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THE CONCEPT OF TREATY IN INTERNATIONAL LAW

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TABLE OF CONTENTS

Detailed Table of Contents *vii*
Preface *xi*
A Guide to Official Documents *xiii*
List of Abbreviations *xv*

INTRODUCTION 1

CHAPTER I: Treaty-like instruments; an Overview 15

CHAPTER II: The 1969 Vienna Convention's Definition 37

CHAPTER III: On Intent 65

CHAPTER IV: Several Varying Theses 97

CHAPTER V: On the Co-existence of Normative Orders 121

EXCURSION TO CHAPTER V: The Soft Law Thesis 157

CHAPTER VI: The World Court 165

CHAPTER VII: Other Courts and Tribunals 219

CONCLUDING REMARKS 245

EPILOGUE: Some Remaining Questions 251

APPENDIX: A Questionnaire among Dutch Agencies 261

TABLE OF CASES 269

BIBLIOGRAPHICAL REFERENCES 279

INDEX 303

DETAILED TABLE OF CONTENTS

Preface *xi*
A Guide to Official Documents *xiii*
List of Abbreviations *xv*

INTRODUCTION 1
Theoretical Orientation 10

CHAPTER I: Treaty-like instruments; an Overview 15
Why cooperate? 25
The road to agreement 29
Televized diplomacy 33

CHAPTER II: The 1969 Vienna Convention's Definition 37
Article 2, paragraph 1 (a) 40
Designation 42
Number of instruments 44
Concluded between states 47
In written form 49
An international agreement 51
Governed by international law 55
Concluding remarks 63

CHAPTER III: On Intent 65
An awkward concept 65
Indicators of intent 68
Expression of consent to be bound 72
Entry into force 75
Judicial settlement 77
International registration 79
Publication 85
Consideration or *causa*? 86
Surrounding statements? 87
The relative importance of intent 89
Customary international law 90
Interpretation 91

Estoppel 93
Good faith 94
Concluding remarks 95

CHAPTER IV: Several Varying Theses 97
Introduction 97
Binding solely agencies or departments? 97
Not binding at all? 105
Legal effects over time? 108
The ties that bind 116
Concluding remarks 118

CHAPTER V: On the Co-existence of Normative Orders 121
Introduction 121
State practice: the problem of identification 122
Excursus: the Atlantic Charter 123
Excursus: the Helsinki Final Act 126
State practice and legal concepts 129
Non-legally binding agreements and democracy 131
Rules of reference? 135
Competing normative orders? 141
Courtesy 142
Morality 143
Politics 152
Concluding remarks 156

EXCURSION TO CHAPTER V: The Soft Law Thesis 157
Why the soft law thesis is self-contradictory 157
Justifications for the soft law thesis 163
Concluding remarks 164

CHAPTER VI: The World Court 165
Introduction 165
The Permanent Court of International Justice 166
Statements made during proceedings 166
The Czech-Polish frontier at Jaworzina 169
The European Danube Commission jurisdiction 172
Lithuanian-Polish railway traffic 176
The Free Zones case 177
Legal status of Eastern Greenland 178

Albanian minority schools 181

The International Court of Justice 182
South Africa's Mandate 182
Ambatielos 188
The Anglo-Iranian Oil Co. Case 190
Monetary Gold 191
Administrative memorandum 191
Interhandel 193
The Temple case 194
Interim agreement 195
Nuclear Tests 196
Aegean Sea 199
The WHO-Egypt agreement 202
Modus vivendi 203
The Nicaragua cases 204
A witticism 207
Border and transborder armed actions 209
The El Salvador/Honduras frontier 210
Libya/Chad 211
The Qatar v. Bahrain cases 212
Concluding remarks 216

CHAPTER VII: Other Courts and Tribunals 219
Introduction 219
Negative decisions 221
Lack of transformation or publication 221
Ultra vires 224
Domestic treaty-definitions 225
Involving third parties 226
Impropriety 226
Lack of agreement 226
Inseparability of agreement 227
Insufficient language 228
Dogmatic dismissals? 229
Positive decisions 232
Absence of form 233
Simplified forms 233
Simply binding 235
Binding, but not so simple 237

Lack of consent? 241
Exact scopes 242
Concluding remarks 243

CONCLUDING REMARKS 245

EPILOGUE: SOME REMAINING QUESTIONS 251
Explaining judicial behaviour 251
The limits of the concept of treaty 255
Law and politics 257
Concluding remarks 260

APPENDIX: A QUESTIONNAIRE AMONG DUTCH AGENCIES 261

TABLE OF CASES 269

BIBLIOGRAPHICAL REFERENCES 279

INDEX 303

PREFACE

It is often said that writing a doctoral dissertation is a solitary exercise. It is also often said that writing a dissertation is misery writ large. If these statements are true, I can only count my blessings. For me, the writing of this study was exciting, fun, and a constant incentive to engage in scholarly discussions with colleagues and students alike.

Without wishing to ignore any of my colleagues in Amsterdam and Helsinki, three of them warrant specific mention. First, I am grateful to my "promotor", Bert Vierdag. Under his supervision, this study was conceived, and under his supervision, this study has now been concluded. In the meantime, Bert left me free to develop my own thoughts, while always being available as a sounding-board and allowing me to pick his brain. His limitless knowledge of the law of treaties and his sharp analytical mind have helped prevent me from making many mistakes I would have otherwise made.

Second, I owe an immense gratitude to Malgosia Fitzmaurice, with whom I shared an office at the University of Amsterdam for several years. Countless have been the moments when we discussed the finer points of sources doctrine in general, and the concept of treaty in particular. In short, between us we approximated what I hold to be the best part of life as a scholar: constant discussion with an open mind.

Third, Martti Koskenniemi has played an important role, first by his written work (the footnotes to this study will readily testify my huge intellectual debt), later also in person. Our discussions have had a tremendous influence on my thinking.

A special word of thanks is due to the Foundation for Law and Public Administration (REOB, Stichting voor Recht en Openbaar Bestuur), without which this study would not have been possible. Its generous grant has kept me alive for the past four years, and its staff allowed me to go abroad for longer periods without putting any obstacles in my way.

But perhaps the biggest contribution has been made by my students. I have had the good fortune to lecture about the topic of this study at the University of Amsterdam, the Amsterdam School of International Relations, and the University of Helsinki. On all occasions, I have had the even better fortune of meeting intelligent, serious and skeptical students. They forced me to present my ideas as clearly as possible; to clarify certain points; and, to go

back to the drawing board and reconsider certain things. Without them, this study would have turned out very different indeed.

I am also hugely indebted to Ted Shapiro, who improved and streamlined my English, and Marguerite Niekoop, who prepared the manuscript for publication.

On those rare occasions when I thought that writing a dissertation was the torture it was rumoured to be, there were always family and friends to help out, each in their own way. Richard, Nathalie, Lars, Marian, Kimmo, Ursula, Mary, Pekka, Marja: thanks. Finally, I thank Marja-Leena for her love, support, guidance, and patience.

Amsterdam, December 1995

A GUIDE TO OFFICIAL DOCUMENTS

In this study, frequent reference will be made to the *travaux préparatoires* of the 1969 Vienna Convention on the Law of Treaties. The Convention was, essentially, prepared by the International Law Commission, which appointed four successive Special Rapporteurs: messrs. Brierly, Lauterpacht, Fitzmaurice, and Waldock. Their reports will be numbered consecutively, in keeping with usual academic practice. Thus, Brierly's first report will be referred to as Brierly I, his second as Brierly II, *et cetera*.

All reports prepared by the Special Rapporteurs have been published in the *Yearbook of the International Law Commission*, each in the second volume of the yearbook. The first volume of each yearbook contains records of discussions that took place within the ILC, and, starting in 1950, most yearbook issues also contain records of discussion on the law of treaties, based on the reports prepared by the Special Rapporteurs. However, not all yearbooks contain such discussions. The Lauterpacht reports, e.g., were never discussed; the ILC was too busy preparing other conventions. Discussions within the ILC will be fully footnoted.

The work was continued by a conference organized under auspices of the United Nations: the United Nations Conference on the Law of Treaties. The Conference, due to the complicated nature of the topic, met in two sessions, both of which took place in Vienna. The first was held in 1968, and its records were published as UN Doc. A/Conf.39/11. These records will be referred to as 1 *Official Records*, following the reference system employed by Vierdag.[1]

The records of the second conference (which took place in 1969) will be referred to as 2 *Official records*; they were published as UN Doc. A/Conf.39/11/Add.1. The official documents pertaining to the Conference, which have been published as UN Doc. A/Conf.39/11/Add.2, will be referred to as 3 *Official Records*. In order not to create overly extensive footnotes, we have, as a rule, refrained from referring to the exact meeting of either the Commit

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[1] See E.W. Vierdag, "The law governing treaty relations between parties to the Vienna Convention on the Law of Treaties and states not party to the Convention", 76 *AJIL* (1982), 779-801.

tee of the Whole, or the Plenary, or the International Law Commission. It is thought sufficient to simply refer to page numbers and paragraph numbers.

LIST OF ABBREVIATIONS

AFDI	Annuaire Francais de Droit International
AIDI	Annuaire de l'Institut de Droit International
AJIL	American Journal of International Law
AJPIL	Austrian Journal of Public and International Law
ARV	Archiv des Völkerrechts
BYIL	British Yearbook of International Law
CLP	Current Legal Problems
CMLRev.	Common Market Law Review
Col. JTL	Columbia Journal of Transnational Law
Col. LR	Columbia Law Review
EJIL	European Journal of International Law
ELR	European Law Review
EPIL	Encyclopedia of Public International law
FYIL	Finnish Yearbook of International Law
GYIL	German Yearbook of International Law
HILJ	Harvard International Law Journal
ICLQ	International and Comparative Law Quarterly
IJIL	Indian Journal of International Law
ILM	International Legal Materials
ILR	International Law Reports
NILR	Netherlands International Law Review
NYIL	Netherlands Yearbook of International Law
OZöRV	Osterreichische Zeitschrift für öffentliches Recht und Völkerrecht
PYIL	Polish Yearbook of International Law
RBDI	Revue Belge de Droit International
RdC	Recueil des Cours
Va. JIL	Virginia Journal of International Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

INTRODUCTION

One of the perennial questions to be answered in any international legal argument is the question whether the norms invoked by the parties are or are not norms of international law. Judges, policy makers, legal advisers, and scholars spend most of their time engaged in a quest to establish the legal nature of an invoked norm of customary international law, an invoked treaty norm, norms laid down in resolutions adopted by or within international organizations, unilateral statements, *et cetera*; The list is endless.[1] Indeed, a leading international lawyer, Sir Robert Jennings, in telling fashion gave one of his articles the title "What is international law and how do we tell it when we see it?"[2], the question-mark indicating the uncertainties surrounding the making of international law and the identification of its norms.

The uncertainties involved in international law-making are usually associated with the formation of customary international law. The determination of customary international law has been called "more an art than a scientific method"[3], and customary law has been deemed to be "one of the most cumbersome" sources of international law.[4] It is hardly surprising, then, that in the past few decades alone several in-depth studies of the concept of custom have appeared, either in book-form[5] or article-form[6], and comprising a wide

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[1] Recently, Higgins suggested that this quest finds its cause in the paucity of third-party judicial procedures. Whereas other legal systems can usually point to judicial decisions to substantiate the existence of certain rights or obligations, in international law the existence thereof is "tested by reference to the sources of international law." Rosalyn Higgins, *Problems and process: international law and how we use it* (Oxford 1994), at 100.

[2] In 37 *Schweizerisches Jahrbuch für Internationales Recht* (1981), 59-88.

[3] Mark W. Janis, *An introduction to international law* (Boston 1993, 2d ed.), at 44.

[4] G.J.H. van Hoof, *Rethinking the sources of international law* (Deventer 1983), at 85. The statement lacks precision: how many other cumbersome sources of international law could there possibly be?

[5] One can mention, e.g., Anthony d'Amato, *The concept of custom in international law* (Ithaca 1971). In studies dealing with the interrelations between custom and treaty, custom is usually problematicized, while the concept of treaty is treated as axiomatic. See, e.g., Mark E. Villiger, *Customary international law and treaties* (Dordrecht 1985); Nancy Kontou, *The termination and revision of treaties in the light of new customary internatio-*

range of theories.

By contrast, the concept of treaty has hitherto hardly been brought into question. Treaties are considered "a relatively clear and reliable source of international law"[7], and "a good deal easier to discuss than custom", as Onuf notes, "for there is only one major controversy about them as a source"[8], this one major controversy being whether treaties are sources of law or merely sources of obligation.[9]

Yet, the concept of treaty is not as clear-cut as may seem at first sight. Admittedly, some international agreements enjoy undisputed status as treaties. Few will deny[10] that, *inter alia*, the Charter of the United Nations, the Treaty establishing the European Union, or the European Convention for the protection of human rights and fundamental freedoms, are treaties, and as such establish legal rights and obligations, at least for the states parties to them.[11]

However, other international agreements have had their treaty-status questioned, and sometimes are not even considered to be legally binding. Several recent incidents may serve as illustrations. In 1994, the German

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nal law (Oxford 1994).

[6] See, e.g., Martti Koskenniemi, "The normative force of habit: international custom and social theory", reproduced in Martti Koskenniemi (ed.), *International law* (London 1992), 213-289.

[7] Van Hoof, o.c. note 4, at 117.

[8] Nicholas G. Onuf, "Global law-making and legal thought", in Nicholas G. Onuf (ed.), *Lawmaking in the global community* (Durham N.C. 1982), 1-81, at 22-23.

[9] Perhaps the major proponent of the latter school was Sir Gerald Fitzmaurice. See, e.g., his "Some problems regarding the formal sources of international law", in F.M. van Asbeck et. al. (eds.), *Symbolae Verzijl* (The Hague 1958), 153-176. A recent reply is Maurice Mendelson, "Are treaties merely a source of obligation?", in W.E. Butler (ed.), *Perestroika and international law* (Dordrecht 1990), 81-88. Actually, one may discern at least two other major controversies: (1) whether treaties are instruments or rather agreements embodied in instruments (see e.g. P.E. Corbett, "The consent of states and the sources of international law", 6 *BYIL* (1925), 20-30, and see below, ch. 2), and, related but distinct, (2) whether what matters is the treaty-instrument or the treaty-obligation. See, especially, Shabtai Rosenne, *Breach of treaty* (Cambridge 1985).

[10] With the exception of those who deny the existence of legally binding agreements at all. Ultimately, this almost Austinian stand is the position taken by Lipson as recently as 1991. See Charles Lipson, "Why are some international agreements informal?", 45 *International Organization* (1991), 495-538, esp. at 508.

[11] It has been claimed, that especially the United Nations Charter also affects the legal position of third states. An extensive treatment of the third party problem is Christine M. Chinkin, *Third parties in international law* (Oxford 1993).

Constitutional Court was faced with the question of whether ministerial declarations issued at summit meetings of international organizations are treaties in disguise[12]; the Court of Justice of the European Community was faced with the question, also in 1994, whether an agreement concluded, on the EC's behalf, by the Commission of the EC, constituted a treaty[13]; the International Court of Justice, still in 1994, had to determine whether an agreement designated as Minutes amounted to a treaty[14]; an international arbitration panel, in 1992, had to investigate whether a so-called informal agreement, a Memorandum of Understanding concluded between the United States and the United Kingdom, amounted to a treaty[15]; in October 1993, Dutch Foreign Minister Kooijmans had great difficulty in explaining the concept of treaty to the Second Chamber of the Dutch Parliament[16]; and the conclusion in January 1994 of what was dubbed a trilateral statement between the United States, Russia, and Ukraine, gave rise to some unrest within the US Congress.[17]

Surprisingly, given this state of confusion, few authors have endeavoured to clarify the concept of treaty[18], and those who have, have by and large done so within the limited confines of articles for scholarly journals.[19] A

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[12] AWACS-, Adria-, Somalia Urteil, 12 July 1994. Reproduced in 21 *Europäische Grundrechte Zeitschrift* (1994), 281. See also Georg Nolte, "Bundeswehreinsätze in kollektiven Sicherheitssystemen: zum Urteil des Bundesverfassungsgerichts vom 12. Juli 1994", 54 *ZaöRV* (1994), 652-685, esp. 665-672.

[13] Case C-327/91, *France v. Commission*, [1994] ECR 3641. See also James Kingston, "External relations of the European Community - external capacity versus internal competence", 44 *ICLQ* (1995), 659-670.

[14] *Qatar v. Bahrain*, [1994] ICJ Rep. 112.

[15] *Heathrow Airport User Chargers panel*, reported on in 88 *AJIL* (1994), 738-744. For comments, see John H. McNeill, "International agreements: recent US-UK practice concerning the memorandum of understanding", 88 *AJIL* (1994), 821-826; also Jennifer Skilbeck, "The US/UK arbitration concerning Heathrow Airport user charges", 44 *ICLQ* (1995), 171-179.

[16] Proceedings of the Second Chamber, 6 October 1993, at 8472-8473.

[17] Thus leading to a memorandum written by Robert E. Dalton, "International documents of a non-legally binding character", reproduced in 88 *AJIL* (1994), 515-519. The statement itself was one of several concluded during President Clinton's trip to eastern Europe in January 1994. They are reproduced in 5 *Department of State Dispatch* (1994, suppl. 1).

[18] A classic works such as Georg Jellinek's *Die rechtliche Natur der Staatenverträge* (Vienna 1880), its title notwithstanding, was more concerned with the conditions of validity of treaties.

[19] Among the first to do so, by his own admission, was Wilhelm Wengler. See his "Die Abgrenzung zwischen völkerrechtlichen und nichtvölkerrechtlichen Normen im internationalen verkehr", in *Legal essays: a tribute to Frede Castberg* (Oslo 1963), 332-352. See

possible reason for the paucity of scholarly attention to treaties, is that although customary law has always been plagued with controversial elements, at least one thing was certain: customary law is, almost by definition, law. Authors writing on the concept of custom have thus been able to concentrate on aspects of the formation of customary legal norms: the generality of practice needed; the temporal aspect; the activities constituting the relevant state practice; or, the articulation of *opinio juris*.

On the other hand, whether or not certain agreements concluded between states, international organizations or their representatives amount to law, is precisely the question that is at issue when the concept of treaty is analyzed. Whereas one can meaningfully write about custom without ever resorting to more fundamental notions about the nature of law in general and international law in particular, such an analysis is practically impossible where agreements are concerned, as indeed some authors have realized.[20]

Moreover, the challenge to the concept of treaty is of fairly recent origin. The very idea that some agreements are not legally binding, but nevertheless concluded with a view to mutual adherence, is a fairly novel one. Traditionally, to the extent that agreements were classified into different categories at all, the reasons for the distinctions related not to their possible legally binding nature, but to other aspects. Thus, Grotius already established a distinction between treaties and sponsions, the latter being concluded without sovereign authorization and therefore, initially, not giving rise to any bonds at all, unless they were tacitly or expressly ratified by the sovereign.[21]

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also his ""Nichtrechtliche" Staatenverträge in der Sicht des Völkerrechts und des Verfassungsrechts", 50 *Juristenzeitung* (1995), 21-26, esp. note 17.

[20] See, e.g., Michael Bothe, "Legal and non-legal norms - a meaningful distinction in international relations?, 11 *NYIL* (1980), 65-95 (based on the work of H.L.A. Hart); Julio A. Barberis, "Le concept de "traité international" et ses limites", 30 *AFDI* (1984), 239-270 (also working in the Hartian tradition); Pieter van Dijk, "Normative force and effectiveness of international norms", 30 *GYIL* 1987, 9-35; Frieder Roessler, "Law, de facto agreements and declarations of principle in international economic relations", 21 *GYIL* (1978), 27-59. Van Dijk finds inspiration in Dworkin, while Roessler draws on Hayek. Earlier writers display the same attitude, establishing the essence of law and laws in order to pinpoint the legal nature of treaties. See, e.g., A.-F. Frangulis, *Théorie et pratique des traités internationaux* (Paris 1934); Georg Jellinek, o.c. note 18.

[21] Hugo Grotius, *On the law of war and peace* (Oxford 1925; first published 1625). Similar notions can be found with Christian Wolff, *Jus gentium methodo scientifica pertractatum* (Oxford 1934; first published 1764) and Emeric de Vattel, *The law of nations* (New York, no date; first published 1758). Another distinction honoured by classic scholarship was the distinction between real and personal compacts; however, both categories were thought to be legally binding even if those of the latter category ceased to be binding after the

In more recent years, the distinctions have been made especially with regard to the degree of formality observed in the conclusion of agreements. Thus, the Harvard Draft Convention on the law of treaties, published in 1935, specifically excluded exchanges of notes and exchanges of letters from its scope, albeit on the understanding that these instruments were nevertheless legally binding.[22] Similarly, debates in the 1950s and 1960s revolved around the notion of 'treaties in simplified form'[23], leading to the conclusion that there are no fundamental differences between such 'treaties in simplified form' and 'regular' treaties as far as their legally binding force is concerned.[24]

Another distinction traditionally made also relates to form: it concerns the distinction between oral and written agreements. Oral agreements are excluded from the scope of the two Viennese Conventions on the law of treaties, for the simple reason that it would have been difficult, if not downright impossible, to deal with both oral and written agreements in a single document.[25] Both Viennese Conventions specifically state, however, that the exclusion of oral agreements from their respective scopes does not affect the legal force of oral agreements.[26]

Most of the distinctions between various classes of agreements, both the older and more recent ones, relate to the form of the agreements, but (initial

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sovereign's abdication or demise.

[22] The Harvard Draft Convention on the Law of Treaties is reproduced in 29 *AJIL* (1935, suppl.) The legally binding qualities of exchanges of notes and of letters were unambiguously confirmed by Max Huber in his 1925 award in *Affaire des biens britanniques au Maroc espagnol* (Espagne c. Royaume-Uni), reproduced in 2 *UNRIAA* 615, esp. 722 ff., as well as by the PCIJ in its opinion on the *Austro-German customs regime*, [1931] Publ. PCIJ, Series A/B, no. 41. See generally also J.L. Weinstein, "Exchanges of notes", 29 *BYIL* (1952), 205-226.

[23] See, e.g., Claude Chayet, "Les accords en forme simplifiée", 3 *AFDI* (1957), 205-226; Fuad S. Hamzeh, "Treaties in simplified form - modern perspective", 43 *BYIL* (1968/69), 179-189; Paul-F. Smets, *La conclusion des accords en forme simplifiée* (Brussels 1969).

[24] The International Law Commission, in its commentary to its final draft articles on the law of treaties, was quite adamant in this respect, noting that "the juridical differences, in so far as they really exist at all, between formal treaties and treaties in simplified form lie almost exclusively in the method of conclusion and entry into force." See 3 *Official Records*, at 8.

[25] Thus, the commentary to the final draft articles reads that "in the interests of clarity and simplicity, [the] draft articles on the law of treaties must be confined to agreements in written form." See 3 *Official Records*, at 9.

[26] Article 3 of both Conventions. See also below.

debates notwithstanding) not to their legally binding force. Traditionally, there were but a few exceptions. Some scholars recognized the existence of so-called 'gentlemen's agreements', which would not be legally binding but would have moral force between the statesmen who concluded them.[27] It was also acknowledged that statesmen could sometimes make declarations of policy, jointly or separately, thereby outlining their plans for the future without those declarations being given normative force. These declarations, then, were simply treated as non-binding.[28]

In recent decades[29], however, a new thesis has gained ground. This new proposition holds that states can actually choose between a number of normative orders under which their agreements may operate. States do not only conclude agreements with one another which are legally binding, but, apart from that, they may also conclude agreements which are, e.g., politically binding, or, perhaps, if they so wish, agreements which are morally binding.[30] Writing in 1980, Michel Virally put it as follows:

> "Levels of social action are multiple. Engagements may be undertaken on every one of them. For simplicity's sake, we will distinguish three of them: the legal level (and the legal engagement); the level of honour (and the moral engagement); the political level (and the political engagement)."[31] [author's translation]

Nevertheless, Virally did provide a warning. Those separate normative orders are not always clearly separated and might even be fused in practice. Indeed, so he continued, it is not uncommon that states take position on two of those

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[27] E.g. Pierre Chailley, *La nature juridique des traités internationaux selon le droit contemporain* (Paris 1932). See also below, ch. 1.

[28] See, e.g., Lauterpacht I.

[29] It would be impossible to pinpoint an exact date, but perhaps Fawcett's 1953 article may be regarded as something of a watershed. Cf. J.E.S. Fawcett, "The legal character of international agreements", 30 *BYIL* (1953), 381-400.

[30] For a fuller elaboration of this thesis, see below, chapter IV.

[31] Michel Virally, "Sur la notion d'accord", in Emmanuel Diez et. al. (eds.), *Festschrift für Rudolf Bindschedler* (Berne 1980), 159-172, at 167. Incidentally, it is difficult to see which other orders Virally could have had in mind in stating that these are "multiples". Possible candidates would perhaps include courtesy or religion, but he cannot seriously have distinguished many other orders. One can hardly conceive of agreements being 'culturally binding', or 'linguistically binding'. Indeed, it is difficult enough to think of an agreement being 'religiously binding'. Religion is, however, treated as a separate order by Antony Allott, *The limits of law* (London 1980).

levels, or even on all three simultaneously.[32]

Statements such as Virally's warrant further investigation because they go to the heart of the concept of treaty. This investigation leads to the question whether or not states can intentionally conclude agreements to which they consider themselves and each other bound, without the obligations created being legal obligations.

Such purportedly non-legally binding agreements are often concluded in state practice. Chapter I of this study will contain a 'tour d'horizon' of such agreements, as well as a discussion of the reasons for concluding them. Chapters II and III will concentrate on the creation of international legal ties. Chapter II explores the genesis of the definition of treaty as laid down in the 1969 Vienna Convention on the Law of Treaties, while chapter III focuses on identification of legally binding agreements and the general role played by the elusive notion of 'intent to be bound' in international law-making.

The doctrinal debate concerning the possible legal effects of purportedly legally non-binding agreements will be discussed in chapter IV, whereas chapter V will demonstrate some of the weaknesses of the various theses. The soft law thesis, for reasons to be explained below, will be separately dealt with in a short excursus to chapter V.

An interesting feature of the doctrinal debate to date is its almost unanimous neglect of the pertinent decisions of courts and tribunals. Accordingly, chapters VI and VII will discuss the pertinent decisions of both international and domestic courts and tribunals, as these are without a doubt the most authoritative sources available for analysis. We are not aware of the existence of any tribunals endowed with the specific task of applying 'politics' or 'morals'. Analyzing legal decisions, therefore, is the best we can do. Although it could be argued that legal officials are particularly prone to view agreements as legally binding, our analysis will demonstrate that they have done so on too many occasions to be considered the result of a jurist's inclination. Moreover, courts and tribunals have applied instruments on a wide variety of topics, ranging from instruments relating to their own jurisdiction to instruments on warfare, trade, boundaries, *et cetera*. This discussion of judicial decisions will effectively conclude the study of the concept of treaty, but some possible points for further thinking and research will be raised in a short epilogue.

As will be clear from the above, this study deals with the concept of treaty, the term 'concept' being understood as something broader than a

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[32] Virally, o.c. note 31, at 167.

definition. Indeed, past experience indicates that it is next to impossible to actually define, in a comprehensive manner, a treaty. As will be shown below, the definition contained in the two Viennese Conventions is of only limited value and is, moreover, not self-contained. As a result, reference is made to other notions, which in turn are in need of further definition or conceptualization. More specifically, definitions of treaties tend to refer to the notion of intent to be bound.[33] Accordingly, we will not attempt to provide a definition of treaty: we will seek to establish a concept.

Furthermore, the focus will rest on the concept of *treaty*; other ways in which international legal rights and obligations may be created will, generally speaking, not be dealt with, except where necessary to clarify the concept of treaty. Thus, decisions of international organizations or organs, customary international law, general principles of law, unilateral acts, all are excluded from the scope of the present study, which is not to deny that the study of unilateral acts and declarations in particular may help to clarify the concept of treaty.[34]

The concept we are trying to establish is limited in various ways. As a result, we will not investigate conditions of validity, methods of entry into force, ways of terminating treaties, *et cetera*. Those questions have been amply dealt with in the existing literature, and while there is always something to be added, if only because of recent developments, we will refrain from making such effort.

Nor will we investigate the intricate question as to who exactly must be deemed to be the parties to treaties. If we consider treaties to be legal acts concluded between two or more international actors, it follows that a treaty must have parties. The exact determination of a treaty's parties has in the past given rise to some complex legal puzzles. Firstly, there is the problem which emerges if one of the entities is of doubtful legal status, as is, e.g., the case with agreements concluded between states and independence movements.[35]

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[33] The definition of the Viennese Conventions is generally understood in that manner, as was the definition adopted by the League of Nations elaborating article 18 of the League's Covenant. The same holds true with the definitions found in treatises. Reuter, e.g., defines treaty as "an expressing of concurring wills attributable to two or more subjects of international law and intended to have legal effects under the rules of international law." Cf. Paul Reuter, *Introduction to the law of treaties* (London 1989), at 23. McNair also cannot, ultimately, escape 'intent' as an important factor: in his view, a treaty is "a written agreement by which two or more States or international organizations create or intend to create a relation between themselves operating within the sphere of international law." *The law of treaties* (Oxford 1961), at 4.

[34] See esp. ch. VI below.

[35] See, e.g., the famous Evian accords, concluded between France and the Algerian FLN.

Secondly, there is the problem posed by the existence of international organizations: is an agreement between a state and an organization literally an agreement between that state and that organization, or is it an agreement between that state and the members of the organization, or is it, in certain circumstances, a mere legislative act of the organization concerned?[36] Such questions warrant separate study; our study will not, except in passing, address them.

The sole question, which is at the heart of the concept of treaty, is when a commitment becomes a treaty-commitment. The issue is whether or not it is possible for states to engage in commitments which are not legal, but are nevertheless commitments. We believe this is impossible, and, even where it would be possible, that it is highly impracticable.[37] Consequently, we will refute theses claiming that states can conclude morally or politically binding agreements, or, alternatively, 'soft law' instruments, and instead conclude that a commitment is, at least presumptively, a legal commitment. In doing so, our method of establishing the concept of treaty is like the peeling of a piece of fruit until the core is reached, stripping away layer after layer of arguments, rather than starting from scratch.

To say that this is a study about the concept of treaty is not, however, to search for something which would in a technical way be distinguishable from similar phenomena. In other words, we will treat the terms 'treaty' and 'legally binding agreement' as synonyms, except in those instances where the former relates to some less-than-inclusive definition, such as the one contained in the Vienna Conventions. Ultimately, we are concerned with what constitutes a legally binding agreement. It is for the sake of convenience, and with a certain respect for centuries of tradition, that we will generally refer to them as treaties.

See, e.g. Suzanne Bastid, *Les traités dans la vie internationale: conclusion et effets* (Paris 1985). As a recent example, of course, one may mention the agreements concluded between Israel and the PLO in late 1993. Text in 32 *ILM* (1993) 1525.

[36] These problems came to the fore most conspicuously in the 1962 *South-West Africa* cases, especially in the joint dissent of Judges Spender and Fitzmaurice. [1962] ICJ Rep. 319, esp. 495 ff. The same point arose in the 1986 *Nicaragua* case, where Judge Schwebel (dissenting) concluded that a letter sent by Nicaragua to the Organization of American States amounted to a legal bond between Nicaragua and the OAS, as well as between Nicaragua and the member states of the OAS.

[37] Cf. chapter V, below.

Theoretical orientation

As noted above, a study on the concept of treaty ultimately has to come to terms with law in general, and international law in particular. Matters would be greatly facilitated if there were something of a paradigmatic concept of law, a concept adhered to by most, if not all, lawyers. Legal philosophy in general is complicated, or enlivened, by debates between positivists and jusnaturalists on such topics as the essence of law and the relationship between law and morality. In the past few decades, traditional insights have been modified or at least challenged by the critical legal studies movement, by lawyers strongly inspired by language philosophy, and by the autopoiesis thesis, to name just a few contending approaches. With regard to international law, the same schools of thought can be discerned.[38] Moreover, the problem is compounded by its political environment, which seems to force the student to position himself or herself somewhere on the continuum between political realism and political idealism.

The present study is, as the reader wil readily discover, rather eclectic with respect to its theoretical orientation. We have borrowed insights from all the above-named approaches (and perhaps one or two not mentioned), while refusing to embrace any one of them as representing the universal truth, or even as the truth for our present purposes.

In part, the theoretical eclecticism may be due to a certain preference for inductive research. Instead of trying to fit empirical findings into preconceived theoretical notions, we have started by looking at judicial decisions concerning the concept of treaty. These decisions do not square all that comfortably with some of the grand theories, and, more importantly, are devastating for most particular doctrinal theses concerning treaty-like instruments.[39]

Somewhat paradoxically, the eclecticism is, at least in part, also the result of accepting some of the core propositions of one of the approaches mentioned above: the critical legal studies movement. The present writer adopts

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[38] With the possible exception of the autopoiesis thesis, which has not yet been transposed to international law. In part this may be due to doubts as to whether international law, as a system, is closed enough to be of autopoietic character. Teubner expresses some serious doubts on this point. See Gunther Teubner, *Law as an autopoietic system* (Oxford 1993, transl. R. Adler & A. Bankowska).

[39] The distinction between theory and doctrine as used here is borrowed from Martti Koskenniemi, *From Apology to Utopia: the structure of international legal argument* (Helsinki 1989).

the critical proposition that embracing one of the more traditional schools of thought necessarily leaves one vulnerable to attacks from any of the other schools. A positivist study will draw obvious, and rather predictable criticism from jusnaturalist angles, and vice versa, the cause being, in a nutshell, that they start from different premises and are mutually incompatible.

The only school for which this does not (or, at any rate, not in the same way) hold true is the critical school itself. The crits, as they are sometimes called, have climbed Mount Olympus in order to observe and criticize the battles going on in the valley, and are invulnerable to both frontal attacks and stray bullets. In doing so, they have also necessarily placed themselves outside doctrinal debates on the precise contents of rules and concepts. As we have had occasion to argue elsewhere, critical legal studies is not the most appropriate tool for analyzing what the law says, yet that is where our interest lies.[40]

Moreover, to the extent that critical legal scholars have devoted time and attention to the concept of treaty, their treatment has been (understandably) rather crude, and most often limited to the interplay of *pacta sunt servanda* and *rebus sic stantibus* and to problems of treaty interpretation.[41]

In essence, the critical concept of treaty has been well summarized by Koskenniemi. There is, as he puts it, an "oscillation between subjective and objective approaches".[42] Some schools stress the intent of the parties when it comes to recognizing treaties, others stress external form, both necessarily interweave their counterpart's arguments into their own, and both are vulnerable to attacks from the opposite schools.

Stressing intent is, especially when it concerns subjective intent, a dubious enterprise, if only for the fact that we cannot know with certainty the intentions of other people. At best, we can rely on objective (or manifest) intent, stressing external form, but this, as Koskenniemi notes,

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[40] See Jan Klabbers, book review of Martti Koskenniemi (ed.), *International law*, in 1 *International Journal on Group Rights* (1993), 159-163. The same notion influences Veijo Heiskanen, *International legal topics* (Helsinki 1992). Koskenniemi himself noted that especially avant-garde research "fails to provide answers to problems on which practicing lawyers are requested to give advice." In David Kennedy & Chris Tennant (eds.), "New approaches to international law: a bibliography", 35 *HILJ* (1994), 417-460, at 427.

[41] Compare, e.g., David Kennedy, *International legal structures* (Baden Baden 1987), esp. chapter 1, or ch. 5 of Koskenniemi's *From Apology to Utopia*, o.c. note 39.

[42] Martti Koskenniemi, "Theory: implications for the practitioner", in Philip Allott et. al., *Theory and international law: an introduction* (London 1991), 3-45, esp. at 19-20.

"raises a serious question about whether it would still be a treaty if the signatories had not so intended. Surely these formal qualities cannot be invoked against a manifestly different intention - surely they cannot by themselves be a kind of *jus cogens* which would override conflicting will?"[43]

The gist of the argument is that we are unable to ground the binding nature of treaties in one single founding principle, be it intent, be it good faith, or be it reliance.[44] Accordingly, we will not undertake such an attempt.

However, Koskenniemi's claim leaves room for sophistication and elaboration.[45] Conceding that the ultimate reason why treaties bind is beyond our grasp (if there is an ultimate reason to begin with)[46], we will explore his claim and try to come up with as objective a view as possible. We do believe that it is possible to develop a concept of treaty which approximates objectivity, and is therefore relatively (even if not completely) immune to various sorts of criticism. To employ Neil MacCormick's felicitous phrase, we will be looking for the relative truth rather than the absolute truth.[47]

In short, we will try to steer a middle course between the two extreme positions sketched by Koskenniemi. In doing so, we will demonstrate that undue stress on the requirement of intent is too extreme to be supported by the law, and that treating requirements of form as a kind of *jus cogens* is too extreme as well.[48]

The exact point at which the present study departs from the critical

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[43] Ibid., at 20.

[44] As far as private law contracts are concerned, the thought is far from novel. Writing in 1976, Dutch author Nieuwenhuis grounded the binding nature of contracts on the interplay of intent, good faith and *causa*. See J.H. Nieuwenhuis, *Drie beginselen van contractenrecht* (Deventer 1979). Similarly, Patrick Atiyah once remarked that "there is no hope of reducing the whole body of contract, or even its main outlines, to a single principle." See his review of Charles Fried, "Contract as promise", in 95 *Harvard Law Review* (1981), 509-528, at 528.

[45] Clearly, his claim did not conclude an in-depth investigation of the topic and was made in passing. Still, it is to date the clearest critical exposé of the notion of treaty.

[46] We thus hope to escape the pitfalls of "essentialism"; the doomed attempt to find the essence of something which only exists as a social construct to begin with. See James Boyle, "Ideals and things: international legal scholarship and the prison-house of language", 26 *HILJ* (1985), 327-359.

[47] Neil MacCormick, *Legal reasoning and legal theory* (Oxford 1994, corr. ed.), at 271.

[48] The criticism that Critical Legal Studies tend to make too extreme statements is of course a quite familiar one. Cf. Andrew Altman, *Critical legal studies: a liberal critique* (1989). It does not imply however, contrary to Altman's suggestions, that their extremism makes them mistaken in principle.

concept of treaty is hidden in Koskenniemi's statement as quoted above. After all, if the external form of a document provides reasons to regard it as a treaty, the question arises how it would be possible that the signatories do not intend it to be a treaty. In our view, such a stand would be conceivable only if we presuppose the existence of various normative orders alongside international law, orders which moreover may and can be intentionally employed by states. Otherwise, the statement would be, to some extent, self-contradictory: if manifest intent (external form) reveals a treaty, manifest intent cannot at the same time reveal the non-existence of a treaty, at least not from one and the same perspective.

In a limited sense, then, this study is linked to critical legal studies, in that it explores the limits of the concept of treaty from a critical background, and attempts to refine what hitherto passed for a critical concept of treaty.
It follows from the above, however, that while doing so, we cannot draw too heavily on critical legal studies itself. Instead, we have to borrow freely from other approaches. We have been inspired mainly (but far from exlusively) by analytic posivitism[49] as practiced and preached by legal philosophers such as H.L.A. Hart and international lawyers such as Hugh Thirlway and, before him, Sir Gerald Fitzmaurice.[50]

The more detailed aspects of the concept of law as employed in this study will become apparent in due time. Treaties rest upon the agreement of states. More importantly, as soon as there is some form of agreement, international legal rights and/or obligations are created. In other words: we deny the required presence of formal characteristics, and we deny the possibility of there being alternatives to law-making: a commitment is either legal, or it is no commitment at all.

In doing so, we base ourselves firmly on traditional sources doctrine, but we also look beyond sources doctrine. The concept of treaty cannot be properly understood by relying solely on sources doctrine. While it may for some purposes be profitable to distinguish between law-making and law-

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[49] On the various kinds of positivism which may be discerned, see Ulrich Fastenrath, *Lücken im Völkerrecht* (Berlin 1990).

[50] As Atiyah suggests with respect to English law, a special interest in conceptual work is a characteristic, "as a matter of historical fact", of (analytic) positivism. Atiyah appears to deplore this, claiming that it has "impoverished" legal doctrine by not paying serious attention to issues of policy or morality. Cf. Patrick S. Atiyah, *Law and modern society* (Oxford 1983), at 104). On the other hand, as far as the concept of treaty is concerned, there has never been a shortage of attention for issues of policy and morality (see e.g. ch. IV below), while conceptual work has been relatively scarce.

application, we will demonstrate that in its application, the concept of treaty is quite unequivocal, and this, in turn, renders all kinds of ambiguities which may, *arguendo*, exist in the law-making stage, redundant. Even so, those ambiguities having failed to convince us in their own right, we will accordingly dismiss them.

Our dismissal of popular and seemingly progressive notions such as 'soft law' or 'politically binding agreements' may seem downright conservative, in that it may reflect that characteristic lawyerly attitude that law can be independent from and even superior to politics. As far as the label of conservatism goes, we can only reply, with Michael Oakeshott, that conservatism implies a preference for facts over mysteries.[51]

Law and politics are not, however separate spheres, and law, with its alleged rigidity, is not incapable of doing justice to political considerations.[52] We endorse the argument that law is eminently suitable for the practice of statecraft, without having to give up its legal character. Justice can be done to political considerations without having to invent notions such as 'soft law', politically binding agreements, or morally binding agreements. Law itself, in its traditional, binary fashion, is well and truly capable of reflecting an 'infinite variety'[53] of motives, considerations, feelings, plans, and expectations.

Thoughts such as these fall properly outside the scope of this study, and consequently, they will be addressed in an epilogue rather than in the main text. However, we must start by sketching the heart of the problem and its magnitude in a tour d'horizon of treaty-like instruments. It is to this that we will now turn.

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[51] See Michael Oakeshott, "On being conservative", in his *Rationalism in politics and other essays* (London 1962), 168-196.

[52] Arguments like this (law's incapacity to do justice to politics) underly some recent scholarship. See, e.g., Ulrich Fastenrath, o.c. note 49; Lipson, o.c. note 10.

[53] The term is borrowed from Richard R. Baxter, "International law in "her infinite variety"", 29 *ICLQ* (1980), 549-566.

CHAPTER I

TREATY-LIKE INSTRUMENTS: AN OVERVIEW

In their recent publication on the end of the Cold War, historians Michael R. Beschloss and Strobe Talbott present some interesting examples of international negotiations. One of their anecdotes is set in 1990. They describe how the United States Secretary of State James Baker and the Soviet Union's Foreign Minister Eduard Shevardnadze talk about a draft agreement prepared by an American official, make comments and additions, and send it back to their assistants. The assistants, in turn, adapt the language of the draft, and discuss it with George Bush and Michael Gorbachev, respectively. Later on, Bush and Gorbachev themselves meet to discuss the draft, and, as Beschloss and Talbot note, spend some time "refining" it. Eventually, the proposal is sent back to the assistants, who, aware that the two presidents have agreed on the language, are set to finalize it.[1]

The involvement of the respective presidents and foreign ministers of the world's two superpowers of the time might lead one to expect that an elaborate arms reduction treaty was being negotiated. Perhaps, given the end of the Cold War and the fact that Iraq had recently invaded Kuwait, one might wonder whether the document was supposed to be a blueprint for a New World Order, a possible successor to the Charter of the United Nations. Or, perhaps, that it would create something as grandiose and unexpected as a US-USSR free trade area. However, as it turned out, those elaborate and high level negotiations concerned something seemingly far more trivial. The US and the Soviet Union were, quite simply, negotiating a press statement, laying down a common position towards Iraq.

This American-Soviet press statement is merely one of many examples of international agreements that do not fit neatly into the generally accepted category of treaties. History is replete with examples of agreements that give rise to doubts as far as their legal nature is concerned.[2]

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[1] See Michael R. Beschloss & Strobe Talbott, *At the highest levels: the inside story of the end of the cold war* (London 1993), esp. 261-265.

[2] The most comprehensive overview to date is contained in Michel Virally's lengthy report

Arguably, the first instruments, which created doubts with respect to their legal nature, were styled 'gentlemen's agreements', and go back to at least the second half of the 19th century. An initially secret Anglo-Russian agreement concluded in 1878 was, as British Foreign Minister Lord Salisbury claimed after the outcry in the United Kingdom following publication of the agreement, merely a 'gentlemen's agreement', binding him personally but not necessarily binding his successor.[3]

As Lord Salisbury's attitude makes clear, gentlemen's agreements were usually thought to bind only those who actually concluded them, and, moreover, the rights and obligations created were deemed to be moral, not legal. Another example of such a personally and merely morally binding gentlemen's agreement is perhaps[4] the exchange of notes concluded between British Foreign Minister Sir Edward Grey and Paul Cambon, the French ambassador to London, in November 1912. The notes have been said to form the written basis of the 'entente cordiale', which previously had rested solely on oral agreements.[5]

Other examples of such "pure" gentlemen's agreements may include the 1907/1908 agreement between Japan and the US on restrictions on emigration of Japanese workers to the US[6]; the Lansing-Ishii agreement of November 1917, also between the US and Japan[7]; and, according to some, the Atlantic

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to the Institut de Droit International: "La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique (à l'exception des textes émanant des organisations internationales)", 60 *AIDI* (1983/I), 166-257.

[3] Reported in Pierre Chailley, *La nature juridique des traités internationaux selon le droit contemporain* (Paris 1932), at 89. In the agreement, the British (or rather, by his own admission, Lord Salisbury à titre personnel) accepted the Russian occupation of Batoum (now Georgia), which of course presupposes that territorial questions can be regulated by means of non-legally binding agreements.

[4] Terminology and classification of the various 'treaty-like instruments' has been, and is, lacking in uniformity. What one scholar deems to be a gentlemen's agreement which creates only personal and moral bonds may be considered a full-fledged treaty by others, or anything in between.

[5] As mentioned in Wilfried Fiedler, "Gentlemen's agreements", 7 *EPIL* (1984), 105-107, at 105. See also Pierre Michel Eisemann, "Le *gentlemen's agreement* comme source du droit international", 106 *Journal du Droit International* (1979), 326-348, at 331.

[6] Mentioned as an example of a gentlemen's agreement in Fritz Münch, "Non-binding agreements", 7 *EPIL* (1984), 353-358, at 354.

[7] As mentioned by Elihu Lauterpacht, who displays some skepticism when observing that "[t]here is nothing in it to suggest that it was not intended to be legally binding". Cf. Elihu Lauterpacht, "Gentleman's agreements", in W. Flume (ed.), *Internationales Recht und Wirtschaftsordnung: Festschrift für F.A. Mann* (Munich 1977), 381-398, at 381.

Charter of August 1941, concluded by Winston Churchill and Franklin Roosevelt aboard a ship off the Newfoundland coast.[8]

In more recent years, it has been observed that the notion of gentlemen's agreements has come to be broadened, so as to include not only those agreements creating a personal moral bond between (predominantly) statesmen, but also agreements which are deemed to create bonds of a moral nature between states.[9]

Perhaps the most explicit broadening of the notion of gentlemen's agreements is contained in Eisemann's seminal article.[10] Eisemann distinguishes three categories of gentlemen's agreements. Apart from the personal and moral variation, he also mentions "accords informel supplétif" or "interprétatif", and "accords informel normatif".[11] Examples of supplementary or interpretative gentlemen's agreements, in Eisemann's view[12], are the agreements concluded on distribution of seats in the Security Council and appointments to the International Law Commission[13], as well as the infamous Luxembourg Accord concluded in 1966 between the member states of the European Community and the 1973 agreement on decision-making at the third United Nations Conference on the Law of the Sea[14].

The most controversial is Eisemann's third category: normative gentle-

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[8] E.g., Fiedler, o.c. note 5, at 105; Eisemann, o.c. note 5, at 323-333. Others treat the Charter as a non-binding set of policy intentions, and at least one writer recently claimed that the Atlantic Charter was to be considered binding international law, although the exact grounds remains somewhat nebulous. Cf. Edward A. Laing, "Relevance of the Atlantic Charter for a new world order", 29 *IJIL* (1989), 298-325, esp. at 322-323, claiming that the Atlantic Charter constituted a legally binding instrument to begin with, has grown into international customary law, and has become binding by virtue of, essentially, incorporation into another agreement (the 1942 United Nations Declaration).

[9] The observation is Fiedler's, o.c. note 5.

[10] O.c. note 5.

[11] Note how 'gentlemen's agreements' are being assimilated with 'informal agreements'. It is no coincidence, then, that in making his distinction, Eisemann has been followed by, *inter alia*, Anthony Aust, "The theory and practice of informal international instruments", 35 *ICLQ* (1986), 787-812.

[12] O.c. note 5, pp. 333-336.

[13] On these, see especially L.C. Green, "Gentlemen's agreements and the Security Council", 13 *CLP* (1960), 255-275.

[14] See, e.g., Barry Buzan, "Negotiation by consensus: developments in technique at the United Nations Conference on the law of the sea", 75 *AJIL* (1981), 324-348. It should be noted that all these examples, as well as the others mentioned by Eisemann, deal with procedural matters. Their designation as being supplementary or interpretative is, thus, based on rather mysterious considerations.

men's agreements. The mere phrase suggests that some kind of law-making takes place, although purportedly it takes place without involvement of the law. As examples, he mentions above all the Final Act of the Conference for Security and Cooperation in Europe, concluded in Helsinki in 1975, as well as some agreements pertaining to dairy products, concluded within GATT in the early 1970s.[15]

Eisemann's category of normative gentlemen's agreements appears to display considerable overlap with what other writers have referred to as informal agreements[16], *de facto* agreements[17], non-binding agreements[18], political texts[19], extra-legal or non-legal agreements[20], agreements devoid of legal force[21], non-obligatory agreements[22], international understandings[23], and, at least to some extent, soft law instruments.[24]

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[15] O.c. note 5, esp. 336-338.

[16] Charles Lipson, "Why are some international agreements informal?", 45 *International Organization* (1991), 495-538; Aust, o.c. note 11.

[17] Frieder Roessler, "Law, de facto agreements and declarations of principle in international economic relations", 21 *GYIL* (1978), 27-59.

[18] Oscar Schachter, "The twilight existence of nonbinding international agreements", 71 *AJIL* (1977), 296-304.

[19] Oscar Schachter, *International law in theory and practice* (Dordrecht 1991), ch. 6. To be sure, Schachter uses this as a catch-all phrase for everything of dubious legality, including decisions of international organizations.

[20] Especially popular in the German literature, where often mention is made of "ausserrechtliche" or "nichtrechtliche" agreements. See e.g. Wilhem Wengler, ""Nichtrechtliche" Staatenverträge in der Sicht des Völkerrechts und des Verfassungsrechts", 50 *Juristenzeitung* (1995), 21-26; Manfred Rotter, "Die Abgrenzung zwischen völkerrechtlichem Vertrag und ausserrechtlicher zwischenstaatlicher Abmachung", in René Marcic et. al. (eds.), *Internationale Festschrift für Alfred Verdross* (Munich 1971), 413-434. It should be noted that Rotter, in what is essentially a study of the genesis of the definition of treaty as contained in the 1969 Vienna Convention, does not suggest that extra-legal agreements may still aspire to normativity, although he is often cited for that purpose. See also below, ch. II.

[21] Cf. Virally, o.c. note 2; see also Fritz Münch's exploratory study to the Institut de Droit International: "La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique: étude exploratoire", 60 *AIDI* (1983/I), 307-327.

[22] Riccardo Monaco, "Accords internationaux non obligatoires et effets juridiques preliminaires", in Karl-Heinz Böckstiegel et. al. (eds.), *Law of nations, law of international orgnization, world's economic law: Festschrift für Ignaz Seidl-Hohenveldern* (Cologne 1988), 383-401.

[23] Grigory I. Tunkin, "International law and other social norms functioning within the

Generally speaking, such agreements (regardless of their precise designation) are all thought to be normative, i.e., aimed at influencing future behaviour, but are deliberately left outside the realm of law. The parties to those instruments did intend to become bound, but did not intend to become bound as a matter of law. Instead, they desired to become bound in a normative order other than law, the orders most often mentioned being 'politics' and 'morality'.

Doubts are also sometimes voiced with respect to their binding character in international law of agreements recorded without taking the barest minimum of formalities into account, and of agreements concluded by officials whose treaty-making powers may be in question.

Prime examples of agreements concluded with a certain disregard for formalities are the large category of press communiqués or joint communiqués, such as the 1979 Joint Communiqué on the establishment of diplomatic relations between the United States of America and the People's Republic of China[25], or the 1990 Argentina-United Kingdom Joint Statement on confidence-building measures[26], dealing with *inter alia* the re-establishment of diplomatic relations.[27]

There are, however, other examples as well. For instance, former British Prime Minister Margaret Thatcher, in her political memoirs, recalls that on

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international system", in Bin Cheng & E.D. Brown (eds.), *Contemporary problems of international law: essays in honour of Georg Schwarzenberger* (London 1988), 282-300.

[24] The latter category is often thought to include anything that is not clearly legally binding, which may range from decisions of international organizations via gentlemen's agreements to loosely formulated provisions of what are undisputably treaties. On the various uses of the phrase 'soft law', see e.g. Tadeusz Gruchalla-Wesierski, "A framework for understanding "soft law"", 30 *McGill Law Journal* (1984), 37-88; Jerzy Sztucki, "Reflections on international "soft law"", in Jan Ramberg et. al. (eds.), *Festskrift till Lars Hjerner* (Stockholm 1990), 549-575. See also below, Excursus to ch. V.

[25] Reproduced in 18 *ILM* (1979), 274.

[26] Reproduced in 29 *ILM* (1990), 1296.

[27] An interesting example is the 1972 Sino-Japanese Joint Communiqué. Purportedly non-legally binding, it did establish diplomatic relations between the two, paved the way to a real peace treaty (which would at least seem to make it a *pactum de negotiando*), and can perhaps even be said to have formally ended the Second World War between Japan and China (the Japanese had earlier concluded a peace treaty with Taiwan). The text of the communiqué is reproduced in 17 *Japanese Annual of International Law* (1973), 81-83. See also the comments of the then head of the treaty department at Japan's Ministry of Foreign Affairs. Cf. Takakazu Kuriyama, "Some legal aspects of the Japan-China Joint Communiqué", 17 *Japanese Annual of International Law* (1973), 42-51. More examples are mentioned in Virally, o.c., note 2.

one occasion she concluded or confirmed an agreement with the Prime Minister of Sri Lanka on the back of postcard.[28]

One of Thatcher's predecessors, James Callaghan, while on a mission to Idi Amin's Uganda in order to save the life of a British subject held captive there, reportedly assured himself of the "behind the scenes" assistance of the leaders of Kenya and Zaire. Although the report does not indicate in which exact form this agreement was cast, chances are that, if in writing at all, the document was not concluded with any regard for formalities.[29] Similar considerations may apply to the infamous 1956 agreement, apparently reached on an airstrip at Villa Coublay in France, between Guy Mollet and British Prime Minister Anthony Eden to launch an attack on Egypt over the Suez Canal problematique.[30]

Whereas the presentation of press communiqués, joint statements, and the like, is presumably a relatively recent phenomenon, agreements concluded by persons, agencies, or departments whose powers to do so may be in doubt (often referred to as administrative agreements[31]) have quite a longer history. Several possible forms of such agreements, such as those based on framework agreements or those concluded by specially authorized civil servants, were already described by Dutch author W.J.M. van Eysinga in 1906.[32]

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[28] Thatcher's choice of words is ambiguous. At one point, she describes the process as a confirmation, yet she also remarks that it was probably the most expensive postcard she ever signed, which would indicate an 'original' agreement instead of a confirmation. Cf. Margaret Thatcher, *The Downing Street years* (London 1993), at 75.

[29] The situation is described in John Dickie, *Inside the Foreign Office* (London 1992), at 83.

[30] Reported in J.H.O. Insinger, *De achterkant van de diplomatie* (Baarn 1986), at 66.

[31] Thus already Ludwig Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* (Berlin 1924). See also Geneviève Burdeau, "Les accords conclus entre autorités administratives ou organismes publics de pays différents", in Daniel Bardonnet et. al. (eds.), *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité* (Paris 1981), 103-126; E.W. Vierdag, "Spanningen tussen recht en praktijk in het verdragenrecht", *Preadvies Nederlandse Vereniging voor Internationaal Recht* (1989), 3-87, esp. 36-73; H. Booysen, "A survey of legal relations flowing from State agreements", 10 *South African Yearbook of International Law* (1984), 56-95; Andrzej Wasilkowski, "The role of international treaties in the process of socialist economic integration", 6 *PYIL* (1974), 57-74; Maciej Lis, "Inter-departmental agreements in the law of treaties and Polish practice", 14 *PYIL* (1985), 183-206; Masaki Orita, "Practices in Japan concerning the conclusion of treaties", 27 *Japanese Annual of International Law* (1984), 52-65.

[32] See W.J.M. van Eysinga, *Proeve eener inleiding tot het Nederlandsch tractatenrecht* (The Hague 1906), at 3, and at 8. In 1906, he seemed convinced that administrative agreements could well be considered treaties. However, later he would write that international cooperation in (especially) administrative matters, could often be achieved "without a

Although exact statistics are hard to come by, such administrative agreements are apparently concluded in large numbers. A survey conducted by Canadian author Jean-Pierre Plouffe reveals that component parts of the Canadian government make extensive use of such agreements, particularly in the fields of defense and technical and economic cooperation.[33]

Plouffe's explicit point of departure was that such administrative agreements would be "non-obligatoire", by which he presumably meant they did not amount to treaties within the meaning of the Vienna Convention.[34] A smaller survey conducted among Dutch agencies and departments indicates that although some of the agencies surveyed consider themselves not to be entering into international legal relations, others are convinced that that is exactly what they are doing, albeit that the ultimate legal source may be domestic law or perhaps a framework treaty.[35]

The phenomenon of administrative agreements may, at times, correspond closely to what in the US are known as executive agreements.[36] Whereas executive agreements were usually concluded, on behalf of the Executive, through regular diplomatic channels, a more recent tendency is that such executive agreements

> "are, with increasing frequency, being negotiated, in whole or in part, by "nondiplomatic" agencies of the Executive Branch, such as the Departments of Treasury, Agriculture, and Transportation ..."[37]

There are many examples of administrative agreements, conceived as agreements concluded by those whose treaty-making powers are or may be in doubt. Some recent examples include an agreement concluded between the US and Japanese patent offices[38], and, between agents of the same two

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treaty" ("zonder verdrag"). See W.J.M. van Eysinga, *Ontwikkeling en inhoud der Nederlandsche tractaten sedert 1813* (The Hague 1916), esp. 22-23.

[33] Cf. Jean-Pierre Plouffe, "Les arrangements internationaux des agences et ministères du Canada", 21 *Canadian Yearbook of International Law* (1983), 176-216.

[34] Ibid., at 177-178.

[35] See below, Appendix.

[36] The classic study is that of Myres S. McDougal & Asher Lans, "Treaties and congressional-executive or presidential agreements: interchangeable instruments of national policy", reproduced in Myres S. McDougal & Associates, *Studies in world public order* (New Haven 1960), 404-717. The study was first published in 2 episodes in 54 *Yale Law Journal* (1945).

[37] David J. Kuchenbecker, "Agency-level executive agreements: a new era in U.S. treaty practice", 18 *Col. JTL* (1979), 1-77, at 7.

[38] Text in 33 *ILM* (1994), 313.

states, the 1991 'Arrangement concerning trade in semiconductor products'.[39]

A somewhat older example, which dates back to the 1950s and may have originally been an oral agreement, is that of the agreement between the acting Dutch Ambassador to Australia, and the director of Australia's secret service, in order to entrap an alleged Russian spy.[40]

Administrative agreements, doubts concerning their legal status notwithstanding, are used not only to establish short-term relations or provide *ad hoc* answers to certain tense situations, but also to establish long-term relations, and may even serve to set up common institutions. A most conspicuous example is that of the 1982 Memorandum of Understanding on Port State Control, concluded between a number of European states[41], by means of which an executive committee and a secretariat were created.[42]

In some cases, participants in administrative agreements are not merely organs of states, but also organs of international organizations, or international agencies. An already infamous example is the 1991 agreement on cooperation in anti-trust affairs concluded between the US Department of Justice and the Commission of the European Community.[43] France, joined by Spain and the Netherlands, argued before the Court of Justice of the EC that the Commission had exceeded its powers in concluding the agreement, and the Court agreed.[44]

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[39] Concluded by the Japanese Ambassador to Washington and a representative of the US Trade Representative's Office. Text in 31 *ILM* (1992), 1074.

[40] Mentioned in Insinger, o.c. note 30. Insinger himself was the acting Dutch ambassador to Australia, at the time.

[41] Text in 21 *ILM* (1982), 1.

[42] See also Vierdag, o.c. note 31, esp. 52-55. On its functioning, see George Kasoulides, "Paris Memorandum of Understanding: a regional regime of enforcement", in David Freestone & Ton Ijlstra (eds.), *The North Sea: perspectives on regional environmental cooperation* (London 1990), 180-192. It has also been argued that CoCom, the committee coordinating western exports of strategically important materials to the former communist countries, has throughout its existence remained "at the legally subliminal level of a gentlemen's agreement or *modus vivendi*." See Stephen C. Neff, *Friends but no allies: economic liberalism and the law of nations* (New York 1990), at 145-146.

[43] Text in 30 *ILM* (1991), 1487. An analysis of its contents is provided by Allard D. Ham, "International cooperation in the antitrust field and in particular the Agreement between the United States of America and the Commission of the European Communities", 30 *CMLRev.* (1993), 571-597.

[44] Case C-327/91, *France v. Commission* [1994] ECR 3641. Incidentally, among practitioners it would seem quite common to describe agreements such as the one at issue, their

The agreements concluded between an agency such as the European Space Agency (ESA) and various international actors are also quite interesting. The ESA has not only concluded agreements with states, but also directly, and most importantly, with its American counterpart NASA, including the 1979 Memorandum of Understanding on the International Solar-Polar Mission.[45] Agreements have been concluded between various states and the United Nations High Commissioner for Refugees, mainly concerning voluntary repatriation of refugees.[46]

The experience of the European Community, or the European Union[47], demonstrates that organs or institutions of the same international organization enter into agreements with each other. In a practice that dates from the 1970s, the Commission, the Council, and the European Parliament have concluded several interinstitutional arrangements and issued a number of interinstitutional declarations, on topics as diverse as the budgetary procedure and the protection of human rights.[48]

Agreements of dubious legal status have also been concluded between various international organizations. An example that gave rise to some debate was the joint declaration issued in 1988 by the EC and the former Council for

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doubtful legality notwithstanding, as 'formal'. Thus, Robert Bicks notes in the aftermath of the EC Court's decision: "Voiding of the formal US-EC Cooperation Agreement need not discourage less formal but equally effective coordination between US and EC antitrust officials." Indeed, such coordination may take place on a case by case basis, as antitrust investigations in the Microsoft case indicate: "After recognizing how closely aligned their positions were, the two authorities simply agreed to work together in resolving the case." See Robert Bicks, "A new day for international antitrust", *International Corporate Lawyer* (no. 41, Dec./Jan. 1995), 23-31, at 28 and 29 respectively.

[45] See generally W.M. Thiebaut, "Legal status of memoranda of Understanding in the United States", *ESA-Bulletin* (no. 38, May 1984), 99-104. Interestingly, Thiebaut (of ESA's Legal Affairs department), points to some "inconveniences" involved in the conclusion of Memoranda of Understanding. Those inconveniences relate particularly, or so it seems, to legal certainty and the somewhat cumbersome relationship these Memoranda of Understanding evoke between international and domestic law.

[46] See e.g. the 1991 South Africa-UNHCR Memorandum of Understanding on the voluntary repatriation and reintegration of South African returnees, reproduced in 31 *ILM* (1992), 522.

[47] An enlightening account of the confusing constitutional structure of the European Union is Deirdre Curtin's "The constitutional structure of the Union: a Europe of bits and pieces", 30 *CMLRev.* (1993), 17-69.

[48] See generally Jörg Monar, "Interinstitutional agreements: the phenomenon and its new dynamics after Maastricht", 31 *CMLRev.* (1994), 693-719. Also: Marijke Gauweiler, *Die rechtliche Qualifikation interorganschaftlicher Absprachen im Europarecht* (Mainz 1988).

Mutual Economic Assistance.[49] More recently, no less than six different international organizations concluded the Memorandum of understanding concerning establishment of the inter-organization programme for the sound management of chemicals.[50]

More importantly, however, the emergence of international organizations has itself given rise to a host of instruments which do not neatly fit the traditional treaty mold. Many summit conferences organized as meetings of organs of international organizations are concluded by means of joint statements, ministerial communiqués or resolutions, or like instruments, which may in a more or less solemn fashion interpret or re-interpret rules of the organization's constituent documents, set out future policy, and lay down what are seemingly commitments.

Leaving aside the decisions adopted by the General Assembly of the United Nations, such practices occur within practically every international organization, and the legal status of such documents is less than clear.[51] The Dutch Advisory Committee on Public International Law, one of the government's advisory bodies, when asked in 1979-1980 in response to parliamentary questions to assess the legal status of such documents, stated that they created merely "political commitments".[52] In 1994, the German Constitutional Court followed a different course, and treated these documents as giving rise to legal obligations. The Court held that the documents were exemplary of a dynamic interpretation of the constituent documents of the organizations concerned.[53]

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[49] Discussed in Sergei A. Voitovich, *International economic organizations in the international legal process* (Dordrecht 1995), at 56. On declarations and similar instruments concluded between the EC and the European Free Trade Area during the 1980s, see Daniel Thürer, "The role of soft law in the actual process of European integration", in Olivier Jacot-Guillarmod (ed.), *L'avenir de libre échange en Europe: vers un espace économique européen?* (Zürich 1990), 131-138, esp. at 136.

[50] Text in 34 *ILM* (1995), 1311.

[51] According to Virally, resolutions "sont l'expression d'un accord politique réalisé entre les Etats qui ont participé à leur adoption." Hence, in his view they are considered politically binding. See Michel Virally, "Résolution et accord international", in Jerzy Makarczyk (ed.), *Essays in international law in honour of Judge Manfred Lachs* (Dordrecht 1984), 299-306, at 305.

[52] For more details, see E.A. Alkema, "Foreign relations in the Netherlands Constitution of 1983", 31 *NILR* (1984), 307-331, at 319.

[53] AWACS-, Adria-, Somalia-Urteil, 12 July 1994, in 21 *Europäische Grundrechte Zeitschrift* (1994), 281. The organizations involved were the Western European Union (WEU) and the North Atlantic Treaty Organization (NATO). See also ch. VII below.

Confusion may sometimes also arise with respect to whether a certain document should be regarded as an agreement concluded under auspices of an international organization or rather as a decision of that organization (or one of its organs). Consequently, it has been argued that the Finnish-Swedish agreement of 1921 concerning the protection of the rights of the Swedish-speaking population of the Aland islands is not to be regarded as an agreement, but as a decision of the Council of the League of Nations.[54]

Finally, summit meetings conducted outside the framework of an international organization may be concluded by means of joint statements and the like. The prime examples are perhaps the documents emanating from meetings of the G-7. Although the informality of such meetings is sometimes taken to include even the dress code of participants[55], these meetings nevertheless establish an "economic policy coordination process".[56]

Why cooperate?

There is an abundant literature on why states, in what is often thought to be an anarchic environment, resort to international cooperation. On a very general level the answer is twofold: (1) states either cooperate in the pursuit of a common goal; or, (2) their cooperation arises out of complementary interests.[57]

In more recent years, political scientists, in particular, have investigated the matter in greater detail, and have in some cases come up with refined models, often derived from game theory[58] and micro-economics[59]. These

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[54] See Lauri Hannikainen, *Cultural, linguistic and educational rights in the Aland islands: an analysis in international law* (Helsinki 1993), esp. at 47.

[55] As reported by Margaret Thatcher, o.c. note 28, at 164.

[56] David C. Mulford, "Non-legal arrangements in international economic relations", 31 *Va. JIL* (1991), 437-446, at 440. Bearing testimony to the normative contents of such decision-making, Mulford notes that the "unique character" of meetings of Finance ministers or Central Bank governors "permits some real horse trading" (at 441).

[57] See, e.g., Max Huber, *Die soziologischen Grundlagen des Völkerrechts* (Berlin 1928, first published 1910). It has been observed that these two purposes correspond closely to the time-honoured distinction between law-making and contractual treaties. Cf. Edoardo Vitta, *La validité des traités internationaux* (Leyden 1940), at 13-14. Vitta himself remarked rather dryly not to insist on such a distinction.

[58] See, e.g., Robert Axelrod's fascinating *The evolution of cooperation* (New York 1984).

[59] Micro-economic analysis influenced at least partly Robert O. Keohane's classic *After*

models sketch more or less precisely the conditions in which cooperation may arise, how cooperation can be maintained, and even how cooperation may become something of a self-sustaining process.[60] The role of international regimes in forming and maintaining cooperation has been stressed[61], as has the role of so-called epistemic communities.[62]

Yet, in spite of their insistence on informal as well as formal rules, principles, norms, and decision-making processes[63], international regime scholars in particular have devoted hardly any attention to the particular forms agreements may be cast in.[64]

One of the few exceptions[65] is political scientist Charles Lipson. In an

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hegemony: cooperation and discord in the world political economy (Princeton 1984).

[60] See on this point, however, John J. Mearsheimer, "The false promise of international institutions", 19 *International Security* (1994/95), 5-49.

[61] The seminal collection is Stephen D. Krasner (ed.), *International regimes* (Ithaca 1983), and an excellent overview is Stephan Haggard & Beth A. Simmons, "Theories of international regimes", 41 *International Organization* (1987), 491-517. A survey of the state of the art a decade later is Volker Rittberger (ed.), *Regime theory and international relations* (Oxford 1993). Studies focusing on the link between regimes and international law include Kenneth W. Abbott, "Modern international relations theory: a prospectus for international lawyers", 14 *Yale Journal of International Law* (1989), 335-411, and Anne-Marie Slaughter Burley, "International law and international relations: a dual agenda", 87 *AJIL* (1993), 205-239. A similar, but broader notion is that of international governance. See, e.g., James N. Rosenau & Ernst-Otto Czempiel (eds.), *Governance without government: order and change in world politics* (Cambridge 1992).

[62] See, e.g., Peter M. Haas (ed.), "Knowledge, power and international policy coordination", 46 *International Organization* (1992), 1-390 (special issue).

[63] Compare Krasner's classic definition of regimes as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." See Stephen D. Krasner, "Structural causes and regime consequences: regimes as intervening variables", in Krasner (ed.), o.c. note 61, 1-21, at 2. One might argue that it is solely the reference to "implicit" principles, norms, rules, and decision-making procedures, which distinguishes these regimes from their more traditional counterparts long known to international lawyers.

[64] Several friendly critics, political scientists as well as lawyers, have noted that regime analysts have by and large failed to come up with anything that can not, in one way or another, be considered 'law'. See, e.g., Abram Chayes & Antonia Handler Chayes, "On compliance", 47 *International Organization* (1993), 175-205, at 195, note 64; see also Tony Evans & Peter Wilson, "Regime theory and the English school of international relations: a comparison", 21 *Millennium: Journal of International Studies* (1992), 329-351, esp. at 340-341.

[65] Another, if he can be considered a typical regime scholar to begin with, is Kratochwil. See, e.g., Friedrich Kratochwil, "Contract and regimes: do issue specificity and variations

article published in 1991, he set out to investigate why some agreements are couched in forms different from others, on the understanding that "[t]he means of international cooperation are frequently informal, and it is important to explore their rationale, uses, and limitations."[66] He enumerated the basic reasons for choosing what he dubbed 'informal agreements' as follows:

> "(1) the desire to avoid formal and visible pledges,
> (2) the desire to avoid ratification,
> (3) the ability to renegotiate or modify as circumstances change, or
> (4) the need to reach agreements quickly."[67]

In other words: states will opt for less formal agreements in order to retain flexibility in dealing with each other. All too formal and visible agreements make it politically difficult for states to change their policies. The necessity of sending proposed agreements through cumbersome procedures of approval in their national legislatures reduces states' freedom of action. Further, agreements allowing for quick renegotiation or modification are by definition not as inflexible as agreements which do not make such allowance. Finally, agreement can be reached more swiftly, so it is thought, the more informal the proposed instrument is considered to be.

Other authors have come up with similar explanations. Bilder, e.g., on a very general level, has contended that the choice for 'nonbinding arrangements' may partly be dictated by the desire to "manage the risks of international agreement".[68]
Those risks are, potentially, manifold, and can be classified in three broad categories:

> "1. The risk that the nation may later change its mind or decide, for extraneous reasons, that it no longer wishes to participate in the agreement ... ;
> 2. The risk that the intrinsic utility of the agreement to the nation may decline to the extent that the prospective benefits from the agreement no longer equal or exceed its costs ...;
> 3. The risk that the other nation may not perform as promised ..."[69]

One of the various risk-managing techniques at the disposal of states then, following Bilder, is the conclusion of legally non-binding agreements:

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of formality matter?", in Rittberger (ed.), o.c. note 61, 73-93.

[66] Lipson, o.c. note 16, at 500.

[67] Ibid., at 501.

[68] Richard B. Bilder, *Managing the risks of international agreement* (Madison 1981), esp. 24-34.

[69] Ibid., at 14-15.

"... where nations are too apprehensive to enter into a firm legal commitment, where a binding agreement is legally impossible or politically impractical, or where circumstances otherwise suggest that a legal agreement is not at the time sensible or attainable, a nonbinding agreement may in many cases effectively meet the parties' needs."[70]

Other authors have brought some slightly more detailed arguments to the fore. Baxter, e.g., witnesses the "widespread phenomenon of papering over international differences and of avoiding hard problems with generalisations that carry little or no legal consequences."[71] Schreuer notes that regular law-making procedures (the conclusion of treaties, the formation of a rule of customary law) are sometimes either politically impossible or perceived to be too cumbersome, and he adds, with some care, that another factor which may play a role is often the circumvention of the constitutional duty to involve parliament.[72]

Anthony Aust, in what has become one of the seminal texts on the topic, distinguishes between 'procedural reasons' and 'substantive reasons' for states to resort to legally non-binding instruments[73]. The main procedural reasons, he writes, are "simplicity, speed, flexibility, and confidentiality."[74] There is, so he contends, no need to enter into formalities such as "internal constitutional procedures", or to publish or register[75] an informal instrument. Dispute settlement provisions usually simply provide for negotiations, informal

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[70] Ibid., at 25.

[71] Richard R. Baxter, "International law in "her infinite variety"", 29 *ICLQ* (1980), 549-566, at 561. See generally also Eibe Riedel, "Standards and sources. Farewell to the exclusivity of the sources triad in international law?", 2 *EJIL* (1991), 58-84.

[72] Christoph Schreuer, "Die innerstaatliche Anwendung von internationalem "soft law" aus rechtsvergleichender Sicht", 34 *OZöRV* (1983), 243-260, at 243. Similarly, Wilhem Wengler, "Rechtsvertrag, Konsensus und Absichtserklärung im Völkerrecht", 31 *Juristenzeitung* (1976), 193-197, who notes with some acidity that especially parliamentary democracies are often quite prone to create "new shadowlands" ("neue Schattenbereiche") between law and non-law. At 193.

[73] Aust, o.c. note 11, at 789. Unfortunately, he does not elaborate on substantive reasons at all, with the possible exception of a rather loose comment in his footnote 11. Presumably, such substantive reasons would indicate that certain topics or issue areas are of such a nature that they would be better regulated by non-law than by law, but it is rather difficult to think of any concrete examples.

[74] Ibid., at 789.

[75] He even notes that, not being legal agreements and thus not susceptible to the obligation of registration as laid down in article 102 of the United Nations Charter (see below, ch. 3), such agreements, even if non-registered, may readily be invoked before UN organs. Ibid., at 790.

instruments may be easily terminated or amended, and, not being treaties, informal instruments need not be registered and are thus suitable for purposes of confidentiality.[76]

The road to agreement

Aust concludes his analysis by pointing out that because the number of states has increased dramatically since the Second World War, and as interactions between states have also increased enormously, what is required are "quick and flexible, not time-consuming, formal procedures", which implies that "[o]ften a treaty is not a suitable vehicle for recording such arrangements."[77]

However, most of the reasons put forward to justify or explain the resort to purportedly non-legally binding agreements do not relate to treaties as such, but rather to domestic procedures. International law does not prohibit states from providing in their treaties for, e.g., flexible renegotiation or amendment procedures. Indeed, in many technical matters, such flexibility is built-in[78], and in at least one international legal regime, the regime pertaining to the protection of the ozone layer, the parties have devised a very flexible procedure for changing what are arguably the most substantive provisions of the entire regime. The speed with which certain substances may be banned can be, and has been, adapted by means of a so-called adjustment procedure. This procedure permits decision-making by majority, the results of which become binding on states parties without any need to employ domestic procedures.[79]

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[76] Ibid., esp. 789-793. He also mentions the practical utility of employing traditional canons of treaty interpretation for interpreting informal agreements, but this, of course, can hardly be called an advantage which informal agreements possess over treaties, let alone be a reason for states to resort to informal agreements (at 793).

[77] Ibid, at 811. The comma between the words time-consuming and formal in the first sentence quoted is presumably out of place.

[78] See, e.g., A.O. Adede, "Amendment procedures for conventions with technical annexes: the IMCO experience", 17 *Va. JIL* (1977), 201-215. For an extensive general overview, see Frederick L. Kirgis, jr., "Specialized law-making processes", in Oscar Schachter & Christopher C. Joyner (eds), *United Nations legal order* (Cambridge 1995, 2 vols.), 109-168.

[79] Article 2, paragraph 9, of the Montreal Protocol. See generally David D. Caron, "La protection de la couche d'ozone stratosphérique et la structure de l'activité normative

Similarly, international law allows states to lay down flexible termination clauses. A case in point is the 1963 Nuclear test ban treaty, which provides for a three months notice period only.[80] Even more telling perhaps is the implicit acceptance by the Permanent Court of International Justice of a period of one month's notice (although admittedly regarding a 'provisional' agreement) in the case of the *Free Zones of Upper Savoy and the District of Gex*.[81]

Moreover, although registration of treaties under article 102 of the Charter of the United Nations is a positive obligation, its violation does not entail very serious consequences[82], and publication of treaties in national treaty series is not based on any general international obligation at all.[83]

The argument that treaties are not always suitable vehicles relates mostly to domestic procedures and guarantees. The protracted nature of the regular treaty-making procedure is not caused by any inherent qualities of treaties, but is in large measure due to domestic factors.

Sir Ian Sinclair has most helpfully divided the period leading up to the entry into force of treaties into four stages. This division is roughly reflected in the order of the pertinent provisions of both Vienna Conventions. According to Sir Ian, the first stage has to do with acquiring domestic authority to negotiate and subsequently adopt or authenticate a treaty; the second consists of the negotiations themselves; the third relates to expressing consent to be

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internationale en matière de l'environnement", 36 *AFDI* (1990), 704-726.

[80] Article IV of the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water. Text in 2 *ILM* (1963), 883.

[81] [1932] Publ. PCIJ, Series A/B, no. 46. Aust himself points out that even informal agreements usually require a period of notice, "although often this is less than the 12 months commonly found in treaties." O.c. note 11, at 791. The ICJ has also pointed to the possibility of agreements which may provide for less than 6 months' notice. See its *WHO-Egypt agreement opinion*, [1980] ICJ Rep. 73, at 94, para. 45.

[82] See below, chapter III.

[83] Similarly, Chinkin's somewhat implicit argument that states resort to soft law instruments partly as a result of the 'hardening' of the law of treaties which accompanied the conclusion of the 1969 Vienna Convention, is not all that persuasive. For one thing, most of the pertinent rules of the Vienna Convention are residual in nature, and for another, most rules already existed prior to the conclusion of the Vienna Convention as rules of customary international law, which are by no means less hard than treaty rules. Cf. Christine M. Chinkin, "The challenge of soft law: development and change in international law", 38 *ICLQ* (1989), 850-866.

bound to a treaty, while the fourth is the period, if any, between expressing consent to be bound and actual entry into force.[84]

The first and the third stage are essentially of a domestic nature. It may, admittedly, take time before authority to negotiate, adopt and authenticate, is acquired. Generally speaking, negotiators need to be in possession of full powers. According to the Vienna Convention's definition[85], they need to be in possession of documents emanating from the competent domestic authority (usually the Head of State or the Foreign Office) showing that they are entitled to negotiate, adopt or authenticate a treaty.[86]

Although possession of full powers is the point of departure of article 7 of the Vienna Convention, the Vienna Convention takes a fairly liberal position. The production of full powers may be dispensed with if "it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State ... and to dispense with full powers."[87] In addition, quite a few functionaries are considered to be empowered, at least to some extent, by virtue of their office.[88] Moreover, article 8 of the Vienna Convention provides that unauthorized acts relating to treaty-making will be without legal effect unless afterwards confirmed.

In other words: however long the process of acquiring the go-ahead to negotiate, adopt or authenticate may take, the length of the procedure will usually be determined by domestic considerations. The law of treaties does not erect any obstacles in this respect, in view of the fact that as far as the Vienna Convention is concerned, formalities can be kept to a bare minimum.

These domestic considerations may be of a varied nature. The competent domestic authority may be slow in handing out full powers. The negotiators participating in permanent frameworks may be frequently forced to wait for instructions; or, perhaps the Cabinet is not so sure that the proposed object of the treaty is worthwhile, or what exact negotiating position is to be adopted.

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[84] Cf. Sir Ian Sinclair, *The Vienna Convention on the law of treaties* (Manchester 1984, 2d. ed.), at 29.

[85] Article 2, paragraph 1 (c) of the Vienna Convention.

[86] The essential study is J. Mervyn Jones, *Full powers and ratification* (Cambridge 1946).

[87] Article 7, paragraph 1 (b) of the Vienna Convention.

[88] Under article 7, paragraph 2, Heads of State, Heads of Government and Foreign Ministers may be considered to represent their states in all stages of treaty-making. Less far-reaching are the presumed full powers of heads of diplomatic missions and delegates to international conferences, organizations and organs.

These domestic considerations, however, are factors which have nothing to do with treaties as such. Indeed, these considerations would, generally speaking, also be present in negotiations where no legal commitments are envisaged (negotiations on purportedly non-legally binding agreements), unless it is supposed that negotiators act either without any authority at all, or act with authority that may not emanate from the competent domestic source.[89]

Similarly, the process of expressing consent to be bound to a treaty will depend, as far as its temporal length is concerned, essentially on domestic factors. Concerning this process, the law of treaties also adopts a fairly liberal attitude[90], allowing practically everything as a valid expression of consent.[91] It is not so much the expression of consent, but rather its formation which may take time, and the formation of consent to be bound is ultimately a domestic process, guided by domestic procedures and subject to domestic political considerations.

The second and fourth stages discerned by Sinclair take place largely at the international level. Negotiations themselves are purely a matter for the parties, the skills of the negotiators, *et cetera*. The law of treaties sets no limits and proposes no time-consuming formalities.[92]

The law of treaties is equally liberal with regard to Sinclair's fourth stage: the period, if any, between expressing consent to be bound and the entry into force of the treaty. The length of this period can be determined by the parties

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[89] This happens perhaps more often than is generally realized, as is witnessed by the outcries of various Foreign Offices. See, e.g., the 1976 memorandum by the then US Dept. of State Legal Adviser, Monroe Leigh, reproduced in Eleanor C. McDowell (ed.), *Digest of United States practice in international law 1976* (Washington D.C. 1977), at 264-267. Leigh referred *inter alia* to the internal guidelines known as Circular 175, which has as one of its objectives the enhancement of the influence of the State Dept. on the making of international agreements. Circular 175 is reproduced in Arthur W. Rovine (ed.), *Digest of United States practice in international law 1974* (Washington D.C. 1975), 199-215. In the Netherlands, similar outcries emanated from the Foreign Ministry in the 1980s. These are reproduced in Ministerie van Justitie, *Draaiboek voor de wetgeving* (The Hague 1989, 2d ed.). For substantiation of the tenor of these outcries, see the appendix below.

[90] Cf. articles 11 to 16 of the Vienna Convention.

[91] See for more details below, ch. III.

[92] As a grim and admittedly rather extreme reminder, it took the USSR and Nazi Germany reportedly less than twelve hours to negotiate and conclude their infamous 1939 non-agression pact plus highly sensitive secret protocol, using a direct telephone line between Moscow and Berlin. For more details, see Wolfgang Leonhard, *Betrayal: the Hitler-Stalin pact of 1939* (New York 1989; transl. R.D. Bosley, first published 1986).

themselves, and such a period may even be surpassed by either having treaties enter into force upon signature or similar direct procedures, or by applying the treaty-regime provisionally pending entry into force. Consequently, any delay the parties encounter in this fourth phase is usually of their own making.

The complaint that treaties are not always the most suitable vehicles for certain arrangements may have some validity, but is difficult to substantiate.[93] And even if, *arguendo*, it were true that treaties, for reasons unrelated to domestic procedures, would not always be equally suitable, that still does not necessarily imply that viable alternatives exist. We have seen, that states often employ instruments which they claim to be non-legally binding in place of treaties, based on the often implicit notion that "qui peut le plus peut le moins".[94] This notion, however, presupposes at the very least that there exists such a 'moins', capable of being done. This question will be central to the following chapters.

Televized diplomacy

Before proceeding, however, one possible argument for states' preference for purportedly non-legally binding instruments should be discussed, even though the argument is to a large extent mentioned only by implication in the pertinent literature.

Observers of diplomacy had already in the 1950s, if not earlier, commented upon the wisdom of secret negotiations. Perhaps most explicit on this point was Harold Nicolson, who with respect to the permanent state of conference introduced by the League of Nations, but possibly of quite wider application, noted:

> "These conferences do little to satisfy the vague desire for what is called 'open diplomacy'; but they do much to diminish the utility of professional diplomatists and, in that they entail much publicity, many rumours, and wide speculation, - in that they tempt politicians to achieve quick, spectacular and often fictitious results, - they tend to promote rather than allay

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[93] A similar point is made by Daniel Thürer, ""Soft law" - eine neue Form von Völkerrecht?", 104 *Zeitschrift für Schweizerisches Recht* (1985), 429-453, doubting whether there really is a need for 'soft law' instruments, given international law's flexible attitude to law-making generally (at 444).

[94] Cf. Eisemann, o.c. note 5, at 344. Adopted by Aust, o.c. note 11, at 806.

suspicion, and to create those very states of uncertainty which it is the purpose of good diplomatic method to prevent."[95]

The argument, then, is simply that the increased use of "broadcast and televised" conferences has led to "all rational discussion being abandoned in favour of interminable propaganda speeches addressed, not to those with whom the delegate is supposed to be negotiating, but to his own public at home."[96] Whatever 'agreement' is reached at such conferences, will most often be merely cosmetic in nature, giving rise to either purportedly legally binding provisions of indeterminate scope, or to the loftiest of aspirations laid down in what are purportedly legally non-binding agreements.

In the early 1970s, an astute observer of international relations wrote that "in the absence of obligations, and of rules and policies of a binding and constraining character, it is useless to negotiate agreements and to draft international instruments."[97] This uselessness has however slowly given way to another kind of utility: the utility to satisfy public opinion and of "pandering to the media"[98]. From a more or less instrumentalist[99] point of view there is, indeed, little to be gained by negotiating lofty statements just for the sake of negotiating lofty statements. On the other hand, from the politician's point of view such statements may serve the important purpose of giving the media and the public back home the impression that something is actually being done about the problems of the day.[100]

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95 Harold Nicolson, *The evolution of diplomatic method* (London 1954), at 89. He referred to this type of diplomacy as "diplomacy by loud-speaker"; ibid., at 91. Somewhat inadvertently, Robert Lansing has made a similar comment, even if, paradoxically, he despised the type of secret diplomacy as practiced by Woodrow Wilson. From his recollection of the negotiations after the First World War concerning Fiume, one readily gets the impression that part of the Italian standpoint was caused by domestic pressures, which would not have surfaced to the same degree if the Italian media would have adopted a more low-key attitude. Cf. Robert Lansing, *The peace negotiations: a personal narrative* (Boston 1921), ch. 17.

96 Nicolson, o.c. note 95, at 90.

97 Gidon Gottlieb, "The nature of international law: toward a second concept of law", in Cyril E. Black & Richard A. Falk (eds.), *The future of the international legal order. Vol. IV: the structure of the international environment* (Princeton 1972), 331-383, at 369.

98 The phrase is Rosenne's. See his *Breach of treaty* (Cambridge 1985), at 36.

99 See in a similar vein (but limited to a domestic context) John Griffiths, "Is law important?", 54 *New York University Law Review* (1979), 339-374.

100 In a similar vein, Koskenniemi has drawn attention to the fact that in the field of

This televized diplomacy may partly explain the preference of states for purportedly non-legally binding agreements, or, to put it differently, their incapacity to conclude treaties. It may also explain why the results of giant, hyped conferences such as the Rio Conference of 1992, are bound to be disappointing in terms of substance.[101] When the time is not ripe for agreement, or when states are locked in publicized negotiating positions, cosmetic results are presumably the best that can be attained.[102]

Nevertheless, two remarks are in order. First, the phenomenon of televized diplomacy as described above can only partly explain the proliferation of purportedly non-legally binding agreements. It may explain the proliferation of declarations and widely phrased agreements reached at highly publicized media events, but it does not explain the conclusion of all other types of purportedly non-legally binding agreements. It does not account for the existence of what Baxter has called the "vast sub-structure of intergovernmental paper"[103] concluded between governmental agencies and civil servants far away from the media spotlights. Finally, it does not explain the existence of substantial agreement which is nevertheless deemed non-legally binding.

Secondly, the often drawn conclusion that the results of televized diplomacy are, if not hard law, at least politically binding, morally binding, or perhap soft law, does not, and can not, automatically follow. It is one thing

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environmental protection, the familiar phenomenon of breach of treaty has come to be accompanied by the newer concept of 'non-compliance'. Cf. Martti Koskenniemi, "Breach of treaty or non-compliance? Reflections on the enforcement of the Montreal Protocol", 3 *Yearbook of International Environmental Law* (1992), 123-162. Talking of non-compliance instead of breach may mark at least a discursive shift, and may partly be caused by the rise of televized diplomacy. Partly, however, since environmental treaties (as well as human rights treaties, where the same phenomenon may be observed) are typically premised on what Keohane has called 'diffuse reciprocity', providing collective goods, the traditional remedies associated with breach (termination or suspension) are of little practical use. Cf. Robert O. Keohane, *International institutions and state power: essays in international relations theory* (Boulder 1989), esp. ch. 6. Indeed, as much is recognized in article 60, paragraph 5 of the 1969 Vienna Convention.

101 Compare Peter H. Sand, "UNCED and the development of international environmental law", 3 *Yearbook of International Environmental Law* (1992), 3-17. See also David Freestone, *The road from Rio: international environmental law after the earth summit* (Hull 1993).

102 It is submitted that this is what other authors have had in mind when claiming that sometimes reaching legally binding agreements is politically impractical. Cf. Bilder, o.c. note 68, at 25.

103 Baxter, o.c. note 71, at 556.

to say that a certain document is purportedly legally non-binding; it is quite a different thing, though, to draw the automatic inference that if not legally binding, it must be deemed politically binding, or morally binding, or an instrument of a soft law nature.[104]

[104] See also Wilhelm Wengler, "Die Wirkung nichtrechtlicher Verträge zwischen Staaten", 22 *ARV* (1984), 306-327, at 316, arguing that it is rather silly to hide the non-obligatory nature of certain instruments in law by claiming that they are 'politically binding'.

CHAPTER II

THE 1969 VIENNA CONVENTION'S DEFINITION

As noted in the introduction, any study dealing with the concept of treaty will sooner or later have to come to terms with wider notions as to what is meant by law in general, and by international law in particular. Without wishing to plunge into sterile debates as to whether international law is really law[1], at the very least it is imperative to clarify what is meant by saying that an international agreement is legally binding.

The notion of an agreement or a norm being legally binding is often inextricably tied to the possibility of having the agreement or norm enforced in a court of law.[2] This very thought is often traced back to 19th century jurist John Austin, for whom law was simply a sovereign command backed by a sanction. A law without a sanction, in Austin's view, was quite simply "not binding"[3], and the connection between the law and the sanction resides with the courts.

The pure Austinian view has for the most part been discarded nowadays[4], although it can sometimes still be seen to rear its head.[5] At least since British

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[1] Cf. Glanville L. Williams, "International law and the controversy concerning the word "law"", 22 *BYIL* (1945), 146-163.

[2] Thus, e.g., James Fawcett, "The legal character of international agreements", 30 *BYIL* (1953), 381-400; K.C. Wellens & G.M. Borchardt, "Soft law in European Community law", 14 *ELR* (1989), 267-321.

[3] John Austin, *The province of jurisprudence determined and the uses of the study of jurisprudence* (London 1954, Hart ed.), at 27. He referred, somewhat confusingly perhaps, to laws without sanctions as "imperfect laws", which may suggest that, albeit imperfect, they are still laws.

[4] Kratochwil, amongst others, has suggested that endogenous enforcement, i.e. without any judicial interference, is also "pervasive in private contracts". See Friedrich Kratochwil, "The limits of contract", 5 *EJIL* (1994), 465-491, at 470.

[5] Thus, one of the definitions of treaty put forward by former Dutch Foreign Minister Kooijmans at the occasion of defending the Dutch State Act on the Approval and Promulgation of Treaties before the Dutch parliament, referred to treaties being only binding if they could be invoked before an international tribunal, *Proceedings of the Second Chamber*, 6 October 1993, at 8473. The discussion is summarized in Jan Klabbers, 'The

legal philosopher H.L.A. Hart published his seminal *The concept of law*[6], there is general agreement among legal philosophers that the fact of whether or not a certain norm can be enforced or can possibly be responded to by means of a sanction has little to do with whether it can be called a legal norm.[7] Perhaps F.A. Mann has put the matter most succinctly: whether or not something is enforceable or sanctionable is, in essence, a matter of procedure, and not of substance.[8]

What, then, is meant by saying that a certain agreement is legally binding? The answer, quite (but deceptively) simply, is that the agreement in question must in one way or another have been subjected to a certain legal system. In our case, we mean to say that the agreement at issue is governed by international law, as opposed to agreements being governed by, say, French law, or Peruvian law, or the law of any other domestic legal system.

That in itself, however, provokes a host of other questions. What does 'governed by international law' mean? How do agreements come to be so governed? Under what conditions does this process occur? The answer to the third question must be postponed for a while, for it is the very question which this study eventually attempts to answer. The first and second, however, deserve an immediate answer.

To say that an agreement is governed by international law is to say that the agreement is subject to the operation of applicable international legal rules. These rules are, predominantly, but not exclusively, the rules which make up that body of rules known as the law of treaties.

The operation of the applicable rules means first and foremost that treaties must be complied with in good faith, following the ancient adage *pacta sunt servanda*.[9] It also means that, in principle, agreements may only be termin-

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new Dutch law on the approval of treaties", 44 *ICLQ* (1995), 629-643.

[6] H.L.A. Hart, *The concept of law* (Oxford 1961). A second edition was published in 1994, and includes a postscript in which Hart replies to his critics. Except where otherwise indicated, all references will be to the first edition.

[7] See Hart, o.c. note 6, esp. at 27-35. One of Hart's fiercest antagonists was Harvard law professor Fuller, who, however, on this point fully agreed. See Lon L. Fuller, *The morality of law*, esp. at 108 ff. The same point was already made (albeit not with iron consistency) in the 19th century by Carl Bergbohm, *Staatsverträge und Gesetzen als Quellen des Völkerrechts* (Dorpat 1877), esp. 24 ff., and in the early twentieth century by Hersch Lauterpacht, *Private law sources and analogies of international law* (London 1927), at 156-157.

[8] F.A. Mann, "Reflections on a commercial law of nations", 33 *BYIL* (1957), 20-51, at 31.

[9] On its antecendents in ancient religion, see Hans Wehberg, "Pacta sunt servanda", 53 *AJIL* (1959), 775-786. An attempt to philosophically ground the *pacta sunt servanda* rule

ated or their operation suspended in accordance with the law of treaties. Further, the possibility to make reservations, amendments, or modifications, must also follow the requirements set forth by the law of treaties. Finally, agreements may not contain norms which would conflict with peremptory norms of international law, and ought to be interpreted in accordance with established canons of treaty interpretation.

Agreements are also subject to more general norms of international law. The rules on priority of norms, such as the *lex specialis* or the *lex posterior* rules, would apply, as would, to the extent not regulated in the law of treaties itself (and this extent is fairly limited), the rules on international responsibility.

Agreements become legally binding by virtue of the rule *pacta sunt servanda*[10]. Roberto Lavalle[11] has convincingly argued that the *pacta sunt servanda* rule does not merely apply to the performance of treaties once concluded, but governs the process of their conclusion as well; the two are, in fact, inseparable.[12] The rule, as he describes it, is a power-conferring rule: "The exact purport of the rule *pacta sunt servanda* is not to lay down a norm of conduct, but ... to empower states to create, by concluding treaties, obligations binding on themselves."[13]

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with special reference to international law is Hidemi Suganami, "Why ought treaties to be kept?", 33 *Yearbook of World Affairs* (1979), 243-256.

[10] In a tradition going back to ancient Greece, the legal bonds were deemed strengthened by the taking of an oath. The Romans added the faculty of exchanging (or rather, unilaterally demanding) hostages in order to compel their treaty partners to perform. See generally Harold Nicolson, *The evolution of diplomatic method* (London 1954), ch. 1. Various other measures to induce performance are collected by J.H.W. Verzijl, *International law in historical perspective* (Leyden 1973), vol VI, at 285-298. Nevertheless, such measures should not obscure the fact that the basis of the obligation created resided in the *pacta sunt servanda* rule. See, e.g., Emeric de Vattel, *The law of nations* (New York, no year, transl. J. Chitty, first published 1758), at 230-231.

[11] Roberto Lavalle, "About the alleged customary law nature of the rule Pacta sunt servanda", 33 *OZöRV* (1982), 9-28. A similar point had already been made by Georg Jellinek, *Die rechtliche Natur der Staatenverträge* (Vienna 1880), at 57, holding that the the applicability of the *pacta sunt servanda* rule follows automatically from the intention to be bound.

[12] To this extent, the formulation of the rule in article 26 of both Viennese 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") can be deemed somewhat unfortunate, for it appears to refer predominantly to observance.

[13] Lavalle, o.c. note 11, at 20-21. In a similar vein, Torsten Gihl, "The legal character and sources of international law", 1 *Scandinavian Studies in Law* (1957), 51-92, esp. at 66.

As Lavalle points out, a distinguishing feature of power-conferring rules is not so much that they can be observed or breached, but rather that they are "susceptible of being or not being applied".[14] That implies, of course, that there is no obligation on states to invoke the *pacta sunt servanda* rule.[15] States are free to apply or not to apply the *pacta sunt servanda* norm, and it is only when they do that agreements can be deemed binding.

The question then becomes a question of when and under what conditions the law says that the *pacta sunt servanda* norm is applied. Since, as stated by Thirlway, *pacta sunt servanda* simply means that "agreements regarded *by the law* as binding (pacta) are binding *in law* (servanda)"[16], our aim is to find out when agreements are regarded by the law as binding.[17]

Article 2, paragraph 1 (a)

The obvious starting point for any investigation into the nature of international agreements is the definition of treaty as laid down in article 2, paragraph 1 (a) of the 1969 Vienna Convention on the Law of Treaties.[18] Even if the Vienna Convention has only a relatively limited number of parties[19], and non-parties include states such as France[20] and the USA, many of its

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The point received not all that much attention during the preparation of the 1969 Convention, although several delegates stressed that good faith should also extend to the preparation and conclusion of treaties. See 2 *Official Records*, 150-158, and 3 *Official Records*, esp. 44-49. This point of view is defended by Tariq Hassan, "Good faith in treaty negotiation", 21 *Va. JIL* (1981), 443-481.

[14] Ibid., at 21. He closely follows Hart, o.c. note 6, esp. 27-35.

[15] In this sense, Wilhelm Wengler, "Die Wirkung nichtrechtlicher Verträge zwischen Staaten", 22 *ARV* (1984), 306-327.

[16] H.W.A. Thirlway, *International customary law and codification* (Leyden 1972), at 38 (emphases in original).

[17] Compare also Manfred Lachs, "Pacta sunt servanda", 7 *EPIL* (1984), 364-371.

[18] A witty, and perhaps somewhat disillusioning inside-account of the Conference by one of the members of the US delegation, is Frank M. Wozencraft, "United Nations arithmetic and the Vienna Convention on the Law of Treaties", 6 *International Lawyer* (1972), 205-218.

[19] As of 1993, the Vienna Convention had 74 parties.

[20] On the French points of view, see Olivier Deleau, "Les positions francaises à la Conférence de Vienne sur le droit des traités", 15 *AFDI* (1969), 7-23.

provisions are deemed to have customary law status.[21]

Article 2 is titled "Use of terms", and paragraph 1 opens with the words "For the purposes of the present Convention", which indicates that the definitions of terms which follow are not supposed to lead an independent existence.[22] As the International Law Commission explained in its final report on the law of treaties: "This article, as its title and the introductory words of paragraph 1 indicate, is intended only to state the meanings with which terms are used in the draft articles."[23] Indeed, several delegates at the Conference expressed concern that the definitions might outgrow their original, limited purposes.[24]

Those warnings notwithstanding, it would appear that at least the definition of treaty[25] has started to lead an existence of its own. Judge Oda, in his dissenting opinion to the *Qatar v. Bahrain* case[26], decided by the International Court of Justice in 1994, suggested, by referring to treaties "in the true sense of the word", that the Vienna Convention's definition has come as close as possible to customary status. This suggestion can also be read into the majority opinion in the same case.[27] A similar attitude was displayed by Sole Arbitrator R.J. Dupuy in his award on the merits in *Texaco v. Lybian Arab Republic*[28]. Dupuy wholeheartedly embraced one of the elements contained in the Vienna Convention's definition of treaty as being of exclusive and universal significance.[29]

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[21] See generally Sir Ian Sinclair, *The Vienna Convention on the law of treaties* (Manchester 1984, 2d. ed.), esp. 12-21.

[22] Note, however, that the ILC's first rapporteur, J.L. Brierly, advocated the use of a similar provision merely to overcome possible constitutional difficulties. See the discussion of Brierly I, *Yearbook of the International Law Commission* (1950/I), at 65.

[23] In 3 *Official records*, at 8. The introductory sentence of paragraph 1 ran slightly different: "For the purposes of the present articles ..."

[24] See e.g. the remarks of Mr. Marcsca (Italy), 1 *Official Records*, at 25, para. 19, noting that "the only purpose of those particular provisions was to avoid unnecessary repetition." Similarly, Mr. El-Erian (United Arab Republic), at 26, para. 35; implicitly also Mr. Meron (Israel), at 32, para. 10.

[25] Apart from 'treaty', a number of other notions are defined in paragraph 1 of article 2.

[26] [1994] ICJ Rep. 112, at 138, para. 13 of Judge Oda's dissent.

[27] Ibid., at 120-121, para. 23.

[28] Text (in English translation) in 53 *ILR*, 420-511.

[29] Dupuy noted that "States alone can be parties to a treaty"; agreements between, e.g., states and international organizations would be "instruments of another nature". Ibid., at 474, para. 66.

The notion of treaty is defined in the Vienna Convention as

> "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[30]

The definition contains a number of possible clues as to what constitutes a treaty, but not all these clues are helpful. Several of them, as the text of the definition itself indicates, are really irrelevant as clues. The uselessness in this respect of several others appears from article 3 of the Vienna Convention.

Designation

Clearly, on the face of the text of article 2, paragraph 1 (a), the designation given to an agreement is legally irrelevant.[31] Throughout history, agreements have been given various names and titles, ranging from rather solemn-sounding labels such as 'Covenant', 'Convention', and 'Charter' to more casual-sounding terms such as 'agreed minutes', 'note verbale' or 'memorandum of understanding'.[32] The International Law Commission,

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[30] The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations contains a similar definition, taking into due account the fact that international organizations may also conclude treaties.

[31] Note however that the High Court of Hong Kong, in *Tang Ping-Hoi v. Attorney General* (decision of 9 October 1985, in 92 *ILR* (1993), 638-644) gave its imprimatur to the view that the Sino-British Joint Declaration amounts to a treaty is demonstrated, *inter alia*, by its title (at 640).

[32] See generally Denys P. Myers, "The names and scope of treaties", 51 *AJIL* (1957), 574-605. In United Kingdom practice, it would seem that designations such as 'memorandum of understanding', 'agreed minute' and 'arrangement' are generally regarded to denote non-binding instruments. See Geoffrey Marston (ed.), "United Kingdom materials on international law 1989", 60 *BYIL* (1990), 569-700, esp. at 581, quoting an instruction manual prepared by the Foreign and Commonwealth Office's Treaty Section in 1988 for internal use. Guidance notes prepared in 1992 by the FCO's Nationality, Treaty and Claims Department convey the same message with regard to memoranda of understanding and arrangements only. Cf. Geoffrey Marston (ed.), "United Kingdom materials on international law 1992", 63 *BYIL* (1992), 615-841, esp. at 630. Note that there is not a hint that those instruments would be politically or morally binding (they are said to regulate "matters which are inappropriate for inclusion in binding agreements"). Note also, that the UK government's position on agreed minutes has apparently changed between 1988 and 1992. A 1951 Dutch manual published by the Foreign Ministry (*Tot-*

while explaining its use of 'treaty' as the generic term, could not but conclude that "an extraordinarily varied nomenclature has developed which serves to confuse the question of classifying international agreements", and observed that "there is no exclusive or systematic use of nomenclature for particular types of transaction."[33]

The various terms, of course, may carry differing degrees of political significance. A simple agreement on technical or administrative cooperation will rarely be designated 'Covenant' or 'Charter', whereas an agreement establishing an international organization will usually not be given such casual labels as 'agreed minutes'[34] or 'memorandum of understanding'.[35]

In earlier times, it was not unusual to have the conclusion of treaties accompanied by an oath in order to promote treaty performance.[36] Nowadays, such symbolism may sometimes be incorporated in the designation of documents. It is widely believed that the name 'Covenant' for the constituent document of the League of Nations was chosen on purpose partly for its reference to biblical principles.[37] The infamous 1928 Kellogg-Briand Pact was officially styled 'general treaty'[38], in order to demonstrate its authors' hopes of widespread participation.[39] In more recent years, one of the docu-

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standkoming van verdragen en overeenkomsten met vreemde mogendheden (The Hague 1951, 2d. ed.), at 22) allowed for the possibility that agreed minutes recorded binding oral agreements.

[33] In 3 *Official Records*, at 8. There seems to be one exception: the term 'concordat' appears to be reserved exclusively for agreements concluded by the Holy See. With respect to other designations, as early as 1923, in its *Jaworzina-opinion*, the PCIJ was perfectly willing to treat a joint declaration issued by Poland and Czechoslovakia by which they accepted a boundary demarcation, as legally binding. See below, ch. VI.

[34] Nevertheless, the establishment of bilateral diplomatic relations between the US and the German Democratic Republic took place by means of an instrument designated as "Agreed Minute", as recalled by the US Court of Appeals for the Fourth Circuit in *United States v. County of Arlington and another*, decision of 1 February 1982, in 98 *ILR* (1994), 1-13.

[35] Note however, that the 1982 Memorandum of Understanding on Port State Control comes, its casual designation notwithstanding, dangerously close to establishing, if not an organization, then at least an international organ. Text in 21 *ILM* (1982), 1.

[36] See above, note 10.

[37] Partly also as a reference to the 1642 Scottish Solemn League and Covenant (the League of Nations' founding father, Woodrow Wilson, was of Scottish descent). See Jan Willem Schulte Nordholt, *Woodrow Wilson: een leven voor de wereldvrede. Een biografie* (Amsterdam 1990), at 297.

[38] General Treaty for the Renunciation of War. Text in 94 *UNTS* 57.

[39] Its counterpart, also concluded in 1928, was the General Act for the Pacific Settlement of

ments concluded between the member states of the European Union on the way to establishing that union was a purportedly legally non-binding Declaration, which was nevertheless given the epithet 'solemn'.[40] Still, that does not change the fact that for purposes of ascertaining whether a certain document or set of documents constitutes a treaty, and therefore a legally binding agreement under international law, the designation is of little use.[41]

Number of instruments

The text of article 2, paragraph 1 (a) also provides that the actual number of instruments of which an agreement consists gives no indication whatsoever as to the nature of that agreement. International law has long recognized the practice of concluding agreements in a series of related instruments. Thus, Chayet notes the existence of two Franco-German treaties concluded in the 1920s, consisting of 17 and 19 related communications, respectively.[42] Not dissimilarly, the International Court of Justice found, in 1984, that the various unilateral declarations issued by states under article 36, paragraph 2, of the ICJ's Statute, thereby accepting the Court's compulsory jurisdiction, establish "a series of bilateral engagements".[43]

Arguably the main importance of the definition's liberal attitude towards the number of instruments making up a treaty resides in its allowing for the inclusion of exchanges of notes, exchanges of memoranda, and exchanges of letters in the Convention.[44] As obvious as such inclusion may sound, it was

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Disputes. Text in 93 *UNTS* 343.

[40] Solemn Declaration on European Union, signed in 1983 in Stuttgart. Text in *Bull. EC* (1983), no. 6, 24-29.

[41] As the ICJ stated in 1962: "Terminology is not a determinant factor as to the character of an international agreement or undertaking." *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)* (preliminary objections), [1962] ICJ Rep. 319, at 331.

[42] See Claude Chayet, "Les accords en forme simplifiée", 3 *AFDI* (1957), 3-13, at 8.

[43] *Nicaragua-case* (jurisdiction and admissibility), at 418, para. 60. Judge Jennings, in his separate opinion, was not willing to go this far, but conceded that they could be regarded as treaties *sui generis*. ICJ Rep 1984, at 547. This observation is reminiscent of the practice, lasting until well into the 19th century, of couching multilateral treaties in the form of a string of related and (almost) identical bilateral treaties. Cf. Paul Reuter, *Introduction to the law of treaties* (London 1989), at 4.

[44] On these, see generally J.L. Weinstein, "Exchanges of notes", 29 *BYIL* (1952), 205-226.

preceded by a serious clash of opinions within the International Law Commission.

The Harvard Draft Convention, prepared in 1935 under auspices of Harvard Law School, had adopted the attitude that exchanges of notes, memoranda, and letters be excluded from its scope. Article 1 of the Harvard Draft had defined treaty as "a formal instrument of agreement", and did not include "an agreement effected by exchange of notes", even if the authors of the Harvard Draft acknowledged the legal force of exchanges of notes and similar related instruments.[45]

The ILC's First Rapporteur, J.L. Brierly, took the position that exchanges of notes and letters should not be excluded from a convention on the law of treaties, and included in his first draft a separate paragraph, holding that the term treaty "includes an agreement effected by exchange of notes."[46] Brierly explained the difference of opinion as essentially stemming from a difference in outlook, when he noted that the exclusion of such instruments is "indeed inevitable where the term "treaty" is used to connote, not an agreement, but an instrument or document the execution or drawing up of which effects an agreement."[47] The essence of a treaty was not so much that it was an instrument, he claimed, but, instead, "lies in the agreement or *consensus* brought into existence by the act of its formal conclusion."[48]

Although Brierly's inclusion of exchanges of notes was commented upon by several members of the ILC, most of them did agree on the possible legally binding nature of such strings of instruments.[49] The one notable

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[45] Other early drafts, such as Field's, Bluntschli's, or Fiore's, left the matter unsettled. These are all, in relevant part, annexed to Brierly I. The legal force of exchanges of notes was clearly recognized by the Permanent Court of International Justice in its 1931 Advisory Opinion on the *Austro-German customs régime*: "From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchanges of notes." [1931] Publ. PCIJ, Series A/B no. 41, at 14.

[46] Brierly I, article 1(b).

[47] Ibid., para. 33.

[48] Ibid., para. 19. Both these statements, somewhat unfortunately, appeared to suggest that treaty precedes agreement, whereas what Brierly really had in mind was rather the opposite. He himself conceded as much after especially American ILC-member Manley O. Hudson had insisted that parts of paragraph 19 of Brierly's report "were perhaps not very well drafted." See the discussion of Brierly I, in *Yearbook of the International Law Commission* (1950/I), at 82. Brierly agreed that the word "by", in the sentence quoted, be replaced by "before".

[49] See the discussion of Brierly I, o.c. note 48, comments by Amado (at 65), Francois (at

exception was Mr. Córdova, who maintained that

> "a treaty was a contract established in writing which contained legal provisions binding the contracting parties. An exchange of notes on the other hand merely settled certain matters of a technical character between the parties. Consequently, if an agreement contained provisions binding the two parties it constituted a treaty."[50]

Mr. Córdova's opinion notwithstanding, the ILC decided by the narrowest of margins (6 in favour, 5 against) to include exchanges of notes and letters in the draft articles.[51]

After this rather heated beginning, emotions on the topic clearly subsided, and the draft submitted to the General Assembly in 1962 specifically included exchanges of notes and letters.[52] The draft contained a separate definition of "treaty in simplified form", by which was meant "a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other document concluded by any similar procedure."[53] In the end, however, the Commission decided to dispense with a separate definition for treaties in simplified form covering, *inter alia*, exchanges of notes and letters. The juridical differences with 'regular' treaties were thought to be negligable, and, moreover, "the Commission did not find it easy to give sufficient precision" to a definition of treaties in simplified form.[54]

No amendments to exclude exchanges of notes or letters were proposed during the Conference. The inclusion of those phenomena even failed to provoke any substantial comments by the delegates. Since it is clear that neither the form of agreements, nor the number of related constituent instruments, are relevant as to their legal force, form and number are rendered useless as indicators of the legally binding force of an agreement.

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65), Alfaro (at 68), El-Khoury (at 70), Hudson (at 71), and, in a rather vague manner, Scelle (at 72-73).

[50] Ibid., at 71.

[51] Ibid., at 78.

[52] As had, earlier, Fitzmaurice I, article 2 (2).

[53] See *Yearbook of the International Law Commission* (1962/II), article 1 (1) (b). The main importance hereof was revealed in the draft article on full powers (article 4), which provided in paragraph (b) that production of full powers could be dispensed with for treaties in simplified form, unless they would be called for by other negotiating states.

[54] Cf. 3 *Official Records*, at 8 and 9.

Concluded between states

The requirement that, for purposes of the Convention, treaties be concluded between states is a logical consequence of the limited scope of the Convention. Under article 1, the scope of the Vienna Convention does not extend beyond treaties concluded between states.[55]

The decision to limit the scope of the Convention to treaties concluded between states, thereby excluding agreements concluded with or by other subjects of international law, was taken at a relatively late stage.[56] In Brierly's first report, the Convention was thought to cover treaties concluded by or with international organizations as well.[57] This thought recurred in the reports of his successors.[58] Even at the Conference itself, several states still proposed amendments to extend the scope of the Convention. Both the United States and Vietnam wished to see other subjects of international law included.[59] Both proposals failed to gain any support, and were as a result

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[55] Note however that, as Gaja argues, the Convention also "applies to treaty relations between States under a treaty to which international organizations or other subjects of international law are also parties." This follows from article 3 (c) of the Vienna Convention, and has been confirmed by article 73 of the 1986 Convention. See Giorgio Gaja, "A 'new' Vienna Convention on treaties between states and international organizations or between international organizations: a critical commentary", 58 *YBIL* (1987), 253-269, at 255. On the origins of article 73 of the 1986 Convention, see E.W. Vierdag, "Some remarks on the relationship between the 1969 and the 1986 Vienna Conventions on the law of treaties", 25 *ARV* (1987), 82-91.

[56] The moment this was decided is difficult to pinpoint exactly. In the report to the General Assembly on its fourteenth session (*Yearbook of the International Law Commission* (1962/II)), the ILC stated that it had "reaffirmed its decisions of 1951 and 1959 to defer examination of the treaties entered into by international organizations until it had made further progress with its draft on treaties concluded by States" (at 161, para. 21), and the accompanying draft articles still left room for treaties concluded by subjects other than states. Nevertheless, the statement quoted was interpreted by Sir Humphrey Waldock as meaning that the ILC "decided at its fourteenth session to confine the draft articles to the treaties of States." Waldock IV, *Yearbook of the International Law Commission* (1965/II), at 11. See generally Shabtai Rosenne, *Developments in the law of treaties 1945-1986* (Cambridge 1989), esp. 13-17; G.E. do Nascimento e Silva, "The 1969 and the 1986 Conventions on the law of treaties: a comparison", in Yoram Dinstein (ed.), *International law at a time of perplexity: essays in honour of Shabtai Rosenne* (Dordrecht 1989), 461-487, esp. 461-463.

[57] Brierly I, art. 1(a).

[58] See e.g. Lauterpacht I, article 1; Fitzmaurice I, article 2 (1); Waldock I, article 1 (a).

[59] See 3 *Official Records*, at 110, for the texts of the proposed amendments.

swiftly withdrawn.[60]

Somewhat surprisingly, perhaps, the notion of what constitutes a state is left undefined in the Convention, even if solely for purposes of the Convention.[61] Although the Convention defines 'negotiating state', 'contracting state', and 'third state'[62], all of these definitions refer to a more central notion of 'state'. The only proposal even remotely resembling an attempt at defining 'state' was submitted by China, to the effect that ""State" means a sovereign state".[63] The proposal was quickly defeated, however, after several delegates had pointed out that "non-sovereign States had been known to conclude treaties".[64] The political motives underlying the Chinese proposal perhaps led most other delegates to feel rather uncomfortable with it. However, this does little to alleviate the sometimes problematic fact that 'state' has been left undefined.[65]

To some extent, the problems which might be caused by the lack of definition of 'state' are mitigated by article 3 of the Convention, which holds that the fact that the Convention's scope does not cover agreements concluded with or between other subjects of international law "shall not affect the legal force of such agreements".[66] In other words, the Convention logically does not preclude other subjects from concluding legally binding agreements, and does not preclude these from being called 'treaty'.[67]

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[60] Withdrawal of the US proposal was motivated by its delegate Mr. Kearney during the third meeting of the Commitee of the Whole, in 1 *Official Records*, at 20, para. 64. A similar motivation by Vietnam is absent; the official documents merely note that the Vietnamese amendment was withdrawn. See 3 *Official Records*, at 110, para. 26.

[61] Fitzmaurice I included a rather broad definition of 'state' in article 3 (a) (1): "... an entity consisting of a people inhabiting a defined territory, under an organized system of government, and having the capacity to enter into international relations binding the entity as such, either directly or through some other State...". Brierly's definition (in Brierly I, article 2(a)) was, if possible, even broader: "A "State" is a member of the community of nations."

[62] Article 2, paragraph 1, subparagraphs e, f, and h, respectively.

[63] Text in 3 *Official Records*, at 112.

[64] In the words of the Lebanese delegate, Mr. Fattal. In 1 *Official Records*, at 27. Similarly, Mr. Bindschedler of Switzerland, at 28. The Italian delegate however maintained that the Chinese proposal "amounted only to a statement of the obvious." (at 26).

[65] In a nice irony, the 1986 Convention on the law of treaties had to include separate terms allowing for the possibility of ratification by Namibia, at the time not yet a state. See articles 82-85 of the 1986 Convention.

[66] Some other problems relate to issues of responsibility. See below, ch. IV.

[67] Indeed, the 1986 Vienna Convention speaks throughout of treaty. In the recent *Nauru*

Agreements between states and individuals or corporations will not generally be considered to amount to treaties. Without denying the legally binding force of a concessionary contract, the ICJ, in the *Anglo-Iranian Oil Company* case, refused to assimilate such agreements to treaties, mainly because the agreement concerned had established no "privity of contract" between the United Kingdom and Iran, but rather between Iran and the Oil Company.[68]

In written form

The limitation of the Convention to agreements in written form was born out of eminently practical considerations. Since one cannot, strictly speaking, sign or ratify an oral agreement, let alone register it, it was thought that the practical differences between written and oral agreements would quite simply be too large to allow them to be treated in a single instrument. As the International Law Commission advised, "in the interests of clarity and simplicity, its draft articles on the law of treaties must be confined to agreements in written form."[69]

This limitation, however, was in no way meant to affect the legal force of oral agreements, as has found expression in article 3 of the Convention.[70] Indeed, state practice has continued to recognize the legal force of oral

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case, the ICJ had no problem treating an instrument concluded prior to Nauru's independence between the Nauru Local Government Council on the one hand and Australia, New Zealand and the United Kingdom on the other, as legally binding. See *Certain phosphate lands in Nauru* (Nauru v. Australia) (preliminary objections), [1992] ICJ Rep. 240. See also the decisions of the French Conseil d'Etat of 27 March 1968 and 31 January 1969 in *Moraly and Société 'Maison Moraly'* (in 52 *ILR* (1979), 406-408), holding, after having sought the advice of the Foreign Minister, that the Evian Agreements amounted to a treaty.

[68] *Anglo-Iranian Oil Company case* (United Kingdom v. Iran) (Preliminary objections), [1952] ICJ Rep. 93, esp. at 112. Interestingly, the Court did not completely close the door on treating agreements between states and corporations as treaties, a thought which may have inspired later authorities to claim that in some cases, they are. See generally Esa Paasivirta, *Participation of states in international contracts* (Helsinki 1990) and references therein.

[69] Its commentary to its final draft article 2, in 3 *Official Records*, at 9.

[70] See, e.g., Brierly I, at 227.

agreements[71], even in the guise of modern-day variations such as telephone conversations.[72]

The exact scope of what constitutes a written agreement, however, may be somewhat unclear. Brierly noted that his requirement that treaties be "recorded in writing"[73] was to be understood as "to include typewriting and printing and, indeed, any other permanent method of recording."[74] Without seriously investigating the matter and explicitly referring to Brierly, Fitzmaurice asked: "Would an oral agreement recorded (a) with the knowledge and by the intention of the parties, (b) secretly by one of them only, on a disc or tape recorder, amount to an agreement in writing?"[75]

However, the matter was not further pursued, and no substantial comments on the scope of 'written' were made during the Conference.[76] The important point for present purposes is that whether or not an agreement is in writing tells us little about its legally binding force.

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[71] Thus, Finland and Denmark settled their dispute over the Great Belt bridge by means of an oral agreement. Reported on in 3 *FYIL* (1992), at 610. One of the few (arguable) exceptions is Baron Lamberton's 1889 award in *Le différend de Lamu (Allemagne/Grande Bretagne)*, where he refused to recognize an oral statement made by the Sultan of Zanzibar as legally binding. It may be argued, however, that Baron Lamberton was inspired foremost by a lack of evidence as to the existence of the undertaking: he had nothing to go on except claimant's assertion that such undertaking had been given. The award is reproduced in H. la Fontaine (ed.), *Pasicrisie internationale: histoire documentaire des arbitrages internationaux* (Berne 1902), 335-340.

[72] Cf. *US v. Gonzalez*, Court of Appeals for the 11th Circuit, decision of 1 November 1985. Reproduced in Bernard D. Reams, jr. (ed.), *American international law cases. Second Series 1979-1986*, vol. 5 (Dobbs Ferry 1987), 201. 'Modern-day' is, of course, a relative notion. McDougal & Lans note that an agreement concluded in 1936 between the UK, the US and France relating to monetary affairs had been concluded by using the telephone. See Myres S. McDougal & Asher Lans, "Treaties and congressional-executive or presidential agreements: interchangeable instruments of national policy", in Myres S. McDougal & Associates, *Studies in world public order* (New Haven 1960), 404-717.

[73] His article 1 (a).

[74] Brierly I, at 227.

[75] Fitzmaurice I, at 117, footnote 4.

[76] Problems may of course come up if and when negotiators start to make use of the information highway. Could an agreement concluded by electronic data interchange or e-mail be regarded as being in written form? And if so, how permanent are they really? Referring to private law, some of the problems stemming from technological developments have been described by David Woolford & Simon Chester, "When is a deal really a deal?", *International Corporate Law* (April 1995), 18-22.

An international agreement

As soon as the ILC started its work on the law of treaties, it became clear that the treaty was to be considered as merely a species of the genus agreement. Whereas every treaty ultimately rests upon an agreement, not every agreement is necessarily a treaty.[77]

This reasoning, however, ultimately leads to the question: if a treaty is a specific class of agreement, what then is an agreement? Brierly left the matter undefined, but he did note that defining treaties as agreements "serves sufficiently to exclude unilateral declarations" from the scope of the Convention.[78]

Whereas Brierly must have thought that use of the epithet 'international' would be redundant, given the subject matter of the law of treaties[79], fourth rapporteur Waldock gave undue stress to 'international'. In attempting to define the notion of 'international agreement', his focus rested completely on the adjective, somewhat to the detriment of the noun.[80]

The question of the meaning of agreement has been left largely unresolved, but at least two elements appear beyond doubt: agreements presuppose communication, and must refer, to be legally meaningful, to future behaviour.

Agreement presupposes communication, both in everyday parlance as well as for the purposes of the Vienna Convention. For that reason, Brierly's deliberate exclusion of unilateral declarations from the scope of the Convention seems fully justified.[81] Unilateral behaviour may coincide with the unilateral behaviour of others, but does not, by definition, rest upon communication, and can therefore in no way be the result of agreement.

This implies that the notion of tacit agreements or understandings (or the similar notion of rules of the game[82]), sometimes assimilated with communi-

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[77] See, e.g., Brierly I, at 227, para. 19 altered as described above, and para. 20.

[78] Ibid., para. 20.

[79] Similarly, Lauterpacht I, stating simply that "[t]reaties are agreements between States ...". Article 1.

[80] Waldock I, article 1 (a), defined 'international agreement' as "an agreement intended to be governed by international law and concluded between two or more States or other subjects of international law ..."

[81] Note, however, that on several occasions, international tribunals have held unilateral declarations to be legally binding. See generally chapters VI and VII, below.

[82] See, e.g., John Lewis Gaddis, "The long peace: elements of stability in the postwar international system", 10 *International Security* (1986), 99-142. See also: Richard A.

cated agreements[83], is for all legal purposes a misnomer. To claim, as Puchala & Hopkins do, that "[w]herever there is regularity in behavior some kinds of principles, norms or rules must exist to account for it"[84], is to confuse regularity for causality.[85]

In the late 1980s, observers of international currency fluctuations may have witnessed that whenever the German Mark changed its value, the British Pound followed suit, so as to keep their mutual ratio at 3 to 1. Some observers might have interpreted this phenomenon as the smooth functioning of currency markets; others might have explained the behaviour as resting upon some form of tacit understanding. Reportedly, however, the British Pound following the German Mark was simply the result of the British policy of "shadowing the Deutschmark", devised by former Chancellor of the Exchequer Nigel Lawson, apparently without even the knowledge of his colleagues in the British cabinet.[86]

In other words, although behaviour may show regularities, those regularities need not necessarily stem from any underlying agreement. Of course, the sociologist or political scientist may well address those regularities as 'rules', but it is important to bear in mind that such 'rules' are as devoid of normativity as are the physicist's laws of gravity.[87] Indeed, it cannot seriously be maintained that the tendency of the superpowers during the cold war to prefer the existence of rather anomalous geopolitical situations (such as the partitioning of Berlin, or the location of communist Cuba just off the US coast)

Falk, "The interplay of Westphalia and Charter conceptions of the international legal order", in Cyril E. Black & Richard A. Falk (eds.), *The future of the international legal order. Vol. I: trends and patterns* (Princeton 1969), 32-70.

[83] E.g., Charles Lipson, "Why are some international agreements informal?", 45 *International organization* (1991), 495-538; Raymond Cohen, "Rules of the game in international politics", 24 *International Studies Quarterly* (1980), 129-150, esp. at 142; Louis Henkin, *How nations behave* (New York 1979, 2d ed.), esp. 56-58.

[84] Donald J. Puchala & Raymond F. Hopkins, "International regimes: lessons for inductive analysis", in Stephen Krasner (ed.), *International regimes* (Ithaca 1983), 61-91, at 63.

[85] See also André Nollkaemper, "The effectiveness of international rules", 27 *Acta Politica* (1992), 49-70, at 62. To be sure, Puchala & Hopkins included legal principles, norms and rules in their analysis. But even if they had not done so, their thesis would have been too extreme.

[86] See Margaret Thatcher, *The Downing Street years* (London 1993), esp. at 699-705.

[87] See for another example science philosopher Thomas Kuhn, claiming that paradigms may be "more binding" than any set of rules for research. Cf. Thomas S. Kuhn, *The structure of scientific revolutions* (Chicago 1970, 2d. enl. ed.), at 46.

over more rational or logical solutions[88] in one way or another obligated them to choose an anomalous solution whenever the possibility arose. Such a stand would be legally untenable; rules like these are descriptive rather than normative.

Treaties then, being agreements, must somehow be based on communication. Most often, this communication will be verbal, be it oral or written. Yet, there may be situations where agreements arise through non-verbal communication, though presumably their range is fairly limited. The only example that comes to mind is the waving of flags in battle to indicate a truce or cease fire.[89]

To be legally relevant, agreements, and thus treaties, must in one way or another refer to future behaviour; and, in some way affect future relations between the parties. Otherwise, the rules on performance, validity, suspension, and termination of treaties, including the *pacta sunt servanda* rule, have no object.[90] One cannot, strictly speaking, violate an 'agreed view' or a 'common position'. Neither can an 'agreed view' or a 'common position' be void or voidable if there is no action to be undertaken. Moreover, with respect to suspension, or termination, such phenomena make little sense.

States can and sometimes do record their 'common position'. Although these common positions may not be entirely without legal effect - states cannot, later, deny their positions thus recorded, although of course they are free to change their minds -, as long as such common positions remain limited to literally reflecting a common point of view, such agreements do not have any limitations upon future behaviour.[91]

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[88] The example is derived from Gaddis, o.c. note 82.

[89] Mentioned by Alfred Verdross, *Die Quellen des universellen Völkerrechts: eine Einführung* (Freiburg 1973), at 45. Cohen, o.c. note 83, at 142, offers military manoeuvers as an example, but at best this would amount to an agreement to be on the brink of war, which can hardly be deemed to constitute an agreement on desirable future behaviour. It has been recognized, though, that there may be a fine line between such tacit agreements and customary international law. See, e.g., Paul Keal, *Unspoken rules and superpower dominance* (London 1983), acknowledging that the tacit recognition of spheres of influence between the superpowers could have come close to customary status. Incidentally, although the line may be thin, it would have been unlikely for the necessary *opinio juris* to arise. An argument based on estoppel might therefore be deemed more convincing.

[90] Compare also Judge Tarazi's separate opinion to the *Aegean Sea Continental Shelf case*, [1978] ICJ Rep. 3, at 57.

[91] The most obvious exception hereto is the formulation of a 'common position' within the Council of Ministers of the European Community. Such common positions form a recognized stage in the Community's decision-making process. See articles 189b and 189c

Whereas the question of the meaning of 'agreement' attracted little attention in the International Law Commission and during the Conference, the requirement that such agreement be 'international' did provoke some interesting debates. As noted earlier, both Fitzmaurice and Waldock had included the adjective in their reports to the ILC, although it is not exactly clear why. During the Conference, Spain tabled an amendment proposing deletion of the word 'international'.[92] Spanish representative De Castro explained at the fourth meeting of the Committee of the Whole that he found the word "unnecessary and liable to cause confusion."[93]

Several representatives supported the Spanish view[94], but others pointed out that "there were agreements between States which did not constitute international agreements."[95] The proposal was referred to the Drafting Committee, which evidently rejected it, without specifying why.[96] Perhaps the general mood was best summed up by US delegate Mr. Bevans, who noted that the American delegation "had given thought to the suggestion to delete the word "international" before "agreement" ... but, on balance, had reached the conclusion that it should be retained."[97]

In the end, for purposes of determining whether or not a certain instrument is legally binding, the requirement that treaties be international agreements does not appear to be of more than limited help. Of course, this requirement excludes all things unilateral from the scope of the Convention, but that is not to say that either unilateral declarations or even unilateral behaviour cannot give rise to international legal obligations.[98]

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of the EC Treaty (as amended).

[92] See 3 *Official Records* , at 111. A Chilean proposal, although apparently directed for the most part at another point (see below), also dropped the word 'international'. Ibid.

[93] In 1 *Official Records*, at 23, para. 20.

[94] See, e.g., the representatives of Chile (1 *Official Records*, at 21, para. 2) and Syria (at 25, para. 7).

[95] Mr. Maresca of Italy, 1 *Official Records*, at 25, para. 20. Unfortunately, Mr. Maresca failed to specify what exactly he had in mind.

[96] Article 2, as proposed by the drafting committee, maintained the word 'international'. The drafting committee's commentary does not mention the fate of the Spanish proposal. Cf. 2 *Official Records*, at 346-348.

[97] In 1 *Official Records*, at 31, para. 115.

[98] See generally ch. VI, below.

Governed by international law

The final requirement that can be read into article 2, paragraph 1 (a) of the 1969 Vienna Convention is the requirement that treaties be governed by international law, and it is this single phrase which was (and presumably still is) the leading source of confusion regarding the determination of the legal nature of international agreements.

Brierly had not used the phrase "governed by international law", although he did make mention of the establishment of "a relation under international law".[99] Lauterpacht referred to treaties as being "intended to create legal rights and obligations", apparently considering that the international element was covered by the reference to states.[100]

The third Special Rapporteur, Fitzmaurice, was more outspoken. In his view, "a treaty is an international agreement ... intended to create legal rights and obligations, or to establish relationships, governed by international law."[101] In the light of later events and comments[102], Fitzmaurice's definition deserves closer scrutiny. The interesting aspect about Fitzmaurice's definition is, that he separated what would later come to be treated as a single notion. His definition separated the intention to create legal rights and obligations or to establish relationships, from the requirement that treaties be governed by international law. According to Fitzmaurice, treaties would automatically be governed by international law, provided that they were the result of an intention to create legal rights and obligations, or an intention to establish relationships.[103]

In a later definition, however, Sir Gerald dropped the requirement of intent. Article 2, *juncto* article 1 of the draft Code[104] presented to the Gen-

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99 Brierly I, article 1(a).

100 Lauterpacht I, article 1.

101 Fitzmaurice I, article 2 (1).

102 See below.

103 The reference to the establishment of relationships was explained as follows: "... it seems difficult to refuse the designation of treaty to an instrument - such as for instance a treaty of peace and amity, or of alliance - even if it only establishes a bare relationship, and leaves the consequences to rest on the basis of an implication as to the rights and obligations involved, without these being expressed in any definite articles." Fitzmaurice I, at 117.

104 Sir Gerald regularly insisted that an expository code containing the law of treaties would be preferable to a treaty. See, e.g., Fitzmaurice I, at 106-107.

eral Assembly in 1959[105] merely mentioned that treaties be governed by international law. Nevertheless, Sir Gerald's exposition on the contents of the phrase "governed by international law" is well worth quoting at length. After having established that "the element of subjection to international law" was utterly essential, he proceeded:

> "Is an agreement between States always or necessarily governed by international law? In one sense, yes: the agreement, once arrived at, must be carried out, and this results from the rule of customary international law, "*pacta sunt servanda*".[106] Subject to that, however, there may be agreements between States, such as agreements for the acquisition by one Government from another of premises for its diplomatic mission in the territory of that Government; or else some other purely commercial transactions between Governments - the incidence of which may be regulated entirely by the appropriate system of private (i.e., national, not international) law."[107]

In other words, in Sir Gerald's view, the requirement that agreements be governed by international law served to distinguish them from those agreements governed by one or another system of domestic law.[108] The same line

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105 In *Yearbook of the International Law Commission* (1959/II), 92-97.

106 At this point a footnote was included, which read "Even here, however, a *petitio principii* may be involved, for the *pactum* is only *servandum* if it is a *pactum* - i.e., already an international agreement." *Yearbook of the International Law Commission* (1959/II), at 95, footnote 30 (emphasis in original). Incidentally, in the light of his other writings, it is somewhat remarkable to see Sir Gerald describe the *pacta sunt servanda* rule as a rule of customary international law. Elsewhere, e.g. in Sir Gerald Fitzmaurice, "Some problems regarding the formal sources of international law", in F.M. van Asbeck et. al. (eds.), *Symbolae Verzijl* (The Hague 1958), 153-176, he described it as a maxim of natural law; the two conceptions do not necessarily exclude each other, though, as is also held by Wehberg, o.c. note 9.

107 *Yearbook of the International law Commission* (1959/II), at 95. Several examples of agreements between states which are governed by some domestic law are afforded by F.A. Mann, "Another agreement between states under national law?", 68 *AJIL* (1974), 490-496. Conversely, Friedmann has noted an increase in agreements between states and private parties, governed by public international law. See Wolfgang Friedmann, "General course in public international law", 127 *RdC* (1969/II), 39-246, at 105.

108 Although separating intent from "governed by international law", it would appear that both, in Fitzmaurice's view, served the same purpose. During the 485th meeting of the ILC, he had still insisted on retaining them both, explaining that a reference to intent was necessary "for there might be agreements between States concerning commercial matters which did not create rights and obligations or establish relationships governed by international law. For example, an agreement for the purchase by one State of property in another State would probably be governed by the domestic law of the site of the property." *Yearbook of the International Law Commission* (1959/I), at 33.

of reasoning was followed by Fitzmaurice's successor as Special Rapporteur, Sir Humphrey Waldock. Sir Humphrey, in the Commission's final draft presented to the General Assembly, stated the matter in unequivocal terms:

> "The phrase "governed by international law" serves to distinguish between international agreements regulated by public international law and those which, although concluded between States, are regulated by the national law of one of the parties (or by some other national law system chosen by the parties)."[109]

The Commission had deliberated whether a separate reference to the intention to be bound should be included, but finally decided against it, for several reasons. One of those, prominent with some members, was that such reference would imply that states could always pick and choose from among various legal systems, whereas this possibility would not always be present. Thus, Roberto Ago, at one point, noted that territorial arrangements would by definition have to be governed by international law, regardless of the specific intentions of the parties, to which Yasseen added the example of an agreement concerning the territorial sea.[110]

Another reason for not specifically referring to intent was the opinion held by some members of the ILC that, in Sir Humphrey's words, "the very nature of the contracting parties necessarily made an inter-State agreement subject to international law, at any rate in the first instance."[111]

Finally, the Commission reached the conclusion that "in so far as it may be relevant, the element of intention is embraced in the phrase "governed by international law""[112], rendering separate reference to intent superfluous. In doing so, Sir Humphrey repeated almost *verbatim* the remarks he had made in response to several governments that had previously pointed out that what was missing from the ILC's definition was a reference to intent. In particular the Australian government had remarked that without reference to intent, the definition would "embrace a great quantity of informal understandings reached by exchange of notes which are not intended to give rise to legal rights ...".

Without giving examples, a reference to intent was also preferred by the governments of Austria, the United Kingdom, and Luxembourg.[113] Sir

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109 See 3 *Official Records*, at 9, para. 6.

110 See *Yearbook of the International Law Commission* (1962/I), at 52.

111 See 3 *Official Records*, at 9, para. 6.

112 Ibid.

113 The comments of governments are included in *Yearbook of the International Law*

Humphrey merely replied to these suggestions that "he [did] not think that the comments of Governments introduce any new considerations which would justify him in formulating a fresh proposal on this point."[114]

Indeed, one might readily agree with Sir Humphrey. As it transpires from the discussions within the ILC and the governmental comments, the notion of intent could possibly serve two purposes: (1) it could distinguish agreements binding under international law from those binding under some domestic legal system; and (2) it could serve to distinguish agreements intended to be legally binding from those which were not intended to be binding at all. The same would apply, *mutatis mutandis*, for the requirement that agreements be governed by international law.

An examination of the Conference records leads to the same impression. At the first session, Chile had introduced a proposal for an amendment holding that ""treaty" means an agreement between States, governed by international law, which produces legal effects."[115] Apart from esthetic considerations (after all, the purpose of the Convention was to deal with legal relationships), the Chilean delegate Mr. Rodriguez endorsed the proposal by pointing to the need to distinguish between legally binding and non-legally binding agreements:

> "It often happened that declarations made on the international plane represented, like treaties, a concurrence of wills, but did not produce legal effects. Such declarations were often the preliminaries to a real agreement, which was concluded later when circumstances permitted. It would be dangerous to confuse them with treaties and make both of them subject to the rules of the convention, thereby gravely restricting freedom of expression in international affairs."[116]

Later, he also stated that "a dividing line should be drawn between treaties intended to produce legal effects and agreements not intended to do so, even though they sometimes did."[117]

A somewhat broader definition had been included in an amendment proposal tabled by Mexico and Malaysia, which, in terms reminiscent of Fitzmaurice, referred to the establishment of a relationship between the

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Commission (1965/II), at 10-11.

[114] Ibid., at 12.

[115] See 3 *Official Records*, at 111.

[116] In 1 *Official Records*, at 21, para. 3.

[117] Ibid., at 32, para. 16. Note that the final five words of the quotation already relativize the importance of intent.

parties as a separate element.[118] The Mexican representative introduced the proposal by pointing out "that the purpose of a treaty was to establish legal relations between the parties, which was not true of declarations of principle or political instruments such as the Atlantic Charter, which also constituted international agreements."[119] The Malaysian representative added that the intention of the parties to create a legal relationship was a generally accepted principle of municipal law[120], which, apparently, explained why it should also be so in international law.

The Chilean and joint Mexican-Malaysian proposals received some support, although perhaps not always for the most appropriate of reasons. The representative of Czechoslovakia appeared to imply that his main reason for supporting the Chilean proposal was because he represented a small country.[121] This comment seems directed at the idea that free consent is necessary in order to enter into obligations rather than at the necessity of a reference to intent itself. Similarly, the Syrian delegate appeared to interpret the proposals mainly as embodying a requirement of free consent, given the comparison he made with a proposal tabled by Ecuador.[122]

Nevertheless, some of the support expressed was more appropriate. The Argentinian delegate simply stated that the Chilean and Mexican-Malaysian proposals "deserved consideration".[123] The Australian delegate was of the opinion that the element of intent was "only implicitly suggested" in the draft[124], whereas Mr. Vallat, representing the United Kingdom, claimed

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118 ""Treaty" means an international agreement concluded between States in written form, *which establishes a relation-ship between the parties* governed by international law ..." 3 *Official Records*, at 111-112 (emphasis in original).

119 See 1 *Official Records*, at 23, para. 26.

120 Ibid., at 28, para. 65.

121 Ibid., at 26, para. 31.

122 Ibid., at 25, para. 9. The Ecuadorian proposal can be found in 3 *Official Records*, at 111. The support expressed by the delegate for the Democratic Republic of the Congo was even more curious, or, if you will, incomprehensible. He was recorded as being of the opinion that "it would appear from the [ILC's] commentary that States were free to choose whether a treaty was to be governed by international law or by the internal law of a certain State. That did not seem entirely satisfactory and he therefore subscribed to the Chilean amendment." In 1 *Official Records*, at 29-30, para. 83.

123 In 1 *Official Records*, at 29, para. 67.

124 Ibid., at 29, para. 76.

that "many agreed minutes could certainly not be regarded as international agreements."[125]

Others, however, were less smitten by the Chilean and Mexican-Malaysian proposals. Several representatives expressed the opinion that the proposals would not be necessary. The Italian delegate thought that the Chilean proposal "amounted only to a statement of the obvious".[126] The representative of the USSR felt that "the proposition it contained was self-evident. It was the essence of an international agreement that it created legal obligations."[127] The US representative agreed with his Soviet counterpart:

> "Any treaty concluded by States, irrespective of its name, had legal effects, as was confirmed by the phrase "governed by international law". The definition proposed in the Chilean amendment suggested that there could exist between States some treaties which had legal effects and other which had not."[128]

The matter was quickly referred to the Drafting Committee, which indicates that it was not considered to be a matter of substance. Indeed, Mr. Elias, chairman of the Committee of the Whole, acknowledged as much when stating that "only two of the amendments submitted dealt with points of substance".[129] Neither the Chilean nor the Mexican-Malaysian proposal was mentioned as such.[130]

Without a decision having been taken on the Chilean or Mexican-Malaysian proposals, Switzerland tabled a similar amendment at the second session, claiming that a requirement should be added to the effect of treaties "providing for rights and obligations."[131] In doing so, the Swiss representative made an interesting *volte-face*. While discussing the proposals submitted by Chile and Mexico and Malaysia at the first session, the Swiss representative had claimed that his delegation could not support the Mexican-Malaysian

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125 Ibid., at 30, para. 97.

126 Ibid., at 26, para. 21.

127 Ibid., at 30, para. 91.

128 Ibid., at 32, para. 3. Similar were the positions of Lebanon (at 27, para. 45) and New Zealand (at 28, para. 63).

129 A similar point had earlier been made by the Canadian delegate. Ibid., at 23, para. 28.

130 Ibid., at 35, para. 35. The amendments considered to be of substance both dealt with defining multilateral treaties. Interestingly, another Chilean delegate, Mr. Vargas, appeared to agree with this characterization, if only implicitly so. See ibid., at 35, para. 39.

131 Text in 3 *Official Records*, at 234.

amendment "because it added nothing new to the text: all treaties naturally established a legal relationship between the parties".[132] He dismissed the Chilean proposal for the reason that all treaties "by their very nature" produce legal effects.[133]

During the second session, the Swiss representative introduced his proposal by pointing to an alleged omission in the draft text:

> "Subparagraph 1 (a) established a distinction between international agreements governed by international law and agreements between States which were governed by municipal law. The sub-paragraph, however, was silent on agreements concluded between States at the international level but not constituting treaties, such as declarations of intent, political declarations and "gentlemen's agreements", which played a very important part in international politics and inter-State relations."[134]

After giving some examples, the Swiss delegate stated:

> "Such political declarations raised certain legal problems and were governed by international law. The definition should therefore be made more precise to exclude that kind of agreement."[135]

As he rounded off his comments on the Mexican-Malaysian and Chilean amendments, the Swiss delegate suddenly appeared to agree when he stated: "An international treaty was an instrument which, provided for legal rights and obligations for the parties."[136]

Before the Swiss proposal was referred to the Drafting Committee, some of the delegates expressed their view on the matter. Consistent with their earlier statements, support was expressed by both Chile[137] and the United Kingdom, although Mr. Sinclair, representing the latter government, made the somewhat curious comment that the elements favoured by, *inter alia*, the Swiss proposal, "were already implicit in the Commission's draft by virtue of

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[132] In 1 *Official Records*, at 27, para. 51.

[133] Ibid., at 28, para. 56.

[134] In 2 *Official Records*, at 225, para. 13.

[135] Ibid. Incidentally, the Swiss delegate left it unclear why agreements which are, apparently, not legally binding, would still be governed by international law. If not legally binding, why would, e.g., the international legal rules on state responsibility apply?

[136] Ibid., at 226, para 16. The comma in the sentence quoted is presumably the result of a typing error.

[137] Ibid., at 226-227, para. 24.

its reference to "international agreement."[138] Mr. Sinclair also provided something of a clarification of the earlier statement made by Mr. Vallat[139]:

> "The United Kingdom delegation considered that many "agreed minutes" and "memoranda of understanding" were not international agreements subject to the law of treaties because the parties had not intended to create legal rights and obligations, or a legal relationship, between themselves. ... International practice had consistently upheld the distinction between international agreements properly so-called, where the parties intended to create rights and obligations, and declarations and other similar instruments simply setting out policy objectives or agreed views."[140]

The Swiss proposal also met with some opposition, most notably from the USSR. Mr. Talalaev, pointing to such documents as the Atlantic Charter and the Potsdam and Yalta Agreements, vigorously claimed that these documents

> "not only provided for "rights and obligations" but also laid down very important rules of international law and had governed international relations since the end of the Cold War. Such political agreements were vitally important sources of contemporary international law, of undeniable legal force and validity ..."[141]

In the end, nothing was to come of the amendments proposed by Chile, Mexico and Malaysia, and Switzerland. Mr. Yasseen, chairman of the Drafting Committee, explained that the Committee "had rejected all amendments to include a reference to the legal effect of treaties."[142] Without underestimating the scientific merits of such reference, the Committee

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138 Ibid., at 227-228, para. 34. The curiosity resides in that if the requirement of "international agreement" would signify the legally binding nature of an agreement, then, in any normal construction, each and every international agreement would be legally binding; clearly, although there are merits to such an opinion, as we shall see, it was decidedly not what Mr. Sinclair was thinking.

139 See above.

140 In 2 *Official Records*, at 228, para. 35.

141 Ibid., at 226, para. 22. By and large, he found support with the delegate for Romania (ibid., at 227, para. 30). Note, that Mr. Talalaev's statement points to an important consideration: even if, e.g., the Yalta and Potsdam agreements could be denied legal force, they have nevertheless been governing international relations for many years. The question then rises how this importance can be explained in non-legal terms. His reference to 'political agreements' appears to relate to the substance of the agreements (dealing with political issues) rather than the normative order governing them. Such reference to 'political treaties' was rather common. Cf. Lord McNair, *The law of treaties* (Oxford 1961), esp. at 501-502.

142 In 2 *Official Records*, at 346, para. 21.

reached the conclusion that the phrase "governed by international law", as contained in the ILC's draft, "covered the element of intention to create obligations and rights in international law."[143] Mr. Yasseen continued by commenting that the Committee "had also noted that States had the right to choose whether a treaty concluded by them should be governed by international law or by internal law only in so far as such choice was permitted by international law itself."[144]

The rather extended discussion, conducted above, on the element "governed by international law" at once shows the problems involved in interpreting such a seemingly simple phrase. If it is accepted that the phrase covers the element of intent (and there is ample authority to support such a construction), then it follows that the decisive element as to whether or not a certain agreement is binding under international law is, at least to some extent, dependent on the intention or intentions of its authors.

Concluding remarks

The analysis of the legislative history of article 2, paragraph 1 (a), without being conclusive, indicates that the element of intent is useful, at least, to distinguish between various agreements in a twofold manner.[145] On the one hand, it is useful to make a distinction between agreements thought to be legally binding and agreements thought to be not binding at all, such as the "agreed views" mentioned by Mr. Sinclair. On the other hand, it is considered useful to distinguish between those agreements properly governed by international law, and those governed by the domestic laws of one or another

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[143] Ibid., at 346, para. 22.

[144] Ibid.

[145] Essentially the same opinion (*mutatis mutandis*) can be found in the ILC's final draft of the 1986 Convention. The ILC sketched three possible alternatives (apart from general international law), commenting on the notion that agreements by or with international organizations be governed by international law: "... the law peculiar to an organization, the national law of a specific country, or even, in some cases, the general principles of law." See *Yearbook of the International Law Commission* (1982/II, part. II), 9-77, at 18.

state[146], except in some cases, as Mr. Yasseen and others suggested, where there are no free options.[147] In those cases, the element of intent cannot be said to play a role. After all, intent implies freedom of choice; where no such freedom exists, intent is rendered inapplicable.

This investigation into the genesis of article 2, paragraph 1 (a) of the Vienna Convention still leaves several questions unanswered. Even if we acknowledge the vital importance of the element of intent, we still need to ascertain whether, as some delegates appeared to suggest, the element of intent can also be used to distinguish between agreements thought to be legally binding, and those thought to be non-legally binding, but binding nonetheless, for instance agreements said to be "politically binding", or "morally binding". Although the legislative history of article 2, paragraph 1 (a), does not support such a construction, this view has nevertheless gained enormous support in academic circles as well as among governments.[148]

Furthermore, the relative weight of intent vis-à-vis other factors contributing to law-making needs to be established. It is one thing to claim that intent is of vital importance, but even a casual acquantaince with international law demonstrates that other factors (good faith, reliance, estoppel) may be of importance as well.

Finally, the recognition of intent's vital importance gives little guidance on how intent is to be identified or recognized. How, in other words, can the intent to be bound be ascertained or demonstrated; can it be so demonstrated or ascertained at all? It is to these questions that we now turn.

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[146] The same conclusion is reached by Manfred Rotter, "Die Abgrenzung zwischen völkerrechtlichem Vertrag und ausserrechtlicher zwischenstaatlicher Abmachung", in René Marcic et. al. (eds.), *Internationale Festschrift für Alfred Verdross* (Munich 1971), 413-434.

[147] Similarly, Eduardo Jiménez de Aréchaga, "International law in the past third of a century", 159 *RdC* (1978/I), 1-344, at 37.

[148] See, e.g., Michel Virally, "Sur la notion d'accord", in Emmanuel Diez et. al. (eds.), *Festschrift für Rudolf Bindschedler* (Berne 1980), 159-172.

CHAPTER III

ON INTENT

An awkward concept

In the previous chapter, it was established that the definition of 'treaty' as embodied in the 1969 Vienna Convention on the law of treaties (and, by extension, the 1986 Convention), provides few clues with regard to determining the legal nature of a given agreement. The most useful element, albeit not directly mentioned in either of the Conventions' definitions, appeared to be the element of intent. This element turned out to be, within certain bounds, useful in the determination of whether or not an agreement is to be considered binding, and whether the agreement is to be considered binding under international law or under some other legal system.

For various reasons, however, the intention to be bound is an awkward notion. Not only is intent difficult to identify, but it also imbues those who conclude agreements with a psychological state they may never really have had. Generally, the element of intent is also thought to be important in domestic contract law. Yet, studies conducted on businessmen indicate that many businessmen in everyday practice are not as concerned about becoming legally bound, as they are about concluding a deal.[1]

In essence, those businessmen place a great deal of faith in notions like trust, reinforced perhaps by personal contacts.[2] The more complex deals, involving relatively large sums of money, are typically more prone to lawyerly supervision. Yet, even with those major deals the goal of negotiations is not so much the creation of legal rights and obligations, or the creation of a legal relationship, but simply the conclusion of a deal. At best, the conclusion of the deal is accompanied by a heightened sense of awareness that legal rights and obligations, or a legal relationship, have been created.

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[1] The seminal study is Stewart Macaulay, "Non-contractual relations in business: a preliminary study", 28 *American Sociological Review* (1963), 55-67.

[2] Cf. Hugh Beale & Tony Dugdale, "Contracts between businessmen: planning and the use of contractual remedies", 2 *British Journal of Law and Society* (1975), 45-60, esp. at 47.

This perception, of course, does not mean that contract law, as far as most businessmen are concerned, has become redundant. Rather, as a sales manager put it: "[I]t is an umbrella under which we operate."[3] There may also be, as has been suggested, a tacit reliance on contract law among businessmen in order to fill in the gaps whenever the agreement reached is indeterminate, and to provide for sanctions.[4]

The existence of this "umbrella" implies that the notion of an intention to be bound in contract law is little more than a useful legal fiction. The utility of this fiction, however, should not be overestimated.[5] As Peter Vincent-Jones has pointed out, "even the most apparently 'non-legal' business relationship may, by the very fact of its existence, be guaranteed by (partial) resort to law, whatever the parties may or may not have 'agreed' beforehand."[6]

It is submitted that the situation in international relations has, *mutatis mutandis*, always been identical. The proposition that the "legal character of international agreements and arrangements can itself become the object of negotiations"[7] is only of recent origin, and is, moreover, founded on dubious presumptions.[8]

Until recently, there has been little evidence that international negotiators ever even contemplated the Shakespeare-inspired question "to treaty or not to treaty?"[9] There is not even a hint on the subject in Harold Nicolson's classic

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[3] Quoted in ibid., at 48.

[4] Stewart Macauley, "Elegant models, empirical pictures, and the complexities of contract", 11 *Law & Society Review* (1977), 507-528, at 519. However, on the relativity of judicial enforcement in private contractual matters, see Friedrich Kratochwil, "The limits of contract", 5 *EJIL* (1994), 465-491.

[5] As Hedley puts it, with a keen sense for the aphoristic, "... parties contemplate performance, not breach." See Steve Hedley, "Contracts as promises", 44 *Northern Ireland Legal Quarterly* (1993), 12-33, at 20. See generally also his "Keeping contract in its place - *Balfour v. Balfour* and the enforceability of informal agreements", 5 *Oxford Journal of Legal Studies* (1985), 391-415.

[6] Peter Vincent-Jones, "Contract and business transactions: a socio-legal analysis", 16 *Journal of Law and Society* (1989), 166-186.

[7] Gidon Gottlieb, "Global bargaining: the legal and diplomatic framework", in Nicholas G. Onuf (ed.), *Lawmaking in the global community* (Durham N.C. 1982), 109-130, at 121. Gottlieb's statement that also the "formality" of agreements is subject to negotiations is presumably of more ancient origins, but formality, as such, has no bearing on legal character.

[8] This will be explored in more detail in the next two chapters.

[9] Peter H. Sand, "To treaty or not to treaty? A survey of practical experience", 87 *Procee-*

study *Diplomacy*.[10] In fact, at several places Nicolson actually draws an analogy between diplomats and businessmen. In his view: "... the foundation of good diplomacy is the same as the foundation of good business - namely credit, confidence, consideration and compromise."[11]

He does notice, of course, that some agreements are cast in more solemn forms than others; and sometimes vague and comforting formulas are preferred over more precise definitions.[12] He also observes that there may sometimes be a preference for provisions of wide and rather indeterminate scope.[13] Finally, he does acknowledge the existence of 'voeux', which he, quite literally, describes as wishes and recommendations which "have no binding force upon the signatories".[14]

But nowhere in the work of this former diplomat is there any reference to questions such as "to treaty or not to treaty?". For Nicolson, the idea that agreement could be couched in anything other than a legally binding instrument was, so it seems, inconceivable.[15] Diplomacy, as he put it, "is the art of negotiating agreements in precise and ratifiable form"[16], and that presupposes that those agreements are legal agreements, or may become legal agreements upon expression of the consent to be bound.

Similarly, the debates during the 1968 and 1969 Vienna Conference on the Law of Treaties, discussed extensively in the previous chapter, indicate that little more than a handful of states were convinced that agreements could intentionally be excluded from the realm of law. The idea that agreements could intentionally be made politically binding or morally binding had not yet gained ground.

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dings of the American Society of International Law (1993), 378-383. See also Paul Szasz, "General law-making processes", in Oscar Schachter & Christopher C. Joyner (eds.), *United Nations legal order* (Cambridge 1995, 2 vols.), 35-108, esp. at 73.

[10] Harold Nicolson, *Diplomacy* (Oxford 1952, 2d. ed.) Nor is there a hint of such possibility in a 1960's classic such as Arthur Lall, *Modern international negotiation* (New York 1966).

[11] Nicolson, o.c. note 10, at 144. In a rather similar vein he notes that "[t]he worst kind of diplomatists are missionaries, fanatics and lawyers..."; at 50.

[12] Ibid., at 96.

[13] Ibid., at 142.

[14] Ibid., at 243.

[15] Nicolson simply notes: "When agreement has been reached at a conference the results are embodied in a Treaty, Final Act, Convention or Protocol..." (at 201).

[16] Ibid., at 101.

This is not to deny that negotiators, throughout history, may have had in mind different designations for the results of their work. Negotiators who wanted to communicate the seriousness of their purpose might call the agreement a 'pact' or a 'convention'. On the other hand, to downplay such seriousness they might refer to agreements as 'memorandum of agreement' or 'agreed minutes'. Yet, there is little evidence to suggest they actually contemplated whether the agreement was meant to be legally binding, or, perhaps, exclusively politically binding or morally binding.

Indicators of intent

Notwithstanding its awkwardness[17], there is virtual unanimity among international lawyers that, at the very least, intent is one of the main determinants of international legal rights and obligations.[18] In a legal order where restrictions on states are not to be presumed lightly[19], it follows that an important factor in determining such restrictions is whether the parties themselves intended them as such.

Since intent is of such vital importance, methods for identifying intent must be found. This identification meets, however, with various obstacles. Referring to criminal law, British legal philosopher Alan White has stated that

> "in contrast to the skeptical view of philosophers and jurists that no one can know for certain the intentions of others but only precariously infer them from their behaviour, it is often as clear as daylight what someone's intentions are or that he could or could not have done so-and-so intentionally or with intent to do such-and-such."[20]

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[17] A nice indication of this awkwardness is also US President Roosevelt's admission that an agreement concluded during the second world war was less than fortunate. The President was reported as saying he himself did not know how that particular agreement had become initialled; it must have been done without much thought. Cf. James F. Byrnes, *Speaking frankly* (New York 1947), at 186.

[18] Quite explicitly so, Shabtai Rosenne, *Developments in the law of treaties 1945-1986* (Cambridge 1989), at ch. 2. See also, amongst many others, H.H.M. Sondaal, "Some features of Dutch treaty practice", 19 *NYIL* (1988), 179-157, at 183; K.I. Igweike, "The definition and scope of "treaty" under international law", 28 *IJIL* (1988), 249-263.

[19] *Case of the "SS Lotus"*, [1927] Publ. PCIJ, Series A, no. 10, at 18.

[20] Cf. Alan R. White, *Grounds of liability: an introduction to the philosophy of law* (Oxford 1985), at 71.

Even if, *arguendo*, this view was true, it offers little guidance with respect to the creation of legal rights and obligations, whether by means of domestic contracts or by means of international agreements.

Even if it were possible to know with certainty the intentions of one person, in order to meaningfully analyze the intent underlying agreements one must at least be able to know, with certainty, the intentions of two persons.[21] The problem becomes even more complicated when international agreements are involved. Although reference to a state's intentions may often be useful as legal shorthand, such a reference should not hide the fact that the state is but an abstract entity, composed of individuals and entities whose intentions need not always coincide.[22]

However, in an important sense White's statement quoted above is also self-defeating in its own right. In some circumstances, a person's intentions may be "as clear as daylight". This clarity falls short, however, of knowing those intentions "for certain". An impression which is "as clear as daylight" is only so in the eyes of the beholder, and is, therefore, based on an inference. In some cases, the making of such inferences will be easier, or will lead to more compelling results, than in other instances, but this depends on the available evidence relating to the intentions of the person or persons under scrutiny. It does not, and cannot, depend on some fullproof and airtight insight into the human psyche, let alone the psyche of some abstract entity.[23]

More useful is the view expressed in the old English maxim that "not even the devil knows what is inside a man's head".[24] This maxim implies that the

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[21] See generally Maarten Henket, "Contracts, promises and meaning: the question of intent", 2 *International Journal for the Semiotics of Law* (1989), 129-148.

[22] Indeed, as the PCIJ noted in its advisory opinion on *Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland*, [1923] Publ. PCIJ, Series B, no. 6, at 22: "States can act only by and through their agents and representatives". In the context of constitutional interpretation, the same point is made by Detlef F. Vagts, "Treaty interpretation and the new American ways of law reading", 4 *EJIL* (1993), 472-505, at 493.

[23] For similar reasons, the element of *opinio juris* in the formation of customary international law has always been thought problematic. See, e.g., Olufemi Elias, "The nature of the subjective element in customary international law", 44 *ICLQ* (1995), 501-520.

[24] Cf. Anne de Moor, "Intention in the law of contract: elusive or illusory?", 106 *Law Quarterly Review* (1990), 632-655, quoting a medieval English judge as saying "the intent of man cannot be tried, for the devil himself knows not the intent of man". At 648. See similarly J.K. de Vree, "The political conditions of international law", 26 *NILR* (1979), 46-59. John F. Kennedy once even claimed that he himself did not really know what was 'inside his head': "The essence of ultimate decision remains impenetrable to the observer -

starting point of any investigation into the intention or intentions of legal subjects must be their intentions as they manifest themselves to the outside world.[25] In other words: we are not looking for 'subjective' intentions, but for 'manifest' intentions.[26]

This reliance on manifest intent also follows from the point sometimes made that what one should be looking for is the common intention of the parties to an agreement. Normally speaking, discerning this 'common intention' can only mean discerning that which the parties agreed to do. It cannot, normally, refer to the underlying motives and reasons, for these may well be radically different from one party to another. To give an obvious and well-recorded example: the original member states of the European Union all had their own reasons for participating. Therefore, while an important reason for West Germany was a desire to be part of the Western partnership, the small Benelux countries saw the establishment of European integration as a means to be protected against their bigger neighbours.[27] Hence, their common intent related to means rather than ends: they agreed that their own motives were best served by European institutions. There may, however, have been fairly little common intent as far as those motives themselves were concerned.

The same point is made by Oscar Schachter with respect to the Third United Nations Convention on the Law of the Sea, "a convention negotiated by about 150 States over more than a decade in a context of package deals and bargaining by numerous groups." Schachter wonders whether we can still

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often, indeed, to the decider himself .... There will always be the dark and tangled stretches in the decision-making process - mysterious even to those who may be most intimately involved." Quoted as one of the motto's to Graham Allison, *Essence of decision: explaining the Cuban missile crisis* (Boston 1971).

[25] The thought comes, among international lawyers, quite close to being a truism. See, e.g., Paul Reuter, *Introduction au droit des traités* (Genève 1985, 2d ed.), at 33. Surprisingly, however, it was presented as something of a novel conception in US contract law as late as 1986. See Randy Barnett, "A consent theory of contract", in 86 *Col. LR* (1986), 269-321, esp. at 303-304. See, however, Oliver Wendell Holmes' famous 1897 article "The path of the law", reproduced in Richard A. Posner (ed.), *The essential Holmes* (Chicago 1992), 160-177, esp. at 165.

[26] These are sometimes, somewhat misleadingly, also referred to as 'objective' intentions. Intellectually more honest, the arbitrators deciding the *Grisbadarna* case between Norway and Sweden spoke of "probable intent" when interpreting certain documents. Decision of 23 October 1909, text in 4 *AJIL* (1910), 226-236.

[27] Cf. Max Jansen & J.K. de Vree, *The ordeal of unity: the politics of European integration since 1945* (Bilthoven 1988, 2d. ed.), e.g. 107-111.

"speak of a "common intent" on any but the most general level? Obviously there were many intentions ...".[28]

The search for manifest intent is quite problematic, as the example of the Atlantic Charter may demonstrate. It is widely believed that the Atlantic Charter, concluded in August 1941 between British Prime Minister Churchill and US President Roosevelt, was never intended to be legally binding.[29] However, if Churchill's reconstruction of the drafting history of the Atlantic Charter is to be believed[30], it would seem that, quite apart from the fact that most of the provisions contained in the Charter would involve participation of third states[31], quite apart also from its sometimes indeterminate language and from the omission of references to the states these two statesmen may or may not have represented, the main reason for this was not so much a lack of intent to be bound on the part of the main negotiators, but on the contrary, it would seem, that what is often cited as a lack of intent, was the result of a reluctance on Roosevelt's part to submit the Atlantic Charter to the US Senate, being afraid that the Senate would never go along with it. The question remains, did the drafters of the Atlantic Charter intend to become bound, or did they intend not to become legally bound[32]? One might easily reach the conclusion that intent was abundantly present, but never able to materialize due to what was but a perception on the part of one of the negotiators.

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[28] Cf. Oscar Schachter, *International law in theory and practice* (Dordrecht 1991), at 284. Some of the dangers of law-making by package deals have been analyzed by Sir Robert Jennings, "Law-making and package deal", in Daniel Bardonnet et. al. (eds.), *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité* (Paris 1981), 347-355.

[29] Note that this is not the same as saying that it was intended to be politically binding or morally binding.

[30] See Winston Churchill, *The Second World War. Vol. III: the Grand Alliance* (London 1950), esp. 385-400. Churchill's recollections were published almost a decade after the event, and thus must be treated with some caution. There is always the risk that memory played some trick or another, or worse, that his statements were meant to be self-serving. See also below.

[31] It is generally accepted that states cannot, on their own accord, create obligations for third states. Compare articles 34 and 35 of the 1969 Vienna Convention.

[32] Incidentally, the USSR has always insisted that the Charter was a legally binding instrument. It may have found some support for this claim in the fact that it was registered with the Secretariat of the League of Nations by the British government, as noted in Michael Brandon, "Analysis of the terms "treaty" and "international agreement" for purposes of registration under Article 102 of the United Nations Charter", 47 *AJIL* (1953), 49-69.

What, then, are reliable indicators of the manifest intentions of the authors of international agreements to actually be bound by these agreements, and, moreover, to be bound by them in law? It has already been established that the elements mentioned in the treaty definitions of the 1969 and 1986 Conventions are of little avail. Form, designation[33], or number of composite elements, do not provide many clues with regard to intent. However, the pertinent literature often mentions some indicators not specified in the definitions of the Conventions.

Expression of consent to be bound

Treaties are only valid if they rest upon the free consent of the parties. Expressions of consent to be bound might, therefore, prove a useful indicator of whether or not the parties intended a binding agreement. After all, expressing consent to be bound usually presupposes the existence of an intention to be bound.[34]

However, since states have an unlimited freedom as far as the methods of expressing consent to be bound are concerned, such expressions are only of limited help in identifying intent.[35] Pursuant to article 11 of the 1969 Vienna

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[33] The United Kingdom appeared convinced, during the Conference on Security and Cooperation in Europe leading up to the Helsinki Final Act, that the term 'Final Act' would sufficiently indicate an intention not to become legally bound. However, as Russell, one of the negotiators for the US, dryly remarks, "[n]ot all delegations, including that of the United States, felt that the problem was so easily susceptible of solution." Cf. Harold Russell, "The Helsinki Declaration: Brobdingnag or Lilliput?", 70 *AJIL* (1976), 242-272, at 246.

[34] Cf. Alexandru Bolintineanu, "Expression of consent to be bound by a treaty in the light of the 1969 Vienna Convention", 68 *AJIL* (1974), 672-686, at 673, referring to the underlying principle of the autonomous will of the parties. Similarly, Shabtai Rosenne, ""Consent" and related words in the codified law of treaties", in Suzanne Bastid et. al. (eds.), *Mélanges offerts à Charles Rousseau* (Paris 1974), 229-248, esp. at 238-239, distinguishing between formation of consent and expression of consent. Obviously, articles 46 to 52 of the Vienna Convention are based on the same premise: vitiation of consent renders a treaty void or voidable. See generally S.E. Nahlik, "The grounds of invalidity and termination of treaties", 65 *AJIL* (1971), 736-756.

[35] In this respect, a far-reaching evolution has occurred during the 20th century. In 1929, the PCIJ could still maintain that it was an established rule of law "that conventions, save in certain exceptional cases, are binding only by virtue of their ratification." *Territorial Jurisdiction of the International Commission of the River Oder*, [1929] Publ. PCIJ, Series

Convention, "[t]he consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."[36]

Article 11 was not included in the International Law Commission's final draft; the final draft only contained separate articles on signature (article 10), ratification, acceptance or approval (article 11), and accession (article 12).[37] It was not until the Conference that what is now article 11 was introduced, on the instigation of Poland and the United States, and Belgium.[38]

Mr. Bevans, the US delegate, introduced the joint Polish-American proposal by pointing out that in some cases, consent to be bound was established by a simple notification that all domestic statutory and constitutional requirements had been met.[39] Polish delegate Mr. Nahlik added the example of the 1955 agreement on the permanent neutrality of Austria, which entered into force on adoption by Austria of a constitutional provision on the subject.[40] He also mentioned that in some cases, documents were not signed or initialled, but still constituted treaties within the meaning of article 2, paragraph 1 (a).[41] The Belgian delegate, introducing his proposed amendment, even mentioned that "some 30 per cent of the agreements concluded by

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A, no. 23, at 20. The development is to some extent recorded in several articles by Manfred Lachs. See, e.g., Manfred Lachs, "Some reflections on substance and form in international law", in Wolfgang Friedmann, Louis Henkin & Oliver Lissitzyn (eds.), *Transnational law in a changing society: essays in honor of Philip C. Jessup* (New York 1972), 99-112, and his "The threshold in law-making", in Rudolf Bernhardt et. al. (eds.), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (Berlin 1983), 493-501.

[36] The 1986 Vienna Convention adds 'confirmation'; this is however widely regarded as the mere cosmetic equivalent of ratification, to be reserved for expression of an international organization's consent to be bound to a treaty. Cf. G.E. do Nascimento e Silva, "The 1969 and the 1986 Conventions on the law of treaties: a comparison", in Yoram Dinstein (ed.) *International law at a time of perplexity: essays in honour of Shabtai Rosenne* (Dordrecht 1985), 461-487.

[37] See 3 *Official Records*, 15-20.

[38] Poland and the US proposed the inclusion of a new article 9bis, which would introduce the Convention's provisions on expressing consent; Belgium proposed an article 12bis, which would conclude these provisions. Cf. 3 *Official Records*, at 123-124.

[39] In 1 *Official Records*, at 83, para. 43.

[40] Ibid., at 84, para. 47.

[41] Ibid., at 84, para. 46.

Belgium in 1964 contained clauses stipulating procedures not covered" by the ILC's draft articles.[42]

The two proposed amendments did not give rise to much discussion during the Conference. The matter was properly regarded as one of drafting, and accordingly swiftly submitted to the Drafting Committee, and eventually adopted by the Conference by an overwhelming majority.[43]

The reference to "any other means if so agreed" makes the expression of consent a not entirely satisfactory indicator of intent. Examples of such methods are many. Apart from the examples mentioned by messrs. Bevans and Nahlik, one may also point to the various opting-in or opting-out procedures[44], or what has been referred to as the process of prolepsis.[45] Hence, it will not do to simply check whether or not ratification or signature has taken place, if other methods may also be employed, and if even unsigned or uninitialled documents may constitute legally binding agreements.[46]

Furthermore, intent, and consent with it, may appear from collateral documents, as happened with the Iran-US agreement embodied in the famous Algiers Declarations of January 19, 1981. Here, although the documents were initialled, the International Court of Justice made use of additional documents in order to establish the reality of the intent displayed by the initials.[47]

Moreover, allegedly non-legally binding agreements which provide for ratification are hard to find. One may, therefore, postulate that a ratified agreement was intended to be legally binding. However, the absence of ratification does not signify the opposite[48], unless the agreement specifically provides for ratification.[49] This finds its cause in the fact that ratification is only employed to serve one single goal: an expression of consent to be bound.[50]

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[42] Ibid., at 96, para. 34.

[43] See 2 *Official Records*, at 25. Article 9bis was adopted by 100 votes to none, with 3 abstentions.

[44] For instance within the framework of the International Labour Organization.

[45] Cf. Sir Geoffrey Palmer, "New ways to make international environmental law", 86 *AJIL* (1992), 259-283.

[46] Cf. *Aegean Sea Continental Shelf case*, [1978] ICJ Rep.

[47] See *Tehran Hostages Order*, [1981] ICJ Rep.

[48] See, e.g., *Qatar v. Bahrain*, [1994] ICJ Rep. 112.

[49] See, e.g., the 1888 *Costa Rica-Nicaragua boundary arbitration*, where it was held that acquiescence could not be regarded as a substitute for ratification. Reproduced in J.B. Moore, *International arbitrations*, vol. II (Washington 1898), 1945-1968, esp. at 1959. See, however, several of the cases discussed in ch. VII.

[50] The same can, *mutatis mutandis*, be said about 'acceptance', 'approval', and 'accession'.

However, with respect to signature and initialling the situation is different. Both signature and initials can be used to serve more than one purpose. They can be used to authenticate a text, but they can also be used as expression of consent to be bound. One must first establish which purpose was being served, prior to drawing any conclusions regarding whether the signature or initials express a consent to be bound.

Furthermore, signature is often also used with purported non-legally binding documents, such as the Solemn Declaration on European Union or the Helsinki Final Act. In these cases, although signature denotes something coming close to consent, it purportedly does not indicate consent to be legally bound, let alone an intention to be so bound.

The presence of signature is therefore, by itself, no grounds on which to base any conclusions regarding the legal nature of the document concerned. Nor is, as noted above, the absence of signature, or any other method for that matter, by itself sufficient proof. There is always the possibility, as acknowledged in article 11 of the 1969 Vienna Convention, that the parties decided to agree on "any other means" of expressing consent to be bound.[51]

Entry into force

One might also surmise that provisions regarding entry into force of agreements might prove a reliable indicator as to whether or not the parties intended to be legally bound. One might argue, after all, that in some way the mere term 'entry into force' must, somehow, relate to law. One cannot meaningfully speak of entry into force[52] without concluding that the instrument acquires force of law.[53]

Cf. article 2, paragraph 1 (b) of the 1969 Vienna Convention.

[51] This renders the test described by Maarten Bos, *A methodology of international law* (Amsterdam 1984), at 109, somewhat cumbersome. In his view, one first checks factual aspects such as signature or ratification, and, thereafter, puts the agreement to the test of a definition. For a more detailed critique, see Jan Klabbers, "Informal instruments before the European Court of Justice", 31 *CMLRev.* (1994), 997-1023, esp. 1017-1019.

[52] See, e.g., E.W. Vierdag, "Spanningen tussen recht en praktijk in het verdragenrecht", *Preadvies Nederlandse Vereniging voor Internationaal Recht* (1989), 3-87, esp. at 54-55. *Mutatis mutandis*, similar considerations would apply to variations upon the 'entry into force' formula, such as 'coming into force', 'coming into effect', et cetera.

[53] The basic rule laid down in the 1969 Vienna Convention is of a clearly residual character. Article 24, paragraph 1 states that "[a] treaty enters into force in such a manner and upon

However, several considerations would militate against such a conclusion. First of all, under article 25 of the 1969 Vienna Convention, a treaty (or rather, a treaty regime[54]) may be applied provisionally, "pending its entry into force".[55] In at least one rather famous instance, this has meant that a treaty has been applied provisionally for almost 50 years between most of its contracting parties: the General Agreement on Tariffs and Trade has never officially entered into force[56], but has been applied by virtue of its Protocol of Provisional Application.[57] Yet, few observers will deny that the General Agreement has the force of law, or at least that most of its provisions have the force of law.[58] If agreements can be considered legally binding without ever formally entering into force, it follows that entry into force is not the best of indicators.[59]

The second reason why provisions regarding entry into force are not reliable indicators resides in the (presumably rather recent) practice of providing in agreements of dubious status that they will enter into force on a given day or on fulfillment of a condition precedent. In this way, many so-called interinstitutional arrangements concluded between the institutions of the

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such date as it may provide or as the negotiating parties may agree." One curious way to provide for an agreement's entry into force was laid down in the 1962 Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian); its entry into force was made dependent upon adoption of a resolution by the General Assembly of the United Nations. Reported in Lall, o.c. note 10, esp. at 111.

[54] Cf. E.W. Vierdag, o.c. note 52, esp. at 7.

[55] Article 25, paragraph 1.

[56] Except for Haiti.

[57] The background is sketched in John H. Jackson, *The world trading system: law and policy of international economic relations* (Cambridge Mass. 1989), esp. 34-37.

[58] The scope of the provisions of Part IV of GATT, added in 1965, is so wide, that some observers deny that any concrete obligations can be distilled therefrom. Kenneth Dam, e.g., referred to Part IV as containing merely a great deal of political verbiage. Cf. Kenneth W. Dam, *The GATT: law and international economic organization* (Chicago 1970), at 237.

[59] An interesting recent example is the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, adopted by the United Nations General Assembly in 1994 (Res. 48/263). This agreement was also to be applied provisionally, *inter alia* by those states "which have consented to its adoption in the General Assembly", unless they have specifically opted out. Cf. Article 7, paragraph 1 (a) of the agreement, reproduced in 33 *ILM* (1994), 1309. See generally D.H. Anderson, "Legal implications of the entry into force of the UN Convention on the Law of the Sea", 44 *ICLQ* (1995), 313-326.

European Union are said to enter into force, come into force, or be applicable. At least one document which specifically claims to be politically binding also contains a provision regarding its entry into force.[60]

Judicial settlement

In one of the seminal articles on the topic, James Fawcett, writing in 1953, claimed that one of the few reliable indicators of intent should be the inclusion in agreements of some form of compulsory judicial dispute settlement. In his view, only agreements which referred to the World Court or to arbitral settlement, or possibly agreements between states which had, without any far-reaching reservations, unilaterally accepted the compulsory jurisdiction of the Court, could qualify as legally binding agreements.[61]

As others have pointed out[62], however, if Fawcett's criterion were to be strictly applied, few agreements would qualify as legally binding. The great majority of agreements concluded do not provide for judicial settlement; and furthermore, the number of states which have accepted the World Court's compulsory jurisdiction is fairly limited. Finally, the number of states which have done so without making far-reaching reservations is even more limited.[63]

Furthermore, Fawcett's criterion would inevitably entail the rather unsatisfactory consequence that rules of customary international law would

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[60] The Final Document of the Conference on confidence- and security-building measures and disarmament in Europe, text in 26 *ILM* (1987), 190. Similarly, the purportedly non-legally binding 1982 Memorandum of Understanding on Port State Control provides in article 8.4 that it "will take effect". Text in 21 *ILM* (1982), 1.

[61] James Fawcett, "The legal character of international agreements", 30 *BYIL* (1953), 381-400.

[62] See, e.g., Kelvin Widdows, "What is an agreement in international law?", 50 BYIL (1979), 117-149.

[63] This approach would also suffer from a problem of a rather principled nature: if a treaty between A and B on a given topic would be legally binding, then it is difficult to see why the greater difficulty of having judicial involvement would deprive an identical treaty between A and C, or B and C, from legal force. It would in the end boil down to establishing a threshold for the acquisition of treaty-making capacity among sovereign states, while usually treaty-making capacity is thought to be one of the essential elements of statehood and, indeed, as the PCIJ held in the *Case of the "SS Wimbledon"*, an attribute of sovereignty. [1923] Publ. PCIJ, Series A, no. 1, at 25.

hardly be legally binding at all. Since such rules do not normally include sub-provisions relating to dispute settlement[64], it would follow that they would only be binding upon those few states that have, without making too far-reaching reservations, accepted the World Court's compulsory jurisdiction. With other states, such rules would only acquire legal force after those states had entered into a *compromis* under article 36, paragraph 1 of the Court's Statute. Clearly, such a consequence is untenable.

Moreover, as was pointed out by Judges Spender and Fitzmaurice in their joint dissenting opinion to the *South West Africa* cases[65], as a matter of principle the mere presence of a judicial dispute settlement clause cannot give legally binding force to provisions which would otherwise be devoid of such force. Where the scope of the purported obligations is too broad to be delimited[66], the presence of a judicial dispute settlement clause is to little avail. By itself, it cannot create legal rights and obligations which would not exist independently of the dispute settlement clause.[67]

In conclusion, the inclusion of a compulsory judicial settlement clause in an instrument may serve as an indicator of its authors' intention to become legally bound (with the proviso that it cannot alone create legal rights and obligations). However, absence of such a clause does not necessarily denote the lack of an intent to become legally bound. Hence, compulsory judicial settlement clauses are of only limited help in identifying the intentions underlying international agreements.

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[64] This renders quite inexplicable applicant's argument in the *Bosnia-case* that the ICJ could base its jurisdiction on, *inter alia*, the customary laws of war. See the *Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Further requests for the indication of provisional measures*, [1993] ICJ Rep. 325, at 341, para. 33. The Court did not directly address the argument, although it may be worthy of note that whereas Bosnia and Herzegovina invoked those customary rules together with some conventional rules, the Court's reply referred only to the "texts" invoked by the applicant.

[65] [1962] ICJ Reports 319.

[66] To be sure, there are actually very few examples of decisions in which courts have reached the conclusion that a certain commitment was too vague to be fleshed out. See also below, ch. 7.

[67] Judges Spender and Fitzmaurice correctly claimed that the dispute settlement clause embodied in article 7 of the Namibia Mandate could not, by itself, turn the Mandate into consensual agreement. Their argument was, however, somewhat less convincing on other points. See, e.g., Hugh Thirlway, "The law and procedure of the International Court of Justice, 1960-1989, part three", 62 *BYIL* (1991), 1-75, esp. at 7-8.

International registration

One indicator that has often been mentioned as being of importance with respect to determining whether an agreement was intended to be legally binding, is whether or not the agreement has been registered with an international registrar.[68]

The idea that it would be worthwhile to register agreements internationally finds its origin in Woodrow Wilson's famous Fourteen Points, put forward by the erstwhile US President on January 8, 1918. The first of these points was a plea for open diplomacy: "[o]pen covenants of peace openly arrived at; after which there shall be no private international understandings of any kind, but diplomacy shall proceed always frankly and in the public view."[69]

Wilson's plea[70] found rather dramatic recognition in article 18 of the Covenant of the League of Nations, which read:

> "Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered."

Article 18 was the first ever independent provision on the law of treaties laid down in a legal instrument[71], but its practical relevance appeared, on balance, rather limited. As the text itself makes clear, article 18 only created an obligation for members of the League. As Dutch lawyer J.H.W. Verzijl, president of the French-Mexican Claims Commission, would hold in 1928:

> "There is no doubt that article 18 is of no importance in the case of conventions concluded between two states non members of the League: they are perfectly free to conclude secret treaties, or not to register their public treaties ..."[72] [author's translation]

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[68] Cf. Lauterpacht I; Widdows, o.c. note 62, at 143.

[69] The Fourteen Points are appended to Robert Lansing, *The peace negotiations: a personal narrative* (Boston 1921), appendix IV, 314-316.

[70] It is not without irony that Nicolson notes that the negotiations leading up to the Versailles Treaty, with which Woodrow Wilson was personnally involved, were themselves rather secretive. This, dixit Nicolson, "proves that the highest apostle of "open diplomacy" found, when it came to practice, that open negotiation was totally unworkable." O.c. note 10, at 84. This is not to say that Nicolson ridiculed the requirement of registration; he was all for 'open covenants', but not for these being 'openly arrived at'. The irony is even compounded by Lansing's slightly malicious comment that President Wilson "was by nature and by inclination secretive." Lansing, o.c. note 69, at 215.

[71] Cf. E.W. Vierdag, "Some problems regarding the scope of international instruments on the law of treaties", 23 *ARV* (1985), 409-449.

[72] *Pablo Nájera (France) v. United States of Mexico*, Decision no. 30-A of the French-

Verzijl furhter reasoned that no tribunal in the world, not even the Permanent Court of International Justice, would deny the obligatory force of an agreement between two states, non-members of the League, on the grounds of lack of registration.[73]

The situation would be even more complex where, as in the *Pablo Nájera* arbitration, one of the parties to an agreement was a member state of the League (*in casu*, France), and the other party (i.e., Mexico) was not. In such a situation, Verzijl reasoned, France would be under an obligation to register, but would only be so obligated towards the League of Nations. Lack of registration would then imply that France would not be entitled (Verzijl used the French word "qualifié") to invoke such an agreement before any organ of the League, including the Permanent Court of International Justice. France would be so barred even if the Court was technically not an organ of the League, and retained the possibility of investigating the agreement on its own initiative.

The non-member of the League, on the other hand, would be under no obligation to register, and hence would remain at liberty to invoke the agreement before any international tribunal, including the Permanent Court of International Justice.[74] *A fortiori*, agreements between two or more states, all of them non-members, would remain completely outside the scope of article 18, which, if nothing else, indicated that unless membership of the League became truly universal, it simply was not feasible to impose an external condition on the conclusion of treaties (registration) as an essential element to their binding character.

Another circumstance rendering registration of treaties, or the lack thereof, as an indicator of the legal nature of agreements somewhat cumbersome, was the extremely broad definition of treaty or international engagement employed by the Secretariat of the League. According to a memorandum prepared by the Secretary-General and adopted by the Council of the League in 1920, the reference in article 18 to treaties and international engagements comprised, amongst other things,

> "... not only every formal Treaty of whatsoever character and every International Convention, but also any other International Engagement or Act by which nations or their Govern-

Mexican Claims Commission (1928), in 5 *UNRIAA*, esp. at 471.

[73] Ibid.

[74] Ibid.

ments intend to establish legal obligations between themselves and another State, Nation, or Government."[75]

The text of the regulation was broad enough, on its face, to include even the transactions between states which were governed by some domestic legal system, unless one interprets the adjective "international" as excluding that possibility.

Another provision on registration was embodied in the 1928 American Convention on Treaties, concluded in Havana, which provided in article 4 that:

"[t]reaties shall be published immediately after exchange of ratifications. The failure to discharge this international duty shall affect neither the force of treaties nor the fulfillment of obligations stipulated therein."[76]

Where the penalty for non-registration provided by the League Covenant was worded in strong terms, the American Convention dispensed with a penalty altogether; failure to register was to remain without any effect whatsoever.[77]

In practice, neither article 4 of the American Convention nor article 18 of the Covenant had all that much impact. With respect to the American Convention, such lack of impact was already to be expected merely on its terms. In the case of the Covenant, it appeared that in several cases the Permanent Court of International Justice did not put too much of a premium on registration: it allowed non-registered agreements to be invoked before it on various occasions. Indeed, in some cases the Special Agreements which gave the Court jurisdiction were themselves not registered.[78]

After the demise of the League of Nations, the United Nations was established. Its constituent document also provides for registration of treaties. Article 102 reads:

"1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be

[75] The text is quoted in Brandon, o.c. note 32, at 50.

[76] The text is appended to Brierly I.

[77] An interesting problem was created due to the 'supremacy clause' laid down in article 20 of the League of Nations Covenant.

[78] For instance, in its judgment on *Interpretation of the Treaty of Neuilly*, the PCIJ effectively ignored the question of whether or not the *compromis* by means of which it was seised had been registered under article 18. [1924] PCIJ Rep., Series A, no. 4. See generally Edoardo Vitta, *La validité des traités internationaux* (Leyden 1940), at 246-247.

registered with the Secretariat and published by it.
2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations."

Two pertinent observations may be gleaned from a comparison of the words of article 18 of the Covenant and article 102 of the Charter. The most eye-catching difference between the two is that whereas article 18 attempted to impose an external condition on the binding force of agreements, no such attempt is undertaken in article 102. Article 102 does not suggest that non-registered agreements are non-binding; it merely states that they cannot be invoked before an organ of the United Nations, which includes the International Court of Justice.[79]

A second difference between the two provisions is that where article 18 of the Covenant spoke of international engagements, in article 102 the term 'international agreement' is used. It has been argued that for this reason, the scope of article 102 is somewhat more limited than the scope of article 18[80], but this argument is less than compelling. It would seem, that both 'engagement' and 'agreement' were simply employed as generic terms, embracing all those agreements that would possibly fall through the cracks if reference could only be made to treaties.[81]

The broadness of article 102 is in no way narrowed down by the regulations adopted by the General Assembly to give effect to article 102.[82] Paragraph 1 of these regulations calls for registration of "[e]very treaty or international agreement, whatever its form or descriptive name ...", the only limit being that, according to paragraph 2, registration "shall not take place until the treaty or international agreement has come into force ...".[83]

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[79] Cf. article 7 of the Charter.

[80] Cf. Brandon, o.c. note 32, at 51. According to the drafters of the Charter, the term 'agreement' "must be understood as including unilateral engagements of an international character which have been accepted by the State in whose favor such an engagement has been entered into." Quoted in Mala Tabory, "Registration of the Egypt-Israel Peace Treaty: some legal aspects", 32 *ICLQ* (1983), 981-1003, at 989. This would seem to suggest the opposite of Brandon's contention.

[81] By way of indication, the official translations of the Covenant and the Charter provisions into Dutch use the same Dutch word denoting both 'engagement' and 'agreement'. In both cases, the word 'overeenkomst' is used.

[82] See generally Shabtai Rosenne, "United Nations treaty practice", 86 *RdC* (1954/II), 281-443, esp. 426-430.

[83] The text of GA Res. 97 (I) can be found in *Yearbook of the United Nations* (1946-47).

As is widely acknowledged[84], the provisions, quoted above, do not amount to a definition of 'treaty or international agreement', and in practice it would seem that most agreements submitted to the Secretariat are, as Tabory observes, duly registered: "without exception, it has resolved doubtful cases in favour of registration."[85]

Indeed, the Secretariat has not only accepted agreements submitted to it, but also unilateral declarations; including those by which states accept the compulsory jurisdiction of the International Court of Justice (these may after all, as noted earlier, be seen as "a series of bilateral undertakings"), as well as regular unilateral declarations. The most famous example, no doubt, is the 1957 Egyptian declaration on the Suez-Canal.[86]

Perhaps the most important exception to the Secretariat's liberal policy of accepting anything submitted to it relates to agreements concluded by entities whose treaty-making capacity may be in doubt. Dutch author Sondaal, the former head of the treaty division at the Dutch Ministry of Foreign Affairs, mentions the example of an agreement concluded between the Netherlands and the German 'Land' of Nordrhein-Westphalen. The agreement was submitted to the Secretariat, which refused registration as such, and was only willing to register it as "agreement between the Kingdom of the Netherlands and the Federal Republic of Germany (Land of North Rhine-Westphalia)".[87]

If almost anything submitted is accepted by the Secretariat, it follows that the requirement of registration is not of much help in determining the intentions of the authors of an agreement. This conclusion is strengthened by other considerations as well.

There is no doubt that, for member states of the United Nations at least[88], registration of agreements is a duty.[89] Yet, it is unclear upon

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The provisions quoted have remained unaffected by later amendments to the regulations.

[84] See the Note by the Secretariat, issued in every volume of the UNTS, holding *inter alia* that "[i]t is the understanding of the Secretariat that its action does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status ..."

[85] Mala Tabory, "Recent developments in United Nations treaty registration and publication practices", 76 *AJIL* (1982), 350-363, at 358.

[86] Text in 265 *UNTS* 299.

[87] See H.H.M. Sondaal, *De Nederlandse verdragspraktijk* (The Hague 1986), at 18-20.

[88] The International Law Commission, in its commentary to its final draft article 75 (now article 80) of the 1969 Vienna Convention, noticed that non-members also "habitually" register their agreements. 3 *Official records*, at 93.

[89] Cf. D.N. Hutchinson, "The significance of the registration or non-registration of an

whom, with any given agreement, the obligation falls. Particularly with respect to bilateral agreements, the situation can arise in which neither of the participants thinks about registration, or the treaty is only registered by one of them.[90] Such a situation should not lead to the inference that one or both of them never intended to become legally bound.[91] If anything, it establishes the contrary presumption: the non-registering treaty-partner is supposed to lodge a protest against registration, or else will be deemed estopped from later denying that it intended to become legally bound.[92]

Moreover, the obligation to register treaties is quite often "honoured in the breaking". Lillich has pointed out that many lump sum settlements remain unregistered, although they are doubtless treaties.[93] Other examples also exist.[94] Finally, secret treaties, by definition, will remain unregistered, which does not deprive them of their legally binding character.

Registration, as well as lack thereof, is not an airtight indication of whether or not an agreement is to be considered legally binding. This conclusion has been acknowledged by the various United Nations organs. As Hutchinson concludes:

> "Both the political organs of the United Nations and its principal judicial organ, the International Court of Justice, have shown little or no inclination to ascertain whether an agreement has been registered with the Secretariat before permitting it to be invoked in proceedings before them. As a result, they have permitted reliance to be placed on unregistered treaties on a number of occasions."[95]

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international agreement in determining whether or not it is a treaty", 46 *CLP* (1993/II), 257-290, at 259. Similarly, Ramiro Valbuena, "What constitutes a treaty? - Acceptance of terms of a conciliation commission", 46 *AJPIL* (1994), 167-175.

90 An infamous example is formed by the Kuwait-Iraq 'agreed minutes' of 1963, registered by Kuwait only. Indeed, its non-participation in registration induced Iraq to maintain that it never intended to become legally bound by the 'agreed minutes'. See, e.g., Maurice Mendelson & Susan C. Hulton, "The Iraq-Kuwait boundary: legal aspects", 23 *RBDI* (1990), 293-332, at 294-295.

91 Hutchinson, o.c. note 89, at 277, observes that there may be whole host of reasons not to register, including a lack of bureaucratic time and resources.

92 This is, correctly, the argument made by Mendelson & Hulton, o.c. note 90, at 294. It may be read into the ICJ's 1994 decision in *Qatar v. Bahrain* that such protest, in order to be effective, must be lodged forthwith. Cf. Jan Klabbers, "Qatar v. Bahrain: the concept of "treaty" in international law", in 33 *ARV* (1995), 361-376, esp. at 373.

93 Richard B. Lillich, "The obligation to register treaties and international agreements with the United Nations", 65 *AJIL* (1971), 771-773.

94 See D.J. Harris, *Cases and materials on international law* (London 1991, 4th ed.), mentioning a US-France treaty on nuclear weapons. At 811, footnote 59.

95 Hutchinson, o.c. note 89, at 279. Note also the ease with which the ICJ dismissed any

Publication

Publication of treaties might be considered a useful indicator of states' intentions to become legally bound, but its usefulness is seriously impeded by considerations similar to those which apply to the registration of treaties.

Firstly, whereas registration, under article 102 of the United Nations Charter, amounts to an international obligation, publication of the agreement is the sole responsibility of the United Nations Secretariat.[96] Hence, lack of publication in the United Nations Treaty Series cannot automatically be taken to imply a lack of intent to be legally bound. From a practical point of view, moreover, reliance on publication in the United Nations Treaty Series would create an unworkable situation, given the impressive backlog regarding publication.[97]

It may, however, be the case that national provisions require publication in the national treaty series before the agreement can be considered to be legally binding.[98] This type of domestic requirement is nonetheless without consequence on the international level. As article 27 of the Vienna Convention states, a violation of domestic norms is no excuse for non-performance of treaty obligations.[99] In other words, if under international law the treaty has entered in force, lack of domestic publication has no effect on the situation.

More convincing is the rule, found in some domestic legal orders, that self-executing provisions of agreements only become self-executing after domestic publication.[100] The rationale is obvious: the public at large needs to be aware of the existence of such provisions in order to rely on them and invoke them. Yet, this rule does not affect the entry into force of the treaty under international law, as is recognized in, e.g., the Dutch situation. Where

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reference to registration as being of probative value in *Qatar v. Bahrain*.

96 Cf. Wilhelm Karl Geck, "Treaties, registration and publication", 7 *EPIL* (1984), 490-496.

97 See generally Carl-August Fleischhauer, "The United Nations Treaty Series", in Yoram Dinstein (ed.), *International law at a time of perplexity: essays in honour of Shabtai Rosenne* (Dordrecht 1989), 131-148.

98 Examples of judicial decisions are mentioned in ch. VII, below.

99 Similarly, it is highly debatable whether such provisions would come within the ambit of art. 46 of the Vienna Convention. On the drafting history of article 46, see Richard D. Kearney, "Internal limitations and external commitments - Article 46 of the Treaties Convention", 4 *International Lawyer* (1969), 1-21.

100 Thus, e.g., art. 93 of the Dutch Constitution. See Jan Klabbers, "The new Dutch law on the approval of treaties", 44 *ICLQ* (1995), 629-643.

the Constitution speaks in this respect of 'binding', there is no doubt that 'binding' means 'self-executing'; and nothing more.[101]

Consideration or *causa*?

In many domestic legal systems, agreements can only seriously be considered to have been intended to be legally binding if they involve a real exchange, if there literally is a *quid pro quo*. Anglo-saxon lawyers refer to this as consideration, whereas in continental legal systems a similar meaning is sometimes conveyed by the term *causa*.

In international law, however, the doctrine of consideration has never met with general acceptance.[102] Judge Jessup, e.g., in his separate opinion to the *South West Africa* cases, flatly denied the existence of the doctrine of consideration in international law.[103] Presumably, Judge Jessup's opinion has some roots in his reluctance to grant South Africa any rights under the Mandate. The majority, however, was less adamant in this respect, noting that by virtue of the Mandate, South Africa had acquired the right to administer the territory of South West Africa, albeit under strict conditions.[104]

Indeed, at least one other decision of the ICJ can be seen initially to lend some support to consideration in principle. In the decision on jurisdiction in the *Fisheries Jurisdiction* case, the ICJ devoted some attention to what it considered to be a "failure of consideration" argument invoked by Iceland, and finally rejected the argument on the facts.[105] Although the Court took great care not to say anything from which sweeping conclusions might be drawn, it did not deny the argument in itself. Its conclusion on the facts, however, would seem to indicate that consideration is not all that persuasive, since most agreements (even the relatively straightforward exchange of notes at issue in the case) consist of several related bargains. The Court appeared to have limited application of the failure of consideration doctrine only to those cases in which a party strikes out on all related bargains, which is unlikely.

The Court implicitly acknowledged that if one looks closely enough, every agreement may display some form of exchange.[106] Even gifts and gratuitous

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101 Cf. E.A. Alkema, "Foreign relations in the Netherlands Constitution of 1983", 31 *NILR* (1984), 307-331.

102 See, e.g., Vitta, o.c. note 78, at 22.

103 [1962] ICJ Rep. 319, at 403.

104 Ibid., at 332.

105 [1973] ICJ Rep. 3, at 16-18.

106 In its *Genocide*-opinion, the ICJ attributed the conclusion of the Genocide-Convention

promises may reveal such an exchange.[107] Whereas the beneficiary acquires a sum of money or a brand-new car, the promisor may receive a sense of moral gratification, or experience the pleasure of giving.[108]

Moreover, agreements which are ostensibly non-legally binding may also be based on some form of consideration. Thus, the Helsinki Final Act is often explained in terms coming dangerously close to consideration. The Western states received the political pledge from the Eastern European states to respect human rights, whereas the former socialist states in turn received a political guarantee of the integrity of their boundaries.[109]

It follows, that consideration as such is less than adequate for the purposes of determining whether there was, with all parties involved, an intent to be legally bound. Indeed, with reference to (American) contract law, it has been argued with some force that here too the doctrine of consideration plays no part during the formation of a contract, and only steps in at a later stage. Its usefulness lies not in determining intent, but, once such intent has been established and after the agreement has been broken, in determining damages.[110]

Surrounding statements?

It has been argued that the intentions of states with regard to the status of their agreements may become manifest by examining the statements surrounding the negotiations.[111] If states publicly announce that they are entering

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to the "common interest" of the contracting states. [1951] ICJ Rep. 15, at 23. See generally also E.W. Vierdag, "Some remarks about special features of human rights treaties", 25 *NYIL* (1994), 119-142, esp. at 124-126.

107 At least in present-day variations of the doctrine. It has been argued that in its 19th century application in the United States, consideration was solely related to market transactions. Cf. Peter Gabel & Jay M. Feinman, "Contract law as ideology", in David Kairys (ed.), *The politics of law: a progressive critique* (New York 1982), 172-184, esp. at 177.

108 A similar point is made by David Clinton, who argues that the foremost obligations for states under treaties are obligations toward themselves. See David Clinton, "International obligations: to whom are they owed?", 55 *Review of Politics* (1993), 291-310.

109 See, e.g., Hans Blix, "The Helsinki Declaration on principles guiding relations between states in Europe", 31 *Revue Egyptienne de Droit International* (1975), 1-15, esp. at 6-7.

110 See, e.g., Charles Fried, *Contract as promise* (Cambridge Mass. 1981).

111 See, e.g., Widdows, o.c. note 62, at 143.

into negotiations without the intention of creating legal bonds, such an announcement would be clear evidence (short of those states changing their minds, of course) of the non-legal character of the ensuing agreement. Similarly, if they repeat or make such statements during or after negotiations, it would seem that the result is, inevitably and undisputably, a non-legally binding agreement.

Some caveats are in order. First of all, accepting *arguendo* the possibility of non-legally binding agreements, such statements should be made as close as possible in time to the actual conclusion. Statements made years prior to the conclusion may have become outdated, whereas statements made years after the conclusion may amount to a denial of what actually took place.

Secondly, as Widdows argues, the statements concerned should preferably be joint statements of all negotiating states. The proclaimed intent of one of them, after all, does not necessarily reflect the intentions of the others. Especially if the agreement has already been concluded, unilateral statements run the risk of being viewed as self-serving.

Thirdly, such statements need to be distinguished from statements which merely recognize existing obligations. As the International Court of Justice noted in its advisory opinion on the *International Status of South-West Africa*[112], statements may have "considerable probative value when they contain recognition by a party of its own obligations under an instrument." It does not follow, given this condition, that statements always have probative value.

Fourthly, and most fundamentally, reliance on surrounding statements presupposes that states actually have a choice with respect to whether or not their agreements are binding in law. This presumption rests, however, on shaky foundations, and will be more fully explored in the following chapters. Intent alone need not always be decisive. International law may be created in disregard of states' intentions, and sometimes perhaps even against their intentions. The following section serves as a brief overview of such possibilities.

A preliminary matter of some importance is the question regarding the scope of the notion of the intention to be bound. Legal philosophers generally agree that there is some difference between a promise and a statement of intentions. A promise is usually taken to signify an intent to be bound, whereas a statement of intentions is usually perceived as something less

[112] [1950] ICJ Rep. 128, at 135-136.

committed. This form of distinction is risky, however, in that it "minimizes, even trivializes, the difference between obligations and other reasons for action."[113]

In Raz's view, the difference must be sought elsewhere. The difference between a promise and a mere statement of intentions is that the former goes beyond the latter by being "the communication of an intention to undertake an obligation"[114], instead of being the intention to do something or refrain from doing something. In other words, an intention to be bound communicates not so much the desire to do something or to refrain from doing something, but the desire to take on an obligation to do that something or to refrain from doing that something.

Consequently, when looking for evidence of the intent to be bound, we will have to focus on the intent to take on an obligation rather than on what may only be indications of possible future behaviour. It remains to be seen, whether this obligation can be undertaken in a normative order other than law.

The relative importance of intent

Notwithstanding the general relevance of intent, not all international legal rights and obligations are intentionally created.[115] International law may be created in a variety of ways, not all of which may be traced back to an original intention on the part of parties to become legally bound; indeed, sometimes states may find themselves confronted with, quite literally, unintended consequences of their behaviour.[116]

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113 Joseph Raz, "Promises and obligations", in P.M.S. Hacker & J. Raz (eds.), *Law, morality, and society: essays in honour of H.L.A. Hart* (Oxford 1977), 210-228, at 218.

114 Ibid., at 218. In a similar vein, Bert van Roermund, *Wet en belofte: overdenkingen omtrent gebondenheid uit overeenkomst* (Nijmegen 1990), esp. at 22.

115 Similarly, Herman Meijers, "Rond het internationale gewoonterecht in Nederland", *Preadvies Nederlandse Vereniging voor Internationaal Recht* (1985), 57-158, esp. 76-88.

116 See also Judge Lachs separate opinion to the *Nicaragua*-case (merits), where he concluded that "legal relations evolve sometimes owing to a strange accumulation of will and deeds." [1986] ICJ Rep. 14, at 162.

Customary international law

The area in which the relative importance of intent is most visible is the formation of customary international law. Whatever the similarities between making agreements and making customary law[117], the rule which finally crystallizes as the product of acts and statements of individual states is, at least in the more or less classical conception of custom, largely unintended.[118]

Nevertheless, those constitutive acts and statements may themselves have been fully intended. A decision to seize fishing vessels in times of war[119] is, presumably, a conscious and intentional decision; whether this act eventually results in a customary rule allowing such seizure is, however, beyond anyone's control. Generally speaking, rules of customary international law will not be created intentionally[120], and consequently, there is little ground for equating the intent to be bound with the psychological element of custom known as *opinio juris*.[121]

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117 Cf. Herman Meijers, *Fasen van volkenrechtsvorming en het nut van internationaal gewoonterecht* (Alphen aan den Rijn 1979). This address was published in English as "How is international law made? The stages of growth of international law and the use of its customary rules", 9 *NYIL* (1978), 3-26.

118 In some contemporary visions, rules of customary international law may be based not so much on actual practice, but on declarations and the like. An interesting example is provided by *Filartiga v. Pena-Irala*, text in 19 *ILM* (1980), 966; see generally Karen E. Holt, "*Filartiga v. Pena-Irala* after ten years: major breakthrough or legal oddity?", 20 *Georgia Journal of International and Comparative Law* (1990), 543-569. Rules thus formed may be made considerably more intentionally than under the classical conception of custom. Indeed, at least one author has wondered whether they should still be called customary international law, and proposed instead a separate source of 'declarative international law'. Cf. Hiram E. Chodosh, "Neither treaty nor custom: the emergence of declarative international law", 26 *Texas International Law Journal* (1991), 87-124.

119 See, e.g., the decision of the US Supreme Court in *The Paquete Habana*, reproduced in Francis Deak (ed.), *American international law cases. Vol. 1* (New York 1971), 88.

120 One may perhaps allow for the exception of custom on a small scale, such as bilateral or trilateral custom, but even then such rule-formation necessarily departs from the traditional conception. If what is needed to form customary law is actual practice "on the ground" (cf. Iain MacGibbon, "General Assembly resolutions: custom, practice and mistaken identity", in Bin Cheng (ed.), *International law: teaching and practice* (London 1982), 10-26) combined with *opinio juris*, chances that even bilateral custom will be created intentionally are meagre. Indeed, if such intention exists, it would be far easier to simply conclude an agreement containing the rule so desired.

121 Compare, e.g., David Kennedy, *International legal structures* (Baden Baden 1987), at

Still, there are some clear connections between rules intentionally created and rules created by the customary process. A customary rule can be based not only on treaty rules[122], but also, it has been stated, on purportedly legally non-binding agreements.[123] Moreover, treaty rules themselves may be superseded by rules of customary origin. Perhaps the most famous example is the new content given to article 27, paragraph 3, of the United Nations Charter, concerning voting requirements within the Security Council.[124]

It follows that even a treaty intentionally concluded may be transformed over the years to an extent that it no longer conforms to the intentions of its authors. While the parties originally intended to be bound to one set of norms, over time they may find themselves bound to different norms, which they may have never intended to come into being.

Interpretation

This process may not only take place by means of the formation of superseding rules of customary international law, but may also be the result, in some cases, of judicial decisions or decisions of other organs endowed with the power to render authoritative interpretations.[125] For example, the original member states of the European Union received more than they may have bargained for from the Court of Justice's far-reaching judgments in landmark cases such as *Van Gend & Loos*[126] and *Costa v. ENEL*[127]. Those

various places.

122 Perhaps the most radical exponent of this thesis is Anthony d'Amato, *The concept of custom in international law* (Ithaca 1971).

123 Thus, Harold Russell, one of the leading US negotiators of the Helsinki Final Act, claimed that "it may become one of the most widely quoted sources of customary international law". Cf. Russell, o.c. note 33, at 248.

124 This new rule has been given the imprimatur of international law by the ICJ in its *Namibia* opinion, [1971] ICJ Rep. 16, although the Court stopped short short of actually calling it a rule of customary law. Since practice is scarce, and by definition limited to the acts of the five permanent members only, such a stand is clearly understandable.

125 Arguably, the redefinition of article 39 of the United Nations Charter by the Security Council meeting on the level of heads of government on 31 January 1992 may be explained as such. For the text, see 31 *ILM* (1992), 758.

126 Case 26/62, *N.V. Algemene Transport- en Expeditie Onderneming Van Gend & Loos v.*

states intentionally bound themselves to the Treaty establishing the European Economic Community. Whether they wanted that treaty's provisions to have direct effect, and be superior to their own domestic legislation, may however be seriously doubted.[128] Although the EEC Treaty was undeniably the result of an intent to be bound, the exact scope of its provisions, as determined by the ECJ's jurisprudence, need not always have been the result of such intent.[129]

On a more general level, the canons of treaty interpretation, as embodied in the 1969 Vienna Convention, allow ample room for the changing of provisions once formally and intentionally entered into. Under article 31, paragraph 3, account shall be taken, while interpreting a treaty, of any subsequent agreements, any subsequent practice, and any relevant other applicable rules of international law.

The potential consequences are obvious. Subsequent treaty practice and relevant other rules of international law need not have been created intentionally. The scope of the rights and obligations, or even those rights and obligations themselves, may be divorced from the intentions of their authors. The result diminishes the role of intent in the formation of international law. Subsequent agreements, moreover, may themselves sometimes be cast in irregular and informal forms, which may or may not have been intended to create legal rights and obligations.[130]

Nederlandse Administratie der Belastingen, [1963] ECR 1.

127 Case 6/64, *Flaminio Costa v. ENEL*, [1964] ECR 585.

128 One prominent commentator has forwarded the thesis of 'dual supranationalism': in the aftermath of those two judgments, France pursued its 'empty chair policy', which eventually led to conclusion of the Luxembourg compromise, itself of dubious legal status. The gist of the thesis is, that the Court would be allowed to make far-reaching judgments, provided any new initiatives were subjected to unanimity voting, and thus, effectively, a veto. Cf. Joseph Weiler, "The Community system: the dual character of supranationalism", 1 *Yearbook of European Law* (1981), 267-306. In the 1980s, another commentator even argued that the Court might be "running wild". Cf. Hjalte Rasmussen, *On law and policy in the European Court of Justice* (Dordrecht 1986).

129 See also Paul Craig and Gráinne de Búrca, *EC law: texts, cases, & materials* (Oxford 1995), at 152. Tomuschat makes a similar point regarding the powers of appreciation of the United Nations Security Council, which may result in states having entered into obligations they never anticipated. Cf. Christian Tomuschat, "Obligations arising for States without or against their will", 241 *RdC* (1993/IV), 195-374, esp. 248 ff.

130 See, e.g., the 're-interpretation' of article XXXV of GATT, agreed upon in March 1994. Reported in *Bulletin of Legal Developments* (1994/7), 11 April 1994, at 92.

As seen above, there is a fine line between an intent to be bound, and an intent to do something or to refrain from doing something. Logically, it would seem that the former precedes the latter, or conversely, that the latter necessarily implies the former, at least where this intent is communicated as a commitment or envisaged commitment. Strictly speaking, then, interpretation of the exact scope of an agreement or a provision thereof should not be confused with a determination in respect of its legal status. In practice, however, this line may often be difficult to draw.[131]

Estoppel

The doctrine of estoppel surely ranks as one of the more mystical doctrines in international law. Apart from the fact that sometimes its very existence is challenged[132], its contents are rather nebulous. Usually, it is applied in situations of law-application rather than law-making. In other words, it relates to situations rather than norms. Estoppel precludes a state from, e.g., recognizing another and then with impunity reneging on the act of recognition; or invoking a certain legal rule and then, on another occasion, denying the rule's existence (except, of course, if the rule has been effectively terminated). In short: blowing hot and cold is inadmissible.[133]

Nevertheless, there is a fine line between law-application and law-making. There may be (and have been) circumstances where the doctrine of estoppel effectively gives rise to a state having to accept obligations it may not necessarily have intended.[134] Perhaps the prime example is the *Temple of*

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131 Some authors even specifically advocate using the canons of treaty interpretation for purposes of determining whether or not the instrument at issue is legally binding. Cf. Anthony Aust, "The theory and practice of informal international instruments", 35 *ICLQ* (1986), 787-812, at 793; Wolfgang Heusel, *"Weiches" Völkerrecht* (Baden Baden 1991), at 91-92.

132 Shabtai Rosenne reportedly "hoped" that the Institut de Droit International "would resolve to banish the term estoppel from the vocabulary of international law." See the debates recorded in 60 *AIDI* (1984/II), at 133.

133 See generally D.W. Bowett, "Estoppel before international tribunals and its relation to acquiescence", 33 *BYIL* (1957), 176-202; Iain MacGibbon, "Estoppel in international law", 7 *ICLQ* (1958), 468-513.

134 Here one should perhaps distinguish between estoppel and acquiescence. Acquiescence, strictly speaking, presupposes consent. While consent may give rise to an estoppel, estoppel need not necessarily involve consent, but involves rather the impression, or

Preah Vihear case[135], in which the International Court of Justice decided that by its behaviour, Thailand had given Cambodia the impression that it had accepted a territorial delimitation. Since Cambodia had to its detriment relied on Thailand's behaviour, Thailand was estopped from later claiming otherwise.[136]

For present purposes, the importance of estoppel lies predominantly in the granting of legal effects to what are purportedly non-legally binding agreements. Several authors[137] have claimed that even if some agreements are never intended to be legally binding, they may nevertheless over time acquire legal effects on grounds of estoppel. Thus, states may end up being estopped from acting contrary to a non-legally binding agreement they concluded. In other words, at some point in time, their original intent not to become legally bound has been overruled by estoppel.[138]

Good faith

Estoppel is usually considered a special, and perhaps somewhat technical, application of the broader notion of good faith. Although the ICJ has cogently stated that good faith alone cannot create obligations where none would otherwise exist[139], the Court itself has come dangerously close to doing so in the *Nuclear tests* cases.[140]

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perception, of consent. Needless to say, however, such a distinction is difficult to maintain in practice, at least in cases where either acquiescence or estoppel must be inferred from conduct alone. See similarly the *Gulf of Maine* case, [1984] ICJ Rep. 246, at 305, para. 130.

135 [1962] ICJ Rep. 6.

136 In English contract law, it appears even possible to invoke detrimental reliance prior to an actual contract being concluded. See Paul Key, "Detrimental reliance in anticipation of a contract", 111 *LQR* (1995), 576-580.

137 E.g., Pierre Michel Eisemann, "Le *gentlemen's agreement* comme source du droit international", 106 *Journal du Droit International* (1979), 326-348; Aust, o.c. note 131.

138 The argument will be dealt with more fully in the next two chapters.

139 *Border and transborder armed action (Nicaragua v. Honduras)*, [1988] ICJ Rep. 69, at 105, para. 94. The same emerges from the opinion on *Interpretation of the WHO-Egypt agreement*, where the Court noted, in effect, that good faith was concommittant to existing obligations. [1980] ICJ Rep. 73, esp. at 93, para. 43.

140 [1974] ICJ Rep. 253, 457. For more details, see ch. VI below.

These cases revolved around the question of whether France had become bound by certain statements it had made unilaterally. Although the Court observed that such statements may only become legally binding if so intended, its actual investigation into France's intent has been deemed rather disappointing by many observers.[141] It would seem then, and a Chamber of the Court acknowledged as much in a decision made twelve years later[142], that what mattered in the *Nuclear tests* cases was not so much France's intent, but rather the reliance (or even simply potential reliance) upon the French statements by other states. Other states must be able to rely, in good faith, upon statements made by any other state.

Concluding remarks

So far, we have established some of difficulties involved in the concept of treaty. In the first chapter, it was shown that states and international organizations alike quite often and for a variety of reasons resort to what they think are non-legally binding agreements. The second chapter demonstrated that the definitions of treaty contained in the two Viennese Conventions do not give the definitive answer as to what constitutes a treaty, although they seem to point to the intent of parties as the single most important element. In chapter III, some of the problems involved in identifying intent have been reviewed, and it was also shown that intent, its importance notwithstanding, cannot always be decisive.

It is time now to move on to a review of the pertinent literature, and the theses developed therein concerning the legal status (if any) of purportedly non-legally binding agreements. Five different theses may be distinguished, and they will, with one exception[143], be discussed in chapter IV. Two of those theses stay firmly within the bounds of international legal discourse; however, the other two, which also happen to be the more popular, challenge international legal discourse as such. Accordingly, this challenge will be separately discussed in chapter V.

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[141] See, e.g., Alfred Rubin, "The international legal effect of unilateral declarations", 71 *AJIL* (1977), 1-30, at 26-28; Martti Koskenniemi, *From apology to utopia: the structure of international legal argument* (Helsinki 1989), at 307.

[142] *The Frontier Dispute* case, [1986] ICJ Rep 554.

[143] The soft law thesis will be dealt with in the Excursus to chapter V.

CHAPTER IV

SEVERAL VARYING THESES[1]

Introduction

The noticeable increase in the number of purportedly non-legally binding agreements concluded during the last couple of decades has induced legal scholars to develop and explore several varying explanations concerning the legal force of such agreements.

Several[2] different theses may be discerned in the pertinent literature. First of all, there is the thesis that although legal ties are created, these ties are not created as between states, but as between agencies or departments. According to a second thesis, some agreements do not create legal bonds at all, although they may give rise to political or moral bonds between states. A third thesis is in fact a more sophisticated variation on the second, holding that although no legal bonds are created, some agreements are nevertheless not without legal effects. And a fourth and final thesis, adhered to by what seems to be a minority among international lawyers, holds that all agreements create legal bonds, at least as a matter of presumption.

Binding solely agencies or departments?

Leaving aside gentlemen's agreements in their initial conception, which were thought to merely create moral bonds between individuals, the first category of agreements whose legal nature merit investigation are administrative agreements. These are agreements concluded by or between govern-

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[1] The present chapter is essentially a revised and expanded version of parts of Jan Klabbers, "Informal agreements in international law: toward a theoretical framework", 5 *FYIL* (1994), 267-387, esp. 347-370.

[2] For reasons explained below one of those theses, the soft law thesis, will be dealt with in an excursus to chapter V.

mental departments or agencies not traditionally associated with the conclusion of treaties.

For Ludwig Bittner, writing in 1924[3], only the Head of State would be competent under international law to conclude legally binding agreements, although there was always the possibility of other persons, acting as proxies, doing so in his or her name. Failing such a 'Beurkundungsauftrag'[4] however, no treaties could be concluded, and since governmental departments or agencies would not be empowered to conclude agreements, it followed that their agreements could not amount to treaties.

Yet, Bittner did observe that administrative agreements were concluded with some regularity without 'Beurkundungsauftrag', and were apparently reasonably well adhered to. The lack of a 'Beurkundungsauftrag' implied that the state could not be bound. As a result, almost inevitably, Bittner was driven to the conclusion that the bonds thus established were bonds between those departments or agencies individually. Their respective states would not be bound.

Bittner was, on this point, among the more outspoken writers of his generation. Others deftly attempted to avoid having to draw conclusions regarding the legal effects of administrative agreements, satisfying themselves by pointing out that for one reason or another, administrative agreements were not treaties, and leaving it at that. Thus, Van Eysinga, in a study of the extent to which the Netherlands was bound by international treaties, merely remarked that there were many examples of international cooperation, especially in administrative matters, which were created without a treaty and which were, apparently for that reason, not within the scope of his study.[5]

In an altogether similar fashion, Jules Basdevant noted the varied existence of administrative agreements only to conclude that whether or not such agreements amounted to treaties or to mere agreements between administrations was a complex question.[6] It would seem that by simply pointing to the

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[3] Ludwig Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* (Berlin 1924).

[4] See, however, Edoardo Vitta, *La validité des traités internationaux* (Leyden 1940), claiming that state agents are not simply notary-like proxies. In his view, Bittner derived his 'Beurkundungsauftrag' from too literal an interpretation of diplomatic instruments. Phrases such as "In the name of the King" *et cetera* need not be interpreted too literally. At 78-79.

[5] W.J.M. van Eysinga, *Ontwikkeling en inhoud der Nederlandsche tractaten sedert 1813* (The Hague 1916), at 22-23.

[6] Cf. Jules Basdevant, "La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités", 15 *RdC* (1926), 539-643, esp. at 624-626.

possibility of there being agreements between administrations he impliedly accepted Bittner's thesis. However, his remark that administrative or technical agreements "devraient etre arretés avec le concours des services diplomatiques"[7] cast some doubts: it may be interpreted as some sort of validity-condition, but also as merely an expression of a sense of legal propriety.

Whatever Basdevant's exact position on the topic at hand may have been, later writers have made clear that Bittner's thesis suffers from at least one major defect: it is difficult to reconcile with some of the fundamental principles of state responsiblity. Blix provides an instructive example sketching the possible consequences:

> "If, for example, an international tribunal were to award damages on the basis of a postal agreement[8], it is presumably beyond dispute that the state as a juridical person would be responsible in the last resort for the payment of the damages."[9]

Still, simply claiming that state responsiblity may be involved, even with agreements concluded at lower levels, ultimately begs the question. The claim that state responsibility may be incurred presupposes that which requires proof: it presupposes that such agreements bind the state, and not merely the individual departments or agencies.[10] State responsibility arises only through the violation of an international legal obligation[11], so the question still remains whether administrative agreements give rise to international legal obligations. If not, their non-performance cannot give rise to state responsibility. With this in mind, it is unfortunate that the 1969 Vienna Convention does not define what it means by 'state'[12], and creates but an open-ended

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[7] Ibid., at 624.

[8] I.e. an agreement between the postal services of states, without the involvement of, e.g., the Foreign Ministries.

[9] Hans Blix, *Treaty-making power* (London 1960), at 20.

[10] Some of the complexities involved in the uneasy relation between the law of treaties and the law of state responsibility are discussed in Shabtai Rosenne, *Breach of treaty* (Cambridge 1985). See also the first chapter of his *Developments in the law of treaties 1945-1986* (Cambridge 1989).

[11] Leaving aside the possibility of responsibility for injurious or hazardous acts not prohibited under international law. See generally the various contributions to the special 16th issue of the *Netherlands Yearbook of International Law*, "Symposium on state responsibility and liability for injurious consequences arising out of acts not prohibited by international law", 16 *NYIL* (1985), 3-300.

[12] See above, ch. II.

regime concerning the capacity of state representatives to perform legal acts on behalf of the state.[13]

While presenting its first set of draft articles on state responsibility to the General Assembly, the International Law Commission stressed that the fact that the draft was limited to the responsibility of states was without prejudice to the responsibility of other subjects of international law.[14] Yet, having said that, it is rather unlikely that the Commission had in mind the possible responsiblity of individual departments or agencies. In the Commission's view, the state is merely an abstract entity, which "as such is not capable of physical action".[15] It affirmingly referred to the PCIJ's advisory opinion in the *German settlers* case, where the Court observed that "States can act only by and through their agents and representatives."[16]

The question then becomes which acts of which agents and representatives can be deemed attributable to the state. As far as state responsibility is concerned, it is generally accepted that acts of organs of the state, regardless of their hierarchical position and regardless of *ultra vires* considerations, are acts of the state, provided the organ was acting in its capacity as state organ.[17]

The ILC itself, however, has warned not to confuse attribution for purposes of state responsibility with attribution for other purposes:

> "... it is an obsolete theory that only an act or omission of an organ responsible for conducting the external relations of the State can constitute an internationally wrongful act of the State ... This theory obviously resulted from confusion between the consideration of certain conduct as an internationally wrongful act and the attribution to the State of a manifestation of will capable of constituting a valid international legal act or establishing participation in such an act."[18]

In this light, it would seem that the problem defies a simple solution. Under the rules pertaining to state responsibility, the state can only be held responsible for internationally wrongful acts, i.e. conduct which is attribu-

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[13] Articles 7 and 8 of the Vienna Convention.

[14] See *Yearbook of the International Law Commission* (1973/II), 165 ff., at 169.

[15] Ibid., at 181.

[16] *Advisory Opinion on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland*, [1922-24] PCIJ Rep., Ser. A/B, no. 6, at 22.

[17] This much follows from articles 5 to 10 of the ILC draft. See generally Ian Brownlie, *System of the law of nations: state responsibility (part one)* (Oxford 1983), esp. ch. 7.

[18] In *Yearbook of the International Law Commission* (1973/II), at 194.

table to the state and constitutes a breach of an international obligation of the state.[19] Hence, breach of an administrative agreement only gives rise to state responsibility if the agreement creates an international obligation on the part of the state. If the agreement merely gives rise to an international obligation of an agency, there is no internationally wrongful act within the parameters set by the ILC draft, and hence no state responsibility is incurred.

However, to say that individual departments or agencies may legally bind themselves under international law, presupposes either that such departments or agencies are themselves subjects of international law, capable of independently bearing international legal rights and obligations, or that the familiar legal orders of national law and international law are accompanied by a third legal order, which could for all practical purposes be called international agency-law.

Both these hypotheses are refutable. The claim that agencies and departments could be subjects of international law in their own right finds no support whatsoever in international law, neither in the writings of publicists, nor in the case-law of tribunals. The *raison d'etre* of the legal institution of state responsiblity, as illustrated by the pertinent provisions of the ILC draft, is that states provide a guarantee to other subjects of international law that their rights will be protected.[20] This guarantee necessarily implies that states do not 'speak in tongues', but manifest themselves as unitary actors, who may be addressed when things go wrong.[21]

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[19] Cf. article 3 of the ILC draft.

[20] See similarly Arbitrator Max Huber in the *Island of Palmas* case: "Territorial sovereignty ... involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory." Hence, Huber's insistence on continuous display of effective manifestations of authority. The award is reproduced in 2 *UNRIAA* 829, at 839.

[21] A similar problem occurs of course with external acts of international organizations: is the organization responsible? Or its member states? Or is there perhaps joint responsibility? The problem is compounded when international acts are performed by organs of international organizations. An important difference, however, is that international organizations are usually considered to be themselves subjects of international law. It would seem that in case C-327/91, the Court of Justice of the EC accepted that an agreement entered into by the Commission did not just entail the Commission's responsibility. See on this point generally Felice Morgenstern, "The convention on the law of treaties between states and international organizations or between international organizations", in Yoram Dinstein (ed.), *International law at a time of perplexity: essays in honour of Shabtai Rosenne* (Dordrecht 1989), 435-447, esp. at 445.

Indeed, as McNair has argued, claiming that some entity other than the state could become legally bound by means of the conclusion of administrative agreements might well open up a virtual Pandora's Box. Limiting himself to the possibility of legal bonds between governments (as opposed to legal bonds between states), he remarked that after a change of government, the new government might be encouraged to repudiate agreements which were binding upon the old government.[22] By extension, recognition of agreements binding solely agencies or departments might incite practices under which agreements would simply be repudiated by replacing the agency or department in question, or perhaps even by simply renaming it.

The other possibility that there be a separate international legal order, quite apart from public international law as we know it, regulating the mutual relations of agencies and departments without affecting those of states, appears equally unconvincing. With respect to the existence of an independent *lex mercatoria*, an independent transnational law, or an independent law of international organizations, Julio Barberis has concluded that "l'hypothèse d'un troisième ordre juridique est impossible".[23] Legal relations, in the final analysis, are subject either to public international law or to some domestic legal system. They cannot exist *in vacuo*.[24] Although, for example, the European Union forms its own internal legal order[25], its relations with third parties are governed either by public international law, or by some domestic legal system.[26]

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[22] See Lord McNair, *The law of treaties* (Oxford 1961), at 20.

[23] Julio A. Barberis, "Nouvelles questions concernant la personnalité juridique internationale", 179 *RdC* (1983/I), 145-304, at 176.

[24] As the PCIJ already held, albeit somewhat fleetingly perhaps, in the *Serbian loans* case: "Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country." [1929] Publ. PCIJ, series A., nos. 20/21, at 41. The same thought was implicit in the PCIJ's advisory opinion on *Nationality Decrees issued in Tunis and Morocco (French Zone)*: if a certain topic ceases "to be one solely within the domestic jurisdiction of the State, [it] enters the domain governed by international law." [1923] Publ. PCIJ, Series B, no. 14, at 26.

[25] Even so, it is doubtful whether the Union could, in its internal legal order, ignore, e.g., norms of *jus cogens*, or domestic peremptory public policy norms relating to matters not regulated in the EU treaties themselves.

[26] In a similar vein Felice Morgenstern, *Legal problems of international organizations* (Cambridge 1986). In its advisory opinion on *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, [1980] ICJ Rep. 73, the ICJ noted: "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or

As a consequence then, if administrative agreements create legal rights and obligations at all[27], they eventually become the onus of the state. There is, quite simply, no other possibility. Agencies and departments can not be considered international legal subjects in their own right[28], and they do not have an international legal order of their own.[29]

Despite this weakness[30] in the thesis that agreements bind only those who actually conclude them, the thesis still makes an appearance every now and again. Thus, writing in 1986, Dutch writer J.C.E. van den Brandhof concluded that administrative agreements only bind the administrative entities involved, and should be recognized as a separate source of international law.[31]

More spectacularly perhaps, Bittner's work may have inspired the drafters of the recent Mexican law on approval of treaties.[32] This law, which came into effect on January 3, 1992, provides for two types of international agreements to be concluded. On the one hand, the law provides for regular treaties, defined as written agreements concluded between the Mexican

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under international agreements to which they are parties." At 89-90, para. 37.

[27] See the next section below.

[28] Similarly, E.W. Vierdag, "Spanningen tussen recht en praktijk in het verdragenrecht", *Preadvies Nederlandse Vereniging voor Internationaal Recht* (1989), 3-87, esp. at 49-52.

[29] As much was recognized in the 1992 Mexican law on treaties, to be discussed below, which explicitly holds that administrative agreements are governed by public international law.

[30] It is not the only weakness. The thesis does not explain what will happen with parliamentary powers over foreign policy. Do they also apply to agreements merely binding agencies or departments? Neither is it clear how such agreements would relate to "regular" treaties or domestic legislation in cases of conflict. These questions, as will be seen, arise with two of the other theses as well, and will thus be more appropriately treated below, in ch. V.

[31] J.C.E. van den Brandhof, "Administratieve overeenkomsten in het internationaal publiekrecht", *Nederlands Juristenblad* (1986, no. 40), 1277-1282. Later, however, he conceded that this position was untenable, although he remained insistent that they be recognized as a separate source of international law. See his remarks during the 1989 meeting of the Dutch branch of the International Law Association. See Nederlandse Vereniging voor Internationaal Recht, *Verslag van de Algemene Ledenvergadering 1989* (Deventer 1989), at 22.

[32] Text in 31 *ILM* (1992), 390. A different approach was chosen by the drafters of the new law on international treaties of the Russian Federation. Text in 34 *ILM* (1995), 1370.

government[33] and other subjects of international law, and governed by public international law.[34] On the other hand, centralized or decentralized agencies of the federal, state or municipal administration may enter into written so-called inter-institutional agreements with foreign governmental agencies or international organizations. Such agreements are also deemed to be governed by public international law[35] (thus, the law specifically exemplifies the point made above), but do not, apparently, need the approval of the Mexican senate.[36] The agencies involved must, however, remain strictly within their authority[37], and inform the Foreign Ministry of any intended inter-institutional agreement.[38]

The law itself, according to the unofficial translation, remains somewhat unclear about the legal consequences attached to the conclusion of inter-institutional agreements. The only pertinent provision holds, as noted, that inter-institutional treaties are governed by public international law.

The law does not, strictly speaking, state that inter-institutional agreements only bind the agencies involved. This is, however, the interpretation offered by a lawyer at the Foreign Ministry's Office of the Legal Adviser, who derives from the lack of need of approval and the requirement that agencies remain within their powers, "that inter-institutional agreements are only binding upon those agencies which have entered them, not upon the Federation."[39]

As argued above, holding that certain agreements are only binding upon individual agencies cannot be reconciled with general international law. Consequently, the Mexican law may contain something of an inner inconsistency.[40] If indeed inter-institutional agreements are deemed to be governed by public international law, the responsibility of the state is or may be involved, and that, in turn, implies that the thesis that only individual agencies may become bound, amounts to little more than an illusion.

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[33] Note that the text refers to the government, not to the state.

[34] Article 2, paragraph I.

[35] Article 2, paragraph II.

[36] The requirement of approval is only mentioned with regard to regular treaties.

[37] Article 2, paragraph II.

[38] Article 7.

[39] Antonio Garza Cánovas, "Introductory note to 'Mexico: law regarding the making of treaties'", 31 *ILM* (1992), 390-392.

[40] That is, if Mr. Garza Cánovas' interpretation is correct.

Not binding at all?

Bittner's thesis that only agencies and departments themselves become legally bound without the state becoming bound by administrative agreements, does not pose any challenge to law as such.[41] The claim, in essence, is simple. It rests upon an (implicitly) alleged rule of international law that the conclusion of administrative agreements may lead to only individual agencies being bound, either as the result of the separate personality of those agencies, or as the result of the agencies possessing their own international legal order. Right or wrong, in both variations the thesis remains squarely within the bounds of legal discourse.[42] That is not the case, however, with some of the other theses.

From a temporal perspective, Bittner's thesis was succeeded by the thesis that some agreements, quite simply, lack all legal effect. As far as we are aware, this second thesis has never been explicitly presented as an alternative to Bittner's thought.

Perhaps the most extreme advocate of this second thesis was James Fawcett. In an influential and often quoted article published in 1953[43], he forcefully advanced the claim that international agreements could only be legally binding if their authors clearly intended them to be legally binding. If no such intent could be discerned, then the obvious conclusion would have to be that no legal rights and obligations had been created.

The intention to be bound, according to Fawcett, would have been most clearly communicated if the treaty contained a compulsory judicial dispute settlement clause. In the absence of such a clause, a document could also be considered legally binding if all its parties had accepted the compulsory jurisdiction of the International Court in some other way without making too far-reaching reservations, or had voluntarily submitted themselves to any other form of compulsory judicial dispute settlement.[44] Furthermore, in some

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[41] There is no indication whatsoever that Bittner considered administrative agreements to be binding under some normative order other than law, so that possibility can safely be ignored as long as Bittner's work is concerned.

[42] As far as the present writer is aware, it has never been claimed that the normative order governing relations between individual agencies would be any other than public international law, with the obvious exception, not relevant here, of agencies concluding transboundary contracts governed by some system of domestic law.

[43] J.E.S. Fawcett, "The legal character of international agreements", 30 *BYIL* (1953), 381-400.

[44] On the merits of arguments such as these, see above, ch. II.

cases, the legal character of the instrument could be determined by its subject matter. A treaty establishing an international organization, e.g., could not be anything but legally binding.[45]

Fawcett's thesis was based on some rather shaky premises, derived as it was from a debatable analysis of predominantly English contract law[46]; a dubious analysis of administrative agreements pertaining predominantly to public affairs and therefore not being comparable to private law contracts[47]; as well as the supposed unlimited freedom of states; and, a somewhat Austinian conception of law.[48] Besides, as Kelvin Widdows has convincingly shown, state practice offers little support for Fawcett's claim that anything not clearly legally binding must be deemed non-legally binding.[49]

More important for present purposes, however, are the legal consequences of Fawcett's thesis. Fawcett claimed that an intent to be bound had to be clearly shown, and therefore was naturally driven to the conclusion that any instrument not meeting his requirement would quite simply not give rise to legal rights and obligations. Yet, in his view that did not mean that such agreements might just as well have not been concluded at all, or that they could be violated at will. As Fawcett noted:

> "International community life can be carried on only if common declarations of policy and agreements for the solution of common administrative and technical problems are adhered to and carried out. To the extent that they are broken or disregarded, international order breaks down."[50]

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[45] While the logic of this proposition is obvious, it is difficult to see the logic of only applying it to a limited number of issue-areas.

[46] Compare e.g. Fawcett's analysis of *Balfour v. Balfour* (All ER (1918-1919) 860) with that of Steve Hedley, "Keeping contract in its place - *Balfour v. Balfour* and the enforceability of informal agreements", 5 *Oxford Journal of Legal Studies* (1985), 391-415.

[47] Needless to say, most treaties pertain to public affairs, and are therefore not readily comparable to private law contracts. The comparison is perhaps most convincing when it comes to cession agreements, which are limited in number. Still, Fawcett would no doubt stop short of saying that only cession agreements can be legally binding, even if this would be the logical extension of his own argument.

[48] "... an obligation cannot be properly called a legal obligation unless its existence and extent are determinable judicially, that is, according to general principles of law; and if the agreement has provided in advance that the parties are to be the judges, each for itself, then *cadit quaestio*." Fawcett, o.c. note 43, at 392. And "... a legal obligation differs from other obligations only in the prescribed mode of its enforcement ..." Ibid., at 397.

[49] Cf. Kelvin Widdows, "What is an agreement in international law?", 50 *BYIL* (1979), 117-149.

[50] Fawcett, o.c. note 43, at 399.

In other words, the binding force of administrative agreements, common declarations of policy, and similar phenomena, derives from considerations of world order. They simply must bind, in one way or another, for otherwise "international order breaks down".

Those agreements could not be considered legally binding. After all, their authors did not, so Fawcett claims, intend them to be legally binding. They were nevertheless binding, but under a normative order other than law: politics. There exist, so Fawcett argued, "inter-State agreements of political obligation, which are not enforceable by judicial process but which are not less binding upon the parties."[51]

The concept of political obligation, however, was given only meagre foundations by Fawcett. Referring to article 5 of the North Atlantic Treaty, allowing NATO's member states a rather wide margin of discretion concerning what to do in case of an armed attack against one of them, Fawcett merely stated that it was "plain" that this amounted to a political obligation.[52] Apparently, he did not consider that the matter deserved much further elaboration. He stated simply that "[p]olitical obligations stand in the same relation to legal obligations, arising under inter-State agreements, as moral obligations between individuals stand to private law contracts."[53]

The argument displays a puzzling inconsistency. Fawcett goes out of his way to argue that agreements are only legally binding to the extent that their authors so intended; however, the binding force of other agreements does not depend on their authors' intentions, but rather on the exigencies of world order. Agreements may be legally binding only if their authors so intend, but are politically binding regardless of such intentions.

Obviously, the distinction cannot solely be explained by reference to the potential breakdown of international order. Indeed, breaking or disregarding legal agreements may just as easily carry the danger of international order breaking down, especially given the paucity of enforcement mechanisms in international law.[54] Conversely, purportedly politically binding agreements

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[51] Ibid., at 398.

[52] It is one thing to say that article 5 of the NATO contains, in the felicitous phrase of Michael Glennon, a clear "element of noncommitment in the commitment", coming dangerously close to an illusory engagement. Cf. Michael Glennon, *Constitutional diplomacy* (Princeton 1990), esp. 209-214. But can it really be maintained that article 5 therefore amounts to a political obligation? To call it a political commitment does little to improve the degree of commitment contained in the article.

[53] Fawcett, o.c. note 43, at 398-399.

[54] Fawcett would probably respond that the possibility of judicial settlement in case a legally

may be respected and carried out even without the shadow of judicial enforceability hanging over the parties' heads. Moreover, there is a certain awkwardness involved in insisting upon intent in one set of circumstances and completely disregarding it in other circumstances with the only difference in those circumstances being precisely the presence or absence of this intent.

Ultimately, a more serious problem for Fawcett's thesis is that in essence it hinges on the supposed existence of a normative order which functions as an alternative to the normative order usually referred to as international law. By claiming that agreements may be politically binding, he presupposes that there exists a normative order which may be called international politics and which, if the occasion arises, provides agreements with their politically binding force. Yet, the existence of such a normative order is never made evident, or even plausible. It is simply posited as being "plain", and as an apparently logical corollary to the (also merely posited) existence of moral obligations in private dealings between individuals.[55]

Legal effects over time?

Fawcett's thesis has sometimes been dubbed rather extreme[56], and indeed, its relentless insistence on the importance of intent when it comes to the creation of international legal rights and obligations leaves little room for

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binding agreement is broken or disregarded goes a long way toward maintaining international order. Yet, what should be done when the ensuing judgment is broken or disregarded? There is, of course, article 94 of the United Nations Charter, allowing for Security Council intervention, but this has so far never been used.

[55] In a very short article written almost a quarter of a century later, Fawcett apparently modified his position somewhat. In the new version, it would seem that all agreements give *ipso facto* rise to political commitments; some of them, however, are also converted into legal commitments. This, however, "does not change their nature though it may strengthen their enforceability." Of course, Fawcett was more or less forced to modify his thesis by the conclusion of the purportedly politically binding Helsinki Final Act, which clearly went beyond mere administrative or technical cooperation. Cf. James Fawcett, "The Helsinki Act and international law", 13 *RBDI* (1977), 5-9, esp. at 9. Fawcett's *Law and power in international relations* (London 1982) unfortunately does not clarify his thoughts on this very point.

[56] Fritz Münch, "Comments on the 1968 Draft Convention on the law of treaties: non-binding agreements", 29 *ZaöRV* (1969), 1-11, at 1.

subtlety. Still, some of the variations of this thesis turn out to be even more extreme.

According to Fawcett agreements would either be legally binding (if parties so intended), or merely politically binding (*ipso facto*, one is tempted to say), without any interaction between the two categories. Later writers have modified the Fawcettian thesis on two crucial points: (1) by claiming that non-legally binding agreements may nevertheless turn out to have "legal effects" or "legal consequences", and, (2) by claiming that states can freely choose to anchor their agreements in one (or perhaps more) of several distinct normative orders. Whereas for Fawcett all agreements were politically binding, and some would be legally binding as well, some of his successors claim that states can choose whether to have their agreements be legally binding, politically binding, morally binding, or perhaps even within other orders as well.

As mentioned above, one of the most obvious weaknesses of Fawcett's thesis is that it is clearly at odds with international practice. States rarely (if at all) specify their agreements to be legally binding. Yet, practice overwhelmingly shows that states not only adhere to their ostensibly non-legally binding agreements; but also apparently employ them to strengthen their legal arguments[57]; seem to rely on them to an extent quite similar to their reliance on legally binding agreements[58]; and, draft them with the care one associates with the drafting of legal documents.[59]

The ensuing discrepancy between theory and practice could, in principle, be overcome by one of two means: either purportedly non-legally binding agreements do have legal effects after all (the initial lack of intent notwithstanding); or, there exists another normative order alongside the familiar legal order, a normative order which possesses characteristics similar to this legal order, and which can be employed by states in similar ways.

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[57] As good an example as any is found in the ICJ's rendition of the application of Bosnia and Herzegovina in the *Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Further requests for the indication of provisional measures*, [1993] ICJ Rep. 325. Applicants invoked a wide array of legal and quasi-legal instruments.

[58] See, e.g., André Nollkaemper, "On the effectiveness of international rules", 27 *Acta Politica* (1992), 49-70. Similarly, Thomas Franck merrily proclaims "the irrelevance of law and non-law", in his *The power of legitimacy among nations* (Oxford 1990), esp. ch. 2.

[59] See, e.g., the press communiqué concluded with the participation of Bush and Gorbachev, mentioned in ch. I above.

In fact, to say that there is an either/or situation, although logically plausible, somewhat overstates the matter in doctrinal terms. The positing of an alternative normative order and the existence of legal effects of non-legally binding documents have quite often gone hand in hand in international legal doctrine.[60]

Perhaps, the most accessible (although by no means the most explicit) account of the thesis that non-legally binding agreements may give rise to legal effects is afforded by Anthony Aust. In what has become a seminal article published in 1986[61], Aust treats 'informal agreements' as anything which is not a treaty, and which may give rise to moral[62] or political[63] commitments.

Aust's point of departure is rather straightforward: if there is no intention to be legally bound, then there is no legally binding agreement. After all, states are sovereign equals and free "to exercise (or not to exercise) their treaty-making power."[64] From this freedom it follows, apparently, that there can be no objective test concerning the status of any document, and hence one has to rely heavily on intent.[65]

Aust nonetheless quickly proceeds to undermine his own position. He acknowledges the possibility that the parties to informal agreements have been acting like Molière's famous *bourgeois gentilhomme*, and have entered into treaties all along, but dismisses this possibility without any argumentation[66], only to conclude that:

"[t]here can be little doubt that the vast majority of informal instruments do record agree-

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[60] Despite the fact that, when thinking it through, several rather serious problems are encountered. These will be dealt with in the next chapter.

[61] Anthony Aust, "The theory and practice of informal international instruments", 35 *ICLQ* (1986), 787-812.

[62] Such as when he refers to gentlemen's agreements within the Commonwealth. Ibid., at 788-789.

[63] Ibid., at 792.

[64] Ibid., at 806.

[65] Ibid., pp. 805-806. The argument here is less than convincing. It fails to take notice of the impossibility of having resort to anyone's subjective intentions (see above, ch. III). The argument becomes even more puzzling considering Aust's apparent approval of Lord Templeman's words: "The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer ... insists that he intended to make and has made a spade." Quoted at 805.

[66] He merely remarks that it would be "more productive" not to treat them as legally binding agreements. Ibid., at 807.

ments (using that term in its ordinary sense[67]) between subjects of international law; they may therefore not be devoid of all legal consequences."[68]

In Aust's view, those legal consequences may arise from notions such as reliance, good faith and estoppel. Indeed, he even goes so far as to acknowledge that the "distinction between a treaty which contains legal rights and obligations, and an informal instrument which can give rise to legal consequences, is admittedly rather fine".[69] He eventually claims, or so it seems, that the distinction is a temporal one rather than a principled one: whereas treaties immediately give rise to legal rights and obligations, informal instruments may do so after some period of time, i.e. as soon as reliance occurs, good faith sets in, or an estoppel has been created.[70]

The problems with Aust's thesis (and, by extension, that of many others) are manifold. First, he presupposes the existence of several distinct normative orders (law, politics, perhaps also morality[71]), a point which we will discuss more fully in the next chapter.

Secondly, it remains unclear where the difference lies between an agreement being legally binding and an agreement not so binding but having legal consequences. At the end of the day, the net result would seem to be the same: states can be legally bound both by legally binding agreements and by non-legally binding agreements. In the former case, they become intentionally legally bound; in the latter, they become so bound without having intended as much, by virtue of good faith, estoppel or reliance. But if that is the case, what then can be said to justify the distinction?

One may even wonder whether such a distinction is feasible at all. In its 1988 decision in the *Transborder armed actions* case, the International Court of Justice underlined that good faith "is not in itself a source of obligation where none would otherwise exist".[72] Hence, it is unclear how a purportedly

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[67] This of course provokes questions such as what exactly the ordinary sense of the word 'agreement' is and whether there is such an ordinary sense which can fruitfully be used in a legal context. Aust, however, does not ask such questions, let alone answer them.

[68] At 807.

[69] Ibid., at 811.

[70] Here he follows Pierre Michel Eisemann, "Le *gentlemen's agreement* comme source du droit international", 106 *Journal du Droit International* (1979), 326-348, at 347.

[71] Aust is not very clear on whether in his view politics and morality are synonymous, or rather separate orders.

[72] *Border and transborder armed actions (Nicaragua v. Honduras), Jurisdiction and Admissibility*, [1988] ICJ Rep. 69, at 105, para. 94. A similar point has been made by Michael

non-legally binding agreement can nevertheless acquire legal effects. If something is not in one way or another law to begin with, it is unclear how good faith (or estoppel, or reliance) would have it become law.[73]

Moreover, it would seem that legal consequences can only be created by or via legal rules or principles. It is difficult to envisage acts having any legal effect unless there is some kind of rule giving it this legal effect. It is difficult to perceive of legal effects originating *in vacuo*.[74]

With respect to Aust's thesis, the implications are as follows. First of all, if legal consequences only become operative by virtue of legal rules, then notions such as good faith or estoppel, on which Aust so heavily relies, must themselves operate within the realm of law in order to provide what are ostensibly non-legally binding agreements with legal consequences. The premise that they do operate within the realm of law is undisputed; but the question of whether they can still apply to agreements deliberately kept out of the realm of law is more problematic. To conclude an agreement outside the law would imply to also withdraw it from the workings of good faith and estoppel.[75] To hold otherwise would smack of attempting to blow hot and cold, something the notion of estoppel, ironically, is supposed to prevent.[76]

Bothe: "Good faith is a legal concept, and basing respect for non-legal obligations on a legal concept would not seem to be appropriate." See Michael Bothe, "Legal and non-legal norms - a meaningful distinction in international relations?", 11 *NYIL* (1980), 65-95, at 95. The obvious way out, then, is to posit the existence of a non-legal version of good faith, which is the option favoured by Michel Virally. See especially Virally's "La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique (à l'exception des textes emanant des organisations internationales)", 60 *AIDI* (1983/I), 166-257. Even so, in either case good faith is unable to produce legal obligations on its own.

[73] See, however, J.F. O'Connor, *Good faith in international law* (Aldershot 1991), who while denying that good faith applies to non-legal relations, seems to construe a thesis that since relations between states generally are legal relations, good faith may be of relevance in situations arising from non-legally binding agreements. At 113.

[74] Thinking along similar lines inspired the recent conception of law as an autopoietic system. See, e.g., Gunther Teubner, ""And God laughed ..." Indeterminacy, self-reference and paradox in law", in Christian Joerges & David Trubek (eds.), *Critical legal thought: an American-German debate* (Baden Baden 1989), 399-434, as well as Gunther Teubner, *Law as an autopoietic system* (Oxford 1993, transl. R. Adler & A. Bankowska).

[75] Cf. Bothe, o.c. note 72.

[76] Cf. Iain MacGibbon, "Estoppel in international law", 7 *ICLQ* (1958), 468-513, quoting McNair. One might perhaps even go further, and claim that any attempt by a state to have legal protection of 'rights' under a non-legally binding agreement is itself difficult to reconcile with the principle of good faith.

Secondly, the distinction between 'legally binding' and 'legal consequences' as made by Aust presupposes the possibility of contracting out of the realm of law. The distinction is only meaningful if it is possible to have non-legally binding (but binding nevertheless) agreements to begin with, which is precisely the point at issue. The Austian thesis therefore presupposes that which requires proof. Moreover, at the risk of stating the obvious, the question whether it is possible to withdraw from international law is not the same as the question whether viable alternative orders simultaneously exist and can be employed intentionally.

Thirdly, Aust's distinction between agreements which are legally binding and agreements which are not so but may give rise to legal consequences by virtue of good faith or estoppel is ultimately based on a misconception of these notions. In Aust's view, it would appear that it is possible for states to enter into a non-legal agreement in, say, 1993, and start to rely on it, in good faith, only two years later. This, however, is not the case.

In the normal course of events, states will start to rely on their partner's commitments, be they legal or otherwise, as soon as the commitments have been created, or from the moment the commitments are supposed to enter into force or become effective. Otherwise, every rationale behind implicit or explicit entry into force clauses, which can also be found in purportedly non-legally binding documents[77], would simply evaporate. It would be senseless to provide that an agreement will come into effect on day x, yet claim that nothing is supposed to happen on day x since reliance on adherence will only start later.

The situation may be different when it concerns unilateral statements and behaviour. Here, there may be a time gap between the statements or behaviour, if only for the purpose of ascertaining the exact factual and legal nature of the unilateral activities. It is presumably for this reason that the ICJ, in the *Nuclear tests* cases, insisted that the series of French statements "constitute a whole", even if the Court conveniently ignored a contrary statement made by the French prime minister.[78]

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[77] See for further references ch. III above.

[78] See *Nuclear tests*, [1974] ICJ Rep. 253, at 269, para. 49. Incidentally, Aust relied rather heavily on those *Nuclear tests* cases as well as the *Temple of Preah Vihear* case, which involved unilateral behaviour. Surprisingly, the most pertinent *Aegean Sea Continental Shelf* case was completely ignored.

With agreements, however, such a time gap would serve no purpose.[79] If the agreement is well drafted, both its factual and legal nature (if any) will be clear from the outset. If, on the other hand, the terms of the agreement are indeterminate to the point of the parties not knowing what they agreed upon, allowing for time gaps will be of no help. What is needed in such a case is a new agreement or at least an authoritative interpretation.

A final problem with the legally binding/legal consequences distinction is its less than firm empirical foundations. Or rather, whatever legal consequences flow from agreements, as soon as there are legal consequences, the origins of the agreement (whether it started out as legally binding or as non-legally binding) have become irrelevant. If, as Aust argues, good faith and estoppel can work so as to attach legal consequences to non-legally binding agreements, what is the point of making the distinction? The net effect (i.e. legal consequences) will invariably be the same, unless one presumes that no reliance on performance takes place. If so, then good faith does not enter the picture, and, more importantly, the agreement might just as well not have been concluded.[80]

Aust's thesis suffers from some serious defects, most notably perhaps its lack of internal coherence. Even if one were to accept the premise that non-legally binding agreements may be concluded, to subsequently claim that such agreements may nevertheless have legal consequences is to shoot oneself in the foot. The thesis, as formulated by Aust, clearly suffers from a lack of theoretical foundations, which is all the more surprising since the few theoretical remarks which have been made concerning non-legally binding agreements were already available, in the form of some of the writings of Michel Virally.

In an article published in 1980, Virally devoted some attention to the notion of "accord" in public international law[81], and claimed that any agreement which might be reached among states could be submitted to several competing normative orders. For simplicity's sake, he only mentioned three of them: law, politics, and morality. He did warn, however, that several of

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[79] Aust himself seems to concede as much when he argues that states would be estopped to deny the binding nature of terms of a dispute settlement between them, even if laid down in an informal instrument. O.c. note 61, at 811.

[80] Aust's remark that "[e]xcessive use of informal agreements can sometimes lead to "retrieval problems"" (o.c. note 61, at 792) appears to suggest that indeed some of them might just as well never have been concluded at all.

[81] "Sur la notion d'accord", in Emmanuel Diez et. al. (eds.), *Festschrift für Rudolf Bindschedler* (Berne 1980), 159-172.

these could be utilized simultaneously, and that in practice it might sometimes be difficult to recognize which normative order had actually been employed.

As Virally himself immediately realized, an important question in this respect is the question why states would wish to conclude agreements which would not be legally binding, but instead be politically binding, or otherwise binding. His answer was less than satisfying: such a question was, with reference to the highly political character of international relations, treated simply as a bit naive. Given the character of international relations, it would only stand to reason that in such an environment politically binding agreements could be concluded.

Nevertheless, in his classic report to the Institut de Droit International on instruments devoid of legal force, Virally saw fit to somewhat expand on this earlier answer. While acknowledging that the category of political obligations was rather novel and still ill-defined, he claimed that states could enter into politically binding agreements because, after all, states are political entities. Whether a similar reasoning would explain the existence of morally binding agreements was, wisely perhaps, left unsaid.

Such are, to date, the theoretical foundations of the alleged existence of non-legally binding agreements, and their merits will receive further investigation in the next chapter. For the moment, however, it is of some importance to point out that Virally's thesis, for all its defects, at least has the merit of consistency.

From positing the existence of a separate political normative order, Virally drew the obvious consequence that if such order exists, it must have some (political) rules operating within its proper sphere. Hence, politically binding agreements could be unilaterally denounced under a political (i.e. more lenient) version of the *rebus sic stantibus* rule[82], and could even be subjected to a political counterpart of the notion of good faith.[83]

In short, for Virally, the political normative order (and, one may presume, morality as well), would function essentially the same as the international legal order. The various normative orders would each have their own rules concerning conclusion of agreements, the effects of agreements, the propriety of suspension, withdrawal or termination, and perhaps even rules laying down the conditions of validity of politically binding or morally binding agreements.

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[82] Here he followed Richard R. Baxter, "International law in "her infinite variety"", 29 *ICLQ* (1980), 549-566.

[83] Michel Virally, o.c. note 72, esp. at 229.

The main difference then between those orders and the international legal order would consist of the greater degree of flexibility offered by the former. While it should never be too easy to terminate agreements, the political rules (and presumably the moral rules as well) pertaining to termination would be less rigid than the legal rules.

The ties that bind

In the context of domestic legal systems, claims that certain agreements are politically or morally but not legally binding, are quite rare. Most domestic lawyers (and laymen alike) would accept without thinking twice the thesis that, e.g., a document pertaining to the purchase of a house, is a legally binding document. They would equally readily accept the thesis that cooperation agreements between companies, if not invalid for anti-trust reasons, would be legally binding, as would even be pre-contractual agreements such as letters of intent.

The morally binding nature of certain agreements may theoretically be well accepted, but this acceptance is usually reserved for agreements between friends or family members. Even here, however, the courts have made inroads, sometimes according legal (instead of merely moral) effects to promises made between relatives, both in the US[84] and in Great Britain.[85]

Similarly, the thesis that agreements between political parties on the main outlines of planned governmental policy can be politically binding but not legally binding (the so-called coalition agreements), has been severely damaged, at least in some countries, by judicial decisions that regardless of the exact intentions of their authors, such agreements may not conflict with existing law.[86] These decisions, of course, presuppose the superiority of law (a point to which we will return in the next chapter), and might even be taken to mean that there is no escaping the law.

In the context of domestic legal systems, the legally binding nature of most agreements is generally accepted as a matter of presumption. Limited classes of agreements (e.g., those between friends or family members pertai-

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[84] Cf. Andrew Kull, "Reconsidering gratuitous promises", 21 *Journal of Legal Studies* (1992), 39-65.

[85] Cf. *Jones v. Padavatton*, Decision of 29 November 1968, Court of Appeal, Civil Division, in 2 *All ER* (1969), 616-625.

[86] See, e.g., the special issue of the *Israel Law Review*, vol. 26 (1992), devoted to such coalition agreements.

ning to social affairs) will presumptively be deemed non-legally binding. In both cases, however, the presumption can be rebutted.

By contrast, in international law the legally binding nature of agreements is, in recent years, presumed only by a few authors. Of course, this presumption has only become necessary due to the advent of the thesis that agreements can also be intentionally made politically or morally binding. Earlier writers must have presumed agreements to be legally binding without giving the matter much thought, simply because the possibility of there being viable alternatives had never entered their minds.[87] Among the first to explicate the thesis that agreements are legally binding, at least as a presumption, was F.A. Mann.[88]

Mann, in what was partly a reaction against Fawcett's seminal article[89], based his conclusion mainly on practical considerations. Not only did he reject Fawcett's interpretation of the legal nature of contracts generally[90], he also claimed, more importantly, that ultimately Fawcett's approach would be nonsensical, in that even if Fawcett was correct on theoretical grounds, his presumption of the non-legally binding nature of international agreements would in practice "always and automatically be rebutted."[91]

A more theoretical explanation was put forward by Paul Reuter.[92] In Reuter's view, agreements are dual phenomena. On the one hand, the conclusion of an agreement is a legal act, consisting of the meeting of "volontés humaines". At the same time, however, the conclusion of an agreement gives rise to a legal norm. Although the two may be analytically distinguished[93], in practice they are really inseparable. Without the act, there can

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[87] See also above, ch. I.

[88] F.A. Mann, "Reflections on a commercial law of nations", 33 *BYIL* (1957), 20-51, esp. 30-31.

[89] See above, texts accompanying footnotes 43 ff.

[90] Fawcett had maintained that contracts generally are only considered legally binding if legally enforceable, a conclusion based on not very convincing readings of a handful of English cases and some continental provisions. For a more detailed critique, see my "Informal agreements in international law: towards a theoretical framework", o.c. note 1.

[91] Mann, o.c. note 88, at 31. Similarly, albeit perhaps less explicit, Fritz Münch, o.c. note 56, esp. at 9.

[92] See, e.g., Paul Reuter, *Introduction to the law of treaties* (London 1989, transl. J. Mico & P. Haggenmacher); "Le traité international, acte et norme", 32 *Archives de Philosophie du Droit* (1987), 111-117; "The operative and normative aspect of treaties", 20 *Israel Law Review* (1985), 123-136.

[93] The utility thereof, dixit Reuter, lies in the fact that some aspects of the law of treaties are solely concerned with the act, while others are solely concerned with the norm. Thus, to

be no agreement; and equally, without the norm, there can be no agreement either: "l'acte ne serait pas s'il n'engendrait pas une norme, la norme tomberait dans le néant si elle n'était pas le fruit d'un acte."[94] Hence, agreements should neither be viewed solely as acts nor solely as norms. States which conclude an agreement that does not give rise to a norm (or various norms, of course), cannot properly be said to have concluded an agreement. The creation of norms, on the other hand, is by definition the result of legal acts. It follows that whenever states conclude an agreement, the agreement must be deemed legally binding.[95]

Concluding remarks

This writer is, by and large, in agreement with the views endorsed by Mann, Reuter, and others, at least as far as their conclusions are concerned. Nevertheless, their reasoning is not immune from criticism. Both Mann's and Reuter's views are vulnerable from a subjectivist conception which stresses intent. It can hardly be maintained, so critics would say, that treaties are legally binding if that is contrary to their authors' intentions. If states intend to become only politically bound, how can F.A. Mann and Paul Reuter claim that those states are legally bound nevertheless?[96]

Moreover, while Mann's practical conception is difficult to counter by means of theoretical arguments, Reuter's view is open for such criticsm. Reuter's view is based on the premise that an agreement is a legal act to begin with, and from there it would follow that agreements undeniably give rise to legal norm. Yet, that is precisely the question at issue: is an agreement

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view treaties solely as legal acts tends to render substantive requirements (*jus cogens*, e.g.) incomprehensible, and *vice versa*.

[94] Paul Reuter, *Introduction au droit des traités* (Genève 1985, 2d. ed.), at 28.

[95] Although Reuter's approach has some roots in Kelsen's legal thoughts (compare, e.g., Hans Kelsen, *Introduction to the problems of legal theory* (Oxford 1992, transl. B.L. Paulson & S.L. Paulson)), the most recent elaboration to date of the underlying theory is Jean-Paul Jacqué, "Acte et norme en droit international public", 227 *RdC* (1991/II), 357-417. Note however that Jacqué appears to accept at least the theoretical possiblity of there being non-legally binding agreements, which bears witness to (as Jacqué acknowledged) the immaturity of this particular theory.

[96] See on this point Martti Koskenniemi, "Theory: implications for the practitioner", in Philip Allott et. al., *Theory and international law: an introduction* (London 1991), 3-45, esp. at 20.

a legal act? While we are inclined to agree with Reuter, it is imperative to show why an agreement must, *ex hypothesi*, be a legal act.

In some of the previous chapters, it was already indicated that the importance of intent, when it comes to the creation of agreements, should not be overestimated; the next chapter will demonstrate that there are no meaningful alternatives to being legally bound. If states wish to become bound, they have no choice but to become legally bound.

CHAPTER V

ON THE CO-EXISTENCE OF NORMATIVE ORDERS

Introduction

In their various guises, the theses according to which agreements can be binding in some normative order other than law face a series of problems. Five such problems may be distinguished, two of them practical, two of them methodological, and one of a principled nature.

The first practical legal problem is that if such distinct normative orders were to exist, there would, logically speaking, also have to be conflict or collision rules in order to regulate relations between the various normative orders.

Secondly, again on the presumption that various orders co-exist, practice would reveal something of a democratic deficit. Parliamentary involvement in foreign affairs usually does not extend to the conclusion of politically or morally binding agreements, but is instead limited to the conclusion of legally binding agreements. Yet, if political or moral commitments exercise a binding force similar to that of legal commitments, albeit within different normative orders, it follows that specific parliamentary powers are wittingly or unwittingly being eroded.

Furthermore, the various theses concerning politically or morally binding agreements meet with two methodological objections. Firstly, such theses typically neglect judicial decisions. They would obviously gain in persuasiveness if they were supported by judicial dicta, but such is, as chapters VI and VII will demonstrate, far from being the case. Secondly, while they claim to be based on state practice, it is submitted that state practice offers but meagre support and, more importantly, that the conception of state practice underlying the theses is grossly misguided.[1]

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[1] Although Hannah Arendt's observation that "it is in the nature of academic quarrels that methodological problems are likely to overshadow more fundamental issues" may hold true, in the case at hand it is probably more correct to state that the methodological problems reflect the more fundamental issues. Either way, such would be a sad comment on the theoretical state of the art of international law. Cf. Hannah Arendt, *Between past*

The most fundamental problem, however, is the fifth. The theses pursuant to which states may intentionally create politically or morally binding agreements rest on two presumptions. First, such theses presume the existence of politics and morality as normative orders, independent from law; and, secondly, they presume that those orders can be intentionally employed.[2] These presumptions do not completely survive closer scrutiny, as will be demonstrated below. First, however, we will deal with some of the other problems facing the theses.

State practice: the problem of identification

Several authors dealing with non-legally binding agreements appear to have (inadvertently perhaps) recognized that the distinction between non-legally binding agreements and legally binding agreements is at times rather fine, so fine, indeed, as to dissolve. Thus, Aust's reference to Molière's *bourgeois gentilhomme*, who discovered he was speaking prose all along while he thought he was speaking poetry, seems to suggest that in the end non-legally binding agreements may turn out to have been legally binding agreements all along. Nevertheless, he claims that it would be "more productive"[3] to investigate the legal consequences arising from non-legally binding agreements, apparently on the premise that these, after all, occur in practice, and therefore cannot be easily dismissed.

Similarly, Wolfgang Heusel notes that whatever considerations may be put forward by scholars, state practice clearly shows the regular conclusion of non-legally binding agreements. One cannot just simply deny such extensive state practice and it follows, in his view, that at the very least the 'regular' concept of treaty does not have customary law status.[4]

Views such as these are mistaken on two counts. First, contrary to what is seemingly a popular opinion, it is not all clear that there is much state practice to begin with. And second, even if state practice were extensive, it

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and future (Harmondsworth 1977), at 53.

[2] Compare, e.g., Wolfgang Heusel, *"Weiches" Völkerrecht* (Baden Baden 1991), claiming that the theoretical and practical distinction between legally binding and politically or morally binding agreements is a generally recognized postulate. At 46.

[3] Anthony Aust, "The theory and practice of informal international instruments", 35 *ICLQ* (1986), 787-812, at 807.

[4] Heusel, o.c. note 2, at 90.

remains to be seen what the exact import of this state practice would be.

The ascertainment of state practice is - like beauty - to a large extent in the eye of the beholder. It is a truism to say that actions may often be explained in more than one way, and it similarly goes without saying that words or texts may lend themselves to varying different interpretations. The question then becomes, of course, how to assess the various acts or words; how to give meaning to them.[5]

Excursus: the Atlantic Charter

Many of the examples cited as text-book examples of non-legally binding agreements are, upon closer scrutiny, not necessarily as clear-cut as is sometimes posited. The Atlantic Charter[6], e.g., according to many observers, is a clear example of an agreement which is either morally binding or politically binding (or both), but is not often regarded as being legally binding.

The assertion that the Atlantic Charter is not legally binding finds expression in the pertinent literature, conveniently summarized by Heusel.[7] Firstly, the preamble of the Charter mentions that it concerns merely certain common principles of the national policies of the US and the UK. Secondly, the Charter was allegedly not signed, or, alternatively, it was signed without reference to Churchill's and Roosevelt's positions. Thirdly, the Charter, if legally binding, was concluded in violation of the US constitution, and finally, its legislative history clearly indicates a conspicuous lack of intent to be legally bound.

These arguments are all of dubious value. In an important sense, all agreements, legally binding or otherwise, are expressions of common national policies.[8] Moreover, even if Churchill and Roosevelt were merely using the Charter to make known to the world their separate national policy principles, such a use would not render the Charter non-legally binding. At the very

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[5] See on this point generally Friedrich Kratochwil, *Rules, norms, and decisions* (Cambridge 1989), at 235.

[6] Text in 35 *American Journal of International Law* (1941, supplement), 191-192. See also ch. III above.

[7] O.c. note 2, at 107.

[8] As is acknowledged in the title of McDougal's & Lans' seminal article, "Treaties and congressional-executive or presidential agreements: interchangeable instruments of national policy", in Myres S. McDougal & Associates, *Studies in world public order* (New Haven 1960), 404-717.

least, an investigation would be required to determine whether the Charter could be classified as a bilateral declaration, which could, as such, be legally binding, in the same way as unilateral declarations may be legally binding.[9]

The argument that the document was not signed presumes requirements of form which are notably absent in present-day international law, and may have been absent in 1941 as well. As pointed out in chapter III above, neither the presence nor the absence of signature, on their own, provide sufficient indication of intent. The alternative argument, according to which the Charter was signed, but was signed without reference to Churchill's and Roosevelt's positions[10], is equally problematic. Not only does, as noted, signature alone provide insufficient evidence in either direction, it also cannot be denied that Churchill and Roosevelt were *ex officio* empowered to enter into legally binding agreements.[11]

Moreover, as a matter of principle, the argument made by some that this lack of reference precludes the agreement from being legally binding would also prevent it from being considered morally binding or politically binding. If neither Roosevelt nor Churchill was acting as state representative, it follows that the state could simply not become bound at all; not legally, but also not morally or politically.

The only remaining possibility then would be that Roosevelt and Churchill entered into a gentlemen's agreement, binding only themselves individually on a moral basis.[12] This interpretation is belied by the fact that at least Churchill was ostensibly representing His Majesty's Government[13], as well as the reference in the first provision to their respective states.[14]

The claim that, if legally binding, the Atlantic Charter was concluded in violation of US domestic provisions, suffers from two difficulties. For one

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[9] Instruments designated as joint declarations have been held to create legal rights and obligations for the parties. See in a similar vein (on this point), Yves van der Mensbrugghe, "Legal status of international North Sea Conference declarations", in David Freestone & Ton IJlstra (eds.), *The North Sea: perspectives on regional environmental co-operation* (London 1990), 15-22, at 15.

[10] The argument is mistaken on the facts.

[11] In 1933, the PCIJ argued the Foreign Ministers can bind their states *ex officio*. It would seem to follow that heads of state and heads of government would be equally empowered. *Legal status of Eastern Greenland*, [1933] Publ. PCIJ, series A/B, no. 53. This has later found recognition in article 7 of the 1969 Vienna Convention on the Law of Treaties.

[12] Indeed, this explanation has been offered by some authors. See ch. I, above.

[13] Cf. the preamble to the Charter.

[14] "First, their countries seek no aggrandizement, territorial or other ..."

thing, although article 2, section 2 of the Constitution, provides that treaties need the advice and consent of a two thirds majority in the US Senate, this provision is notorious for failing to state the conditions under which it must be employed.[15] It is, therefore, by no means clear that the Atlantic Charter would, as a constitutional matter, have had to have been submitted for senatorial approval.[16] Secondly, it is by no means clear that had the Atlantic Charter been intended to be legally binding, it would have been invalid due to, in present-day terminology, a manifest violation of a national rule of fundamental importance.[17] Finally, the legislative history of the Charter, as recalled by Churchill himself[18], is by no means unequivocal. It would seem that both Churchill and Roosevelt themselves were quite willing to make a blueprint for a new world order. They realized, however, that they could neither, due to the *pacta tertiis* principle, lay down obligations for third states nor, *inter se*, change their existing obligations vis-à-vis third states. A close reading of the text of the Charter reveals that all those provisions which involve third states are formulated rather loosely, as aspirations rather than as obligations. There are, however, two main exceptions: the first provision, and the first part of the third.

Under the first provision, Churchill and Roosevelt agreed that their states would "seek no aggrandizement"; and, under the third, they agreed to "respect" something akin to a right of self-determination. Neither involves the creation of obligations for third parties, and both are framed considerably "harder" than the remaining provisions. Churchill's recollections suggest that the actual choice of words was the result of a careful and elaborate drafting process, which in turn suggests that Churchill and Roosevelt intended, to the fullest extent possible, to become bound by the Charter, or at least were highly aware of the possibility that their agreement might not be devoid of legal consequences.

A further indication of the troublesome nature of the prevailing interpretation is the fact that the Atlantic Charter was submitted (by the UK) for registration with the League of Nations.[19] Such registration can only be

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[15] See, e.g., Maria Frankowska, "The Vienna Convention on the Law of Treaties before United States courts", 28 *Va. JIL* (1988), 281-391.

[16] That such submission would have been wise with an eye to the political legitimacy of the Charter may well be true, but is an entirely different matter altogether.

[17] See presently article 46 of the 1969 Vienna Convention.

[18] See Winston Churchill, *The Second World War. Vol. III: The grand alliance* (London 1950), esp. 385-400.

[19] The UK submitted it in conjunction with the 1942 Declaration by United Nations as a

interpreted as evidence that at least one of the parties regarded the agreement as being legally binding. Hence, as far as state practice goes, the example of the Atlantic Charter is, at best, highly ambiguous.

Excursus: the Helsinki Final Act

Similar considerations apply to that other textbook example of a non-legally binding document, the Helsinki Final Act. The purportedly non-legally binding character of the Helsinki Final Act is sometimes derived from repeated statements in the text itself that it concerns a document of "political significance". Yet it is clear that such statements are of little probative value and merely state the obvious. The conclusion that a document is not legally binding cannot be derived from a statement that the document is politically significant.

The Helsinki Final Act is usually also denied legal force because it is not eligible for registration under article 102 of the United Nations Charter. Yet, that fact alone does not necessarily lead to the conclusion that it was intended not to be legally binding. There is at least the hypothetical possibility that registration was deemed undesirable for other reasons than an intent not to be legally bound, such as a reluctance to have any of the parties ever invoke it before an organ of the United Nations.[20]

Collateral evidence is usually found in some of the declarations issued at the time of conclusion of the Final Act by predominantly western heads of state and government, to the effect that the Act is not a legally binding agreement.[21] Yet, some other delegations (predominantly, but not exclusively, eastern European) claimed the opposite, and some delegates claimed off the record that the Final Act amounted to taking on no obligations at all.[22] At best, then, we are left with conflicting statements as to intent.[23]

"related document". The signatories to this Declaration explicitly subscribed to the provisions of the Atlantic Charter. The whole package was published in 204 *LNTS* 381.

[20] If so, the Final Act's non-eligibility would ultimately be without much success, since there is nothing in the Charter which prohibits the UN organs themselves to refer to unregistered agreements. Thus, the ICJ freely referred to the Final Act in the *Nicaragua* case, holding it to confirm *opinio juris* concerning the prohibition of force. [1986] ICJ Rep. 14, at 100, para. 189.

[21] See, e.g., the references in Pieter van Dijk, "The Helsinki Final Act - Basis for a pan-European system?", 11 *NYIL* (1980), 97-124.

[22] As noted by Van Dijk, ibid. He dismisses the latter statements as being evidence of either

The point of all this is to illustrate that state practice concerning conclusion of non-legally binding agreements is far from unequivocal. Neither the Atlantic Charter nor the Helsinki Final Act clearly specify that they are legally non-binding, let alone that they are to be considered politically binding or morally binding. Any conclusions to that effect are, by necessity, based upon inferences, some even less convincing than others.

Indeed, there are only a few known documents that are relatively clear-cut in this respect. Perhaps the most convincing examples are the Document of the Stockholm Conference on Confidence- and Security-Building Measures and Disarmament in Europe[24], concluded in 1986, which provides in article 101 that "[t]he measures adopted in this document are politically binding ...", and, the 1992 UNCED declaration on forests, which proclaims its own non-legally binding nature.[25]

Other examples often mentioned are the so-called COST agreements, which are agreements on scientific and technological cooperation within Europe.[26] Some of the documents emanating from this framework are considered legally non-binding, but this has not always been the case. During the 1970s, several of the participating states (most notably Austria and the Netherlands) appeared convinced that COST's joint policy declarations amounted to legally binding agreements. As a result, from 1980 onwards it has been explicitly laid down that the COST-declarations are of a merely recommendatory character, a stand which has been accepted by Austria and Holland.[27] However, if merely recommendatory, it is difficult to see why

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an acid sense of humour or of a disproportionate cynicsm. Either way, he refuses to take the statements seriously, something which seems methodologically hardly defensible.

[23] Note also that whatever the intentions at the time of conclusion may have been, the Final Act is quite often treated simply as a legally binding document. Thus, Warbrick notes that the British government has sometimes based representations to other states concerning human rights matters on the Helsinki Final Act. Cf. Colin Warbrick, "The theory of international law: is there an English contribution?", in Philip Allott et. al., *Theory and international law: an introduction* (London 1991), 47-71, at 65. Compare also Margaret Thatcher, *The Downing Street years* (London 1993), at 478 and 794.

[24] Text in 26 *ILM* (1987), 191.

[25] It carries the breathtaking title "Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests". Text in 31 *ILM* (1992), 882.

[26] The acronym stands for Coopération Européenne dans la domaine de la recherche Scientifique et Technique.

[27] See for more details Heusel, o.c. note 2, at 189 ff. Also Clemens Jabloner & Wolf Okresek, "Theoretische und praktische Anmerkungen zu Phänomenen des "soft law'", 34

they would be binding at all[28], and moreover, it is difficult to understand how an elaborate organizational framework can be built on mere recommendations.[29]

Furthermore, some state practice evidently runs counter to the claim that political commitments are in any sense meaningful. Thus, the member states of the Council of Europe agreed, in 1993, to work towards transforming their existing political commitments concerning the protection of minorities in Europe into legal commitments. This stand would clearly have been superfluous if those political commitments themselves had any meaning beyond the purely rhetorical.[30] After all, given the paucity of enforcement mechanisms in international law generally (and the Council of Europe itself provides no exception), there is little reason to presume that political commitments had to be transformed into legal commitments because of an alleged greater effectiveness of legal commitments.[31]

Other counter-examples may include such phenomena as the 1987 European Convention for the protection of pet animals[32], which recognizes in the preamble "that man has a moral obligation to respect all living creatures ...". Apparently, however, such a moral obligation is in itself insufficient, in view of the fact that the authors of the Convention felt the need to provide it with legal teeth.[33]

Other agreements clearly intended to be legally binding refer in their preambles to existing: "responsibilities"[34], rights"[35], or, "obligations".[36]

OZöRV (1983), 217-241.

[28] Heusel e.g., o.c. note 2, treats them as politically binding.

[29] A similar consideration applies, incidentally, to the Helsinki Final Act, which provided for something of a regular framework for negotiations among participating states. On 6 December 1994, the former Conference on Security and Cooperation in Europe has even been turned into an organization. Text in 34 *ILM* (1995), 764.

[30] Reproduced in *Europe Documents*, no. 1855, 15 October 1993, Appendix II.

[31] The ensuing Convention for the protection of national minorities was concluded on 1 February, 1995, in Strasbourg. Text in 34 *ILM* (1995), 351.

[32] Text in Iwona Rummel-Bulska & Seth Ofaso (eds.), *Selected multilateral treaties in the field of the environment*, vol. II (Cambridge 1991), 403-408.

[33] A similar consideration applies to the 1948 Genocide convention, giving legal form to what was, in the view of the ICJ in its 1951 *Genocide* opinion, already a moral obligation. See for a more elaborate discussion below.

[34] See, e.g., the 1985 Convention for the protection, management and development of the marine and coastal environment of the eastern African region, as well as the 1986 Convention for the protection of the natural resources and environment of the South Pacific region. Both are reproduced in Rummel-Bulska & Ofaso, o.c. note 32, at 324-330 and

Obviously, these rights, obligations and responbilities are, at the time of conclusion of the treaty in question, not yet of a legal nature; if they were of a legal nature, the treaties themselves would be superfluous.[37] On the other hand, if these rights, reponsibilities and obligations are of a moral or political nature, it follows that such moral or political rights, responsibilities and obligations are not overly effective. Again: if they were effective, there would be little reason to cast the same rights, responsibilities and obligations in treaty-form.

State practice by itself, therefore, does not reveal the regular conclusion of politically or morally binding agreements. Most of the proferred instances are based on inferences which may themselves be debatable, and several counter-examples also present themselves.

State practice and legal concepts

Even if there were abundant unequivocal state practice illustrating the regular conclusion of non-legally binding agreements, it is by no means self-evident what the consequences of such state practice would be. Implicit in the arguments made by Aust and Heusel, to the effect that one has to reckon with state practice, is the idea that in one way or another, if states behave in a certain manner, that manner must be legally consequential. Without putting it in so many words, the notion of state practice as employed by Aust and Heusel is largely or exclusively modelled on the notion of state practice as it is generally used when it comes to the formation of customary law. This notion implies that there is, at the very least, a usage of concluding non-

372-380 respectively.

[35] The preambles to the two 1966 human rights covenants refer to the "equal and inalienable rights of all the members of the human family". Similarly, the 1953 Convention on the political rights of women states in the preamble a right to political participation.

[36] See, e.g., the preamble to the 1985 South Pacific nuclear free zone treaty: "all countries have an obligation to make every effort to achieve the goal of eliminating nuclear weapons". Text in Rummel-Bulska & Ofaso, o.c. note 32, at 352-358.

[37] Unless of course these treaties could be considered as elaborations of earlier treaties. This is however hardly the case with the examples mentioned. At best, one could argue that the human rights covenants elaborate some (rather general) provisions contained in the UN Charter as well as the (non-legal) Universal Declaration of Human Rights. On the other hand, the present writer is not aware of any treaty which would create a universal obligation to eliminate nuclear weapons.

legally binding agreements which may even, if accompanied by *opinio juris*, crystallize into a rule of customary international law.

This argument, however, falters on several counts. First, there is the question to what extent legal concepts are susceptible to deliberate change. Writers such as Aust, Heusel and many others are apparently convinced that what is purportedly a non-legal phenomenon requires a legal explanation, and perhaps even a legal justification. International law, in this view, allows the conclusion of non-legally binding agreements.[38] Apart from the fact that this view posits the legal order as superior to alternative orders without any substantiation whatsoever, it also means that somehow non-legally binding agreements are legal phenomena, since they are authorized by international law.

This, however, raises the question to what extent (if at all) the existence of non-legally binding agreements can actually be legally justified. As Thirlway has argued in a slightly different context[39], some of international law's rules relate not so much to conduct as to concepts.[40] Thus, Thirlway notes that international law possesses some criteria for statehood, and the concept of statehood has some typical characteristics. For example, a state cannot do away with all its territory and still remain a state; similarly, a state cannot commit an internationally wrongful act vis-à-vis another state and then reach the agreement with that other state that its behaviour did not constitute an internationally wrongful act. Whereas rules of conduct may be altered by agreement, legal concepts such as 'state' or 'internationally wrongful act' are, if not entirely immune to change, relatively resistant to such deliberate change. In the same vein, it is doubtful whether states can simply conclude treaties and nevertheless agree that those treaties are not treaties, but something else.[41]

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[38] Best expressed in Eisemann's "qui peut le plus peut le moins". See Pierre Michel Eisemann, "Le *gentlemen's agreement* comme source du droit international", 106 *Journal de Droit International* (1979), 326-348, at 344.

[39] See H.W.A. Thirlway, *International customary law and codification* (Leyden 1972), at 28-30.

[40] A similar kind of reasoning (albeit of more limited application, perhaps), explicitly based on Hegel, is displayed by Erik Ringmar, "The relevance of international law: a Hegelian interpretation of a peculiar seventeenth-century preoccupation", 21 *Review of International Studies* (1995), 87-103: "As Hegel argued, the law is not only a tool for telling right from wrong, but also a tool for determining the class of subjects to whom the law itself applies." At 92 (emphasis omitted).

[41] In a similar vein, A.V. Lowe notes that concepts such as sovereignty or rules such as *pacta sunt servanda* are "logically inhering in the concept of legal system", which

For such purposes, the state practice argument in itself is insufficient. One cannot change the nature of a thing by simply giving it another name.[42] One would also have to change its characteristics, and even then it is unclear at which point exactly the nature of the thing has decisively changed.[43] And, as we have seen in the previous chapters, the characteristics of politically or morally binding agreements are, by any account[44], quite similar to those of legally binding agreements. They are drafted in similar ways, concluded in similar ways, complied with or violated in similar ways, and often even terminated in similar ways.

Hence, the state practice argument as implicit in the work of, e.g., Aust and Heusel fails to convince on two counts. Not only is the relevant state practice, at its very best, ambiguous, but moreover, and more importantly, the concept of treaty cannot be circumvented by simply claiming that what looks like a treaty, is drafted like a treaty, and has consequences similar to those associated with treaties is, appearances notwithstanding, something other than a treaty.

Non-legally binding agreements and democracy

In many democracies, an important component of the treaty-making power lies with parliament. Article 2, section 2, of the US Constitution provides that the Senate, by a two-thirds majority, has the final say regarding the conclusion of treaties. Similarly, article 91 of the Dutch Constitution specifies

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suggests that they are relatively immune from deliberate change. By analogy, the same would apply to the concept of treaty. Cf. A.V. Lowe, "Do general rules of international law exist?", 9 *Review of International Studies* (1983), 207-213, esp. at 211.

[42] Cf. Lord Templeman, as quoted in Aust, o.c. note 3, at 805: "The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer ... insists that he intended to make and has made a spade."

[43] Compare the familiar philosophical problem: how many Chevrolet parts, replacing corresponding parts in a Ford automobile, would it take to transform the vehicle from a Ford into a Chevrolet? As mentioned in Oran Young, "Regime dynamics: the rise and fall of international regimes", in Stephen D. Krasner (ed.), *International regimes* (Ithaca 1983), 93-113, at 107, note 57.

[44] Even Virally conceded as much when noting that often it may be difficult to ascertain in which order an agreement is supposedly binding. See his "Sur la notion d'accord", in Emmanuel Diez et. al. (eds.), *Festschrift für Rudolf Bindschedler* (Berne 1980), 159-172.

that, as a general rule, all treaties shall be submitted for parliamentary approval.[45]

In other words, the instrument of the treaty-making power enables parliaments to exercise some degree of control over foreign affairs, even if in practice this control may often be limited to either accepting or rejecting *faits accomplis*.[46]

However, it has often been noted that parliamentary contol over foreign affairs is, or must be, different in kind from parliamentary control over domestic affairs. As Dutch author Struycken put it in 1918, domestic societies are united by bonds of solidarity, whereas international society (if the term society is appropriate at all) is made up of egotistical actors, simply looking after their own interests. It follows that in foreign affairs states must first and foremost protect those interests, and this in turn may imply that parliamentary control be less extensive than when domestic matters are involved.[47]

The argument has become something of a truism; many authors accept the proposition that, in foreign affairs, governments need to have their hands free in order to be able to respond quickly and flexibly to changing circumstances. A duty to consult parliament on the wisdom or desirability of every single contemplated international action would eventually be detrimental to the interests of the state.[48]

Furthermore, it is sometimes held that the protection of those interests is best left to experts, skilled diplomatists and the foreign policy elite. They know what is best for the country; they can see long-term advantages in situations which may at first sight look detrimental; and, they are less prone than

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[45] General works on the topic include Hans Blix, *Treaty-making power* (London 1960); Luzius Wildhaber, *Treaty-making power and constitution: an international and comparative study* (Basel 1971), and Louis Henkin, *Constitutionalism, democracy and foreign affairs* (New York 1990). The history of the pertinent Dutch provisions is recorded with painstaking detail in J.G. Brouwer, *Verdragsrecht in Nederland* (Zwolle 1992).

[46] For an argument that until the recent enactment of the new law on approval of treaties the Dutch situation was like this, see Leonard F.M. Besselink, *Staatsrecht en buitenlands beleid* (Nijmegen 1995, 2d. ed.). One may wonder, however, whether the new law markedly improves the situation. Cf. Jan Klabbers, "The new Dutch law on approval of treaties", 44 *ICLQ* (1995), 629-643.

[47] A.A.H. Struycken, *Het bestuur der buitenlandsche betrekkingen: een staatsrechtelijk en politiek vraagstuk* (Arnhem 1918), esp. 25-41. To be sure, Struycken did advocate a gradually increasing parliamentary involvement in foreign affairs.

[48] See, e.g., Cees Flinterman, "Parlement en buitenlands beleid", in E.A. Alkema et. al., *Staatsrecht, buitenlandse betrekkingen en de internationale rechtsorde: Staatsrechtconferentie 1986* (Nijmegen 1987), 7-23.

ordinary members of parliament or the public at large to give in to sentiments rather than analyses.

Regardless of the merits of such arguments[49], the democratic theory underlying such arguments[50], and their consistency[51], it remains unclear why parliaments should have a partial say when it concerns the conclusion of legally binding agreements, but be denied such a say with respect to non-legally binding agreements. Why should a government be able to conclude a politically binding agreement without consulting parliament, whereas the same agreement, concluded by the same actors under the same circumstances and containing the same terms, if cast in legal form, would often require parliamentary approval?

In other words, if it is accepted that parliaments should exercise some control over foreign policy, then there appears to be no sound reason why this control should not extend to politically or morally binding agreements as well. After all, if these agreements are truly binding, i.e. impose constraints on states' freedom of action, then the same rationale, which underlies parliamentary control over foreign affairs, is applicable. Yet, as far as this writer is aware, there is not a single constitution in the world which explicitly provides for parliamentary approval of politically or morally binding agreements.

The argument is sometimes made that even if explicit provisions on the conclusion of politically or morally binding agreements are absent, their conclusion is nevertheless legally permitted by virtue of constitutional practice.[52] Although such practices may occur, the creation of constitutional

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[49] They are vigorously criticized by Miroslav Nincic, *Democracy and foreign policy: the fallacy of political realism* (New York 1992).

[50] Reportedly, the ancient Athenians saw fit not to attach any consequences to a possible distinction between foreign policy and domestic policy. See John Dunn, *Western political theory in the face of the future* (Cambridge 1993, 2d. ed.), at 17.

[51] The claim that foreign policy is different in kind from domestic policy has, if it was ever true to begin with, presumably been superseded by the emergence of global problems and concerns (human rights, the environment, trade, communications, et cetera). Moreover, attempts to circumvent parliamentary control also extend to issues which are not directly international in nature, as witness the emergence of phenomena such as legislation by delegation, pseudo-legislation, and government by contract. See, e.g., Jan Vis, "Commentaar op 'parlement en buitenlands beleid'", in E.A. Alkema et. al., o.c. note 48, 24-29. On government by contract in the Netherlands, see generally F.J. van Ommeren & H.J. de Ru (eds.), *Convenanten tussen overheid en maatschappelijke organisaties* (The Hague 1993).

[52] See, e.g., Benedetto Conforti, *International law and the role of domestic legal systems*

practices is not easily presumed. Constitutional provisions are usually characterized not only by their fundamental nature, but also by elaborate procedures for changing them. Usually, a more extensive parliamentary majority is needed to amend constitutional provisions than is the case with ordinary legislation. As a result, the presumption that a constitutional practice has arisen is not easily reached. This argument holds true, *a fortiori*, if the alleged constitutional practice is "*contra constitutionem*".[53]

It is also sometimes suggested that the absence of a formal right of approval notwithstanding, parliaments may at all times exercise control *ex post facto*. Thus, parliament could ask the responsible government minister for an explanation and perhaps even force him or her to resign over the conclusion of a non-legally binding agreement. Moreover, if parliament objects to such an agreement, the government could be forced to terminate the agreement in question as soon as possible.[54]

This argument shows that the theses concerning non-legally binding agreements are in a serious state of confusion; the argument eventually shoots itself in the foot. *Ex post facto* control is democratically unsatisfying, and forcing ministers to resign is an *ultimum remedium* which may politically not be very practicable. The more principled problem, however, resides in the reference to terminating the agreement as soon as possible.

If the agreement is not legally binding, it follows that it is not governed by international law. As a result, there can be no international legal obstacles to terminating it immediately. Unilaterally terminating such an agreement without respecting any period of notice could, on the theses' own terms, never result in a violation of international law.

The response may be put forward that even if there were no legal obstacles to the agreement's immediate termination, the agreement is politically or morally binding and therefore political or moral obstacles block its immediate termination. Such agreements are, after all, deemed no less binding than their legal counterparts, and they may, e.g., contain their own

(Dordrecht 1993), at 81, note 84. It is unclear whether Conforti, by calling it a constitutional practice, implies that as such the practice is not 'law'.

[53] Such argument is made, and rather cogently so, by Ulrich Rosengarten, *Der Begriff der völkerrechtlichen Verträge im Sinne des Art. 59 Abs. 2 Satz 1 Alt GG im Lichte moderner Entwicklungen des Völkerrechts* (Cologne 1994).

[54] This is the gist of comments made in parliament by (former) Dutch foreign minister Kooijmans during the debates on the new Dutch law on approval of treaties. See Proceedings of the Second Chamber, 6 October 1993, at 8473.

provisions on termination[55]. But, if this is the case, then most of the rationales allegedly underlying the appearance of non-legally binding agreements on the international scene vanish into thin air. If termination (by way of example) of non-legally binding agreements must take place under similar conditions as termination of legally binding agreements, then why conclude non-legally binding agreements in the first place? Most aspects of arguments relating to the necessity of speed and flexibility would dissipate; such concerns are, moreover, not necessarily precluded by using legally binding instruments.[56]

The most likely conclusion is that use of a non-legally binding agreement was influenced by domestic rather than international considerations, most notably perhaps the wish to circumvent parliament.[57] The longer termination of an undesirable non-legally binding agreement must wait, the longer parliament remains circumvented: it cannot control conclusion of the agreement, nor can it get rid of it when it so desires. The *ultimum remedium* of forcing the responsible government minister to resign still leaves the agreement itself untouched.

Rules of reference?

The separate existence of normative orders alongside international law to regulate international relations, implies that occasionally the norms laid down in the various normative orders may conflict with one another.

The point is perhaps best illustated by a somewhat extreme (hypothetical) example. Under article 53 of the Vienna Convention on the law of treaties, a treaty concluded in violation of a norm of *jus cogens* is void. Supposing the prohibition of official torture is such a peremptory norm of international law[58], would it nevertheless be possible for states to conclude a politically

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[55] As is recognized by e.g. Aust, o.c. note 3, at 791.

[56] See also chapter I above.

[57] Similar thoughts are raised by, *inter alia*, Christoph Schreuer, "Die innerstaatliche Anwendung von internationalem "soft law" aus rechtsvergleichender Sicht", 34 *OZöRV* (1983), 243-260, at 243, and Wilhelm Wengler, "Rechtsvertrag, Konsensus und Absichtserklärung im Völkerrecht", 31 *Juristenzeitung* (1976), 193-197, at 193.

[58] As has been decided by the US Court of Appeals for the 9th Circuit on several occasions; see e.g. *Siderman de Blake v. Republic of Argentina*, decision of 22 May 1992, reproduced in B.D. Reams, jr (ed), *American international law cases. Third Series, vol 24, 1992*

binding agreement allowing for torture in certain serious and narrowly specified circumstances?[59]

The few authors who have noted the problem have been unanimous in their verdict that such a circumvention of rules of *jus cogens* would not be permissible, presumably on the ground that such circumvention would nullify the concept of *jus cogens* altogether.[60] If it were possible to escape the workings of peremptory norms, it would simply follow that those peremptory norms are not, literally, peremptory.

Following the rationale of the *jus cogens* concept, such reasoning is undoubtedly correct. The implication, which is often overlooked, however, is that the argument presupposes that the international legal order is superior to any alternative orders which may exist to govern international relations. If politically binding agreements (or morally binding agreements, for that matter) cannot supersede legal rules, it must simply be because those legal rules, in one way or another, take precedence.

Yet this precedence of law itself begs three questions: (1), is there any positive evidence of the existence of a rule claiming that legal rules (or at least some legal rules) are superior to other rules; (2), if such a rule exists, does it specify exactly which legal rules are superior? Does it only hold true for *jus cogens* rules (if it holds true at all), or does it cover all conflicts between legal norms on the one hand and those stemming from other normative orders on the other; or, (3) should we rather think of those orders as being closed systems, not touching upon one another's realms?

The first question, concerning the existence of a 'meta-rule' regulating relations between normative orders, is difficult. It immediately encounters the rather principled question to what normative order this 'meta-rule' should

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(Dobbs Ferry 1994), 338; *In re Estate of Ferdinand E. Marcos human rights litigation*, decision of 21 October 1992, reproduced in 32 *ILM* (1993), 106.

[59] It has been argued that torture be allowed for purposes of the fight against terrorism. More generally, few states willingly violate *jus cogens* norms; however, they may find themselves doing so inadvertently. In this sense, *ad hoc* judge E. Lauterpacht suggested that the Security Council resolution imposing an arms embargo on Bosnia might inadvertently contribute to the genocide of Bosnians, and hence conflict with an alleged rule of *jus cogens*. Judge Lauterpacht, with brutal honesty, nevertheless shied away from the ultimate consequence, and ended his suggestion by conceding that it involved some debatable links, such as the prohibition of genocide being a peremptory norm. See Judge Lauterpacht's separate opinion to the ICJ decision in the *Application of the Genocide-convention case*, [1993] ICJ rep. 325, esp. at 439-441, paras. 98-104.

[60] See, e.g., Julio A. Barberis, "Le concept de "traité international" et ses limites", 30 *AFDI* (1984), 239-270.

itself belong. If there is a legal rule which provides for the superiority of international law, what weight would this rule carry in the alternative orders? The argument can, of course, also be reversed: why should law be bothered by an alleged politically binding supremacy rule? Or a morally binding supremacy rule?[61]

As far as we are aware, there is no clear evidence to substantiate any claims that there exists such a legal 'meta-rule'. Indeed, if any 'meta-rule' exists at all, it probably provides something to the effect that ultimately moral precepts take precedence over other precepts. One should not be forced to do that which is utterly immoral, regardless, in the final analysis, of what the law says one should do. Although it would be extremely difficult to find empirical evidence in support of such a rule, according superiority to morality does seem to be the position taken by most philosophers. All the more so if it is acknowledged that those legal rules remain, their immoral character notwithstanding, legally valid rules of law.[62]

Paradoxically, international lawyers do not hesitate to claim the superiority of *jus cogens* norms over other rules, even over non-legal rules. In other circles there appears to be a large consensus that, in the end, legal norms must bow to moral precepts. How are these positions to be reconciled? The only possible way, it is submitted, is by making the point that *jus cogens* norms do not override other norms because of their formal legal character, but that they do so because of their moral content. They are not superior because they are *jus*, but because they are *cogens*. They would be superior even without being cast in legal form.[63]

As will be shown below, the superiority of morality by no means implies that morally binding agreements must take precedence over legally binding

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[61] See also Terry Nardin, *Law, morality, and the relations of states* (Princeton 1983), esp. 250-254.

[62] This is, e.g., the position taken by H.L.A Hart, *The concept of law* (Oxford 1961), esp. 203-207. Nardin however (o.c. note 61, at 252) denies the existence of any "Olympian standpoint". In his view, arguments proclaiming the supremacy of a particular normative order are doomed to fail. Such arguments are "either false or tautological".

[63] The most-often mentioned candidates for *jus cogens* status are such norms as the prohibitions against the use of: force; genocide; and, torture. To the present writer's mind, no one has ever seriously suggested that a morally neutral, but nevertheless universally accepted norm such as the right of innocent passage in territorial waters be recognized as being of peremptory character. The closest, presumably, is the claim sometimes made that the norm *pacta sunt servanda* (with some obvious moral connotations) would qualify as *jus cogens*, but this claim would lead to absurd results. There is no point in rendering void treaties which themselves proclaim not to be treaties in the first place.

agreements. It remains to be seen whether morally binding agreements can be intentionally entered into, and whether anything laid down in a morally binding agreement can become a moral precept.

The observation that, in extreme cases, *jus cogens* norms may be superior because of their moral content brings us right back to where we started. We still do not know how to handle situations in which the provisions of a legally binding agreement conflict with those in agreements of competing normative orders. To say that moral precepts always should prevail makes little sense. Moral precepts are not always of such a compelling quality[64], and even if they were, it would still leave us in the dark as far as the relationship between legally binding and politically binding agreements is concerned.[65]

The problems involved in identifying a 'supremacy clause' to organize relations between the various normative orders are even more prominent when rules of an ordinary character (whether legal or otherwise) are concerned. Can states refer to a politically binding agreement to justify non-compliance with a legally binding agreement? Can non-legally binding agreements set aside provisions of domestic law?

There appears to be some agreement that with regard to this second question, legal norms are deemed superior to others. Dutch government circles have consistently held the view that non-legally binding agreements, which conflict with domestic law, should be terminated as soon as possible.[66]

This position, however, meets with at least one serious objection. Practically speaking, it may not be easy to rapidly terminate even a merely politically binding agreement. As noted earlier, a notice period may have to be respected and, at least in the Austian thesis concerning non-legally binding agreements, notions such as good faith and estoppel may in the meantime have become effective. As a result, any abrupt denunciation might be unlawful.[67] The consequence of this thesis, at least for some time (until the notice

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[64] See on this point generally George Klosko, "The moral force of political obligations", 84 *American Political Science Review* (1990), 1235-1250.

[65] Unless one, like Fawcett, equates the positions held by politically and morally binding agreements. See James Fawcett, "The legal character of international agreements", 30 *BYIL* (1953), 381-400.

[66] In this sense Cor Noë, in Nederlandse Vereninging voor Internationaal Recht, *Verslag van de Algemene Ledenvergadering 1989* (Deventer 1989), at 13; also, Minister Kooijmans in the Second Chamber (o.c. note 54). It should be noted that if the reverse were true, there would effectively be no parliamentary control left.

[67] The argument would be based on an analogy with article 27 of the Vienna Convention:

period has passed), is that the non-legally binding agreement must be deemed to override the domestic legal provision. This result, in turn, implies that any distinction between legally binding and non-legally binding simply evaporates. In its legal effects, a legally binding agreement can no longer be distinguished from a non-legally binding one, which renders dubious the enterprise of making that distinction in the first place. Indeed, under this scenario, non-legally binding agreements come close to treaties 'in simplified form', whose only distinction with 'regular' treaties lies in their being concluded with a certain disregard for formalities.

Moreover, this reasoning can not apply in the same way if it is not conceded that non-legally binding agreements may have legal effects. Without legal effects, the various normative orders will not intersect. Legal effects are necessary before legal notions devised to deal with situations in which various legal norms collide, such as the *lex specialis* and *lex posterior* rules, can be applied. In the absence of legal effects, such norms cannot be applied for the simple reason that one part of the equation (the politically or morally binding agreement) is not deemed to be *lex*.

Application by analogy is perhaps hypothetically possible, but requires a further rule providing for superiority of one of the normative orders. To state that, in cases of conflict, the provision which is latest in time prevails, whether *lex* or not, itself implies that such a rule has already been stated.

The problem has been approached from a rather different perspective by German lawyer Ulrich Fastenrath. In his view, the occurence of non-legally binding agreements finds justification in their function as aids to the interpretation of legally binding agreements. Non-legally binding agreements thus allow the entry of politics and morality into law. He founds his conception on the conviction that the language used in treaties is most often, if not as a matter of principle, indeterminate. Words themselves carry little or no meaning, so he claims, and are constantly in need of clarification, elaboration and interpretation. In this light, informal instruments (as he calls them) can be of help.[68]

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domestic laws can not be invoked to justify non-performance of treaties. If non-legally binding agreements can be deemed to have legal effects, there is no reason why the analogy should not be applied.

[68] See his *Lücken im Völkerrecht* (Berlin 1990), and especially his "Relative normativity in international law", 4 *EJIL* (1993), 305-340. Incidentally, it is somewhat puzzling to note that whereas he presents his thesis as a reply to Prosper Weil's classic article "Towards relative normativity in international law?", 77 *American Journal of International Law* (1983), 413-442, his conception of 'relative normativity' is radically different. For Weil,

This argument, however, does not survive closer scrutiny. Fastenrath conveniently ignores the circumstance that informal instruments may themselves be cast in deliberately indeterminate language.[69] Furthermore, 'hard' language might be used, because of the drafters' thought that the instrument concerned was not deemed to have legal consequences anyway.[70] Moreover, if words themselves are indeterminate, it follows that the words used in informal instruments are equally indeterminate, and themselves in need of further clarification, elaboration and interpretation. The result is an infinite regression into more and more informal instruments, all clarifying their predecessors to some extent (in the ideal situation), but all structurally in need of clarification themselves.[71]

Furthermore, there appears to be no good reason why informal (or politically or morally binding ageements) would be eminently suitable as interpretative guides. As indicated above, international law itself erects few, if any, obstacles on the road to legally binding agreements, so why not simply use these?[72]

Finally, if it were true that "informal instruments" helped the interpretation of legally binding agreements, then courts or other law-applying agencies would apply the terms of those informal instruments. This being the case, these instruments would themselves have become legally binding, which in the end can only mean that there is no valid reason to distinguish between legally binding and non-legally binding instruments, at least not in terms of their legal effects.[73]

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relative normativity implied varying degrees of 'oughtness'; for Fastenrath, it implies varying degrees of determinacy.

[69] Indeed, it is generally acknowledged that quite often they are indeterminate on purpose, allowing states to paper over political differences. See, e.g., P.W. Birnie, "Legal techniques of settling disputes: the "soft settlement" approach", in W.E. Butler (ed.), *Perestroika and international law* (Dordrecht 1990), 177-195.

[70] One of Fastenrath's foremost categories of gap-filling instruments consists of General Assembly resolutions.

[71] With regard to language generally, the same point has been made by Ludwig Wittgenstein, *Philosophical investigations* (London 1967, 3d ed.), para. 29.

[72] Cf. above, ch. I.

[73] See chapters VI and VII, below, for a number of examples.

Competing normative orders?

Human behaviour is generally said to be governed by various normative orders, competing with one another for their subjects' attention. Writing in a specific domestic law context, Antony Allott has distinguished four such competing normative orders: law; morality; religion; and, what he called mores, which in an international setting are usually referred to as courtesy.[74]

Three of these orders also figure regularly in debates on international affairs. The relations of states are also governed by law, by morality, and by courtesy. Religion, on the other hand, is not usually mentioned. Indeed, as one author put it, religion is not very apt to govern international relations. At best, religion exercises an indirect influence upon the conduct of states, in the sense that some precepts may have been inspired by religion.[75]

While religion is usually discarded as a separate normative order governing interstate conduct, quite a few observers have seen fit to posit the existence of another candidate: politics. Following this line of thought, agreements can be 'politically binding', and their violation may give rise to 'political sanctions'.

The previous pages were devoted to some of the problems which would need to be solved in order to do justice to the co-existence of several competing normative orders. It was shown that rules of reference in case of conflict or collision between norms emanating from various normative orders need to be established. It was shown that the use of various normative orders can entail an erosion of domestic provisions pertaining to foreign policy. Finally state practice, at its most favourable, provides only limited support for the co-existence of the various normative orders, and it is far from clear whether state practice in this respect can have the normative effect often implictly ascribed to it.

In the following pages, the claim will be investigated at a somewhat deeper level. We will try to answer the question whether the orders usually posited as alternatives to international law (i.e. politics, morality and courtesy) can actually function as such alternatives. In order words: does it make sense to claim that states A and B concluded an agreement which they

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[74] Cf. Antony Allott, *The limits of law* (London 1980). We will henceforth employ the term courtesy with the proviso that it shoud be understood in a broad fashion, as embracing non-legal social practices generally.

[75] Cf. Ko Swan Sik, *De verplichting in het volkenrecht* (The Hague 1991), at 3. To be sure, Ko makes the same point with respect to morality.

intended to be morally binding, politically binding, or binding as a matter of courtesy?

We approach the theses of Aust, Virally, and others on their own terms: they claim that states can intend to have their relations governed by some normative order other than law. We will investigate whether that claim is in any way meaningful. The remarks made above already indicate that such is not to be presumed lightly. The remainder of this chapter will demonstrate that whatever merits those alternative normative orders may possess, they cannot function as viable alternatives to international law when it comes to the conclusion of international agreements.

Courtesy

Some aspects of international relations are apparently governed by rules of courtesy. Michael Akehurst, in his introductory textbook[76], familiarizes the reader with the notion that intergovernmental correspondence is usually written on white paper only. The occasional use of paper of another colour will not, however, give rise to international responsibility. There is no legal obligation for diplomats to use white paper; it merely concerns a social practice, a rule of courtesy.

In a similar vein, the positive existence of courtesy as a separate normative order has clearly been recognized by the International Court of Justice in the 1969 *North Sea Continental Shelf* cases. According to the Court,

> "[t]here are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."[77]

While accepting the idea of courtesy as a separate normative order, it remains to be seen whether it is an order which can be employed intentionally. Naturally, there is little to prevent a state from intentionally engaging in

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[76] Michael Akehurst, *A modern introduction to international law* (London 1988, 6th ed.), at 29.

[77] [1969] ICJ Rep 3, at 44. See also the *Haya de la Torre* case, [1951] ICJ Rep. 15, where the Court expressed its confidence that Colombia and Peru would solve their problem by seeking guidance from "considerations of courtesy and good neighbourliness" (at 83).

an act of courtesy towards another state. Yet, such an activity does not necessarily imply the creation of courteous rights and obligations.

Rules of courtesy appear to come into existence in ways quite similar to the coming into existence of customary international law. Although single acts of courtesy may be done intentionally, and may occur before a courteous usage has arisen, it is not likely that rules of courtesy can be intentionally created. Or rather, to the extent that such rules can be intentionally created, they would have to be created by way of a treaty. An international instrument on standard protocol for royal visits is perfectly conceivable; however, it is less conceivable, that such an instrument would be binding as a matter of courtesy only.

Moreover, courtesy is unlikely to be intentionally employed in, as Danilenko has put it with a certain measure of tautology, areas which are "legally relevant".[78] Agreements on free trade, nuclear disarmament, treatment of prisoners of war, or the uses of the high seas, are not very likely to be governed by courtesy only.[79] Although courtesy can be said to have some place in international relations, it does not appear to be a viable alternative to international law: it does not lend itself to intentional use, and even if it did, it would not be employed in areas where it really matters.

Morality

The relation between law and morality is a highly intricate one, at the heart of most contemporary (Western) legal philosophy. With the upsurge of legal positivism[80], in whichever of its variations, it is usually conceded that, in principle, law and morality are not exactly the same. Some legal precepts,

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[78] Cf. G.M. Danilenko, *Law-making in the international community* (Dordrecht 1993), at 120.

[79] Ko, o.c. note 75, at 3, discards courtesy altogether as an alternative, since in his view it is concerned with the purely cosmetic aspects of international relations. It is to be remembered though that his conception of courtesy is less broad than the one employed here.

[80] David Kennedy has noted that classic international lawyers were hardly aware of any possible distinction between law and morality. See his "Primitive legal scholarship", 27 *HILJ* (1986), 1-98. Roscoe Pound appears to trace the distinction back to Kant. See Roscoe Pound, *Law and morals* (New York 1969, first published 1924), at 10.

such as the code of the road or notary formalities, have little to do with morality, whereas not all moral precepts have found legal regulation.[81]

Given this point of departure, the debates generally concern questions such as: (1) is law at all possible without being in one way or another anchored in morality[82]; (2) to what extent should moral precepts find recognition in legal rules[83]; (3) is it at all feasible to act morally in international relations?[84] Decidedly less attention has been paid to the question with which we are concerned: Can morally binding agreements be created intentionally?

The relation between law and morality is, generally, a complex one, but the relation between international law and morality is even more puzzling. In particular[85], the possibility that states might enter into morally binding commitments presupposes that states can be equated with moral persons. Without wishing to study the matter in any detail, some of the more influential ethical traditions do accept the state's moral personality.[86] This assumption allows us to proceed on the premise that the state is such a moral person.[87] Indeed, whatever the merits of the assumption, it is one which is necessary to the thesis that states can intentionally conclude morally binding

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[81] See generally J.C. Smith, *Legal obligation* (London 1976).

[82] See, e.g., the long-running debate on this question between Lon Fuller and H.L.A. Hart. An interesting attempt at synthesis is offered by R.A. Duff, "Legal obligation and the moral nature of law", *Juridical review* (1980), 61-87.

[83] Here too Hart was heavily involved. See, e.g., H.L.A. Hart, *Law, liberty, and morality* (Stanford 1963).

[84] Stanley Hoffmann, *Duties beyond borders: on the limits and possibilities of ethical international politics* (Syracuse 1981).

[85] It has also been noted that the horizontal structure of the international order is not very suitable for the application of moral precepts. Cf. J.G. Merrills, "Morality and the international legal order", 31 *Modern Law Review* (1968), 520-534.

[86] For an excellent overview, see Terry Nardin & David R. Mapel (eds.), *Traditions of international ethics* (Cambridge 1992). For an argument that states are only moral persons if and when they behave morally, see Fernando Tesón, "The Kantian theory of international law", 92 *Col. LR* (1992), 53-102.

[87] Implicitly, this was rejected by Fawcett, o.c. note 65, when he claimed that political commitments are to states what moral commitments are to individuals. Note also Virally's rather lacklustre justification for the existence of political agreements: states are, after all, political entities. Yet, he kept silent about moral agreements. "La distinction entre textes internationaux de portée juridique et textes dépourvus de portée juridique (à l'exception des textes émanant des organisations internationales)", 60 *AIDI* (1983/I), 166-257, at 230, note 41.

agreements. In order that states might conclude morally binding agreements, they must regarded as moral agents, having "moral personality".

Furthermore, the idea has often been advanced that international law as such does not really exist, and amounts to little more than "positive morality".[88] Although Austin's view is generally no longer accepted, his line of reasoning does point to an important insight. Austin discarded the legal character of international law because of the lack of a sovereign and all that comes with it. Yet, he must have felt it unwise to discard the whole corpus of international law from the realm of normativity. The relations between states were governed by rules, and these rules were even, to some extent, effective. They could not, in his framework, be law, but they were nonetheless normative; therefore, they must be moral rules. In other words, for Austin, morality ('positive morality', at least, in contrast to divine prescriptions) functioned as a normative safety-net. All things normative but not law must, in his view, have been moral precepts.[89]

Austin's treatment of morality is still rather commonplace. The normative safety-net protects all precepts which popular sentiment or opinion holds to be normative, but which have yet to become law. Judge Alvarez, in one of his many dissenting opinions, claimed that South-Africa's mandate over Namibia would at least give rise to some moral obligations, even if he had to concede that no legal obligations could be discerned.[90] Judges Spender and Fitzmaurice appear to have had the same thing in mind when noting that the ICJ is a court of law, in which "considerations of a non-judicial character" as such have no place.[91]

In a like manner, Woodrow Wilson informed members of the US Senate, in 1919, that the more indeterminate provisions of the Versailles Treaty were, although perhaps not legally binding, still morally binding.[92] Numerous writers have, in a similar vein, held that certain agreements which were not to be deemed legally binding could nonetheless be morally binding.[93]

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[88] Cf. John Austin, *The province of jurisprudence determined and the uses of the study of jurisprudence* (London 1954, ed. Hart, first published 1832, 1863), e.g. at 123-124.

[89] Consistent with Austin's empiricism, if you will, he did not indicate any value judgments with the term 'morality': he specified repeatedly that 'positive morality' had little to do with "goodness or badness". Ibid., at 126.

[90] *International Status of South-West Africa*, [1950] ICJ Rep. 128, esp. at 177-178.

[91] *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)*, preliminary objections, [1962] ICJ Rep. 318, at 466.

[92] As reported in Charles Cheney Hyde, *International law chiefly as interpreted and applied by the United States. Vol. II* (Boston 1947, 2d. rev. ed.), at 1369-1370, note 1.

[93] See, e.g., McNair, *The law of treaties* (Oxford 1961), at 6, seemingly treating 'morally

This view might, if taken literally, lead to somewhat unconvincing results, such as a memorandum of understanding between states on exchange of information concerning trade statistics, that could be said to create moral rights or obligations between the parties. However, in the final analysis this example illustrates little more than a shorthand way of saying that it would be improper, if not legally sanctionable, not to live up to such agreements.

The discussion took on a decidedly different character, however, when arguments began to be put forward to the effect that states could intentionally conclude morally binding agreements. In such arguments, perhaps most clearly spelled out by Michel Virally in 1980[94], morality no longer serves as a normative safety-net, catching everything which falls through the cracks of the upper floor of law, but becomes a viable alternative, a policy option among other options. In such arguments, states can simply choose how to have their agreements work: legally binding, morally binding, or whatever else they prefer.[95]

Such a thesis is ultimately untenable, based as it is on fallacious presumptions. It presumes, firstly, that those who conclude agreements actually have a say in the matter, something which, as our account of intent demonstrated[96], is rather dubious. Secondly, and this is what is at issue here, it presumes that moral rights and obligations are capable of being intentionally created, and so the argument impliedly continues, suspended, withdrawn, or terminated.

Morality is without a doubt a normative order governing the everyday behaviour of individuals. By the same token, we may presume that states can be bound by moral prescriptions. The International Court of Justice, in its 1951 Advisory Opinion on *Reservations to the Genocide Convention*, held with regard to this Genocide Convention that "the principles underlying the

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binding' and 'politically binding' as synonymous. A similar conception is indicated by France's claim for "moral damages" in the 1978 *Air Services* award. Text in 18 *UNRIAA* 417, esp. at 426-427.

[94] O.c. note 44.

[95] Virally, at least, posited what could amount to an enormous variety of normative orders, and specifically noted to discuss, for simplicity's sake, only three of them: law, morality, and politics. Ibid., esp. at 167. It is, however, difficult to envisage language, or culture, to name just two possible candidates, as normative orders which can be intentionally employed. Few would argue that an agreement could intentionally be 'linguistically binding', or 'culturally binding'. Therefore, we will not investigate these and other possible normative orders.

[96] See above, ch. III.

Convention are provisions which are recognized as binding on States even without any conventional obligation."[97]

Those words have often been interpreted as meaning that the Court found genocide already to be prohibited under customary international law[98], yet such an interpretation is open to doubt on several counts.

First, on various occasions in both the majority opinion and the powerful joint dissent of Judges Guerrero, McNair, Read and Hsu Mo, mention is made of the aspiring character of the Convention. The spirit and aims of the United Nations Charter were cited to underline this point, and the joint dissenters claimed that the Convention was an effort "to promote a great humanitarian project", meant to "attain a high objective for all humanity."[99] Such language has little place in an argument based on custom. Indeed, such language is usually employed to counter claims based on custom.[100] The Court's *dictum* is more convincing when treated as a recognition of the role of morality in international law: even without a conventional obligation, some precepts are nevertheless binding, and they are so as a matter of morality.

Dicta in the 1986 *Nicaragua* case point in the same direction. The Court noted that the absence of a Nicaraguan commitment to the Organization of American States "would not mean that Nicaragua could with impunity violate human rights".[101] Although this could be read as a reference to customary human rights, the statement can also be seen as a reference to international morality. Similarly, in the *Corfu Channel* case the Court relied, *inter alia*, on "elementary considerations of humanity" as among the bases of the obligations incumbent upon Albania.[102]

If such *dicta* are taken to be references to international morality, the moral precepts to which they actually refer should be identified. They are as follows: the moral precept at issue in the *Genocide*-opinion was the prohibition of genocide; in the *Nicaragua*-case it was the protection of human rights, while in the *Corfu Channel* case it concerned the protection of human

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97 [1951] ICJ Rep. 15, at 23.

98 Cf. Danilenko, o.c. note 78, at 151-153.

99 Joint dissent to the *Genocide* opinion, esp. at 46-47.

100 Judge Tanaka, in his dissenting opinion to the *South West Africa cases (second phase)*, on this point reached the same conclusion, yet went on to proclaim that the genocide prohibition was part of natural law. [1966] ICJ Rep 6, at 297-298. It should be noted that this implies a conviction that the prohibition of genocide was not based on intent.

101 [1986] ICJ Rep. 14, at 134, para. 267.

102 [1949] ICJ Rep. 4, at 22.

life. It is also noteworthy, that in these cases the moral obligation was present "even without any conventional obligation".

The creation of moral obligations is not necessarily reliant on a moral institution. Moral obligations can exist without being the product of a promise or an agreement; their moral force does not rest on a specific act of consent. They may arise without being intentionally created.

Whether the reverse also holds true, and whether specific acts of consent can create moral precepts are also important questions. In two rather general senses, they probably can. First, if promises are morally binding, it would seem that acts of consent can give rise to moral bonds: he who promises is morally bound to live up to his promise. It does not, however, automatically follow that the thing which is promised by definition becomes morally binding as well.[103] While it may make sense to say that a person who promised a friend to take him out to lunch has a moral duty to make good on his promise, it makes little sense to say that as a result that particular lunch-date becomes morally binding.

Second, as Edmond Cahn has pointed out, morals do not exist in a vacuum, but are part of everyday life. We learn them, and we apply them in making our decisions, and by applying them in numerous ways and by adding or subtracting numerous elements, we unwittingly act as 'moral legislators'. Indeed, in Cahn's view, it would be impossible for anyone to escape from being a moral legislator: whether one adheres to moral precepts or not, whether one applies them in a certain way or in a certain other way, one "inevitably modifies" morality.[104]

Nevertheless, it remains to be seen whether morally binding precepts can be intentionally created, simply by concluding morally binding agreements. Even if it can be said that all of us (including states) are moral legislators, and even if we should all live up to our promises, does it follow that we can

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[103] Such a claim has been defended, however, e.g. by G.I. Tunkin, "International law and other social norms functioning within the international system", in Bin Cheng & E.D. Brown (eds.), *Contemporary problems of international law: essays in honour of Georg Schwarzenberger* (London 1988), 282-300, at 294.

[104] See Cahn's highly inspiring *The moral decision: right and wrong in the light of American law* (Bloomington 1955), esp. at 25. There may be a third sense, even more general, in which it can be said that morality may rest upon agreement. Some theorists have proclaimed that morality may ultimately be derived from a real or hypothetical social contract. Whatever the merits of such arguments, they usually concern moral systems as a whole, not individual moral precepts. It usually concerns the basis of what is called political obligation in general. For an overview, see John Horton, *Political obligation* (London 1992).

create moral rights and duties for ourselves and our partners in agreement, based on mutual consent?

The answer must be in the negative, for two reasons. Firstly, it is doubtful whether the creation of a morally binding agreement can result in moral rights and obligations in the same way as legally binding agreements generally result in legal rights and obligations. Secondly, it is questionable whether morality can be created intentionally.

A morally binding agreement would normally (at least if based on a bargain, consideration, or even a simple exchange of promises) entail the creation of moral rights. Party A promises to do something, whereupon party B promises to do something in return. If the agreement is morally binding, the terminology would seem to dictate that one ought to speak of moral rights and duties being created.

Yet, philosophically it is somewhat awkward to speak of moral rights.[105] Some scholars have pointed out that to think in terms of moral rights is misleading[106], given the fact that at best we may expect our fellow men to do their utmost to perform their moral duties. If they fail after having done their utmost, they will still have fulfilled their moral duties[107], but the moral rights will not have been honoured.[108]

Other scholars, who accept the notion of moral rights, have nevertheless insisted that not just anything can be elevated to that status. Feinberg notes that "a purported moral right is a genuine moral right if and only if it is validated as such by correct moral principles", and these, eventually, are

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105 Some of the relations between legal and moral rights are discussed in Joseph Raz, "Legal rights", 4 *Oxford Journal of Legal Studies* (1984), 1-21. It has also been noted that "[m]uch of rights discourse is no more than the transformation of political goals into human rights language." See Martti Koskenniemi, "The future of statehood", 32 *HILJ* (1991), 397-410.

106 It should be noted perhaps that even the term 'moral rights' as used in some domestic legal systems in relation to protection of intellectual property is misleading, since those rights are rights derived from and recognized by law.

107 The same consideration appears to underlie Klosko's remark that certain promises may be broken for good reasons. Cf. Klosko, o.c. note 64.

108 See, e.g., George P. Fletcher, "Law and morality: a Kantian perspective", 87 *Col. LR* (1987), 533-558. Following Kant, of course, it was the effort which counted, not the result; cf. Immanuel Kant, *Fundamental principles of the metaphysic of morals* (Buffalo 1988, transl. T.K. Abbott, first published 1785). Conversely, under a more utilitarian philosophy, it might be argued that it is the result which counts, regardless of the motives leading to the result. Here too, then, there is a certain awkwardness in speaking of moral rights, since whether or not the result stems from any sense of moral duty is quite irrelevant.

rational principles and cannot be derived from a moral analogue to the legal order.[109]

If moral rights owe their existence to validation by correct moral principles, then obviously not every object of a morally binding agreement gives rise to moral rights. A distinction should be made "between the act of promising with the moral quality that it has and the action promised with the value that it has."[110] When the action promised (or agreed upon) is itself of moral value, only then will the promise or agreement gives rise to morally binding rights and obligations beyond the obvious one that promises and agreements should be kept.

This sheds new light on quite a few assertions which have been made with respect to international instruments. In particular, the documents underlying the mechanism known as European Political Cooperation have been called morally binding.[111] As a result, the reports adopted by the Foreign Ministers of the member states of the European Communities must have been considered as giving rise to moral rights and duties. The contents of those reports, however, bears little resemblance to what is usually referred to as morality. The Foreign Ministers had agreed to engage in more or less regular consultations with one another; and they had agreed to establish a network for the exchange of information. It cannot really be said that this results in moral rights and duties, without eroding our everyday notion of morality. Nor can it be said that Luxemburg had thus acquired a moral right to be consulted whenever the United Kingdom contemplated certain foreign policy actions.

Such a position can really only be maintained if one views every agreement to be morally binding, by virtue of the morally binding nature of promises. The obvious consequence of such a thesis is the disappearance of discretion. If every agreement is morally binding, it follows that the only choice left is to agree or not to agree. One cannot, in such a conception, conclude an agreement which would not be morally binding. At best, some

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109 Joel Feinberg, "In defence of moral rights", 12 *Oxford Journal of Legal Studies* (1992), 149-169, esp. at 165-168.

110 Cf. Richard Bronaugh, "Promises", in Lawrence C. Becker & Charlotte B. Becker (eds.), 2 *Encyclopedia of ethics* (New York 1992), 1020-1023, at 1020.

111 Cf. Maarten Lak, "Interaction between European Political Cooperation and European Community (external) - existing rules and challenges", 26 *CMLRev.* (1989), 281-299. Others have qualified them as soft law. See, e.g., Renaud Dehousse & Joseph Weiler, "EPC and the Single Act: from soft law to hard law?", in M. Holland (ed.), *The future of European Political Cooperation: essays on theory and practice* (London 1991), 121-142.

morally binding agreements could be anchored in law (or any other normative order, hypothetically) as well.[112]

The consequence is that intent becomes superfluous: one can neither intend to be morally bound, nor can one intend not to be morally bound.[113] As soon as one promises or agrees to do something (or to abstain from doing something) one is morally bound to live up to the promise or agreement. As a result, morality is not, as such, a viable alternative to law, since one cannot choose to become morally bound.

Secondly, and more fundamentally perhaps, with respect to moral precepts, the prohibitions on genocide or torture do not rely on a wide network of promises or agreements. Although moral precepts may be a man-made creation, they are not created intentionally.[114] Again, as with courtesy, the analogy to the formation of customary law becomes relevant: moral precepts appear to be based on practices which are accompanied, ultimately, by a sense of moral obligation. As Nardin puts it, both customary international law and international morality "are not the outcome of deliberate acts of will but rather the residue of innumerable particular acts and judgments repeated with a consistency sufficient to allow a pattern or practice to be discerned."[115]

The implication is obvious: one cannot legislate morality, at least not in the way one can legislate law. And, one most definitely cannot create it simply by agreement. Although different societies may entertain different moralities[116], to maintain that states A and B have a moral obligation which does not extend to state C because the latter did not consent to be bound to the agreement giving rise to the moral obligation is to analogize between law and morality, and thus to ignore the fundamental distinction between the two.[117]

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[112] In this sense, Smith, o.c. note 81, at 73. Similarly, Samuel Stoljar, "Keeping promises: the moral and legal obligation", 8 *Legal studies* (1988), 258-276.

[113] Apart, of course, from the option of not becoming bound at all.

[114] Cf. H.L.A. Hart, o.c. note 62, noting that moral rules are immune from deliberate change. At 171.

[115] O.c. note 61, at 249. See similarly Michael Oakeshott, *On human conduct* (Oxford 1975), noting that morality is a "vernacular language", which "is not the creation of grammarians; it is made by speakers." At 78.

[116] The point is highly debated. See, e.g., Bernard Williams, *Morality* (Cambridge 1993, 2d. ed.) who refers to relativism as "possibly the most absurd view to have been advanced even in moral philosophy" (at 20).

[117] In philosopher's jargon, morality is thought to be primarily axiological, relating to concepts such as good and bad, or right and wrong (values, in short), while law is

Politics

Neither courtesy nor morality present themselves as very viable policy options. Courtesy is not considered serious enough to deal with important matters, while morality can not be employed at will. The remaining question, therefore, is whether politics represent a viable option to law.

Virally claimed, as noted above, that states could conclude politically binding agreements simply because states are, after all, political entities.[118] Virally conceded that the idea of a political normative order was still "mal définie", but he nevertheless saw fit to employ it. Unfortunately, subsequent writers have done little to clarify the notion. They appear instead to have adopted Virally's ill-defined concept. Had they given the idea more thought, they might have discarded it, for the concept is unconvincing for several reasons.

First, although states might be considered political entities, many other entities are also considered as such and they are rarely said to have entered into politically binding agreements, or even considered as having the capacity to do so. This objection is dependent upon the concept of what exactly constitutes a political entity. In a domestic context, organizations of employers and employees might qualify as such.[119] Yet, it would seem hardly plausible for that reason to conclude that collective bargaining agreements only amount to politically binding agreements, or would only be politically binding if the organizations concerned so intended.[120]

Moreover, Virally's argument gives insufficient consideration to the fact that, apart from being political entities, states are also legal entities. States have, in the words of article 6 of the Vienna Convention, the capacity to conclude treaties and are indeed often considered if not the only, then at least

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primarily deontological, i.e. concerned first and foremost with respect for rules, principles and the like. Cf. Georg Henrik von Wright & Aulis Aarnio, "On law and morality: a dialogue", 3 *Ratio Juris* (1990), 321-330. A similar distinction was made in the late 1930s by Hermann Kantorowicz in a series of lectures which were not published until 1958, *The definition of law* (Cambridge 1958), esp. 43-44.

[118] O.c. note 87, at 230, his footnote 41.

[119] In some sense, it could even be posited that every individual is a political entity. Yet, agreements between, e.g., a tenant and a landlord, or a passenger and a taxi-driver, are rarely considered to be politically but not legally binding.

[120] To be sure, in some countries collective bargaining agreements have been held inapplicable in individual cases, but on rather different grounds. For more details, see B.A. Hepple, "Intention to create legal relations", 28 *Cambridge Law Journal* (1970), 122-137.

the original and most important subjects of international law.[121] In short, it is not enough assert that since states are political entities, they can conclude politically binding agreements. This assertion does not explain why states on some occasions utilize their legal capacities, and at other times they employ their political capacities.[122] Moreover, it presumes that which requires proof: it presumes that there exists a political normative order, distinct from the legal order, to begin with.

Virally himself realized that at least the first problem as to why states would wish to conclude politically binding agreements in the first place required some type of an answer. The answer, according to Virally, was obvious: international relations are highly political relations, so as a matter of course states would wish to conclude politically binding agreements.[123]

The argument retains its mysterious qualities even upon close analysis. In particular, the statement that international relations are highly political relations is unclear. Presumably, Virally was reasoning along realist lines to the effect that international relations are generally less law-governed than domestic politics. Where domestic politics are usually (or ideally, perhaps) constrained by the dictates of the Rechtsstaat, the international system is usually thought of as anarchic. In this respect, law is thought to be less pervasive in international relations than in domestic relations.

Even so, it is difficult to imagine how this would open up the possibility of concluding politically binding agreements. The conclusion of politically binding agreements does not, and cannot, automatically follow from the description of a particular society as 'political', as there is no direct or

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121 The corresponding article 6 of the 1986 Vienna Convention grants treaty-making capacity to international organizations, but only to the extent covered by their internal rules.

122 To some extent, this objection could be met by defining politically binding agreements as agreements "whose object is to regulate the exercise or division of political power". Cf. David Kretzmer, "Political agreements - a critical introduction", 26 *Israel Law Review* (1992), 407-437, at 408. Even so, as Kretzmer (unwittingly perhaps) concedes (at 409), this still presupposes the existence of politics as a normative order. Moreover, it might be difficult, if not downright impossible, to accurately delimit whether an agreement regulates the exercise or division of political power. In one sense at least, all agreements can be seen to do so.

123 Virally himself called such questions a bit naive, with reference to the political nature of international relations. His answer was phrased in a non-committal manner, suggesting rather than revealing insights. It might also be noted that this explanation would look even more absurd if applied to morally binding agreements. Consequently, these would be in need of a separate explanation, yet none was ever provided. See also above, ch. 4.

indirect causal link between the two. Indeed, one would be hard pressed to find any commentator arguing that the breakdown of the rule of law within a given domestic society would necessarily be accompanied by the possibility of concluding politically binding agreements.[124]

More importantly, arguments such as that made by Virally neglect the fundamentally political character of all law. Agreements reached in the body politic (whatever body politic) are generally given the form of law. In domestic situations, agreements between governments and parliaments end up as law, despite being thoroughly 'political' agreements. In international relations, the same thought traditionally prevailed: agreements between states become law, simply because law is the normative order governing politics.[125] Every single treaty has its origins in an agreement between political entities and is, broadly speaking, concluded for political reasons.[126] Every international agreement is, in the final analysis, political, concluded for political reasons between political entities to reach political goals.[127] There-

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124 A domestic analogy would hold that in times of civil strife, when law is on the verge of breakdown, or already broken down, agreements would no longer be legally binding but would or could become politically binding.

125 Compare, e.g., Sir Hersch Lauterpacht's separate opinion to the ICJs opinion on *Voting procedures on questions relating to reports and petitions concerning the territory of South-West Africa*, [1955] ICJ Rep 67: "The size of the majority required for the validity of the decisions of a corporate political body is not a mere matter of technical convenience or mathematical computation. It is expressive of the basic political philosophy of the organization." (at 108). See also (albeit limited to domestic contexts) John Griffiths, "Is law important?", 54 *New York University Law Review* (1979), 339-374, esp. at 357; G.I. Tunkin, "On the primacy of international law in politics", in W.E. Butler (ed.), *Perestroika and international law* (Dordrecht 1990), 5-12, at 6; J.K. de Vree, "The political conditions of international law", 26 *NILR* (1979), 46-59, esp. at 58; Louis Henkin, *How nations behave: law and foreign policy* (New York 1979. 2d. ed.), 32 ff.

126 Indeed, writing in the 1950s, Hannah Arendt claimed that the conduct of international relations was the only "purely political domain" left, "because the relationships between nations still harbor hostilities and sympathies which cannot be reduced to economic factors". O.c. note 1, at 155. And her conception of politics was a relatively narrow one; most political scientists and philosophers would not hesitate to include economics in the realm of politics. See e.g. Meindert Fennema & Ries van der Wouden (eds.), *Het politicologen-debat: wat is politiek?* (Amsterdam 1982).

127 Essentially the same kind of reasoning underlies the neo-functionalist theory of integration. Classic functionalists posited that once integration has started, it would grow automatically, like the proverbial snowball. The great merit of neo-functionalism is to have pointed out that the logic of 'ramification' and 'spill-over' were not logically bound to occur. Even integration in technical and administrative sectors requires

fore, all agreements, if binding at all, are by definition politically binding.

The same point was unequivocally made by Judges Basdevant, Winiarski, McNair and Read in their joint dissenting opinion to the Court's advisory opinion on *Conditions of admission of a state to membership in the United Nations (article 4 of the Charter)*[128]. They noted:

> "The resolutions which embody either a recommendation or a decision in regard to admission are decisions of a political character; the emanate from political organs; by general consent they involve the examination of political factors, with a view to deciding whether the applicant State possesses the qualifications prescribed by paragraph 1 of Article 4; they produce a political effect by changing the condition of the applicant State in making it a Member of the United Nations ... The admission of a new Member is pre-eminently a political act, and a political act of the greatest importance."[129]

The one thing the Judges omitted to mention was that admission of a member to the United Nations, while pre-eminently a political act, is a legal act as well. They must have thought this to be self-evident, too obvious to bother mentioning.

It follows that a separate category of politically binding agreements, apart from legally binding agreements, is not possible. If law is the normative order governing politics (in the same way as morality is the normative order governing morals), then there is no point in positing the existence of agreements which are politically binding only. Such a line of thinking presupposes that politics function as a clearing-house for law, in the sense that all agreements are politically binding but some may become legally binding, which in turn presupposes the separate existence of politics as a normative order.

The line of thinking that endows politics with a clearing-house function, still leaves open the problem of intent. If all agreements are by definition politically binding, it follows that one can not intend to become politically bound. The automatic result of concluding an agreement is to be politically bound. Nor can one intend not to become politically bound. As soon as the

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political decisions. See generally J.K. de Vree, *Political integration: the formation of theory and its problems* (The Hague 1972).

128 [1948] ICJ Rep. 57.

129 Ibid., at 85, para. 9. In a similar vein, the Court noted in 1962: "It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise." *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, advisory opinion, [1962] ICJ Rep. 151, at 155.

agreement is concluded (or enters into political force), one is politically bound.

Concluding remarks

We have seen that the theses according to which states can intentionally become bound in ways other than legal face some serious, indeed insurmountable, difficulties. We have seen that to the extent that viable alternatives for law exist at all, they are neither suitable for important matters, nor are they capable of being used intentionally. Moreover, even if they could be so used, their existence is less than plausible given: the absence of rules of reference in cases of conflict; and, the absence of domestic provisions regarding anything else but treaty-making. For these reasons, a politically or morally binding agreement cannot exist unless it is also legally binding. As soon as states or international organizations enter into commitments, those commitments become automatically governed by law; there is simply no viable alternative.

In this connection, it is worthwhile to recall the ICJ's opinion on *Reservations to the Genocide-convention*. When confronted with an alleged administrative practice concerning reservations to multilateral treaties, the majority found that it was merely an administrative practice, which may, but need not, be followed. In their joint dissenting opinion, Judges Guerrero, McNair, Read and Hsu Mo, however, found that the practice amounted to a rule of law. The important thing, which emerged quite clearly from especially the joint dissent, is that those were the only possible alternatives: a rule is either a rule of practice, or it is a rule of law.[130]

The next chapters will show that our conclusion finds more than generous support in the decisions of both national and international courts and tribunals. Before that, however, it is imperative that we undertake a small excursus in order to investigate a claim hitherto left largely unaddressed: the soft law thesis, holding that law can exhibit various degrees of "oughtness", in Patrick Atiyah's felicitous phrase.[131]

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[130] [1950] ICJ Rep. 15, esp. at 36.

[131] See his *Promises, morals, and law* (Oxford 1981), at 45.

EXCURSUS TO CHAPTER V

THE SOFT LAW THESIS

Why the soft law thesis is self-contradictory

Hitherto, we have refrained from dealing too explicitly with yet another thesis which attempts to distract from the traditional concept of treaty: the soft law thesis. We have refrained from doing so in order to avoid overcomplicating the discussion of the other theses.

The main claim of the soft law thesis[1] is that law is not (or should not be) an on/off, binary phenomenon, but rather a mode of analysis which can account for various shades of grey. In this view, it is fruitless to think of law simply in traditional dichotomies such as legal/illegal, and binding/non-binding; rather, one should think in terms of varying degrees of legality, or 'bindingness'. Actions can be more or less legal or illegal; and agreements can be more or less binding or non-binding.

Consequently, when compared to theses concerning politically or morally binding agreements, at first sight the soft law thesis is qualitatively different. While analyses of politically or morally binding agreements invariably presuppose that just like legally binding agreements, politically or morally binding agreements either are or are not, the soft law thesis appears to take a different track. Instead of analyzing phenomena in terms of either binding or not, or legal or not, the soft law thesis purports to accomodate differences of weight. In other words, according to the soft law thesis, norms can be more or less binding; and actions can be more or less legal.[2]

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[1] Needless to say, we have devised a somewhat stylized version of the soft law thesis, if only to overcome its sometimes muddled treatment in the literature. Thus, for some, soft law is synonymous to politically and/or (usually "and") morally binding agreements; see, e.g., Wolfgang Heusel, *"Weiches" Völkerrecht* (Baden Baden 1991).

[2] A vigorous critique of such notions was already rendered by David Hume, who argued that while varying degrees of 'oughtness' might well be possible in social life, with respect to law such notions would amount to "perfect absurdities". See David Hume, *Political writings* (Indianapolis 1994, S.D. Warner & D.W. Livingston eds., first published 1758), at 43-45.

Theses on politically or morally binding agreements presuppose the existence of normative orders alongside law, which, moreover, can be utilized intentionally by parties (we have seen that those presumptions together do not survive closer scrutiny). On the other hand, the soft law thesis in its strictest form does not presuppose alternative normative orders; instead, it presupposes that law itself is made up of various sub-orders. The soft law thesis does, however, share the second presumption: it does presuppose that states can intentionally decide to make their agreements legally binding in varying degrees, while remaining within one and the same (international) legal order.

At this point, however, the soft law thesis goes astray and becomes self-contradictory. In order for the soft law thesis to be distinctive from more traditional legal modes of analysis, those various legal compartments, so to speak, must be self-contained. In other words, if the legal consequences attaching to soft law were indistinguishable from those attaching to hard law, the *raison d'etre* of the soft law thesis would dissipate.[3] If a recommendation is as binding as a treaty, and gives rise to the same legal consequences as a treaty, then there is little point in casting agreement in the form of a recommendation instead of a treaty and insisting that it is only soft law.[4] The various legal sub-orders must be self-contained. A soft law instrument can only give rise to soft liability and, eventually, soft sanctions, and one may even wonder whether any pronouncements in contentious proceedings could ever result in anything else but soft dispute settlement, resulting in soft awards to be enforced softly.

Ironically, however, the necessarily self-contained character of soft law forces it right back into the on/off, binary mode of thinking. A soft law instrument is either (softly) legally binding or not; and, a soft law instrument can only be either (softly) violated or not. It cannot be a little bit violated; and it can not be a little bit binding.

To put matters more graphically: if one were to devise a hypothetical soft-hard continuum ranging in value from 1 (very soft) to 10 (very hard), an instrument given value 3 at the time of its conclusion would, *ceteris paribus*,

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[3] Hence, some authors do not hesitate to speak of soft liability, soft dispute settlement, and soft sanctions. Cf. Ryuichi Ida, "Formation des normes internationales dans un monde en mutation. Critique de la notion de soft law", in Daniel Bardonnet et. al. (eds.), *Le droit international au service de la paix, de la justice et du développement. Mélanges Michel Virally* (Paris 1991), 333-340; Ignaz Seidl-Hohenveldern, "International economic "soft law"", 163 *RdC* (1979/II), 165-246.

[4] Except, perhaps, for purposes of circumventing domestic procedures. See also below.

have to retain the same value during its entire existence. An instrument given a value of 3 at the time of its conclusion cannot, without further action, acquire a value of 7 at the time of its application. By necessity, it would have to retain its value of 3 in order to do justice to the intentions of its authors. And in that sense, it would be as rigid as "hard" instruments which have been given a value of 8 or 10.

The point is that the soft law thesis eventually displays the same binarism which characterizes traditional legal method: a document is either softly binding, or not binding at all; it is either softly violated, or not violated in sufficient degree to establish a violation; and it either gives rise to soft responsibility, or it fails to meet the test required by the weight the authors attached to the instrument. The soft law thesis, therefore, loses its *raison d'etre*. It does not, and cannot, accomodate shades of grey without lapsing into on/off thinking itself.

The argument might be made that a scale of 1 to 10 allows for more subtlety and nuance than the traditional binary code in which an instrument qualifies either as a 0 or as a 1; is either binding or non-binding. The argument may be countered, however, by claiming that traditional binarism itself is well capable of reflecting subtlety and nuance.

Lawyers are well accustomed to the idea that some norms are more important than others. This notion has found recognition in concepts such as *jus cogens* and international crimes. Further, some acts may be countered with graver countermeasures than others without necessarily claiming that those former acts are more binding. Indeed, the very notion of proportionality which permeates the law of international responsibility functions as a weighing device. An internationally wrongful act of a certain weight may only be countered by a measure of equal or similar weight.[5]

The soft law thesis fails to meet its own stated goal, or at the very least fails to meet it in a better way than law as it is traditionally conceived, and can thus be deemed redundant. The soft law thesis is also vulnerable to the same types of criticism applied to theses concerning politically or morally binding agreements.[6]

Indeed, actual state practice is, at its very best, ambiguous. There are few, if any, international instruments which actually provide that they should be characterized as soft law. Most often, a finding to that effect is based on

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[5] See generally D.W. Greig, "Reciprocity, proportionality, and the law of treaties", 34 *Va. JIL* (1994), 295-403. See also the Epilogue, below.

[6] See above, ch. V.

inferences and suppositions, which need not always be convincing. Even if there were some relevant state practice, it does not automatically follow that this practice becomes or even can become a normative institution. As we have seen, legal concepts do not change simply by giving them another name. A treaty does not become a soft law instrument merely because its authors call it that. The conclusion of soft law instruments presupposes the possibility of soft law, but it does not automatically create that possibility.

With respect to the democratic process, the soft law thesis is also open to criticism. As was noted with regard to politically and morally binding agreements, as soon as the state becomes bound, and its freedom of action restricted, many constitutions require that domestic procedures pertinent to the creation of international obligations be followed to the fullest extent. If soft law instruments are binding (even if only softly), then national democratic institutions should be given a chance to participate in the decision-making process.

Finally, and in sharp contrast to what the soft law thesis itself claims, the application of soft law renders it indistinguishable from hard law. Moreover, it is often recast in one of the more traditional sources of law. Arbitrator Dupuy's award in the *Texaco*-case may serve as a convenient illustration.

Professor Dupuy was one of the founding fathers of the soft law thesis[7], and when confronted as an arbitrator with the chance to give the thesis the legal imprimatur of an award, one might have expected him to seize the opportunity. The award in question contains some references to the legal nature of General Assembly resolutions, and contains, generally, a friendly approach to the soft law thesis. The crux, however, is that when it actually came to applying a soft law instrument (the Declaration on Permanent Sovereignty over Natural Resources[8]), Professor Dupuy shied away from the consequences and felt it necessary to recast the soft law instrument into one stemming from a more traditional source of international law. He did apply the Declaration on Permanent Sovereignty over Natural Resources, but he ap

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[7] See, e.g., René-Jean Dupuy, "Declaratory law and programmatory law: from revolutionary custom to "soft law"", in R.J. Akkerman, P.J. van Krieken & Ch. O. Pannenborg (eds.), *Declarations of principles: a quest for universal peace. Liber Röling* (Leyden 1977), 247-257. Dupuy himself claims that the term was coined by McNair; it is doubtful, though, whether McNair used it in a way other than to distinguish between propositions *de lege lata* and *de lege ferenda*. Compare, e.g., Sir Robert Jennings, "An international lawyer takes stock", 39 *ICLQ* (1990), 513-529, esp. at 516.

[8] Resolution 1803 (XVII) of 14 December 1962. Text in 2 *ILM* (1963), 223.

plied it because it reflected customary law, not because it was 'law' in its own right.

Similar attitudes are displayed by other tribunals, both national[9] and international. Ostensible 'soft law' instruments are either applied as if they were 'hard law', or they are not applied at all. Thus, to the extent that the ICJ has relied on General Assembly resolutions[10] or other instruments often said to be of soft law character, it has either fit them in the mould of customary international law[11], or assimilated them to treaties.[12]

Formally non-binding resolutions adopted by or within international organizations are quite often mentioned as the quintessential soft law instruments.[13] Laying down the common desires of the member states of the organization in question (or at least of a majority thereof), they cannot, so the argument goes, be completely devoid of legal effects. While formal provisions may prevent them from being 'hard law', at the very least they may constitute 'soft law'.

Domestic courts, however, have shown less enthusiasm for such constructions. In some cases, they have simply applied resolutions such as the Universal Declaration on Human Rights without further ado; and in one case at least, the Universal Declaration overruled conflicting domestic legislation.[14]

To say that resolutions have been applied by domestic courts is, however, not by definition tantamount to saying they were regarded as legally binding. Rather, in those cases where they have been applied, they have been assimilated to one of the more familiar sources of international law: treaties or customary international law.[15]

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[9] Some examples are provided in chapter VII below.

[10] With the exception, of course, of internally operative resolutions.

[11] For instance as evidence of *opinio juris*. Cf. *Nicaragua* case, [1986] ICJ Rep. 14, at 101, esp. paras. 188 & 191. Note also the careful suggestion of the Court in the *Tehran hostages* case, speaking of the "fundamental principles enunciated in the Universal Declaration of Human Rights". [1980] ICJ Rep. 3, at 42.

[12] As in the *Western Sahara* opinion, [1975] ICJ Rep. 12. The Court, however, treated them as conditional. They could be overruled by existing legal ties, in which case they would not be applied at all.

[13] The claim that these instruments would be politically or morally binding is less often heard.

[14] See the *Klahr Ehlert*-decision of the Guatemalan Supreme Court, 9 May 1952. As reported in Krzysztof Skubiszewski, "Recommendations of the United Nations and municipal courts", 46 *BYIL* (1972-73), 353-364.

[15] Christoph Schreuer observes that most scholars, when dealing with resolutions, display a

Thus, in the famous *Filartiga v. Pena-Irala*[16] case, the US Court of Appeals for the Second Circuit based its conclusion that official torture was prohibited under customary international law, *inter alia*, on resolutions such as the Universal Declaration. Although the Court approved of the words of a scholar (Egon Schwelb) to the effect that the Declaration did not fit into the binding-non-binding dichotomy, the Court concluded that the torture prohibition had become binding, as a rule of custom.

A case sometimes referred to as the leading example of judicial application of a soft law instrument is less convincing than is sometimes argued.[17] In the *Nigerian Cultural Property* case, a 1972 decision of the German Bundesgerichtshof in Zivilsachen[18], at issue was whether in the light of recent developments within UNESCO the export of cultural property could be legitimately insured. In 1964, UNESCO had adopted a resolution on the matter, and under its auspices a draft convention had been concluded.[19] When the case came up for a decision, Nigeria had already become a party to that Convention, which had moreover been approved by the German Bundestag.

The Court seemingly applied the terms of the resolution. The Convention had not yet acquired binding force for Germany. The Court nevertheless occasionally referred to the text of the Convention, which suggests that the case does not necessarily illustrate application of a soft law instrument, but rather illustrates anticipatory application of a treaty.[20]

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similar attitude: they wish to defend resolutions in terms of the more familiar sources. See Christoph Schreuer, "Recommendations and the traditional sources of international law", 20 *GYIL* (1977), 103-118.

[16] US Court of Appeals for the 2d Circuit, decision of 30 June 1980, reproduced in 19 *ILM* (1980), 966.

[17] Cf. Christoph Schreuer, "Die innerstaatliche Anwendung von internationalem "soft law" aus rechtsvergleichender Sicht", 34 *OZöRV* (1983), 243-260, at 257-258; Friedrich Kratochwil, *Rules, norms, and decisions* (Cambridge 1989), 203-204.

[18] Reproduced in 59 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* (1972), 82.

[19] Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, concluded in Paris, 14 November 1970. Text in 10 *ILM* (1971), 289.

[20] And to reiterate the argument made above, even if the case can be seen as application of a soft law instrument, it should be observed that the resolution was applied as if it contained 'hard' provisions.

Justifications for the soft law thesis

The soft law thesis, its meagre support in both judicial and state practice notwithstanding, has been warmly welcomed by the community of international lawyers, and it has been justified along various lines. One justification asserts, as we have already seen, that the recognition of soft law allows the law to be responsive to political considerations. Above we have already sketched the spurious character of this contention. The soft law thesis itself inevitably lapses into on/off thinking. In addition, it would seem that the traditional conception of law is more than capable of dealing with political nuances and subtleties.[21]

Another justification for the validity of soft law is of a more teleological nature. Given the state of anarchy which is said to characterize international relations generally, one must simply take what one can get, and with this in mind, a soft agreement between states is always better than no agreement at all.

Apart from the fact that it is postulated rather than demonstrated, this justification overlooks the fact, noted earlier, that international law places no obstacle on the road to any agreement, hard or soft. Consequently, the reasons why states would opt for a soft law instrument are not that obvious. It is, however, obvious that the use of soft law instruments cannot be convincingly inspired by considerations of substance.[22]

Finally[23], the claim made recently that soft law instruments fill in the gaps existing in law by taking into account political or moral considerations has already been discussed and refuted above.[24] There is no obvious reason why soft law instruments would be better suited for those purposes than hard law itself. Moreover, soft law instruments themselves are often quite indeterminate, embodying political mystifications rather than political clarifications.

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[21] See further the Epilogue, below.

[22] See similarly Daniel Thürer, ""Soft law" - eine neue Form von Völkerrecht?", 104 *Zeitschrift für Schweizerisches Recht* (1985), 429-453, at 444.

[23] A different approach altogether is that which focuses on the use of ostensible soft law instruments in the exercise of executive or quasi-executive functions. Here, the soft law instrument does not so much reflect interstate agreement but rather executive policy. A valuable study of the use of such instruments by the Commission of the EC is Francis Snyder, "The effectiveness of European Community law: institutions, processes, tools, and techniques", 56 *Modern Law Review* (1993), 19-54, esp. at 31-36.

[24] See ch. V above.

Concluding remarks

We have seen that the soft law thesis is far from convincing: it is not seriously supported by either state practice or judicial practice (let alone both); it lacks plausible theoretical underpinnings and even plausible justifications, and, most importantly, its application falls victim to the same binary way of thinking which has traditionally characterized law.

Having, in the preceding pages, discredited the various theses concerning non-legally binding instruments, and having discarded the soft law thesis, it should by now be clear that any commitment entered into by international actors must amount by hypothesis to a (hard) legal commitment. Although we have reached this conclusion mainly on theoretical grounds, the following two chapters will demonstrate that it is, generally, also a position supported by the jurisprudence of both international and domestic courts.

CHAPTER VI

THE WORLD COURT

Introduction

On the first of July, 1994, the International Court of Justice rendered its first decision in a dispute on the territorial and maritime delimitation between Qatar and Bahrain.[1] In the process the Court clarified the concept of treaty in international law. The Court found that agreed minutes concluded between Qatar, Bahrain and Saudi Arabia (the latter extending its good offices) amounted to a legally binding agreement, despite protestations on Bahrain's part that it never intended to become legally bound, and that this lack of intent was demonstrated by various indicators.

The key to the Court's reasoning is to be found in paragraph 25 of the Judgment. The Court held that the minutes concluded in 1990:

> "enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement."[2]

In deciding the way it did, the Court struck the final death blow to theses holding that in one way or another, states can conclude agreements outside the legal order. Any commitment, the Court held, by definition amounts to a legally binding commitment.

The case will be discussed more fully below, but for the moment, it is imperative to note that although the *Qatar v. Bahrain* decision may have come as a surprise to some, it has clearly been foreshadowed in the pertinent case-law of both the International Court of Justice itself and that of its predecessor, the Permanent Court of International Justice.[3] In this chapter, those

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[1] *Maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and admissibility*, [1994] ICJ Rep. 112.

[2] Para. 25

[3] In a similar vein, Shabtai Rosenne, "The Qatar/Bahrain case: What is a treaty? A

pertinent cases will be analyzed and commented upon, and it will be demonstrated that the *Qatar v. Bahrain* decision, far from constituting a break with past decisions, is merely the clearest exposition of the concept of treaty, and that it is by no means the first of its kind.

In most of the decisions and opinions dealt with below, the legal character of a certain instrument only came up as a secondary issue. Yet, this fact does not render the Court's decisions concerning those instruments to be of only secondary importance; in most of the decisions that follow, the Court had to make up its mind concerning the instant instrument in order to complete its reasoning. Hence, despite their somewhat incidental appearance, those "hidden" pronounciations are of great relevance.

This chapter will largely be structured on a chronological basis, dealing first with the pertinent cases of the Permanent Court of International Justice, and subsequently with those of its successor. Most of the pertinent cases will be dealt with separately, with two exceptions. The first concerns the class of cases in which the Permanent Court found itself confronted with statements and declarations made during proceedings before it; and the second will deal with the various decisions and opinions rendered by the International Court concerning South Africa's mandate over what is now Namibia. The combined treatment of those two classes of cases appears justified because of their shared characteristics.[4]

The Permanent Court of International Justice

Statements made during proceedings

On several occasions, the Permanent Court of International Justice had to rule on statements and declarations made during proceedings before it. In one of the *Mavrommatis* cases between Greece and the United Kingdom[5], the

framework agreement and the seising of the Court", 8 *Leiden Journal of International Law* (1995), 161-182.

[4] We will largely ignore decisions concerning unilateral declarations issued under article 36, paragraph 2, of the Court's Statute, for the obvious reason that these are by hypothesis intended to be legally binding and have always been treated as such. The main legal problem with those declarations generally is to determine their precise scope, not their legal nature.

[5] *Mavrommatis Palestine Concessions*, [1925] Publ. PCIJ, Series A, no. 5.

Court noted that the parties had made oral statements accepting of the Court's jurisdiction on a point where the Court otherwise would have lacked jurisdiction.[6] Accordingly, the Court pronounced itself on the matter, and found those oral statements to be binding.

The case dealt with contracts for public works in Jerusalem concluded between the Ottoman authorities and Mr. Mavrommatis in 1914. The concessions were suspended due to the outbreak of the First World War, and after the war, Britain, the mandatory over Palestine, concluded similar contracts with someone else. This could have lead to expropriation of Mr. Mavrommatis, but both in one of its memorials and before the Court, the British agent promised that "there can be no question of our acting ... to expropriate M. Mavrommatis."[7] The Court limited itself to finding that the binding character of this statement was "beyond question"[8], without, however, providing any supporting arguments.

With reference to its decision in the above-mentioned *Mavrommatis* case, the Court decided in the German-Polish *Case concerning the rights of minorities in Upper Silesia (Minority Schools)*[9] that Poland by its behaviour had accepted the jurisdiction of the Court:

> "It seems hard to deny that the submission of arguments on the merits, without making reservations in regard to the question of jurisdiction, must be regarded as an unequivocal indication of the desire of a State to obtain a decision on the merits of the suit."[10]

The Court thus accepted Poland's initial behaviour as binding upon it, without pointing out the exact legal basis of its reasoning[11]. The Court did, however, sketch two circumstances which would render the Polish action legally inconsequential. Such would be the case, the Court declared,

> "... only if the conditions under which the declaration had been made were such as to invalidate the expression of intention, or if the Applicant had, in the subsequent proceedings, essentially modified the aspect of the case, so that the consent, given on the basis of the

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[6] Ibid., at 28.

[7] Ibid., at 37.

[8] Ibid., at 37.

[9] [1928] Publ. PCIJ, Series A, no. 15.

[10] Ibid., at 24.

[11] One is tempted to explain the Court's behaviour as an application of the estoppel principle. The word estoppel was not mentioned though, perhaps because at the time application of the principle in international law might have been deemed controversial.

original claim, could not reasonably be held to apply to the claim in the form which it now assumes."[12]

In an earlier case between Germany and Poland, also concerning Upper Silesia[13], the Polish representative before the Court had made some declarations averring that Poland would not expropriate certain German-held properties in Upper Silesia. The Court was "in no doubt" with regard to the binding character of these declarations.[14] Moreover, the Court in no way distinguished between such declarations made in Court, and similar declarations made outside Court. The Court was "in no doubt as to the binding character of *all* these declarations."[15]

Perhaps the most well-known aspect of the case between France and Switzerland concerning the *Free Zones of Upper Savoy and the District of Gex*[16] relates to the unilateral statement made by the Swiss representative during the proceedings. The Swiss representative had during oral argument before the Court offered to have certain matters settled by experts, whose decisions would not require ratification.

The Court treated the Swiss statement as binding, despite protestations from the French that the Swiss proposal would not be in conformity with Swiss constitutional law. The Court, however, regarded the Swiss declaration as binding on Switzerland, "having regard to the circumstances in which this declaration was made".[17]

It is unclear what exactly the Court referred to. Presumably, the Court simply referred to such a declaration being made in the setting of international judicial proceedings. The circumstances alluded to would then be limited to those of international judicial proceedings.

Furthermore, the exact scope of the declaration is not completely clear. Suy[18] treats it as merely an offer, a binding offer, to enter into negotiations. Such an interpretation, however, appears unduly limited. The offer went beyond an invitation to enter into negotiations, it contained concessions on the

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[12] *Rights of minorities in Upper Silesia*, o.c. note 9, at 25.

[13] *German interests in Polish Upper Silesia*, [1926] Publ. PCIJ, Series A, no. 7.

[14] Ibid., at 13.

[15] Ibid., at 13 (emphasis added).

[16] [1932] Publ. PCIJ, Series A/B, no. 46

[17] Ibid., at 170.

[18] Eric Suy, *Les actes juridiques unilatéraux en droit international public* (Paris 1962), at 126-127, footnote 51.

part of Switzerland. Otherwise, the constitutional issue could not have arisen. Relatively innocent acts such as mere invitations to enter into negotiations encounter no conceivable constitutional limits, unless perhaps in cases where the prospective partner has not been recognized.[19]

On the whole, these cases clearly show that statements, declarations and promises made before the Court are to be considered as legally binding. Nevertheless, the question remains why they should be considered as such. The most obvious explanation would hold that they are to be considered binding precisely because they are made during proceedings before the Court, but this explanation is not entirely satisfactory.

First, it is not exactly clear why judicial proceedings would have a status different from other types of proceedings. Inasmuch as judicial proceedings are a solemn occasion, so too are most forms of diplomatic intercourse.

Second, the recognition of the special status of judicial proceedings still leaves unexplained the Court's treatment of the Polish statements in the *German interests in Polish Upper Silesia-case*. The statements made outside the judicial context were held to be as binding as the statements made before the Court. It also leaves unexplained some of the decisions which will be discussed below.

The Czech-Polish frontier at Jaworzina

The Permanent Court of International Justice first dealt[20] with treaty-like instruments of contentious status in 1923, in the case concerning *Delimitation of the Czechoslovak-Polish Frontier (Question of Jaworzina)*.[21] Two instruments were at issue. The first one was a declaration signed by the Polish and Czechoslovak Foreign Affairs Ministers on 10 July 1920, under which they agreed to accept a decision of the Allied Powers regarding their frontier. A day later, the Allied Powers instructed the Conference of Ambassadors to

[19] Suy, ibid., submits that the Court had concluded that the offer was binding not as a matter of international law, but as a matter of Swiss constitutional law.

[20] The Court could have done so in the *Eastern Carelia case* concerning the 1920 Treaty of Dorpat between the Soviet Union and Finland and a declaration which was or was not part of that treaty, on the ground that the Soviet Union was not a member of the League of Nations and had never consented to the jurisdiction of the Court. [1923] Publ. PCIJ, Series B, no. 5.

[21] [1923] Publ. PCIJ, Series B, no. 8.

make a division of the territory concerned, a division which took place on 28 July of the same year.

The Court, while deciding the dispute before it, had to assess the legal basis of the decision of the Conference of Ambassadors, and found it to rest on the resolution adopted by the Allied Powers on 11 July. Moreover, the Court stated,

> "[t]his resolution appeared ... all the more opportune as it was in conformity with the agreement of July 10th, 1920, between the two States concerned which agreement was, according to its very terms, concluded by Poland and Czechoslovakia on being apprised of the desires, of the Principal Allied Powers."[22]

In addition, the two states had explicitly declared their acceptance of the decision of 28 July. Although two days later the Polish delegate sent a letter to the President of the Conference of Ambassadors which stated that he regretted the decision, the Court easily dismissed this attempt to renege. In the Court's view, the letter could not be given "any weight" when compared with the declaration by which the two states had accepted the division:

> "This declaration concludes the series of documents which begins with the agreement signed at Spa on July 10th, 1920, by the same Polish and Czechoslovak plenipotentiaries. The two agreements give to the decision arrived at ... the force of a contractual obligation entered into by the parties."[23]

The message was clear. Both the agreements reached on July 10th and July 28th of 1920 were considered legally binding. Formalities such as ratification were not mentioned, although it was stated that both declarations had been signed. Neither is there any mention of full powers and the like, which can mean that either the Court considered Foreign Ministers *ex officio* empowered to conclude binding agreements, or the Court considered that their powers rested upon their being accredited to an international conference. Neither of these possibilities, however, was explicitly addressed by the Court.

The Court made it equally clear that there was no room for second thoughts. The Polish letter, embodying a change of heart (presumably after having received instructions to that effect), was simply dismissed by the Court, without much argumentation. The Court contented itself by claiming

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[22] Ibid., at 29.

[23] Ibid., at 30.

that the letter could not have "any weight" in comparison to the joint declaration. At best, the Court stated somewhat nebulously, the letter could be of "historical value".[24]

The second instrument of debated status was a declaration made by Poland on 23 April 1921. On that date, the Conference of Ambassadors had unanimously adopted the Delimitation Commission's proposal regarding two of the three contested areas. After this adoption, Poland declared that it had made some concessions to Czechoslovakia, and had voted in favour of the proposal as tabled in the hope that the favour would be returned when considering the delimitation of the third contested area (Jaworzina). Although the Czechoslovak delegate never replied, Poland claimed that Czechoslovakia had accepted its declaration, and was thus bound to allow some "territorial modifications" regarding this third area.

The Court was less than convinced. First, it concluded that on its terms, the Polish declaration was "in the nature of an expression of a mere expectation and not a condition in the proper sense of the term."[25] More importantly, neither of the parties were empowered to make conditions. It was up to the Commission to make proposals, by majority decision, which, when unanimously accepted by the Conference, would be binding upon the parties involved. "It was not therefore possible for the interested parties to make conditions."[26]

The Court also pointed out that the condition would have been invalid anyway, since it was made after the vote had been taken. Yet, the Court did not wish to completely deny the Polish declaration any value, or so it seems. It noted: "Of a totally different nature is the moral value of the Polish declaration, in this sense that afterwards [when delimiting the third zone], the Polish concessions ... should be borne in mind."[27]

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[24] One is left to wonder what the Court could possibly have meant. Legally speaking, there would be little point in even ascribing historical value to the letter. Being unable to invalidate the agreement, the letter would appear useless for purposes of interpretation. It makes no sense to say X one day, negate X the next day, and subsequently claim that in interpreting X, account should be taken of the negation. If taken seriously, there would be nothing left to interpret, and if so, the initial agreement might just as well have been declared invalid immediately.

[25] *Jaworzina* case, o.c. note 21, at 52.

[26] Ibid., at 53.

[27] Ibid., at 54. Note that, in traditional fashion (see above, ch. V) morality is used as a normative safety-net. What appears somewhat odd at first sight is that a unilateral Polish declaration is apparently capable of creating something close to moral obligations for Czechoslovakia. Again, this can only mean that morality is created regardless of intent. In

The *Jaworzina* case already seems to set the stage for the 1994 *Qatar v. Bahrain* decision. The Court was not troubled at all with formalities. Instead, it seemed to take both declarations at face value. Although the Court's opinion is somewhat short on argument, it did start its analysis of the 1921 Declaration by looking at its terms. On its terms, there was no condition made by Poland, and even if there was, it would have been invalid.

The interesting point is that the Court bothered to look at the terms of the Declaration at all. The Court could have simply declared it invalid due to its being made after the agreement had already been consented to, or due to lack of powers, or both. Perhaps the Court simply wanted to show Poland that in making its declaration, it had not seriously considered making such a condition.[28]

The European Danube Commission's jurisdiction

In the PCIJ's 1927 Advisory Opinion on the *Jurisdiction of the European Commission of the Danube between Galatz and Braila*[29], the extent of the powers granted the European Commission of the Danube, first established in 1856, was at issue. According to Roumania, one of the four states represented on the Commission, the Commission's powers between Galatz and Braila were limited to what Roumania referred to as technical jurisdiction, i.e. the maintenance of a navigable channel and pilotage services. The other three members (Great-Britain, France and Italy) were of the opinion that the Commission's jurisdiction also covered "juridical powers", especially the power of enforcing regulations.

The matter was governed by the 1921 Convention establishing the Definitive Statute of the Danube, signed and ratified by the four states involved in addition to eight others. However, the Definitive Statute did not settle the jurisdictional controversy. The articles 5 and 6, dealing respectively with the material and the territorial jurisdiction of the Commission, remained vague; they merely affirmed that the pre-existing situation ought to be maintained.

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this case, it would seem that the (near-) moral obligation would be derived from considerations of reciprocity rather than from anything else.

[28] This line of thinking is inspired by Martti Koskenniemi, *From Apology to Utopia: the structure of international legal argument* (Helsinki 1989).

[29] [1927] Publications of the PCIJ, Series B, no. 14.

The delegates to the Commission, invited to attend the Danube Conference at which the Definitive Statute was concluded, were asked to give their views on the meaning of article 6 in particular. They did so in an Interpretative Protocol, which was to be appended to the minutes of the Conference. According to this Interpretative Protocol, it was "understood that between Galatz and Braila the European Commission wil continue as in the past to maintain the navigable channel and its pilotage service."[30]

The crucial issue, therefore, was the legal status of this Interpretative Protocol. Roumania maintained that it was a legally binding agreement, stipulating that the Commission's jurisdiction had always been limited to maintenance of the navigable channel and pilotage service and had never been extended to encompass the power to enforce regulations.

The Court denied that this was the case:

> "The so-called Interpretative Protocol is not an international agreement between the Parties to the Definitive Statute; it is not annexed thereto, whilst many interpretations of the articles of the same Statute were inserted in the Final Protocol, which has the same validity and duration as the Convention to which it refers. The Interpretative Protocol is not even mentioned in the Statute, which Roumania signed without any reservations, and can in no sense be considered as a part of it."[31]

The Court concluded that it could "only consider the Interpretative Protocol as a part of the preparatory work."[32]

Several elements of the above reasoning are important. First, the Court held that the protocol is not an agreement between the parties to the Definitive Statute. Although not unambiguous, the Court here apparently refers to the fact that the Protocol was the product of only four states, or perhaps not even that, but rather the product of the four delegations represented in the Commission, who attended the Conference in an advisory capacity. It follows that such agreements can not be considered as binding upon their respective states, let alone as binding upon those who did not participate in their conclusion.

Nevertheless, the fact remains that the Interpretative Protocol was accepted by the Conference. Although drafted by the European Commission, and drafted explicitly as containing "their interpretation" of article 6 of the Definitive Statute, it was accepted, upon being read by the Conference's

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[30] Ibid., at 32, note 1.

[31] Ibid., at 34.

[32] Ibid., at 34.

President, by the Conference, and as such acquired the status of an official document emanating from the Conference. Yet, the Court simply referred to it as part of the preparatory work, instead of as an authoritative interpretation having the force of law.

This holding is based (and this is the second important aspect of the above citation) on the Court's opinion that had the Parties intended the Protocol to be an authoritative interpretation, they would no doubt have inserted it in the Final Protocol, as they had so many other authoritative interpretations. From the fact that this had not occurred, the Court deduced *a contrario* that the parties had not intended to attach legally binding force to the Protocol.[33]

It is interesting to speculate about what would have happened had the Protocol embodied the only interpretative declaration relating to the Definitive Statute. Had this been so, the Court would not have been able to reason *a contrario*, and would have been forced to clarify its thoughts on the making of international agreements. The Court's comments regarding a second point invoked by Roumania may provide some further indication of its thoughts on the concept of treaty.

This second argument invoked by Roumania related to a so-called *modus vivendi*, dated October 1922. Great Britain, France and Italy had, presumably in order to pacify Roumania, proposed an arrangement under which Roumania would be entitled to enforcement jurisdiction, but the proposal was made dependent upon certain conditions. Roumania had claimed that the proposal amounted to a legally binding agreement, but since those conditions were not accepted by Roumania, the Court concluded that "[n]o agreement was therefore reached, and the matter was left as it stood."[34] The wording seems to suggest that had agreement been reached, i.e. had the proposal been accepted by Roumania, the matter would not have been "left as it stood".[35]

With regard to the Interpretative protocol and to the proposed *modus vivendi*, the Court found that there was no legally binding agreement. Yet,

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[33] And as if to bolster its conclusion, it also expresed doubts as to whether Roumania's interpretation of the Protocol, holding that no enforcement jurisdiction had ever been granted to the Commission, was the correct interpretation. Ibid., at 35.

[34] Ibid., at 35.

[35] Roumania also invoked the argument that the Protocol was really a decision of the European Commission of the Danube, and was as such legally binding. This too was denied by the Court, on the grounds that first, the Commission itself was acting in an advisory capacity at the Conference, and second, that even if it were a binding Commission decision, it would have been *ultra vires*, since "the Commission has no power to decide to abandon the functions with which it was entrusted under existing treaties." (Ibid., at 34).

what is important, for present purposes, is not so much that conclusion but rather the way in which the Court arrived at its conclusion. In both respects, the Court's handling of the concept of treaty appears to be remarkably liberal.

Roumania's claim concerning the Interpretative Protocol was rejected by the Court on the basis of what appears to be a formality, but what turned out to be more than just a formality for formality's sake. The Court rejected the Interpretative Protocol because, when compared to other interpretations, it had not been included in the Final Protocol of the Conference. The Conference habitually inserted interpretations in the Final Protocol, so the Court must have reasoned that if an interpretation is not so inserted, then this latter interpretation was not intended to be of legal force. Moreover, as the Court noted, Roumania could have made a declaration referring to it upon signing the Final Protocol. Its failure to do so must, in the Court's view, have indicated that even Roumania itself did not, when signing the Final Protocol, consider the Interpretative Protocol as anything more than a part of the preparatory works. In short, the Court employed what looks like a mere formality for reasons of substance.

On Roumania's invocation of the proposed *modus vivendi*, the Court's reasoning was equally liberal. The Court made no mention whatsoever of formalities which need be taken into account when concluding international agreements. In the case at issue, only offer and acceptance were required, and as soon as that occurred, the matter would no longer have been, so the Court appeared to suggest, "left as it stood". Since there was no acceptance, there was no agreement; had there been acceptance, the Court's opinion might be interpreted as holding that there was an agreement which could have changed the legal situation. As a result, the Court left wide open the door to modification of the provisions of an existing formal agreement by a later informal agreement.

Judges Moore and Nyholm attached separate opinions to the judgment. Judge Negulesco (a Roumanian national) wrote a long dissenting opinion, which, if compared *a contrario* to the majority opinion, confirms the above. According to Judge Negulesco, the Interpretative Protocol was a binding decision of the Commission itself, but he reached his conclusion by default. He started by claiming that the Interpretative Protocol was an international agreement, but it was not obligatory since it was not annexed to the Definitive Statute.[36] Although he denied its obligatory force, the Judge claimed

[36] Apparently, he used the term 'agreement' in a far more generic sense than the majority did.

that it must have interpretative value, and since it was not a treaty, its obligatory force

> "must be attributed to it on another ground: it is a decision of the European Commission which is not submitted to ratification by the Powers and which establishes the conditions under which the Commission's powers were in fact exercised in the past."[37]

On its face, Judge Negulesco's reasoning appears somewhat confused: if the obligatory character of the Interpretative Protocol "has rightly been disputed", it is difficult to see why all of sudden it would possess obligatory force. It could be argued that dismission of the Interpretative Protocol as a treaty would not necessarily imply that it could not amount to a decision of the Commission. This seems to be the track chosen by Judge Negulesco, but he immediately undermined this very position by his assumption that the Protocol was not legally binding "either as an act of the Conference relating to the Statute of the Danube or as a decision of the European Commission".[38] As a result, the Protocol was eventually relegated to the same status as that had been accorded to it by the majority: a part of the preparatory work.[39]

Lithuanian-Polish railway traffic

In the case concerning *Railway traffic between Lithuania and Poland (Railway sector Landwarów-Kaisiadorys)*[40], the issue concerned obligations on the parties stemming from a resolution adopted by the Council of the League of Nations in 1927. Council resolutions as such were not legally

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[37] Judge Negulesco's dissenting opinion to the *Danube Commission* opinion, o.c. note 29, at 121.

[38] Ibid., at 121-122.

[39] With regard to the proposed *modus vivendi*, Judge Negulesco claimed that the proposal had in fact been accepted, without however providing any substantiation for this claim. In his view, it amounted to "a decision of the European Commission upon points unanimously accepted by the members of the Commission." (Ibid., at 123.) Without going into detail, it is questionable whether the Commision itself was empowered to determine the scope of its own powers to begin with, in defiance of the existing legal framework. The majority clearly thought this would be impossible (o.c. note 29, at 34).

[40] [1931] Publ. PCIJ, Series A/B, no. 42

binding upon the members[41], yet the Court distilled from the fact that the representatives of Poland and Lithuania had "participated in the adoption" of the resolution and had accepted it, that they had become bound by its terms.[42]

The scope of the obligation was, however, limited. The Council had resolved that it "[r]ecommends the two Governments to enter into direct negotiations as soon as possible", and, due to its acceptance by both states involved, this was interpreted by the Court as a *pactum de negotiando*.[43] There was, no doubt, an obligation to negotiate, but, as the Court noted,

> "an obligation to negotiate does not imply an obligation to reach an agreement, nor in particular does it imply that Lithuania, by undertaking to negotiate, has assumed an engagement ..."[44]

Again, the Court's liberal interpretation of what it takes to become legally bound is noteworthy. In this case, the acceptance of a resolution was enough, regardless of how the actual acceptance had taken place. There was no reference to signature or anything similar, let alone to ratification.

An initial interpretation of this case might consider that the Court went too far by discerning an obligation at all. The resolution clearly used the verb 'recommend' in its pertinent paragraph: the two parties were recommended to enter into direct negotiations. The Court must have reasoned, however, that by accepting the resolution, the parties also accepted the recommendation, and were henceforth bound to make good on their pledges. By accepting the resolution, the parties had accepted the value of the recommendation and agreed to bring it into practice.

The Free Zones case

Apart from the above-mentioned offer made by the Swiss representative[45], a second interesting aspect of the *Free Zones* case[46] relates to the

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[41] Cf. Derek W. Bowett, *The law of international institutions* (London 1982, 4th ed.), at 19.

[42] *Railway traffic case*, o.c. note 40, at 116.

[43] See generally Ulrich Beyerlin, "Pactum de contrahendo und pactum de negotiando im Völkerrecht?", 36 *ZaöRV* (1976), 407-443.

[44] *Railway traffic case*, o.c. note 40, at 116.

[45] See above, text accompanying notes 16-19.

Court's *dictum* concerning the Special Agreement under which the case had been brought before the Court. It was argued that the Special Agreement constituted a compromise. Switzerland saw its wishes honoured in article 1 of the Special Agreement, and article 2 dealt with the French wishes. Consequently, the French argued that it would be "unjust" to render judgment on the question put forward in article 1 of the Special Agreement alone, as this would destroy the balance between the parties.

The Court swept the argument aside: "The Court is not satisfied that these arguments should prevail. It is the Special Agreement which represents, so far as the Court is concerned, the joint will of the Parties."[47] In other words, the Court refused to look beyond the terms of the Special Agreement. It looked merely at what was on the table, disregarding any ulterior motives.

Legal status of Eastern Greenland

It is debatable whether the decision of the Permanent Court in the 1933 *Eastern Greenland* case[48] concerned the conclusion of an international agreement or not. Some authors have argued that the Court decided on the existence of an oral agreement.[49] According to others, the Court accorded legal force to a unilateral declaration. The decision itself is somewhat ambiguous on the point. However, even if only concerned with a unilateral declaration, the Eastern Greenland case to some extent clarified the creation of international legal rights and obligations with respect to conventional acts, and is therefore of great value for present purposes.

In the instant case, the Court found a declaration made by the Norwegian Foreign Minister to be legally binding. Regarding the question of sovereignty over Greenland, on 22 July 1919, Mr. Ihlen told the Danish minister "that the Norwegian Government would not make any difficulty in the settlement of this question."

The Court treated Ihlen's statement as legally binding for reasons which

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[46] O.c. note 16.

[47] Ibid., at 163.

[48] [1933] Publ. PCIJ, Series A/B, no. 53.

[49] This thesis was already advanced by Judge Anzilotti in his dissenting opinion (esp. at 91), and wholeheartedly embraced by Suy, o.c. note 18, at 124.

are not readily apparent. The Court satisfied itself by remarking that it considered it

> "beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs."[50]

Whether Norway actually intended to become bound was not determined[51]; the Court must have simply taken such to be the case, given the fact that the statement was made by the Foreign Minister, affirmed a couple of months later[52], and since the wording of the statement was "unconditional and definitive".[53]

An important, and often overlooked, element of the Eastern Greenland decision on this point is that the Court not only noted the existence of a legal commitment, but also delimited the scope of this commitment with some subtlety and precision. Although the Court regarded Mr. Ihlen's statement as "unconditional and definitive", it also noted that the statement did not amount to a definitive recognition of Danish sovereignty. The question of sovereignty was initially scheduled for resolution at the Peace Conference following the First World War. When the subject could not be brought up during this Conference, Denmark sought to obtain the assurances of some of the major powers that its sovereign rights be recognized, having already received an American recognition to that effect.

The discussions at which Mr. Ihlen had promised not to make any difficulties had, however, transpired before the Conference actually took place. Given the fact that sovereignty was to be decided upon at the Confer-

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[50] *Eastern Greenland* case, o.c. note 48, at 71. For a critique, see Edvard Hambro, "The Ihlen Declaration revisited", in D.S. Constantinopoulos et. al. (eds.), *Grundprobleme des internationalen Rechts: Festschrift für Jean Spiropoulos* (Bonn 1957), 227-236.

[51] This is presumably the reason why Brierly regarded the declaration as no more than a policy statement. See Brierly III, at 52, paras. 8 and 9. Earlier, however, he seemed to regard it as an oral agreement. Cf. Brierly I, at 227, para. 21.

[52] *Eastern Greenland* case, o.c. note 48. On 7 November 1919, Mr. Ihlen was recorded as having told the Danish Minister at Christiana that "it was a pleasure to Norway to recognize Danish sovereignty over Greenland". At 73.

[53] Ibid., at 72. There is a vague hint at consideration. The Court dwelled a bit on the possibility of Norwegian concessions regarding Eastern Greenland being exchanged for Danish concessions regarding Spitsbergen (ibid., 70-71), without, however, reaching any firm conclusions.

ence and the future tense in which Mr. Ihlen's declaration was framed, the Court concluded

> "that mr. Ihlen cannot have meant to be giving then and there a definitive recognition of Danish sovereignty over Greenland, and shows also that he cannot have been understood by the Danish Government at the time as doing so."[54]

The important consequence is that the Court delimited the scope of the obligation as being an unconditional and definitive promise not to make any dificulties, and nothing more. The scope of the commitment was limited, but it nevertheless existed. As will be demonstrated below, in doing so the Court clearly foreshadowed its decision of more than 60 years later in *Qatar v. Bahrain*.

In the light of later decisions, especially those in the *Nuclear tests* cases[55], it is also of some importance to note that the Court did not base its decision upon Denmark's reliance on the Ihlen declaration. As the above citation shows ("cannot have been understood"), the Court was convinced that Denmark could not rely on the Declaration in order to claim definitive sovereignty.

Moreover, Denmark's own behaviour made reliance an implausible course. In 1921, after having obtained the written assurances from Great Britain, France, Italy and Japan, it asked both Sweden and Norway for written recognitions. Sweden complied; and, Norway did not, at least not unconditionally.[56] Had Denmark actually relied on the Ihlen declaration as a recognition of sovereignty, asking for a written declaration would not have been, strictly speaking, necessary. It was only after, in 1921, Norway had imposed conditions which Denmark was unwilling to meet, that Denmark decided "that it would rest content with the verbal undertaking given by M. Ihlen in 1919."[57]

In other words, the binding nature of the Ihlen declaration was not based on reliance by Denmark. Indeed, the text of the declaration, which was merely an undertaking not to make any difficulties, did not contain much on which to rely. The Court concluded, that the declaration meant that "Norway

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[54] Ibid., at 69.

[55] To be discussed below: text accompanying notes 126-140.

[56] Norway, at this time, was only willing to grant recognition on condition that it received guarantees concerning traditional hunting and fishing by Norwegians on the east coast.

[57] *Eastern Greenland* case, o.c. note 48, at 37.

is under an obligation to refrain from contesting Danish sovereignty"[58], but that was as far as it went. It did not create an obligation to definitively recognize Danish sovereignty.

Nor was the binding nature of the declaration based on an intention on Norway's part to become bound. No investigation into Norway's intentions (if any) is reflected in the judgment, and lack of intent as such was not even mentioned as a possible argument. The closest reference thereto was the argument relied on by *ad hoc* Judge Vogt in his dissenting opinion, holding that Mr. Ihlen, "when making his declaration, was labouring under a fundamental and excusable misapprehension".[59] While Judge Vogt accepted the legally binding force of declarations such as Ihlen's in principle, in the instant case he felt that the declaration was invalid due to a mistake: Mr. Ihlen had misunderstood the true nature of Denmark's request in 1919, and Judge Vogt implied that Denmark had intentionally misled Mr. Ihlen.

The important point is that the declaration was held to be legally binding simply because it contained a commitment made by someone empowered to do so. The commitment was, on its terms, not too far-reaching, but it was there, and that sufficed for the Court to proclaim the Ihlen declaration legally binding.

Albanian minority schools[60]

In 1920, after its admittance to the League of Nations, Albania accepted the request to consent to a declaration concerning the treatment of minorities. This Declaration was drafted by the League, taking into account suggestions by some of its members. The Declaration was signed on 2 October 1921 and ratified on 17 February 1922. An Albanian constitutional change in 1933 led, according to Greece, to an infringement of the declaration. Eventually, the Court was asked for an advisory opinion on the matter.

Notwithstanding the somewhat peculiar drafting history of the Declaration, the Court simply concluded that Albania's declaration was legally binding, stating only: "The Declaration of October 2nd, 1921, belongs to the numer

[58] And, *a fortiori*, not to occupy the contested territory. Ibid., at 73.

[59] In ibid., at 118.

[60] *Minority Schools in Albania* (advisory opinion), [1935] Publ. PCIJ, Series A/B, no. 64.

ous category of international acts designed for the protection of minorities."[61]

Indeed, the question as to whether the declaration was legally binding or not was not even raised. The differences of opinion centered around the question of how to properly interpret the Declaration.[62] The case is of some interest because of the unusual form[63] in which the obligations were cast, but there was no doubt that legal commitments had been envisaged and created.

The International Court of Justice

Like its predecessor, the International Court of Justice has on several occasions been confronted with treaty-like instruments, and like the Permanent Court, the post-war International Court has repeatedly demonstrated that it will not insist on strict adherence to formalities.

South Africa's Mandate

In a string of decisions and advisory opinions, the International Court between 1950 and 1971 had to deal with various aspects of the Mandate held by South Africa over South-West Africa, since 1990 known as Namibia.[64] Repeatedly, the Court had to give its opinion on the legal nature of the Mandate, hence the obvious interest of the Mandate cases for present purposes. One caveat is in order though. As Thirlway correctly states, the mandate was an institution *sui generis*. It had some roots in voluntary acceptance, but

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[61] Ibid., at 15.

[62] See also the joint dissenting opinion of Judges Sir Cecil Hurst, Count Rostworowski and Negulesco.

[63] It was not, however, unique. Similar declarations concerning minority protection had been made by other states. See generally Suy, o.c. note 18, 114-121, who concludes that their unilateral appearance notwithstanding, these were really agreements between the League of Nations and the states concerned.

[64] One of those opinions is not of importance for present purposes. The Court's third advisory opinion, on *Admissibility of hearings of petitioners by the Committee on South-West Africa* ([1956] ICJ Rep. 23) does not in any way relate to the concept of treaty.

should not "be forced into the definition of a "treaty" which is inappropriate ..."[65]

Apart from the Mandate itself, the string of decisions is of interest on various other points, such as the nature of unilateral statements made before international organs, and the combined effect of unilateral statements made by various parties.

In the first of it opinions concerning the Mandate[66], the Court was, *inter alia*, asked whether the Mandate was still in existence and whether it would be incumbent on South Africa to negotiate and conclude a trusteeship agreement with the United Nations.

With regard to the first of these questions, the Court considered that the Mandate was still in existence, for several reasons. The exact legal nature of the basis of the Mandate was left in doubt, although the Court suggested that the Mandate was something more than a mere contract: "The object of the Mandate regulated by international rules far exceeded that of contractual relations regulated by national law."[67]

Among the reasons why the Court found the Mandate to be still extant were a number of South African statements, made to the League of Nations and the United Nations. As the Court was quick to point out:

> "These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government."[68]

The Court was equally quick to point out that such statements were not in themselves law-creative. The Court considered them as interpretations of the Mandate, and as such they "have considerable probative value when they contain recognition by a party of its own obligations under an instrument."[69]

With respect to the question as to whether or not South Africa was, by virtue of Chapter XII of the United Nations Charter, under a duty to negotiate and conclude a trusteeship agreement, the Court found that no such duty

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[65] Hugh Thirlway, "The law and procedure of the International Court of Justice 1960-1989, part three", 62 *BYIL* (1991), 1-75, at 8.

[66] *International Status of South-West Africa* (advisory opinion), [1950] ICJ Rep. 128.

[67] Ibid., at 132.

[68] Ibid., at 135.

[69] Ibid., at 135-136.

existed. There was no legal duty to negotiate, let alone a legal duty to conclude a trusteeship agreement.[70]

As noted above, whether the mandate was a treaty or not was left unresolved in the majority opinion. It did attract the attention of Lord McNair, who in a separate opinion reached the conclusion that the mandate was a treaty concluded between the mandatory and the other members of the League of Nations.[71]

The Court was perhaps justified in not dwelling too much on the exact legal character of the Mandate, given the fact that this question was not at issue in 1950. The question was, however, central to the claim which was the subject of the Court's first contentious case on the Mandate. Both Ethiopia and Liberia had brought cases concerning the Mandate against South Africa before the Court. In response, South Africa argued that the Court did not have jurisdiction to hear the complaints.[72]

South Africa stumbled somewhat over its own arguments. At first, it had argued that during the League of Nations era, the Mandate had been a treaty, but had ceased to be in force since the demise of the League. Responding to a question by Judge Spender, it changed its submission and claimed that the Mandate "has never been, or at any rate is since the dissolution of the League of Nations, no longer, a 'treaty or convention in force' within the meaning of Article 37 of the Statute of the Court ..."[73]

The Court ruled that the Mandate had been and continued to be a treaty, taking the form (but not more than that) of a resolution of the Council of the League of Nations. The Court considered the Mandate to be "a special type of instrument composite in nature", incorporating agreement on several points and of varying levels of specificity.[74]

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[70] Ibid., at 140. The Court added that it was not in the position to "pronounce on the political or moral duties which these considerations [i.e. ch. XII of the UN Charter] may involve"; a clear case of morality and politics being used indiscriminately as normative safety nets. With characteristic verve, Judge Alvarez, dissenting, found a legal obligation to negotiate and conclude a trusteeship agreement to exist, which he derived from "the spirit of the Charter" (ibid., at 183). In the alternative, there was in his view "at least" a political obligation to that effect, derived from "social interdependence" (at 184).

[71] Ibid., at 158.

[72] *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, [1962] ICJ Reports 319.

[73] Ibid., at 327.

[74] Ibid., at 331.

The Court's analysis is not without problems. If the Mandate was a treaty, then the obvious question, and one ruthlessly pursued by Judges Spender and Fitzmaurice in their joint dissenting opinion, was who were the parties to the treaty. The majority left this question unanswered, as did Judge Jessup in his separate opinion. Indeed, Judge Jessup rationalized the omission by claiming that as soon as agreement has been established, "the identification of a document or instrument embodying the agreement is not required by any rule of international law."[75]

Judge Bustamante, for his part, claimed that the "real parties" to the mandate were "the population under Mandate" and South Africa[76], a claim wholeheartedly dismissed by Judges Spender and Fitzmaurice as "obviously untenable".[77] Their own conclusion was based on a process of elimination, and following that process, the most likely treaty-partner of South Africa would have been not the Allied Powers, not the members of the League of Nations individually, but either the League itself or its Council. Yet, as they noted, the treaty-making powers of the League at that time were in doubt, and this held true *a fortiori* for its organs. In the end, they concluded that the Mandate was not to be considered as a treaty (let alone one conferring jurisdiction upon the Court), but as a quasi-legislative act of the League of Nations Council.

To some extent, the argument made by Judges Spender and Fitzmaurice was based on conjecture. Thus, they claimed that had the authors of the Mandate intended it to be a treaty, they would have explicitly drafted it in treaty-form (as happened with the British Mandate over Iraq), and would no doubt have registered it under article 18 of the Covenant (as also happened with the Iraq Mandate). For reasons set out above, neither argument would have been decisive in its own right.[78]

As noted earlier, the majority found that the Mandate embodied agreement, and therefore amounted to a treaty. Judges Spender and Fitzmaurice conceded the existence of some form of agreement: "Clearly the Mandate would never have been promulgated except against a background of some general common understanding."[79] Yet, this "common understanding" did

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[75] Ibid., at 405. Judge Jessup came close to treating at least the continuance of the Mandate after the Second World War as resting upon a unilateral undertaking. At 418.

[76] Ibid., at 369.

[77] Ibid., at 95.

[78] See chapter III, above.

[79] *South West Africa cases*, preliminary objections, o.c. note 72, at 491.

not suffice to give it "a treaty character". In their view, the test was in the act or instrument itself, and since the Mandate only entered into force by virtue of the Council resolution, it followed that its legal character was that of a resolution, a quasi-legislative act of the Council of the League of Nations.

During the second stage of the proceedings[80] the Court retreated somewhat from its 1962 decision. This retreat took the form of a claim that the 1962 decision that apparently held the Mandate to be a treaty in force had been but an assumption, "assumed for the purpose of determining the purely jurisdictional issue which was all that was then before the Court."[81]

Moreover, the question as to the exact parties to the Mandate agreement came back to haunt the Court, and it finally settled for the thesis that the Mandate had been an agreement between the mandatory and the League of Nations, or, perhaps, between the mandatory and the Council of the League of Nations.[82] Either way, the important conclusion was that the individual members of the League were not parties to the agreement, and this construction gave the Court the necessary leeway to decide that the applicant states (Ethiopia and Liberia, both former members of the League) had no legal interest to defend, which in turn allowed the Court to dismiss the application.

As noted earlier, the Mandate was an institution *sui generis*, and it is difficult to draw any precise conclusions concerning its legal character from the various opinions and decisions of the Court.[83] It is, however, noteworthy that although the Mandate was treated as an agreement between the mandatory and either the League of Nations or its Council, at no point did the Court seriously investigate whether the League (or its Council) was empowered to conclude treaties.[84] The least one might have expected was a reference to some explicit or implied power to that effect, but even such a reference was conspicuously absent. At the very least, this implies a certain disregard for formalities.

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[80] *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, [1966] ICJ Rep 6.

[81] Ibid., at 19.

[82] The Court was somewhat ambiguous on this point.

[83] In its 1971 opinion the Court merely affirmed that the mandate was an agreement. *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep. 16, esp. at 46-47.

[84] This was, as will be recalled, one of the arguments invoked by Judges Spender and Fitzmaurice in their dissent to the 1962 decision.

The exact legal nature of events which had taken place in April, 1946, during the 'dissolution-session' of the Assembly of the League of Nations, presented a range of opinions as divided as those relating to the exact legal nature of the Mandate. On the 9th of April, a number of members had made statements to the effect that Mandates should continue to be exercised in accordance with the terms of the instruments. Those statements were confirmed by Assembly-resolution of 18 April, in which the Assembly declared that it had taken note of the expressed intentions of a number of members.

In its 1962 decision, the Court inferred from the various unilateral statements "that there was a unanimous agreement among all the Member States present at the Assembly meeting".[85] This conclusion was strongly contested by Judges Spender and Fitzmaurice.

In 1966, the Court, having had its composition changed, also changed its mind. Without substantiation, the Court found that those unilateral statements could not be read "as conferring on the members of the League individually any new legal rights or interests of a kind they did not previously possess."[86]

As far as the texts of the statements and the resolution of 18 April 1946 are concerned, this latter interpretation is surely the better interpretation.[87] In either case, what should be noted is the ease with which international legal rights and obligations can be created. Whichever interpretation is favoured, all the arguments invoked concentrated specifically on the language of the resolution and statements and the circumstances surrounding its adoption. Notably absent were arguments relating to treaty-making powers and similar formalities, and even arguments referring to the intentions of the pertinent actors were omitted. The only inferences relating to intent can be gleaned from the language and the circumstances. The argument that the statements and/or the resolution did not show an intent to be legally bound was not even considered.

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[85] O.c. note 72, at 341.

[86] O.c. note 80, at 36 (para. 56). The gist of the 1962 decision on this point had been that new legal rights had been created, not merely that old ones continued to exist. Mere continuation would at least in part (given the dissolution of the League) have been without object.

[87] See also *ad hoc* Judge Van Wyk's separate opinion to the 1966 decision, o.c. note 80, esp. at 113, and Judge Fitzmaurice's dissent to the 1971 opinion, referring to the resolution as a "classic of ambiguity". O.c. note 83, at 255.

Ambatielos[88]

The *Ambatielos* case between Greece and the United Kingdom centered around the question of whether a declaration issued by the parties on the same day on which they concluded a bilateral agreement was to be considered an integral part of that agreement or not.

The majority found this to be the case mainly because the instruments of ratification (the British more so than the Greek) suggested that the agreement and the declaration were intimately related. The Court found that the instruments of ratification constituted "cogent evidence" of the parties' intentions.[89] Ratification, the Court stated, is in those cases where provided for in treaties, "an indispensable condition for bringing [the treaty] into operation. It is not, therefore, a mere formal act, but an act of vital importance."[90]

The Court buttressed its thesis by claiming that the joint declaration, having regard to its text and the circumstances surrounding its conclusion, was in the nature of an interpretative clause, "and, as such, should be regarded as an integral part of the Treaty, even if this was not stated in terms."[91]

In some forceful dissenting opinions, the wisdom of the Court's conclusion was seriously put in doubt. Judges McNair, Basdevant, Zoricic, Klaestad and Hsu Mo all attached dissenting opinions to the decision, and all were less than pleased with the Court's refusal to look beyond the act of ratification. Judge McNair noted that the formal parts of treaties "contain many expressions of an archaic and purely routine character"[92], which implies that one cannot infer from those formal parts anything with respect to the parties' intentions.

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[88] *Ambatielos case (Greece v. United Kingdom)*, preliminary objections, [1952] ICJ Rep. 28.

[89] Ibid., at 42.

[90] Ibid., at 43.

[91] Ibid., at 44. A rather similar kind of reasoning was recently employed by the Queen' Bench Division of England's Divisional Court in *Regina v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* (decision of 30 July 1993, in 98 *ILR* (1994), 166-179). The Court held that since there was no separate provision on ratification of protocols to the Treaty establishing the European Union, and since the instruments deposited by a handful of other states made no distinction between the Treaty and the Protocols, plaintiff's argument that separate ratification of the Protocol on Social Policy was called for should be dismissed.

[92] O.c. note 88, at 62.

Judge Basdevant went even further, and claimed that the physical operations relating to the conclusion of agreements were usually carried out by low-level government officials: "... these operations commonly take a form deriving from tradition, which is followed scrupulously, and therefore blindly, by the officials entrusted with this material task."[93]

Sir Gerald Fitzmaurice, writing in his scholarly capacity, suggested that the dissenting judges may well have been in the right. In his view, the Court had failed to distinguish between the act of ratification itself and the instrument embodying it: while the act is of vital importance, the same does not necessarily hold true with regard to the instrument.[94]

Moreover, as several of the dissenting judges noted[95], the substance of the declaration would suggest that it could not have been intended to form an integral part of the treaty. This suggestion was strengthened by other features (the lack of explicit incorporation; other instances of Greek practice regarding such declarations, et cetera).

The arguments of the dissenters appear persuasive, but two other points deserve some attention. First, the Court refused to look beyond the act of ratification. What matters is the act itself and the wording used. Indeed, the language of especially the British instrument of ratification supports the contention that the treaty and the declaration were but parts of the same thing. Moreover, the dissenters were also reluctant to look beyond the act of ratification. They disagreed with the weight attached by the majority to some of the words used in the instrument of ratification, but they were all fully prepared to accept the ratification itself for what it was: the expression of consent to be bound.

Accordingly, the second noteworthy aspect is that the legally binding nature of the declaration was never in doubt. Disagreement centered over whether it was an integral part of the treaty, but there was no doubt as to its legal qualities. Even if the declaration were not to be considered an integral part of the treaty, it would still be legally binding. Indeed, Judge McNair specifically referred to the declaration as "a collateral and contemporaneous

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[93] Ibid., at 69-70.

[94] Sir Gerald Fitzmaurice, *The law and procedure of the International Court of Justice* (vol. I) (Cambridge 1986), at 391.

[95] See also the second phase of the proceedings: *Ambatielos case (Greece v. United Kingdom), merits: obligation to arbitrate*, [1953] ICJ Rep. 10, and especially the joint dissenting opinion of Judges McNair, Basdevant, Klaestad and Read.

agreement"[96], while Judge Zoricic viewed treaty and declaration as two independent parts of a "simultaneous agreement".[97]

The Anglo-Iranian Oil Co. case

In order to invoke the jurisdiction of the International Court of Justice, in the *Anglo-Iranian Oil Company* case[98], the United Kingdom argued, *inter alia*, that a 1933 concession agreement concluded between the company and the Iranian Government amounted to a treaty. In the United Kingdom's view, the agreement, concluded with the help of the British Government and after mediation by the League of Nations Council[99], "has a double character"[100], being both a concesssionary contract and an international treaty.

The Court, however, dismissed the claim on the ground that there was no privity of contract between the governments of Iran and the United Kingdom. Consequently, the agreement "does not regulate in any way the relations between the two Governments."[101]

On this point, the decision of the Court attracted few dissents. The dissenting judges fully agreed that there was no privity of contract between the two states, and that consequently the agreement was not a treaty or convention for jurisdictional purposes.[102]

It is worthwhile to note, however, that the lack of privity of contract was the only thing barring the Court (on this point) from claiming jurisdiction. Had the agreement in one way or another regulated relations between the two states, there would have been no problem in considering it to be a treaty, which suggests once more that the mere creation of commitments between the

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96 *Ambatielos*, o.c. note 88, at 65.

97 Ibid., at 75.

98 [1952] ICJ Rep. 93.

99 The agreement concluded an earlier dispute concerning the so-called D'Arcy concession; hence, the involvement of both the British Government and the League of Nations Council.

100 *Anglo-Iranian Oil Co. case*, o.c. note 98, at 112.

101 Ibid., at 112.

102 Judge Levi Carneiro suggested, explicitly *de lege ferenda*, that the term "treaties and conventions in force" should ideally also include private international contracts. He also hinted at the fact that the UK government was the majority shareholder in the company, without letting this affect his final opinion. Ibid., esp. at 152-153.

proper parties (*in casu*, states) suffices to create international legal rights and obligations.

Monetary Gold

In April 1951, France, the United Kingdom and the United States concluded an agreement in which they asked an arbitrator to decide whether gold removed from Rome during the second World War belonged to Albania, Italy, or to neither state.[103] The agreement was accompanied by the so-called Washington Statement, in which, dependent on the arbitrator's decision, both Albania and Italy were invited to initiate proceedings before the ICJ with respect to the gold.

Throughout the proceedings, the Washington Statement was regarded as a "collective offer"[104] made by France, the UK and the US, which was finally accepted by Italy when it instigated proceedings. As a result, this informal document designated as a Statement created legally binding rights and obligations between the three powers; and, none of them could with impunity back out of the agreement. The Statement had become binding upon Italy by virtue of its acceptance of it. Judge Read, opining individually, found that Italy's acceptance had been defective, and that, in an *a contrario* way, proves the point: if the document was not to be considered legally binding to begin with, there would be little point to refer to a defect in Italy's acceptance.[105]

Administrative memorandum

In 1956, the Court was asked for an advisory opinion on the jurisdiction of the administrative tribunal of the International Labour Organization.[106]

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[103] *Case of the monetary gold removed from Rome in 1943 (preliminary question) (Italy v. France, the United Kingdom of Great Britain and Northern Ireland and the United States of America)*, [1954] ICJ Rep. 19. If the gold had belonged to Albania, then the UK would have claimed it as damages for the Corfu Channel incident.

[104] Ibid., at 28.

[105] Ibid., at 38.

[106] *Judgments of the Administrative Tribunal of the International Labour Organization upon complaints made against the United Nations Educational, Scientific and Cultural*

The request came as a result of the personnel policy of Unesco, whose Director-General, pressured by McCarthyism, had decided not to renew the contracts of several employees.

Before those contracts came up for renewal, Unesco's Director-General had issued an administrative memorandum, according to which the contracts of all professional staff members who satisfied certain conditions and whose services were needed, would be renewed. The effect of this memorandum, in the Court's view, was "to create a right to the renewal of the contracts."[107] The Court held, in careful terms, "that it could reasonably be maintained that an administrative notice framed in such general terms might be regarded as binding on the Organization ..."[108] Unesco's counterargument that it would have had to make individual offers to all employees concerned and then wait for individual acceptances, was, given the circumstances, "a matter of form rather than substance."[109]

Judge Hackworth dissented, and found that the memorandum had been "no more than the annoucement of an interim measure with respect to personnel", which was, moreover, qualified: "It did not constitute an offer of renewals. It merely announced a purpose to extend offers."[110]

The gap between the Court's view and Judge Hackworth's dissent was not as wide as it may seem on first analysis.[111] Judge Hackworth's view appears to have been inspired mainly by a conflation of the instrument and its contents, for even if the memorandum itself was not legally binding being merely the announcement of a measure, clearly the measure itself must have been regarded as binding by Judge Hackworth. Indeed, he proceeded (ostensibly for argument's sake) by pointing out that the memorandum contained certain qualifications, and could for that reason not create a "vested right".[112]

The Court hinted at the possibility of the memorandum having been issued *ultra vires*, but quickly dismissed that possibility. For the Court, the memorandum "constituted a modification of the Staff Rules then in force", and there

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Organization, Advisory Opinion, [1956] ICJ Rep. 77.

107 Ibid., at 95.

108 Ibid.

109 Ibid.

110 Ibid., at 120.

111 It is perhaps worth noticing that none of the other dissenting judges placed great weight on the exact legal nature of the memorandum.

112 *ILO Tribunal* opinion, o.c. note 106, at 121.

was no doubt, according to the Court, that Unesco's Director-General was authorized to make such modifications.[113]

Although this decision does not pertain directly to the concept of treaty, it does once more illustrate the ease and liberalism with which the Court approaches questions as to whether or not certain instruments are legally binding.

Interhandel

The *Interhandel* case[114], which came before the Court in 1959, but had its origins in the Second World War, revolved in part around the so-called Washington Accord, concluded between Switzerland and the three Allied Powers (France, the UK and the US) in 1946. The case concerned the investigation into and liquidation of German property in Switzerland. The question of whether or not the company known as Interhandel was in German hands had arisen before American courts, where it had been argued that the Washington Accord was an Executive Agreement, the apparent implication being that for this reason the agreement could not be legally binding.

The Court specifically claimed that "[a]t the present stage of the proceedings it is not necessary for the Court to express an opinion on the matter"[115] of the legally binding nature of the Washington Accord. Yet elsewhere in the judgment the Court referred to the Washington Accord as an "international agreement".[116]

The Washington Accord grew out of a provisional agreement concluded during the Second World War. Although the Court did not deal with the legal nature of either the provisional agreement or the Washington Accord at any length, it did note that discussions between the Swiss and American authorities between 1945 and 1947 "took place within the framework of the collaboration established between them prior to the Washington Accord and defined in that Accord."[117] In other words, both the provisional agreement and the

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113 Ibid., at 96.

114 *Interhandel case (Switzerland v. United States of America)* (preliminary objections), [1959] ICJ Rep 6.

115 Ibid., at 28.

116 Ibid., at 24.

117 Ibid., at 21.

Washington Accord represented a framework for cooperation, and it seems clear that the Court considered both to give rise to legal rights and obligations.

The Temple case

In the Court's first judgment in the *Temple* case[118], Thailand argued that its renewal of its 1950 declaration accepting the World Court's jurisdiction, although intended to be binding, was rendered ineffective because its previous declaration had lapsed due to the demise of the League of Nations. Therefore, the declaration renewed an acceptance of jurisdiction which did not exist in the first place, and would consequently be without legal effect.

In more general terms, Thailand's claim amounted to saying that, as the Court saw it, "in legal transactions, just as the deed without the intent is not enough, so equally the will without the deed does not suffice to constitute a valid legal transaction."[119]

The Court dismissed this more general argument, pointing out that in private law sometimes requirements of form may exist, e.g. to protect interested parties or for public policy reasons, but that this situation could not easily be transposed to international law:

> "Where ... as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it."[120]

Since the only formal requirement of acceptance of the jurisdiction of the Court is the deposit of the instrument of acceptance with the Secretary-General of the United Nations, and since Thailand had undoubtedly taken this step in 1950, the Court proceeded to analyze the contents of Thailand's 1950 declaration. The Court found that although the declaration appeared to be a mere renewal of its earlier declaration, in reality it constituted by itself an acceptance of the ICJ's compulsory jurisdiction. The references to earlier

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[118] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary objections, [1961] ICJ Rep. 17.

[119] Ibid., at 31.

[120] Ibid., at 31.

declarations were taken to refer to the scope of the acceptance, not its validity.

Thailand's argument was a clever response to the Court's holding in *Israel v. Bulgaria*[121], in which the Court had decided some two years earlier that Bulgaria's declaration of acceptance of the PCIJ's jurisdiction had lapsed following the demise of the League of Nations and had not been transformed into an acceptance of the ICJ's compulsory jurisdiction. This decision forced the Court to accept Thailand's thesis that her earlier declarations had also lapsed, and to grant the 1950 declaration independent legal effect.

While the Court's judgment was unanimous, some of the Judges made it known that they had problems with those particular consequences of the *Israel v. Bulgaria* decision. Judges Wellington Koo, Fitzmaurice, Tanaka and Spender[122] all found that no lapse had occurred, and that consequently the 1950 declaration was a valid renewal. Judge Morelli followed a slightly different route, arguing that at any rate the earlier declaration would have expired before the 1950 declaration had been issued (let alone deposited), and that consequently the 1950 declaration could only be regarded as an instrument by which Thailand agreed to recognize as compulsory the jurisdiction of the ICJ.

The obvious interest for present purposes resides in the Court's flat denial of the importance of formalities in international law generally and its handling of intent. Formalities were thought to be largely absent, and although intent was said to be given "principal emphasis", it is beyond doubt that the Court referred to "manifest intent" rather than anything more subjective.

Interim agreement

In the *Fisheries Jurisdiction* case, the legal nature of the 1961 exchange of notes concluded between Iceland and the UK, was never in doubt.[123] Nor

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121 *Case concerning the aerial incident of July 27th, 1955 (Israel v. Bulgaria)*, preliminary objections, [1959] ICJ Rep. 127.

122 Judge Wellington Koo attached a declaration to the judgment, Judges Fitzmaurice and Tanaka issued a joint declaration, while Judge Spender wrote a separate opinion.

123 *Fisheries Jurisdiction case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, merits, [1974] ICJ Rep. 3. An almost identical dispute occurred between the Federal Republic of Germany and Iceland, [1974] ICJ Rep. 175. With regard to the 1961 exchange of notes, Iceland had claimed that it had been terminated; there was

was there any doubt concerning the legal nature of an interim agreement, concluded in November 1973 in the form of an exchange of notes.

The Court held that the interim agreement "clearly possesses the character of a provisional arrangement adopted without prejudice to the rights of the Parties ..."[124], and to reinforce this point, the UK had referred to it as a "treaty in force".[125]

The case is of interest because of the way in which the Court handled the reference contained in the agreement that it would be without prejudice to existing legal positions. In the pertinent literature, such a phrase has sometimes been regarded as a tell-tale sign that no legal rights and obligations were intended; clearly, the Court was of a different opinion.

Nuclear Tests

Among the Court's more controversial decisions were, and still are, its decisions in the 1974 *Nuclear Tests* cases between Australia and France, and New Zealand and France.[126] Both Australia and New Zealand had lodged complaints against French nuclear tests in the South Pacific. After proceedings were instigated, members of the French government (the President, the Foreign Affairs minister, and the Defence minister) made several public statements to the effect that no more tests would take place. Basing itself on the legally binding nature of these statements, the Court concluded that the case no longer had any object. The Court decided that it was no longer necessary to render a decision on the matter before it.

The Court's exact reasons for reaching the conclusion that the French statements amounted to the creation of a legal obligation to stop nuclear testing remain somewhat enigmatic. The Court started by laying down two criteria which must be fulfilled in order that unilateral declarations might

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never any mention of the possibility that it had not been legally binding to begin with. Cf. [1973] ICJ Rep. 3.

124 1974 *Fisheries Jurisdiction case (UK v. Iceland)*, o.c. note 123, at 18, para. 38.

125 Ibid., para. 39. Whatever disagreement there was concerning the interim agreement pertained to the scope of the rights and obligations contained therein. See, e.g., Judge De Castro's separate opinion (esp. at 76-77) and the dissenting opinions of Judge Gros (at 144) and Judge Petrén (at 155).

126 [1974] ICJ Rep. 253 and 457, respectively. Further references will be, unless otherwise indicated, to the case between Australia and France.

have legal effect[127]: they must be made with an intent to be bound; and, they must be made in public.[128]

Establishing the public nature of the statements at issue proved to be fairly unproblematic. They had been made at press conferences; in television-interviews; before the United Nations General Assembly; and, some of them, moreover, had been communicated to Australia and New Zealand. There could be little doubt that those states were aware that the statements had been made, as indeed they themselves had acknowledged.[129]

Establishing the intention of the French authorities, on the other hand, necessitated the legal equivalent of a quantum leap, especially when taking into consideration the Court's claim that statements limiting the freedom of action of states need be restrictively interpreted.[130] In fact, no investigation into France's intentions was undertaken. The Court's stated adherence to finding the intention by interpreting the acts[131] proved, in the end, fairly empty. Only a few references to the language used by the French authorities or the circumstances surrounding the making of the statements were included in the judgment.[132]

In light of the lipservice paid to intent, the Court must have decided the case on other grounds, but those remain hidden as well. At certain points in the judgment, great weight was placed on the role of good faith and reliance[133]. Yet, absent actual reliance (as *in casu*[134]), reliance hardly seems a

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127 Strict positivists might argue that this step in itself would be unwarranted, given the fact that unilateral declarations as such are not mentioned in the sources catalogue contained in article 38 of the Court's Statute. For an argument along these lines, see Alfred P. Rubin, "The international legal effect of unilateral declarations", 71 *AJIL* (1977), 1-30.

128 *Nuclear Tests*, o.c. note 126, at 267, para. 43.

129 Ibid., at 261-262, paras. 27 and 28.

130 Ibid., at 267, para. 44.

131 Ibid.

132 Although it is not mentioned as such in the judgment, it could perhaps be argued that the Court placed great weight on the fact that there was not just one statement (which could have been an aberration), but that there were a number of similar statements. This, it could be argued, communicated a seriousness of purpose and an intention to be bound. Unfortunately, the Court hardly mentions the point, with the exception of the unsubstantiated remark that the statements "constitute a whole." (at 269, para. 49). Yet if so, it remains puzzling why a contrary statement made by the French prime minister (quoted at 266, para. 37) was left out of consideration.

133 Especially in the often-quoted paragraph 46 of the judgment.

134 The Court had to construe the declarations as having been made *erga omnes*, and actual

good ground on which to decide the issue, and most certainly not in the absence of some insight into the intentions of the state making the declarations.[135]

The Court's decisions, as noted above, proved quite controversial. Several of the dissenting judges pointed out that even if the French statements were to be considered legally binding, it remained unclear to what behaviour France had committed itself, under which conditions, and vis-à-vis whom.[136] Such comments were also made by many academic observers.[137]

This reaction must have worried the Court somewhat, for one of its chambers seized the opportunity, when it arose, to clarify the *Nuclear Tests* decisions. In the 1986 *Frontier Dispute* case, where a not dissimilar unilateral declaration was at issue[138], the Chamber noted that given the circumstances of the *Nuclear Tests* cases,

> "... the French Government could not express an intention to be bound otherwise than by unilateral declarations. It is difficult to see how it could have accepted the terms of a

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reliance was thus replaced by something resembling potential reliance (at 269, para. 50). Had Australia and New Zealand actually relied on the French statements, there would have been no need to continue the proceedings, except perhaps, as has been suggested, as a matter of legal tactics. Cf. Thomas M. Franck, "Word made law: the decision of the ICJ in the Nuclear Test cases", 69 *AJIL* (1975), 612-620, esp. at 618.

135 It could be argued that the Court, faced by the choice between the devil and the deep blue sea, chose the wisest political course. A finding that nuclear testing was prohibited would have been untenable; and, a finding that it was permissible would politically have been unacceptable. Hence, the Court decided to skirt the issue and find a way out, thus only antagonizing a handful of academic commentators and, perhaps, France. The argument has been made, however, that even France was not (or should not be) too displeased with the result. Thierry interprets the decision that the case was left without an object to come as close as possible to an apology for the Court's earlier decision to grant interim measures. Cf. Hubert Thierry, "Les arrets du 20 décembre 1974 et les relations de la France avec la Cour Internationale de Justice", 20 *AFDI* (1974), 286-298, esp. at 294. The Court granted those interim measures in its orders of 22 June 1973, [1973] ICJ Rep. 99 & 135.

136 See, e.g., Judge De Castro's dissent, esp. at 274-275, and Judge Barwick's, esp. at 448-449.

137 See, e.g., among many others, Brigitte Bollecker-Stern, "L'Affaire des essais nucléaires francais devant la Cour International de Justice", 20 *AFDI* (1974), 299-333, at 331-332; Serge Sur, "Les affaires des essais nucléaires devant la CIJ", 79 *RGDIP* (1975), 972-1027, at 1002; Pierre Lellouche, "The Nuclear Tests cases: judicial silence v. atomic blasts", 16 *HILJ* (1975), 614-637, at 624-625.

138 [1986] ICJ Rep. 554. See also below.

> negotiated solution with each of the applicants without thereby jeopardizing its contention that its conduct was lawful."[139]

Hence, France's intent to be bound was to be distilled from the circumstances, thereby effectively ignoring the language of the French declarations and departing somewhat from the Court's general line of thinking.

Even so, the Chamber's argument is less than compelling. If it is true that negotiated settlements usually imply loss of face, then why are settlements still being negotiated? Extrapolating the argument, it is submitted that in many instances international obligations can only unilaterally be undertaken.

Moreover, even if circumstances had forced France to take the unilateral route, the rather ambiguous nature of the French statements remains unexplained. Had France really intended to stop is nuclear testing, it could have quite simply said so in far more 'binding' language than the language it actually used.

Nevertheless, the cases are important for present purposes. They illustrate that as soon as a hint of a commitment can be discerned, this commitment is deemed legally binding. The text of the French statements might not have presented any readily discernible commitments, but the Court must have simply decided that whatever the uncertainties surrounding the exact scope of the commitments, their core-meaning was clear. Hence, France had become legally bound.[140]

Aegean Sea

In 1978, the Court was confronted with the dispute between Greece and Turkey concerning delimitation of the continental shelf in the Aegean Sea. Greece had brought the case to the Court, invoking *inter alia* a joint communiqué issued by the Heads of Government as the basis of the Court's jurisdiction.[141] The Court eventually held that the joint communiqué could not

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[139] Ibid., at 574, para. 40.

[140] Atiyah comments: "The truth is that the obligation was created not by the French Government, but by the Court ..." See Patrick S. Atiyah, *Promises, morals, and law* (Oxford 1981), at 167.

[141] *Aegean Sea Continental Shelf case (Greece v. Turkey)*, Jurisdiction of the Court, [1978] ICJ Rep. 3.

serve as the basis of jurisdiction, without explicitly pronouncing itself on the wider issue as to whether the communiqué was a legally binding instrument.

Nevertheless, the Court gave some important *dicta*. With respect to the form of the instrument (a joint communiqué) the Court remarked "that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement."[142] The Court's references (in parentheses) to the 1969 Vienna Convention imply that the Court was of the opinion that no rules of international law would preclude a joint communiqué from being legally binding in the first place, even outside the context of the jurisdiction of international tribunals.

Moreover, although the Court observed that the communiqué was neither signed nor initialled, it refused to draw any consequences from that circumstance.[143] It follows that signature or initials, and *a fortiori* other external signs, are not inherent to the concept of treaty.[144]

The Court also established something of a methodological order with respect to ascertaining the nature of an act or transaction: one "must have regard above all to its actual terms and to the particular circumstance in which it was drawn up."[145] Since the Court, after an extremely short survey of the text of the communiqué, reached the conclusion that there was a "divergence of views"[146], it proceeded by looking at the context in which the communiqué was drawn up, only to find that the communiqué did not express a mutual commitment to take the dispute to Court.

The Court's conclusion is perhaps not altogether clear from the judgment itself. It was clear that some two weeks prior to the communiqué no agreement had yet been reached. This discord is evident from notes made by both the Greek and Turkish authorities. It was also clear, as evidenced by the Turkish behaviour, that Turkey, after the proceedings had begun, made no plans whatsoever to go to Court: it did not appear before the Court; it did not file a counter-memorial; and, it refused to appoint the *ad hoc* judge to which it was entitled. The Court must have considered it unlikely that, at the time of

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142 Ibid., at 39, para. 96.

143 Ibid., at 39, para. 95.

144 Some doubts on this point were expressed by Karin Oellers-Frahm, "Die Entscheidung des Internationalen Gerichtshofes im griechisch-türkischen Streit um den Festlandsockel in der Aegaeis", 18 *ARV* (1979-80), 377-392, at 386.

145 *Aegean Sea* case, o.c. note 141, at 39, para. 96.

146 Ibid., at 41, para. 100.

the communiqué, Turkey was willing to unconditionally submit itself to the Court's jurisdiction.[147] Such would have meant that Turkey would have changed its position twice: once between the Rome meeting some two weeks prior to the Brussels meeting and the Brussels meeting itself[148], and once after the Brussels meeting.

Although the Court refused to "pronounce upon any other implications which [the] Communiqué may have"[149], several judges went somewhat further in their separate opinions. Judges Lachs, Nagendra Singh and Tarazi all considered there to exist an agreement to negotiate a *compromis*, and at least Judges Lachs and Tarazi based this obligation on the communiqué itself.[150] *Ad hoc* Judge Stassinopoulos went even further, and simply proclaimed that the communiqué itself was "an international agreement giving rise to international rights and obligations", explaining that it was "an oral international agreement (recorded in writing)."[151] He extracted from the wording evidence that the Court could have been vested with the jurisdiction to decide the case.

The findings of Judges Lachs, Tarazi (and perhaps those of Judge Nagendra Singh as well), and *a fortiori* Judge Stassinopoulos imply that the communiqué itself had to be legally binding. Otherwise, no legal obligation to negotiate could be derived from it. Indeed, one might even argue that the majority itself, while artfully circumventing the issue, worked on the notion that the communiqué was a legally binding agreement, only to conclude that it was not the kind of agreement invoked by Greece.[152]

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147 Indeed, Turkey insisted that the reference in the Communiqué concerning meetings of experts to prepare a submission to the Court, was clear enough. In itself, however, this argument failed to be honoured. The Court merely remarked that as far as the text was concerned, there was a divergence of views.

148 The Court even made a rhetorical attempt to underline the unlikeliness of such a change of heart, by referring, somewhat liberally perhaps, to the period of almost two weeks as "only a few days". *Aegean Sea* case, o.c. note 141, at 43, para. 104.

149 Ibid., at 44, para. 108.

150 It is unclear whether Judge Nagendra Singh based his opinion on the communiqué or on a more general notion such as the obligation to settle disputes peacefully as embodied in article 33 of the UN Charter. See also Wolfgang Heusel, *"Weiches" Völkerrecht* (Baden Baden 1991), at 101.

151 *Aegean Sea* case, o.c. note 141, at 80-81.

152 In this sense, Thirlway, o.c. note 65, at 15.

The WHO-Egypt agreement

One of the more elusive holdings of the Court is its advisory opinion on the *Interpretation of the agreement between the World Health Organization (WHO) and Egypt*.[153] Due to political tensions in the Middle East, a number of states thought it opportune to transfer the regional office of the World Health Organization (WHO) from Alexandria to Amman.

The question which came before the Court was whether in doing so (and under what conditions) Section 37 of the Host agreement concluded between Egypt and the WHO (relating to denunciation) should be taken into account. One group of states endorsed the argument that the 1951 agreement merely related to privileges and immunities of the regional office, and that the establishment of the regional office had already taken place in 1949, based on the less tangible notion of an agreement consisting of offer and acceptance.[154]

The other group, however, espoused the view that establishment of the regional office had been accomplished by a composite process, the final step of which was the 1951 agreement. Accordingly, while the first group sought to diminish the import of the 1951 agreement and its Section 37, the second group did its utmost to emphasize the weight of the 1951 agreement.

After a lengthy analysis of the historical facts leading up to the conclusion of the 1951 agreement, the Court refused to explicitly take sides:

> "Whatever view may be held on the question whether the establishment and location of the Regional Office in Alexandria are embraced within the provisions of the 1951 Agreement, and whatever view may be held on the question whether the provisions of Section 37 are applicable to the case of a transfer of the Office from Egypt, the fact remains that certain legal principles and rules are applicable in the case of such a transfer ..."[155]

Yet, in its description of the legal rules and principles applicable to the transfer it would seem that the Court implicitly sanctioned the offer-and-acceptance thesis[156], without entirely discounting the 1951 Agreement.[157]

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153 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, advisory opinion, [1980] ICJ Rep. 73.

154 As noted in ibid., at 90, in para. 38, in this view there was an agreement resulting either from Egypt's offer to transfer the pre-existing Alexandria Bureau to the WHO and acceptance by the WHO, or from Egypt's acceptance of an offer made by the WHO to the same effect.

155 Ibid., at 92, para. 42.

156 See, e.g., at 93, para. 43.

If this reading is correct, it again follows that the Court attached legal effect to actions which would defy more formalistic analysis. It accepted an agreement as composed of offer and acceptance, relying on a set of related events and documents rather than on a more formal agreement.

Modus vivendi

In the *Tunisia/Libya continental shelf* case, mention was made of "a sort of tacit *modus vivendi*"[158] regarding delimitation of the maritime boundary between the two states. Although the exact origins of the *modus vivendi* were not clearly spelled out, it appeared that as early as 1913, Italy (at that time Libya's colonial power) had claimed rights of surveillance over sedentary fisheries in the Mediterranean up to a certain point. This claim was affirmed and re-affirmed in 1919 and 1931, and had never met with protests from France, which at the time was Tunisia's protecting state.

The line as delimited did not, in the Court's view, amount to a "recognized maritime boundary"[159], but nor was it completely devoid of legal effect. It could affect the choice of the method of delimitation to be agreed upon, "to the extent that the historic rights claimed by Tunisia could not in any event be opposable to Libya east of the *modus vivendi* line."[160]

Although the Court's judgment does not suggest that the *modus vivendi* was in any way comparable to a conventional agreement, some such suggestions were made in separate and dissenting opinions. *Ad hoc* Judge Evensen even likened the *modus vivendi* to interim agreements such as the ones at issue in the 1974 *Fisheries jurisdiction* cases, noting that such arrangements are "non-prejudicial" to the parties[161]. Hence, whatever the outcome, neither those who held *modi vivendi* generally to be more or less customary cre

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157 It argued that the parties should respect a "reasonable" period of notice. An indication of the possible period involved could be seen in Section 37 of the 1951 Agreement. Cf. Ibid., at 96, para. 49.

158 *Case concerning the continental shelf (Tunisia/Libya Arab Jamahiriya)*, [1982] ICJ Rep. 18, at 70, para. 93.

159 Ibid., at 70, para. 95.

160 Ibid., at 71, para. 95.

161 Ibid., at 306, para. 20, emphasis omitted.

ations, nor those who likened them to conventional acts, placed too much weight on the *modus vivendi* at issue.[162]

As Judge Evensen demonstrated, some agreements concluded between states are designated *modus vivendi*; their origins are the same as the origins of any treaty or agreement. In the case at hand, however, the term *modus vivendi* appears to have been used mainly to denote a state of affairs which had arisen through unconcerted behaviour.[163]

The Nicaragua cases

In 1984, the Court had to to decide whether it had jurisdiction to entertain a complaint made by Nicaragua against the United States, and whether Nicaragua's application was admissible. In doing so, it made some rather curious (and perhaps untenable) comments on notions such as validity and bindingness.

In 1929, Nicaragua had filed a declaration accepting the jurisdiction of the Permanent Court. However, at that time, Nicaragua was not a party to the Permanent Court's Statute, for it had not ratified the Statute's Protocol of Signature. Accordingly, the US argued that Nicaragua had not accepted the compulsory jurisdiction of the Court. The Court disagreed, holding essentially that Nicaragua's declaration had been valid, and even though it had not been binding initially, it had become so by virtue of Nicaragua's membership in the United Nations. The declaration remained valid even though it was not binding until Nicaragua became a member of the UN.

The Court based itself on an interpretation of the French text of article 36, paragraph 5, of its Statute.[164] Whereas the English text transfers PCIJ juris-

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[162] With two exceptions: Judge Ago, in a separate opinion, claimed that it had become binding on France by virtue of acquiescence (at 97); whereas *ad hoc* Judge Jiménez de Aréchaga, also opining separately, suggested it was a binding conventional agreement (at 127). Both invoked the *uti possidetis* principle to establish its binding nature as between Tunisia and Libya.

[163] A similar outlook was adopted in the 1984 *Gulf of Maine* case, where the Chamber noted (at 310-311, para. 151) that a period of 7 years "is too brief" to have produced a legally binding *modus vivendi*. See *Case concerning delimitation of the maritime boundary in the Gulf of Maine area (Canada/United States of America)*, [1984] ICJ Rep. 246.

[164] As several Judges noted in their separate and dissenting opinions, the Court may have stretched the meaning of the French phrase beyond the bounds of the legally plausible.

diction to the ICJ with respect to declarations "still in force" (which, the US argued, must be read so as to mean 'binding'), the French text speaks of a "durée qui n'est pas encore expirée". The Court stated:

> "It may be granted that, for a period to continue or expire, it is necessary for some legal effect to have come into existence. But this effect does not necessarily have to be of a binding nature."[165]

In other words, the declaration was valid and therefore had "some legal effect", yet all the same it was not binding. In this respect, the Court distinguished between validity and 'bindingness' of instruments. Such a distinction may be useful for analytical purposes. For example, agreements may be deemed invalid (e.g., for having been concluded under duress), and therefore not binding. If such is the case, it is useful to isolate the duress as the ground for invalidity and, therefore, the ultimate reason why the agreement is non-binding.

Nevertheless, examples of valid instruments which are not binding, but do produce legal effects (however minimal) are difficult to identify, unless the thesis that initially non-binding instruments may acquire legal effects over time with the help of notions such as estoppel is accepted.[166] Although an estoppel-argument is partially discernable in the Court's reasoning, the argument cannot explain why the legal effects were present from the moment the declaration was made.[167]

The only occasion in which validity does not go hand in hand with 'bindingness' concerns treaties prior to their entry into force.[168] Yet, the

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See, e.g., Judge Jennings' separate opinion to *Military and paramilitary activities in and against Nicaragua (Nicaragua v. USA), jurisdiction and admissibility*, [1984] ICJ Rep. 392, at 537-539.

165 Ibid., at 406, para. 30.

166 As noted earlier, such would be less likely to occur with agreements, but could occur with unilateral declarations.

167 The estoppel supposedly was created by the mentioning of Nicaragua as having accepted the Court's jurisdiction in several issues of the UN Yearbook. As one commentator noted, the argument is rather "thin". Cf. Thomas M. Franck, "Icy day at the ICJ", 79 *AJIL* (1985), 379-384.

168 Cf. Article 18 of the Vienna Convention on the Law of Treaties. Ostrihansky, without referring to article 18 of the Vienna Convention, reaches the conclusion that "normally no substantial difference exists between the terms "valid" and "binding"." Cf. Rudolf Ostrihansky, "Compulsory jurisdiction of the International Court of Justice in the dispute between Nicaragua and the United States", 1 *Hague Yearbook of International*

legal effects treaties that may have during this period are derived from a positive international legal rule, article 18 of the Vienna Convention or its customary counterpart.

The question then arises as to the rule of international law which gave Nicaragua's declaration its legal effects without it becoming binding. The Court, at any rate, did not mention any such rule, unless the estoppel or acquiescence[169] argument are considered as such. Yet, as noted above, they fail to explain the presence of legal effects from the outset. The Court's finding on this point was seriously criticized in some of the separate and dissenting opinions, for instance by Judge Mosler. He noted that the Nicaraguan declaration was a legal instrument, "the effect of which depended on a condition precedent, namely the deposit of the instrument of ratification"[170] of the PCIJ's Statute. The legal force of the declaration was, therefore, conditional upon this ratification: "So long as this act had not been performed the Declaration remained without legal effect."[171] The Court's distinction between validity and 'bindingness', as employed in the instant case was, according to Judge Mosler, a "misreconstruction".[172]

While dealing with the merits of the dispute[173], the Court had to address the argument that Nicaragua had somehow undertaken obligations by means of a letter written to the Secretary-General of the Organization of American States (OAS), following a resolution adopted by the Foreign Affairs ministers of the OAS. In the letter, the Nicaraguan Junta stated its intention of respecting human rights and governing the country democratically.

The Court, however, refused to recognize the letter as a binding commitment. The Court referred to the letter, in a quite significant choice of words, as a "political pledge".[174] This political pledge did not, in the view of the

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Law (1988), 3-15, at 9.

169 Interestingly, Judge Lachs, during the merits stage of the case, felt compelled to defend the Court's decision on jurisdiction, and did so by way of an acquiescence argument. See *Military and paramilitary activities in and against Nicaragua (Nicaragua v. USA), merits*, [1986] ICJ Rep. 14, esp. at 161-162.

170 *Nicaragua* case (jurisdiction), o.c note 164, at 462.

171 Ibid.

172 Ibid.

173 O.c. note 169.

174 Ibid, at 132, para. 261. The Court took great care in avoiding, in association with the letter, words such as 'obligation' or 'commitment'. Yet, writing 5 years later in a scholarly capacity, Judge Schwebel (one of the dissenters) referred to the judgment as "[t]he Court's holding that Nicaragua had assumed only a political obligation through

Court, amount to "an instrument with legal force, whether unilateral or synnalagmatic, whereby Nicaragua has committed itself ..."[175]

The reason why the Court denied the letter to be anything more than a political pledge is not completely clear. It claimed a lack of intent on Nicaragua's part, without however (again) conducting an in-depth investigation into Nicaragua's intentions. It seems more plausible that the Court reasoned that it was unlikely that Nicaragua would take on obligations that went far beyond the OAS standards concerning domestic policy, which the Court described as "far from being a commitment to the use of particular political mechanisms."[176]

In his dissent, Judge Schwebel viewed the Nicaraguan letter as part of an international agreement: "essentially, in exchange for the OAS and its Members stripping the Somoza Government of its legitimacy and bestowing recognition upon the Junta as the Government of Nicaragua, the Junta extended specific pledges to the OAS and its Members which it bound itself to "implement"."[177]

Perhaps the most important part of Judge Schwebel's dissent for present purposes is his lucid and brief exposition on what he regards as the essence of international undertakings:

> "... an international commitment binding upon a State need not be made in written, still less particularly formal, form. The question is simply, did the authority of the State concerned give an assurance, or extend an undertaking, which, in the particular circumstances, may be regarded as binding upon it?"[178]

A witticism

A relatively minor point in the 1986 *Frontier Dispute* case, decided by a Chamber of the Court, concerned whether an absurd statement made by the

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its assurances to the OAS ...". Cf. Stephen M. Schwebel, "Human rights in the World Court", 24 *Vanderbilt Journal of Transnational Law* (1991), 945-970, at 968.

175 *Nicaragua* case, o.c. note 169, at 132, para. 26. And even if Nicaragua had committed itself, so the Court proceeded, it would have been a commitment not directly vis-à-vis the United States, but towards the OAS, "the latter being alone empowered to monitor its implementation." Ibid., at 132, para. 262.

176 Ibid., at 132, para. 261.

177 Ibid., at 384, para. 247.

178 Ibid., at 384, para. 248.

President of Mali could be held, as contended by Upper Volta, to constitute a legally binding obligation. The two states went to Court to have their border dispute settled, after earlier attempts under auspices of the Organization of African Unity (OAU) had failed. During the course of this earlier attempt, Mali's President had stated in an interview or at a press conference[179] that he would comply with the decision of the OAU Commission even if this Commission decided that "the frontier line passes through Bamako".[180]

Since Bamako is the capital of Mali and is situated nowhere near the disputed area, it was obvious from the outset that the President could not have meant what he said, and that his remark could not have been taken seriously by Upper Volta.[181] In short, it was obvious that the statement was merely, as Mali put it, "a witticsm of the kind regularly uttered at press conferences."[182]

Although the Chamber dismissed Upper Volta's claim on this point, it reached its conclusion via a different route. It decided to contrast the circumstances surrounding this statement with the circumstances surrounding the French statements at issue in the *Nuclear Tests* cases. Whereas France, in the Chamber's view, had no other option but to bind itself unilaterally, Mali and Upper Volta did have every opportunity to employ "the normal method: a formal agreement on the basis of reciprocity."[183]

In retrospect, the Chamber's opinion on the point at issue was probably inspired more by a desire to illuminate the *Nuclear Tests* decisions than by considerations arising from the case at hand. Interestingly, the Chamber unequivocally claimed, referring to the *Nuclear Tests* cases, that when it comes to assessing the legal effects of unilateral declarations, "it all depends on the intention of the State in question"[184]. As in the *Nuclear Tests* cases, however, no serious investigation into the intention of the government making the statement was made. The text of the statement would have been enough to dismiss Upper Volta's contention, yet the Chamber did not even examine the text of the statement and proceeded forthwith by comparing the circumstances of the case with those of the *Nuclear Tests* cases.

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179 *Frontier Dispute* case, o.c. note 138. The Chamber is not entirely clear on this point.

180 Ibid., at 571, para. 36.

181 Compare the PCIJ's *dictum* in the *Eastern Greenland* case, quoted above, text accompanying note 54.

182 *Frontier Dispute* case, o.c. note 138, at 573, para. 38.

183 Ibid., at 574, para. 40.

184 Ibid., at 573, para. 39.

In doing so, the Chamber even had to strech the limits of legal logic somewhat in its final conclusion regarding the comparison of the two cases:

> "Since no agreement of this kind [i.e. a formal agreement on the basis of reciprocity] was concluded between the Parties, the Chamber finds that there are no grounds to interpret the declaration made by Mali's head of State ... as a unilateral act with legal implications ..."[185]

The curiosity resides in the Chamber's linkage of the lack of agreement and the interpretation of the unilateral act. The use of the word "since" displays reasoning of the *if p, then q* kind; yet, *in casu*, p and q were wholly unrelated quantities. The Chamber attributed its dismissal of the unilateral act to the lack of a bilateral agreement, which in turn signified a lack of intent to be bound, which in turn signified that the unilateral statement could not have been intended to be legally binding either.

Despite the circuitous reasoning, the result was clearly correct: the Malian President's statement did not constitute a legally binding undertaking. It is somewhat unfortunate though that the Chamber wanted to make the *Nuclear Tests* detour at the cost of legal clarity, all the more so since the results of that detour are not very compelling.[186]

Border and transborder armed actions

During the course of proceedings instigated by Nicaragua against Honduras[187], the Court was faced with the somewhat curious task of establishing a lack of agreement. In order for Nicaragua's application to be admissible, it had to be established, under the 1948 Pact of Bogotá, that before Nicaragua filed its application, the so-called Contadora process had come to an end.

The parties themselves claimed that the process had never been abandoned or suspended. The Court noted that it

> "fully appreciates the importance of the concordance of views between the parties ... But it cannot see in this a concordance of views as to the interpretation of the term "concluded" in Article IV of the Pact of Bogotá."[188]

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185 Ibid., at 574, para. 40.

186 See above, text accompanying notes 138-139.

187 *Border and transborder armed actions (Nicaragua v. Honduras), jurisdiction of the Court and admissiblity of the complaint*, [1988] ICJ Rep. 69.

188 Ibid., at 104, para. 90.

The Court, with reference to "the facts"[189], decided that the Contadora group itself had regarded its mission as completed before Nicaragua filed its application. The fact that several months later new initiatives were taken, organized in a somewhat different fashion, could not alter that fact.

The case is somewhat odd because of its quest for a non-agreement. Yet it illustrates the important point that the parties do not have the final word on factual situations. The facts showed, in the Court's view, that the Contadora process had come to a halt. The fact that the two parties concerned thought otherwise did not impress the Court.[190]

While working its way to its conclusion, the Court described the Contadora-process in some detail. It paid some attention to instruments which may themselves have given rise to doubts concerning their legal nature, such as the 1983 Cancún Declaration.[191] Significantly, however, the legal nature of those documents was not questioned. To the extent that they were meant to be finalized normative statements or agreements (and not, e.g., draft agreements), the Court treated them as legally binding.

Indeed, at one point the Court quotes a letter sent by the Contadora Group which asserted that the final draft of the Act of Contadora for Peace and Cooperation in Central America "incorporates the essential political commitments".[192] As already alluded to above, this final draft never came into existence. Its non-signature, the Court noted, implied that the mediation was unsuccessful[193], the obvious consequence being that political commitments alone, if not made legally binding, do not amount to much.

The El Salvador/Honduras frontier

In 1992, the Court was asked to delimit the land, island and maritime frontier between El Salvador, Honduras and, partly, Nicaragua.[194] In the

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[189] Ibid., at 105, para. 92.

[190] The Court's decision was adopted unanimously, and the only Judge who expressed some doubts on this point was Judge Schwebel. In his separate opinion, he noted that the Court could also have come to a different interpretation of the facts regarding the cessation of the Contadora process (without, however, providing such alternative interpretation). Still, he did feel that the Court's interpretation was tenable. (Ibid., at 127).

[191] Ibid., at 97, para. 70.

[192] The quotation is in ibid., at 101, para. 82.

[193] Ibid., at 105, para. 92.

[194] *Case concerning the land, island and maritime frontier dispute (El Salvador/Honduras:*

course of its proceedings, the Court referred to negotiations which had taken place in 1934 and 1935. El Salvador and Honduras had agreed on part of their boundary. However, El Salvador's acceptance of the agreement was only expressed through signature *ad referendum*, since its representatives "did not consider that they were empowered to agree to it on behalf of the Government of El Salvador."[195]

The signature *ad referendum* was never confirmed, but, as the Court observed, nor did the government of El Salvador ever denounce the agreed terms. Moreover, the lack of finalization did not cause Honduras to withdraw the terms, and apparently, the agreed terms were left unchallenged for a long time.

In 1985, Honduras proposed adoption of those 1934 terms as well as another delimitation. El Salvador accepted the first part of the proposal, but not the second.[196] In the end, the Court decided to adopt the line agreed upon in 1934. Presumably, it considered that this part of the boundary had been consented to by both parties (if not in 1934 then at least in 1985), even if the consent had never been formalized.

Yet, the Court must have thought it wise to bolster its conclusions by pointing to the practical utility of the boundary line established in 1934, as well as the fact that the 1934 agreement (the Court called it "provisional") "was so long left unchallenged."[197]

Apart from the precise arguments of the Court, the case demonstrates that strict adherence to the pertinent formalities was not considered mandatory. Before 1985, consent had at best been expressed by behaviour. The decision does not determine in which way consent was expressed in 1985; it merely notes that Honduras proposed, and that El Salvador accepted.

Libya/Chad

In its decision in the 1994 territorial dispute between Libya and Chad[198],

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Nicaragua intervening), [1992] ICJ Rep. 351.

[195] Ibid., at 421, para. 99.

[196] This would explain why this part of the boundary was still within the terms of reference of the Court. Had the 1985 proposal been accepted in its entirety, chances are that it would have been excluded. Cf. article 2 of the Special Agreement by which the Court was seised, excluding another part of the boundary formally settled.

[197] *El Salvador/Honduras* case, o.c. note 194, at 422, para. 101.

[198] *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, [1994] ICJ Rep. 6.

the Court was called upon to delimit the boundary between Libya and Chad. Parts of the boundary had been established before both states had gained independence, and rested on a variety of instruments to which the United Kingdom, France and Italy were parties, in varying constellations.

The Court ultimately based its decision on the instruments mentioned in the 1955 treaty concluded between France and Libya. Yet, before doing so, the Court also mentioned some other instruments, including an Anglo-French Exchange of Declarations concluded in 1890. Despite its title, the judgment indicates that it should be considered as having legal force.[199]

Among the other possibly pertinent instruments was a non-ratified treaty concluded between Italy and France in 1935, which was, as the Court saw it, the "most detailed" of those instruments. The Court did not apply it, and is not clear on this course of action. The Court might have argued that since the Franco-Italian treaty was not ratified, it never entered into force.[200] Instead, it observed that the 1935 agreement was not mentioned in the 1955 agreement, which was governing the delimitation, and accordingly had to be left out of consideration.[201]

This construction opens up the possibility that the 1935 agreement could have, despite its being non-ratified, acquired force of law. This suggestion is strengthened by the Court's statement that there is a "variety of ways" in which recognition of boundaries can be expressed.[202] If recognition of boundaries can be expressed in a variety of ways (including conduct alone), then the consent to be bound to agreements can also be expressed in a variety of ways.

The Qatar v. Bahrain cases

As noted earlier, the cases discussed above culminated in the Court's 1994 judgment in *Qatar v. Bahrain*.[203] The most startling feature of that decision

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199 Ibid., at 17, para. 28.

200 There is but a slight hint to this effect in the Court's observation that it had never entered "en vigueur" (ibid., p. 25, para. 50). Even so, the formulation refers directly to the 1955 agreement, not to any independent test.

201 Ibid., at 28, para. 57.

202 Ibid., at 23, para. 45. Of course, the Court referred to its Judgment in the *Temple of Preah Vihear* case. [1962] ICJ Rep. 6.

203 O.c. note 1.

was the Court's use of an interlocutory judgment. Less obvious, but equally important, were the Court's principled words on the concept of treaty.[204]
The Court was confronted with two rather special agreements, the first an unusual exchange of letters concluded in December 1987, and the second an agreement recorded in signed Minutes and dated 25 December 1990.

The first agreement was, its unusual form notwithstanding, far from problematic. Saudi Arabia had sent identical letters to both Qatar and Bahrain pertaining to the possibility of a judicial settlement of their longstanding territorial dispute. Both states wrote Saudi Arabia that they accepted the proposal (which was framed in rather loose language). The result was an agreement between the two parties, even if the conclusion thereof had involved a third party, viz. Saudi Arabia. Any doubts which may have remained concerning the legally binding character of the 1987 agreement were dispelled by both parties themselves. As the Court noted: "The parties agree that the exchanges of letters of December 1987 constitute an international agreement with binding force in their mutual relations."[205]

The 1990 agreement, on the other hand, posed more problems, or rather, would have posed more problems had the Court been receptive to theses justifying the existence of non-legally binding agreements. The 1990 Minutes were drawn up and signed during a meeting of the Gulf Cooperation Council. The parties agreed to take the case to the Court in accordance with a formula devised by Bahrain in 1988, if by May 1991 no other solution had been reached.

Although the agreement had been signed on behalf of Bahrain by its Foreign Minister, he stated later (in May 1992, i.e. almost a year and a half after the conclusion of the agreement): "at no time did I consider that in signing the Minutes I was committing Bahrain to a legally binding agreement".[206] Instead, Bahrain's Foreign Minister appeared to have been under the impression that he was concluding a "political understanding".[207]

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[204] For a more detailed analysis, see Jan Klabbers, "Qatar v. Bahrain: the concept of "treaty" in international law", 33 *ARV* (1995), 361-376.

[205] O.c. note 1, at 120, para. 22. See however Judge Oda's dissenting opinion. He was not convinced of the binding nature of the agreement despite the parties' admissions to that effect.

[206] Quoted in ibid., at 121, para. 26.

[207] Ibid., at 121-122, paras. 26 and 27. Elsewhere, however, it was asserted that the 1990 Minutes were no more than a simple record of negotiations (at 120, para. 22). Therefore, they would have constituted no understanding at all, political or otherwise. The text of the Minutes makes abundantly clear, however, that the understanding went

The Court was not impressed with the "political understanding" argument. It remarked that it

> "does not find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar. The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to a "statement recording a political understanding", and not to an international agreement.[208]

Viewed in isolation, the above passage could be interpreted as leaving open the possibility of arguments which maintain that commitments are only legal if they are "of immediate application", or if they are surrounded by other commitments of immediate application. If no immediate application is envisaged, then such commitments could also be of a non-legally binding nature. Such a reading would, however, be mistaken on three counts.

First, it would be mistaken as a matter of principle. Commitments which are "of immediate application" are not more legal than less urgent commitments. Immediacy alone cannot determine the status (legal or otherwise) of commitments.

Second, such an interpretation would be difficult to maintain in view of the text of the 1990 Minutes. The only possible commitment of immediate application was to continue Saudi Arabia's good offices. The commitment to take the case to Court was only a conditional obligation and should not be equated with a non-legally binding obligation.[209]

Third, such an interpretation of paragraph 27 of the judgment would be difficult to reconcile with the strong words of paragraph 25. The 1990 Minutes, according to the Court:

> "enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the parties. They constitute an international agreement."

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well beyond a mere record of negotiations (ibid., at 119, para. 19).

[208] Ibid., at 121-122, para. 27.

[209] The other commitments were also either conditional (the case could have been withdrawn from judicial settlement had a brotherly solution been reached), or continuous: paragraph 1 of the Minutes re-affirmed what had previously been agreed, and would thus be of application even without the Minutes.

The strength of this phrase resides mainly in the Court's linking of "commitments" and "law" by means of the word "thus", suggesting that every commitment engaged in by international actors necessarily is a legal commitment. In such a view, political or moral commitments are not viable alternatives to legal ones. Agreements are legally binding, or they are not binding at all.

The other arguments invoked by Bahrain were also not well-received by the Court. The argument that Qatar left registration of the Minutes under article 102 of the United Nations Charter rather late did not, as the Court noted, "have any consequence for the actual validity of the agreement".[210]

The argument that Qatar would have violated its own constitutional rules while concluding the Minutes was not considered more persuasive; even if true, such a violation would not necessarily indicate an intention not to be bound and, more importantly, "nor could any such intention, even if shown to exist, prevail over the actual terms of the instrument in question."[211]

The *Qatar v. Bahrain* decision is important for two reasons. First, it unequivocally makes clear that any commitment is a legal commitment. Second, it establishes something of a methodology for ascertaining the true nature of an international instrument: first and foremost are its actual terms. If the text of an instrument allows the ascertainment of commitments, then it is a legal text, and the discussion is effectively closed. It is only where the text itself is ambiguous that recourse to other indicators appears justified.

In February 1995, the Court decided that indeed it had jurisdiction to entertain the dispute between Qatar and Bahrain.[212] In doing so, it confirmed that the 1990 Minutes were a legally binding instrument.[213] The Court proceeded by interpreting the terms of the Minutes, in conjunction with

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210 Ibid., at 122, para. 29. The Court did not discuss Bahrain's formal protest against the registration, perhaps because the protest was lodged only after Qatar had seised the Court.

211 Ibid., at 122, para. 29. It is of some interest to note that article 46 of the Vienna Convention is not readily suitable to deal with such a contention. In exceptional cases, state A may invoke invalidity of a treaty if its own domestic rules have been breached; article 46 does not deal with the situation in which A contends that B broke B's domestic rules. Yet, occasionally, such a contention is made. See, e.g., Theodor Meron, "Article 46 of the Vienna Convention on the Law of Treaties (*ultra vires* treaties): some recent cases", 49 *BYIL* (1978), 175-199.

212 *Case concerning maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and admissibility, [1995] ICJ Rep. 6.

213 Ibid., at 9, para. 9.

those of the 1987 Agreement, and concluded that those terms allowed Qatar, contrary to Bahrain's assertions, to unilaterally seise the Court.

Some of the dissenting judges found fault with this particular conclusion but, notably, did not disagree with the confirmation of the legally binding nature of the 1990 Minutes. Judge Schwebel, in a rather vigorous critique of the majority opinion, pleaded strongly for use of the *travaux préparatoires* for purposes of interpreting the 1990 Minutes, but at no point cast doubt on the finding that the 1990 Minutes constituted a legally binding agreement. It was clear that the Minutes amounted to a treaty[214], containing some commitment. The exact scope of this commitment was a matter of debate, but its existence in law was not in question.

Concluding remarks

The judgments as discussed above demonstrate that the World Court has never put too high a premium on considerations of form. From the outset (the 1923 *Jaworzina* case), the Court has been concerned with whether the parties were substantially in agreement. Where parties agreed to engage in commitments, those commitments have, generally, been held to be legally binding. The Court has never found the existence of a 'morally binding agreement', or a 'politically binding agreement', or 'soft law'. The closest it came to such a finding was Nicaragua's "political pledge"[215], and here the Court refused to attach any normative consequences to that pledge.

In those (rare) cases where the Court has concluded that an apparent commitment lacked legal force, there were usually good grounds for doing so. Thus, in the *Jurisdiction of the European Danube Commission* opinion, the circumstances revealed that binding interpretations were generally attached to the formal agreements. Where such incorporation was absent, no legal consequences were intended by the parties.

Similarly, in the *Nicaragua* case and the *Frontier Dispute* case, the existence of international legal obligations was denied because the circumstances, in the Court's view, clearly demonstrated that no such obligations had been intended. The statement made by Mali's President was clearly a

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[214] Note that the Court takes great care in not calling the Minutes a treaty, presumably for the reason that the notion of treaty will too readily be identified with the definition of the Viennese Conventions.

[215] *Nicaragua* case, o.c. note 169, at 132, para. 261.

witticism which could not have been taken seriously, while Nicaragua's pledge to the OAS went considerably beyond official OAS policy and could not be construed as intended to be legally binding.

The binding force of international agreements cannot be based on a sole principle: be it intent; be it good faith: or, any of its derivates.[216] The cases as discussed confirm this picture, the most obvious example being the decision in the *Nuclear Tests* cases, in which the Court oscillated between intent and reliance. In the end, the Court did not base its holding on either of these principles separately.

It follows that an explanation for the consistent attitude of the World Court must be sought elsewhere. The Court has consistently held commitments to be legally binding, because, as seen above, there is no viable alternative to law. Agreements are either legally binding, or not binding at all. The question then becomes under what circumstances agreements are held to be legally binding, and under what circumstances they are held not to be binding at all. This question will be briefly addressed in the epilogue to this study.

Prior to that, however, it may be useful to briefly illustrate that the findings of the Permanent Court and the International Court of Justice are not isolated findings, but are by and large shared by other courts and tribunals, international as well as domestic. It is to these findings that we now turn.

[216] See above, Introduction.

CHAPTER VII

OTHER COURTS AND TRIBUNALS

Introduction

In the previous chapter, we have seen that both the Permanent Court of International Justice and its successor, the International Court of Justice, have on quite a few occasions had to express themselves on the legal character of certain instruments. We have also seen that on most of these occasions the World Court did not hesitate to proclaim the instruments concerned as legally binding. This line of cases culminated in the *Qatar v. Bahrain* judgment which held that as soon as commitments can be discerned, those commitments are necessarily commitments of a legal nature.

In this chapter, the case-law of other tribunals (both domesic and international) will be discussed in order to illustrate that these courts generally uphold he same position as the World Court. For reasons of economy, we will not analyze these cases as extensively as we did the cases of the World Court. The World Court's reasoning appears to be generally the same as that of other tribunals. The cases therefore do not need to be discussed to the same extent. This present chapter is more concerned with illustration than demonstration.

Also for reasons of economy, we have been forced to forego the systematic analysis of the decisions of many of the standing international courts and tribunals which are now operative in the international system. Thus, we will not systematically address decisions of the various judicial bodies set up within or under auspices of international organizations, which range from GATT panels to the European Court of Human Rights. Neither do we deal with the case-law established by such institutions as the Iran-US Claims Tribunal.

The materials in this present chapter are largely drawn from three pools of data: decisions of national courts[1]; decisions of the Court of Justice of the

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[1] Predominantly, but not exclusively, as reported in the invaluable *International Law Reports* and its predecessor, the *Annual Digest of Public International Law Cases*.

European Community; and, international arbitral awards.[2] Although the inclusion of decisions of national courts and international arbitral awards will be of obvious importance, the choice to include the case law of the EC Court may require some explanation.

The European Community[3] is, by general acclamation, a rather special type of international organization. It is often deemed to be a hybrid, lying somewhere between the average international organization and the form of political organization usually referred to as the (federal) state. It has its own, rather strict, rules on law-making and the types of instruments that can be adopted. Thus, article 189 of the EC Treaty provides for five types of instruments, two of which (recommendations and opinions) "shall have no binding force."

The enumeration of article 189 appears at first sight to be exhaustive. However, the process of European integration has revealed a great deal of inventiveness on the part of both the EC's member states and its institutions in devising an impressive array of other types of instruments. Several of these instruments have in one way or another come before the Court of Justice. Hence, for present purposes, the Court's case-law is potentially a useful source for analysis.[4]

In the following, we have tried to discuss decisions mainly by grouping them together according to their rationales. This task is by definition troublesome, for the search for the *ratio decidendi* is the search of practical legal science *par excellence*.[5] Moreover, the search is sometimes complicated by a lack of clarity on the part of the courts or by the combination of rationales.

Nevertheless, we have felt compelled to proceed with the attempt at classification, for two reasons. The first is of a stylistic nature: a mere enumeration of decision after decision without any distinction would be, as we feared, extremely boring. More importantly, especially with respect to what we will call "negative" decisions, it may be of some importance to

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[2] For the period leading up to 1945, we have made grateful use of the repertory prepared by Vincent Coussirat-Coustère and Pierre Michel Eisemann, *Répertoire de la jurisprudence arbitrale internationale* (Dordrecht 1989, 2 vols.). The case-law stemming from the period after 1945 is drawn largely from the *United Nations Reports on International Arbitral Awards* and, once again, the *International Law Reports*.

[3] We will refer to the European Community rather than the European Union, if only for the reason that the Court is first and foremost an institution of the Community.

[4] All the more so since every decision is accompanied by a reasoned analysis by one of the Advocates-General.

[5] See generally, H. Ph. Visser 't Hooft, *Filosofie van de rechtswetenschap* (Leyden 1988).

figure out why exactly a certain instrument was struck down. Was it struck down because it was, purportedly, non-legally binding? Or was it considered inapplicable for other reasons?

With respect to what we will refer to as "positive" decisions, upholding the legal value of instruments, the same point plays a far less important role. Courts need not always explain why they regard a certain instrument as legally binding. They may often satisfy themselves (as we will see) by simply making an observation to that effect, or be even less explicit by simply treating an instrument as legally binding without further comment.

Negative decisions

We have seen in the previous chapter that the World Court has only rarely reached the conclusion that a certain instrument was not legally binding, and that it has never done so for strictly dogmatic reasons, i.e. out of a conviction that the instrument was binding but not legally binding. Usually, only the application of another rule of law prevented the instrument in question from being considered legally binding, or, more often, prevented application of the instrument concerned.

Arbitral tribunals, the EC Court, and national courts have in quantitative terms more often reached a negative decision than the World Court, but here as well, most often the negative decision was the result of the application of another rule of law. In essence, the courts and tribunals, analyzed below, have based negative decisions on rules of international law, or on rules present within their own legal system.

Lack of transformation or publication

On various occasions, domestic courts have refused to apply instruments on grounds of a lack of transformation of the instrument into the domestic law concerned. An instructive example is the decision of the Italian Court of Cassation in *Unione Manifatture v. Ministry of Finance*[6]. The Court refused to apply an agreement in simplified form because it had not been imple-

[6] Decision of 22 March 1972, in 71 *ILR* (1986), 589-593.

mented in national legislation, but it also explicitly observed that the agreement at issue was nevertheless binding under international law, and it even acknowledged the possibility of international sanctions stemming from the lack of implementation.[7]

Similarly, in 1965, the French Conseil d'Etat held an agreement in simplified form to be inapplicable due to lack of transformation into domestic law in *Re Société Navigator*[8]. The Conseil d'Etat based its decision on the submission of the Commissaire du Gouvernement, who had argued that agreements in simplified form need be ratified (in a constitutional law sense[9]) by act of approval of the President, as may, e.g., be embodied in the decree by which publication is ordered. Failing such publication, the agreement is without effect in the domestic legal order; and, to render it effective would be tantamount to undermining the internal organization of public powers. Since the agreement at issue had been signed merely by the Foreign Minister, and had been published without presidential decree, it followed that it was inapplicable in French law.

In other cases, courts have refused to apply instruments because of lack of publication *per se*. In *Re Spiessens*[10], the French Court of Appeal of Colmar refused to apply a French-Belgian Extradition agreement for (at least partly[11]) this reason, a ground also honoured by other courts.[12]

Similarly, in a rather curious decision, the Belgian Tribunal de Police of Vilvorde argued that since notification of an exchange of notes concerning temporary mutual recognition of driving licenses concluded between Belgium and the United Kingdom had been incomplete and partially inaccurate, it could not be applied. The curiosity in this particular case (*Ministère Public v. Simon*[13]) resided in the ironic situation that defendant's behaviour was, the

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[7] Ibid., esp. at 591.

[8] Decision of 13 July 1965, in 47 *ILR* (1974), 312-325.

[9] In international law, ratification is generally taken to be an international act, establishing on the international plane the state's consent to be bound (cf. article 2, paragraph 1 (b) of the 1969 Vienna Convention). Clearly, this is not what the Court here had in mind.

[10] Decision of 7 May 1953. In *ILR* (1953), 369-370.

[11] The decision as published is not entirely clear as to the grounds.

[12] See e.g. *Orso and Nari v. Sevastopoulo*, France, Court of Cassation, 19 october 1956, in *ILR* (1956), 468; *State v. Eliasov*, South Africa, Supreme Court, Appellate Division, 28 September 1967, in 52 *ILR* (1979), 408-413; and *Magdalena K., Arkadiusz K. & Ewa M. v. Polish State Railways*, Poland, Supreme Court, 22 November 1972 and 5 October 1974, in 51 *ILR* (1978), 424-429.

[13] Decision of 4 February 1974, in 77 *ILR* (1988), 387-394.

incomplete and inaccurate notification of the agreement notwithstanding, in perfect conformity with the agreement. Nevertheless, the Tribunal de Police refused to honour defendant's appeal based on the agreement.

Extradition agreements or those concerning recognition of driving licenses are, normally speaking, intended by their authors to ultimately give rise to legal rights and obligations. Yet, in some decisions even purportedly non-legally binding instruments such as the Helsinki Final Act or the Gleneagles Agreement were not applied due to lack of transformation or similar reasons.

In *Frolova v. Union of Soviet Socialist Republics*[14], the US Court of Appeal for the Seventh Circuit found, having analyzed the Helsinki Final Act as if it were a treaty, that the Final Act was not self-executing, and thus declined to apply it. The Court stated that by becoming a party to the Final Act, the USSR had not waived its sovereign immunities, and in doing so, flatly remarked that the Act "create[s] obligations on the signatory countries".[15]

Similarly, the Gleneagles Agreement, concluded in 1977 by the member states of the Commonwealth in order to dissuade sporting contacts with South Africa, was deemed inapplicable not for lack of intent, but for lack of transformation, in the courts of both India[16] and England.[17]

In a similar vein, the EC Court has found on several occasions that resolutions adopted by the Council do not automatically have direct effects. Thus, in *Manghera*[18], it found that a resolution which "basically expresses the political will of the Council ... cannot engender effects which can be used against individuals."[19]

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[14] Decision of 1 May 1985, in 85 *ILR* (1991), 236-247.

[15] The US Court of Appeals for the Sixth Circuit found in *Huynh Thi Anh and another v. Levi and others* the Universal Declaration of Human Rights to be non-self-executing. Decision of 20 October 1978, in 95 *ILR* (1994), 494 ff.

[16] See *CRV Committee, SLSRC College of Law v. Union of India and others*, Karnataka High Court, decision of 6 January 1982, in 92 *ILR* (1993), 501-509.

[17] See *Wheeler and others v. Leicester City Council*, Court of Appeal, Civil Division, decision of 14 March 1985, 2 *All England Law Reports* (1985), 151-160; House of Lords, decision of 25 July 1985, 2 *All England Law Reports*, 1106-1114.

[18] Case 59/75, *Pubblico Ministero v. Flavia Manghera and others*, [1976] ECR 91.

[19] Ibid., at 102. See also case 9/73, *Carl Schlüter v. Hauptzollamt Lörrach*, [1973] ECR 1135, esp. at 1161. On the notion of direct effect in Community law, see the classic article of J.A. Winter, "Direct applicability and direct effect: two distinct and different concepts in Community law", 9 *CMLRev.* (1972), 425-438.

Ultra vires

Agreements have also been struck down for *ultra vires* reasons, courts and tribunals holding that the organ which actually concluded the agreement was not authorized to do so. Thus, the Criminal Chamber of the Dutch Supreme Court found in 1969 that since the Dutch legislature had clearly expressed its desire to regulate recognition of driving licenses, an agreement concluded between the Dutch Transport Ministry and its German counterpart without the participation of the legislature "enjoys no legal force".[20]

Similarly, the Fiscal Court of Schleswig-Holstein found in 1971, in the *Danish Company Tax Liability* case[21], that an "understanding" arrived at between German and Danish fiscal authorities could not "create a tax liability over and above the legally enacted extent of such liability".[22] Such liability would only be possible either by the conclusion of an agreement following the constitutional requirements, or on the basis of some delegated authority.

In 1994, the European Court found that an agreement concluded between the European Commission and the US Department of Justice, regarding cooperation in anti-trust affairs, had been concluded *ultra vires* by the Commission.[23] Nevertheless, the Court did acknowledge that the agreement was binding under international law, and the agreement was later approved by the competent institution under the EEC-Treaty, the Council of Ministers.[24]

Earlier, also in a case between France and the Commission[25], the EC Court had struck down a Code of Conduct allegedly based on a regulation, since the possibility of adopting such a Code was not provided for by the Regulation in question. Nevertheless, the Court left wide open the possibility that Codes of Conduct generally may be legally binding, their designation notwithstanding.

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[20] Decision of 21 October 1969, in *Nederlandse Jurisprudentie* (1970), no. 126, 293-298, esp. at 296.

[21] Decision of 29 July 1971, in 72 *ILR* (1987), 210-217.

[22] Ibid., at 217.

[23] Case C-327/91, *France v. Commission*, [1994] ECR I-3641.

[24] Decision of the Council and the Commission of 10 April 1995 (95/145 EEC, ECSC), OJ L/95/45, 27 April 1995. The Commission was only competent under the ECSC-Treaty; under the EEC-Treaty, the competent institution was the Council.

[25] Case C-303/90, *France v. Commission*, [1991] ECR I-5315.

The arbitrator deciding the *Croft* case in 1856[26] found that decisions of national courts could not amount to international legally binding acts. Courts do not engage in international relations, after all, and do not even speak for the government. Consequently, a judicial finding that a foreign plaintiff has a valid claim against a government cannot in itself give rise to international reclamations.

Domestic treaty-definitions

On some occasions, agreements have been struck down not so much because of having been concluded *ultra vires*, but for their not being in conformity with domestic definitions of treaty. In *Bautista v. Martinez*[27], the Mexican Supreme Court held, in 1955, that an agreement between the US and Mexico did not amount to a treaty for it was not, as prescribed by Mexican law, entered into by the President and ratified by the National Congress.

Similar decisions have been taken by the French Conseil d'Etat, e.g., in *Re Chatelain*[28], striking down an agreement concluded between the Keeper of waters and forests in Doubs and the head of the Swiss Fisheries Service as not amounting to a treaty within the meaning of the French Constitution.[29]

Most often the domestic definition of treaty will be the definition found in the constitution. Sometimes, however, notions of treaty as laid down in other laws may also come to the fore. An example thereof is the 1955 decision of the German District Court of Coburg in the *Prosecution for misdemeanours* case.[30] In this case, the Court found that an agreement between the Justice ministries of Austria and the Federal Republic of Germany, recorded "in identical notes", did not constitute a treaty within the meaning of section 6 of the German Criminal Code. Whether it could nevertheless be "effective" in international law was a question the Court felt no need to investigate.

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[26] *Affaire Croft* (Grande-Bretagne v. Portugal), decision of 7 February 1856, in A. de la Pradelle & N. Politis (eds.), *Recueil des arbitrages internationaux* (Paris 1957), vol. II, 22-27.

[27] Text in *ILR* (1956), 486.

[28] Decision of 18 June 1965, in 47 *ILR* (1974), 113-115.

[29] Not dissimilarly, *Ministry of Finance v. Chauvineau*, Conseil d'Etat, decision of 24 February 1967, in 48 *ILR* (1975), 213-214, holding *inter alia* that non-ratified agreements do not amount to treaties under French constitutional law.

[30] Decision of 6 July 1955, in *ILR* (1955), 560-561.

Involving third parties

An example of an agreement presumably struck down because of the necessary involvement of non-parties for successful execution was a resolution (which included a time schedule) adopted by the EC's Council of Ministers pertaining to the establishment of a market organization for dairy products. In *Commission v. Luxembourg and Belgium*[31], the EC Court must have reasoned that since the Council itself cannot solely guarantee that deadlines it sets will actually be met (European law-making, after all, involves at least the Commission and often the European Parliament as well), such deadlines cannot strictly be intended to have legal effect.[32]

Impropriety

In its landmark *Defrenne*-decision[33], the EC Court refused to honour an agreement (drafted in the form of a resolution) reached by the member states two days prior to the expiry of the deadline set in the EEC-treaty concerning the achievement of equal pay for men and women. The Court stated flatly that "the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236".[34] Yet, it did leave some room for subtlety by introducing an escape clause and by not completely annihilating the possible legal effects of the resolution at issue. Presumably, the Court's decision was based on a rejection of the member states' rather bold attempt to change the previously set deadline at a mere two days' notice, rather than at the instrument itself.

Lack of agreement

Instruments which do not reflect agreement between their (alleged) parties will usually not be honoured as agreements by courts. Still, in such situ-

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[31] Joined cases 90 and 91/63, [1964] ECR 625.

[32] This interpretation finds support in Advocate-general Roemer's conclusion that possibly, by not living up to the resolution, "an obligation based on the Treaty was not observed." Ibid., at 638.

[33] Case 43/75, *Defrenne v. Sabena*, [1976] ECR 455.

[34] Ibid., at 478.

ations, the lack of agreement is the important factor, and not the type of instrument. A good example is the EC Court's decision that interpretative declarations made by a single member state at the occasion of adoption of a Community legal act "cannot be relied upon for the interpretation of Community measures, since the objective scope of rules laid down by the common institutions cannot be modified by reservations or objections which Member States may have made at the time the rules were being formulated."[35]

Inseparability of agreement

In *The Blonde and other ships*[36], the English prize court found that an extensive correspondence between belligerents Great Britain and Germany did not amount to an agreement to allow for a period of grace prior to the seizing of enemy ships. At issue was whether the parties had agreed to apply the terms of Hague Convention No. 6 of 1907 in their mutual relations. The court rejected this, and based its holding on a version of the principle that treaty provisions are, essentially, inseparable:

> "With regard to a particular matter, the parties were ad idem, but with regard to other questions of the one negotiation they were at issue, and their differences never were concluded."[37]

The decision indicates that the prize court was also not overly interested in formalities as such. It seemed perfectly willing to grant an extensive intergovernmental correspondence legally binding status, but for the existence of a rule, cited by it, that agreement can only exist if negotiations have been completely concluded.

On appeal, the Judicial Division of the Privy Council displayed some partial problems with this reasoning.[38] Although it agreed with the prize court that not "every interchange of messages, some formal and some informal, should be deemed to result in a new and binding agreement as soon

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[35] Case 143/83, *Commission v. Denmark*, [1985] ECR 427, at 436.

[36] Decision of the Probate Division, in Prize, of 19 January 1921, in 6 *British International Law Cases*, 584-592.

[37] Ibid., at 592.

[38] *The Blonde and other ships*, decision of 10 February 1922, in 6 *British International Law Cases*, 593-606.

as the parties have reached the stage of affirming identical positions"[39], it noted that, in fact, the parties had not been trying to conclude a new agreement, but rather had been attempting to give effect to an existing agreement. According to the Judicial Division, the parties had agreed to apply the terms of the sixth Hague Convention in their mutual relations. This was clear from the correspondence as well as from Britain's behaviour in similar circumstances. In other words, to the extent that the Judicial Division of the Privy Council agreed with the "inseparability" argument at all (and nothing in the judgment indicates that it did), it found that the argument did not apply in cases where it concerned not so much the conclusion of a new agreement but rather the application of an existing one.[40]

Insufficient language

Courts have sometimes found that the agreements which the parties have invoked was not really an agreement, mainly due to the language used in the instrument. As a result, courts sometimes make a distinction between statements of intentions, and the intention to be bound.

In this category falls part of the decision of arbitrator Hambro in the *Case concerning taxation liability*.[41] Confronted with a phrase contained in a report of an OECD preparatory Committee, which had been adopted by a Conference, he found the statement at issue[42] to be "closer to a pure statement of fact"[43] than to a statement of a compulsory nature.

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[39] Ibid., at 597.

[40] The distinction, needless to say, is a rather subtle one, too subtle perhaps for consistent application. Under article 44 of the 1969 Vienna Convention, separability is only regulated with respect to the validity of treaties and with respect to termination or suspension. This would not preclude entry into force of only parts of a treaty, provided consent to be bound by those parts can be established.

[41] Its full title is *Case concerning the taxation liability of Euratom employees between the Commission of the European Atomic Energy Community (Euratom) and the United Kingdom Atomic Energy Authority*, decision of 25 February 1967, in 18 *UNRIAA* 497.

[42] The statement at issue was to the effect that privileges and immunities of European civil servants "will have to be settled by agreements or arrangements ...". Quoted in ibid., at 511.

[43] Ibid., at 511.

Similarly, the EC Court in 1991 dismissed a claim based on a press release issued by the EC Commission and the Union of European Football Associations purely on the basis of the contents of the press release.[44]

The Swiss Federal Tribunal, as early as 1925, apparently struck down a set of related unilateral declarations, issued by the Austrian government and the government of the canton of Zürich, on the basis of their wording.[45] Those declarations, the Tribunal held, "only affirmed that the conditions ... required by the two legislatures were satisfied."[46] Hence, their wording was not of such a nature as to be an independent source of obligations.

In the Indian case of *Scindia Steam Navigation Co. Ltd. v. Union of India*[47], the applicants argued that a Communiqué issued solely by the Indian government and dealing with contractual liabilities arising out of the partitioning of India and Pakistan, was really an agreement between those two states. The Indian Supreme Court, basing itself on the wording of the Communiqué, eventually dismissed the argument, although it conceded that it was "not unlikely that there may have been some agreement between the Dominions ...".[48] The wording of the Communiqué, however, as well as the circumstances, were deemed insufficient proof for the positive existence of such agreement.

Dogmatic dismissals?

Perhaps the closest to what might be termed a dogmatic dismissal of an instrument for not being legally binding can be found in the recent *Heathrow Airport user charges* arbitration.[49] At issue was, *inter alia*, the legal status of a Memorandum of Understanding concluded between the UK and the US in 1983, specifying and clarifying some of the provisions of the so-called Bermuda II-agreement on air services.

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[44] Case C-117/91, *Bosman v. Commission*, [1991] ECR I-4837.

[45] *Jecker, Ltd., v. Geonafta, Ltd.*, Decision of 20 February 1925, in *Annual Digest* (1925-26), 333-334.

[46] Ibid., at 334.

[47] Decision of 31 August 1961, in 53 *ILR* (1979), 112-129.

[48] Ibid., at 127.

[49] Between the UK and the US, as reported in 88 *AJIL* (1994), 738-744.

According to the US, the Memorandum was a treaty within the meaning of the 1969 Vienna Convention, despite its not being registered. The US pointed to the imperative language used, and to the fact that by means of the Memorandum, the British government had secured American agreement on certain outstanding issues.

The British position was diametrically opposed; the British claimed that the Memorandum "could not be regarded as a source of independent and free-standing legal obligations".[50] The British government nevertheless hastened to add that both parties clearly expected the Memorandum to be honoured.[51]

The arbitrators, at least at first sight, sided with the British government and held that the Memorandum was not "intended ... to create independent legally enforceable obligations". It was "merely recording the understandings of the Parties".[52] Nevertheless, the Memorandum was not completely devoid of legal effects. In the tribunal's view, it constituted a useful aid to interpretation of the Bermuda II-agreement, as it was the "consensual subsequent practice"[53] of the parties.

The tribunal's opinion gives some ground for puzzlement. The tribunal seemingly provides judicial imprimatur for the possibility of concluding a non-legally binding agreement, but its characterization of the Memorandum as "consensual subsequent practice" appears to immediately erase that impression. After all, "consensual subsequent practice" can only be another term for agreement. Without consensus, the term is inconclusive, and with consensus, it automatically signifies agreement.

Moreover, the apparent lack of intent to be bound is of little avail if the "consensual subsequent practice" is used as an important interpretative aid. As soon as the Bermuda II-agreement is interpreted in the light of the Memorandum, the Memorandum necessarily acquires legal effects (the lack of intent notwithstanding).

Similar considerations apply to the various decisions rendered by the EC Court on recommendations. Under Article 189 of the EC Treaty, recommendations are explicitly listed as non-binding. Yet, in *Van Ameyde*[54], such a

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[50] Ibid., at 742, para. 6.6.

[51] Indeed, in the view of the British government, the designation 'Memorandum of Understanding' usually denotes non-legally binding instruments. See Geoffrey Marston, "United Kingdom materials on international law 1989", 60 *BYIL* (1989), 569-700, at 581.

[52] Ibid., at 742, para. 6.8.

[53] Ibid., at 742, para. 6.7.

[54] Case 90/76, *Van Ameyde v. UCI*, [1977] ECR 1091.

recommendation was mentioned in the same category as applicable "binding" instruments, thus suggesting that any differences would be legally negligible. In *Grimaldi*[55], the Court went even further and held that "national courts are bound to take recommendations into consideration ... [e.g.] where they are designed to supplement binding Community provisions."[56] Although the Court affirmed the formal non-legally binding nature of recommendations (given the text of article 189, it could hardly do otherwise), it also created a potentially large field of application for recommendations, to the extent that the binding/non-binding dichotomy becomes quite meaningless. After all, if a recommendation can "supplement" existing law, it follows that it itself must be law.[57]

One of the issues confronting arbitrator Hambro in the *Case concerning taxation liability*[58] was whether the British practice of exempting European officials working on certain projects in Britain from British income tax amounted to a legally binding practice.

The parties were in agreement as to the existence of the practice, but held different opinions concerning its importance. Nevertheless, arbitrator Hambro found some middle ground. He did not want to go so far as to regard a practical arrangement as "creating a binding precedence [sic]", or as a "purely voluntary action", and accordingly interpreted the practice "as an indication of the undetermined state of affairs".[59]

Arbitrator Hambro's reasoning initially appears to belong in a study on customary law formation rather than in one on the concept of treaty. Yet, as it turns out he dismissed the legally binding force of the practice largely on the absence of successful negotiations between the parties.[60] In other words, as there was no real agreement, the practice, such as it was, should not automatically be presumed to be legally binding.

Finally, the decision of Singapore's Court of Appeal in *N.V. De Bataafsche Petroleum Maatschappij and others v. The War Damages Commission*[61] should also be included in the rubric of dogmatic dismissals, at least partly.

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[55] Case C-322/88, *Salvatore Grimaldi v. Fonds des maladies professionelles*, [1989] ECR I-4407.

[56] Ibid., at 4421.

[57] See also above, esp. ch. IV.

[58] O.c. note 41.

[59] Ibid., at 509.

[60] Ibid., esp. at 510.

[61] Decision of 13 April 1956, in *ILR* (1956), 810-849.

Although two of the three judges found the 1943 London Declaration on Despoliation to be irrelevant to the issue at bar, the third judge held it to be non-binding.[62] In doing so, he based himself primarily on a British governmental note according to which the Declaration had never been intended to be binding.[63]

Positive decisions

The above overview indicates that when courts and tribunals have struck down certain instruments, they have rarely, if at all, done so for the dogmatic reason that the instrument in question was non-legally binding. Instead, on most occasions such instruments have been denied legal effect due to the interference of other rules of law.

Moreover, all those decisions that could possibly be characterized as dogmatic nevertheless accord some legal effect to the instrument at issue[64], with the exception of the *Bataafsche* decision. Further, in none of those decisions have the courts given even a hint of the possibility that, if not legally binding, the instrument could be binding under some other normative order.

The legally binding nature of instruments is sometimes denied due to the interference of other rules of law, but where those other rules do not interfere nothing hinders the instrument at issue from being legally binding. The remainder of this chapter will demonstrate that this has quite often been the case: as soon as a commitment can be discerned, the execution of which is not impeded by the interference of another rule of law, courts and tribunals have not hesitated to designate such instruments as legally binding.

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[62] French courts have had no problem in applying the Declaration, given its transformation into French law. See, e.g., *Werner v. Widow Rotschild*, Paris Court of Appeal, decision of 18 July 1953, in *ILR* (1953), 406-407; *Cohen-Klarsfeld v. Pouchard-Stopt*, Court of Cassation, decision of 20 November 1956, in *ILR* (1956), 758-759.

[63] Had the judge consulted other sources, he could presumably have reached the opposite conclusion. Thus, former US Secretary of State Byrnes, writing in 1947, clearly treated the Declaration as legally binding. Cf. James F. Byrnes, *Speaking frankly* (New York 1947), at 163.

[64] As indicated above (in ch. IV), for all practical purposes purportedly non-legally binding instruments which are accorded legal effects should be treated as legally binding.

Absence of form

An extreme, but therefore all the more illustrative example, is the reasoning of the EC Court in its landmark *ERTA*-decision[65], where the Court even applied a non-existent instrument. During a meeting of the Council of Ministers in March 1970, the Council failed to establish a formal instrument laying down a policy regarding negotiation and conclusion of the European Agreement concerning the work of crews of vehicles engaged in international road transport. This agreement was to encompass not just the EC member states, but several other European states as well.[66]

The lack of formalized achievements, however, did not mean that the member states of the EC had not bound themselves. The Court decided that the proceedings of that Council meeting "were designed to lay down a course of action binding on both the institutions and the Member States", having "definite legal effects both on the relations between the Community and the Member States and on the relationship between institutions."[67]

Simplified forms

The assertion that treaties in simplified form are (or can be) legally binding is far from novel. The International Law Commission, preparing the 1969 Vienna Convention, already reached that conclusion in the 1960s, as did some legal scholars[68] and a host of domestic courts.[69]

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[65] Case 22/70, *Commission v. Council*, [1971] ECR 263. The importance of *ERTA* is well illustrated by Rachel Frid, *The relations between the EC and international organizations: legal theory and practice* (Dordrecht 1995).

[66] The main question before the Court was whether participation in this agreement was still a prerogative of the member states individually, or whether treaty-making powers in this area had been transferred to the Community.

[67] Ibid., at 278.

[68] See, e.g., Claude Chayet, "Les accords en forme simplifiée", 3 *AFDI* (1957), 3-13; Fuad S. Hamzeh, "Agreements in simplified form - modern perspective", 43 *BYIL* (1968/69), 179-189; Paul-F. Smets, *La conclusion des accords en forme simplifiée* (Brussels 1969).

[69] In the US, e.g., there is ample jurisprudence upholding the binding nature of executive agreements under international law. Similar decisions have been rendered in, amongst others, France (see *Clot v. Schpoliansky*, decision of the Civil Tribune of the Seine of 4 November 1930, in *Annual Digest* (1929-1930), 333-335), Germany (see the *Paris Agreement (9 January 1920)* case, decision of the German Reichsgericht in Civil Matters

Nevertheless, this conclusion did not prevent the introduction, at least in the literature, inspired possibly to some extent by what appeared at first glance to be state practice, of arguments to the effect that 'treaties in simplified form' were still not simplified enough. According to some observers, the possibility of concluding treaties in simplified form impedes the speedy and flexible intercourse of states. Hence, the emergence of 'informal agreements', which are generally thought to be non-legally binding but, instead, are nonetheless binding as a matter of politics, morality, or soft law.[70]

The courts have, however, done little to promote this position, and the reason for this lack of support was perhaps most succinctly put by the Pennsylvanian Orphan's Court for Philadelphia County in *In re McCall's Estate*, as early as 1919.[71] Although the court acknowledged that unratified instruments cannot formally have the force of municipal law, it stated that such instruments nevertheless "pledge the good faith of the country", and should accordingly be applied, unless the absence of ratification was due to a senatorial refusal to approve of the instrument in question.

In other words, every engagement entered into by a state pledges the good faith of the state concerned, and should therefore be applied, unless this engagement has failed to meet the approval (or rather, has been actively disapproved) of the relevant authority before the consent to be bound is expressed. In such a conception, politically binding agreements, morally binding agreements, or soft law, are not possible. Moreover, no legally relevant distinction between formal treaties and treaties in simplified form is conceivable, let alone between formal and informal agreements. What counts is that you have given your word, and once you give your word, you must make good on it.

In some cases, courts have also found pre-existing obligations to have been re-activated despite a lack of respect for formalities. The leading example is the Austrian Supreme Court's 1973 decision in the *Re-application of treaty*-case[72]. An unilateral declaration issued by the Council of State of the German Democratic Republic sufficed, in this court's view, to re-apply

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in 1922, in *Annual Digest* (1919-1922), 313-315) and the Philippines (see *USAFFE Veteran's Association Inc. v. Treasures of the Philippines*, decision of the Supreme Court of 30 June 1959, in 88 *ILR* (1992), 714-716).

[70] If they were legally binding, they would be indistinguishable from formal treaties, in much the same way as treaties in simplified form are, their simplified form notwithstanding, indistinguishable from formal agreements.

[71] Decision of 1 April 1919, in *Annual Digest* (1919-1922), 186.

[72] Decision of 8 November 1973, in 77 *ILR* (1988), 440-443.

the 1905 Hague Convention on Civil Procedure and its 1924 Protocol of Accession. The Court based itself solely on the text of the declaration, and concluded that "the only way of interpreting it is to regard it as a declaration by which the German Democratic Republic bound itself in relation to the other parties to the Hague Convention on Civil Procedure."[73]

Not dissimilarly, the Judicial Division of the Dutch Council of State in 1976 left ample room for the suggestion that the 1896 Netherlands-Germany Extradition Treaty (suspended due to the outbreak of the Second World War) had been re-activated by virtue of an informal exchange of notes concluded in 1956.[74] Although the Council's task was made easy due to the existence of a subsequent (and more formal) exchange of notes, its handling of the 1956 exchange of notes more than suggests that it could by itself have been capable of re-activating the extradition treaty.[75]

Simply binding

Judicial decisions have often also treated agreements as legally binding without giving reasoned explanations. These decisions occur most often where the instrument concerned is generally considered to be legally binding. Thus, courts rarely confirm that agreements such as the United Nations Charter or the European Human Rights Convention are legally binding instruments; they simply start their analysis on that basis.

However, in some cases instruments of less clear-cut status have been treated in similar fashion. In four cases dealing with fisheries the EC Court, in the late 1970s and early 1980s, treated a resolution adopted by the EC's member states in The Hague on 30 October 1976 as legally binding.[76]

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[73] Ibid., at 442.

[74] *Rijn-Schelde Verolme v. State Secretary of Justice*, decision of 20 December 1976, in 74 *ILR* (1987), 118-120.

[75] The Council limited itself to finding that the 1956 exchange of notes did not constitute a modification of the extradition treaty. The fact that the agreement had not been approved by parliament played, apparently, no role. It should, moreover, be noted, that according to Dutch case-law, the difference between treaties and other agreements as mentioned in the Dutch Constitution is held to refer only to formal characteristics. The classic exposition is *Institut National des Appellations d'Origine des Vins et Eaux-de-vie v. Mettes*, Dutch Supreme Court, 10 December 1954, in *ILR* (1954), 166-167.

[76] The Court did note that the Resolution at issue had been "formally approved", without however indicating the importance (if any) thereof. See case 61/77, *Commission v.*

Moreover, the parties involved also regarded the resolution as legally binding.[77] In all these cases, the issue was not the formal status of the resolution, but whether or not its terms had been met.

In his order in *Deufil*, the EC Court's President, without wasting any words, mentioned a code of conduct on aid for synthetic fibres and yarn production under the general rubric of "the legal rules applicable".[78] The Court's finding, at a later stage in the same dispute, that the code of conduct could not derogate from the pertinent treaty provisions does not indicate its non-legal nature; rather, it testifies to the necessity of employing the amendment procedure of article 236 if a derogation from the treaty is desired.[79]

In a similar vein, the EC Court held in *Council v. Parliament*[80] that the Joint Declaration on the budget procedure, issued by Council, Commission and Parliament in 1982, governed the budget procedure. By claiming that the budget problems "are capable of being resolved" within the context of the Joint Declaration, the Court was obviously of the conviction that the Joint Declaration constituted a legally binding document, binding at least the three institutions involved.[81]

The legal character of agreements concluded between the allied powers during and shortly after the Second World War has rather consistently been downplayed by the western states.[82] To the extent that the Potsdam agreement may have given rise to any doubts concerning its legal nature, such

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Ireland, [1978] ECR 417, at 438. See also case 141/78, *France v. United Kingdom*, [1979] ECR 2923; case 32/79, *Commission v. United Kingdom* [1980] ECR 2403, and case 804/79, *Commission v. United Kingdom*, [1981] ECR 1045. Some of the backgrounds are discussed in Joseph Weiler, "Alternatives to withdrawal from an international organization: the case of the European Economic Community", 20 *Israel Law Review* (1985), 282-298.

[77] As the Court noted: "It is not contested that this Resolution is binding on the Member States." Case 32/79, o.c., at 2432.

[78] Case 310/85 R, *Deufil GmbH & Co. KG v. Commission*, [1986] ECR 537, at 540.

[79] Case 310/85, *Deufil GmbH & Co. KG v. Commission*, [1987] ECR 901, esp. at 927.

[80] Case 34/86, [1986] ECR 2155.

[81] Advocate-general Mancini, while explicitly "leaving aside the problem of its binding character", noted that the mere existence of the Joint Declaration had already given rise to "positive effects". Ibid., at 2166. Incidentally, it is unclear how the possible legally binding nature of interinstitutional instruments can be reconciled with the Court's view stated elsewhere that the European Parliament, one of the institutions involved, is not a legal person. See the so-called Comitology-case, case 302/87, *European Parliament v. Council* [1988] ECR 5615, at 5640.

[82] Cf. Fritz Münch, "Non-binding agreements", 7 *EPIL* (1984), 353-358, at 355.

doubts did not influence the decision of the US Court of Claims in *Aris Gloves Inc. v. United States.*[83] The Court simply accepted the agreement on its face as legally binding, subtly noting that "courts should be hesitant to interfere in any way with the wording or intent of a treaty."[84]

Binding, but not so simple

In a number of cases, courts have to a certain extent shied away from drawing the conclusion that a purportedly non-legally binding instrument was nevertheless legally binding in its own right. Instead, courts have (wittingly or unwittingly) used constructions to apply those instruments as legally binding without having to take a doctrinal position. Thus, agreements have sometimes been given legal force as authoritative interpretations or on the basis of an earlier agreement, and in one case, a court even invoked customary law when, in fact, it used a not yet formalized multilateral agreement.

This latter case was a decision rendered by the District Court of The Hague in *Compania Naviera Panlieve S.A. and Compania Financiera y Commercial Panapubli S.A. v. Public Prosecutor*, better known as the *Magda Maria* case.[85] At issue was whether the "Magda Maria", a ship used for 'pirate broadcasting', had been lawfully seized on the high seas by Dutch authorities. The applicants, who wanted their equipment returned, claimed that since the "Magda Maria" sailed under Panamanian flag and was outside Dutch territorial jurisdiction, the Dutch authorities had violated international law.

The District Court decided differently, and posited the existence of a rule of customary international law allowing coastal states to exercise jurisdiction on the high seas in the circumstances of this case. The Court relied on one precedent[86], but based itself mainly on the status of the discussions on the topic at the third United Nations Conference on the Law of the Sea. The Court concluded that at the time the "Magda Maria" was seized, "there was

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[83] Decision of 23 January 1970, in 56 *ILR* (1980), 537-547.

[84] Ibid., at 543.

[85] Decision of 27 November 1981, reported in 13 *NYIL* (1982), 381-391.

[86] It has convincingly been argued that this precedent was of dubious value. Cf. H. Meijers & R.C.R. Siekmann, "The Magda Maria and customary law at sea. A case-note.", 13 *NYIL* (1982), 143-156.

agreement among the vast majority of (maritime) nations on (the necessity for) this rule."[87] The Court proceeded by arguing that such agreement during a conference constituted state practice and this, together with the precedent, led it to find the existence of a positive rule of international law.

The Court's conclusion that there was widespread agreement among participants at the law of the sea conference was undoubtedly correct, in the light of the final formulation of the rule as laid down in the law of the sea convention.[88] Whether such agreement can safely be assimilated to customary law is a matter for debate, and would ultimately entail acceptance of the highly controversial "instant custom" thesis.[89] The Court's decision should be regarded as being based on an as yet unformalized agreement concluded between the states negotiating the United Nations Convention on the Law of the Sea.

In a number of other decisions, courts have held agreements to be legally binding by virtue of earlier agreements. The new agreements were either seen as interpretations of the earlier one, or as based (and therefore legally justified) on the earlier agreement.

Uncompromising examples of a court holding an agreement to be binding as an interpretation of a preceding agreement are two decisions by French courts in *Société Ruegger & Boutet v. Société Weber & Howard.*[90] As the Civil Tribunal of the Seine put it, "if the interpretation is agreed upon by both governments, there is, so to speak, a clause added to the treaty which is embodied therein, has the same authority, and like it, has the binding force of law."[91]

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[87] The *Magda Maria*, o.c. note 85, at 388.

[88] Compare what is presently article 109 of the Law of the Sea Convention, granting a wide array of states jurisdiction in cases of piracy broadcasting conducted on the high seas. Text in 21 *ILM* (1982), 1261.

[89] Cf. Bin Cheng, "United Nations resolutions on outer space: "instant" international customary law?", reproduced in Bin Cheng (ed.), *International Law: teaching and practice* (London 1982), 237-262.

[90] The first decision was rendered by the Civil Tribunal de la Seine on 25 April 1934 (see *Annual Digest* (1933-34), 404-405), the second by the Paris Court of Appeals on 4 May 1936 (*Annual Digest* (1919-1942, suppl. vol.), 231).

[91] O.c. note 90, at 405. French courts have sometimes gone so far as to award such interpretative agreements retro-active effect, on the (somewhat dubious and, so it seems, mutually exlusive) grounds that it replaces the initial agreement and becomes part of it. See, e.g., *Vicens v. Bonfillon*, decision of the Court of Appeal of Dijon of 2 May 1933, in *Annual Digest* (1933-34), 405-406.

A similar argument was made by the French Tribunal de Sarreguemines in *Becker v. Préfet de la Moselle.*[92] In 1939, France and Germany had, by exchange of letters, agreed on an interpretation of a provision of one of the annexes to the Versailles Treaty. Although the exchange of letters had never been ratified, or published, the Tribunal nevertheless decided to apply it, on the ground that it "clearly established" the intentions of the parties.[93]

Several judicial decisions have presumably used initial agreements in order to provide the legal basis for other agreements. Thus, in an advisory opinion, the Supreme Court of Burma held in 1960, in *In re Burmanization of import trade*[94], that an exchange of notes concluded between Burma's Prime Minister Nu and his British counterpart Attlee in 1947, forming part of a more comprehensive agreement, was legally binding, despite the fact that the 1947 agreement was intended to be merely provisional. The agreement had never been superseded by another agreement.

Interestingly, the US Canal Zone District Court found that a Joint Communiqué and aide-mémoire issued by the US and Panama in 1963 were legally binding. The instruments were themselves based on what was nothing more than a Joint Communiqué, yet the court accepted the legal character of all the instruments with great ease.[95]

An American court was confronted by a very intricate problem in *Husserl v. Swiss Air Transport Company Ltd..*[96] Since international carriage by air was initially governed by the 1929 Warsaw Convention (as amended), the Court had to assess the impact on this Warsaw Convention of what was loosely called the 'Montreal Agreement'. The Montreal Agreement was a package including, amongst other things, an agreement signed by airlines. Although first presented at an inter-state conference, the Montreal Agreement was, or so it seemed, more in the nature of a contractual arrangement than an interstate compact.

Nevertheless, the Court did accord the Montreal Agreement legal effects under public international law. Acknowledging that it was not a treaty within the meaning of the US Constitution, the Court felt that "it is difficult to

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[92] Decision of 22 June 1948, in *Annual Digest* (1948), 321-322.

[93] It has been noted, however, that in other decisions the exchange of letters remained effectivey ignored. Ibid., at 322, editor's note.

[94] Decision of 2 September 1960, in 31 *ILR* (1966), 341-344.

[95] *Doyle v. Fleming et. al.*, decision of the Canal Zone District Court, Division of Balboa, 8 July 1963, in 34 *ILR* (1967), 7-12.

[96] Decision of the District Court, Southern District, New York, 3 November 1972, in 60 *ILR* (1981), 442-449.

question the modification effectuated by the Montreal Agreement ...".[97] It justified its decision by invoking the Vienna Convention's provisions on treaty interpretation, holding that the Montreal Agreement constituted 'subsequent action of the parties'.[98]

Another intricate problem faced the Italian Council of State in 1961, in *Società Teatro Puccini v. Commissioner-General of the Government for the territory of Trieste*.[99] This tribunal held that a 1954 Memorandum of Understanding concluded between Italy, Yugoslavia, the United Kingdom, and the United States on the administration of the Free Territory of Trieste was legally binding, but it did note that the Memorandum could not have the effect of modifying the 1947 Peace Treaty "for the reason, if for no other, that the other signatories of the Treaty of Peace did not participate in the Memorandum."[100] Hence, legal value could be attached to informal instruments, to the extent that those instruments did not deviate from existing law.

The EC Court has on several occasions confirmed that the most informal of instruments may nevertheless be of use for purposes of interpretation. This reasoning follows not only from its decision in *Grimaldi*[101], but also transpires from its decisions in several cases where declarations contained in the minutes of Council meetings were given effect.[102] In the *Hauer*-case[103], moreover, the EC Court confirmed that a declaration issued by the Council, the Commission and the European Parliament could at the very least be declaratory of existing law.

In other cases, courts have explicitly held that highly informal agreements, although not amounting to treaties in their own rights, are nevertheless creative of "new" rights and obligations. The reasoning in such decisions, however, is not always very convincing.

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97 Ibid., at 448.

98 A footnote (at 488, note 6) refers to article 31 (3) (6) of the Vienna Convention; undoubtedly, what the Court meant was article 31 (3) (b), in which the importance of 'subsequent practice' is acknowledged.

99 Decision of 20 December 1961, in 40 *ILR* (1970), 43-50.

100 Ibid., at 48.

101 O.c. note 55.

102 See, e.g., case 136/78, *Ministère Public v. Auer*, [1979] ECR 437; case C-292/89, *The Queen v. The Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen*, [1991] ECR I-745, and case C-310/90, *Nationale Raad van de Orde van Architecten v. Egle*, [1992] ECR I-177.

103 Case 44/79, *Hauer v. Land Rheinland-Pfalz*, [1979] ECR 3727.

As noted earlier, the arbitrators deciding the *Heathrow Airport user charges* case[104] held that a Memorandum of Understanding concluded between the UK and the US constituted "consensual subsequent practice", a term which does not, as such, occur in the Vienna Convention on the Law of Treaties.[105]

A similar opinion was that of the German Constitutional Court in its 1994 *AWACS-, Adria-, Somalia* decision.[106] It held that while the numerous ministerial declarations issued during or at the conclusion of summit meetings of NATO and WEU did depart, materially, from the constituent documents of those organizations, the declarations fell short of being treaties in their own right, and would be better seen as dynamic interpretations of those constituent documents.

Lack of consent?

With respect to consent, courts have in many cases demonstrated that the lack of a formal expression of consent to be bound, even where the treaty at issue itself specifically prescribed such expression, can be overcome. Most often, as was to be expected, the case related to an absence of ratification.

Thus, the Canadian Supreme Court held in 1974, in *Chateau-Gai Wines Ltd. v. Institut National des Appellations d'Origine des Vins et Eaux-de-vie et. al.*[107], that the 1933 Canada-France Free Trade Agreement had entered into force without the prescribed ratification having taken place. The parties' conduct subsequent to the drawing up of the text of the agreement constituted a sufficient expression of consent to be bound. Similarly, in the 1930 *The Cysne* arbitration (Portugal v. Germany), the arbitrators decided the case on the basis of the London Declaration of 1909 despite the fact that it had never

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104 O.c. note 49.

105 Article 31 mentions as important for purposes of interpretation both "subsequent practice" and "subsequent agreement". The term "consensual subsequent practice" appears to represent an uncomfortable compromise between the two, especially given the fact that the "consensual subsequent practice" had not, in the view of the US, materialized. It claimed, after all, that the British practices were not in conformity with the Memorandum of Understanding. Hence, while this Memorandum reflected a consensus, practice apparently remained divergent.

106 Decision of 12 July 1994, in 21 *Europäische Grundrechte Zeitschrift* (1994), 281.

107 Decision of 2 April 1974, in 69 *ILR* (1985), 284-294.

been ratified by the parties involved in the dispute. Since both parties relied on it during proceedings, "the Tribunal would regard as contrary to international law any act clearly contrary to the precise text of the Declaration."[108]

There is a fine line between the application of agreements to which the consent to be bound has not been explicitly expressed, and the application of agreements on a provisional basis. The subtle difference is exemplified by the 1966 decision of the Stuttgart Court of Appeals in the *Prosecution of U.S. soldier* case.[109] In this case, the court applied a so-called administrative agreement concluded between the US and the Federal Republic of Germany, despite the fact that it had not yet been ratified. The Court somehow found that "the two countries have mutually agreed to apply it at this stage", without referring to a specific provision to that effect contained in the agreement at issue.[110]

Exact scopes

Sometimes provisions of treaties are framed in such noncommitting words that those provisions are, in fact, empty. Nevertheless, in some cases, courts have managed to delimit the exact scope of loosely worded provisions in otherwise legally binding documents with some accuracy, and have not hesitated to give legal effect to such provisions.

The prime examples in this category are the findings that what parties had concluded amounted to a *pactum de contrahendo* or *pactum de negotiando*, and the most well-known example thereof is the *Tacna-Arica* arbitration.[111] Arbitrator Calvin Coolidge found that parties, in article 3 of their Treaty of

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108 Decision of 30 June 1930, in *Annual Digest 1929-1930* (1935), 487-491, at 490.

109 Decision of 23 November 1966, in 57 *ILR* (1980), 340-341.

110 According to the version as reproduced in *ILR*. In the German summary reproduced in *Fontes Iuris Gentium* (Series A, Sectio II, Tomus 6, pp. 189-190), mention is made of the intent to be provisionally bound appearing from a Circular issued by the Justice Department of the German Land of Baden-Württemberg. On the assumption that this Department did not act on its own, it would seem that provisional application of the administrative agreement at issue was itself the subject of a collateral (and presumably highly informal) German-American agreement.

111 *Tacna-Arica question (Chile/Peru)*, award of 4 March 1925, in II *UNRIAA* 921.

Ancon, had agreed to enter into a special protocol, and this meant that "their undertaking was in substance to negotiate in good faith to that end".[112]

In a similar spirit, the EC Court has concluded that the Commission's task under article 118 EEC "of promoting close cooperation between Member States in the social field" was not an empty provision.[113] Instead, by invoking the principle of effectiveness, the Court found that the provision had a definable content: "Since the Commission was specifically given the task of promoting such collaboration and arranging it, it is entitled to initiate consultation procedures within the social field referred to in Article 118."[114]

Concluding remarks

The purpose of chapters VI and VII was to establish the existence of judicial decisions relevant to our quest, and, more substantively, to illustrate that those judicial decisions lend no support to theses which proclaim the existence of politically binding agreements, morally binding agreements, and soft law.

By and large, the judicial decisions affirm our thesis that as soon as commitments can be discerned, they should be considered legally binding commitments. The thesis we put forward in the first chapters finds full support in the pertinent decisions of international and domestic tribunals.

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[112] Ibid., at 929.

[113] Joined cases 281, 283 to 285, and 287/85, *Federal Republic of Germany and Others v. Commission*, [1987] ECR 3203.

[114] Ibid., at 3254.

CONCLUDING REMARKS

International actors and their representatives enter into undertakings with one another on almost a daily basis. A substantial part of those undertakings are undoubtedly treaties, giving rise to legal rights and obligations under the system known as public international law. Nevertheless, a large number of undertakings are often deemed to be of doubtful status.

In the first chapter of this study, we have given an overview of such instruments. Doubts were voiced concerning instruments with various types of designation, shaped in various forms, or concluded by state representatives of doubtful authority. Such instruments, it is often asserted, do not give rise to legal rights and obligations under public international law. They are not "treaties". Considerations of political expediency, aggravated by the increased demand for international intercourse and the exigencies of international relations in general, make it imperative that states, as well as other international actors, respond quickly and flexibly to ever-changing circumstances. The law, so the argument goes, is unable to provide such flexibility; hence, different types of instruments must be concluded. Although the terminology is often varied and rarely consistent, some authors argue that as a result some agreements can, if states so wish, be politically binding as opposed to being legally binding, or be morally binding as opposed to being legally binding, or amount to soft law as opposed to positive "hard" law.

In doing so, those authors (as well as many governments) apparently feel compelled to justify the conclusion of politically or morally binding agreements, or of soft law instruments, in terms of international law. In the most popular of views, such authority is implicit in the international community's most authoritative definition of treaty: article II, paragraph 1 (a) of the 1969 Vienna Convention on the Law of Treaties. The analysis, in chapter II, of this definition of treaty illustrated how the definition is often interpreted as only qualifying an agreement as a treaty if its authors intend it to be legally binding. The drafting history of article 2, paragraph 1 (a) lends some support to the view that intent is an important ingredient of the concept of treaty, in that it helps to delimit the binding from the non-binding, and the agreement governed by domestic law from the agreement governed by public international law. It does not follow, however, that intent is always decisive; and most importantly, it does not follow, that if one can intend to conclude a treaty, one can also intend to conclude other instruments. Although the perti-

nent literature contains many suggestions to that effect, chapter 2 above indicated that those suggestions cannot rely on the drafting history of article 2, paragraph 1 (a).

If article 2, paragraph 1 (a) of the 1969 Vienna Convention, while allowing some room for the intention to be bound, is eventually inconclusive with regard to the concept of treaty, it follows that further investigations into the nature of intent are necessary. Such further investigations were undertaken in chapter III. We established that at the very least, one cannot attach value to a party's subjective intentions. At best, the intentions as they manifest themselves to the outside world are to be taken into account. As a result, the identification of intent is a matter of interpretation, which in turn implies that intent can never be the decisive criterion. After all, matters of interpretation are open to debate as to the correct mode of interpretation and the meaning to be attached to that which is to be interpreted. Moreover, the significance of intent is to some extent reduced by two circumstances: (1) it is doubtful whether international actors actually, when concluding agreements, actively intend to become legally bound by them (as counterposed to merely having an awareness that such may happen); and (2), it is generally accepted that in some circumstances international law may be created in disregard of the intentions of the actors involved.

After having relativized the importance of intent, in chapter IV a number of distinct theses concerning the doubtful legal status of certain instruments were discussed. The oldest, and most limited of these, is the thesis that some agreements (often referred to as administrative agreements) are only binding upon the agencies which actually conclude them. This thesis can be refuted rather easily on the main ground that they do not fit in the general system (such as it is) of international law. In the end, the state will be held responsible for such agreements.

The other theses, however, pose more of a challenge, in that they are based in one way or another on the presumption that international law is not the only normative order capable of governing the conduct of international relations. More accurately, both the Fawcettian thesis (agreements are not legally binding, unless specifically so intended), and the thesis that agreements can be intended to be non-legally binding but acquire legal effects nevertheless (in various guises represented by especially Aust and Virally), rest on two presumptions. They rest, firstly, on the presumption that international relations are governed by several simultaneously existing, competing, normative orders, and secondly, on the presumption that each of these various normative orders can be resorted to as a matter of choice.

This presumed co-existing validity of various competing normative orders in international relations is further examined in chapter V. Accepting, for argument's sake, these two pivotal presumptions, it was shown that the co-existence of separate normative orders is problematic. The relationship between the rules of the various normative orders in the case of a conflict of rules is unclear. Furthermore, the possibility of concluding politically or morally binding agreements or soft law instruments may have an adverse impact on the control exercised by national democratic institutions over the conduct of foreign relations. Moreover, state practice is not widespread and far from unambiguous. More importantly, the existence of such state practice does not in itself necessarily give rise to the creation of new legal concepts, replacing or supplementing the traditional treaty.

Although several normative orders may govern international relations, none of them is capable of serving as a viable alternative to the international legal order, for they cannot be utilized intentionally. Courtesy and morality develop over time, through the aggregate conduct of actors; and neither can be created intentionally (except, perhaps, by legal instrument). It follows, that an agreement cannot be concluded with the intention of becoming courteously bound, or morally bound. Politics moreover, perhaps the most popular alternative to law, is really no alternative. Rather, law is the normative order governing politics, and in that sense at least, law and politics are one and the same. Again, it follows that one cannot intend to become politically bound without at the same also becoming legally bound. With the help of similar arguments, the soft law thesis was refuted in an excursus to chapter V. The soft law thesis presumes that law itself consists of various orders, a presumption which proves untenable upon closer scrutiny.

It is a distinct feature of most studies of the concept of treaty conducted thus far, that they have been conducted without much regard to judicial decisions. The empirical goldmine which consists of some 75 years of case-law of the World Court, and a handful of centuries of case-law rendered by domestic courts and international tribunals other than the World Court, has been rather consistently neglected. Chapters VI and VII of this study were designed to fill in this gap.

Chapter VI clearly demonstrated that when it comes to the concept of treaty, the case-law of the Permanent Court of International Justice and the International Court of Justice reveals a remarkable *jurisprudence constante*. As early as the 1923 *Jaworzina* case, the Permanent Court had already displayed a relative disregard for formalities, finding no problem in attaching legal effect to a series of international agreements which would not have

passed most tests concerning formalities, nor most tests according to which subjective intent is of any importance.

In addition to this benign neglect of formalities, the case-law of the World Court on the concept of treaty was shown to have two distinguishing features. The first of these is that the Court has on no occasion even hinted at the possibility of instruments being politically binding, morally binding, or soft law. The closest the Court has come during its 75 year existence was its description of Nicaragua's letter to the Organization of American States as a "political pledge" which was, however, devoid of normative contents, at any rate on the international level.

The second distinguishing feature of the World Court's case-law is, in fact, a corollary of the first: in those cases where the Court did not apply agreements invoked by the parties, it did so for reasons other than what we have dubbed dogmatic reasons. The Court did so either because it had to apply another pertinent legal rule, or because the instrument at bar was clearly not intended to be binding. Yet, while acknowledging that certain instruments were not intended to be binding, the Court never chose the doctrinally popular distinction of intent to become legally bound versus intent to become bound otherwise. In short, an instrument that was seen by the Court as not intended to be legally binding, was therefore also seen as to be not intended to be binding at all. In that sense, the landmark 1994 decision in *Qatar v. Bahrain* was really little more than the logical culmination of 75 years of case-law, and its importance therefore resides not so much in its representing a change of course, but rather in its relentless explicitness. The *Qatar v. Bahrain* decision does not mark a departure. It is the Court's most explicit pronouncement on the concept of treaty, a concept the Court has adopted since its first pertinent holdings in the *Jaworzina* case.

With minor deviations, the same picture emerged in chapter VII with respect to decisions of domestic courts, the EC Court, and international tribunals. To paraphrase Louis Henkin: almost all courts have on almost all occasions found almost all agreements before them to be legally binding. They may have occasionally refused to apply an agreement, but they have rarely found agreements to be non-binding, let alone found them binding in an order other than law.

Indeed, the pertinent cases show that sometimes agreements were discarded because of a clear lack of intent, or were not applied because of the existence of another pertinent legal rule. Moreover, few, if any, of these cases support the theses concerning politically or morally binding agreements or soft law. And, even in those rare cases in which a court or tribunal tried to argue that a certain agreement was non-legal, but binding nonetheless, such

as the *Heathrow Airport User Charges* arbitration, it was shown that in the end the court or tribunal re-introduced the concept of treaty. The 'consensual subsequent practice' relied on by the arbitrators in the *Heathrow Airport User Charges* arbitration is nothing more than a reference to a legally binding agreement, albeit in disguise.

The concept of treaty can be easily delineated. Essentially, every agreement concluded between representatives of states or international organizations which is of a normative nature (in that it attempts to influence future behaviour), and which is not subjected by its drafters, explicitly or implicitly, to any other system of law, is a treaty for purposes of public international law.

Of course, the recognized conditions of validity of treaties apply. Thus, if the conclusion occurred in violation of a rule of *jus cogens*, or took place in manifest violation of fundamental rules of domestic law, or any other situation envisaged in articles 46 to 53 of the two Viennese Conventions, the agreement will either be void or voidable, and therefore (if invalidated) not legally binding. Once a treaty is void, it is also void in any other guise; it cannot by some magical process become binding in another way, such as a politically binding agreement.

The role of intent in the concept of treaty is a limited role. The intent-requirement can only refer to the intent to become bound, which inevitably means legally bound. Moreover, intent, rather than having to be proven, will normally be presumed. It follows from elementary principles of good faith that agreements entered into must be intended to be binding; otherwise, the conclusion of the agreement is pointless. And, it follows from the above consideration that intent can only refer to law. Agreements can be presumed to be binding in law, and in law only.

However, the intent-requirement has not become totally redundant. Intent will function to distinguish between treaties and mere political statements, or between legally binding unilateral undertakings and the kind of witticism which came to the fore in the Frontier Dispute case. In other words, intent plays a role in distinguishing between the legal and the non-legal, but on the understanding that the non-legal is devoid of normativity.

Apart from that, however, the requirement of intent can only relate to the intention to be legally bound. Hence, any agreement which is concluded with an eye to being adhered to (and good faith would require this to be true of each and every agreement) is by definition a legally binding agreement. One cannot escape the workings of the law by claiming that it was never meant to be a legal instrument. This study has shown why the International Court of Justice's decision in *Qatar v. Bahrain* could not have been decided in any

other way: commitments create rights and obligations for the parties under international law and constitute international agreements.

EPILOGUE

SOME REMAINING QUESTIONS

Having established the concept of treaty, our quest has come to an end. We set out to establish the concept of treaty, and have found ample empirical support for our concept. Although we have achieved our stated goal, some related questions have inevitaby presented themselves. Answers to these questions would not fit particularly well within the ambit of the present study, but the questions themselves are too interesting and important to leave them unmentioned. Hence, in this short epilogue we would like to address those questions, albeit fleetingly, and perhaps come up with one or two suggestions as to how they might be answered.

The first question is rather obvious: in the light of the prevailing academic opinion of the last two or three decades, which accepts the conclusion of 'politically binding' agreements, 'morally binding' agreements, or 'soft law' instruments, why have courts upheld the concept of treaty as elaborated above, and why have they done so in such overwhelming fashion? The second question can also be readily anticipated: are there any limitations to the concept of treaty? The third question, though, may be slightly less obvious: what does the concept of treaty as developed here tell us about the ever-problematic relationship between law and politics?

Explaining judicial behaviour

The first question, relating to the discrepancy between judicial and academic opinion, can be addressed in two ways. Viewed from the perspective of the sociologist of science, it is curious that scholars have consistently neglected the wealth of case-law. Yet, to approach it from this angle, although interesting in its own right, is to question only academic practices, cultures, and paradigms, and leave unaddressed the question as to why courts have decided the way they did.

As far as we are aware, only one answer has been submitted to that particular question, and that answer was submitted within the relatively limited context of EC law. According to Ulrich Everling, a former judge with the Court of Justice of the EC, the EC Court has wherever possible upheld

agreements which it thought beneficial to European integration, and has based itself, in doing so, on the notion of Community solidarity ("Gemeinschaftstreue") as laid down in article 5 of the EC Treaty.[1] Under article 5, the EC's member states shall "ensure fulfilment" of their obligations under EC law, and "shall abstain from any measure which could jeopardise the attainment" of the Community's objectives.[2]

At first sight, Everling's explanation has some attraction. Article 5 of the EC Treaty has been used to stimulate Community solidarity in an explicit fashion[3], and therefore it may perhaps be deduced that it is sometimes also implicitly present in the Court's reasoning. Moreover, the notion of "Gemeinschaftstreue" may well be transposed (albeit with adaptations) to non-Community settings.[4] Most, if not all, treaties and treaty regimes possess an 'object and purpose'.[5] Therefore, subsequent agreements, however informal, could be considered legally binding to the extent that they contribute to the 'object and purpose' of the initial treaty.

Attractive as Everling's explanation may seem, it falters for several important reasons. First, in cases where no initial agreement establishing 'object and purpose' exists, measuring 'contribution' or 'non-contribution' is not possible.[6] Second, and more importantly, the "Gemeinschaftstreue"

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[1] See Ulrich Everling, "Zur rechtlichen Wirkung von Beschlüssen, Entschliessungen, Erklärungen und Vereinbarungen des Rates oder der Mitgliedstaaten der Europäischen Gemeinschaft", in G. Lüke et. al. (eds.), *Rechtsvergleichung, Europarecht und Staatenintegration: Festschrift für Leontin-Jean Constantinesco* (Cologne 1983), 133-156.

[2] More limited, Gauweiler, while treating interinstitutional agreements within the EC generally as political declarations, allows for them to have legal effect on the basis of "Organtreue", the duty of the EC's institutions to co-operate with one another. As a result, infringement of an interinstitutional agreement might imply infringement of this "Organtreue". See Marijke Gauweiler, *Die rechtliche Qualifikation interorganschaftlicher Absprachen im Europarecht* (Mainz 1988), esp. 104-134.

[3] Perhaps most famously in case 14/83, *Von Colson & Kamann v. Land Nordrhein-Westfalen*, [1984] ECR 1891. See generally also John Temple Lang, "Community constitutional law: article 5 EEC Treaty", 27 *CMLRev.* (1990), 645-681.

[4] Hints of such an approach are to be found in Manfred Lachs, "Some reflections on substance and form in international law", in W. Friedmann et. al. (eds.), *Transnational law in a changing society: essays in honor of Philip C. Jessup* (New York 1972), 99-112.

[5] But see D.W. Greig, "Reciprocity, proportionality, and the law of treaties", 34 *Va. JIL* (1994), 295-403, who notes that identification of a treaty's object and purpose may at times be quite problematic.

[6] Unless one wishes to postulate some common goals of mankind, an attitude which is one of the distinguishing characteristics of the so-called New Haven approach to international law. See generally Myres S. McDougal, "International law, power, and policy: a

explanation presupposes an ability to judge which actions are good, and which are bad, for the furtherance of 'object and purpose', or of solidarity. In abstract terms, it also presupposes a paradigmatic theory of political integration, which has not yet been developed.[7] Although intuition and common sense may occasionally indicate the utility of certain agreements in furthering a regime's goals, intuition and common sense have their limits.[8]

As a result, the explanation for the consistent judicial attitudes must be sought elsewhere. The most plausible answer is that courts, when deciding on whether or not a certain instrument is legally binding, start from the presumption that such an instrument is intended to be legally binding. In other words: courts approach each and every document before them on the presumption that the instrument is intended to be legally binding, and refuse to give an instrument legal force when there is clear evidence that it was not so intended, or refuse to apply it when other legal rules prevail.

The definitive answer cannot be given here, but several arguments support the 'presumption' thesis as an explanation for the consistent judicial attitudes on the concept of treaty. First, the thesis flows from the concept of treaty itself. As we stated earlier, as soon as there is an interstate commitment, the commitment is legally binding. There is, quite simply, no viable alternative. Good faith implies that if parties conclude a agreement, they conclude it with an intention of being bound, and that necessarily means legally bound. From this perspective, a court or tribunal can hardly entertain different thoughts when presented with an agreement concluded between international actors.

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contemporary conception", 82 *RdC* (1953/I), 133-259; recent works along those lines include Ingrid Detter de Lupis, *The concept of international law* (Stockholm 1987), and Rosalyn Higgins, *Problems and process: international law and how we use it* (Oxford 1994).

[7] See generally J.K. de Vree, *Political integration: the formation of theory and its problems* (The Hague 1972). The lack of a paradigmatic theory of even European integration (let alone political integration generally) is clearly indicated by the lively debates currently conducted in some of the leading journals. See, e.g., Anne-Marie Burley & Walter Mattli, "Europe before the Court: a political theory of legal integration", 47 *International Organization* (1993), 41-76; Andrew Moravcsik, "Preferences and power in the European Community: a liberal intergovernmental approach", 31 *Journal of Common Market Studies* (1993), 473-524; Dorette Corbey, "Dialectical functionalism: stagnation as a booster of European integration", 49 *International Organization* (1995), 253-284.

[8] See esp. the works of Joseph Weiler, e.g. "The Community system: the dual character of supranationalism", 1 *Yearbook of European Law* (1981), 267-306; "The transformation of Europe", 100 *Yale Law Journal* (1991), 2403-2483; and "Journey to an unknown destination: a retrospective and prospective of the European Court of Justice in the arena of political integration", 31 *Journal of Common Market Studies* (1993), 417-446.

The court might reach the conclusion that the instrument was never meant to be binding at all; is binding under some domestic legal system; should not be applied; or, that its scope is too indeterminate to warrant judicial enforcement. But, contrary academic opinion notwithstanding, courts are unlikely to come to any other conclusion.

However, to claim that this thesis necessarily flows from the concept of treaty is a tautology: courts apply the concept of treaty because it is correct, and this concept is correct because courts apply it. We should, therefore, try to find other reasons which support the 'presumption' thesis.

The most obvious reason is that such a presumption is not unknown to some domestic legal systems. English contract law (at least) has long recognized that contracts or promises are to be presumed legally binding. Atiyah succinctly provides the arguments:

> "Exchanges of benefits are likely to be in the interests of those who make them, and there is therefore a strong prima facie case for upholding them. Promises are likely to be relied upon and those who would rely would suffer loss from breach: these too are prima facie good reasons for upholding the binding nature of a promise."[9]

And what holds true in English contract law may well hold true in other legal systems as well (which is not, of course, to deny the possibility that such presumption may be rebutted). Indeed, in recent years some scholars have argued, either *de lege lata* or *de lege ferenda*, that all law is (or should be) a matter of presumptions. According to such views, litigation is, as Anthony d'Amato puts it, to be compared to a tennis game, with presumptions being hit back and forth until one of the parties is unable to answer a presumption raised by its opponent.[10]

Moreover, the idea of presumptions is also not unknown to international law. F.A. Mann already postulated the presumption that parties intend agreements to be binding as early as 1957[11] and more recently Oscar Schach-

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[9] Patrick S. Atiyah, Book review of Charles Fried, "Contract as promise", 95 *Harvard Law Review* (1981), 509-528, at 527. Incidentally, Atiyah here wittingly conflates promises and agreements in order to demonstrate that Fried's claim following which promises are not merely presumptively, but absolutely and conclusively binding, is mistaken.

[10] See Anthony d'Amato, *Jurisprudence: a descriptive and normative analysis of law* (Dordrecht 1984), at 70-73. Incidentally, there is little reason not to expand the notion so as not only to include litigation, but other situations of law-application as well. See also J. Harvie Wilkinson III, "Toward a jurisprudence of presumptions", 67 *New York University Law Review* (1992), 907-920.

[11] F.A. Mann, "Reflections on a commercial law of nations", 33 *BYIL* (1957), 20-51, at 30-

ter held (some) resolutions of the General Assembly to be presumptively legally binding.[12] Following the notion of a presumption of being bound, there are, as a matter of presumption, only two possibilities: agreements can either be presumed to be binding; or, presumed to be non-binding. And, as Mann already argued in 1957, to employ this second possibility would be meaningless, since such a presumption would practically always have to be rebutted.[13]

The limits of the concept of treaty

If we are correct in asserting that, as a matter of judicial reasoning, agreements are presumed to be (intended to be) legally binding, are there then any circumstances in which the presumption can be rebutted? After all, if a presumption is irrebuttable, then the question arises whether it can still be meaningfully referred to as a presumption.

The preceding chapters have indicated that on various occasions and for various reasons, courts and tribunals have not applied international agreements. These reasons, however, do not all amount to valid rebuttals; indeed, some of them might even be seen to strengthen the presumption.

The reason most often invoked by courts to justify not applying agreements resides in the application of another rule of law, either a rule of domestic law or a rule of international law. However, intervention by other rules of law can only be taken to strengthen our presumption. If a court were to find a certain agreement to be non-binding to begin with, the intervention of other rules would not be necesssary. Put differently, in the case of an agreement which is not binding to begin with, the questions of whether it was concluded *ultra vires*, would involve third parties in its execution, or was not in conformity with domestic treaty-definitions, are irrelevant. Although we cannot rule out the possibility that a court may sometimes invoke an intervening rule merely to avoid having to pronounce itself on the nature of the agreement in question, we can say that generally the invocation or application of other rules cannot in itself qualify as a rebuttal.

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[12] Oscar Schachter, "United Nations legal order: an overview", in Oscar Schachter & Christopher C. Joyner (eds.), *United Nations legal order* (Cambridge 1995, 2 vols.), 1-31, at 5.

[13] O.c. note 11, at 31.

The presumption that agreements are intended to be legally binding can only be rebutted by proving that no such intention existed at the time of conclusion. The best example of such a lack of intent was the declaration made by the President of Mali and the subject of part of the decision of the ICJ in the 1986 *Frontier Dispute*. The Court held this declaration to be a mere 'witticism', and left it at that.

It should be noted that this declaration was issued unilaterally. It is conceivable that when acting unilaterally, statesmen may sometimes engage in witticisms, and express opinions or plans which they absolutely never intend to carry out. However, matters are more complicated when agreement is at issue. The idea that statesmen meet, negotiate for some period of time, devote resources to establish something during the negotiation stage, and in the end claim that they were only engaged in a practical joke, is not conceivable.

Such is not likely to be presumed, particularly from the instrumentalist or rationalist point of view.[14] Nevertheless, in some circumstances the ultimate goal is not so much the creation of rights and obligations, but rather the creation of the impression that (domestic) political demands are taken seriously and implemented in international instruments. Indeed, we have, in chapter I above, described the impact which 'televized diplomacy' may have on negotiations generally, and postulated that in such cases, the resulting instruments are filled with vague and indeterminate provisions. The point is, however, that even vagueness and indeterminacy do not necessarily rebut our presumption. Courts have found no difficulty in attaching at least some minimal scope to vague and indeterminate provisions, and the parties themselves have often honoured the more or less institutional provisions which can be found in such documents. Ostensibly non-binding documents providing for, e.g., follow-up meetings to be organized regularly, have indeed given rise to such follow-up meetings.

Again, instead of rebutting our presumption, including vague and indeterminate provisions in a document actually strengthens it. The non-application of an instrument for reasons of indeterminacy does not rebut the presumption that it would have been binding to begin with. Secondly, indeterminacy would not need to be institutionalized if parties were assured that such provisions would be without any consequences at all.

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[14] In a similar vein, Gidon Gottlieb, "The nature of international law: toward a second concept of law", in Cyril E. Black & Richard A. Falk (eds.), *The future of the international legal order. Vol. IV: the structure of the international environment* (Princeton 1972), 331-383, at 369.

General Assembly resolutions illustrate the point. Such resolutions may at times be quite specific, which is most likely due to their drafters' knowledge that, at least formally[15], they are non-binding. In those circumstances, states sacrifice little by agreeing to specific words, and by voting in favour of a resolution or allowing it to be adopted by consensus.

The question then presents itself as to whether the conclusion of such formally non-binding resolutions would amount to a rebuttal of our presumption: would the laying down of behavioural rules in a formally non-binding instrument provide sufficient proof that the instrument was never intended to be legally binding[16]?

On the one hand, the question may be answered in the affirmative. It could be argued that the adoption of such a resolution, following the terms of the United Nations Charter, indicates a lack of intent to be bound, sufficiently clear to rebut the presumption that it was intended to be binding. On the other hand, if the only way to escape the *pacta sunt servanda* rule is to conclude what are explicitly *non-pacta*, an analysis in terms of presumption and rebuttal is meaningless.

In sum, we have been unable to find any viable rebuttals to our posited presumption that agreements are intended to be legally binding. The possible application of intervening rules of law only strengthens the presumption, as does the deliberate use of vague and indeterminate provisions, and it is debatable whether the conclusion of explicit non-treaties (such as resolutions) can operate so as to rebut the presumption.

Law and politics

The third question mentioned at the outset of this epilogue was what we dubbed a somewhat less obvious question: what does the concept of treaty tell us about the relation between law and politics? It has sometimes been argued

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[15] See, e.g., Richard A. Falk, "On the quasi-legislative competence of the General Assembly", 60 *AJIL* (1966), 782-791.

[16] A similar argument with respect to so-called gentlemen's agreements (their non-binding character being indicated by their designation) was made by Elihu Lauterpacht, "Gentleman's agreements", in W. Flume et. al. (eds.), *Internationales Recht und Wirtschaftsordnung: Festschrift für F.A. Mann* (Munich 1977), 381-398, esp. at 396.

that the conclusion of soft law instruments or politically or morally binding agreements would serve a useful purpose in international relations. Law is traditionally conceived of in binary fashion, in terms of black and white, but politics do not rest comfortably within such divisions, and require the varying shades of grey to which politically binding agreements, morally binding agreements, or soft law instruments, can cater.[17]

The argument is seriously flawed, for at least one important reason: the choice of particular words in treaties allows negotiators to indicate their political motivations; and by using particular phrases in agreements, political considerations can be given pride of place. Law is, indeed, a binary phenomenon, but it is also, through its reliance on language, capable of accurately reflecting political considerations.

An example may serve to clarify the point. As early as 1933, the PCIJ decided that by means of the Ihlen declaration, Norway had promised not to make any difficulty over the question of sovereignty over Eastern Greenland. Basing itself on the explicit terms of the declaration (Mr. Ihlen had used the future tense), as well as the circustances in which the declaration was made (with both parties still anticipating final settlement of the question at a Peace Conference), the Court managed to delimit the scope of the Ihlen declaration with some precision. The PCIJ held that Norway, because of the Ihlen Declaration, should quite literally not make any problems regarding Eastern Greenland, and *a fortiori* refrain from occupying parts thereof. The Court refused, however, to take the Ihlen declaration as a definitive recognition of Danish sovereignty over Eastern Greenland.

Such a distinction may be subtle, but it is of vital importance, as was the distinction drawn by the ICJ in the 1994 *Qatar v. Bahrain* case between an agreement to submit a dispute to the Court, and the submission itself. The Court concluded that the parties had agreed to the former, but had not yet done the latter. Thus, by interpreting the terms of the declaration or agreement in question, accompanied by an investigation into the context where necessary, the Court managed to delimit the precise scope of the agreement. This analysis illustrates that law is capable, its binary character notwithstanding, of accurately reflecting politics. After all, if the original intentions were different from the findings of the Court, this could only have been the result

[17] For an example of such argument, see Charles Lipson, "Why are some international agreements informal?", 45 *International Organization* (1991), 495-538, esp. at 498, note 7, claiming that the "political dimension" of international agreements cannot be accounted for by international law.

of unfortunate drafting; and if the original intentions had in the meantime been revised, parties could have simply re-opened negotiations, or made sure that their agreements left either enough room to manoeuvre or allowed for speedy termination. The law is flexible enough to serve politics (if one wishes to think in those terms at all). Within its necessary rigidity, law is also immensely flexible, not by relaxing its binary way of organization, but by providing for flexibility within.

To speak of varying degrees of 'oughtness' as a characteristic of law itself is pointless. Law cannot be more or less binding, and analogously, law cannot be accompanied by separate yet co-existing normative orders. Nevertheless, law can reflect an infinite variety of political emotions, considerations and opinions. It is by choosing and using the correct words that law can and indeed does reflect politics.

Nevertheless, this proposition must not be taken to mean that language itself can be completely accurate in capturing the intentions and motivations of its users.[18] To the extent that language is capable of doing so, however, this capability can be reflected in legal instruments. Instruments other than legal instruments are not required to take account of the political dimensions of agreement.

This proposition rests on the premise that states actually mean what they say. States may sometimes deliberately use double-talk, or even worse: they may not mean what they say. In such cases, two points are relevant. First, concluding agreements while not meaning what one says comes dangerously close to acting in bad faith (unless, perhaps, if it is understood that all parties do not mean what they say). If bad faith can be ascertained, then the resulting agreement is arguably invalid.[19]

Second, if states do not say what they mean, then the intent to be bound is absent. Such agreement are not legally binding, and to argue that they are nevertheless politically or morally binding is absurd.

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[18] On language and international law, see generally Nicholas G. Onuf, "Do rules say what they do? From ordinary language to international law", 26 *HILJ* (1985), 385-410, as well as Onuf's *World of our making* (Columbia S.C. 1989). See also Friedrich Kratochwil, *Rules, norms, and decisions* (Cambridge 1989), and Ulrich Fastenrath, *Lücken im Völkerrecht* (Berlin 1990).

[19] For an argument along these lines, see Paul Reuter, *Introduction au droit des traités* (Geneva 1985, 2d. ed.), at 146, arguing that the infamous 1938 Munich agreement was never valid due to Germany acting in bad faith. Somewhat surprisingly, he treats this as an example of 'fraud' ('dol').

Concluding remarks

As set out above, all three questions shortly and tentatively addressed in this epilogue arose as a by-product of the concept of treaty as developed in this study. We feel that all of them warrant deeper and separate investigation, and in order to do justice to them in the present context we would have had to write four books in one. These questions could be further developed, and we hope that someone will pick up where we left off.

In particular the third question may be of wider interest, as the relation between law and politics has consistently held a place on the research agenda's of both lawyers and political scientists, working within a wide variety of intellectual traditions. At present, we can only hope that we have provided some fresh impetus to the debate.

APPENDIX

A QUESTIONNAIRE AMONG DUTCH AGENCIES

When we started this research project, in early 1992, our initial aim was to analyze the legal status of administrative agreements, roughly defined as agreements concluded between state agencies without the involvement of the Foreign Ministry. It soon became clear that such would be a meaningless exercise in the absence of a more general concept of treaty. To decide whether or not administrative agreements are treaties (i.e. legally binding) presupposes that one knows what a treaty is. We therefore quickly reached the conclusion that we should concentrate on the concept of treaty, and that doing so would enable us to analyze the legal status of administrative agreements.[1]

Part of our initial plan was to investigate the practice of Dutch ministerial departments and agencies concerning the conclusion of administrative agreements. Although administrative agreements would no longer be the central focus of our study, we felt that some picture of this practice could still be interesting enough in its own right, for two main reasons. First, the study of administrative agreements would always remain a part of this project. Second, we were rather interested in the way branches of Dutch government think about international law-making.

Two attempts have been made to acquire information concerning current practice concerning administrative agreements. The first of these consisted, quite modestly, of a call upon readers of the *Nederlands Juristenblad* to provide the author with all possible information pertaining to the topic. The call was contained in a footnote to my article "Het volkenrecht convenant", published in said journal in 1993.[2] Unfortunately, it evoked no response at all.

A second and decidedly more serious attempt was undertaken in 1994. A questionnaire was sent to 32 selected agencies with Dutch ministries. All

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[1] As we mentioned in ch. 4 above, the most popular thesis concerning administrative agreements (Bittner's thesis) does not survive closer scrutiny.

[2] Jan Klabbers, "Het volkenrechtelijk convenant", 68 *Nederlands Juristenblad* (1993, no. 27), 983-988, footnote 38.

ministries were involved, with the exclusion of the small Ministry of General Affairs (which serves mainly to support the prime minister), and, for obvious reasons, the Ministry of Foreign Affairs.

The agencies were selected with a view to the possibility that they might be engaged in concluding informal agreements. In other words: excluded from the scope of the survey were, e.g., the personnel departments at the various ministries, as well as accountancy departments, *et cetera*. It was never the purpose to acquire a complete or even representative picture of the Dutch practice regarding informal agreements; beforehand, it was considered satisfactory if merely a tip of the veil would be lifted.

It is believed that the results of the questionnaire do indeed lift a tip of the veil, even though the response has been somewhat meagre, and even though not all respondents answered all questions. Seven agencies were kind enough to answer (most of) the questions in some detail; several others wrote that they did not conclude adminsitrative agreements to being with. The rest did not respond at all.

The questionnaire consisted of 14 questions. The central question was whether ministerial departments or agencies[3] on their own accord conclude agreements with foreign counterparts which may bind the Kingdom, be it at law or otherwise.

Of course, as far as definitions go, the above-rendered definition of administrative agreement is vague and indeterminate. Yet, it was thought to be the best possible working definition, for two reasons. First, its very indeterminacy gave respondents the opportunity to regard the matter relatively unbiased. The one thing conveyed by the definition is that it concerns those documents not normally regarded as 'treaties', and that is precisely what we wished to convey.

Second, and more fundamentally, the present study indicates the practical impossibility of defining administrative agreements in a more clear-cut way, or, for that matter, the impossibility of defining treaty in any clear-cut way. Indeed, any definition of treaty at one point or another falls back on intent, although, as shown above, intent, important as it is, need not always be decisive. As a result, no definition has hitherto been made which satisfies all possible cases.

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[3] In Dutch, we used the word 'afdeling' which may denote both ministerial departments and agencies. Where in the following the word 'agency' is used, it includes ministerial departments.

Defining other instruments suffers, almost by proxy, from similar problems. If intent is not always decisive, it follows that defining other instruments by way of lack of intent is not entirely satisfactory either. As this example indicates, it is virtually impossible to define those other instruments by any means other than contrasting them to treaties, which presupposes a satisfactory, or at least plausible, definition of treaties in the first place.

Given this problematical definition, the results look as follows:

Question 1: *"Does your department or agency conclude such administrative agreements [as meant in the cover letter] with foreign counterparts, and if so, in what frequency? (Often, sometimes, rarely, possibly a numerical indication, etc.)"*

While some agencies responded that they never conclude administrative agreements, two of them reported to enter into such engagements twice or three times per year; one answered "rarely" (three times in the last decade); and, two said "regularly". One agency remarked that the head of the department, the minister, "often" concludes administrative agreements. The seventh mentioned to enter into such agreements once a year, with some twenty different partners.

Question 2: *"Who are regularly recurring treaty-partners (ministry abroad, department, etc.)?"*

All respondents but one conclude administrative agreements (to the extent that they conclude them all) with their direct counterparts abroad. Similar agencies, endowed with similar tasks, are recurring agreement-partners. The remaining agency, instead, mentioned some of its recurrent treaty-partners, mainly located within Europe: eastern European states, France, Italy, and the Scandinavian countries.

Question 3: *"What form do such agreements usually get (exchange of letters, single instrument, etc.)?"*

Given the relatively small number of respondents to this particular question (one of the agencies had not answered this question and another had misunderstood it), the variety in the forms of administrative agreements is

noteworthy. The single document seems to be the most popular, but exchanges of letters are fairly common as well, and one agency mentioned to normally use a "signed declaration".

Question 4: *"How are such agreements usually designated (treaty, agreement, protocol, accord, etc.)?"*

Here again, there is a large variety, with one exception: six out of seven agencies used the term Memorandum of Understanding, and three of them even did so exclusively; the others mentioned other designations as well, such as: protocol (twice); arrangement; joint statement; agreed minutes; and, letter of intent. The one agency which does not use the term Memoranda of Understanding refers to its agreements as 'special agreements' or 'arrangements'.

Question 5: *"Is within your organisation a single person or a small group exclusively empowered to conclude such agreements, or is the power usually conferred on an ad hoc basis?"*

Three agencies answered that normally the minister concludes administrative agreements. One referred to the director-general of the ministry; one mentioned the agency head, and the remaining two replied that power is usually conferred on an *ad hoc* basis.

Question 6: *"If the power is usually conferred on an ad hoc basis, which functionary within your organisation confers this power?"*

Power is usually conferred by the director-general, but sometimes also by the head of the agency. One agency replied that such is dependent upon the agency's mandate.

Question 7: *"Does your department or agency usually consult with the Ministry of Foreign Affairs before it concludes such agreements?"*

Three agencies replied with a wholehearted "yes", although one of them admitted that this had not always been the case. Two agencies simply replied

"no". The remaining two used terms such as "when appropriate" and "whenever possible".

Question 8: *"Are you familiar with possible guidelines issued by the Ministry of Foreign Affairs concerning the conclusion of international agreements?"*

One agency responded not to be familiar with any guidelines. A second was familiar with some guidelines, but not with explicit guidelines. The remaining five replied to be familiar with guidelines, but one of them added that these only pertain to "certain" agreements.

Question 9: *"If so, do you usually adhere to these guidelines?"*

Those agencies who are familiar with the guidelines adhere to them. One of them hinted, however, at some dissent, stating to adhere to the guidelines "in most cases".

Question 10: *"Under what circumstances would you deviate (or could you deviate, or might you wish to deviate) from the guidelines meant above?"*

This question received only three answers. One agency replied never to deviate. The other two mentioned factors such as extreme time pressure, or the exigencies of policy.

Question 11: *"Are you of the opinion that such agreements, concluded by your department or agency, are binding on the Kingdom under international law, or is the bond in your opinion merely political or moral, or does the legal bond only pertain to your department or agency?"*

The answers to this question generally illustrate the prevailing confusion surrounding the concept of treaty, as analyzed in this study. Only one agency felt its agreements would be legally binding, and then only because, in its opinion, its agreements are of an executive nature, concluded within the framework of an outline convention. Two claimed that administrative agree-

ments are both politically and morally binding; a third held them to be politically *or* morally binding. Two others implied that at any rate, administrative agreements are not legally binding. The last one remarked that whether or not an agreement is binding depends on the type of agreement.

Two agencies added that agreements concluded by them bind only their ministries, although one of them did not wish to exclude the possibility that eventually the state might 'feel' bound.

Question 12: *"If agreements concluded by your department, in your opinion, bind the Kingdom under international law, what is the treaty-making power of your department based on? (law or regulation, outline convention, otherwise)"*

This question appears to have been answered mainly for argument's sake. After all, the agencies are convinced (see the previous question) not to conclude legally binding agreements. If those agreements are nevertheless legally binding, two of them thought it would have to be on the basis of an outline convention, while the third and final referred to the powers of the minister concerned.

Question 13: *"Are such agreements usually published in the Dutch Treaty series? If not, why not?"*

The answer here was almost unanimous: they are not published, because they are not binding. One agency added that it would not be desirable either. The one dissenting agency claimed that its (non-legally binding) agremeents may be published "if necessary".

Question 14: *"Are such agreements usually submitted to the Secretariat of the United Nations for registration under article 102 of the Charter of the United Nations? If not, why not?"*

Most just simply replied "no", with one of them adding that such would be the duty of the Foreign Ministry to begin with. One agency, however, the one that predominantly concludes 'execution' agreements, mentioned that these would be registered with the depositary of the outline convention.

The results of the questionnaire are not unambiguous. In part, the number of respondents was simply too small to allow for any firm conclusions. Partly, however, it would also seem (and that is perhaps the main conclusion to be drawn from the questionnaire), that practice (at least Dutch practice) is quite varied. And if practice is varied, it follows that a questionnaire about this practice will show varied results.

One conclusion appears justified. Agencies generally do not always realize they enter into international engagements. They tend to think they concude non-legally binding agreements, yet the present study demonstrates that such a concept is untenable.

Finally, what remains puzzling is the rather enormous divergence between the practice of the Netherlands and that of Canada, as described, in 1983, by Jean-Pierre Plouffe.[4] The overall picture emerging from our questionnaire, with all its limitations, would appear to be that administrative agreements are concluded every now and then. Most respondents noted that such agreements are concluded on some 2 or 3 occasions each year. This is a far cry from the data collected by Plouffe.

The most obvious explanation for the discrepancy between the Dutch and the Canadian practice is that Plouffe's research was aimed at achieving a more comprehensive picture, inducing him to address all Canadian government agencies. In the light of the findings of the present study, it might be wise if states themselves make an inventory of all the commitments they have over the years, wittingly or unwittingly, entered into.

[4] Jean-Pierre Plouffe, "Les arrangements internationaux des agences et ministères du Canada", 21 *Canadian Yearbook of International Law* (1983), 176-216.

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Permanent Court of International Justice

* Case of the S.S. Wimbledon [1923], *77*
* Nationality decrees issued in Tunis and Morocco (French Zone) (advisory opinion) [1923], *102*
* Eastern Carelia case (reply to request for advisory opinion) [1923], *169*
* Delimitation of the Czechoslovak-Polish Frontier (Question of Jaworzina) (advisory opinion) [1923], *43, 169-172, 216, 246, 247*
* Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland (advisory opinion) [1923], *69, 100*
* Interpretation of the Treaty of Neuilly [1924], *81*
* Mavrommatis Palestine Concessions [1925], *166*
* German interests in Polish Upper Silesia [1926], *168-169*
* Case of the S.S. Lotus [1927], *68*
* Jurisdiction of the European Commission of the Danube between Galatz and Braila [1927], *172-176, 216*
* Rights of minorities in Upper Silesia [1928], *167*
* Serbian Loans case [1929], *102*
* Territorial jurisdiction of the International Commission of the River Oder [1929], *72*
* Austro-German customs regime (advisory opinion) [1931], *5, 45*
* Railway traffic between Lithuania and Poland (Railway sector Landwarów-Kaisiadorys) [1931], *176-177*
* Free zones of Upper Savoy and the District of Gex [1932], *30, 168, 177-178*
* Legal status of Eastern Greenland [1933], *124, 178-181, 208, 258*
* Minority schools in Albania (advisory opinion) [1935], *181-183*

International Court of Justice

* Conditions of admission of a state to membership in the United Nations (article 4 of the Charter) (Advisory Opinion) [1948], *155*
* Corfu Channel case (merits) [1949],*147*
* International status of South-West Africa (Advisory Opinion) [1950], *88, 145, 183-184*
* Reservations to the Convention on the prevention and punishment of the crime of Genocide (Advisory Opinion) [1951], *86-87, 146-147, 156*
* Haya de la Torre case (Colombia v. Peru) [1951], *142*
* Ambatielos case (Greece v. United Kingdom), Preliminary Objection [1952], *188-190*
* Anglo-Iranian Oil Company case (United Kingdom v. Iran) (Preliminary objections) [1952], *49. 190-191*
* Ambatielos case (Greece v. United Kingdom), merits: obligation to arbitrate [1953], *189*
* Case of the monetary gold removed from Rome in 1943 (preliminary question) (Italy v. France, the United Kingdom of Great-Britain and Northern Ireland and the United States of America) [1954], *191*
* Voting procedure on questions relating to reports and petitions concerning the territory of South-West Africa (Advisory Opinion) [1955], *154*
* Admissibility of hearing of petitioners by the Committee on South-West Africa (Advisory Opinion) [1956], *182*
* Judgments of the Administrative Tribunal of the International Labour Organization upon complaints made against the United Nations Educational, Scientific and Cultural Organization (Advisory Opinion) [1956], *191-193*
* Interhandel case (Switzerland v. United States of America) preliminary objections [1959], *193-194*
* Case concerning the aerial incident of July 27th, 1955 (Israel v. Bulgaria), preliminary objections [1959], *195*
* Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), preliminary objections [1961], *194-195*
* Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), merits [1962], *93-94, 113, 212*
* Certain expenses of the United Nations (article 17, paragraph 2, of the Charter), advisory opinion [1962], *155*
* South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa) (Preliminary objections) [1962], *9, 44, 78, 86, 145, 184-186*

* South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase [1966], *147, 186-187*
* North Sea continental shelf cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) [1969], *142*
* Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971], *91, 186*
* Fisheries Jurisdiction case (United Kingdom of Great Britain and Northern Ireland v. Iceland), jurisdiction [1973], *86, 195-196*
* Fisheries Jurisdiction case (United Kingdom of Great Britain and Northern Ireland v. Iceland), merits [1974], *195-196, 203*
* Nuclear tests case (Australia v. France) [1974], *94, 113, 196-199, 208, 209, 217*
* Western Sahara (advisory opinion) [1975], *161*
* Aegean Sea Continental Shelf case (Greece v. Turkey), jurisdiction of the Court [1978], *53, 74, 113, 199-201*
* Case concerning United States diplomatic and consular staff in Tehran (United States of America v. Iran) [1980], *161*
* Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (advisory opinion) [1980], *30, 94, 102, 202-203*
* Case concerning United States diplomatic and consular staff in Tehran (United States of America v. Iran), Order of 12 May 1981 [1981], *74*
* Case concerning the continental shelf (Tunisia/Libya Arab Jamahiriya [1982], *203-204*
* Case concerning delimitation of the maritime boundary in the Gulf of Maine area (Canada/United States of America) [1984], *94, 204*
* Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), jurisdiction of the Court, admissibility of the application [1984], *44, 204-205*
* Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), merits [1986], *9, 89, 126, 147, 161, 206-207, 216*
* Case concerning the Frontier Dispute (Burkina Faso v. Mali) [1986], *95, 198, 207-209, 216, 154*
* Border and transborder armed actions (Nicaragua v. Honduras), jurisdiction of the Court and admissibility of the application [1988], *94, 111, 209-210*
* Certain phosphate lands in Nauru (Nauru v. Australia) (Preliminary objections) [1992], *48-49*

* Case concerning the land, island and maritime frontier dispute (El Salvador/Honduras: Nicaragua intervening) [1992], *210-211*
* Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), further request for the indication of provisional measures [1993], *78, 109, 136*
* Case concerning the territorial dispute (Libyan Arab Jamahiriya/Chad) [1994], *211-212*
* Maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and admissibility [1994], *3, 41, 74, 84, 165, 172, 212-216, 218, 246, 247, 256*
* Case concerning maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and admissibility [1995], *215-216*

International arbitral and similar awards

* Affaire Croft [1856], *124*
* Costa Rica-Nicaragua boundary arbitration [1888], *74*
* Le différend de Lamu (Allemagne/Grande Bretagne) [1889], *50*
* Grisbadarna (Norway/Sweden) [1909], *70*
* Tacna-Arica question (Chile/Peru) [1925], *242-244*
* Affaire des biens britanniques au Maroc espagnol (Espagne c. Royaume-Uni) [1925], *5*
* Island of Palmas case (Netherlands/United States) [1928], *101*
* Pablo Nájera (France) v. United States of Mexico [1928], *79-80*
* The Cysne (Portugal v. Germany) [1930], *241-242*
* Case concerning the taxation liability of Euratom employees between the Commission of the European Atomic Energy Community (Euratom) and the United Kingdom Atomic Energy Authority [1967], *228, 231*
* Texaco Overseas Petroleum Company and California Asiatic Oil Company v. the Government of the Libyan Arab Republic (merits) [1977], *41, 160-161*
* Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France [1978], *146*
* Heathrow Airport User Charges (United States/United Kingdom) [1992], *3, 229-230, 241, 248*

Court of Justice of the European Communities

* 26/62, Van Gend & Loos v. Nederlandse Administratie der Belastingen, *91-92*
* 6/64, Flaminio Costa v. ENEL, *91-92*
* 90 & 91/63, Commission v. Belgium & Luxembourg, *226*
* 22/70, Commission v. Council, *233*
* 9/73, Carl Schlüter v. Hauptzollamt Lörrach, *223*
* 43/75, Defrenne v. Sabena, *226*
* 59/75, Pubblico Ministero v. Flavia Manghera and others, *223*
* 90/76, Van Ameyde v. UCI, *230*
* 61/77, Commission v. Ireland, *235-236*
* 136/78, Ministère Public v. Auer, *240*
* 141/78, France v. United Kingdom, *235-236*
* 32/79, Commission v. United Kingdom, *235-236*
* 44/79, Hauer v. Land Rheinland-Pfalz, *240*
* 804/79, Commission v. United Kingdom, *235-236*
* 14/83, Von Colson & Kamann v. Land Nordrhein-Westphalen, *251*
* 143/83, Commission v. Denmark, *227*
* 281, 283-285 & 287/85, Federal Republic of Germany and Others v. Commission, *243*
* 310/85 R, Deufil GmbH & Co. KG v. Commission, *236*
* 310/85, Deufil GmbH & Co. KG v. Commission, 236
* 34/86, Council v. European Parliament, *236*
* 302/87, European Parliament v. Council, *236*
* C-322/88, Salvatore Grimaldi v. Fonds des maladies professionelles, *231, 240*
* C-292/89, The Queen v. The Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen, *240*
* C-303/90, France v. Commission, *224*
* C-310/90, Nationale Raad van de Orde van Architecten v. Egle, *240*
* C-117/91, Bosman v. Commission, *229*
* C-327/91, France v. Commission, *3, 22, 101, 224*

NATIONAL TRIBUNALS

Austria

* Re-application of treaty case, Supreme Court [1973], *234-235*

Belgium
* Ministère Public v. Simon, Tribunal de Police of Vilvorde [1974], *220-223*

Burma
* In re Burmanization of import trade, Supreme Court, [1960], *239*

Canada
* Chateau-Gai Wines Ltd. v. Institut National des Appellations d'Origine des Vins et Eaux-de-vie et. al., Supreme Court, [1974], *241*

France
* Clot v. Schpoliansky, Civil Tribunal of the Seine [1930], *233*
* Vicens v. Bonfillon, Court of Appeal of Dijon [1933], *238*
* Société Ruegger et Boutet v. Société Weber et Howard, Civil Tribunal of the Seine [1934], *238*
* Société Ruegger et Boutet v. Société Weber et Howard, Court of Appeal of Paris [1936], *238*
* Becker v. Préfet de la Moselle, Tribunal de Sarreguemines [1948], *239*
* Re Spiessens, Court of Appeals of Colmar [1953], *222*
* Werner v. Widow Rotschild, Court of Appeal of Paris [1953], *232*
* Orso and Nari v. Sevastopoulo, Court of Cassation [1956], *222*
* Cohen-Klarsfeld v. Pouchard-Stopt, Court of Cassation [1956], *232*
* Re Chatelain, Conseil d'Etat [1965], *225*
* Re Societé Navigator, Conseil d'Etat [1965], *222*
* Ministry of Finance v. Chauvineau, Conseil d'Etat [1967], *225*
* Moraly and Société 'Maison Moraly, Conseil d'Etat, [1968] & [1969], *49*

Germany
* Paris Agreement (9 January, 1920) case, Reichsgericht in Civil Matters [1922], *233*
* Prosecution for misdemeanours case, District Court of Coburg [1955], *225*
* Prosecution of U.S. soldier case, Court of Appeals of Stuttgart [1966], *242*
* Danish company tax liability case, Fiscal Court of Schleswig-Holstein [1971], *224*
* Nigerian cultural property case, Federal Court in Civil Matters [1972], *162*

* AWACS- Adria-, Somalia-case, Federal Constitutional Court [1994], *3, 24, 214*

Guatemala

* Klahr Ehlert case, Supreme Court [1952], *161*

Hong Kong

* Tang Ping-Hoi v. Attorney-General, High Court [1985], *42*

India

* Scindia Steam Navigation Co. Ltd. v. Union of India, Supreme Court [1961], *229*
* CRV Committee, SLSRC College of Law v. Union of India and others, Karnataka High Court [1982], *223*

Italy

* Società Teatro Puccini v. Commissioner-General of the Government for the territory of Trieste, Council of State [1961], *240*
* Unione Manifatture v. Ministry of Finance, Court of Cassation [1972], *221-222*

Mexico

* Bautista v. Martinez, Supreme Court [1955], *225*

Netherlands

* Institut National des Appellations d'Origine des Vins et des Eaux-de-vie v. Mettes, Supreme Court [1954], *235*
* German driving license case, Supreme Court [1969], *224*
* Rijn-Schelde Verolme NV v. State Secretary of Justice, Council of State (Judicial Division) [1976], *235*
* Compania Naviera Panlieve S.A. and Compania Financiera y Commercial Panapubli S.A. v. Public Prosecutor, The Hague District Court [1981], *237-238*

Philippines

* USAFFE Veterans Association Inc v. Treasurer of the Philippines, Supreme Court [1959], *234*

Poland
* Magdalena K., Arkadiusz K. & Ewa M. v. Polish State Railways, Supreme Court [1972] & [1974], *222*

Singapore
* N.V. De Bataafsche Petroleum Maatschappij and others v. The War Damage Commission, Court of Appeal [1956], *231-232*

South Africa
* State v. Eliasov, Supreme Court, Appellate Division [1967], *222*

Switzerland
* Jecker, Ltd. v. Geonafta, Ltd., Swiss Federal Tribunal [1925], *229*

United Kingdom
* The Blonde and other ships, Probate Division, in Prize [1921], *227-228*
* The Blonde and other ships, Privy Council, Judicial Division [1922], *227-228*
* Jones v. Padavatton, Court of Appeal, Civil Division [1969], *115*
* Wheeler and others v. Leicester City Council, Court of Appeal, Civil Division [1985], *223*
* Wheeler and others v. Leicester City Council, House of Lords [1985], *223*
* Regina v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg, Divisional Court, Queen's Bench Division [1993], *188*

United States of America
* The Paquete Habana, supreme Court [1900], *90*
* In re McCall's Estate, Orphan's Court for Philadelphia County (Pennsylvania) [1919], *234*
* Doyle v. Fleming et. al., District Court, Canal Zone, Division of Balboa [1963], *239*
* Aris Gloves Inc. v. United States, Court of Claims [1970], *237*
* Husserl v. Swiss Air Transport Company Ltd., District Court, Southern District, New York [1972], *239-240*
* Huynh Thi Anh and another v. Levi and others, Court of the Appeals for the 6th Circuit [1978], *223*
* Filartiga v. Pena-Irala, Court of Appeals for the 2d Circuit [1980], *90, 162*

* United States v. County of Arlington and another, Court of Appeals for the 4th Circuit [1982], *43*
* Frolova v. Union of Soviet Socialist Republics, Court of Appeals for the 7th Circuit [1985], *223*
* United States v. Gonzalez, Court of Appeals for the 11th Circuit [1985], *50*
* Siderman de Blake v. Republic of Argentina, Court of Appeals for the 9th Circuit [1992], *135-136*
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INDEX

Ago, Roberto, *57*
Agreed minutes, *62, 68, 166*
Agreement, Lansing-Ishii, *16*
Agreements, administrative, *21-23, 97-104*
Agreements, classification of, *4-6*
Agreements, executive, *21, 193*
Agreements, 'indirectly binding', *107-115*
Agreements and state practice, *120, 121-130, 149-150*
Agreements and state responsibility, see State responsibility and agreements
Akehurst, Michael, *142*
Aland Islands, *25*
Algiers Declarations (1981), *74*
Allott, Antony, *141*
Alvarez, Alejandro, *145*
d'Amato, Anthony, *254*
American Convention on Treaties (article 4), *81*
Atiyah, Patrick S., *156, 254*
Atlantic Charter, *16-17, 59, 62, 71, 122-125*
Aust, Anthony, *28-29, 110-112, 122, 129-131, 138, 142*
Austin, John, *37, 145*
Autopoiesis, *10*

Baker, James, *15*
Barberis, Julio A., *102*
Basdevant, Jules, *98-99, 155, 188-189*
Baxter, Richard R., *28, 35*
Beschloss, Michael, *15*
Bevans, Mr., 54, *73-74*
Bilder, Richard B., *27*
Bittner, Ludwig, *97-104, 105*
Blix, Hans, *99*
Brandhof, J.C.E. van den, *103*
Brierly, J.L., *45, 47, 50, 51, 55*
Bush, George, *15*
Bustamante, Judge, *187*

Cahn, Edmond, *148*
Callaghan, James, *20*
Cambon, Paul, *16*
Castro, Mr. de, *54*
Causa, *see Consideration*
Claude Chayet, *44*
Churchill, Sir Winston, *17, 71, 123-126*
Communication and agreement, *51-53*
Communication, non-verbal, *53*
Comecon, *23-24*
'Common positions' and 'agreed views', *53*
Conflict rules, *120, 135-140*
Consent to be bound, *30-32, 72-75*
Consideration, *86-87*
Constitutional practices, *133-134*
Contract law, *65-66, 116*
Contract law, English, *106, 116, 254*
Contract law, U.S., *87, 116*
Coolidge, Calvin, *242*
Cooperation, *25-26*
Córdova, Mr., *46*
COST agreements, *127-128*
Council of Europe, protection of minorities, *128*
Courtesy, *141, 142-143*
Critical legal studies, *10-13*
Customary international law, *1-2, 4, 77-78, 90-91, 122, 129-130, 143, 147, 151*

Danilenko, G.M., *143*
Declarations of policy, *6, 61, 63*
Declaration on Permanent Sovereignty over Natural Resources, *160-161*

Democracy and treaty-making, *121, 131-135, 160*
Domestic procedures relating to treaty-making, *29, 31-32*
Dupuy, René-Jean, *41, 160-161*

Eden, Anthony, *20*
Egypt's Suez-Canal Declaration (1957), *83*
Eisemann, Pierre-Michel, *17-18*
Elias, T.O., *60*
Entente cordiale, *16*
Epistemic communities, *26*
Estoppel, *93-94, 111-114, 138, 197-198*
European Union, *2, 23, 70, 90-91, 102*
European Union, Solemn declaration on, *43, 75*
European Community, *23, 219-220, 252*
European Community, Interinstitutional instruments, *23, 76-77, 236*
European Convention for the Protection of Pet Animals (1987), *128*
European Court of Human Rights, *218*
European Political Cooperation, *150*
European Space Agency, *23*
Evensen, Jens, *203-204*
Everling, Ulrich, *251-253*
Eysinga, W.J.M. van, *20, 98*
Exchanges of notes or letters, *5, 44-47,*

Fastenrath, Ulrich, *139-140*
Fawcett, James, *77-78, 105-108, 109, 117*
Feinberg, Joel, *149-150*
Fitzmaurice, Sir Gerald, *13, 50, 54, 55-57, 58, 78, 145, 185, 187, 189, 195*

G-7, *25*
Game theory, *25*
GATT, *18, 76, 218*
"Gemeinschaftstreue", *251-253*
Gentlemen's agreements, *6, 16-18, 124*
General Assembly resolutions, *24, 160-162, 257*
Gleneagles Agreement, *223*
Good faith, *38, 94-95, 111-114, 138, 197-198, 216, 249*
Gorbachev, Michael, *15*
'Governed by international law', *38, 55-63*
Gratuitous promises, *86-87*
Grey, Sir Edward, *16*
Grotius, Hugo, *4*
Guerrero, Judge, *147, 156*
Gulf Cooperation Council, *213*

Hackworth, Judge, *192*
Hambro, Edvard, *227, 230*
Hart, H.L.A., *13, 38*
Harvard Draft, *5, 45*
Helsinki Final Act, *18, 75, 87, 126, 223*
Heusel, Wolfgang, *122, 129-131*
Hopkins, Raymond F., *52*
Hsu Mo, Judge, *147, 156, 188*
Human rights, European Convention on, *2, 235*
Hutchinson, D.N., *84*

Ihlen Declaration, *178-181, 258*
Informal agreements, reasons for, *26-29*
Instrumentalism, *34*
Intention to be bound, *8, 11, 13, 55, 63-64, 65-95, 122, 217*
'International agency law', *101-102*
International Law Commission, *17, 42, 46, 54, 57, 58, 63, 73, 74, 100, 101, 233*

International organizations, summit instruments, *24*
International organizations, resolutions of, *24*
Iran-US Claims Tribunal, *220*

Jennings, Sir Robert, *1*
Jessup, Philip C., *85, 184*
Judicial proceedings, statements made during, *166-169*
Judicial settlement, *77-78, 105*
Jus cogens, *12, 135-138, 197, 249*

Kellogg-Briand Pact (1928), *43*
Klaestad, Judge, *188*
Kooijmans, P., *3*
Koskenniemi, Martti, *11-13*

Lachs, Manfred, *201*
Language and international law, *258-259*
Language philosophy, *10*
Lauterpacht, Sir Hersch, *55*
Lavalle, Roberto, *39-40*
Law, binary character of, *14, 157-159, 163, 258-259*
Law and politics, *14, 139-140, 154-155, 257-259*
Lawson, Nigel, *52*
League of Nations, *25, 33, 181, 183, 184*
League of Nations, Council, *176-177, 185-186, 190*
League of Nations, Covenant of, *43*
League of Nations Covenant (Article 18), *79-81, 82, 185*
League of Nations, dissolution of, *187*
Lex specialis, *39, 139*
Lex posterior, *39, 139*
Lillich, Richard B., *84*
Lipson, Charles, *26-27*
London Declaration on Despoliation (1943), *234*
Luxembourg Accord, *17*

MacCormick, Neil, *12*
Mandate (Iraq), *185*
Mandate (Palestine), *167*
Mandate (South West Africa), *86, 145, 166, 182-187*
Mann, F.A., *38, 117, 118, 254*
McNair, Lord, *102, 147, 155, 156, 184, 188, 189*
Memoranda of understanding or agreement, *62, 68*
Mexico, law of treaties, *103-104*
Micro-economics, *25*
Modus vivendi, *174-175, 203-204*
Mollet, Guy, *20*
Molière, *103, 122*
Moore, Judge, *175*
Morality, *128-129, 134, 136-138, 143-151*
Morelli, Judge, *195*
Mores, *141*
Mosler, Judge, *206*

Nagendra Singh, Judge, *201*
Nahlik, S.E., *73-74*
Nardin, Terry, *151*
NASA, *23*
NATO, *107*
Negulesco, Judge, *175-176*
Netherlands, Constitution, *85-86, 131*
Netherlands, Parliament, *3*
Netherlands, Ministry of Foreign Affairs, *83*
Normative orders, coexistence of, *6-7, 13, 19, 107-108, 109, 111, 113-114, 120, 122, 136-137, 141-156, 246*
Natural law, *10, 11*
Nicolson, Harold, *33, 66-67*
Nuclear Test Ban Treaty, *30*
Number of related instruments, *44-46*
Nyholm, Judge, *175*

Oakeshott, Michael, *14*
Oda, Judge, *41*
Oral agreements, *5, 49-50*
Ozone layer regime, *29*

Pacta sunt servanda, *11, 38-40, 53, 56, 257*
Pacta tertiis, *127*
Pactum de contrahendo, *242*
Pactum de negotiando, *177, 242*
Plouffe, Jean-Pierre, *21*
Political pledge, *206-207, 216*
Politics (as normative order), *140, 152-156*
Politics and law, see Law and politics
Positivism, *10, 11, 13*
Potsdam agreement, *62, 236-237*
Presumption of being bound, *116-117, 253-257*
Promise and promising, *88-89, 148*
Puchala, Donald, *52*

Raz, Joseph, *89*
Read, Judge, *147, 155, 156, 191*
Rebus sic stantibus, *11, 115*
Regime theory, *26*
Reliance, *111-114, 197-198, 217*
Religion, *141*
Reuter, Paul, *117-118, 119*
Rio Conference, *35*
Rodriguez, Mr., *58*
Roosevelt, Franklin, *17, 71, 123-125*
Rules of the game, *51-52*
Rules of reference, *see Conflict rules*

Salisbury, Lord, *16*
Schachter, Oscar, *70, 254-255*
Schreuer, Christoph, *28*
Schwebel, Judge, *207, 216*
Schwelb, Egon, *162*
Shevardnadze, Eduard, *15*
Sinclair, Sir Ian, *30, 32, 61-62, 63*
Soft law, *9, 14, 157-164*
Sondaal, H.H.M., *83*
Sources doctrine, *13*
Spender, Judge, *78, 145, 184-185, 187, 195*
Sponsio, *4*
Stassinopoulos, Judge, *201*
State responsibility and agreements, *99-102*
Statements, surrounding, *87-88*
Stockholm Conference on Confidence- and Security-Building measures and disarmament in Europe (1986), *127*
Struycken, A.A.H., *132*

Tabory, Mala, *83*
Tacit agreements, *51-52*
Talalaev, Mr., *62*
Talbott, Strobe, *15*
Tanaka, Judge, *195*
Tarazi, Judge, *201*
Televized diplomacy, *33-36, 256*
Thatcher, Margaret, *19-20*
Thirlway, Hugh, *13, 40, 130, 182*
Treaties in simplified form, *5, 46, 139, 233-234*
Treaties, amendment, *29, 39*
Treaties, conclusion, *39*
Treaties, designation, *42-44*
Treaties, entry into force, *8, 30, 32-33, 75-77*
Treaties, interpretation, *39, 91-93*
Treaties, object and purpose, *252-253*
Treaties, parties to, *8-9, 47-49*
Treaties, provisional application, *33, 76*
Treaties, publication, *85-86, 221-224*
Treaties, registration, *79-84, 125-126, 215*
Treaties, termination, *8, 39, 115*
Treaties, transformation, *221-224*
Treaties, validity, *8*
Treaty-making powers, *31, 123-124*
Treaty-making procedure, *29-33*

UNCED Declaration on Forests (1992), *127*
UNESCO, *192-193*
UNESCO instruments on sale of cultural property, *162*
Unilateral acts and declarations, *8, 51-52, 54, 83, 94-95, 113, 196-199*
United Nations, Charter of, *2, 147, 183, 235*
United Nations Charter (Article 102), *30, 81-84, 85, 215*
United Nations Conference on the Law of the Sea, *17, 70, 237-238*
United Nations, General Assembly, *24, 82*
United Nations High Commissioner for Refugees, *23*
United Nations, Secretariat, *83, 85*
United Nations, Security Council, *17*
United States, Constitution, *123, 124-125, 131-132*
Universal Declaration on Human Rights, *161*

Vallat, Sir Francis, *59, 62*
Versailles Treaty, *145*
Verzijl, J.H.W., *79-80*
Vienna Conference on the Law of Treaties (1968/69), *46, 47, 58-63, 67, 73-74*
Vincent-Jones, Peter, *66*
Virally, Michel, *6-7, 114-115, 142, 146, 152-154*
Voeux, *67*
Vogt, Judge, *181*

Waldock, Sir Humphrey, *51, 54, 57-58*
Welington Koo, Judge, *195*
White, Alan, *68-69*
Widdows, Kelvin, *88, 106*
Wilson, Woodrow, *79, 145*
Winiarski, Judge, *155*
Written agreement, *49-50*

Yalta agreement, *62*
Yasseen, Mr., *57, 62-63, 64*

Zoricic, Judge, *188, 190*