

that "his (Prophet's) wonderful life was a living illustration and exploration of the Qur'ān, and we can do no greater justice to the Holy Book than by following him who was the means of its revelation"<sup>32</sup> In the light of the above I will now discuss the principle of "*Pacta Sunt Servenda*" as applied, interpreted, and developed by the Prophet through his *Sunnah*.

It is a matter of incontrovertible historical fact that the Prophet, without exception, made the strict adherence to the fulfillment of agreements a condition for establishing external relations. In the Treaty of Hudiabiyah he included a provision which stipulated 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". Similar, if not identical, provisions on faithful application were also incorporated in other treaties the Prophet concluded with the Jews and the polytheists. For example in the "Pact of Madinah" a provision was included to the effect that "no one shall go against this agreement—Allah and Muhammad, the Apostle of Allah, will protect those who observe and guarantee this agreement"<sup>33</sup> These provisions not only constituted the very essence of the treaty-law but also contributed enormously to the development and crystallization of the principle "*pacta sunt servenda*" in Islamic International Law. In Islam this principle is not dependent on any superior norm for its implementation. In fact it is considered the supreme norm which must be read into every treaty.

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all cases the other party to the treaty were either Jews and/or polytheists. It was perhaps these Divine Ordinances that convinced Muhammad to believe that "Islamic Law imposes the respect of covenants and treaties even above the respect for religious solidarity".<sup>30</sup>

From the preceding discussion it is evident that the sanction behind the principle on faithful application of treaties, as part of *siyar*, is not only the same as ordinary Muslim law of the land i.e. *Fiqh*, but is also, in a more pre-eminent degree, the belief in the after-life and judgment by God. This principle enshrined in the Qur'ānic verses lays down the basic norm for the conduct of inter-state relations and establish the religious and moral values that allows no room for the deliberate violation of the treaty obligations.

While the Qur'ān establishes the immutable principles which influence Muslim conscience, establish basic moral values, and govern their strategies for action it is strictly speaking "not a legal code" although "no doubt the Qur'ān does lay down a few general principles and rules of legal nature".<sup>31</sup> These limited number of Qur'ānic verses in fact constitute the corpus and juridical basis for all our laws.

While these limited number of Qur'ānic verses may not cater for every eventuality they nevertheless provide binding guidelines for the Muslims to follow and lay down the foundations on which the edifice of the Islamic Law relating *Siyar* in general, and of treaties in particular, could be constructed. The Prophet, through his *Sunnah* elaborated the concepts as there were many questions of practical importance which were not explicitly dealt with in the Qur'ān. In doing so the Prophet was inspired by God and for this reason value is placed on his saying (*Hadīth*) for the interpretation and elaboration of the Qur'ānic precepts. These are the reasons which may have influenced Asad to conclude, and rightly so,

This Qur'ānic verse evidently shows the sacred character of the treaty in Islam. It is also worth noting that this verse is concluded with the following divine injunction "and Allah see the all that ye do". That is, Allah watches you lest sympathy and kindness towards your brothers make you fight a people with whom you have a treaty of mutual alliance. This injunction establishes a principle of honouring one's obligations which should always remain the ideal objective which all humanity should aspire to realize.

In that fledgling Islamic society the Muslim *Ummah* was a well knit entity. The numerous verses of the Qur'ān and the *Sunnah* of the Prophet provide the basis for relations among the Muslims as individuals, groups and States. These verses and the *Sunnah* clearly emphasize the minimum requirements of just, brotherly and peaceful relations among Muslims. They enjoyed the absence of aggression and violence between them and stressed upon the spirit of mutual help and cooperation in case of need. In the light of the Qur'ānic verses Asad has rightly stated that "when seeking them for help and assistance in time of misfortune a brother need not justify his demand".<sup>29</sup> In view of these clear cut religious injunctions no treaty was necessary to regulate relations between the Muslims. However, as the most immediate need of the time was to maintain peace and tranquillity in the Muslim lands treaties of peace and non-aggression were concluded by the Prophet, not only with the Jewish tribes but also with the polytheists. In the then prevailing circumstances, in which the Muslims *Ummah* found itself beset on all sides by hostile elements, the Qur'ān in numerous verses imposed a religious duty to assist the fellow believers against the enemies of Islam. Even then the only exception to this rule related to cases involving tribes with whom there was a treaty. As no treaty was needed to regulate relations between the Muslims irrespective of their tribal bonds, political boundaries or geographic distances it was, therefore, obvious that in almost

such agreement. Every oath taken, or every covenant made, is a covenant before Allah and should be faithfully observed. In particular every Muslim makes, by the profession of his faith, a covenant with Allah, and he confirms that covenant every time he repeats that profession. He should, therefore, faithfully observe the duties taught to him by Islam. Consequently, any breach of a treaty obligation is an unforgivable sin since it is also a renouncement of an obligation towards Allah.

Every Muslim will have to render account on the day of judgment about the fulfilment of his obligations under a covenant or a Treaty. And those who violate this religious trust and disobey "Allah and His Messenger and transgress His limits, He will make him enter fire, where such will dwell for ever; his will be a shameful doom".<sup>27</sup>

The religious obligations on Muslims to fulfill their undertakings are clear from the Qur'ānic verses. Those who disobey are warned of the "shameful doom". In fact Surah 23 verse 8 (Al Mu'mimin) defines the quality of "the believers" in the following terms:

"And who are shepherds of their pledge and their covenant....."

And again the Qur'ān Ordains:

"O ye who believe fulfill your undertakings"

The sanctity Islam attaches to this principle is further emphasized and its importance further accentuated by the following Qur'ānic verse which ordains:

".....if they seek help from you in the matter of religion then it is your duty to help (them) except against a folk between whom and you there is a treaty. Allah seethe all that ye do".<sup>28</sup>

manner, command people not to abuse treaties and refrain from practicing deception and intrigues. In fact these Qur'ānic injunctions deal with the question of honouring treaties in a very clear and precise manner. As the Qur'ān is believed and admitted by the Muslims to be the direct, revealed word of God its binding nature is also beyond dispute. As such the Qur'ān constitutes the basis of all Islamic laws and shapes the outlook and conscience of all Muslims and forms the foundation of all their beliefs. In this lies the secret of the grandeur of Islam.

A close examination of the Qur'ānic verses cited in the preceding paragraphs would reveal both the religious duty imposed on Muslims as well as the legal principles that would guide their actions. The basic legal principles that can be deduced from them can be summarized as follows:

- Once a treaty is concluded the Muslims should not break their oaths if the other party does not commit a breach of the Treaty provisions;
- Muslims must fulfill their part of the Treaty till the end of the term.
- Actual breach and not merely a fear of any breach of the Treaty provisions can be invoked to terminate the Treaty immediately. However, this principle must not be confused with fear of treachery in which case the treaty can be terminated on giving a reasonable notice to the other party.

Apart from the legal obligations imposed by Islam there are also religious sanctions for violation of treaty obligations. These are :

- Breach of a Treaty obligation is in fact violation of the oath made to God as He becomes a "surety" in every

numerous Qur'ānic verses which enjoins Muslims to fulfill all their obligations, voluntarily undertaken, in letter and spirit. The juridical basis for this principle is traced to the Qur'ānic verses which ordains "O ye who believe! fulfill your undertakings",<sup>22</sup> and "promise should be kept and contracts implemented". These, and several other verses in the Qur'ān elaborate, articulate and concretize this basic concept. They constitute the juridical foundation and authoritative source for not only international relations in general and treaty obligations in particular but for all kinds of undertakings. Some of these Qur'ānic verses, which have already been cited earlier, are reproduced below for ready reference:-

"Fulfill the covenant of Allah when ye have covenanted and break not your oaths after the asseveration of them, and after ye have made Allah surety over you. Lo! Allah knoweth which ye do"<sup>23</sup>

"Keep the covenants. Lo! of the covenants it will be asked".<sup>24</sup>

"Excepting those of the idolaters with whom ye (Muslims) have a Treaty and who have since abated nothing of your right nor have supported anyone against you. (As for these), fulfill their Treaty to them till their term. Lo! Allah loveth those who keep their duty"<sup>25</sup>

"How can there be a treaty with Allah and his Messenger for the idolaters save those with whom ye made a Treaty at the inviolable place of worship? So long as they are true to you, be true to them. Lo! Allah loveth those who keep their duty".<sup>26</sup>

The Islamic legal principles and moral and religious commitments to faithfully adhere to, and carry out the treaty obligations in good faith, are clear from the above quoted Qur'ānic verses. These verses also very clearly, and in a lucid

domestic law principle and must provide legal cover to treaties in case of any conflict with domestic laws.<sup>20</sup>

The customary rule of international law principle of "Pacta Sunt Servenda" has now been codified in the Vienna Convention on the Law of Treaties which provides that:-

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith"<sup>21</sup>

In Islamic Law, on the other hand, the binding nature of the treaties and their faithful application has both a religious and moral sanctions.

Centuries before the adoption of the Vienna Convention on the Law of Treaties 1969 the principle of "Pacta Sunt Servenda" was laid down by the Qur'ān and is inherent in the concept of 'Aqd'. In fact the Arab society even before the advent of Islam, had its moral code. In their relations with others respect for hospitality and for sworn oaths was for them a categorical imperative to be observed in all circumstances. This was further strengthened by the injunctions of the Qur'ān and Sunnah of the Prophet after Islam took roots in Arabia.

The Prophet of Islam is known to have said that "Muslims shall be bound by the conditions which they make". The direction contained in this ḥadīth is of a general nature and relates to all contracts, including treaties, which in Islamic Law are in the nature of a contract. This ḥadīth of the Prophet supports the basic Islamic norm of faithful application of treaty obligations. This fundamental principle manifests the need to ensure orderly behaviour, both between individuals as well as between States, and prevents arbitrary action and chaos, which would result if the treaty obligations were not fulfilled in good faith.

This principle of "good faith fulfillment" of the treaty obligations is not only evident from the *ḥadīth* but there are also

powerful one. It is this aspect of the treaty that shall be discussed next under the rubric of Pacta Sunt Servenda.

### The Rule of 'Pacta Sunt Servenda'

The most fundamental principle in the customary international law of treaties is the doctrine of "Pacta Sunt Servenda".

In every uncodified legal system there are a few basic principles agreed upon by the comity of nations and on which specific legal instrument are difficult to find. They are established by custom. In customary international law treaties have a consensual basis and normal international intercourse would be impossible without mutual confidence. Oppenheim<sup>18</sup> mentions four grounds as to why treaties are binding. They are (1) natural law (2) religious and moral principles, (3) States' self-restraint in becoming parties to treaties and (4) the will of the contracting parties. These elements have been criticized by many as being far removed from the realities of international life as practiced by States.

McNair<sup>19</sup>, perhaps basing his theory on consent of States stated that "no government would decline to accept the principle 'Pacta Sunt Servenda', and the very fact that governments find it necessary to spend so much effort in explaining in particular case that the 'pactum' has ceased to exist, or that the act complained of is not a breach of it, either by reason of implied term or for some other reason, is the best acknowledgment of that principle".

Generally the binding nature of the treaty and its implementation depends on the Law of the Land. In some countries their constitutions contain provisions that treaties must be legislated upon in order to be internally binding. There faithful application, in such cases, is the legislation and not the treaty itself. Most countries follow the supremacy of the



injunctions of the Divine Law it is binding so long as necessity remains;

- Treaty must be based on an element of reciprocity and mutuality and is binding only if the other party or parties to it also faithfully perform their obligations thereunder; and
- If the above two conditions are met its implementation becomes both a legal as well as religious duty as in all such treaties and agreements Allah himself is made a surety and a third party.

The legal status of treaties and their binding nature in Islam, as we have seen, is beyond dispute. That it is an integral part of the *Shari'ah* and, therefore, constitutes the fundamental basis of the whole of the legal system of Islamic jurisprudence, is also clear. Consequently, whoever violates it not only infringes the legal order but also commits a sin as God is the third party to every treaty. In Islam juridical order and religion, - one dealing with positive law and the other with morality, are, in fact two sides of the same coin. While religion and law may be perceived as two distinct orders, they are, in Islam, complementary to each other, being strictly connected through their common end, which is the welfare of man. As the object of treaties is the same, and, as we have seen, also forms an integral part of the *Shari'ah*, its binding nature cannot be disputed.

After having established the legal status of treaties in Islam it becomes incumbent that it must be applied in letter and spirit. This principle is of particular importance because at present there are no effective international sanctions for the treaty-breakers, especially when the offending nation is a

The observation of the Federal Shari'ah Court, apart from the verses of the Qur'ān and the traditions of the Prophet already adverted to further derive its strength from the following verse of the Qur'ān which ordains:-

“Excepting those of the idolaters with whom ye (Muslims) have a Treaty, and who have since abated nothing of your right nor have supported anyone against you: (As for these) fulfill their treaty to them till their term. Lo! Allah loveth those who keep their duty”.<sup>16</sup>

The Qur'ān further states:

Nor sell the covenant of Allah for a miserable price: For with Allah is (a prize) for better for you, if ye only know”.<sup>17</sup>

In the above quoted verses the motive for false and fraudulent covenants has been pointed out with reprobation. It points out that any possible gain that one can make by breaking the covenant, and thus breaking God's law, must necessarily make one miserable, while one's own benefit is far greater in obeying God's will by doing the right thing by faithfully observing the covenant.

In short Islam establishes certain pre-requisites for a Treaty to be binding and if those conditions are faithfully complied with Muslims cannot, on any pretext, shun responsibility. These essential elements may be summarized as follows; namely:-

- Conclusion of a Treaty must be a voluntary act and entered into on the basis of political equality. However, if a Treaty is concluded under duress and is against the

have said that "Muslims are a single hand like a compact wall whose bricks support each other".<sup>13</sup> It is also known that Caliph Abū Bakar, echoing the thought of the Prophet, once said that those who worshipped the same God were "brethren in the faith, partners in the share of booty, allies against the common foe---".<sup>14</sup> It is, therefore, clear that Muslims were under religious duty to assist each other whenever any assistance was required. Nothing was more sacred to them than their faith. If Islam, even at that critical juncture, imposed respect for treaties over and above the respect for religious solidarity it is but evident that an Islamic State cannot repudiate its international obligations in normal circumstances. It is self-evident from the above cited verses of the Qur'ān and the traditions of the Prophet, and the Caliphs who succeeded him, that Islam attaches to Treaties a degree of sanctity never before conferred on it and which may be worth emulating even in present time. The world would be a far more peaceful place to live in if the same status was conferred on the Charter of the United Nations by the community of Nations and applied with the same degree of faith and conviction as laid down in Islam for Treaties. The legal status of treaties has been lucidly explained by the Federal Shari'ah Court of Pakistan when it stated:-

"It is one of the duties of the Muslims that they shall fulfill their covenants and shall never break them. If the covenant be for some period it shall be fulfilled till the period so fixed expires or till the other party breaks it. The sanctity of the covenant is thus guaranteed in Islam. Thus a covenant entered into between nations on the basis of equality must be accorded the sanctity to which covenants are entitled according to the injunctions of Qur'ān and the *Sunnah*"<sup>15</sup>.

“Allah will guarantee the observance of this document”

and later in the same document added that :

“Allah, and Mohammed, the apostle of Allah, will protect those who observe and guarantee this agreement”<sup>11</sup>.

In the Treaty with Dhimmis it was again observed:

“This document is guaranteed by the assurance of Allah, of his apostle, of the caliphs, and of the believers”.

It is clear that the duty imposed on Muslims by God as ordained in the Qur’ān and by the Prophet through his traditions, as evidenced from his treaties referred to in the preceding paragraphs, leave no doubt as to their legally binding nature. Consequently, an Islamic State is under both religious as well as legal obligation to adopt all necessary measures to ensure that the Treaty is implemented in letter and spirit. In fact, under the Islamic system the binding force of a treaty is so strong that in case of a conflict between religious consideration and treaty obligations the obligations under the treaty shall take precedence. This is evident from the following Qur’ānic verse:

“...if they seek help from you in the matter of religion then it is your duty to help (them) except against a folk between whom and you there is a treaty”<sup>12</sup>

At the time of the Prophet religious solidarity among the Muslims was of paramount importance and all Muslims were considered as brothers in faith. Religion was the strongest possible uniting force between them. The Prophet is known to