GOOD FAITH IN INTERNATIONAL LAW by J.F. O'Connor (Brockfield: Dartmouth Publishing Co.)

The author points out that the earliest analyses of good faith as fundamental to international legal conduct are to be found in Schwarzenberger's statement of 'fundamental principles' and Cheng's *General Principles*, yet also suggests that the concept may be traced back to early society when a member of the group was 'trusted' to do what was 'entrusted to him',[1] and that this gradually gave way to the idea that *pacta sunt servanda* - agreements must be kept — "developed for purely pragmatic reasons"[2] to be reinforced by the oath, becoming by the time of the Roman Twelve Tables an established legal concept.[3] This idea had, by the time of Gaius, become a standard by which the judge would decide on the basis of what in all 'fairness' the defendant ought to do.[4] By the beginning of the seventeenth century, Suarez regarded good faith as a basic precept of the law of nature and of God, so much so that "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'."[5]

One-third of the book, four chapters, is devoted to showing the significance and growth of the concept of good faith, *bona fides*, *pacta sunt servanda*, in legal systems generally, particularly by reference to Roman and common law, English equity and continental systems, with a further chapter devoted to the development of the principle in international legal doctrinal writings from Belli to Vattel, leaving a mere forty pages to consider the principle in practice.

Insofar as the attitude of the World Court is concerned, Mr. O'Connor looks more to the comments of individual judges than to actual judgments. He points out that the *Temple* case (1962) was really the first in which the Court "applied the good faith principle in a major way other than in abuse of rights and related areas."[6] Often the Court has given expression to the idea by way of equitable principles like estoppel or the obligation to negotiate, although the latter does not imply any obligation to conclude an agreement.[7] In this connection, he draws attention to Article 26 of the Vienna Treaty on Treaties which is the article on *pacta sunt servanda* and relates this back to Article 18 which precludes a signatory from indulging in "acts which would defeat the object and purpose of a treaty" between signature and ratification, or after expressing its intention to be bound and the entry of the treaty into force.[8] He also makes the interesting point that the principle *rebus sic stantibus* (remaining bound until circumstances change fundamentally) is, in fact, merely an example of the application of the good faith doctrine.[9]

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1. J.F. O'Connor, *Good Faith in International Law* (Aldershot, U.K.: Dartmouth Publishing Co.) at 6.
2. *Ibid.* at 7.
3. *Ibid.* at 19.
4. *Ibid.* at 21.
5. *Ibid.* at 5.
6. *Ibid.* at 6.
7. *Ibid.* at 7.
8. *Ibid.*
9. *Ibid.* at 110-12.

Not everybody will find it possible to agree with the author's suggestion that, "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."[10] O'Connor suggests that "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."[11]

The author gives us, as the final sentence of his monograph, a definition, although some may question whether it really tells us anything that was not already crystal clear: "The principle of good faith in international law is a fundamental principle [shades of Schewarenberger] from which the rule *pacta sunt servanda* and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived [it would be interesting to hear Kelsen's comments on this], 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."[12]

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10. *Ibid.* at 113.
11. *Ibid.* at 122.
12. *Ibid.* at 124.