DOI: 10.7251/GFP2111091G

UDC: 341.1/.8:316.42(100)

Originalni naučni rad

Datum prijema rada:
03. mart 2021.

Datum prihvatanja rada:
01. jun 2021.

Use of Legally Non-Binding Instruments in Contemporary Practice of International Relations

Abstract: The article explores the use of legally non-binding (informal) instruments in contemporary international practice by international political actors. In this context, the article examines definitions and main characteristics of legally non-binding instruments, as well as their effects. In addition, the use of this type of instruments was assessed as a practical response to the need of concerting between the political actors at the international plane due to their functionality and flexibility. It was concluded that these instruments implied a softer form, unlike treaties, and the act of their conclusion does not require conducting a formal and cumbersome procedures, such as parliamentary ratification. These instruments imply political commitments between their parties and their effects are usually shielded by the bona fides principle. Although these instruments are generally deprived of legally binding effects, they remain quite pragmatic tools in brokering political agreements at the diplomatic level between relevant international political actors.

Key words: Public International Law, Sources of International Law, Non-binding Instruments, Soft Law, Gentlemen's Agreement.

Duško Glodić

Prof. dr Duško Glodić, e-mail: dusko.z.glodic@apeiron-edu.eu , College of Legal Studies, Pan-European University Apeiron, Banja Luka.

1. INTRODUCTORY REMARKS

A number of relevant issues stemming from relationships between international law subjects are usually settled down either in the form of treaties or in the form of other legally binding rules, such as the acts adopted within international organisations and customary rules. Nonetheless, some other instruments, which are not binding from a strictly legal point of view, have been also used with a view to resolving some issues at the international plane without the conclusion of treaties. These instruments are not made in the form of treaties, within the meaning of international law, and are usually denoted as non-binding or informal instruments,[1] but different denominations can be seen, such as: *gentlemen's agreement, non-binding agreements, instruments concertés non conventionnels,*[2] and

[1] Dailler, P., Forteau, M., Pellet, A. (2009). *Droit international public*, Paris: LGDJ, 423.

[2] *Ibid*., 423-431.

nonlegal agreements.[3] Therefore, for the purpose of this article, a non-binding instrument will be considered as an expression of concurring will of two or more subjects, which is not made in the form of a legally binding agreement and does not constitute obligations under international law, but which create rather political commitments.

This article will examine the role and importance of these instruments in international relations. In this respect, this article will, firstly, explore their notion and main features, and then it will elaborate the use of these instruments as a pragmatic response to the needs of contemporary practice of international politics.

2. LEGALLY NON-BINDING INSTRUMENTS: THEIR DEFINITION AND MAIN CHARACTERISTICS

Non-binding bilateral or multilateral instruments are used as tools for agreeing on some issues between the interested parties and for constituting their political commitments, without using the instruments existing under international law. Although these instruments are not international agreements under international law,[4] they incite some interest of the international law scholars due to their practical importance. Therefore, the following lines will elaborate on the definitions of the non-binding instruments and then will examine their main features.

2.1. Defining non-binding instruments: a role for legal science or an issue of diplomatic pragmatism

One can find a variety of definitions in the relevant literature. A group of French authors defines these instruments as "*instruments issus d'une négociation entre personnes habilitées à engager l'Etat ou l'organisation internationale ... et appelés à encadrer les*

[3] Posner, E. A., Goldsmith, J. L. (2003). International Agreements: A Rational Choice Approach, *Virginia Journal of International Law*, 44, 114

[4] According to Article 2(1) a) of the Vienna Convention on the Law of Treaties, a treaty „*means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.*" (Vienna Convention of the Law of Treaties, *United Nations Treaties Series*, Vol. 1155, I-18232.). A similar definition may be found in Article 2.1 a) of the Draft Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (*United Nations publication, Sales No. E.94.V.5*).

relations de ceux-ci, sans pour autant avoir un effet obligatoire."[5,6] Aust[7] finds that a non-binding instrument is „*instrument which is not a treaty because the parties to it do not intend it to be legally binding*." D'Aspremont[8] finds that „*the instrument is soft when parties decide to resort to an instrument other than a formal treaty or a binding unilateral declaration*." Fastenrath[9] defines a gentlemen's agreement as instruments „*which were originally understood to be agreements reached between statesmen or diplomats in which they committed themselves personally and politically only. The basis of such agreements is not law but trust in one's partner*."

The above cited definitions demonstrate that the scholars usually underline that these instruments are not formally binding in legal terms, albeit the parties thereto are aiming at stipulating certain type of commitment which has merely a political and ethical character. Although not vested with legally binding nature, these instruments, nonetheless, do create some effects towards their parties. The scholars agree that these instruments make political commitment and may engage moral responsibility for their signatories and those who have entered into them.[10] [11]

From a practical perspective, the parties to such instruments usually consider them as regulating political issues and they do not demonstrate their intention to be bound by a legal agreement.[12] Nonetheless, this should not be understood as preventing to settle political issues through legally binding documents. Even more so, the parties tend to regulate important political issues in the form of treaties, albeit, due to some concrete circumstanc-

---

5 Dailler, Forteau, Pellet (2009), 424.

6 Alain Pellet in an article from mid 1980s, indicates that there are two groups of scholars with different ideological views regarding the sources of international law. One group is made by the scholars coming from developed countries and these scholars mostly consider that the acts and instruments, which are deprived of legally binding effect, such as the majority of UN General Assembly resolutions and other non-binding instruments, do not constitute part of international law. The other group is composed of the authors coming from developing countries and they advocate the position that these non-binding instruments should, somehow, acquire certain status within international law due to their role played in international relations. Pellet is of the opinion that both groups represent extreme positions and that they neglect the fact that international law is being developed in a given international context and under the influence of realistic circumstances and needs of international community. (Pellet (1987) p. 118). One should not forget that there are historical examples when some statesmen treated fully fledged international agreements as mere sheets of paper. (See: Krivokapić, B. (2017). *Međunarodno javno pravo*. Beograd: Poslovni i pravni fakultet, Institut za uporedno, 139).

7 Aust, A. (1986). The Theory and Practice of Informal International Instruments. *International and Comparative Law Quarterly*, 35(4), 787.

8 D'Aspremont, J. (2008). Softness in International Law: A Self-Serving Quest for New Legal Materials. *European Journal of International Law*, 19 (5), 1082.

9 Fastenrath, U. (1997). The Legal Significance of CSCE/OSCE Documents, *OSCE Yearbook 1995/1996*, 114.

10 Dailler, Forteau, Pellet (2009), 429.

11 Aust points out that, during the preparations of the Vienna Convention on the Law of Treaties, there were some initiatives to consider non-binding instruments as a simplified form of treaties. However, this proposal was not accepted during the codification exercise as there was no wide agreement on this issue. The non-binding treaties, consequantly, were not included in this codifcation (Aust (1986), 794-795).

12 Shaw, M. (2003). *International Law*. Cambridge: Cambridge University Press, 813.

es and different diplomatic conditions, it is also possible to opt for setting some political agreements without concluding a formal treaty. This is, however, subject to a pragmatical choice and political preferences of the concrete parties in a given moment.

It is of utmost importance to carefully treat the issue of nature of any concrete instrument. It is easy to determine the legal nature of an instrument if the will of the parties to this instrument is clearly manifested. On the contrary, some instruments, regardless to their particular title, may leave room for ambiguity regarding their binding or non-binding character under international law[13]. In other terms, in order for one to conclude that the instrument in question is a legally binding treaty, it is necessary for the parties to the former to have expressed their intention to establish rights and obligations based and governed by international law.[14] Although these instruments do not create legal duties, it is legally justifiable to expect that these instruments shall not be contrary to the internationally undertaken obligations of their parties and shall not constitute breach of positive international law, *i.e.* be substantially in contravention of *ius cogens* and other relevant international obligations.[15]

Since the purpose of such instruments is to define certain behaviours of the concerned parties, one may question what would happen if a breach of such an instrument occurs. It appears that, due to the lack of legally binding force, it would not be possible to invoke legal responsibility or to use any dispute settlement mechanism of legal nature. The obligations to which the parties have been committed by concluding a non/binding instrument are of a pure political nature. Thus, any responsibility and potential sanctions would be also political in its essence.[16]

The non-binding instruments may be made in different forms, under various titles, and as both bilateral or multilateral. They may be concluded between the states, but also under the auspices of international organisations. Based on the existing practice, some quite important documents for international politics fall within the category of the non-binding instruments[17] and are often made in the form of final acts or *communiqués* from the international conferences or bilateral political and diplomatic meetings.[18] The most illustrious examples are the Final Helsinki Act of 1975 and the Paris Charter for New Europe of 1990, both of them representing an expression of concerted will of their parties on some important issues of international relations. However, some scholars conclude that the instruments, such as the Helsinki Final Act, represent a collection of already existing general principles of international law, which are binding upon the parties by their own virtue, and, hence the substance of these political documents produce binding effects and not the fact that the political declaration was signed.[19] In the practice of the former Yugo-

---

[13] D'Aspremont (2008), 1082; Fastenrath (1997), 412.

[14] Jennings, R., Watts, A. (1992). *Oppenheim's International Law*. Volume I, Harlow: Longman, 814.

[15] Fastenrath (1997), 425.

[16] Aust (1986), 807; Dailler, Forteau, Pellet (2009), 428.

[17] Shaw (2003), 111-112.

[18] Degan, V. Đ. (2000). *Međunarodno pravo*. Rijeka: Pravni fakultet Sveučilišta u Rijeci, 87.

[19] Degan, (2000), 87-88; Dailler, Forteau, Pellet (2009), 430-431; Đurić, V. (2007). *Ustav i međunarodni Ugovori*. Beograd: Institut za uporedno parvo, 78; Cassese, A. (2005). *International Law*. Oxford: Oxford University Press, 196; Shaw (2003), 111; Vaïsse, M. (2005). *Les relations internationales depuis 1945*, 10e Edition. Paris: Armand Colin, 84; Fastenrath (1997), 414. Additional examples of important political instruments are the documents related to Cuban Crisis and

slavia, one may recall the use of the Memorandum of Understanding on Trieste territory of 1954 which was entered to by the USA, UK, Yugoslavia and Italy.[20]

However, the parties sometimes disagree about the nature of the document that they entered to and some of the parties may argue that the document does produce legally binding effect. There does not seem to exist any general pattern on how to overcome such situations, but it is a rather practical issue.[21] The scholars underline few examples of disputes over the legal nature of such an instrument. Two cases before the International Court of Justice are quite notorious in the literature. In the case regarding the continental shelf in the Aegean Sea, the Court has found that the joint communiqué, issued by the parties (Greece and Turkey) following the meeting of their prime ministers held in 1975, could not be considered as a legally binding document by virtue of which the parties agreed on the Court's jurisdiction to settle the dispute between the parties.[22] [23] Actually, the Court has examined the course of relations between the parties regarding the concrete issue, including diplomatic communications and meetings between their representatives that followed the one held in 1975. Thus, the Court has concluded:

„Consequently, it is in that context - a previously expressed willingness on the part of Turkey jointly to submit the dispute to the Court, after negotiations and by a special agreement defining the matters to be decided-that the meaning of the Brussels Joint Communiqué of 31 May 1975 has to be appraised. When read in that context, the terms of the Communiqué do not appear to the Court to evidence any change in the position of the Turkish Government in regard to the conditions under which it was ready to agree to the submission of the dispute to the Court. It is true that the Communiqué records the decision of the Prime Ministers that certain problems in the relations of the two countries should be resolved peacefully by means of negotiations, and as regards the continental shelf of the Aegean Sea by the Court. ... These statements do not appear to the Court to be inconsistent with the general position taken up by Turkey in the previous diplomatic exchanges: that it was ready to consider a joint submission of the dispute to the Court by means of a special agreement. At the same time, the express provision made by the Prime Ministers for a further meeting of experts on the continental shelf does not seem easily reconcilable with an immediate and unqualified commitment to accept the submission of the dispute to the Court unilaterally by Application. In the light of Turkey's previous insistence on the need to "identify" and "elucidate" the issues in dispute, it seems unlikely that its Prime Minister

the acts dopted by the OPEC countries. See: Posner, E.A., Goldsmith, J.L. (2003). International Agreements: Rational Choice Approach, *Virginia Journal of International Law*, 44, 116.

[20] Avramov, S., Kreća, M. (2001). *Međunarodno javno pravo*. Beograd: Savremena administracija, 460.

[21] Aust (1986), 803-804.

[22] Cassese (2005), 172-173.

[23] Greece invoked a joint communiqué of the meeting held in Brussels as a ground establishing jurisdiction of the International Court of Justice to settle this dispute. Namely, the Greek Government put forward the following argumemnt: " *The joint communiqué of Brussels of 31May 1975, which followed previous exchange of views, States that the Prime Ministers of Greece and Turkey have decided that the problems dividing the two countries should be resolved peacefully 'et, au sujet du plateau continental de la mer Egée, par la Cour internationale de La Haye'. The two Governments thereby jointly and severally accepted the jurisdiction of the Court in the present matter, pursuant to Article 36 (1) of the Statute of the Court*." (*Aegian Sea Continental Shelf (Greece v. Turkey),* Judgment of 19 December 1978, ICJ Reports 1978, para. 94.)

should have undertaken such a commitment in such wide and imprecise terms."[24]

Finally, the Court has established:

„ Accordingly, having regard to the terms of the Joint Communiqué of 31 May 1975 and to the context in which it was agreed and issued, the Court can only conclude that it was not intended to, and did not, constitute an immediate commitment by the Greek and Turkish Prime Ministers, on behalf of their respective Governments, to accept unconditionally the unilateral submission of the present dispute to the Court. It follows that, in the opinion of the Court, the Brussels Communiqué does not furnish a valid basis for establishing the Court's jurisdiction to entertain the Application filed by Greece on 10 August 1976."[25]

On the contrary, the Court held a different standpoint in the boundary dispute between Qatar and Bahrain, whereby the Court found that the minutes of the meeting between the foreign ministers of the parties could be considered as an agreement constituting the Court's jurisdiction.[26] [27]

Therefore, in light of the foregoing illustrations, one may conclude that the true nature of a document, *i.e.* the issue of its binding effect, has to be assessed in the context of its conclusion and concrete relationship between the involved parties as well as their rapport to the subject matter.

2.2. Features and effects of non-binding instruments

Although they are deprived of formal effects under international law, these instruments, however, enable the conduct of politics and achieving some policy objectives on the international plane. From a practical point of view, there are some resemblances between the treaties, on the one hand, and the legally non-binding instruments, on the other hand. The two types of instruments are to be concluded by the authorised representatives of the parties. Nonetheless, the non-binding instruments are not subject to formal approval procedures and do not systematically require involvement of the parliaments, as the case may be with the ratification of the treaties. Therefore, the non-binding instruments are somewhat procedurally *lighter* and do not entail long and cumbersome procedures under national or international law.[28]

From the substantial point of view, the parties have, in principle, committed to act pursuant to what was defined in the non-binding instruments, albeit they did not concur to make a formal treaty under international law.[29] Although it may not appear evident,

---

[24] *Aegian Sea Continental Shelf (Greece v. Turkey),* Judgment of 19 December 1978, ICJ Reports 1978, para. 105.

[25] *Aegian Sea Continental Shelf (Greece v. Turkey),* Judgment of 19 December 1978, ICJ Reports 1978, para. 107. See also: Cassese, 2005, p. 173.

[26] The ICJ has concluded: „*The Minutes are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement*. " *Maritime Delimitation and Territorial Questions between Qatar and Bahrain,* Jurisdiction and Admissibility, Judgment of 1 July 1994, ICJ Reports 1994, para. 25.

[27] Cassese (2005), 173; Shaw (2003), 814.

[28] Pellet (1987), 126; Fastenrath (1997), 412-413.

[29] D'Aspremont (2008), 1082.

the scholars widely consider that the parties act pursuant to the non-binding instruments due to the same reasons as when they act pursuant to the treaties. They do not want their international reputation to be questioned and also are fearful that their behaviour, which would go against the instruments, would constitute basis for retorsions.[30] Furthermore, acting pursuant to the instruments creates expectations that the remaining parties would also honour their commitments and will respect their political obligations.[31] These instruments create similar effects to these of the recommendations issued by the international organisations, which do not create binding effects in principle, but do provide for some '*psychological pressure*' to their parties.[32] Overall, behaving in the above explained manner creates the political bounds that ensure effects of the legally non-binding documents.

Another important trait of these instruments is the use of different terminology from the one used in formal treaties. If the instrument is drawn in English, the parties use the word 'will' instead of 'shall', the latter being typical of treaties. Furthermore, in order to denote the effective date, the formulation 'will come into operation' is widely used in non-legal documents.[33]

Lack of legally binding effect means that breaching these instruments would not constitute violation of international law and this would not be a ground for invoking international responsibility.[34] Nevertheless, there are also some views according to which: "*the issue of an instrument's legal form is distinct from the issue of whether particular provisions create legal obligations. The former requires examining the instrument as a whole, and depends on whether the instrument is in writing and is intended to be governed by international law".*[35] Some scholars underline that the non-binding instruments, in some circumstances, can also generate effects similar to the ones of the treaties and breaching of such instruments can cause international responsibility. They consider that it is not possible to draw a strict distinction between legally binding and non-binding instruments. In this context, Degan[36] states that: "*If the text of an instrument whose form of treaty is doubtful provides for precise rights and duties for its parties, and if non-performance or breach of the obligations of one party causes material damage to the other, then it is a genuine legal obligation. Obligations of this kind cannot have non legal, i.e. moral or political significance, regardless of the form of the instrument in question."* Furthermore, Aust[37] mentions an example of a non-binding instrument by which one State expressed political commitment to pay a certain amount of money to the other State within a development assistance programme, and then the latter, pursuant to the political commitment of the former, planned expenditure of the financial resources provided through the expected development assistance. Thus, if the donor State do not honour its political commitment, then the beneficiary could suffer from negative consequences. In this case, the issue of possible legal consequences of such behaviour of

---

30 Posner (2003), 118; Aust (1986), 807; Fastenrath (1997), 418.

31 Fastenrath (1997), 425.

32 Diez de Velasco Vallejo, M. (2002). *Les organisations internationales*. Paris: Economica, 116.

33 Aust (1986), 799-802; Fastenrath (1997), 422.

34 Pellet (1987), 128.

35 Bodansky, D. (2015). Legally Binding versus Non-legally Binding Instruments. In: S. Barret, C. Carraro, J. de Melo (eds.) *Towards a Workable and Effective Climate Regime*. London: CERP Press; Bodansky, 155-165.

36 Degan (2000), 129-130.

37 Aust (1986), 808.

the expected donor may arise. Furthermore, in light of the practice of the International Court of Justice (*Nuclear Tests Case*), unilateral declaration of persons authorised to commit the State, pursuant to the principle of *bona fides*, may generate the binding effect to the party that intended to be committed by such a declaration.[38]

Nonetheless, bearing in mind the lack of legally binding effect and different examples from the practice, we tend to conclude that the issue of possibility to invoke any sort of responsibility under international law for the violation of political commitments remains an open issue and, thus, it is impossible to make any general conclusion or prediction on the consequences of the failure to honour one's political obligations. This issue is actually dealt on a case-by-case basis.

Moreover, besides questioning the effect of these instruments on the international plane, it is also possible to examine their potential effect *in foro domestico*, i.e. within municipal legal order. The municipal courts may sometimes recognise relevance to these instruments and use them as rather interpretative instruments than formal legal sources.[39] However, one cannot conclude that there is uniform practice of municipal courts regarding the effects of these instruments. This issue is settled by concrete courts and within the remits of the concrete cases and prevailing legal systems.

Although it is not possible to consider existence of fully fledged treaties, one cannot, however, neglect any practical importance of the legally non-binding instruments. They represent moral and political commitments and the parties thereto are expected to act *bona fide*.[40] Authority and importance of these instruments is also due to the role and

[38] Aust (1986). 808. Aust underlines the *Nuclear Tests case (Australia v. France)* in which the ICJ established, based on a number of unilateral declarations of different political organs of the French Republic, that: "In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective. The validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States. It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect. The Court considers that the President of the Republic … gave an undertaking to the international community to which his words were addressed. … The Court finds that the unilateral undertakings resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration. The Court finds further that the French Government has undertaken an obligation, the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed." (*Nuclear Tests Case (Australia v. France)*, Judgment of 20 December 1974, ICJ Reports 1974, 269-270, para. 51) See also: Brownlie, I. (2001). *Principles of Public International Law*. Oxford: Oxford University Press, 643.

[39] Kanetake, M., Nollkaemper, A. (2014). The application of informal international instruments before domestic Courts. *The George Washington International Law Review*, 46(4), 774-775.

[40] Institut de Droit International has found that „*L'Etat ayant souscrit un engagement purement politique est soumis à l'obligation générale de bonne foi qui régit le comportement des sujets du droit international dans leurs rapports mutuels.*." Institut de Droit International, *Textes internationaux ayant une portée juridique dans les relations mutuelles entre leurs auteurs et textes qui en sont dépourvus*, Session de Cambridge – 1983, 29 août 1983, para. 6.

positions of their signatories.[41]

3. USE OF LEGALLY NON-BINDING INSTRUMENTS: A PRAGMATICAL RESPONSE TO THE NEED OF POLITICAL CONCERTING ON THE INTERNATIONAL PLANE

A contemporary legal theory has questioned practical significance of the legally non-binding instruments in defining the way in which the international affairs should develop between their parties. Since these instruments do not produce the same effect as treaties and do not require the same formalities, they are also applied to settle different issues that emerge in the relations between the international law subjects and, thus, they are used instead of the treaties.[42] Actually, in the situation when the representatives of states or international organisations conclude or enact a legally non-binding instrument, they act as political representatives and such instruments, consequently make a political commitment. Therefore, despite the lack of legal force, these instruments can influence the conduct of international affairs and have some practical importance.[43] This section will further examine the issue of their functionality and flexibility.

3.1. Functionality of the use of legally non-binding instruments

Dynamics of international relations require to regulate certain international issues in the most convenient manner , but without necessarily using some of the sources laid down by Article 38 of the ICJ Statute.[44] In this respect, Pellet[45] considers that „*it is not sufficient to recognise that 'it is no longer possible to say that there are no sources of international law other than those listed in Article 38 of the Statute of the International Court of Justice'. The fact is that the venerable and traditional doctrine of the sources of the international law itself proved to be too abrupt and to be unable to satisfy the requirements of contemporary international society*". Such needs and dynamics have exactly motivated the use of such non-binding instruments and have conferred certain 'use value' upon them because there are justified expectations that the parties thereto shall honour these instruments and execute them *bona fide*.[46] Hence, the relevant representatives of the states, international organisations and other players on the international scene, are trustful of these instruments and determined to conduct their international affairs in accordance with them. At the same time, they believe that all other parties will also respect these commitments without need to conclude a treaty.

If the functionality of these instruments is observed from a practical perspective, although one of the basic principles on the contemporary international law is the principle of sovereign equality of the States,[47] the concrete circumstances determine to which extent and by using which means a concrete State can represent its own interests. Not all the international actors dispose of the same powers in influencing international affairs and in conclusion of ei-

---

41 Kanetake, Nollkaemper (2014), 787.

42 Posner (2003), 114.

43 Shaw (2003), 111.

44 Statute of the International Court of Justice, available at https://treaties.un.org/doc/source/docs/charter-all-lang.pdf#page=23 (5.5.20210.

45 Pellet (1987), 123.

46 Đurić (2007), 79.

47 Rousseau, C. (1980). *Droit International Public*. Tome IV, Paris: Sirey, 21-22.

ther bilateral or multilateral treaties or purely political agreements. Nonetheless, the possibility for a State to refuse to be bound by international law norms without its consent, except the peremptory norms, opens room for certain influence when it comes to creating international rules.[48] [49] Due to their capacity to create international law, Kelsen qualified the States as international law organs,[50] but pragmatism remains being tightly linked to the use of international law tools.[51] Overall, it is usually underlined that, in the context of international negotiations, the course of bargaining process and nature of issues at stake are able to influence preferences of the parties for choosing the most adequate manner of making a compromise.[52]

The non-binding instruments can also exercise some substantial influence over actions of the states and other actor on the international plane. Namely, the parties may invoke these instruments in their interactions with the other parties, albeit they are deprived of legally binding effect. These instruments actually may be valuable tools to justify one's stances in international politics. Furthermore, these instruments set for a certain law development directions and may be used as a material component in constituting a customary rule.[53] Violation of a legally non-binding instrument, which contains a political commitment, adversely affects international reputation and diplomatic capacity of a party that failed to honour its commitment.[54] Such behaviour would prove that the party in question fails to respect its political commitments.

A continuous development of international political and economic relations impose on the concerned actors a certain level of pragmatism in shaping their international commitments. In this context, *soft law* documents prove to be useful tools for defining the modes of cooperation, either when it is not possible to concur to concluding a treaty or when it is considered that the use of a legally non-binding instrument would suffice to establish expectations that the political commitments would be honoured *bona fide*.[55]

Functionality of the legally non-binding instruments may be also assessed though the lenses of national inter-institutional rapports. The use of legally non-binding instruments may cause different understandings of their nature and the respective procedures at the national level in order to enable their conclusion. Such confusion can appear in inter-institutional relations within a government, particularly if the procedure for concluding treaties is not applied. In other words, different organs of one country can have different understanding of the nature and effects of the instruments in question. Therefore, some scholars advise that all the relevant institutions should be involved and the treaty making procedure should be applied.[56] Although such advises, if founded on the relevant provisions of municipal law,

[48] Pellet (1987), 123.

[49] Rousseau underlines that the principle of sovereing equality is merely a legal principle that does not necessarily reflect into substantial and functiomnal equality between the States, particualrly when they interact wthin an international organisation. See: Rousseau (1980), 27.

[50] Kelzen, H. (2010). Opšta *teorija prava i države.* Beograd: Pravni fakultet Univerziteta u Beogradu, 464.

[51] Bederman, D. J. (2002). *The Spirit of International Law*. Athens: University of Georgia Press,163.

[52] Pekar Lempereur, A., Colson, A. (2004). *Méthode de négociation.* Paris: DUNOND, 228-235.

[53] Pellet (1987), 127; D'Aspremont (2008), 1082; Bederman (2002), 42.

[54] Fastenrath (1997), 418.

[55] Pellet (1987), 129-130; Rosenne, S. (2004). *The Perplexities of Modern International Law*. Leiden/Boston: Martinus Nijhoff Publishers, 338).

[56] Đurić (2007), 79-80.

seem justified. However, one of the general reasons why the parties decide to conclude a non-binding document is their intention not to observe the rules and procedures required for treaty conclusion. The parties rather seem satisfied with making political commitments without concluding a legally binding agreement. Hence, they consider that such approach provides sufficient assurances that the commitments will be honoured.

If the conclusion of informal instruments is observed from a domestic political arena, maturity of political institutions and capability to clearly define national interests play a key role in ensuring political and diplomatic representation of a State on the international plane. Posner and Goldsmith[57] consider that: "*Better political institutions will result in a more constant and far-sighted state interest than political institutions that generate arbitrary, cyclical, or fragile foreign policy preferences. The states with better political institutions have an interest in revealing this information to the world, for those states are more reliable cooperative partners. One way to convey this information is to comply with promises, agreements, and treaties.*" On the contrary, D' Aspremont[58] finds that the international subjects may conclude treaties which are formally binding legal documents, but whose content remains *soft* without imposing any strict and specific obligation upon their parties.[59]

3.2. Flexibility of the legally non-binding instruments

International interactions and transactions may be conducted in more or less formalised way and can result in conclusion of the formal or informal documents and instruments.[60] Therefore, the legally non-binding instruments are used, acknowledging their flexibility, to ease international transactions.[61] The lack of legally binding effect renders these documents much easier for conclusion than the treaties.[62] Actually, it is widely considered that the states and international organisations use the treaties due to their inherent legal nature and binding effects. Their conclusion usually requires involvement and approval by the legislative organs, thus having larger impact on the internal political processes. Their legal form provides for certain assurances that the agreed obligations would be honoured. Any legal system is expected to follow development of social phenomena that are subjects of regulating by that legal system.[63] Dynamics of international relations require development and use of different instruments. Thus, international practice tends to be flexible, in both its form and content, as well as to accommodate political reality and enable the stakeholders to use other instruments besides the formal sources of international law.[64]

It is reasonable, indeed, to question the reasons and justifications for opting to sign a non-binding instrument instead of concluding a formal treaty. Therefore, some scholars tried to explore what would be differences between the two types of documents. Firstly, it

---

[57] Posner, E. A., Goldsmith, J.L. (2003). International Agreements: A Rational Choice Approach. *Virginia Journal of International Law*, 44, 136.

[58] D'Aspremont (2008), 1086.

[59] *Ibid.* D'Aspermont mentions Article 3(d) of the Charter of American States for which the ICJ has established in the case *Military and paramilitary activities in Nicaragua* not to produce legally binding effect.

[60] Jennings, R., Watts, A. (1992). *Oppenheim's International Law*. Volume I, Harlow: Longman, 1181-1184.

[61] D'Aspremont (2008), 1076.

[62] Shaw, M. (2003). *International Law*, Cambridge: Cambridge University Press, 814.

[63] Posner (2003), 122-123.

[64] Pellet (1987), 125.

is a general standpoint that these instruments are of legally non-binding nature pursuant to intentions of the parties. It is therefore required that the intentions of the parties be easily readable from such a document. Furthermore, such intentions may be demonstrated by the parties which stipulate provisions excluding the registration of the signed instrument pursuant to Article 102 of the UN Charter; they do not envisage the ratification procedure or similar clauses; they exclude usual parts of treaties, such as final provisions and entry into force provisions; and they may use the language which is not typical for international legal acts. All these elements may be used to determine the nature of the document in question.[65]

Jennings & Watts[66] illustrate such a flexible States' practice in the following terms: "*Where states wish to record certain matters in writing, but wish to do so in a manner which is not intended to create legal rights and obligations and does not constitute a legally binding agreement, various procedures are open to them. Thus they may conclude a memorandum of understanding, or they may make parallel – but unilateral rather than consensual – statements, or they may record their views in a 'gentlmen's agreement' thereby implying that they do not have the intention of entering upon legal rights or obligations, or they may adopt a Declaration intended as more a statement of policy and intention than a legally binding instrument.*" Basically, the practice to use the legally non-binding instruments has been a pragmatical option for the international law subjects. This enables them to conduct international relations without relying on complex and lengthy procedures of concluding treaties as envisaged by municipal law. This is particularly important as the lack of legally binding effect does not mean that the duties politically agreed will not be honoured.[67] In his assessment of political agreements, D'Aspremont[68] finds that „*non-legal instruments may prove more adapted to the speed and complexity of modern international relations and are more and more resorted to in practice. Non-legal instruments can be at least as integrative for a community as legal ones. This means that the use of non-legal instrumentum is not a sign of the disintegration of a community. It simply shows that the members of a community have found more practical and convenient means to regulate their relationships with one another. The presupposition that law is good thus does not suffice to explain the tendency of legal scholars to stretch the boundaries of their field of study.*"

The states' representatives, when concluding legally non-binding instruments, are also looking for a lighter procedure for its approval and acceptance by their respective authorities. In the cases when the conclusion of treaty requires conducting a parliamentary ratification procedure, then the representatives of the parties face a political risk that their agreement may be rejected by the legislature. Since this is not necessarily involved when a non-binding instrument is at the stake, the use of the former renders the whole process *lighter* and smoother.[69] Therefore, the legally non-binding instruments, due to their inherent flexibility, have many advantages over the treaties, and one of them is that their implementation may start upon the conclusion, *i.e.* signature by the parties. They do not require the same formalities as the treaties usually do in order to become effective.[70]

---

[65] Đurić (2007), 77-78; Jennings, Watts (1992), 1202-1203; Cassese (2005), 196; Fastenrath, (1997), 413.

[66] Jennings, Watts (1992), 1202-1203.

[67] Dailler, Forteau, Pellet (2009), 428.

[68] D'Aspermont (2008), 1089.

[69] Posner (2003), 124.

[70] Aust (1986), 789.

4. CONCLUDING REMARKS

This article has explored the use of legally non-binding instruments in contemporary practice of international relations. It has explained how these instruments are determined in theory and which types of effects they may produce on the international plane. Possible ways of using these instruments and differences between them and treaties have also been examined. Functionality and flexibility of these instruments have been assessed as their main advantages over the treaties that motivated their use by the states and international organisations. A less formal character and lack of any 'heavy' procedural requirements render these instruments more suitable to stipulate political commitments towards agreed objectives. Their parties usually expect that these instruments will be implemented in good faith and may be an adequate replacement to the formal treaties in order to regulate a number of important issues in the conduct of international affairs.

LITERATURE

Monographs, articles

Aust, A. (1986). The Theory and Practice of Informal International Instruments. *International and Comparative Law Quarterly*, 35(4), 787-812.

Avramov, S., Kreća, M. (2001). *Međunarodno javno pravo*. Beograd: Savremena administracija.

D'Aspremont, J. (2008). Softness in International Law: A Self-Serving Quest for New Legal Materials. *European Journal of International Law*, 19 (5), 1075-1093.

Bederman, D.J. (2002). *The Spirit of International Law*. Athens: University of Georgia Press.

Bodansky, D. (2015). Legally Binding versus Non-legally Binding Instruments. In: S. Barret, C. Carraro, J. de Melo (eds.) *Towards a Workable and Effective Climate Regime*. London: CERP Press, 155-165.

Brownlie, I. (2001). *Principles of Public International Law*. Oxford: Oxford University Press.

Cassese, A. (2005). *International Law*. Oxford: Oxford University Press.

Dailler, P., Forteau, M., Pellet, A. (2009). *Droit international public*. Paris: LGDJ.

Diez de Velasco Vallejo, M. (2002). *Les organisations internationales*. Paris: Economica.

Degan, V. Đ. (2000). *Međunarodno pravo*. Rijeka: Pravni fakultet Sveučilišta u Rijeci.

Fastenrath, U. (1997). The Legal Significance of CSCE/OSCE Documents, *OSCE Yearbook 1995/1996*, 411-427.

Jennings, R., Watts, A. (1992). *Oppenheim's International Law*, Volume I. Harlow: Longman.

Kanetake, M., Nollkaemper, A. (2014). The application of informal international instruments before domestic courts. *The George Washington International Law Review*, 46(4), 765-807.

Kelzen, H. (2010). O*pšta teorija prava i države*. Beograd: Pravni fakultet Univerziteta u Beogradu.

Krivokapić, B. (2017). *Međunarodno javno pravo*. Beograd: Poslovni i pravni fakultet, Institut za uporedno parvo.

Pekar Lempereur, A., Colson, A. (2004). *Méthode de négociation*. Paris: DUNOND.

Pellet, A. (1987). A New International Legal Order: What Legal Tools for What Changes? In: F. Snyder, P. Slinn, (eds.) *International Law of Development: Comparative Perspectives*, Abingdon: Professional Books, 117-130.

Posner, E. A., Goldsmith, J. L. (2003). International Agreements: A Rational Choice Approach. *Virginia Journal of International Law*, 44, 113-143.

Rosenne, S. (2004). *The Perplexities of Modern International Law*. Leiden/Boston: Martinus Nijhoff Publishers.

Rousseau, C. (1980). *Droit International Public*, Tome IV. Paris: Sirey.

Shaw, M. (2003). *International Law*. Cambridge: Cambridge University Press.

Đurić, V. (2007). *Ustav i međunarodni ugovori.* Beograd: Institut za uporedno pravo.

Vaïsse, M. (2005). *Les relations internationales depuis 1945*, 10e édition. Paris: Armand Colin.

Legal sources

Statute of the International Court of Justice. Available at
https://treaties.un.org/doc/source/docs/charter-all-lang.pdf#page=23 (5.5.2021).

Vienna Convention of the Law of Treaties of 23 May 1969, *United Nations Treaties Series*, Vol. 1155, I-18232.

South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962, ICJ Reports 1962, 319.

Aegian Sea Continental Shelf (Greece v. Turkey), Judgment of 19 December 1978, ICJ Reports 1978, p. 3;*Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility,* Judgment of 1 July 1994, ICJ Reports 1994, 112.

Nuclear Tests Case (Australia v. France), Judgment of 20 December 1974, ICJ Reports 1974, 253.

Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*). Merits, Judgment. I.C.J. Reports 1986, 14.

Institut de Droit International, *Textes internationaux ayant une portée juridique dans les relations mutuelles entre leurs auteurs et textes qui en sont dépourvus*, Session de Cambridge – 1983, 29 août 1983.

Upotreba pravno neobavezujućih instrumenata u savremenoj praksi međunarodnih odnosa

Rezime: Članak istražuje upotrebu i značaj pravno neobvezujućih instrumenata u savremenoj međunarodnoj praksi, koje zaključuju međunarodnpravni subjekti. Nadalje, članak ispituje definicije i glavne karakteristike ovih instrumenata, kao i njihovo dejstvo. Uz to, razmatrana je upotreba pravno neobvezujućih instrumenata, kao praktičnog odgovora na potrebu usaglašavanja političkih aktera na međunarodnom planu te njihova funkcionalnost i fleksibilnost. Zaključeno je da takvi instrumenti podrazumijevaju "soft" formu, za razliku od međunarodnih ugovora, te njihovo zaključivanje ne zahtijeva formalne i dugotrajne postupke, poput parlamentarne ratifikacije. Ti instrumenti stvaraju političke obaveze između njihovih strana, a smtra se da je njihovo dejstvo zagarantovano načelom bonae fidei. Iako su ti instrumenti, u načelu, lišeni pravno obavezujućeg dejstva, oni predstavljaju prilično pragmatična sredstva u postizanju političkih sporazuma na diplomatskom nivou između relevantnih međunarodnih političkih aktera.

Ključne riječi: međunarodno javno pravo, izvori međunarodnog prava, prvano neobvezujući instrumenti, soft law, džentlmenski sporazumi.