In Diplomatic Banquet of Treaty: Islamic Sharī‘ah and International Laws Share the Attires of *Pacta Sunt Servanda*

Hamzah Adesola Dawood

Abstract

The importance of treaties in international relations cannot be overemphasized especially now that the contemporary world has radically changed to a global village'. It has been observed as far back as 1960s that "modern international law can hold the allegiance of the world at large only by establishing its claim to continuing acceptance as a synthesis of the legal thought of widely varying tradition and culture."[1]including Islamic law. Hugo Grotius drew most of his ideas of modern international law from the Bible and from the St. Augustine's just war theory. It is not surprising, therefore, that treaties under modern international law are based on good faith. "The ideal of law in Islam is based on good faith. . . ."[2] This is an indication that Islamic law and modern international law must have come from the same source. Treaties, therefore provide a veritable opportunity to attempt a harmony and a communality between the two legal regimes with a view to achieve, despite the complexity and diversity of human society, a common universal understanding that ensures peace and cooperation across the globe. This article aims at achieving that objective.

Hamzah Adesola Dawood teaches the Law of Banking and Insurance in the Department of Business Law, University of Ilorin, Nigeria. He is presently obtaining a PhD in International and Islamic Laws in the School of Oriental and African Studies, University of London. He has written a series of articles for the University of Ilorin journal.

Introduction

Under modern international law, treaties have the same role as contracts between parties. For example, treaties can be in the form of an extradition treaty or defense pact. Treaties can also lead to the creation of legislation. In this way, treaties regulate a particular aspect of international relations, or form the constitutions of international organizations. Guiding principles of treaties are built within the legal framework of the proposition that treaties are binding upon the parties to them and must be performed in good faith. This principle is expressed in the maxim *pacta sunt servanda* (agreements must be kept). It underscores the mutual trust that exists between states in every international agreement – and in the absence of which there is no justification for countries to enter into obligations with each other. It has been argued that it is the oldest principle of international law which was reaffirmed in Article 26 of the Vienna Convention on the Law of Treaty of 1969.[3] Whether or not all treaties can be regarded as sources of law, they certainly create obligations for the parties that enter into them. Thus, Article 38(1)(a) of the United Nations Charter uses the term *international convention* to make treaties bound by a contractual obligation. It should be noted, however, that the provisions under the above article acknowledge the possibility of a state expressly accepting the obligations of a treaty to which it is not formally a party. It should be noted, further, that for a treaty-based rule to be a source of law, rather than simply a source of obligation, it must either be capable of affecting nonparties or have consequences for parties more extensive than those specifically imposed by treaty itself.

The Qur'ān, the first primary source of law in Islam, contains abundant references affirming what is now known as the principle of *pacta sunt servanda*. This lends credence to the contention that the principle is not foreign to Islamic law and it is also not repugnant to its rules, especially when it comes to a relationship between Muslims and non-Muslims in domestic and international affairs. Muslim jurists and theologians consider the principle to be a basic religious duty.[4] And, that explains why it is further maintained that is the duty of "faithful and forthright fulfillment of pacts and covenants dominates Muslim international law."[5]

If it can be established that the principle of *pacta sunt servanda* forms the core value of both the Islamic law and modern international law, it follows that the two systems of law must share a similar origin. Therefore, the two legal systems can be said to be partners in promoting friendship and mutual cooperation among nations that form the entity called the international community.

Principles of Treaty under Modern International Law

Under modern international law, a treaty is operating within the spheres of international law, is written, and is an agreement between nation-states or between states and international organizations,.[6] The states that are parties to a treaty bind themselves legally to act in a particular way or to set up particular relations between themselves. The word *treaty* is a generic term to describe all kinds of agreement between states. Thus, it is known by a variety of differing names – ranging, inter alia, from conventions, international agreements, pacts, general acts, charters, to statutes, declarations and covenants,[7] communiqués, protocols, declarations, concordats, exchanges of notes, agreed minute, memorandum of agreements, and modi vivendi. It is however, defined by the Vienna Convention as "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[8] Treaties may be multilateral or bilateral. Multilateral treaties bind many states, while bilateral treaties bind only two states.[9] They are divided into three broad categories – namely, contractual, legislative, and constitutional treaties.

In a contractual treaty, two or more states contract with each other to establish a particular legal relationship in matters such as trade, extradition, air and landing rights, and mutual defense.[10] Legislative or law-making treaties are those in which a number of treaties have been entered into between the states which codify existing rules of customary international law or which create new rules of law.[11] They are not biding upon non-signatory states.[12] The charter of the United Nations is a good example of a constitutional treaty. International organizations are usually created by multilateral treaties that serve as the organizations' constitutions.[13]

As a general rule, parties that did not sign and ratify a particular treaty are not bound by the terms of such a treaty. A treaty binds only parties to it who have signed and ratified it. It does not bind the third party (*pacta tertiis, nec nocent, nec prosunt*). This rule was illustrated in the North Sea Continental Shelf Case.[14] In this case, West Germany had not ratified the relevant convention and was, therefore, under no obligation to heed its terms. Thus, the fundamental principle of treaty law is undoubtedly the proposition that treaties are binding upon the parties to them and must be performed in good faith.[15] This principle is expressed in the maxim *pacta sunt servanda* and is arguably the oldest principle of international law which was reaffirmed in article 26 of the 1969 Convention.[16] It underscores the mutual trust that exists between states in every international agreement and in the absence of which no justification for countries to enter into such obligations with each other.[17]

That treaties now occupy the top position among sources of international law is evidenced by the sheer size of the United Nations Treaty Series.[18] It is also said that the UN Charter, which is arguably the most important source of modern international law, is itself a treaty, whose provisions consider treaties as the main source of international law.[19] For this reason, it is pertinent, on one hand, to discuss some basic principle and also for the purpose of a comparative appraisal on the subject, on other hand.

The International Convention on the Law of Treaties, which came into force in 1980, was earlier signed into law in 1969,[20] while the Convention on Treaties between states and international organizations was signed in 1986. For a treaty to enjoy recognition by an international law, it does not need to follow specific formalities, as long as the treaty communicates an intention to create legal relations between parties involved by virtue of their agreement.[21] In order to answer the question as to whether a particular agreement is intended to create legal relations, all the facts of the surrounding circumstances have to be carefully considered. For example, a registration of the agreement with the United Nations under Article 102 of the UN Charter is one useful indication to that effect. However, as the International Court had pointed out, non-registration does not affect the actual validity of an international agreement nor its binding quality.[22] It should be observed that the International Court of Justice (ICJ) takes into account a mandate agreement as having the character of a treaty; therefore, it is doubtful whether a concession agreement between a private company and a state constitute an international agreement in the sense of a treaty. This appears to be the position of the international court in the case of the Anglo-Iranian Oil Co case.[23] To see the practical functioning of treaties, it is necessary to examine how they are classified under the principle of modern international law.

Treaties had been classified into various forms. Some French writers, for instance, contend that treaties can be classified as either *traites-lois* or *traites–contracts*. *Traits-lois* is a law-making treaty, which prescribes a legal framework or a legal regime for a relationship that is intended to have a universal or a general relevance. It is a law-making treaty that is constantly subjected to review. They are, however, those agreements whereby states elaborate their perception of international law upon any given topic or establish new rules that are to guide them for the future in their international conduct. This kind of treaty constitutes a normative treaty or agreement that prescribes rules of conduct to be followed. Examples of these types of treaties include, the Genocide Convention, and the Antarctica Treaty.

Traites-contracts, on the other hand, are not law-making treaties in themselves since they are between two or a small number of states, and

on a limited subject-matter. As soon as parties to a treaty performed their respective obligations in accordance with the agreed terms contained therein and to a logical conclusion that marks the end of the treaty.

A treaty can also be classified as bilateral or multilateral treaties. Bilateral treaties are those that are concluded between two states, while multilateral treaties are those that concluded by a large number of states. Multilateral treaties usually lay down general rules of conduct to be followed by the parties to them. Examples of multilateral treaties include: the Vienna Convention of Diplomatic Relation, concluded in 1961; The Convention on the Rights of the Child, concluded in 1989 which has 191 parties; the Red Cross (Geneva) Convention which has 190 parties; and the UN Charter which also has 191 State parties.

There is no laid-down rule of symmetry or formalities for the making of a treaty. The question as to how a treaty is formulated, and by who it is endorsed, will depend largely upon the intention and agreement of the states involved. However, in international law, particular principles have been evolved to ensure that the persons representing states indeed have the capacity to conclude the treaty in question.[24] This is necessary because states are not identifiable human persons – and because of this, at the conclusion of a treaty, persons representing states must be duly authorized. Such persons must produce what is termed "full powers" in accordance with Article 7 of the Vienna Convention on Treaty.[25] This is a required condition before persons representing their countries can be accepted as capable of representing their countries.[26] In subsequent paragraph, I will examine other details that guide the creation of treaties. These include: consent and its forms; reservations, amendment and interpretation of terms of treaties; coercion; the doctrine of *jus cogens* (a peremptory norm); and the termination of treaties.

For a treaty to become binding after parties involved might have agreed on its terms, consent is a vital factor. Without the consent, provisions of a treaty will not be binding upon the parties concluding their terms. Parties to the treaty may express their consent to an international agreement by variety of ways. These include – according to Article 11 of the Vienna Convention on Treaty – by signature, the exchange of instruments constituting a treaty, ratification, acceptance, approval, or accession, and by any other means, if so agreed.[27]

Under Article 12, a treaty is deemed to have been given consent by the affixing of signatures of the parties to it, especially where the treaty provides that signature shall have that effect, or where it is otherwise established that the states involved in the negotiation agreed that their signatures should have that effect – or where the intention of the states

to give that effect to the signature appears from the full powers of its representatives, or was expressly stated in the course of negotiation.[28]

Consent by the exchange of an instrument is provided for under Article 13. According to this article, when parties involved agreed that the exchange of instrument would have the effect of consent it would be considered as such.

Consent by approval or ratification dictates that a treaty has to get the approval of competent authorities of the state. This method was adopted to ensure that representatives during the negotiation stage of a treaty did not exceed their powers or instructions with regard to the making of a particular clause or clauses in the agreement. Ratification in this form can either be internal or external.[29] In this method, the delay between signature and ratification allows extra time for the consideration of various terms in the agreement after the negotiation must have been completed.

Consent by accession is a method by which a state becomes a party to a treaty it has not signed – either due to the fact that the treaty provides that signature is restricted to certain states, and it is not such a state, or because a particular time limit for signature has passed.[30] Under the provisions of Article 15, consent by accession is possible when it is provided for in the treaty or when stakeholders agreed or subsequently agreed that consent by accession could occur in the case of the state concerned.[31]

However, when a party, is satisfied with most of the terms of a treaty, but a particular term (or terms) appear(s) to be unacceptable to it, such state may wish to reject or not be bound by such treaty provision(s), while accepting the rest of the terms in the agreement. Article 2 of the convention allows a state to an agreement to have reservations for a particular term (or terms) of a treaty. It provides that a unilateral statement – however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty – purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.

Where parties to a treaty feel that it is desirably necessary, such treaty may be amended or modified by their mutual agreement. Article 40 of the Vienna Convention specifies the procedure to be adopted in amending multilateral treaties, in the absence of contrary provisions in the treaty itself.[32] Notification of the proposed amendment or modification has to be sent to all stakeholders in the agreement, each one of which is entitled to participate in the decision as to action to be taken and in the negotiation and conclusion of any agreement.[33]

Under international law, there are three basic approaches to the interpretation of treaties. They include, the objective approach by emphasizing the words used in the actual text of the agreement; the subjective approach

to interpreting the terms of the treaty by examining the intention of the parties involved; and the adoption of a wider perspective by emphasizing the object and purpose of the treaty as the most important backcloth against which the meaning of any particular treaty provision should be measured.[34] Articles 31 to 33 of the Vienna Convention make provisions for the three techniques of interpretation of treaties. Article 31 lays down the basic rules of interpretation, and it is considered a reflection of customary international law. This point was emphasized by the International Court in the Indonesia/Malaysia Case;[35] the Libya/Chad Case;[36] and Qatar v. Bahrain case.[37]

Article 31(1) states that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms therein in their context and in the light of its object and purpose."[38]

The first duty of an International Court or tribunal when called upon to interpret and apply the provisions of a treaty is to endeavor to make clear their natural and ordinary meaning in the context in which they occur. This particular rule of interpretation was enunciated with approval by the International Court of Justice (ICJ) in the *Competence of the General Assembly for the Admission of a State to the United Nations* case.[39] This principle was also observed and applied by the European Court of Human Rights in the *Lithgow* case. In this case, the court emphasized that the use of the phrase "subject to the conditions of Protocol I of the European Convention in the context of compensation for interference with property rights, could not be interpreted as extending the general principles of international law in this field to establish standards of compensation for the nationalization of property of nationals (as distinct from aliens)."[40] They stated that the word *context* was to be held to include the preamble and annexes of the treaty as well as any agreement or instrument made by the parties in connection with the conclusion of the treaty.[41]

Article 31(1)(c), which provides that any relevant rules of the international law applicable in the relations between the parties, shall be taken into account in interpreting a treaty was applied in *Iran v. United States*.[42] In this case, the point of contention was whether a dual Iran-US national could bring a claim against Iran before the Iran-US Claims Tribunal where the Claims Settlement Agreement, 1981 simply defined a US national as a "natural person who is a citizen of . . . the United States."[43] The tribunal held that jurisdiction existed over claims against Iran by dual Iran-US nationals when the dominant and effective nationality of the claimant at the relevant period was that of the United States In taking this decision, the tribunal took into consideration Article 31(3)(c) of the 1969 Vienna Convention as a tool

in examining the volume of legal rules and literature in the area in interpreting the 1981 agreement and which led the tribunal to arrive at its decision.[44]

Where a treaty is validated in dual or multiple languages as the case with multilateral agreements, if there is a difference of meaning that the normal processes of interpretation cannot resolve, Article 33 of the Convention provides that the meaning that best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.[45] A more restrictive interpretation in such instances was advocated for in some decided cases.[46]

Where consent is obtained by coercion on a representative of the state in a treaty in any form including force or threat directed against that representative, such consent shall have not validated the document of the agreement and to that extent is shall not have any legal consequences. This is the purport of Article 51 of the Convention. Article 52 of the same Convention is blunt by providing that "[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." It must be noted however, that at that historic Vienna Convention, "the issue of the impact on treaties of coercion of a State by the threat of use of force was one that, generally speaking, pitted western nations against the rest of the world. "[47] It must also be noted that the Convention issued a Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, which condemned the exercise of such coercion to procure the formation of a treaty.[48] Whether coercion or force is used to obtain consent will largely depend upon the relevant circumstances. This point was noted by Judge Pa Dilla Nervo of the International Court of Justice in the Fisheries Jurisdiction Case.[49]

If at the time of concluding a treaty, it conflicts with peremptory norm of general international law, such treaty is void to the extent of that conflict. Article 53 of the Convention makes this declaration in its provisions. It further defines what it means by a peremptory norm. According to that article, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted, and which can be modified by a subsequent norm of general international law having the same character. Article 64 of the same Convention further provides that "i]f a new peremptory norm of general international law emerges, any existing treaty which in conflict with that norm becomes void and terminates."[50]

Under Article 64 of the Convention, where a treaty terminates, the parties are released from any obligation to perform the treaty, but

this does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination – provided that the rights, obligations or situations may be maintained thereafter in conformity with the new peremptory norm. Treaties may come to termination point in a number of methods including the following:[51]

1. A treaty may become terminated or suspended in accordance with a specific clause in that treaty, or otherwise at any time by consent of all the stakeholders after due consultation. This is contained in Articles 54 and 57 of the Convention.

2. A treaty may be rendered terminated due to material breach. For instance, if one party violates an important provision in an agreement, it is natural for the other party involved to regard that agreement as terminated by it. Similarly, a treaty may be rendered revocable because one party has acted contrary to what might very well be only a minor provision in the agreement taken as a whole. Certainly, in this circumstance, this would place the parties participating in a treaty in a vulnerable position. It is noted that there is a need for flexibility as well as certainty in such situations.[52]

3. A treaty may become terminated due to supervening impossibility of performance. Article 61 of the Convention makes provision to cover such situations. There could be instances of events such as submergence of an island, or the drying up of a river where the consequence of such events is to render the performance of the treaty impossible.

4. A treaty stands terminated when there is a fundamental change of circumstance since an agreement was concluded. A party to such an agreement may withdraw from or terminate it.[53] This is covered by the doctrine of *rubus sic stantibus*. It is a principle of international law which provides that where there has been a fundamental change of circumstances since an agreement was concluded – a party to that agreement may exercise his right of withdrawal or terminating the agreement. It must be noted however, that there has been radical innovation to the doctrine. For instance, the International Court of Justice in the *Fisheries Jurisdiction case*[54] admitted the existence of the doctrine, but severely restricted its scope.

Historical Background and Principle of Treaty in Islamic Law

Arab society before Islam was mostly nomadic – consisting for the most part of scattered tribes bound by no central authority.[55] Conditions in the remote parts and places of the country had remained primitive. Mostly the people were idol worshippers; Judaism, Christianity and some other religions also had followers. It must be noted however, that some parts of Arabia had attained quite a high degree of culture mostly due to the influence of the neighboring countries.[56] Thus, the culture of treaties was known among the Arabs before Islam. But the advent of Islam brought into this culture civilized and international dimensions.

Islam came and offered a worldview of history where man worships one God – maintaining the image of history as one great process limited in time and cultivating the great vision that belief in one God requires a World State based on the brotherhood of man.[57] The first cultural movement in Islam was . . . rightly the movement of literacy.[58] The advent of the faith that led to contacts with various tribes and cultures dictated designing a mechanism of maintaining relations with such cultures through a variety of methods that were in vogue – including the culture of writing and entering into treaties, covenants, and pacts with neighboring countries and nations.

The doctrine of *pacta sunt servanda* is clearly expressed and reflected in a number of verses of the Qur'ān, which is the primary source of law in Islam. This is an indication that the principle is not alien to Islamic law especially when it comes to the relationship between Muslims and non-Muslims at both local and international levels. Perhaps, that explains why Muslim theologians consider the principle to be a basic religious duty.[59] The duty of "faithful and forthright fulfillment of pacts and covenants" it is said, "dominates Muslim international law."[60] The Qur'ān lays down the principles of *pacta sunt servanda*,[61] and "the Islamic State . . . has no right to repudiate or amend its obligations unilaterally as long as the other party is fulfilling its obligations. . . ."[62] "The legitimate authority of treaties over an Islamic state is . . . sanctioned by the Sharī'ah."[63] The duty to fulfill treaty obligations is said to emanate from both the Qur'ān itself and from the actual practice of the Prophet (ṢAAS), as was demonstrated notably in the historical Treaty of Hudaybiyah.[64] In the course of its development, Islamic jurisprudence has evolved guiding principles and rules of treaties. Attempt will be made to examine those principles. In the meantime, it is necessary to consider the proof of treaty from the primary sources of Islamic law, namely, the Qur'ān and Sunnah.

Muslim jurists defined the relationship of the Islamic state with other powers by dividing the world into two groups of territories – those territories under Islamic rule (*Dar al-Islam*) and those "not-yet" under Islamic rule and such not fully recognized by the Muslim state.[65] The temporary status of the non-Muslim territories (*Dar al-Harb*) would be ended – either when they joined *Dar al-Islam* voluntarily or as a result of conquest, or when they submitted to certain financial obligations *(jizya*) offered as a consideration for their protection – until then, the non-Muslim territories were considered to be in a state of war, active or in suspense, with *Dar al-Islam*.[66]

Under normal circumstances when war was over, a third classification was formed to contain the territories which had treaty relations with *Dar al-Islam*. This classification was called the territories of covenant or of peace (*Dar al-Ahd* or *al-Sulh*).[67] The relationship between the Muslim state and this latter classification was governed exclusively by the terms of the treaties involved.[68] Thus, treaties are governed by the rules of Qur'ān, the Sunnah and other usages of Islamic jurisprudence.

It is well established under the Islamic law that when it comes to the choice of the source in legislation, priority is given to the Qur'ān – which, of course, is the first primary source. Authority found therein should, as a matter of priority, be followed in legislating on such a matter.[69] Where the Qur'ān is silent over such matter, recourse has to be taken to the Sunnah, which is the second primary source of law. If rules are found therein, they will be followed and legislation would be based on these rules.[70] Fortunately, as well as the usages of Islamic jurisprudence, treaty as an important source of Islamic International law has been found to have root in the Qur'ān and Sunnah (the practice of the Prophet). A number of Qur'ān verses have been quoted to support the legality of treaty. They include the following:

> For, had God so willed, He could surely have made you all one single community.[71]

It means that the freedom of choice of belief, conscience, and ideology is a birthright of humankind, and this freedom was expected to automatically lead to the formation of independent nations across the globe. Contrary to what some critics perceive of Islamic nation as a launchpad for a movement to bring the entire world under the rule of the Sharī'ah; however, here the Qur'ān points to the contrary. This particular reference conforms to another one which says that:

> There is no compulsion in the matter of religion. Verily, the Right Path has become distinct from the wrong path.[72]

The combined effect of these two references is that if nations of the world have freedom to live their life in accordance with their convictions and chosen

beliefs and ideologies, then, there will be need for them to come together if they would attain peace and mutual coexistence by concluding treaties and pacts.

Therefore, emphasizing what modern International law jurists refer to as the principle of *pacta sunt servanda*, the Qur'ān succinctly instructs the Muslims thus: "O you who believe! Fulfill (your) obligations."[73] It means that as soon as Muslims enter into a treaty, pact, or agreement with other nations of the world, it is incumbent on them to abide by the terms of such treaty, pact or agreement – *pacta sunt servanda.*

The Qur'ān appears not to draw a distinction between the individual or the group or compromise in the observance and adherence to the principle of *pacta sunt servanda* (good faith) in treaty and agreement. It provides: "And be true to every promise – for, verily, [on Judgment Day] you will be called to account for every promise which you have made!"[74] The reference here is to the fulfillment of every covenant and treaty between nations and individuals.

As a constant reminder of keeping to the principle of good faith in treaties and agreements, the Qur'ān, in its opening statement of another chapter declares: "O you who have attained to faith! Be true to your covenants!"[75] The practicality of keeping to terms of treaties, covenants, pacts and agreements are demonstrated in a number of verses of a chapter of the Qur'ān when it was declared in the following terms:

> Disavowal by God and His Apostle [is herewith announced] unto those who ascribe divinity to aught beside God, [and] with whom you [O believers] have made a covenant (Qur'ān: 9:1).

The Muslims scrupulously observed their part of treaties with Makkan pagans, but they violated their own part again and again when it suited them. Consequently, the Muslim denounced the treaties with four months' notice while those who faithfully observed their pledges were allowed to continue their alliance.[76]

Another example is the instance mentioned in Qur'ān 2:229, which ordinarily related to the marriage relationship between husband and wife that was going to end up in divorce.

> A divorce may be [revoked] twice, whereupon the marriage must either be resumed in fairness or dissolved in a goodly manner.
>
> And it is not lawful for you to take back anything of what you have ever given to your wives unless both [partners] have cause to fear that they may not be able to keep within the bounds set by God: hence, if you have cause to fear that the two may not be able to keep within the

> bounds set by God, there shall be no sin upon either of them for what the wife may give up [to her husband] in order to free herself.

More than that, however, is about a treaty between citizens of two different nationalities. The historical background of this reference will make the point clear:

> According to a narration by Ibn Abbas, "the wife of Thabit bin Quiz came to the Prophet and said; "O Allah's Messenger! I do not blame Thabit for defects in his character or his religion, but I, being a Muslim, dislike behaving in an un-Islamic manner (if I remain with him)." On that Allah's Messenger said (to her), "Will you give back the garden which your husband has given (as *mahr* – that is, bride price)? She said, "Yes." Then the Prophet said to Thabit, "O Thabit! Accept your garden, and divorce her once."[77]

The hadith indicates that the husband and wife belonged to two different religions. The wife was a Muslim, while the husband was not. While marrying the lady, the husband gave her a garden as bride price. The wife later discovered a mutual incompatibility between them. She then sought for a divorce. Since marriage in Islam is considered a contract and a religious obligation, she asked the Prophet if it was acceptable for her to give back the garden that her ex-husband gave her –in keeping with the principle that regulates the conclusion of treaty and pact in Islam.

It is interesting to note that the cardinal point being emphasized in all the above Qur'ānic quotations and the hadith is the principle of good faith (*pacta sunt servanda*) while concluding a treaty, pact, covenant or agreement with non-Muslims.

It must also be noted that when Muslims entered into treaties with non-Muslims, it was equivalent to two different nations coming together to strike a balance in matters relating to matters of political or economic or military or security and peace – irrespective of the geographical affiliation all parties. In other words, the other parties might be a tribe within the territory of Islam or a neighboring state or country adjacent to the Muslim community at that time. This particular scenario goes to confirm that the definition of a foreign country at that time was far different from the definition recognized under the modern international law – where the diplomatic arrangement is more sophisticated and advanced than the ancient times, especially after the Western colonial territorial expeditions.

We will now look at relevant texts and events in the Sunnah (tradition) of the Prophet Muḥammad. Sunnah in Islamic legal parlance, is used as an adjunct to Prophet Muḥammad in linguistic or technical senses. It means what emanates from the Prophet in words, action, and what-

ever he has tacitly approved.[78] Historical records revealed that Prophet Muḥammad concluded a number of treaties, agreements, and pacts with different tribes, clans, and nations – including Jews and the Quraysh. Those important legal documents were carefully recorded and preserved – and interestingly, most of these documents had remained in their original forms. The Prophet Muḥammad is said to be the first man to give the world a written constitution in the shape of the Treaty of Madina.[79] He also concluded treaties with a number of tribes and clans in the Arabian peninsula and beyond. The treaties, agreements and pacts that were entered into were aimed at not only to safeguarding the Muslims from troubles and disputes, but were also in the interest of establishing an atmosphere of universal peace and tranquility – in which everybody is given complete freedom of thought, expression, and making independent decisions.[80]

The Treaty of Madina could be said to be in form of modern multilateral treaty.[81] It shows that rules of the Islamic international law – in the sense of the conduct of the state in war as well as in peace and neutrality – have existed from the lifetime of Prophet Muḥammad.[82] But their systematization into a science is not easy to determine.[83]

We have an example of a treaty prepared by Prophet Muḥammad himself as the head of the state and the government of the city-state of Madina. In the thirteenth year of his mission – when the Muslims were persecuted and their life was in serious danger by machination of the powerful Makkan Quraysh – he and his followers migrated to Madina, then called "Yathrib." The decision to relocate to Madina was actually informed by two reasons. First, by the perennial persecution of the Makkans against the nascent nation of Islam – and second, due to political turmoil and division that existed among various tribes and groups in the city of Yathrib – the citizens there were in dire need of a leader to unite them because he was not only neutral, but also politically and administratively capable of managing their affairs in a judicious manner.

He was thus invited by the consensus of the leadership of various tribes of this city who promised to recognize his leadership and to support his mission. Besides the two tribes of Ansar – known as the 'Aus' and the 'Khazraj' – there were the three Jewish tribes of the Banu Qainuqa', the Banu Nazeer, and the Banu Quraiza living in the then city of Yathrib.[84] The Banu Quraiza always sided with the 'Aus' in fights, and the Banu Nazeer helped the Khazraj. The two tribes of the Ansar always remained at war with each other. The Jews, who used to sell arms to both the tribes, desired that the Ansar should always remain disunited and weak. After the migration, a large number of people from among the Ansar of

Madina accepted Islam. Prophet Muḥammad united them. This development did not go down well with the Jews who started to conspire with the Makkan Quraysh with an intention to incite violence against the Muslims and to organize the invasion of the city of Madina. The Muslims, therefore, felt very insecure.[85] Consequently, the first state policy matter to be handled by Prophet Muḥammad was how to regularize the relationship between various groups that were living in the city – namely, the Muslims comprising the Ansar of Madina and the Muhajirun, the immigrant Muslims from Makkah, and the Jews. He therefore, entered into a treaty with the Ansar and Jews and thus the Treaty of Madina came into existence.[86]

The Treaty contained about fifty-one clauses touching on several subjects of interest to the parties involved. Due to lack of space, the entire clauses cannot be cited in this article. Some salient clauses are:

1. This agreement of Allah's Prophet Muḥammad shall apply to the migrants, Quraysh, the citizens of Yathrib (Madina) who have accepted Islam and all such people who are in agreement with the above bodies and side with them in war.[87]

2. Those who are party to this agreement shall be treated as a body separate from all those who are not a party to this agreement.[88]

3. It is incumbent on all the Muslims to help and extend sympathetic treatment to the Jews who have entered into an agreement with us. Neither an oppression of any type should be perpetrated on them nor should their enemy be helped against them.[89]

4. Neither shall any non-Muslim who is a party to this agreement, provide refuge to the life and property of any Quraysh, nor shall assist any non Muslim against a Muslim.[90]

5. The Jews of the Bani Auf, who are a party to this agreement and are the supporters of the Muslims, shall adhere to their religions and the Muslims to theirs. Except in religious matters, the Muslims and the Jews shall be regarded as belonging to a single party. If anyone from among them commits an outrage or breaks a promise or is guilty of a crime, he shall deserve punishment for his crime.[91]

6. If a third (party) community wages war against the Muslims and Jews (who are parties to this treaty), they will have to fight together. They shall help each other mutually, and there shall be mutual goodwill and faithfulness. The Jews shall bear their expenses of war and the Muslims their expenses.[92]

7. If Yathrib (Madina) is invaded, the Muslims and the Jews both shall put up a joint defense.[93]

8. If anyone of the parties to this treaty has to go out of Madina on account of the exigency of war, they shall be entitled to peace and protection. And whoever stays in Madina shall also be entitled to peace. Neither shall anybody be oppressed, nor shall the breach of this promise be permissible for him. Whoever will respect this agreement with his heart and will abide by it – Allah and His Prophet are his protectors.[94]

9. As could be seen in the above treaty, the status of Madina was, more or less, that of a confederate city-state – whereby each confederate unit was not only considered autonomous but given its rights and freedom, but under a single head of government.

It may be interesting to cite instances in which the Jews, who were not Muslims, were allowed to adjudicate their matters in accordance with their own legal system. This position was actually supported by the corpus of Islamic law – the Qur'ān. Jews retained their judicial autonomy, even when they referred their cases to Prophet Muḥammad at their option. History records that in cases, in which the parties were Jewish, and they appealed to the arbitration of the Prophet, he administered them with their personal law.[95] This is contained in Qur'ān 5:42–48 and 68.

When the Christians of Najran (Yemen) and Ailah ('Aqabah) and the Jews of Khaibar, Maqna, etc., became subjects of the Muslim state, the Prophet Muḥammad conceded to them judicial autonomy where the parties were of the same community.[96] This culture of good faith in respect of terms of treaty, pact, and covenant with other nations was observed by the succeeding leadership of the Muslims – especially during the time of the Orthodox Caliphs, when the culture was even further developed and jealously observed. This is particularly confirmed in some historical records.[97] Another important historical evidence in this regard was provided by a Nestorian priest during the reign of Caliph 'Omar, when it was only fifteen years had passed since the conquest of Syria.[98]

The Prophet was also reported to have concluded the Pact of Banu Dhamra with an Arab tribe of Banu Dhamra.[99]

It is pertinent to bring into focus the historic Treaty of Hudaibiya. It is the most important treaty of the time of Prophet Muḥammad. History has it that the Prophet, having migrated from Makkah due to persistent persecution of the powerful enemies and settled in Madinah, the enemies had not relented and had continued their attacks in various forms – in-

cluding military harassment for a period of six years after the city-state of Madinah had been founded. In the sixth year, the Prophet and his followers decided to go on pilgrimage to Makkah, which was still the stronghold of his inveterate enemies. At this point in time, the embittered Jews had remained in the formidable colony of Khaibar in the north –and the irritated, though much exhausted, Quraysh of Makkah remained in the south. Thus, there was a deliberate step to build a formidable force for a potential attack against Madinah. To that effect, a coalition between the Jews of Khaibar and the Quraysh of Makkah was formed. The Muslims were not sufficiently powerful to undertake expeditions toward the two fronts at the same time – neither were they able to spare a sufficient force to defend the metropolis of Islam when the expedition against either Makkah or Khaibar had left the city.[100] At this time, the Iranians – who had colonized some of the Arabian provinces including Bahrain, Oman, and Yemen – had suffered terrible defeat at the hand of the Byzantines. It was an opportune time for the Arabs to forget their mutually destructive feud and take the advantage of the international situation to free their colonized provinces from the Byzantines. It was hoped that under this prevailing circumstance, the Quraysh would be more easily prepared to come to terms, provided their armor proper was not hurt, and face-saving clauses were inserted.[101] Thus, the Prophet, with a four-hundred-strong force camped at Hundaibiyah, an outskirts of Makkah. The Muslims and Makkans began negotiations described by historians as "protracted"[102] – after which the landmark treaty was concluded. Texts of the treaty are:[103]

This is what was agreed upon between Muḥammad, son of ʻAbdulllah, and Suhayl, son of ʻAmr:

> They both agreed to put down fighting on the part of people for ten years, during which period the people were to enjoy peace and refrain from fighting with each other.
>
> And whoever of the companions of Muḥammad comes to Makkah on Hajj or ʻUmrah (lesser pilgrimage), or in quest of the bounty of God (i.e., commerce) en route to Yemen or Ta'if, such shall be in security regarding his person and property. And whoever come to Madinah, from among the Quraysh en route to Syria or Iraq [variant : Egypt] seeking the bounty of God, such shall be in security regarding his person and property.
>
> And whoever comes to Muḥammad from among the Qurayshis without the permission of his guardian (*mawla*), he (i.e., Prophet Muḥammad) will hand him over to them; and whoever comes to the Quraysh from among those who are with Muḥammad, they will not hand him over to him.

> And that between us is a tied-up breast [i.e., bound to fulfill the terms] and that there shall be no secret help violating neutrality, and no acting unfaithfully.
>
> And that whoever likes to enter the league of Muḥammad and his alliance may enter into it: and whoso likes to enter the league of the Quraysh and their alliance may enter it – And thereupon up sprang the tribe of Khuza'ah and said: We are in league with Muḥammad and his alliance; and upsrang the tribe of Banu Bakr and said: We are in league with Quraysh and their alliance –
>
> And that thou (Muḥammad) shall return from us [Quraysh] in this year and enter not in our midst (i.e., Makkah); and that when it is the coming year, we shall go out from thee and thou shalt enter (Makkah) with thy companions and stay there three nights, with thee being the weapon of the rider; having swords at the side; thou shalt not enter with what is other than them [swords].
>
> And that the animals of sacrifice (brought by thee this time) will be slaughtered where we found them [i.e., in Hudaibiyah], and thou shalt not conduct them to us [in Makkah].
>
> [Probably Seal of Muḥammad and Seal of Suhayl]
>
> Witnesses:
>
> Muslims: Abu Bakr, Umar,, 'Abd ar-Rahman ibn Awf, 'Abdullah ibn Suhayl ibn 'Amr, Sa'd ibn Abi Waqqas, Mahmud ibn Maslama**h,** etc.
>
> Makkans:- Mikraz ibn Hafs, etc;
>
> Scribe and Witness:- 'Aliy ibn Abi Talib."[104]

The treaty was prepared in duplicate, and each party having its own copy. It should be noted that shortly after the agreement was reached, but before the completion of signatures, a persecuted convert, who happened to be the son of the Qurashite plenipotentiary, fled from confinement by his father, and took refuge in the Muslim camp. Upon demand, the Prophet extradited him, and conceded that the treaty should come into force immediately upon agreement without waiting for formal execution.[105] Also, the one-sided extradition proved expensive and inconvenient to the Makkan pagans – and, upon their own request, the Prophet consented to amend the treaty in this respect.[106] Unfortunately, the extension of the limit for the stay of Prophet Muḥammad and his followers in Makkah beyond the stipulated three days was requested, but was not granted by the Quraysh when the Prophet visited Makkah the following year.[107] Also, Prophet Muḥammad added a proviso before affixing his seal. The proviso is to the effect that

"the rights and duties are equal and reciprocal between you and us."[108] Other treaties during the life of Prophet Muhammad include, a Trade Security Pact with Yohannah ibn Ru'ba (John son of Robin) and the Ailah people[109]

A Conceptual Analysis of Islamic Jurisprudence on Treaties

In Islamic law, certain rules are not only general in nature but also have eternal binding force. They are considered *ta'abudi wa ta'abadi* (imperatively, compulsory, and forever).[110] These rules retain their binding characteristics except and until when a person affected by those rules finds himself in *idtirar*, (an extreme stress and unavoidable necessity), then the exceptions to those rules come in. This is the essence of the Qur'ānic text:

> He has forbidden to you only carrion, and blood, and the flesh of swine, and that over which any name other than God's has been invoked; but if one is driven by necessity – neither coveting it nor exceeding his immediate need – no sin shall be upon him: for, behold, God is much-forgiving, a dispenser of grace (2:173).

This rule of exception is abound in the Qur'ān and is expressed in the maxim of Islamic jurisprudence as "*Al-Darurat tabi'u Al-Mahdhurat* (stress renders the forbidden permissible)."[111]

The above general rule (with binding force) is followed by those that have no binding force, yet their execution and implementation is considered praiseworthy. They are known and classified under the Islamic jurisprudence as "*mustahad*."[112] There are a third category of rules that maintains a position between the two. They are optional rules, and to that extent, their performance or omission is left to the discretion of the individuals concerned.

The proof and validity of both the custom and treaty as sources of Islamic international law is considered under the third category in the light of an exception provided by the first category. Treaties concluded under stress or necessity against the injunction of Muslim religious law are binding only so long as the necessity remains.[113] In the subsequent paragraph, I will attempt to discuss: elements of treaties; negotiation and ratification of treaties; amendment, denunciation. and interpretation of treaties; and the effects of treaty.

The combined effect of the Qur'ānic text which provides that: "O you who have attained to faith! Whenever you give or take credit for a stated term, set it down in writing. . . "[114] – and according to the practice of the Prophet, jurists of Islamic international law particularly Shaybani observed that treaty must be in writing.[115] The date of the writing of the treaty and the date on which it comes into force, as well as the duration of the treaty must be clearly stated in the content of the treaty.[116] Apart from the above, the content of the treaty must also in-

clude the solemn promises for the observance and execution of such treaty;[117] the signature (seal in most cases) of the duly authorized person;[118] sanction for execution; and, annexes, supplements, and provisos.

Generally speaking, treaties are negotiated by representatives of a state authority a referred to as "*Al-madub Al-Sultat*." Similarly, the representatives of the authority of an Islamic state provisionally concludes the treaties. Historical records show a letter written by Khalid ibn al-Walid, a notable Companion of the Prophet, in which he requested the Prophet's instructions on a treaty to be concluded while in Yemen.[119] For matters ultra vires, treaties were referred even in the time of Shaibany to the central government.[120] In the absence of the head of government, the provisional agreement is later ratified by competent authorities, and there is possibility of denial of ratification thereby rendering the whole treaty null and void.[121] For instance, it was reported that Prophet Muḥammad had concluded a pact with the proviso that it would be ratified after consulting the principal personalities of the state. It turned to be that they rejected the terms of the pact and the parchment was consequently effaced.[122]

Treaties and pacts are capable of being revised and amended before ratification. The amendment may be in part and has to be by the mutual consent of the stakeholders in the subject matter. As soon as a treaty is amended or revised by mutual consents and parties strike agreement and ratified the terms therein, it becomes law.

It is possible that changes of time render certain conditions of a treaty impracticable, and in view of the changed circumstances, they should be revised. Muslim jurists are of the view that if the Muslim ruler denounced a former treaty, he cannot do so unless he informs the other party, and he cannot act in any way contrary to the treaty until a reasonable time has passed – in which it is expected that the central government of the other party to the treaty has been duly notified.[123]

From the account of classical Muslim writers on International law and the Islamic legal theory, it appears that "the method of interpretation adopted is a textual approach, taking into account not only the preparatory materials but also the factual circumstances within which the common intent of the parties was arrived at."[124] A statement credited to Shaibany confirms this assertion. He expressed great concern which Muslim jurists at the zenith of their empire had for the scrupulous observance of treaties, and how they feared scandal and disrepute.[125] Shaibaniy observed that "there are things which may be taken for granted by the Muslims even without express mention of them, but other nations may not imply that. Such things must be expressly mentioned . . . and we have men-

tioned, the document must be written in a way to bear witness against the contracting parties, and no accusation of perfidy should be possible."[126]

As soon as terms of a treaty are agreed upon, certain consequences arise, depending on the subject matter of the treaty or pact. For instance, if the treaty is on security or peace the following effects are likely to arise:

1. The subject that led to hostilities and the resultant conflict and war between parties involved had become settled in an amicable manner.

2. The rights of belligerency – that is, killing, capturing, plundering, occupying, and other things described before – are brought to an end.

3. The status quo before the conclusion of terms of the treaty will be maintained by the two parties, except in a situation where a contrary agreement is called for.

4. Prisoners of war are either exchanged or released according to a stipulation agreed upon by the two parties. There is no exchange of booty between the parties unless this is expressly provided for in the treaty.

5. As soon as a peace is concluded, the treaties, suspended during the war, those which require no renewal, and treaties dealing with behavior during the war are suspended.[127]

6. Scholars' Debates on Treaties in Islamic and Modern International Laws

As I have shown in the above discussion, there are rules and regulations – as well as a modus operandi guiding the conclusion and application of a treaty in the two legal systems. That does not, however, rule out the possibility of a comparative appraisal with a view to showing the points of agreement and divergence between the two systems. In doing this, I intend to bring into focus the protagonist and antagonist arguments advanced by scholars on this subject. The points of view of both Professor Majid Khaduri of John Hopkins University of Baltimore, Maryland[128] and Christopher A. Ford a scholar of international law at Harvard University in Cambridge, Massachusetts [129] form the core points here. It is interesting to note that any lack of agreement between them is on the principle of *pacta sunt servanda*.

Christopher A. Ford maintains that "the most ambitious claims about the congruence of Islamic and modern international legal doctrines have been made in the area of the sanctity of international treaty law. Under the

Article 38 formula, this sanctity derives from the traditional Western doctrine of *pacta sunt servanda*, requiring that treaty obligation be fulfilled."[130]

Ford's statement in this article has a number of implications. He maintains that the tradition of "good faith" is exclusive to the Western culture. Secondly, other nations (nay, other world traditions and customs) borrowed the culture of good faith from the West, and thirdly, Western civilization preceded other civilizations including the Islamic legal civilization.

Ford's argument lacks historical fact. He could not deny the fact that many communities of the world with which the Western colonialists have had contacted were found to be leading their entire life on the principle of good faith. When the Western world launched their colonial and expansionist agenda and began to monopolize God's own land, it began to systematically overrun the culture of good faith everywhere. People from the West introduced various methods, including divide and rule, which could only establish deliberate acts intended to corrupt the leaders in the invaded territories. Among other methods, they also introduced the "repugnancy test" into their legal systems. One can guess the consequences of their actions in these innocent territories.

If it is established that the principle of *pact sunt servanda* is recognized by all Muslim jurists and theologians as having its religious basis in the light of the Qur'ān and the Sunnah, the two primary sources of law in Islam, then the question is which one preceded the other: Islamic civilization or Western civilization?

Ford concluded his criticism by saying that as a result of uncertainty surrounding the basic principle of *pacta sunt servanda* as propounded by modern Muslim jurists for Islamic law – they have only succeeded in drawing a parallel line between it and modern international law. However, he also contends that Islamic law now wears the garb of secular law, and it is questionable if it could still hold on to its Islamic legitimacy.[131]

Whatever argument Christopher Ford might have advanced against the classical core of Islamic law, the fact remains that this classical core is talking about not only recognized the principle of good faith, but also makes it a religious basis. Also, the same classical core, grants leverage to interpret and reinterpret the law with a view to achieving adaptation to the varying circumstances of the Muslim communities in various geographical locations and generations. Perhaps that explains what he himself referred to as "the foreign relations of Muslim states may have become predominantly secularized."

Professor Majid Khaduri and some other scholars approached the question differently. They maintained that the principle of *pacta sunt servanda* is recognized by all Muslim jurist/ theologians.[132] In fact, the prin-

ciple of *pacta sunt servanda* has a religious basis.[133] The duty to fulfill treaty obligations is said to stem from both the Qur'ān and Sunnah – as evidenced by the historical Treaty of Hudaybiyah.[134] The most widely-cited modern juridical articulation of this point is found in a 1963 arbitration case of *Saudi Arabia v. Arabian-American Oil Company (ARAMCO)*[135]. In this case, the arbitration court of Saudi Arabia declared that:

> Moslem Law does not distinguish between a treaty, a contract of public or administrative law and a contract of a commercial law. All these types are viewed by Moslem jurists as agreements or pacts which must be observed, since God is a witness to any contract entered into by individuals or by collectivities; under Moslem law, any valid contract is obligatory, in accordance with the principles of Islam and the Law of God, as expressed in the Koran: "Be faithful to your pledge to God when you enter into a pact."[136]

It was held further in this arbitration case that the Saudi monarch's discretion in the concluding contract by treaty in this case was not contrary to the rules of the Sharī'ah . . . [because] it is in conformity with two fundamental principles of the whole Moslem system of law, i.e., the principle of liberty to contract within the limits of Divine Law, and the principle of respect for contract.[137]

Pacta Sunt Servanda: A Conceptual Overview and Comparative Appraisal

Pacta sunt servanda is used primarily in reference to the fulfillment of the terms of an agreement between two parties in good faith. The nonfulfillment of respective obligations is a breach of the pact. Of course, the general principle of correct behavior in Islamic law and modern international law, including the assumption of *good faith* – is a requirement for the efficacy of the whole system, and this allows that, after the eventual disorder, some systems will respond without a direct penalty incurred by any of the parties. The 1969 Vienna Convention on this principle, which is to a very large extent the codification of the preexisting general law on the subject expresses the principle in Article 26, under the heading "*Pacta sunt servanda*": "Every treaty is binding upon the parties to it and must be performed by them in good faith."[138] That explains why it has been argued that a treaty is better understood as a source of obligation, and that the only rule of law in the matter is the basic principle that treaties must be observed.[139] The same argument goes under Islamic rules on the principles of treaties.

It is necessary at this juncture to briefly appraise some points of comparison of the doctrine under the two legal regimes. In doing this, the following points should be noted:

1a. With reference to international agreements, every treaty in force is binding upon the parties to it and must be performed by them in good faith. *Pacta sunt servanda* is based on good faith. This entitles states to require that obligations be respected and to rely upon the obligations being respected. This good faith basis of treaties implies that a party to the treaty cannot invoke provisions of its municipal (domestic) law as justification for a failure to perform. In other words it is based on the sanctity of agreement or contract.

1b.With reference to Islamic law, good faith principle is based on religious belief and dictates. In other words, the parties are expected to observe the right of the other party on one hand and the dictate of the "Divine imperative" on the other hand. To that extent, it is not only a secular matter, but also, an act of religious devotion

2a. Under modern international law, the only limit to the *pacta sunt servanda* is the peremptory norms of general international law, called *jus cogens* (compelling law). The legal principle *clausula rebus sic stantibus*, part of customary international law, also allows for treaty obligations to be unfulfilled due to a compelling change in circumstances.

2b. Under Islamic law, certain rules are not only general in nature but also have eternal binding force. They are considered imperative – compulsory with everlasting characteristics. These rules retain their binding features except and until when a party affected by those rules finds itself in an extreme stress and unavoidable necessity, then the exceptions to those rules come in.

3a. The principle was established under international law with a view to protect the interests of parties involved.

3b. Under Islamic law, it is not only to protect the interests of parties involved, but also to reenact obeisance to God.

4a. Under international law, the principle as enunciated in all the varieties of treaties, contract, legislation, and constitution is applicable essentially to states or sovereign nations.

5a. Under Islamic law, the application is general to both humans and legal personalities, including, sovereign states.

Conclusion

The principle of *pacta sunt servanda* forms the core value of both the Islamic and conventional international law. It is only when this principle is well recognized and upheld that all other rules and regulations provided for under each system to guide the formation and the conclusion of a treaty are successful.

Notes

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5. Saba Habachy, "Property, Right, and Contract in Muslim Law," *Columbia Law Review* 62 (1962): 450–61.
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7. Malcom N. Shaw, *International Law*, 5th ed (New York: Cambridge University Press, 2005), 88.
8. Article 2(1)(a)
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15. Shaw, *International Law*, 5th ed., 811.
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20. Shaw, *International Law*, 5th ed., 810.
21. Ibid. See also Third US Restatement of Foreign Relations Law, Washington, 1987, vol. I, p. 149.
22. Qatar v. Bahrain, International Court of Justice Annual Report, 1994, 319, 330; 37 ILR, pp. 183, 196.

23. International Court of Justice Annual Report, 1952, 93; 112; 19 ILR, 507, 517.
24. Shaw, *International Law*, 5th ed., 815.
25. Ibid.
26. See Sir Ian Mc Taggart Sinclair, *Vienna Convention*, 29 ff; Shaw, *International Law*, 5th ed., 815
27. Shaw, *International Law*, 5th ed., 817.
28. Ibid.
29. Ibid.
30. Ibid.
31. Ibid.
32. Ibid.
33. Ibid.
34. G. G. Fitzmaurice, *Law and Procedure,* 204–207; Shaw, *International Law*, 5th ed., 839.
35. International Court of Justice Annual Report, 2002, Para. 37.
36. International Court of Justice Annual Report, 1994,6, 21–22.
37. International Court of Justice Annual Report, 1995, 6, 18; 102 ILR, 47, 59.
38. German External Debts Arbitration, 19 ILM, 1980, pp. 1357, 1377. See also Judge Bola Ajibola's Dissenting Opinion in the Libya/Chad case, ICJ Reports, 194, pp. 6, 71; 100 ILR, pp/ 1, 69.
39. International Court of Justice Reports, 1950, 4. 8; 17 ILR, 326, 328, Shaw, *International Law*, 5th ed., 840.
40. Shaw, *International Law*, 5th ed., 840.
41. Article 31 (2); "US Nationals in Morocco Case," *ICJ Reports*, 1952, 176, 196; 19 ILR, 255, 272; the Young Loan Arbitration, 59 ILR, 495, 530.; Shaw, *International Law*, 5th ed., 840.
42. 75 ILR, 175, 188.
43. Article VII(1) (a).
44. Shaw, *International Law*, 5th ed., 840.
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46. Mavromattes Palestine Concession case, PCIJ, Series A, No. 2, p. 19; The Young Loan case, supra.
47. Akin Oyebode, "Treaty-Making and Treaty Implementation in Nigeria" (PhD diss., York University, Canada), 165.
48. Shaw, *International Law*, 5th ed., 849
49. ICJ Reports, 1973, –47; 55 ILR, 183–227.
50. See also Article 71; Shaw, International Law, 5th ed., 850.

51. Ibid.
52. Ibid, 853.
53. Ibid.
54. ICJ Reports, 1973, p. 18; also the Gabcikovo-Nagymaros Project Case, *ICJ Reports*, 1997, 7, 38; 116 ILR, 1. Shaw, *International Law*, 5th ed., 855–56.
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69. A. W. Khallaf, *Ilm Usul Al-Fiqh* (Cairo,Egypt: 1947), 39.
70. Ibid.
71. Qur'ān (16:93).
72. Qur'ān (2:256).
73. Qur'ān (5:1).
74. Qur'ān (17:34).

75. Qur'ān (5:1).
76. A. A. Yusuf *The Holy Qur'ān Text: Translation and Commentary* Amana Corp., (Brentwood, MD, 1983), 438n1246.
77. *Sahih al-Bukhari*, vol. 7, hadith no. 197.
78. A. Hasaba Allah, *Usul Al-Tashri' Al-Islami* (Cairo, Egypt: Dar Al-Ma'arif), 253–54.
79. S. A. Qureshi, *Letters of the Holy Prophet* (Lahore, Pakistan: Siddiq-E-Akbar Academy, 1988), 15.
80. Ibid.
81. Ibid., 34.
82. Hamidullah, *Muslim Conduct of State* (Lahore, Pakistan: M. Ashraf, 1945), 61.
83. Ibid.
84. Qureshi, *Letters of the Holy Prophet*, 16.
85. Ibid.
86. Ibid.
87. Clause 1.
88. Clause 2.
89. Clause 17.
90. Clause 22.
91. Clause 27.
92. Clause 39.
93. Clause 47.
94. Clause 51. Ibn Hisham , vol. 1, 178–79. Ibn Kaseer, , Al-Bidaya Wal- Nihaya, vol. 3, pp. 224–-26 and Al-Wasaiq-ul-Siyasiya, 1-7. as quoted by Qureshi, *Letters of the Holy Prophet*, 34–42.
95. Hamidullah, *Muslim Conduct of State,* 142.
96. Ibid.
97. Dimitri Karalevski, in *Dictionnaire d'Histoire et Gographie Ecclesiastiques, s.v.Antioche*, col, 594; Hamidullah, *Muslim Conduct of State,* 142:

    The most important innovation of the Muslims, which the Jacobites most heartily welcomed, was that each religious community was recognized as an autonomous unit, and spiritual leaders of such communities were accorded temporal and judicial powers in considerable numbers.

98. Yusef Assemani, (n.d.) Bible, Orient, vol. 3, 2, xcvi; De Goeje, *Memoire sur la conquete'de ia Syrie* (2nd ed.) p. 106; Hamidullah, M., ibid at p. 143. "*These Tayites (i.e. Arabs), who God as accorded domination in these days, have also become our masters; but they do*

not combat the Christian religion at all; on the contrary, they protect our faith, respect our priests and saints, and make donations to our Churches and our convents."

99. Qureshi, *Letters of the Holy Prophet*, 44; *Tabaqah Ibn Sa'ad* (New Delhi, India: Kitab Bhaven), vol. 3, 27.
100. Ibid.
101. Ibid.
102. Ibn Hisham, 998.
103. As usual Prophet Muhammad, had "*Bismilla-hir-Rahman-ir-Rohim*," meaning in the "Name of Allah, The Compassionate, The Merciful" written at the top of the agreement – but due to the objection of Sohail, the representative of the Makkan Quraish – "*Bismika Allahuma*" meaning "With Thy Name, O God" was written in its place, according to the custom of Arabia. Qureshi, *Letters of the Holy Prophet*, 46.
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105. Ibn Hisham, 748; Tabariy, (n.d.), History, pp. 1547-48; Ibn Sa'd, ½, 73, Hamdidullah, *Muslim Conduct of State*, 273.
106. Ibn Hisham, 752–53; Hamidullah, *Muslim Conduct of State*, 107, 273.
108. Ibn Sa'd, 2/1, 74; The Prophet wrote at the bottom of the document: "For us and upon you will be like that which will be for you and upon us." Hamidullah, *Muslim Conduct of State*, 274n55.
109. Ibn Hisham, 902; Ibn Sa'd, 2/1, 3: Abu 'Ubid; Hamidullah, *Muslim Conduct of State*, 260.
110. Ibid at p. 32.
111. Sarakhsiy, *Sharh Al-Siyar Al-Kabir*, vol. 4, 279.
112. Hamidullah, *Muslim Conduct of State*, 260.
113. Ibid.
114. Qur'ān 2: 282.
115. Sarakhsiy, *Sharh Al-Siyar Al-Kabir*, vol. 4, 282.
116. Ibid, 62–63.
117. Ibid.
118. Ibid, 63.
119. Ibn Hisham, 259; Tabariy, *History*, 1724–25.
120. Sarakhsiy, *Sharh Al-Siyar Al-Kabir*, vol. 4, 13 – as quoted by Hamidullah, *Muslim Conduct of State*, 267.
121. Ibid.
122. Ibn Hisham, 676; Tabariy, 1474; Sarakhsiy, *Sharh Al-Siyar Al-Kabir*, vol. 4, 5; and Hamidullah, *Muslim Conduct of State*, 268.

123. Sarakhsiy, *Sharh Al-Siyar Al-Kabir*, vol. 4, 7.
124. Oyebode, "Treaty-Making and Treaty Implementation in Nigeria," 161.
125. Hamidullah, *Muslim Conduct of State*, 268.
126. Sarakhsiy, *Sharh Al-Siyar Al-Kabir*, vol. 4, 64.
127. Hamidullah, *Muslim Conduct of State*, 266.
128. M. Khadduri, "Islam and the Modern Law of Nations," *The American Journal of International Law* 50, no. 2 (1956): 359–72.s
129. Christopher A. Ford, "Siyar-ization and Its Discontent: International Law and Islam's Constitutional Crisis," *Texas International Law Journal* 30 (1995): 499–533.
130. Ibid, 518.
131. Ibid, 522.
132. Khaduri, *War and Peace in the Law of Islam*, 204.
133. Wehberg, "Pacta Sunt Servanda," 775.
134. Khaduri, 212–13; Ford, "Siyar-ization and Its Discontent," 519.
135. 27 I.L.R. at 163.
136. 27 I.L.R, 163-64.; see also, Kristan L. Peters Hamlin, "The Impact of Islamic Revivalism on Contract and Usury Law in Iran, Saudi Arabia, and Egypt," *Texas International Law Journal* 22 (1987): 351, 364.
137. "Aramco," *I.L.R* 27, 163.
138. M. D. Evans, *International Law* (Oxford: Oxford University Press, 2003), 122.
139. Ibid.