

The Concept of Treaty in Islamic Jurisprudence: A Comparative View of the Classical Jurists

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Abstract

This article aims to shed light on a particular area in the field of Islamic International Law (*siyar*), i.e., treaty in Islamic jurisprudence. It addresses a comparative view of classical jurists on treaties both theoretically and historically, and highlights their continued relevance to the contemporary world. Not only is there a lacuna in scholarship concerning the concept of treaties in Islamic jurisprudence, but it can be argued that there is a failure of conception of international legal theorists to study and integrate the Islamic treaty system into the body of modern international law in order to have a mutual understanding and respect and honor for treaties among nations. I would like to present and address the concept of treaty in Islamic jurisprudence with special reference to treaty of *Hudaybiyyah* that took place between Muslims and non-Muslims.

Key Words: Islamic Treaties, International Relations, Islamic Jurisprudence, Classical Muslim jurists, Islamic History.

Abstrak

Artikel ini bertujuan untuk mengupas perjanjian antarabangsa sebagai salah satu bidang di dalam fiqah. Ia mengupas secara teoretikal dan sejarah perkembangannya pendapat-pendapat para fuqaha' tradisional dengan melakukan perbandingan di antara mereka dalam rangka untuk melihat bagaimana pendapat-pendapat tersebut masih lagi relevan dan penting dengan suasana dunia semasa. Bukan sahaja kerja-kerja kesarjanaan masih terlalu kurang memberikan perhatian kepada bidang ini, tetapi kegagalan untuk mengkaji dan mengintegrasikan konsep ini dalam bidang perjanjian antarabangsa boleh juga dikatakan antara sebab kegagalan terhasilnya perjanjian antarabangsa yang berlandaskan kepada saling memahami dan hormat menghormati di antara negara-negara di dunia. Saya secara khususnya ingin mengketengahkan dan mengupas konsep berkenaan dalam fiqah melalui perjanjian Hudaybiyyah yang di buat di antara orang Islam dan bukan Islam sebagai rujukan kajian ini.

Kata Kunci: Perjanjian-perjanjian Islam, hubungan antarabangsa, *fiqah*, *fuqaha'*, tradisional, sejarah Islam.

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I. Introduction

Treaties have been among the most important instruments of international relations both in ancient and modern times. They have provided the framework for peaceful relations in the spheres of both internal and external relations between Muslims and non-Muslims. International treaties were of particular interest to classical Muslim jurists, chief among them Shaybānī (d. AH189/804AD). These jurists constructed a system of drawing up such instruments that covered all aspects of the process, such as the establishment, conclusion, effects and termination of international treaties. Classical Muslim scholars focused on specific aspects of these treaties, in particular the fulfillment of the contract and the ramifications of acts of treachery and violation. A discussion and analysis of international treaties follow here, examining the philological roots of the term treaties/*mu'āhadāt* and its basis for legitimization in Islamic law.

A. Definition of Treaties (*Mu'āhadāt*)

The root of *mu'āhadah* is *'ahd*, which means a promise or commitment. *Mu'āhadah* is the verbal noun of the verb *'ahada*, denoting the conclusion of a covenant between two parties. *'Ahd* is a covenant, pact, treaty or agreement that requires commitment and fulfillment whenever it is concluded and enforced.¹ *'Ahd* also signifies a firm commitment to observe an agreed-upon contract. The Qur'ānic verses that deal explicitly with the concept of *'ahd* laid the foundations for later interpretation:

And fulfill the Covenant of Allāh (*Bay'ah*: pledge for Islam) when you have covenanted (Q. 16: 91); But if they seek your help in religion, it is your duty to help them except against a people with whom you have a treaty of mutual alliance (Q. 8: 72); O you who believe! Fulfill your obligations (Q. 5: 1).²

'Ahd also encompasses the concepts of *amān*/pledge³ of security and *dhimmah*/protection.⁴ The *ahl al-'ahd* are the people or the parties

¹Al-Sayyid 'Alī bin Muḥammad bin 'Alī al-Sharīf al-Jurjānī (d. 816 AH /1416AD), *Al-Ta'rīfāt*, (ed.) Ibrāhīm al-Ibyārī (Beirut: Dār al-Kitāb al-'Arabī, 1405/1984), p. 204.

²All quotations from the Qur'ān used in this article are from the translation of its meaning into the English language entitled *The Noble Qur'ān*, by Muḥammad Taqī al-Dīn al-Hilālī and Muḥammad Muḥsin Khān (Riyad: Dār al-Salām, 1996).

³*Amān*/safe conduct: there are two kinds of *amān*: one temporary and the other permanent. Under Islamic Law the *amān* is given to foreign nationals who enter *Dār*

who are involved in concluding a covenant (*'ahd*). *Mu'āhadah* is both the act of conclusion of a contract between parties and the resulting covenant itself.⁵ On an international level a *mu'āhadah* is a contract between two or more states designed to normalize relations among them.⁶

Shaybāni uses the term *mu'āhadah* interchangeably with *muwāda'ah* (truce), *'ahd* (contract or pact), *murāwahdah*, *hudnah*, *muṣālahah* (external peace), *mutārakah* and *musālamah* (external peace) in his writings,⁷ but he writes *muwāda'ah* and *mu'āhadah* more frequently

al-Islām. For further discussion of *amān* please see 'Alā' al-Dīn Abu Bakr ibn Mas'ūd al-Ḥanafī al-Kasānī (d. 587AH/1191AD), *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1406/1968), vol. 9, p. 4318.

⁴In legal works, *dhimma* is most often defined as *'ahd* or covenant, whether it be contemporary or everlasting. See Abū Bakr Muḥammad bin Aḥmad bin Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, ed. Muṣṭafa' Zayd with the commentary of Muḥammad Abū Zahrah (Cairo: Maṭba'at Jāmi'at al-Qāhirah, 1958), vol. 1, p. 252; Kasānī, *Badā'i' al-Ṣanā'i'*, vol. 9, pp. 4318, 4327.

⁵Abū al-Ḥusn al-Aḥmad bin Fāris Zakaruyyā, *Mu'jam Maqāyīs al-Lughah* (Beirut: Dār al-Fikr, 1979), vol. 4, pp. 167-170; Ismā'il bin Ḥamad al-Jawharī, *al-Ṣiḥāh*, edited Aḥmad 'Abd al-Ghāfir (Beirut: Dār al-'Ilm lil-Malayīn, 1979), vol. 2, pp. 515-516; Muḥammad bin Ya'qūb al-Fayrūzabādī, *Tartīb al-Qāmūs al-Muḥīṭ* (Beirut: Mu'asassat al-Risālah, 1987), vol. 3, pp. 335-336; Abū al-Faḍl Jamāl al-Dīn Muḥammad bin Mukarram al-Anṣārī bin Manẓūr (d. 711AH/1311AD), *Lisān al-'Arab* (Beirut: Dār Ṣādir, 1992), vol. 3, pp. 311-315; Aḥmad bin Muḥammad al-Fayūmī, *al-Miṣbāḥ al-Munīr* (Beirut: Maktabat Lubnān, 1987), vol. 2, p. 435; Ayyūb bin Mūsā al-Kaffawī, *al-Kulliyāt* (Cairo: Dār al-Kitāb al-Islāmi, 1992), vol. 3, p. 255; Muḥamad bin Aḥmad al-Rakbī, *al-Nuzum al-Musta'dhab* (Beirut: Dār al-Ma'rifah, 1959), vol. 1, p. 156; vol. 2, p. 340; Abū al-Fātiḥ Nāṣir bin 'Abd al-Sayyid bin 'Alī al-Muṭarriẓī, *al-Mughrib fī Tartīb al-Mu'rib* (Beirut: Dār al-Kitāb al-'Arabī, 1980), vol. 2, pp. 91-92; 'Alī bin Muḥammad al-Sayyid Zayn Abu al-Ḥasan al-Jurjānī, *al-Ta'rifāt* (Cairo: Al-Baḥī al-Halabī, 1938), p. 204; Majd al-Dīn al-Mubarak bin Muḥammad bin al-Athīr, *al-Nihāyah fī Gharīb al-Ḥadhīth*, ed. Ṭāhir Aḥmad al-Zāwī (Cairo: Dār Iḥyā' al-Kutub al-'Ilmiyyah, 1965), vol. 3, p. 325; Abū al-Qāssim al-Ḥusn bin Muḥammad al-Rāghib al-Iṣfahānī, *Mufradāt al-Qur'ān* (Cairo: Maktabat al-Anglu al-Maṣriyyah, 1970), pp. 350-351; Nāṣir Sulaymān al-'Umar, *al-'Ahd wa al-Mithāq fī al-Qur'ān al-Karīm* (Riyad: Dār al-'Aṣimah, 1992), pp. 17-19; Ibrāhīm Anīs, *al-Mu'jam al-Wasīṭ* (Beirut: Dār al-Fikr, 1960), vol. 2, p. 134.

⁶Michael Byers, *Custom, Power and the Power of Rules: International Law and Customary International Law* (Port Chester, N.Y.: Cambridge University Press, 1999), pp. 147-155.

⁷Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, vol. 2, pp. 409-419, 461; vol. 5, pp. 1689-1697; and idem, *Mabṣūṭ* (Beirut: Dār al-Ma'rifah, 1324/1906) vol. 10, p. 85; Kasānī, *Badā'i' al-Ṣanā'i'*, vol. 9, p. 4324; Kamāl al-Dīn Muḥammad ibn 'Abd al-Wāḥid bin al-Humām al-Sīwāsī (d. 861/1456-7), *Fath al-Qadīr 'alā' al-Hidāyah*, with the margin of *Hāshiyat Qādī Zādah* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1986), vol. 4, p. 292; 'Alā' al-Dīn

than other terms. For Shaybānī, a *mu'āhadah* is a *muwāda'ah* between Muslims and non-Muslims for a fixed period of time.⁸ Many Ḥanafī jurists adopt this definition, including the eminent Samarqandī, who defines a *muwāda'ah* as a *ṣulḥ* (reconciliation) designed to end physical conflict for a fixed time period, involving the payment of tribute or other conditions.⁹ Kāsānī agrees with Samarqandī and defines *muwāda'ah* as a *ṣulḥ* that puts an end to physical conflict for a temporary period.¹⁰ Other Ḥanafī jurists likewise use different expressions for *mu'āhadah*, such as *muwāda'ah* and *muqādat*,¹¹ moreover, jurists sometimes define it as *amān* or *isti'mān*,¹² and some refer to it by the term *muhāwadah*.¹³ Ḥanbalī jurists adopt the same definition as the Ḥanafī jurists do, and use terms such as *muhādanah*, *muwāda'ah*, *mu'āhadah*, *musālamah*, *isti'mān* and *ṣulḥ* interchangeably.¹⁴

It is essential to explain the meanings of certain Islamic legal terms that lie at the heart of our discussion. Firstly, *muwāda'ah* (reconciliation) refers to the achievement of *ṣulḥ* (peace or truce); it is a verbal noun designating the cessation of fighting, usually for a specific period of time. *Mutārakah* (suspension of hostilities) is also commonly used, and, where

Muḥammad bin 'Alī al-Ḥaṣkafī, *Durr al-Muntaqa* (Cairo: Dār al-Ṭibā'ah), vol.1, p. 638.

⁸Muḥammad bin Ḥasan al-Shaybānī, *Al-Siyar al-Kabīr*, with the commentary of Sarakhsī, ed. Ṣalāḥ al-Dīn al-Munajjid (Cairo: Maṭba'at Sharikat al-I'lānāt al-Sharqiyyah, 1391/1971), vol. 5, p. 1780.

⁹'Alā' al-Dīn Abū Bakr Muḥammad bin Aḥmad al-Samarqandī, *Tuḥfat al-Fuqahā'*, ed. Muḥammad Zakī 'Abd al-Barr (Beirut: Dār al-Kutub al-'Ilmiyyah, 1405/1984), vol. 3, p. 507.

¹⁰Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol. 9, p. 4324.

¹¹Abū al-Fatih Nāṣir bin 'Abd al-Sayyid bin 'Alī al-Muṭarrizī, *Al-Mughrib fī Tartīb al-Mu'rib*, (Eds.) Maḥmūd Fākhūrī, 'Abd al-Ḥamīd Mukhtār (Aleppo: Maktabat Usāma bin Zayd, 1399/1978), vol. 2, p. 184.

¹²Muḥammad bin 'Arafa al-Warḡhamī al-Tūnisī (d. 803 AH/1400 AD), *Mukhtaṣar ibn 'Arafah*, with *Sharḥ al-Raṣāṣ al-Atī* (Beirut: Dār al-Gharb al-Islāmī, 1993), vol. 1, p. 226.

¹³Muḥammad bin Aḥmad Al-Azharī (d. 370 AH/980-1AD), *Al-Zāhir fī Gharīb Alfāz al-Shāfi'i*, (Ed.) Samīḥ Abū Maghlī, Majdī 'Alī al-Ash'arī (Āmman: Dār al-Fikr, 1999), p. 398.

¹⁴For more details see, Raṣṣāḥ al-Mālikī, *Sharḥ Hudūd Ibn 'Arafah*, vol. 1, p. 226; Abū al-Ḥasan 'Alī bin Sulaymān al-Mardāwī, *Al-Inṣāf fī Ma'rifaṭ al-Rājiḥ min al-Khilāf*, ed. Muḥammad Ḥamīd al-Fiḳī (Beirut: Dār Iḥyā' al-Turāth al-Islāmī, 1980), vol. 4, p. 211; Maṣṣūr bin Yūnus bin Idrīs al-Bahūfī (d. 1051AH/1641-2 AD), *Kashshāf al-Qinā' 'ala' Matn al-Iqnā'* (Makkah: Maṭba'at al-Ḥukūmiyyah, 1394/1974), vol. 3, p. 103.

present, the parties involved (in particular *ahl al-ḥarb*) are bestowed with the attribute of *musta'min* by virtue of being granted the *amān*. That is why some Ḥanafī jurists describe it as the “appeal for *amān* and abstention from fighting.”¹⁵

The majority of jurists define *mu'āhadah* as a *muhādanah* (conclusion of a truce). If a peaceful state is reached between the two parties engaged in a battle or dispute under the condition of reconciliation for a period of time to reduce tension and aggression, it is called a *muhādanah*.¹⁶ Mālikī jurists define *mu'āhadah* as a truce between Muslims and *ḥarbīs* concluded to end physical conflict for a fixed period of time under Islamic law,¹⁷ while Shāfi'ī jurists define it as a contract concluded for the sake of ending fighting for a fixed time period with or without compensation.¹⁸ Ḥanbalī jurists define it as an abstention from fighting for a fixed time period with or without compensation.¹⁹ *Muṣālahah* (the making of peace), refers to the initiative taken by two

¹⁵See Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol. 9, p. 4324; Al-Muṭarrizī, *al-Mughrib*, vol. 2, p. 346; Muḥamad bin Aḥmad al-Rakbī, *al-Nuẓum al-Musta'dhab*, vol. 2, p. 8; Al-Fayūmī, *Al-Miṣbāḥ al-Munīr*, vol. 2, p. 653; 'Abd Allāh bin Ḥijāzī al-Sharqāwī, *Hāshiyat al-Sharqāwī 'ala' al-Taḥrīr*, vol. 2, p. 466; Aḥmad bin Muḥammad bin Shalabī, *Hāshiyat al-Shalabī 'ala' Tabyīn al-Ḥaqā'iq* (Beirut: Dār al-Ma'rifah, 1990), vol. 3, p. 245.

¹⁶Maṣṣūr bin Yūnis bin Idrīs al-Bahūtī, *Kashshāf al-Qinā'* (Beirut: Dār al-Fikr, 1982), vol. 3, p. 103; Muṭarrizī, *al-Mughrib*, vol. 2, p. 381; Al-Rakbī, *al-Nuẓum al-Musta'dhab*, vol. 2, p. 381; *Al-Zāhir*, 397-398; Al-Fayūmī, *Al-Miṣbāḥ al-Munīr*, 2, p. 636.

¹⁷Muḥammad bin 'Arafah, *Ḥudūd Ibn 'Arafah* (Beirut: Dār al-Jīl, 1991), vol. 1, p. 226; Abū Barakāy Aḥmad bin Muḥammad al-Dardīr, *Al-Sharḥ al-Kabīr*, (Cairo: Maṭba'at 'Isā al-Ḥalībī, (Cairo: Dār al-Ma'arif, 1972-1974), vol. 2, p. 206; Abū al-'Abbās Aḥmad bin Yahyā' Wansharīsī, *Al-Mi'yār al-Mu'arib* (Beirut: Dār al-Gharb, nd.), vol. 2, p. 209.

¹⁸See Zakariyyā al-Anṣārī bin Muḥammad, *Sharḥ al-Taḥrīr* (Beirut: Dār al-Fikr al-Mu'āsir, 2001), 2, p. 465-466; Sulaymān bin Muḥammad al-Bujayrimī, *Fatḥ al-Wahhāb and Hāshiyat al-Bujayrimī* (Beirut: Dār al-Ma'rifah, 1978), vol. 4, p. 285; Ramlī, *Nihāyat al-Muḥtāj*, 8, p. 106; Muḥammad bin Aḥmad al-Shirbīnī, *Mughnī al-Muḥtāj* (Cairo: Maṭba'at Muṣṭafā al-Bābī al-Ḥalabī, 1958), 4, p. 260; Ibn Ḥajar, *Fatḥ al-Bārī* (Cairo: Maṭba'at Muṣṭafā al-Bābī al-Ḥalabī, 1959), vol. 6, p. 259.

¹⁹Abū Ishāq Burhān al-Dīn Ibrāhīm bin Muḥammad bin 'Abd Allāh bin Muflīḥ, *Al-Mubdī'* (Dimashq: al-Maktab al-Islāmī, 1974-1979), vol. 3, p. 398; Muwaffaq al-Dīn 'Abd Allāh bin Aḥmad bin Qudāmah, *al-Mughnī* (Cairo: Maktabat Ibn Taymiyyah, 1965), vol. 9, p. 509; Muṣṭafā bin Sa'ad Suyūfī, *Ghāyat al-Muntahā* with *Maṭālib Uḥ al-Nuḥā'*, (Dimashq: al-Maktab al-Islāmī, 1961), vol. 2, p. 585-586.

parties involved in a dispute to reach a peaceful agreement.²⁰ *Muqāḍāt*, or taking legal action, is the recourse by which parties seek a *ḥukm* (verdict) in a disputed case.²¹ *Mutārahah*, or the suspension of hostilities, is similar in concept to *muṣālahah* (to make peace) or *musālamah* (to demand a peaceful agreement).²²

Some scholars try to define further the distinctions between these terms. For example, Abū Hilāl al-‘Askarī indicates that there is a difference between *‘aqd* and *‘ahd*. According to al-‘Askari, an *‘aqd* is more elastic than an *‘ahd*, for when a person or a party reaches an *‘ahd* with another person or party, it means that each is bound to that particular agreement with the other, while in the case of an *‘aqd*, the person or party is bound by conditions that can be waived under certain circumstances. The difference between an *‘ahd* and a *mīthāq* “covenant” is that a *mīthāq* is only a confirmation of an *‘ahd*.²³

In modern international law, the *mu‘āhadah* (treaty or international treaty) is restricted to significant political agreements, such as peace treaties or affiliations or alliances between nations or supranational agencies. In the case of economic international treaties, the term *‘ahd* or *mīthāq* is normally used in the case of agreements with world organizations, such as the International Monetary Fund, the World Bank, the Asian Development Bank, etc.²⁴

B. The Basis of Mu‘āhadāt

According to Shaybānī, there are two sets of circumstances in which Muslims might conclude *mu‘āhadāt* with non-Muslims, both of which must consider the best interests of Muslims and maintain their honor, prestige and dignity.

²⁰Muṭarrizī, *al-Mughrab*, vol. 1, p. 479.

²¹Abū al-Faḍl Jamāl al-Dīn Muḥammad bin Mukarram al-Anṣārī bin Manẓūr (d. 711AH/1311AD), *Lisān al-‘Arab* (Beirut: Dār Ṣādir, 1992), vol. 15, p. 186.

²²Muṭarrizī, *al-Mughrab*, vol. 1, p. 104; Fayūmī, *Miṣbāḥ al-Munīr*, vol. 1, p. 287.

²³Abū Hilāl al-‘Askarī, *al-Furūq al-Lughawīyyah*, 42-43; Abū Bakr Muḥammad bin ‘Abd Allāh bin ‘Arabī al-Ishbīlī (d. 543AH/1148 AD), *Aḥkām al-Qur’ān* (Ed.) ‘Alī Muḥammad al-Bajāwī (Cairo: Maṭba‘at ‘Isā al-Ḥalabī, 1394/1974), vol. 2 525; Nāsir Sulaymān al-‘Umar, *Al-‘Ahd wa al-Mīthāq fī al-Qur’ān al-Karīm* (Riyāḍ: Dār al-‘Āshimā, 1992), pp. 44-47; Muḥammad Ṭal‘at al-Ghunaymī, *Aḥkām al-Mu‘āhadāt fī al-Sharī‘ah al-Islāmīyyah* (Alexandria: Munshā‘at al-Ma‘ārif, 1977), 49-50.

²⁴A. Le Roy Bennett and James Oliver, *International Organizations, Principles and Issues* (New Jersey: Streen, Geoffrey 2002); *The Structure of International Society* (London and Washington: Pinter, 1995), 66-67.

The first situation arises where the Muslims are in a position of power; in such an instance they should not seek a *muwāda‘ah* with non-Muslims, especially if it is not in the best interests of the greater Muslim community. This condition is made explicitly in the following Qur’ānic verses:

So do not become weak (against your enemy), nor sad, and you will be superior (in victory) if you are indeed (true) believers (Q.3:139).

Then “So be not weak and ask not for peace (from the enemy of Islam), while you are having the upper hand. Allah is with you, and will never decrease the reward of your good deeds (Q.47:35).

The second situation arises when Muslims are not in a position of advantage over non-Muslims, at which time it is permissible to seek a *muwāda‘ah*, since in these circumstances it may serve the interests of Muslims to do so.²⁵ Further justification of *muwāda‘ah* is found in the Qur’ān:

But if they incline to peace, you also incline to it, and (put your) trust in Allah. Verily, He is the All-Hearer, the All-Knower (Q. 8: 61).

This verse validates *muwāda‘ah* in circumstances where non-Muslims are inclined to propose peace. However, jurists argue that if a *muwāda‘ah* serves the interests of Muslims, it is permissible for them to take the initiative in cases where it is required or advantageous.²⁶ The other Qur’ānic verse that pertains to this situation is the following:

If he belonged to a people with whom you have a treaty of mutual alliance, compensation must be paid to his family (Q. 4: 92).

This verse addresses cases in which a Muslim has killed a person with whom a pre-existing treaty or alliance had been established. It

²⁵Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, (ed.) Muṣṭafā Zayd with the commentary of Muḥammad Abū Zahrah (Cairo: Maṭba‘at Jāmi‘at al-Qāhira, 1958), vol. 5, p.1689; and idem, *Al-Mabsūṭ* (Beirut: Dār al-Ma‘rifah, 1324/1906)10, p. 86; Fakhr al-Dīn ‘Uthmān ibn ‘Alī Zayla‘ī, (d. 743/1340-1), *Tabyīn al-Ḥaqā‘iq Sharḥ Kanz al-Daqā‘iq* with the margin of *Ḥāshiyat al-Shalābī* (Cairo: n. p., 1313/1895), vol. 3, pp. 245-246; Abū Bakr Aḥmad bin ‘Alī al-Rāzi al-Jaṣṣāṣ (d. 370/980), *Aḥkām al-Qur’ān* (Cairo: Dār al-Fikr, 1980), vol. 3, pp. 69-70 and 428-429.

²⁶Abū Ja‘far Muḥammad bin Jarīr al-Ṭabarī, *Tafsīr al-Ṭabarī* (Beirut: Dār al-Fikr, 1995),14, p. 40; Muḥyī al-Sunnah Abū Muḥammad al-Ḥusayn bin Mas‘ūd al-Farrā’ al-Baghawī, *Ma‘ālim al-Tanzīl* (Riyāḍ: Dār al-Ṭaybah, 1993), vol. 3, p. 373; Al-Jaṣṣāṣ, *Aḥkām al-Qur’ān*, vol. 3, p. 69-70; Ibn Ḥajar al-‘Asqalānī, *Fath al-Barī* (Beirut: Dār al-Fikr, 1996),vol. 6, p. 275.

encourages the parties to seek redress within the confines of that particular treaty or understanding. The verse also indicates and encourages the concept of *muwāda‘ah* or *mu‘āhadah*, referring to it as a *mīthāq* (covenant), i.e., a confirmed contract.²⁷ When the Qur‘ān exhorts Muslims to fight, it also stipulates that Muslims should not take up arms against those who have established a treaty with them:

Except those who join a group, between you and whom there is a treaty (of peace), or those who approach you with their hearts restraining from fighting you as well as fighting their own people (Q. 4: 90).

It is clear from this verse that the Qur‘ān places a restriction upon fighting those with whom a *muwāda‘ah* has been concluded or with their affiliated parties. This also validates and legitimizes the standing of affiliated parties to the *muwāda‘ah* as members covered by the agreement.²⁸

Another source for the institution of *mu‘āhadah* with non-Muslims arises from the conduct of the Prophet (ﷺ) as spelled out in the traditions. When the Prophet Muhammad (ﷺ) entered Madīnah, for instance, he concluded a treaty (strictly speaking, a *muwāda‘ah*) with the various Jewish tribes living there.²⁹ This agreement drawn up by the Prophet (ﷺ) illustrates the validity of *mu‘āhadah* with non-Muslims at a time of weakness on the part of Muslims.³⁰ The conduct of the Prophet (ﷺ) in this instance became a source for validating a *muwāda‘ah* under special circumstances.

²⁷Baghawī, *Ma‘ālim al-Tanzīl* (Riyād: Dār al-Ṭaybah, 1993), vol. 5, p. 263; Muḥammad bin Aḥmad al-Qurṭubī, *al-Jāmi‘ li-Aḥkām al-Qur‘ān: Tafsīr al-Qurṭubī*, (Cairo: Dār al-Kutub al-Miṣriyyah, 1950), vol. 5, p. 325; Al-Jaṣṣāṣ, *Aḥkām al-Qur‘ān* (Cairo: Dār al-Fikr, 1990), vol. 2, p. 239; Ibn al-‘Arabī, *Aḥkām al-Qur‘ān* (Cairo: Maṭba‘at ‘Isā al-Ḥalabī, 1974), vol. 1, p. 477.

²⁸Ṭabarī, *Tafsīr al-Ṭabarī*, 9, p. 24-25; Baghawī, *Ma‘ālim al-Tanzīl*, 2, p. 260.

²⁹Aḥmad bin Yahyā al-Balādurī, *Ansāb al-Ashraf*, (ed.) Iḥsan Ṣidqī al-‘Amad (Riyād: Dār al-Mu‘tamin, 1974), 1, p. 286; Al-Shāfi‘ī, *Al-Umm*, with *Mukhtaṣar al-Muznī* (d. 264 H.) (Cairo: Maṭba‘at al-Sha‘b, 1321/1903), vol. 4, p. 124; Abū ‘Ubayd al-Qāsim bin Sallām (d. 224AH/837 AD), *Al-Amwāl*, (ed.) Muḥammad Khalīl Harrās (Doḥa: al-Shaykh ‘Abd Allāh al-Anṣārī, 1987), 232; Ṭabarī, *Tārīkh al-Rum wa al-Mulūk*, (ed.) Muḥammad Abū al-Faḍl (Beirut: Dār al-Ma‘ārif, 1979), vol. 2, p. 479; For the text of the treaty in detail see, Muḥammad Ḥamid Allāh, *Majmū‘at al-Wathā‘iq al-Siyāsiyyah lil-‘Ahd al-Nabawī wa al-Khilāfa al-Rāshidah* (Beirut: Dār al-Irshād, 1969), 57-59.

³⁰Sarakhṣī, *Sharḥ al-Siyar al-Kabīr*, vol. 5, p. 1690.

The Battle of the Trench (5AH/627AD) marked another aspect of *muwāda‘ah*, on that occasion the Prophet (ﷺ) received an envoy from the non-Muslims, ‘Uyayna b. Ḥiṣn, who requested that the Prophet (ﷺ) hand over all of the produce of Madīnah for one year in return for the Makkans’ renouncing hostilities. The Prophet (ﷺ) consulted two community leaders from the Aws and Khazraj, Sa’d b. Mu‘ādh and Sa’d b. ‘Ubāda, regarding the offer. The Prophet (ﷺ) and his two consultants agreed to give half of the produce, and a *ṣulḥ* was concluded.³¹ However, a *muwāda‘ah* was not established in this circumstance; rather, only a *murāwaḍah* (to restore relations between parties to a normal condition) was agreed to, since Sa’d ibn Mu‘ādh and Sa’d b. ‘Ubāda asked the Prophet (ﷺ) whether his action had been revealed to him and he replied no. They questioned the grounds of the agreement to hand over half of the produce of Madīnah, since their opponents had never demanded this from them before, but had always purchased the produce. At their urging, the Prophet (ﷺ) realized the possible effect of the treaty and decided not to change the norms or deny the will of the inhabitants of Madīnah.³²

Another event that provided a precedent for future *muwāda‘ah* was the *ṣulḥ* of al-Ḥudaybiyyah concluded between the Prophet (ﷺ) and the Makkan chiefs. The *ṣulḥ* came with conditions stipulating a fixed duration of ten years, and imposed a further condition in proscribing theft or betrayal by either party. Whoever left for or escaped to Madīnah from

³¹ Muḥammad bin Sa’d (d. 230AH/844-5AD), *Al-Ṭabaqāt al-Kubrā* (Beirut: Dār Ṣādir, 1377/1958), vol. 2, p. 73; Muḥammad bin Ishāq bin Yasār al-Muṭṭalibī (d. 151AH/786 AD), *Sīrat Ibn Ishāq al-Mubtada’ wa al-Mab‘ath wa al-Maghāzī*, (ed.) Muḥammad Hamid Allāh (Ribāt, Morocco: Ma’had al-Dirasāt wa al-Abḥāth lil-Ta’rīb, 1976), vol. 2, p. 232; Abū Yūsuf, *Al-Kharāj* (Al-Madīnah: Al-Maṭba‘ah al-Salafiyyah, 1392/1972), 225; Abū ‘Ubayd al-Qāsīm bin Sallām (d. 224AH/837AD), *Al-Amwāl*, 189-190; Ḥamīd bin Zanjawayh al-Ārtdhī al-Nisā’ī (d. 251AH/866AD), *Al-Amwāl*, (ed.) Shākīr Dhīb Fayyād (Riyād: Markaz al-Malik Fayṣal li al-Buḥūth wa al-Dirāsāt al-Islāmiyyah, 1406/1985), 1, p. 399; Abū ‘Abd Allāh Muḥammad bin Wāqid al-Islāmī al-Madanī al-Wāqidī (d. 207 AH/822AD), *Kitāb al-Maghāzī*, (ed.) Marsden Jones (London: Oxford University Press, 1966), vol. 2, p. 477-479.

³² ‘Abd Allāh bin Muḥammad bin Abī Shaybah (d. 235AH/848AD), *Al-Muṣannaf fī al-Aḥādīth wa al-Āthār*, (ed.) Muḥammad ‘Abd al-Sallām Shāhīn (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1995), vol. 14, p. 420; Nūr al-Dīn ‘Alī bin Abī Bakr al-Haythamī (d. 807AH/1405AD), *Mawārid al-Zamān ‘ala’ Mawārid Sawā’id Ibn Ḥibbān* (d. 965), (ed.) Shu‘ayb al-Arnawūṭ, Muḥammad Riḍwān ‘Irqūsī (Beirut: Mu’assasat al-Risālah, 1993), 6, p.132; Wāqidī, *Kitāb al-Maghāzī*, vol. 2, p.477-479; Taqī al-Dīn Aḥmad bin ‘Alī al-Maqrīzī (d. 845 AH/1441-2AD), *Imtā‘ al-Asmā’*, (ed.) Maḥmūd Muḥammad Shākīr (Doha: al-Shu‘ūn al-Dīniyyah, 1401/1981), vol. 1, p. 235.

Makkah after the *ṣulḥ* was concluded would be handed back, even if he or she were a Muslim, whereas whoever left Madīnah for Makkah would not be returned to the Prophet. The Prophet and the Meccan representatives agreed upon these conditions.³³

Al-Jaṣṣāṣ summarizes the opinions of Ḥanafī jurists with regard to the validity of a *mu'āhadah* being concluded under such circumstances. The jurists point out that the Prophet (ﷺ) concluded several *ṣulḥ* contracts with non-Muslim tribes, such as the Naḍīr, Qaynuqā', and Qurayzah, as well as the *ṣulḥ* of Ḥudaybiyyah, upon his arrival in Madīnah. All of these *ṣulḥs* were concluded at a time when the Muslims were weak and reduced in number, a fact mentioned also in treatises on *maghāzī* and *siyar*. When the Muslims became stronger and Islam and the Prophet's authority in Madīnah were recognized, however, agreements with Ahl al-Kitāb were more likely to include a demand for *jizyah*. The revelation of two *sūras* (chapters) -the eighth and ninth- dealing with fighting and concluding *mu'āhadāt* with non-Muslims is an evidence of encouragements to conclude agreement in order to eliminate and avoid further fighting. However, the apparent difference in the legal effect in these chapters depends on the political status of Muslims. In *Sūrat al-Anfāl*, we see encouragement to conclude a *musālamah* or *muhādanah* with the non-Muslims at a time of disadvantages for Muslims. In *Sūrat al-*

³³Ibn Ishāq, *Sīrah*, 2, p. 316-317; Ibn Sa'd, *Al-Ṭabaqāt al-Kubrā*, 2, p. 97; Ibn Ḥajar, Aḥmad ibn 'Alī ibn Muḥammad al-'Asqalānī (d. 852AH/1449AD), *Fath al-Bārī fī Ṣaḥīḥ al-Bukhārī*, (eds.) 'Abd al-'Azīz bin Bāz and Muḥammad Fu'ād 'Abd al-Bāqī (Beirut: al-Maṭba'ah al-Salāfiyyah, n. d.), vol. 5, p. 343; Ibn Qayyim al-Jawziyyah, Aḥmad bin 'Alī bin Muḥammad al-'Asqalānī (d. 852AH/1449AD), *Zād al-Ma'ād fī Hudā Khayr al-'Ibād*, (eds.) Shu'ayb and 'Abd al-Qādir al-Arnāwūṭ (Beirut: Mu'assasat al-Risāl and Dār al-Fikr, 1392/1972), vol.3, p. 140; Kamāl al-Dīn Muḥammad ibn 'Abd al-Wāḥid bin Humam al-Sīwāsī (d. 861AH/1456-7AH), *Fath al-Qadīr 'ala' al-Hidāyah*, with the margin of *Hāshiyat Qāḍī Zādah* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1986), vol. 4, p. 293; Muḥammad ibn 'Alī b. Muḥammad al-Shawkānī (d. 1250/1834), *Nayl al-Awṭār Sharḥ Muntaqā al-Abḥār* (Cairo: Maṭba'at Muṣṭafā al-Ḥalabī, 1391/1971), 8, p.56. Disagreement evolved among the scholars about the period of effectiveness of the treaty of Ḥudaybiyyah. Some of them say that it was for ten years and some others say that it was for four years. Ibn 'Adī, in his *al-Kāmil*, Ibn al-Ḥākim in his *Mustadrak*, Ṭabarānī in his *al-Awsaṭ* and Abū 'Ubayd in his *Amwāl* indicate that the period of the *ṣulḥ* concluded between the Prophet (ﷺ) and the Makkans was four years. However, according to the majority of classical sources, the Ḥudaybiyyah *ṣulḥ* was for ten years, as indicated in Ibn Ishāq, *Sīrah*, vol. 2, p. 316-317 and Ibn Sa'd, *Ṭabaqāt*, vol. 2, p. 92.

Tawbah, there is an assumption that fighting should resume whenever the Muslims are in a position of power.³⁴

The opinions of Ḥanafī jurists are largely mirrored in consensus among the Mālikī, Shāfi‘ī and Ḥanbalī jurists. For example, Mālikī jurists hold that, if *jihād* is obligatory upon all, then the *muwāda‘ah* is not permissible, in case the *jihād* is a collective duty with an intention to conclude truce/*sulḥ* and the Imam considers it to be in the public interest of Muslims. Shāfi‘ī jurists give their opinion that if the Imam is in a position of strength and the outcome of the truce/*sulḥ* does not serve the interests of the Muslims, then it is not permissible to conclude it. Similarly, Ḥanbalī jurists believe that as long as the truce/*sulḥ* favors the interests of the Muslims, it can be of use in cases where the Muslims are weak or there is some other necessity; otherwise, it is not permissible.³⁵

Thus, treaties vary according to their status, requirements and conditions. They can be permanent as in the case of an *‘aqd al-dhimmah*; or temporary, as in the case of *amān*, *hudnah* or *muwāda‘ah*, and they can contain a condition limiting their duration to a fixed period of time. Moreover, in the eyes of Muslim scholars, the *mu‘āhadah* can be concluded with all types of people regardless of their faith or nationality; for example, it can be a treaty to end a battle or hostilities (such as the

³⁴ Abū Bakr Aḥmad ibn ‘Alī al-Rāzi al-Jaṣṣāṣ (d. 370AH/980AD), *Aḥkām al-Qur‘ān* (Cairo: Dār al-Fikr, 1980), vol. 3, pp. 69-70.

³⁵ Abū al-Barakāt Aḥmad ibn Muḥammad bin Aḥmad Dardīr al-‘Adawī al-Mālikī (d. 1201/1786-7), *Al-Sharḥ al-Kabīr ‘ala’ Mukhtaṣar Khafīl*, with *Hāshiyat al-Dasūqī*; and *Taqrīrāt al-Shaykh ‘Alīsh* (Cairo: Maṭba‘at ‘Isā al-Ḥalabī, n.d.), vol. 2, p. 205-206; Abū al-‘Abbās Aḥmad bin Yaḥya’ Wansharīshī (d. 914/1508), *Al-Mi‘yār al-Mu‘rib ‘an Fatawī Ulama’ Ifrīqiya wa al-Maghrib*, (ed.) Muḥammad Ḥajjī (Beirut: Dār al-Gharb al-Islāmī., n.d.), vol. 2, p. 207-208; Al-Shāfi‘ī, *Umm*, vol. 4, p. 108; Abū Zakariyyā Muḥyī al-Dīn Yaḥya’ bin Sharaf al-Nawawī (d. 676/1277-8), *Al-Majmū‘ Sharḥ al-Muḥadhdhab* (Beirut: Dār al-Fikr, 1405/1975), vol. 18, pp. 221-222; *Al-‘Azīz Sharḥ al-Wajīz*, 13, p. 553; Abū Muḥammad Muwaffaq al-Dīn ‘Abd Allāh bin Aḥmad bin Qudāmah (d. 630/1233-4), *Al-Mughnī Sharḥ Mukhtaṣar al-Kharqī*, with *Sharḥ al-Kabīr* (Beirut: Dār al-Fikr, 1404/1983), 10, pp. 509-510; Abū Ya‘lā Muḥammad bin al-Ḥusayn bin Muḥammad al-Farrā’ al-Baghdādī (d. 458AH/1066AD), *Al-Aḥkām al-Sultāniyyah*, (ed.) Muḥammad Ḥāmid al-Fiḳī (Cairo: Maṭba‘at Muṣṭafā al-Bābī al-Ḥalabī, 1356/1937), 49; *Al-Baḥr al-Zashkhār*, vol. 6, p. 446; Muḥammad bin ‘Alī bin Muḥammad al-Shawkānī (d. 1250/1834), *Al-Sayl al-Jarrār al-Mutadaffiq ‘ala’ Ḥadā’iq al-Azhār*, (ed.) Maḥmūd Ibrāhīm Zayid (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1405/1984), 4, p.565; Abū Muḥammad ‘Abd Allāh bin al-Azraq al-Andalusī (d. 896/1492), *Badā’i’ al-Silk fī Ṭabā’i’ al-Mulk*, (ed.) Muḥammad ‘Abd al-Karīm (Tunisia: al-Dār al-‘Arabiyyah lil-Kitāb, 1400/1979), vol. 2, pp. 576-577.

hudnah) or it can relate to matters of trade. It can be a simple bilateral treaty, or a multilateral one with several different signatories affiliated with either of the two main contracting parties, as occurred in the case of the *ṣulḥ* of al-Ḥudaybiyyah.³⁶ As far as these *mu‘āhadāt* are concerned, each one has its own rules (*aḥkām*) that depend upon the circumstances of Muslims stipulated in the document itself, as we shall see when dealing with selected treaties concluded between Muslims and non-Muslims in the final chapter, below.

However, the validity of such treaties depends to a large measure on how they are concluded. A valid treaty should fulfill basic elements and conditions that take place in the process leading up to it. Each party might impose conditions that conform to its interests and that would have to be agreed upon by both parties involved in order for the treaty to be ratified. These elements and conditions fall into four main categories: basic elements, conditions, the process of its establishment and reservations.

C. Basic Elements of The Treaty/Mu‘āhadah

The first necessary element of the treaty is the *ṣīghah* (form), which reflects the acceptance and consent of both parties involved as in any other legal contracts in Islamic law. The *ṣīghah* can be made known either by expression or by indication, and expression can be either explicit or implicit. Explicit expression, for example, includes use of the terms *muwāda‘ah*, *mu‘āhadah*, *musālamah* or *muṣālaḥah*.³⁷ Shaybānī gives an example of an explicit expression: a hypothetical case where a non-Muslim army lays siege to Muslim territory. If the Muslims fear that the siege could lead to the loss of their lives and families, then they can offer the enemy a tribute of ten thousand *dinars* in return for withdrawing from their territory. If the enemy accepts, this agreement is an explicit expression of truce/*ṣulḥ*. Another example that he offers is where non-Muslims theoretically impose a condition for their withdrawal from Islamic territory, such as the payment of a tribute of ten thousand dinars, and the Muslims accept this. If the Muslims realize that the non-Muslims have broken the treaty prior to their withdrawal, they cannot retaliate until the non-Muslims reach their own territory, for the Muslims’

³⁶Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, vol. 5, pp. 1689, 1706-1707, 2016-2017; Abū al-Faḍl ‘Abd Allāh bin Maḥmūd bin Wadūd al-Mawṣifī (d. 683AH/1286AD), *Al-Ikhtiyār li-Ta‘fīl al-Mukhtār* (Cairo: Maṭba‘at Muṣṭafa al-Ḥalabī, 1371/1951), vol. 4, p. 191.

³⁷Al-Kāsānī, *Badā‘i‘ al-Ṣanā‘i‘*, vol. 9, p. 4324.

acceptance of paying tribute to the non-Muslims is based on a truce containing an explicit expression. Should a Muslim retaliate while the truce is in effect, it would be considered as perfidy, an act forbidden in Islam.³⁸

On the other hand, an implicit expression is reflected in the case where Muslims do not specify the amount or type of tribute offered to non-Muslims in exchange for their withdrawal from Muslim territory. This is an indication of *muṣālahah* (conciliation, settlement or peace) and *muwāda'ah* (truce) alike, since the impetus to fight may stem from both sides. The implicit expression of truce/*ṣulḥ* has, as one of its conditions, the termination of fighting on the part of both sides. This imposes an obligation for a *muwāda'ah* to be established, binding on both parties.³⁹ However, where the expression does not indicate any explicit form of safe conduct, the contract of truce is not accomplished and neither party is obligated to terminate the fighting, since non-explicit expression does not impose any type of explicit safe conduct.⁴⁰

If any Muslim should give any sign or gesture that might be taken as a sign of *amān* by non-Muslims, then it is a valid *amān* and restricts any Muslim from committing any kind of attack upon them. According to Ḥanafī jurists, even on the battlefield, if any Muslim makes any sign to non-Muslims that they understand as an indication of *amān*, whether the intention was known or unknown to them, it is still considered a valid safe conduct (*amān*).⁴¹

Ibn Taymiyya summarizes the opinions of scholars on the validity of three general modes of concluding contracts. First, the contract cannot be valid unless the condition of the consent of both parties is met, and this

³⁸ Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, vol. 5, pp. 1711-1712; vol. 2, pp. 418-419.

³⁹ Al-Shaybānī, *al-Siyar al-Kabīr*, vol. 5, p. 1713.

⁴⁰ *Ibid.*

⁴¹ Ibn Humām, *Fath al-Qadīr*, 4, p. 302; Abū Yūsuf Ya'qūb bin Ibrāhīm bin Ḥabīb al-Anṣārī, *Kharāj* (Al-Madīnah: al-Maṭba'ah al-Salafiyyah, 1972), 232; Malik bin Anas (d. 179AH/795AD), *Muwatṭa'*, 2, p. 49, and his *Al-Mudawwanah, riwayāt Saḥnūn* (Beirut: Dār Ṣādir, reprint of Maṭba'at al-Sa'ādah, 1323/1905), vol. 2, p. 42. In reference to the conduct of 'Umar bin al-Khaṭṭāb, and whether it validates the *amān* or not, see also Abū 'Ubayd, *Amwāl*, pp.133-134; Aḥmad bin Yaḥya' bin Jābir al-Balādhurī (d. 279AH/892-3AD), *Futūḥ al-Buldān*, (ed.) Ṣalāḥ al-Dīn Munajjid (Beirut: Dār al-Kutub al-'Ilmiyyah, 1398/1977), vol. 2, p. 469; Abū Ja'far Muḥammad bin Jarīr al-Ṭabarī (d. 310AH/923AD), *Ikhtilāf al-Fuqahā'*, "Kitāb al-Buyū'", (ed.) Fredrick Kern (Beirut: Dār al-Kutub al-'Ilmiyyah, n. d.), 25; Al-Nawawī, *Rawḍat al-Ṭālibīn* (Damascus: Al-Maktab al-Islāmī, 1405/1984), vol. 10, pp. 279-280.

must be made known as an explicit expression. The second is that the contract is made valid by actions taken by both parties according to the interpretations and details of both parties involved in concluding the contract. And third, the contract is concluded in all of its indications by expression or action that is known to the people or customary practice among the people. The third mode is not limited by language or code of law, but varies according to the people involved and their customary practices.⁴²

D. The Conditions of Treaty/Mu'ahadah

In order for the treaty to be genuine and sound, it should impose effective conditions that are incumbent upon the signatories or agreeing parties. If any one of the conditions is violated, omitted or disputed by any party, it will terminate the treaty.⁴³ The conditions may be related to the parties, or to the treaty itself and the motives that lead to its

⁴²Abd al-Salām bin ‘Abd Allāh bin Khidīr bin Muḥammad bin Taymiyyah, *Al-Qawā'id al-Nūrāniyyah al-Fiqhiyyah*, (ed.) Muḥammad Ḥāmid al-Fiḳī (Beirut: Dār al-Ma'rifah, 1979), pp. 104-114; Malik, *Mudawwanah*, vol. 2, p. 42; Dardīr, *Al-Sharḥ al-Ṣaghīr*, vol. 3, p. 28; Ibn Juzayy, *al-Qawānīn al-Fiqhiyyah* (Cairo: 'Ālam al-Fikr, 1975), p. 161; Al-Nawawī, *Rawḍat al-Ṭālibīn*, 10, pp. 279-280; Sharbinī, *Mughnī al-Muḥtāj*, 4, p. 237; Ramlī, *Nihāyat al-Muḥtāj*, vol. 8, pp. 80-81; Ibn Qudāmah, *Mughnī*, vol. 10, pp. 548-550; Maṣṣūr ibn Yūnus ibn Idrīs al-Bahūfī (d. 1051/1641-2), *Kashshāf al-Qinā' 'alā Matn al-Iqnā'* (Makkah: Maṭba'at al-Ḥukūmiyyah, 1394/1974), vol. 3, p. 93; ‘Abd al-Salām bin ‘Abd Allāh bin Khidīr bin Muḥammad bin Taymiyyah, *Al-Muḥarrar fī al-Fiqh* (Riyadh: Dār al-Ma'rif, 1984), vol. 2, p. 180; Ibn Mufliḥ, *Al-Mubdī' Sharḥ al-Muḥtāj*, 3, pp. 390-391.

⁴³The genuine ‘*aqd*, according to the jurists, is that binds its signatories to all of the conditions agreed upon. See for example, Al-Sayyid ‘Alī bin Muḥammad bin ‘Alī al-Sharīf al-Jurjānī (d. 816/1416), *Al-Ta'rīfāt*, (ed.) Ibrāhīm al-Ibyārī (Beirut: Dār al-Kitāb al-'Arabī, 1405/1984), p.173; Abū al-Baqā' Ayyūb ibn Mūsā al-Ḥusaynī al-Kaffawī (d. 1094/1675), *Al-Kulliyāt*, (ed.) ‘Adnān Darwīsh, Muḥammad al-Miṣrī (Damascus: n. p, 1982), vol. 3, p.113; Abū al-'Abbās Aḥmad bin Muḥammad al-Muqrī al-Fayyūmī (d. 770/1368), *Al-Miṣbāḥ al-Munīr fī Ghārīb Sharḥ al-Kabīr li al-Ramlī*, (ed.) ‘Abd al-'Azīm al-Shinnāwī (Beirut: Dār al-Kutub al-'Ilmiyyah, 1978), vol.1, p. 333; Manāwī, *Al-Tawqīf 'alā' Muḥimmāt al-Ta'arīf*, p. 448; Muḥammad bin Aḥmad bin ‘Abd al-'Azīz bin Najjār al-Fatūhī (d. 972/1536-7), *Sharḥ al-Kawkab al-Munīr*, (eds.) Muḥammad al-Zuḥaylī, Nazīh Ḥammād (Makkah: Markaz al-Baḥth al-'Ilmī, 1408/1987), vol. 1, p. 467; Amīrbādshāh, *Taysīr al-Tahrīr*, vol. 2, pp. 234-235; Al-Ghazālī, *Al-Mustaṣfā'* (Cairo: Maktabat al-Jundī, 1971), vol. 1, p. 94; Nazīh Ḥammād, *Mu'jam al-Muṣṭalahāt al-Iqtisādiyyah fī Lughat al-Fuqahā'* (Virginia: Al-Ma'had al-'Ālamī lil-Fikr al-Islāmi, 1414/1993), 172.

conclusion. In the following pages, we examine the conditions of a genuine and sound treaty.

a. Signatories of The Treaty/Mu‘ahadah

The Imam (Muslim ruler or Caliph) or his deputy must conclude the *mu‘ahadah* on behalf of the Muslim community, on the condition that the *mu‘ahadah* is in the interest of Muslims, for only then it is permissible to pursue it.⁴⁴ According to Shaybānī, if the caliph appoints a deputy, such as the chief of the army, he may invite a group of non-Muslims to Islam. If they accept it, then they are free as Muslims and the obligation to pay *jizyah* will be dropped. If they reject this offer, the deputy can propose that they become *dhimmi*, and then they will be treated according to the rules regulating *ahl al-dhimmah*. The actions of the chief of the army or deputy here represent the caliph’s or the Imam’s wishes.⁴⁵ Anyone else from the Muslim community who wishes to offer *amān* to non-Muslims must consult the Imām first, since it is obligatory for all Muslims to obey him.⁴⁶ However, there are exceptions to limit the right to conclude a treaty to the Imam and his deputy. In some circumstances, according to Shaybānī, it is permissible for an ordinary Muslim to conclude *muwāda‘ah* without the permission of the Imam, since no Muslim would conclude any *muwāda‘ah* without first considering the interests of Muslims. As long as the treaty favors the Muslims at large, it is permissible to conclude it.⁴⁷

The opinion of the majority of jurists is at variance with the opinions of Ḥanafī jurists on the question of who is entitled to conclude a *mu‘ahadah* with non-Muslims. The jurists agree that the only individual

⁴⁴ ‘Alā’ al-Dīn Abū Bakr Muḥammad bin Aḥmad al-Samarqandī (d. 539AH/1143AD), *Tuḥfat al-Fuqahā’*, (ed.) Muḥammad Zakī ‘Abd al-Birr (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1405/1984), vol. 3, p. 507; Ibn Humām, *Al-Hidāyah*, with *Fath al-Qadīr*, 4, p. 293; Abū al-‘Abbās Aḥmad bin Idrīs al-Qarāfī (d. 684/1285-6), *Al-Aḥkām fī Tamyīz al-Fatāwā’ ‘an al-Aḥkām wa-Taṣarrufāt al-Qāḍī wa al-Imām*, (ed.) Maḥmūd ‘Arnūs (Rabāṭ: Wizarat al-Awqāf li al-Shu’ūn al-Dīniyyah, 1974), vol. 1, pp.106-107; Qarāfī, *Al-Aḥkām fī Tamyīz al-Fatāwā’ ‘an al-Aḥkām wa Taṣarrufāt al-Qāḍī wa al-Imām*, 24-25; Nizām al-Shaykh, *Al-Fatāwā al-Hindiyyah*, (Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, 1980), vol. 2, p. 196.

⁴⁵ Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, vol. 5, p. 2179-2181.

⁴⁶ Al-Shaybānī, *al-Siyar al-Kabīr*, vol. 2, p. 576.

⁴⁷ Al-Kāsānī, *Badā’i’ al-Ṣanā’i’*, vol. 9, pp. 4324-4325; Nizām al-Shaykh, *Al-Fatāwā al-Hindiyyah*, vol. 2, p. 196; this was also the opinion of the Maliki jurist Saḥnūn, as reported by al-Dardīr, *Sharḥ al-Kabīr*, vol.2, pp. 205-206.

who is allowed to negotiate and conclude a *mu'āhadah* with the non-Muslims is the Imam or his deputy. It is unacceptable for anyone besides those vested with authority to conclude a treaty. Hence, in the case where a Muslim has concluded a *hudnah* (truce) with a group of people and subsequently they enter *dār al-Islām* based upon that *hudnah*, it is not acceptable. Therefore, the Muslim's obligation under these circumstances is limited to securing their departure, because they had entered the *dār al-Islām* under the assumption that they enjoyed full protection of safe conduct (*amān*). However, it is permissible for an ordinary individual Muslim to conclude an *'aqd al-amān* (contract of safe conduct) with an individual non-Muslim.⁴⁸

b. Consent

For the *mu'āhadah* to be valid, the consent of the two parties involved must be expressed, as indicated by the Qur'ānic verse which reads: "O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent (Q. 4: 29)."

This verse is the basis for the principle of the mutual consent of both parties. This applies to all contracts or agreements, such as those dealing with trade or reciprocal arrangements.⁴⁹ The Prophet's tradition shows that there is no sale without mutual consent, as illustrated by the following *ḥadīth*, "Transfer of the wealth of the Muslim is not lawful without his consent."⁵⁰ This is extended to include the consent of both

⁴⁸ *Hāshiyat al-Dasūqī 'ala' al-Sharḥ al-Kabīr*, 205-206; Muḥammad bin Aḥmad bin Juzayy al-Gharnāfī (d. 741AH/1342AD), *Al-Qawānīn al-Fiqhiyyah* "Qawānīn al-Aḥkām al-Shar'iyyah," (eds.) Ṭāhā Sa'd and Muṣṭafa al-Ḥamawī (Cairo: 'Ālam al-Fikr, 1395/1975), 163; Ibn Shāsh, *'Iqd al-Jawāhir al-Thamīnah*, 1, p. 496; Shāfi'ī, *Al-Umm*, vol. 4, p. 111; *Al-'Azīz Sharḥ al-Wajīz*, vol. 13, p. 554; Al-Nawawī, *Rawḍat al-Ṭālibīn*, 10, p. 343; and idem, *Al-Muḥadhdhab*, with *Takmilat al-Majmū'*, vol. 18, p. 221; Badr al-Dīn bin Jamā'ah (d. 733/1332-3), *Tahrīr al-Aḥkām fī Tadbīr Ahl al-Islām*, (ed.) Fu'ād 'Abd al-Mun'im (Doha: Maṭbū'āt Ri'āsat al-Maḥākīm al-Shar'iyyah, 1407/1986), p. 231; Shirbīnī, *Mughnī al-Muḥtāj*, vol. 4, p. 260; Abū Ḥāmid al-Ghazālī, *Al-Wajīz* (Beirut: Dār al-Ma'rīfah, 1978), p. 203; Ibn Qudāmah, *Al-Mughnī*, vol. 10, p. 512; Abū Ishāq Burhān al-Dīn Ibrāhīm bin Muḥammad bin Mufliḥ, *Al-Mubdī'* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1997), vol. 3, p. 398; Al-Bahūtī, *Kashshāf al-Qinā'*, vol. 3, p. 103; Al-Shawkānī, *Al-Sayl al-Jarrār* (Cairo: Maṭba'at Muṣṭafa al-Ḥalabī, 1971), vol. 4, p. 564.

⁴⁹ Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, vol. 2, pp. 584-585.

⁵⁰ This *ḥadīth* can be found in the *Sunan* of Ibn Mājah in the trade section under the heading "*Bay' al-Khiyār*," (Beirut: Maṭba'at 'Īs' al-Ḥalabī, 1972), vol. 2, p. 737; Al-Bayhaqī, *Al-Sunan al-Kubra'* (Beirut: Dār al-Ma'rīfah, 1927), vol. 6, p. 17; *Musnad*

parties, translated into action by obligation and acceptance, in the concluding of a *mu'āhadah*.⁵¹

If consent is necessary with reference to trade and other related contracts, then it is *a fortiori* much more necessary in international treaties that are primarily connected with the Islamic state.⁵² Furthermore, if consent is one of the basic conditions of concluding contracts, including treaties, absence of consent because of shortcomings (such as compulsion or blunder) does not preclude the motive to conclude a treaty, but it does have a negative impact upon the contract, or contractual aspect of the treaty. To Ḥanafī jurists, this degrades the contract so that, if the contract is accepted, it will be immediately void in the eyes of the law.⁵³ The consent here is not one of the treaty's optional conditions; rather, it is a condition of its soundness as a whole. The contract that deals with money is a compulsory contract, despite its conclusion; it is degraded since it lacks consent. The condition for soundness of these contracts is consent. If the compulsion is removed and the party that had suffered compulsion turned around and consented, the contract would become sound and genuine.⁵⁴

of *Aḥmad*, vol. 5, p. 113; Ṭaḥāwī, *Mushkil al-Āthār* (Cairo: Maṭba'at al-Anwār, 1973), vol. 7, p. 251; Ibn Ḥajar, *Talkhīṣ al-Ḥabīr*, 3, p. 45-46.

⁵¹Fakhr al-Din Uthman bin 'Ali al-Zayla'ī, *Tabyīn al-Ḥaqā'iq* (Cairo: n. p., 1895), 4, p. 2; Ibn Humām, *Fath al-Qadīr*, with *al-'Ināyah 'ala' Sharḥ al-Hidāyah*, vol. 5, p. 73-74; *Ḥāshiyat al-Dasūqī 'ala' al-Sharḥ al-Kabīr*, vol. 3, p. 2; Al-Nawawī, *Al-Majmū' Sharḥ al-Muhadhdhab*, vol. 9, p. 167; Al-Mardāwī, *Inṣāf*, vol. 4, p. 265; Al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, vol. 2, pp. 172-173; Muḥammad Yūsuf Mūsā, *Al-Amwāl wa Nazariyyat al-'Aqd*, 254-257.

⁵²Aḥmad Abū al-Wafā, *Al-Mu'āhadāt al-Dawliyyah fī al-Sharī'ah*, 64; Maḥmūd Shaltūt, *Al-Islām 'Aqīdah wa-Sharī'ah* (Beirut: Dār al-Shurūq, n. d.), p.457.

⁵³Some Ḥanafī jurists reject the option of annulment, since any such objections should have been raised before consent was given. For further details see the following sources: Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol. 9, pp. 4492-4501; Al-Sarakhsī, *Al-Mabsūṭ*, 24, pp. 40-44 and 85-87; *Mukhtaṣar al-Ṭaḥāwī*, pp. 407-408.

⁵⁴Al-Sarakhsī, *Mabsūṭ*, vol. 24, pp. 38-39; Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 9, pp. 4503-4504; Ibn Humām, *Fath al-Qadīr*, vol. 5, p. 74; *Takmilat Fath al-Qadīr*, 7, pp. 293-294; Al-Zayla'ī, *Tabyīn al-Ḥaqā'iq*, vol. 5, p. 192; Bukhārī, *Kashf al-Asrār*, vol. 4, p. 357; Amīrbādshāh, *Taysīr al-Tahrīr*, vol. 2, p. 307; Taftazānī, *Al-Talwīḥ wa al-Tawḍīḥ*, vol. 2, pp. 197-198; Muḥammad Yūsuf Mūsā, *Al-Amwāl wa Nazariyyat al-'Aqd*, pp. 398-399; 'Alī Muḥyī al-Dīn, *Mabdā' al-Riḍā fī al-Uqūd*, 2, pp. 1002-1005; *Ḥāshiyat al-Dasūqī 'ala' al-Sharḥ al-Kabīr*, 3, pp. 2-3; *Al-Kurshī 'ala' Khalīl*, with *Ḥāshiyat al-'Adawī*, vol.5, p. 9; Al-Nawawī, *Rawḍat al-Ṭālibīn*, vol. 8, pp. 56-58; Ibn Qudāmah, *Al-Mughnī*, vol. 8, p. 260.

c. *Public interest*

According to Muslim jurists, one of the conditions for concluding a *mu'āhadah* is that it perpetuates the interests of Muslims, and it is never more necessary to do so than in cases where the Muslims are weak and unable to confront the enemy. This also applies, when they fear a legitimate threat to their security, or when the Imam wishes to pursue peace with non-Muslims in order to bring them under the category of *dhimmi*s or acquire some other benefits or aids to the Muslim state.⁵⁵

Shaybānī observes:

An example of the condition of interest for the Muslims in concluding a *muwāda'ah* with the non-Muslims, is that if the Imam is engaged in making peace with non-Muslims in return for the payment of tribute that would benefit the Muslims, it is permissible as long as it serves the interests of the Muslims. The Imam should not forget the duty of Muslims to spread and preach Islam while he accepts the tribute of others.⁵⁶

The Qur'ānic verse that encourages Muslims to make peace with others, is as follows: "But if they incline to peace, you also incline to it, and (put your) trust in God. Verily, He is the (All)-Hearer, the (All)-Knower" (Q. 8: 61).

For Muslims to preserve the status of the Islamic state in cases where they are the weaker party, it is important to consider their own interests in pursuing a *muwāda'ah*.⁵⁷ Similarly, if the non-Muslims ask to conclude a *muwāda'ah* with the Muslims for a fixed period of time without paying *jizyah*, the Imam should take this offer into consideration,

⁵⁵Majid Khadduri, *Kitāb al-Siyar of Shaybānī* (Beirut: Dār al-Muttaḥidah lil-Nashr, 1975), 165; Sarakhṣī, *Al-Mabsūṭ*, vol. 10, p. 86; Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 9, p. 4324; Ibn Humām, *Fath al-Qadīr*, vol. 4, p. 293; Al-Zayla'ī, *Tabyīn al-Ḥaqā'iq*, vol. 3, pp. 245-246; Ibn Nujaym, *Al-Baḥr al-Rā'iq*, vol. 5, p. 85; Abū Yūsuf, *Kharāj*, pp. 224-225; *Al-Fatāwā al-Hindiyyah*, vol. 2, p. 196; 'Abd al-Ghanī bin Ṭālib al-Ghunaymī, *Al-Lubāb Sharḥ al-Kitāb*, vol. 4, p. 120; 'Abd Allāh Maḥmūd Muṣūfī, *Al-Ikhtiyār li-Ta'fīl al-Mukhtār* (Beirut: Dār al-Ma'rifah, 1975), vol. 4, pp. 189-190.

⁵⁶Al-Shaybānī, *Al-Siyar al-Kabīr*, vol. 2, p. 498.

⁵⁷Al-Sarakhṣī, *Sharḥ al-Siyar al-Kabīr*, vol. 5, p. 1689 and vol. 1, pp. 190-191; and idem, *Mabsūṭ*, 10, p. 86; Al-Zayla'ī, *Tabyīn al-Ḥaqā'iq*, vol. 3, p. 246; Al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, vol. 3, p. 69; *Al-Fatāwā al-Hindiyyah*, vol. 2, pp. 196-197; Muḥammad Amīn bin 'Umr bin 'Abidīn, *Ḥāshiyat Ibn 'Abidīn* (Beirut: Dār Iḥyā' al-Turāth, 1998), vol. 4, p. 133; Zayn al-Dīn Ibrāhīm al-Ḥanafī bin Nujaym, *Al-Baḥr al-Rā'iq* (Beirut: Dār al-Ma'rifah, 1958), vol. 5, pp. 85-86.

especially if the Muslims are in a position of weakness and it is in the interests of Muslims to conclude the *muwāda‘ah* and accept the offer.⁵⁸

If the above-mentioned interests are dropped from the treaty, which then is no longer in the interest of Muslims, then it is not valid. In the case where Muslims realize that the treaty is going to cause or lead to further threats to them, the Imam should oppose this suspected threat since it will render the treaty.⁵⁹ If it appears to the Imam that the outcome of a *mu‘āhadah* will be different from what was agreed upon, he can terminate it by informing the other parties of his decision prior to its termination.⁶⁰

Based on the verses cited above, the consensus of jurists is that if the situation or conditions are not in the interest of Muslims who are about to conclude a treaty, then it is not permissible to conclude it.⁶¹ Among the conditions of interest for a *muwāda‘ah* is the spread of Islam, its protection and the prevention of any foreign attack.⁶² The obligation of Muslims to address this common interest of Islam has a spiritual dimension, and must be addressed whenever there is a prospect of concluding a *muwāda‘ah*.⁶³

⁵⁸ Khadduri, *Kitāb al-Siyar of Shaybānī*, 165.

⁵⁹ Abū Yūsuf, *Kharāj*, 224; Ibn Humām, *Fath al-Qadīr*, vol. 4, p. 294; Al-Zayla‘ī, *Tabyīn al-Ḥaqā‘iq*, vol. 3, p. 246; *Al-Fatāwā al-Hindiyyah*, vol. 2, p. 197; *Hāshiyat Ibn ‘Abīdīn*, vol. 4, p. 133; Al-Maydānī, *Al-Lubāb Sharḥ al-Kitāb*, 4, p. 120.

⁶⁰ Al-Jaṣṣās, *Aḥkām al-Qur‘ān*, 3, p. 77; Al-Sarakhsī, *Mabsūṭ*, 10, pp. 86-87; and idem, *Sharḥ al-Siyar al-Kabīr*, vol. 2, p. 499. According to Al-Zuhaylī and Abū Zahrah, the act of terminating the *muwāda‘ah* in any given event is considered as a violation to the emergence of the Islamic principle of loyalty and fulfillment of *‘ahd*. See Wahbah al-Zuhaylī, *Athār al-Ḥarb fī al-Fiqh al-Islāmī* (Beirut: Dār al-Fikr, 1401/1981), pp. 671-672; Muḥammad Abū Zahrah, *Al-‘Alāqāt al-Dawliyyah fī al-Islām*, p. 80. The Ḥanafī jurists favor the termination of the *‘aqd* due to the suspicion of outcome. However, the termination of an *‘aqd* does not necessarily mean a violation of the principle of loyalty and fulfillment that is associated with any given *‘aqd*. The Prophet and his Companions did observe a *mu‘āhadah* until its conclusion unless it was violated by the other side. For further information regarding this issue see Al-Jaṣṣās, *Aḥkām al-Qur‘ān*, vol. 3, p. 77; Muṣṭafā ‘Āmāl Waṣfī, *Muṣannafat al-Nuzum al-Islāmiyya*, pp. 371-372.

⁶¹ Ibn Humām, *Fath al-Qadīr*, vol. 4, p. 293; Al-Zayla‘ī, *Tabyīn al-Ḥaqā‘iq*, vol. 3, p. 246; *Hāshiyat al-Sharqāwī ‘ala’ al-Taḥrīr fī Fiqh al-Shāfi‘iyyah*, vol. 2, p. 266; Ibn Nujaym, *Al-Ashbāh wa al-Nazā‘ir*, p. 109; Zarkashī, *Al-Manthūr fī al-Qawā‘id*, 1, p. 125; Amīr Bādshāh, *Taysīr al-Taḥrīr*, vol. 3, p. 144.

⁶² Aḥmad Abū al-‘Abbās bin Idrīs al-Qarāfī, *Al-Furūq*, (Beirut: Dār al-Ma‘rifah, 1980), vol. 3, p. 260.

⁶³ Al-Jaṣṣās, *Aḥkām al-Qur‘ān*, vol. 2, p. 294.

d. The Status of Treaty/Mu'āhadah in the Qur'ān and Sunnah

In order for the *mu'āhadah* to be valid, it must not contradict the legal rulings of the scriptural texts, i.e., the Qur'ān and the *Sunnah*. It should fall within the realm of Islamic law, preventing wrongdoing and encouraging good deeds.⁶⁴ However, it is permissible to pursue any obligation that is not imposed or mentioned in the Qur'ān that is directly related to the outcome of a treaty or the purpose of the treaties, or does not contradict the Qur'ān and the teachings of the Prophet.⁶⁵

One of the Prophet's traditions that refers to this obligation to conform to the Qur'ānic text at the time of concluding a treaty, reads, "Every condition that has no root in the Qur'ān is void."⁶⁶ Thus, this *ḥadīth* is interpreted by Shaybāni:

If any member of the *ahl al-ḥarb* requests to make *ṣulḥ* with the Muslims under the condition that if the Muslims conquer a part of their territory they should not prevent the non-Muslims from selling alcohol or pork, the Imam should not conclude a truce (*ṣulḥ*) that is based on these conditions because alcohol, pork and *ribā* (unlawful interest) are prohibited in the Islamic legal statutes, and it is a violation of Islamic law and jurisdiction.⁶⁷

The Prophet's conduct at Ḥudaybiyyah, moreover, gives a practical dimension of what is permissible and what is not. For example, one of the conditions that the *ṣulḥ* established was that, whenever a member of the Makkan community escaped to Madinah, the Prophet (ﷺ) was obliged to return that person to Makka. The verse that was revealed regarding the matter reads: "If you ascertain that they are true believers, send them not back to the disbeliever" (Q. 60:10).

This verse imposes a restriction upon Muslims, whereby some of the conditions required of the Muslims were to be fulfilled and honored, while others were declared void and was not to be fulfilled. Therefore,

⁶⁴Abū Ishāq Ibrāhīm ibn Mūsā al-Gharnāṭī al-Shāṭibī (d. 790/1388), *Al-Muwāfaqāt fī Uṣūl al-Sharī'ah*, (ed.) 'Abd Allāh Darāz (Beirut: Dār al-Ma'rifah, n .d.), vol. 2, pp. 227, 244-247; Zarkashī, *Al-Manthūr fī al-Qawā'id*, vol. 3, p. 106; Al-Suyūṭī, *Al-Ashbāh wa al-Nazā'ir*, p. 285.

⁶⁵Al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, vol. 2, p. 294.

⁶⁶This *ḥadīth* distinguishes between Qur'ānic rulings and other rulings, such as the *Aḥkām al-Sharī'ah* obtained from the Prophet's sayings, as well as other Books that were sent to other people. See the following: Ibn Qutaybah, *Tā'wīl Mukhtalaf al-Ḥadīth* (Beirut: Mu'assasat al-Risālah, 2004), 84; Ibn al-Athīr, *Al-Nihāyah fī Gharīb al-Ḥadīth*, vol. 4, p. 147; Rāghib, *Al-Mufradāt fī Gharīb al-Qur'ān*, 423; Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, 5, p. 1788.

⁶⁷Al-Shaybānī, *Al-Siyar al-Kabīr*, vol. 4, pp. 1547-1548.

among the duties of the Imam is the task of looking into what is permissible and what is prohibited and acting upon this knowledge.⁶⁸

Shaybānī also indicates that it is not permissible to violate justice and encourage oppression, just as it is prohibited to conclude a contract with parties who practice oppression on their people because it is a violation of Islamic rulings. It is also forbidden to conclude a contract that justifies the acceptance of oppression because this is a type of validation of oppression, and it is not lawful to fulfill that condition in the event of concluding a truce.⁶⁹ Shaybānī illustrates this point further by giving an example:

If the ruler of *ahl al-ḥarb* rules over a broad territory where people residing under his realm are treated like slaves and he exercises oppressive means on them, and if he has suggested to the Muslims to become *dhimmī* and to pay *kharāj* in return for letting him maintain his oppressive treatment of his own people, it is not acceptable according to the principle of *dār al-Islām*. The Muslims should not conclude a truce with a party who imposes oppressive acts.⁷⁰

According to Sarakhsī, the perpetuation of oppression is unlawful. Since a *dhimmī* is bound to respect the Islamic legal transactions, any violation of this can lead to the termination of the contract. Even if the king became a Muslim under the condition of resuming his oppressive practices against his own people, it is considered a violation of the principles of the contract.⁷¹

The same Islamic legal rulings apply to prisoners, as in cases where a representative of a party approaches the Imam holding Muslim prisoners and seeks to conclude a truce with the Muslims on the condition that the Muslim prisoners not to be released. Under such circumstances the Muslims should not accept this condition. The Imam should proclaim that no truce is possible without the release of the Muslim prisoners, or he can impose conditions whereby an exchange of prisoners occurs. Therefore,

⁶⁸ Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, vol. 4, pp. 1548, 1594-1595; Al-Jaṣṣāṣ, *Aḥkām al-Qurʾān*, 3, p. 437; Ibn Humām, *Fatḥ al-Qadīr*, vol. 4, p. 296; Al-Shāfiʿī, *Al-Umm*, vol. 4, p. 113; Baghawī, *Sharḥ al-Sunna*, vol. 11, pp. 161-162.

⁶⁹ Al-Shaybānī, *Al-Siyar al-Kabīr*, vol. 4, p. 1595; Al-Shāfiʿī, *Al-Umm*, vol. 4, p. 113. This was the conduct of the Prophet (ﷺ), when he concluded the Ḥudaybiyah *ṣullḥ* with the Makkans, for afterwards he did not return the women.

⁷⁰ Al-Sarakhsī, *Mabsūṭ*, vol. 10, p. 85; Al-Shaybānī, *Kitāb al-Siyar*, p. 162.

⁷¹ Ibid.

among the duties if the Imam is to look into what is permissible and what is prohibited and to act upon his knowledge.⁷²

The consensus of jurists regarding the legal aspects of the *mu'āhadah* maintains that any *mu'āhadah* that includes conditions contradictory to the Islamic legal rulings is automatically void. Muslims should look into the scriptural texts (i.e. the Qur'ān and *Sunnah*) prior to the conclusion of any treaty, and that treaty should be free of any such conditions that contravene Islamic principles.⁷³

E. Time limits

Among the conditions of the *mu'āhadah* is its designated time.⁷⁴ It can be short or long, in order to allow for reflection upon the situation of the *mu'āhadah* and its obligations. This condition is founded on the understanding that both parties are aware of the exact duration.⁷⁵ The *mu'āhadah* can either be temporary, limited to a specific time period, or it can be a permanent treaty that is not restricted to any time period. This condition is explored at greater length in the following section.

a. The permanent Mu'āhadah

According to the consensus of jurists, the permanent treaty (*mu'āhadah*) is one that is concluded with non-Muslims, with the exception of idol worshipers and the conciliation (*muṣālahāt*) with the People of the Book (*Ahl al-Kitāb*). Islamic legal rulings stipulate that a

⁷²Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, 5, pp. 1813-1814; Al-Shāfi'ī, *al-Umm*, 4, p. 114.

⁷³Al-Shāfi'ī, *al-Umm*, vol. 4, pp. 110-111; Al-Nawāwī, *Rawḍat al-Tālibīn*, vol. 10, p. 334; Ibn Jamā'ah, *Tahrīr al-Aḥkām fī Tadbīr Ahl al-Islām* (Doha: Maṭba'at Ri'āsat al-Maḥakim al-Shar'iyyah, 1986), 233; Ibn Qudāmah, *Al-Mughnī*, vol. 10, pp. 510-511; Ṭabarī, *Ikhtilāf al-Fuqahā'* (Beirut: Dār al-Kutub al-'Ilmiyyah, n. d.), pp. 18-19; *Fatāwā al-Shaykh 'Alīsh*, vol. 1, p. 391; Bayḍāwī, *al-Ghāyah al-Quṣwā'*, (Dammam: Dār al-Iṣlāḥ, 1982), vol. 2, p. 961.

⁷⁴Dāmād, *Majma' al-Anhur Sharḥ Multaqā' al-Abḥur*, (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1986), vol. 1, p. 637.

⁷⁵Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, vol. 5, p. 1782; an exception is the *'aqd al-dhimma*, which, as we saw earlier, is not limited to time period. It is a permanent *'aqd* as far as the Muslims are concerned, but it is subject to termination by the *ahl al-dhimma* in the event that they decide to become Muslims.

treaty cannot be forever,⁷⁶ since it must be immediately void should the Muslims become capable of fighting them.⁷⁷

Shaybānī indicates that a *muwāda'ah* can be permanent and not subject to annulment by Muslims on the occasion of a renewed capacity to fight, even if they are able to redeem all the pledges or obtain the consent of the other party.⁷⁸

b. Temporary Mu'āhadah That is Restricted to A Fixed Time Period

It is the nature of any *mu'āhadah* that it should contain explicit reference to its duration.⁷⁹ A typical, temporary *mu'āhadah* is thus effective for one to three years or less -- even for a few months.⁸⁰ The classical jurists derived their opinion from the conduct of the Prophet demonstrated in the treaty of Ḥudaybiyyah, where the two parties fixed the specification of the time, i.e. the Prophet and the Makkan representative. They consented to terminating fighting between the two parties for a period of ten years.⁸¹

⁷⁶Rāghib al-Iṣfahānī, *Mufradāt al-Qur'ān*, p. 8; Jurjānī, *Ta'rifāt*, p. 21; Jawharī, in *Ṣiḥāḥ*, vol. 2, p. 439.

⁷⁷Ṭabarī, *Ikhtilāf al-Fuqahā'*, p. 14; Al-Shawkānī, *Al-Sayl al-Jarrār*, vol. 4, p. 565; Ibn al-Murtaḍā, *Al-Baḥr al-Zakhkhār al-Jāmi' li-Madhāhib 'Ulamā' al-Amṣār*, vol. 6, p. 448; *Fatāwā al-Shaykh 'Alīsh*, vol. 11, p. 392; Wansharīshī, *al-Mi'yār al-Mu'rib*, vol. 2, p. 208; Some modern scholars, such as al-Zuḥayfī in his *Athār al-Ḥarb fī al-Fiqh al-Islāmī*, p. 675, indicate that the consensus of scholars is that no *muhādanah* is valid without the designation of a time period. See Abū Zahrah, *Al-'Alāqāt al-Dawliyya fī al-Islām* (Cairo: Dār al-Qawmiyyah li-Ṭibā'ah, 1964), pp., 78-79; 'Alī Maṣṣūr, *Al-Sharī'ah al-Islāmiyyah wa al-Qānūn al-Dawli* (N. c.: Majlis al-'Ālā lil-Shu'ūn al-Islāmiyyah, 1974), pp. 375-379; Al-Zuḥayli, *Athār al-Ḥarb* (Beirut: Dār al-Fikr, 1981), p. 359.

⁷⁸Al-Shaybānī, *Al-Siyar al-Kabīr*, 5, pp. 1758-1759.

⁷⁹Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, 2, p. 486; vol. 5, p. 1713; Al-Zarkashī, *Al-Manthūr fī al-Qawā'id* (Kuwait: Wizārat al-Awqāf wa al-Shu'ūn al-Islāmiyyah, 1981), vol. 1, p. 240; Zarkashī indicates that any *'aqd* specifying a time period is a temporary *'aqd*, such as contracts of rent or lease, sharecropping and armistice or truce; Jalāl al-Dīn 'Abd al-Raḥmān ibn Abū Bakr al-Suyūfī (d. 911/1505), *Al-Ashbāh wa al-Nazā'ir fī Qawā'id wa Furū' al-Shāfi'iyyah* (Cairo: Maṭba'at Muṣṭafā' al-Ḥalabī, 1378/1958), pp. 282-283.

⁸⁰Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, vol. 5, pp. 1713-1714, 1780.

⁸¹*Ibid.*; vol. 5, p. 1780; Ibn Ishāq, *Sīrah* (Rabāt: Ma'had al-Dirāsāt wa al-Abḥāth lil-Ta'riḥ, 1976), vol. 2, pp. 316-317; Ibn Sa'd, *Ṭabaqāt* (Beirut: Dār Ṣādir, 1958), vol. 2, p.97; Ibn Ḥajar, *Fath al-Bārī*, vol. 5, p. 343; Ibn Qayyim al-Jawziyyah, *Zād al-Ma'ād* (Beirut: Dār al-Fikr, 1972), vol. 3, p. 140; Ibn Humām, *Fath al-Qadīr*, vol. 4, p. 293; Al-Shawkānī, *Nayl al-Awṭār* (Cairo: Maṭba'at Muṣṭafā' al-Ḥalabī, 1971), vol. 8, p. 56.

However, the time period specified in the case of Ḥudaybiyyah is not, according to Abū Ḥanīfah, Abū Yūsuf and Shaybānī, a precedent that must be followed in all treaties (*mu'āhadāt*); rather, it is left to the Imam to determine the time period, based on the interests and needs of Muslims. Furthermore, the specified time limit should stand to benefit Muslims in the event it is exceeded, or is deemed subject to extension. If it does not serve the interests of Muslims it is not permissible for the Imam to renew the treaty or extend its duration.⁸²

Since the Qur'ān does not specify the time period, and even permits and encourages Muslims to seek *muwāda'ah* and *mu'āhadah* with others without imposing a specific duration,⁸³ the Prophet's decision to agree to a ten year treaty in the case of Ḥudaybiyyah was made on the understanding that the *'illah* (cause or reason) determining the necessary duration must be sought in each case whenever other treaties or temporary truce are being negotiated.⁸⁴ For the truce terminating fighting and putting an end to all hostilities can often serve the interests of the Muslims.

Mālikī jurists state that the period of effectiveness of a treaty is not restricted, but is left to the Imam to determine according to the community's needs. However, it is suggested that it should not exceed four months, unless there is an unexpected shortfall in the Muslim ability to perform *jihād*. Here we see Muslim interests equated with the time period, which is determined by what serves the greater public interest.⁸⁵

This was also the opinion of Khaṭṭābī and Ibn Ḥajar of the Shāfi'ī school, as well as of al-'Aynī of the Ḥanafī school and Shawkānī, who all

⁸²Ibid.

⁸³See the Qur'ān, 8: 61, "But if they incline to peace, you also incline to it."

⁸⁴*Uṣūl al-Sarakhsī*, vol. 2, pp. 158-162; *Kashf al-Asrār*, vol. 3, pp. 389-390; *Taysīr al-Taḥrīr*, vol. 4, pp. 5-6; *Mizān al-Uṣūl*, p. 630; *Sharḥ al-Kawkab al-Munīr*, vol. 4, pp. 52-53; *Al-Mustaṣfā'*, 2, p. 345.

⁸⁵See for example, Ṣālih 'Abb al-Samī' Abū al-Azharī, *Jawāhir al-Ikḥlīl* (Cairo: Dār Ihyā' al-Kutub al-'Arabiyyah, 1912), vol. 1, pp.269-270; Wansharīsī, *Al-Mi'yār al-Mu'rib* (Beirut: Dār al-Gharb al-Islāmī, n. d.), vol. 6, p. 208; Muḥammad bin Aḥmad bin Jazī, *Al-Qawānīn al-Fiqhiyya* (Libya: Dār al-'Arabiyyah lil-Kutub, 1982), 163; 'Abd Allāh bin Nujaym al-Khalāl, *Iqd al-Jawāhir al-Thamīnah*, (Beirut: Dār al-Gharb al-Islāmī, 1995), vol. 1, p. 497; Dardīr, *Al-Sharḥ al-Kabīr* (Cairo: Maṭba'at 'Īsa' al-Ḥalībī, n. d.), vol. 2, p. 206; Yūsuf bin 'Abd allāh bin 'Abd al-Birr, *Al-Kāfi fī Fiqh Ahl al-Madīnah* (Riyāḍ: Maktabat al-Riyāḍ al-Ḥadīthāh, 1978), vol.1, p. 404; Al-Baghawī, *Sharḥ al-Sunnah* (Beirut: al-Maktab al-Islāmī, 1982), vol. 11, p. 161; Al-Bayḍāwī, *Al-Ghāyah al-Quṣwā'*, (Dammam: Dār al-Iṣlāh, 1982), vol. 2, p. 961.

insist that there is no restriction on the time limit, in the event that a *muhādanah* is concluded. This will be based on the needs of Muslims and will be left to the Imam to decide along with the learned jurists. However, the time period, whether long or short, must be specified.⁸⁶

Shāfi'ī scholars distinguish between two cases, the first being one where the Imam retains full strength and where he can see that some interests can be served through agreeing to a truce or cessation (*hudnah*). He may in this case conclude that truce or *hudnah* for four months or less. The time limit is derived from both the Qur'ān⁸⁷ and the Prophetic tradition.⁸⁸ Here the Imam is not allowed to agree to a truce of more than four months' duration because, according to these scholars, any period chosen requires the *jizyah* to be imposed at its termination, and Muslims should not be under any obligation to do so. According to al-Māwardī, the time may be extended to between more than four months and less than one year, but there are two opinions on this, one of which insists that it is not permissible.⁸⁹

The second case, according to the Shāfi'ī school is where the Imam or the Islamic state is weak or developing strength, only slowly. To strengthen his authority, it is permissible for the Imam to conclude a truce in order to fend off any outside attacks in the meantime. The truce (*hudnah*) is to be limited to ten years, as we saw in the case of Ḥudaybiyyah, and it should not exceed that time period. If the Imām needs to extend the ten year period in line with Muslim interests, then he may conclude or renew the previous truce for a time period that should

⁸⁶Ḥamad bin Muḥammad al-Khaṭṭābī, *Ma'ālim al-Sunan* (Beirut: al-Maktabah al-‘Ālmiyyah, 1981), 4, p. 80; Ibn Ḥajar, *Fath al-Bārī*, 6, p. 282; Badr al-Dīn Abū Muḥammad Maḥmūd ibn Aḥmad al-Ḥalabī al-‘Aynī (d. 855/1451) *‘Umdat al-Qārī Sharḥ Ṣaḥīḥ al-Bukhārī* (Beirut: Dār al-Fakr, n. d.), vol. 15, p. 105; Al-Baghawī, *Sharḥ al-Sunna*, vol. 11, p. 161; Al-Shawkānī, *al-Sayl al-Jarrār*, vol. 4, p. 565.

⁸⁷Ponder upon the Qur'ān, 9: 1 and 2, “Freedom from (all) obligations (is declared), from Allah and His Messenger to those of the *Mushrikūn* (polytheists, pagans, idolaters, disbelievers in the Oneness of Allah) with whom you made treaty.” “So travel freely (*OMushrikūn*), for four months (as you will), throughout the land.”

⁸⁸The Prophet (ﷺ) concluded armistice or truce with Ṣafwān bin Umayyah for four months. References to this may be found in Malik bin Anas, *Muwatta'* (Beirut: Dār al-Fikr, 1999), vol. 2, pp. 543-544; Al-Shāfi'ī, *Al-Umm*, vol. 4, p. 112; Ibn ‘Abd al-Birr, *Tamhīd* (Morocco: Wizārit al-Awqāf, 1967), vol. 12, p. 19.

⁸⁹Mawārdī, *Al-Aḥkām al-Sulṭāniyyah* (Cairo: Maṭba'at Muṣṭafā al-Bābī al-Ḥalabī, 1973), 151.

not itself exceed ten years; otherwise, according to the Shāfi'ī jurists, it would be null and void.⁹⁰

For Ḥanbalī and Zaydī jurists, a truce (*hudnah*) is not permissible unless the time period is determined by the Imam in consideration of the interests of the Muslim community. The maximum permissible term for a truce (*hudnah*) is theoretically ten years, the maximum length of a lease contract, it being understood that they are two parallel reflect the interests of the two parties. The welfare of the Muslim state may indeed be answered through truce (*ṣulh*) more than by war. As long as the community's interest is served better by peace, it is permissible to conclude a *mu'āhadah* for a ten year period and extend it as necessary.⁹¹

b. The Mu'āhadah That is Not Limited by Time

According to Shaybānī, this particular *mu'āhadah* is permissible in certain circumstances, though it is neither permanent nor temporary. It is a type of treaty (*mu'āhadah*) in which the condition of time is not a factor, and in this sense it is better termed a *muwāda'ah* (temporary truce). For example, in a situation where non-Muslims are willing to surrender to one of the Muslim territories, and the Muslims fear their continued threat, they can make an offer of truce with the enemy offering them, for example, ten thousand *ḍīnars*, in order to persuade them to withdraw from their territory and return to their own.⁹² Sarakhsī describes this temporary truce (*muwāda'ah*) as conditional on withdrawal. Here withdrawal means an enemy leaves a territory formerly under their control and returns to their original territory, which in the case of the non-Muslims is *dār al-ḥarb* and in the case of the Muslims is *dār al-Islām*.⁹³

⁹⁰See for example: Al-Shāfi'ī, *Al-Umm*, vol. 4, p. 110; and Al-Jaṣṣās, *Aḥkām al-Qur'ān*, vol. 2, p. 62-64; Ṭabarī, *Ikhtilāf al-Fuqahā'*, 15-17; Al-Nawāwī, *Rawḍat al-Ṭālibīn*, 10, p. 335; and idem, *al-Muhadhdhab*, with *Takmilat al-Majmū'* (Beirut: Dār al-Fikr, 1975), vol. 18, pp. 221-222; Al-Ghazālī, *Al-Wajīz* (Beirut: Dār al-Ma'rifah, 1978), vol.2, p. 240; Ibn Jamā'ah, *Tahrīr al-Aḥkām*, p. 232; Māwardī, *Al-Aḥkām al-Sulṭāniyya*, p. 151; Al-Baghawī, *Sharḥ al-Sunnah*, vol. 11, p. 161; Ibn Ḥajar, *Fath al-Bārī*, vol. 5, p. 343; Al-Shawkānī, *Nayl al-Awṭār*, vol. 8, p. 56.

⁹¹Ibn Qudāmah, *Al-Mughnī*, 10, p. 509-510; Ibn Taymiyyah, *Al-Muḥarrar*, 2, p. 182; Al-Mardāwī, *Al-Inṣāf*, vol. 4, p. 212; Ibn Mufliḥ, *Al-Mubdi'*, vol. 3, p. 398; Al-Bahūfī, *Kashshāf al-Qinā'*, vol. 3, p. 104; Ibn al-Murtaḍā, *Al-Baḥr al-Zakhkhār*, vol. 6, p. 448.

⁹²Al-Shaybānī, *Al-Siyar al-Kabīr*, vol. 5, pp. 1711-1712.

⁹³Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, vol. 5, p. 1712.

This is what Hanafī, some Mālikī, and some Ḥanbali jurists declare to be their opinion.⁹⁴

However, various Shāfi‘ī and other Ḥanbafī, Mālikī and Zaydī jurists advance the opinion that a temporary truce (*muwāda‘ah*) is not permissible without being conditioned by a definite period of time. In the case where a *muwāda‘ah* is concluded without a definite time limit, it may be considered null and void.⁹⁵ Should the temporary truce (*muwāda‘ah*) have been concluded on behalf of some trustworthy Muslims or a group of scholars, it is permissible for him or them to terminate it on the grounds that, by concluding the *muwāda‘ah* according to the wishes of a non-Muslim party, it would give the latter authority over Muslims.⁹⁶ Such an outcome is regarded as anathema, which is reflected in the Prophetic tradition: “Islam is superior but nothing rises over it.”⁹⁷

Some jurists acknowledge the validity of the *‘aqd al-muwāda‘ah and hudnah* without a definite time period, among them are Ibn Taymiyyah and Ibn Qayyim al-Jawziyyah. These two scholars state that whatever is consistent with the Qur’ānic text, such as the obligation to fulfill and honor the contract, or conforms to the practice of the Prophet, is allowable. The Muslims should under no circumstances fight against those with whom they have concluded a temporary truce (*muwāda‘ah*) or cessation truce (*hudnah*) unless the non-Muslims are the ones who first violate that contract. As long as the contract that was concluded between the two parties is respected, and regardless of whether the condition of a time limit is indicated or not, it is a permissible and valid contract.⁹⁸

⁹⁴ Al-Kāsānī, *Badā‘i‘ al-Ṣanā‘i‘*, vol. 9, p. 4327; Ibn al-‘Arabī, *Aḥkām al-Qur’ān*, vol. 4, p. 1789; Ibn Hubayrā, *Ifṣāḥ*, vol. 2, p. 296; *Mukhtaṣar al-Muzanī* in the margin of *Al-Umm*, vol. 3, pp. 399-400.

⁹⁵ Al-Shāfi‘ī, *Al-Umm*, vol. 4, pp. 110-111; Al-Nawawī, *Al-Muhadhdhab*, with *Takmilat al-Majmū‘*, 18, p. 222; and idem, *Rawḍat al-Ṭālibīn*, vol. 10, pp. 335-336; Al-Ghazālī, *Al-Wajīz*, 2, p. 204; Ibn Qudāmah, *Al-Mughnī*, vol. 10, p. 509; Ibn Muflīḥ, *Al-Mubdī‘*, vol. 3, p. 399; Al-Mardāwī, *Al-Inṣāf*, vol. 4, pp. 212-213; Bahūtī, *Kashshāf al-Qinā‘*, vol. 3, p. 104; Ibn Hubayrā, *Al-Ifṣāḥ*, vol. 2, p. 296; Ibn Murtaḍa‘, *Al-Baḥr al-Zakḥkhār*, vol. 6, p. 449.

⁹⁶ Al-Nawawī, *Al-Muhadhdhab*, with *Takmilat al-Majmū‘*, vol. 18, p. 222; Al-Shāfi‘ī, *Al-Umm*, 4, pp. 110-111; *Sunan al-Bayhaqī*, vol. 9, p. 224.

⁹⁷ Abū ‘Ubayd, *Amwāl*, 149; Ṭaḥāwī, *Ma‘ānī al-Athār*, vol. 3, p. 257; Ibn Ḥajr al-‘Asqalānī, *Fath al-Bārī*, 3, p. 220; Muḥammad Nāṣr al-Dīn al-Albānī, *Irwā‘ al-Ghalīl* (Beirut: al-Maktab al-Islāmī, 1985), vol. 5, pp. 106-109.

⁹⁸ *Majmū‘ Fatawā Ibn Taymiyyah*, vol. 29, p. 140; Ibn Qayyim al-Jawziyyah, *Aḥkām*

Some modern scholars favor the opinion of concluding a *mu'āhadah* without indication of the time period. Some go so far even as to approve the concept of such a treaty, which in a sense is an extension of the concept of *'aqd al-dhimmah*, in order to establish goodwill and friendly relationships and a peaceful environment to spread the teachings of Islam. According to them, a permanent or ever-lasting truce with non-Muslims has its origin in the basic principle of Islam, i.e. that the external affairs of Muslims consist in peace, not war. They realize that the rulings or opinions of classical scholars were based on their own personal *ijtihād* (or discretion) and that it is permissible for the rulers to override them.⁹⁹

This opinion, voiced mainly by modern scholars, is not however accepted by Ghunaymī. He insists that to follow the example of others instead of that of the Prophet (ﷺ), who concluded the truce (*ṣulh*) of al-Ḥudaybiyyah makes no sense, because the Prophet concluded that truce under political circumstances to accomplish specific needs.¹⁰⁰ Ja'far Abd al-Salām states that the emphasis on concluding a contract such as a *muwāda'ah* or a *hudnah* should be conditional on a fixed time period, since the permanent treaty or everlasting contract with non-Muslims contradicts the reality of a world that has never seen a *mu'āhadah* that lasted for a long period of time.¹⁰¹

Ahl al-Dhimmah, vol. 2, pp. 476-490; and idem, *Zād al-Ma'ād*, vol. 3, p. 146; Ba'fī, *al-Ikhtiyārāt al-Fiqhiyyah*, 542; *Mukhtaṣar al-Muzanī*, within the margin of *al-Umm*, vol. 3, pp. 399-400.

⁹⁹See for example, Abū Zahrah, *Al-'Alāqāt al-Dawliyya fī al-Islām*, p. 78, and his preface to Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, p. 96; 'Alī Maṣṣūr, *Al-Sharī'ah al-Islāmiyyah wa al-Qānūn al-Duwalī al-'Amm* (n. c.: Al-Majlis al-A'la' li al-Shu'ūn al-Islāmiyyah, 1395/1974), pp. 77-378; Ṣubḥī Maḥmaṣānī, *Al-Qānūn wa al-'Alāqāt al-Dawliyyah fī al-Islām* (Beirut: Dār al-'Ilm li al-Malāyīn, n. d.), pp. 144-145; Al-Zuḥaylī, *Āthār al-Ḥarb fī al-Fiqh al-Islāmī*, pp. 678-680, and his *Al-'Alāqāt al-Dawliyyah fī al-Islām*, p. 139; Muḥammad Kamāl Imām, *Al-Ḥarb wa Al-Salām fī al-Fiqh al-Duwalī al-Islāmī* (Cairo: Dār al-Ṭibā'ah al-Muḥammadiyyah, 1399/1978), p. 136.

¹⁰⁰Ghunaymi Muḥammad Ṭal'at, *Aḥkām al-Mu'āhadāt fī al-Sharī'ah al-Islāmiyyah* (Alexandria: Munsha'at al-Ma'ārif, 1977), p. 97, Ghunaymi Muḥammad Ṭal'at, *Qānūn al-Salām fī al-Islām*, (Alexandria: Munsha'at al-Ma'ārif, 1988), p. 511. He labels these scholars as imitators and criticizes the Islamic legal tradition for the same fault, stressing the need to follow logically the footsteps of the Prophet, indicated by the Qur'anic verse "You have the Prophet (ﷺ), as the right example."

¹⁰¹'Alī Ja'far 'Abd al-Salām, *Qawā'id al-'Alāqāt al-Dawliyyah fī al-Qānūn al-Dawli wa al-Sharī'h al-Islāmiyyah* (Cairo: Maktabat al-Salām al-'Ālamiyyah, 1981), p. 393; and *Sharḥ Baqā' al-Shay' 'ala' Ḥālīh*, 403; it is worth mentioning that a recent Mālikī

d. The Mu'āhadah Should Be Free of Unsound Conditions

According to the majority of jurists from the Mālikī and Shāfi'ī schools, one of the conditions of the treaty or conclusion of truce is that it should be free of unsound conditions. What they mean by unsound conditions is that it is not permissible to agree with the return of Muslims who escaped from *dār al-ḥarb* to *dār al-Islām*, whether they be male or female.¹⁰² This is a legally established verdict and cannot be made subject to a condition, just as it is not permitted to conclude a *mu'āhadah* with the condition of ransoming Muslim prisoners, leaving empty territory to the non-Muslims, arbitration between Muslims and non-Muslims on the basis of non-Muslims' rulings, permitting non-Muslims to reside in the Arab peninsula, drink alcohol within *dār al-Islām* publicly, or to build a place of worship within the Arab peninsula.¹⁰³

jurist, Muḥammad 'Alīsh, in his *Fatḥ al-'Alī al-Malik fī al-Fatwā 'ala Madhhab al-Imām Mālik*, vol. 1, p. 190, states a similar opinion. Other modern scholars, such as Muḥammad 'Alī Ḥasan in his book *al-'Alāqāt al-Dawliyyah fī al-Qur'ān wa al-Sunnah*, p. 360, indicate that the early jurists were in no disagreement (*ikhtilāf*) over the fact that a *mu'āhadah* that is not conditioned by time period is impermissible. He insists furthermore that there is no text in either the Qur'ān or the *Sunnah* that approves the *mu'āhadah* without fixed duration, but that one can find evidence indicating that such a treaty would be invalid.

¹⁰²The majority of scholars are in agreement on not returning female Muslims and disagree over whether to return Muslim males. Ḥanbalī and Mālikī jurists allow the latter under severe circumstances, while Abū Ḥanīfah and some Mālikī jurists do not permit it because it is a null condition; thus, should the Muslims not fulfill this condition, the *mu'āhadah* would resume and remain accurate and valid. Some Shāfi'ī jurists permit it only should the male Muslim have some family to protect him within *dār al-ḥarb*. See *Sharḥ al-Siyar al-Kabīr*, vol. 4, pp. 1594-1595; Al-Jaṣṣāṣ, *Mukhtaṣar Ikhtilāf al-Fuqahā'*, vol. 3, p. 45; idem, *Aḥkām al-Qur'ān*, vol. 3, p. 437; *al-Fatāwā al-Hindiyyah*, vol. 2, p. 197; *Al-Bayān wa al-Taḥṣīl*, vol. 3, pp. 46-48; 'Abd Allāh bin Nujaym al-Khalāl, *Iqd al-Jawāhir al-Thamīnah* vol. 1, p. 397-398; *Hāshiyat al-Dasūqī*, vol. 2, p. 206; *Hāshiyat al-Ṣāwī 'ala' al-Sharḥ al-Saghīr*, 2, p. 64; Al-Nawawī, *al-Muhadhdhab*, with the *Majmū'*, vol. 18, p. 225; Al-Māwardī, *al-Aḥkām al-Sulṭāniyyah*, p. 52; Ibn Ḥajar al-Haythamī, *Al-Fatāwā al-Kubra' al-Fiqhiyyah*, vol. 4, p. 249; Ibn Qudāmah, *Al-Mughnī*, 5, p. 517; Al-Mardāwī, *Al-Inṣāf*, vol. 4, p. 214; Ibn Qayyim al-Jawziyyah, *Zād al-Ma'ād*, vol. 3, pp. 140-141; Al-Shawkānī, *Al-Sayl al-Jarrār*, vol. 4, pp. 566-567; Al-Shāfi'ī, *Aḥkām al-Qur'ān*, vol. 2, pp. 66, 68; Ibn 'Arabī, *Aḥkām al-Qur'ān*, vol. 4, p. 1789; Ibn Ḥajar, *Fatḥ al-Bārī*, 5, p. 345.

¹⁰³Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, vol. 4, pp. 1536, 1594; *Al-Dasūqī 'ala' al-Sharḥ al-Kabīr*, vol. 2, p. 206; Muḥammad bin Aḥmad al-Jazī, *Al-Qawānīn al-*

According to Shaybānī, should the other party make a condition to return to it a Muslim who had escaped to *dār al-Islām*, the condition is automatically void, and there is no need or obligation to fulfill that particular condition.¹⁰⁴ In case the representative of the other party brings up the ransom of prisoners and imposes a condition upon the Muslims to which they cannot agree, they should not accept this condition. Shaybānī says that this is because the *ahl al-ḥarb* torture their Muslim prisoners, and there is no point in returning them to that *dār* once their release has been secured. Since they cannot accept this condition, or still less honor it, it is prohibited to give promise of fulfillment. In the event that the negotiations fail, this is not a violation of any contract. It is more important to keep Muslim prisoners safe in *dār al-Islām*, even if this might cause or lead to further dispute.¹⁰⁵

The majority of scholars are in agreement with the termination of a treaty in the event that one of the conditions is defective or is no longer applicable.¹⁰⁶ If the treaty was concluded on the condition of paying money to enemies, this is not permissible except in cases of dire necessity, for example, fear of threat or attack which might lead to the killing of Muslims; therefore, paying money in that specific instance in order to survive is permissible.¹⁰⁷ This opinion constitutes a consensus among most scholars. They countenance the conclusion of a truce that calls for paying

Fiqhīyyah, 163; Al-Shāfi'ī, *Al-Umm*, vol. 4, pp. 110-111; Al-Nawāwī, *Rawḍat al-Ṭālibīn*, vol. 10, pp. 334-335; Ibn Jamā'ah, *Taḥrīr al-Aḥkām*, p. 233; Al-Mardāwī, *Al-Insāf*, vol. 4, pp. 213-214; Ibn Taymiyyah, *Al-Muḥarrar fī al-Fiqh*, vol. 2, p. 182; Ibn Muflīh, *Al-Mubdi'*, vol. 3, p. 400; Ibn Murtaḍā, *Al-Baḥr al-Zakḥkhār al-Jāmi' li-'Ulāmā al-Amsār*, 6, p. 448; Ṭabarī, *Ikhtilāf al-Fuqahā'*, pp. 18-19; Ibn Ḥajar, *Fath al-Bārī*, 6, p. 276; Qalqashandī, *Subḥ al-A'shā'*, vol. 14, pp. 7-8.

¹⁰⁴ *Al-Fatāwā al-Hindiyyah*, vol. 2, p. 197; Abū Yūsuf, *Kharāj*, 224; Khawārizmī, *Mufīd al-'Ulūm wa Mubīd al-Humūm*, p. 344.

¹⁰⁵ Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, vol. 5, pp. 1788, 1813-1814, vol. 4, pp. 1594-1595; and idem, *al-Mabsūṭ*, 10, p. 88; *Al-Fatāwā al-Hindiyyah*, vol. 2, p. 197; Ibn Nujaym, *al-Baḥr al-Rā'iq*, vol. 5, p. 86.

¹⁰⁶ Khāll, *'Iqd al-Jawāhir al-Thamīnah*, vol. 1, p. 497; *Al-Sharḥ al-Kabīr*, with *Hāshiyat al-Dasūqī*, vol. 2, p. 206; Al-Ghazālī, *Al-Wajīz*, vol. 2, p. 203; Al-Nawāwī, *Rawḍat al-Ṭālibīn*, vol. 10, pp. 334-335; Ibn Qudāmah, *Al-Mughnī*, vol. 10, pp. 517-519; and idem, *Al-Sharḥ al-Kabīr*, vol. 10, pp. 568-569; Ibn Muflīh, *Al-Mubdi'*, vol. 3, pp. 400-401.

¹⁰⁷ *Al-Fatāwā al-Hindiyyah*, 2, p. 196; Ibn Humām, *Fath al-Qadīr*, 4, p. 296; *Hāshiyat Ibn 'Abidīn*, vol. 4, p. 133; Al-Zaylā'ī, *Tabyīn al-Ḥaqā'iq*, 3, p. 246; Dāmād Afandī, *Majm' al-Anhur*, 1, p. 637; Mawṣilī, *al-Ikhtiyār li-Ta'līl al-Mukhtar*, vol. 4, p. 191; Ṭabarī, *Ikhtilāf al-Fuqahā'*, 19.

money to ensure their safety and survival only under the most severe circumstances.¹⁰⁸ Ḥasan Ibn Ziyād, a Ḥanafī jurist, does not agree with the policy of agreeing to a temporary truce with non-Muslims that stipulates giving the latter money every year, because this amounts to a form of *jizyah*. Therefore, they should neither accept this condition nor conclude a temporary truce (*muwāda‘ah*) in these circumstances.¹⁰⁹

On the other hand, should the non-Muslims suggest a condition stipulating that money be paid to Muslims, it is permissible to conclude the treaty. The amount of money that is to be paid by the non-Muslims under the treaty is subject to the same rules as *kharāj* and *jizyah*.¹¹⁰ According to the majority of scholars, it is permissible to conclude a treaty with non-Muslims by accepting an amount of money every year from them.¹¹¹

Conclusion

This article began by examining the theoretical bases for treaties in Islamic law. Although many classical jurists consider the normal relationship between Muslim and non-Muslim communities to be one of natural hostility, others insist that it is not inconsistent with Islam’s ultimate objective that a peace treaty be concluded with the enemy,

¹⁰⁸ *Al-Karshī ‘ala’ Khafil*, vol. 2, p. 449; Ibn Rushd, *Bidāyat al-Mujtahid*, 1, p. 388; and idem, *al-Bayan wa al-Taḥṣīl*, vol. 3, p. 80; Wansharīsī, *al-Mi‘yār al-Mu‘rib*, 2, pp. 210-211; Ibn Shāsh, *‘Iqd al-Jawāhir al-Thamīnah*, vol. 1, p. 497; Al-Shāfi‘ī, *al-Umm*, vol. 4, pp. 110-111; *Al-‘Azīz Sharḥ al-Wajīz*, vol. 13, pp. 555-556; Al-Nawāwī, *Rawḍat al-Ṭālibīn*, vol. 10, p. 335; and idem, *al-Muhadhdhab with Takmilat al-Majmū‘*, 18, p. 223; Al-Suyūṭī, *Al-Ashbāh wa al-Nazā‘ir*, p. 491; Ibn Jamā‘ah, *Taḥrīr al-Aḥkām fī Tadbīr Ahl al-Islām*, p. 233; Ibn Qudāmah, *Al-Mughnī*, 10, p. 511; Ibn Taymiyyah, *Al-Muḥarrar fī al-Fiqh*, 2, p. 182; Al-Mardāwī, *Al-Inṣāf*, vol. 4, p. 211; Al-Bahūtī, *Kashshāf al-Qinā‘*, vol. 3, p. 104; Ibn Murtaḍā, *Al-Baḥr al-Zakḥkhār al-Jāmi’ li Madhāhib ‘Ulamā’ al-Amṣār*, vol. 6, p. 447; Ṭabarī, *Ikhtilāf al-Fuqahā’*, pp. 171-172; Ibn ‘Arabī, *Aḥkām al-Qur‘ān*, 2, p. 876; Ibn Ḥazm, *Marātib al-Ijmā‘*, p. 122; Ibn Ḥajar, *Fath al-Bārī*, 6, p. 276.

¹⁰⁹ Ṭabarī, *Ikhtilāf al-Fuqahā’*, pp. 19-20; ‘Abd al-Sattār Ḥāmid, *Al-Ḥasan Ibn Ziyād wa Fiqhih*, pp. 624-626; the Mālikī jurist al-Māzirī adopts a similar opinion, *Badā‘i’ al-Sulūk*, 2, p. 577.

¹¹⁰ Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, vol. 5, pp. 1690-1691; and idem, *Mabsūṭ*, vol. 10, p. 87; Ibn Humām, *Fath al-Qadīr*, vol. 4, p. 295.

¹¹¹ Ibn Ḥazm, *Marātib al-Ijmā‘*, p. 122; Ṭabarī, *Ikhtilāf al-Fuqahā’*, pp. 20-21; Al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, 51; *Nihāyat al-Muḥtāj*, 8, p. 108; Ibn Shāsh, *‘Iqd al-Jawāhir al-Thamīnah*, vol. 1, p. 497; Al-Nawāwī, *al-Muhadhdhab with Takmilat al-Majmū‘*, vol. 18, pp. 222-223; As‘ad bin Muḥammad bin Ḥasan al-Naysābūrī Karābīsī, *Furuq* (Kuwait: Wizārat al-Shu‘ūn al-Islāmiyyah, 1981), vol. 1, p. 334.

whether for purposes of expediency or because Muslims have suffered a setback. According to Islamic teachings, making treaties with non-Muslims is permitted by Divine legislation.¹¹² Explicit Qur'ānic verses enjoin Muslims to seek accords with non-Muslims in order to eliminate conflicts. They oblige Muslims to respect the letter and the spirit of treaties once concluded, even when it may seem expedient not to do so. The Qur'ān thus views the written agreement as a religious duty and not just as an act of political necessity (Q. 16:7,91; 17:34; 9:4; 8:72).¹¹³

Traditionally, the Muslims' duty to implement treaties, external or internal, was derived from the Qur'ānic verses as well as Prophetic words and deeds. Islamic legal theory in this area also drew on precedents. For this reason, a principle focus of our study is the written treaties concluded by the Prophet and the four Rightly Guided caliphs (*Rāshidūn*). These agreements became models for other treaties in later Islamic practice. Classical Muslim jurists collected these treaties, which can be found embedded both in general works on the points of law (*fiqh*/jurisprudence) and in particular works devoted to the conduct of the Islamic state (*siyar*). Certain jurists, however, showed a particular interest in the study of diplomacy and international law, and wrote on it under a variety of subject headings. Their comments on these treaties, particularly the treaty of Ḥudaibiyyah (concluded in 6AH/628AD) and the agreements reached by the four Rightly Guided Caliphs in their dealings with sovereign non-Muslim communities, contributed generally to the development of Islamic international law (*siyar*).

¹¹²Khadduri, *War and Peace in the Law of Islam* (Baltimore: Johns Hopkins University Press, 1955), p. 202; Abū Yūsuf, *Kitāb al-Kharāj* (Al-Madinah: Al-Maṭab'ah al-Salafiyyah, 1972), p. 207; Al-Ṭabarī, *Kitāb al-Jihād*, (ed.) J. Schacht (Leiden: E. J. Brill, 1933), pp. 14-15; Hanse Kruse, "Al-Shaybani on International Instruments," in *Journal of the Pakistan Historical Society* (1953), vol. 1, pp. 90-100.

¹¹³Ponder upon the Qurān, 16: 91-92, "Fulfill the Covenant of Allah when you have made a covenant, and do not break oaths after making them... be not like her who unravels her yarn, disintegrating it into pieces after she has spun it strongly".