PACTA SUNT SERVANDA

Few rules for the ordering of society have such a deep moral and religious influence as the principle of the sanctity of contracts: *Pacta sunt servanda*. In ancient times, this principle was developed in the East by the Chaldeans, the Egyptians, and the Chinese in a noteworthy way. According to the view of these peoples, the national gods of each party took part in the formation of the contract. The gods were, so to speak, the guarantors of the contract and they threatened to intervene against the party guilty of a breach of contract. So it came to be that the making of a contract was bound up in solemn religious formulas and that a cult of contracts actually developed.

For the Islamic peoples, the principle, *Pacta sunt servanda*, has also a religious basis: "Muslims must abide by their stipulations." This is clearly expressed by the Koran in many places, for example, where it is said: "Be you true to the obligations which you have undertaken. . . . Your obligations which you have taken in the sight of Allah. . . . For Allah is your Witness."

With the peoples of the Mediterranean area, the common interest in a regulated commerce was added to the religious motive. The juridical sense of the Romans recognized that a well-regulated trade was possible only if contracts were kept. Then, as earlier, contracts were considered as being under Divine protection. But their psychological basis then was, above all, the necessity of a legal regulation of international contractual relations.

Christianity exercised a great influence on the sanctity of contracts. Its basic idea demanded that one's word be kept, as is clearly expressed in the Gospel according to St. Matthew, in particular, where it is said, at Chapter 5, Verses 33 to 37, at the end: "But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil." Later, the Fathers of the Church set forth in detail the notion of the sanctity of contracts. Thus St. Augustine (354-430), for example, taught that one must keep one's word even with one's enemies. The same idea is to be found in the *Decretum Gratiani*.

In the Middle Ages, after the Empire of Charles the Great was dissolved, when the unity of the will of the state was broken, the principle of vassalage acquired a decisive meaning. The feudal system involved a chain of contracts, voluntarily entered into by lords and vassals, and the existence of such contracts alone prevented anarchy. The moral basis of feudalism may be found in the *miles christianus*. The Christian knight was required above all to be true to his given word. At the same time the study of Roman law was strengthening the concept of an Obligation to perform contracts.

The Renaissance and the Reformation followed. The idea of the "Reason of State" was a basic one in the theories of Machiavelli (1469-1527). It is true that he adhered unreservedly to the "general value of religion, morality and law." Nevertheless his political thought was influenced by the idea of necessity. He asserted that the Prince could put himself above law and justice, should this be necessary for the state. To be sure, Machiavelli said that the Prince ought, if he could, to follow the paths of goodness; but he was justified in doing wrong in cases of necessity. In order to protect the interests of the state, explained Machiavelli, the Prince must be ready to act "against loyalty, against charity, against
humanity and against religion."

This was understandably grist to the will of the adherents of power politics, who have always relied upon Machiavelli's teaching in order to justify their viewpoint. However, the direct influence that Machiavelli exercised upon contemporary thinking, especially in the field of international law, should not be overestimated. The fact that Machiavelli, in Il Principe (first published in 1532) had broken with Christian ethics and taken up ancient heathen ideas prevented the spread of his teaching. Immediately afterwards, the minds of men were occupied to the highest degree with the religious contest which divided the Christian world, and "the ancient and heathen State idealism of Machiavelli was no longer understood by the people of the time of the Counter-Reformation, even by the free-thinkers, who continued the secular Spirit of the Renaissance." Even the founder of the modern theory of sovereignty, Bodin - of whom more will be said below - can be described as an opponent of Machiavelli, as was shown in particular by Friedrich Meinecke.

It is certain, however, that Machiavelli's views were helpful to those who admitted exceptions to the sanctity of contracts. Thomas Aquinas (1225-1274), who on principle demanded that contracts be performed even with regard to enemies, had also said that, if the circumstances existing

in reference to persons or objects at the time of making the contract had changed, non-performance of the contract was excusable. It is in this way that the doctrine of clausula rebus sic stantibus developed. According to the majority of writers, this doctrine is regarded as justified today, however, only when the circumstances existing at the time of entering into contract have changed to such an extent that either contracting party has the right to demand the revision of the contract - a right which must be exercised in good faith. On the other hand, a unilateral right of termination or alteration does not exist. We must limit ourselves here to this general remark on the clausula rebus sic stantibus, for its discussion would go beyond the scope of this article.

Even before Grotius, Jean Bodin (1530-1596) developed his famous theory of sovereignty. In his major work De la République (1577), he defined national sovereignty as the highest authority, independent of state laws, with respect to the citizens and subjects of the state (summa in cives ac subditos legibusque soluta potestas). He added that no one could bind himself through his own laws and that no law was so sacred that it could not be changed under the pressure of necessity. Nothing could be discreditable, he said, which was connected with the welfare of the state. It would seem easy to draw therefrom the conclusion that international agreements need not be kept if their performance is no longer in the interest of the state. However, such a conclusion would be unwarranted. The following, at least, appears to be clear: Bodin set up his theory of sovereignty in order to build up the complete autonomy of the French state as against the three Powers which, in the Middle Ages, threatened its independence, the Church, the Roman Empire, and the feudal lords. Far from wishing to deny that the sovereign is subject to legal rules, Bodin stated expressly that the Princes "are all bound by God's law and also by the law of nature." The Prince must, above all, keep his word, he said, for "fidelity and loyalty are the very bases of all justice. Not only the State, but the whole human community, is held together by them." Contracts concluded with foreign countries, therefore, must also be faithfully performed. Even the danger of destruction cannot release the state from its contractual obligations.

In the opinion of Jellinek, this theory of Bodin, and the political theories of the 16th, 17th and 18th centuries, are illogical. Jellinek wished to restrict, "in conformity with the Spirit of the times," the sanctity of contracts for states, according to Bodin's concept of sovereignty, to such contracts "which established a lasting Situation (e.g., treaties of peace or of cession) or which provided for a short period of performance by the State with the means at its disposal." He thought that a lasting

restriction of the legislative and administrative powers of the state, as is frequently found in modern contracts, would amount to "an unacceptable surrender of sovereignty." If, however, Bodin's thought is adapted to its contemporaneous world setting, where there were no unions, nor any supra-national organizations, then it appears that Bodin's theory included all the international contracts which could be made at the time, and that his principle of the sanctity of contracts was not limited to a special kind of convention.

It is true that Bodin formulated exceptions to the rule, for instance "in cases where what you have promised is by nature unfair or cannot be performed." Such exceptions gave the supporters of power politics an opportunity for extensive interpretation. This is why Grotius found it advisable to argue, against Bodin's view, that "the King himself cannot reverse a position previously established in the civil law or annul a contract or release himself from his oath," if he has
made it as head of state. These remarks show that Bodin's doctrine has scarcely been disadvantageous to international law and in particular to the sanctity of contracts. Unlike Hegel's theory in the 19th century, that of Bodin did not misguide the science of international law. Already Franciscus Vitoria (1483-1546), Francisco Suárez (1548-1617), among other predecessors of Grotius, had laid much stress on the sanctity of contracts.

In the 17th century, a new danger arose for the principle of sanctity of contracts from two great philosophers, Hobbes and Spinoza, the exponents of the doctrine of raison d'Etat. Thomas Hobbes (1588-1679), the English philosopher of utilitarianism, expressed the idea, in particular in his Leviathan, that the holder of state power had an almost unlimited power. He considered as decisive not the principles of justice, but those of wisdom. Nevertheless, he recognized as natural law the principle that

agreements are to be kept. The concept of wrong arises out of the non-performance of a contract, the promisor being therefore in contradiction with himself.

However, also according to Hobbes, agreements need not be kept if the security of the state so requires.

The idea of the raison d'Etat was expressed even more favorably by the Dutch philosopher, Spinoza (1632-1677). In his Tractatus Theologicopoliticus (1670), he said that

no holder of State power can adhere to the sanctity of contracts to the detriment of his own country, without committing a crime.

The words "to the detriment of his country" should be noted. It follows that the sanctity of contracts depends upon whether the contract is beneficial to one's own state. This is undoubtedly a rejection of the principle

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\text{Pacta sunt servanda. Therefore, Spinoza can in fact be described as a forerunner of Hegel.}
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The followers of Grotius in the 17th and 18th centuries were unanimously in favor of the sanctity of contracts. The views of Samuel Pufendorf (1632-1694) and of Cornelius van Bynkershoek (1673-1743) are especially noteworthy in this connection. In his De jure naturae et gentium (1672), the former described as one of the inviolable rules of natural law that each man must keep his word without breaking it. The latter expressed the opinion that, without the principle of good faith and that of the binding force of contracts, international law would be entirely destroyed.

The principle of sanctity of contracts was brought out in strong relief by Emer de Vattel (1714-1767) in his famous Droit des Gens (1757). He devoted to this question a special section of his book, under the title "Obligation to Keep Contracts." He pointed out that nations and their leaders must hold fast to their oaths and their contracts, since no security and no commerce would otherwise be possible between nations. He mentioned on several occasions what he called the "foi des traités" (faith of treaties). Vattel meant here something more, as was shown by Ernst Reibstein, than the mere sanctity of contracts between the contracting parties. He had the same thing in mind as Abbé de Mably (1709-1785), who, in his Droit public de l'Europe (1748), referred to the trust that all Powers should and must create through the establishment of an objective legal order, even though limited to single states.

As regards the application of the clausula rebus sic stantibus, Vattel, it should further be pointed out, urged the greatest caution: it would be a shameful misuse of the clause - in his opinion - if a contracting party took advantage of any change in the circumstances to release himself from his obligations. Nothing would then be left upon which one could rely.

Johann Jacob Moser (1701-1785), the founder of the positivist school of international law, explained, in his Grundsätze des jetzt üblichen Europäischen Völkerrechts in Friedenszeiten (1763), that contracts could only be canceled "with the consent of all interested parties."

In the age of Napoleon also the science of international law remained true to this principle. Reference should first be made here to Georg Friedrich von Martens (1756-1821) who explained, in his Einleitung in das positive Völkerrecht, auf Verträge und Herkommen gegründet (1796):
a valid and binding contract creates, for nations and individuals alike, the complete right to demand from the
other party the performance of the contract, so long as the contracting party, on his side, has performed
satisfactorily his obligations.

The remarks of Johann Ludwig Klüber (1762-1837) are also characteristic in this respect; in his Europäisches Völkerrecht
(1821), he devoted to the "sanctity of contracts" a special chapter in which he emphasized that the performance without
breach of international contracts was a principle common to all nations and was required by the very purpose of the state.

In the succeeding years the German philosopher, Georg Friedrich Wilhelm Hegel (1770-1831), exercised a strong
influence on the thinking of the 19th century on international law. For him the law was a product of the will. The will of the
nation was the carrier of the law. Contracts could be valid only so long as they contributed to the welfare of the state.
Hegel placed the will of the state as the central point of all his observations. The influence of his theory on the German,
Italian, English and French doctrine of international law has been clearly shown by Verdross. The objectionable manner
in which the German scholar, August Wilhelm Heffter (1796-1880), expressed himself on the sanctity of contracts in his
otherwise excellent book, Das Europäische Völkerrecht der Gegenwart (1844), a book which was translated into many
languages and had eight editions, is worth noting. While pointing out that the expression, Pacta sunt servanda, was a
foremost principle of international law, he limited the scope of the principle as follows:

one can scarcely disagree with the view that a contract in itself creates a right only through the union of wills
(duorum vel plurium in idem consensus) and thus only for so long as this union exists.

This Observation prompted the editor of the last two editions of the work, F. Heinrich Geffcken, to add:

but nevertheless for so long as the will of the contracting parties has bound them, unless there exists a special
reason to justify a withdrawal from the contract.

Writers on international law could not for long fail to perceive that international law was being undermined, if one based
contracts on the will of the state. They therefore tried to find a basis which would leave unaltered the principle of sanctity
of contracts, in spite of a continued adherence to the will of the state as a foundation of international law.

Thus Georg Jellinek (1851-1911), whose influence on the science of international law cannot be overestimated, rested
the validity of international contracts on the self-imposed obligation of states:

The State can release itself of any self-imposed restraint, but only in legal forms and in creating new limitations.
The restraint, but not the particular limitation, is permanent.

It is, however, clear that the state, if its will is decisive in the last analysis, can release itself from a self-imposed
obligation. If there is no higher will which compels the state to keep its word, then there is no sufficient basis given to the
contract which obligates the state to observe it. For this reason, the theory of Jellinek is generally rejected today, and
rightly so.

Another attempt was made by Heinrich Triepel (1868-1946) to reconcile the doctrine of the will of the state with the rule,
Pacta sunt servanda, in his classical work, Völkerrecht und Landesrecht (1899). Rejecting Jellinek's theory of self-imposed
obligation, he sought to show that the source of contracts was the common will of the contracting parties, "which
arises through interaction with the will of other States." However, this attempt to found the validity of an international
contract upon the will of the contracting parties must also be described as a failure. For here also the binding character of
a contract is based, not on a higher law, but on the will of the states, even if on the will of a majority of states. Moreover,
the hypothesis of a "common will" is a mere fiction. It should be added that Triepel limited the application of his theory to
agreements in the sense of law-making treaties ("traités-lois"). Above all, however, only a law which stands above the will
of the state can create the binding power of contracts.

Later on, the theory was abandoned that the validity of contracts, and of international law in general, rested on the
national will of one or all of the contracting parties. Another basis was sought for the principle Pacta sunt servanda. Thus
Dionisio Anzilotti (1867-1950) described the principle of the sanctity of contracts as a hypothetical basic norm, which can be assumed but not proven. For Anzilotti the rule *Pacta sunt servanda* is the basic norm of all international law. It is clear, however, that this cannot explain the validity of customary law. Above all, the validity of contracts cannot rest upon a mere Postulate. Anzilotti's attempt shows, however, the great value attached by this prominent author and his followers to the principle of *Pacta sunt servanda* as an integral part of international law.

The newer theory of international law, whether it is regarded as positivist or not, adheres to the validity of the phrase *Pacta sunt servanda*. This is hardly surprising, since any other view would amount to denying the existence of international law in general. However, the law of nations is built less upon customary law than upon contracts essentially. If a contract, validly concluded, were not binding, then international law would be deprived of a decisive foundation and a society of states would not longer be possible. International law, and with it also the sanctity of contracts, results by a natural necessity from the inevitability of social intercourse. The binding force of contracts is an obligation which exists, not only *vis-à-vis* the contracting parties, but also *vis-à-vis* the international community as a whole. In the system of international law, which stands over states, the sanctity of contracts is not to be rationalized away.

We shall concern ourselves no further with the general foundations of international law, as such a discussion would go beyond the framework of the present study. It is important to ascertain, however, upon what legal sources the maxim *Pacta sunt servanda* rests, according to the international law now in force.

For those who believe that the "general principles of law" form a third source of international law, which is not limited to the jurisdictional system of the International Court of Justice in The Hague, the principle of the sanctity of contracts is such a general legal principle. It is found in *foro domestico*, as we have seen, in all countries. It is one of the most important general principles of law for the relations between nations. Without the powerful Instrument of the contract, no international law is possible. As this writer is an adherent of the application, carefully adapted and taking into account social necessity, of natural law to international relationships, the idea that the sanctity of contracts rests on a general principle of law seems especially evident.

This principle is, however, also a part of customary law. Certainly, the phrase *Pacta sunt servanda*, in the first instance, had a religious origin, as was pointed out in the first part of this paper. With time, however, it was integrated into international law, and it can now be described as a part of customary law. The usage (*consuetudo*) exists - that is to say, the application, always repeated, of the principle (in spite of many breaches of the same) - in the life of individuals and nations alike. One could even speak of a "use from time immemorial," if this were a necessary condition of custom, which is, however, not the case. Likewise the *opinio juris sive necessitatis* is given. For governments have always taken the view that the principle corresponded to their conviction.

No one will deny that many breaches of contract have taken place in the course of history. The fact that, in spite of this, the principle of the sanctity of international contracts preserved its validity is indeed remarkable. Its breach has always been regarded as a wrong which entitles the wronged party to demand compensation. It must be admitted, in this connection, that the reparation can only be viewed as an incomplete compensation for the wrong. For the moral wrong in a breach of contract is so immense that the material amends cannot possibly give the wronged party a true reparation.

Numerous declarations have been made by statesmen, in the course of centuries, to emphasize the obligation to observe the sanctity of contracts. We shall content ourselves here with mentioning two examples: Lord Russell, British Foreign Minister, in a dispatch dated December 23, 1860, to the British Ambassador in China, Earl James Bruce Elgin, said that the universal notions of justice and humanity teach even the worst barbarians among human beings, that, if an agreement has been made, the law demands its observance. Later the American Secretary of State, Cordell Hull, on July 16, 1937, in a speech on international affairs, said of American foreign policy:

We advocate faithful observance of international agreements. Upholding the principle of the sanctity of treaties, we believe in modification of provisions of treaties, when need therefor arises, by orderly processes carried out in a spirit of mutual helpfulness and accommodation. We believe in respect by all nations for the rights of others and performance by all nations of established obligations.
General declarations of many states in favor of the sanctity of contracts can also be mentioned. One of the most famous is the statement made by the Powers in the case of the neutralization of the Black Sea, when Russia, on October 19-31, 1870, suddenly repudiated her obligation, under the Paris Peace of 1856, to keep in the neutralized Black Sea henceforth only a fixed number of warships of a fixed tonnage. In the London Protocol of January 17, 1871, it was said that the representatives of North Germany, Austro-Hungary, Great Britain, Italy, Russia and Turkey, having met in a conference, recognized as a necessary principle of international law that no Power can repudiate the obligations of a contract nor change its provisions without having obtained first the consent of the other contracting parties by a peaceful understanding. Further, one can read in a communiqué of the Atlantic Council of December 16, 1958, in response to the Russian withdrawal from the provisions of the Inter-Allied Agreement on Berlin, that

no State has the right, by itself, to free itself unilaterally from its contractual obligations. The Council declares that such a procedure destroys the mutual trust between nations which represents one of the foundations of peace.

Moreover, the treaties which emphasize especially the sanctity of contracts are extraordinarily numerous. Here, also, a few examples will suffice. The preamble of the Covenant of the League of Nations characterizes as an important fundamental principle, in order to promote international co-operation and to achieve international peace and security, the rule of "scrupulous respect for all treaty obligations in the dealings of organized peoples with one another." In the preamble of the Charter of the United Nations one finds likewise, "respect for the obligations arising from treaties and other sources of international law." Not less important is the reference in Article 5 of the Charter of the Organization of American States that international order is based, among other things, on the faithful fulfillment of the obligations arising from treaties and from other sources of international law.

Thus, it is easily understandable that no arbitral tribunal has ever rejected the rule Pacta sunt servanda, or even thrown doubt on it. On the other hand, cases are numerous in which international arbitration tribunals have expressly emphasized and recognized the rule. Here also we will limit ourselves to a few examples.

In his decision of April 7, 1875, the U. S. Ambassador in Santiago, as sole arbitrator in the dispute between Chile and Peru, held:

It is a principle well established in international law that a treaty containing all elements of validity cannot be modified except by the same authority and according to the same procedure as those which have given birth to it.

In the case of Ch. Adr. van Bokkelen, between the United States and Haiti, the arbitrator, A. Porter Morse, in his decision of December 4, 1888, stated:

Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals . . . and to be kept with the most scrupulous good faith.

In the Newfoundland controversy between the United States and Great Britain, the Permanent Court of Arbitration in The Hague held, in its award of September 7, 1910:

Every State has to execute the obligations incurred by treaty bona fide, and is urged thereto by the ordinary sanctions of international law in regard to observance of treaty obligations.

In its first Advisory Opinion on July 31, 1922, on the designation of the workers' delegate to the International Labor Conference, the Permanent Court of International Justice emphasized that a contractual obligation was not merely "a mere moral obligation" but was an "obligation by which, in law, the parties to the treaty are bound to one another."

Later on, the International Court of Justice, in its Advisory Opinion of May, 28, 1951, on Reservations to the Genocide
Convention, stated that "none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and raison d'être of the convention."\(^{51}\)

In his statement following the Judgment of the International Court of Justice of November 28, 1958, in the case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden), the Soviet Judge, Mr. Kojevikov, expressly based his opinion on the principle, *Pacta sunt servanda*,\(^ {52}\) the Mexican Judge, Mr. Córdova, in his dissenting opinion, referred to the rule as "a time-honoured and basic principle,"\(^ {53}\) and he was obviously, on this point, in agreement with the Judgment of the majority of the Court.

We have described above the rule of *Pacta sunt servanda* as a general principle of law that is found in all nations. It follows, therefore, that the principle is valid exactly in the same manner, whether it is in respect of contracts between states or in respect of contracts between states and private companies. Whether one regards, with Verdross,\(^ {54}\) the contracts of a state with a foreign company for the purpose of granting a concession as being quasi-international law agreements, or whether one ascribes to them another character, the principle of the sanctity of contracts must always be applied.

As has been pointed above, the principle of sanctity of contracts is an essential condition of the life of any social community. The life of the international community is based not only on relations between states, but also, to an ever-increasing degree, on relations between states and foreign corporations or foreign individuals. No economic relations between states and foreign corporations can exist without the principle *Pacta sunt servanda*. This has never been disputed in practice. The best proof that the principle also applies in such a case is the following fact: it has long been suggested that disputes between states and foreign companies (or foreign individuals) should be submitted to international adjudication. Such a course would be meaningless if the principle *Pacta sunt servanda* were not applicable also to that kind of relations. How would it be possible to suggest the creation of such an International Court of Justice if contracts between a state and a foreign company were not binding? The conclusion is thus inescapable that in each case, as Verdross has shown,\(^ {55}\) such contracts are subject to the general principle of law: *Pacta sunt servanda*.

5. Second section, Ch. 23, qu. 1, c. 3.
8. Friedrich Meinecke, op. cit. 56 ff.
9. S. Théol., 2, 2, p. 140. Cf. also Michel de Taube, loc. cit. 360 et seq.
13. Friedrich Meinecke, op. cit. 80.
16. Suárez, De legibus ac Deo legislatore, II, cap. XVIII, No. 19.
19. Cornelius van Bynkershoek, Quaestionum juria publici libri duo (1737), II, cap. 10.
20. Emer de Vattel, Droit des Gens, Book II, chap. XII, § 163.
27 Alfred Verdross, *op. cit.* 6 ff.
28 August Wilhelm Hefter, *Das Europäische Völkerrecht der Gegenwart* 144 (Berlin, 1844).
30 Georg Jellinek, *Allgemeine Staatslehre* 482 (3rd ed.).
33 See also Jules Basdevant, 58 *Hague Academy Recueil des Cours* 643 (1936, IV).
40 See A. F. Frangulis, *op. cit.* 95.
41 5 Hackworth, *Digest of International Law* 164 (Washington, 1943).
42 See A. F. Frangulis, *op. cit.* 95.
46 *See for this A. F. Frangulis, ibid. 115 et seq.; John B. Whittou, loc. cit. 236 et seq.
47 Translated from La Fontaine, *Pasicrisie Internationale* 165 (Bern, 1902).
49 See the decision in James Brown Scott, *Argument of the Honorable Elihu Root on behalf of the United States before the North Atlantic Coast Fisheries Arbitration Tribunal at The Hague* 500 (Boston, 1912).
52 *[1958] ibid. 72.

**Referring Principles:**
I.1.1 - Good faith and fair dealing in international trade