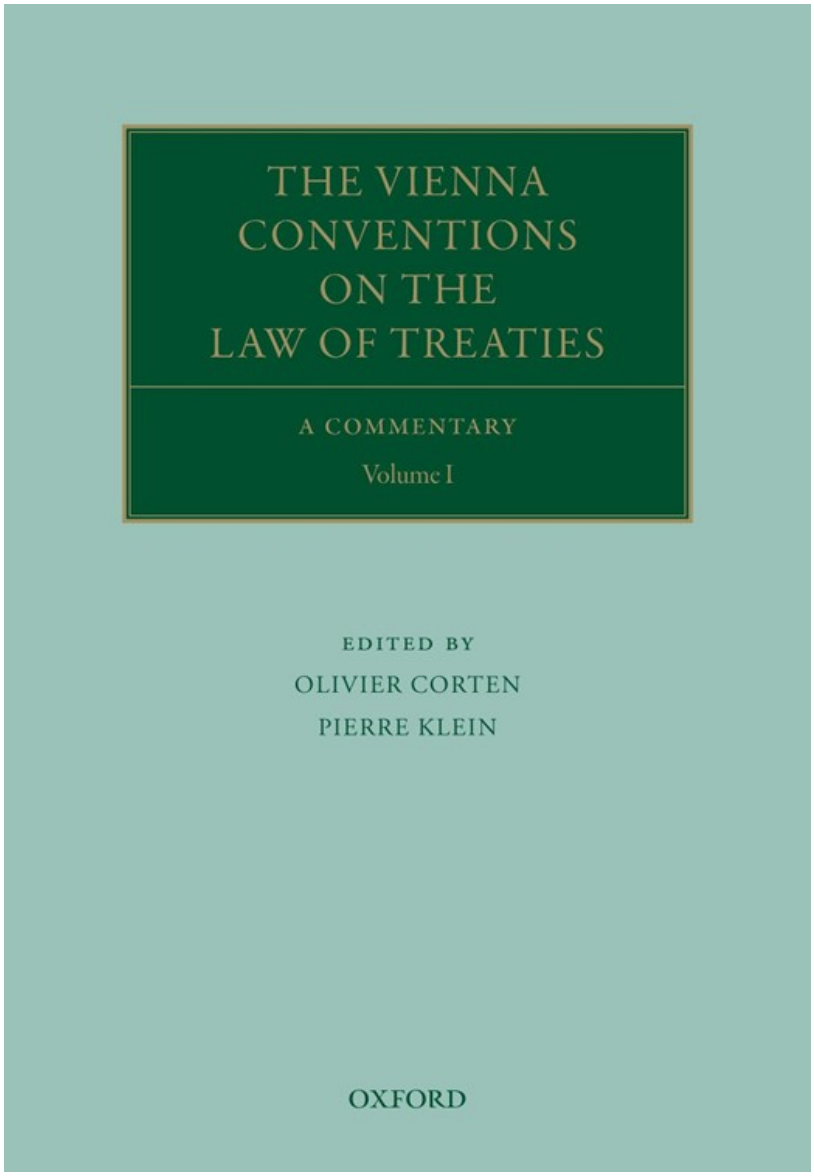

The Vienna Conventions on the Law of Treaties: A Commentary

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CHAPTER

1969 Vienna Convention: Article 26 Pacta sunt servanda

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A. General characteristics

Object and purpose

1. The codification of the principle *pacta sunt servanda* within the framework of the ILC, the Sixth Committee of the General Assembly, and the Conference of Vienna of 1968–1969, clearly indicates that, while favouring the proclamation of the classic rule according to which every treaty must be performed by the parties, the creators of those texts tried to strike a balance between the maintenance of the status quo in treaty obligations and other preoccupations such as justice and openness to change. For this reason, governmental representatives insisted on the necessity to temper the *pacta sunt servanda* rule with other rules of the law of treaties or general international law; particularly:

- the respect owed to freedom of contract and the establishment of an invalidity regime for vices of consent;[1]
- the clause *rebus sic stantibus* in order to reconcile stability with progress;[2]
- the *jus cogens*, contemplating the same purposes;[3]
- its close relation with the basic principles of the Charter of the United Nations.[4]

p. 661 As it is considered *infra*, the rule set out in Article 26 is therefore inseparable from all the other rules of the Convention prescribing its modalities and limitations.

Sources of the principle

2. An historical analysis of the rule will not be attempted here as many authors have devoted significant developments to it. The rule boasts a lengthy past, dating back to Roman times and having subsisted ever since.[5] It is found in all legal traditions around the world.[6]

3. The fundamental character of the rule embodied in Article 26 of the Vienna Convention has been proclaimed since time immemorial. Vattel already declared that:

> Every thing therefore which for the common [s]afety of the people, and for the tranquillity and [s]ecurity of the human race, ought to be inviolable, is held [s]acred among nations. Who can doubt that treaties are in the number of tho[s]e things that are held [s]acred by nations?[7]

It is thus not surprising that the *pacta sunt servanda* rule appears in a great many codification texts, such as the Declaration on the Rights and Duties of Nations, proposed at the Institute of International Law in October of 1921 by Albert de Lapradelle;[8] Article 20 of the 1935 Harvard Draft;[9] Article 13 of the draft Declaration on Rights and Duties of States (1949)[10] by the ILC; and the Declaration on Friendly Relations of 24 October 1970.[11] However, the foregoing codifications leave unanswered the issue of determining the original source of the rule. Although it is undoubtedly included in numerous treaties, it may also be considered a general principle of law in the sense of Article 38(1)(c) of the Statute of the International Court of Justice (ICJ), a principle of customary law, or even of natural law.

The expression of the rule in international law

4. Before its codification in the Vienna Conventions on the law of treaties, the rule had already been formally included in treaties on several occasions. The protocol of 17 January 1871 adopted at the London Conference is well known in this respect:

> The plenipotentiaries of the North German Union, of Austria-Hungary, of Great Britain, of Italy, of Russia, and of Turkey, met to-day in conference, recognize that it is an essential principle of the Law of Nations, that not Power can liberate itself from the engagements of a treaty, nor modify the terms thereof, except by the consent of the contracting parties, amicably had.[12]

p. 662 References to the necessity to respect obligations arising from treaties are also found in the preamble to the Covenant of the League of Nations; the preambles to the Locarno Treaties of 16 October 1925;[13] Article 10 of the Havana Convention on Treaties, adopted on 20 February 1928 by the 6th International Conference of American States;[14] the preamble to the Charter of the United Nations; and Article 14 of the Charter of the Organization of American States, also known as the Pact of Bogota of 30 April 1948.[15]

5. The principle, while expressed in a variety of forms, is presented as a conventional provision within the framework of those treaties. However, it is generally admitted that the rule is purely declaratory of the law[16] and that its basis is to be found prior to those conventions. Therefore, even if the principle is expressed in a given treaty, it is nonetheless true that the principle's validity precedes it because, to be binding, the treaty must already be governed by the principle.[17]

The rule as a customary principle or as a general principle of international law

6. For the most part, the doctrine considers that in this context the *pacta sunt servanda* rule has its origin in custom or that it would be a principle of general international law.[18] As Roberto Ago expressed it at the ILC, *pacta sunt servanda*, construed 'as a fundamental rule of the law of treaties…was a rule of general customary law which recognized the binding force of treaty provisions'.[19]

Is the rule a general principle of law within the meaning of Article 38(1) of the Statute of the ICJ?

7. A minority of authors considers that the rule constitutes a general principle of law in the sense of Article 38(1)(c) of the statute of the ICJ.[20] This view stems from the idea that domestic laws include the *pacta sunt servanda* principle in the area of private contracts (for example, Art. 1134 of the French civil code and
p. 663 analogous provisions in other legal systems).[21] The principle that conventions must be performed in good
↳ faith was also mentioned by the Committee of Jurists during the elaboration of the Statute of the Court as one of the general principles embodied in Article 38(3).[22] However, the rule's specific application in the context of public international law (between equal and sovereign States) and its particular limitations brought by the framework of the public international law of treaties[23] proves the analogy to be superficial. The situation with regard to interstate law is entirely different from that in the private law of contract where, in addition, the parties find the autonomy of their will protected by law.

Is the rule a principle of natural law?

8. Finally, some authors, such as Pufendorf[24] and Vattel,[25] considered that the rule was grounded in natural law. Moreover, in modern times Hans Wehberg ascribed a dual nature to the rule—while at the same time showing its religious origins—based on both custom and natural law.[26] Similarly, for Le Fur, the obligation to observe freely chosen engagements was one of the fundamental basis of natural law.[27] Verdross saw in the rule *pacta sunt servanda* 'an ethical rule; that is to say, an *obvious* value or one which logically emerges from an absolute rule, for example the norm *suum cuique*'.[28] The present author aligns with the doctrine that ascribes a customary source to the rule.[29]

B. Scope of the rule *pacta sunt servanda*

Doctrinal positions

9. Generally, the doctrine restricts the scope of the rule to the law of treaties.[30] However, this is not necessarily obvious. The customary rule, or the general principle of international law embodying the rule, has a broader scope in the eyes of other authors, who interpret its wording as a general principle linked to *any agreement* between States regardless of its form.[31] In fact, it is convenient to examine the meaning that should be given to the Latin term *pacta.* The Roman and medieval traditions from which the maxim derives permit two readings of the word. In the *ius civile*, used among Roman citizens, the word '*pacta*' was connected to a formalized system of contract creation. In contrast, in the *ius gentium*, applicable in the
p. 664 relations between Roman citizens and foreigners, engagements ↳ were not dependent on form but were instead based on good faith.[32] Thus, the word '*pactum*' could take on the broader sense of a juridical engagement between two subjects of law, regardless of form; a conception still supported by some contemporary authors. For example, Josef Kunz emphasized that attaching the norm *pacta sunt servanda* to treaties only would give rise to serious problems when it came to non-written (or oral) agreements.[33] It is for this reason that Dionisio Anzilotti, the spokesman of positivism, extended the scope of the rule to obligations derived from custom.[34] In addition, Maurice Bourquin wrote that '*Pacta sunt servanda* is nothing more than a particular form of a broader principle which must be applied to all norms'.[35] Suzanne Bastid similarly considered that the rule was:

> a general principle expanding beyond the law of treaties *stricto sensu*. The consent given by the State to a request formulated by another State [was] binding upon it in all circumstances, even if a treaty ha[d] not been formally concluded.[36]

Phillip Jessup took a similar stance.[37] Finally, Manfred Lachs, author of the entry *Pacta sunt servanda* in the first edition of the *Encyclopedia of Public International Law*, considered that the principle applied within the framework of custom, resolutions of international organizations, unilateral acts, acquiescence, etc.[38]

10. If it is admitted that a '*pactum*' may be informal, it is entirely logical to consider that the principle '*pacta sunt servanda*' applies every time there is a commitment to be legally bound which creates an agreement between subjects of law.[39] As Serge Sur noted:

> The commitment of the State is directly or indirectly the source to all international normativity. This is true for all norms, whatever their nature, whatever their intensity, whatever their scope. Thus, the State is solely bound by virtue of its own consent, including its consent to custom and to the norms of *jus cogens*. That consent can present itself in a variety of forms; it can be explicit, implicit, tacit or even presumed.[40]

Ultimately, if it is considered that the 'principle *pacta sunt servanda*' is the primary source of the mandatory character of the norms arising from an agreement, there is no reason to limit its scope to formal treaties. For this reason, and taking into consideration the following excerpt by Jean Combacau, would it not be open to be interpreted as applying to any commitment, both formal and informal?

> ...the conventional edifice juxtaposes binding conventions which emanate from sovereign States, and no concept can better bring together those elements than the principle *pacta sunt servanda*
> p. 665 (what has been consented to must be respected); a metajuridical principle more than a rule of law, ↳ the basic axiom without which no legal assertion may be taken seriously and which imposes on subjects of law that they consider as law that to which they have agreed to be law.[41]

At the ILC, the two renowned jurists Grigory Tounkine[42] and Roberto Ago[43] took the position that the rule had a broad scope of application. Particularly, they relied on the stance of the Portuguese government which in its written comments asserted that 'the principle "*pacta sunt servanda*" [was] certainly recognized as having sufficient force to be the foundation for the legal rules expressly or tacitly accepted or recognized by States'.[44]. The present author adheres to that opinion.

11. From the foregoing, it can be concluded that some of the teachings relating to the rule *pacta sunt servanda*, which are developed *infra*, may be similarly contemplated in regard to other forms of interstate agreements. In this respect, the application of the principle to provisional application agreements[45] or collateral agreements[46] is also considered hereunder.

12. As already discussed, the *pacta sunt servanda* rule also applies to contracts under domestic law. By transposing to public international law the principle of the mandatory character of a contract to the parties to it, some concluded that it was a general principle of law within the terms of Article 38(1)(c) of the Statute of the ICJ. This conclusion—as shown *supra*—was rejected by many authors who considered that the foundation of the two rules was entirely distinct and that any analogy between contracts and treaties was inaccurate. Nevertheless, it must be mentioned that the analogy led part of the arbitral jurisprudence in international commercial law, as well as the doctrine supporting it, to consider that the rule *pacta sunt servanda* applied to contracts concluded between States or their administrative subdivisions and private companies. That reasoning was based on the theory according to which the principle constituted a rule of international law arising from a general principle of law within the meaning of Article 38 of the Statute of the ICJ.[47] This conception has been criticized by numerous authors.[48]

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Position of the Vienna Convention

13. Regardless of the scope of the rule in general international law, according to the terms of the Vienna Convention the rule specifically applies to 'treaties' within the meaning of the Convention, as defined in Article 2(1)(a); that is, within the narrow sense of a 'procedural operation'. This position is supported by the fact that the rule—as it is considered *infra*—concerns every treaty 'in force' and, as such, all the necessary formal and substantive preconditions to this effect must have been satisfied between the 'parties', within the meaning given to the term 'parties' by these conventions. Moreover, the treaty must be valid. This limitation to the scope of the rule is not surprising, since the sole object of the Vienna Convention is the treaty, for which it codifies its formal rules. The 1986 Convention adopted the same position. From the foregoing discussion, it ensues that the rule applies solely when the following conditions are fulfilled:

(1) the treaty is in force;

(2) the treaty is valid;

(3) the provisions of the treaty apply to the particular case;

(4) in addition, the rule solely applies between 'parties' to the treaty.

The rule applies solely to treaties 'in force'

14. In an Article 30, adopted in 1963, the ILC had retained the following formulation:

> Every treaty concluded and brought into force in accordance with the provisions of part I shall be considered as being in force and in operation with regard to any State that has become a party to the treaty, unless the nullity, termination or suspension of the operation of the treaty or the

> withdrawal of the particular party from the treaty results from the application of the present Articles.[49]
>
> 49 Report of the ILC, *YILC*, 1963, vol. II, pp 189–90.

The issue was extensively debated at the Commission in 1964. The text under discussion had been excerpted from the Third Report by Sir Humphrey Waldock, whose Article 55(1) (*Pacta sunt servanda*) partly stated that:

> A treaty in force is binding upon the parties and must be applied by them in good faith in accordance with its terms and in the light of the general rules of international law governing the interpretation of treaties.[50]

Several members of the Commission considered that the words 'in force' had to be deleted. Successively, Herbert Briggs,[51] Taslim, O. Elias,[52] Alfred Verdross,[53] Mustafa Kamil Yasseen,[54] Abdul Hakim Tabibi,[55] and Yuen Li Liang[56] expressed opinions to that effect. Their arguments were that the words were superfluous, useless, or tautological, as a treaty which was not in force could not be binding upon the parties. Thus, the phrase was no more needed in that Article than in any other Article of the Convention referring to the
p. 667 concept of 'treaty'. In contrast, other members such as Milan Bartoš,[57] Shabtai Rosenne,[58] Grigory ↳ Tounkine,[59] Roberto Ago,[60] Antonio de Luna,[61] and Abdullah El-Erian[62] considered that the words were necessary. Their arguments were that a treaty is only binding upon the parties between whom it is in force. The controverted terms had the effect of specifying the status of the obligations under the convention *across time*. It distinguished between different situations, such as that of existing treaties not yet in force or of treaties no longer in force as a result of denunciation or due to an external cause. The terms also assured that only *valid* treaties could be in force. In particular, Roberto Ago emphasized that:

> It had been argued that it [the expression 'in force'] was superfluous, because a treaty which was not in force was not binding; but at its fifteenth session the Commission had considered a number of cases in which a treaty ceased to be in force; for example, in consequence of a new peremptory norm of general international law supervening after the treaty's entry into force, or by the operation of a resolutive condition in a treaty. If Article 55 did not specify that it referred to a treaty in force, a State might require the performance of an obligation deriving from a treaty which had in fact ceased to be in force.[63]

The outcome of the Commission's debate eventually coincided with the Rapporteur's conclusion that it was preferable to retain the expression 'in force'.[64] The draft was submitted to the Sixth Committee of the General Assembly and it was open to comments by governments. Several States insisted on the essential character of that precondition to make the norm *pacta sunt servanda* applicable.[65] Consequently, the application of Article 26 of the Convention is subordinated to the rest of its provisions relating to the entry into force of treaties (Arts 24 and 25 of the Convention).[66]

15. The argument that the treaty should be in force for the norm to be applicable raised the issue of the mandatory character of final clauses, which apply from the time the text is adopted (this issue was solved by Art. 24(4)) and the provisional application of treaties (which was the subject of Art. 25). In their comments, some governments stressed that in their view, the norm must also apply 'to the provisional entry into force of treaties' (wording used before the ILC made official the expression 'provisional application').[67] The Commission agreed with this perspective:

> The words 'in force' of course cover treaties in force *provisionally*...as well as treaties which enter into force definitively.[68]
>
> 68 Report of the ILC to the General Assembly, *YILC*, 1966, vol. II, p 169. This viewpoint was again emphasized by

several delegations during the Conference of Vienna: Official Records, Summary Records, 2nd session, 12th plenary meeting, 6 May 1969, Norwegian delegation paras 30 ff, Colombia paras 44–5, and the declaration by the Chairman para. 63.

16. Moreover, the application of Article 26 of the Convention is subordinated to all other provisions relating to the termination of treaties, as well as to the suspension of their application (Arts 54–64 of the Convention)[69]—even if in the latter case the treaty remains formally in force, though no longer operative. It
p. 668 is for this reason that what had often ↳ been called by the doctrine 'exceptions to the rule *pacta sunt servanda*'—such as the termination or suspension of a treaty's application due to the conclusion of a subsequent agreement, as a result of its violation, a supervening impossibility of performance, a fundamental change of circumstances, or a supervening new norm of *jus cogens*[70]—were in fact modalities of application of the rule, given that the treaty must be *in force*. As Charles Chaumont wrote, the *pacta sunt servanda* rule did not apply to those treaties that had become 'unenforceable'.[71]

The rule applies solely to valid treaties

17. The validity requirement had already been emphasised by the Permanent Court of Internationa Justice (PCIJ) in its Advisory Opinion of 21 February 1925 on the *Exchange of Greek and Turkish Populations.* The Court prescribed the following formula:

> ...a State which has contracted *valid* international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken.[72]

72 PCIJ, *Exchange of Greek and Turkish Populations,* Advisory Opinion of 21 February 1925, Series B, no. 10, p 20.

Sir Gerald Fitzmaurice expressly stated this idea in his Fourth Report. Article 3(1) was couched in the following terms:

> The immediate foundation of the treaty obligation is the consent given to it by the parties, it being an antecedent principle of international law that consent finally and validly given creates a legally binding obligation.[73]

73 Fourth Report by Sir Gerald Fitzmaurice of 17 March 1959, A/CN.4/120, *YILC*, 1959, vol. II, p 42.

And Article 4(3) added:

> In relation to any particular treaty, the application of the foregoing provisions [the obligation to carry them out in good faith] is conditional on the treaty possessing the necessary *validity*...that is to say, on its having been regularly concluded...on its possessing essential *validity*...[74]

74 Ibid, *YILC*, 1959, vol. II, p 42; emphasis added.

Following in his footsteps, the Commission adopted an Article 4 entitled 'General conditions of obligatory force' which was worded as follows:

> 1. A treaty has obligatory force only if, at the material time, it combines all the conditions of validity referred to in the preceding Article.
> 2. In the case of multilateral treaties, obligatory force for any particular State exists only if,... the treaty [is] valid in itself...[75]

75 Report of the Commission to the General Assembly, *YILC*, 1959, vol. II, p 99. The preceding Article (Art. 3) contemplated the different elements of the notion of validity: '1. validity has three aspects—a formal aspect, a substantial aspect and a temporal aspect—all of which must be present, both in respect of the treaty itself, and in respect of each contracting party' (ibid).

p. 669 18. Subsequently, this Article disappeared as such, but the concept of validity was dealt with in the provisions relating to the conclusion and invalidity of treaties. During the examination of the draft Articles by the ILC in 1964, the essentials of that prerequisite were covered within the discussion relative to the expression 'treaties in force'. Several members argued that this expression specifically referred to valid treaties, which otherwise could not be deemed to be 'in force'. The same opinion was later endorsed in the comments by some governments.[76] The discussion resurfaced in the Commission in 1966. In this respect, Abdullah El-Erian stated that:

> the words 'in force'...meant that the treaty had been freely consented to, did not derogate from fundamental principles of international law and had not been secured by fraud or coercion. Thus the words conveyed that the instrument met the requirements for essential validity laid down in the draft.[77]

Similarly, Ago declared that '...if a treaty was "*in force*", it must be "*valid*"; if it was not "*valid*", in was not "*in force*"'.[78] Once again, the matter came up during the Vienna Conference by way of a draft amendment which would have replaced the term 'in force' with the expression 'valid'. At this juncture, numerous delegations insisted that a treaty had to be valid to be deemed 'in force'. Eventually, the original text was retained as the Drafting Committee considered that the divergence of opinions was not based on a substantive issue but on one of drafting. That argument convinced the proponents of the amendment, which was consequently withdrawn.[79]

19. It thus follows that the application of Article 26 of the Convention is subordinated to all the provisions of the Convention relating to the validity and invalidity of treaties (Arts 42–53).[80] In this manner, what the doctrine had sometimes characterized as 'exceptions' to the rule *pacta sunt servanda*—such as invalidity through the violation of provisions of domestic law concerning the capacity to conclude treaties, error, fraud, corruption of a representative of a State, coercion of the representative of a State or of the State itself, and the conflict of a treaty with a peremptory norm of general international law at the time of its conclusion —turned out to be modalities of its application, given that the treaty had to be *valid*.

The rule applies solely to treaties the provisions of which are operative in the particular case

20. The matter of validity must be distinguished from cases where the treaty contains obligations which are subordinated to a suspensive condition. In those cases, the treaty may be both valid and in force but
p. 670 inapplicable because its provisions are not operative ↳ before the condition is fulfilled,[81] as, for example, in the case of treaties which are inoperative due to the activation of a *si omnes*[82] clause. The same holds true if the effectiveness of the treaty is affected by a suspensive condition or a resolutory condition.

The rule applies solely between parties to the treaty

21. For the norm to be applicable, the States concerned must be and continue to be 'parties' to the treaty.[83] It is important to remember that according to Article 2 of the Convention:

> 1. For the purposes of the present Convention:...
>
> (g)'party' means a State which has consented to be bound by the treaty and for which the treaty is in force

The meaning of 'State' was not specifically debated during the *travaux préparatoires* of the Convention, other than to recall that the rule '*pacta sunt servanda*' was binding upon all branches of government: executive, legislative, and judicial.[84] In the Third Report by Sir Humphrey Waldock, paragraph 3 of the draft Article

(then Art. 55) set out that the *pacta sunt servanda* rule applied to the territory of every State covered by the scope of a treaty because of the State's authorization, and to every State to which the provisions of a given treaty applied due to the fact that treaties create rights or obligations for third States or create objective regimes. A consensus rapidly arose from the discussion in favour of removing the paragraph and referring the matter to the Articles relating to the effect of treaties on third parties.[85] The issue was never discussed further, but it does not seem questionable that, even if the effects with regard to third parties were to be explained through the eventual role of a collateral agreement, it would still fall within the scope of the rule *pacta sunt servanda*.

C. Foundation of the rule *pacta sunt servanda*

22. Different foundations of the *pacta sunt servanda* rule were advanced by the doctrine. At the ILC, Sir Gerald Fitzmaurice overtly advocated in favour of consent. Subsequently, Sir Humphrey Waldock, without directly addressing the issue, ascribed a determinative role to good faith. The members of the Commission only rarely positioned themselves with regard to this aspect of the matter.

Consent as foundation

23. This point of view has long had many supporters. The draft Convention by the Harvard Law School already considered that 'treaties are binding only because the parties to them have freely consented to be bound by them and not because of any obligation resulting from some superior law'.[86] In his First Report to
p. 671 the ILC on the law of treaties, ↳ Sir Gerald Fitzmaurice saw the consent given by States as the foundation of the obligatory character of treaties (Art. 4—*Ex consensu advenit vinculum*).[87] Many subscribed to this viewpoint, including Manfred Lachs, who saw the agreement of the State as the basis for the rule.[88] Incidentally, the ICJ also took a position to that effect:

> It is...a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and the *raison d'être* of the convention.[89]

89 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, *ICJ Reports 1951*, p 21.

Good faith as foundation?

24. Other authors considered the rule a simple application of the principle of good faith.[90] At the ILC, Antonio de Luna clearly supported the view that:

> ...[the concept of good faith] was important not only as a rule for interpreting a treaty, but as the very foundation of the principle *pacta sunt servanda*....although in international practice States had always recognized that once they had declared their will together with other States they were bound by the declaration, that was not a requirement of logic; for why should past will prevail over future will? It was a requirement of the principle of good faith, without the observance of which no society could exist.[91]

Further, de Luna considered 'the principle of good faith as even more important that the rule *pacta sunt servanda*, which was one of the consequences of good faith in international relations'.[92] By contrast, Mustapha Kamil Yasseen opposed this notion: '[t]he obligation laid down in paragraph 2 derived from the

idea that the treaty was mandatory; he was therefore reluctant to regard that obligation as a consequence of the idea of good faith'.[93] Similarly, Radhabinod Pal highlighted that '[g]ood faith was in essence a matter of conscience and was too subtle and imprecise a concept to be taken seriously as a basis for international order'.[94]

25. Although the matter regarding the foundation of the rule was never directly broached by the Commission, it was indirectly introduced during the discussion of paragraphs 1 and 2 of draft Article 55, presented by Sir Humphrey Waldock. Paragraph 1 has already been quoted:

> 1. A treaty in force is binding upon the parties and must be applied by them in good faith in accordance with its terms and in the light of the general rules of international law governing the interpretation of treaties.[95]
>
> 95 Third Report, Sir Humphrey Waldock, A/CN.4/167, *YILC*, 1964, vol. II, p 7.

Paragraph 2 added the issue of good faith:

> 2. Good faith, *inter alia*, requires that a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects.[96]
>
> 96 Ibid.

p. 672 26. The first idea—included at the end of paragraph 1, that interpretation in good faith is an essential element to the application of treaties—originated from the fear expressed by the Rapporteur that a *stricto juris* interpretation of the wording of a treaty may lead to a violation of its spirit.[97] This part of the clause, supported by Verdross[98] and Bartoš,[99] was, by contrast, countered by other members of the Commission. They considered that the issue of interpretation should be treated elsewhere in the draft and not under the rule *pacta sunt servanda,* as doing so would weaken the principle.[100] Eventually, both the Rapporteur and the Commission endorsed Ago's proposition, according to which it was sufficient for paragraph 1 'to say that the treaty was binding upon the parties and must be applied by them in good faith'.[101]

27. The second idea, embodied in paragraph 2, came under criticism by the majority of the members of the Commission. It was criticized for only covering the negative aspects of the application of the treaty and for leaving unresolved the question of its positive application. Numerous members demanded its deletion.[102] In particular, Yasseen justified it as follows:

> What [is] said in paragraph 2 follow[s] from the binding force of the treaty, and there [is] no reason to mention that consequence rather than the others.[103]

The Rapporteur eventually decided to combine both paragraphs.[104] The modified text returned by the Drafting Committee read as follows:

> A treaty in force is binding upon the parties to it and must be performed by them in good faith. [Every party shall abstain from any act incompatible with the object and purpose of the treaty.][105]

The words in square brackets were received with almost unanimous reluctance, as the majority of members hoped for a clear, short, and precise text. Their abandonment was consummated at the following meeting;[106] when the amended text was returned by the Drafting Committee, on 6 July 1964, it was adopted by 16 votes to 0, with 2 abstentions (Paredes and Bartoš).[107] The issue resurfaced in 1966, when two governments demanded the reinsertion of the phrase in square brackets.[108] Roberto Ago disposed to that proposition by stating that:

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> When a treaty was in force, it must be performed in good faith, and States parties were obliged not only to refrain from acts that might prevent its application, but also to apply it in full. The proposed addition was therefore superfluous, and apart from the fact that it might give rise to misunderstanding, it would make the text less concise and less forceful than the Commission had intended.[109]

109 Ago, ILC, 849th meeting, 11 May 1966, *YILC*, 1966, vol I, Part Two, pp 34–5, para. 38; Reuter, ibid, p 35, para. 39.

Put to the vote again in 1966, the unchanged text was adopted by 14 votes to 0.[110] That formulation remained identical until the final adoption of the text at the Vienna Conference. In any event, it follows from this long controversy that good faith is the companion to the rule *pacta sunt servanda*, but not its source.

A fundamental axiomatic norm as foundation?

28. For some authors, the principle *pacta sunt servanda* is a postulate, a fundamental, indemonstrable norm relating to every agreement. Dionisio Anzilotti expressed this point of view in the following terms:

> The obligatory force of those norms derives from the principle that States must respect agreements concluded between them, i.e. *pacta sunt servanda*. This principle, precisely because it is at the basis of the norms under discussion, may not be the object of an ulterior demonstration from the standpoint of those norms themselves. It must be considered an objective, absolute value or, in other words, as the first, indemonstrable hypothesis to which this order, as any other order of human knowledge, necessarily pertains.
>
> Every legal order consists of a complex of norms which derives its obligatory character from a fundamental norm, to which they all are directly or indirectly linked. The particular fundamental norm determines which norms compose a given legal order and pulls them together into a unified system. What distinguishes the international legal order is that, in the international order, the principle *pacta sunt servanda* is not based, unlike domestic law, on a superior norm; it is itself the supreme norm....[111]
>
> From a *normative* standpoint, which is the view pertaining to the science of law, the problem may be expressed in the following terms: why *must* international treaties be observed? The answer, as it is already know, is given by the rule *pacta sunt servanda*. States must reciprocally behave in the agreed manner; original norm beyond which it is impossible to find another norm explaining its legal character, and which subsequently is taken by the science of law as an indemonstrable hypothesis or postulate.[112]

This was also the position taken by Kelsen who, in his first writings, saw the *pacta sunt servanda* rule as the *Grundnorm* of international law.[113] Subsequently, he hesitated regarding the status to be given to the norm, between a customary norm and a 'hypothetical legal norm':

> because the rule of the compliance with treaties, basis of voluntary international law, is indeed a rule of 'natural' law; that is, an objectively valid legal principle, be it as a customary rule or as a legal hypothesis,[114]

p. 674

to finally place the *Grundnorm* as pertaining to a different concept and simply according to the rule *pacta sunt servanda* the status of a customary norm:

> International law consists of...norms originally created by way of custom. They are the norms of general international law....Among them, the norm known as *pacta sunt servanda* is of special

> significance. It empowers the subjects of the international legal community [namely, the individual states] to govern their behaviour by means of treaties…creating norms by way of the declared agreement of duly authorized organs of two or more states, norms that impose obligations on, and grant rights to, the states entering into the treaty.…The basic norm of international law…must be a norm that establishes custom—the reciprocal behavior of states—as a law-creating material fact.[115]

Jan Verzijl also supported the proposition that the rule is an improvable axiom.[116] Similarly, again, Jean Combacau noted that:

> …the conventional edifice juxtaposes binding conventions which emanate from sovereign States, and no concept can better bring together those elements than the principle *pacta sunt servanda* (what has been consented to must be respected); a metajuridical principle more than a rule of law, the basic axiom without which no legal assertion may be taken seriously and which imposes on subjects of law that they consider as law that to which they have agreed to be law.[117]

For his part, Georges Scelle considered that the basis for the validity of treaties lay solely on social necessity and *objective law*, conceived as a superior principle ante-dating the will or the agreement between contracting States.[118] The idea of a fundamental norm was criticized by Gregory Tunkin in the following manner:

> The norms of international law result from an agreement between States. However, that does not mean that all of international law rests on the principle *pacta sunt servanda* as some sort of 'fundamental' or 'original' rule. In reality, international law has not in any way developed from some 'fundamental norm'. The principle *pacta sunt servanda* itself has evolved as a customary rule among many. It is intimately linked to principles such as those of the respect for the sovereignty of States, for equal treatment in law, etc. Like other fundamental principles of contemporary international law, they are connected and influence each other. They express and legally establish the fact that it is sovereign States which are engaged in contemporary international relations.[119]

A principle of non-contradiction

29. In this respect, Charles Chaumont likened good faith to the logical principle of non-contradiction:

> The principle of good faith contains the rule *pacta sunt servanda* but it does not entirely coincide with it, in the sense that the rule cannot be considered an application of the principle. The latter rests on the logical notion of non-contradiction, that a State cannot want something and its contrary at the same time.[120]

30. The ILC abstained from taking a position on questions of legal theory concerning the basis for the
p. 675 principle *pacta sunt servanda*. As discussed *infra*, the Vienna Conference ↳ equated the two principles of freedom of consent and of good faith with the *pacta sunt servanda* rule, by inscribing them side by side in the preamble to the Convention.

D. Content of the rule

31. According to Article 26 of the Convention:

> **Pacta sunt servanda**

> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Before delving into the exact content of the rule, it is not without interest to examine the placement of the Article setting out the rule in the codification draft. After clarifying this point, the two distinct concepts embodied in the *pacta sunt servanda* rule will be analysed; on the one hand, that every treaty possesses an obligatory character for the parties; and on the other, that the treaty must be performed in good faith. It can be concluded that, based on the treatment given to the rule by both the Commission and the Conference, they deemed it to be a customary rule.

Placement of the Article

32. There were many doubts regarding the placement of the Article. Formulating the rule at the beginning of the Convention would have meant granting it a fundamental *locus*, which would have governed the codification process as a whole; conveying it in the part relating to the performance of the treaty would have ascribed to it only a limited empirical reach. In the First Report on the law of treaties by Sir Gerald Fitzmaurice, the *pacta sunt servanda* rule was placed in the preliminary Articles of the draft.[121] In the Waldock report, the text containing the rule was situated rather far into the draft, as the introduction to the chapter relative to the performance of the treaty (Art. 55). The Israeli government suggested that the rule should be introduced at the beginning of the draft Articles rather than in the chapter relative to the performance of the treaty. It invoked the fact that the rule reached beyond the simple application and effects of treaties and, particularly, that it applied to the draft Article itself.[122] Other members of the Commission expressed opinions along the same lines.[123] Eventually, a compromise was reached through a proposal by the Special Rapporteur, which considered that the question must be treated as soon as the Introduction (Part I) and that the issues regarding conclusion and entry into force (Part II) would also be introduced.[124] This is what was done. The formally remodelled text was placed in the draft, as in the Vienna Convention of 1969, in 'Part III—Observance, Application and Interpretation of Treaties', 'Section 1—Observance of Treaties' and before 'Part IV—Amendment and Modification of Treaties' and 'Part V—Invalidity, Termination and Suspension of the Operation of Treaties'.

p. 676 33. The Special Rapporteur, Sir Humphrey Waldock, proposed, additionally, to recall the importance of the principle in the preamble to the draft Convention.[125] This position was adopted in its principle by the Commission in 1966,[126] which was not competent itself to formulate the wording of the preamble; it fell to the Diplomatic Conference to draft it.[127] However, the Commission's report expressly wished for this outcome.[128] The paragraph of the preamble adopted at the Vienna Conference indissociably combined three fundamental aspects: '*Noting* that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized'.

The obligatory character of the treaty to the parties: 'Every treaty is binding upon the parties to it'

34. In his Fourth Report, Sir Gerald proposed an Article 4 that read as follows:

> A treaty being an instrument containing binding undertakings and creative of vested rights, the parties are under a legal obligation to carry it out.[129]
>
> 129 *YILC*, 1959, vol. II, p 42.

This wording responded to abundant State practice[130] and to numerous arbitral awards or court judgments, such as:

- *The Van Bokkelen v Haïti* (1888) case:

> treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals,...and these are...to be kept with the most scrupulous good faith;[131]
>
> 131 J. B. Moore, *International Arbitrations*, vol. II, p 1849.

- *The Metzger and Co v Haïti* (1900) case:

> It need hardly be stated that the obligations of a treaty, are as binding upon nations as are private contracts upon individuals;[132]
>
> 132 J. B. Moore, *Digest*, vol. V, p 369.

- *The Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference* case, Advisory Opinion of 31 July 1922:

> The engagement contained in the third paragraph is not a mere moral obligation. It is a part of the Treaty and constitutes an obligation by which the parties to the Treaty are bound to one another.[133]
>
> 133 PCIJ, Series B, no. 1, p 18. See also PCIJ, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion of 4 February 1932, Series A/B no. 44, p 24.

35. The undisputed reception of the obligatory character of treaties to the parties results particularly from
p. 677 the fact that States normally honour their engagements. In the ↳ relatively rare case where States try to repudiate them, it is worth noting that the attempt is always accompanied by a claim that a precondition to the application of the rule has disappeared, thus affecting either the effectiveness of the treaty, its validity, or its obligatory character in the particular case.[134] It may suffice to recall some classic examples.

- On 19–31 October 1870, by way of the famous Gortchakoff circular, Russia announced that it repudiated certain provisions of the Treaty of Paris of 18–30 March 1856 on the status of the Black Sea. It invoked violations of the treaty on the part of the other contracting parties and a change of circumstances. The other powers protested and eventually, while conceding to Russia on the substance, were able to funnel the desired modifications into a protocol. It was on that occasion that—as the homage vice pays to virtue—the *pacta sunt servanda* principle was solemnly recalled in the aforementioned protocol of 17 January 1871.[135]

- A British protest accompanied the Austrian decision of 6 October 1908 to annex Bosnia-Herzegovina over which, according to the terms of the Berlin Treaty, the Austro-Hungarian Empire solely possessed administration powers.[136]

- At the end of December 1958, the Soviet Union unilaterally declared null the Allied agreement on Berlin and demanded that the status of the city be changed to that of a free city. The North Atlantic Council reacted through a communiqué on 16 December 1958, which stated 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 natural trust between nations which represents one of the foundations of peace’.[137]

From all this, it can be concluded that the rule of the obligatory character of a treaty to the parties is a well-established norm of general international law.

The obligation to perform the treaty in good faith

36. In turn, this obligation is composed of two elements: on the one hand, the determination of the *object* which must be performed (the treaty); and, on the other, the determination of the *manner* in which the performance must occur (in good faith). The connection between the obligation to perform the treaty and good faith has sufficiently been repeated in practice so as to make it unnecessary to turn our attention to this issue at considerable length.

The object of the performance: the treaty

37. The *pacta sunt servanda* rule is a formal requirement. '*Sunt servanda*', declares the Latin formulation. It is a command to perform the obligation arising from the *pactum.* Nevertheless, one may wonder whether—when the word 'treaty' is used—it refers to the instrument (the *instrumentum*) or to the obligations it contains (the *negotium*). Sir Gerald Fitzmaurice, in his Fourth Report to the ILC, conveyed that obligation in the following manner:

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> 1. A treaty being an instrument containing binding undertakings and creative of vested rights, the parties are under a legal obligation to carry it out.[138]
>
> 138 Article 4, para. 1, *YILC*, 1959, vol. II, p 42.

That formulation was thus closer to the *negotium* than to the *instrumentum.* In other words, if there was an obligation to perform the *pactum*, it was because it contained obligatory engagements (obligations or rights). However, it is necessary to go beyond the *negotium/instrumentum* dichotomy, or, to recapture the distinction drawn by Paul Reuter,[139] between 'act' and 'norm'. Both aspects must be the object of the observance. The parties must perform the obligations ensuing both from the provisions relating to the mechanism of the juridical act constituting the treaty and the substantive norms contained in it.

38. Diplomatic and judiciary practice calling for the observance of treaties is particularly abundant. In the arbitral award of 30 April 1990, the *Rainbow Warrior* case, the arbitral tribunal specifically invoked Article 26 as being applicable to the case. The issue under consideration was whether the violation of a treaty was a matter related to the law of treaties or to the law of international responsibility. The Tribunal held that:

> both the customary Law of Treaties and the customary Law of State Responsibility are relevant and applicable. The customary Law of Treaties, as codified in the Vienna Convention, proclaimed in Article 26, under the title '*Pacta sunt servanda*' that
>
> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.
>
> This fundamental provision is applicable to the determination whether there have been violations of that principle, and in particular, whether material breaches of treaty obligations have been committed.[140]
>
> 140 Paragraph 75 of the Award, *RIAA*, vol. XX, p 251.

The manner in which performance must take place: the observance of good faith

39. Sir Gerald Fitzmaurice, in his Fourth Report, adopted the following wording:

> 2. A treaty must be carried out in good faith, and so as to give it a reasonable and equitable effect according to the correct interpretation of its terms.[141]
>
> 141 Article 4, para. 1, *YILC*, 1959, vol. II, p 42.

The principle of good faith is a substantive principle which clarifies the interpretation of the obligation that must be performed. It took on a central role in Grotius' final chapter of his work *The Law of War and Peace*

> ...comme le dit Cicéron, la Fidélité à tenir ce que l'on a promis est le fondement non seulement de tous les Etats, mais encore de cette grande Société qui embrasse toutes les Nations. Otez la bonne foi, il n'y aura plus de commerce entre les Hommes...[142]

p. 679 International jurisprudence has frequently referred to good faith in the performance of treaties, as exemplified by various arbitral awards:

- The award rendered by the Permanent Court of Arbitration on 7 September 1910 in the *North Atlantic Coast Fisheries* arbitration, which turned on the application of a treaty relating to the regulation by Great Britain of the fishing rights accorded to United States citizens in Canadian waters;[143]
- The matter between Germany and Lithuania concerning the nationality of several people (Memel territory) (1937);[144]
- The case concerning the filleting within the Gulf of St Lawrence (*Canada v France*) (1986).[145]

As is the case with the PCIJ,[146] the jurisprudence of the ICJ is particularly rich concerning the application of good faith in regard to treaties.[147] As recently as 1997, the Court spoke as follows:

> Article 26 combines two elements, which are of equal importance. It provides 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' This latter element, in the Court's view, implies that, in this case, it is the purpose of the treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.[148]
>
> 148 ICJ, *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*), Judgment of 25 September 1997, *ICJ Reports 1997*, pp 78–9, para. 142.

In his Third Report to the ILC, Sir Humphrey Waldock specified that 'in commenting upon the rule it may be desirable to underline a little that the obligation to observe treaties is one of good faith and not *stricti juris*'.[149] He proposed the following language to govern the subject:

> Article 55.
> **—Pacta sunt servanda**
>
> 1. A treaty in force is binding upon the parties and must be applied by them in good faith in accordance with its terms and in the light of the general rules of international law governing the interpretation of treaties.
>
> p. 680 ↳ 2. Good faith, inter alia, requires that a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects.[150]
>
> 150 Ibid.

In its report of 1964,[151] the Commission refined the text of the draft Article by presenting it in the following form, which remained unchanged until its adoption at the Vienna Conference:

> A treaty in force is binding upon the parties to it and must be performed by them in good faith.

40. The second part of Sir Humphrey Waldock's proposal—'that a party must abstain from acts calculated to frustrate the objects and purposes of the treaty'—was considered by the Commission as 'implicit in the obligation to perform the treaty in good faith'.[152] In its written comments, the Finnish government proposed to reintroduce in the text that 'a party must abstain from acts calculated to frustrate the objects and purposes of the treaty'.[153] A similar proposition was advanced by Turkey.[154] The Rapporteur supported the Commission's position[155] and the Article remained unchanged. Nevertheless, the concept of the interpretation of the treaty in good faith was inserted in Article 31(1) of the Convention.

41. The relation between good faith and *pacta sunt servanda* is, at first sight, demarcated by the preamble to the convention, which calls the former a principle and the latter a rule. As Sir Humphrey Waldock put it, '[t]he rule *pacta sunt servanda* is itself founded upon good faith'.[156] This statement calls for clarification, taking the discussion to the basis and scope of the rule *pacta sunt servanda*. If the restrictive conception of the *pactum* adopted by the Vienna Convention is refuted, the scope of the good faith principle extends well beyond the treaty concerned. The work by Robert Kolb, currently the authority on the issue of good faith, clearly demonstrates this proposition.[157] First of all, the principle of good faith already applies *before the entry into force of the treaty.*[158] In addition, the principle of good faith governs all types of non-formal agreements. If the notion of *pactum* is broadly construed, it is the respect of the word given in an exchange of consents, which is at the same time the foundation of both the obligation to respect this promise and the way in which it must be respected (in good faith). For this reason, the same obligation of good faith operates with regard to resolutions of international organizations conceived as interstate agreements, for acquiescence, etc. This was certainly the position of Manfred Lachs, who favoured a broad conception of the *pacta sunt servanda* principle and who linked the principle of good faith to 'every manifestation of an interstate agreement'.[159] The ICJ established the same connection for unilateral acts. In the *Nuclear Tests* case of 1974, concerning formally and substantively unilateral acts, the Court considered that:

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith....Just as the very rule of *pacta sunt servanda* in the law of ↳ treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.[160]
>
> 160 ICJ, *Nuclear Tests* (*Australia/France*), Judgment of 20 December 1974, *ICJ Reports 1974*, p 268, para. 46.

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As Michel Virally emphasized:

> That *dictum* of the Court formulated a general principle that was quite analogous, for unilateral acts, to what *pacta sunt servanda* was for treaties. Its foundation was the same in the two cases, that of good faith.[161]

For Virally, as for the Court, the case was an application of the *pacta sunt servanda* principle applied *by analogy*, as it involved a unilateral act binding the State without consensual link, without *pactum*. Thus, *a fortiori* this should be the rule in any situation where the consensual link is established and where a tacit *pactum* clearly exists. In addition, it is worth noting that:

- The Rapporteur of the ILC on unilateral acts similarly proposed the adoption in respect to such acts of a principle parallel to *pacta sunt servanda*, that he referred to through the expressions *acta sunt servanda* or *declaratio est servanda*.[162] As he—rightly or wrongly—contemplated to deal with unilateral acts

solely outside any acceptance by third parties, his standpoint excluded, by definition, any notion of *pactum*.

- In his report at the Institute of International Law, Michel Virally extended the obligation of good faith to the performance of political agreements.[163]

42. Having answered the question of the difference between the scopes of the principle of good faith and of the rule *pacta sunt servanda*, it is unnecessary to examine which of the two, the principle or the rule, takes priority. The agreement resulting from that freedom of consent is binding upon the parties and must be performed in good faith. The three elements are indissociably linked. The rest is only talk.

Conclusion: customary character of the rule

43. It ensues from the previous exposition that, whatever the doctrinal opinions relative to the foundation of the rule or its scope in the relations between States, the Commission did not find it difficult to establish the content of the rule. And if an attempt to answer the classic question on codification is made, regarding whether the Commission proceeded from custom or from the progressive development of international law, it is undoubtedly the former proposition which was at work in this case.

E. Consequences of the rule

44. An examination of the *travaux préparatoires* of Article 26 shows that the commentaries regarding this
p. 682 Article mostly touched on its conditions of application and the ↳ consequences of the obligation to perform the treaty, as well as on the exceptions to the rule.

45. In this respect, regarding the *conditions of application of the rule*, several situations which did not affect the obligatory character of the treaty were identified. They were:

(1) the succession of governments;[164]

(2) the state of diplomatic relations[165] (a question now governed by Art. 63 of the Convention);

(3) the question of the impact of territorial modifications on the treaty, subject to the provision on State succession (Art. 73 of the Convention).

46. Regarding the *consequences of the obligation to perform the treaty*, the Vienna Convention governs, by way of other provisions:

- the fact that the treaty must be performed notwithstanding any contrary provision in the internal law of the State (Art. 27). International practice has long established that, if a treaty to which a State has consented is contrary to its domestic law, it is incumbent upon that State to take, if required, any legislative measures necessary to perform its obligations,[166] to modify its legislation if needed,[167] or to take any necessary measures that must be observed by its citizens;[168]
- the rules relating to the interpretation of the treaty (Art 31–3);
- the fact that it cannot be terminated by way of unilateral repudiation (rules on the denunciation of a treaty)[169] (Arts 56–7);
- the matter of successive treaties (Arts 30, 58, and 59);
- the effect of treaties on third parties (Arts 34–8), etc.

F. ‘Exceptions’ to the rule

47. It is mostly in the early modern period that exceptions to the rule were overtly advocated. From the fifteenth to the nineteenth century, some authors supported the idea that the *pacta sunt servanda* rule could be set aside in certain circumstances; for instance to protect the superior interests of princes or their States (Machiavelli, Hobbes, Spinoza, Hegel) or owing to a state of necessity (eg Jean Bodin).[170] In modern times, it was often suggested that the rule was relative and included several exceptions because of the existence of
p. 683 other rules governing the treaty regime. The following ‘exceptions’ have been mentioned: ↳

- the principle of the hierarchy of norms: Article 103 of the Charter and *jus cogens*;
- the rules concerning the vices of consent;
- the failure to perform by the other party;
- the impossibility to perform;
- the *rebus sic stantibus* clause, etc.

It was particularly the last rule that unleashed the most vivid discussions. The question was brought up at both the ILC and the Sixth Committee.[171]

48. After the work of the Vienna Conference, the different ‘exceptions’, as it has been shown *supra*,[172] are nowadays considered not ‘exceptions’ to the rule, but modalities of its scope or application, by taking into consideration other rules of the law of treaties regarding the entry into force, validity, termination, etc. which are integrated in the different chapters of the treaty regime and which are now inseparable of the *pacta sunt servanda* rule itself. In this respect, the wording adopted by Sir Gerald Fitzmaurice in his First Report to the ILC on the law of treaties, if it had been followed, would have had the merit to properly show the conditionality of the rule:

> Art. 5.
> **Pacta sunt servanda**
>
> 1. Subject to the provisions of the present code, States are bound to carry out in good faith the obligations they have assumed by treaty.[173]
>
> 173 *YILC*, 1956, vol. II, p 108.

The reason for the removal of this phrase is unclear, as the restraints which temper the rule result less from actual exceptions than from the application of other rules of the law of treaties.

49. The only true exceptions on which the Vienna Convention did not take a stand were, on the one hand, aggression, which Article 76 does not prejudge, avoiding deciding the issue in one sense or another; and, on the other, the state of necessity which, in contrast, the Commission discussed in its draft Articles on state responsibility. A word of clarification is undoubtedly necessary with regard to these two questions. Regarding *aggression*, it was sustained that the *pacta sunt servanda* principle need not be respected in relation to lawful sanctions on an aggressor, thus dispensing the victim States with the obligation to respect certain treaties concluded with the aggressor. As regards the *state of necessity*, even if it had often been invoked as an exception to the rule *pacta sunt servanda*, it is, in the law of responsibility, a circumstance which eliminates the responsibility resulting from an unlawful act. Thus, strictly speaking, it is less a matter of an exception to the obligation to respect treaties than of a circumstance precluding the wrongfulness of the State's violation in the exceptional and restrictive circumstances where that excuse is admitted.[174]

G. Determinations and sanctions of breaches of the rule

50. It is commonplace for a State to invoke situations where a violation by another would dispense that State
p. 684 with the application of the *pacta sunt servanda* rule. The ↳ question is to know whether it is sufficient to invoke such a situation to be relieved from the application of the rule. This point was incidentally evoked at the ILC by Mr Tsuruoka, who in this respect expressed the opinion that 'as long as a treaty was in force and its invalidity had not been established, it must be performed by the parties in good faith',[175] which meant that, in his opinion, it was not sufficient for a party to sustain that the treaty was null as an excuse for refusing to perform it. Thus, it was still necessary that the cause invalidating the treaty be established.

51. This delicate question is dealt with in a different section of the Convention, particularly in Articles 65 and 66, governing the procedure to be followed if the validity of a treaty, its termination, the withdrawal of a party, or the suspension of its application were to be challenged. The ICJ, for its part, was prompted to caution in its judgment in the *Gabčíkovo-Nagymaros Project* case, regarding the possibility to invoke the termination of a treaty on the grounds that it had been breached. The Court noted:

> Finally, Hungary maintained that by their conduct both parties had repudiated the Treaty and that a bilateral treaty repudiated by both parties cannot survive. The Court is of the view, however, that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda* if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance. It would be otherwise, of course, if the parties decided to terminate the Treaty by mutual consent.[176]
>
> 176 ICJ, *Case concerning the Gabčíkovo-Nagymaros Project*, Judgment of 5 February 1997, *ICJ Reports 1997*, p 68, para. 114.

Further, the Commission evoked the relation between the *pacta sunt servanda* rule and international responsibility. In his Third Report, Sir Humphrey Waldock proposed the following text as paragraph 4 of Article 55:

> The failure of any State to comply with its obligations under the preceding paragraphs engages its international responsibility, unless such failure is justifiable or excusable under the general rules of international law regarding State responsibility.[177]
>
> 177 Third Report on the Law of Treaties, A/CN.4/167 of 3 March 1964, *YILC*, 1959, vol. II, p 37.

As a matter of fact, the paragraph was met with little enthusiasm. With the exception of Kameel Yasseen, who was in favour of the text,[178] the majority of the members favoured its elimination, deeming its first part as useless for establishing the obvious, ie that responsibility is a consequence of the violation of any international obligation, as its second part, which contemplated justifications and excuses specific to the law of responsibility therefore, implying that in those cases there was no longer an obligation to be respected.[179] The Special Rapporteur was convinced by these arguments and decided to withdraw the text.[180]
p. 685 The question of the relation between the law of treaties and international ↳ responsibility was broached by the arbitral award of 30 April 1990, in the *Rainbow Warrior* case. The Tribunal recalled that:

> the general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligation, since in the international law field there is no distinction

> between contractual and tortuous responsibility.[181]
>
> 181 Paragraph 75 of the Award, *RGDIP*, 1990, p 851.

New Zealand argued that the application of the *pacta sunt servanda* rule implied that when *restitutio in integrum* was possible, the State could not simply confine itself to pecuniary reparation:

> ...at least in cases of treaty breach, what a claimant State seeks is not pecuniary compensation but actual, specific compliance or performance of the treaty, adding that if the party in breach were not expected to comply with the treaty, but need only pay monetary compensation for the breach, States would in effect be able to buy the privilege of breaching a treaty and the *norm pacta sunt servanda* would cease to have any real meaning.[182]

The tribunal did not accept this argument as it considered that in the particular case, France's obligation had expired.[183]

52. Thus, the Vienna Convention does not deal with sanctions for violations of the rule, which in consequence fall under the scope of general international law.

General conclusion

53. Article 26 of the Vienna Convention is certainly a fundamental Article of the law of treaties. However, it must be assessed within its context. At the present time, there are multiple valid reasons for not applying a treaty: because it is subject to a cause of invalidity, because it is not at all or no longer in force, because it does not apply to the particular case, because its effects are suspended between the parties, because it has expired, etc. Article 26 is inseparable of all other Articles of the Vienna Convention and must always be read in context.

JEAN SALMON *

Notes

1 General Assembly, 22nd session, 6th committee, 974th meeting, 18 October 1967, p 98, paras 22–4 (Cuba); 980th meeting, 25 October 1967, p 129, para. 43 (United Arab Republic).

2 General Assembly, 21st session, 6th committee, 909th meeting, 13 October 1966, p 47, para. 32 (Bolivia); General Assembly, 22nd session, 6th committee, 974th meeting, 18 October 1967, p 98, paras 22–4 (Cuba); 976th meeting, 20 October 1967, p 108, para. 30 (China); 978th meeting, 23 October 1967, p 118, para. 6 (Hungary); 981st meeting, 25 October 1967, p 137, para. 20 (Philippines).

3 General Assembly, 22nd session, 6th committee, 974th meeting, 18 October 1967, p 98, paras 22–4 (Cuba); 976th session, 20 October 1967, p 107, para. 23 (Czechoslovakia).

4 General Assembly, 22nd session, 6th committee, 975th meeting, 19 October 1967, p 104, para. 18 (Yugoslavia); 980th meeting, 25 October 1967, p 128, para. 29 (Bolivia); 981st meeting, 25 October 1967, p 138, para. 29 (Ecuador).

5 M. Sibert, 'The Rule Pacta Sunt Servanda From the Middle Ages to the Beginning of Modern Times', *Indian Yearbook of Int'l Affairs*, 1956, vol. 5, pp 219–26; J. B. Whitton, 'La règle Pacta sunt servanda', *RCADI*, 1934-III, vol. 49, pp 160–74; M. Lachs, 'Pacta sunt servanda', *Encyclopedia of Public International Law* (Amsterdam: Elsevier, 1984), vol. 7, pp 364–5; H. Wheberg, 'Pacta sunt servanda', *AJIL*, 1959, pp 775 ff.

6 C. W. Jenks, *The Common Law of Mankind* (London: Stevens & Sons, 1958), pp 143–5; J. B. Whitton, *supra* n 5, pp 164 ff.

7 E. Vattel, *Le droit des gens*, book II, ch. 15, s 218.

8 Article 5, para. 2 of the Draft, Institute of International Law, *Annuaire*, 1921, vol. 28, p 208.

9 Harvard Law School, *Research in International Law*, Part III, Law of Treaties, *AJIL*, Supplement 1935, vol. 29, p 977: 'A State is bound to carry out in good faith the obligations which it has assumed by a treaty (*pacta sunt servanda*)'.

10 Report of the ILC on the work of its 1st session (1949), Official Records, General Assembly, 4th session (A/925).

11 GA Res. 2625 (XXV).
12 British and Foreign State papers, vol. 61, pp 1198–9, in 9 *AJIL* 4 (October) 959–62 (1915) at p 962. The protocol finds its origin in the attempt by Russia unilaterally to abrogate certain provisions of the Treaty of Paris of 30 March 1856 on the Turkish Straits, see *infra* para. 35.
13 L. le Fur and G. Chklaver, *Recueil de texts de droit international public, 1934,* p 872 (reproduced in Appendix E: Germano-Czechoslovak agreement); LNTS, vol. 54, p 341 and for the agreement with Poland, ibid, p 327.
14 M. O. Hudson, *International Legislation*, vol. 4, p 2378; L. le Fur and G. Chklaver, *supra* n 13, p 951.
15 Cl.-A. Colliard and A. Manin, *Droit international and histoire diplomatique. Documents choisis*, Book 1, II (Paris: Montchrestien, 1970), p 809; UNTS, vol. 119, p 49.
16 Harvard Law School, *supra* n 9, p 977.
17 See the explanation by Sir Gerald Fitzmaurice, Fourth Report on the Law of Treaties, A/CN.4/120 of 17 March 1959, *YILC*, 1959, vol. II, p 37.
18 See particularly J. B. Whitton, *supra* n 5, pp 217–49; Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (London: Stevens & Sons, 1953), pp 112–14; J. Kunz, 'The Meaning and the Range of the Norm Pacta Sunt Servanda', *AJIL*, pp 181 and 190; H. Kelsen, who, in his most recent writings, considers it one of the basic norms of customary international law, *Théorie pure du droit* (ed. de la Baconnière) (Neuchatel: 1953), p 164 or 'Théorie du droit international public', *RCADI*, 1953-III, vol. 84, pp 133–4: '[the treaty] applies the norm of general international law *pacta sunt servanda* and it creates obligations and rights which did not exist prior to the conclusion of the treaty'; P. Guggenheim, *Traité de droit international public* (Geneva: Georg, 1953), vol. I, p 9; R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Harlow: Longman, 1996), vol. 1, Parts 2–4, para. 584, p 1206. It was the standpoint adopted by the doctrine of socialist States: M. Lachs, *supra* n 5, p 366; G. I. Tunkin, *Droit international public* (Paris: Pedone, 1965), p 139.
19 ILC, 727th meeting, 20 May 1964, para. 26, *YILC*, 1964, vol. I, p 28.
20 E. Kaufmann, 'Règles générales du droit de la paix', *RCADI*, 1935-IV, vol. 50, pp 515–16. At the Conference of Vienna, this view was only sustained by the delegate of Ecuador, Official Records, Summary Records, 2nd session, 12th plenary meeting, 6 May 1969, p 45, para 9.
21 It is shown below that those characteristics led part of the doctrine and the arbitral jurisprudence to extend the scope of the rule *pacta sunt servanda* to contractual relations between a State and private parties.
22 G. Ripert, 'Les règles du droit civil applicables aux rapports internationaux', *RCADI*, 1933-II, vol. 44, p 601.
23 See *infra.*
24 *De jure naturae and gentium*, book III, ch. III, iv, paras 1 and 2.
25 *Droit des gens*, book II, ch. XII, para. 163.
26 H. Wehberg, *supra* n 5, pp 775, 782, and 783.
27 'La théorie du droit naturel depuis le XVIIIe siècle and la doctrine moderne', *RCADI*, 1927-III, vol. 18, p 439.
28 A. von Verdross, 'Le fondement du droit international', *RCADI*, 1927-I, vol. 16, pp 285–6. Allusion to the norm of Roman law '*suum cuique tribuere*'; ie 'to give each his own'. While admitting the same origin to the rule, A. Decencière-Ferrandière considers that it follows from a superior rule of natural law, common to both international and domestic law; the search for the common good, *Du principe 'pacta sunt servanda' considéré comme norme fondamentale du droit international* (Barcelona: Missel-Lania Paxtot, 1931), pp 144–6.
29 See also, on this matter, *infra*, para. 43.
30 eg J. Combacau and S. Sur, *Droit international public* (4th edn, Paris: Montchrestien, 1999), pp 76–7 and 85; Nguyen Quoc Dinh, P. Daillier, and A. Pellet, *Droit international public* (7th edn, Paris: LGDJ, 2002), p 385, no. 250.
31 See Sir Gerald Fitzmaurice, Third Report on the Law of Treaties, citations quoted *supra* para. 17.
32 R. Kolb, *La bonne foi en droit international public* (Geneva, Paris: PUF, 2000), pp 86 ff. See also from the same author, 'La bonne foi en droit international public', *RBDI*, 1998/2, pp 674–6.
33 J. L. Kunz, *supra* n 18, p 185.
34 *Cours de droit international* (trans. G. Gidel) (1929), pp 67–9.
35 'Règles générales du droit de la paix', *RCADI*, 1931-I, vol. 35, p 80.
36 S. Bastid, *Les traités dans la vie internationale* (Paris: Economica, 1985), no. 96, p 115.
37 ICJ, *South West Africa Cases* (*Ethiopia v South Africa; Liberia v South Africa*), Preliminary Objections, Separate Opinion under judgment of 21 December 1962, *ICJ Reports 1962*, p 411.
38 M. Lachs, *supra* n 5, p 370. See also, by the same author, 'Some Reflexions on Substance and Form in International Law', *Transnational Law in a Changing Society, Essays in Honor of Philip C. Jessup* (New York: Columbia University Press, 1972), pp 99 ff.
39 See J. Salmon, 'Les accords *solo consensu*', *AFDI*, 1999, pp 1 ff, and the practice cited.
40 S. Sur, 'Quelques observations sur les normes juridiques internationales', *RGDIP*, 1985, p 924.

41 J. Combacau, *Le droit des traités,* Collection 'Que sais-je?' (Paris: PUF, 1991), p 5.

42 The rule was, in his opinion, of much wider application than the law of treaties, as agreement between States underlay every norm of international law. But he would not, of course, object to its being stated with regard to treaties. (ILC, 727th meeting, 20 May 1964, *YILC*, 1964, vol. I, para. 14, pp 27–8).

43 '…the principle *pacta sunt servanda* might be taken in a broad sense as the basis of the binding force of any rule of international law, whether conventional or customary. But the members of the Commission were agreed that, in the particular context, it should be construed only in the strict sense as a fundamental rule of the law of treaties' (ILC, 727th meeting, 20 May 1964, *YILC*, 1964, vol. I, p 28, para. 26).

44 Comments by Portugal, *YILC*, 1966, vol. II, p 332.

45 See *infra* para. 15.

46 See *infra* para. 21.

47 eg *The Administrations of Posts and Telegraphs of the Republic of Czechoslovakia v The Radio Corporation of America*, Arbitral Award of 1 April 1932: 'in public law the sentence *pacta sunt servanda* will also apply, just as public interest requires stability as regards any arrangement legally agreed upon' (*AJIL*, 1936, p 523); *Saudi Arabia v Arabian American Oil Company (Aramco)*, 23 August 1958, *ILR*, vol. 27, pp 163–4; *Sapphire International Oil Company v National Iranian Oil Company*, 15 March 1963, *ILR*, vol. 62, pp 170 and 190; *BP Exploitation Company (Libya) Limited v Government of the Libyan Arab Republic*, Arbitral Award of 10 October 1973; *ILR*, vol. 53, p 332; *Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of Libyan Arab Republic*, 19 January 1977, *ILR*, vol. 53, p 464; *Amco v Indonesia (Merits)*, 20 November 1984, para. 248, *ILR*, vol. 89, p 495. For a radical assertion of the idea that the rule *pacta sunt servanda* applies to State contracts, see Garcia Amador, Fourth Report on International Responsibility (A/C.N.4/119 of 26 February 1959, *YILC*, 1959, vol. II, pp 24 ff); H. Wehberg, *supra* n 5, p 786.

48 For a review of arguments against this theory, see L. Lankarani El-Zein, *Les contrats d'État à l'épreuve du droit international* (Brussels: Bruylant, 2001), esp. pp 139–58.

50 Third Report, Sir Humphrey Waldock, A/CN.4/167 and Add.1–3, *YILC*, 1964, vol. II, p 5.

51 ILC, 16th session, 726th meeting, 19 May 1964, *YILC*, 1964, vol. I, Summary Records, p 24, para. 44.

52 Ibid, p 24, para. 51 and again at the 727th meeting, 20 May 1964, p 31, para. 58.

53 ILC, 16th session, 726th meeting, 19 May 1964, *YILC*, 1964, vol. I, Summary Records, p 24, para. 57.

54 Ibid, p 26, para. 79 and at the 727th meeting, 20 May 1964, pp 30–1, para 50.

55 ILC, 16th session, 727th meeting, 20 May 1964, *YILC*, 1964, vol. I, Summary Records, p 27, para. 10.

56 Ibid, p 30, para. 49.

57 Ibid, p 25, para. 66.

58 Ibid, p 26, para. 75.

59 Ibid, p 28, para. 15.

60 Ibid, p 29, para. 30 and pp 31–2, para. 60.

61 Ibid, p 29, para. 34.

62 Ibid, p 30, para. 41.

63 Ibid, p 29, para. 30.

64 Ibid, p 32, para. 69.

65 See the comments by the government of Cyprus (in relation to the invalidity or the termination) (*YILC*, 1966, vol. II, Part One, p 285 and *YILC*, 1966, vol. II, Part Two, p 59).

66 See in addition the commentary on those Articles in this work.

67 Comments by the Israeli government, *YILC*, 1966, vol. II, pp 64 and 340.

69 See the commentary on those Articles in this work.

70 Reuter considered that 'a supervening new rule of *jus cogens* automatically deprived of all force a treaty in conflict with that rule', ILC, 849th meeting, 11 May 1966, *YILC*, 1966, vol. I, Summary Records, Part Two, p 37, para. 69.

71 Ch. Chaumont, 'Cours général de droit international public', *RCADI*, 1970-I, vol. 129, p 381:

> A State cannot perform in good faith a treaty that has become unenforceable, either because there has been a violation of the treaty by the other party, because performance is impossible or because a fundamental change of circumstances has occurred. In other words, the rule *pacta sunt servanda* does not have an abstract and absolute value. It can derive from changing factors capable of altering the substantive content of the international regime. In this manner, good faith may not come into play at every stage as it follows the fate of the rule, from its formation and performance to its termination.

76 See the comments by the governments of Cyprus (*YILC*, 1966, vol. II, pp 59 and 285) and of Czechoslovakia (*YILC*, 1966, vol. II, pp 59 and 286).

77 ILC, 849th meeting, 11 May 1966, *YILC*, 1966, vol. I, Part Two, p 34, para. 22; supported by Tounkine, ibid, p 34, para. 41 and Yasseen, ibid, as well as Bartos, who invoked the possible application of *jus cogens*, ibid, p 36, para. 65.
78 Ago, ILC, 849th meeting, 11 May 1966, *YILC*, 1966, vol. I, Part Two, p 35, para. 47.
79 Official Records, Summary Records, 1st session, Committee of the Whole, 29th meeting, 18 April and 72nd meeting, 15 May 1968, paras 34 and 39 as well as Official Records, Summary Records, 2nd session, Committee of the Whole, 12th meeting, 6 May 1969, para. 11 (Ecuador), paras 46–7 (Bolivia), and para. 54 (Costa Rica).
80 See the commentary on those Articles in this work.
81 Report of the ILC, *YILC*, 1959, commentary on Art. 4, p 97, para. 1.
82 Ch. Rousseau, *Principes généraux du droit international public* (Paris: Pedone, 1944), p 356.
83 See ILC Report, 1959, Art. 4(2) 'if…the State concerned has become and still remains a party to it', *YILC*, 1959, vol. II, p 97.
84 Harvard Law School, *supra* n 9, pp 478–9.
85 See the discussions during the 726th and 727th meeting, *YILC*, 1964, vol. I, Summary Records, pp 20–32.
86 Harvard Law School, *supra* n 9, p 987.
87 Article 4 of the draft code on treaties, *YILC*, 1956, vol. II, p 108.
88 M. Lachs, *supra* n 5, p 364.
90 A. von Verdross, 'Règles générales du droit de la paix', *RCADI*, 1929-V, vol. 30, pp 427 and 443; J. Basdevant, 'Règles générales du droit de la paix', *RCADI*, 1936-IV, vol. 58, pp 520–2; P. Chaillez, *La nature juridique des traités internationaux*, thesis (Paris: 1932), pp 79 and 95 ff.
91 ILC, 16th session, 727th meeting, 20 May 1964, *YILC*, 1964, vol. I, Summary Records, p 29, para. 34.
92 ILC, 16th session, 748th meeting, 18 June 1964, *YILC*, 1964, vol. I, Summary Records, p 163, para. 70.
93 ILC, 726th meeting, 19 May 1964, *YILC*, vol. I, p 26, para. 80.
94 ILC, 16th session, 727th meeting, 20 May 1964, *YILC*, 1964, vol. I, p 27, para. 5.
97 Ibid, p 8 and specifications given ILC, 16th session, 727th meeting, 20 May 1964, *YILC*, 1964, vol. I, Summary Records, pp 28–9, para. 17.
98 ILC, 16th session, 726th meeting, 19 May 1964, *YILC*, 1964, vol. I, Summary Records, p 24, para. 56.
99 ILC, 16th session, 727th meeting, 20 May 1964, *YILC*, 1964, vol. I, Summary Records, p 30, para. 38.
100 Briggs: ILC, 16th session, 726th meeting, 19 May 1964, *YILC*, 1964, vol. I, Summary Records, p 24, para. 45; Elias: ibid, p 24, para. 52; Pal: ILC, 16th session, 727th meeting, 20 May 1964, *YILC*, 1964, vol. I, Summary Records, p 27, para. 7.
101 ILC, 16th session, 727th meeting, 20 May 1964, *YILC*, 1964, vol. I, Summary Records, p 29, para. 31.
102 eg Elias: ILC, 16th session, 726th meeting, 19 May 1964, *YILC*, 1964, vol. I, Summary Records, p 24, para. 53; Tounkine: ILC, 16th session, 727th meeting, 20 May 1964, *YILC*, 1964, vol. I, Summary Records, pp 27–8, paras 14 and 18; Ago: ibid, pp 28–9, para. 27.
103 Ibid, p 31, para. 52.
104 Ibid, p 32, para. 71.
105 ILC, 16th session, 748th meeting, 18 June 1964, *YILC*, 1964, vol. I, Summary Records, p 162, para. 52. The notion of 'object and purpose of the treaty' had been formulated by Paul Reuter, ILC, 16th session, 726th meeting, 19 May 1964, *YILC*, 1964, vol. I, Summary Records, p 26, para. 77.
106 ILC, 16th session, 749th meeting, 22 June 1964, *YILC*, 1964, vol. I, Summary Records, p 165, para. 8.
107 ILC, 16th session, 759th meeting, 6 July 1964, *YILC*, 1964, vol. I, Summary Records, p 232, para. 2.
108 The government of Finland (*YILC*, 1966, vol. II, pp 61 and 292) and of Turkey (ibid, pp 61 and 342), supported also by Greece and the United Kingdom: ILC, 849th meeting, 11 May 1966, *YILC*, 1966, vol I, Part Two, pp 33–4, para. 24.
110 ILC, 867th meeting, 10 June 1966, *YILC*, 1966, vol. I, Summary Records, p 169, para. 3.
111 D. Anzilotti, *Cours de droit international*, 1st vol.: *Introduction, Théorie générale* (trans. Gidel) (Paris: Sirey, 1929), pp 43–4.
112 Ibid, p 65.
113 *Hauptprobleme der Staatslehre* (2nd edn, 1923), pp 123, 125, 174 ff.
114 'Les rapports de système entre le droit interne and le droit international public', *RCADI*, 1926-IV, vol. 14, p 300.
115 H. Kelsen, *Théorie pure du droit, supra* n 18, pp 164 and 165.
116 *International Law in Historical Perspective* (Leiden: Sijthoff, 1968), vol. I, pp 244 and 254.
117 J. Combacau, *supra* n 41, p 5.
118 *Précis de droit international* (Paris: Sirey, 1932), vol. II, pp 336–7.
119 G. I. Tunkin, *supra* n 18, p 139.
120 Ch. Chaumont, *supra* n 71, p 381.
121 Article 5, *YILC*, 1956, vol. II, p 108.
122 Comments by the Israeli government, *YILC*, 1966, vol. II, pp 61 and 298.
123 Particularly Ruda, ILC, 849th meeting, 11 May 1966, *YILC*, 1966, vol I, Summary Records, Part Two, p 32, para. 9.
124 El-Erian, ILC, 849th meeting, 11 May 1966, *YILC*, 1966, vol I, Summary Records, Part Two, p 33, para. 20; Ago, ibid, pp 34–5,

para. 35.

125 Ibid, p 37, para. 71 and *YILC*, 1966, vol. II, p 59.

126 *YILC*, 1966, vol. II, pp 210–11.

127 Lachs, ILC, 849th meeting, 11 May 1966, *YILC*, 1966, vol I, Summary Records, Part Two, p 32, para. 14; Rosenne, ibid, p 34, para. 29.

128 Report of the Commission, para. 5 of the commentary on the Article *Pacta sunt servanda*, renumbered Art. 23, *YILC*, 1966, vol. II, pp 210–11. That appeal was taken up by certain delegates at the 6th Committee: 906th meeting, 10 October 1966, p 29, para. 14 (Czechoslovakia) and 912nd meeting, 18 October 1966, p 66, para. 14 (Argentina).

130 See eg A. Ch. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris: CNRS, 1962), vol. 1, pp 161–75; J. B. Whitton, *supra* n 5, pp 231–41.

134 See particularly J. B. Whitton, *supra* n 5, pp 224–31.

135 See *supra* para. 4 and for the facts Lord A. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), pp 494–7.

136 Ibid, pp 499–500.

137 *Department of State Bulletin*, 1959, vol. 40, (4).

139 P. Reuter, 'Le traité international, acte and norme', *Archives de la philosophie du droit*, 1987, vol. 32, pp 111–18.

142 As Cicéron said, the Fidelity to keep one's promises is not only the fundament of every State, but also of that great Society that embrace every Nations. Remove good faith, and there will be no more commerce between Humans
(Own translation; H. Grotius, *Le droit de la guerre and de la paix* (trans. Jean Barbeyrac) (1724), book III, ch. 25, s 1. See also Bynkershoek, *Quaestionum juris publici*, libri duo, II, cap. IX: 'Pacta privatorum tuetur jus civile, pacta principium bona fides'.

143 The Permanent Court of Arbitration, after invoking 'the principle of international law that treaty obligations are to be executed in perfect good faith', added: 'from the Treaty results an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty by making regulations is limited to such regulations as are made in good faith, and are not in violation of the Treaty' (*RIAA*, vol. XI, p 188).

144 By virtue of the principles of international law, a State must fulfill its international obligations *bona fide*. And by virtue of that principle, Lithuania must quash a decision rendered by one of its organs (*RIAA*, vol. III, p 1751).

145 Whatever the stock capacity of a filleting trawler operating within the Gulf, any fishing exceeding the asigned quota to a given trawler should be considered as a breach of good faith capable of engaging France's responsibility, which as a party to the Agreement of 1972, has the duty to assure the scrupulous respect by its citizens of international engagements which it has entered into to their benefit (*RIAA*, vol. XIX, p 265).

146 See the following Opinions: *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion of 4 February 1932, Series A/B, no. 44, p 28; *Minority Schools in Albania*, Advisory Opinion of 6 April 1935, Series A/B, no. 64, pp 19 and 20.

147 See the following cases: *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion of 28 May 1948, *ICJ Reports 1947–48*, p 63; *Rights of Nationals of the United States of America in Morocco*, Judgment of 27 August 1952, *ICJ Reports 1952*, p 212.

149 *YILC*, 1964, vol. II, p 7.

151 Ibid, p 176.

152 Ibid, commentary on Art. 55, p 177, para. 2.

153 *YILC*, 1966, vol. II, p 59.

154 Ibid and see Castrén, ILC, 849th meeting, 11 May 1966, *YILC*, 1966, vol I, Summary Records, Part Two, pp 33–4, para. 24.

155 *YILC*, 1966, vol. II, p 61.

156 Third Report on the Law of Treaties, commentary to Art. 55, para. 2, *YILC*, 1964, vol. II, p 7.

157 R. Kolb, *supra* n 32.

158 See the commentary on Art. 18 in this work.

159 ILC, 849th meeting, 11 May 1966, *YILC*, 1966, vol I, Summary Records, Part Two, p 33, para. 17.

161 M. Virally, 'Panorama du droit international contemporain. Cours général de droit international public', *RCADI*, 1983-V, vol. 183, p 197.

162 Report of the ILC on the work of its 50th session (1998), AG NU A/53/10, p 101, para. 141.

163 Conclusions by Rapporteur Michel Virally, reproduced following the resolution adopted by the Institut de droit international on 29 August 1983 at its session in Cambridge, 'Textes internationaux ayant une portée juridique dans les relations mutuelles entre leurs auteurs and textes qui en sont dépourvus', para. 6, Institute of International Law, *Annuaire*, 1984, vol. 60, II, p 288.

164 First Report by Sir Gerald Fitzmaurice, draft Art. 5, *YILC*, 1956, vol. II, p 108.

165 Fourth Report by Sir Gerald Fitzmaurice, draft Art. 4(4), *YILC*, 1959, vol. II, p 42.

166 A. Ch. Kiss, *supra* n 130, vol. I, n 172, pp 89–90.

167 Harvard Law School, *supra* n 9, p 985; PCIJ, *Exchange of Greek and Turkish Populations*, Advisory Opinion of 21 Feburary 1925, Series B, no. 10, p 20; PCIJ, *Greco-Bulgarian 'Communities'*, Advisory Opinion of 31 July 1930, Series B, no. 17, p 32.

168 A. Ch. Kiss, *supra* n 130, vol. I, fn 173, p 90, fn 174, pp 91–4 and fn 174, pp 94–5. See also Harvard Law School, *supra* n 9, pp 977–8.

169 The practice is particularly rich. See A. Ch. Kiss, *supra* n 130, vol. I, nos 176 and 177; Lord A. McNair, *supra* n 135, pp 493 ff; Arbitral award of 7 April 1875 in the *Chile-Peru* case:

> It is a well established principle of international law that once a treaty possessing all the elements of validity has been formally performed, it may solely be modified by the authority and following the procedures which have contributed to its creation. (La Fontaine, *Pasicrisie internationale*, p 165).

170 See J. B. Whitton, *supra* n 5, pp 241–5.

171 Paredes, ILC, 16th session, 726th meeting, 19 May 1964, *YILC*, 1964, vol. I, Summary Records, p 25, para. 61; General Assembly, 20th meeting, 6th Committee, 851st meeting, paras 4 and 6 (Pakistan).

172 See *supra* paras 16 and 19.

174 See Art. 26 of the draft Articles on State responsibility for an illicit act committed internationally adopted by the Drafting Committee on second reading (A/RES/56/83 of 12 December 2001).

175 Tsuruoka, ILC, 849th meeting, 11 May 1966, *YILC*, 1966, vol. I, Part Two, p 36, para. 60.

178 *YILC*, 1964, vol. I, Summary Records, 726th meeting, 19 May 1964, para. 81 and 727th meeting, 20 May, para. 81.

179 See *YILC*, 1964, vol. I, Summary Records, the interventions by Briggs (726th meeting, 19 May 1964, p 24, para. 48), Elias, ibid, p 24, para. 53, Verdross, ibid, p 25, para. 60, Tounkine, 727th meeting, p 28, para. 20, Bartos, 726th meeting, p 25, para. 71, Rosenne, ibid, p 24, para. 48, Pal, 727th meeting, p 27, para. 9, Tabibi, ibid, p 27, para. 13, Tsuruoka, ibid, p 28, para. 24, Ago, 727th meeting, p 29, para. 29, De Luna, ibid, p 29, para. 37, etc.

180 727th meeting, p 32, para. 73.

182 Ibid, p 860, para. 111.

183 Ibid, p 873, para. 114.

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