Governance by Academics: The Invention of Memoranda of Understanding

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Abstract

This contribution aims to sketch how a single article published in a legal journal came to influence generations of international lawyers worldwide, despite not being a very good article, and despite its main proposition not being supported by much empirical evidence. The article concerns is *James Fawcett's* "The Legal Character of International Agreements", published in 1953 in the British Yearbook of International Law, which more or less single-handedly invented the (binding, but ostensibly not legally binding) Memorandum of Understanding (MoU). This contributions traces *Fawcett's* forerunners, dissects his argumentation, and scrutinizes its reception in both the academy and the practice of Foreign Office lawyers. It does so in order to illustrate how power can be shaped through epistemic means and can be exercised even by academics, in this case by means of a journal article.

I. Introduction

Students of international affairs are increasingly aware that governance is not merely the province of formal decision-making processes, but can take place in many different ways and by many different people. Some of these

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people may be endowed with formal governance powers (heads of state or government, e.g., or members of government). Others may be less well-endowed with formal prerogatives but still generally seen as wielding governance powers: think only of the captains of industry involved in *Eisenhower*'s military-industrial complex, or of the sort of norm entrepreneurs identified as playing an influential role in the development of human rights.[1]

A category increasingly scrutinized is formed by so-called "experts", although the label is not always uniformly applied. For some, the relevant experts are typically (or mostly) bureaucrats involved in the work of intergovernmental institutions;[2] others also encompass those working for non-governmental agencies,[3] and yet others think of experts even more broadly (and probably too broadly) as everyone giving their opinions for a fee.[4]

In what follows, I aim to tell a peculiar story about how a single individual international lawyer – an expert, by any standard – in a position of no formal authority managed to shift the boundaries of the possible in international law-making. This was not a towering intellectual like *Vitoria* or *Grotius* or *Gentili* or, later, like *Kelsen* or *Lauterpacht*. Instead, the international lawyer concerned was *James Fawcett*, and his contribution concerned an influential (very influential), though not particularly good, article on the legal character of international agreements. I trace *Fawcett*'s influence on the way international lawyers have come to think about treaties and what have been called informal agreements[5] or, in terms most often used by international lawyers, Memoranda of Understanding. These have become very popular instruments for the conduct of international affairs, whose use is "widespread".[6]

That individuals can exercise power in international affairs is as such not a particularly innovative observation: *Max Weber* already pointed to the role of charisma in political leadership,[7] while *Fred Greenstein* later did

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[1] For useful general discussion, see *M. A. Hajer*, Authoritative Governance: Policy-making in the Age of Mediatization, 2009.

[2] *M. Ambrus/K. Arts/E. Hey/H. Raulus* (eds.), The Role of "Experts" in International and European Decision-Making Processes: Advisors, Decision Makers or Irrelevant Actors?, 2014; *D. Kennedy*, A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy, 2016.

[3] *O. J. Sending*, The Politics of Expertise: Competing for Authority in Global Governance, 2017.

[4] *R. Koppl*, Expert Failure, 2018.

[5] See, e.g., *C. Lipson*, Why are Some International Agreements Informal?, IO 45 (1991) 495 et seq.

[6] The characterization is by *A. Aust*, Modern Treaty Law and Practice, 2nd ed. 2007, 38.

[7] *M. Weber*, Economy and Society, edited by G. Roth/C. Wittich, 1978.

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much to conceptualize the role of personality in politics.[8] It would seem to be generally accepted that much the same can apply to global governance,[9] and libraries are filled with historical works on individual statesmen (usually men) and their impact. What may be less often realized is the impact (influence, power) exercised by individuals through epistemic means, and that those individuals may include academics.[10] This influence will rarely be a direct influence on policy: few governments will change direction on the advice of an international law professor pointing out that their behavior may be illegal, or on advice of an economics professor who suggests that policy may be counter-productive. The power wielded, by contrast, is more likely to be indirect and somewhat ephemeral, but for that no less real, as it may "work on people's conceptions of reality".[11]

In some fields of knowledge, the influence of individuals is generally recognized. Economists are well aware of the formative influence of someone like *John Maynard Keynes* on the way we think about macro-economics and government spending, and economists typically receive Nobel prizes for breakthroughs and have theorems named after them. *Keynes* himself repeatedly suggested much the same, dedicating his 1920 classic *The Economic Consequences of the Peace* to the intentional "formation of the general opinion of the future", in a quest to influence public opinion. He was convinced that the future depended not on the acts of statesmen, but on "instruction and imagination"[12] or, as he put it a decade and a half later, on the insights of economists and political philosophers.[13]

Things are less obvious with international lawyers, who may fit into earlier established categories (in that someone may be labelled a *Grotian*, or a *Kantian*, or even both), but whose contributions are rarely singled out in individual terms. Different schools of thought may exist and may revolve around a handful of individuals (the New Haven approach around *McDougal*, *Reisman* and *Lasswell*; the critical approach around *Kennedy* and *Koskenniemi* and *Orford* perhaps), but it is rare for important breakthroughs to be associated with single individuals, and it is rare for individu-

[8] *F. I. Greenstein*, The Impact of Personality on Politics: An Attempt to Clear Away Underbrush, Am. Polit. Sci. Rev. 61 (1967), 629 et seq.

[9] *D. Avant/M. Finnemore/S. K. Sell* (eds.), Who Governs the Globe?, 2010.

[10] An early forerunner is the important, if somewhat neglected, study by *M. Edelman*, The Symbolic Uses of Politics, 1985 [1964].

[11] *P. Alasuutari/A. Qadir*, Epistemic Governance: An Approach to the Politics of Policy-Making, European Journal of Cultural and Political Sociology 1 (2014), 67 et seq.

[12] *J. M. Keynes*, The Economic Consequences of the Peace, 1920, 278 and 279, respectively.

[13] *J. M. Keynes*, The General Theory of Employment Interest and Money, 1970 [1936], 383 et seq.

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als to be associated with specific topics as opposed to general approaches: there may a *Charlesworth* approach to international law in general, but there is no *Benvenisti* theorem on occupation law, or a *Milanovic* postulate on extraterritorial jurisdiction, or a *Vinuales* axiom on investment and environment, nor is there such a thing as *Posner* optimality or a *Goldsmith* equilibrium in international law. This probably owes much to the way academic disciplines are structured and whether new insights come to replace existing insights or exist alongside them, but the takeaway should not be that international lawyers are incapable of exercising epistemic influence. And while epistemic communities by definition work as communities, within these communities some will have a more prominent position than others; the work of some will have a greater impact than that of others. While it would be nonsense to claim that *Fawcett* imposed his *trouvaille* of the non-legally binding instrument on his colleagues and on practitioners at Foreign Ministries, it would seem by no means absurd to suggest that his article struck a nerve, and functioned at the very least as a catalyst, formulating a proposition that was, so to speak, waiting to be formulated. *Fawcett* formulated an insight that fell into fertile soil and came to be embraced by Foreign Ministry lawyers; equally though, those lawyers could not have proceeded the way they have without *Fawcett*'s contribution, and it is at least arguable that it were precisely *Fawcett*'s experiences and sensibilities that brought him to the central argument of his article. Put differently, *Fawcett's* contemporaries might not have thought of quite the same argument. *Lauterpacht*, *McNair* or *Fitzmaurice* would, in all likelihood, not have written this article – not in the same way, at any rate.

What makes *Fawcett*'s example even more interesting is that his influential piece is actually not a very good piece, and would have been be unlikely to pass any serious peer review screening of the sort that is common today. *Fawcett* makes a number of claims that are unsubstantiated and incoherent, turning then-existing knowledge on its head. He proposed a thesis that is unpersuasive on theoretical grounds and not supported by much empirical evidence, least of all the sort of empirical evidence that usually counts among lawyers: the dicta of courts and tribunals. Even state practice, not a very suitable empirical correspondent for conceptual work to begin with, was hardly supportive when he wrote, although it has come to represent the one pillar on which current argumentation rests. And yet, his has been a singularly influential work, followed by many states and most academics writing on the topic, and without *Fawcett* occupying the sort of official position that would make his influence understandable: he did not, at the time of his writing, occupy any formal position which would cloth him with in-

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stitutional authority. Put differently, it is one thing for special rapporteurs writing for the International Law Commission (ILC) to stamp their individual authority on a topic, in the manner of *James Crawford* on the law of state responsibility, or *Giorgio Gaja* on the responsibility of international organizations. But it is quite another thing for a lone academic to exercise this kind of influence not just within the academy but also on the conduct of international affairs.

Fawcett's article paved the way for the immense popularity of memoranda of understanding as instruments for the conduct of international affairs. Such MoUs are often said not to give rise to legal commitments under international law, but rather to de-activate the workings of international law: they are thought to give rise merely to political commitments or "politically binding" agreements, and occasionally also to morally binding agreements. Terminology is not quite uniform, and *Fawcett* further confused matters considerably when he wrote, without further explication or substantiation – neither legal nor philosophical – that

> "[p]olitical obligations stand in the same relation to legal obligations, arising under inter-State agreements, as moral obligations between individuals stand to private law contracts".[14]

This effectively equates morality and politics, suggesting that what constitutes morality in private relations qualifies as politics among states – a questionable proposition from any perspective. Be that as it may, the idea uniting various labels and positions is the negative idea that whatever else they may represent, MoUs are devoid of legal force: they are supposed to bind the states concluding them, but are not supposed to do so as a matter of law. Hence, they are said not to give rise to legal rights or legal obligations, and one cannot rely on them before a court or other law-applying agency. Instead, the binding force of MoUs is said to operate somewhere in the spheres of politics or morality, and these two labels are often used interchangeably.[15]

Their proponents often suggest that MoUs are convenient instruments of foreign policy: they can speedily be concluded, so it is claimed, and are supposedly more flexible in their operation than regular, legally binding trea-

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[14] *J. E. S. Fawcett*, The Legal Character of International Agreements, BYIL 30 (1953), 381 et seq., 398 et seq.

[15] The literature is voluminous, and well-known contributions include, in addition to the references elsewhere in this article, *R. R. Baxter*, International Law in "Her Infinite Variety", ICLQ 29 (1980), 549 et seq.; *M. Bothe*, Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?, NYIL 11 (1980), 65 et seq.; and *K. Widdows*, What Is an Agreement in International Law?, BYIL 50 (1979), 117 et seq.

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ties. And since they are not to be considered as regular treaties, they have also allowed agencies, ministries and departments other than Foreign Offices or State Departments (I will refer to these generically as Foreign Ministries) to enter into them. As a result, their use seems to have expanded enormously (precise statistics are hard to come by though), in particular their use by sub-state divisions.

The present paper takes a step back from the discussion concerning their legal status (*vel non*), and aims to trace how the idea of MoUs came to the fore. In other words, I am not sketching that MoUs are ontologically impossible (although they are); nor do I wish to set out that *Fawcett*'s article was based on reasoning of doubtful quality (although it was) or that the practical advantages of MoUs largely dissipate upon closer scrutiny (although they do). My interest, instead, is in trying to understand how the international legal profession, practicing and academic, came to think of MoUs as a viable and popular alternative to the time-honored treaty. This story tells us something about how the "right" academic paper at the "right" time can generate a considerable amount of influence on the profession and therewith become a manifestation of expert governance.

By any standard, MoUs are a relatively recent phenomenon, first endorsed only in the 1950s. I will start by briefly (all too briefly) discussing the state of the art up to the early 1950s (section II), and thereafter discuss the academic article that triggered this minor revolution in how we think about the creation of international obligations and such things as *pacta sunt servanda*: *Fawcett*'s "The Legal Character of International Agreements", published in 1953 (section III). The subsequent section (section IV) will delve into the drafting history of the definition of treaty contained in the Vienna Convention on the Law of Treaties (VCLT) while focusing on *Fawcett*'s seminal piece, while section V discusses the further development of the discussion during the 1980s – for these were the formative years of the Memorandum of Understanding. Section VI discusses why MoUs became so popular, while Section VII concludes. This "genealogy", if that is the proper term to use, aspires to illustrate that it is possible for a single academic author to change the way an entire discipline thinks. This is remarkable in its own right, but what makes it even more remarkable are two additional circumstances: the circumstance that the article concerned was not, by any standard, a very good article, and that it made waves despite being undermined by "empirical" evidence, both contemporaneous and later.

What follows may not easily fit into a particular genre or discipline of scholarship. While drawing on some historical source material, it does not profess to be a contribution to legal history. While discussing the legal sta-

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tus of MoUs, it does not purport to be a doctrinal study of that phenomenon; and while classifying *Fawcett*'s contribution as an exercise of authority, it does not claim to be a contribution to political science. My interest resides, instead, in combining insights from various disciplines in the hope of tracing how the influence exercised by *Fawcett*'s article was established.

One terminological matter needs to be clarified from the outset. There is a considerable difference of opinion, and therewith of understanding, as to the relevance of the term MoU as designation of an international agreement. Some authorities suggest that the use of the label MoU signifies that states intend to create a politically binding but not legally binding instrument; others, deriving considerable support from the practices of states and international organizations, are less certain.[16] It would seem that while some states think the label MoU is determinative (the United Kingdom [UK] is the most prominent example), most agree that an MoU can also contain a legally binding instrument: *nomen* is far from *omen*, so to speak. It is not necessary for present purposes to take sides once and for all; suffice it to say that my use of the term MoU in this paper signifies an agreement between states (and with or between international organizations) that is eventually considered not to be legally binding, and thus, presumptively, politically binding – in line with *Fawcett*'s argument. This is not a category whose existence I am convinced of, whether ontologically or epistemologically, but it is the category used in international legal discourse, and thus of relevance for my discussion in this paper. It is this use of the term that is significant for present purposes; the other usage is merely one among a wide variety of possible designations for treaties.[17]

II. The Intellectual Non-History of the MoU

The writings of authors attributed with parentage of international law tend not to differentiate between the various kinds of agreements states could possibly conclude. Or rather, the founding fathers of modern international law and their progeny would make distinctions, but none of these would concern or affect the legal force of the instruments they discussed.

[16] Even *Aust*, who is strongly inclined to hold that the designation MoU signifies an intention *not* to be legally bound, concedes that one must be “extremely careful” when evaluating the status of an MoU, for “sometimes one will find a treaty called a Memorandum of Understanding”. *A. Aust* (note 6), 25.

[17] *D. P. Myers*, The Names and Scopes of Treaties, AJIL 51 (1957), 574 et seq.

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An agreement between states would simply, and always, be a treaty and be legally binding, although different kinds of treaties were typically identified.

Take, e.g., *Grotius*' classic *On the Law of War and Peace*, written almost 400 years ago. *Grotius* distinguishes between different types of instruments, but it did not occur to him that states could conclude an agreement and somehow not think of it as a legal instrument. Thus, *Grotius* held that kings could make promises, and was unhappy with the suggestion that these would only bind by virtue of the law of nature and not also under municipal law; this, he felt, was a "very obscure way of speaking".[18] And while *Grotius* distinguished between treaties and what he referred to as "sponsions", it was clear that the distinction never meant to refer to differentiation in terms of effects. In fact, for *Grotius*, the "sponsion" (the term has its origins in Roman law) is an agreement requiring ratification, most likely because the negotiating agent may not have been duly empowered.[19]

In the almost one and a half century between *Grotius'* writings and those of *Emer de Vattel*, sometimes considered his antipode,[20] nothing much had changed. Like *Grotius*, *Vattel* discussed a number of different possible instruments but, like *Grotius*, he too never thought of the possibility that agreements could be concluded and aspire to create a new normative situation between the parties, yet be something other than a treaty. He introduced all sorts of distinctions, including distinctions between treaties and contracts, between proper treaties and those which barely contain promises to do no injury, between treaties and alliances, and between personal and real treaties, but at no point did he see fit to make a distinction concerning the binding nature (*vel non*) of the undertaking concerned.[21]

The same applied, another century and a half later, to the popular writings of *Lassa Oppenheim*.[22]

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[18] *H. Grotius*, On the Law of War and Peace, S. C. Neff (ed.), 2012 [1625], Book II, Ch. 14, para. 6.

[19] *H. Grotius* (note 18), Book II, Ch. 15, para 16. *Hollis* suggests, without spelling it out, that *Grotius* may have considered sponsions as political commitments; there is however, no shred of evidence for this proposition in *Grotius'* writings. See *D. Hollis*, Preliminary Report on Binding and Non-Binding Agreements, OEA/Ser. Q. CIJ/doc. 542/17 corr. 1, 103, footnote 21.

[20] *Van Vollenhoven* does not hold his punches and claims that *Vattel* "betrayed" the thoughts of *Grotius*, and gave the *Grotian* system the "kiss of Judas". *C. van Vollenhoven*, De drie treden van het volkenrecht, 1918, 24 et seq.

[21] *E. de Vattel*, The Law of Nations, B. Kapossy/R. Whatmore (eds.), 2008 [1758], respectively paras. 154, 171, 174, 183.

[22] *Oppenheim*'s influence is well-sketched in *M. García-Salmones Rovira*, The Project of Positivism in International Law, 2013.

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Oppenheim's work, avidly read in legal chancelleries all over the world, contains not a trace of thinking about MoUs. As in *Grotius* and *Vattel*, several different sorts of treaties are discussed, but none of them is considered to be anything other than legal in nature. In particular, *Oppenheim* may have been among the first to posit a distinction between law-making treaties and other treaties, but without belaboring the point and without suggesting that some would be more "binding" or more "legal" than others. Interestingly for present purposes, to his mind treaties were legally binding because of a rule to this effect: *pacta sunt servanda*. And *pacta sunt servanda*, he held, derived from state interests as well as from religious and moral reasons, "for no law could exist between nations if such rule did not exist".[23] Indeed, before the emergence of modern international law and the *pacta sunt servanda* norm, religious and moral sentiments contributed to the sanctity of treaty commitments.[24]

Much the same applies to other writers, including *McNair*, possibly the greatest authority on the law of treaties until the conclusion of the Vienna Convention. Publicists may have made all sorts of distinctions, but the idea of an agreement concluded between states with a view to regulating their mutual behavior but somehow not subjected to international law, had simply not arisen. *McNair*, e.g., distinguished between conveyance-like, contractual, law-making, and institutional agreements;[25] made a proper distinction between inter-state treaties and inter-state contracts,[26] and happily acknowledged the existence of *pacta de contrahendo*,[27] but at no point considered the possibility that agreements between states might be anything other than legal instruments.[28]

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[23] *L. Oppenheim*, International Law: A Treatise, 1905, 520. The sentiment was echoed half a century later by *Sir Gerald Fitzmaurice*, holding that *pacta sunt servanda* is a rule of natural law in the sense that it could not be otherwise: "The idea of *servanda* is inherent and necessary in the term *pacta*." See *Sir G. Fitzmaurice*, Some Problems Regarding the Formal Sources of International Law, in: F. M. van Asbeck/J. H. W. Verzijl (eds.), Symbolae Verzijl, 1958, 153 et seq., 164 (italics in original).

[24] *L. Oppenheim* (note 23), 517.

[25] See in particular his The Functions and Differing Legal Character of Treaties, first published in 1930 and reproduced in *A. D. McNair*, The Law of Treaties, 1961, 739 et seq.

[26] See *A. D. McNair* (note 25), 4 et seq., suggesting that a deal between Argentina and the UK on beef import based on a standard contract in the meat trade, would likely be governed by the terms of that contract, not by international law.

[27] *A. D. McNair* (note 25), 27 et seq.

[28] Likewise, *Basdevant* discussed the emergence of all sorts of instruments other than treaties, and generally less solemn than treaties, but without distinguishing between legally binding and non-legally binding: see *J. Basdevant*, La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités, RdC 15 (1926/V), 533 et seq.

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In other words, throughout the history of international law, there existed a comfortable unanimity among international lawyers, something coming close to a veritable paradigm even in the restrictive meaning given to that term by the philosopher of science who popularized it:[29] an agreement between states is a treaty, however named, and thus creative of legal rights and legal obligations if any are identifiable. In other words: agreements between states were considered, by definition, to be binding under international law. It is possible, of course, that the sense of legal obligation was different for *Grotius* than it is today; it is possible that the understanding of "legal obligation" is not constant over time and throughout history. But it is nonetheless striking that no distinction was made between the "politically binding" and the "legally binding" before *Fawcett*. The distinctions made by *Grotius* or by *McNair* and those writing in the intervening years were all distinctions within law, so to speak, taking for granted the existence of one single normative order to be utilized intentionally: the legal order. What made *Fawcett*'s argument so radical was precisely his break with this underlying epistemological assumption.

There simply was, at the time, no other category available, and sociologist *Emile Durkheim* provides a glimpse as to how this state of affairs – the inextricable bond between agreement and law – could have come about. In a set of lectures delivered repeatedly around the turn of the twentieth century but only published posthumously, he discusses the origins of the modern state (and therewith of law) as residing in property. Property, in turn, was considered to have divine origins, and was thus sacred. Property could not just change hands, but was linked to ritual. One emanation (for better or worse) is the ritual of carrying the bride across the threshold into her new home: the ritual marks a partial change in ownership. Property could only be transferred (if not by inheritance) by contract – but in order to do justice to the sacred nature of property, the transaction itself had to be sacred in nature as well; it had to tap into religious rites and rituals, which in later times came to be manifested in such things as sharing a drink or sharing a meal to seal a deal, or the handshake to close the deal, and other formalities. The formalities are a residue of these ancient rituals, and were preceded by more dramatic rituals, including the sharing of blood or the exchange of oaths. *Durkheim* was well in tune with the increasing de-formalization and the increasing relevance of commercial exchanges – the rise of exchange, he notes earlier, is the reason why the economic sphere has no professional ethics of its own (unlike, say, professions such as that of the lawyer or the doctor), even in his days, but the message was nonetheless clear. The bind-

[29] *T. S. Kuhn*, The Structure of Scientific Revolutions, 2nd ed. 1970.

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ing force of contract was somehow related to the sacred origin of transactions: "Juridical formalism is only a substitute for sacred formalities and rites."[30] In doing so, *Durkheim* sketches an almost metaphysical bond between law and morality, a bond which seems to reject the possibility of anything less sacred intervening; it is precisely because of this strong bond that a looser category – the category of "politically binding" but not "legally binding" – was unthinkable.

With respect to the conclusion of international agreements, much the same would apply. Treaties are generally considered as contracts between states, and even the modern Vienna Convention is strongly based on contractual analogies – it is decidedly less useful with respect to agreements with quasi-legislative ambitions, such as human rights conventions.[31] Naturally, the same kind of thinking that struck *Durkheim* was transplanted to the conclusion of treaties, complete with sealing the binding nature of treaties with oaths, or exchanges of hostages, and the pomp and circumstance manifested by *testimonia*.[32] As with contracts, the bargain reflects something vaguely sacred; as a result, the rituals of the law were involved by necessity, and international agreements would by definition be considered as legally binding, as governed by international law – how could it be otherwise? To this state of affairs there were only two very minor exceptions.

The first of those was the possibility that states would agree to have an agreement concluded between states but governed not by international law, but by some system of domestic law, be it the domestic law of one of the parties, or the domestic law of a third party. Undertakings of a commercial nature (think of renting embassy premises, e.g., or the sale of military equipment) could be given this form. The point to note though, in light of the later discussion, is that this in no way entailed a de-activation of law: the parties could decide to have their agreements governed either by one of two possible systems, either by international law or by domestic law, but in both cases the agreement would be legally binding.

The other exception is more interesting at first sight in that it seems to be an early form of MoU, but eventually proves a little deceptive as an antecedent to the notion of MoUs. It concerned a category that gained some popularity and notoriety towards the latter part of the nineteenth century: the gentlemen's agreement. These were, and still are, said to be agreements

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30 *E. Durkheim*, Professional Ethics and Civic Morals (C. Brookfield transl.), 1992, 187.

31 *J. Klabbers*, How to Defeat the Object and Purpose of a Treaty: Toward Manifest Intent, Vand. J. Transnat'l L. 34 (2001), 283 et seq.

32 The *testimonium* is the part of a treaty listing the date of conclusion and the names of the parties and their representatives.

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that do not bind their states, but merely the persons who concluded them, *à titre personnel*. In an important sense, however, gentlemen's agreements were the result of improvisation and existed, so to speak, by default. Typically, the agreements generally considered to be gentlemen's agreements in the late nineteenth and early twentieth centuries were politically so sensitive that they were initially concluded in secret.

It concerned instruments[33] such as the 1904 *entente cordiale*, representing a rapprochement between the United Kingdom and France (involving *Lord Lansdowne* and the French ambassador to London, *Paul Cambon*), which upset Germany and gave France and the UK a sphere of uncontested influence in Africa as well – not something to shout from the rooftops perhaps, and preferably kept secret. Another example was the *Lansing-Ishii* agreement of 1917, concluded between US Secretary of State *Robert Lansing* and Japan's viscount *Ishii Kikujiro*, which provided for United States (US) recognition of Japanese interests in China, especially in Manchuria – again not something to shout from the rooftops.[34] At some point the existence of these agreements became public knowledge, however, which created politically awkward situations for the states concerned, and responsible statesmen could do only one thing: to save their states from opprobrium, they could only claim that the agreement was never meant to bind the state, but was the sole responsibility of those statesmen. They would shield their states by claiming that it was only their personal honor, their moral standing, that was at stake. It was only much later that the term gentlemen's agreement started to be used as a way of designating non-legally binding agreements.[35]

If classical international law until far into the twentieth century did not think of distinguishing between legally binding agreements (treaties) and agreements deemed to bind in some other way or in some other normative system, one may legitimately wonder when and how this change came about, and one way of trying to find this out is by tracing the steps the literature has taken. Those writing about the law of treaties seem to have generally accepted the existence of MoUs, and one leading example is the popular textbook written by *Anthony Aust*, which even devoted an entire chapter to MoUs as well as an annex facilitating the identification thereof. Intellectually, much of this is based on an earlier contribution by *Aust*, an oft-referred-

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33 See, e.g., *J. Klabbers*, The Concept of Treaty in International Law, 1996.

34 Manchuria would in the 1930s be occupied by Japan; by then, the agreement had already been replaced by a different one, but the damage had been done.

35 Seminal is *Eisemann* who, to be sure, uses a broad notion of gentlemen's agreements. See *P.-M. Eisemann*, Le gentlemen's agreement comme source du droit international, J.D.I. 106 (1979), 326 et seq.

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to article in the venerable International and Comparative Law Quarterly, published in 1986. This too refers to some earlier writings by others: *Eisemann*'s analysis of gentlemen's agreements, for instance, but mostly, both in quantitative and qualitative terms, an article written by *J. E. S. Fawcett* more than three decades earlier. It is this article that receives more cites than anything else cited by *Aust* but, more importantly, it is this article that seems to provide *Aust* with the main intellectual justification – whenever a legally relevant claim is made (e.g., that by including a provision on dispute settlement in an agreement, the parties intend to create a legally binding document), reference is made to *Fawcett*.[36] Thus, there may be merit in subjecting *Fawcett*'s article to closer scrutiny, all the more so as this seems to be where the idea about MoUs was first formulated: *Fawcett* does not refer to much previous work that could be considered of relevance.

III. The Origins of the MoU: *Fawcett*'s Classic Contribution

When the International Law Commission contemplated working on what would become the Vienna Convention on the Law of Treaties, the underlying idea was largely one of solidifying and codifying the existing law, with some further clarification and streamlining needed on topics such as ratification and accession,[37] and perhaps most importantly figuring out what to do with treaty reservations, a topic on which different approaches vied for prominence and where traditional approaches seem difficult to align with an emerging international human rights regime.[38] Hence, the inspiration behind the codification of the law of treaties was, to a large extent, to enhance legal certainty.

In this light, it is not a little ironic that it was precisely the attempt to codify the law of treaties that sparked discussions on MoUs – and eventually generated uncertainty. It seemed reasonable that a convention on the law of treaties would require a definition of the phenomenon it aimed to regu-

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[36] See, e.g., *A. Aust*, The Theory and Practice of Informal International Instruments, ICLQ 35 (1986), 787 et seq., 802.

[37] There were considered somewhat uncertain in the 1940s and 1950s: see, e.g., *J. Mervyn Jones*, Full Powers and Ratification, 1946.

[38] It was the tension between the classic idea of unanimous approval of reservations versus the universal ambitions of human rights law that sparked *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (advisory opinion), ICJ Reports 1951, 15.

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late; it seemed reasonable that a "treaty on treaties"[39] needs to figure out what the object of its attention is, even if only for purposes of that convention itself.[40] The problem then, not unfamiliar but probably not often enough recognized, is that few definitions can be airtight and precise. It was one thing, for centuries, to view agreements between states and conceive of them as treaties, but in trying to describe the phenomenon, it is easy to run into problems. This applies to every day material objects: most people will be able to recognize such things as eye glasses (spectacles) – we will know them when we see them. But how to describe them in such a way as to make clear that it is spectacles we are talking about, rather than magnifying glasses, or binoculars, or telescopes or microscopes or the old *lorgnette*? These are all similarly construed and perform much the same function, yet are different from spectacles. Things are much more difficult still with non-material objects or abstract concepts, including the concept of treaty.

Writing at the beginning of the twentieth century, *Oppenheim* inadvertently made clear what the problem was when attempting to define the notion of "treaty". To his mind, treaties are "conventions or contracts between two or more States concerning various matters of interest".[41] As far as definitions go, his was a brief and succinct one, but not particularly useful: in order to know what a treaty is, one would have to know what conventions or contracts between states are and these, in turn, were (and are) generally considered to be much the same thing as treaties, allowing for considerable circularity in *Oppenheim*'s definition. Moreover, one can also contemplate the existence of things between states concerning matters of interest which have some legal effect but which are not treaties: a joint statement e.g., or perhaps a decision by the proper organ of an international organization.[42]

As a result, it quickly transpired that the notion of treaty could not plausibly be defined except under reference to the intentions of states. *Lauterpacht*'s first report to the ILC, preparing for what was to become the Vienna Convention, made clear that referring to intent seemed to be the most obvious – perhaps the only – way of defining treaty, as somehow an instrument

[39] The phrase, obvious as it is, was coined by *R. D. Kearney/R. E. Dalton*, The Treaty on Treaties, AJIL 64 (1970), 495 et seq.

[40] Whether it was strictly necessary to define "treaty" is open to debate: the drafters could possibly have chosen for a more passive approach, circumventing any definition, in much the same way as the ILC's articles on responsibility (of states as well as of international organizations) do not contain a definition of responsibility.

[41] *L. Oppenheim* (note 23), 517.

[42] Even in his day, international organizations having such powers existed. The International Sugar Union, e.g., had the power to set prices, and could be conceptualized as a grouping of states. On the International Sugar Union, see *F. B. Sayre*, Experiments in International Administration, 1919, 117 et seq.

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between states intended to create legal rights and obligations under international law. And the reference to intent was deemed necessary because there had always been the possibility of submitting inter-state agreements to a domestic legal order;[43] hence, a more objective definition referring merely to treaties as inter-state agreements but without referring to intent, would carry insufficient detail – it would fail to distinguish between treaties and private law undertakings between states.

The problem then turned out to be that defining treaty in terms of the intention to have the treaty be governed by international law opened the door for other concepts, and that door was kicked wide open by *Fawcett*'s highly influential, paradigm-shifting article. *Fawcett* was, in all likelihood, the first to realize that if an agreement comes to be seen as a treaty because it is intended to be governed by international law, then it might also be possible to have an agreement that is *not* intended to be governed by international law, or create rights and obligations but without the intention to submit the agreement containing them to international law. This was indeed *Fawcett*'s main point: he maintained that international law insisted on a dual intent, on two separate expressions of intent. The first of these was an intention to create rights and obligations. This would, in the highly charged political environment of international relations, result in an agreement which, given that it was concluded between political actors, would be considered politically binding. But it clearly transpired that for *Fawcett*, concluding a politically binding agreement would merely be a starting point: in order to turn it into a legally binding agreement, a second expression of intent was required. This second intention would have to be not merely an intention to create rights and obligations, but a further intention to submit these rights and obligations to the international legal order – only then could an agreement properly be called a treaty.

This differed fundamentally from earlier ideas. Traditionally, as suggested above, the creation of rights and obligations was only thought possible in a legal order to begin with: it was, and in a way still is, unorthodox to speak of rights and obligations in a context other than legal. In other words, most lawyers (and quite a few non-lawyers as well, we may presume) almost automatically associate terms such as rights and obligations with legal thinking. Legal thinking may not have had a monopoly on this usage, in that

[43] The same problematique would later recur with respect to internationalized contracts, i.e. agreements between a state and a private party, e.g., arranging for oil concessions. These can also be submitted to either of the two legal systems, and often opt for a mixture of the two. A thoughtful study is *E. Paasivirta*, Participation of States in International Contracts, 1990.

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moral theorists sometimes posit a moral right to some good,[44] or a moral obligation to do something or abstain from doing something. But moral theorists rarely, if ever, suggest that the existence of a moral right or a moral obligation can depend on the intentions of actors concluding an agreement: we may have a moral obligation to rescue a drowning person when we are in a position to do so, but the moral obligation to rescue a drowning person owes nothing to any agreement between the victim and the rescuer – it exists independently from any agreement, and indeed independently from any legislative intention. And a moral right, while it may possibly be reinforced by a promise, typically does not stem from the individual intentions of the promisor either, except in a class of highly trivial cases. Concretely put, if someone promises not to torture other people, the promise is at best bolstering an already existing moral right to be free from torture or moral obligation not to commit torture. The only setting where a promise may lead to a specific moral right on the part of the promise consists of such promises as a promise to be taken to lunch, and even here the right is parasitical on the underlying moral obligation that one should keep one's promises.

But the truly revolutionary part in *Fawcett*'s thinking was the idea that a special intention was needed to turn political agreements (i.e., all agreements) into legally binding treaties. As he put it with some aplomb, "there is no presumption that States, in concluding an international agreement, intend to create legal relations at all", and he proceeded to state "that this intention must be clearly manifested before a legal character is attributed to the agreement".[45] The mere intention to create rights and obligations, despite their association with legal thinking and the law, was not considered sufficient – something additional was needed. In effect, this reversed the prevailing presumption: earlier thinkers had considered that an intention to create rights and obligations could be presumed to result in a treaty; after all, no meaningful alternatives were available to begin with (other than domestic contract law), and surely the creation of rights and obligations must be intentional,[46] and thus it followed that rights and obligations amounted to treaties. This left the possibility for rebuttal, for those rare cases where an agreement would not be creative of rights or obligations but, perhaps, hy-

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[44] And intellectual property law, to make things more complicated still, accepts "moral rights".

[45] *J. E. S. Fawcett* (note 14), 385.

[46] This in turn draws on the presumed moral autonomy of actors: if we (or our states) are considered morally autonomous, then a good case can be made for the necessity of our consent as the basis of rights and obligations, and given our moral autonomy, our consent needs to be based on our intentions.

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pothetically, merely record a state of affairs,[47] or for those rare occasions where the rights or obligations would fully depend on voluntary compliance.[48]

The question then arises why *Fawcett* suggested that the presumption could be reversed: what was his argument for suggesting that special intent was required? And how was it substantiated? On closer scrutiny, his argument was virtually non-existent. It boiled down to saying that while private law contracts could be presumed binding on the individuals concluding them, the same logic could not apply to states, for "States and Governments differ greatly from individuals in the type of business they transact […]".and among these differences "not least" was the

> "manifest lack of any intention that they should constitute legal obligations or that the agreed minutes or memoranda in which they are embodied should be regarded as contractual instruments […]".[49]

The argument here strikes as facile and more than a little circular: somehow states were sovereigns, and thus somehow important, and from there it followed that the legally binding force of treaties could not merely be presumed upon the creation of rights and obligations, but had to be demonstrated with the help of a second, separate intention: the intention to create legally binding relations. Moreover, it ignores that in the normal course of events, private parties do not have a separate intention to submit their agreement to contract law: few people buying a loaf of bread or boarding the subway even realize that they are entering into a contractual engagement.[50] And with some innuendo *Fawcett* further suggested that international agreements generally differ from private law contracts "in that their

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[47] It is difficult to see how this work though: an agreement to record a state of affairs tends to offer recognition of this state of affairs, and therewith cast a shadow of the future: recording that Russia controls Crimea tends to bestow recognition on Russia's control of Crimea, and immunizes Russia's claim against legal attacks. Therewith, it is creative of rights and obligations in some sense, even if the language of rights and obligations is not specifically used.

[48] There is one example from the case-law of what was then still the European Court of Justice, where the Court held that an EU-US agreement stipulating that compliance was to be achieved on a voluntary basis meant that the agreement failed to meet the threshold for being a treaty. The case concerned is case C-233/02, *France v. Commission*, ECLI:EU:C:2004:173, and is briefly discussed in *J. Klabbers*, International Courts and Informal International Law, in: J. Pauwelyn/R. Wessel/J. Wouters (eds.), Informal International Lawmaking, 2012, 219 et seq., 234.

[49] *J. E. S. Fawcett* (note 14), 386.

[50] A classic formulation is *S. Macauley*, Non-Contractual Relations in Business: A Preliminary Study, American Sociological Review 28 (1963) 55 et seq.

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provisions may sometimes be expressions not of agreement but of artfully formulated disagreement".[51]

This begged the question. It suggested that international agreements are not really agreements, and should thus not be considered legally binding, but without indicating why states would resort to "artfully disguised disagreement". This was all the more puzzling as *Fawcett* seemed also to think that what sets agreements between states apart from contracts between individuals is that administrative cooperation ("the whole field of joint administrative and technical enterprise"[52]) is not in the nature of a private law transaction. But surely administrative cooperation cannot be based on "artfully disguised disagreement", for if there is disagreement, no matter how artfully disguised, there will be no cooperation; one might expect artful disagreement in connection with ambitious policy declarations, but not so much with administrative cooperation which, if it is to be meaningful, is supposed to proceed as agreed. Put differently, administrative cooperation is unlikely to be based on fundamental disagreement, artfully disguised or otherwise. Moreover, *Fawcett*'s argument blithely ignores the circumstance that state sovereignty is protected at any rate by such institutions as signature and ratification: the chances that a state will stumble into a treaty by accident, against its sovereign will, must be close to non-existent.[53]

This in turn suggests that *Fawcett* may have had different motives, and indeed his article indicates that he was not so much worried about a state becoming legally bound, but rather more so about states being subjected to compulsory dispute settlement procedures. At some point he even proclaimed that "a legal obligation differs from other obligations only in the prescribed mode of its enforcement".[54] Here too he may have overdramatized the danger: states are free to provide in their treaties that the instruments in question may not be invoked before an international court or tribunal,[55] and at any rate, the overwhelming majority of treaties never ends up being applied by an international tribunal. International litigation is scarce (relative to the size of the corpus of international law) to begin with before general tribunals, and the more specialized among these tribunals all

[51] *J. E. S. Fawcett* (note 14), 381.

[52] *J. E. S. Fawcett* (note 14), 386.

[53] There is perhaps the possibility of coercion, but military coercion will render a treaty invalid (see Arts. 51 and 52 VCLT), and economic or political pressure in a world of political and economic inequality is unavoidable.

[54] *J. E. S. Fawcett* (note 14), 397.

[55] Given England's dualist legal order, this is what he must have had in mind, rather than the possibility of the UK being sued before its domestic courts on the basis of some self-executing provision, as this is categorically excluded in its dualist system.

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have their own sources of applicable law – think of the European Convention on Human Rights, which serves as the applicable law for the European Court of Human Rights, or the Statute of the International Criminal Court (ICC), which does much the same for the ICC.[56] Hence, the risk of being dragged before these courts on the basis of a treaty other than one establishing it, is close to zero.[57]

Still, identifying "law" with "enforcement" (and more precisely: judicial enforcement) provides an important clue as to *Fawcett*'s mindset: for him, law was eventually only law if it could be judicially enforced. On such an assumption, there is indeed little sense in suggesting that all kinds of agreements are really legally binding, for such a designation has no meaning in the absence of enforcement mechanisms. In a world of sovereign states, one can expect nothing else than that states specifically indicate their desire to become legally bound, i.e., submit their agreements to the possibility, however remote, of judicial enforcement. The state of nature, to use *Hobbesian* inspiration, does not recognize a legal order; consequently, the only thing that can matter is the intention of each and every individual state at each and every individual occasion.

Surprisingly perhaps, given his assumptions, there were, for *Fawcett*, a few classes of instruments that in virtue of their topic would be legally binding, regardless of specific authorial intentions.[58] These included agreements of a private law nature but also, more interestingly for present purposes, agreements "operating within the framework of accepted rules of international law or State practice", at first sight a mystical category which can comprise everything and for which he gave consular conventions as an example. And more interesting still was his opinion that treaties establishing the constitutions of international organizations would by definition (or so it seems – he was not always very lucid in his writing) be legally binding – one can only wonder what he would have made of entities such as the Council

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[56] And note that when *Fawcett* wrote, the only international tribunal worth mentioning would have been the International Court of Justice – never the most active of tribunals.

[57] Note that apart from judicial enforcement, the conclusion of MoUs may also make it nigh-on impossible to attribute responsibility: the state that violates an MoU, on *Fawcett's* conception, does not violate a legal obligation, and can thus not be held legally responsible. This might help explain the relative silence following the annexation of Crimea: possibly the main instrument involved was the 1994 Budapest Memorandum on Security Assurances, in which Ukraine gave up its nuclear arsenal in exchange for security assurances from the US, UK and Russia. The instrument is designated Memorandum and was not supposed to "enter into force" but, instead, to "become applicable". See further *T. D. Grant*, The Budapest Memorandum of 5 December 1994: Political Engagement or Legal Obligation?, Polish Y.B. Int'l L. 34 (2014) 89 et seq.

[58] *J. Fawcett* (note 14), 390.

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of Baltic Sea States (supposedly non-legal and devoid of legal personality, but with a Secretariat having separate legal personality) or the Organization for Security and Cooperation in Europe (OSCE), likewise supposed to be non-legal but a proud party to several recently concluded agreements on privileges and immunities.[59]

While in retrospect it is abundantly clear that *Fawcett*'s fears were rather over-dramatized, it is perhaps no surprise that it took someone like *Fawcett* to invent the idea of a separate intention to submit agreements to international law – separate, that is, from creating rights and obligations. *Fawcett*, born in 1913, joined the UK Foreign Office (its Foreign Ministry) after having been in the military during World War II.[60] He stayed with the Ministry for about five years, having been posted to the mission to the United Nations and in that capacity having been close to the drafting of instruments such as the Universal Declaration of Human Rights. This declaration, to the impressionable and still fairly young government lawyer *Fawcett*, may well have seemed rife with dangerous possibilities, its non-binding nature as a General Assembly resolution notwithstanding. Moreover, it was around the Universal Declaration that discussions on intent to be legally bound first took center stage: as a resolution it could not have binding force, and this in turn paved the way for making a distinction between legally binding and non-legally binding instruments, and for thinking that it might be possible to intend to be bound in ways other than legal. The unthinkable, quite literally, had become thinkable.[61]

Upon leaving the Foreign Ministry, *Fawcett* went into private practice for a while, maintaining an affiliation with Oxford University, before he joined the International Monetary Fund (IMF) as its legal counsel in 1955.[62] Upon

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[59] See, e.g., *J. Arsic-Dapo*, Another Brick in the Wall: Building Up the OSCE as an International Organization One Agreement at a Time, International Organizations Law Review 14 (2017), 414 et seq. (discussing the recently concluded headquarters agreement between Poland and the OSCE). For a comprehensive review, see *M. Steinbrück Platise/C. Moser/A. Peters* (eds.), The Legal Framework of the OSCE, 2019.

[60] There is not much biographical detail available; such little as is produced here has been culled mainly from *Sir Robert Jennings, James Fawcett, Sir James Edmund Sandford* (1913-1991), in the Oxford Dictionary of National Biography <www.oxforddnb.com>, accessed 18.10.2019, and from the obituary written by *Sir I. Brownlie*, In Memoriam Professor Sir James Fawcett, DSC, QC (1913-1991), BYIL 63 (1992), ix et seq.

[61] Around the same time international organizations lawyers started to grapple with the normative status of resolutions adopted by international bodies: see, e.g., *A. J. P. Tammes*, Decisions of International Organs as a Source of International Law, RdC 94 (1958/II), 265 et seq.

[62] The IMF (and other international organizations too) frequently uses MoUs, including for bail-outs, and there can be little doubt that the IMF's partners are strongly expected to respect those MoUs. The tantalizing thought arises that the IMF's practice owe much to *Faw-*

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his return from Washington, and following a brief interval, he became a member of the European Commission of Human Rights for more than two decades, and served as its President for a decade. This made him well-placed to write a commentary on the European Convention, which he duly did,[63] having a little earlier written a general introductory textbook on international law.[64] Simultaneously, as membership of the Commission was only a part-time position, he remained active in academic settings, e.g., as director of Chatham House, and as a professor of international law at King's College for a handful of years.

His main intellectual testament arguably was a slender book, published in 1981, when he was in his late sixties, titled *Law and Power in International Relations*. This brought a number of themes together, and rarely has a book title been this accurate. The focal point of the study was the subject of international relations, and it is perhaps worth recalling that this is a focal point rarely adopted by international lawyers – and was considerably less obvious still in *Fawcett*'s days, when inter-disciplinary scholarship was rarely seen: the book aspires to say something about international relations, more than anything else. And as its title makes clear, what mattered was not only the role played by law in international relations, but also the role of power – and power, again, rarely features in book titles drafted by international lawyers, other perhaps than those affiliated with the New Haven school.[65] In fact, the book exemplifies the general conviction on *Fawcett*'s part that law ought to serve power – this is the best recipe for survival in a world of sovereign states, all out to increase their own power following principles discovered or, more likely, developed by so-called "realist" political scientists.[66] While *Fawcett* never became as well-known as some of his contemporaries, and his intellectual legacy consists mostly of paving the way for the possibility of states concluding agreements that are considered binding but not legally so, he has proved influential in British and global

cett's role as the IMF's legal counsel, but it would take a separate article to do justice to this hypothesis.

63 *J. E. S. Fawcett*, The Application of the European Convention on Human Rights, 2nd ed. 1987. The first edition was published in 1969.

64 *J. E. S. Fawcett*, The Law of Nations, 1968.

65 *MacDougal* and associates often referred to power in their titles. Where power still features in the title of a legal study, it is not so much naked state power that is referred to, but the power of some concept of other: think of *T. M. Franck*, The Power of Legitimacy among Nations, 1990.

66 And he was nothing if not consistent: his earlier textbook oozed the importance of power for international order, with law being, effectively, a useful instrument. See *J. E. S. Fawcett* (note 64).

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politics in a different way: the UK's Prime Minister at the time of writing (and former Foreign Minister) *Boris Johnson* is his grandson.

IV. Beyond *Fawcett*

Fawcett's article did not immediately seem to strike a chord. Perhaps the first response was by *Fritz Mann*, who both understood and misunderstood *Fawcett*'s point. *Mann* suggested that the presumption offered by *Fawcett* (agreements do not create legal relations unless there is evidence suggesting they were specifically intended to do so) was untenable and "does not seem to do more than to state the obvious: all international agreements must be governed by some system of law; an agreement governed by no system of law is unthinkable".[67] *Mann* understands the relevance of *Fawcett*'s reversal of the traditional presumption and attending difficulties, but underestimates *Fawcett*'s radicalism: *Fawcett* precisely aspired to think what *Mann* held to be unthinkable, tried to have agreements governed by something but not by law. *Mann*'s conclusion was straightforward: because *Fawcett*'s presumption embodied the unthinkable, it would "always and automatically be rebutted",[68] and thus be no good as a presumption, for a presumption that will always and automatically be rebutted does no work. But this critique partly missed its target.

If *Mann* missed the target, *McNair* hardly acknowledged its existence. *McNair*'s magnum opus, as published in 1961 (and thus almost a decade after *Fawcett's* article) acknowledges the possibility of states making political declarations, but it is unclear whether this is to be received as an endorsement of *Fawcett*'s position. There are two circumstances which cast some doubt on the idea that he followed *Fawcett* when claiming that states can issue declarations of policy which they regard as politically or morally binding. First, *McNair* mentions *Fawcett*'s piece in the bibliography to the pertinent first chapter of *Law of Treaties*, but does not specifically refer to it in the footnotes. Second, and more important perhaps, the one example provided by *McNair*[69] is that of the 1941 Atlantic Charter, concluded by US President *Roosevelt* and UK Prime Minister *Winston Churchill* – but that is by its wording alone not particularly rich in commitments. The Atlantic Charter mostly calls upon third states to respect self-determination, free-

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[67] *F. A. Mann*, Reflections on a Commercial Law of Nations, BYIL 33 (1957), 20 et seq., 31.

[68] *F. A. Mann* (note 67).

[69] *A. D. McNair* (note 25), 6.

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dom of the seas, access to trade and raw materials, economic collaboration, and secure boundaries, and given the *pacta tertiis* rule,[70] it is obvious that the UK and the US cannot commit third parties without their consent. The only provision that can plausibly be read as directed at the US and UK themselves is the first provision: a pledge to "seek no aggrandizement, territorial or other". It is abundantly clear that with the possible exception of this first provision, the Atlantic Charter contained no enforceable mutual rights or obligations, and thus constitutes a poor example of the non-legally binding instrument or political commitment. It may have contained obligations of sorts: surely, an attempt by the US or UK to obstruct economic collaboration could well be deemed a violation of the Charter, but with language so open-ended, so soft, so reliant on good faith efforts, it is difficult to envisage enforcement in any accepted meaning of the term. Moreover, if *Churchill*'s recollections are to be believed, *Roosevelt* was markedly reluctant to submit the Atlantic Charter for approval to an isolationist US Senate: it was not so much that there was an active intention not to become legally bound on the part of both parties, but a fear that one of them might not acquire domestic approval.[71] The other side had no such qualms, and had even registered it with the Secretariat of the League of Nations.[72]

Little subsequent discussion took place in the literature in the years immediately following the publication of *Fawcett*'s article, and the VCLT does not address MoUs or anything closely resembling them. Still, this was not for lack of trying: an attempt was made to insert a distinction in the VCLT between treaties properly so-called, and what were referred to as "treaties in simplified form", understood as instruments that would be more flexible, easier to conclude and perhaps to escape from, than treaties properly so-called.[73] The attempt, however, failed, largely because it proved impossible to find a plausible way of defining both. After all, their legal effects proved identical and they would have to be defined in well-nigh identical ways (with "simplified form" being the only mark of distinction), so a distinction that would consider both as instruments governed by international law proved out of reach. It did not seem to have occurred to anyone just yet that the point of such simplified instruments might precisely reside in hav-

70 See generally *C. Chinkin*, Third Parties in International Law, 1993.

71 *W. Churchill*, The Second World War. Vol III: The Grand Alliance, 1950, 385 et seq.

72 *M. Brandon*, Analysis of the Terms "Treaty" and "International Agreement" for Purposes of Registration under Article 102 of the United Nations Charter, AJIL 74 (1953), 49 et seq., 52, note 10 (noting that the Atlantic Charter may well have been "unlegalistic" in the language it uses, but that it is "undeniable" that it records international agreement).

73 *F. S. Hamzeh*, Agreements in Simplified Form – Modern Perspective, BYIL 43 (1968/69), 179 et seq.

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ing them be devoid of legal effects. And had that thought occurred, then it could have been considered improper to address the issue (the non-legal nature of a particular class of agreements) in a convention dedicated to instruments with legal effects. In a sense, therewith, it is not surprising that the VCLT rests silent: if they are treaties after all, then the VCLT applies; if they are not binding, then they are *ex hypothesi* not treaties, and need not be addressed in the VCLT.

But if *Fawcett*'s work went largely unheeded in the International Law Commission and at the Vienna Conference, it did not go unnoticed in the literature or, indeed, in state practice. The ILC may have dropped the idea of devoting a separate provision to the simplified form, as an earlier draft had still done,[74] but the underlying distinction seemed to tap into something and would gain considerable popularity during the 1970s and 1980s under the heading of MoUs, together with the emergence of a related new phenomenon, the phenomenon of soft law. The concept of MoUs relied for its theoretical justification on *Fawcett*'s groundwork as discussed above, thin and incoherent as this may have been; while the soft law concept was initially invented, or so it seemed, to give at least some legal meaning to instruments that would formally be devoid of legal force, such as resolutions of the United Nations (UN) General Assembly or adopted by other international organizations. Surely, so the argument went, it must mean something when states massively support a certain proposition or condemn a certain practice – it may not be hard law, but can be devoid of legal effect altogether.

There are two main distinctions then between soft law and MoUs: soft law represents an attempt to upgrade the legal value of instruments, whereas MoUs represents the aspiration to downgrade them; and generally speaking, soft law emanates from multilateral settings, while MoUs are mostly used in bilateral settings. What they share though is more important than what separates them: they both share the assumption that there is something that can be normative and, what is more, intentionally normative, but not law.[75]

Endorsements of MoUs in the literature were facilitated by initial misunderstandings or underestimation of the appeal of MoUs (think of *Mann*) or neglect (think of *McNair*), and eventually culminated in the late *Anthony Aust's* 1986 piece on the theory and practice of MoUs (the title refers to "informal international instruments"), and perhaps this piece best symbolizes

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[74] For brief discussion, see *J. Klabbers* (note 33), 46.

[75] On soft law, see, e.g., *C. Chinkin*, The Challenge of Soft Law: Development and Change in International Law, ICLQ 38 (1989), 850 et seq.; *J. Klabbers*, The Redundancy of Soft Law, Nord. J. Int'l L. 65 (1996), 167 et seq.

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the prevailing confusion at the time. On the one hand, *Aust* strongly claimed, following *Fawcett*, that MoUs are politically binding because that is what their authors intend; on this line of reasoning, again following *Fawcett*, authorial intention is sacrosanct and can mostly manifest itself in the terminology chosen. If states use terms like "should" instead of "shall", or "come into operation" instead of "enter into force", then they clearly, *dixit Aust*, intend to create politically binding rather than legally binding agreements – and this was a line of thought *Aust* stuck to with great consistency over the next three decades, as witnessed by the various incarnations of his textbook *Modern Treaty Law and Practice*.

Nonetheless, and here a certain level of inconsistency set in, *Aust* also upheld the proposition that while intent would be sacrosanct, nonetheless MoUs could acquire legal force through the working of such legal institutions as good faith and estoppel, protecting legitimate expectations, i.e., independently of intent. Yet, it is difficult to see how an agreement intended to be non-legal in nature could generate legally relevant legitimate expectations – surely, whatever expectations it would generate should also be considered extra-legal if it is true that intent is all-decisive. After all, if states claim that they intend to create a non-legal instrument, then it would be hypocritical of them later to claim that legally relevant expectations were built on such agreement, the original intent notwithstanding. Ironically perhaps, one could very well argue that the very resort to the non-legal realm would mean that states be estopped from claiming legal effects: estoppel would not operate to attach legal effect to non-legal instruments, but would operate to prevent states from claiming legal effects attaching to non-legal instruments to begin with. Accordingly, suggesting that legal force be acquired through good faith or estoppel entails that intent cannot be all-decisive, and this, in turn, undermines *Aust*'s very thesis about MoUs. It was here that he differed from *Fawcett*; it was here also that *Fawcett* showed himself to be the more consistent thinker of the two.[76]

[76] Consistency and incoherence, in turn, are generally appreciated epistemological criteria, but have little to do with the truthfulness or falsehood of claims. A response available to *Aust* (but never, as far as I am aware, utilized by him) would have been to acknowledge that yes, his approach was inconsistent or incoherent, but then again, so is real life every now and then. Being incoherent does not, on its own, necessarily mean that you are wrong.

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V. The 1980s and Beyond

Discussions on MoUs after the 1980s mostly become repetitive, and seem to have calmed down.[77] The intellectual arguments have all been voiced and heard, while state practice has been referred to and seems ambivalent, in that some states are happy to think of MoUs as by definition non-legal, while others are not so sure but refuse to exclude the possibility that at least some MoUs can be binding, but not in law. And indeed, why would they? For states, the possibility of there being a normative order other than law that can be employed at will seemed like a Godsend: it allows them to enter into all kinds of deals, without having to consider legal formalities and requirements. It promises states the possibility of having their cake and eating it too: make quick deals with each other, without having to account for it. What, from a foreign policy-maker's perspective, could be better?

In particular, MoUs (like soft law) offer the possibility of not having to go through the trouble of obtaining parliamentary approval, and the possibility of not being reminded by domestic judges that states had committed to a questionable course of action. Besides, so it is often said, MoUs can not only be swiftly concluded, they can also be swiftly terminated. After all, they are not treaties, so it is somehow thought to follow that no notice needs to be given, nor any justification in case of termination.

The downside of concluding MoUs, and more generally the move to informalization facilitated by MoUs, is to some extent the mirror image of the ostensible advantages. Typically, MoUs do not go through parliamentary approval procedures, making their democratic credentials questionable. Equally typically (and indeed for *Fawcett* a core proposition) is that courts, domestic and international, are left behind. Courts themselves have been loath to accept this, as will be shown below, but the very wish to de-activate the possibility of judicial enforcement is regarded as a strong factor motivating the conclusion of MoUs. There is more still at stake though. *Nico Krisch* has persuasively pointed out that informalization tends to go hand in

[77] An illustration is that two relatively recent and ambitious edited volumes all but ignore the possible existence of MoUs: see *M. Bowman/D. Kritsiotis* (eds.), Conceptual and Contextual Perspectives on the Modern Law of Treaties, 2018, and *C. Tams/A. Tzanakopoulos/A. Zimmermann* (eds.), Research Handbook on the Law of Treaties, 2014, while a recent textbook on the law of treaties treats MoUs as given without much further discussion, uncritically buying into *Fawcett*'s conception while possibly spreading further confusion: "If an instrument is not purported to have legal effects, it cannot be a treaty. […] These texts are then only political agreements, memoranda of understanding (MOU) or gentleman's agreements, that is, soft law. The issue is one of the choice of means by States." The words are taken from *R. Kolb*, The Law of Treaties: An Introduction, 2016, 19.

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hand with increased hierarchy: informal regimes tend to be run by the powerful, not the under-privileged.[78] Where *Krisch* found this to be the case with multilateral regimes, much the same may apply in bilateral relations; the point for present purposes is to suggest that *Fawcett's trouvaille* has done much to pave the way.

It may be objected that the advantages ascribed to MoUs listed above are spurious, as the same can apply to treaties, if only the parties agree. After all, nothing in the law of treaties prevents treaty partners from agreeing on termination without notice, and nothing prevents them from devising swift methods of revision either, or speedy entry into force. Indeed, treaties can very well be concluded without any form of domestic democratic control as far as the law of treaties is concerned – such approval procedures as exist are imposed by domestic law, not by the international law of treaties. This is not to say that the conclusion of normative instruments without democratic control is somehow desirable, far from it; but the point is that the law of treaties contains no obstacles to doing so, and if it is true that MoUs are somehow binding, even if only as political commitments, the proper democrat would have to insist on democratic approval procedures with respect to MoUs or political commitments as well – and that would undermine some of the alleged flexibility.

What is surprising in all this though, and a sign that the positions have hardened and become articles of faith rather than the product of serious intellectual reflection, is that the case-law of international tribunals is systematically being ignored. And this case-law overwhelmingly suggests that there is no such thing as an extra-legal agreement. The International Court of Justice (ICJ) explicitly makes the point in the 1994 *Qatar v. Bahrain* case, strongly maintaining that as soon as an agreed text contains an identifiable obligation, it is an agreement subject to the law of treaties.[79] And the brief words it spends on the issue in a later case involving the boundary between Cameroon and Nigeria is worth quoting in full, as it is a most obvious rejection of anything *Fawcett* had proposed. In connection with a declaration adopted by the Heads of State of Cameroon and Nigeria (known as the Maroua Declaration) but never submitted to ratification, the Court stated unequivocally:

> "The Court considers that the Maroua Declaration constitutes an international agreement concluded between States in written form and tracing a boundary; it is

78 *N. Krisch*, The Decay of Consent: International Law in an Age of Public Goods, AJIL 108 (2014), 1 et seq.

79 See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar v. Bahrain*), Jurisdiction and Admissibility, ICJ Reports 1994, 112.

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thus governed by international law and constitutes a treaty in the sense of the Vienna Convention on the Law of Treaties […].”[80]

Note the Court's use of the word "thus": if there is an agreement between states, if it is in written form, and if it contains some sort of rights or obligations (in this case in the form of a dispositive, tracing a boundary), then a treaty has been concluded. There is no separate investigation into the intentions of the parties, and most assuredly there is no separate investigation into whether they actually intended to create a legal instrument as opposed to some other kind of instrument – creating rights or obligations "thus" results in a treaty, governed by international law.

The European Court of Justice (now the Court of Justice of the European Union) had a little earlier held that there is no such thing as an administrative agreement (a phenomenon often captured under the heading MoU), binding the parts of the administration that conclude them but not binding the state or international organization concerned. In this case, it involved an agreement between the European Union's (EU) Commission and the US Department of Justice on formalization of their anti-trust cooperation; the Commission's argument that this would not engage the EU on the international level was struck down by the Court, which suggested that any breach would engage the responsibility of the EU.[81] While not explicitly discussing MoUs, the message seemed clear enough: commitment equals treaty.

This stance was confirmed by both the EU Court and the ICJ, as well as other international tribunals. In the *Black Sea* delimitation, a succession of instruments referred to as procès-verbal were considered as containing rights and obligations, their designation and relative lack of formality notwithstanding.[82] In *Pulp Mills*, the ICJ happily applied a most informal memorandum concluded between Argentina and Uruguay, paying scant attention to what the intentions of the parties may have been, and much the same applies to *Maritime Delimitation in the Indian Ocean*[83] – neither, it should be added, did the parties to these MoUs argue their non-binding nature. In *Maritime Delimitation in the Indian Ocean*, e.g., Somalia argued

80 See *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria; Equatorial Guinea Intervening*), ICJ Reports 2002, 303, para. 263.

81 Case C-327/91, *France v. Commission*, ECLI:EU:C:1994:305.

82 *Maritime Delimitation in the Black Sea* (*Romania v.. Ukraine*), ICJ Reports 2009, 61, paras. 43-66.

83 *Maritime Delimitation in the Indian Ocean* (*Somalia v. Kenya*), Preliminary Objections, ICJ Reports 2017, 3, paras. 36-50.

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something approximating invalidity[84] of a MoU between it and Kenya due to absent authority and circumvention of domestic treaty-making procedures, but at no point was the suggestion raised that the MoU would not have been concluded in the realm of law to begin with. The International Tribunal for the Law of the Sea (ITLOS) followed the ICJ's approach and accepted that protocols concluded in informal circumstances or emanating from joint commissions may well create legally binding rights and obligations, but whether they actually do so is dependent largely on the language used. On this basis, it held that some provisions of a protocol decided upon by a Japanese-Russian Fisheries Commission had legal force, but others did not.[85]

There are also cases where courts have held that agreements contained no identifiable or enforceable rights or obligations, something *Fawcett* actually predicted without seemingly realizing it. To his mind, one of the hallmarks of the intention to create legal relations resided in the wording of the terms of an agreement; while he seemed to stipulate the need for a separate intent to be bound, he also seemed perfectly happy to let this depend on the wording of obligations – an obligation on a state to act "as it deems necessary"[86] suggested little that could be enforceable, and in stipulating as much *Fawcett* can at the very least be accused of not really having thought things through.[87] Be this as it may, the European Court of Justice has held that an agreement stipulating that compliance take place "on a voluntary basis" had no legal effect, precisely because no obligation could be discerned.[88] Following the same mode of analysis, ITLOS denied treaty status with respect to agreed minutes concluded in 1974 between Bangladesh and Myanmar, partly because of some of the persons involved in the conclusion lacked the requisite powers, but mostly because the text of the agreed minutes reflected no rights or obligations: it literally was a record of what was discussed, and most definitely could not be seen (contrary to Bangladesh's suggestion)

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84 Somalia's argument contained strong hints as to invalidity but this was never fully developed, as Somalia claimed that even if the agreement were valid, its contents would necessitate a rejection of Kenya's claims. *See Somalia v. Kenya* (note 83), para. 39.

85 "*Hoshinmaru*" *(Japan v. Russian Federation)*, ITLOS, Case No. 14, 6.8.2007, paras. 86-87.

86 The example is taken from Art. 5 NATO, and discussed by *Fawcett* in terms of providing the parties with "freedom of action, that is to say, freedom from *strict legal* responsibility": see *J. E. S. Fawcett* (note 14), 392, emphasis in original.

87 Intriguingly, his examples of politically binding agreements are all of this nature: see *J. E. S. Fawcett* (note 14), 391 et seq.

88 Case C-233/02, *France v. Commission*, ECLI:EU:C:2004:173.

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as containing a final boundary delimitation.[89] And in the notorious *South China Sea Arbitration* the tribunal devoted a lengthy analysis to a 2002 instrument, a Declaration on Conduct, adopted between China and Association of Southeast Asian Nations' (ASEAN) member states, and concluded that its wording suggested strongly that no rights or obligations were created; the instrument in questions mostly affirmed existing obligations, and aimed to pave the way for a new, binding instrument, but neither the words chosen nor the circumstances surrounding its conclusion supported the proposition that it would be a legally binding instrument nor, indeed, an instrument binding under politics or morality – the wording simply was not concrete enough to make the document much more than an "aspirational" instrument.[90] And whatever else it was, it was clearly not, contrary to China's suggestion, a binding instrument related to dispute settlement: it did not contain anything precluding third party settlement of an existing dispute. The instrument was a step on the way towards a code of conduct to be concluded later (this never happened), but nothing more.

If international courts and tribunals have not been very receptive to *Fawcett*'s thesis, neither have domestic courts. A study conducted a quarter of a century ago found that domestic courts have either treated MoUs as legally binding or, if dismissive, dismissed them for other reasons (*ultra vires* considerations, or the open-ended nature of the wording used in the agreement), and a recent decision from Ghana's Supreme Court confirms much the same. Confronted with a claim to invalidate an agreement concluded by Ghana and the US on the settlement of two former Guantanamo detainees in Ghana, the Ghanaian government attempted to argue that the agreement at issue was not intended to create legally binding rights and obligations. This now the Supreme Court curtly dismissed:

> "Taking into account the substance [of the Agreement], we are in no doubt that, despite the form in which it has been drafted and the text couched, it is intended to create an obligation on the part of Ghana to the USA whereby, inter alia, Ghana binds herself to 'receive' and 'resettle' the said two persons […]."[91]

Still, *Fawcett*'s thesis resonated enormously in state practice, with many states having adopted circulars, internal instructions, and ministerial guidelines. The responsible department at Britain's Foreign Ministry e.g., the

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[89] *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (*Bangladesh v. Myanmar*), ITLOS, Case No. 16, 14.3.2012, paras. 88-99.

[90] See PCA Case 2013 No. 19, *Philippines v. People's Republic of China* (*South China Sea*), award on jurisdiction and admissibility, (29.10.2015), esp. paras. 212-217.

[91] *Banful and Boakye v. Attorney General and Ministry of Interior*, writ No. J1/7/20216, Judgment of 22.6.2017, available at <https://ghalii.org> (accessed 25.4.2019).

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Treaty Section at the British Foreign and Commonwealth Office, regularly updates a document referred to as *Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures*, instructing civil servants how to act, what terms to use and what to avoid, which domestic procedures to follow, etc. The US Foreign Ministry (the Department of State) offers much the same in condensed form through its Guidance on Non-Binding Documents,[92] and the German Federal Government, in 2000, instructed its employees always to verify whether a binding treaty was really necessary or whether things could not just as well be arranged below the legal threshold.[93] French guidelines circulated in 2010 warn that administrative agreements, i.e. agreements concluded between government ministers and their counterparts abroad may turn out to be devoid of legal effect and therewith are best avoided[94] – thus suggesting that agreement-makers may have a say in the matter of the binding force of the instrument they conclude. The precise scope of the popularity of the MoU is difficult to assess, but that it is popular in the practice of states (though not their judicial institutions) is clear, and perhaps no better illustration can be given than the disclaimer on the website of the Treaty Section at the United Nations Office of Legal Affairs, pointing out that when it registers an instrument as a treaty it does so without prejudice to the proper nature or status of the instrument:

> "It is the understanding of the Secretariat that its action does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status […]."[95]

VI. A Popular Misapprehension

The popularity of the MoU should not come as a surprise, but it does demand something of an explanation. How could a loosely argued and rather incoherent proposition, lacking support from the sort of empirical evidence that is habitually thought to be relevant in legal circles (i.e., judicial support), nonetheless manage to become so influential? The answer will

[92] <https://www.state.gov> (accessed 25.4.2019).

[93] *E. Benvenisti*, "Coalitions of the Willing" and the Evolution of Informal International Law, 15, n. 28, available at <https://papers.ssrn.com> (accessed 25.4.2019).

[94] These are reproduced, in relevant part, in *B. Kingsbury*, Global Administrative Law in the Institutional Practice of Global Regulatory Governance, World Bank Legal Review 3 (2012), 3 et seq., 6, n. 5.

[95] <https://treaties.un.org> (accessed 25.4.2019).

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have to remain speculative, but it seems that a number of different considerations and factors may have played a role.

First, and probably most important, *Fawcett* provided practicing Foreign Ministry lawyers and other bureaucrats at other departments with a highly convenient new tool in their tool kit. If states conclude regular, legally binding agreements, such agreements often need to be approved by parliaments, which entails that considerable delay can take place: parliaments may have their own protracted procedures, and might even be reluctant to go along with what the Foreign Ministry or some other department proposes. In short, the policy experts can negotiate all they want, but if there is parliamentary scrutiny, they cannot be certain that the results of their negotiations will actually see the light of day – parliaments may get in the way. So for practicing policy-makers the invention of the non-legally binding instrument, the MoU, was an answer to several prayers at once. The MoU would still be binding, but without having to follow pesky procedures; it would guarantee that policy-makers and negotiators could get things done, without any outside interference leading perhaps to a watering down of the deal or even its complete obstruction. The managerial approach so prevalent among policy-makers thus would be assisted in no small measure, and of course the policy-makers recognized as much, ascribing such virtues as flexibility and speed to *Fawcett*'s newly found creation. It did not matter that the arguments for speed and flexibility were largely spurious, in that the same result could be achieved by concluding regular, legally binding treaties: the law of treaties, as seen above, places no obstacle in the way of managerial action.[96] It is, instead, domestic constitutional law that can make the treaty-making process slow and cumbersome, and the MoU now offered the ideal method for setting aside domestic procedural requirements. After all, there is probably not a country in the world whose constitutional law suggests that political commitments, like legal commitments, should be approved by parliaments.[97] And what applies to parliamentary scrutiny also applies, by and large, to judicial review: MoUs offer the promise of international concerted action, while simultaneously excluding judicial review. So one can make deals about, say, the acceptable division of refugees among states, without offering those refugees the possibility to enforce such a deal judicially. One can agree that terrorism suspects may be sent abroad and

[96] One would hardly need to be reminded by the ICJ, for instance, that consent to be bound by a treaty can be expressed by ratification, but also by signature: see *Maritime Delimitation in the Indian Ocean* (note 83), para. 45.

[97] The literature contains a proposal to this effect though: see *D. Hollis/J. Newcomer*, "Political" Commitments and the Constitution, Va. J. Int'l L. 49 (2009), 507 et seq.

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offer diplomatic assurances in MoUs that no harm befalls them, without offering any guarantee of legal protection.[98] And, of course, equally possible, Foreign Ministry lawyers could use the facility to make arrangements serving the greater public good, or at least their conception of it. Above it was already noted that *Roosevelt* was worried that the Atlantic Charter, this blueprint for the post-war period, might not meet with senatorial approval, and the 1975 Helsinki Final Act likewise may have been considered too volatile for parliamentary approval in some of its signatories: it was famously deemed not eligible for registration under Art. 102 of the UN Charter, something which was expected to entail that it could not be relied on before any of the organs of the UN.[99] Note however that it is doubtful that a category of non-legally binding agreements would have been necessary to serve these laudable community goals, and that there remains a dose of hypocrisy involved in suggesting that an agreement may be binding but not so as a matter of law.

Second, it was with such considerations in mind that the practicing Foreign Ministry lawyers and other departmental servants found a willing ally in many an international law academic. International lawyers, as *David Kennedy* once astutely observed, have an international project:[100] they tend to favor forms of international cooperation above anything else and in ways that do not apply to, e.g., banking lawyers, even regardless of the contents. International lawyers want to see international cooperation between states, because it is engrained in their acculturation and socialization that international agreement is commendable, and a fine value in its own right, in relative isolation from substantive concerns. This "international project" entails that international cooperation is deemed worthwhile, regardless of the purpose the cooperation serves, and this mindset in turn entails that all forms of cooperation must be cherished. As *Christine Chinkin* once put it in the context of soft law, but equally applicable to MoUs: a soft agreement is better than no agreement at all.[101] Hence, the idea behind MoUs tapped into a natural coalition of interests between practitioners wishing to get things done, and academics wishing to elevate "the international".

And what helped the international law academic to support *Fawcett*'s proposition even against the insights of courts and tribunals was the cir-

98 But see *G. Noll*, Diplomatic Assurances and the Silence of Human Rights Law, Melbourne Journal of International Law 7 (2006), 104 et seq.

99 *H. S. Russell*, The Helsinki Declaration: Brobdingnag or Lilliput?, AJIL 70 (1976), 242 et seq.

100 *D. Kennedy*, A New World Order: Yesterday, Today, and Tomorrow, Transnational Law and Contemporary Problems, 1994, 1 et seq.

101 *C. Chinkin* (note 75).

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cumstance that states were keen to take it up. *Fawcett* himself suggested to be writing "very largely" *de lege ferenda*, and started by claiming that a change in practice was "desirable".[102] This entailed, most likely, that not much practice concerning MoUs had yet materialized, but following his contribution, slowly but surely states started to resort to the faculty of concluding MoUs instead of treaties, or at least started to accept the possibility that MoUs could be concluded in certain circumstances. As *Aust* would write three decades later, anyone denying a distinction between treaties and MoUs offers a hypothesis that "is just not supported by the extensive practice of states".[103] This insistence on state practice is curious, in that what often matters to lawyers is the hermeneutic support of authoritative opinion, i.e., what courts say. The resort to state practice is of course a building brick of customary international law, but normally speaking "the jury is still out" until a court confirms that the practice of states adds up to a legal rule. With MoUs, though, this latter part never happened, and there are sound theoretical arguments to claim that relying on state practice alone cannot be enough when it comes to the creation of legal concepts and what *H. L. A. Hart* referred to as secondary rules[104] – and surely, MoUs must be seen in this category rather than as emanations of a primary rule of behavior on a par with "thou shall respect innocent passage" and "thou shalt not commit torture". In yet other words, state practice is dogmatically not all that relevant in the context of MoUs, at least not when it comes to offering a legally valid justification for their use.

These two factors (the attraction to practitioners and normative appeal to academics) were in all likelihood the most important factors at play, but there were additional ones. One of these concerned again the perceived rigidities of the international legal system. Treaties, so the 1969 Vienna Convention on the Law of Treaties seemed to suggest, could only be concluded between states, and perhaps with or between international organizations. But obviously, states may wish to make all sorts of deals with other entities as well: there might be considerable political merit in concluding an agreement with a liberation movement, or with an indigenous people, or perhaps even with private sector actors, yet none of these could formally be considered treaties, since treaties could seemingly only involve public actors. Likewise, treaty relations with unrecognized states could be mutually bene-

[102] *J. E. S. Fawcett*, (note 14), 385, 381, respectively.

[103] *A. Aust* (note 6), 50.

[104] *H. L. A. Hart*, The Concept of Law, 1961. In *Hart's* terminology, primary rules are rules of behavior, while secondary rules are rules relating to the creation, application and enforcement of primary rules.

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ficial, but seemed legally difficult and diplomatically awkward.[105] Here then the MoU came to the rescue, allowing states to conclude agreements with other actors without having to be too concerned about the formal status of those other actors. And possible critics could always be put in their place by suggesting that a particular agreement with a particular non-recognized entity or liberation movement was merely a MoU, and not a full-fledged treaty binding the state under international law.

Related was uncertainty concerning the scope of treaty-making powers of most international organizations. The constitutions of quite a few organizations envisage cooperation and coordination between organizations, but without spelling out the instruments through which such coordination or cooperation can take place, and the formal treaty-making powers of most international organizations are limited.[106] In those circumstances, international organizations often resort to the conclusion of MoUs with each other, as again these can do the by now familiar trick: they are supposed to bind the entities on whose behalf they are concluded, but since they are not supposed to be binding under international law, they cannot be seen to be in tension with the legal powers of the organization in question.

In short, MoUs could become a big hit because MoUs cleverly operated within the interstices of the international legal order, exploiting the natural coalition between practitioners and academics to get things done, and allowing states and international organizations to circumvent provisions on the proper procedure to be followed, or the proper limits to competences, or the formalities as regard the legal status of possible partners. And all of this worked on the mistaken thesis that the law of treaties represented a rigid system, which needed to be set aside in the name of the greater international good and this, in turn, is mostly tenable on the epistemological assumption that an international legal order can hardly be said to exist; and consequently, whatever legal effects the activities of states engender depends solely on their direct intentions. *Lipson* put it well when suggesting that in order to enforce whatever bargains they make, "states must act for themselves. This limitation is crucial; it is a recognition that international politics is a realm of contesting sovereign powers",[107] and does not, he might have added, constitute a legal order worthy of the name. On such an assumption, where all international agreements must be "enforced endogenously",[108]

[105] The leading study (still) is *B. R. Bot*, Nonrecognition and Treaty Relations, 1968.

[106] *J. Klabbers*, Transforming Institutions: Autonomous International Organisations in Institutional Theory, Cambridge International Law Journal 6 (2017), 105 et seq.

[107] *C. Lipson* (note 5), 508.

[108] *C. Lipson* (note 5), 508.

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where states are wolves to each other and life is nasty, brutish and short – in such a world, devoid of law, really, it may make some sense for states to keep a close reign on their commitments, and suggest that the legal nature (*vel non*) of their agreements depends solely on their own intentions and owes nothing to an overarching legal order – an overarching legal order whose existence is denied *ex hypothesi*.[109]

Whether this broad assumption about international affairs being nothing more than "a realm of contesting sovereign powers" is tenable, is a different matter altogether, and at some point becomes an article of faith more than anything else. Suffice it to say that identifying the international legal order with enforcement, as *Fawcett* does unwittingly (it seems) and as *Lipson* does wittingly (it seems), may strike many as unpersuasive: there is so much more to international law than enforcement alone.[110] On points of detail, moreover (the points often mentioned as favoring the MoU) it should be noted that the law of treaties never insists of formalities: things can get done speedily if only states agree. Agreements can enter into force the day of their conclusion; states can access international cooperative ventures by mere announcement;[111] if treaties need to be applied speedily, states can agree to apply them provisionally. Treaties can be terminated on a day's notice or even less, should states so agree, and amendment likewise can be arranged without the merest hint of time-consuming formalities. Such formalities as do exist stem from domestic constitutional law, and usually exist for good reasons, in particular the protection of democratic control of foreign policy.

VII. The Nail in the Coffin

MoU's have lost some of their glamour over the last few years, and if ever a practice symbolized the old adage about being a victim of one's own success, then MoUs may well qualify. Ever since *Fawcett* paved the way in his 1953 article, under-developed and under-theorized as it may have been, MoUs have become increasingly popular in state practice. Hard statistics are hard to come by, for the obvious reason that states are reluctant to pub-

[109] Note that the underlying logic is radically different from the logic (or logics) underlying the conclusion of secret treaties, recently ably discussed in *M. Donaldson*, The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order, AJIL 111 (2017), 575 et seq.

[110] See, e.g., *F. V. Kratochwil*, Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs, 1989.

[111] An example is the constitution of the World Customs Organization.

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lish them and prefer to operate in the "twilight zone"[112] and on the "legally subliminal level".[113] Still, one indicator is that many Foreign Ministries have issued instructions to other departments and agencies pertaining to the proper use of MoUs, and how to distinguish them from treaties. Those same Foreign Ministries have started to worry though: while the conduct of foreign affairs is their primary responsibility, they have lost control over what other departments and agencies have been doing. This is a point that cannot strictly be proven, but will privately be acknowledged by many Foreign Ministry lawyers: the practice of concluding MoUs has gotten out of hand, to the extent that Foreign Ministries no longer know what has been concluded by which department or agency. Indeed, those departments or agencies themselves are not in full control: reportedly, it happens on occasion that different officials within the same department end up concluding similar MoUs with the same counterparts, without realizing it. And often enough, as *Aust* already finely noted in 1986 while endorsing MoUs, their conclusion may lead to "retrieval problems":[114] being informal, they are often kept outside of formal record-keeping, and never registered, neither with the UN nor with any domestic agreement registry.

There may, moreover, be a second reason why foreign policy elites have lost some of their enthusiasm for MoUs, and this is related to the very reason for their success: MoUs exemplify the sort of "expert governance", taking place between foreign policy elites and far from public scrutiny, that many so vocally complain about. For this is precisely the point of MoUs: that governance and regulation can be conducted by those "in the know", unhampered by parliamentary scrutiny, judicial review, or the vagaries of public opinion.

The truly curious point, however, is how the invisible college of international lawyers (and international relations scholars as well) came to accept and embrace the MoU despite the flimsy foundations, little more than wishful thinking, provided by *Fawcett* in his 1953 contribution, and despite also the consistent rejection of MoUs by a host of international courts and tribunals. It is difficult to find even a single judgment endorsing the MoU thesis despite some 70 years of discussion, and it is difficult to think of *Fawcett*'s "theory" as anything else but fanciful, based on questionable premises and debatable logic. If the discipline of academic international law is this

[112] *O. Schachter*, The Twilight Existence of Nonbinding International Agreements, AJIL 71 (1977), 296 et seq.

[113] *S. C. Neff*, Friends but No Allies: Economic Liberalism and the Law of Nations, 1990, 145 et seq.

[114] *A. Aust* (note 36), 792.

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easily persuaded to give up centuries of reasonable thought, then one can only wonder what this says about the discipline.

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