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Kitāb Al-Jihād in Al-Mughni

By

Ibn Qudāmah

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Thesis for fulfilment of the requirements of M.Th.

in Theology and Religious Studies

Centre for the Study of Islam

Department of Theology and Religious Studies

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ABSTRACT

This thesis is based on *Kitāb al-Jihād* from *Al-Mughni*, which is compiled by Ibn Qudāmah and considered one of the major sources of Islamic Law. Ibn Qudāmah was a scholar of the Hanbali School of Islamic Law but his book presents opinions of all schools of Islamic Law. The research is divided into four chapters. The first chapter consists of the introduction of the basic concepts of jihād and the introduction of the research. The personality, life and work of Ibn Qudāmah have been discussed in the second chapter. The characteristics of *Al-Mughni* and its methodology have also been included in this chapter. The translation and explanation of selected portions of *Kitāb al Jihād* from *Al-Mughni* are presented in the third and fourth chapters.

The main topics of the third chapter are the legal status of jihād, the role of government in jihād, the conditions of jihād, the importance of jihād, the kinds of jihād and the declaration of war. The participation of women in war and the concept of *amān* (protection) in Islamic Law are also included in this chapter. The status of Non-Muslims in an Islamic State is also discussed in this chapter. The principles of conduct in jihād like the ransoming of prisoners of war, prohibited and legitimate acts of war, the protection of females, children and infrastructure are included in the fourth chapter. Detailed discussion regarding the principles of Islamic law for peace treaties is also within the fourth chapter. The results in the light of analysis of the text of *Al-Mughni* have been compiled in conclusion of the research. This research could be considered a significant effort for presenting a more in depth analysis of jihād.

DECLARATION

No portion of the work referred to in this thesis has been submitted in support of an application for this or any other university or other institute of learning.

Mrs. Fadwa M. U. Al-Obead

February 2005

DEDICATION

To my father Muhammed Al-Obead and my mother Fatima Osilan

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The time I spent working on my MTH has been one the most enjoyable and happiest times of my life. I now appreciate why so many former students would like to return to work in this wonderful city of Glasgow.

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TRANSLITERATION TABLE

CONSONANTS

Ar = Arabic, Pr = Persian, OT = Ottoman Turkish, Ur = Urdu

Ar	Pr	OT	Ur	Ar	Pr	OT	Ur	Ar	Pr	OT	Ur
ا	ا	ا	ا	ز	z	z	z	گ	—	g	g
ب	b	b	b	ژ	—	—	ī	ج	l	l	l
پ	p	p	p	ڙ	zh	j	zh	م	m	m	m
ت	t	t	t	س	s	s	s	ن	n	n	n
ث	—	—	ī	ش	sh	ş	sh	ه	h	h'	h'
ث	th	th	th	ص	ṣ	ṣ	ṣ	و	v/u	v	v/u
ج	j	c	j	ض	ḍ	ḍ	ḍ	ی	y	y	y
چ	ch	ç	ch	ط	ṭ	ṭ	ṭ	اۛ	-a ²	—	-a ²
ح	h	h	h	ظ	ẓ	ẓ	ẓ	ال	al ³	—	—
خ	kh	h	kh	ع	‘	‘	‘	¹ when not final ² -at in construct state ³ (article) al- or l-			
د	d	d	d	غ	gh	ğ	gh				
ذ	—	—	d	ف	f	f	f				
ذ	dh	dh	dh	ق	q	k	q				
ر	r	r	r	ك	k/g	k/ā/	k				

VOWELS

	Arabic and Persian		Urdu	Ottoman Turkish
<i>Long</i>	ا	ā	ā	ā
	آ	Ā	Ā	—
	و	ū	ū	ū
	ي	ī	ī	ī
<i>Doubled</i>	ي	iiy (final form ī)	iy (final form ī)	iy (final form ī)
	و	uww (final form ū) uvv (for Persian)	uv	uvv
<i>Diphthongs</i>	و	au or aw	au	ev
	ي	ai or ay	ay	cy
<i>Short</i>	ا	a	a	a or e
	ا	u	u	u or ū
	ا	i	ī	o or ō i

URDU ASPIRATED SOUNDS

For aspirated sounds not used in Arabic, Persian, and Turkish add h after the letter and underline both the letters e.g. جھ jh گھ gh

For Ottoman Turkish, modern Turkish orthography may be used.

Chapter One

Introduction to the Research

1-Introduction

Jihād is a concept, which is very familiar in the world wide. The notion of jihād is alive in the Islamic world. There are Islamic groups who have declared jihād and on the opposite spectrum those who declare this as terrorism. Each group uses elaborate arguments to present their case due to that many misconceptions regarding the original principles of jihād have been created. There is a need to consult the original sources of Islamic Law and conduct academic research for clarification on the concepts of jihād. *Al-Mughnī* is one of the important sources of Islamic Law. The author of this book, Ibn Qudāmah was the Imam of the *Hanbalī* school of law but the juristic opinions in the book are not limited only to *Hanbalī* School and thus represent all the Sunni schools of Islamic Law. Due to this characteristic of *al-Mughnī*, the English translation of *Kitāb al- Jihād* and its explanation is selected as the focus of this study.

2-Introduction to Jihād

2.1) Meanings of Jihād

The terminology of jihād is derived from the Arabic word *Jahada*. *Jahada* is a verb used to emphasis the extraordinary efforts in any action.¹ The extraordinary performance of a person on completing a certain task is described by the verb *Jahada*. The word jihād is a noun derived from the verb *Jahada* and is used in the literal sense for extraordinary or maximum efforts on performing a certain work.²

Jihād, in its general understanding means to maximise efforts or 'striving exertion' in the way of God, but most often it is translated to mean 'holy war'. War is

¹ Ibn Manzūr Al-Afriqi, *Lisan al-Arab* (Beirut, Dar Lisan al-Arab, 1985), p. 2/397.

² Ibid, p. 2/397.

one aspect of jihad yet separate terminology, such as *qitāl*, has been used in *Qurān* for war. The Qur'an says:

[Fight in the cause of Allah against those who fight against you, but do not transgress limits. Lo! Allah loves not aggressors.]³

Jihād can be interpreted in many ways but the meaning *qitāl* is related to war. The Prophet Muhammad himself used the terminology of jihād in its comprehensive sense and included it in matters other than war. It is reported that once Aisha, wife of the Prophet asked, "is the participation of females in jihad necessary". He replied, "Yes, they can participate in jihād in which there is no war and that is *Hajj* and *Umra*."⁴

Also, during the time of the Prophet Muhammad, it was said that when a person asked his permission to participate in war, the Prophet inquired of him: Do you have parents? The man said, yes. The Prophet said, then strive by them.⁵

These *ahadīth* show that jihād may be applied to matters other than war. The prophet used the terminology of jihād in its comprehensive sense and *qitāl* for war. Jihād is divided into *Jihād Kabīr* and *Jihād Sagīr*. *Jihād Kabīr* or greater jihād has nothing to do with war. It is the individual's personal struggle with faith and devotion against his or her bad intentions. This jihād is a spiritual jihād in which a person tries to control himself from doing wrong things. *Jihād Sagīr* or lesser jihād involves, if necessary, armed struggle against the enemies of Islam, although it should only be in self-defence⁶.

³ Q2:190

⁴ Al-Bukhari (Abu Abdullah Muhammad bin Ismail), *Al-Jamia Al-Sahih, Bab Hajj al-mr'ah* (Dar Ibn Kathir, 1987), p. 3/24.

⁵ Al-Bukhari, *al-Sahih*, Hadith No5972, p. 3/18.

⁶ Rudolph Peters, *The Doctrine of Jihād in Modern Islam*, (Princeton: Markus Wiener Publishers, 1996), p. 115-116.

However at times, the meaning of jihād is restricted to war particularly in the early centuries of Islam during the expansion of the Islamic Empire. This came to be its normal meaning and it was the holy war for a religious duty prescribed by the faith.⁷

Many scholars have ignored the comprehensive meaning of jihād and confined it to war only⁸. *Al-Mughni* one of the important books of Islamic *fiqh*, compiled by the 13th *Hanbali* jurist, Ibn Qudamah restricted the meaning of jihad to war (*qitāl*) and it must be in the way of God, such opinions supported by many jurists such as Imām Ahmed Ibn Hanbal, Imām Abū Hanifa, Imām Mālik and Imām Al-Shāfiʿī⁹. A contemporary Muslim scholar, Syed Abdullah Madūdī has written a book on the topic of Jihād. He also explained this terminology in the meaning of war:

‘Jihād is a part of this overall defence of Islam. Jihād means struggle to the utmost of one’s capacity. A man who exerts himself physically or mentally or spends his wealth in the way of Allah is indeed enjoyed in jihād. But, in the language of Shari’ah this word is used particularly for the war that is waged solely in the name of Allah and against those who perpetrate oppression as enemies of Islam. This extreme sacrifice of lives develops on all Muslims. If however a section of Muslims offer themselves for participating in jihād, the whole community is absolved of its responsibility’.¹⁰

In this kind of traditional explanation the other notions of jihād are neglected. The struggle for the good of Muslim society and against corruption and decadence is also included in jihād. All Muslims must participate in this struggle and work with

⁷ Joseph Schacht, C.E Bosworth, *The Legacy of Islam*, (Oxford: The Clarendon Press, 2nd edition 1974), p.175.

⁸ Watt W. Montgomery, *Islamic Fundamentalism and Modernity* (London, Routledge: 1989), p. 99.

⁹ Ibn Qudāmah, *Al-Mughni*, p. 13/5.

¹⁰ Maudūdī, *Towards understanding Islam*, (Lahore:1960), p. 150.

other intellectual and material abilities for the realisation of justice and equality between the people and for the spreading of security and human understanding both among individuals and groups.¹¹ The comprehensive meanings of Jihād did not find much place in the writings of Muslim scholars and usually jihād became synonymous to war. Thus jihād in the terminology of Law is used for expending ability and power in fighting in the path of God by means of life, property, and good words other than these things.¹²

To summarise, the terminology of jihād is described in its general and particular meaning. According to the general meanings all serious struggles for the benefit and protection of Muslims are called jihād. In this sense jihād is not particularly applied to war only. A war against all non-Muslims, which is generally taken in these days as the specific meaning of jihād, is not its true meaning. An armed struggle is one aspect of jihād and is necessary for the survival of Muslims. In the literal sense, the Arabic word 'Jihād' means to struggle or strive and it applies to all kinds of action. It would then be fair to argue that a student struggling to learn is also jihād. Service to family members and particularly to parents is also jihād.¹³

Jihād can be categorised into three kinds:

1- Jihād bi'nafs

This is also called *al- Jihād al- akbar*. This type of Jihād means to bear all the hardships that one bears in order to prevent himself from committing wrong and

¹¹Rudolph Peters, *Jihād in Classical and Modern islam* (Princeton :Markus Wiener Publishers, 1996), p. 116.

¹² Al-Kasānī, 'Alauddin Abi Bakar bin Masūd, d.1191, *Bidat asanaia fi tartib al-shari'a* (Beirut, 1974) p. 161.

¹³ Mohna al-Ali Muhammad, *Minhāj al-Islām fi al-Silm wa al-Harb* (Riyad:1412A.H), p. 298.

prohibited acts. This *jihād* demands that one must do what Allah has asked him to do without fear.

II- Jihād bi'l māl

The spending of money on the way of God is *Jihād bi-l mal*. Spending money on charities or giving it to needy people is also included in *jihād bi-l mal*.

III- Jihād bi 'l sayf (war against enemies)

Usually the terminology of *jihād* is applied only to this kind. This is only the kind, in which Muslims organize themselves under an *amīr* (leader) and begin a sacred struggle against the enemy. This kind of *jihād* is conducted under the guidance of the *shari'ah*. All wars cannot be included in it. Only legitimate wars, such as war declared by the Islamic government, are included in it¹⁴.

2.2) Nature of War in Jihād

War is not an objective for Muslims except to fight for their defence. All military aggressions cannot be called *Jihad* and be declared legitimate. The Qur'ān says:

[If they incline to peace, incline thou also to it, and trust in God].¹⁵

The Qur'ān states further:

[So do not falter and invite to peace when you are the uppermost and God is with you and He will not grudge (the reward of) your actions].¹⁶

The unavoidable nature of war, which is permissible in Islam mentioned in The Qur'an:

[Fighting is prescribed upon you, and you dislike it. But it may happen

¹⁴Mulna al-Ali, *Minhāj al-Islām fī al-Silm wa al-Harb*, p. 168.

¹⁵ Q 8:61.

¹⁶ Q 47:35.

that you dislike a thing which is good for you and it may happen that you love a thing which is bad for you. And Allah knows and you know not]¹⁷.

Also, this nature explained in the sayings of the Prophet as he advised:

‘Do not be eager to meet the enemy. Perhaps they may put you to test. But if you force to fight say: God suffices for us and they might away from us’¹⁸

These arguments from the Qur’ān and *Sunna* show that war is permissible only after all peaceful means have been exhausted. Muslims scholars also consider war unavoidable and not to be desired. Hassan Ibn Abdullah strikes an interesting note by saying:

“Wars are accidents among the happenings of the time, just like sicknesses, in contrast to peace and security, which resemble health for bodies so it is necessary to preserve health by means of political action and to stop sickness by means of warlike actions and to busy one’s self in preserving health.”¹⁹

It is clear from the above description that war is not a permanent relationship between Muslims and non-Muslims. It is only allowed in extraordinary situations in which the defence of Muslims and their land is not possible without the option of war.

2.3) Legitimacy of Jihād

2.3.1) Importance of Jihād in Qur’ān and *Sunna*

Ibn Qudamah and Muslim Jurists have not considered jihād as a personal duty (*Fard Ayn*) that is to be observed by all individuals. This is clearly shown from

¹⁷ Q 2:216

¹⁸ Al-Bukhari, *al-Jami’ al-Sahih*, bab fadil al-jihad, p. 3/18.

¹⁹ Hassan Ibn Abdullah, *Athar al-Awwal fi Tartib al-Duwwal* (708), p.1,7.

the *Qur'ānic* verses that the participation in jihād is required only from one group of Muslims and it is not obligatory on all²⁰.

God said:

[And it is not (proper) for the believers to go out to fight (Jihād) all together. Of every troop of them, a party only should go forth, that they (who are left behind) may get instructions in (Islamic) religion, and that they may warn their people when they return to them, so that they may beware (of evil)].²¹

Thus participation in it is a general duty (*Fard Kifāya*) which if accomplished by a sufficient number, then absolves the rest of the community. Since it is a general duty, its administration is entirely governed by the Muslim government. The *Sunna* of the Prophet shows that either he himself organized the expeditions or delegated its authority to other persons i.e. governors, tribal chieftains²².

Imām Abū Yūsuf says:

‘No army marches without permission of the Caliph.’²³

Ibn Qudāmah discussed this matter in a separate discussion in the third chapter at No1 and he is of the same opinion of Al-Māwardī who was also clear that war cannot be waged without the permission of the Muslim Caliph.²⁴ The situation of foreign aggression is different. In this case the permission of the ruler may not be required.²⁵

²⁰ Ibn Qudāmah, *Al-Mughnī*, p. 13/6

²¹ Q 9:122.

²² Hamidullah, *The Muslim Conduct of Islamic State*, p. 161.

²³ Abū Yūsuf, *Kitāb al-Kharāj* (Egypt: 1302 AH), p. 123.

²⁴ Al-Māwardī, *Al-Ahkam al-Sultaniyyah* (London: Taha publishers Ltd, 1996), p.53 and Ibn Qudāmah, *al-Mughnī*, p. 13/7.

²⁵ Hamidullah, *The Muslim Conduct of Islamic State*, p. 161.

Imām Al-Sarkhasī goes as far as to say that if foreign armed forces, without the permission of its government, take belligerent action against a Muslim state; this cannot be a declaration of war or like war.²⁶

In the case of aggression against a Muslim state, the government will declare war after its confirmation through diplomatic sources. War is not a choice for Muslims unless their existence and faith are being threatened. They are bound to follow the injunctions of God in all situations. The Just war is a situation in which the Kingdom of God requires the participation from the Muslims within. Since every thing belongs to Allah, it is therefore a Muslim's duty to struggle in the path of God²⁷. It is stated in the Qur'ān:

[Lo! God hath bought from the believers their lives and their wealth because paradise will be theirs: they shall fight in the path of God and shall slay and be slain. It is a promise which is binding on Him in the Torah and the Gospel and the Qur'an, and who fulfilleth his covenant better than God? Rejoice then in your bargain that ye have made, for that is the supreme triumph].²⁸

The Qur'ān says regarding training and preparation of war:

[And make ready for them all ye can of armed force and of horses tethered that ye may dismay the enemy of God and your enemy and others beside them whom ye know not: God knoweth them. And if they incline to peace, incline thou also to it, and trust in God. Lo! He is the Hearer, the knower].²⁹

²⁶ al-Sarakhsī, *Sharh al-Sīr al-Kabīr* (Haiderabad, 1335A.H), p. 4/226.

²⁷ Hamidullah, *The Muslim Conduct*, p. 162.

²⁸ Q 9:11.

²⁹ Q 8:60-61.

These verses of the Qur'ān show that the protection of God's kingdom is a collective duty for Muslims. The Prophet's traditions render military service as an obligatory duty on every Muslim. Ordinary women, children and slaves are exempt but if the rest of the manpower proves insufficient even these people are liable to undertake active military service.³⁰

2.3.2) Lawful war in Islam

Hostile relations other than war

Contemporary International Law recognizes various kinds of hostile relations other than war. War is not necessarily the inevitable result of hostile relations. Islamic Law also recognizes different situations of hostile relations in which the Islamic state is not at war. The various actions that a Muslim state can take to tackle hostile situation other than war are:

1- Reprisals.

Reprisal signifies a mode of force. If a state takes steps against an Islamic State, the Islamic State may also take the same measures against the foreign forces. The Qur'ān says:

[The forbidden things are reciprocal so one who attacks you,
attack him in like manner he attacked you and fear God. And
know that God is with those who fear him]³¹.

There are examples that Islamic States took various reprisal actions as the result of actions taken by their enemies. The expedition of *Mu'tah* was intended for similar

³⁰ Hamidullah, *The Muslim Conduct*, p. 163.

³¹ Q 2:194.

purposes. The Prophet took reprisal actions during the negotiation for the conduct of Hudaibīyya when *Quraysh* arrested his envoy Uthmān.³²

In light of the above discussion it can be said that the war must always be lawful. Muslim jurists have clearly explained the situations in which war is considered lawful. If some one enters into war other than in these situations, it will not be treated as lawful, and it cannot be included in jibād.

2.3.3) Continuation of Existing war

If a war is stopped for some reason or both parties enter a mutual agreement for stopping war for a fixed time, the recommencement of war after that period will be legal. The Qur'ān says:

[And when the months of immunity on account of the treaty (of peace) have passed, stay the associates wherever ye find them, and take them (capture) and besiege them and prepare for them each ambush.]³³

al-Sarkhasī derived from these verses, 'after the passing of fixed period for treaty the war can be restarted.'³⁴

Ibn Qudamah goes as far as to say that starting a war and attacking enemies before informing them about the termination of the treaty is not allowed.³⁵

2.3.4) Defence

Muslims are allowed to fight for their defence. This can be either when the enemy has invaded Muslim territory or is intending to. The Qur'ān says:

[Fight in the path of God against those who fight against you,

³² Hamidullah, *The Muslim Conduct*, p. 158.

³³ Q 9:5.

³⁴ al-Sarkhasī, *Sharh Al- Siyar al-Kabir*, p. 1/680

³⁵ Ibn Qudamah, *Al-Mughni*, p. 13/158.

but do not transgress. Lo! God loveth not transgressors]³⁶

The following verse explains more clearly:

[Sanctions given into those who are fought against because they
have been wronged and God is indeed able to give them victory]³⁷

Ibn Hishām reported that the battles that Muslims fought with the *Quraysh* of Makkah were defensive in nature and Muslims were forced to fight. When the Prophet and other Muslims took refuge in Medina, they were still harassed by the people of Makkah in many ways. They issued an ultimatum to the leader of Madinah for the expulsion of Muslims from Madinah or they (the people of Makkah) would attack Madina.³⁸

The verse of the Qur'an in this regard can also be referred to:

[Will ye not fight a folk who broke their solemn pledges and purposed
to drive out the messenger and did attack you first.]³⁹

2.3.5) War for the Protection of Muslims

A Muslim State or the Muslim community may offer states help in defence; help might be given to them on a case-to-case basis. The Qur'an says:

[And those who believe but have not left their homes ye have duty to
protect till they leave their homes; but if they seek help from you in
the matter of religion, then it is your duty to help (them) except against
a folk between whom and you there is treaty, God is seer of what ye
do]⁴⁰

³⁶ Q 2:190.

³⁷ Q 22:39.

³⁸ Ibn Hishām, *Al-Sira al-Nabawīyya* (Egypt: Mustafa al-halabi, 1955), p. 2/170.

³⁹ Q 9:12.

⁴⁰ Q: 8:72.

The Qur'ān further says:

[How should ye not fight for the cause of God and the feeble among men and of the women and the children who are crying: our Lord! Bring us forth out from this town of which the people are oppressors! Oh give us from they presence some protecting friend! Oh give us from the presence some defender! Those who believe do battle for the case of God and those who disbelieve do battle for the cause of devil]⁴¹

2.3.6) Punitive

Dr Muhammad Hamīdullah says that in cases of hypocrisy, apostasy and insisting in the binding character of *Zakāt* or any other religious duty an Islamic State can initiate war against the violators. The first Caliph of Islam fought against those who refused to pay *Zakāt*. The Islamic government can also fight against rebellions that break treaties with the government.⁴²

The Islamic conception of life is based on the unity of God and the vicegerency of man on earth. This implies that all the faithful are equal, irrespective of race and creed, and also that the word of God should rule supreme in the world. It is this mission to uproot godlessness and the association with God in His divinity that is referred to in Islamic literature by the expression 'In the path of God.'

The Qur'ān says:

[He it is who hath sent his messenger (Muhammad) with the guidance and the religious however much the associates may

⁴¹ Q: 4: 75-76.

⁴² Hamidullah, *The Muslim Conduct*, p. 167.

be averse.]]⁴³

The Qur'ān has recognized a certain amount of latitude in personal judgment, and hence the sharp distinction between Islamic rule and the Islamic faith. According to Islamic law no one can be forced to embrace the Islamic faith. Non- Muslims can live their lives in an Islamic State. The Qur'ān says:

[There is no compulsion in religion. The right direction has become distinct from error]]⁴⁴

In light of the above description it can be said that Jihād is 'striving exertion' in the way of God. It can only be achieved through good deeds and actions. War against enemies is also included in Jihād. But understanding Jihād only as war is not an inclusive understanding. Every war is not Jihād and only lawful wars are included in it. However Muslims are allowed to fight for their defence and protection. Jihād is a common duty. It is not obligatory on all Muslims and participation by one group of Muslims is sufficient. Jihād *bi-l sayf* cannot be conducted without the orders of the government. It cannot be conducted with the aim of forcing people to embrace Islam. According to Islamic teaching, there is no compulsion in faith. Jihād is for the protection of Muslims and Islamic States and not for making people Muslims by force. War against civilians who are not fighting against Muslims is a violation of Islamic injunctions and cannot be included as jihād.

3) Scope of this research

The important points of research scope of this thesis are:

1- This is a library-based research and its data and information have been collected from books of Islamic Law, *Sirah*, *Hadīth* and Islamic History.

⁴³ Q 9:33. The same is repeated in 48:28, 61:9.

⁴⁴ Q: 2:256

- 2- The text for translation is taken from the *Kitāb al- Jihād* of *Al-Mughnī*.
- 3- The other sources of Islamic Law have been used for explanation and analysis of the opinions of Ibn Qudāmah.
- 4- Volume no.13 of Ibn-Qudāmah *Al-Mughnī* is *Kitāb al-Jihād*.
- 5- This study is not based on all the topics covered in *Kitāb al-Jihād*. Only selected parts of it are included in this research. Issues regarding the basic concepts and legitimacy of jihād have been given preference. Some alternative issues have also been included.
- 6- Each section consists of a selected issue. After the title, the original text in Arabic and its translation in English is presented. The translation is followed by analytical comments and explanations in which a variety of sources have been used.
- 7- This thesis is divided into five chapters. The first chapter is the introduction and a general view of jihād.
- 8- The second chapter is about the life and work of Ibn-Qudāmah.
- 9- The translation and explanation of *Kitāb al-Jihād* is presented in the third and fourth chapters.
- 10- The fifth and final chapter consists of the conclusion and results of the research.

4-Objectives Of the Research

This research aims to:

- 1- Identify the legal status of jihād in Islamic Law
- 2- Provide the principles of Islamic Law with regard the conduct of jihād.
- 3- Explain the role of political Leader of Muslims in conduct of jihād.
- 4- Provide the principles of Islamic Law regarding the protection of prisoners, civilians, females, children, animals, infrastructure and birds.

- 5- Present the principles of Islamic Law regarding *amān* (protection)
- 6- Mentioning the principles of Islamic Law with regard to peace treaties.

5- Literature Review of the research

Jihād remains one of the important topics of Islamic Law. It is usually combined in all major compilations of *fiqh* but there are also compilations, which are specified for it. *Kitāb al-Majmūh* attributed to Zāid Ibn Alī (d.179H.) is one of the earliest compilations, *Kitāb Al-kharāj* by Abū Yūsuf and *Al-Aṣḥal* by Muhammad Ibn Hassan al-Shaybanī are early books of *Hanafī* school of Law related to the subject. *Muwatta'* of Imām Mālik (d.179H.) has a special chapter on the subject. *Al-Umm*, which is compiled by al-Shafī has also *Kitāb al-Jihād*. *Bidāyat Al-mujtahid* by Ibn Rushd and *Sharh al-Siyar al-Kabīr* of Al-Sarkhasī also deal with the subject. Along with these original sources, contemporary scholars have also written about this topic. The most famous are *al-Jihād fī al-Islam* by Abū al-'alā' Al Maudūdī, *the Muslim Conduct of Islamic State* by Dr. Muhammad Hamidullah and *The Doctrine of Jihad in Classical and Modern Islam* by Rudolph Peters. The present research is a combination of classical Islamic and contemporary literature. The English translation and explanation of *Kitāb al-Jihād* from *Al-Mughnī* will provide an opportunity for English speakers to study and appreciate this significant work by Ibn Qudāmah.

Chapter Two

The Life and Work of Ibn-Qudāmah

1-The life of Ibn-Qudāmah

1.1-The personality of Ibn-Qudāmah

His full name is Abdullah Ibn Ahmed Ibn Muhammad Ibn Qudāmah Ibn Muqdam Ibn Nāṣer Ibn Abdullah al-Muqadasī al-Demashī al-Saliḥī al-Faqīh al-Zāhid and titled as Shaikh of al-Islam Mūwafaq al -Dīn Abu Muhammad. ⁴⁵Ibn-Qudāmah was born in 541 A.H. in the month of *Sha'bān* in a small village in Palestine named *Jijma'il*. He belonged to a learned family that was famous for its love and depth of knowledge, nobility and righteousness.⁴⁶ His father played an effective role in his primary education. Ibn Qudāmah started his early education with his family and his father was one of his early teachers. He migrated to Damascus (Syria) along with his family at the age of ten.⁴⁷

1.2- Education and Training

Ibn-Qudāmah devoted himself from an early age to seek knowledge. He spent all his life in learning Islamic *Ulūm* research, writing, and working in the different fields of Islamic knowledge. The reading of Qur'ān and memorising of the *Mukhtasar* of *al-Kharqī* were important elements of the syllabus of his early education. In 561 AH, he travelled to Baghdad for higher education along with his cousin (al-Ḥāfiṣh Abd ul Ghanī).⁴⁸ He remained in Baghdad for four years, during which time he continued his education under the supervision of a number of Muslims scholars. He acquired much knowledge and understanding at the *Hanbalī* School of Islamic Law and

⁴⁵ Most of this information has been compiled by imām of *Hanbalī madhab* in Al -Shām Abd ul Qādir Badrān and were attached in the preface of *Al-Mughni* Ibn Qudāmah, *Al-Mughni* (Ciara :Maktibah Aljamhuriya Al arbia), p. 1/3; Ibn Kūhalah, *Muajam al-Mu'alafin*(Beirut: Dar Ihya Alturas Alarabi) p. 6/30.

⁴⁶ Ibn Al Emād, *Shuzrat al-Dhahab fi Akhbār Man Dhahab* (Beruit: Dar Al Maseerat,1979), p. 5/88.

⁴⁷ Abdul Qādir Badrān, *Al-Mughni*, p. 1/3.

⁴⁸ Abdul Qādir Badrān, *Al-Mughni*, p.1/3.

superseded his classmate, showing his extraordinary ability in the understanding of *fiqh*. He left Baghdad for two years to go to Damascus and returned to Baghdad in 567 AH. In 574 AH, he made pilgrimage to Makkah for *Hajj*. After the *Hajj* he arrived back in Baghdad with an Iraqi delegation to spend another year working under the supervision of Ibn al-Muna al-Ḥanbalī.⁴⁹ Then he moved to Damascus and started the compilation of his famous book *al-Mughnī fi Sharḥ al-Kharqī*.⁵⁰ Imām Al-Kharqī (Umar Ibn al-Ḥusayn Abū al-Qāsem al-Kharqī, died in 334AH) is one of the most famous jurists of Ḥanbalī *fiqh* who benefited from scholars like Ṣaleh and Abdullah, sons of Imām Ahmed Ibn Hanbal, founder of the *Hanbalī* School of thought. He summarised all the opinions of Imām Ahmed Ibn Hanbal in his *Mukhtasar*. The book of Ibn-Qudāmah is an explanation of this book.⁵¹

1.3-Teachers of Ibn-Qudāmah

Ibn Qudāmah received his early education from his father Ahmed Ibn Muhammad Ibn Qudāmah bin Muqdam. Abi al Makārim bin Hilal and Abi Alma'li bin Ṣabir were also his teachers during his early education. During his time in Baghdad he benefited from scholars like Hobāl Allah al-Daqaq, Abdulqādir al-Jaīlānī, the sufi sheikh, and many others. Ibn- Qudamah studied the text of *Mukhtasar al-Kharqī* from al Mubarik bin al Tabakh for a short period in Makkah. Then he was attached to Abū al-Fatah bin al Muna and was taught the principles of Hanbali Fiqh and the principles of juristic differences.⁵²

⁴⁹ Ibn Al Emād, *Shuṣrat al-Dhahab fi Akhbār Man dhahab*, p. 5/89.

⁵⁰ The details of this book are presented in the second part of this chapter.

⁵¹ Ibn-Qudāmah, *Al-Mughnī*, p. 1/5.

⁵² Abdul Qādir Badrān, *Al-Mughnī*, p. 1/6.

1.4- Famous Students of Ibn Qudamah

Ibn Qudāmah became Imām and chief of the Mosque of Damascus after the death of his brother Abī Umar. He used to deliver his lectures about Hanbali Fiqh in the circle of study in the al-Jāmi' al-Musafiri in Damascus.⁵³ Due to his scholarship and commitment to teaching, he became renowned as a font of knowledge and many students graduated after his training. Ibn Qudāmah's students became scholars of *Hanbalī* legal school in different parts of the Islamic world. The most famous of his students was; Shams al-Dīn a'bū Muḥamed A'bdulrahman Ibn Muḥamed Ibn Aḥmed Ibn Qudāmah al-Muqadasī aljamā'īlī: The author of *Al-Sharh al-Kabir*, which was based on *Al-Mughni* as a main reference. He was a close relative of Ibn Qudāmah and died in 682 AH. Saif al-Dīn Abū al'Abās Aḥmad Ibn 'Esah Ibn Abdullah Ibn Qudāmah alMuqadasī al-Salehi al-Iḥanbalī, died in 642 AH was also his student.

Ibn-Qudāmah was famous not only for his scholarship but also because of characteristics that were recognized in his personality by a number of other scholars who have praised him. The opinions of some of the scholars follow:⁵⁴

Sabṭ Ibn al-Jawzī said:

'He was proficient Imām in the various fields of knowledge. There was no one in his lifetime better than him in his consciously submission to God and abstentions of the worldly life, except his brother Abi 'Umar. He was shy, humble, keen to help the needy and generous. He spent a lot of time in reciting the Holy Qur'ān throughout night.'

Imām Aḥmad Ibn Taymīya said:

⁵³ Ibn Al Emād, *Shuzrat al-Dhahab fi Akhbār Man dhahab*, p.5/89.

⁵⁴ Ibn Al Emād, *Shuzrat al-Dhahab fi Akhbār Man dhahab*, p.5/89.

‘No one possessing more understanding of the *Hanbali Madhhab* entered Syria after al-Awzā’i, other than Shaikh al-Mūwafaq.’

Ibn Kathīr said that he was the *Sheikh al-Islam, Imām*, scholar, and extraordinarily proficient in different fields of Islam. There was no one to be found who was more expert in his area than he in his time.⁵⁵

1.5 - Extra ordinary Spiritual Power of Ibn Qudāmah (*Karāmāt*)

It is believed by Muslims that God gives extraordinary spiritual powers to his pious and closest followers. In Islamic beliefs this power is named as *Karāmāt*. With the help of this power these people can perform extraordinary tasks, which ordinary people cannot perform. This power was reported to have been blessed upon Ibn-Qudāmah.⁵⁶

Sabṭ bin al-Jawzī said that al-Mūwafaq had the powers to read what was in the minds of other people, it was reported from Abū Abdullah Fadel al-’A’nākī. He said one day, I wished I could build a school for al-Mūwafaq and give him one thousand *dirhams* every day. Then I came to him after some days. He looked at me and smiled and said: ‘when a person intends to do something, God rewards him for it. Another story was reported from an ill person Abū Hassan Ibn Hamdān al-Jerā’i. He said, I was ill and unable to move for twenty-seven days and was wishing to die. Mūwafaq visited me early at night and recited the following verse from the Qur’ān:

[And we send down the Qur’ān that which is a healing and a mercy to those who believe.]⁵⁷

⁵⁵ Abdul Qādir Badrān, *Al-Mughni*, p. 1/4.

⁵⁶ Ibid.

⁵⁷ Q 17:87.

Then he rubbed the sick area of my body. I immediately felt better and then cured. The caller for prayer (*Muādhin*) at Damascus Mosque said: 'One night al-Mūwafaq stayed in the mosque and I saw doors were opening and closing automatically for him'.⁵⁸

1.6-Work of Ibn-Qudamah

Ibn Qudāmah was considered one of the most able and famous scholars of his time. He produced numerous scholarly and beneficial works on subjects such as *usūl al-Dīn*, *Ḥadīth*, *Fiqh*, *Raḡā'iq* (heart-softening material), and Arabic Language. These books (see Appendix) are considered significant in different areas of Islamic Sciences⁵⁹.

1.7-Death of Ibn Qudāmah

Ibn Qudāmah died in Damascus in 620 AH on Sat. 1st Shawwal, 620 AH. His funeral prayer was performed by a great number of people. He was buried in the graveyard located in Qāsyūn Mountain.⁶⁰

2- Introduction to *Al-Mughni*

2.1- Facts and figures of *Al-Mughni*

Al-Mughnī of Ibn Qudāmah is a commentary on the *Mukhtasar* of al *Kharqī*. The book is divided into 57 books that are on a variety of topics of *fiqh*. These 57 books are further divided into 2027 matters (*Masā'il*) of *fiqh*. Out of these 57 books one book is *kitāb al-Jihād*. This book contains 67 matters related to *jihād*.

⁵⁸ Abdul Qādir Badrān, p. 1/5

⁵⁹ Ibid; Ibn Kubalāh, p. 6/31.

⁶⁰ Abdul Qādir Badrān, *al-Mughni*, p. 1/4; Ibn Kubalah, *Muajam al-Mu'alaqin*, p. 6/31.

2.2- Methodology of Ibn Qudāmah in *Al- Mughnī*

Ibn Qudāmah was learned in the *Hanbalī* School of Law but he wrote *Al Mughni* with the intention of making it a reference for all Schools of Islamic Law. He collected arguments and rules of *fiqh* from all the schools with evidence. The evidence and sources of his compilation were taken from the Qur'ān and *Sunna*. He also used the sayings of the companions of the Prophet Muhammad as a source. He presented the opinions from around the Islamic world at that time through a critical approach. He also analysed opinions of the Muslim jurist on the basis of Qur'ān and *Sunna*. Being a *Hanbalī* scholar, in matters of *fiqh*, he gave priority to the *fiqh* of *Hanbalī*, but he did not criticise other Schools of Islamic Law. Ibn Qudāmah is known for his respect and understanding of the opinions of Jurists from different Schools of Islamic Law.

The important points of *Al-Mughni* methodology are:

- 1- *Kitāb al- Jihād* is divided into different topics (*Masā'il*). Sixty-seven issues (*Masā'il*) are included in this book. They are numbered from issue no.1619 to issue No. 1686.
- 2- The topic of each issue is the opinion of Imām Kharqī. The text under that issue is the work of Ibn Qudāmah.
- 3- At times Ibn-Qudāmah provides an explanation of his subject, which uses sources from the *Qur'ān* and *Sunna*. The jurists usually derived their opinions from these sources. The Qur'anic verses are mentioned with the use of words like (Allah said), (this confirmed by the Qur'anic verses) and (on the basis of the Qur'anic verses).
- 4-*Ahādīth* are mentioned with the chain of the authentic narrators and its sources are introduced in the text.
- 5- Some issues are divided into sub-issues with the title of *fasl* (sub division).

2.3-Sources of *Al-Mughnī*

He summarised the *fiqh* of *Fuqahā*⁶¹ with the necessary evidence he collected from a number of books of *fiqh* such as *Ummuhāt al-Aḥkām* and *Ummahāt al-Masā'il*. Through this summarize of *fiqh*, he gave a concise and compact presentation of all the schools of Islamic Law (*Madhāhib*), the books of *Sunna* and *al-āthār*, the *Madhāhib* of the Prophet's companions.

Al-Hāfiz Ibn Rajab, who is the author of *Ṭabaqāt al-Ḥanābilah*, reported that:

'*Al-Mughnī* was written in the way similar to *Imām* Aḥmed Ibn Hanbal and *Imāms* of *Ḥadīth*. The book was written with a large number of authentic *hādīth*. He avoided involvement in subordinate and minor matters and presented the Qur'ān and *Sunna*'s *ahkām* without distortion and manipulation'⁶²

2.4-Significance of *Al- Mughnī*

The author of *Manār al-Islām*, Muhammad Rāshid Riḍā (a contemporary Muslim jurist from Egypt) said:

'al-Sheikh 'ez al-Dīn Ibn Abdul salam, the greatest scholar of his time, preferred the book of *al-Muḥalla* (written by Ibn Ḥazm) and *al-Mughnī* to other books of *fiqh*. Hence I became interested in these two books and, extensively examined the books and concluded that these books are the best books of *fiqh*'⁶³.

⁶¹ A Muslim scholar who gives *fatwa* is called *faqīh* for singular /or *fuqahā* for plural

⁶² Ibn Al Emād, *Shuḥrāt al-Dhahab*, p. 5/89

⁶³ Ibn Qudāmah, *al-Mughnī*. p. 1/ 11

The undisputed position of his work is confirmed by the scholars of other schools of law like Ibn 'Abdulsalām.⁶⁴ Muhammad Rshid Ridā observed that *Al-Mughnī* encouraged Muslims to study the rules of *fiqh* in each *madhhab* (school of law). It makes Muslims aware of a variety of interpretations to *al-Ahkām al-Shar'īah* (Islamic law). This book also discovers the common ground between the schools of Islamic Law. This book contributed positively in understanding the harmony between the different schools of Islamic Law.⁶⁵ The author of this book avoided going into details in discussing differences among *Madhāhib*, which may encourage division and hostility. Instead, he concentrated on serious matters of *fiqh* and gave acceptable interpretations by all *Madhāhib* and tried to save the unity and integrity of Islam and Muslims. The book made Muslims aware of *Masā'il al-'Ijmā'* (Matters on which the schools of thoughts are united) which are for all Muslims to follow, while the disputed matters were left for each school of law to deal with according to its own interpretation.⁶⁶

⁶⁴ Ibn Al Emād, *Shuzrt al-Dhahab*, p. 5/91.

⁶⁵ Ibid p. 5/91.

⁶⁶ See for details :Ibn Qudāmah, *al-Mughni*, p. 1/ pp.17-18. Ibn Al Emād, *Shuzrt al-Dhahab*, p. 5/92; Ibn Kūhalah, *Muajam al-Mu'atafin* (Beirut:Dar Ihya Aṭluras Alarabi), p. 6/31.

Chapter Three

Legitimacy of Jihād in *al-Mughnī*

1- Legal Status of Jihād

Kitāb al-jihād starts without any title. In the first page, the author mentions three sayings of the Prophet Muhammad regarding conditions and rewards of Jihād⁶⁷

روى أبو هريرة ، رضى الله عنه ، عن النبي ﷺ قال : « اتدب الله لمن خرج في سبيله ، لا يُخرجهُ إلا جهاد في سبيلي ، وإيمان بي ، وتصديق برسولي ، فهو على ضامن أن أدخله الجنة ، أو أرجعه إلى مسكنه الذي خرج منه ، نائلاً مائلاً من أجر أو غنيمه » . مُتَّفَقٌ عَلَيْهِ . ولسلم : « مثل المُجاهد في سبيل الله ، كمثل الصائم القائم » . وعن أنس ، رضى الله عنه ، قال : قال رسول الله ﷺ : « لَعْدُوهُ في سبيل الله أو رُوْحَهُ ، خَيْرٌ مِنَ الدُّنْيَا وَمَا فِيهَا » . رواه البخاري .

‘Abū Hurairah narrated that the holy prophet said: ‘Allah guarantees him who strives in his cause and whose motivation for going out is nothing, but, Jihād in his cause and belief in his word, that he will admit him into paradise or bring him back to his dwelling place, where he has come out, with what he gains of reward or booty’.⁶⁸

In the report of Imam Muslim it is also added that The Prophet said, ‘The example of *mujāhid* in Allah’s cause is like a person who observes fast and offers prayers continuously’.⁶⁹

Anas Ibn Mālik narrated that, the Prophet said: ‘A single endeavor in Allah’s cause in the afternoon or in the forenoon is better than the world and whatever is in it’.⁷⁰

Ibn Qudāmah has mentioned these three hadith at the start of his *kitāb-al-jihād*. These are related to the conditions of Jihād. According to Islamic teachings, human beings

⁶⁷ Ibn Qudāmah, *Al-Mughni*, p. 13/5.

⁶⁸ Al Bukharī, *Al-Jāmi’ al-Sahih*, *Bab al-Jihad Min al-Emān*, p.1/15-16.

⁶⁹ Muslim, *Al-jāmi’ al-Sahih*, *Bab Fadul al-Jihād wal-Khrij Fi Sabil Allah* (Beruit: Dar Alifkar, 1983), p. 3/1495, 1496.

⁷⁰ Al Bukharī, *al-Sahih*, *Bab al-Ghudwa wa al-Roha*, p. 4/20

are vicegerents of God on earth. In this capacity, it is the duty of every Muslim to struggle in God's recommended way or path. That is named *Jihād Fi Sabīl Allah*. It is one of the important duties that are imposed on Muslims but it cannot be for the self-seeking aggression at the expense of others but simply to establish a kingdom of God on earth.⁷¹

It is clearly mentioned in the above saying of the Prophet that only Jihād through belief in God and his Prophet will be accepted. It is like worship and its reward will be from God. Regarding this reward Imam Ibn 'Taymiya says:

Jihād brings great reward for Muslims in present life and the day after.

It includes all type of worships like the loving of Allah, being faithful to him, dependence upon him and willing to scarify the most expensive and dearer in the way of Allah ⁷².

It is clear from these sayings of the Holy Prophet that the slightest desire for worldly gain pollutes the purity of noble jihād. Jihād can only be for the purpose of obeying God's commands. The Prophet said:

'If some one will not fight in Jihad for the sake of God and desires personal gains, he would not be rewarded with paradise.'⁷³

Thus in light of the above mentioned traditions it can be said that Jihād does not mean killing and plundering others or offering one's own self to be killed. It is a supreme sacrifice required of an idealist. Sacrifice both of property and life for the sole purpose of obeying the commands of the creator and Master, God Almighty.⁷⁴

⁷¹ Hamidullah, *The Muslim Conduct*, p 189.

⁷² Ibn Taymiya, *Al-Syasah Al-Shari'ah*, p. 42; Muhammed Al-Ali, *Minhaj al-Islam*, p. 323.

⁷³ Al Bukhari, *al-Sahih*, p. 3/45-55.

⁷⁴ Hamidullah, *The Muslim Conduct*, p. 189.

Ibn-Qudāmah discussed the status of Jihād in issue number 1619. He starts his discussion with the following saying of Imām Kharqī:

١٦١٩ - مسألة ؛ قال : (والجهاد فرضٌ على الكفاية ، إذا قام به قومٌ ، سقط
عن الباقي)

‘Jihād is a collective duty (*Fard Kifāya*) if it is performed by a group of people in one community, it will not remain obligatory on remaining’.

In explanation of this Ibn-Qudāmah says:

معنى فرض الكفاية ، الذي إن لم يُقْمَ به مَنْ يَكْفِي ، أثمَ النَّاسُ كُلُّهُمْ ، وإن قامَ به مَنْ يَكْفِي ، سقطَ عن سائرِ النَّاسِ . فالخطابُ في ابتدائه يتناول الجميع ، كفرَض الأعيان ، ثم يختلِفان في أنَّ فرضَ الكفاية يسقطُ بفعلِ بعضِ النَّاسِ له ، وفرضُ الأعيان لا يسقطُ عن أحدٍ بفعلِ غيره . والجهاد من فروضِ ”الكفایاتِ“ ، في قولِ عامةِ أهلِ العلمِ .

‘Collective duty (*Fard Kifāya*) means that if those who are capable to do it do not perform it, it will be a sin on the part of all the people. But if it is performed by some of the capable individuals then its performance will not be obligatory on others. This legal order starts by indicating it obligatory for all but then specifying that it is a collective duty and the performance by one group will relinquish others from the performance of this duty. Duties obligatory on all are required to be performed by all. According to the general opinion of the learned people, jihād is a collective duty.’⁷⁵

The above citation is about the legal status of Jihād in Islam. Muslim Jurists are agreed that it is a collective and not a personal duty. A personal duty that is named ‘*Fard Ayn*’ is to be observed by each and every one⁷⁶. According to the majority of scholars, the compulsory nature of it is found in Qur’ān:

⁷⁵ Ibn Qudāmah, *Al-Mughni*, p. 13/6.

⁷⁶ Hamidullah, *The Muslim Conduct*, p. 161.

[Prescribed for you is fighting, though it be hateful to you]⁷⁷

Islamic Law clearly differentiates between *Fard Ayn* and *Fard Kifāya*. The (*Fard Ayn*) is necessary to be performed by each one but (*Fard Kifāya*), if it is properly carried out by a limited number of people, it is considered cancelled in favour of the remaining people.⁷⁸ A group of jurists disagree with the majority and consider it an individual obligation compulsory on all. Ibn Qudāmah mentions this opinion along with the arguments as below⁷⁹:

وَحُكِيَ عَنِ سَعِيدِ بْنِ الْمُسَيَّبِ ، أَنَّهُ مِنْ فُرُوضِ الْأَعْيَانِ ؛ لِقَوْلِ اللَّهِ تَعَالَى : ﴿ أَفِرُّوا خِفَافًا وَثِقَالًا وَجَاهِدُوا بِأَمْوَالِكُمْ وَأَنْفُسِكُمْ فِي سَبِيلِ اللَّهِ ﴾ . ثُمَّ قَالَ : ﴿ إِلَّا تَنْفِرُوا يُعَذِّبْكُمْ عَذَابًا أَلِيمًا ﴾ . وَقَوْلُهُ سَبْحَانَهُ : ﴿ كُتِبَ عَلَيْكُمُ الْقِتَالُ ﴾ . وَرَوَى أَبُو هُرَيْرَةَ ، رَضِيَ اللَّهُ عَنْهُ ، أَنَّ النَّبِيَّ ﷺ قَالَ : « مَنْ مَاتَ وَلَمْ يَغُزْ ، وَلَمْ يُحَدِّثْ نَفْسَهُ بِالْعَزْوِ ، مَاتَ عَلَى شُعْبَةٍ مِنَ التَّفَاقُ » . رَوَاهُ أَبُو دَاوُدَ .

‘It is reported from Sa’id Ibn al-Musayyab that he said, ‘Jihād is from the individual obligations’. He gave this opinion on the basis of the following sayings of God and The Prophet. God said: [March faith, whether you are light (being healthy, young and wealthy) or heavy (being ill, old and poor) in the way of Allah.]⁸⁰ God also said: [if you march not faith, he will punish you with a painful treatment]⁸¹ God Almighty also declared: [Jihād is ordained for you.]⁸² Abū Hurairah reported that The Prophet said, ‘who died without participation in war or without thinking about participation in it, he died with some part of hypocrisy’.⁸³

⁷⁷ Q 2:16.

⁷⁸ Ibn Rushd, *Pidāyat al-Mujtahid*, p.409

⁷⁹ Ibn Qudāmah, *Al-Mughni*, p. 13/6

⁸⁰ Q 9:41.

⁸¹ Q 9:31.

⁸² Q 2:216.

⁸³ Abū Dawūd, *Al-sunan*, *Kitāb Al-jihād* (Pakistan: Maktibah Al-isharia), p. 2/10.

On the basis of the above-mentioned arguments, one small group declared it as *fard ayn* but the majority did not accept *jihād* as *Fard Ayn*. They think that these arguments indicate the importance of *jihād* and not declaring it *Fard Ayn* obligatory for all. The arguments in favour of declaring *jihād Fard Kifāya* are stronger. Ibn Qudāmah cites these arguments as below⁸⁴:

وَلَنَا ، قَوْلُ اللَّهِ تَعَالَى : ﴿ لَا يَسْتَوِي الْقَاعِدُونَ مِنَ الْمُؤْمِنِينَ غَيْرُ أُولَى الضَّرَرِ وَالْمُجَاهِدُونَ فِي سَبِيلِ اللَّهِ بِأَمْوَالِهِمْ وَأَنْفُسِهِمْ فَضَّلَ اللَّهُ الْمُجَاهِدِينَ بِأَمْوَالِهِمْ وَأَنْفُسِهِمْ عَلَى الْقَاعِدِينَ دَرَجَةً وَكُلًّا وَعَدَ اللَّهُ الْحُسْنَى ﴾ . وَهَذَا يُدَلُّ عَلَى أَنَّ الْقَاعِدِينَ غَيْرُ أَتَمِّينَ مَعَ جِهَادِ غَيْرِهِمْ ، وَقَالَ اللَّهُ تَعَالَى : ﴿ وَمَا كَانَ الْمُؤْمِنُونَ لِيَنْفِرُوا كَافَّةً فَلَوْلَا نَفَرَ مِنْ كُلِّ فِرْقَةٍ مِنْهُمْ طَائِفَةٌ لِيَتَفَقَّهُوا ﴾ . وَلَئِنْ رَسُولَ اللَّهِ ﷺ كَانَ يَنْعَثُ السَّرَايَا ، وَيُقِيمُ هُوَ وَسَائِرُ أَصْحَابِهِ .

‘Our opinion is based on the following sayings of God: [Not equal are those of the believers who sit (at home), except those who are disabled by (injury or are blind or lame), and those who strive hard and fight in the cause of Allah with their wealth and their lives. Allah has preferred in grades those who strive hard and fight with their wealth and their lives above those who sit (at home). Unto each, Allah has promised well.]⁸⁵ This is proof that those who stay behind (and do not physically participate in the *jihād*) are not sinners, provided others are waging *jihād*. God further said: [And it is not (proper) for the believers to go out to fight (*Jihād*) all together. Of every troop of them a party only should go forth.]⁸⁶ Holy Prophet (S.A.W) was sending troops and was remaining behind himself with his companions’.

⁸⁴ Ibn Qudāmah, *Al-Mughni*, p. 13/6-7.

⁸⁵ Q, 4:95

⁸⁶ Q, 9:122

The above-mentioned arguments clearly identify the nature of Jihād. Declaring it *Fard Kifāya* is also matched with the practices of the Prophet. During the period of the Prophet all Muslims did not use to go for Jihād. He used to let some people in Medina go for Jihād. His action implies that this activity is *Fard Kifāya*. The meanings of the above mentioned verses are also very clearly indicate that all Muslims together should not go for jihād.⁸⁷

To strengthen his opinion, Ibn Qudāmah also quotes the opinion of Ibn -Abbas in which he said that these verses used by Sa'id Ibn Al-Musayyab for declaring Jihād individual duty were abrogated by the following verse:⁸⁸

[And it is not (proper) for the believers to go out to fight (jihād) all together. Of every troop of them, a party only should go forth]⁸⁹

He further clarified that jihād could be *Fard Ayn* if it is ordered by the government that every person must participate in Jihād as the Prophet did during the war of Tabūk.⁹⁰

1.1- The role of the government in the conduct of Jihād

Ibn Qudāmah is very clear in elaborating that Jihād can be only conducted under the order of the government or rulers. He mentioned the following saying of the Prophet.

‘Participate in the war when you are asked (by the government) to do so’.⁹¹

This *hadīth* shows that the administration of Jihād is the duty of the Muslim government. The Prophet as head of state himself organised wars or appointed his senior companions administrators of the war. Imām Abū Yūsuf says: ‘No army can

⁸⁷ Ibn Rushd, *Bidāyat al-Majthid*, p.409

⁸⁸ Ibn Qudāmah, *Al-Mughni*, p. 13/7

⁸⁹ Q 9: 122.

⁹⁰ Ibn Qudāmah, *Al-Mughni*, p. 13/7

⁹¹ Al Bukhari, *al-Sahih*, *Bāb La Yahil al-Qital in Makkah*, p. 3/18.

march without the permission of the Caliph.⁹² Al Mawardī and Al Sarkhasī are of the same opinion.⁹³

Ibn Qudāmah discusses status of Jihād further and says:

ومعنى الكفاية في الجهاد أن ينهض للجهاد
قوم يكفون في قتالهم ؛ إما أن يكونوا جندا لهم دواوين من أجل ذلك ، أو يكونوا قد أعدوا
أنفسهم له تهيئة بحيث إذا قصدتهم العدو حصلت المنفعة بهم ، ويكون في الثغور من
يدفع العدو عنها ، ويثبت في كل سنة جيش يغيرون على العدو في بلادهم .

‘Jihād as a collective duty means that only those, who are capable of fighting with the enemies, will participate in it. They might have been selected for that purpose in the troops (of the government) or they want to participate in it as volunteers (so that they be could benefited). They should be harboured so that they can repel the enemy. Jihād should be undertaken once a year.⁹⁴

Ibn Qudāmah describes here a different view for the conduct of Jihād. He is of the opinion that people who participate in war should be recruited in an army and they should participate with full protection and preparation. He concludes that it is in general *fard kifāya* but it becomes compulsory in certain cases such as:

فصل : ويتعين الجهاد في ثلاثة مواضع ؛ أحدها ، إذا التقى الرُحفان ، وتقابل
الصفان ؛ حرم على من حضر الانصراف ، وتعين عليه المقام ؛ لقول الله تعالى :
﴿ يَا أَيُّهَا الَّذِينَ ءَامَنُوا إِذَا لَقِيتُمْ فِئَةً فَاثْبُتُوا وَاذْكُرُوا اللَّهَ كَثِيرًا ۖ ﴾ . وقوله :
﴿ وَأَصْبِرُوا إِنَّ اللَّهَ مَعَ الصَّابِرِينَ ﴾ . وقوله تعالى : ﴿ يَا أَيُّهَا الَّذِينَ ءَامَنُوا إِذَا لَقِيتُمْ
الَّذِينَ كَفَرُوا زَحَفًا فَلَا تُلْوَهُمُ الْأَذْيَارَ ۚ وَمَنْ يُلْوَهُمْ يَوْمَئِذٍ دُبُرُهُ إِلَّا مُتَحَرِّفًا لِّقِتَالٍ أَوْ
مُتَحِيزًا إِلَىٰ فِتْنَةٍ فَعَدَّ بَاءَ يَعْصِبُ مِنَ اللَّهِ ﴾ . الثاني ، إذا نزل الكفار ببلد ، تعين على
أهله قتالهم ودفعهم . الثالث ، إذا استنفر الإمام قوما لزمهم النقيض معه ؛ لقول الله
تعالى : ﴿ يَا أَيُّهَا الَّذِينَ ءَامَنُوا مَا لَكُمْ إِذَا قِيلَ لَكُمْ أَنْفِرُوا فِي سَبِيلِ اللَّهِ أَنْتُمْ قُلْتُمْ إِلَى
الْأَرْضِ ﴾ . الآية والتي بعدها . وقال النبي ﷺ : « إِذَا اسْتَنْفَرْتُمْ فَأَنْفِرُوا » .

⁹² Abū Yūsuf, *Kitāb Al-Kharāj* (Egypt, 1302 A.H), p.123.

⁹³ Al Mawardī, *'Al-a hkām al-sultaniyya'*, p.57; Alsarakhsi, *'Sharh Alsiyar Alkabit'*, p. 4/226.

⁹⁴ Ibn Qudāmah, *Al-Mughni*, p. 13/ 8.

‘In following three cases *jihād* became obligatory on every eligible person (*Fard Ayn*). Firstly, when troops are ready to fight in its full formation. It is the duty of every person who is present there that he should not move from there and remain engaged in the war. God said: [You who believe! When meet (an enemy) force, take a firm stand against them and remember the name of Allah much]⁹⁵ and God Almighty said [Be patient God is with them and who have patience]⁹⁶ and God said [You who believe! When you meet those who disbelieve, in a battlefield, never turn your back on them. And whoever turns his back on them on such a day--unless it be a stratagem of war or to retreat to a troop (of his own) -- he indeed has -upon himself wrath from Allah. And his abode is Hell, and worst indeed is that destination.]⁹⁷ Secondly, when *al-Kuffār* attacked any country, it is a duty of the people of that country to defend them and the third situation is that in which the ruler asks the people to go to war. It is duty of all the people to go with their leader. God said: [To you who believe! What is the matter with you, that when you are asked to march forth in the cause of Allah (i.e.) *Jihād* you cling heavily to the earth? Are you pleased with the life of this world rather than the hereafter? But little is the enjoyment of the life of this world compared to the hereafter.]⁹⁸. The Prophet also said, ‘that when you are asked (by the rulers) to participate in the war, participate in it’.⁹⁹

⁹⁵ Q 8: 45.

⁹⁶ Q 8: 46.

⁹⁷ Q 8: 15-16.

⁹⁸ Q 9:38.

⁹⁹ Al-Bukharī, *Al-Sahīh, Bāb Fadl Al-jihād*, p. 3/18.

In the above citation, Ibn Qudāmah mentioned these three situations in which war became compulsory on every one who has the capacity of fighting with the enemies. These are extraordinary situations. In these situations, even today, civilians are also called to participate in war along with the military.

2) Conditions for participation in Jihād

Ibn Qudāmah discusses the conditions for participation in war in a separate discussion. He said that there are seven conditions necessary for participation in jihād. These conditions are belief in Islam, puberty, wisdom, liberty, manhood, good health and the necessary money for participation in it. He also describes details of all these conditions along with its authority from Qur'ān and *Sunna*.¹⁰⁰ The other jurists are also agreed upon these conditions. Ibn Rushd says that the obligation to participate in jihād applied to adult free men who have the means at their disposal to go to war and who are healthy and not suffering from any chronic disease.¹⁰¹ Ibn Qudāmah mentioned that manhood is one of the prerequisites of war. He derived this opinion from one report of Aisha in which the Prophet said that females could participate in jihād in which there is no war (*Qitāl*) Like *Hajj* and *Umra*.¹⁰² In the period of the Prophet, women took part in the battles as nurses, transporters of the wounded and dead, cooks and also as general helpers. In emergency situations women participated in wars.¹⁰³

Ibn Qudāmah concludes that during the days of war, participation in jihād, was obligatory once a year for eligible individuals. He also discusses peace and cease-fire situations. He is of the opinion that if war is not in the interest of the Muslims, then it

¹⁰⁰ Ibn Qudāmah, *Al-Mughni*, p. 13/8-9.

¹⁰¹ Ibn Rushd, *Bidāyat al-Mujtahid*, p. 412

¹⁰² Al Bukharī, *Al-Sahīh*, p 3/24

¹⁰³ This matter is discussed in separate discussion of this chapter at No.7

is not necessary. It can be derived from his opinion that the ultimate goal of Jihād is not war but the protection of the Muslims' interests.

3- Importance of Jihād

After discussing legitimacy and conditions of Jihad, Ibn Qudāmah discusses the justification and importance of Jihād in issue number 1620.¹⁰⁴ He starts this discussion with the following opinion of Imām Kharqī:

١٦٢٠ - مسألة ؛ قال : (قَالَ أَبُو عَنَيْدَةَ اللَّهِ : لَا أَعْلَمُ شَيْئًا مِنَ الْعَمَلِ بَعْدَ الْفَرَائِضِ أَفْضَلَ مِنَ الْجِهَادِ) .

‘Abū Abdullah Imām Ahmed bin Hanbal said, ‘I do not know any action more morality than Jihād after obligations (*Alfarā'id*)’¹⁰⁵

Ibn Qudāmah explains this opinion with the following sayings of the Prophet:

Masūd reported that he asked the Holy Prophet, ‘which deed is dearest to Allah?’ He replied, ‘to offer the prayers at its fixed times’. I asked “After that?” He said, ‘To be good and dutiful to your parents’. I again asked ‘after that?’ He said, ‘participation in Jihād that is conducted in the way of God’.¹⁰⁶

This *hadith* is clear in its meaning and stipulates that only Jihād in the way of God is required from Muslims. Jurists have stated that any war, which is not conducted for the sake of God and does not fulfil the conditions laid down by God will not be treated as Jihād.

¹⁰⁴ Ibn Qudāmah, *Al-Mughni*, see issue no 1620.

¹⁰⁵ Ibn Qudāmah, *Al-Mughni*, 13/10.

¹⁰⁶ Al Bukharī, *Al-Sahih*, p. 7/159.

4-Warfare and Jihād

4.1-Sea Warfare

The Qur’ān and Sunna elaborate on sea warfare and also describe its dangers. It even refers to a pre Islamic practice in certain regions to prohibit the visit of foreign ships due to search and confiscations. This practice is considered unjust by the Qur’ān:

[As for the ship, it belonged to *Miskīn* (poor people) working in the sea.
So I wish to make a defective damage in it, as there was a king behind them who seized every ship by force]¹⁰⁷

Ibn Qudāmāh specifies issue number 1621 for describing the importance of sea warfare. He starts his discussion with the following opinion of Imam Kharqī:

مسألة ؛ قال : (وَغَزَوْ الْبَحْرَ أَفْضَلُ مِنْ غَزْوِ الْبَرِّ)

‘Sea warfare is better than war on land.’

He explains by stating a tradition of the Prophet that war at sea is legitimate.

‘Anas Ibn Mālik narrated that once the Holy Prophet slept and then woke up smiling. Um Harām said I asked him, ‘why are you smiling?’ He replied, ‘some people from my *umma* were brought before me as fighters in Allah’s cause (on board a ship) this is why I smile. They were like kings on thrones.’¹⁰⁸

Ibn Qudāmāh also mentions;

Ibn Mājah reported that I have heard the Messenger of Allah saying ‘A martyr who has been killed at sea (on board a ship) is like two martyrs on the land (twice the reward of that who is been killed on the land). *Mujāhid* with seasickness is like an injured *Mujāhid* on the land and the reward of a *Mujāhid* who is trying to move the ship between the waves is like a person who has spent all his life going around the world to worship Allah.

¹⁰⁷Q 18:79.

Allah appointed an angel to take the soul of human kind except the soul of the sea martyr as Allah himself takes his soul. All the sins that the sea martyr committed will be forgiven including loans. All the sins of the land martyr will be forgiven except his loans to the people.¹⁰⁹

The history of Muslims witnessed that Muslims used sea warfare during the early Islamic period. The Prophet used the sea as a means of communication to transport men and perhaps also material during the battle of *Mu'tah*.¹¹⁰ In the 9th *Hijra*, the Prophet sent a detachment against an island in the Red Sea, where negro pirates had come to harass inhabitants of the Muslim territory.¹¹¹ In the same year a treaty was concluded with the inhabitants of the port of *Ailah*, in which important provisions were explicitly made regarding boats and sea-borne traders.¹¹²

The small beginning of both pacific and belligerent use of the navy during the time of the Prophet did not take long to convert the camel rider to efficient use of naval power. It is played an important for the expanding Muslim empire.¹¹³

5- The rule of command in war

Muslim jurists have discussed the role of the leader in organising war. They are agreed that individual Jihād is possible. It is the duty of the government to organise it when required for the safety of the Muslim community. They are also agreed that it is not legitimate without the permission and guidance of the ruler. Ibn Qudāmah starts this topic with the following opinion of Imām al-Kharqī:

مسألة؛ قال: (وَيُعَزَى مَعَ كُلِّ بَرٍّ وَفَاجِرٍ) .

¹⁰⁸ Al Bukharī, *al-Sahīh*, p. 4/19.

¹⁰⁹ Abū Dawūd, '*Alsunan*', *Kitāb Al-jihad*, p. 2/5.

¹¹⁰ Ibn 'Asaker, *Tarikh Dimashq*, p. 1/96.

¹¹¹ Ibn S'ad, *Al-tabaqāt* (Beirut: Dar Sada, 1958), p. 2/1.

¹¹² Ibn Hishām, *Al-sirah al-Nabawyya*, p. 2/1,118.

¹¹³ Hamidullah, *The Muslim Condot*, p. 233.

‘Military expeditions are conducted with everybody, whether pious (*Bār*) or dissolute (*Fājir*)’.¹¹⁴

Ibn Qudāmah point out two types of rulers. A *Bār* is a ruler who practises Islam and lives his life according to the injunctions of Islam. The second type of ruler is one who does not precisely follow the rules of Islam in his personal life. This kind of ruler is called *Fājir*. This category is based upon the following saying of the Prophet:

Abū Hurairah narrated that the Holy Prophet said, ‘Jihād is obligatory upon you under the leadership of the ruler regardless of him being *Bār* or *Fājir*’.¹¹⁵

It appears to be evident from the opinion of Ibn Qudāmah that as he was writing this book there were some scholars who disliked Jihād under the leadership of *Fājir* type leader in this regard he says:

وَلَا تَرْكُ الْجِهَادِ مَعَ الْفَاجِرِ يُقْضَى إِلَى قَطْعِ الْجِهَادِ ،
وَيُظْهِرُ الْكُفَّارَ عَلَى الْمُسْلِمِينَ وَاسْتِغْثَالَهُمْ ، وَيُظْهِرُ كَلِمَةَ الْكُفْرِ ، وَفِيهِ فُسَادٌ
عَظِيمٌ ، قَالَ اللَّهُ تَعَالَى : ﴿ وَلَوْلَا دَفْعُ اللَّهِ النَّاسَ بَعْضَهُمْ بِبَعْضٍ لَفَسَدَتِ
الْأَرْضُ ﴾ .

‘Non-performance of Jihād with *Fājir* will lead to abandonment of Jihād and the *Kuffār* will have the upper hand on the Muslims. There is a huge danger for Muslims with this regard. God says: [And if Allah did not check one set of people by means of other, the earth would indeed be full mischief.]’¹¹⁶

Ibn Qudāmah also mentions the opinion of Imām Ahmed Ibn Hanbal who was ready to fight along with the *Fājir* type of leader. He supported his opinion of fighting

¹¹⁴ Ibn Qudāmah, *Al-Mughni*, p. 13/14

¹¹⁵ Abū Dawūd, *Al-Sunan*, p. 2/17-18

¹¹⁶ Q.2:251

under the leadership of a *Fājir Imām* by presenting the following tradition of the Holy Prophet;

‘It is reported from Holy Prophet that he said, ‘God will protect this Din (Islam) even with a man who is *Fājir*.’¹¹⁷

Ibn Taymiya said, ‘A strong and brave Muslim leader, even if he is a *Fājir* is preferred over the weak and trustworthy. Imām Ahmed agreed with Ibn Taymiya on this ruling. He was asked which of two leaders should be followed in Jihād. One is stronger but *Fājir* while the other is weak but pious. He replied, ‘the benefit of strength of the *Fājir* will benefit the Muslims but the weakness of the pious will be dangerous for the Muslims. Therefore Jihād should be preferred under the leadership of the stronger even if he is a *Fājir*.’¹¹⁸

At this place Ibn Qudāmah advised Muslim commanders that they should not select weak and dangerous people for the army. They should be careful about the involvement of enemy agents infiltrating the Muslim army. They must protect their national security and their forces and try to keep their war tactics confidential.¹¹⁹

6- Declaration of war

The declaration of war is an important matter in the conduct of Jihād. In the case of defensive or punitive war, declaration of war or its notification to other parties is not required. Ibn Qudāmah argues with the opinion of Imam Kharqī:

١٦٢٧ - مسألة ؛ قال : (وَيُقَاتِلُ أَهْلَ الْكِتَابِ وَالْمُجُوسُ ، وَلَا يُدْعَوْنَ ، لِأَنَّ الدَّعْوَةَ قَدْ بَلَغَتْهُمْ ، وَيُدْعَى عَبْدُ الْأَوْثَانِ قَبْلَ أَنْ يُحَارَبُوا)

¹¹⁷ Al Bukharī, *Al-Sahīh*, p. 4/88

¹¹⁸ Muhanā Al-ali, *Minhaj al-Islam*, p. 337-38.

¹¹⁹ Ibn Qudāmah, *Al-Mughni*, p. 13/15.

‘People of the book and *Majūs* are fought without inviting them towards the oneness of God (*Tawhīd*) because this *Da‘wa* has been conveyed to them already. The worshippers of Idols will be invited to embrace Islam before the start of war.’¹²⁰

Ibn Qudāmah explains this opinion of Imam Kharqī while saying:

أَمَّا قَوْلُهُ فِي أَهْلِ الْكِتَابِ وَالْمَجُوسِ : لَا يُدْعَوْنَ قَبْلَ الْقِتَالِ . فَهُوَ عَلَى عُمُومِهِ ؛ لِأَنَّ الدَّعْوَةَ قَدْ انْتَشَرَتْ وَعَمَّتْ ، فَلَمْ يَبْقَ مِنْهُمْ مِمَّنْ لَمْ تَبْلُغْهُ الدَّعْوَةُ إِلَّا نَادِرٌ بَعِيدٌ . وَأَمَّا قَوْلُهُ : يُدْعَى عَبْدُ الْأَوْثَانِ قَبْلَ أَنْ يُحَارَبُوا . فَلَيْسَ بِعَامٍّ ، فَإِنَّ مَنْ بَلَغَتْهُ الدَّعْوَةُ مِنْهُمْ لَا يُدْعَوْنَ ، وَإِنْ وَجِدَ مِنْهُمْ مَنْ لَمْ تَبْلُغْهُ الدَّعْوَةُ دُعِيَ قَبْلَ الْقِتَالِ ، وَكَذَلِكَ إِنْ وَجِدَ مِنْ أَهْلِ الْكِتَابِ مَنْ لَمْ تَبْلُغْهُ الدَّعْوَةُ ، دُعُوا قَبْلَ الْقِتَالِ .

‘His opinion that people of the book and *Majūs* will not be invited to embrace Islam before the start of war is due to the commonality between monotheist faiths. An invitation to Islam (*Da‘wa*) has already reached them and became known. It will be very rare if some one has not information of the arrival of Islam. His saying that worshippers of Idols should be invited before the start of war is not a general opinion. If there were people among them to whom *Da‘wa* has not reached they would be invited to embrace Islam otherwise not. The same approval is recommended with the people of book. If any one of them is found to be unaware of Islam then he will be invited to Islam before the start of war.’¹²¹

Islamic law has given importance to the declaration of war. In the early days of Islam, Muslims were prohibited from attacking the enemy before inviting them to Islam. In this regard Buredah reported:

¹²⁰ Ibid., p.13/29.

¹²¹ Ibn Qudāmah, *Al-Mughni*, p. 13/29.

‘When the Holy Prophet was appointing anyone to the command of the troops he would advise him to be pious with himself and with his fellow Muslims and advised him, ‘when you find the non-believer enemies invite them to three things. If they accept any one of these stop the war against them. Invite them towards Islam. If they accept this invitation, stop the war against them. If they refuse to accept this ask them to pay the *Jizya*. If they agree to this stop the war against them otherwise fight them with the blessings of God.’¹²²

Ibn Qudāmah is of the opinion that this invitation was a requirement during the early days of Islam. The opinion of Imām Ahmed Ibn Hanbal is similar to this, he said, ‘the Prophet used to invite non-Muslims towards Islam before the start of war until Islam was strongly established. I do not know any one who is invited to Islam before the start of war nowadays’.¹²³

The Muslim Jurists have discussed this issue in detail. Imām Al-Sarkhasī has presented a variety of opinions on this matter. He said that when Muslims encounter non-believers to whom Islam is an unknown faith, Muslims must not attack before inviting them to accept the “unity of God”, or if they agree to pay the protection tax (*Jizya*) unless they belong to a nation from whom it is not accepted and who have to chose between Islam and the sword.¹²⁴

Muslim Jurists also discuss the fact that if Muslims attack an enemy without previous warning then they will be liable for payment of compensation. The Shaf‘ī School of law holds that the Muslim state has to pay for each human life destroyed in battle as much as it pays for a Muslim killed unintentionally. The Hanafī School of law, however, leaves the blood of such unbelievers with its impurity. But if such a

¹²² Muslim, *Al-Sahīh, Kitāb al-Jihād w al-Siyar*, p. 3/1357.

¹²³ Ibn Qudāmah, *Al-Mughni*, p. 13/30.

¹²⁴ Al-Sarkhasī, *Sharh al-Syūr al-Kabīr*, p. 4/57-58.

nation understands fully what Islam means, warnings and excuses may be given, this is not compulsory because they know why they are being attacked and an ultimatum may hinder the achieving of the aim. A Muslim state may fight without inviting them to accept Islam or pay the protection tax.¹²⁵

Ibn Qudāmah discusses the situations in which a declaration of war is not required and he presents examples from the life of the Prophet .It appears from the practices of the Holy Prophet that there are three types of war situation which require no invitation to Islam or a warning to enemy forces:

- a. Fresh encounters of an enemy with whom no peace is made, though the forces of the two parties are separated from each other from time to time. The expedition against the people of Makkah was of such kind.
- b. Preventive war against the threatened aggression of a foreign state with which no treaty or relation exists. The wars of *Banū al Mustalik*, *Khaibar*, *Hunain* are all of this kind.
- c. Punitive and retaliatory wars to punish a state for a breach of treaty. The attack on *Banū Qunyah* and *Banū Qurayzah* were of such kind.¹²⁶

In other cases the declaration of war is necessary against the threatened violation by a state with which treaty relations exist. Qur'ān says:

[And if thou dearest treachery from any folk, then back to them
(Their treaty) on a par Lo God loveth not the treacherous]¹²⁷

¹²⁵ Al- Sarkhasī, *Sharh al-Syūr al-Kabīr*, P. 1/58.

¹²⁶ Al Māwardī, *Al-Ahkām al -Sultaniyya*, p. 57-58.

¹²⁷ Q 8:58.

7- Female Participation in war

This topic begins with the opinion of Imām al-Kharqī:

مسألة ؛ قال : (وَلَا يَدْخُلُ مَعَ الْمُسْلِمِينَ مِنَ النِّسَاءِ إِلَى أَرْضِ الْعَدُوِّ
إِلَّا الطَّاعِنَةُ فِي السِّنِّ ، لِسَقْيِ الْمَاءِ ، وَمُعَالَجَةِ الْجُرْحَى ، كَمَا فَعَلَ النَّبِيُّ ﷺ)

‘Female should not enter into the enemy country with the Muslims except old females who can enter as water carriers and nurses for the wounded as the Holy Prophet did.’¹²⁸

In the exploration of above text Ibn Qudāmah says:

وجعلته الله يكره دخول النساء الشواب أرض العدو ؛ لأنهن لسن من أهل القتال ،
وقلما يتنفع بهن فيه ، لا سقياء الخور والعجن عليهن ، ولا يؤمن ظفر العدو بهن ،
فيسجلون ما حرم الله منهن .

‘His says that the entrance of young females in the land of enemies is disapproved (*makrūh*)’ because they are not eligible to participate in Jihād. It is rare that their participation was of benefit to it because of their fear and trepidation. With them victory over the enemy is not guaranteed, and they will regard as licit (*halāl*) to do with them what God has forbidden (*harām*)’-ie, the young women will be forced to commit fornication (*zinā*), which, in law, is an offence against God,¹²⁹

Ibn Qudāmah also includes *hadīth* reported from Hashraj, who reported an incident recounted by his grand mother, who said:

Six females went out, along with the Prophet in the battle of *Khaibar*.

When he was informed of this, the Holy Prophet summoned us. When we reached him, we found him angry. He asked us whom we went with.

¹²⁸ Ibn Qudāmah, *Al-Mughni*, p. 13/35.

¹²⁹ Ibid. p. 13/35

We said, 'we came for knitting and helping in the way of God. We brought medicines for the injured. We want to feed the people and then to take our share of the booty. The Holy Prophet said, 'Go on'. He then gave us our share of the booty equal to that of the males'.¹³⁰

Ibn Qudāmah says that Imām Awzā'ī was asked about the participation of females in the army troop and his opinion based on different traditions of the Prophet was that, 'there is no problem in the participation of an old female if their participation is beneficial for the provision of water and treatment of the wounded'.¹³¹ The opinion of the majority of jurists is in favour of the participation of old females in war but the traditions of the Holy Prophet show that even young females participated in the wars. Aisha, the wife of the Prophet was very young at the battle of *Uhud* where she and several other female volunteers supplied water to the wounded. Imām Bukhārī has several chapters on women participating in sea warfare, nursing the wounded, transporting the injured to hospital or otherwise rendering services to the soldiers. Ibn Qudāmah favours participation of only aged females in wars but some Jurists allow the participation of young females. Imām Muhammad bin Hassan al-Shaibanī was also in favour of the participation of young females in war. He said:

'A free woman may lawfully go on military expeditions along with her male relatives in order to nurse the wounded; but she should not go without the permission of her near relative bc she of advanced age or young'.¹³²

¹³⁰ Abū Dawūd, *Al-Sunan, Kitāb Al-Jihād*, p. 2/68.

¹³¹ Ibn Qudāmah, *Al-Mughnī*, p. 13/35.

¹³² Al-Sarkhasī, *Sharh al-Syūr al-Kabīr*, p. 3/206.

It is evident from the Islamic history that females did participate in war. In the battle of *Al-Qādesiya* a group of sincere volunteers, armed with thick sticks contributed their valuable service to the fighting and once saved a situation by marching in ranks giving the impression of the arrival of reinforcements.¹³³

8-Treatment of prisoners of war

Imām al-Kharqī said about prisoners of war:

مسألة ؛ قال : (وَإِذَا سَبَى الْإِمَامُ فَهُوَ مُخَيَّرٌ ، إِنْ رَأَى قَتْلَهُمْ ، وَإِنْ رَأَى مِنْ عَلَيْهِمْ وَأُطْلِقَهُمْ بِلَا عَوَضٍ ، وَإِنْ رَأَى أُطْلِقَهُمْ عَلَى مَالٍ يَأْخُذُهُ مِنْهُمْ ، وَإِنْ رَأَى فَادَى بِهِمْ ، وَإِنْ رَأَى اسْتَرْفَهُمْ ، أَيْ ذَلِكَ رَأَى فِيهِ نِكَايَةً لِلْعَدُوِّ ، وَحَظًّا لِلْمُسْلِمِينَ ، فَعَلَّ) .

‘When the leader of the Muslims imprisons enemies, he has the right to kill them or free them without attaining anything or free them on payment of ransom. If he likes, he can enslave them. He can do any action in this regard that may make the enemy weaker and Muslims stronger.’¹³⁴

Ibn Qudāmah explains it:

وجملته أن من أسير من أهل الحرب على ثلاثة أضرب ؛ أحدها ، النساء والصبيان ، فلا يجوز قتلهم ، ويصيرون رقيقاً للمسلمين بنفس السبي ؛ لأن النبي ﷺ نهى عن قتل النساء والولدان . متفق عليه () . وكان عليه الصلاة والسلام يسترقهم إذا سباهم . الثاني ، الرجال من أهل الكتاب والمجوس الذين يقرؤون بالجزية ، فيتخير () الإمام فيهم بين أربعة أشياء ؛ القتل ، والممن بغير عوض ، والمفاداة بهم ، واسترقاقهم . الثالث ، الرجال من عبدة الأوثان وغيرهم ممن لا يقر بالجزية ، فيتخير الإمام فيهم بين ثلاثة

¹³³ Al-Tabri, *Tarikh al-Ummam W al-Matūk* (Beirut: Dar al fikar, 1979), p. 1/235.

¹³⁴ Ibn Qudāmah, *Al-Mughni*, p. 13/44.

أشياء ؛ القتل ، أو العَسْ ، والمُفَادَةُ ، ولا يجوزُ اسْتِرْقَاقُهُمْ . وعن أحمد ، يجوزُ
استرقاقَهُمْ . وهو مذهبُ الشافعيِّ .

‘There are three kinds of prisoners of war. The first kind is children and women. Their killing is prohibited. They will be enslaved because the Prophet prohibited their killing and he himself used to enslave them in their imprisonment. The second kind is males from the people of the book and *Majūs* who are liable to pay *Jizya*. The Muslim ruler has four options regarding their fate (killing or freeing them without any ransom or freeing them on payment or enslaving them). The third kind of prisoner is worshippers of Idols and others who are not liable to pay *Jizya*. In this situation the Muslim ruler has three options. He can kill them or free them or receive any benefit in return. Their enslavement is not allowed. But Imām Ahmed and Imām al-Shāfi‘ī allowed it.’¹³⁵

Some Muslim jurists do not permit the killing of prisoners; Ibn Rushd recorded a consensus of the companions of the Holy Prophet in this regard. This does not preclude the trial and punishment of prisoners for crimes beyond the rights of belligerency. During the battle of *Badr* two prisoners were beheaded on his order as punishment for their crimes. Muslim Jurists clearly recognise that a prisoner cannot be held responsible for mere acts of belligerency. The Muslim jurists said in this regard:

‘Similarly there is unanimity that belligerents would not be held responsible for damage they inflicted on Muslims regarding life and property. This would be so even when they embrace Islam or become *Dhimīs*, (i.e. subjects). For they did that conscientiously and in accordance with the dictates of their religion and at a time when they

¹³⁵ Ibid. p. 13/44.

were authorised to do that possessing as they did a resisting power. So they were on the same footing as Muslims. The same is true regarding the capture of property'.¹³⁶

The treatment of prisoners of war has been the subject of liberal understandings in Islam. The Holy Prophet said about the prisoners from the battle of *Badr*:

'Take heed of the recommendations to the treatment of prisoners fairly'.¹³⁷

The consequence of this fair treatment was that many Muslim soldiers contented themselves with dates and fed the prisoners in their charge with bread.¹³⁸

Imām Abū Yūsuf said that prisoners must be fed and well - treated until a decision is reached regarding them. They will be provided with free food. It is stated in the Qur'ān:

[Lo, the righteous shall...(go to paradise)...(because) they perform the vow and fear a day whereof the evil is wide spreading, and feed with food the needy wretch, the orphan and the prisoner, for love of him, (saying): we feed you, for the sake of God only, we wish for no reward nor thanks from you]¹³⁹

The prisoners are to be protected from heat and cold. If they have no clothes, these might be provided, as this was the practice of the Holy Prophet. Prisoners of war can draw up wills for their property.¹⁴⁰

There is no evidence in early Muslim history of exacting labour from prisoners. If they tried to escape or otherwise violate discipline they could be punished.¹⁴¹

¹³⁶ Hamidullah, *The Muslim Conduct*, p214.

¹³⁷ al-Tabarī, *Tarikh Al-Ummam w al-Mulūk*, p. 1/1337-38.

¹³⁸ Ibid. p. 1/1337-38.

¹³⁹ Q 5-9.

¹⁴⁰ al-Sarkhasī, *Sharh al-Syūr al-Kabīr*, p. 4/229.

¹⁴¹ Hamidullah, *The Muslim Conduct*, p. 215.

As mentioned by Ibn Qudāmah, Islamic Law leaves it to the discretion of the commanders to decide whether prisoners of war are to be (a) beheaded (b) enslaved (c) released on payment of ransom (d) exchanged for Muslim prisoners or (e) released gratis. This option will be possible only in a case in which unconditional surrender is made. In case of conditional surrender the treatment of prisoners will be according to the set conditions.

9-Giving of *Amān* (protection)

Ibn Qudāmah quotes the following opinion of Imām Kharqī:

مسألة ؛ قال : (ومن أعطاهم الأمان منا ؛ من رجل ، أو امرأة ، أو
عبيد ، جاز أمانه)

'If any male from amongst us (Muslims), female or slave gives *amān* (protection), his *amān* is permissible'.¹⁴²

Then Ibn Qudāmah explains:

وجاءه أن الأمان إذا أُعطي أهل الحرب ، حُرِّمَ قتلهم ومألهم والتعرض لهم . ويصحُّ من كلِّ مسلم بالغ عاقل مختار ، ذكرًا كان أو أنثى ، حُرًّا كان أو عبدًا . وبهذا قال الثوري ، والأوزاعي ، والشافعي ، وإسحاق ، وابن القاسم ، وأكثر أهل العلم . وروى ذلك عن عمر بن الخطاب ، رضي الله عنه . وقال أبو حنيفة ، وأبو يوسف : لا يصحُّ أمان العبيد ، إلا أن يكون مأذونًا له في القتال ؛ لأنه لا يجب عليه الجهاد ، فلا يصحُّ (أمانه ، كالصبي) ، ولأنه مجلوب من دار الحرب () ، فلا يؤمن أن ينظر لهم في (تقديم مصلحتهم . ولنا ، ما روى علي () ، عن النبي ﷺ ، أنه قال : « دُمة المسلمين واجدة ، ينسعى بها أذناهم ، فمن أخفر مسلمًا ، فعليه لعنة الله والملائكة والناس أجمعين ، لا يقبل منه صرف ولا عدل » . رواه البخاري .

'His opinion stipulates if protection is given to the enemy, their killing

¹⁴² Ibn Qudāmah, *Al-Mughni*, p. 13/75.

and taking of their wealth is prohibited. This act is true for any adult, who has full legal capacity, male or female, free or slave. This is the opinion of Imām Thawrī, Imām Awzā'ī, Imām Shāf'ī, Ishāq, Ibn Qāsim and the majority of other scholars. The same is also reported of Umar Ibn Khattāb. Imām Abū Hanifa and Abū Yūsuf said, '*amān* from a slave is not correct except if he is allowed to participate in jihād so because Jihād is not obligatory on him. His protection is like the protection of a child. He is brought from the land of war so he will not give protection and there is no interest for Muslims in his protection'¹⁴³.

The legitimacy of *amān* is approved from Qur'ān. God Al mighty said in this regard:

[And if any one of the Associates (non-Muslim) seeketh the protection (Oh Muhammad), then protect him so that he may hear the word of God, and afterwards convey him to his place of safety].¹⁴⁴

Imām al-Sarkhasī described *amān* as:

'Protection is the practice of refraining from opposing them (i.e. belligerents) killing or capturing for the sake of God'.¹⁴⁵

Protection might be granted to the enemy when they solicit it individually or collectively. If surrender is unconditional, they become prisoners of war and their property booty. In case of a conditional surrender, capitulation as it is termed, if conditions were accepted by the conqueror, those conditions must be faithfully observed and Muslims must abide by their conditions. The Muslim jurists declared:

'The Muslims are bound to fulfil the conditions (of the contracts)'.¹⁴⁶

¹⁴³ Ibid. p. 13/75.

¹⁴⁴ Q 4:6.

¹⁴⁵ Al-Sarkhasī, *Sharh al-Syūr al-Kabīr*, p. 1/189.

¹⁴⁶ Ibid. p. 1/189.

Ibn Qudāmah is of the opinion that old adult Muslims having full legal capacity can give protection. According to him, even Muslim slaves can give protection. His opinion is based on the following saying of the Prophet, which is reported by Ali:

‘The responsibility of all Muslims is equal even the lowest of them is also trying for it. Who ever betrays any Muslim, the curse of God, Angels and all human beings will be upon him. Any kind of substitute from this kind of person will not be accepted.’¹⁴⁷

9.1-Protection granted by a slave

Ibn Qudāmah mentions a report from Fadīl Ibn Yazīd who said, ‘once we conquered an area. One of our slaves stayed there and wrote protection for them (enemies). This matter was brought to the notice of Umar Ibn Al-Khattāb, Leader of the faithful, who said:

‘The Muslim slave is a man from their community and protection from him is protection from all the Muslims.’¹⁴⁸

Ibn Qudāmah added to it:

‘Because he (slave) is a Muslim *Mukallaf* (responsible) so his protection is correct like the protection of a free man.’¹⁴⁹

9.2- Protection granted by a Female

All Muslim Jurists are agreed that Muslim females can give protection. Aisha wife of the Holy Prophet, said:

¹⁴⁷ This tradition of Holy Prophet is reported by Imām Bukhārī, *Al-Sahīh*, p. 4/17

¹⁴⁸ Abū Dawūd, *Al-Sunan*, p. 2/233.

¹⁴⁹ Ibn Qudāmah, *Al-Mughni*, p.13/76.

‘If a Muslim female gives protection from Muslims it is correct.’¹⁵⁰

There are examples that Muslim females gave protection and the Muslims fulfilled it.

One female companion of the Holy Prophet ‘Um Hani’ stated:

‘Oh Holy Prophet I gave protection to my relatives and allowed them to enter into my house but my brother wants to kill them. Holy Prophet said we gave protection to whom ‘Um Hani’ has given protection. Any one of Muslims even lower can give protection.’¹⁵¹

Zaynab, daughter of the Holy Prophet, gave *amān* to her non-Muslim husband Abu Al‘aṣ Ibn Al Rabi‘. Holy Prophet declared this protection legitimate.¹⁵²

9.3- *Amān* granted by miscellaneous persons

Ibn Qudāmah also mentions *amān* granted by other different persons like prisoners, children and others in these words:

ويصحُّ أمانُ الأسيرِ إذا عَقَدَهُ غيرُ مُكْرِهِ ؛ لَدُخُولِهِ فِي عُمُومِ الْخَبَرِ ، ولأنَّه مسلمٌ مُكَلَّفٌ مُخْتَارٌ ، فأشْبَهَ غيرَ الأسيرِ . وكذلك أمانُ الأجيرِ والتاجرِ في دارِ الحربِ . وهذا قال الشافعيُّ . وقال الثوريُّ : لا يصحُّ أمانُ أحدٍ منهم . ولنا ، وعمومُ الحديثِ ، والقياسُ على غيرِهِمْ . فأما الصبيُّ المميرُ ، فقال ابنُ حامدٍ : فيه روايتان ؛ إحداهما ، لا يصحُّ أمانُهُ . وهو قولُ أبي حنيفة ، والشافعيِّ ؛ لأنَّه غيرُ مُكَلَّفٍ ، ولا يلزمُه بقوله حكمٌ ، فلا يلزمُ غيرُهُ ، كالجنونِ . والروايةُ الثانيةُ ، يصحُّ أمانُهُ . وهو قولُ مالكٍ . وقال أبو بكرٍ : يصحُّ أمانُهُ .

‘The protection from Muslim prisoners is valid if he is doing it without any compulsion. This provision is included in general orders confirming the *Hadīth* of the Prophet. A Muslim prisoner is legally eligible to do it

¹⁵⁰ Ibid. p. 13/76

¹⁵¹ Abū Dawūd, *Al-Sunan*, *Kitāb al-Jihād*, p. 2/234

¹⁵² Ibn Qudāmah, *Al-Mughni*, p. 13/77.

like other free Muslims. Muslim traders and employers in a land of war can also give *amān*. The opinion of Imām al-Shāf'ī is also the same. Imām Thawrī said that *amān* from any of these is not correct. Our argument is based on the general order of the *hadīth* and those who do not allow the right of *amān* to these people are legalizing it on the basis of *Qiyās* (Analogy). Ibn Hāmed said there are two opinions regarding protection granted by the child who is able to discriminate. Abū Hanifa and Imām Shāf'ī said, 'his protection is not correct because he is legally not eligible to offer this and he cannot conduct this kind of transition. He is similar to insane or mad persons who have not this capacity. The second opinion is that his protection is correct. This is the opinion of Imām Mālik. Abū Bakr says his protection is valid.'¹⁵³

Ibn Qudāmah agrees with this interpretation as he considers a discriminating child like a mature man but he does not permit of giving the right of protection to an insane person.

He discussed several other matters in a separate *fasl* in which he said:

فصل : وإذا شهد للأسير اثنان أو أكثر من المسلمين ، آثمهم أمئوه ، قُبِلَ ، إذا كانوا بصيغة الشهود . وقال الشافعي : لا تُقْبَلُ شهادتهم ؛ لأنهم يشهدون على فعل أنفسهم . ولنا ، أنهم عدول من المسلمين ، غير متهمين ، شهدوا بأمانه ، فوجب أن يُقْبَلَ ، كما لو شهدوا على غيرهم أنه آمنه . وما ذكره لا يصح ، لأن النبي ﷺ قُبِلَ شهادته الموضوعة على فعلها ، في حديث عتبة بن الحارث . وإن شهد واحد آثي أمئته . فقال القاضي : قياس قول أحمد ، أنه يُقْبَلُ .

If two or more Muslims give evidence for any prisoner that they gave him protection before his imprisonment, their claim will be accepted if they qualify to become witnesses. Imām Shāf'ī said, 'their evidence will not be

¹⁵³ Ibn Qudāmah, *Al-Mughni*, p. 13/77.

accepted because they are witnesses for themselves'. Our opinion is that that they are pious Muslims. There is no doubt of their personality. They witnessed their protection and it must be accepted as if they witnessed for others give him protection. What Imām Shāf'ī said is not correct because the Holy Prophet accepted evidence of a suckling mother regarding her adultery in tradition of 'Uqbah Ibn AL-Harith.¹⁵⁴ In the matter of witnesses of one Muslim on protection, al-Qādī said that on the basis of analogy of the saying of Imām Ahmed this witness would be accepted.¹⁵⁵

9.4- Protection granted by non-Muslims *Dhimmi*s

In this matter Ibn Qudāmah says:

ولا يصح أمان كافر، وإن كان ذمياً؛ لأن النبي ﷺ قال: « ذمة
المسلمين واحدة، يسعى بها أدناهم ». فجعل الذمة للمسلمين، فلا تحصل
لغيرهم، ولأنه منتهى على الإسلام وأهله، فأشبهه الحرابي. ولا يصح أمان مجنون، ولا
طفل، لأن كلامه غير معتبر، ولا يثبت به حكم. ولا يصح أمان زائل العقل، بنوم أو
سكر أو إغماء؛ لذلك، ولأنه لا يعرف المصلحة من غيرها، فأشبه المجنون. ولا يصح
من مكره؛ لأنه قول أكره عليه بغير حق، فلم يصح، كالإقرار.

'The protection granted by a non-Muslim even if he is a (*Dhimmi*), who is a permanent resident of an Islamic State is invalid. The Holy Prophet said, 'the lowest Muslim may grant protection that will be binding on all Muslims'. The Holy Prophet allowed this saying the right of protection to Muslims only and this is not applicable to others. These non-Muslims are not benefiting from Islam or their families so they became similar to people in war. The protection

¹⁵⁴ Abū Dawūd, *Al-Sunan, Kitāb al-Fihād*, p. 2/252.

¹⁵⁵ Ibn Qudāmah, *Al-Mughni*, p. 13/77.

of an insane person and child is not correct because their sayings are not trustworthy. The protection of a person who has lost his wisdom due to sleeping, intoxication or something else is also not correct. (In this situation) he cannot understand the interests of other people so he became similar to a mad person. The protection granted by a person who is forced to do so is also not accepted because he is forced to do so against his will like a forced confession.¹⁵⁶

9.5- Collective *amān* granted by a Muslim Ruler

Ibn Qudāmah elaborates the rights of the leaders of the Muslims to give protection. He also differentiates different ways of administration of *amān* by individual Muslims and by the leaders of the Muslims. The conditional *amān* is also included in this discussion:

فصل : ويصيحُ أمانُ الإمام لجميع الكفار وأحاديهم ؛ لأنَّ ولايته عامَّةٌ على المسلمين . ويصيحُ أمانُ الأمير لمن أقيم بإزالته من المشركين ، فأما في حقِّ غيرهم ، فهو كآحاد المسلمين ، لأنَّ ولايته / على قتال أولئك دون غيرهم . ويصيحُ أمانُ آحاد المسلمين للواحد ، والعشرة ، والقافلة الصغيرة ، والحصن الصغير ؛ لأنَّ عمر ، رضي الله عنه ، أجازَ أمانَ العبد لأهل الحصن الذي ذكرنا حديثه . ولا يصيحُ أمانه لأهل بلدة ، ورستاق ، وجميع كثير ؛ لأنَّ ذلك يُفضي إلى تعطيل الجهاد ، والافتيات على الإمام .

فصل : ويصيحُ أمانُ الإمام للأسير بعد الاستيلاء عليه ؛ لأنَّ عمر بن الخطاب ، رضي الله عنه ، لما قدم عليه بالهزمزان أسيرًا ، قال : لا بأس عليك ، ثم أراد قتله ، فقال له أنس : قد أمنتُه ، فلا سبيل لك عليه . وشهد الزبير بذلك ، فعذَّوه أمانًا . رواه سعيد . ولأنَّ للإمام المَنَّ عليه ، والأمان دون ذلك . فأما آحاد الرعية ، فليس له ذلك . وهذا مذهب الشافعي . وذكر أبو الخطاب ، أنَّه يصيحُ أمانه ؛ لأنَّ زينب ابنة رسول الله ﷺ ، أجازت زوجها أبا العاص بن الربيع بعد أسره ، فأجاز النبي ﷺ أمانها .

¹⁵⁶ Ibn Qudāmah, *Al-Mughni*, p. 13/77

‘The protection granted by the ruler of the Muslims (*imām*) to all the non-Muslims or some individuals is correct. His authority on the Muslims is general so the protection granted by him is correct for those non-believers. The protection granted by a Muslim leader of the military (*amir*) is just permissible to those non-Muslims close to him. He is like ordinary Muslims as far as giving protection to other than those. The protection from individual Muslims is permissible for one person or some people or a small caravan or for a small castle. Umar bin al-Khattāb allowed protection from a slave for the people of a castle, which we have already discussed. The protection from individual Muslims is not permissible for one whole city or a large number of the people because it will lead to the suspension of *jihād* and it will create problems for the ruler of the Muslims. The ruler is allowed to give protection to the prisoners of war after their imprisonment. Umar Ibn Al-Khattāb said to Al-Hurmozān when he was brought before him, ‘there is nothing wrong for you’. Later on he intended to kill him but Anas said to Umar, ‘You have given him protection, now you have no right to kill him’. Zubair witnessed it and it was considered protection. Said reported this.¹⁵⁷ The Muslim ruler has a right to do favours other than giving protection. This kind of right is not allowed to individuals who are ordinary Muslims. This is the opinion of Imām Shāfi‘ī. Abū Khattāb mentioned that individual Muslims could also give protection to prisoners because the daughter of the Holy Prophet, Zaynab, gave protection to her husband Abū Al‘ās Ibn Al Rabi‘ after his imprisonment. The Prophet permitted this *amān*. This opinion is also reported by Imām Awzā‘ī. Our opinion is that the matter of prisoners comes under the

¹⁵⁷ Abū Dawūd, *Al-Sunan*, p. 2/252.

authority of the ruler of the Muslims, and making problems for him by violation of his orders, so *amān* granted by individual Muslims to prisoners is not permissible. The protection of Zaynab was implemented after the permission of the Holy Prophet'.¹⁵⁸

According to Islamic law, soldiers of the Muslim army, allies or otherwise, and every non-Muslim subject of the Muslim state are denied this right of granting protection. However, if the Islamic Government authorises them then they can give protection.¹⁵⁹ As the authorities of the Islamic states are allowed to authorise non-Muslims to use the right of protection the same is admitted that the authorities might notify that the enemy might not be given protection by an individual Muslim other than the competent authority.¹⁶⁰ In the constitution of the city state of Madina promulgated by the Prophet, there are clear exceptions to the general right of granting protection. The constitution stated, 'neither the Arabs nor the Jewish citizens of the city state could protect the *Quraysh* or even their allies'.¹⁶¹

9.6-Disputes regarding Claims of protection

There can be disputes between Muslims and non-Muslims regarding claims of protection. Ibn Qudāmah points out these disputes and suggests their solution in the following text.

فصل : إذا جاء المسلم بمشرك ادعى أنه أسره ، وادعى الكافر أنه آمنه ، ففيها ثلاث روايات ؛ إحداهن ، القول قول المسلم ؛ لأن الأصل معه ، فإن الأصل إباحة دم الحرابي ، وعدم الأمان . والثانية ، القول قول الأسير ؛ لأنه يحتل صدقه وحقن دمه ،

¹⁵⁸ Ibn Qudāmah, *Al-Mughni*, p. 13/77-78.

¹⁵⁹ al-Sarkhasi, *Sharh al-Syir al-Kabir*, p. 1/172.

¹⁶⁰ Ibid. p. 1/356-59.

¹⁶¹ Hamidullah, *The Muslim Conduct*, p. 210.

فيكون هذا شبهة تمنع من قتله . وهذا اختيار أبي بكر . والثالثة : يرجع إلى قول من ظاهر الحال يدل على صدقه ؛ فإن كان الكافر ذا قوة ، معه سلاحه ، فالظاهر صدقه ، وإن كان ضعيفا مسلوا سلاحه ، فالظاهر كذبه ، فلا يلتفت إلى قوله . وقال أصحاب الشافعي : لا يقبل قوله وإن صدقه المسلم ؛ لأنه لا يقدر على أمانه ، فلا يقبل إقراره به . ولنا ، أنه كافر ، لم يثبت أسره ، ولا نازعه فيه منازع ، فقبل قوله في الأمان ، كالرسول .

‘If a Muslim brought with him a non-believer and claimed that he (the Muslim) imprisoned him but the non-believer claimed that he (the Muslim) gave me *amān*. These are three opinions of jurist in this kind of situation. The first opinion is that the claim of the Muslim will be accepted because his claim is matched with the original situation in which there is no protection for non-believers and their blood is permissible. The second opinion is that the claim of the non-believer will be accepted on the basis of the possibility of truth in his claim for saving his life. His claim created doubt and this doubt became obstetrical in his killing. This is the opinion of Abū Bakr. The third opinion is that the claim of that person will be accepted as it matches more with the apparent situation. If the non-believer is powerful and armed than his appearance shows his truthfulness. If he appears weak without weapon and his appearance does not support his claim, his claim will not be considered appropriate. The scholars of the Shāfī School of thought said his claim would not be accepted even if a Muslim witnessed his truthfulness because he is not competent to give protection to himself so his confession will not be accepted. Our opinion is that he is a non-Muslim and his imprisonment is still not proved and no one has conflicted to his claim so his claim will be accepted as the claim of envoys regarding protection is accepted’.¹⁶²

¹⁶² Ibn Qudāmah, *Al-Mughni*, p. 13/79.

9.7- Protection for understanding of Islam

In this regard Ibn Qudāmah said:

فصل : وَمَنْ طَلَبَ الْأَمَانَ لِيَسْمَعَ كَلَامَ اللَّهِ ، وَيَعْرِفَ شَرَائِعَ الْإِسْلَامِ ، وَجِبَّ أَنْ يُعْطَاهُ ، ثُمَّ يُرَدَّ إِلَى مَأْمَنِهِ . لَا تَعْلَمُ فِي هَذَا خِلَافًا . وَبِهِ قَالَ قَسَادَةُ ، وَمَكْنُحُولٌ ، وَالْأَوْزَاعِيُّ ، وَالشَّافِعِيُّ . وَكَتَبَ عُمَرُ بْنُ عَبْدِ الْعَزِيزِ بِذَلِكَ إِلَى النَّاسِ ؛ وَذَلِكَ لِقَوْلِ اللَّهِ تَعَالَى : ﴿ وَإِنْ أَحَدٌ مِنَ الْمُشْرِكِينَ اسْتَجَارَكَ فَأَجِرْهُ حَتَّى يَسْمَعَ كَلَامَ اللَّهِ ثُمَّ اتِّلْهُ مَأْمَنَهُ ﴾ . قَالَ الْأَوْزَاعِيُّ : هِيَ إِلَى يَوْمِ الْقِيَامَةِ .

‘If anyone asks protection for listening Qur’ān and understanding Islamic rules, it is obligatory that he will be given protection and he will be returned to his peaceful place. We do not find any difference of opinion in this issue. This is the opinion of Qutādah, Makhūl, Awzā’ī and Shāf’ī. Umar bin Abdul ‘Aziz wrote the same to the people. The opinion is based on the following saying of God Almighty: [if any one from the enemies ask *amān* for listening Quran give him and return him his place of peace]¹⁶³. Imām Awzā’ī said that this kind of *amān* is allowed up to the day of judgement.’¹⁶⁴

9.8-Protection to the Envoys and Diplomats (Diplomatic Immunity)

Ibn Qudāmah writes:

وَيَجُوزُ عَقْدُ الْأَمَانِ لِلرَّسُولِ
وَالْمُسْتَأْمِنِ ؛ لِأَنَّ النَّبِيَّ ﷺ كَانَ يُؤْمَنُ رُسُلَ الْمُشْرِكِينَ . وَلَمَّا جَاءَهُ رَسُولًا مُسْتَلِمَةً ،
قَالَ : « لَوْلَا أَنَّ الرُّسُلَ لَا تُقْتَلُ لَقَتَلْتُكُمْ » . وَلِأَنَّ الْحَاجَةَ تَدْعُو إِلَى ذَلِكَ ، فَإِنَّا لَوْ
قَتَلْنَا رُسُلَهُمْ ، لَقَتَلْنَا رُسُلَنَا ، فَتَفُوتُ مَصْلَحَةُ الْمُرَاسَلَةِ . وَيجوزُ عَقْدُ الْأَمَانِ لِكُلِّ وَاحِدٍ
مِنْهُمَا مُطْلَقًا وَمُقَيَّدًا بِمُدَّةٍ ، سِوَاءٍ كَانَتْ طَوِيلَةً أَوْ قَصِيرَةً ، بِخِلَافِ الْهَدْيَةِ ، فَإِنَّهَا لَا تَجُوزُ
إِلَّا مُقَيَّدَةً ؛ لِأَنَّ فِي جَوَازِهَا مُطْلَقًا تَرْكَاً لِلْجِهَادِ ، وَهَذَا بِخِلَافِهِ .

¹⁶³ Q 9:6.

¹⁶⁴ Ibn Qudāmah, *Al-Mughni*, p. 13/79.

‘The contract of *amān* for envoys and protection seekers (*Musta'manīn*) is permissible. The Prophet used to give *amān* to the envoys of non-believers. When two envoys of Masiyūmah came to him he said to them, ‘if it was not the principle that envoys couldn’t be killed I would have killed both of you’.¹⁶⁵ The protection of envoys is necessary because if we kill their envoys they will kill our envoys and it will go against our interest. The contract of *amān* with every one of these (envoy and *Musta'manīn*) for unlimited or limited, short or long periods is allowed. The contract of cease-fire is not because it is allowed for a limited period only. Because peace treaty for unlimited period means relinquishing from jihād. The contract of *amān* is not like this.¹⁶⁶

9.9- Miscellaneous matters of *amān*

Ibn Qudāmah discussed a variety of matters with regard to protection. He has tried to address the all-important issues regarding it. The other issues regarding *amān* that he also discussed are a permanent peace accords between Muslims and their enemies. He also discussed that protection might be given temporarily or conditionally.¹⁶⁷ There are examples of temporary protection in the life of the Holy Prophet. He accorded Mu'awiyah Ibn Maguire three days to quit Madinah.¹⁶⁸ The Jews of *Khaibar* were given protection with the condition that they would not hide their property.¹⁶⁹

Protection is sometimes granted for persons absent and the necessary assurance is provided in order to create confidence. On one such occasion the Holy Prophet sent

¹⁶⁵ Ibid, p. 13/79

¹⁶⁶ Ibid, p. 13/79

¹⁶⁷ Ibid, p. 13/80.

¹⁶⁸ Ibn Hishām, *Al-Sira al-Nabawyya*, p. 1/591.

¹⁶⁹ Al-Sarkhasī, *Sharh al-Syūr al-Kabīr*, p. 1/185.

his turban.¹⁷⁰ The case of the two persons from *Banū 'Āmer* may be cited here, as an instance of the time of the Holy Prophet, which happened just before the battle with of *Banū Nadir* the Jews of Madinah.¹⁷¹ Protection is strictly a personal matter and not transferable. If not expressly mentioned otherwise, it does not protect even the granted's family, less so his property. This applies, however, only when one is in immediate danger. On the other hand when one is safe in one's home, and *amān* is solicited, then it automatically includes life, property, wives, minor children, unmarried daughters and sisters, mothers and grandmothers and aunts on both the Mother's and Father's side. In the case of licence to trade, even servants and slaves used to be included in protection during the time of classical jurists.¹⁷²

9.10- Protection for a Castle or City

Ibn Qudāmah discussed this issue in no. 1642. The discussion started with the following saying of Imām Kharqī:

١٦٤٢ - مسألة ؛ قال : (وَمَنْ طَلَبَ الْأَمَانَ لِيَفْتَحَ الْحِصْنَ ، فَفَعَلَ ، فَقَالَ كُلُّ وَاحِدٍ مِنْهُمْ : أَنَا الْمُعْطَى . لَمْ يُقْتَلْ وَاحِدٌ مِنْهُمْ)

If protection was requested for conquering a castle and it was granted and then every one of them (non-Muslims) said I received it, no one would be killed'.¹⁷³

Ibn Qudāmah, in explanation of this text, says:

وجاءته أن المسلمين إذا حصنوا حصنًا ، فناداهم رجل : آمِنُونِي أَفْتَحْ لَكُمْ الْحِصْنَ . جَازَ أَنْ يُعْطَوْهُ أَمَانًا ؛ فَإِنَّ زِيَادَ بْنَ لَيْثٍ لَمَّا حَصَرَ النَّجَّارَ ، قال الأشعثُ بْنُ قَيْسٍ : أَعْطُونِي الْأَمَانَ لِعَشْرَةٍ ، أَفْتَحْ لَكُمْ الْحِصْنَ . ففعلوا . فَإِنَّ أَشْكَالَ الَّذِي أُعْطِيَ الْأَمَانَ ، وَأَدْعَاهُ كُلُّ وَاحِدٍ مِنْ أَهْلِ الْحِصَنِ ، فَإِنَّ عُرْفَ صَاحِبِ الْأَمَانِ ، عَمِلَ عَلَى ذَلِكَ ، وَإِنْ لَمْ

¹⁷⁰ Tabrī, *Tarikh al-Ummam*, p. 1/1645.

¹⁷¹ Ibn Hisham, *Al-Sira al-Nabawyya*, p. 1/652.

¹⁷² Hamidullah, *The Muslim Conduct*, p. 211.

¹⁷³ Ibn Qudāmah, *Al-Mughni*, p. 13/82.

يُعَرَفُ ، لم يُجْزَ قَتْلُ وَاحِدٍ مِنْهُمْ^(١) ؛ لِأَنَّ كُلَّ وَاحِدٍ مِنْهُمْ يَحْتَمِلُ صِدْقَهُ ، وَقَدْ اشْتَبَهَ الْمُبَاحُ بِالْمَحْرَمِ فِيمَا لَا ضَرُورَةَ إِلَيْهِ ، فَحَرُمَ الْكُلُّ ، كَالْوِاسْتِثْبَاتِ مَيْتَةً بِمَذَكَّاةٍ ، أَوْ أُخْتَهُ بِأُجْنَبِيَّاتٍ ، أَوْ اشْتَبَهَ زَانٍ مُنْخَصِنٌ بِرَجَالٍ مَعْصُومِينَ . وَهَذَا قَالَ الشَّافِعِيُّ ، وَلَا أَعْلَمُ فِيهِ خِلَافًا .

‘Regarding his (Imām al-Kharqī) opinion that if Muslims were besieging a castle and someone demanded of them from the castle, ‘give me protection and I will open the castle for you’. It is permissible to give him this kind of protection. When Ziyad Ibn Labid besieged the castle of al-Najr, Alash’ath bin Qais requested, ‘give me protection for ten people and I will open the castle for you’. They accepted the offer and gave them protection. If there was ambiguity about who had requested protection then everyone inside the castle has protection. None would be killed because each of them has the possibility of truth and the permissibility or prohibition became unclear and so everyone became protected from killing. The matter is similar to the mixing of taxable animals with the dead or ambiguity between sisters with others, or the mixing of adulterers with the pious. This is the opinion of Imām al-Shāf’ī and I do not know any difference between jurists on this matter.¹⁷⁴

Islamic rules of protection seeker can be derived from this discussion. If any foreigner comes to an Islamic land and requests to settle there permanently, the authorities may grant the request. In the time of Badrudine Ibn Jum’ah when non-Muslims were granted naturalisation, there was a special register in which entries were made as to their name, distinguishing features, age and religion. Inspectors were

¹⁷⁴ Ibid. p. 13/83

appointed from among them to control their affairs and take notice of deaths, travel, returns from abroad, reaching the age of maturity and also to attend them at the time of the annual capitation tax.¹⁷⁵ There does not seem to be any probationary period suggested by jurists, yet obviously it lay with the Government to decide whether to grant the request for naturalization or to reject it just in the same way as it lay with the government to grant temporary residence permits.¹⁷⁶

9.11- Protection of Traders

Ibn Qudāmah says:

فصل: وإذا دخل حربي دار الإسلام بغير أمان ، نظرت ؛ فإن كان معه متاع يبيعه في دار الإسلام ، وقد حوت العادة بدخولهم إليها تجاراً بغير أمان ، لم يعرض لهم . وقال أحمد : إذا ركب القوم في البحر ، فاستقبلهم فيه تجار مشركون من أرض العدو ، يريدون بلاد الإسلام ، لم يعرضوا لهم ، ولم يقاتلوه ، وكل من دخل بلاد المسلمين من أهل الحرب بتجارة ، يبيع ، ولم يسأل عن شيء ، وإن لم تكن معه تجارة ، فقال : جئت مستأمناً . لم يقبل منه ، وكان الإمام مخيراً فيه . ونحو هذا قول الأوزاعي ، والشافعي .

‘If anyone from an enemy land enters into an Islamic state without protection, his luggage will be checked. If he has trade goods for sale in an Islamic state and they (traders) were used to entering our land without prior *amān*. They will not be touched. Imām Ahmed said, ‘If people came to an Islamic state by sea and traders from the land of the enemy are among them, they will not be touched and there will be no fight with them’. Anyone who enters an Islamic state from the land of enemies will be given *amān* and will not be asked about anything. If he has no trade goods with him and says that I come as *Must’amin*

¹⁷⁵ Badrudine Ibn Jum’aa, *Tahrir al-Ahkām fī Tadbīr Ahl al-Islām*, p. 330

¹⁷⁶ Hamidullah, *The Muslim Conduct*, p. 113.

his claim will not be accepted and the Imām will have the option to decide regarding him. The opinion of Imām al-Shāf'ī and Awzā'ī is similar to this'.¹⁷⁷

Trade was very important to the people of Arabia. Traders travelled to foreign countries before their state had any diplomatic or official relations with them. Trade caravans used to stay in a country for a long period of time. The local affairs were given administrators who were appointed for the settlement of disputes. The Prophet himself gave importance to trade. He abolished all inter-provincial customs duties. Many treaties concluded by him with tribes submitting to his authority expressly stipulate that the traders were free to travel. They were not required to get any special permission for their entry into an Islamic state. The condition was that they should be actually traders.¹⁷⁸

10-The Status of Non-Muslim *Dhimmi* of Islamic State

Islamic law allows non-Muslims to become residents of the Islamic state either by payment of *Jizya* (tax of protection) or by getting *amān* without payment. The matters regarding protection have been discussed. Non-Muslims *Dhimmi*s and the nature of their relations with Muslims and the state will be discussed here. Ibn Qudāmah quotes:

قال /القاضي: ويجوز أن يُقيموا مدة الهدنة بغير جزية. قال أبو بكر: وهذا ظاهر كلام أحمد؛ لأنه قيل له: قال الأوزاعي: لا يترك المشرك في دار الإسلام إلا أن يُسلم أو يُؤدى. فقال أحمد: إذا أمته، فهو على ما أمته. وظاهر هذا أنه خالف قول الأوزاعي. وقال أبو الخطاب: عندي أنه لا يجوز أن يُقيم سنة بغير جزية. وهذا قول الأوزاعي،

¹⁷⁷ Ibn Qudāmah, *Al-Mughni*, p. 13/83.

¹⁷⁸ Abū Yūsuf, *kitāb al-Kharāj*, p.78; al-Sarkhasī, *Sharh al-Syūr al-Kabīr*, p. 4/286.

والشافعي ! لقول الله تعالى : ﴿ حَتَّى يُعْطُوا الْجِزْيَةَ عَنْ يَدٍ وَهُمْ صَاغِرُونَ ﴾ .
 ووجه الأول ، أن هذا كافر أبيح له الإقامة في دار الإسلام ، من غير التزام جزية ، فلم
 تلزمه جزية ، كالتساء والصبيان ، ولأن الرسول لو كان مفعلاً لا يجوز أخذ الجزية منه ،
 يستوى في حقه السنة وما دونها ، في أن الجزية لا تؤخذ منه في المدة ، فإذا جازت له
 الإقامة في أحدهما ، جازت في الأخرى ، قياساً لها عليها .

'Qādī said, 'It is permissible that *Dhimmi*s (non-Muslims) can stay without payment of *Jizya* during the period of treaty. Abū Bakr said, 'this is the opinion of Imām Ahmed also'. He was told that the opinion of Imām Awzā'ī is that non-Muslims are not allowed to stay in the Islamic state unless they accept Islam or pay the *Jizya*. Imām Ahmed replied, 'if you give him *amān* he has nothing to pay. This opinion of Imām Ahmed clearly goes against the opinion of Imām Awzā'ī. Abū al-Khattāb said, 'in my opinion, he (a non-Muslim) is not allowed to stay in an Islamic state for one year without the payment of *Jizya*. This opinion of Imām Shāf'ī and Awzā'ī is on the basis of the following Qur'ānic verse:

[Until they pay *Jizya* and they are subordinates]¹⁷⁹

The first reason for not imposing *Jizya* on him is that he is allowed to stay in the Islamic state without the condition of payment of *Jizya*. So payment of *Jizya* will not be obligatory on him as it is not obligatory on females and children, because envoys are also not bound to pay *Jizya*. It is the same case in favour of others. *Jizya* cannot be taken for two periods. If he is allowed to stay in one period without payment of *Jizya*, he will be entitled to the same in another period'.¹⁸⁰

¹⁷⁹ Q 9:29.

¹⁸⁰ Ibn Qudāmah, *Al-Mughni*, p. 13/80.

Ibn Qudāmah points out that there are two kinds of non-Muslims. Those who pay *Jizya* and those who do not. The non-Muslims who pay *Jizya* are called *Dhimmi*. They are permanent resident of the Islamic state. The second kind of non-Muslims is called *Musta'mnīn*. They are temporary visitors to the Islamic state. It is true that Muslim law has maintained a difference between Muslims and non-Muslims but the rights of non-Muslims are completely protected and sometimes they appear more privileged than the Muslims. Islamic law, as a principle, protects life, property honour and liberty of religion even for non-Muslims, be they a subject of the Muslim state or resident aliens or tourists so much so that if a minor is taken prisoner of war along with a parent, the child conserves the ancestral religion even if later his parents die.¹⁸¹ Non-Muslims are exempt from the payment of *Zakāt* which all Muslims males and females pay every year at the rate of 2-½ % on their savings.¹⁸² Non-Muslims are also exempt from compulsory military service whereas all Muslims are subject to this training. Non-Muslims in Islamic society enjoy a sort of autonomy. Their cases are adjudicated by their co-religionists in accordance with their personal law.¹⁸³ Their life and property is protected by the Muslim state even as that of the Muslim subjects¹⁸⁴. In return for all these privileges they are bound to pay *Jizya* annually with several exemptions.

10.1- The concept of *Jizya*

This tax is expected only from men and not from women, minors. The rich have to pay more and the poor have to pay less. The amount of the *Jizya* is varied between 12 and 48 *dirhams*. Instead of cash they may pay the value. This tax is not

¹⁸¹ al-Sarkhasī, *Sharh al-Sīr al-Kabīr*, p. 4/369-72.

¹⁸² Ibid., p.4/293.

¹⁸³ Al Tabrī, *Tarikh al-Ummam*, p. 1/2497.

¹⁸⁴ Abū Yūsuf, *kitāb al-Kharāj*, p. 71.

liable to be paid by indigents who receive charities nor from the blind who have no profession and do not work, nor from the chronically sick receiving charity, nor from the crippled – except those chronically sick and crippled and blind who are rich nor from the monks in convent nor from very old who can neither work nor have wealth nor from lunatics. The last words which the Caliph Umar Ibn al Khattāb uttered on his death bed, included the following: 'I exhort my successor regarding the treatment to be meted out to the people protected by the messenger of God.'¹⁸⁵

Non-Muslim slaves are also exempted from this *Jizya* tax¹⁸⁶. If any non-Muslim subject renders military service, at his will, he is exempted from *Jizya* during the years of active service.¹⁸⁷ There are instances when this tax was remitted for a whole lifetime for meritorious public services, as, for instance, the Caliph Umar did when a non-Muslim subject helped in selecting the site for digging a canal from Cairo to the Red Sea.¹⁸⁸

10.2- Protection of Wealth and Property of Non- Muslims(*Musta'mnūn*)

Ibn Qudāmah says:

وإذا دخل حربى دار الإسلام بأمان ، فأودع ماله مسلماً أو ذمياً ، أو أقرضه إياه ، ثم عاد إلى دار الحرب ، نظرنا ؛ فإن دخل تاجراً ، أو رسولاً ، أو مُتَنَزِّهاً ، أو لحاجة يَقتضيها ثم يعود إلى دار الإسلام ، فهو على أمانه في نفسه وماله ؛ لأنه لم يخرج بذلك عن نيّة الإقامة بدار الإسلام ، فأشبه الذمى إذا دخل لذلك ، وإن دخل مُستوطنًا ، بطل الأمان في نفسه ، وبقي في ماله ؛ لأنه بدخوله دار الإسلام بأمان ؛ ثبت الأمان لماله الذى معه ، فإذا بطل في نفسه بدخوله دار الحرب ، بقي في ماله .

'If a non-Muslim enters in an Islamic state with protection and deposits his wealth with any Muslim or *Dhimmi* or gives it as a loan, then he returns to his

¹⁸⁵ Hamidullah, *The Muslim Conduct* , p. 113.

¹⁸⁶ Ibn Rushd, *Pidāyat al-Mujtahid*, p. 1/371.

¹⁸⁷ Hamidullah, *The Muslim Conduct*, p. 113.

¹⁸⁸ Al-Suyuti, *Hussan al-Muhazharah Fi Akhbar Missar Wa Qahirah*, p. 207.

country. If he entered as a trader or diplomat or tourist or doing some work, he and his wealth is in *amān* because he has not returned to his own country to remain there. So he is similar to a *Dhimmi* who entered an Islamic state to seek protection. But if he enters in his country to settle there permanently then *amān* for his person is invalid but it is valid for his wealth and property. Because when he came first protection was granted to him and his wealth, when he went out his protection became invalid but it remained valid for his wealth'.¹⁸⁹

This paragraph of *Al-Mughnī* shows the provision by Islamic Law for the protection of non-Muslims and their wealth. The text also indicates that if due to any reason the protection for a person becomes invalid, this would remain valid for his wealth. He will continue to own his wealth and no one is authorised to take his wealth even if his protection becomes invalid. Ibn Qudāmah continues:

وإن مات في دار الحرب انتقل إلى واريته ، ولم ينطَل الأمان فيه .
وقال أبو حنيفة : ينطَل فيه . وهو قول للشافعي^(١) ؛ لأنه قد صار لوارثه ، ولم يعقد فيه
أماناً ، فوجب أن ينطَل فيه ، كسائر أمواله . ولنا ، أن الأمان حق له لازم متعلق بالمال ،
فإذا انتقل إلى الوارث ، انتقل بحقه^(٢) ، كسائر الحقوق ؛ من الرهن ، والضمين ،
والشفعة . وهذا اختيار المزي . ولأنه مال له أمان ، فينتقل إلى واريته مع بقاء الأمان فيه ،
كالمال الذي مع مضاربه . وإن لم يكن له وارث ، صار فيمالي بيت المال . فإن كان له وارث في
دار الإسلام ، فقال القاضي : لا يرثه ، لاختلاف الدارين . والأولى أنه يرثه ؛ لأن ملكتهما
واحدة ، فيرثه كالمسلمين ، وإن مات المستامن في دار الإسلام ، فهو كالو مات في دار
الحرب ، سواء ؛ لأن المستامن حربى تجري عليه أحكامهم . وإن رجع إلى دار
الحرب ، فسبى واسترق ، فقال القاضي : يكون ماله موقوفاً حتى يعلم آخر أمره ،
بموت أو غيره ، فإن مات كان فيمالي ؛ لأن الرقيق لا يورث ، وإن عتق كان له ، وإن لم
يُسترق ، ولكن من عليه الإمام ، أو فاداه ، فماله له ، وإن قتله ، فماله لورثته

¹⁸⁹ Ibn Qudāmah, *Al-Mughnī*, p. 13/80.

'If a non-Muslim died in his country and his wealth is in the Islamic state, it will be transferred to his heir and *amān* in wealth will not be invalid. According to the opinion of Imam Abū Hanifa and Imām Shāfi'ī *amān* for his wealth will be invalid because it became the wealth of his heir and it was not included in the contract of protection. So it is necessary that it should be invalid as his whole wealth. Our opinion is that *amān* is a right related to his wealth. When wealth transfers to its heir, it transfers with full rights as other rights like pledge and mortgage and this is the right of beneficiaries. Because the protection was granted to wealth it is transferred along with it like wealth, which is invested in business. If there is no heir to this wealth then it will be official wealth included in the *Bait al- Māl*. If the dead person has an heir in the Islamic states, Qādī said he would not inherit because of the differences of states. But our opinion is that he will inherit it because they are from the same nation like Muslims. If a temporary resident of Islamic State (*Musta'men*) dies in an Islamic state, he will be considered as in his own country because he is temporarily in an Islamic state and its law will be applicable to him. If this a temporary resident of an Islamic State (who deposited his wealth) returned to the land of war and he was captured by the Muslims and became a prisoner, the fate of his wealth would be dependent on his own fate according to Qādī. If he died after being enslaved his wealth will be official wealth included in *Bait al-Māl* because the slave does not have the right to bequeath his wealth. If he freed by the Islamic State then he has the right to retrieve his wealth. If he was killed his wealth would be transferred to his heir'.¹⁹⁰

¹⁹⁰ Ibn Qudāmah, *Al-Mughni*, p. 13/81.

This text is also related to the status of the non-Muslims in an Islamic State, civil matters and their solution in Islamic law and also this text indirectly elaborates the methods of getting protection of Islamic State which is known as *amān*.

10.3- Social security for non-Muslims in an Islamic State

Ibn Qudāmah states that Imām al-Kharqī says:

(وَإِذَا سَبَى الْمُشْرِكُونَ مَنْ يُؤَدِّي إِلَيْنَا الْجِزْيَةَ ، ثُمَّ قُدِرَ عَلَيْهِمْ ، رُدُّوا إِلَى مَا كَانُوا عَلَيْهِ ^(١) ، وَلَمْ يُسْتَرْقُوا ، وَمَا أَخَذَهُ الْعَدُوُّ مِنْهُمْ مِنْ مَالٍ أَوْ رَقِيقٍ ، رُدَّ إِلَيْهِمْ ، إِذَا عَلِمَ بِهِ قَبْلَ أَنْ يُقَسَمَ ، وَيُقَادَى بِهِمْ بَعْدَ أَنْ يُقَادَى بِالْمُسْلِمِينَ)

'If non-Muslims *Dhimmīs* of an Islamic State, who are pay *Jizya*, are captured by the enemies then Muslims get them back, they will revert to their previous status and they will not be enslaved. Of their wealth and their servants, what enemies have taken, will be returned to them if it is known before the division of booty. Ransom will be given to enemies for them only after ransom has been paid for Muslims.'¹⁹¹

In explanation of this text Ibn Qudāmah says:

وجملة ذلك أن أهل الحرب إذا استولوا على أهل دِمَّتِنَا ، فَسَبَوْهُمْ ، وَأَخَذُوا أَمْوَالَهُمْ ، ثُمَّ قَلَبُوا عَلَيْهِمْ ، وَجَبَّ رُدُّهُمْ إِلَى دِمَّتِهِمْ ، وَلَمْ يُجْزَ اسْتِرْقَاقُهُمْ . فِي قَوْلِ عَامَّةِ أَهْلِ الْعِلْمِ ؛ مِنْهُمْ الشَّعْبِيُّ ، وَمَالِكٌ ، وَاللَّيْثُ ، وَالْأَوْزَاعِيُّ ، وَالشَّافِعِيُّ ، وَإِسْحَاقُ ، وَلَا نَعْلَمُ لَهُمْ مُخَالَفًا ؛ وَذَلِكَ لِأَنَّ دِمَّتَهُمْ بَاقِيَةٌ ، وَلَمْ يُوجَدْ مِنْهُمْ مَا يُوجِبُ تَقْضِيهَا . وَحُكْمُ أَمْوَالِهِمْ ، حُكْمُ أَمْوَالِ الْمُسْلِمِينَ فِي حُرْمَتِهَا . قَالَ عَلِيُّ ، رَضِيَ اللَّهُ عَنْهُ : إِذَا بَدَلُوا الْجِزْيَةَ لِتَكُونَ دِمَاؤُهُمْ كِدِمَاتِنَا ، وَأَمْوَالُهُمْ كَأَمْوَالِنَا . فَمَتَى عَلِمَ صَاحِبُهَا قَبْلَ قَسْمِهَا ، وَجَبَّ رُدُّهَا إِلَيْهِ ، فَإِنْ عَلِمَ بِهِ بَعْدَ الْقِسْمَةِ ، فَعَلَى الرَّابِتَيْنِ ؛ إِحْدَاهُمَا ، لِأَحَقِّ لَهُ فِيهِ . وَالثَّانِيَةُ ، هُوَ لِيَسْمَتِهِ ؛ لِأَنَّ أَمْوَالَهُمْ مَغْصُومَةٌ كَأَمْوَالِ الْمُسْلِمِينَ . وَأَمَّا إِذَا وَهَبَهُمْ ، فَظَاهِرُ كَلَامِ الْخِرَقِيِّ ، أَنَّهُ يَجِبُ فِدَاؤُهُمْ ، سِوَاءَ كَانُوا فِي مَعْرِيتِنَا أَوْ لَمْ يَكُونُوا . وَهَذَا قَوْلُ عَمْرِ بْنِ عَبْدِ الْعَزِيزِ ، وَاللَّيْثِ ؛ لِأَنَّا

¹⁹¹ Ibn Qudāmah, *Al-Mughni*, p. 13/134-35.

الْتَرْمَنَا حِفْظَهُمْ ، بِمُعَاهَدَتِهِمْ ، وَأَتَّخِذَ حِزْبَتَهُمْ ، فَلَزِمْنَا الْقِتَالَ مِنْ وَرَائِهِمْ ، وَالْقِيَامُ
 ذُوْنَهُمْ ، فَإِذَا عَجَزْنَا عَنْ ذَلِكَ ، وَأَمْكَنَّا تَخْلِيصَهُمْ ، لَزِمْنَا ذَلِكَ ، كَمَا يَحْرُمُ عَلَيْهِ
 إِتْلَافُ شَيْءٍ ، فَإِذَا أَثْلَقَهُ غَرَمَهُ . وَقَالَ الْقَاضِي : إِنَّمَا يَجِبُ فِدَاؤُهُمْ إِذَا اسْتَعَانَ بِهِمُ الْإِمَامُ
 فِي قِتَالِهِ فَسُبُّوا ، وَجَبَّ عَلَيْهِ فِدَاؤُهُمْ ؛ لِأَنَّهُمْ كَانُوا لِمَعْنَى مِنْ جِهَتِهِ . وَهُوَ الْمَنْصُوصُ
 عَنْ أَحْمَدَ .

‘The explanation of his statement is that if an enemy captures non-Muslim protected *Dhimmi*s of an Islamic state and takes their wealth and Muslims get them back, it is obliged to consider them protected as they were before. Their emancipation is not allowed. This is the general opinion of scholars like Shū‘abī, Mālik, Alīyath, Awzā‘ī, Shāf‘ī and Ishāq and we do not know any opinion against it. The protection of their wealth is as the wealth of Muslims. Ali said that they are paying *Jizya* so that their blood and wealth should be like us. If the loss of their belongings is known before the division of booty it is a duty of the concerned authority to return their belongings to them. If it is known it after the division of booty, there are two opinions; one opinion is that they lose their rights and the second opinion is that the price of their belongings will be paid to them because their belongings are protected as the belongings of the Muslims are. As for the issue of payment of ransom for freeing them from the enemy, it is clear from the opinion of Kharqī that ransom for them is obligatory, whether their help for war was sought or not. This is the opinion of Umar bin AbdulAziz and Alīyath. We are committed to protect them on the basis of payment of *Jizya*. We are bound to fight for their defence. If we are not able to fight for their defence and we are able to free them we have to do this. As destroying their things is prohibited and in case of it happening we are bound to compensate them. Qādī said, ‘Ransoming for them is obligatory if

their help was sought and they are caught by the enemies because their imprisonment is on the part of the Imām of the Muslims. This opinion is reported from Imām Ahmed.¹⁹²

The above discussion shows the importance that the Islamic States gave to its non-Muslim *Dhimmi*. The last words, which the Caliph Umar Ibn al-Khattāb uttered on his death-bed, included the following: 'I exhort my successor regarding the treatment to be meted out to the people protected by the Messenger of God (i.e. non-Muslim subjects). They should receive the fullest execution of their covenant, and their life and even going to war to defend their property, and they should not be taxed beyond their capacity.'¹⁹³

Once Umar passed along a street where an old, blind man was asking for charity. Umar tapped his shoulder from behind and said, 'Which community do you belong to?' He replied, 'Jewish'. Umar asked, 'Why are you asking people for money?' He replied, 'I have to pay the capitation tax, I am poor; and I am old'. At this Umar took him by the hand and led him to his own house and gave him something from his private coffers. Then he sent orders to the cashier of the *Bait al-Māl* (State Treasury), 'Look at him and his like. By God! We should never be doing justice if we eat out his youth and leave him deserted in his old age. Qur'ān has laid down this principle that government taxes are meant for the poor and the indigent. The poor are the Muslims, and this one is an indigent from among the non-Muslims And Umar remitted the capitation tax from him and his like. When he came to *al-Jibāyah*, en route he passed some Christians suffering from leprosy, so he gave orders that they should be aided out of *Ṣadaqāt* and that they should be given a life-pension¹⁹⁴. Ibn

¹⁹² Ibn Qudāmah, *Al-Mughnī*, p. 13/135.

¹⁹³ Abū Yūsuf, *Kitāb al-Kharāj*, p. 78.

¹⁹⁴ al-Bladhurī, *Fotūh al-Buldān*, p. 129.

Sa'd records that 'Umar Ibn 'Abd al-A'ziz ordered during his caliphate that non-Muslim subjects, taken prisoner by an enemy, should as much be ransomed and liberated on government expenses as any Muslim subject.¹⁹⁵

¹⁹⁵ Ibn S'ad, *Al-Tabaqāt*, p.5/272.

Chapter Four

Principles of Jihād in *Al-Mughnī*

1- Ransoming of prisoners of the war

Ibn Qudāmah specifies a separate *faṣl* for this matter in which he says:

فصل : وَيَجِبُ فِدَاءُ أَسْرَى الْمُسْلِمِينَ إِذَا أُمْكَنَ . وَهَذَا قَالَ عُمَرُ بْنُ عَبْدِ الْعَزِيزِ ، /
وَمَالِكٌ ، وَإِسْحَاقُ . وَيُرْوَى عَنْ ابْنِ الزُّبَيْرِ ، أَنَّهُ سَأَلَ الْحَسَنَ بْنَ عَلِيٍّ : عَلَى مَنْ فَكَانُكَ
الْأَسِيرِ ؟ قَالَ : عَلَى الْأَرْضِ الَّتِي يُقَاتِلُ عَلَيْهَا . وَثَبَّتَ أَنَّ رَسُولَ اللَّهِ ﷺ قَالَ : « أَطْعِمُوا
الْجَائِعَ ، وَعَوِّدُوا الْمَرِيضَ ، وَفُكُّوا الْعَانِي » . وَرَوَى سَعِيدٌ ، بِإِسْنَادِهِ عَنْ حِبَّانَ بْنِ
أَبِي جَبَلَةَ ، أَنَّ رَسُولَ اللَّهِ ﷺ قَالَ : « إِنْ عَلَى الْمُسْلِمِينَ فِي قَيْدِهِمْ أَنْ يُفَادُوا أَسِيرُهُمْ ،
وَيُؤَدُّوا عَنْ غَارِمِهِمْ » . وَرَوَى عَنِ النَّبِيِّ ﷺ ، أَنَّهُ كَتَبَ كِتَابًا بَيْنَ الْمُهَاجِرِينَ وَالْأَنْصَارِ
« أَنْ يَتَقَلَّوْا مَعَاقِلَهُمْ ، وَأَنْ يَفُكُّوْا عَانِيَهُمْ بِالْمَعْرُوفِ » . وَفَادَى النَّبِيُّ ﷺ رَجُلَيْنِ مِنَ
الْمُسْلِمِينَ بِالرَّجُلِ الَّذِي أَخَذَهُ مِنْ بَنِي عُقَيْلٍ (١) ، وَفَادَى بِالْمَرْأَةِ الَّتِي اسْتَوْهَبَهَا مِنْ سَلَمَةَ بْنِ
الْأَكْوَعِ رَجُلَيْنِ .

'If possible the ransoming of Muslim prisoners is obligatory. This is the opinion of Umar bin Abdul 'Aziz and Mālik and Ishāq. It is reported from Ibn Zubair that he asked Hassan bin Ali where should prisoners of war be freed. He said the land on which they fought. The Prophet said, 'Feed the hungry and treat the patients and free the prisoners.'¹⁹⁶ Sa'id reported on the authority of Hibān bin Abi Jablah that the Prophet Said, 'It is the duty of the Muslims to pay ransom for their prisoners from their *Fai*' (official wealth)¹⁹⁷. It is reported by him that he arranged an agreement between *Muhājirūn* (those who accompanied Muhammad on the *Hijra*) and Ansar (people of Madinah) for help in freeing their prisoners.¹⁹⁸ The Prophet exchanged one man from *Banū 'Uqīl*

¹⁹⁶ Al Bukharī, *Al-Sahih*, *Kitāb Al-jihād*, p. 4/83.

¹⁹⁷ Abū Dawūd, *Al-Sunan*, p. 2/293.

¹⁹⁸ Ahmed bin Hanbal, *Al-Musnad*, p. 1/271.

as ransom for two Muslim men and exchanged one female (given to him from Salma bin Al-'akw') as ransom for two Muslim men.¹⁹⁹

With regard to Muslim subjects, it is the duty of the Muslim State to seek their release by allocating money from the public treasury. The Qur'ān clearly lays down that a portion of the State income is to be allotted for freeing prisoners and slaves. The Qur'ān says:

[*As-Sadaqat* are only for the *Fuqara* (poor), and *Al-Masakin* (the poor) and those employed to collect (the funds), and to attract the hearts of those who have been inclined (towards Islam), and to free the captives, and for those in debt, and for Allah's Cause (i.e. for *Mujāhidūn* – those fighting in a holy battle), and for the wayfarer (a traveller who is cut off from everything); a duty imposed by Allah. And Allah is All-Knower, All Wise.]²⁰⁰

These verses are interpreted as aiding prisoners and slaves to get them freed. There are clear traditions of the Prophet to the same effect recorded by al-Bukhari and others; for instance: 'Manage the release of the prisoner' The Caliph Umar however, ordered, 'Every Muslim prisoner in the hands of non-Muslims must be relieved by means of the Muslim State treasury.'²⁰¹

Regarding later times, al-Mas'ūdī and al-Maqrizī record and describe more than half a dozen general releases of Muslim prisoners by their enemy.²⁰² Historians of foreign countries have also recorded them. Finlay, for instance, says, 'Regular exchanges of prisoners with the Muslims commenced as early as the reign of Constantine V, 769 C.E. (contemporary of the al-'Abbāsīd al-Manṣūr). In the year 797

¹⁹⁹ Abū Dawūd, *Al-Sunan*, p. 2/56.

²⁰⁰ Q 9:60.

²⁰¹ Abū yūsuf, *Kitāb al-Kharāj*, p. 121.

²⁰² Ibn Al-Athīr, *Al-Kāmil* (Beirut :Dar Sader, 1966), p. 8/262.

(i.e. under Hārūn al-Rashīd) a new clause was inserted in a treaty for the exchange of prisoners, binding the contracting parties to release all supernumerary captives on the payment of a fixed sum for each individual.²⁰³

2-Prohibited acts during war

2.1-Burning of enemies in fire

Ibn Qudāmah discusses this matter in issue number 1669 and reports from al- Kharqī:

١٦٦٩ — مسألة ؛ قال : (وَإِذَا حُورِبَ الْعَدُوُّ ، لَمْ يُحْرَقُوا بِالنَّارِ)

'During war with the enemies, they would not burn in fire.'²⁰⁴

Then he explains:

أَمَّا الْعَدُوُّ إِذَا قُبِرَ عَلَيْهِ ، فَلَا يَجُوزُ تَحْرِيقُهُ بِالنَّارِ ، بغيرِ خِلافٍ نَعْلَمُهُ . وقد كان أبو بكر الصديق^(١) رَضِيَ اللهُ عَنْهُ ، يأْمُرُ بِتَحْرِيقِ أَهْلِ الرَّدَّةِ بِالنَّارِ . وفعل ذلك خالد بن الوليد بأمره ، فأَمَّا اليومُ فلا أعلمُ / فيه بينَ الناسِ خِلافًا . وقد رَوَى حمزةُ الأَسْلَمِيُّ ، أن رسولَ الله ﷺ أَمَرَهُ عَلَى سَرِيَّةٍ ، قال : فَخَرَجْتُ فِيهَا ، فقال : « إِنْ أَخَذْتُمْ فَلَانًا ، فَاحْرِقُوهُ بِالنَّارِ » . فَوَلَّيْتُ ، فناداني ، فَرَجَعْتُ ، فقال : « إِنْ أَخَذْتُمْ فَلَانًا ، فَاقْتُلُوهُ ، وَلَا تُحْرِقُوهُ ؛ فَإِنَّهُ لَا يُعَذَّبُ بِالنَّارِ إِلَّا رَبُّ النَّارِ » . رَوَاهُ أَبُو دَاوُدَ ، وسعيدٌ . وَرَوَى أَحَادِيثَ مِثْلَهُ فِي هَذَا الْمَعْنَى . وَرَوَى الْبُخَارِيُّ ، وَغَيْرُهُ ، عَنْ أَبِي هُرَيْرَةَ ، رَضِيَ اللهُ عَنْهُ ، عَنِ النَّبِيِّ ﷺ نَحْوَ حَدِيثِ حَمْزَةَ . فَأَمَّا رَمْيُهُمْ قَبْلَ أَخْذِهِمْ بِالنَّارِ ، فَإِنْ أَمَكَنْ أَخْذَهُمْ بِلَوْنِهَا ، لَمْ يَجُزْ رَمْيُهُمْ بِهَا ؛ لِأَنَّهُمْ فِي مَعْنَى الْمَقْدُورِ عَلَيْهِ ، وَأَمَّا عِنْدَ الْعَجْزِ عَنْهُمْ بِغَيْرِهَا ، فَجَائِزٌ ، فِي قَوْلِ أَكْثَرِ أَهْلِ الْعِلْمِ . وَبِهِ قَالَ الثَّوْرِيُّ ، وَالْأَوْزَاعِيُّ ، وَالشَّافِعِيُّ .

'Captured enemies should not be burnt in fire. This is the unanimous opinion of the jurist that we knew. Abū Bakr ordered to be burnt the apostates in fire. Khālīd bin al-Walīd did it on his orders but today I do not know any difference of opinion regarding this (prohibition of burning). Hamzah al-'Aslamī reported from the Prophet that he appointed him to the troop and said, 'If you find so

²⁰³ Finlay, *History of Byzantine Empire*, p. 1/106.

and so burn him. I turned from him then he called me again and said, 'if you find him kill him and do not burn him because only Almighty God can execute the punishment of burning'.²⁰⁵ There are other reports also with the same meaning. Imām al-Bukhārī and others reported from Abu Hurairah who narrated from the Prophet another *hadīth* similar to the *hadīth* of Hamzah. The enemy should be caught without the use of firing in the first instance. In this case firing is not allowed because the principle is to catch them. However, if firing is the only means of capturing them then it is allowed. Imām Thawrī, Al Awzā'ī and Shāf'ī are of the same opinion.²⁰⁶

The opinion of Ibn Qudāmah expressed in this part is clear. Burning a captured man or animal to death is strictly prohibited. The tradition that once the Prophet despatched a detachment with the instructions to accept a culprit and burn him alive; but he immediately recalled them and ordered them not to burn the criminal but simply kill them; for, he said, only the lord of fire can punish with fire, the opinion of Ibn Qudāmah is very important for this matter.²⁰⁷

2.2- Sinking of Enemies in Water and use of *Manjanīq* (Catapults)

Ibn Qudāmah looks into the legitimacy of different methods used in wars and says:

فصل: وكذلك الحكم في فتح البثوق عليهم، لتعريضهم^(١)، إن قُدر عليهم بغيره، لم يجز، إذا تضمن ذلك إثلاف النساء والصبيان والذرية، الذين يحرم إثلافهم قصداً، وإن لم يُقدَّر عليهم إلا به، جاز، كما يجوز البيات المتضمن لذلك. ويجوز نصب المنجنيق عليهم. وظاهر كلام أحمد جوازه مع الحاجة وعدمها؛ لأن النبي ﷺ نصب المنجنيق على أهل الطائف^(٢). ومن رأى ذلك الثوري، والأوزاعي، والشافعي، وأصحاب

²⁰⁴ Ibn Qudāmah, *Al-Mughni*, p. 13/138.

²⁰⁵ Abū Dawūd, *Al-Sunan*, Bāb Fi krahiat harq al-Adaw bi'l'Inar, p. 2/50.

²⁰⁶ Ibn Qudāmah, *Al-Mughni*, p. 13/138

²⁰⁷ Finlay, *History of Byzantine Empire*, p. 1/106..

الرأي . قال ابن المنذر : جاء الحديث عن النبي ﷺ ، أنه نصب المنجنيق على أهل الطائف . وعن عمرو بن العاص ، أنه نصب المنجنيق على أهل الإسكندرية^(١) . ولأن القتال به معتاد ، فأشبه الرمي بالسهم .

'The same order is given in the sinking of enemies in water. If they surrender than this it is not allowed because it may be dangerous for females and children whose killing is prohibited. If enemies cannot be captured except in this way then it is permissible. The installations of *Manjanīq* (Catapults) are allowed and this appears from the following opinion of Imām Ahmed: 'it is allowed when it is necessary because the Holy Prophet had used this against the people of Ta'if. Imām Thawrī, Awzā'ī, Shāf'ī and Hanfī are among these who allowed this. Ibn Al Manṣūr said it is reported from the Prophet that he fixed *Manjanīq* against the people of Ta'if. It is also reported from A'mr bin al-'As that he used it against the people of Alexandria because using it in wars became frequent and it became similar to attacking with poisoned arrows.'²⁰⁸

Catapult (*Manjanīq*), which is apparently an arabicisation of the Greek word mechanic²⁰⁹, was used by the Prophet in the siege of Ta'if. Its use in war is permissible.²¹⁰

2.3- Night Attacks on enemies and treatment of non-combatants

In the discussion of prohibited acts during war Ibn Qudāmah includes:

فصل : ويجوز تبييت الكفار ، وهو كبسهم ليلاً ، وقتلهم وهم غارون . قال /أحمد : لا بأس بالبيات ، وهل غزوا الروم إلا بالبيات ؟ قال : ولا نعلم أحدا كره بيات العدو . وقرئ^(١) عليه : سفيان ، عن الزهري ، عن عبيد الله^(٢) ، عن ابن عباس ، عن الصعب بن جثامة ، قال : سمعت رسول الله ﷺ يسأل عن الديار من المشركين ، تبيتهم فنصيب من نساءهم وذرائعهم ؟ فقال : « هُم مِنْهُمْ »^(٣) . فقال : إسناده جيد . فإن

²⁰⁸ Ibn Qudāmah, *Al-Mughni*, p. 13/139.

قِيلَ : فَقَدْ نَهَى النَّبِيُّ ﷺ عَنْ قَتْلِ النِّسَاءِ وَالذَّرِيَّةِ . قُلْنَا : هَذَا مَحْمُولٌ عَلَى التَّعَمُّدِ لِقَتْلِهِمْ . قَالَ أَحْمَدُ : أَمَّا أَنْ يَتَعَمَّدَ قَتْلَهُمْ ، فَلَا . قَالَ : وَحَدِيثُ الصَّغْبِ بَعْدَ نَهْيِهِ عَنْ قَتْلِ النِّسَاءِ ؛ لِأَنَّ نَهْيَهُ عَنْ قَتْلِ النِّسَاءِ حِينَ بَعَثَ إِلَى ابْنِ أَبِي الْحَقِّيقِ . وَعَلَى أَنَّ الْجَمْعَ بَيْنَهُمَا مُمَكِّنٌ ، يُحْمَلُ النَّهْيُ عَلَى التَّعَمُّدِ ، وَالْإِبَاحَةُ عَلَى مَا عَدَاهُ .

'Night attacks on non-believer enemies are allowed. A night attack is to attack the enemies and kill them at night when they are attacking Muslims. Imām Ahmed said there is no harm in night attacks. He was asked about fighting with Romans at night only, he replied, 'I do not know anyone who disliked it and rejected it'. This was reported to him by Al Ş'ab bin Jathama, who said, 'I have listened to the Prophet, who was asked about the attack on enemies at night catching their female and children, saying 'they are from them'. The reporter said that the chain of this *hadīth* is strong. When it was said that the Holy Prophet had prohibited killing of children and females, we replied that the Prophet prohibited intentionally killing them. Imām Ahmed said that if we intend to kill females and children then it is not allowed. Imām Ahmed said that this *hadīth* which was narrated by Al Ş'ab and the prohibition of killing of females on the basis of the order of the Prophet when he sent Ibn Abi Al-Huqīq, The combination of both traditions is possible while considering prohibition on intentionally killing and it is permissible in other situations'.²¹¹

Night attacks were used during the time of the Prophet. Muslim historians have recorded even the very watchwords used on these occasions.²¹² This was a practical means of distinguishing friend from foe in darkness. On one such occasion two parties

²⁰⁹ Hamidullah, *The Muslim Conduct*, p.223.

²¹⁰ Ibn Hishām, *Al-Sira al-Nabawyya*, p. 2/244.

²¹¹ Ibn Qudāmah, *Al-Mughni*, p13/139.

²¹² Ibn S'ad, *Al-Tabaqāt*, p. 2/1,17.

of Muslims clashed with each other by mistake and some blood was shed before it was discovered. The Prophet agreed that it was by mistake, and it was left unpunished.²¹³

During the war of *alKhandaq* (the trench), two Muslim detachments met each other at night, and before the exchange of parole and ascertainment of identity, some blood was already shed, causing some injuries. The Prophet gave them the benefit of the doubt, and left the matter with impunity and said, 'The dead of either party are entitled to martyrdom and shall go to paradise and the action of either party was in the path of God and no right to damages accrue should occur'.²¹⁴

Muslim jurists have included forbidden and permissible acts in their writing. The aim of this is to protect the lives of human beings. The prophet said: 'Fairness is prescribed by God in every matter; so if you kill, kill in a fair way'.²¹⁵

According to Islamic rules the killing of non-combatants is prohibited. The Muslim Jurists have clearly defined who are combatants. Imām Muhammad says: 'Combatants are only those who are physically capable of fighting'.²¹⁶

Women, minors, servants and slaves who accompany their masters but do not take part in war are not combatants. The blind, monks, hermits, the very old, physically incapable of fighting are also non-combatants. They cannot be killed.

2.4-Use of Females and Children as Shields

Ibn Qudāmah says:

فَصْل : وَإِنْ تَرَسُّوا فِي الْحَرْبِ بِنِسَائِهِمْ وَصِبْيَانِهِمْ ، جَازَ رَمِيهِمْ ، وَيَقْصِدُ الْمُقَاتِلَةُ ؛
لَأنَّ النَّبِيَّ ﷺ رَمَاهُمْ بِالْمَنْجَنِيقِ وَمَعَهُمُ النِّسَاءُ وَالصِّبْيَانُ ، وَلَأنَّ كَافَّ الْمُسْلِمِينَ عَنْهُمْ
يُنْفِضِي إِلَى تَعْطِيلِ الْجِهَادِ ، لِأنَّهُمْ مَتَى عَلِمُوا ذَلِكَ تَرَسُّوا بِهِمْ عِنْدَ خَوْفِهِمْ ، فَيَنْقَطِعُ

²¹³ Hamidullah, *The Muslim Conduct*, p. 227.

²¹⁴ Ibid, p. 228.

²¹⁵ Muslim, *Al-Sahih*, p. 6/72

²¹⁶ al-Sarkhasi, *Sharh al-Sir al-Kabir*, p. 4/78

الجهاد . وسواء كانت الحرب مُلتَحِمَةً أو غير مُلتَحِمَةٍ ؛ لأنَّ النَّبِيَّ ﷺ لم يكن يتَحَيَّنُ بالرَّمْيِ حالَ التحامِ الحَرْبِ .

فصل : ولو وقفت امرأة في صف الكفار ، أو على حصنهم ، فشتمت المسلمين ، أو فكشفت لهم ، جاز رميها قصداً ؛ لما روى سعيد^(١) : حَدَّثَنَا حَمَّادُ بْنُ زَيْدٍ ، عَنْ أَيُّوبَ ، عَنْ عِكْرِمَةَ ، قَالَ : لَمَّا حَاصَرَ رَسُولُ اللَّهِ ﷺ أَهْلَ الطَّائِفِ أَشْرَفَتْ امْرَأَةٌ ، فَكَشَفَتْ عَنْ قُبْلِهَا ، فَقَالَتْ : هَادُوا نَفْسَكُمْ ، فَأَرْمُوا^(٢) . فَرَمَاهَا رَجُلٌ مِنَ الْمُسْلِمِينَ ، / فَمَا أَلْخَطَ ذَلِكَ مِنْهَا . وَبَجُورُ النَّظَرِ إِلَى قَرْجِهَا لِلْحَاجَةِ إِلَى رَمِيهَا ؛ لِأَنَّ ذَلِكَ مِنْ ضَرُورَةِ رَمِيهَا . وَكَذَلِكَ يَجُوزُ رَمِيهَا إِذَا كَانَتْ تَلْتَقِطُ لَهُمُ السَّهَامَ ، أَوْ تَسْقِيهِمُ الْمَاءَ ، أَوْ تُخْرِضُهُمْ عَلَى الْقِتَالِ ؛ لِأَنَّهَا فِي حُكْمِ الْمُقَاتِلِ . وَهَكَذَا الْحُكْمُ فِي الصَّبِيِّ وَالشَّيْخِ وَسَائِرِ مَنْ مَنَعَ مِنْ قَتْلِهِ مِنْهُمْ .

'If the enemies sheltered behind their females and children, the firing of arrows is allowed in this case on the opponent forces because the Prophet fired them with *Manjanīq* (Catapults) and they had with them their children and females. If Muslims stop firing in this situation, it will lead to the suspension of Jihād. It will become habitual to use them as shelter. This issue is not different in individual or collective war because the Prophet did not allow the use of arrows in case of individual fights. If any female stands with the troops of enemies or stands on the castle of the enemies and abuses Muslims or appears naked before them, intentionally firing of arrows on her is allowed. This opinion is based on the narration of Sa'id who reported it from Hammād bin Zaid who reported it from Ayūb, who reported it from 'Ikrima who said, 'the Prophet was confined around the people of Ta'if, one female came and indecently exposed herself and asked for throwing arrows. At that time, one Muslim male fired upon her and he did not miss her. An attack on a female is also allowed if she helps them with poisoned arrows or by giving them water or instigating war. In these

situations she is like the enemy. The same position applies to the child, or old man and others whose killing is prohibited'.²¹⁷

فصل : وإن تَرَسُّوا بِمُسْلِمٍ ، ولم تَدْعُ حَاجَةً إِلَى رَمِيهِمْ ، لَكُونِ الْحَرْبُ غَيْرَ قَائِمَةٍ ،
أو لِإِمْكَانِ الْقُدْرَةِ عَلَيْهِمْ بِذَوْنِهِ ، أو لِلْأَمْنِ^(٢٢) مِنْ شَرِّهِمْ^(٢٤) ، لم يَجُزْ رَمِيهِمْ . فَإِنْ
رَمَاهُمْ فَأَصَابَ مُسْلِمًا ، فَعَلَيْهِ ضَمَانُهُ . وَإِنْ دَعَتْ الْحَاجَةُ إِلَى رَمِيهِمْ لِلخَوْفِ عَلَى
المُسْلِمِينَ ، جَازَ رَمِيهِمْ

If they sheltered with any Muslims and the situation of war does not require immediate attack because war is not continued or without this attack they could not be captured or for protection from their evilness, throwing arrows on them is not allowed. If arrows were fired at them by a Muslim, ransom will be obligatory. But if the situation of war requires the use of arrows than it is allowed.²¹⁸

Muslim jurists have derived their principles on the basis of the following sayings of the Prophet in which he advised Abd al-Rahman Ibn 'Awf, 'O son of 'Awf! take it. Fight ye all in the path of God and combat those who do not believe in God. Yet never commit breach of trust, nor treachery, nor mutilate anybody nor kill any minor or woman. This is the pact of God and conduct of His Messenger for your guidance.'²¹⁹

3-Protection of Animals and birds

Muslim jurists not only legislated the protection of human beings but also provided rules and regulations for the protection of animals and birds. Ibn Qudāmah also gave importance to this matter and provided guidance regarding it.

²¹⁷ Ibn Qudāmah, *Al-Mughni*, p. 13/141.

²¹⁸ Ibn Qudāmah, *Al-Mughni*, p. 13/141.

²¹⁹ Ibn Hishām, *Al-Sira al-Nabawyya*, p. 992.

3.1-Prohibition of unnecessary slaughtering of animals

Imām al-Kharqī says:

مسألة ؛ قال : (وَلَا يَغْفِرُ شَاةً ، وَلَا دَابَّةً ، إِلَّا لِأَكْلٍ ^(١) لَا بُدَّ لَهُمْ مِنْهُ)

‘Do not slaughter goats, or any other animal except for eating, when it is necessary.’²²⁰

Ibn Qudāmah comments on this and says:

أَمَّا عَقْرُ دَوَابِّهِمْ فِي غَيْرِ حَالِ الْحَرْبِ ، لِمُغَايَظَتِهِمْ ، وَالْإِفْسَادِ عَلَيْهِمْ ، فَلَا يَجُوزُ ، سِوَاءِ خِفَتْنَا أَوْ أَخَذْنَاهُمْ لَهَا أَوْ لَمْ نَخَفْ . وَهَذَا قَوْلُ الْأَوْزَاعِيِّ ، وَاللَّيْثِ ، وَالشَّافِعِيِّ ، وَأَبُو ثَوْرٍ . وَقَالَ أَبُو حَنِيفَةَ ، وَمَالِكٌ : يَجُوزُ ؛ لِأَنَّ فِيهِ غِيْظًا لَهُمْ ، وَإِضْعَافًا لِقُوَّتِهِمْ ، فَأَشْبَهَ قَتْلَهَا حَالَ قِتَالِهِمْ . وَلَنَا ، أَنَّ أَبَا بَكْرٍ الصَّدِّيقَ ، رَضِيَ اللَّهُ عَنْهُ ، قَالَ فِي وَصِيَّتِهِ لِيَزِيدَ حِينَ بَعَثَهُ أَمِيرًا : يَا يَزِيدُ ، لَا تَقْتُلْ صَبِيًّا ، وَلَا امْرَأَةً ، وَلَا هَرِمًا ، وَلَا تُخَرِّبَنَّ عَامِرًا ، وَلَا تُعَقِّرَنَّ شَجَرًا مُثْمِرًا ، وَلَا دَابَّةً عَظْمَاءً ، وَلَا شَاةً ، إِلَّا لِمَا كَلَيْتَ ، وَلَا تُحَرِّقَنَّ نَخْلًا ، وَلَا تُعَرِّقَنَّ ، وَلَا تُغْلُلَ ، وَلَا تُجَبِّنَ . وَلَئِنَّ النَّبِيَّ ﷺ نَهَى عَنْ قَتْلِ شَيْءٍ مِنَ الدَّوَابِّ صَبْرًا . وَلَئِنَّهُ حَيَوَانٌ ذُو حُرْمَةٍ ، فَأَشْبَهَ النِّسَاءَ وَالصَّبِيَّانَ . وَأَمَّا حَالُ الْحَرْبِ ، فَيَجُوزُ فِيهَا قَتْلُ الْمُشْرِكِينَ كَيْفَ أَمَكُنَ ، بِخِلَافِ حَالِهِمْ إِذَا قُدِرَ عَلَيْهِمْ ، وَلِهَذَا جَازَ قَتْلُ النِّسَاءِ وَالصَّبِيَّانِ فِي الْبَيَاتِ ، وَفِي الْمَطْمُورَةِ ، إِذَا لَمْ يَتَعَمَّدَ قَتْلُهُمْ مُتَفَرِّدِينَ ، بِخِلَافِ حَالَةِ الْقُدْرَةِ عَلَيْهِمْ ، وَقَتْلُ بَهَائِمِهِمْ .

‘The snatching of animals of the enemy, whether we scared of them taking the animals or not, other than war for making them angry and for mischief is not allowed. This is the opinion of Awzā’ī, Layith, Shāfī and Abū Thawr. Imām Abū Hanifa and Imām Mālik said, ‘It is allowed because it could frighten the enemy and could weaken their influence. So it becomes similar to their being killed during the war. Our opinion is based on the advice of Abū Bakr to Yazīd Ibn Abū Sufyān when he sent him on military detachment. He said to him, ‘O Yazīd do not kill a minor child or an old man or a woman, do not cut down a palm tree nor burn it, do not cut down a fruit tree, do not slaughter a goat or

²²⁰ Ibn Qudāmah, *Al-Mughni*, p. 13/143.

cow or camel except for food. The Prophet has prohibited the killing of animals. Because animals have sanctity and they become similar to females and children in it. As for the situation of war, the killing of non-believers is permissible if they are not captured. The unintentional killing of females and children is also permissible if they are found in their strong holds. But after capturing them their killing is not allowed. During war the killing of enemies' animals can lead to their defeat.²²¹

3.2-Slaughtering of Animals for Eating

فصل: فَمَا عَقَرُهَا لِلْأَكْلِ، فَإِنْ كَانَتْ الْحَاجَةُ دَاعِيَةً إِلَيْهِ، وَلَا بُدَّ مِنْهُ، فَمُبَاحٌ، بِغَيْرِ خِلَافٍ؛ لِأَنَّ الْحَاجَةَ تُبَيِّحُ مَالَ الْمَعْصُومِ، فَمَالُ الْكَافِرِ أَوْلَى. وَإِنْ لَمْ تَكُنْ الْحَاجَةُ دَاعِيَةً إِلَيْهِ^(٥)، نَظَرْنَا؛ فَإِنْ كَانَ الْحَيَوَانُ لَا يُرَادُّ إِلَّا لِلْأَكْلِ، كَالدَّجَاجِ وَالْحَمَامِ وَسَائِرِ الطَّيْرِ وَالصَّيْدِ، فَحُكْمُهُ حُكْمُ الطَّعَامِ. فِي قَوْلِ الْجَمِيعِ؛ لِأَنَّهُ لَا يُرَادُّ لغيرِ الْأَكْلِ، وَتَقِلُّ قِيَمَتُهُ، فَأَشْبَهَ الطَّعَامَ. وَإِنْ كَانَ مِمَّا يُنْتَجَجُ إِلَيْهِ فِي الْقِتَالِ، كَالْخَيْلِ، لَمْ يُبَيِّحْ ذَبْحُهُ لِلْأَكْلِ، فِي قَوْلِهِمْ جَمِيعًا. وَإِنْ كَانَ غَيْرَ ذَلِكَ، كَالغَنَمِ وَالْبَقَرِ، لَمْ يُبَيِّحْ. فِي قَوْلِ الْخِرَقِيِّ. وَقَالَ الْقَاضِي: ظَاهِرُ كَلَامِ أَحْمَدَ إِبَاحَتُهُ؛ لِأَنَّ هَذَا الْحَيَوَانُ مِثْلُ الطَّعَامِ فِي بَابِ الْأَكْلِ وَالْقَوْبِ، فَكَانَ يُمَثَّلُ فِي إِبَاحَتِهِ. وَإِذَا ذُبِحَ الْحَيَوَانُ، أَكَلَ لَحْمُهُ، وَلَيْسَ لَهُ الْإِنْفِاقُ بِجِلْدِهِ،

'The slaughtering of animals belonging to the enemy at the time of extreme need is permissible without any difference. This is due to necessity, which permits the use of prohibited things, and the things of non-believers are preferable in this situation. If need did not require this, our opinion is that if from a animal means all edible like chicken, pigeon and all other birds, then it is food in opinion of all jurists. Because it is not meant except for eating and its price is also low so it became similar to food. The animals which are needed for war like horses, are not allowed to be slaughtered in the opinion of all the

²²¹ Ibn Qudāmah, *Al-Mughni*, p. 13/143-144.

jurists. As for other animals like goats and cows, in the opinion of Imām Kharqī, it is not permissible to slaughter them. Qādī said, 'the opinion of Imam Ahmed is in favour of permission because these animals are like food so they became similar to those which are permissible. If the animal is slaughtered its meat can be used but no benefit from its skin is allowed because permission for benefit from it, is for its edible parts and not for other things.'²²²

3.3-Protection of bees

Kharqī says:

١٦٧٠ - مسألة ؛ قال : (وَلَمْ يُعْرِقُوا النَّحْلَ)

'Bees would not be destroyed.'²²³

Ibn Qudāmah explains:

/وَجَمَلُهُ أَنْ تُعْرِقَ النَّحْلَ وَتُحْرِقَهُ لَا يَجُوزُ ، فِي قَوْلِ عَامَّةِ أَهْلِ الْعِلْمِ ؛ مِنْهُمْ الْأَوْزَاعِيُّ ،
وَاللَّيْثُ ، وَالشَّافِعِيُّ . وَقِيلَ لِلْمَالِكِ : أَنْ تُحْرِقَ بَيْوتَ نَحْلِهِمْ ؟ قَالَ : أَمَّا النَّحْلُ فَلَا أَذْرِي مَا
هُوَ ؟ وَمُقْتَضَى مَذْهَبِ أَبِي حَنِيفَةَ إِبَاحَتُهُ ؛ لِأَنَّ فِيهِ غَيْظًا لَهُمْ ^(١) وَإِضْعَافًا ، فَأَشْبَهَ قَتْلَ
بَهَائِمِهِمْ حَالَ قَتَالِهِمْ . وَلَنَا ، مَا رَوَى عَنْ أَبِي بَكْرٍ الصَّدِّيقِ ، رَضِيَ اللَّهُ عَنْهُ ، أَنَّهُ قَالَ لِيَزِيدَ
ابْنَ أَبِي سَفْيَانَ ، وَهُوَ يُوصِيهِ ، حِينَ بَعَثَهُ أَمِيرًا عَلَى الْقِتَالِ بِالشَّامِ : وَلَا تُحْرِقَنَّ نَحْلًا ، وَلَا
تُعْرِقْنَهُ . وَرَوَى عَنْ ابْنِ مَسْعُودٍ ، أَنَّهُ قَدِمَ عَلَيْهِ ابْنُ أَخِيهِ مِنْ غَزَاةٍ غَزَاهَا ، فَقَالَ : لَعَلَّكَ
حَرَّقْتَ حَرْثًا ؟ قَالَ : نَعَمْ . قَالَ : لَعَلَّكَ غَرَّقْتَ نَحْلًا ؟ قَالَ : نَعَمْ . قَالَ : لَعَلَّكَ قَتَلْتَ
صَبِيًّا ؟ قَالَ : نَعَمْ . قَالَ : لِيَكُنْ غَزَاؤُكَ كِفَافًا . أَخْرَجَهُمَا سَعِيدٌ ^(٢) . وَنَحْوُ ذَلِكَ عَنْ
ثَوْبَانَ ^(٣) . وَقَدْ ثَبَتَ أَنَّ رَسُولَ اللَّهِ ﷺ نَهَى عَنْ قَتْلِ النَّحْلِ ^(٤) ، وَنَهَى أَنْ يُقْتَلَ شَيْءٌ مِنْ
الدَّوَابِّ صَبِيرًا ^(٥) . وَلِأَنَّهُ إِفْسَادٌ ، فَيَدْخُلُ فِي عُمُومِ 'قَوْلِهِ تَعَالَى : ﴿ وَإِذَا تَوَلَّى سَعَى فِي
الْأَرْضِ لِيُفْسِدَ فِيهَا وَيُهْلِكَ الْحَرْثَ وَالنَّسْلَ ﴾ وَاللَّهُ لَا يُجِبُّ الْفُسَادَ ^(٦) . وَلِأَنَّهُ حَيَوَانٌ ذُو
رُوحٍ ، فَلَمْ يَجُزْ قَتْلُهُ لِعَيْظِ الْمُشْرِكِينَ ، كَنَيْسَانِهِمْ وَصَرْيَانِهِمْ . وَأَمَّا أَخْذُ الْعَسَلِ وَأَكْلُهُ
فَمُبَاحٌ ؛ لِأَنَّهُ مِنَ الطَّعَامِ الْمُبَاحِ .

²²² Ibn Qudāmah, *Al-Mighni*, p. 13/144-145.

²²³ Ibn Qudāmah, *Al-Mughni*, p. 13/143-144

‘The destroying of bees and their burning is not allowed. This is the opinion of the majority of scholars among them Awzā’ī, Laith, Shāf’ī. It was asked of Imām Mālik, ‘can we burn houses of their bees.’ He said, ‘I do not know what is bees’. The Hanfī school of thought intend to allow it because there is danger and fear for them and it became similar to killing animals in case of war with them. Our opinion is based on the report from Abū Bakr. He said to Yazīd bin Abī Sufyān when he was advising him at the time of his departure as commander of a military detachment, ‘do not burn bees and do not destroy them’. It is reported from Abū Mas’ūd that the son of his brother came to him after a war. He asked him, ‘Have you burnt any field?’ He replied ‘Yes’. Then he asked him, ‘Did you destroy the bees?’ He said, ‘Yes’. Then he asked, ‘Have you killed any child’. He said, ‘Yes’. He told him (in spite of all these actions) should your participation in war save you (from any punishment). S’ad reports this. The same is reported from Thwbān. It is proved from the Prophet that he prohibited the killing of bees.²²⁴ He also prohibited mutilation of animals²²⁵ because it is mischievous and its prohibition is included in the general orders of God in this verse. God says: [And when he turns away (from you “O Muhammad, his effort in the land is to make mischief there in and to destroy the crops and the cattle, and Allah likes not mischief.”)²²⁶ This is because animals have souls and their killing just for instigating enemies is not correct like that of children and females. Eating their honey is permissible because it is a permissible food.’²²⁷

²²⁴ Abū Dāwūd, *Al-Sunan*, p. 2/240

²²⁵ Ahmed bin Hanbal, *Al-Musnad*, p. 5/276

²²⁶ Q:2:205

²²⁷ Ibn Qudāmah, *Al-Mughni*, p. 13/142-143.

3.4- Protection of Trees and Agriculture

This matter is discussed in issue No.1672. The discussion is started with the following opinion of Imām Kharqī:

١٦٧٢ - مسألة : قال : (ولا يقطع شجرهم ، ولا يحرق زرعهم ، إلا أن يكونوا يفعلون ذلك في بلدنا) ، فيفعل ذلك بهم ليتنهوا

'Their trees would not be cut down and their agriculture would not be burned except if they do it in our cities and then it could be done to prevent them from doing this.'²²⁸

Ibn Qudāmah comments on this opinion and says:

وَجُمْلَتُهُ أَنَّ الشَّجَرَ وَالزَّرْعَ يَنْقَسِمُ ثَلَاثَةً أَقْسَامٍ : أَحَدُهَا ، مَا تَدْعُو الْحَاجَةَ إِلَى إِثْلَاقِهِ ، كَالَّذِي يَقْرُبُ مِنْ حُصُونِهِمْ ، وَيَمْنَعُ مِنْ قِتَالِهِمْ ، أَوْ يُسْتَرُونَ بِهِ مِنَ الْمُسْلِمِينَ ، أَوْ يَخْتَانُجُ إِلَى قَطْعِهِ لَتَوْسِيعَةِ طَرِيقٍ ، أَوْ تَمَكُّنٍ مِنْ قِتَالٍ^(١) ، أَوْ سَدِّ بَثْقٍ ، أَوْ إِصْلَاحِ طَرِيقٍ ، أَوْ سِتَارَةِ مَنْجَبٍ ، أَوْ غَيْرِهِ ، أَوْ يَكُونُونَ يَفْعَلُونَ ذَلِكَ بِنَا ، فَيَفْعَلُ بِهِمْ ذَلِكَ ، لِيَتَنَهُوا ، فَهَذَا يَجُوزُ ، بغيرِ خِلَافٍ نَعْلَمُهُ . الثَّانِي ، مَا / يَنْضُرُّ الْمُسْلِمُونَ بِقَطْعِهِ ؛ لَكُونِهِمْ يَتَفَعَّلُونَ بِبِقَائِهِ لَعُلُوفَتِهِمْ ، أَوْ يَسْتَظِلُّونَ بِهِ ، أَوْ يَأْكُلُونَ مِنْ ثَمَرِهِ ، أَوْ تَكُونُ الْعَادَةُ لَمْ تَجْرَ بِذَلِكَ^(٢) ، بَيْنَنَا وَبَيْنَ عَدُوِّنَا ، فَإِذَا فَعَلْنَاهُ بِهِمْ فَعَلُوهُ بِنَا ، فَهَذَا يَحْرُمُ ؛ لِمَا فِيهِ مِنَ الْإِضْرَارِ بِالْمُسْلِمِينَ . (الثَّالِثُ ، مَا عَدَا هَذَيْنِ الْقِسْمَيْنِ ، مِمَّا لَا ضَرَرَ فِيهِ بِالْمُسْلِمِينَ^(٣) ، وَلَا نَفْعَ سِوَى غَيْظِ الْكُفَّارِ ، وَالْإِضْرَارِ بِهِمْ ، فَعِيهِ رَوَاتَانِ ؛ أَحَدُهُمَا ، لَا يَجُوزُ ؛ لِحَدِيثِ أَبِي بَكْرٍ وَوَصِيَّتِهِ^(٤) ، وَقَدْ رَوَى نَحْوَ ذَلِكَ مَرْفُوعًا إِلَى النَّبِيِّ ﷺ ، وَلَأنَّ فِيهِ إِتْلَافًا مُحْضًا ، فَلَمْ يَجْزْ ، كَعَقْرِ الْحَيَوَانِ . وَهَذَا قَالَ الْأَوْزَاعِيُّ ، وَاللَّيْثُ ، وَأَبُو ثَوْرٍ .

'His statement 'trees and agriculture can be divided in to three types (during war).'The first type of trees are those that needed to be destroyed like trees, which are close to their (enemies) strong holds. They are obstacles in the battleground because they hide the enemy from the Muslims. The land, where these trees are, is required for expansion of the road or repair of the road or for

²²⁸ Ibid., p. 13/146.

the installation of *Manjanīq* or they are doing this to us so it will be done to them so that they can be stopped. This is permitted without any known deference of opinion. The second kind of tree of which cutting is dangerous for the Muslims because they benefit from its existence and they are attached to it. The trees that are used by Muslims for shelter or they eat its fruits. The trees which are usually protected between our enemies and us and if we will cut theirs they will cut ours are also included in this type. The cutting and burning of these types of trees is prohibited because wastage is dangerous for Muslims. The third category of trees is those which are other than these two kinds. These trees cause no danger for Muslims and there is no benefit except the anger of the enemies and their loss. There are two opinions; the first opinion is that it is not allowed on the basis of the advice of Abū Bakr. The same is reported from the Holy Prophet because there is only wastage in it so it is not allowed to destroy it like the slaughter of animals this is the opinion of Awzā'i, Laiyth and Abū Thawr.²²⁹

وَالرَّوَايَةُ الثَّانِيَّةُ ، بِجَوَازِ . وَهَذَا قَالَ مَالِكٌ ،
وَالشَّافِعِيُّ ، وَإِسْحَاقُ ، وَابْنُ الْمُثَنِّرِ . وَقَالَ إِسْحَاقُ : التَّحْرِيقُ سُنَّةٌ ، إِذَا كَانَ الْكَفَى فِي
الْعَدُوِّ ، لِقَوْلِ اللَّهِ تَعَالَى : ﴿ مَا قَطَعْتُمْ مِنْ لِينَةٍ أَوْ تَرَكْتُمُوهَا قَائِمَةً عَلَى أُصُولِهَا فَبِإِذْنِ اللَّهِ
وَيُخْرِىَ الْفَاسِقِينَ ﴾

The second opinion is that these trees can be destroyed. The holders of this opinion are Mālik, Al-Shāfi'i, Ishāq and Ibn Munzir. Imām Ishāq said, 'burning of trees, if it is related to enemies,' is *Sunnah* on the basis of the following saying of the God: [What you (O Muslims) cut down of the palm trees (of the enemy), or you left them standing on their stems, it was by the leave of Allah

²²⁹ Ibn Qudāmah, *Al-Mughni*, p. 13/146.

and in order that He might disgrace The *Fāsiq* (the rebellious, the disobedient to Allah)]²³⁰

4- Prohibited Act on the basis of Treaties

There are other acts, which are also prohibited under treaties. Imām Shaibānī has mentioned many fictitious cases which show that it was common practice in these days to agree what not to do in the conduct of war regarding prisoners, devastation, cutting of the water supply and the like.²³¹ It is to be noted that acts prohibited under treaties are forbidden only so long as the treaties last. Other prohibited acts form part of the injunctions of positive Muslim laws, and they cannot become allowable even in reprisal; the immediate criminals and not their countrymen are to be considered responsible.²³² Muslims are not allowed to hold slogans also they are not bound to keep faith with the Gentiles, enunciated, according to the Qur'ān by Jews and reiterated by Papal bulls during the Middle Ages.²³³

5- Peace Treaties

5.1- Legitimacy and conditions of Peace Treaty

Ibn Qudāmah states:

فصل : ومعنى الهدنة ، أن يعقد لأهل الحرب عقداً على ترك القتال مدة ، يعوض
وبغير عوض . وتسمى مهادنة وموادعة ومعاهدة ، وذلك جائز ، بدليل قول الله تعالى : ﴿ بَرَاءَةٌ مِنَ اللَّهِ وَرَسُولِهِ إِلَى الَّذِينَ عَاهَدْتُمْ مِنَ الْمُشْرِكِينَ ﴾ (١) . / وقال سبحانه
وتعالى : ﴿ وَإِنْ جَنَحُوا لِلسَّلَامِ فَاجْتَنِحْ لَهُمْ ﴾ (٢) . ورؤى مروان ، ومستور بن
مخرمة ، أن النبي ﷺ ، صالح سهيل بن عمرو بالحديبية ، على وضع القتال عشر

²³⁰ Q 59:5.

²³¹ al-Sarkhasī, Sharh al-Sīr al-Kabīr, p. 1/200-05.

²³² See for details Q:3:75.

²³³ Hamidullah, The Muslim Conduct, p. 208.

سينين^{٢٣٤} . ولأنه قد يكون بالمسلمين ضعف ، فيهاديهم حتى يقوى المسلمون . ولا يجوز ذلك إلا للنظر للمسلمين ؛ إما أن يكون بهم ضعف عن قتالهم ، وإما أن يطمع في إسلامهم بهدوتهم ، أو في أدائهم الجزية ، والتزامهم أحكام الملة ، أو غير ذلك من المصالح . إذا ثبت هذا ، فإنه لا تجوز المهادنة مطلقاً من غير تقدير مدة ؛ لأنه يقضى إلى ترك الجهاد بالكلية . ولا يجوز أن يشترط تقضها لمن شاء منهما ؛ لأنه يقضى إلى ضد المقصود منها . وإن شرط الإمام لنفسه ذلك دونهم ، لم يجوز أيضاً . ذكره أبو بكر ؛ لأنه يناقض مقتضى العقد ، فلم يصح ، كما لو شرط ذلك في البيع والشكاح .

Hudna (peace treaty or cease fir) is an agreement with the enemy for cease of war for a particular period with payment of money or without it. This treaty is named as *Muhādnāt*, *Mu'ahidāt* and is permissible on the basis of the following sayings of God: [Freedom from (all) obligations (is declared) from Allah and His Messenger to those of the pagans with whom you made a treaty.]²³⁴ The God says: [But if they incline to peace, you also incline to it, and (put your) trust in Allah warily; He is the All Hever, the All Knower.]²³⁵. Marwān and Miswar Ibn Makhrama reported that the Prophet –may God bless him and give him peace– made peace with Suhail bin Amr at Hudaibiyya on condition that fighting cease for ten years; and also because the Muslims are weak and make a peace with them until the Muslims recover their strength'.²³⁶ The peace treaty is not allowed except for the interests of the Muslims. It can be due to their weakness or the hope that the enemy will embrace Islam or will pay *Jizya* or their obligation to follow the rules of the *Umma* or any other interest of the Muslims. The peace treaty is not allowed for an unlimited period without fixing its deadlines because it will lead to an end to the Jihād completely. It is not allowed with the condition that any one can break it at any time because this kind of condition will be against its objectives. If the leader of the Muslims puts

²³⁴ Q 9:1.

²³⁵ Q 8:61.

²³⁶ Abū Dawūd, *Al-Sunan*, p. 2/78.

this condition for himself other than the enemy this will also be prohibited. Abū Bakr disapproved of this because this condition will be against the objectives of the peace agreement. It is as though some one has included this condition in contract of Marriage or sale (which are not correct).

وقال القاضي ، والشافعي :
يَصِحُّ ؛ لِأَنَّ النَّبِيَّ ﷺ صَلَّحَ أَهْلَ خَيْبَرَ عَلَى أَنْ يُقَرِّمَهُمْ مَا أَقَرَّهُمُ اللَّهُ تَعَالَى () . وَلَا يَصِحُّ
هَذَا ، فَإِنَّهُ عَقْدٌ لَا زِمَ ، فَلَا يَجُوزُ اشْتِرَاطُ تَقْضِيهِ ، كَسَائِرِ الْعُقُودِ الْإِجَارِيَةِ ، وَلَمْ يَكُنْ بَيْنَ النَّبِيِّ
ﷺ وَبَيْنَ أَهْلِ خَيْبَرَ هُدْنَةٌ ، فَإِنَّهُ فَتَحَهَا عَنْوَةً ، وَإِنَّمَا سَاقَاهُمْ () ، وَقَالَ لَهُمْ ذَلِكَ . وَهَذَا
يُذِلُّ عَلَى جَوَازِ الْمُسَاقَاةِ ، وَلَيْسَ هَذَا بِهُدْنَةٍ اتِّفَاقًا ، وَقَدْ وَافَقُوا الْجَمَاعَةَ فِي () أَنَّهُ لَوْ شَرَطَ فِي
عَقْدِ الْهُدْنَةِ أَنِّي أَقَرُّكُمْ مَا أَقَرَّكُمْ اللَّهُ . لَمْ يَصِحَّ ، فَكَيْفَ يَصِحُّ مِنْهُمْ الْإِجْتِجَاعُ بِهِ ، مَعَ
إِجْمَاعِهِمْ مَعَ غَيْرِهِمْ عَلَى أَنَّهُ لَا يَجُوزُ اشْتِرَاطُهُ !

'Al Qādī and Imām Al Shāfi'ī said a contract for this condition is valid because the Prophet made a peace treaty with the people of *Khaibar* with the condition that he will remain committed to them until God commit to them. This opinion is not correct because a contract is necessary and placing condition of breach contract is not permissible as with any other obligatory contracts. There was no peace treaty between the Prophet and the people of *Khaibar* because he conquered them with power and imposed it on them. This action of the Prophet with people of *Khaibar* is an indication of permissibility of this kind of action and it was not treaty *hudna* in the opinions of Jurists. Jurists are agreed that if they agreed on a peace treaty on the condition that it would keep them on it as God has kept them, this condition will be not permissible. The derivation of authority from this example (for a peace agreement with this kind of condition) is not correct because all jurists are agreed that a peace treaty with this kind of condition is not permissible.²³⁷

²³⁷ Ibn Qudāmah, *Al-Mughni*, p. 13/156.

The contents of the treaty are generally governed by the result of war. Usually a provisional agreement is first reached settling preliminary points. Immediately afterwards military manoeuvres are prohibited, including the right of inflicting loss of life and property on the enemy. Later other details of the final settlement are discussed and carried out.²³⁸

Sometimes a treaty of peace provides for future friendship and even alliance and co-operation on conditions agreed upon in the treaty. More often it simply provides for cessation of hostilities and correct neighbourly relations. Weaker parties often consent to make reparations and pay tribute. In the ungratified provisional treaty with the tribe of *Banū Gatafān*, the Prophet had agreed to hand over to them a third of the produce of the Madinah provided they deserted their allies besieging Madinah, and made a separate and immediate peace with the Muslim State'.²³⁹

5.2-Period of Peace Treaties

About period of a peace treaty Ibn Qudāmah says:

فصل : ولا يجوز عقد الهدنة إلا على مدة مقدرة معلومة ؛ لما ذكرناه . قال القاضي :
وظاهر كلام أحمد ، أنها لا تجوز أكثر من عشر سنين . وهو اختيار أبي بكر ، ومذهب
الشافعي ؛ لأن قوله تعالى : ﴿ فَاقْتُلُوا الْمُشْرِكِينَ حَيْثُ وَجَدْتُمُوهُمْ ﴾ . عامٌ خاصٌ
منه مدة العشر لمصالحه النبي ﷺ قرئنا يوم الحديبية عشرًا ، فبيما زاد يبقى على
مقتضى العموم . فعلى هذا ، إن زاد المدة على عشر ، بطل في الزيادة . وهل تبطل في /
العشر ؟ على وجهين ، بناء على تفريق الصنفين . وقال أبو الخطاب : ظاهر كلام أحمد ،
أنه يجوز على أكثر من عشر ، على ما يراه الإمام من المصلحة . وبهذا قال أبو حنيفة ؛ لأنه
عقد يجوز في العشر ، فجاز على الزيادة عليها ، كعقد الإجارة ، والعام مخصوص
في العشر لمعنى موجود فيما زاد عليها ، وهو أن المصلحة قد تكون في الصلح أكثر منها في
الحرب .

²³⁸ Hamidullah, *The Muslim Conduct*, p. 264.

²³⁹ al-Sarkhasī, *Sharh al-Syūr al-Kabīr*, p. 4/4-5.

‘The peace treaty is not allowed except for a limited period as we have already mentioned. Al Qādī said, ‘this also appears from the saying of Imām Ahmed that a peace treaty for more than ten years is not allowed.’ This opinion chosen by Abū Bakr and the same is the opinion of the Shāfī school of Islamic Law. God said: [fight with the pagans wherever you find them, and capture them and besiege them]²⁴⁰. This general order is specified with the peace treaty of the Prophet with *Quraysh* in Hudaibiyah for the period of ten years. The general order will be applicable on the remaining period (that is more than ten years). On the basis of this if the period of the peace treaty will exceed more than ten years, it will be invalid. Will the peace agreement be void within ten years? There are two explanations; the situation on the basis of difference of the characteristics between the treaty and its termination that means it is not allowed for more than ten years. Abū Khattāb said, ‘It appears from the sayings of Imām Ahmed that it is allowed even for more than ten years if a leader of the Muslims finds benefit for Muslims in it’. The same is the opinion of Imām Abū Hanifa because the peace accord is allowed for the period of ten years and is also permissible for more than this period as hiring contract. The general rule, which specified the period of ten years for the peace treaty, can also be used if the interest of the Muslims will be at peace for more than ten-years period.’²⁴¹

Islamic polity is based on a community of co-religionists it is unthinkable to contract a treaty of perpetual alliance with non-Muslims. When the Prophet established a City-State at Madinah immediately on his migration there, he consented, however, to

²⁴⁰ Q 9:5.

²⁴¹ Ibn Qudāmah, *Al-Mughni*, p. 13/156.

a confederation with the Jews.²⁴² Further more, he concluded pacts of mutual assistance with pagan tribes around Madinah, especially with those in the direction of south, through which the *Quraysh* caravans passed reroute to and from Syria and other northern countries. In all these treaties of agreed during early days of the Muslim State, there is no time limit. There are allusions in the Qur'ān to many other treaties of friendship with non-Muslims without any defined duration. In the treaty of Hdaybiyyah alone we come across the mention of the term "ten years" during which the treaty would operate.²⁴³

During the late years of the life of the Prophet, the Qur'an laid down:

[O ye who believe! take not the Jews and the Christians for friends. They are friends one to another. He among you who taketh them for friends is (one) of them. Lo! God guideth not wrongdoing folk your friends can only be God and His Messenger and those who believe, who establish worship and pay the *Zakāt* (surplus property tax), and bow down (in prayer). And whoso ever taketh God and His Messenger and those who believe for friends (will see that) the party of God are victorious. O ye who believe! Choose not for friends such of those who received the Scripture before you, and of the disbelievers as make a jest and sport of your religion. But fear God if ye are true believers.]²⁴⁴

And it went even so far as to prescribe:

[O ye who believe! choose not your fathers nor your brethren for friends if they take pleasure in disbelief rather than faith. Whoso ever of you taketh them for friends, such are wrongdoers.]²⁴⁵

²⁴² Ibn Hishām, *Al-Sira al-Nabawyya*, p. 2/200.

²⁴³ Ibn Hishām, *Al-Sira al-Nabawyya*, p. 2/200.

²⁴⁴ Q 5:51,55,57.

²⁴⁵ Q ix:23.

Moreover, in conformity with the Qur'anic command the Prophet once caused a declaration or proclamation to be made that all treaties for defined periods should remain operative during the contracted time, yet all those treaties concluded with pagans for mutual help without time limit were thereby denounced with notice of four months.²⁴⁶

For all these reasons, Muslim jurists conclude that treaties of friendship should not be concluded with non-Muslims for perpetuity. Generally the jurists agree that ten years should be the maximum period, in view of the treaty of Hudabia. Imam Suhailiy however, records that 'the Jurists of *Hijāz* allow peace for a definite period even exceeding ten years, provided the supreme ruler, and not any lesser authority, agrees to it'.²⁴⁷ Shaibānī has also used the term "*muwād'ah mu'ahadah*" (perpetual peace), although incidentally and as a fiction, but its very use is significant on his part.²⁴⁸

5.3-Payment of money or wealth as condition of peace treaty

Ibn Qudāmah says:

فصل: ويجوز مهادنتهم على غير مال؛ لأن النبي ﷺ هادتهم يوم الحديبية على غير مال. ويجوز ذلك على مال يأخذه منهم؛ فإنها إذا جازت على غير مال، فعلى مال أولى. وأما إن صالحتهم على مال تبذله لهم، فقد أطلق أحمد القول بالمنع منه. وهو مذهب الشافعي؛ لأن فيه صغاراً للمسلمين. وهذا محمول على غير حال الضرورة، فأما إن دعت إليه ضرورة، وهو أن يخاف على المسلمين الهلاك أو الأسر، فيجوز؛ لأنه يجوز للأسير فداء نفسه بالمال، فكذا هذا، ولأن تبذل المال إن كان فيه صغار، فإنه يجوز تحمُّله لدفع صغاراً أعظم منه، وهو القتل، والأسر، وسبى الثرية الذين يُفصى سببهم

²⁴⁶ Hamidullah, *The Muslim Conduct*, p. 226.

²⁴⁷ Sohalī, *Al-raud Al-anaf*, p. 2/229.

²⁴⁸ al-Sarkhasī, *Sharh al-Syir al-Kabir*, p. 4/47.

إلى كُفْرِهِمْ . وقد رَوَى عَبْدُ الرَّزَّاقِ ^(١) ، في المغازي ، عن مَعْمَرٍ ، عن الزُّهْرِيِّ ، قال :
 أَرْسَلَ النَّبِيُّ ﷺ إِلَى عُيَيْنَةَ بْنِ حِصْنٍ ، وَهُوَ مَعَ أَيْ سَفِيَّانَ - يَعْنِي يَوْمَ الْأَخْزَابِ - :
 « أَرَأَيْتَ إِنْ جَعَلْتُ لَكَ ثَلَاثَ ثَمَرِ الْأَنْصَارِ ، أَتَرْجِعُ بَعْدَ مَعْلِكَ مِنْ غَطَفَانَ ، وَتُحْدِلُ بَيْنَ
 الْأَخْزَابِ ؟ » . فَأَرْسَلَ إِلَيْهِ عُيَيْنَةُ : إِنْ جَعَلْتُ لِي الشُّطْرَ فَعَلْتُ . قَالَ مَعْمَرٌ : فَحَدَّثَنِي
 ابْنُ أَبِي نَجِيحٍ ، أَنَّ سَعْدَ بْنَ مُعَاذٍ وَسَعْدَ بْنَ عُبَادَةَ قَالَا : يَا رَسُولَ اللَّهِ ، وَاللَّهِ لَقَدْ كَانَ يُجْرُ
 سَرْمَهُ فِي الْجَاهِلِيَّةِ فِي عَامِ السَّنَةِ حَوْلَ الْمَدِينَةِ ، مَا يُطِيقُ أَنْ يَدْخُلَهَا ، فَلَا نَ حِينَ جَاءَ اللَّهُ
 بِالْإِسْلَامِ ، تُعْطِيهِمْ ذَلِكَ ! فَقَالَ النَّبِيُّ ﷺ : « فَتَعَمَّ إِذَا » . وَلَوْلَا أَنَّ ذَلِكَ جَائِزٌ ، لَمَا
 بَدَّلَهُ النَّبِيُّ ﷺ . وَرَوَى أَنَّ الْحَارِثَ بْنَ عَمْرِو الْعُطْفَانِيَّ ، بَعَثَ إِلَى النَّبِيِّ ﷺ ، فَقَالَ : إِنْ
 جَعَلْتُ لِي شَطْرَ ثِمَارِ الْمَدِينَةِ ، وَإِلَّا / مَلَأْتُهَا عَلَيْكَ نَحِيلًا وَرَجَالًا ^(٢) . فَقَالَ لَهُ النَّبِيُّ
 ﷺ : « حَتَّى أَشَاوَرَ السُّعُودَ » . يَعْنِي سَعْدَ بْنَ عُبَادَةَ ، وَسَعْدَ بْنَ مُعَاذٍ ، وَسَعْدَ بْنَ
 زُرَّارَةَ ، فَشَاوَرَهُمُ النَّبِيُّ ﷺ ، فَقَالُوا : يَا رَسُولَ اللَّهِ ، إِنْ كَانَ هَذَا أَمْرًا مِنَ السَّمَاءِ ،
 فَتَسْلِيْمٌ لِأَمْرِ اللَّهِ تَعَالَى ، وَإِنْ كَانَ بِرَأْيِكَ وَهَوَاكَ ، اتَّبِعْنَا رَأْيَكَ وَهَوَاكَ ، وَإِنْ لَمْ يَكُنْ أَمْرًا مِنَ
 السَّمَاءِ وَلَا بِرَأْيِكَ وَهَوَاكَ ، فَوَاللَّهِ مَا كُنَّا نَعْطِيهِمْ فِي الْجَاهِلِيَّةِ بُسْرَةً وَلَا ثَمْرَةً إِلَّا شِرَاءً أَوْ قَرَى ،
 فَكَيْفَ ^(٣) ؟ وَقَدْ أَعَزَّنَا اللَّهُ بِالْإِسْلَامِ ! فَقَالَ النَّبِيُّ ﷺ لِرَسُولِهِ : « أَسْمَعُ ؟ » ^(٤)
 فَعَرَضَهُ النَّبِيُّ ﷺ لِيَعْلَمَ ضَعْفَهُمْ مِنْ قُوَّتِهِمْ ، فَلَوْلَا جَوَازُهُ عِنْدَ الضَّعِيفِ ، لَمَا عَرَضَهُ
 عَلَيْهِمْ .

'A peace treaty with the enemy is allowed if it is without payment because the Prophet made peace with them on the day of *Hudaybiyya* without payment. The agreement of peace with the condition of taking money from the enemy is also permissible because if it is allowed without money then with money it will be more preferable. A peace treaty with the payment of money to the enemy, Imām Ahmed prohibits. The same is the opinion of Imām Al Shāf'ī because this situation will put Muslims on an inferior footing. This prohibition is when Muslims are not in need of a peace treaty. If Muslims are in danger of being killed or imprisoned if they do not enter into a peace treaty, a peace treaty with the payment of money is permissible. A prisoner can pay ransom himself and the same is the situation here. A peace treaty with payment of money creates an inferior situation for the Muslims but it may save them from major loss such as

killing or imprisonment, which may lead their children to *Kuffār*. Abdul Razāq narrated in his *Mughāzi* from Mu‘amar who reported that Imām Zuhraī said, ‘The Prophet sent a message to ‘Uyayina bin Hiṣen who was an ally of Abū Sufyān at the battle of the trench, which stated: ‘what is your opinion if I gave you 1/3 of the dates of the Anṣar, will you and others return and abandon the trench. Uyayina bin Hiṣen replied to the Prophet, ‘I will do it if you will give me half (of the dates of Madina). Mu‘amar said, Abi Najīh told me, ‘S‘ad bin Muadh and S‘ad bin Ubādah said: ‘Oh Prophet of God he (Uyayina bin Hiṣen) used to walk around Madina in *al-Jahiliya* and was not able to enter it. Now when God has given us Islam will we give him this?’ The Prophet said, ‘yes we are going to do it’. If it was not permissible the Prophet would never have done it. It is reported that Al-Harith bin ‘Amr Al-Guṭfānī sent a message to the prophet and said, ‘Give me half of the food of Madina or else I will attack this city with my soldiers and horses. The Prophet told him, ‘let me consult with S‘ad bin Muadh and S‘ad bin Ubādah. The Prophet consulted with them, who said, ‘if it is the order of God or your opinion then we will follow it but if it is not your opinion or order of God then by God we are not used to giving them any-thing except what they paid for in *al-Jahiliya*. Why should we do it now after God has dignified us with Islam? After listening to this reply The Prophet asked his envoy, ‘Have you listened?.’ The Holy Prophet consulted them to know their commitment. If it was not permissible at the time of the nations weakness the Prophet would not have asked them’.²⁴⁹

²⁴⁹ Ibn Qudāmah, *Al-Mughni*, p. 13/155-156.

5.4-Authority to enter in to Peace Agreements

Ibn Qudāmah specified a separate *fasl* for this issue in which he says:

فصل : ولا يجوز عقد الهدنة ولا الذمة إلا من الإمام أو نائبه ؛ لأنه عقد مع جملة الكفار ، وليس ذلك لغيره ، ولأنه يتعلق بنظر الإمام ومآثره من المصلحة ، على ما قدمناه ، ولأن تجويزه من غير الإمام يتضمن تعطيل الجهاد بالكلية ، أو إلى تلك الناحية ، وفيه أفتيات على الإمام . فإن هادنهم غير الإمام أو نائبه ، لم يصح . وإن دخل بعضهم دار الإسلام بهذا الصلح ، كان آمناً ؛ لأنه دخل معتقدا للأمان ، ويرد إلى دار الحرب ، ولا يقر في دار الإسلام ؛ لأن الأمان لم يصح . وإن عقد الإمام الهدنة ، ثم مات أو عزل ، لم ينتقض عهده ، وعلى من بعده الوفاء به ؛ لأن الإمام عقده باجتهاده ، فلم يجز للحاكم قبض أحكام من قبله باجتهاده .

‘The agreements of peace or *Dhimma* are not allowed except by the ruler or his deputy. This is because this agreement is with the non-believers and no one has the authority other than the political ruler of the Muslims. This is related to the authority of the ruler or for the interest that he saw in the Muslims as we have already presented. The agreement of peace by any one other than the ruler will lead to complete discontinuity of Jihād and will create problems for the rulers. This is why the peace treaty will not be correct if it is not conducted by the ruler of the Muslims himself or by his appointee. If some one enters the land of Muslims with this peace agreement (which is conducted by any one other than ruler or his deputy) he will be considered in *amān* because he enters with the intention of *amān* (protection). But he will not be allowed to stay in Islamic State and will be deported. The peace treaties conducted by the ruler of the Muslims will remain enforce even if he dies or is separated from the rule. Its fulfilment will be obligatory on his successors. The Muslim ruler has

conducted these agreements with his *Ijtihād* and the new ruler cannot terminate the decisions of his predecessor with his *Ijtihād*.²⁵⁰

5.5-Commitment with the Agreements

About this matter Ibn Qudāmah says:

وإذا عقد الهدنة ، لزمه الوفاء بها ؛ لقول الله تعالى : ﴿ يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ ﴾^(٢٧) . وقال تعالى : ﴿ فَأَتِمُوا إِلَيْهِمْ عَهْدَهُمْ إِلَى مَدَنِهِمْ ﴾^(٢٨) . ولا تله لو لم يف بها ، لم يسكن إلى عقده ، وقد يحتاج إلى عقدها ، فإن نقضوا العقد^(٢٩) ، جاز قتالهم ؛ لقول الله تعالى : ﴿ وَإِنْ كَثُرُوا أَيمَنُوهُمْ مِنْ بَعْدِ عَهْدِهِمْ وَطَعَنُوا فِي دِينِكُمْ فَقَاتِلُوا أَئِمَّةَ الْكُفْرِ إِنَّهُمْ لَا أَيْمَنَ لَهُمْ لَعَلَّهُمْ يَنْتَهُونَ ﴾^(٣٠) . وقال تعالى : ﴿ فَمَا اسْتَقْسَمُوا لَكُمْ فَاسْتَقِيمُوا لَهُمْ ﴾^(٣١) . ولما نقضت قريش عهد النبي ﷺ ، خرج إليهم ، فقاتلهم ، وفتح مكة^(٣٢) . وإن نقض بعضهم دون بعض ، فسكت باقيهم عن الناقض ، ولم يوجد منهم إنكار ، ولا مراسلة الإمام ، ولا تبرؤ ، فالكل ناقضون ؛ لأن النبي ﷺ لما هادن قريشا ، دخلت خراعة مع النبي ﷺ ، وبنو بكر مع قريش ، فعادت بنو بكر على خراعة ، وأعادتهم بعض قريش ، وسكت الباقيون ، فكان ذلك نقض عهدهم ، وسار إليهم رسول الله ﷺ فقاتلهم . ولأن سكوتهم يدل على رضاهم ، كما أن عقد الهدنة مع بعضهم يدخل فيه جميعهم ؛ لدلالة سكوتهم على رضاهم ، كذلك في النقص . وإن أنكر من لم ينقض على الناقض ، بقول أو فعل ظاهر ، أو اعتزال ، أو راسل الإمام بأى منكر لما فعله الناقض ، مقيم على العهد ، لم ينتقض في حقه ، وبأمره الإمام بالتميز^(٣٣) ، ليأخذ الناقض وحده

'If a peace treaty is conducted commitment with it is obligatory on the basis of the following saying of the God: [O you who believed! Fulfil obligations]²⁵¹ and God said, [Fulfil their treaty to them of the end of their term].²⁵² Because if the treaties will not be fulfilled there will be no peace and there will be its need.

If they break their agreement their killing is permissible on the basis of the

²⁵⁰ Ibn Qudāmah, *Al-Mughni*, p. 13/157.

²⁵¹ Q 5:1.

²⁵² Q 9:4.

following saying of God: [But if they validate their oaths after their covenant and attack your religion with disapproval and criticism then fight (you) the leaders of disbelief for surely their oaths are nothing to them – so that they may stop] ²⁵³and God said: [so long as they are true to you, stand you true to them.]²⁵⁴ When *Quraysh* broke their agreement with the Prophet then he fought with them and conquered Makkah. If some of them break their agreements and others remain silent do not criticise their action, it will be considered as broken by all. Because the Prophet when he made peace with *Quraysh*, entered *Khozā'ah* in peace agreement with the Prophet and *Banū Bakr* with *Quraysh*. *Banū Bakr* attacked on *Khozā'ah* and some folk from *Quraysh* helped them and others remained silent. This was a breach of agreement from all. The Prophet moved towards them and attacked them because their silence showed their agreement on breach of treaty. The silence of some during the peace treaty acts as their acceptance for it. The same is in its breaching. If some of them refused to breach the treaty and cleared their intention with their actions or saying or separating them from the others or they sent a message for refusing the actions of the others then they will be protected and the Muslim ruler will ask his army to attack breaches only.²⁵⁵

5.6- Terminations of Peace Treaties

In a separate *Fasl* Ibn Qudāmah discussed possibilities and modes of terminating peace treaties. He says:

فصل: وإن خافَ نَقْضَ الْعَهْدِ مِنْهُمْ، جَازَ أَنْ يُبَدِّلَهُمْ عَهْدَهُمْ؛ لِقَوْلِ اللَّهِ تَعَالَى: ﴿وَأَمَّا تَخَافَنَّ مِنْ قَوْمٍ خِيَانَةً فَانْبِذْ إِلَيْهِمْ عَلَى سَوَاءٍ﴾ (١). يَعْنِي أَعْلِنَهُمْ بِنَقْضِ

²⁵³ Q 9:12.

²⁵⁴ Q 9:7.

²⁵⁵ Ibn Qudāmah, *Al-Mughni*, p. 13/158.

عَهْدِهِمْ ، حَتَّى تَصِيرَ أَنْتَ وَهُمْ سَوَاءً فِي الْعِلْمِ ، وَلَا يَكْفِي وَقُوعُ ذَلِكَ فِي قَلْبِهِ (٢٥٦) ، حَتَّى
يَكُونَ عَنْ أَمَارَةٍ تَدُلُّ عَلَى مَا خَافَهُ . وَلَا يَجُوزُ أَنْ يَبْدَأَهُمْ بِقِتَالٍ وَلَا غَارَةَ قَبْلَ إِعْلَامِهِمْ بِتَقْضِ
الْعَهْدِ ؛ لِلآيَةِ ، وَلَا تَهُمُ آمَنُونَ مِنْهُ (٢٥٧) بِحُكْمِ الْعَهْدِ ، فَلَا يَجُوزُ قَتْلُهُمْ ، وَلَا أَخْذُ مَا لَهُمْ . فَإِنْ
قِيلَ : فَقَدْ قُلْتُمْ : إِنَّ الدِّمَى إِذَا خِيفَ مِنْهُ الْحَيَاةُ ، لَمْ يَتَّقِضْ (٢٥٨) عَهْدُهُ . قُلْنَا : عَقْدُ الدِّمَةِ
أَكْذٌ ؛ / لِأَنَّهُ يَجِبُ عَلَى الْإِمَامِ إِجَابَتُهُمْ (٢٥٩) إِلَيْهِ ، وَهُوَ نَوْعٌ مُعَاوَضَةٍ ، وَعَقْدٌ مُؤَبَّدٌ ،
بِخِلَافِ الْهَدَنَةِ وَالْأَمَانِ ، وَلِهَذَا لَوْ تَقَضَّى بَعْضُ أَهْلِ الدِّمَةِ ، لَمْ يَتَّقِضْ عَهْدُ الْبَاقِينَ ، بِخِلَافِ
الْهَدَنَةِ ، وَلَأنَّ أَهْلَ الدِّمَةِ فِي قَبْضَةِ الْإِمَامِ ، وَتَجِبُ وَلَايَتُهُ ، وَلَا يُحْشَى الضَّرَرُ كَثِيرًا مِنْ
تَقْضِيهِمْ ، بِخِلَافِ أَهْلِ الْهَدَنَةِ ، فَإِنَّهُ يَخَافُ مِنْهُمْ الْغَارَةَ عَلَى الْمُسْلِمِينَ ، وَالضَّرَرُ الْكَثِيرُ
بِأَخْذِهِمْ لِلْمُسْلِمِينَ .

'If a Muslim ruler fears that the enemies will violate a peace treaty, he can break it with them on the basis of the saying of the God: [If you fear treachery from any people throw back (their covenant) to them (so as to be on equal terms (that there will be no more covenant between you and them). Certainly Allah not like treacherous.²⁵⁶ It means inform them about the breaking of their contracts so that they may become aware of its breaking as you are aware of it. The knowledge of breaking treaties in heart is not sufficient. There must be some evidence that leads to the breaking of the treaties. Starting a war and attacking them before informing them about the termination of the contract is not allowed because as the result of this peace they are in *amān* and their killing and taking their wealth is prohibited. If it is said to us, 'You told that even if it is feared that *Dhimmi* will violate his treaty of *Dhimma* his contract would not break'. We replied, ' the contract of *Dhimma* is stronger because it is the duty of the Imām to accept a request for it and this is a kind of compensation. This is a contrary to the permanent treaty of peace and *amiān*. This is why if some *Dhimmi*s break it, it will remain enforce on others. These people are in the custody of the Muslim ruler and his guardianship is obligatory on them.

²⁵⁶ Q:8:58

Violation of the treaty of *Dhimmi*s is not dangerous for us contrary to the contract of peace. It is afraid in this case that they will attack Muslims and there is great danger for the Muslims if they capture them.²⁵⁷

5.7- Effects of Peace Treaty

Ibn Qudāmah discusses effects of peace treaties in separate part and says:

فصل : وإذا عَقِدَ الْهُدْنَةُ ، فعليه جَمَاعَتُهُمْ مِنَ الْمُسْلِمِينَ وَأَهْلُ الدِّمَةِ ؛ لِأَنَّهُ آمَنَهُمْ مِنْهُمْ (هو في قَبْضَتِهِ وَتَحْتِ يَدِهِ ، كَمَا آمَنَ مَنْ فِي قَبْضَتِهِ مِنْهُمْ . وَمَنْ أَتْلَفَ مِنَ الْمُسْلِمِينَ أَوْ مِنْ أَهْلِ الدِّمَةِ عَلَيْهِمْ شَيْعًا ، فعليه ضَمَانُهُ ، وَلَا تَلْزَمُهُ جَمَاعَتُهُمْ مِنْ أَهْلِ الْحَرْبِ ، وَلَا حِمَايَةُ بَعْضِهِمْ مِنْ بَعْضٍ ؛ لِأَنَّ الْهُدْنَةَ التِّزَامُ الْكَفِّ عَنْهُمْ فَقَطْ . فَإِنْ أَغَارَ عَلَيْهِمْ قَوْمٌ آخَرُونَ فَسَبَّوهُمْ ، لَمْ يَلْزَمُهُ اسْتِنْقَاذُهُمْ ، وَلَيْسَ لِلْمُسْلِمِينَ شِرَاؤُهُمْ ؛ لِأَنَّهُمْ فِي عَهْدِهِمْ ، فَلَا يَجُوزُ لَهُمْ أَذَاهُ وَلَا اسْتِزْقَاؤُهُمْ . وَذَكَرَ الشَّافِعِيُّ مَا يُدُلُّ عَلَى هَذَا . وَيَحْتَمِلُ جَوَازَ ذَلِكَ . وَهُوَ مَذْهَبُ أَبِي حَنِيفَةَ ، لِأَنَّهُ لَا يَجِبُ أَنْ يَدْفَعَ عَنْهُمْ ، فَلَا يَحْرُمُ اسْتِزْقَاؤُهُمْ ، بِخِلَافِ أَهْلِ الدِّمَةِ . فعلى هذا ، إِنْ اسْتَوْلَى الْمُسْلِمُونَ عَلَى الَّذِينَ أَسْرَوْهُمْ ، وَأَخَذُوا أَمْوَالَهُمْ ، فَاسْتَنْقَذُوا ذَلِكَ مِنْهُمْ ، لَمْ يَلْزَمْ رَدُّهُ إِلَيْهِمْ ، عَلَى هَذَا الْقَوْلِ . وَمُقْتَضَى الْقَوْلِ الْأَوَّلِ وَجُوبُ رَدِّهِ ، كَمَا تُرَدُّ أَمْوَالُ أَهْلِ الدِّمَةِ إِلَيْهِمْ .

'The enemy is protected from Muslims and *Dhimmi* in case of peace treaty they because Muslim ruler has provided them security in the behalf of those are under his control. He has also given peace to those who are in his custody. If anyone from Muslims or from *Dhimmi* waste anything belonging to those persons (with whom a peace treaty has been signed) he will have to pay compensation. The protection of enemies from other enemies after the peace treaty will not be the Muslim rulers duty. Their protection among themselves will also not be his duty because the peace treaty is applied only to their obligatory protection from Muslims. If any other enemy attacks them and imprisons them their protection will not be the duty of the Muslim ruler. But Muslims cannot purchase them because they are in agreement of peace with

²⁵⁷ Ibn Qudāmah, *Al-Mughni*, p. 13/158-159

them. Their emancipation and hurting is not allowed for Muslims. Imām Shāfi' has mentioned the same. This is also the opinion of Imām Abū Hanifa. Because he is not bound to defend them from their enemies. The case of *Dhimmīs* is otherwise (because a Muslim ruler is bound to protect them from their enemies also).²⁵⁸

The effects of peace treaty described by jurist can be summarised as under:

1. The subject over which hostilities have broken out and settled.
2. The rights of belligerency, i.e. killing, capturing, plundering, occupying and other things described before, are brought to an end.
3. Unless otherwise provided in the treaty the condition before the conclusion of the treaty will be maintained.
4. The prisoners of war are exchanged or otherwise released, for which there are generally expressed stipulations. Other booty is not exchanged unless expressly provided for.
5. As soon as a peace is included, the treaties, suspended during the war, and which require no renewal automatically revive; and treaties dealing with behaviour during the war are suspended.²⁵⁹

Ibn Qudāmah specifies in another *fatā* for the effects of treaties and says:

فصل : وإذا عقد الهدنة مطلقاً ، فجاءنا منهم إنسان مسلماً أو بأمان ، لم يجب ردّه إليهم ، ولم يجر ذلك ، سواء كان حُرّاً أو عبداً ، أو رجلاً أو امرأة . ولا يجب ردّ مهر المرأة . وقال أصحاب الشافعي : إن خرج العبد إلينا قبل إسلامه ، ثم أسلم ، لم يردّ إليهم ، وإن أسلم قبل خروجه ، ثم خرج إلينا ، لم يصير حُرّاً ، لأنهم في أمان مِنّا ، والهدنة تمنع من جواز القهر . وقال الشافعي في قول له : إذا جاءت امرأة مسلمة ، وجب ردّ مهرها ؛ لقول الله تعالى : ﴿ وَآتَوْهُمْ مَا اتَّفَقُوا عَلَيْهِ ﴾ . يعني ردّ المهر إلى زوجها إذا

²⁵⁸ Ibn Qudāmah, *Al-Mughni*, p. 13/159.

²⁵⁹ Hamidullah, *The Muslim Conduct*, p. 266.

جاء يطلبها / وإن جاء غيره ، لم يُرد إليه شيء . ولنا ، أنه من غير أهل دار الإسلام ، خرج
إلينا ، فلم يجب^{٢٦٠} رده ، ولا رد شيء بدلا عنه ، كالمحرر من الرجال ، وكالعبد إذا أخرج ثم
أسلم . وقولهم : إنهم^{٢٦١} في أمان منا . قلنا : إنما أمانهم^{٢٦٢} ممن هو في دار الإسلام ،
الذين هم في قبضة الإمام ، فأما من^{٢٦٣} هو في دارهم ، ومن ليس في قبضته ، فلا يمنع منه ،

‘In the case of the general peace agreement (with out any conditions) if anyone from them came to Muslims as a Muslim or with protection his return will not be compulsory and it is not be permissible. There is no difference if he is a free, male, slave or female. The return of dowry of the female is not obligatory (If she came towards the Muslims). The companions of Imām Shāf’ī said if a slave came to us before embracing Islam, then he became Muslim, he would not be returned to them. If he became Muslim before his arrival towards us, he will not be declared freed person because they are in *amān* from us and the peace treaty is stopping us from compelling them (to declare him free). Imām Shāf’ī said in one of his sayings, ‘when any Muslim female arrives the return of her dowry is obligatory on the basis of following saying of God: [give them which they have spent to them]²⁶⁰. It means that her dowry will be returned to her husband (non Muslim) if he came to claim her. If other than her husband came nothing will be returned. Our opinion is that he is not from an Islamic land. So to return the dowry to him is not obligatory and nothing else will be substituted. Like free person from males and slaves if he arrived and embraced Islam. If their opinion is that they are in *amān* from us. We replied, ‘we gave *amān* to them from those who are in an Islamic land and are in the custody of

²⁶⁰ Q 60:10.

the ruler of the Muslims'. As for other who is in their land and is not in his custody he can not defend him.²⁶¹

5.8-The kinds of conditions of peace treaty

Ibn Qudāmah divides the conditions of peace as follows:

فصل : والشروط في عقد الهدنة تنقسم قسمين ؛ صحيح ؛ مثل أن يشترط عليهم مالا ، أو معونة المسلمين عند حاجتهم إليهم ، أو يشترط^(١) لهم أن يرّد من جاءه من الرجال مسلما أو بأمان . فهذا يصح . وقال / أصحاب^(٢) الشافعي : لا يصح شرط ردّ المسلم ، إلا أن يكون له عشيرة تحميه وتمنعه . ولنا ، أن النبي ﷺ شرط ذلك في صلح الحديبية ، ووفى لهم به ، فردّ أبا جندل^(٣) بن سهيل وأبا بصير ، ولم يخص بالشرط ذا العشيرة ، ولأن ذا العشيرة إذا كانت عشيرته هي التي تقتله وتؤذيه ، فهو كمن لا عشيرة له ، لكن لا يجوز هذا الشرط إلا عند شدة الحاجة إليه ، وتعين المصلحة^(٤) فيه ، ومتى شرط لهم ذلك ، لزم الوفاء به ، بمعنى^(٥) أنهم إذا جاءوا في طلبه ، لم يمنعههم أخذه ، ولا يجبره^(٦) الإمام على المضى معه ، وله أن يأمره^(٧) سيرا بالهرب منهم ، ومقاتلتهم ، فإن أبا بصير لما جاء النبي ﷺ ، وجاء الكفار في طلبه ، قال له النبي ﷺ : « إنا لا بصلح في ديننا العذر ، وقد علمت ما عاهدناهم عليه ، ولعل الله أن يجعل لك فرجا ومخرجا » فلما رجع مع الرجلين ، قتل أحدهما في طريقه ، ثم رجع إلى النبي ﷺ ، فقال : يا رسول الله ، قد أوفى الله ذمتك ، قدر دنتي إليهم ، وأتجاني^(٨) الله منهم . فلم ينكر عليه النبي ﷺ ، ولم يلّمه ، بل قال : « ويل أمه من عرّ حرب ، لو كان معه رجال ! » فلما سمع ذلك أبو بصير ، لحق بساحل البحر ، وانحاز إليه أبو جندل بن سهيل ومن معه من المستضعفين بمكة ، فجعلوا لا تمر عليهم^(٩) غير قریش إلا عرضوا لها ، فأخذوها ، وقتلوا من معها ، فأرسلت قریش ، إلى النبي ﷺ ، تائبين الله والرحم ، أن يضمهم إليه ، ولا يرّد إليهم أحدا جاءه ، ففعل .

'The conditions in a peace treaty are divided into two kinds. *Ṣaḥīḥ* valid and correct conditions: like imposing on them payment of money (to the Muslims)

²⁶¹ Ibn Qudāmah, *Al-Mughni*, p. 13/159-160.

or helping the Muslims at the time of need or including the condition of return to the males who came towards Muslims as Muslims or with protection. These types of conditions are true *Ṣaḥīḥ*. The companions of Imām Shāfiʿī said, 'the condition of return of a Muslim is not correct except if he has his family there which can save him and protect him from them. Our opinion is that the Prophet put this condition in *Sulh al-Hudaybiyyah* and fulfilled it when he returned Abū Jandal bin Suhail and Abū Basīr. The condition of family is not necessary because if his family tortures him, he becomes a person who has no family. But this kind of condition can be placed only if the Muslims are in extreme of its need and it fulfils their interest. If this condition for them was included it will be fulfilled in the meaning that if they came asking (for the return of the person) they will not be stopped to talk to him nor will he be forced by the Imām to go with them. He can secretly ask him to run away and fight with them. When Abū Basīr came to the Prophet and the *Kuffar* came to take him back the Prophet told him, breach of treaty is not permissible in our religion. You know the conditions of our treaty. Allah Almighty may provide ways of rescue for you'. When he returned with two persons (Who came to take him) he killed one of them in his way. He then came to the Prophet and said, 'oh Prophet of God the God has fulfilled your promise. You sent me towards them and God has saved me from them. The Prophet at this time did not refute him or blame him but said '*wayl 'ommh ms'ir harb*, this means he encouraged him surreptitiously to instigate war if he had men with him. When Abū Basīr heard this he ran away towards the seaside. Abū Jandal and others who were weak people from Makkah went with him. From there they started to attack the caravans of the *Quraysh* and kill them. *Quraysh* sent a message to the Prophet

and begged him that he asked them to join the Muslims in Madina. The Prophet allowed them to join the Muslims in Madina.²⁶²

In this discussion Ibn Qudāmah describes that if any one wishes to behave in the same manner of Abū Jandal Abū Basīr it is permissible. The same discussion explains void and unacceptable conditions of peace treaty in the following words:

شَرْطٌ فَاسِدٌ، مِثْلُ أَنْ يَشْتَرِطَ رَدُّ النِّسَاءِ، أَوْ مُهَوِّرِهِنَّ، أَوْ رَدُّ سِلَاحِهِمْ، أَوْ إِعْطَاءَهُمْ شَيْئًا مِنْ سِلَاحِنَا، أَوْ مِنْ آلَاتِ الْحَرْبِ، أَوْ يَشْتَرِطَ لَهُمْ مَا لَا فِي مَوْضِعٍ لَا يَجُوزُ بَذْلُهُ، أَوْ يَشْتَرِطَ تَقْضِيَهَا مَتَى شَاءُوا²⁶³، أَوْ (أَنْ لِكُلِّ طَائِفَةٍ مِنْهُمْ تَقْضَى، أَوْ يَشْتَرِطَ رَدُّ الصَّبْيَانِ، أَوْ رَدُّ²⁶⁴ الرِّجَالِ، مَعَ عَدَمِ الْحَاجَةِ إِلَيْهِ. فَهَذِهِ كُلُّهَا شُرُوطٌ فَاسِدَةٌ، لَا يَجُوزُ الْوَفَاءُ بِهَا.

‘The second kind of conditions are void (*Fāsid*) for example the condition of returning females or returning their dowry, returning of their (enemies) weapons or giving them something from our weapons or from tools of war or giving them money so that they can spend it in the place in which the spending of money is not allowed or putting the condition that they can break the treaty whenever they like or anyone can break the treaty or putting the condition of return of children or return male without its need. All conditions like this are *Fāsid* (void). Their fulfilment will not be obligatory.²⁶³

5.9- Elements of treaty

I- Treaties must be in writing

God said Qur’ān: [When ye contract a debt for a fixed term, record it in writing.]²⁶⁴ On the basis of the practices of the Prophet, Shaibānī and others say that a

²⁶² Ibid., p13/160-161.

²⁶³ Ibid., p13/162.

²⁶⁴ Q 2:282.

treaty must be in writing. The day of the writing of the treaty and the date in which it comes into force, as well as the duration of the treaty, must be precisely mentioned.

II- Condition must be included in it

Apart from the general matters, such as the cessation of fighting, the settlement of the condition created by war, etc., and special things such as agreement and miscellaneous things which have a connection either with general or special things — apart from all these things.

III- Treaties must be signed

The treaties include solemn promises for the observance and execution of the treaty, the signature of the duly authorised persons, and the sanction for execution. Such as hostages, etc. and along with the main treaty, sometimes annexes, supplements, provisos and even secret sections are also to be found. It was traditional to seal these treaties with stamps. In fact there is no limit to the subject matters of treaties. Hence no more than these essential and elementary points of treaty require mention.²⁶⁵

5.10- Ratification of treaties

Generally, the treaties are negotiated and provisionally settled by representatives of the states. Then referred to central government for rectification. History records a letter of Khālīd Ibn al-Walīd, in which he asked Yaman for instructions from the Prophet.²⁶⁶

²⁶⁵ See for details al-Sarkhasi, *Sharh al-Sīr al-Kabīr*, p. 4/63; al-Qalqashandī, *Subh al-Ishāh* p.18/11.

²⁶⁶ Ibn Hishām, *Al-Sira al-Nabawyya*, p. 2 25

It is possible that the ratification may be denied and the whole treaty becomes null and void. There is an instance of this in the time of the Prophet, when he concluded a pact with the provision that it would be ratified after consulting with the other pillars of the State. As a matter of fact, they rejected the terms, and the parchment was subsequently effaced.²⁶⁷

5.11- Interpretation and Amendment of treaties

Classical Muslim writers on International Law and "Roots of Law" have given long details of the principles of the interpretation of the terms of the treaties. Imām Shaibānī in this regard wrote:

'There are things which may be taken for granted by Muslims even without express mention of them, but other nations may not imply that. Such things must be expressly mentioned; otherwise the contracting party may conclude that there is an infringement of the pact. And as we have mentioned, the document must be written in a way to bear witness against the contracting parties, and no accusation of perfidy should be possible.'²⁶⁸

In another passage, the same author states that if a besieged fortress surrenders on the condition that the free people will not be molested and the ownership of the slaves will be transferred to the conquering army, and the parties differ regarding the status of certain individuals, the presumption will be that they are free people, since originally every man is free.²⁶⁹

Finally, this chapter highlighted the rules and regulations of Islamic Law in light of the opinion of Ibn Qudāmah, the author and compiler of *Al-Mughnī*. The matters related to

²⁶⁷ Ibid, 2/222

²⁶⁸ Al-Sarakhsī, *Sharh al-Syār al-Kabīr*, p. 4/64

²⁶⁹ Ibid., 4/5

prisoners of war, prohibited acts in war and peace treaties have been discussed in this chapter.

The discussion in matters of prisoners of war is related to their ransom, their rights and treatment of them. The second important discussion is about the prohibited acts during war. Usually it is considered that every kind of act is allowed in war but this discussion shows how Islam provided ethical values for the protection of human beings. Unnecessary killing and torture are prohibited. The old, female and children are particularly protected. Islamic injunction for protection is not limited to human beings but animals, birds, trees and agriculture are also included. The rules of Islamic law related to peace treaties are also very comprehensive. The legitimacy, importance, ways, conditions, effects and kinds of peace treaties have been discussed and it has been tried to present a clear picture of Islamic Law regarding these matters.

Chapter Five

Conclusion and Finding

The opinions of Ibn Qudāmah shows that Jihād is a collective duty imposed on Muslims by God but its performance is not required from all Muslims. If any groups of Muslims who are eligible to participate in Jihād perform it, it will be considered performed on the part of all Muslims. Participation in it is a symbol of sincerity with Islam and it is one of the actions that are dear to God. In each period it is a unanimous opinion of Muslims that it is obligatory on Muslims for protection of Muslims and their interests. This must be for the cause of Islam and in the way of God. Fighting for personal interests or political gains can not be included in Jihād. During the discussion relating to the legal position of Jihād, Ibn Qudāmah did not explain the terminological and legal meaning of this term. It seems that he followed the majority of the jurists who specify Jihād for war only and neglected its other aspects that are based on *Hadīth* and considered important by the '*ulmā*' (scholars).

Ibn Qudāmah declares Jihād collective active action requires organization and preparation and can be conducted only under the leadership of the government. The government of an Islamic State has to decide when, where and who has to participate in it. This explanation by Ibn Qudāmah clarifies the position of individual militant groups who are fighting without permission of their governments and sometimes they even attacking their governments in the name of Jihād. The majority of Muslim Jurists including Ibn Qudāmah declare it legitimate only when it is conducted under the supervision of the Islamic State.

Ibn Qudāmah states that if enemies attack Muslim land (*dar al-Islam*) it becomes obligatory on the people of that land to participate in jihād.

He discusses pre requisite conditions for the participation in Jihād. The important of which are Islam, puberty, wisdom, liberty, manhood, good health and necessary money. He also draws his attention to the participation of females in war. It

seems that he is not encouraging active participation of females in the war as fighters. In his opinion they can participate as helpers only. However, Islamic history shows that Muslim females used to participate actively and they were also fighting as soldiers of the Muslim army. Many jurists like Muhammad bin Hassan Al-Shaibānī and Al-Sarkhasī allow active participation of females in wars and their opinion seems more close to the present situation in which females are accepted in the armies of the Muslim countries.

Ibn Qudāmah declares all kinds of warfare including sea war permissible. The Muslims started sea war from the time of the Prophet and there are his traditions, which show importance to sea warfare. He also discusses the leadership during war and concluded that the notion of Jihād under the leadership of a pious leader is not necessary but expertise in matters of warfare is prerequisite of the command. His opinion seems very practical even in contemporary situations.

Ibn Qudāmah says that war cannot be started without warning and the enemy has not been invited to other options like Islam or a payment of *Jizya* before the start of war. Actual war will be started in the case of non-acceptance of these first two options. At present under International Law declaration of war is necessary before the start of war. The Islamic Law's concept of offering Islam and other options before the start of war seems similar to the modern concepts of declaration of war before start of actual war.

Another very important issue that has been discussed by him is treatment of prisoners of war. He has divided prisoners of war into three kinds. They cannot be killed and the Muslim ruler can take any appropriate decision regarding their fate. He can seek a payment of ransom or not. However trial and punishment of prisoners of war for their crimes is not prohibited. Generally prisoners should be treated mercifully

in Islamic Law. They are protected from heat and cold and provided with food and clothes. The opinion of Ibn Qudāmah regarding prisoners of war is very close to the present International Law for treatment of prisoners of war. His opinion also shows the human aspect of Islam for the treatment of prisoners.

Ibn Qudāmah considers protection (*amān*) as a legitimate way of naturalization in war and peace. Each Muslim has a right to give protection if he is not forbidden to do so by the Islamic government. It might be granted to individuals or to the mass. If any conditions have been laid down during the contract of *amān* it will be fulfilled. He has the opinion that Muslim females and slaves can also give protection. He also discusses other matters related to *amān* such as *amān* from a Muslim prisoner, conflict regarding *amān* between Muslim and non-Muslim, *amān* from the non-Muslim citizen of an Islamic State. *amān* could be granted for many purpose like understanding of Islam, visit of Islamic State, diplomacy and trade. If any one solicited *amān* for understanding Islam its granting would be obligatory. The grant of *amān* to envoys and traders is also obligatory. *Must'amen* (a person who has granted *amān*) can stay in Islamic State without payment of *Jizya*. During the period of his stay the Islamic State will protect his life, property, honor and liberty of religion and their personal matters will be conducted as per their personal Law.

Ibn Qudāmah also states about the permanent non-Muslim citizens of an Islamic State, who are named as *Dhimmi*. They are not liable to pay *Zakāt*, which all the Muslims male and female pay every year but they will have to pay another tax, which is named as *Jizya*. If they participate in war along with Muslims or they are so poor that they cannot pay *Jizya* they can be exempted from its payment. As a general rule the Muslims ruler has right to exempt them from the payment of *Jizya*. Presently this status of non-Muslims is changed in all Islamic States and non-Muslims are no

longer liable to pay *Jizya* because they are a part of Muslim armies and Muslim governments have exempted them from payment of this tax.

The author of *Al-Mughnī* also elaborates the acts that are prohibited during war. His discussion shows that the Muslim conduct of war is based on ethical values. The enemy cannot be burned after being captured them during war. This principle is based on the saying of the Prophet in which he forbids burning. The use of up- to-date weapons is legitimate and Muslims are encouraged to prepare and purchase. The latest war techniques can be used. Night attacks and destruction of the strong holds of enemies are also allowed when they are attacking Muslims.

Ibn Qudāmah says that the killing of non-combatants is prohibited. Women, minors, servants and slaves who are accompanying their masters but not taking part in war are non-combatants. The blind, monks, hermits, the aged, physically incapable of fighting are also included in this category. They cannot be killed during the war. The Prophet advised one of his commanders: 'Fight in the way of God and combat those who do not believe in God. Yet never commit breach of trust, nor treachery, nor mutilate any body nor kill any minor or women. This is the pact of God and the conduct of his messenger for your guidance.' Ibn Qudāmah says that the animals, birds, trees and agriculture will be protected. Only the required number of animals will be slaughtered. These opinions are very important and need to be explained in the present context because the killing of civilians who are not participating in war is an un-Islamic act but unfortunately some Muslims are committing this illegal act in the name of Islam. In the light of Ibn Qudāmah's description these actions seem unlawful.

Peace treaties between Muslims and their enemies are permissible and legitimate in the opinion of Ibn Qudāmah. Muslim jurists used different terminologies like *Muhādnat*, *Muwadi'āt* and *Mu'ahidāt* to describe peace treaties or cease-fire.

Hudna is the most famous terminology used for it. The Prophet himself entered in a peace treaty with the *Quraysh* of Makkah. The opinions of Jurists are different about the period of the peace treaty but they are agreed that its period must be fixed. The peace treaty for unfixed and unlimited time is not allowed in opinion of Ibn Qudāmah. Many contemporary scholars do not agree that the peace treaty for more than ten years cannot be conducted. They are of the opinion that permanent peace treaties that are present in these days are legitimate. Muslim jurist have discussed conditions of the peace treaty. The conditions like payment of money, return of people is allowed but the conditions like the deporting of Muslim females and the handover Muslim weapons to the enemy are unacceptable. As the result of the peace treaty the enemies will be saved from the citizen and the government of the Islamic State. The rights of belligerency like killing, capturing, plundering, and occupying will be brought to an end. The treaties must be in writing and signed by the concerned parties. The conditions of the treaties must be mentioned clearly and an authority must rectify it. All the conditions of the treaty must be fulfilled. Breach of the treaty is not allowed. In case of its breach from the other side Muslims are allowed to terminate it. Before termination it is necessary that the other party be informed about it. The discussion of Ibn Qudāmah regarding peace treaties is similar to the present rules of international law. It shows how close Islam is to International Law.

Appendix

The following is a list of Scholarly work of Ibn-Qudamah

I-Work of Ibn-Qudāmah on *Usūl al-Dīn*

1. *Al-Burhān Fi Mas'lat Al-Qur'ān* (one volume)
2. *Jawāb Mas'lah Wuredat Fi Al-Qur'ān* (one volume)
3. *Al-Itiqād* (one volume)
4. *Mas'lat al-'olū* (two volumes)
5. *Dham al-Ta'wīl* (one volume)
6. *Kitāb al-Qadar* (two volumes)
7. *Kitāb Fadā'il al-Ṣaḥābah* (two volumes)
8. *Resālah Ilā Alshīkh Fakher al-Dīn Ibn Taymīya Fi Takhlīd A'hal al-bida' Fi al-Nār*
9. *Mas'lat Taḥrīm al-Nāẓer Fi Kutub A'hal al-klām*

II-Work of Ibn Qudāmah on *Ḥadīth*

10. *Mukhtaṣar Al'ilal* (large volume)
11. *Mashīakhah Shūūkhoh* (one volume)
12. *Mashīakhah 'Ukhra* (many volumes)

III- Work of Ibn-Qudāmah on *Fiqh*

13. *al-Mughnī* (10 volumes hand written)
14. *al-Kāfī* (4 volumes)
15. *al-Muqne'* (one volume)
16. *Mukhtaṣar Al hedīyah* (one volume)
17. *al-'Umdah* (small volume)
18. *Manāsek al-Ḥajj* (one volume)

19. *Dham al-Weswās* (one volume)

IV- Work of Ibn-Qudamah on *Usul al Fiqh*

20. *Rawḍat al-Nāẓer Wa Jannat al-Munāẓer*

V- Work of Ibn-Qudāmah on Arabic Language

21. *Qan'at Al'arīb fi Algharīb* (small volume)
22. *Al-Tabyīn fi Nesab al-Qūrashīn* (One volume)
23. *Al-'Istibsār fi Nasb al-'Ansār* (One volume)

VI-Miscellaneous work of Ibn-Qudāmah

24. *Al-Tawābīn* (Two volumes)
25. *Al-Mutaḥabīn fi Allāh* (Two volumes)
26. *Al Ruḡah Wa Albu'ka'* (Two volumes)
27. *Fadā'il 'Ashūrah* (One volume)
28. *Fadā'il al'Ashr* (One volume)

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