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# Between a Treaty and Not: A Case Study of the Legal Value of Diplomatic Assurances in Expulsion Cases

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## Article

# Between a Treaty and Not: A Case Study of the Legal Value of Diplomatic Assurances in Expulsion Cases

William Thomas Worster\*

I. Background .....	254
II. Diplomatic Assurances as Treaties.....	266
A. An Agreement Concluded Between States .....	272
B. In Writing.....	285
C. Governed by International Law .....	288
1. Anthony Aust.....	289
2. Jan Klabbers.....	304
3. The Role of Formal Assessment and Enforcement.....	307
4. Private Law Analogies.....	313
5. Conclusion on the Law of Treaties.....	319
6. Application to Diplomatic Assurances.....	327
III. Diplomatic Assurances as Binding Unilateral Statements .....	339
IV. Diplomatic Assurances as Subsequent Practice .....	344
V. Conclusion.....	345

Diplomatic assurances issued by states declaring that they will not mistreat individuals returned to them occupy a strange middle ground between being legal and non-legal obligations. The question of their value forces us to re-evaluate our understanding of the law of treaties, which, like law in general, requires a binary approach to obligation: either there is a legal obligation or not, even if the fit with either of these categories is not precise. This study concludes that some of the obligations

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in certain assurances can be understood as legal obligations, and some cannot; and it will state a methodology for determining which obligations are legal under the law of treaties. The examination of this particular type of international communication can shed light on the larger phenomenon of soft law instruments and similar instruments whose legal value is unclear.

The paper begins in Section I with relevant background of the legal environment of diplomatic assurances and their use in cases of expulsion. The next sections discuss the legal nature of diplomatic assurances. Section II discusses diplomatic assurances as treaties; Section III discusses diplomatic assurances as binding unilateral statements; and Section IV discusses diplomatic assurances as subsequent practice that would inform treaty interpretation.<sup>1</sup>

The lengthiest of these examinations is Section II on whether diplomatic assurances could be considered treaties. This is because the claim that diplomatic assurances—which purport to not be legally binding—could qualify as treaties is the most controversial of the questions considered by this paper. Although there are strong arguments on both sides, in the end, they prove to be unsatisfactory.

## I. BACKGROUND

In many instances a state may have an obligation not to return an individual to a state from which he came even where the person is otherwise lawfully deportable. This obligation is termed the “*non-refoulement*” obligation. The obligation arises in instances where an individual faces some risk of poor treatment upon return. The most common risks are persecution and torture, but the risk of other human rights violations may also trigger the *non-refoulement* obligation.<sup>2</sup>

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1. This paper will not examine the legal value of diplomatic assurances under customary international law other than the way in which customary international law might further refine the definition of treaty.

2. See, e.g., Convention Relating to the Status of Refugees, July 28, 1951, art. 1, 189 U.N.T.S. 150 as amended by Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [together hereinafter Refugee Convention] (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 31, 32, 45, 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 2–3, 6, 213 U.N.T.S. 221 [hereinafter European Convention on Human

This *non-refoulement* obligation sometimes inhibits a state that wishes to remove a person who presents a security risk or danger to society. There are limited exceptions to the *non-refoulement* obligation, but they are neither universal nor absolute.<sup>3</sup> In cases where the expelling state cannot invoke an exception to *non-refoulement*, it may ask the receiving state for assurances that the person will not face the feared problematic treatment—*i.e.* that the person will not be tortured or will not face persecution by the receiving state.<sup>4</sup> These are termed

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Rights or ECHR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 6–7, 14, S. TREATY DOC. No. 95–20, 999 U.N.T.S. 171 [hereinafter ICCPR]; Organization for African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, art. II(3), 1001 U.N.T.S. 45; American Convention on Human Rights, Nov. 22, 1969, art. 4, 5(2), 8, 22(8), 1144 U.N.T.S. 143; African Charter on Human and Peoples' Rights, June 27, 1981, art. 4, 5, 7, 1520 U.N.T.S. 363; Cartagena Declaration on Refugees, Nov. 22, 1984, § III(5), *reprinted in* 2 COLLECTION OF INTERNATIONAL INSTRUMENTS AND OTHER LEGAL TEXTS CONCERNING REFUGEES AND DISPLACED PERSONS 206, 208 (1995); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1, 3, 16, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture or CAT]; Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, art. 2, O.A.S.T.S. No. 67; Arab Charter on Human Rights, Sept. 15, 1994, art. 13, *reprinted in* 18 HUM. RTS. L.J. 151, 152 (1997); Arab Charter on Human Rights, May 22, 2004, art. 5, 6, 7, 8, 14, 16, *reprinted in* 12 INT'L HUM. RTS. R. 893, 896–97 (2005). *See generally* U.N. High Commissioner for Refugees [UNHCR], *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, ¶ 15 (Aug. 2006), available at <http://www.unhcr.org/refworld/pdfid/44dc81164.pdf> [hereinafter *UNHCR Note*] (“The principle of *non-refoulement* as enshrined in Article 33 of the 1951 Convention is part of customary international law. As such, it is binding on all States, including those which have not yet become party to the 1951 Convention and/or its 1967 Protocol.”) (citation omitted).

3. *Compare* Refugee Convention, *supra* note 2, art. 33(2) (prohibiting refugees from claiming the protection of *non-refoulement* if they are deemed a “danger to the security of the country” or who have been convicted of serious crimes), *with* Rep. of the U.N. Comm. Against Torture, U.N. GAOR, 52d Sess., Supp. No. 44, A/52/44, Commc’n No. 39/1996, ¶ 14.5 (Apr. 28, 1997) (“The Committee considers that the test of article 3 (the *non-refoulement* principle of the CAT) is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return that person concerned to that State. The nature and activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the [CAT].”).

4. It is also possible that the receiving state might, in some situations, assure the expelling state that the relevant person would not face persecution by non-state agents. The credibility of these kinds of assurances would simply fall into the general assessment of credibility for any assurances. The existence of non-state agent persecution, where it is recognized as a valid basis for *non-refoulement*, would not *per se* bar the state from issuing assurances.

“diplomatic assurances.”<sup>5</sup> They can take the form of a blanket agreement (usually called a “Memorandum of Understanding”), a case-by-case agreement, or a combination of the two.<sup>6</sup>

Diplomatic assurances were initially used without much scholarly comment in extradition cases for common crimes, and in non-expulsion matters.<sup>7</sup> Assurances were usually sought to assure the expelling state that the individual would not face an

5. See generally *UNHCR Note*, *supra* note 2, ¶ 1 (“The term ‘diplomatic assurances’, as used in the context of the transfer of a person from one State to another, refers to an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law.”).

6. See Memorandum of Understanding Between the Gov’t of the U.K. and the Gov’t of Eth. Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, Dec. 12, 2008, *available at* <http://www.fco.gov.uk/resources/en/pdf/3849543/mou-ethiopia-combined> [hereinafter U.K.–Eth. MOU]; Memorandum of Understanding Between the Gov’t of the U.K. and the Gov’t of Leb. Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, Dec. 23, 2005, *available at* <http://www.fco.gov.uk/resources/en/pdf/lebanon-mou> [hereinafter U.K.–Leb. MOU]; Memorandum of Understanding Between Gov’t of Libya and the Gov’t of the U.K. Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, Oct. 18, 2005, *available at* <http://www.fco.gov.uk/resources/en/pdf/libya-mou> [hereinafter Libya–U.K. MOU]; Memorandum of Understanding Between the Gov’t of the U.K. and the Gov’t of Jordan Regulating the Provision of Undertakings in Respect of Specified Persons Prior to Deportation, Aug. 10, 2005, *available at* <http://www.fco.gov.uk/resources/en/pdf/jordan-mou> [hereinafter U.K.–Jordan MOU]. For a helpful history of the negotiation of the U.K.–Jordan MOU, see *Othman v. Sec’y of State for the Home Dep’t*, [2007] S.I.A.C. No. SC/15/2005, ¶¶ 171–174 (Eng.), *available at* [http://www.siac.tribunals.gov.uk/Documents/QATADA\\_FINAL\\_7FEB2007.pdf](http://www.siac.tribunals.gov.uk/Documents/QATADA_FINAL_7FEB2007.pdf).

7. See, e.g., *Early Warning System*, U.S.–Isr., Sept. 1, 1975, 26 U.S.T. 2271; Memorandum of Agreement Concerning Assurances, Consultations, and U.S. Policy on Matters Related to Middle East Peace., U.S.–Isr., Sept. 1, 1975, 32 U.S.T. 2150. The United States appears to regard the MOU as a treaty because it has recorded it in the *United States Treaties and Other International Agreements* series (U.S.T.) and referenced it in U.S. Department of State, *Treaties in Force: A list of Treaties and Other International Agreements of the United States in Force on January 1, 2011*. See U.S. DEP’T OF STATE, TREATIES IN FORCE 138 (2011), *available at* <http://www.state.gov/documents/organization/169274.pdf>; see also *Noriega v. Pastrana*, 564 F.3d 1290, 1298 (11th Cir. 2009) (relying on diplomatic assurances regarding the application of the Third Geneva Convention); *Eain v. Wilkes*, 641 F.2d 504, 512 n.8, 519 (7th Cir. 1981) (assurances from Israel for a fair trial); *M.S.S. v. Belgium and Greece*, Judgment, App. No. 30696/09, Eur. Ct. H.R. (Jan. 21, 2011), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search case name “M.S.S.” and respondent state “Belgium”) (regarding assurances that an asylum hearing would be conducted).

unfair trial or the death penalty.<sup>8</sup> Beginning with the *Soering* case, however, the European Court of Human Rights (“European Court”) held that extradition could result in a violation of article 3 of the European Convention on Human Rights (“ECHR”) on the part of the *expelling* state.<sup>9</sup> Because this violation would be reviewable by the European Court, assurances became even more important.<sup>10</sup>

Increased attention on diplomatic assurances was also created by the policies, collectively known as the “War on Terror,” that were adopted by the United States subsequent to the terrorist attacks on the United States on September 11, 2001, because assurances have been used in connection with the extradition of persons suspected of terrorism offenses.<sup>11</sup>

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8. See, e.g., ECHR, *supra* note 2, art. 2; Protocol No. 6 to the ECHR Concerning the Abolition of the Death Penalty Apr. 28, 1983, 1496 U.N.T.S. 281, *as amended by* Protocol No. 11 to the ECHR, May 11, 1994, 2061 U.N.T.S. 7; Protocol No. 13 to the ECHR Concerning the Abolition of the Death Penalty in All Circumstances, May 3, 2002, 2246 U.N.T.S. 110; Cipriani v. Italy, Admissibility Decision, App. No. 22142/07, Eur. Ct. H.R. (Mar. 30, 2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=cipriani&sessionid=89743436&skin=hudoc-en>; Koktysh v. Ukraine, Final Judgment, App. No. 43707/07, Eur. Ct. H.R. (Dec. 10, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=43707/07&sessionid=89536360&skin=hudoc-en>; Kaboulov v. Ukraine, Final Judgment, App. No. 41015/04, Eur. Ct. H.R. (Nov. 19, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=kaboulov%20|%20ukraine&sessionid=89536360&skin=hudoc-en>; Einhorn v. France, Admissibility Decision, App. No. 71555/01, Eur. Ct. H.R. (Oct. 16, 2001), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=einhorn%20|%20france&sessionid=89536360&skin=hudoc-en>; United States v. Burns, [2001] 1 S.C.R. 283 (Can.) (regarding assurances from the United States that the death penalty would not be applied), X v. The Netherlands, Admissibility Decision, App. No. 15216/89, Eur. Comm’n H.R. (Jan. 16, 1991), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=15216/89&sessionid=89536360&skin=hudoc-en>; Soering v. United Kingdom, Final Judgment, App. No. 14038/88, Eur. Ct. H.R. (July 7, 1989), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=soering%20|%20united%20|%20kingdom&sessionid=89536360&skin=hudoc-en>; Bamohamed v. France, Admissibility Decision, App. No. 13706/88, Eur. Ct. H.R. (Dec. 9, 1988), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Bamohamed&sessionid=89743436&skin=hudoc-en>.

9. *Soering*, App. No. 14038/88, ¶¶ 44–45.

10. See, e.g., *Cipriani*, App. No. 22142/07; *Einhorn*, App. No. 71555/01, X v. The Netherlands, App. No. 15216/89, *Bamohamed*, App. No. 13706/88.

11. See, e.g., *Othman v. United Kingdom*, Judgment, App. No. 8139/09, Eur. Ct. H.R. (Jan. 17, 2012), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=8139/09&sessionid=89743436&skin=hudoc-en>, *Sellem v. Italy*,

This attention on assurances was heightened when several persons were extradited on the basis of assurances from states well known for employing torture and then were tortured notwithstanding these assurances.<sup>12</sup>

As an initial matter, it does not appear to be a violation of international law either to issue or to solicit and receive diplomatic assurances. Amnesty International and Human Rights Watch have criticized the use of diplomatic assurances

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Final Judgment, App. No. 12584/08, Eur. Ct. H.R. (May 5, 2009), <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=89743436&skin=hudoc-en> (search "12584/08" in application number field); Cherif v. Italy, Final Judgment, App. No. 1860/07, Eur. Ct. H.R. (Apr. 7, 2009), <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionId=89743436&skin=hudoc-en> (search "1860/07" in application number field), Abdelhedi v. Italy, Final Judgment, App. No. 2638/07, Eur. Ct. H.R. (Mar. 24, 2009), Ben Salah v. Italy, Final Judgment, App. No. 38128/06, Eur. Ct. H.R. (Mar. 24, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=38128/06&sessionId=90121775&skin=hudoc-en>; C.B.Z. v. Italy, Final Judgment, App. No. 44006/06, Eur. Ct. H.R. (Mar. 24, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=44006/06&sessionId=90121775&skin=hudoc-en>; Darraji v. Italy, Final Judgment, App. No. 11549/05, Eur. Ct. H.R. (Mar. 24, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=11549/05&sessionId=90121775&skin=hudoc-en>; Hamraoui v. Italy, Final Judgment, App. No. 16201/07, Eur. Ct. H.R. (Mar. 24, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=16201/07&sessionId=90121775&skin=hudoc-en>; O. v. Italy, Final Judgment, App. No. 37257/06, Eur. Ct. H.R. (Mar. 24, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=37257/06&sessionId=90121775&skin=hudoc-en>; Soltana v. Italy, Final Judgment, App. No. 37336/06, Eur. Ct. H.R. (Mar. 24, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=37336/06&sessionId=90121775&skin=hudoc-en>; Ben Khemais v. Italy, Final Judgment, App. No. 246/07, Eur. Ct. H.R. (Feb. 24, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=246/07&sessionId=90121775&skin=hudoc-en>; Gasayev v. Spain, Admissibility Decision, App. No. 48514/06, Eur. Ct. H.R. (Feb. 17, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=48514/06&sessionId=90121775&skin=hudoc-en>; Boumediene v. Bosnia and Herzegovina, Admissibility Decision, App. No. 38703/06, Eur. Ct. H.R. (Nov. 18, 2008), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=38703/06&sessionId=90121775&skin=hudoc-en>.

12. See, e.g., Alzery v. Sweden, U.N. Doc. CCPR/C/88/D/1416/2005 (U.N. Human Rights Comm., Nov 10, 2006), <http://www.unhcr.org/refworld/docid/47975afa21.html>; Agiza v. Sweden, U.N. Doc. CAT/C/34/D/233/2003 (U.N. Comm. Against Torture, May 20, 2005), <http://www.unhcr.org/refworld/docid/42ce734a2.html>; Daniel J. Wakin, *Tempers Flare After U.S. Sends a Canadian Citizen Back to Syria on Terror Suspicions*, N.Y. TIMES, Nov. 11, 2002, at A9 (reporting on the situation of Maher Arar).

to relieve the expelling state of its *non-refoulement* obligations<sup>13</sup> but have not argued that the solicitation, issuance, or receipt of assurances is itself unlawful. Without a rule of international law prohibiting them, their request and issuance must be *per se* lawful.<sup>14</sup>

Receipt of assurances may diminish or alleviate the risk that an expelled person will face problematic treatment, so that the individual may be returned without violating domestic or international law prohibiting his or her return. It is not entirely clear, however, which legal element of the *non-refoulement* obligation is directly affected by assurances. Instead, it appears that the receipt of assurances contributes to defeating the application of several elements collectively.<sup>15</sup>

The assurances, in and of themselves, are not sufficient to relieve the state of its *non-refoulement* obligation.<sup>16</sup> Rather, the

13. See generally Amnesty Int'l, *Dangerous Deals: Europe's Reliance on 'Diplomatic Assurances' Against Torture*, AI Index EUR 01/012/2010 (Apr. 2010); Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, Vol. 17, No. 4(D) (Apr. 2005).

14. See *The Case of the S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). This author has already concluded elsewhere that the request, issuance, and use of diplomatic assurances is permissible under customary international law, see William Thomas Worster, *The Evolving Definition of the Refugee in Customary International Law*, 30 BERKELEY J. INT'L L. (forthcoming 2012); Rep. of the U.N. Comm. Against Torture, U.N. GAOR, 52d Sess., Supp. No. 44, A/52/44, Commc'n No. 39/1996, ¶ 14.5 (Apr. 28, 1997).

15. See *Hilal v. United Kingdom*, Final Judgment, App. No. 45276/99, Eur. Ct. H.R. (Mar. 6, 2001), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=45276/99&sessionid=90121775&skin=hudoc-en>. But see *Svazas v. Sec'y of State for the Home Dept.*, [2002] EWCA (Civ) 74 (Eng.) (holding in a Refugee Convention case that the test is whether there exists sufficient protection in respect of the acts of rogue state agents measured in a general or systemic manner, and may co-exist with a real risk of prohibited ill treatment); *Regina v. Sec'y of State for the Home Dept.*, [2005] UKHL 38 (Eng.) (applying the *Svazas* test to ECHR art. 3).

16. See *Othman*, App. No. 8139/09; Rep. of the U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention*, ¶ 4, U.N. Doc. CAT/C/CR/33/3 (Dec. 10, 2004) (expressing concern at the U.K.'s reliance on diplomatic assurances in the *refoulement* context); UNHCR, *No. 30 (XXXIV) The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum\* (1983)*, in CONCLUSIONS ADOPTED BY THE EXECUTIVE COMMITTEE ON THE INTERNATIONAL PROTECTION OF REFUGEES 1975–2009 (CONCLUSION NO. 1–109) 39 (2009) (“Recognized the substantive character of a decision that an application for refugee status is manifestly unfounded or abusive, the grave consequences of an erroneous determination for the applicant and the resulting need for such a decision to be accompanied by appropriate procedural guarantees.”); Rep. of the Special Rapporteur of the Comm'n on Human Rights, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, transmitted by Note of the*



state must complete an individualized assessment of the person being expelled to determine whether the assurances overcome the reasons for *non-refoulement*. This evaluation must include an assessment of the credibility and reliability of the assurances, taken in light of such factors as the receiving state's history of human rights abuses, its history of honoring assurances, and the ability of the expelling state or a third party to monitor compliance with the assurances.<sup>17</sup>

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*Secretary-General*, ¶ 51, U.N. Doc. A/60/316 (Aug. 30, 2005) ("It is the view of the Special Rapporteur that diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment.").

17. See *Agiza v. Sweden*, Commc'n No. 223/2003, ¶ 13.4 U.N. Doc. CAT/C/34/D/233/2003 (Comm. Against Torture 2005):

The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons. . . . In the Committee's view, the natural conclusion from these combined elements, that is, that the complainant was at a real risk of torture in Egypt in the event of expulsion. . . . The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.

*Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, ¶ 124 (Can.) ("A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process) . . . . The former [death penalty] are easier to monitor and generally more reliable than the latter [torture]."); *Mahjoub v. Canada* (Minister of Citizenship and Immigration), [2005] 3 F.C.R. 334 (Can.); Hof 's-Gravenhage 20 januari 2005, NJF 2005, 106 m. nt. BPV (De Staat der Nederlanden (Ministerie van Justitie)/Geïntimeerde) (Neth.); HR 7 mei 2004, NJ 2007, 276 m. nt. A.H. Klip (Advies inzake [de opgeëiste persoon]) (Neth.); *Youssef v. Home Office*, [2004] EWHC (QB) 1884 (Eng.); *Russia v. Akhmed Zakaev*, [2003] Bow Street Magistrates' Court (unreported decision) (Eng.); *Khouzam v. Att'y Gen.*, 549 F.3d 235 (3d Cir. 2008):

Prior to removal on the basis of diplomatic assurances, Khouzam must be afforded notice and an opportunity to test the reliability of those assurances in a hearing . . . . The alien must have an opportunity to present, before a neutral and impartial decisionmaker, evidence and arguments challenging the reliability of diplomatic assurances proffered by the Government, and the Government's compliance with the relevant regulations. The alien must also be afforded an individualized determination of the matter based on a record disclosed to the alien.

(citations omitted); *In re Ashraf Al-Jailani*, File A73 369 984 – York, 2004 WL 1739163 (BIA June 28, 2004); Human Rights Comm., *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, ¶ 12, CCPR/CO/74/SWE, 74th Sess. (Apr. 24, 2002) ("[Assurances may be accepted provided the state] institute[s] credible mechanisms for ensuring compliance of the receiving State with these assurances from the moment of expulsion."); Rep. of the Special Rapporteur of the Comm'n on Human Rights, *Torture and*

Additionally, the expelling state must consider whether the state is even able to ensure compliance with the assurances.<sup>18</sup> Strangely, although the seeking of assurances itself appears to be an admission of risk that the individual could face unlawful treatment upon expulsion,<sup>19</sup> courts do not appear to consider that fact as actually weighing against an expulsion.

There are many cases where, even after the expelling state sought and received assurances that an expelled person would not be tortured, the receiving state tortured the person anyway. This article will set aside questions of attribution and whether the state's obligation is one of conduct or result, to focus on the question of whether the failure to honor the assurances is a violation of a legal obligation under international law.

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*Other Cruel, Inhuman or Degrading Treatment or Punishment, transmitted by Note of the Secretary-General*, ¶ 35 U.N. Doc. A/57/173 (July 2, 2002) (Assurances may be accepted provided "the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return, and that a system to monitor the treatment of the persons in question has been put into place with a view to ensuring that they are treated with full respect for their human dignity.").

18. See, e.g., *Chahal v. United Kingdom*, Final Judgment, App. No. 22414/93, Eur. Ct. H.R., ¶¶ 104–05 (Nov. 15, 1996), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=22414/93&sessionid=90121775&skin=hudoc-en>:

[T]he United Nations' Special Rapporteur on torture has described the practice of torture upon those in police custody as "endemic" and has complained that inadequate measures are taken to bring those responsible to justice. The NHRC [Indian National Human Rights Commission] has also drawn attention to the problems of widespread, often fatal, mistreatment of prisoners and has called for a systematic reform of the police throughout India . . . . Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above, it would appear that, despite the efforts of that Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem . . . . Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.

(citations omitted).

19. See U.N. Comm. on Human Rights, *Promotion and Protection of Human Rights, transmitted by Note of the High Comm'r for Human Rights*, U.N. Doc. E/CN.4/2005/103, ¶ 56 (Feb. 7, 2005) (by Robert K. Goldman) ("[T]he mere fact that such assurances are sought is arguably a tacit admission by the sending State that the transferred person is indeed at risk of being tortured or ill-treated."); Rep. of the Comm'r for Human Rights, on His Visit to Sweden 21–23 April 2004, C.O.E. Doc. CommDH(2004)13 (July 8, 2004) ("The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture and ill-treatment.").

One difficulty with examining particular assurances is that their text is most often confidential, and in some cases the executive has even misrepresented the nature of the assurances to the judiciary.<sup>20</sup> But on occasion the texts of some assurances are made public. Assurances between Jordan and the United Kingdom took the form of a blanket Memorandum of Understanding (“MOU”) under which individual assurances were issued. The MOU with Jordan was made public as an annex to the judgment in the *Othman* case<sup>21</sup> (sometimes alternatively referred to as “Abu Qatada”). Similarly, the MOU between Ethiopia and the United Kingdom was reprinted in the *XX* case, which, like the *Othman* case, was heard before the U.K. Special Immigration Appeals Commission (“SIAC”).<sup>22</sup> Additional U.K. MOUs have also now been published on the website of the U.K. Foreign and Commonwealth Office (“FCO”).<sup>23</sup> Many other assurances and MOUs regarding expulsion cases remain confidential, however.

The legal nature of diplomatic assurances is disputed. It has been argued that diplomatic assurances are not binding in the sense of giving rise to state responsibility for violations,<sup>24</sup>

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20. See, e.g., *United States v. Pileggi*, 361 F. App'x 475, 476–77 (4th Cir. 2010):

At sentencing, the Government made the following misrepresentation about the assurances it provided to Costa Rica: “the United States, we gave a sentencing assurance to the government of Costa Rica that we would not seek a sentence in excess of 50 years.” When the court asked if this bound the court or the executive branch, the Government responded, “I think technically what it says is that the United States, the executive branch will not seek a sentence in excess of fifty years or death.”

(citations omitted). Executive Branches have even disregarded the judiciary’s holding regarding assurances altogether. See *Labsi v. Slovakia*, Statement of Facts, App. No. 33809/08, Eur. Ct. H.R. (July 18, 2008), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=33809/08&sessionid=90362720&skin=hudoc-cc-en> (alleging the Slovakian Executive expelled Labsi despite a stay entered by the Slovakian Constitutional Court).

21. See *Othman v. Sec’y of State for the Home Dep’t*, [2007] S.I.A.C. No. SC/15/2005, Annex 1A (Eng.), available at [http://www.siac.tribunals.gov.uk/Documents/QATADA\\_FINAL\\_7FEB2007.pdf](http://www.siac.tribunals.gov.uk/Documents/QATADA_FINAL_7FEB2007.pdf).

22. See *XX v. Sec’y of State for the Home Dep’t*, [2007] S.I.A.C. No. SC/61/2007, ¶ 20 (Eng.).

23. See U.K.–Leb. MOU, *supra* note 6; U.K.–Eth. MOU, *supra* note 6; Libya–U.K. MOU, *supra* note 6; U.K.–Jordan MOU, *supra* note 6.

24. See Thomas Hammarberg, Commissioner for Human Rights, Council of Europe, *Torture Can Never, Ever Be Accepted*, (June 27, 2006), [http://www.coe.int/t/commissioner/viewpoints/060626\\_en.asp](http://www.coe.int/t/commissioner/viewpoints/060626_en.asp):

[Diplomatic assurances] are not credible and have also turned out to be ineffective in well-documented cases. The governments concerned

and even that assurances have no legal value at all.<sup>25</sup> It has also been suggested, however, that diplomatic assurances are not “mere piece[s] of paper,”<sup>26</sup> and specifically that they are “irrevocable”<sup>27</sup> or “formal,”<sup>28</sup> may be “binding”<sup>29</sup> or may even be

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have already violated binding international norms and it is plain wrong to subject anyone to the risk of torture on the basis of an even less solemn undertaking to make an exception in an individual case. In short, the principle of *non-refoulement* should not be undermined by convenient, non-binding promises of such kinds.

See Human Rights Watch, *supra* note 13, at 21–22:

Diplomatic assurances against torture represent a set of “understandings” agreed in principle between two governments. They have no legal effect and the person who they aim to protect has no recourse if the assurances are breached . . . . It is unlikely that governments that practice torture unconstrained by international legal commitments will rein in abuse on the basis of non-binding assurances.

25. See *Alzery v. Sweden*, Commc’n No. 1416/2005, ¶ 4.11, U.N. Doc.CCPR/C/88/D/1416/2005 (Human Rights Comm., Nov. 10, 2006):

In May 2004, when Sweden unsuccessfully sought an investigation, the Egyptian authorities were unsympathetic to the suggestion that the claims of mistreatment be investigated by any foreign independent person or body. The Swedish authorities, while expressing their disappointment, were unable to further act. The author notes in this regard that the assurance is of no legal value in Egypt and cannot be enforced or utilised as a legal document by him.

See Human Rights Watch, *supra* note 13, at 21 (“Diplomatic assurances against torture represent a set of “understandings” agreed in principle between two governments. They have no legal effect and the person who they aim to protect has no recourse if the assurances are breached.”).

26. *Othman*, [2007] S.I.A.C. No. SC/15/2005, ¶ 501:

The significance of the MOU against that political background, is first in the fact of its negotiation. It plainly did require some political thought at all levels, political, security and diplomatic. This is an agreement which we accept has been supported and agreed to not just at the highest level but also by the GID which has to operate within it. It is not a mere piece of paper which some ordinary official could sign and then leave others to ignore, hoping that that was enough to satisfy an old friend.

27. *Alzery v. Sweden*, Commc’n No. 1416/2005, ¶ 3.12, U.N. Doc.CCPR/C/88/D/1416/2005 (Human Rights Comm., Nov. 10, 2006):

In its follow-up report of 6 May 2003 to the Human Rights Committee, the Swedish Government also stated that it: “[i]s the opinion of the Swedish Government that the assurances obtained from the receiving State are satisfactory and irrevocable and that they are and will be respected in their full content. The Government has not received any information which would cast doubt at this conclusion.”

(citations omitted).

28. See *Othman*, [2007] S.I.A.C. No. SC/15/2005, ¶ 283:

Mr Oakden however said that failure to comply with *formal political commitments* in an MOU could do serious damage to diplomatic relations between the signatory states, and would harm a state’s reputation as a reliable international partner. The Appellant was a

“legally binding.”<sup>30</sup> Moreover, some authorities seem to shift

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well known figure in the United Kingdom and in Jordan, and his case had been well publicised. Allegations of a breach of the conditions in the MOU in his case would inevitably attract considerable publicity and damage the international reputations of both governments.

(emphasis added).

29. See *UNHCR Note*, *supra* note 2, ¶¶ 5, 21:

Diplomatic assurances given by the receiving State do not normally constitute legally binding undertakings. . . . In determining the weight which may be attached to diplomatic assurances, the sending State must consider a number of factors, including the degree and nature of the risk to the individual concerned, the source of the danger for the individual, and whether or not the assurances will be effectively implemented. This will depend, *inter alia*, on whether the undertaking provided is *binding* on those State organs which are responsible for implementing certain measures or providing protection, and whether the authorities of the receiving State are in a position to ensure compliance with the assurances given.

(emphasis added).

There is no inherent reason why diplomatic assurances, or the frameworks in which they might be applied, could not be legally binding. The Council of Europe had proposed to draft an instrument, apparently proposed to be binding, on the use of diplomatic assurances in expulsion cases, although the project was dropped. *Compare* Steering Comm. for Human Rights, Rep. on its 52nd Meeting, Nov. 6–9, 2001, app. VIII ¶ 4, Doc. No. CDDH(2001)035 (Nov. 19, 2001), *and* Steering Comm. for Human Rights, Group of Specialists on Human Rights and the Fight Against Terrorism, Rep. on its 1st Meeting, Dec. 7–9, 2005, app. III ¶ 4, Doc. No. DH-S-TER(2005)018 (Dec. 16, 2005) (“[T]he Group . . . is called to . . . (ii) consider the appropriateness of a *legal* instrument, for example a recommendation on minimum requirements/standards of such diplomatic assurances, and, if need be, present concrete proposals.”) (emphasis added), *with* Steering Comm. for Human Rights, Group of Specialists on Human Rights and the Fight Against Terrorism, Rep. on its 2nd Meeting, Mar. 29–31, 2006, app. III ¶¶ 12–17, Doc. No. DH-S-TER(2006)(005) (Apr. 3, 2006) (recommending against such an instrument).

30. See *Yin Fong v. Australia*, ¶¶ 7.4, 9.7, U.N. Doc. CCPR/C/97/D/1442/2005 (Human Rights Comm., Nov. 23, 2009), <http://www.unhcr.org/refworld/docid/4b1d223d.html> (summarizing the submissions of Australia on the legally binding nature of assurances and possibility endorsing that view):

The State party submits that a legally binding assurance is one given by the part of the government or the judiciary that would usually have the responsibility of carrying out the act or enforcing the assurance . . . .

For all of the above reasons and while recognizing the State party’s assertion (para.7.1) that it currently has no plans to remove her from Australia, the Committee considers that an enforced return of the author to the Peoples’ Republic of China, without adequate assurances, would constitute violations by Australia, as a State party which has abolished the death penalty, of the author’s rights under art.6 and art.7 of the Covenant.

In the alternative, or additionally, assurances could be legally binding under domestic law. See, e.g., *United States v. Pileggi*, 361 F. App’x. 475, (4th Cir.,

their perspective over time from non-binding to legally binding, or the reverse.<sup>31</sup>

Disagreements over the legal value of assurances and similar communications are not just isolated to academia. Disagreements occur there,<sup>32</sup> but disagreements also play out between States on a case-by-case basis.<sup>33</sup> This paper will first

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Jan. 20, 2010) (enforcing U.S. assurances given to Costa Rica that Pileggi would not be subjected to the death penalty or life imprisonment by requiring resentencing).

31. Compare MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS, CCPR COMMENTARY 150 (2d ed. 2005) (“If a real risk [of the imposition of the death sentence] exists . . . Governments are prohibited from expelling or extraditing the person concerned unless the Government which has requested extradition provides a legally binding assurance not to execute the person.”), with Rep. of the Special Rapporteur of the Comm’n on Human Rights, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, transmitted by Note of the Secretary-General, *supra* note 16, ¶ 51 (“[D]iplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated.”), in *Sultanov v. Russia*, App. No. 15303/09, Eur. Ct. H.R. ¶ 58 (Nov. 4, 2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=15303/09&sessionid=90849272&skin=hudoc-en>, also in *Yuldashev v. Russia*, App. No. 1248/09, Eur. Ct. H.R. ¶ 70 (July 8, 2010), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=1248/09&sessionid=90849272&skin=hudoc-en>. It is not clear why this type of shift would occur.

32. In favor of the legally binding nature of assurances, MOUs and similar communications, see Rep. of the Int’l Law Comm’n, 18th sess, May 4–19, 1966, U.N. Doc. A/CN.4/186 and Add.1-7, 188, reprinted at II(2) YB. INT’L L. COMM’N 188 (1966) (“[T]he use of the term ‘treaty’ as a generic term embracing all kinds of international agreements in written form is accepted by the majority of jurists.”); Eduardo Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 REC. DES COURS HAGUE ACAD. 1, 37 (1978). See generally JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW (1996); ARNOLD D. MCNAIR, THE LAW OF TREATIES 15 (1961). For those authorities not in favor of the binding nature of assurances and similar communications, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 cmt. e (1987); ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 32–57 (2d ed. 2007); OPPENHEIM’S INTERNATIONAL LAW 1201–03, 1209 n.8 (Robert Jennings & Arthur Watts ed., 9th ed. 1992).

33. See generally Arbitration Concerning Heathrow Airport User Charges (U.S./U.K.), Award on the First Question, XXIV R.I.A.A. 3 (1992) [hereinafter Heathrow Airport Arbitration Award]. For a discussion of the divergent opinions of the United States and China in connection with communiqués that China believes to be binding and the United States does not, see Jerry Z. Li, *The Legal Status of Three Sino-US Joint Communiqués*, 5 CHINESE J. INT’L L. 617 (2006). Li analyzes the countries’ interpretations of three agreements. See Shanghai Communiqué, Feb. 27, 1971, 66 DEP’T OF ST. BULL. NO. 1708, 435 (1972); Joint Communiqué on the Establishment of Diplomatic Relations, Dec. 15, 1978, 79 DEP’T OF ST. BULL. NO. 2022, 25 (1979); Joint Communiqué on US Arms Sales to Taiwan, Aug. 17, 1982, 82 DEP’T OF ST. BULL. NO. 2067, 20 (Oct. 1982). For further analysis of these agreements, see ZHU QIWU, ZHONGGUO

examine whether assurances and similar communications might qualify as treaties and then consider whether they might otherwise qualify as binding unilateral statements or subsequent practice.<sup>34</sup>

## II. DIPLOMATIC ASSURANCES AS TREATIES

The Vienna Convention provides that:

For the purposes of the present Convention:

(a) "Treaty" means 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.<sup>35</sup>

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GUOJIFA DE LILUN YU SHIJIAN [INTERNATIONAL LAW – THEORY AND PRACTICE IN CHINA] 368 (1998); MU YAPING ET AL., DANGDAI GOUJIFA LUN [MODERN INTERNATIONAL LAW] 474 (1998) (evidencing that China has recorded the communiqués in its domestic treaty register); John H. McNeill, *International Agreements: Recent US-UK Practice Concerning the Memorandum of Understanding*, 88 AM. J. INT'L L. 821, 821–22 (1994).

34. A preliminary observation is that law must be categorical in a binary fashion—either some act is legal or not legal—at least insofar as international law is currently structured. This is a fact which literary writers have frequently observed that binary categorization of situations with legal value is not satisfactory. See e.g., Mary Gaitskill, *On Not Being a Victim: Sex, Rape, and the Trouble With Following Rules*, HARPER'S MAG. (Mar. 1, 1994), at 35, reprinted in HERE AND NOW: CURRENT READINGS FOR WRITERS 167 (Gilbert Muller ed., 1998) (arguing that the categories of rape and non-rape are insufficient). This does not necessarily mean that obligations are truly binary in a moral or social sense—they rarely are—but it does mean that we can only apply them legally in that way, so every rule must be forced into either the obligatory or optional categories. The act of forcing a rule that might not be clearly obligatory or not into one of these binary categories is somewhat fictional, based partly on our degree of certainty that the norm is either obligatory or not. Our certainty is in turn based on the assessment of evidence pointing in one direction or the other. If we wish to move to a graduated system of obligation then we can, but it does not appear to be the case today.

35. Vienna Convention on the Law of Treaties art. 2(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention on Treaties]. See Vienna Convention on Succession of States in Respect of Treaties art. 2(1)(a), Aug. 23, 1978, 1946 U.N.T.S. 3 [hereinafter Vienna Convention on Succession of States] (“‘treaty’ means 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”); Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations art. 2(1)(a), Mar. 20, 1986, 25 I.L.M. 543, 578 [hereinafter Vienna Convention on Treaties between States] (“‘treaty’ means an international agreement governed by international law and concluded in written form: (i) between one or more States and one or more international organizations; or (ii) between international organizations.”).

Most of the states to which a discussion of diplomatic assurances is applicable have adhered to this convention, which provides that agreements qualifying under its terms will be governed by it.<sup>36</sup> Of the states which are parties to the diplomatic assurances discussed here, the following are also parties to the Vienna Convention<sup>37</sup>: Algeria<sup>38</sup>, Australia<sup>39</sup>,

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36. It must be acknowledged that the Vienna Convention does not specifically purport to define what a treaty is. It merely provides for the use of terms for its own purposes. See Vienna Convention on Treaties, *supra* note 35. Additionally, the Vienna Convention applies only to agreements between states. This article exclusively analyzes the legal nature of inter-state diplomatic assurances, but an MOU could also be concluded inter-agency. See *e.g.*, Memorandum of Understanding between the Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002, H.R. Doc. No. 108-131 (2003) [hereinafter DOS-DHS MOU], [available at](http://www.nafsa.org/uploadedFiles/dos_dhs_mou_on_respective.pdf) [http://www.nafsa.org/uploadedFiles/dos\\_dhs\\_mou\\_on\\_respective.pdf](http://www.nafsa.org/uploadedFiles/dos_dhs_mou_on_respective.pdf) (effective on Sept. 30, 2003, in accordance with Report to the Congress on the Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002, 68 Fed. Reg. 56,519 (Sept. 29, 2003)) (providing a method to determine which agency would undertake tasks relating to visa adjudication, classification, admission documentation, refusal, and revocation; coordinating the issuance of legal advisory opinions; staffing consular posts and evaluating and training staff; and maintaining records databases). In these cases, the precise legal value of the MOU can also be questioned. See *e.g.*, *id.* ¶ 14 (providing for a dispute resolution mechanism); *id.* ¶ 15 (providing for terms of modification of termination of the MOU); *id.* ¶ 16 (providing for an “effective date”). However, the DOS-DHS MOU explicitly states that “[n]othing in this MOU is intended, or should be construed, to create any right or benefit, substantive or procedural, enforceable at law by any person against the United States, or any of its agencies, officers, or employees.” although it does not say anything about Legal rights and obligations between the Departments of State and Homeland Security. *Id.* ¶ 18.

37. The current status of states as parties to the Vienna Convention can be found on the UN Treaty Database. See UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XIII~1&chapter=23&Temp=mtdsg3&lang=en](http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XIII~1&chapter=23&Temp=mtdsg3&lang=en) (last visited Apr. 5, 2012). Bosnia and Herzegovina succeeded to adherence since the former Soviet Federal Socialist Republic of Yugoslavia and its successor were parties. Although the Republic of China, now on Taiwan Island only, signed in 1970, the People’s Republic later acceded in 1997. Russia succeeded to adherence since the former Union of Soviet Socialist Republics was a party. Slovakia succeeded to adherence since the former Czechoslovak Socialist Republic and its successor were parties. Turkmenistan acceded in its own right. The USSR was party to the Vienna Convention, but the successor states to the USSR largely regarded themselves as not succeeding to the treaty, with many of them later acceding in their own right. Armenia, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Lithuania and Uzbekistan are parties. Ukraine acceded in 1986 separately from the USSR. Since Azerbaijan has not confirmed that it has succeeded to it, we can presume it is not a party. There



Austria<sup>40</sup>, Belgium<sup>41</sup>, Bosnia and Herzegovina<sup>42</sup>, Canada<sup>43</sup>, China<sup>44</sup>, Colombia<sup>45</sup>, Denmark<sup>46</sup>, Egypt<sup>47</sup>, Germany<sup>48</sup>, Italy<sup>49</sup>,

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are also two other Vienna Conventions regarding treaties that are relevant. See Vienna Convention on Succession of States, *supra* note 35; Vienna Convention on Treaties between States, *supra* note 35, (not yet in force).

38. See *e.g.*, Moloud Sihali v. Sec'y of State for the Home Dep't, (2010) No. SC/38/2005 (S.I.A.C.)[6]–[7] (U.K.); MT, RB, & U v. Sec'y of State for the Home Dep't, [2007] E.W.C.A. (Civ) 808, [125]–[129], [168], [2008] Q.B. 533, 583–585, 593;

39. See, *e.g.*, Amnesty Int'l, *Dangerous Deals*, *supra* note 13, at 33 n.3;

40. See, *e.g.*, Amnesty Int'l, *Europe and Central Asia: Summary of Concerns in the Region, January-June 2004*, Sept. 1, 2004, at 6 [hereinafter Amnesty Int'l, *Central Asia*] (regarding the case of Akhmed A., expelled to Uzbekistan). *But see* Amnesty Int'l, *Dangerous Deals*, *supra* note 13, at 18 (noting that Austria appears to have ceased relying on assurances).

41. See, *e.g.*, M.S.S. v. Belg., App. No. 30696/09, Judgment Eur. Ct. H.R. (2011).

42. See, *e.g.*, Al Hanchi v. Bosnia & Herzegovina, App. No. 48205/09 Eur. Ct. H.R. ¶ 27 (2011); Amnesty Int'l, *Bosnia and Herzegovina: Deportation/Fear of Torture and Other Ill-Treatment: Awad Aiman*, AI Index EUR 63/004/2009 (May 6, 2009); Amnesty Int'l, *Bosnia and Herzegovina: Forcible Return/Fear of Torture or Ill-Treatment: Imad Al Husin*, AI Index EUR 63/005/2008 (Oct. 20, 2008).

43. See, *e.g.*, Suresh v. Minister of Citizenship & Immigration, 2002 SCC 1, [2002] 1 S.C.R. 3 (Can.); Mahjoub v. Minister of Citizenship & Immigration, 2006 FC 1503, [2007] 4 F.C.R. 247, paras. 39, 53 (Can. Fed. Ct.); Sing v. Minister of Citizenship & Immigration, 2006 FC 672, para. 6 (Can. Fed. Ct.).

44. See, *e.g.*, Amnesty Int'l, *USA: Fear of Forcible Return / Fear of Torture / Fear of Execution: Uighers Held in Guantanamo Bay*, AI Index AMR 51/147/2003 (Dec. 4 2003).

45. See, *e.g.*, Klein v. Russia, App. No. 24268/08 Eur. Ct. H.R. ¶¶ 21, 37–40 (2010).

46. See, *e.g.*, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on His Mission to Denmark*, Human Rights Council, ¶ 69, U.N. Doc. No. A/HRC/10/44/Add.2 (Feb. 18, 2009).

47. See, *e.g.*, Mahjoub, 2006 FC at ¶¶ 39, 53; Youssef v. Home Office, [2004] EWHC (QB) 1884 (Eng.); See Agiza v. Sweden, Commc'n No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (Comm. Against Torture 2005); Attia v. Sweden, Commc'n No. 199/2002, U.N. Doc. No. CAT/C/31/D/199/2002 (U.N. Comm. Against Torture, Nov. 24, 2003); Alzery v. Sweden, Commc'n No. 1416/2005, ¶¶ 3.6–3.9, U.N. Doc. CCPR/C/88/D/1416/2005 (Human Rights Comm. 2006).

48. See, *e.g.*, Gemeinsames Ministerialblatt (“GMBL”) 42-61, S. 877ff, sec. 60(2)(3) (Oct. 30, 2009); Verwaltungsgericht Düsseldorf [VG] [Administrative Trial Court for Düsseldorf] Mar. 4, 2009, *available at* [http://www.asyl.net/index.php?id=185&tx\\_ttnews\[tt\\_news\]=34308&cHash=518e0da6f1](http://www.asyl.net/index.php?id=185&tx_ttnews[tt_news]=34308&cHash=518e0da6f1); VG Düsseldorf, Jan 16, Case No. 21 K 3263/07.A, *available at* [http://www.asyl.net/index.php?id=185&tx\\_ttnews\[tt\\_news\]=33716&cHash=7a95fe16d8](http://www.asyl.net/index.php?id=185&tx_ttnews[tt_news]=33716&cHash=7a95fe16d8).

49. See, *e.g.*, Saadi v. Italy, App. No. 37201/06 Eur. Ct. H.R. ¶ 51 (2009); Ben Khemais v. Italy, App. No. 246/07 Eur. Ct. H.R. (2009).

Kyrgyzstan<sup>50</sup>, Morocco<sup>51</sup>, the Netherlands<sup>52</sup>, Russia<sup>53</sup>, Slovakia<sup>54</sup>, Spain<sup>55</sup>, Sweden<sup>56</sup>, Syria<sup>57</sup>, Tunisia<sup>58</sup>, Turkmenistan<sup>59</sup>, the United Kingdom<sup>60</sup>, Uzbekistan<sup>61</sup>, and possibly Azerbaijan.<sup>62</sup>

50. Maksudov, et al. v. Kyrgyzstan, Comm. Nos. 1461, 62, 76, 77 2006, ¶12.5, UN Doc. CCPR/C/93/D/1461, 1462, 1476 & 1477/2006 (Human Rights Comm. July 30, 2008)

51. See, e.g., In re Charkaoui, [2005] FC 1670, [2006] 3 F.C.R. 325, para. 14 (Can. Fed. Ct.).

52. See, e.g., HR 7 mei 2004, NJ 2007, 276 m.nt. AHK (Kesbir) (Neth.) (rejecting reliance on assurances); Ramzy v. Netherlands, App. No. 25424/05, Eur. Ct. H.R. ¶¶ 106, 126 (2008).

53. See, e.g., Klein v. Russia, App. No. 24268/08 Eur. Ct. H.R. ¶¶ 21, 37–40 (2010); Ryabikin v. Russia, App. No. 8320/04 Eur. Ct. H.R. ¶ 109 (2008); Ismoilov v. Russia, App. No. 2947/06 Eur. Ct. H.R. ¶¶ 30–31 (2008); Shamayev v. Georgia, App. No. 36378/02 Eur. Ct. H.R. ¶¶ 20, 62 (2005); Amnesty Int'l, *Dangerous Deals*, supra note 13 (discussing Spain's extradition of Murad Gasayev, a Chechen, to Russia); Amnesty Int'l, *Central Asia*, supra note 40 (regarding the case of Akhmet A.).

54. See, e.g., Amnesty Int'l, *Slovakia: Constitutional Court Upholds the Absolute Ban on Torture*, AI Index EUR 72/005/2008 (June 27, 2008) (reporting the case of Mustapha Labsi in the Constitutional Court of Slovakia (June 2008), which rejected reliance on Algerian assurances).

55. See, e.g., Amnesty Int'l, *Dangerous Deals*, supra note 13, at 25–27.

56. See, e.g., Agiza v. Sweden, Commc'n No. 223/2003, ¶ 4.12 U.N. Doc. CAT/C/34/D/233/2003 (Comm. Against Torture 2005); Alzery v. Sweden, Commc'n No. 1416/2005, ¶¶ 3.6–3.9 (Hum Rts. Comm., Nov. 10, 2006); Switzerland, see e.g., Khouzam v. Hogan, 529 F. Supp. 2d 543, 547, 565–66 (M.D. Pa. 2008) (“Austria, Canada, Germany, Netherlands, Russia, Sweden, Switzerland, Turkey and the United Kingdom, all parties to [the Convention Against Torture], provide for judicial review of the reliability and sufficiency of diplomatic assurances.”); see also Roper v. Simmons, 543 U.S. 551, 604–05 (2005) (indicating it is proper to consider the legislation of other countries in US Constitutional interpretation).

57. See, e.g., *Diplomatic Assurances and Rendition to Torture: The Perspective of the State Department's Legal Adviser: Hearing Before the Subcomm. On International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. 1–2, 35–40 (2008) (discussing the torture of Maher Arar after transfer to Syria based on diplomatic assurances); 29-B DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2004: SYRIA 1979 (2005).

58. See, e.g., *Verwaltungsgericht Düsseldorf [VG] [Administrative Trial Court for Düsseldorf] Mar. 4, 2009, Case No. 11 K 4716/07.A, available at [http://www.asyl.net/index.php?id=185&tx\\_ttnews\[tt\\_news\]=34308&cHash=518e0da6f1](http://www.asyl.net/index.php?id=185&tx_ttnews[tt_news]=34308&cHash=518e0da6f1)*; Al Hanchi v. Bosnia & Herzegovina, App. No. 48205/09 Eur. Ct. H.R. ¶ 27 (2009); Ben Khemais v. Italy, App. No. 246/07 Eur. Ct. H.R. ¶¶ 26–28 (2009); Saadi v. Italy, App. No. 37201/06 Eur. Ct. H.R. ¶¶ 51–55 (2009).

59. See, e.g., Ryabikin v. Russia, App. No. 8320/04 Eur. Ct. H.R. ¶¶ 109–19 (2008).

60. See, e.g., *id.*; U.K.–Eth. MOU, supra note 6, U.K.–Jordan MOU, supra note 6, U.K.–Leb. MOU, supra note 6; Libya–U.K. MOU, supra note 6; Youssef v. Home Office, [2004] EWHC (QB) 1884 (Eng.); AS & DD v. Sec'y of State for the Home Dep't, [2008] EWCA (Civ) 289, [2008] H.R.L.R. 28; MT, RB, & U v. Sec'y of State for the Home Dep't, [2007] EWCA (Civ) 808, [125]–[129], [168],

Additionally, Ethiopia<sup>63</sup> and the United States<sup>64</sup> have signed the Convention but have not ratified it.<sup>65</sup> By contrast, the following states which are parties to diplomatic assurances discussed here are neither signatories nor parties to the Convention: France<sup>66</sup>, India<sup>67</sup>, Jordan<sup>68</sup>, Lebanon<sup>69</sup>, Libya<sup>70</sup>, Sri Lanka,<sup>71</sup> Turkey,<sup>72</sup> the United Arab Emirates,<sup>73</sup> and Yemen.<sup>74</sup>

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[2008] Q.B. 533, 583–85, 593; DD & AS v. Sec'y of State for the Home Dep't, (2007) Nos. SC/42/2005 and SC/50/2005 (S.I.A.C.); Moloud Sihali v. Sec'y of State for the Home Dep't, (2010) No. SC/38/2005 (S.I.A.C.); Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. 1831, ¶ 37 (1996); Othman (Abu Qatada) v. United Kingdom, App. No. 8139/09 Eur. Ct. H.R. (2012); Comm. Against Torture, Consideration of Reports Submitted By States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture, ¶ 4(d), U.N. Doc. CAT/C/CR/33/3 (Dec. 10, 2004).

61. See, e.g., Ismoilov v. Russia, App. No. 2947/06 Eur. Ct. H.R. ¶¶ 30–31 (2008); Mamatkulov & Askarov v. Turkey, 2005-I Eur. Ct. H.R. 295 ¶¶ 28–31; and Yemen, see e.g., Abdah v. Bush, No. 04-1254 (D.D.C. Mar. 12, 2005) (temporary restraining order); Abdah v. Bush, No. 04-1254 (D.D.C., Mar. 29, 2005) (prohibiting transfer of detainees to foreign jurisdictions without notice).

62. See, e.g., Pelit v. Azerbaijan, Commc'n No. 281/2005, ¶ 4.8, U.N. Doc. No. CAT/C/38/D/281/2005 (Comm. Against Torture 2007).

63. See, e.g., U.K.–Eth. MOU, *supra* note 6.

64. See, e.g., 8 C.F.R. § 208.18(c); Yusupov v. Attorney Gen., 518 F.3d 185, 189 n.4 (2008) (indicating assurances could be sufficient but not relying on them).

65. *Id.*

66. See e.g., Amnesty Int'l, Russian Federation: Rule without Law: Human Rights Violations in the North Caucasus, at 11, AI Index EUR 46/012/2009 (July 2009) (Russian assurances to France).

67. See e.g., Chahal v. United Kingdom, 1996-V Eur. Ct. Hum. Rts. 1831, ¶ 37 (1996); Iraq, see, e.g., Munaf v. Geren, 553 U.S. 674, 702 (2008) (Iraqi assurances to U.S.).

68. See, e.g., U.K.–Jordan MOU, *supra* note 6; VG Düsseldorf, Jan. 16, Case No. 21 K 3263/07.A, available at [http://www.asyl.net/index.php?id=185&tx\\_ttnews\[tt\\_news\]=33716&cHash=7a95fe16d8](http://www.asyl.net/index.php?id=185&tx_ttnews[tt_news]=33716&cHash=7a95fe16d8); Othman (Abu Qatada) v. United Kingdom, App. No. 8139/09 Eur. Ct. H.R. (2012).

69. See, e.g., U.K.–Leb. MOU, *supra* note 6.

70. See, e.g., Libya–U.K. MOU, *supra* note 6; AS & DD v. Sec'y of State for the Home Dep't, [2008] EWCA (Civ) 289, [2008] H.R.L.R. 28 (U.K.); DD & AS v. Sec'y of State for the Home Dep't, (2007) Nos. SC/42/2005 and SC/50/2005 (S.I.A.C.) (U.K.).

71. See, e.g., Suresh v. Minister of Citizenship & Immigration, 2002 SCC 1, [2002] 1 S.C.R. 3, (Can.).

72. See, e.g., HR 7 mei 2004, NJ 2007, 276 m.nt. AHK (Kesbir) (Neth.); Pelit v. Azerbaijan, Commc'n No. 281/2005, ¶ 4.8, U.N. Doc. No. CAT/C/38/D/281/2005 (Comm. Against Torture 2007); Mamatkulov & Askarov v. Turkey, 2005-I Eur. Ct. H.R. 295.

73. See, e.g., Lodhi v. Sec'y of State for the Home Dep't, [2010] EWHC (Admin) 567, [62]–[67] (Eng.) (rejecting reliance on assurances).

74. See, e.g., Abdah v. Bush, No. 04-1254 (D.D.C. Mar. 12, 2005) (temporary restraining order); Abdah v. Bush, No. 04-1254 (D.D.C., Mar. 29,

However, the Vienna Convention definition may not be limited to only those agreements undertaken by signatories to it.<sup>75</sup> The convention's terms have also been held to constitute a definitive definition of a treaty and have otherwise inspired domestic definitions of a treaty.<sup>76</sup> Many terms of the Vienna Convention have also been found to restate customary international law, and while it is not clear that the convention's definition of treaty is such a term, the International Court of Justice ("ICJ") has reached a conclusion suggesting that it is.<sup>77</sup>

There are several elements of the Vienna Convention's definition that, when met, demand that a given instrument be regarded as a treaty, at least for purposes of the convention's rules on reservations, invalidity, and interpretation. Those elements are (1) that the agreement be concluded between States; (2) that the agreement be made in writing; and (3) that it be governed by international law. Additionally, in case of any doubt, two factors are specifically designated as irrelevant to this inquiry: (a) its form in two or more related instruments; and (b) its particular designation.

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2005) (prohibiting transfer of detainees to foreign jurisdictions without notice).

75. See generally *Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.)*, 2008 I.C.J. Reps. 177 (June 4) (where neither France nor Djibouti objected or argued against the application of the Vienna Convention to their dispute, despite the fact that neither is a party).

76. See, e.g. *Harksen v. President of the Republic of South Africa & Others* 1999 (A) (S. Afr.) ("The term 'international agreement', according to Mr. Seligson, is wider than 'treaty' and includes *ad hoc* agreements of an informal nature entered into between South Africa and other States. He referred in this regard to [art. 2.1 (a) of] the Vienna Convention on the Law of Treaties (1969) as being declarato[r]ly of customary international law and hence becoming part of South African law in terms of s 232 of the Constitution."), *aff'd*, 2000 (2) SA 825 (CC), *reprinted in* 132 I.L.R. 529, 541 (S. Afr. (A) 1999). See also Federal Law of Russian Federation on International Treaties of the Russian Federation, 1995, art. 2 (Russ.), *in* WILLIAM E. BUTLER, *RUSSIAN LAW OF TREATIES* 13 (1997) (defining "treaty" under domestic law as "an international agreement concluded by the Russian Federation with a foreign State(s) or with an international organization in written form and regulated by international law, irrespective of whether such agreement is contained in one or in several related documents, and also irrespective of its specific name."); Constitutional Reform & Governance Act, 2010, c. 25 (Eng.) (defining "treaty" in the sense of treaties that must be laid before Parliament, as "(1) a written agreement — (a) between States or between States and international organisations, and (b) binding under international law. (2) But 'treaty' does not include a regulation, rule, measure, decision or similar instrument made under a treaty (other than one that amends or replaces the treaty (in whole or in part)).").

77. See *Case Concerning Mar. Delimitation & Territorial Questions Between Qatar & Bahrain (Qatar v. Bahr.)*, 1995 I.C.J. Reps. 6 (Feb. 15); *Case Concerning Mar. Delimitation & Territorial Questions Between Qatar & Bahrain (Qatar v. Bahr.)*, 1994 I.C.J. Reps. 112 (July 1).

## A. AN AGREEMENT CONCLUDED BETWEEN STATES

## 1. In General

The first question is whether assurances amount to agreements at all.<sup>78</sup> Not all pledges amount to agreements. For example, in the *Nicaragua* case, the ICJ held that the letter sent by Nicaragua to the Organization of American States was a “political pledge” only, without legal effects. However, before we jump to the conclusion that pledges and similar promises are not legally binding, we should observe that the ICJ appears to have reached that conclusion because the pledge contained no concrete commitments.<sup>79</sup> In short, Nicaragua did not agree

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78. See Vienna Convention on Treaties, *supra* note 35; Vienna Convention on Succession of States, *supra* note 35; Vienna Convention on Treaties between States, *supra* note 35. For purposes of this discussion we will omit an analysis of whether the entities are states or not. See e.g. Wei Wang, *CEPA: A Lawful Free Trade Agreement Under One Country, Two Customs Territories?*, 10 L. & BUS. REV. AMS. 647, 656–57 (2004) (arguing that the CEPA does not qualify as a treaty because it does not satisfy the Vienna Convention requirement of an agreement *between states*).

79. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 261 (June 27):

However, the Court is unable to find anything in these documents, whether the resolution or the communication accompanied by the ‘Plan to secure Peace’, from which it can be inferred that any legal undertaking was intended to exist. Moreover, the Junta made it plain in one of these documents that its invitation to the Organization of American States to supervise Nicaragua's political life should not be allowed to obscure the fact that it was the Nicaraguans themselves who were to decide upon and conduct the country's domestic policy. The resolution of 23 June 1979 also declares that the solution of their problems is a matter “exclusively” for the Nicaraguan people, while stating that that solution was to be based . . . on certain foundations which were put forward merely as recommendations to the future government. This part of the resolution is a mere statement which does not comprise any formal offer which if accepted would constitute a promise in law, and hence a legal obligation. Nor can the Court take the view that Nicaragua actually undertook a commitment to organize free elections, and that this commitment was of a legal nature. The Nicaraguan Junta of National Reconstruction planned the holding of free elections as part of its political programme of government following the recommendation of the XVIIth Meeting of Consultation of Foreign Ministers of the Organization of American States. This was an essentially political pledge, made not only to the Organization, but also to the people of Nicaragua, intended to be its first beneficiaries. But the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections. . . . It is evident that provisions of this kind are far from being a commitment as to the use of particular political mechanisms.

Also note that the terms of the Vienna Convention defining a treaty as an agreement between states have been complemented by the Vienna Convention on the Law of Treaties between States and International Organizations or

to anything.<sup>80</sup> The concept of “agreement” appears, therefore, to contemplate bilateral (at least) communication regarding a *commitment*.

What it means for a country to make an agreement is a question that can be analyzed by reference to domestic contract law.<sup>81</sup> We can and should consider private law contract analogies in our analysis of the law of treaties, especially because every legal system selects certain agreements to be

between International Organizations, which provides the same definition for agreements with international organizations. See Vienna Convention on Treaties between States, *supra* note 35. Arguably, its terms restate customary international law.

80. Also, the communication from Nicaragua was unilateral and, without reliance by any other state, did not satisfy the *Nuclear Tests* standard for binding unilateral statements. *But see infra* Sec. III (discussing the questionable nature of reliance in the *Nuclear Tests* cases).

81. Hersch Lauterpacht argued that we can look to private law to assist in resolving issues of international law, and the practice that has since become almost axiomatic. See generally *Second Report on the Law of Treaties*, 1954 II Y.B. Int'l L. Comm'n 125, ¶ 10, U.N. Doc. A/CN.4/SER.A/1954/Add.1; HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 115, 205 (1933); HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (1927). In the *Second Report on the Law of Treaties*, Lauterpacht cited *Rose & Frank Co. v. R. Crompton Bros. Ltd.*, [1923] 2 K. B. 261, 293 (Eng.):

“To create a contract there must be a common intention of the parties to enter into legal obligations . . . Such an intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts. It may be negative impliedly by the nature of the agreed promise or promises.”

Lauterpacht also cited *Balfour v. Balfour*, [1919] 2 K.B. 571 (Eng.):

“[such agreements] are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon.”

See also Wolfgang Friedmann, *The Uses of ‘General Principles’ in the Development of International Law*, 57 AM. J. INT’L L. 279 (1963); MCNAIR, *supra* note 32; WOLFGANG FRIEDMANN, LAW IN A CHANGING SOCIETY 383 (1959). It is now commonplace to observe that many aspects of the law of treaties have come to us from principles of domestic contract law. See *Law of Treaties*, [1953] 2 Y.B. Int’l L. Comm’n 90, art. 1, comments, U.N. Doc. A/CN.4/63 (noting that a treaty embodied contractual elements).

Admittedly contract law is not a perfect parallel to treaty law, so we must remain mindful of the important differences, but the parallels between treaties and private contract law have been highlighted many times. See *e.g.* ANTHONY CARTY, THE DECAY OF INTERNATIONAL LAW?: A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION IN INTERNATIONAL AFFAIRS (1986); SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945–1986 (1989).

legally binding and certain agreements not to be.<sup>82</sup> Domestic contract law looks for a *consensus ad idem*<sup>83</sup>—an objective assessment of whether the parties agreed to the same thing. This assessment is, of course, partly a legal fiction;<sup>84</sup> the interpreter of the instrument will look for evidence that the parties “said the same thing,” not for what they subjectively understood or intended.<sup>85</sup> Proving intent to create a new

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82. See e.g. Herbert Bernstein & Joachim Zekoll, *The Gentleman's Agreement in Legal Theory and in Modern Practice: United States*, 46 AM. J. COMP. L. SUPP. 87, 88 (1998); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992). In addition to agreements that are intentionally removed from the legal system, most legal systems also provide for contracts that are non-binding despite their intent to be governed by law. See, e.g., Comm'n on European Contract Law, *Principles of European Contract Law: Excessive Benefit or Unfair Advantage*, art. 4:109 (1999) [hereinafter PECL], available at [http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/PECL%20engelsk/engelsk\\_partI\\_og\\_II.htm](http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm) (providing that a lawfully concluded contract is not enforceable in certain circumstances).

83. See generally FRIEDRICH KARL VON SAVIGNY, *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* (1840).

84. See generally Anne de Moor, *Intention in the Law of Contract: Elusive or Illusory?*, 106 L. Q. REV. 632, 648 (1990) (“[T]he intent of man cannot be tried, for the devil himself knows not the intent of man.”). It is arguable that knowing the intent of a state is perhaps even more difficult than knowing the intent of a man. Contract law in continental Europe is similar. For example, the PECL states that “[t]he intention of a party to be legally bound by contract is to be determined from the party's statements or conduct as they were reasonably understood by the other party.” PECL, *supra* note 82, at art. 2:102.

85. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897):

From the time of the Romans down to now, this mode of dealing has affected the language of the law as to contract, and the language used has reacted upon the thought. We talk about a contract as a meeting of the minds of the parties, and thence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known of the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent. . . . The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said. In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs — not on the parties' having *meant* the same thing but on their having *said* the same thing. . . .

See also Jan Klabbbers, *How to Defeat a Treaty's Object and Purpose Pending Entry Into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNAT'L L. 283, 305 (2001) (“Nothing is particularly novel about a manifest intent test. One could argue that in many cases when trying to determine whether a violation of

obligation can be problematic, but courts and commentators are always attempting to discover the intent of the parties to agreements. A similar problem occurs in cases in which the international legal personality of an international organization is disputed and the organization's constitutive instrument is silent on the question of personality. Courts address the problem by looking to what the constitutive instrument objectively did, rather than to the subjective understandings of its signers.<sup>86</sup>

Thus, the Vienna Convention's requirement of an agreement should not be read to mean that a pledge cannot result in legal effects; rather it means that a mutual agreement to some *commitment* must be made before a communication may be called an agreement. It also does not mean that only synallagmatic agreements are agreements, as there does not appear to be any *quid pro quo* requirement in the Vienna Convention. Instead, the parties must simply, objectively, communicate an identical promise that in the future one or both will do a certain thing.

If an agreement stating commitments is found, the next question is whether the assurances are creating new,

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international law has taken place, intent is 'constructed' or implied from the nature of the acts themselves'. Much the same applies to reconstructing the terms of an agreement. In the context of determining whether there is an intent to be bound by a treaty, a manifest intent test also is involved.") (internal citations omitted) (citing Martti Koskenniemi, *Evil Intentions or Vicious Acts? What is Prima Facie Evidence of Genocide?*, in LIBER AMICORUM BENGT BROMS 180, 196 (Matti Tupamaki ed., 1999); FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 235 (1989)). Comparisons to finding objective intent in the field of tort law can also be drawn. See John Finnis, *Intention in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 229, 229 (David G. Owen ed., 1995) ("[Intention is] the linking of means and ends in a plan or *proposal-for-action adopted by choice* in preference to alternative proposals (including to do nothing)"). See H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 136 (1968), for an argument that negligence is an emanation of subjective intent rather than of inadvertence.

86. See e.g. Tarcisio Gazzini, *NATO's Role in the Collective Security System*, 8 J. CONFLICT & SECURITY L. 231, 240–41 (2003) (citing IAN BROWNLEE, PRINCIPLES OF INTERNATIONAL LAW 678–80 (1998)):

The Washington Treaty is silent on the international legal status of the Alliance. A specific norm in the constituent treaty, however, is neither sufficient nor necessary to establish the international personality of the organization. What needs to be demonstrated is the exercise, based on an autonomous decision-making process, of powers not limited to the national systems of one or more member states.



additional obligations, and are thus an agreement, or whether they constitute a re-statement of existing obligations that are obligatory by force of a different source of law.

Several examples will illustrate the possibility that an obligation may be doubly owed by force of different sources of law. One way in which a subsequent, additional obligation might be incurred, in addition to the pre-existing obligation, is through the law of international organizations and the legal effect of their acts. A recent example is the Chapter VII resolution by the UN Security Council regarding the violence in Libya.<sup>87</sup> In the resolution, the Security Council reiterated its referral of the situation to the International Criminal Court and established a flight ban, among other measures.<sup>88</sup> It also demanded that attacks on civilians cease,<sup>89</sup> and that Libya comply with its legal obligations under international law, specifically international humanitarian law, human rights law and refugee law.<sup>90</sup> Of course, Libya was already held to those obligations under international law, notwithstanding the UN Security Council Resolution, but now it has the additional obligation under the UN Charter to comply with a Chapter VII resolution of the Security Council regarding those obligations. Its obligations were doubly owed, due to having been made obligatory by two different sources.

Another illustrative example of legal duties made obligatory by different sources of law occurs in the context of “umbrella clauses” in Bilateral Investment Treaties (“BITs”) and similar agreements.<sup>91</sup> The language of such a clause varies

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87. See S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011). It is, however, doubtful that the Security Council finding that “the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity” and the affirmation of the conclusions by other international organizations that “serious violations of human rights and international humanitarian law . . . have been and are being committed in the Libyan Arab Jamahiriya” is in any way binding on the International Criminal Court, the Court not being a party to the UN Charter, among other considerations. See *id.*

88. See S.C. Res. 1973, *supra* note 87, ¶¶ 6–12, 17–18 (regarding the flight ban); *id.* ¶¶ 19–21 (regarding freezing assets); *id.* ¶¶ 22–23 (regarding designated certain individuals).

89. See *id.* ¶ 1 (“Demands the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians”).

90. See *id.* ¶ 3. (“Demands that the Libyan authorities comply with their obligations under international law, including international humanitarian law, human rights and refugee law . . .”).

91. In the literature, these clauses are also referred to as ‘elevator,’ ‘mirror’ or ‘parallel’ clauses, among other names. See Thomas W. Wälde, *The “Umbrella” Clause in Investment Arbitration: A Comment on Original*

from “[e]ach Party shall observe any obligation it may have entered into with regard to investments”<sup>92</sup> to “[e]ach Contracting Party shall observe any contractual obligation it may have entered into towards an investor of the other Contracting Party with regard to investments approved by it in its territory,”<sup>93</sup> and all the way to the extreme of “[a] Contracting Party shall, subject to its law, do all in its power to ensure that a written undertaking given by a competent authority to a national of the other Contracting Party with regard to an investment is respected.”<sup>94</sup> Treaties also situate these provisions in varying sections, such as in sections providing for protections and commitments,<sup>95</sup> or in sections divorced from specific obligations and dispute resolution mechanisms.<sup>96</sup> That these provisions are slightly different from each other, and are stated in different contexts, suggests differing degrees of commitment.

The question that arbitral tribunals have to address when

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*Intentions and Recent Cases*, 6 J. WORLD INVESTMENT & TRADE 183, 185 (2005); Anthony C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 ARB. INT’L 411, 412 (2004). An example of such a provision in a multilateral treaty would be the Energy Charter Treaty. See Energy Charter Treaty art. 10(1), Dec. 17, 1994, 2080 U.N.T.S. 100 (“Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.”).

92. Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.–Arg., art. 2(2)(c), Nov. 14, 1991, S. TREATY DOC. NO. 103–2 (1993). See also Agreement Between the Lao People’s Democratic Republic and the Federal Republic of Germany Concerning the Encouragement and Reciprocal Protection of Investments, Laos–Ger., art. 8(2), Aug. 9, 1996, 2109 U.N.T.S. 32 [hereinafter German Model BIT] (“Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by nationals or companies of the other Contracting Party.”).

93. Agreement Between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments, Austria–Croat., art. 8(2), Feb. 19, 1997, 2098 U.N.T.S. 517, 529 [hereinafter Austrian Model BIT].

94. Agreement Between Australia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments, Austl.–Pol., art. 10, May 7, 1991, 1680 U.N.T.S. 235.

95. See, e.g., Agreement Between the Belgo-Luxemburg Economic Union and the Government of the United Mexican States on the Reciprocal Promotion and Protection of Investments, Lux.–Mex., art. 10, Aug. 27, 1998, 223 U.N.T.S. 3, 21; Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Socialist Republic of Vietnam, Neth–Viet., art. 3, Mar. 10, 1994, 2240 U.N.T.S. 355, 365 [hereinafter Netherlands Model BIT].

96. See e.g. German Model BIT, *supra* note 92, at art. 8. It is not entirely clear whether the placement of a clause and the section headings and groupings constitute context for purposes of treaty interpretation.

determining their jurisdiction under such treaties is whether such a clause serves to transform existing obligations in a contract between a state and an investor into additional obligations under a BIT. If so, any violation of the investment contract by the state would necessarily result in a violation of the treaty in addition to any violation under domestic contract law. Not all investment treaties include such a provision,<sup>97</sup> so where one is included, its presence appears to be meaningful, suggesting a meaning beyond simply restating the binding nature of the contract. Scholarly opinion tends to favor the opinion that the clause creates new, additional obligations under international law.<sup>98</sup> The case law of investment arbitral tribunals is divided, but there is an observable trend away from a very restrictive reading of these clauses toward a more expansive reading.<sup>99</sup> Nonetheless, factors such as the clause's

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97. *Compare* Agreement Between the Government of the Kingdom of Sweden and the Government of the Republic of Albania on the Promotion and Reciprocal Protection of Investments, Swed.–Alb. art. 10, Mar. 31, 1995, 2087 U.N.T.S. 291, 307 [hereinafter Swiss Model BIT] and United Kingdom of Great Britain and Northern Ireland and Argentina Agreement for the Promotion and Protection of Investments, U.K.–Arg., art. 2(2), Dec. 11, 1990, 1765 U.N.T.S. 33, 35 [hereinafter U.K. Model BIT] (where it is included) with Agreement Between the Government of Hong Kong and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments, H.K.–Fr., art. 3, Nov. 30, 1995, 2053 U.N.T.S. 221, 237 and Agreement Between the Government of the Republic of Peru and the Government of the Republic of France on the Reciprocal Promotion and Protection of Investments, Fr.–Peru, art. 2, 1992 and Agreement Between the Government of the Republic of France and the Government of the Russian Federation on the Reciprocal Promotion and Protection of Investments, Fr.–Russ., art. 8, 1989; Agreement Between the Government of Hong Kong and the Government of Japan for the Promotion and Protection of Investment, H.K.–Japan, art. 2(3), 1997; Agreement Between the Government of Japan and the Government of the Russian Federation Concerning the Promotion and Protection of Investments, Japan–Russ., art. 3(3), 1998, (where it is missing).

98. See Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INVESTMENT & TRADE 231 (2004); F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT. YB INT'L L. 241, 246 (1981). *But see* Wälde, *supra* note 91 (taking a middle position that only very large investments would suggest the exercise of sovereign functions); Charles N. Brower, *The Future of Foreign Investment — Recent Developments in the International Law of Expropriation and Compensation*, in PRIVATE INVESTORS ABROAD — PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1975 93, 105 (Virginia S. Cameron ed., 1976).

99. See *LG & E Energy Corp. v. Argentine Republic*, I.C.S.I.D. Case No. ARB/02/1, Decision on Liability, ¶¶ 169–75 (2006); *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, (Oct. 12, 2005), <http://italaw.com/documents/Noble.pdf>; *Eureko B.V. v. Republic of Poland*, Partial Award (Aug. 19, 2005), 12 ICSID Rep. 331 (2007); *Sempra Energy Int'l v. Argentine Republic*, I.C.S.I.D. Case No ARB/02/16, Decision on Objections to

precise text and location in the treaty instrument may play some role in particular interpretations, because each clause must be assessed on its own merits.<sup>100</sup> However, this individual variance does not detract from the general conclusion that a treaty provision creating an obligation of the state to observe undertakings can operate to create international legal responsibility for a violation of a contract with a private investor.

This means that even where an instrument restates existing obligations, it may still constitute a binding agreement to re-impose those obligations under another source of law.<sup>101</sup> In other cases, however, an instrument might simply restate obligations that already exist under international law in a non-binding way. Thus the instrument as a whole would only serve as a subsidiary source of law.

## 2. Application to Diplomatic Assurances

The conclusion that additional obligations are being undertaken by givers of diplomatic assurances is borne out in state practice. Diplomatic assurances often contain obligations that are additional to and distinct from a state's pre-existing obligations under international law. These additional pledges are often very clear—*e.g.* the obligation to permit monitors<sup>102</sup>—

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Jurisdiction (May 11, 2005); *Waste Mgmt Inc. v. United Mexican States*, I.C.S.I.D. Case No. ARB(AF)/00/3, Award, ¶ 73 (Apr. 30, 2004); *SGS Société Générale de Surveillance S.A. v. Republic of Philippines*, I.C.S.I.D. Case No. ARB/02/6, Decision on Objections to Jurisdiction, ¶¶ 130–135 (Jan. 29, 2004).

100. See *SGS Société Générale de Surveillance, S.A. v. Islamic Republic Pakistan*, I.C.S.I.D. Case No. ARB(AF)/00/3 (where the tribunal concluded that the section of the treaty where the umbrella clause was situated suggested that it was not an additional, enforceable undertaking). *But see* *SGS Société Générale de Surveillance S.A. v. Republic of Philippines*, I.C.S.I.D. Case No. ARB/02/6 (concluding the opposite—that situation of the clause was not determinative).

101. See *e.g.* UNHCR, *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")*, (Aug. 9, 1999), U.N. Doc. No. HRP/PT/8/Rev.1 [hereinafter *Istanbul Protocol*] (restating obligations under international law regarding torture, although for purposes of this analysis, this document is assumed to be non-legally-binding).

102. See *Alzery v. Sweden*, Commc'n No. 1416/2005, ¶ 3.28, U.N. Doc. CCPR/C/88/D/1416/2005 (Human Rights Comm., Nov. 10, 2006):

On 21 September 2005, Parliament's Standing Committee on the Constitution reported on an investigation that had been initiated in May 2004 at the request of five members of Parliament . . . . With respect to the assurances procured, the Committee was of the view that a more detailed plan for a monitoring mechanism had not been agreed with the Egyptian authorities and appears not to have existed at all prior to the decision to expel. This shortcoming was reflected in

and they indicate that *some* additional agreement is being reached already. Additionally, where diplomatic assurances reaffirm existing international obligations, they usually contain very strong language normally reserved for binding commitments—*e.g.* that the assuring state “will” comply with a certain pre-existing obligation.<sup>103</sup> A restatement of pre-existing obligations might constitute a new, supplementary obligation if the new instrument produces separate and independent legal

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the actual monitoring of the guarantee, which was not consistent with the recommendations issued later on by the UN Special Rapporteur on issues relating to torture or the practice established by the Red Cross.

Regarding the provision for an independent monitoring body, there is a discrepancy between the Libyan and Lebanese MOUs on the one hand and the Jordanian MOU on the other. The Libyan and Lebanese MOUs provide for it in the “Application and Scope” section while the Jordanian and Ethiopian provides for it in the “Understandings” section. In all three cases, though, there does not appear to already be an obligation under international law to provide for monitoring bodies, so it must be seen as an additional obligation, and thus an agreement to do something. *See, e.g.,* Libya–U.K. MOU, *supra* note 6.

An independent body (“the monitoring body”) will be nominated by both sides to monitor the implementation of the assurances given under this Memorandum, including any specific assurances, by the receiving state. The responsibilities of the monitoring body will include monitoring the return of, and any detention, trial or imprisonment of, the person. The monitoring body will report to both sides.

*See also* U.K.–Jordan MOU, *supra* note 6, ¶ 4; U.K.–Leb. MOU, *supra* note 6 at 2; XX v. Sec’y of State for the Home Dep’t, [2007] S.I.A.C. No. SC/61/2007, ¶ 20 (Eng.) (Mitting, J.):

Having clarified that the parties will comply with their existing international obligations and will permit the creation and operation of an independent monitoring body, the agreements proceed to lay out several obligations on the states – which are understood to already bind the states under international law – but here are affirmed to apply to circumstances where a person is being returned under the agreement. Each provision in turn uses the phrasing “will be afforded adequate accommodation, nourishment, and medical treatment . . . .” *See* U.K.–Jordan MOU, *supra* note 6, ¶ 1 (“will be brought promptly before a judge”); *id.* ¶ 2 (“will be informed promptly . . . of any charge against him”); *id.* ¶ 3 (“will be entitled to contact . . . from the representative of an independent body”); *id.* ¶ 4 (“the receiving state will not impede . . . access . . . to the consular posts”); *id.* ¶ 5 (“will be allowed to follow his religious observance”); *id.* ¶ 6 (“will receive a fair and public hearing”); *id.* ¶ 7 (“will be allowed adequate time and facilities to prepare his defence”); *id.* ¶ 8. None of these understandings appear to be simply political statements in the sense of Nicaragua’s pledges to the OAS in the *Nicaragua* case, but are instead statements of the parties obligations under international law, applied to the particular case.

103. *But see* AUST, *supra* note 32, at 27 (arguing that “will” is less obligatory than “shall”).

effects. The precise content of some of the additional pledges may be somewhat unclear,<sup>104</sup> but objectively speaking it appears that states believe that giving an assurance imposes some obligations, additional to those already existing under international law.<sup>105</sup>

Some courts have agreed that diplomatic assurances create additional binding obligations. For instance, SIAC concluded that the MOU between Jordan and the United Kingdom did create its own obligations, so that it was not merely a restatement of existing international law.<sup>106</sup> SIAC also noted

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104. For example, what the steps are for investigating purported violations, *See Othman v. Sec'y of State for the Home Dep't*, [2007] S.I.A.C. No. SC/15/2005, ¶ 505 (Eng.)

It is right that the MOU does not specify the steps which are to be taken in order to investigate an allegation of a breach; indeed there is no provision for an investigation as such at all. Mr Oakden could only say that an investigation would be consonant with the MOU. However, in reality, if an allegation of a breach were made or if the Centre were to be hindered in the way in which it went about its work . . . the most obvious starting point for any diplomatic response would be to try to find out or to require that the Jordanians find out what had happened and to do so quickly.

105. *See id.* ¶¶ 502–03.

Second, the level of scrutiny which Jordan has accepted, through giving another individual state with which it has close relations a real interest in the way in which one of its own nationals is treated, cannot but show that it is willing to abide by the terms and spirit of the MOU. The MOU was not the result of a desire by Jordan to obtain the return of the Appellant. It gives standing to the UK and to another body to intervene, ultimately through diplomatic measures, in what it has done or might do. It knows that a failure on its part to observe the MOU and the monitoring arrangements would lead to a diplomatic response at all levels and quickly.

[H]ere there is a specific agreement, which has a specific purpose engaging the self-interest of the UK and, in differing ways, of Jordan. We accept that there must be a limit, albeit undefined, as to how far the UK Government would go in taking measures against Jordan in the event of a breach or a failure to investigate a well-founded allegation of a breach, or in the event of obstruction of the monitors. There is an obvious problem about the UK taking steps which would harm itself in the apparent interest of this Appellant. But there is scope and an incentive for measures to be taken by the UK and an incentive to take steps to obviate such a response on the part of the Jordanians.

106. *See id.* ¶ 176.

The MOU is couched as a document the obligations in which apply equally to removals from Jordan to the UK, and to those from the UK to Jordan. Each is obliged to “*comply with their human rights obligations under international law regarding a person returned under this arrangement*”. A monitoring body is envisaged. There are eight specific provisions which govern the proper treatment of those in custody . . . .

that, in contrast to the MOU, the “side letter” on the enforcement of the death penalty did not have the same gravity as the MOU on compliance with other human rights norms.<sup>107</sup> It used the expression “formal undertaking” to refer to the MOU, but not to the “side letter.”<sup>108</sup>

In addition, the European Court also appears to contemplate the possibility that diplomatic assurances may create additional binding obligations. In general, the Court appears to consider diplomatic assurances as a part of the factual assessment of the risk of ill treatment, and on occasion, the Court has found diplomatic assurances to be insufficient. The Court’s position on the legally binding nature of assurances is more equivocal, but in some cases, the Court has suggested that real obligations may need to be undertaken in assurances in order to render them valid. In *Saadi*, the Court cited the text of assurances in that case given by Algeria, and found fault with them.<sup>109</sup>

The note [verbale] in question, written in French, reads as follows:

. . . - please give assurances that the fears expressed by Mr Saadi of being subjected to torture and inhuman and degrading treatment on his return to Tunisia are unfounded;

- please give assurances that if he were to be committed to prison he would be able to receive visits from his lawyers and members of his family.

In addition, the Italian embassy would be grateful if the Tunisian authorities would keep it informed of the conditions of Mr Saadi’s detention if he were to be committed to prison.

. . . On 4 July 2007 the Tunisian Ministry of Foreign Affairs sent a note verbale to the Italian embassy in Tunis. Its content was as follows:

“The Minister of Foreign Affairs . . . has the honour to inform the ambassador that the Tunisian Government confirm that they are

107. *See id.* ¶ 177.

The side letter on the death penalty, whilst containing the UK Government’s policy on return where execution is a significant risk, recognises that “*for constitutional reasons*” Jordan is not able to give a formal undertaking in the MOU itself. It records that if someone returned were sentenced to death, “*the British Government would consider asking the Jordanian Government to commute the sentence*”. There was no formal response from the Jordanians; there was a debate over whether one had been expected. The terms of the UK letter had been discussed with them beforehand and agreed.

108. *Id.* The question of whether the agreement is governed by international law or not will be addressed in the section on that point.

109. *Saadi v. Italy*, Application No. 37201/06, Judgment, Eur. Ct. H.R. ¶¶ 51–55 (2008), reprinted in (2009) 49 E.H.R.R. 30 (ECHR (Gr. Ch.)); *Ben Khemais v. Italy*, Application No. 246/07, Eur. Ct. H.R. (2009), reviewed in 3 Eur. Hum. Rts L. Rev. 450–54 (2009).

prepared to accept the transfer to Tunisia of Tunisians imprisoned abroad once their identity has been confirmed, in strict conformity with the national legislation in force and under the sole safeguard of the relevant Tunisian statutes.”

... A second note verbale, dated 10 July 2007, was worded as follows:

“... The Minister of Foreign Affairs hereby confirms that the Tunisian laws in force guarantee and protect the rights of prisoners in Tunisia and secure to them the right to a fair trial. The Minister would point out that Tunisia has voluntarily acceded to the relevant international treaties and conventions...”

The Court held that the assurances were not sufficient because

... the Tunisian authorities did not provide such assurances. At first they merely stated that they were prepared to accept the transfer to Tunisia of Tunisians detained abroad... It was only in a second note verbale... that the Tunisian Ministry of Foreign Affairs observed that Tunisian laws guaranteed prisoners’ rights and that Tunisia had acceded to “the relevant international treaties and conventions”... In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.”<sup>110</sup>

This decision, and others like it, reaffirm the requirement that for assurances to even be considered in the assessment of risk to the person—*i.e.* to even constitute assurances in the first place—they must be individualized to that person or otherwise provide for specific promises regarding procedures and potential sentences in the particular case, which by implication is a pledge to respect that person’s individual human rights.<sup>111</sup> Where the assurances merely confirm already

110. *Id.* ¶ 147.

111. See *Kaboulov v. Ukraine*, Final Judgment, ¶¶ 33–34, 113, App. No. 41015/04, Eur. Ct. H.R. (Nov. 19, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=kaboulov%20|%20ukraine&sessionid=89536360&skin=hudoc-en>, (holding that the assurances, to be considering in reaching the factual determination of risk of maltreatment, must contain specific and explicit promises regarding the particular individual, not be merely blanket, non-individualized pledges). *Also see* *Khaydarov v. Russ.*, Application No. 21055/09, Eur. Ct. H.R., ¶ 111 (2010); *Klein v. Russ.*, Application No. 24268/08, (Eur. Ct. H.R. ¶ 55 (2010); *Hamraoui v. It.*, Application No. 16201/07, Eur. Ct. H.R., ¶ 15 (2009); *Bouyahia v. It.*, Application No. 46792/06, Eur. Ct. H.R. ¶ 16 (2009); *C.B.Z. v. It.*, Application No. 44006/06, Eur. Ct. H.R. ¶ 17 (2009); *Ben Salah v. It.*, Application No. 38128/06, Eur. Ct. H.R. ¶ 14 (2009); *Soltana v. It.*, Application No. 37336/06, Eur. Ct. H.R., ¶ 20 (2009); *O v. It.*, Application No. 37257/06, Eur. Ct. H.R. ¶ 18 (2009); *Darraji v. It.*, Application No. 11549/05, Eur. Ct. H.R. ¶ 35 (2009); *Sellem v. It.*,



existing domestic and international obligations, there is no additional substance to the assurances. There was no imperative to act using mandatory language such as “will comply”. There was not even a statement by the state issuing the assurances, Algeria that it would comply with its own laws. The Court was quite right in holding that there was no agreement to anything.

The European Court again considered assurances in *MSS v. Belgium* and upheld its assessment in *Saadi*.<sup>112</sup>

... The Belgian Government argued that in any event they had sought sufficient assurances from the Greek authorities that the applicant faced no risk of treatment contrary to the Convention in Greece. In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection . . .<sup>113</sup>

The Court added that the content necessary must include an additional undertaking regarding the specific person.

... Secondly, [the Court] notes that the agreement document . . . contains no guarantee concerning the applicant in person. No more did the information document the Belgian Government mentioned, provided by the Greek authorities, contain any individual guarantee; it merely referred to the applicable legislation, with no relevant information about the situation in practice.<sup>114</sup>

Other courts and foreign affairs ministries appear to hold the same opinion that additional undertakings, beyond mere restatements of the merely pre-existing obligations of international law, are included in assurances.<sup>115</sup> The conclusion

Application No. 12584/08, Eur. Ct. H.R. ¶ 18(2009); Cherif, Application No. 1860/07, Eur. Ct. H.R. ¶¶ 17, 26 (2009); Ben Khemais v. It., Application No. 246/07, Eur. Ct. H.R. ¶¶ 27–28 (2009); Muminov v. Russ., Application No. 42502/06, Eur. Ct. H.R. ¶¶ 12, 79, 97–8 (2008).

112. *M.S.S. v. Belg.*, Application No. 30696/09, Judgment (Eur. Ct. H.R. 2011).

113. *Id.* at ¶ 353.

114. *Id.* at ¶ 354.

115. See *Gasayev v. Spain*, Application No. 48514/06, Eur. Ct. H.R. ¶¶ 2–3 (2009) (observing that the assurances from Russia provided that the CAT Committee would be able to have private visits with the applicant); John R. Crook, ed., *State Department Legal Advisor Testifies Regarding Diplomatic Assurances*, 102 AM. J. INT'L L. 882 (2008) (providing transcript of testimony of John Bellinger before the US Congress).

... [T]he Department may obtain arrangements by which U.S. officials or an agreed upon third party will have physical access to the individual . . . in the custody of the foreign State for purposes of verifying the treatment he or she is receiving. In addition, . . . we . . . pursue any credible report and take appropriate action if we have reason to believe that those assurances will not be, or have not been, honored.

to be drawn is that in order to constitute a fact that might overcome a risk of ill treatment, an assurance must contain a *new undertaking*, which is an agreement between the states.<sup>116</sup>

In sum, assurances can provide for additional, mutual pledges to do some act. Similar to pledges undertaken in umbrella clauses, those pledges are made in addition to already existing obligations under general international law and do not result in mere restatement. Furthermore, some of the pledges are new and not elsewhere covered by pre-existing promises or international law, such as the provision for monitoring bodies. These assurances then must be seen as new obligations that the parties have agreed to, and thus we have an agreement in the sense of the Vienna Convention.

#### B. IN WRITING

The second element of the treaty definition is that the agreement be made in writing.<sup>117</sup> Assurances are issued in

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116. *Also see* M.S.S. v. Belg., Application No. 30696/09, Judgment Eur. Ct. H.R.(2011) (Bratza, J., partly dissenting, at ¶ 12).

The diplomatic assurances given by Greece to the Belgian authorities are found in the judgment not to amount to a sufficient guarantee since the agreement of Greece to take responsibility for receiving the applicant under the Dublin Regulation was sent after the order to leave Belgium had been issued and since the agreement document was worded in stereotyped terms and contained no guarantee concerning the applicant in person.

It is true that the assurances of the kind sought by the United Kingdom authorities in the *K.R.S.* case after interim measures had been applied and after specific questions had been put by the Court to the respondent Government, were not sought by the Belgian authorities in the present case. However, the assurances given in *K.R.S.* were similarly of a general nature and were not addressed to the individual circumstances of the applicant in the case . . . .

*Also see* Ismoilov *et al.* v. Russ., Application. No. 2947/06, Judgment, Eur. Ct. H.R., ¶ 127 (2008)

Finally, the Court will examine the Government's argument that the assurances of humane treatment from the Uzbek authorities provided the applicants with an adequate guarantee of safety. . . . Given that the practice of torture in Uzbekistan is described by reputable international experts as systematic . . . the Court is not persuaded that the assurances from the Uzbek authorities offered a reliable guarantee against the risk of ill-treatment.

117. Vienna Convention, *supra* note 35 art. 2(1); Vienna Convention on Succession of States in respect of Treaties, *supra* note 35 art. 2(1)(a); Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, *supra* note 35 art. 2(1)(a). *Also see* UN, TREATY SECTION OF THE OFFICE OF LEGAL AFFAIRS, TREATY HANDBOOK 23–6 (2006), *available at* <http://untreaty.un.org/English/TreatyHandbookEng.pdf> (hereinafter “UN TREATY HANDBOOK”); IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 610

either written<sup>118</sup> or oral<sup>119</sup> form. It would appear, however, that oral agreements could nonetheless qualify as treaties where there is a written documentation of the oral agreement. In such a case, the written documentation of the agreement is binding in its own right, notwithstanding the legal force of the oral agreement.<sup>120</sup>

Clearly for those assurances that have been documented in public writing, the second element is satisfied. As noted above,<sup>121</sup> however, many assurances are secret. In fact, assurances are often used for the very reason that they are secret; as well as because they are informal and are not subject to domestic, parliamentary scrutiny. The Vienna Convention, however, does not appear to require publicity of the writing as an inherent aspect of the written element of the definition of treaty.

Lack of publication *does* present itself as an issue with respect to deposit or registration, however. Failure to deposit a treaty with a depository does not render the agreement non-

(1998).

118. See, e.g., Abdelhedi v. It., Application No. 2638/07, Eur. Ct. H.R. ¶ 17 (2009); Hamraoui v. It., Application No. 16201/07, Eur. Ct. H.R. ¶ 15 (2009); Bouyahia v. It., Application No. 46792/06, ¶ 16 Eur. Ct. H.R. ¶ 16 (2009); C.B.Z. v. It., Application No. 44006/06, Eur. Ct. H.R. ¶ 17 (2009); Ben Salah v. It., Application No. 38128/06, Eur. Ct. H.R. ¶14 (2009); Soltana v. It., Application No. 37336/06, Eur. Ct. H.R. ¶ 20 (2009); O v. It., Application No. 37257/06 Eur. Ct. H.R. , ¶ 18(2009); Darraji v. It., Application No. 11549/05, Eur. Ct. H.R. ¶ 35 (2009); Sellem v. It., Application No. 12584/08, Eur. Ct. H.R. ¶ 18(2009); Cherif v. It., Application No. 1860/07, Eur. Ct. H.R. ¶ 26 (2009); Ben Khemais v. It., Application No. 246/07, Eur. Ct. H.R. ¶ 27 , (2009).

119. See, e.g., Shamayev v. Geor. & Russ., Eur. Ct. H.R. (2005) 153, 243 (court considers oral assurances, supplemented by written assurances, as relevant evidence).

120. This assumes that the parties have the intent to reduce their agreement to writing. We can imagine a situation where a written document, e.g. a politician's memoirs, personal negotiation notes or a secretly documented transcript of an oral agreement, contains a written agreement, but where the documentation in writing was performed against the will of the other party. We will limit our discussion in this paper to agreements where neither party argues that it was written without its consent. Surely in the cases of exchanges of notes the writing can be presumed to be intentional.

121. The secret nature of some of the diplomatic assurances is not, in itself, determinative of the statement's legal value. See e.g. Becker v. Préfet de la Moselle (= [Trib. de Sarreguemines] June 22, 1948 (Fr.) reprinted at Ann. Dig. 321-2 (1948) (holding that an unpublished, and therefore confidential, agreement was still an agreement under international law). In one case, a court held that the secret nature of the assurances was itself a bar to their use since the court would be prohibited from examining them, and thus could not examine whether the *non-refoulement* obligation was overcome). Also see Khouzam v. Hogan, et al., 529 F.Supp.2d 543 (M.D.Pa. 2008).

legal, though it may have effects on the ability to cite the agreement before a dispute settlement body.<sup>122</sup> Where certain documents have declared that they are not eligible for registration,<sup>123</sup> some authors have taken this language to mean that the instrument was not legally binding.<sup>124</sup> The Helsinki Accords are often cited as an example of this practice, which supposedly leads to a non-legally binding instrument.<sup>125</sup> This conclusion is a stretch, especially since drafters have been known to include explicit language that an agreement is not legally binding when that result is sought.<sup>126</sup> Given that a more clear formulation that attempts to exempt an agreement from law is available, the statement that an agreement may not be registered should be taken at face value. It means quite simply that the parties to the agreement may not register the agreement, the consequence of which is that they might not be able to invoke the agreement in a dispute between them. It is true that states party to the UN Charter have an obligation to register their treaties with the organization, but the consequences of failure to register are not that the treaty is non-binding, but rather that the treaty cannot be invoked in

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122. *Cf.* Covenant of the League of Nations, art. 18, June 28, 1919, *available at* [http://foundingdocs.gov.au/resources/transcripts/cth10\\_doc\\_1919.pdf](http://foundingdocs.gov.au/resources/transcripts/cth10_doc_1919.pdf) (“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.”) *with* Charter of the United Nations, art. 102, June 26, 1945, *available at* <http://www.un.org/en/documents/charter> (“[e]very 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 registered with the Secretariat and published by it.”)

123. *See, e.g.* Final Act of the Conference on Security and Co-operation in Europe [Helsinki Final Act], Aug. 1, 1975, *reprinted at* 14 INT’L L. MATS. 1292.

124. *See* AUST, *supra* note 32 at 34 (substituting the language of “not eligible for registration under Article 102 of the Charter” to “not eligible for registration [i.e. as a treaty] under Article 102 of the Charter”)

125. *See* Conference on Security and Co-operation in Europe, Charter of Paris for a New Europe, Nov. 19–21, 1990, at 13, *available at* [http://www.osce.org/documents/mcs/1990/11/4045\\_en.pdf](http://www.osce.org/documents/mcs/1990/11/4045_en.pdf) (declaring the charter “not eligible for registration”). The conclusion that the Helsinki Accords are not legally binding because they are not eligible for registration is not particularly satisfactory. The condition states simply that the Accords cannot be registered; it does not say anything, other than an attenuated implication, about their legal value.

126. *See e.g.* Declaration on Trade in Services, Isr.–U.S., Apr. 22, 1985 *available at* <http://www.sice.oas.org/Trade/US-Israel/DECLARATION%20.doc> (“the principles set forth below shall not be legally binding”).

the UN.<sup>127</sup> Beyond this, there does not appear to be any obligation for states to otherwise publicize their treaties in order for them to be considered as creating legal rights and obligations.<sup>128</sup> But prohibiting registration does not necessarily mean that the instrument is non-legally binding. Based on this argument, even if diplomatic assurances are kept secret, as long as they are documented in some kind of writing, such as through the exchange of notes, they will satisfy this element of the treaty definition.

### C. GOVERNED BY INTERNATIONAL LAW

A written agreement must be governed by international law in order to be a treaty,<sup>129</sup> but it is unclear whether intent plays a role in this element. UN practice as a depositary of treaties does not seem to understand intent as an aspect of the “governed by international law” element in the definition of treaty.<sup>130</sup> The European Union, on the other hand, appears to understand the opposite.<sup>131</sup> The ICJ specifically stated in the

127. See D.N. Hutchinson, *The Significance of the Registration or Non-Registration of an International Agreement in Determining Whether or not it is a Treaty*, 46 CURRENT LEGAL PROBS. 257 (1993); R.B. Lillich, *The Obligation to Register Treaties and International Agreements with the United Nations*, 65 AM. J. INT'L L. 771, 772 (1971).

128. Special Rapporteur, *Second Rep. on the Law of Treaties*, II YB INT'L L. COMM'N 126, ¶ 13, U.N. Doc. A/CN.4/SER.A/1954/Add.1 (1954), (by Hersch Lauterpacht).

[the Special Rapporteur] continues to believe that the mere fact of registration is not *decisive*. In particular, it cannot be admitted that the Secretary-General can be entrusted with the function of giving, by complying with the request for registration, the complexion of a legal instrument to something which otherwise would not possess that character.

129. Vienna Convention, *supra* note 35 art. 2(1); Vienna Convention on Succession of States in respect of Treaties, *supra* note 35 art. 2(1)(a); Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, *supra* note 35 art. 2(1)(a).

130. See UN TREATY HANDBOOK, *supra* note 117 at 61

The term memorandum of understanding (M.O.U.) is often used to denote a less formal international instrument than a typical treaty or international agreement. . . . The United Nations considers M.O.U.s to be binding and registers them if submitted by a party or if the United Nations is a party.

131. See EU, TREATIES OFFICE, GLOSSARY, available at <http://ec.europa.eu/world/agreements/glossary/glossary.jsp?internal=true>

In order to speak of a “treaty” in the generic sense, an instrument has to meet various criteria. First of all, it has to be a binding instrument, which means that the contracting parties intended to create legal rights and duties. Secondly, the instrument must be concluded by states or international organizations with treaty-making power.

*Qatar/Bahrain Delimitation case, that*<sup>132</sup>

The Court 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.

The two major figures in the debate over the role of intent to be “governed by international law” are Anthony Aust<sup>133</sup> and Jan Klabbers.<sup>134</sup> Generally speaking, Aust favors the intent element being determinative and Klabbers is against it. This paper concludes that both arguments have their shortcomings and neither is satisfactory.

## 1. Anthony Aust

Anthony Aust argues, based on his considerable experience with the FCO, that there are a large number of agreements which he generically calls “Memoranda of Understanding” (or “MOUs”) that are made between states but which are not legally binding. Instead, they are merely politically binding, and thus are enforceable only through the diplomatic process. Aust argues that states demonstrate the practice of not intending to create international legal relations and therefore intent must be an element, albeit an implied element, of the definition in the law of treaties. Based on the massive volume of MOU examples supporting this practice, he concludes that it is permissible.<sup>135</sup> He states his position most succinctly in his response to the argument of Jan Klabbers:

Professor Jan Klabbers has expressed doubts whether the distinction between MOUs and treaties is legally valid . . . This sweeping assertion immediately runs up against the fact that when states do not intend to enter into a legally binding instrument they generally make this clear by a deliberate and careful choice of words. Klabbers

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Thirdly, it has to be governed by international law. Finally the engagement has to be in writing.

However, in the EU’s understanding the intent aspect is not a part of the element “governed by international law”, rather it is an aspect of the “agreement” element. As we will see this is not so different from the UN’s position after all.

132. *Mari. Delimitation & Territorial. Questions (Qatar v. Bahr.)*, 1994 I.C.J. Reps. 112, ¶ 27 (July 1).

133. See generally AUST, *supra* note 32.

134. See e.g. KLABBERS, *supra* note 32.

135. See generally AUST, *supra* note 32.

argues that intention is not decisive. But to argue so ignores, first, the history behind the definition of treaty in the [Vienna] Convention . . . Secondly, Klabbers' theory is incompatible with the basic principle that a sovereign state is free to exercise (or not to exercise) its treaty-making power . . . Moreover, there is no principle or rule in the law of treaties or in general international law that requires that every transaction between states has to be legally binding, or, more particularly, to be a treaty. Thirdly, the hypothesis is just not supported by the extensive practice of states . . . Klabbers' theory, though thought-provoking, relies heavily on academic writing,<sup>136</sup> interpretations of judicial decisions and philosophical arguments.

There are, however, several shortcomings with his argument. Aust sets up a straw man argument with his assertion that "there is no principle or rule . . . that requires that every transaction between states has to be legally binding". The problem with this argument is that it is not clear what he means by "transaction". Certainly characterizing the relations of states in that way would lead to the conclusion that not all interactions in the realm of foreign relations are legally binding. "Transactions" could involve anything from the gift of a pen set to a visiting ambassador to inter-state loans. The difficulty is that we are not discussing "transactions", but rather agreements to undertake commitments. Where there is no agreement to undertake a commitment, then, of course, the state is not legally bound.

Aust is quite right to look to state practice, and there is considerable evidence of the practice of using assurances and similar communications.<sup>137</sup> Certainly it is possible for this extensive practice to create customary international law that clarifies, or even amends, the definition of treaty in the Vienna

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136. See AUST, *supra* note 32 at 49-51. Aust also notes that one of the principle reasons that states claim that an instrument is non-binding is to avoid constitutional requirements of parliamentary approval. This assessment comes dangerously close to permitting reference to domestic constitutional practice regarding treaties to be determinative of their value under international law. Whether an agreement is governed by international law should be determined by international law. See also *Othman v. Sec'y State Home Dep't*, (2007) No. SC/15/2005 (S.I.A.C.), ¶ 500 (U.K.). This author will omit a response to Aust's pejorative references to "academic writing" and "philosophic arguments" other than to wonder how either of these expressions constitute a critique.

137. See *Nicaragua* judgment, *supra* note 79 at ¶ 261; *Border and Transborder Armed Acts (Nicar. v. Hond.)*, Juris. Ct. & Admission Application, Judgment, 1988 I.C.J. ¶ 69, 70 (Dec. 20); *Land, Island & Maritime Frontier Dispute (El Sal./Hond.; Nic. intervention)*, 1992 I.C.J. 351, ¶¶ 99-101 (Sept. 11); *Sultanov v. Russ.*, Application No. 15303/09, Judgment, Eur. Ct. H.R. ¶ 58 (2010) (request for referral to the Grand Chamber pending); *Yuldashev v. Russ.*, Application No. 1248/09, Judgment, Eur. Ct. H.R. ¶ 70 (2010); Human Rights Watch, *Still at Risk*, *supra* note 13; NOWAK, *supra* note 31.

Convention; however, the practice of using these kinds of instruments began before the Vienna Convention was adopted and continues after, and parties continue to refer to the Vienna Convention in their dispute settlement. This practice does not suggest that the definition in the Vienna Convention has been significantly modified or eclipsed by custom. Even if it does not change the definition, it is also possible that this practice merely aids in our interpretation of the Vienna Convention definition as subsequent practice;<sup>138</sup> however, that practice would have to establish agreement and it seems in many situations the parties were in disagreement about the normative value of the assurances. In any event, before we even reach these analyses, we might consider the practice and *opinio juris*, if any, that is being expressed and manifested.

The practice of states is far more equivocal than Aust presents it.<sup>139</sup> Although the FCO may be an exception, there does not appear to be “deliberate and careful choice of words” in all treaty drafting.<sup>140</sup> On many occasions, states have indeed argued that certain instruments are not legally binding,<sup>141</sup>

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138. Vienna Convention on Treaties, *supra* note 35 art. 31(3)(b).

139. However, Aust does cite, *e.g.*, an instance of the inclusion of a term in a treaty that claim to replace one MOU and preserve another. *See* AUST, *supra* note 32 at 33 (citing the UK-US Maritime and Aerial Operations to Suppress Illicit Trafficking by Sea in the Waters of the Caribbean and Bermuda Agreement, 1998, 2169 U.N.T.S. 252).

140. Perhaps many cases of complex, multi-party diplomatic negotiations with parties of varying degrees of legal sophistication prevented the careful choice of words in favor of deliberately vague constructions. It might be that the Helsinki Accords suffered this fate, though there is no evidence to suggest sloppy draftsmanship in that case.

141. *See e.g.* U.S. Dept. of State, Cable 10-PARIS-183 ¶ 1 (Feb. 17, 2010) *available at* <http://wikileaks.org/cable/2010/02/10PARIS183.html#> (emphasis added):

French Environment Minister Jean-Louis Borloo told the Ambassador that the key to advancing climate negotiations is to drop the notion of a legally binding TREATY in favor of a system of national commitments . . . Borloo attributed the European obsession with legally binding treaties to its post-war history and experience in creating the EU by progressively ceding sovereignty via TREATY.

U.S. Dept. of State, Cable N10-RIYADH-184, ¶ 11 (Feb. 12, 2010) *available at* <http://wikileaks.org/cable/2010/02/10RIYADH184.html#> ([Prince Abdulaziz told the Minister that Saudi Arabia had missed a real opportunity to submit “something clever,” like India or China, that was not legally binding but indicated some goodwill towards the process without compromising key economic interests]. U.S. Dept. of State, Cable 10-MADRID-174, ¶¶ 8–11 (Feb. 12, 2010) *available at* <http://wikileaks.org/cable/2010/02/10MADRID174.html#> (discussing the 1998 Washington Conference on Nazi Confiscated Art and 2009 Prague Conference on Nazi Confiscated Art, and the US signature on the “Declarations of Principles” in the context of the Cassirer claim to a Pissarro painting; acknowledging the signature on the Declaration of Principles but



although they are frequently confused or deliberately vague, stating in the same document that an agreement is not legally binding, but then arguing that the agreement “authorized” a certain act and demanded “compliance”.<sup>142</sup> There are several

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stating that Spain could rely on its internal law to bar the claim – not possible if the agreement was concluded under international law – and seek alternate “creative solutions” amounting to “gestures to the family and to the Los Angeles Jewish community”); U.S. Dept. of State, Cable 09-KYIV-1942, ¶¶ 6, 54 (Nov. 9, 2009) *available at* <http://wikileaks.org/cable/2009/11/09KYIV1942.html#> (discussing “security assurances”)

The first item Nykonenko raised during the one-on-meeting was an appeal for additional security assurances for Ukraine, beyond those the U.S. had provided in the 1994 Budapest Declaration . . . Legally binding assurances were best, he concluded, but he said he understood this was very difficult.

Couch asked Nykonenko to explain why Ukraine needed additional, legally binding security assurances, . . . Nykonenko responded that Ukraine had no doubts about the commitment of the United States; however, Ukraine had serious concerns about Russia’s commitment. . . . Nykonenko explained that if the United States would agree to new security assurances with Ukraine, then Russia would likely agree to join in the document . . . .

142. *See e.g.* U.S. Dept. of State, Cable 10-THE HAGUE-7, ¶ 3 (Jan. 8, 2010) *available at* <http://wikileaks.org/cable/2010/01/10THEHAGUE7.html#> (discussing the US-Dutch Agreement of Cooperation . . . . Concerning Access To and Use of Facilities In the Netherlands Antilles and Aruba For Aerial Counter-Narcotics Activities (“FOL”)) (“This bilateral agreement allows the USG access to and use of the Hato International Airport in the Netherlands Antilles and the Reina Beatrix International Airport in Aruba . . . solely in connection with aerial counter-narcotics detection and monitoring . . . .”); *id.* at ¶2 (“The MFA has requested a letter signed by the Ambassador confirming that the U.S. abides by the provisions of the March 2, 2000 Agreement . . . .”); *id.* at ¶ 5 (“Nonetheless, the MFA [Ministry of Foreign Affairs of the Netherlands] has requested a letter from the U.S. Ambassador stating the airfields are only being used as authorized in the FOL Agreement.”); *id.* at ¶ 6 (“Still, it is to our benefit to assist the Dutch Government to state explicitly that confirmation of compliance with the FOL Agreement has been received from the U.S.”); U.S. Dept. of State, Cable 08-MADRID-1280, ¶ 8 (Dec. 4, 2008) *available at* <http://wikileaks.org/cable/2008/12/08MADRID1280.html#at> ¶ 8 (discussing the Agreement on Defence Cooperation (“ADC”) between US and Spain)

The ADC provides us the extremely valuable use of two military bases in southern Spain midway between the continental U.S. and the theaters of operation in Afghanistan and Iraq. . . . By unfortunate coincidence, the ADC was already in the press in recent weeks thanks to MOD Chacon’s repeated references to her hope that the U.S. would elevate it to the level of a TREATY (septel).

*But see id.* at ¶ 3. (“ . . . El Pais published a February 2007 letter from the Spanish President of the joint Permanent Committee which manages implementation of the ADC, asking the U.S. section to confirm that the U.S. was in compliance with Article 25.2 of the ADC with respect to U.S. military flights to and from Guantanamo”); ¶ 9 (“When we do speak publicly on the

instances in which parties disagreed about the binding nature of the instrument.<sup>143</sup> Given the extensive and rigorous nature of negotiating practice, this author can only conclude that these vague constructions on legal value are intentional.

States are indeed negotiating and concluding agreements and inserting language in those agreements that is slightly different from the language of instruments that are more clearly considered treaties. But states are also not commencing legal dispute settlement following violations of MOUs.<sup>144</sup> That language and practice, as well as the other practices Aust cites, does not necessarily mean either that the law of treaties includes an element of intent. Nor does it mean that states engage in a practice and demonstrate *opinio juris* that some of their agreements are not legally binding. The only practice and *opinio juris* that can comfortably be found based on this examination is that violations of diplomatic assurances do not result in a legal enforcement action.<sup>145</sup> It is not clear that this

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issue, our mantra is that we have not violated Spanish law and have complied fully with the ADC.”); ¶ 10:

“Thus far, the MOD and MFA have done a reasonably good job in their public affairs efforts of making clear that they do not believe we have violated the ADC. The MOD issued a December 2 statement saying it knew of no U.S. military flights that were either illegal or in violation of our bilateral agreements (this echoes what MOD officials have told us privately -- e.g. ref b).”

U.S. Dept. of State, Cable 08-TRIPOLI-308, ¶ 3 (Apr. 10, 2008) *available at* <http://wikileaks.org/cable/2008/04/08TRIPOLI308.html> (discussing the military cooperation MOU between US and Libya)

Section Six: Dispute Resolution Any disputes that might arise between the two parties regarding the interpretation or the implementation of this MOU shall be resolved through negotiations between the two parties solely . . .

Section Nine: Entry into Force, its Scope and Termination

- 1- This MOU shall enter into force upon its signature by both parties.
- 2- This MOU does not include any provisions that entail commitments under International Law
- 3- This MOU shall remain effective unless terminated by a mutual agreement, or by either party, upon 90-day written notice submitted in advance to the other party.

143. See Mari. Delimitation & Territorial. Questions, *supra* note 132.

144. *But see* Heathrow Airport Arbitration Award, *supra* note 33 (where the US claimed that an MOU was binding in arbitration).

145. See Hum. Rts. Watch, *Still at Risk*, *supra* note 13 (citing Written Declaration of Samuel M. Witten, Assistant Legal Adviser for Law Enforcement and Intelligence in the Office of the Legal Adviser of the U.S. Department of State, *Cornejo-Barreto v. Seifert*, Case No. 01-cv-662-AHS, ¶¶ 11–13 (C.D. Cal. 2001) *available at* <http://www.state.gov/documents/organization/16513.pdf>. (“For example, in an October 2001 statement, a United States Department of State legal advisor

failure of enforcement means that there is no legal obligation.

In addition, it would seem that the history of the definition of treaty in the Vienna Convention is not quite as clear as argued by Aust. Although the delegates to the Vienna Conference may have used the word "intent" on occasion, the context in which they used the word does not suggest the meaning Aust attributes to it.

On first glance, the International Law Commission ("ILC"), the framers of the Vienna Convention, did not seem to embrace any notion of an agreement that was not legally binding, but the ILC's final position is less clear. Hersch Lauterpacht, the Special Rapporteur, argued in his second report that the Vienna Convention project should have as one of its objectives the establishment of the legal character of obligations whose legal value had previously been questioned.<sup>146</sup> It is questionable

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argued that seeking, securing, and monitoring diplomatic assurances must be done on a strictly confidential basis, with no public or judicial scrutiny, in order not to undermine foreign relations and to reach 'acceptable accommodations' with the requesting state . . .").

146. *Second Report on the Law of Treaties*, 2YB Int'l L. Comm'n 126-27, ¶. 14 (1954), U.N. Doc. A/CN.4/SER.A/1954/Add.1

The Special Rapporteur has devoted further study to — and has to some extent modified his view on — this question for the reason that, in his opinion, the codification of the law of treaties ought to provide an opportunity not for devitalising such legal element as is contained in international instruments but for salvaging from them any existing element of legal obligation. There are, in addition to the types of instrument referred to above, other categories of treaties whose legal importance and beneficence may be jeopardized unless that principle is adopted. Thus the numerous agreements between the United Nations and the specialized agencies, as well as the agreements of the specialized agencies *inter se*, have been regarded by some as purely administrative arrangements of coordination devoid of legal character. It is not believed that that view is substantiated either by their content or form. The same applies to the numerous inter-State treaties for cultural co-operations; for technical assistance; for co-operation between Governments and public international organizations of a humanitarian character, such as the Agreement of 19 July 1950 between the United Nations International Children's Emergency Fund and the Government of the Republic of China concerning the activities of the former in China; and agreements relating to military co-operation by way of establishment of military missions and otherwise. (internal citations omitted)

(citing, *inter alia*, Agreement relating to a naval mission to Haiti, Haiti-U.S., Apr. 14, 1949, 80 U.N.T.S. 38; Agreement for the establishment of a United States army mission to Honduras, Hond.-U.S., Mar. 6, 1950, 80 U.N.T.S. 72; Agreement concerning a military advisory mission to Argentina, Arg.-U.S., Oct. 6, 1948, 80 U.N.T.S. 92; Agreement relating to a military advisory mission to Brazil, Braz.-U.S., July 29, 1948, 80 U.N.T.S.112; Agreement relating to a military mission to Ecuador, Ecuad.-U.S., June 29, 1944, 80 U.N.T.S. 284; Agreement between Thailand and the United States of America of July 1950, Thai. - U.S., July 1950, 81 U.N.T.S. 62; Basic Agreement

whether this goal was achieved, though the members of the ILC must have surely been aware of the problem. The ILC stated that “[t]he term ‘treaty’ is used throughout the draft articles as a generic term covering *all forms of international agreement* in writing concluded between States”,<sup>147</sup> which, with Lauterpacht’s statement, suggests that the ILC meant to incorporate agreements of questionable legal value into the fold. In its proper context, however, this statement actually appears primarily to establish that the name of the instrument is not determinative; the ILC continues to state that:

Although the term “treaty” in one sense connotes only the single formal instrument, there also exist international agreements, such as exchanges of notes, which are not a single formal instrument, and yet are certainly agreements to which the law of treaties applies. Similarly, very many single instruments in daily use, such as an “agreed minute” or a “memorandum of understanding”, could not appropriately be called *formal* instruments, but they are undoubtedly international agreements subject to the law of treaties.<sup>148</sup>

Also the ILC appears to clarify that there is no distinction in law between a treaty and a treaty in simplified form.<sup>149</sup> Therefore, although the ILC appeared to refuse to recognize

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between the U.N., the Food and Agriculture Organization, the International Civil Aviation Organization, the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization and France for the provision of technical assistance, Mar. 20, 1951, 82 U.N.T.S. 174; Basic Agreement between the U.N., the Food and Agriculture Organization of the United Nations, the International Civil Aviation Organization, the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization and Colombia for the provision of technical assistance, Nov. 24, 1950, 81 U.N.T.S. 190; Cultural Convention, Netherlands–U.K., July 7, 1948, 82 U.N.T.S. 260; Agreement relating to the financing of certain educational exchange programmes, France–U.S., Oct. 22, 1948, 84 U.N.T.S. 174; Exchange of notes constituting an agreement relating to anthropological research and investigation, Mexico–U.S., June 21, 1949, 89 U.N.T.S. 4; Basic Agreement for the provision of technical assistance, Thailand–U.S., June 11, 1951, 90 U.N.T.S. 46). However, Lauterpacht’s argument to clarify the legal value of these instruments also appears to implicitly acknowledge that there are instruments that might not have legal value.

147. Draft articles on the law of treaties with commentaries, Rep. of the Int’l L. Comm’n, 18th sess, May 4–July 19, 1966, 187–89, art. 2, cmt. 6; U.N. Doc. A/CN.4/SER.A/1966/Add.1 (1966).

148. *Id.*

149. Draft articles on the law of treaties with commentaries, Rep. of the Int’l L. Comm’n, 18th sess, May 4–July 19, 1966, 187–89, art. 2, cmt. 3; U.N. Doc. A/CN.4/SER.A/1966/Add.1 (1966).

First, the treaty in simplified form, far from being at all exceptional, is very common, and its use is steadily increasing. Secondly, 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.

that a non-binding international agreement was possible, in fact, the ILC was simply distinguishing between forms of agreements, all of which are treaties. Although it does not provide for it, it does not exclude the possible existence of non-legally binding agreements. Therefore, if an instrument qualifies under the Vienna Convention as a treaty, then it will be governed by those treaty rules. If it does not, then it may be a non-binding agreement.

In the Vienna Convention commentaries, the ILC addressed the question of the intention of the state and whether intent was an aspect of the “governed by international law” element. The ILC commentaries state that the phrase was meant only “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).”<sup>150</sup> By this language, the ILC appears to understand that all agreements between States are governed by some law in principle, the question only being whether the agreement is governed by national or international law. One finds no room for “political agreements”. Therefore, where an agreement clearly excludes domestic law, it must necessarily be governed by international law. The ILC observed that some international agreements would fall outside the definition in the Vienna Convention.<sup>151</sup> Initially, this

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150. See *Draft articles on the law of treaties with commentaries*, [1966] 2 Y.B. Int'l L. Comm'n, 187, art. 2, cmt. 6, U.N. Doc. A/CN.4/SER.A/1966/Add.1. The ILC continued:

The Commission examined the question whether the element of “intention to create obligations under international law” should be added to the definition. Some members considered this to be actually undesirable since it might imply that States always had the option to choose between international and municipal law as the law to govern the treaty, whereas this was often not open to them. Others considered that the very nature of the contracting parties necessarily made an inter-State agreement subject to international law, at any rate in the first instance. The Commission concluded that, in so far as it may be relevant, the element of intention is embraced in the phrase “governed by international law”, and it decided not to make any mention of the element of intention in the definition.

States can and do submit agreements between them to national law; however we must distinguish between an agreement under national law, and a treaty whose terms are interpreted or assessed with reference to some national law.

151. Vienna Convention, *supra* note 35, art. 3. The text reads:

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

- a. the legal force of such agreements;

understanding covered only unwritten, or oral, agreements,<sup>152</sup> but it later grew to consider agreements with or between international organizations.<sup>153</sup> Even for those specific categories of international agreement that are exempted from the Vienna Convention, however, the ILC makes an effort to reiterate that they are still agreements under international law.<sup>154</sup> Therefore, agreements will still be legally binding if they are oral and if they are between or with international organizations. Again, we find no room for agreements that are non-legal.

When the negotiation of the Vienna Convention moved from the ILC to the Vienna Conference, the delegates had another opportunity to insert language regarding intent and the possibility of non-legal effects. As State representatives, rather than the independent experts that sit on the ILC, presumably the delegates would have had a stronger motivation to demand an intent element, if states truly understood that to be a part of the definition.<sup>155</sup>

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b. the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention.

152. See *Draft articles on the law of treaties with commentaries*, supra note 150, art. 3, cmt. 1 (“The text of this article, as provisionally adopted in 1962, contained only the reservation in paragraph (b) regarding the force of international agreements not in written form.”); *id.* 2, cmt. 7 (“The restriction of the use of the term ‘treaty’ in the draft articles to international agreements expressed in writing is not intended to deny the legal force of oral agreements under international law or to imply that some of the principles contained in later parts of the Commission’s draft articles on the law of treaties may not have relevance in regard to oral agreements . . . .”); *id.* art. 3, cmt.3.

153. *Id.* 3, cmt. 3

The first reservation in sub-paragraph (a) regarding treaties concluded between States and other subjects of international law or between such other subjects of international law was added at the seventeenth session as a result of the Commission’s decision to limit the draft articles strictly to treaties concluded between States and of the consequential restriction of the definition of “treaty” in article 2 to “an international agreement concluded *between States*.”

This understanding was also reflected in the discussion at the United Nations Conference on the Law of Treaties. See United Nations Conference on the Law of Treaties, 1st Session, Vienna, Austria, Mar. 26-May 24, 1968, 7th Meeting of the Committee of the Whole, at 36, paras. 5, 17, 55, 56, 68, 70, 72, 73 U.N. Doc. A/CONF.39/C.1/SR.63 (Apr. 1, 1968) [hereinafter Vienna Conv. O.R.].

154. See *Draft articles on the law of treaties with commentaries*, supra note 150, art. 3, cmt. 4. The article accordingly specifies that the fact that the present articles do not relate to either of those categories of international agreements is not to affect their legal force or the “application to them of any of the rules set forth in the present articles to which they would be subject independently of these articles.”

155. It should be recalled that supposedly non-legally-binding instruments had been concluded for some time prior to the Vienna Conference.

Some concern was expressed at the Vienna Conference that the ILC articles and commentary suggested that all agreements were subjected to either international or domestic law, without a choice for non-legal agreements.<sup>156</sup> In the records of the Conference, it was suggested that the ILC omitted mention of intent to create legal relations because it was inherent in the phrase “governed by international law”.<sup>157</sup> Some of the participants at the conference believed that states could reach agreements that did not produce legal effects.<sup>158</sup> As a

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156. See Vienna Conv. O.R., 5th mtg. at 24, para. 83 (Mar. 29, 1968) (“Mr. MUTUALE (Democratic Republic of the Congo) said that it would appear from the 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 . . .”).

157. See *id.* at para. 63

Mr. SMALL (New Zealand) . . . pointed out that the International Law Commission had regarded the intention to create a legal relationship as an essential element of its draft until 1962, but had since abandoned the idea of including an explicit reference to that intention. The Drafting Committee might consider whether such a reference was necessary; the New Zealand delegation believed that the element was already implicit in the phrase “governed by international law” in paragraph l(a);

Vienna Conv. O.R., 6th mtg. at 31, para. 26 (Apr. 1, 1968)

Sir Humphrey WALDOCK (Expert Consultant) said . . . The only point regarding sub-paragraph (a) which the Commission had discussed at length was the question whether to mention the intention of establishing legal relations between States. The Commission had preferred not to mention that intention, as it believed that the words “governed by international law” were sufficient. He himself had some doubts on the point, since in many cases an instrument might have the characteristics of a treaty because of the intention with which it had been drawn up. Certain communiques now published at the end of important conferences were in fact agreements between ministers and had legal effects.

158. See Vienna Conv. O.R., 4th mtg. at 21, para. 3 (Mar. 29, 1968)

Lastly, the Chilean delegation thought it would be well to mention in sub-paragraph (a) that an agreement between States must produce legal effects. That idea had been included in the 1953 and 1956 drafts, but had been dropped from the latest draft. . . . [I]t appeared essential to include that idea in the definition, so as to distinguish between agreements between States which produced legal effects and those which did not and reserve the term “treaty” solely for the former. 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 to make both of them subject to the rules of the convention, thereby gravely restricting freedom of expression in international affairs. . . .

Vienna Conv. O.R., 6th mtg. at 31, para. 16 (Apr. 1, 1968)

Mr. RODRIGUEZ (Chile) explained the intended meaning of the expression “produces legal effects” in the Chilean amendment . . . [A] dividing line should be drawn between treaties intended to produce legal effects and agreements not intended to do so, even though they

result, some participants thought that the intention to create legal rights was crucial and was lacking in the Vienna Convention text.<sup>159</sup> However, there was some understanding that establishing intent was often problematic,<sup>160</sup> for, after all,

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sometimes did. A definition of a treaty *lato sensu*, covering all agreements of whatever kind, would make the convention too wide in scope and might curtail the international dialogue which was the necessary preliminary to treaty-making. Some speakers had objected that the amendment was unnecessary because an agreement which did not produce legal effects was not a treaty. His reply to that was that if legal effects were implied in the term "treaty", the definition should mention them. Others had maintained that the amendment would add to the text a condition for the validity of treaties. In fact, it was not a rule governing validity, which would be out of place in a definitions article, but merely a criterion for distinguishing treaties from agreements not intended to produce legal effects.

159. See Vienna Conv. O.R., 4th mtg. at 21, para. 26 (Mar. 29, 1968)

Mr. SEPULVEDA AMOR (Mexico), introducing the amendment . . . , pointed out that the International Law Commission's draft omitted an important element, namely, the intention to create rights and obligations. That element had been present in the earlier drafts, but in 1959 the Commission had decided against including it in the definition of a treaty, on the ground that it would be preferable to omit any reference to the object of a treaty, since it was impossible to cover all cases. The Mexican delegation wished to point out, however, 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. The Mexican delegation therefore considered that the existence of a legal relationship between States which concluded a treaty should be regarded as an essential element of that legal act. (internal footnote omitted).

Vienna Conv. O.R., 5th mtg. at 24, para. 65 (Mar. 29, 1968)

Mr. ARIFF (Malaysia) said that the definition of "treaty" in paragraph 1 (a) was insufficiently comprehensive, since it failed to indicate the intention of the parties to a treaty. It was a generally accepted principle of municipal law that the intention of the parties was to establish a legal relationship, and he therefore supported the Mexican and Malaysian amendment . . . , with the possible insertion of the word "legal" before "relationship".

Vienna Conv. O.R., 5th mtg. at 24, para. 76 (Mar. 29, 1968)

Mr. HARRY (Australia) said that one essential element of a treaty was the intention of the parties to create legal rights and obligations, and that was only implicitly suggested in the Commission's text. . . . It would be preferable for the text to be more precise in the manner suggested in the first Chilean and the Mexican and Malaysian amendments. . . .

160. See Vienna Conv. O.R., 31st mtg. at para. 64 (Apr. 19, 1968)

Similarly, Sir Eric Beckett had claimed that there was a complete unreality in the references to the supposed intention. As a matter of experience, it often occurred that the difference between the parties to the treaties arose out of something which the parties had never thought of when the treaty was concluded and that, therefore, they had absolutely no common intention with regard to it. In other cases, the parties might all along have had divergent intentions with regard to the actual question in dispute. Each party had deliberately



if intent was so clear, then the parties never would have reached a dispute. An amendment by Chile to include intent language was proposed and debated,<sup>161</sup> but was not adopted, suggesting, though not conclusively, that intent was not seen by a majority of the Vienna Conference delegates as necessary beyond what was inherent in the phrase “governed by international law” as drafted by the ILC, a phrase specifically acknowledged by the ILC to only contemplate intent to be governed by either international or domestic law. Upon signature and ratification or accession, none of the states parties to the Vienna Convention entered a reservation or even interpretative declaration concerning intent. In sum, it would seem that Aust is wrong about state practice and *opinio juris*, as well as the drafting history and background of the Vienna Convention definition.

All of the foregoing does not mean that intent is entirely irrelevant. Although in the *Qatar/Bahrain* case, the ICJ held that the intent of the Foreign Ministers was not important where there is a “text recording commitments accepted by their Governments”,<sup>162</sup> this is an assessment of the intent to reach an agreement, *consensus ad idem*. It is not the intent for the agreement to be governed by law or not, similar to the holding in *Nicaragua* regarding the “political pledge” to the OAS that

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refrained from raising the matter, possibly hoping that the point would not arise in practice, or possibly expecting that, if it did, the text which had been agreed would produce the result which it desired.

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See Vienna Conv. O.R., 1st sess., 33d mtg. at 164, para. 4 (Apr. 22, 1968)

[Mr. SINCLAIR (United Kingdom)] . . . [T]he dangers of the alternative doctrine had been persuasively presented by Sir Eric Beckett at the Institute of International Law when he had stated that there was a complete unreality in the references to the supposed intention of the legislature in the interpretation of the statute when in fact it was almost certain that the point which had arisen was one which the legislature had never thought of at all; that was even more so in the case of the interpretation of treaties. As a matter of experience it often occurred that the difference between the parties to the treaties arose out of something which the parties had never thought of when the treaty was concluded and that, therefore, they had had absolutely no common intention with regard to it. In other cases the parties might all along have had divergent intentions with regard to the actual question which was in dispute; each party had deliberately refrained from raising the matter, possibly hoping that that point would not arise in practice, or possibly expecting that if it did, the text which was agreed would produce the result which it desired. (internal footnote omitted)

161. See Vienna Conv. O.R., 6th mtg. at 31, para. 16 (Apr. 1, 1968).

162. Maritime Delimitation and Territorial Questions (*Qatar v. Bahr.*), 1994 I.C.J. 112, ¶ 27 (July 1).

lacking an intent to agree to anything in the first place. This appears to be what the UN Office of Legal Affairs, Treaty Section, had in mind when it drafted the “Consent to be Bound” portion of the Treaty Handbook.<sup>163</sup> Therefore, intent in this context cannot be determinative of whether an agreement is governed by law or not. The subjective intentions of States agreeing to treaties never have a role in interpreting the document. Were it otherwise, a signature and ratification of a treaty would not be definitive evidence of consent to the treaty. We can only look to the objective intent—*i.e.*, to the document itself that the parties agreed on as the statement of their intentions. Therefore, it appears that intent—at least the kind of intent that Aust argues—is not an aspect of the “governed by international law” element, but rather an aspect of the “agreement” element. With respect to the “governed by international law” element, as the ILC states, intent is relevant only to whether the agreement is governed by international or domestic law.<sup>164</sup>

Aust clearly believes that States create international law, not the reverse. Since States created the law, the law is their creation, not a system that permeates (and perhaps precedes) everything they do. States are the masters of the law. Indeed Aust is correct to note that a sovereign state is free to enter into a treaty or not, but when a state has objectively concluded a treaty, the state is not then free to argue its sovereignty as an excuse. States are not “sovereign” to that degree or in that way.<sup>165</sup>

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163. The Office of Legal Affairs does not appear to linger on the legality of the rights and obligations as something the state can entertain intent about, rather the state can only entertain intent to become a party to the agreement or not. We can see that the positions of the EU and UN are thus essentially the same. See UN TREATY HANDBOOK, *supra* note 117 at 8, § 3.3.1

In order to become a party to a multilateral treaty, a State must demonstrate, through a concrete act, its willingness to undertake the legal rights and obligations contained in the treaty. In other words, it must express its consent to be bound by the treaty. A State can express its consent to be bound in several ways, in accordance with the final clauses of the relevant treaty. . . .

164. U.S. v. Pileggi conceivably supports this proposition. U.S. v. Pileggi, No. 08-4237, 2010 WL 235144, at \*476 n. 2 (4th Cir., Jan. 20, 2010) (“Both parties agree that diplomatic assurances reflecting agreement between parties to an extradition treaty are to be enforced by the courts.”).

165. We are forced to wonder what Aust’s position would be regarding the solemn assurances that Hissène Habré would be prohibited from travelling Senegal offered to Belgium, and apparently to the ICJ itself, in court session in the *Obligation to Prosecute or Extradite* case. The court was unclear about the value it attached to the Senegalese assurance. Although the order of the court seems to consider the assurance a fact in the context of preliminary

The difficulty with such an extreme consent hypothesis is that, like many other theories, it creates an abstract “first world” existing prior to the creation of the first law. It would argue that states are not only the masters of the law, but they are even pre-legal entities. While history does matter in the

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measures (“there does not exist . . . any urgency”), the separate opinion of Koroma and Yusuf suggests it was viewed as a legal obligation assumed by that state comparable to an order of the Court. *Compare* Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Senegal), Order, 2009 I.C.J. 139, ¶¶ 68, 69, 71, 73 (May 28)

whereas the Co-Agent of Senegal, at the end of the hearings, solemnly declared, in response to a question put by a Member of the Court, the following:

“Senegal will not allow Mr. Habré to leave Senegal while the present case is pending before the Court. Senegal has not the intention to allow Mr. Habré to leave the territory while the present case is pending before the Court.”

Whereas the Co-Agent of Belgium, making clear that he spoke in the name of his Government, asserted at the hearings, in response to a question put by a Member of the Court, that such a solemn declaration given by the Agent of Senegal, in the name of his Government, to the effect that the latter would not allow Mr. Habré to leave Senegalese territory while the present case was pending before the Court, could be sufficient for Belgium to consider that its Request for the indication of provisional measures no longer had any object, provided that certain conditions were fulfilled . . .

Whereas the Court further notes that Senegal, both *proprio motu* and in response to a question put by a Member of the Court, gave a formal assurance on several occasions during the hearings that it will not allow Mr. Habré to leave its territory before the Court has given its final decision;

Whereas the Court concludes from the foregoing that there does not exist, in the circumstances of the present case, any urgency to justify the indication of provisional measures by the Court;

*with id.* (separate opinion of judges Koroma and Yusuf) at ¶ 10.

In our view, Senegal’s solemn declaration . . . preserves the rights of the Parties and ensures against the risk of irreparable prejudice in exactly the same way as would an order indicating provisional measures. Accordingly, the purpose of Belgium’s request for the indication of provisional measures having been served, there was no further need for the Court to examine the judicial measure requested by Belgium. In our view, the Court should simply have declared that following the declaration by Senegal the request for the indication of provisional measures had ceased to have any object.

*Also see* South West Africa cases (Ethiop. v. S.Afr.; Liber. v. S. Afr.), Prelim. Objs., Judgment, 1962 I.C.J. Repts. 319, 418 (Dec. 21) (Jessup, J. Sep. Op.) (“Surely a formal pledge of the kind just quoted made by the representative of a State to the Assembly of the League also constituted a binding international obligation. As quoted above from McNair, Law of Treaties, ‘a declaration contained in the minutes of a conference’ may embody a binding international engagement.”)

assessment of norms, a hypothetical history that probably never existed could confuse more than it clarifies. Was there really ever a situation of neighboring States, in the modern sense of “State”, that one day decided to invent international law and conclude the first treaty? If not, and it is most likely not the case, then the theoretical exercise becomes “academic”, in the pejorative sense of that word. We should consider an analysis that begins with the common and contemporaneous development of modern states alongside international law, admitting that the label “international law” is a retroactive characterization of the relationships those proto-states had, precisely insofar as the label “state” is suffering the same weakness. Aust refuses to see that a legal conclusion can be assessed by a third-party, even a law professor, though without direct and immediate consequences. As such he embraces a kind of legal nihilism about international law that seems typical of officers of ministries of foreign affairs.

Although it is commonly stated that international law emanates from the will of states,<sup>166</sup> that absolute notion is not so easily theoretically reconciled with international law in practice.<sup>167</sup> Acknowledging the freedom of treaty, the question is not sovereignty, but whether the state has objectively concluded a treaty. Deliberate and careful words have failed many a drafter. Consider, for example, the influence of the Draft Articles on State Responsibility. In Article 3 of the Draft Articles, the ILC adopted the following text: “The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”<sup>168</sup> Although this provision is simply a restatement that internal law of a state is no defense,<sup>169</sup> it

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166. The leading illustration of this consent continues to be S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (holding that international legal rules emanate from the free will of states).

167. See CHARLES G. FENWICK, *INTERNATIONAL LAW* 36 (4th ed., 1965) (“[consent is] inadequate to explain the assumption upon which governments appear to have acted from the beginning of international law”). See generally MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989); DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987) (focusing on relationships among doctrines and arguments and their recurring theoretical structure).

168. See *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, U.N. Doc. A/56/10 (2001), reprinted in [2007] 2-II Y.B. Int'l L. Comm'n 31, U.N. Doc. A/CN.4/SER.A/2001/ADD.1 (PART 2).

169. See *e.g. id.* at art. 3, comm. (1) (“Secondly and most importantly, a

appears to inherently contemplate that all acts of states are governed by international law and are tested for compliance with international law. It could be argued that there is an implicit exception for those acts that are not acts of state or acts that are submitted to the exclusive competence of internal law, but the latter argument is difficult to sustain. In sum, the intent of a State for an instrument to be governed by international law cannot be the sole determinant of the legal value of the agreement. If a state concludes an agreement that is expressly legally binding, then that state could never succeed in arguing that it did not intend for that result. The document speaks for itself.

## 2. Jan Klabbers

Jan Klabbers has countered Aust's argument.<sup>170</sup> He argues that if MOUs are not undertaken in the system of international law, but rather international politics, then international politics must be a separate regime from law. He concludes that there is no evidence of this regime, and no evidence that, if there was one, its rules would be any different from the rules of international law. Additionally, he argues that the consistent case law of international tribunals, chiefly the ICJ, demonstrates that agreements are binding and enforceable at international law, sometimes regardless of the legal force the parties intended.

Klabbers is quite right to argue that there is no separate regime from international law and that the Permanent Court of International Justice ("PCIJ") and ICJ have held that similar agreements are enforceable at law.<sup>171</sup> However, the

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State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law."); Vienna Convention, art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty . . ."); Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44, at 4, 24, 25 (Feb. 4).

170. See generally KLABBERS, *supra* note 32 (favoring the legally binding nature of assurances, MOUs and similar communications).

171. See Maritime Delimitation and Territorial Questions, *supra* note 162 ¶ 27 (July 1) (rejecting the inquiry into the intentions of the Foreign Ministers in signing the "Minutes"); Land, Island & Maritime Frontier Dispute (El Salv./Hond.; Nic. interv.), 1992 I.C.J. 351 (Sept. 11) (finding the boundary agreement binding even though El Salvador had only signed *ad referendum*); Border and Transborder Armed Actions. (Nic. v. Hond.), Jurisdiction and Admissibility, Judgment, 1988 I.C.J. 69 (Dec. 20) (seeming to regard the Cancun Declaration as legally binding); Continental Shelf (Tunis./Libya), 1982 I.C.J. 70, ¶¶ 93–95 (Feb. 24); Aegean Sea Continental Shelf Case (Greece v.

International Tribunal for the Law of the Sea appears to have held the opposite.<sup>172</sup> It does not appear that Aust is actually arguing in favor of an alternate regime, but rather, implicitly, that all legal systems choose which agreements are enforceable at law and which are not. Aust is quite right in this assertion. For example, in common law systems some “contracts” are not enforceable, regardless of their status as an agreement, if they lack consideration. These kinds of agreements have only moral force, not legal force. Aust does not so clearly make this argument, although it can be inferred from his writing. The difficulty is that international law is not so easily assimilated to municipal law that has this legal and non-legal distinction between types of agreements.<sup>173</sup> This question will be addressed in more detail in the section below regarding private law analogies and intent.

Furthermore, Klabbers appears to believe, diametrically opposed to Aust, that international law governs States, regardless of whether they created it or not. The law now exists as a system and governs the international relations of States, even if States can modify it and change it. Arguably, States are the slaves to the law. The problem with master-slave analogies is that they are quickly prone to Hegelian breakdown. Arguing that states are slaves or masters of international law is unhelpful and has been shown through modern legal scholarship to be fruitless.<sup>174</sup> This author takes the perspective that States and international law developed into modern notions of States and law in concert (or alongside one another – in opposition to each other if the reader is prone to a Hobbesian view of the world). States are simultaneously master and slave.

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Turk.), Jurisdiction, 1978 I.C.J. 3 (Dec. 19) (no rule prohibiting a joint communiqué from being a legally binding instrument).

172. See *Disp. Concerning Delimit. Of the Marit. Boundary Betw. Bangladesh & Myanmar in the Bay of Bengal (Bangl./Myan.)*, Case No. 16, Judgment, paras. 92–5 (Int’l Trib. Law Sea, Mar. 14, 2012) (where the signed “Agreed Minutes” were held not to be a treaty, partly because of the gravity of the subject matter of the minutes which suggesting that the parties could not have intended to create legal obligations).

173. We are reminded of Judge McNair’s caution about transposing municipal legal principles into international law “lock, stock and barrel”. See *International Status of South-West Africa*, Advisory Opinion, 1950 I.C. J. 128, 148 (July 11):

The way in which international law borrows from this source is not by means of importing private law institutions ‘lock, stock and barrel’, ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of ‘the general principles of law.’

174. See KOSKENNIEMI, *supra* note 167, at 265–66.

They create international law by act of will, but also submit themselves to it. Although holding such cognitive dissonance is not pleasant, it seems to best capture the essence of the international legal system. As a result the international legal system, to the degree to which we can call it a system, paradoxically accommodates the sovereign prerogatives of states while still demanding compliance.

The difficulty for Klabbers is that even if MOUs contain legal obligations, they have no enforcement mechanism. Does that not mean that the obligation is removed from law? And what shall we make of provisions that expressly state that the MOU is not governed by international law? Can these declarations be explained away as somehow inapplicable? We might argue that the principle of effectiveness should result in enforceability of any norm, but that conclusion is difficult to reach if the document expressly excludes legality and enforceability. Klabbers presumes that a violation of international law is just that, even without a complaint and assessment of a violation. Essentially he argues that a tree falling in the woods does make a sound, even though no one hears it. This author has considerable sympathy for Klabbers' arguments, but believes Klabbers is not completely correct. Klabbers appears to hold a certain perspective on international law—*i.e.*, that it is a completely coherent, unified and, moreover, formal legal system, where every act must be objectively discoverable as lawful or unlawful. It is not clear that international is.<sup>175</sup> Klabbers appears to believe that an arguable violation of a legal right, perceived by a third-party, in this case a member of academia, is necessarily a violation of a legal right. Professors of law are not judges or diplomats, notwithstanding the conceit that they would be good ones. In the largely auto-interpretative system of international law,<sup>176</sup> a

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175. The ICJ has found *lacunae* in the law. See *e.g.*, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141 (July 22) (esp. Decl. of Simma, J.); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶105(2)(E) (July 8). *But see* Hersch Lauterpacht, *Non Liquet and the Completeness of Law*, in SYMBOLE VERZIJL: SYMBOLE VERZIJL: PRÉSENTÉES AU PROFESSEUR J.H.W. VERZIJL À L'OCCASION DE SON LXX-IÈME ANNIVERSAIRE 196, 205 (Le Baron F. M. Van Asbeck et. al eds., 1958) (arguing against *lacunae*).

176. *Second Report on the Law of Treaties*, [1954] 2 YB Int'l L. Comm'n 123–24, ¶ 4, U.N. Doc. A/CN.4/SER.A/1954/Add.1

In the first instance, as already stated in the first report, the fact that the extent of the application of the instrument is left in some respects to the appreciation of the parties and that, as the result, the scope of

potential claim of a violation of international law can only be definitely settled as such where the parties consent to do so and a conclusive settlement is reached to classify a certain act as legally legitimate or not. Koskenniemi is correct to identify the need to remove and ignore the actor making the legal classification in order for international law to achieve a formal doctrine of sources,<sup>177</sup> but it is not entirely clear that international law has concluded this operation fully. The actor making the classification of an act as lawful or not remains crucial in international dispute settlement. The UN Charter provides a number of modes for peaceful resolution of international disputes, without distinguishing which of those disputes are legal ones and, if that is a distinction that can be made, which disputes must be settled through legal means. A state might reach a negotiated settlement of a dispute over a diplomatic gaffe such as insulting the ambassador's wife, and a state might similarly reach a negotiated settlement of a dispute over the purported "unlawful" use of force, without an admission of the act being unlawful. Until international law ceases to have voluntary, consensual dispute settlement that accepts non-legal settlement methods as equally valid, we are left with a system where relatively few dispute outcomes can conclusively inform us about the law and very few hypotheticals are clearly unlawful.

### 3. The Role of Formal Assessment and Enforcement

This author is not willing to adopt either the Aust or Klabbers views in their entirety. Aust and Klabbers argue past each other because of their differing notions of the role of enforcement of international agreements, the master-slave dichotomy and the formality of international law generally.<sup>178</sup>

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the obligation is indefinite and elastic, is not a decisive factor for denying that there is in existence a legal duty to be fulfilled in good faith. This is so even if, in what must be regarded as the typical case in treaties of this nature, the instrument contains no provisions, or purely nominal provisions, for the settlement of disputes arising out of the application or the interpretation of the treaty . . . .

177. See KOSKENNIEMI, *supra* note 167, at 265–66.

178. See Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 715 (Feb. 2010)

The key difference, we believe, between scholars who evaluate hard and soft law in terms of a binary binding/nonbinding distinction and those who evaluate it based on characteristics that vary along a continuum depends on whether they address international law primarily from an ex post enforcement perspective or an ex ante negotiating one.



Many commentators, Aust and Klabbers included, seem to commingle the notion of whether an obligation is legal or not with whether the obligation is enforceable or not through third-party adjudication based on the law.<sup>179</sup> These are not the same thing.<sup>180</sup> Lauterpacht, in his capacity of Special Rapporteur on

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179. See AUST, *supra* note 32 at 34 (“when an instrument contains an article providing for the settlement of disputes by compulsory international judicial process, such a provision is hardly consistent with an intention not to enter into a legally binding instrument”) (citing Hugh Thirlway, *The Law and Procedure of the International Court of Justice*, 1991 BRIT. YB INT'L L. 1, 7–8); Citizens Trade Campaign, *The Colombian Free Trade Agreement is an Affront to Human Dignity*, Apr. 14, 2011, available at <http://www.citizenstrade.org/ctc/blog/2011/04/14/colombia-free-trade-agreement-an-affront-to-human-dignity>

On April 7, Presidents Obama and Santos announced a new ‘Colombian Action Plan Related to Labor Rights,’ paving the way for a vote on the U.S.-Colombia Free Trade Agreement . . . . More disturbing still, the ‘Action Plan’ is in no way legally binding. It provides zero mechanisms for compliance once the Colombia FTA is implemented — making it in some ways weaker than even NAFTA’s ineffectual labor side agreement.

UNHCR, *Note, supra* note 2, ¶ 5

Diplomatic assurances given by the receiving State do not normally constitute legally binding undertakings. They generally provide no mechanism for their enforcement nor is there any legal remedy for the sending State or the individual concerned in case of non-compliance, once the person has been transferred to the receiving State. . . .

HUMAN RIGHTS WATCH, *supra* note 13 (arguing that assurances do not provide for enforcement mechanisms and that this fact has an effect on the legal value of the obligations undertaken). *But see* Ahmad, Aswat, Ahsan and Mustafa (Abu Hamza) v. U.K., Appls. Nos. 24027/07, 11949/08, and 36742/08, Partial Decision Admissibility, Eur. Ct. H.R. ¶ 78 (Jul. 6, 2010) (“Amnesty [International] concluded that the assurances lacked a clear legal basis or mechanism by which the persons concerned could enforce them.”). Some authors also in turn commingle compliance with effectiveness or utility of the instrument. See Shaffer, *supra* note 178; Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296, 304 (1977) (“It would seem wiser to recognize nonbinding agreements may be attainable when binding treaties are not . . .”).

180. See *e.g.*, Prosecutor v. Blaskic, Case No. IT-95-14, Judgement [*sic*] on the Req. of the Rep. of Croatia for Rev. of the Dec. of Tr. Ch. II of 18 July 1997, paras. 35–6 (Int'l Crim. Trib. former Yugoslavia, Appls. Ch., Oct. 19, 1997 (distinguishing between legal obligation and power of enforcement of the obligation). *Also see* ICCPR, *supra* note 2, at arts. 6, 7, 14 (providing for what are undoubtedly legal obligations, but failing to provide third-party enforcement mechanisms); First Optional Protocol to the ICCPR, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (providing for the right of individual complaint before a third-party, *i.e.*, the Human Rights Committee). See generally Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421 (2000) (“most international law is ‘soft’ in distinctive ways”); Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269

the Law of Treaties, argued vigorously that neither enforcement mechanisms<sup>181</sup> nor self-assessed discretion in compliance<sup>182</sup> is the test for legal nature of obligations. It could just as easily be claimed that the rulings of the European Court or the ICJ are not legally binding since the former relies on the Council of Ministers and the latter relies on the UN Security Council for enforcement of its judgments,<sup>183</sup> both of which are “political” bodies that entertain discretion whether to act. Nevertheless, it is recognized that the enforcement mechanism is distinct and separate from the legal classification of the act as wrongful or not. In this author’s submission, whether an act is legal or not is a question of classification of an act as legally legitimate or not.<sup>184</sup> The Vienna Convention requires only that

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HAGUE ACAD. REC. DES COURS 9, 19 (1997).

181. *Second Report on the Law of Treaties*, [1954] 2 Y.B. Int’l L. Comm’n 125–26, ¶ 12, U.N. Doc. A/CN.4/SER.A/1954/Add.1

In particular, there is probably no warrant for the suggestion that an instrument is not a treaty unless it contains provisions for the compulsory judicial or arbitral settlement of disputes as to its interpretation or application. While most multilateral treaties of a general character and many other treaties contain clauses of this nature, this is not the case in many treaties which clearly create legal rights and obligations. The legal nature of rules of customary international law does not depend upon the existence of compulsory machinery for their arbitral or judicial ascertainment. There is no reason for more stringent requirements in this respect in the matter of treaties.

182. Hersch Lauterpacht, Spec. Rapp., *Second Report on the Law of Treaties*, [1954] 2 Y.B. Int’l L. Comm’n 125, ¶ 9, U.N. Doc. A/CN.4/SER.A/1954/Add.1 (arguing that “purely administrative agreements” could also have legally binding obligations notwithstanding “their nature and subject matter, [which] leave a considerable measure of discretion to the authorities in question [when they] exhibit the essential characteristics of an international treaty.”) (*citing* Agreement between the Post Office of the United Kingdom of Great Britain and Northern Ireland and the Shereefian Post and Telegraph Administration for the exchange of money orders, July 12 & Aug. 28, 1948, 90 U.N.T.S. 84).

183. *See, e.g.*, U.N. Charter, art. 94, para. 2.

If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

*See also* ECHR, *supra* note 2, as amended by Protocol No. 14, June 1, 2010, art. 46, para. 2 (providing for the Committee of Ministers to monitor and supervise implementation of judgments by the European Court).

184. James Crawford, Spec. Rapp., *Report of the Commission to the General Assembly on the work of its fifty-third session: State Responsibility*, [2001] 2 Y.B. Int’l L. Comm’n 33, art. 1, cmt (3), U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter Crawford, *State Responsibility*] (“[E]very internationally

the agreement be “governed by” international law, not that it be “enforced by” international legal mechanisms. The question of enforcement focuses on the compliance with the obligation following its legal classification. This notion is a distinct one from that of “governance” or the authoritative legal classification of the act as lawful or not. Indeed, sometimes the classification itself is enough to induce compliance, but not always, though these are separate phenomena.

This analysis of the binding nature of agreements being measured by their enforcement provisions is difficult business and trends very close to analyses of why states comply with international law in the first place and the role of legitimacy of norms.<sup>185</sup> This problem, of course, is not unique to international law. Domestic legal systems sometimes struggle with compliance or non-compliance with decisions of legal or illegal tribunals.<sup>186</sup> In those cases too, the line between what is law and what is not can be blurred. Clearly states look to a variety of concerns when selecting their course of action on the international plane.<sup>187</sup> Certainly there may always be

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wrongful act of a State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place . . .”). Thus responsibility is objective; it is not dependent on an assessor definitively characterizing an act as unlawful, and, impliedly, states cannot exclude it. *See also id.* at 54–57, art. 12, cmts. (1), (5), (6), (11) (concluding that the origin or character of the international obligation—whether it is a treaty norm or customary international law, whether it is a bilateral or multilateral obligation, whether it is an obligation of conduct or result—is irrelevant to the question of whether the act is in conformity with it). For discussions of the duties incumbent upon states committing internationally wrongful acts see generally *id.* at 88–107, arts. 29, 30, 31, 34, 35, 36, 37, and their commentaries.

185. *See, e.g.*, LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979) (“It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.*”); ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 71–111 (2008) (arguing that states desire that their promises be credible); Shaffer, *supra* note 178, at 712–15 (discussing reputational costs of non-compliance); Jose E. Alvarez, *Why Nations Behave*, 19 *MICH. J. INT’L L.* 303 (1998) (reviewing a new wave of compliance scholarship).

186. *See, e.g.*, *Servai, et al. v. Tamil Nadu*, 2011 STPL (Web) 403 SC 1, ¶¶ 16–17 (India) (Katju J.), available at [http://www.stpl-india.in/SCJFiles/2011\\_STPL\(Web\)\\_403\\_SC.pdf](http://www.stpl-india.in/SCJFiles/2011_STPL(Web)_403_SC.pdf) (holding that the traditional tribunals of “khap panchayats” were “illegal” “kangaroo courts” and that their “decrees” encouraging honor killings were unlawful; ordering non-compliance by law enforcement officials).

187. *See Othman v. Sec’y State For the Home Dep’t*, (2007) No. SC/15/2005 (S.I.A.C.), ¶ 296 (U.K.) (“States look not only to the legal status of international documents when deciding their behaviour but to the whole political context.”).

diplomatic consequences for non-compliance, which can operate as sufficient inducements to comply<sup>188</sup> although that conclusion may be more problematic for human rights treaties.<sup>189</sup> However, failure to effect compliance does not necessarily render the classification as legally illegitimate or not correct.

The authoritative classification of the act is often permitted through a number of dispute settlement mechanisms, including party-to-party negotiations without a disinterested third party. Negotiations, as opposed to “legal” (or “quasi-legal”) dispute settlement such as arbitration, do not clearly result in a legal classification of the acts as lawful or not, they simply settle the dispute, although they can potentially inform us of state *opinio juris* regarding acts of that type. The mere fact that an obligation may be settled only by negotiation does not mean that the obligation is, of necessity, not a legal one.<sup>190</sup>

The problem with the objective (third-party) or subjective (negotiated) legal assessment standards is that legal legitimacy depends on whether there is a person to hear the tree fall in the woods, which is the precise problem to begin with. The answer to the tree falling in the woods question is that we cannot know

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188. See Beth A. Simmons, *Money and the Law: Why Comply with the Public International Law of Money?*, 25 YALE J. INT'L L. 323, 356–57 (2000) (finding reasons for compliance to include reputational consequences); HUMAN RIGHTS WATCH, *supra* note 13 (concluding that assurances do not have sufficient inducements to comply with human rights obligations). That is not to say that there are no consequences when diplomatic enforcement is the only available mode. See, e.g., Katherine R. Hawkins, *The Promises of Torturers: Diplomatic Assurances and the Legality of Rendition*, 20 GEO. IMMIGR. L.J. 213, 241 (2006) (reporting on the suspension of funding for Egypt's intelligence services after diplomatic assurances against torture were violated and the change in policy against extraditing or rendering suspects to Syria following the Maher Arar incident) (citing Dana Priest, *CIA's Assurances on Transferred Suspects Doubted; Prisoners Say Countries Break No-Torture Pledges*, WASH. POST, Mar. 17, 2005, at A1); Dana Priest & Barton Gellman, *U.S. Decries Abuse But Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1.

189. See HENKIN, *supra* note 185, at 235 (“The forces that induce compliance with other law ... do not pertain equally to the law of human rights.”); Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1938 (2002) (“[T]he major engines of compliance that exist in other areas of international law are for the most part absent in the area of human rights.”).

190. Crawford, *supra* note 184, at 34–35, art. 2, cmts. (1)–(3) (finding that the conditions for responsibility are only attribution of the act to the state and that the act be a breach of international law, without provision for the nature and role of a third-party assessor); *id.* at 87, art. 28, cmt. (2) (finding that any unlawful conduct that results in responsibility of the state, impliedly, regardless of any or the existence of dispute settlement mechanism, requires cessation and reparation).

the answer.<sup>191</sup> A party that violates an MOU is potentially in violation and responsible to the other party, and only to the other party. Had Qatar and Bahrain never taken their dispute to the ICJ, we would not know whether the minutes constituted a treaty, and perhaps neither would the ICJ as a theoretical matter. Whether an agreement is legally binding or not is only addressed by a third-party when the principle parties disagree as to its legal effect.<sup>192</sup> When the parties submitted the dispute for definitive settlement by the ICJ, they agreed that the decision of the Court constituted their reality, not their own self-assessment or mutual negotiations. It was only through the dispute settlement process, by claiming that an instrument provides for legal rights, that the binding nature of those rights is realized. If one state with a right to complain does not claim a violation, then we do not know whether there was a violation or not, although we can guess. This is all the more difficult in

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191. In this context the socio-legal studies of Malinowski and the early Hawthorne studies are particularly illuminating. Sociology has long identified and attempted to account for the "Hawthorne" or "observer" effect of the researcher on the behavior of the researched. *See generally, e.g.*, BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1926) (characterizing observer forces in the "primitive" law of indigenous cultures); HENRY A. LANDSBERGER, *HAWTHORNE REVISITED* (1958) (conducting a reevaluation of the conclusions of the Hawthorne studies, as well as the works of its advocates and critics); Debra Steele-Johnson et al., *Goal Orientation and Task Demand Effects on Motivation, Affect, and Performance*, 85 J. APPLIED PSYCHOL. 724 (2000) (analyzing goal orientation and task demands on motivation, affect, and performance); Lyle Yorks & David A. Whitsett, *Hawthorne, Topeka, and the Issue of Science Versus Advocacy in Organizational Behavior*, 10 ACAD. MGMT. REV. 21 (1985) (summarizing the Hawthorne and Topeka studies, and the role of observers in reporting outcomes); Richard H. Franke & James D. Kaul, *The Hawthorne Experiments: First Statistical Interpretation*, 43 AM. SOC. REV. 623 (1978) (providing statistical study of the Hawthorne studies, analysis of which revealed increased worker output simply due to the presence of observers); Alex Carey, *The Hawthorne Studies: A Radical Criticism*, 32 AM. SOC. REV. 403 (1967) (finding significant deficiencies in the basic hypothesis of the Hawthorne studies). Occasionally, courts also take note of the observer effect when assessing evidence of a norm. *See, e.g.*, *In re Estate of Apachee*, 4 Nav. R. 178, 180 (W.R. Dist. Ct. Oct. 11, 1983) (holding that for proving a Native American customary norm, the court should not seek evidence from anthropologists and ethnologists, but rather the tribal members themselves, although this practice does not entirely resolve the observer problem).

192. *See, e.g.*, Herbert Bernstein & Joachim Zekoll, *The Gentleman's Agreement in Legal Theory and in Modern Practice: United States*, 46 AM. J. COMP. L. SUPP. 87, 88 (1998) Although speaking of non-legally binding commercial agreements, Bernstein and Zekoll argue:

It is extremely difficult to determine, with any degree of certainty, how widespread the use of permanent 'no-law' agreements is in actual American business practice. ... [N]o such agreement will ever surface in a court of law unless the parties differ as to its effect. *Id.*

international law where parties may not seek to enforce their claims due to a variety of political concerns of diplomacy.<sup>193</sup>

#### 4. Private Law Analogies

Before reaching a conclusion on diplomatic assurances and the law of treaties, we should once again consider analogies with private law specifically in the context of intent to create legal relations. Admittedly private law does not necessarily suffer the international law problem of erecting such a large additional burden separating legal classification from the available modes of enforcement.<sup>194</sup> But it does reflect some of

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193. See, e.g., *Alzery v. Sweden*, Commc'n No. 1416/2005, ¶ 4.11, U.N. Doc.CCPR/C/88/D/1416/2005 (Human Rights Comm., Nov. 10, 2006) (noting Sweden's diplomatic reasons for not interfering with an Egyptian national detained in Egypt); *Youssef v. Home Office*, [2004] EWHC 1884 (QB), HQ03X03052 [18] (Eng.) (citing the UK Prime Minister's letter to the Home Office requesting that terms of assurances be narrowed for diplomatic reasons)

Diplomats are often quite candid that their top priority is to ensure friendly relations with other states, sometimes at the expense of confronting governments about possible human rights violations, including about breaches of pre-agreed diplomatic assurances. For example, when the former Swedish Ambassador to Egypt was asked why he let five weeks lapse before visiting two Egyptians expelled in December 2001 from Stockholm to Cairo following diplomatic assurances, he replied that the Swedes could not have visited the men immediately because that would have signaled a lack of trust in the Egyptian authorities. . . . Inter-state dynamics at the diplomatic level are by their very nature delicate, and diplomats often invoke the need for "caution" and "discretion" in diplomatic representations and negotiations. As a result, serious human rights issues—even those involving the absolute prohibition against torture—are often subordinated to diplomatic concerns. . . . Blair's Private Secretary detailed those concerns in an April 1999 letter to the Home Office stating, "[W]e are in danger of being excessive in our demands of the Egyptians . . . why [do] we need all the assurances proposed by the F[oreign] C[ommonwealth] O[ffice] and Home Office Legal advisers. Can we not narrow down the list of assurances we require?";

HUMAN RIGHTS WATCH, *supra* note 13 (alteration in original) (citations omitted) (citing former Swedish Ambassador to Egypt's statement: "What do you think [would] have happened if I had come rushing in after four or five days and demanded to see those people? It had been to signal from the start that we don't trust you Egyptians.")

194. Although the American experience of Andrew Jackson's, probably apocryphal, statement in reaction to the judgment of the Supreme Court in *Worcester v. Georgia*, 31 U.S. 515 (1832), does come to mind as an exception: "John Marshall has made his decision, now let him enforce it!" The modern case of *Labsi* in Slovakia could be another example where the executive appears to have ignored the judgment of the Supreme Court. See *Labsi v. Slovakia*, Statement of Facts, Eur. Ct. H.R., Appl. No. 33809/08 ¶ 3 (Jun. 8, 2010) (noting that the Slovakian Executive expelled *Labsi* despite a stay entered by the Slovakian Constitutional Court), the case is pending as of this publication).

the same debates over the relevance of intent in forming of a contract.<sup>195</sup> Again, care should be given in drawing private law analogies, but here the analogy is particularly helpful because the same questions are at issue in a highly similar context. Furthermore, both sides of the analogy, the national legal system and the international legal system, share a common feature, which is that all agreements are concluded within and submitted to the legal system, and it is the system that determines whether the parties concluded a legally binding agreement based on, *inter alia*, whether there is an agreement, whether the parties had the requisite objective intentions, etc.

A particularly relevant example within domestic contract law is the treatment of agreements that are variously termed “letters of intent” (“LOIs”) or, unfortunately, “memoranda of understanding” (“MOUs”). LOIs and MOUs are often entered into between corporations, usually as a preliminary stage in negotiations over purchases, mergers and acquisitions. These agreements often include express language that they are not legally binding. Nevertheless, they also often provide for legal rights and obligations.<sup>196</sup> In the case of *Venture v. Zenith*,<sup>197</sup> one

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195. For the “objective” school, see SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 21 (1st ed. 1920) (citing *Davison v. Holden*, 10 A. 515 (Conn. 1887) and *Wellington v. Aphorp*, 13 N.E. 10 (Mass. 1887) (summarizing the law related to the non-necessity of intent in formation of contracts). However it is interesting to note that in one of the cases that Williston cites, namely *Wellington*, the court probed the question of intent: “[W]hether it appears there was a promise by the defendant’s testator sufficiently definite to be enforced, and made with the understanding and *intention* that she would be legally bound thereby.” *id.* at 13 (emphasis added). For the “intent” school, see GUENTHER TREITEL, *THE LAW OF CONTRACT* 149 (10th ed. 1999) (“An agreement, though supported by consideration, is not binding as a contract if it was made without any intention of creating legal relations.”) (footnote omitted); WILLIAM REYNELL ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT AND OF AGENCY IN ITS RELATION TO CONTRACT* pt. 2, at 11 (11th ed. 1906) (including intent as part of the first element of a legal contract). An interesting middle ground is *Sulzbach v. Town of Jefferson*, 155 N.W.2d 921, 923 (N.D. 1968) (“It is not necessary that the parties are conscious of the legal relationship which their words or acts give rise to, but it is essential that the acts manifesting assent shall be done intentionally.”) The court appears to hold that it is not the intent to have a legally bound result that is at stake, but that the acts that result in the binding contract are done intentionally. Lastly, some courts have held that the legally-binding nature of the agreement could even be auto-interpretive, further justifying the analogy with international law. See, e.g., *Empro Mfg. Co. v. Ball-Co Mfg.*, 870 F.2d 423, 425 (7th Cir. 1989) (Easterbrook, J.) (citations omitted) (“Parties may decide for themselves whether the results of preliminary negotiations bind them . . .”).

196. Courts have adopted one of two perspectives for dealing with these kinds of preliminary agreements. Either the agreement is seen as legally binding but the court needs to supply the missing terms, or the court holds

corporation sent the other a non-binding LOI that included a paragraph providing that the parties must negotiate in good faith regarding a potential purchase agreement and excluding the parties' right to negotiate with other parties. Eventually when the negotiations broke down, the buyer sued. Judge Posner found that the LOI "established a *binding agreement* to negotiate in good faith toward the formation of a contract of sale"<sup>198</sup> and regarding damages as follows:

Damages for breach of an agreement to negotiate may be, although they are unlikely to be, the same as the damages for breach of the final contract that the parties would have signed had it not been for the defendant's bad faith. If, quite apart from any bad faith, the negotiations would have broken down, the party led on by the other party's bad faith to persist in futile negotiations can recover only his reliance damages—the expenses he incurred by being misled, in violation of the parties' agreement to negotiate in good faith, into continuing to negotiate futilely. But if the plaintiff can prove that had it not been for the defendant's bad faith the parties would have made a final contract, then the loss of the benefit of the contract is a consequence of the defendant's bad faith, and, provided that it is a foreseeable consequence, the defendant is liable for that loss—liable, that is, for the plaintiff's consequential damages.<sup>199</sup>

This conclusion does not mean that the parties are easily able to claim damages, since the corporation would need to prove what the terms of the final agreement would have been but for the bad faith.<sup>200</sup> Significantly for our purposes, Posner

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that there is no agreement aside from the obligation to continue negotiating the agreement in good faith. See E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 249–55 (1987) (presenting two types of negotiating agreements; one where the parties agree to be bound, and the other where they do not); *Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co.*, 670 F. Supp. 491, 498–99 (S.D.N.Y. 1987) (finding that in order to determine if a preliminary agreement is binding, the court must look to the intent of the parties).

197. See *Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 96 F.3d 275 (7th Cir. 1996). See also RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981) ("Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract . . ."). *But see* *Balfour v. Balfour*, [1919] 2 K.B. 571, 578 (U.K.) (requiring intent to be bound); *Baird Textile Holdings Ltd v. Marks & Spencer plc*, [2001] EWCA (Civ) 274 (Mance L.J.) (searching for certainty as evidence of intent); United Nations Convention on Contracts for the International Sale of Goods, art 14(1), Apr. 11, 1980, 1489 U.N.T.S. 3, (entered into force Jan. 1, 1988) ("A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it . . . indicates the intention of the offeror to be bound in case of acceptance.").

198. *Venture Assoc.*, 96 F.3d at 277 (emphasis added).

199. *Id.* at 278.

200. Insofar as we might apply this rule of international law, we might note that many cases brought at international law result only in a declaratory



concluded that that problem “goes to the practicality of the remedy, not the principle of it.”<sup>201</sup> This holding seems to affirm the distinction between legal classification and remedy. This approach has been followed in other jurisdictions,<sup>202</sup> though others have clearly rejected it.<sup>203</sup>

In *Logan v. Sivers*, the Oregon Court of Appeals found that there are four types of LOIs.<sup>204</sup> The first is a binding contract in which all terms are agreed and written, despite it being titled an “LOI”. The second is a binding agreement in which some terms are not entirely settled and the court will move to settle them and render the agreement effective. The third is a generally non-binding contract where certain provisions may nonetheless still be binding, such as the obligation to negotiate in good faith. The last is a completely non-binding agreement in which the parties have clearly and deliberately excluded any binding legal obligation.<sup>205</sup>

Where the parties have expressly manifested their intent

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judgment. *See generally, e.g.*, Statute of the International Court of Justice, ch. III, June 26, 1945, 1 U.N.T.S. 16, 59 Stat. 1055 (outlining the general procedure the ICJ follows in administering judgments). *But see generally* ICSID, *supra* notes 99–100 (noting ICSID cases where declaratory judgments were not given).

201. *Venture Assoc.*, 96 F. 3d at 279.

202. *See, e.g.*, *Vestar Dev. II, L.L.C. v. Gen. Dynamics Corp.*, 249 F.3d 958 (9th Cir. 2001) (leaving open the question of expectation damages for breaches of agreements to negotiate); *Coal Cliff Collieries Pty. Ltd. v. Sijehama Pty. Ltd.*, (1991) 24 NSWLR 1, 40–41 (Supreme Court) (Austl.) (finding a binding agreement to negotiate possible, though not present on the facts); *Hillas & Co. Ltd. v. Arcos Ltd.*, [1932] UKHL 2, [1932] Ll. L. Rep. 359 (H.L.) (appeal taken from Eng.) (holding that where there is consideration, a promise to negotiate in good faith is a legally binding agreement).

203. *See, e.g.*, *Walford v. Miles*, [1992] 2 A.C. 128, 136–38 (H.L.) (appeal taken from Eng.) (reaching the opposite conclusion in a more modern case than *Hillas*). Other jurisdictions rejecting this rule include some American ones. *See, e.g.*, *Goodstein Constr. Corp. v. City of N.Y.*, 604 N.E.2d 1356, 1362 (N.Y. 1992) (rejecting claims for lost profits based only on agreement to negotiate). *Cf.* PECL, *supra* note 82, art. 2:101: Conditions for the Conclusion of a Contract (“(1) A contract is concluded if: (a) the parties intend to be legally bound, and (b) they reach a sufficient agreement without any further requirement.”).

204. *Logan v. D.W. Sivers Co.*, 141 P. 3d 589, 593–95 (Or. Ct. App. 2006 *aff'd in part, rev'd in part*, 169 P.3d 1255, 1258–59 (Or. 2007)) (enforcing certain terms in an otherwise “non-binding” LOI).

205. *See also* *Jarvis Interiors Ltd v. Galliard Homes*, [2000] CLC 411 (A.C.) (Lindsay J.) (finding in a document entitled “Contract Preliminaries” that: (a) there could be no contract unless and until there was a deed between the parties—without which the agreement was equivalently “subject to contract” and (b) nothing that occurred afterwards overtook that—including the “handshake agreement” which was itself subject to a formal contract being entered into).

to be bound in certain terms, the court will find the provisions enforceable. This conclusion also holds for “if–then” contracts, where a binding contract is conditional only upon performance, remaining non-binding prior to the performance.<sup>206</sup> In *Logan*, the particular language was the “[s]eller agrees to be bound to provide the required due diligence documents within the time required to comply with the [n]on-[s]olicitation provision . . . .”<sup>207</sup> Where that intent was clearly expressed and the terms were definite, the court found the obligation binding.

These cases demonstrate that, in private law, parties may elect to agree on non-legally binding terms, but the language doing so must be express, and terms capable of creating legally binding obligations may still do so, even if the overall document purports to be non-binding. There is no *a priori* instrument that is binding or not in its entirety: each case must be analyzed on its own merits, and each term analyzed on its own merits.<sup>208</sup> The role of intent is in looking for what the parties, objectively, intended to agree upon.<sup>209</sup> What governs is the terms the parties intended to agree on.<sup>210</sup> That the parties may have contemplated that there would be a final contract after the conclusion of the LOI is not determinative of the legal value of an LOI if the LOI clearly expresses agreed-upon terms.<sup>211</sup> The judge can look at all the surrounding circumstances to determine this intent, and not only at the language of the

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206. In these cases, there is a non-binding document that imposes binding obligations only if the other party performs. *See, e.g.*, *British Steel Corp. v. Cleveland Bridge & Eng’g Co.*, [1984] 1 All E.R. 504 (Q.B.) (Robert Goff J.) (Eng.) (finding quantum meruit for plaintiff for work performed in expectation of a contract); *Baird Textile Holdings Ltd. v. Marks & Spencer Plc*, [2001] EWCA (Civ) 274 ¶ 6 (Mance L.J.) (Eng.) (noting plaintiff’s allegations that if it performed certain conditions, defendant would be bound to an implied contract).

207. *D.W. Sivers Co.*, 141 P.3d at 591–92.

208. *See Twintec Ltd. v. GSE Bldg. & Civil Eng’g Ltd.*, [2003] EWHC 605, [67] (Kirkham J.) (Eng.) (“There is no settled law on the meaning and effect of letters of intent. The court must decide each case on its facts.”).

209. Or perhaps an even stronger conclusion would be to look for intent to agree on language that expressed an objective intent to be bound.

210. *See Harvey Shopfitters Ltd. v. ADI Ltd.*, [2003] EWCA (Civ) 1757 (Eng.). The case reflects two principles. First, it is sufficient that the parties are agreed on all material and necessary terms. *Id.* at [9]. Second, the labels the parties attach to their documents are not determinative. *Id.* What matters is the intention of the parties to be gathered from all the relevant evidence including, so far as admissible, the factual matrix in which the documents in question were written. *Id.*

211. *See, e.g.*, *Westminster Bldg. Co. Ltd. v. Beckingham*, [2004] EWHC (TCC) 138, [10]–[11] (Thornton J.) (Eng.) (finding a simple contract created by an LOI even where LOI stated another contract was to follow).

document.<sup>212</sup> Furthermore, the expectations arising from a non-legally binding agreement may be so difficult to prove that they cannot be recovered as a remedy, though reliance expenses may be recoverable.<sup>213</sup>

Therefore, LOIs and MOUs in the corporate world can be (1) Completely binding; (2) Partially binding – some terms are binding and some are not and the court may or may not move to fill gaps and render it effective; or (3) Completely non-binding. For agreements that are completely binding, the parties have committed themselves to perform the obligations discussed.<sup>214</sup> A partially binding agreement will have some portions that are non-binding and some portions that are binding. For example, there may be no obligation to negotiate to a final transaction, even as some clauses, such as confidentiality, exclusivity and good faith clauses, are binding. An agreement may specify stipulated damages for failure to complete the negotiation.<sup>215</sup> An agreement may even contain terms, the binding force of which is contingent on practice. The last category of agreements, completely non-binding, has no legal effect whatsoever. Documents fall in this category where the parties' intentions are purely speculative.<sup>216</sup>

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212. *See, e.g.*, *Hackwood Ltd. v. Areen Design Serv. Ltd.*, [2005] EWHC (TCC) 2322, [17] (Field J.) (Eng.) (finding it necessary to look at the “matrix of facts” in order to determine the terms of an interim contract).

213. *See Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 962 (9th Cir. 2001) (finding that an exclusivity provision in a clearly non-legally binding LOI was enforceable, resulting in a damages award for reliance expenses but not expectation expenses).

214. *See Allen Wilson Shopfitters v. Buckingham*, [2005] EWHC (TCC) 1165, [12]–[17] (Coulson J.) (Eng.) (using language of obligation in the contract to discern legal obligations from LOI); *Eugena Ltd. v. Gelande Corp. Ltd.*, [2004] EWHC (QB) 3273, [104], [108] (Hegarty J.) (Eng.) (noting obligations to perform based on LOI); *Hall & Tawse S. Ltd. v. Ivory Gate Ltd.*, [1997] EWHC (TCC) 358, [34] (Eng.) (determining the obligations of work to be done from an LOI).

215. *See, e.g.*, *Copeland v. Baskin Robbins U.S.A.*, 117 Cal.Rptr.2d 875, 882–84 (Cal. Ct. App. 2002) (holding that the LOI was not binding but nonetheless did constitute an obligation to negotiate, with the possibilities of reliance damages where that obligation is breached); *Schwanbeck v. Fed.-Mogul Corp.*, 592 N.E.2d 1289, 1291 n.2, 1292–93 (Mass. 1992) (citing an LOI stating “this letter is not intended to create, nor do you or we presently have any binding legal obligation whatever” yet the next paragraph stating “[h]owever, it is our intention, and we understand, your intention immediately to proceed in good faith in the negotiation of such binding definitive agreement . . . .” and finding that the second obligation was binding even though the LOI generally was not).

216. *See, e.g.*, *Stephen Donald Architects Ltd. v. King*, [2003] EWHC (TCC) 1867, [67]–[68] (Seymour J.) (Eng.) (finding that the evidence as to the agreement was far too vague to base a clear obligation on).

## 5. Conclusion on the Law of Treaties

It appears that NewCenturySchlbfkof the question. Either states come before and are the masters of the law, or states come after and are the slaves. Either subjective intent governs in the final analysis or objective agreed terms do. Either those objective terms are truly objective or simply the imposition of value by a third-party adjudicator.

These questions bring up the issue of whether legal or non-legal relations is the normal, default situation. We can begin this inquiry with a hypothetical: could, two states agree to exclude the entirety of their bilateral relations from international law? Partly, yes. They could merge into a new state, thus transforming their international *inter se* relations into domestic constitutional legal relations.<sup>217</sup> They could not, however, excuse themselves from any *erga omnes* obligations or human rights obligations. Setting aside those exceptional situations, it does not appear objectionable that two states might agree to have non-legal relations between themselves on a wide range of topics.

Our usual means of interpreting international law point in differing directions for resolving this problem. The state practice and *opinio juris* seems vague and confusing. It is clear where disputes are not legally enforced or submitted to binding third-party arbitration, suggesting, though not conclusively that they are legal, but lacking effective enforcement. The drafting history of the Vienna Convention is unclear, but appears to show that the ILC and delegates to the Vienna Conference understood that intent is not an aspect of the “governed by international law” element, rendering all agreements, where they are agreements, governed by either international or domestic law. Private law analogies, on the

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217. See, e.g., *Worcester v. Georgia*, 31 U.S. 515, 518–19 (1832) (describing the fusion of the Cherokee Nation with the United States—although admittedly it is unclear whether the Native American tribes were states in the sense of international law in the first place); *Land and Maritime Boundary (Cameroon v. Nigeria; Eq. Guinea intervening)*, Judgment, 2002 I.C.J. 303, ¶¶ 200–09 (Oct. 10) (discussing “treaty” relations between Great Britain and the “Kings and Chiefs of Old Calabar” to determine legal rights to fusion of state territories). See also *Reservation Entered by the German Democratic Republic (GDR) to the Vienna Convention on Diplomatic Relations*, Apr. 18, 1961, 500 U.N.T.S. 95 (entered into force Apr. 24, 1964) (on Feb. 2, 1973 to articles 11(1), 48, and 50 to which the Federal Republic of Germany (FRG) objected on Sept. 5, 1974, although permitting the convention to enter into force between the two states notwithstanding the objection. 856 U.N.T.S. 321. The current status of these communications remains unclear following the absorption of the GDR by the FRG.

other hand, suggest that even in a legal system where the actors are individuals beholden to a hierarchical, coercive legal authority with mandatory enforcement powers, the actors are still free to conclude non-legally binding agreements; however, the agreements will be carefully examined and the legally binding portions will be severed from the non-legally binding ones. In this process, there may be a presumption that communications be legally binding, rather than not, but this question will be addressed in more detail below. Surely states would have the same freedom to treaty or not in the international legal system.

The ILC (Koskenniemi more precisely) wisely concluded that *lex specialis* is always in the eye of the beholder.<sup>218</sup> If we adopt the perspective that the international system, in as much as it is a system, is one based on law, then we must conclude that the *lex specialis* in the hypothetical above is the non-legal relations on particular topics; the *lex generalis* is that relations are governed by international law. If, on the other hand, we adopt the perspective that law is the creation of states acting in their sovereign capacity, then we might conclude that the *lex generalis* is the Hobbesian world of power and the *lex specialis* is relations governed by international law. This understanding of which condition is the *lex specialis* and which the *lex generalis* then plays a role in our understanding of whether there is a presumption in favor of non-legal or legal relations.

How do we cut this Gordian knot? It is important to recognize that in all of these hypotheticals, the states are able to adopt such a non-binding agreement because the law permits them to do so, not as an inherent aspect of their sovereignty, at least insofar as the legal system is concerned. The reason for this conclusion is the premise that international law is law made between equal sovereigns, who, in acting in their sovereignty, reflect and develop international law in a symbiotic relationship. After all, states would not even be sovereign equals without that conclusion already being a legal postulate. We all know that neither the chicken nor the egg came first. The two exist together, one necessitating the other and the two evolving together in parallel. This analogy comes closest to describing the relationship between state sovereignty

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218. See Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*: Rep. of the Study Group of the International Law Commission, 11, ¶ 8, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (discussing the legal pluralism of international law).

and international law. Each reaffirms the other. This author proposes to find a way forward by choosing to see international law as permeating international relations because states appear to have chosen that the law should do so. Where they purport to excuse certain obligations from the law, they use legal structures, legal devices, legal language and legal argument to accomplish this end. If a claim for enforcement of an instrument without mandatory third-party dispute settlement mechanisms was lodged at the ICJ, the court would be prohibited from entertaining it, not because the agreement was not existing in the international legal system, but because the agreement does exist in the international legal system, and that system provides that the Court shall not have jurisdiction to hear the case. It is only by operation of the law that the sovereign right to exclude legal effect can be realized. At the very least, the agreement in a non-binding document that the document is non-binding, is itself binding, otherwise the document might be binding.

Therefore, this author understands that there must be an implied exception to the Vienna Convention permitting states to exempt certain communications and understandings from enforcement and legal accountability. This exception must be narrowly construed—where legally binding aspects of the communication can be severed from the non-legally binding ones—and there is likely a presumption that communications are legally binding. There appears to be a widespread agreement among scholars of international law, including those along the spectrum of positive and natural law, that there is a presumption that agreements between and among states will be governed by international law rather than politics.<sup>219</sup> Given

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219. See, e.g., Lauterpacht, *supra* note 81, at 125, ¶ 11.

While in the sphere of private law the informality and variety of private arrangements may permit an inquiry into the question whether the nature of the promise is such as to create legal rights and obligations, it is believed that with regard to formal international compacts such intention must be implied from the fact of the formality of the instrument unless there is cogent and conclusive evidence to the contrary. Undoubtedly, the legal rights and obligations do not extend further than is warranted by the terms of the treaty. The fact that the instrument is a treaty does not imply an intention of the parties to endow it with the fullest possible measure of effectiveness. They may intend its effectiveness to be drastically limited. But, subject to that consideration which must be evidenced by the terms of the treaty and any other available evidence, the guiding assumption is that the instrument creates legal rights and obligations. Any measure of discretion and freedom of appreciation, however wide, which it leaves to the parties must be exercised in accordance with the legal principle of good faith. Although the parties

the track record of the ICJ in holding that most of the instruments that were challenged before as not being treaties were found to have been treaties, we might guess that the ICJ agrees with this presumption. In addition, this presumption is borne out in state practice. Drafters of treaties never appear to trouble themselves to expressly state when an instrument is

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may have intended a treaty to mean little, no assumption is permissible that they intended it to mean nothing and that the instrument concluded in the form of a treaty—with the concomitant solemnity, formality, publicity and constitutional and other safeguards—is not a treaty.

See also Kelvin Widdows, *What Is An Agreement in International Law?*, BRIT. Y.B. INT'L L. 117, 142 (1979) (finding intention of the parties critical to understanding a treaty's binding nature); 22 Code. Fed. Reg. §181.2(a) (US)

(a) General.

The following criteria are to be applied in deciding whether any undertaking, oral agreement, document, or set of documents, including an exchange of notes or of correspondence, constitutes an international agreement . . . .

(1) Identity and intention of the parties. A party to an international agreement must be a state, a state agency, or an intergovernmental organization. The parties must intend their undertaking to be legally binding, and not merely of political or personal effect. Documents intended to have political or moral weight, but not intended to be legally binding, are not international agreements. An example of the latter is the Final Act of the Helsinki Conference on Cooperation and Security in Europe. In addition, the parties must intend their undertaking to be governed by international law, although this intent need not be manifested by a third party dispute settlement mechanism or any express reference to international law. In the absence of any provision in the arrangement with respect to governing law, it will be presumed to be governed by international law. This presumption may be overcome by clear evidence, in the negotiating history of the agreement or otherwise, that the parties intended the arrangement to be governed by another legal system. Arrangements governed solely by the law of the United States, or one of the states or jurisdictions thereof, or by the law of any foreign state, are not international agreements for these purposes. For example, a foreign military sales loan agreement governed in its entirety by U.S. law is not an international agreement. (emphasis added).

Cf. OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 98 (1991) (“[T]he designation by the parties that their agreement is a treaty or international agreement should be accepted as conclusive evidence that a legal relationship is intended. . . . [However,] [s]tates are entirely free to decide that they do not wish to be bound legally by a particular instrument or declaration.”); Oscar Schachter, *The Twilight Existence of Nonbinding International Agreement*, 71 AM. J. INT'L L. 296, 297 (1977) (arguing that the presumption is the reverse—against legal obligations—at least where indefinite principles are being declared); J.E.S. Fawcett, *The Legal Character of International Agreements*, 30 BRIT. Y.B. INT'L L. 381, 400 (1953) (“[I]nternational agreements are to be presumed not to create legal relations unless the parties expressly or impliedly so declare”).

legally binding.<sup>220</sup> They only take pains to state the legal value of the document where it is purportedly non-legally binding. This practice suggests that states feel a need to rebut something when reaching agreements that might be misunderstood as binding and it appears that silence is meant to be understood as establishing a legal obligation. This exception is also not dependent on the existence of enforcement or third-party legal qualification of the acts, but could be informed by them. International law is only partly formalized, so law professors and other commentators are invited to offer their legal classifications of acts, recognizing that they could be wrong, but that submitted classifications might contribute to the meaningful, *inter se* legal assessment. That *inter se* assessment might include binding, third-party assessment, but simply by its being assessed by a third-party does not mean it is not *inter se*.<sup>221</sup>

Based on the foregoing, this author proposes the following analytical framework. An agreement between states could be non-binding, partly binding or fully binding in international law. In all three cases, it will not be such because it is removed from law but because of law. Terms within agreements will be legally binding where the parties clearly reached agreement (including agreement that the remainder of the instrument is non-binding), and will be non-binding where they did not. Since there is not necessarily a judge in international dispute settlement, the aggrieved party may interpret the law and sustain a claim itself. This classification of whether the terms of the understanding are binding will be done on a case-by-case analysis of the particular terms.

A first possibility is that there might be an express statement of intent in the agreed text as to the legal effects of the instrument. For example, the U.S.-Israel Free Trade Area Agreement clearly states that its provisions are “not . . . legally-binding”.<sup>222</sup> Aust also refers to an instrument that is explicitly

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220. See, e.g., Vienna Convention on the Law of Treaties, *supra* note 35; Vienna Convention on Diplomatic Relations, *supra* note 217; U.N. Charter; U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397; Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. All of these agreements are undoubtedly treaties, though none of them explicitly states they are meant to be binding.

221. Crawford, *supra* note 184, at 33, art. 1, cmt (4) (finding that responsibility is an essentially *inter se* relationship, aside from obligations *erga omnes*).

222. See Free Trade Area Agreement, Declaration on Trade in Services, U.S.-Isr., Apr. 22, 1985, 24 I.L.M. 653, 679 (providing in its preamble that the “principles set forth below shall not be legally-binding”).



titled the “Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests”.<sup>223</sup> The proposed MOU with Libya regarding military cooperation provides that “[T]his MOU does not include any provisions that entail commitments under International Law.”<sup>224</sup>

The question for this possibility would be how explicit would the provision need to be to be considered an express statement. The NATO-Russia Founding Act refers to “political commitments”<sup>225</sup> and the Stockholm Disarmament Declaration states that it embodies commitments that are “politically binding.”<sup>226</sup> These examples do not explicitly exclude legally binding commitments which could exist in parallel with the political commitments. However, if we understand that all legal commitments are also political commitments, then expressly providing for the political ones implicitly excludes the legal ones. That being said, Hersch Lauterpacht argued that express designation of an agreement as “a declaration of policy” did not suffice to remove it from being a legal agreement.<sup>227</sup> Apparently, the designation would need to be more specific than that example to succeed.

There could, of course, also be implied intent to establish whether commitments are legally binding or not. Subjective intent for an instrument to be legally binding (or not) is essentially impossible to prove.<sup>228</sup> Instead, we must look for objective implied intent. And by “objective”, we mean the

223. AUST, *supra* note 32, at 28 (citing U.N. Conference on Env't & Dev., Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, U.N. Doc. A/Conf.151/26 (Vol. III), Annex III (June 13, 1992)).

224. U.S. Dept. of State, Cable 08–Tripoli–308 (Apr. 10, 2008), ¶ 3, § 9(2), available at <http://wikileaks.org/cable/2008/04/08TRIPOLI308.html>.

225. See Founding Act on Mutual Relations, Cooperation and Security, N.A.T.O.–Russ., May 27, 1997, 36 I.L.M. 1006.

226. See Conference on Confidence- and Security-Building Measures and Disarmament in Europe, Final Stockholm Document, art. 101, Sept. 19, 1986, 26 I.L.M. 190, 195.

227. Lauterpacht, *supra* note 81, at 125, ¶ 8 (citing Declaration by the French Republic constituting an agreement on commercial policy and related matters, May 28, 1946, 1951 U.N.T.S. 84, 152) (“Neither is the legal nature of the instrument affected by its designation as a declaration of policy, especially if it is described as an agreement and if in other respects it imposes ascertainable obligations upon the parties.”).

228. See Widdows, *supra* note 219, at 121 (declaring such a search to lead to a tautology).

objective understanding of the parties to imply legal value, not our objective understanding. Therefore, we cannot rely on the individual parties' subjective intent, but rather evidence of their objective intent: the words that they agreed to and the circumstances of the time, and the inferences we can draw from them.<sup>229</sup> Insofar as international law is partly formalized, we, as scholars and commentators on the law, can at least submit our opinions on what objective intent is expressed, and to the degree that a dispute involving a third-party dispute resolution mechanism might be engaged, that arbiter might do the same.

A variety of cues have been identified that supposedly track state practice in designating which agreements are treaties and which are not. The title of an agreement ("treaty" or "Memorandum of Understanding") is suggestive, but not determinative.<sup>230</sup> An agreement could speak in aspirational terms,<sup>231</sup> use the word "will" or "shall", or employ "entry into

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229. See Schachter, *supra* note 219.

230. See *Peace*, in OPPENHEIM'S INTERNATIONAL LAW (Vol. 1), pt. 2, § 586, at 1209 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("[S]tates cannot avoid an instrument being a treaty merely by giving it a title suggesting otherwise"). In *Treaties in Force*, the U.S. State Department has recorded 768 documents which were entitled "Memorandum of Understanding" as treaties. See generally U.S. DEP'T STATE, *TREATIES IN FORCE* (2010) available at <http://www.state.gov/documents/organization/143863.pdf>.

231. See *Second Report on the Law of Treaties*, II Y.B. Int'l L. Comm'n 124-25, ¶¶ 5-7, U.N. Doc. A/CN.4/87

In a sense these provisions, which leave for future agreement the determination of the extent of the substantive obligations of the parties, are no more than *pacta de contrahendo*. They are further weakened by qualifications such as that the amount of assistance shall be such as the Government in question shall authorize. Nevertheless, it would not be accurate to maintain that an instrument of that character is no more than a pious statement of intention as distinguished from an assumption of binding legal obligations.

(citing, *inter alia*, Preliminary Agreement, U.S.-Czechoslov., July 11, 1942, 90 U.N.T.S. 258 (relating to the principles applying to mutual aid in the prosecution of the war against aggression); Agreement, U.S.-Den., Apr. 27, 1951, 94 U.N.T.S. 45 (regarding the defense of Greenland); Agreement, Den.-Pol., Dec. 7, 1949, 81 U.N.T.S. 22 (concerning the exchange of commodities); Exchange of notes constituting an agreement regarding the placement of Netherlands agricultural workers in Luxembourg, Lux.-Neth., Aug. 17 & 25, 1950, 81 U.N.T.S. 14; Mutual Defense Assistance Agreement, U.S.-Fr., Jan. 27, 1950, 80 U.N.T.S. 172; Customs Regime between Germany and Austria (Protocol of Mar. 19, 1931), 1931 P.C.I.J. (ser. A/B) No. 41 (Sept. 5). Cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (SW Afr.)*, Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 114 (June 21)

It has also been contended that the relevant Security Council resolutions are couched in exhortatory rather than mandatory language and that, therefore, they do not purport to impose any legal

force” language.<sup>232</sup> However, again, the ICJ has ruled that terminology cannot alone be sufficient,<sup>233</sup> and states have concurred.<sup>234</sup> Lastly, the instrument could follow an “if-then” structure, further suggesting that a *quid pro quo* is envisioned. Whether an instrument is recorded or registered has been suggested as evidence that it is not a treaty,<sup>235</sup> however, this author has argued above that failure to register – even a prohibition on registration – does not exclude binding effect.

Turning to the content, where pre-existing obligations are additionally inserted and where states are under no obligation to restate them, they may be meaningful—*i.e.* creating new binding obligations between the parties regarding that obligation. If the obligation is already owed *erga omnes*, perhaps this implicit creation of a new obligation is less clear.

Even if the terms of an agreement generally were considered non-legally binding, we might find specific provisions within it that are severable and binding on their own, despite the fact that other aspects of the communication did not result in binding commitments. The most glaring example cited above is the binding nature of provisions in agreements ordering that the agreement itself is generally not binding. We should keep in mind that agreements are presumed to be generally binding and that non-binding aspects are generally the exception. This conclusion suggests that not

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duty on any State nor to affect legally any right of any State. The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.

For an example of aspirational terms, see Organization of American States: Inter-American Convention Against Corruption, art. III, Mar. 29, 1996, reprinted in 35 INT'L LEGAL MATERIALS 724 (“to consider the applicability of measures within their own institutional systems . . .”).

232. Other terminology could include the verbs used (e.g. “will”, “shall”, etc.) and provisions (such as “entry into force”, “breach”, “termination”, etc.). AUST, *supra* note 32 at 27; Juris A. Lejnicks, *The Nomenclature of Treaties: A Quantitative Analysis*, 2 TEX. INT'L L.J. 175, 179 (1966). *But see* 22 C. F. R. § 181.2(a)(5); AUST, *supra* note 32, at 27–32.

233. *See* Maritime Delimitation and Territorial Questions (Qatar v. Bahr.), 1994 I.C.J. Repts. 112, 122 (July 1).

234. *See* AUST, *supra* note 32, at 32.

235. *See* U.N. Charter art. 102, para. 1 (“Every treaty and every international agreement entered into by any Member . . . shall as soon as possible be registered with the Secretariat and published by it.”).

only must agreements be analyzed assurance-by-assurance, but also obligation-by-obligation. There could be obligations of confidentiality, monitoring among other possibilities that could be legally binding even though the principle obligation(s) were not. Furthermore, the state expelling the person who then suffered mistreatment might attempt to claim reliance damages.

Lastly, there is probably at least an obligation of good faith in complying with the non-binding obligations or at least good faith in continuing negotiations. This is a legal obligation.<sup>236</sup> In principle a state party should be able to maintain an international dispute over whether the other party pursued its obligations in good faith, though the obligation was not itself binding, although its inability to resolve the dispute through third-party adjudication might be limited. The difficulty in terms of remedies would be showing the situation the state (or its national) would have been in had the state acted in good faith. And in any event, that remedy would most likely be requested through diplomatic channels rather than third-party dispute resolution.

Lastly, where we find that the individual terms of the agreement are not governed by international law, we will want to also examine whether the terms are binding under domestic law. Where the parties are clear that the assurances do not create any legal obligations at all, then it is hard to deny them that force. We should conclude that there is no legal obligation.

## 6. Application to Diplomatic Assurances

It has been submitted that in the practical application of assurances, the receiving state would simply not engage in the prohibited act because of the political repercussions. In the case of Canada and Egypt, the court in *Mahjoub*, discussed above, held that Egypt had “too much to lose”.<sup>237</sup> Since the process by which Egypt would lose—*i.e.* being either legal or extra-legal—was unclear, the legal nature of the assurances is thrown into doubt. In *Othman*, SIAC understood that Jordan would not jeopardize its bilateral relationship with the UK in such a

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236. See Voting Procedure on Questions Relating to Reports and Petitions Concerning Territory of South-West Africa, Advisory Opinion, 1955 I.C.J. 67, 88, 99, 105, 119–20 (June 7) (separate opinion of Judge Klaestad) (separate opinion of Judge Lauterpacht).

237. See *Mahjoub v. Canada* (Minister of Citizen and Immigration), [2006] 4 F.C.R. 247, ¶ 61 (Can.).

way.<sup>238</sup> However, it is important to observe that whatever Jordan or Egypt lost, they would lose it through one of the agreed modes of peaceful settlement of international disputes, specifically, negotiations. Notwithstanding the multiple submission that the assurances were not legal, a negotiated settlement of a dispute and repercussions of non-compliance are not necessarily non-legal.

Looking at the language of the UK MOUs, specifically those with Libya, Jordan, Lebanon, and Ethiopia we do not see any language that would suggest that the obligations assumed are anything but legally binding ones, but that is not to say that effective, legal enforcement mechanisms are contemplated. The titles of the instruments are all “Memorandum of Understanding” but the MOUs with Libya and Lebanon are “Concerning the Provision of Assurances in Respect of Persons Subject to Deportation”<sup>239</sup> whereas the MOU with Jordan is “Regulating the Provision of Undertakings in Respect of Specified Persons Prior to Deportation”.<sup>240</sup> In the latter case, a stronger legal value is suggested, and the fact that the United Kingdom used a different title when it could have used the same title also suggests a change in intent, but that is merely indicative by the title. All three instruments then have a section entitled “Application and Scope”.<sup>241</sup> The principle provision in this section uses very mandatory wording and states that “This arrangement will apply to any person accepted by the receiving state for admission to its territory following a written request by the sending state under the terms of this arrangement.”<sup>242</sup> This section also contains a direction on the procedure for request of assurances, and requiring that the assurances be requested and issued in

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238. See *Othman v. Sec’y State Home Dep’t*, Appeal No: SC/15/2005 (S.I.A.C.) ¶ 279 (U.K.)

The agreement could not be enforced legally by the Appellant or by the UK Government but Mr Oakden said that he would be very surprised if the Jordanian Government decided not to respect it. Conversely, the parties were not approaching the MOU as if it were to be the basis for legal argument about narrowly defined obligations, which one or other could seek to get round. Commitment had been firm on both principle and practice. It was that firmness of commitment at all levels which had persuaded Mr Oakden that the MOU would work as intended.

239. U.K.–Leb. MOU, *supra* note 6; Libya–U.K. MOU, *supra* note 6.

240. U.K.–Jordan MOU, *supra* note 6.

241. U.K.–Jordan MOU, *supra* note 6; U.K.–Leb. MOU, *supra* note 6; Libya–U.K. MOU, *supra* note 6; U.K.–Eth. MOU, *supra* note 6.

242. U.K.–Jordan MOU, *supra* note 6.

promptly in writing.<sup>243</sup> In the case of the MOU with Jordan, the instrument contemplates oral assurances, but still demands that they be eventually issued in writing before the expulsion can be affected.<sup>244</sup>

Still in the Application and Scope section, the Libyan and Lebanese MOUs provide for compliance with human rights. The MOU with Jordan also provides for compliance with human rights, but strangely does so in the following section regarding “Understandings” rather than in the “Application and Scope” section. It is not entirely clear why this placement was used in this case and whether any change in meaning is intended. It could be that the imperative nature of the obligations as well as their nature as separate and independent obligations apart from the pre-existing obligations under international law is affected. For example, the language in the Jordanian MOU simply says that “[i]t is understood that the authorities of the United Kingdom and of Jordan will comply with their human rights obligations under international law regarding a person returned under this arrangement,”<sup>245</sup> whereas the Libyan and Lebanese MOUs state that the parties “will comply with their human rights obligations under international law.”<sup>246</sup> This latter language of “will comply” suggests an additional obligation more clearly than the former language of “understands that they will comply.” In any event, in all three MOUs, that language is followed by mandatory language about the application of certain assurances. The Libyan and Lebanese MOUs use somewhat less compelling language, though not necessarily non-binding language: “The assurances set out in the following paragraphs . . . will apply to such a person . . . .”<sup>247</sup> while the Jordanian MOU characterizes the assurances as “conditions.”<sup>248</sup> This latter usage suggests a greater sense of reliance on the assurances as a condition for the expulsion.

It was noted above that the Ethiopian, Libyan and

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243. U.K.–Jordan MOU, *supra* note 6; Libya–U.K. MOU, *supra* note 6; U.K.–Eth. MOU, *supra* note 6.

244. U.K.–Jordan MOU, *supra* note 6.

245. *Id.*

246. U.K.–Eth. MOU, *supra* note 6; U.K.–Leb. MOU, *supra* note 6; Libya–U.K. MOU, *supra* note 6.

247. U.K.–Leb. MOU, *supra* note 6; Libya–U.K. MOU, *supra* note 6.

248. U.K.–Jordan MOU, *supra* note 6 (“Where someone has been accepted under the terms of this arrangements, the conditions set out in the following paragraphs (numbered 1-9) will apply, together with any further specific assurances provided by the receiving state.”).

Lebanese MOUs provide for a monitoring body and that such a provision appears to be an additional one, therefore an agreement. The next question is whether this agreement is a legally binding one. The reasoning for including the monitoring body provision in the Libyan and Lebanese MOU "Application and Scope" section and in the Jordanian and Ethiopian MOU "Understandings" section, is unclear; however, the obligation is provided for in mandatory language.<sup>249</sup>

Then the agreements proceed to lay out several obligations on the states such as "will be brought promptly before a judge,"<sup>250</sup> "will be informed promptly . . . of any charge against him"<sup>251</sup> etc.<sup>252</sup> Firstly, they are already existing obligations under international law, so arguing that they are not binding here is a bit difficult. It is strange to imagine that a state would agree to non-binding obligations to perform tasks that are otherwise binding. Surely, where a state agrees to something, and we have already concluded that there is an agreement to do the task, it would agree to do it with the same legal compulsion. We can consider the presumption in favor of binding agreements to buttress this argument. Secondly, even if we were tempted to see the agreements as non-binding, though still otherwise binding under general international law, we should follow that temptation since the obligations were expressed in mandatory language once again.

Lastly, the terms on withdrawal sound almost identical to those usually used in treaties, in this case, that either party may withdraw by giving six months notice. However, what is particularly interesting, and what reaffirms that these are legally binding obligations, is that the MOUs provide for surviving obligations: "Where one or other government withdraws from the arrangement, the terms of this arrangement will continue to apply to anyone who has been returned in accordance with its provisions."<sup>253</sup> It is difficult to

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249. *E.g.*, typical language is in the Libya–U.K. MOU, *supra* note 6:

An independent body ("monitoring body") will be nominated by both sides to monitor the implementation of the assurances given under this Memorandum, including any specific assurances, by the receiving state. The responsibilities of the monitoring body will include monitoring the return of, and any detention, trial or imprisonment of, the person. The monitoring body will report to both sides.

See also U.K.–Jordan MOU, *supra* note 6, at Understanding 4; U.K.–Leb. MOU, *supra* note 6; U.K.–Eth. MOU, *supra* note 6.

250. U.K.–Jordan MOU, *supra* note 6, at Understanding 2.

251. *Id.* at Understanding 3.

252. *Id.* at Understanding 4–8.

253. *Id.* at Withdrawal.

interpret this document as anything but a legally binding agreement.

In U.K. practice, the MOUs are supplemented by specific assurances in each case. These instruments are also difficult to locate, however in the case of *RB* before the House of Lords, the specific assurances were publicized and the House made a point to argue that the person subject to expulsion must be informed of the assurances in his case.<sup>254</sup> The assurance stated that the person at issue “will enjoy the following rights, assurances and guarantees as provided by the Constitution and the national laws currently in force concerning human rights: . . .”<sup>255</sup> This provision does not expressly refer to international human rights, but appears to transform domestic obligations into international ones. The House did not appear to consider these legal obligations, although it did not reach a decision on that point, but instead simply observed that the assurances were meant to be followed.<sup>256</sup>

Turning to an example of Canadian-Egyptian practice, the precise text of the assurances in the *Mahjoub* case is difficult to locate, but the Canadian court did refer to them in its judgment:

Egypt had given assurances to Canada that Mr. Mahjoub would not be tortured upon his return, in the form of two diplomatic notes and a letter from Major General Omar M. Soliman, GIS Chief. The delegate

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254. See *RB (Algeria) et al. v. Sec’y State Home Dep’t*, [2010] UKHL 10, [2009] 110 (H.L.) ¶ 102 (U.K.)

[W]e wish to make one point clear, which emerged more clearly during the substantive appeals. It is our view that the SSHD cannot rely on any substantive assurance unless it is put into the open. . . . [T]he key documents or conversations relied on to show that an Appellant’s return would not breach the UK’s international obligations or put him at risk of a death sentence or death penalty have to be in the open evidence. SIAC could not put weight on assurances which the giver was not prepared to make public; they would otherwise be deniable, or open to later misunderstanding; the fact of a breach would not be known to the public and the pressure which that might yield would be reduced. They must be available to be tested and recorded.

255. See *id.* ¶ 25 (including “the right to appear before a court . . .”, “receive free legal aid”; “presumed to be innocent . . .”; “right to notify a relative”; “right to be examined by a doctor”; “right to appear before a court”; and right to “human dignity”).

256. See *id.* ¶ 192

The arrangements with Algeria were negotiated at the highest level and it was plain to the Algerian authorities that what the United Kingdom required was an assurance which would enable it to comply with its obligations under article 3. On the other hand, the assurances had to be expressed in language which would respect the dignity of a sovereign state.



reviewed the trustworthiness of the assurances “as to their nature, their content as well as precedents and incentives with regards to the Egyptian government”. She gave little weight to the letter in view of its unofficial nature. However, she did accord considerable weight to the diplomatic notes as they constituted “part of the official record of bilateral relations between Canada and Egypt”. She decided that Egypt would not torture Mr. Mahjoub after officially denying it would, concluding it had too much to lose in the event it reneged on its guarantee.<sup>257</sup>

The court is not entirely clear what legal value it believes the assurances have. On the one hand, they are “part of the official record of bilateral relations” and despite the letter being “unofficial,” the assurances were not, suggesting that they were “official,” whatever that means. On the other hand, they are enforceable only to the degree that Egypt had “too much to lose.” We are left wondering what Egypt would lose if it failed to comply and whether it would lose whatever it might lose through legal or extra-legal process.

Another text of assurances between Egypt and Sweden was revealed in *Alzery v. Sweden* before the Human Rights Committee:

On 12 December 2001, a senior official of the Swedish Ministry for Foreign Affairs met with a representative of the Egyptian government. . . . The state secretary of the Swedish Ministry for Foreign Affairs presented an Aide-Mémoire to the official which read:

“It is the understanding of the Government of the Kingdom of Sweden that [the author and another individual] will be awarded a fair trial in the Arab Republic of Egypt. It is further the understanding of the Government of the Kingdom of Sweden that these persons will not be subjected to inhuman treatment or punishment of any kind by any authority of the Arab Republic of Egypt and further that they will not be sentenced to death or if such a sentence has been imposed that it will not be executed by any competent authority of the Arab Republic of Egypt. Finally, it is the understanding of the Government of the Kingdom of Sweden that the wife and children of [another individual] will not in any way be persecuted or harassed by any authority of the Arab Republic of Egypt.”

. . . The Egyptian Government responded in writing: “We herewith assert our full understanding to all items of this memoire, concerning the way of treatment upon repatriate from your government, with full respect to their personal and human rights. This will be done according to what the Egyptian constitution and law stipulates.” In oral discussions with representatives from the Egyptian government, the Swedish Government also requested that the Embassy would be allowed to attend the trial. The author states that it remains unclear

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257. See *Mahjoub v. Canada* (Minister of Citizenship and Immigration), [2006] 4 F.C.R. 247, ¶ 61 (Can.).

what other kind of follow-up mechanisms were discussed and decided upon prior to the expulsion. While the Swedish Government had since indicated that there had been discussions about the right to visit the author in prison, this remained unconfirmed. . . .<sup>258</sup>

The Human Rights Committee found the assurances not to have been sufficient because

the assurances procured contained no mechanism for monitoring of their enforcement. Nor were any arrangements made outside the text of the assurances themselves which would have provided for effective implementation. The visits by the State party's ambassador and staff commenced five weeks after the return, neglecting altogether a period of maximum exposure to risk of harm. . . .<sup>259</sup>

It is unclear whether the Committee believed that the monitoring and enforcement mechanism would need to simply exist or would need to constitute a legally binding obligation. In any event, the committee clearly believed that an additional commitment, not a mere restatement of existing obligations, would need to be made to render the assurances effective. This agreement appears to be a mere "piece of paper."<sup>260</sup>

One court has found that diplomatic assurances along these very lines are treaties, the European Court. In *Babar Ahmad v. United Kingdom*, the Court held:

It is true that these assurances have been given by the United States Government to the United Kingdom Government and not to the applicants. On this basis, Amnesty International has observed in its report that there is no mechanism by which the applicants could enforce the assurances which have been given. However, in the Court's view that would only be relevant if it were established that there was a real risk of a breach of those assurances. It is the President of the United States who would be responsible for any designation as enemy combatants and it has not been alleged that those responsible for the prosecution of the applicants would wish to

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258. See *Alzery v. Sweden*, Comm. No. 1416/2005, ¶¶ 3.6–3.7, U.N. Doc. CCPR/C/88/D/1416/2005 (Human Rights Comm. Nov. 10, 2006).

259. See *id.* ¶ 11.5. See also *Maksudov, et al. v. Kyrgyzstan*, Comm. Nos. 1461, 62, 76, 77 2006, ¶12.5, UN Doc. CCPR/C/93/D/1461, 1462, 1476 & 1477/2006 (Human Rights Comm. July 30, 2008) (*citing Alzery*)

. . . The procurement of assurances from the Uzbek General Prosecutor's Office, which, moreover, contained no concrete mechanism for their enforcement, was insufficient to protect against such risk. The Committee reiterates that at the very minimum, the assurances procured should contain such a monitoring mechanism and be safeguarded by arrangements made outside the text of the assurances themselves which would provide for their effective implementation.

260. Note that the oral communication about permitting attendance at the trial could never constitute a treaty since it is not written, but it could be classic example of binding oral promises if the expulsion relied on them. See *infra* Sec. III.

breach (or indeed be capable of breaching) the assurances by another means. Consequently, the only question is whether the President would breach the assurances which the United States Government have given. Whatever the breadth of the executive discretion enjoyed by the President in the prosecution of the United States Government's counter-terrorism efforts, the Court is unable to accept that he, or any of his successors, would commit such a serious breach of his Government's assurances to a extradition partner such as the United Kingdom; the United States' long-term interest in honouring its extradition commitments alone would provide sufficient dissuasion from doing so.<sup>261</sup>

While the real thrust of the passage is the enforceability of the assurances and the risk of prosecution in anything other than civilian courts, the Court appears to implicitly understand assurances to be legally binding, or at least potentially legally binding, though without enforcement mechanisms. Firstly, the Court repeatedly refers to "breach" of the assurances, a word that is more usually linked to a failure to comply with legally binding commitments. Secondly, and perhaps more significantly, the Court argues that the lack of an individual right to enforce the assurances is not relevant until and unless there is a "breach." The fact that the Court highlights the lack of a breach as the only reason why an individual enforcement right is irrelevant suggests that if there was a breach, then the mechanism for enforcement of the assurances would be entirely relevant. But that issue presupposes that there is something to be enforced by the Court—a legal obligation. Since the Court jumps over this question, it suggests that the Court does not see it as an issue whether the assurances are legally binding—they clearly are.

The European Court stated that its assessment of diplomatic assurances included an assumption of good faith and suggested that the good faith assumption was based on the United States' good human rights record.<sup>262</sup> Good faith in fulfilling obligations is the same standard applied to international legal obligations. It is difficult to understand how the same standard would govern both political and legal commitments when legal commitments are supposed to have a

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261. See *Ahmad v. United Kingdom*, App. Nos. 24027/07, 11949/08 and 36742/08, 51 Eur. H.R. Rep. SE6, ¶ 108 (2010). *But see Saadi v. Italy*, App. No. 37201/06, Eur. Ct. H.R. (2008) (where the European found the assurances not legally binding). The inconsistent approach of the European might be indicative of the need for a case-by-case examination.

262. See *Ahmad v. United Kingdom*, App. No. 24027/07, 11949/08 and 36742/08, 51 Eur. Ct. H.R. SE6, ¶ 105 (2010) ("it is appropriate that [a presumption of good faith] be applied to a requesting State which has a long history of respect for democracy, human rights and the rule of law . . .").

greater binding force. If the Court is correct that the assurances are to be judged by the good faith standard, then the Court may have been legalizing political commitments. This conclusion also suggests that it is possible to sever legal obligations from a mostly non-legally binding assurance.

The prior European Court case is suggestive, but in a final case to examine, the Court is more explicit. In the case of *Einhorn v. France*, the U.S. State of Pennsylvania had requested the extradition of Ira Einhorn from France, and the French Government had received diplomatic assurances from the U.S. Embassy that Einhorn would be treated correctly upon return to the United States—, *e.g.* that he would receive a fair trial and that he would not face the death penalty. The Court held that the assurances amounted to treaties.

13. In a diplomatic note of 2 July 1998 to the French Government, the United States embassy stated: . . .

[T]he U.S. Government provides its assurances that if the Government of France extradites Ira Einhorn to the United States to stand trial for murder in the Commonwealth of Pennsylvania, the death penalty will not be sought, imposed or executed against Ira Einhorn for this offense. The sworn affidavit of District Attorney Lynne Abraham, dated June 10, 1998, and an earlier assurance by Abraham sworn June 23, 1997, affirms that under Pennsylvania law it is legally impossible for a prosecutor to seek or a court on its own motion to impose [the] death penalty for murders committed in Pennsylvania prior to September 13, 1978. The Pennsylvania Supreme Court decision, *Commonwealth v. Truesdale*, dated September 15, 1983, unequivocally prohibits the imposition of the death penalty for murders committed prior to the enactment of the Pennsylvania Death Penalty Statute on September 13, 1978. This decision binds all Pennsylvania courts, district attorneys and prosecutors regarding the imposition of the death penalty. . . .”

Those assurances were reiterated in a diplomatic note of 24 September 1999, in which it was also stated that the Supreme Court had held that laws enacted after a criminal judgment had been delivered, particularly where they might benefit the accused, were not inconsistent with the prohibition on *ex post facto* laws (see *Collins v. Youngblood*, 497 U.S. 37-1990), a fact which served to confirm the constitutionality of the 1998 Pennsylvania statute guaranteeing the applicant a new trial on his return to the United States.

. . . .

30. . . . The [French] Government added that even supposing a Pennsylvania court were to hold that the statute was unconstitutional, such a ruling could not call into question the validity and scope of the undertaking which the United States Federal Government had given France. The diplomatic assurances given to the French authorities came under the “executive agreements” defined in the Federal Constitution’s provisions concerning the executive. By Article VI, section 2, of the Federal

Constitution, such agreements were binding on the federal Government and the federal States, and in particular on the federal States' courts, notwithstanding any indication to the contrary in the Federal Constitution or the legislation of any federal State. The precedents of the United States Supreme Court were consistent on that point (the Government cited *United States v. Belmont*, 301 US 324 (1937), *United States v. Pink*, 315 US 203 (1941), and *United States v. Rauscher*, 119 US 407 (1886), from the latter of which it appeared, in particular, that anyone extradited to the United States was entitled to ask the federal or State courts to enforce those fundamental rules). . . .

If, by some extraordinary chance, Mr Einhorn was unable to be retried in Pennsylvania, the Government considered "that he should, in principle, be released by the American authorities". The "speciality rule" of international customary law – whereby the requesting State's authorities were required to comply with the terms of an extradition order and were prohibited from taking any coercive measures against the extradited person other than those permitted by the order – precluded the applicant's being kept in prison in order to serve the sentence that had been imposed on him *in absentia* in 1993.<sup>263</sup>

The language of the assurance is the very kind that has featured in other assurances examined above, a re-statement of the existing law without provision for legal enforcement mechanisms, aside from diplomacy, accompanied by the mandatory language of "will not be sought" but failing to state the legal value of the assurance itself.<sup>264</sup> One difference here is that the restatement of law is only a restatement of municipal law, not international law, but for purposes of this analysis the distinction is not important because we are focusing on the value of assurance itself. The European Court concluded that the diplomatic assurances given by the United States amounted to an "executive agreement," which is a municipal law classification for what is, under international law, a treaty. Because it was a treaty, the European Court held that the assurances were, quite simply, legally binding on the United States.<sup>265</sup> This conclusion appears to be correct since the

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263. See *Einhorn v. France*, 2001-XI Eur. Ct. H.R. 275, ¶¶ 13, 30 (2001).

264. Note that the assurance states that "[t]his decision binds all Pennsylvania courts, district attorneys and prosecutors regarding the imposition of the death penalty" but that that statement is not referring to the binding force of the assurances, rather the binding force of the Pennsylvania Supreme Court precedent. *Id.* ¶ 13.

265. See *Einhorn v. France*, 2001-XI Eur. Ct. H.R. 275, ¶ 30 (2001); See also *Klein v. Russia*, Judgment, Appl. No. 24268/08, Eur. Ct. H.R. (2010) (Kovler & Hajiyev, JJ., dissenting) ("The Court does not have valid reasons to foresee with any degree of certainty that Colombia would fail to comply with its obligations arising from international law (see, *mutatis mutandis*, *Einhorn v. France* (dec.), no. 71555/01, § 33, ECHR 2001-XI)"). It is unclear whether the dissenting judges believed that the obligations were binding on Russia under

language of the assurance was clear and unequivocal that something was being agreed to and that it was not exempting the pledge from international law.

A final case study will be diplomatic assurances issued by Germany to South Africa in an extradition request. The specific case was later litigated in *Harksen v. President of South Africa* where Germany and South Africa did not have an extradition treaty in place so the proposed transfer would be solely pursuant to this exchange. In this case the communications read in part:

...Germany... ask[s] for the extradition of the German citizen Jürgen Harksen... the Embassy would be most grateful if all items found at the time of Mr Harksen's arrest could be handed over to the German prosecuting authorities as they could be judicial evidence... After extradition, the Embassy would appreciate information on the time Mr Harksen spent under arrest in South Africa for the required extradition.

The Embassy would like to point out that the Federal Republic of Germany is prepared to extradite persons with similar criminal offences to South Africa if these persons do not have German citizenship and if German extradition laws are satisfied.

The Embassy would like to assure that Mr Harksen will only be liable for punishment for offences for which extradition is sought and that no other proceedings may be introduced.

The Embassy further assures the Department that Mr Harksen will not be extradited, transferred or deported to another country without the permission of the South African Government and that he may leave the Federal Republic of Germany after conclusion of the legal proceedings for which the extradition has been granted.

The Embassy wishes to advise that in the case of sentencing by a German court Mr Harksen will not be punished for political, military or religious reasons and that the time of arrest in South Africa for extradition will be taken into account for a possible penalty.

....

The Embassy should be most grateful for any co-operation in this matter and looks<sup>266</sup> forward to hearing from the competent authorities in due course.

The Constitutional Court concluded that the agreement was not a treaty because the promises were not seen to have been intended to be binding, largely because of the way non-treaty-based extradition operates under South African domestic law, being a mere reply by the office of the President that the request is being forwarded to the appropriate agency for

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international law due to the assurances themselves or other sources (e.g. ICCPR, etc.) or both.

266. See *Harksen v. President of the Republic of South Africa & Others* 1999 (A), aff'd 2000 (2) SA 1189 (CC), ¶ 19 (*citing* Diplomatic Note 96/94 (8 Mar. 1994)), *reprinted in* 132 I.L.R. 529, 537 (S. Afr. (A) 1999).

processing.<sup>267</sup>

It is submitted that this conclusion was plainly wrong. This assurance is clearly issued between states and is made pursuant to extradition, an inter-state matter on the international plane, though it does involve some aspects of domestic law. In particular, Germany asks for South Africa to perform an act of transfer, although aspects of the transfer of evidence and information do not appear to be a mandatory part of the request.<sup>268</sup> Germany stated that at least some of the usual rules of extradition would apply to this *ad hoc* case of extradition: the rule of speciality,<sup>269</sup> the rule prohibiting prosecution for political offenses,<sup>270</sup> and the rule that Germany would not extradite him to another state subsequently. Germany then states that it would be “prepared” to reciprocally extradite persons, even though it does not have an extradition agreement with South Africa. We know that extradition treaties are treaties as such and this informal arrangement in lieu of an extradition treaty appears to embody most of the same requirements and conditions as an extradition treaty. Although several of the terms are worded in less mandatory terms, others are quite specific such as the application of the rule of speciality. Although it is not mentioned whether this agreement is legally binding or not, especially given the fact that extradition is normally conducted pursuant to a treaty, it would seem entirely reasonable for South Africa to consider Germany responsible if, for example, the accused was prosecuted for a political crime following extradition. Although the agreement may have required action on the domestic plane—*i.e.* the domestic processing of an extradition request—the question is whether the agreement to trigger that domestic process was made on the international plane—*i.e.* the request is made by a foreign state, and can only be made by a foreign state, to another state for that state to render a person internationally with all the protections of international law. It

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267. *Harksen v. President of the Republic of South Africa & Others*, 1999 (A), *aff'd* 2000 (2) S.A. 825 (CC)829 (S. Afr.), *reprinted in* 132 I.L.R. 529, 558 (S. Afr. (A) 1999).

268. *See Harksen v. President of the Republic of South Africa & Others* 1999 (A), *aff'd* 2000 (2) SA 1189 (CC), ¶ 19 (S. Afr.) (*citing* Diplomatic Note 96/94 (8 Mar. 1994)), *reprinted in* 132 I.L.R. 529, 537 (S. Afr. (A) 1999) (“the Embassy would be most grateful” . . . “the Embassy would appreciate”)

269. *See id.* (“only be liable for punishment for offences for which extradition is sought”).

270. *See id.* (“will not be punished for political, military or religious reasons”).

matters not which government agency is fulfilling the obligation.

The analysis of the foregoing instances of assurances has shown that the case-by-case analysis is correct. Some of the obligations assumed in assurances are legally binding and some are not, depending on the objective intent expressed. Note in addition that if the obligations regarding treatment of the expelled persons are not legal, then they are just “pieces of paper” documenting the bilateral relationship and difficult to base an expulsion on. If a state feels a need to request assurances, surely there is some concern about a risk of mistreatment.<sup>271</sup> If there is a risk that the person will be ill-treated upon expulsion, then the court reviewing the expulsion, in assessing the fact of the likelihood of abuse, will have to consider that the receiving state was unwilling or unable to agree to legally binding commitments to treat the person humanely. This is already two strikes against expulsion. Where the evidence of a likelihood of mistreatment is exceptionally weak beyond those consideration, those non-legal assurances might suffice. Where there is any additional evidence pointing to a likelihood of mistreatment, however, it seems difficult to understand how the assessor of fact could conclude that mere “pieces of paper” and general unwillingness to agree to anything legal and binding, would suffice to establish the fact that the risk is too low to qualify for *non-refoulement*.

### III. DIPLOMATIC ASSURANCES AS BINDING UNILATERAL STATEMENTS

Diplomatic assurances might also be legal obligations if they are binding unilateral statements. This analysis focuses on the legal force of the assurances after the person has been expelled by a state in reliance on them. Unilateral statements have consistently been held by the ICJ and PCIJ to create legal

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271. See Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, transmitted by Note of the High Commissioner for Human Rights*, U.N. Doc. E/CN.4/2005/103, ¶ 56 (Feb. 7, 2005) (by Robert K. Goldman) (“the mere fact that such assurances are sought is arguably a tacit admission by the sending State that the transferred person is indeed at risk of being tortured or ill-treated”); Commissioner for Human Rights, *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to Sweden, 21–23 April 2004*, C.O.E. Doc. Comm. DH (2004) 13 (July 8, 2004) (“[t]he weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment.”).



obligations. These have included pledges to submit cases to the court's jurisdiction<sup>272</sup> but also pledges on matters of substance.<sup>273</sup> The most articulate statement of the doctrine comes from the *Nuclear Tests* case, in which the ICJ stated:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. . . . An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect. . . .<sup>274</sup>

This text contemplates an intention to be bound. The Court continued to state, however, that “the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for . . . .”<sup>275</sup> Thus, discovery of intent is limited to an examination of the text itself. Courts in other cases have acknowledged that diplomatic communication necessarily entails statements made in good faith—that is, with an intention that they be followed.<sup>276</sup> After that consideration,

272. See *Free Zones (Fr. v. Switz.)*, 1932 P.C.I.J. (ser. A/B) No. 46 (June 7); *Rights of Minorities in Upper Silesia (Minority Schools)*, 1928 P.C.I.J. (ser. A) No. 15 (Apr. 26); *German Interests in Upper Silesia*, 1926 P.C.I.J. (ser. A) No. 7 (May 25); *Mavrommatis*, 1925 P.C.I.J. (ser. A) No. 5 (Mar. 26). That being said, this author is mindful of the argument that submission of a dispute to the Court's jurisdiction is a very special kind of agreement that may not be very helpful in supporting this argument.

273. However, it must be conceded that the ICJ was not particularly clear about the role of reliance. In the *Nuclear Tests* cases, neither Australia nor New Zealand truly relied on the promises to its detriment in the usual sense of estoppel. The Court appeared to convert the type of reliance in estoppel to reliance on the international plane which is far more abstract. See *Nuclear Tests Case (Austl. v. Fr.)*, 1974 I.C.J. 253, 267–68, ¶¶ 43–46 (Dec. 20). In fact, the Court later backed away from the reliance requirement in the *Burkina Faso and Mali Frontier Dispute* case. See *Case Concerning the Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 554, 574, ¶ 40 (Dec. 22) (holding that the promise by France could only have been made as a binding promise unilaterally and so, since it was a unilateral statement, it should be understood to have been binding). If we follow this reasoning, then a far greater amount of diplomatic assurances would be swept into the legally binding category.

274. *Nuclear Tests Case (Austl v. Fr.)*, 1974 I.C.J. 253, ¶ 43 (Dec. 20).

275. *Id.* ¶ 44.

276. See *Ahmad, Aswat, Ahsan & Mustafa (Abu Hamza) v. United Kingdom, Partial Decision Admissibility*, App. Nos. 24027/07, 11949/08 & 36742/08, Eur. Ct. H.R. ¶ 105 (2010)

The Court recognises that, in extradition matters, Diplomatic Notes are a standard means for the requesting State to provide any

the analysis is simple: if the state limited its freedom of action, then it is bound.

Moreover, the Court does not appear to require an intention to be legally bound, just an intention to be bound:

When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.<sup>277</sup>

The Court appears to exclude the possibility that a state can choose which obligations are legal and which obligations are not.

The counsel for Australia submitted specifically that an “assurance” was not received from France. That the ICJ eventually found the unilateral statements to be binding, even though an “assurance” was not given,<sup>278</sup> suggests that an “assurance” would have more legal gravity than a unilateral statement. The language used in the statements made by France was that “France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed . . . .”<sup>279</sup> “[t]hus the atmospheric tests which are soon to be carried out will, in the normal course of events, be the last of this type.”<sup>280</sup> This language seems even less committal than the MOUs and assurances examined so far in this paper. Although the Court also observed that the statements were communicated both

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assurances which the requested State considers necessary for its consent to extradition. It also recognises that, in international relations, Diplomatic Notes carry a presumption of good faith. The Court considers that, in extradition cases, it is appropriate that that presumption be applied to a requesting State which has a long history of respect for democracy, human rights and the rule of law, and which has longstanding extradition arrangements with Contracting States. Consequently, the Court considers that it was appropriate for the High Court, in its judgment concerning the first and second applicants, to accord a presumption of good faith to the United States Government.

277. Nuclear Tests Case (Austl v. Fr.), 1974 I.C.J. 253, ¶ 43 (Dec. 20).

278. *See id.* ¶ 32

At the hearing . . . the Attorney-General of Australia made the following statement :

You will recall that Australia has consistently stated it would welcome a French statement to the effect that no further atmospheric nuclear tests would be conducted. Indeed as the Court will remember such an assurance was sought of the French Government by the Australian Government by note dated 3 January 1973, but no such assurance was given. . . .

279. *Id.* ¶ 34; see also *id.* ¶ 39.

280. *Id.* ¶ 35; see also *id.* ¶¶ 36–38.

publically and directly to other states, what it found to be crucial was that other states would be understood to rely on the statements.<sup>281</sup>

In the *Einhorn* case the European Court held that the assurances amounted to a treaty, but the Court also held that the assurances could alternatively amount to binding unilateral statements. France argued that the diplomatic assurances it had received were unilateral statements, legally binding under international law, citing the *Nuclear Tests* cases, *inter alia*.<sup>282</sup> The Court agreed with this view and declared the application inadmissible, partly for this reason.

30. . . . The diplomatic notes could also be regarded in public international law as a unilateral international undertaking requiring the United States to fulfil the obligations it had entered into, failing which its international responsibility would be engaged; that position was established in the case-law of the International Court of Justice, and in particular in the "Nuclear Tests" judgment of 20 December 1974 (*New Zealand v. France*, *ICJ Reports 1974*, §§ 45-63). The Government accordingly inferred that "inasmuch as the fulfilment of the obligation to afford Mr Einhorn the possibility of a new and fair trial [was] an essential prerequisite of his extradition, the French authorities [could not] seek additional guarantees in the event of such an obligation not being be fulfillable".<sup>283</sup>

France did not refer to the Vienna Convention in its argument in order to argue that the assurances amounted to a treaty, perhaps because neither France nor the United States was a party to the Convention. But it did argue that the *Nuclear Tests* standard operated to make the assurances legally binding because the individual was only extradited in reliance on the condition stated in the assurances

Most of the cases examined in this paper, however, were decided prior to expulsion, meaning that the state had yet to fully rely on them. However, it is not clear that reliance, at least as understood in the municipal law of estoppel as reliance *to one's detriment*, is a part of the international law of binding unilateral statements. If, indeed, reliance in this sense is not required, then diplomatic assurances are very good candidates to be legally binding from the moment of their issuance.

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281. *See id.* ¶ 51

In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective.

282. *Id.*

283. *Einhorn v. France*, 2001-XI Eur. Ct. H.R. 275, ¶ 30 (2001).

If reliance in the stricter sense is required, then it is a matter of debate what actions amount to such reliance. Reaching an expulsion decision based on assurances might amount to reliance even prior physical expulsion. Or reliance might qualify as such only after the physical expulsion of the person to the receiving state. Without question, reliance to a detriment would exist when an expelled person is mistreated and the expelling state has potentially incurred state responsibility for failing to uphold its *non-refoulement* obligation.<sup>284</sup>

Even if reliance is required, and assurances only become legally binding at the moment of reliance, one can still find reliance in expulsion cases concluded on the basis of assurances. In the case of *MSS v. Belgium and Greece*<sup>285</sup>, in which extradition was concluded pursuant to assurances promising that an asylum status determination hearing would be conducted, the European Court held that:

However, the Government pointed out that the order to leave the country had been issued based on the assurance that the applicant would not be sent back to Afghanistan without the merits of his complaints having been examined by the Greek authorities. Concerning access to the asylum procedure and the course of that procedure, the Government relied on the assurances given by the Greek authorities that they had finally accepted responsibility, and on the general information contained in the summary document drawn up by the Greek authorities . . . .<sup>286</sup>

The fact that another state is placing its responsibility for compliance with *non-refoulement* and other obligations in the hands of another state when it expels a person on the basis of assurances constitutes reliance. If the state then commits acts that trigger the expelling state's responsibility, even only potentially, then the expelling state has relied on the receiving state to its detriment.

Taking this conservative view, after an expulsion is physically completed, reliance on the assurances is also complete, converting the assurances into a legal obligation to

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284. This raises the difficult question of whether the assessment of the risk of mistreatment is an obligation of result or conduct. For the first, the eventual mistreatment would mean that the state did expel a person to a situation of risk of mistreatment, in the second, the eventual mistreatment would only contribute evidence to whether there was a risk at the time of the expulsion. It could be imagined that there might be no risk at the time of expulsion and that the risk only appeared after the person had been expelled, thus there was no violation of the non-refoulement obligation.

285. *M.S.S. v. Belgium & Greece*, Judgment, App. No. 30696/09, Eur. Ct. H.R. (2011).

286. *Id.* ¶ 328.

comply with what was pledged. Nevertheless, this conclusion might not operate to block an expulsion, because at the time a decision is being made there would not yet be reliance because the expulsion is not complete.

#### IV. DIPLOMATIC ASSURANCES AS SUBSEQUENT PRACTICE

A further way in which diplomatic assurances could operate to create legal effects is through the interpretative provisions of the Vienna Convention—in particular, the role of subsequent practice.

The Vienna Convention provides a general rule of interpretation: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>287</sup> The context of a treaty shall comprise the treaty’s preamble and annexes, and

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.<sup>288</sup>

Furthermore, the interpreter must take into consideration, along with the context,

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the <sup>289</sup>agreement of the parties regarding its interpretation; . . .

An MOU was examined in the Heathrow User Charges arbitration.<sup>290</sup> In that case, there was a treaty called “Bermuda 2” and a subsequent Memorandum of Understanding of April 6, 1983. There was a difference of opinion between the United States and the United Kingdom regarding the legally binding nature of the agreement: the United States contended that the MOU was legally binding<sup>291</sup> and the United Kingdom denied it.<sup>292</sup> The United States argued that the MOU satisfied the definition of treaty in the Vienna Convention,<sup>293</sup> The United

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287. Vienna Convention on Treaties, *supra* note 35, at art. 31(1).

288. *Id.* at art. 31(2).

289. *Id.* at art. 31(3).

290. See Heathrow Airport Arbitration Award, *supra* note 33.

291. See *id.* ¶ 6.2.

292. See *id.* ¶ 6.3.

293. See *id.* ¶¶ 6.2, 6.5.

Kingdom replied that “it was not to be taken as denying any legal effect whatsoever to the provisions of the MoU,” but that the “both parties to the MoU clearly expected and anticipated that the ‘understandings’ embodied in it would be honored . . . even if [the U.K. Government] did not regard them as amounting to treaty obligations in the strict sense.”<sup>294</sup> The tribunal essentially accepted the position of the United Kingdom, holding that the MOU was not in itself a legally binding instrument, but that its terms were evidentiary for the interpretation of the initial Bermuda 2 agreement that was binding. In short, that the “MoU constitutes consensual subsequent practice of the Parties.”<sup>295</sup>

To apply the same reasoning to diplomatic assurances, it is necessary to identify the treaty that serves as the dock to which the subsequent practice of assurances might be moored. In the context of U.K. practice, one such possible type of treaty is an umbrella MOU under which individual assurances are given. If the umbrella MOU itself qualifies as a treaty, as this article has argued it might, then even if individual assurances fail to qualify as treaties themselves, they could still be considered subsequent practice under the binding MOU.

Alternately, treaties that provide for the various *non-refoulement* obligations<sup>296</sup> might serve as the relevant treaty. The assurances issued to clarify and condition the risk of mistreatment, and serve to overcome the *non-refoulement* obligation, would then be binding insofar as they clarified the applicable treaty. This might then impose a legal obligation between the states to provide for monitoring treatment, and could even mean that where the treaty’s *non-refoulement* obligation has been overcome through the use of diplomatic assurances, that the receiving state incurs responsibility under the treaty where it violates the rights of the person, as per the sending state.

## V. CONCLUSION

Diplomatic assurances are potentially legally binding as treaties under the Vienna Convention, or, failing that, as binding unilateral statements, at least once the expelling state has relied on them. Applying the Vienna Convention and the doctrine of binding unilateral statements, to the language of

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294. See *id.* ¶ 6.6.

295. See *id.* ¶ 6.7.

296. E.g. the Refugee Convention, Torture Convention, etc.

representative MOUs and assurances, we find that such pledges appear to be binding, and in turn result in state responsibility when not honored. Even if both of those legal theories could be refuted, certain assurances would at least qualify as subsequent practice.

That does not mean that states have either clear enforcement rights or clear enforcement mechanisms through legal dispute settlement. Nor does it mean that states will ever seek to enforce their rights outside of negotiation—seeking to enforce assurances through a claim of right would be perceived as exposing the claiming state to similar treatment, which is an option states may want to avoid. Nor does it mean that the assurances themselves are clear enough to be capable of assessing violations, except as to a generalized good faith in pursuing vague ends, and here too, a state might be reluctant to claim a violation of good faith.

In sum, there is no debate that diplomatic assurances are politically and diplomatically binding, but these do not constitute an alternate normative regime. They are merely types of peaceful international dispute settlement under international law. That these solutions to disputes can result in situations in which states may appear to excuse or forgive violations of the law does not mean that violations did not occur—the relevant state simply did not “press charges”. Nor do these dispute resolutions mean that the relevant state could not have pursued a legal claim. In the world of diplomacy, it would appear that there are agreements that do qualify as legally binding treaties but for which the parties tacitly understand not to invoke legal dispute settlement procedures. Such agreements are not political or diplomatic only, without legal force; it is just that their legally binding nature may not be tested.