

<sup>4</sup> The prophet (peace be up him) says "O people! Do not wish to face the enemy (in a battle) and ask Allah to save you (from calamities) but if you should face the enemy, then be patient and let it be known to you that Paradise is under the shades of swords." He then said,, "O Allah! The Revealer of the Book, the Mover of the clouds, and Defeater of Al-Ahzab (i.e. the clans of infidels), defeat them infidels and bestow victory upon us". *Saḥīḥ al-Bukhari*, vol.3, 1082.

enemies of Islam but if they find themselves stronger enough to bring a successful change then they will adopt aggressive relations with non-Muslim and will keep the enemies of Islam depressed and subservient in paying poll tax and other reciprocal duties<sup>1</sup>. So the cause of war between Muslims and non-Muslim is not infidelity but it depends on the response of non-Muslims towards Muslims' invitation to Islam. If non-Muslims other than pagans of Arab and apostates agree to pay the poll tax, their blood, property and honor will be protected instead of their infidelity. In such situation the relations between Muslims and non-Muslims are peaceful. If they reject these two options, then they will be considered aggressors.

### 2.3 Division of the world

The concept of territory in Muslim International Law plays an important role. The rights and duties of the citizens of Muslim state are associated with their residence within or out of its territories. It also amounts to change the nature of various juristic and legal issues like distribution of booty, status of *Ribā*, voidable contract and the territorial jurisdiction of the courts of Muslim state. This division of the world into different parts although is made by Muslim jurists as Zuhayli considers.<sup>2</sup> The division of the world is based on the primary sources of Shari'ah<sup>3</sup>

<sup>1</sup> Ahmad bin abd ul Haleem bin taymiyyah, *Al-Ṣarim al-Maslūl 'Alā Shamit al-Rasūl*, vol.1 (Riadh: al-Hars al-watani, n.d)221. فمن كان من المؤمنين بأرض هو فيها مستضعف أو في وقت هو فيه مستضعف فليعمل بأية الصبر والصفح عمن يؤذي الله ورسوله من الذين أوتوا الكتاب والمشركين وأما أهل القوة فإنما يعملون بأية قتال أئمة الكفر الذين يطعنون في الدين وبأية قتال الذين أوتوا الكتاب حتى يعطوا الجزية عن يد وهم صاغرون.

Ibn Qudāmah, *al- Muḡni* vol.9, 29

<sup>2</sup> Zuhailly says The division of the world into two kinds is not mentioned in the *Qūr'ān* and *Sunnah*. It is created by Muslim jurists in the second century of *Hijri* due to some Islamic law rules regarding general affairs of those Muslims live in a place where non-Muslims are in majority or some time Muslim state hostile relations with non-Muslims. in other words, he considers the division of the world is the impact of war between Muslims and non-Muslim state not more than that. (Waḥba al-Zuhailī, *Asār al- Harb fī al- Fiqh al-Islamī derāṣah Muqāranah*, (Dimishq: Dār-Fikar, 1998),194.

<sup>3</sup> "Never should a believer kill a believer; but [if it so happens] by mistake, [Compensation is due]: If one [so] kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's

as other juristic issues are derived from the primary sources. Madīnah became the domain of Islam (*Dār al-Islām*) after the migration of the Prophet (peace be upon him) and Makkah became the domain of war (*Dār al-Ḥarb*). Muslims were ordered to migrate to Madinah. Those who did not migrate, their rights and privileges as the citizens of Muslim state were suspended.<sup>1</sup> Besides this, Muslim state was only bound to support logistically with respect to protect the religion of such people if the Muslim state had no peace treaty with the state in which they were living<sup>2</sup>. With reference to the notion of relations between Muslims and non-Muslims, Muslims jurists divide the world into three parts. The first one is the Domain of Islam (*Dār al-Islām*) domain of disbelief (*Dār al-Kufr*) and domain of treaty (*Dār al-ḥd*). Keeping in view the division of the world into different parts does not relate to the notion of perpetual war<sup>3</sup>. It is not necessary that negation of the division of world negate the concept of perpetual war and similarly the division of the world does not cause a perpetual war between Muslims and non-Muslims. The hostile or peaceful relations between Muslims and non-Muslims does not directly link to the division of the world. Division of the world is directly linked to the rights and duties of the residents and to the territorial jurisdiction of the courts of Muslim

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family, unless they remit it freely. If the deceased belonged to a people at war with you, and he was a believer, the freeing of a believing slave [is enough]. If he belonged to a people with whom ye have treaty of Mutual alliance, compensation should be paid to his family, and a believing slave be freed. For those who find this beyond their means, [is prescribed] a fast for two months running: by way of repentance to Allah: for Allah hath all knowledge and all wisdom" Al-Qur'ān:4,92. And Abū Basīr's Incidence quoted by Muhammad bin Ismail Abu Abdullah al-Bukhari, *Sahih al-Bukhari*, vol.3 (Riadh: al-Ma'ārif, , 2002),193.

<sup>1</sup>Muhammad. Mushtaq Ahmad, "The notion of *Dār- Islam and Dār -Ḥarb* in Islamic Jurisprudence with special reference to the Hanafi School", *Islamic studies*1 (2008): 5-37.

<sup>2</sup>"Those who believed, and adopted exile, and fought for the Faith, with their property and their persons, in the cause of Allah, as well as those who gave [them] asylum and aid,- these are [all] friends and protectors, one of another. As to those who believed but came not into exile, ye owe no duty of protection to them until they come into exile; but if they seek your aid in religion, it is your duty to help them, except against a people with whom ye have a treaty of mutual alliance. And [remember] Allah seeth all that ye do". Al-Qur'ān: 8, 72.

<sup>3</sup>Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),85.

state<sup>1</sup>. If anyone resides beyond the territory of Muslim state, such person will lose the basic rights towards Muslim state. If someone violates the Islamic Law beyond the territorial limits of Muslim state, the courts of Muslim state cannot entertain such cases. Similarly, it cannot enforce the rights of the citizen of Muslim state beyond the territorial limits because Muslim International Law preserves the rights of those who live in Muslim state like its citizens and its guaranteed persons.

### 2.3.1 Division of the world, according to Al-Mawdūdī

Al-Mawdūdī divides the world on the basis of faith into two parts Islam and *Kufr*.<sup>2</sup> On the basis of this division, Muslims are one nation. Muslims' properties bloods and honors are protected. They are equal in the eye of law, they have equal rights and duties. All of them are bound to follow Islamic law wherever they are. On the other hand, non-Muslims are another separate nation. Due to this discrimination of religion, the relations between Muslims and non-Muslims are hostile and peaceful relations are an exception to this rule. He asserts war between Muslims and non-Muslims is hypothetically or theoretically rather practically. Due to this religious differences between Muslims and non-Muslims, permanent and forever friendship and peace agreement will not be concluded. On the basis of this principle, every non-Muslim is to be considered as alien till he accepts Islam<sup>3</sup>.

Division of the world on the basis of constitutional law

Al-Mawdūdī has distinctively divided the world in territorial and constitutional jurisdictions of Muslim and non-Muslim states. According to him, world is divided into two parts on the basis of Islamic Constitutional Law: Domain of Islam (*Dār al-Islām*) and Domain of Disbelief (*Dār al-kufr*). According to him,

<sup>1</sup> Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghawāt* (Gujanwala: Al-Shariāh acadāmī, 2012), 85

<sup>2</sup> Sayed abū al-ʿĀlā al-Mawdūdī, *Sūd* (Lahore: Islamic publicaitons, 1999), 296.

<sup>3</sup> Ibid. 297-298.

Domain of Islam is a territory where Muslims govern their state and Islamic Law is either implemented practically or at least they have the power to implement it<sup>1</sup>. On the other hand, the Domain of Disbelief is a territory where non-Muslims govern it and Islamic Law is not implemented. He is of the view that Muslim state implements Islamic Law for its inhabitants to protect their all constitutional rights. Under this principle all the residents are constitutionally protected (*Ma'sūm*) that is the blood, property and honor of them are protected irrespective of their nation, religion, ethnicity language discriminations. Conversely whosoever resides beyond the territorial jurisdiction of Muslim state is not protected. Principally under the Islamic Constitutional Law protection is linked to the territorial jurisdiction of Muslim state. Muslim state is not bound to protect even a Muslim who resides beyond the territorial limits of Muslim state by virtue of its constitutional responsibilities.<sup>2</sup> On the basis of the division of faith all Muslims are protected while non-Muslims are not protected by virtue of their respective faiths. On the basis of Constitutional Division all those residents who reside within the territorial limits of Muslim state are protected without the discrimination of their faith, race, and language while those who reside outside of the limits of Muslim state are unprotected by the Muslim state without the discrimination of faith, race and language. By the virtue of faith (*Diyānatan*) every Muslim is bound to follow Islamic law wherever he resides while *Qādhā'n* a Muslim is only bound to follow the Islamic Law who resides in the territorial jurisdiction of Muslim state. If a Muslim violates any rule of Islamic law, the court of a Muslim state can only ask for it if the criminal act is done within the territorial limit of Muslim state. From the first division of the world by Maulana Al-Mawdūdī, it can be concluded that such division causes a perpetual ideological war between Muslims and non-Muslims while the second constitutional division of the world does not cause any

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<sup>1</sup> Sayed abū al-'Ālā al-Mawdūdī, *Sūd*(Lahore: Islamic publicaitons,1999), 299.

<sup>2</sup> Ibid,296.

war or hostility between Muslims and non- Muslims. It only amounts to the territorial jurisdiction of Muslim and non- Muslim states.

### 2.3.2 Division of the world by Shaybānī

According to Shaybānī, world is divided into three divisions. The Domain of Islam (*Dār al-Islām*)<sup>1</sup>, the Domain of Disbelief (*Dār al-kufr*) and the Domain of treaty (*Dār al-'hd*). According to him, the important element in the domain of Islam is the potential of Muslims to implement Islamic law<sup>2</sup>. This means that Muslims are in majority in such state and have the power to implement Islamic Law. The second condition is that a state where Muslims and non-Muslim citizens or guaranteed persons are protected with all respects. This means the domain of Islam is a place where Muslims have the authority to award guarantee and the state has an authority of establishing its writ<sup>3</sup>. Domain of Disbelief (*Dār al-kufr*)<sup>4</sup>. This is a territory where non-Muslims are physically in power to implement their laws. A state where Muslims have no authority to award guarantee on the behalf of state as in Muslim state. Moreover, Muslim state has neither hostile relations nor peace relation with it. If a Muslim state has hostile relations with a non-Muslim state that state changes its status to the Domain of War. Rules applied to the

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<sup>1</sup>*Dār-Islam* consists of all the countries under Muslim control in which Muslims are safe and free and wherein they can practice their religion without any external interference, the main element in the domain of Islam is that Islamic law implementation. According to Muslim jurists any territory in which Islamic law implemented is called *Dār-Islam*. See for details, 'Alā al-ddīn, Abū bakar bin Māsūd bin Ahmad al-Kāsānī, Bādāi al-Sānāi vol.7 (Bairut: Dār-kutub al- 'Imiyyah, 1986),130.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> *Dār-Kūfār* according *Abū Hanifah* any territory in which *Shari'ah* does not prevail and the territory is adjacent to the domain of war moreover Muslims and *dhimmi*s are not protected there as protected in Muslim state. According to Abū Yousaf, and *Shāybanī* any territory where unIslamic law implemented is called the domain of *Kūfār*. See for details. 'Alā al-ddīn, Abū bakar bin Māsūd bin Ahmad al-Kāsānī, Bādāi al-Sānāi vol.7 (Bairut: Dār-kutub al- 'Imiyyah, 1986),130.



domain of war are different than the rules applied to the Domain of Treaty<sup>1</sup>. Domain of Treaty (*Dār al-'ahd*)<sup>2</sup>. This means a non-Muslim state with which Muslim state has signed a peace agreement.

### 2.3.3 Division of the world by Imam Al-Shāfi'i

On the other hand, Imam Al-Shāfi'i believes in partition of the world in the Domain of Islam and Domain of Disbelief or Domain of War. He does not believe in the territorial impact of both the states i.e the Domain of Islam and the Domain of Disbelief or Domain of War<sup>3</sup>. He asserts that there is no difference between the domain of Islam and domain of war from the obligations of Muslims towards Muslim state. He is of the view that the divine obligations and prohibitions will not be changed with the change of territorial jurisdictions of a Muslim state. It means lawful act in the domain of Islam will be considered lawful in the domain of war and unlawful act in the domain of Islam will be considered unlawful in the domain of war. Territorial changes of Muslim state do not affect the legal status of the injunctions of Islamic law<sup>4</sup>. He says *Hudūd* will also be implemented and the contract of *Ribā* will be void in the territory of war as they are void in the domain of Islam<sup>5</sup>. While Shaybānī and Imam Abū Ḥanīfah believe that the implementation of *Hudūd* laws changes with the change of the territorial jurisdiction of Muslim state. No *Hudūd* punishments will be inflicted on Muslims in a non-Muslim state. All voidable commercial contracts will also be considered valid. From the above explanation, it can be concluded that Imam Al-Shāfi'i, does

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<sup>1</sup> Muhammad Mushtaq Ahmad, "The Notion of *Dār-al- Islam and Dār al- Harb* in Islamic Jurisprudence with special reference to the Hanafi School", *Islamic studies*1 (2008),16.

<sup>2</sup> *Dār al-Ahd*, is a territory of peace with which Muslim state has suspended war and signed the peace agreement.

<sup>3</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'i, *Al-Umm*, vol.7 (Bairut: Dār-Marifah, 1990),374

<sup>4</sup> Ibid.375.

<sup>5</sup> Ibid,37 4,378.

believe in the partition of the world into two divisions on the basis of faith but he does not believe in any constitutional or territorial jurisdiction of Muslim state. He asserts that there is no territorial jurisdiction in Islamic law. If any Muslim violates the rules and regulations of Islamic law irrespective of the territorial limitations of Muslim state, he will be held accountable by the Muslim state as well as will be held accountable on the Day of Judgement. According to him if a right of a Muslim or non-Muslim the citizen of Muslim state is violated beyond the territorial jurisdiction of the Domain of Islam, in such situation the wrongdoer will be punished if he is captured or enters to the Domain of Islam. According to him, legal protection is granted to Muslims on the basis of faith not on the basis of territory while non-Muslims citizens of Muslim state is granted protection on the basis guarantee given by Muslim individual or Muslim state.

Ḥanābilah endorses the view point of Imam Al-Shāfi'ī regarding the territorial jurisdiction of Muslim state. According to them there is no difference between the Domain of Islam and the Domain of War from the divine prohibitions and obligations point of view<sup>1</sup>. Ibn e Qudāmah, asserts that for the implementation of *Qisās*, it is not necessary that the cause of action would be took place in the domain of Islam. *Qisās* will also be implemented even the cause of action will take place in the Domain of War<sup>2</sup>. According to him, *Ḥadde Qadhif* will be implemented even beyond the Domain of Islam because the order of Allah regarding *Ḥadde Qadhif* is common not limited to the domain of war<sup>3</sup>. It means, they also do not believe in territorial jurisdiction and everyone is bound to follow Islamic Law wherever he is. Similarly, the rights of Muslims are preserved even beyond the territorial jurisdiction of the Domain of Islam.

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<sup>1</sup> Abu Muhammad Abdullah bin Ahmad bin Muhammad bin Qudāmah al-Ḥanbalī, *al-Mughnī le Ibn Qudāmah* vol.4 (Egypt: Maktab tul Qahira, 1968),32.

<sup>2</sup> Ibid,8,279.

<sup>3</sup> Ibn Qudāmah al-Ḥanbalī, *al-Mughnī le Ibn Qudāmah* vol.9 (Egypt: Maktab tul Qahira, 1968),84.

### 2.3.4 The status of occupied territory

The status *Dār al-Islām* is not changed to the status of *Dār al- Kufar* by the occupation of non-Muslims and vice versa. According to Abū Yūsuf and Shaybānī, the status of *Dār al-Islām* will be changed into the status of *Dār al- Kufr* when non-Muslims take the actual possession of the aforementioned territory and implement other than divine laws<sup>1</sup>. It means that the domain of Islam will not be changed by occupation into the domain of disbelieve unless non-Muslims apply their own laws and obviously non-Muslim can apply their laws only when Muslims lose their power and non-Muslims became strong. While Abū Ḥanīfah has added two more elements to change the status of *Dār al-Islām* and become *Dār al- Kufr* firstly, adjacent to the domain of disbelieve and suspension of Muslims and non-Muslim citizens protected by Muslim state<sup>2</sup>. The logic for the conditions of Abū Ḥanīfah, the first one, the occupied territory of Islam Adjacent of the domain of war is the sign of power and permanent presence of non-Muslims. If the occupied *Dār al-Islām* is not adjacent to *Dār al- Kufr* in such situations Muslims can easily snatch the occupied territory back from non-Muslims. The last condition is the protection of Muslims it means if the authority to award guarantee to non-inhabitants of the territory was in Muslims hands that constituency will be called *Dār al-Islām* and if the authority of granting the guarantee in non-Muslims hands then the territory will be called *Dār al- Ḥarb*.<sup>3</sup> Similarly, *Dār al- Ḥarb* will not be change into *Dār al-Islām* by occupation of Muslim army. The occupied territory will be considered the domain of Islam when Muslim rulers implement Islamic law practically there. Sarakhsī says implementation of Islamic law by Muslim rulers in any territory is

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<sup>1</sup>Alā al-ddin, Abū bakar bin Māsūd bin Ahmad al-Kāsānī, *Bādāi al-Sānāi* vol.7 (Bairut: Dār-kutub al- 'Imiyyah, 1986), 130.

<sup>2</sup> Ibid.

<sup>3</sup>Muhammad Mushtaq Ahmad, "The Notion of Dār-al- Islam and Dār al- Ḥarb in Islamic Jurisprudence with special reference to the Ḥanafī School", *Islamic studies*1,(2008)15.

the sing of supremacy and power of Muslims<sup>1</sup>. If Muslims rulers occupy the territory of *Dār al- Ḥarb* and then apply Islamic law, there then that territory will be considered the domain of Islam. Or Muslim ruler announces that the occupied territory is the part of *Dār al-Islām*. In other words, that the immovable property of the domain of war or disbelieve will be considered the part of the domain of Islam either by implementing Islamic laws there or by announcement of Muslim rulers. While movable property of non-Muslims snatched by Muslim army during war will be considered the ownership of Muslims if that is transferred to the domain Islam. According to Ḥanafiyyah the ownership of the movable property of non-Muslims will not be transferred to the Muslim army by snatching from them but it must be transferred to the domain of Islam. This property will not be distributed among Muslim army in the domain of war but it will be distributed in the domain of Islam<sup>2</sup>. Once the Muslim ruler annexes the occupied territory to the domain of Islam, he is bound by virtue of ruler to defend that territory. While contemporary international legal order does not reflect occupation or annexation to be a sound base for getting territory<sup>3</sup>.

### 2.3.5 Impact of the division of the world

Al- Shāfi'ī and Ḥanābilah also believe in the partition of the world into two parts. But they divide the world into two parts on the basis of faith that *Dār al-Kufr* and *Dār al- Islām* similarly they do not believe in the partition of world into parts on the basis of territory. They are of the view that Islamic Law does not recognize the partition of the world on the basis of territorial limits. According to them the domain of Islam and war have the same statuses, anything permissible

<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: *Dār-Fikār*, 2000), 193.

<sup>2</sup> Alā al-ddīn, Abū bakār bin Māsūd bin Ahmad al-Kāsānī, *Bādāi al-Sānāi* vol.7 (Bairut: Dār-kutub al- 'Imiyyah, 1986), 123.

<sup>3</sup> Muhammad Mushtaq Ahmad, "The Notion of Dār-al- Islam and Dār al- Ḥarb in Islamic Jurisprudence with special reference to the Ḥanafi School", *Islamic studies*1,(2008), 15.

in the *Dār al-Islām* will also be permissible in *Dār al- Ḥarb* and vice versa. While Shaybānī believes in the legal impact of territorial jurisdiction. According to him, territory changes the impact of some of Islamic laws like:

Guaranteed aliens will only be subject to the transactions which are contracted in Muslim state but not to those which took place beyond the territorial jurisdiction of Muslim state. Shaybānī asserts when a group of aliens (*Ḥarbīs*) enters to the [domains of Islam] with proper permission, no intervention will be made in whatever mutual debts and contracts have taken place among them in the domain of war. But the contracts made in domains of Islam will be followed by them<sup>1</sup>. According to Sarakhsī, for a *Ḥarbī* it is not necessary to get all the benefits of the previous contracts done by him/her on the entering to the domain of Islam. Muslim state is only bound to address the grievances of its citizens or its guaranteed aliens which took place within the territorial jurisdiction of Muslim state<sup>2</sup>.

According to Shaybānī, Muslim *Mustā'min* is a person who seeks guarantee in alien state<sup>3</sup>. It means that a Muslim can also be a *Mustā'min* if he gets the guarantee from an alien state. Shaybānī says that a Muslim or a non Muslim citizen of a Muslim state can also be given guarantee by an alien state. Once the guarantee is given by the alien state the guaranteed person is bound to follow the domestic law of the state and the other conditions that are agreed. The said guaranteed person is not bound to follow the alien state for international affairs in a situation when Muslim state aggresses on the alien state. In such situation the guaranteed person even can help logistically and non-logistically the Muslim state against the alien state during war with Muslim state. Shaybānī allows the guaranteed Muslims of

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<sup>1</sup> Muhammad bin Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār- Ma'rifah, 1993), 93.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid., 65.

alien state to take their appropriate portion from the booties and spoils of war<sup>1</sup>. From the above argument of Shaybānī we can conclude the aforementioned guaranteed person cannot help any other state beside the Muslim state in the condition of war. A guaranteed Muslim is not allowed to violate the rules and regulations of the alien state in which he resides a guaranteed person in case it will be considered the treachery of the guaranteed person which is strictly prohibited by the Hadith of the Prophet (peace be upon him).<sup>2</sup> So the guaranteed Muslim should be careful about his pledge even in alien state otherwise he will be punished on the Day of Judgment. According to Shaybānī a guaranteed Muslim of an alien state is not allowed to get released his slave girl from the possession of aliens or to have a sexual intercourse with her. The reason behind this point is that when property is transferred from the jurisdiction of a Muslim state to an alien state automatically entitles the ownership of the alien state<sup>3</sup>. *Abū y'lā* also supports this view point of Shaybānī.<sup>4</sup> There is an exception to this rule of law that if the slave girl is either *an Umme walad* or *Mudabbārah* then the guaranteed person can restore their possession forcefully and can intercourse them sexually. Any action taken for this purpose will not be considered treachery by the guaranteed person<sup>5</sup>. This exception is based on the rule of Islamic Law of Slavery (ILS) that *Umme walad* and *Mudabbārah* cannot be separated from their master and neither will be occupied as slaves for another term and will be set free on the fulfillment of the respective conditions.<sup>6</sup>

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<sup>1</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 46

<sup>2</sup> "Narrated by Abū sa'ed that the Prophet (peace be up him) has said: whoever violates a pledge, a flag will be hoisted over him on the Day of Judgment in order to point out that he was a traitor" Muhammad bin Ismail bin Ibrahim bin al-Mughīrah al-Būkhārī, *Sahīh al-Būkhārī*, Vol.10, 458.

<sup>3</sup> Sarakhsī, *al-Mabsūt*, Vol.10, 65.

<sup>4</sup> Muhammad bin Hussain bin Muhammad al-Qazi Abu Yala, *Al-Aḥkam al-Sultāniyyah* (Beirut: Dār al-kutub al- 'Imiyyah, 2000),152.

<sup>5</sup> Sarakhsī, *al-Mabsūt*, Vol.10, 65.

<sup>6</sup> *Ibid*.

According to Shaybānī a prisoner in an alien state can use all kinds of measures for freeing himself and his slaves from the occupation of aliens. In this situation he is allowed take the possession of his slave girl by force, any other illegal means or stealing her. He is also allowed to kill any one the aliens and steal their properties as well.<sup>1</sup> Muslims and non- Muslim citizens of a Muslim state can make property in any alien state through trade and business. According to Shaybānī their properties cannot be declared as spoils or booties by Muslim state with exception to immovable properties<sup>2</sup> This rule of law of declaring the immovable properties of Muslims and non- Muslims who were the guaranteed residents of an alien state, follow the famous rule of Shari'ah that a shadow rule is followed by the actual rule of law.<sup>3</sup> The adult slaves of the guaranteed Muslims of an alien state, who are captured in war against a Muslim state, will be considered the property of the Muslim state and not the property of their masters. Such slaves will be dealt and distributed like other common slaves.<sup>4</sup> According to Shaybānī only marriage of a woman with a Muslim is not sufficient to save her from being a captive. Either she has to become a Muslim or prove herself the non-Muslim citizen of a Muslim state otherwise she will be made captive if a Muslim state conquers an alien state. Furthermore, her pregnancy if results a child the expected child will also be considered captive as the shadow rule of law follows the actual rule of law. According to Shaybānī only two things create immunity of life, honor and property that are the acceptance of Islam or being a citizen of a Muslim state<sup>5</sup>.

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<sup>1</sup> Sarakhsī, *al-Mabsūt*, Vol.10, 66.

<sup>2</sup> *Ibid.*, 67.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, 68.

In case of conquering an alien state by a Muslim state, all the deposits of Muslim and non- Muslim guaranteed persons will be restored to them even if these are distributed as booties or spoils. In case of their death their deposits will be restored to their legal heirs.<sup>1</sup> Guaranteed Muslims and non- Muslims of a Muslim state lose their right of guardianship over their manumitted non- Muslim slaves in an alien state if it is conquered by the Muslim state. Manumission in an alien state is considered null and void according to Shaybānī and Abū Ḥanīfah <sup>2</sup>. Muslim as a trader, prisoner or someone who has embraced Islam in an alien state cannot award guarantee to the citizens of an alien state<sup>3</sup>. *Ibn Qudamah* recognizes the guarantee given by a Muslim trader or prisoner due a Hadith of the Prophet (peace be upon him) which makes all Muslims capable of awarding guarantee without the specification of their legal statuses<sup>4</sup> Shaybānī says, the guarantee given by Muslim army on the behalf of Muslim state in an alien state will be considered as valid.<sup>5</sup>

If a guaranteed Muslim makes transactions in an alien state or does any wrong act with the properties of aliens beyond the territorial jurisdiction of Muslim state, the court of Muslim state will have no jurisdiction to address such legal issues. According Abū Ḥanīfah and Shaybānī the illegal transactions done by Muslims in an alien state will have no effect in a Muslim state because Muslim state has no jurisdiction to have a trial of such cases. Abū Yūsuf declares such illegal and void transactions done by a Muslim anywhere is bound to obey Islam and Islamic Law. If any Muslim abridges Shari'ah rules, wherever he is will be

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<sup>1</sup> Sarakhsī, *al-Mabsūt*, Vol.10, 68.

<sup>2</sup> *Ibid*.

<sup>3</sup> *Ibid*, 69.

<sup>4</sup> Ibn Qudāmah, *al-Mughni*, vol.9, 242.

<sup>5</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 69.



held accountable for its consequences in Muslim state<sup>1</sup>. Shaybānī asserts, if a Muslim enters to *Dār al-Ḥarb* after seeking guarantee and makes the transactions of debts with the people of that territory or they take each other's property forcefully, Islamic court will not hear such cases. Likewise, if a guaranteed Muslim exchanges one *Dirham* with two on cash or on credit or he makes the contract with them involving liquor or pork, there will be no harm because he is taking their property with their willingness and this is lawful according to Abū Ḥanīfah and Shaybānī while unlawful according to Abū Yūsuf. On the other side if a *Ḥarbi* comes to us as a *Mustā'min*, Muslim cannot make with him these kinds of contracts in *Dār al-Islām* <sup>2</sup>. When a guaranteed Muslim kills an alien, or destroys his property in an alien state will carry no consequences for a Muslim state therefore the court of Muslim state has no jurisdiction to hear such cases. Similarly, if aliens kill a guaranteed Muslim in alien state they will not be demanded for the retaliation or blood money through Muslim state<sup>3</sup>. In alien state the affected parties are not liable to claim for any damages or retaliation through Muslim state.<sup>4</sup> Shaybānī asserts, if a Muslim enters to *Dār al-Ḥarb* after seeking *Amān*, kills a *Ḥarbi* or destroys the property of *Ḥarbi*, he will not be liable to pay any compensation after his return to *Dār al-Islām*. Same will be the case if *Ḥarbīs* kill him in their territory. Shaybānī says I do not like a Muslim who enters to *Dār al-Ḥarb* with the permission of *Ḥarbīs* to deceive them there. This is not allowed for him because his *Dīn* does not allow him to commit any kind of treachery there. If he deceives them and takes their property to *Dār al-Islām*, Shaybānī says I do not like the Muslim to buy that property if they know about it. However, if anybody buys it I will consider the sale contract lawful. If a property which a Muslim *Mustā'min* took from *Dār al-*

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<sup>1</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 95.

<sup>2</sup> Ibid. 96.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

*Ḥarb* is a slave girl, and he sales out her in *Dār al-Islā*, the buyer should not have sexual relation with her. If *Ḥarbīs* acquire prisoners from other non-Muslim, the Muslim *Mustā'min* may buy from them. If the people of the territory in which a Muslim *Mustā'min* lives, become captives by someone else, he can also buy from them captives.<sup>1</sup> According to Shaybānī, the third part of the division of the world is the domain of peace treaty. He says if a person who belongs to a state with whom Muslim state has armistice to a peace agreement enters to a Muslim state without seeking guarantee, such person will be considered a guaranteed person. Such person will be considered as a party to the previous contact<sup>2</sup>. According to Sarakhsī such person will be protected anywhere he resides even beyond the jurisdiction of Muslim state by the virtue of peace agreement with his mother state.<sup>3</sup> Peace treaty plays a vital role in the restoration of peaceful relations between the agreed states but does not change the territorial differences of the state parties. Due to peace treaty, the territory of non- Muslim state will not be considered the domain of Muslim state. Shaybānī asserts, if any Muslim enters to the territory with whom Muslim state signed the peace treaty and makes the contract of *Ribā* there in such situation court of Muslim state has no jurisdiction to hear the case. Because according to him peace treaty changes the status of hostility to peaceful relations but does not merge the two different territories (domain of Islam and war) into the same territory.<sup>4</sup> Similarly, if another state attacks on the state with whom Muslim state has peace treaty, in such case Muslim state is not bound to defend the ally state (if and only if not agreed in the contract) because a simple peace contract does not acquire the status to the domain of Islam.<sup>5</sup> According to

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<sup>1</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: *Dār- Ma'rifah*, 1993), 96

<sup>2</sup> Ibid., 89.

<sup>3</sup> Ibid.

<sup>4</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 1493.

<sup>5</sup> Ibid, 1856.

Shaybānī, if anyone whose country has a peace treaty with Muslim state enters to the domain of Islam without any guarantee he will be considered as guaranteed person. If such person makes any unlawful contract with Muslim or non-Muslim citizen of Muslim state courts will declare the illegal contracts as void. In such situation the territory of Islam makes such contract void if such contract is made beyond the territorial limit of the territory of Islam then courts do not have the power to declare it void<sup>1</sup>.

This discussion is concluded that according to Shaybānī division of the world into different parts does not directly link to the notion of perpetual war or peaceful relations between Muslims and non-Muslim states but this division is on the basis of territorial jurisdiction. The inhabitants of Muslim state will be provided legal protection by Muslim state irrespective of their faiths. Muslims reside outside the territorial jurisdiction will not be provided with the legal protection but some time they will lose some rights. Due to difference of territory (*Dār*) with difference of religion of spouses, the contract of marriage is come to an end automatically.<sup>2</sup>

## 2.4 Peace Treaties with non-Muslims

This section of study examines the legal status of peace treaty done a Muslim state. It will also examine the situations and conditions which conclude such

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 1494.

<sup>2</sup> ". O ye who believe! When there come to you believing women refugees, examine [and test] them: Allah knows best as to their Faith: if ye ascertain that they are Believers, then send them not back to the Unbelievers. They are not lawful [wives] for the Unbelievers, nor are the [Unbelievers] lawful [husbands] for them. But pay the Unbelievers what they have spent [on their dower], and there will be no blame on you if ye marry them on payment of their dower to them. But hold not to the guardianship of unbelieving women: ask for what ye have spent on their dowers, and let the [Unbelievers] ask for what they have spent [on the dowers of women who come over to you]. Such is the command of Allah: He judges [with justice] between you. And Allah is Full of Knowledge and Wisdom." Al-Qur'ān: 60, 10.

treaties: Like if an alien state wants to make a peace treaty on its own terms and conditions, can a Muslim state make such peace treaty on the basis of its stipulations? The other question like, can Muslim state give some amount of money for contracting a peace treaty? These kinds of questions are discussed in this part. Peace plays a vital role in bilateral relations of states. Muslim International Law does not only allow peace treaty with non-Muslim state but also emphasizes not to breach such treaties and contracts even in the situation of war<sup>1</sup>. It also prohibits military action against a nation state with whom any Muslim state have peace treaty<sup>2</sup>. Muslim International Law also stresses on the observance of treaty's obligations even against the pagans of Arab.<sup>3</sup> Peace treaties are the formal settlement of the differences between a Muslim state and an alien state. Sometimes it provides friendship and coalition on the basis of bilateral and agreed conditions. Sometimes it simply terminates the hostile relations between the two states. Hamidullah considers peace treaty is the end of war<sup>4</sup>. Peace treaties are concluded for peaceful relationship between Muslims and non-Muslim states so Muslim state must be peaceful at every cost with the other state with whom a peace treaty is concluded.

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<sup>1</sup> "Except those who join a group between whom and you there is a treaty [of peace], or those who approach you with hearts restraining them from fighting you as well as fighting their own people. If Allah had pleased, He could have given them power over you, and they would have fought you: Therefore if they withdraw from you but fight you not, and [instead] send you [Guarantees of] peace, then Allah Hath opened no way for you [to war against them]" Al-Qur'ān:4,90.

<sup>2</sup> "Those who believed, and adopted exile, and fought for the Faith, with their property and their persons, in the cause of Allah, as well as those who gave [them] asylum and aid,- these are [all] friends and protectors, one of another. As to those who believed but came not into exile, ye owe no duty of protection to them until they come into exile; but if they seek your aid in religion, it is your duty to help them, except against a people with whom ye have a treaty of mutual alliance. And [remember] Allah seeth all that ye do" Al-Qur'ān:8,72.

<sup>3</sup> Al-Qur'ān:9,1-6.

<sup>4</sup> Muhammad Hamidullah, *The Muslim Conduct of State* (Lahore: India Kashmiri Bazar, 1954), 160-258, 259.

### 2.4.1 Formation and duration of Peace treaties

According to the Muslim International Law, peace treaty is to be concluded with non-Muslims if they incline for it<sup>1</sup>. But the terms and conditions of treaty may vary with time and space. According to Imam Al-Shāfi'i peace treaty is permitted and said that the Prophet (peace be upon him) had contracted the Peace Treaty of covenant of Madinah with the Jews of Madinah<sup>2</sup>. According to him the following conditions, if are fulfilled, may consider any peace treaty with non-Muslims:

1-Weakness of Muslims. According to him, peace treaty will be considered valid if Muslims are weak and cannot fight against non-Muslim. He is also of the view that if non-Muslims demand some consideration in lieu of peace treaty it may also be agreed if Muslims see suited. Similarly, Muslims can also demand any consideration in lieu of peace treaty but that will be for specific time only.<sup>3</sup>

2-Limited time. According to Imam Al-Shāfi'i , peace treaty may be signed with non-Muslims for a limited time. He is of the view that Muslim state cannot make a peace treaty without mentioning a specific time period because not mentioning a specific time such peace treaty will be considered forever which is not permitted. He gives reason to this rule of law that the Prophet (peace be upon him) had made Peace treaty of Hūdaybiyyah for limited time of 10 years because *Jus ad bellum* (cause of war) according to him is disbelief. Moreover, the Prophet (peace be upon him) had the obligation to fight the pagans of Arab till they accept Islam and other than the pagans of Arab were to pay poll tax in case of denying Islam<sup>4</sup>. In addition to the view point of Al-Shāfi'i , a Muslim state can sign any peace treaty without mentioning a specific time, if it keeps the option of termination reserved<sup>5</sup>. The

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<sup>1</sup> "But if the enemy incline towards peace, do thou [also] incline towards peace, and trust in Allah: for He is One that heareth and knoweth [all things]" Al-Qur'ān: 8,61.

<sup>2</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'i , *Al-Umm*, vol.4 (Bairut: Dār-Marifah, 1990),199.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.,200.

<sup>5</sup> Ibid.

option of termination immunises Muslim state from a perpetual binding and allows it to set aside the treaty whenever it thinks fit.<sup>1</sup>

3-Time must not exceed 10 years. According to Imam Al-Shāfi'ī, the limitation of the time is 10 years because the maximum time for which the Prophet (peace be upon him) had contracted Hudaibiyyah peace treaty for 10 years only. He is of view the Muslims should follow this rule of law at any cost. If Muslim state is still weak then it will renew the treaty for another period of 10 years or less<sup>2</sup>. Imām Al-Shāfi'ī did not mention any logic for the renewal of peace treaty by Muslim state.

According to Ibn Qudāmah peace treaty with non-Muslims is permissible with or without consideration. According to him peace treaty with non-Muslims would be permissible only if it fulfills the following conditions:

1-Weakness of Muslims. According to him, peace treaty will be considered valid when Muslim state does not have sufficient power to fight against non-Muslims. Peace treaty is signed to achieve power and strength during peace. Getting power by Muslim state in the result of peace treaty is not the actual reason. The actual reason according to most of the jurists is weakness of Muslim state that considers the legality of the treaty.

2-Peace treaty yielding accepting Islam. According to Ibn Qudāmah, the peace treaty would also be considered valid if Muslims expect embracing Islam from non-Muslims.

3-Pay poll tax by non-Muslims. According to Ibn Qudāmah Peace treaty will also be valid if non-Muslims pay poll tax to Muslim state in the consequence of peace treaty. Moreover, he is of the view that Muslim state can conclude peace treaty for

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<sup>1</sup>Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī, 2012), 294.

<sup>2</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.4 (Bairut: Dār-Marifah, 1990), 200.

getting any benefit other than acceptance of Islam and Paying poll Tax by non-Muslims.<sup>1</sup>

4-Limited time. According to him, peace treaty must be for limited time and it must not be for more than 10 years because peace treaty for unlimited time suspends the spirit of Jihād against non-Muslims. This rule of law is based on the doctrine of " Perpetual Hostile Relations between Muslims and non-Muslims".

5-Peace Treaty is a bilaterally a Binding Contract. According to Ibn Qudāmah, peace treaty is binding for both the parties. He explicitly says that option of the termination of peace treaty would not be given to none of the parties. He gives logic for this rule of law that giving the option of termination to either party is against the spirit of peace treaty<sup>2</sup>.

Ibn Qudāmah 's view point is different from the view point of Imam Al-Shāfi'i regarding giving the option of terminating peace treaty. According to Imam Al-Shāfi'i , peace treaty is to be signed for a limited time but it would also be possible that the peace treaty would be for unlimited time provided that if Muslim state has the option of termination. Ibn Qudāmah does not recognize the option of termination for any of the parties. According to him the option of termination is against the spirit of peace treaty.

According to Shaybānī, as already discussed that "*Jus ad bellum*" is considered aggression against Muslim state. According to him peace treaty will be signed with non-Muslims when there is Muslims interest arises. Moreover, peace treaty is not a binding contract which a Muslim state can suspend it by any unilateral formal declaration. Imam Kāsānī is of the view that peace treaty is the suspension of war against non-Muslim belligerents. It may be signed with them

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<sup>1</sup> Ibn Qudāmah, al Mughni vol.9 (Egypt: Maktabt ul Qahirah,1968),297.

<sup>2</sup> Ibid.

لا يجوز الشهادة مطلقاً من غير تقدير مدّة؛ لأنّه يفضي إلى ترك الجهاد بالكلية

when Muslims have any interest in the peace treaty<sup>1</sup>. If Muslims do not have any interest then Muslim state should not inclined to it<sup>2</sup>. He is also of the view that peace treaty is not a binding contract, Muslim state has the power to terminate it with a formal declaration and must give sufficient time to hostile state for the necessary safety of its non-combatant components. According to him, peace treaty may be for both periods of time limited and unlimited<sup>3</sup>. According to Ibn Qayyim al-Jawziyyah, peace treaty may be signed for limited time and unlimited time also. He is of the view if peace treaty contracted for unlimited time will not be bilaterally binding, both parties will have the option of termination. If peace treaty is for limited time it will be binding on both the parties. At the same time both the parties will have the option of termination with a condition of informing each one.<sup>4</sup> According to Muhammad 'Arafah al-Dāsūqi al-Māliki, the time duration of peace treaty is the mandate of Muslim state. He is of the view that a valid peace treaty fulfills the following four conditions:

- A. Such treaty must be contracted by a Muslim state or its representative
- B. It must be contracted in the general interest and welfare of Muslims
- C. The treat must not contain any voidable condition according Islamic Fiqh.

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<sup>1</sup> 'Alā al-dīn, Abū bakar bin Māsūd bin Ahmad al-Kāsānī, Bādāi al-Sānāi vol.7 (Bairut: Dār-kutub al- 'Imiyyah, 1986),108.

<sup>2</sup> "Be not weary and faint-hearted, crying for peace, when ye should be uppermost: for Allah is with you, and will never put you in loss for your [good] deeds" Al-Qur'ān: 47,35.

<sup>3</sup> 'Alā al-dīn, Abū bakar bin Māsūd bin Ahmad al-Kāsānī, Bādāi al-Sānāi vol.7 (Bairut: Dār-kutub al- 'Imiyyah, 1986),109.

<sup>4</sup> Muhammad bin Abi Bakr bin Ayub bin Saad, Shams-u-ddin Ibn Qayyim al-Jawziyyah, *Aḥkam ahl al-dhimmah* vol.2 (Damam: Ramadi linnashr,1997),876.



D. The duration for which the treaty is contracted is better to not exceed four months but Muslim state may contract it for more than four months as a discretionary mandate<sup>1</sup>.

Muslim jurists are unanimously agreed on the permissibility of peace treaty by a Muslim state with non-Muslim but are divided on the time-period, and other requisites of peace treaty. According to Imam Al-Shāfi'ī and al-Ḥanbali, peace treaty must be for a limited period of time and it must not be exceeded ten years. Muslim state can renew the treaty after its time of expiry. According to them peace treaty is a binding contract and have dividing opinion regarding the option of termination. According to imam Al-Shāfi'ī peace treaty may be contracted for unlimited time if the option of the termination of treaty possesses by Muslim state. According Ibn Qudāmah, none of the parties has any option of termination of peace treaty because it contradicts the spirit of peace treaty. On the other hand, Shaybānī, and Kāsānī are of the view that peace treaty is not a binding contract and it may be for unlimited time also and both parties have the option of terminating the treaty with a condition of formal bilateral declaration. The view point of Muhammad 'Arafah al-Dāsūqī al-Mālikī is similar to the view point of Shaybānī, and Kāsānī, regarding the limit of time for which treaty is contracted. All these jurists are agreed on the mandate of Muslim state about the time-period of the treaty. Ḥanfiyyah and Mālikiyyah schools of thought are agreed that peace treaty will only be contracted in the general interest and welfare of Muslims and Muslim state. Muslim state can terminate the treaty in the general interest of Muslims and Muslim state with a formal declaration. Ḥanābilah has two different opinions regarding the requisites of peace treaty like the limit of time for which a peace treaty is contracted and its binding and non-binding on the contracting parties. According to Ibn Qudāmah peace treaty will be contracted for a limited

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<sup>1</sup> Muhammad Arafah al-Dāsūqī, *Ḥashiyat al-Dāsūqī 'alā Sharḥ al-Kabīr* VOL.2 (Bairūt: Dār-Fikār,n.d),206.

period of time and such treaty will be binding bilaterally binding. According to Ibn Qayyim al-Jawziyyah, peace treaty for limited is bilaterally binding while the peace treaty for unlimited time is not bilateral binding and contracting parties have the option of termination with a formal declaration. Ibn Qayyim al-Jawziyyah agrees with Ḥanafīyyah, that peace treaty may be temporary or permanent and in both cases the requisites will remain the same and will not be binding on Muslim state. Muslim state can terminate it on its own discretion.

## **2.5 Use of Force by Muslim state and the status of Contemporary International Law**

Islam protects the life of every human being irrespective of religion and it considers the killing of a single human being as the killing of humanity.<sup>1</sup> Similarly, Islamic law ensures this right of all human beings at every cost<sup>2</sup> that is why Islam gives the right of self-defense to everyone<sup>3</sup> for making society peaceful. Even the use physical force by the state organs is allowed to ensure a peaceful environment. According to Shaybānī any disturbance which endangers peace within or outside the domain of Muslim state may be suppressed at every cost. If the disturbance is within the domain of Muslim state by its citizens like insurgency, then in such situation Muslim state by virtue of its duty has to use physical force for its culmination. Similarly, every aggression from the outside of the domain of Muslim state will also be extinguished by using physical force by

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<sup>1</sup> "On that account: We ordained for the Children of Israel that if any one slew a person--unless it be for murder or for spreading mischief in the land-- it would be as if he slew the whole people: And if any one saved a life, it would be as if he saved the life of the whole people. Then although there came to them Our Apostles with Clear Signs, yet, even after that, many of them continued to commit excesses in the land". Al-Qur'ān:5,32.

<sup>2</sup> Al-Qur'ān:17,32.

<sup>3</sup> "The recompense for an injury is an injury equal thereto [in degree]: but if a person forgives and makes reconciliation, his reward is due from Allah: for [Allah] loveth not those who do wrong. But indeed if any do help and defend themselves after a wrong [done] to them, against such there is no cause of blame" Al-Qur'ān: 42,40-41.

Muslim state. Non-Muslim citizens can enjoy all human rights in a Muslim state until they by themselves terminate it by starting aggression against Muslim state<sup>1</sup>. When aggression is there use of force will be permitted and some time it will become obligatory to maintain or restore peace within the Domain or outside of the domain of Muslim state by protecting Muslim citizens everywhere in the world.

Contemporary International Law also allows the use of force before clarifying some important aspects of its use. These are: What is the nature and extent of force?

Whether the use of force is permitted or not in Contemporary International Law? If permitted under what circumstances? Who has the power to use force? Everyone who wants to study International Law, he starts its study from the comparison with Domestic Law. John Austin stated the concept of Domestic Law is based on the authority of sovereign sponsored by punishment.<sup>2</sup> Due to this definition of Law by John Austin every reader of International Law raises questions like is there any legal institution which forms International laws? General Assembly of the United Nations presents resolutions; it cannot be called legal institution that formulates International Law. Similarly, is there any hierarchy of the courts which has the required authority to solve International disputes? International Court of Justice (ICJ) can hear those cases upon which both state parties are agreed to be decided by it. The question of the authority to enforce such decisions will always be there. The Security Council of the UN was formed to play the role of enforcement of the ICJ decisions but Security Council's role is in controlling hand of the five Veto powers the permanent members of the Council. Without having legal body to format laws, Judiciary system and

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<sup>1</sup> 'Alā al-ddīn, Abū bakar bin Māsūd bin Ahmad al-Kāsānī, Bādāi al-Sānāi vol.7 (Bairut: Dār-kutub al- 'Imiyyah, 1986),113

<sup>2</sup> Malcolm N. Shaw, International Law (New York: Cambridge University Press, 2008),3.

executive body how it could be considered a proper legal mandate? <sup>1</sup> This kind of questions are raised and discussed by the experts of International Law when they compare domestic law with International Law. These issues can easily be resolved by making the difference between domestic and International Law. In domestic law no individual is above the law and similarly individuals have no power to make law. The individuals have the choice to obey or disobey the law legislated for them. On the contrary, International Law is made by states themselves and they make in accordance to their interests.<sup>2</sup>

Although the Contemporary International law does not have the legal enforcement system like domestic law but in some situations the collective use of force against the aggressor becomes justified. Majority of states in the world have signed the UN Charter which binds them not to encroach any rule of International Law. Generally, the UN Charter does not use the word war rather use the terms "Force" and "Armed Attack" it does not permit the use of force for the settlement of issues among different countries. However, it allows a state in some cases to use physical force if it sees anything danger to its National Integrity. Article 2 subsection 4 of the UN Charter says:

"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations"<sup>3</sup>.

The Contemporary International Law came into being after Second World War in the specific historical background of the West. Majority of Western states are affiliated in one hand or in other to Christianity and it is known about Christianity that it does not believe in war either it is lawful or unlawful. Christianity believes in love and observes surrender even against tyranny and

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<sup>1</sup> Malcolm N. Shaw, International Law (New York: Cambridge University Press, 2008),3.

<sup>2</sup> Ibid.

<sup>3</sup> Charter of United nations

injustice<sup>1</sup>. How Christianity led to war and the use of physical force although philosophically war and force do not suit to it is historical question which is discussed in this section of the study. The other questions like when and how religiously and morally Christianity justifies the use of arms and physical force are also discussed here. The foremost doctrine in this connection is the legal philosophy of Just War Theory or philosophy.

## 2.6 History of Muslim and Contemporary International Laws

It is discussed that the term *Siyar* was used for international affairs of Muslim state. *Siyar* is the plural of *Sirah* that means in the context of Muslim International Law(MIL), the conduct of the Prophet (peace be upon him).<sup>2</sup> For the first time the term “*Siyar*” is used for Muslim International Law by Zayd bin Ali.<sup>3</sup> In the earlier stages of Muslim state, Muslim International Law was not compiled in the present form. This deficiency was filled in the second century of Hijrah by Muhammad bin al- Hasan al- Shaybānī by writing and compiling two important books “*al- Siyar al- Saghīr*” and “*al-Siyar al- Kabīr.*” *Siyar al-Saghīr* is the compilation of the thoughts and opinions of his teacher Imam Abū Ḥanīfah. Shaybānī is one of the disciples of Imam Abū Ḥanīfah, he used to attend each class of his teacher and used to write down his opinions about *Siyar* and probably reviewed by Imam Abū Ḥanīfah.<sup>4</sup> When *al-Siyar al-Saghīr* was completed by Shaybānī and presented to Imam al- Awzā’ī. He commented on the book: “What concern the people of Iraq have with the Science of *Siyar*?” He made some disagreements with the view point of Abū Ḥanīfah regarding MIL. Awzā’ī meant that the people have no knowledge

<sup>1</sup> Sayed abū al-’Ālā al-Mawdūdī, *Al-Jihād fī al-Islam*, (Lahore: Idārā Tarjuman al-Qurān,2011),411.

<sup>2</sup> Mehmood Ahmad Ghazī, *The Shorter Book on Muslim International Law* (Islamabad: Islamic Research Institute, 1998), XI.

<sup>3</sup> Mehmood Ahmad Ghazi, *Khutbāte Bhāwalpur Islam kā Qānūn Bayn al-Mumālīk*, (Islamabad: Shari’ah Acadmey, IIU,2007), 8.

<sup>4</sup> Mehmood Ahmad Ghazī, *The Shorter Book on Muslim International Law* ( Islamabad : Islamic Research Institute, 1998), 9.

of *Siyar* because the wars of the Prophet (peace be upon him) and his campaigns took place in *Hijāz* and *Syria*. He was of the view that Iraq was conquered later. The senior fellow of Shaybānī, Abū Yūsuf wrote a rejoinder to Awzā'ī named as *Al-Raad 'alā Siyar al-Awzā'ī*. On the other side the satire disagreements of Awzā'ī was communicated to Shaybānī which motivated him in attempting a voluminous compilation on the subject matter in the form of a subsequent book *al- Siyar al-Kabīr*.<sup>1</sup> Apart from this Shaybānī had also written other essential book named "Asl". Along with this, Imam al-Shāfi'ī also contributed in MIL in his substantive book *Kitāb al-Umm*. With the passage of time, in the later centuries, Muslims International Law continued to develop as a separate legal identity. With the emergence of different political changes and new situations arose, Muslim jurists tried to handle the problems of international persons and the affairs of Muslim state and compile the solutions in the form of Muslim International Law.<sup>2</sup>

The classical has contribute to Muslim International Law like Ibn Qayyim al-Jawziyyah, he wrote a book in the name of *Aḥkām Ahl al-Dhimmah* <sup>3</sup>. Similarly, the contemporary scholars like Maudoodī, also contributed in the field of Muslim International Law. He wrote a book named "*Al-Jihad fil Islam*". <sup>4</sup> Muhammad Hamidullah has written astonished book "The Muslim Conduct of State".<sup>5</sup> Similarly, "*Khutbate Bahāwalpur-1*" of Hamidullah is a series of lectures in the field of Muslim International Law.<sup>6</sup> Mehmood Ahmad Ghazi has also shown the tendency to work in this field and has re-compiled the book *al- Siyar al- Saghir* of Shybanī "The Shorter Book on Muslim International Law" and presented a series of

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1 Mehmood Ahmad Ghazī, *The Shorter Book on Muslim International Law* ( Islamabad : Islamic Research Institute, 1998), 9.

<sup>2</sup> Ibid., 17.

<sup>3</sup> Ibn Qayyim al-jawziyyah, *Aḥkām Ahl al-Dhimmah*, (Dmmam: Rimadi linnashr,1997).

<sup>4</sup> Sayed abū al-'Ālā al-Mawdūdī, *Al-Jihād fī al- Islam* (Lahore: IDāra tarjūman al-Qūrān,2011),

<sup>5</sup> Muhammad Hamidullah, *The Muslim Conduct of State* (India Lahore: Kashmiri Bazar, 1954),

<sup>6</sup> Ibid.

lectures “*Khutbate Bhāwalpur Islam ka Qanūn Bayn al-Mumālīk*”.<sup>1</sup> Al-Zuhayli has also written a book “*Athār al- Harb Fī al-Fiqh al-Islamī*”<sup>2</sup> *Aḥkam al-dhimyyin wa al-Mustā’mīnīna fī al-Islam* is written by Zaidān.<sup>3</sup> *Jihād Muzaḥamat aor Baghawāt* written by Mushtaq Ahmad.<sup>4</sup> All the contemporary scholars have tried their best to make Muslim International Law as a practiceable law for solving the modern complexities of nation states.

For understanding the history of Contemporary International Law it is necessary to study the history and development of European society in the context of law because it has grown in the specific historical events of the West.<sup>5</sup> In this context the earlier Romans have developed their own theory of Just War.

### 2.6.1 Just War Theory

For understanding of the concept of the use of force by United Nations, the religious background of West regarding the notion of the use of force must be known at earliest stage because the contemporary International Law regarding the legality and illegality of war grows in the specific historical events of the West<sup>6</sup>. It can be concluded from the Canonical Doctrines that Christianity does not believe in self-defense at individual and national level. In the 4th century BC when the Roman emperor accepted Christianity and declared it the official religion of Rome. At that time, it was felt that the Roman Empire without using force would not be

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1 Mehmood Ahmad Ghazi, *Khutbāte Bhāwalpur Islam kā Qānūn Bayn al-Mumālīk*, (Islamabad: Shari’ah Acadmey, IIU, 2007). Mahmood Ahmad Ghazi, *The Shorter Book on Muslim International Law* (Islamabad: Islamic Research Institute, 1998),

2 Wahbah al-Zuhaylī, *Athār al- Harb fī Fiqh al- Islamī* (Beruit : Dārul Fikar, 1998).

<sup>3</sup> Abdul Kareem Zaydan, *Aḥkam al-dhimyyin wa al-Mustā’mīnīna fī al-Islam* (Baghdad: Makābah al-Qūds, 1982).

<sup>4</sup> Muhammad Mushtaq Ahmed, *Jihad, Jihād Muzaḥamat aor Baghawāt* (Gujranwala: Al-Shari’ah acadami, 2008).

<sup>5</sup> Micolm N. Shaw, *International Law* (New York: Cambridge University Press, 2008), 13.

<sup>6</sup> Ibid.

maintained and defended.<sup>1</sup> Saint Augustine, the religious scholar and is being considered the most important symbol the preacher of the Western rational and scientific practice. He contributed philosophically in every aspect of life. He is being considered the father of the "Just War Theory". According to him, waging war is the sole right of state not of its citizens.<sup>2</sup> The theory of St. Augustine got fame as compare to another theory of Plato's Athenian theory of War and Ethics in the West.<sup>3</sup> According to him war must be waged on just grounds and must not be waged on any unjust grounds. He redefined the issue of waging war in Canonical terms which got acceptance throughout the West. He gave the theory of Just War on the basis of Charity in Christianity.<sup>4</sup> He declared Rome as the "City of God" which was necessary to be defended by using physical force or any arm attack by the state only. The theory was refraining individuals from waging war or using physical force against individuals. According to this theory, two conditions were important to be fulfilled for the waging of "Just War" by the **Roman Empire:**

When the right of the state was negated and second one was the illegal aggression against the Roman Empire. Only one exception was attached to this theory under which it was justified to wage war against polytheists or religious innovators on any ground. Which later on in the Middle Centuries was called as Holy War. This "Just War Theory" was acceptable and recognized by the Western Jurists for many centuries till the abolishment of the City of God. After the abolishment of the City of God different nation states came into being. The Western jurists were confused in re-defining and handling the new emerged nation states juristically and

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<sup>1</sup> Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī, 2012), 180.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton: Princeton University Press, 1981): xxiv, xxv.



philosophically. At that time, the top leading naturalist Dutchman Hugo Grotius (1583– 1645) had played a vital role in the amendments of the "Just War theory" according to the new amendment any nation state can wage war if it considers fit and Just morally and legally. In the eighteen and nineteen centuries when the power of sovereignty was accepted for the state it was already accepted impliedly for the state to have the power of waging war. Now legally, state is considered as sovereign so it is the mandate of the state to wage war if thinks fit so. Although theoretically states have the power to wage war but practically they have to furnish sound justification doing so. For instance, if the property or life of the citizens are endangering and the host state is unable or has no interest in securing it then concerned state has the mandate to wage war against such danger to secure its citizens interests. Or in self-defense a state can use physical force or arm attack in such self-defense. Similarly, pre-emptive attack also became the mandate of every nation state in the form of modified Just War Theory of the St. Augustine. By the introduction different legal amendments and international practices and justifications by the nation states in the field of war have made the "Just War Theory" as a neo-Just War Theory of the contemporary age for the uses of physical force or arm attack by the nation states.

### 2.6.2 Pre- UN Charter Law

Historically, state was used to decided waging war against any other state due to danger to its sovereignty with justified reason for waging war. There were not any formal restrictions for waging war by state. This situation remained till the first world war<sup>1</sup>. After the conclusion of the first world war the in 1919 formal institution came into being in the name of League of Nations. According to the Covenant of the League, war was not declared illegal it considers the matter

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<sup>1</sup>Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),180.182.

concerned to the League and imposes some restrictions on the member states for waging war. The article 11 of covenant says "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise, the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council"<sup>1</sup>.

However, it is proposed that all meaningful steps will be taken by the member states to maintain peace in the world. Article 11 says "It is also declared to be the friendly right of each member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends"<sup>2</sup>. It is also declared that all members of League should respect and preserve the integrity and political independence of others member states. If there is any disputed issue among the members of the League the General Council of the League was considered a proper forum to resolve the issue. Article 10 of the covenant says "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled"<sup>3</sup>. If the Council of the League failed to resolve the disputed issue peacefully the complainant state had the right to wage war for its rights. Article 15 of the Covenant League says "If the Council fails to reach a report which is unanimously agreed to

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<sup>1</sup>Article 11 of the covenant of the League of Nations, Available on:<http://www.unhcr.org/refworld/docid/3dd8b9854.html>

<sup>2</sup>Article of the covenant of the League of Nations, Available on:<http://www.unhcr.org/refworld/docid/3dd8b9854.html>

<sup>3</sup> Ibid.

by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice"<sup>1</sup>. The members of the League of Nations were agreed that any member of the league violates the agreed article of the covenant regarding war, such act of the member state will be considered war against all members of the league. In the consequences of such violations by the member state all kinds of relations with the members of the League will be suspended. Article 16 says in this regards "Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not"<sup>2</sup>. The covenant also states the council of the League the by virtue of its duty to constitute a military armed force to safeguard the covenant of the League. It states, "It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League"<sup>3</sup>. Any member of the League violates the covenant will lose its membership of the League of Nations. Article 16 states "Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council

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<sup>1</sup>Article of the covenant of the League of Nations, Available on:<http://www.unhcr.org/refworld/docid/3dd8b9854.html>

<sup>2</sup>Article of the covenant of the League of Nations, Available on:<http://www.unhcr.org/refworld/docid/3dd8b9854.html>

<sup>3</sup> Ibid Article 16.

concurred in by the Representatives of all the other Members of the League represented thereon"<sup>1</sup>.

### 2.6.3 The Pact of Paris and Use of force by states

In 1928 the pact of Paris was signed by the United States of America and France and later on other countries like Japan, Canada, New Zealand also became the part of the Pact<sup>2</sup>. According to the Pact, solution of the disputed Issues through war became illegal<sup>3</sup>. The article 1 of the Pact in this regard states "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of International Controversies, and renounce it as an instrument of national policy in their relations with one another"<sup>4</sup>. Through this Pact the war became illegal for the first time in the history of Modern West<sup>5</sup>. It was declared that the disputed issues would be solved through peaceful means. The article 2 of the Pact says "The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means"<sup>6</sup>. The Pact was silent about war under the right of self-defense of the state due to it was considered the absolute right of the state<sup>7</sup>. Similarly, the Pact was also silent about the Use of Force lessor than war for the state. From the thorough study

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<sup>1</sup>Article 16 of the covenants of the League.

<sup>2</sup>Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī, 2012), 182.

<sup>3</sup> Ibid.

<sup>4</sup> Article 1. The whole Pact is available on: <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0732>

<sup>5</sup>Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī, 2012), 182.

<sup>6</sup> The Pact of Paris

<sup>7</sup>Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī, 2012), 182.

of the Articles of the Pact and practices of the member state of the Pact it is understood that Use of Force was not declared illegal by the Pact<sup>1</sup>.

## 2.7 Post UN charter law and the Use of Physical force

The League of Nations imposed some restrictions on waging war for the Member States and later on the Pact of Paris declared waging war as illegal. These stipulations were in acted till the conclusion of Second World War in 1944<sup>2</sup>. After the second world war the United Nations came into being which declared not only war but all the threats that were causing war as illegal and unjust. Article 2 subsection 4 of the UN Charter states " All the Member states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations"<sup>3</sup>.

All the nation states have signed the Charter of the United Nations due to which they all are bound to follow it. Moreover, International Court of Justice declared that refraining from the threat and not using of physical force by nation states now recognized as International Custom and International moral values of the world. Due this all states including non-signatory state are bound to follow this rule of customary International Law. So it can be said that the pre-UN Law regarding war is either changed or repelled by the current UN Charter<sup>4</sup>. Although some states and scholars of International law have the opinion that pre UN Charter Law is still implemented. This juristic issue needs to be elaborated further under the topic of Use of Force under the UN Charter Law.

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<sup>1</sup>Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),182.

<sup>2</sup>Ibid.

<sup>3</sup> Charter of United nations

<sup>4</sup>Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),183.

### 2.7.1 Use of Force under the UN Charter

According to most of international law experts, the UN Charter Law has changed the pre-UN Charter Law and that is known as "The Paris Pact" which considered the use of physical force by nation states as legal while war was declared as illegal. The UN Charter not only declared the use of force as illegal but all the threats that cause any war also as illegal. According to them the UN Charter bans every kind of threat or use of force against the territorial integrity, political independence of any state and in any other manner which is contradictory the objectives of the UN Charter. International Law jurists are of the view that the use of force which does not affect the objectives of the UN Charter will also be interpreted as unjust. It means that use of force by nation states against states is unjust and illegal in every situation. Moreover, in other words the inverse implication may not be meant by the Article 2 sub article 4 of the UN Charter in using of physical force by the nation states. This approach to the interpretation of International Law is known as restrictive school of thought. According to this school of thought every kind of threat or use of force is prohibited under the UN Charter law while there are exceptions from this law under which Use of Force is allowed<sup>1</sup>.

Under the aforementioned UN Charter, all kinds of using force by nation states against another nation state is declared illegal while there are two exceptions to this rule of law.

1. Collective use of force, against the aggressor state under the supervision of General Council of the UN is to be considered as just and moral.

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<sup>1</sup>Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī, 2012), 183.

2. Use of any physical force in self-defense by a nation state against the oppressor is also to be considered as just and moral.

On the other hand, there are others international law experts who are of the view that UN Charter does not expressly change or repel the pre-UN Charter Law under which the use of force was allowed, it means which is still enacted by the present Charter.

According to this school of thought, under the UN Charter Article 2 sub article 4 bans the use of force is only allowed in the following situations:

1. Use of force against the territorial integrity of any state.
2. Use of force against the political independence of any state.
3. Use of force which is inconsistent with the purpose of the UN.

According to them if the use of force is for other than the aforementioned objectives of the UN Charter then the uses of force may be considered as permitted and just this school of thought is known as Permissive School of Thought. They are of the view that invers implication will be applied and the use of force by the nation states would be considered just and moral if it is not against the territorial integrity and not against the political independence of any state and consistent with the objectives of the UN Charter.

Theoretically the use of force according the Permissive School of Thought is legal and just but practically it is illegal to use any kind of physical force by a nation station against another nation state in accordance with Article 2 of the UN Charter of the last session at San Francisco Conference<sup>1</sup>.

### **2.7.2 Collective Use of Force under the supervision of UN Security Council**

Collective use of force under the supervision of UN Security Council is not a narrow down methodology but a war procedure that changes with space and time as well as the need of the Member States. The methodology of collective

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<sup>1</sup> Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī, 2012), 186.

use of physical force has been passed through different stages that can be divided into four categories:

#### The Hypothetical UN Charter System for the Collective Use of Force

It is declared in the UN Charter that all kinds of the use of force by any state is prohibited and the Security Council is made responsible to maintain peace everywhere in the world. If peace is breached by any means the Council will restore it by using all means and measures. If any state violates this rule of law, all member states of the UN will use force collectively against such state. Under the UN Charter Articles 39 to 51 make the Security Council a responsible organization for relinquishing any future threat and terror in the world gives the authority for using any physical measures against such state. The article 39 of the UN Charter gives the authority to the Council for using collective physical force or arm action against any nation state in the following situations:

1. Any state does aggression against another nation state
2. Any state breaches peace of the world
3. Any state threatens peace of the world

Any action taken by the Security Council in the first two cases is for the restoration of international peace and tranquility while in the last case the action of the Council is done as a pre-emptive strike for maintaining international peace. The act of the Security Council will be determined by the resolution of the Members of the Council. Under the Article 41 of the UN Charter, the action of the Security Council may be sometimes non-military sanctions like economic embargo which is called swift punishment. The Article 42 of the Charter further furnishes a way for military sanctions being authorized by the resolution of the Security Council against such state. Under the Article 43 of the Charter, it was determined to make a Combined Military Force under the Security Council but the Combined Military Force could not come into existence till this date. Article 40 of the Charter



gives power for using provisional measures under the supervision of Security Council for the restoration of international peace and tranquility.

### **2.8.1 The right of self-defense and self-deterrence**

As earlier discussed that the Charter of United Nations Organization permits the Collective Use of Force against the nation state who disturbs or threatens international peace and tranquility. In the continuation to the maintenance of international peace the UN Charter also grants the right of Self-defense to every nation state. The law regarding the right of Self-defense has gone through different stages of development.

### **2.8.2 The right of Self-defense prior to UN Charter**

Gradually in the eighteenth and nineteenth centuries nation states got the status of sovereign states. After that every nation state got the power to wage war against any danger and threat. Although states were used to have some sort of justification for waging war. The right of Self-defense was also used to be considered justification for waging war. At that time waging war was not considered illegal but the right of Self-defense was always by some international customs and usages and there was not a uniform standard for measuring the validity of any international custom or usage but when the UN Charter was passed unanimously it provided understood ways and methods of using the right of self-defense by nation states. Prior to the UN Charter, war fought in the following situations was being considered in the right of Self-defense.

1. The war waged against the factual aggression that involves military action.
2. The pre-emptive attack against aggression or danger to international peace in order to stop the aggression or to minimize the expected loss.

3. The war for the right and benefit of state or for the security of life or property of the citizens or threat to the life and property of citizens even beyond the state.
4. The war against the economic embargos or sever propaganda in a situation where military action is necessary to be taken.

In the pact of Paris 1928, there were no restrictions laid down on the right of Self-defense.

### **2.8.3 The right of Self-defense under the UN Charter**

The "Collective Use of Force" by the Security Council does not deprive the right of Self-defense of the affected state. This means that the affected state can be defended by using the right of self-defense as well as the right of Collective Use of Force. The effected state can use force being informing the UN Security Council for further military assistance. The UN Charter states in this regard as "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member state of the United Nations, until the Security Council has taken measures to maintain international peace"<sup>1</sup>. The article does not snatch the inherent right of self-defense of state but it conditions the use of this right with the incidence of armed attack.

### **2.9 Pre-emptive strike by State under the UN Charter**

The article 51 of the UN Charter considers self-defense an inherent right of state and the Collective Use of Force through the UN Security Council in a situation of armed attack. In inverse implication of the said article, in case of no armed attack the affected state will have no right of self-defense. Similarly, the Security Council can also take no action for preventing any anticipatory strikes.

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<sup>1</sup> Article 51 of the UN Charter.

But the Security Council will still have a right of taking any arm action as a precautionary for preventing any anticipatory attacks from the aggressor state. In other words, the inverse implication in the case of the Security Council may not be applied because article 39 of the UN Charter gives the authority to the Security Council is supposed to act in three situations: first when an aggression takes place, second when international peace is abridged and the third one when there a threat to the international peace is sensed by the Council<sup>1</sup>. The last situation is known as a pre-emptive strike. The article 39 of the Charter gives a mandate of pre-emptive strikes to the Security Council. About the right of state for pre-emptive strikes nation states' have different stances, United States of America and Israel are of the view that state has the power of pre-emptive strike. According to them, article 51 of the UN Charter considers self-defense the "inherent right" of the state. It means the pre-emptive right is given to state in the pre-UN Charter Law while UN Charter Law in article 51 maintains this right as stated previously<sup>2</sup>. The interpretation of the said article by this means is not suitable because the word "inherent right" indicates that the right of self-defense is given to the state by virtue of its sovereignty<sup>3</sup>. On the other hand, the developing countries are of the view that state has the right of self-defense when attack occurs while pre-emptive attack is the right of Security Council only<sup>4</sup>. It was declared in the UN Charter that Combined Force will come into being under the UN Security Council but it could not come into practice by the Security Council. Due to the non-implementation of the UN Charter provisions, states use the pre-UN Law regarding the Pre-emptive Strike.

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<sup>1</sup> Article 51 of the UN Charter.

<sup>2</sup> Muhammad Mushtaq Ahmad, *Jihād, Muzāhamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī, 2012), 194.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid 196.

### Conditions for the Pre-emptive Strike under pre- UN Law

1. Pre-emptive strike is unavoidable
2. Pre-emptive strike will only be just when the threat is obvious and dangerous in real
3. The threat can only be prevented by the Pre-emptive military attack
4. Physical force will be used to an extent of preventing the threat not more than that<sup>1</sup>

Under the UN Charter the pre-emptive strike is only the right of the Security Council. State has the right of self-defense only in arm attack.

#### 2.9.1 Contemporary issues regarding self-defense and Pre-emptive strike

The Use of Force by the Security Council has caused multiple issues like:

The right of Self-defense and pre-emptive strike after 9/11.

After the incident of 9/11 the United States of America violated rules of International Law and regulation in the name of 'War on Terror'. Similarly, it also misinterpreted the right of Self-defense and pre-emptive strike which affected the Global peace very badly.

Safeguarding of the citizens and their rights in other states.

As earlier discussed that in pre- UN Charter Law the notion of Self-defense of state was extended to different interpretations. State had the right to ensure safeguarding of its citizens and their property beyond its territorial Jurisdiction. Such act of state for the safety of its citizens or their property was considered under the right of Self-defense by the state. Under the UN Charter Law article 51, the issue of safeguarding citizens beyond the territorial jurisdiction of any state is

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<sup>1</sup>Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī, 2012), 194.

debatable among the experts of International Law. Some of them are accepting this right for state under the title of Self-defense. While most of them do not believe in any kind of use of force by state. State has only right of Self-defense under Article 51 of the UN Charter.<sup>1</sup>

## **2.10 State humanitarian intervention**

The act of humanitarian intervention usually takes place when a foreign state intervenes in a state that targets its citizens or non-citizens in its territory for ending the violation of Human Rights. This action is taken by the foreign state in the name of humanitarian integrity and solidarity. This issue is also debatable among the experts of International Law. Some of them are of the view that Humanitarian Intervention is legal under the UN Charter Law. Indian attack on East Pakistan in 1971 and NATO attack on Serbia in 1998 were considered examples of the Humanitarian Intervention. They argue that article 39 of the UN Charter states the "Use of Force" which is to be considered valid if there is obvious threat to International Peace. It means that every action taken for maintaining or restoring peace is legal under the UN Charter Law. This argumentation does not seem sound because the said article gives authority of action to the Security Council only not to a nation state.

## **2.11 Comparison of Muslim and Contemporary International Laws**

This section of study is concluded to highlight the differences between Muslim International Law and Contemporary International Law.

The most important difference between the two laws is the validity of law. International Law experts discuss the question whether Contemporary

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<sup>1</sup>Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aur Baghāwat* (Gujranwala: Al-Shariāh acadāmī, 2012), 198.

International Law fulfills the criteria of law or not.<sup>1</sup> The question of validity arises due to the definition of law by John Austin, he is of the view, that law is based on the authority of sovereign backed by sanctions.<sup>2</sup> Due to this definition of law by John Austin every reader of International Law raises questions like is there any legal institution which forms International laws? General Assembly of the United Nations presents resolutions; that cannot be called legal institution which formulates International Law. Similarly, is there any hierarchy of the courts which has the required authority to solve International disputes? International Court of Justice (ICJ) can hear those cases upon which both state parties are agreed to be decided by it. The question of the authority to enforce such decisions will always be there. The Security Council of the UN was formed to play the role of enforcement of the ICJ decisions but Security Council's role is in in controlling hand of the five Veto powers the permanent members of the Council. Without having legal body to format laws, Judiciary system and executive body how it could be considered a proper legal mandate? <sup>3</sup>

On the other side, Muslim jurists never faced the difficulty of validity of Muslim International Law(MIL). The rules through which domestic law developed are the same for the development of MIL. The basic sources of MIL and domestic law are the Qur'ān and Sunnah. The binding force in MIL is religious sanctions not reciprocity, mutual consent and any external agency. MIL established by Muslim jurists in the light of Qur'ān and Sunnah independently without controlling by any political authorities or Muslim state.<sup>4</sup>

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<sup>1</sup> Malcolm N. Shaw, *International Law* (New York: Cambridge University Press, 2008),3.

<sup>2</sup> Ibid.

<sup>3</sup> Malcolm N. Shaw, *International Law* (New York: Cambridge University Press, 2008),3.

<sup>4</sup> Mehmood Ahmad Ghazī, *The Shorter Book on Muslim International Law* (Islamabad: Islamic Research Institute, 1998), 18.

Contemporary International Law (CIL) is made and developed by states and controlling by political authorities.<sup>1</sup> The universality of CIL is also in question because this law is made and developed by Christian states of Europe. Article 38 of the Statute of the International Court of Justice, sub Article C says "the general principles of law recognized by civilized nations".<sup>2</sup> The civilized nation are according to them European Nations.

By contrast, MIL does believe in civilized and uncivilized nations rather it believes in the classification of the behavior of the people toward Islam.<sup>3</sup>

In the conclusion, both the laws have no enforcing agencies to implement their decisions. Unlike CIL, Muslim International Law carries no choice in many cases and will be implemented as demanded by the sprit of the Quran and Sunnah like prohibition of treachery and Mutilation of the opponent party. It will be implemented either as per the discretion of Muslim state in cases like awarding guarantty. On the other hand, in the case of CIL a nation state is allowed to not become a party to either the whole Law or to any its particular convention. From this discussion we can conclude that if CIL successfully runs the affairs of nation states with the difficiencies like enforcing agency and legal validity then how Muslim International Law cannot run the affairs of nation states?

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<sup>1</sup> Sir robert jennings qc, Oppenheim's International Law vol.1 (London: British Library, 19996), 24.

<sup>2</sup> Ibid.

<sup>3</sup> Mehmood Ahmad Ghaz, *The Shorter Book on Muslim International Law* (Islamabad: Islamic Research Institute, 1998), 20.

## CONCLUSION

This chapter may be concluded as that MIL believes in the diversity of the world into different parts on the basis of territorial jurisdiction. Domain of Islam, Domain of war and Domain of peace. Theoretically, everyone who resides within the territorial jurisdiction of Muslim state will be protected by Muslim state and all actions committed within the territorial jurisdiction of Muslim state will be heard by the courts of Muslim state. Conversely, all those who reside beyond the territorial jurisdiction of Muslim state will not be protected and their cases will not be heard by the courts of Muslim state. According to Muslim International Law (MIL) diversity of the world changes the status of human being with reference to their rights and duties. The diversity does not create hostile relations between Muslim state and other nation states. Aggression against Muslims or Muslim state sets parameters of relations between Muslim state and other nation states. MIL considers aggression is the cause of war which gives right of use of physical force against the aggressors. On the other hand, Contemporary International law (CIL) also cognizes armed attack is the cause of war. In case of armed attack CIL gives the right of self-defense to the affected state. Similarly, CIL gives authority to UN Security Council for "Collective Use of Force". The "Collective Use of Force" by the Security Council does not deprive the right of Self-defense of the affected state. This means that the affected state can be defended by using the right of self-defense as well as the right of Collective Use of Force. CIL also empowers Security Council to use the right of pre-emptive attack in dire need to maintain international peace.



## CHAPTER THREE: AMĀN IN SHAYBĀNĪ'S WORK

### INTRODUCTION

The relationships between Muslims and non-Muslims cannot be comprehended without discussing the doctrine of *Amān* recognized by the founder of Muslim International Law Shaybānī in *al- Asl*, (*al-Mabsūt*), *al -Siyar al-Saghīr* and *al -Siyar al-Kabīr*.

This chapter covers the work of Shaybānī about *Amān*. In Islamic history Shaybānī is the first jurist who worked on Muslim International Law in the form of two voluminous books *al- Siyar al- Saghīr* and *al- Siyar al- Kabīr* due to which it became an independent science of law. His first ever worked in this connection had recognized him as the founder of Muslim International Law.<sup>1</sup> Shaybānī has discussed the relation of Muslim states with other nation states in his books especially in *al- Asl*, (*al-Mabsūt*), *al -Siyar al-Saghīr* and *al -Siyar al-Kabīr*. He elaborated major aspects of the international relations of Muslims with non-Muslims, like war and peace. Peace is one of the major aspects of the international relations between Muslims and non-Muslims. It plays a vital role in relations at state levels. Shaybānī focuses that Islam believes in war for the restoration of peace only. According to him, if an alien (*Ḥarbī*)<sup>2</sup> seeks permission to enter into a Muslim state, he should be given permission to enter to the Muslim state in order to get some basic information and observe the important aspects of Islam. He says that the wealth of a guaranteed alien will be protected as the wealth of a non-Muslim citizen and the wealth of a non-Muslim citizen is protected as the wealth of a Muslim citizen. He is of the view that Muslims are protected by their faith while non-Muslims are either by *Dhimah* or *Amān*. It means that Muslim state not only

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<sup>1</sup>Mehmood Ahmad Ghazi, *The Shorter Book on Muslim International Law*, 1.

<sup>2</sup> Means the citizen of a state at war with the Muslim state, actually or theoretically. The latter case includes a state with which no agreement of peace or armistice, etc. Muslim Conduct of State, PP 111-119

gives protections to its Muslim citizens but also its non-Muslim citizen with all respects.

### 3.1 *Amān* in Shaybānī's work

Shaybānī is considered the founder of International Law because of introducing it as a separate science. The work of Shaybānī towards International Law is in voluminous form in the shape of *al-Siyar al-Saghīr* and *al-Siyar al-Kabīr* but he also discussed the notion of *Amān* and its legal impact in his book *al-asāl* known as *al-Mabūt li Shaybānī*.

#### 3.1.1 *Amān* in *al- Asl*

According to Shaybānī a guaranteed alien (*Mustā'mīn*) in a Muslim state is a person who qualifies the condition of legal demand/permission or proposal either by aliens by themselves or by a Muslim state and with the acceptance of a Muslim individual or by a Muslim state. Shaybānī classifies *Mūsta'mīn* on the basis of gender and religion<sup>1</sup>. Male *Mūsta'mīn* has different rights and duties that from a female *Must'mīn*. He also recognizes a Muslim male and female as *Musta'mineen wal Musta'mina't*. Muslim *Musta'mineen wal Musta'minat* will have different rights and duties that from non-Muslim guaranteed aliens. Furthermore, his book *Al-asl* assigns some rights and duties to the person who seeks legal protection as under: Shaybānī is of the view that aliens should be given the guarantee either by Muslim individuals or by the state. The alien who wants guarantee should fulfill his duties in order to get the guarantee in a Muslim state. The first and most important duty of the alien is to demand the guarantee properly

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<sup>1</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 111- 113

otherwise he should not be given the guarantee.<sup>1</sup> Once he is given the guarantee, he should respect all rules and regulations of Islamic law. If he violates the rules and regulations of Islamic law his guarantee will not be terminated.<sup>2</sup> Shaybānī differentiates between the rights of Allah (*Ḥaqqūllah*) and the right of human being (*Ḥāqqūl'ib*). If the guaranteed person violates the right of Allah in a Muslim state, Court will be having the jurisdiction to hear the case but *Ḥad* punishment will not be given to him if he is found guilty. He may only be demanded to pay damages because he is living temporary in a Muslim state<sup>3</sup>. He is not bound to follow Islamic law as a citizen of Muslim state. Muslims are bound to follow Islamic law and non Muslim citizens also bound to obey Islamic law in their general affairs. This is the view point of Shaybānī while Abū Yūsuf does not differentiate between the rights of Allah (*Ḥaqqūllah*) and the right of human being (*Ḥaqqūl'bd*). Abū Yūsuf says if a guaranteed person is found guilty of either right he should be punished<sup>4</sup>. According to Shaybānī a guaranteed person will only be given the punishment if he violates the private right of any citizen of a Muslim state. Court will also be having the jurisdiction to hear the case and gives punishment if he is found guilty in the aforementioned situation because the right of everyone who resides in a Muslim state is protected by Islamic law. No one has the right to violate the right others. If the guaranteed person is found guilty of a killed person, he should be killed. Shaybānī says the punishment of *Qadh* will be given to the guaranteed person because it involves the right of human being. Shaybānī again differentiates between Muslim and a non Muslim citizen of a Muslim state. If the guaranteed person blames Muslim in a Muslim state court will be having the

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<sup>1</sup> Muhammad ib-ne al- Ḥassan al-Shaybānī, *Al-asl al-Marūf bil-Mabsūt*, vol.4 (Karachi: IDārat ul Qurān Wal olūm al-Islamiyya, n.d),48.

<sup>2</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 326.

<sup>3</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 ,326.

<sup>4</sup> *Ibid*.

jurisdiction to hear the case and if it is proved that he is guilty of *Qadhf*. The punishment of *Qadhf* will be given to him because the honor of every Muslim is to be protected. If a guaranteed person blames any non Muslim citizen of a Muslim state, he may be given the punishment of *Qadhf*.<sup>1</sup> Shaybānī says the guaranteed alien should be given *Ta'zīr* if court thinks fit.<sup>2</sup>

Shaybānī has classified guaranteed aliens on the basis of gender. Male guaranteed aliens are different rights than females. If a male guaranteed alien marries a non- Muslim female citizen of a Muslim state, his status would not be changed from guaranteed alien to a non- Muslim citizen of a Muslim state because usually husband is dominant and he does not follow his wife. If a female guaranteed alien marries a non- Muslim citizen of a Muslim state, her status will be changed automatically from guaranteed alien to a non Muslim citizen of a Muslim state because usually wife follows her husband and she will be remained in a Muslim state. She would be prevented from going back to her mother country<sup>3</sup>. While Ibn Qūdamāh al-Ḥanbalī says she would not be prevented from going back to her mother country if her husband allows her. According to him the contract of a guarantee is not a binding contract on a *Mustā'min* (guaranteed person) that is why a Muslim state cannot raise objection on leaving the Muslim state by the wife of the non- Muslim who sought *Amān*.<sup>4</sup> Male guaranteed Slaves' guaranty is followed by his master legal guaranty. If master disqualifies the awarded guaranty his slave also disqualifies but if the master has set free his slaves, then the freed slave is considered as an independent legal person if he/ she wants to live in a Muslim state or to leave the Muslim state.

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<sup>1</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 ,326..

<sup>2</sup> *Ibid.*, 327.

<sup>3</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 119.

<sup>4</sup> Ibn Qūdamah, *al-Mughni*, vol.9, 245.

### 3.1.1.1 Guaranteed aliens in Muslim state

When a guaranteed alien comes to a Muslim state, he will be given all kinds of protections and his every transaction will be considered as valid transaction. He will not be deprived of his property. All the properties he has brought from his homeland will be remained in his ownership. Shaybānī says if he has taken a slave to the Muslim state and he wants to make the contract of *Mukātabah*.<sup>1</sup> with him he can do so because the slave is his property and he can dispose off his property whatever mode he wants. He even can manumit his slave in Muslim state. The manumitted slave has two options either to reside in the Muslim state or not. It means he should not be forced to live in the Muslim state or to go anywhere he wants.<sup>2</sup> After the manumission he becomes an independent legal person and the Muslim after cannot force a freed person against his/her free of movement. His residence in the Muslim state will be assumed his implied *Amān* contract with the Muslim state as slave follows his master in all legal contracts.

As a general rule under the Islamic Law of Slaves, guaranteed aliens are not allowed to trade Muslim slaves but if a guaranteed non- Muslim alien buys a Muslim slave being ignorant to this rule of law will be forced to sell out it in the hand of a Muslim that is to secure the religion of the said Muslim slave.<sup>3</sup> Shaybānī did not mention that such Muslim slave can only be sold to a Muslim that is to meet the objective (protection of religion) of Shari'ah . He only focuses on the point that the guaranteed non- Muslim alien will be forced to sale out such Muslim slave. Here another non- Muslim guaranteed alien can buy the said Muslim slave in the market and then this chain of buying and selling of Muslim slaves will be run for infinite time. This miserable condition may harm the religion of Muslim

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<sup>1</sup>Means the written agreement between a slave and his master to manumit his on the payment of certain amount as his price. Hamidullah, *Muslim Conduct of State*, 122.

<sup>2</sup> Shaybānī, *Al-asl*, vol.4, 48.

<sup>3</sup> Al- Sarakhsī, *al- Mabsūt*, vol. 10, 151

slaves. Sarakhsi's text reveals that such slave will be only sold to a Muslim that is to avoid the disrespect of the religion of Islam by the non- Muslim aliens<sup>1</sup>.

Shaybānī says if a guaranteed alien made the contract of *Mukātabah* or *tadbīr*<sup>2</sup> with his Muslim slave that contract will be considered as valid with a condition if the master is ignorant to the law of Muslim slaves that it cannot be owned by any non- Muslim aliens. In the case of *Tadbīr*, a judge of Muslim state will decide the price of the *Mudabbār* slave and that price will be given to his master. According to Abū Ḥanīfah if a guaranteed alien wants to take back his slave to his mother-state he will be assumed manumitted automatically<sup>3</sup> but Qaḍi Abū Yūsuf and Shaybānī, are of the view that such slave will be assumed manumitted if Muslim state conquers the alien state or such slave runs from the alien state and get shelter in Muslim state.<sup>4</sup> Here the view point of Qaḍi Abū Yūsuf and Shaybānī is preferred in the sense that when a Muslim state establishes it writ in the territory of alien state then under the Muslim Law of Slaves a non-Muslim cannot own any Muslim slave.

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<sup>1</sup> Al- Sarakhsi, *al- Mabsūt*, vol. 10, 151

<sup>2</sup> "Declaration of the manumission of a slave on the death of the master was technically known as *tadbīr*; a slave so promised freedom was called *mudabbār*. The principle followed in case of *tadbīr* was that a *Mudabbār* slave could neither be sold to anybody nor gifted away. However, the master had every right to utilize the services of the *mudabbār* slave as allowed under the law of *Sharī'ah*. Further, the principle of *tadbīr* was subject to the laws of inheritance and wills that restrict the will upto one-third of the total property bequeath. As such, if the value of the *mudabbār* exceeded one-third of the total value of the property bequeathed, the excess was to be paid by the *mudabbār* after his manumission to the heirs of the deceased master". See for details, Mehmood Ahmad Ghazi, *The Shorter Book on Muslim International Law*, 94.

<sup>3</sup> Shaybānī, *al-asl*, vol.4, 48

<sup>4</sup> *Ibid.*

### 3.1.1.2 Exceptions to buying and taking to the mother country by Guaranteed person

There are some exceptions provided in this context like the beast of burden, steel, iron and Muslim or non- Muslim slave (the citizens of Muslim state).<sup>1</sup> Sarakhsī gives logic to the given explanation as: These things empower logistically the aliens. That is why the guaranteed aliens are not given such authority to make a transaction or any contract to make stronger any alien state against a Muslim state.<sup>2</sup> Similarly exchanging inferior goods or weapons with superior goods or weapons is also prohibited for the guaranteed aliens<sup>3</sup>. Goods in raw form that can obviously be used or converted with a little effort into weapons like Uranium or Radium or hard water etc. also come under this category. Furthermore, such guaranteed aliens will not be prevented from carrying back goods which they have brought from their mother country along with to the Muslim state.<sup>4</sup> The risk and danger of such goods makes no obstacle from carrying them back to their country of their origin. There must be a point mentioning the Muslim state discretion for prohibiting highly dangerous goods, chemical and mass destructive weapons and their carriage back to the alien country by the guaranteed aliens. This point also needs to be discussed and problem to be solved by the Muslim jurists and researchers. From this it can be concluded that all the belongings and assets of the entering guaranteed aliens will be recorded that is to be evaluated on the standards of logistics and non- logistics on the leaving of Muslim state by the guaranteed aliens or in case of their becoming aliens of Muslim state.

A guaranteed alien can also buy a slave girl in Muslim state and he can also do sexual intercourse with her. If she becomes pregnant from her master, then

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<sup>1</sup> Al- Sarakhsī, *al- Mabsūt*, vol. 10, 152

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Al- Sarakhsī, *al- Mabsūt*, vol. 10, 152

judge will decide the value of the slave girl and she will be manumitted after paying her price to her master. If the slave girl became *Umm-e Walad*.<sup>1</sup> Then master cannot take her to his own country and she will reside in Muslim state. If her master wants to take her to his own country, she will be manumitted automatically because taking her to her master's country makes the master as dead. Generally if the master of *Umm-e Walad* dies she will be manumitted at once.<sup>2</sup> A guaranteed alien can also buy a slave girl *dhimmīyyah*.<sup>3</sup> (a non- Muslim citizen of a Muslim state) but he will be compelled to sale out her because she is just like a Muslim slave girl. A guaranteed alien has no right to own a Muslim or non- Muslim slave girls the citizens of a Muslim state. If he has made a contract of *Mukātabat* with her and wants to take her to his country such slave girls will be manumitted automatically.<sup>4</sup> Shaybānī says, a guaranteed alien even can buy two slaves jointly. He can make the contract of *Mukātabah* with both of them. If they both or one of them pay the price jointly they will be manumitted otherwise both of them will be remained slaves. If one of them pays his freedom price, then he may get his freedom. Shaybānī says, if the master takes one of them to his own country so that slave will be manumitted because entrance of a slave, who is the citizen of a Muslim state, to an alien state makes him manumitted, and the other one will

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<sup>1</sup> *Umm-e- walād*, "literally 'mother of the child', means a slave girl who gives birth to the child of her master. According to Islamic law, as soon as a slave girl who gives birth to the child of her master, she acquires some special privileges. She becomes like a *mudabbbar* to be automatically manumitted on the death of the master. An *umm walad* can neither be sold to anybody nor her ownership can be transferred to anybody. But unlike a *mudabbbar*, an *umm-e- walad* shall not be liable to pay any excess amount to the heirs of the master if her price/value exceeds one-third of the total inheritance of the master". Mehmood Ahmad Ghazi, *The Shorter Book on Muslim International Law*, 96.

<sup>2</sup> Shaybānī, *Al-asl*, vol.4, 48

<sup>3</sup> *Dhimmi*, "literally guaranteed, protected or covenanted, means a non Muslim citizen of the Islamic state whose area of residence has acceded to the Islamic state as a result of military conquest, or who's accepted to be the guaranteed citizen of the Islamic state". Mehmood Ahmad Ghazi, *The Shorter Book on Muslim International Law*, 93.

<sup>4</sup> Shaybānī, *Al-asl*, vol.4, 48



remain still slave<sup>1</sup>. It means that if one of them became free by any reason it does not affect the other one on the base only that they were bought jointly by their master. Both of them have their own status with their master.

### 3.1.1.3 The effect of going back of a guaranteed person to the mother country

All the legal contracts made by a guaranteed alien will be effective even on leaving of Muslim state on any reason. These contracts will be claimed to be fulfilled on the arrival of the said alien in the Muslim state. According to Ibn Qudāmah, if a guaranteed alien goes back to his mother country not on a permanent basis but as a trader, messenger or for any other reason, his guarantee will not be affected. It means that his property remained in a Muslim state will be in his ownership and he can again enter to a Muslim state without any fresh guarantee. If the guaranteed alien goes back to his country even on permanent bases his property will be remained secured in a Muslim state but he has to get fresh guarantee to enter into a Muslim state because going back to the alien state on permanent bases terminates the guarantee.<sup>2</sup>

Shaybānī says, if a guaranteed alien makes the contract of *Mukātābāh* with his slave in a Muslim state and then he goes back to his country. After some period, he comes again to Muslim state as a guaranteed alien. In this situation the *Mukatab* is bound to pay the price mutually fixed. If he pays the price to his master, he will be manumitted.<sup>3</sup>

According to Shaybānī the assets made by a guaranteed alien in a Muslim state will be secured in all situations even if an alien leaves a Muslim State then he will claim for it through court and court will ensure such property to be given to the

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<sup>1</sup> Shaybānī, *Al-asl*, vol.4, 49.

<sup>2</sup> Ibn Qudāmah, *al-Mughni*, vol.9, 245.

<sup>3</sup> Shaybānī, *al-asl*, vol.4, 49.

said alien. Shaybānī has explained this point by giving example of *Mūkatabat* contract by an alien and fixes some amount of money in lieu of the freedom of his slave. He is of the view that if the alien leaves the Islamic state permanently or temporarily before to recover the prescribed money from his slave and then demand for it in the court of law of Islamic state. Then court is responsible to recover his money and to pay it to the said guaranteed alien.<sup>1</sup>

#### 3.1.1.4 The status of guardianship of guaranteed persons

A Muslim slave will be in the guardianship (*Walā*<sup>2</sup>) of the guaranteed alien master on the condition if he accepts Islam or becomes a non- Muslim citizen of Muslim state. The guaranteed alien will have no right of mastership if he has freed his slave in an alien state<sup>3</sup>. From the argument we conclude that a non- Muslim guaranteed alien can only become the guardian of a non- Muslim slave. If a guaranteed alien buys a slave (Muslim or non- Muslim) in a Muslim state and manumits him then goes back to an alien state. After some time, he again comes to the Muslim state as a Muslim. Shaybānī says, he will be the guardian of the manumitted slave<sup>4</sup>.

According to Shaybānī a guaranteed alien will be the guardian of his manumitted slave on the condition if he embraces Islam or gets the status of non- Muslim citizen of the Muslim state<sup>5</sup>. Here the status of a master who embraces in

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<sup>1</sup>Shaybānī, *Al-asl*, vol.4, 49.

<sup>2</sup> *Walā*, "guardianship or client ship, basically it has two types: *walā Nīmah* and *walā l'tāqā*, the first one is from *Allah* and second one is from the manometer. This is a special contract between the contracting parties in order to help each other. This relationship between the manumitted and the remains throughout their life. In the case of inheritance, preference should be given to the manometer on legal heirs. *Walā* is like a kinship". Al-Sarakhsī, *al-Mabsūt*, Vol.8, 144.

<sup>3</sup> *Ibid.*, 51.

<sup>4</sup> Shaybānī, *al-asl*, vol.4, 50.

<sup>5</sup> *Ibid.*, 50.

an alien state and if he has freed his slave in a Muslim state is not explained by Shaybānī. It is although not explained by the author in detail but from another argument of the author it can be concluded that all the proprietary rights of the guaranteed alien are preserved by the court of Islamic state and wala is also be considered one of the proprietary rights of the said Muslim manumitted slave. According to Islamic Law an alien may become a guardian of a manumitted Muslim slave who he manumits it in an alien state<sup>1</sup>. His contract will have no legality if the alien seeks guarantee from a Muslim state as a guaranteed alien. This is an exception to general law of contract regarding aliens.<sup>2</sup> According to Imam Abū Ḥanīfah, if a guaranteed alien buys a Muslim slave in a Muslim state and then takes him back to the alien state, the slave will be manumitted automatically but the master will lose the guardianship of the manumitted slave. According to the aforementioned author, if a guaranteed alien re-enters to a Muslim state as a Muslim, in such situation he will not be the guardian of his manumitted slave who became automatically freed on the entrance to an alien state because he had not freed him willfully but the slave had been freed automatically.<sup>3</sup> Guardianship or Wala is a privilege and non- proprietary right for non- Muslim guaranteed aliens and non- Muslim citizens of Muslim state and considered as a proprietary right for a master which can only be inherited by Muslim legal heirs. Non- Muslim citizen or a non- Muslim guaranteed alien's heirs who are not Muslims cannot inherit this privilege in any situation.<sup>4</sup> The essence of this rule reveals that non-Muslims cannot inherit the Wala of slaves except Muslim legal heirs.

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<sup>1</sup> Shaybānī, *al-asl*, vol.4, 50.

<sup>2</sup> *Ibid.*, 52.

<sup>3</sup> *Ibid.*, 51.

<sup>4</sup> *Ibid.*, 50.

Shaybānī says, if a guaranteed alien makes a contract of *Mukātabah* with his slave and contract of *Tadbīr* with different slaves in an alien state, and then takes them to a Muslim state along with an *Umm-e-Walād*. The guaranteed alien can sale out them in Muslim state except *Umm-e-Walād* to Muslims. because the contract of *Mukātabah* or *Tadbīr* was made in alien state has no legal effect and considered as void. Shaybānī says but Muslim should not buy the aforementioned *Umm-e- Walād* from him. Same is the case with the manumitted slave in an alien state, if he was forcefully took to a Muslim state by his master, he can sale out him in a Muslim state because the manumission took place in an alien state and that is null and void.<sup>1</sup> If a *Mukātab* of Muslim state seeks *guarantee* in alien state and makes some transactions with people who also become guaranteed aliens of Muslim state. On any demand of the contractual parties no action will be taken by the court of Muslim state for any recovery because Muslim state has no jurisdiction to do so. If one or both of the contractual parties embrace Islam then the court of Muslim state is bound to hear the case.<sup>2</sup>

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<sup>1</sup> Shaybānī, *Asl*, vol.4, 50

<sup>2</sup> *Ibid.*,53.

### 3.1.2 *Amān* in *al-Siyar al-Saghīr*

*Al-Siyar al-Saghīr* is also written by Shaybānī. This is the first ever book on Muslim International Law. This book holds that Muslim International Law as an independent science which was taught in every learning institution of Muslim state from the day one. When this book was first published and read by *Awzā'ī*, he satire the famous quotation about the jurists of Iraq said "what is the relationship of the jurists of Iraq with Muslim international law". When Shaybānī came to know this he decided to write a voluminous book on Muslim International Law *Al-Siyar al-Kabīr*. Shaybānī has discussed various aspect of Muslim International Law in *Al-Siyar al-Saghīr*. This invaluable work of Shaybānī has also discussed to the concept of *Amān* in detail. According to Shaybānī if anyone from aliens seeks a guarantee either from a Muslim state or any individual the person will be awarded with guarantee that is to provide an opportunity to non-Muslims aliens to observe the normative qualities of Islam in practical. By providing guarantee to any non-Muslim amounts to assist Islam in its preaching and Muslims by facilitating them with global community.<sup>1</sup> Shaybānī also recognizes a Muslim or a non Muslim citizen of a Muslim state as a guaranteed person of any alien state. According to Shaybānī *Amān* is impliedly a bilateral contract between a Muslim state and non-Muslim state. If Muslim state gives *Amān* to the citizens of any alien state in lieu the citizens of Muslim state will also be given *Amān* that demands for mutual relationship between the contractual countries.<sup>2</sup> The Muslim or non Muslim citizens of a Muslim state have the same reciprocal rights and duties as inflected on the alien state's guaranteed persons. Further details in *Al-Siyar al-Saghīr* as under:

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<sup>1</sup> Al-Sarakhsī, *Sharḥ, al-Siyar al-Kabīr*, Vol.1, 262.

<sup>2</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 111.

### 3.1.2.1 Muslim guaranteed persons in alien state

According al- Siyar al- Saghīr, Muslim *Mustā'min* is a person who seeks guarantee in alien state<sup>1</sup>. It means that a Muslim can also be a *Mustā'min* if he gets the guarantee from an alien state. Shaybānī says that a Muslim or a non Muslim citizen of a Muslim state can also be given guarantee by an alien state. Once the guarantee is given by the alien state the guaranteed person is bound to follow the domestic law of the state and the other conditions that are agreed. The said guaranteed person is not bound to follow the alien state for international affairs in a situation when Muslim state aggresses on the alien state. In such situation the guaranteed person even can help logistically and non-logistically the Muslim state against the alien state during war with Muslim state. Shaybānī allows the guaranteed Muslims of alien state to take their appropriate portion from the booties and spoils of war<sup>2</sup>. From the above argument of Shaybānī we can conclude the aforementioned guaranteed person cannot help any other state beside the Muslim state in the condition of war. A guaranteed Muslim is not allowed to violate the rules and regulations of the alien state in which he resides a guaranteed person in case it will be considered the treachery of the guaranteed person which is strictly prohibited by the Hadith of the Prophet (peace be upon him).<sup>3</sup> So the guaranteed Muslim should be careful about his pledge even in alien state otherwise he will be punished on the Day of Judgment. According to Shaybānī a guaranteed Muslim of an alien state is not allowed to get released his slave girl from the possession of aliens or to have a sexual intercourse with her. The reason behind this point is that when property is transferred from the jurisdiction of a

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<sup>1</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 65.

<sup>2</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 46

<sup>3</sup> "Narrated by Abū sa'ed that the prophet (peace be up him) has said: whoever violates a pledge, a flag will be hoisted over him on the Day of Judgment in order to point out that he was a traitor" Muhammad bin Ismail bin Ibrahim bin al-Mughīrah al-Būkhārī, *Sahīh al-Būkhārī*, Vol.10, 458.

Muslim state to an alien state automatically entitles the ownership of the alien state<sup>1</sup>. *Abū y'lā* also supports this view point of Shaybānī.<sup>2</sup> There is an exception to this rule of law that if the slave girl is either *an Umme walad* or *Mudabbārah* then the guaranteed person can restore their possession forcefully and can intercourse them sexually. Any action taken for this purpose will not be considered treachery by the guaranteed person<sup>3</sup>. This exception is based on the rule of Islamic Law of Slavery (ILS) that *Umme walad* and *Muḍbārah* cannot be separated from their master and neither will be occupied as slaves for another term and will be set free on the fulfillment of the respective conditions<sup>4</sup>.

According to Shaybānī a prisoner in an alien state can use all kinds of measures for freeing himself and his slaves from the occupation of aliens. In this situation he is allowed take the possession of his slave girl by force, any other illegal means or stealing her. He is also allowed to kill any one the aliens and steal their properties as well.<sup>5</sup> Muslims and non- Muslim citizens of a Muslim state can make property in any alien state through trade and business. According to Shaybānī their properties cannot be declared as spoils or booties by Muslim state with exception to immovable properties<sup>6</sup> This rule of law of declaring the immovable properties of Muslims and non- Muslims who were the guaranteed residents of an alien state, follow the famous rule of Shari'ah that a shadow rule is followed by the actual rule of law.<sup>7</sup> The adult slaves of the guaranteed Muslims of an alien state, who are captured in war against a Muslim state, will be

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<sup>1</sup> Sarakhsī, *al-Mabsūt*, Vol.10, 65.

<sup>2</sup> Muhammad bin Hussain bin Muhammad al-Qazi Abu Yala, *Al-Ahkam al-Sultaniyya* (Beirut: Dār al-kutub al- 'Imiyyah, 2000),152.

<sup>3</sup> Sarakhsī, *al-Mabsūt*, Vol.10, 65.

<sup>4</sup> *Ibid.*

<sup>5</sup> Sarakhsī, *al-Mabsūt*, Vol.10, 66.

<sup>6</sup> *Ibid.*, 67.

<sup>7</sup> *Ibid.*

considered the property of the Muslim state and not the property of their masters. Such slaves will be dealt and distributed like other common slaves.<sup>1</sup> According to Shaybānī only marriage of a woman with a Muslim is not sufficient to save her from being a captive. Either she has to become a Muslim or prove herself the non-Muslim citizen of a Muslim state otherwise she will be made captive if a Muslim state conquers an alien state. Furthermore, her pregnancy if results a child the expected child will also be considered captive as the shadow rule of law follows the actual rule of law. According to Shaybānī only two things create immunity of life, honor and property that are the acceptance of Islam or being a citizen of a Muslim state<sup>2</sup>.

In case of conquering an alien state by a Muslim state, all the deposits of Muslim and non-Muslim guaranteed persons will be restored to them even if these are distributed as booties or spoils. In case of their death their deposits will be restored to their legal heirs.<sup>3</sup> Guaranteed Muslims and non-Muslims of a Muslim state lose their right of guardianship over their manumitted non-Muslim slaves in an alien state if it is conquered by the Muslim state. Manumission in an alien state is considered null and void according to Shaybānī and Abū Ḥanīfah<sup>4</sup>. Muslim as a trader, prisoner or someone who has embraced Islam in an alien state cannot award guarantee to the citizens of an alien state<sup>5</sup>. *Ibn Qudamah* recognizes the guarantee given by a Muslim trader or prisoner due a Hadith of the Prophet (peace be upon him) which makes all Muslims capable of awarding guarantee without the specification of their legal statuses<sup>6</sup> Shaybānī says, the guarantee

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<sup>1</sup> Sarakhsī, *al-Mabsūt*, Vol.10, 67.

<sup>2</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 68

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 69

<sup>6</sup> Ibn Qudāmah, *al-Mughni*, vol.9, 242.



given by Muslim army on the behalf of Muslim state in an alien state will be considered as valid.<sup>1</sup>

According to Abū Ḥanīfah the guarantee given by a slave who is fighting along with his master against an alien state will be considered valid but a guarantee given by a slave who is not fighting is void. According to Shaybānī and Ibn Qudāmah the guarantee granted by a slave will be valid in both the situations irrespective of fighting and not fighting<sup>2</sup>. The guarantee given by a non Muslim citizen of a Muslim state, who is not fighting with Muslims against an alien state, is void.<sup>3</sup> This logic is based on the a probability that non- Muslims citizen cannot be trusted in public affairs of state especially when non- Muslims or a non- Muslim state are the stakeholders<sup>4</sup>. A guaranteed Muslim can buy a Christen or Jew slave girl and is allowed to establish sexual relations with her being observing the rules and regulations of *Istibrā*<sup>5</sup>. Shaybānī dislikes guaranteed Muslims to have sexual relation with their wives or slave girls in an alien state in order to save Muslim generation from adopting the traits and culture of non- Muslims.<sup>6</sup>

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<sup>1</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 69.

<sup>2</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 70. Ibn Qudāmah *al-Mughni*, vol.9, 241.

<sup>3</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 70.

<sup>4</sup> *Ibid.*, 72.

<sup>5</sup> *Istibrā*, "literally means to secure absolution or freedom from liability. But technically, in the context of the law of slavery, it means a waiting period to ascertain whether or not a slave girl is pregnant and in case of pregnancy, *istibrā*, would mean waiting till the birth of the child and the passage of the post-natal period of confinement". Mehmood Ahmad Ghazi, *The Shorter Book on Muslim International Law*, 97.

<sup>6</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 74.

### 3.1.2.2 Marriage of guaranteed person, entry of the citizens with whom armistice agreement is made and buying and taking back objects of guaranteed person to the mother country

The marriage of an alien with a non- Muslim woman in a Muslim does not change the status of his citizenship. He will not be considered a citizen of the Muslim state because husband remains legally dominant and to be followed in immigration rules<sup>1</sup>. The marriage of an alien guaranteed woman with a citizen of a Muslim state will change her status from a guaranteed alien to a non- Muslim citizen in accordance the aforementioned rule. If alien spouses obtain guarantee in Muslim state and the husband acquires the citizenship, his wife will also be considered as the citizen in accordance to the rule mentioned above. If the guaranteed alien wants to live in Muslim state permanently for one year or more then he will be considered a non Muslim citizen of a Muslim state.<sup>2</sup> According to Shaybānī, a person who belongs to a state with whom Muslim state has armistice to a peace agreement enters to a Muslim state without seeking guarantee, will be considered a guaranteed person.<sup>3</sup> Such person will be considered as a party to the previous contact. According to Sarakhsī such person be protected anywhere he resides even beyond the jurisdiction of Muslim<sup>4</sup>. If a guaranteed alien buys a Muslim or a non Muslim slave in a Muslim state or one of the slaves who come along with him to a Muslim state embraces Islam. He will not be allowed to take any one or all of them to his state<sup>5</sup>. According to Sarakhsī, citizens of Muslim state should not be given in the ownership of non- Muslim aliens in order to protect them from any expected unjust treatment. The guaranteed alien will be compelled

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<sup>1</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 84

<sup>2</sup> *Ibid.*, 74.

<sup>3</sup> *Ibid.*, 124.

<sup>4</sup> *Ibid.*, 89.

<sup>5</sup> *Ibid.*

to sale them out to Muslim citizens<sup>1</sup>. In case of non- Muslim slaves, they can be sold to non- Muslim citizens too. As a general rule of Muslim International Law guarantee is awarded to aliens for observing respect for Islam they are not allowed to disrespect the citizens of Muslim state.<sup>2</sup>

All the properties including debts and deposits or any legal claim against the citizens of Muslim state will have no effect if the guaranteed alien is made a war captive or found killed during war. The contracts of *Tadbīr* or *Mukātabat* and *Umme Walad* will be effective and the slaves will be manumitted automatically on the declaration of their Master death or captivity.<sup>3</sup> On the death of guaranteed alien in Muslim state, all his assets will be seized that is to protect it from misuse and any other loss. The Islamic state will search for the legal heirs and will grant the assets to them on the ground of sufficient proof being the legal heirs of the deceased. He leaves behind some property and does not have the legal heirs in a Muslim state.<sup>4</sup> A guaranteed alien can take back each and every thing from a Muslim state to his country except any beast of burden, weapons, steal, iron or Muslim or non- Muslim slaves who are the citizens of Muslim state. The aforementioned exceptions are also applicable to Muslim traders when they are seeking guarantee from an alien state except a Muslim trader can take along with his Muslim or non- Muslim slaves.<sup>5</sup> According to Sarakhsī, guaranteed aliens and guaranteed Muslims are not permitted to take the aforesaid things to an alien state that is abandon it from being logistically not stronger against Muslim state.<sup>6</sup> The guaranteed alien will also be prevented to exchange his goods and weapons

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<sup>1</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 74.

<sup>2</sup> *Ibid.*

<sup>3</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 89.

<sup>4</sup> *Ibid.*, 91.

<sup>5</sup> *Ibid.*

<sup>6</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 89.

with a higher and sophisticated one which may empower alien state against Muslim state. Sarakhsi accounts diversity of weapons a kind of logistic empowerment of aliens<sup>1</sup>. However exchange of goods or weapons with similar or inferior is allowed<sup>2</sup>. From the above arguments we may conclude that Muslim state's citizens including guaranteed aliens may transfer all their properties (logistic and non-logistic) to a non- Muslim and non- alien state on the condition that these will not be exported to alien state.

### 3.1.2.3 Claiming of an alien to be an ambassador in Muslim state

If an alien is found being claiming an ambassador in Muslim state. He will be assumed as an ambassador by showing an appointment letter. By showing any fake document in proving himself as an ambassador will declare him as captive of Muslim state.<sup>3</sup> According to Qaḍi Abū Yūsuf only sufficient proofs like an official appointment letter or gift from his state to the head of Muslim state will declare him as ambassador<sup>4</sup>. According to Sarakhsi, ambassadors protection is important for maintaining peace among nations or declaring war against state.<sup>5</sup> If an alien is found in a Muslim state being claiming guaranteed alien in a Muslim state, he will be asked for proof. On the failure he and all his belongings will be declared the ownership of Muslim state<sup>6</sup>. According to Abū Hanīfah, his arrest will cause him a property of Muslim state even embraced. Abū Yūsuf and Shaybānī are of the view the he will be the ownership of the Muslim who has arrested him.

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<sup>1</sup> Al-Sarakhsi, *al-Mabsūt*, Vol.10, 91.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Abū Yūsuf Yaqūb bin Ibrahīm, *Al- Kharāj*, (Egypt: Māktābāh al-Azhāriyya Litūrāth, n.d), 206.

<sup>5</sup> Al-Sarakhsi, *al-Mabsūt*, Vol.10, 92.

<sup>6</sup> *Ibid.*, 93.

Furthermore if the arrested alien embraces Islam will cause his manumission<sup>1</sup>. Abū Ḥanīfah is of the view if he is found in *Ḥarām* he will be arrested and will be declared the ownership of Muslim state. In the view of Abū Yūsuf and Shaybānī, he will not be arrested however he will not be provided with food, drink and shelter in order to oust him from *Ḥarām*. Furthermore if someone arrests him inside *Ḥarām* will be considered as a wrong doer<sup>2</sup>.

### 3.1.2.4 Transactions beyond the jurisdiction of Muslim state

If a guaranteed Muslim makes transactions in an alien state or does any wrong act with the properties of people, the Islamic court will have no jurisdiction to address such legal issues. According Abū Ḥanīfah and Shaybānī the illegal transactions done by Muslims in an alien state will have no effect in a Muslim state because the Muslim state has no jurisdiction to have a trial of such cases. Abū Yūsuf declares such illegal and Haram transactions done by a Muslim anywhere is bound to obey Islam and Islamic Law. If any Muslim abridges Shari'ah rules, wherever he is will be held accountable for its consequences in Muslim state.<sup>3</sup> According to Shaybānī and Al-Shāfi'ī, Muslim killer will not be retaliated as a *Qisās* for the blood of a guaranteed alien in any situation. He will be held accountable for the blood money (*Diyyah*) equal to a Muslim freeman.<sup>4</sup> According to Sarakhsī, equality is a condition which will be maintained in cases of retaliation while a guaranteed alien is not equivalent to Muslim.<sup>5</sup> Guaranteed aliens will be subject to the transactions which are transacted in Muslim state but not to those

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<sup>1</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 94.

<sup>2</sup> *Ibid*.

<sup>3</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 95.

<sup>4</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.6 (Beirut: Dār al-Ma'rifah,, 1990), 39

<sup>5</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 95.

which took place beyond the jurisdiction of Muslim state. According to Sarakhsī Muslim state is only bound to address the grievances of its citizens or its guaranteed aliens.<sup>1</sup>

### **3.1.2.5 Wrong done by a guaranteed Muslim beyond the jurisdiction Muslim state**

When a guaranteed Muslim kills an alien or destroys his property in an alien state inflicts no consequences for a Muslim state. Similarly if aliens kill a guaranteed Muslim in alien state they will not be demanded for the retaliation or blood money by Muslim state<sup>2</sup>. In alien state the affected parties are not liable to claim for any damages or retaliation through Muslim state.<sup>3</sup> Guaranteed Muslims must not deceive citizens of alien state. Islam does not allow Muslims to deceive humans. While seeking guarantee Muslims make a commitment with alien state that they will not deceive the citizens of the state. If a guaranteed Muslim obtains deceitfully a property in an alien state, he cannot sell it out to any Muslim in a Muslim state. Shaybānī considers a property which is obtained in a result of deceit or undue force in an alien state for a Muslim as lawful if the buyer is ignorant to the possession of the property. If the deceitful property is a slave girl, the master is not allowed to have sexual relations with her because he has taken her from alien state by treachery. If the guaranteed Muslim sales out the slave girl in a Muslim state, the buyer will also be not allowed to have sexual relation with her because illegal sale cannot change the status of the slave girl.<sup>4</sup> From the above rulings of Shaybānī we conclude that when a property is shifted either from a Muslim state to an alien state or from an alien state to a Muslim state, its ownership

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<sup>1</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 95.

<sup>2</sup> *Ibid.*, 96.

<sup>3</sup> *Ibid.*

<sup>4</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 97.

and other laws related to the property are also changed. The guaranteed Muslim who has wrongfully obtained a slave girl in the alien state can sell it out because *prima facie* he is the owner of the slave girl and he cannot make any sexual relation with her because his sexual relation with her will lead to unlawful relations in Islam. According to Sarakhsī the master is bound faithfully to return her and the property to the real owner.<sup>1</sup> Guaranteed Muslims can buy the citizens of the alien state who are made captives by any state except a Muslim state. The buying activities of the captives by the guaranteed Muslims do not amount to any deception with the alien state. Reason to this permission to buy the captives is that they are not freed humans and are made as a property by any other state and Guaranteed Muslims have bought them in due course of business. This law is also applicable to the captives of an alien state with whom Muslim state has armistice agreement<sup>2</sup>. There is an exception to this rule of law that if one Muslim state has a contract of peace with an alien state and if another Muslim state attack on the said alien state illegally then guaranteed Muslims will have no authority to buy captives which are made slave by the Muslim state. Sarakhsī make all Muslim states bound to observe the peace contract made with an alien state by any Muslim state<sup>3</sup>.

From the given arguments of Sarakhsī we may conclude that such guaranteed Muslims can also buy Muslim captives from the third country which has made them captives as allowed in the case of aliens.

Muslims are supposed to fight for the ideology of Islam only and not for anything else. If a non- Muslim or an alien state is under war, in such situation guaranteed Muslims will only fight in self-defense and not for any other cause<sup>4</sup>.

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<sup>1</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 97.

<sup>2</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 96.97.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid*, 98.

This ruling is based on the precedent of Hazarat Ja'far bin Abi Talib and Muslim refugees fought for the defense state of Utopia because the Muslim migrants were conscious about their self-protection.<sup>1</sup> In the situation of war between a Muslim State and an alien state, guaranteed Muslims are bound to set free Muslim women and children captives by applying all measures on the conditions to declare the contract of guaranteed being nullified and to assess their defense against alien-forces. Guaranteed Muslims are not bound to recapture the properties of Muslims from the alien-forces. They are only bound to set free Muslim women and children captives from the illegal possession of alien-forces.<sup>2</sup> Guaranteed aliens can dispose their property which they have transferred to Muslim without subjecting to any verification for the ownership because prima facie he is to be assumed as the legal owner of the property. However in the view of Abū Ḥanīfah any fled slave will be returned to the real master if claimed so.<sup>3</sup> According to Shaybānī, if a Muslim enters in an alien state without obtaining guarantee and does some misconduct to their properties or makes someone kidnaped from there, will not be held accountable for any punishment by Muslim state.<sup>4</sup>

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<sup>1</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 98.

<sup>2</sup> Al-Sarakhsī, *al-Mabsūt*, Vol.10, 96.97.

<sup>3</sup> *Ibid.*

<sup>4</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 266.



### 3.1.3 *Amān* in *al-Siyar al-Kabīr*

*Al-Siyar al-Kabīr* is also written by Shaybānī. Shaybānī started work on this book when the adverse opinion of *Awzā'ī* communicated to him. The adverse opinion of *Awzā'ī* was "what is relation of Iraqi people with the knowledge of Muslim international law"? Shaybānī discusses the major aspects of Muslim and non Muslim relations in this book like war, peace and neutrality. Sarakhsī further discusses these major aspects of international relation in such a way that it becomes difficult to differentiate between the text and the commentary of the book. The purpose of this study is only to focus on the notion of *Amān* discussed either by Shaybānī or Sarakhsī. According to Sarakhsī, *Amān* is the practice of refraining from the activities like capturing or killing of aliens<sup>1</sup>. According *Al-Siyar al-Kabīr*, *Amān* plays a vital role in Muslim International Law and the person who knows it in-depth philosophy is considered as a scholar of the Muslim International Law. *Amān* is discussed by Shaybānī and Sarakhsī in *Al-Siyar al-Kabīr* as under:

#### 1.1.3.1 Awarding guarantee (*Amān*)

According to Shaybānī the guarantee given by a free Muslim, to an alien will be binding on Muslim state. This is based on the Ḥadith of the prophet (peace be upon him), the Prophet said: All Muslims are equal in awarding guarantee as they are equal in blood money.<sup>2</sup> The guarantee given by lowest Muslim will be binding on all Muslims<sup>3</sup>. According to Sarakhsī the word "*Adna*" mentioned in the aforementioned Ḥadith stands for three possibilities in the case of awarding *Amān*

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<sup>1</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 252.

<sup>2</sup> Abū Dawood Sulaiman bin al-ash'th bin Ishaq, *Sunan-e-Abi Dawood*, vol. 4 (Beirut: Dār al-Risalah al-'alamiyyah, 2009), 379.

<sup>3</sup> Ibn Majah abū Abullah Muhammad bine Yazeed Al-Qazwīni, *Sunane Ibn Majah*, vol.3 (Beirut: Dār al-Risalah Al-ālāmiyya, 2009), 689.

that is either giving by a Muslim individual or by a Muslim who lives on the border to aliens or by a *fāsiq* (less authentic Muslim), will be binding on all Muslims and Muslim state.<sup>1</sup> According to Sarakhsi a guarantee given by a Muslim individual or state to an alien is a kind of assisting Islam. Giving protection to aliens when they request for it, make their hearts soft for accepting Islam. According to him, Muslims are supposed to assist Islam either fighting against the enemies of Islam or by giving guarantee to those who deserve it. Sarakhsi considers the peace contract of Ḥudaybiyyah as a great success and assistance for the earlier Muslims as mentioned in Surah al- Fath of the Qur'ān<sup>2</sup>. According to him guarantee is considered assisting Islam and every Muslim is supposed to assist Islam so every Muslim individual is eligible to assist Islam<sup>3</sup>. This shows that every Muslim is eligible to award guarantee to a person who requests for it. The giver of the guarantee will be the representative of all Muslims<sup>4</sup> and Muslim state. Therefore, guarantee given by any Muslim will be binding on all Muslims and Muslim state. According to Shaybānī a Muslim female is also eligible to award guarantee to aliens because she is eligible to assist Islam either by her wealth or sayings. Although she is not bound to fight to defend Islam but she can assist Islam by her wealth or by her saying. Awarding guarantee means pledging of someone verbally or in writing<sup>5</sup>. Shaybānī has argued that the prophet (peace be upon him) ratified the security and guarantee given by Zainab RA to her husband Abū al- 'ās<sup>6</sup> and also endorsed the guarantee given by Umme Hani RA to her two

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<sup>1</sup> Al-Sarakhsi, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 252

<sup>2</sup> Al-Qūr'ān, 48, 1.

<sup>3</sup> Al-Sarakhsi, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 252

<sup>4</sup> *Ibid.*, 253.

<sup>5</sup> *Ibid.*

<sup>6</sup> "Yazid bin Roman said: Abū al-a'ās entered to the house of Zainab RA and got guarantee from her. When the Prophet (peace be up him) was praying *fājr* prayer, Zainab shouted O people! I have given guarantee to Abū al-a'ās. When the Prophet (peace be up him) completed his prayer, turned his face to the people and said: have you heard what I heard? The people said: yes, the Prophet (peace be up him) said: I swear

relatives.<sup>1</sup> The Prophet (peace be upon him) did not only ratify the guarantees given by these females but also said, we have given guarantee to whom you have given guarantee.<sup>2</sup>

According to Abū Ḥanīfah and Abū Yūsuf, only a Muslim fighter slave can award guarantee to aliens. Generally, a Muslim slave is not eligible to award guarantee. He is only required to serve his master. A Muslim slave who fights Jihād with the permission of his master makes him/her eligible to award any guarantee to aliens. Permission of master makes him/her eligible for fighting Jihād against non- Muslims and fighting empowers him/her awarding guarantee to aliens. Guaranteed aliens will be protected at any cost by their guarantors<sup>3</sup>. According to Shaybānī and Al- Shāfi'ī Muslim slaves (fighters and non-fighters both) are eligible to award guarantee to aliens on the qualification of assisting Islam as mentioned earlier<sup>4</sup>. All Muslims without any discrimination of slavery and freedom and gender are required to assist Islam as per their faculties. Awarding guarantee to aliens amounts to assist Islam so Muslim slaves and freed individuals all can award guarantee. A Muslim slave has the capability to give the guarantee as he has the capability to give witness in sighting of *Rāmādān* moon<sup>5</sup>.

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in the name of whom in whose hand my soul is, I did not know anything of that until I heard what you heard, and the guarantee of a lowest Muslim is binding on other Muslims. Then the prophet (peace be up him) entered to the house of *Zainab* RA and told her, take care of him only neither he is a lawful husband of you nor you are a lawful wife of him". Ahmad bin Hussain bin Ali Abu bakar al-baihaqi, *Al- Sunan al- Kubrā*, vol.9 (Beirut: Dār al-Kūtūb al- 'Imiyyah, 2003), 162.

<sup>1</sup>"Abdullah bin Ikramah said: when *Makkah* was conquered by the prophet (peace be up him), *Ḥaris bin hisham* and Abdullah bin abi Rabīa entered the house of *Umm-e-Hani* and got her guarantee. Later on Ali RA came to the house of *Umm-e-Hani* and wanted to kill both of them. But *Umm-e-Hani* did not let him to kill them and she said: if you want to kill them kill me first. *Ali* RA said: you have given the guarantee to polytheists and went away. *Umm-e-Hani* came to the prophet (peace be up him) narrated the story, the prophet (peace be up him) said: we have given the guarantee to whom you have given". Abu 'Isa Muhammad ibn 'Isa al-Tirmidhī, *Sunan al-Tirmidhī*, Vol.3 (Riyadh: Dār-al-Salam, 2007), 348.

<sup>2</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 253.

<sup>3</sup> *Ibid.*, 255.

<sup>4</sup> Al-Shāfi'ī, *Al-Umm*, vol.4, 302.

<sup>5</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 256.

Furthermore, Shaybānī argues from the precedent of Hazrat 'Umar RA when he was informed about a Muslim slave who had written the words of guarantee on an arrow and had thrown it to aliens. *Umar* RA had ratified the guarantee<sup>1</sup>. Abū Ḥanīfah interprets the guarantee of the slave as the guarantee of fighter slave who is allowed to award.<sup>2</sup>

Guarantee given by a non- Muslim citizen is void even he is fighting along with Muslims. Shaybānī has furnished two reasons in this respect: The first one is the similarity in beliefs (the belief of a non Muslim guarantor and the belief of an alien) and the second one is that he is not bound to assist Islam as Muslim. According to Shari'ah non- Muslim is not capable to defend Islam. In lieu of this duty Muslim state collects poll tax from the non- Muslim citizens. Awarding guarantee by a Muslim is considered by Sarakhsī assisting Islam<sup>3</sup>. Shaybānī answers the question of why Muslim state seeks help from non- Muslim citizens during war. He argues that Muslim state also uses logistic help from other different things like horses, elephants, dogs then how could these things award guarantee to aliens<sup>4</sup>. This means that weapons or animals including non-Muslim citizens which are using in war by a Muslim state do not capable of awarding any guarantee to aliens. According to Shaybānī, seeking help from non-Muslims during war is to pressurize aliens by giving an impression to aliens that the non-Muslim citizens are also defending Muslim state<sup>5</sup>.

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<sup>1</sup>“ Fādhāl al-Reqāshi says we have occupied the fort of (non Muslim) one of the Muslim slave wrote words of guarantee on an arrow and thrown it to aliens. We wrote to *Umār* RA (in order to ask him about the legality of the guarantee given by the slave). *Umār* RA replied that the guarantee is awarded by a Muslim is enforceable”. Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 256.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, 257.

<sup>5</sup> *Ibid.*

### 3.1.3.2 The status of a guarantee given by Muslim and non-Muslim juvenile, apostates Muslim prisoners

According to Shaybānī guarantee given by a Muslim juvenile will be considered valid. Similarly, if a non-Muslim juvenile who is well versed in Islamic qualities and also convinces other people on Islam if awards guarantee to any alien will also be endorsed by Muslim state. Shaybānī furnishes his argument for accepting guarantee of person as if *Eimān* of such person is acceptable then his *Amān* will also be acceptable on the basis of his *Eimān*<sup>1</sup>. According to Abū Ḥanīfah, guarantee will only be valid if the guarantor knows in-depth the philosophy of awarding a guarantee on the grounds whether such guarantee will be beneficial logistically for Muslim state or not. According to him a child is incapable of such decision in respect of a war strategy of Muslim state. Furthermore, he also argues that the right of awarding guarantee is associated with Muslim soldiers not with Muslim non-combatants. Legally a child irrespective of his/her faith not required to participate in war. In the light of these arguments any guarantee awarded by a child will be considered void.<sup>2</sup> According to Abū Bakar al-Rāzī, a child who is fighting with due permission capable of awarding guarantee. Such child will be assumed as a Muslim slave who fights with the permission of his master. If such slave is capable for awarding guarantee, then the Muslim young will also be treated as capable of awarding any guarantee to aliens. While the others Ḥanafī jurists are of the view that a child who participates in fighting has no capability to award guarantee because he does not know the strategic affairs of Muslims and Muslim state.<sup>3</sup> According to Shaybānī, a guarantee given by an idiot is valid if the idiot understands Islam and can elaborate the qualities of Islam. In case if the idiot

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<sup>1</sup>Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 257.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

does not understand Islam and its qualities then the guarantee will not be valid.<sup>1</sup> An apostate cannot be trusted for Islam that is why Shaybānī has excluded him from awarding guarantee to aliens.<sup>2</sup> According to Shaybānī, generally non-Muslim citizens of a Muslim state cannot award guarantee because they have soft corner for aliens and may have a similarity of faith. A non-Muslim citizen can only award guarantee if he is made authorized by a Muslim individual or Muslim state. In this case the non-Muslim exercises the delegated authority given by a Muslim state or individual. Moreover the non-Muslim who exercises the delegated powers must follow the terms and conditions that are attached to the contract of attorney otherwise such guarantee will not be effected.<sup>3</sup> According to Shaybānī, a guarantee given by a Muslim prisoner in an alien state is not valid. A prisoner's guarantee does not yield any benefit to Muslim state but to make himself free from aliens. Usually guarantee is awarded when the guarantor is dominant while a prisoner is dominated and chained in fetters. Therefore, such guarantee will not be binding on other Muslims. The guarantee will be binding on him only. Under such he has to take care of the rules that are required from him because if the aliens fulfill their promise the Muslim prisoner should also fulfill his promise. His contract of guarantee will change his status to a guaranteed Muslim in alien state<sup>4</sup>.

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<sup>1</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1,285.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, 286.

<sup>4</sup> *Ibid.*

### 3.1.3.3 The status of guaranteed aliens who are attacked by Muslims and trapped peoples who embraced Islam

According to Shaybānī, a guarantee awarded by Muslim individuals or Muslim state is binding on all Muslim individuals and Muslim states. If Muslim individuals or Muslim state attacks on the guaranteed aliens and kills them, destroys their properties or disgraces them being knowing their guaranteed status or not, in every situation the attackers are bound to pay the blood money for all the murders and have to redress the properties destroyed and pay the damages for any loss done by them. If they do not know about the guarantee, then the killing will be considered unintentionally and obviously there is blood money in unintentional killing. If they know about the guarantee, then blood money will also be given because the suspicion of *Mūḥārābāh* (wagering war against Islam or Muslims) is attached to all aliens. This argument of Shaybānī draws its authenticity from the verse of the Qur'ān.<sup>1</sup> According to Shaybānī, the captured women and children of guaranteed aliens should not be made captives and will be handed over to them because they are protected with respect to their properties and families by the contract of guarantee between Muslims and the aliens. Dowry will be given to the women who are sexually used. Although sexual intercourse is illegal with such women are protected through a contract of guarantee by any Muslim individual or state but due to the suspicion of *Muharabah* attached to them no penalty will be inflicted on those who have done sexual intercourse with such women. As compensation dowry will be given to these women<sup>2</sup>. If these women gave birth children, these children will be considered free Muslims because their fathers are Muslims. This argument is based on a juristic maxim that

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<sup>1</sup> "That compensation should be given to the killed person's family "If he (killed person) belonged to a people with whom you have a peace treaty, then compensation should be handed over to his family, and a believing slave should be set free" Al-Qūr'ān,4,92.

<sup>2</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 258.

children are associated to the best parent in the context of religion.<sup>1</sup> Sarakhsī has referred several Ḥadith of the Prophet (peace be upon him) and precedents of the Companions in support of this argument<sup>2</sup>.

According to Shaybānī, people who are surrounded by Muslim army will also be protected for their properties, children and other belongings on the condition if they accept Islam. Shaybānī derives this law from the verse of the Qur'ān<sup>3</sup> and several Ahadith of the Prophet (peace be upon him) and precedents of the companions<sup>4</sup>. Furthermore, the wives and the adult children of such people,

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<sup>1</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 258.

<sup>2</sup> According to the Ḥadith of Mūhallāb bin abi Sūfrah "when the city of *al-āhwāz* was conquered by Muslim army in the era of Hazrat *Umār* RA. The inhabitants were already protected through a peace treaty under the sign of Hazrat *Umār* RA. After the settlement of war the women were made captives and were sexually abused by the Muslims. When *Umār* RA came to know, he ordered to return the captive women and to own the children by the Muslims who were born due the sexual intercourse by them. *Sārākhsī* has also quoted another Ḥadith in which the prophet (peace be up him) not only paid the compensation to the legal heirs of *Bānī Jādhīma* who were killed by Muslim Army General Hazrat *Khālīd bin Waleed* RA but also announced that he is not responsible for the act of *Khālīd* RA. {*Ibn Umār* RA says, that the prophet (peace be up him) sent *Khālīd* RA to *Bānī Jādhīma*(name of the tribe in order to embrace Islam) the people of that tribe used the word *Sābā'nā* which did not give the clear message to *Khālīd* RA. *Khalid* RA started killing and making them slave and ordered every of Muslim to kill what he captured among them. *Ibn Umār* RA says I declined to kill my slave and also announced that my friends will also not kill their slaves. Then we informed the prophet (peace be up him) and he said two times: "oh Allah I am not liable for what *Khalid* did. The Prophet (peace be up him) paid the blood money of the deceased persons from the public treasury of Muslims and ordered Hazrat *Ali* RA to pay the compensation to the heirs of of *Bānī Jādhīma* who were killed. Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 261.

<sup>3</sup> "If they (non-Muslim) repent, establish prayer and pay Zākā then let them go". Al- Qur'an, 09:05.

<sup>4</sup> "Ibn Umar RA narrates that the prophet (peace be up him) says, I have been commanded to fight the people until they say there is no God but Allah. So when they say there is no God but Allah then they will be granted protection from me for their lives and property, except by right of justice, and their reckoning is with Allah". Saḥīḥ al-Bukhari, vol.1 (Riadh: al-Ma'ārif, 2002), 25.

When the tribe of *Bānū Qūrāidhā* was trapped by the prophet (peace be up him), some people from them embraced Islam. The prophet (peace be up him) gave them protection although they were trapped.



will not be granted any protection those who do not embrace Islam. They will be considered as spoils.<sup>1</sup>

#### 3.1.3.4 Status of Implied and conditional guarantee

According to Shaybānī, a guarantee can be given verbally or in writing as well as by using an indication that means protection. According to him guarantee will be assumed even the guaranteed person does not know such indication of the guarantor and vice versa as the precedent of Hazrat Umar witnesses. In this incident Harmuzan got guarantee from him while he was not aware of the situation that he has given him guarantee<sup>2</sup>. Awarding guarantee carries the elements of facilitation and easement there is no fixed wordings for it in Muslim International Law.<sup>3</sup> According to Shaybānī, the gestures that are usually people use for granting a guarantee or which stand for an implied guarantee are accepted in this regard. *Amān* will only be consider applicable if it is given in situation when aliens are dominant but will not be effective in a situation when they are surrounded and captured by Muslim army. In the later situation they will be dealt as combatants who will be explained in the next chapter. According to Shaybānī, usually customary indications and gestures are to be used for awarding guarantee as Shari'ah Maxim<sup>4</sup> guides us that if a thing is proved by a particular custom will be dealt as legal and just, in accordance with this maxim Ibn Qudāmāh is of the view that if an alien is found possessing some trading goods indicating him a

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Shaybānī, says it understood that embracing Islam is giving protection to trapped people as it gives protection to free people. Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 261.

<sup>1</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 258.

<sup>2</sup> *Ibid.*, 264.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*,169.

trader in Muslim state will be assumed as guaranteed alien.<sup>1</sup> According to Shaybānī, guarantee is considered effective in all languages. If Muslims give guarantee to aliens in a language which they do not understand, the guarantee will be considered legal and effective it is important for them to listen the wording of the contract otherwise there will be no more guaranteed aliens<sup>2</sup>. Sarakhsī considers *Eīmān* and *Amān* similar things, both award protection of life and honour in Muslim state. According to him *Eīmān* is acceptable in all languages so *Amān* also must be acceptable in all languages. The second reason is that giving guarantee is the right of Allah (public right) so He knows all the languages of humans.<sup>3</sup>

If a guarantee is awarded on fulfilling some conditions by the aliens, then such guarantee will be considered nullified if such conditions are not fulfilled or abridged or violated by the aliens. Muslim state is free to declare such guarantee as ineffective and may inflict punishment on the guaranteed aliens. Such punishment will be either killing aliens or make them captives.<sup>4</sup>

### 3.1.3.5 Muslim state has the right to dismiss a guarantee

According to Shaybānī, guarantee of aliens is directly related to the security and benefit of Muslims. Any guarantee that endangers the security or interest of Muslims can be dismissed by Muslim state being communicating it to the guaranteed aliens<sup>5</sup>. Shaybānī has made the base of this rule of law on the verse of

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<sup>1</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 247.

<sup>2</sup> *Ibid.*, 283.

<sup>3</sup> *Ibid.*, 284.

<sup>4</sup> *Ibid.*, 278.

<sup>5</sup> *Ibid.*, 264.

the Qur'ān.<sup>1</sup> This verse of the Qur'ān indicates that if Muslim state fears treachery of aliens then may announce the treaty is being revoked. This verse gives Muslim state the power of dismissal of the peace treaty. The dismissal of any guarantee will only be dismissed being publically announced. Moreover enough time will be given to aliens to protect themselves<sup>2</sup> and their properties otherwise it will be considered perfidy in accordance with the Qur'ān.<sup>3</sup> Sarakhsi has referred to a precedent of Mu'āwiyah RA regarding the fulfillment of peace treaty with aliens<sup>4</sup>. From this precedent, Sarakhsi concludes, that Muslims must fulfill their covenants with others and have not only to avoid explicit perfidy but also not to indulge suspicion activities that lead to perfidy<sup>5</sup>. According to Shaybānī, if an army chief dismisses the guarantee of aliens during war, in such situation they should be given sufficient time and opportunity to save themselves as well as their properties. This can be possible by announcing a time period in which they can easily vacate their dwellings and letting them to access to their properties to save them accordingly. Those who are not leaving the particular area will be treated as non-Muslim citizens of Muslim state. Poll tax will be imposed on such guaranteed aliens and they lose the aforementioned opportunity to avail it for second time.<sup>6</sup>

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<sup>1</sup> "If you fear treachery from any group, throw back (their covenant) to them, (so as to be) on equal terms: Allah does not love the treacherous". Al-Qūr'ān,8,58.

<sup>2</sup> "If one amongst the Pagans seeks you for guarantee, grant it to him, so that he may hear the word of Allah" Al-Qūr'ān: 09,06.

<sup>3</sup> Al-Qūr'ān: 08,58.

<sup>4</sup> "Reported by *Sūlaim bin āmir*, he says: There was a peace treaty between *Moāwiya* RA and Roman Empire. When the time period of the peace treaty came to expire, *Moāwiya* RA intended to attack on Romans before the time peace treaty had to expire. *Amr bin āmbāsā* RA came and said to him "Allah is greatest, fulfillment of the treat is binding on you and you have to avoid perfidy". *Moāwiya* RA asked him to explain his statement. He replied that I have heard the Prophet (peace be up him) saying: when there is a peace treaty between Muslim and others, the peace treaty will be remained effective unless the treaty expires or dismisses it by any party. *Moāwiya* RA ordered the people to go back from the border". Abu 'Isa Muhammad ibn 'Isa al-Tirmidhī, *Sunan al-Tirmidhī*, Vol.6, 99.

<sup>5</sup> Al-Sarakhsi, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 265.

<sup>6</sup> Al-Sarakhsi, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 287.

### 3.1.3.6 *Amān* during war

According to Shaybānī, if Muslim army finds a person during war in the occupied territory of alien state being claiming to seek guarantee, will be treated as spoils of war. In this situation the person will be considered as imposter claiming for guarantee. If the aforementioned person is found in a place where Muslim army conquer the area but the person did not plead for any guarantee while the person had an opportunity to plead for guarantee and the Muslim army was in position to hear the pleading for guarantee, will be either killed or will be declared as war spoils. In continuation to the said person, if he/she pleads for guarantee being surrendering before Muslim army will be given guarantee. If a person is found in a safe place being surrendering before Muslim Army and the Muslim neither capture him nor kill him, in this situation he will not be killed and will be given guarantee.<sup>1</sup> During war, if a person is found being leaving any protected place and have surrendered to Muslims army, will be given guarantee on the demand of the person regardless caring weapons or not by the person. Conversely if the person was caring any weapons and was giving the impression to fight with Muslim army, will not be given any guarantee<sup>2</sup>. Moreover, if the particulars of such person are not known to Muslim army he will be handover to Muslim state and after the necessary verification the state declare him as a non-Muslim citizen.<sup>3</sup> According to the spirit of guarantee, it can only be awarded in a situation when aliens are in weak position and want to save themselves and properties from any expected loss in war. In accordance with this pen point philosophy, if aliens enter to Muslim state being showing that they are powerful

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<sup>1</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 91.

<sup>2</sup> *Ibid*, 292.

<sup>3</sup> *Ibid.*, 294.

logistically, the Muslim will have an option of awarding them any guarantee or not. Moreover, if guaranteed aliens gather to show any logistic strength against Muslims and intend to make any law and order situation for Muslim state will be declared as aliens and their guarantee will be terminated by Muslim state without giving them any concessions which a Muslim state usually gives to guaranteed aliens. Such persons will not be let to go back to the country or countries of their origin.<sup>1</sup>

According to Shaybānī, if an alien is found in a Muslim state claiming that he has been given guarantee, his claim will not be entertained without sufficient proof. Sufficient proof in a case of individual alien's guarantee is the acknowledgement of guarantee by a Muslim along with furnishing of two witnesses. While for a trader the proof may be trading goods or services and for a messenger may be a possessor of a message or letter from his king otherwise, according to Abū Ḥanīfah if are caught by Muslim army or any Muslim individual will be declared as spoils of war. Abū Ḥanīfah presents reason to his logic as that individual who arrest such aliens in Muslim state considers the property of Muslim state because Muslim state has facilitated and strengthen Muslims individual to arrest such aliens. Without the sufficient protection by state Muslim individual was not capable to arrest them. He exemplifies it with the spoils of war which a Muslim soldier captures from non- Muslims with the help of Muslim Army. Moreover their acceptance of Islam before or after their arrest will not save them from declaring them being spoils of war<sup>2</sup>. According to Shaybānī these aliens will be considered personal property of the individual who has arrested them. Shaybānī declare them as hunted by Muslim individual who is the sole proprietor of his prey. According to him if these aliens accept Islam before their arrest, will

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<sup>1</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1,295.

<sup>2</sup> Ibid.,. 294-297.

be considered freed and if are acknowledged for any guarantee then will be declared as guaranteed aliens.<sup>1</sup>

According to Shaybānī, if a female pleads for guarantee or being the wife of the accompanied Muslim male who remained either prisoner in the alien state or he was given guarantee by the alien state or he is a newly Muslim and the Muslim who accompanies her claims to be his slave girl, in all such cases she will be granted guarantee. In case if she was chained in fitters then statement of a Muslim male would be considered valid for her slavery and she will not be given any guarantee and will be declared as war spoils.<sup>2</sup> Similarly if a Muslim male having some aliens and possessing a property during war and claims they are his captives and the property also belongs to him then then the captives will be declared as guaranteed aliens on the condition if they were not found in the chains and fitters of the possessor and by no witness they were proved as slaves of their master<sup>3</sup>. While the property will follow the status of its owner in due course of proof.<sup>4</sup> If a Muslim having a female alien during war and both claim being spouses then guarantee will be given to the female and will be declared as a non- Muslim citizen because wife follows the legal status of her husband.<sup>5</sup> If there a dispute arises between a guaranteed alien and a Muslim about the ownership of a property in the possession of both the parties, then the dispute will be settled in due course of witnessing to prove the ownership of the property by one of the party. In case if both the parties fail to prove their ownerships then the property will be divided into two divisions. One division will be given to the guaranteed alien and the other

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<sup>1</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 297.

<sup>2</sup> Ibid., 336.

<sup>3</sup> Ibid., 338.

<sup>4</sup> Ibid., 352.

<sup>5</sup> Ibid., 339.

one will be declared as war spoils.<sup>1</sup> According to Shaybānī, the guarantee of an alien during war will be extended to his family members who are dependent on him and to the cattle on whom he carries loads and luggage on the basis of *Istīḥsān* to facilitate aliens to pass easeful life. The independent family members are required to apply for guarantee independently. Otherwise they will be declared war spoils.<sup>2</sup>

### 3.1.3.7 Awarding *Amān* by Muslim army by fulfillment terms and conditions

During war, Muslim army can fix any terms and conditions with alien forces for their safe passage through alien territories in the wide interest of Muslims and Muslim state. As general rule of Muslim International Law if Muslim pledges to avoid any least harm to the properties of aliens then Muslim army must observe it on large scale. Conversely if Muslim army has pledged any large scale harm to the properties of aliens then it is not necessary to observe it on least account<sup>3</sup>.

Exception to this rule of law. All the terms and conditions will strictly be observed by Muslim army but those terms and conditions which's violation do not harm directly or indirectly the alien's interests may be violated only in cases of using water from the wells and canals of aliens. Muslim army can also eat from the fruit and vegetable gardens of aliens without conveying them in case if it is agreed that Muslim army will not destroy aliens fruit and vegetable or crops.

Logistic routing for the passage of Muslim army must be observed. In case of logistic routing, if Muslim army has agreed that it will follow a particular passage

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<sup>1</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 353-354.

<sup>2</sup> *Ibid.*, 345, 346.

<sup>3</sup> *Ibid.*, 301-303.

of the aliens for their safe journey then the agreed terms should be observed mindfully with letter and spirit.

Using the green pastures of aliens. In case if Muslim army has agreed that it will not harm any green pastures and fruit of aliens or will not graze their cattle on their green pastures then Muslim army is bound to observe what has pledged bilaterally. In the aforementioned cases if Muslim army thinks it necessary to revoke any agreement partially or totally then it must convey it to aliens that the peace agreement is being revoked and ineffective between aliens and Muslim army. Without conveying Muslim army cannot violate any agreed terms and conditions otherwise it will amount to war treachery.<sup>1</sup> According to Shaybānī, if aliens offer some incentives in lieu of conditional guarantee for their families and belongings then Muslim army may give them guarantee. If aliens perform the duty or duties for which they had held pledged themselves like if they're given guarantee, then they will open the doors of the fort of alien army to conquer by Muslim army and if they do open the doors then Muslim army is bound to given them conditional guarantee. The provided guarantee to aliens will be inclusive to their family members like their wives, children and captives and belongings excepts gold, silver, ornament and cash money<sup>2</sup>. The captives of the facilitators will be returned to them if they're not distributed or sold in the market. In case if they're sold or distributed among Muslim soldiers then such slave will only be recovered by the aliens if they produce Muslim witnesses to prove their ownership on such slaves. The other belongings including their family members and captives will be recognized to them after the due clarification with proper witnessing. Those who are failed to be ratified in due course of clarification will be declared war spoils. If they claim that we have taken the guarantee for these specific

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<sup>1</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 297-300.

<sup>2</sup> *Ibid.*, 324.



belongings which are not in the hands of Muslims so their statement would be accepted and the belongings would be given back to them. The belongings of aliens in this case will be decided on the basis of prima facie possession. Goods which are in their possession of aliens will not be made subject for any more inquiry but goods in the possession of Muslim army if are claimed by aliens will be decided by the procedure of proper witnessing to be produced by aliens on basis of Muslim witnesses. If aliens fail to prove the ownership of such goods then it will be declared as spoils of war<sup>1</sup>. Under Muslim International Law, Muslim state is only allowed reciprocally to behave with aliens' war prisoners, captives and other properties which is ethical and just in eye of Muslim International Law.<sup>2</sup>

#### **3.1.3.8 Committing sever crimes and its legal impact on guarantee**

According to Shaybānī, committing any kind of crime by a guaranteed alien in Muslim state cannot alter his/her status in the context of the guarantee he/she enjoys, even if the guaranteed person commits a crime of spying against Muslim state. He will be punished for those crimes which amount to human rights and will not be held liable for the crimes which amount to the violation of (rights of Allah) public rights. According to him Crimes like killing of someone intentionally or unintentionally, dacoity, spying the information of Muslims and sending to the alien state, committing adultery with Muslim female or a female of non Muslim citizen of Muslim state, or committing theft do not alter the status of guarantee of aliens. However, Sarakhsī says if a guarantee alien kills anyone intentionally within the territory of Muslim state, he will be given the punishment of retaliation<sup>3</sup>. Shaybānī gives a reason to this rule of law that if the aforementioned

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<sup>1</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 308-322

<sup>2</sup> *Ibid.*, 304.

<sup>3</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 306.

crimes do not alter the status a Muslim citizen then how these can change the status of a guaranteed alien. Sarakhsī supports this rule of Shaybānī on the bases of a letter written by Ḥatīb bin abī balta'ah RA to Quraysh Makkah<sup>1</sup> and the consultation of *Banū Qurydah* with abū Lubābah RA disclosing the intention of Muslim army<sup>2</sup>. Sarakhsī has presented the verses of the Qur'ān in the support of

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<sup>1</sup>"Narrated `Ali: Allah's Apostle sent me, Abu Marthad and Az-Zubair, and all of us were riding horses, and said, "Go till you reach Raudat-Khakh where there is a pagan woman carrying a letter from Hatib bin Abi Balta' a to the pagans of Makkah." So we found her riding her camel at the place which Allah's Apostle had mentioned. We said (to her)," (Give us) the letter." She said, "I have no letter." Then we made her camel kneel down and we searched her, but we found no letter. Then we said, "Allah's Apostle had not told us a lie, certainly. Take out the letter, otherwise we will strip you naked." When she (peace be up him) that we were determined, she put her hand below her waist belt, for she had tied her cloak round her waist, and she took out the letter, and we brought her to Allah's Apostle Then `Umar said, "O Allah's Apostle! (This Hatib) has betrayed Allah, His Apostle and the believers! Let me cut off his neck!" The Prophet asked Hatib, "What made you do this?" Hatib said, "By Allah, I did not intend to give up my belief in Allah and His Apostle but I wanted to have some influence among the (Mecca) people so that through it, Allah might protect my family and property. There is none of your companions but has some of his relatives there through whom Allah protects his family and property." The Prophet said, "He has spoken the truth; do no say to him but good." `Umar said, "He as betrayed Allah, His Apostle and the faithful believers. Let me cut off his neck!" The Prophet said, "Is he not one of the Badr warriors? May be Allah looked at the *Badr* warriors and said, 'Do whatever you like, as I have granted Paradise to you, or said, 'I have forgiven you.'" ' On this, tears came out of `Umar's eyes, and he said, "Allah and His Apostle know better." *Ṣaḥīḥ al-Bukhārī*, vol.10, 194.

<sup>2</sup> "it has been narrated on the authority of A'isha who said: Sa'd was wounded on the day of the Battle of the Ditch. A man from the Quraish called Ibn al-Ariqah shot at him an arrow which pierced the artery in the middle of his forearm. The Messenger of Allah may (peace be upon him) pitched a tent for him in the mosque and would inquire after him being in close proximity. When he returned from the Ditch and laid down his arms and took a bath, the angel Gabriel appeared to him and he was removing dust from his hair (as if he had just returned from the battle). The latter said: You have laid down arms. By God, we haven't (yet) laid them down. So march against them. The Messenger of Allah (may () asked: Where? He pointed to Banu Quraiza. So the Messenger of Allah (peace be upon him) fought against them. They surrendered at the command of the Messenger of Allah (peace be upon him), they consulted *Abū lūbaba* RA and he indicated them to be slaughtered then they said we will come down on the judgment of sā'd. the prophet (Peace be upon him) referred the decision about them to Sa'd who said: I decide about them that those of them who can fight be killed, their women and children taken prisoners and their properties distributed". Ahmad bin Ḥanbāl, *Mūsnaḍ Ahmad* vol.5, 233.

this rule of law.<sup>1</sup> Instead of the aforementioned two incidents Allah did not call the wrong doers as non- Muslims.<sup>2</sup> This verse was revealed to redress the behavior of Muslims for not consulting the enemies of Muslims and Allah. From the above two verses it is known that a *Mū'mīn* is remained *Mū'mīn* even after the committing of a capital crime. Same is the case with a guaranteed person that his contract of guarantee will be effective even after committing a capital crime<sup>3</sup>. According to Mālik the contract of guarantee will come to its end if the guaranteed person commits the aforementioned acts because he got the guarantee that he will not go against any law of the Muslim state. If he could not fulfill the agreed terms and conditions of the guarantee then his guarantee will be assumed terminated.<sup>4</sup> Courts of Muslim have the jurisdiction to hear all kinds of cases of guaranteed aliens during their stay in Muslim state<sup>5</sup>. Shaybānī says courts of Muslim state do not have the jurisdiction to hear the cases of a guaranteed aliens which are occurred beyond the jurisdiction of Muslim state. In case if guaranteed aliens embrace Islam or change their statuses from guaranteed aliens to non- Muslim citizens then the courts are bound to hear the cases of personal loans and cash deposits only.<sup>6</sup> According to Shaybānī and Abū Hanīfah says, *Hād* punishment will not be implemented on guaranteed aliens because they are not the citizens of Muslim state. They are not bound to follow Islamic law<sup>7</sup>. According to Shaybānī

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<sup>1</sup> "O you who have faith! Do not take My enemy and your enemy for friends, [secretly] offering them affection, if you have set out for *jihad* in My way and to seek My pleasure, for they have certainly denied whatever has come to you of the truth, expelling the Apostle and you, because you have faith in Allah, your Lord. You secretly nourish affection for them, while I know well whatever you hide and whatever you disclose, and whoever among you does that has certainly strayed from the right way" *Al-Qūr'ān*: 60, 01.

<sup>2</sup> "O you who have believed, do not betray Allah and the Messenger or betray your trusts while you know [the consequence]" *Al-Qūr'ān*: 08, 27.

<sup>3</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 306.

<sup>4</sup> *Ibid.*, 305.

<sup>5</sup> *Ibid.*, 406.

<sup>6</sup> *Ibid.*

<sup>7</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 306.

only *Qadhf* (Labeling) and *Qisās* (Retaliation) punishments will be implemented on guaranteed aliens because it's a matter of human rights. If a guaranteed alien is killed by a non-Muslim citizen, then *Qisas* (Retaliation) punishment will not be implemented on non-Muslim citizen. If guaranteed aliens commit a crime in Muslim state *tāzīr* punishment will be implemented on him. Any wrong done by guaranteed alien to any citizen of Muslim state will result in paying damages to affected party.<sup>1</sup>

In the era of Shaybānī, Muslims were dominant and Muslim International Law was enacted among the Muslim armies. The contemporary International Law was not enacted. The Nation States were not sovereign states as we see today. Legal complexities with reference to Muslims and non-Muslims' interaction were not highlighted. Therefore, Muslims' every international dealing was accepted to non-Muslims. Now, the international trends are changed and Muslims are made dominated with all aspects. Islam is blamed for promoting solo flight at international level. MIL is accused for meeting not several legal needs of nation states and is held liable for encouraging terrorism and extremism. CIL is claimed as the only solution in the emerging political needs of Nation States at international level. It is said that a secular international law like CIL is more acceptable to all the nation states because a particular religious international law can only meet the political needs of that nation not all the nation states. It becomes important to address these core issues related to both the laws with reference to peace and waging war phenomena presented by the laws.

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<sup>1</sup> Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 307.

## CONCLUSION

This chapter may be concluded as that Shaybānī considers *Amān* a guarantee which may be awarded to Muslims by non-Muslim or aliens state. Moreover, guarantee may also be awarded by Muslims individual or Muslim state to non-Muslims. He also believes in territorial jurisdiction of the state. Any illegal act committed by Muslims beyond the territorial jurisdiction of Muslim state will not be heard by the courts of Muslim state. According to Shaybānī, ideologically all Muslims are bound to follow Islamic law within or beyond the territorial jurisdiction of Muslim state. The impact of territorial jurisdiction is that Muslim state is bound to protect the rights of all those who are living within the territorial jurisdiction of Muslim state without any religious discrimination. Conversely, Muslim state is not bound to protect the rights of those who are living beyond the territorial jurisdiction even they are Muslims. According to Shaybānī, Muslim state and all Muslim individuals are equally capable without any gender discrimination of awarding guarantee. The authority of awarding guarantee by Muslim individuals cannot be snatched by Muslim state. Once the guarantee is awarded to aliens, their all rights will be protected by Muslim state. The status of guaranteed persons is just like the status of the citizens of Muslim state with reference to their fundamental rights. Shaybānī is of the view that Muslim state is not only bound to protect guaranteed persons from internal threat but it is bound to protect them from external as well. According to Shaybānī, the guarantee of the protected persons will not be terminated by committing sever crimes like adultery with Muslim females.

## CHAPTER FOUR: THE DOCTRINE OF *AMĀN* AND *JUS AD BELLUM* (CAUSE OF WAR)

### INTRODUCTION

Muslim International Law allows war against aggressors If justified cause of war is there, if there is no justified cause of war then division of the world into different parts does not necessarily create hostile relations between Muslim and non-Muslim.

All People are divide on the basis of ideology into two kinds Muslims and non-Muslims which are two different nations. Due this difference between Muslims and non-Muslims, hypothetically the blood, honor and property of non-Muslims are not protected while in practice their aggression makes their blood, honor and property permissible to be dismantled. The second division that divides humans into two sections is the territorial division (*Dār*). Those humans which resides either temporarily or permanently within the territorial boundaries of Muslim state are called citizens of Muslim state. The properties, honor and blood of such inhabitants are protected by the Muslim state irrespective of their faiths. Conversely those humans who live beyond the territorial jurisdictions, their properties, honor and blood are not guaranteed by Muslim state. The above two ideological and territorial divisions of humans may result one of the peace or hostile relations. It is assumed that if there is no aggression and violation of the rights of Muslims by any non-Muslim state then relations with such state or states will be peaceful otherwise will be hostile<sup>1</sup>. Hostile relations only emerge with three conditions:

- 1- When non-Muslims take aggression against Muslim state
- 2- Drive Muslims out of their native land

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<sup>1</sup> " Allah forbids you not, with regard to those who fight you not for (your) Faith nor drive you out of your homes, from dealing kindly and justly with them: for Allah loveth those who are just. " Surah 60 verse 08.

### 3- Help enemy of Muslims in deriving them out of their native land.<sup>1</sup>

#### 4.1 Shaybānī view point about cause of war

Shaybānī did not discuss the issue of the cause of war directly as other scholars have discussed. He is of the view that Muslims should invite non-Muslims to Islam before starting any war against them. He is of the view that if Muslims are going to start fighting against non-Muslims in the battle of war then Muslims should also invite them to Islam before killing them. He argues from the verse of the Qur'ān which orders inviting people to the way of Allah with wisdom and etiquettes<sup>2</sup>. Due to this, the Prophet (peace be upon him) was used to order commander-in-Chiefs to invite non-Muslims to the way of Allah<sup>3</sup>. Imam Kāsānī has a bit different view from Shaybānī, according to him Muslims are bound to invite non-Muslims to the way of Allah in the battle of war. Being not inviting non-Muslims to Islam, participation in war is not obligatory for Muslims. That is to leave non-Muslims not pretending of being not invited to Islam<sup>4</sup>. While Shaybānī says it's a matter of fairness for Muslims to invite non-Muslims to Islam. He further says if non-Muslims are already invited to Islam, in a such situation it will also be a matter of justice for non-Muslims to offer them for paying poll tax before starting war against them<sup>5</sup>. According to him all non-Muslims other than the

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<sup>1</sup> " Allah only forbids you, with regard to those who fight you for (your) Faith, and drive you out of your homes, and support (others) in driving you out, from turning to them (for friendship and protection). It is such as turn to them (in these circumstances), that do wrong ". Al-Qūr'an: 60, 9.

<sup>2</sup> "Invite [all] to the Way of thy Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious: for thy Lord knoweth best, who have strayed from His Path, and who receive guidance" *Al-Qur'ān*: 16,125.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 76.

<sup>4</sup> 'Alā al-ddīn, Abū bakar bin Māsūd bin Ahmad al-Kāsānī, *Bādāi al-Sānāi* vol.7 (Bairut: Dār-kutub al- 'Imiyyah, 1986), 100.

<sup>5</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 76.

pagans of Arab and apostates will be offered poll tax based on the verse of the Qur'ān<sup>1</sup>.

From the above viewpoint of Shaybānī, it seems that Shaybānī does not believe that the cause of war is infidelity. He focuses on inviting non-Muslims to Islam or poll tax before waging war against them. He differentiates that those non-Muslims who are not invited to Islam will be invited to accept Islam and those who are invited to Islam but they did not embrace Islam in such a situation they will be offered to pay poll tax and live in Muslim state peacefully as non-Muslim citizens. If once the message of Islam has been conveyed to the non-Muslims with whom Muslims are going to fight war against them, in such situation no need to invite them again for accepting Islam. Further he says if non-Muslims are killed by Muslims without inviting them to Islam, Muslims will not bound to pay blood money or any compensation. According to him blood is either protected by faith or by a guaranty awarded by a Muslim individual or state<sup>2</sup>. According to him if re-inviting non-Muslims results any danger to Muslims then no need to invite them again<sup>3</sup>. If the view point of Al-Shāfi'ī and Ḥanbālī School of thoughts regarding the cause of war is accepted, then the exceptions announced by the Prophet (peace be upon him) that is not to kill the children and women of non-Muslims in war and all those who are not combatant will not be meet. Moreover, if the cause of war is infidelity then the war against non-Muslims will be continued till their total subjection to Islam and it will become difficult to act upon the

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<sup>1</sup> "Fight those who believe not in Allah nor the Last Day, nor hold that forbidden which hath been forbidden by Allah and His Messenger, nor acknowledge the religion of Truth, [even if they are] of the People of the Book, until they pay the Jizya with willing submission, and feel themselves subdued" Al-Qur'ān: 9,29.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 77.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 77



commandment of Allah of no compulsion in the case of non-Muslims<sup>1</sup>. Furthermore, due to the acceptance of the view, non-Muslims will have only one option of accepting Islam. This view point results a perpetual enmity between Muslims and non-Muslims. This will also make the living of non-Muslims in a Muslim state permanently in lieu of giving poll tax or temporary by getting guarantee from Muslims void and illegal. By accepting this point of view peace relations with non-Muslims will be considered prohibited while the Qur'ân does not prevent Muslims from making good relations with non-Muslims who are peaceful to Muslims<sup>2</sup>. Moreover, any peace treaty with non-Muslims will also be considered prohibited while the Prophet (peace be upon him) by himself did make a peace treaty with the pagans of Makkah. Similarly, giving any guarantee to non-Muslims will also be considered unlawful while Allah orders to give guarantee to non-Muslims if they seek it.<sup>3</sup>

According to Shaybānī the cause of war is aggression. He asserts that if pagans of Arab are captured by Muslims being causing no aggression they will not be killed even they refuse to accept Islam<sup>4</sup>. From the above explanation of Shaybānī, it is clear that if the pagans of Arabs are captured in aggression then they will be offered to accept Islam in case of refusal they will be killed. According to him aggression makes the blood of non-Muslims permissible to be shed. Ibn Qayyim

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<sup>1</sup> "Let there be no compulsion in religion: Truth stands out clear from Error: whoever rejects evil and believes in Allah hath grasped the most trustworthy hand-hold, that never breaks. And Allah heareth and knoweth all things". *Al-Qūr'ân*: 2,256.

<sup>2</sup> "Allah does not forbid you, with regard to those who do not fight you on account of your religion nor drive you out of your homes, to treat them with goodness and to be just to them; truly, Allah loves those who are just. Indeed, Allah forbids you (only) with regard to those who fight you on account of religion and drive you out of your homes, and assist (others) in driving you out, that you turn to them (in friendship); and whoever turns to them (in friendship), they are wrong-doers" *Al-Qur'ân* 60,8,9.

<sup>3</sup> "If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah; and then escort him to where he can be secure. That is because they are men without knowledge". *Al-Qur'ân*:9,6.

<sup>4</sup> Muhammad bn Abi Saḥl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 2234.

al-Jawziyyah also endorses the view point of Shaybānī and asserts that the cause of war against non-Muslims is aggression not infidelity<sup>1</sup>. He further says that war is obligatory for Muslims against those non-Muslims who are belligerent not against all non-Muslims. He gives logic for this rule of law that the Prophet (peace be upon him) used to fight against those who did aggression against Muslims<sup>2</sup>. Now it's become important to mention Shaybānī's view point regarding the pagans of Arab and apostates.

#### 4.1.1 Apostasy and Paganism of Arab

Shaybānī differentiates non-Muslims from apostates and pagans of Arab. According to him apostates and Pagans of Arab have only option to accept Islam. If they refuse to embrace Islam, war will be waged against them<sup>3</sup>. He argues from the verse of the Qur'ān which orders for fighting against the desert Arabs till they embrace Islam<sup>4</sup>. On the basis of these arguments, Shaybānī says Muslim state cannot sign peace treaty or guarantee agreement with the pagans of Arab. They will be invited to embrace Islam otherwise they will be killed, their women and children will be made captives<sup>5</sup>. Shaybānī divides Pagans of Arab into two classes on the basis of *Da'wāh*. One who are formally offered Islam and the second one who are not invited to Islam. Those pagans of Arab who are not invited to Islam, if they are captured in war without any resistance will not be killed. In such

<sup>1</sup> Ibn Qayyim al-jawziyyah, *Aḥkām Ahl al-Dhimma*, vol.1 (Dmmam: Rimadi linnashr,1997),110.

<sup>2</sup> Ibid.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 76.

<sup>4</sup> "Say to the desert Arabs who lagged behind: "Ye shall be summoned [to fight] against a people given to vehement war: then shall ye fight, or they shall submit. Then if ye show obedience, Allah will grant you a goodly reward, but if ye turn back as ye did before, He will punish you with a grievous Penalty" *Al-Qur'ān*:48,16.

<sup>5</sup> Mahmood Ahmad Ghazi, *The Shorter Book on Muslim International Law* (Islamabad: Islamic Research Institute, 1998),46.

situation, Muslim should offer them Islam and if they refuse to accept Islam, they will be given imprisonment and will not be killed<sup>1</sup>. Sarakhsī furnishes a logic of not killing the Pagans of Arab in a situation because they are captured without war and aggression on their behalf. According to him, poll tax will also not be offered to them because they are not *Ahle Kitāb*<sup>2</sup>. According to Shaybānī, if a Muslim leaves Islam, he will be given the opportunity to re-accept Islam otherwise he will be executed<sup>3</sup>. Apostasy is worse than any disbelief. According to him, immolation of apostate is prohibited. He will be considered dead if he leaves the domain of Islam and his property will be distributed and his all transactions made will be void once he enters to the domain of war. He will not be given any guarantee to inter into the domain of Islam or to be the non-Muslim citizen of Muslim state in lieu of giving the poll tax<sup>4</sup>. Shaybānī also differentiates apostasy on the bases of gender, male will be executed if he refuses to accept Islam while female will be given imprisonment till to accept Islam or died in jail<sup>5</sup>. According to Muhammad Hamidullah apostates will be the subject of Muslim International Law if they have enough power or occupying a territory of Muslim state otherwise they will be the subject of domestic law and they will not be dealt under the Muslim International Law. He further says that apostasy is also disbelieving in any and every article of Islamic faith<sup>6</sup>. He divides the enemy of Muslims into four kinds:

### 1- Apostates

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 2234.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 2234.

<sup>3</sup> Mahmood Ahmad Ghazi, *The Shorter Book on Muslim International Law* (Islamabad: Islamic Research Institute, 1998),38.

<sup>4</sup> Ibid,40-46.

<sup>5</sup> Ibid,41.

<sup>6</sup> Muhammad Hamidullah, *The Muslim Conduct of State* (Lahore: India Kashmiri Bazar,1954),160-161.

- 2- Rebels
- 3- Highwaymen and pirates,
- 4- Non-Muslims combatants<sup>1</sup>.

From the above explanation of Shaybānī and Muhammad Hamidullah, it seems that according to Shaybānī apostates are the subjects to Muslim International Law either they have power or occupied any territory of Muslim state or not. He has mentioned some cases of individual apostates for instance if an apostate of having no power and has occupied no territory of Muslim state leaves the domain of Islam and attaches to the domain of war he will be considered dead and his property will be distributed among his legal heirs. While according to Muhammad Hamidullah, only those apostates are the subject to Muslim International Law who have enough power to challenge the writ of the Muslim state and have occupied any territory of Muslim state. According to Shaybānī, non-Muslims other than pagans of Arab and apostates are of two kinds: Enemy of Muslims<sup>2</sup> and non-enemy of Muslims. According to him Muslims should invite non-Muslims who are the enemy of Muslims in the battle of war either to accept Islam or surrender to the supremacy of Muslim state and pay poll tax. Shaybānī gives logic for the justification of invitation of the non-Muslims to Islam during war, says they (non-Muslims) should not think about Muslims that they fight against non-Muslims to get their properties and make their women and children captives<sup>3</sup>. If they reject these two options, then Muslims should start fighting against them till they surrender to Muslim state or accept Islam<sup>4</sup>.

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<sup>1</sup> Muhammad Hamidullah, *The Muslim Conduct of State* (Lahore: India Kashmiri Bazar, 1954), 160.

<sup>2</sup> According to Shaybānī, enemies of Muslims are those non-Muslims who belong to the domain of war (*Dār-ḥarb*) and non-enemy of Muslims either belongs to the domain of treaty or (*Dār-āhd*) domain of infidelity (*Dār-Kufr*)

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 76.

<sup>4</sup> Ibid. 76.

It can be concluded that the permanent relations between Muslims and non-Muslims are based on the doctrine of peace while *Jus ad Bellum* is not disbelief (*Kufr*) rather than aggression<sup>1</sup>.

#### **4.2 Acts of hostility by non-Muslims which amount to aggression:**

These actions are considered aggression in Muslim International Law

##### **4.2.1 Foreign Aggression against Muslim State (*Dār-al-Islam*)**

In case of aggression on the domain of Muslim state by non-Muslims, the aggressors will be considered belligerents and war against belligerents becomes obligatory for Muslims according to the Qur'ān<sup>2</sup>. Shaybānī considers aggression on Muslim state as the main cause of war. If aggression is done by a non-Muslim state on Muslim state war will be obligatory on Muslims against the aggressing state. He asserts that if pagans of Arab are captured by Muslims being causing no aggression they will not be killed even they refuse to accept Islam<sup>3</sup>. According to Shaybānī, if the pagans of Arabs are captured while causing aggression will be offered to accept Islam in case of their refusal will be killed. According to him aggression makes the blood of non-Muslims permissible. Ibn Qayyim al-Jawziyyah also endorses the view point of Shaybānī and asserts that the cause of war against non-Muslims is aggression not infidelity<sup>4</sup>. Further he is of the view that war is obligatory for Muslims against non-Muslims belligerents not against common non-Muslims. He gives logic to this rule of law that the Prophet (peace

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 2234.

<sup>2</sup> "Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressor" Al-Qur'ān: 2,190.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 2234.

<sup>4</sup> Ibn Qayyim al-Jawziyyah, *Aḥkām Ahl al-Dhimmah*, vol.1 (Dmmam: Rimadi linnashr,1997),110.

be upon him) used to fight against those who did aggression against Muslims<sup>1</sup>. To defend the domain of Islamic state, the Prophet (peace be upon him) did preemptive aggressions like the battles of Khayber, Bano Mustāliq and Tabūk.<sup>2</sup>

#### **4.2.2 Tyranny on Muslims beyond the territorial Jurisdiction of Muslim State**

As discussed in the preceding section that Muslim state is bound to defend the rights of its inhabitants live within its territorial jurisdiction. Muslims who are living beyond the territorial jurisdiction of the Muslim state if they seek logistic support from Muslim state, Muslim state will make their support ensured because Muslims are one nation by virtue of their ideology.<sup>3</sup>

#### **4.2.3 Persecution is also considered an aggression**

Persecution means preventing people from accepting Islam, or compelling people to accept faith without their free consent<sup>4</sup>. Allah orders Muslims to fight against those non-Muslims who oppress Muslims not to accept Islam. The fight against such non-Muslims will be continued till the persecution comes to its end.<sup>5</sup>

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<sup>1</sup> Ibn Qayyim al-Jawziyyah, *Aḥkām Ahl al-Dhimma*, vol.1 (Dmmam: Rimadi linnashr,1997),110.

<sup>2</sup>Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),218.

<sup>3</sup> “And why should ye not fight in the cause of Allah and of those who, being weak, are ill-treated [and oppressed]?- Men, women, and children, whose cry is: “Our Lord! Rescue us from this town, whose people are oppressors; and raise for us from thee one who will protect; and raise for us from thee one who will help” Al-Qur’ān: 4,75.

<sup>4</sup>Sayed abū ā’lā al-Mawdūdī, *Al-Jihad fil-Islam* (Lahore: Idara-e-Tarjuman Al-Qur’ān(ptv)Islamic publicaitons,2011),104.

<sup>5</sup>“And slay them wherever ye catch them, and turn them out from where they have Turned you out; for tumult and oppression are worse than slaughter; but fight them not at the Sacred Mosque, unless they [first] fight you there; but if they fight you, slay them. Such is the reward of those who suppress faith”.Al-Qur’ān: 2,191.

“And fight them on until there is no more Tumult or oppression, and there prevail justice and faith in Allah; but if they cease, Let there be no hostility except to those who practise oppression” Al-Qur’ān: 2,193.

#### 4.2.4 Aggression against Islam

Muslim state cannot compel a non-Muslim for accepting Islam amounts to immorality and injustice<sup>1</sup>. Islam believes in freedom of thought and expression and gives a free choice for accepting Islam or disbelieving in it<sup>2</sup>. Conversely Islam will not be degraded and disdained by anyone. It declares all kinds of contempt and disrespect of the symbols of Islam as aggression<sup>3</sup>. The Qur'ān urges for fighting against those who contempt Islam and defame the Prophet (peace be upon him) and also considered it as *Jus ad bellum*<sup>4</sup>. Any individual or individuals who commit to contempt Islamic Symbols even beyond the territorial jurisdiction of the domain of Muslim state with the assistance of their mother state, will be considered aggression of the individuals or the concerned state against Muslims and Muslim state. Muslims state is bound to take arm action against such individuals or state.

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<sup>1</sup>" Let there be no compulsion in religion: Truth stands out clear from Error: whoever rejects evil and believes in Allah hath grasped the most trustworthy hand-hold, that never breaks. And Allah heareth and knoweth all things" Al-Qur'ān: 2,256.

<sup>2</sup>"Say, "The truth is from your Lord": Let him who will believe, and let him who will, reject [it]: for the wrong-doers We have prepared a Fire whose [smoke and flames], like the walls and roof of a tent, will hem them in: if they implore relief they will be granted water like melted brass, that will scald their faces, how dreadful the drink! How uncomfortable a couch to recline on!" Al-Qur'ān: 18,29.

<sup>3</sup>Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shari'ah acadāmī,2012),222.

<sup>4</sup> "Hast thou not turned Thy vision to those who were given a portion of the Book? they traffic in error, and wish that ye should lose the right path. But Allah hath full knowledge of your enemies: Allah is enough for a protector, and Allah is enough for a Helper. Of the Jews there are those who displace words from their [right] places, and say: "We hear and we disobey"; and "Hear what is not Heard"; and "Ra'ina"; with a twist of their tongues and a slander to Faith. If only they had said: "What hear and we obey"; and "Do hear"; and "Do look at us"; it would have been better for them, and more proper; but Allah hath cursed them for their Unbelief; and but few of them will believe" Al-Qur'ān: 4,44,45,46.

#### 4.2.5 Mischief within Muslim State

There are two kinds of Preventive Laws for controlling any mischief within the domain of Muslim state:

- 1- Domestic Criminal Laws like *Hudūd*, Retaliation (*Qisās*) and *Ta'zīr*,
- 2- Muslim International Law.

Mischief within the domain of Muslim state is also considered aggression against Muslim state. The following situations amount to mischief:

- A. Degrading of the Symbols of Islam (*Sha'er-e-Islam*) or Defaming the Prophets of Islam.
- B. Apostasy
- C. Breach of *Dhimah* by guaranteed aliens.<sup>1</sup>
- D. Dacoity
- E. Rebelling by Muslims

Mischief committed by a group of non- Muslims having enough power within the domain of Muslim state, will be dealt by the Muslim International Law and if the culprits have no power to challenge the writ of Muslim state then will be dealt by domestic law of the Muslim state.<sup>2</sup>

#### 4.2.6 Breach of Peace Treaty

Islamic law stresses on the observance of peace treaty by Muslims in every situation. If non-Muslims breach peace treaty with Muslims, their action will be also considered as aggression.<sup>3</sup>

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<sup>1</sup> Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī, 2012), 224.

<sup>2</sup> Muhammad Hamidullah, *The Muslim Conduct of State* (Lahore: India Kashmiri Bazar, 1954), 160-161

<sup>3</sup> "Will ye not fight people who violated their oaths, plotted to expel the Messenger, and took the aggressive by being the first [to assault] you? Do ye fear them? Nay, it is Allah Whom ye should more justly fear, if ye believe" Al-Qur'ān: 9, 13.



### 4.3 *Amān* and Peace Treaties

It would be difficult to comprehend the relation between Muslims and non-Muslims without mentioning the role of peace treaties. In this section important issues related to peace treaties are discussed like; Is peace treaty allowed to be signed with non-Muslims? Is peace treaty to be considered with non-Muslims a temporary ceasefire or it should be explicit in this connection? Do peace treaties are contracted for a fixed period?

How peace treaties are to be terminated? What will be the status of peace treaty when non-Muslims violate any provision of it? Can Muslim state terminate a peace treaty? Up to what extent Muslim state is bound to observe peace treaty? Is Muslim state bound to declare null and void any peace treaty before its termination for attacking on non-Muslims in case of any violation? These questions are addressed below as:

#### 4.3.1 Nature and duration of Peace Treaties

According to the Muslim International Law, peace treaty is to be concluded with non-Muslims if they incline for it<sup>1</sup>. But the terms and conditions of treaty may vary with time and space. According to Imam Al-Shāfi'i peace treaty is permitted and said that the Prophet (peace be upon him) had contracted the Peace Treaty of *Mithaq-e- Madinah* with the Jews of Madinah<sup>2</sup>. According to him the following conditions, if are fulfilled, may validify any peace treaty with non-Muslims:

##### A. Weakness of Muslims.

According to him, peace treaty will be considered valid if Muslims are weak and cannot fight against non-Muslim. He is also of the view that if non-Muslims demand some consideration in lieu of peace treaty it may also be agreed if Muslims

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<sup>1</sup> "But if the enemy incline towards peace, do thou [also] incline towards peace, and trust in Allah: for He is One that heareth and knoweth [all things]" ..Al-Qur'ān: 8,61.

<sup>2</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'i, *Al-Umm*, vol.4 (Bairut: Dār-Marifah, 1990),199.

see suited. Similarly, Muslims can also demand any consideration in lieu of peace treaty but that will be for specific time only<sup>1</sup>.

#### B. Limited time.

According to Imam Al-Shāfi'ī , peace treaty may be signed with non-Muslims for a limited time. He is of the view that Muslim state cannot make a peace treaty without mentioning a specific time period because not mentioning a specific time such peace treaty will be considered forever which is not permitted. He gives reason to this rule of law that the Prophet (peace be upon him) had made Peace treaty of Hudaibiyyah for limited time of 10 years because *Jus ad bellum* (cause of war) according to him is disbelief. Moreover, the Prophet (peace be upon him) had the obligation to fight the pagans of Arab till they accept Islam and other than the pagans of Arab were to pay poll tax in case of denying Islam<sup>2</sup>. In addition to the view point of Al-Shāfi'ī , a Muslim state can sign any peace treaty without mentioning a specific time, if it keeps the option of termination reserved<sup>3</sup>. The option of termination immunes Muslim state from a perpetual binding and allows it to set aside the treaty whenever it thinks fit.<sup>4</sup>

#### C. Time must not exceed 10 years.

According to Imam Al-Shāfi'ī , the limitation of the time is 10 years because the maximum time for which the Prophet (peace be upon him) had contracted Hudaibiyyah peace treaty for 10 years only. He is of view the Muslims should follow this rule of law at any cost. If Muslim state is still weak then it will renew the treaty for another period of 10 years or less<sup>5</sup>. *Imām* Al-Shāfi'ī did not mention any logic for the renewal of peace treaty by Muslim stat.

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<sup>1</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.4 (Bairut: Dār-Marifah, 1990),199.

<sup>2</sup> Ibid200

<sup>3</sup> Ibid.

<sup>4</sup> Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī,2012),294.

<sup>5</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.4 (Bairut: Dār-Marifah, 1990),200.

According to Ibn Qudāmah al-Ḥanbali peace treaty with non-Muslims is permissible with or without consideration. According to him peace treaty with non-Muslims would be permissible only if it fulfills the following conditions:

A. Weakness of Muslims

According to him, peace treaty will be considered valid when Muslim state does not have sufficient power to fight against non-Muslims. Peace treaty is signed to achieve power and strength during peace. Getting power by Muslim state in the result of peace treaty is not the actual reason. The actual reason according to most of the jurists is weakness of Muslim state that validify the legality of the treaty.

B. Peace treaty yielding accepting Islam

According to Ibn Qudāmah, the peace treaty would also be considered valid if Muslims expect embracing Islam from non-Muslims.

C. Pay poll tax by non-Muslims

Peace treaty will also be valid if non-Muslims pay poll tax to Muslim state in the consequence of peace treaty. Moreover, he is of the view that Muslim state can conclude peace treaty for getting any benefit other than acceptance of Islam and Paying poll Tax by non-Muslims.<sup>1</sup>

D. Limited time. According to him, peace treaty must be for limited time and it must not be for more than 10 years because peace treaty for unlimited time suspends the spirit of *Jihad* against non-Muslims. This rule of law is based on the doctrine of "Perpetual Hostile Relations between Muslims and non-Muslims".

E. Peace Treaty is a bilaterally a Binding Contract

According to Ibn Qudāmah, peace treaty is binding for both the parties. He explicitly says that option of the termination of peace treaty would not be given to none of the parties. He gives logic for this rule of law that giving the option of termination to either party is against the spirit of peace treaty<sup>2</sup>.

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<sup>1</sup> Ibn Qudāmah, al Mughni vol.9 (Egypt: Maktabt ul Qahirah,1968),297.

<sup>2</sup> Ibid.

Ibn Qudāmah 's view point is different from the view point of Imam Al-Shāfi'i regarding giving the option of terminating peace treaty. According to Imam Al-Shāfi'i , peace treaty is to be signed for a limited time but it would also be possible that the peace treaty would be for unlimited time provided that if Muslim state has the option of termination. Ibn Qudāmah does not recognize the option of termination for any of the parties. According to him the option of termination is against the spirit of peace treaty.

According to Shaybānī, as already discussed that "*Jus ad bellum*" is considered aggression against Muslim state. According to him peace treaty will be signed with non-Muslims when there is Muslims interest arises. Moreover, peace treaty is not a binding contract which a Muslim state can suspend it by any unilateral formal declaration. Imam Kāsānī is of the view that peace treaty is the suspension of war against non-Muslim belligerents. It may be signed with them when Muslims have any interest in the peace treaty<sup>1</sup>. If Muslims do not have any interest then Muslim state should not inclined to it<sup>2</sup>. He is also of the view that peace treaty is not a binding contract, Muslim state has the power to terminate it with a formal declaration and must give sufficient time to hostile state for the necessary safety of its non-combatant components. According to him, peace treaty may be for both periods of time limited and unlimited<sup>3</sup>. According to Ibn Qayyim al-Jawziyyah, peace treaty may be signed for limited time and unlimited time also. He is of the view if peace treaty contracted for unlimited time will not be bilaterally binding, both parties will have the option of termination. If peace treaty is for

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لا يجوز المهادنة مطلقاً من غير تدبير مؤقت، لأنه يُغضي إلى ترك الجهاد بالكيفية

<sup>1</sup> 'Alā al-dīn, Abū bakar bin Māsūd bin Ahmad al-Kāsānī, Bādāi al-Sānāi vol.7 (Bairut: Dār-kutub al- 'Imiyyah, 1986),108.

<sup>2</sup> "Be not weary and faint-hearted, crying for peace, when ye should be uppermost: for Allah is with you, and will never put you in loss for your [good] deeds"Al-Qur'an: 47,35.

<sup>3</sup> 'Alā al-dīn,Abū bakar bin Māsūd bin Ahmad al-Kāsānī, Bādāi al-Sānāi vol.7 (Bairut: Dār-kutub al- 'Imiyyah, 1986),109.

limited time it will be binding on both the parties. At the same time both the parties will have the option of termination with a condition of informing each one.<sup>1</sup>

According to Muhammad 'Arafah al-Dāsūqi al- Mālīki, the time duration of peace treaty is the mandate of Muslim state. He is of the view that a valid peace treaty fulfills the following four conditions:

- E. Such treaty must be contracted by a Muslim state or its representative (Imam *ao nā' būhū*)
- F. It must be contracted in the general interest and welfare of Muslims
- G. The treat must not contain any voidable condition according Islamic Fiqh.
- H. The duration for which the treaty is contracted is better to not exceed four months but Muslim state may contract it for more than four months as a discretionary mandate<sup>2</sup>.

Muslim jurists are unanimously agreed on the permissibility of peace treaty by a Muslim state with non-Muslim but are divided on the time-period, and other requisites of peace treaty. According to Imam Al-Shāfi'i and al-Ḥanbali, peace treaty must be for a limited period of time and it must not be exceeded ten years. Muslim state can renew the treaty after its time of expiry. According to them peace treaty is a binding contract and have dividing opinion regarding the option of termination. According to Imam Al-Shāfi'i peace treaty may be contracted for unlimited time if the option of the termination of treaty possesses by Muslim state. According Ibn Qudāmah, none of the parties has any option of termination of peace treaty because it contradicts the spirit of peace treaty. On the other hand, Shaybānī, and Kāsānī are of the view that peace treaty is not a binding contract and it may be for unlimited time also and both parties have the option of terminating the treaty with a condition of formal bilateral declaration. The view

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<sup>1</sup> Muhammad bin Abi Bakr bin Ayub bin Saad, Shams-u-ddin Ibn Qayyim al-Jawziyah, *Aḥkam ahl al-dhimmah* vol.2 (Damam: Ramadi linnashr,1997),876.

<sup>2</sup> Muhammad Arafa al-Dāsūqi, *Ḥashiyat al-Dāsūqī alā Sharḥ al-Kabīr* VOL.2 (Bairūt: Dār-Fikār,n.d),206.

point of Muhammad 'Arafah al-Dāsūqi al- Māliki is similar to the view point of Shaybānī, and Kāsānī, regarding the limit of time for which treaty is contracted. All these jurists are agreed on the mandate of Muslim state about the time-period of the treaty. Hanfiyyah and Mālikiyyah schools of thought are agreed that peace treaty will only be contracted in the general interest and welfare of Muslims and Muslim state. Muslim state can terminate the treaty in the general interest of Muslims and Muslim state with a formal declaration. Ḥanābilah has two different opinions regarding the requisites of peace treaty like the limit of time for which a peace treaty is contracted and its binding and non-binding on the contracting parties. According to Ibn Qudāmah peace treaty will be contracted for a limited period of time and such treaty will be binding bilaterally binding. According to Ibn Qayyim al-Jawziyyah, peace treaty for limited is bilaterally binding while the peace treaty for unlimited time is not bilateral binding and contracting parties have the option of termination with a formal declaration. Ibn Qayyim al-Jawziyyah agrees with Ḥanafiyyah. that peace treaty may be temporary or permanent and in both cases the requisites will remain the same and will not be binding on Muslim state. Muslim state can terminate it on its own discretion.

#### 4.3.2 Kinds of Peace Treaties: *al- Muwādā'ah* and *al- Dhimmah*

Peace treaties are of two kinds: Citizenship (*al- Dhimmah*) and armistice (*al- Muwādā'ah* ). According to Sarakhsī, *al-dhimmā* is a kind of contract to which both the contracting parties are binding<sup>1</sup>. *al- Dhimmah* contract is further divided into two types: Permanent and Temporary contracts. According to him *al- Muwādā'ah* may also be either temporary or permanent.<sup>2</sup> Both Permanent Peace Treaties will be between a Muslim state and non-Muslims who want to reside being citizens in

<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār- Ma'rifah, 1993), 8.

<sup>2</sup> Ibid, vol.9,134.

Muslim state being paying poll tax. It makes a non-Muslim to be a part of the domain of Muslim state<sup>1</sup>. All non-Muslim citizens have to follow the domestic law of Muslim state in general. All the Ḥūdood punishments will be inflicted in case of any violation on such citizens except the punishment of drinking.<sup>2</sup> While a Temporary Contract is a guarantee given by a Muslim individual or state to an alien. Sarakhsī considers awarding guarantee to an alien by Muslims is a kind of assisting Islam. Giving protection to aliens when they request for it, make their hearts soft for accepting Islam. According to him, Muslims are supposed to assist Islam either fighting against the enemies of Islam or by giving guarantee to those who deserve it<sup>3</sup>. Sarakhsī considers the peace treaty of Ḥudaybiyyah as a great success and assistance for the earlier Muslims as mentioned in Surah al- Fath of the Qur'ān<sup>4</sup>

According to him guarantee is considered assisting Islam so every Muslim is supposed to assist Islam. Due this reason every Muslim individual is eligible to assist Islam<sup>5</sup>. According to Mehmood Ahmad Ghazi, the term "*Al-Sulh*", is used in Islamic Jurisprudence for "a permanent peace treaty with non-Muslims who accept military and political suzerainty of Muslim state"<sup>6</sup>. Sarakhsī uses the term *al-Sulh* for the peace treaty with the non-Muslims who are belligerents.<sup>7</sup> According to Ibn Qudāmah , the contract of *dhimma*h is to be concluded with two conditions: The poll tax must be payed annually at the end of the year not after the contract

<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār- Ma'rifah, 1993), 78.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 306.

<sup>3</sup> Ibid, 253.

<sup>4</sup> Al-Qūr'ān, 48, 1.

<sup>5</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 252

<sup>6</sup> Mehmood Ahmad Ghazi, *The Shorter Book on Muslim International Law* (Islamabad: Islamic Research Institute, 1998).99.

<sup>7</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār- Ma'rifah, 1993), 87.

immediately and to surrender being accepting the supremacy of Muslim state.<sup>1</sup> According to Shaybānī, *al- Dhimmah* is a contract between a Muslim state and non-Muslims being giving poll tax and Muslim state is bound to give them of protection<sup>2</sup>. *al- Muwāda'ah* is an agreement between a Muslim and non-Muslim states to suspend war and have peaceful relations<sup>3</sup>. He further asserts if the peace treaty is demanded by non-Muslim state on the condition that Muslim state will suspend Jihād, in such situation Muslim state will accept its offer if Muslim state is weak to defend its citizens against any attack of enemy. If a Muslim state has enough power to fight against the enemy, it will not accept such offer to make any peace treaty. Moreover, he argues on the basis of Ḥudaybiyyāh contract that Muslims were weak at the time of peace treaty that is why they agreed on such weak terms and conditions<sup>4</sup>. According to Imam Abū Ḥanīfah, peace treaty will only be signed with the belligerents when Muslims are weak because war against non-Muslim belligerents is obligatory and it will be suspended only when Muslims have any lawful justification<sup>5</sup>. Muslim state has the authority to sign peace treaty with non-Muslim belligerents<sup>6</sup>. Shaybānī asserts that in general, peace treaty will not be signed with apostates but it may be signed with them if Muslim state is weak and does not have enough power to fight against them. Consideration may be taken for making peace treaty with non-Muslim state while it may not be taken from apostates but if it is taken once then it will not be returned to them<sup>7</sup>. Peace treaty may also be signed with rebels and consideration will not

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<sup>1</sup> Abu Muhammad Abdullah bin Ahmad bin Muhammad bin Qudama al-Hanbali, *al-Mughni le Ibn Qudāmah*, vol.9 (Egypt: Maktab tul Qahira, 1968),332. 336.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971),688 .

<sup>3</sup> Ibid,190.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid,1689.

<sup>6</sup> Ibid,

<sup>7</sup> Ibid,1691.



be taken from them if it is taken then it will be returned to them because they are Muslims and taking money from Muslims without any justification is unlawful<sup>1</sup>. If Muslims are weak and they offer peace treaty to non-Muslim belligerents and they accept Muslim state's offer subject to some compensation in such situations if Muslims are weak then they are allowed to pay the compensation for making peace treaty. Similarly, Shaybānī also uses the term of *Muwāda'ah* for awarding guarantee to a non-Muslim by a Muslim individual. He asserts if any Muslim award guarantee to an alien by taking one thousand *Dīnar* this *Muwāda'ah* will be considered lawful and the aforementioned money will be deposited in treasury of Muslims<sup>2</sup>.

From the aforementioned explanation it becomes clear that Sarakhsī considers *al-Muwāda'ah* and *al-Dhimma* are both divided into two types permanent and temporary peace treaty. According to him permanent peace treaty is the treaty between non-Muslim and Muslim states for the residence in Muslim state being agreeing to pay poll tax by non-Muslims. While temporary is a peace treaty between Muslim individuals or Muslim state by giving guarantee to non-Muslims to enter to Muslim state for accomplishing any lawful purpose. According to Sarakhsī the term *al-Sūlḥ* used for the suspension of war against the belligerents. According to Shaybānī the term *al-Dhimma* is used for the peace treaty between Muslim state and non-Muslims who want to reside in Muslim state to be given protection by paying poll tax in lieu of not discharging the duties of defending a Muslim state. While the term *al-Muwāda'ah* is general contract sometimes it carries the meaning of awarding guarantee by Muslim individuals or Muslim state to a non-Muslim to come to the domain of Islam for the accomplishing

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil Ilanāt, 1971), 1692.

<sup>2</sup> Ibid, 583.

of any lawful objective. While sometimes carries the meaning of suspending war and settlement between Muslim and non-Muslim state.

#### **4.3.3 Elements of the armistice contract**

According to Shaybānī following are the elements of peace treaty.

1. It must be in written form.
2. One copy of the peace treaty should be provided to the contracting parties.
3. Must be recorded carefully to satisfy the contracting parties.
4. Start and end of the treaty must be known to the contracting parties if it is for fixed time.
5. Date must be written at the end.
6. Any terms and conditions may be mutually agreed even unlawful and impossible terms conditions.
7. Rules of reciprocity will be applied subject to the rules of Islamic law if peace treaty is salient.
8. In case of difference about the interpretation of any clause or term of the contract, the relevant International Custom or International Market will be considered final source of decision.<sup>1</sup>

#### **4.3.4 Breach of Peace Treaty**

Any Peace treaty between the party states is a bilateral contract. Both the parties are bound by virtue of treaty to follow the agreed terms and conditions. If anyone of the parties wants to terminate the treaty it must declare its termination formally. Peace Treaty may come to its end by the expiration of its time period or

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 1780-1800.

by breaching by any party to the treaty<sup>1</sup>. According to Kāsānī, breach of peace treaty is either explicitly or implicitly<sup>2</sup>. In case of explicit breach, if one party violates any of the term/s of the treaty being not announcing the treaty as terminated.<sup>3</sup> In such situations, Allah orders Muslims to fight with those non-Muslims who breach peace treaty<sup>4</sup>. The said command is related to the explicit breach which is considered aggression against Muslim state. In case of implicit breach by non-Muslims, Muslim state is bound to investigate and confirm any breach of the treaty as the Prophet (peace be upon him) did confirm the contravention of Banū Qurayṣah. Similarly, the Prophet (peace be upon him) had also sent a delegation to Makkah for confirming the violation of the treaty of Ḥidaybiyyah. According to Shaybānī, if the breach is implicit and creates doubts about the maintenance of peace treaty then Muslim state must examine such implicit breach in order to confirm whether treaty is breached intentionally or not to avoid committing any perfidy by the Muslim state. In this connection Shaybānī has set some principles for examining any breach as implicit.

Peace treaty will not be considered breached in the following case

Spreading fear and terror by one or more persons being not capable (*Mān'ā*) to challenge the writ of Muslim state belong to a state with whom Muslim state has signed peace treaty without the permission of their state, the peace treaty will not be considered breached because such action does not affect the writ of Muslim state. If highwaymen have enough power (*Mān'ā*) to challenge the writ of a

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<sup>1</sup> 'Alā alddīn, Abū bakar bin Māsūd bin Ahmad al-Kāsānī, Bādāi al-Sānāi vol.7 (Bairut: Dār-kutub al- 'Ilmiyyah, 1986), 109

<sup>2</sup> 'Alā al-ddīn, Abū bakar bin Māsūd bin Ahmad al-Kāsānī, Bādāi al-Sānāi vol.7 (Bairut: Dār-kutub al- 'Ilmiyyah, 1986), 109.

<sup>3</sup> Ibid.

<sup>4</sup> "Will ye not fight people who violated their oaths, plotted to expel the Messenger, and took the aggressive by being the first [to assault] you? Do ye fear them? Nay, it is Allah Whom ye should more justly fear, if ye believe!" *Al-Qur'ān*: 9, 13.

Muslim state and if they are spreading not a "Declared Fear" (*Mujaharah bil Qital*) in the domain of Muslim state without the permission of their mother state, the peace treaty will not be breached because they did it without the permission the party state.<sup>1</sup>

Peace treaty will be considered breached in the following case

Spreading "Declared Fear" (*Mujaharah bil Qital*) and violence in the domain of Muslim state by highwaymen who have enough power to challenge the writ of Muslim state without the permission of their mother state dismisses the protection given to them in the result of peace treaty. If such highway men are captured by Muslims state, they will be punished according to the Islamic law because they have denied to live in accordance with the legal protection provided by the Muslim state.<sup>2</sup> Similarly, if the aforementioned highwaymen come to the domain of Muslim state with due permission of the party state to the peace contract, in such situations the peace treaty will be considered terminated because in such case their criminal act will be assumed the act of party state due to its involvement in the dispute. Likewise, if the highwaymen enter to the domain of Muslim state being knowing by the party state and of not stopping the oppressors and not informing Muslim state about the criminal activities of such people.<sup>3</sup>

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<sup>1</sup>Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971),1696.

<sup>2</sup> Ibid,1696.

<sup>3</sup> Ibid,1696.

#### **4.3.5 Impact of the Breach of Peace Treaty**

If any breach of the treaty by the enemy is confirmed after sound investigation<sup>1</sup>, then it will be declared as aggression against Muslim state. Consequently, the belligerents will be given three options as the Prophet (peace be upon him) did in the case of breach of the treaty of Hudaibiyyah by Quraish of Makkah.

1. To Pay compensation and blood money to the affected.

2- Withdraw support of the belligerents. or

3-Consider the treaty as null.

The Pagans of Makkah chosen the last option. Later on Abū Sufyan came to Madinah for the renewal of the treaty but the Prophet (peace be upon him) did not meet him and he announced the renewal as unilaterally but the Prophet (peace be upon him) reached to Makkah and have not felt the need of termination of the treaty formally because Quraish had already breached the treaty. The attack of the Prophet (peace be upon him) on the Pagans of Makkah in response to their obvious aggression against Muslim state in the form of the breach of the treaty of Hudaibiyyah was affirmed by the divine commandment<sup>2</sup>.

#### **4.3.6 Termination of Peace Treaty**

According to Shaybānī, Muslim state is bound to observe peace treaty but if it thinks fit can terminate it formally. State is also bound to declare the termination of peace treaty and must inform formally the other state party. Muslim state may invade on the previously contracting state after the declaration of termination of the contract and must wait for the response of her act of

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<sup>1</sup> Al- Qur'ān: 49,06

<sup>2</sup> Al- Qur'ān: 09,13

termination.<sup>1</sup> If Muslim state has obtained some consideration for making peace treaty for a fixed period which is not yet expired and wants to terminate the peace treaty, in such cases Muslim state is bound to return the consideration for the period which is to be expired <sup>2</sup>. Imam Nawawi endorses the opinion of Shaybānī regarding the termination of peace treaty by Muslim state<sup>3</sup>.

#### 4.3.7 Parties in the contract of *al- Dhimmah*

Contract of *al- dhimmāh* is a bilateral and binding contract for Muslim state while for non-Muslim citizens is not binding. According to Shaybānī and Ibn Qudāmah no kind of peace agreement will be signed with the pagans of Arab and apostates. They have only option of accepting Islam. If they deny accepting Islam they will be killed<sup>4</sup>. Other than these two kinds of people, peace treaty may be signed with non- Muslim citizens like pagans of non-Arab, Majūs, Hindūs, Ahle Kitab etc<sup>5</sup>. According to Shaybānī, Muslim state and Muslim individuals both can make any peace contract. He considers that peace contract is either permanent or temporary. He is of the view that both are a kind of assisting Islam and every Muslim is bound to assist Islam. The assistance may be either to fight against the enemies of Islam and Muslim state or also to assist Islam by signing any peace agreement <sup>6</sup>. While Al-Shāfi'i is of the view that the contract of peace treaty is only

<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971),1697.

<sup>2</sup> Ibid,1709.

<sup>3</sup> Abu Zakriyya Muhiuddin yahya bin Sharf Al-Nāwawi, *Al-Majmu' o Sharḥ-ul-Muhazzab* vol.19 (Dimishq: Dar-ul-Fikr,n.d),451.

<sup>4</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 189. and Abu Muhammad Abdullah bin Ahmad bin Muhammad bin Qudama al-Hanbali, *al-Mughni le Ibn Qudāmah*, vol.9 (Egypt: Maktab tul Qahira, 1968),334.

<sup>5</sup> Ibid.

<sup>6</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 253.

be signed by Muslim state.<sup>1</sup> Ibn Qudāmah endorses the view point of Al-Shāfi'ī, he asserts the only Muslim state or its representative (*Imām or Nāi'būhu*) can sign the contract of *dhimmāh* if it is signed by other than Imam or his representative will be considered a void contract<sup>2</sup>. According to him if contract of citizenship has any voidable condition, the contract will be considered voidable<sup>3</sup>. According to a contemporary Muslim scholar, Abdul Karim Zaydān contract of *dhimmāh* is a contract of citizenship it may only be concluded by Muslim state as majority of Muslim states practice it.<sup>4</sup>

#### 4.3.7.1 Elements of the contract of *al- Dhimmah*

A valid peace contract has the following elements:

According to Shaybānī the contract of *al- Dhimmah* must be:

1. Permanent not temporary. Temporary contract is a guarantee given by Muslim individuals or Muslim state.  
individuals or Muslim state to an alien who wants to visit Muslim state for a temporary period. All kinds of protections are provided to a guaranteed alien by Muslim state but his legal status remains different from the legal status a non-Muslim citizen<sup>5</sup>. Similarly, Ibn Qudāmah endorses the view point of Shaybānī and asserts that the contract of *al- Dhimmah* is a permanent contract between Muslim state and non-Muslims<sup>6</sup>. According to Ibn Qudāmah, the contract of *dhimmāh* is to be concluded with two conditions: The poll tax must be paid annually at the end

<sup>1</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.4 (Bairut: Dār-Marifah, 1990),209.

<sup>2</sup> Abu Muhammad Abdullah bin Ahmad bin Muhammad bin Qudama al-Hanbali, *al-Mughni le Ibn Qudāmah* vol.9 (Egypt: Maktab tul Qahira, 1968),337.

<sup>3</sup> Ibid, 338.

<sup>4</sup> Abdul Kareem Zaydan, *Aḥkam al-dhimyyinā wa al-Mustā'minīna fi Dār-Islam*, (Baghdad: Makābah al-Qūds,1982),24.

<sup>5</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 253.

<sup>6</sup> Abu Muhammad Abdullah bin Ahmad bin Muhammad bin Qudama al-Hanbali, *al-Mughni le Ibn Qudāmah* vol.9 (Egypt: Maktab tul Qahira, 1968),337.

of the year not after the contract immediately<sup>1</sup>. And the second one is to surrender to accept the writ of Muslim. Without these two basic conditions the contract will be considered void<sup>2</sup>.

2. Totally subjugated to Muslim state.

According to Shaybānī the second element in the contract of *al- Dhimmah* is the total submission of non-Muslim to the writ of Muslim state<sup>3</sup>. He further says, non-Muslim citizens of Muslim state are bound to follow Islamic law in their general affairs<sup>4</sup>. They will also be prevented to wear their religious dress like cross.<sup>5</sup>

#### 4.3.7.2 Kind of the contract of *al- Dhimmah*

According to Shaybānī following are the different kinds of *al- Dhimmah* contract:

.1 *Al-dhimmā* by Explicit contract

Explicit contract of *al- Dhimmah* means that non-Muslims' demand for the citizenship of Muslim state either by their own conditions or without any conditions and Muslim state accept their demand with or without conditions<sup>6</sup>.

.2 *Al-dhimmā* by exceed of the allowed time to guaranteed alien in Muslim state.

According to Shaybānī the period for a guaranteed alien to stay in a Muslim state is one year. After the expiry of one-year, Muslim state will give enough time to guaranteed alien to leave Muslim state. If such guaranteed alien does not leave

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<sup>1</sup> Abu Muhammad Abdullah bin Ahmad bin Muhammad bin Qudama al-Hanbali, *al-Mughni lebn Qudāmah* vol.9 (Egypt: Maktab tul Qahira, 1968),336.

<sup>2</sup> Abu Muhammad Abdullah bin Ahmad bin Muhammad bin Qudama al-Hanbali, *al-Mughni lebn Qudāmah* vol.9 (Egypt: Maktab tul Qahira, 1968),332.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 57.

<sup>4</sup> Ibid,191

<sup>5</sup> Ibid,57.

<sup>6</sup> Ibid,190.



Muslim state within the time limit given through notice by the Muslim state, it will be assumed that the alien is interested to change his status from a guaranteed alien to a non-Muslim citizen<sup>1</sup>. Today's status is different from this rule of law. No one can get the citizenship of a state by the expiry of visa. If anyone wants to get citizenship of a state, he should apply according to the rules and regulations for it. By the expiry of visa no one can get the citizenship of any country<sup>2</sup>. Today's rule of law is not contrary to the previous rule due to time and space, the status of issues changes their natures<sup>3</sup>. According the current practices, there is no country in the world neither Muslim nor non-Muslim which practices this rule of law. Today's rule of is deportation, if any one whose visa is expired and he is captured then he is deported to his own country.

3*Al-dhimmā* by Marriage contract.

The marriage of an alien with a non- Muslim woman in a Muslim state does not change the status of his citizenship. He will not be considered as a non-Muslim citizen of Muslim state because the husband remains juristically dominant which is to be followed by the wife in immigration rules<sup>4</sup>. The marriage of an alien guaranteed woman with a citizen of a Muslim state will change her status from a guaranteed alien to a non- Muslim citizen in accordance with the under discussing rule of law. From this rule of law, it can also be concluded that if alien spouses obtain guarantee in Muslim state and the husband acquires the citizenship, his wife will also be considered as the citizenship in accordance to the rule mentioned

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār-Fikar,2000), 84.

<sup>2</sup> Abdul Kareem Zaydan, *Aḥkam al-dhimyīnā wa al-Mustā'mīnīna fī Dār-Islām*, (Baghdad: Makābah al-Qūds,1982),34.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid, 84.

above. If the guaranteed alien wants to live in Muslim state permanently for one year or more than one year will be considered a non-Muslim citizen<sup>1</sup>.

#### 4 *Al- Dhimmah* by Parentage.

According to Shaybānī, the citizenship of a Muslim state may also be obtained by subordination. He asserts if a couple or one of them gets the citizenship of a Muslim state the minors children will follow their parents in the citizenship<sup>2</sup>. Ibn Qudāmah endorses the view point of Shaybānī and asserts the children of the non-Muslim citizens of Muslim state do not need to separate citizenship agreement in a situation when they reach the age of puberty in Muslim state<sup>3</sup>.

#### 5 *Al- Dhimmah* by conquered

According to Shaybānī, the citizenship of a Muslim state may be obtained by confiscation of the alien territory. He asserts if Muslim state occupies the territory of aliens and by formal announcement by Muslim state will change the legal status of the inhabitants from aliens to a non- Muslim citizen<sup>4</sup>.

#### 4.3.7.3 Termination of the contract of *al- Dhimmah*

According to Shaybānī the citizenship of non-Muslim will not be terminated by committing any act which is considered crime in a Muslim state. He gives logic to this rule of law that Muslim will remain Muslim even he commits any crime in a Muslim state<sup>5</sup>. The citizenship of a non-Muslims will be terminated

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 ( Bairūt: Dār-Fikar,2000), 84.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 1870.

<sup>3</sup> Abu Muhammad Abdullah bin Ahmad bin Muhammad bin Qudama al-Hanbali, *al-Mughni lebn Qudāmah* vol.9 (Egypt: Maktab tul Qahira, 1968),339.

<sup>4</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 1539.

<sup>5</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 304.

when they either embrace Islam<sup>1</sup> or go to the domain of war permanently or they occupy any territory and start aggression against Muslim state<sup>2</sup>. According to Ḥanafiyah, the contract of *al- Dhimmah* will only be terminated by the aforementioned reasons. This contract will not be terminated by denying paying the poll tax. The denial of the poll tax may be due to several reasons like, not having sufficient amount to pay or becoming unable to earn or manage it due to extreme old age or illness<sup>3</sup>. According to him the contract of *al- Dhimmah* will also not be terminated even by committing the act of blasphemy of the Prophet (peace be up him). Similarly, the contact of *dhimmāh* will not be terminated by killing a Muslim or committing *Zinā* with a Muslim female<sup>4</sup>. According to Kāsānī, these crimes are lesser than disbelief and the contract of *al- Dhimmah* remains with disbelief so it will also be remained with any crime which is lesser than infidelity<sup>5</sup>. According to Imam Al-Shāfi'ī , the contract of *al- Dhimmah* will be terminated by committing the following crimes:

1. Poll tax is denied by non-Muslims practically or they confessed of not paying the poll tax to Muslim state<sup>6</sup>.
2. Commit *Zina* or marrying a female Muslim
3. Committing mischief with Muslims
4. Becoming a source of persecution (*Fitna*) for the beliefs of Muslims
5. Providing help to the belligerent against Muslims in war
6. Disclosing the state secrecy to the enemies of Muslims

<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971),,254.

<sup>2</sup> 'Alā al-ddin, Abū bakar bin Māsūd bin Ahmad al-Kāsānī, *Bādāi al-Sānāi* vol.7 (Bairut: Dār-kutub al- 'Imiyyah, 1986),113.

<sup>3</sup> Ibid,113.

<sup>4</sup> Ibid,113.

<sup>5</sup> Ibid,113.

<sup>6</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.4 (Bairut: Dār-Marifah, 1990),198.

## 7. Providing accommodation for infiltrators

According to Imam Al-Shāfi'ī, when the contract of *al-dhimmāh* is terminated the protection already provided by Muslim state will come to an end. The blood and property of such non-Muslim will not be protected any more by the Muslim state<sup>1</sup>. According to Nawawi the contract of *al-Dhimma* is terminated by the following reasons:

1. By denying Poll Tax to pay.
2. By hindering Islamic injunctions in the Domain of Islam. He is of the view that Muslim state gives citizenship to non-Muslims by observing these two conditions. If they fail to observe the basic conditions of the contract, then the contract *al-dhimmāh* will come to an end<sup>2</sup>
3. By fighting against Muslim state. According to Nawawi the contract of *al-dhimmāh* is a bilateral contract both parties are agreed to live with each other peacefully. Fighting against Muslims suspends peace and creates anarchy which is opponent to the spirit of *al-dhimmāh*.
4. By committing any act which is harmful to the public good of Muslims<sup>3</sup>

Imam Nawawi is of the view that only these four reasons dismiss the contract of *al-Dhimma* provided if any other reasons are mutually agreed between Muslim state and non-Muslims during making the contract of *al-dhimmāh*<sup>4</sup>. According to him, the reasons mentioned by Imam Al-Shāfi'ī for the dismissal of *al-dhimmā* will

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<sup>1</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.4 (Bairut: Dār-Marifah, 1990),209.

<sup>2</sup> Abu Zakriyya Muhiuddin yahya bin Sharf Al-Nāwawi, *Al-Majmu' o Sharḥ-ul-Muhazzab* vol.19 (Dimishq: Dar-ul-Fikr,n.d),443.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

only nullify the contract of *al- Dhimmah* if these are mutually agreed otherwise, he does not consider solid reasons for the dismissal of the contract of *al-dhimmāh*<sup>1</sup>. Moreover, in such situation the violator of the contract of *al-dhimmāh* will not be allowed to go to the Domain of War (*Dār al- Harb*). Muslim state will deal him in accordance with its domestic or international Law.<sup>2</sup>

#### 4.4 Contemporary International Law on Peace Treaty

Treaties and International Conventions are the major sources of International Law.<sup>3</sup> Treaties play a vital role in the development of global relations among the nation states. Wars are concluded, clashes are settled, regions are acquired, national concerns are determined, associations are recognized and international associations are formed, through international treaties and conventions.<sup>4</sup> Before the UN Charter, International Law regarding treaties was based on international customs. The Vienna Convention 1969 on the law of treaties has given a universal acceptance to the international treaties. The Vienna Convention 1969 reflects in the Customary International Law being a law universally accepted. According to the Convention, international treaty is a global contract among the nation states in written form which is administered by International Law<sup>5</sup>. The definition excludes contracts among the nation states are not administered by International Law and are run by national laws. The term

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<sup>1</sup> Abu Zakriyya Muhiuddin yahya bin Sharf Al-Nāwavi, *Al-Majmu' o Sharḥ-ul-Muhazzab* vol.19 (Dimishq: Dar-ul-Fikr,n.d),424.

<sup>2</sup> Ibid.

<sup>3</sup> Malcolm N. Shaw, *International Law* (New York: Cambridge University Press, 2008),902.

<sup>4</sup> Ibid.

<sup>5</sup> "treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". Article 2 (a) of the Convention.

“written form” does not invalidate the oral contracts among the nation states administered by International Law. Article 3 of the Convention states:

“The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

- (a) The legal force of such agreements;
- (b) The application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
- (c) The application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties”<sup>1</sup>

This means that these agreements will not lose its validity because of not being included in the definition of term treaty by the article of 2 of the Vienna Convention. There are Several other terms which represent the term treaties are, Charter, Pacts, International agreements, Declarations, Conventions and Covenants<sup>2</sup>. According to the Vienna Convention, every peace treaty is binding on the agreed party states. The rule of binding for the nation states is based on the Customary International Law code and that is (*Pacta Sunt Servanda*) means a treaty is binding and the contractual parties must perform their duties accordingly for both kinds of treaties either fixed or unfixed periods of time.<sup>3</sup>

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<sup>1</sup> Vienna Convention on the law of Treaties.

<sup>2</sup>“Treaty is the creation of written agreements whereby the states participating bind themselves legally to act in a particular way or to set up particular relations between themselves. A series of conditions and arrangements are laid out which the parties oblige themselves to carry out”. Malcolm N. Shaw, International Law (New York: Cambridge University Press, 2008),93

<sup>3</sup> Article 26 of the said Convention states "PACTA SUNT SERVANDA" Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

#### 4.4.1 Kinds of International Treaties

Under CIL, Treaties are divided into two kinds:

1. General treaty with reference to its applicability at International level.

This treaty is constituted for worldwide general significance. It is made with consent of all the UN members. The purpose of this kind of treaty is to align different viewpoints of member states in order to maintain and promote international peace and security. This kind of treaty is considered as International Law<sup>1</sup>. Reservation by any nation state is accepted if such reservation is not contrary to the spirit of the treaty.<sup>2</sup>

2. Specific Treaty

This kind of treaty is not worldwide with reference to its applicability to the contracting parties only. It is made and applicable either between two or among minor figure of nation states<sup>3</sup>. This kind of treaty contract does not have any concern with those states which are not party to this contract.<sup>4</sup> The contracting parties are bound to observe the terms and conditions agreed mutually in the contract and they also bound to avoid those elements which effect the contract.<sup>5</sup> Reservation by either party may also be accepted if such reservation does not negate the spirit of the treaty.<sup>6</sup>

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Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghāwat* (Gujanwala: Al-Shariāh acadāmī, 2012), 751.

<sup>1</sup> Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)

<sup>2</sup> Article 19.

<sup>3</sup> Malcolm N. Shaw, *International Law* (New York: Cambridge University Press, 2008), 94.

<sup>4</sup> Article 11 of Vienna Convention.

<sup>5</sup> Article 18.

<sup>6</sup> Article 19.

#### 4.4.2 Formation and procedure of making General Treaty

Before the Vienna Convention 1969, international treaties were administered under Customary International Law. There were no requisites to be fulfilled by the nation states for contracting a valid international treaty. Similarly, no specific manners were also prevailed for observing and contracting international treaties. This diversity with reference to the formation and execution of international treaties had created different difficulties for the nation states other than the contracting party states to any international peace treaty. Peace treaties were formed by the conditions and wishes of the contractual party states. The Vienna Convention on the law of Treaties has formulated some internationally defined and globally recognized rules and regulations for the formation of peace treaties. These rules will only be applied when there is any dispute between the contractual states or the terms and conditions of the treaty need to be interpreted<sup>1</sup>. If there are no disputes between the contracting parties or terms and conditions do not create confusion and conflicts, then in such situations the treaty terms and condition will prevail.

Before the execution of any international treaty a willful consent of the party states to any international treaty is required. For this purpose, the procedure of adoption of treaty in the convention is to be taken by the majority of states present in the convention. If a is related to General Treaty which is constituted for worldwide and general significance of all States. The draft of the agreed treaty by the legal representatives of the participant states will be adopted for a valid approval. Article 9 of the Convention states the draft of agreed treaty other than in international conference will be adopted by the all participant states unanimously. If the procedure of making of a treaty takes place in an international conference, then adaption will be by two-third majority of the participant states by

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<sup>1</sup>Malcolm N. Shaw, International Law, 908.



voting. If the required majority does not agree than any other rule of adoption for the approval may take place like exchange of the treaty instruments and so on<sup>1</sup>. After the adoption of any treaty by the participant states of international convention, the consent of the involved states must be given, because consent is the sole element in the formation of treaty to make the state bound to observe the treaty. The ways of giving consent by participant states may be in different forms like mutually agreed or any other mode of consent, the Convention has stated. Consent of the participant states may be in the form of their signatures, approvals, acceptance, accessions, ratifications and exchanging of the instruments of the treaty.<sup>2</sup>

Formation and procedure of making Specific Treaty.

The formation and produce of making Specific Treaty is confined to the requirements and needs of the contracting parties. Vienna convention provides some basic requirements for the formation of treaty between or among states. According to the convention treaty must be made between or among states through competent authority.<sup>3</sup> Contracting parties must have consent form contracting the treaty otherwise such treaty will not be binding.<sup>4</sup> Revocation of any term and condition or extending it to third party may possible through mutual consensus of the contracting states.<sup>5</sup>

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<sup>1</sup> "ADOPTION OF THE TEXT 1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2. 2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule". Article 9.

<sup>2</sup> "MEANS OF EXPRESSING CONSENT TO BE BOUND BY A TREATY The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed". Article 11 of the Convention.

<sup>3</sup> Article 2 sub section C of the Vienna Convention.

<sup>4</sup> Article 13.

<sup>5</sup> Article 37.

#### 4.4.3 Elements of Peace Treaties under CIL

Under the Vienna Convention 1969, there are the elements of international peace treaty that must be fulfilled by contracting states.

##### 1 State

Both the kind of treaties either specific or general it will be constituted by state only because Contemporary International Law deals only with nation States not individuals. It has given the sole authority to state to conclude any international treaty. State itself does not use the authority of contracting international treaty it delegates such authority to human beings.<sup>1</sup> Article 7 of the Vienna Convention 1969 proposes that a person who represents the delegated authority through state for contracting any peace treaty internationally must have "Full Power" otherwise the treaty will be in question<sup>2</sup>. Persons who represent state by virtue of their functions not by acquiring "Full Power" of the state, if such person makes a peace treaty on the behalf of the state, such peace treaty will also be bounding on such state. Article 7 (2) of the Convention states in this regard "In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

- (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
- (b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

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<sup>1</sup> Article 1

<sup>2</sup> "Article 7. FULL POWERS 1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if: (a) He produces appropriate full powers; or (b) It appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers". Vienna Convention on the Law of Treaty 1969.

(c) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ"<sup>1</sup>.

Any treaty concluded or any act regarding a treaty committed by anyone who does not fall in the category of the Article 7 of the Vienna Convention 1969 will have no legal effect unless the state ratifies it<sup>2</sup>.

## 2.Consent

For both of kinds of treaties specific or general require the explicit consent of the contracting states. According to the Vienna Convention 1969 under Article 9, such consent may be expressed in the form of form of their signatures, approvals, acceptance, accessions, ratifications and exchanging of the instruments of the treaty by participant states of any international convention.<sup>3</sup>

### 4.4.4 Alteration and amendments in peace treaty

Alteration and amendments are also possible in both kind of treaties specific and general subject to consensus of the contracting states.<sup>4</sup> In case of general treaty, every contracting state must participate in the negotiation of amendments of treaty, if any state does not agree to the amendment will be bound by such amendment.<sup>5</sup> In case of specific treaty, if any contracting state does not agree on amendment then such amendment will not be made.

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<sup>1</sup> Article 7 (2) of the Vienna Convention.

<sup>2</sup>"SUBSEQUENT CONFIRMATION OF AN ACT PERFORMED WITHOUT AUTHORIZATION. An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State". Article 8 of the Convention.

<sup>3</sup>"MEANS OF EXPRESSING CONSENT TO BE BOUND BY A TREATY The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed". Article 11 of the Convention.

<sup>4</sup> Article 40.

<sup>5</sup> Article 30.

#### 4.4.5 Breach and termination of peace treaty

CIL bounds all contracting states of observe peace treaty for maintaining and promoting international peace and security.<sup>1</sup> This provision is known is Customary International Law as(*Pacta Sunt Servanda* ). General peace treaty has its own terms and conditions for termination and suspension which will be prevailed. If peace treaty does not have any ground of termination, then Vienna conventions will be followed. This convention gives the right of termination or withdrawal or denouncing form whole peace treaty or any specific ground to the contracting states subject to the consent of all states.<sup>2</sup> The convention also states that any party of the peace treaty has the right of termination subject to the notice of 12 months before withdrawal or denouncing if not otherwise mentioned.<sup>3</sup>

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<sup>1</sup> Article 47.

<sup>2</sup> "[Termination of or withdrawal from a treaty under its provisions or by consent of the parties] The termination of a treaty or the withdrawal of a party may take place:

in conformity with the provisions of the treaty;

or (b) at any time by consent of all the parties after consultation with the other contracting States." Article 54.

<sup>3</sup> "[Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal] 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty. 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1" article 56.

#### 4.5 *Amān* and Diplomatic Immunity

Muslim International Law (MIL) as well as Contemporary International Law (CIL) recognize and promote diplomacy for peaceful relations among nation state. Both of the laws are compatible with reference to the protection of life, honor and belongings of diplomats in receiving state. While in criminal jurisdiction classical jurists like Shaybānī differentiate between the violation private rights and public rights. If diplomats violate private rights of any inhabitant of Muslim state, they will be held accountable for that. According to him, in the violation of public rights they will not be held accountable. CIL gives complete immunity to diplomats from all criminal and civil jurisdiction of the receiving state but it does not mean that diplomats are free to do any crime in receiving state. Diplomats are bound to respect all laws of the receiving state and they should not interfere in any matter of the receiving state.<sup>1</sup> In case of violation of any law of receiving state such diplomats will held accountable before the law of sending state.

##### Status of diplomacy under MIL

The notion of diplomacy and immunity of diplomats based on *Amān*. MIL considers diplomats protected even without seeking proper guarantee of Muslim state. According to Shaybānī, non-Muslims visit to Muslim state being claiming as diplomat will be considered as guaranteed person by showing an appointment letter. By showing any fake document as an ambassador will be declared as captive of Muslim state.<sup>2</sup> According to Qaḍī Abū Yūsuf, only sufficient proofs like an official appointment letter or gift from his state for the head of Muslim state can declare such person as ambassador.<sup>3</sup> According to Sarakhsī , ambassadors'

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<sup>1</sup> "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State". Article 41, 1.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: *Dār- Ma'rifah*, 1993), 92.

<sup>3</sup> Abū yousuf Yaqoob bin Ibrahim, *Al- Khārāj*, (Qāhirah: Māktābāh al-Azhāriyya Litūrāth,n.d),206.

protection is important for maintaining peace order among nation states or for declaring war against any state. due to this they have a right to visit Muslim state even without seeking formal guarantee.<sup>1</sup> Imam Al-Ghazālī, is of the view that only visit of Muslim state by aliens for examining the qualities and advantages of Islam or for diplomacy make them guaranteed persons without due processing their guarantee. According to him the other motives of aliens cannot make them guaranteed persons if they did not formally process their guarantee. In such cases they will be enslaved by Muslim state and will be treated accordingly. He is of the view that the guarantee of other than these two kinds of aliens, will be awarded according to the international rules, values and norms by Muslims or Muslim state.<sup>2</sup> According to Abu al-Abbas al-Mālīkī, the intention of diplomacy can make any alien a guaranteed person if such alien visits a Muslim state even without seeking any formal guarantee from Muslims or Muslim state.<sup>3</sup> According to Sulaiman bin 'Umar Al-Shāfi'ī, diplomats can visit Muslim state without the contract of guarantee and even they will not be demanded any proofs of formal guarantee.<sup>4</sup> According to Shaybānī no person can visit Muslims or Muslim state without showing formal documents of guarantee. According to him, the intention cannot alter the visitors' status of alien-ship. In the current scenario of the behavior of nation states, the view point of Shaybānī is considerable but the clear text of the Qur'ān in this connection defies the view point of Shaybānī. Which clearly award the right of visiting for observing Islam and the qualities of the organization of

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār- Ma'rifah, 1993), 92.

<sup>2</sup> Abū Ḥamid Muhammad bin Muhammad al-Ghazali al-tūsi, *Al-wasīt fi al-Madhab*, vol.7 (Egypt: Dār-Ssālām, 4117), 44.

<sup>3</sup> Abu al-abbas Shahab udin ahmad bin Idrees bin abd ur rehman al-Maliki al-Shaheer bil Qarrafi, *Al-Zakheerah* vol.3 (Beirut: Dār-Gharb al-Islami, 1994), 446.

<sup>4</sup> Sulaiman bin Umar bin Mansor al-a'jeeli al-Azhari, *Futuḥat al-Wahab be Taiwdheeh Sharḥ Minhaj al-Tullab* vol.5 (Bairut: Dār-Fikar, n.d), 212.

Muslim state.<sup>1</sup> The viewpoint of Imam Al-Ghazālī, Sulaiman bin 'Umar Al-Shāfi'ī and Abū al-Abbas al-Mālikī are similar in case of protection of diplomats by Muslim state. the later view point of Imam Al-Ghazālī, Sulaiman bin 'Umar Al-Shāfi'ī and Abu al-Abbas al-Mālikī can be preferred based on these arguments:

- 1- The Qur'ānic verse has given this right to aliens or non- Muslims.
- 2- Islam promotes peace at every cost it is possible through diplomacy to establish good relations with other nations and nation states.
- 3- The ambassadors of Mulayma Kadhāb were declared protected by the Prophet (peace be up him) even they did not process formally their guarantees.
- 4- Sulaiman A.S had also considered the diplomats of Balqīs protected when they had presented gifts to Sulaiman. Although Sulaiman did not accept the gifts but treated them as protected persons and they did not seek proper guarantee.<sup>2</sup>
- 5- Abū sufyan was also given protection when he came to Madinah al-Munawwara for renewal of peace treaty of Ḥudaybiyyah.<sup>3</sup> He did not seek any guarantee to enter into Madinah.

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1 " If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah. and then escort him to where he can be secure. That is because they are men without knowledge. "Al-Qur'ān: 09,06. Abdul Kareem Zaydan, *Aḥkam al-dhimyyinā wa al-Mustā'mīnīna fi Dār-Islam*, (Baghdad: Makābah al-Qūds,1982),113.

2 "But I am going to send him a present, and [wait] to see with what [answer] return [my] ambassadors." . Now when [the embassy] came to Solomon, he said: "Will ye give me abundance in wealth? But that which Allah has given me is better than that which He has given you! Nay it is ye who rejoice in your gift! ."Go back to them, and be sure we shall come to them with such hosts as they will never be able to meet: We shall expel them from there in disgrace, and they will feel humbled [indeed]." Al-Qur'ān: 27, 35,36,37.

3 Mushtaq ahmad, jihad, Muzahmat aor Baghawat, 301.

#### 4.5.1 Diplomats with reference to their liability under MIL

As discussed in the preceding section of this study that diplomats are given protection based on the notion of *Amān*. Classical jurists discuss the liability of diplomats under discussion of guaranteed persons (*Mustā'min*). Under MIL all rights of guaranteed persons are protected. According to al-Awzā'i, public rights are equally applied to all the inhabitants of Muslim state. In case of violation all the criminals will be treated equally for penalties.<sup>1</sup> In Muslim state guaranteed persons can claim for the rights which are either generally understood as rights or for those which Muslim state has awarded in exceptional cases.<sup>2</sup> Once if Muslim state awards guarantee the guaranteed persons should be treated equally with the other citizens before the law.<sup>3</sup> In the view of Shaybānī, no violation of law by the guaranteed persons affect their guarantee to be terminated.<sup>4</sup> According to Imam Abū Ḥanīfah and Shaybānī, guaranteed persons may be made subject to pay the damages in case of any violation of personal and some public rights like consensual sexual intercourse and theft. Shamsuddin Al-Shāfi'i has endorsed the viewpoint of Abū Ḥanīfah and Shaybānī.<sup>5</sup> According to them, in case of *Hadde Qadhf* the guaranteed person will be held to *Hadd* Punishment. Imam Malik and Abū Yūsuf are of the view that all *Hudūd* punishments are equally applied to

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<sup>1</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'i, *Al-Umm*, vol.7 (Bairut: Dār-Marifah, 1990), 378. Abu al-Hassan Ali bin Muhammad bin Muhammad bin Habib al-Basri al-Shaheer bil Mawardi, *Al-Havi al-Kabir fi Fiqh Madh al-Imam al-Shāfi'i* vol.14 (Beirut: Dār-Kutb al-Elmiyyah, 1999), 190.

<sup>2</sup> Muhammad ibne al-Hassan al-Shaybānī, *Al-asl al-Marūf bil-Mabsūt*, vol.4 (Krachi: Idarat ul Qurān Wal olūm al-Islamiyya, n.d), 48.

<sup>3</sup> "O ye who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear Allah. For Allah is well-acquainted with all that ye do." Al-Qur'an: 05:08

<sup>4</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 326.

<sup>5</sup> Shams ul-din Muhammad bin aḥmad al-Khatīb al-Sharbīnī al-Shāfi'i Mughni al-Muḥtaj ila Ma'rifat Ma'ni al-fāz al-Minhaj vol.5 (Bairūt: Dār al-Kutub al-Elmiyyah, 1994), 447.



guaranteed persons and such violation may terminates the guarantee of violators.<sup>1</sup> The case of forceful sexual intercourse is not discussed by Imam Abū Ḥanīfah and Shaybānī. It can be presumed that the Imams consider the forceful sexual intercourse as intentional killing of the citizens, in which guaranteed persons are retaliated. So, it can be presumed that in case any forceful sexual intercourse with citizens of Muslim state guaranteed persons will be made subject to the punishments of either stoning to death or wiping hundred lashes. According to Shaybānī, guaranteed persons will only be punished if they violate personal right of citizens.<sup>2</sup> Shaybānī says the guaranteed alien should be given penalty (*Tāzīr*) in *Hudūd* punishments except *Hadde Qadhf* or as court thinks fit to inflict any other penalty.<sup>3</sup> Al-Shāfi'ī and Al-Māwardi differentiate between public and private rights. In case of violation of public rights, the guaranteed persons will not be held accountable for *Hudūd* punishments like adultery and apostasy. They are of the view that if guaranteed persons do sexual intercourse with other guaranteed persons they will be made known to the fact that Muslim state does not allow such kind of vulgarity. If sexual intercourse was done with non-Muslim citizen, they will be required to be repented otherwise their guarantee will be terminated. If sexual intercourse was done with Muslim citizens, their guarantee will be terminated if it was mutually agreed during making the contract of *Amān*. If such stipulation was not agreed in the contract of *Amān* then such persons will be required to make repentance otherwise the guarantee will be terminated. In case of violation of private rights, the guaranteed persons will be held accountable. In case of theft (which is combination of private and public rights) al-Māwardi is of the view, that if the stolen property belongs to another guaranteed person, the thief

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<sup>1</sup> Abu al-abbas Shahab udin ahmad bin Idrees bin abd ur rehman al-Maliki al-Shaheer bil Qarrafi, *Al-Zakheerah* vol.3 (Beirut: Dār-Gharb al-Islami,1994),447.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shāriyya lil ilanāt, 1971), 306.

<sup>3</sup> Ibid, 307.

will be held accountable neither for damages nor for imputation of hand rather they will be warned not to repeat the same crime otherwise the guarantee will be terminated. If the stolen property belongs to Muslims or non-Muslim citizen, the criminal will pay damages for it. Al-Māwardi has two opinions about imputation of the hand of thief:

- 1- Hand will not be imputed due the violation of public right (*Haqullah*) for which guaranteed persons will not be held accountable.
- 2- Hand of the guilty person will be imputed because it is necessary for the protection of property like retaliation is to be imposed for the protection life of humans.<sup>1</sup>

According to Mansūr al-Ḥanbali, guaranteed persons will not be held accountable for the violation of public rights like *zina*. He is of the view that if guaranteed persons do sexual intercourse with Muslim females, they will be given death punishment due to the violation of the contract of guarantee. According to him if guaranteed persons do sexual intercourse with non-Muslim citizens for which they will not be punished for *Ḥadde Zina*.<sup>2</sup>

In the discussion, the view point of Imam Awzā'ī can be preferred. According to him, it is important to stop violation of public and private rights guilty persons should be punished as equal to Muslims without discrimination based on guarantee or citizenship of non-Muslims. The view point of Awzā'ī can help us to make Muslim state and Muslim societies free from capital crimes. The rest of the opinions give relaxation to guaranteed persons on different grounds to be encouraged for doing crimes and violating the public of the citizens of Muslims. It

<sup>1</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.7 (Bairut: Dār-Marifah, 1990),378. Abu al-Hassan Ali bin Muhammad bin Muhammad bin Habib al- Basri al- Shaheer bil Mawardi, *Al- Havi al- Kabir fi Fiqh Madh al- Imam al- Shāfi'ī*,vol.13 (Beirut: Dār- Kutb al- Elmiyyah, 1999), 329-330.

<sup>2</sup> Mansoor bin younas bin Salah Uddin al-Ḥanbali, *Kashāf al-Qin a' a'an Mtn al-Iqna'a* vol.6 (Beirut: Dār-Kutub al- 'Imiyyah,n.d),91.

is also a matter of injustice to equalize guaranteed persons for getting benefits being the inhabitants of Muslim state with Muslims and not Muslims and to let them relax in violating the rights of the citizen of Muslim state.

#### **4.5.2 Status of diplomacy under CIL**

CIL also considers diplomacy is a source of communication for the purpose of dialogs and negotiations amongst nation states.<sup>1</sup> Before the introducing of International Laws regarding war and peace, international affairs of states were administered by the "Customary International Law". Diplomats were having special rights and privileges and they were being considered the formal representatives of their states. Before the emergence of modern tools of communications like telephone, Fax and Telegraph, diplomats were considered the only source of intra states communications<sup>2</sup>. Under the Contemporary International Law, diplomats facilitate nations states in the field of commerce, economics, culture and religious affairs as well as especially in the maintenance of peace at international levels.<sup>3</sup> Vienna Convention of Diplomatic relations came into being in 1961. This Convention highlights and formulized the practical need of ambassador's rights and immunities to run international affairs effectively among the nation states. It also highlights the mission of diplomats appointed by nation states and gives procedure of appointing diplomats in nation states.<sup>4</sup> The Convention also stresses on the mutual consent of the nation states for enhancing the diplomatic relations among the nation states. If any state does not want to have diplomatic relations with any other state, in such case it will not be compelled to

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<sup>1</sup> Malcolm N. Shaw, *International Law* (New York: Cambridge University Press, 2008),93

<sup>2</sup> Ibid.

<sup>3</sup> Article 3, E. of the Vienna Convention on Diplomatic Relations 1961.

<sup>4</sup> Article 10, A.

establish diplomatic relations with the other state or states. Similarly, furnishing reasons for having not diplomatic relations with any nation state or states is also not mandatory for any state. Article 4 of the Convention states that "the 'Sending State' must make certain that the agreement of the 'Receiving State' has been given for the person it proposes to accredit as head of the mission to that State. The receiving State is not obliged to give reasons to the sending State for a refusal of agreement"<sup>1</sup>

#### **4.5.2.1 Diplomatic rights and privileges under Vienna Convention Diplomatic Relations 1961**

Under the convention diplomats appointed for the purpose of diplomacy are the nationals of sending states.<sup>2</sup> Presence in the receiving state will not change the legal status of the diplomats. They will be considered that they reside in their own sending state. They have given some special rights and privileges while performing their official duties in receiving state.

Personal inviolability of diplomats with their belongings

- 1- Diplomats enjoy complete immunity from all criminal, civil and administrative jurisdiction of the receiving state.<sup>3</sup>
- 2- Diplomats enjoy freedom of movement and will not be arrested and detained by the receiving state.
- 3- Diplomats will be treated with all respect in the receiving state.
- 4- Receiving state is supposed to take all the necessary steps to ensure the safety and dignity of diplomats.<sup>4</sup>

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<sup>1</sup> Article 4 of the Convention

<sup>2</sup> Article 8.

<sup>3</sup> Article 31, A.

<sup>4</sup> "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." Article 29.

- 5- Diplomats will not be obliged to testify as witness and they be keep away from all judicial process of the receiving state.<sup>1</sup>
- 6- Official as well as personal constituency both of diplomats will be inviolable situated in the receiving state. Vienna convention does not differentiate between personal and official constituency with reference to its immunity.<sup>2</sup>
- 7- All belongings of the diplomats either for their personal or official use, like their correspondence, property movable or immovable will enjoy inviolability.<sup>3</sup>

All these privileges and inviolability of diplomats will be come to an end by adopting the procedure mentioned in the article 9 of the convention. This article states that receiving state has the right to notify not accept any member of the mission as diplomat. Furthermore, it states if sending state does not take recall such diplomat back to his country after passing reasonable time, in such situation, such diplomat will loss the status of protection in the receiving state.<sup>4</sup>

Inviolability of diplomatic constituency in receiving state

Receiving state is supposed to take all necessary measures for the security and safety of the official premises of diplomats. This premises will be given immunity from any kind of searching by the receiving state. The official of the receiving state

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<sup>1</sup> Article 31, 2.

<sup>2</sup> "The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission." Article 30,1

<sup>3</sup> Article 30,2.

<sup>4</sup> "1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.

2.If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a member of the mission."

will be entered with the permission of the head of the mission of the sending state.<sup>1</sup> The attached element like transport any requisition of the constituency will also be immune from searching by the receiving state.<sup>2</sup>

This discussion may be concluded that MIL and CIL is compatible to each other with reference to the privileges and rights of diplomats. MIL considers that any international treaty made by Muslim state which is not contrary to the spirit of Qur'ān and Sunnah will be observed at any cost. The observance of Qur'ān and Sunnah is based on the legality and prohibition of the general rules of MIL. For instance, mutilation and treachery are prohibited by Qur'ān and Sunnah, it cannot be allowed by mutual consent of the contractual states or on the basis of reciprocity. The Prophet (peace be up him) said in this connection that all conditions stipulated by Muslims in the formation of the contract must be fulfilled except those which affect prohibitions and permissions.<sup>3</sup> It means the aforementioned Hadith confines Muslim state not to violate the spirit of the Quran and Sunnah in making any international treaty or contract.

All Muslim states in current era are the member of UN and they unanimously signed the Vienna conventions related to diplomatic privileges and inviolability. They all of them bound to fulfill their agreements as the Prophet (peace be up him) did in the case Abū Basīr RA after concluded treaty of Hudaibiyah. All Muslim states must participate in the formation of any international treaty in UN level if there is any element repugnant to the injunction of Qur'ān and Sunnah or the

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<sup>1</sup> "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity" Article 22, 1, 2.

<sup>2</sup> "The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution" article 22, 3.

<sup>3</sup> Abu Dawūd Sulaiman bin al-ashās al-Shabistāni, *Sunan-e-Abi Dawūd*, vol.3 (Riyadh: Dār-al-Salam, 2008), 354.

interest of Muslim ummah, they must follow the process of reservation to eliminate the contrary elements of international treaty.

## CONCLUSION

This chapter may be concluded as that Muslim International Law(MIL) recognizes co-existence of nation states with peaceful relations. Peaceful relations will be converted into hostile relations if aggression is made by either nation states or any group of non-Muslims or Muslims which has enough power. MIL considers aggression is the case of war not infidelity. The aggression may be either against Muslim state or Muslims individuals who reside even beyond the territorial jurisdiction of Muslim state. Similarly, MIL considers preventing non-Muslims from embracing Islam or compelling Muslims not follow Islam or making them apostates as aggression. Blasphemy of the Prophets by state or group of individuals supported by nation state is also accounts aggression by MIL. MIL also considers breach of peace treaty as aggression against Muslim state. Under MIL, Muslim state is bound to observe peace treaty till the end of its expiry or formal announcement of termination with sufficient time. Similarly, Contemporary International Law(CIL) also bounds nation states to observe and fulfill the terms and conditions of peace treaty. Breach of peace treaty is considered cause of lawful war CIL.MIL considers diplomats are protected and immune on the basis of *Amān* even without proper seeking the guarantee of *Amān*. MIL differentiates between public and private rights. Diplomats are immune from public rights while they will be held countable to private rights. CIL gives complete immunity to diplomats and does not differentiate between public and private rights.in case of violation of law of the receiving state by diplomats, they will be held accountable to the law of sending state.



## CHAPTER FIVE: AMĀN AND JUS IN BELLO (ETHICS OF WAR)

### INTRODUCTION

Muslim International Law allows and sometime bounds Muslims to wage war against aggressors in case of justified cause of war it also at the same time bounds Muslims to fight against the aggressors according to the Ethics of war.

In this Chapter the modes and ethics of war (*Jus in bello*) in Muslim International Law and Contemporary International Law are discussed. According to the Contemporary International Law there are two important aspects of war: The first one "*Jus ad bellum*", that discusses the validity and causes of war. The second one "*Jus in bello*" explains the modes and ethics of war. The cause of war (*Jus ad bellum*) is already discussed in chapter four of this study. This chapter covers an analysis of the modes and ethics of war (*Jus in bello*) in Muslim International Law and the contemporary International Law. Muslim International Law emphasizes on the point of settling conflicts and issues with non-Muslims peacefully. In case of attack by non-Muslims, Muslim state is bound to repel the aggression. According to Shaybānī, in a situation of aggression by non-Muslims, they will be invited to Islam before starting war against them. Imam Kāsānī has more persisting view as compare to Shaybānī. According him Muslims are bound to invite non-Muslims to the way of Allah even in the battle of war. Without inviting non-Muslims to Islam, participating in war for Muslims becomes not obligatory. That is to leave non-Muslims not pretending of being not invited to Islam<sup>1</sup>. While Shaybānī says it's a matter of fairness for Muslims to invite non-Muslims to Islam before waging war against them. Furthermore, if non-Muslims are already invited to Islam, in such situation it will also be a matter of justice to

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<sup>1</sup> 'Alā al-ddīn, Abū bakār bin Māsūd bin Ahmad al-Kāsānī, Bādāi al-Sānāi vol.7 (Bairut: Dār-kutub al- 'Ilmiyyah, 1986),100.

offer them a choice of paying poll tax before starting war against them<sup>1</sup>. Although Islamic law allows military action against non-Muslims in the prescribed situations. Islam allows war against belligerents under a specific objective of establishing the writ of Allah on the earth.

## 5.1 Ethics of War in Muslim International Law

The following ethics must be observed during war against aggressors.

### 5.1.1 Objective of War

Islamic Law of War and Peace has changed the notion of people about war from getting property, obtaining the titles of bravery, securing national or tribal interests to the sole objective of establishing the writ of Allah on the earth. It recognizes war against the belligerents a matter of eternal reward.<sup>2</sup>

### 5.1.2 Obliterating injustice

Justice is the distinctive feature of Islamic Law which must be maintained at any cost. The conduct of Muslims in war with non-Muslims is monitored either by the Qur'ān and Sunnah which are the primary sources of Islamic Law. Even Allah orders Muslims categorically to avoid injustice with non-Muslim<sup>3</sup>. Under Islamic code of conduct the divine requirements are to be fulfilled even in war against non-Muslims. In both cases of aggression and defense, Muslims are supposed to observe the divine limits prescribed by the Qur'ān and Sunnah not minor act should not cause any oppression against non-Muslims<sup>4</sup>. Similarly, Allah

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 76.

<sup>2</sup> Sayed abū al-'Ālā al-Mawdūdī, *Al-Jihād fī al-Islam* (Lahore: Idara tarjūman al-Qūrān, 2011), 218.

<sup>3</sup> "O ye who believe! Stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: That is next to Piety: And fear Allah. For Allah is well acquainted with all that ye do". *Al-Qur'ān*: 5,8.

<sup>4</sup> "And if ye do catch them out, catch them out no worse than they catch you out: But if ye show patience, that is indeed the best [course] for those who are patient". *Al-Qur'ān*: 16,126.

mentions Muslims with respect to a quality of maintaining justice and do not commit any act of injustice in taking their revenge from belligerents.<sup>1</sup> Moreover, Allah orders Muslims to fight against those people who fight with you but don't be cruel because He does not like cruelty<sup>2</sup>. It becomes clear from the teachings of the Qur'ān that Muslims must maintain justice not only among themselves and with their friends but even with belligerents in war. The Prophet (peace be upon him) fought against belligerents in the light of injunction of the verses of Qur'ān. The war methodology of the Prophet (peace be upon him) during fighting with enemies of Islam was justified in accordance with the Qur'ān.<sup>3</sup>

### 5.1.3 Discriminating combatants from noncombatants

Muslim International Law makes a distinction between those who practically participate in war against Muslim State and those who practically not<sup>4</sup>. Non-combatant is a person who is not participating in war in person, nor facilitating it logistically by making arrangements for war with necessary materials and weapons, will be considered immune from being attacked by Muslim state. This rule of non-combatants is based on the Sunnah of the Prophet (peace be upon him) about ensuring the safety of non-combatants like children, women, aged persons, the sick, the injured, the insane, the incapables and religious leaders. The Prophet (peace be upon him) has strictly forbidden killing of non-combatant women in war.<sup>5</sup> Similarly, the Prophet (peace be upon him) sent a

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<sup>1</sup> "And those who, when an oppressive wrong is inflicted on them, [are not cowed but] help and defend themselves. The recompense for an injury is an injury equal thereto [in degree]: but if a person forgives and makes reconciliation, his reward is due from Allah: for [Allah] loveth not those who do wrong" *Al-Qur'ān*: 42,39,40.

<sup>2</sup> "Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors" *Al-Qur'ān*: 2,190.

<sup>3</sup> Sayed abū al-'Ālā al-Mawdūdī, *Al-Jihād fī al-Islam* (Lahore: Idara tarjūman al-Qūrān, 2011), 222.

<sup>4</sup> Ibid.

<sup>5</sup> Muhammad bin Yazeed Abū Abdullah al-Qāzweenī, *Sunan-e-ib-e-Majā*, vol. 2 (Bairūt: Dār-Fikar, D,N), 948.

message to the commander in chief Khalid RA about not of killing children and shepherds in war.<sup>1</sup> Shaybānī's book "*al-Siyar al-Saghīr*" starts from the Hadith of the Prophet (peace be up him) that differentiates combatants from non-combatants. The Prophet (peace be up him) was used to remind Muslim Army-in-Chief about God consciousness and to be polite with Muslim soldiers, he would say: "Fight in the name of Allah and in the way of Allah; Fight only those who disbelieve in Allah (belligerents); do not misappropriate belligerents with cruelty and injustice<sup>2</sup>; don't commit treachery<sup>3</sup>; don't mutilate [the dead bodies of enemies]; and don't kill a child"<sup>4</sup>. The Hadith explains the ethical aspects of war

<sup>1</sup> Muhammad bin Yazeed Abū Abdullah al-Qāzweeni, *Sunan-e-ib-e-Majā*, vol. 2(Bairūt: Dār-Fikar,D,N),948.

<sup>2</sup>"Narrated 'Abdullāh bin 'Amr There was a man who looked after the family and the belongings of the Prophet (peace be up him) and he was called *Kirkira*. The man died and Allah's Messenger said, "He is in the (Hell) Fire." The people then went to look at him and found in his place, a cloak he had stolen from the war booty" Muhammad bin Ismail Abu Abdullah al-Bukhari, *Sahih al-Bukhari*, vol. 4 (Riyadh: Dar-al-Salam 1997),192.

"Narrated Abū Huraira RA, The Prophet (peace be up him).got up amongst us and mentioned Al-Ghulūl, emphasized its magnitude and declared that it was a great sin saying, "Don't commit Ghulz2l, for I should not like to see anyone amongst you on the Day of Resurrection, carrying over his neck a sheep that will be bleating, or carrying over his neck a horse that will be neighing. Such a man will be saying: 'O Allah's Messenger! Intercede with Allah for me,' and I will reply, 'I can't help you, for I have conveyed Allah's Message to you.' Nor should I like to see a man carrying over his neck, a camel that will be grunting. Such a man will say, 'O Allah's Messenger! Intercede with Allah for me, and I will say, 'I can't help you for I have conveyed Allah's Message to you, or one carrying over his neck gold and silver and saying, 'O Allah's Messenger! Intercede with Allah for me' and I will say, 'I can't help you for I have conveyed Allah's Message to you', or one carrying clothes that will be fluttering, and the man will say, 'O Allah's Messenger! Intercede with Allah for me.' And I will say, 'I can't help you, for I have conveyed Allah's Message to you.'" Muhammad bin Ismail Abu Abdullah al-Bukhari, *Sahih al-Bukhari*, vol.4 (Riyadh: Dar-al-Salam 1997),191.

<sup>3</sup> "Narrated 'Abdullāh and Anas RA: 'The Prophet said, "Every betrayer (treacherous and perfidious person) will have a flag on the Day of Resurrection" (One of the two sub narrators said) that the flag would be fixed, and the other said that it would be shown on the Day of Resurrection, so that the betrayer (treacherous and perfidious person) might be recognized by it". Muhammad bin Ismail Abu Abdullah al-Bukhari, *Sahih al-Bukhari*, vol.4 (Riyadh: Dar-al-Salam 1997),261.

<sup>4</sup>Muhammad dīn al-Ḥassan al-Shāyḡbānī, *Al-Siyār al-Sāghīr*(edited and translated by Mehmood Ahmad ghazi)(Islamabad: IRI,1998)43.

"Buraidah narrated from his father who said: "Whenever the Messenger of Allah dispatched a commander of an army he would exhort him personally; that he should have *Tāqwa* of Allah, and regarding those of the Muslims who are with him; that he should be good to them. He would say: 'Fight in the Name of Allah and in Allah's cause. Fight those who disbelieve in Allah, and fight, do not be treacherous, nor mutilate, nor kill a child.'" [Imām Ḥāfiẓ Abū 'Elsa Mohammad Ibn 'Elsa At-Tirmidhi,Jami al-Trmidhi Vol 3( Riyadh: Darussalam,2007),193.

that must be kept up right in every situation. The first command of the Prophet (peace be up him) in the said Ḥadith changes the objectives of fighting. Before Islam, Arabs were fighting for gaining wealth, fame, and tribal empowerment<sup>1</sup>. The Prophet (peace be up him) refined Muslims soldiers to fight for the sack of Allah and in the way of Allah<sup>2</sup>. The wording of the Ḥadith "fight those who disbelieve in Allah" prima facie means killing of every disbeliever but the underpinning context of the Ḥadith only allow killing of the disbelievers who are aggressors and belligerents only not disbelievers by virtue of their infidelity. The logic upon which this rule law is based; that if the first portion of the Ḥadith of the Prophet (peace be up him) is considered a general rule of law about the killing of infidels then the next portion of the Ḥadith restricts it to the killing of non-Muslim belligerents only.<sup>3</sup>

#### 5.1.3.1 The rights of Combatants in Islam

Islam is a religion that gives the rights to both combatants and noncombatants. Islam allows fight against non-Muslims belligerents with their rights during war which are to be observed in all situations.<sup>4</sup>

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"Narrated 'Abdullāh bin 'Umar RA: During some of the Ghazawātt' of the Prophet (peace be up him). a woman was found killed. Allah's Messenger, disapproved the killing of women and children" Muhammad bin Ismail Abu Abdullah al-Bukhari, *Sahih al-Bukhari*, vol. Muhammad bin Ismail Abu Abdullah al-Bukhari, *Sahih al-Bukhari*, vol.4 (Riyadh: Dar-al-Salam 1997),158.

<sup>1</sup> Sayed abū al-'Ālā al-Mawdūdī, *Al-Jihād fī al- Islam* (Lahore: Idara tarjūman al-Qūrān,2011),222

<sup>2</sup> "Narrated Abū Mūsā AU :A man came to the Prophet (peace be up him) and asked, "A man fights for war booty; another fights for fame and a third fights for showing off; which of them fights is in Allah's Cause? The Prophet (peace be up him) said, "He who fights that Allah's Word (i.e. Allah's Religion of Islamic Monotheism) be superior, fights s in Allah's Cause". Muhammad bin Ismail Abu Abdullah al-Bukhari, *Sahih al-Bukhari*, vol.4 (Riyadh: Dar-al-Salam 1997)59.

<sup>3</sup> Muhammad bin Abi Sahl al-Sarakhsī, *Al-Mābsūt* vol.10 (Bairūt: Dār-Marifā,1993),7.

<sup>4</sup> Sayed abū al-'Ālā al-Mawdūdī, *Al-Jihād fī al- Islam* (Lahore: Idara tarjūman al-Qūrān,2011),224.

### 5.1.3.2 No Blistering of Belligerents

Muslim International Law does not allow belligerents to be burnt. Burning criminals and sinners is a punishment the only mandate of almighty Allah.<sup>1</sup> Once Hazrat Ali RA punished criminals with fire. Hazrat Abbas RA said to him that this kind of punishment is forbidden by the Prophet (peace be up him).<sup>2</sup> Once the Prophet (peace be up him) ordered the companions when he was sending them for fighting against some belligerents. He specified two men of the belligerents and advised for their burning as punishment but revelation came to him about the prohibition of human burning as a punishment. The Prophet (peace be up him) re-ordered his companions and forbade them from the burning of the criminals.<sup>3</sup> From the above instructions of the Prophet (peace be up him) to his companions it becomes clear that the last order of the Prophet (peace be up him) was killing the belligerent not burning them. As a rule of law, none of the criminals will be punished with fire as a death penalty.<sup>4</sup>

### 5.1.3.3 Looting is prohibited

Generally, war was considered a game free of rules and ethics but Muslim International Law has restricted it to well defined principles and ethics. Now everything is not lawful in war but there are strict rules and regulations which are to be followed by Muslim army in all situations. Islamic law prohibits Muslims

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<sup>1</sup> Abū Dawood Sulaiman bin al-Ashās al-Sajistānī, *Sūnān-e-Abi Dawood* vol.3 (Bairūt: Dār-Kitāb,n.d),8.

<sup>2</sup> "Narrated 'Ibn Abbas RA , that Ali RA burnt some people and this news reached to him, he said, "Had I been in his place I would not have burnt them, as the Prophet (peace be up him) said, 'Don't punish (anybody) with Allah's Punishment.' No doubt, I would have killed them, for the Prophet said, 'If somebody (a Muslim) discards his religion, kill him". Muhammad bin Ismail Abu Abdullah al-Bukhari, *Sahih al-Bukhari*, vol. vol.4 (Riyadh: Dar-al-Salam 1997),159.

<sup>3</sup> "Narrated Abū Hūrairah RA Allah's Messenger sent us on a military expedition telling us, "If you find such and such persons (he named two men from Quraish), burn them with fire." Then we came to bid him farewell, when we wanted to set out, he said, "Previously I ordered you to burn so-and-so and so-and-so with fire, but as punishment with fire is done by none except Allah, if you capture them, kill them, (instead)" Muhammad bin Ismail Abu Abdullah al-Bukhari, *Sahih al-Bukhari*, vol. vol.4 (Riyadh: Dar-al-Salam 1997),129.

<sup>4</sup> Muhammad bin Salih al-osaimeen, *Sharh Riyadh al-Sāliheen* vol.6 (Riadh: Dār-watān,1426 hijri),301.

from any kind of looting in the Domain War<sup>1</sup>. When peace treaty was signed with the people of Khaybar, there were some new Muslims in Muslim army started looting the People of Khaybar. There was a Jew came to the Prophet (peace be up him) and said "O Muhammad! Is it (permissible) for you to slaughter our donkeys, eat our fruits and disrespect our women? The Prophet (peace be up him) annoyed and ordered Ibne 'Awuf RA to announce, "paradise is only for believers and come to prayer". Then the Prophet (peace be up him) said that Allah has forbidden beating the women of the People of the Book and entering their houses and eating the fruit of the People of the Book without their permission.<sup>2</sup> Similarly, the Prophet (peace be up him) ordered for the disposing of the cooked meat of goats when he knew that goats were snatched by the companion during war from the belligerents. He said looting and snatching is worse than un-slaughtered animal.<sup>3</sup> Violating these rules and regulations set by Muslim International Law of war is punishable and are considered as war crimes.

#### 5.1.3.4 Destruction of the property is also prohibited

The sole purpose of waging war under Muslim International Law is culminating persecution and restoring peace.<sup>4</sup> War is not waged for destroying agriculture, green pastures, community centers, villages and cities of belligerents during war as was accustomed before Islam. Islam prohibits every kind of unnecessary encroachment of the property of belligerents. Muslim International Law discourages all kinds of mischief in the earth and promotes fairness<sup>5</sup>. In case

<sup>1</sup> Sayed abū al-'Ālā al-Mawdūdī, *Al-Jihād fī al-Islam* (Lahore: Idara tarjūman al-Qūrān, 2011), 227.

<sup>2</sup> Abu Dawood Sulaiman bin al-ashās al-Shabistāni, *Sunan-e-Abi Dawood* vol.3 (Bairūt: Dār-Kitāb al-Arabi n.d.), 135.

<sup>3</sup> *إِنَّ النُّهْبَةَ لَيْسَتْ بِأَخْلٍ مِنَ الْمَيْتَةِ*

<sup>4</sup> Sayed abū al-'Ālā al-Mawdūdī, *Al-Jihād fī al-Islam* (Lahore: Idara tarjūman al-Qūrān, 2011), 227.

<sup>5</sup> "When he turns his back, His aim everywhere is to spread mischief through the earth and destroy crops and cattle. But Allah loveth not mischief". Al-Qur'ān: 2, 205.

of dire need, Muslim Army can infringe the property of belligerents as was ordered by the Prophet (peace be up him) to cut of the palm trees of Banū Nazir to block the passage of belligerents which Allah has rectified<sup>1</sup>. It can be concluded that any act which is necessary to be done as a war strategy will not be considered destruction or persecution.<sup>2</sup> As a rule of law, destroying agriculture, trees and villages is strictly prohibited but Muslim army can infringe any property of belligerents as a war strategy or for their running usages.

### 5.1.3.5 Mutilation is prohibited

Muslim International Law also prohibits mutilation of the dead bodies of belligerents. When the Prophet (peace be up him) was used to send Muslim army, usually he was giving instruction to the commander-in-chief regarding not to mutilate belligerents' dead bodies.<sup>3</sup> The Prophet (peace be up him) did not only prohibit the mutilation of human being but also prohibit the mutilation of animals.<sup>4</sup> While the incident the tribe of 'Ūraynāh whom the Prophet (peace be up

<sup>1</sup> " Whether ye cut down [O ye Muslim!] The tender palm-trees, or ye left them standing on their roots, it was by leave of Allah, and in order that He might cover with shame the rebellious transgresses" Al-Qur'ān: 59,5.

"It was narrated from 'Abdullāh that the Messenger of Allah burned the palm trees of Banū An-Nadir and cut them down, at AlBuwairah. Qutaibah and Ibn Rumh added in their Hadith: And Allah revealed the words: "What you (O Muslims) cut down of the palm trees (of the enemy), or you left them standing on their stems, it was by leave of Allah, and in order that He might disgrace the Fāsiqeen (the rebellious, the disobedient to Allah)" [A1-Hashr]" [Muslim bin Al Hajja] Abul Hassan, *al- Jami al- Sahih Muslim* vol.5 ( Riadh: Dar-al-Salam 2007)28.

<sup>2</sup> Sayed abū al-'Ālā al-Mawdūdī, *Al-Jihād fī al- Islam* (Lahore: Idara tarjūman al-Qūrān,2011),229.

<sup>3</sup>"Buraidah narrated from his father who said: "Whenever the Messenger of Allah dispatched a commander of an army he would exhort him personally; that he should have *Tāqwa* of Allah, and regarding those of the Muslims who are with him; that he should be good to them. He would say: 'Fight in the Name of Allah and in Allah's cause. Fight those who disbelieve in Allah, and fight, do not be treacherous, nor mutilate, nor kill a child.'" [Imām Hāfiz Abū 'Elsa Mohammad Ibn 'Elsa At-Tirmidhi,Jami al-Trmidhi Vol 3( Riadh: Darussalam,2007),193.

<sup>4</sup> Ali RA advises to his son Hassan while he is injured if I remained alive I will decide if I dead of this injury then kill the man who made me injured don't mutilate him because I heard from the Prophet (peace be up him) saying mutilation of a biting dog is also prohibited. Sulaim bin ahmed bin ayub abu al-Qasim al-Tābrani, *Al-Mūjām al-Kabīr* vol.1 (Al-Mūsāl: Maktāba tu olūm wa al-ḥikam,1983),97.



him) has punished exemplary.<sup>1</sup> Imam Muslim has mentioned the Ḥadith related to 'Uraynāh tribe in the book of retaliation (*Qisās*) and aggressors (*Muḥāribīn*). It seems that he considers the said punishment as either retaliation, aggression or apostasy. According to Sharbīnī, the punishment given by the Prophet (peace be up him) tribe of 'Uraynāh was the punishment of apostasy and they were not required to accept Islam because they did aggress against Muslim state. According to him if apostates do aggression they will not be given any time-period of three days for re-accepting Islam but will be executed at once.<sup>2</sup> Actually the Prophet (peace be up him) neither punished anyone before the incident nor after the incident with such severe punishment. The said punishment was not the punishment of retaliation, aggression or apostasy but it was exceptional and an exemplary punishment given by the Prophet (peace be up him).<sup>3</sup> According to Taḥāwī the punishment given by the Prophet (peace be up him) to the tribe of 'Uraynāh was before the revelation of the punishment of Muḥāribīn<sup>4</sup>. The verse which specifies the punishment of Muḥāribīn repealed the punishment given the Prophet (peace be up him).<sup>5</sup> According to Imam Sarakhsī such severe punishment

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<sup>1</sup>"it was narrated from Anas bin Mālik that some people from 'Uraynah came to the Messenger of Allah in Al-Madinah, but they found that the climate did not suit them (and they fell sick). The Messenger of Allah said to them: "If you wish, you may go out to the camels from *Sadaqah* and drink their milk and urine." So they did that and got better. Then they went to the herdsmen and killed them, and apostatized from Islam, and drove off the camels of the Messenger of Allah. News of that reached the Prophet (peace be up him) and he sent men after them. They were brought, and he had their hands and feet cut off, and their eyes poked out, and he left them in Al-Harrah until they died". [ Muslim bin Al Hajjaj Abul Hassan, *al- Jami al-Sahih Muslim* vol.5 ( Riadh: Dar-al-Salam 2007)432.

<sup>2</sup>Shams al-ddin Muhammad bin Aḥmed al-Sharbīnī al-Shāfi, *Mughni al-Muḥtaj* vol.5 (Bairūt: Dār-Kūtūb al-'Imiyyah,1994),436.

<sup>3</sup>Muhammad Mushtaq Ahmad, *Jihād, Muzāḥamat aor Baghawāt* (Gujanwala: Al-Shariāh acadāmī,2012),348.

<sup>4</sup> "The punishment of those who wage war against Allah and His Apostle, and strive with might and main for mischief through the land is: Execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: That is their disgrace in this world, and a heavy punishment is theirs in the Hereafter"" Al-Qur'ān: 5, 36.

<sup>5</sup> Abū Jafar aḥmed bin Muhammad bin Salamah al-Marūf bi al-Taḥāwī, *Sharḥ Mushkil al-āsār*.vol12 (Egypt: Mūāssisāh al-Risālāh,1994),68.

is repealed by the Prophet (peace be up him) by himself<sup>1</sup>. From the above explanation it becomes clear that the said punishment was given once and last by the Prophet (peace be up him) and it is repealed either by the punishment of Muḥāribīn or by the Prophet (peace be up him) or by both. The prohibition of mutilation is cleared under Muslim International Law. Under this rule of law every act against belligerents which accounts to disrespect to their dead bodies is considered unethical and disliked. According to Shaybānī the heads of dead bodies if are to be cut off and be taken away is to be considered a kind of mutilation.<sup>2</sup> Once the head of christen leader cut off during war and presented to Ḥazrat abū Bakar RA. He disapproved the act and said: we are neither from Persians nor from Romans who mutilate and disrespect dead bodies, and we are the followers of the Qur'ān and Sunnah which prohibits it.<sup>3</sup> Islam commands of holding respect of belligerents' dead bodies. Islam also orders if someone is liable to be killed will be punished with death penalty of not a disrespectful manner and avoiding all means of torturing in killing a belligerent.<sup>4</sup>

#### 5.1.4. Killing of war prisoners

According to general rule of Muslim International Law, killing of war prisoners is prohibited. They will be freed with or without consideration of ransom.<sup>5</sup> The Prophet (peace be up him) has prohibited the killing of war prisoners

<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.11 (Bairūt: Dār- Ma'rifah, 1993), 486.

<sup>2</sup>Muhammad dīn al-Ḥassan al-Shāybānī, *Al-Siyār al-Sāghīr*(edited and translated by Mehmood Ahmad ghazi)(Islamabad: IRI,1998),53.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār- Ma'rifah, 1993),131.

<sup>4</sup>"It was narrated that Shaddād bin Aws said: "There are two things that I memorized from the Messenger of Allah. He (peace be up him) said: 'Allah has prescribed proficiency in all things, so if you kill, kill well, and if you slaughter, slaughter well. Let one of you sharpen his blade and spare suffering to the animal he slaughters.'" [ Muslim bin Al Hajja] Abul Hassan, *al- Jami al- Sahih Muslim* vol.5 ( Riadh: Dar-al-Salam 2007),293.

<sup>5</sup> "Therefore, when ye meet the Unbelievers [in fight], smite at their necks; At length, when ye have thoroughly subdued them, bind a bond firmly [on them]: thereafter [is the time for] either generosity or

chained in fitters.<sup>1</sup> According to Maulana Al-Mawdūdī, there is an exception to this rule of law that is if a Muslim state thinks fit the killing a war prisoner even without any legal proceeding who is remained involved in severe crime against Muslim state and if it is proved that if he is set free, he will be engaged in such crimes. He is of the view that the law is based on the precedent of the Prophet (peace be up him) about killing of 'Uqbah bin abi Mu'eith one of prisoners of Bādār<sup>2</sup>. According to Ḥassan RA and Ḥammad bin abi Sulaiman, Muslim state has only one option regarding war prisoners that is to take any consideration as ransom and make them free. They are of the view that war prisoners will not be killed because the cause of war which was the aggression by the belligerents remains ineffective after the conclusion of war.<sup>3</sup> This rule of law is based on the verse no 4 of Sūrah Muhammad which orders Muslims to fight non-Muslims till war comes to an end.<sup>4</sup> It means when the cause of war is concluded the killing of belligerents becomes illegal. According to Shaybānī, Muslim state has two options regarding male war prisoners, either to kill them or release them in lieu of

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ransom: Until the war lays down its burdens. Thus [are ye commanded]: but if it had been Allah's Will, He could certainly have exacted retribution from them [Himself]; but [He lets you fight] in order to test you, some with others. But those who are slain in the Way of Allah, -He will never let their deeds be lost" Al-Qur'ān: 47,4.

<sup>1</sup>"It was narrated that when Abu Ayub al-Ansari RA was informed that Abdurrehman the son of khalid bin Waleed RA has killed four prisoners of war while they were chained he said: I have heard from the prophet (peace be up him) that he made the killing of fasten man prohibited and said: I swear in the name of whom in whose hand my soul is, if it was chained chicken I would not kill it. When abdurrehman was informed by the saying of Abu Ayub he made four captives free". Abu Dawūd Sulaiman bin al-ashās al-Shabistāni, Sunan-e-Abi Dawūd vol.3(Riyadh: Dar-al-Salam 2008),308.

<sup>2</sup> Sayed abū al-'Ālā al-Mawdūdī, *Al-Jihād fī al- Islam* (Lahore: Idara tarjūman al-Qūrān,2011),231.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, (Al-Qāhirāh: al-Shārikāh al-Shāriqiyya lil ilanāt, 1971),1024.

<sup>4</sup> Therefore, when ye meet the Unbelievers (in fight), smite at their necks; At length, when ye have thoroughly subdued them, bind a bond firmly (on them): thereafter (is the time for) either generosity or ransom: Until the war lays down its burdens. Thus (are ye commanded): but if it had been Allah.s Will, He could certainly have exacted retribution from them (Himself); but (He lets you fight) in order to test you, some with others. But those who are slain in the Way of Allah,- He will never let their deeds be lost. Al-Qur'ān: 47,04

Ransom<sup>1</sup>. Sarakhsī supports the validity of killing of male prisoners as the Prophet (peace be up him) did kill men capable of war of Banū Quraydhah. He is also of the view that the Prophet (peace be up him) had killed ‘Uqbah bin abi Mu’eit the prisoner of Badr due to his involvement in war crimes against Muslim state. He is of the view that under Muslim International Law the blood of humans is either protected by *Eiman* or *Amān* awarded by Muslim state. In case of war prisoners, they are neither Muslims nor guaranteed aliens but are aggressors and their aggression does not come to end by their capturing. On their capture as prisoners they lose their capability of fighting against Muslim state if they were not captured by Muslim state they would continue their fight against Muslim state.<sup>2</sup> According to him, the verse number four of Sūrah Muhammad that gives two options regarding war prisoners is repealed by the verse no five of Sūrah al- Tawbah <sup>3</sup> that orders the killing of belligerents.<sup>4</sup> The view point of Ḥassan RA and Ḥammad bin abi Sulaiman is stronger than Sarakhsī they are of the view that if the verse no 4 of Sūrah Muhmmad is repealed by the verse no 5 of Sūrah al- Tawbah presents no solid reason for the abrogation of the said verse because accepting the view point of Sarakhsī would bound Muslim state for killing all war prisoners. On the other hand, Sarakhsī and Shaybānī both are of the view that Muslim state (Imam) has the authority to decide the killing or setting war prisoners free against their ransom, negates their first view about the abrogation of verse number four of Sūrah

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971),1024.

<sup>2</sup> Ibid,1025.

<sup>3</sup>“But when the forbidden months are past, then fight and slay the Pagans wherever ye find them, an seize them, beleaguer them, and lie in wait for them in every stratagem [of war]; but if they repent, and establish regular prayers and practise regular charity, then open the way for them: for Allah is Of forgiving, Most Merciful” Al-Qūran: 9,5.

<sup>4</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971),1026.

Muhammad by verse number five of Sūrah al- Tawbah .<sup>1</sup> The third reason to this logic is that the verse number five of Sūrah al- Tawbah is revealed specially in case of the Pagans of Arab not common pagans because they had abridged the peace treat of Ḥudaybiyyah.

### 5.1.5 Killing of Ambassadors

Under the Muslim International Law, it is not valid to kill ambassador. This law is based on the Sunnah of the Prophet (peace be up him) that he did not give order for the killing of the ambassadors of Musaylmah Kadhāb instead of their misbehavior with the Prophet. The Prophet (peace be up him) told them if ambassadors were to be killed I would surely kill both of you.<sup>2</sup> From the above precedent of the Prophet (peace be up him), it can be concluded that ambassadors are completely protected under Muslim International Law until the contrary is proved against an ambassador. According to Sarakhsī , protection can be availed either by faith (Eīmān) or by guarantee (Amān).<sup>3</sup> It means that Muslims are protected by virtue of their faith and ambassadors or others by Amān. According to Zaydān a contemporary scholar, ambassadors and traders are protected by custom and tradition of the nation states even they do not get proper Amān from Muslim state but they will be considered as protected. According to him, such people will be required to furnish sufficient proof for their recognition as

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971),1026.

<sup>2</sup> "It was reported from Salamah, meaning Ibn A1-Fal, from Muhammad bin Isaq, who said: "Musailimah wrote to Allah's Messenger ḡ." He said: "And Muhammad bin Isiaq narrated to me, from a Shaikh, from Aja' named Sa'd bin Tariq, from Salamah bin Nu'aim bin Mas'Ud Al-Asjja'l, from his father, Nu'aim, who said: 'I heard the Messenger of Allah say to the two of them (the messengers) after he was read the letter from Musailimah: "What do you to believe (in)?" They said: "We believe as he believes." He said: "By Allah! If it wasn't that the messengers are not to be killed, I would have cut off their heads." Abu Dawūd Sulaiman bin al-ashās al-Shabistāni, Sunan-e-Abi Dawūd vol.3 (Riyadh: Dar-al-Salam 2008),354.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971),1026

violation of private rights, ambassadors will be held accountable by the court of Muslim state and will have dealt them in due course of law<sup>1</sup>.

### 5.1.6 Treachery is Forbidden

Muslim International Law is divinely supposed to observe fulfilling all the agreements, pledges and contracts done with aliens and non-aliens.<sup>2</sup> Allah dislikes a conflict between the actions and pledges of believers and warns of grievous consequences in eternal life.<sup>3</sup> Allah emphasizes on the fulfillment of all agreements and contracts either they are between Allah and believers or among believers or between believers and non-believers. The Prophet (peace be upon him) has also emphasized on the fulfillment of the agreement and ordered Muslims to refrain themselves from disloyalty with guaranteed persons. The Prophet (peace be upon him) said anyone who shows disloyalty to a non-Muslim citizen and kills him, the killer will be deprived of Paradise<sup>4</sup>. This Hadith is not only for Muslim individuals but also applicable on Muslim state. Muslim state is supposed to avoid all kinds of perfidy with non-Muslim individuals and states.<sup>5</sup> All Muslim jurists are unanimously agreed on a point that Muslim state must fulfill its pledges, agreements or contracts in all situations of war and peace at every cost. According to Shaybānī, if Muslim state feels any threat or danger to national security from

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 326.

<sup>2</sup> "O ye who believe! Fulfill (all) obligations." *Al-Qūran*: 5,1.

<sup>3</sup> "O ye who believe! Why say ye that which ye do not? Grievously odious is it in the sight of Allah that ye say that which ye do not." *Al-Qūran*: 61,2,3.

<sup>4</sup> "It was reported from AN Bakrah who said: "The Messenger of Allah said: 'Anyone who kills a person to whom a covenant was granted prior to its expiration, Allah will forbid him from entering Paradise.'" Abu Dawūd Sulaiman bin al-ashās al-Shabistāni, *Sunan-e-Abi Dawūd* vol.3(Riyadh: Dar-al-Salam 2008),354.

<sup>5</sup> "It was narrated that Ibn 'Umar said: The Messenger of Allah (ﷺ) said: "When Allah gathers together the first and the last (of men) on the Day of Resurrection, a banner will be raised for every betrayer and it will be said: This is the betrayal of so-and-so the son of so-and-so." [ Muslim bin Al Hajja] Abul Hassan, *al- Jami al- Sahih Muslim* vol.5 ( Riyadh: Dar-al-Salam 2007)20.

the state with which Muslim state has signed an agreement of peace in such situation, Muslim state is still bound to fulfill its pledges and agreements and should avoid attack on the state. In such situation of danger before attacking on the conflicting state, Muslim state is required to communicate the formal dismissal of all agreements and treaties to the opponent state.<sup>1</sup> Shaybānī's this rule of law draws its authority from Surah al- Anfal verse number fifty-eight of the Qur'ān<sup>2</sup>. This verse of the Qur'ān indicates that if Muslim state fears of the treachery of alien state and the disloyalty to the agreement or contract of alien state endangers the national security Muslim state then Muslim state will announce the revoking of such peace treaty. The power of dismissal of treaty is given to Muslim state. The dismissal of the treaty will be announced formally and publicly. Moreover, sufficient time will be given to the alien state for taking the precautionary measurements for safeguarding the public. Attacking on alien state without announcing the dismissal of the treaty or not giving them enough time for ensuring the public security will be considered perfidy in accordance to the Qur'ān.<sup>3</sup> Sarakhsī has referred to a precedent of Hazrat Mu'āwiyah RA regarding the fulfillment of peace treaty with alien state<sup>4</sup>. From this precedent, Sarakhsī concludes, that Muslims state must not violate its covenants with other states and

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<sup>1</sup>Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 264.

<sup>2</sup> "If you fear treachery from any group, throw back (their covenant) to them, (so as to be) on equal terms: Allah does not love the treacherous". Al-Qūr'ān,8,58.

<sup>3</sup>Al-Qūr'ān,8,58.

<sup>4</sup> "Reported by *Sūlaim bin āmir*, he says: There was a peace treaty between *Moāwiya* RA and Roman Empire. When the time period of the peace treaty came to expire, *Moāwiya* RA intended to attack on Romans before the time peace treaty had to expire. *Amr bin āmbāsā* RA came and said to him "Allah is greatest, fulfillment of the treaty is binding on you and you have to avoid perfidy". *Moāwiya* RA asked him to explain his statement. He replied that I have heard the Prophet (peace be up him) saying: when there is a peace treaty between Muslim and others, the peace treaty will be remained effective unless the treaty expires or dismisses it by any party. *Moāwiya* RA ordered the people to go back from the border". Abu 'Isa Muhammad ibn 'Isa al-Tirmidhī, *Sunan al-Tirmidhī*, Vol.3(Riyadh: Dar-al-Salam 2007)350.

must avoid explicit perfidy and should not involve in suspicious activities against the conflicting state which lead to perfidy<sup>1</sup>.

### 5.1.7 Mismanagement and Noising during War

In pre-Islamic society, when Arabs were leaving for war, they used to block roads and terrify the travelers. Similarly, in pre-Islamic society, people were noising when they were fighting each other. Once the Prophet (peace be up him) was on the way to Jihād , someone complained about mismanagement and blockage of the roads by Muslim army<sup>2</sup>. The Prophet (peace be up him) took notice of the complaint and said, " Anyone who blocks the roads and loot people will lose the reward of Jihād ."<sup>3</sup> The Prophet (peace be up him) advised Muslim army not to be dispersed on different trails during war because Satan does so.<sup>4</sup> The Prophet (peace be up him) has trained Muslim army how to leave the habits of (Ignorance) Jahiliyyah for not disturbing the wayfarers. Under Muslim International Law when Muslims were allowed to fight against belligerents it was ordered to show firmness in war and be God conscious all the time.<sup>5</sup> After the revelation of the command, once the companions of the Prophet (peace be up him) were

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<sup>1</sup>Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 265.

<sup>2</sup> Sayed abū al-Ālā al-Mawdūdī, *Al-Jihād fī al- Islam* (Lahore: Idara tarjūman al-Qūrān,2011),234.

<sup>3</sup> "It was reported from Sahl bin Mu'ādh bin Anas Al-Juhani, from his father, who said: "I fought in such and such battle with Allah's Prophet. The camp was overcrowded and the people started to block the road. The Prophet sent a caller to announce among the people: 'Whoever crowds the camp or blocks the road, then there is no Jihad for him.'" Abu Dawūd Sulaiman bin al-ashās al-Shabistāni, *Sunan-e-Abi Dawūd* vol.3 (Riyadh: Dar-al-Salam 2008),271.

<sup>4</sup> "Tha'labah Al-Khushani, who said: "When the people dismounted to camp" - 'Amr (one of the narrators) said: "When the Messenger of Allah dismounted to camp, the people" - "used to break up in mountain paths and valleys. So the Messenger of Allah said: 'Your scattering in these mountain passes and valleys is only from Shaitān.' So after that, they would not halt to camp, except that they were so close together that it would be said: 'If a piece of cloth was spread over them, it would cover them all". Abu Dawūd Sulaiman bin al-ashās al-Shabistāni, *Sunan-e-Abi Dawūd* vol.3(Riyadh: Dar-al-Salam 2008),271.

<sup>5</sup>"O ye who believe! When ye meet a force, be firm, and call Allah in remembrance much [and often]; that ye may prosper:" *Al-Qūran*: 8,45.



remembering Allah with loud sound during war, the Prophet (peace be up him) ordered them to observe submission to Allah and do not make noise.<sup>1</sup> This shows that Muslim International Law discourages noise during war.<sup>2</sup> The Prophet (peace be up him) disapproved the uplifting sound in the three occasions, while reciting the Qur'ān, offering funeral prayer and fighting war against belligerents.<sup>3</sup> According to Shaybānī, uplifting sounds by Muslim army during war is not absolutely disliked by the Prophet (peace be up him) but has left on the discretion of commander of Muslim army, If he thinks fit to raise sounds then it will be allowed otherwise raising sounds by the soldiers while passing through passages without the permission of the commander is disapproved. Reason to leaving it on the discretion of the commander of Muslim army is that sometimes uplifting sound may be dangerous which amounts indicating positioning and numbering of the army that may cause to defeat. Contrary to this logic, sometimes uplifting sound may be used as a rouse and need of the army, in such cases raising sounds and pronouncing war slogans are liked under the Muslim International Law.<sup>4</sup> The discussion may be concluded that Muslim International Law has changed the war habit of Arabs of making noise. They were considering that making noise is a necessary part of war and that was easing their success against enemy. Muslim

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<sup>1</sup> "Narrated Abū Mūsā al-Ash'ārī RA: We were in the company of Allah's Messenger. Whenever we went up a high place we used to say: "La ilaha illallah and Allahu Akbar (none has the right to be worshipped but Allah, and Allah is the Most Great)," and our voices used to raise. So the Prophet; said, "O people! Be merciful to yourselves (i.e., don't raise your voice), for you are not calling a deaf or an absent one, but One Who is with you, no doubt He is All-Hearer, Ever Near (to all things)". Muhammad bin Ismail Abu Abdullah al-Bukhari, *Sahih al-Bukhari*, vol.4 (Riyadh: Dar-al-Salam 1997),148.

<sup>2</sup> Sayed abū al-'Ālā al-Mawdūdī, *Al-Jihād fī al- Islam* (Lahore: Idara tarjūman al-Qūrān,2011),234.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 89.

<sup>4</sup> *Sārākhsī* considers the voice of *abu Dūjana* RA during war is the source of provocation of Muslims and the source of terroir for non-Muslims. He stated when the Prophet (peace be up him) listened the voice of *Abū Dūjana* consisting on provocation and terroir said: "The voice of *Abū Dūjana* during war as a force". Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 89.

International Law not only banned making noise but also disapproved disturbing the non-combatants during war. The logic behind this rule of law is that Islam considers Jihād (fighting against belligerents) a kind of worshiping Allah like offering five-time prayers that demand a complete God consciousness and total submission while following the commander of Muslim army.

### 5.1.8 Obeying the Commander of Muslim Army

To administer war with all its parameter excellently, Islam has made it compulsory that it should be fought under the command of an expert and God conscious and pious commander that is to avoid mismanagement and tyranny during war.<sup>1</sup> Muslim International Law confines every action of Muslim army to the permission and discretion of its commander.<sup>2</sup> It considers the obedience of the Muslim commander as the obedience of the messenger of Allah and disobeying the commander amounts to the disobedience of the messenger of Allah. The Prophet (peace be up him) considers commander as a custodian of Muslims.<sup>3</sup> War conducted under full obedience of the commander of Muslim army with an attitude of God consciousness yields to eternal reward. Conversely any war in which Muslim commander is not followed will give no benefit in the eternal life

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<sup>1</sup> "Umm Al-Husain Al- Ahmasiyyah said: "I heard the Messenger of Allah delivering a Khutbah during the Farewell Hajj and he was wearing a Burd which he had had wrapped from under his armpit." She said: "I was looking at the muscle of his upper arm 'quivering and I heard him saying: 'O you people! Have Taqwa of Allah. If a mutilated Ethiopian ) slave is put in command over you, then listen to him and obey him, as long as he upholds the Book of Allah among you." [Imām Hāfiz Abū 'Elsa Mohammad Ibn 'Elsa At-Tirmidhi, Jami al-Trmidhi Vol.3( Riyadh: Darussalam,2007),415.

<sup>2</sup> Sayed abū al-Ālā al-Mawdūdī, *Al-Jihād fī al- Islam* (Lahore: Idara tarjūman al-Qūrān,2011),234.

<sup>3</sup> "The Prophet (peace be up him) added, "He who obeys me, obeys Allah, and he who disobeys me, disobeys Allah. He who obeys the Muslim chief, obeys me; and he who disobeys the Muslim chief, disobeys me. The Imam (Muslim ruler) is like a shelter for whose safety the Muslims should fight and they should seek protection with him. If the Imam (Muslim ruler) orders people to be dutiful to Allah and fear Him and rules justly, then he will be rewarded for that; and if he does the opposite, he will be responsible for that". Muhammad bin Ismail Abu Abdullah al-Bukhari, *Sahih al-Bukhari*, vol.4 (Riyadh: Dar-al-Salam 1997),131.

although it is fought with all ethics and observing piety.<sup>1</sup> In case of the disobedience to the Muslim commander during war, any public loss will be compensated by the Muslim state as Sarakhsī has mentioned some precedents in which the affectees were compensated.<sup>2</sup> Muslim commander is been equipped with multiple discretions in fighting war *Jus in bello* against belligerents, like awarding guaranty of peace and rectifying any act of individual soldiers.<sup>3</sup>

### 5.2.1 Awarding *Amān* during war

To observe the ethics prescribed by Muslim International Law it is mandatory for Muslim army including Muslim commanders and non- Muslim soldiers (if any). As mentioned earlier that Islam considers war like any worship. So there is no worship without ethics. Awarding guaranty to aliens if they demand for it is the ethical and legal duty under Muslim International Law of all Muslim

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<sup>1</sup> "It was reported from Mu'ādh bin Jabal that the Messenger of Allah said: "Military campaigns are of two types: As for the one who fights (in the cause of Allah) seeking His Countenance, obeys the Imām, spends what is precious, deals with ease with his associates, and avoids mischief, whether he is asleep or awake, he is earning reward. But as for the one who fights out of pride, and in order to show off and gain a reputation, and disobeys the Imam, and spreads mischief in the land, he comes back empty-handed." Abu Dawūd Sulaiman bin al-ashās al-Shabistāni, Sunan-e-Abi Dawud vol.3(Riyadh: Dar-al-Salam 2008),213.

<sup>2</sup> "According to the *Ḥadith* of *Mūhallāb bin abi Sūfrah* when the city of *al-āhwāz* was conquered by Muslim army in the era of Hazrat *Umār* RA. The inhabitants were already protected through a peace treaty under the sign of Hazrat *Umār* RA. After the settlement of war, the women were made captives and were sexually abused by the Muslims. When *Umār* RA came to know, he ordered to return the captive women and to own the children by the Muslims who were born due the sexual intercourse by them. *Sārākhṣī* has also quoted another *Ḥadith* in which the prophet (peace be up him) not only paid the compensation to the legal heirs of *Bānī Jādhīma* who were killed by Muslim Army General Hazrat *Khālīd bin Waleed* RA but also announced that he is not responsible for the act of *Khālīd* RA. {*Ibn Umār* RA says, that the prophet (peace be up him) sent *Khālīd* RA to *Bānī Jādhīma*(name of the tribe in order to embrace Islam) the people of that tribe used the word *Sābā'nā* which did not give the clear message to *Khālīd* RA. *Khalid* RA started killing and making them slave and ordered every of Muslim to kill what he captured among them. *Ibn Umār* RA says I declined to kill my slave and also announced that my friends will also not kill their slaves. Then we informed the prophet (peace be up him) and he said two times: "oh Allah I am not liable for what *Khalid* did"The Prophet (peace be up him) paid the blood money of the deceased persons from the public treasury of Muslims and ordered Hazrat *Ali* RA to pay the compensation to the heirs of of *Bānī Jādhīma* who were killed". Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shāriyya lil ilanāt, 1971), 261.

<sup>3</sup> Al-Qur'ān: 9,6.

commanders to award it. Shaybānī has discussed different types of guarantee and peace treaty in the context of war ethics (*Jus in bello*). These types of guaranty and peace treaty are discussed in the following section.

During war, Muslim army can fix any terms and conditions with belligerent forces for their safe passage through aliens' territories. As general rule of Muslim International Law, if Muslim commander pledges to avoid any least harm to the properties of aliens then Muslim army must observe it on large scale. Conversely if Muslim army has pledged any large-scale harm to the properties of aliens then it is not necessary to observe it on least account.<sup>1</sup> There are few exceptions to this rule of law: All the terms and conditions will strictly be observed by Muslim army but those terms and conditions whose violation do not harm directly or indirectly the alien's interests may be violated only in cases of using water from the wells and canals of aliens. Muslim army can also eat from the fruit and vegetable gardens of aliens without conveying them in case if it is agreed that Muslim army will not destroy aliens fruit and vegetable or crops. In case of logistic routing, if Muslim army has agreed that it will follow a particular passage of the aliens for their safe journey then the agreed terms should be observed mindfully with letter and spirit. In case if Muslim army has agreed that it will not harm any green pastures and fruit of aliens or will not graze their cattle on their green pastures then Muslim army is bound to observe what has pledged bilaterally. In the aforementioned cases if Muslim army thinks it necessary to revoke any agreement partially or totally then it must convey it to aliens that the peace agreement is being revoked and ineffective between aliens and Muslim army. Without conveying Muslim army cannot violate any agreed terms and conditions otherwise it will amount to war treachery<sup>2</sup>. Shaybānī does not consider as combatants the

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 301-303

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 297-300.

providers of medical treatment to the wounded soldiers or any other services like cooking food for the combatants so they cannot be attacked.<sup>1</sup> From the view point of Shaybānī it conclude that non- logistic facilitators may not be considered combatants and they will be protected from any harm during war.<sup>2</sup> According to him such Muslim facilitators can provide guarantee in during war.<sup>3</sup> According to Shaybānī, if belligerents offer some incentives in lieu of conditional guarantee for their families and belongings then Muslim army may give them guarantee. If aliens perform the duty or duties for which they had held pledged themselves like if they're given guarantee, then they will open the doors of the fort of alien army to conquer by Muslim army and if they do open the doors then Muslim army is bound to given them conditional guarantee. The provided guarantee to aliens will be inclusive to their family members like their wives, children and captives and belongings excepts gold, silver, ornament and cash money.<sup>4</sup> The captives of the facilitators will be returned to them if they're not distributed or sold in the market. In case if they're sold or distributed among Muslim soldiers then such slave will only be recovered by the aliens if they produce Muslim witnesses to prove their ownership on such slaves. The other belongings including their family members and captives will be recognized to them after the due clarification with proper witnessing. Those who are failed to be ratified in due course of clarification will be declared war spoils. If they claim that we have taken the guarantee for these specific belongings which are not in the hands of Muslims so their statement would be accepted and the belongings would be given back to them. The belongings of aliens in this case will be decided on the basis of *prima facie*

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 208.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.3 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 21.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār- Ma'rifah, 1993), 69.

<sup>4</sup> Ibid, 324.

possession. Goods which are in their possession of aliens will not be made subject for any more inquiry but goods in the possession of Muslim army if are claimed by aliens will be decided by the procedure of proper witnessing to be produced by aliens on basis of Muslim witnesses. If aliens fail to prove the ownership of such goods then it will be declared as spoils of war.<sup>1</sup>

According to Shaybānī, if a female pleads for guarantee or being the wife of the accompanied Muslim male who remained either prisoner in the alien state or he was given guarantee by the alien state or he is a newly Muslim and the Muslim who accompanies her claims to be his slave girl, in all such cases she will be granted guarantee. In case if she was chained in fitters then statement of a Muslim male would be considered valid for her slavery and she will not be given any guarantee and will be declared as war spoils<sup>2</sup>. Similarly, if a Muslim male having some aliens and possessing a property during war and claims they are his captives and the property also belongs to him then then the captives will be declared as guaranteed aliens on the condition if they were not found in the chains and fitters of the possessor and by no witness they were proved as slaves of their master.<sup>3</sup> While the property will follow the status of its owner in due course of proof.<sup>4</sup> If a Muslim having a female alien during war and both claim being spouses then guarantee will be given to the female and will be declared as a non- Muslim citizen because wife follows the legal status of her husband.<sup>5</sup>

If there a dispute arises between a guaranteed alien and a Muslim about the ownership of a property in the possession of both the parties, then the dispute will

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 308-322

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 336.

<sup>3</sup> Ibid, 338.

<sup>4</sup> Ibid. 352.

<sup>5</sup> Ibid, 339.

be settled in due course of witnessing to prove the ownership of the property by one of the party. In case if both the parties fail to prove their ownerships then the property will be divided into two divisions. One division will be given to the guaranteed alien and the other one will be declared as war spoils<sup>1</sup>. According to Shaybānī, the guarantee of an alien during war will be extended to his family members who are dependent on him and to the cattle on whom he carries loads and luggage on the basis of *Istīḥsān* to facilitate aliens to pass easeful life. The independent family members are required to apply for guarantee independently. Otherwise they will be declared war spoils<sup>2</sup>. According to Shaybānī, people who are surrounded by Muslim army will also be protected for their properties, children and other belongings on the condition if they accept Islam. Shaybānī derives this law from the verse of the Qur'ān<sup>3</sup> and several Ahadith of the Prophet (peace be upon him) and precedents of the companions.<sup>4</sup> Furthermore, the wives and the adult children of such people, will not be granted any protection those who do not embrace Islam. They will be considered as spoils<sup>5</sup>. According to Shaybānī, a guarantee can be given verbally or in writing as well as by using an indication that means protection. According to him guarantee will be assumed even the guaranteed person does not know such indication of the guarantor and vice versa as the precedent of Hazrat Umar witnesses. In this incident Harmuzan

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 353-354

<sup>2</sup> Ibid, 345, 346.

<sup>3</sup> "If they (non-Muslim) repent, establish prayer and pay Zākāh then let them go" Qūr'ān, 09:05.

<sup>4</sup> Jabīr RA says that the prophet (peace be up him) says, I have been commanded to fight the people until they say there is no God but Allah. So when they say there is no God but Allah then they will be granted protection from me for their lives and property, except by right of justice, and their reckoning is with Allah.

When the tribe of Bānū Qūrāidhā was trapped by the prophet (peace be up him), some people from them embraced Islam. The prophet (peace be up him) gave them protection although they were trapped. Shaybānī, says it understood that embracing Islam is giving protection to trapped people as it gives protection to free people. {Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 261.}

<sup>5</sup> Ibid.

got guarantee from him while he was not aware of the situation that he has given him guarantee<sup>1</sup>. Awarding guarantee carries the elements of facilitation and easement there is no fixed wordings for it in Muslim International Law.<sup>2</sup> According to Shaybānī, the gestures that are usually people use for granting a guarantee or which stand for an implied guarantee are accepted in this regard. *Amān* will only be consider applicable if it is given in situation when aliens are dominant but will not be effective in a situation when they are surrounded and captured by Muslim army. In the later situation they will be dealt as combatants who will be explained in the next chapter. According to Shaybānī, usually customary indications and gestures are to be used for awarding guarantee as Shari'ah Maxim<sup>3</sup> guides us that if a thing is proved by a particular custom will be dealt as legal and just, in accordance with this maxim Ibn Qudāmah is of the view that if an alien is found possessing some trading goods indicating him a trader in Muslim state will be assumed as guaranteed alien<sup>4</sup>.

According to Shaybānī, if Muslim army finds a person during war in the occupied territory of alien state being claiming to seek guarantee, will be treated as spoils of war. In this situation the person will be considered as imposter claiming for guarantee. If the aforementioned person is found in a place where Muslim army conquer the area but the person did not plead for any guarantee while the person had an opportunity to plead for guarantee and the Muslim army was in position to hear the pleading for guarantee, will be either killed or will be declared as war spoils. In continuation to the said person, if he/she pleads for

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 264.

<sup>2</sup> Ibid.

<sup>3</sup> <sup>الثابت بالعرف كالنائب بالنص</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 169.

<sup>4</sup> Abu Muhammad Abdullah bin Ahmad bin Muhammad bin Qudama al-Hanbali, *al-Mughni le Ibn Qudāmah* vol.9 (Egypt: Maktab tul Qahira, 1968), 247.



guarantee being surrendering before Muslim army will be given guarantee. If a person is found in a safe place being surrendering before Muslim Army and the Muslim neither capture him nor kill him, in this situation he will not be killed and will be given guarantee<sup>1</sup>. During war, if a person is found being leaving any protected place and have surrendered to Muslims army, will be given guarantee on the demand of the person regardless caring weapons or not by the person. Conversely if the person was caring any weapons and was giving the impression to fight with Muslim army, will not be given any guarantee<sup>2</sup>. Moreover, if the particulars of such person are not known to Muslim army he will be handover to Muslim state and after the necessary verification the state declare him as a non-Muslim citizen.<sup>3</sup> According to the spirit of guarantee, it can only be awarded in a situation when aliens are in weak position and want to save themselves and properties from any expected loss in war. In accordance with this pen point philosophy, if aliens enter to Muslim state being showing that they are powerful logistically, the Muslim will have an option of awarding them any guarantee or not. Moreover, if guaranteed aliens gather to show any logistic strength against Muslims and intend to make any law and order situation for Muslim state will be declared as aliens and their guarantee will be terminated by Muslim state without giving them any concessions which a Muslim state usually gives to guaranteed aliens. Such persons will not be let to go back to the country or countries of their origin.<sup>4</sup> According to Shaybānī, if an alien is found in a Muslim state claiming that he has been given guarantee, his claim will not be entertained without sufficient proof. Sufficient proof in a case of individual alien's guarantee is the

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār- Ma'rifah, 1993), 91.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 292.

<sup>3</sup> Ibid, 294.

<sup>4</sup> Ibid, 295.

acknowledgement of guarantee by a Muslim along with furnishing of two witnesses. While for a trader the proof may be trading goods or services and for a messenger may be a possessor of a message or letter from his king otherwise, according to Abū Ḥanīfah if are caught by Muslim army or any Muslim individual will be declared as spoils of war. Abū Ḥanīfah presents reason to his logic as that individual who arrest such aliens in Muslim state considers the property of Muslim state because Muslim state has facilitated and strengthen Muslims individual to arrest such aliens. Without the sufficient protection by state Muslim individual was not capable to arrest them. He exemplifies it with the spoils of war which a Muslim soldier captures from non- Muslims with the help of Muslim Army. Moreover their acceptance of Islam before or after their arrest will not save them from declaring them being spoils of war<sup>1</sup>. According to Shaybānī these aliens will be considered personal property of the individual who has arrested them. Shaybānī declare them as hunted by Muslim individual who is the sole proprietor of his prey. According to him if these aliens accept Islam before their arrest, will be considered freed and if are acknowledged for any guarantee then will be declared as guaranteed aliens.<sup>2</sup>

### 5.2.2 The power of awarding Guaranty (*Amān*)

Under Muslim International Law, every Muslim without the discrimination of gender can award guarantee to aliens on the behalf of Muslim state. Muslim state rectifies guaranties with a condition if such guarantee does not contradict with national interests of Muslims and Muslim state. During war, such guaranties are subject to the rectification of commander of Muslim army. Commander of Muslim army may also delegate this power of rectification to any civil or military

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 294-297.

<sup>2</sup> Ibid.

officer because awarding guaranty is the sole discretionary power of commander of Muslim army. According to Shaybānī the guarantee given by a free Muslim, to an alien will be binding on Muslim state. This is based on the Ḥadith of the Prophet (peace be up him), the Prophet said: All Muslims are equal in awarding guarantee as they are equal in blood money<sup>1</sup>. The guarantee given by lowest Muslim will be binding on all Muslims<sup>2</sup>. According to Sarakhsī the word "*Adna*" mentioned in the aforementioned Hadith stands for three possibilities in the case of awarding *Amān* that is either giving by a Muslim individual or by a Muslim who lives on the border to aliens or by a *fāsiq* (less authentic Muslim), will be binding on all Muslims and Muslim state.<sup>3</sup> According to Sarakhsī a guarantee given by a Muslim individual or state to an alien is a kind of assisting Islam. Giving protection to aliens when they request for it, make their hearts soft for accepting Islam. According to him, Muslims are supposed to assist Islam either fighting against the enemies of Islam or by giving guarantee to those who deserve it. Sarakhsī considers the peace contract of Ḥudaybiyyah as a great success and assistance for the earlier Muslims as mentioned in Surah al- Fath of the Qur'ān<sup>4</sup>. According to him guarantee is considered assisting Islam and every Muslim is supposed to assist Islam so every Muslim individual is eligible to assist Islam<sup>5</sup>. This shows that every Muslim is eligible to award guarantee to a person who requests for it. The giver of the guarantee will be the representative of all Muslims<sup>6</sup> and Muslim state.

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<sup>1</sup> Abū Dawood Sulaiman bin al-ash'th bin Ishaq, *Sunan-e-Abi Dawood*, vol. 4 (Beirut: Dār-Risalah al-'alamiyyah, 2009), 379.

<sup>2</sup> Ib-e- Majah abū Abullah Muhammad bine Yazeed Al-Qazweeni, *Sunane Ib-e-Majah*, vol. 3(Bairūt: Dār-Risalah Al-ālāmiyya,2009)689.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 252

<sup>4</sup> Al-Qūr'ān, 48, 1.

<sup>5</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 252

<sup>6</sup> Ibid.253

Therefore, guarantee given by any Muslim will be binding on all Muslims and Muslim state.

According to Shaybānī a Muslim female is also eligible to award guarantee to aliens because she is eligible to assist Islam either by her wealth or sayings. Although she is not bound to fight to defend Islam but she can assist Islam by her wealth or by her saying. Awarding guarantee means pledging of someone verbally or in writing<sup>1</sup>. Shaybānī has argued that the Prophet (peace be up him) ratified the security and guarantee given by Zaynab RA to her husband Abū al-a'ās<sup>2</sup> and also endorsed the guarantee given by Umme Hani RA to her two relatives<sup>3</sup>. The Prophet (peace be up him) did not only ratify the guarantees given by these females but also said, we have given guarantee to whom you have given guarantee<sup>4</sup> According to Abū Ḥanīfah and Abū Yūsuf, only a Muslim fighter slave can award guarantee to aliens. Generally, a Muslim slave is not eligible to award guarantee. He is only required to serve his master. A Muslim slave who fights

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 253

<sup>2</sup> Yazid bin Roman said: *Abū al-a'ās* entered to the house of *Zainab* RA and got guarantee from her. When the Prophet (peace be up him) was praying *fājir* prayer, *Zainab* shouted O people! I have given guarantee to *Abū al-a'ās*. When the prophet (peace be up him) completed his prayer, turned his face to the people and said: have you heard what I heard? The people said: yes, the Prophet (peace be up him) said: I swear in the name of whom in whose hand my soul is, I did not know anything of that until I heard what you heard, and the guarantee of a lowest Muslim is binding on other Muslims. Then the prophet (peace be up him) entered to the house of *Zainab* RA and told her, take care of him only neither he is a lawful husband of you nor you are a lawful wife of him. Ahmad bin Hussain bin Ali Abu bakar al-baihaqi, *Al- Sunan al-Kubrā*, vol.9 (Bairūt: Dār-Kūtūb al- 'Imiyyah, 2003)162.

<sup>3</sup> Abdullah bin Ikramah said: when *Makkah* was conquered by the prophet (peace be up him), *Haris bin hisham* and Abdullah bin abi Rabīa entered the house of *Umm-e-Hani* and got her guarantee. Later on Ali RA came to the house of *Umm-e-Hani* and wanted to kill both of them. But *Umm-e-Hani* did not let him to kill them and she said: if you want to kill them kill me first. *Ali* RA said: you have given the guarantee to polytheists and went away. *Umm-e-Hani* came to the prophet (peace be up him) narrated the story, the prophet (peace be up him) said: we have given the guarantee to whom you have given. Abū Abdullah al-Ḥakim Muhammad bin Abdullah, *Al-Mustadrāk ālā al-Sāḥīḥain*, vol.3 (Bairūt: Dār-Kūtūb al- 'Imiyyah, 1990)312.

<sup>4</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 253.

Jihād with the permission of his master makes him/her eligible to award any guarantee to aliens. Permission of mater makes him/her eligible for fighting Jihād against non- Muslims and fighting empowers him/her awarding guarantee to aliens. Guaranteed aliens will be protected at any cost by their guarantors<sup>1</sup>. According to Shaybānī and Al-Shāfi'ī Muslim slaves (fighters and non-fighters both) are eligible to award guarantee to aliens on the qualification of assisting Islam as mentioned earlier.<sup>2</sup> All Muslims without any discrimination of slavery and freedom and gender are required to assist Islam as per their faculties. Awarding guarantee to aliens amounts to assist Islam so Muslim slaves and freed individuals all can award guarantee. A Muslim slave has the capability to give the guarantee as he has the capability to give witness in sighting of Ramaḍān moon<sup>3</sup>. Furthermore, Shaybānī argues from the precedent of Hazrat 'Umar RA when he was informed about a Muslim slave who had written the words of guarantee on an arrow and had thrown it to aliens. 'Umar RA had ratified the guarantee<sup>4</sup>. Abū Ḥanīfah interprets the guarantee of the slave as the guarantee of fighter slave who is allowed to award<sup>5</sup>.

Guarantee given by a non- Muslim citizen is void even he is fighting along with Muslims. Shaybānī has furnished two reasons in this respect: The first one is the similarity in beliefs (the belief of a non-Muslim guarantor and the belief of an alien) and the second one is that he is not bound to assist Islam as Muslim.

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 255

<sup>2</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.4 (Bairut: Dār-Marifah, 1990),302.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 256

<sup>4</sup> Fādhāl al-Reqāshi says we have occupied the fort of (non-Muslim) one of the Muslim slave wrote words of guarantee on an arrow and thrown it to aliens. We wrote to *Umār* RA (in order to ask him about the legality of the guarantee given by the slave). *Umār* RA replied that the guarantee is awarded by a Muslim is enforceable. Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 256

<sup>5</sup> Ibid.

According to Shari'ah non-Muslim is not capable to defend Islam. In lieu of this duty Muslim state collects poll tax from the non-Muslim citizens. Awarding guarantee by a Muslim is considered by Sarakhsī assisting Islam<sup>1</sup>. Shaybānī answers the question of why Muslim state seeks help from non-Muslim citizens during war. He argues that Muslim state also uses logistic help from other different things like horses, elephants, dogs then how could these things award guarantee to aliens<sup>2</sup>. This means that weapons or animals including non-Muslim citizens which are using in war by a Muslim state do not capable of awarding any guarantee to aliens. According to Shaybānī, seeking help from non-Muslims during war is to pressurize aliens by giving an impression to aliens that the non-Muslim citizens are also defending Muslim state<sup>3</sup>. According to Shaybānī guarantee given by a Muslim juvenile will be considered valid. Similarly, if a non-Muslim juvenile who is well versed in Islamic qualities and convinces other people on Islam if awards guarantee to any alien will also be endorsed by Muslim state. Shaybānī furnishes his argument for accepting guarantee of person as if *Eīmān* of such person is acceptable then his *Amān* will also be acceptable on the basis of his *Eīmān*<sup>4</sup>. According to Abū Ḥanīfah, guarantee will only be valid if the guarantor knows the in-depth philosophy of awarding a guarantee on the grounds whether such guarantee will be beneficial logistically for Muslim state or not. According to him a child is incapable of such decision in respect of a war strategy of Muslim state. Furthermore, he also argues that the right of awarding guarantee is associated with Muslim warriors not with Muslim non-combatants. Legally a

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhīrāh: al-Shārikāh al-Shāriyya lil ilanāt, 1971), 253

<sup>2</sup> Ibid, 257.

<sup>3</sup> Ibid, 257.

<sup>4</sup> Ibid.

child irrespective of his/her faith not required to participate in war. In the light of these arguments any guarantee awarded by a child will be considered void<sup>1</sup>

According to Abū Bakar al-Rāzī, a child who is fighting with due permission capable of awarding guarantee. Such child will be assumed as a Muslim slave who fights with the permission of his master. If such slave is capable for awarding guarantee, then the Muslim young will also be treated as capable of awarding any guarantee to aliens. While the others Ḥanafī jurists are of the view that a child who participates in fighting has no capability to award guarantee because he does not know the strategic affairs of Muslims and Muslim state<sup>2</sup>. Awarding guarantee by anyone is subject to some terms and conditions to be fulfilled in general or specific welfare of Muslim state. If a Muslim state considers a guarantee awarded as in conflict with the conditions accepted to Muslim state, will be consider void and ineffective. In this connection the bilateral conditions upon which belligerent/contracting states have agreed must be fulfilled by every guarantee awarded. Failing to any of the agreed conditions may result ineffectiveness of the guarantee awarded.

### 5.2.3 Conditions in *Amān* during war

There are two categories of conditions that are to be fulfilled while awarding any guarantee to aliens. The first category of conditions is to be checked whether Muslim state is capable for awarding any guarantee on its own behalf and the second category which is to be checked in the context of the belligerent/contracting state.

First category of condition with reference awarding *Amān*

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 257.

<sup>2</sup> Ibid.

Muslim state. Muslim state can award guarantee to aliens subject to the condition of observing of previous agreements/pledges or contracts. If Muslim state thinks fit to award guarantee being fulfilling all the vicarious liabilities, then such guarantee will be considered a valid guarantee under Muslim International Law<sup>1</sup>.

Muslim Individuals. All Muslim individuals irrespective of the discrimination of gender are capable of awarding guarantee to aliens and belligerents<sup>2</sup>.

Muslim Slaves. According to Imam Abū Ḥanīfah and Imam Abū Yūsuf only Muslim fighter slaves can award guarantee to aliens and belligerents. According Imam Shaybānī and Imam Al-Shāfi'ī, all Muslims irrespective of their gender and slavery capable of awarding guarantee to belligerents and aliens.<sup>3</sup>

Non- Muslim Citizens. All non- Muslim citizens are incapable of awarding guarantee to belligerents and aliens. According to Imam Shaybānī reason to their incapability is similarity in belief with non-Muslim and non- Muslim citizens are not bound to assist Islam by virtue of their belief.<sup>4</sup>

Muslim Juvenile. According to Shaybānī, Muslim juvenile can award guarantee on the behalf of Muslim state to belligerents and aliens. According to him if Eimān of Muslim juvenile is acceptable then his *Amān* must be acceptable. Iman Abū Ḥanīfah does not believe in a guaranteed awarded by a juvenile. He is of the view that awarding guarantee is a matter of national security of Muslim state which a juvenile cannot decide precisely in the benefit of Muslim state. He is of the view

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 252

<sup>2</sup> Abū Dawood Sulaiman bin al-ash'th bin Ishaq, *Sunan-e-Abi Dawood*, vol. 4 (Beirut: Dār-Risalah al-'alamiyyah, 2009), 379.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 255

<sup>4</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 253



that the such affairs of Muslim state should be decided by an adult capable Muslim.<sup>1</sup>

Muslim Child participated in Jihād. According to Shaybānī a child who is participating in Jihād with due permission of Muslim state/parents is capable of awarding guarantee. Imam Abū Ḥanīfah denounces a guarantee of children.<sup>2</sup>

Second category of condition on the behalf of bilateralism. The second category of condition is related to the bilateral fulfillment of conditions. A guarantee will be considered valid if it fulfills the bilateral conditions otherwise will be ineffective and void.

Guarantee may be awarded on the fulfillment of bilateral conditions. According to Shaybānī, if aliens offer some incentives in lieu of conditional guarantee for their families and belongings then Muslim army may give them guarantee. If aliens perform the duty or duties for which they had held pledged themselves like if they're given guarantee, then they will open the doors of the fort of alien army to conquer by Muslim army and if they do open the doors then Muslim army is bound to given them conditional guarantee. The provided guarantee to aliens will be inclusive to their family members like their wives, children and captives and belongings excepts gold, silver, ornament and cash money<sup>3</sup>. The captives of the facilitators will be returned to them if they're not distributed or sold in the market. In case if they're sold or distributed among Muslim soldiers then such slave will only be recovered by the aliens if they produce Muslim witnesses to prove their ownership on such slaves. The other belongings including their family members and captives will be recognized to them after the due clarification with proper

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 257.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 255.

<sup>3</sup> Ibid, 324.

witnessing. Those who are failed to be ratified in due course of clarification will be declared war spoils. If they claim that we have taken the guarantee for these specific belongings which are not in the hands of Muslims so their statement would be accepted and the belongings would be given back to them. The belongings of aliens in this case will be decided on the basis of prima facie possession. Goods which are in their possession of aliens will not be made subject for any more inquiry but goods in the possession of Muslim army if are claimed by aliens will be decided by the procedure of proper witnessing to be produced by aliens on basis of Muslim witnesses. If aliens fail to prove the ownership of such goods then it will be declared as spoils of war.<sup>1</sup> If a guarantee is awarded on fulfilling some conditions by the aliens, then such guarantee will be considered nullified if such conditions are not fulfilled or abridged or violated by the aliens. Muslim state is free to declare such guarantee as ineffective and may inflict punishment on the guaranteed aliens. Such punishment will be either killing aliens or make them captives.<sup>2</sup> If any bilateral or unilateral condition of the awarded guarantee is abridged either by the awarding state or by the person to whom a guarantee is awarded, may result to the violation of the contract of guarantee (*Amān*).

#### 5.2.4 Violation of *Amān* during war

Violation of (*Amān*) results in two forms. The individual who has violated the guarantee awarded by Muslim state will be made subject to either punishment, compensation or the cancellation of the guarantee availed. In case of state, if the treaty of peace is violated then the aggressor state will be dealt as we find in the

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 308-322

<sup>2</sup> Ibid 278

precedents of Banū Qurayḍah and Ḥudaybiyyah. According to Shaybānī, a guarantee awarded by Muslim individuals or Muslim state is binding on all Muslim individuals and Muslim states. If Muslim individuals or Muslim state attacks on the guaranteed aliens and kills them, destroys their properties or disgraces them being knowing their guaranteed status or not, in every situation the attackers are bound to pay the blood money for all the murders and have to redress the properties destroyed and pay the damages for any loss done by them. If they do not know about the guarantee, then the killing will be considered unintentionally and obviously there is blood money in unintentional killing. If they know about the guarantee, then blood money will also be given because the suspicion of *Mūḥārābāh* (wagering war against Islam or Muslims) is attached to all aliens. This argument of Shaybānī draws its authenticity from the verse of the Qur'ān<sup>1</sup>. According to Shaybānī, the captured women and children of guaranteed aliens should not be made captives and will be handed over to them because they are protected with respect to their properties and families by the contract of guarantee between Muslims and the aliens. Dowry will be given to the women who are sexually used. Although sexual intercourse is illegal with such women are protected through a contract of guarantee by any Muslim individual or state but due to the suspicion of Muharabah attached to them no penalty will be inflicted on those who have done sexual intercourse with such women. As compensation dowry will be given to these women<sup>2</sup>. If these women gave birth children, these children will be considered free Muslims because their fathers are Muslims. This argument is based on a juristic maxim that children are associated

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<sup>1</sup> "That compensation should be given to the killed person's family "If he (killed person) belonged to a people with whom you have a peace treaty, then compensation should be handed over to his family, and a believing slave should be set free" *Qūr'ān*,4,92.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 258.

to the best parent in the context of religion.<sup>1</sup> Sarakhsī has referred several Aḥādith of the Prophet (peace be upon him) and precedents of the Companions in support of this argument<sup>2</sup>. Termination of (*Amān*) is the willful act of the contractual parties to dismiss any peace contract. Although Muslim International Law emphasizes on the fulfillment of all the bilateral agreements and contracts but in case of unavoidable circumstances it allows Muslim state to terminate a contract which may result dire consequences for Muslims individuals or Muslim state if not terminated formally. According to Shaybānī, guarantee of aliens is directly related to the security and benefit of Muslims. Any guarantee that endangers the security or interest of Muslims can be dismissed by Muslim state being communicating it to the guaranteed aliens<sup>3</sup>. Shaybānī has made the base of this rule of law on the verse of the Qur'ān<sup>4</sup>. This verse of the Qur'ān indicates that if Muslim state fears treachery of aliens then may announce the treaty is being revoked. This verse gives Muslim state the power of dismissal of the peace treaty. Public and formal

<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 258.

<sup>2</sup> According to the *Ḥadith* of *Mūhallāb bin abi Sūfrah* "when the city of *al-āhwāz* was conquered by Muslim army in the era of Hazrat *Umār* RA. The inhabitants were already protected through a peace treaty under the sign of Hazrat *Umār* RA. After the settlement of war the women were made captives and were sexually abused by the Muslims. When *Umār* RA came to know, he ordered to return the captive women and to own the children by the Muslims who were born due the sexual intercourse by them. *Sārākhṣī* has also quoted another *Ḥadith* in which the prophet (peace be up him) not only paid the compensation to the legal heirs of *Bānī Jādhīma* who were killed by Muslim Army General Hazrat *Khālīd bin Waleed* RA but also announced that he is not responsible for the act of *Khālīd* RA. {*Ibn Umār* RA says, that the prophet (peace be up him) sent *Khālīd* RA to *Bānī Jādhīma*(name of the tribe in order to embrace Islam) the people of that tribe used the word *Sābā'nā* which did not give the clear message to *Khālīd* RA. *Khalid* RA started killing and making them slave and ordered every of Muslim to kill what he captured among them. *Ibn Umār* RA says I declined to kill my slave and also announced that my friends will also not kill their slaves. Then we informed the prophet (peace be up him) and he said two times: "oh Allah I am not liable for what *Khalid* did". Muhammad bin Ismail Abū Abdullah al-Bukharī, *Sāḥīḥ al-Būkhārī*. The Prophet (peace be up him) paid the blood money of the deceased persons from the public treasury of Muslims and ordered Hazrat *Ali* RA to pay the compensation to the heirs of of *Bānī Jādhīma* who were killed". Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 261.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 264.

<sup>4</sup> "If you fear treachery from any group, throw back (their covenant) to them, (so as to be) on equal terms: Allah does not love the treacherous". Al-Qūr'ān, 8, 58.

dismissal is required for any treaty or guarantee to be announced as null and void by the contracting parties. Moreover, enough time will be given to aliens to protect themselves<sup>1</sup> and their properties otherwise it will be considered perfidy in accordance with the Qur'ān.<sup>2</sup> Sarakhsī has referred to a precedent of Hazrat Mu'āwiyah RA regarding the fulfillment of peace treaty with aliens<sup>3</sup>. From this precedent, Sarakhsī concludes, that Muslims must fulfill their covenants with others and have not only to avoid explicit perfidy but also not to indulge suspicion activities that lead to perfidy<sup>4</sup>. According to Shaybānī, if an army chief dismisses the guarantee of aliens during war, in such situation they should be given sufficient time and opportunity to save themselves as well as their properties. This can be possible by announcing a time in which they can easily vacate their dwellings and letting them to access to their properties to save them accordingly. Those who are not leaving the area will be treated as non-Muslim citizens of Muslim state. Poll tax will be imposed on such guaranteed aliens and they lose the opportunity to avail it for second time<sup>5</sup>. When full-fledged war is waged against the belligerents then Muslim state is allowed under Muslim International Law to adopt ethical rouses of war.

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<sup>1</sup> "If one amongst the Pagans seeks you for guarantee, grant it to him, so that he may hear the word of Allah; *Al-Qūr'ān*, 9,6

<sup>2</sup>*Al-Qūr'ān*, 8,58. .

<sup>3</sup> Reported by *Sūla'im bin āmir*, he says: "There was a peace treaty between *Mo'āwiyah* RA and Roman Empire. When the time period of the peace treaty came to expire, *Mo'āwiyah* RA intended to attack on Romans before the time peace treaty had to expire. *Amr bin āmbāsā* RA came and said to him "*Allah* is greatest, fulfillment of the treat is binding on you and you have to avoid perfidy". *Mo'āwiyah* RA asked him to explain his statement. He replied that I have heard the Prophet (peace be up him) saying: when there is a peace treaty between Muslim and others, the peace treaty will be remained effective unless the treaty expires or dismisses it by any party. *Mo'āwiyah* RA ordered the people to go back from the border". Abu 'Isa Muhammad ibn 'Isa al-Tirmidhī, *Sunan al-Tirmidhī*, Vol.6, 99.

<sup>4</sup>Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 265.

<sup>5</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 287.

### 5.3 *Amān* and Ruses of war

Under Muslim International Law Muslim state is bound to observe with letter and spirit all the agreements and peace contracts upon which it is agreed bilaterally in both the situations of war and peace.<sup>1</sup> Similarly, Muslim International Law disapproves any inconsistency between the actions and pledges of Muslim individuals and State.<sup>2</sup> It also strictly disapproves any kind of disloyalty to the pledges to which it has bound itself explicitly or implicitly.<sup>3</sup> It bounds Muslim state to observe all the agreements or contracts between Muslim state and non-Muslim individuals or non-Muslim state at all possible efforts. According to Shaybānī, if Muslim state feels any threat or dangers to its national security from the state with which Muslim state has signed agreement in such situation, Muslim state can formally and bilaterally terminate such contract.<sup>4</sup> This rule of law of Shaybānī is based on Qur'ānic injunction which bounds Muslim state to such formality.<sup>5</sup> On the other hand, Muslim International Law allows to adopt ruses of war according to the need of time.<sup>6</sup> Muslim International Law allows only those ruses of war

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<sup>1</sup> "O ye who believe! Fulfill (all) obligations." *Al-Qūran*: 5,1.

<sup>2</sup> "O ye who believe! Why say ye that which ye do not? Grievously odious is it in the sight of Allah that ye say that which ye do not." *Al-Qūran*: 61,2,3.

<sup>3</sup> "It was reported from AN Bakrah who said: "The Messenger of Allah said: 'Anyone who kills a person to whom a covenant was granted prior to its expiration, Allah will forbid him from entering Paradise.'" Abu Dawūd Sulaiman bin al-ashās al-Shabistānī, *Sunan-e-Abi Dawūd* vol.3(Riyadh: Dar-al-Salam 2008),354.

<sup>4</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shāriyya lil ilanāt, 1971), 264.

<sup>5</sup> "If you fear treachery from any group, throw back (their covenant) to them, (so as to be) on equal terms: Allah does not love the treacherous". *Al-Qūr'ān*,8,58.

<sup>6</sup> "Sufyān said: 'Amr heard Jābir say that the Messenger of Allah j4 said: "War is deceit". [ Muslim bin Al Hajjaj Abul Hassan, *al- Jami al- Sahih Muslim* vol.5 ( Riadh: Dar-al-Salam 2007),23.

"It was reported from Ma'mar, from Az-Zuhri, from 'Abdur-Rahmān bin Ka'b bin Malik, from his father that whenever the Prophet (peace be up him) wanted to go on a military expedition, he made it appear as if he was headed somewhere else, and he used to say: 'War is deception.'" Abū Dāwud said: No one came with this (narration) except for Ma'mar, meaning his saying: "War is deception" with this chain of narrators. It was only related from the Ijādith of 'Amr bin Dinar, from JAbir, and from the Ijādith of Ma'mar, from

which are in accordance to the spirit of Islam and all the approved rituals of worshipping Allah. No rouse of war is allowed which comes with conflict to the spirit of Islamic approved worshipping Allah. These ethical rouses of war discussed in the following section. According to Shaybānī, a ruse during war is giving an expression to the belligerents other than the actual logistic position of Muslim army in such a way that combatants consider it as actual situation while the expresser does not highlight intentionally the real situation<sup>1</sup>. Sarakhsī explains it as ruses of war is telling lie nor deceiving combatants during war because both are prohibited Muslim International Law. According to him, a ruse of war means using words during war by Muslim army which have multiple meanings<sup>2</sup>. According to him, this rule of law is based on the precedents of Hazrat Ibrahim AS who had used words which carried various meanings.<sup>3</sup> He further elaborates the word ruse of war by giving an example of commander of Muslim army when he shares his views with soldiers in a manner that Muslim army will be succeeded in the ongoing war while the actual situation does not support for what is claimed on condition that commander should avoid himself from telling lie in his all expressions giving to Muslim army or belligerents. According to Sarakhsī this rule of law is based on an incident with aged women when she came to the Prophet (peace be up him) and asked him whether aged women will enter Paradise or not. The Prophet (peace be up him) replied with no and she started weeping then Prophet (peace be up him) asked her, had she not recited in the Qur'ān that all Muslims will enter the heaven in young-age. Then she stopped her weeping and

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Hammām bin Munabbih, from Abu Huraira" Abu Dawūd Sulaiman bin al-ashās al-Shabistāni, Sunan-e-Abi Dawūd vol.3(Riyadh: Dar-al-Salam 2008),275.

<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 119.

<sup>2</sup>Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 119

<sup>3</sup> Ibid.

consoled.<sup>1</sup> Sarakhsī has suggested for Muslim army to use in its communication the words 'may be' or 'hoped' to avoid lie and apply the principle of *Tawriyyah*.<sup>2</sup> He says the Prophet (peace be up him) used the term of 'may be' in the battle of Aḥzāb<sup>3</sup>.

The term '*Tawriyyah*' (Using manifold words) means giving an expression of someone according to actual situation while the listener understands something else<sup>4</sup>. The Prophet (peace be up him) used this term when he was going out of Madinah for any military action against the combatants. The companions of the were not aware of the direction of the Prophet (peace be up him).<sup>5</sup> Likewise, adopting of ruses during war accustomed in the practice of the Prophet (peace be up him) at the time of migration from Makkah to Madinah direction of movement of the Prophet (peace be up him) was not towards Madinah but he had stayed in the cave of *Thawr* for a few days which is situated the opposite direction of Madinah. Later, he moved to Madinah. From the explanation it is cleared that ruses are permissive and treachery is prohibited under Muslim International Law. Treachery and deceiving belligerents by telling them lie is prohibited under Muslim International Law but it has made ruses of war permissible. The consequences of the two war phenomena have opposite impact on the opponent party that is why these opposite phenomena cannot be summed off and sandwiched. Any treachery in the name of war ruses, will be considered perfidy. The rule of law is that guarantee of any Muslim individual results the protection

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shāriyya lil ilanāt, 1971),120.

<sup>2</sup>Ibid,121.

<sup>3</sup>Ibid,121.

<sup>4</sup> Jihad Muzaḥamat

<sup>5</sup> "It was reported from Ma'mar, from Az-Zuhri, from 'Abdur-Rahmān bin Ka'b bin Malik, from his father that whenever the Prophet (peace be up him) wanted to go on a military expedition, he made it appear as if he was headed somewhere else, and he used to say: 'War is deception.'" Abu Dawūd Sulaiman bin al-ashās al-Shabistāni, *Sunan-e-Abi Dawūd* vol.3(Riyadh: Dar-al-Salam 2008),275.



of the life and property of guaranteed aliens. If Muslim army gives a signal of guarantee for the protection of belligerents and under lips pronounces their killing. This behavior of Muslim army will amount to deception which results perfidy on the behalf of Muslim army because the given signal of guarantee has made the belligerents protected with all respects.<sup>1</sup> According to Sarakhsī green signal of guarantee by the Muslim army to belligerents during war accounts to the protection of life and properties of belligerents not making their lives and properties to be demolished. According to him a guarantee can only be terminated or revoked explicitly and formally and not by deceptive measures. In the above example, the belligerents to whom guarantee was awarded by using of gestures of guarantee considered as explicit guarantee. The rule of law in case of availing guarantee during war depends on the understanding of the gestures of guarantee by the opponent party (belligerents) to the contract of guarantee not the understanding of Muslim army.<sup>2</sup> Ambassadors are given protection in Muslim as well as Contemporary International law. Muslim International Law does not allow misuse of diplomatic immunity for ruses of war. According Shaybānī and Sarakhsī, if some of the Muslim soldiers show themselves as ambassadors for facilitating Muslim army and the alien or belligerent army trust in them as ambassadors this kind of war ruse will be counted as treachery and invalid under Muslim International Law. This rule of law is also applicable for the real ambassadors who surreptitiously facilitating Muslims army in their movement around belligerents. According to Shaybānī this rule of law is also applicable to individual ambassadors and a group of ambassadors. According to him, under Muslim International Law such diplomats whether real or fake are strictly not allowed to facilitate Muslim army in its mission nor they by themselves harm any

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 263.

<sup>2</sup> Ibid.

belligerents otherwise it will be considered treachery.<sup>1</sup> Reason to this rule of law is that if guarantee to such diplomats is awarded on their demand then under the spirit of demand such diplomats are not allowed to harm directly or indirectly the state which has awarded guarantee. Such diplomats' properties and other belongings are protected from both sides that is from the guest and host states.<sup>2</sup> According to Sarakhsī , guarantee is awarded to ambassadors or traders to facilitate nation states among themselves and this facilitation will be made easy on both sides so any chance of facilitating the nations states will not let be spoiled and will be availed for establishing friendly relations that is why fake ambassadors and traders are awarded guarantees on their face.<sup>3</sup>

Under Muslim International Law traders are protected by custom and tradition of the nation states even they do not obtain formal *Amān* from Muslim state. Possessing trading goods is sufficient proof to have presumed them as traders.<sup>4</sup> The protection of traders is not unilateral issue but are bilaterally protected. The above rule of law does not allow Muslim traders to facilitate Muslim army in the name of ruses of war. If Muslim traders commit any action contrary to their guarantee will be considered treachery. Shaybānī is of the view that if Muslims show themselves as traders while they are not actual traders, they cannot deceive aliens like the actual traders otherwise it will be considered treachery.<sup>5</sup> According to general rules of Muslim International Law regarding Muslim prisoners in an alien's state, a Muslim prisoner can take any action either legal or illegal against aliens for making himself free. Likewise, he also can take

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 507.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Abdul Kareem Zaydan, *Aḥkam al-dhimyyinawa al-Mustā'mīnīna fi Dār-Islam*, (Baghdad: Makābah al-Qūds, 1982), 53.

<sup>5</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 508.

any measures to get the possession of his property back from aliens. Shaybānī stated in this regards a Muslim prisoner in an alien state can use all kinds of methods for freeing himself and his slaves from the occupation of aliens. In such situation he is also allowed take the possession of his slave girl by force, any other illegal means or stealing her. He is also allowed to kill any one of aliens and steal their properties as well.<sup>1</sup> Another general rule of Muslim International regarding Muslim prisoner is that a Muslim prisoner even after freedom from prison of aliens can do any act cases harm for aliens. Shaybānī, states in this regard, if there are some Muslims in alien's state freed by aliens from their prison, there is not harm for them if they could kill anyone of aliens or snatch their property and flee from their territory<sup>2</sup>. Sarakhsī elaborates the rule of law and says that the detention of Muslims does not change their status. They could fight non-Muslims before their imprisonment same is the case after the freedom. Muslims neither demand any guarantee to be given by the aliens nor aliens make them free by awarding guarantee rather than considered them weak and ignored<sup>3</sup>. The third rule of Muslim International Law regarding the Muslim prisoners is that the status of Muslim prisoners will remain the same unless and mutually (Muslim prisoners and aliens) changed to guaranteed persons. Shaybānī states in this regard if aliens say to Muslim prisoners go you are given guarantee and Muslims prisoner remain quiet. After getting freedom in such situations, Muslim can fight them because Muslim prisoner neither demand guarantee nor they compel anything on them in response to their offer.<sup>4</sup> If Muslim prisoners demand guarantee from aliens or they do not demand guarantee explicitly but commit any action or any saying which

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 ( Bairūt: Dār-Fikār, 2000),66.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 510.

<sup>3</sup>Ibid.

<sup>4</sup>Ibid.

resembles to the demand of guarantee in such situations, Muslim prisoners cannot deceive aliens because their status changes from Muslim prisoners Muslim guaranteed. Under Muslim International Law, guaranteed Muslim cannot deceive non-Muslim guarantor in anyway otherwise it will be considered treachery. According to Shaybānī, if belligerents ask Muslims who are detained in alien's state about their identity? Muslims tell them that they are traders or envoys of Muslim state, in this situation the detained Muslims are not allowed to kill the belligerents or give them any harm.<sup>1</sup> It is clear from the above explanation that treachery is different from ruses of war. Ruses of war are permissible while treachery is prohibited under Muslim International Law. According to them, the issue of *Amān* demands due care and should not be denied without any solid grounds by the Muslim state because it is related to the safety human life which Islam promotes and ensure at every cost. International Humanitarian Law also considers the matter of *Amān* like Muslim International Law. Shaybānī does not consider the providers of medical treatment or any other services like cooking food and providing water to wounded soldier as combatants. They are usually protected during war from every kind of attack and harm.<sup>2</sup> This protection provided by Muslim International Law to the medical care unit may not be used as ruses of war. such kind of any act will amount to perfidy.

#### 5.4 *Amān* and International Humanitarian Law

As earlier discussed that there are two aspects of International Law that are "*Jus ad bellum*" and "*Jus in bello*". *Jus ad bellum* analyses whether war is lawful or unlawful. This aspect of International Law is dealt by the UN charter under the

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 510,11.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 208.

title of "Use of Force". While the other aspect "*Jus in bello*" analyses ethics and conduct of war. Conduct of war is the core subject of International Humanitarian Law (IHL). IHL is the part of International Law which governs the strengths of fortified war. This law is also known as "The Law of Armed Conflict" before this it was known as "The Law of War".<sup>1</sup> IHL does not focus on the validity or legality of war but to ensure human rights during war<sup>2</sup>. It also focuses on how to minimize human loss during war. IHL negates the notion of free-hand-war.<sup>3</sup> International Humanitarian Law is derived from International Conventions and Customary International Law<sup>4</sup>. IHL is the combination of International Conventions and Customary International Legal Maxims.<sup>5</sup> The IHL expert, C.G. Weeramantry<sup>6</sup> is of the view that the sources Customary International Law and International Treaties of IHL are equally important and no precedence can be given to one over the other. With reference to differentiation between International Treaty and Customary International Law (CIL), he states that the general view of IHL experts of preferring treaty over CIL is due its binding on the countries concerned. According to him, CIL may be given preference over treaty because the Law of Treaty is based on CIL. He also considers CIL a combination of traditions, wisdom, moral and religious principles of a community. Further, he elaborates that the Law of Treaty is a narrow down phenomenon as compare to CIL. It compels every state to follow

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<sup>1</sup> Hans peter Gasser, International Humanitarian Law (Haupt: Henry Dunant Institute,1993),3.

<sup>2</sup>Ibid.

<sup>3</sup> Jihad, Mūzahamāt ao Baghāwāt, 201.

<sup>4</sup> Peter Malanczuk, Akehurst's Modern Introduction to International Law, (New York: Routledge,1997),35,36.

<sup>5</sup> Larry Maybee and Benarji Chakka, Custom as a Source of International Humanitarian Law (New Delhi: ICRC),43.

<sup>6</sup> Former Judge, International Court of Justice, Chairman of the Weeramantry International Centre for Peace Education and Research.

the general principles of Customary Law while the Law of Treaty bounds only the states signatories to a treaty<sup>1</sup>.

Before nineteenth century, International Law was based on Customary Law of the West. In nineteenth century, the struggle for the codification of the Customary Law started. Which later on became fruitful in twentieth century in the form of a precise and self-explanatory international conventions of CIL.<sup>2</sup> There are so many conventions and customary principles regarding IHL but the Four Geneva Conventions are very important in this regard. The first convention is the "Geneva Convention for the Improvement of the Condition of the Wounded and Sick in Armed Forces in the Field". While the second is the "Geneva Convention for the Improvement of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea". The third one is the "Geneva Convention Relative to the Treatment of Prisoners of War." The fourth one is "Geneva Convention Relative to the Protection of Civilian Persons in Time of War". These Conventions came into being on 12 august 1949. These conventions are enacted in a situation of armed conflict between the two nation states. According to article 2 of the first Convention, "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance"<sup>3</sup>. It is known from the above article that rights of those people are protected by the said conventions who are a part of an international armed

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<sup>1</sup> Larry Maybee and Benarji Chakka, Custom as a Source of International Humanitarian Law (New Delhi: ICRC),25,26.

<sup>2</sup> Jihad, Mūzāmāt aor Bāghwāt, 316,317.

<sup>3</sup> The first Geneva convention

conflict. Although there is an article 3 which is combined in the four Geneva conventions which applies to civil wars means non-international Armed conflict. Civil war may be taking place between the government and rebels of the government. Article 3 of the Geneva conventions states in this regard "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

b) taking of hostages;

c) outrages upon personal dignity, in particular humiliating and degrading treatment;

d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of

the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict"<sup>1</sup>.

Likewise, the additional protocol 2 to the Geneva conventions also gives protections to the basic rights of the civilians in non-international conflict on the basis of humanity.

Protocol 2 bans "violence to the life, health, and physical or mental wellbeing of people. In particular, it prohibits acts of murder and cruel treatment, terrorism, hostage-taking, slavery, outrages on personal dignity, collective punishment, and pillage. These protections are considered fundamental guarantees for all persons. Children are to be evacuated to safe areas when possible, and reunited with their families. Persons interned or detained during internal conflicts are assured of the same humane treatment as specified by the Geneva Conventions. It strengthens protection of the wounded, sick, and shipwrecked as well as medical and religious personnel. Attacks are forbidden on civilians and on "objects indispensable to civilian survival" such as crops, irrigation systems or drinking water sources, cultural objects, and places of worship. Impartial humanitarian relief organizations—such as the ICRC— are to be permitted to continue their humanitarian services"<sup>2</sup>.

It is known that according to Geneva Conventions and additional protocol rules that the victims of the non-international conflict, like noncombatants, children, wounded, disables and war prisoners will be given protection and will be treated based on humanity. Another source of the IHL is The Hague Law. It plays a vital role in IHL because in the history of the West, for the first time it was recognized that there should be some manners and ethics of war. Some rules were

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<sup>1</sup>Geneva conventions

<sup>2</sup> A Summary of the Geneva Conventions and Additional Protocols. ICRC, P 7.



set to regularize the conduct of war. Hague Conventions 1899 and 1907<sup>1</sup>. For the importance of The Hague Conventions it could be said that the current Geneva Conventions are the revised shape of The Hague Convention with a little bit amendments and addition.<sup>2</sup>

#### 5.4.1 General principles of IHL

IHL not only provides the guidelines for war but also enunciates the notion of taking every legal and illegal step as a warfare for defeating enemy.<sup>3</sup> Some of the important principles of war are:

1- Observing humanity.

IHL recognizes war as a fact based on unavailability provided that the basic human rights and ethics must not be violated. According to the rules of IHL, killing of combatant during war would not be unlawful but in case of surrender, wounded combatants become disable to fight or "*hors de combat*" their killing will be illegal like people not participating in war.<sup>4</sup>

2- Prisoners of war should not be killed

According to the general rules of IHL, the wounded combatants "*hors de combat*" will not be killed. Although there is an exception to this rule of law if prisoners of war have committed a crime before or after of their arrest which amounts to killing. Geneva Convention 3 article 85 states, "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention"<sup>5</sup>. In

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<sup>1</sup>Peter Malanczuk, Akehurst's Modern Introduction to International Law, (New York: Routledge,1997),50,51.

<sup>2</sup> Ibid.

<sup>3</sup> Hans peter Gasser, International Humanitarian Law (Haupt: Henry Dunant Institute,1993),74.

<sup>4</sup> Ibid.,15.

<sup>5</sup> Geneva Convention 3

such situations, the judicial process must be fulfilled, and they will be given the opportunity for legal defense. Similarly, they will not be pressurized for any confession. According to article 99 of the Geneva Convention 3, "No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused. No prisoner of war may be convicted without having had an opportunity to present his defense and the assistance of a qualified advocate or counsel"<sup>1</sup>. Moreover, the prisoners of war may be given the penalty of death if they have committed crime which amounts to death punishment. Article 100 of the Geneva Convention 3 says in this regard "Prisoners of war and the Protecting Powers shall be informed as soon as possible of the offences which are punishable by the death sentence under the laws of the Detaining Power. Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the Power upon which the prisoners of war depend"<sup>2</sup>.

### 3- Prisoners of war must be treated humanely

As earlier discussed that according to the rules of IHL, prisoners of war (POW) must not be killed. Likewise, POW must be treated based on humanity. During war combatants before their detention may be killed but after their arrest they must not be harmed and will be protected at every cost. Detaining state must treat POW humanly and must not act which causes harm to them.<sup>3</sup> POW must be

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<sup>1</sup> Geneva Convention 3.

<sup>2</sup> Ibid.

<sup>3</sup> "Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest. Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited" article 13 of the convention 3.

given due respect and honor with danger discrimination by the authority concerned.<sup>1</sup> POW are also entitled to free medical treatment and maintenance<sup>2</sup>.

#### 4- Distinction between civilians and belligerents

According to IHL rules, aliens and their territory must not be targeted during war. They must be attacked with reference to the army objectives. Military action should not disturb civilians, hospitals, schools, universities Markets, community centers and worship places. Attacking on places where the possibility of civilians exist will be considered unlawful<sup>3</sup>. Although, if a military action is become necessary against a such place where non-combatants exists, in such situations army will try their best to avoid civilians and to minimize their loss. The loss in such attacks is called collateral damages<sup>4</sup>. If the military action is necessary against a place where noncombatants exist in such cases the Principles of Proportionality will be observed.<sup>5</sup> Such places can only be attacked in situations of self-defense.<sup>6</sup> According to the 'Distinctive Rules', the use of weapons which have mass destructive effects or which basis unnecessary damage or needless pain even against military is unlawful.<sup>7</sup>

International Court of Justice (ICJ) expressed its observations regarding the legality and illegality of nuclear weapons and considered that the use of nuclear

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1 "Prisoners of war are entitled in all circumstances to respect for their persons and their honor. Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favorable as that granted to men. Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires" Article 14 of the Geneva Convention 3

2 "The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health" Article 14 of the Geneva Convention 3

<sup>3</sup> Hans peter Gasser, International Humanitarian Law (Haupt: Henry Dunant Institute,1993),16.

<sup>4</sup> Ibid

<sup>5</sup> Ibid,63.

<sup>6</sup> Jihad, Mūzāhmāt 212.

<sup>7</sup> Hans peter Gasser, International Humanitarian Law (Haupt: Henry Dunant Institute,1993),58.

weapons violates the rules and regulations of IHL. According ICJ, the important general prohibitions must be avoided during war are:

1. Destruction of civilians' dwellings
2. Indiscriminate attacks
3. Unnecessary harm to aliens
4. Harm to neutral state/s
5. Spreading pollution
6. Use of nuclear weapons
7. No application of the "Rules of Proportionality" during war<sup>1</sup>

IHL does not allow any kind of revenge if a state aggresses against another state unless in self-defense to repeal the aggression. That is why the "Rule of Reciprocity" cannot be claimed on any ground in a situation war violating IHL rules by anyone of the nation states. Under the Rule of Reciprocity (ROR) all affairs of the nation states are governed. According to this rule of law all affairs of states are administered based on mutual obligations.<sup>2</sup> Under IHL a state cannot attack on another state being pretending the rule of reciprocity like if one state attacks on civilians or on protected places like, Schools, Hospitals, universities then other state cannot justify its attack on civilians and the protected places of the aggressor state.<sup>3</sup> The effected state is not allowed to take revenge from the aggressor state. Every individual involved in such war crimes will be held accountable under the rule of Individual Criminal Liability.

#### 5- Individual Criminal Liability

As discussed in the preceding lines that principle of reciprocity is not applicable due to "individual criminal liability" of IHL that holds individuals accountable to their war crimes. IHL also accounts individuals liable to the

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<sup>1</sup> Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. Available on [www.icj-clj.org](http://www.icj-clj.org).

<sup>2</sup> Hans peter Gasser, International Humanitarian Law (Haupt: Henry Dunant Institute,1993),80.

<sup>3</sup> Ibid.

fulfillment of ethical and legal responsibilities during war. According to this rule of IHL individuals along with their states are held responsible for war crimes done during hostility. During war, the concerned military commander is responsible to implement the rules and regulations of IHL and to make ensure the prevention of breaching of Geneva Conventions. During war, if a military commander fails to perform in accordance with the rules and principles of IHL will be held answerable to the area under controlled.<sup>1</sup> This rule of law is also applicable on all those subordinates who carry on the orders of a commander.<sup>2</sup> The said rule of IHL instructs army soldiers who are participating in war to look into the legality of their commanders' orders issued to them, if any order abridges a rule of IHL then such order will not be obeyed otherwise the individuals involved will be punished for the crimes committed.<sup>3</sup> In case if disobeying for subordinates during war becomes not possible due to a just reason/s of an order which breaches a rule of IHL, the "benefit of justifying position" will be awarded to such subordinates.<sup>4</sup> The notion of "universal jurisdiction" means the culprits of crucial breaches of IHL may be punished by any nation states including non-party states to a conflict.<sup>5</sup> It can be concluded that International Law is applicable only to nation states while IHL is applicable to nation states as well as individual combatants and non-combatants.

#### 6- Discrimination of Combatants from non-combatants

International Humanitarian Law discusses war and its subsequent conditions and provides the complete guidelines of war. IHL does not only discriminate between the combatants and non-combatants but determines the

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<sup>1</sup> Hans peter Gasser, International Humanitarian Law (Haupt: Henry Dunant Institute,1993),85.

<sup>2</sup> Ibid. additional Protocol 1, articles 86,87.

<sup>3</sup> Hans peter Gasser, International Humanitarian Law (Haupt: Henry Dunant Institute,1993),86.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

limits of using weapons of war to make the non-combatants safe from the damages of war.

According to the general rules of IHL, all civilians are protected they cannot be attacked in any situation.<sup>1</sup> Article 13 of the additional protocol states in this regard:

1. "The civilian population and individual civilians shall enjoy general protection against the dangerous arising from military portion. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilian shall enjoy the protection afforded by this part, unless and for such time they take a direct part in hostilities"<sup>2</sup>.

The above article does not only give complete protection to civilians from military attacks but protects them from any terror.

IHL rules and regulations not only protect the life of civilians but also protect the goods and services which are indispensable for the survival of civilians. Like keep civilians starving with food or water is a war crime about which article 14 of the additional protocol 1 states:

"Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose objects indispensable to the survival of the civilian population, such as foodstuff, agriculture area for the production of foodstuff, crops, livestock, drinking water installations and supplies and irrigation works."<sup>3</sup>

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<sup>1</sup>Ibid,48. Additional Protocol 1, Article 50,51.

<sup>2</sup> Additional Protocol 1, Article 13.

<sup>3</sup> Ibid, Article 14.

## 7- 1. Exceptions to this rule of IHL

According to the general rule of IHL, civilians will not be attacked. There are two situations in which civilians may also be attacked:

1-When they take part practically in war and get the status of combatants<sup>1</sup>.

This situation is clear and according to the general rule of IHL under which civilians are considered non-combatants unless they take part in war conversely all military men are considered combatants unless they leave the battle field ("*hors de combat*"). According to IHL, there is not discrimination of gender and religion for a combatant.<sup>2</sup>

2-If a military action becomes necessary on a place where non-combatants exhibits, in such situations army will not attack intentionally and directly on civilians but will try to avoid civilians' harm and will be tried to give them least loss. The loss in such attack are called collateral damages<sup>3</sup>. If the military action becomes necessary on places where noncombatants exhibit in such cases the "Principles of Proportionality" will be applicable.<sup>4</sup>

Combatants according to Hague Law 1907.

Hague Law is one of the sources of IHL. According to this law everyone will be considered combatant who fulfills the following conditions:

1. Army soldiers under one command and control,
2. Army soldiers in one uniform,
3. Showing war weapons openly; and
4. Performing their military operation under the laws and customs of war.<sup>5</sup>

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<sup>1</sup>Additional Protocol 1, Article 13,(3).

<sup>2</sup>Jihad, Mūzāhmāt, 322.

<sup>3</sup> Hans peter Gasser, International Humanitarian Law (Haupt: Henry Dunant Institute,1993),16

<sup>4</sup> Ibid,63.

<sup>5</sup> Hague law, article, Geneva convention 3, article 4.

These four conditions are also repeated in Geneva Convention 3 article 4 that differentiate combatants from non-combatants. Such person shall be given all the rights and privileges of the combatants if they are detained in any military operation and will be considered war prisoners under the IHL. There is exception to this law. This exception also includes those civilians who are attacked and detained during self-defense.

Exception to this rule of Hague Law 1907

The rule of "*levee en masse*" is an exception to this rule of law which means taking up weapons by civilians to fight for making themselves and their children safe from the aggressors.<sup>1</sup> According to this exception such civilians do not fight under a proper command and distinctive uniform or emblem will be considered combatants. They will avail all the rights of combatants.<sup>2</sup> This article of The Hague Law is repeated by the Geneva convention 3.<sup>3</sup> Both the laws focus on the civilians who take up guns suddenly and have no enough time to regulate themselves under a proper command and control. Such civilians must carry guns openly to avoid perfidy. Carrying arms openly does not mean carrying with in hands but it means they should not show themselves being non-combatants otherwise it will amount to perfidy which is prohibited under International Humanitarian Law.<sup>4</sup>

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<sup>1</sup> Hans peter Gasser, International Humanitarian Law (Haupt: Henry Dunant Institute,1993),36.

<sup>2</sup> "The inhabitants of a territory which has not be occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with article 1, shall be regarded as belligerents if they carry arms openly and if they respect the law and custom of warHague law, article, 2.

<sup>3</sup> "Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war Geneva convention 3" Article 4, sub article 6.

<sup>4</sup> Jihad, Mūzāḥmāt,323.



#### 5.4.2 Prohibition of Perfidy under IHL

All means which lead to perfidy are prohibited under International Humanitarian Law. It considers all kinds of perfidy as war crimes. Perfidy is defined as "Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of International Law applicable in armed conflict, with intent to betray that confidence."<sup>1</sup> According to this definition, if a belligerent during war shows himself incapable of fighting in order to be helped by the opponent party or shows a sign of peace like white flag or keeps down the weapons or surrenders, in all such situations, when the adverse party comes near to him, he suddenly attacks on the opponent party. Such attack will be considered perfidy because under IHL the person is protected in such circumstances.<sup>2</sup> Similarly, misuse of the symbol or the use of the protecting marks intending to hurt the trust of the opponent party during war is also prohibited under the rule of IHL. For example, using of ambulance or the marked of ambulance on the military vehicles in a such manner that the opponent party let the vehicles to cross an area. Likewise, using the symbols of red cross or red crescent to deceive the enemy is considered prohibited.<sup>3</sup> Article 37 of the additional Protocol 1 states some examples of perfidy:

- a) "The feigning of an intent to negotiate under a flag of truce or of a surrender;
- b) The feigning of an incapacitation by wounds or sickness;
- c) The feigning of civilian, non-combatant status; and

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<sup>1</sup> Hans peter Gasser, International Humanitarian Law (Haupt: Henry Dunant Institute,1993),75.

<sup>2</sup> Ibid

<sup>3</sup> Ibid,34.

d) The feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other states not parties to the conflict.”<sup>1</sup> Although perfidy is strictly disallowed under the IHL but it allows ruses of war. It allows any army to adopt a measure to give maxim harm to enemy.

#### 5.4.3 Permission of Ruses

Under IHL, ruses of war do not mean to deceive enemy with defrauding measures during war.<sup>2</sup> Ruses of war are performing acts being misinforming the opponent party to encourage him to show irresponsibility or keeping enemy in doubt about the position and strength of army soldiers.<sup>3</sup> Additional protocol 1 article 37 states in this regard “Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of International Law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law”<sup>4</sup>.

The above-mentioned protocol allows such ruses of war which are not inconsistent to the rules of IHL. Following are the examples of ruses of war given by the article of the same protocol: “camouflage” is the concealment of army position and its number from the opponent side during war. “Mock operation” is the surprise attack on the opponent side<sup>5</sup>. “Decoys” are military tricks which are used during war, for example army wants to attack from west side but they pretend to the opponent side that they are going to attack from east side engage the enemy focusing on east and to ignore the safety of west side for a sudden attack from

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<sup>1</sup> Additional Protocol 1.

<sup>2</sup> Hans peter Gasser, International Humanitarian Law (Haupt: Henry Dunant Institute, 1993), 75.

<sup>3</sup> Jihād Mūḥāmāt, 325.

<sup>4</sup> Additional Protocol 1.

<sup>5</sup> Jihād Mūḥāmāt, 324.

west.<sup>1</sup> Similarly, giving of misinformation to the opponent side about army position or its number is also the example of ruses. One thing must be kept in mind about the ruses that one must not use any method or manner during war which leads to perfidy or harms the confidence of enemy.<sup>2</sup> Simply, in ruses of war, enemy expects an attack being not knowing its pros and cons. Such ruses do not amount to treachery or perfidy.<sup>3</sup> Although the IHL allows to give maximum harm to enemy but also restricts army to give quarter if it is requested by the belligerent army. Awarding quarter is not only mandatory on the request of belligerents but also sometimes becomes compulsory to be given to the belligerents even if it is not demanded or requested formally.

#### 5.4.4 Giving Quarter

As earlier discussed that IHL considers war is a fact based on necessity. It emphasizes on humanity and it recognizes ethics and manners which must be fulfilled during war. One of the important manner of IHL is giving Quarter to the belligerent during war. "Quarter is a contract of protection provided during war-time to protect the person and the property of an enemy or belligerent, or a regiment, or everyone inside a fortification or the entire enemy army or city."<sup>4</sup> Article 40 of the additional protocol 1 is about Quarter. It states "It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis"<sup>5</sup> article 41 of the said protocol states that who will be considered safe during war? it says " A person who is recognized or who, in

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<sup>1</sup> Ibid.

<sup>2</sup> Additional Protocol 1 article 37.

<sup>3</sup> Jihād Mūḥāmāt, 325.

<sup>4</sup> Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, *International Criminal Law Review* 13 (2013) 593–625.615

<sup>5</sup> Additional Protocol 1

the circumstances, should be recognized to be hors de combat shall not be made the subject of attack".

The notion of *Amān* is more comprehensive than Quarter. It can be said that the term "Quarter" is considered as a sub part of *Amān*. *Amān* is a general conduct of Muslim state and Muslim individuals under MIL that deals in both situations of war and peace. It is a partially bilateral contract which sometimes needs not legal proceedings or proper demand on the behalf of guaranteed person. A Muslim state may award it on its own discretion. While Quarter is a unilateral contract of protection provided under the rules of International Humanitarian Law (IHL) during war only. Muhammad Hamidullah considers both the terminologies as synonymous. The basic conditions that are to be fulfilled for awarding *Amān* or Quarter are overlapping while according to the consequences both have similar impact on the behalf of the protected person and on the guarantor like both provide protection to the life and property of the guaranteed person either by *Amān* or Quarter. While awarding *Amān*, the concerned persons are not required to be belligerents they may be laymen. But under IHL, Quarter will be given to those fighters who meet the criteria of belligerents. Belligerents must carry a unique symbol like proper uniform and flag or carrying weapons openly, fight under the supervision of a commanders and observing the rules and regulations of IHL. Awarding Quarter is the sole right of the imprisoning state. Individuals have no capability of awarding Quarter.<sup>1</sup> According to IHL, individuals will only be capable to award quarter by the appointment of the state in case of using the delegated authority. Under Muslim International Law, *Mustā'min* (guaranteed person) has more rights as compared to a person to whom the Quarter has been given. Under the IHL, a person to whom the Quarter has been given entitles the fundamental human rights like food, shelter, cloths,

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<sup>1</sup> Mohamed Elewa Badar, *Ius in Bello under Islamic International Law*, International Criminal Law Review 13 (2013) 593–625.615. Article 40 of the additional protocol 1

freedom of thought and expression and medical facilities like hygienic environment.<sup>1</sup> They are considered prisoners of war, they cannot move beyond the territory specified. According to the entitlements, guaranteed persons under *Amān* are dealt equal to either Muslims or non-Muslim citizens mostly. Similarly, the term "Asylum" is also recognized by CIL which may be considered the sub part of *Amān*. According to an orientalist law expert Khadduri is of the view that the process of *Amān* is very simple and easy. He is of the view that there is no formal procedure for seeking *Amān* by the non-Muslim seeker. It does not require the intention of the guarantor. If guarantors show any gesture which is either known to the persons concerned of *Amān* for awarding guarantee or they consider it as guarantee, in such situation the guarantee will be considered as awarded. The informal communication was acknowledged as awarded guarantee in the case of *al-Hurmuzān* by the caliph Umar RA. Although the Caliph did not award *Amān* in explicitly and nor had intended to award guarantee to Hurmuzān. But he claimed the guarantee and it was awarded without the willingness of the Caliph.<sup>2</sup> While asylum is a restricted phenomenon of awarding protection. It is the sole authority of state which is to be given on the proper demand by the person/s concerned. Asylum is usually awarded on the bases of diplomatic or political grounds. The rights of a person who gets asylum are to be judged in accordance with the rules of Contemporary International Law but there are no agreed rules through which the rights of the person who has obtained asylum are to be determined. The rights of the person who got asylum are determined by the International Court of Justice are not unanimously agreed.<sup>3</sup>

The notion of refugee is also recognized by CIL and may be said that it is also different from the legal philosophy of *Amān*. According to the Contemporary

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<sup>1</sup> Geneva convention relative to the treatment of prisoners of war of 12 august 1949, articles, 25-37.

<sup>2</sup> Majid Khadduri, War and Peace in the law of Islam (London: The Johns Hopkins, 1960), 165.

<sup>3</sup> Malcolm N. Shaw, International Law (New York: Cambridge University Press, 2008), 76-79.

International Law, refugee is a stateless person.<sup>1</sup> According to Geneva Convention 4, refugee is a person who does not enjoy any shelter of any government.<sup>2</sup> Usually, refugee-status is demanded by the persons who have fled from their mother countries in order to seek protection along with fundamental rights.<sup>3</sup> According to IHL, the rights of refugees are to be determined either by Customary International Law (CIL) or by International Peace Treaty between the states concerned. In the absence of (CIL) and any peace treaty, the rights of refugees are to be determined by the host state.<sup>4</sup> It can be concluded that the notion of *Amān* is a broader phenomenon with respect to legal process of completion, impact on both the parties, consequences, revocation or termination and the rights of *Mustā'minīn* under Muslim International Law as compare to Quarter, asylum and refugee.

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<sup>1</sup> Additional Protocol 1, article 73.

<sup>2</sup> Geneva convention relative to the protection of civilian persons in time of war of 12 august 194, Article 44.

<sup>3</sup> Hans peter Gasser, International Humanitarian Law (Haupt: Henry Dunant Institute,1993),21.

<sup>4</sup> Malcolm N.Shaw, International Law ( New York: Cambridge University Press, 2008),675.

## CONCLUSION

This chapter may be concluded that MIL considers aggression is the cause of war between Muslim and non-Muslim state. Similarly, MIL also recognize ethics of war. ethics of war are those manners which must be followed during lawful war. objective of war should be lawful according to MIL otherwise such war will be considered unlawful. Justice will be maintaining during war as it is maintaining during peace. All kind of perfidy is prohibited. MIL also recognizes the authority of awarding guarantee to aliens during war by all Muslims army without gander discrimination. The authority of Muslim army of awarding guarantee will not be expelled by the commander of Muslim army. If such authority is even banned by the commander will have no legal impact. On the other hand, CIL also recognizes ethics of war under the rule of IHL. IHL also recognizes ethics of war. it also differentiates between combatants and noncombatants. Noncombatants are completed protected during war subject to discrimination between them. Rights of war prisoners and combatants are also recognized by IHL. Ruses of war is permitted while all kind of perfidy is prohibited. Quarter may also be given during war. Ethics of war recognized by MIL is more comprehensive than IHL. MIL recognizes no strict restrictions for combatants while IHL recognizes such strict conditions which must be there otherwise such person will not be having the rights of POW. MIL considers the authority of every Muslim individual of awarding *Amān* while IHL considers it for state or its representative only.

## CHAPTER SIX: GENERAL PRINCIPLES OF AMĀN IN AL -SIYAR AL-KABĪR:AN ANALYTICAL AND COMPARATIVE STUDY

### INTRODUCTION

The applicability and viability of Muslim International Law in the context of peace and war between Muslims and non-Muslims with special reference to the doctrine of *Amān* cannot be comprehended properly unless and until it is not discussed an analytically and comparatively.

The first section of this study comprises the authority of awarding *Amān*. All Muslim individuals along with Muslim state have the authority to award *Amān* in both situations of war and peace. According to Shaybānī, authority of awarding *Amān* by Muslim individual cannot be snatched by Muslim state. The view point of classical jurists regarding authority of *Amān* is comparatively discussed. The second section of this study consists of a comparison among the viewpoints of classical Muslims and contemporary Muslim scholars. In the third section of this study a comparison has been made of the views of contemporary Scholars of Muslim International Law and the experts of Contemporary International Law about the notion of *Amān*. A preferred view point of classical Muslim law experts if any is found compared it with preferred viewpoint of the contemporary Muslim and non-Muslim Scholars. Finally, the two viewpoints are analyzed on pure scientific and logical reasoning and the most précised and scientific view point is accepted. Suggestions and viewpoints between the lines to every analysis have made in this study.



## 6.1 Authority of awarding *Amān*

Under Muslim International Law, the authority with reference to award guarantee to aliens is of two kinds:

- 1- Authority of Muslim state to award guarantee to aliens.
- 2- Authority of Muslim individuals to award guarantee to aliens.

### 6.1.1 Authority of Muslim state with reference to award guarantee

As a rule of Muslim International Law, Muslim state has the authority to award guarantee to aliens. According to Shaybānī and Sarakhsī, Muslim state and Muslim individuals without gender discrimination are both equally capable of awarding guarantee to aliens. According to them the logic for this rule of law is the responsibility of both (Muslim state and Muslim individuals) to assist Islam with their all means and measures. They are of the view that awarding guarantee to aliens is a kind of assisting Islam.<sup>1</sup> Imam Al-Shāfi'ī also endorses this view point of Shaybānī with reference to awarding guarantee.<sup>2</sup> Imam Al-Shāfi'ī is of the view that Muslim state will never dismiss any guarantee awarded by a Muslim individual with a condition if such guarantee is not against the general interest of Muslims and Muslim state.<sup>3</sup> From this it can be concluded that even a Muslim state also cannot award any guarantee to aliens if it is against the general interests of Muslims like Muslim individuals. Shaybānī gives equal right to Muslim individuals of awarding guarantee to aliens with Muslim state while al-Shāfi'ī recognizes it as a privilege for Muslim individuals with a condition of being not

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 252. Muhammad bin Muhammad al-Bābātī, *Al-Ināyah sharḥ al-hidaya*, vol.7 (Bairūt: Dār al-fikar, 1988, ), 465.

<sup>2</sup> Shams ul-din Muhammad bin aḥmad al-Khatīb al-Sharbīni al-Shāfi'ī Mughni al-Muḥtaj ila Ma'rifat Ma'ni al-fāz al-Minhaj vol.6 (Bairūt: Dār al-Kutub al- 'Imiyyah, 1994), 51. Sham ul-din Muhammad bin Al-abbas Aḥmad bin Ḥamza Shahb ul-din al-Ramli, *Nihayat al-Muḥtaj ila Sharḥ al-Minhaj* vol.8 (Bairūt: Dār al-fikar, 1984, ), 79.

<sup>3</sup> Sham ul-din Muhammad bin Al-abbas Aḥmad bin Ḥamza Shahb ul-din al-Ramli, *Nihayat al-Muḥtaj ila Sharḥ al-Minhaj* vol.8 (Bairūt: Dār al-fikar, 1984, ), 81.

against the general interests of Muslims and Muslim state. According to him Muslim state has a one-degree preference in awarding guarantee to aliens over Muslim individuals because it has absolute right for awarding guarantee while the guarantee given by Muslim individuals is subject to the general interests of Muslims and Muslim state. Imam al-Ghazālī divides guarantee into two types with reference to authority, that is specific guarantee and common guarantee. According to him common guarantee is the sole authority of Muslim state while a specific guarantee may be awarded by Muslim individuals.<sup>1</sup> According to Imam al-Nawawī, Muslim individuals can award guarantee only to one or two aliens. Guarantee for more than two aliens will be awarded by Muslim state only. He is of the view that awarding citizenship to non-Muslim is the sole authority of Muslim state similarly, awarding guarantee is also the sole authority of Muslim state. The logic for this rule of law is that awarding guarantee to more than two persons suspend fighting against belligerents and the decision of suspending fighting against belligerents is the sole authority of Muslim state.<sup>2</sup> According to Kāsānī al-Hānāfi, Muslims individuals are capable of awarding guarantee without any limitations of small and large number of aliens. Single Muslim individual can award guarantee to in bulk of aliens. He also believes in the capability of a group of Muslims for contracting armistice contract with alien state.<sup>3</sup> The logic for the view of Kāsānī that group of Muslims is also capable for armistice contract because he considers armistice contract is the part of *Amān*. The right of awarding *Amān* is given to all Muslim individuals by the Prophet (peace be upon him).<sup>4</sup>

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<sup>1</sup> Abū Ḥamid Muhammad bin Muhammad al-Ghazālī al-tūsi, *Al-wasīt fi al-Madhhab*, vol.7 (Egypt: Dār-Ssalām, 4117), 43.

<sup>2</sup> Abu Zakariyya Muḥī ddīn yaḥya bin Sharf al-Nawawī, *Al-Majmu' Sharḥ al-Muḥadhdhab* vol. 19 (Bairūt: Dār al-fikar, n.d), 309.

<sup>3</sup> 'Alā al-ddīn Abu bakar bin Masood bin Ahmad al-Kasānī al-Hānafi, *Bdā'e al-Sānā'e* vol.7 (Beirut: Dār-Ktub al- 'Imiyyah, 1986), 107-108.

<sup>4</sup> Abū Dawood Sulaiman bin al-ash'th bin Ishaq, *Sunan-e-Abi Dawood*, vol. 4 (Beirut: Dār-Risalah al-'alamiyyah, 2009), 379.

The view of al- Kāsāni is based on weak perception. If Muslim individuals are given with authority of making armistice contracts with aliens, then it affects the sole authority of making sensitive contracts by the state as Imam Malik is of the view that contracts which are directly related to the security of Muslims must be dealt by the Muslim state only. It seems that al- Kāsāni is also not of the view of such contracts being subject to the approval of Muslims state. The element of wisdom (*Maslahah*) which approves a contract valid will become difficult to perceive unanimously by the citizens and state. These like issues spoil the validity of such contracts.

According to Imam Aḥmad bin Ḥanbl, Muslim individuals are capable of awarding guarantee to aliens with a condition if such aliens are limited in number. This opinion of Imam Aḥmad bin Ḥanbl is based on two logics. The first one is that limited number usually cannot endanger the national security of Muslim state and the second logic is that Muslim state can easily accommodate the guaranteed aliens in Muslim state. According to him awarding guarantee to a huge number of aliens is the sole authority of Muslim state. Reason to this argument is that only Muslim state can assess by itself all its capabilities, limitations and other necessary arrangements in this connection. He did not discuss the number of guarantors along with guaranteed aliens. It is possible for a large number of aliens to be awarded by a large number of guarantors. The issues related to the security of Muslim state or other accommodation problems may be controlled when a large number of grantors present their sureties for awarding guarantee to a large number of aliens. According to him, whether guaranteed aliens are large in number or small, will be decided by the prevailing national and international customs and will be assessed in accordance with the variation of space and time. More specific to the solution of the problem is the opinion of Imam al- Nawawī who lemmatizes the term large and small number of Imam Aḥmad bin Ḥanbl to a figure of two in case of awarding guarantee by Muslim individuals and more than

two aliens by a Muslim state. So the opinion of Imam Aḥmad bin Ḥanbal still remains open for modification by the Muslim state and it can change the issue of small and large number into three or more than three. There a common point comes where the opinions of al- Nawawī and Imam Ahmad bin Hanbal intersect each other. Moreover, it can be stated that during war the discretion of Muslim state is preferred in the issues related to war because suspending or waging war is the sole domain of Muslim state. Although Muslim individuals and the fighters who fight against belligerents have also some rights. Similarly, fighters' rights are preferred over Muslim individuals who are not fighting against belligerents.<sup>1</sup>

Imam Aḥmad bin Ḥanbal is of the view that the guarantee awarded to a small number of aliens by Muslim individual will not be dismissed by Muslim state because of its binding on Muslim state. Reason to this ruling is that Muslim state can easily control and supervise their activities and movements. According to him Muslim state can only terminate the guarantee awarded by Muslim individual if it amounts to threat or dangers the security of Muslims and Muslim state.<sup>2</sup> al- Nawawī has restricted the authority of Muslim individuals for awarding guarantee into two aliens. Muslim individuals cannot award guarantee to more than two aliens. The reason which he has presented to the argument is that a Muslim individual can easily adjust or accommodate and can control their movements before a Muslim state ratify their guarantee and took charge of them. In addition to the argument he further elaborates the logic that awarding guarantee to more than two aliens suspend war against the belligerents which is not the authority of an individual or group of individuals. Suspending war

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<sup>1</sup> " Not equal are those believers who sit (at home) and receive no hurt, and those who strive and fight in the cause of Allah with their goods and their persons. Allah hath granted a grade higher to those who strive and fight with their goods and persons than to those who sit (at home). Unto all (in Faith) Hath Allah promised good: But those who strive and fight Hath He distinguished above those who sit (at home) by a special reward,- " Al- Qur'ān: 04, 95.

<sup>2</sup> Mansoor bin Younas bin Salāḥ ul-dīn bin Ḥasan bin Idrees al-Bahūti al-Ḥanbālī, *Kashāf al-Qānā' a'n Matn al-Iqnā'* vol.3 (: Dār-Kutub al- 'Imiyyah,N.D),104.

permanently or temporarily is the sole discrimination of Muslim state. So, the opinion of *al-Nawawī* can be preferred on the grounds of pure logic because his opinion also does not contradict any *Hadith-e-Saheeha* of the Prophet (peace be upon him). It can be concluded that *Shaybānī* and *Sarakhsī* recognize the right of individual for awarding guarantee equally with the right of Muslim state. While *Imam Al-Shāfi'ī* restricts it with a condition if it is not in conflict with the general interests of Muslims and Muslim state. *Imam Aḥmad bin Ḥanbl* restricts it with the number of aliens. According to him if aliens are in large number then only Muslim state will award guarantee not Muslim individuals.

According to *Imām Mālik* principally, the authority of awarding guarantee can only be entertained by Muslim state.<sup>1</sup> He is of the view that if an individual or a group of individuals use this authority of state and award a guarantee to aliens then Muslim state has the authority to dismiss such guarantee. He is of the view that in the verse of the *Qur'ān*<sup>2</sup> which issues authority awarding guarantee is not related to Muslim individual but related to Muslim Imam who acts on the behalf of Muslim state. The logic for this rule of law is that awarding guarantee to aliens is directly linked to the security of Muslims and Muslim state, so it should only be awarded by Muslim state.<sup>3</sup> According to *Zaydān* and *Zuḥaylī* the contemporary Muslim scholars, the authority of individuals vests in the authority of state. State act on the behalf of its individuals for safeguarding their rights and interests. Therefore, the authority of awarding guarantee can be entertained by Muslim state

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<sup>1</sup> Muhammad bin Ahmad bin Muhammad alaiish, Abū Abdullah Al-Mālikī, *Manḥ al-Jaleel sharḥ Mukhtasār Khalil* vol.3 (Bairūt: Dār al-fikar, 1989), 170.

<sup>2</sup> "If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah. and then escort him to where he can be secure. That is because they are men without knowledge." *Al-Qur'ān*: 06,09.

<sup>3</sup> Muhammad bin Ahmad bin Muhammad alaiish, Abū Abdullah Al-Mālikī, *Manḥ al-Jaleel sharḥ Mukhtasār Khalil* vol.3 (Bairūt: Dār al-fikar, 1989), 170.

only.<sup>1</sup> In the light of modern complications of international security to Muslim state and the opinion of Imam Malik partially, the view point of Imam Aḥmad bin Ḥanbl can be preferred in case of a large number of aliens. It seems that Zaydān and Zuḥaylī are scholastically affected by the contemporary notion of Nation States. In the past Roman Empire was considered a sovereign holy state but with the fall of Roman Empire nation states came into being and they were recognized as sovereign states. Every head of the territory was considered as sovereign and he was given with authority to rule the nation state accordingly. This concept of sovereignty of state has snatched the authority of individuals. Due to this chronological change, now individuals have no right of awarding guarantee to aliens under the Contemporary International Law. This right only vests in state for awarding guarantee to aliens. The view point of contemporary scholars and Imam Malik can also be criticized under the following arguments:

- 1- The divine command related to awarding guarantee is common to all Muslims as other commandments of the Qur'ān.
- 2- Under the Hadith of the Prophet (peace be up him) every Muslim is qualified to award guarantee.
- 3- Every Muslim is bound to assist Islam and according to Shaybānī, and Sarakhsi awarding guarantee is a kind of assisting Islam.
- 4- The authority of awarding guarantee by any Muslim is absolute and no one can deprive any Muslims of this authority.
- 5- The concept of *wilayah* (Custodianship) and *Man'ah* (writ of Muslim state) are accepted for Muslim state also.<sup>2</sup> The *wilayah* and *Man'ah* both are conditioned with observance of rules and principles of Muslim

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<sup>1</sup> Abdul Kareem Zaydan, *Aḥkam al-dhimyyinawa al-Mustā'mīnīna fī Dār-Islam*, (Baghdad: Makābah al-Qūds, 1982), 50.

Wahbah al Zūḥaylī, *Athār al- Ḥarb fī Fiqh al- Islāmī* (Beruit : Darul Fikar, 1998), 230

<sup>2</sup> Abu Abdullah Ahmad bin Muhammad bin Hanbal, *Musnad Ahmad bin Hanbal* vol. 42 (Egypt: Muassisah al- Risalah, 2001), 199.

International Law. The authority of Muslim individual for awarding guarantee cannot be deprived by Muslim state claiming that the status of sovereignty vests in nation state. *wilaya* and *Man'ah* are different from the notion of sovereignty. Under Muslim International Law, a Muslim state acts under the authority of *wilayah* and *Man'ah* by head of the state while nation states act under the concept of sovereignty. Sovereignty in Contemporary International Law is given due to its territorial jurisdiction with unlimited powers while this is not true in case of Muslim state. In Muslim state, the head of the state is totally subject to the observance of Muslim International Law.<sup>1</sup>

It can be concluded that the notion of the authority of Muslim individual as discussed by the classical Muslim jurists Shaybānī, Sarakhsī, while partially by Al-Shāfi'ī Imam Ahmad bin Ḥanbal and al-Nawawī which give authority to Muslim individuals with Muslim state for awarding guarantee is preferred opinion. To control the abuse of this authority, Muslim state may prevent all individuals or some of the individuals from exercising this authority.

### 6.1.2 Preventing individuals from awarding guarantee

According to Shaybānī, if Muslim state prevents Muslim individuals from the award of guarantee, in such situation Muslim individual should not award guarantee and should follow the order of Muslim state because the order of Muslim state is to be obeyed by all citizens of the state. Reason to this rule of law

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<sup>1</sup> Jihad Muzahimat awr Baghawat page no. 155.

"Reported by *Sūlaim bin āmir*, he says: There was a peace treaty between *Moāwiya* RA and Roman Empire. When the time period of the peace treaty came to expire, *Moāwiya* RA intended to attack on Romans before the time peace treaty had to expire. *Amr bin āmbāsā* RA came and said to him "*Allah* is greatest, fulfillment of the treat is binding on you and you have to avoid perfidy". *Moāwiya* RA asked him to explain his statement. He replied that I have heard the Prophet (peace be up him) saying: when there is a peace treaty between Muslim and others, the peace treaty will be remained effective unless the treaty expires or dismisses it by any party. *Moāwiya* RA ordered the people to go back from the border". Abu 'Isa Muhammad ibn 'Isa al-Tirmidhī, *Sunan al-Tirmidhī*, Vol.6,99.

is that Islam binds Muslims to obey *Ulil Amr* until an *Ulil Amr's* obedience may result the disobedience of Divine.<sup>1</sup> This rule of law reveals the power of discretion of Muslim state for preventing any individual or group of individuals from awarding guarantee to aliens. This rule also indicates that state knows well its strength and limitations regarding awarding guarantee to aliens not Muslim individuals. This rule of law also weakens Shaybānī's another rule of compulsory ratification by Muslim state of the guarantee given by a Muslim individual. This rule of law of Shaybānī may strengthens the rule of law promulgated by Imam Malik regarding awarding guarantee by Muslim individual. According to Shaybānī, if any Muslim individual awards guarantee despite of preventing by Muslim state, such guarantee will be considered valid.<sup>2</sup> Reason to this rule of law is that Muslim state has no authority to stop doing good and assisting Islam by Muslim individuals. The disobedience committed by the individual will be asked for physical or financial punishment. Here the physical punishment is not suitable to be inflicted on the individual or group of individuals. Such individual or group of individuals may be made liable to accommodate the aliens guaranteed by them with their own expenses and will be made responsible for any wrong the aliens do in future against the Muslim state. Or the Muslim can also demand for the compensation of the damages done to the public interests of Muslims in the result of awarding a wrongful guarantee to aliens. The punishment of the guarantors in this connection may vary as per space and time. According to Shaybānī, if such guarantee is found beneficial for Muslims, then Muslim state cannot punish the individuals for disobeying the order of Muslim state. The logic for this rule of law

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<sup>1</sup> "O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day: That is best, and most suitable for final determination." Al- Qur'ān: 04,59.

Jihad Muzahimat awr Baghawat page no. 155.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.2 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971),576.



is that Muslim International Law has already authorized every Muslim for awarding guarantee and has recognized it as a right of every Muslim which cannot be taken away by issuing a simple order by Muslim state. Another reason to this rule of law is the unawareness of aliens about the prevention by Muslim state. If Muslim state dismisses such guarantee then it will result to perfidy by the Muslim guarantors and Muslim state.<sup>1</sup> So to avoid a major evil, minor evil is allowed to be adopted under Muslim International Law for not dismissing such guarantee of aliens. According to Imam Mālik, such guarantee will not be considered valid.<sup>2</sup> The logic for this rule of law is that obeying the order of Muslim state is the foremost obligation of the citizens of Muslim state after obeying Allah and the Prophet of Allah. *Uloom Amr* have similar rights to Allah and Rasoolullah. So an *Uloom Amr* can dismiss any guarantee given to aliens in conflict with the general interests of Muslims and Muslim state. Awarding guarantee is a sensitive and public matter which is directly linked with the security of Muslims and Muslim state so it can only be exercised by a Muslim not by Muslim individuals because they do not know the exact meaning of national and international security of Muslim state. A Muslim state can safeguard its citizens better than a Muslim individual or group of individual. A Muslim individual or group of individuals may be guardian (*Wali*) of their own interests and may not be the custodians of the general interests of Muslims and Muslim state. Only Imam or leader of the Muslim state can exercise such powers.

According to the philosophy of Islamic International Law of war and peace, awarding guarantee is to assist Islam while in the contemporary International Law there is no such concept of assisting state by individual citizens. Under the

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<sup>1</sup>Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.2 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971),576

<sup>2</sup>Muhammad bin Abdullah AL-kharshi al-Mālikī, *Shārḥ Mūkhtāsar Khalil lil kharshi*.vol.3(Bairūt: Dār al-fikar,d.n.),124.

contemporary International Law only trained armies and bureaucracies are supposed to assist the concerned nation state but Islam binds Muslim Army and Muslim citizens to assist Islam logistically and non-logistically both in the situation of war and peace. There is an exception to this rule of law that non-Muslim citizens are kept immune to assist Islam or Muslim state logistically that is why they cannot award any kind of guarantee to aliens that is they have no duty to assist Islam and Muslim state therefore they have no right to award guarantee.

### 6.1.3 Awarding guarantee as assisting Islam

Imam Sarakhsī considers awarding guarantee to aliens as assisting Islam. He is of the view that awarding guarantee to aliens protects their life property and honor and also gives them opportunity to observe the quality of Islam. Moreover, giving protection to aliens when they request for it, makes their hearts soft for accepting Islam. He stresses that Muslims are supposed to assist Islam either by fighting against the enemies of Islam or by giving guarantee to those who deserve it. Muhammad Munir considers awarding guarantee to asylums is their right and Muslim individuals and Muslim state have the duty to award it unless contrary is proved. According to him awarding guarantee is the ideological, jurisdictional and ambassadorial duty of every Muslim state<sup>1</sup>. Sarakhsī considers the peace contract of Ḥudaybiyyah as a great success and assistance for the earlier Muslims as mentioned in Surah al- Fāṭḥ of the Qur'ān.<sup>2</sup> According to him guarantee is considered assisting Islam and every Muslim is supposed to assist Islam, so every Muslim individual is eligible to assist Islam in the form of awarding guarantee.<sup>3</sup>

<sup>1</sup> Muhammad Munir, Refugee Law in Islam, Journal of Social Sciences vol. 04, No. 2 August 2011. 08.

<sup>2</sup> Al-Qūr'ān: 48, 1.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 252. Muhammad bin Muhammad al-Bābātī, *AL-Ināyah sharḥ al-hidaya*, vol.7 (Bairūt: Dār al-fikar, 1988), 465.

The giver of the guarantee will be considered the representative Muslims and Muslim state and its guarantee will kept up right.<sup>1</sup> According to Shaybānī the guarantee awarded by a free Muslim, to an alien will be binding on Muslim state. This is based on the Ḥadith of the Prophet (peace be up him), the Prophet said: All Muslims are equal in awarding guarantee as they are equal in blood money<sup>2</sup>. The guarantee given by the lowest of Muslims will be binding on all Muslims<sup>3</sup>. According to Sarakhsī the word "Adna" mentioned in the aforementioned Ḥadith stands for three possibilities in the case of awarding *Amān* that is either giving by a Muslim individual or by a Muslim who lives on the border of aliens or by a *fasiq* (less authentic Muslim), will be binding on all Muslims and Muslim state.<sup>4</sup> According to Abu-al Ḥasan al-Mālikī the word "Adna" means a person whose presence and absence is not considered. If he disappears no one asks him and if he is present no one consult him about any public matter.<sup>5</sup> According to Al-Bāberti al-Ḥanafi, the word "Adna" is used in the context of singular against plural that means the single Muslim guarantee will also be binding on other Muslims and Muslim state. He further criticized the view point of Shaybānī for being elaborating the word "Adna" (least count) in the context of slavery. According to him the guarantee awarded by Muslim slave will also be binding like free Muslim.<sup>6</sup> It seems from the above explanation that Al-Bāberti does not believe in the guarantee of Muslim slave. In the above inferences, the comprehension of Abū

<sup>1</sup> Muhammad bin Muhammad al-Bābātī, *AL-Ināyah sharḥ al-hidayah*, vol.7 (Bairūt: Dār al-fikar,1988,),465.

<sup>2</sup> Abū Dawood Sulaiman bin al-ash'th bin Ishaq, *Sunan-e-Abi Dawood*, vol. 4 (Beirut: Dār-Risalah al-ʿalamiyyah, 2009), 379.

<sup>3</sup> Ibne Majah abū Abdullah Muhammad bine Yazeed Al-Qazweeni, *Sunane Ib-e-Majah*, vol. 3(Bairūt: Dār-Risalah Al-ālāmiyya,2009)689.

<sup>4</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 252 the original Arabic Word is "ادنى"

<sup>5</sup> Abu al-Ḥasan ali bin aḥmad bin al-Mukarram al-sa'di al-a'dawi, *Ḥashyat al-a'dawi ala sharḥ kifayah al-Talib al-Rabbani*, vol.2 (Bairūt: Dār-Fikr,1994),9.

<sup>6</sup> Muhammad bin Muhammad al-Baberti, *al-'Inayah Sharḥ al-Hidayah* vol.5 (Beirut: Dār-Fikr,n.d),462.

al Ḥasan al-Mālikī is preferred because the Hadith by itself indicates that all Muslims are equal based on their faith and piety. The other Hadith has strictly forbidden the condemnation and insult of Muslims<sup>1</sup>. Under the contemporary International Law, individual has no right to award guarantee because individuals are not bound to assist logistically or non-logistically a nation state. Under Muslim International Law once a guarantee is given either by a Muslim individual or Muslim state cannot be revoked until a contrary is proved. A Muslim individual or state can only revoke its guarantee if it conflicts with the general interests of Muslims or Muslim state.

#### 6.1.4 Revocation of *Amān* (Guarantee)

Guarantee is terminated either by expiring its period of execution or by leaving the Muslim state by the guaranteed person. Besides these when a Muslim state or Muslim individual consider the guarantee as conflicting to the general interests of Muslim individuals, can to dismiss the guarantee or a guarantee remains unproductive on the behalf of Muslim state or aliens. Shaybānī's view point regarding the revocation of a guarantee is that aliens must be given sufficient time for minimizing the consequences of the revocation of any guarantee. Such revocation must be a formal revocation being communicated to the affected party. According Sulaiman bin 'Umar Al-Shāfi'ī , awarding guarantee is a bilateral contract which is binding on Muslim state and Muslim individuals while not binding for guaranteed aliens. He is of the view that the contract of guarantee must be observed by Muslim individuals and Muslim state. Guaranteed aliens can dismiss the guarantee any-time because they cannot be trusted for following the terms and conditions agreed. Generally, Muslim state and Muslim individuals cannot revoke the guarantee once awarded. In case of any accusation or expected

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<sup>1</sup> Muslim bin al- Hajjaj abu al- Hassan al- Qushairi al- Nisaburi, Saheeh Muslim vol. 04 (Beirut: Dār- Ahya al- Turath al- Arabi n.d), 1986.

danger on the behalf of guaranteed aliens Muslim individuals or Muslim state can revoke it by proper announcement and formal communication to the affected party.<sup>1</sup> According to Imam al-Al-Ghazālī, , the contract of guarantee may be revoked by the guaranteed aliens any time. Generally, on the other hand Muslim individuals or Muslim state cannot revoke it because it is binding on them like the Contract of Citizenship (الذمة). Muslim state and Muslim individuals have the right of revocation in case of anticipatory danger to Muslims or Muslim state.<sup>2</sup> According to Muhammad Hamidullah, Muslim state or Muslim individuals has the right to revoke *Amān* subject to two conditions:

1- Public good of Muslims. It means that *Amān* will be revoked general interest of Muslims.

2- The protected aliens must be allowed to return to their previous position and resistance as they were at the time when the *Amān* was awarded to them.<sup>3</sup>

The argument of Sulaiman bin 'Umar Al-Shāfi'ī ' and Imam al- Ghazālī is based on pure science and logic. According to them Muslim state remains always on safe-side and secured logistically and non- logistically that is why it is kept bound by the Muslim International Law to perform just conduct internationally and to stick always to the ethics of war and peace. On the other side belligerents or aliens always remain logistically and non- logistically insecure and on unsafe side of war. Besides this, they can also not be fully trusted for the observance of the terms mutually agreed. They also lack ethics of war and peace. Therefore, Muslim state may expect any breach or perfidy on the behalf the guaranteed aliens. According to them the philosophy of waging war or maintain peace under

<sup>1</sup> Sulaiman bin Umar bin Mansor al-a'jeeli al-Azhārī, *Futuḥat al-Wahab be Taiwdheeh Sharḥ Minhaj al-Tullab* vol.5 (Bairut: Dār al-Fikar,n.d),205.

<sup>2</sup> Abū Ḥamid Muhammad bin Muhammad al-Ghazālī al-tūsi, *Al-wasīt fi al-Madḥḥab*, vol.7 (Egypt: Dār al-Ssalām,4117),45.

<sup>3</sup> Muhammad Hamidullah, *The Muslim Conduct of State* (Lahore: India Kashmiri Bazar,1954),202.

the Muslim international Law is only to keep the writ of God upright and not to kill unnecessarily belligerents. So Muslim army is supposed to establish the writ of God throughout the globe at the cost of minimum loss of the humans concerned due this reason under Muslim International Law, Muslim state or Muslim individuals are bound to announce the revocation formally and to communicate it to the parties concerned. The first condition laid down by Muhammad Hamidullah for the revocation of the grantee awarded is the observance of the general interests of Muslims and Muslim state carries a wide range of meanings as compare to the condition of "anticipatory danger" laid down by Sulaiman bin 'Umar Al-Shāfi'i, and Imam al- Ghazālī . The first condition of Muhammad Hamidullah for the revocation of the Guarantee prima facie seems more preferable as compare to the condition of anticipatory danger of Sulaiman bin 'Umar Al-Shāfi'i, and Imam al- Ghazālī . Reason to the preference of the condition of Muhammad Hamidullah is based on scientific reasoning because it is possible for the aliens who may be very weak and may not cause any danger the internal or external security of Muslim state or Muslim individuals but may cause severe loss to the general interests of Muslim citizens like spreading obscenity among Muslims or promoting unnecessary foreign values among Muslim citizens which may result to the suspension of the guarantee granted to them.

The second condition for the revocation of the guarantee of Muhammad Hamidullah is more explicit in its execution in a sense that the guaranteed aliens will be restored to the position logistically and non-logistically before the guarantee was awarded to them as compare to the condition of giving "sufficient time" of Shaybānī.

## 6.2 The authority of individuals with reference to award guarantee

Under Muslim International Law, Muslim individuals and Muslim state are capable of awarding guarantee. Muslim individuals are classified according to their social and legal statuses with reference to awarding guarantee. According to Imam Mālik, awarding guarantee is the official right of Muslim state only due to this he made the guarantee awarded by a Muslim individual subject to the ratification of Muslim state. While on the other hand, Shaybānī, Al- Shāfi'ī and Aḥmad bin Ḥanbal are of the view that Muslim individuals are capable to award guarantee equal to a Muslim state. According to them guarantee awarded by Muslim individuals is binding on Muslims and Muslim state with a condition that such guarantee must not endanger Muslim general interests and the security of Muslim state. Gazali also considers Muslim individuals capable of awarding guarantee with a condition of not interfering in the affairs of state. He has classified guarantee into two types that is common and specific guarantees. According to him a guarantee which is directly affect political or jurisdictional autonomy of state is named as common guarantee and the guarantee which may not affect such state autonomies is specific guarantee. He recognizes the right of awarding specific guarantee to Muslim individuals. al- Nawawī also recognizes the right of Muslim individuals of awarding guarantee to a number of not more than two aliens. The reason to al- Nawawī rule of law is given in the discussion of the right of awarding guarantee by Muslim state. In the sum up it can be concluded that all the Muslim classical jurists recognize the right of awarding guarantee by Muslim individuals in one form or in another form. According to the classical jurist's different guarantees given by different Muslim individuals have different impact. According to Shaybānī, Muslim males and females both are also eligible to award guarantee. He is of the view that awarding guarantee is a kind of assisting Islam and every Muslim without the discrimination of gender is required to assist Islam. According him, assisting Islam will be either to fight against belligerents or

provide support to those who fight for the cause of Islam. Inviting non-Muslims to observe the qualities of Islam by awarding them guarantee is one kind of assisting Islam.<sup>1</sup> In this connection a Muslim female is equally required to assist Islam to a Muslim male. According to him, awarding guarantee does not need any physical force. It is a pledge that may be given verbally, in writing or by indicating a gesture for awarding guarantee.<sup>2</sup> The logic for this rule of law is also the Ḥadith of the Prophet (peace be up him) that considered the equal status with reference to awarding guarantee of all Muslims without any gender discrimination. Shaybānī has argued that the Prophet (peace be up him) ratified the guarantee given by Zaynab RA to her husband Abū al-a'ās<sup>3</sup> and had also endorsed the guarantee given by Umme Hani RA to her two relatives.<sup>4</sup> The Prophet (peace be up him) not only ratified their guarantees but also encouraged them for awarding guarantees by saying, we have given guarantee to whom you have given

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<sup>1</sup> "If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah; and then escort him to where he can be secure. That is because they are men without knowledge". *Al-Qūrā'n*: 6,9.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 253

<sup>3</sup> "Yazid bin Roman said: *Abū al-a'ās* entered to the house of *Zainab* RA and got guarantee from her. When the Prophet (peace be up him) was praying *fājr* prayer, *Zainab* shouted O people! I have given guarantee to *Abū al-a'ās*. When the prophet (peace be up him) completed his prayer, turned his face to the people and said: have you heard what I heard? The people said: yes, the Prophet (peace be up him) said: I swear in the name of whom in whose hand my soul is, I did not know anything of that until I heard what you heard, and the guarantee of a lowest Muslim is binding on other Muslims. Then the prophet (peace be up him) entered to the house of *Zainab* RA and told her, take care of him only neither he is a lawful husband of you nor you are a lawful wife of him". Ahmad bin Hussain bin Ali Abu bakar al-baihaqi, *Al-Sunan al-Kubrā*, vol.9 (Bairūt: Dār al-Kūtūb al-'Imiyyah, 2003)162.

<sup>4</sup> "Abdullah bin Ikramah said: when *Makkah* was conquered by the prophet (peace be up him), *Haris bin hisham* and Abdullah bin abi Rabīa entered the house of *Umm-e-Hani* and got her guarantee. Later on Ali RA came to the house of *Umm-e-Hani* and wanted to kill both of them. But *Umm-e-Hani* did not let him to kill them and she said: if you want to kill them kill me first. *Ali* RA said: you have given the guarantee to polytheists and went away. *Umm-e-Hani* came to the prophet (peace be up him) narrated the story, the prophet (peace be up him) said: we have given the guarantee to whom you have given". Abu 'Isa Muhammad ibn 'Isa al-Tirmidhī, *Sunan al-Tirmidhī*, Vol.3(Riyadh: Dār-al-Salam 2007)348.



guarantee.<sup>1</sup> Imam Mālik, Imam Al-Shāfi'i and al-Mawardi also consider the guarantee awarded by Muslim females as valid like Shaybānī<sup>2</sup> According to Abū 'Umar al-Māliki, the guarantee of a Muslim female is subject to the approval of Muslim state.<sup>3</sup> This means that Abū 'Umar al-Māliki does not consider the guarantee awarded by Muslim male subject to the ratification of Muslim state. This opinion is also in conflict with the opinion of Imam Malik because he believes in the authority of Muslim individuals as an exception. The opinions of Shaybānī, Imam Mālik, Al-Shāfi'i and al-Māwardi are to be preferred in the light of clear text of the Hadith mentioned. According to them Muslim individuals without any discrimination of gender are capable of awarding guarantee like Muslim state. The view point of Abū 'Umar al-Māliki contradicts the command of the Hadith which has given equal status to Muslim females with Muslim males in awarding guarantee. Shaybānī considers the guarantee given by a Muslim juvenile as valid. Similarly, if a non-Muslim juvenile who is informed in Islamic qualities and convinces other people on Islam if awards guarantee will also be endorsed by Muslim state. Shaybānī presents reason for the accepting the guarantee of the juvenile that if his *Eimān* is acceptable then his *Amān* will also be acceptable based on his capacity of embracing Islam.<sup>4</sup>

Burhanuddin al-Ḥanbali and Abū Muhammad al-Ḥussain Al-Shāfi'i agree with the view point of Shaybānī in case of guarantee awarded by a Muslim

<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 253.

<sup>2</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'i, *Al-Umm*, vol.4 (Bairut: Dār al-Ma'ārif, ah, 1990), 302. Malik bin Anas bin Malik bin a'mir al-Asbahī Al-Madani, *Al-Madoonah al-Kubrā* vol.1 (Bairūt: Dār al-Kutub al-'Imīyyah, n.d), 525. Abu al-Ḥasan Ali bin Muhammad bin Muhammad bin Ḥabīb al-Bsri al-Baghdadi al-Shaheer bil Mawardi, *al-aḥkam al-Sūltania* (Egypt: Dār al-Ḥadith, n.d), 226.

<sup>3</sup> Abū Umar Yousaf bin Abdullah bin Muhmmad bin abd ul baar bin a'sim al-Namari al-Qurtobi, *Al- Kafi fi Fiḥ ahl al-Madinah* vol.1 (Riyadh: Maktabah al-Riyadh, 1980), 469.

<sup>4</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 255.

juvenile.<sup>1</sup> This means that Burhanuddin al- Ḥanbali and Abū Muhammad al-Ḥussain Al-Shāfi'ī do not believe in the authority given by a non- Muslim juvenile. According to Abū Ḥanīfah, guarantee will only be valid if the guarantor knows the in-depth philosophy and consequences of awarding guarantee. Moreover, the guarantor is also capable of fighting war against aliens. According to him juvenile is incapable of understanding the philosophy and consequences of awarding guarantee and he is also incapable of fighting war against aliens. According to him the right of awarding guarantee is associated with Muslim fighters not with Muslim non- combatants. Legally a juvenile irrespective of faith is not required to participate in war against belligerents. In the light of these arguments a guarantee awarded by a juvenile is invalid.<sup>2</sup> According to Imam Malik Muslim juvenile will only be capable of awarding guarantee if the juvenile knows the philosophy and consequences of awarding guarantee.<sup>3</sup> Abū Abdullah al-Māliki agrees with view point of Imam Abū Ḥanīfah. He considers the guarantee of juvenile who knows the philosophy and consequences of guarantee subject to the approval of Muslim state.<sup>4</sup> According to imam al-Ghazālī, juvenile is not capable of awarding guarantee because guarantee is the ruses of war and it can only be understood by a Muslim adult who is capable of fighting against belligerents.<sup>5</sup> Imam Nawawī

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<sup>1</sup> Ibrahim bin Muhammad bin Abdullah bin Muhammad bin Muflih Abu Ishaq Burhanuddin, al- Mubdi' fi Sharh al- Muqni' vol. 03 (Beirut: Dār al- Kutub al- Elmiyyah 1997), 352. Abu Muhammad al-Ḥussain bin Mas'ud bin Muhammad bin al-Farrā al-Baghavi al-Shāfi'ī Al-Tahzeeb fi Fiqh al-Imam Al-Shāfi'ī vol.7 (Bairut: Dār al-Kutub al- 'Imiyyah,1997),480.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 257.

<sup>3</sup> Malik bin Anas bin Malik bin a'mir al-Asbahī Al-Madani, *Al-Madoonah al-Kubrā* vol.1( Bairūt: Dār al-Kutub al- 'Imiyyah,n.d),525.

<sup>4</sup> Abū Abdullah Muhammad bin Yousaf al-AbDārī al-Shāheer bil Mūwaq, Al-Tāj wal Ikleele Mukhtasar Khalil vol.4(Bairūt: Dār al-Kutub al- 'Imiyyah,1994),559.

<sup>5</sup> Abū Ḥamid Muhammad bin Muhammad al-Ghazali al-tūsi, *Al-wasīt fi al-Madhhab*, vol.7 (Egypt: Dār al-Ssalām,4117),43.

also endorses the view point of Abū Ḥanīfah.<sup>1</sup> Shaybānī's view about the about the validity of guarantee awarded by a non- Muslim juvenile is weak based on his own argument about the guarantee awarded by non- Muslims adults during war defending Muslim state invalidates the guarantee due to similarity in faith between aliens and the non- Muslims combatants. If he considers the guarantee of non- Muslim combatants as invalid, then how he considers the guarantee of a non- Muslim juvenile as valid. Non- Muslim juvenile lacks three requisites of awarding guarantee, the quality of Islam, ignorance to the philosophy and the consequences of awarding guarantee as well as incapability of fighting war against belligerents. In addition to the argument the reason of well-versing of a non- Muslim juvenile is also weak due to the non-accepting of Islam by the non-Muslim juvenile being well informed in Islamic qualities and who invites others to the way of Islam but not embracing it whole-heartedly. Shaybānī considers it a quality of the juvenile but the Qur'ān considers it a deficiency.<sup>2</sup> Abū Ḥanīfah did not discuss the status of a juvenile who knows the philosophy of awarding guarantee and fights for defending Islam. It seems that a juvenile who has such qualities will be considered capable of awarding guarantee. According to him there are three requirements for awarding guarantee that is Islam, awareness of the philosophy or consequences of awarding guarantee and capability of fighting war against belligerents and a Muslim juvenile who can take part in war and knows the philosophy of awarding guarantee deserves to award guarantee.

In conclusion to the above discussion, Shaybānī recognizes the validity of the guarantee of both the Muslim and non- Muslim juvenile which is criticized for

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<sup>1</sup> Abu Zakriyya Muḥī ddin yaḥya bin Sharf al-Nawawī, *Al-Majmu' Sharḥ al-Muhadhdhab*, vol. 19 (Bairūt: Dār al-fikar, n.d), 309

<sup>2</sup> " Do ye enjoin right conduct on the people, and forget (To practise it) yourselves, and yet ye study the Scripture? Will ye not understand? " Al- Qur'ān: 02, 44.

"Grievously odious is it in the sight of Allah that ye say that which ye do not." Al- Qur'ān: 61, 03.

its weak arguments within his arguments. While Imam Abū Ḥanīfah , Ghazālī and Nawawī also do not recognize right of awarding guarantee by both Muslim and non-Muslim juveniles. Similarly, Burhanuddin al- Ḥanbali and Abū Muhammad al-Ḥussain Al-Shāfi'ī recognize the right of warding guarantee only for a Muslim juvenile and do recognize it for a non- Muslim juvenile. So, it can be summed up that argument presented by Shaybānī, Burhanuddin al- Ḥanbali and Abū Muhammad al-Ḥussain Al-Shāfi'ī are too weak to be supported against the national and international security of Muslim state. Ghazālī accounts awarding guarantee as ruses of war which is the sole official right of Muslim state. According to him a juvenile is usually not aware of ruses war and the general interests of Muslim state. Only Muslim state or Muslim adults know the ruses of war, the philosophy and consequences of awarding guarantee not a juvenile.

According to Abū Ḥanīfah and Abū Yūsuf, only a Muslim slave fighter is capable of awarding guarantee. Generally, a Muslim slave is not eligible to award guarantee because he is not supposed to assist Islam. He is only required to serve his master. A Muslim slave who fights Jihād with the permission of his master makes him/her eligible to award any guarantee to aliens. Permission of master makes him/her eligible for fighting Jihād against non- Muslims and fighting empowers him/her awarding guarantee to aliens. Guaranteed aliens will be protected at any cost by their guarantors<sup>1</sup>. According to Shaybānī, Imam Mālik, Ibn Qudāmah , Imam al-Ghazālī and al-Māwardī, Muslim slaves either fighters or non-fighters both are eligible to award guarantee to aliens on the qualification of the text of Hadith that enables all Muslims to award guarantee without the discrimination of freedom and slavery.<sup>2</sup> Imam Al- Shāfi'ī also considers a Muslim

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 255

<sup>2</sup>Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 255. Malik bin Anas bin Malik bin a'mir al-Asbahī Al-Madani, *Al-Madoonah al-Kubrā* vol.1(

slave eligible for awarding guarantee. According to him, Muslim International Law gives the right of awarding guarantee irrespective of participating in fighting or not. Reason is that if Muslim females are eligible for awarding guarantee while generally they do not participate in war against belligerents. If they can award guarantee without fulfilling the condition of participation in war, then how the condition of participation of war can be imposed in the case of Muslim slaves.<sup>1</sup> According to Majority of the classical Muslim scholars, all Muslims without the discrimination of slavery, freedom and gender are equally required to assist Islam. they consider awarding guarantee as assisting Islam so Muslim slaves and freed individuals all are capable of awarding guarantee. According to Shaybānī Muslim slaves are capable to give witness of sighting of the moon of *Ramadān* then they can also award guarantee to aliens.<sup>2</sup> Furthermore, Shaybānī furnishes a precedent of Hazrat 'Umar RA in this connection in which a Muslim slave had wrote the words of *Amān* and had thrown it to the belligerents as a symbol of *Amān*. When Hazrat Umar was informed about the guarantee of a Muslim slave he ratified it<sup>3</sup>. In continuation to the precedent, Sarakhsī is of the view that Abū Ḥanīfah considers the guarantee of the slave as the guarantee of a fighter slave whose

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Bairūt: Dār al-Kutub al- 'Imiyyah, n.d), 525. Muhammad Abdullah bin Ahmad bin Muhammad bin Qudama al-Hanbali, *al-Mughni le Ibn Qudāmah* vol.9 (Egypt: Maktab tul Qahira, 1968), 241. Abū Ḥamid Muhammad bin Muhammad al-Ghazali al-tūsi, *Al-wasīt fi al-Madhhab*, vol.7 (Egypt: Dār al-Ssalām, 4117), 43. Abu al-Ḥasan Ali bin Muhammad bin Muhammad bin Ḥabib al-Bsri al-Baghdadi al-Shaheer bil Mawardi, *al-aḥkam al-Sūltania* (Egypt: Dār al-Ḥadith, n.d), 226.

Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.4 (Bairut: Dār al-Ma'ārif, ah, 1990), 302.

<sup>1</sup> Ibid, 239.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 256

<sup>3</sup> Fādhāl al-Reqāshi says we have occupied the fort of (non-Muslim) one of the Muslim slave wrote words of guarantee on an arrow and thrown it to aliens. We wrote to *Umār* RA (in order to ask him about the legality of the guarantee given by the slave). *Umār* RA replied that the guarantee is awarded by a Muslim is enforceable. Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 256.

guarantee was ratified by the Caliph Umar RA.<sup>1</sup> In conclusion to the topic, the viewpoint of the Majority of Classical Muslim Scholars (MCMS) is to be preferred because their view point is endorsed by the clear text of the Hadith of the Prophet (peace be up him) which qualifies all Muslims for awarding guarantee without any discrimination of gender, freedom or slavery. Another argument which supports the viewpoint the MCMS is the ratification of the Caliph Umar RA of the guarantee awarded by the Muslim slave. In addition to the argument it can be said that slave fighters deserve more to be ratified his guarantee.

As earlier discussed that giving guarantee to alien is linked to the national security of Muslims and Muslim state. A guarantee may be given by Muslim guarantor who can assess the security and its crucially along with its pros and cons that is to avoid endangering Muslims or Muslim state. According to Shaybānī a Muslim who is fighting against belligerents has the capacity to award guarantee to belligerents during war in the Domain of War.<sup>2</sup> According to Mūsā bin Aḥmad al-Ḥanbali, Muslim commander of Muslim army is capable to award guarantee without the limitation of number of aliens while a Muslim soldier is only capable of awarding guarantee to a limited in number of hundred aliens.<sup>3</sup> Mūsā bin Aḥmad al-Ḥanbali follows Imam Shaybānī in awarding guarantee by a Muslim soldier. He has only fixed the numbers of aliens with reference to the capacities of Muslim commander and a Muslim soldier. The view point of Mūsā bin Aḥmad al-Ḥanbali is to be preferred due to his clear ruling that can minimize the complexities of war. According to Shaybānī and Abū Bakar al-Rāzī, a child who is fighting with due permission is capable of awarding guarantee. According to them such child is

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 256

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār al-Fikār, 2000), 69

<sup>3</sup> Musa bin aḥmad bin Musa bin salim bin e'isa bin salim sharf Uddin, *al-Iqna' fi fiqh al-imam aḥmad bin ḥanbal* vol.2 (Beirut: Dar al-Ma'ārif, a n.d),37.

assumed as a Muslim fighter slave who fights with the permission of his master. The guarantee of such slave is considered valid. While the others jurists like Imam Abū Ḥanīfah and Abū Yūsuf are of the view that a child who participates in fighting has no capability of awarding guarantee because he does not know the pros and cons of awarding guarantee as well as also unaware of the strategic affairs of Muslims and Muslim state.<sup>1</sup> According to Abū al-Ḥasan al-Mālikī the guarantee of a child will be subject to the ratification of Muslim state. Reason to this rule of law is that child is incapable of understanding the philosophy and consequences of guarantee.<sup>2</sup> According to al-Nawawī, child is not capable of awarding guarantee.<sup>3</sup> Burhanuddin al-Ḥanbali, has two views about the capacity of child with reference to awarding guarantee. He is of the view that child is capable if he has given permission to participate in fighting against belligerents. The other view is that child is incapable due to not understanding of the philosophy and consequences of guarantee.<sup>4</sup> Al-Māwardī, also does not believe in the guarantee awarded by a Muslim child.<sup>5</sup> The view point of Shaybānī seems preferred. The permission with which child fights against belligerents, justifies the validity of the guarantee awarded by the child. Guarantee given by a non- Muslim citizen is void even the citizen is fighting along with Muslim soldiers for defending Muslim state. Shaybānī has furnished two reasons in this respect: The first one is

<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 257

<sup>2</sup> Abu al-Ḥasan ali bin aḥmad bin Mukarram al-Saeedi al-A'dawi, ḥashiyat al-a'dawi ala sharḥ kifayat al-Talib al-Rabbani vol.2 (Beirut: Dār al-Fikar,1994),9.

<sup>3</sup> Abu Zakriyya Muḥi ddin yahya bin Sharf al-Nawawī , Al-Majmu' Sharḥ al-Muhadhdha,bvol. 19 (Bairūt: Dār al-fikar,n.d),309.

<sup>4</sup> Ibrahim bin Muhammad bin Abdullah bin Muhammad bin Muflih Abu Ishaq Burhanuddin, al- Mubdi' fi Sharḥ al- Muqni' vol. 03 (Beirut: Dār al- Kutub al- Elmiyyah 1997), 352

<sup>5</sup> Abu al-Ḥasan Ali bin Muhammad bin Muhammad bin Ḥabib al-Bsri al-Baghdadi al-Shaheer bil Mawardi, al-aḥkam al-Sūltania (Egypt: Dār al-Ḥadith, n.d),226.

the similarity in beliefs with aliens.<sup>1</sup> The second reason is that such non-Muslim is not required to assist Islam.<sup>2</sup> According to Shaybānī if non-Muslims are required by Muslim state for any logistic support then they will be bound to obey the order of the state being citizens. According to him their logistic support will not deserve them for the right of awarding guarantee. He argues that Muslim state also seeks logistic support from other different things like horses, elephants, dogs then how could these things award guarantee to aliens<sup>3</sup>. This means that weapons or animals including non-Muslim citizens which are using in war by a Muslim state do not capable of awarding any guarantee to aliens. According to Shaybānī, seeking help from non-Muslims during war is to pressurize aliens by giving an impression to aliens that the non-Muslim citizens are also defending Muslim state<sup>4</sup>. Abū 'Umar al-Mālikī, al-Nawawī and ibn Qudama al-Ḥanbalī also follow the view point of Shaybānī in this regard.<sup>5</sup> The reasoning can be summed off about the capacity of non-Muslim citizens for awarding guarantee that the text of the Hadith has clearly given the authority only to Muslims. Non-Muslims are not mentioned in any reference with respect to awarding guarantee. Moreover, the reasons that presented by Shaybānī in this connection clarify the point that non-Muslims citizens are not capable of awarding any guarantee.

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1"General Gracey Said No to Quaid e Azam To Fight For Kashmir"  
<https://www.siasat.pk/forums/threads/general-gracey-said-no-to-quaid-e-azam-to-fight-for-kashmir.488080/>

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 253

<sup>3</sup> Ibid, 257.

<sup>4</sup> Ibid, 257.

<sup>5</sup> Abū Umar yousaf bin Abdullah bin Muhmmad bin abd ul baar bin a'sim al-Namari al-Qurtobi, *Al- Kafi fi Fiqh al-al-Madinah* vol.1 (Riyadh: Maktabah al-Riyadh, 1980), 469. Abu Zakriyya Muḥi dīn yahya bin Sharf al-Nawawī , *Rawdhah al-Talebeen* vol.10 (Bairūt: al-Maktab al-Islami 1991), 289. Abu Muhammad Mofiq Uddin Abdullah bin aḥmad bin Muhammad bin Qudamah, *al-Mughni le ibne Qudamah* vol.9 (Egypt: Maktabah al-Qahira, 1968), 241.



### 6.2.1 The use of power of delegated guarantee by non- Muslim citizens

As earlier discussed that according to Shaybānī, generally non- Muslim citizens of a Muslim state cannot award guarantee to aliens because they have soft corner for them and may have a similarity of faith. A non- Muslim citizen can only award guarantee if he is made authorized by a Muslim individual or Muslim state. Sarakhsī has given logic of using the delegated authority by non-Muslim valid because when non-Muslim uses the delegated authority he cannot benefit aliens. In such situations the non- Muslim exercises the delegated authority given by a Muslim state or Muslim individual. Moreover, the non- Muslim who exercises the delegated powers must follow the terms and conditions that are attached to the contract of attorney otherwise such guarantee will not be effected.<sup>1</sup> In this case a non-Muslim is actually not giving any guarantee for which Shaybānī cannot be criticized in opposing the clear Hadith about the incapability of non-Muslims for awarding guarantee. Shaybānī considers such non- Muslims who is empowered to use the delegated authority of awarding guarantee to aliens must follow the authority with letter and spirit. Non-Muslim is bound to spell the words of authority delegated by Muslim state tit for tat otherwise such guarantee will not be enacted. In case if the non- Muslim attorney deviates or misuse the power of attorney, will be punished for war-crimes. The aliens who are given guarantee, if are found ignorant to the origin of authority will be given guarantee that is to avoid perfidy.

### 6.2.2 Awarding guarantee by an idiot

According to Shaybānī, a guarantee given by an idiot is valid if the idiot understands Islam and can elaborate the qualities of Islam. In case if the idiot does

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 286.

not understand Islam and its qualities then the guarantee will not be valid<sup>1</sup>. Besides Shaybānī, rest of the jurists do not believe in the guarantee awarded by an idiot. According to them, idiot is not bound to follow the other divine commandments like prayers and fasting because senselessness.<sup>2</sup> The argument of Shaybānī in this connection cannot be preferred because it becomes difficult for a Muslim state to enquire about the mental and rational health of an idiot because idiot sometimes periodically well and good like a periodic lunatic while sometimes loses all senses of understanding. Awarding guarantee is a sensitive matter so it should be in the safe hand of rational and adult Muslims and should not be played in the hand of careless or idiot people.

### 6.2.3 Awarding guarantee by an apostate

As earlier discussed that according to Shaybānī non-Muslims citizens of a Muslim state enjoy most of the rights enjoyed by Muslim citizens but they (*dhimmiyīn*) are not eligible to award guarantee to aliens. Shaybānī has linked the non-eligibility of non-Muslims to award guarantee on their own behalf with their soft corner to aliens because of their similarity in faith<sup>3</sup>. According to Shaybānī, apostasy is worse than any disbelief. Apostates may not be given any kind of relief even he is of the view that Peace treaty will be signed with them. They will be given the opportunity to re-accept Islam otherwise they will be executed<sup>4</sup>. According to him, awarding guarantee to aliens is linked to the Muslim

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 285.

<sup>2</sup> A'la Uddin Abu al-Hasan ali bin Sulaiman al-Ḥanbali, *al-Insaf fi Ma'rifah al-rajiḥ min al-Khilaf* vol.4 (Beirut: Iḥya al-Turas al-Arabi n.d), 203.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 257

<sup>4</sup> Mahmood Ahmad Ghazi, *The Shorter Book on Muslim International Law* (Islamabad: Islamic Research Institute, 1998), 38.

security. So apostates cannot be trusted for Islam that is why Shaybānī has excluded them from awarding guarantee to aliens.<sup>1</sup>

#### 6.2.4 Awarding guarantee by Muslim traders or prisoners, in an alien state

According to Shaybānī, Muslims as traders and prisoners in an alien state cannot award guarantee to aliens.<sup>2</sup> Imam Al-Ghazālī, follows the view point of Shaybānī.<sup>3</sup> Al-Ghazālī, considers the guarantee of a prisoner as the guarantee of a forced person. Ibn Qudāmah recognizes the guarantee given by a Muslim trader or prisoner due to the Ḥadith of the Prophet (peace be upon him) which makes all Muslims capable of awarding guarantee without the specification of their legal statuses.<sup>4</sup> Abū Muhammad al-Mālikī divides the guarantee awarded by Muslim prisoners into two types: Guarantee awarded by them while they are themselves safe and secure in alien state. The second one is guarantee awarded by Muslim prisoners while by themselves they are unsafe. According to him if the guarantors are safe then their guarantee will be considered valid.<sup>5</sup> According to him guarantee means providing safety and providing the other necessary arrangements of life to the guaranteed aliens by the guarantor which are possible to be provided by the guarantors. The view point of Abū Muhammad al-Mālikī is valid only in specific and exceptional situations. The view point also facilitates to keep the Ḥadith enacting. According to Kamal al-ddin al-Shāfi, the guarantee awarded by Muslims

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 257

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār al-Fikār, 2000), 69

<sup>3</sup> Abū Ḥamid Muhammad bin Muhammad al-Ghazali al-tūsi, *Al-wasīt fi al-Madhhab*, vol.7 (Egypt: Dār al-Ssalām, 4117), 43.

<sup>4</sup> Abu Muhammad Abdullah bin Ahmad bin Muhammad bin Qudama al-Hanbali, *al-Mughni l'ibn Qudāmah* vol.9 (Egypt: Maktab tul Qahira, 1968), 242.

<sup>5</sup> Abu Muhammad Abdullah bin Abd ur rehman al-Maliki, *Al-nāwadir wa al-Ziyadat ala ma fi al-Mudavina min ghairha min al-Ummahat* vo.3 (Beirut: Dār al-gharb al-Islami 1999), 83.

prisoners will be considered valid if they are not forced for it.<sup>1</sup> The logic for this rule of law is that the Law considers all Muslims capable of awarding guarantee without space and time. According to Shaybānī, a guarantee given by a Muslim prisoner in an alien state is not valid. A prisoner's guarantee does not yield any benefit to Muslim state rather to himself to make free from aliens. Usually guarantee is awarded when the guarantor is dominant while a prisoner is dominated and chained in fitters. Therefore, such guarantee will not be binding on other Muslims. The guarantee will be binding on him only. Under such he must take care of the rules that are required from him because if the aliens fulfill their promise the Muslim prisoner should also fulfill his promise. His contract of guarantee will change his status to a guaranteed Muslim in alien state.<sup>2</sup> Similarly, the guarantee of a Muslim in the occupied territory of Muslim state, will also be not valid because the Muslim in such situation is not safe although he is in the territory of Muslim state.<sup>3</sup> As mentioned in the preceding lines, that guarantee carries the philosophy of life security and life necessary arrangements of the guaranteed aliens while the Hadith of the Prophet (peace be up him) which gives the power of awarding guarantee to all Muslims also indicates that on the back of every Muslim the logistic strength and support acts. Muslims wherever they are act on the behalf of Muslim state without the discrimination of gender and freedom or any other temporary legal status like space and time. Therefor the conditional view point of Abū Muhammad al-Mālikī and Kamal al-ddin al-Shāfi is preferred on the view point of Shaybānī and al- Ghazālī. Reason to this

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<sup>1</sup>Kamal-u-ddin Muhammad bin Musa bin e'isa bin ali al-damiri Al-Shāfi'ī, *al-Najm al-Wahaj fi Sharḥ al-Minhaj*, vol.9 (Jiddah: Dār al-Minhaj, 2004), 369.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 285.

<sup>3</sup> Abdurrehman Muhammad bin sulaiman, *Majma' al-anhr fi sharḥ Multaqa al-abḥar* vol.1 (Beirut: Dār aḥya al-Turath al-arabi, n.d), 639.

preference is that to avoid conflict with the Hadith *Sahīh* of the Prophet (peace be up him) in this connection.

#### **6.2.5 Awarding guarantee by newly converted Muslim in an alien state**

According to Shaybānī, newly converted Muslims in alien state cannot award guarantee to aliens although they are safe and secure and can manage the necessary arrangements for the guaranteed aliens.<sup>1</sup> This view of Shaybānī about the newly converted Muslims in aliens' state who are not capable of awarding guarantee to aliens carries a sound reason because such newly converted Muslims are usually unaware and not well informed in Islamic thought and practice. Therefore, the guarantee of such Muslims will not be ratified by Muslim state that is to avoid security complexities. Moreover, Shaybānī formulates separate laws and ethics for the domain of war which are different from the Domain of Muslim state.

In concluding the topic of the authority of awarding guarantee, Awarding *Amān* by a Muslim state is unanimously recognized by all Muslim classical and contemporary Muslim jurists and law experts. Muslim International Law experts are divided into the following categories with reference to Shaybānī's viewpoint, the Classical Muslim Jurists' (Cl.MJ) approach towards the authority and power of awarding guarantee, the insights of the Contemporary Muslim Jurists (CMJ), the expert opinions of the Contemporary International Law Experts (CILE) and the actual practice of the Contemporary International Law. The dynamism involved in the phenomenon and chronological (timely) growth of the term *Amān*. The impact of the dynamism of *Amān* in the development of Muslim state by exercising the power or authority of awarding *Amān*. The school of thought recognizing the use of power or authority by state or Muslim individuals with reference to

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār al-Fikār, 2000), 69

jurisdictional or territorial variations. How the exercise of power or authority of awarding *Amān* affect the jurisdictional or territorial autonomy of Muslim state? Partially, all Muslim classical jurists and law experts recognize the exercise of power and authority of awarding guarantee. They are of the view that *Amān* with reference to authority is divided into three kinds:

- i. *Amān* as armistice treaty between Muslim and alien state and aliens
- ii. *Amān* as citizenship contract between a Muslim state and non-Muslim citizens
- iii. *Amān* as contract for the temporary settlement of aliens in Muslim state

According to all classical jurists, the first two categories of *Amān* with reference to authority is the sole official right of Muslim state. Classical Muslim jurists have different opinions with reference to award guarantee by Muslim individuals. They are of the view that Muslim individuals have equal right to Muslim state in awarding guarantee. Only Imam Malik has different viewpoint. He doesn't recognize the right of individuals to award the above third category of *Amān*. In case, if a Muslim individual awards it the Muslim can dismiss it without furnishing any reason. The other classical law experts give Muslim state the authority of revocation of the guarantee awarded only in case of conflict to the security of Muslims and Muslim state. The contemporary Muslim scholars do not recognize all the three kinds of *Amān* for Muslim individuals. The contemporary orientalist like Majid Khadduri is of the view that Muslim International Law changes its rules and regulations with change of time and space. He is of the view that when Muslims were dominant, the Muslim International Law did not recognize co-existence with other nations and nation states. With the passage of time when Muslim dominancy went on its fall, Muslim law experts have started

to recognize other the nations and nation states.<sup>1</sup> From the Khaduri viewpoint, it can be concluded that an element of dynamism is involved in the mechanical growth of Muslim International Law which gave a colorful flight for introducing first the concept of co-existence under the treaty of Madinah, treaty of Hudaibiyyah or the treaty of Wasikahe 'Umariyyah under the flexible and digestive character of Muslim International Law. In continuation to the Khadduri viewpoint, the contemporary Muslim scholars have accepted the sovereignty of Muslim state as the sole custodian of Muslim individuals' rights and all the Muslim individuals' rights are now vested in sovereign Muslim state especially with reference to awarding *Amān* (guarantee).

According to Shaybānī, al-Shāfi'ī ' and Ahmad bin Hanbal, the difference between "Power of Awarding Guarantee" and the "Authority of Awarding Guarantee" are recognized two different things. Under power of authority of awarding guarantee Muslim individuals have equal power of awarding guarantee to Muslim state. According to the jurists mentioned such guarantee needs no ratification by the state and Muslim state is bound to acknowledge the guarantee awarded by Muslim individuals. Under the power of awarding guarantee Muslim individuals are not capable to award guarantee in situation of peace in case of awarding guarantee as a *dhimmah* or citizenship. They are only allowed to award guarantee in the situation of war. Under the authority of awarding guarantee only Muslim state is officially authorized to award guarantee both in the situations of war and peace in the form of awarding guarantee as *Amān* or *dhimmah* and citizenship. This mean that guarantee is divided into two kinds of embracing custodianship of aliens that is guarantee as *Amān* or safe conduct in terms of Majid Khadduri<sup>2</sup> and guarantee as a *dhimmah* or citizenship. The Contemporary Muslim

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<sup>1</sup> Majid Khadduri, War and Peace in the law of Islam (London: The Johns HopKins,1960), 1.

<sup>2</sup> Ibid.

Law Experts like Zuḥayli and Zaydān do not recognize the power of awarding guarantee by Muslim individuals. They believe in the use of authority for awarding guarantee only by Muslim state. The contemporary Muslim jurists and experts do not recognize divisions made by the classical law experts. According to them reason to this rule of law is that all Muslim individuals' rights are now vested in sovereign Muslim state. The scholastic approach of the contemporary Muslim Law experts (CMLE) to the use authority of awarding guarantee is similar to the classical approach but different in the use of power of awarding guarantee by Muslim individuals. Reason that to this deviation is that the CMLE believe in the crucially and complexity of the state security in which individuals have no right to intervene. Shaybānī's approach to the power of awarding guarantee and the authority of awarding guarantee. (Mana' and Wilayah) is different from the rest of Muslim jurists. According to him, jurisdiction plays vital role in the operations of Muslim state under Muslim International Law. The status of divine injunctions changes with the change of the territorial jurisdiction of Muslim state. He is of the view that all those people living within the territory of Muslim state are protected irrespective of their religion by Muslim state. Conversely, all those who are living beyond the territorial limits of Muslim state are not protected by Muslim state. The result of this territorial jurisdiction is that any cause of action occurs beyond the territorial jurisdiction of Muslim state either by Muslims or non-Muslims citizens will not be entertained by the courts of Muslim state. According to Shaybānī, due to territorial jurisdiction, those Muslims who are living beyond the limits of Muslim state, will not be forced by Muslim state to follow the divine commandments and they will not be held accountable for any misconduct under Muslim Law. Although, ideologically a Muslim state does not possess physical or geographical boundaries, but Muslims are supposed to follow the divine commandments everywhere they are within or beyond the territorial jurisdiction of Muslim state. In this connection, Shaybānī is of the view that if a Muslim state



loses its writ within its jurisdiction, then Muslims individuals will also lose their capability of awarding guarantee even they are safe and sound. It means that power of awarding guarantee falls with the falling of the authority of awarding guarantee. Reason to this argument is that all individuals Muslims act on the behalf of Muslim state. While the others classical jurists Al-Shāfi'ī<sup>1</sup> and Imam Malik do not recognize territorial jurisdiction of Muslim state<sup>1</sup>. According to them, all Muslims individuals will be legally forced for following the divine commandments by Muslim state without any consideration of territorial jurisdictions of Muslim state. They are of the view about every cause of action occurs either within or beyond the jurisdiction of Muslim state; the wrong doers will be made accountable before the courts of Muslim state. the order of lodging FIR by the Supreme Court of Pakistan against the cartoonists of the Prophet (peace be up him) is a precedent in this connection. In the continuation of this discussion, Abū Muhammad al- Mālīki and Kamaluddin Al-Shāfi'ī<sup>1</sup> are of the view that all Muslims individuals are capable of awarding guarantee without any limit of the jurisdiction of Muslim state. They are of the view that Hadith of the Prophet (peace be up him) has given equal status to all Muslims with reference to award guarantee without any territorial jurisdiction. According to them, Muslim prisoners and Muslim traders in an alien state are capable of awarding guarantee if they are safe and secure.

### **6.3 Authority of giving Quarter, Asylum and Refugee with reference to *Amān***

The Contemporary International Law recognizes the legal status of Quarter. Under the notion of *Amān*, the term "Quarter" is considered as a sub part of *Amān*. *Amān* is a general conduct of Muslim state and Muslim individuals under Muslim

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<sup>1</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.7 (Bairut: Dār al-Marifah, 1990),379.

International Law that deals in both situations of war and peace. It is a partially bilateral contract which sometimes needs not legal proceedings or proper demand on the behalf of guaranteed person. A Muslim state may award it on its own discretion. While Quarter is a unilateral contract of protection provided under the rules of International Humanitarian Law (IHL) during war only. Muhammad Hamidullah considers both the terminologies as synonymous. The basic conditions that are to be fulfilled for awarding *Amān* or Quarter are overlapping while according to the consequences both have similar impact on the behalf of the protected person and on the guarantor like both provide protection to the life and property of the guaranteed person either by *Amān* or Quarter. While awarding *Amān*, the concerned persons are not required to be belligerents they may be laymen. But under IHL, Quarter will be given to those fighters who meet the criteria of belligerents. Belligerents must carry a unique symbol like proper uniform and flag or carrying weapons openly, fight under the supervision of a commanders and observing the rules and regulations of IHL. Awarding Quarter is the sole right of the imprisoning state. Individuals have no capability of awarding Quarter.<sup>1</sup> According to IHL, individuals will only be capable to award quarter by the appointment of the state in case of using the delegated authority. Under Muslim International Law, *Musta'min* (guaranteed person) has more rights as compared to a person to whom the Quarter has been given. Under the IHL, a person to whom the Quarter has been given entitles the fundamental human rights like food, shelter, cloths, freedom of thought and expression and medical facilities like hygienic environment.<sup>2</sup> They are considered prisoners of war, they cannot move beyond the territory specified. According to the entitlements, guaranteed persons under *Amān* are dealt equal to either Muslims or non- Muslim citizens

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<sup>1</sup> Mohamed Elewa BaDār, *Ius in Bello under Islamic International Law*, International Criminal Law Review 13 (2013) 593–625.615. Article 40 of the additional protocol 1

<sup>2</sup> Geneva convention relative to the treatment of prisoners of war of 12 august 1949, articles, 25-37.

mostly. Similarly, the term "Asylum" under the notion of *Amān* is considered a sub part of it. According to an orientalist law expert Khadduri is of the view that the process of *Amān* is very simple and easy. He is of the view that there is no formal procedure for seeking *Amān* by the non-Muslim seeker. It does not require the intention of the guarantor. If guarantors show any gesture which is either known to the persons concerned of *Amān* for awarding guarantee or they consider it as guarantee, in such situation the guarantee will be considered as awarded. The informal communication was acknowledged as awarded guarantee in the case of al-Hurmuzān by the caliph 'Umar RA. Although the Caliph did not award *Amān* in explicitly and nor had intended to award guarantee to Hurmuzān. But he claimed the guarantee and it was awarded without the willingness of the Caliph.<sup>1</sup> While asylum is a restricted phenomenon of awarding protection. It is the sole authority of state which is to be given on the proper demand by the person/s concerned. Asylum is usually awarded on the bases of diplomatic or political grounds. The rights of a person who gets asylum are to be judged in accordance with the rules of Contemporary International Law but there are no agreed rules through which the rights of the person who has obtained asylum are to be determined. The rights of the person who got asylum are determined by the International Court of Justice are not unanimously agreed.<sup>2</sup> The notion of refugee is also different from the legal philosophy of *Amān*. According to the Contemporary International Law, refugee is a stateless person.<sup>3</sup> According to Geneva Convention 4, refugee is a person who does not enjoy any shelter of any government.<sup>4</sup> Usually, refugee-status is demanded by the persons who have fled

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1 Majid Khadduri, War and Peace in the law of Islam (London: The Johns HopKins,1960), 165.

2 Malcolm N.Shaw, International Law ( New York: Cambridge University Press, 2008),76-79.

3 Additional Protocol 1, article 73.

4 Geneva convention relative to the protection of civilian persons in time of war of 12 august 194, Article 44.

from their mother countries in order to seek protection along with fundamental rights.<sup>1</sup> According to IHL, the rights of refugees are to be determined either by Customary International Law (CIL) or by International Peace Treaty between the states concerned. In the absence of (CIL) and any peace treaty, the rights of refugees are to be determined by the host state.<sup>2</sup> It can be concluded that the notion of *Amān* is a broader phenomenon with respect to legal process of completion, impact on both the parties, consequences, revocation or termination and the rights of *Mustā'minīn* under Muslim International Law as compare to Quarter, asylum and refugee.

#### 6.4 Rights of *Mustā'min* (Guaranteed Person)

Guaranteed person (*Mustā'min*) is a non-Muslim to whom the guarantee is awarded by Muslim state or Muslim individuals. The social, religious, financial and spiritual status of guaranteed persons either they are aliens or not, remain unchanged by obtaining guarantee. Only their deterrent and logistic status may be changed on the condition if Muslim state considers it necessary otherwise not. The relationships between a Muslim state and guaranteed persons will be in accordance to the terms and conditions mutually agreed at the time of contract. All the rules, principles, impact and consequences of any contract which are mutually agreed and endorsed by the parties and Islamic law are equally applicable on the contract of *Amān*. Similarly, rights of the parties to the contract under Islamic law will also applicable to the contract of *Amān*. The difference between a common contract and the contract of *Amān* is that in the contract of *Amān* everything is dealt under Muslim International Law while in case of any other contracts parties are dealt under Islamic Law. In the contract of *Amān* both

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<sup>1</sup> Hans peter Gasser, International Humanitarian Law (Haupt: Henry Dunant Institute, 1993), 21.

<sup>2</sup> Malcolm N. Shaw, International Law ( New York: Cambridge University Press, 2008), 675.

the parties are international while in case of common contract parties may not be so. In case of *Amān* any breach of contract causes international consequences while in common contract the consequences may not be necessary at international level but usual has national consequences. Same is the case of rights of the parties to the contract. According to Shaybānī, all *Hudūd* punishments are applicable except *Hadd al-Khamr* to non-Muslim citizens. *Hudūd* whose violation leads to the infringement of any personal right of citizens will be applicable to guaranteed persons like *Ḥadde Qadhf*. According to Shaybānī, guaranteed persons will be held accountable for any death as a retaliation. Non-Muslim citizens will not be held liable for retaliation but will be made subject to pay the blood money in case of murdering guaranteed persons.<sup>1</sup> According to Mansūr al-Ḥanbali, there is no difference between non-Muslims and guaranteed persons reference to retaliation. Both kinds of murderers will be retaliated for the offenses of killing.<sup>2</sup> According to Shaybānī, non-Muslim citizens are bound to obey Islamic Law in their general affairs. Guaranteed persons are not bound to follow Islamic Law in their affairs.<sup>3</sup> Non-Muslim citizens have the right of buying and selling like Muslims. Guaranteed aliens do not have the right to buy weapons or anything which strengthen them logistically Muslim state.<sup>4</sup> According to Shamsuddin Al-Shāfi'ī the *Hadd* punishment will be applicable to non-Muslim citizens while it will not be applicable in the case of guaranteed persons.<sup>5</sup> The rights of guaranteed persons

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 306.

<sup>2</sup> Mansoor bin younas bin Salah Uddin al-Ḥanbali, *Kashāf al-Qin a' a'an Mtn al-Iqna'a* vol.5 (Beirut: Dār al-Kutub al- 'Imiyyah,n.d),524.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 306.

<sup>4</sup> Shams ul-din Muhammad bin aḥmad al-Khatīb al-Sharbīni al-Shāfi'ī Mughni al-Muḥtaj ila Ma'rifat Ma'ni al-fāz al-Minhaj vol.2 (Bairūt: Dār al-Kutub al- 'Imiyya,1994),338.

<sup>5</sup> Shams ul-din Muhammad bin aḥmad al-Khatīb al-Sharbīni al-Shāfi'ī, Mughni al-Muḥtaj ila Ma'rifat Ma'ni al-fāz al-Minhaj vol.5 (Bairūt: Dār al-Kutub al- 'Imiyya,1994),447.

may be divided into two types. The general rights like fundamental rights and specific rights. General rights are the rights which all guaranteed individuals enjoy without all kinds of discriminations like protection of life, property, honor, freedom of thought and expression. Specific rights are those special rights which only specific guaranteed persons enjoy like the special privileges entertained by diplomats. Specific rights are all inclusive of general rights while general rights are exclusive and may be restricted and changed by Muslim state with reference to the guaranteed persons and situation of war and peace.

#### 6.4.1 General rights of guaranteed persons

Rights of the guaranteed persons which are equally protected by Muslim state and whose violation may result the implementation of *Hudūd* punishments like theft and Qadhf. These rights cannot be changed with change of space and time of the guaranteed persons and can be claimed even after the demise or willful or forceful departure of the persons concerned.

##### 1 -Right of protection of life and property

Shaybānī is of the view that Muslim state must protect guaranteed persons from all aspects.<sup>1</sup> According to him Muslim state will not only protect guaranteed persons from internal threats but also from external.<sup>2</sup> Moreover, he is of the view that if guaranteed persons can defend themselves from any external threat then Muslim state has the responsibility to facilitate them accordingly.<sup>3</sup> Shaybānī even does not consider the exchange of guaranteed persons in lieu of Muslim prisoners with alien state lawful. He is of the view that such exchange will only be possible if the guaranteed persons do agree. According to him, if the alien state pressurizes

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.4 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 334. .

<sup>2</sup> Ibid.335.

<sup>3</sup> Ibid.

and threatens to attack on Muslim state for such exchange, in this situation, Muslim state has no authority to compromise on such exchange although it cannot defend itself. He is of the view that exchange of guaranteed persons with prisoners without their willingness will amount to treachery.<sup>1</sup> The logic for this rule of law is that the territorial jurisdiction of Muslim state (*Dār*) and sovereignty (*Wilayah*) make Muslim state bound to protect and help everyone who is within the territorial jurisdiction of Muslim state without the discrimination of faith and thought. Those who are living beyond the territorial jurisdiction of Muslim state are not supposed to be protected on the cost of those who are living inside the jurisdiction of Muslim state. According to Shaybānī, the assets made by guaranteed persons will also be secured in all situations even if they leave Muslim State permanently or temporarily. They will claim as a right for it through court.<sup>2</sup> According to Imam Malik, Shaybānī and Imam Al-Shāfi'ī on the death of guaranteed persons all their assets will be seized that is to protect it from misuse and any other unnecessary loss. The Islamic state will deliver it to the legal heirs concerned. The distribution of the assets of deceased guaranteed person will take place under the personal law concerned.<sup>3</sup> According to abū al-abbas al-Mālīki, contract of *Amān* provides security to the life, property and honor of the guaranteed persons either it is awarded by Muslim individuals or Muslim state.<sup>4</sup> Once guarantee is awarded to aliens they will be treated like non-Muslim citizens with reference to their protection of life, honour and property. They will be having

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.4 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 334.

<sup>2</sup> Muhammad ib-ne al- Hassan al-Shaybānī, *Al-asl al-Marūf bil-Mabsūt*, vol.4 ( Krachi: IDārat ul Qurān Wal olūm al-Islamiyya, n.d),49.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: *Dār al- Ma'rifah*, 1993), 91. Makin bin Anas bin Malik bin a'mir al-Madani, *al-Maūnah* vol. 1 (Beirut: Dār al-Kutub al- 'Imiyyah 1994),512. Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.4 (Bairut: Dār al-Ma'rifah,, 1990),308.

<sup>4</sup> Abu al-abbas Shahab udin ahmad bin Idrees bin abd ur rehman al-Maliki al-Shaheer bil Qarrafī, *Al-Zakheerah* vol.3 (Beirut: Dār al-Gharb al-Islami,1994),444.

all fundamental rights. Killing of guaranteed persons and snatching their property will be considered treachery.<sup>1</sup> According to all Muslim jurists classical and contemporary, guaranteed persons are protected with reference to their life, honour and property by Muslims and Muslim state.

## 2- Right to freedom of movement

Guaranteed aliens are also free to go anywhere they want within Muslim state except highly secured places or prohibited especially for non-Muslims like *Hudūde Haram*.<sup>2</sup> According to Ibn 'abdīn al-Ḥanafī, guaranteed persons have the right to visit everywhere except Majide Ḥarām. They have also the right to go to Makkah and Madinah al-Munawarah for trading purposes even without the permission of Muslim state. They will not be allowed to live permanently in Makkah and Madinah.<sup>3</sup> According to Mansūr al-Ḥanbali guaranteed persons will not be allowed to enter in to *Hudūde Haram*.<sup>4</sup> This rule of law is based on the divine commandment of the Qur'ān in which Allah makes the entrance of non-Muslims prohibited in *Hudūde Haram*.<sup>5</sup> Mansūr al-Ḥanbali is of the view that the divine commandment is related to Ḥarme Makki. He is of the view that the said commandment was revealed when Jews were living in Madinah and they were not being prevented from living there after the revelation of this commandment.<sup>6</sup> According to Ahmad bin Muhammad Al-Shāfi'i, guaranteed persons have the

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<sup>1</sup> Ahmad bin Ghaneem bin Salim al-Nafravi, *Al-Fawakih al-dawani a'la Risalah ibn abi Zaid al-Qirwani* vol.2 (al-Madina: Maktabah al-Saqafah al-Deeniyyah, n.d), 887.

<sup>2</sup> Abdul Kareem Zaydan, *Aḥkam al-dhimyīnā wā al-Mustā'mīnīnā fi Dār al-Islam*, (Baghdad: Makābah al-Qūds, 1982), 121.

<sup>3</sup> Ibn 'abdīn, *Hāshyat Radd al-Mukhtar ala al-ddur al-Mukhtar* vol.6 (Beirut: Dār al-Fikr, 2000), 387.

<sup>4</sup> Mansoor bin younas bin Salah Uddin al-Ḥanbali, *Kashāf al-Qin a' a'an Mtn al-Iqna'a* vol.8 (Beirut: Dār al-Kutub al- 'Imiyyah, n.d), 355.

<sup>5</sup> "O ye who believe! Truly the Pagans are unclean; so let them not, after this year of theirs, approach the Sacred Mosque. And if ye fear poverty, soon will Allah enrich you, if He wills, out of His bounty, for Allah is All-knowing, Allwise" Al-Qurān: 9, 28.

<sup>6</sup> Mansoor bin younas bin Salah Uddin al-Ḥanbali, *Kashāf al-Qin a' a'an Mtn al-Iqna'a* vol.8 (Beirut: Dār al-Kutub al- 'Imiyyah, n.d), 355.



right to live everywhere in Muslim state except *Hijāze Muqadasah*. Guaranteed persons cannot live temporarily or permanently in *Hijāz*.<sup>1</sup> According to him guaranteed persons can enter *Hijāz* in dire need only with special permission of Muslim state.<sup>2</sup>

According to Muhammad bin Ahmad bin a'rafa al-Māliki, guaranteed persons have the right to live in *Hijāz* with the permission of Muslim state for three days if they have any economic interest related to *Hijāz*.<sup>3</sup> Zuhayli is of the view that guaranteed persons will not be allowed to enter *Hrame Makki* while they have the right to live temporarily in *Hijaz* not permanently.<sup>4</sup> All Muslim jurists are agreed on the point that guaranteed persons have no right to enter *Harame Makki*. The view of Imam al-Shāfi'i about the entry of guaranteed persons with the permission of Muslim state is preferable in case of their dire need. While the view point of Ibn 'abidīn endanger the security of Haram and Muslim state by allowing non-Muslim citizens to *Hijāz* without any permission of Muslim state. Guaranteed aliens have the right of privacy as non- Muslim citizens of Muslim state. Permission must be taken before entrance to the residence of aliens.<sup>5</sup>

Under Muslim International Law, all rights of guaranteed persons are protected. According to al- Awzā'i, public rights are equally applied to all the inhabitants of Muslim state. In case of violation all the criminals will be treated

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<sup>1</sup>Ahmad bin Muhammad bin Muhammad bin Ali bin hijr al-haismi, *Tuḥfat-ul-Muḥtaj fi Shrh al-Minhaj* vol.9 (Egypt: al-Maktabah al-tijariyya al-Kubrā,1983),280.

<sup>2</sup>Ibid, 282.

<sup>3</sup> Muhammad bin Ahmad bin a'rafa al-Dasooqi al-Maliki, *Ḥāshiyah al-dasooqi ala al-Sheḥ al-Kabir* vol.2(Beirut: Dār al-Fikr,n.d),201.

<sup>4</sup> Wahbah al Zuhayli, *Athār al- Harb fi Fiqh al- Islamī* (Beruit: Dārul Fikar,1998),301.

<sup>5</sup> The Holy Prophet is reported to have said: "If someone peeps into your house, it will be no sin if you injure his eye with a piece of stone". Muhammad bin Ismail al- Bukhari, *Saheeh al- Bukhari*, vol. 08 (Riyadh: Dār al- Salam, 1997), 146.

equally for penalties.<sup>1</sup> In Muslim state guaranteed persons can claim for the rights which are either generally understood as rights or for those which Muslim state has awarded in exceptional cases.<sup>2</sup> Once if Muslim state awards guarantee the guaranteed persons should be treated equally with the other citizens before the law.<sup>3</sup> In the view of Shaybānī, no violation of law by the guaranteed persons affect their guarantee to be terminated.<sup>4</sup> According to Imam Abū Ḥanīfah and Shaybānī, guaranteed persons may be made subject to pay the damages in case of any violation of personal and some public rights like consensual sexual intercourse and theft. Shamsuddin Al- Shāfi'ī has endorsed the viewpoint of Abū Ḥanīfah and Shaybānī.<sup>5</sup> According to them, in case of Ḥadd Qadhif the guaranteed person will be held to Ḥadd Punishment. Imam Malik and Abū Yūsuf are of the view that all Ḥuddūd punishments are equally applied to guaranteed persons and such violation may terminates the guarantee of violators.<sup>6</sup> The case of forceful sexual intercourse is not discussed by Imam Abū Ḥanīfah and Shaybānī. It can be presumed that the Imams consider the forceful sexual intercourse as intentional killing of the citizens, in which guaranteed persons are retaliated. So, it can be presumed that in case any forceful sexual intercourse with citizens of Muslim state guaranteed persons will be made subject to the punishments of either stoning to

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<sup>1</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.7 (Bairut: Dār al-Ma'rifah,, 1990),378. Abu al- Hassan Ali bin Muhammad bin Muhammad bin Habib al- Basri al- Shaheer bil Mawardi, *Al- Havi al- Kabir fi Fiqh Madh al- Imam al- Shāfi'ī*,vol.14 (Beirut: Dār al- Kutb al- Elmiyyah, 1999), 190.

<sup>2</sup> Muhammad ib-ne al- Hassan al-Shaybānī, *Al-asl al-Marūf bil-Mabsūt*, vol.4 (Krachi: IDārat ul Qurān Wal olūm al-Islamiyya, n.d),48.

<sup>3</sup> " O ye who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear Allah. For Allah is well-acquainted with all that ye do."Al- Qur'ān: 05:08

<sup>4</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 326.

<sup>5</sup> Shams ul-din Muhammad bin aḥmad al-Khatīb al-Sharbīni al-Shāfi'ī, *Mughni al-Muḥtaj ila Ma'rifat Ma'ni al-fāz al-Minhaj* vol.5 (Bairūt: Dār al-Kutub al- 'Imiyya,1994),447.

<sup>6</sup> Abu al-abbas Shahab udin aḥmad bin Idrees bin abd ur rehman al-Maliki al-Shaheer bil Qarrafi, *Al-Zakheerah* vol.3 (Beirut: Dār al-Gharb al-Islami,1994),447.

death or wiping hundred lashes. According to Shaybānī, guaranteed persons will only be punished if they violate personal right of citizens.<sup>1</sup> Shaybānī says the guaranteed alien should be given penalty (*Tāzīr*) in Ḥuddūd punishments except Ḥadde Qadhf or as court thinks fit to inflict any other penalty.<sup>2</sup>

Al-Shāfi'ī and Al-Māwar didifferentiate between public and private rights. In case of violation of public rights, the guaranteed persons will not be held accountable for *Hudūd* punishments like adultery and apostasy. They are of the view that if guaranteed persons do sexual intercourse with other guaranteed persons they will be made known to the fact that Muslim state does not allow such kind of vulgarity. If sexual intercourse was done with non-Muslim citizen, they will be required to be repented otherwise their guarantee will be terminated. If sexual intercourse was done with Muslim citizens, their guarantee will be terminated if it was mutually agreed during making the contract of *Amān*. If such stipulation was not agreed in the contract of *Amān* then such persons will be required to make repentance otherwise the guarantee will be terminated. In case of violation of private rights, the guaranteed persons will be held accountable. In case of theft (which is combination of private and public rights) al-Māwardī is of the view, that if the stolen property belongs to another guaranteed person, the thief will be held accountable neither for damages nor for imputation of hand rather they will be warned not to repeat the same crime otherwise the guarantee will be terminated. If the stolen property belongs to Muslims or non-Muslim citizen, the criminal will pay damages for it. Al-Māwardī has two opinions about imputation of the hand of theft:

- 3- Hand will not be imputed due the violation of public right (*Ḥaqqullah*) for which guaranteed persons will not be held accountable.

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 306.

<sup>2</sup> Ibid, 307.

- 4- Hand of the guilty person will be imputed because it is necessary for the protection of property like retaliation is to be imposed for the protection life of humans.<sup>1</sup>

According to Mansūr al-Ḥanbali, guaranteed persons will not be held accountable for the violation of public rights like *zina*. He is of the view that if guaranteed persons do sexual intercourse with Muslim females, they will be given death punishment due to the violation of the contract of guarantee. According to him if guaranteed persons do sexual intercourse with non-Muslim citizens for which they will not be punished for Hadde Zina.<sup>2</sup> In the discussion, the view point of Imam Awzā'ī can be preferred. According to him, it is important to stop violation of public and private rights guilty persons should be punished as equal to Muslims without discrimination based on guarantee or citizenship of non-Muslims. The view point of Awzā'ī can help us to make Muslim state and Muslim societies free from capital crimes. The rest of the opinions give relaxation to guaranteed persons on different grounds to be encouraged for doing crimes and violating the public of the citizens of Muslims. It is also a matter of injustice to equalize guaranteed persons for getting benefits being the inhabitants of Muslim state with Muslims and not Muslims and to let them relax in violating the rights of the citizen of Muslim state.

### 3- Right to claim for Retaliation

According to Shaybānī and Imam Al-Shāfi'ī guaranteed persons cannot claim for retaliation for the killing of their guaranteed persons. They will be

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<sup>1</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.7 (Bairut: Dār al-Ma'rifah,, 1990),378. Abu al- Hassan Ali bin Muhammad bin Muhammad bin Habib al- Basri al- Shaheer bil Mawardi, *Al- Havi al- Kabir fi Fiqh Madh al- Imam al- Shāfi'ī*, vol.13 (Beirut: Dār al- Kutb al- Elmiyyah, 1999), 329-330.

<sup>2</sup> Mansoor bin younas bin Salah Uddin al-Ḥanbali, *Kashāf al-Qin a' a'an Mtn al-Iqna'a* vol.6 (Beirut: Dār al- Kutub al- 'Imiyyah,n.d),91.

entitled for blood money (*Diyyah*) of their deceased.<sup>1</sup> Ibn Qudāmah al- Ḥanbli endorses the view point of Shaybānī and Imam Al-Shāfi'ī .<sup>2</sup> According to Sarakhsī, reason to this rule of law is the principle of "equality in retaliation" which cannot be compromised. In this case a guaranteed aliens are not equivalent to Muslims.<sup>3</sup> Imam Malik also endorses this view point.<sup>4</sup> According to Shaybānī, if murderers of guaranteed person are non-Muslim citizens, in such case retaliation will also not be demanded.<sup>5</sup> The logic behind this rule of Shaybānī is the principle of equality in retaliation with reference to ideology and citizenship of Muslim state. In case of lacking one of the conditions may eliminate the claim of retaliation. The murdered guaranteed persons lack the both the conditions which are required by the principles of equality in retaliation. According to *Mansūr al-Ḥanbali*, retaliation requires only equality in faith. In case of murdered guaranteed persons by non-Muslims the principle of retaliation will be applied.<sup>6</sup> According to him ideology matters not the citizenship of the persons concerned.

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<sup>1</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī , *Al-Umm*, vol.6 (Bairut: Dār al-Ma'rifah,, 1990),39. Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: *Dār al- Ma'rifah*, 1993), 95

<sup>2</sup> Abu Muhammad Abdullah bin Ahmad bin Muhammad bin Qudama al-Hanballi, *al-Mughni le Ibn Qudāmah* vol.8 (Egypt: Maktab tul Qahira, 1968),274.

<sup>3</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī , *Al-Umm*, vol.6 (Bairut: Dār al-Ma'rifah,, 1990),39. Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: *Dār al- Ma'rifah*, 1993), 95

<sup>4</sup> Makin bin Anas bin Malik bin a'mir al-Madani, *al-Maūnah* vol. 1 (Beruit: Dār al-Kutub al- 'Imiyyah 1994),512.

<sup>5</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 306

<sup>6</sup> Mansoor bin younas bin Salah Uddin al-Ḥanbali, *Kashāf al-Qin a' a'an Mtn al-Iqna'a* vol.5 (Beirut: Dār al-Kutub al- 'Imiyyah,n.d),524.

#### 6.4.2 Specific Rights of guaranteed persons

Specific rights are those rights which are conditional rights that infringe from the observance of the contract of guarantee mutually by the parties to the contract. These rights cannot be claimed by the party to the contract of guarantee if it has not fulfilled its vicarious responsibilities or liabilities. These rights may be terminated or restricted either by mutual agreement or by the Muslim state, party to the contract of guarantee or by the guaranteed persons like by willful leaving the Muslim state.

##### 1 Right of entrance to Muslim state

The first right of guaranteed aliens is to visit Muslim state to know and see the qualities of Islam and the organization of Muslim state. They may also visit Muslim state for individual or national interests like trade or states mutual affairs. According to if Shaybānī, non-Muslims visit of Muslim state being claiming as diplomat will be considered as guaranteed person by showing an appointment letter. By showing any fake document as an ambassador will be declared as captive of Muslim state.<sup>1</sup> According to Qaḍī Abū Yūsuf, only sufficient proofs like an official appointment letter or gift from his state for the head of Muslim state can declare such person as ambassador.<sup>2</sup> According to Sarakhsī, ambassadors' protection is important for maintaining peace order among nation states or for declaring war against any state. due to this they have a right to visit Muslim state even without seeking formal guarantee.<sup>3</sup> Imam Al-Ghazālī, is of the view that only visit of Muslim state by aliens for examining the qualities and advantages of Islam or for diplomacy make them guaranteed persons without due processing their guarantee. According to him the other motives of aliens cannot make them

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār al- Ma'rifah, 1993), 92.

<sup>2</sup> Abū yousuf Yaqoob bin Ibrahim, *Al- Khārāj*, ( Qāhirah: Māktābāh al-Azhāriyya Litūrāth,n.d),206.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār al- Ma'rifah, 1993), 92.

guaranteed persons if they did not formally process their guarantee. In such cases they will be enslaved by Muslim state and will be treated accordingly. He is of the view that the guarantee of other than these two kinds of aliens, will be awarded according to the international rules, values and norms by Muslims or Muslim state.<sup>1</sup> According to Abu al-Abbas al-Māliki, the intention of diplomacy can make any alien a guaranteed person if such alien visits a Muslim state even without seeking any formal guarantee from Muslims or Muslim state.<sup>2</sup> According to Sulaiman bin 'Umar Al-Shāfi'i, diplomats can visit without the contract of guarantee and even they will not be demanded any proofs of formal guarantee.<sup>3</sup> According to Majd- ud- Din, visit of non-Muslims to Muslim state being claiming as traders are considered as guaranteed persons with the condition if international customs allow it.<sup>4</sup> According to Shaybānī no person can visit Muslims or Muslim state without showing formal documents of guarantee. According to him, the intention cannot alter the visitors' status of alien ship. In the current scenario of the behavior of nation states, the view point of Shaybānī is considerable but the clear text of the Qur'ān in this connection defies the view point of Shaybānī. Which clearly award the right of visiting for observing Islam and the qualities of the organization of Muslim state.<sup>5</sup> The view point of Majd-ud-Din restricts this right of aliens to trading and international custom which seems not considerable in

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<sup>1</sup>Abū Ḥamid Muhammad bin Muhammad al-Ghazālī al-tūsi, *Al-wasīt fi al-Madhab*, vol.7 (Egypt: Dār al-Salām,4117),44.

<sup>2</sup> Abu al-abbas Shahab udin ahmad bin Idrees bin abd ur rehman al-Maliki al-Shaheer bil Qarrafi, *Al-Zakheerah* vol.3 (Beirut: Dār al-Gharb al-Islami,1994),446.

<sup>3</sup> Sulaiman bin Umar bin Mansor al-a'jeeli al-Azhari, *Futuḥat al-Wahab be Taiwdheeh Sharḥ Minhaj al-Tullab* vol.5 (Bairut: Dār al-Fikar,n.d),212.

<sup>4</sup> Abdulssalam bin Abdullah bin al-khadhr bin Muhammad abu al-Barkat Maj du din al-Muḥarir fil fiqh 'lā Madhab al-Imam Aḥmad bin ḥanbal vol.2 ((Riyadh: Maktabah al-Ma'rif, 1984),181.

<sup>5</sup> " If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah. and then escort him to where he can be secure. That is because they are men without knowledge. "Al-Qur'ān: 09,06. Abdul Kareem Zaydan, *Aḥkam al-dhimyyinawa al-Mustā'mīnina fi al-Islam*, (Baghdad: Makābah al-Qūds,1982),113.

international scenario and the spirit of the Qur'ānic verse in this connection. The viewpoints of Imam Ghazālī, Sulaiman bin 'Umar Al-Shāfi'ī and Abū al-Abbas al-Māliki are similar in case of protection of diplomats by Muslim state. the later view point of Imam Al-Ghazālī, , Sulaiman bin 'Umar Al-Shāfi'ī and Abū al-Abbas al-Māliki can be preferred based on these arguments:

- 1- The Qur'ānic verse has given this right to aliens or non- Muslims.
- 2- Islam promotes peace at every cost. Through diplomats it is possible to establish good relations with other nations and nation states.
- 3- The ambassadors of Mulaymah Kadhdhab were declared protected by the Prophet (peace be up him) even they did not process formally their guarantees.

## 2 Right to stay in Muslim state

According to classical jurist like Shaybānī and al-Al-Ghazālī, , the staying period of guaranteed aliens in Muslim state must not exceed one year.<sup>1</sup> Shaybānī is of the view that before expiring one year stay, Muslim state will offer the guaranteed aliens to be the non-Muslim citizens and pay poll tax otherwise leave Muslim state on the completion of one year. Access of stay may result paying poll tax by such guaranteed persons.<sup>2</sup> According to Sulaiman bin 'Umar al-Shāfi'ī, the staying period of guaranteed persons is four months. He is of the view if Muslim state is weak then the contract of guarantee will be considered as Armistice Contract that may not be exceed ten years. If *Amān* is awarded for more than four months, then it will be considered valid only for four months. In this situation the remaining time-period will be considered null and void on the condition if Muslim

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.4 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 2062. Abū Ḥamid Muhammad bin Muhammad al-Ghazali al-tūsi, *Al-wasīt fi al-Madhdhab*, vol.7 (Egypt: Dār al-Ssalām,4117),45.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.4 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 2062.



state is logistically strong.<sup>1</sup> According to Ibn Qudāmah , the right of stay of the guaranteed persons is subject to the conditions of the contract of *Amān* that may be for limited and unlimited period of time which is the sole discretion of Muslim state.<sup>2</sup> According to Abd ul Ssalam Majd ud Din al- Ḥanbali, guaranteed persons have the right to stay in Muslim state without paying poll tax for ten years.<sup>3</sup> According to Zaydān and Zuḥayli , the right of guaranteed alien to stay in Muslim state is not limited to specific time as classical jurist have fixed. It is not limited to four or twelve months, this is discretion of Muslim state that fixes which depends on the party to the contract of *Amān*.<sup>4</sup> Zuḥayli , is of the view the right of stay of guaranteed persons will not be decided by the international customs or rules of reciprocity rather than the sole right of Muslim state to fix any time-period.<sup>5</sup> The view point of those classical jurists like Zaydān or Zuḥayli who have restricted the stay period of guaranteed persons to four months, one or ten years seems non-preferable and not applicable in the current scenario. The view point of Ibn Qudāmah, seems preferable and applicable in contemporary discourse of nation states. The stay of guaranteed persons depends on the mutually agreed terms of contract of guarantee. According to him to fix the stay period of guaranteed persons is considered the sole authority of Muslim state. In case of any expecting security threat with reference to such guaranteed persons, state can dismiss their guarantee and may order of their deportation. Fixing the stay period may snatch the right of dismissal by Muslim state which may cause Muslim state insecure

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<sup>1</sup> Sulaiman bin Umar bin Mansor al-a'jeeli al-Azhari, *Futuḥat al-Wahab be Taiwdheeh Sharḥ Minhaj al-Tullab* vol.5 (Bairut: Dār al-Fikara,n.d),206.

<sup>2</sup> Abu Muhammad Abdullah bin Ahmad bin Muhammad bin Qudama al-Hanbali, *al-Mughni le Ibn Qudāmahh* vol.9 (Egypt: Maktab tul Qahira, 1968),244.

<sup>3</sup> Abdulssalam bin Abdullah bin al-khadhr bin Muhammad abu al-Barkat Maj du din, *al-Muḥarir fil fiqh 'lā Madhab al-Imam Aḥmad bin ḥanbal* vol.2 (Riyadh: Maktabah al-Ma 'arif, 1984),181.

<sup>4</sup> Abdul Kareem Zaydan, *Aḥkam al-dhimyyinawa al-Mūstā'mīnina fi al-Islam* , (Baghdad: Makābah al-Qūds,1982),116.

<sup>5</sup> Wahbah al Zūḥaylī, *Athār al- Ḥarb fi Fiqh al- Islamī* (Beruit : Dārul Fikar,1998),309.

logistically. The contract of guarantee is '*Aqde Lazim* on the behalf Muslim state, in case of fixing of the staying period, Muslim state will become bound to continue which is in conflict with strategy of Muslim state. Moreover, the guaranteed persons will renew their guarantee after the expiration of every stay period which may cause them to face the complexities of the process of renewal. These complexities may affect their noble job of promoting peace or acknowledging the good qualities of Muslims and the organization of Muslim state.

### 3 Right to go back to the mother country

Guaranteed aliens have the right to go back to their own country whenever they want because the contract of guarantee is '*Aqde Jayez* on the behalf of guaranteed aliens. Leaving Muslim state permanently terminates their contract of guarantee. All the legal contracts made by guaranteed aliens will be effective even on leaving of Muslim state without any reason. These contracts will be claimed to be fulfilled on the arrival of the such aliens in the Muslim state. According to Ibn Qudāmah, if guaranteed aliens go back to their native land not on a permanent basis but as traders, messengers or for any other reason, their guarantee will not be affected. It means that their property remained in Muslim state will be seized in their ownership and they can re-enter to Muslim state without seeking any fresh guarantee. If the guaranteed aliens go back to their country even on permanent bases their property will be remained secured in Muslim state, but they will be required to seek fresh guarantee for entering Muslim state because leaving Muslim state on permanent basis may terminate the guarantee.<sup>1</sup> According to Aḥmad bin Muhammad bin Ali Al-Shāfi'i , if guaranteed aliens go back to their native land with due permission of Muslim state, then their guarantee will not be affected. If they leave Muslim state without due permission or go back for permanent

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<sup>1</sup> Abu Muhammad Abdullah bin Ahmad bin Muhammad bin Qudama al-Hanbali, *al-Mughni le Ibn Qudāmah* vol.9 (Egypt: Maktab tul Qahira, 1968),245.

settlement Their guarantee will be considered terminated.<sup>1</sup> According to Shaybānī and Abu Ishaq al- Shāfi, leaving of the Muslim state by guaranteed persons does not affect their lawful contracts made with other citizens. In case of permanent leaving, their properties will be preserved by Muslim state.<sup>2</sup> Under the law of *'Aqde Jayez*, the opinion of Ahmad bin Ali Al- Shāfi'ī seems not preferable because by imposing the condition of permission of Muslim state. This view point of Ahmad bin Ali Al- Shāfi'ī is contradictory to the spirit of the right of freedom of movement of guaranteed persons. The view point of Ibn Qudāmah about the temporary departure of the guaranteed persons which does not affect their contract of guarantee because the spirit of *'Aqde Jayez* allows guaranteed persons to leave Muslim state temporarily to meet their needs reason to this argument is that it is possible that they cannot easily meet their needs within Muslim state. The freedom of movement also supports the view point of Ibn Qudāmah.

#### 4 Right to worship and getting religious education

Guaranteed persons are free to worship according to their faith. This rule of law is based on the divine commandment of the Qur'ān.<sup>3</sup> In most cases the status of guaranteed persons is treated as non-Muslim citizens of Muslim state. According to this treatment guaranteed persons are also allowed to worship accordingly.<sup>4</sup> The right of getting religious education by the guaranteed persons is a derived right of the freedom of worshipping. The only restriction that may be imposed in this connection is that such education must not be harming the

<sup>1</sup> Ahmad bin Muhammad bin Ali bin al-ḥajar al-haisamī, *Tuḥfah al-Muḥtaj fi Sharḥ al-Minhaj* vol. 9( Beirut: Dār Iḥya al-turāb al-arabi 1983),303.

<sup>2</sup> Muhammad ib-ne al- Ḥassan al-Shaybānī, *Al-asl al-Marūf bil-Mabsūt*, vol.4 (Krachi: IDārat ul Qurān Wal 'lūm al-Islamiyya, n.d),49. Abu Ishaq Ibraheem bin Ali bin Yūsuf al-Shīrazī, *al-Muhadhdhab fi fiqh al-Imam al-Shāfi'ī*, vol.2( Beirut: Dār al-Kutub al- 'Imiyyah,n.d),263.

<sup>3</sup>“Let there be no compulsion in religion: Truth stands out clear from Error: whoever rejects evil and believes in Allah hath grasped the most trustworthy hand-hold, that never breaks. And Allah heareth and knoweth all things” al-Qurān: 2,256.

<sup>4</sup> Al-Kasani, *Badāe' al-Sanāe'* vol,13,158.

emotions of other citizens, Muslims and non- Muslims.<sup>1</sup> Guaranteed persons are in majority cases are treated as non-Muslim citizens.<sup>2</sup> Non-Muslim citizens have the right to use all the public resources and benefits provided by Muslim state like means of communications, transportations, oil and gas.<sup>3</sup> All social rights related to family and cast will be availed by the guaranteed persons subject to the certain prohibitions under Islamic law. Guaranteed females belong to the people of the book (Ahl al- Kitab) can marry Muslims as well as non-Muslim citizens.<sup>4</sup> Guaranteed females other than ahl kitab can also marry guaranteed persons as well as non-Muslim citizens.<sup>5</sup> The only restriction in this connection is that male guaranteed persons cannot marry Muslim females.<sup>6</sup> According to Ibn Nujaim al-Hanafi their person law will be regarded and will be implemented as it is.<sup>7</sup>

## 5. Right to make transactions

Guaranteed aliens have the right of selling and purchasing goods and services with certain limitations. These limitations are like the beast of burden,

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1 " Revile not ye those whom they call upon besides Allah, lest they out of spite revile Allah in their ignorance. Thus have We made alluring to each people its own doings. In the end will they return to their Lord, and We shall then tell them the truth of all that they did. "Al- Qur'ān:06,108. Abdul Kareem Zaydan, *Aḥkam al-dhimyyinawa al-Mustā'mīnina fī al-Islam* , (Baghdad: Makābah al-Qūds,1982),125.

<sup>2</sup> Al-Kasani, *Badā' al-Sanā'at* vol,13,158.

<sup>3</sup> Abdul Kareem Zaydan, *Aḥkam al-dhimyyinawa al-Mustā'mīnina fī al-Islam* , (Baghdad: Makābah al-Qūds,1982),126.

<sup>4</sup> " This day are (all) things good and pure made lawful unto you. The food of the People of the Book is lawful unto you and yours is lawful unto them. (Lawful unto you in marriage) are (not only) chaste women who are believers, but chaste women among the People of the Book, revealed before your time,- when ye give them their due dowers, and desire chastity, not lewdness, nor secret intrigues if any one rejects faith, fruitless is his work, and in the Hereafter he will be in the ranks of those who have lost (all spiritual good). " Al- Qur'ān: 05,05.

<sup>5</sup> Muhammad bin Abi Sahl Al- Sarakhsī , *al- Mabsūt*, vol. 6 (Beirut: Dār al- Fikr, 2000), 167.

<sup>6</sup> "Do not marry unbelieving women (idolaters), until they believe: A slave woman who believes is better than an unbelieving woman, even though she allures you. Nor marry (your girls) to unbelievers until they believe: A man slave who believes is better than an unbeliever, even though he allures you. Unbelievers do (but) beckon you to the Fire. But Allah beckons by His Grace to the Garden (of bliss) and forgiveness, and makes His Signs clear to mankind: That they may celebrate His praise. " Al- Qur'ān: 02,221.

<sup>7</sup> Zain ud Din bin Ibrahim bin Nujaim, *al- Al- Baḥr al- Rayeq Sharḥ Kanz al- Daqaiq* vol.03 (Beirut: Dār al- Kitab al- Islami, n.d),222.

steel, iron, should not sold and purchased in Muslim state. These restrictions may be extended to some of the modern goods that can be used in explosives and other mass destructive weapons like black money, goods prohibited under law for the public interest like forest timbers, phosphorus, benzenes and radioactive elements like Uranium and radium. Sarakhsī gives logic to the given explanation as: These things empower logistically aliens. That is why the guaranteed aliens are not given the authority to make a transaction or any contract of it that is to keep aliens subservient to Muslim state.<sup>1</sup> According Ibn Nujaim al- Hanafi, some relaxations are also avail to the guaranteed persons which cannot be availed by the Muslim citizens of Muslim state like the selling and purchasing of pork and liquor.<sup>2</sup> When guaranteed persons come to Muslim state, they will be given all kinds of protections and their all transactions will be considered as valid transaction. They will not be deprived of their property in all situations. All the movable properties they have brought from their homeland will be remained in their ownership. According to Shaybānī, they are free to use and dispose their properties in ethical modes.<sup>3</sup> In case of release of personal assistants and slaves the law of their lords will be applied as it is on them.

According to Shaybānī and Shams al-ddin Al-Shāfi'ī if guaranteed persons buy prohibited goods like Muslim slave or the goods mentioned above will not become their property. In such cases they will be forced to sale out to Muslims (if allowed) or Muslim state. Similarly smuggled goods will also not be claimed as their property and Muslim state will forfeit such properties.<sup>4</sup> Similarly Guaranteed person will have no right to exchange inferior goods or weapons with superior

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<sup>1</sup> Muhammad bin Abi Sahl Al- Sarakhsī, , al- Mabsūt, vol. 10 (Beirut: Dār al- Fikr, 2000), 152

<sup>2</sup> Zain ud Din bin Ibrahim bin Nujaim, al- Al- Baḥr al- Rayeq Sharḥ Kanz al- Daqaiqv.13 (Beirut: Dār al- Kitāb al- Islami, n.d),301.

<sup>3</sup> Muhammad ib-ne al- Hassan al-Shaybānī, *Al-asl al-Marūf bil-Mabsūt*, vol.4 (Krachi: IDārat ul Qurān Wal olūm al-Islamiyya, n.d),48.

<sup>4</sup> Muhammad bin Abi Sahl Al- Sarakhsī, al- Mabsūt, vol. 10 (Beirut: Dār al- Fikr, 2000), 151

goods or weapons.<sup>1</sup> They will have the right of carrying back goods which they had brought along with them from their native land to Muslim state.<sup>2</sup> The risk and danger of such goods makes no obstacle from carrying them back to their country of their origin. Muslim state may prohibit the mobility of goods which highly dangerous goods like chemicals and mass destructive weapons. From this it can be concluded that all the belongings and assets of the entering guaranteed persons will be recorded that is to evaluate them on logistics and non- logistics standards and these goods will also be evaluated for their worth for defense when guaranteed aliens carry them to their native lands by Muslim state. Guaranteed persons will be able to claim for the benefits of the transactions for the post guarantee transactions in Muslim state. They cannot claim for any benefit of pre-guarantee transactions or the transactions which took place beyond the jurisdiction of Muslim state. According to Sarakhsī , Muslim state is only bound to address the grievances of its citizens or its guaranteed persons.<sup>3</sup> If guaranteed persons make transactions or does any wrong with the properties of aliens beyond the territorial of Muslim state, then Islamic court will have no jurisdiction to address such grievances legally. According Abū Ḥanīfah and Shaybānī the illegal transactions done by Muslims in alien state will have no retrospective effect for Muslim state because the court of Muslim state has no jurisdiction to trial of such cases. Abū Yūsuf makes Muslims bound to face the music of their illegal and Haram transactions wherever they perform by court of Muslim state.<sup>4</sup>

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<sup>1</sup> Muhammad bin Abi Sahl Al- Sarakhsī, al- Mabsūt, vol. 10 (Beirut: Dār al- Fikr, 2000), 151. Shams ul-din Muhammad bin aḥmad al-Khatīb al-Sharbīnī al-Shāfi‘ī, Mughni al-Muḥtaj ila Ma’rifat Ma’ni al-fāz al-Minhaj vol. 2 (Bairūt: Dār al-Kutub al- ‘Imiyyah,1994),338.

<sup>2</sup> Muhammad bin Abi Sahl Al- Sarakhsī, al- Mabsūt, vol. 10 (Beirut: Dār al- Fikr, 2000), 152

<sup>3</sup> Ibid., 94.

<sup>4</sup> Ibid. 95.

## 6. Personal Rights of the Guaranteed Persons

Shaybānī's classification of guaranteed persons' rights based on gender discrimination. According to him, male guaranteed persons have different rights than female guaranteed persons. He elaborates, if a male guaranteed alien marries a non- Muslim female citizen of a Muslim state, his status would not be changed from a guaranteed alien to a non- Muslim citizen. The sociological reason to this rule of law is that male domination due to which husband does not follow his wife in survival, in the consequence his immigration remains unchanged. On the other hand, if a female guaranteed alien marries a non- Muslim citizen, her status will be changed automatically from guaranteed alien to a non-Muslim citizen because usually wife follows her husband in especially emotional survival and she will not be unnecessarily indulged in immigration complexities and will be let to live in Muslim state. She would be prevented from going back to her mother country.<sup>1</sup> Reason to this rule of law is that to maintain the emotional attachment of wife by not letting her to go back to her mother country. According to Imam Al-Shāfi'ī and Ibn Qudāmah wife of the alien will be allowed only to go back to the country of her origin with the consent of her husband.<sup>2</sup> Ibn Qudāmah is of the view that the contract of a guarantee is not an *Aqd-e-Lazim* (bilateral binding) contract. According to him, *Mustā'mīn ah* (the wife) will not be forced to live in Muslim state permanently.<sup>3</sup> The view point of Imam Al-Shāfi'ī and Ibn Qudāmah seems more acceptable in case guaranteed wife (*Mustā'mīn ah*) as compare to Shaybānī view point. They allow the guaranteed wife to leave Muslim state with the consent of her husband. In case if her husband does not allow his wife to leave Muslim state then she will be forced to stay with her husband in Muslim state. Reason to this

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār al-Fikār, 2000), 119.

<sup>2</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.4 (Bairut: Dār al-Ma'rīfah,, 1990),283.

<sup>3</sup> Abu Muhammad Abdullah bin Ahmad bin Muhammad bin Qudama al-Hanbali, *al-Mughni le Ibn Qudāmah* vol.9 (Egypt: Maktab tul Qahira, 1968),245.

rule of law is that under Islamic Law marriage is '*Aqde Lazim* (binding) contract. Shaybānī did not discuss the status of the wife who leaves Muslim state with the consent of her husband. According to Shaybānī's own viewpoint of '*Aqde Lazim*, husband may allow his wife to leave him with mutual consent. The view point of Ibn Qudāmah does not cover the status male guaranteed person who marries a non-Muslim citizen and leaves Muslim state with or without the consent of his wife. He considers guarantee of *Amān* as *Aqde Jayez* (not binding) contract under which Muslim may not force the guaranteed person to stay with his wife in Muslim permanently. While for wife she also may not force her husband to stay with her in Muslim state. According to him the marriage contract between guaranteed husband non-Muslim citizen (wife) is '*Aqde Lazim* but still she may not prevent her husband to leave her by leaving Muslim state. The reason is that under the sociological construction of Muslim family system husband is supposed to be a dominant figure who needs not any permission of his wife in all most all family affairs.

## 6.5 Conditions of *Amān*

Conditions of *Amān* can be classified into two main categories. That is intrinsic conditions which are attached to nature of contract of *Amān*. These conditions are mutually agreed, and their violation may cause grievous consequences on the behalf of the abridging party like termination of the contract of *Amān* or paying damages for any loss or Ta'zīr punishments or death penalty of the abridging party.<sup>1</sup>

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<sup>1</sup> 'Alā al-ddin Abu bakar bin Masood bin Ahmad al-Kasānī al-Ḥnafi, *Bdā'e al-Sānā'e* vol.7 (Beruit: Dār al-Ktub al- 'Imiyyah, 1986), 108.



### 6.5.1 Intrinsic conditions

Intrinsic conditions are the core pre-requisites which must be met by both parties to the contract of *Amān* like *Mū'āmin* and *Musta'min*. These are the basic qualifications and must be fulfilled by both the parties accordingly.

#### The Pre- requisites for the Giver of *Amān* (*Mū'āmin*)

Under Muslim International Law, *Amān* is a bilateral contract. Both the parties must be capable for making the contract of *Amān*. One party in the contract of *Amān* is known as the Giver of *Amān* (*Mu'āmin*). The giver of *Amān* will be either Muslim individual or Muslim state. In case of guarantee awarded by Muslim individuals, they must possess the following pre-requisites otherwise the contract of *Amān* will not be binding.

1- Islam. According to the majority of classical jurists except Imam Malik, Muslim state and all Muslims without gender discrimination are equally capable of awarding guarantee to aliens. According to Imam Malik, Muslim individuals' guarantee is subject to the ratification of Muslim state.<sup>1</sup> According to Imam al-Ghazālī "Common Guarantee" is the sole authority of Muslim state while a "Specific guarantee" may be awarded by Muslim individuals.<sup>2</sup> According to Imam al-Nawawī, Muslim individuals can award guarantee only to one or two aliens. Guarantee for more than two aliens will be awarded by Muslim state only.<sup>3</sup> Under Muslim International Law, non-Muslim citizens is not capable of awarding

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shāriyya lil ilanāt, 1971), 252. Muhammad bin Muhammad al-Bābātī, *AL-Ināyah sharḥ al-hidayah*, vol.7 (Bairūt: Dār al-fikar, 1988), 465.

Shams ul-dīn Muhammad bin aḥmad al-Khatīb al-Sharbīnī al-Shāfi'ī, *Mughni al-Muḥtaj ila Ma'rifat Ma'ni al-fāz al-Minhaj* vol.6 (Bairūt: Dār al-Kutub al- 'Imiyyah, 1994), 51. Shams ul-dīn Muhammad bin al-abbas Aḥmad bin Ḥamza Shahb ul-dīn al-Ramlī, *Nihayat al-Muḥtaj ila Sharḥ al-Minhaj* vol.8 (Bairūt: Dār al-fikar, 1984), 79

<sup>2</sup> Abū Ḥamid Muhammad bin Muhammad al-Ghazālī al-tūsi, *Al-wasīt fi al-Madhhab*, vol.7 (Egypt: Dār al-Ssalām, 4117), 43.

<sup>3</sup> Abu Zakariyya Muḥi ddin yahya bin Sharf al-Nawawī, *Al-Majmu' Sharḥ al-Muhadhdhab*, vol. 19 (Bairūt: Dār al-fikar, n.d.), 309.

guarantee. They only may use the delegated authority of awarding guarantee by Muslim individuals or Muslim state.<sup>1</sup>

2- Muslim slave. According to Imam Abū Ḥanīfah and Abū Yūsuf, Muslim fighter slaves are capable of awarding guarantee.<sup>2</sup> According to Shaybānī, Imam Malik, Ibn Qudāmah, Imam al-al-Ghazālī, and al-Māwardī, Muslim slaves either fighters or non-fighters both are eligible to award guarantee to aliens on the qualification of the text of Ḥadīth that enables all Muslims to award guarantee without the discriminations of freedom and slavery.<sup>3</sup>

### 3- Adulthood, Sanity, Willingness and Without fear

Most of the classical jurists like Imam Abū Ḥanīfah, Abū Yūsuf, Imam Malik and Al-Shāfi'ī, do not recognize the guarantee of Muslim child. According to Imam Abū Ḥanīfah, guarantee is directly linked to the security of Muslim state. It will be awarded by such Muslim individuals who are capable of knowing the philosophy of guarantee and capable for fighting against belligerents. Shaybānī is of the view that child who is participating in fighting with due permission is also capable of awarding guarantee.<sup>4</sup> Under Muslim International Law, Muslim

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<sup>1</sup> Abū Umar yousaf bin Abdullah bin Muhmmad bin abd ul baar bin a'sim al-Namari al-Qurtobi, *Al- Kafi fi Fiqh al-al-Madinah* vol.1 (Riyadh: Maktabah al-Riyadh,1980),469. Abu Zakriyya Muḥi ddin yaḥya bin Sharf al-Nawawī, *Rawdhah al-Talebeen* vol.10 (Bairūt: al-Maktab al-Islami1991),289. Abu Muhammad Mofiḡ Uddin Abdullah bin aḥmad bin Muhammad bin Qudamah, *al-Mughni le ibne Qudamah* vol.9( Egypt: Maktabah al-Qahira, 1968), 241.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 255

<sup>3</sup>Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 255. Malik bin Anas bin Malik bin a'mir al-Asbahī Al-Madani, *Al-Madoonah al-Kubrā* vol.1( Bairūt: Dār al-Kutub al- 'Imiyyah,,n.d),525. Muhammad Abdullah bin Ahmad bin Muhammad bin Qudama al-Hanbali, *al-Mughni leibn Qudāmah* vol.9 (Egypt: Maktab tul Qahira, 1968),241. Abū Ḥamid Muhammad bin Muhammad al-Ghazali al-tūsi, *Al-wasīt fi al-Madhhab*, vol.7 (Egypt: Dār al-Ssalām,4117),43. Abu al- Ḥasan Ali bin Muhammad bin Muhammad bin Ḥabib al-Bsri al-Baghdadi al-Shaheer bil Mawardi, *al-aḥkam al-Sūltania* (Egypt: Dār al-Ḥadīth, n.d),226.

Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.4 (Bairut: Dār al-Ma'rīfah,, 1990),302.

<sup>4</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 257.

individuals must be sane for knowing the philosophy of guarantee. An idiot is not capable of awarding guarantee.<sup>1</sup> According to Muslim jurists, guarantee must be awarded by Muslim individuals with free consent. Undue forced guarantee will not be considered valid.<sup>2</sup> Under Muslim International Law, Muslim individuals may award guarantee without any fear and terror. Shaybānī does not consider Muslim prisoner and trader as capable of awarding guarantee. According to him, they usually are unsafe and unsecured in alien state.<sup>3</sup> Abū Muhammad al-Mālikī is of the view that if Muslim traders and prisoners are safe then they may award guarantee.<sup>4</sup>

4- Guaranteed person. Most of the Muslim jurists both classical and contemporary are of the view that Guaranteed persons (Musta'minīn) may be Muslims and non-Muslims both. Muslims will also be awarded guarantee by any alien state if they want to go alien or non-Muslim state for personal or national interests.

5-Territorial Jurisdiction. The territorial jurisdiction of Muslim state plays a vital role in the validity in the contract of *Amān*. Sometimes the pleaders of *Amān* fulfil all the intrinsic pre-requisites but the role of territorial jurisdiction of Muslim state cannot be ignored in this regard. A Muslim state or Muslim individual cannot award guarantee beyond the territorial jurisdiction of Muslim state except in some

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 285.

A'la Uddīn Abu al-Ḥasan alī bin Sulaiman al-Ḥanbali, *al-Insaf fī Ma'rifah al-rajiḥ min al-Khilaf* vol.4 (Beirut: Iḥya al-Turas al-Arabi n.d), 203.

<sup>2</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār al-Fikār, 2000), 69.

Abū Ḥamid Muhammad bin Muhammad al-Ghazali al-tūsi, *Al-wasīt fī al-Madhhab*, vol.7 (Egypt: Dār al-Ssalām, 4117), 43.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār al-Fikār, 2000), 69.

Abū Ḥamid Muhammad bin Muhammad al-Ghazali al-tūsi, *Al-wasīt fī al-Madhhab*, vol.7 (Egypt: Dār al-Ssalām, 4117), 43.

<sup>4</sup> Abu Muhammad Abdullah bin Abd ur rehman al-Maliki, *Al-nāwadir wa al-Ziyadat ala ma fī al-Mudavina min ghairha min al-Ummahat* vo.3 (Beirut: Dār al-gharb al-Islami 1999), 83. Wahbah al Zūḥaylī, *Athār al-Harb fī Fiqh al-Islamī* (Beirut: Dārul Fikar, 1998), 262.

situations like if Muslim army which busy insurgency in an alien state and find it suitable to award guarantee to any aliens. Similarly, a Muslim state or Muslim individuals cannot award to Muslim individuals or group of individuals. Reason to this rule of law is that ideologically all Muslims are assumed the citizens of Muslim state and brothers of Muslim individuals. Muslim state and Muslim individuals are not allowed to leave any Muslim pleader who seeks the help of Muslim state or Muslim individuals in a situation of insecurity or danger.<sup>1</sup> A Muslim can only be awarded with guarantee by a non-Muslim or an alien state.

6- Wording of *Amān*. No contract is concluded without proper offer and acceptance. Wording of offer and acceptance is not much important in a situation when wording does not clarify its meaning. In such situation meaning of the spirit of the contract will be taken into consideration.<sup>2</sup> Like other contracts, in the contract of *Amān*, any wording of any language verbally or in writing explicitly or implicitly indicating on the willingness of the contractual parties of *Amān* by custom and tradition, will be considered<sup>3</sup>. There are specific words or gestures for awarding guarantee. According to Shaybānī, a guarantee can be awarded verbally or in writing as well as by using proper indications that usually mean protection. According to him guarantee will be assumed even the guaranteed person does not know such indication of the guarantor and vice versa in the case of guarantor as the precedent of Hazrat 'Umar RA guides us in this connection. On the occasional ignorance of Hazrat 'Umar RA, Harmuzān got guarantee from him while he was

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1 "Narrated 'Abdullah bin 'Umar: Allah's Messenger (peace be up him) said, "A Muslim is a brother of another Muslim, so he should not oppress him, nor should he hand him over to an oppressor. Whoever fulfilled the needs of his brother, Allah will fulfill his needs; whoever brought his (Muslim) brother out of a discomfort, Allah will bring him out of the discomforts of the Day of Resurrection, and whoever screened a Muslim, Allah will screen him on the Day of Resurrection . " Muhammad bin Abdullah bin Muhammad Ismail al- Bukhari, Saheeh al- Bukhari vol.03(Riyadh: Dār al- Salam, 1997), 361.

<sup>2</sup> Muhammad bin Abi Sahl Al- Sarakhsī, al- Mabsūt, vol. 25 (Beirut: Dār al- Fikr, 2000), 244.

<sup>3</sup> Wahbah al Zuhaylī, *Athār al- Harb fi Fiqh al- Islamī* (Beirut : Dārul Fikar,1998),286.

not aware of the situation of awarding guarantee<sup>1</sup>. Awarding guarantee carries the elements of facilitation and easement there is no fixed wordings for it in Muslim International Law but the words may vary with the variation of languages, customs and the environment of the battle field.<sup>2</sup> According to Shaybānī, the gestures that are usually people use for granting a guarantee or which stand for an implied guarantee are accepted in this regard. *Amān* will only be considered applicable if it is given in situation when aliens are dominant but will not be effective in a situation when they are surrounded and captured by Muslim army. In this situation they will be treated as war prisoners. According to Shaybānī, usually customary indications and gestures are to be used for awarding guarantee as Shari'ah Maxim guides us that if a thing is proved by a particular custom will be dealt as legal and just, in accordance with this maxim.<sup>3</sup> Ibn Qudāmah is of the view that if an alien is found possessing some trading goods indicating him a trader in Muslim state will be assumed as guaranteed alien.<sup>4</sup>

7-Subject matter of *Amān*. The subject matter of *Amān* means, what will be included in *Amān* and what not. The wording of the contract will be asked for the fixation of the subject matter for which *Amān* is awarded. The subject matter of *Amān* will be decided by customs and traditions in case of conflict when the wordings do not fix their meaning explicitly. It may not be fixed on the willful explanations of the guarantor of *Amān*. Similarly, the need of the guaranteed

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 264.

<sup>2</sup> Ibid.

<sup>3</sup> <sup>الثابت بالعرف كالنص</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqīyya lil ilanāt, 1971), 169.

<sup>4</sup> Abu Muhammad Abdullah bin Ahmad bin Muhammad bin Qudama al-Hanbali, *al-Mughni leln Qudāmah* vol.9 (Egypt: Maktab tul Qahira, 1968), 247.

aliens will not be considered in this connection.<sup>1</sup> Classical jurists like Kāsānī is of the view that *Amān* awarded will be inclusive to the property and all dependent family members of the guaranteed aliens.<sup>2</sup> In the absence of clear wording of the contract of *Amān* given by Muslim individuals, only a needful property of the guaranteed aliens will be protected.<sup>3</sup>

### 6.5.2 Extrinsic conditions

Extrinsic conditions are those conditions which are not strictly binding or sometimes beyond the control of the parties on the behalf of both the parties like the environment in which the contract of *Amān* is going to be executed. The nature and the quantity of resistance or acceptance that environment presents sometimes uncontrollable for any or both parties to the contract due to which the contract cannot be executed with its letter and spirit. In such complex situation the maximum stipulations of the contract will be held up right. The willingness of the parties will still play important role, if one of the party is unwilling to follow the contract then formal communication of disobedience to the contract will be communicated and the quasi-contract will be either terminated or will be continued for further execution. Proper and formal announcement of the termination of the contract of *Amān* and giving sufficient time to the other party in case of termination. Nature of force to be used in the execution of principle of reciprocity. There are also conditions attached either to the parties to the contract of *Amān* or to the space and time. These conditions may also affect the execution

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 264. Abu Muhammad al-Hussain bin Masood al-Baghawī Al-Shāfi'ī, *al-Tahzeeb fi Fiqh al-Imam Al-Shāfi'ī* vol.07 (beruit: Dār al-Kutub al- 'Imiyyah,1997),479.

<sup>2</sup> 'Alā al-ddin Abu bakar bin Masood bin Ahmad al-Kasānī al-Ḥnafi, *Bdā'e al-Sānā'e* vol.7 (Beruit: Dār al-Ktub al- 'Imiyyah,1986),107.

<sup>3</sup> Wahbah al Zūḥaylī, *Athār al- Ḥarb fi Fiqh al- Islāmī* (Beruit: Dārul Fikar,1998),255.

of the contract of *Amān* like logistic weakness or strength of Muslim state that may change the status of the contract.

1-Weakness of Muslims. According to Kāsānī, weakness of Muslim state paly cardinal role in awarding guarantee to aliens.<sup>1</sup> It seems that he does not believe in the guarantee awarded by Muslim state when it has sufficient power of fighting with aliens. This view point seems contradictory to the divine commandment which gives absolute power to Muslim individuals and Muslim state considering their logistic status awarding guarantee to give them an opportunity of understanding the best managerial qualities of Islam.<sup>2</sup> Rest of the Muslim jurists differentiate between peace treaty and awarding *Amān*. According to them, the condition of Muslim state is only to be considered in peace treaty. They are of the view that, if Muslim state has enough power to fight against aliens it must continue fighting. In case of awarding guarantee, the condition of logistic strength of Muslim state is not be considered. According to them the contract of *Amān* is '*Aqde Lazim* on the behalf of Muslim state while Kāsānī considers it as '*Aqde Jayez*. According to him logistic strength of Muslim state plays important role in both the contracts of awarding guarantee and peace treaty.

2-Guarantee will be awarded on the Principle of Reciprocity. According to Shaybānī, guarantee of protection will be awarded to aliens as per stipulated mutually especially when either of the parties or both the parties facilitate one another through logistic support. In the situation, the principle of reciprocity will be applied on both the parties to the contract.<sup>3</sup> The provided guarantee to aliens will be inclusive to their family members like wives, children and captives and

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<sup>1</sup> 'Alā al-ddin Abu bakar bin Masood bin Ahmad al-Kasānī al-Hnafi, *Bdā'e al-Sānā'e* vol.7 (Beruit: Dār al-Ktub al- 'Imiyyah,1986), 106.

<sup>2</sup> "If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah; and then escort him to where he can be secure. That is because they are men without knowledge" Al-Qur'ān: 09,06.

<sup>3</sup> "Is there any Reward for Good - other than Good?" Al- Qur'ān: 55, 60.

belongings excepts gold, silver, ornament and cash money.<sup>1</sup> The belongings of aliens in this case will be decided on the principle of prima facie possession.<sup>2</sup>

3- Pronouncing guarantee with reference to its audibility (docility) impact. If guarantee is pronounced by Muslim Army or Muslim state with a sound of decibel range which can be heard easily but due to some reasons it was not heard by aliens and not responded as it was expected, still guarantee will be executed. In other situation if guarantee was pronounced with a sound of non- decibel range and the aliens were too far away from the range of audibility range of the guarantee, then such guarantee will not be effective. In both the cases of decibel and non-audible ranges the effective role of telecommunication instruments will be considered accordingly. In the use of telecommunication instruments for the pronouncement of guarantee may vitiate the physical considerations.<sup>3</sup> These exceptionalities to the general rule of law regarding the announcement of guarantee is only discussed by Shaybānī not by any other Muslim jurist. He considers the phenomenon of awarding guarantee is all inclusive phenomenon in which any technical or physical inconvenience doesn't matter. According to Shaybānī, any letter written by an authoritative person of Muslim state or similar other several tools like making symbols by means of Army tanks barrels in the battle field will be assumed for the guarantee is awarded.<sup>4</sup> According to Sarakhsī letter of guarantee is one of the tools of communicating guarantee.<sup>5</sup> According to Shaybānī, no deception, fraud or misleading clues by Muslims will not affect the guarantee awarded through different means of tricks. Similarly, any false representatives of Muslim

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 324.

<sup>2</sup> Ibid, 308-322

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 358.

<sup>4</sup> Ibid, 359.

<sup>5</sup> Ibid.



state will also not affect the guarantee they have given. According to Sarakhsī, every Muslim is inherently eligible to award guarantee on his own behalf whether representing falsely or truly Muslim state. Such kind of guarantee will be considered valid as specific guarantee.<sup>1</sup> According to Shaybānī, the representation of a non-Muslim citizen for the chief commander in awarding guarantee during war will also be considered valid on the condition of the honesty and fair representation of the representative.<sup>2</sup>

4-Suspicious guarantee. According to Shaybānī, any suspicion in awarding the conditional guarantee with reference to identifying or fixing the required qualities demanded by the guarantee will have no effect to stop it from its execution as a general guarantee. In case, if the required qualities were easy to fix then the conditional guarantee will be executed for its letter and spirit.<sup>3</sup> Sarakhsī gives logic for the above mentioned rule of law that there are two contradictory situations about the aliens: one is permitted (awarding guarantee to aliens) and the other one is prohibited (killing of someone without just) Usually, if two confronting evil come together the minor evil shall prevail. Committing mistake in awarding guarantee of aliens is better than committing mistake in killing of them<sup>4</sup>. On the basis of this rule of law, Shaybānī, states if non-Muslim citizen of Muslim state enters to the shield of aliens and later on, Muslim army conquers the shield of the aliens, in such situation, if Muslim army cannot differentiate the non-Muslim citizen of Muslim state amongst the captives they cannot kill the whole captives because of the non-Muslim citizen of Muslim state<sup>5</sup>. Similarly, if every one of

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 361-62.

<sup>2</sup> Ibid, 362.

<sup>3</sup> Fath-e-Makkah guarantee by the Prophet (peace be up him).

<sup>4</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 411. فادرا والحدود بالشبهات

<sup>5</sup> Ibid, 413.

captives claiming of being the non-Muslim citizen of Muslim state<sup>1</sup>. There is another suspicious situation in which the benefit of doubt will be given to the aliens and that is if Muslim awards guarantee to one of the aliens every one of them claiming that I have given the guarantee, in such situation, all of them will be considered protected<sup>2</sup>. According to Shaybānī, ontologically *Amān* carries the philosophy of inclusion. He says if a group of aliens enters to the village of non-Muslims citizen without seeking guarantee and then captured by the Muslim army claiming being non-Muslims citizens in such situations, their statement will be accepted *prima facie* because they are present in a territory of Muslim state which gives protection to every non-Muslim until and unless proved contrary.<sup>3</sup> According to Shaybānī, during war, if trapped aliens by Muslims army claimed that they have embraced Islam, they would not be considered honest in their statement<sup>4</sup>. If trapped aliens embrace Islam before conquering by Muslim army then they will be given protection<sup>5</sup>. Intrinsic or extrinsic conditions along with the conditions attached to the space and time in which the contract of guarantee or peace is to be executed, have divided *Amān* or peace treaty contracts into different kinds that is to know their impact on the parties and execute them on easy mechanics.

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<sup>1</sup>Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971),414.

<sup>2</sup>Ibid,415.

<sup>3</sup>Ibid.413.

<sup>4</sup> Ibid,412.

<sup>5</sup>Ibid,261.

## 6.7 Kinds of *Amān*

The contract of guarantee with reference to its impact is similar to the contract of peace treaty and contract of al-dhimmah. While with reference to parties to the contract, a contract of guarantee is different from peace contract and contract of al-dhimmah. Peace treaty is usually contracted between Muslim state and aliens that may be a group of aliens or in the form of an alien states while the contract of guarantee may be conducted between Muslim individuals and aliens. The contract of al-dhimmah may be conducted between Muslim state and non-Muslims. Peace treaty and al-dhimmah may be executed with due process while the contract of guarantee needs not such formal execution it may also be contracted verbally or by means making some specific gestures or responses by both the parties. According to Shāfi' school of thought, the maxim time of peace contract may not exceed ten years while the maxim time-period in guarantee contract may not be exceeded one year according to Hanafi school of thought. Contract of al-dhimmah is usually contracted once for permanent. Based on Muslim practices and legal philosophy, *Amān* is divided into two kinds:

Contract of *Amān* is of two kinds:

1-Permanent (*Amān Mua'bbad*). Permanent *Amān* or *Amān Mua'bbad* which is also known 'Aqad al-dhimmah is a permanent contract between non-Muslims and Muslim state to be peaceful citizens in lieu of paying poll tax annually.<sup>1</sup> According to al-Kāsānī, pagans of Arab and apostates will not be awarded with this kind of citizenship by Muslim state because they have only one option of embracing Islam.<sup>2</sup> With reference to non-Arabian Pagans and apostate the rest of non-Muslims will be awarded with Temporary *Amān*

2-Temporary (*Amān Muaqqat*). Temporary *Amān* is further divided into two kinds:

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<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār al-Ma'rifah, 1993), 78

<sup>2</sup> 'Alā al-ddīn Abu bakār bin Masood bin Ahmad al-Kasānī al-Hanafī, *Bdā'e al-Sānā'e* vol.7 (Beruit: Dār al-Ktub al-'Ilmiyyah, 1986), 110-111.

1. Armistice Contract. Armistice contract (*Al-Mūwād'ā* or *al-Hudnah*) is a peace contract between Muslim state and group of aliens or alien state on the suspension of war.<sup>1</sup> The opinion of al- Kāsānī validities Armistice Contract with a condition if Muslim state is logistically weak for fighting with aliens. He is of the view that Armistice contract the authority of Muslim state as well as group of Muslims on the condition of public good.<sup>2</sup> He argues from a Hadith of the Prophet (peace be up him) which makes enable all Muslims for awarding guarantee. According to him the main purpose of Armistice agreement is to increase the logistic strength of Muslim state. This objective may be achieved if Muslim individuals are allowed of making Armistice contracts with aliens along with Muslim state. According to al-Ghazālī, Nawawī and Sulaiman bin 'Umar Al-Shāfi'i , armistice contract is the sole authority of Muslim state.<sup>3</sup> According to Zaydān. Armistice contract with alien state by Muslim state is a kind of *Amān*. Such contract my only be concluded by Muslim state, Muslim individual has no right of making such contracts. The citizens of alien state with whom the armistice contract is signed by Muslim state will be treated as guaranteed persons in Muslim state<sup>4</sup>. The view point of al- Ghazālī, al- Nawawī and and Sulaiman bin 'Umar Al- Shāfi'i seems more precise and preferable due to the logic they present as a proponent argument. According to them if the authority of making Armistice contract is given in the hand common people will surely spoil the pool proof security of Muslim state. The second

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<sup>1</sup> 'Alā al-ddīn Abu bakar bin Masood bin Ahmad al-Kasānī al-Hanafī, *Bdā'e al-Sānā'e* vol.7 (Beruit: Dār al-Ktub al- 'Imiyyah,1986), 108.

<sup>2</sup> Ibid,108.

<sup>3</sup> Abū Ḥamid Muhammad bin Muhammad al-Ghazali al-tūsi, *Al-wasīt fi al-Madhhab*, vol.7 (Egypt: Dār al-Ssalām,4117),43.

Abu Zakriyya Muḥi ddīn yahya bin Sharf al-Nawawī , *Al-Majmu' Sharḥ al-Muhadhdhab*,vol. 19 (Bairūt: Dār al-fikar,n.d),309. Sulaiman bin Umar bin Mansor al-a'jeeli al-Azharī, *Futuḥat al-Wahab be Taiwdheeh Sharḥ Minhaj al-Tullab* vol.5 (Bairut: Dār al-Fikar,n.d),205.

<sup>4</sup> Abdul Kareem Zaydan, *Aḥkam al-dhimyyinawa al-Mustā'mīnīna fi al-Islam*, (Baghdad: Makābah al-Qūds,1982),51.

argument of public good of al- Kāsāni in case of Muslim individuals can also be defied for its fixation in case of conflict.

2. Guarantee Contract (*Amān*). Guarantee Contract is contract of peace awarded by Muslim individuals or Muslim state to aliens or non-Muslims for staying in Muslim state to observe the good qualities of Islam or for other reasons of national or personal interests. According to Kāsāni, guarantee can only be awarded in situation of war on proper demand of the aliens.<sup>1</sup> He considers logistic weakness of Muslims as key point in the contract of *Amān* which validity its legality. According to the most classical Muslim jurists, *Amān* is a general phenomenon of war and peace. It may be awarded to aliens during war by their demand. Similarly, it may also be awarded in lieu of logistic assistance required by Muslim army. *Amān* can be awarded by the declaration of Muslim state after conquering the territory of aliens likewise, a guarantee which was awarded by the Prophet (peace be up him) after conquering Makkah. It may also be awarded during peace to those who are not in a hostile relation with Muslim state like diplomats, traders and tourists either to observe the qualities of Islam or for any other personal interests. It seems that al- Kāsāni does not believe in *Amān* for the non-Muslims who are not in hostility with Muslim state. Similarly, he does not recognize *Amān* during war without proper demand by aliens. likewise, according to him *Amān* will be awarded to aliens when Muslims are weak. The view point of Kāsāni seems confine the divine commandment to the state of war. while the command allows Muslims and Muslim state for awarding guarantee in all situations of war and peace to non-Muslims for understanding Islam and its qualities.<sup>2</sup> Temporary *Amān* (*Amān Mu'aqqat*) is further divided into different kinds:

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<sup>1</sup> وَهُوَ أَنْ يُخَاصِرَ الْغَزَاةَ مَدِينَةً أَوْ جُزْءًا مِنْ حُصُونِ الْكُفْرَةِ، فَيَسْتَأْمِنُهُمُ الْكُفَّارُ فَيُؤْمِنُوهُمْ

<sup>2</sup> "If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah; and then escort him to where he can be secure. That is because they are men without knowledge" Al-Qur'ān: 09,06.

1. Inclusive Guarantee. Inclusive guarantee is a kind of guarantee which is explicit and implicit in its nature and applicable to all the concerned aliens being not investigating their particularities. Such guarantee has its uniform implications and consequences. This kind of guarantee is also called general guarantee which a Muslim state can award not Muslim individuals.<sup>1</sup> It is not necessary for the awarding of *Amān* to be given only by the demand of aliens, Muslim state can also declare it by itself.<sup>2</sup> The *Amān* given by the declaration of Muslim state, Muslim army or even given on the demand of aliens during war, such *Amān* will be applicable only to whom it is awarded and will not be inclusive to the dependents of the guaranteed aliens if not mentioned.<sup>3</sup> This rule of law is based on the declaration of the Prophet (peace be upon him) when he announced on the conquer of Makkah that whosoever enters *Masjid Ḥarām*, or enters into the house of Abū Sufyān and persons who close the doors of their houses will be considered protected.<sup>4</sup>

2. Exclusive Guarantee. Exclusive guarantee is a kind of guarantee which is specific in its nature. The wording of the guarantee is always take into consideration not its implicitly. Such guarantee has exclusive impact and has specific nature of consequences. Which is usually awarded by Muslim individuals.<sup>5</sup> *Amān* given on the demand of aliens being in safe place, will be applicable to their dependents too otherwise not. Such *Amān* will include protection of their lives, properties, and all their dependents including their wives, children, unmarried

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<sup>1</sup> Abū Ḥamid Muhammad bin Muhammad al-Ghazali al-tūsi, *Al-wasīt fi al-Madḥḥab*, vol.7 (Egypt: Dār al-Ssalām,4117),43. Abdul Kareem Zaydan, *Aḥkam al-dhimyyinawa al-Mūstā'mīnīna fi al-Islam*, (Baghdad: Makābah al-Qūds,1982),48.

<sup>2</sup> Muhammad Hamidullah, *The Muslim Conduct of State* (Lahore: India Kashmiri Bazar,1954),201

<sup>3</sup> Ibid,203.

<sup>4</sup> Muslim bin Al Hajjaj Abul Hassan, *al- Jami al- Sahih Muslim*, vol.4,232.

<sup>5</sup> Abū Ḥamid Muhammad bin Muhammad al-Ghazali al-tūsi, *Al-wasīt fi al-Madḥḥab*, vol.7 (Egypt: Dār al-Ssalām,4117),43.

daughters and sisters, mothers and grandmothers. If *Amān* is demanded for trade, then it will include all the servants and helpers who perform trading activities and the necessary equipment and inventories of business<sup>1</sup>.

3. Guarantee (*Amān*) awarded based on Reciprocity. If *Amān* is given on the fulfillment of some terms and conditions either to be fulfilled by Muslim Army or by aliens as mutual liabilities. On the fulfillment of such terms and conditions *Amān* will be awarded.<sup>2</sup> Muslims are faithfully bound to fulfill their bilateral terms and conditions if they are according to the spirit of Islamic Law.<sup>3</sup> While the guaranteed aliens are pledged under the *Amān* given by Muslim individuals or Muslim state. Imam Shaybānī is of the view that conditional guarantee will be considered nullified if mutually agreed conditions are not fulfilled or violated by aliens. In such cases Muslim state can declare the guarantee as ineffective and may inflict punishment on the aliens that may result killing aliens or make them captives in a situation of war.<sup>4</sup>

4. Customary Contract of Guarantee (*Amān*). Ambassadors and traders are protected by customs and traditions of the nation states even they do not get proper *Amān* from Muslim state, but they must have sufficient proof to be recognized them as ambassadors and traders like letter of from alien state or goods respectively<sup>5</sup>. The Prophet (peace be upon him) himself gave protection to the messengers of Mūsāyīmah Kadhāb (the liar)<sup>6</sup>. From the above precedent it is

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<sup>1</sup> Muhammad Hamidullah, *The Muslim Conduct of State* (Lahore: India Kashmīrī Bazar, 1954), 203.

<sup>2</sup> Ibid., 200.

<sup>3</sup> Muhammad bin Ismā'il al-Bukhārī, *Saheeh al-Bukhārī*, vol. 08 (Riyadh: Dār al-Salam, 1997), 43.

<sup>4</sup> Muhammad bin Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol. 1 (Al-Qāhirāh: al-Shārikāh al-Shāriqiyya lil ilanāt, 1971), 266.

<sup>5</sup> Ibid., 53.

<sup>6</sup> "It was reported from Salamah, meaning Ibn Al-Fal, from Muhammad bin Isāq, who said: "Musallimah wrote to Allah's Messenger ḡ." He said: "And Muhammad bin Isāq narrated to me, from a Shaikh, from Aja' named Sa'd bin Tariq, from Salamah bin Nu'aim bin Mas'ud Al-Asjja'i, from his father, Nu'aim, who said: 'I heard the Messenger of Allah say to the two of them (the messengers) after he was read the letter from Musallimah: "What do you believe (in)?" They said: "We believe as he believes." He said: "By Allah! If it

understood that ambassadors are considered protected by Muslim International Law to have the source of communication between nation states. According to Sarakhsī, safety is given by either by faith or by guarantee.<sup>1</sup> It means that Muslims are protected by faith (Eīmān) and ambassador and aliens are protected by guarantee (Amān). According to Zaydān ambassadors and traders are protected by customs and traditions as well by the several precedents of the Prophet (peace be up him). Zaydān and Sarakhsī also follow the classical view point regarding the protection of ambassadors and traders.<sup>2</sup> On the basis of precedent regarding the safety of ambassadors, Sarakhsī considers them protected. He is of view that anyone claiming being ambassador will be protected unless contrary is proved. Showing any fake document for proving as an ambassador, will become as captive of Muslim state.<sup>3</sup> According to Qaḍi Abū Yūsuf, only sufficient proof like an official appointment letter or gift from sending state to the host Muslim state will be sufficient for considering as an ambassador.<sup>4</sup> Imam Al-Ghazālī, is of the view that the post of diplomacy makes ambassadors protected persons even without due processing of their guarantee. According to him the other motives of aliens cannot make them guaranteed persons if they did not formally process their guarantee. In such cases they will be enslaved by Muslim state and will be treated accordingly. According to him, other than ambassadors will be made such people captives if their guarantees are not processed in due course of legal procedure.<sup>5</sup>

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wasn't that the messengers are not to be killed, I would have cut off their heads." Abu Dawūd Sulaiman bin al-ashās al-Shabistānī, Sunan-e-Abi Dawūd vol.3 (Riyadh: Dār-al-Salam 2008),354.

<sup>1</sup> Muhammad bn Abi Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, (Al-Qāhīrāh: al-Shārikāh al-Shāriyya lil ilanāt, 1971),1026

<sup>2</sup> Abdul Kareem Zaydān, *Aḥkam al-dhimyyinawa al-Mūstā'mīnina fī al-Islam*, (Baghdad: Makābah al-Qūds,1982),53.

<sup>3</sup> Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār al- Ma'rifah, 1993), 92.

<sup>4</sup> Abū yousuf Yaqoob bin Ibrahim, *Al- Khārāj*, (Qāhīrah: Māktābāh al-Azhāriyya Litūrāth,n.d),206.

<sup>5</sup> Abū Ḥamid Muhammad bin Muhammad al-Ghazali al-tūsi, *Al-wasīt fī al-Madhhab*, vol.7 (Egypt: Dār al-Ssalām,4117),44.



Abū al-Abbas al-Māliki is of the view that mere intention of diplomacy is sufficient to declare an alien as ambassador to Muslim state.<sup>1</sup> Shaybānī defies this argument and make ambassadors to show formal documents for working in Muslim state. Moreover, Sulaiman bin Umar Al-Shāfi'ī discards the demand of documents of diplomacy from such people.<sup>2</sup> According to Majd-ud-Din, possessing sufficient inventory trade by the traders make them protected person with the condition if international customs allow it.<sup>3</sup> According to Shaybānī, no person can visit Muslims or Muslim state without showing formal documents of guarantee. According to him, the intention cannot alter the visitors' status of alien ship. In the current scenario of the behavior of nation states, the view point of Shaybānī is considerable but the clear text of the Qur'ān in this connection confronts the view point of Shaybānī. Which clearly award the right of visiting for observing Islam and the qualities of the organization of Muslim state.<sup>4</sup> The view point of Majd-ud-Din restricts this right of aliens to trading and international custom which seems not considerable in international scenario and the spirit of the Qur'ānic verse in this connection. The view points of Imam Al-Ghazālī, , Sulaiman bin Umar Al-Shāfi'ī and Abu al-Abbas al-Māliki are similar in case of protection of diplomats by Muslim state. the later view point of Imam Al-Ghazālī, , Sulaiman bin Umar Al-Shāfi'ī and Abu al-Abbas al-Māliki can be preferred based on these arguments:

1-The Qur'ānic verse has given this right to aliens or non- Muslims.

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<sup>1</sup> Abu al-abbas Shahab udin ahmad bin Idrees bin abd ur rehman al-Maliki al-Shaheer bil Qarrafi, *Al-Zakheerah* vol.3 (Beirut: Dār al-Gharb al-Islami,1994),446.

<sup>2</sup> Sulaiman bin Umar bin Mansor al-a'jeeli al-Azharī, *Futuhat al-Wahab be Taiwdheeh Sharh Minhaj al-Tullab* vol.5 (Bairut: Dār al-Fikar,n.d),212.

<sup>3</sup> Abdulssalam bin Abdullah bin al-khadhr bin Muhammad abu al-Barkat Maj du din, *al-Muḥarir fil fiqh a'la Mazhab al-Imam Aḥmad bin ḥanbal* vol.2 (Riyadh: Maktabah al-Ma'rif, 1984),181.

<sup>4</sup> " If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah. and then escort him to where he can be secure. That is because they are men without knowledge. "Al-Qur'ān: 09,06. Abdul Kareem Zaydan, *Aḥkam al-dhimyyinawa al-Mūstā'minīna fi al-Islam*, (Baghdad: Makābah al-Qūds,1982),113.

2-Islam promotes peace at every cost. Through diplomats it is possible to establish good relations with other nations and nation states.

3-The ambassadors of Musaylmah Kadhāb were declared protected by the Prophet (peace be up him) even they did not process formally their guarantees.

5. Dependency contract of Guarantee (*Amān bil- Tabā'*). All dependents of the guaranteed alien will be considered protected if they are secured with reference to security threats. This rule of law is applicable even it is not explicitly mentioned the contract of awarding guarantee.<sup>1</sup> There is a slight difference between the view of Hamidullah and Zaydān. According to Hamidullah the *Amān* will only be extended to the dependents of the guaranteed aliens either the guarantee seeker demand guarantee for their dependents or when the seeker of the guarantee applied for the guarantee was secured.<sup>2</sup> Zaydān considers the dependents of the guaranteed alien protected in any situation either the seeker of the guarantee is secured or not, applied for the guarantee of the dependents or not.<sup>3</sup> According to Zaydān if anyone from alien state is found in Muslim state without having proper guarantee, he will be treated as captive of war.<sup>4</sup> It can be concluded that the view point of Zaydān is preferred in general guarantee which awarded by state but not in the case of specific guarantee.

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<sup>1</sup> Ibid. Muhammad bn Abi Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: Dār al- Ma'rifah, 1993), 78

<sup>2</sup> Muhammad Hamidullah, *The Muslim Conduct of State* (Lahore: India Kashmiri Bazar,1954),203.

<sup>3</sup> Abdul Kareem Zaydān, *Aḥkam al-dhimyyinawa al-Mūstā'mīnīna fī al-Islam*, (Baghdad: Makābah al-Qūds,1982),53.

<sup>4</sup> Ibid,54.

## CONCLUSION

Muslim International Law (MIL) and Contemporary International Law (CIL) are to some extent compatible with each other with reference to International customs and International treaties. These two principles are considered in MIL as well as in CIL in the context of awarding *Amān*. There are several points common in both the laws like the protection of diplomats and war prisoners. Under the Siyars' general principles, diplomats are protected by the international customs as the Prophet (peace be upon him) has given protection to the messengers of Musaylmah Kadhāb because they were customarily protected before the advent of Islam. CIL has formalized the notion of protection of diplomats by the Vienna Conventions. According to Vienna Conventions every nation state nominates its diplomats on permanent basis in other nation state in the form constituency called embassy.

The Geneva Convention 3 have also fixed some special rights for war prisoners. This custom was also approved by the earlier Islamic state of Madinah. Thamamah bin Othaal like examples of several other war prisoners are available in the history of Muslims.

Discriminating combatants from non-combatants is common to both the laws. The assumption that CIL is a positive law which is not compatible to MIL. Moreover, CIL is man-made non-Muslim law while MIL a divine law corresponds to the basic needs of Muslims and all human beings, seems partially unscientific assumption. According to CIL the first draft of every common treaty is usually made by International Law Commission. The duty of this commission is to prepare the initial draft of treaty and present to all nation states. Every nation state has the right to accept or reject either totally or partially or accept it with its reservations. Consensus of the party to treaty is mandatory either partially or completely. In case of any disagreement to a treaty makes no nation state binding to follow such treaty. All Muslim states are responsible to take part in the formulation of common

international treaties. If there is anything contradictory to MIL, Muslim states may show their reservations and may not signatory to such treaties. MIL accepts every treaty and international custom which is not contradictory to the spirit of general principles of the Qur'ān and Sunnah.

On the other hand, there are dissimilarities on the basis on which CIL is not compatible with MIL. In CIL, nation states play a vital role in formulation of international treaties. Nation states are sovereignly free to make any treaty whatever they want. Head of state is only accountable to the citizens. While MIL does not consider head of state as sole sovereign, but it considers as the vice gerent of almighty Allah. Head of the Muslim state is supposed to act in accordance to the established rules of the Qur'ān and Sunnah not in accordance to the will of the citizens. Every International treaty will be made accordingly otherwise such international treaty will be considered null and void. MIL considers that every conditions which are bilaterally agreed among states will be fulfilled subject to the Qur'ān and Sunnah. While under CIL all terms and conditions will be followed without the question of the approval of Divine. MIL also considers international affairs among the nation states to be managed under the principles of reciprocity with the condition of no contradiction to the spirit of the divine law. Mutation is prohibited under MIL which cannot be permitted on the basis reciprocity. It can be concluded that Qur'ān and Sunnah are considered touch stone for managing international relations under MIL while CIL lacks such divine principles.

Contemporary International Law (CIL) recognizes the legal status of Quarter. Under Muslim International Law (MIL), recognizes the term "Quarter" under the notion of *Amān* especially during war. *Amān* is a general conduct of Muslim state and Muslim individuals which deals in both the situations of war and peace. It is partially bilateral as well as a unilateral contract. It sometimes needs not proper demand on the behalf of guaranteed person. A Muslim state may award it unilaterally on its own discretion. Similarly, Quarter is a unilateral

contract of protection provided under the rules of International Humanitarian Law (IHL) during war only. The basic conditions that are to be fulfilled for awarding *Amān* and Quarter are not similar with reference to the awarding authority. *Amān* may be awarded by Muslim individuals as well as by a Muslim state while Quarter is only awarded by a nation state. With reference to consequences, both have similar impact on the behalf of the protected person and on the guarantor. Both provide protection to the life and property of the guaranteed person. While awarding *Amān*, the guaranteeing persons are not required to be belligerents they may be anyone. But under IHL, Quarter will be only given to those fighters who meet the criteria of belligerents. Belligerents must carry a unique symbol like proper uniform and flag, carrying weapons openly, fighting under the supervision of a commanders and observing the rules and regulations of IHL. Awarding Quarter is the sole right of the imprisoning state. Individuals have no capability of awarding Quarter. According to IHL, individuals will only be capable to award quarter by the appointment of the state in case of using the delegated authority. Under MIL, *Musta'min* (guaranteed person) has more rights as compared to a person to whom the Quarter has been awarded. Under the IHL, a person to whom the Quarter has been given entitles the fundamental human rights like food, shelter, cloths, freedom of thought and expression and medical facilities like hygienic environment. They are considered prisoners of war; they cannot move beyond the specified territory. According to the entitlements, guaranteed persons under *Amān* are dealt equal to either Muslims or non- Muslim citizens mostly.

Similarly, the term "Asylum" under the notion of *Amān* is considered a sub part of *Amān*. According to the process and procedure awarding *Amān* is very simple as compare to Asylum. There is no formal procedure for seeking *Amān* by the non-Muslim is needed. Even *Amān* does not require the intention of the guarantor for awarding *Amān*. If guarantor shows any gesture which is either

known to the seekers of *Amān* for awarding guarantee or they consider it as guarantee, in such situation the guarantee will be considered as awarded. An informal communication may be considered sufficient for awarding *Amān* as was acknowledged in the case of al-Hurmuzān by the caliph Umar RA. While asylum is a restricted phenomenon of awarding protection. It is the sole authority of state which is to be given on the proper demand by the asylum seekers. Asylum is usually awarded based on diplomatic or political grounds. The rights of a person who gets asylum are to be judged in accordance with the rules of CIL but there are no agreed rules through which the rights of the person who has obtained asylum are to be determined. The rights of the person who got asylum are determined by the International Court of Justice are not unanimously agreed while the rights of guaranteed persons are already determined by the MIL.

The notion of refugee is also different from the legal philosophy of *Amān*. According to the CIL, refugee is a stateless person or a person who does not enjoy any shelter of any government. Usually, refugee-status is demanded by the persons who have fled from their mother countries to seek protection along with fundamental rights. According to IHL, the rights of refugees are to be determined either by Customary International Law (CuIL) or by international peace treaty between parties to the treaty. In the absence of (CuIL) and peace treaty, the rights of refugees are to be determined by the host state.

It can be concluded that the notion of *Amān* is a broader phenomenon with respect to legal process of completion, impact on both the parties, consequences, revocation or termination and the rights of guaranteed persons (*Mustā'minīn*) under the MIL as compare to the phenomena of Quarter, asylum and refugee. The notion of *Amān* which MIL represents is not only more applicable as compare to the rest of international phenomena of awarding protection under CIL in 21<sup>st</sup> century but it is a good alternative for resolving any issue of nations state related to their internal or external affairs with reference to awarding protection during

war or beyond the parameters of war whether the seekers are stateless or state's men.

The Qur'ān and Sunnah are the primary of sources of MIL. All rules and regulations regarding international affairs are administered under the guidance of these sources. MIL is divine as well as universal law while CIL is either customary or positive international law. MIL does not believe in the differences of civilized and uncivilized divisions of nation states based on the territorial habitats. Which gives some nations as veto authority while some are backward nation state that must to follow the veto powers in maintain the global security. The epistemological foundations of CIL lie in the Social Evolution Theory of Darwin which considers the nations of Western hemisphere is superior nations and the nations of Eastern hemisphere as inferior nations. The epistemological roots of MIL can be traced in the ideological foundations of equality of humans which are presented by the Qur'ān and Sunnah. The principle of reciprocity which gives validity to every rule of CIL. While MIL does not recognize the principle of reciprocity which is contrary to the spirit of the Qur'ān and Sunnah. The third foundation in this connection is the international customs which give legal strength to CIL while in case of MIL only just and equity-based customs are recognized, which are not against the spirit of the Qur'ān and Sunnah.

The concept of sovereignty in both the laws is perceived differently with reference to their worldviews. MIL considers the worldly resources as a source of attaining the pleasure of Divine for it MIL disciplines all the parameters of war and peace within the establish rules of the Qur'ān and Sunnah. MIL considers Allah the almighty sovereign of this world and state or Imam is the representative or vicegerent of Allah. The Islamic concept of sovereignty of Allah under MIL is different from the Theocracy of Christianity in which Queen or King is to be considered the representatives of God who are only accountable to God not to public. While Imam or Muslim commander is held accountable to Allah and public

as well in both the situation of war and peace. Under CIL only state is considered sovereign. This is state who defines the parameters of war and peace. State has some discretionary powers which enable it to either wage war or maintain peace without seeking any super natural guidance. CIL draws its ethics of war from its national or international interests. CIL faces the issue of lacking implementing decisions the effective sanctions and proper judicial system as agency to implement and execute any required rule of while MIL does not usually make any difference between the sections of domestic or Muslim International Law. In addition to the agency force, MIL has intrinsic agency of self-motivation to implement it with its letter and spirit because Muslim army considers its implementation as pleasing Almighty Allah.

MIL, has two facets one is its international and the other is domestic as well. Some organs of the MIL Muslim individuals too like rebels and apostates (in large number). It also deals non-Muslim individuals who live beyond the territorial jurisdiction of Muslim state. MIL also entertains the claims and remedies individuals even in domestic courts along with international courts while contemporary deals only states and no individuals can claim any remedy in International Court of Justice (ICJ).

The nature of CIL and its acceptability is subject to a particular culture and environment MIL is equally transcendent throughout the globe due to its nature of beyond the space and time. MIL is lesser dynamic in nature as compare to CIL which is a pure positive law.

CuIL, a source of CIL remained always in questioned for its applicability ethicality while MIL never faced this question because domestic and international laws due to similar sources the Qur'ān and Sunnah. CIL developed in the shadow of politics and state while MIL grew in no clash of political or state interests rather than based on sound divine principles.



Muslim International Law (MIL) is a divine law which is based on justice and equity. It promotes peace and justice. It is a unique law which considers war is to be fought for maintaining and restoring peace. This objective of MIL does not change with the status of Muslims or Muslim state. Muslim state must follow MIL in all situations either it is weak or strong, peace and war, allies and aliens. MIL emphasizes on justice for all without concerning the opponent party to the peace. Trust must be maintained at any cost and the trust of enemy will not be damaged. MIL deals all humans equally with reference to their fundamental rights. It divides all humans to two categories on the bases of ideology and territorial jurisdiction of Muslim state. Muslims and non-Muslims as two distinct nations. The second division of humans is based on territorial jurisdiction. The kind of humans who live within the boundaries of Muslim state they may be either Muslim citizens or non-Muslim citizens or protected persons to whom Muslim state has issued guarantee. The other category of humans who live beyond the territorial jurisdiction of Muslim state they may be Muslims or non-Muslim citizens. The result of the dissimilarities in faith between Muslims and non-Muslims do not necessarily create hostility. The relation of peace and war is related to aggression against Muslims or Muslim state. Under MIL aggression plays crucial role in peace and war relations with non-Muslims. Sometimes if aggression is made by any Muslim group which has enough power fight against Muslim state, relationship with such group of Muslims will be considered as hostile. In other words, it can be said that infidelity or difference of ideology does not yield peaceful or hostile relationships between Muslim and non-Muslim nations.

MIL considers aggression is the cause of war either it is from nation states or group of non-Muslim individuals or even from Muslims like rebels. This aggression is either against Muslim state or against those Muslims who reside beyond the territorial limits of the "Domain of Muslim state". Any tyranny against

Muslims by non-Muslims beyond the territorial jurisdiction of Muslim state will be considered aggression with two conditions:

Affected Muslims demand support of Muslim state and the second condition is Muslim state does not have any Peace contract with the state in which Muslims are treated unjustly. In the latter case, Muslim state must help the affected Muslims through diplomacy. If diplomatic support yielded no positive result, then Muslim state will announce the dismissal of peace treaty as logistic support of Muslims unless it the treaty clearly abandons Muslim state from dismissing the treaty. MIL also considers breach of peace treaty by any nation state as aggression. Similarly, preventing people from embracing Islam or compelling Muslim not follow Islam or making them apostates. Blasphemy against the Prophets by state or any group which is supported by the state is also considered aggression under MIL. In the above all situation the relationship between Muslims and non- Muslim will be considered as hostile. Other than the above situations as a general, all the relations between Muslim and non- Muslim states are considered as peaceful and friendly.

The other important phenomenon in MIL is the territorial jurisdiction of the "Domain of Muslim state" (*Dār al-Islām*). Everyone who resides within the territorial jurisdiction of Muslim state without any discrimination will be protected.

MIL, does not recognize free hand to be used against aggressors with reference to using combating force. There are defined manners and ethics which are to be fulfilled during war. MIL considers that ethics and war manners to be fulfilled by the fighter as principles of law. The most important ethics of war is that the object of war must be lawful. Muslims fighter are supposed to not commit any act which amounts to injustice. MIL also differentiate between combatants and non-combatants. Non-combatants will not be attacked. MIL recognizes the rights combatants which contains on that they will not burnt and mutilated. The

principle of reciprocity will not be applied in this regard. MIL does not recognize the applicability principles of reciprocity with is contrary to the spirit of divine law. Unnecessary harm and destruction of aliens and their property is also prohibited. The principles of proportionately will applicable during war. Under MIL, war will be fight under the supervision of Muslim commander. Disobedience of Muslim commander will amount to war crime.

*Amān* is a phenomenon which is usually used for peace. The term *Amān* covers both the relations of peace and war. Under MIL, Muslim army is bound to award guarantee either by the demand of combatants or by its own discretion by declaring common *Amān* or for specific group of combatants. MIL gives equal authority of awarding guarantee to Muslim army commander as well as Muslim army and Muslim individuals. If Muslim army commander prevents Muslim army from awarding guarantee, then the guarantee awarded by Muslim army will be considered still valid. MIL gives validity to all the void and voidable agreements of Muslim guaranteed persons (*Mustā'mīn*) of alien state. During war if Muslim guaranteed persons (*Mustā'mīn*) immigrate from alien state to Muslim state their agreements and contracts will not be affected by their move from an alien state to Muslim state. Reason to this validity of the past voidable agreements is due to their occurrence beyond the territorial jurisdiction of Muslim state. This validity does not bound Muslim state to pursue such cases of a Muslim *Mustā'mīn* which occurred in alien state.

*Amān* provides basic guidelines for contracting peace treaties and promoting peace through diplomacy among the nation states. Diplomats are not only protected by their blood and property, but they also avail special rights and privileges. Diplomats need not formal process of getting guarantee. They have the right to enter Muslim state without formal permission subject sufficient proofs. MIL encourages Muslim state to make peace treaty with those nation states which want peaceful relations with Muslim state. MIL allows Muslim state in dire need

of Muslims even to pay compensation for making peace treaty. Muslim state is supposed to keep the basic terms and conditions of peace treaty upright even if it vitiates basic spirit of MIL as the Prophet (peace be up him) had done during making peace treaty with the Pagans of Arab. Similarly, MIL also makes Muslim state to observe peace treaty till its expiration. MIL considers all the citizens of a state with which Muslim state made peace treaty as guaranteed persons within and beyond the territorial jurisdiction of Muslim state. Similarly, any combatant if gets the guarantee of such ally state will also be considered protected. In case of breach of peace treaty by the opponent party Muslim state must inform violators state before attacking on it. Muslim state must avoid perfidy while observing peace treaty. MIL allows Muslim state to pursue the legal issues related to the peace treaty done between a Muslim and non-Muslim state:

All cases of a Muslim *Mustā'min* done in non-Muslim ally state will be heard by Muslim courts. Void and voidable contracts are not allowed for Muslim *Mustā'min* in ally non-Muslim state which are contrary to the peace treaty because MIL considers the territory of ally state just like the territory of Muslim state for Muslim *Mustā'min* with reference to facilitation. The life and property of the inhabitants of such ally state are protected by peace treaty. Any act by Muslim *Mustā'min* contrary to peace treaty will be considered crime and courts of Muslim state has the jurisdiction to hear such cases although the cause of action committed beyond the territorial jurisdiction of Muslim state. If the act of a Muslim *Mustā'min* is not contrary to the peace treaty but illegal and unlawful according to the injunctions of MIL, courts of Muslim state do not have jurisdiction to hear such cases because the cause of action committed beyond the territorial jurisdiction of Muslim state. Any illegal cause of action occurred beyond the territorial jurisdiction will not be heard by the courts of Muslim state. In such cases Muslims will be advised to pay damages if possible or return the same because ideologically all Muslims are supposed to follow Islamic law wherever they are.

Under MIL, it is not necessary for Muslim state either to have friendly or hostile relations with other nation states. It may also be possible for Muslim state to have neutral relations with other nation states.

## RECOMMENDATIONS

- 1- There is divine intrinsic re-enforcing agencies to implement MIL, but it lacks international physical re-enforcement like the Security Council which acts as a re-enforcing agency to implement CIL at global level.
- 2- Active participation by Muslim states in the formulation of CIL to decrease its secular nature and to align it more with MIL in theory and practice.
- 3- There should an agreement among all the Muslim states about the enforcing of MIL with its letter and spirit.
- 4- The classical literature on the MIL should be translated to the contemporary languages and codified on the modern patterns to make them easily understandable and practicable.

## RESEARCH QUESTIONS FOR FUTURE RESEARCHERS:

- 1- Theocratic and positivistic natures of MIL with reference to *Amān* is to be searched by the future researchers to fix that how much theoretically and positivistically changes with the change of space and time in awarding the different kinds of protection which Muslim individuals or Muslim state award.
- 2- The status of awarding guarantee should also be fixed for further ruling because the clear text of the Qur'ān and Sunnah award the authority to Muslim individuals. The current practices of awarding protection by state impair this kind of protection by Muslim individuals.

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