

*Good Faith*  
*in*  
*International Law*



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# Good Faith in International Law

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# Introduction

Good faith appears in different guises in a variety of legal contexts. The concept has existed for millennia, and since the development and widespread influence of Roman Law, it has been an accepted and integral part of legal systems. The axiomatic simplicity and familiarity of the expression 'good faith' contributes to the uncritical acceptance of the principle in legal theory. While the existence of the principle in both municipal legal systems and international law can hardly be doubted, its nature, scope and function present difficulties which have not been adequately considered, and no writer has hitherto presented a comprehensive study, or proposed a definition of the principle, as it operates in international law.

Good faith is a general principle of law recognized by civilized nations, and as such is a formal source of international law<sup>1</sup>. Influential writers assure us that it is a fundamental principle<sup>2</sup> or that 'it unquestionably pervades public international law'.<sup>3</sup> The uncontroverted comments of members of the International Law Commission when considering Draft Articles of the proposed Convention on the Law of Treaties,<sup>4</sup> and the subsequent acceptance by a large number of States of Article 26 of the *Convention on the Law of Treaties (1969)*, hardly leave room for doubt on the matter. Yet, apart from three chapters by Professor Bin Cheng in his study of the general principles of law,<sup>5</sup> there is no major work on what is, apparently, a fundamental (perhaps even *the* fundamental)<sup>6</sup> principle to reflect its alleged importance in international law. Dr Vouin, who presented an excellent thesis on good faith in French Law fifty years ago, saw two preliminary difficulties in the choice of his subject matter and the determination of its limits. These were the existence of a juridical function of good faith and the legitimacy of a study entirely devoted

to good faith.<sup>7</sup> His concern about the legitimacy of such a study was directed towards the relationship between good and bad faith. He posed the question whether these concepts are distinct, each requiring a separate study, or whether only one of the two constitutes 'the efficient principle' (*le principe efficace*), in which case that is the one to be examined, the other defining itself by opposition to it.<sup>8</sup> He discussed the differing views of French jurists on this problem, and gave his own view that it was impossible to link all the effects of good and bad faith to each other *a priori*, or to affirm that there will be perfect concordance between the two notions.<sup>9</sup>

As regards the existence of a juridical function of good faith, Dr Vouin saw this as a matter of producing juridical effects out of phenomena of a psychological or moral order ... as manifestations of the nature of man.<sup>10</sup> He did not consider as a preliminary difficulty the question of the existence of good faith as a *legal* principle (as distinct from producing legal effects out of phenomena of a psychological or moral order), and he concluded that the doctrinal dispute between French jurists on whether there was a unified concept of good faith or two concepts, 'good' and 'bad' faith, was a question posed 'without our being able to solve it *a priori* (*la question est donc posée sans que nous puissions la résoudre a priori*).<sup>11</sup> He also eventually concluded that there was not in any case a general principle of good faith,<sup>12</sup> so it is hardly surprising that he does not offer a definition of the principle. Professor Bin Cheng believed that good faith, like other rudimentary terms applicable to human conduct such as 'honesty' or 'malice', eludes *a priori* definition and he confined himself to illustrating some applications of it.<sup>13</sup>

More limited references to good faith or the principle of good faith in codes, legislation, judicial pronouncements and legal writings generally range from categorical assertions that 'good faith is the foundation of all law',<sup>14</sup> through less dramatic but confident statements about what justice and good faith (or good faith coupled with other moral qualities such as honesty) demand in a particular situation, to dismissive remarks about a vague *moral* principle which lacks the definition necessary for a *legal* principle.<sup>15</sup> In legal orders generally, the expression 'good faith' is found in many different contexts. It is often simply used to designate a state of mind.<sup>16</sup> It is often used, with appropriate additional expressions, to designate an objective standard of behaviour.<sup>17</sup> It is sometimes added (perhaps tautologically) to statements of positive legal obligation.<sup>18</sup> There is often confusion in the terminology employed in good faith discourse. Even in the same sentence, a speaker or writer will switch without explanation from 'principle of good faith' to 'standard', 'rule' or 'rules' of good faith.<sup>19</sup>

There are clearly difficulties about this principle, which is variously described as the foundation of all law, or a fundamental principle of law, and as not pertaining to law at all but rather to morality or ethics. Probably a majority in all legal orders accept that there is a relationship between good

faith in legal contexts and morality or ethics, although the precise nature of that relationship is not often examined.<sup>20</sup>

The purpose of this book is to examine the nature, scope and function of the principle of good faith in international law, and to suggest a definition of the principle for that legal order. However, because of the diverse sources of modern international law, and the direct debt which that system owes to the major municipal legal systems, it is necessary first to examine the origin and development of good faith in legal theory generally (Chapters 2 and 3) and (in Chapter 4) to identify and discuss briefly some characteristic features and rules of good faith in both international law and municipal legal systems.

In the absence of a generally accepted corpus of good faith 'rules' or an authoritative definition of the principle of good faith, the following three chapters will provide an essential focus for the more detailed examination of the principle in the doctrine, treaties and judicial decisions of international law.

## Notes

- 1 See the comments by Lord Phillimore on Art. 38 of Statute of PCIJ, *Procès verbaux, Proceedings of Committee of Advisory Committee of Jurists*, 16 June–24 July 1920, p. 335 (LON Publications).
- 2 For example, Schwarzenberger, (1957) p. 15.
- 3 Mann (1973), p. 162.
- 4 For example, *International Law Commission* (1950), p. 299.
- 5 Cheng (1987), pp. 106–60.
- 6 *Megalidis Case* (1928) 8 TAM 386 at p. 395, cited by Cheng (1987), p. 105.
- 7 Vouin (1939), p. 1.
- 8 *Ibid.*, p. 14.
- 9 *Ibid.*, pp. 14–20.
- 10 *Ibid.*, p. 2.
- 11 *Ibid.*, p. 21.
- 12 *Ibid.*, p. 456.
- 13 Cheng (1987), p. 105.
- 14 See Note 6.
- 15 Judge Klaestad in *South-West Africa Voting Procedure, Advisory Opinion*, ICJ Rep. 1955, p. 67 at p. 88.
- 16 For example, in English Law, *Contempt of Court Act 1981* secs. 3, 4; *Theft Act 1968* Sec. 3(2) and in the Law of Property, where for example although the meaning of good faith in the *Law of Property Act 1925*, S.205(1)(xxi) – 'a purchaser in good faith for valuable consideration' – is not defined, it probably means 'honestly', Halsbury, vol. 3 para. 678, pp. 375–6.
- 17 For example, as in German Law, BGB Arts. 157 and 242.
- 18 For example, the rule *pacta sunt servanda*, as now stated in Art. 26, *Vienna Convention on the Law of Treaties* (1969) UKTS No. 58 (1980) Cmnd. 7964.
- 19 See for example, *International Law Commission* (1950), p. 299 (Mr Yepes, Colombia).
- 20 The relationship between good faith in English law and morality or ethics is discussed in O'Connor, (1990).

## 2 The Origin of the Concept of Good Faith in Legal Theory

### **The Beginnings of Human Society and *Pacta sunt servanda***

With the emergence of modern man<sup>1</sup> there was an enormous acceleration in the rate of cultural evolution. Tools, weapons, fish traps and the sickle appeared. Human beings eventually began to form settled communities with dwellings, boats, art and sculpture.<sup>2</sup> All these developments did not occur immediately, although in the vast time scale of the evolution of man they appear to have occurred in a remarkably short period.<sup>3</sup>

The continuing controversies about the origin and evolution of man have not yet seriously affected the nineteenth century evolutionary hypothesis that there were major consecutive phases in the development of human culture, such as food-gathering, pre-literate primitive cultivators and civilized, that is, literate, organized societies.<sup>4</sup> It appears that all peoples everywhere did not inevitably pass autonomously and successively through these stages – ‘Social evolution was polycentric, developing in many distinct though interconnected areas’.<sup>5</sup>

The development of human culture, although clearly a complex process, originated with the formation of human groups,<sup>6</sup> and there appears to be a correlation between the level and rate of development of a culture and the numbers in the relevant cultural group. In general, the larger the group, the more likely it is that it will flourish and develop a wider range of specializations in a shorter time.<sup>7</sup> But group living at any level only becomes possible if there is some minimum of co-operation and tolerance between the members of the group.<sup>8</sup> Whether the ‘rules’ governing co-operation and tolerance in primitive groups are to be classified as ‘legal rules’ or ‘law’ need not concern us at this

point.<sup>9</sup> For the purpose of suggesting the possible origin of the concept of good faith, the necessity for a minimum of human co-operation and tolerance if group living is to emerge and survive is adopted here. From that necessity, the emergence of a concept such as good faith would seem to be inevitable.

Membership of any human group involves obligations, and membership of even the earliest human groups must have required the performance of whatever obligations were assumed or imposed on the members of those groups. There is no suggestion that the notion of obligation as it developed in ethical and legal theory,<sup>10</sup> was understood or applied even in an elementary fashion in the earliest human groups. The notion of obligation postulated here for such groups is infinitely more simple. It can be expressed by saying that any member of the group was 'trusted' (that is, he was relied upon) to perform whatever task was 'entrusted' to him. A simple illustration of the working of that expectation is where one or more members of a hunting group lure or drive the quarry into a position where other members can capture or kill it.<sup>11</sup> On this basic level, a member of the group was expected or trusted to do whatever was required of him as his contribution to the survival of the group. In this sense, the requirement that 'obligations must be fulfilled' is relevant to, and must have been applicable in the earliest human societies.<sup>12</sup>

In the Neolithic phase of the evolution of man, with the foundation of small settled communities in which arts and crafts began to flourish, some specialization of labour and a system of exchange appeared,<sup>13</sup> and with it, necessarily an extension of the concept of obligation.<sup>14</sup> The earliest primitive communities, without a legislature or officials of any kind must have lived by certain primary rules, without which no community could retain that degree of cohesiveness which is essential for its very existence.<sup>15</sup> The fact of community – 'the cardinal fact in the history of civilization',<sup>16</sup> and speculations about the origin of law have led to a wide acceptance of the view that in all communities a primary or basic rule about the obligation of 'promises' must have existed.<sup>17</sup> The maxim *pacta sunt servanda* is often used to express this requirement, and provided we understand it in this general sense rather than in the formal senses it has since acquired in both municipal and international law, it will suffice for the present purpose. It is in the most general sense that John B. Whitton used the expression *pacta sunt servanda* when he wrote that 'it would be difficult to trace the exact origin of this rule, but it seems to date from the very beginnings of human society'.<sup>18</sup> It is in the same sense that we can accept that the binding force of *pacta sunt servanda* is axiomatic in relation to 'a savage island tribe which allows a rival clan to land, unmolested, on the shore, where it leaves certain articles after taking others which the local tribe deposited for the purpose, and then departs, in safety, the whole transaction is one of contract, considered by both parties to be binding.'<sup>19</sup>

There is no need to postulate that both parties considered such 'contracts' to be binding because of religious, moral or legal considerations, and for very remote ages such elements might be disregarded. It is possible to suggest, for

example, that *pacta sunt servanda* was a feature of human society from its very beginnings for purely pragmatic reasons. Malinowski thought that primitive man was guided by experience and used strictly rational methods in areas within the limits of his knowledge.<sup>20</sup> Some later writers agree that the study of a number of primitive peoples indicate that their ordinary rules of secular morality (including the rule about keeping promises) did not have a divine origin.<sup>21</sup> We can suggest therefore that primitive rational man accepted the need to observe the rule *pacta sunt servanda* (in its general sense) simply to ensure that his community continued to exist. It is, however, also believed that irrational forces were invoked almost from the dawn of man to reinforce obligations thought to be essential for man's survival,<sup>22</sup> and 'religion' was also an element in the foundation of the concept of good faith.

### Religion, the Oath and Good Faith

In the earliest known city states and empires which developed from about 3000 BC,<sup>23</sup> there is abundant evidence of increasingly complex systems of social control, including the use of religion. Evidence from prehistoric sites from the early Palaeolithic suggests that prehistoric peoples also had a consciousness of the 'sacred',<sup>24</sup> contributing to the belief that magico-religious phenomena have been part of human culture for countless millennia.<sup>25</sup> Sir James Frazer's definition of religion as including two elements – 'a theoretical and a practical, namely a belief in powers higher than man and an attempt to propitiate or please them',<sup>26</sup> is possibly the most expressive of general views of magico-religious phenomena. One distinctive feature of the belief in powers higher than man is the practice of oath-taking and this practice played an important supportive role in the development of the concept of good faith.

There is little evidence of a Golden Age when men were strict observers of the laws of truth and justice and there was no occasion for oaths. Potter's *Antiquities*, cited by James Endell Tyler, suggests that oaths had their origin when men began 'to degenerate from their primitive simplicity, when truth and justice were banished out of the earth'.<sup>27</sup> Tyler himself approves of the view of Heineccius (an extract from whose *Treatise on the Lubricity or Slippery Uncertainty of the Suppletory Oath* he includes in his book) that men were ever attempting to injure their fellow creatures, and as Heineccius says, 'in this state of affairs, it was essentially necessary to devise some means by which a rein might be put on the perfidy of men'.<sup>28</sup> The religious obligation of an oath was the means used, almost by all nations, 'as if by an agreement'.<sup>29</sup>

Dr Paley defined an oath thus, 'it is the calling upon God to witness, that is, to take notice of what we say and it is invoking His vengeance or renouncing His favour, if what we say be false, or what we promise be not performed'.<sup>30</sup> If we substitute, where appropriate, other phenomena regarded

as sacred in particular cultures, this definition is adequate to convey what an oath involved throughout the ages. The universal characteristic of an oath was, and is, the appeal to whatever is held to be sacred by the oath-taker, to bear witness to the truth of testimony or to give a guarantee of the performance of an obligation. Its efficacy has always depended on belief or *faith* in the awesome power of the sacred entity invoked. It matters not whether the entity is 'The Lord the most High God' of the Hebrew, or the Holy Gospel of the Christian or the Sacred Koran of the Muslim or the numerous other things, animate or inanimate, which have served this purpose in all ages and cultures.<sup>31</sup>

The rationale of the oath was explained by St. Augustine in his reply to an inquiry as to whether it was lawful for the Church to put a man known to be a heathen upon his oath, and who would consequently swear by an idol:

If you will not admit the oath of an idolater there is no other adequate method of forming a covenant with him, or of binding him to keep his word or preserving the public peace; nor is it forbidden by any law of God to employ for a good purpose the oath of that man whose fault consists in swearing by false gods but who keeps the faith which he has pledged.<sup>32</sup>

Failure to keep pledged faith was regarded as a heinous crime in most cultures which, if it did not involve immediate punishment by men, would inevitably attract condign punishment at some future time by a higher power.<sup>33</sup>

It is, of course, impossible to make any firm assertion about the remote origin of the concept of good faith, but it is submitted that the factors briefly discussed here were predominant in the perception of the basic concept long before it crystallized into an accepted principle in ancient civilizations. From the very beginnings of human society, the necessity to perform 'promises' or 'obligations' (in the general sense of these terms) must have been recognized as essential for survival and it is not surprising that this essential requirement (*pacta sunt servanda*) was buttressed by recourse to the higher powers which were believed to be capable of intervention in the affairs of men. At a very early date, a crucial connection was made between 'faith', and obligations considered vital for human intercourse. The universality of the principle which is now perceived as one of its most characteristic features,<sup>34</sup> may be ascribed to the fact that the concept originated in the universal rational nature of man and in the universal fascination of man with the reality of the 'sacred', defined by Rudolf Otto as 'the holy'.<sup>35</sup>

Religion, the domain of the sacred, as opposed to the profane world of practical activities and rational outlook<sup>36</sup> had a supportive role in relation to *pacta sunt servanda*. That rule belongs primarily to the domain of practical activities, and its origin lies most probably in man's reason and social experience. Religious oaths were adopted as an expedient to help ensure

observance of the rule. But religion was destined to play a major role in the development of a concept of good faith which was much wider than the basic requirement *pacta sunt servanda*.

The emphasis in historical times on *good faith* rather than *faith* came about because some men overcame the primeval sense of awe and terror of mysterious forces which constituted the earliest religious experience of man. Man developed a sense of 'the holy' which, as Professor Berman wrote, enabled him to challenge all existing social structures.<sup>37</sup> It was the sense of metaphysical wondering, which Huston Smith identifies as one of the indispensable marks of all world religions,<sup>38</sup> which led to the invention of the idea of natural law, and in that sense it might be said that the idea of natural law had a religious origin. It was through natural law itself, however, rather than through any particular world religion that the concept of good faith was established and developed in legal theory, and some aspects of natural law, as they relate to the concept, will be considered in the following section.

### **Natural Law and the Concept of Good Faith**

Dr Rommen, in his study of the natural law, states that 'in the early periods of all peoples the mores and laws, undifferentiated from the norms of religion, were looked upon as being exclusively of divine origin'.<sup>39</sup> This is true of the ancient Greeks, the early Germans and the Roman people.<sup>40</sup> He explains that the idea of a natural law can emerge only when men note the profound changes that have occurred in the history of their own communities and when they notice the dissimilarity of the institutions of neighbouring peoples.<sup>41</sup> This realization of cultural diversity, as experienced for example, in fifth-century Greece, is also suggested by Professor Unger as one possible origin of the conception of a higher law.<sup>42</sup> Changes, and dissimilar institutions, are difficult to reconcile with the conception of an unalterable and unchanging divine law, and men are led to the distinction between divine and human law. Soon, human reason 'has to grapple with the natural law, with the question of the moral basis of human laws'.<sup>43</sup> While it is no doubt true, as d'Entreves says, that there is no end to the divisions and subdivisions required to cover and to account for the infinite varieties of natural law,<sup>44</sup> it is clear that the natural law, since its philosophical conception and first elaboration among the ancient Greeks, has been largely concerned with the question of the moral basis of human laws.

It is hardly possible to say with certainty when, or with whom, the ethical speculation of Greece (and, therefore, of Europe) began. For the purpose of this work, the most relevant contribution to the idea of natural law appears to have been first made by Heraclitus of Ephesus. With him, Rommen says, the idea of the natural law for the first time emerged as a natural, unchangeable law from which all human laws draw their force.<sup>45</sup> Heraclitus was, on the

whole, in the opinion of Dr Max Hamburger, an upholder of the divine law; '... all things come to pass in accordance with this Word', *logos*, the mystical world-law.<sup>46</sup> Heraclitus expressly invoked Diké, the goddess of Justice, in support of good faith when he said that she 'shall overtake the artificers of lies and the false witnesses'.<sup>47</sup> This appears to be the first reference available to us of the direct association of justice with good faith. By the time of Cicero, the association was firmly established, so much so that he reversed the order of association. For him, good faith was the foundation of justice.<sup>48</sup> In the intervening centuries of course, Greek philosophy had developed and adapted the *logos*-idea of Heraclitus, and the mystical idea of the great goddess Diké, to produce more refined theories of natural law and justice. The history of the development of Greek philosophy generally is not relevant to the concept of good faith in legal theory, and obviously, no attempt could be made here to mention even the high points. But some results of that development appear to be highly important, and an attempt is made to identify and briefly discuss these.

As early as the sixth century BC, systems of rational thought based to some extent on observation had emerged in Greece. Initial speculations about the universe were naturally affected by such cosmogonies as those of Hesiod and Anaximander, whereby the creation of the universe, in the typical creation-myth syndrome,<sup>49</sup> is imagined as the development out of one basic entity of many entities possessed of diverse qualities. The Theogony of Hesiod, in epic style, described the creation of the world from chaos, the emergence of the various gods and the successive ages of man.<sup>50</sup> For Anaximander, 'justice' played a role in the development of the cosmos by adjusting the relationship between the particular substances.<sup>51</sup> Parmenides and Zeno of Elea challenged the view of the world which was based on the idea of diversity and change and taught the doctrine that 'the all is one, that is, that 'Being' itself is perfectly homogenous, immune from change, and timeless.<sup>52</sup> Karl Reinhardt believes that the views of Heraclitus and of Pythagoras, although supposed to have preceded the system of Parmenides, are in fact a later response to his ideas.<sup>53</sup> The significance of Heraclitus for the emergence of the idea of natural law as a natural unchanging law has been noted above; as for Pythagoras, Hamburger states that it was to him and to his disciples that we owe the notion of a juridical community of human beings.<sup>54</sup>

In the second half of the fifth century BC, the emphasis in Greek philosophical speculation shifted from natural science and speculative cosmology to more practical human problems. Socrates, as Cicero said, was the first to call philosophy down from the heavens and set her in the cities of men.<sup>55</sup> As the principal speaker in almost all of the dialogues of Plato, Socrates posed fundamental questions about the special features of moral experience, and highlighted the problems revealed by the vague and conflicting opinions commonly held on moral questions and the answers hitherto offered by philosophers. He identified justice with obedience to law.<sup>56</sup> This view was

central to his life and to his death. The law must be obeyed, and for him law and morality were one and the same thing.<sup>57</sup> Through his thesis that virtue consists in knowledge, 'he also showed that there exists a knowable objective world of such values as goodness, beauty, and justice...'.<sup>58</sup> The significance of Socrates for the idea of natural law lies, according to Rommen, in his regarding 'the daimonion, conscience and its voice', as a reflection and testimony of these ultimate values and of the divinely instituted order of the world.<sup>59</sup> The discussion of the problem of definitions of ultimate values like goodness and justice, initiated by Socrates, was continued by Plato.<sup>60</sup>

In the *Republic* Book I, Plato has Socrates questioning the view of Cephalus that justice or right consists simply and solely in truthfulness and paying one's debts.<sup>61</sup> Having rejected as unsatisfactory the views that justice consists in giving to each his due or that justice is the interests of the stronger (as Thrasymachus argued) and so on, Plato arrives at a more fundamental conclusion that justice is 'keeping to what belongs to one and doing one's own job'.<sup>62</sup> In the ideal State, as propounded in Plato's *Republic*, a man naturally fitted to be a shoemaker, or carpenter or whatever should stick to his own trade, and this becomes the image of justice for the individual also. Justice, as conceived by Plato, lay in a man's complete performance of his duties, but its real concern is not with external actions, but with a man's inward self:

The just man will not allow the three elements<sup>63</sup> which make up his inward self to trespass on each other's functions or interfere with each other, but by keeping all three in tune, like the notes of a scale (high, middle and low, or whatever they be), will in the truest sense set his house in order, and be his own lord and master and at peace with himself.<sup>64</sup>

Justice in the individual is, therefore, that quality which harmonizes the various elements in man and enables him to distinguish the just from the unjust. Plato held that such realities as courage and justice (which he called 'forms') could not be apprehended by perception or empirical observation but only by pure reason, because they were permanent and unchanging entities existing independently of particular things and actions. The 'forms' alone were real, and man's reason leads him to knowledge of the 'forms'.

Plato also held that all the various forms are themselves made intelligible by their relation to one supreme form – the Form of the Good.<sup>65</sup> Later, in *The Laws*, Plato applied his doctrine that knowledge of the Good is discoverable by the philosopher through the use of reason to 'the common law of the State' in the sense of a fundamental law or 'right reason'.<sup>66</sup> This is an idea which, as Professor Jowett said, is an aspect of the Platonic idea of Good which corresponds to a certain extent with 'the modern conception of a law of nature or of a final cause, or of both in one'.<sup>67</sup>

Aristotle's views were influenced by his master Plato, but inevitably he pursued his own thought, and particular fields of interest, and he departed in

important respects from Plato. From his criticism of Plato's views on the nature of the soul and of causation, he advanced his own view that the efficient cause of change is 'nature', an inherent characteristic of all things which leads them to develop their capacities or potential to their end state of actuality.<sup>68</sup> For him, therefore, the essence, and the perfect expression of it in the individual, is also the *telos*, or end.<sup>69</sup>

As Professor Friedmann explains, Aristotle saw the world as a totality comprising the whole of nature: 'Man is part of nature in a twofold sense: on the one hand he is part of matter, part of the creatures of God and as such he partakes of experience; but man is also endowed with active reason which distinguishes him from all other parts of nature. As such he is capable of forming his will in accordance with the insights of his reason.'<sup>70</sup> Following Socrates and Plato, Aristotle believed that man through the insights of his reason, could know justice, in an absolute sense or, as he explains in his *Ethics*, in the sense of natural justice which is invariable or immutable.

Natural [justice is] that which everywhere has the same force, and does not exist by people's thinking this or that; legal [justice] is that which is originally indifferent, but when it has been laid down is not indifferent. e.g. that a prisoner's ransom shall be a mina, or that a goat and not two sheep shall be sacrificed.<sup>71</sup>

According to Aristotle, natural justice is superior to legal or conventional justice,<sup>72</sup> and although one of his definitions of justice is action in obedience to (positive) law,<sup>73</sup> this is in the sense of justice being co-extensive with virtue in general. He, like Plato,<sup>74</sup> recognized that positive law, being the product of a human law maker, could not provide exactly that which was proper for each individual. He thus explains equity as a rectification of legal justice.

When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission – to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice – not better than absolute justice but better than the error that arises from the absoluteness of the statement.<sup>75</sup>

Of the various systems of Greek philosophy which emerged in the period after Aristotle, Stoicism proved to be the one which most influenced Roman legal development. As Friedmann says, with the Stoics both nature and the law of nature assumed meanings different to that of the Sophists, for whom nature was something external, outside man. Because of the revolution in thinking brought about by Socrates, Plato and Aristotle, nature was now conceived as not only the order of things, but also man's reason. Man's reason is now part of nature.<sup>76</sup> The ethical doctrine of Stoicism was first laid down by Zeno of Citium about the end of the fourth century, and was originally

strange and uncompromising, Oriental rather than Hellenic in character.<sup>77</sup> The detailed tenets are not relevant for the purpose of this work, but some major ideas in Stoic thought, as eventually adopted and adapted by the Romans, are fundamentally important for the concept of good faith which developed in legal theory.

Sir Frederick Pollock identifies the first of these major ideas. 'The Stoics asserted that the world is a product of reason, and that all the laws of nature aim in the long run at reasonable ends'.<sup>78</sup> He explains further the Stoic doctrine that Reason is the guide or standard of human life:

This reason, as expressed in the constitution of man and his relations to the world, his capacities, his achievements, and his aspirations, furnishes a type or pattern of life which may be sufficiently known by those who choose to model their conduct upon it. Actions conformable to this type are morally right, and rightmindedness is the conscious striving to attain it (we neglect for the moment the minuter points of Stoic doctrine); it is in this sense that moral goodness is the fulfillment of man's proper nature. ...<sup>79</sup>

The second major Stoic idea of importance for the concept of good faith was the idea that though all men are free and equal individuals, they are also members of a common humanity. Plutarch summed up the *Republic* of Zeno in one main principle:

... that all the inhabitants of this world of ours should not live differentiated by their respective rules of justice into separate cities and communities, but that we should consider all men to be one community and one polity, and that we should have a common life and an order common to us all, even as a herd that feeds together and shares the pasturage of a common field. ...<sup>80</sup>

The Stoic concept of a universal community had never before, as Professor Gilbert Murray observed,<sup>81</sup> been clearly formulated by any people known to history, although, as noted above, the notion of a juridical community of human beings appears to have originated with the Pythagoreans. The concept of a universal community, and the concept of a universal natural law governing that community were two products of the long history of Greek speculative thought which decisively influenced Roman legal philosophy at a critical point. In particular, they contributed to the enlargement of the idea of good faith from a narrow obligation to keep promises and agreements in accordance with the oath sworn by one's own God, to a wider ethical conception of good faith as a principle of natural law.

## Notes

1 The date of the emergence of *Homo Sapiens* remains a controversial matter. See gen-

- erally, 'The Earliest Populations of Man in Europe, Asia and Northern Africa in Palaeolithic Times' in vol. 1, Chapter V, *The Cambridge Ancient History*, Hughes and Brothwell (1970). The greater integration of knowledge between physical anthropologists and molecular biologists, and new fossil discoveries, have led to advances in understanding of human evolution, and a further revision (in the order of 5 million years!) to a more recent possible date for the split of the ancestors of man from the African ape lineage, which have important implications for the controversy.
- 2 See generally 'Primitive Man in Egypt, Western Asia and Europe' in Chapter III *The Cambridge Ancient History* (1970); Clarke, (1977); Braidwood (1975).
  - 3 Although 'Cultural Man' has been on Earth for some two million years and *homo sapiens* assumed an essentially modern form about 60 000 years ago, it is only in the last 10 000 years that man domesticated plants and animals, began to use metals and to harness energy sources other than the human body. See Lee and Devore (1968), p. 3.
  - 4 See Clarke (1970) pp. 60–62. For a critical discussion of nineteenth-century evolutionary theories on the development of society see Chodak (1973), pp. 14–41, and for a discussion and citation of the authorities on 'differential evolution' and cultural evolutionism generally see Carneiro (1973).
  - 5 See Clarke, (1970) note 4, p. 67.
  - 6 The earliest recorded philosophical literature contains a great deal of wisdom about the nature of groups and the relations between individuals and groups, and the modern student of 'group dynamics' (strictly a twentieth century development) is not essentially different in his interests from scholars writing at various times over the centuries. Cartwright and Zander, (1968), p. 4.
  - 7 The crucial relevance for prehistorians of the size and density of population for understanding culture change is emphasized by Renfrew (1973) pp. 112–19. For a discussion of various scholarly views on demography and population growth and cultural development see Redman, (1978) pp. 99–103.
  - 8 Compare Hart (1961) pp. 189–95, on the minimum content of natural law.
  - 9 The views of various writers on 'What is law?' and 'What kind of rules are law?' in this context are fully discussed by Mair (1972), Chapter 9.
  - 10 The idea of 'obligation' is discussed by Hart, (1961) pp. 79–88, and for further references see his notes to Chapter V, p. 243.
  - 11 See the example of the Australian aborigines in Clarke (1967), p. 32.
  - 12 Luhmann regards 'Trust', in the broadest sense of confidence in one's expectations, as a basic fact of social life. At this most basic level, 'faith' (*Zutrauen*) is a natural feature of the world. See Burns and Poggi (1979), p. 4.
  - 13 See generally. Mellaart (1965 and 1975).
  - 14 See Note 8.
  - 15 See Hart (1961), p. 89.
  - 16 See Jenks (1919), p. 1.
  - 17 Primitive societies operated largely on the basis of the recognition of obligations arising from duties of kinship or other involuntary status rather than the enforcement of 'contractual promises'. However, some promises or pledges were enforced at an early stage of social development, especially a solemn ritual promise such as betrothal.
  - 18 See Whitton, J. B. (1935), pp. 396–7.
  - 19 Ibid.
  - 20 Malinowski (1936), p. 33.
  - 21 'It is likewise agreed among anthropologists that there is, at any rate as far as contemporary primitive societies are concerned, a phenomenon that can be isolated from religious and other social observances and for which the term 'law' would be convenient'. Diaz (1985), p. 391. Diaz discusses the various views on the secular character of primitive law at pp. 390–1.

- 22 'Irrational forces' is used here to embrace all appeals, rituals and incantations to 'supernatural' or 'sacred' phenomena.
- 23 For a survey of this significant and exciting time bracket in Prehistory see Trump (1980) (Ch. 5 'The Third Millennium BC'). On the origin of cities generally see Adams (1975) and Sjöberg (1975).
- 24 See Note 22.
- 25 For the place of religion and myth in primitive culture generally see Dawson (1933) Ch. 2; and Kirk (1971) especially Ch. 1.
- 26 See Frazer, Sir J (1911), vol 1, part 1, p. 222.
- 27 See Tyler (1834), p. 7.
- 28 Ibid., p. 235.
- 29 Ibid.
- 30 *Moral Philosophy*, b. III, part I, c. 16, cited Tyler, (1834) p. 9.
- 31 For an early work on the subject of oaths generally, see, in addition to Tyler (1834), Rutherford, *Institutes* (Nature of Oath) p. 15 *et. seq.* and for a modern study of the judicial oath in various legal systems (including a presentation of the historical evolution of the judicial oath) see 2 part article by Helen Silving, 68 Yale L.J. 1329–90: 1527–77 (1959).
- 32 Epistle 154, cited Rutherford, *op. cit.* p. 151.
- 33 Some striking examples of the dire consequences of transgressing oaths from a wide range of cultures in the ancient world are given in Phillipson (1911), vol. 1, pp. 386–90.
- 34 Good faith is formally recognized as a fundamental principle in international law and is also an accepted concept in all municipal legal systems.
- 35 For a critical discussion of Otto's emphasis on 'the Holy', or irrational 'essence' of religion, and reference to authorities, see Schmidt (1931) pp. 141–2.
- 36 See Malinowski (1948), p. 18.
- 37 See Berman (1974), p. 24.
- 38 See Smith (1958), p. 92.
- 39 See Rommen (1947), p. 3.
- 40 Ibid.
- 41 Ibid., p. 4.
- 42 See Unger (1976), p. 76.
- 43 See Rommen, (1947), p. 4.
- 44 See D'Entreves (1967), p. 12.
- 45 See Rommen (1947), p. 6.
- 46 See Hamburger (1942), p. 9.
- 47 Cited by Dr Hamburger from various fragments, *op. cit.*, p. 10.
- 48 Cicero, *De Officiis*, Book 1, Ch. VII, 23 p. 25.
- 49 A continuing tradition of myths of gods and the world, with a metaphysical ingredient, must have existed before and after Hesiod but we know almost nothing of it. See Frankel (1975) p. 97, f.n. 2. Myths about the creation of the universe were not confined to one area or culture, or exclusively related to the 'Genesis of the Gods'; See for example, the legend of the creation of the universe involving P'an Ku, primeval man emerging from the egg at the beginning of the Universe in Yap and Cotterell (1975) p. 22, and for Ancient Cosmologies generally see Blacker and Loewe (1975).
- 50 See generally West (1966). As West observes (p. 14), accounts of the origin of the world and the birth of the gods in their generations, so far from being peculiar to Greek literature, are to be found over a very wide area, from Iceland to the Pacific.
- 51 Cf. Frankel (1975), pp. 266–7.
- 52 Hamburger (1942), p. 7.
- 53 As well as Reinhardt, Zeller, Rey and others deny that Parmenides could have been

- acquainted with Heraclitus' work on chronological grounds. This is disputed. See Taran (1965), pp. 4–5.
- 54 Hamburger (1942), p. 5.
- 55 Cicero, *Tusculan Disputations* V. IV. 10–11, p. 435.
- 56 Xenophon, *Memorabilia*, IV. pp. 309–25 for Socrates' views on Justice.
- 57 Ibid.
- 58 Rommen, (1947), p. 12.
- 59 Ibid.
- 60 It is accepted that it is difficult to distinguish precisely between the achievements of Socrates and Plato because of the form in which Socrates' thought is transmitted to us through Plato.
- 61 Plato, *Republic*, Book I, (Loeb p. 19), (Penguin p. 55).
- 62 Plato, *Republic*. (1955), p. 182.
- 63 In the argument, the three elements making up the inward self are said to be reason (which ought to rule), spirit (which ought to obey and support reason) and appetite (which must be controlled by reason and spirit).
- 64 Plato, *Republic* (1955), p. 196.
- 65 See 'the Good as Ultimate Object of Knowledge', *Republic* Book 6, (1955), pp. 265–74.
- 66 Plato, (1871) *Laws* I, 645, vol. IV p. 166.
- 67 Plato, (1871) vol. III (Intro), CCVII.
- 68 'The end is the good life', Plato, (1885), III, ix, 13.
- 69 Rommen (1947), pp. 16–17.
- 70 Friedmann (1967), p. 99.
- 71 Aristotle, *Nicomachean Ethics*, V. Ch. 7, in Aristotle (1915b), vol. IX, at 1134<sup>b</sup>.
- 72 Aristotle, *Magna Moralia*, Book 1. 33, in Aristotle (1915a), note 71 at 1195<sup>a</sup>.
- 73 Aristotle, *Nicomachean Ethics*, (1915b), note 71 at 1138<sup>a</sup>.
- 74 Plato, *The Statesman*, 294 (1871).
- 75 Aristotle, *Nicomachean Ethics*, (1915b) Book V. 10. note 71 at 1137<sup>b</sup>.
- 76 Friedmann, (1967), p. 99.
- 77 Stoic philosophy is viewed primarily as a reaction to the Epicurean. The thesis may be exaggerated, but Stoic and Epicurean views differed radically on the role of pleasure in the life of the good man. See Rist, (1969), p. 37.
- 78 Pollock, (1882), pp. 314–51, 325.
- 79 Ibid., pp. 334–5.
- 80 Plutarch, *On the Fortune or the Virtue of Alexander*, *Moralia* IV, 328–9, (1962), p. 397.
- 81 See Murray (1922), pp. 21–2.

### 3 The Development of the Concept of Good Faith in Legal Theory

#### **The Influence of Rome and Roman Law**

The association of *pacta sunt servanda* with 'faith' and a sacred oath which was characteristic of many communities from the earliest times, is well marked in the history of ancient Rome. The keeping of treaties and pacts was associated by the Romans with the Goddess Fides, the personification of trust, and *Dius Fidius*, the heavenly God of Trust. Otto, in a learned note, discusses the origin of the worship of Fides and cites numerous references in ancient literature to what was undoubtedly an extremely ancient and important Roman cult.<sup>1</sup> He points out that no documents exist to bear out the information provided by the various authors,<sup>2</sup> and it is, therefore, difficult to establish precisely what the origin of the cult was, or the significance of the ceremonies associated with it. There is, for example, a difference of opinion between Agathokles and Dionysius as to the founder of the first temple to Fides.<sup>3</sup> Otto states that according to Dionysius, it was Numa (legendary King of Rome and successor to Romulus) who built a sanctuary dedicated to Fides Publica and established a public cult, whereas, according to Agathokles, it was Rhome, grand-daughter of Aeneas, who was the first to dedicate a temple to Fides on the Palatine.<sup>4</sup> The explanation may be that there were two strands in the cult of Fides – a private and a public aspect. The Fides Publica, ascribed to Numa, related to the public loyalty and trust of the Roman people. The temple to Fides which was erected on the Capitoline Hill (near the Temple of Jupiter), emphasized the public and international aspect of *fides* in Roman affairs. Otto says:

Now with regard to the temple on the Capitoline Hill, it represented the trust (loyalty) of the Romans and the State; namely, it meant the keeping of treaties and pacts, pledging the individual as well as the entire people. It is the *Fides Publica* of which Valerius Maximus speaks. Her temple was used for sittings of the Senate. International documents and military diplomas were fastened to its walls.<sup>5</sup>

The first 'international' agreement concluded by Rome is associated with a legend which emphasizes the sacred character of the *fides publica populi Romani*. Newly founded Rome, in the course of her war with the Etruscans, concluded a treaty with the Etruscan king, Porsena, which included the giving of hostages to him. One of these, a Roman maiden named Cloelia, escaped, and swam the Tiber to return to Rome. She was returned to Porsena, an act which Otto regards as brilliant proof for the *fides populi Romani*.<sup>6</sup> Otto also states that Varro derived the name 'Fetiales' directly from the *fides publica*. The Fetiales were priests who were charged with the formalities of international relations and played an important part in making treaties and declaring war.<sup>7</sup> The private strand of the cult of Fides may have emphasized the virtues of loyalty and trust in dealings between individuals. The *fides* of the individual was clearly important in the later development of *bona fides* in Roman Law. When the Senate suggested that a magistrate should act, for example, 'it added the phrase that he should act as seemed good to him in accordance with the national interest and his own *fides*'.<sup>8</sup> The concept of *fides* embodies the expectation that a Roman entrusted with the care of the public interest would pursue it conscientiously, single mindedly, and honourably.<sup>9</sup> Otto quotes Cattullus in relation to the important part which *fides* played in private intercourse: '*Si tu oblitus es* (my assured friendship and the friendship promised to me), *at dii meminerunt, meminit Fides, quae te ut paeniteat postmodo facti faciet tui*'.<sup>10</sup>

*Fides* was an idea of lasting importance in Roman public affairs, but it was a complex idea, and the word (which the late Professor J.A.C. Thomas regarded as almost untranslatable),<sup>11</sup> appears to have had different shades of meaning at various times in Roman society. As between Romans or equals, *fides* appears always to have retained its old connotations of honour and conscientiousness, although, as Adcock remarks, it was a poor protection to the weak and alien.<sup>12</sup> The Romans, for example, considered it proper to repudiate the treaty entered into by their consuls with the Samnites in 391 BC, whereas the view of Caius Pontius, leader of the Samnites, was that Rome 'had reaped all the advantages of the Treaty of Claudium but refused to fulfill its conditions', and he had no doubt that 'the gods would not be mocked with a piece of childish trickery which invoked their holy names in support of perfidy and injustice'.<sup>13</sup> Roman *fides* in that situation was clearly determined by immediate self-interest and justified later by advertence to technical considerations of fetial law. An agreement concluded without the authority of the people and the fetial formalities and solemn ceremonies, did not involve the *fides* of the Roman people.<sup>14</sup>

The legislation of the Twelve Tables, traditionally dated 451–450 BC, is the first point in Roman legal history which is at all fixed.<sup>15</sup> The Twelve Tables presupposed the existence of established notions which had never been expressed authoritatively at all.<sup>16</sup> *Fides* was an established notion in Roman society before the enactment of the Twelve Tables, but it is not certain how precisely *fides* first became connected with specifically legal obligations. Alongside the harsh form of debt-contract (*nexum*) in the Twelve Tables, there also appeared a simple form of debt-contract (*sponsio*).<sup>17</sup> The exact nature and derivation of *sponsio* has led to considerable differences of opinion which need not concern us,<sup>18</sup> but it is interesting to note that some authorities have suggested a possible connection between *sponsio* and the taking of an oath at the *ora maxima*<sup>19</sup> or an appeal to Fides the Goddess of Truth.<sup>20</sup> What is certain is that in the earliest *stricti iuris* transactions of Roman Law, like *stipulatio*, the obligation on the promisor to keep his word was absolute: ‘The promisor would be bound to honour his undertaking, even though perhaps he was coerced or tricked into it. Having in fact given his word, he must do as he promised.’<sup>21</sup> It is a peculiarity of early formalism that conduct which complies with the required formalities creates legal effects, even if the actor’s intention was not at all directed to the effect in question.<sup>22</sup>

The influence of the magistrates was limited while Roman Law was dominated by the strict formalism of the *legis actiones*. ‘The parties had to proclaim cause of action and defence before the magistrate according to formulae whose wording was closely associated with the underlying provisions of the Twelve Tables and some later Statutes (hence the expression *legis actiones*).’<sup>23</sup> Cardozo has pointed out that the moral code of each generation supplies a norm or standard of behaviour which struggles to make itself articulate in law,<sup>24</sup> and cites Vinogradoff’s observation that in order that a moral claim should become juridical, it must pass through a second stage, the declaration of a right, which is the admission by organized society that the claim is justified from the public point of view.<sup>25</sup> In the third or early second century BC, Roman society felt it necessary to concede that certain claims (the earliest being based on informally concluded contracts of sale, hire and service, partnership and mandate) should be upheld by the legal system. The means adopted was to free the magistrate from the strict formalism of the *legis actiones* and to allow him, after an informal proceeding *in jure*, to accord a *iudicium* with a formula which directed the judge to adjudicate on the claim, not according to strict statutory law but according to the principle of contractual good faith (*ex fide bona*). ‘There thus arose a group of “good faith” actions which were of great importance to economic life and gave an entirely new appearance to the Roman Law of obligations.’<sup>26</sup> At that stage in Roman legal history, *fides*, for long associated in Roman society with trustworthiness, conscientiousness and honourable conduct was, as it were, officially introduced into the working of the legal system. The extension of judicial discretion permitted to a judge, which enabled him to condemn for what the

defendant ought to give to the plaintiff in accordance with good faith, proved enormously fruitful.

By the time of the late Republic, the obligations provided with *bonae fidei iudicia* comprised sale, hire (including lease of land, hire of services and of work), partnership, mandate, *fiducia*, tutelage, *negotiorum gestio*, and, a little later, also deposit.<sup>27</sup> These transactions were common in normal daily life, not only between citizens, but also between citizens and peregrines, and good faith provided a juridical link between citizens and peregrines.<sup>28</sup>

Professor Dawson, discussing the case law of *iudex* and *praetor*, points out that the scope accorded to the *iudex* in Roman procedure to decide cases according to moral ideas which reflected the usages and expectations of the upper ranks of Roman society was limited by the formula which appointed him and defined his authority.<sup>29</sup> But, as the praetorian system developed, it became increasingly common for the *praetor* to include in the formula some highly generalized standards. The judge was directed to decide according to 'good faith', or 'equity' or in a manner that would prevent 'fraud'.<sup>30</sup> The period of greatest activity for the *praetors* extended for about 200 years (roughly, 150 BC to AD 50),<sup>31</sup> and it is significant for the history of the development of good faith that this period also coincides with the period when Roman legal science was most influenced by Greek thought.<sup>32</sup>

The Stoic philosophers proclaimed that conscience and spirit were superior to the State, and the way was thus opened to a wider and more human world.<sup>33</sup> Even in the later Republic, the ethical philosophy of the Stoics began to exert some influence on the upper ranks of Roman society from which the judges were usually chosen. The substantive content of good faith was thus determined by laymen of high rank in Roman society who were to some extent influenced by Greek philosophy. The leading juriconsults certainly were familiar at least indirectly with Plato and Aristotle, and it made little difference to which of the Greek schools this or that jurist belonged, that is, whether he was a strict Stoic or an Eclectic.<sup>34</sup> Both the *praetors* and the *iudices* were ordinarily laymen, and as Professor Dawson says, the custodians of the Roman legal tradition, the men who gave guidance and direction to the laymen, were a special and highly honoured group – the jurists.<sup>35</sup> It was the jurists who formulated the rules of good faith which were eventually transmitted to medieval jurisprudence through Justinian's codification.

From the beginning of the classical period of Roman Law, from about 27 BC, *bonae fidei iudicia* were accepted as part of the *ius civile* itself. But by then the function of good faith had changed. *Bona fides* was no longer needed as an independent source of obligation.

... it now provided a standard according to which the judge had to examine the legal relationship. The content of the obligation was now taken to comprise all that which had been formally agreed upon by the parties themselves, with regard to the source and content of obligations, but also that which – even failing such

agreement – was to be regarded as being owed according to the concrete circumstances and in consideration of the local and general custom.<sup>36</sup>

Gaius explained the task of the judge in suits *bonae fidei iudicia* as doing far more than just condemning or acquitting. The judge must decide ‘what in all fairness the defendant ought to pay or do; all contracts; partnerships, and guardianships were of this kind’.<sup>37</sup> Good faith in Roman Law had become a standard by which the judge might decide what in all ‘fairness’ the defendant ought to do.

The perception of the standard of good faith which was applicable towards the end of the Republic, and which continued into the succeeding age, was influenced by local custom, that is, traditional Roman ideals of *fides*, and general custom. The perception of the general standard of *bona fides* was connected with the concepts of natural law and *ius gentium*. The various meanings of these concepts, and the relationship between them at various periods in the history of Roman Law is a difficult and controversial topic which has given rise to a considerable body of literature.<sup>38</sup> The exact meanings and relationships are not so important for the history of the development of good faith in legal history as the fact that the Greek conceptions – ‘the contrasts of *ius naturae* and *ius civile*, of *ius gentium* and *ius civile*, of *ius scriptum* and *non scriptum*, of *lex* and *mos* as manifestations of *ius*, and of *ius* and *aequitas*’ – penetrated into Roman jurisprudence in classical and post-classical times.<sup>39</sup> The identification or confusion of the idea of Nature with the idea of Reason or the idea of Good, may have almost hopelessly confused legal thought for almost twenty centuries,<sup>40</sup> but there is little evidence that the Roman jurists of the late republican or classical period were confused by Greek conceptions of *ius naturae*, *lex*, *aequitas* or, indeed, Greek philosophy generally. They were concerned with the concrete problems of life, not far-reaching speculations about the nature of justice,<sup>41</sup> and they were concerned to formulate practical rules for the application of the good faith standard to the everyday problems of life rather than to speculate on the ultimate meaning of the Good.

In addition to the peculiarly Roman concept of *fides* which they inherited, the jurists of the classical period abstracted what they required from Greek, particularly Stoic, philosophy, to add a wider, ethical dimension to good faith. Seneca and Cicero, both of whom did much to promote the influence of Stoic thought in Rome, had written about good faith and its relationship to ‘positive’ legal rules about covenants and agreements. Seneca wished that the keeping of covenants and agreements could be left to good faith and a conscience that cherishes justice, as they might be if all men were ‘good men’ in Aristotle’s sense. Regrettably, he said, men prefer what is necessary to what is ideal, and it was necessary to surround transactions with legally significant rituals like seals, written signatures, attendance of witnesses and so on, to compel good faith.<sup>42</sup> For Cicero, a person who failed to carry out a trust was guilty of a disgraceful fault, not only because he violated the demands of

friendship but because he violated good faith,<sup>43</sup> and making a solemn promise involved an obligation to keep it, not because of fear of the gods, but because of the requirement of good faith.<sup>44</sup> The influence of Aristotle is clear in both of these observations on good faith.<sup>45</sup>

The law of nature, as conceived by the Stoics and received by the Romans, was an ideal, universal law, in harmony with reason. The expression *ius naturae* always had, and retained, a philosophical meaning in Roman jurisprudence, and does not present quite the same difficulty as the expression *ius gentium* which has given rise to sharp differences of opinion about its origin, its meaning and its relationship with *ius naturae*.<sup>46</sup> The *ius naturae* of the Roman jurists (with the peculiar exception of the definition, attributed, probably falsely, to Ulpian)<sup>47</sup> was the natural law as set forth by Cicero.<sup>48</sup> This was the doctrine of the law of nature which had been elaborated by the Stoics and which also passed into the teaching of the Christian Church.<sup>49</sup> On the other hand, *ius gentium* was exclusively Roman, and, although also a general popular term, was essentially legal rather than philosophical. Its connection with natural law was seen by some writers as an attempt by the Roman jurists to supply the (positive) *ius gentium* with the philosophical background it needed.<sup>50</sup>

It was Sir Henry Maine's view that our modern estimate of the *ius gentium* is based on the matured views of the later jurists on the subject,<sup>51</sup> and this would seem to be true in relation to, for example, Gaius. His explanation of *ius gentium*, as contrasted with *ius civile*, was what natural reason dictates to all men, as that law which is practised by all mankind.<sup>52</sup> This is clearly an attempt to equate *ius gentium* with the natural law of the Stoics, and whatever the meanings which *jus gentium* may have had at various periods, it seems clear that for the later jurists anyway, *jus gentium* was that part of Roman Law which was not in origin peculiar to citizens (*ius civile*), but which was the product of the various law-creating agents of Roman Law (especially the *praetor peregrinus*) who introduced into the positive law the rules which natural reason dictated to all men and which were observed in nations generally.

The rules of good faith were seen as pre-eminently belonging to the *ius gentium* in that sense. Clearly, *pacta sunt servanda* was regarded as a universal rule, dictated by natural reason, and was formulated by the jurist as, 'What is so suitable to the good faith of mankind as to observe those things which parties have agreed upon'.<sup>53</sup>

Good faith applied to all contracts, and its relation to justice was noted, 'It is no more than just for good faith to be taken into consideration in all contracts'.<sup>54</sup> Cicero had, of course, connected the idea of justice with good faith. He wrote that the foundation of justice was good faith – that is, truth and fidelity to promises and agreements.<sup>55</sup>

More specific formulations emphasized the requirements of a *voluntary* agreement and the importance of the intention of the parties.

Wherefore you should understand that when you have once been bound by a voluntary agreement, you can under no circumstances repudiate it without the consent of the other party.<sup>56</sup>

In agreements, the intention of the contracting parties should rather be considered than the terms of the stipulation.<sup>57</sup>

Nothing is so opposed to consent, which is the basis of *bonafide* contracts, as force and fear; and to morals.<sup>58</sup>

The obligation of contractual good faith arose only in respect of agreements which were lawful<sup>59</sup> and which related to something which it was humanly possible to perform.<sup>60</sup>

It was not possible 'to contract out' of liability for breach of good faith. The rule in the Digest is quite specific: 'It cannot be provided by agreement that a person shall not be responsible for bad faith'.<sup>61</sup>

Professor McIlwain wrote that 'the Greek genius produced a theory of the State and of law, Rome above all developed a scientific jurisprudence'.<sup>62</sup> Rome also, as one lasting effect of its conquests, helped to spread the elements of a common life and order over a large part of the inhabited world. The theoretical idea of a universal law was given some practical reality when Roman jurists identified *ius gentium* with the law of nature. When they translated vague Greek and Roman notions about justice, fidelity, trustworthiness, fairness and good morals into specific rules of good faith, they enlarged the basic obligation – *pacta sunt servanda* – into a wider ethical principle, and it is that concept of good faith, in the form of practical rules, which a large part of the inhabited world adopted as part of its legal thinking. The 'reception' of good faith, in that usable form was to prove highly significant for the eventual foundation and development of the modern law of nations, but before then, other influences, particularly the emergence of Christianity, contributed to the further development of the principle in legal theory.

## The Influence of Christianity

In Chapter 2, religion was considered as an element in the foundation of the concept of good faith. Another major phase in the influence of religion on good faith opened with the contact of Christianity with Roman civilization.

Walter Ullmann makes the point

that Christianity had absorbed a great deal of Hellenism, oriental law and ancient philosophy, notably Platonism. By virtue of its contact with the Roman civilization nascent Christian organizations furthermore came to absorb Roman institutional ideas, of which none was more important than the very concept of law.<sup>63</sup>

One of the developed institutional ideas of Roman civilization which was highly compatible with nascent Christianity was *bona fides*. Ullmann also points out that it was purely private efforts by private writers which in the second and third centuries AD began the process not only of assimilating the pagan Roman law to Christian conceptions, but also of infusing the very language, substance and method of Roman law into Christian ideology.<sup>64</sup> He mentions particularly the work of Tertullian 'a Roman jurist of the old stamp', in this regard.<sup>65</sup> Tertullian (AD 150–230) cast the religious idea into legal forms and shaped the at the time (turn of the second and third centuries) embryonic Christian doctrine by the instrument of Roman law.<sup>66</sup>

Professor Barnes, in a detailed historical and literary study, discounts the traditional identification of the jurist Tertullianus, quoted in the Digest and Codex Justinianus with the Christian writer Tertullian.<sup>67</sup> The possible confusion of identities is not relevant to the major point of the assimilation of Roman Law to Christianity. It is clear that the Christian Tertullian, even if not a distinguished Roman jurist, was familiar with Roman Law, and legal terminology undoubtedly influenced his theology.<sup>68</sup> Perhaps, as Barnes states, his legal knowledge is readily explicable by the easy hypothesis that he received a normal education, and knowledge of Roman Law was a normal possession of the educated man of his time.<sup>69</sup> It is also clear from the writings of Tertullian that 'he used the benefits of a traditional education and the fruits of his pagan erudition to defend and to propagate what he considered to be the truth'.<sup>70</sup>

In his more extreme attempts to assert an absolute and radical discontinuity between Christian and pagan philosophy,<sup>71</sup> Tertullian explicitly rejected a Stoic, Platonic, or dialectical Christianity. He explained the presence of noble and good elements in paganism by employing the idea of natural law rather than that of the seminal *Logos*.

For him, these elements included knowledge of the existence, the goodness, and the justice of God, but especially the moral precepts flowing from that knowledge. This law of nature agreed with Christian revelation in its condemnation of moral evil.<sup>72</sup>

Thus, even though he formally rejected any connection between Christianity and pagan philosophy, Tertullian must be included with other early Christian apologists, such as Justin, Clement and Origen, who dealt with and reconciled pagan objections that Christianity and its ancestor, Judaism, did not have a monopoly on either the moral or the doctrinal teachings whose superiority Christian apologetics was seeking to demonstrate.<sup>73</sup>

The questions involved in the Christian dispute with classical thought<sup>74</sup> are outside the scope of this work, but the point must be made that the synthesis of Judao-Christianity with Graeco-Roman philosophy, and in particular, the 'Christianization' of Roman Law concepts and terminology especially by

Tertullian, was important for the development of good faith. The distinctively Roman *bona fides*, with its origins in obscure religious cults and rituals, was transformed by its association with Greek philosophy and nascent Christianity into a moral–legal concept with universal application. It should also be noted that the association of Christianity with *bona fides* invested the Roman concept with elements of the great earlier civilizations which flourished in and around the land of the Hebrews because of the debt which Christianity owed to Judaism and the Hebrew Prophets.<sup>75</sup> Among these civilizations, as well as that of the Hebrew itself, might be numbered Egypt, ‘the mother of civilization’, Sumeria and Babylon.<sup>76</sup> Seen in this perspective, the universality of the principle of good faith is not surprising. The ‘Christianized’ principle of *bona fides* found easier acceptance throughout the civilized world because it contained within it familiar moral elements from a wide range of civilizations.

### *Good Conscience and Good Faith*

One of the key elements in the Christianization of the Roman *bona fides* was the idea of good conscience. There is a marked emphasis on good conscience in applications of the principle of good faith in law and this is due to the influence of the Christian religion. More specifically, it is due to the canon law of the Roman Catholic Church – the second oldest component of the civil law tradition.<sup>77</sup>

It is no doubt true, as Westermarck insisted, that the theological argument in favour of the objective validity of moral judgments, which is based on belief in an all-good God who has revealed his will to mankind, contains an assumption that cannot be scientifically proved.<sup>78</sup> Nevertheless, the advocates of Christianity succeeded in persuading many to accept that in the Christian revelation they possessed an absolute moral standard and that, consequently, any mode of conduct which conformed with that standard must be objectively right. By the fourth century, what has been described as ‘the new spiritual jurisprudence’<sup>79</sup> had become the dynamic element, replacing the Roman jurisprudence which, long before the year AD 300 had become stricken with sterility.<sup>80</sup>

For a disciplinary jurisdiction over clergy and laity, the state now left a large room wherein the bishops ruled. As arbitrators in purely secular disputes they were active; it is even probable that for a short while under Constantine one litigant might force his adversary unwillingly to seek the episcopal tribunal.<sup>81</sup>

Canon law, the body of universal law and procedure developed by the Church for its own governance and to regulate the rights and obligations of its communicants, had from the beginning its own sphere of application and

separate courts. It existed side by side with Roman civil law.<sup>82</sup> However, there was a tendency towards overlapping jurisdiction, and before the Reformation it was common to find ecclesiastical courts exercising civil jurisdiction.<sup>83</sup> In this situation, it was inevitable that the more dynamic 'spiritual jurisprudence' should overshadow the declining Roman law, and inevitable that notions of Christian conscience should be applied to the Roman law *bona fides*. *Bona fides*, from the time when the doctrine of natural law passed into Roman Law as a result of the influence of Stoic philosophy, was one of the concepts designated by the jurists as part of the law of nature. *Lex naturae* to the jurists is a norm which from the very beginning lies forever imbedded in the nature of things.<sup>84</sup> 'Aequitas' was the echo of the *lex naturae*, and 'aequitas' is the legal conscience which speaks even when a positive norm is at hand, for it is the 'meaning' of the positive law.<sup>85</sup> As Rommen says, the Fathers of the Early Church made use of the Stoic natural law to proclaim the Christian doctrine of the personal Creator-God as the author of the eternal law as well as of the natural moral law which is promulgated in the voice of conscience and in reason.<sup>86</sup>

According to Dr René Metz, the Church of the first centuries had no precisely defined juridical system, still less any technique or science of law.<sup>87</sup> Rudolf Sohm also contended that in its beginnings the Church knew nothing of any law and that it was not until as late as the twelfth century that what he called the juridical Church came into being.<sup>88</sup> Both these contentions are incorrect, for as early as AD 325, the Council of Nicaea used the Greek term 'canon', meaning rule, for the disciplinary measures of the Church, and there is a very early distinction between Church rules (*canones*) and *leges*, the legislative measures taken by the State. The expression '*jus canonum*' has been in general use since the high Middle Ages.<sup>89</sup>

However, Sohm's reference to the twelfth century is significant in so far as it was not until 1139 that the many sources of the law of the Church were collected and presented in systematic form, together with commentaries and observations on the material presented. The *Concordia Discordantium Canonum* or *Decretum*, prepared by Gratian at Bologna, was intended to be a law book for the Church that should be parallel with Justinian's *Corpus Juris Civilis*.<sup>90</sup> Although it never possessed official legal authority, the *Decretum* became the foundation of the classic Church Law because it was so generally used in the universities and Church courts.<sup>91</sup> Figgis declared that it was one of the most important elements in the construction of medieval society.<sup>92</sup>

Professor Barker wrote that the *lex* which was *rex* to medieval thinkers was a law which did not proceed from a human legislature. He quotes Gratian: 'all custom, and all written law, which is adverse to natural law, is to be counted null and void'.<sup>93</sup> The law of nature, which for the Fathers of the Church and Canonists like Gratian was both natural and of divine origin was therefore the standard by which all law (including canon law) was to be measured. The canon law which was developed in the centuries after Gratian, and which

exerted considerable influence on secular law, continued to exhibit the moral conceptions of the Church and in particular the concepts of good faith and equity which the early canonists took over from the Roman jurists and applied to their theory of contracts.<sup>94</sup>

The century following the publication of Gratian's *Decretum* saw the remarkable development of Scholasticism. In that age, St. Thomas Aquinas (c. 1225–74), the greatest of all the Scholastics, was largely responsible for the most enduring contributions of scholastic philosophy. It is not proposed to trace the development of the thought of Aquinas and his successors generally, but to consider specifically scholastic views on good faith, and for this purpose reference is made, not to Aquinas and his immediate successors, but to Francisco Suarez. Suarez, 'the last of the Schoolmen', represents the great scholastic tradition of the Middle Ages.<sup>95</sup> He provides a convenient point of reference because, in a sense, he stands at a crossroads in the history of moral and legal philosophy.

While paying due reverence to the great achievements and the views of his predecessors, especially St. Thomas Aquinas, he does not hesitate to depart from their teachings when he considers it necessary. Significant differences between the views of Suarez and Aquinas on natural law and moral philosophy are discussed by Dr E. B. F. Midgley in a modern work.<sup>96</sup> He concludes that the Thomist philosophy of law in general and the Thomist doctrine of the obligation of the natural moral law in particular are incompatible with the more moderately voluntarist doctrines of Suarez.<sup>97</sup> While he would not think it just to attribute to Suarez the responsibility for all the future 'aberrations' of (mainly Protestant) theologians concerning eternal and natural law,<sup>98</sup> he suggests that 'as we follow the succession of natural law thinkers which transformed the Thomist natural law into an insubstantial doctrine which readily collapsed under sceptical attack, we may well conclude that a decisive breach was left without adequate defence by Suarez himself'.<sup>99</sup>

Someone less committed than Dr Midgley to the defence of 'authentic' Thomist conceptions of natural law might equally well conclude that Suarez restated and redefined *fundamental* Scholastic conceptions and doctrines, adapting them to the changing conditions of a newer age.<sup>100</sup> It is, in any case, certain that Suarez revived and transmitted the scholastic influence into the seventeenth and eighteenth centuries, and it is the Suarezian, rather than the Thomist influence which may be seen in the works of Hugo Grotius and Christian Wolff.<sup>101</sup> What Suarez wrote about good faith contributed in very large measure to modern perceptions of the principle in legal theory. His views may be taken as representing the culmination of the centuries of thought which assimilated the moral and legal philosophies of the ancient worlds of Greece and Rome with Christianity. It is against that perspective that we must consider what Suarez wrote about good faith.

### *Francisco Suarez and Good Faith*

Suarez had no doubt that the observance of good faith pertained 'most decidedly to the province of the natural law'.<sup>102</sup> He defined the subject matter of natural law as consisting 'in the good which is essentially righteous or necessary to righteousness and the evil which is opposed to that good; in the one, as something to be prescribed, in the other, as something to be forbidden'.<sup>103</sup> Precepts on the observance of good faith and speaking the truth are precepts of natural law and not merely subject matter of the *ius gentium*.<sup>104</sup> While he accepts that rational nature is the foundation of the objective goodness in the moral actions of human beings, he does not accept the exposition of the natural law which asserts that rational nature, strictly speaking, is natural law itself, in the sense that rational nature involves no inconsistency and is the basis of moral goodness in actions.<sup>105</sup>

... rational nature itself, strictly viewed in its essential aspect, neither gives commands, nor makes evident the rectitude or turpitude of anything; neither does it direct or illuminate, or produce any of the other proper effects of law.<sup>106</sup>

Suarez cannot admit as true the conclusion that natural law does not have God as its author, 'but necessarily dwells within rational nature in that manner, in such fashion that it is inherently endowed with this essence, and no other'.<sup>107</sup> Natural law is truly law, in as much as all the Fathers, theologians and philosophers so speak and think of it. The mere knowledge or conception of anything existing in the mind cannot be called law.<sup>108</sup> He defines law briefly as 'a common, just and stable precept which has been sufficiently promulgated'.<sup>109</sup> Natural law, which is truly law, consists of those common, just and stable precepts which exist in the Lawgiver as none other than the eternal law and which exist in the minds and hearts of men because God, the Creator of man, has promulgated those precepts to man. Suarez, here relying on St. Thomas, Alexander of Hales, St. Augustine 'and other theologians', shows how man is linked to the eternal by natural law discovered through right reason:

... all men necessarily behold within themselves some sort of participation in the eternal law, since there is no rational person who does not in some manner judge that the virtuous course of action must be followed and the evil avoided; and in this sense, it is said that men have some knowledge of the eternal law ...<sup>110</sup>

Good faith, in the Scholastic tradition, is thus not merely a dictate of human positive law. It is a precept of natural law and therefore also of the eternal law 'the source and origin of all laws'.<sup>111</sup>

Good faith must be observed towards God and man.<sup>112</sup> This precept of natural law possesses an intrinsic rectitude that can never be abolished or violated if applied to its proper subject matter.<sup>113</sup> On the other hand, to change

or vary the subject matter is not contrary to natural law. Such a variation depends on human volition. Thus, a private individual can sometimes do away with the obligation in good faith arising from a promise by remitting it, or a superior power may dispense from a vow or an oath. These 'relaxations' are not, strictly speaking, dispensations from natural law but dispensations in fact.<sup>114</sup>

Suarez emphasizes the point that although we often speak of some natural law rules as if they were framed in absolute terms, under which they suffered an exception, the fact is that the general terms used do not adequately set forth the natural precept. Natural reason itself dictates that a given act shall be performed in such a way, and not otherwise, or under specific concurrent circumstances, and not unless those circumstances exist.<sup>115</sup> Thus the obligation imposed by good faith relates to its proper subject matter. If the subject matter is a promise, and the promisor fails to perform because of a notable change in the circumstances involved, there is no breach of the obligation. The law requiring the observance of good faith is not changed in that situation. It simply does not apply to a promise which was from the very beginning made subject to a virtual exception in regard to the changed circumstances which have occurred.<sup>116</sup> Similarly, pacts and oaths, even those entered into with enemies, must be kept in good faith, 'unless perchance they were manifestly unjust and exacted by coercion'.<sup>117</sup>

Suarez expands on the topic of keeping faith with the enemy in his work on the theological virtues of Faith, Hope and Charity. Generally speaking, breaking faith with an enemy is not permissible, since it involves patent injustice, but again, circumstances may alter the force of the obligation. Apart from the necessity of a valid agreement, it is necessary that the promise shall have remained in full vigour and force. If one party breaks faith, or if any change in circumstances occurs, 'such that the promises in question cannot be kept without grave loss', then the other party is entirely freed from his obligation. Even so, the opposing side must be warned that it is not possible to keep the promise made, and such a declaration is seldom to be permitted.<sup>118</sup>

Suarez's view on the scope of good faith may also be seen in his discussion of the fact that at certain times, acts committed in opposition to the natural law are not only evil, but also invalid. In this category he includes contracts effected under the influence of fear, violence, substantial fraud or some similar condition.<sup>119</sup> On the relationship between natural law and man-made law (the civil law or *jus gentium*) in the context of good faith, he explains that human laws may prescribe the forms and procedures for entering into agreements, whether these are commercial contracts or compacts on such matters as peace, truces and ambassadors. Indeed, individuals or any community of men might choose not to enter into such agreements at all, but if and when any agreement is validly concluded, then an obligation of a higher order results. The obligation to observe an agreement, express or implied, after it is made, pertains to the natural law.<sup>120</sup>

Suarez represented a tradition which regarded good faith as a principle of natural law and which held that observance of good faith was an obligation which was owed ultimately to God – the source and origin of all laws. However, because it was a principle of natural law it was equally binding on non-believers. ‘The natural law is made known to men in a two-fold way; first through the natural light of reason, and secondly, through the law of the Decalogue written on the Mosaic tablets’.<sup>121</sup> As noted above, Suarez was careful to remind his readers that the natural light of reason dictated that the obligation of good faith related to its proper subject matter. Thus, this particular precept of natural law, although written on the hearts and minds of men by God, was subject, in its application to particular circumstances, to the will of man and man’s appreciation of the reasonableness of applying the precept in specific situations. In relation to good faith it must be said that the legacy which the Scholastics transmitted to legal theory, especially through the writings of Suarez, reflected in a sophisticated form the second major phase of religious influence upon the concept.

At the close of the Middle Ages in Western Europe, good faith was perceived, in philosophical thinking, as a universal ethical principle derived from natural law. In positive law, it was reflected in specific rules incorporating or referring to good conscience, fairness, equitable dealing and reasonableness.

Good faith was applied in both the civil and the common law, the two major legal traditions in the modern world. Although there are other important legal traditions, the influence of these two is clearly predominant, and particularly evident in the later development of international law. For that reason, characteristic elements of good faith in the civil law, the common law and international law are identified in the following chapter to provide a focus for the more detailed study of good faith in international law.

## Notes

- 1 Otto (1919), vol. VI columns 2281–6.
- 2 *Ibid.*, col. 2281:40.
- 3 *Ibid.*, col. 2281:50.
- 4 *Ibid.*
- 5 *Ibid.*, col. 2283:10,20. (translated, references omitted).
- 6 *Ibid.*, col. 2283 and 2284:60.
- 7 *Ibid.*, col. 2228:30.
- 8 Adcock (1964), p. 13.
- 9 *Ibid.*
- 10 Otto (1919) col. 2285:10.
- 11 Thomas (1968) p. 10.
- 12 Adcock (1964), p. 102.
- 13 The famous affair of the ‘Caudine Forks’ is described in Hosack (1882) pp. 17–19, and the words of Caius Pontius cited above are given by him from the description of the

- event by Livy. There are several other references to the Treaty in classical and modern writers on international law. See Vattel's discussion, Chapter 5, pp. 71–3 below and see Phillipson (1911) vol. I, pp. 370–1 and vol. II, p. 294.
- 14 For the distinction between *foedus* and *sponsio* see Jolowicz (1965), pp. 39–40 (*Foedus* – treaties); pp. 293–5 (*stipulatio* – *sponsio*).
- 15 Kunkel (1966), p. 23.
- 16 Stein (1966), p. 7.
- 17 Kunkel (1966), p. 26.
- 18 See Note 14.
- 19 Buckland (1931), p. 258; Kazer (1965), p. 40.
- 20 See above.
- 21 Thomas (1968).
- 22 Kazer (1965), pp. 44–5.
- 23 Kunkel (1966), pp. 83–4.
- 24 Cardozo (1928), p. 17.
- 25 *Ibid.*, p. 48.
- 26 Kunkel (1966), pp. 85–6.
- 27 Kazer (1965), p. 142.
- 28 *Ibid.*
- 29 Dawson (1968), p. 104.
- 30 *Ibid.*
- 31 *Ibid.*, p. 105.
- 32 Schulz (1946), p. 38.
- 33 Scott (1939) vol. I, p. 51, n. 17, citing Castelar (1865), III, 59.
- 34 Schulz (1946), p. 84.
- 35 Dawson (1968), p. 107.
- 36 Kazer (1965), pp. 142–3.
- 37 Gaius, *Institutes* IV, 61–2, cited by Crook (1967), footnote 70, p. 82.
- 38 See generally Jolowicz (1965), pp. 100–105; Buckland (1921), pp. 52–5; Declareuil (1970), pp. 27–30.
- 39 Schulz (1946), pp. 71, 72.
- 40 Hazlitt (1972), p. 205.
- 41 Schulz (1946), p. 70.
- 42 Seneca, *De Beneficiis*. (1887), p. 64.
- 43 Cicero, *Pro Sexto Roscio Amerino* XXXIX, (1930), p. 223.
- 44 Cicero, *De Officiis* III, XXIX, (1913), p. 383: 'For the question no longer concerns the wrath of the gods (for there is no such thing) but the obligations of justice and good faith'.
- 45 Aristotle, *Magna Moralia*, II, xii, 4–10, (1912), p. 673; (1935).
- 46 See Note 38.
- 47 See d'Entreves (1967), p. 27.
- 48 Cicero, *De Republica*, III, XXII, 33, (1928).
- 49 d'Entreves (1967), p. 27.
- 50 See for example, Scott (1939), vol. I, p. 111.
- 51 Maine (1865), pp. 47–50.
- 52 Justinian, Digest I. i, 9, Scott (1932).
- 53 Justinian, Digest II. XIV.1, Scott (1932).
- 54 Code IV.X.4.
- 55 Cicero, *De Officiis*, I, vii. 23. (1913), p. 25.
- 56 Justinian, Code IV.15, Scott (1932).
- 57 Justinian, Digest, L.XVI.219, Scott (1932).
- 58 Justinian, Digest, L.XVII.116, Scott (1932).
- 59 Opinions of Julius Paulus I, I.i, Scott (1932).

- 60 Justinian, Digest, L.XVII.31, Scott (1932).  
61 Justinian, Digest, II.XIV.27.3, Scott (1932).  
62 McIlwain (1932), pp. 121-2.  
63 Ullmann (1975), p. 32. (footnote omitted).  
64 Ibid.  
65 Ibid., p. 33.  
66 Ibid.  
67 Barnes (1971), Ch. IV, pp. 22-9 and see references Pollock and Maitland (1968), vol. I, p. 3, f.n. 2.  
68 Barnes (1971), p. 27 and authorities cited his footnote 2.  
69 Barnes (1971), p. 24.  
70 Barnes (1971), p. 210.  
71 Chadwick (1966), p. 1.  
72 Pelikan (1971), p. 32.  
73 Ibid., p. 31.  
74 See generally, Pelikan (1971), pp. 27-41.  
75 See generally, Scott (1939), note 50, Chapter X.  
76 Ibid.  
77 Merryman (1969), p. 11  
78 Westermarck (1932), p. 56.  
79 Pollock and Maitland (1968) vol. I, p. 4.  
80 Ibid., p. 3 (citing Kruger and Karlowa) f.n. 3.  
81 Ibid., p. 4 (footnotes omitted).  
82 Merryman (1969), pp. 11-12.  
83 Ibid., p. 12.  
84 Rommen (1947), p. 27.  
85 Ibid., pp. 27-8.  
86 Ibid., p. 35.  
87 Metz (1960). p. 15.  
88 Ibid.  
89 Ibid., p. 16.  
90 Figgis (1963), p. 91.  
91 Le Bras (1926), p. 326.  
92 Figgis (1963), p. 92.  
93 Barker (1923).  
94 Le Bras (1926), p. 361.  
95 Janet cited vol. II Scott (1939), note 2 at p. 558. Sherwood (1927), p. 21.  
96 Midgley (1975), pp. 71-83.  
97 Ibid., p. 69.  
98 Ibid., p. 81.  
99 Ibid., p. 71.  
100 Scott (1944), p. 12a.  
101 Chroust, (1943).  
102 Scott (1944), selections from Suarez.  
103 Ibid., p. 208.  
104 Ibid., p. 330.  
105 Ibid., p. 178.  
106 Ibid., p. 180.  
107 Ibid., p. 182.  
108 Ibid., p. 192.  
109 Ibid., p. 128.  
110 Ibid., p. 176.  
111 Ibid., p. 143.

- 112 Ibid., p. 274.
- 113 Ibid.
- 114 Ibid., pp. 274–5.
- 115 Ibid., pp. 262–3
- 116 Ibid., p. 263.
- 117 Suarez (1613), trans., Scott (1944), p. 712.
- 118 Suarez (1612), trans., Scott (1944), 'On Charity, Disputation XIII, On War' p. 852–3.
- 119 Scott, selections from Suarez.
- 120 Ibid., p. 347.
- 121 Ibid., p. 143.

## 4. Elements of Good Faith in Legal Systems

The principle of good faith probably receives more unqualified acceptance than any other in *international law*. Grotius concluded his great work on the system of the law of nations with 'Admonitions on behalf of Good Faith and Peace', and left his readers in no doubt of his conviction that good faith sustained the society of states.<sup>1</sup> More than three hundred years later, Mr Yepes of Colombia reminded the members of the International Law Commission, who were considering the law of treaties, that Article 2, paragraph 2 of the Charter of the UN made good faith the supreme rule of international life, and he urged the members of the Commission to draw all the possible conclusions from that principle.<sup>2</sup> Declarations by Statesmen, judicial pronouncements and the teachings of the most highly qualified publicists all accept or refer to this principle. Dr Mann assures us that it 'unquestionably pervades public international law'.<sup>3</sup>

Professor Schwarzenberger included good faith in his rigorously selected catalogue of seven Fundamental Principles of International Law.<sup>4</sup> He concluded that the inductively verified rules from which this fundamental principle is derived are confined to:

- 1 A duty to interpret and execute consensual (and, within their limits, duly communicated unilateral) engagements in good faith.
- 2 The interpretation as relative rights of such rules of international customary law as form part of *jus aequum*.
- 3 The interpretation of other rules as absolute rights or *jus strictum* or in accordance with the ethical minimum standards laid down specifically in

such rules. The arbitrary or unreasonable exercise of such absolute rights is not illegal, but an unfriendly act.

He also recognized that absolute rights tend to be transformed into relative rights on the international judicial level 'in the course of a balancing process in which considerations of good faith and reasonableness play a prominent part'.<sup>5</sup> But he rejects the notion that there is a general rule of international customary law prohibiting the abuse of rights. Such evidence as exists for the prohibition of bad faith and unreasonableness appears to justify merely more limited rules.<sup>6</sup>

The principle of good faith is included by Professor Bin Cheng in his study of general principles of law applied by International Courts and Tribunals, and he devotes three chapters to good faith in treaty relations; good faith in the exercise of rights (the theory of the abuse of rights); and 'other applications of the principle'.<sup>7</sup> Like Professor Schwarzenberger, he does not attempt to provide a definition of this principle, but in the three chapters he provides many illustrations of the application 'of this essential principle of law in the international legal order' by means of international judicial decisions.<sup>8</sup>

Unlike Professor Schwarzenberger, he considers that there is a general rule or theory of abuse of rights which is recognized both by the Permanent Court of International Justice and the International Court of Justice, and that it is merely an application of the principle of good faith to the exercise of rights.<sup>9</sup> Professor Cheng does not distinguish between good faith as a general principle of law and good faith as a general principle of international law, because he concludes that in relation to this, as well as all the other general principles examined in his work, it is of no avail to examine the possible distinction. It is precisely of the nature of these general principles that they belong to no particular system of law, but are common to them all.<sup>10</sup> Consequently, his 'other applications of the principle' (Chapter 5) are largely examined under rubrics familiar in legal systems generally such as *allegans contraria non est audiendus*, *nullus commodum capere de sua injuria propria* and *fraus omnia corrumpit*.<sup>11</sup>

Apart from the section in Professor Cheng's book on the General Principles, there is no other study of good faith in international law which attempts to set forth the nature, scope and function of the principle generally. There is, however, a considerable volume of literature referring to good faith in relation to treaties,<sup>12</sup> which is hardly surprising if, as the highest international tribunal has asserted, the very rule of *pacta sunt servanda* in the law of treaties is based on good faith.<sup>13</sup> The dominant role of treaties in modern international law, and the consequent relative diminution in importance of other law-creating processes, has led to such an emphasis on good faith in treaties that the principle often appears to be virtually confined to the rule *pacta sunt servanda* and other doctrines directly associated with the obligation of treaties such as *rebus sic stantibus*. Professor Cheng's illustrations of the application of good

faith in other than treaty relations is a valuable indication of the wider scope of the principle in international law.

### **Characteristic Rules and Elements of the Principle of Good Faith**

Foremost amongst these is the rule *pacta sunt servanda*, the importance of which in relation to treaties has already been mentioned. This norm has constituted 'since times immemorial the axiom, postulate and categorical imperative of the science of international law'.<sup>14</sup> Kunz explains its meaning as 'the institution, by general international law, of a special procedure – the treaty procedure – for the creation of international norms'<sup>15</sup> and, while undoubtedly a positive norm of international law, he admits that the meaning of the norm is controversial.<sup>16</sup>

Chailley observed that the rule originated in the Roman Civil law and from it was transferred to international law and applied to treaty engagements between States.<sup>17</sup> Perhaps (as Mr Maresca, the Italian delegate at the United Nations Conference on the Law of Treaties in Vienna said) if Latin were still the language of diplomacy, the mere statement of such a basic rule as *pacta sunt servanda* would have sufficed as the text of what became Article 26 of the Convention on the Law of Treaties, 1969.<sup>18</sup> However, as is clear from the record of the disagreements about the precise meaning and scope of *pacta sunt servanda* which emerged at that Conference,<sup>19</sup> the International Law Commission was justified in expressing the principle contained in the maxim more fully, and its Draft Article included a specific reference to good faith.<sup>20</sup> The Commission's Commentary on the article pointed out that there is much authority in the jurisprudence of international tribunals for the proposition that in the present context the principle of good faith is a legal principle which forms an integral part of the rule *pacta sunt servanda*.<sup>21</sup>

The origins of the link between *pacta sunt servanda* and good faith were referred to above,<sup>22</sup> and despite any modern doubts about the precise meaning of the Latin maxim, it is beyond question that it has been associated with the Roman concept of *bonafides* and its equivalents in other societies for millenia.<sup>23</sup> That association of good faith with the keeping and manner of performance of treaties is one of the oldest and most clearly established of the major elements of the principle in international law.

Another major element is the association of good faith with the notion of abuse of right. Whether the arbitrary or unreasonable exercise of an absolute legal right is unlawful or, as Professor Schwarzenberger believes, merely an unfriendly act,<sup>24</sup> may be debatable, but there can be little serious disagreement with the proposition that the notion of abuse of right is an important element in the principle of good faith in international law.

The theory of abuse of rights, *abus de droit*, recognised in principle both by the Permanent Court of International Justice and the International Court of Justice, is merely an application [of the principle of good faith] to the exercise of rights.<sup>25</sup>

The Roman Law *bona fides* is the basis of the doctrine of abuse of right in the civil law,<sup>26</sup> and although the doctrine is not formally applied in common law systems as a general principle, international lawyers from the common law tradition have not denied the applicability of the doctrine in appropriate cases in international law.<sup>27</sup> For present purposes, the expression ‘abuse of rights’ may be taken to include cases where a legal right – whether arising from a treaty or by virtue of customary rules – is exercised arbitrarily, maliciously or unreasonably, or fictitiously to evade a legal obligation. Thus stated, it is hardly surprising that abuse of rights should be seen as merely an application of good faith to the exercise of rights.

In addition to *pacta sunt servanda* and abuse of rights, good faith in international law is also associated with various kinds of action or conduct which, in municipal legal systems, are often subjected to specific rules. These rules reflect standards of ethical or equitable behaviour in a society, which are considered to be so important that they are supported by the legal institutions of the society. The range and development of legal rules of this type inevitably vary between different municipal legal systems, and differences in their formulation and classification, for example, procedural or substantive, add further to the difficulty of identifying them precisely. The extent to which they may then have been incorporated in or translated to international law could hardly fail to give rise to differences of opinion, and firm conclusions about this could be made only after a detailed and systematic study of the corpus of rules of the system. As regards the principle of good faith in international law, it is perhaps sufficient at this point to identify some major examples of unethical or inequitable behaviour which have been subjected to scrutiny and dealt with in a manner which closely parallels (even as to terminology) municipal law systems. Here, however, it is suggested that the parallels arise because of the common origin of the deciding principle – good faith – rather than as a result of importing into international law, private law institutions ‘lock, stock and barrel’ ready made and fully equipped with a set of rules.<sup>28</sup>

It is because certain actions or conduct in international relations are regarded as unjust, dishonest, unfair or unreasonable that they are condemned in certain circumstances by international law. As in municipal law, such actions or conduct are considered to be ‘contrary to good faith’, and the concept of good faith in international law includes a strong element of rejection of injustice, dishonesty, unfairness or unreasonableness. There may be dispute about the precise nature, scope and function of the rules which reflect that rejection, but there is little dispute about the fact of rejection. In the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits*<sup>29</sup> the International Court of Justice rejected conduct by Thailand which

amounted to the withdrawal of a clear and unequivocal representation it had made to Cambodia (and on which Cambodia had relied). This application of a view based on common sense and common justice, and which is expressed in the maxim *allegans contraria non est audiendus*,<sup>30</sup> is often referred to in both international and municipal law as ‘estoppel’, ‘preclusion’, ‘forclusion’, ‘acquiescence’ or ‘recognition’, but the basis of it is the perception that it is contrary to good faith to allow a party to blow hot and cold – to affirm at one time and deny at another.<sup>31</sup>

Earlier, the Permanent Court of International Justice, in two cases,<sup>32</sup> rejected the essentially unjust, dishonest and unfair act of seeking to take advantage of one’s own wrong, expressed in the maxim *nullus commodum capere de sua injuria propria*. ‘Fraud is the antithesis of good faith, and indeed of law ...’<sup>33</sup> It is hardly necessary to state that in international law as in legal systems generally, fraudulent or deceitful conduct is associated with lack of good faith. In the praetorian system in Roman Law, it became common for the praetor to include in the formula a direction to the judge to decide according to ‘good faith’ or in a manner which would prevent ‘fraud’.<sup>34</sup> *Dolus* in Roman Law provided a defence in an appropriate case even before the development of the good faith actions,<sup>35</sup> and fraud had, and continues to have, a special and separate role in both civil law and common law systems. The International Law Commission agreed that fraud is a concept which is found in most legal systems, but that the paucity of precedents in international law meant that there was little guidance to be found either in State practice or the jurisprudence of international tribunals as to the scope to be given to the concept. The Commission concluded that it would suffice to formulate the general concept of fraud in relation to treaties, leaving its precise scope to be worked out in practice and in judicial decisions.<sup>36</sup> In modern international law, fraud and corruption or coercion of the representative of a State to procure a State’s consent to an agreement,<sup>37</sup> are not major factors, but in Roman Law, and in the classical writers of international law, such manifestations of injustice, dishonesty and unfairness were stigmatized as contrary to good faith and might vitiate a transaction.

The original narrow obligation to keep one’s word, expressed in the maxim *pacta sunt servanda*, was enlarged through philosophical and religious influences<sup>38</sup> to embrace higher standards of ethical behaviour. The elaboration of the concept of *bona fides* in Roman Law as involving a *legal* obligation to do what a decent, honourable, fair and conscientious man would do in particular circumstances<sup>39</sup> contributed very largely to the association of good faith, in a wider ethical sense, with *pacta sunt servanda*. In relation to keeping promises and agreements, good faith acquired the meaning of not only the obligation to observe literally the undertakings given, but also the advertence to the real intentions of the parties or to the ‘spirit’ of the agreement.<sup>40</sup> It also required that the promise or agreement itself should have been the result of real consent and not vitiated by for example, force or fear.<sup>41</sup>

An important element in the concept (which is also traceable directly to Roman Law) is that good faith adds a dimension to strict law which enables a court to take into account circumstances and considerations of fairness which might otherwise be excluded.<sup>42</sup> Reasonable belief or honest mistake of fact might, therefore, be taken into account as defences, or might operate to reduce liability for wrongful acts.<sup>43</sup>

The canonist conception of good conscience added an individual dimension to the community aspect of *bona fides* in Roman Law. As Sohm noted, the Roman jurists applied the demands of good faith in human dealings to individual cases.<sup>44</sup> The standard of good faith applied was the community standard. The canonists, on the other hand, emphasized personal conscience, and for them, good faith and personal good conscience were the foundations of *pacta sunt servanda* and thus, even nude pacts were binding.<sup>45</sup>

The association of good faith with individual conscience, which was particularly marked in the development of Equity in English Law,<sup>46</sup> is still very marked in cases where the actual intention or state of mind of a party is relevant. *Actual* knowledge of particular circumstances, for example, that the seller of goods had a defective title, clearly involves questions of conscience. Good (or bad) faith in such cases is judged in accordance with the individual's conscience, but as a practical matter, it may be difficult to convince a tribunal of personal good faith and good conscience if the conduct in question has significantly deviated from what might reasonably have been expected, having regard to common usage or the community standard of good faith in that situation.

The special association of good faith and conscience in the development of English Equity jurisprudence, already referred to, is not paralleled in civil law systems, but there is a general association of good faith with 'equity' in all legal systems.<sup>47</sup> In that context, 'equity' has the meaning which it had for Ulpian when he laid down the doctrine of equity or good faith in contractual obligations.<sup>48</sup> This was seen as opening up a wide discretion for the judge to apply the *exceptio doli* to *actiones stricti juris*, and it was also seen as the basis of such moral or natural justice-based legal doctrines as *clausula rebus sic stantibus*, unjust enrichment and abuse of rights.<sup>49</sup>

The association of good faith with moral obligation gives rise to one of the recurring themes in the concept of good faith in legal theory. That is the perception that the obligations of good faith pertain in some way to a 'higher' order than the normal obligations of positive law. Suarez, for example, while conceding that the validity of an agreement might depend on compliance with (positive) rules of law, asserts that when any agreement is validly concluded, an obligation of a higher order results. For him, this higher order obligation belongs to natural law.<sup>50</sup>

In relation to the basic obligation to keep an agreement, the reference to good faith and a 'higher order', such as natural law, does not create a problem in as much as the rule *pacta sunt servanda* is in any case undoubtedly a norm

of positive law.<sup>51</sup> But in relation to other good faith obligations, the association of good faith with a higher order than positive law may give rise to the view that such obligations, although perhaps *morally* binding, are not *legally* binding.<sup>52</sup> Although there can be no real doubt about the facts that good faith is associated with morality or ethics, and that there is a *moral* principle of good faith, this work is concerned with international *law* and the *legal* principle of good faith. Thus, we are here concerned only with obligations which are *legally* binding, and the relationship between 'moral' and 'legal' good faith, if any, is a matter which might be considered later when confronting the question of the definition of the principle of good faith in international law.

Higher order values like 'equity', 'justice', and 'fairness' are indelibly associated with good faith in German law as a result of the revalorization cases,<sup>53</sup> even if the good faith applied in these cases consisted in essence in an appeal to community standards or common usage.<sup>54</sup> Similarly, in Swiss law, the determination of whether a party has acted in good faith is decided on principles of justice and equity.<sup>55</sup> In many contract cases this simply means determining whether a party by normal standards had acted unfairly or unconscionably by overreaching or sharp practice.

The development of codified good faith in German, Swiss (and to a lesser extent) French law has led to particular national perceptions of the concept which cannot, in the absence of detailed comparative studies, be accepted as generally accepted elements of good faith. For example, the limitation of good faith to a merely interpretative or 'completion of the legal norm' function in Swiss law appears to be peculiar to that system, and the assignment by Swiss law of the function of taking into account imperative superior moral standards to abuse of right<sup>56</sup> would perhaps be assigned to good faith itself in most legal systems. But disregarding for present purposes differences in national techniques or doctrinal presentations of good faith, there appears to be a common core or general perception of good faith in both civil law and common law systems. That good faith is concerned with the introduction of superior moral standards such as 'justice', 'equity', 'fairness', 'good conscience' into legal norms. The development of Article 242 of the German Civil Code<sup>57</sup> to introduce justice and fairness into contracts in a situation where the contract or the general law did not provide for the situation is not essentially different from French views of the role of Article 1134, para. 3, of the French Code,<sup>58</sup> or Swiss views of the role of Article 2 of the Swiss Civil Code.<sup>59</sup>

In the common law, with its tradition of separate Courts of Equity derived from the jurisdiction of the Chancellor and the Court of Chancery, the perception of good faith as concerned with the introduction of moral standards into strict law is equally, or even more clearly marked. The jurisdiction of the Court of Chancery was based on conscience, and good faith in English law has long been associated with the idea of the Chancellor intervening in the

normal legal process to ensure that a party acted 'equitably' or 'fairly' as required by good conscience.

The development of separate Courts of Equity and Common Law in England eventually produced separate bodies of equitable rules and common law rules. The equitable rules became as rigid and technical as the common law rules, and the 'conscience' upon which the rules of equity were based moved largely from the desire of the Chancellor 'to correct men's consciences for frauds, breaches of trust, wrongs and oppressions of whatever nature' to a more generalized concept of 'the conscience of the realm'.<sup>60</sup> The origin of the rules of equity in a requirement of good faith to which the convenient label of conscience was attached, and the supremacy accorded to equitable rules in the fused system of law and equity has resulted in a corpus of 'normal' rules in English law which, it might be said, were inspired by the general concept of good faith. But in addition, there is a principle of good faith in English law which may supplement or supersede the normal rules.<sup>61</sup>

## Conclusion

From the foregoing it is possible at this stage to suggest at least that the principle of good faith in international law is a fundamental principle; that it is a *legal* principle integrally associated with the rule *pacta sunt servanda*; that, as in municipal law, it is directly associated with fairness in the exercise of legal rights and the rejection of dishonest, unfair or unreasonable conduct. Further conclusions on the nature, scope and function of the principle must await the examination of good faith in international law.

## Notes

- 1 Grotius (1925), vol. II, Chap. XXV, p. 860.
- 2 International Law Commission, (1950), p. 299.
- 3 Mann (1973), p. 162.
- 4 Schwarzenberger (1957), p. 15. Schwarzenberger and Brown (1976), p. 7; pp. 35–6.
- 5 Schwarzenberger and Brown (1976), p. 119.
- 6 Ibid., p. 85.
- 7 Cheng (1953), pp. 106–60.
- 8 Ibid., p. 105.
- 9 Ibid., p. 121.
- 10 Ibid., p. 390. For a criticism of this conclusion, see Lauterpacht (1953), pp. 544–7.
- 11 Cheng (1953), pp. 141–60.
- 12 The principle of good faith in the Law of Treaties is discussed in Chapter 7 below.
- 13 *I.C.J. Rep.* (1974), p. 268, para. 46; p. 473, para. 49.
- 14 de Taube (1930), vol. II, p. 295.
- 15 Kunz (1945), p. 197.
- 16 Ibid., p. 180.
- 17 Chailley (1935), pp. 988–9.

- 18 United Nations (1968), p. 155.
- 19 Ibid., pp. 150–8.
- 20 The Draft Article 23 was adopted as Article 26 in the Convention and reads: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’.
- 21 *Year Book, International Law Commission*, 1966, II, p. 211.
- 22 Chapter 2, p. 5–9 above.
- 23 See e.g. Phillipson, *1 The International Law and Custom of Ancient Greece and Rome* (1911), pp. 387–388 (China), p. 391 (Greece and Rome). There is a strong emphasis on *pacta sunt servanda* and *bona fides* in the 4th century BC work of *Kautilya-Arthashastra* in relation to treaty-making between sovereign rulers in India and Further India, C.H. Alexandrowicz, ‘Kautilyan Principles in the Law of Nations’, *B.Y.I.L.* (1965-66) 301 at p. 308
- 24 *Supra*, p. 36.
- 25 Cheng (1953), p. 121 (footnotes omitted).
- 26 Newman (1961), p. 97.
- 27 For example, Sir Charles Russell in the *Fur Seal Arbitration* (1892) cited by Cheng (1953), pp. 121–2; Lauterpacht (1933), p. 286.
- 28 Cf. Lord McNair in the *South-West Africa Case*, I.C.J. Rep. 1950 at p. 148.
- 29 I.C.J. Rep. 1962, p. 6.
- 30 Cf. Cheng (1953), p. 141.
- 31 Ibid.
- 32 *Jurisdiction of the Danzig Courts* (1928), P.C.I.J. Rep., Series B, No. 15; *Chorzow Factory Case (Jurisdiction)* P.C.I.J. Rep., Series A, No. 9, p. 21 at p. 31.
- 33 Cheng (1953), p. 158.
- 34 Dawson (1968), p. 104.
- 35 See for example Buckland (1932), pp. 408; 415.
- 36 *Y.B.I.L.C.*, 1966, II, p. 244; Article 49 of the *Vienna Convention on the Law of Treaties* 1969 states: ‘If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty’.
- 37 See Articles 50 (corruption), 51 (coercion of representative), *Vienna Convention on the Law of Treaties*, 1969.
- 38 See Chapter 2 above, especially pp. 7–13.
- 39 See Chapter 3 above, especially pp. 19–21.
- 40 Cf. Justinian Digest LXVI. 219.
- 41 Justinian Digest LXVII 116.
- 42 Chapter 3, p. 19–21 above.
- 43 Ibid.
- 44 Sohm (1901), p. 106.
- 45 von Mehren (1957), p. 580.
- 46 O’Connor (1990), pp. 5-10.
- 47 For a survey which includes major studies of good faith and equity see Newman (1973).
- 48 Newman (1961), p. 97.
- 49 Ibid.
- 50 See Chapter 3 above, p. 29.
- 51 The rule *pacta sunt servanda* existed in, and between ancient civilizations and was considered to be ‘obligatory and inviolable’, De Taube (1930), vol. 32, p. 317 *et seq.*, and see Whitton, 313 *International Conciliation*, p. 398.
- 52 See for example, Judge Alvarez, I.C.J. Rep. 1948, p. 71; Judge Klaestad, I.C.J. Rep. 1955, p. 88.
- 53 The collapse of the German currency in 1923 and the subsequent revalorization of

obligations by German courts is discussed *inter alia*, by Cohn (1968), vol. 1., pp. 60 *et. seq.*; Nussbaum (1950), esp. p. 206 *et. seq.*; Dawson (1968).

54 Cf. Powell (1956), p. 16 at p. 37.

55 Arts. 1–4, Swiss Civil Code (Trans. Ivy Williams, 1925).

56 Dutoit (1973), p. 330.

57 Article 242 reads: 'The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage.' (Trans. Forrester, Goren, Ilgen, (1975).

58 Art. 1134, para. 3, reads: 'Agreements lawfully formed take the place of law for those who have made them. They cannot be revoked except by mutual consent or on grounds allowed by law. They must be performed in good faith.' (Trans. von-Mehren-Gordley (1977)).

59 Art. 2 reads: 'Every person is bound to exercise his rights and fulfill his obligations according to the principles of good faith. The law does not sanction the evident abuse of a man's rights.' (Trans. Williams (1925)).

60 O'Connor (1990), pp. 5–10.

61 *Ibid.*, pp. 99–102.

## 5 Good Faith in the Doctrine of Public International Law

Coleman Phillipson, in his introduction to the translation of Gentili's *De Jure Belli Libri Tres*, stated that, strictly speaking, no writer can be truly described as the 'progenitor' or 'forerunner' or 'creator' of international law.<sup>1</sup> Dr Phillipson, in his own work on ancient international law, demonstrated that modern international law is not a new creation, but partly a reassertion and refinement of ancient doctrines and partly a restoration or continuation or adaptation of ancient customs and institutions.<sup>2</sup> It is a truism that every age builds on the preceding ages, and it is certainly true that Gentili and Grotius, two of the writers often referred to as the founders of modern international law, constantly appealed to their predecessors (classical and post-classical) as authority for their rules and principles, for practices, for analogies and for all kinds of illustrations.<sup>3</sup>

It has also been suggested that the emergence of modern international law is not marked so much by the creation of entirely new rules and principles as by the theoretical detachment of international law from certain theological premises upon which it had been based.<sup>4</sup> Coleman Phillipson also pointed out that 'in the Middle Ages the Glossators and the Commentators, the Fathers of the Church, and the ecclesiastical doctors often discuss various questions appertaining to the sphere of the law of nations'.<sup>5</sup> These discussions, like those of the influential Spanish jurist-theologians of the sixteenth century such as Vitoria, Soto and Suarez, were based on the Scholastic and Canonist traditions. In this Chapter, the writings of those who have made important contributions to the doctrine of international law, especially those who contributed to the emergence of the new 'law of nations', are examined for discussions of the nature, scope and function of the principle of good faith.

## The Sixteenth and Early Seventeenth Centuries

*Pierino Belli, De Re Militari et de Bello tractatus* (1563)

Belli, a native of Piedmont, studied jurisprudence at the University of Perugia and subsequently held high offices under the Emperor Charles V, Phillip II and Emmanuel Philibert, Duke of Savoy. The beginnings of the process of detachment of international law from theology, and the first tentative steps towards a new and more scientific approach to international law, may be seen in his principal work, *De Re Militari et De Bello*, written in 1558, and first published in 1563. Although opinions differ about the originality and importance of his work in the history of the development of international law, Cavaglieri considered that he was one of the first to attempt 'to liberate the study of international law from the bonds of theology and to give it the dignity of an independent discipline'.<sup>6</sup> Whatever justification there may be for this opinion in relation to Belli's work generally, there is little evidence in *De Re Militari* that he sought to liberate the topic of good faith in the law of nations from the glossators, the commentators and the Churchmen.

He repeats the accepted rule that pledges be not violated and that agreements made even with an enemy must be carried out. *Decretum Gratiani*, St. Thomas Aquinas and Cicero are cited as sufficient authorities.<sup>7</sup> However, he does not hesitate to condemn certain departures from the strict requirement of good faith which the Commentator Baldus would have permitted. Baldus stated that a prisoner, who was allowed to go under a promise and an oath to return, need not keep the promise. Belli disagrees, unless the prisoner had not been lawfully captured, or had been captured by brigands or pirates (who did not count as enemies).

But if it be a regular war, there both capture and contract are lawful; and an oath must be kept, as well from the point of view of law, as from that of the usage of war.<sup>8</sup>

He also questions whether Baldus is sound and right in contending that it would be permissible to break a pledge to avoid *the risk of losing life itself*. He prefers the view of Cicero and the example of Regulus who chose to return to torture by the Carthaginians rather than break the pledge he had given.

Even pagans, who lived by the light of nature alone, have declared for the principle that if under stress of circumstances, individuals have made any promise to the enemy faith must be kept on that point.<sup>9</sup>

There are limits to his insistence on the strict requirements of good faith. For example, he approves of the opinion of Paulus in the *Digest* that a *pledge* given by a private person to the detriment of State or Church must not be kept,

and he uses this to explain the Glossators' and Doctors' declaration that a commanding officer must keep faith, but that the case is different with the common soldier. He thinks that a distinction may be drawn:

For (1) the soldier promised something to his own loss, and in accordance with the law of war; then he should keep faith; or (2) he promised something to the disadvantage of the State without reference to the accustomed usage of war; then he will not be bound. For his obligation to the State will be stronger than to his personal word.<sup>10</sup>

Furthermore, the rule that promises, even to the enemy, must be kept does not apply where it conflicts with the practice of war, obligation to the State, and the force of an earlier superior oath.<sup>11</sup>

Belli does not discuss any other aspects of good faith, although he shows some awareness that good faith may involve more than the basic obligation to keep promises and agreements. For example, where a peace treaty requires the surrender of captured strongholds (or other places) it would be contrary to good faith to surrender the positions as agreed but to establish other fortified positions in near proximity to those surrendered.<sup>12</sup> He also criticizes the Spartan (Cleomenes?) 'who, after arranging a truce for thirty days with the enemy, devastated the country of the latter by night, alleging that the agreement covered the days, but not the nights'.<sup>13</sup>

*BALTHASAR AYALA, De Jure et Officiis Bellicis et Discipline Militari, Libri III*

Ayala, writing shortly after Belli, attaches considerably more significance to good faith and devotes substantial sections of *De Jure et Officiis Bellicis et Disciplina Militari, Libri III* to the concept. He begins his treatise on the Law of War with a discourse on the importance which the Romans placed on the observance of law and good faith in the matter of declaring and conducting war. The rules of Feacial Law were directed to this.<sup>14</sup> The whole of Chapter VI of his first book<sup>15</sup> is devoted to a discussion of the meaning and scope of good faith, particularly in relation to keeping agreements with an enemy. After the fashion of his time, he includes many references to classical authors (especially Cicero and Livy) and religious authorities in his general discussion of good faith, but he was the first, among the precursors of Gentili and Grotius, to attempt a systematic and detailed exposition of the principle.

In so doing, he relied almost exclusively on rules collected from the *Digest* and *Institutes*, and indeed Ayala must be regarded as a leading figure among those early writers who used Roman Law as the basis for many of the rules of the new law of nations. In criticizing the opinion that the giving of hostages operated to discharge the obligation to keep faith (as Bodin for example argued in the *Republic*, Book 1, Ch. 8), Ayala relied on the *Institutes* and the

*Digest* for the rule that the giving of hostages, like sureties and pledges, are merely accessory to the principal obligation and do not destroy it.<sup>16</sup> Cicero and the Jurists are quoted for the reason why brigands and pirates are not included in the definition of 'enemy' for the purpose of the rule about keeping faith with an enemy:

... and so (as Cicero says) if you fail to pay to pirates the sum promised for sparing your life, there is no fraud, not even if you swore to do what you have failed to do, for a pirate is not included in the list of State enemies, but is the common enemy of all and we ought to have no matter of good faith or oath in common with him; and that is the reason why the jurists say that brigands and pirates are not denoted by the word '*hostes*'.<sup>17</sup>

Ayala deals at some length with the distinction between 'just' and 'unjust' enemies. The distinction is used to reconcile apparently conflicting rules of good faith. The praetor's edict promises rescission of a transaction which has been entered into because of duress:

... anything done or promised in these circumstances is *ipso jure* void and will not be validated by the employment of an oath, for there is no confirming what is null, nor does an oath carry any obligation when it was extorted by gross and abominable compulsion.<sup>18</sup>

Ayala says that this does not refer to duress which is lawfully exercised, as in a 'just war' or to engagements formed with (a just) enemy, but to transactions between citizen and citizen,<sup>19</sup> and with 'unjust enemies', like pirates, brigands and rebels.<sup>20</sup> As regards lawful enemies, as Cicero writes: 'there is nothing which is capable of exercising upon one a greater degree of duress than good faith does'.<sup>21</sup> Apart from the case of unjust enemies there are occasions, Ayala writes, which are exceptions to the rule about keeping faith. First and foremost is the case where a person, overcome by weakness, has sworn to do something offensive to God, by whom he has sworn:

he must not fulfill his oath, for an oath should not be a bond of iniquity nor is it expedient to keep faith in wrongful promises, nor is there any bindingness in an oath, the taking of which violates good morals.<sup>22</sup>

Again, Ayala relies on the opinions of Paulus and Ulpian, in the *Digest*, for the rule that a private pledge or an agreement which is contrary to the interests of the State must not be kept.<sup>23</sup> It would, of course, be safer and more praiseworthy not to allow oneself to be driven by any fear of danger into pledging one's word to do something unlawful rather than to break the word so pledged.<sup>24</sup>

Ayala writes that faith need not be kept, not even when accompanied by an oath, with an enemy who breaks faith:

For it is part of the general law of contract that no one is bound by a contract unless the other party performs what he has undertaken, it being futile for one who refuses to keep faith with another to claim that that other shall keep faith with him.<sup>25</sup>

Again, the *Code* and the *Digest* are cited in support of this proposition.

As well as the bad faith involved in not keeping a treaty, it is bad faith to procure a treaty by fraud, and such agreements are void, just as fraud inducing a *bona fidei* contract in Roman Law makes the contract void by mere operation of law, subject to the aggrieved party electing at his discretion, to affirm the contract or not.<sup>26</sup>

Like Belli, Ayala cites with approval the opinion of Paulus that a pledge given by a private person which is opposed to the interests of the State should not be kept. Such an agreement is outside private competence.<sup>27</sup> Ulpian is relied upon for the rule that no agreement which infringes the common law should be kept 'not even when accompanied by an oath, the law being superior to an oath'.<sup>28</sup>

Ayala's contribution to the topic of good faith, as it related to the law of war in the second half of the sixteenth century, thus largely consisted of a restatement or adaptation of rules taken from Roman Law, which he considered to be appropriate to the solution of problems arising from agreements with enemies. His discussion of good faith in the matter of the conduct of war and other topics of the law of nations of his time was rather cursory. He briefly acknowledges the 'old Romans' who disdained all frauds and deceptions and who had no wish to conquer, save by sheer valour and downright force,<sup>29</sup> but he clearly regards this attitude as rather untypical of olden times. He cynically observes 'that the Romans of olden times sometimes found the mere reputation for downright valour and untarnished good faith more useful than their unconquered arms'.<sup>30</sup>

He himself appears to approve of trickeries, stratagems and deceit in war (apart from breach of a pledged word)<sup>31</sup> but he devotes little discussion to this matter, unlike Alberico Gentili, whose extended discussion of good faith in relation to the conduct of war marks a significant advance in doctrinal development of the principle.

#### *ALBERICO GENTILI, De Jure Belli Libri Tres (1598)*

Gentili, in his major work *De Jure Belli Libri Tres* deals in considerable detail with the conduct of war and the aftermath of war, so that his treatise, as Coleman Phillipson says, undertakes to answer the question: in what circumstances is war justly undertaken, conducted and terminated?<sup>32</sup>

Good faith emerges in Books II and III of *De Jure Belli* as the dominant theme in Gentili's discussion of how a war should be waged and terminated. It is the basis of his statement of the rules on a wide variety of topics but at the beginning of Book II, Gentili decisively shifts the emphasis from the percep-

tion of *pacta sunt servanda* as comprising virtually the *only* element in good faith, to the perception of good faith as a wider ethical–legal principle which included *pacta sunt servanda* as one of its distinctive elements. Gentili emphasized the importance of the spirit of an agreement and the real intentions of parties to an agreement – agreements in good faith ‘by no means admit of knotty interpretations and disputes about points of law, that is to say, about subtleties.’<sup>33</sup> The whole of Chapter IV (of deception by words) is devoted to the explanation and elaboration of this position. The Greeks, Romans, Carthaginians, Phoenicians, Persians and, of his own time, Charles V and Louis, King of France, are all castigated for literal or pettifogging interpretations of agreements which, while claiming to following the agreement strictly, rob it of the real meaning intended by the parties. Gentili sums up his discussion in Chapter IV as follows:

In agreements in good faith and deserving of favour, all fine points of law are disdained, since they have nothing to do with good faith, and by excess of subtlety they subvert the good faith of those who make the agreements. Verbal snares are far removed from the truth.<sup>34</sup>

Good faith for Gentili is evidently a more sophisticated and complex principle than the simple requirement that agreements and promises must always be kept. He accepts that an oath is sacred among all nations,<sup>35</sup> but earlier in his treatise he took the view that even oaths are subordinated to the three concomitants, ‘justice, judgment and truth’. To break a rash and ill-considered oath is not perjury but a duty.<sup>36</sup>

Good faith is a principle which he invokes at many points throughout to give effect to his philosophy that in all matters, ‘the consideration of justice and equity prevails over the strict interpretation of the law; that the law of equity is superior to the letter of the law; that the meaning is more than the words; that the good and the fair are law.’<sup>37</sup>

Thus, when an agreement is made in good faith, we must consider not only what is expressed in the actual language ‘but other things as well which equity and the opinion of a good man are accustomed to understand in addition and to introduce into contracts in good faith’.<sup>38</sup> He rejects the opinion of Bartolus on two points, first, that truces are not to be interpreted according to the nature of contracts in good faith, and second, that the contracting of a treaty is a matter of strict law. He is firmly convinced that ‘all contracts with sovereigns or communities are in good faith’ and this is also true of contracts made with military leaders.<sup>39</sup> He does not accept that the only contracts in good faith are those mentioned in the law books. These books deal only with the private law of the State, and there are (in addition) truces (which are a matter of public law) and ‘many other agreements’ which fall under the same law of good faith and thus should be regulated by the principles of right and justice.<sup>40</sup>

Throughout Book II, Gentili adverts again and again to the necessity of interpreting agreements on the basis of right and justice 'without cavil and in a broad spirit'.<sup>41</sup> In discussing and illustrating the interpretation of safe conducts (Chapter XIV), agreements on the exchange and liberation of prisoners (Chapter XV) and terms of surrender to the enemy (Chapter XVII), he emphasizes that these are all matters where the principle of good faith demands that a party to an agreement should not only abide by the express terms and conditions but that he should also implement the agreement in a reasonable and fair manner. He notes with approval the statement of Decianus that in agreements about prisoners only good faith is considered, not fine points of law.<sup>42</sup> It is not inquired, for example, whether the contracts are nominate or innominate.

The strictness of the civil code, and the subtleties of the courts, are not matters of concern to military men.<sup>43</sup> He condemns adherence to the strict letter of an agreement made in time of war which changes the real intention or spirit of the agreement. Thus, he says, it was a quibble of the Spaniards to claim Valerio Orsini as their captive on the ground that there was no French camp, when Orsini had surrendered to them on condition that he should be led in safety to the French camp. Gentili explains that the condition provided for the certainty of carrying out the surrender agreement, and 'provisions with regard to the execution of a contract do not change its spirit'.<sup>44</sup> The real intention in this case was that Orsini should go free.

Not every kind of craft and every kind of cunning device is allowed<sup>45</sup> but it is lawful to make use of stratagems and deceptions in war,<sup>46</sup> and Gentili, therefore, considers that it was an 'absurd quibble' of Saladin to refuse to abide by his liberal terms for the surrender of Ascalon because he had been deceived into thinking that it was protected by a strong garrison when it was almost without defenders.<sup>47</sup>

The mere quibbles of the civil law (such as regarding slaves as dead men)<sup>48</sup> or indeed quibbles on the meaning of words as they are commonly understood in military life or in the understanding of the people<sup>49</sup> are not to be used to deprive agreements on surrender of their real meaning. One who has been granted his life may be made a slave.<sup>50</sup> However, it is not keeping faith to enslave one who has bargained for safety.<sup>51</sup>

At some points, Gentili appears to go beyond the demands of reasonableness and fairness and to be suggesting the need to observe standards of behaviour which might be regarded as highly virtuous, even saintly. Thus, he quotes with approval Agamemnon's view that in some circumstances what the law does not forbid is forbidden by shame, and the words of the younger Seneca:

there is but scant innocence in being good according to the law, but the rules of duty are more extended than those of the courts. Loyalty, humanity, generosity, justice and faith demand much that is wholly absent from the public codes.<sup>52</sup>

Where there is an unconditional surrender to the enemy, and free will allowed to him, good faith limits the exercise of formally unlimited powers.

The fullest exercise of free opportunity and power always demand good faith and a civil interpretation of good faith, as well as the intelligence belonging to humanity. What is unlawful is never included, even by the broadest interpretation of discretion.<sup>53</sup>

Here, although lack of good faith is equated with unlawfulness, in fact the standard of good faith demanded in these passages appears to be much higher than good faith 'contrary to law'. The standard is that suggested earlier by Gentili as the highest Christian standard expressed in terms of the Golden Rule of not doing to others what you would not wish to have done to you.<sup>54</sup>

It is clear, however, that Gentili's conception of the scope of good faith in law is more limited than a reading confined to these passages would suggest. The concept which emerges from the whole of Book II is that good faith is a principle which emphasizes the requirements of reasonableness, equity, fairness, generosity of spirit; a principle which emphasizes the importance of the real intentions of the parties to an agreement; a principle which has regard to the conscience of a good man. However, equity and conscience must be understood as founded upon law,<sup>55</sup> and while no doubt it would be the act of a good man to forgive the perfidy of another, and to do so would be in accordance with the high ideals of religious teaching, Gentili does not suggest that good faith extends so far. On the contrary, he believes that the integrity of the principle suffered because of the development of the custom of remitting punishment for breaches of faith. He would even agree with the killing of blameless hostages where faith has not been kept.<sup>56</sup> This rigorous attitude is again evident in Book III where he mentions with approval the opinion of Philo Judaeus that the cities of those who have broken treaties should be utterly destroyed as a salutary example to others.<sup>57</sup> The demands of humanity and generosity of spirit evidently must not be extended so far as to endanger good faith *as a principle of law*.

Nevertheless, in the concluding part of *De Jure Belli*, Gentili reverts to his emphasis on the spirit rather than the letter of an agreement. He disagrees with Baldus about the character of peace agreements. Such are not, as Baldus says, contracts of strict law, but, like all agreements of sovereigns, based upon good faith.<sup>58</sup> The very name of a treaty (*foedus*) 'is by some derived from faith (*fides*)'.<sup>59</sup> Good faith ought to hold the chief place in it,<sup>60</sup> and at this point Gentili repeats that in such agreements 'we do not admit the more subtle discussions on fine points of law which, passing over the principles of right and justice, push the examination to the very quick'.<sup>61</sup>

The discussion which follows in Book III illustrates the nature and scope of his proposition that good faith ought to hold the chief place in peace treaties. The effects of duress, misrepresentation, substantial error, change of

circumstances and breach are considered. So too are questions which until, and for some time after Gentili died, were much canvassed, for example the binding force of a treaty concluded by a Prince who was in captivity,<sup>62</sup> the legitimacy of pacts with infidel peoples and the significance of an oath for the binding force of a treaty.

Gentili is satisfied that a captive ruler can make a binding peace agreement if the captivity is just, but if the agreement involves a matter which is beyond his competence, for example, the alienation of part of his realm, it would not be binding.<sup>63</sup> Even where an oath is appended, the agreement is always understood to be subject to the reservation that it is concluded in the light of certain conditions, and if there is an unforeseeable change of circumstances, it is not a breach of faith to fail to keep the promise.<sup>64</sup>

In the concluding chapter of his Treatise, Gentili considers more explicitly the question of good faith in relation to violation of a treaty.

That faith may be broken with one who breaks faith, even though he be your master, and whether the pledge was made under oath or without an oath, is the opinion of the people, of justice and of the law.<sup>65</sup>

Failure by the other party to a treaty to observe a provision of it is one of the clearest justifiable reasons for refusing to go on with the treaty. Rather curiously, Gentili refers to the opinions of Ulpian and Pomponius (who were dealing with partnership of individuals) as authorities for this.<sup>66</sup> It is to be understood, however, that the provision breached must be a matter of prime importance.<sup>67</sup> It would be contrary to good faith to seize upon some trivial matter which although perhaps formally a breach of the treaty, is not sufficiently serious to justify a retaliatory breach. 'The justice of the law of nations does not allow this'.<sup>68</sup> Gentili is again making the point that the spirit of the agreement and the real intention of the parties are the essence of agreements based upon good faith, and the real law involved must not be 'buried under the syllables and fine distinctions of the pettifoggers'.<sup>69</sup>

For the same reason, necessity and superior force will excuse a party from being considered a breaker of treaties although warning must be given that he does not intend to abide by the letter of the law.<sup>70</sup>

*Alberico Gentili, De Legationibus Libri Tres (1585)*

Gentili also published the first systematic work on the special topic of embassies and ambassadors in the law of nations. In *De Legationibus Libri Tres*, published in London in 1585, he unequivocally made good faith the essence of the law relating to embassies and of the law of nations.<sup>71</sup> As we have seen, his later and more famous work, *De Jure Belli*, reflects his views on the importance of good faith in the law of nations generally.

The cardinal rule that ambassadors are to be protected from injury, and that if they are injured, the offenders must be punished, 'arises from the fact that ambassadors are entitled to the good faith of the state and the prince, and he who does violence to an ambassador violates the good faith of the state and the prince'.<sup>72</sup> On the other hand, the ambassador himself is bound to act in accordance with good faith.

The ambassador ought to have a superabundance of this virtue, for the prince has intrusted himself wholly to his fidelity. He who shows good faith, says one man, though a barbarian, has a claim on good faith.<sup>73</sup>

Gentili is particularly severe in his opinion on the punishment which ought to be meted out to one who betrays his embassy and he gives with evident approval several examples of the terrible punishments which were exacted in ancient times for treachery in this respect.<sup>74</sup>

*Alberico Gentili, Hispanicae Advocationis Libri Duo (1613)*

Gentili's notes, mainly on English Admiralty Prize Cases in which he was engaged as counsel for Spain, were published after his death by his brother, Scipione.

In one case, Gentili supported his argument with a reference to that aspect of good faith to which, as we have seen, he devoted considerable attention in *De Jure Belli*, that is, the spirit rather than the letter of the law. The case concerned an edict issued by the King of Spain which directed that when a ship was manned with more Britons than foreigners, it was to be regarded as a pirate ship if it harassed Spanish ships or ships of allies of Spain. The purpose of this edict was to prevent British pirate ships from availing themselves of the law of war and claiming as lawful prize booty captured from Spain and her allies by including in a crew a few persons of a nation which was at war with Spain. In the case in question, a sloop manned entirely by Britons, but sailing under the convoy of a Dutch warship, captured a Spanish vessel. Gentili anticipated the argument that the purpose of the edict was to prevent trickery by the inclusion of a few 'token' Dutchmen, and that in the instant case, while the British ship was manned entirely by a British crew, it was in fact operating under the protection of the much larger Dutch ship. It was, therefore, (it might be argued) the Dutch majority rather than the British which really captured the Spanish vessel; no trickery was involved, as there would be if the British were really the leaders of an expedition with a few Dutchmen added as a blind.<sup>75</sup> Gentili's reply to that argument is based on the aspect of good faith which concerns the spirit of a legal provision as opposed to the letter; good faith forbids a flagrant evasion of the law by doing a forbidden act in a way not contemplated and not provided for in the letter of the law. 'Precaution must always be taken against everything elusory, that is,

every indirect nullification of the law, and against everything illusory, that is, every specious deception.’<sup>76</sup>

In a number of other cases, he also invoked good faith expressly. For example, where an enemy of Spain knowingly received property which had been robbed by pirates, Gentili argued that his lack of good faith demanded that the property be restored to its owner.<sup>77</sup> Stolen property generally must be restored, even by those who have bought it in good faith,<sup>78</sup> and here, the partner in a piratical venture cannot be permitted to retain the property, even though he might himself, as an enemy of Spain, have seized the property as lawful booty of war.<sup>79</sup> In a case involving English merchants, Gentili agreed that a buyer of goods is safe in his title if the goods are bought through the Treasury of a Prince, as long as the property is sold ‘as its own, honestly not with an ulterior motive’.<sup>80</sup> However, a good title is not acquired where there is bad faith on the part of the buyer. In this particular case, the English merchants knew that the goods which they had bought through the intervention of the Treasury of the King of Barbary was booty left by pirates. Their bad faith was clear from the fact that when summoned to Court they took pains to have the marks of the true owners effaced from the goods.<sup>81</sup>

In another case, English ship owners, who sought compensation for a ship requisitioned and sent to war, were met with the objection that compensation had been promised for loss in warfare, and that in their case, the loss occurred when the ship was returning after the war due to the negligence of the Tuscan crew, so that no compensation was payable. Gentili clearly regarded the matter as involving the good faith of a prince, and ‘however the case may be in contracts according to strict law, in those implying good faith, the case is entirely as I have said in view of the presumption of perfect good faith’.<sup>82</sup> While the possibility that the ship would be lost in warfare was obviously greater than loss from other causes, and thus expressly mentioned, loss from other causes was not to be regarded as thereby excluded.<sup>83</sup> Good faith clearly required that a Prince who requisitioned property for public purposes, especially the property of a foreigner, should pay compensation for its loss.<sup>84</sup>

The relevance of good faith in the conduct of litigation is discussed at some length by Gentili in Chapter VIII and IX of *Hispanicae Advocationis*.<sup>85</sup> The discussion is confused and repetitious, and this section particularly emphasizes the unsatisfactory nature of the presentation in the work as a whole. No doubt it would have been revised and improved before publication by the author himself had he lived. However, the sustained attack on bad faith in the conduct of litigation, and the examples of it given by Gentili, make the point clearly enough. The court should not allow a late desperate intervention by the real parties to an action, and he cites a case where Dutchmen, the real owners of goods, sought to conceal their interest and appeared on the scene only when judgment had been pronounced against the captain of a ship.

... it is an unusual, an unheard of thing that a navigator should be a party to an action covering merchandise of such value, when the owners are near at hand, present, acquainted with the facts, but saying nothing, and lying in concealment.<sup>86</sup>

A party suspected of bringing an action in bad faith should not be allowed to delay the execution of a judgment pronounced against another.<sup>87</sup> When there is a presumption of bad faith, the third party, even if he offers immediate proof of his interest, will not hinder the execution [of a judgment].<sup>88</sup> The judge ought to reject such attempts: 'if we are not to foster malice, if we are not to listen to petitions made in bad faith, if we are not to listen to those acting in bad faith, but rather to repel them from the threshold and give no heed to their appeal'.<sup>89</sup> Gentili concludes: 'in fact, just as the right of defence ought not to be denied to those who have been injured, so the way ought not to be opened to bad faith'.<sup>90</sup>

*Hugo Grotius: De Jure Belli ac Pacis Libri Tres (1625)*

Hugo Grotius, the most celebrated of the 'founders' of modern international law, concluded his influential treatise on the law of war and peace with an 'admonition' on behalf of good faith and peace.

... and good faith should be preserved, not only for other reasons but also in order that the hope of peace may not be done away with. For not only is every state sustained by good faith, as Cicero declares, but also that greater Society of States. Aristotle truly says that, if good faith has been taken away, 'all intercourse among men ceases to exist'.<sup>91</sup> Peace, once concluded, and whatever the terms on which it is made, ought to be preserved absolutely, on account of the sacredness of good faith.<sup>92</sup>

From this, it would appear that Grotius regarded good faith as the foundation of the relationship between States and therefore, it is important to try and establish what he understood by the expression. Grotius adopted the Stoic view of the 'sociableness' of man<sup>93</sup> and he found the source of law 'properly so called', in the desire inherent in the nature of man to maintain social order.<sup>94</sup> The rules on respect for the property of others, the obligation to fulfil promises, the obligation to compensate for loss incurred through our fault, and punishment according to deserts constitute the sphere of law which is concerned with the maintenance of social order.<sup>95</sup> Having firmly based the source of law in the nature of man himself, Grotius proceeds to pay due deference to the orthodoxy of his day in finding 'another source of law besides the source in nature, that is, the free will of God, to which beyond all cavil our reason tells us we must render obedience'.<sup>96</sup> God implanted certain fundamental traits in man and by means of the laws which He has given, He has made those traits more manifest 'even to those who possess feebler reasoning powers'.<sup>97</sup>

The ultimate source of the various bodies of municipal law is also to be found in the law of nature (derived from the very nature of man) because 'the mother of municipal law is that obligation which arises from mutual consent'.<sup>98</sup> The association of men in political groups is explained on the basis of an express or implied agreement to abide by the decisions of the majority or to accept the decisions of the ruler upon whom authority has been conferred.<sup>99</sup> The obligation to abide by this pact or agreement derives its force from the law of nature. Because the law of nature derives from the very nature of man with his inherent inclination to 'sociableness', it is not strictly accurate to say that expediency alone determines what is just and fair. However, expediency does reinforce the law of nature, in the sense that God willed that individuals should be weak and thus the more constrained to cultivate social life for their own advantage. The association of men in systems of municipal law has its roots in expediency and laws are, or should be, prescribed with a view to the advantage of men.<sup>100</sup> Having thus justified the familiar institution of law in municipal societies, Grotius immediately proceeds to his major objective:

But just as the laws of each state have in view the advantage of that state, so by mutual consent it has become possible that certain laws should originate as between all states, or a great many states; and it is apparent that the laws thus originating had in view the advantage, not of particular states, but of the great society of states. And this is what is called the law of nations, whenever we distinguish that term from the law of nature.<sup>101</sup>

Grotius was convinced of the necessity for law in the relationship between nations, and in the 'Prolegomena' to *De Jure Belli* he marshalled all the possible arguments to convince his readers that there was 'a common law among nations, which is valid alike for war and in war'.<sup>102</sup> Arguments based on expediency, and reminders to statesmen that such a common law might actually work to the advantage of a state were likely to have considerable persuasive force and accordingly figure prominently in his thesis. When he does invoke justice he is careful to add a practical reason for the application of that virtue to the affairs of nations. While it might not seem necessary for the protection of great states to appeal to the standard of justice (unlike the citizen within a state who is powerless to protect himself), nevertheless no state is so powerful that it may not at the same time need the help of others, either for purposes of trade or to counter a hostile grouping of states.<sup>103</sup> Justice, as an attribute of law, is thus as necessary for the association of states as it is for the association of individuals within the state.

Neither should it be admitted that all laws are in abeyance in time of war. 'On the contrary war ought not to be undertaken except for the enforcement of rights; when once undertaken, it should be carried on only within the bounds of law and good faith'.<sup>104</sup> Again, an additional argument for this proposition is found in the practical advantage to be derived from the

reputation of undertaking and waging war justly. '... no one readily allies himself with those in whom he believes that there is only a slight regard for law, for the right, and for good faith.'<sup>105</sup>

Although there are these direct references to good faith in the opening pages of Book I there is no explanation of what is meant by the expression. The distinction which Grotius makes in the passage quoted above between 'law', 'right' and 'good faith' is assumed to be self-explanatory, or at least known to his readers. The same is true of the next direct references to good faith, although the topics concerned are quite unrelated. The first refers to the right of self-defence even against a soldier who, acting in good faith, assails another.<sup>106</sup> The second refers to good faith in a contract.<sup>107</sup> The expression is clearly being used by Grotius in different contexts without any previous indication that it may have several meanings, and without any explanation of the meaning intended in the particular instance. Grotius is not unique in this respect. A similar undefined and indiscriminate usage is found in the writings of his predecessors and successors.<sup>108</sup> But Grotius is particularly culpable in as much as no one before him made good faith the basis of an entire legal system for 'the greater society of states'.<sup>109</sup>

The first significant elaboration of the very foundation of his system does not appear until he deals with the obligations which arise from ownership at an advanced stage of Book II. The questions discussed in Chapter X, Book II are, according to Grotius, 'commonly raised by jurists and by theologians who lay down rules for the tribunal of conscience'.<sup>110</sup> St. Augustine is quoted:

Just as by the law of real property a man is very properly called the rightful possessor so long as he is in ignorance that he is in possession of another's estate, but when he has found this out and has not withdrawn from the other's property, then he will be accounted a possessor in bad faith, then will he justly be called an unjust possessor.<sup>111</sup>

Here, for the first time in *De Jure Belli*, the reader is given some indication of the meaning of good faith (by implication from the meaning of bad faith) in a specific legal context. Grotius states that there is a basic obligation binding on all men (as if by a universal agreement),<sup>112</sup> to restore property to its owner. This is an over-riding positive rule and provides an answer to the questions 'commonly raised by jurists and by theologians'. But the presence or absence of good faith may make a difference to the position of the possessor of the property. For example, a person who is 'honestly' in possession of a thing does not have to make restitution if the thing has perished, whereas a dishonest possessor must account for the property (as well as being liable for his own wrongdoing). An 'honest' possessor is one who possesses in good faith.<sup>113</sup>

### *Promises and Good faith*

'The obligation to perform promises arises from the nature of immutable justice, which in its own fashion is common to God and to all beings possessed of reason.'<sup>114</sup> It was essential for Grotius thus to emphasize the binding obligation to perform a promise, and he accordingly set out to refute the rules of Roman Law on bare promises. The views of jurists such as François de Connon on the non-obligatory character of promises unsupported by consideration,<sup>115</sup> or wholly executory agreements<sup>116</sup> (unless they derive their binding force from the legal form in which they are given) must be rejected. Grotius could not do otherwise, if he wished to succeed in setting forth rules of a system of law for all the nations. As he himself points out, agreements between kings and different peoples would have no force so long as no part of such agreements were carried out, especially in those places where no set forms of treaties or guaranteed engagements existed.<sup>117</sup>

Grotius was quite willing to draw upon the rules of Roman Law when it suited his purpose, but he was not willing to base the validity of promises or agreements in the law of nations on the narrow technical rules of that system. Instead, he relied on the universally accepted law of nature, although he does not neglect to cite the opinions of the jurists where they also support the law of nature on the obligation, in good faith, to keep promises and agreements:

For just as the jurists say that nothing is so in accord with the law of nature as that the wish of the owner should be held valid when he desires to transfer his property to another, in like manner it is said that nothing is so in harmony with the good faith of mankind as that persons should keep the agreements which they have made with one another.<sup>118</sup>

Again, (citing Paul), 'the man who according to the law of nations ought to pay, and on whose good faith we have relied' – and here the word 'ought' implies a kind of moral necessity – 'is indebted by the law of nature'.<sup>119</sup> Grotius rejects Connon's view that we are considered to have relied on a person's good faith only when action according to the agreement has commenced,<sup>120</sup> and he concludes his refutation of the opinion that by the law of nature a right does not arise from promises, by invoking the authority of the great classical writers:

Cicero, moreover, in his treatise *On Duties*, attributed to promises such force that he calls good faith the foundation of justice. Horace calls her the sister of justice, while the Platonists often designate justice by the Greek word meaning 'truth', which Apuleius has translated 'fidelity'. Simonides, in fact, explained that justice consists not only in returning what had been received but also in speaking the truth.<sup>121</sup>

As noted above in the discussion of the obligation of ownership, good faith in that context was equated with honesty in the sense of a possessor of property acting honestly, with no knowledge initially that he was in possession of property which belonged to another. The 'Chapter on Promises' deals with a much wider concept of good faith and associates it more directly with the law of nature and the great moral and legal virtue of Justice. Good faith becomes part of justice; indeed, for Cicero it was the foundation of it. The binding obligation of a promise is made to depend on good faith, as part of Justice, and good faith in that sense again includes honesty or truth.<sup>122</sup> Thus far, at least, it is now clear that, for Grotius, good faith is a matter of the universal law of nature; that it is related to justice, and particularly and directly related to that part of justice which is concerned with 'truth' or 'fidelity'.<sup>123</sup>

His elaboration of the rules relating to promises in Book II, Chapter XI, goes some way towards enlarging our understanding of his concept of good faith, but his writing on promises is particularly confused and contradictory. Thus, even in respect of the binding force of agreements between kings and peoples – the good faith on which he founded his system of the law of nations – he writes: '... by the law of nature a promise is binding, but ... no legal right is thereby gained by another'.<sup>124</sup> In the passage he equates 'law of nature' with moral obligation:

In many cases it happens that a moral obligation rests upon us, but no legal right is acquired by another, just as becomes apparent in the duty of having mercy and showing gratitude; similar to these is the duty of constancy or of good faith.<sup>125</sup>

A careful reading of this, and the following passages, reveals that the major distinction which Grotius had in mind in the 'Chapter on Promises' was not the distinction between moral and legal obligation, but rather the difference between promises which are binding by virtue of special rules of the civil law, and promises which are binding by the law of nature or the law of nations. Thus, if a foreigner makes an agreement with a citizen, he will be bound by the law of the latter's country, but agreements made on the sea or on a desert island or between sovereigns are governed by the law of nature alone.<sup>126</sup>

A further, and related distinction is that made by Grotius between what might be called promises enforceable by the law of nature and those which are not, but which give rise to *some* moral obligation:

What is done without deliberate intent does not, as we also believe, attain to the force of an obligation, a fact which Theophrastus noted in his book on *Laws*. As to that which is done deliberately, but without an intent to grant a corresponding right to another, we declare that a right of enforcement is not thereby naturally given to any one, although we admit that there arises not only a question of honour, but also a kind of moral necessity.<sup>127</sup>

This distinction seems to suggest that, for Grotius, good faith is part of natural law (which is equated with morality), but promises and agreements which are subject to the natural law principle of good faith, do not give rise merely to *moral obligation* but are in some sense *enforceable*. The explanation of this paradox of an enforceable *moral* obligation is that Grotius, like many others, is inexact in his use of language about the relationship between natural law and positive law. In his case, the overriding objective was to propound an acceptable law of nations, and he used the idea of natural law to considerable effect in promoting that objective. Earlier, the Roman jurists had similarly used natural law as the theoretical foundation for *jus gentium* and, in particular, had used the natural law principle of good faith to develop a new and very important group of 'good faith' contracts.<sup>128</sup>

The sequence of juridical thought which Grotius followed (but which he does not explain clearly) is as follows: natural law is an ideal universal law, but not enforceable as such; the positive laws of particular states or communities reflect many rules or principles of natural law (for example, justice and good faith) so that some part of natural law becomes enforceable through its incorporation in positive law. Grotius explains that some promises and agreements which are binding in municipal law because of particular rules might not be enforceable otherwise than in the particular municipal legal system. On the other hand 'the special effects of municipal law' might render certain promises void (for example, those of wards and minors) which would not be void by the law of nature.<sup>129</sup> In other words, the scope of the natural law principle of good faith, *as regards a particular legal system*, will be determined by the rules of that system.

Special rules might enlarge the principle (even beyond its normal scope in natural law itself) or, which is more likely, special rules might restrict the scope of the principle. What applies to municipal law in this respect also applies to the law of nations. Here, however, there is less discrepancy between the two systems. The relationship between the law of nature and the law of nations is much more direct and immediate. More of the law of nature is enforced through the (positive) law of nations than is perhaps enforced in a particular municipal legal system. In particular, more of the (natural law) principle of good faith is adopted and enforced through the positive rules of the law of nations. The congruence is so close that Grotius sometimes speaks of 'the law of nature or the law of nations' as if they were synonymous.<sup>130</sup>

Exceptions mentioned by Grotius himself reminds us that there is not a complete identity between the law of nature and the law of nations. A promise or contract inspired by fear might be allowed by the law of nations, when the law of nature might require the promisee to release the promisor if the latter so wishes, or might annul the contract.<sup>131</sup> On the other hand, good faith is enforced in the law of nations, for example, as regards ambassadors and those like them who come under a pledge of public faith to the extent that they

should not be brought to trial for wrong doing although to do so would be in accordance with the law of nature.<sup>132</sup>

Just as Grotius was concerned to show that not all the rules of Roman Law in relation to promises and contracts apply in the law of nature and the law of nations, so also was he concerned to show that the Roman Law distinction between contracts of good faith and contracts of strict legal right did not apply to 'the acts of peoples and kings'.<sup>133</sup> In this, he took the same line as Gentili,<sup>134</sup> and, like him, Grotius' discussion of treaties (Chapter XV) and the interpretation of promises (Chapter XVI) emphasizes that in good faith what you mean, not what you say, is to be considered.<sup>135</sup> He, too, condemns the quibbles and evasions whereby a party, purporting to adhere to the words of an agreement, subverts the real meaning and intent of it.<sup>136</sup>

In the concluding chapters of Book III of *De Jure Belli*, Grotius deals expressly with the principle of good faith. Under that rubric, he discusses good faith generally between enemies, and particular aspects of the principle in relation to making peace, truces, safe conducts, ransom of prisoners, competence of military leaders to make agreements binding on the supreme commander, and the status of pledges given by private persons in war.

In the first Chapter of Book III, he disposes of some general questions about the use of deceit in warfare. Like most of his predecessors (and successors) he regards the use of deceit and ruses in war as permissible, but he draws the line unequivocally at the use of falsehood in relation to promises, express or implied.<sup>137</sup> In Chapter XIX, beginning with the statement of the basic rule that good faith is to be kept with enemies of every description,<sup>138</sup> Grotius systematically considers the various objections to, and various proposed qualifications of, the basic rule. He uses the distinction between the law of nature and the law of nations to reconcile conflicting views on the question of keeping faith with pirates, tyrants, brigands and runaway slaves.

Such agreements do not in fact share in that special community of legal obligations which the law of nations has introduced between enemies engaged in a formal and complete war. But because their authors are human beings they have a common share in the law of nature ...<sup>139</sup>

The addition of an oath to a promise creates a special situation: '... a man is thereby bound not only to a man but also to God and in relation to Him fear makes no exception'. Therefore the fact that the promise was extracted by fear does not present an obstacle.<sup>140</sup> Such a promise does not bind an heir, and in practice, because of the general hatred of brigands, a man who violates a pledge, given to a brigand, sworn or unsworn, will not be liable to punishment among other nations. His illegality will be overlooked.<sup>141</sup> Both a state and a king can be bound by an oath and Grotius reminds us of the public, religious, or sacred character attached to the obligation of an oath in the affairs of Greece and Rome.<sup>142</sup>

The problem of a promise extracted by reason of a fear unjustly inspired is also dealt with by reference to the distinction between the law of nature and the law of nations. Such promises, made in a formal war, are valid according to the law of nations, although not devoid of fault in some degree. The fear must not be of a kind disapproved of by the law of nations:

For if anything has been extorted by the fear of rape, or by terrorizing of any other sort which involves violation of pledged faith, it will be nearer the truth to say that the case has been brought within the scope of the law of nature; the force of the law of nations does not extend to such a fear.<sup>143</sup>

The basic rule that good faith is to be kept applies even in relation to treacherous, faithless enemies. The Romans are presented as particularly noble in this respect, because they kept faith inviolably even with the treacherous Carthaginians.<sup>144</sup>

Breach of good faith by one party which does not justify breach by the other must be distinguished from a situation which may arise from a conditional agreement. A party does not break faith where the condition is not fulfilled. The obligation is entered into subject to the condition. The same principle applies if the individual items of one and the same agreement seem to be related in respect of the two sides after the manner of a condition. If one party does not fulfil what he was bound to carry out, the other party ceases to be liable.<sup>145</sup> Grotius thus recognized what in modern contractual terminology is described as independent promises as opposed to interdependent and concurrent promises.<sup>146</sup> Where the promises are independent: '... it is usually expressly stated that if anything is done contrary to this or that provision, the others nevertheless will remain valid'.<sup>147</sup>

The meaning of good faith, in the rule that good faith is to be kept with enemies of every description, is nothing more or less than the positive rule that promises and agreements, express or implied, must be observed. The scope of good faith in that context is indicated by Grotius in Chapter XIX in his discussion of the effect of promises or agreements in doubtful or difficult cases, for example, with pirates, rebellious subjects or treacherous enemies. The same is also true of the 'special questions' which Grotius considers in the subsequent chapters.

Chapter XX (on Good Faith in Ending War) deals with treaties of peace, surrender, hostages and pledges, and again, it emerges that the meaning of good faith in that context is simply that promises and agreements on these matters must be kept. The particular rules mentioned by Grotius, for example, on the right of a king or the majority in a democracy to make peace<sup>148</sup> are, of course, relevant to the binding force of agreements generally, and in so far as good faith means that agreements must be kept, his discussion of these 'special questions' does add something to our knowledge of his concept of good faith. But his views do not differ significantly from those of his

predecessors (especially Gentili) except that in the case of an absolute surrender, he accords greater impunity to the victor in his treatment of the vanquished. In an absolute surrender 'to good faith', the victor becomes absolute master and may treat the vanquished with clemency, wisdom or moderation; but it is in his complete discretion. He can act with 'great impunity and without violating the law of nations'.<sup>149</sup> Clearly, for Grotius, the meaning of good faith in 'a surrender to good faith' is very different from the meaning which good faith has in 'the good faith of an agreement'. It is not a matter for the law of nations at all.<sup>150</sup>

The admonition on behalf of good faith in the last chapter of *De Jure Belli* contains a reference to Seneca's phrase that good faith is 'the most exalted good of the human heart'.<sup>151</sup> But Grotius himself in *De Jure Belli* presents a rather less exalted view of good faith. When he writes that Justice, in its other aspects, 'often contains elements of obscurity, but the bond of good faith is in itself plain to see',<sup>152</sup> he clearly has in mind only the meaning of good faith which was dominant throughout the concluding chapters of his treatise, that is, the basic obligation to keep promises and agreements. It is this meaning of good faith which 'is brought into use to so great an extent that it removes all obscurity from business transactions' and which the supreme rulers of men 'ought so much the more earnestly than others to maintain as they violate it with greater impunity'.<sup>153</sup>

*Samuel Pufendorf: De Jure Naturae et Gentium Libri Octo (1672)*

Samuel Pufendorf, in his principal work *De Jure Naturae et Gentium Libri Octo* first published in 1672, venerated the name of Grotius,<sup>154</sup> and in the sections of his treatise which deal specifically with the rules of the law of nations he relies heavily on his authority. Nevertheless, he disagreed in numerous instances with Grotius and sometimes on quite fundamental points. For example, he regarded it as incongruous for some (including Grotius) to refer the special agreement of two or more peoples (usually defined by leagues and agreements of peace) to the law of nations. 'For although the natural law about the keeping of faith orders that such agreements be maintained, they still do not properly fall under the term of laws'.<sup>155</sup> The reason is, of course, that Pufendorf subscribes fully to the view of Hobbes that the injunctions of the natural law of men and the natural law of nations ('which is commonly called the law of nations') are the same. He adds, 'nor do we feel that there is any other voluntary or positive law of nations which has the force of a law, properly so called, such as binds nations as if it proceeded from a superior'.<sup>156</sup> If Grotius was the most influential early contributor to the idea of a positive law of nations, and if, as suggested above, his treatment of good faith emphasized its positive *legal* character, Pufendorf must be regarded as a leading exponent of the 'natural' law of nations and the essentially *moral* character of good faith as part of it. Indeed, it is largely due to his influence

that, as De Visscher wrote, 'the tendency to dissociate the Law of Nations from the Law of Nature and to regard it as entirely positive is but rarely found in authors before the nineteenth century'.<sup>157</sup>

Pufendorf's view of good faith in the law of nations must therefore be considered in the light of his general view that the law of nations did not exist apart from the law of nature and that, as he wrote, 'most of the matters which the Roman Jurisconsults and others refer to the law of nations, such as ways of acquiring things, contracts, and the like, belong either to the law of nature or to the civil law of different nations'.<sup>158</sup> Of course, while Pufendorf rejected the idea of a positive law of nations distinct from natural law, he did not mean thereby to deny that nations were not subject to obligations. The dictates of natural law were as binding on nations (where appropriate) as they were on individuals.<sup>159</sup> The difficulty with his position, unlike that of Grotius, is that it left the relations between nations entirely dependent upon 'a common standard of human action'<sup>160</sup> which was based essentially on the rational nature of individual human beings.

For Pufendorf, because all civil laws presuppose or incorporate the general principles at least of natural law,<sup>161</sup> we do not have to concern ourselves with the problem of the enforceability or 'the sanctions' of natural law in the relations between individuals subject to civil law or in the relations between nations, because they are very often defined according to the civil law which is common to both.<sup>162</sup> Where, however, questions arise about the relations between nations which are not susceptible of solution according to a civil law which is common to both, the problem of the enforceability of natural law looms large. As to this, Pufendorf is forced to rely on generalities about 'uneasiness of conscience, distress and degeneracy of mind, a wasting away of body and mind and countless evils which can arise from the provoked violence of other men and the withdrawal of their aid'.<sup>163</sup>

Pufendorf explained the relationship between civil and natural law more fully in Chapter 1, Book VIII:

On this matter, we should note that it belongs to the power accorded kings to add to or to withdraw from natural laws the force of the civil, before human tribunals, by adding or denying penal sanction, and to make many things, which lie outside natural laws, just, by commanding them, or unjust, by forbidding them.<sup>164</sup>

The reasons why all natural and divine laws are not made part of civil law are both practical and idealistic.<sup>165</sup> Some obligations are not made subject to fear of human punishment in order to leave scope for worthy men to merit high praise by living up to a higher standard out of mere reverence for God.<sup>166</sup> An example of this was given earlier in his work by Pufendorf. He pointed out that the rule of good faith in usucapion in canon law required a higher standard (approaching more nearly the sanctity of natural law) than that required in Roman Law.<sup>167</sup>

Despite their fundamental difference on the conceptual basis of international law, both Grotius and Pufendorf accepted that good faith was a principle of natural law which was incorporated into positive law, and both also agreed that there was not a complete incorporation. The standard of 'natural law' good faith was higher than the standard demanded in positive law. Pufendorf's view that international law did not exist apart from the law of nature doomed his system to eventual failure,<sup>168</sup> but his, and Grotius's, concurrence on the nature and scope of good faith ensured its continuance as a significant principle in the doctrine of the emerging new law of nations.

*Samuel Rachel, Dissertations on the Law of Nature and of Nations (1676)*

Samuel Rachel was one of the few writers in the seventeenth century who attacked the doctrine of Pufendorf that a Positive Law of Nations did not exist apart from Natural Law. It was quite wrong, in his view, to confuse the Law of Nations with the Law of Nature. Mankind has laid down various positive laws which the human race, divided up as it is into independent peoples and different states, employs as a common bond of obligation, '... and peoples of different forms of government and of different size lie under the control of these rules, which depend for their efficacy upon mutual good faith'.<sup>169</sup> For Rachel, the only way in which independent States could become subject to positive law is by agreement.<sup>170</sup> Though one free Nation is not the superior of another, and cannot lay down law (specially so called) for another,

Yet if they choose to bind themselves by pacts, they are reciprocally bound just as if by true law; so that, should one of them break faith, it by that very fact makes the other or others its superior so far as that they can compel it to keep faith.<sup>171</sup>

Indeed, such a wronged State might even rightfully resort to war against the perfidious State, and in so doing will have on their side, not only the other Nations who heed justice '... but also God himself, the Supreme Umpire and Arbiter of good faith'.<sup>172</sup>

Rachel explains that errors and confusion arise about Natural Law and Law of Nations because the proximate cause of the obligation of Arbitrary Laws, strictly so called (that is, the positive Law of Nations) is not distinguished from the remote cause. The proximate cause of the obligation of arbitrary Laws is the will of the law-giver; and that of pacts and conventions is the free will and consent of the parties thereto.

So the obligation, alike of Laws and of Pacts, is supported, as it were, on the foundations of the following rules of Natural Law: Obedience must be rendered to the Civil Majesty, and to law-givers issuing just and regular enactments; Good Faith must be observed.<sup>173</sup>

The influence of Grotius, who had proclaimed the doctrine that the natural law principle of Good Faith was the foundation of the new positive law of nations, is already evident in this passage of Rachel's work.

*Johann Wolfgang Textor: Synopsis Juris Gentium (1680)*

To Von Bar, Textor, in his *Synopsis Juris Gentium*, appears as a keen jurist, well versed in history and in affairs.<sup>174</sup> His general views on international law are not relevant here, and his application of the principle of good faith to topics such as the conduct of war, the conclusion of peace and the rupture of peace adds little which is not already to be found at some length in Gentili, Grotius and others who preceded him.

However, his treatment of one aspect of good faith is more satisfactory than any of his predecessors and worthy of special mention. Dealing with the rights of a victor over the vanquished, he examines the meaning of the formula of 'surrender into good faith'.<sup>175</sup> This, he explains, was frequently used in the wars both of Greeks and Romans and he discusses Grotius's treatment of the subject in *De Jure Belli*. Grotius, (he writes) understood the formula as denoting 'naught but a mere surrender, and that the use of the words "good faith" in that context means only the probity of the conqueror to which the conquered entrusts himself'.<sup>176</sup> Grotius, as noted above,<sup>177</sup> thought that in an absolute surrender 'to good faith', the victor became absolute master and could act as he wished without violating the law of nations. Textor, however, saw no distinction between the formula of surrender into good faith and 'a reference to the discretion of the victor, tempered ['tempted' is an error in text] by considerations of what is good and just'.<sup>178</sup>

Pursuing the meaning of the formula further, he concludes that it is a question of fact in each case, namely, what did the parties intend by the formula, and especially how do they usually employ it?<sup>179</sup> Textor clearly thinks that the formula is usually employed with the meaning that the victor is not given an absolute discretion, but 'a discretion tempered by the rules of the Law of Nations'.<sup>180</sup> Just as a surrender may be made subject to express conditions, so it may be made subject to tacit conditions. These may be presumed, especially where the circumstances show that the victor has not achieved complete and final mastery over the conquered (as indeed was the case with the Aetoliens, who were able to resume arms and obtain a more honourable peace).<sup>181</sup> As Textor says, the best statement of the underlying principle is that given by Celsus, that it is not likely that anyone intends to bind himself without any limit, by words of obligation framed at the other party's choice, but only within the limits of the proper and just.<sup>182</sup> Textor's discussion of the topic emphasized the *legal* duty of the victor to act reasonably, and it helped to counteract the strongly stated view of Grotius that a surrender into good faith gave unlimited discretion to the victor.

*Richard Zouche, Juris et Judicii Feicialis, sive, Juris Inter Gentes, et  
Questionum de Eodem Explicatio (1650)*

Before leaving the more important seventeenth century writers on international law matters, some mention of Richard Zouche's views on good faith should be made because he was the first to conceive the law of nations as a whole, and to recognize that war (with which his predecessors had mainly busied themselves), was but a means, as a last resort, to vindicate the rights which nations enjoy in time of peace.<sup>183</sup>

Zouche noted that public conventions and treaties sometimes rest [only] on the good faith of the parties, and sometimes a solemn oath is added.<sup>184</sup> It is characteristic of early writers to 'reinforce' the obligation to keep treaties, usually by an oath or pledge of faith, but Zouche reminds us that various peoples at various times subscribed to different customs, for example, the giving of the right hand among the Persians was regarded as the strongest bond of good faith.<sup>185</sup> Zouche is particularly concerned about breaches of faith or disregard of the sanctity of an oath:

... for it is a serious thing to break faith, the foundation of all justice, whereby not only states are bound together, but all human society; and because perjury is more hateful even than atheism, since perjurers appear to recognise the Deity, but dare to mock Him.<sup>186</sup>

Zouche also deals at some length with the wrong which is done when the right of military congress and conventions is broken. Fraudulent and treacherous conduct in relation to pretending to confer on truces, exchange of prisoners, safe conducts are all condemned,<sup>187</sup> but Zouche here adds nothing to what his predecessors had already written on these matters.

On questions of duty between those at peace, Zouche uses the incident of Henry Wotton, ambassador of King James to the Venetians, who wrote (in a jesting manner) that 'an ambassador is a good man sent abroad to lie for his country' to discuss whether an ambassador may tell lies. His view is that of Pascal, who would not altogether exclude the diplomatic lie for meritorious purposes, and Zouche says that it is 'pardonable if the purpose of the lie is not the destruction of those to whom it is addressed, but the safety of those who use it'.<sup>188</sup>

In those matters which Belli, Ayala, Gentili and Grotius had already fully dealt with, such as whether promises in a treaty may ever be broken,<sup>189</sup> and on the laws of war generally, Zouche contents himself with simply stating the views of others. As Holland says,<sup>190</sup> Zouche was a good specimen of the Civilian who was produced at Oxford while the thorough drill of the old system of legal training, as revived by the impulse given to it by Alberico Gentili still continued, (Zouche in 1620 succeeded John Budden, who had acted as deputy for, and succeeded Gentili as Regius Professor of Civil Law

at Oxford). His influence both in England and in Europe was considerable, and enduring.

### The Eighteenth Century

The writers so far discussed must be regarded as having considered the 'law of nations' as essentially part of natural law, as the natural law of individuals applied to the conduct of States. From the beginning of the eighteenth century, writers began the process of separating the law of nations from the natural law of individuals, and, eventually, from natural law itself. The two most influential writers on the law of nations in that century were Christian Wolff and Vattel, and their views on good faith are of particular interest in this era of transition from the 'natural law of nations' to the system of positive 'international law'.

*Christian Wolff: Jus Gentium Methodo Scientifica Pertractatum (1749)*

Significantly, the first explicit reference to good faith does not occur in Wolff's great treatise until he considers Treaties and other agreements. However, his first express reference is quite unequivocal and among the most dogmatic of all the assertions in his work:

Nothing contributes more to the glory of nations and their rulers than complete and perfect good faith, since it is of the greatest importance that a promise should not be violated, if treaties have been made. Therefore, since not only nations, but also in particular their rulers, ought to desire that they be worthy of fame, and do nothing which can diminish or weaken it, nations therefore and their rulers ought to take care to be full of faith, steadfast and persistent. Nothing tarnishes the reputation of a nation or of the ruler of a nation among outside nations more than treachery.<sup>191</sup>

Furthermore, a nation which is brought with reluctance and difficulty to a performance of its treaty, loses much of the glory of acting in good faith, for a prompt performance proves that a nation has full and complete good faith.<sup>192</sup>

Wolff devotes a number of sections of his work specifically to the sanctity of good faith in treaties; 'the inviolability of a treaty and the inviolability of good faith are inseparably connected'.<sup>193</sup> He also emphasized that the sanctity of good faith has no relation to religion, ('it depends upon the common welfare of nations'<sup>194</sup>) so that it is allowable to enter into a treaty with a nation of whatever religion.<sup>195</sup> The latter point was worth some emphasis in the age for which Wolff wrote, as at that time the contacts of Christian European powers with peoples of very different religions in many lands were increasing and deepening rapidly. The independent sanctity of the obligation of good faith was further emphasized by Wolff's assertions that an oath does not

impose a new obligation to a treaty<sup>196</sup> or the giving of hostages.<sup>197</sup> On the other hand, Wolff was a realist about good faith. He accepted that it is nowhere assured, so there is a place for guarantees of good faith.<sup>198</sup>

Wolff, like his predecessors, stated the various rules about keeping faith with enemies, robbers and brigands,<sup>199</sup> including promises and truces in time of war (although deceit is allowable<sup>200</sup>), but his rules on these matters did not differ from Grotius and Gentili, and do not require further discussion.

Wolff's significance for the perception of good faith in the international law of his time does not lie in the substance of his rules of good faith, as there is nothing in his discussion which does not appear in the writings of his predecessors. His value lies in the fact that he emphasized the supreme importance of good faith, as an independent 'sacred' basis for the observance of treaties, in a *scientific* restatement of the rules of the law of nations of, and for, his time. His influence, which spread far beyond his native Germany, was comparable with that of Grotius. His treatment of good faith and the law of treaties ensured that in the new age of international law, the rule that treaties must be observed in good faith would be accepted as a fundamental maxim. It is no coincidence that, following the publication of his disciple Vattel's *Law of Nations* later in the century, writers on international law no longer devoted much attention to good faith. It had become an unquestioned principle of the 'new' international law.

*de Vattel: The Law of Nations, or the Principles of Natural Law (1758)*

Vattel uses the term 'necessary Law of Nations' for that law which results from applying the natural law to nations, and uses the expression to denote what Grotius called the 'internal Law of Nations', in as much as it is binding upon the conscience of nations.<sup>201</sup> As he notes, several writers call it the 'Natural Law of Nations',<sup>202</sup> and he himself also uses that term frequently. The 'Positive Law of Nations' is formed from the voluntary, the conventional and the customary law,<sup>203</sup> and is contrasted with the 'natural' or 'necessary' law of nations. The principles of the natural law of nations are always binding upon the conscience of nations as an internal matter, but when it becomes a question of imposing an enforceable duty on a State, we must consult the positive *external* law of nations.<sup>204</sup> The rules of the external law differ on certain points from the principles of internal law.<sup>205</sup>

As Dr Ruddy explains in his study on the background of de Vattel's *Le Droit des Gens*,<sup>206</sup> there was, for Vattel, an ethical and legal relationship between nations, and ideally both should correspond.

Where they did not correspond, the Spirit of the Law (the *Necessary Law of Nations*) had to yield to the letter of the law as it were, the implications from the freedom and independence of states, the Voluntary Law of Nations.<sup>207</sup>

The little reliance that prudent nations actually place on the natural or internal law of nations is evidenced by the way in which they seek to secure benefits (which should be secured to them by the natural law) by treaties.<sup>208</sup> Vattel has in mind here the distinction between the rights and duties of nations which arise from the *internal* law, and which are binding in conscience, and those which are binding and enforceable as a matter of *positive external* law. Yet, he states that the obligation to observe treaties arises also from natural law.<sup>209</sup>

This particular obligation of natural law imposes on the one side a perfect obligation, and produces on the other side a perfect right, and therefore differs from other obligations of natural law, which give rise only to 'imperfect' rights. Indeed, it is through treaties that nations are able to obtain a perfect right to things to which they had only an imperfect right by natural law.<sup>210</sup>

Vattel, like Grotius,<sup>211</sup> accepts that good faith (in relation to treaties) is not only a moral (natural law) obligation, but also an enforceable obligation as a matter of the positive external law of nations. But the legal and moral obligations of good faith are not co-extensive. For example, a treaty may operate injuriously to one of the parties, but this does not make it invalid:

But a sovereign is none the less bound in conscience to pay due regard to justice and to observe it as far as possible in all his treaties. And if it should happen that a treaty entered into by him in good faith and without his perceiving any unfairness in it afterwards turns out to be injurious to the other party, nothing is more honourable, more praiseworthy, and more conformable to the mutual duties of Nations than to relax the terms of the treaty insofar as he can do so without failing in his duty to himself or without putting himself in danger or suffering considerable loss.<sup>212</sup>

In other words, a treaty entered into in good faith is legally binding, even if it operates on one party more onerously than was envisaged.<sup>213</sup> Conscience, or 'moral' good faith may demand that the other party should reduce the onerous effects, but he is not *legally* obliged to do so.

On the other hand, if a treaty is entered into without good faith, as, for example, for an unjust or dishonest purpose, it is absolutely void.<sup>214</sup> In such a case, the *legal* obligation to observe a treaty does not arise. The injustice and dishonesty which constitute the lack of good faith in this context clearly pertains to the moral order, but because in this case they produce *legal* effects, we must also regard them as pertaining to the legal order.

The complexity of the ethical and legal relationship between nations which Vattel emphasized is illustrated in *Le Droit des Gens* by his use of the concept of good faith in both its ethical and legal senses to try and explain the rules of the law of nations on the binding force of treaties. Vattel uses the ethical and legal dichotomy in his extended discussion of the controversial agreement of the Caudine Forks, concluded by the Roman Consuls Calvinus and Sp. Postumius with the Samnites. He was not entirely satisfied with the way in

which this famous case had been discussed, even by the most celebrated writers, and he proceeded, as he says, to throw new light on the subject.<sup>215</sup>

Vattel's arguments are more subtle, and his conclusions depend upon a more sophisticated application of the principle of good faith, than is the case with previous writers. The rule of the law of nations is quite clear: if a public official, an ambassador or a general concludes a treaty without orders from the sovereign or in excess of the express or implied powers of his office or commission, the treaty is void. It can only become binding if the sovereign expressly or tacitly ratifies it.<sup>216</sup> The consuls who made the agreement with the Samnites were not authorized to conclude a real public treaty (*foedus*), and this was made clear to the Samnites. Nevertheless, the Samnite General was satisfied with exacting a promise from the Roman officials, and, after securing six hundred hostages and forcing the Roman legions to lay down their arms and pass under the yoke, he allowed the entrapped Roman army to escape.<sup>217</sup> There was no *legal* obligation (arising from the principle of good faith that treaties must be observed) imposed on the Roman State in consequence of the promise made by the *sponsores* at the Caudine Forks. The agreement had not been ratified.

Vattel, however, pursues the question of the effect of an unratified treaty further, and points out that good faith requires that a sovereign who does not intend to ratify an unauthorized agreement must not remain silent and so allow the other state to fulfil its part of the agreement. Any property (for example, strongholds or money) must be restored.<sup>218</sup> The *character* of the advantage obtained under an unratified treaty must be considered. If the other State, like the Samnites, has been imprudent enough to give up a military advantage before the agreement is confirmed by ratification, there is no obligation to restore that advantage to the enemy. The fact that the enemy was not induced by fraud to enter into the agreement, or to give up its advantage, is clearly relevant. The obligations raised by good faith do not include a *legal* obligation to restore to the enemy the advantages he has lost through his own folly rather than through any reliance on your promise.<sup>219</sup>

On the other hand, Vattel argues that if the enemy has acted generously and has not used its opportunity to dictate a disgraceful or too severe agreement:

justice requires that the State ratify the agreement or that it make a new treaty on just and reasonable terms, even yielding some of its claims as far as the public welfare will permit; for the generosity and noble confidence even of an enemy should not be abused.<sup>220</sup>

This, however, is an exhortation to behave with high moral standards, or to act as required by *moral* good faith, rather than an argument based on the legal requirements of good faith. As regards the Caudine Forks agreement, Vattel did not accept Pufendorf's assessment of its reasonableness. Vattel considered that it was a disgraceful agreement, especially having regard to the pride

of Rome, and he did not think that it raised any moral obligation because of the generosity and noble confidence of the Samnites.<sup>221</sup> His conclusion was that neither legal nor moral good faith required the Roman State to send their army back to the Caudine Forks and restore the original situation.

A similar approach is used to deal with the personal obligations of *sponsores* in this situation. If the promisor is *fraudulent* in claiming sufficient authorization to conclude the agreement, the promisee has the right to punish him.<sup>222</sup> But where the promisor has acted in good faith (as in the case of the Roman Consuls at the Caudine Forks) nothing else can be presumed. Even in that case, it did not follow naturally from the agreement that the *sponsores* themselves should be delivered up to the Samnites should the agreement not be ratified, although the custom of the times and Roman Fetial Law entailed that consequence.<sup>223</sup>

In the usual case, Vattel considered that all that was required of the promisor was that he was obliged to take, in good faith, every lawful step to induce his sovereign to ratify what has been promised, 'and there is no doubt that this is his duty if the treaty be at all just, advantageous to the State, or endurable in consideration of the evils from which it has saved the State'.<sup>224</sup> It would be contrary to good faith, and 'a shameful abuse of the faith of treaties', for the promisor to make the arrangement with the intention of advising his sovereign not to ratify, not because of the severity of its terms, but to take advantage of the fact that it was concluded without authorization. The promisor, in a case where circumstances force him into making an agreement which is harmful or disgraceful to the State, is not obliged by good faith to inform the other party that the agreement will, in all probability, not be ratified. 'That would be asking too much'.<sup>225</sup> Nor is he, in such a case, obliged to do more than set forth the reasons which forced him to make the agreement, and to point out that he alone is bound, that he is willing to have his act disavowed, and to be himself delivered up for the public good.<sup>226</sup>

The major portion of Book II of *Le Droit des Gens* is devoted to a discussion of treaties, and this is understandable in view of Vattel's conviction that treaties were the means by which States obtained the rights and benefits accorded to them by natural law, but denied to them in practice because of 'the mischievous designs of dishonest statesmen', who were not prepared to observe the dictates of conscience.<sup>227</sup>

As Dr Ruddy states, Vattel followed Wolff's treatment of treaties, adding to it examples of state practice and emphasizing particular areas.<sup>228</sup> In the result, his statement and exposition of particular rules on the formation, interpretation and execution of treaties does not differ in substance from his predecessors. It is undoubtedly true though, that his modern style of writing, 'in the spirit of the Philosophes',<sup>229</sup> made it easier for his contemporaries to understand and apply the rules he promulgated. While it is not necessary to consider all his rules, a general observation might be made in so far as his exposition relates to the development of the principle of good faith in international law. Vattel

stated, in clear and simple language, rules of the law of nations which were accepted very widely and which exerted considerable influence on the policy of nations. Although criticized by some,<sup>230</sup> he has truly been described as the father of the second stage of the Law of Nations (1770–1914).<sup>231</sup>

His law of treaties was unequivocally based on good faith,<sup>232</sup> and his clearly expressed rules represent one of the first and most influential formulations of *legal* good faith rules in the new era of positive international law. At the same time, he held a sophisticated concept of good faith, which he regarded as a principle of natural law, and especially in his work on the interpretation of treaties, he laid down detailed rules which, in his own words, were ‘founded upon reason and authorised by the natural law and adapted to throw light upon what is obscure, decide what is uncertain, and frustrate the designs of one who enters into the contract in bad faith’.<sup>233</sup> Vattel’s importance in the history of the development of international law generally, judged by the standard of the wide acceptance of his work as an authoritative exposition of the law, if not by its intrinsic merits, is beyond question. His contribution to the development of the principle of good faith, in terms both of its popular exposition and in the intrinsic value of its analysis of the scope and function of the principle, make him the last outstanding figure in the long line of philosophers and jurists who helped to make good faith a fundamental principle of the modern law of nations.

### **Good Faith in the Doctrine of Modern International Law**

Writers after Vattel devoted little attention to extended discussion of good faith. The first ‘modern’ text books on what, after Jeremy Bentham, was now called ‘international law’, such as Henry Wheaton’s *Elements of International Law*, first published in 1836,<sup>234</sup> assumed the independent binding force of the principle of good faith as the basis of treaties, and dealt with the ‘positive’ rules of treaties, largely, as Wheaton did, by citing Vattel as the authority. The dominating influence of treaties as the source of international law in the nineteenth century, and the concentration on *positive rules* of the law of treaties, led to the virtual disappearance of any discussion of good faith, as a wider principle of international law, in the nineteenth and early twentieth centuries. Following the inclusion of ‘general principles of law’ as a source of international law in the Statute of the Permanent Court of Justice there was revived interest in good faith as a general principle, but in international law generally the focus of attention shifted in the modern era from doctrine, or the writings of publicists, to positive customary rules, and to a larger extent, to treaties and the decisions of international tribunals.

## Notes

- 1 Gentili (1598), Introduction, p. 12a.
- 2 Phillipson (1911).
- 3 See Note 1.
- 4 Cavaglieri (1936), p. 25a.
- 5 *Op. cit.* note 1, p. 9a.
- 6 Belli (1563), trans. (1936), p. 25a.
- 7 *Ibid.*, p. 88.
- 8 *Ibid.*, p. 126.
- 9 *Ibid.*, p. 126.
- 10 *Ibid.*, p. 127.
- 11 *Ibid.*, p. 127.
- 12 *Ibid.*, p. 302.
- 13 *Ibid.*, pp. 139–40.
- 14 Ayala (1582), trans. (1912), p. 7.
- 15 *Ibid.*, pp. 55–72.
- 16 *Ibid.*, p. 59.
- 17 *Ibid.*, p. 59.
- 18 *Ibid.*, p. 60.
- 19 *Ibid.*, p. 57.
- 20 *Ibid.*, p. 60.
- 21 *Ibid.*, p. 57.
- 22 *Ibid.*, p. 65.
- 23 *Ibid.*, pp. 66–7.
- 24 *Ibid.*, p. 67.
- 25 *Ibid.*, p. 68.
- 26 *Ibid.*, p. 72.
- 27 *Ibid.*, p. 66.
- 28 *Ibid.*, p. 66.
- 29 *Ibid.*, p. 85.
- 30 *Ibid.*, p. 86.
- 31 *Ibid.*, p. 87.
- 32 Gentili (1598), trans. (1933), p. 17a.
- 33 *Ibid.*, p. 145.
- 34 *Ibid.*, p. 148.
- 35 *Ibid.*, p. 136.
- 36 *Ibid.*, p. 51.
- 37 *Ibid.*, p. 101.
- 38 *Ibid.*, p. 191.
- 39 *Ibid.*, p. 191.
- 40 *Ibid.*, p. 192.
- 41 *Ibid.*, p. 195.
- 42 *Ibid.*, p. 204.
- 43 *Ibid.*, p. 204.
- 44 *Ibid.*, p. 221.
- 45 *Ibid.*, p. 143.
- 46 *Ibid.*, p. 221.
- 47 *Ibid.*, p. 221.
- 48 *Ibid.*, p. 223.
- 49 *Ibid.*, p. 222.
- 50 *Ibid.*, p. 223.

- 51 Ibid., p. 223.
- 52 Ibid., p. 211.
- 53 Ibid., p. 226.
- 54 Ibid., p. 224.
- 55 Ibid., p. 227.
- 56 Ibid., p. 243.
- 57 Ibid., p. 319.
- 58 Ibid., p. 361.
- 59 Ibid., p. 361.
- 60 Ibid., p. 361.
- 61 Ibid., p. 361.
- 62 This matter is also discussed by Grotius, (1925), Ch. XIV, pp. 381–90.
- 63 Gentili (1598) trans. (1933), p. 363.
- 64 Ibid., p. 365.
- 65 Ibid., p. 432.
- 66 Ibid., p. 427.
- 67 Ibid., p. 427.
- 68 Ibid., p. 427.
- 69 Ibid., p. 427.
- 70 Ibid., p. 427.
- 71 Gentili (1585), trans. (1924), p. 87.
- 72 Ibid., p. 96.
- 73 Ibid., p. 162.
- 74 Ibid., pp. 162–3.
- 75 Gentili (1613), trans. (1921), pp. 47–8.
- 76 Ibid., p. 48.
- 77 Ibid., p. 50.
- 78 Ibid., p. 50.
- 79 Ibid., p. 51.
- 80 Ibid., p. 71.
- 81 Ibid., p. 70.
- 82 Ibid., p. 120.
- 83 Ibid., p. 119.
- 84 Ibid., p. 119.
- 85 Ibid., pp. 158–65.
- 86 Ibid., p. 159.
- 87 Ibid., p. 158.
- 88 Ibid., pp. 159–60.
- 89 Ibid., p. 162.
- 90 Ibid., p. 162.
- 91 Grotius (1925), p. 860.
- 92 Ibid., p. 862.
- 93 Ibid., p. 11.
- 94 Ibid., p. 12.
- 95 Ibid., pp. 12–13.
- 96 Ibid., p. 14.
- 97 Ibid., p. 14.
- 98 Ibid., p. 15.
- 99 Ibid., p. 15.
- 100 Ibid., p. 15.
- 101 Ibid., p. 15.
- 102 Ibid., p. 20.
- 103 Ibid., p. 17.

- 104 Ibid., p. 18.  
 105 Ibid., p. 20.  
 106 Ibid., p. 172.  
 107 Ibid., p. 216.  
 108 It is precisely because no legal writer, ancient or modern, has adequately dealt with the meaning, scope and function of good faith in international law that an attempt is made to do so in this book.  
 109 Grotius (1925), p. 860.  
 110 Ibid., p. 324.  
 111 Ibid., p. 320, footnote 1.  
 112 Ibid., p. 321.  
 113 Ibid., p. 324.  
 114 Ibid., p. 331.  
 115 Ibid., p. 328.  
 116 Ibid., p. 329.  
 117 Ibid., p. 329.  
 118 Ibid., p. 329.  
 119 Ibid., p. 329.  
 120 Ibid., p. 329.  
 121 Ibid., p. 330.  
 122 Ibid., p. 330.  
 123 Ibid., p. 330.  
 124 Ibid., p. 330.  
 125 Ibid., p. 330.  
 126 Ibid., pp. 332–3.  
 127 Ibid., p. 332.  
 128 See above Chapter 3, p. 19.  
 129 Grotius (1925), p. 332.  
 130 Ibid., p. 332.  
 131 Ibid., pp. 224, 248, 435.  
 132 Ibid., p. 442.  
 133 Ibid., p. 414.  
 134 Gentili. (1598). trans. (1933). vol. II, p. 191.  
 135 Grotius (1925), p. 409.  
 136 Ibid., pp. 410–12.  
 137 Ibid., p. 619.  
 138 Ibid., p. 792.  
 139 Ibid., p. 794.  
 140 Ibid., p. 796.  
 141 Ibid., p. 796.  
 142 Ibid., pp. 797–8.  
 143 Ibid., p. 799.  
 144 Ibid., p. 799.  
 145 Ibid., p. 800.  
 146 Cheshire and Fifoot (1986) p. 515; Anson (1984), p. 478.  
 147 Grotius (1925), p. 800.  
 148 Ibid., pp. 804–5.  
 149 Ibid., p. 827.  
 150 It is not clear from Gentili's discussion of an unconditional surrender whether the duty of the victor to exercise his unlimited power with moderation is a legal or a moral duty.  
 151 Grotius (1925), p. 860.  
 152 Ibid., p. 860.  
 153 Ibid., p. 860.

- 154 Pufendorf (1672), trans. (1934), p. 18a.  
155 Ibid., p. 229.  
156 Ibid., p. 226.  
157 de Visscher (1968), p. 20.  
158 Pufendorf (1672), trans. (1934), p. 226.  
159 Ibid., p. 212.  
160 Ibid., p. 179.  
161 Ibid., p. 199.  
162 Ibid., p. 193.  
163 Ibid., p. 222.  
164 Ibid., p. 1138.  
165 Ibid., p. 1131.  
166 Ibid., p. 1132.  
167 Ibid., p. 648.  
168 Cf. Ruddy (1975), p. 30.  
169 Rachel (1676), trans. (1916), p. 157.  
170 Ibid.  
171 Ibid., p. 208.  
172 Ibid.  
173 Ibid.  
174 Textor (1680), trans. (1916), p. 9a.  
175 Ibid., p. 305.  
176 Ibid.  
177 See above p. 64.  
178 Textor (1680), p. 305.  
179 Ibid., p. 317.  
180 Ibid.  
181 Ibid.  
182 Ibid.  
183 Zouche (1911), Introduction, ed. T.E. Holland, vol. 1, xiii.  
184 Zouche (1911), trans. J.L. Brierly, vol. 2, p. 25.  
185 Ibid.  
186 Ibid., p. 31.  
187 Ibid., pp. 53-6.  
188 Ibid., pp. 96-7.  
189 Ibid., p. 111.  
190 Zouche (1911), vol. 1, p. v.  
191 Wolff (1934), p. 194.  
192 Ibid., p. 195.  
193 Ibid., p. 282.  
194 Ibid., p. 283.  
195 Ibid., p. 224.  
196 Ibid., p. 222.  
197 Ibid., p. 261.  
198 Ibid., p. 233.  
199 Ibid., p. 414.  
200 Ibid., p. 442.  
201 Vattel (1758), trans. (1916), p. 4.  
202 Ibid., p. 4.  
203 Ibid., p. 9.  
204 Ibid., p. 9.  
205 Ibid., p. 9.  
206 Ibid., Ruddy (1975).

- 207 Ibid., p. 81. Dr Ruddy disagrees with Professor Corbett's suggestion that Vattel derived his Necessary and Voluntary Law of Nations from Suarez and Grotius 'at least not in any direct sense'. For this key distinction in Vattel's work (and for his work generally) Dr Ruddy believes that Wolff's *Jus Gentium Methodo* was the immediate influence on Vattel (Ruddy, page 101 et. seq.).
- 208 Vattel (1758), trans. (1916), p. 160.
- 209 Ibid., p. 162.
- 210 Ibid., p. 163–4.
- 211 See above, pp. 60–1.
- 212 Vattel (1758), trans. (1916), p. 161.
- 213 But if the change in the obligation is fundamental as a result of unforeseeable change of circumstances, the doctrine of *rebus sic stantibus* may be invoked.
- 214 Vattel (1758), trans. (1916), p. 162.
- 215 Ibid., p. 181.
- 216 Ibid., pp. 180–1.
- 217 Ibid., p. 181.
- 218 Ibid., p. 184.
- 219 Ibid., pp. 184–5.
- 220 Ibid., p. 185.
- 221 Ibid., p. 185.
- 222 Ibid., p. 182.
- 223 Ibid., p. 183.
- 224 Ibid., p. 183.
- 225 Ibid., p. 183.
- 226 Ibid., p. 183.
- 227 Ibid., p. 160.
- 228 Ruddy (1975), p. 196.
- 229 Ibid., p. 314.
- 230 Ibid., p. 308.
- 231 Van Vollenhoven (1919), p. 32.
- 232 See particularly Vattel (1758), trans. (1916), Chapter XV 'The Faith of Treaties', pp. 188–92.
- 233 Ibid. p. 199.
- 234 For the 'definitive' edition of the Text of 1866 see Wheaton, (1936).

## 6 Good Faith in International Courts and Tribunals

In Part II of his study on the General Principles of Law<sup>1</sup> Dr Bin Cheng illustrated by means of international judicial decisions the application of good faith in the international legal order. He wrote, 'What exactly this principle implies is perhaps difficult to define',<sup>2</sup> and he accepted the view of Lord Hobhouse that such rudimentary terms applicable to human conduct such as 'Good Faith', 'Honesty', or 'Malice' elude *a priori* definition. 'They can be illustrated but not defined.'<sup>3</sup>

The publication of his work in 1953 was timely. It coincided with the beginning of a rapid expansion in the number of subjects of international law. Many of the States which have emerged in the last three decades do not share the political, moral and legal ideas of the small group of States of the European tradition which created modern international law through international conventions and international custom.<sup>4</sup> The potential value of general principles as a source of international legal rules for this new heterogeneous society of States has already become evident, and Dr Cheng's work, together with a number of later works by others on the general principles, have contributed to a greater awareness of this rather neglected formal source of international law.<sup>5</sup> He did not purport to define good faith, and confined himself to presenting examples of the application of the principle in a wide range of international tribunals. His approach, while not altogether neglecting questions of how or why the principle was applied,<sup>6</sup> was expressly not directed to the problem of definition.

Since 1953 there have been many more references by international courts and tribunals, and by individual judges and arbitrators, to good faith. While it is not possible, or indeed necessary, to consider all of these, some raise

interesting issues or help to clarify the nature, scope and function of the principle. They are therefore dealt with in this chapter. For obvious reasons most attention is devoted to the jurisprudence of the World Court, but some contributions from other tribunals are also mentioned.

The principle of good faith was invoked in one of the first Advisory Opinions delivered by the newly established International Court of Justice. In the *Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion*,<sup>7</sup> the question submitted by the General Assembly to the Court was:

Is a Member of the United Nations which is called upon, in virtue of article 4 of the Charter, to pronounce itself by its vote either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article? In particular, can such a Member, while it recognises the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?

The reference to the Court arose out of the fact that political differences in the Security Council between the Soviet and Western Powers, in the height of the Cold War era, prevented the admission of a large number of applicants for membership of the United Nations. 'Pro-Western' applicants were 'vetoed' by the Soviet Union and communist or 'pro-communist' applicants failed to obtain the necessary number of votes in the Security Council which was at the time largely 'pro-western'. The reasons given varied from case to case. In some cases, the reasons were allegedly based on the legal requirements of Article 4. The States concerned were said to be ineligible because they were not truly independent, or not peace-loving, or willing or able to accept the obligations contained in the Charter. In other cases, the political motives for rejection were stated explicitly, or recommendation for membership of a number of states was offered in return for a recommendation of other states by the opposing bloc.

The question put to the Court clearly involved complex political issues, but the Court rejected the argument that it was a 'political' rather than a 'legal' question<sup>8</sup> and gave its opinion that the conditions laid down in Article 4(1) were exhaustive and therefore of course it followed that it was not open to a member to make its affirmative vote subject to the (additional) condition that other States be admitted to membership at the same time.<sup>9</sup> In relation to the conditions which were laid down in Article 4(1), the Court accepted that these were very wide and very elastic in nature, and a State might consider circumstances of fact (including political factors) in its assessment of whether an applicant did fulfil the necessary conditions. In doing so, a member must act in good faith – 'Article 4 does not forbid the taking into account of any

factor which it is possible reasonably and in good faith to connect with the conditions laid down in that article'.<sup>10</sup>

More light is shed on the meaning and function of good faith by the Individual and Dissenting Opinions. Judges Alvarez and Azevedo, in their Individual Opinions, equated good faith in the context of this case with abuse or misuse of right. Judge Alvarez accepted that a State might abuse its right by voting against the admission of a State on grounds other than those provided for in Article 4 without incurring legal sanction; although the Court must condemn such a *moral* failure, 'no sanction attaches to it save the reprobation of public opinion'.<sup>11</sup> On the other hand, Judge Azevedo appeared to regard the breach of good faith involved in the misuse of a right as essentially a *legal* matter, susceptible of objective judgement 'in accordance with standards of what is normal, having in view the social purpose of the law'.<sup>12</sup>

Judges Basdevant, Winiarski, McNair and Read, (Joint dissenting Opinion), had no doubt about the *legal* nature and the function of the obligation of good faith imposed upon members of the Security Council and General Assembly in the matter of the admission of new members of the United Nations. While agreeing that a Member was legally entitled to make its consent to the admission of a State dependent on any political considerations which seemed to it to be relevant, 'in the exercise of this power the Member is legally bound to have regard to the principle of good faith'.<sup>13</sup> The obligation to act in good faith was an overriding legal obligation resting upon every Member of the United Nations.<sup>14</sup> The function of good faith in this context was to limit the power of freedom of choice of the political considerations that might induce a Member to refuse or postpone its vote in favour of the admission of a State. 'It must use this power in good faith, in accordance with the Purposes and Principles of the Organisation and in such a manner as not to involve any breach of the Charter.'<sup>15</sup> Both Judges Zoricic and Krylov, in their separate Dissenting Opinions, also held that while Members had a discretion in the exercise of a right to vote, or a right of appreciation in respect of an applicant State, they were not authorized to act arbitrarily but must exercise these rights in good faith.<sup>16</sup>

In the *Corfu Channel Case*,<sup>17</sup> Judge Alvarez advanced from the cautious 'moral only' view of the misuse of right as an aspect of good faith which he had expressed in the *Admission Case*. He referred to the fact that while formerly the misuse of a right had no place in law, 'that is no longer the case; some civil codes, especially those of most recent dates, expressly forbid the misuse of a right in private relations'.<sup>18</sup> He advocated that the express condemnation of the misuse of a right, as contained for example, in the German and Swiss Civil Codes, should be transported into international law.<sup>19</sup> As to the question – when is there a misuse of a right? – Judge Alvarez said the facts must be evaluated in any given case, and the existence of extenuating circumstances, such as that the act was committed for the general advantage,

might be admitted.<sup>20</sup> Extenuating circumstances were clearly regarded as relevant by the majority of the Court on the question of the manner in which the British warships exercised their right of innocent passage through the North Corfu Channel on 22 October, 1946. Having regard to all the circumstances of the case (and in particular the fact that British cruisers had been fired at by an Albanian shore battery on 15 May), it was not unreasonable to make the passage on 22 October with the ships at action stations so that they might be able to retaliate quickly if fired at again.

The abuse or misuse of a right was also referred to in the *Colombian-Peruvian Asylum Case* in the Judgement of the Court<sup>21</sup> and in the Dissenting Opinion of Judge Azevedo,<sup>22</sup> but in that case there was no direct linking of the abuse of the right of asylum with a general obligation of good faith. The Court and Judge Azevedo both referred to the specific means adopted to deal with abuses which had arisen in relation to the grant of asylum, in particular, by Conventions concluded between Latin-American States.

The Court, in its advisory opinion on the *Interpretation of Peace Treaties, (Second Phase)*<sup>23</sup> also refused to invoke any general principle of good faith to override the clear meaning of the text of the Peace Treaties of 1947 between the Allied Powers and Bulgaria, Hungary and Rumania. This was so, although the Court characterized the failure of the Governments of Bulgaria, Hungary and Rumania to appoint their representatives to the Commissions established by the Treaties to hear disputes concerning interpretation or execution of the Treaty, as a failure to fulfil a treaty obligation involving international responsibility. The Court refused to accept the argument, reinforced by a long line of precedents on arbitration, which established that a party cannot prevent completion of arbitration and the rendering of a binding decision by the device of withdrawing its national representative from the tribunal. Judge Read, in his Dissenting Opinion, had no doubt about the relevance of good faith to the situation:

I am of the opinion that the principle established by these precedents is equally applicable to the case where a party to a dispute acts in bad faith from the outset, and attempts to use the device of defaulting on its treaty obligation to appoint its national representative on the tribunal in order to prevent the provisions of the arbitration clause from taking effect.<sup>24</sup>

The Court, as it had done in the *Admission Case*,<sup>25</sup> again referred to the necessity of exercising a power 'reasonably and in good faith' in the case concerning *Rights of Nationals of the United States of America in Morocco*.<sup>26</sup> In that case, the Court was of opinion that it was the duty of the Customs authorities in the French Zone, in fixing the valuation of imported goods, to have regard, *inter alia*, to reasonableness and good faith. In so far as a legal power which is exercised unreasonably and in bad faith must surely constitute an *abus du droit*, the opinion of the Court in the *Rights of Nationals Case*

would seem to be that formal recognition which Judge Alvarez thought the Court would have to give 'at the appropriate time'.<sup>27</sup> Even at that time however, there was nothing particularly novel in that recognition. As Professor Bin Ching noted, the Permanent Court of International Justice recognized the concept of abuse of a right in the *Free Zones Case*, (1932),<sup>28</sup> and the International Court of Justice recognized the concept, at least implicitly, in the *Admission of a State to the United Nations Case*.<sup>29</sup>

In 1955, individual judges of the International Court of Justice, for the first time, began to consider more fully the nature and scope of good faith. In the *South-West Africa Voting Procedure, Advisory Opinion*,<sup>30</sup> Judge Klaestad in his Separate Opinion thought that while South Africa 'is in duty bound to consider in good faith a recommendation adopted by the General Assembly ... a duty of such a nature, however real and serious it may be, can hardly be considered as involving a true legal obligation....'<sup>31</sup> On the other hand, Judge Lauterpacht in his Separate Opinion thought that 'a Resolution recommending to an Administering State a specific course of action creates *some* legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision. The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith.'<sup>32</sup> Several times in his Separate Opinion Judge Lauterpacht emphasized the *legal* nature of the obligation to act in good faith in circumstances where it was difficult to draw the dividing line between a legal obligation and a non-legal obligation. Thus, while there was discretion vested in the Members of the United Nations in respect of Resolutions of the General Assembly in the sphere of the administration of Trust Territories or territories assimilated thereto, it

is not a discretion tantamount to unrestricted freedom of action. It is a discretion to be exercised in good faith. Undoubtedly, the degree of application of good faith in the exercise of full discretion does not lend itself to rigid legal appreciation. This fact does not destroy altogether the legal relevance of the discretion thus to be exercised.<sup>33</sup>

Again, Judge Lauterpacht said '... although there is no automatic obligation to accept fully a particular recommendation or series of recommendations, there is a legal obligation to act in good faith in accordance with the principles of the Charter and of the System of Trusteeship.'<sup>34</sup>

It is significant that Judge Lauterpacht ultimately invoked the concept of abuse of right in his attempt to clarify the legal obligation to act in good faith in relation to the non-legally binding nature of recommendations of the General Assembly.

[An Administering State] ... may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the

abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction.<sup>35</sup>

Judge Read, in his Dissenting Opinion in the *Nottebohm Case*, said that the doctrine of abuse of right cannot be invoked by one State against another unless the State which is admittedly exercising its rights under international law causes damage to the State invoking the doctrine.<sup>36</sup> It appears that Judge Read, while apparently being prepared to accept that abuse of right might be invoked in some circumstances, nevertheless held a restricted view as to its possible applicability. There is the suggestion that the exercise of the right (in this case the right of Liechtenstein to naturalize Mr Nottebohm) must be so outrageous and unconscionable that its results could not be invoked against Guatemala.<sup>37</sup> There is also the connection of the abuse of a discretionary power with fraud and injury to an adverse party.<sup>38</sup> To the same effect, Judge Guggenheim, in his Dissenting Opinion, concluded that it might be possible to speak of a failure on the part of Mr Nottebohm to observe the principle of good faith *vis-à-vis* Liechtenstein and perhaps also *vis-à-vis* Guatemala, if it could be proved that he had acted in a fraudulent manner, such as by concealing German property with the help of naturalization.

In such a case, however, it would not be the absence of good faith which would be the decisive element in the fact that Liechtenstein nationality could not be invoked, but the wrongful character of the fraudulent transaction of concealment – of which the acquisition of Liechtenstein nationality would only be one of the constituent elements.<sup>39</sup>

Mr Nottebohm had not concealed any essential or subordinate element for the full consideration of his application by the authorities of Liechtenstein, and consequently he had not failed to observe the principles of good faith, as defined by the municipal law of civilized states, including Article 2 of the Civil Code of Liechtenstein 1926.<sup>40</sup>

Judge Guggenheim, earlier in his opinion, had concluded that because Nottebohm was not himself subject to any duties based on the principles of international law, it was not necessary to consider whether he had acted in 'good faith' when he had applied for naturalization.<sup>41</sup> By this, he evidently meant that it was not necessary to consider whether Nottebohm had acted in good faith *as required by international law*, because he went on to consider the possibility of a breach by him of the principles of good faith 'as defined by the municipal law of civilized States and in particular by article 2 of the Civil Code of Liechtenstein'.<sup>42</sup> The substantive content of good faith, so defined, included a duty not to conceal any essential or subordinate element in his application to the authorities of Liechtenstein.<sup>43</sup> He was not in breach of that duty, so there was no failure by him to observe the principles of good faith. Judge Klaestad, in his Dissenting Opinion in the same case, repeated his reservations about the legal character of good faith in the context of abuse of

rights<sup>44</sup> and agreed with Judge Read that, if applicable, it required the infliction of some kind of injury by Liechtenstein upon the legitimate interests of Guatemala.<sup>45</sup>

In *Judgements of the Administrative Tribunal of the ILO upon complaints made against the UNESCO (Advisory Opinion)*<sup>46</sup> the Court was not concerned with the merits of four judgements given by the Tribunal in favour of members of the Staff of UNESCO whose fixed term appointments had not been renewed by the Director-General of that Organization. The Court was concerned with the issue of the exercise of jurisdiction by the Tribunal which, UNESCO alleged, was invalid. On this issue, the Court expressed the opinion that the Tribunal had been competent to hear the complaints in question. The opinion evoked Dissenting Opinions from the President (Judge Hackworth), The Vice-President (Judge Badawi) and Judge Read, which merit special consideration in view of the association of good faith with abuse of right in earlier cases in the Court. In these, Judges had adverted to the question of reconciling the existence of a discretionary power with legal restraints on the exercise of the power.<sup>47</sup> In the *Administrative Tribunal Case*, Judge Badawi referred directly to 'the paradox of discretionary power subject to judicial control'<sup>48</sup> which earlier, Judge Hackworth had explained as residing in the person of the Director-General of UNESCO as follows:

In declining to renew the appointments, he was exercising a discretionary power given him by the Constitution and by the Staff Regulations. It was for him to determine whether the action of the individuals was incompatible with the high standards required of them and it was for him to determine whether their actions were capable of harming the interests of the organisation.<sup>49</sup>

The Tribunal, however, as Judge Badawi critically observed, proceeded to make its own examination of the facts, and concluded that the decision not to renew the appointment was one which should not only be rescinded, but also constituted a wrongful exercise of powers and an abuse of rights which consequently involved the obligation to make good the prejudice resulting therefrom.<sup>50</sup>

The notions of '*détournement de pouvoir*' and 'abuse of rights', as Judge Read points out, were based on the assumption that the Director-General was observing the terms of appointment and the provisions of the Staff Regulations, and exercising the legal rights of the organization, but that he was exercising the rights unconscionably or for motives different from those which the framers of the Regulations had in mind.<sup>51</sup> Both the Vice-President and Judge Read clearly had reservations about the propriety of introducing the public and private law concepts of *détournement de pouvoir* and abuse of rights into international administrative law,<sup>52</sup> but all three dissenting Judges appeared to accept that the Tribunal could base its judgement on abuse of right only if the evidence showed that the Director-General had acted in bad faith,

arbitrarily, capriciously, or unconscionably. It would seem from a consideration of the Judgement in the *Administrative Tribunal Case* that the paradox of a discretionary power subject to judicial control might be easily resolved by applying the principle of good faith. The content of good faith, in this context, would include the duty not to exercise a legal power in an arbitrary, capricious or unconscionable manner. The duty to exercise undoubted legal rights or powers in good faith was confirmed by the Court in this, and earlier cases,<sup>53</sup> but the Court has also had to deal with doubtful or quasi-legal obligations, and the principle of good faith has also been referred to in this connection with less certain effect.

In the *Case of Certain Norwegian Loans*,<sup>54</sup> Judge Lauterpacht thought that an instrument in which a party is entitled to determine the existence of its obligation is not a valid and enforceable legal instrument.<sup>55</sup> A Declaration accepting the optional clause of Article 36 of the Statute of the Court, in which the declaring State reserves to itself the right to determine whether a matter falls within its domestic jurisdiction, is of this nature. After an extended discussion of the question of good and bad faith in invoking the domestic jurisdiction reservation, he concluded that the Court was prevented from examining the question.<sup>56</sup> He did not feel it possible to adhere to the view he had expressed as Special Rapporteur for the International Law Commission<sup>57</sup> that such determination must take place in accordance with the implied obligation to act in good faith. There was no *legal* obligation raised by an instrument couched in such terms, and it was irrelevant that having regard to public opinion, an enlightened State was not likely to invoke such reservation capriciously, unjustifiably and in bad faith.<sup>58</sup>

At first reading, Judge Lauterpacht's views on good faith in this case appear to be less favourable to the development of the principle in international law than the views he had expressed earlier both judicially<sup>59</sup> and extrajudicially. On closer analysis, however, it becomes clear that in the *Norwegian Loans Case* he was articulating rather more clearly the distinction between the principle of good faith and its possible impact on an existing *legal* obligation, and *attempts to create or define a legal obligation* in doubtful or quasi-legal situations by means of the principle of good faith.

In the *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion of June 1st, 1956*<sup>60</sup> Judge Lauterpacht, referring to another doubtful legal obligation, pointed out that it might not be easy to characterize precisely in legal terms a situation in which South Africa declined to act on an Advisory Opinion which it was not legally bound to accept, but which gave expression to the legal position as ascertained by the Court.<sup>61</sup> He said that a legal instrument of continuing validity was repudiated by [the Government] of South Africa, but was also being invoked for the benefit of that Government, and that measure of contradiction – 'reminiscent of situations underlying estoppel' – was one of the considerations 'not wholly extraneous' to the case before the Court.<sup>62</sup> 'For these are not technical rules

of the law of contract or treaties. They are rules of common sense and good faith. As such, they are relevant to all legal instruments of whatsoever description....<sup>63</sup> There was, in Judge Lauterpacht's opinion, a *legal* obligation in this case, to which good faith might be applied; however, there was no legal obligation created by the Declaration in the *Norwegian Loans Case*, so considerations of good faith were irrelevant.

Judges Basdevant and Read, in separate Dissenting Opinions in the *Norwegian Loans Case*, both stressed the fact that Norway herself had put forward a more moderate interpretation of the reservation. It was not contended that the provisions conferred an arbitrary power to oust the jurisdiction of the court. Judge Basdevant said:

Should a Government seek to rely upon it with a view to denying the jurisdiction of the Court in a case which manifestly did not involve a matter which is essentially within the national jurisdiction it would be committing an *abus de droit* which would not prevent the Court from acting.<sup>64</sup>

Judge Read agreed with the basic principle underlying the position taken by Norway in this regard, while disinclined to bring notions of 'good faith' and *abus de droit* into the question. 'Practically speaking, it is, I think, impossible for an international tribunal to examine a dispute between two sovereign states on the basis of either good or bad faith or of abuse of law.'<sup>65</sup> Having dismissed the possibility of examining a dispute on the basis of good or bad faith, he then proceeded directly to do precisely that:

I am unable to accept the view that the reservation should be interpreted as giving the respondent Government an arbitrary power to settle any question of jurisdiction which arises by the assertion that the Government understands that the matter is essentially within the national jurisdiction regardless of whether that assertion is true or false.<sup>66</sup>

It is clear that Judge Read believed that while Norway invoked the reservation in good faith at the outset, the course which the dispute took led him to conclude that it was 'impossible to reach the conclusion that Norway could have reasonably understood that the case was essentially within the Norwegian national jurisdiction'.<sup>67</sup> That is surely tantamount to saying that Norway was in bad faith in maintaining her position.

The Court, in the *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants, (Netherlands v. Sweden)*,<sup>68</sup> held that the Convention did not include within its scope the Swedish Law on Protective Upbringing which the Swedish authorities had applied to an infant of Dutch nationality. Accordingly, there was no failure to observe the Convention on the part of Sweden. Individual Judges, in Separate Opinions, considered the relevance of good faith in the invocation by Sweden of its *ordre public* to its obligations under the Convention. Judge Lauterpacht

observed that if a State takes action which, on the face of it, departs from the language of the Convention, it must show that the exception (*ordre public* in this case) was applied reasonably and in good faith.<sup>69</sup> However, he also adumbrated 'a margin of appreciation' doctrine in as much as he emphasized that the decision of the local authorities ought not to be lightly disturbed, particularly, as in this case, where the applicant Government failed to adduce any evidence that the discretion of the authorities had not been exercised properly and in good faith.<sup>70</sup> Judge Quintana Moreno and Judge Wellington Koo also emphasized the fact that in the absence of any allegations by the Netherlands of bad faith it must be presumed that the Swedish authorities had made proper use of its *ordre public*.<sup>71</sup>

Judge Sir Percy Spender was concerned about the dangers inherent in allowing a party to an international treaty to fashion its own yardstick to determine its obligations, such as by the contention of Sweden that a reservation on *ordre public* should be read into the Convention.<sup>72</sup> He was not impressed with the suggestion that a State invoking such a reservation is under some kind of duty to show that its public policy has been applied reasonably and in good faith: '... and what is to be the test or standard of reasonableness that is to be applied?'<sup>73</sup> He did, however, concede that if in a particular case it could be shown that a law comparable to the relevant provisions of the Swedish law had been used by a contracting State 'not *bona fide* to carry out that law but for a purpose *aliunde*, for example to interfere with and restrict a guardian in the exercise of his right of custody and control as such, other and quite different considerations would arise'.<sup>74</sup> The other and different considerations which Judge Sir Percy Spender had in mind can only have been that such an abuse of the internal law of the State would be contrary to good faith, in as much as it would defeat the true objects of the Convention, the provisions of which were based on the principle that the national law applied to the rights of the guardian and the infant.<sup>75</sup>

The opinions of Sir Percy Spender and Judge Read, of all the Judges of the Court up to this period, betray a certain ambivalence towards the principle of good faith. Sir Percy, in the case just discussed, was critical of suggestions that a State invoking a reservation to its Treaty obligations was under some kind of implied duties of reasonableness and good faith in so doing.<sup>76</sup> Similarly, in the *Case Concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria), Preliminary Objections*, he saw it as the clear task of the Court to apply a Treaty clause as it stood, without considering whether other provisions might with advantage have been added to or substituted for it.<sup>77</sup> In the *Interhandel Case*,<sup>78</sup> he was emphatic that the United States reservation in its Declaration of Acceptance of the jurisdiction of the Court should not be re-drafted or added to so as to include limitations of reasonableness or good faith on the United States in its determination of the question of jurisdiction. 'There is no room for questions of abuse of power or good faith or bad faith in relation to a determination by the Government concerned that the dispute is within its

domestic jurisdiction.’<sup>79</sup> Yet he also subscribes to the view that it is ‘the ever present duty of States to act in good faith’, and he agrees with applying the test of reasonableness to the interpretation of international instruments.<sup>80</sup>

Judge Lauterpacht referred in the *Interhandel Case* to his Separate Opinion in the *Norwegian Loans Case* ‘which must be read as forming part of the present opinion’.<sup>81</sup> He repeated what he had concluded in the earlier case that the Court has no power to pronounce on the manner and justification of the exercise of the automatic reservation because, in a declaration of acceptance of that kind, there is absent the indispensable element of legal obligation.<sup>82</sup>

Judge Lauterpacht earlier, in his Dissenting Opinion in *Interhandel*, had expressly adverted to the possibility of the Court deciding, at the very first stage of the proceedings, that the question of the reasonableness and good faith of the reliance on the automatic reservation must in any case be within the jurisdiction of the Court.<sup>83</sup> There can be no doubt that it was his considered opinion that the Court had no power to pronounce on the question of reasonableness and good faith because of the absence of a *legal* obligation on the United States.

The Court also found a legal obligation (to which good faith attached) in the *Right of Passage over Indian Territory (Merits) Case*.<sup>84</sup> The Court held that Portugal had a right of free passage with regard to private persons, civil officials and goods between the Portuguese territory of Daman and two parcels of that territory which were completely surrounded by the territory of India. However, Portugal’s right of passage was subject to India’s power of regulation and control, and the Court held that India’s refusal of passage in the circumstances of the case was covered by this power. It was this power of regulation and control which gave rise to discussion of the principle of good faith (described by Judge *ad hoc* Fernandes as the most general and the most essential of the general principles of law).<sup>85</sup>

It seemed clear to Judge Wellington Koo that the basic element in the policy of control and regulation of a right of passage by an intervening territorial state was consideration in good faith of its own national interest.<sup>86</sup> Later he said:

The fact that enclaves exist and thrive today in many parts of the world shows that whatever difficulties may have arisen between the enclaved and enclaving territories from time to time have always been satisfactorily arranged in good faith and with goodwill in both sides.<sup>87</sup>

Judge Armand-Ugon thought that India was bound to settle each request for authorization of passage in good faith and with due regard to the purpose of such passage, uninfluenced by considerations extraneous to that purpose.<sup>88</sup> Judge Sir Percy Spender regarded the regulation and control question as an example of a controllable discretion to accord or refuse permission to exercise an admitted right and ‘one which must be exercised in good faith’.<sup>89</sup>

Apart from the Portuguese Judge *ad hoc*, the Judges who delivered Individual Opinions preferred to avoid the use of terms such as abuse or misuse of a right or power, but it is difficult to disagree with Judge Fernandes when he suggests that, where the question arises of deciding whether India's opposition to the exercise by Portugal of its right of passage was justified or not, it really is a question of the abuse or misuse of a power. The Court itself expressed the view that it was not called upon to deal with the question of India's responsibility for the state of tension which led to the suspension of the right of passage, so the larger question of India's possible breach of the principle of good faith through an abuse of right did not arise. The function of good faith in the *Right of Passage Case*, for those Judges who adverted to it, was to enable two conflicting legal rights to operate rather than to deal with the abuse of a right. The analogy drawn by Judge Wellington Koo was particularly apt to express the situation. He drew an analogy between 'Spring' rivers which discharge deep into the ocean and the ocean pushing its tide water well up the river 'without denying the existence of either'.<sup>90</sup>

The *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) Merits*,<sup>91</sup> was the first in which the International Court of Justice applied good faith in a major way other than in abuse of rights and related areas. In 1904, the Boundary between Cambodia (then a French protectorate) and Thailand (then Siam) in the area of Preah Vihear was determined by a Treaty between France and Siam. The Treaty provided that the boundary was to follow the watershed line and that the details were to be worked out by a mixed Franco-Siamese Commission. A map was eventually produced under the aegis of this Commission which clearly placed the Temple, which was the focus of the dispute, in Cambodia. Cambodia relied upon this map, but Thailand argued, *inter alia*, that the map embodied a material error in that it did not follow the watershed line as provided for in the Treaty. The map in question, although never formally approved by the Boundary Commission, had been accepted by the competent Siamese authorities and had not been questioned by Siam/Thailand until the dispute arose. The Court rejected the argument of Thailand:

It is an established rule that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error.<sup>92</sup>

The established rule of law referred to by the Court will not be found in the international jurisprudence of that time in the terms in which it was stated by the Court. The rule, as formulated by the Court, has since been incorporated in Article 48, paragraph 2, of the *Vienna Convention on the Law of Treaties*, 1969,<sup>93</sup> but at the time the case was decided, the rule as stated by the Court was only to be found as a deduction from doctrines variously referred to in international and municipal law as 'estoppel', 'preclusion', 'forclusion', 'acquiescence', or 'recognition'.

The Vice-President, Judge Afaro, did not believe that any of these particular designations fitted exactly to the principle or doctrine as applied in international cases,<sup>94</sup> the foundation of which 'is the good faith that must prevail in international relations, inasmuch as inconsistency of conduct or opinion on the part of a State to the prejudice of another is incompatible with good faith'.<sup>95</sup> Preclusion and estoppel were discussed at some length by Judge Sir Gerald Fitzmaurice.<sup>96</sup> He referred to and cited with approval the comment of H. Lauterpacht in his *Report on the Law of Treaties* that it is of little consequence whether the rule that a State cannot be allowed to avail itself of the advantages of a treaty when it suits it to do so and repudiate it when its performance becomes onerous is based on the English law principle of estoppel or the more generally conceived requirement of good faith. 'The former is probably not more than one of the aspects of the latter.'<sup>97</sup> Sir Percy Spender also agreed that the principle of preclusion ('a beneficent powerful instrument of substantive international law') was based upon the necessity for good faith between States in their relations one with another, and it was not to be hedged in by artificial rules. He thought the principle operated

to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself.<sup>98</sup>

The majority of the Court in the *Temple Case* clearly believed that this was a situation where good faith (however designated) required that Thailand should not be permitted to resile from the clear and unequivocal representations it had made to Cambodia that it accepted the map (and the consequences therefrom).

In 1969, the Court in the *North Sea Continental Shelf Cases* pointed out that estoppel may be inferred from the conduct, declarations and the like made by a State which not only clearly and consistently evinced acceptance by that State of a particular regime, but also had caused another State or States in reliance on such conduct, detrimentally to change position or suffer some prejudice.<sup>99</sup> Estoppel, as a rule derived from the principle of good faith, has become an established rule in the jurisprudence of the Court and it applied the rule in the case *Military and Paramilitary Activities in and Against Nicaragua*, holding that Nicaragua's reliance on the Optional Clause accepting the jurisdiction of the Court was in no way contrary to good faith or equity, so the invocation of estoppel by the United States could not be said to apply to Nicaragua.<sup>100</sup>

In the *South West Africa, Second Phase, Judgement*, the International Court found it necessary to emphasize that it was a Court of Law and that it could take account of moral principles only in so far as these are given a sufficient

expression in legal form.<sup>101</sup> In the *North Sea Continental Shelf Cases*, the Court attempted to clarify the relationship between 'moral principles' and law, or, as the Court itself put it, very general precepts of justice and good faith and 'actual' rules of law.<sup>102</sup> The Court held that delimitation of the Continental Shelf 'must be the object of agreement between the States concerned and that such agreement must be arrived at in accordance with equitable principles'.<sup>103</sup> The Court stressed that it was not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles.

... when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles.<sup>104</sup>

The Court did not, however, clarify the question whether the 'equitable principles' referred to are themselves an integral part of the rules of law, and some differences of opinion are evident on this point in the individual opinions. Judge Morelli thought that the fact that a rule of law makes reference to 'extra-legal criteria' by no means signifies that those criteria are embodied in the rule of law. 'They are criteria which the legal rule makes it obligatory to apply, but which remain outside that legal rule.'<sup>105</sup> On the other hand, Judge Amoun thought that 'extra legal criteria' or principles of the moral order (among which he included estoppel, non-misuse of right and good faith, 'which is no more than a reflection of equity and which was born from equity') are embodied in the rules of international law through the medium of the general principles of law.<sup>106</sup> It seemed to Judge Koretsky that the difficulty about introducing so vague a notion as 'equity' (the obligation of which was ethical rather than jural) into the jurisprudence of the Court was that it opened the door to making subjective and therefore at times arbitrary evaluations instead of following established general principles.<sup>107</sup>

The Court in the *North Sea Continental Shelf Cases* decided that the Parties were under an obligation to enter into negotiations with a view to arriving at an agreement on the delimitation of the Shelf. The negotiations were to be meaningful, and not merely a formality.<sup>108</sup> The Permanent Court of International Justice had earlier considered the duty to negotiate, and had similarly declared the obligation to be not only to enter into negotiations, but also to pursue them as far as possible with a view to concluding agreement, even if 'an obligation to negotiate does not imply an obligation to reach an agreement'.<sup>109</sup> This is another example of what might be described as a doubtful or quasi-legal obligation,<sup>110</sup> and it is perhaps significant that the Court invoked good faith to deal with it both in the *North Sea Continental Shelf Cases* and the *Fisheries Jurisdiction Cases*.

The Court went further in both instances than simply stating the obligation 'to negotiate in good faith'. In the *North Sea Continental Shelf Case*, the delimitation was to be effected by agreement in accordance with equitable principles and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each party all those parts of the Continental Shelf that constitute a natural prolongation of the land territory of the other. In the course of their negotiations in good faith, the Parties were also to take certain factors into account, such as the general configuration of the coasts of the parties, as well as the presence of any special or unusual features, the physical and geological structure and natural resources of the areas involved, and the element of a reasonable degree of proportionality of the extent of Shelf and the length of coast concerned.<sup>111</sup>

In the *Fisheries Jurisdiction Cases (UK v. Iceland)* the Court, in directing negotiations in good faith held that

each must in good faith pay reasonable regard to the legal rights of the other in the waters around Iceland outside the 12 mile limit, thus bringing about an equitable apportionment of the fishing resources based on the facts of the particular situation and having regard to the interests of other States which have established fishing rights in the area.<sup>112</sup>

In the *Federal Republic of Germany v. Iceland Case*, negotiations in good faith 'involve in the circumstances of the case an obligation upon the parties to pay reasonable regard to each other's rights and to conservation requirements pending the conclusion of the negotiations'.<sup>113</sup> In the *Fisheries Jurisdiction (UK v. Iceland) Case*, the Court repeated what it had stressed in the *North Sea Continental Shelf Case* that it was not finding simply an equitable solution, but an equitable solution derived from the applicable law.<sup>114</sup>

Although Judge Padilla Nervo has stated that 'the obligation to negotiate is an obligation of *tracto continuo*; it never ends and is potentially present in all relations and dealings between states',<sup>115</sup> it should be noted that the International Court or its predecessor has not gone so far in its jurisprudence. The obligation to negotiate involves good faith, but in the cases so far considered, the Court has not applied good faith other than in situations where a legal obligation (albeit in some cases a doubtful obligation) was present. In those cases, the duty to negotiate in good faith was applied in situations where legal rights and duties existed independently of any abstract principle of good faith. The States concerned in the *North Sea Continental Shelf Cases* clearly had legal rights in the Shelf adjacent to their coasts and the problem was to establish the extent of their respective rights. As the Court said, the basic legal notion which reflected *opinio juris* in the matter of delimitation was that delimitation must be a matter of agreement, arrived at in accordance with equitable principles.<sup>116</sup>

The obligation of good faith was applied to the duty to negotiate an agreement in accordance with equitable principles so as to ensure that the

negotiations were meaningful. In the *Fisheries Jurisdiction Cases*, the Court accepted that all the Parties had legal rights in the waters around Iceland outside the 12 mile limit, and again the problem was to establish the extent of their respective rights. Good faith was applied to the mutual obligations of the parties to undertake negotiations (in accordance with the guidelines laid down by the Court) so as to ensure reasonable regard for each others' legal rights.

The International Court was careful to stress, in both the *North Sea Continental Shelf* and the *Fisheries Jurisdiction Cases*, that its decisions were based on an equitable solution derived from law and not simply an equitable solution. Likewise, it was not content in these cases simply to propound a duty to negotiate in good faith. It took some pains to provide practical guidelines for the parties concerned in the negotiations. In adopting this approach, the Court was paying due regard to its inherent function as a Court of Law, in which capacity, as it declared in the *South West Africa, Second Phase Case*, it can take account of moral principles only in so far as these are given a sufficient expression in legal form.<sup>117</sup>

In the *Nuclear Tests (Australia v. France) Case*, Judge Gros cited a passage from De Visscher's *Theory & Reality in Public International Law*, which is particularly appropriate to the treatment of 'good faith' situations by the International Court of Justice since its foundation:

... law can only intervene in the presence of elements it can assimilate, i.e. facts or imperatives possessing a regulatory and at least minimum correspondence with a given social order that enable them to be subjected to reasoned analysis, classified within some known category, and reduced to an objective value-judgement capable of serving in turn as a basis for the application of established norms.<sup>118</sup>

The differences of opinion which have emerged between Parties and between Members of the Court on the applicability of good faith often appear to be due to differences of opinion about the presence or absence, in particular cases, of elements which law can assimilate. In the *Nuclear Test Cases* Judge De Castro and Judge Barwick for example, differed from the majority in their assessment of the legal character of the unilateral declarations by France that it would not conduct further atmospheric nuclear tests after 1973. The Court classified the unilateral declarations within some known category. '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.'<sup>119</sup> Judge De Castro, however, could see no indication warranting a presumption that France, by her statements, wished to bring into being an international obligation possessing the same binding force as a treaty.<sup>120</sup> Presumably, Judge Fitzmaurice also would have disagreed with the view of the majority in the *Nuclear Tests Case* on the binding force of France's statement of policy on testing, in view of his comments in the *Legal Conse-*

*quences Case* on attempts to make binding what are 'really only statements of policy'.<sup>121</sup>

The majority of the Court, in the *Legal Consequences Case*, had no doubt about the binding legal nature of the obligations on South Africa under the Charter of the United Nations, by which the former Mandatory of South West Africa had pledged itself to observe and respect human rights and fundamental freedoms for all without distinction as to race. The Court rejected the contention that it would be necessary to prove that South Africa was not acting in good faith in exercising its legislative or administrative powers before it could be established that South Africa was in breach of her international obligations under the Mandate for South West Africa. The Court found that the question of intention or governmental discretion was not relevant, nor was it necessary to investigate the effects of the South African measures upon the welfare of the inhabitants. Under the Charter of the United Nations, South Africa had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race, and to establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race was a flagrant violation of the Purposes and Principles of the Charter.<sup>122</sup> The Court in this case considered that the question of the good faith of South Africa was irrelevant because, objectively, there was an ongoing breach of an independent legal obligation so there was no need to invoke the principle of good faith.

The Permanent Court of International Justice, as distinct from its individual members, did not invoke the principle of good faith as the basis of any of its decisions, and in fact, in one important aspect of good faith in treaty relations, avoided expressing an opinion, and was also cautious in its treatment of abuse of right. In its first major reference to good faith,<sup>123</sup> the Court did not find it necessary to consider the important question whether, and if so, how far, the signatories of a treaty are obliged in good faith to abstain from any action likely to interfere with its execution when ratification has taken place.<sup>124</sup> The legal obligations imposed on Germany by the Treaty of Versailles did not include an obligation to refrain from alienation (of the property in question) and it was, *a fortiori*, 'impossible to regard as an infraction of the principle of good faith Germany's action in alienating the property before the coming into force of the Treaty which had already been signed'.<sup>125</sup>

The Court in this case also linked for the first time the principle of good faith with misuse of a right. The Court held that there was no misuse of the right of alienation by Germany – the alienation was a *genuine transaction effected in good faith*.<sup>126</sup> When the question of abuse of right was also raised in *Diversion of Water from the River Meuse Case*,<sup>127</sup> the Court did not find it necessary to deal with the submission, because, as Judge Hudson said in his Individual Opinion, there could be no question in the case of the good faith of either party.<sup>128</sup> It is not of course suggested that the Court rejected either

of these aspects of good faith as not forming part of international law at the relevant times. On the contrary it may be assumed that the Court accepted both in principle, and the jurisprudence of the Court helped to establish the later more definite formulations of the relevant rules on these, and other aspects of good faith.

As regards these other aspects, decisions<sup>129</sup> of the Court have helped to establish that estoppel, a characteristic rule of good faith, is also part of international law, and thus the Court contributed to the enlargement of the perception of the principle which, in modern international law, had tended to be confined to the matter of treaties.

### **International Arbitration Between States**

It is usual to suggest that very few cases of arbitration occurred in the era of the development of modern international law, and that the modern age of arbitration began with the Jay Treaty of 1794.<sup>130</sup> The well known and successful resort to arbitration under that Treaty by the United States and Great Britain in the *Alabama Claims Arbitration* in 1872<sup>131</sup> helped to increase interest in this method of settling international disputes. The international machinery for arbitration was greatly improved by the establishment of the *Permanent Court of Arbitration* in accordance with the *Hague Conventions for the Pacific Settlement of International Disputes* in 1890 and 1907.<sup>132</sup> In fact, as Professor Johnson points out,<sup>133</sup> the history of the subject demonstrates beyond doubt that arbitration as a means of settling international disputes suffers from vicissitudes. The extent and importance of arbitrations have always depended on the general political climate and the particular climate between the States concerned.<sup>134</sup>

The special agreements between the parties to Arbitration naturally differ, but many have included a standard formula such as that the decision or award shall be 'in accordance with the principles of international law, justice and equity'.<sup>135</sup> Less common is a specific reference to good faith,<sup>136</sup> but Sole Arbitrators and Joint or Mixed Commissioners have frequently referred to good faith in the course of conducting proceedings or in rendering arbitration awards. In some arbitrations, the principle of good faith, or some rule derived therefrom, has been extensively considered, or regarded as a crucial factor in the dispute.

Even before the Permanent Court, in the *German Interests Case*,<sup>137</sup> avoided expressing an opinion on whether, and if so, how far, signatories of a treaty are under an obligation even before the treaty is ratified, the *Reparations Commission* in 1924 held that certain measures being taken after the signature of an international treaty, and before its entry into force, could be contrary to good faith.<sup>138</sup> In the *Pensions of Officials of the Saar Territory*,<sup>139</sup> the Sole Arbitrator, Dr Fazy, rejected a claim to apply the *clausula*

*rebus sic stantibus* (relying, *inter alia*, on the Good Faith Article 242 of the German B.G.B.) because, although the number and cost of the pensions had increased considerably, the changed circumstances were not so great as to render the insistence of the German Government that the original agreement be adhered to an act contrary to good faith. In *Affaire des Reclamations Français Contre le Perou* (1920),<sup>140</sup> it was held that a law passed by a Government, annulling the acts of a previous Government, could not be opposed to foreigners who had, in good faith, dealt with the previous Government.

International Tribunals generally accept that States must be presumed to have acted in good faith,<sup>141</sup> and Arbitrators have applied the presumption, as appropriate, to non-State entities.<sup>142</sup> Thus, the lack of good faith of the private claimants proved to be the decisive factor in two cases<sup>143</sup> before the Arbitrators in the Tribunal established between the United States and Great Britain to dispose of pecuniary claims arising out of 'war measures' taken by Britain in the First World War. The claimants failed in both cases because the 'screens' of 'neutral ship and neutral goods' and 'neutral ownership', when penetrated, revealed the underlying enemy character of the claimants.

Private law concepts of good faith in partnership and agency relationships were also applied by the Arbitration Board established in 1935 to deal with a dispute between the Republic of China and the Radio Corporation of America arising out of a concession agreement between the parties. The Board said

... the utmost *bona fides* of contracts is to be observed between the parties to a contract of partnership (or: of joint adventure). Such a contract is violated, if one of the parties initiates a direct joint activity on parallel lines with a competing third party. Even if not explicitly stipulated, such an obligation will then have to be implied. It is one of the essential obligations included in contracts of partnership. It will also make no difference, if one of the parties to such contract is a Government.<sup>144</sup>

The duty of Governments to act in good faith in their dealings with foreign individuals or corporations is not confined to contractual dealings. An expropriation of property, for the purpose of public utility, must be conducted in good faith.<sup>145</sup>

Good faith has been prominent in a number of territorial disputes submitted to arbitration. The relevance of good faith in that context arises in a number of ways. In the *Honduras Borders* dispute between Guatemala and Honduras (1933) the Tribunal was expressly authorized to depart from the line of *uti possidetis* of 1821, 'in the interests of justice, as disclosed by subsequent developments', and the Tribunal was to have regard first, to the facts of actual possession of territory and second, to the question whether possession by one party had been acquired in good faith and without invading the right of the other party.<sup>146</sup> In view of the nature of the territory, long uninhabited and

unknown, and the lack of authoritative delimitation of the boundary, it was natural that a Party should advance into the unoccupied zone and develop enterprises therein, and, if this was done in good faith, 'priority in settlement in good faith would appropriately establish priority of right'.<sup>147</sup>

The *Tacna–Arica Arbitration* (1925)<sup>148</sup> between Chile and Peru is a case which illustrates the wider scope of good faith in a long running territorial dispute between States. The *Treaty of Ancon* (1883) had provided that a plebiscite would decide whether the provinces in dispute were to remain under the sovereignty of Chile (which was to continue in possession for ten years from the date of ratification of the Treaty) or to continue to constitute a part of Peru. The Parties agreed to enter into a Special Agreement on the conditions of the plebiscite, and although formal negotiations on this began in 1892, following years of conferences and exchanges, no agreement had yet been arrived at by 1922, and at that stage it was agreed to submit the entire matter to a Sole Arbitrator (President Coolidge, US).

Inevitably perhaps, in view of the arrangement that Chile should have possession for a period of years *before* the plebiscite, and the long delay that occurred in the negotiations for the Plebiscite Protocol, Peru accused Chile of bad faith, both in its administration of the provinces it had in its possession and in the protracted negotiations to hold a plebiscite. The Arbitrator held that the agreement to make a special protocol (on the plebiscite) with undefined terms, did not mean that either Party was bound to make an agreement unsatisfactory to itself, provided it did not act in bad faith.<sup>149</sup> The question presented was not whether the particular views, proposals, arguments and objections of either Party during the course of negotiations should be approved, 'but as to the good faith with which [these] were advanced'.<sup>150</sup> As regards Chilean administration in the Tacna and Arica region,

the fair construction is that Chile was to regain possession pending the holding of a plebiscite and that thus retaining possession, her administrative authority continued ... if this was the situation immediately after the ten-year period, there is no warrant for holding that the failure to agree on the special protocol for the plebiscite produced a change unless there was bad faith in the conduct of the negotiations, and this charge, as already stated, cannot be sustained.<sup>151</sup>

The *Tacna–Arica Case* remains an important case on the *legal* duty to negotiate in good faith, even if it also provides an example of how difficult it may be to convince a Tribunal of the bad faith of a State in a long and complex series of negotiations. The accidents of history which affect a State even over a short period may provide valid excuses for not proceeding with a particular line in negotiations, or for interrupting negotiations. In the case itself, there was no shortage of such circumstances: a cabinet crisis, a revolution, the illness of a Minister, the death of a President. Nothing short of a demonstrable wilful refusal to proceed with negotiations, or an unjustified failure even to

consider reasonable proposals, will probably suffice for a failure to negotiate in good faith.

The relevance of good faith in relation to a state's responsibility has also been considered in a number of arbitrations. Good faith of a *government* must be distinguished from the good faith of its officials or authorities. A state may be responsible for errors of judgement of its representatives, even if *they* have acted in good faith.<sup>152</sup> But a Government will not be held responsible for the acts of rebels committed in violation of its authority.<sup>153</sup> In the *Neer Claim*,<sup>154</sup> the Commissioners attempted to clarify the boundary between an international delinquency arising out of the death or injury of a foreign national at the hands of a mob, or its own forces, and the (mere) unsatisfactory exercise of power included in national sovereignty. Without attempting to be precise, it was the opinion of the Commission that the propriety of governmental acts should be put to the test of international standards, and that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty or an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. The test being formulated here was clearly one of objective good faith, judged by the minimum standards of the international community.

The duty to execute the obligations incurred by a Treaty *bona fide*, and the application of this rule to the limitation of a right given by a Treaty to 'reasonable exercise' was declared by the Tribunal in the *North Atlantic Coast Fisheries Case* (1910).<sup>155</sup> In the case between Great Britain and the US, the Tribunal accepted that Great Britain, as the local sovereign, had the right and duty to legislate in regulation of the fisheries, but 'treaty obligations are to be executed in perfect good faith, therefore excluding the right to legislate *at will* concerning the subject matter of the Treaty, and limiting the exercise of sovereignty of the States bound by a Treaty with respect to that subject matter to such acts as are consistent with the Treaty'.<sup>156</sup>

As stated at the beginning of this chapter, there have been many references to good faith by international tribunals of traditional type in the last 50 years or so and, it might be added, in the new and important system of arbitration on Investment Disputes between States and non-State entities created under the auspices of the World Bank,<sup>157</sup> tribunals have also adverted to the principle. For example, in a recent case, an arbitration tribunal held that Guinea had breached the Convention by secretly entering into an agreement with a third party which vitiated its original agreement. This was condemned as being contrary to the principle of good faith which applied to the agreement between the parties.<sup>158</sup>

Finally, two cases of some interest from national courts dealing with questions of international law might be mentioned to make the point about the universality of the principle. An Italian magistrate, dealing with a question of sovereign immunity, has held that the real basis for restricted immunity

(which has replaced absolute immunity) was the principle of good faith, by virtue of which each state was required to accord to other states the same treatment as that which it reserved to itself in its own municipal legal order.<sup>159</sup> The difficulty, discussed above,<sup>160</sup> about those 'marginal' cases where the existence of a legal obligation is questionable, such as in some declarations of acceptance of the optional clause of Article 36 of the Statute of the International Court of Justice, was discussed and resolved by Brennan, J. in *Commonwealth of Australia v. State of Tasmania*<sup>161</sup> on the basis of the principle. The obligation in question in that case was imposed by Article 4 of the *UNESCO Convention for the Protection of the World Cultural and Natural Heritage* (1972), which required a State Party to 'do all it can – to the utmost of its own resources – ' to identify, protect, conserve and so on, its natural heritage. Brennan, J. had no doubt that the obligation in Article 4 left no discretion in a Party, and the question whether it is unable to take a particular step within the limits of its resources 'is a justiciable question'. If a party sought exemption on the ground that it had allocated its available resources to other purposes, the question whether it had done so in good faith would be justiciable.<sup>162</sup>

## Notes

- 1 Cheng (1953).
- 2 Ibid., p. 105.
- 3 Ibid., quoting Lord Hobhouse in *Russell v. Russell* [1897] A.C. p. 395, at p. 436.
- 4 The impact of the large and rapid growth in the number of new States on traditional international law has been discussed by a number of writers including Friedmann (1964) and de Visscher (1968). The critical attitude of some new states to traditional rules has been referred to judicially, see for example, *Barcelona Traction, Light and Power Co*, I.C.J. Rep. 1970, at 310. For a recent novel theory of modern international law which accords more with Third World views see de Lupis (1987).
- 5 See for example, Friedmann (1964, Ch. 12 'The Uses of General Principles in the Development of International Law', pp. 188–210); for the significance of general principles (including Good Faith – *Treu und Glauben*), for the development of the law of international trade see Unidroit (1977), vols. I and II especially vol. I, pp. 158, 163. The general principles are usefully analysed by Bos (1984).
- 6 E. Lauterpacht, in his review of Bin Cheng's *General Principles*, considered that Dr Cheng made no endeavour to ascertain how or why the general principles were applied (Lauterpacht 1953, p. 546). In fact, the reasons why and how for example, good faith was invoked to prevent abuse of rights is routinely adverted to in Chapter 4 of the *General Principles of Law*.
- 7 I.C.J. Rep. 1948, p. 57.
- 8 Ibid., p. 61.
- 9 Ibid., pp. 62–5.
- 10 Ibid., p. 63.
- 11 Ibid., p. 71.
- 12 Ibid., p. 80.
- 13 Ibid., p. 92.

- 14 Ibid., p. 91.
- 15 Ibid., p. 93.
- 16 Ibid., p. 103 (Zoricis), p. 115 (Krylov).
- 17 I.C.J. Rep. 1949, p. 4.
- 18 Ibid., p. 47.
- 19 Ibid., p. 48.
- 20 Ibid.
- 21 I.C.J. Rep. 1950, p. 266 at p. 275.
- 22 Ibid. at p. 348.
- 23 I.C.J. Rep. 1950, p. 221.
- 24 Ibid., p. 242.
- 25 See above, pp. 82–3 *et seq.*
- 26 I.C.J. Rep. 1952, p. 176 at p. 212.
- 27 I.C.J. Rep. 1952, p. 133.
- 28 Cheng (1953), p. 123
- 29 Above, pp. 82–3 *et seq.*
- 30 I.C.J. Rep. 1955, p. 67.
- 31 Ibid., p. 88.
- 32 Ibid., pp. 118–9.
- 33 Ibid., p. 120.
- 34 Ibid.
- 35 Ibid.
- 36 *Nottebohm Case (Second Phase)*, I.C.J. Rep. 1955, p. 4 at p. 37.
- 37 Ibid.
- 38 Ibid., p. 43.
- 39 Ibid., p. 58.
- 40 Ibid.
- 41 Ibid., p. 57.
- 42 Ibid., p. 58.
- 43 Ibid.
- 44 See above, p. 85.
- 45 I.C.J. Rep. 1955, p. 31.
- 46 I.C.J. Rep. 1956, p. 77.
- 47 See for example, Judge Lauterpacht, I.C.J. Rep. 1955, p. 67 at p. 120 and the Joint D.O. of Judges Basdevant, Winiarski, McNair and Read, I.C.J. Rep. 1948, p. 57 at pp. 91, 92.
- 48 I.C.J. Rep. 1956, p. 132.
- 49 Ibid., p. 121.
- 50 Ibid., p. 131.
- 51 Ibid., p. 151.
- 52 Ibid., p. 140 and p. 151.
- 53 See for example, *The Admissions Case*, supra pp. 82–3 and the *Rights of Nationals Case*, supra pp. 84–5.
- 54 I.C.J. Rep. 1957, p. 9.
- 55 Ibid., Sep. Op. p. 48.
- 56 Ibid., pp. 52–5.
- 57 See *Yearbook I.L.C.* (1953) vol. II, p. 97.
- 58 I.C.J. Rep. 1957, p. 50.
- 59 See for example, I.C.J. Rep. 1955, p. 67 at p. 120; I.C.J. Rep. 1956, p. 23 at pp. 47–8.
- 60 I.C.J. Rep. 1957, p. 23.
- 61 Ibid., p. 47.
- 62 Ibid.
- 63 Ibid., pp. 47–8.

- 64 I.C.J. Rep. 1957, p. 73.  
65 Ibid., p. 94.  
66 Ibid.  
67 Ibid., p. 95.  
68 I.C.J. Rep. 1958, p. 55.  
69 Ibid., p. 99.  
70 Ibid., p. 101.  
71 Ibid., p. 109 (Judge Moreno), p. 115 (Judge Wellington Koo).  
72 Ibid., p. 121.  
73 Ibid., p. 130.  
74 Ibid., p. 120.  
75 Cf. the S.O. of Judge Lauterpacht, *ibid.*, p. 99.  
76 I.C.J. Rep. 1958, p. 130.  
77 I.C.J. Rep. 1959, p. 127 at p. 184.  
78 I.C.J. Rep. 1959, p. 6  
79 Ibid., pp. 58–9.  
80 I.C.J. Rep. 1959, p. 189; and see also I.C.J. Rep. 1960, p. 220 and I.C.J. Rep. 1960, p. 107.  
81 I.C.J. Rep. 1959, p. 116.  
82 Ibid., p. 115.  
83 Ibid., p. 100.  
84 I.C.J. Rep. 1960, p. 6.  
85 Ibid., p. 139.  
86 Ibid., p. 63.  
87 Ibid., p. 67.  
88 Ibid., p. 85.  
89 Ibid., p. 107.  
90 Ibid., p. 67.  
91 I.C.J. Rep. 1962, p. 6.  
92 Ibid., p. 26.  
93 *U.K.T.S. No. 58 (1980)*, Cmnd. 7964.  
94 I.C.J. Rep. 1962, p. 39.  
95 Ibid., p. 42.  
96 Ibid., pp. 62–5.  
97 Ibid., p. 65. For Report see I.L.C. (1953) vol. II, p. 144.  
98 I.C.J. Rep. 1962, pp. 143–4.  
99 I.C.J. Rep. 1969, p. 26.  
100 I.C.J. Rep. 1984, p. 414–15.  
101 I.C.J. Rep. 1966, p. 6 at p. 34.  
102 I.C.J. Rep. 1969, p. 3 at pp. 46–7.  
103 Ibid., p. 46.  
104 Ibid., p. 48.  
105 Ibid., p. 213.  
106 Ibid., p. 136.  
107 Ibid., p. 166. The Court, in the *Tunisia/Libya Continental Shelf Case*, made clear that ‘the legal concept of equity is a general principle directly applicable as law’ [1982] I.C.J. Rep. p. 60.  
108 I.C.J. Rep. 1969, p. 46.  
109 *Railway Traffic Between Lithuania and Poland (1931)*, P.C.I.J. A/B 42, at p. 116.  
110 See above, p. 88.  
111 I.C.J. Rep. 1969, p. 53. In *Continental Shelf (Tunisia/Libyan Arab Jamah-Iriya) Case* [1982] I.C.J. Rep. 18 at 60, the Court confirmed the ‘primordial’ importance of equitable principles in the delimitation of the continental shelf. See also Court of

- arbitration award, 30 June 1977, *Delimitation of the Continental Shelf (UK v. France)* esp. paras. 99, 100.
- 112 I.C.J. Rep. 1974, p. 33.
- 113 Ibid., p. 202.
- 114 Ibid., p. 33.
- 115 I.C.J. Rep. 1969, p. 92.
- 116 Ibid., p. 46.
- 117 I.C.J. Rep. 1966, p. 34.
- 118 I.C.J. Rep. 1974, p. 253 at 297.
- 119 Ibid., p. 268.
- 120 Ibid., p. 374–5.
- 121 *Legal consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion*, I.C.J. Rep. 1971, p. 16 at p. 263.
- 122 Ibid., p. 57.
- 123 *German Interests in Polish Upper Silesia and the Factory at Chorzow*, Judgement No. 7 (Merits) (1926), Series A, No. 7, p. 4; Hudson, vol. I at pp. 536–40.
- 124 Hudson, vol I at p. 538. For the relevant rule in modern international law see Article 18, *Vienna Convention on Law of Treaties* (1969).
- 125 Ibid.
- 126 Ibid., p. 597, 622.
- 127 Series A/B No. 70, (1937); Hudson, vol. IV p. 178.
- 128 Hudson, vol. IV p. 231.
- 129 *Diversion of Water from the River Meuse*, P.C.I.J. A/B 70 at p. 25, Hudson, vol. IV p. 231; *Serbian Loans Case*, P.C.I.J. A.20/21, pp. 38–9, Hudson, vol. II p. 369; *Eastern Greenland Case*, P.C.I.J. A/B 53, pp. 68–79, Hudson, vol. III pp. 189–90.
- 130 See Lauterpacht (1952) vol. 2, pp. 33–4; Brownlie (1973), p. 684.
- 131 Moore, 1 *Int. Arb.* 95; J. Gillis Wetter, (1979) vol. 1, pp. 27–173.
- 132 *U.K.T.S.* 9 (1901) Cd. 798; *UKTS* 6 (1971) Cmnd. 4575.
- 133 See Johnson, (1980) at p. 305.
- 134 See generally, Simpson and Fox, (1959) .
- 135 Art. 1 *Convention on General Claims Commission Mexico and US* (1923).
- 136 For an example see *Administrative Decision II – Mixed Claims Commission, Germany and US* (1922): ‘The Commission will not be bound by a particular code or rules of law but shall be guided by justice, equity and good faith’.
- 137 See above p. 97.
- 138 *Affaire des Reparations Allemandes Selon l’ Article 260 du Traité de Versailles* (1924) UNRIAA vol. 1, pp. 522–3.
- 139 UNRIAA vol. 3, p. 1555.
- 140 UNRIAA vol. 3, p. 216 at p. 219.
- 141 See for example p. 90 above.
- 142 *Norwegian Shipowners’ Claims*, (1922) UNRIAA vol. III, p. 324; *Aquilar-Amory and Royal Bank of Canada Claims*, (1923), UNRIAA vol. 1, p. 394.
- 143 *S.S. ‘Sequanca’ Case*, *S.S. ‘Edna’ Case*, UNRIAA vol. 1, pp. 1867–9, p. 1592 at p. 1599.
- 144 UNRIAA vol. 1, p. 1623 at p. 1628.
- 145 *Walter Fletcher Smith Claim* (1929) UNRIAA vol. II, p. 915.
- 146 UNRIAA, vol. II, p. 1309 at p. 1352.
- 147 Ibid., p. 1359.
- 148 UNRIAA, vol. II, p. 923.
- 149 Ibid., p. 929.
- 150 Ibid., p. 933.
- 151 Ibid., p. 935.
- 152 ‘*The Jessie*’, ‘*Thomas F. Bayard*’ and ‘*The Pescawha*’ Case (US and GB) (1910),

- opinion of M. Henri Fromageot, cited in *Lillie S. Kling (USA) v. United Mexican States* (Mexico and US General Claims Commission) (1930) UNRIAA vol. IV, p. 581. See also 16 A.J.I.L. (1922) pp. 114–6.
- 153 *Home Frontier and Foreign Missionary Society of the United Brethren in Christ (US) v. Great Britain*, (1920), UNRIAA vol. VI, p. 42.
- 154 *US v. Mexico* (1926) UNRIAA, vol. 4, p. 60.
- 155 UNRIAA vol. XI, p. 167.
- 156 *Ibid.*, at p. 188.
- 157 *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (1965), 575 U.N.T.S. 159.
- 158 *Maritime International Nominees Establishment v. Republic of Guinea*, Case No. ARB/84/4, (1988), noted 82 A.J.I.L. (1988), p. 598.
- 159 *Italian Trade Union for Embassy and Consular Staff v. United States*, 65 I.L.R. (1984), p. 338. See also *Zucca and Others v. Fondazione Internazionale Premio Balzan and Swiss Confederation*, (Court of Appeal, Milan), 65 I.L.R., p. 281.
- 160 *See* p. 88.
- 161 68 I.L.R., p. 266.
- 162 *Ibid.*, p. 423.

## 7 Good Faith in the Law of Treaties

*Pacta sunt servanda* – the rule that treaties are binding on the parties and must be performed in good faith – is the fundamental principle of the law of treaties. There is much authority in the jurisprudence of international tribunals for the proposition that in the present context the principle of good faith is a legal principle which forms an integral part of the rule *pacta sunt servanda*.<sup>1</sup>

In the *Nuclear Tests (Australia v. France) Case*, the International Court of Justice said:

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. 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.<sup>2</sup>

Whatever doubts and difficulties there may be about the binding character of the type of unilateral declaration in question in the *Nuclear Test Case*,<sup>3</sup> there can be no doubt that *pacta sunt servanda* in the law of treaties is based on good faith,<sup>4</sup> and the maxim itself has constituted 'since times immemorial the axiom, postulate and categorical imperative of the science of international law'.<sup>5</sup> Whether, as suggested in Chapter 2, good faith developed from the basic postulate *pacta sunt servanda*, or that *pacta sunt servanda* is 'but an expression of the principle of good faith which above all signifies the keeping of faith',<sup>6</sup> matters not in the modern law of treaties. The international

community overwhelmingly<sup>7</sup> accepts the integral relationship between the positive rule *pacta sunt servanda* and the principle of good faith, and it is quite unnecessary to argue the matter further.<sup>8</sup> The difficulty about good faith and the law of treaties does not lie in the basic obligation that treaties must be kept, but in the meaning, scope and function of the principle of good faith in relation to the making and performance of treaties generally.

The *Vienna Convention on the Law of Treaties* (1969), which entered into force on 27 January 1980, codified and 'progressively developed' the customary rules on the law of treaties. The Convention now provides a convenient and authoritative statement of some rules which were imprecise and disputed in the customary law before 1969, but it was not intended to be a complete codification of the law on treaties and the Preamble expressly affirms that the customary law rules will continue to apply in those matters not provided for in the Convention.

As regards customary rules derived from the principle of good faith (apart from the *pacta sunt servanda* rule in Article 26), the Convention formulates in Article 18 the rule adverted to, but not considered, by the Permanent Court of International Justice in the *German Interests Case*,<sup>9</sup> that an obligation in good faith rests upon a signatory State to refrain from acts calculated to frustrate the object of a treaty which is signed subject to ratification, acceptance or approval. The Convention does not affect the customary rule that it is not *per se* a breach of good faith to refuse to ratify a signed treaty which is regarded by the ratifying authority as unsatisfactory, even if the treaty in question was concluded in pursuance of a *pactum de contrahendo*, as an obligation to negotiate does not involve an obligation to conclude an agreement deemed to be unsatisfactory.<sup>10</sup> The Convention (Articles 30 and 59) provides some assistance also on the question of the 'conflict' of good faith arising from inconsistent successive treaties relating to the same subject matter.<sup>11</sup>

The provisions of the Convention on Fraud and Corruption (Article 49), Coercion (Articles 51, 52), Supervening Impossibility of Performance (Article 61) and Fundamental Change of Circumstances (Article 62) may be regarded as modern re-statements of accepted rules<sup>12</sup> which have clear associations with good faith. They are, however, properly to be regarded now as positive rules of law and do not require extended discussion in relation to the principle of good faith. However, even after the Vienna Convention, the principle remains very relevant to the issues of Treaty Interpretation and Unilateral Breach, and the nature, scope and function of the principle has always been seen most clearly in these areas.

The problem of treaty interpretation<sup>13</sup> is clarified, rather than solved, by the Vienna Convention. Article 31(1) states, 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The ascertainment of the real and common intention of the parties is a matter of interpretation, '... Good faith prevailing throughout this subject, treaties

ought not to be interpreted exclusively according to their letter, but according to their spirit. ...'<sup>14</sup> As McNair observed, from the time of Grotius onwards, successive generations of writers, arbitrators and judges have elaborated rules for the interpretation of treaties, borrowing mainly from the private law of contract, and one result is that today for many of the so-called rules that one party may invoke, the adverse party can often find another.<sup>15</sup> 'The rules, canons and principles, although sometimes invested with the sanctity of dogmas, are not absolute formulae, but are in every sense relative – relative to the particular text, and to the particular problem that is in question'.<sup>16</sup>

The International Law Commission shared the scepticism of McNair and others about the real value of the so-called 'rules' of interpretation, and there is no attempt in the Vienna Convention to codify these rules. The emphasis is quite properly placed on the requirement that a treaty shall be interpreted *in good faith*, and that requires first that the Tribunal shall have regard to the actual text or 'plain meaning' of the treaty. The jurisprudence of the International Court of Justice, and the Permanent Court, confirms that the textual approach is established law.<sup>17</sup> It might be said that this is in accordance with the basic rule of good faith – *pacta sunt servanda* – parties must observe what they have actually agreed to observe.

The wider function of the principle of good faith is called into service when the plain meaning approach fails. Then it becomes necessary to interpret the treaty 'in good faith', having regard to its context and in the light of its object and purpose, and in this exercise, the essence of good faith comes to the fore. The 'spirit' of the treaty, which requires the Tribunal to have regard to honesty, fairness and reasonableness, takes precedence over the incomplete or ambiguous words which have failed to yield a 'plain meaning'.

The various rules or maxims of interpretation – such as *ut res magis valeat quam pereat* (often referred to as the rule of effectiveness)<sup>18</sup> or *inclusio unius est exclusio alterius* or references to one or other of the various 'schools' of thought on the subject of interpretation, especially the 'teleological' school, are often invoked in questions of treaty interpretation in support of the exercise of ascertaining the real intentions of the parties or the spirit of the treaty. It is difficult, however, to disagree with writers such as Tsune-Chi-Yu who regard such 'rules' (where they are not useless and dangerous!) as merely illustrative of forms which the application of the fundamental principles of interpretation may assume, or a simple manifestation of good faith and high purpose imputed to the contracting parties by the interpreter.<sup>19</sup>

Although 'rules' may be derivable from the 'principle' of good faith, the interpretation of treaties 'in good faith' is not reducible to rules. In this context, good faith is 'a standard of behaviour', and treaty interpretation 'a work of art' rather an exact science.<sup>20</sup> There is thus justification for the criticism of Tamello that the Articles drafted by the Commission (and now adopted in the Treaty) still remain on a level of abstraction from which descent to the concrete reality of the application of treaty law may sometimes

prove difficult and hazardous.<sup>21</sup> 'The standard of good faith has become in the draft [Treaty] an overworked idea because it is expected to perform the tasks which otherwise inclusion of specific canons of interpretation would have done.'<sup>22</sup>

Doubts about the 'overworked' standard of good faith, and its lack of utility as a platform for descent to solid treaty interpretation, arise from the lack of a clear definition of the nature, scope and function of the *principle* of good faith in the law of treaties. The principle demands honesty, fairness and reasonableness, and some of the positive rules of the modern law of treaties, such as *pacta sunt servanda* (Article 26), the obligation to refrain from acts calculated to frustrate the object of a treaty signed subject to ratification (Article 18), Articles 49, 50, 51 (fraud, corruption, coercion) and Article 62 (fundamental change of circumstances – *rebus sic stantibus*) are directly derived from the principle.

Article 31 on the interpretation of a treaty in good faith, as applied by international tribunals, has a central core of concreteness. In the great majority of cases, the textual or plain meaning approach disposes of the matter,<sup>23</sup> and, as the International Court made clear in the *Interpretation of Peace Treaties Case (Second Phase)*<sup>24</sup> it is the duty of the Court to interpret treaties, not to revise them, and the Court refused to apply the rule of effectiveness (*ut res magis valeat quam pereat*) so as to attribute a meaning to the Treaties in that case which would have been contrary to their letter and spirit.<sup>25</sup> But the *principle* of good faith may be invoked to ensure that *any* of the positive rules of the law of treaties are applied honestly, fairly and reasonably. Thus a Court may, in interpreting a Treaty, have regard to the subsequent conduct and practice of the parties<sup>26</sup> to establish what the parties fairly and reasonably intended when they concluded their agreement.<sup>27</sup>

The principle is particularly relevant in relation to the performance of treaties. Every treaty must be performed in good faith, (Article 26) and the Convention does not provide further elucidation of good faith performance. There is, however, no lack of judicial and arbitral jurisprudence on the matter, and the cases illustrate the distinctive scope and function of good faith in this context. Article 60 of the Convention provides, 'A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part'. This appears to be a simple enough rule to apply, but in the practice of states it has too often been used as an excuse for withdrawing from a treaty that a particular state has found inconvenient.<sup>28</sup> In practice also, from the earliest times, the rule has given rise to the most frequent allegations of bad faith, and it is hardly surprising that all the classical and modern writers on international law have discussed the matter. State practice, while accepting the rule, provides little satisfactory evidence of its application.<sup>29</sup>

Good faith has always demanded that one party to an agreement should not repudiate the agreement for a trifling breach by the other party, and the

*International Law Commission*, in accordance with international juristic opinion, sought to reflect that requirement by limiting the right to terminate or suspend to *material breach*.<sup>30</sup> It is also a requirement of good faith that a right to terminate or suspend for material breach should be exercised within a reasonable time.<sup>31</sup>

A characteristic application of the principle of good faith in the performance of a treaty relates to the exercise of treaty rights. International tribunals have demonstrated the function and scope of the principle in a number of cases. In the *Minority Schools in Albania Case*<sup>32</sup> the Permanent Court, following its decision in the *Treatment of Polish Nationals in Danzig Case*,<sup>33</sup> held that in the performance of Albania's obligation not to discriminate, it was not sufficient to refrain from discriminatory legislation if the effect of general educational legislation – not discriminatory on the face of it – was *in fact* a discrimination against a minority. In a more obvious earlier situation of abuse of right, the Arbitral Tribunal in the *Fur Seal Arbitration* (1893)<sup>34</sup> pointed out that the malicious exercise of a right was unlawful. Abuse of right, as a breach of the obligation to perform a treaty in good faith, can take various forms.<sup>35</sup> The scope of the principle of good faith, however, is sufficiently wide to ensure that rights are exercised honestly, reasonably and fairly, however their abuse may be disguised.

The function and scope of good faith in the process of negotiations for a treaty has not been extensively considered by International Tribunals, and has not received much attention from jurists.<sup>36</sup> Some civil law systems, particularly the French, have developed rules of good faith specifically in the area of pre-contractual negotiations (*culpa in contrahendo*). International Law, like the common law generally, may invoke specific rules derived from good faith (such as estoppel) which may be applied as appropriate to negotiations for a treaty, but there is clearly scope for more generalized applications of the principle in the sometimes complex and protracted process of treaty negotiations.<sup>37</sup>

### **Rebus sic Stantibus**

Although Article 62 of the Vienna Convention on the Law of Treaties now provides that fundamental change of circumstances may be invoked in some cases as a ground for termination of a treaty, thus giving 'legal respectability' to the doctrine of *rebus sic stantibus*<sup>38</sup>, the Article does not provide a positive treaty rule which eliminates altogether the relevance of good faith to the doctrine. David J. Bederman in a recent article accurately referred to the 'enduring problem in the history and theory of international law created by the tension between the doctrines of *pacta sunt servanda* and *rebus sic stantibus*'<sup>39</sup>. He asks, 'how can the notion that fundamental changes in circumstances can terminate treaties be reconciled with the promise of good faith made by

countries when signing’?<sup>40</sup> A possible answer is provided by the Vienna Convention in Article 26, ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith’ (emphasis added). If the basic rule *pacta sunt servanda* is accepted as a positive rule of international law (as is certainly the case), and if it forms an integral part of the *principle* of good faith,<sup>41</sup> the answer to Bederman’s question may be found in the function of the principle. The tension between the two doctrines arises from the fact that they express a conflict between two legal obligations. Reconciliation between them must be effected by means which do not deny the existence of either.<sup>42</sup> The rule that treaties are binding leads to the corresponding right to demand compliance with a treaty. However, that right must itself be exercised in good faith and it may be unreasonable and unfair to insist on the performance of a treaty where, in the words of the International Court, there has been

a radical transformation of the extent of the obligations still to be performed. The change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken.<sup>43</sup>

The International Law Commission recognized the juridical basis of the *rebus sic stantibus* doctrine in equity and justice (rejecting the implied term theory) and, noting the concern of most jurists about the obvious risks the doctrine presents to the security of treaties in the absence of any general system of compulsory jurisdiction, formulated the doctrine as an objective rule of law with restricted scope.<sup>44</sup> Just as insistence on the observance of a treaty when a radical change of circumstances had occurred would be contrary to the principle of good faith, so too would be the unjustified invocation of *rebus sic stantibus* to avoid a treaty which had become (merely) more burdensome than anticipated or where relatively trivial changes had occurred.<sup>45</sup> An unjustified invocation would be one which was dishonest, unfair or unreasonable in the particular circumstances.

### **Informal International Agreements**

Informal agreements are employed in almost every field of international relations – diplomatic, defence, commercial, transport and aid.<sup>46</sup> They are frequently employed to supplement treaties, but in many cases they serve instead of treaties. In so far as an informal agreement, however designated,<sup>47</sup> satisfies the definition of a treaty in Article 2 of the Vienna Convention it will be dealt with accordingly.

The intention to create legal relations, familiar in the contract law of municipal systems, is not stated as a requirement in Article 2; the phrase ‘governed by international law’ is used, and at least in the opinion of one

Special Rapporteur of the International Law Commission on the matter, the intention to be legally bound was embraced by the phrase used<sup>48</sup>. The mere fact that an agreement (however designated) was made between states does not create a presumption that they intended to be legally bound,<sup>49</sup> and it is of course not uncommon for states to subscribe to 'agreements' or 'declarations' which clearly are not intended to be legally binding instruments, for example, *The Final Act of the Helsinki Conference on Security and Co-operation in Europe* (1975).

If an agreement between States is a formal treaty, or in the form of an informal instrument which is intended to be legally binding, the principle of good faith will apply. If a question arises as to whether an informal agreement was intended to be legally binding, the principle of good faith will also be very relevant, because good faith applies in the legal relations generally between states, and this is precisely the kind of legal difficulty in which the principle finds its paradigm function. But a more difficult question arises about the scope of good faith where it is accepted that an informal 'agreement' was not intended to be legally binding.

In Chapter 6, it was suggested that the International Court has not applied good faith otherwise than in situations where a *legal* obligation was present.<sup>50</sup> If therefore, an informal agreement is not legally binding, it would seem to follow that there is no scope for the principle in such a case. We are concerned with a *legal* principle, which must operate in a legal context, and whatever obligations states may be under by virtue of entering into 'understandings' or 'agreements' of a non-legal character (political, moral or whatever), they are not obligations to which the legal principle of good faith can attach. Unless the distinction between legal and other kinds of obligation, such as political or moral, in the relations between states is to be ignored, and the distinction between 'legal' and 'moral' good faith eliminated, it is necessary to accept that this is the position.

However, because good faith applies generally in the legal relations between states, the principle will often continue to be relevant to situations arising from non-legally binding agreements, if those situations are themselves governed by or reducible to, legal rules. For example, factual reliance, perhaps over a long period, on a non-legal agreement may give rise to a legal claim based on estoppel. More questionably, even insistence on the legal right to disregard a non-legally binding agreement might be challenged as an abuse of right.

## Notes

- 1 *Y.B.I.L.C.* vol. II (1966) p. 211.
- 2 *I.C.J. Rep.* 1974, 253 at p. 268.
- 3 *Rubin*, 71 *A.J.I.L.* (1977) p. 1; in the *Frontier Dispute Faso/Mali Case*, [1986] *I.C.J. Rep.* 554, the Chamber found that Mali did not intend to be bound through a unilateral

- act, and emphasized the necessity to be very cautious in inferring a legal obligation from a unilateral declaration not directed to any particular recipient.
- 4 Art. 26, *Vienna Convention on the Law of Treaties* (1969) UKTS No. 58 (1980), Cmnd. 7964. 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.
  - 5 de Taube (1930), vol. II p. 295 and see Kunz (1945).
  - 6 Cheng (1953), p. 113.
  - 7 Although the Conference on the *Convention on the Law of Treaties* was not unanimous with regard to defining the *scope* of the *pacta sunt* rule, the rule as formulated in Article 26 was adopted by 96 votes to none against at the Twelfth Plenary Meeting, 6 May 1969.
  - 8 As to the question – 'why ought treaties to be kept?', Hidemi Suganami contends that the normative foundation of the principle of *pacta sunt servanda* can be found in the combination of two factors. First, the 'natural necessity' of the *intra-societal* institution of promise-making for the fulfillment of basic human needs, and second, the logical rules governing the use of moral concepts (33 *Y.B.W.A.* (1979) p. 243). Ingrid Detter De Lupis (1987) considers that the basis of obligation in international law depends on the nature of the rule. A rule is binding by virtue of either logical necessity, social necessity or consent. The rule *pacta sunt servanda* is binding by virtue of logical necessity. (pp. 122–3).
  - 9 *German Interests in Polish Upper Silesia and the Factory at Chorzow (Merits)* (1926), (P.C.I.J.), see above Chapter 6, p. 97.
  - 10 *Tacna–Arica Arbitration* (1925) U.N.R.I.A.A., vol. II, p. 923 and see discussion of the case above Chapter 6, pp. 100–1.
  - 11 As Schwarzenberger and Brown (1976), p. 131 observe, in international customary law the legality of conflicting treaty obligations cannot be tested by reference to overriding principles of public policy or *jus cogens*. Article 103 of the Charter of the United Nations is accorded primacy as regards the conflicting treaty obligations of Members (Article 30, Vienna Convention).
  - 12 Article 52: 'A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'. As the I.L.C. Commentary noted, the traditional doctrine prior to the Covenant of the League of Nations was that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. (*YBILC* (1966) vol. II, p. 246.) In municipal law, contracts procured by the threat or use of force have always been condemned as contrary to good faith, and the *Convention on the Law of Treaties* confirms that this has now become an established rule in international law also.
  - 13 The literature on the topic is very extensive. Works reflecting views and cases from different epochs include: Tsune-Chi Yu (1927); Yi-Ting (1933); Tammelo (1967); McDougall, Laswell and Miller (1967); Lauterpacht (1949), p. 48; Fitzmaurice (1951), p. 1; Rosenne (1966), p. 205; 'ILC Commentary on Articles 31–33', in ILC (1966) vol. II, pp. 219–55; Yambrusic (1987).
  - 14 *Timor Case* (1914), citing Rivier, see Cheng (1953), p. 115.
  - 15 McNair (1961), p. 364.
  - 16 Starke (1984), p. 456.
  - 17 I.L.C. (1966) vol. II, p. 220
  - 18 This maxim, according to the I.L.C. Commentary was, in the view of the Commission, embodied in what is now Article 31 of the *Convention on the Law of Treaties*. I.L.C. (1966) vol. II, p. 219.
  - 19 Tsune-Chi Yu (1927), note 13 at p. 203, citing Sedgwick, Field, Hyde. For a valuable survey of the various views of scholars in a setting of 'political and scholarly detachment', and a confirmation of the prevailing scepticism about the value of the

- canons of treaty interpretation, see Tamello (1967), on the work of the Institute of International Law on Treaty Interpretation, note 13, pp. 18–25 and on the work of the International Law Commission, pp. 26–35.
- 20 Tamello (1967), p. 22, citing Jules Basdevant.
- 21 Ibid., p. 33.
- 22 Ibid.
- 23 See for example, *Competence of the General Assembly Case*, I.C.J. Rep. 1950, p. 4 especially at p. 8.
- 24 I.C.J. Rep. 1950, p. 221.
- 25 Ibid., at p. 229.
- 26 *Competence of the I.L.O. with respect to Agricultural Labour Case*, P.C.I.J. Rep. (1922) Series B, No. 2 at pp. 39–40; *Anglo-Iranian Oil Co. Case*, I.C.J. Rep. 1952 p. 92 at p. 107; *Status of South-West Africa Case*, I.C.J. Rep. 1950, p. 128 at p. 135–6.
- 27 Subsequent practice in the application of the treaty is now included in the matters to be taken into account in interpreting a treaty in good faith – Article 31(3)(b), *Vienna Convention*.
- 28 Greig (1976), p. 499.
- 29 Ibid.
- 30 For the I.L.C. commentary on the topic see I.L.C. (1966) vol. II pp. 253–5.
- 31 This, and unilateral denunciation generally because of prior treaty violations are fully discussed by Sinha (1966).
- 32 P.C.I.J. Adv. Op. (1935) Ser. A/B64, p. 17. The case concerned a declaration by Albania before the Council of the League of Nations that minority groups in Albania would enjoy, *inter alia*, ‘an equal right’ to maintain educational facilities as other nationals. It is, however, referred to in the ILC Commentary to Article 65 as an authority for the obligation to perform a treaty in good faith.
- 33 P.C.I.J. (1932) Ser A/B 44, at p. 28.
- 34 *Moores Int. Arb.* Vol. 1, p. 755. See Cheng (1953), pp. 121–2.
- 35 See, for example, France’s evasion of her treaty obligation to maintain customs free zones with Switzerland under the guise of policy controls at the border – *The Free Zones Case*, P.C.I.J. (1932) Ser A/B46 at p. 167; and for the obligation to exercise rights reasonably and in good faith see *Rights of Nationals of the United States in Morocco*, I.C.J. Rep. 1952, p. 212 and the *North Atlantic Coast Fisheries Arbitration* (1910) UNRIAA vol. XI, p. 167.
- 36 Good faith in the negotiations involved in settling a dispute about a treaty (Article 65, *Vienna Convention*) is discussed fully by David (1975), pp. 162–202. In relation to a dispute on delimitation, Art 83(3) of the *Law of the Sea Convention* provides that pending an agreement, the states concerned, in a spirit of understanding and co-operation, shall make every effort to reach a provisional arrangement without prejudice to the final agreement.
- 37 See for example, *Tacna–Arica Arbitration*, UNRIAA vol. II, p. 923.
- 38 See Fox (1986).
- 39 Bederman (1988).
- 40 Ibid.
- 41 I.C.J. Rep. 1974, p. 268, para. 46; p. 473, para. 49.
- 42 Cf. *The Right of Passage over Indian Territory (Merits) Case*, I.C.J. Rep. 1960, p. 67.
- 43 *Fisheries Jurisdiction Case (Jurisdiction)* I.C.J. Rep. 1973, p. 21.
- 44 See International Law Commission, (1966), vol. II, pp. 257–8.
- 45 Claims to withdraw from treaties on tenuous grounds in the period immediately preceding the Great War 1914–18 served to confirm juristic unease with *rebus sic stantibus*, see Garner (1927).
- 46 See generally Aust (1986).
- 47 The I.L.C. Commentary on the Draft Articles of the Convention mentioned as

examples of names given to 'less formal' types of agreement – 'exchange of notes', 'exchange of letters', 'memorandum of agreement' 'agreed minute' – as more common than others, while acknowledging that the nomenclature is almost illimitable. I.L.C. (1966) vol. II. p. 188.

48 I.L.C. (1965) vol. II, p. 12.

49 For the conflicting views of two respected writers on this question, see Fawcett, 30 *British Yearbook of International Law*, (1953), p. 381 at pp. 385–400 (B.Y.I.L.) and F. A. Mann, 33 B.Y.I.L. (1957) p. 20 at pp. 30–2.

50 See Chapter 6, p. 85 *et. seq.*

## 8 Definition of the Principle of Good Faith in International Law

In the Introduction to this book, it was stated that its purpose was to examine the nature, scope and function of the principle of good faith in international law, and to suggest a definition of the principle. In this concluding chapter, the various manifestations of good faith, not only in international law but in legal theory generally, which were considered in the chapters above are brought together and focused on the stated objectives.

### **The Nature and Scope of the Principle of Good Faith**

Good and bad faith are phenomena of the moral order, and in Chapters 2 and 3 on the origin and development of good faith in legal theory, it was suggested that religion and natural law philosophies enlarged the originally narrow and pragmatic rule that promises and agreements must be kept (*pacta sunt servanda*) into the wider ethical conception of good faith as a principle of natural law. The legal principle of good faith was firmly based on the moral principle by the Roman jurists. *Bona fides*, in Roman society, was always associated with trustworthiness, conscientiousness and honourable conduct. The good faith actions in Roman Law permitted discretion to the judge to condemn breaches of good faith including, as Gaius explained, deciding what 'fairness' required in a particular case.<sup>1</sup> But the judges and jurists were concerned with *law*, and although *bona fides* in Roman Law was based on the ethical concept, it was applied in the form of specific rules, the most important of which were formulated in relation to the basic rule – *pacta sunt servanda*.<sup>2</sup> The 'core' of good faith has always existed in this basic obligation, and its development into

a more complex and sophisticated principle began with more complex and sophisticated views about the obligation of contracts, promises and agreements.

The emergence of Christianity as the dynamic influence in European human affairs was a vital factor in the development of good faith. The Fathers of the Early Church proclaimed the Christian doctrine of the personal Creator – God as the author of the eternal law as well as of the natural moral law which is promulgated in the voice of conscience and in reason.<sup>3</sup> Good faith, as far as the Church was concerned, was not merely a dictate of human positive law. It was a precept of natural and eternal law, and in the law of the Church itself (the canon law), good faith and conscience were intertwined. The Church would not accept, because it was contrary to the dictates of a good conscience, the failure of Roman Law to enforce some promises for lack of form. As von Mehren said, ‘the Church supported strongly the proposition that a simple, formless promise should be binding: *pacta sunt servanda*’.<sup>4</sup> The view of the Church on this matter eventually prevailed in the civil law, thus strengthening the association of moral good faith and conscience with legal contractual good faith. The combined influence of centuries of Roman Law *bona fides*, with its connotations of trustworthiness, conscientious and honourable conduct, and emphasis of the Church on good faith and conscience in promise-keeping, ensured that modern civil law (and international law) rules of promises and agreements would reflect these moral virtues.

The basic obligation of good faith arising from a promise or an agreement was also originally enforced on grounds of conscience in the Court of Chancery in England, but the development of more sophisticated rules of good faith in English Law did not occur in the context of the common law of contract in that system, for historical and technical reasons, but through the jurisdiction of the Court of Chancery generally.<sup>5</sup> The Roman Law concept of *bona fides* made its most obvious contribution to modern legal theory in the area of contract, but the moral content of that concept, specifically the requirement to act conscientiously, honourably, fairly, appeared very prominently in other areas of Roman Law as well, and their legacy, much increased, can be seen clearly in modern systems. As Buckland illustrates, *bona fides*, in the sense of ‘honest belief’, was an integral part of the rules on, for example, *usucapio*, compensation for fusion of the goods of different owners, and restoration of fruits in boundary disputes.<sup>6</sup> Roman Law good faith was also perceived by modern civilians as the basis of abuse of rights and unjustified enrichment doctrines.<sup>7</sup>

Moral virtues are clearly involved in the legal principle of good faith, but the precise virtues and the manner of their involvement requires further analysis. The elements and various manifestations of good faith identified earlier included the rule *pacta sunt servanda* and honesty, fairness and reasonableness. These have for centuries been distinctively and directly related to good faith. *Pacta sunt servanda* is a positive rule of international law and requires little discussion here, but as regards honesty, fairness and reason-

ableness, while their general meanings may be understood well enough, they are elemental expressions which are difficult, if not impossible, to define precisely. They are also to some extent interconnected. For example it is 'fair' to exercise legal rights in a 'reasonable' manner and it is unfair to take advantage of another's 'honest' mistake. It is not so important for lawyers to try and define these moral virtues precisely as to consider the way in which they have become *legal* and why there is universal acceptance of a *legal* principle of good faith which embraces these moral virtues. Cardozo wrote, 'The moral code of each generation, this amalgam of custom and 'philosophy' and many an intermediate grade of conduct and belief supplies a norm or standard of behaviour which struggles to make itself articulate in law'.<sup>8</sup> The process of articulation of moral norms and standards in law is a familiar phenomenon in the history of the development of legal systems. The question of the relationship between morality, religion and law, particularly in primitive and ancient societies is complex,<sup>9</sup> but need not concern us, as the fact of the relationship, and the process described by Cardozo, are both fully accepted. There is a close, and in many cases, virtually identical relationship between legal and moral rules and the possibility of identifying many, if not most, legal rules as 'good faith rules', in as much as the rules of any developed legal system may be presumed to reflect the standards of honesty, fair dealing and reasonableness implicit in the very idea of law and justice. This raises the questions, 'why is a separate *principle* of good faith necessary?' and 'what function could such a principle have which is not in any case performed by Cardozo's process or implicit in the very nature of law?'

The answer to the second question will be discussed later when the function of the principle of good faith is considered. As regards the first question, the conditions required for the classification of a fundamental principle in international law by Professor Schwarzenberger<sup>10</sup> are surely satisfied and justify the universally held acceptance of the fundamental principle of good faith.

- 1 Good faith is exceptionally significant for legal theory. Its basic rule – *pacta sunt servanda* – is not only of cardinal importance in international law, but in legal systems generally.
- 2 As well as *pacta sunt servanda*, there are, it was suggested above, three moral elements (honesty, fairness and reasonableness) which are distinctively and directly related to, and reflected in, legal rules of good faith. These rules cover a relatively wide range of issues and fall without artificiality under one and the same heading.
- 3 Good faith forms an essential part of every system of law, including of course international law.<sup>11</sup>

By these general tests, good faith qualifies as a fundamental principle of international law and does not differ, on a technical basis, from any other

fundamental principle. The fact that the rules derived from this principle are based directly on specific and clearly identifiable moral concepts does not diminish the *legal* nature of the principle, but that legal nature may diminish the scope of the *moral* concepts concerned because in any area of law where there is a close and obvious connection between law and morality, the inherent limits of law operate.<sup>12</sup>

### **The Principle of Good Faith in International Law**

The nature and scope of good faith, as it emerges from the earliest writers in the law of nations, does not differ significantly from *bona fides* in Roman and civil law. Belli applied the rules on pledged faith and agreements in private law to agreement with enemies in war, and relied on the rules in the *Digest*, and the Glossators and the Doctors of the Church as his authorities. The scope of good faith in his treatise was virtually confined to the rule *pacta sunt servanda*.<sup>13</sup> Ayala gave good faith considerably more attention, but he also largely restated or adapted rules from Roman Law.<sup>14</sup> The first major writer on the emerging new law of nations, Gentili, made good faith the basis of his rules on a wide variety of topics, and decisively shifted the emphasis from the perception of *pacta sunt servanda* as comprising virtually the *only* element in good faith to a wider ethical–legal principle. In particular, he impressed on the consciousness of his time the scope of good faith in relation to the interpretation and performance of agreements ‘without cavil and in a broad spirit’. However, he also insisted on the basic importance of the rule that faith must be kept, and distinguished between good faith in accordance with law, and religious or moral good faith.<sup>15</sup>

Grotius, the most influential of ‘the founders’ of modern international law, made good faith the foundation of the relationship between States, and his admonition on good faith has rung through the ages.<sup>16</sup> Grotius also drew upon the rules of Roman Law, but he relied on the universally accepted law of nature as the basis of *pacta sunt servanda*, and thus reinforced the basis of international law on broader foundations than the narrow technical rules of Roman Law.<sup>17</sup> Although the congruence of the law of nature and the law of nations is close in the treatise of Grotius, he does make clear that they are not identical.<sup>18</sup>

Following Grotius, and up to the nineteenth century, there is a general tendency to maintain the close association between the law of nature and the law of nations, and there is thus a certain confusion about the *legal* nature of the rules of the law of nations (including *pacta sunt servanda*). However, the rise of positivism in the nineteenth century, and the relative decline in the influence of natural law, transformed the now established (and following Vattel particularly) the more scientifically stated rules of the law of nations into the system of positive rules of the modern system. With this development,

The principle of good faith in international law began to resemble the scope of the principle in legal systems generally. In particular, an examination of the rules of the modern system reveals that there are now many normal rules (such as estoppel) which exhibit the elements of honesty, fairness and reasonableness of the principle, and its scope is correspondingly reduced. However, because of the undeveloped nature of international law relative to municipal systems, and in particular because of the central importance of treaties in the modern system, the scope of the principle, as it appears in the jurisprudence of international tribunals, is potentially greater than in developed municipal legal orders.

The scope of good faith as a mechanism to regulate and prevent the abuse of a legal right was demonstrated in the *Admission of a State to the United Nations Case*,<sup>19</sup> and its application in that case confirms the indispensability of the principle in resolving the difficult problem of reconciling legal rights, and the political rights and interests of independent sovereign states in the international order. The case, however, also revealed that some judges of the Court were uncertain about the nature of the principle; Judge Alvarez, for example, considered that abuse of the right of a State to vote against the admission of a State to the UN was a *moral* rather than a legal failure.<sup>20</sup> Although he changed his opinion,<sup>21</sup> similar doubts surfaced periodically in subsequent cases.<sup>22</sup> A detailed consideration of the cases, particularly in the first decades of the International Court suggests that much of the uncertainty about the *legal* nature of the principle of good faith in international law arose from confusion about the scope and function, rather than the nature, of the principle. The cases confirm acceptance of the principle, but suggest doubts about its application to particular situations, and about how precisely one applied 'obligatory' extra legal criteria which nevertheless remained outside the legal rule.<sup>23</sup>

Another source of confusion which emerged from a study of the cases was failure to distinguish clearly between the scope of good faith as a mechanism to control the exercise of an undoubted legal right, as in the *Admission Case*, and its scope in the creation or definition of a *legal* obligation in situations where the moral content of good faith, in a legal context, appears to demand recognition in a legal rule. There may be factors other than the desirability of advancing fairness and reasonableness in the relations between States, which require to be taken into account when a Court is deliberating whether an alleged rule exists, or is applicable, or should be extended to apply to some situation. The inherent limitations of law, and the limit to the amount of law which any society (especially international society) can afford, even when moral wrong has been done, have already been mentioned.<sup>24</sup> If there is no established legal obligation, or a Court, for whatever reason, does not see fit to create one by extension or analogy, even if considerations of honesty, fairness and reasonableness indicate that this might be done, the legal principle of good faith is not applicable. However, if the Court is satisfied that

a legal obligation does exist, albeit one which is doubtful in extent or difficult to characterize precisely in legal terms, this is a paradigm situation for invocation of the principle of good faith.

The International Court, in the *Right of Passage Case* gave Judge Wellington Koo particularly the opportunity to draw attention to the potential value of the principle in reconciling the co-existence of two legal rights (as distinct from the abuse of a legal right).<sup>25</sup> This is the kind of situation which arises, for example, where there are conflicting treaties. The rules in the *Vienna Convention* on this matter do not provide a complete solution, and do not absolve a State from responsibility which may arise from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.<sup>26</sup> As regards treaties generally, the basic rule *pacta sunt servanda* is within the principle of good faith in international law. It is, of course, a positive normal rule, but it remains within the scope of the principle, because of the integral relationship of the basic proposition and the *principle*, reflected in the formulation of Article 26 of the *Vienna Convention on the Law of Treaties* – ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith’. The principle in international law finds its most important and characteristic force in ‘the good faith performance’ of treaties, although it is also relevant in the negotiation of treaties, in so far as normal rules, such as estoppel, may not be applicable. It is also very relevant in the interpretation of treaties, where the principle demands that treaties must be interpreted in accordance with their spirit.

### **The Function of the Principle of Good Faith**

Some indication of the function of the principle may be gathered from its nature and scope, as revealed by the foregoing discussion, but it is difficult to explain precisely how the principle fulfills its purpose in international law. The problem with other ‘fundamental’ principles of international law is not so acute. A principle is a common denominator for a number of related rules and a principle functions through the application of rules singly or in combination to relevant situations, and by providing a coherent source for the development of a new rule. Principles such as sovereignty or recognition for example, have established and accepted rules associated with them. However, apart from the accepted positive rule *pacta sunt servanda*, it is hardly possible to point to other specific ‘rules’ of good faith.

There is of course no lack of rules of international law, such as estoppel, *rebus sic stantibus*, fraud and so on, which are obviously associated with the distinctive and characteristic elements of good faith (honesty, fairness, reasonableness). These and other rules like them clearly originated in general conceptions of ‘justice’ and ‘good faith’. The question is therefore presented

whether the principle of good faith is a matter of *rules* at all? One fact emerges clearly from the foregoing examination. It is extremely difficult to differentiate between what have been identified as normal rules (concerned with honesty, fairness and reasonableness) and rules suggested as ones which could properly be subsumed under the *principle* of good faith, the nature of which is a legal principle *distinctively* and *directly* related to the moral elements just mentioned.

As an alternative to the curious possibility that the principle of good faith, which undoubtedly exists in international law, is a fundamental principle which cannot be inductively or deductively defined because of the absence of rules, it might be suggested that what is really involved is a *Rule of Good Faith*. This would help to explain the terminological confusion in this area between the rule (or rules) of good faith and the principle (or principles) of good faith.<sup>27</sup> That alternative is rejected. It is submitted that it is correct to refer to the *Principle of Good Faith in International Law*, although the difficulty about identifying rules of this fundamental principle is a real difficulty, arising from the nature and scope of the principle. It is a *legal* principle, but the substance of it is the distinctive group of moral concepts (honesty, fairness and reasonableness) which is not easily reducible to precise rules.

As a legal principle it must be applied where relevant, and that means that it must be applied only where there is a legal obligation in question. The difficulty which some judges have adverted to about introducing extra-legal criteria into international law under some vague rubric like good faith is a simple reflection of the recognition of the existence of different normative orders governing the relations between subjects of international law. The legal and moral orders may be quite closely related in some respects, but they are different and must be kept distinct.

The principle of good faith in international law provides a mechanism for the articulation of a specific group of concepts of the moral order in the form of legal rules. This process of articulation may result eventually in the emergence of 'normal' rules (such as estoppel) which may continue to be referred to in connection with 'good faith', but once articulated and established, operate as normal rules of law without the necessity of continued reference to the *principle*. It follows that the more developed a legal system is, the less scope there will be for the principle, and it is already the case that with the ever-growing body of treaties designed to codify and progressively develop the rules of international law (for example, *The Convention on the Law of Treaties*) the need to invoke the principle as the source of a rule is becoming less.

The enduring and indispensable functions of the principle have emerged from this study. These are:

- (a) The addition of good faith (honesty, fairness and reasonableness) as an integral part of the rule *pacta sunt servanda*. Good faith must be ob-

served in all the obligations connected with treaties (negotiations, formation, performance).

- (b) Good faith must be observed in the exercise of legal rights.
- (c) The conflict of equal legal rights must be reconciled by the application of good faith.
- (d) The application of good faith to doubtful obligations or to obligations which are difficult to characterize precisely in legal terms, to give definition to these obligations. This function may result in the creation of a new legal rule where the moral content of good faith, in a *legal* context, appears to demand articulation.

It is not possible to say to what extent international tribunals will be disposed to apply the principle of good faith. Law may aspire to justice and to high moral standards generally but there are complex factors involved in law creation (not least the problems of ascertainment of certain kinds of fact, enforceability and political expediency) which may lead to a decision at some period in a legal system that the principle is not applicable. However, as times and circumstances change, the inherent force of the moral elements in the principle will succeed in securing articulation in law.<sup>28</sup>

Finally, reference was made in the Introduction to good and bad faith.<sup>29</sup> The question whether there are two concepts, and the relationship, if any, between them did not emerge as an issue in the examination of good faith as a legal principle in this study. It is clear that *good* faith was uniformly treated as the dynamic principle and *bad* faith simply regarded as a breach of that principle.

### **Definition of the Principle of Good Faith in International Law**

Based on the nature, scope and function of the principle of good faith in international law as revealed by this study, the following definition of the principle is presented:

The principle of good faith in international law is a fundamental principle from which the rule *pacta sunt servanda* and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by the compelling standards of honesty, fairness and reasonableness prevailing in the international community at that time.

### **Notes**

- 1 See Chapter 3, p. 21.
- 2 See pp. 22–3.
- 3 See p. 26.

- 4 Von Mehren (1957), p. 580.  
5 O'Connor (1990), pp. 5–10.  
6 Buckland (1932), pp. 243–4.  
7 Ibid., p. 545.  
8 Cardozo (1928), p. 17.  
9 It used to be accepted that law and religion were indistinguishable in primitive societies, but this view has now been revised and there is increased recognition of the secular character of primitive law. See Diaz, (1985) pp. 390–1, and for a useful summary and reference to various anthropological jurists' views on the relationship between custom and law in primitive societies see Lloyd and Freeman, (1985), pp. 873–80.  
10 Schwarzenberger and Brown (1976), p. 35.  
11 Ibid.  
12 Even Lord Devlin (1965, p. 23), concedes that the whole dead weight of sin cannot be allowed to fall upon the law. See also generally, Allot (1980).  
13 See Chapter 5, pp. 46–7.  
14 See pp. 47–9.  
15 See pp. 51–2.  
16 See p. 56.  
17 See p. 59.  
18 See p. 61.  
19 The case is discussed Chapter 6, pp. 82–3.  
20 I.C.J. Rep. 1948, p. 57 at p. 71.  
21 I.C.J. Rep. 1949, p. 4 at p. 48.  
22 For example, Judge Klaestad, I.C.J. Rep. 1955, p. 88; Judge Morelli, I.C.J. Rep. 1969, p. 213.  
23 Judge Morelli, see previous note.  
24 See p. 120; and see Hart (1961), p. 162.  
25 I.C.J. Rep. 1960, p. 6 at p. 67.  
26 *Vienna Convention*, Art. 30(5).  
27 See Chapter 1, p. 2.  
28 Article 52, Vienna Convention on the Law of Treaties now provides that a treaty procured by threat or use of force is void, presenting an example of a change in the traditional rule on this matter brought about by a development in the moral climate of international relations.  
29 Chapter 1. p. 2.

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