

# What Are the Functions of the General Principles?

## Good Faith and International Legal Pragmatics

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### Abstract

As this article seeks to establish, a fuller understanding of the operation of the principle of good faith helps to understand the function or functions of general principles in international legal discourse, generally. Three propositions are argued. First, good faith serves as a principle of international legal pragmatics. It helps to explain the understanding of conduct in much the same way as the requirement that in a verbal utterance, the first singular pronoun “I” be used to refer to the utterer, and a temporal expression such as “now” to the point in time of the utterance. Second, unlike many general principles of international law, the principle of good faith does not itself presuppose the good of any particular state of affairs. It helps to ensure the

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comprehension of communicative behaviour on the part of international law-makers, irrespective of the particular interests or values that they themselves happen to be pursuing. Thus, the principle of good faith can be accommodated with a value-pluralist legal order. Third, in international law, there are other norms that share with the principle of good faith the distinguishing traits outlined in this article, such as for example the principle of *pacta sunt servanda* and the principle of proportionality. It stands to reason that they, too, be characterised as principles of international legal pragmatics.

## I. Introduction

The increased diversification and specialisation of international law and legal practice has brought a renewed interest among international law academics in the general principles of international law. One of the more interesting issues currently considered is the overall function of general principles.<sup>1</sup> Over the many years of writing on the topic, international scholars have ascribed a wide variety of functions to general principles. Thus, as contended, general principles:

- Reveal the values which inspire the whole international legal order.<sup>2</sup>
- Act as conceptual aids through which the totality of legal phenomena may be more easily grasped.<sup>3</sup>
- Facilitate systematic description of international law and enable theoretical reflection on individual legal phenomena.<sup>4</sup>
- Complement to a certain extent the conventional and customary international law.<sup>5</sup>

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<sup>1</sup> See for instance the topic of the conference “General Principles as Applied by International Courts and Tribunals and the Coherence of International Law”, co-organised in Paris, on 21.-22.6.2017, by PluriCourts, the Centre for Global Governance Studies at KU Leuven, and the Centre Universitaire de Norvège à Paris, sponsored by the European Society of International Law. The program of the Conference is available at: <<https://www.paris.uio.no>>. Last visited on 24.9.2017.

<sup>2</sup> A. Cançado Trindade, *International Law for Humankind*, 2010, 56.

<sup>3</sup> M. Koskenniemi, *General Principles: Reflexions on Constructivist Thinking in International Law*, *Oikeustiede-Jurisprudentia* 18 (1985), 120, at 157. The article is reprinted in: M. Koskenniemi (ed.), *Sources of International Law*, 2000, 359.

<sup>4</sup> M. Koskenniemi (note 3), 157; G. Schwarzenberger, *A Manual of International Law*, 1957, 35; R. Kolb, *Principles as Sources of International Law (With Special Reference to Good Faith)*, *NILR* 53 (2006), 1, at 27.

- Help bringing value considerations into the legal system.<sup>6</sup>
- Contribute to the filling of gaps, and help to prevent the occurrence of a *non liquet* in judicial proceedings.<sup>7</sup>
- Serve to make the law of nations a viable system for application in a judicial process.<sup>8</sup>
- Facilitate the reaching of compromises in the negotiation of treaties.<sup>9</sup>
- Serve as a guide to the interpretation of rules of conventional and customary international law.<sup>10</sup>
- Serve to modify rules, and thus, to make the international legal system more flexible.<sup>11</sup>

Overall, to most international lawyers legal doctrine may appear as somewhat confusing. It is obvious that at least some of the outlined functions of the general principles bear directly on the respective theoretical orientation of scholars as either legal positivists or legal idealists.<sup>12</sup> That is to say that depending on the notion of international law defended by a person, that person will conceive differently not only of the idea of the coherence of the international legal system,<sup>13</sup> but also, for the same reason, of the function of general principles. Yet, further research is required to establish the precise features of this relationship and how it plays out in the context of modern international law and its various branches. In a best-case scenario, this task may be accomplished by contemporary international legal scholarship.

A necessary element of any productive additional research into the function of the general principles of international law is a comparative study of the operation of singular norms that come clearly within the extension of this normative category. The contribution of this article to this common

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<sup>5</sup> C. Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(c) and “General Principles of International Law”*, Duke J. Comp. & Int’l L. 35 (1994), 35 et seq.; G. Gaja, *General Principles of Law*, in: R. Wolfrum (ed.), MPEPIL, 2012, Vol. IV, 370, at 374.

<sup>6</sup> R. Kolb (note 4), 29; D. P. O’Connell, *International Law*, Vol. 1, 1965, 10 et seq.

<sup>7</sup> G. Gaja (note 5), 374; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), Grotius Classic Reprint Series, Vol. II (1987), 390; R. Kolb (note 4), 30 et seq.; C. Bassiouni, *A Functional Approach to “General Principles of International Law”*, Mich. J. Int’l L. 11 (1989-90), 768, at 778 et seq.; G. J. H. van Hoof, *Rethinking the Sources of International Law*, 1983, 146.

<sup>8</sup> I. Brownlie, *Principles of Public International Law*, 5<sup>th</sup> ed. 1998, 16.

<sup>9</sup> R. Kolb (note 4), 35 et seq.

<sup>10</sup> C. Bassiouni (note 7), 776 et seq.; R. Kolb (note 4), 32 et seq.

<sup>11</sup> C. Bassiouni (note 7), 779 et seq.; R. Kolb (note 4), 32 et seq.

<sup>12</sup> On legal positivism and legal idealism, see e.g. U. Linderfalk, *Understanding the Jus Cogens Debate: The Pervasive Influence of Legal Positivism and Legal Idealism*, NYIL 46 (2015), 51.

<sup>13</sup> M. Prost, *The Concept of Unity in Public International Law*, 2012.

effort will be a study of the operation of the principle of good faith. Good faith is recognised by many international lawyers as a clear-cut example of a general principle of international law;<sup>14</sup> as sometimes said, it is, perhaps, the most important general principle of all.<sup>15</sup> This categorisation receives confirmation in the preambles to the 1969 and 1986 Vienna Conventions on the Law of Treaties, in which the “universally recognised” principle of good faith is placed on par with the principle of free consent and “the *pacta sunt servanda* rule”.<sup>16</sup>

As the article will suggest, a fuller understanding of the operation of the principle of good faith helps to understand the function or functions of general principles in international legal discourse, generally. Three propositions will be argued:

- (1) Good faith serves as a principle of international legal pragmatics. In the specific context of international legal discourse,<sup>17</sup> it helps to explain the understanding of communicative conduct in much the same way as any generally applicable pragmatic principle, which insists, for instance, that the first singular pronoun “I” be used to refer to the utterer, and a temporal expression such as now to the point in time of the utterance.
- (2) Unlike many general principles of international law, the principle of good faith does not itself presuppose the good of any particular state of affairs. It helps to ensure the comprehension of communicative behaviour on the part of international law-makers (that is, states and international organisations), irrespective of the moral or political agen-

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<sup>14</sup> See e.g. *G. Ress*, The Interpretation of the Charter, in: B. Simma/H. Mosler/A. Paulus/E. Chaitidou (eds.), *The Charter of the United Nations. A Commentary*, 2<sup>nd</sup> ed. 2002, Vol. 1, 13, at 19; *R Kolb*, Article 2(2), in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), *The Charter of the United Nations. A Commentary*, 3<sup>rd</sup> ed. 2012, Vol. 1, 166, at 169; *M. Kotzur*, Good Faith (*Bona Fides*), in: R. Wolfrum (note 5), Vol. IV, 508, at 511; *J. F. O’Connor*, Good Faith in International Law, 1991, 120 et seq.

<sup>15</sup> See e.g. *M. Shaw*, *International Law*, 7<sup>th</sup> ed. 2014, 73; *R. Jennings/A. Watts*, *Oppenheim’s International Law*, 9<sup>th</sup> ed. 1992, Vol. 1, 38; *H. Thirlway*, *The Law and Procedure of the International Court of Justice, 1960-1989*, Part One, *BYIL* 60 (1989), 4, at 7 et seq.; *M. Vitrally*, Review Essay: Good Faith in Public International Law, *AJIL* 77 (1983), 130, at 132.

<sup>16</sup> Preambular para. 3.

<sup>17</sup> In this article, the term “international legal discourse” is used to refer simply to any verbal exchange of propositions bearing on international law. In this sense, international legal discourse extends over a number of different activities, such as the making of international law, the interpretation and application of international law, the description of international law, the systemisation of international law, the critical assessment of international law, the pleading of a particular interpretation or application of international law, the appeal for its revision, and so forth.

da that they themselves happen to be pursuing. Thus, the principle of good faith can be accommodated with a value-pluralist legal order.

- (3) In international law, there are other norms that share with the principle of good faith the traits outlined in points (1) and (2). They, too, can be characterised as principles of international legal pragmatics.’

The line of argument put forward will be taking the form of a combined inductive and deductive reasoning – like any child’s understanding of a general concept, it will consist in a process going back and forth from the specific to the general, and from the general to the specific. First, the article will inquire into the way in which the principle of good faith has been put to use by international courts and tribunals in the particular context of treaty interpretation (Section II), and in the context of the application of treaty law, generally (Section III). Second, based on the patterns of practice established, the article will work out a set of hypotheses providing the contours of a general theory on the function of the principle of good faith as applied in a treaty law context (Section IV). Third, the article will put this set of hypotheses to the test of further practice in order to establish whether it can be adjusted to serve also as a description of the application of the principle of good faith outside of the context of the application of treaty law proper (Section V). Fourth and finally, the article will synthesise all results of the study and bring out the inferences relevant to a discussion of the function of good faith and of principles of international law, generally (Section VI).

## II. Good Faith in the Context of Treaty Interpretation

A large number of disputes submitted to resolution by international courts and arbitration tribunals bear explicitly on the relevance of the principle of good faith for the interpretation of treaties.<sup>18</sup> This is perhaps not surprising since in common Art. 31, para. 1 of the 1969 and 1986 Vienna Conventions on the Law of Treaties (VCLTs), explicit reference is made to the principle. According to what the Article provides, “[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”.<sup>19</sup> The recent judgment of the International Court of Justice in

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<sup>18</sup> For further references, see *U. Linderfalk*, *On the Interpretation of Treaties*, 2007.

<sup>19</sup> Vienna Convention on the Law of Treaties, adopted on 22.5.1969, 1155 UNTS 331; Vienna Convention on the Law of Treaties between States and International Organizations or

*Maritime Delimitation in the Indian Ocean* will serve to illustrate the further implications of this requirement.<sup>20</sup>

## 1. Maritime Delimitation in the Indian Ocean: Understanding Treaty Language

In its application to the Court, Somalia requested a decision on “the complete course of the single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean”.<sup>21</sup> It invoked as a basis of jurisdiction of the Court the declarations that the two parties had made pursuant to Art. 36, para. 2 of the Statute of the International Court of Justice (ICJ), in 1963 and 1965, respectively. Kenya, for its part, directed attention to the fact that it had appended to its 1965 declaration a series of reservations. Among other things, it had specifically excluded from the jurisdiction of the Court any dispute “in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement”.<sup>22</sup> As Kenya contended, the dispute between Kenya and Somalia came within the scope of this reservation. This would be the case since by the conclusion in 2009 of a Memorandum of Understanding (“the MoU”), the two parties had agreed on a method of settlement of their maritime boundary dispute other than having recourse to the Court. More specifically, they had agreed to settle the existing dispute by the conclusion of agreement, and this agreement was to be concluded after the Commission on the Limits of the Continental Shelf had made its recommendations to each of the two states concerning the establishment of the outer limits of their continental shelves beyond 200 nautical miles.<sup>23</sup> Consequently, as claimed by Kenya, the Court lacked jurisdiction to entertain Somalia’s application.

At the heart of this preliminary objection was the text included in para. 6 of the MoU:

“The delimitation of *maritime boundaries in the areas under dispute, including the delimitation of the continental shelf beyond 200 nautical miles, shall be*

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between International Organizations, adopted on 21.3.1986, UN Doc. A/CONF.129/15, at the time of writing, the Convention has not yet entered into force.

<sup>20</sup> *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment of 2.2.2017, available at: <<http://www.icj-cij.org>>.

<sup>21</sup> *Maritime Delimitation in the Indian Ocean* (note 20), para. 11.

<sup>22</sup> *Maritime Delimitation in the Indian Ocean* (note 20), para. 31.

<sup>23</sup> *Maritime Delimitation in the Indian Ocean* (note 20), para. 56.

agreed between the two coastal States on the basis of international law after the Commission has concluded its examination of the separate submissions made by each of the two coastal States and made its recommendations to two coastal States concerning the establishment of the outer limits of the continental shelf beyond 200 nautical miles.”<sup>24</sup>

Kenya insisted that all maritime areas were intended to be covered by that paragraph, and in order to support this proposition, it pointed to the use of the plural of “maritime boundaries” and “areas under dispute”, and to the word “including”.<sup>25</sup> As Kenya maintained, whether a dispute between Kenya and Somalia referred to the delimitation of the territorial sea, the Exclusive Economic Zones (EEZ), or the continental shelf – whether within or beyond the 200 nautical miles – it came within the scope of application of para. 6.<sup>26</sup> The Court found that before it determined this issue, it had first to clarify the meaning of the precise terms of the MoU. It applied for that purpose customary international law as reflected in Art. 31, para. 1 of the 1969 Vienna Convention.

In its consideration of the context of para. 6, the Court noted the wording of para. 2 of the MoU, which outlined the existing dispute between Kenya and Somalia: “The claims of the two coastal States cover an overlapping area of the continental shelf which constitutes the ‘area under dispute’.” As the Court inferred, “[t]he delimitation of maritime boundaries in the areas under dispute” must be taken to relate to the same dispute as referred to in para. 2 – the delimitation of the continental shelf between the two states.<sup>27</sup> Contrary to what Kenya had argued, it could not be taken to relate to the delimitation of the territorial sea or the EEZ.

The structure of this reasoning helps explain the relevance of good faith for the interpretation of treaties. As this article will suggest, the principle of good faith forms a linkage between the means of interpretation that feature in Arts. 31-33 of the two VCLTs and the overarching purpose of those same provisions. As envisaged by Arts. 31-33, ultimately, treaty interpretation serves to determine the communicative intention of the treaty parties, that is to say, what the parties intended to communicate by adopting, ratifying, or acceding to the particular treaty considered.<sup>28</sup> For any intellectual process

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<sup>24</sup> The judgment quotes the MoU in full at *Maritime Delimitation in the Indian Ocean* (note 20), para. 37. Italics are added.

<sup>25</sup> *Maritime Delimitation in the Indian Ocean* (note 20), para 57.

<sup>26</sup> *Maritime Delimitation in the Indian Ocean* (note 20).

<sup>27</sup> *Maritime Delimitation in the Indian Ocean* (note 20), paras. 83-84.

<sup>28</sup> Compare the following statement made by the International Court of Justice in *Navigational and Related Rights (Costa Rica v. Nicaragua)*: “It is true that the terms used in a treat-

aiming to determine the communicative intention of some treaty parties, it remains a problem that such an intention can only be assumed.<sup>29</sup> Thus, the interpretation of a treaty is no different from the understanding of just any verbal utterance produced by a person or group of persons at a particular occasion – whether orally or in writing.<sup>30</sup> As emphasised by modern pragmatics, an utterance can be understood only on the assumption that whoever produced it acted rationally.<sup>31</sup> The good faith requirement inserted in common Art. 31 can be seen as recognition of the necessity of such a rationality assumption.

This observation is fully consistent with the reasoning of the International Court in *Maritime Delimitation in the Indian Ocean*. The Court was obviously doing more than merely considering the terms of para. 6 of the MoU in their context. It was assuming that the parties to the agreement had tailored the text of the MoU so that it would conform to certain communicative standards. More specifically, the Court was assuming that throughout the text of the MoU, the parties ascribed to all words and lexicalised phrases a consistent meaning. This is why it inferred that the words “area of dispute”, which figure not only in para. 6, but also in several other provisions of the MoU, such as para. 2, had to be taken to refer consistently to the same area.

## 2. Maritime Delimitation in the Indian Ocean: Exercising Discretion

The relevance of good faith for the interpretation of treaties extends beyond the assumption that treaty parties tailor the language of their treaties so that it conforms to certain communicative standards. This is because of the inherent nature of the relevant legal regulation. If the application of Arts. 31-33 of the VCLTs is throughout dependent on assumptions such as the one highlighted in Section II 1, then it follows that the relevant international law can be described as rules of interpretation, proper.<sup>32</sup> Examples include:

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ty must be interpreted in light of what is determined to have been the parties' common intention.” Judgment of 13.7.2009, ICJ Reports 2009, 213, at 242.

<sup>29</sup> See *U. Linderfalk* (note 18), 29 et seq.

<sup>30</sup> *U. Linderfalk* (note 18), 29 et seq.

<sup>31</sup> See e.g. *D. Blakemore*, *Understanding Utterances. Introduction to Pragmatics*, 1992.

<sup>32</sup> By a *rule of interpretation proper*, lawyers usually mean a rule stated in a particular form: “If, in the interpretation of a treaty, a state of affairs of a particular kind P obtains, then

‘If a treaty uses elements of conventional language (such as words, grammatical structures, or pragmatic features), the treaty shall be understood in accordance with the rules of that language.’<sup>33</sup>

‘If in one of the two possible ordinary meanings of a treaty it entails a logical contradiction, whereas in the other ordinary meaning it does not, then the latter meaning shall be adopted.’<sup>34</sup>

‘If one of the two possible ordinary meanings of a treaty helps attain its object and purpose, whereas the other ordinary meaning does not, then the former meaning shall be adopted.’<sup>35</sup>

‘If one of the two possible ordinary meanings of a treaty accords with the way in which the treaty has subsequently come to be applied, whereas the other meaning does not, then the former meaning shall be adopted.’<sup>36</sup>

‘If the preparatory work of a treaty indicates a common understanding of the negotiators of a particular term of the treaty, then the term shall be interpreted accordingly.’<sup>37</sup>

Rules like these leave to parties to the VCLTs a certain discretion. Although states and international organisations are bound to apply a certain number of rules of interpretation, in many situations they retain the power to choose between diverse courses of action. For example, there is often nothing in the Vienna Conventions that helps resolve situations in which the application of two rules of interpretation drawing on the context as defined in Art. 31 of the VCLTs lead to conflicting results. This is not to say that parties to the VCLTs are left to decide such situations at will. As argued in this article, the principle of good faith serves to limit the exercise of any discretion conferred under Arts. 31-32. If good faith required that interpretation be based on the assumption that treaty parties communicate rationally, then it would seem to follow that interpreters should be guided by this

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the treaty shall be interpreted in a particular manner Q.” See e.g. *J. Wróblewski*, *The Judicial Application of Law*, 1992, 96 et seq.

<sup>33</sup> See e.g. *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment of 13.12.1999, ICJ Reports 1999, 1045, at 1062.

<sup>34</sup> See e.g. *Case of Soering v. The United Kingdom*, Judgment of 7.7.1989, available at: <<http://hudoc.echr.coe.int>>, 33 and 34.

<sup>35</sup> See e.g. *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment of 17.3.2016, available at: <<http://www.icj-cij.org>>, para. 40.

<sup>36</sup> See e.g. *Guinea – Guinea-Bissau Maritime Delimitation*, Award of 14.2.1985, 77 ILR, 636, at 666 et seq.

<sup>37</sup> See e.g. *LaGrand Case (Germany v. United States)*, Judgment of 27.7.2001, ICJ Reports 2001, 466, at 503 et seq.

same idea throughout the entire process of interpretation – even in cases when the settlement of an issue is left to their discretion. Interpreters should continue pursuing the same ultimate purpose – the determination of the communicative intention of the treaty parties – seeking good reasons for choosing one course of action rather than any other that could potentially be taken.<sup>38</sup>

This was precisely the approach of the International Court in *Maritime Delimitation in the Indian Ocean*. To buttress its objection to the jurisdiction of the Court, Kenya directed attention to the fact that where the term “area of dispute” appeared in para. 6 of the MoU, it was rendered in the plural, whereas in para. 2 of the instrument, the singular form of this same term (“area under dispute”) was used. Kenya inferred from this fact that the delimitation of the territorial sea and the EEZ would come within the scope of para. 6.<sup>39</sup> Interestingly, for its argument, it would seem to have assumed, like the Court, a rule of interpretation drawing upon an assumed relationship between para. 6 and other parts of the same treaty instrument. This is the rule assumed by the Court:

‘If the adoption of the one of the two possible ordinary meanings of a treaty implies that a consistent meaning will be ascribed to words and lexicalised phrases throughout the text of that treaty, whereas the adoption of the other ordinary meaning does not, then the former alternative shall be preferred.’

This is the rule that Kenya assumed:

‘If the adoption of one of the two possible ordinary meanings of a treaty implies that a different meaning will be ascribed to any similar but different words and lexicalised phrases used for the text of a treaty, whereas the adoption of the other ordinary meaning does not, then the former alternative shall be preferred.’

The situation is interesting because it entails a conflict of two rules of interpretation that can only be resolved by giving preference to one rule over the other. The decision of the Court implies that preference be given to the former rule. This conclusion does not follow from any rule of interpretation. Nevertheless, as the Court seemed very keen to demonstrate, it is supported by good reasons:

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<sup>38</sup> See *U. Linderfalk/M. Hilling*, The Use of OECD Commentaries as Interpretative Aids: The Static/Ambulatory-Approaches Debate Considered from the Perspective of International Law, *Nordic Tax Journal* (2015), 34, at 53 et seq.

<sup>39</sup> *Maritime Delimitation in the Indian Ocean* (note 20), para. 57.

‘the singular and plural versions of the term are used interchangeably elsewhere in the text, even in the same paragraph, such as the fourth paragraph, which provides that Somalia’s submission of preliminary information ‘may include the area under dispute’ and that Kenya has no objection to ‘the inclusion of the areas under dispute’ in that submission (emphasis added). This suggests that no differentiation in meaning was intended by the use of the plural form ‘areas’ in the MoU’.<sup>40</sup>

The argument builds on two propositions: first, that when drafting all other provisions of the MoU than paras. 2 and 6, the treaty parties did not attach any importance to the difference between “area of dispute” and “areas of dispute”; and, second, that this observation inevitably casts doubt on the assumption that they did when drafting paras. 2 and 6. The argument refers to the assumed way in which the treaty parties tried getting their communicative intention across. It presupposes the application of the principle of good faith, in the sense of this article.

### III. Good Faith in the Application of Treaties, Generally

International scholars stress the foundational value of good faith.<sup>41</sup> They refer, interchangeably, to the principle of good faith as “a major pillar of treaty law”,<sup>42</sup> as the basis of the law of treaties,<sup>43</sup> and as an idea that “pervades the whole of this branch of the law”.<sup>44</sup> Categorisations such as these assume that the application of the principle of good faith extends beyond the domain of treaty interpretation. Common Art. 26 of the 1969 and 1986 Vienna Conventions on the Law of Treaties confirms this assumption by tying the relevance of the principle to the application of treaty law, generally, rather than to merely the way in which it shall be interpreted. The Article provides: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

Judicial practice provides a series of examples of the operation of this general good faith obligation. As the following three cases will demonstrate, a reoccurring feature is that the principle of good faith serves to limit the

<sup>40</sup> *Maritime Delimitation in the Indian Ocean* (note 20), para. 85.

<sup>41</sup> See e.g. *M. Virally* (note 15).

<sup>42</sup> *K. Schmalenbach*, Preamble, in: K. Schmalenbach/O. Dörr (eds.), *Vienna Convention on the Law of Treaties. A Commentary*, 2012, 9, at 12.

<sup>43</sup> *M. K. Yaseen*, *L’interprétation des traits d’après la Convention de Vienne sur le droit des traités*, RdC 151 (1976), 1, at 22. See, similarly, *B. Cheng* (note 7), 105.

<sup>44</sup> *S. Rosenne*, *Developments in the Law of Treaties 1945-1986*, 1989, 173.

application of discretionary powers conferred under treaty rules, like common Art. 31 of the VCLTs. In each and every case of application, this limit is relative to the object and purpose of the particular rule conferring the power.<sup>45</sup>

### 1. *Military and Paramilitary Activities in and against Nicaragua*

In *Military and Paramilitary Activities in and against Nicaragua*,<sup>46</sup> the International Court of Justice considered the scope of application of Art. 36 of the Statute of the Court. In its application, Nicaragua had founded the jurisdiction of the Court on the two declarations submitted by the United States and Nicaragua under Art. 36, para. 2 of the Statutes of the International Court of Justice and the Permanent Court of International Justice, in 1946 and 1929, respectively. The United States had appended a reservation to its declaration: The 1946 Declaration would “remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate the declaration”.<sup>47</sup> On 6 April – three days before Nicaragua filed its application with the International Court – the United States had deposited with the Secretary-General of the United Nations a notification, which stated, with reference to the still valid 1946 Declaration:

“[T]he aforesaid declaration shall not apply to disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.

Notwithstanding the terms of the aforesaid declaration, this proviso shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America.”<sup>48</sup>

As the United States contended, this notification modified the 1946 Declaration with the effect that the claims of Nicaragua fell outside of the Court’s jurisdiction.

Art. 36, para. 2 of the Statute of the ICJ furnishes states with the possibility of declaring, at any time, that they recognize as compulsory *ipso facto*

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<sup>45</sup> This proposition has been argued more extensively elsewhere. See *U. Linderfalk*, Good Faith and the Exercise of Treaty-Based Discretionary Powers, available at: <<http://ssrn.com>>.

<sup>46</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment of 26.11.1984, ICJ Reports 1984, 392.

<sup>47</sup> *Military and Paramilitary Activities in and against Nicaragua* (note 46), para. 13.

<sup>48</sup> *Military and Paramilitary Activities in and against Nicaragua* (note 46), para. 13.

and without special agreement, the jurisdiction of the Court “in relation to any other state accepting the same obligation”. It does not provide explicitly for the possibility of amendments or withdrawals of declarations already submitted. The question for the Court to answer was, first, whether, under Art. 36, para. 2, parties to the Statute had the power to freely recall their declarations at any time. Secondly – assuming that an affirmative answer to this first question would be given – the question was whether, in the exercise of this power, a party could bring about an effect that was sufficiently immediate so as to bar the consideration by the Court of an application filed only three days later.

The Court noted that, admittedly:

“Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations.”<sup>49</sup>

It did not follow that a state, once that a declaration has been submitted, had the power to amend the scope and contents of its commitments as it pleases. The principle of good faith must be respected. As the Court explained:

“[D]eclarations, even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations and time-limit clauses are taken into consideration. In the establishment of this network of engagements, which constitutes the Optional-Clause system, the principle of good faith plays an important role [...]”<sup>50</sup>

The Court concluded that even though, in certain cases, depending on how states had framed the terms of their declaration, they may be free to amend or recall the commitments that they had thus undertaken, the principle of good faith required that reasonable notice be given – a mere three days would not be sufficient.

As the Court seems to be arguing, it is the object and purpose of Art. 36, para. 2 of the Statute of the Court to allow states the possibility of establishing a network of “consensual bonds”.<sup>51</sup> This is to say that when a state submits a declaration, it undertakes a certain commitment in relation to eve-

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<sup>49</sup> *Military and Paramilitary Activities in and against Nicaragua* (note 46), para. 59.

<sup>50</sup> *Military and Paramilitary Activities in and against Nicaragua* (note 46), para. 60.

<sup>51</sup> Compare *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment of 11.6.1998, ICJ Reports 1998, 275, at 295.

ry other state, which has similarly accepted the same obligation. It is implicit in the object and purpose of Art. 36, para. 2 that any such bond must be reasonably certain and foreseeable. That is why, when an amendment of a declaration purports to reduce the scope of the Court's jurisdiction, the effect of that amendment cannot be immediate. The discretion conferred on states under Art. 36, para. 2 does not extend as far as to completely negate its purpose.

## ***2. Application of the Interim Accord of 13 September 1995***

Many treaties impose on treaty parties an obligation to negotiate. Such an obligation typically applies on the condition of the existence of some or other specific state of affairs, such as a dispute between two parties concerning the delimitation of continental shelf areas. The obligation to negotiate may be explicitly stated, as in the case of Art. 5, para. 1 of the Interim Accord of 13.9.1995 between the Former Yugoslavian Republic of Macedonia and Greece:

“The Parties agree to continue negotiations under the auspices of the Secretary-General of the United Nations pursuant to Security Council resolution 845 (1993) with a view to reaching agreement on the difference described in that resolution and in Security Council resolution 817 (1993).”<sup>52</sup>

It may also follow implicitly from the treaty. For example, although, explicitly, Art. 6, para. 1 of the 1958 Geneva Convention on the Continental Shelf provides that a dispute between two states concerning the delimitation of continental shelf areas shall be settled by the conclusion of an agreement, as clarified by the International Court of Justice, this entails the obligation to enter into negotiations with a view to arriving at an agreement.<sup>53</sup>

Many of the hundred-or-so disputes settled by The Hague Court entailed allegations that brought some treaty-based obligation to negotiate into focus.<sup>54</sup> In *Application of the Interim Accord of 13 September 1995*,<sup>55</sup> for ex-

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<sup>52</sup> UNTS, Vol. 1891, 7.

<sup>53</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment of 12.10.1984, ICJ Reports 1984, 246, at para. 293.

<sup>54</sup> See e.g. *Application of the Interim Accord of 13 September 1995 (The Former Republic of Macedonia v. Greece)*, Judgment of 5.12.2011, ICJ Reports 2011, 644, at paras. 127-138; *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20.4.2010, ICJ Reports 2010, 14, at paras. 145-148; *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25.9.1997, ICJ Reports 1997, 7, at paras. 112, 132-142; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Car-*

ample, the Court considered the Respondent's allegation that the applicant had breached the obligation laid down in the just-quoted Art. 5, para. 1. The provision, although it clearly imposed on the Greek and the Former Yugoslav Republic of Macedonia's (FYROM) governments an obligation to "continue negotiations", conferred on them the discretion to decide precisely how negotiations are to be conducted and when. Referring to Art. 26 of the 1969 Vienna Convention, the Court stressed that it is a requirement following implicitly from Art. 5, para. 1 that the parties negotiate in good faith.<sup>56</sup> As the Court noted, the obligation imposed "is not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements".<sup>57</sup> No doubt, so understood, Art. 5, para. 1 of the Interim Accord did not impose on the parties the obligation to reach an agreement; nor did it require that lengthy negotiations be pursued of necessity. As the Court seemed very keen to convey, the provision entailed an obligation of conduct. In exercising the discretion conferred under Art. 5, para. 1, the parties would have to conduct themselves so as not to frustrate the object and purpose of the provision – the creation of conditions favourable to reaching an agreement. As the Court explained:

"States must conduct themselves so that the 'negotiations are meaningful'. This requirement is not satisfied, for example, where either of the parties 'insists upon its own position without contemplating any modification of it' or where they obstruct negotiations, for example, by interrupting communications or causing delays in an unjustified manner or disregarding the procedures agreed upon. Negotiations with a view to reaching an agreement also imply that the parties should pay reasonable regard to the interests of the other."<sup>58</sup>

### 3. *Philip Morris Asia v. Australia*

In *Philip Morris Asia v. Australia*,<sup>59</sup> a limited liability company incorporated in accordance with the law of the Hong Kong Administrative Region

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*ribean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17.3.2016, available at: <<http://www.icj-cij.org>>, para. 80 et seq.

<sup>55</sup> *Application of the Interim Accord of 13 September 1995* (note 54).

<sup>56</sup> *Application of the Interim Accord of 13 September 1995* (note 54), para. 131.

<sup>57</sup> *Application of the Interim Accord of 13 September 1995* (note 54), para. 132. Quotes are from the PCIJ in *Railway Traffic between Lithuania and Poland*.

<sup>58</sup> *Application of the Interim Accord of 13 September 1995* (note 54), para. 132. References to earlier case-law have been omitted.

<sup>59</sup> *Philip Morris Asia Ltd v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17.12.2015. Pursuant to Procedural Order No. 5, each party

complained about the effects of the Australian tobacco control legislation, enacted in late 2011, on one of its Australian subsidiaries (Philip Morris Ltd). Both companies were equally part of the Philip Morris International group. The ownership of Philip Morris Ltd had been transferred to Philip Morris Asia from another Australian company of the same group, subsequent to the approval of a restructuring proposal in early 2011. Philip Morris Asia initiated arbitration invoking Art. 10 of the 1993 Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments (“the 1993 BIT”).<sup>60</sup> As provided by this Article, in the case of a dispute “between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter”, as a remedy of last resort,

“the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force”.

The Respondent raised a series of objections to the jurisdiction of the Arbitration Tribunal established. Among other things, since Philip Morris Asia had acquired all interests in Philip Morris Ltd not more than ten months after the Australian Government announced its intention to enact the tobacco control legislation, as the Respondent alleged, the claim brought by Philip Morris Asia amounted to an abuse of right.<sup>61</sup> Thus, it fell outside of the scope of Art. 10 of the 1993 BIT.

The doctrine of abuse of rights has figured increasingly in the practice of international law over the last ten to fifteen years, especially in the sphere of international economic law.<sup>62</sup> As is commonly recognised, the doctrine builds upon the principle of good faith.<sup>63</sup> In *Philip Morris Asia*, the doctrine

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had an opportunity to identify any confidential information contained in the award that it proposed to redact before publication. Various exchanges between the parties occurred to narrow their differences in respect of certain redactions. In Procedural Order No. 17, the Tribunal determined which of the redactions proposed by the parties would be permitted to protect confidential information. The redacted version was published on the case repository of the Permanent Court of Arbitration on 16.5.2016: <<https://pca-cpa.org>>.

<sup>60</sup> 1748 UNTS 385.

<sup>61</sup> *Philip Morris Asia Ltd v. Commonwealth of Australia* (note 59), paras. 30-31.

<sup>62</sup> See, generally, U. Linderfalk, *The Concept of Treaty Abuse: On the Exercise of Legal Discretion*, available at SSRN: <<http://ssrn.com>>.

<sup>63</sup> See e.g. B. Cheng (note 7), 121; T. Cottier/K. N. Schefer, *Good Faith and the Protection of Legitimate Expectations in the WTO*, in: M. Broncker/R. Quick (eds.), *New Directions in International Economic Law*, 2000, 47, at 51; H. E. Zeitler, “Good Faith” in the WTO Jurisprudence, *JIEL* 8 (2005), 738; H. Thirlway (note 15), 7 et seq., esp. 25 et seq.; M. Kotzur (note 14), 514; R. Jennings/A. Watts (note 15), 408; E. De Brabandere, *Good Faith, Abuse of Pro-*

is invoked because of the reliance of the Claimant on Art. 10 of the 1993 BIT. Art. 10 is like most BIT jurisdictional clauses: it provides for the settlement of investor-state disputes without itself defining the concept of an investor. A definition of sort can be found in Art. 1(f), which provides that in respect of Hong Kong, “investors” means among other things “companies defined in para. 1(b)(i) of this Article”. The latter provision confers the discretion, which is in focus of the Respondent’s objection. According to Art. 1 para. 1(b)(i), “companies” means, in respect of Hong Kong, “corporations, partnerships, associations, trusts or other legally recognised entities incorporated or constituted or otherwise duly organised under the law in force in its area ...”. The 1993 BIT, obviously, leaves to the Government of Hong Kong to determine the criteria that make a corporation a Hong Kong investor for the purpose of the agreement. According to the abuse of rights doctrine, this discretion is not unlimited. Of course, the doctrine does not go as far as to limiting the law-making power of Hong Kong. What it implies is that the application of the nationality criteria laid down in the laws of Hong Kong will not necessarily always be recognised for the purpose of the application of the 1993 BIT.

As the Tribunal found, “the mere fact of restructuring an investment to obtain BIT benefits is not *per se* illegitimate”.<sup>64</sup> However, if restructuring is made to obtain benefits with respect to a particular dispute,<sup>65</sup> this may amount to an abuse of rights, depending on the circumstances. In a case such as the present, the question that would have to be asked is whether or not, at the time of the decision of Philip Morris International to restructure, a dispute with Australia was foreseeable:

“[T]he initiation of a treaty-based investor-State arbitration constitutes an abuse of rights ... when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time ... when there is a reasonable prospect ... that a measure which may give rise to a treaty claim will materialise.”<sup>66</sup>

The Tribunal juxtaposed developments within the Philip Morris International group of companies with events arising at the political level within the Australian Government, and it concluded that this question would have to be answered in the affirmative. Consequently, the abuse of rights objection made by the Respondent would have to be upheld.

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cess, and the Initiation of Investment Treaty Claims, *Journal of International Dispute Settlement* 3 (2012), 609.

<sup>64</sup> *Philip Morris Asia Ltd v. Commonwealth of Australia* (note 59), para. 540.

<sup>65</sup> *Philip Morris Asia Ltd v. Commonwealth of Australia* (note 59), para. 545.

<sup>66</sup> *Philip Morris Asia Ltd v. Commonwealth of Australia* (note 59), para. 554.

As the Tribunal would seem to have taken for granted, if the nationality laws of Hong Kong would be unconditionally accepted for the purpose of the application of Art. 1 para. 1(b)(i) of the 1993 BIT, then any existing or foreseeable dispute between an Australian corporation and the Government of that country could easily be made arbitrable under the agreement. All that was needed was a transfer of ownership of the corporation to a company incorporated in accordance with the laws of Hong Kong. To apply in this way, the 1993 BIT would be inimical to its purpose, which, as stated in the preamble to the Agreement, is “to create favourable conditions for greater investment by investors of one Contracting Party in the area of the other”.

#### **IV. The Function of Good Faith as Applied in a Treaty Law Context: Drawing the Contours of a General Theory**

As illustrated in Sections II-III of this article, the principle of good faith is relevant to the application of treaty law, for two reasons. First, it enables the understanding of treaty language. In international law, the meaning of the terms of a treaty is tied to the idea of the treaty instrument as a vehicle, which helps carrying the communicative intention of its parties across. The only way to capture the communicative intention carried by a treaty instrument is through the assumption that the treaty parties acted rationally – that they tailored the language of their treaty so that it would be understood. It is implicit in this assumption that the treaty parties conformed to certain communicative standards. The good faith requirement inserted in common Art. 31 of the two VCLTs can be seen as recognition of the necessity of such a rationality assumption. When legal decision-makers engage in the interpretation of a treaty, not only are they bound to found their arguments on the means of interpretation that feature in Arts. 31-33 of the two VCLTs, such as the context, including the entire text of the treaty.<sup>67</sup> In addition, legal decision-makers are to assume that the language of the treaty was tailored so that it conforms to certain communicative standards, such as the standard that you should ascribe to words and lexicalised phrases a consistent meaning.<sup>68</sup> In other words, the principle of good faith serves as a link between the recognised means of interpretation and the overarching pur-

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<sup>67</sup> Compare Section II 1.

<sup>68</sup> Compare Section II 2.

pose of common Arts. 31-33, which, to repeat, is to establish the communicative intention of the treaty parties.

Second, the principle of good faith serves to constrain the exercise of treaty-based discretionary powers. Because of the limitations inherent in the generality of law, and because of the conviction of international law-makers that some issues are best settled on a case-by-case basis, treaty norms sometimes confer on states or international organisation a power to choose between diverse courses of action. Parties to the 1969 Vienna Convention on the Law of Treaties, for example, have the power to choose whether to prefer one contextual argument of interpretation to another. Parties to the 1993 Australia – Hong-Kong BIT have the power to define, each for itself, the criteria that make a corporation an Australian or Hong-Kong investor for the purpose of that treaty. Parties to the Statute of the International Court of Justice have the power to amend and withdraw their declarations recognising the compulsory jurisdiction of the International Court of Justice. Parties to the Interim Accord of 13.9.1995 have the power to decide precisely how negotiations are to be conducted and when. The principle of good faith serves to limit the exercise of such a discretion. It does so by introducing the requirement that discretion be exercised so as not to put the object and purpose of the relevant treaty at risk.

These observations provide the contours of a general theory of good faith. The scope of a discretionary power conferred under a treaty rule is determined by the communicative intention of the treaty parties, just like the meaning of any treaty term. As stated, such an intention cannot be determined with full certainty; it can only be assumed. The principle of good faith points out the direction that any such assumption must be taking. It builds on the idea that when states and international organisations enter into a treaty relationship, they implicitly commit themselves to two purposes. First, they commit to trying to make themselves understood – to bring their communicative intention across. Second – since fulfilling this first purpose cannot be assumed to be an end in itself – states and organisations commit to trying to bring about some particular state or states of affairs – the object and purpose of the treaty. The principle of good faith serves to explain this twofold commitment. It serves the function of a pragmatic principle.

Pragmatics is the study of the understanding of words and sentences by human beings in contexts.<sup>69</sup> A pragmatic principle is a norm that serves to explain the understanding of verbal utterances based on regularities in their contexts. Take for instance the following two sentences uttered by a person engaged in conversation with a colleague over lunch:

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<sup>69</sup> See e.g. *D. Blakemore* (note 31).

“I’m now working on an article on the function of the principle of good faith. That topic fascinates me.”

In this context, the colleague would normally understand the first pronoun “I” to refer to the speaker. He or she would normally understand the adverb “now” to refer to the time of utterance – perhaps not to the precise moment of utterance (assuming, of course, that the speaker is not sitting there with his laptop in front of him), but rather the day, week or month, in which the conversation takes place. The colleague would normally also understand “That topic” to refer back to the topic referred to in the preceding sentence: “the function of the principle of good faith”. In neither of the three cases can the colleague’s understanding be explained by the lexical meaning of the words used. Nor can it be explained by any grammatical rule of the English language. The colleague’s understanding follows from the assumption that the utterer, by engaging in conversation, implicitly commits himself to basic pragmatics principles: in an utterance, typically, the first singular pronoun *I* will be used to refer to the utterer; a temporal expression such as *now* will be used to refer to the time of utterance; and a demonstrative expression such as *that topic* will be used to refer back to whatever topic was referred to earlier in the same conversation.

Contrary to the examples just given, pragmatic principles are not always generally valid in the sense that they explain the understanding of utterances among speakers of a language, generally. Specific patterns of utterance understanding often exist among limited groups of people. This phenomenon can be observed not only among professional groups – neurobiologists, linguists, dentists, construction builders, printers, and so on – but also among people who share a hobby or a spare time interest, such as runners, backpackers or football buffs. This means that the understanding of an utterance will sometimes be dependent on its social context. If, on TV, for example, in the beginning of a game of football, a commentator sounds off “United has a good bench”, football buffs will understand that the commentator is referring to the substitutes of this team. Outside of the group of football buffs people will understand this utterance differently.

It is against the background of this linguistic knowledge that the function of the principle of good faith should be seen. As suggested in this article, good faith serves the function of a pragmatic principle. This principle, obviously, does not purport to explain the understanding of utterances among English-speaking people in general. It purports to do no more than explain the understanding of such utterances that are made in the limited context of international legal discourse. This is why, in this article, it will be referred to as a principle of international legal pragmatics.

## V. Good Faith in Contexts Other Than the Application of Treaties Proper

As Section IV of this article suggested, when states and international organisations enter into a treaty relationship, they implicitly commit themselves to two purposes: first, to bring their communicative intention across; and, second, to bring about some particular state or states of affairs – commonly referred to as the object and purpose of the treaty. The principle of good faith has the function of a pragmatic principle – it helps to explain how this twofold commitment may arise from the mere act of concluding a treaty.

Now, as the principle of good faith has come to be known by international lawyers, its scope of application is certainly not limited to the application of treaty law. The principle has importance also in other contexts, such as the creation or waiver of rights and obligations by acquiescence or estoppel or by unilateral declaration.<sup>70</sup> As commonly assumed, furthermore, it explains how obligations may arise from the mere signature of a treaty or the exchange of instruments constituting a treaty, or again from the expression of a consent to be bound by a treaty, already before the treaty has entered into force.<sup>71</sup> Any robust general theory on the function of good faith should be capable of explaining those other applications of the principle, too. The set of hypotheses worked out in Section IV fails to meet this requirement. It would therefore seem appropriate that it be reassessed, and possibly adjusted, in the light of the legal practice developed outside of the context of the application of treaty law proper. This is precisely the task that this section will perform.

### 1. *Nuclear Tests (I)*

On 9.5.1973, New Zealand filed an application with the International Court of Justice instituting proceedings against France.<sup>72</sup> As the Applicant

<sup>70</sup> Seen as a categorical statement, the following statement is simply not correct: “[The principle of good faith relates] only to the fulfilment of existing obligations.” *Land and Maritime Boundary between Cameroon and Nigeria* (note 51), 304.

<sup>71</sup> See e.g. O Dörr, Article 18, in: K. Schmalenbach/O. Dörr (note 42), at 220.

<sup>72</sup> *Nuclear Tests (New Zealand v. France)*, Judgment of 20.12.1974, ICJ Reports 1974, 457. A similar but not identical claim filed by Australia was adjudged, at the same time, but in separate proceedings, by the International Court. See *Nuclear Tests (Australia v. France)*, Judgment of 20.12.1974, ICJ Reports 1974, 253. To avoid unnecessary complication, in this article, the latter judgment will not be specifically analysed. However, with respect to the relevance of

asked the Court to adjudge and declare, the nuclear tests conducted by the French Government in the South Pacific region constituted a breach of international obligations owed to New Zealand, and they would continue to do so for as long as the French Government insisted that they be carried out.<sup>73</sup> The Court, however, found that this claim was inadmissible. Subsequent to the closure of the oral part of the proceedings, the President of France made a series of public statements announcing an intention on the part of France to terminate atmospheric nuclear tests. While the original and ultimate objective of the Applicant had always been to obtain a termination of the atmospheric nuclear tests conducted by France in the South Pacific region, as the Court inferred, the dispute with France had thus disappeared and no longer existed.<sup>74</sup>

This conclusion builds on the proposition that France, by way of the statements made by the President of the Republic, had undertaken to terminate atmospheric nuclear tests *as a matter of international law*. What should be particularly noted is how the Court went about to explain this proposition. In a first step, it affirmed that in international law, a unilateral declaration may have the effect of creating legal obligations, depending on the intention of the declarant:

“When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.”<sup>75</sup>

In a second step – with obvious reference to the question how the intention of a state can be established – the Court stressed the relevance of the principle of good faith:

“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. Thus interested States may take cognizance of unilateral declarations and

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good faith for the creation of rights and obligations, the reasoning of the Court remains in both cases, in all relevant respects, the same.

<sup>73</sup> *Nuclear Tests* (note 72), para. 11.

<sup>74</sup> *Nuclear Tests* (note 72), para. 59.

<sup>75</sup> *Nuclear Tests* (note 72), para. 46.

place confidence in them, and are entitled to require that the obligation thus created be respected.”<sup>76</sup>

In a third step, having now established the important legal principles involved, the Court turned to the particular statements made by the President of France. It stressed the context in which the statements had been made – “outside the Court, publicly and *erga omnes*” –<sup>77</sup> as well as their “general nature and characteristics”:

“In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective. The validity of these statements and their legal consequences must be considered within the general frame-work of the security of international intercourse, and the confidence and trust which are so essential in the relations among States. It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect.”<sup>78</sup>

What the Court appears to be saying is that although the legal effect of the statements made by the President of France is inextricably tied to his intentions, those intentions – like the communicative intention of any utterer – can only be inferred from observable facts. All such facts have to be assessed in the light of the principle of good faith, which requires that the statements of the President be interpreted on the assumption that he communicated rationally, and, thus, that he conformed to certain communicative standards. This way of approach seems fairly in line with the set of hypotheses worked out in Section IV, with the exception, of course, that a unilaterally made statement is not a treaty. The suggested tentative theory will explain the *Nuclear Tests (I)* judgment only if it is adjusted so that it applies also to statements such as those made by the President of France. The question can be asked whether the theory should be adjusted so as to apply to unilateral acts, generally. As will be demonstrated in Section V 2, there is indeed case-law to suggest this.

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<sup>76</sup> *Nuclear Tests* (note 72), para. 49.

<sup>77</sup> *Nuclear Tests* (note 72), para. 52.

<sup>78</sup> *Nuclear Tests* (note 72), para. 53.

## 2. *The M/V Saiga (No. 2)*

In the context of the theory of sources of international law, a unilateral act can be defined as an expression of will, on the part of a single state or international organisation, which is capable of producing an effect governed by international law.<sup>79</sup> According to the doctrines of acquiescence and estoppel,<sup>80</sup> for example, if the conditions for the application of these doctrines obtain, a failure to act may be tantamount to a waiver of rights. To illustrate, consider the case of the oil tanker M/V “Saiga” (No. 2).<sup>81</sup>

This vessel was engaged in selling bunker fuel to fishing vessels off the coast of West Africa, when, on 28.10.1997, it was boarded and arrested by a Guinean patrol boat and brought to Conakry, Guinea. Saint Vincent and the Grenadines – in which country the “Saiga” had been provisionally registered – submitted to the International Tribunal of the Law of the Sea a request for the prompt release of the vessel and its crew under Art. 292 of the 1982 UN Convention on the Law of the Sea.<sup>82</sup> On 4.12.1997, the Tribunal delivered its judgment. It ordered that Guinea promptly released the “Saiga” and its crew upon the posting by Saint Vincent and the Grenadines of a reasonable bond or security, such as for example a letter of credit or bank guarantee.<sup>83</sup> There was, of course, also the further issue of whether, by the exercise of enforcement jurisdiction over the “Saiga”, Guinea had violated the right of freedom of navigation enjoyed by Saint Vincent and the Grenadines under the 1982 Convention. By the conclusion of an agreement, this issue was submitted by the two states to the jurisdiction of the Hamburg Tribunal.<sup>84</sup>

In the proceedings before the Tribunal, Guinea raised objections to the admissibility of the claim made by its Co-Applicant. As it maintained, among other things, Saint Vincent and the Grenadines did not have legal standing to bring claims originating from the measures taken by Guinea against the “Saiga”.<sup>85</sup> The vessel had been registered provisionally, on

<sup>79</sup> V. Rodríguez Cedoño/M.I. Torres Cazorla, *Unilateral Acts of States in International Law*, in: R. Wolfrum (note 5), Vol. X, 163, at 163.

<sup>80</sup> See e.g. I. Sinclair, *Estoppel and Acquiescence*, in: V. Lowe/M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings*, 1996, 104.

<sup>81</sup> *The M/V “Saiga” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1.7.1999, available at: <<https://www.itlos.org>>.

<sup>82</sup> 1833 UNTS 397.

<sup>83</sup> *The M/V “Saiga” (No. 1) Case (Saint Vincent and the Grenadines v. Guinea)*, Prompt Release, Judgment of 4.12.1997, available at: <<https://www.itlos.org>>.

<sup>84</sup> *The M/V “Saiga” (No. 2) Case* (note 81), para. 4.

<sup>85</sup> *The M/V “Saiga” (No. 2) Case* (note 81), para. 55.

12.3.1997, as a Saint Vincent and the Grenadines ship under section 36 of the Merchant Shipping Act of 1982 of Saint Vincent and the Grenadines. According to the provisional certificate of registration issued to the ship, that instrument would expire on 12.9.1997.<sup>86</sup> Since a permanent certificate of registration was not issued until 28.11.1997, as Guinea insisted, the “Saiga” did not have, at the time of its arrest, the nationality of Saint Vincent and the Grenadines. It was for all intents and purposes a ship without a nationality.<sup>87</sup>

In assessing this objection, the Tribunal considered the national legislation produced by Saint Vincent and the Grenadines. Most importantly, according to provisions of the Merchant Shipping Act of 1982, first, a provisional certificate was to have “the same effect as the ordinary certificate of registration until the expiry of one year from the date of its issue”;<sup>88</sup> and, second, a provisional certificate of registration was to remain in force until the expiry of one year from the date of its issue.<sup>89</sup> The Tribunal remarked that, by this evidence, Saint Vincent and the Grenadines had discharged its initial burden of establishing that, at the time of arrest, the “Saiga” was a ship of Vincentian nationality. As for Guinea, the Tribunal noted that it had consistently failed to question the assertion of Saint Vincent and the Grenadines that it was the flag state of the “Saiga”, although it had every reasonable opportunity to do so:

“[I]t did not challenge or raise any doubts about the registration or nationality of the ship at any time until the submission of its Counter-Memorial in October 1998. Prior to this, it was open to Guinea to make inquiries regarding the registration of the *Saiga* or documentation relating to it. For example, Guinea could have inspected the Register of Ships of Saint Vincent and the Grenadines. Opportunities for raising doubts about the registration or nationality of the ship were available during the proceedings for prompt release in November 1997 and for the prescription of provisional measures in February 1998. It is also pertinent to note that the authorities of Guinea named Saint Vincent and the Grenadines as civilly responsible to be summoned in the schedule of summons by which the Master was charged before the Tribunal of First Instance in Conakry. In the ruling of the Court of Appeal, Saint Vincent and the Grenadines was stated to be the flag State of the *Saiga*.”<sup>90</sup>

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<sup>86</sup> *The M/V “Saiga” (No. 2) Case* (note 81), para. 57.

<sup>87</sup> *The M/V “Saiga” (No. 2) Case* (note 81), para. 58.

<sup>88</sup> *The M/V “Saiga” (No. 2) Case* (note 81), para. 60.

<sup>89</sup> *The M/V “Saiga” (No. 2) Case* (note 81), para. 60.

<sup>90</sup> *The M/V “Saiga” (No. 2) Case* (note 81), para. 69.

The Tribunal concluded that Guinea could not successfully challenge the registration and nationality of the “Saiga” any more.<sup>91</sup>

Vice-President *Wolftrum*, in a Separate Opinion, expressly regretted that the Tribunal did not develop and spell out its reasoning in more detail:

“The Judgment should have further examined whether Guinea had acquiesced in Saint Vincent and the Grenadines as the flag State of the *Saiga*. The conduct of Guinea after the arrest of the ship and, in particular, in the proceedings in the *M/V ‘SAIGA’* case (prompt release) clearly point in this direction.

43. The doctrine of acquiescence has, as the doctrine of estoppel, its basis in the concepts of equity and good faith. The case law referred to considers acquiescence to be a type of qualified inaction. There seems to be some uncertainty in international jurisprudence as to what are the prerequisites to establish a binding effect of inaction. It is, however, common ground that the acquiescing State must have remained inactive although a protest or action would have been required ... That is exactly the case here. Guinea should have raised the lack of registration of the *Saiga* at the outset of the proceedings in the *M/V ‘SAIGA’* case (prompt release). By remaining inactive in this respect and by negotiating the conditions of the bank guarantee to be submitted by Saint Vincent and the Grenadines for the release of the ship and by finally accepting the bank guarantee Guinea accepted Saint Vincent and the Grenadines as the flag State. It would be contrary to good faith if Guinea were now allowed to reverse its position; it is barred from invoking the lapse of registration between the expiry of the Provisional Certificate of Registration and the issuing of the Permanent Certificate of Registration.”<sup>92</sup>

Analytically, the argument of Judge *Wolftrum* – which, on the face of it, would seem to be the argument assumed also by the majority – comes out as very similar to that used by the International Court of Justice in *Nuclear Tests (I)*. As the principle goes, a waiver is the voluntary renunciation of a right or claim.<sup>93</sup> Obviously, in the *M/V ‘Saiga’ (No. 2) Case*, Guinea had not expressly waived its right to challenge the registration and nationality of the “Saiga”. The question to be answered was whether Guinea had done so implicitly, by consistently failing to question the assertion of Saint Vincent and the Grenadines that it was the flag state of the “Saiga”. What the doctrine of acquiescence takes for granted is that a failure to act cannot always be understood to imply a waiver of rights. As Vice-President *Wolftrum* put it, acquiescence is “a type of qualified inaction”. The failure of Guinea to act

<sup>91</sup> *The M/V ‘Saiga’ (No. 2) Case* (note 81), para. 73(c).

<sup>92</sup> *The M/V ‘Saiga’ (No. 2) Case* (note 81), Separate Opinion of Vice-President *Wolftrum*, paras. 42-43.

<sup>93</sup> See e.g. C. Tams, Waiver, Acquiescence, and Extinctive Prescription, in: J. Crawford/A. Pellet/S. Olleson (eds.), *The Law of International Responsibility 2010*, 1035, at 1036.

should be seen to be qualified, in this case, because the overall context suggests that Guinea voluntarily renounced its right to challenge the registration and nationality of the “Saiga”. To state this context concretely: Guinea had reason, as well as plenty of opportunity, to challenge the registration and nationality of the “Saiga”. The principle of good faith explains this inference by adding one premise that is missing: the failure of Guinea to act must be understood on the assumption that it conformed to certain communicative standards.

### 3. The Obligation Not to Defeat the Object and Purpose of a Treaty Prior to Its Entry Into Force

Several of the provisions laid down in the two VCLTs give precise form to the principle of good faith. They all express the idea that when states and international organisations enter into a treaty relationship, they implicitly commit themselves to bringing about some particular state or states of affairs – the object and purpose of the treaty. Obvious examples include the prohibition of reservations that are incompatible with the object and purpose of a treaty;<sup>94</sup> the obligation to reconcile the different authenticated texts of multilingual treaties by adopting the meaning that helps best attain their object and purpose;<sup>95</sup> the provision that excludes any modification of a treaty incompatible with the effective execution of its principal object and purpose;<sup>96</sup> the prohibition of suspension of the operation of a treaty by agreement between some of its parties when suspension is incompatible with the object and purpose of the treaty;<sup>97</sup> and the requirement that a breach of a treaty may only be used as an excuse for terminating it, or suspending its operation, when it consists in the violation of a provision essential for the accomplishment of the object and purpose of the treaty.<sup>98</sup>

It is apt to compare this list of examples with the provision laid down in common Art. 18, which is also said to be an expression of the general principle of good faith:

“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

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<sup>94</sup> See common Art. 19(c).

<sup>95</sup> See common Art. 33, para 4.

<sup>96</sup> See common Art. 41, para 1(b).

<sup>97</sup> See common Art. 58, para 1(b).

<sup>98</sup> See common Art. 60, para 3(b).

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”

This provision is designed to meet a fundamentally different concern. It, too, lays upon states and international organisations to refrain from acts that would be contrary to the aspirations implicit in the object and purpose of a treaty. However, unlike the earlier examples, the obligation refers to a period in time *before* the treaty enters into force. The question that would have to be asked is how there can ever be any obligations of this kind. The set of hypotheses worked out in Section IV provides the explanation, after necessary adjustments:

‘By engaging in conduct of a kind that is capable of producing an effect governed by international law, states and international organisations implicitly commit themselves to two purposes – to bring their communicative intention across, and to bring about some particular state or states of affairs.’

## VI. Principles of Legal Pragmatics and the Coherence of International Law

This article has sought to establish whether and to what extent a fuller understanding of the operation of the principle of good faith may help to understand the function or functions of general principles in international law and legal discourse. As argued, good faith helps to explain the understanding of conduct in much the same way as any pragmatic principle. Pragmatic principles, as noted in Section IV, explain the understanding of verbal utterances based on regularities in their contexts. The principle of good faith, however, presupposes a context of a very particular kind. It presupposes a conduct, which is imputable to a state or to an international organisation, and which is capable of producing an effect governed by international law. This is why, throughout this article, good faith has been referred to as a principle of international legal pragmatics. As will now be explained, the distinguishing trait of a principle of international legal pragmatics is the particular way in which it contributes to the coherence of international law.

In a loose sense, international law can be seen as a set of legal propositions such as any of those set out below:

‘The occupation by Russian troops of Crimea, and the subsequent annexation of the territory by the Russian Federation, is a breach of an international obligation owed by Russia to Ukraine and to others members of the United Nations.’

‘Russia has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.’

‘No territorial acquisition resulting from the threat or use of force shall be recognised as legal.’

When international lawyers talk about the *coherence* of international law, however, they do not refer to just any set of legal propositions, but to a system of legal knowledge – typically denoted as “the international legal system”. In fact, the concept of coherence and the notion of a system of knowledge are inseparable. As emphasised by philosophers, there can be no knowledge without the idea that there is something that ties single propositions together. What is incoherent is simply unintelligible.<sup>99</sup>

There are various ways of conceiving of the coherence of international law, depending on the notion of international law that a legal agent is defending, such as the logical consistency among legal propositions, or the unity of the principles underlying international law and legal practice in terms of either the system of values or ideals which law and practice protect, or the various purposes that it aims to achieve.<sup>100</sup> Interestingly, the principle of good faith does not seem to contribute to the coherence of international law in any of those senses. Unlike other general principles of international law – such as the principles of *lex specialis* and *lex posterior*, the principle of free consent, the principle of equality of arms, the principle of the freedom of the high seas, or the principle of sustainable development – the function of the principle of good faith is not tied to its propositional contents, but to the way in which it helps legal agents to bring other legal propositions across. While the principle of good faith builds on the assumption that international law-makers act for a reason, it does not itself presuppose the good of any such reason – apart, of course, from the rationality of commu-

<sup>99</sup> See e.g. J. Raz, *Ethics in the Public Domain*, 1994, 264.

<sup>100</sup> J. Dickson, *Interpretation and Coherence in Legal Reasoning*, in: E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2016 ed.), available at: <<https://plato.stanford.edu>>.

nication among international law-makers. Its function is tied not so much to a moral or political agenda as to the needs of international legal discourse.<sup>101</sup>

In international law, there are certainly other principles that equally fit this description. A first obvious example is the principle of *pacta sunt servanda*: if an agreement is binding, then it should be performed by its parties. Accepting the assumption that international law-makers act rationally, this principle makes sense of the mere act of concluding a binding agreement. As the argument goes, if indications suggest that an agreement is binding, then, of course, the mere act of concluding it must be understood to imply a commitment to the idea that the agreement should be performed. Anything else would be to assume the irrational.

Another example is the principle of proportionality so-called. Assume, for example, that a rule of law (R) lies upon a state (S) the obligation to act to protect freedom of expression. This rule, furthermore, allows for exceptions for the protection of national security “if and to the extent necessary”, leaving it to the discretion of state S to determine whether, in particular cases of application of the rule, this condition is met or not. As most international lawyers would take for granted, the mere form of the rule R implicitly commits the state S to act *proportionately* – it may take measures to protect national security only to the extent that they are commensurate with whatever interference in the freedom of expression is entailed. The argument presupposes that the rule R is the result of rational action. A rational agent acts on the balance of reasons. While no interest is itself a reason for action, as the argument goes, the rule R presupposes the existence of two principles:

‘Principle (1): Parties to the rule R should act to protect freedom of expression.’

‘Principle (2): Parties to the rule R should be allowed to act to protect national security.’

When two principles such as these are in conflict, the rational way to proceed is to determine their relative weight, and to act pursuant to which-

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<sup>101</sup> Given that the effective exchange of legal propositions is a prerequisite for the practical operation of international law, indirectly, for this same reason, the principle would seem to serve also the needs of international legal practice. This is supposedly what *Michel Virally* had in mind when commenting: “The effects attached to the expressed will and, more broadly, to the behaviour of international actors are conceivable only because it is assumed that they act in good faith and that what is apparent is in conformity with their real will. If this postulate is not taken for granted, the whole fabric of international law will collapse.” *M. Virally* (note 15), 132.

ever principle is found to be the weightier, which is precisely what the principle of proportionality commands.

As the analysis reveals, the principle of *pacta sunt servanda* and the principle of proportionality serve as principles of international legal pragmatics, just like the principle of good faith. They, too, presuppose that international law-makers are rational agents. They ensure the coherence of international law, without paying any regard to the particular moral or political agenda that parties to an agreement happen to be pursuing. For international lawyers and scholars interested in the function of the general principles of international law, this observation should be of great interest. It reinforces the importance of the concept of international legal pragmatics for the construction of international law as a legal system. More concretely, it encourages further research into this terribly fascinating topic.

