



Shaybānī's Notion of Authority of Awarding *Amān*: A Comparative Study of Contemporary International Law

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Abstract:

The nature of relations between Muslims and non-Muslims has always been remained debatable. The notion that Muslim International Law (MIL) does not recognize co-existence of other nation states and it gives non-Muslims only option to embrace Islam. This comprehension is based on low arguments because MIL strives to maintain peaceful relations with non-Muslims and also recognize co-existence of nation states. MIL divides the world into different parts: *Dar al-Islām*, *Dār al-Kufr* and *Dār al-‘hd*. MIL gives authority to Muslim state as well as Muslim individual to award protection to non-Muslim in both the situations of war and peace. The authority of awarding protection to non-Muslim is called *Amān* which is discussed by Shaybānī, the founder of MIL. According to Shaybānī, If *Amān* is demanded by non-Muslims, then Muslims are bound to award them. According to him, the authority of Muslim individual to award *Amān* cannot be snatched by Muslim state. On the other hand, Contemporary International Law (CIL) also recognizes protection of combatants called “Quarter”, protection of homeless people called “refugees” and protection of foreigners called “asylum”. The protection recognizes by CIL is the sole authority of state. This study sums up that the notion of Shaybānī about awarding *Amān* is quite comprehensive as compare to the concepts of the CIL.



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Keyword: *Amān, Dār ul-Islām, Shaybānī, Muslims, Non- Muslims*

Introduction:

After the incident of 9/11, the nature of relations between Muslims and non-Muslims once again emerged as burning issue and research has been started on the doctrine of *Jihād*. It is discussed by researchers that whether MIL recognizes co-existence of non-Muslims or not? Are nation states recognized by MIL as de facto or de jure recognition? The cause of war between Muslims and non-Muslims is infidelity or aggression? It is felt that a comprehensive notion of *Amān* is neglected which plays a cardinal role in the relationships between Muslims and non- Muslims. The notion of non-Muslims that MIL does not recognize co-existence of nation states and it gives non-Muslims only option to embrace Islam or would be killed.⁽¹⁾ This comprehension is not considerable because MIL not only recognizes division of the world into three parts: *Dar al-Islām*, *Dār al-Kufr* and *Dār al- 'hd*.⁽²⁾ but it also stresses on peaceful, kindly and justly relations with non-Muslims in case if they are peaceful.⁽³⁾ For the purpose of maintaining peace across the globe, MIL gives authority to Muslims for awarding *Amān*. The importance and legality of *Amān* can be understood from the verse of the Qur'ān, Allah says "If someone amongst the Pagans asks *Amān*, 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."⁽⁴⁾ The said verse enables Muslim individuals without gender discrimination and Muslim state to award *Amān* to non-Muslims. This *Amān* can be awarded to non-Muslims permanently or temporary. The seekers of permanent *Amān* are considered permanent citizen of Muslim state and this kind of *Amān* is to be awarded by Muslim state only. The seekers of temporary *Amān* are considered visitors and this kind of *Amān* can be given by every Muslim individual.⁽⁵⁾ This article includes division of the world into different parts ,the view of Shaybānī along with classical and contemporary Muslim jurists regarding authority of awarding *Amān* to non-Muslims and concept of protection in CIL.

Literally, the term *Amān* is opposite to terror.⁽⁶⁾ 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 for the protection of their lives, honors and properties for a limited period of time.⁽⁷⁾ Two contracting parties are the requisites of contract of *Amān*. One party is known as *Mu'āmin* (*Amān* giver) who inherently vests the authority of awarding *Amān* and the second party is *Mustā'min* (*Amān* seeker) a person to whom the guarantee is given.⁽⁸⁾ *Amān* giver may be state or Muslim citizen of Muslim state.⁽⁹⁾ According to the majority of Muslim jurists, a Muslim slave who is a citizen of Muslim state has also the authority of awarding *Amān*.⁽¹⁰⁾ The authority of awarding *Amān* can be used as

uttering a word or giving a gesture which explicitly or implicitly indicates using of the authority of awarding *Amān*.⁽¹¹⁾ Making such gestures or using words will not be inquired for the intention of the person who has the authority of awarding *Amān*.⁽¹²⁾ Authority of awarding *Amān* changes with the change of the territory of the domain of Islam (*Dār al-Islām*), domain of Infidelity (*Dār al-kufr*) and Domain of Treaty (*Dār al-'hd*).

Division of the World by Shaybānī with Reference to the Authority of Awarding *Amān*:

Territorial jurisdiction of Muslim state plays an important role in using the authority of awarding of *Amān*. The world is divided into three parts with reference to using the authority of awarding *Amān*. The Domain of Islam (*Dār al-Islām*) the Domain of Infidelity (*Dār al-kufr*) and the Domain of Treaty (*Dār al-'hd*).⁽¹³⁾ The important element in the Domain of Islam is the potential of Muslims to implement Islamic law which guarantees the protection awarded by the Muslim citizens of Muslim state.⁽¹⁴⁾ This means that domain of Islam is a place where Muslims have legal power to use the authority of awarding *Amān* and the state is capable to regard such authority of its citizens.¹⁵ The Domain of Infidelity is a territory where Muslims have physically not in a position to use the authority of awarding *Amān*.⁽¹⁶⁾

Shaybānī believes that territorial jurisdiction has legal impact on the authority of awarding *Amān*. 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 amounting benefit to himself to make himself free from the chains of aliens. Usually guarantee is awarded when the guarantor by himself is secured while a prisoner is dominated and not secured by himself to protect others. Therefore, such guarantee will not be binding on other Muslims. The guarantee will be binding on him only.⁽¹⁷⁾ Similarly, the guarantee of a Muslim in an occupied territory by Muslim state will also not be valid because the occupied territory status will not be changed to the domain of Islam unless Muslim state does announce it to be the part of Muslim state.⁽¹⁸⁾ Shaybānī is the view that Muslim traders and newly converted Muslims beyond the territorial jurisdiction of Muslim state do not have the authority to award *Amān*.⁽¹⁹⁾

According to Shaybānī, the third part of the division of the world is the domain of peace treaty. He is of the view if a person who belongs to a state with whom Muslim state has signed peace agreement, enters to a Muslim state without seeking guarantee; such person will be considered a guaranteed person because of peace agreement.⁽²⁰⁾ According to Shaybānī, peace treaty changes the status of hostility to peaceful relations but it does not merge two different territories (domain of Islam and war) into the same territory.⁽²¹⁾

The discussion can be concluded that divisions of the world do not directly link to the notion of perpetual war or peaceful relations between Muslims and non-Muslim states it only signifies the territorial jurisdiction of Muslim state with reference to award *Amān* by Muslims. Only Muslim citizens of Muslim state have the authority of awarding *Amān*. Non- Muslims citizens and Muslims who reside beyond the territorial jurisdiction do not have the authority to award *Amān*. Shaybānī recognizes the authority of awarding *Amān* under the rule of reciprocity. He is of the view that non-Muslim state or its citizen can award *Amān* to the citizen of Muslim state as Muslim individuals or Muslim state have the authority of awarding *Amān*.⁽²²⁾

Shaybānī's Notion of Authority of Awarding *Amān*:

Under Muslim International Law, the authority with reference to awarding *Amān* is of two kinds:

- 1- Authority of Muslim state to award *Amān*.
- 2- Authority of Muslim individuals to award *Amān*.

Authority of Muslim State to Award *Amān*

According to Shaybānī Muslim state is bound to act in the best interest of its citizen. It can be in form of armistice contract with non-Muslims or in the form of awarding *Amān* to non-Muslims.⁽²³⁾ Imām al-Shāfi‘ī is of the view that the *Amān* awarded by Muslim state will only be valid if it is awarded in the large interest of Muslims.⁽²⁴⁾ According to him Muslim state has a one-degree preference in awarding *Amān* over Muslim individuals because it has inherent right for awarding guarantee while the guarantee given by Muslim individuals is subject to the general interests of Muslims and Muslim state. According to Imām al-Nawawī and al-Kāsānī Muslim state can award *Amān* to unlimited number of persons.⁽²⁵⁾ The logic for this rule of law is that awarding *Amān* unlimited persons suspends fighting against belligerents and the decision of suspending fighting against belligerents is the sole authority of Muslim state.⁽²⁶⁾ According to Imām Mālik, principally, the authority of awarding guarantee can only be entertained by 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.⁽²⁷⁾

According to Shaybānī, *Amān* is directly related to the security and benefit of Muslims. Any guarantee awarded by Muslim individuals or Muslim state that endangers the security or interest of Muslims can be dismissed by Muslim state being communicating it to the guaranteed persons.⁽²⁸⁾ Shaybānī has made the base of this rule of law on the verse of the Qur’ān.⁽²⁹⁾ 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 *Amān*. The dismissal of any *Amān* will only be dismissed being publicly announced.

Moreover enough time will be given the protected persons to safe themselves⁽³⁰⁾ and their properties otherwise it will be considered perfidy in accordance with the Qur'ān.⁽³¹⁾ Shaybānī has referred to a precedent of Mu‘awiyah RA regarding the fulfillment of peace treaty with aliens.⁽³²⁾ From this precedent, Shaybānī concludes that Muslims must fulfill their covenants with others and have not only to avoid explicit disloyalty but also not to indulge suspicious activities that lead to dishonesty.⁽³³⁾

It can be concluded that Shaybānī, al- Nawawī, Imām Aḥmad, Imām Mālik and al-Kāsānī recognize the unconditional authority of awarding *Amān* for Muslim state. While Imām al-Shāfi‘ī restricts it with a condition of large interests of Muslims and Muslim state. Shaybānī recognizes the authority of awarding *Amān* for Muslim individuals along with Muslim state.

According to Shaybānī principally, Muslim state should not deprive the authority of Muslim individuals from awarding *Amān*.⁽³⁴⁾ The logic for this rule of law is that MIL has already authorized every Muslim for awarding *Amān* which cannot be taken away by issuing a simple order by Muslim state. Another reason to this rule of law is the unawareness of the seeker of *Amān* about preventing of Muslims individuals by Muslim state. If Muslim state does not consider such *Amān* then it will result to perfidy by the Muslim guarantors and Muslim state.⁽³⁵⁾ .

Shaybānī Notion of Authority of Muslim Individuals to Award *Amān*:

Shaybānī is of the view that Muslim individuals are equally capable for the authority of awarding *Amān* without any discrimination.⁽³⁶⁾ He is of the view that awarding guarantee is a kind of assisting Islam and every Muslim without gender discrimination 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 *Amān* is one kind of assisting Islam.⁽³⁷⁾ 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.⁽³⁸⁾ Shaybānī has argued that the Prophet (Peace be upon him) ratified the *Amān* awarded by Zaynab RA to her husband Abū al-‘ās⁽³⁹⁾ and had also endorsed the *Amān* awarded by Umme Hani RA to her two relatives.⁽⁴⁰⁾ The Prophet (Peace be upon him) not only ratified their guarantees but also encouraged them for awarding guarantees by saying; we have given guarantee to whom you have given guarantee.⁽⁴¹⁾ Imām Mālik, Imām al-Shāfi‘ī and al-Māwardī also consider the guarantee awarded by Muslim females as valid like Shaybānī.⁽⁴²⁾ According to Abū ‘Umar al-Mālikī the guarantee of a Muslim female is subject to the approval of Muslim state.⁽⁴³⁾ This means that Abū ‘Umar al-Mālikī 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 Imām Mālik because he

believes in the authority of Muslim individuals as an exception. The opinions of Shaybānī, Imām Mālik, Al-Shāfi‘ī and al-Māwardī are to be preferred in the light of clear text of the Ḥadīth mentioned. According to them Muslim individuals without any gender discrimination are capable of awarding guarantee as Muslim state. The view point of Abū ‘Umar al-Mālikī contradicts the command of the Ḥadīth which has given equal status to Muslim females with Muslim males in awarding *Amān*. Al-Ghazālī also endorsed the view point of Shaybānī regarding the number of the seekers of *Amān*.⁽⁴⁴⁾ According to al-Nawawī Muslim individuals can award *Amān* only to one or two persons.⁽⁴⁵⁾ According to al-Kāsānī Muslims individuals are capable of awarding *Amān* without any limitations of small and large number of persons. Single Muslim individual can award *Amān* in bulk of persons. He also believes in the capability of a group of Muslims for contracting armistice contract with alien state.⁽⁴⁶⁾ The logic behind the view of al-Kāsānī that group of Muslims is also capable for armistice contract is that the armistice contract is a part of *Amān* as he considers. The authority of awarding *Amān* is given to all Muslim individuals by the Prophet (Peace be upon him).⁽⁴⁷⁾ According to Ahmād bin Ḥanbāl, Muslim individuals are capable of awarding *Amān* with a condition if such persons are limited in numbers. This opinion of Ahmād bin Ḥanbāl is based on two premises. The first one is that limited number usually cannot endanger the national security of Muslim state and the second premise is that Muslim state can easily accommodate the guaranteed persons in Muslim state. According to him awarding *Amān* to a huge number of persons is the sole authority of Muslim state. The reason to this argument is that 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 persons. It is possible for a large number of persons 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 *Amān* to a large number of persons. According to him, whether guaranteed persons 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.⁽⁴⁸⁾ Imām Mālik is of the view that Muslim individuals have the authority of awarding *Amān* subjected to permission from Muslim state. If *Amān* is awarded without the prior permission of Muslim state then Muslim state has the authority to dismiss it.⁽⁴⁹⁾ Muslim classical jurists recognize the authority of awarding *Amān* by Muslim individuals in one form or in another form.

Views of Contemporary Muslim scholars regarding the Authority of Muslim individuals to award *Amān*:

Classical Muslim jurists are of the view that all Muslim individuals along with Muslim state have the authority to award *Amān*. While the contemporary Muslim scholars like Zaydān and Zuḥaylī are of the view that the authority of Muslim individuals to award *Amān* vests in the authority of Muslim state. According to them, State acts on the behalf of its individuals for safeguarding their rights and interests. Therefore, the authority of awarding *Amān* can only be entertained by Muslim state.⁽⁵⁰⁾ It seems that Zaydān and Zuḥaylī are scholastically affected by the contemporary notion of Nation States. The view point of contemporary scholars with regard to the authority of awarding *Amān* can be criticized under the following arguments:

- 1- The divine command related to the authority of awarding *Amān* is common to all Muslims as other commandments of the Qur'ān.⁽⁵¹⁾
- 2- Under the Ḥadīth of the Prophet (Peace be upon him) every Muslim has the authority to award *Amān*.⁽⁵²⁾
- 3- Every Muslim is bound to assist Islam and according to Shaybānī, awarding *Amān* is a kind of assisting Islam.⁽⁵³⁾
- 4- The authority of awarding *Amān* by any Muslim individuals is absolute and no one can deprive any Muslims of this authority.⁽⁵⁴⁾
- 5- The concept of *Wilāyah* (Custodianship) and *Man'ah* (writ of Muslim state) are accepted for Muslim state also.⁽⁵⁵⁾ The Custodianship and writ of the state both are conditioned with observance of rules and principles of MIL. The authority of Muslim individual for awarding *Amān* cannot be deprived by Muslim state claiming that the status of sovereignty vests in nation state. Custodianship and writ of the state are different from the notion of sovereignty. Under MIL, a Muslim state acts under the authority of Custodianship and writ of the state 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 MIL.⁽⁵⁶⁾

It can be concluded that the notion of the authority of Muslim individual as discussed by the classical Muslim jurists Shaybānī, while partially by Al-Shāfi'ī

Imām Aḥmad bin Ḥanbīl and al-Nawawī which award authority to Muslim individuals with Muslim state for awarding *Amān* is preferred opinion.

Authority of awarding Protection in Contemporary International Law

Contemporary International Law recognizes only the authority of state to award protection to combatants during war, this protection is known as Quarter. While in the situation of peace, state also has the authority to award protection to foreigners as refugees or asylum seekers. “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”.⁽⁵⁷⁾ 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”⁽⁵⁸⁾ 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 the circumstances, should be recognized to be hors de combat shall not be made the subject of attack”. This article protects wounded belligerents who cannot fight during war. According to Hague Law 1907, only the following persons can be provided quarter:

1. Army soldiers under one command and control,
2. Army soldiers in one uniform,
3. People showing war weapons openly; and
4. Persons who are performing their military operation under the laws and customs of war.⁽⁵⁹⁾

These four kinds of people are also recognized for quarter under 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 only one exception to this rule of law that some time civilian will be considered as combatants although they do not meet this criterion of IHL. The rule of “levee en masse” is an exception to this rule of law that means taking up weapons by civilians to fight for making themselves and their children safe from the aggressors.⁽⁶⁰⁾ According to this exception such civilians do not fight under a proper command and in distinctive uniform or emblem will be considered combatants. They will avail all the rights of combatants including quarter.⁽⁶¹⁾ This article of The Hague Law is repeated by the Geneva convention 3.⁽⁶²⁾ 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. During war combatants before their detention may be killed but after their arrest they must not be harmed and will be protected.⁽⁶³⁾

According to the general rules of IHL, the wounded combatants "hors de combat" will not be killed. Exception to this rule of law is that if a prisoner of war has committed a crime before or after of the arrest which amounts to death penalty so the said person would be killed.⁽⁶⁴⁾

CIL also recognizes the term "Asylum" for the protection on the grounds of diplomacy or politics only.⁽⁶⁵⁾ The notion of refugee is also recognized by CIL, refugee is a stateless person.⁽⁶⁶⁾ According to Geneva Convention 4, refugee is a person who does not enjoy any shelter of any government.⁽⁶⁷⁾ Usually, refugee-status is demanded by the persons who have fled from their mother countries in order to seek protection along with fundamental rights.⁽⁶⁸⁾ 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 (CuIL) and any peace treaty, the rights of refugees are to be determined by the host state.⁽⁶⁹⁾

Comparative study of the authority of awarding *Amān*:

Under MIL, the seekers of *Amān* are not required to be belligerents they may be laymen residing beyond the territorial jurisdiction of Muslim state while under the rules of IHL, Quarter will be given to those fighters who meet the criteria of belligerents like carrying a unique symbol, proper uniform, carrying weapons openly, fighting under the supervision of a commander and observing the rules and regulations of IHL. Moreover, *Amān* may be awarded by an Muslim individual while awarding Quarter is the sole authority nation state, individuals have no authority of awarding Quarter.⁽⁷⁰⁾ According to IHL, individuals will only be capable to award quarter by the appointment of the state in case of using the delegated authority. Muhammad Hamidullah got misconception about the terms "Quarter" and *Amān*. He has considered both the terminologies as synonym. He is of the view that impact of guarantee (*Amān*) and (Quarter) is similar and both assure the protection of life and property of the person under consideration.⁽⁷¹⁾ The process of *Amān* is very simple and easy which needs no formal or legal procedure and does not require the intention of the guarantor. If guarantor shows any understood gesture of *Amān* will enact it immediately.⁽⁷²⁾ In *Amān*, 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.⁽⁷³⁾ While guaranteed person enjoys the same rights of non-Muslim citizen of Muslim state. The notion of "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 basis 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.⁽⁷⁴⁾ The notion of refugee is also different from the legal philosophy of *Amān*. The status of refugee is given by the state only and to those persons who are stateless.⁽⁷⁵⁾ Refugee-status is demanded by the persons who have fled from their mother country in order to seek protection along with fundamental rights.⁽⁷⁶⁾ The rights of refugees are based on reciprocity rules.⁽⁷⁷⁾ 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 protected person under Muslim International Law as compare to Quarter, asylum and refugee law.

Conclusion:

This research may be concluded as that MIL recognizes division of the world into different parts on the basis of territorial jurisdiction. Domain of Islam, Domain of war and Domain of Treaty. 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 Shaybānī anyone irrespective of religion wants to move from one domain (Islam, peace, war) to other he/she must get *Amān*. The authority of awarding *Amān* is given to every Muslim individual along with Muslim state. According to Shaybānī, Muslim state and all Muslim individuals are equally capable without any gender discrimination of awarding *Amān*. According to him, Muslim state cannot snatch the authority of awarding *Amān* from Muslim individuals. Once the *Amān* (guarantee) is awarded, all rights of the concerned persons 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.

On the other hand, CIL also recognizes the authority of state to award protection to foreigners as well as aliens. CIL does not recognize the authority of awarding protection by individuals. Individuals do not represent the authority of state while awarding protection. The notion of CIL is restricted as compare to MIL with reference to awarding *Amān* (guarantee). MIL awards the authority of awarding *Amān* to every individual along with Muslim state while CIL awards the authority of awarding protection to nation state only.



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- (13) *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 is implemented as called *Dār-Islam*. See for details,'Alā al-ddin,Abū bakar bin Masūd bin Ahmad al-Kāsānī, *Bādā'i 'al-ṣānā'i'* vol.7 (Beirut: Dār-al-ktub al- 'lmiyyah, 1986),'3'.
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- (30) “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.
- (31) *Al-Qur’ān*: 08,58.
- (32) “Reported by Sūlaim 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‘āwiya RA intended to attack on Romans before the time peace treaty had to expire. Amr bin ‘āmbasāh RA came and said to him “Allah is greatest, fulfillment of the treat is binding on you and you have to avoid perfidy”. Mo ‘āwiya RA asked him to explain his statement. He replied that I have heard the Prophet SAW 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 ‘āwiya RA ordered the people to go back from the border”. Abū ‘Isā Muhammad bin ‘Isā al-Tīrmidhī, *Sunan al-Tīrmidhī*, Vol. 1, ۱۹.
- (33) Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 265.
- (34) *Ibid*, 576.
- (35) *Ibid*.
- (36) *Ibid*, 252.
- (37) *Ibid*,253.
- (38) *Ibid*.
- (39) “Yazīd bin Roman said: *Abū al-a’ās* entered to the house of *Zainab* RA and got guarantee from her. When the Prophet SAW was praying *fājr* prayer, *Zainab* shouted O people! I have given guarantee to *Abū al-a’ās*. When the prophet SAW completed his prayer, turned his face to the people and said: have you heard what I heard? The people said: yes, the Prophet SAW 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 SAW 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 Abū Bakar al-baihaqi, *Al- Sunan al-Kubrā*, vol.۱, (Beirut: Dār al-Kutub al- ‘Imiyah, 2003), ۱۶۲.
- (40) “Abdullah bin Ikramah said: when *Makkah* was conquered by the prophet SAW, *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 SAW narrated the story, the prophet SAW said: we have given the guarantee to whom you have given”. Abū ‘Isā Muhammad bin ‘Isā al-Tīrmidhī, *Sunan al-Tīrmidhī*, Vol.3 (Riyadh: Dār-al-Ssalām 2007), 348.
- (41) Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 253.

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- (42) Abu Abdullah Muhammad bin Idrīs Al-Shāfi‘ī , *Al-Umm*, vol.4 (Beirut: Dār al-Ma‘ārifah, 1990),302. Malik bin Anas bin Malik bin a’mir al-Asbahī Al-Madani, *Al-Madūnah al-Kubrā* vol.‘ (Beirut: Dār al-Kutub al- ‘Imiyah,n.d),525. Abu al-Hasan Ali bin Muhammad bin Muhammad bin Ḥabib al-Bsri al-Baghdadi al-Shāhīr bil Mawardi, *al-ahkam al-Sūltania* (Egypt: Dār al-Hadith, n.d),226.
- (43) Abū ‘Umar Yūsuf bin Abdullah bin Muḥammad bin abd ul baar bin a’sim al-Namari al-Qurtūbī, *Al- Kaft fī Fiqh ahl al-Madinah* vol.1 (Riyadh: Maktabah al-Riyadh,1980), 469.
- (44) Abū Ḥamid Muḥammad bin Muḥammad al-Ghazālī al-tūsi, *Al-wasīt fī al-Madhab*,vol.7 (Egypt: Dār-al-Ssalām,4117),43.
- (45) Abū Zakriyyā Muhi al-ddin yaḥya bin Sharf al-Nawawī, *Al-Majmu‘ Sharḥ al-Muhadhdhab* vol. 19, (Beirut: Dār al-fikar,n.d),309.
- (46) Al-Kasānī al-Ḥnafī, *Bdā’e al-Sānā’e*, vol.7, 107-108.
- (47) Abū Dawood Sulaiman bin al-ash‘th bin Ishaq, *Sunane Abī Dawood*, vol. 4 (Beirut: Dār-al-Risalah al-‘alamiyah, 2009), 379.
- (48) Mansūr bin Younas bin Salāḥ ul-din bin Hasan bin Idrees al-Bahūti al-Ḥanbālī, *Kashāf al-Qānā‘ lā Matn al-Iqnā‘* vol.3 (: Dār-al-Kutub al- ‘Imiyah,n.d),104.
- (49) Abū Abdullāh Al-Mālikī, *Manh al-Jaleel sharḥ Mukhtṣar Khalil* vol.3, 170.
- (50) Abdul Karīm Zaydān, *Aḥkām al-dhimyīna wa al-Mustā’miṇīna fī Dār-al-Islām*, (Baghdad: Makābah al-Qūds,1982),50. Wahbah al-Zūhaylī, *Athār al- ḥarb fī Fiqh al- Islāmī* (Beirut: Dār al- Fikar, 1998),230.
- (51) *Al-Qur’ān*: 09,06.
- (52) Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.‘.252.
- (53) *Ibid*, 2٥٣.
- (54) *Ibid*, 576.
- (55) Abū Abdullāh Ahmad bin Muḥammad bin Hanbal, *Musnad Ahmad bin Hanbal* vol. 42 (Egypt: Muassisah al- Risālah, 2001), 199.
- (56) Muhammed Mushtaq Ahmed, *Jihad Muzahimat awr Baghawat*, (Gujranwala: Al-Shari‘ah ikādmī, 2012), 155.
- (57) Mohamed Elewa Badar, Jus in Bello under Islamic International Law, International Criminal Law Review 13 (2013) 593–625.615.
- (58) Additional Protocol 1.
- (59) Hague law, article, Geneva convention 3, article 4.
- (60) Hans peter Gasser, International Humanitarian Law (Haupt: Henry Dunant Institute,1993),36.
- (61) “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 war” Hague law, article, 2.
- (62) “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.
- (63) Geneva convention 3, article 13.
- (64) *Ibid.*
- (65) Malcolm N.Shaw, *International Law* (New York: Cambridge University Press, 2008),76-79.

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- (66) Additional Protocol 1, article 73.
 - (67) Geneva convention relative to the protection of civilian persons in time of war of 12 august 194, Article 44.
 - (68) Hans peter Gasser,21.
 - (69) Malcolm N.Shaw, International Law (New York: Cambridge University Press, 2008),675.
 - (70) Mohamed Elewa Badar, *Jus in Bello under Islamic International Law*, International Criminal Law Review 13 (2013) 593–625.615. Article 40 of the additional protocol 1.
 - (71) Muhammad Hamidullah, *Muslim Conduct of State* (India Lahore: Kashmiri Bazar, 1954), 200.
 - (72) Majid Khadduri, 165.
 - (73) Geneva convention relative to the treatment of prisoners of war of 12 august 1949, articles, 25-37.
 - (74) Malcolm N.Shaw, 76-79.
 - (75) Additional Protocol 1, article 73.
 - (76) Hans peter Gasser, 21.
 - (77) Malcolm N.Shaw, 675.