WHAT DOES IT TAKE TO BE A LOYAL MEMBER? REVISITING THE 'GOOD MEMBERSHIP' OBLIGATIONS IN THE LAW OF INTERNATIONAL ORGANIZATIONS

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The goal of this article is to examine the nature and the scope of the 'good membership' obligations that every state acquires as a consequence of its membership in international organizations. While the concept of membership duties represents one of the most foundational issues in the law of international organizations, so far, it has received little attention in legal scholarship. This article aims to remedy this gap and to demonstrate that, contrary to the descriptive approach prevailing in the field, the 'good membership' duties are more than a simple reiteration of member states' commitments formulated in an organization's constitution. Instead, it is argued that these obligations are of a more far-reaching nature, having their basis in the application of the principle of good faith to the interpretation and performance of member states' institutional commitments. In this regard, good faith represents an overarching principle of institutional legal order, which – through the generation of more concrete norms and sub-principles – serves to maintain the loyalty of member states to the joint enterprise by ultimately requiring them to cooperate and compromise for the achievement of common institutional goals. The article subsequently illustrates this thesis by exploring the use of the principle by the International Court of Justice and the Administrative Tribunal of the International Labour Organization to determine the scope of members' obligations in three case studies concerning, respectively, the United Nations membership crisis in the late 1940s, the potential transfer of the World Health Organization's Regional Office for the Middle East in 1980 and the premature ousting of the Organisation for the

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Prohibition of Chemical Weapons' Director-General in 2003. The resulting analysis underscores the potential normative value of good faith, which can contribute to the continuous development of institutional legal order while protecting the primacy of common endeavour from manifestations of excessive unilateralism by the member states.

Keywords: international organizations; member states; membership duties; principle of good faith; treaty interpretation

I. INTRODUCTION

It is commonplace in the law of international organizations to speak about the so-called 'duties of good membership' or the 'duties of loyal co-operation' that every member acquires as a consequence of its membership in international organizations. In fact, most treaties establishing international organizations contain provisions providing for such 'good membership' duties, with one of the most common formulations found in Article 2(2) of the United Nations (UN) Charter, requiring the UN member States to 'fulfil in good faith the obligations assumed by them in accordance with the present Charter'.[1] Another prominent example is contained in Article 4(3) of the Treaty on European Union (TEU), which calls on European Union (EU) Member States to 'facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.[2]

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1 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (UN Charter) art 2(2). For other examples of 'good membership' clauses, see Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press 2002) 194-95; Henry G Schermers and Niels Blokker, *International Institutional Law: Unity Within Diversity: Fifth Edition* (Martinus Nijhoff 2011) 121–22.

2 Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU) art 4(3).

While the concept of membership duties represents one of the most foundational issues in the law of international organizations, its comprehensive examination in the field is lacking. The classical sources in the discipline tend merely to provide a summary of the most typical membership-related duties found in constitutions of most international organizations, such as the duty to contribute to the organization's budget or to grant privileges and immunities to its staff.[3] These expressly formulated duties arise directly from the text of these treaties and, as such, do not require further elaboration. However, this approach does not account for a number of membership obligations that are not specified in an organization's constitution and that instead have been developed in the case law of international courts and tribunals, as well as the work of the International Law Commission (ILC) and several scholarly writings.[4] Indeed, in the absence of specific treaty provisions providing for these duties – ranging from the duty to consider non-binding decisions of international organizations to the duty to cover their debts towards third parties – their legal basis is not evident. As a consequence, the lack of a comprehensive conceptualization of the 'good membership' obligations that could account for both explicit and implicit duties makes it hard to identify their full scope. This, in turn, makes it hard to evaluate the legal parameters within which the contestation of power between international organizations and their member states takes place.

Against this background, the goal of this article is to shed light on the nature and scope of 'good membership' obligations in the law of international organizations. The main argument presented herein is that these obligations stem from the application of the principle of good faith to the interpretation

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3 See, for example, Schermers and Blokker, *International Institutional Law* (n 1) 121; Klabbers, *An Introduction to International Institutional Law* (n 1) 194).

4 These include, for instance, the duty to consider non-binding recommendations of the UN General Assembly, as well as the obligation to cover the organization's debts towards third parties. For a detailed discussion, see text to footnotes 22-26.

and performance of member states' institutional commitments. In other words, it is submitted that it is the principle of good faith that determines how member states' commitments must be interpreted and performed in particular legal scenarios. While what good faith requires will depend upon the particular circumstances of each case, its ultimate *raison d'être* is to facilitate the realization of common institutional goals by demanding from member states loyalty towards the joint enterprise. As will be demonstrated, the conceptualization of the 'good membership' duties by reference to good faith contributes to further understanding the complex dynamics existing between international organizations and their member states and allows for reflection on the process of informal "constitutional" change in international institutions more generally.

In constructing this argument, the paper first presents in Section II an overview of explicit and implicit 'good membership' obligations that have been identified in institutional law scholarship, albeit without a valid legal basis. Section III, in turn, theorizes the principle of good faith as the foundation of the membership obligations, which – by means of several more concrete sub-principles and norms – specifies how institutional commitments should be interpreted and performed in particular legal scenarios. This argument is further developed in Section IV, which shows how the principle of good faith has been used by international courts and tribunals in developing various membership obligations in three cases, namely the *Conditions of Admission* and *Interpretation of the Agreement of 25 March 1951* Advisory Opinions rendered by the International Court of Justice (ICJ) and the *Bustani* case decided by the Administrative Tribunal of the International Labour Organization (ILOAT). The selection of the case studies was motivated by the aspiration to demonstrate the application of the principle of good faith in different institutional areas: the admission of new members to the organization; the relations between organization and the host state; and the relations between the organization and its employees. Finally, Section V will summarize the argument presented in the article and

provide some concluding remarks on the role of good faith in the development of institutional legal order.

II. An Overview of 'Good Membership' Obligations in the Law of International Organizations

During the negotiations on the text of the UN Charter during the San Francisco Conference in 1945, a debate arose around the proposal of the Colombian delegation to include the term 'good faith' in Article 2(2).[5] Several delegates from the Anglo-Saxon legal tradition, including the United States (US), United Kingdom and Australia, maintained that the emphasis on fulfilling the Charter obligations in good faith was superfluous as it was already clear from the text of the provision that the obligations under the Charter must be observed by the Member States.[6] However, the Colombian delegation, with the support of several European and Latin American countries, insisted upon the importance of including the principle of good faith in the UN Charter, with the aspiration that it will 'develop into the "*leit motif*" of the new International Organization'.[7] The Colombian delegate Mr. Yepes added that:

> The United Nations must […] proclaim that international life requires a minimum of morality as a normative principle of conduct for peoples. This minimum cannot be anything else than full good faith and respect for the pledged word. The Colombian amendment, therefore, has a profound spiritual meaning. It symbolizes this new spirit of loyalty, of full good faith, of good neighborliness and honesty in international life.[8]

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5 'Documents of the United Nations Conference on International Organization', vol VI (San Francisco, 1945) (UNCIO) 71-80.

6 Ibid 73-77. See also Robert Kolb, *Good Faith in International Law* (Hart 2017) 160.

7 UNCIO (n 5) 71.

8 Ibid 72.

Eventually, the US, along with other opposing countries, declared itself convinced by the argument that 'we are all to observe these obligations, not merely the letter of them but the spirit of them',[9] and on this reading of the term, the Colombian proposal was adopted unanimously.[10]

Although 'good membership' clauses in the constituent treaties of various international organizations, similarly to Article 2(2) of the Charter, contain references to good faith,[11] the legal import of the principle in determining the scope of the membership duties has rarely been explored in institutional law scholarship, as the rest of this section will demonstrate.[12] In their seminal treatise on international institutional law, Schermers and Blokkker contend that 'there are some rights and obligations that each individual member has as a consequence of its membership of an organization'.[13] As examples of such duties, the authors mention the obligations to contribute one's share to the organization's budget, to be present at sessions of the organization's organs and to grant privileges and immunities to the organization and its

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9 Ibid 74.

10 Ibid 80.

11 See, for instance, Statute of the International Atomic Energy Agency (adopted 26 October 1956, entered into force 29 July 1957) 276 UNTS 3, art IV, which provides that '… all members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligation assumed by them in accordance with this Statute'. See also Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3, which likewise stipulates that good faith will govern its members' mutual relations.

12 The only exceptions are two articles discussing the connection between the principle of good faith and the EU law principle of loyalty. See Geert De Baere, Timothy Roes, 'EU Loyalty as Good Faith' (2015) 64 International & Comparative Law Quarterly 829, 835-838; Daniel Davison-Vecchione, 'Beyond the Forms of Faith: Pacta Sunt Servanda and Loyalty' (2015) 16 German Law Journal 1163.

13 Schermers and Blokker, *International Institutional Law* (n 1) 121.

staff when necessary.[14] Elsewhere, the authors state that, as a part of the 'good membership' duties, members should fulfil all other additional obligations formulated in the organization's constitution.[15] These, naturally, vary from one organization to another and may include obligations to disclose or report certain information of common concern to other members and organization's organs, to bring relevant national legislation in line with standards agreed in the institutional framework or to carry out certain decisions of the organization.[16]

From this conventional account of 'good membership' presented by leading scholars in the field, it may appear that it is simply an umbrella term for all member state commitments formulated in an organization's constitution. In this sense, the various 'good membership' clauses in the treaties establishing international organizations, such as Article 2(2) of the UN Charter, are simply restatements of the *pacta sunt servanda* principle.[17] However, as noted by Klabbers, such a reading would make these provisions redundant, as it goes without saying that all treaty commitments must be observed.[18] Instead,

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14 Ibid 122.

15 Henry G Schermers and Niels Blokker, 'International Organizations or Institutions, Membership' *Max Planck Encyclopedia of Public International Law* (January 2008) <https://opil-ouplaw-com.eui.idm.oclc.org/view/10.1093/law:epil/9780199231690/law-9780199231690-e505?prd=MPIL> accessed 19 October 2020, para 13. See also Niels Blokker, 'International Organization and Their Members: 'International Organizations Belong to All Members and To None' – Variations on A Theme' (2004) 1 International Organizations Law Review 139, 147.

16 Schermers and Blokker, 'International Organizations or Institutions, Membership' (n 15) para 13.

17 The *pacta sunt servanda* principle is codified in Article 26 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 26.

18 Klabbers, *An Introduction to International Institutional Law* (n 1) 194.

he argues that 'good membership' clauses go beyond the letter of the treaties, albeit without elaborating on their alternative legal basis:

> … these solidarity clauses remind the member-states of organizations that they may be called upon to do things which are not to their liking and which they may never even have expected; rather than merely replicating the *pacta sunt servanda* norm […] they remind the member-states that they enter into a relationship which aspires to create 'an ever closer union' as the EC Treaty poetically puts it.[19]

Most importantly, the *pacta sunt servanda* rule codified in Article 26 of the Vienna Convention on the Law of Treaties (VCLT) merely stipulates that existing treaty commitments must be executed by contracting parties.[20] In Kolb's words, *pacta sunt servanda* is nothing 'but a formal injunction to execute the due, a sort of blanket to be filled by concrete content'.[21] Since it does not determine what needs to be done in order to fulfill the obligation, it cannot account for various membership obligations that have been developed in international legal practice and scholarship outside of explicit treaty commitments.

Among these are a number of extensive obligations for EU member states that have been elaborated by the European Court of Justice in its case law on the basis of the principle of loyal co-operation enshrined in Article 4(3) of the TEU, probably the most successful 'good membership' clause.[22] Most recently, these duties included an obligation to abstain from any form of action in external affairs in any matter on which the EU has taken a common

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19 Ibid 195.

20 VCLT (n 17) art 26, which provides: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

21 Kolb, *Good Faith in International Law* (n 4) 34.

22 For overviews on this topic, see Marise Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance' in Marise Cremona and Bruno De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart 2008) 125; De Baere and Roes (n 12) 835-38.

position.[23] While it is true that the most wide-ranging 'good membership' obligations are found in the field of EU law, similar expansive approaches to such duties, going beyond the explicit commitments formulated in the organizations' constitutions, have been also invoked in relation to classical inter-governmental organizations that are less integrated than the EU.

For instance, Amerasinghe devotes several pages of his monograph to the UN member states' duties to consider non-binding recommendations of the General Assembly and other UN organs and to report their plans and progress in respect of implementation.[24] In his view, even though the UN Charter does not contain obligations to carry out non-binding decisions of the above-mentioned organs, these duties stem implicitly from membership status. In particular, Amerasinghe maintains that this duty to consider recommendations of the General Assembly in good faith stems from the 'basic obligation of membership … to co-operate in achieving the objectives of the organization'.[25]

A similarly expansive interpretation of 'good membership' duties was adopted by the ILC in its work on the 2011 Draft Articles on the Responsibility of International Organizations (DARIO). During the preparatory stages of the DARIO, there was much debate about the general obligation of member states to provide funds to the organization for the purpose of making reparation to third parties in the absence of explicit rules to this effect in the organization's constitution.[26] The final approach taken

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23 Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 4 European Law Review 524.

24 Chittharanjan F Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, Cambridge University Press 2005) 177–79.

25 Ibid 178.

26 For an overview of the debate, see Paolo Palchetti, 'Exploring Alternative Routes: The Obligation of Members To Enable the Organization to Make Reparation' in Maurizio Ragazzi (ed), *Responsibility of International*

by the Commission in the commentary on Article 40 provides that, in the absence of any express rules on the issue, the duty to cover the organization's debts can be considered as part of the 'good membership' obligations and inferred from the 'general duty to cooperate with the organization'.[27]

How, then, can we comprehend the legal basis and scope of 'good membership' duties, when a wide-ranging number of obligations not originally formulated in the organization's constitution have been included in their ambit? Although detailed conceptualization of 'good membership' duties is absent in scholarship, both Amerasinghe and the ILC mention a 'general duty to cooperate', conceived as a general principle of law, as their legal basis. Could this principle account for the expansive reading of the membership obligations in the manner described?

To start with, the obligation for states to cooperate in international law is said to be conceptually linked to the idea that modern international law has developed from the 'law of coexistence' to the 'law of co-operation'.[28] As part of this development, a number of instruments – including primarily the UN Charter and several resolutions of the General Assembly – proclaimed the aspiration of states to achieve objectives of common concern through coordinated action, including through the channel of inter-governmental institutions.[29] In a nutshell, the duty to co-operate is defined as 'the

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Organizations: Essays in Memory of Sir Ian Brownlie (Martinus Nijhoff 2013) 303, 305-06.

27 ILC, 'Report of the International Law Commission on the work of its 63rd Session' (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10, 133.

28 Rüdiger Wolfrum, 'Cooperation, International Law of', *Max Planck Encyclopedia of Public International Law* (April 2010) <https://opil-ouplaw-com.eui.idm.oclc.org/view/10.1093/law:epil/9780199231690/law-9780199231690-e1427?rskey=zw8KxS&result=2&prd=MPIL> accessed 19 October 2020, para 1.

29 Ibid para 2. These include UN Charter (n 1) arts 1, 11, 13 and s IX; Declaration on Principles of International Law concerning Friendly Relations and Co-

obligation to *enter into* […] co-ordinated action so as to achieve a specific goal'.[30] However, the binding nature of the duty to co-operate as a general legal obligation remains contested.[31] This is because both the wording and the negotiating history of both the Friendly Relations Declaration and the Charter of Economic Rights and Duties of States, two non-binding UN General Assembly resolutions that contain such a duty,[32] demonstrate that it is meant to have a declaratory character only.[33] Moreover, even if one accepts the binding nature of the duty to co-operate in international law, at maximum, it can be interpreted as an obligation to establish an international organization in order to foster international co-operation in a particular field.[34]

The same reasoning is valid for the terms 'loyalty' or 'solidarity', which are frequently utilized to describe the 'good membership' obligations in EU law: all these terms simply stand for the readiness of a member to take into account the interests of the organization and make compromises for the common good, even at one's own expense.[35] Both are merely *sociological* terms that refer to a particular state of mind and, as such, have no intrinsic *legal* content.[36] Instead, as will be demonstrated in the next section, it is good

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operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) (adopted without a vote) (Friendly Relations Declaration).

30 Wolfrum (n 28) para 2 (emphasis added).

31 On contested nature of the obligation to co-operate in international law, see ibid paras 16-22.

32 Friendly Relations Declaration (n 26); Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (17 December 1974) (adopted by 115 votes to 6, 10 abstentions).

33 Wolfrum (n 28) para 16-18.

34 Ibid para 4.

35 Wolfrum (n 28) para 3.

36 Ibid para 2.

faith – as a *general principle of law* – that is capable of forming the legal basis for 'good membership' obligations.

III. The Role of the Principle of Good Faith in Institutional Legal Order

The principle of good faith has been described by many scholars as one of the most fundamental principles of international law, in the sense of Article 38(1) of the Statute of the ICJ.[37] Indeed, the principle can be found across all fields of public international law, including international criminal law, the law of the sea, international trade law, investment law and others.[38] The principle has also been frequently referred to in resolutions of the UN General Assembly and the UN Security Council, including the Friendly Relations Declaration, demonstrating the wide acknowledgment of the principle by the UN member states.[39] Last but not least, good faith is consistently mentioned in the case law of international courts and tribunals,

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37 See e.g. John F O'Connor, *Good Faith in International Law* (Aldershot 1991) 124. Kolb, in turn, distinguishes in his treatise between three different meanings of good faith in public international law: a state of mind related to an erroneous subjective belief, a legal standard for evaluating the normality of reasonableness of behaviour and, finally, a general principle of law in the sense of Article 38(1). See Kolb, *Good Faith in International Law* (n 4) 15. For other authors confirming the status of good faith as a general principle of law, see Michel Virally, 'Review Essay: Good Faith in Public International Law' (1983) 77 American Journal of International Law 130, 131-12*;* Georg Schwarzenberger, *Fundamental Principles of International Law* (Brill 2006) 25-26.

38 See e.g. Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Hart Publishing 2006) 13-20, Markus Kotzur, 'Good Faith (Bona Fide)', *Max Planck Encyclopedia of Public International Law* (January 2009) <https://opil-ouplaw-com.eui.idm.oclc.org/view/10.1093/law:epil/9780199231690/law-9780199231690-e1412?rskey=F6ESwH&result=1&prd=MPIL> accessed 19 October 2020, paras 13-14.

39 Kotzur (n 38) paras 9-11.

most notably that of the ICJ and of the WTO Appellate Body.[40] To illustrate, in *Nuclear Tests Cases,* the ICJ defined good faith as 'one of the basic principles governing the creation and performance of legal obligations, whatever their source'.[41] Likewise, the WTO Appellate Body in the landmark *US-Shrimp* case unequivocally affirmed that good faith is 'at once a general principle of law and a general principle of international law, [which] controls the exercise of rights by states'.[42] After this brief introduction, the rest of this section will explore in more detail the operation of the principle in institutional legal order.

At the outset, it should be noted that good faith – as with any other general principle – does not directly create binding obligations for legal subjects where none exist. Instead, it plays a pivotal role in defining how existing commitments should be interpreted and performed.[43] In other words, for the principle of good faith to have legal effects, 'qualified relationships of confidence' should already exist among legal subjects, such as involvement in judicial proceedings, the relationships of protectorate or simply the conclusion of bilateral or multilateral treaty.[44] Accordingly, the principle of good faith may acquire different meanings, depending on the nature of legal bond existing between particular legal actors: the stronger such bond is, the more demanding the obligations flowing from the good faith principle become.[45]

While in bilateral relationships of contractual origin, such as investment treaties, the protection of legitimate expectations becomes good faith's main

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40 For an overview of relevant case law, see ibid paras 15-18.

41 *Nuclear Tests Case (Australia v France)* (Judgment) [1974] ICJ Rep 253, para 46.

42 *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, para, 158. See also Panizzon (n 36) 109-19.

43 De Baere and Roes (n 12) 871.

44 Jörg P Müller and Robert Kolb, 'Article 2(2)' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary*, vol 1 (2nd edn, Oxford University Press 2002) 91, 95; Kolb, *Good Faith in International Law* (n 6) 159.

45 Kolb, *Good Faith in International Law* (n 6) 163.

raison d'être, in the law of international organizations, the principle is of a more ambitious nature.[46] In particular, good faith in the law of international organizations, expressed in 'good membership' clauses, serves to protect and to further loyalty to the common enterprise against excessive unilateralism by member states.[47] In doing so, it requires member states to compromise and cooperate towards the achievement of common goals.[48] While the understanding of what good faith requires will vary from one organization to another depending on the degree of integration achieved, at a minimum, loyalty to common commitments constitutes a necessary condition for the proper functioning of any organization as a joint enterprise.[49] Ultimately, good faith serves as an overarching principle for the entire institutional legal order, whose main function is to ensure the primacy of common objectives over member states' excessive unilateralism.[50]

How exactly does the principle of good faith operate within international organizations? By producing various more concrete sub-principles and norms that channel the value of loyalty to common organizational goals throughout the institutional legal order.[51] These include the norm of *pacta sunt servanda,* the obligation to interpret and perform the treaty in accordance with its spirit rather than the letter, the prohibition against the abuse of rights and the abuse of procedure, the notions of acquiescence and estoppel, the duty to negotiate and cooperate in the execution of the treaty, the obligation to settle disputes in good faith, the doctrine of reasonable notice for withdrawal from an agreement and others.[52] As is clear from this

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46 Ibid.

47 Ibid 160.

48 Ibid 162.

49 Müller and Kolb (n 44) 96.

50 Kolb, *Good Faith in International Law* (n 6) 164.

51 Ibid 23.

52 Ibid. See also Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (first published 1953, Cambridge University Press 1987) 106-20.

description, good faith essentially dominates all stages of contractual behaviour in international law.[53]

Of most relevance to the current argument are the obligations to interpret and to perform one's obligations in good faith, codified in Articles 31 and 26 of the VCLT, respectively.[54] To start with the former, the interpretation of treaty commitments in good faith has several meanings. At the most basic level, the principle implies the primacy of the spirit of the treaty over an excessive adherence to the letter.[55] In particular, good faith implies consideration of the object and purpose of the treaty, together with its context and other relevant elements.[56] In the words of the ICJ:

> It is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.[57]

Here, reference to the purpose of the treaty, rather than pointing to a teleological reading, means choosing an interpretation that enables the treaty to have appropriate effects or, in other words, ensures its *effet utile*.[58] The second meaning of the principle in the context of treaty interpretation is that

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53 For more on this subject, see Kotzur (n 38) para 21; Kolb, *Good Faith in International Law* (n 6) 34.

54 VCLT (n 17) arts 26, 31. The VCLT also codifies, among other relevant norms, an obligation not to defeat the object and purpose of the treaty before its entry to force. Ibid art 18(1).

55 Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2008) 426; Kolb, *Good Faith in International Law* (n 6) 62-64.

56 Villiger (n 55) 426.

57 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, para 142 (as cited in De Baere and Roes (n 12) 844). See also Cheng (n 52) 115-18.

58 Villiger (n 55) 428; De Baere and Roes (n 12) 872. See also Hersch Lauterpacht, *The Function of Law in the International Community* (first published 1933, Oxford University Press 2011) 131-35.

good faith prohibits an interpretation that will lead to manifestly absurd or unreasonable results.[59] Good faith here corresponds to the standards of reasonable and non-abusive interpretation.[60] The corollary of this is an obligation of the parties to refrain from fraudulent use of the language, in order to evade their obligations under the treaty.[61] In this sense, one can see a clear connection between the requirement of good faith interpretation and the prohibition of the abuse of rights granted by the treaty.[62]

In addition to the obligation to interpret one's commitments in good faith, several other norms flow the principle that re applicable during the execution stage. These are covered under Article 26 of the VCLT. According to the well-established case law of the ICJ and other international courts, such norms include the duty to negotiate and cooperate to solve any difficulties in the execution of the treaty, the duty not to frustrate the object and purpose of the treaty after it has entered into force, the duty abstain from exercising one's rights in an abusive manner and others.[63]

To sum up, this section has maintained that good faith is an overarching principle of institutional legal order that manifests itself in various more concrete sub-principles and norms that transmit allegiance to the common objectives pursued through institutional co-operation. Through these norms, the principle of good faith constantly shapes the standards of member states' behaviour in accordance with ideals of honesty, loyalty and reasonableness, allowing them to adapt to changing conditions of communal life.[64] Although a brief overview of the norms flowing from good faith has been provided above, their meaning will necessarily remain context-

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59 De Baere and Roes (n 12) 872.

60 Panizzon (n 38) 44; Kolb, *Good Faith in International Law* (n 6) 64-65.

61 Villiger (n 55) 425-26; Kolb, *Good Faith in International Law* (n 6) 63.

62 Villiger (n 55) 426; Kolb, *Good Faith in International Law* (n 6) 63.

63 For more on these performance-related duties, see Villiger (n 55) 365-67; Kolb, *Good Faith in International Law* (n 6) 67-73.

64 Kotzur (n 38) para 22; Kolb, *Good Faith in International Law* (n 6) 164.

dependent, leading to different interpretations of membership obligations that are appropriate to the circumstances of each individual case.

IV. Good Faith as the Basis of 'Good Membership' Obligations in the Practice of International Courts and Tribunals

The three sections below will demonstrate how the principle of good faith has been utilized by the ICJ and the ILOAT to develop 'good membership' obligations in three case studies concerning, respectively, the UN membership crisis in the late 1940s, the potential transfer of the World Health Organization's (WHO) Regional Office for the Middle East in 1980 and the premature ousting of the Organization for the Prohibition of Chemical Weapons' (OPCW) Director-General in 2003.

1. Voting in Good Faith on the Admission of New Members to the UN: The Conditions of Admission *Advisory Opinion of the ICJ*

The *Conditions of Admission* advisory opinion issued by the ICJ is one of the leading examples of the application of the principle of good faith in institutional legal order.[65] As the analysis of the case below will demonstrate, good faith here assumed a function of limiting the exercise of voting discretion by UN members on the admission of new members to the organization.[66] In particular, it required the member states to refrain from espousing abusive interpretations of the UN Charter admission criteria for the sake of their ideological interests.

The case arose in the early years of the Cold War when the United States and the Soviet Union each started to halt the admission of members belonging to the rival bloc. To protect itself from becoming outnumbered in the General Assembly, the Soviet bloc insisted that, when a country from one camp is admitted, a country from the other camp should be admitted

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65 Müller and Kolb (n 44) 98; Kolb, *Good Faith in International Law* (n 6) 163.

66 Müller and Kolb (n 44) 98.

simultaneously (so-called 'conditional admission').[67] This eventually created a membership deadlock, with only six (out of seventeen) applicants being accepted into the UN during the first two years of its existence.

In an attempt to resolve the crisis, the General Assembly requested the ICJ to render an advisory opinion, inquiring whether a member of the UN, when casting a vote on the admission of new members to the organisation, either in the General Assembly or in the Security Council, is allowed to make its decision based on criteria not explicitly provided in the UN Charter.[68] In particular, could a member state condition its vote for a candidate's membership upon other states being allowed to join the UN?

To clarify, Article 4 of the UN Charter regulates the question of admission of new members in the following manner:

> Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.[69]

Several states from the Eastern bloc, including Yugoslavia and Poland, argued that the Article 4 criteria were open-ended and, as a result, individual decisions on the admission of new members were entirely within each state's political discretion.[70] The Western bloc, represented by the United States, Canada, Australia, Belgium and others, instead argued that member states

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67 Simon Chesterman, Ian Johnstone and David M. Malone, *Law and Practice of the United Nations: Documents and Commentary* (Oxford University Press 2016) 196.

68 *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (Advisory Opinion) [1948] ICJ Rep 57.

69 UN Charter (n 1) art 4(1).

70 *Conditions of Admission* (Observations Submitted by Governments) [1948] ICJ Pleadings 22; *Conditions of Admission* (Annexes to the Minutes) [1948] ICJ Pleadings 99-112. See also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006) 372.

were not legally entitled to invoke any other conditions external to the Charter when casting their votes.[71]

The Court, by a majority of nine judges to six, sided with the latter position, ruling that the membership conditions provided in Article 4 of the UN Charter were exhaustive. To clarify, in reaching this conclusion, the Court first ruled that the wording of the provision clearly demonstrated that the authors intended Article 4 to represent 'an exhaustive enumeration' of the membership criteria that 'are not merely stated by way of guidance or example'.[72] Further, the judges emphasized that the contrary interpretation would deprive the provision of its 'significance and weight' and would grant the member states an unlimited discretion that is incompatible with the very spirit of the UN Charter.[73] At the same time, the ICJ noted that the UN member states were allowed to take into account other political factors to determine whether the prescribed conditions were fulfilled in the case of each individual applicant.[74] Although this granted a wide margin of discretion to the member states in deciding on the admission of new members, this did not imply that such discretion was open-ended. Importantly, the Court emphasized that states were only allowed to take into account such factors that could 'reasonably and *in good faith*' be connected to the Article 4 conditions.[75]

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71 *Conditions of Admission* (Observations Submitted by Governments) (n 70) 14-33. See also Koskenniemi (n 70) 372.

72 *Conditions of Admission* (Advisory Opinion) (n 68) 9.

73 Ibid 10.

74 Ibid. In his individual opinion, Judge Azevedo gives examples of such permissible political factors. When interpreting the 'peace-loving' criterion in Article 4, they include, for instance, positions that the countries adopted during World War II or the status of their diplomatic relations with existing UN members, See *Conditions of Admission* (Individual Opinion by M Azevedo) [1948] ICJ Rep 78.

75 Ibid (emphasis added).

As noted by Koskenniemi, even though the ICJ referred to good faith only once in the judgment, the principle played a pivotal role in its reasoning.[76] The paramount role of good faith in constraining the member states' decisions on the admission of new members was also emphasized by the dissenting judges. For instance, dissenting Judge Zoričič emphasized that good faith represents a legal basis for the member states' conduct in institutional settings:

> Any organization, and especially that of the United Nations, is, as a general principle, founded on good faith. This rule, which all States have bound themselves to observe when signing the Charter (Article 2/2), requires that a Member shall fulfil its obligations in accordance with the purposes of and in the interests of the Organization.[77]

Moreover, in the joint dissenting opinion, Judges Basdevant, Winiarski, McNair and Read reached the conclusion that, although the UN members were allowed to take any political considerations into account when deciding on the question of membership, they are 'legally bound to have regard to the *principle of good faith*, to give effect to the Purposes and Principles of the United Nations' when exercising their votes. [78]

Thus, in both the majority and dissenting opinions, good faith was utilized as a limit on states' interpretative powers, prohibiting them from invoking criteria that are not intrinsically connected with those prescribed in the Charter.[79] In other words, the principle provided a yardstick for distinguishing between political factors that were permissible in the admission decisions and the ones that were not. As emphasized by the Court, only arguments that can be reasonably justified in terms of Article 4 were

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76 Koskenniemi (n 70) 378.

77 *Conditions of Admission* (Dissenting Opinion by M. Zoričič) [1948] ICJ Rep 94, 103.

78 *Conditions of Admission* (Dissenting Opinion by Judges Basdevant, Winiarski, Sir Arnold McNair and Read) [1948] ICJ Rep 82, para 9 (emphasis added).

79 Müller and Kolb (n 44) 98.

admissible in support of member states' votes. This, in essence, is the articulation of one of the corollaries of good faith, the doctrine of abuse of rights, which prohibits the exercise of a right or discretion 'for an end different from that for which the right was created, to the injury of another person or the community'.[80] The doctrine was most explicitly articulated in the individual opinion of Judge Azevedo:

> Having established that the required conditions are fixed, it might still be possible – having regard to the doctrine of the relativity of rights already accepted in international law … – to admit a kind of censorship for all cases in which there has been a misuse or, at any rate, abnormal use of power in the appreciation of the exhaustive list of qualities.[81]

The judge also noted that the concept of misuse of rights is no longer determined by subjective intent but is rather defined in accordance with objective standards, by reference to 'what is normal, having in view the social purpose of the law'.[82] He further observed that, although it would be difficult to ascertain such limits in abstract, several examples may be provided.[83] As one of such examples, the judge mentioned the hypothetical claim that Switzerland, despite its neutrality in both World Wars, did not satisfy the requirement of being a' peace-loving' country, which at the time referred to the countries that did not side with the Axis powers during the World War II.[84]

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80 BO Iluyomade, 'The Scope and Content of a Complaint of Abuse of Right in International Law' (1975) 16 Harvard International Law Journal 44, 48. See also Michael Byers, 'Abuse of Rights: An Old Principle, A New Age' (2002) 47 McGill Law Journal 389, 392-410.

81 *Conditions of Admission* (Individual Opinion by M. Azevedo) [1948] ICJ Rep 79-80.

82 Ibid 80.

83 Ibid.

84 Ibid. The judge also noted that states are not obliged to state their reasons for vote but subject themselves to scrutiny if they choose to do so.

The majority of the judges seemed to believe that the case of conditional admission presented before the Court in the current case clearly constituted a manifest misinterpretation of the Article 4 criteria. In particular, the Court characterized conditional admission as being 'entirely unconnected" with the Charter conditions because it makes the admission to the organization dependent not upon certain characteristics of the applicant in question but on completely foreign conditions, concerning the admission of another state.[85] The *Conditions of Admission* advisory opinion represents a compelling example of the application of good faith in clarifying the UN members' obligations under Article 4 of the Charter. When presented with the membership crisis provoked by the ideological divide between the Western and the Eastern blocs, the ICJ required the member states to interpret the article in good faith or, in other words, to refrain from abusing the UN Charter criteria when deciding on the admission of new members.

2. The Duty to Negotiate the Transfer of a WHO Regional Office in Good Faith: Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt *Advisory Opinion of the ICJ*

As mentioned above, the application of the principle of good faith extends beyond the phase of interpretation of institutional commitments and also covers their execution. One of the main norms flowing from good faith performance of institutional commitments is the general duty to cooperate.[86] As explained by Kolb, this duty is a natural consequence of the 'treaty bond itself', the existence of which creates legitimate expectations that the parties will work together to solve any issues that may arise during implementation of the treaty.[87] The specific manifestations of the duty to cooperate in relation to the possible termination of a treaty between an international organization and one of its member states were clearly articulated by the ICJ

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85 Ibid 65.

86 Kolb, *Good Faith in International Law* (n 6) 67.

87 Ibid. See also De Baere and Roes (n 12) 853.

in its Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt.*[88]

The advisory opinion concerned the potential transfer of the WHO seat for the Eastern Mediterranean Regional Office from Alexandria to Amman due to changes in the political climate in the region. To elaborate, since 1949, the former Alexandria Sanitary Bureau, an international health agency created in Egypt back in the nineteenth century to prevent the spread of diseases among pilgrims on the way to and from Mecca, had for decades been operating as the WHO seat for its Eastern Mediterranean Regional Office.[89] While the Alexandria office was integrated into the WHO system in July 1949 pursuant to Article 54 of the Constitution of the WHO and a subsequent resolution of the WHO's Executive Board,[90] the agreement between Egypt and the organization for determining the latter's privileges, immunities and facilities was concluded only in 1951 (the '1951

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88 *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73.

89 Ibid. For more on the historical background of the dispute, see paras 11-27.

90 Constitution of the World Health Organization (adopted 22 July 1946, entered into force 7 April 1948) 14 UNTS 185 (WTO Constitution), art 54, which states the following: 'The Pan American Sanitary Organization, represented by the Pan American Sanitary Bureau and the Pan American Sanitary Conferences, and all other inter-governmental regional health organizations in existence prior to the date of signature of this Constitution, shall in due course be integrated with the Organization. This integration shall be effected as soon as practicable through common action based on mutual consent of the competent authorities expressed through the organizations concerned'; WHO (Resolution of the Executive Board) 'Establishment of Regional Organization and Place of Regional Office' (March 1949) EB3.R30, para 1, which states that 'The Executive Board … conditionally approves the selection of Alexandria as the site of the Regional Office for the Eastern Mediterranean Area, this action being subject to consultation with the United Nations'.

Agreement').[91] From that point, the office in Alexandria functioned as a fully-fledged WHO Regional Office until the conclusion of a series of peace treaties between Egypt and Israel in 1978 (the so-called 'Camp David Accords') drastically changed the situation in the region.[92]

As a consequence of the shift in Egypt's position on the Arab-Israeli conflict, the relationships between Egypt and other Arab states became hostile, with the latter pressing for the immediate transfer of the Regional Office from Egypt to Jordan.[93] Egypt objected to the office transfer, claiming that, in line with Section 37 of the 1951 Agreement, the decision to transfer could not be taken unilaterally by the WHO. Rather, it was to be made in consultation with the other party and was subject to two years' notice:

> The present Agreement may be revised at the request of either party. In this event the two parties shall consult each other concerning the modifications to be made in its provisions. If the negotiations do not result in an understanding within one year, the present Agreement may be denounced by either party giving two years' notice.[94]

The other Arab states, in turn, contested this interpretation, arguing that it was the decision of the Health Assembly giving effect to the 1949 resolution

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91 Agreement between the World Health Organization and the Government of Egypt for the Purposes of Determining the Privileges, Immunities and Facilities to Be Granted in Egypt by the Government to the Organization, to the Representatives of Its Members and to Its Experts and Officials (WHO-Egypt) (signed 25 March 1951) (1951 Agreement). For more on the process through which the Alexandria Bureau was integrated within the WHO framework, see Kolb, *Good Faith in International Law* (n 6) paras 14-27.

92 Catherine Brölmann, 'Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, [1980] ICJ Rep 73' in Cedric Ryngaert, Ige F Dekker, Ramses A Wessel and Jan Wouters (eds), *Judicial Decisions on the Law of International Organizations* (Oxford University Press 2016).

93 *Interpretation of the Agreement* (n 88) paras 29-31.

94 1951 Agreement (n 89) s 37, quoted in *Interpretation of the Agreement (*n 88) 166. For further discussion, see *Interpretation of the Agreement* (n 88) 165-70.

of the WHO Executive Board that formed the legal basis for the establishment of the Regional Office, not the 1951 Agreement, which was concluded two years after the Alexandria Bureau began operating as a WHO site.[95] As a result, Section 37 did not govern the choice and the potential transfer of the site of the WHO Regional Office. [96] Rather, it was completely within the power of the World Health Assembly to change the location of the WHO regional office, whenever it wished to do so.[97] To bring some clarity to the question, the World Health Assembly decided to refer the question of the applicability of Section 37 of the 1951 Agreement to the potential transfer of the Regional Office to the ICJ. In addition, the Assembly inquired about the legal obligations of both the WHO and Egypt in relation to the Regional Office during the two-year period between the notice and the actual termination of the 1951 Agreement.[98]

The Court's reasoning was clearly motivated by the concern that an abrupt denunciation of the 1951 Agreement by either of the parties would lead to a serious disruption of the WHO's work in the region. To avoid such an outcome, the ICJ decided to bypass the controversial issue of whether the 1951 Agreement, concluded two years after the Alexandria Bureau had been operating as the WHO Regional Office, constituted the legal foundation for its establishment and whether, as a result, the Agreement's provisions on treaty termination were applicable to the Office's potential transfer.[99] Instead, the Court declared at the outset that the real question underlying the advisory opinion was the identification of the wider legal framework

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95 *Interpretation of the Agreement* (Written Statements) [1980] ICJ Pleadings 141-55.

96 Ibid.

97 Ibid 142.

98 *Interpretation of the Agreement* (Request for Advisory Opinion) [1980] ICJ Pleadings 3.

99 See Brölmann (n 92) 249.

regulating the permissibility and the conditions of the transfer of the Regional Office from Egypt, not just the application of Section 37.[100]

After reformulating the question in this manner, the Court emphasized that, irrespective of the legal nature of the 1951 Agreement, there existed 'a contractual legal regime' regulating the relations between Egypt and the organization. This legal regime consisted of various agreements concluded between the parties in the period from 1949 to 1951 and, most importantly, was based on Egypt's status as both a WHO member and one of the organization's host states.[101] As a consequence of this strong 'contractual' bond between the parties, they were under an obligation to implement their treaty commitments in good faith, including the duty to cooperate in resolving any problems related to the transfer of the Regional Office. In Court's own words:

> … the very fact of Egypt's membership in the Organization entails certain mutual obligations of co-operation and good faith incumbent upon Egypt and the organization. Egypt offered to become host to the Regional Office in Alexandria and the Organization accepted that offer: Egypt agreed to provide the privileges, immunities and facilities necessary for the independence and effectiveness of the Office. As a result, the legal relationship between Egypt and the Organization became, and now is, that of a host State and an international organization, the very essence of which is a body of mutual obligations of *co-operation and good faith*.[102]

The Court stressed once again that it was the deliberate actions of both parties that led to the creation of an important WHO office, 'employing large staff and discharging health functions important both to the Organization and to Egypt itself' for over thirty years.[103] This, in turn, created legitimate expectations that both parties would handle the transfer of the office with due care, in order to preserve the continuous work of the

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100 *Interpretation of the Agreement* (n 88) para 35.

101 Ibid para 43.

102 Ibid (emphasis added).

103 Ibid.

WHO in the region.[104] Thus, in these particular circumstances, good faith required the parties to allocate a reasonable period of time for a 'smooth and orderly' transfer of the Office to the new location and, in the meantime, to ensure that the WHO enjoyed full use of its privileges, immunities and facilities at the old site.[105] In summary, the Court opined that it was the very nature of this situation or, in other words, the urgent need to protect the effectiveness of institutional commitments, that 'demands consultation, negotiation and co-operation' between the parties.[106]

On the basis of these legal and practical considerations, the Court derived three specific manifestations of the duty to cooperate in the current context: firstly, to negotiate the conditions of the potential transfer in good faith; secondly, if such transfer is to be effectuated, to continue consultations with regard to the logistics of such transfer 'with a minimum prejudice to the work of the Organization'; and, thirdly, to give a reasonable period of notice for the termination of the existing arrangements.[107] The Court concluded by emphasizing, once again, that throughout the whole process both parties should be guided by the principle of good faith:

> the paramount consideration both for the Organization and the host State in every case must be their clear obligation to co-operate in good faith to promote the objectives and purposes of the Organization as expressed in its Constitution.[108]

To summarize, this advisory opinion is another illustration of the important role that good faith plays throughout all stages of the execution of institutional commitments, including right before their termination. In this particular case, the ICJ emphasized the existence of a close 'contractual' bond

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104 Ibid para 44.

105 Ibid para 44. See also Kolb, *Good Faith in International Law* (n 6) 68.

106 *Interpretation of the Agreement* (n 88) para 44. See also Kolb, *Good Faith in International Law* (n 6) 68.

107 *Interpretation of the Agreement* (n 88) para 49.

108 Ibid.

between Egypt and the WHO, the natural consequence of which was the duty of both parties to cooperate in resolving any problems arising out of the implementation of their respective treaty obligations. Thus, the Court developed, as a part of good faith performance of the parties' institutional commitments, specific duties of negotiation and co-operation concerning the transfer of the WHO Regional Office in order to ensure the smooth and continuous work of the organization in the Middle East.

3. Ensuring the Due Process Rights of International Civil Servants: Bustani *Case Before the ILOAT*

International administrative law, or the law of international civil service, which regulates the relationships between international organizations and their staff members, represents one of the main areas of application of the good faith principle in the law of international organizations.[109] Indeed, as was affirmed by the Court of Justice of the European Communities already in the 1960s, the principle is the cornerstone of the contractual relationships between an organization and its staff.[110] Thus, as elsewhere, a number of more concrete sub-principles and norms, through which the principle of good faith operates, can be traced in this area.[111]

According to Amerasinghe, such sub-principles are mainly centred on the prohibition of arbitrary conduct of an organization vis-à-vis its employees, which has been reviewed by administrative tribunals on the basis of three grounds: irregularity of motives, substantive deficiencies and procedural

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109 On the role of good faith and related principles, including abuse of power, in the law of international civil service, see Kolb, *Good Faith in International Law* (n 6) 169-75.

110 Joined Cases 43, 45 and 48/59 *Eva von Lachmüller, Bernard Peuvrier, Roger Ehrhardt v Commission of the European Economic Community* [1960] EU:C:1960:37 (cited in Kolb, *Good Faith in International Law* (n 6) 170).

111 Amerasinghe, *Principles of the Institutional Law of International Organizations* (n 24) 301-02; Kolb *Good Faith in International Law* (n 6) 170.

deficiencies.[112] The first category refers to organizational decisions vis-à-vis its employees that are taken on discriminatory basis or for any other malice or irregular purposes.[113] In turn, review of administrative decisions on substantive grounds further includes lack of legal basis for the decision, absence of competent authority, error of law or fact and omission of facts, as well as reaching unreasonable conclusions.[114] For their part, procedural irregularities concern the absence of fair procedure in the taking the administrative decision, including not providing the employee the possibility to defend herself or not stating reasons for the administrative decision.[115]

Indeed, all typical elements of the application of good faith in the law of international civil service can be found in the high-profile *Bustani* case before the ILOAT. The case concerned the premature termination of the second term appointment of the former Director-General of the OPCW, Mr. Jose Bustani, an unprecedented action in the history of international organizations.[116] He was first appointed in 1997 for the period of four years.

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112 Chittharanjan F. Amerasinghe, 'Termination of Permanent Appointments for Unsatisfactory Service in International Administrative Law' (1984) 33 International and Comparative Law Quarterly 859, 862; Amerasinghe, *Principles of the Institutional Law of International Organizations* (n 24) 303.

113 Amerasinghe, 'Termination of Permanent Appointments' (n 112) 871; Amerasinghe, *Principles of the Institutional Law of International Organizations* (n 24) 303.

114 Amerasinghe, 'Termination of Permanent Appointments' (n 112) 862-71; Amerasinghe, *Principles of the Institutional Law of International Organizations* (n 24) 303.

115 Amerasinghe, 'Termination of Permanent Appointments' (n 112) 875-82; Amerasinghe, *Principles of the Institutional Law of International Organizations* (n 24) 305-06.

116 *Bustani v Organisation for the Prohibition of Chemical Weapons (Case No 2232)* Judgment of the ILO Administrative Tribunal (16 July 2003). For analysis of this case, see Jan Klabbers, 'The *Bustani* Case Before the ILOAT:

In 2000, his mandate was unanimously renewed for another four years by the Conference of the States Parties, upon the recommendation of the Executive Council and with strong support from the US. However, by 2001, the relationship between Bustani and the US, the main contributor to the organization's budget, had started to deteriorate. The US accused Bustani of 'polarizing and confrontational conduct' and financial and political mismanagement of the organization, as well as 'advocacy of inappropriate roles for the OPCW', in particular referring to his continuous encouragement of the OPCW's inspections of weapons of mass destruction in Iraq.[117] Eventually, in March 2002, the US presented a no-confidence motion to the OPCW Executive Council demanding Bustani's resignation. After the motion failed to meet the required two-thirds majority, the US called for a special session of the Conference of the State Parties, once again pressing for the termination of Bustani's appointment, which was eventually accepted.[118]

Bustani subsequently appealed the decision before the ILOAT, which, under the OPCW Staff Regulations, was competent to hear the disputes between the organization and its staff members.[119] In particular, he alleged that a number of substantive and procedural deficiencies rendered the decision terminating his contract illegal. As regards substantive irregularities, he first claimed that the decision lacked a valid legal basis in the Chemical Weapons

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Constitutionalism in Disguise?' (2004) 53 International and Comparative Law Quarterly 455, 461.

117 Bureau of Arms Control, 'Fact Sheet: Preserving the Chemical Weapons Convention: The Need for a New Organization for the Prohibition of Chemical Weapons (OPCW) Director-General' (US Department of State, 2 April 2002) <https://2001-2009.state.gov/t/ac/rls/fs/9120.htm> accessed 19 October 2020. See also Sean Murphy, 'U.S. Initiative to Oust OPCW Director-General' (2002) 96 American Journal of International Law 711, 711.

118 Murphy (n 117) 711. The motion was adopted with 48 votes in favour, seven against and 43 abstentions.

119 *Bustani* (n 116).

Convention, which only allowed the Conference to appoint the Director-General or to renew his or her mandate.[120] He also claimed that the decision was adopted by an incompetent authority, specifically the special session of the Conference, which he alleged was 'abusively and erroneously seized' by the US to overrule the previous decision of the Executive Council rejecting the no-confidence motion brought against him.[121] Lastly, he submitted that the decision was procedurally flawed as it was not properly substantiated, with the 'lack of confidence' being the only reason indicated for the termination of his contract.[122]

On the other hand, the OPCW affirmed that lack of confidence presented a legitimate basis for terminating the Director-General's contract in exceptional circumstances when 'preservation and effective functioning of the Organisation' were at stake.[123] In addition, the organization objected to the ILOAT's jurisdiction to hear the case, claiming that the decision ending Bustani's appointment was political in nature and could not be subject to the ILOAT's review.[124] Further, the OPCW claimed that, in any event, the Director-General, in light of his position and responsibilities, cannot be considered an ordinary staff member of the organization, thereby falling outside the material scope of the tribunal's jurisdiction.[125]

The judgment of the ILOAT represents an affirmation of the above-mentioned principles of international administrative law aimed at prohibiting arbitrary conduct of the organization vis-à-vis its employees, even in the most high-profile cases. To this end, it was not surprising that the ILOAT's main focus in the case was on asserting jurisdiction over the dispute by construing the case as an ordinary staff dispute and downplaying

120 Ibid para B.

121 Ibid.

122 Ibid.

123 Ibid para C.

124 Ibid paras C and E.

125 Ibid para C.

its significant political connotations.[126] In doing so, it observed that, according to the standard usage of the word 'official' in the OPCW rules and its own Statute, the Director-General was to be regarded as a staff member entitled to the protection of his labour rights, as opposed to a political leader who can be removed simply due to lack of support from his constituency.[127] As regards the jurisdiction *ratione materiae,* the Tribunal emphasized that the decision to prematurely terminate the appointment of an international civil servant is necessarily administrative in nature.[128] As such, it cannot be exempted from the Tribunal's review, even if it was adopted by the Organisation's highest decision-making organ.[129]

At the merits stage, the Tribunal cautiously dodged the central question concerning the authority of the Conference of the State Parties to dismiss the Director-General in the absence of an explicit provision to this end in the organization's constitution. Instead, it simply noted that the Conference enjoys a broad competence to examine any issue concerning the Secretariat under the Chemical Weapons Convention.[130] However, at the same time, it ruled that the contested decision violated the core principles of international administrative law, whose observance represents a necessary condition for the effective functioning of any international organization. In doing so, it once again affirmed the limitations on the discretionary power of the organization:

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126 Klabbers, 'The *Bustani* Case Before the ILOAT' (n 116) 461. For an extensive analysis of the case, see also Treasa Dunworth, 'Towards a Culture of Legality in International Organizations: The Case of the OPCW' (2008) 5 International Organizations Law Review 119, 124.

127 *Bustani* (n 116) paras 7-8. On the ambiguous role of Director-Generals in international organizations more generally, see Klabbers, 'The *Bustani* Case Before the ILOAT' (n 116) 458-60.

128 *Bustani* (n 116) para 10.

129 Ibid.

130 Ibid para 15. See also Klabbers, 'The *Bustani* Case Before the ILOAT' (n 116) 458-60.

> In accordance with the established case law of all international administrative tribunals, the Tribunal reaffirms that the independence of international civil servants is an essential guarantee, not only for the civil servants themselves, but also for the proper functioning of international organisations [...] To concede that the authority in which the power of appointment is vested – in this case the Conference of the States Parties of the Organisation – may terminate that appointment in its unfettered discretion, would constitute an unacceptable violation of the principles on which international organisations' activities are founded […] by rendering officials vulnerable to pressures and to political change.[131]

In doing so, the ILOAT emphasized that any decision prematurely ending the appointment of a staff member should respect all procedural guarantees, including access to an independent body where the applicant can defend his case.[132] In addition, any decision of this kind should be well substantiated, pointing to 'grave misconduct' displayed by the staff member or other abnormal circumstances that could justify the exceptional measure of the civil servant's dismissal.[133] However, in case of Mr. Bustani, no such procedural guarantees were followed and the reasons for his replacement were 'extremely vague', merely referring to 'the lack of confidence in the present Director-General'.[134] As a result, the impugned decision resulted in the violation of his contract of employment and the fundamental principles of the law of the international civil service and, thus, was set aside.[135]

To sum up, the *Bustani* judgment rendered by the ILOAT illustrates the important role that the principle of good faith can play in protecting international civil servants from abusive conduct by the organization. In particular, in present circumstances, the *leit motif* of the Tribunal's reasoning was the reaffirmation of the application of well-recognized principles of

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131 *Bustani* (n 116) para 16.

132 Ibid para 15.

133 Ibid.

134 Ibid.

135 Ibid para 17.

international administrative law – flowing from the principle of good faith – to the decision to terminate the Director-General's appointment. As demonstrated, while the Tribunal recognized that the organization's highest plenary organ had broad discretion in adopting the decision, it nevertheless maintained that this discretion cannot be exercised in an arbitrary manner, or, in other words, that the organization should respect essential procedural guarantees, including providing the employee with the possibility to defend herself and stating reasons for terminating the appointment. The application of substantive and procedural limits on an organization's conduct is important not only for the protection of its employees' individual rights but also to ensure the independence of the international civil service, without which no modern international organization can function effectively.

V. Conclusion

The aim of this article was to examine the foundation of various explicit and implicit obligations pertaining to membership in international organizations that have been developed in legal practice and scholarship. In particular, against the grain of the descriptive approach prevailing in international institutional law, it was argued that these duties are not merely a reiteration of the member states' commitments as formulated in the constitutions of particular international organizations. Rather, their scope is much more far-reaching, being determined by the application of the principle of good faith to the performance of states' institutional commitments in particular legal scenarios. To put it differently, the resulting analysis demonstrated that the principle of good faith allows an international organization to constantly shape the scope of membership duties, leaving the legal parameters within which the power between the organization and its member states is contested in constant flux. With the principle of good faith as the legal basis for the membership obligations, the member states cannot claim that their duties have been set once and for all. Instead, whenever a new problem of institutional life arises, new expectations will emerge with regard to member

states' conduct, depending on organizational needs at a particular point in time.[136]

Moreover, the analysis undertaken in this article underscored the pivotal role that the principle of good faith, as a general principle of law, can play in the development of institutional legal order. Normally, constitutions of international organizations only establish the basic rules of communal life, leaving resolution of various legal problems to subsequent stages. With formal constitutional amendment being frequently unattainable, good faith, in light of its flexible and comprehensive nature, contributes to the organic evolution of an organization's legal order.[137] As demonstrated, this is realized through the generation of more concrete norms and sub-principles – such as the obligation to interpret and perform the treaty in accordance with its spirit rather than the letter, the prohibition of the abuse of rights and of the abuse of procedure, the notions of acquiescence and estoppel and others – that are then used to *concretize, supplement* and *correct* existing institutional norms. The three functions played by good faith and these related norms in the development of institutional legal order can be explained in more detail by the three cases presented in the article.

Firstly, the *Conditions of Admission* advisory opinion exemplifies the concretizing function of good faith, which allows the assessment of an act whose legal limits have not been well defined *prima facie* in the constituent instrument against the standard of reasonableness existing in the organization at a particular point in time.[138] As previously illustrated, in this case, good faith served as a limit on the exercise of member states'

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136 Kolb, *Good Faith in International Law* (n 6) 164.

137 See De Baere and Roes (n 12) 872.

138 Robert Kolb, 'Principles as Sources of International Law: (With Special Reference to Good Faith)' (2006) 3 Netherlands International Law Review 1, 28; Martijn W Hesselink, 'The Concept of Good Faith' in Arthur S Hartkamp, Martjin W Hesselink, Ewoud H Hondius, Chantal Mak and C Edgar du Perron (eds), *Towards a European Civil Code, Fourth Revised and Expanded Edition* (Kluwer Law International 2010) 623-627.

interpretative powers, verifying whether their votes were based on acceptable reasons.[139] Arguably, this function is essential in the majority of international organizations, which, unlike the European Union, include no organ that can provide an authoritative interpretation of their constitutions that is binding on other organs and member states.[140] In this light, reliance on good faith can compel member states to exercise self-restraint in their auto-interpretation of provisions of the constituent instrument by requiring them to act reasonably.[141]

In turn, the second case study concerning the potential transfer of the WHO Regional Office in the Middle East is an illustration of the supplementary function of good faith, which consists of devising specific additional duties to cover novel legal situations.[142] As explained in the analysis of the case, the ICJ developed various duties of consultation and co-operation incumbent upon Egypt and the organization, which were a natural consequence of faithful execution of their commitments. The case illustrates the fundamental role that the duty of cooperation plays in compensating for institutional shortcomings, specifically in relation to law enforcement. In the absence of a final judicial authority capable of resolving disputes between the organization and its member states and enforcing the solution by means of sanctions (with the ICJ exercising merely an advisory function), the willingness to cooperate in good faith is essential for peaceful resolutions of major and minor crises.[143]

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139 Eric De Brabandere and Isabelle Van Damme, 'Good Faith in Treaty Interpretation' in Andrew D Mitchell, M Sornarajah and Tania Voon (eds), *Good Faith and International Economic Law* (Oxford University Press 2015) 57.

140 Müller and Kolb (n 44) 95.

141 Ibid 97. See also De Brabandere and Van Damme (n 139) 38-40.

142 Mathias E Storme, 'Good Faith and Contents of Contracts in European Private Law' in Santiagu Espiau and Antoni Vaquer (eds), *Bases de un Derecho Contractual Europeo* (Tirant lo Blanch 2003); Hesselink (n 138) 627.

143 Kotzur (n 38) para 8.

Lastly, the *Bustani* case before the ILOAT highlights the role of the principle of good faith in correcting institutional norms. As mentioned, while the ILOAT noted that the Conference of the States Parties had the power to terminate the appointment of the Director-General prematurely, it also noted that any decision terminating such an appointment should respect the basic procedural guarantees provided in international administrative law, which derive from the principle of good faith and the prohibition of arbitrary conduct of the organization vis-à-vis its employees. By limiting the exercise of discretion by the organization's plenary organ by means of due process norms, the Tribunal managed to mitigate the unjust consequences suffered by the applicant as a result of the organizational act.[144] In other words, it allowed the ILOAT the flexibility to balance the right of the organization's plenary organ to remove the Director-General, when the support for his policies is lacking, with the need to protect the latter's employment's rights.

Thus, the theoretical analysis and the three cases presented above underlined an understanding of the principle of good faith as an instrument for informal constitutional change within international organizations, allowing for continuous functioning of the legal order in changing circumstances.[145] While the success of its application will depend largely on the political climate existing in an organization at a particular point in time, good faith represents a powerful legal mechanism for promoting the loyalty of member states to the common endeavour pursued through an international organization.[146]

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144 Kolb, 'Principles as Sources of International Law' (n 138) 28.

145 See Kolb, *Good Faith in International Law* (n 6) 164.

146 Ibid.