

Good faith and international
legal pragmatics

Good faith is a general principle

- Art 38 of the Statute of the ICJ:

“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations”.

My argument in brief

- Good faith ...
 - serves much the same function as any principle of general pragmatics
 - does not itself presuppose the good of any particular state of affairs

Vienna Conventions 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**." (Art 26)
- "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." (Art 31, para 1)

Communicative standards

- You should ascribe to words and lexicalised phrases a consistent meaning
- You should ensure that the several norms of a treaty do not contradict one another
- You should ensure that the treaty does not derogate from any other international legal norm applicable in the relationship between you

Exercise of discretion

- Art 5(1) of the Interim Accord of 13 September 1995:
 - “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)”
- The parties must conduct themselves so that the “negotiations are meaningful” (ICJ in Interim Accord of 13 September 1995, para 132).

The operation of pragmatic principles

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

Nuclear Tests (I) Case

- "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 place confidence in them, and are entitled to require that the obligation thus created be respected." (para 49)

Obligations arising from the conclusion of a treaty before it enters into force

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

- (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.” (Art 18 of the VCLT-69)

A general theory of good faith

- Good faith explains the understanding of verbal utterances based on regularities in their context
- It presupposes a context of a very particular kind:
 - A conduct, which is imputable to a state or to an international organisations, and which is capable of producing an effect governed by international law
- As the principle takes for granted:
 - When states and international organisations engage in conduct capable of producing an effect governed by international law, they act (1) to make themselves understood, and (2) to bring about some or other state or states of affairs

Good faith and legal coherence

- International is not merely a set of legal propositions:
 - ‘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.’

Good faith according to Michel Virally

- "The effects attached to the expressed will and, more broadly, to the behavior 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." (77 AJIL 130, at 132)