EDITORIAL COMMENT

The Twilight Existence of Nonbinding International Agreements

The adoption of the Final Act of the Helsinki Conference in 1975[1] and subsequent references to it as evidence of international commitments raise questions about the nature and effect of international agreements which are entered into by states but are not intended to be legally binding on the parties. In the case of the Helsinki Final Act, the Heads of State and other "High Representatives" of thirty-five countries signed the texts, covering sixty printed pages, after declaring in the last paragraph "their determination to act in accordance with the provisions contained in the above texts."[2] Another paragraph, among the final clauses, requests the Government of Finland to transmit to the Secretary-General of the United Nations the text of the Final Act "which is not eligible for registration under Article 102 of the Charter of the United Nations."[3] This clause was further clarified by a letter sent by the Government of Finland to the Secretary-General of the United Nations (which was based on drafts negotiated by the major governments) stating that the Final Act is not eligible for registration under Article 102 "as would be the case were it a matter of a treaty or an international agreement, under the aforesaid Article."[4] Statements by delegates during the Conference, notably by the United States and other Western delegations, expressed their understanding that the Final Act did not involve a "legal" commitment and was not intended to be binding upon the signatory Powers. Harold Russell, the leading member of the American delegation, observed that considerable importance was attached to that point by the United States.[5] There does not appear to be any evidence that the other signatory states disagreed with this understanding.

International lawyers generally agree that an international agreement is not legally binding unless the parties intend it to be. Put more formally, a treaty or international agreement is said to require an intention by the parties to create legal rights and obligations or to establish relations governed by international law.[6] If that intention does not exist, an agreement

[1] The full name is the Final Act of the Conference on Security and Cooperation in Europe. The text of the document signed in Helsinki on August 1, 1975 is reproduced in 14 ILM 1293 (1975) and in 73 Dept. State Bull. 323 (1975).

[2] 14 ILM 1325 (1975). [3] *Id.*

[4] Russell, *The Helsinki Declaration: Brobdingnag or Lilliput*, 70 AJIL 242, 247, 248 (1976).

[5] *Id.* at 246.

[6] 1 D. P. O'Connell, International Law 195 (2nd ed. 1970); A. McNair, Law of Treaties 6 (1961).

is considered to be without legal effect ("sans portée juridique").[7] States are, of course, free to enter into such nonbinding agreements, whatever the subject matter of the agreement. However, questions have often arisen as to the intention of the parties in this regard. The main reason for this is that governments tend to be reluctant (as in the case of the Helsinki Final Act) to state explicitly in an agreement that it is nonbinding or lacks legal force.[8] Consequently inferences as to such intent have to be drawn from the language of the instrument and the attendant circumstances of its conclusion and adoption. Emphasis is often placed on the lack of precision and generality of the terms of the agreement. Statements of general aims and broad declarations of principles are considered too indefinite to create enforceable obligations and therefore agreements which do not go beyond that should be presumed to be nonbinding.[9] It is also said, not implausibly, that mere statements of intention or of common purposes are grounds for concluding that a legally binding agreement was not intended. Experience has shown that these criteria are not easy to apply especially in situations where the parties wish to convey that their declarations and undertakings are to be taken seriously, even if stated in somewhat general or "programmatic" language. Thus, conflicting inferences were drawn as to the intent of the parties in regard to some of the well-known political agreements during the Second World War, notably the Cairo, Yalta, and Potsdam agreements.[10] No doubt there was a calculated ambiguity about the

[7] International Status of South-West Africa, Advisory Opinion [1950] ICJ REP. 128 at 140. For a similar view expressed recently by the Legal Adviser of the State Department in connection with the Case Act, see *infra* note 22.

[8] See Münch, *Non-Binding Agreements* 29 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1 at 3 (1969). During the Helsinki Conference, the USSR, Switzerland, and Romania objected to including an explicit statement in the text that the Final Act was not a treaty or international agreement susceptible of registration under Article 102. *See* Russell, *supra* note 4, at 247.

[9] O'CONNELL, *supra* note 6, at 199–200. But other jurists have noted that vague and ill-defined provisions appear in agreements which do not lose their binding character because of such indefiniteness. *See* P. REUTER, INTRODUCTION AU DROIT DES TRAITÉS 44 (1972); G. G. Fitzmaurice, Report on the Law of Treaties to the International Law Commission. [1956] 2 Y.B. INT. LAW COMM. 117, UN Doc. A/CN.4/101 (1956). The latter commented that "it seems difficult to refuse the designation of treaty to an instrument—such as, for instance, a treaty of peace and amity, or of alliance—even if it only establishes a bare relationship and leaves the consequences to rest on the basis of an implication as to the rights and obligations involved, without these being expressed in any definite articles." *Id.*

[10] Statements by officials of the British and U.S. Governments indicated that they did not consider the Yalta and Potsdam agreements as binding. For the U.K. views, see references in Münch, *supra* note 8, at 5 n. 22. For the U.S. position, see *infra* note 11. A contrary point of view was expressed in 1969 by a representative of the USSR at the Vienna Conference on the Law of Treaties. He declared that the Yalta and Potsdam agreements as well as the Atlantic Charter provided for "rights and obligations" and laid down "very important rules of international law." UN Doc. A/Conf.39/11 Add. 1, at 226 (para. 22). Sir Hersch Lauterpacht considered that the Yalta and Potsdam agreements "incorporated definite rules of conduct which may be regarded as legally binding on the States in question." 1 OPPENHEIM, INTERNATIONAL LAW 788 (7th ed.

obligatory force of these instruments at least in regard to some of their provisions and this was reflected in the way the governments dealt with them.[11] After all, imprecision and generalities are not unknown in treaties of unquestioned legal force. If one were to apply strict requirements of definiteness and specificity to all treaties, many of them would have all or most of their provisions considered as without legal effect. Examples of such treaties may be found particularly among agreements for cultural cooperation and often in agreements of friendship and trade which express common aims and intentions in broad language. Yet there is no doubt that they are regarded as binding treaties by the parties and that they furnish authoritative guidance to the administrative officials charged with implementation. Other examples of highly general formulas can be found in the UN Charter and similar "constitutional" instruments the abstract principles of which have been given determinate meaning by the international organs (as, for example, has been done in regard to Articles 55 and 56 of the Charter).[12] These cases indicate that caution is required in drawing inferences of nonbinding intention from general and imprecise undertakings in agreements which are otherwise treated as binding. However, if the text or circumstances leave the intention uncertain, it is reasonable to consider vague language and mere declarations of purpose as indicative of an intention to avoid legal effect.[13] Other indications may be found in the way the instrument is dealt with after its conclusion—for example, whether it is listed or published in national treaty collections, whether it is registered under Article 102 of the Charter, whether it is described as a treaty or international agreement of a legal character in submissions to national parliaments or courts.[14] None of these acts can be considered as decisive evidence but together with the language of

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H. Lauterpacht, ed. 1948). On the other hand, Professor Briggs suggested that the Yalta agreement on the Far Eastern territories may be considered only as "the personal agreement of the three leaders." Briggs, *The Leaders' Agreement of Yalta*, 40 AJIL 376, at 382 (1946).

[11] The Yalta Agreement was published by the State Department in the Executive Agreements Series (No. 498) and was also published in U.S. Treaties in Force (1963). However, in 1956 the State Department stated to the Japanese Government in an aide-mémoire that "the United States regards the so-called Yalta Agreement as simply a statement of common purposes by the heads of the participating governments and . . . not as of any legal effect in transferring territories." 35 DEPT. STATE BULL. 484 (1956). But see Briggs, *supra* note 10, for statements by the U.S. Secretary of State that an agreement was concluded by the leaders.

[12] *See* memorandum of State Department quoted *infra* note 24. *See also* L. SOHN AND T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 505–14, 946–47 (1973).

[13] *See* Münch, *supra* note 8, at 8; O'CONNELL, *supra* note 6, at 199. But *cf.* REUTER and FITZMAURICE, *supra* note 9.

[14] The appellation of an instrument has but little evidentiary value as to its legal effect in view of the wide variety of terms used to designate binding treaties and the accepted rule that form and designation are immaterial in determining their binding effect. Thirty-nine different appellations for treaties are listed in Myers, *The Names and Scope of Treaties*, 51 AJIL 574 (1957).

the instruments they are relevant. The level and authority of the governmental representatives who have signed or otherwise approved the agreement may also be relevant but here, too, some caution is necessary in weighing the evidentiary value. Chiefs of state and foreign ministers do enter into nonbinding arrangements and lower officials may, if authorized, act for a state in incurring legally binding obligations. If a lower official, without authority, purports to conclude an agreement, the supposed agreement may be entirely void and without any effect. It would, in consequence, have to be distinguished from the kind of nonbinding agreement which is treated by the parties as an authorized and legitimate mutual engagement.

We should bear in mind that not all nonbinding agreements are general and indefinite. Governments may enter into precise and definite engagements as to future conduct with a clear understanding shared by the parties that the agreements are not legally binding. The so-called "gentlemen's agreements" fall into this category. They may be made by heads of state or governments or by ministers of foreign affairs and, if authorized, by other officials. In these cases the parties assume a commitment to perform certain acts or refrain from them. The nature of the commitment is regarded as "nonlegal" and not binding. There is nonetheless an expectation of, and reliance on, compliance by the parties. An example is the agreement made in 1908 by the United States and Japan, through their foreign ministers, relating to immigration which was observed for nearly two decades, although probably not considered binding.[15] On the multilateral level, some gentlemen's agreements have been made by governments with regard to their activities in international organizations, particularly on voting for members of representative bodies which have to reflect an appropriate distribution of seats among various groups of states (as for instance, the London agreement of 1946 on the distribution of seats in the Security Council).[16] It has been suggested that a gentlemen's agreement is not binding on the states because it is deemed to have been

[15] In this gentlemen's agreement, the Japanese Government agreed to take administrative measures to check the emigration of Japanese laborers to the United States on the understanding that the United States would not adopt discriminatory exclusionary legislation against Japanese, "stigmatizing them as unworthy." [1924] 2 FOREIGN RELATIONS OF THE UNITED STATES 339–74. The agreement came to an end when Congress enacted the 1924 immigration law which did discriminate against Japanese. *Id.* at 374–93.

[16] The 1946 London agreement was described in the General Assembly as "an oral agreement . . . known as a gentlemen's agreement, because it was an agreement by word of honour and was not recorded in any document" . . . "whereby the seats were to be distributed among the non-permanent members of the Security Council in accordance with a fixed plan." 2 REPERTORY OF UNITED NATIONS PRACTICE 8 para. 16 (1955). Reference to the gentlemen's agreement on the distribution of seats in the International Law Commission was made recently in the UN General Assembly in connection with the election of members of the Commission on November 17, 1976. *See* UN Doc. A/31/PV.68 at 7, 11. For earlier references to the gentlemen's agreement on distribution of I.L.C. seats, see H. BRIGGS, THE INTERNATIONAL LAW COMMISSION 33–42 (1965).

concluded by the representatives in their personal names and not in the name of their governments.[17] This reasoning is rather strained in the case of agreements which are intended to apply to government action irrespective of the individual who originally represented the government. It seems more satisfactory to take the position, in keeping with well-established practice, simply that it is legitimate for governments to enter into gentlemen's agreements recognizing that they are without legal effect.

This still leaves us with questions as to the nature of the commitment accepted by the parties in a nonbinding agreement and what precisely is meant by stating that the agreement is without legal effect. We shall begin with the latter point.

It would probably be generally agreed that a nonbinding agreement, however seriously taken by the parties, does not engage their legal responsibility. What this means simply is that noncompliance by a party would not be a ground for a claim for reparation or for judicial remedies. This point, it should be noted, is quite different from stating that the agreement need not be observed or that the parties are free to act as if there were no such agreement. As we shall indicate below, it is possible and reasonable to conclude that states may regard a nonbinding undertaking as controlling even though they reject legal responsibility and sanctions. The conclusion that a nonbinding agreement does not give rise to legal responsibility is not an analytical proposition (*i.e.*, it does not simply follow from the definition of a nonbinding agreement). It is an empirical conclusion based on state practice. In the absence of such practice one could take the position that a nonbinding international agreement should be treated in the same way as a contract terminable at the will of either party and, on that basis, conclude that a breach prior to such termination would give rise to legal responsibility for reparation. However, this theoretical position finds no support in the practice of states or in their expressed attitudes. There have been more than a few nonbinding agreements, yet there has been no indication that the parties have treated nonperformance as a ground for reparations or legal sanctions.

A second proposition that would command general (though not unanimous) agreement is that nonbinding agreements are not "governed by international law." Exclusion from the Vienna Convention on the Law of Treaties follows from the conclusion that such agreements are not governed by international law, a requirement laid down in the definition in Article 2(a). A paradox may be seen in this reasoning. For when it is said that nonbinding agreements are not governed by international law, that assertion must itself be a rule of international law, ergo the first assertion cannot be true but if not true then the second is false and therefore not applicable. This is similar to classical paradoxical statements like "all generalizations are false" (or "I am lying") which if true are false. The logical solution is to recognize that the two propositions (*i.e.*, "The agreements are not governed by international law" and "the foregoing is a

[17] The suggestion was made by REUTER, *supra* note 9, at 44.

rule of international law") are of different hierarchical order and therefore the second cannot contradict the first.[18] Apart from that nice point of logic, there is still the question why nonbinding agreements are not governed by international law. I suggest the answer is that, since nonbinding agreements are by definition outside the basic rule of pacta sunt servanda, they cannot be within the customary law of treaties based on pacta sunt servanda. This might seem tautologous but it is not if we recognize that the latter proposition about the scope of customary law is not definitional but empirical (*i.e.*, based on state practice). It might be noted, parenthetically, that the travaux préparatoires of the Vienna Convention on the Law of Treaties confirm the conclusion that nonbinding agreements were intended to be excluded from the Convention on the ground that they are not governed by international law.[19]

The conclusion that nonbinding agreements are not governed by international law does not however remove them entirely from having legal implications. Consider the following situations. Let us suppose governments in conformity with a nonbinding agreement follow a course of conduct which results in a new situation. Would a government party to the agreement be precluded from challenging the legality of the course of conduct or the validity of the situation created by it? A concrete case could arise if a government which was a party to a gentlemen's agreement on the distribution of seats in an international body sought to challenge the validity of the election. In a case of this kind, the competent organ might reasonably conclude that the challenging government was subject to estoppel in view of the gentlemen's agreement and the reliance of the parties on that agreement.[20]

[18] In logic, this principle is known as the theory of types. *See* BERTRAND RUSSELL, AN INQUIRY INTO MEANING AND TRUTH 75–76 (1940).

[19] At the Vienna conference a Swiss amendment was proposed to exclude nonbinding agreements such as "political declarations and gentlemen's agreements." In the opinion of the Swiss legal adviser (Bindschedler), such nonbinding agreements were governed by international law and had legal consequences and therefore would not be excluded by the definition in Article 2. The amendment was not adopted presumably because most representatives thought that such nonbinding agreements were not governed by international law. Taking a different position, the USSR representative opposed the Swiss amendment because he considered that some of the agreements referred to by the Swiss delegate should be covered by the Vienna Convention (mentioning the Atlantic Charter, Yalta, and Potsdam agreements). *See supra* note 10. As indicated by its preparatory work, the International Law Commission intended to exclude the nonbinding agreements from the scope of the Vienna Convention and thought this would be done by the definition of international agreements as those governed by international law. *See* Report of the International Law Commission to the General Assembly [1959] 2 Y.B. INT. LAW COMM. 96–97, UN Doc. A/4169 (1959). For earlier references, see Brierly, Report [1950] *id.* 228, UN Doc. A/CN.4/23 (1950); Lauterpacht, Report [1953] *id.* 96–99, UN Doc. A/CN.4/63 (1953).

[20] Münch also suggests the principle of estoppel, *supra* note 8, at 11. On estoppel in international practice, see I. C. MacGibbon, *Estoppel in International Law* 7 INT. COMP. L.Q. 468 (1958); A. P. Rubin, *The International Legal Effects of Unilateral Declarations* 71 AJIL 1 (1977).

Another aspect relates to the meaning of "international agreements" for purposes of national law requirements such as submission for parliamentary approval or information. For example, in the United States the Case Act of 1972 requires the Secretary of State to transmit to the Congress all international agreements other than treaties no later than sixty days after their entry into force.[21] The criteria employed by the State Department in deciding what constitutes an international agreement for this purpose have included "as a central requirement" that the parties intend their undertaking to be of legal, and not merely political or personal, effect.[22] "Documents intended to have political or moral weight, but not intended to be legally binding, are not international agreements."[23] Another criterion of the State Department is that the agreements have a "certain precision and specificity setting forth the legally binding undertakings."[24] These criteria are the same as the international law standards generally accepted for determining the binding force of agreements. Presumably they are also consistent with the congressional intent in regard to the reporting requirements. But the Congress might have adopted a less exacting interpretation and required reports of agreements intended to have "political or moral weight," even if legally nonbinding. It would not be unreasonable to do so in the light of the significance accorded to such agreements in international relations.[25] There is no constitutional reason why the Congress could not require reports on political or moral commitments irrespective of whether they constitute legal obligations.

Still another kind of legal question may arise in regard to nonbinding agreements. What principles or rules are applicable to issues of interpretation and application of such agreements? As we have already seen, customary law and the Vienna Convention do not "govern" the agreements. But if the parties (or even a third party such as an international organ) seek authoritative guidance on such issues, it would be convenient and reasonable to have recourse to rules and standards generally applicable to treaties and international agreements insofar as their applicability is not at variance with the nonbinding nature of these agreements. For example,

[21] Pub. Law 92-403, 1 U.S.C. 112(b) (1972).

[22] Memorandum by the State Department Legal Adviser to "Key Department Personnel" dated March 12, 1976 on "Case Act Procedures and Department of State Criteria for Deciding What Constitutes an International Agreement." (The memorandum was unclassified and transmitted to other government agencies.)

[23] *Id.* at 3.

[24] *Id.* at 4. The memorandum states "For example, a promise 'to help develop a more viable world economic system' lacks the specificity essential to constitute a legally binding international agreement. At the same time, undertakings as general as those of Articles 55 and 56 of the U.N. Charter have been held to create internationally binding agreements (though not self-executing ones)."

[25] A pertinent example would be the "absolute assurances" given by President Nixon in letters to President Thieu of South Vietnam that the United States would take "swift and severe retaliatory action" if Hanoi failed to abide by the terms of the Paris Agreement and that in the event of violations the United States would "respond with full force." New York Times, May 1, 1975, at 16.

questions as to territorial scope, nonretroactivity, application of successive agreements, or criteria for interpretation could be appropriately dealt with by reference to the Vienna Convention even though that Convention does not in terms govern the agreements.

Our comments thus far have been made on the assumption that the nonbinding agreements under consideration contain undertakings taken seriously by the states parties to them. We are not concerned with those agreements which have been made by persons lacking authority or which are no more than propaganda, or which are immediately treated as "scraps of paper." The examples referred to have been agreements which the parties intend to observe and which they consider impose restraints on their freedom to act as if the agreements did not exist.[26] Since the agreements are, by hypothesis, legally nonbinding, they are generally referred to as political or moral commitments or some variant of that. What is meant by a political or moral commitment is rarely spelled out beyond the negative implication that it does not entail legal effect or sanctions. When the International Court of Justice was faced with an issue of this kind, it said, understandably, that it was not for the Court to "pronounce on the political or moral duties" which flow from such agreements.[27] International lawyers have, on the whole, taken a similar attitude. At times one can detect an element of condescension in their summary references to undertakings which are "merely" political or moral. The question whether such commitments are generally observed is, of course, a question for empirical research and not for normative analysis. It may be useful, however, to indicate what may reasonably be meant by an understanding that an agreement entails a political or moral obligation and what expectations are created by that understanding.

Two aspects may be noted. One is internal in the sense that the commitment of the state is "internalized" as an instruction to its officials to act accordingly. Thus, when a government has entered into a gentlemen's agreement on voting in the United Nations, it is expected that its officials will cast their ballots in conformity with the agreement though no legal sanction is applicable. Or when governments have agreed, as in the Helsinki Act, on economic cooperation or human rights, the understanding and expectation is that national practices will be modified, if necessary, to conform to those understandings. The political commitment implies, and should give rise to, an internal legislative or administrative response. These are often specific and determinate acts.

[26] Secretary of State Kissinger in testimony to the Senate Foreign Relations Committee on the United States undertakings in connection with the Sinai Disengagement Agreements of 1975 noted that certain of the undertakings were "not binding commitments of the United States" but he went on to say that that "does not mean, of course, that the United States is morally or politically free to act as if they did not exist. On the contrary, they are important statements of diplomatic policy and engage the good faith of the United States as long as the circumstances that gave rise to them continue." 73 DEPT. STATE BULL. 613 (1975).

[27] ICJ REP., *supra* note 7, at 139.

The second aspect is "external" in the sense that it refers to the reaction of a party to the conduct of another party. The fact that the states have entered into mutual engagements confers an entitlement on each party to make representations to the others on the execution of those engagements. It becomes immaterial whether the conduct in question was previously regarded as entirely discretionary or within the reserved domain of domestic jurisdiction. By entering into an international pact with other states, a party may be presumed to have agreed that the matters covered are no longer exclusively within its concern. When other parties make representations or offer criticism about conduct at variance with the undertakings in the agreement, the idea of a commitment is reinforced, even if it is labelled as political or moral. We must, however, recognize that noncompliance may be so substantial and widespread as to bring into question whether the agreement is still operative. Just as the parties may terminate an agreement expressly, they may do so by not observing its terms in a manner or on a scale sufficient to confirm their rejection of the agreement. This does not mean, of course, that any violation of the requirements of the agreement would signify its termination. There may still be expectations of continued observance by the parties.

The fact that nonbinding agreements may be terminated more easily than binding treaties should not obscure the role of the agreements which remain operative. De Gaulle is reported to have remarked at the signing of an important agreement between France and Germany that international agreements "are like roses and young girls; they last while they last."[28] As long as they do last, even nonbinding agreements can be authoritative and controlling for the parties. There is no *a priori* reason to assume that the undertakings are illusory because they are not legal. To minimize their value would exemplify the old adage that "the best is the enemy of the good." It would seem wiser to recognize that nonbinding agreements may be attainable when binding treaties are not and to seek to reinforce their moral and political commitments when they serve ends we value.[29]

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[28] De Gaulle's remark was quoted in a lecture by Dr. Shabtai Rosenne at the 27th Congress of the Association of Alumni of the Hague Academy of International Law in 1975. The source cited by Dr. Rosenne was a letter in THE ECONOMIST (London), March 18, 1972, at 6.

[29] Illustrative of such efforts are the official and nonofficial activities in several countries to monitor and comment on the implementation of the Helsinki Final Act, especially in regard to the "Third Basket" or human rights provisions. There are indications that these efforts have been a factor in producing changes in the national policy of some signatories to conform to the engagements of the Final Act. A conference of signatories is to be held in Belgrade in 1977 on the implementation of the Helsinki accord.