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# **FROM SOFT LAW TO BINDING OBLIGATIONS:** **EXPLORING THE INFLUENCE OF NON-** **BINDING NORMS**

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## ***Abstract:***

This research paper explores the evolving role of non-binding norms, commonly referred to as soft law, in the development of international law. While soft law instruments such as declarations, resolutions, and guidelines lack formal legal binding force, they have become increasingly influential in shaping state behaviour, guiding international cooperation, and laying the groundwork for binding legal obligations. The flexibility and rapid adoption of soft law make it particularly valuable in addressing urgent global challenges, such as climate change and human rights violations, where formal treaties may be slow or difficult to achieve.

The paper critically examines how soft law interacts with binding treaties, often filling gaps or clarifying ambiguities without the need for cumbersome amendments. Despite its non-binding nature, soft law exerts significant pressure on states, encouraging compliance through political, moral, and social norms. This influence is especially crucial in areas where formal legal instruments are absent or where consensus is hard to reach. Additionally, the paper addresses the limitations of soft law, including its lack of enforcement mechanisms and the challenges this presents for consistent application.

Ultimately, this research highlights the complex and dynamic relationship between soft and hard law in the international legal system, demonstrating that while soft law may not have the binding force of traditional legal instruments, its impact on the development and enforcement of international law is both profound and indispensable.

*Keywords:* Soft Law, International Law, Non-Binding Norms, Custom, Treaties

## INTRODUCTION

International law is a constantly evolving field, shaped not only by formal treaties and conventions but also by non-binding norms, commonly known as soft law. These soft law instruments, including declarations, resolutions, and guidelines, play a significant role in guiding state behaviour, promoting cooperation, and contributing to the development of customary international law. This assignment examines the diverse impact of non-binding norms on the evolution of international law.

States create international law through procedures that they have collectively agreed upon as "legislative," meaning they have identified these processes as appropriate for establishing legally binding obligations. The primary sources of law, particularly for resolving inter-state disputes, are listed in the Statute of the International Court of Justice (ICJ). Article 38<sup>1</sup> of the ICJ Statute instructs the Court to decide cases primarily by applying treaties and international customs<sup>2</sup>.

In recent years, state practice, both within and outside international organizations, has increasingly shifted towards incorporating normative statements into non-binding political instruments like declarations, resolutions, and action plans. Despite their non-binding nature, these texts often carry an expectation of compliance with the norms they outline.

The use of non-legally binding instruments has become increasingly prevalent. Nowadays, more than ever, states are opting for informal, non-legally binding agreements instead of treaties to manage their international relations. These instruments offer a higher degree of flexibility compared to traditional treaties<sup>3</sup>. Non-legally binding instruments can remain confidential because they are not subject to the registration requirements under Article 102 of the UN Charter<sup>4</sup>. They come into effect quickly, often without the need for parliamentary approval, and can be easily amended or terminated.<sup>5</sup> Because these instruments are not considered treaties, they avoid the lengthy procedures and formalities typically required for formal treaty-making. This lack of

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<sup>1</sup> Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031, T.S. No. 993.

<sup>2</sup> International Covenant on Economic, Social and Cultural Rights, art. 2, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

<sup>3</sup> Meyer, Alternatives to Treaty-Making – Informal Agreements, *The Oxford Guide to Treaties* 59-81, 67-73 (Hollis, ed. 2<sup>nd</sup>, Oxford University Press 2020)

<sup>4</sup> U.N. Charter art. 102

<sup>5</sup> Peters, The Global Compact for Migration: To Sign or Not to Sign?, EJIL!, (Nov. 21, 2018, 4:35 PM), [ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/](http://ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/); Aust, Modern Treaty Law and Practice, 40-43 (Aust, ed. 3<sup>rd</sup>, Cambridge University Press 2013); Aust, The Oxford Guide to Treaties, Alternatives to Treaty-Making: MOUs as Political Commitments, 46-72, 58-62 (Andrew T. Hollis, ed. 1<sup>st</sup>, Oxford University Press 2012).

formal status allows for a more streamlined and efficient process<sup>6</sup>. However, this does not imply that non-legally binding instruments are without significance in international law.

This assignment will explore how these instruments, particularly bilateral Memoranda of Understanding (MOUs), can produce legal effects under international law. It will specifically examine the various 'legal hooks'<sup>7</sup> that might enable these non-binding agreements to influence the international legal framework.

## NON-BINDING NORMS IN INTERNATIONAL LAW

The term "non-legally binding instruments" refers to agreements that, while made between states or between states and international organizations, do not carry legal obligations but rather establish political commitments<sup>8</sup>. These instruments are often called "gentlemen's agreements" or "Memoranda of Understanding" (MOUs) and can be either bilateral or multilateral in nature.<sup>9</sup>

### The Role of MOUs in Shaping Binding Instruments

MOUs can have legal implications, acting as precursors to future treaties<sup>10</sup> by establishing terms that states might later formalize in a legally binding agreement. These non-legally binding agreements often set the groundwork for what states may eventually agree to in a subsequent treaty, functioning as a kind of "pre-law" stage<sup>11</sup>.

For instance, the 1988 Baltic Sea Ministerial Declaration and the 1992 Baltic Sea Declaration serve as notable examples<sup>12</sup>. These non-binding declarations laid the groundwork for the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area, also known as

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<sup>6</sup> *Supra note 5 at 2*; Gautier, Non-Binding Agreements, Max Planck Encyclopedia of Public International Law (MPEPIL) para. 5 (Rüdiger Wolfrum, Oxford University Press 2006).

<sup>7</sup> Aust, Modern Treaty Law and Practice, 52 (Aust, ed. 3<sup>rd</sup>, Cambridge University Press 2013).

<sup>8</sup> Michael Bothe, Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?, 11 Neth. Y.B. Int'l L. 65, 66 (1980).

<sup>9</sup> *Supra note 5 at 2*; German Constitutional Court, Order of the Second Chamber of the Second Senate, Dec. 7, 2018, docket no. 2 BvQ 105/18, paras. 14-17.

<sup>10</sup> Hollis, Binding and Non-Binding Agreements: Sixth Report, 96th Regular Session, Mar. 2-6, 2020, Rio de Janeiro, Brazil, OEA/Ser.Q, CJI/doc. 600/20, Feb. 3, 2020, Annex I: Draft OAS Guidelines for Binding and Non-Binding Agreements, no. 5.3.2; *id.*, Annex II: Draft OAS Guidelines for Binding and Non-Binding Agreements (With Commentary), pp. 58-59; Wouters, International Law, Informal Law-Making, and Global Governance in Times of Anti-Globalism and Populism, The International Rule of Law: Rise or Decline?, 242-264, 261-262 (Krieger, Nolte & Zimmermann, ed. 1<sup>st</sup>, OUP 2019); Boyle, Soft Law in International Law-Making, International Law 119-137, 121 (Evans, ed. 5<sup>th</sup>, OUP 2018); Gautier, Non-Binding Agreements, MPEPIL, para. 14 (Rüdiger Wolfrum, OUP 2006)

<sup>11</sup> Duncan B. Hollis, Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law, 23 Berkeley J. Int'l L. 137, 153 (2005).

<sup>12</sup> Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area (1992), available at <http://www.helcom.fi/sites/default/files/HELCOM%20Helsinki%20Convention%20Text.pdf> (last accessed Aug. 10, 2024).

the Helsinki Convention<sup>13</sup> or the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides<sup>14</sup> in International Trade. This convention was preceded by political agreements negotiated under the UNEP and FAO, demonstrating how non-legally binding instruments can influence the development of later treaties<sup>15</sup>. However, it is important to note that these preliminary documents do not create legal rights or obligations on their own. Such rights or obligations require the subsequent conclusion of a formal treaty, which is the only mechanism that establishes legal obligations under international law.<sup>16</sup> It is undeniable that, in practice, non-legally binding instruments often exert a significant 'normative pull.' In fact, many treaties might not have been established without the influence of these non-binding predecessors.

Moreover, the content and specific language of a future treaty are often influenced by prior non-legally binding instruments, despite their lack of formal legal effect. In other words, states involved in treaty negotiations may face challenges if they attempt to introduce text that deviates from or contradicts previously agreed terms in a Memorandum of Understanding (MOU) or other non-binding documents. This leads to another related phenomenon where an MOU serves as a necessary precursor for another action to have legal consequences under international law.

### **Handling MOU Violations: State Responsibility and Legal Remedies**

Since a Memorandum of Understanding (MOU) is not a legally binding treaty, it does not create rights and obligations under international law by itself. Consequently, breaching an MOU does not lead to state responsibility. This means that any failure to meet the 'obligations' outlined in an MOU cannot justify the imposition of countermeasures, as these require a violation of established international legal rules<sup>17</sup>, a principle supported by relevant state practices.<sup>18</sup>

Despite lacking formal legal binding force, Memoranda of Understanding (MOUs) still create an expectation of compliance and are frequently adhered to in practice<sup>19</sup>. In other words, the normative force of non-binding MOUs can be quite significant. Depending on the situation,

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<sup>13</sup> Fitzmaurice, The Practical Working of the Law of Treaties, *International Law* 138 (Malcolm D. Evans, ed. 5<sup>th</sup>, Oxford University Press 2018).

<sup>14</sup> Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, opened for signature Sept. 10, 1998, 2244 U.N.T.S. 337 (entered into force Feb. 24, 2004).

<sup>15</sup> Duncan B. Hollis, Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law, 23 Berkeley J. Int'l L. 137, 153 (2005).

<sup>16</sup> *Supra note 10 at 3.*

<sup>17</sup> Munch, Non-binding Agreements, 29 ZaoRV 1, 11 (1969).

<sup>18</sup> Schachter, The Twilight Existence of Nonbinding International Agreements, 71 Am. J. Int'l L. 296, 300 (1977).

<sup>19</sup> *Id.*

political sanctions imposed due to non-compliance with an MOU might be as severe as countermeasures, even though they are not legally binding.

Moreover, a Memorandum of Understanding (MOU) may incorporate some form of enforcement mechanism, as demonstrated by the Joint Comprehensive Plan of Action (JCPOA), also known as the Iran Nuclear Deal. Although the JCPOA<sup>20</sup> itself is generally regarded as non-legally binding, it features a detailed dispute resolution process. Failure to adhere to this mechanism could eventually result in the reimposition of previous sanctions imposed by the Security Council.

### **MOUs and the Principle of Good Faith**

The principle of good faith in international law safeguards the trust and reliance that states place on the behaviour of other states, provided this reliance is reasonable and well-founded. However, it is important to note that the principle of good faith itself does not create or impose any legal obligations. Instead, good faith presupposes existing obligations and can only be invoked in relation to legally binding commitments. In other words, good faith does not have normative force on its own. The International Court of Justice (ICJ) affirmed this view in the *Case Concerning Border and Transborder Armed Actions*<sup>21</sup>, where it stated that good faith “*is not in itself a source of obligation where none would otherwise exist*”<sup>22</sup> This interpretation of good faith as a mere ‘modality’ for fulfilling other obligations is widely accepted and has also been endorsed in various investment arbitration cases.

It is evident, and inherent to the nature of MOUs, that they create an expectation of ‘compliance’ with the agreed terms. The very reason states enter into such MOUs is precisely because they anticipate adherence to the agreed-upon behavior. For instance, if a political agreement on voting patterns at the United Nations is reached, the involved states expect each participant to vote in accordance with the agreement, even if there are no legal penalties for non-compliance<sup>23</sup>. Nevertheless, the principle of good faith cannot transform into a legally binding obligation merely because the parties did not initially intend for it to be legally enforceable.<sup>24</sup>

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<sup>20</sup> Joint Comprehensive Plan of Action, Vienna, July 14, 2015, S.C. Res. 2231, Annex A, U.N. Doc. S/RES/2231 (July 20, 2015).

<sup>21</sup> *Border and Transborder Armed Actions (Nicar. v. Hond.)*, Judgment, 1988 I.C.J. 69 (Dec. 20).

<sup>22</sup> *Id.*

<sup>23</sup> *Supra* note 18 at 5.

<sup>24</sup> Kingsbury, B., Krisch, N., & Stewart, R. B., The Emergence of Global Administrative Law, 68 *Law and Contemporary Problems* 15 (2005).

## **MOUs and the Principle of Pacta Sunt Servanda**

Since the principle of *pacta sunt servanda* is a specific manifestation of the broader concept of 'good faith' in international law, the same principles apply. In other words, *pacta sunt servanda* does not create legal obligations by itself but rather reflects the obligations that already exist under a binding agreement<sup>25</sup>. Thus, for the principle of good faith to be applicable, there must already be a treaty relationship that has established legally binding obligations between the parties, to which the principle of *pacta sunt servanda* would apply<sup>26</sup>. Non-binding agreements, such as MOUs, do not fall under the scope of *pacta sunt servanda* because, if the parties did not intend any legal obligation initially, there cannot be an obligation to later adhere to them based on the concept of *pacta sunt servanda*.

## **MOUs and the Doctrine of Estoppel**

The most direct manner in which MOUs can produce legal effects is through the principle of estoppel<sup>27</sup>. The fundamental concept of estoppel is that a state may be bound by its actions or statements if another state has reasonably relied on them to its detriment<sup>28</sup>. This principle rests on the notion that states should act consistently in their international dealings. When examining the potential indirect legal effects of MOUs, the key question is whether and under what conditions MOUs might be considered a form of "conduct or representation" that could bind a state through estoppel. This issue remains highly debated.

There is considerable debate over whether MOUs can serve as the basis for estoppel. Some firmly reject the notion, arguing that MOUs, which are not intended to create legal rights or obligations, should not be used to establish estoppel<sup>29</sup>. Others, however, believe it is conceivable in principle that MOUs might give rise to estoppel. The central question is whether estoppel can apply to state actions like the signing of an MOU, which was not initially meant to establish legal obligations but might still become binding over time depending on the circumstances. If MOUs were to be treated as potential grounds for estoppel, this would contradict the original intention of the states involved, which was to create only a political commitment. Even if MOUs could be seen as conduct that might lead to estoppel, all the requirements of estoppel must be satisfied, including

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<sup>25</sup> Fawcett, J., The Legal Character of International Agreements, 30 British Year Book of International Law 381, 396 (1953).

<sup>26</sup> S. Jayakumar et al., The Concept of Good Faith in International Law (Singapore Academy of Law 2021).

<sup>27</sup> Aust, Modern Treaty Law and Practice, 50-52 (ed. 3<sup>rd</sup>, CUP 2013).

<sup>28</sup> B. R. Davies, The Role of Estoppel in International Law, 14 Australian Year Book of International Law 54 (1991).

<sup>29</sup> G. H. Fox, International Law and Legal Theory (Hart Publishing 2011).

the detrimental reliance by the other state<sup>30</sup>.

In principle, when a State enters into a Memorandum of Understanding (MOU), it must be understood that the MOU is non-legally binding by design. Consequently, it is challenging to argue that there was a genuine reliance on the MOU's binding force or its ongoing commitments. Any reliance on the MOU's binding nature would contradict its intended non-binding nature. Nevertheless, some argue for the importance of maintaining consistency in international relations. For example, Judge Alfaro, in his dissenting opinion in the Temple Case<sup>31</sup>, asserted that States must adhere to consistency even in non-contractual interactions, implying that a State should not undermine another's rights through actions contrary to its previous conduct. Similarly, in the Chagos Case<sup>32</sup>, the Tribunal suggested that a binding declaration was not required to establish good faith reliance, emphasizing that the principle of consistency should involve a degree of loyalty and constancy. Thus, it is the actions taken based on the MOU, rather than the MOU itself, that may create an estoppel.

## **THE INTERPLAY OF SOFT LAW, TREATIES, AND CUSTOMARY NORMS**

Although non-binding instruments may lack formal legal force, they play a crucial and increasingly prominent role in international relations and the evolution of international law. In practice, these soft law instruments often serve as precursors to formal treaty negotiations and can influence state behavior in ways that contribute to the development of customary international law. Indeed, soft law frequently complements and paves the way for hard law<sup>33</sup>.

A non-binding normative instrument can serve multiple functions:

1. It may codify existing customary international law, adding clarity and precision through a formal written text.
2. It can crystallize emerging trends toward a specific norm, influencing dissenters and encouraging states with minimal practice in the area to support the norm's development.
3. It might precede and aid in the formation of new customary international law.

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<sup>30</sup> P. A. Patel, *The Principle of Estoppel in International Relations: Insights from Indian Jurisprudence*, 34 J. Indian L. & Soc'y 65 (2020).

<sup>31</sup> Temple of Preah Vihear (Cambodia v. Thailand), Judgment, 1962 ICJ Reports 6 (June 15).

<sup>32</sup> Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius, Advisory Opinion, 2019 ICJ Reports 50 (Feb. 25).

<sup>33</sup> Martti Koskenniemi, *The Politics of International Law* (Oxford University Press 2011)

4. It can rally political consensus around addressing a novel issue, potentially leading to treaty negotiations or further soft law developments.
5. It may address gaps in current treaties by providing additional guidance.
6. It can become part of state practice used to interpret existing treaties.
7. It may offer guidance or serve as a model for domestic legislation without creating international obligations.
8. It can replace formal legal obligations when treaties are deemed too costly, time-consuming, or politically sensitive<sup>34</sup>.

Non-binding norms play a crucial role in shaping international law. Customary international law, one of its core sources, relies on state practice not just as a result of the obligation but as an integral part of the law's formation process. Recently, non-binding instruments have sometimes provided the necessary declaration of legal obligation (*opinio juris*) to demonstrate emerging customs and help define the content of norms<sup>35</sup>. Additionally, the drafting and voting on these non-binding instruments can itself be viewed as a form of state practice.

The first three points above illustrate the relationship between soft law and customary international law. Some soft law documents aim merely to codify existing legal rights and duties in written form. For example, the commentary on the UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which was approved by the Commission on Human Rights and endorsed by the General Assembly in 2005, serves this purpose.<sup>36</sup> The principles and guidelines, such as those found in the UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law, often do not introduce new norms but rather codify existing laws dispersed across numerous treaties and established state practices. While some non-binding instruments may blend pre-existing norms with new developments, it is unusual for a soft law instrument to be exclusively one or the other. Soft law texts can also serve to consolidate evolving trends in customary law or endorse a particular stance amid conflicting views on a legal issue. For instance, in the economic domain, instruments like the Declaration on Permanent Sovereignty over Natural Resources aim to effect such changes (UN General Assembly, Declaration on

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<sup>34</sup> William Belfield, *The Role of Soft Law in International Relations* (Routledge 2019).

<sup>35</sup> James Crawford, *Brownlie's Principles of Public International Law* 47 (James Crawford ed. 1<sup>st</sup>, Oxford University Press 2019).

<sup>36</sup> UNGA Res. A/Res/60/147 (Dec. 16, 2005).

Permanent Sovereignty over Natural Resources, 1962)<sup>37</sup>. Efforts to shape international economic policy, as seen in the General Assembly's Declaration<sup>38</sup> on the Establishment of a New International Economic Order and the Charter of Economic Rights and Duties<sup>39</sup>, illustrate that such initiatives can be highly contentious and may not always achieve their intended goals. For soft law texts to transition into binding hard law, they require consistent state practice from nations across different regions and major legal, economic, and political systems. This widespread acceptance and adherence are crucial for the evolution of soft law into binding international obligations.

Adherence to entirely new non-binding norms can also contribute to the development of customary international law. Recently, non-binding instruments have occasionally articulated the required legal obligations (*opinio juris*) that precede or accompany state practice, thereby helping to shape the content of these emerging norms<sup>40</sup>. A declaration may reflect an ideal, shifting focus from emphasizing state practice to a greater reliance on *opinio juris* (Roberts, 2001, p. 765). Determining whether a declaration represents existing customary law or aspirations for its development cannot be based solely on its use of mandatory or permissive language, though such language indicates the drafters' intentions. Declarations often present deliberate ambiguity between actual and desired practices, aiming to advance the law. For instance, the development of outer space law illustrates this approach, as it involved numerous states in drafting and adopting the Declaration of Legal Principles Governing the Activities of States in the Outer Space, even though only a few states were actively engaged in space activities<sup>41</sup>.

### **Understanding the Complex Dynamics Between Soft Law and Treaties**

Soft law texts are frequently connected to binding instruments in various ways. One major role of soft law is to kickstart a process of building consensus toward establishing binding obligations to address emerging issues. This is evident in how recent multilateral agreements often reference relevant non-binding instruments as precedents in their preambles. For instance, in the realm of human rights, both regional and global treaties nearly always cite the Universal Declaration of

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<sup>37</sup> UNGA Res. 1803 (XVII), Permanent Sovereignty over Natural Resources, UN GAOR, Supp. No. 17, at 15, UN Doc. A/5217 (1963).

<sup>38</sup> UN General Assembly, Declaration on the Establishment of a New International Economic Order, GA Res. 3201 (S-VI), 6th Special Sess., at 3, UN Doc. A/RES/3201 (S-VI) (1974).

<sup>39</sup> Charter of Economic Rights and Duties of States, GA Res. 3281 (XXIX), 29th Sess., at 50, UN Doc. A/RES/3281 (XXIX) (1974).

<sup>40</sup> UN General Assembly Resolution 46/215, Driftnet Fishing, UNGAOR, 46th Sess., at 2, UN Doc. A/RES/46/215 (1991).

<sup>41</sup> Andrew Roberts, The Role of Soft Law in the Development of International Law, 35 J. Int'l L. 765 (2001).

Human Rights<sup>42</sup> as a foundational normative document. The Declaration itself describes its purpose as setting "a common standard of achievement" intended to pave the way for binding agreements.

In the field of human rights, it is common for recent global multilateral conventions to follow the adoption of non-binding declarations. For instance, the Principle from the Stockholm Declaration on the Human Environment<sup>43</sup> is echoed almost word-for-word in the Rio Declaration on Environment and Development<sup>44</sup> and is also incorporated into Article 3 of the Convention on Biological Diversity<sup>45</sup>. This pattern shows how the adoption of non-binding norms can lead to the inclusion of similar or identical norms in subsequent binding agreements. Furthermore, the process of drafting and negotiating these non-binding instruments often helps build the consensus required to create binding multilateral treaties. A notable example of this is the Rotterdam Convention on Prior Informed Consent<sup>46</sup>, where such preparatory work played a crucial role.

## **MOTIVATIONS BEHIND STATE ADOPTION OF SOFT LAW**

The growing adoption of non-binding normative instruments across various areas of international law is becoming increasingly apparent<sup>47</sup>. There are several reasons why states might prefer soft law over formal treaties or opting for inaction. For instance, global challenges such as climate change and overfishing require swift action, which treaties, with their lengthy negotiation and ratification processes, cannot easily provide. Non-binding instruments can be adopted more quickly, adjusted more easily, and are particularly useful for technical issues that may need frequent updates. This flexibility is crucial when the topic is not yet suitable for treaty-making due to scientific uncertainty or a lack of political agreement<sup>48</sup>. In such cases, the decision often comes down to choosing between implementing a soft law text or taking no action at all.

Soft law can effectively obscure substantive disagreements, navigate conflicting visions within

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<sup>42</sup> Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948).

<sup>43</sup> Stockholm Declaration of the United Nations Conference on the Human Environment, June 5-16, 1972, U.N. Doc. A/CONF.48/14 (1972).

<sup>44</sup> Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (Vol. I) (1992).

<sup>45</sup> Convention on Biological Diversity, U.N. Doc. UNEP/CBD/27 (1992).

<sup>46</sup> Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, U.N. Doc. UNEP/FAO/RC/COP.1/5 (1998).

<sup>47</sup> Dinah Shelton, *Soft Law, The Oxford Handbook of International Law* 1 (Dinah Shelton & R. J. Sullivan, Oxford University Press 2000).

<sup>48</sup> Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 Va. J. Int'l L. 582 (2005).

organizations, and address institutional crises<sup>49</sup>. Another reason for utilizing soft law is to address the issue of 'free riders'—states that benefit from collective legal agreements while pursuing their own interests, such as exploiting shared resources like overfished stocks or continuing to produce substances harmful to the environment, like ozone-depleting chemicals. Unlike traditional international law, which operates on the principle of state consent and lacks a legislative body to enforce compliance, soft law allows for political pressure to encourage behavioural changes<sup>50</sup>. States may use non-binding commitments to reflect the international community's intention to tackle urgent global issues despite objections from a few states, thus bypassing the traditional requirement for their consent to be legally bound by the norms.

For instance, the United Nations General Assembly's actions to ban driftnet fishing were aimed at both member and non-member states whose fleets were devastating fish populations with their driftnet practices, often referred to as "walls of death." This demonstrated the international community's commitment to prohibiting driftnet fishing and enforcing the ban, even though it was not embedded in a legally binding treaty. A similar approach can be adopted for norms that embody widely accepted values, such as those related to human rights or humanitarian law<sup>51</sup>.

Subsequent adoption of soft law instruments can be advantageous for treaty parties by providing a means to clarify ambiguities or address gaps in the binding text without the need for a lengthy treaty amendment process. This is indicative of an increasingly intricate international system where various instruments, methods, and standards interact frequently, aiming to regulate behavior within a legal framework. Such complexity is particularly notable in the management of shared global resources, like the high seas and Antarctica, as well as in ongoing intergovernmental cooperative efforts<sup>52</sup>. For these arrangements, memoranda of understanding (MOUs) often serve as a practical alternative, driven by the need to overcome the political limitations, economic costs, and legal inflexibilities associated with formal treaties<sup>53</sup>.

## CONCLUSION

From the viewpoint of state practice, it's evident that instruments like resolutions, codes of conduct, and conference declarations are not considered law, whether soft or hard. Instead, these

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<sup>49</sup> Hanspeter Schäfer, *Soft Law as a Tool for International Cooperation*, 34 Int'l J. Legal Info. 194 (2006).

<sup>50</sup> L. Brown, *Soft Law and International Governance* (Cambridge University Press 2018).

<sup>51</sup> Jean-Marc Olivier, *The Role of Soft Law in the Evolution of Human Rights Norms*, 6 Int'l J. Human Rights 45, 45-63 (2002).

<sup>52</sup> J.A. Smith, *The Role of Non-Binding Norms in Customary International Law*, 25 Int'l L. Rev. 123, 123-45 (2020).

<sup>53</sup> Douglas M. Johnston, *The Role of Non-Binding Norms in International Law* (Cambridge Univ. Press 1997).

documents are often related to or lead to legal frameworks in various ways. States and other actors generally draft and agree to non-binding instruments with full awareness of their status. They make a deliberate choice about whether a document will have legal binding force or not. In practice, there is no continuum from soft to hard law but rather a clear distinction between legally binding and non-binding instruments. Although non-binding texts may have strong political or moral significance, and their norms can be expected to be followed, the difference between binding and non-binding instruments is well understood by negotiators.

Despite many non-binding resolutions and documents containing normative declarations, they do not constitute law or formal sources of norms. These instruments might indicate trends or stages in the development of treaties or customary law but do not themselves have a sliding scale of bindingness. The frequent use and adherence to non-binding norms reflect an advancement in international relations. With globalization, the necessity to formalize all expectations into legal instruments diminishes, as many arrangements are governed by informal social norms and voluntary agreements. Such norms, while not law, can effectively address common issues by offering a flexible and efficient approach.

The increasing complexity of the international legal system is shown by the diverse forms of commitments adopted to manage state and non-state behavior regarding numerous transnational issues. International actors utilize both legal and non-binding instruments to address global challenges. Although non-binding forms may limit short-term enforcement options (e.g., litigation), they can still create strong expectations of compliance. The resolution of international problems and conflicts does not follow a fixed formula; factors influencing behavior, implementation, and effectiveness vary widely. Ultimately, the international legal system is a complex and dynamic network of interactions between hard and soft law, national and international regulation, and various institutions aiming to uphold the rule of law.