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

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

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

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


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I. Introduction

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

A. Definition of Treaties (Mu’āhadāt)

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

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

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

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2 All quotations from the Qur’ān used in this article are from the translation of its meaning into the English language entitled The Noble Qur'ān, by Muḥammad Taqī al-Dīn al-Hilālī and Muḥammad Muḥsin Khān (Riyad: Dār al-Salām, 1996).
3 Amān/safe conduct: there are tow kinds of amān: one temporary and the other permanent. Under Islamic Law the amān is given to foreign nationals who enter Dār
who are involved in concluding a covenant (‘ahd). Mu‘āhadah is both the act of conclusion of a contract between parties and the resulting covenant itself. On an international level a mu‘āhadah is a contract between two or more states designed to normalize relations among them.

Shaybāni uses the term mu‘āhadah interchangeably with muwa‘da’ah (truce), ‘ahd (contract or pact), murawadah, hudnah, muṭāraḥah and musālamah (external peace) in his writings, but he writes muwāda’ah and mu‘āhadah more frequently.
than other terms. For Shaybānī, a *muʿāhadah* is a *muwādaʾah* between Muslims and non-Muslims for a fixed period of time. Many Ḥanafi jurists adopt this definition, including the eminent Samarqandī, who defines a *muwādaʾah* as a *sulḥ* (reconciliation) designed to end physical conflict for a fixed time period, involving the payment of tribute or other conditions. Kāsānī agrees with Samarqandī and defines *muwādaʾah* as a *sulḥ* that puts an end to physical conflict for a temporary period. Other Ḥanafi jurists likewise use different expressions for *muʿāhadah*, such as *muwādaʾah* and *muqāḍār*, moreover, jurists sometimes define it as *aʿmān* or *istiʾmān*, and some refer to it by the term *muhāwadah*. Ḥanbali jurists adopt the same definition as the Ḥanafi jurists do, and use terms such as *muhādanah*, *muwādaʾah*, *muʿāhadah*, *musālamah*, *istiʾmān* and *sulḥ* interchangeably.

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

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

The majority of jurists define *mu‘āhadah* as a *muhādānah* (conclusion of a truce). If a peaceful state is reached between the two parties engaged in a battle or dispute under the condition of reconciliation for a period of time to reduce tension and aggression, it is called a *muhādānah*. Mālikī jurists define *mu‘āhadah* as a truce between Muslims and *ḥarbūs* concluded to end physical conflict for a fixed period of time under Islamic law, while Shafi‘i jurists define it as a contract concluded for the sake of ending fighting for a fixed time period with or without compensation. Ḥanbalī jurists define it as an abstention from fighting for a fixed time period with or without compensation.

*Muṣālahah* (the making of peace), refers to the initiative taken by two
parties involved in a dispute to reach a peaceful agreement.\textsuperscript{20} Muqādāt, or taking legal action, is the recourse by which parties seek a ḥukm (verdict) in a disputed case.\textsuperscript{21} Mutārakah, or the suspension of hostilities, is similar in concept to musālahāh (to make peace) or musālamah (to demand a peaceful agreement).\textsuperscript{22}

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

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

\textit{B. The Basis of Muʿāhadāt}

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

\textsuperscript{20}Muṭṭarriż, \textit{al-Mughrāb}, vol. 1, p. 479.
\textsuperscript{21}Abū al-Fadl Jamāl al-Dīn Muhammad bin Mūkarram al-Anṣārī bin Mānẓūr (d. 711AH/1311AD), \textit{Līsān al-ʻArab} (Beirut: Dār Ṣādir, 1992), vol. 15, p. 186.
The first situation arises where the Muslims are in a position of power; in such an instance they should not seek a *muwāda‘ah* with non-Muslims, especially if it is not in the best interests of the greater Muslim community. This condition is made explicitly in the following Qur’ānic verses:

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

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

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

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

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

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

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

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

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

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

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


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

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


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

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

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

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

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

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

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

C. Basic Elements of The Treaty/Muʿāhadah

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

37Al-Kaṣānī, Badā‘i‘ al-Ṣanā‘i‘, vol. 9, p. 4324.
acceptance of paying tribute to the non-Muslims is based on a truce containing an explicit expression. Should a Muslim retaliate while the truce is in effect, it would be considered as perfidy, an act forbidden in Islam.\(^{38}\)

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

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

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

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\(^{40}\) Ibid.

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

**D. The Conditions of Treaty/Mu‘āhadah**

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

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

a. Signatories of the Treaty/Mu‘āhadah

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

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

47 Al-Kāshānī, Badā’i’ al-Ṣanā’i’, vol. 9, pp. 4324-4325; Niẓām al-Shaykh, Al-Fatāwā al-Hindiyyah, vol. 2, p. 196; this was also the opinion of the Maliki jurist Sahnūn, as reported by al-Dardīr, Shahr al-Kabīr, vol. 2, pp. 205-206.
who is allowed to negotiate and conclude a *muʿāhadah* with the non-Muslims is the Imam or his deputy. It is unacceptable for anyone besides those vested with authority to conclude a treaty. Hence, in the case where a Muslim has concluded a *hudnah* (truce) with a group of people and subsequently they enter *dār al-Īslām* based upon that *hudnah*, it is not acceptable. Therefore, the Muslim’s obligation under these circumstances is limited to securing their departure, because they had entered the *dār al-Īslām* under the assumption that they enjoyed full protection of safe conduct (*aμān*). However, it is permissible for an ordinary individual Muslim to conclude an *ʿaqd al-aman* (contract of safe conduct) with an individual non-Muslim.

**b. Consent**

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

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

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50This ḥadīth can be found in the *Sunan* of Ibn Mājah in the trade section under the heading “Bayʾ al-Khiyāʾ,” (Beirut: Maṭbaʿat ‘Īsā al-Ḥalābī, 1972), vol. 2, p. 737; Al-Bayhaqī, *Al-Sunan al-Kubrā* (Beirut: Dār al-Maʿārifah, 1927), vol. 6, p. 17; *Musnad*
parties, translated into action by obligation and acceptance, in the concluding of a mu’āhadah. 51

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

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

c. Public interest

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

Shaybānī observes:

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

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

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

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

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

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

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\(^{58}\) Khadduri, *Kitāb al-Siyar of Shaybānī*, 165.


**d. The Status of Treaty/Mu‘āhadah in the Qurān and Sunnah**

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

One of the Prophet’s traditions that refers to this obligation to conform to the Qurānic text at the time of concluding a treaty, reads, “Every condition that has no root in the Qurān is void.”\(^{66}\) Thus, this *ḥadīth* is interpreted by Shaybānī:

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

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

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


\(^{66}\)This *ḥadīth* distinguishes between Qurānic rulings and other rulings, such as the *Ahkām al-Shari‘ah* obtained from the Prophet’s sayings, as well as other Books that were sent to other people. See the following: Ibn Qutaybah, *Tā’wil Mukhtalaf al-Ḥadīth* (Beirut: Mu‘assasat al-Risālah, 2004), 84; Ibn al-Athīr, *Al-Nihāyah fī Gharīb al-Ḥadīth*, vol. 4, p. 147; Rāghūb, *Al-Muṭradaṭ fī Gharīb al-Qurān*, 423; Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, 5, p. 1788.

\(^{67}\)Al-Shaybānī, *Al-Siyar al-Kabīr*, vol. 4, pp. 1547-1548.
among the duties of the Imam is the task of looking into what is permissible and what is prohibited and acting upon this knowledge.68

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

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

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

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

69 Al-Shaybānī, Al-Siyar al-Kabīr, vol. 4, p. 1595; Al-Shāfi‘ī, Al-Umm, vol. 4, p. 113. This was the conduct of the Prophet (%), when he concluded the Ḥudaybiyah sūlḥ with the Makkans, for afterwards he did not return the women.
70 Al-Sarakhsi, Mabsūf, vol. 10, p. 85; Al-Shaybānī, Kitāb al-Siyar, p. 162.
71 Ibid.
among the duties if the Imam is to look into what is permissible and what is prohibited and to act upon his knowledge.\textsuperscript{72}

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

\textbf{E. Time limits}

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

\textbf{a. The permanent *Mu‘ahadah*}

According to the consensus of jurists, the permanent treaty (*mu‘ahadah*) is one that is concluded with non-Muslims, with the exception of idol worshipers and the conciliation (*muṣallah*) with the People of the Book (\textit{Ahl al-Kitāb}). Islamic legal rulings stipulate that a


\textsuperscript{75}Al-Sarakhsi, \textit{Sharḥ al-Siyar al-Kabīr}, vol. 5, p. 1782; an exception is the ‘\textit{aḍḥimma}, which, as we saw earlier, is not limited to time period. It is a permanent ‘\textit{aḍḥ} as far as the Muslims are concerned, but it is subject to termination by the \textit{ahl al-ḍhimma} in the event that they decide to become Muslims.
treaty cannot be forever, since it must be immediately void should the Muslims become capable of fighting them. Shaybani indicates that a muwāda‘ah can be permanent and not subject to annulment by Muslims on the occasion of a renewed capacity to fight, even if they are able to redeem all the pledges or obtain the consent of the other party.

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

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

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78 Al-Shaybânî, Al-Siyar al-Kabîr, 5, pp. 1758-1759.
However, the time period specified in the case of Ḥudaybiyyah is not, according to Abū Ḥanīfah, Abū Yūsuf and Shaybānī, a precedent that must be followed in all treaties (muʿāhadāt); rather, it is left to the Imam to determine the time period, based on the interests and needs of Muslims. Furthermore, the specified time limit should stand to benefit Muslims in the event it is exceeded, or is deemed subject to extension. If it does not serve the interests of Muslims it is not permissible for the Imam to renew the treaty or extend its duration.82

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

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

This was also the opinion of Ḥanafī jurists, as well as of al-ʿAynī of the Ḥanafī school and Shawkānī, who all...

82Ibid.
83See the Qurʾān, 8: 61, "But if they incline to peace, you also incline to it."
insist that there is no restriction on the time limit, in the event that a *muḥāḍarāt* is concluded. This will be based on the needs of Muslims and will be left to the Imam to decide along with the learned jurists. However, the time period, whether long or short, must be specified.\(^8^6\)

Ṣāḥīḥ scholars distinguish between two cases, the first being one where the Imam retains full strength and where he can see that some interests can be served through agreeing to a truce or cessation (*ḥudnāh*). He may in this case conclude that truce or *ḥudnāh* for four months or less. The time limit is derived from both the Qur’ān\(^8^7\) and the Prophetic tradition.\(^8^8\) Here the Imam is not allowed to agree to a truce of more than four months’ duration because, according to these scholars, any period chosen requires the *jīzah* to be imposed at its termination, and Muslims should not be under any obligation to do so. According to al-Mawāridi, the time may be extended to between more than four months and less than one year, but there are two opinions on this, one of which insists that it is not permissible.\(^8^9\)

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

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\(^{8^7}\)Ponder upon the Qur’ān, 9: 1 and 2, “Freedom from (all) obligations (is declared), from Allah and His Messenger to those of the Mushrikūn (polytheists, pagans, idolaters, disbelievers in the Oneness of Allah) with whom you made treaty.” “So travel freely (OMushrikūn), for four months (as you will), throughout the land.”

\(^{8^8}\)The Prophet (ṣ) concluded armistice or truce with Saʿwān bin Umayyah for four months. References to this may be found in Malik bin Anas, *Muṣṣadda* (Beirut: Dār al-Fikr, 1999), vol. 2, pp. 543-544; Al-Shāfīʿī, *Al-ʿUmm*, vol. 4, p. 112; Ibn ʿAbd al-Bīr, *Ṭamhīd* (Morocco: Wizarīt al-Awqāf, 1967), vol. 12, p. 19.

not itself exceed ten years; otherwise, according to the Shafi’i jurists, it would be null and void.\textsuperscript{90}

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

\textbf{b. The Mu’ahadah That is Not Limited by Time}

According to Shaybani, this particular mu’ahadah is permissible in certain circumstances, though it is neither permanent nor temporary. It is a type of treaty (mu’ahadah) in which the condition of time is not a factor, and in this sense it is better termed a muwada’ah (temporary truce). For example, in a situation where non-Muslims are willing to surrender to one of the Muslim territories, and the Muslims fear their continued threat, they can make an offer of truce with the enemy offering them, for example, ten thousand dinars, in order to persuade them to withdraw from their territory and return to their own.\textsuperscript{92} Sarakhsi describes this temporary truce (muwada’ah) as conditional on withdrawal. Here withdrawal means an enemy leaves a territory formerly under their control and returns to their original territory, which in the case of the non-Muslims is dar al-harb and in the case of the Muslims is dar al-Islam.\textsuperscript{93}


\textsuperscript{92}Al-Shaybānī, \textit{Sharḥ al-Siyar al-Kabīr}, vol. 5, pp. 1711-1712.

\textsuperscript{93}Al-Sarakhsi, \textit{Sharḥ al-Siyar al-Kabīr}, vol. 5, p. 1712.
This is what Ḥanāfī, some Mālikī, and some Ḥanbalī jurists declare to be their opinion.94

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

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


96 Al-Nawawī, Al-Muhaddithah, with Takmilat Al-Majmū‘; vol. 18, p. 222; Al-Shāfī‘ī, Al-Umm, 4, pp. 110-111; Sunan al-Bayḥaqī, vol. 9, p. 224.


98 Majmū‘ Fatāwā Ibn Taymiyyah, vol. 29, p. 140; Ibn Qayyim al-Jawzīyyah, Ḥabkām
Some modern scholars favor the opinion of concluding a muʿāhadah without indication of the time period. Some go so far even as to approve the concept of such a treaty, which in a sense is an extension of the concept of ‘aqd al-dhimmah, in order to establish goodwill and friendly relationships and a peaceful environment to spread the teachings of Islam. According to them, a permanent or ever-lasting truce with non-Muslims has its origin in the basic principle of Islam, i.e. that the external affairs of Muslims consist in peace, not war. They realize that the rulings or opinions of classical scholars were based on their own personal ijtihād (or discretion) and that it is permissible for the rulers to override them.⁹⁹

This opinion, voiced mainly by modern scholars, is not however accepted by Ghunaymi. He insists that to follow the example of others instead of that of the Prophet (ṣallīahu ‘alayhi wa sallam), who concluded the truce (ṣulḥ) of al-Ḥudaybiyyah makes no sense, because the Prophet concluded that truce under political circumstances to accomplish specific needs.¹⁰⁰ Jaʿfar Abd al-Salām states that the emphasis on concluding a contract such as a muwadaʿah or a hudnah should be conditional on a fixed time period, since the permanent treaty or everlasting contract with non-Muslims contradicts the reality of a world that has never seen a muʿāhadah that lasted for a long period of time.¹⁰¹

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¹⁰⁰Ghunaymi Muḥammad Taʿlʿat, Aḥkām al-Muʿāhadāt fi al-Shariʿah al-Islāmiyyah (Alexandria: Munshaʿat al-Maʿārif, 1977), p. 97, Ghunaymi Muḥammad Taʿlʿat, Qaʾun al-Salām fi al-Islām (Alexandria: Munshaʿat al-Maʿārif, 1988), p. 511. He labels these scholars as imitators and criticizes the Islamic legal tradition for the same fault, stressing the need to follow logically the footsteps of the Prophet, indicated by the Qurʾānic verse “You have the Prophet (ṣallīahu ‘alayhi wa sallam), as the right example.”

¹⁰¹ʿAli Jaʿfar ʿAbd al-Salām, Qaʿwāʾid al-ʿAlaʿqāt al-Dawlīyyah fi al-Qaʾun al-Duwāfī wa al-Shariʿah al-Islāmiyyah (Cairo: Maktabat al-Salām al-ʿĀlamīyyah, 1981), p. 393; and Sharḥ Baqāʾ al-Shayʿ “alā Ḥālīth, 403; it is worth mentioning that a recent Mālikī
d. The Mu‘āhadah Should Be Free of Unsound Conditions

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


103Al-Sarakhsī, Sharh al-Siyār al-Kabīr, vol. 4, pp. 1536, 1594; Al-Dāṣūqī ‘ala al-Sha‘rāb al-Kabīr, vol. 2, p. 206; Muhammad bin ʿAlīmad al-Jazī, Al-Qawānîn al-
According to Shaybāni, should the other party make a condition to return to it a Muslim who had escaped to dār al-İslām, the condition is automatically void, and there is no need or obligation to fulfill that particular condition. In case the representative of the other party brings up the ransom of prisoners and imposes a condition upon the Muslims to which they cannot agree, they should not accept this condition. Shaybāni says that this is because the ahl al-ḥarb torture their Muslim prisoners, and there is no point in returning them to that dār once their release has been secured. Since they cannot accept this condition, or still less honor it, it is prohibited to give promise of fulfillment. In the event that the negotiations fail, this is not a violation of any contract. It is more important to keep Muslim prisoners safe in dār al-İslām, even if this might cause or lead to further dispute.

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

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**Notes:**


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

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

**Conclusion**

This article began by examining the theoretical bases for treaties in Islamic law. Although many classical jurists consider the normal relationship between Muslim and non-Muslim communities to be one of natural hostility, others insist that it is not inconsistent with Islam’s ultimate objective that a peace treaty be concluded with the enemy.
whether for purposes of expediency or because Muslims have suffered a setback. According to Islamic teachings, making treaties with non-Muslims is permitted by Divine legislation. Explicit Qur’anic verses enjoin Muslims to seek accords with non-Muslims in order to eliminate conflicts. They oblige Muslims to respect the letter and the spirit of treaties once concluded, even when it may seem expedient not to do so. The Qur’an thus views the written agreement as a religious duty and not just as an act of political necessity (Q. 16:7,91; 17:34; 9:4; 8:72).

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


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