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Article 2 of the Charter of the United Nations

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conduct of states'.¹⁶⁵ The international law of co-existence of the past¹⁶⁶ was a rather loosely woven fabric, offering States many opportunities for action not, or not strictly, based on the authority of law. In contrast, the present international legal order aspires comprehensively to regulate social life on all levels of governance.¹⁶⁷ In this transformed environment, sovereignty of States stands out as a legal concept which exposes one of its flanks to politics and power. 'It has frequently had to serve as a juridical cover to mere power politics.'¹⁶⁸ In other cases, it provided, or rather channelled, legal arguments which, having found acceptance by other States, eventually led to a change in the law. What has made the concept especially convenient (or vulnerable) in that respect is a certain blurredness resulting from its long history and the many different uses made of it in the past. In particular, sovereignty's original meaning as 'supreme authority' has asserted an indistinct presence, notwithstanding the efforts—attempts as well as achievements—of legal science to domesticate the notion and define it as the legal autonomy of a State under international law. There is an untamed side of sovereignty—characteristic, one could say, of the international system as a political system *sui generis*¹⁶⁹—which to ignore in legal analysis would be a mistake.

In the late 1920s, Kelsen referred to his time as a transitional period in the history of international law, and saw this character reflected in the 'contradictions of an international legal theory which in an almost tragic conflict aspires to the height of a universal legal community erected above the individual States but, at the same time, remains a captive of the sphere of power of the sovereign state'.¹⁷⁰ The UN Charter was a bold effort to end this transitional stage in favour of a lasting international constitutional order no longer dependent on the capriciousness of sometimes well-meaning, sometimes egoistic States. But more than 50 years after the 'constitutional moment' which gave rise to the Charter the contradictions Kelsen spoke of have not completely disappeared. As long as there is an international State system as we know it (and this author does not envisage it vanishing any time soon), not only governments but also legal scholars will continue to construct their images of sovereignty as they see fit in changing conditions of international life.

¹⁶⁵ See Brierley, J.L., 'The Sovereign State Today' (1949), in *id.*, *The Basis of Obligation in International Law and Other Papers* (Lauterpacht, H./Waldock, C.H.M. eds., 1958), pp. 348–57, at 352. See also *supra*, MN 13.

¹⁶⁶ See *supra*, MN 10.

¹⁶⁷ See *supra*, MN 70.

¹⁶⁸ See Steinberger, p. 501.

¹⁶⁹ See Hinsley, p. 229.

¹⁷⁰ See Kelsen, *Problem der Souveränität*, p. 320.

ARTICLE 2(2)

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

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A. On the Genesis of Article 2(2)

- 1 The Principle of Art. 2(2), and in particular the clause 'in good faith', was proposed as a constitutional principle of the new world Organization by several Latin American States at Dumbarton Oaks and was sponsored at the San Francisco Conference by the delegate of Colombia, Prof. Yepes. He declared that the Principle

constituted the *leitmotif* of the new footing upon which relations between States were to be built. He stated that it was dangerous to be content with a merely formal, legalistic obedience towards the obligations laid down in the Charter. The Colombian delegate emphasized: ‘The United Nations . . . must proclaim that international life requires a minimum of morality as a normative principle of conduct for peoples. This minimum cannot be anything else than full good faith and respect for the pledged word.’¹ Other participants likewise emphasized that the clause meant abandoning legalistic contractual positivism. On the other hand, some delegates failed to understand the specific legal significance of the good faith requirement. Thus, the delegate of the United States thought that the clause was superfluous since it was sufficient that the obligations assumed are fulfilled without regard for the state of mind in which performance took place.² However, when Prof. Rolin, representing the Romanist tradition, explained to the delegates the sense of the good faith requirement, i.e. the necessity to fulfil an obligation according to the spirit of the undertaking and not merely with regard to the letter, the amendment seeking to introduce good faith into the wording of Art. 2 was accepted unanimously and even with strong support of its former opponents.³ Therefore, even if the initial inspiration had a strong moral touch,⁴ the explanations with respect to the primacy of the spirit over the letter show that the good faith principle of the Charter also received a specifically legal significance.

B. The Scope and Interpretation of the Good Faith Requirement

I. THE OBLIGATION COVERED BY THE GOOD FAITH CLAUSE

First of all, Art. 2(2) lays down the obligation for *all* members of the UN to fulfil their obligations ‘in accordance with the present Charter’.

The members are called upon to fulfil all the obligations under international law that can be reconciled with the law of the Charter, not only those set out in the Charter. This interpretation becomes important because of the idea that the fulfilment of the Charter obligations and the observation of other rules, especially those of general international law, serve the goals of peace and co-operation in accordance with Art. 1 of the Charter. The Charter obligations, as well as other obligations of international law in accordance—or at least not incompatible—with the Charter, have to be regarded as duties resulting from membership. The obligations therefore fall within the reach of Art. 2(2).

II. THE ADDRESSEES OF THE OBLIGATION

Good faith is not exclusively an obligation incumbent upon the member States. It is a principle from which duties flow for all the organs of the Organization.⁵ Thus, the ICJ has held that certain duties of co-operation

¹ UNCIOVI, p. 72.

² UNCIO VII, pp. 331–3. Similarly, *cf.* the opinion of Kelsen, according to whom the whole of Art. 2(2) of the Charter contains nothing more than a tautological explanation with no legal significance. In particular, Kelsen states: ‘The words “in good faith” in Article 2, paragraph 2, too, are superfluous for it is impossible to fulfil an obligation in bad faith’ (Kelsen, p. 89). This view presupposes—incorrectly and unrealistically, in the opinion of the present authors—that legal obligations within the common system can always be determined unambiguously. It overlooks the fact that in the law of the UN, there are not even any procedural guarantees that there will be an authoritative decision in the final instance on the existence or non-existence of rights and duties (see *infra*, MN 6 and 17).

³ UNCIOVI, pp. 74–80. The amendment was proposed by Yepes, the delegate from Colombia. The president of Committee I stated that good faith was ‘a principle of interpretation of obligations. If two interpretations are possible, but one allows a literal carrying out of the obligation which is not consistent with “good faith”, it must be rejected’. The American delegate emphasized that the principle had ‘the meaning that we are all to observe these obligations, not merely the letter of them, but the spirit of them’. In his capacity as the delegate from Panama, Alfaro commented that the reference to the principle had a special function precisely in those cases in which a document like the Charter contained general provisions laying down the foundations for co-operation in the future with comprehensive objectives. The provision of Art. 2(2) was adopted unanimously in Committee I.

⁴ *cf.* the development of the question by Yepes during the war: J.M. Yepes, *Philosophie du panaméricanisme et organisation de la paix* (1945), pp. 266 *et seq.*

⁵ *cf.* Verdross/Simma, p. 47; Schwarzenberger, G., *International Law: As Applied by International Courts and Tribunals*, vol. III (1976), p. 215; Spiropoulos, J., ICJ, *Effect of Awards of Compensation Made by the UNAT*, Pleadings Series (1954), p. 351.

in good faith applied to Egypt as the host State as well as to the World Health Organization.⁶ Good faith also regulates the relationships between the organs of the Organization. It gives rise to a duty of fairness, respect and mutual co-operation, and a duty to take account of the juridical acts of the various organs between each other.⁷ Finally, good faith also applies to the relationships between the Organization and its staff members.⁸ As has been noted by the administrative tribunal of the Organization of American States in the *Uehling* Case (1974), good faith lies at the root of the contractual bonds between the Organization and its employee.⁹ Several obligations have been derived from that general principle: the prohibition of abuse of power or procedure (*détournement de pouvoir*);¹⁰ the duty to protect legitimate expectations;¹¹ the duty to respect promises;¹² the applicability of estoppel;¹³ and the doctrine of qualified silence (acquiescence).¹⁴

III. THE SYSTEMATIC SETTING OF ARTICLE 2(2): ITS RELATION TO ARTICLES 1 AND 2(1)

- 5 The introductory sentence of Art. 2 establishes a clear connection with the Purposes of the UN enshrined in Art. 1 which reads that in order to realize the Purposes of Art. 1, the Principle of good faith must be complied with. This link provides a particular aim and a direction for such a broadly stated obligation as acting in good faith.
- 6 The legal effect of the phrase 'in order to ensure to all of them the rights and benefits resulting from membership' is disputed. The clause in question acknowledges that the Purposes of the Charter, as laid down in Art. 1, can only be achieved if all members fulfil their obligations under the Charter in good faith. The entire para. 2 describes the sole condition under which the Charter can achieve its purpose and work for the benefit of all, i.e. that all members fulfil their obligations under the Charter in good faith. In other words, the legal obligations assumed by the members in the context of the Charter are not an end in themselves, but are oriented towards the Purpose of the Charter: to ensure that all of the members are able to enjoy the benefits of a community of States living in peace in conformity with the law, and showing solidarity in accordance with the Principles of Art. 1.
- 7 The systematic arrangement and the genesis of Art. 2 indicate that there is an internal connection between the obligation to act in good faith (para. 2) and the guarantee of the sovereign equality of all States (para. 1). The official report of Committee I at the San Francisco Conference states that the expression 'sovereign equality of all Members' in Art. 2(1) was chosen on the understanding and condition that while each State enjoyed the rights inherent in full sovereignty, each member was still required to comply faithfully with international duties and obligations.¹⁵
- 8 The good faith clause was therefore intended to blunt the principle of sovereignty, which undermined the foundations on which the existence of the community arrangements was based. In legal terms, therefore, no State can invoke its sovereignty in order to evade its international obligations as determined by the duty of good faith and in accordance with the Charter.

6 *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, Advisory Opinion, ICJ Reports (1980), pp. 93–6, 95. In the same vein, good faith has a directive function when it comes to the qualification of situations giving rise to recommendatory or coercive action of the Organization. cf. Franck, T.M., 'Fairness in the International Legal and Institutional System, General Course on Public International Law', *Rec. des Cours* 240 (1993-III), pp. 191, 218–21; Dahm, G., *Völkerrecht*, ii (1961), p. 290.

7 cf. Klein, E., 'Paralleles Tätigwerden von Sicherheitsrat und IGH bei friedensbedrohenden Streitigkeiten', *Essays in Honour of H. Mosler* (1983), pp. 481 *et seq.*

8 See generally Kolb, *La bonne foi*, pp. 531 *et seq.*

9 Judgment no. 8, p. 10.

10 *Richard Case* (1993), Judgment no. 1231 of ILOAT, p. 16.

11 e.g., in the context of renewal of a fixed-term contract: *Levcik Case* (1974), Judgment no. 192 of UNAT, pp. 245 *et seq.*

12 *Gieser Case* (1986), Judgment no. 782 of ILOAT, pp. 4 *et seq.*

13 *Banerjee Case* (1985), Judgment no. 344 of UNAT, in *AFDI* 31 (1985), p. 463.

14 *Waghorn Case* (1957), Judgment no. 28 of ILOAT, p. 7; *ILR* 24 (1957), p. 752.

15 That 'each State enjoys the right inherent in full sovereignty' and 'that the state should, under international order, comply faithfully with its international duties and obligations' (UNCIO VI, pp. 446 *et seq.*). The clause 'faithful compliance' used in the report undoubtedly refers to the same standard as the expression 'in good faith' in Art. 2(2) of the Charter; this opinion is shared by Baxter, R. R., *Study of the Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, prepared for the office of the legal adviser (US Department of State ed., 1965), pp. 4–27.

This link is again confirmed by the Friendly Relations Declaration (GA Res. 2625 (XXV), Oct. 24, 1970).⁹ Among the elements that constitute the principle of sovereign equality, the Declaration mentions the following principle: '(f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States'. The passage is related to the Principle of Art. 2(2) of the Charter; this link once again confirms the connection described.

IV. THE PURPOSE-ORIENTED INTERPRETATION OF ARTICLE 2(2): COMMITMENT TO COMMUNITY OBJECTIVES

The decisions of international courts show that good faith develops particular legal effects wherever States have a qualified relationship of confidence with one another, such as in the context of an arbitral or border adjustment procedure, or a protectorate-like relationship, *inter alia*.¹⁶ These effects consist of increased obligations to show mutual consideration and an increased responsibility for the confidence that has developed with regard to achieving the common objective. Thus good faith may develop specific legal meanings according to the subject-matter to which it applies.

As previously mentioned, the relations between the members of an international organization constitute a qualified relationship of confidence. The more intensive the co-operation, and the more comprehensive the objectives, the more it is necessary that its legal constitution should also include obligations to cooperate in good faith within the context of the aims and procedures agreed upon. Recourse to general principles of co-operation and mutual consideration beyond that which is required in a strictly legalistic sense becomes necessary. The obligation to act in good faith obliges the members to fulfil the legally relevant expectations that could be placed on their future mutual conduct with regard to community objectives on the occasion of their accession to the organization (or upon its foundation). This especially applies to the members of an organization with such extensive and fundamental objectives as the UN.

In the law of the UN, the principle of good faith is thus objective in nature.¹⁷ In the awareness of the State organs acting in each case, what matters is not so much the subjective integrity as the objective orientation of their conduct towards the meaning and spirit of the community objectives agreed upon.¹⁸ As has already been explained above, this results, among other things, from the formulation of Art. 2(2) of the Charter, which draws attention to the community purpose of the obligation of good faith ('in order to ensure to all of them the rights and benefits resulting from membership').

The function of the good faith clause must also be examined by paying particular attention to the conditions of the legal/institutional design of the UN Organization, which is in some respects precarious. This can be seen, for example, from the fact that no organ is competent to interpret the Charter in a manner that is binding on other organs.¹⁹ Conflicts between the individual organs of the Organization or between members and the Organization on the interpretation of the Charter cannot be solved, as in a State with a unitary structure, by the final decision of a supreme organ.²⁰ The function of the clause can therefore also be seen in

¹⁶ *cf.* the comments in Müller, pp. 63 *et seq.* (arbitral procedures), pp. 22 *et seq.*, and 43 *et seq.* (border adjustment procedures), pp. 48 *et seq.* (vassalage relationship).

¹⁷ This becomes especially clear in the dissenting opinion of Azevedo (*Conditions of Admission*, ICJ Reports (1947/8), p. 80), where it is stated with regard to the abuse of legal rights, which is related to the principle of good faith: '[It] has now been freed from the classical notions of *dolus* and *culpa*; in the last stage of the problem an inquiry into intention may be discarded, and attention may be given solely to the objective aspect; i.e. it may be presumed that the right in question must be exercised in accordance with standards of what is normal, having in view the social purpose of the law'.

¹⁸ *cf.* the dissenting opinion of Azevedo (*Competence for the Admission*, ICJ Reports (1950), p. 23): 'by a unanimous vote, the signatories . . . stressed that the obligation assumed by the Members must be carried out in good faith. That is why the interpretation of the San Francisco instruments will always have to present a teleological character if they are to meet the requirements of world peace, co-operation between men, individual freedom and social progress. The Charter is a means and not an end. To comply with its aims one must seek the methods of interpretation most likely to serve the natural evolution of the needs of mankind'.

¹⁹ At the San Francisco Conference, a Belgian proposal that differences of opinion between organs of the UN on the interpretation of the Charter should be referred to the ICJ for a binding decision was expressly rejected. On this point the Preparatory Committee IV/2 of the San Francisco Conference stated in its declaration that in the practice of the UN, it would be inevitable that different organs of the Organization would, in the course of their activities, arrive at different interpretations of the Charter (*cf.* the debates of May 28 and June 7, 1945, in Committee IV/2, UNCIO XIII, pp. 633 *et seq.*, 653 *et seq.*).

²⁰ While the political organs of the Organization can, in the framework of Art. 96 of the Charter, request the ICJ to give an advisory opinion on questions concerning the interpretation of the Charter, the legal authority of such an advisory opinion is nevertheless disputed. Even in the founding phase of the UN, the opinion was put forward that such an advisory opinion, like any interpretation of the Charter by an

the fact that it calls for a willingness to co-operate as promised wherever it becomes apparent that there are gaps or even simply inadequacies in the institutional structure. Even in quite general terms, such a willingness is of increased—indeed existential—importance for a legal system that substantially cannot rely on a hierarchically closed structure of decision-making, and which has no power to enforce its instructions by means of a uniform sanction. An organization with such comprehensive aims and yet which is so little secured in institutional terms is particularly dependent on the need to renew continually the consensus among the members to co-operate and to accommodate themselves to one another.

14 In this sense, the good faith clause is a realistic expression of the conditions for the existence of the communal body. The fact that the Principle of good faith is emphasized among the fundamental principles of the organizational law of the UN creates an awareness of the limits of technical rules and terminology, and at the same time attempts to mitigate them by appealing to the members' loyalty towards the community objectives agreed upon. One might say that the legal principle of good faith constitutes the enzyme in the organism of the institution, without which it would not be viable.²¹ The appeal for action in good faith is intended as a constant reminder that a set of treaties with such comprehensive objectives as those of the UN does not survive merely on the strength of the terms used and on its individual provisions, but only achieves its reality via the communal will of its members, for which there is ultimately no guarantee. Where, in a concrete case, there is no fundamental consensus among the community of nations on what is to be a legal obligation, or where the will to co-operate gives way to the overpowering weight of individual national interests, the substantial basis of the Organization breaks down, even if the outward legality is preserved.

15 The weakness of the good faith clause, which is emphasized by some authors,²² is not so much a weakness of the legal concept, but rather an expression of the permanent risk to the community spirit to which it refers.

C. The Specific Content of the Obligation of Good Faith in the Framework of the Charter

I. GOOD FAITH AS A GENERAL LEGAL PRINCIPLE IN INTERNATIONAL LAW

16 According to the predominant opinion and practice, the Principle of good faith is a general principle in international law.²³ Article 2(2) integrates it into the law of the Charter but gives it a more specific and objective meaning with regard to the community-oriented aims of the Organization. Article 2(2) combines moral ideas on correct action (honesty, seriousness, loyalty) and strictly legal contents (e.g. a ban on the abuse of legal rights).²⁴ Good faith is not however merely a general and abstract principle.²⁵ Practice and legal writings have established the concrete, partial legal contents of the Principle, which have developed into operational rules of international law. These partial legal contents are concretizations of the general principle of good faith.²⁶ These include certain rules of the law of treaties (considered below) and the concepts of acquiescence,

individual organ of the UN, was only binding on the others if its binding nature was generally acceptable, otherwise it had no binding force (UNCIO XIII, pp. 703, 709 *et seq.*). Since there is no procedure that leads to a decision in the final instance on the normative meaning of a provision of the Charter in an individual case, the possibility of conflict remains open, and in the practice of the UN, this has indeed become manifest in the relationship between the political organs and the ICJ. (On this point, see Müller, pp. 231 *et seq.* with fn. 13.)

21 As is also stated by Virally, M., 'Good Faith in Public International Law', *AJIL* 77 (1983), p. 133.

22 Zoller stresses the vagueness of the principle of good faith and denies the juridical usefulness of the concept within the framework of the UN Charter, *cf.* CP/Zoller (2nd edn.), pp. 100 *et seq.* *Contra*: Kolb, *La bonne foi*, pp. 111 *et seq.*, 501 *et seq.*; Müller, pp. 227 *et seq.* For a juxtaposition of the approaches chosen by Zoller on the one hand and Müller on the other hand *cf.* Stuyt, pp. 55 *et seq.* See also Rosenne, p. 171. He speaks of good faith as a topic which 'on the one hand is not open to serious question, yet on the other hand is imprecise and even fluid, defying formal definition . . . and lacking what many would regard as necessary attributes of a rule of law. Yet it is a rule of law, and has been so stated not only by the International Court of Justice itself, but also by major international plenipotentiary conferences and by the International Law Commission, throughout the twentieth century'.

23 As representatives of a widely held view, *cf.* Verdross/Stimma, paras. 60 *et seq.*, 601, 645; Lachs, 'Pacta', p. 368; Virally, M., 'Good Faith in Public International Law', *AJIL* 77 (1983), pp. 130, 133; Müller, p. 3; Mosler, pp. 90–2; Zoller, p. 12, with refs. to Anzilotti, Basdevant, Strupp.

24 On the relationship between these two categories of rules, *cf.* the recent work by Tomuschat, C., 'Ethos, Ethics and Morality in International Relations', *EPIL* II, pp. 120–7.

25 As claimed, e.g., by Mosler, pp. 91 *et seq.*

26 See Kolb, *La bonne foi*, pp. 112 *et seq.* and Kolb, *RBDI*, pp. 674, 682–3.

estoppel or the prohibition of abuse of rights which can today be regarded as generally recognized rules of international law.²⁷

II. GOOD FAITH AS A DIRECTIVE FOR INTERPRETATION

The emphasis of the rule laid down in para. 2 is on the requirement of fulfilling the Charter obligations (or other obligations under international law) 'in good faith'. In other words, it is concerned with a particular method of fulfilling obligations. This excludes a merely formalistic understanding of law in which too much attention is paid to the letter of the law. The duty of one member towards another, or towards the Organization under the Charter, is not to be determined according to purely formal criteria based on the letter of the law, but rather according to the principle of good faith, which alone gives the treaties the elasticity that is indispensable for implementation in concrete situations.

Paragraph 2 lays down how to fulfil legal obligations that can be precisely determined but it also establishes a particular method of determining obligations in a particular case. The clause contains a directive on the way to establish the concrete obligations of membership within the framework of the Charter, and not only the requirement that these be fulfilled in a particular manner, that is in good faith.

At the same time, this good faith requirement commits the member States to self-restraint. This is particularly true for the frequent occurrence of auto-interpretation of the constituent instrument of the Organization and of obligations incurred under it by the member States. Thus, for example, States must act carefully when they claim the *ultra vires* character of acts of the Organization in order to further their own position.²⁸

III. GOOD FAITH AS AN ELEMENT OF CONSTITUTIONAL DECISION-MAKING TO SECURE CO-OPERATION

As elaborated above, within international organizations the good faith requirement has primarily an objective and finalistic character. It offers a legal basis for the duty imposed on the members to seek to cooperate and reconcile themselves in view of the accomplishment of the common aims. In the light of the requirements of the Organization and the practical problems with which it has to deal, good faith can provide a juridical starting point from which specific obligations in relation to decision-making by the Organization can be developed, thus overcoming uncertainties or gaps in its constituent instruments. Good faith has in this context the function of assuring the primacy of common aims over manifestations of excessive individualism by States which are incompatible with them. This duty to act in good faith and without abuse of rights has been stressed in different contexts: the admission of new States to the United Nations in periods of ideological struggle that placed strains on the admission mechanism of the Charter;²⁹ the right of veto;³⁰ the legal consequences flowing from the denunciation of a headquarters agreement when there is uncertainty about the delay after which it will take effect.³¹ Good faith has also been invoked by certain judges of the ICJ as the basis of a duty of a State holding a mandate by the League of Nations to renegotiate its terms within the United Nations in order to transform it into a trusteeship.³²

²⁷ For a detailed analysis, cf. Müller, J. P./Cottier, T., 'Acquiescence and Estoppel', *EPIL* I, pp. 14–16, II, pp. 116–19 and Kolb, *La bonne foi*, pp. 339 *et seq.*, 357 *et seq.*, 429 *et seq.*, with further refs. On good faith and equity, cf. Kolb, *La bonne foi*, pp. 99 *et seq.*

²⁸ See Kolb, *La bonne foi*, p. 507 and fns. 46–7.

²⁹ *Conditions of Admission of a State to Membership in the United Nations*, Advisory Opinion, ICJ Reports (1947/8), p. 63 and pp. 91–2, 103, 115.

³⁰ cf. Spiropoulos, J., 'L'abus de droit de vote par un membre du Conseil de Sécurité', *Revue Hellén. de Droit Int.* 1 (1948), pp. 3 *et seq.*

³¹ *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, Advisory Opinion, ICJ Reports (1980), pp. 93–6.

³² Dissenting opinion, Alvarez, *International Status of South West Africa*, Advisory Opinion, ICJ Reports (1950), pp. 183 *et seq.*; dissenting opinion, Ch. De Visscher, *ibid.*, pp. 186 *et seq.*; dissenting opinion, Krylov, *ibid.*, pp. 191–2. See also Mr. Ingles (Philippines), ICJ, Pleadings Series (1950), pp. 249, 271–2.

D. The Application of Good Faith in UN Practice

I. CASE PRACTICE

21 There are three important spheres in which the principle has been applied in the constitutional history of the United Nations.

1. Voting Rights and Veto Power

22 Within the United Nations, attention was first drawn to good faith in the context of the admission of new members during the time-span 1945–1955. The ongoing ideological conflicts provoked a halt to new admissions. Each bloc, especially the Soviet Union, feared a growth in the number of politically hostile States within the Organization. In order to overcome this situation, it was thought useful to link the admission of different States and to proceed by simultaneous admission *en bloc*. The ideological equilibrium of the Organization could thus better be preserved. Confronted with the question of the lawfulness of this policy, the ICJ held that the conditions for admission enumerated in Art. 4 of the Charter were exhaustive, and that no other condition (including the ideological equilibrium) could be added to them. It did, however, note that within the margin of appreciation left for determining whether the stated conditions were met, States could take into account any factor ‘which it is possible reasonably and in good faith to connect with the conditions laid down in that article.’³³ Good faith therefore sets a limit to the admissible exercise of discretion.³⁴ The principle forbids a State to make its vote dependent on conditions that are not inherently connected with the sense and purpose of the Charter provision to be applied. The fact that the rules are directed to a specific purpose provides a yardstick for deciding what is required by good faith in the individual case.³⁵

23 The objective of the proper functioning of the Organization has also been claimed as a limit to the use of the right of veto.³⁶ Good faith is in such a case the legal vector through which the abuse of the voting right could be sanctioned as being the expression of a policy alien and irreconcilable with the aims of the Organization.³⁷ For obvious political reasons, a satisfactory legal answer to the abuse of the veto could not be found. As the ICJ has no general competence of constitutional review, the law of the Charter rests in this field more than anywhere else a *lex imperfecta*.

24 The doctrine of *détournement de pouvoir* has been applied in the case of less clearly political voting rights. Thus, in the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation* (Advisory Opinion, 1960), the vote constituting the Council of the Organization was scrutinized under the aspect of abuse of rights (*détournement de pouvoir*).³⁸

2. Effects of Recommendations of UN Organs (especially the General Assembly)

25 Some authors³⁹ claim that member States which voted in favour of a recommendation are estopped from challenging its binding character, at least with regard to themselves. If we take account of the fact that States

³³ *Conditions of Admission of a State to Membership in the United Nations*, Advisory Opinion, ICJ Reports (1947/8), p. 63.

³⁴ *Conditions of Admission*, ICJ Reports (1947/8), pp. 57, 63 *et seq.* In their joint dissenting opinion on the ICJ Advisory Opinion, the four Judges Basdevant, Winarski, McNair, and Read likewise recognize the principle that there is a legal limit to discretion resulting from the fact that the rules to be applied are directed to a specific purpose, and from the supreme principle of loyalty to the Purposes of the UN. A Member of the UN ‘must use this power in good faith, in accordance with the Purposes and Principles of the Organization and in such a manner as not to involve any breach of the Charter’ (ICJ Reports (1947/8), p. 93). See also, to the same effect, the opinion of Zorlic (p. 103) and Krylov (p. 115). For details on this point *cf.* Müller, pp. 234 *et seq.* and Kolb, *La bonne foi*, pp. 511 *et seq.*

³⁵ See Sperduti, G., ‘La buona fede e l’ammissione di nuovi membri nelle Nazioni Unite’, *Comunità internaz.*, 7 (1952), pp. 47 *et seq.*, particularly pp. 50–1.

³⁶ Or, *mutatis mutandis*, of any preponderant vote in a weighted voting system.

³⁷ *Conditions of Admission* Case, Pleading by Scelle, G.: ‘Il peut également arriver de déceler le détournement de pouvoir dans une situation plus délicate, c’est-à-dire lorsque le représentant de l’Etat qui en use au Conseil de Sécurité ou à l’Assemblée aboutit, par l’usage de sa compétence, à bloquer la possibilité d’action de l’organisme tout entier. C’est alors faire de sa compétence, de son pouvoir juridique, non pas un instrument d’action de l’Organisation des Nations Unies, mais un instrument de paralysie de cette Organisation’ (Pleadings Series (1948), p. 77). See also Spiropoulos, *supra*, fn. 30.

³⁸ ICJ, Pleadings Series (1960), pp. 77 *et seq.*, 193 *et seq.*, 249, 392, 406–8, 418, 439.

³⁹ There is a powerful body of opinion (e.g. Schachter, Thürer, Simma, Bleckmann, *inter alia*), which holds that a State is debarred from invoking *vis-à-vis* another State the non-binding nature of an act of a UN organ that is not actually binding in the strictly legal sense, if the

are aware that they are not engaging themselves legally, and that they are voting in favour of certain resolutions as an expression of political opinion, the view based on a generally applicable estoppel seems excessive.⁴⁰ But such a conclusion only means that the affirmative vote *itself* is insufficient for founding an estoppel. Facts surrounding the vote, such as assurances given, declarations explaining the vote, strong references to the resolution as legally important, subsequent practice, etc., may however create a legitimate expectation and thus give rise to a preclusion. Moreover, other effects than the full binding nature of the recommendation may flow from an affirmative vote combined with estoppel. Thus, a favourable vote may in itself preclude a State from challenging the procedural validity of the recommendation⁴¹ or its status within the Organization. Similarly, States having voted in favour of the resolution may be estopped from raising the illegality of conduct by other States which act in accordance with the resolution, or from raising the *domaine réservé* exception. One could also think of applying by analogy the principle enshrined in Art. 18 of the VCLT which rests on good faith.⁴² Such an application would mean that a State might to some extent be bound by its vote at least until the State concerned has publicly (or at least *vis-à-vis* those member States especially interested) declared its change of attitude, and, where necessary, has given reasons for that change.

Good faith⁴³ also implies that member States and, in particular, an addressee directly named in a GA resolution, has a certain legal obligation to examine the resolution carefully and to give reasons for its decision in the event that it should reject the resolution.⁴⁴ Hersch Lauterpacht, in a separate opinion on the ICJ Advisory Opinion,⁴⁵ stated those principles which have since found broad support in doctrine and inspired some institutional action. For certain authors there is only an obligation to take the recommendation into account, but no duty to inform about the reasons for non-application (subject to the existence of specific duties under the constituent instrument).⁴⁶ One may add that, according to Lauterpacht, a violation of the Principle of good faith is more likely in cases of systematic refusal to pay due regard to the recommendations of the United Nations.⁴⁷

It is important to stress that the extent of the obligation of examination and/or of giving reasons varies according to the solidarities expressed in a certain matter or institution. Their force depends on the more or less strong normative or institutional internationalization to which a branch of social life has been subjected. Thus, for example, particularly strong international solidarities (strengthening the duties under consideration) can be found concerning mandates and trusteeships, labour (ILO), peace and security, etc.

first State has voted in favour of that act. cf. Thürer, D., '“Soft Law”—eine neue Form von Völkerrecht?', in *Z. f. Schweiz. Recht* 104 (1985), p. 445, with further refs.; Schachter, O., 'The Twilight Existence of Non-Binding Agreements', *AJIL* 71 (1977), pp. 296 *et seq.* Also on these lines: Bailey, K., 'Making International Law in the United Nations', *ASIL Proc.* (1967), p. 237; with regard to the Declaration of Human Rights of 1948, cf. also Schwelb, E., 'Neue Etappen der Fortentwicklung des Völkerrechts durch die VN', *ArchivVR* 13 (1966), pp. 20 *et seq.* See also Schwarzenberger, G., *A Manual of International Law* (5th edn., 1967), p. 117; Schwarzenberger, G., *International Law: As Applied by International Courts and Tribunals*, I (1957), pp. 51–2; II, pp. 47–8. The ICJ's Advisory Opinion on *Certain Expenses* (ICJ Reports (1962), pp. 151–2) can be quoted in support of the thesis that a State cannot plead that an organ of an international organization has exceeded its competences in accordance with the treaty establishing it, if, by voting accordingly or by some other active participation by its delegates, that State has contributed to establishing the practice at issue. In its advisory opinion, the ICJ repeatedly emphasizes that the decisive resolutions of the GA were adopted without opposition; since, therefore, no State denied at the decisive moment that the actions were legal, no one could later escape the obligations that were thus created for all members (ICJ Reports (1962), pp. 176 *et seq.*). See also the separate opinions of Spender and Fitzmaurice, who emphasize in particular that by voting in favour, a State prejudices its position and cannot later invoke the—strictly speaking—non-binding nature of a recommendation (ICJ Reports (1962), p. 210).

40 On the whole question, see Sloan, R.B., 'General Assembly Resolutions Revisited (Forty Years Later)', *BYIL* 58 (1987), pp. 43, 65, 94, 103–4, 123, 140; Kolb, *La bonne foi*, pp. 518 *et seq.*

41 *Certain Expenses*, Advisory Opinion, ICJ Reports (1962), pp. 176 *et seq.*

42 Article 18(a) obliges a State that has signed a treaty requiring ratification not to act in a manner contrary to the aim and purpose of the treaty 'until it has announced its intention of not becoming a party to the treaty'.

43 Occasionally, the requirement of acting in good faith is found in the text of the resolution itself, e.g., in GA Res. 1598 (XV), Apr. 13, 1961 on the problems of Apartheid in South Africa: 'The General Assembly Reminds the Government of the Union of South Africa of the requirement in Article 2, paragraph 2, of the Charter that all Members shall fulfil in good faith the obligations assumed by them under the Charter' (para. 6).

44 See on the question, Kolb, *La bonne foi*, pp. 521 *et seq.*

45 *Voting Procedure*, Advisory Opinion, ICJ Reports (1955), pp. 118 *et seq.*

46 Dahm, *supra*, fn. 6, pp. 26–7. Bindschedler, R.L., 'La délimitation des compétences des Nations Unies', *RCADI* 108 (1963–I), pp. 346–8. For such a specific provision, see Art. 19(6) of the Constitution of the ILO.

47 ICJ Reports (1955), p. 120.

28 The various reporting systems of several organizations institutionalize the duties formulated by Lauterpacht; the reports comprise sections devoted by member States to explain the measures taken in execution of decisions and recommendations of the Organization. Mention can be made of Art. 64 of the Charter, which deals with economic and social recommendations of the United Nations and provides for a reporting system. It may be recalled that the duties of examination and information were known at least since the League of Nations era; they were raised in the First Commission of the Assembly in 1923 in the context of Art. 10 of the Covenant.⁴⁸

3. Prohibition of Abuse of Procedure⁴⁹

29 Finally, good faith prohibits any abuse of procedure. It consists of the use of instruments or procedural rights by one or more parties for any purposes alien to those for which the procedural rights were established, especially for a fraudulent, procrastinatory or frivolous purpose, for the purpose of causing harm or obtaining an illegitimate advantage, for the purpose of reducing or removing the effectiveness of some other available process or for purposes of pure propaganda. The case law of the ICJ or the European Court of Human Rights is rich in applications of the concept. Abuse of procedure can take many forms and relate to various subject-matters. Four illustrations may suffice. First, the notion of abuse of rights has been applied to voting questions (see above). Secondly, the notion of abuse of procedure can be found in the context of the right of petition recognized under the mandate system (League of Nations) or the trusteeship system (UN).⁵⁰ Thirdly, procedural motions may be exploited in order to obstruct a meeting: by tabling a flood of amendments or points of order delegates may try to frustrate any constructive discussion.⁵¹ Fourthly, a State having submitted to the jurisdiction of the ICJ, but having finally lost its case, may be tempted to move to the political organs of the United Nations in order to evade or to delay the execution of the judgment. Since the competences of political and judicial organs are different, there is no reason to conclude automatically that there has been an abuse of procedure if a political organ is seized after a judicial procedure. But in the presence of elements evidencing a dilatory intent or an attempt to escape obligations flowing from the judgment, the political organ could find *in limine* that the abuse of procedure is established and thus that the case cannot be heard.⁵²

II. TREATY PRACTICE

30 The Principle of the UN concerning the Principle of good faith has been confirmed and given concrete form in various major documents.

31 The Principle of good faith is of central importance in the Vienna Convention on the Law of Treaties of 1969. The draft of the VCLT was elaborated in the context of the ILC,⁵³ an organ of the UN. The GA convened the Vienna Conference in 1969, and the GA finally gave the VCLT its backing in a further resolution calling upon all States to accede to the VCLT.⁵⁴

32 Article 26 of the VCLT emphasizes the principle of acting in good faith as the fundamental principle of the law of treaties, and Art. 31 repeats it in the context of interpretation.⁵⁵ In the commentary of the ILC, it is

48 *cf.* *La prassi italiana di diritto internazionale, Terza Serie*, vol. I (Rome, 1995), p. 595.

49 *cf.* on the whole question, Kolb, *La bonne foi*, pp. 637 *et seq.*

50 Schwebel, E., 'The Abuse of the Right of Petition', *Human Rights Journal* 3 (1970), pp. 313 *et seq.*, 324-6.

51 *cf.* Schermers, H.G./Blokker, N.M., *International Institutional Law* (3rd edn., 1999), p. 250, fn. 390. As an example the discussion on the proposal for a High Commissioner for Human Rights during the 25th Session of the GA is mentioned. See also Bailey, S.D., *The General Assembly of the United Nations: A Study of Procedure and Practice* (1960), pp. 175-6.

52 *cf.* Salvioi, G., 'Les règles générales de la paix', *Rec. des Cours* 46 (1933-IV), pp. 138-9. See also Ciobanu, D., *Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs* (1975), p. 139.

53 For details, *cf.* Rosenne, S., 'Vienna Convention on the Law of Treaties', *EPIL* IV, pp. 1308-17.

54 GA Res. 3233 (XXIX), Nov. 12, 1974; Rosenne, pp. 503 *et seq.*, draws attention to the special role of the UN in the genesis of the Convention: 'The solutions adopted at the Vienna Conference were facilitated by the fact that the work was undertaken with very solid political backing from the General Assembly, in which all the permanent members of the United Nations Security Council were associated.'

55 According to Art. 26, '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'; Art. 31, para. 1 states: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

stated that conduct is contrary to good faith if it tries to evade the actual content of international obligations by merely obeying the literal wording. Good faith forbids contracting parties to behave in any way that is intended to frustrate the meaning and purpose of a treaty. In this context the ILC expressly refers to Art. 2(2) of the UN Charter.⁵⁶ The demand that good faith is demonstrated aims not so much at subjective conscientiousness in the fulfilment of treaties, which is a category of subjective morality, but requires conduct that, according to objective criteria, is oriented towards mutual consideration. It demands fulfilment of the treaty in such a way as the other party to the treaty may ordinarily expect on the basis of the text agreed upon, or, in other words, in such a way as is required by the sense and purpose of the treaty, as understood by the contracting parties in good faith. This objectivity-creating understanding of the requirement of good faith gives it a meaning in the light of which various traditional, technical/formal rules of interpretation are finally given their correct meaning.⁵⁷

The important function of the provision of Art. 2(2) of the Charter is reaffirmed by the GA's Friendly Relations Declaration (Res. 2625 (XXV), Oct. 24, 1970). The principle of Art. 2(2) of the Charter is divided in the operative part of the Declaration into three paragraphs, which go into concrete detail and which take the requirement of acting in good faith beyond the narrow confines of the Charter obligations and extend it successively to the obligations based on general international law and the law of treaties.⁵⁸ Where the Declaration gives concrete form to the valid law of the Charter, as in the case in point, the legally binding nature of its content must undoubtedly be affirmed.

For the field of the law of the sea, reference should be made to the United Nations Convention on the Law of the Sea of December 10, 1982, which contains the following provision (Art. 300): 'States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right'.⁵⁹

⁵⁶ ILC Commentaries on Draft Articles 1966, paras. 1, 2, and 5 on Art. 23 ILC Draft (Art. 26 of the Convention), *ILC Yearbook* (1966) ii, pp. 210 *et seq.*

⁵⁷ *cf.* Müller, p. 128, and on the importance of the principle of good faith in the preliminary stages of concluding treaties, on the handling of the treaty, and on the question of the competence to conclude international treaties, pp. 154 *et seq.*, 171 *et seq.*; *cf.* also Kolb, *La bonne foi*, pp. 181 *et seq.*; Bernhardt, R., *Die Auslegung völkerrechtlicher Verträge insbesondere in der neueren Rechtsprechung internationaler Gerichte* (1963), pp. 175 *et seq.*

⁵⁸ The three paragraphs each begin with the words 'Every State has the duty to fulfil in good faith . . .', followed by: (a) a repetition of the wording of the Charter; (b) the obligations assumed by it in accordance with the Charter; (c) the words: 'its obligations under the generally recognized principles and rules of international law'; (d) the words: 'its obligations under international agreements'.

⁵⁹ Article 300 emanates from the merger of the Mexican and American proposals at the Conference (*cf.* Nordquist, M. H. (ed.), *United Nations Convention on the Law of the Sea 1982, A Commentary*, vol. V (1989), pp. 150–2). It was initially inserted in the part on peaceful settlement of disputes and aimed at equalizing the various interests of the several categories of States according to an obligation of mutual due regard.

ARTICLE 2(3)

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

...

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

...

UN MATERIALS

Handbook on the Peaceful Settlement of Disputes between States (1992).

The Charter of the
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A COMMENTARY

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