

## Aspects of 'Soft Law' and the Use of 'MoUs' as a Tool for 'Soft' Cooperation

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### Abstract

*The paper conceptualises and presages 'soft law' as widely adopted and followed despite lacking a coercive and legal force. However, since legal standards are susceptible to cooperation network tendencies. It is evident that a substantial part of 'soft law' today, in an impressionistic way, describes part of tomorrow's 'hard law'. In this sense, the normative emission of international institutions is playing a catalytic role in the process. Since the cooperation tendencies often occur when the value of a standard to a user increases as the number of other agents using the same standard grows, which in turn draws more users to the standard, as seen in the case of memorandum of understanding (MoUs). In this regard, the paper argues that many areas of 'soft law' exhibit strong cooperation tendencies, which induce voluntary adoption and even compliance. As the tendencies of 'soft law' are gaining grounds, despite having crucial implications for global governance. This is because it is difficult to identify among the codified principles, the ones that already belongs to *lex lata* and those still to be considered as *lex ferenda*. Since the codifying bodies find 'soft law' to be reliable indicators of actual trends in contemporary international law-making. From this, the paper emphasizes that 'soft law' may represent opportunities for the promotion of international norms that can further the legalisation of international relations. As it is considered part of a continuum of international legal mechanisms, contributing to the development of international law, creating stability and expectation in international relations, and facilitating international cooperation. Thus, it is a non-binding instrument with a robust persuasive force within the international community. From these, the paper examines the double impact of memorandum of understandings as 'soft law' in the likes of binding registrable instruments and non-binding instruments, focusing on MoUs as a tool for 'soft cooperation'.*

**Keywords:** Soft Law, Treaties, Memorandum of Understanding, Cooperation, Tool

### Introduction

'Soft law' explicitly rests on the idea that the binary nature of law, that is, 'law is either hard or not law at all', is not suitable to accommodate the growing complexity of contemporary international relations. Thus, it is realized that there is expectedly no commonly shared understanding of international 'soft law', which at times embodies the memorandum of understanding (MoUs). In this sense, this paper tries to assess the aspects of 'soft law' and the use of MoUs as a tool for 'soft cooperation'. In so doing, it presents the issues in two sections, with the first section considering the competing views on soft law by focusing on treaty soft law, non-binding 'soft law', non-state 'soft law', rejection of 'soft law', and the reconsideration of 'soft law'. While the second section focuses on the comprehensive view of memorandum of understanding as a particular category of 'soft law'. It examines the distinctive features between the binding registerable instruments (BRIs) and non-binding instruments (NBIs) in international law. Thus, it focuses on MoUs as soft law (NBIs), often use as a tool for 'soft cooperation'. The paper wraps up with a perception of 'soft law' and its conceivable implications in international relations, while also reassessing and providing some impetus of MoUs as a mechanism for 'soft' cooperation within the normative structure of international law.

### 1. Conceptual Framework of Soft Law

Accordingly, *Druzin* asserts that "'soft law' is the quasi-legal instrument that does not have any legally binding force. Whose binding force is somewhat weaker than the binding force of traditional law, often contrasted with soft law by being referred to as 'hard law'".<sup>1</sup> In this regard, it is worth emphasizing that soft law emerged in the post-war period due to the structural shortcomings of public international law, caused basically by the extension of the scope and actors of international law. Besides, the changes are highly attributable to the expanded and intensified international activities following the foundation of the United Nations (UN), the increased heterogeneity of the international society, and the growing number of sovereign states triggered by the Cold War and the decolonization process.<sup>2</sup>

<sup>1</sup>Druzin, B. (2016). "Why does Soft Law have any Power anyway?" *Asian Journal of International Law*.

<sup>2</sup> Ibid.

Likewise, *Ilhami* avers that “the advances of sciences and technology have eroded the traditional distinctions between domestic and international affairs and created new or deepened common interests and multiplied common actions among states, which resulted, among others, in the widening role of international organizations”.<sup>3</sup> He equally considers that in parallel to the expansion of the market economy, privatization, and deregulation promoted by international economic institutions, the role of ‘non-state actors’ has rapidly been transformed.<sup>4</sup> From this, it is observed that a substantial body of international rules is not derived from the formal law-making institutions of international law. As a result of this process, the possibility of states to exercise control over the content of international law has diminished considerably. In fact, it should be noted that in this contemporary era, apart from states, international organizations, formal and informal technical bodies, treaty bodies within the UN system, international conferences on various subject-matters as well as a wide range of non-state actors, including multinational corporations (MNCs), non-governmental organizations (NGOs) are involved in shaping the international normative order.<sup>5</sup>

Similarly, the traditional mechanisms of international law-making, that is, the list of international law sources enumerated in Article 38 of the International Court of Justice (ICJ) Statute, have not evolved at the same rate as the expansion of its scope and proliferation of its actors.<sup>6</sup> For this reason, it has been increasingly argued that in the face of the multiplicity of law-making processes in ‘contemporary’ international law, the understanding of Article 38 sources of law exhausting the methods of international law-making has proven inadequate. This is because it is mainly associated with the developments mentioned above. Besides, a new range of international legal commitments that either lack the requisite normative content of creating enforceable rights and obligations or do not fall into the ‘traditional’ categories of ‘treaty’ or ‘custom’ or ‘general principles of law’, has gained unprecedented currency.<sup>7</sup> In this sense, *Van Hoof* argues that “since the norms of ‘contemporary’ international law can be created in many new ways that can no longer be adequately captured solely by reference to the traditional categories of custom and treaty. Then there is a need to reassess the conventional sources and subjects of the theory of international law”.<sup>8</sup> Likewise, *Dupuy* reiterates that “soft law has developed in response to describe normative activities that do not strictly conform to the ‘traditional’ sources of international law”.<sup>9</sup>

From these views, it is interesting to note that the concept of soft law has readily encountered fierce opposition by some international lawyers and even some scholars who recognize it as a normative category but employ it to describe various types of rules and international instruments.<sup>10</sup> In a nutshell, an assessment of the four competing approaches to soft law is worth considering.

#### a) The Scope of ‘Treaty Soft Law’

Explicitly, *Ilhami* asserts that “‘treaty soft law’ are treaties and treaty provisions that do not intend to create firm obligations. Despite their legally binding form and imprecision in terms of language or flexibility in terms of context, it lacks a peremptory character”.<sup>11</sup> Equally, *Baxter* avers that “norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between states but do not create enforceable rights and duties may be described as soft law”.<sup>12</sup>

Indeed, some scholars like *Chinkin* believe that “the conclusion of an agreement in treaty form does not ensure that a hard obligation has been incurred”.<sup>13</sup> From these views, it is interesting to appreciate that though formally binding.

<sup>3</sup> *Ilhami*, A. (n.d.). Four Competing Approaches to International Soft Law, *Scandinavian Studies in Law* from 1999-2015.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Van Hoof*, G. (1983). *Rethinking the Sources of International Law*, (Kluwer Law and Taxation Publishers: Deventer), p. 66.

<sup>9</sup> *Dupuy* notes that the term soft law was coined by Lord McNair, likely at the beginning of the 1970s. (See *Dupuy*, R. *Declaratory Law and Programmatic Law: From Revolutionary Custom to ‘Soft Law’*, in *Akkerman, R., Sijthoff, L.* (eds.), “Declarations on Principles. A Quest for Universal Peace”, 1977, p. 252).

<sup>10</sup> *Ilhami*, A. (n.d.), *op cit.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Baxter*, R. (1980). “International Law in Her Infinite Variety”, 29 *International and Comparative Law Quarterly*, p. 549. Elsewhere, *Baxter* explains why he prefers to use the term ‘international agreement’ instead of ‘treaties’. Accordingly, the term ‘treaty’ in its technical meaning as used in the 1969 VCLT, is legally ‘binding’ upon the parties. Avoiding this term, *Baxter* essays to open a possibility to include all ‘agreements’ regardless of whether they are legally binding or not, such as ‘political treaties’ (*Ibid.* p.550).

<sup>13</sup> *Chinkin*, C. (2003). *Normative Development*, in *Shelton, Dinah* (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, (Oxford University Press: New York), p. 25.

Some treaties or treaty provisions may be soft in that they do not involve clear and specific legal commitments. Nor impose real obligations on the parties in the way 'hard law' does. In such cases, it is realized that the vagueness, indeterminacy, or generality of a treaty or treaty provision may deprive the instruments of the character of 'hard law'. However, it is noteworthy that this is not the same as saying that 'soft treaties' or 'soft treaty provisions' are 'non-binding'. Since Article 26 of the Vienna Convention on the Law of Treaties (VCLT) clearly states that treaties with a legal form are always binding upon the parties.<sup>14</sup>

Aptly, as mentioned earlier, it is interesting to note that treaties and treaty provisions might be either hard or soft or both. In fact, within this category, it is appropriate to stress that it is the content of the treaty or treaty provision that is the determinant of whether a treaty or treaty provision is hard or soft, not the form of the treaty or treaty provision. Similarly, the character of the dispute resolution process may reveal whether a treaty or treaty provisions are hard or soft law. That is, if a treaty is subject to compulsory adjudication in cases of non-compliance, then it can be inferred that the rules of the treaty lay down precise, enforceable legal obligations. Indeed, on this account, contrasted with 'soft enforcement'<sup>15</sup> or 'dispute avoidance', the existence of 'hard enforcement', which is characterized by compulsory binding settlement of disputes, appears as a feature that may reveal whether the treaty at issue is hard or soft. In this regard, it is worthwhile noting that treaty, as a legal form, does not necessarily indicate the existence of a 'hard law' if accepted that 'hard law' is not only about a legal form but also about enforceability, that is, the presence of an enforceable legal obligation.<sup>16</sup>

By the same token, Weil asserts that in practice, "a growing number of treaty and treaty provisions do not include immediate obligations for the parties but instead they merely develop programs of actions, as can be seen in the examples of the 1961 European Social Charter and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), urging or merely advising the parties to 'seek to', 'make effort to', 'promote', or 'avoid'".<sup>17</sup> From this, it is observed that such soft law provisions included in treaties are often nothing more than strong recommendations for the contracting parties. Since the content of such a treaty may often be nothing more than a declaration of intention as in the example of the 1979 Convention on Long-Range Trans-boundary Air Pollution.

Equally, it is interesting to note that more often, states conclude treaties to consult together, open negotiations, settle certain problems by subsequent agreement, or 'to develop the best policies and strategies' in a rather 'conventional' way, especially in areas such as environment or economic/social development.<sup>18</sup> Likewise, not very different from the techniques mentioned above, it is observed that some treaty provisions may lay down the undertakings more of a political bargain than legal commitments. For instance, the UN Framework Convention on Climate Change (UNFCCC) provides some good examples of such techniques, with its Article 4.7 stating that the commitments undertaken under the UNFCCC by developing countries are conditional on performance of solidarity commitments by developed countries to provide funding and transfer of technology.<sup>19</sup> In this way, such treaty

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<sup>14</sup> See Article 2(1)(a) of the 1969 VCLT that defines a treaty as follow: "An international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whether its particular designation".

<sup>15</sup> 'Soft enforcement' refers to either non-binding conciliation before an independent third party or non-binding compliance procedure that aims to find an agreed solution rather than to engage in adversarial litigation or claims for reparation. Soft enforcement characteristically evades issues of responsibility for breach and relies on a combination of inducements or the possibility of termination or suspension of treaty rights to secure Compliance. See Boyle, A. (1999). "Reflections on Treaties and Soft Law", 48 *International and Comparative Law Quarterly*, 4, p. 909.

<sup>16</sup> It is interesting to note that the binding quality of treaties is historically a new concept. According to the classical understanding of sovereignty, it was utterly reasonable that a sovereign was supreme and this supremacy could not be surrounded. Spinoza, for instance, objected to the idea that international treaties could bind sovereign states. Thus, treaties last so long as the cause that produced it. When this enticement is no longer there, it is the right of either contracting party to disengage itself from obligation. See Spinoza, *Tractatus Theologico-Politicus*, P.III, 11 cited in Lauterpacht, H., *Spinoza and International Law*, (8 *British Year Book of International Law*), 1927, p. 94. It is also interesting to note that the rule of *pacta sunt servanda* that many scholars tend to recognize as the 'fundamental norm' is not highly valued by Spinoza. Lauterpacht distinguishes three main features in Spinoza's doctrine of international relations: (i) the broad assertion that the mutual condition of states is that of states of nature with all its implications; (ii) the absence of any obligation to observe treaties; (iii) the notion that the state in its dealings with its neighbors is not bound by the canons of morality and good faith (Ibid. p. 92-93). He also draws our attention to the influence of Spinoza on Hobbes' political theory and his views on international relations (Ibid. p. 95-96).

<sup>17</sup> Weil, P. (1983). "Towards Relative Normativity in International Law?" 77 *The American Journal of International Law*, p. 414.

<sup>18</sup> Ilhami, A. (n.d.), *op cit*.

<sup>19</sup> See Article 4.7 of the UNFCCC

Provisions are almost impossible to breach, although they are not normative and cannot be described as creating rules in a legal sense. In a similar manner, it is observed that states usually adopt treaty soft law for a number of reasons. For instance, the conclusion of a treaty may aim to create a framework for everyday cooperation as well as develop further international rules that are stricter. In this sense, Boyle affirms that: This is particularly true of the so-called framework or umbrella conventions, which refer to a new international legislative method. According to which a first agreement has to be reached on the principles of common action, with the setting of more precise rules and standards to be agreed on in subsequent protocol(s) and annex(s). As observed with the UNFCCC which provides a good example of such a legislative method, as it imposes some commitments on the parties. For instance, the principles found in Article 3 prescribe how the regime for regulating climate change is to be developed by the parties<sup>20</sup>, even though its core articles, dealing with policies and measures to tackle greenhouse gas emissions, are so cautiously and obscurely worded and so weak that it is uncertain whether any real obligations are created.<sup>21</sup> Thus, it should be noted that the UNFCCC, like the 1985 Vienna Convention for the Protection of the Ozone Layer and the subsequent Montreal Protocol, are seen as a declaration of policy rational for the subsequent Kyoto protocol, which has readily sets out to a greater extent the specificity and more precise obligations.

In addition, Chinkin reiterates that “some treaty provisions may provide guidance to the interpretation, elaboration, or application of hard law, or demands to continue negotiations in order to conclude a new or further/detailed agreement in order to work out a permanent agreement or to give effect to a previous treaty”.<sup>22</sup> Despite this, the so-called ‘political treaties’, that is, treaties concluded with no expectation of effective enforcement, are traditionally classified as legal soft law - with the name of ‘treaty’ in such international agreements being only a camouflage for a soft instrument.<sup>23</sup> By these ‘treaties’, states enter into alliances, agree to coordinate their military action, or declare the neutrality of an area, or layout their agreed policies for the future. In this manner, Baxter avers that “a state party to such an agreement is often not under a legal obligation unless the treaty in question contains territorial or similar dispositive terms”.<sup>24</sup>

Indeed, despite this, it is observed that states usually express their commitments in a given policy area by preferring the treaty form, instead of choosing a ‘non-binding form’, when in fact they do not intend to be bound by enforceable treaty obligation. This position was enhanced by *Abbott and Snidal*, who assert that “by choosing the treaty form, which is legally binding, states reinforce the credibility of their commitments, expand their available political strategies, and resolve problems of incomplete contracting”.<sup>25</sup>

Moreover, as *Lipson* puts it, “treaties are a conventional way of raising the credibility of promises by staking national reputation on adherence, that is, the more formal and public the agreement, the higher the reputational costs of non-compliance.”<sup>26</sup> Altogether, it is interesting to note that by framing the agreement in the formal legal status, states do not restrict only their sovereignty but also impose the same restriction on the other state parties, in order to gain from the counter-promises of others or/and to manifest their normative commitment. Altogether, it is interesting to note that by framing the agreement in the formal legal status, states do not restrict only their sovereignty. But they also impose the same restriction on the other state parties, to gain from the counter-promises of others or/and to manifest their normative commitment. In a nutshell, the ‘hard’ or ‘soft’ nature of obligation defined in a treaty or treaty provision cannot necessarily be identified on the sole basis of the formally legally binding character of the legal instrument is affirmative. This is because in several cases, the ‘softness’ of the instrument corresponds to the ‘softness’ of its contents and form.<sup>27</sup>

## b) The Tenets of Non-Binding Soft Law

<sup>20</sup> For instance, the principles found in Article 3 prescribe how the regime for regulating climate change is to be developed by the parties. It also calls for negotiation of the Kyoto Protocol.

<sup>21</sup> Boyle (1999), *op cit.*, p. 907.

<sup>22</sup> Chinkin names such treaty provisions ‘elaborative’ soft law. See Chinkin (2003), *op cit.*, p. 30.

<sup>23</sup> Baxter (1980), *op cit.*, p. 550. Although the Yalta Agreement was published in US Treaties in Force, the State Department declared that “the US regards the so-called Yalta Agreement as simply a statement of common purposes by the heads of the participating states and not as of any legal effect in transferring territories” (35 Dept. State Bull. 484 (1956), cited in Schachter, O. (1977). “The Twilight Existence of Non-binding International Agreements”. *The American Journal of International Law*, 71:2, p. 298).

<sup>24</sup> *Ibid.*, A state's refusal to come to the aid of another under the terms of an alliance or the withdrawal of a State from a political or military pact cannot be subject to a legal dispute but political or economic. In contrast, Lauterpacht considered that the Yalta agreement “incorporated definite rules of conduct which may be regarded as legally binding on the state in question”. See Oppenheim (1948), *op cit.*, p. 788.

<sup>25</sup> Abbott, K. and Snidal, D. (2000). “Hard and Soft Law in International Governance”, *International Organization*, 54:3, p. 422.

<sup>26</sup> Lipson, C. (1991). “Why are some international agreements informal”? *International Organization*, pp. 511-508.

<sup>27</sup> Dupuy, P-M. (1990-1991). “Soft Law and the International Law of Environment”, *Michigan Journal of International Law*, 12, p. 429.

Generally, treaties, whether bilateral or multilateral, are the most formal commitments with full international legal status. Nonetheless, as aforementioned, it should be noted that a treaty is not the only form that states use to govern their relations; since they can choose from a wide variety of forms to express their commitments, obligations, and expectations. According to *Lipson*, these 'alternative' forms include 'informal arrangements', such as tacit agreements, in which obligations and commitments are implied or inferred but not openly declared. And oral agreements, in which bargains are expressly stated but not documented as well as joint declarations, final communiqués, statements, and ministerial conferences.<sup>28</sup> It is worth noting that many of these instruments do not possess the precise characteristic of law in terms of formality and enforceability, nor are drafted in the form of legally enforceable instruments. That is, such 'soft law' instruments are often no more than political pronouncements, even though they are either drafted and signed by the representatives of the states or voted for by them. Consequently, they may still possess some degree of normative significance.<sup>29</sup> For instance, it is noted that some of such instruments, especially the UN General Assembly (UNGA) resolutions, may provide evidence of the legal practice of nation-states, or they may generate expectations regarding future behaviour.

In like manner, according to *Ilhami*, an alternative view of soft law labelled 'non-binding soft law' focuses on the contrast between 'binding' and 'non-binding' international instruments.<sup>30</sup> In this connection, *Thürer* asserts that "soft laws are international norms and instruments that are deliberately non-binding in character but still have legal relevance, located in the 'twilight between law and politics'".<sup>31</sup> Similarly, *Francioni* holds that "international norms and instruments that fall outside Article 38 of the Statute of the ICJ are 'soft law'".<sup>32</sup> From this, it is observed that 'soft law' is in definite contrast to 'binding law'. As treaties by definition, are always hard laws binding upon state parties. Besides, if the form of an international instrument is that of treaty, then it cannot be soft law and vice versa. In this light, it should be noted that the decisive factor in understanding soft law is to appreciate the legal form and not the content of the international instruments. Since, it is observed that soft law may be adopted either as an alternative to treaty law-making or exist as a part of a multilateral treaty-making process. Thus, *Ilhami* affirms that when used as an alternative to treaty law model, soft law instruments do not constitute part of a legally binding regime although they aspire to have some normative significance and hold some element of law-making intention; with such non-binding instruments taking a number of different forms, such as resolutions of the UNGA, codes of conduct, guidelines and recommendation of international organizations, like the OECD Guidelines for Multinational Enterprises, and declarations and final acts of international conferences, such as the Rio Declaration on Environment and Development.<sup>33</sup>

In addition, it is interesting to note that non-binding instruments do not always represent an alternative mode of law-making to treaty, but may also constitute an integral part of a multilateral treaty-making process.<sup>34</sup> Indeed, as for *Brunnée*, the latter is a part of a multilateral treaty-making process although such soft law norms and standards are legally non-binding, because they emanate from bodies that have not been endowed with the power to adopt mandatory texts, as in the case of decisions of Conference of the Parties (COP) under the various multilateral environmental agreements.<sup>35</sup> Besides, it is realized that COPs, nonetheless, usually elaborate and adopt guidelines, rules, or procedures that are needed to put flesh on the bones of several treaties or key provisions of protocols. This can be appreciated in the cases of the Vienna Convention for the Protection of the Ozone Layer/Montreal Protocol<sup>36</sup>, and the UNFCCC /the Kyoto Protocol.<sup>37</sup> Likewise, it is essential to bear in mind that non-binding soft

<sup>28</sup> Lipson notes that even though these informal agreements differ in form and political intent, legal scholars rarely distinguish them. See Lipson (1991), *op cit.*, p. 502.

<sup>29</sup> *Ibid.*

<sup>30</sup> The term 'international instrument' mainly refers to treaty, convention, agreement, protocol, declaration, guidelines, and codes of conduct. See Ilhami, A. (n.d.), *op cit.*

<sup>31</sup> Thürer, D. (2002). *Soft Law*, 4th edn, (Encyclopaedia of Public International Law), p. 452.

<sup>32</sup> Francioni, F. (1996). *International 'Soft Law'*, in Lowe, A. and Fitzmaurice, M. (eds.), *Fifty Years of the International Court of Justice, Essays in Honour of Sir Robert Jennings*, (Cambridge University Press: NY), p. 167.

<sup>33</sup> Ilhami, A. (n.d.), *op cit.*

<sup>34</sup> *Ibid.*

<sup>35</sup> Brunnée, J. (2002). "Coping with Consent: Law-Making under Multilateral Environmental Agreements", *Leiden Journal of International Law* 15:1.

<sup>36</sup> For instance, the terms of the non-compliance procedures were first set out by the Decision II/5 of the 2nd meeting of the Parties in December 1990. Subsequently, they were revised and then incorporated by amendment as an annex IV in the Protocol in Copenhagen in 1992.

<sup>37</sup> See for instance the reporting guidelines for national communication decided by the COP. The basis for reporting and review under the climate change regime is established in Article 4 of the UNFCCC, which requires all parties to prepare national communications according to common reporting guidelines agreed by the COP. These non-binding "FCCC reporting guidelines" have been revised three times, each time specifying in more detail the information that parties must include in their reports and how this should be presented, with the aim of improving the comprehensiveness, accuracy, transparency and comparability of the data provided. See Yamin, F. and Depledge, J. (2004). *The International Climate Change Regime*, (Cambridge University Press: UK), p. 332.

law is a multi-faceted concept that presents alternatives to treaties and is sometimes used to complement them. That is, some non-binding soft law instruments, decisions, and standards can constitute a part of a multilateral treaty-making process in various ways. For instance, they may be first used in a process eventually leading to the conclusion of a treaty as seen in the case of the UN Environment Programme (UNEP) Guidelines on Environmental Impact Assessment.<sup>38</sup> Subsequently, they were incorporated in the 1991 UN Convention on Environmental Impact Assessment in a Trans-boundary Context (UNECE).<sup>39</sup>

In sum, it is worth highlighting that other non-binding soft law instruments may be used as mechanisms for authoritative interpretation or strengthening of the terms of a treaty. As in the example of the "General Comments of the Committee on Economic, Social and Cultural Rights under the ICESCR".<sup>40</sup> It is also worth noting that another important related role of non-binding soft law as part of a multilateral treaty-making process is to provide the detailed rules and technical standards required for the implementation of treaties. Indeed, such decisions,<sup>41</sup> operational directives of multilateral development institutions, and technical and legal standards developed by legal and technical bodies frequently function, in giving hard content to the overly-general and open-textured terms, especially, for framework environmental treaties. From this, it is interesting to note that the 'treaty' and 'non-binding' soft law categorization is neither absolute nor exempt from objections. Nor does the classification intend to draw a sharp distinction between those soft law instruments that create legal rights and obligations and those, which do not create any legal rights and obligations; instead, it lays its emphasis on the degree of normative specificity.

### c) The Trends of Rejection of Soft Law

It is interesting to accentuate that despite the acceptance of soft law in international relations, it still faces some criticism, especially concerning the positivist objection to soft law, which draws on the idea that law is either hard or not law at all.<sup>42</sup> In this connection, 'soft law' has initially been rejected categorically or partially based on a lack of legality. It has for a long time not been attributed neither the status of a source of law nor considered having a 'self-contained regime'.<sup>43</sup> Although some writers have claimed that it has or should have such a status.<sup>44</sup> Likewise, it is observed that some more recent criticisms of soft law seem to be more concerned with the question of the effectiveness of international law, and the risk of undermining the authority of established legal norms.

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<sup>38</sup>"The Goals and Principles of Environmental Impact Assessments", adopted by decision 14/25, of the Governing Council of UNEP of 17 June, 1987.

<sup>39</sup>The Convention, which entered into force on 10 September 1997, sets out the obligations of Parties to assess certain activities' environmental impact at an early stage of planning. It also lays down the general obligation of States to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across boundaries "www.unece.org/env/pdf".

<sup>40</sup>At the UN Economic and Social Council's invitation, this Committee, which is a treaty body, has adopted general comments on various issues to assist states in fulfilling their treaty obligations. Although these comments and recommendations taken by multiple UN treaty bodies are not legally binding on the parties, it is, nevertheless, challenging to ignore them due to their often precise and detailed contents.

<sup>41</sup>That is certain decisions of international organizations are legally binding upon state members. For instance, Article 25 of the UN Charter states that the Members of the UN "agree to accept and carry out" the decisions of the Security Council per the UN Charter. Likewise, the decisions of the IMF on the maintenance or alteration of exchange rate or depreciation of currency and the International Civil Aviation Authority's authority to adopt binding standards for navigation or qualifications of flight personnel also exemplify the binding character of the decisions that international organizations can have.

<sup>42</sup>For some more recent and noteworthy 'neo-positivist' criticism of soft law. See D'Aspremont, J. (2009). "Softness in International Law: A Self-Serving Quest for New Legal Materials". *The European Journal of International Law*, 19:5.

<sup>43</sup>A 'self-contained' regime is generally understood as a sub-system of international law that contains all necessary secondary norms, and that significantly limits the application of secondary norms of general international law. The regime provides for remedies in case of breaches of the obligations under the regime. That is, a self-contained regime does not include only the rules for conduct of states, but also rules on the consequences of non-compliance with such rules. Prime examples of 'self-contained' regimes are: WTO legal system and European Community Law. See Marschik, A. (1998). "Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System". *European Journal of International Law*, 9:1, p. 220; Simma, B. and Pulkowski, D. (2006). "Of Planets and the Universe: Self-contained Regimes in International Law". *European Journal of International Law*, 17:3, 2006, 3.

<sup>44</sup>The discussing on 'non-treaty agreement', Hillgenberg, for instance, argues that it is not possible to ascertain from the 1969 VCLT whether non-treaty agreements are excluded from the application of international law. While the writer acknowledged that if the parties expressly or implicitly do not want a treaty, the Vienna Convention's provisions will not apply. However, he adds, "this does not necessarily mean that all non-treaty agreements only follow political or moral rules. There is no provision of international law which prohibits such agreement as sources of law, unless they violate jus cogens". (Hillgenberg, H. (1999). "A Fresh Look at Soft Law", *European Journal of International Law*, 10, p. 503.

For instance, *Ilhami* avers that ‘soft law’ instruments and the hortatory and goodwill language of ‘soft law’ clauses in international treaties are often welcomed on the ground of flexibility. Equally, this is based on the widespread participation, speed, adaptability, effective implementation, and the purposive interpretation of ‘soft law’ instruments and treaty principles.<sup>45</sup> From this, it is worth stressing that ‘soft law’ instruments and ‘soft law’ clauses in international treaties are also understood as proof of the unwillingness of treaty-makers to create effective law or of the inability of the state parties to reach a clear conclusion on a specific and formally binding and, thereby, effective obligation.

In addition, *Klabbers* asserts that arguments such as the ‘wish of the states’ and ‘the advantages of reaching some form of agreement’ in relation to the ‘facilitatory’ function of ‘soft law’ should be approached with prudence. Since the ‘wish of the states’ approach embodying a certain degree of subjectivism, which presumes that ‘states can conclude whatever they wish to conclude, and if they wish to conclude a ‘soft law’ instrument, then a ‘soft law’ instrument it will be.<sup>46</sup> Indeed, the notion that states ‘choose’ ‘soft law’ (states’ wish) formulations may be deceptive, thus, needs to be approached with prudence. As *Finnemore* holds that “‘soft law’, like customary law, is not always deliberately created by states as a result of their strategic purpose and it is not simply out there to be chosen”.<sup>47</sup> In this sense, *Allott* affirms that the root of the premise that states are able to ‘choose’ may be found in the understanding that equal, independent and sovereign states are empowered to act in ways that have been decided among them. Therefore, from this assumption, it follows that international law is the ‘universalizing will of sovereign states’.<sup>48</sup> Conversely, it should be noted that taking states as sole ‘international reality maker’, does not consider several other aspects of the dynamic and complex social process in which international law is formed. In this sense, *Klabbers* contends that ‘the some agreement better than no agreement’ approach is rather a simplistic assessment of international relations, with the understanding that ‘norms are better than chaos’. Hence, revealing the apologetic tendency of the use of ‘soft law’ that gives the politicians the possibility to be released from their responsibility to take necessary measures to achieve a given effect.<sup>49</sup> Similarly, *D’Amato* contends in questioning whether ‘soft law’ has a place in the international legal system that it allows a breach to be cost-effective.

This is because a violator of a norm of ‘soft law’ may suffer a reputational loss, but reputational damage may be well worth the benefits that are derived from non-compliance with the norm.<sup>50</sup> Indeed, unlike the positivist scholars, *D’Amato* considers ‘soft law’ as ‘a naked norm’, that is, law that generates no sanction. From this, it is observed that his criticism still attaches great importance to the ‘penalty’, not as a constitutive part of a legal act, but as functionality. Nevertheless, it should be noted that as per *D’Amato*, ‘soft law’ owing to its lack of enforceability, cannot perform the function to guide the nations toward the moral, just, or democratic nature that is expected from international law. But it may instead lead states to take risks in their foreign policy that may lead to their defeat or extinction.<sup>51</sup> From these, it is realised that such criticism can be seen somewhat surprising because *D’Amato* elsewhere has expressed his criticisms of the positivistic approaches by stating that if law is essentially considered a matter of commanded rules backed by sanction,<sup>52</sup> then the whole international law can be seen as ‘soft’ and ‘little more than a euphemism for international morality’.<sup>53</sup>

#### **d) The Nature of ‘Non-state’ Soft Law**

Explicitly, *Ilhami* provides that another vital definition of soft law is concerned with the ‘non-state soft law’ that involves a structural shift between ‘law’ and ‘non-law’. This is manifested in the increasingly blurred boundary between the public and private domains and in the growing pluralism of sources and subjects of international law.<sup>54</sup> From this perception, it is observed that a revolutionary shift is taking place from a state-dominated to a market-dominated international economy, which inevitably will lead to a re-definition of international public sphere.

<sup>45</sup> Ilhami, A. (n.d.), *op cit*.

<sup>46</sup> Klabbers, J. (1996). “The Redundancy of Soft Law”, *Nordic Journal of International Law*, 65:2, p. 169.

<sup>47</sup> Finnemore, M. and Toope, S. (2001). “Alternatives to Legalization: Richer Views of Law and Politics”, *International Organization*, 55:3, p.748.

<sup>48</sup> Allott, P. (2001). *Eunomia*, (Oxford University Press: New Y Palgrave MacMillan), p. 300.

<sup>49</sup> Klabbers, J. (1998). “The Undesirability of Soft Law”, *Nordic Journal of International Law*, 67, p. 383.

<sup>50</sup> D’Amato, A. (2009). “Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d’Aspremont”, *The European Journal of International Law*, 20:3, p. 902.

<sup>51</sup> *Ibid.*, p. 905.

<sup>52</sup> Austin famously argued that “Laws properly so called are a species of commands (...) And hence it inevitably follows that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author”. See Austin, J. (1954). *The province of jurisprudence determined*, (Weidenfeld and Nicolson: London), p. 133).

<sup>53</sup> D’Amato, A. (1990). *International Law and World Order*, (West Publishers: St.Paul), p. 11.

<sup>54</sup> Ilhami, A. (n.d.), *op cit*.

With the latter also often conceived as signalling a paradigm shift in international law making from a sovereignty-based international legal system to an ‘informal’, ‘transnational’ and ‘non-state’ legal order.<sup>55</sup> Likewise, it is noted that the decline of the state has led to an open and truly global economy characterised by unrestricted trade, financial flows, and the international activities of MNCs. Consequently, the integration of the world economy unavoidably is shifting the balance of power away from the states towards the markets, and non-state actors with authoritative roles and functions in the emerging new order.<sup>56</sup>

In a similar manner, according to *Reisman*, the rapidly enhanced role of non-state actors in both formal and informal law-making institutions has resulted in the increasing heterogeneity of and pluralism in the modes of law making as well as in the decrease in the control of states over the content of international law.<sup>57</sup> In this sense, it should be noted that the globalization of liberalism and privatization of government activities has increased the reliance on market mechanisms. This has resulted in the relocation of regulatory functions from public to private authority, which as a result has blurred the distinction between international public and private sphere, national and international, and local and global.<sup>58</sup> From this perspective, it is observed that there is an increasing tendency among scholars to extend the use of ‘soft law’ instruments and institutions as something that can and should reside outside the ‘traditional’ international public sphere. In this regard, *Cutler* avers that the “state-based, positivist international law and ‘public’ notions of authority are being combined with or, in some cases, superseded by non-state law, informal normative structures, and ‘private’ economic power and authority as a new transnational legal order takes shape”.<sup>59</sup>

Equally, *Ruggie* also affirms that MNCs and global business associations have alone assumed the roles that traditionally belonged to the international public authority. This is often conceptualized by the term ‘global private governance’ that basically refers to commercial arbitration, rating agencies, and other types of private regimes.<sup>60</sup>

Succinctly, it is worth stressed that the recurring reason offered by *Lipschutz and Fogel* for this modification is the changing international reality, which has created a disjunction between ‘formalistic and legalistic’ structures of international law, combined with the new world that has developed in the globalisation process in which the state and law has become detached and the public/private distinction has eroded.<sup>61</sup> Despite this, many writers conclude that there is a need to recognize that the basic rules and rule makers of ‘the game’ have changed the basic premises of ‘traditional’ international law, which is a system based on sovereign states. Similarly, *Flood* avers that “in this ‘new age’, which demands fast, flexible and often unaccustomed solutions, ‘soft law’ has become the law of globalisation”.<sup>62</sup> In this light, *Kirton and Trebilcock* affirm that “in this emerging legal order, the concept of ‘soft law’ is gradually redefined. This is because it does not necessarily refer to the rules with vague obligation that governs inter-state relations, but to ‘regimes that rely primarily on the participation and resources of non-governmental actors in the construction, operation, and implementation of a governance arrangement’”.<sup>63</sup>

In addition, it is observed that even though there is no uniformity in the definition of ‘informal soft law’ and ‘soft law regimes’, the exclusion of state authority from the norm creating and implementation processes appears to be the common characteristic. Especially, since these emerging sources of law do not emanate from the public or state authority, but from privatized, non-state authority.<sup>64</sup>

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<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Reisman, M. (n.d.). *The Democratization of Contemporary International Law-making Processes and the Differentiation of Their Application*, in Wolfrum, Rüdiger and Röben, Volker (eds.). (2005). *Developments of International Law in Treaty Making*, (Springer: Berlin), p. 21.

<sup>58</sup> Cutler, C. *Private international regimes and interfirm cooperation*, in Hall, R. and Biersteker, T. (eds.). (2002). *The emergence of Private Authority in Global Governance*, (Cambridge University Press: Cambridge), 2002, p. 23; See also Strange, S. (1966). *The Retreat of the State: the diffusion of power in the world economy*, (Cambridge University Press: Cambridge).

<sup>59</sup> Cutler, C. (2003). *Private Power and Global Authority*, (Cambridge University Press: UK), p. 1.

<sup>60</sup> Ruggie, J. (2004). “Reconstituting the Global Public Domain”, *European Journal of International Relations*, 10:4, p. 502.

<sup>61</sup> In the words of Lipschutz and Fogel, “Today, the state monopoly over regulation is well past its twentieth-century apogee. The “fluidisation” of regulatory space is a feature arising from globalization, the declining authority of the state, and the growing tendency of individuals and organizations to act outside traditional rules and frameworks” (see Lipschutz, R. and Fogel, C. “Regulation for the rest of us?” Global civil society and the privatization of transnational regulation in Hall and Biersteker, 2002, p. 122; See also Cutler, C. (1999). “Public Meets Private”, *Global Society*, 13:1.

<sup>62</sup> Flood, J. (2002). *Capital markets, globalisation and global elites*, in Likosky, M. (ed.), *Transnational Legal Process*, (Butterworths: UK), p.116.

<sup>63</sup> Kirton, J. and Trebilcock, M. (eds.), (2004). *Hard Choices, Soft Law*, (Ashgate: UK), p. 4.

<sup>64</sup> Cutler (2003)., *op cit.*, p. 22.



From this, it is realized that the private international regimes, which are created by enterprises and business associations in the interactions among themselves as well as between their customers, is the most important example of these emerging non-state authorities. In this regard, many scholars, like *Reisman*, have characterised such 'non-state law-making' modes as 'privatisation and democratisation' of international law. Thus, suggesting the replacement of the traditional division of 'hard law' and 'soft law' with the 'state-made law', which refers to the law that is produced in arenas to which only state representatives have formal access, and 'media-made law', which refers to the 'law', which is produced within a much larger and more open 'law-making' process that is transmitted through multiple electronic and print channels.<sup>65</sup> Or as some others have suggested replacing this 'old' division with 'formal soft law', which is primarily defined within the inter-state/governmental realm, and 'non-state soft law', which is confined to those norms and regimes that rely on the participation and recourses of non-state actors in the construction, operation, and implementation.<sup>66</sup> Indeed, according to this thinking, governmental authority in the non-state 'soft law' is either completely absent or does not play a constitutive role.<sup>67</sup>

Conversely, it is observed that the legal status of the instruments adopted by the non-state actors causes much controversy for the reason that if norm-like activities of non-state actors should be classified as 'soft law' or some sort of law, it involves a paradigm shift in the subjects and sources of the theory of international law.<sup>68</sup> Equally, it also implies a decline of the public/private distinction and requires a wrapped in a larger context of the tendency of deformalisation of international law. In a nutshell, it is worth reiterating that the concept of 'soft law' as mentioned earlier, initially emerged as a result of the structural shortcomings of international law to respond to the increasing complexity of the post-war inter-state life.

From this, it is realised that the growing role of non-state actors and decreasing/re-organised regulatory power of the state has had significant impact on the nature and role of international 'soft law'. Most interestingly, it is noted that in the globalisation process, the concept of 'soft law' has increasingly been used to develop other instruments and regimes that rely primarily on non-state actors in their making, implementation and enforcement. This is because it is observed that in the recent interpretation; 'soft law' is no longer a concept of international law or tool for governments and inter-state agencies, but rather it is the norm-like activities of the private actors within a combined public-private transnational realm.

#### **e) The Reconsideration of Soft Law**

Unequivocally, as mentioned earlier, a considerable amount of principles, rules, or instruments of international law are not easily explained within the concept of 'traditional sources'. In this regard, it is observed that these rules and instruments, which are now frequently named 'soft law', are found both in treaties, which are legally binding, and in legally non-binding instruments such as the resolutions of the UNGA. Likewise, it is noted that it would be misleading to classify all treaties and treaty provisions as 'hard' and categorize all resolutions, declarations, and codes of conduct as 'soft'. This is because some treaties may entirely or partly be soft and unenforceable due to being vague, too general, non-self-executing, hortatory, or political. In contrast, some non-binding instruments, such as specific UNGA resolutions, can be legally binding.<sup>69</sup> Besides, specific provisions of mostly non-binding international instruments may be considered obligatory.<sup>70</sup> Indeed, there are cases where the content of a formally binding instrument has been so precisely defined and formulated that some of its provisions could be integrated into a treaty. In this sense, it is worth stressing that treaty and non-binding 'soft law' entails different consequences. Since only violation of formally binding rules can bring about responsibility under international law, a 'treaty soft law' may serve as the basis of a legal decision delivered by an international court. Nonetheless, it is noted that although non-legal obligations can be relevant in a legal dispute as a proof of customary law, it cannot constitute the basis of a legal judgement.

Similarly, it is argued that 'soft law' creates only moral and political obligation but no legal obligations. In fact, it is realised that this understanding of soft law fails to consider the obvious fact that 'soft law' may also generate direct as well as indirect legal effects alongside with political and moral ones.

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<sup>65</sup>Reisman (n.d.), *op cit*.

<sup>66</sup>Kirton, and Trebilcock (2004), *op cit*, p. 8.

<sup>67</sup>Ibid., p. 9. Shelton, on the other hand, takes a more 'cautious' track. According to the writer, the norms adopted by non-state actors can be classified as 'soft law' mainly because of two reasons: (i) these norms are predominantly designed to influence states conducts and policies. (ii) as is argued, with the increasing globalisation, 'transnational entities' that make their own rules (i.e., 'self-regulation') enter into normative relations and instruments that "look much the same as state-adopted norms". See Shelton, D. (ed.). (2003). *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, (Oxford University Press: New York), p. 4.

<sup>68</sup>Ilhami, A. (n.d.), *op cit*.

<sup>69</sup>Such as the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States as per the UN Charter.

<sup>70</sup>Such as the provisions of Helsinki Final Act of 1975, which regulate military maneuvers.

Besides, one of the most important features of 'soft law' is that it can start a rule of customary international law or serve as an evidence of it. Moreover, in certain cases 'soft law' may 'de-legitimize' the legal status or binding nature of an existing norm through adopting a 'soft law' norm, which is opposite to an existing customary norm. From these cases, it may be possible to claim that there is no longer *opinion juris* for the rule of custom.<sup>71</sup> Another significant effect that 'soft law' may create is the internationalisation of a subject area. Once a matter has become the subject of a 'soft law', it would hardly be possible for a state party to claim that the matter in question still falls into the state's domestic jurisdiction. This is appreciated with respect to human rights and environmental protection.<sup>72</sup>

Arguably, it is observed that 'soft law' may also make state behaviour more predictable, thereby making inter-state relations more stable. In this sense, 'soft law' may promote a more democratic international law, as it more immediately reflects 'general tendencies of change of beliefs and opinions' in the 'international community'.<sup>73</sup> However, it should be remembered that the concept of 'soft law' is a double-edged tool. On the one hand, it may serve as a strategy to a few powerful states to strengthen their position and undermine the will of the remainder, that is, whenever a few powerful states do not agree with the will of the rest, they may seek 'non-binding soft law' as a refuge. Or it may give an excuse to states, which are unwilling to comply with their international commitments as in the case of the ICESCR.<sup>74</sup>

On the other hand, it may also promote more participatory international law permitting non-state actors' participation in the law-making process. States are seemingly more inclined to accept non-state actors' involvement in norm-creating activities when the instruments are expressly legally non-binding and when the outcome is either declaratory or programmatic. Thus, the non-binding international instruments like declarations, agenda, and programs, increased in number during the 1990s and can be exemplified by the results from the global summit conferences.<sup>75</sup> In this light, *Chinkin* argues that limited development has occurred in the domains, although "inherently soft or perhaps too intrusive into domestic jurisdiction to be subject of binding obligation" like human rights, environment, population, poverty, economic and social development, human habitation, women, and children.<sup>76</sup>

Congruently, it is interesting to note that the global summit conferences have been brought into being with the active participation of individuals, NGOs, and business organizations though have only observer status, do not partake in the formal conference negotiations. In this connection, *Ilhami* argues that "it is highly questionable whether the participation of non-state entities in the creation of non-binding rules should be accepted as the democratisation of international law".<sup>77</sup> Since it may be deceptive to consider international NGOs as the true representatives of the international community, even if such a concept exists. Consequently, to affirm that all NGOs are democratic and monolithic is an ungrounded assertion. As the understanding underestimates the risk of over-representation in the meaning that NGOs with greater resources and support can have more chances to be heard in international institutional activities. Besides, *Rosenau and Finkelstein* argue that it is hardly surprising that there is an increasing interest in this issue focusing on democratic deficiency or a legitimacy crisis of global governance.<sup>78</sup>

Concretely, it is noteworthy that 'soft law' may represent opportunities for the promotion of international norms and further the legalisation of international relations. In this sense, it is important to understand the relations between 'hard law' and 'soft law' as well as the formal and informal norms, to appreciate their joint contribution to efforts to improve world order instead of insisting upon a rigid dichotomy between what is legal or not.

<sup>71</sup> Gruchalla-Wesierski, T. (1984). "A Framework for Understanding 'Soft Law'", *McGill Law Journal*, p. 56.

<sup>72</sup> Ilhami, A. (n.d.)., *op cit.*

<sup>73</sup> 'Soft law' is the bearer of the damned hopes of the earth in a society that they wish to turn into a better world. This is also one of the functions of Law. See Pellet, A. (1992). *Contre la tyrannie de la ligne droite*, (Thesaurus Acroasium), Vol. XIX, p. 354, cited in Casanovas, O. (2001). *Unity and Pluralism in Public International Law*, (Martinus Nijhoff Publishers: The Hague), p. 83.

<sup>74</sup> The Covenant has a reporting system and no provision for inter-state complaints or individual petitions. However, the Committee established 1987, prepares 'General Comments' on particular rights to hinder States from evading their responsibilities under the pretext of that rights that the Covenant contains are rather programmatic and their realization depends much on resources of States parties.

<sup>75</sup> See the 1992 Rio de Janeiro World Conference on Environment and Development, 1993 Vienna World Conference on Human Rights, 1995 Beijing 4<sup>th</sup> World Conference on Women, 1996 Istanbul Habitat II.

<sup>76</sup> Chinkin (2003)., *op cit.*, p. 28; Charlesworth, H. and Chinkin, C. (2000). *The Boundaries of International Law: A feminist analysis*, (Juris Publishing: Manchester University Press), p. 66.

<sup>77</sup> Ilhami, A. (n.d.)., *op cit.*

<sup>78</sup> Rosenau, J. (1995). "Governance in the Twenty-First Century in Wilkinson, 2000; and Finkelstein, L., What is Global Governance"? *Global Governance Journal*.

As Chinkin suggests that ‘hard and soft law’ need to be seen as part of a continuum of the international legal mechanisms, with both contributing to the development of international law, creation of stability and expectation in international relations, and facilitating international co-operation.<sup>79</sup> In this sense, Tiewal corroborates by affirming that “the forces that converge to impinge upon and constrain states to behave one way or another are broader than the narrow consideration of legality”. Since the aptness of a norm to affect state practice is not conclusive reason for its legal validity. Otherwise, there would hardly be left any meaningful criterion to differ legal norms from moral, political or social norms.<sup>80</sup> In a nutshell, it should be noted that ‘soft law’ is a non-binding instrument although it has a strong persuasive force within the international community. In this regard, it is appropriate to vividly distinguish between M.O.U.S from MoUs, and examine MoUs as soft law and a tool for ‘soft’ cooperation.

## 2. Appraisal of ‘MoUs’ as a ‘Soft’ Form of Cooperation

Explicitly, Scully *et al.* aver that “within the specific scope of intergovernmental relations, practitioners often deplore the vast jurisprudential ‘grey zone’ between the various types of ‘international’ instruments that are legally binding (which are often called ‘treaties’ even when that title is not given to them in their texts) and those that are not (which are now sometimes referred to ‘MoUs’, even when they are not described as ‘Memorandum of Understanding’ in their texts)”.<sup>81</sup> In this regard, before diving into the crux of the matter, it is apposite to address and provide the distinction between treaties, M.O.U.S and MoUs that is contemporarily contended in the classifications of international instruments.

### a) The Distinction between ‘Treaties’, ‘M.O.U.S’ and ‘MoUs’

Indeed, Aust alludes that several sources call legally binding instruments ‘treaties’, while on the contrary non-legally binding instruments as ‘MoUs’.<sup>82</sup> Conversely, Scully *et al.* argue that even though the reference text of Aust mentioned the term ‘MoUs’ but not ‘M.O.U.S’. It is not considered an acronym for ‘Memorandum of Understanding’; instead, it is used instead to designate an instrument that is not legally binding on the international plane.<sup>83</sup> In this sense, it is noted that in Aust’s terminology an instrument designated as a ‘Memorandum of Understanding’ may in fact be either an ‘MoUs’ or a ‘treaty’.<sup>84</sup> Consequently, to have clarity on the situation, Scully *et al.* suggest a more precise classification of non-binding instrument (NBI) and binding registerable instrument (BRI) while documenting the emerging consensus on how to identify, classify and therefore draft intergovernmental instruments properly.<sup>85</sup>

In this regard, concerning treaties, it is noteworthy that in spite of Article 2 of the Vienna Convention on the Law of Treaties (VCLT), there is no ultimate and universally accepted definition of what a treaty is. Conversely, Judge Jessup aptly summarized that, “The notion that there is a clear and ordinary meaning of the word ‘treaty’ is a mirage”<sup>86</sup>. Nevertheless, Scully *et al.* submit that the ‘ordinary’ meaning of the word treaty concerns a legal agreement on the international plane, but that Judge Jessup’s opinion is still valid since it is not clear which international instruments are in fact encompassed by the definition.<sup>87</sup> Likewise, Baxter asserts that there exists a “vast sub-structure of intergovernmental paper”<sup>88</sup> whose parties, it is probably fair to say, have no intention of enforcing as agreements.<sup>89</sup> In fact, it is observed that parties often comply with these arrangements without considering that there is a legal duty to do so.

<sup>79</sup>Chinkin (2003), *op cit.*, p. 42.

<sup>80</sup>Tiewal, S. (1975). “The United Nations Charter of Economic Rights and Duties of States”, *Journal of International Law and Economics*, 10, p. 687.

<sup>81</sup>Scully, Roberto., Miguel, R., Cleenewerck, L. (2011). *Binding and Non-Binding Instruments in Intergovernmental Relations: Legal Foundations and Practical Recommendations*. EUCLID (Euclid University, USA). p. 18. ISBN-13. www.euclid.int | www.euclidconsortium.org.

<sup>82</sup> This is the terminology used in Anthony Aust’s influential textbook *Modern Treaty Law and Practice*. See Aust, A. (2000). *Modern Treaty Law and Practice*. 2nd edn, (London School of Economics, London, Cambridge University Press).

<sup>83</sup>Scully *et al.* (2011), *op cit.*, pp. 19-20.

<sup>84</sup>*Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> South West Africa Case (First Phase), ICJ 1962, 402.

<sup>87</sup>Scully *et al.* (2011), *op cit.*, p. 21. See also Lord Gore-Booth (Ed). (1957). *Satow’s Guide to Diplomatic Practice*, 236. (“there is no single, all-embracing definition of the term “treaty”)

<sup>88</sup> Baxter, R. (1980). “International Law in Her ‘Infinite Variety’”, *International and Comparative Law Quarterly*, Vol. 29, pp. 549-566.

<sup>89</sup> Scully *et al.* (2011), *op cit.*, p. 21.

In this sense, *Scully et al.* provide that "because governmental agencies do not consider the possibility that some of this 'intergovernmental paper' may constitute a treaty, these kinds of arrangements are sometimes drafted in a way that gives rise to disputes over their legal nature and enforceability".<sup>90</sup> From these and other related arguments, it is worth reiterating that the most authoritative definition of treaty is that found in Article 2 of the VCLT, because several States are parties to the convention.<sup>91</sup>

Explicitly, it is worth stressing that Article 2 of the VCLT crystallised and codified a 'treaty' as an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation. From this, it is noted that the key concept is the expression 'governed by international law', which is reflected in the consensus among diplomats that intergovernmental instruments often fall under the two broad categories of NBI and BRI. That is, the instruments that are not legally binding on the international plane are always distinguished from the legally binding agreements that may be registered as per Article 102 of the UN Charter.<sup>92</sup>

Conversely, Article 3 of the VCLT implies that an MoUs can still exist as an international agreement even though it is not a treaty, as the language of the VCLT does not explicitly specify what legal standing an MoUs represent.<sup>93</sup> In a similar manner, Article 2(1)(a) of the VCLT states that the definition of a treaty applies to an instrument "whatever its particular designation". This is seen to be consistent with State practice, although *Scully et al.* conclude that an instrument's designation such as 'Treaty', 'Charter', 'Exchange of Notes', 'Memorandum of Understanding', etc., of itself, has little bearing on whether or not an instrument attains or lacks treaty status, except to the extent that in given circumstances, the use of such a term may shed light on the signatories' intentions for the instrument.<sup>94</sup>

Indeed, this is especially significant with regards to any instrument called a 'Memorandum of Understanding'. Since the UN Treaty Handbook states that "The UN considers M.O.U.S to be binding and registers them if submitted by a party or if the UN is a party".<sup>95</sup> It is observed that this is consistent with the VCLT definition that makes the designation irrelevant. Even though *Aust* seemingly disagrees that the UN Treaty handbook is quite wrong in appearing to regard MoUs as treaties.<sup>96</sup> As earlier mentioned, it is noteworthy that 'M.O.U.S', according to UN usage standing for 'Memorandum of Understanding' differs from the term 'MoUs' defined in *Aust's* book - *Modern Treaty Law and Practice*.<sup>97</sup>

Concretely, it is worth highlighting that there is a general assumption that intergovernmental 'agreements' under any written form may give rise to an international legal process or be relevant to such process. This is why Article 102 of the UN Charter requires that 'every treaty and international agreement' be registered.<sup>98</sup> Nevertheless, *Scully et al.* argue that "this broad definition of 'every treaty and every international agreement', however, is not the whole story because in recent practice, the UN Secretariat General (UNSG) has paid and will continue to pay close attention to any instrument presented for registration that comes under the designation 'Memorandum of Understanding' with the heightened presupposition that it may in fact be an NBI, either objectively or in terms of perception by one of more of the parties."<sup>99</sup> In fact, this approach is seemingly connected with the 1983 claim by the United Kingdom (UK) that a Memorandum of Understanding signed with the United States (US) was not in fact a binding agreement but merely "a gentlemen's agreement".<sup>100</sup>

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<sup>90</sup>Ibid., p. 22.

<sup>91</sup> As of October 2010, it has been ratified by 111 States. Moreover, those that have not yet ratified it may still recognize it as a restatement of customary international law in light of the large number of states which have ratified the VCLT.

<sup>92</sup>*Scully et al.* (2011), *op cit.*, p. 23.

<sup>93</sup> *Scully et al.* (2011), *op cit.*, p. 27. See Braswell, R. (n.d.). RSC Working Paper No. 35, Protection Against Torture in Western Security Frameworks: The Erosion of Non-Refoulement in UK-Libya MoU, <http://repository.forcedmigration.org>

<sup>94</sup>*Scully et al.* (2011), *op cit.*, p. 32.

<sup>95</sup> UN Office of Legal Affairs Treaty Section, Treaty Handbook - <http://untreaty.un.org/english/treatyhandbook/glossary.htm>.

<sup>96</sup>*Aust* (2000), *op. cit.*, p. 26.

<sup>97</sup>*Scully et al.* (2011), *op cit.*, p. 33.

<sup>98</sup> Ibid. Article 102 of the UN Charter states that (1) Every treaty and every international agreement entered into by any Member of the UN after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it. (2) No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations. See 1 UNTS XVI.

<sup>99</sup> *Scully et al.* (2011), *op cit.*, p. 34.

<sup>100</sup> Ibid., pp. 34-35.

A situation that caused consternation on the part of the US led to the clarification of what terminology and designation need to be used when dealing with prospective partners.<sup>101</sup> From this, it is noted that this significant case saw the UK challenging the traditional perception that a Memorandum of Understanding was “an informal but legal agreement”<sup>102</sup> between two or more parties. Despite this, *Scully et al.* provide that “it may have been assumed (at least by some States of the British Commonwealth) that ‘Memorandum of Understanding’ was a fairly standard designation for an informal arrangement that was not legally binding, that is, an NBI not a BRI.”<sup>103</sup>

In a nutshell, on the specific issue of instruments called ‘Memorandums of Understanding’, it is noteworthy that international lawyers and diplomats are bound to be confused not only by the UK/US controversy mentioned above but also by the possibly contradictory or evolving position of the UNSG as well as the terminological approach found in *Aust’s* book – “*Modern Treaty Law and Practice*”. Indeed, relying on the UN Treaty Handbook’s definition earlier mentioned, it is worthwhile noting that the ‘Memorandum of Understanding’ designation is quite fitting for a rather informal but still legally binding agreement, as long as it is worded according to standard practice and presented for registration in accordance with Article 102.<sup>104</sup> Similarly, it is important to note that the term ‘treaty’ is in itself ambiguous. This is because governments often desire to conclude agreements that involve rights and obligations under international law but without having to ever use the word ‘treaty’ in the text of that agreement, as the term ‘treaty’, in the minds of many, evokes a solemn act requiring parliamentary ratification or even, in some cases, a popular referendum.<sup>105</sup> Expediently, it is observed that diplomats often use ‘instrument-of-less-than-treaty status’ designations such as Arrangement, Memorandum of Cooperation. Still yet these instruments are intended to create specific binding obligations under international law.<sup>106</sup>

Consequently, it should be noted that the terms ‘treaty’ and ‘Memorandum of Understanding’, which are used to distinguish between MoUs and M.O.U.S according to the terminology adopted by *Aust*, may not be well understood or practical.<sup>107</sup> In this sense, in the preceding sub section, more emphasis shall be laid on the issue of MoUs as soft law.

#### **b) The Scope and Significance of ‘MoUs’ as Soft Law in International Law**

Undoubtedly, according to *Chinkin*, an MoU is an instrument concluded between states which they do not intend to be governed by international law or any other law, thus, not legally binding. With *Boyle and Birnie* alluding that there is no agreement on what is ‘soft law’, or if it exists at all, as a distinct source of law.<sup>108</sup> In addition, *Aust* cogently argues that ‘soft law’ is generally used to describe international instruments that their makers recognize are not treaties, even if they employ mandatory language like ‘shall’, but have as their purpose the promulgation of norms, albeit not legally binding, of general or universal application.<sup>109</sup> Likewise, *Rastiala* shrewdly points out that since a ‘soft law’ instrument is not intended to be legally binding, it cannot be law. This is because the choice between, what he calls, ‘contracts’ (treaties) and ‘pledges’ (non-treaties) is made consciously by the negotiating states.<sup>110</sup> However, it should be noted that ‘soft law’ instruments can represent an intermediate stage in treaty making, but sometimes never get beyond that stage. Although some norms do, like the 1948 Universal Declaration of Human Rights, which have been the inspiration for many universal and regional human rights treaties. In fact, all such ‘soft law’ instruments are MoUs in the sense that there is no intention that they should themselves be legally binding. Besides, the main difference between them and most other MoUs is that ‘soft law’ MoUs are invariably multilateral, seek to lay down universal norms, and published and widely disseminated. In contrast, most MoUs are often bilateral, but even when they are multilateral, they do not generally lay down universal norms.

<sup>101</sup> McNeill, J. (1994). *American Journal of International Law, International Agreements: Recent U.S.-UK Practice Concerning the Memorandum of Understanding*, Vol. 88. See also infra our review of current UK and US guidelines.

<sup>102</sup> McNair (n.d.). *The Law of Treaties*, cited in McNeill, J. (1994), *op cit.*

<sup>103</sup> Scully et al. (2011), *op cit.*, p. 35.

<sup>104</sup> *Ibid.*, p. 36.

<sup>105</sup> *Ibid.*, p. 37.

<sup>106</sup> As long as it is understood that constitutional processes may be required, this approach is both practical and legitimate. It should be noted, though, that the ICJ ruled in the case of *Qatar v Bahrain* that Minutes which had not complied with constitutional processes were nevertheless binding on the parties. (Cf. *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain)* ICJ Reps. 2001)

<sup>107</sup> Scully et al. (2011), *op cit.*, p. 37-38.

<sup>108</sup> Boyle, A. (1999). *Some Reflections on the Relationship of Treaties and Soft Law*, (ICLQ), 901-13; Birnie, P.W. and Boyle, A. (2002). *International Law and the Environment*, 2<sup>nd</sup> edn, (Oxford), pp. 24-7.

<sup>109</sup> See *Aust, Handbook on international environmental MOUs*. pp. 329-32

<sup>110</sup> Rastiala, K. (2005). *Form and Substance in International Agreements*, (A/IL), pp. 581-614; Boyle, A. and Chinkin, C. (2007). *The Making of International Law*, (Oxford, esp. Ch).

Nonetheless, it is noteworthy that whether they are multilateral or bilateral, they are seldom published even when unclassified.<sup>111</sup> In a nutshell, it is worth stressing that the possible international legal consequences of MoUs is that it has effect only in the realm of politics or morals, therefore, if a state does not carry out its commitments the sanction is political.

### c) The Extent of MoUs as Soft Law in the Field of Mutual Assistance

In practice, it is consonant to contextualize the latitude of MoUs as 'soft law' in the field of mutual assistance by considering what entails in Switzerland. For instance, the Swiss new treaty strategy of the Federal Office of Justice (FOJ) in the field of international mutual assistance<sup>112</sup> provides that where it is not appropriate to conclude an international treaty to cooperate with a state, increasing use should be made of more informal cooperation instruments like 'soft law'. As the treaty strategy has chosen the term 'Memorandum of Understanding (MoUs)', for the non-legally binding bilateral instruments. Nevertheless, this is not new to Switzerland in the form of cooperation in the field of mutual assistance, since it earlier concluded an MoUs with Russia shortly after the collapse of communism.<sup>113</sup> This is because a more formal form of cooperation was not yet possible. Thus, these initial experiences gained from the bilateral agreements have proved useful in subsequent groundwork on the Council of Europe instruments. As other departments also followed suit in using MoUs, as in some cases, they were used as MoUs originally intended,<sup>114</sup> 'pre-contracts' to evaluate in a non-binding way, but with a certain degree of formality, whether closer cooperation and further possible agreements.<sup>115</sup>

From this, the essence to situate MoUs as 'soft form of cooperation' in the context of international law and how it can be of practical use in the field of mutual assistance, is well appreciated, thus, bringing out the appropriate benefits and significance of MoUs.

### d) The Significance of MoUs in International Law

Generally speaking, it should be noted that even though an MoUs is not legally binding in its effect, it is not irrelevant. This is because if drafted in suitable terms, it can become 'soft law'. In fact, the term covers instruments or standards that are not 'the law' as such, but are important enough within a legal frame of reference that can still play a role.<sup>116</sup> Equally, *Shaw* affirms that if a legal field is politically controversial, it is readily advisable to resort to 'soft law', especially if concluding a binding treaty is unrealistic, as 'soft law' is preferable to the absence of any regulations at all.<sup>117</sup> Thus, it is observed that it may be worthwhile in such circumstances to cooperate without a formal agreement but by means of an MoUs. In this way, it is noted that the relationship between the states concerned can graduate to a new level. That is, by concluding an MoUs, the governments signal that they have decided to work more closely together and discuss cooperation in the field in question in more detail. In this sense, it is important to note that MoUs are concluded at ministerial level, and not by civil servants. Therefore, beyond the symbolic importance of this, agreement can be reached, again in non-binding form, on certain formal procedures and direct contacts between administrative units in both states. Equally, it is also worth bearing in mind that 'soft law' that has proven its worth can ultimately be made binding.<sup>118</sup> Concretely, this can be done either by concluding a formal treaty or act, or by the 'soft law' becoming established as international customary law<sup>119</sup>.

<sup>111</sup> Aust, A. (2000). *Modern Treaty Law and Practice*. 2nd edn, (London School of Economics, London, Cambridge University Press), p. 53.

<sup>112</sup> The Strategy for a network of state treaties in the field of judicial cooperation on criminal matters, approved by Federal Councillor Sommaruga on 12.04.2013.

<sup>113</sup> Switzerland entered into an MoUs on mutual assistance with Russia in 1994, before the state signed the European Convention on Mutual Assistance in Criminal Matters in December 1999.

<sup>114</sup> The term MoUs originates from Anglo-American business law, where pre-contracts are known as MoUs, especially in the field of corporate acquisitions. MoUs contain the key provisions of the subsequent contract in the form of non-binding declarations of intent.

<sup>115</sup> For example, the MoUs between the Federal Department of Economic Affairs and Brazil, signed by Federal Councilor Leuthard on 8.02.2007 and aims to create a bilateral economic committee in the short term, but in the longer term has the express aim of exploring the possibility of an economic treaty. See the press release at <<http://www.news.admin.ch/message/index.html>.

<sup>116</sup> Shaw M. (2008). *International Law*, 6<sup>th</sup> edn, (Cambridge), p. 117. The Helsinki Final Act of 1975, which founded the CSCE, is an example of an international law instrument that, although not legally binding, had a strong influence on legal and political reality to the collapse of communism and promoted the concept of universal human rights.

<sup>117</sup> Shaw (2008)., *op. cit.*, p. 118, has observed that 'soft law' arrangements are especially common in the fields of economic and environmental international law, partly due to this factor.

<sup>118</sup> *Ibid.*

<sup>119</sup> 'Soft law' is an important indicator in this process of the element of *opinion iuris*.

Indeed, due to these advantages, and in particular, the negotiating flexibility that governments gain, 'soft law'-regulations have become more important in this contemporary era.<sup>120</sup> For instance, recently, Belgium and Turkey signed anMoUs in order to increase bilateral cooperation in criminal cases.<sup>121</sup> Similarly, Switzerland also uses MoUs in relation to armed forces relations, where cooperation is a particularly sensitive issue thanks to Switzerland's neutrality, but is nevertheless possible provided a certain degree of formality is applied.<sup>122</sup>

Explicitly, MoUs have numerous advantages in relation to judicial cooperation in criminal matters. For example, they have readily provided Switzerland with an instrument that allows it to consider closer cooperation in the field of mutual Assistance in criminal matters in detail, without having to establish mutual rights and obligations beforehand. Besides, it also permits more flexible access to legal systems that differ substantially from the Swiss system, and which even apply very different constitutional and human rights standards. Indeed, anMoU can be an initial step towards closer and more efficient cooperation in criminal cases as seen in the case of the agreement between Switzerland and Russia<sup>123</sup>. Nonetheless, suppose anMoU is to prove useful to criminal law practitioners and not simply to be regarded as an instrument of symbolic and political value. In that case, the following two aspects are decisive: (i) The MoU must not limit itself simply to making political declarations, but should aim to make practical advances like direct contacts between central offices; and (ii) there must be general awareness of the MoUs. This is because only when the general public and practitioners are aware of the MoUs' existence can they be of any value. Necessarily, in terms of the first, 'practical aspect', the negotiations will always pay careful attention to the usefulness of entering into an agreement. While in terms of the second, 'on awareness of MoUs', the question of their publication is crucial. However, this is not possible, due to the statutory regulations on publication. In this regard, it is worth recommending that MoUs that have come into effect should be duly published in the appropriate legal journal.

This is to allow the practitioners, general public, and the media to have easy and direct access to the information. Indeed, to increase the awareness of the MoUs even further among the general public, a press release needs to be published when they are signed, together with a link to the text of the MoUs.

### **Conclusion**

Essentially, this paper has illustrated that there exists no uniform one-fits-all solution in developing viable international instruments of global governance. This is because while legally binding agreements remain the prime option given their back-up system of enforcement measures and non-compliance regimes, it is observed that the availability of such mechanisms is not a guarantee of favourable and notable environmental change or effectiveness. Comprehensive, global, and legally binding instruments are developed only when the negotiating states are truly capable of implementing the adopted measures in their domestic law and solely when parties are confident that they can exert compliance. In contrast, soft law can also create commitments for the participating states and effectively induce environmental change. In this light, the several advantages of soft law are based on the fact that it is not incompatible with an international order grounded in the principle of national sovereignty. Since the 'soft law' instruments are not hindered by issues intrinsic to a legally binding format. As such, 'soft law' instruments can be both an alternative and a supplement to legally binding international agreements.

Concretely, some of the advantages of developing 'soft international norms' instead of mandatory ones are: (i) It is easier to reach a global accord since states have complete control over the type and level of commitment assumed under a soft law instrument. (ii) There are less delays in negotiations compared with legally binding norms. (iii) It is easier to fulfil principles and targets set in soft law since states are allowed to adopt a more customised approach to instruments for incorporating norms in domestic regimes and for their enforcement. (iv) Soft law bridges North-South differences more successfully as it leaves more room for dialogue and alternative ways of achieving particular goals tailored to the specific needs of participating states. (v) Generally, there is a higher level of global, interstate dialogue and a focus on cooperation that furnishes legally binding instruments on bilateral or regional levels. And (vi) Soft law enables greater participation of non-state actors such as industry and NGOs. Equally, it is worth stressing that 'soft law' is not an alternative to traditional law making, but rather a complement to it. It is designed as a preparatory instrument for future adoption or as a 'post-law' instrument that may provide interpretation for its application, such as many declarations and general recommendations of international organizations. Succinctly, this paper affirms the potential of soft law in reforming traditional sources of international law and the modalities for their creation by allowing broader participation and opening up new channels for further legalization.

<sup>120</sup> Shaw (2008), *op. cit.*, p. 118, with a reference to a study by the US State Department.

<sup>121</sup> See Communiqué de Presse conjoint, [http://countries.diplomatie.belgium.be/fr/pays\\_bas.jsp?id=210291](http://countries.diplomatie.belgium.be/fr/pays_bas.jsp?id=210291).

<sup>122</sup> See the information on the VBS website, at <http://www.vtg.admin.ch/internet/vtg/de/home.html>.

<sup>123</sup> Switzerland entered into anMoU on mutual assistance with Russia in 1994, before the state signed the European Convention on Mutual Assistance in Criminal Matters in December 1999.

In this sense, it is worthwhile noting that soft law has ceased to be the 'substitute' for hard law alternative in interstate relations, and has become the dominant 'legalization form' of the norm-like activities of private and public-private crossbreed authorities. Closely related to the emergence of private authority and the proliferation of informal or hybrid institutions on the international scene, it is realized that the new type of informal soft law has come to rely on private and public-private mixed authorities primarily. Thus, by implying the multiplicity of legal sources and subjects of international law, giving rise to a flexible and context-dependent norm-making process, the informal soft law is now a central mechanism in privatizing public power. In this regard, it is noted that even if an MoU is not a binding agreement under international law, it has the inherent potential to herald a new era of formalised relations with a state. In practice, the instrument can lead to valuable progress made by making direct contact between central offices on mutual assistance matters possible. Aptly, to achieve this, it must be made public and generally accessible. Besides, MoUs need to be understood in their political context, as they prepare the way for closer cooperation with states in the field of judicial cooperation in criminal matters. With an initial step in the form of an MoU usually leading to further steps being taken. Concisely, an MoU is ideal for any ground breaking work. This is because it is not legally binding and does not have the same depth as a treaty, but it can steer its way through waters that would otherwise be unnavigable.