
A Fresh Look at Soft Law

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Abstract

International agreements not concluded as treaties and therefore not covered by the Vienna Convention on the Law of Treaties play an important role in international relations. Often states prefer non-treaty obligations as a simpler and more flexible foundation for their future relations. The difference lies mainly in the parties' wish to model their relationship in a way that excludes the application of treaty or customary law on the consequences of a breach of obligations. This restriction does not justify discarding such agreements as being of a 'political' or 'moral' nature only. It would appear more appropriate to consider the extent to which the parties chose to bind themselves and what legal consequences they wanted to attach to their agreement, even though non-treaty agreements are not a source of law in the sense of Article 38 para. 1 of the Statute of the International Court of Justice. The relationship may best be described as a self-contained regime whose characteristics depend on the parties' intentions in the specific case. The introduction of some of the rules of treaty law and general principles of law into that regime may be appropriate. Considerations of good faith may also help to supplement the parties' agreement.

And when that good man saw how things were, he very sensibly obeyed the promise he had freely given.

Geoffrey Chaucer, *The Canterbury Tales*, General Prologue

1 Introduction

Political documents have long been adopted not only in the form of treaties, but also as non-treaty arrangements. And states have treated such arrangements with the utmost seriousness. As early as 1934, Karl Strupp¹ suggested that greater attention should be given to this type of agreement. Wengler has considered the subject in depth several times over the past three decades. In 1995 he wrote:² 'what is involved in such agreements cannot be ascertained from statements by the foreign office lawyers, nor has it really been explained in the literature'. To tackle the subject undoubtedly constitutes quite a challenge. It takes us beyond the safe bounds of the legal sources canonized in Article 38 of the Statute of the International Court of Justice and leads us into difficult and controversial dogmatic terrain.

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¹ 47 RdC (1934, I) 373.

² JZ (1995), at 23.

There is quite clearly a broad area of situations in which states enter into commitments without concluding a formal treaty under international law. I will refer to these arrangements as ‘non-treaty agreements’, although I find the term ‘soft law’, attributed to McNair, very revealing precisely because it is a contradiction in terms. ‘Non-treaty agreement’ is of course a general term which covers a variety of types of agreements. I will not attempt to develop a more exact definition for the purposes of this article.

Non-treaty agreements should, however, be differentiated from true gentlemen’s agreements. These latter are personal pledges given by officials, on pain, as it were, of their reputation, but they are in no way binding on the officials’ own states or, indeed, even on their successors in office.³ They concern personal, not government, action. The literature makes reference to an early example of such an agreement, when Lord Salisbury accepted the Russian occupation of Georgia ‘à titre personnel’.⁴ Rotter⁵ notes the 1954 Moscow Memorandum on the Austrian State Treaty, at least as far as the pledge on the part of the Austrians is concerned. Heads of government continue to make such pledges today. However, the concept of pledging one’s own reputation, one’s honour, cannot be simply transferred to relations between states.⁶ The oral London gentlemen’s agreement of 1946 on the regional distribution of seats on the UN Security Council, the 1956 agreement on the same issue in the UN International Law Commission and the so-called Luxembourg compromise of 1966 on voting procedures in the EEC Council of Ministers would *not* constitute gentlemen’s agreements in this sense. Similarly, a distinction should probably be drawn between non-treaty agreements and ‘inter-agency agreements’, which are expressly intended to be binding only on governments or on specific ministries or authorities and not on states, as far as that is possible.

We should also distinguish between those non-treaty agreements that we shall be considering in this article and arrangements in the form of treaties which contain — either in whole or in part — obligations which cannot be implemented due to their lack of specificity; such arrangements are also often referred to as ‘soft law’. According to Lauterpacht,⁷ they are ‘provisions ... void and inapplicable on account of uncertainty and unresolved discrepancy’. Precision or lack thereof is not, however, an appropriate criterion for determining whether an agreement is binding or not.⁸ Thus, the commitment in Article 5 of the NATO Treaty of 4 April 1949 to the effect that each party will take ‘such action as it deems necessary’ does not mean that this is not a genuine treaty obligation to be observed by all parties.⁹ Treaties remain treaties even if

³ Schachter, ‘The Twilight Existence of Nonbinding International Agreements’, 71 *AJIL* (1977), at 300 *et seq.*

⁴ J. Klabbers, *The Concept of Treaty in International Law* (1996), at 16.

⁵ M. Rotter, *Völkerrechtlicher Vertrag und außerrechtliche Abmachung*, *Festschrift Verdross* (1971) 417.

⁶ P. Reuter, *Droit International Public* (5th ed., 1976), at 103.

⁷ See Münch, 3 *EPIL* (1997), at 609.

⁸ P. Reuter, *Introduction au droit des traités* (1972), at 44; Schachter, *supra* note 3, at 298 and Schachter, ‘International Law in Theory and Practice’, 178 *RdC* (1982, V), at 127.

⁹ Watts, in R. Jennings and A. Watts (eds), *Oppenheim’s International Law*, vol I (9th ed., 1993), at 1.

there are only minimal possibilities for responding to infringements or if the justification for non-fulfilment or withdrawal from the treaty is largely left to the discretion of the state under obligation. Admittedly, such treaties pose particular problems, as their fulfilment is largely subject to good faith. This may ultimately approximate them to non-treaty agreements.

2 Why Non-treaty Agreements?

The reasons for avoiding treaties proper are many and various.¹⁰ To name a few:

- a general need for mutual confidence-building;
- the need to stimulate developments still in progress;
- the creation of a preliminary, flexible regime possibly providing for its development in stages;
- impetus for coordinated national legislation;
- concern that international relations will be overburdened by a 'hard' treaty, with the risk of failure and a deterioration in relations;
- simpler procedures, thereby facilitating more rapid finalization (e.g. consensus rather than a treaty conference);
- avoidance of cumbersome domestic approval procedures in case of amendments;
- greater confidentiality — drawing on his experience as a British legal adviser, Sinclair gives most emphasis to this aspect;
- agreements can be made with parties which do not have the power to conclude treaties under international law, such as the 1998 Belfast multi-party agreement on the future of Northern Ireland, or with parties which have only limited competence, such as Germany's *Länder* pursuant to Article 32(2) of the Basic Law;
- agreements can be made with parties that other parties to the agreement are not willing to recognize.

It may be necessary to conclude a non-treaty agreement simply in order to reach an agreement at all. The wholesale criticism that international law is thus being 'softened'¹¹ does not seem, in this author's opinion, to be justified. There is an equally strong danger of elusive results for both treaties and non-treaty agreements. Indeed, it has frequently been the case that a text which has been laid down at a conference as a non-treaty-binding standard gradually becomes, as awareness grows, a binding and possibly a 'hard' obligation. The results of the Copenhagen Meeting on the Human

¹⁰ Klabbers, *supra* note 4, at 27; Aust, 'The Theory and Practice of Informal International Instruments', 35 *ICLQ* (1986), at 787 *et seq.*; Schachter, *supra* note 8, at 126 *et seq.*

¹¹ Székely, 'Non-binding Commitments: A Commentary on the Softening of International Law Evidenced in the Environmental Field', in *International Law on the Eve of the 21st Century — Views from the International Law Commission* (1997) 173; Weil, 'Towards Relative Normativity in International Law?', 77 *AJIL* (1983) 413; for a more positive approach Eisemann, 'Le Gentlemen's agreement comme source du droit international', 106 *JDI* (1979) 326; Schachter, in L. Henkin, R. C. Pugh, O. Schachter and A. Smit, *International Law, Casebook* (3rd ed., 1993), at 37 with further citations.

Dimension (1990) concerning the protection of minorities have thus been inserted in Germany's 'hard' neighbourhood agreements with Poland and the CSSR (1991, 1992). I also believe that concerns such as those put forward by Schwarzenberger of a 'proliferation of a para-international law with negative implications for the credibility of international law as a whole'¹² are somewhat exaggerated.

The fact that, when assessed realistically, the difference between a treaty and the binding 'political' effect of a non-treaty agreement is not as great to a politician as is often thought may also play a role in the decision to opt for a non-treaty form of agreement. Even treaties, if they are not simply to exist on paper, are dependent on continuing cooperation between states. And when that willingness to cooperate diminishes, it is unlikely that attempts will be made to enforce them either in court or through reprisals — owing to anticipated costs and political consequences — even if such possibilities do exist from a legal point of view. Like non-treaty agreements, treaties may also rely on an intermediate stage in the development of relations. Rotter¹³ has posited some interesting ideas on the strategic reasons behind states' choice to conclude non-treaty agreements. In line with the 'prisoner's dilemma', the behaviour of those involved will be made predictable for the joint (minimum) benefit, even without enforceable rules. Both non-treaty agreements and treaties are complied with to largely the same extent.¹⁴ 'Soft law' may sometimes be '*pré-droit*' in the sense that it leads to treaty obligations. This is, however, generally far from being its purpose.

3 Are Agreements Binding Only in the Form of a Treaty?

In terms of legal dogma there now arises the question: In the field of agreements intended by those involved to be normative, is there merely a choice between international treaties on the one hand and exclusively 'political' or moral commitments on the other? Or is there an intermediate area covering non-treaty, but binding, agreements, which entail certain repercussions under international law that are less extensive than those incurred under treaties?

The subject is not new. It has been considered by Wengler¹⁵ as well as Münch,¹⁶ Viralli¹⁷ and Rotter¹⁸ (1971). It enjoyed a renaissance in the 1970s in relation to the CSCE, and as reflected in resolutions of the UN General Assembly and the UN

¹² 'Die Glaubwürdigkeit des Völkerrechts' in *Bindschedler-Festschrift* (1980), at 99.

¹³ *Supra* note 5, at 419 *et seq.*

¹⁴ W. Heusel, *Weiches Völkerrecht: Eine vergleichende Untersuchung typischer Erscheinungsformen* (1991), at 306.

¹⁵ W. Wengler, *A Tribute to Frede Castberg, Legal Essays* (1963).

¹⁶ Münch, 'Unverbindliche Abmachungen im Zwischenstaatlichen Bereich', in *Mélanges offerts à Juraj Adrassy* (1968); *Idem*, 'Non-binding Agreements', 29 *ZaöRV* (1969) 1.

¹⁷ Viralli, 'La distinction entre textes internationaux ...', 60 *Annuaire IDI* (1983, I) 328.

¹⁸ Rotter, 'Die Abgrenzung zwischen völkerrechtlichem Vertrag und außerrechtlicher zwischenstaatlicher Abmachung', in *Internationale Festschrift für Alfred Verdross* (1971) 413.

International Covenant on Economic, Social and Cultural Rights. In 1984 Thürer¹⁹ delivered his inaugural lecture at the University of Zurich on the subject. A further impetus for such considerations came from the 1992 Rio Summit. Detailed studies by Hensel²⁰ and Klabbers²¹ appeared in 1991 and 1996 respectively. Non-treaty multilateral agreements are of growing importance, particularly in the fields of international economic relations and environmental protection. It is not my intention here to discuss the question of whether agreements produce political or moral obligations for states, apart from their binding effect under international law. In its 1950 advisory opinion on the *International Status of South West Africa*,²² the International Court of Justice stated that it was not the Court's business 'to pronounce on political or moral duties'. What we are concerned with is the legal force of such agreements.

First, it is necessary to clarify to what extent the Vienna Convention of 1969 on the Law of Treaties has an influence on the legal status of non-treaty agreements. For the Convention to be applied, the agreements in question must be treaties, with 'treaty' meaning in particular that it is an 'international agreement concluded between States . . . and governed by international law' (Article 2(1)(a) of the Vienna Convention). The history of the drafting negotiations supports the view²³ that the qualification 'governed by international law' is intended to distinguish between treaties under international law and those under domestic law. Whether non-treaty agreements are excluded from the application of international law cannot be ascertained from the Convention. If the parties expressly or implicitly do not want a treaty, the provisions of the Vienna Convention do not apply. However, this does not necessarily mean that all non-treaty agreements only follow 'political' or moral rules. There is no provision of international law which prohibits such agreements as sources of law, unless — obviously — they violate *jus cogens*.²⁴

4 Excursus: Constitutional Law

Naturally, attention also needs to be given to the constitutional aspects of the issue. If agreements are of legal relevance only in the form of treaties, then the question of the need for parliamentary approval (laid down, for instance, in Article 59(2) of the German Basic Law) does not arise for any other agreements. (Agreements entered into

¹⁹ '“Soft Law” — eine neue Form von Völkerrecht?', 1 *ZSchwR* (1985), at 451; see also the considerations of Bothe, 'Legal and Non-legal Norms — A Meaningful Distinction in International Relations?', 11 *NYIL* (1980), at 66 *et seq.*

²⁰ *Supra* note 14.

²¹ *Supra* note 4.

²² ICJ Reports (1950), at 139.

²³ Eisemann, *supra* note 11, at 343; Rotter, *supra* note 5, at 424 and 432.

²⁴ Wengler, 'Nichtrechtliche Staatenverträge in der Sicht des Völkerrechts und des Verfassungsrechts', *JZ* (1995), at 23.

by the German *Länder* in accordance with Article 32(3) of the German Basic Law would require the approval of the Federal Government only if they took the form of a treaty governed by international law.) If, however, there were agreements producing limited legal consequences under international law, the application of constitutional provisions on the conclusion of treaties would not be ruled out in principle.²⁵ As far as Germany is concerned, however, this possibility can be left aside. The Federal Constitutional Court allows the Federal Government's non-treaty dealings in international law to remain unaffected by Article 59(2) of the Basic Law.²⁶ This, presumably, would equally apply to Article 32(3) of the Constitution. In the United States it is common practice to conclude non-binding agreements in order to avoid involving the Senate.²⁷

5 Intention to be Bound by, and Freedom to Choose, the Form of Agreements

Let us return to the intention of parties to be bound by agreements they conclude: it is recognized that states are free to design the agreements they enter into. Can they conclude an agreement, then, with the same degree of obligation as holds in the case of international treaties — in other words, with consequences such as compensation and reprisals — with, however, the understanding that it is not an international treaty but merely a 'political' agreement? This would seem to be impossible because the fact that the agreement supposedly lacks the force of a treaty contradicts the full intention of the parties to be bound by it.²⁸ In terms of constitutional law, this could be an abuse of legal form in order to circumvent obligations imposed on a government by the constitution.

Non-treaty agreements are concluded, however, because the states involved do not want a full-fledged treaty which, in the event of non-fulfilment, would result in a breach of international law. This must be the assumption when the parties speak of a gentlemen's agreement (in the broad sense), a declaration of intent or a declaration of principle, and often even of a joint declaration or a memorandum of understanding. One indication of the lack of treaty force can be seen in instances where the parties expressly exclude registration in accordance with Article 102 of the Charter of the United Nations, as was the case with the very prominent example of the 1975 CSCE Final Act and with the 1997 Founding Act on Mutual Relations, Cooperation and Security between NATO and the Russian Federation. The resulting status is irrespective of whether the content of an agreement is of major significance for international relations. Thus, the Atlantic Charter of 1941, the Cairo, Yalta and

²⁵ Klabbers, *supra* note 4, at 160, overemphasizes this point.

²⁶ Judgment of 12 July 1994, *BverfGE*, 90, at 286 *et seq.*

²⁷ E.g. Soviet-American agreement to continue to apply the elapsed Interim SALT Agreement: *Restatement (Third) of US Foreign Relations Law*, at 301, Reporter's Note.

²⁸ For a doubtful voice on this point see Koskenniemi, 'Theory: Implications for the Practitioner', in P. Allott, *Theory and International Law* (1991) 3, at 20.

Potsdam Agreements,²⁹ the 1948 Universal Declaration of Human Rights, which has in the meantime acquired the force of customary international law, the 1982 Bonn Declaration on Hijacking³⁰ and the Charter of Paris for a New Europe (1990) are not binding international treaties. There is much literature on the question of delineation between treaties and non-treaty documents. An agreement is contractually binding only if the parties want it to be.³¹ International law does not seem to contain a general assumption that agreements are of a treaty nature.³²

I do not wish to dwell further on the question of delineation, nor to consider what may be the consequences if there is a dispute between the parties involved concerning whether their agreement amounts to a treaty or not; I would rather pursue the question of what is the legal significance of such non-treaty rules governing the interaction of states which the parties consider to be binding? Is it not premature to conclude that, in the absence of a treaty, there can be only an extra-legal or — to put it positively — only a political or moral commitment, which is of interest to jurists at most as a fact but not as a source of obligation? In 1976 Wengler wrote: ‘The question arises as to whether the strict legal/non-legal division applied in international law in analogy to domestic law could be outdated or wrong.’³³ In the interests of clear rules for practical application, I would prefer to proceed from the assumption that a division must be possible.

The problem of appropriate legal treatment of the agreements discussed here can be approached from two angles: either ‘subjectively’, from the standpoint of the parties’ intention to be bound by their commitments; or ‘objectively’, in the sense of a factual interdependence created by the parties’ actions and other elements from which certain legal conclusions must be drawn in the light of the overall situation. In the first case, obligations arise from the moment an agreement is reached, the agreement being the source. In the second case, we are dealing with rules to be applied to the events in question, rules which originate not from the parties’ wishes but directly from customary international law or general principles of law. In this case, the commitment may not come into being until long after the actual time that the agreement was reached.

The traditional approach, particularly in the case of non-treaty agreements, is the ‘objective’ one. In addition to good faith,³⁴ the relevant legal concepts are the prohibition of *venire contra factum proprium* or — from the field of common law — estoppel.³⁵

²⁹ D. P. O’Connell, *International Law*, vol. I (2nd ed., 1970), at 200.

³⁰ Aust, *supra* note 10, at 811.

³¹ A. D. McNair, *The Law of Treaties* (1961), at 6; Schachter, *supra* note 8, at 296 *et seq.*; Department of State, *Digest of US Practice in International Law* (1976), at 263 *et seq.*; Widdows, ‘What’s an Agreement in International Law?’, 50 *BYbIL* (1979), at 120 *et seq.*; Aust, *supra* note 10, at 806; Eisemann, *supra* note 11, at 344.

³² Wengler, *supra* note 24, at 26.

³³ Wengler, *JZ* (1976), at 197.

³⁴ *Nuclear Tests* case, judgment of 20 December 1974, ICJ Reports (1974) 268.

³⁵ *Temple of Preah Vihear* case, Merits, Judgment of 15 June 1962, ICJ Reports (1962); Klabbers, *supra* note 4, at 94; Aust, *supra* note 10, at 810.

If one looks at the consequences for the parties of a non-treaty agreement, these legal concepts, with the exception of the very general principle of good faith, are less convincing. They aim at the limits on the exercise of rights, rather than at their origin. For this reason, it is difficult to apply them even to unilaterally-binding declarations. Such declarations are generally recognized to be legal commitments on the basis of good faith; they reckon with both the sovereign will of the declaring state to enter into a commitment and with the need — evolving over time and depending on the circumstances — to protect the justified expectations of the recipient of the declaration ('detrimental reliance').³⁶ Given this uncertainty about the source of the obligation, the legal consequences, too, are unclear (for instance, rules of interpretation, revocation).³⁷

Since we are concerned with the question of whether non-treaty agreements can be sources of law, I can leave aside the aspect of 'objective' protection under customary law of justified expectations and, instead, concentrate on the legal consequences of a (limited) intention to be bound by a commitment. Both treaties and non-treaty agreements are based on a coincidence of declared intentions.³⁸ Since the decisive factor in international law, and especially in the field of international agreements, is the intention of states, there appears — at least at first glance — to be no reason why states should be denied the possibility to take on a commitment with lesser legal consequences than a treaty would have. Since their desire is constitutive, it could be decisive in answering not only the question — as is generally recognized — of whether a treaty exists or not, but also the question of whether there are legally relevant commitments below treaty level.

6 On the Content of Non-treaty Agreements

One can assume that the partners in a non-treaty agreement are aware that if they do not conclude a treaty, they thus also exclude certain legal consequences of a treaty. This primarily concerns consequences relating to non-fulfilment; namely, compensation and the possibility of enforcement through dispute settlement procedures and reprisals.³⁹ Whether the parties' ideas go much further than this may frequently be in doubt. Usually the negotiations concentrate on the substance of what the two parties want, leaving aside concomitant rules on validity, interpretation, implementation, consequences of non-fulfilment or preconditions for termination of the agreement.

The content of agreements may range from a simple promise of a one-off future action to a complex system of regulated cooperation. However, this is not what distinguishes the field of non-treaty agreements from treaties. The agreements can be independent; they can also supplement or flesh out treaties. There are many bilateral

³⁶ R. Higgins, *Problems and Progress: International Law and How We Use It* (1994), at 35 *et seq.*, tries to clarify the concepts of 'intention to create a binding obligation' and 'detrimental reliance'.

³⁷ Koskenniemi, *supra* note 28, at 13, note 35.

³⁸ Rotter, *supra* note 5, at 423.

³⁹ Schachter, *supra* note 8, at 300.

and multilateral non-treaty agreements which are just as complete as a well-formulated international treaty. Such agreements contain rules on, for instance, the relationship of individual obligations to one another, procedures for identifying breach of commitment⁴⁰ or for revising the agreement in the light of changed circumstances, and even denunciation.

Where such precise details are agreed, they are permissible in substance, independently of the legal nature of the agreement, in so far as they are in keeping with *jus cogens*. The question is: To what extent can supplementary rules governing the relationship between the parties be introduced without the agreement being regarded as a treaty under international law (which the parties expressly do not want)?

7 Excursus: Non-binding Declarations of Intent

Clearly, an agreement will not have any binding force if those involved have obviously proceeded from the assumption that their statements in no way represent a commitment, but are rather solely intended to express shared values, interests, or desires and uncertain hopes. For this means that the parties exclude not only the *pacta sunt servanda* principle, but also the validity of any other supplementary rules, and that they assume that their freedom of action will in no way be restricted.⁴¹ For example, joint communiqués or summit declarations and even declarations of the summits of the group of leading industrial nations (G7/G8) may lack binding force. Such declarations, whatever they are called, would in reality be parallel declarations of intent by the respective governments, and their political significance would be that they document a coincidence of intention at the highest level.⁴²

8 Degree of Non-treaty Commitments

However, as soon as a document links the future action of parties, we must assume that a greater degree of commitment is intended. Objections have rightly been raised to the idea of a sliding scale of increasing legal commitment, according to which a genuine treaty, with all the consequences of the Vienna Convention on the Law of Treaties — and if the treaty is infringed, of state responsibility — is only the highest degree of commitment, on the grounds that there is a difference of principle and not only of degree between a treaty and a non-treaty. The understanding that there can be no sliding scale of legal commitment must apply to the non-treaty field too: either an agreement is binding under international law or it is not.⁴³ Thürer has rightly

⁴⁰ For CSCE dispute settlement procedures see H. Neuhold and B. Simma, *Neues europäisches Völkerrecht nach dem Ende des Ost-West-Konfliktes?* (1996), at 35; for La Valletta mechanism: Hillgenberg, 'Der KSZE-Mechanismus zur friedlichen Regelung von Streitfällen', 34 *GYIL* (1991), at 122 *et seq.*

⁴¹ Heusel, *supra* note 14, at 280, note 22.

⁴² A joint communiqué, of course, does not exclude the possibility that it represents a treaty: *Aegean Sea Continental Shelf Case*, ICJ Reports (1978), at 39. Everything depends on content and circumstances.

⁴³ Heusel, *supra* note 14, at 287 *et seq.*; Thürer, *supra* note 19, at 441.

emphasized that states themselves, as the originators of laws, attach the greatest importance to this and take the greatest care to make this distinction.⁴⁴ In some cases the question whether the agreement will or will not have the force of an international treaty is a serious matter of negotiation, as was the case with the ‘Basic Act’ between NATO and Russia in 1997. If, however, one denies states any possibility to introduce rules regulating their behaviour below treaty level, the outcome will be too rigid to take account of the various forms of international cooperation. This rigidity is compounded if the same tough rules are, as it were, mechanically applied to all failures to fulfil obligations. (It is precisely in order to avoid such rigidity that the German Federal Government’s statement on the International Law Commission’s Draft Articles on State Responsibility expresses doubt as to whether it is right to stipulate that all breaches, including those of obligations of information, negotiation, cooperation or dispute settlement, should lead to compensation or possible reprisals.)

To demonstrate the need for a certain degree of flexibility in the application of rules to agreements: clearly, even treaties can entail not only contractual obligations to perform or abstain, but also concomitant duties which will not have such strict consequences if they are infringed. This is the case with the obligation not to defeat the object and purpose of a treaty prior to its entry into force (Article 18 of the Vienna Convention on the Law of Treaties) or when provisional application of a treaty is agreed pending its entry into force (Article 25 of the Vienna Convention).

Admitting the existence of such concomitant obligations opens up the possibility of regarding a treaty as a complex and differentiated whole. It seems clear to me, particularly from the judgment of 25 September 1997 in the *Gabčíkovo-Nagymaros* case,⁴⁵ that the International Court of Justice is moving away from mechanical application of the rules on treaty breaches to a more complex view of relations between the parties. Clearly, the majority of the judges rejected the possibility of deciding the dispute according to the rules of treaty cancellation and compensation in favour of forward-looking obligations for the future development of the damaged cooperative relationship. The judgment and its outcome met with broad approval. The resulting obligations — to work together in the development of meaningful cooperation — were neither contained in the treaty nor could they be enforced by the usual means of treaty law or state responsibility.⁴⁶ In the view of the ICJ, however, they are of a legal and not just of a political nature.

This shows that international law can endow obligations with greater or lesser possibilities for enforcement. To this extent, therefore, without any watering down of the distinction between what is binding under international law and what is not, one could speak of a graduated strength of the means provided by international law to enforce agreements between states.⁴⁷ Theoretically, this could open the door, beyond

⁴⁴ Thürer, *supra* note 19, at 442 with reference to Viralli.

⁴⁵ 37 ILM (1998), at 162 *et seq.*

⁴⁶ Münch, *supra* note 7, at 610.

⁴⁷ For references see Heusel, *supra* note 14, at 28, notes 54 and 287.

the sphere of international treaties, for agreements under international law which bear less significant consequences, i.e. limited protection under international law.

9 Differentiation between Legal Levels

This is the furthest point to which a positive evaluation of non-treaty agreements can lead. Doubts, however, remain in view of the urgent warnings by prominent practitioners and academics against adding new categories to the sources listed in Article 38 of the Statute of the International Court of Justice. In order to maintain clarity about the tools provided by international law I shall try to bring a certain order into the subject by making more explicit distinctions between various levels of rules, thereby possibly removing the concerns about a differentiation of the legal consequences of an agreement according to its character.

Firstly, there is the subject-matter that the states have agreed upon in their agreement — numerous substantive details which do not need to be discussed here. I shall content myself with reporting just one example, i.e. the frequent case of parties agreeing pursuant to Article 25(1) of the Vienna Convention on the Law of Treaties, without conclusion of a treaty, on the provisional application of a treaty which has yet to enter into force; this may possibly be only a partial provisional application which excludes those provisions requiring parliamentary approval.

Secondly, at a higher level, there is the question of what rules the parties want to apply to that which has been agreed. This set of rules could be called a self-contained regime in which the parties exclude the application of rules which follow from *pacta sunt servanda* but not, for instance from *inadimplenti non est adimplendum*.⁴⁸ The rules applicable to such a regime or system cannot be found in the Vienna Convention on the Law of Treaties or in customary treaty law, because the parties have excluded this possibility. In so far as they are not implied in the agreement itself, the rules must be developed afresh, within the system of each individual agreement, and they must be consistent. Rules of international treaty law may be drawn upon analogously to the extent that they do not contradict the parties' lack of desire to enter into a treaty, and — where appropriate — they may take account of general principles of law. The aim is a sensible interpretation of, and supplement to, what the parties want and not — to emphasize the point again — the application of a pre-existing system of rules of international law to the agreement. This is not always recalled when dealing with 'political' agreements, but it is the decisive point in distinguishing between pledges under international treaty law and non-treaty agreements.

Thirdly, there is the question of what role the specific non-treaty agreement plays in the system of international law. We are no longer talking here about the rules inherent in the agreed system, but about the place that the regime or system occupies in the overarching system of international law created by the community of states, which the parties, by deciding not to conclude a treaty, have opted in their relations not to amend. It has been maintained that a special system of rules separate from

⁴⁸ A. Verdross and B. Simma, *Universelles Völkerrecht* (3rd ed., 1984), at para. 1309.

international law exists to deal with non-treaty agreements, in the form of '*courtoisie*'. Owing to their special character, however, and particularly in view of the understanding that the rules of '*courtoisie*' are implemented on a totally voluntary basis, they are not appropriate in the context of the type of agreement we are considering here.⁴⁹

I should now like to give a somewhat more detailed, yet necessarily brief, picture of the rules of these last two levels.

10 The 'Rules of the Game' Applicable to the Partners in a Non-treaty Agreement

As regards the self-contained regime, we must consider rules relating to the elaboration, interpretation and later amendment of agreements.

In the absence of a system developed in international practice and codified in a multilateral treaty, as exists for treaties, it is necessary that recourse be had for the main part to the will of the parties alone. Unfortunately, academia gives us little to go on. Münch⁵⁰ is right when he writes: 'Although authors generally admit that the phenomenon exists, much about it remains to be explained and delimited, not least the concomitant rules which govern it.' The proposals which follow are, admittedly, rudimentary.

A *Conclusion of Agreements*

As far as conclusion of agreements is concerned, full powers are not generally requested. If there was no authorization to conclude the agreement, one may be able to assume the existence of a gentlemen's agreement in the narrow sense. For the conclusion of multilateral agreements, a single-stage consensus procedure, which usually, but not always,⁵¹ excludes reservations, is customary. The agreement, like a treaty, can be open to accession by other states.⁵² The content of the agreement is often drawn up in the usual treaty language, if only to underline the importance of what is being agreed. By applying Article 31ff. of the Vienna Convention on the Law of Treaties *mutatis mutandis*, the content may be established by interpreting the parties' will and applying the principle of good faith as well as examining the history of negotiations and subsequent practice.⁵³

B *Extent of Inherent Commitment*

Such agreements alter neither treaties nor other international law governing relations between the parties. It is particularly difficult to give a legal description of the nature of the commitment. Since treaty law is excluded, it is — as I outlined above —

⁴⁹ Heusel, *supra* note 14, at 271.

⁵⁰ Münch, *supra* note 7, at 609.

⁵¹ E.g., Recommendations by the Council of Europe for the protection of privacy.

⁵² Heusel, *supra* note 14, at 303.

⁵³ Aust, *supra* note 10, at 793.

not possible to apply the principle of *pacta sunt servanda* (Article 26 of the Vienna Convention on the Law of Treaties).⁵⁴ Pledges cannot be enforced in the same way that treaties can.⁵⁵ A breach of a pledge is not a delict.⁵⁶ Pledges will not be regarded by a court or arbitral authority as treaty obligations.⁵⁷ States can, however, submit disputes arising out of non-treaty agreements to a settlement procedure, as is demonstrated by the Convention of 15 December 1992 on Conciliation and Arbitration within the CSCE. (Characteristically, however, this Convention provides for the application of CSCE commitments only in the field of conciliation, whereas a (binding) arbitral award must be based only on international law.) States can also exert pressure through action short of reprisals. The political pressure to keep one's pledges may be great, and the consequences of non-fulfilment considerable.⁵⁸

Moreover, non-treaty agreements may be 'enforced' in a 'soft' manner by the creation of control mechanisms to which the parties voluntarily, but under international or internal political pressure, submit and whose results have a bearing on public opinion (e.g. CSCE follow-up conferences). Observance of the obligations may also be a precondition to the obtaining of services upon which a state may be dependent. Soft law obligations may thus be supplemented by 'soft sanctions', a good example being the Investment Guidelines of the World Bank.

In any event, pledges are to be fulfilled in good faith.⁵⁹ In relation to the non-treaty binding sections of the Sinai Disengagement Agreements of 1975, Henry Kissinger is reported to have said: 'While some of the undertakings are non-binding they are important statements of diplomatic policy and engage the good faith of the United States as long as the circumstances that gave rise to them continue.' Thus, what has been agreed upon cannot be represented by one side to the other as not having been intended or as being unlawful from the outset without such behaviour having repercussions for the agreement as a whole.⁶⁰ Nor can one side render impossible whatever has been agreed without incurring similar consequences. This could be derived either from *mutatis mutandis* application of Article 18 of the Vienna Convention on the Law of Treaties or from the general principle of law recognized by the ICJ in the *Chorzow* case. Furthermore, actions performed in keeping with the agreement cannot be claimed back as an unjustified enrichment on the part of the beneficiary.⁶¹ An election held on the basis of a non-treaty agreement regarding the regional distribution of seats in international bodies cannot be challenged by participants as being irregular.⁶² The general opinion is that this result, as in the case of binding unilateral declarations, is obtained by applying the principles of estoppel.

⁵⁴ Schachter, *supra* note 8, at 301.

⁵⁵ *Restatement*, *supra* note 27; Schachter, *supra* note 8, at 289.

⁵⁶ Rotter, *supra* note 5, at 419.

⁵⁷ Wengler, *supra* note 33, at 194.

⁵⁸ Wengler, *supra* note 24, at 24; *Restatement*, *supra* note 27, at 301, Reporter's Notes.

⁵⁹ Schachter, *supra* note 8, at 130.

⁶⁰ Schachter, *supra* note 8, at 131; Thürer, *supra* note 19, at 445 *et seq.*

⁶¹ For references on unjustified enrichment see Simma, *supra* note 48, at para. 614.

⁶² Schachter, *supra* note 8, at 301.

non venire contra factum proprium and acquiescence.⁶³ However, from a continental viewpoint at least, it would appear to be more plausible to recognize the underlying non-treaty agreement as ‘*causa*’ and thus to deny the existence of unjustified results.

C *Disruption, Termination*

Subsequent changes to the regime may result in particular from the following:

- reciprocal dependence of the intended actions;
- change of circumstances;
- one party’s withdrawal from the agreement.

Analogous application of the grounds for termination contained in treaty law is ruled out. Non-treaty agreements are by their nature more unstable than treaties and more dependent on the continuation of a conformity of interests. This does not mean, however, that the parties are free to act as though there were no agreement at all.

Consequences of non-adherence to pledges may arise within the regime or system of cooperation, with recourse to the principle of good faith. Minor infringements may be dealt with in good faith without any far-reaching disruption to the system. If major pledges are not fulfilled, a mutual dependence of actions, and thus the applicability of the general principle of law *inadimplenti non est adimplendum*, comes into play.⁶⁴ Mutual dependence of certain pledges can thus lead to practically the same result as the synallagma in a reciprocal international treaty.⁶⁵ One example of this mutual dependence may be seen in the justification given by the USA for exceeding the SALT II ceilings, namely, by making reference to a Russian infringement of the treaty, even though the treaty itself had not been ratified.⁶⁶

Other good examples of mutual dependence can be found in the so-called standstill agreements, e.g. the agreement not to introduce new restrictions unilaterally within the framework of the OECD⁶⁷ or para. IV of the German-Czech Declaration of 1997 which contains the agreement of both parties not to complicate their relations by certain matters originating in the past.

D *Multilateral Non-treaty Agreements*

It is, as ever, harder to judge the issues when one is concerned with multilateral, rather than bilateral, agreements. Here too we can find agreements based on reciprocity (*do ut des*) but there are also those which are intended to achieve a joint objective. The most prominent agreements in this latter category are the Helsinki

⁶³ Sinclair, ‘Book Review’, 91 *AJIL* (1997) 750; Heusel, *supra* note 14, at 277; Münch, *supra* note 7, at 610.

⁶⁴ *Sapphire Int. Petroleum Ltd. v. National Granian Oil Co.*, arbitral award of 15 March 1963; see Simma, *supra* note 48, at para. 614.

⁶⁵ Wengler, *supra* note 33, at 195.

⁶⁶ Heusel, *supra* note 14, at 303.

⁶⁷ Eisemann, *supra* note 11, at 345, note 100; to be distinguished from unilateral assurances of this kind, e.g. the intention declared by China in 1996 not to introduce measures in contravention of WTO rules as long as China’s accession negotiations are under way: Kong, ‘The Foreign Direct Investment Regime in China’, 57 *ZaöRV* (1997), at 897, note 67.

Final Act, agreements in the field of arms control and verification, and GATT arrangements. In case of non-fulfilment of such an agreement, it must be left up to each individual party to decide whether it regards the lack of participation of one or several parties as removing the basis for its own participation or, instead, whether it prefers to continue cooperation with those states still willing to be involved.

As far as subsequent withdrawal from bilateral or multilateral non-treaty agreements irrespective of the *inadimplenti non est adimplendum* principle is concerned, we will have to assume that withdrawal is not subject to the narrow rules of treaty law's *clausula rebus sic stantibus*, but certainly to the principle of good faith. This makes possible a flexible approach to the nature of the agreement. The possibility of arbitrary withdrawal would contradict the parties' limited intent to be bound by the agreement in question. If such a possibility were agreed, one would have to envisage non-binding declarations in the absence of an intent to be bound. Oscar Schachter⁶⁸ thinks differently: referring to a remark by de Gaulle on treaties, he remarked that it is enough that 'they [non-treaty agreements] last while they last'.⁶⁹ As has already been noted, non-treaty agreements can contain termination clauses. In such cases, particular emphasis needs to be attached to the principle of good faith over premature termination.

11 Role of Non-treaty Agreements in the General System of International Law

Allow me now to turn to what are not the 'rules of the game' agreed between the parties, but rather the rules developed by the community of states for international relations in general. We have seen that the parties to a non-treaty agreement exclude both the application of international treaty law, particularly its central *pacta sunt servanda* principle, and therefore also the legal consequences arising from non-fulfilment of this key commitment. To this degree, the agreements are not to be 'governed' (as Article 2(1)(a) of the Vienna Convention on the Law of Treaties puts it) by international law. If the parties reduce the intended consequences of their agreement to this extent, their agreement cannot be considered as a source of law effective beyond the closed system that the parties have created unless international law provides a set of rules applicable to agreements intended to have such limited consequences. As long as this is not the case, the agreement must remain merely a fact to be taken into account or disregarded, depending on the content of the applicable rules of international law.

I can only touch upon the possible consequences that international law attaches to non-treaty agreements as a fact, not as a source. Such agreements can be 'subsequent practice', as defined in Article 31(3)(b) of the Vienna Convention on the Law of

⁶⁸ In J. Delbrück (ed.), *New Trends in International Lawmaking* (1997) 88.

⁶⁹ Also Fastenrath, *FAZ*, 27 May 1997, assumes that states can at any time dissociate themselves from such agreements.

Treaties, to be taken into account in interpreting a treaty. Thus, Riedel⁷⁰ considers the 1992 Rio Declaration as an aid in interpreting vague but binding commitments in the environmental field. If such an agreement runs counter to a treaty obligation existing between the same states, it cannot alter the earlier treaty. However, in exceptional cases, it may be that the state against which a claim is made objects to enforcement measures on the grounds that enforcement of the claim made under the treaty is in bad faith (estoppel). It may even be that the relationship prohibits a state against whom a claim has been made from invoking the lack of an international treaty. Since the parties have expressly excluded *pacta sunt servanda*, however, only additional factors can lead to such an unusual result. Similarly, invocation of customary international law may be inadmissible. Thus, even if there are no treaty commitments, non-treaty pledges may exclude invocation of the principle of non-interference in a state's internal affairs.⁷¹ In particular, non-interference may not be invoked against application of the CSCE Final Act and its further developments.

Indisputably, a non-treaty agreement cannot directly produce customary international law, but it can contribute to its creation as an emerging *opinio juris*. Infringements of the agreement do not, as I have demonstrated, constitute violations of international law; they are not *delicts*. They are, however, unfriendly acts which can be responded to not only with countermeasures inherent in the system, but also with retaliation — in other words, with other unfriendly acts.

12 Resolutions of Organizations as Soft Law?

In the context of an evaluation of the so-called 'law-declaring resolutions' of the UN General Assembly, the question of their contribution to the creation of international law has been examined by some authors in the light of their being 'soft law'.⁷² Clearly, agreements negotiated by international or supranational organizations may also create 'soft law'. Classical examples include, as noted above: agreement on the (regional) distribution of seats in the UN Security Council (London Agreement of 1946), the so-called Luxembourg Compromise of 1966 and an agreement concluded at the third UN Conference on the Law of the Sea. These latter dealt with the application of consensus and majority rules. The significance of such agreements depends on the importance attached to them by the statute of the organization in question.

The question, however, of whether 'law-declaring resolutions' of the UN General Assembly can create law beyond their contributory role in the formation of customary international law, according to Article 38(I)(b) of the Statute of the ICJ, is a different one. It certainly bears some resemblance to the question discussed here of whether 'soft law' can be a source of legal obligations. Despite the world-embracing

⁷⁰ In Delbrück, *supra* note 68, at 88.

⁷¹ Schachter, *supra* note 8, at 131.

⁷² G. Abi-Saab, *Les résolutions dans la formation du droit international du développement* (1971), at 9 *et seq.*

membership of the UN, it concerns, however, consequences which go beyond the Organization's power to legislate. If, therefore, we extended the notion of soft law to such resolutions we would come to the same conclusions as for soft law in general, i.e. that international law in its present state does not attribute to soft law the status of a source of law. In the case of General Assembly resolutions, of course, there is the additional reason that it is not in the intention of all the parties participating in the vote to create (new) law. Even if in a specific case there was such a common intention, binding international law would not be created since the Charter of the UN does not vest the General Assembly with such rights. This cannot be altered without changing the rules of the Charter according to its rules on amendment.

13 Conclusion

By way of conclusion, I shall summarize the main points put forward in this article:

- Non-treaty agreements are not regarded by states as substitutes for treaties, but as an independent tool which can be used to regulate their behaviour in cases where, for various reasons, a treaty is not an option.
- Innumerable technical agreements, as well as documents of the highest political importance, declarations of intent, codes of conduct and guidelines demonstrate the increasing importance of agreements below the level of treaties.
- Non-treaty agreements can be rudimentary or complex; they can stand independently or they may flesh out treaty law.
- Such agreements, at the parties' will, are not subject to international treaty law, and particularly not to its fundamental principle of *pacta sunt servanda*. Nor is there, to date, any other set of rules in international law into which they fit, and which would regulate and supplement them.
- On the other hand, these agreements are not indifferent in legal terms. If they contain rules governing relations between the parties, they are the source of a self-contained regime subject to legal thinking and thus deserve the international lawyer's attention.
- Such rules of behaviour must be ascertained on a case-by-case basis, depending on the will of the parties, they may be developed according to the parties' desires along the lines, in some aspects, of treaty law.
- As long as non-treaty agreements are not recognized in international law as a source of legal obligations and are not provided with a set of rules regulating their coming into existence, functioning and effects, they remain 'closed'. Outside the regime created by the non-treaty agreement, rules of international law presently take account of such agreements only as a factor, not as a source, of law.
- In the final analysis, it is of little import whether one attaches limited legal quality to such self-contained regimes. In any event, their political function resembles that of treaties: non-treaty agreements, too, provide the parties to international arrangements with the power 'to justify and persuade'.