SOFT LAW, HARD STAKES?

State Commitment to Non-Binding International Instruments and the Case of the UN Declaration on the Rights of Indigenous Peoples

Léticia Villeneuve
University College

Thesis submitted in partial fulfilment of the requirements for the degree of
Doctor of Philosophy in International Relations
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ABSTRACT

Soft law is a common feature of international governance, occupying a grey zone between the realms of politics and law. The multifaceted concept can refer to vague provisions or norms generally, but is most useful when defined as international instruments adopted in a non-binding form. Whilst the advantages and appeal of soft law have been widely studied, with its effects explored in both International Relations (IR) and International Law (IL) scholarship, states' behaviour on commitment to soft law *per se* has remained underexplored. It is often assumed that its non-binding status upon adoption makes commitment to soft law a relatively inconsequential endeavor, at least in comparison to hard law. In this thesis, incorporating insights from public international law into rationalist IR approaches, I argue that soft law instruments can have important effects over time and bring substantial costs for states to bear. This is particularly the case for soft law instruments 'hardening' through domestic law, treaties or customary international law, increasing the sovereignty and implementation costs attached to commitment. I further argue that those potential costs of soft law are taken into account by states when making decisions on commitment. Depending on the importance and likelihood of the costs foreseen, states can craft their commitment to mitigate these costs or block them from arising. Empirical evidence for the place of the costs of soft law in states' decision-making on commitment is offered through an in-depth case study of the UN Declaration on the Rights of Indigenous Peoples, with a focus on the opposition it faced upon adoption – an unusual occurrence for a UN declaration in the field of human rights. Recognizing the potential costs of soft law and their impact on state commitment helps to bridge theory and practice regarding the creation of non-binding instruments and sheds light on challenges raised by the use of soft law by states and non-state actors at the frontiers of international law-making.

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Chapter 1

INTRODUCTION

On 13 September 2007, the United Nations General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[1] This non-binding – or soft law – instrument joined the ranks of numerous declarations in the field of human rights adopted since the UN's creation, setting standards for the protection or fulfilment of the rights of various groups and communities such as children, women, migrants, etc. While most of these declarations had been adopted by acclamation (consensus), the voting record for UNDRIP was an unprecedented event. Four states voted against its adoption (Australia, Canada, New Zealand and the United States of America), a stance that had barely ever been witnessed in the history of UN declarations on human rights.[2]

As these declarations are non-binding instruments, they do not impose legal obligations on states to comply. Their adoption by states constitutes a commitment in principle to an instrument that has moral and political force, perhaps, but not legal force internationally. It is usually assumed, therefore, that commitment to an international soft law instrument is relatively inconsequential for states. As such, it is the expected outcome for high profile instruments where commitment may bring about reputational benefits for states, while

[1] A/RES/61/295 (13 September 2007).

[2] The only other negative vote ever recorded for a UN declaration in the HR field (as classified by the UNGA) was made by the USA on the Declaration on the Right to Development. (UN Doc. A/RES/41/128). See UN Declarations dataset, Appendix 3.

opposition may entail costs. In the UN context, these assumptions held true for almost all declarations on human rights topics. This was until UNDRIP came to the UNGA, and four important states (all democracies with a strong history of public support for human rights generally) decided to oppose it, in spite of the reputational costs of doing so. This raises the question: why would states oppose international human rights soft law?

In this thesis, I explore how states behave towards soft law in the international legal order. More specifically, I provide an account of how states make decisions on commitment to soft law, defined as international instruments adopted in a non-binding form. I refine existing accounts of commitment to international instruments mainly by looking at the potential effects and costs of soft law, at how these costs are acknowledged by states, and how that in turn impacts their decision on whether (or how far) to commit to a soft law instrument. I argue that soft law can have costs over time, especially through its potential hardening into international legal obligations. I contend that these potential costs of soft law are acknowledged and taken into account by states when making a decision on commitment; substantial costs attached to a soft law instrument can lead states to craft their commitment in particular ways to mitigate future costs or attempt to block them from arising.

This revised account of commitment to soft law allows rationalist approaches to address instances of unexpected state behaviour, like opposition to high profile soft law instruments in the field of human rights. This can only be done by considering, along its benefits and advantages, the potential costs that may arise from a commitment made in a soft law form. As such, this project contributes to international relations (IR) rationalist approaches' understanding of international cooperation in non-binding forms, an increasingly important field in the theory and practice of international relations and international law (IL).

In this introduction, I first present an overview of the place of soft law in IR and IL, establishing the term's relevance in theory and practice in both fields (Section 1). I then present the research question and core claims argued in the thesis (2). In Sections 3 and 4, respectively, I give an overview of the project's general theoretical approaches and research design. Finally, in section 5, I present an outline of each of the thesis chapters.

1. SOFT LAW IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW

In order to explore states' behaviour towards soft law, it is important to look into the place and meanings of the concept itself, and its use in the theory and practice of international relations and international law. Indeed, soft law is a fascinating concept sitting at the nexus of international politics and law, occupying a grey zone between moral or political commitments and legally-binding obligations. It first emerged in the 1980s in relation to – and contradistinction with – conventional hard, binding, law. The concept of 'soft law', however, cannot be defined in a straightforward way. It is generally understood as including phenomena showing some legal relevance,[3] but lacking particular attributes expected of binding law, or falling short of what is traditionally recognized as a legally-binding international obligation.[4] Soft law can be defined in multiple ways, as referring principally to vague or unenforceable provisions, non-binding instruments or norms

[3] E.g. Ellis, "Shades of Grey," 319; Blutman, "In the Trap of a Legal Metaphor," 606.

[4] In international law, this usually refers the traditional sources of international law, as presented in art. 38 (1), *Statute of the International Court of Justice* (ICJ), 1945, including international conventions, customary international law and 'general principles of law recognized by civilized nations', along with 'judicial decisions and the teachings of the most highly qualified publicists' as subsidiary sources.

generally.[5] This thesis focuses specifically on soft law instruments: written international instruments adopted in a non-binding form.[6]

In spite of those conceptual challenges, soft law instruments have gained an enviable place in the theory and practice of international relations and international law. As a category, soft law instruments include any kind of written arrangement made between participants that do not consider it binding under international law. It can refer to documents such as exchanges of notes, joint communiqués,[7] conference outcome documents, or more commonly, resolutions and declarations adopted by international organisations.[8] Such instruments are increasingly recognized as useful alternatives to binding international instruments to accomplish a wide range of objectives, from encouraging international cooperation on various issues to fostering consensus on broad normative developments globally. Their increasing popularity comes in great part from their flexibility and adaptability; as they are not regulated under international law, they can arise in any setting and include a diversity of actors, pushing the boundaries of the usual requirements of international law-making.

From a state's perspective, soft law is attractive considering the lesser constraints it imposes on its participants. It is usually easier for states to signal their commitment to soft law compared to hard law, since it dispenses with most of the domestic constitutional formalities attached to the ratification of international obligations in treaty form.[9] More

[5] See Chapter 2, section 2, for a literature review of those three approaches.

[6] For a full exploration of the definition adopted in this project and its main components, see Chapter 2, section 3.

[7] New Zealand uses 'arrangements' as an umbrella term. New Zealand Ministry of Foreign Affairs, "International Treaty Making," 34.

[8] In the case of international organisations, those instruments are non-binding unless the statutes of the organisation provides otherwise.

[9] These may require confirmation by a state's legislature for instance. Soft law forms are generally not subject to the same constraints or requirements as treaty-making in domestic constitutional orders, and are

importantly, its non-binding status theoretically means that states adopting or joining a soft law instrument keep close to full control over how far they intend to implement its provisions (if at all). Thus, soft law instruments are generally praised for allowing states and other actors to show deference or generally adhere to a certain goal, rule or norm internationally, without having to go through the hurdles of negotiating a fully-fledged international legal instrument and without directly facing the shadow of legal responsibility and the costs that may be associated with it. Yet, the status of such instruments may at times be ambiguous in practice, and states do pay close attention to the final status of international instruments in negotiation and decision-making. In Australia and New Zealand's governmental guidance on treaty-making, for instance, soft law instruments are referred to as 'arrangements of less than treaty status'.[10] This confirms the proximity between soft law forms and treaties, with the understanding that the former are meant to remain non-binding.

A rich body of IR scholarship has paid close attention to soft law, especially from the angles of compliance and institutional design. Studies investigating the role and effects of soft law instruments have highlighted its importance investigating how it can stimulate compliance with the norms it sets forth in similar ways to hard law instruments, in spite of a non-binding status.[11] In terms of rationalist approaches to institutional design, soft law is generally portrayed as a low-cost, low-stakes alternative to hard law that can still deliver interesting benefits in particular fields, by providing focal points for cooperation or

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often under the purview of the executive branch. See Pauwelyn, Wessel, and Wouters, *Informal International Lawmaking*.

[10] Australia Department of Foreign Affairs and Trade, "Treaties and Treaty-Making: An Official's Handbook," 11; New Zealand Ministry of Foreign Affairs, "International Treaty Making," 34–37.

[11] See e.g. Weiss, *International Compliance with Nonbinding Accords*; Shelton, *Commitment and Compliance*.

gradually building international consensus, making it a valuable tool in international governance.[12]

Yet, there is a lack of scholarship focusing on the particular challenges soft law raises for states at the commitment stage, i.e. how states will make policy decisions to join or adopt a non-binding instrument.[13] While some scholars readily acknowledge soft law's potential to foster compliance or to bear some effects on states behaviour or on the evolution of international law,[14] this does not usually translate into costs for a cost-benefit assessment of commitment to soft law. From a rationalist standpoint, soft law's main drawback is usually presented in terms of its incapacity to deliver the same degree of certainty in future dealings as hard law. Beyond that, there are usually no costs associated to commitment to soft law *per se*, especially not in terms of its legal effects over time, considering that its creators purposely design it outside the traditional realm of international legal obligations. Since soft law is defined in terms of its 'lesser-than-law' status, it is assumed that commitment to a soft law instrument does not bring costs for its participants to bear, as states committing to a soft law instrument are commonly believed to retain control over whether or how far they wish to implement it. That is the case, even if the potential effects of soft law and the interplay between non-binding and binding international norms are well documented in international law literature.

A few allusions can effectively be found in IR/IL literature raising doubts about the ease of commitment to soft law for states and the extent to which decision-making on commitment

[12] Abbott and Snidal, "Hard and Soft Law in International Governance," 423; Koremenos, Lipson, and Snidal, "The Rational Design of International Institutions."

[13] Commitment is defined in this project as joining a non-binding instrument and being recognized as one of its supporters or participants, irrespective of the mode of adoption or the specific actions through which commitment is communicated.

[14] e.g. its potential to will pave the way to a treaty or act as stepping stone towards future legal developments and more intense cooperation.

to soft law really differs from hard law at the adoption stage,[15] or reflecting on how the development and proliferation of soft law instruments over time could give states something to reflect upon and learn from in their dealings on commitment.[16] These allusions to soft law's effects and potential costs, and how they might have an impact on the development of state practice on soft law have not yet been explored in a systematic way or assessed empirically.

2. RESEARCH QUESTIONS AND ARGUMENT

In this context, the research question guiding this thesis is: how do states make decisions on commitment to soft law instruments? And more specifically, why would states oppose the adoption of human rights soft law (as occurred in the case of UNDRIP)?

Building on existing IR rationalist approaches combined with insights from international law, I present a revised account of state decision-making on commitment to soft law instruments, taking into consideration the potential costs of soft law. I argue that states make decisions on commitment on the basis of a cost-benefit assessment, balancing broad sets of policy preferences with a distinct element: the potential costs of soft law. Indeed, using insights from public international law, I show that soft law can have important effects from the moment of adoption, and can potentially harden into legally binding international obligations. I argue that these effects can bring costs to states who have committed to soft law, and modify the usual cost-benefit assessment of commitment based on soft law's non-binding status. I further argue that states recognize the presence of these potential costs in practice; in some cases, the prospect of substantial costs in case of hardening may push

[15] Chinkin, "The Challenge of Soft Law," 860.

[16] Abbott and Snidal, "Hard and Soft Law in International Governance," 412. See also Chapter 3.

states to craft their decision on commitment in particular ways to introduce safeguards against future costs arising. This can be achieved through the position taken upon commitment (especially if it proceeds through a vote) as well as through additional interpretive statements setting formal or substantive limitations to a states' commitment to a soft law instrument. Yet, if the potential costs of soft law are deemed important enough, it may push a state to oppose in spite of other policy preferences (including normative and strategic considerations) pulling towards commitment.

This refined rationalist approach to commitment accounts for greater variation in state behaviour than accounts overlooking the potential costs of soft law. It explains cases deviating from the usual assumptions made about the ease of state commitment in existing approaches as long as there are some benefits to be made, especially when looking at heavily normative fields like human rights. Indeed, it explains that states may oppose the adoption of non-binding instruments if potential costs are substantial enough to outweigh benefits, even in fields like human rights, in which there is an important reputational premium on commitment and low costs upon adoption.

3. THEORETICAL APPROACH

This thesis contributes to the general framework of IR/IL scholarship, building on knowledge of the dynamic interplay between the two disciplines.[17] IR/IL scholarship is particularly relevant to explore topics such as soft law, since soft law stands directly at the nexus of both fields. The main theoretical anchor of the thesis is in IR

[17] For an overview of IR/IL scholarship, see: Dunoff, Jeffrey L. and Pollack, Mark A., *Interdisciplinary Perspectives on International Law and International Relations*; Byers, "International Law"; Simmons and Steinberg, *International Law and International Relations*; Byers, *The Role of Law in International Politics*; Slaughter, Tulumello, and Wood, "International Law and International Relations Theory."

rationalist/institutionalist approaches.[18] This thesis aims to advance current understandings of state decision-making on commitment to international instruments, with a focus on actors' conscious decision-making processes in weighing the costs and benefits of different courses of action to make a decision.[19] It is also rooted in a distinctly institutionalist approach, looking at how states and other international actors purposely design international institutions to achieve various goals and fulfil state interests in international governance.[20]

Yet, the thesis does not confine itself to a strictly rationalist/institutionalist approach. Along with Abbott's call for a 'richer institutionalism',[21] it remains open to bringing in liberal and constructivist insights, mostly to account for the role of domestic actors and norms in the formation of state interests and evaluation of policy preferences in the decision-making process. In the analysis, these insights will mostly serve to inform the rational cost-benefit evaluation of various courses of action, therefore remaining mostly subsumed in the overarching rationalist approach (for the sake of parsimony and coherence in theory refinement/development).[22]

Additionally, and more importantly, the main value of the theoretical approach taken in this project is in the combination of insights from IR and IL scholarship to address specific challenges in the practice of international affairs and the development of international law.

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[18] Cf. rationalist approaches in international law, White, *The Law of International Organisations*, 7.

[19] It is acknowledged that this standpoint will not allow me to cover all relevant dimensions in the study of the development of legal institutions (especially on issues of legitimacy, appropriateness, and broader influences on the (co)constitution of actors' identities). Normative considerations will thus be covered as much as they fit into conscious decision-making processes as recalled by the main actors involved (as much as they are aware of it, and as consigned in official records, notwithstanding other structural factors at play).

[20] In a broad sense in IR, institutions can be defined as 'persistent and connected sets of rules (formal or informal) that prescribe behavioural roles, constrain activity, and shape expectations.' Keohane, "International Institutions," 383.

[21] Abbott, "Enriching Rational Choice Institutionalism for the Study of International Law."

[22] Instances where those other theories have the potential to inform our understanding further are identified as future avenues for research. See Conclusion.

It achieves this by bringing in insights from the legal field into its IR rationalist account of state commitment to non-binding international instruments. As noted by Byers, a drawback of rational choice approaches is often that their 'theorists ignore the specificity of international law, which is rooted in obligation', in a process where 'states consent, not just to the specific rules, but also to the general processes through which the rules develop and change'.[23] The goal is here to enrich our understanding of IR rational institutionalist approaches, especially in the creation of international instruments, by using insights from international law to unpack how obligations arise in the international legal order – and leverage that knowledge from the legal field to give a more comprehensive account of state behaviour towards international legal institutions. This is accomplished through a combination of research methods from both fields: legal doctrinal analysis and (IR) case study methods.

4. RESEARCH DESIGN

The research design elaborated for this thesis has two main components, in line with the interdisciplinary theoretical framework presented above: legal analysis and IR case study methods. Part II relies primarily on legal doctrinal analysis. It proceeds through an analysis of international legal rules and theory, as well as precedents and state practice to identify the effects of soft law in the international legal order. It focuses on uncovering the actual effects of soft law from the moment of adoption, as well as identifying its potential effects through different pathways towards hardening. The relevant research methods and data sources are further described in the introduction to Part II.

[23] Byers, "International Law," 618.

Part III turns to an empirical analysis of state commitment to soft law, through an in-depth case study of state commitment to the UN Declaration on the Rights of Indigenous Peoples. It is based on information gathered through various sources, including interviews with (former and current) government and UN officials, official governmental and individual archives, as well as UN records. The analysis of the case proceeds through descriptive statistics, content analysis, as well as process-tracing (the latter is used mostly to trace the development of the instrument and relevant negotiations, as well as steps taken in states' decision-making process towards commitment to the instrument and changes of position). Further details on case selection, research methods, and data sources are presented in the introduction to Part III.

5. THESIS OUTLINE

In this thesis, I address the complex theoretical question of how states make decisions on commitment to soft law, and the specific empirical question of why states would oppose soft law in the field of human rights, through three distinct parts: Part I is a conceptual and theoretical literature review, Part II constitutes the core theoretical contribution of the thesis, and Part III presents empirical insights from the study of state commitment to soft law in practice, through the UNDRIP case.

I devote Part I (Chapters 2 and 3) to a conceptual and theoretical literature review on soft law and commitment to international instruments. To approach the question of states' behaviour towards soft law, it is essential to first survey the place and meaning of the concept of soft law in IR/IL literature, especially to settle on the most relevant definition for this project. The same goes for a review of existing accounts of state commitment to international instruments generally. Commitment to soft law remains understudied in IR

literature, but it is worth surveying the relevant scholarship on commitment to hard, binding law, and on the trade-offs between hard and soft law instruments in terms of institutional design.

In Chapter 2, I first delve into the concept of soft law, to evaluate existing definitions and settle on the most appropriate one for the study of state behaviour on commitment. I present various definitions of soft law grouped under three different approaches: soft law as provision, instrument, or norm generally. For the purposes of this project, I define soft law as an international instrument that is non-binding at the time of adoption, and explore in Chapter 2 each of the definition's components in depth.

In Chapter 3, I survey conventional rationalist accounts of commitment to international instruments. This is crucial to establish what is known about states' behaviour towards international instruments generally, and circumscribe areas left to explore with regards to soft law specifically. In this chapter, I present a systematic account of the different types of costs and benefits involved for state parties when committing to an international instrument, hard or soft (material, reputational, and sovereignty costs and benefits). I then present the usual assumptions and trade-offs involved in joining international instruments in the most common 'hard law' form, before moving to explore the assumptions derived from rationalist approaches when applied to commitment to soft law instruments. The chapter concludes with an assessment of the areas left unexplored by existing accounts, especially relating to the evaluation of the potential costs of commitment to soft law over time and how this feeds into states' decision-making on commitment to soft law.

In Part II (Chapters 4 and 5), I present the core theoretical contribution of the thesis. I argue that soft law can have important effects over time, especially through its potential

hardening, and that this can bring important costs to states. These potential costs must be integrated in rationalist accounts of states' decision-making on commitment to to soft law instruments.

In Chapter 4, I look into the effects and costs of soft law, bringing insights from public international law to international relations. I first look into the core functions played by soft law in the international legal order. I then survey the effects of soft law instruments, in terms of the actual effects arising from the moment of their adoption, as well as of the potential effects that may arise over time if they harden in various ways. This allows me to establish the potential costs of soft law that may arise through the instrument hardening, in a way that challenges conventional assumptions about the costs of commitment to soft law.

Taking these considerations into account, Chapter 5 provides a revised theory of states' decision-making on commitment to soft law. It presents the key considerations to feed in states' decision-making, centered around three steps: assessing the form and function of the instrument (A), evaluating the potential costs of soft law (B), and establishing policy preferences (C). It posits that states' evaluation of the potential costs of soft law at Step B is a two-fold operation, carried out by assessing the costs that could arise if the instrument hardened (depending on a state's ties to a certain issue-area, as well as the current status of its implementation of the instrument's provisions) and the likelihood that the instrument actually hardens (therefore bringing these costs to materialize). The final decision on commitment is then a result of balancing the potential costs foreseen (Step B) and other policy preferences (Step C). This refines existing accounts of commitment to soft law, where, in absence of explicit consideration for the potential costs of soft law, policy preferences alone may guide states' behaviour. Yet, as I note that commitment is often not a binary operation (join/not join), I conclude the chapter by providing an overview of

possibilities for states to 'craft' their commitment, i.e. of the opportunities they may have to shape the content of an instrument or their response to it, to mitigate the potential costs or attempt to block them from arising.

In Part III (Chapter 6), I present an empirical analysis of a case demonstrating the theory developed in the previous chapters. In Chapter 6, I look at the decision-making process behind commitment to the UN Declaration on the Rights of Indigenous Peoples, primarily from the perspective of the four states who initially opposed its adoption. I conclude that their opposition was motivated by concerns about the potential effects of soft law and a fear of the costs associated with its potential hardening. I then compare the position of the opposing states to the ways in which other states (some for whom UNDRIP could also have entailed costs) have crafted their commitment to it, with different cost-benefit trade-offs as a result. As the opposing states on voting day have all subsequently (in the following four years) announced their support for the Declaration, I also compare the rationale behind their initial decision to their subsequent change of position. This provides additional evidence confirming their concerns with the costs of soft law, their initial strategy relying on the rule of the persistent objector status, and the flexibility with which they have approached their revised position on commitment.

In the concluding chapter (Chapter 7), I recall the main arguments and contributions of this project, as well as the main insights from the empirical analysis of the UNDRIP case. Considering the scope of the thesis and its main case study, I assess the potential generalizability of the findings and suggest further avenues for research to supplement the theoretical contributions of this thesis and consolidate our understanding of state behaviour towards soft law, and the place of soft law in contemporary international law-making.

PART I

SOFT LAW AND STATE COMMITMENT TO INTERNATIONAL INSTRUMENTS IN IR/IL LITERATURE

Part I of this thesis aims to give an overview of the current scholarship on soft law in international relations (IR) and international law (IL) literature, to explore what is currently known or assumed about soft law. This literature review is twofold: conceptual and theoretical.

Chapter 2 is devoted to the concept of soft law. It first looks at the history of the term and at its recent rise in IR/IL literature in the last few decades, and surveys the debates on soft law's very existence. I argue that in spite of the theoretical puzzles it creates (mostly in the legal sphere), soft law is a useful concept as long as its meaning is clear. To this end, I review and classify the relevant literature in three approaches to defining soft law: soft law as vague or unenforceable provision, soft law as non-binding instrument, or soft law as any norm short of hard law. Soft law as non-binding instrument is established as the most relevant basis for the study of state commitment, since it provides clearly identifiable instances of soft law in the international sphere for which it is possible to isolate and observe decision-making by states and other actors. This is supported by my own working definition of soft law as instrument: a written international instrument that is non-binding at the time of adoption.

In Chapter 3, I provide an overview of what is known or assumed about state commitment to international instruments, the act through which states join or adopt international instruments, hard or soft. Taking a rationalist approach, I survey the different costs and benefits involved when states consider creating or joining international instruments. These can be grouped into three categories: material, reputational, and sovereignty costs/benefits. This research focuses on state commitment to soft law specifically, a topic that has not been covered as extensively in existing literature. I therefore use rationalist assumptions developed with regards to hard law, as

well as insights from IR literature about the trade-offs between hard and soft law, to derive rationalist assumptions regarding commitment to soft law. I then highlight the main issue arising when existing approaches are applied to the study of commitment to soft law: since it is usually assumed that the soft form of an instrument is enough to keep its intrinsic costs very low, there is not enough consideration given to the potential effects and costs of soft law over time and how they might impact decision-making on commitment. I argue that these potential effects and costs of soft law have to be integrated in a rationalist account of commitment to international instruments in order to adequately account for state behaviour towards soft law, something that is pursued in the second part of the thesis.

Chapter 2

THE CONCEPT OF SOFT LAW: HISTORY, TYPOLOGY AND DEFINITION

Soft law occupies a grey zone[1] in the international legal order, at the nexus of international law and international politics, somewhere between 'hard' binding rules and mere political arrangements. The term has established itself in relation to 'hard law', which refers to the traditional core of the international legal order encompassing what is commonly accepted as international law in a more restrictive sense: instruments, norms or general principles that are undoubtedly legally binding for states. Hard law is created or identified through the recognized traditional sources of international law, namely treaty-making, customary international law or general principles of law.[2] The concept of soft law then qualifies a category of international norms or instruments which are not quite meeting the requirements or usual characteristics we expect of hard law, but are still showing semi-legal attributes and/or carry similar effects to binding commitments.

The presence of 'law' in the concept of 'soft law' aims to project the reality it describes in close proximity to, if not literally inside the legal sphere.[3] Yet, the boundaries of soft law's realm are not unambiguously traced. In spite of a variety of approaches developed

[1] Metaphors of the sort abound, with e.g. Abbott writing of the 'penumbra of international law'. Abbott, "Enriching Rational Choice Institutionalism for the Study of International Law," 43.

[2] These are recognized as the traditional sources of international law, as identified in article 38 (1), Statute of the International Court of Justice.

[3] Blutman refers to such approaches as based on 'proximity arguments'. Blutman, "In the Trap of a Legal Metaphor," 617.

to make sense of the phenomenon, none can claim unanimous support in the literature. It appears, however, that in spite of those definitional issues (or protracted debates as to its very existence),[4] soft law has been a growing presence in the international legal order since the 1980s, both in academic discussions and in the practice of international affairs.

The first section of this chapter starts by providing a historical overview of soft law's rise in international affairs. It traces the most likely origins of the term in its current form and covers milestone debates that consecrated its existence in the early 80s. It then gives an overview of soft law's rise in academic discussions since, offering likely explanations for its exponential growth. This rise, however, conceals the multifaceted character of the concept, which is often used to describe different phenomena. This leads some scholars to contend that the term is confusing or misleading. I argue that the concept of soft law is very useful and allows us to understand new dimensions of international cooperation, as long as we can distinguish between the various uses of the term and settle on a working definition adapted to the analytical framework of IR/IL research.

Section 2 embarks on this mission and starts by providing a comprehensive review of existing definitions of soft law in IR and IL literature. To make sense of the diversity of existing approaches to defining soft law, I have grouped them in three categories: (2.1) soft law as vague or unenforceable provision, (2.2) soft law as non-binding instrument, and (2.3) soft law as norms generally (anything short of binding legal obligation). Section 2.4 presents approaches whose definitions combine these categories. While this project does not dismiss the relevance of the first and third categories, it aligns itself with the second – soft law as instrument – for theoretical and empirical reasons. These will be explored in greater depth below (2.5). The core point is that the study of

[4] See sections 2.3 and 2.5 below.

commitment to soft law necessitates access to an identifiable and independent soft law component, for which it is possible to isolate decision-making processes. This is best done by looking at soft law instruments, individual instances of soft law created through a purposive multilateral exercise.

In this project, therefore, I define soft law as referring to *international instruments that are non-binding at the time of adoption.* This builds upon elements found in existing definitions of soft law in IR and IL literature, but palliates some of their shortcomings. More specifically, it aims at providing a clear and workable definition for the identification of instances of 'standalone' soft law. It also insists on the inclusion of a temporal element, to account for the possible evolution over time of the status of a soft law instrument or of provisions within it. To establish the definition above as a relevant starting point, section 3 delves into its different constitutive elements.[5] At the end of this exploration, the existence and relevance of soft law should be undoubtedly clear, and it should be understood that defining it as 'non-binding instruments' is useful and opens worthwhile paths for further enquiry.

1. HISTORICAL OVERVIEW: THE RISE OF SOFT LAW IN INTERNATIONAL AFFAIRS

'Soft law' is now a common – albeit still controversial – term in IR and IL literature. Yet, this is a relatively recent occurrence. In fact, from a likely emergence sometime in the twentieth century, the use of the concept of soft law has grown exponentially over the last four decades. An overview of the history of soft law's emergence in international

[5] This approach is inspired by Gruchalla-Wesierski, "A Framework for Understanding Soft Law," 44–45.

affairs is useful to map its rise and explore the evolution of states' behaviour towards it in practice.

1.1. First mentions of the term

Credit for first coining the term 'soft law' is often attributed to Lord McNair, with references to material dating back to the 1930s.[6] Written records of McNair's 'paternity' are, however, difficult to come by as the term is not explicitly present in his writings; it seems to have rather emerged in public lectures or through others' accounts of his work. The key piece to have attributed soft law's creation to McNair is Dupuy's 1977 article on 'Declaratory and Programmatory Law'.[7] In it, Dupuy described soft law as 'a term honored by the authorship of Lord McNair evoking this transitional stage in the development of norms when their content is vague and their scope imprecise'. This piece has since become scholars' main reference point when tracing the emergence of soft law in the literature.[8]

Yet, as d'Aspremont and others point out, it is likely that McNair's conception of soft law in those days was used as a synonym for the concept of *lex ferenda*, i.e. normative provisions that *should* be adopted, in contrast to the existing 'hard law' in force at a

[6] The genealogy of the theoretical and philosophical foundations of the term may be traced back much further. See Robilant, "Genealogies of Soft Law."

[7] Dupuy, *Droit Déclaratoire et Droit Programmatoire: De La Coutume Sauvage à La "Soft Law"*; Dupuy, "Declaratory Law and Programmatory Law."

[8] Dupuy's acknowledgement of McNair's authorship has been subsequently referenced by many authors in their attempts to locate the term's origins. See e.g. d'Aspremont, "Softness in International Law," 1081; Fitzmaurice and Elias, *Contemporary Issues in the Law of Treaties*, 34; Fitzmaurice, *Recueil Des Cours, Collected Courses 2001*, 124; Klabbers, *The Concept of Treaty in International Law*, 22:160.

Yet, it has not been possible to confirm the presence of the exact term in McNair's published work. Duplessis refers to McNair's 1930 paper on 'The Functions and Differing Legal Character of Treaties', but 'soft law' as such is not present in it. Duplessis, "Le Vertige et La Soft Law: Réactions Doctrinales En Droit International". Thürer is another scholar granting the paternity of the term to McNair, mentioning that he used it 'to describe instruments with extra-legal binding effect', without a precise reference to McNair's work. Thürer, "Soft Law," para. 5.

given time.[9] Soft law in McNair's view was then not a distinct category of international norms or instruments, but rather a shorthand to refer to a future program for desirable international norms. Dupuy's view of soft law was coming from a similar perspective, contrasting 'programmatory law' (his variation on *lex ferenda*) with existing instruments and norms already laid out, no matter their source or form.[10]

1.2. 1980s debates consolidating the concept

The presence and importance of soft law in academic spheres were consecrated in the early eighties, through a debate opposing the seminal perspectives of Baxter and Weil. In 1980, Baxter, then Judge at the International Court of Justice, wrote of 'International Law in "Her Infinite Variety"'. There, he argued that within the realm of international law

> 'there are norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between States but do not create enforceable rights and duties. They may be described as "soft" law, as distinguished from the "hard" law consisting of treaty rules which States expect will be carried out and complied with.'[11]

This concretized a shift in the usual meaning of soft law until that point, moving the concept away from *lex ferenda* and applying it to those norms which do not meet the strict requirements for the emergence of 'hard' legal obligations, but which can nonetheless create expectations and influence state behaviour. This 'infinite variety' therefore introduced the idea of varying degrees of 'bindingness' for international

[9] d'Aspremont, "Softness in International Law," 1081. d'Aspremont bases his interpretation on Robert Jennings' account of his years working alongside McNair. Jennings, "An International Lawyer Takes Stock," 516.

[10] In fact, Dupuy placed outside the realm of soft law what he called 'declaratory law': 'certain resolutions of international organisations which formally represent only recommendations, have a content sufficiently precise to express the norm and, from a substantial point of view, constitute obligations'. The concept of soft law was better suited, according to him, to those resolutions 'that can make no such claim'. Dupuy, "Declaratory Law and Programmatory Law," 252. This view is contested and such resolutions are still seen by many as the archetype of soft law.

[11] Baxter, "International Law in 'Her Infinite Variety,'" 549.

norms, in a flexible hierarchy where the ambit and effects of international agreements no longer had to be interpreted through the binary lenses of 'binding/non-binding'.

The meaning of the concept fanned out in two further directions (beyond that of *lex ferenda*), to describe softened links with the legal sphere, either through the soft form of an instrument, or its soft content.[12] Baxter was at the forefront of this way of thinking, but was by no means the only one. In fact, this view was supported by a range of actors who saw in the evolution of the international legal order (including increasing presence of international organisations and the output of their 'quasi-legal activities'[13]) the emergence of new sources of international law with relative normative force. In subsequent years, sometime during the 1980s, it became clear that a 'soft law approach'[14] to international law had crystallized, to account for this variety of 'new sources' beyond the cannon of the traditional sources of international law-making.

Weil's now famous response to this fast-forming approach came in 1982, in the form of his rebuttal of the possibility of 'relative normativity in international law'.[15] He mainly argued that 'the capacity of the international legal order to attain the objectives it was set up for will largely depend on the quality of its constituent norms.'[16] Opening the door to a relative scale of normativity transcending the traditional binding/non-binding divide, he argued, risked 'destabiliz[ing] the whole international normative system and turn it into an instrument that can no longer serve its purpose.'[17] While he did not object

[12] This is what d'Aspremont has dubbed 'soft instrumentum' and 'soft negotium'; see note 37 below. See also section 2, a review of various approaches to defining soft law.

[13] Schachter, "The Quasi-Judicial Role of the Security Council and the General Assembly."

[14] Hoof, "Some Conclusions: The Movement Towards 'Other Sources' and the 'Soft Law' Approach."

[15] Weil, *Vers Une Normativité Relative En Droit International?* This was followed by an English version, published in 1983. See note 16.

[16] Weil, "Towards Relative Normativity in International Law?," 413.

[17] Ibid., 423.

to the fact that various international acts or instruments could feed into the development of international norms, he maintained that this should not be done at the expense of the structural and conceptual integrity of the international legal order. This officially crystallized the debates on the existence and relevance of soft law, which have not been decisively extinguished since.

To this day, the theoretical conflict mostly comes down to whether or not one is ready to acknowledge some form of spectrum view or continuum in international law, going beyond the binding vs. non-binding, or law vs. politics divide. Both perspectives are still present in contemporary scholarship, with opponents to the concept of soft law surfacing periodically.[18] Yet, the exponential rise of the concept of soft law in recent scholarship, as well as its increased relevance in practice, are making it increasingly difficult to refute the concept's very existence.

1.3. Soft law's rise in international affairs

In spite of – or perhaps thanks to – the debates on the possibility of this 'grey zone' of varying normativity at the margins of the international legal order, use of the term 'soft law' in scholarship has grown steadily in the literature from the mid-70s onwards, and exponentially since the 1990s. These tendencies are visible across a wide-range of scholarly materials, books and journal articles combined. For instance, Google Books Ngram Viewer (an exploration of Google Books' English corpora of scanned material from the 1800 onwards)[19] gives a clear perspective on the increase in the frequency of

[18] Amongst the most recent rebuttals of the concept, see Blutman, "In the Trap of a Legal Metaphor"; d'Aspremont, "Softness in International Law." See also section 2.3 below.

[19] This counts close to 2.5 billion digitized pages, contained in 4.5 million volumes. Google Books, "Google Ngram Viewer - Total Counts."

the use of the term soft law over time, here compared with the terms 'public international law' and 'hard law'[20] for scale.[21]

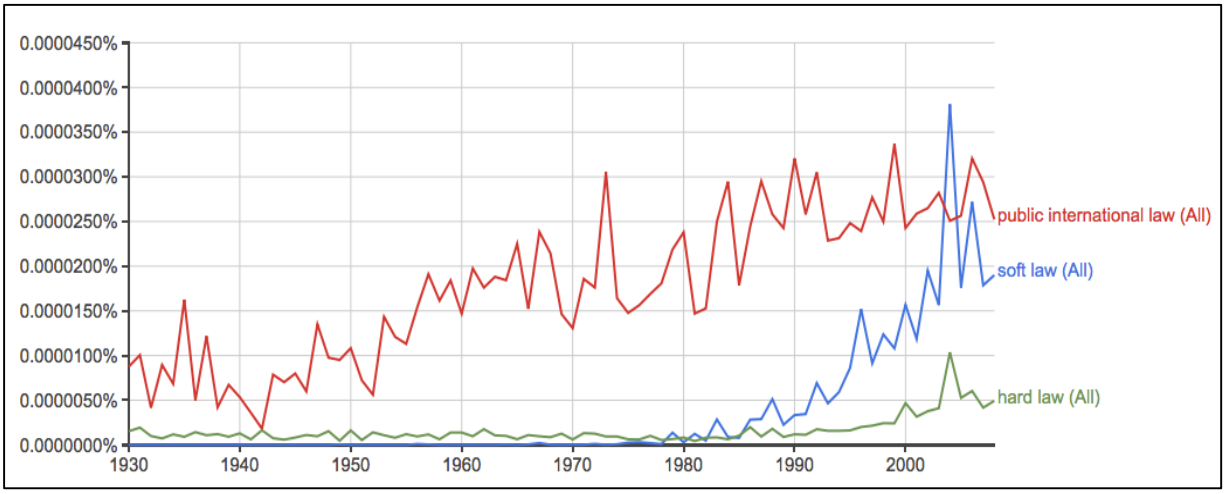

Figure 1.1.Occurences of 'Soft Law', 'Hard Law' and 'Public International Law' in Google Books English Corpora, 1930-2008

This trend pointing to the increasing presence of soft law in books is mirrored in journal publications, as shown using JSTOR's Database for research:[22] soft law's rise (observed by looking at the number of articles each year containing a reference to the term)[23] has followed a very similar pattern over time in scholarly articles.

[20] Interestingly, references to hard law remained somewhat constant until the 1990s, and then followed a much quieter rise than the term 'soft law'. This is likely due to the inclusion in the graph of references to 'hard law' as qualifier to a particular law seen as harsh or restrictive (which explains the presence of regular references to the term prior to the emergence of soft law), and to the fact that 'hard law' in the meaning of interest here (as a contrast to soft law) can also be referred to simply as 'law' or 'existing', 'positive' law (without a need to write of 'hard law' specifically).

[21] Data expresses the frequency of the occurrence of the term "soft law" as a proportion of the entire corpus, between 1930 and 2008 (the latest date for which data is available), in a case-insensitive format (aggregating all forms of capitalization). Google Books, "Google Ngram: Soft Law." The addition 'public international law' offers a general reference point to assess the rise of the frequency of 'soft law' over time.

[22] Data for 1930-2008, to mirror the data available on Google Ngrams (JStor's database for research includes partial data up to 2014). JSTOR, "Data For Research." The JStor database is limited to publications for which it holds archival rights, which nonetheless amounts to over 9 million articles in 3800 publications across all fields.

[23] JSTOR's database for research provides for each year a figure representing the total number of articles containing at least one mention of the term 'soft law' (regardless of the number of times the term appears in it). It is therefore a different measure than Google Ngram's frequency of appearance of the term in the total corpus. Still, we observe that the timeline of soft law's rise is very similar in both datasets, confirming the timing of its rise in the scholarly literature as a whole.

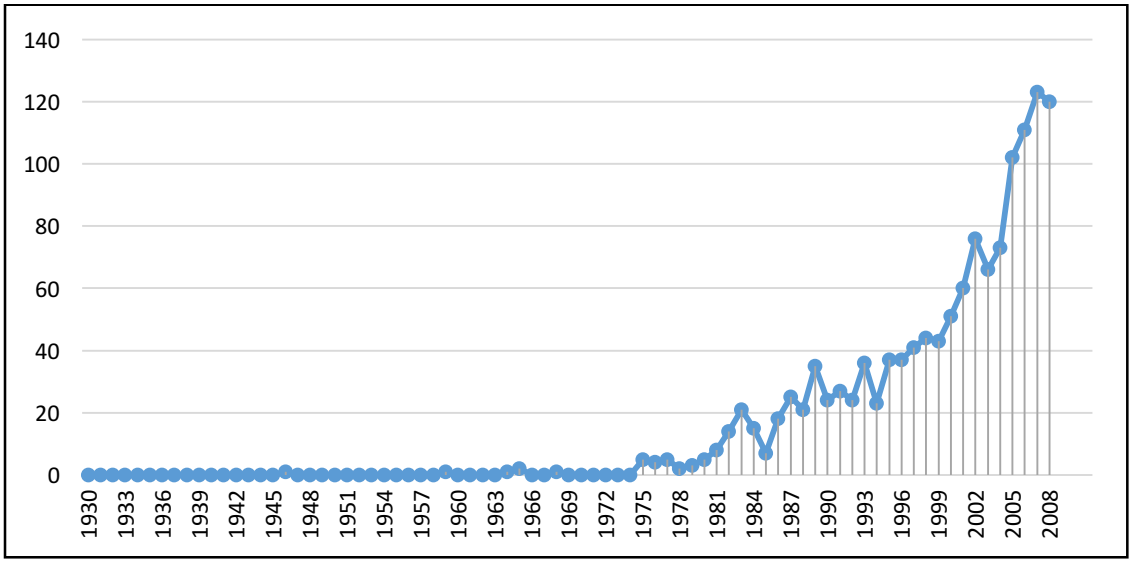

Figure 1.2: Number of articles in the JSTOR archive containing the term 'soft law', per year of publication

This marked rise of the term 'soft law' and of soft law instruments from the mid-1970s onwards is certainly not exclusively attributable to tensions rising in scholarly debates on the topic. It was likely propelled by a conjunction of factors and circumstances in the international community, starting much earlier in the twentieth century. First, soft law's rise is undoubtedly a by-product of the development of international law as a tool of international cooperation following the Second World War[24] and can be linked to the development of a rich body of literature exploring the role and value of new types of instruments in international law-making, especially those created through the activities of international organisations like the United Nations.[25]

As shown in both figures above, the emergence of the term 'soft law' itself in scholarly literature can be specifically traced to the mid-1970s. While it is difficult to ascertain an irrefutable motive for the rise of a term or concept, one likely hypothesis is that the rise

[24] Elias and Lim, "'General Principles of Law', 'Soft' Law and the Identification of International Law," 46. This phenomenon is also partly illustrated by the rising references to 'public international law' from 1945 onwards in figure 1.1, above.

[25] See introduction to Part III for further remarks on the emergence and legal value of UN recommendations and declarations.

of soft law in international affairs is partly linked to the emergence and consolidation of the decolonization and 'Third World' movements at the United Nations. Indeed, as newly-independent countries gained UN membership in the preceding decades, by 1967, new UN members formed a majority of the organisation's membership.[26] As a result, the General Assembly became more active in adopting milestone documents putting forward a new vision for international relations between states, adopting (through simple majority votes) resolutions questioning some foundational norms of international law at the time, especially with regards to social, economic and redistributive issues. This may have sparked academic interest on the value and effects of such resolutions, partly through a soft law framework. This is illustrated by the fact that some of the earliest mentions of the term 'soft law' in the literature are tied to case studies looking specifically at UNGA resolutions on economic and social matters or at a redefinition of relations with newly-independent states.[27]

Chinkin points out that 'soft law instruments gained momentum within a very short time after the finalizing of the Vienna Convention, which hardened the rules governing treaties', suggesting that it may be another contributing factor to soft law's rise.[28] From the mid-1990s onwards, the EU consolidated the presence of soft law in the literature, as the term is often used to refer to non-binding instruments which constitute one of its agreed modes of governance, and one which is periodically privileged over binding directives in certain fields.[29]

[26] At its inception in 1945, the UN counted 51 members. Over the following 5 years, 9 more members joined, for a total of 60 in 1950. This figure had doubled by 1967, with a total of 123 member states. UN membership has reached 193 in 2011. United Nations, "Growth in United Nations Membership, 1945-Present."

[27] See e.g. Dupuy, "Declaratory Law and Programmatory Law," 247–48; Röling et al., *Declarations on Principles*; Hoof, *Rethinking the Sources of International Law*, 186.

[28] Chinkin, "The Challenge of Soft Law," 860.

[29] Eurofound, "Soft Law."

While still a debated notion at times, soft law is now omnipresent in the fields of IR and IL, and feeds into an imposing body of scholarship. There remains, however, one main challenge raised by the concept, namely the diversity of ways in which the term is used to describe different phenomena in international law-making. This can indeed complicate definitional efforts and introduce a certain degree of complexity in the understanding of soft law's origins and effects. Still, rather than taking this challenge as a rallying call for the abandonment of the term as some international legal scholars have done,[30] I argue that this calls for a thorough examination, clarification and systematization of the different meanings of the term in existing literature. Once we take stock of the different approaches to defining soft law and the main criteria upon which these are based, it becomes possible to isolate a particular type of soft law, in order to pursue further enquiries on the impact it may have on the theory and practice of international relations. As Fajardo states, in accordance with records on the use of the term over the last four decades, 'in spite of its critics, soft law is here to stay'.[31] Thus, what matters the most once one is ready to explore this grey zone in the international legal order is to distinguish clearly between the various meanings of the term 'soft law'.

2. A TYPOLOGY OF SOFT LAW: SOFT LAW AS PROVISION, INSTRUMENT OR NORM

Throughout its various meanings, the concept of soft law conveys the idea of particular links between norms that may not conform to the traditional sources of international law-making, and the workings of international (or domestic) legal orders. In doing so, it draws onto the specific dynamics of the legal sphere, going beyond the confines of the

[30] See sections 2.3 and 2.5 below

[31] Fajardo, "Soft Law."

political realm.[32] Still, the concept of soft law implies a certain degree of flexibility, of looser ties with the requirements of international legal obligations. Depending on which angle we focus on to account for this flexibility or links with the international legal order, soft law will be used to define quite different phenomena. As noted above, this does not render the term irrelevant; it simply calls for a clear differentiation between these different meanings, so that the concept can claim its highest possible analytical power in different contexts.

By looking through existing definitions and approaches to conceptualizing soft law (in both IR and IL scholarship), I argue that they can be grouped into three categories: (2.1) soft law as vague or unenforceable provision, (2.2) soft law as non-binding instrument, or (2.3) soft law as any norm short of hard law. Some scholars' definition(s) will be cast neatly within a single approach, while others will combine them (2.4). Each of these approaches will be examined in turn below.

2.1. Soft Law as Provision

First, the term soft law is used to describe written provisions,[33] within a broader instrument, which are too vague to be readily enforceable. This diminishes the value of the legal obligation it imposes on the parties to the instrument, warranting the use of the qualifier 'soft'. For Gruchalla-Wesierski[34] and Chinkin,[35] these vague or unenforceable

[32] For an exploration of the legal effects of soft law, see Chapter 4.

[33] The term 'provision' is defined here as referring to any individual clause or article contained in a contract or other legal instrument (in this case international treaties). Merriam-Webster Dictionary, "'Provision' - Legal Definition."

[34] Gruchalla-Wesierski, "A Framework for Understanding Soft Law," 44.

[35] Chinkin, "The Challenge of Soft Law," 851. (quoting Gruchalla-Wesierski, "A Framework for Understanding Soft Law," 44.)

provisions in otherwise binding instruments constitute 'legal soft law'.[36] Blutman[37] takes note of a similar view in the literature: soft law norms adopted according to the formal requirements for a legal source of international law, but which 'are not enforceable owing to their generality, vague normative content or subjective nature.'[38] This echoes reflections made by Boyle, for whom 'soft law is law that is not readily enforceable through binding dispute resolution'.[39] In sum, from this perspective, the legal value of an instrument is not determinant for the qualification as 'soft law'. Individual provisions may be given this label even if they are included in an otherwise legally-binding instrument, if they are vague, general or too imprecise to dictate a clear line of conduct for states to implement and enforce.[40]

2.2. Soft Law as Instrument

The second approach to conceptualizing soft law refers to instruments[41] that are adopted in a non-binding form. The parties creating them proceed through a formal, written form, yet agree that the outcome is not meant to be legally-binding. In that perspective, this is enough to warrant a qualification as soft law. Weiss defines soft law as 'non-binding

[36] As opposed to non-legal soft law, i.e. provisions in soft law instruments that are not legally binding (what is covered under the second approach to soft law: soft law as non-binding instruments).

[37] Blutman himself is not convinced by the relevance of the term, but is making a commendable effort at delivering a review of existing definitions, covering categories 1 and 2. Blutman, "In the Trap of a Legal Metaphor," 606. d'Aspremont also counts amongst detractors of the term who nonetheless produce an interesting review of its potential definitions. In his perspective, soft law is said to emerge either through a 'soft instrumentum' or 'soft negotium' i.e. the softening of the instrument of an agreement, or that of its content. The latter fits with the 'soft law as provision' approach. d'Aspremont, "Softness in International Law," 1084.

[38] Blutman, "In the Trap of a Legal Metaphor," 606.

[39] Boyle, "Some Reflections on the Relationship of Treaties and Soft Law," 901. This is one of three definitions of soft law he suggests, the others being: 'soft law is non-binding' (fits with approaches 2 and 3) and 'soft law consists of general norms or principles, not rules' (found in the third approach).

[40] The legalization approach, explored further below (2.4), also makes this distinction.

[41] The legal definition of 'instrument' is 'formal legal document', which I extend to include both binding and non-binding written international documents adopted by a group of states or other actors. Merriam-Webster Dictionary, "'Instrument' - Definition." See section 3.1 below.

instruments'[42] which do 'not purport to be binding and could not qualify as binding under the rules of international law, including both the Vienna Convention on the Law of Treaties and the rules of customary international law.'[43] This element of reference to the formal traditional requirements of international law-making is also reflected in definitions by Thürer[44] and Shelton.[45] D'Aspremont, coming otherwise from a highly skeptical position, reports possible definitions of soft law premised on a '*soft instrumentum*', which refers to 'the choice made by the legal subjects of an instrument which lies outside the realm of law'.[46] Posner and Gersen establish a similar definition, applicable in the broader context of both international and domestic jurisdictions, in which 'soft law consists of rules issued by law-making bodies that do not comply with procedural formalities necessary to give the rules legal status.'[47] The treatment of soft law as non-binding instruments is central to this project and will be further explored in section 3 as a more specific definition is elaborated.

2.3. Soft Law as any norm short of hard law

The third approach to defining soft law does not draw clear boundaries for the term, and rather posits that all norms are potential candidates to qualify as soft law. In fact, from this angle, soft law can include any norm that falls short of a fully binding obligation, but which may be in the process of becoming one. Cerone, for instance, considers that

[42] Weiss, *International Compliance with Nonbinding Accords*, 1.

[43] Ibid., 4.

[44] Thürer, "Soft Law," para. 5.

[45] Shelton, "Compliance with International Human Rights Soft Law," 3.

[46] d'Aspremont, "Softness in International Law," 1083.

[47] Posner and Gersen, "Soft Law," 573. This shows some similarity with Pauwellyn *et al.*'s project on 'informal law-making', defined 'in contrast and opposition to 'traditional' international lawmaking […] in the sense that it dispenses with certain formalities traditionally linked to international law' in terms of process followed, actors involved, and output produced. Berman et al., *Informal International Lawmaking: Case Studies*, 3. While the concept of informal law is at times used interchangeably with soft law in the project's publications, informal law is meant to reflect a broader perspective than solely soft law as outputs.

every norm, rule, or standard has the potential to constitute soft law (irrespective of its source, support, scope, or subject-matter).[48] As such, it is a perspective that maintains some ties with McNair and Dupuy's original conception of the term as close to the concept of *lex ferenda*.[49] Soft law's impact on further normative developments or on actors' behaviour is then a function of a particular norm gaining momentum or traction at a given point in time.[50] The idea that soft normative statements have the potential to become law on the basis of a behavioural criterion (i.e. when they are respected and have effects) is another variant of this approach.[51]

Some formulate a similar idea while trying to be somewhat more restrictive in terms of how wide they cast the net, by expressing the necessity for such norms to entertain certain links with the legal realm. Blutman thus reports on soft law 'as norms which do not appear in the form of a legal source recognized by international law, but are of some legal relevance'.[52] Similarly, Thürer presents it as 'a complex of norms lacking binding force, but producing significant legal effects nevertheless.'[53] This point on the effects of soft law will be addressed in Chapter 4, as the possibility for soft law to have legal effects is central to its role and to the challenges it raises for state commitment. This may describe soft law's role, but it does not contribute much to the efforts to *define* soft law

[48] 'The definition refers to the rules themselves, and not the instruments in which they may be found', while 'the term soft law is understood to refer to rules … that are in the process of becoming, though may not ultimately become, binding rules of international law in the form of any of the established sources of international law'. Cerone, "A Taxonomy of Soft Law," 18.

[49] Ibid., 18–20.

[50] As Cerone puts it, 'a normative statement will be considered a rule of soft law only if it acquires a degree of traction', which 'must come in the form of acceptance by the authors of international law – states.' Ibid., 21.

[51] Alvarez puts forwards the concept of 'normative ripples', from international organisations' internal law towards external effects. Alvarez, *International Organizations as Law-Makers*, 109. also in Klabbers, *International Law*, 38.

[52] Blutman, "In the Trap of a Legal Metaphor," 606. This is the second component of his review of soft law in the literature, a concept he otherwise argues against.

[53] Thürer, "Soft Law," para. 37.

and distinguish it from other types of norms,[54] hence their placement under the third approach, i.e. soft law as all provisions short of hard law.

By extension, this third category also covers approaches claiming that soft law does not exist or that it is not relevant as an analytical concept, considering that it does not refer to a distinct category of norms. Such approaches are defended mostly by those who are reluctant to move beyond the binary divide between law and non-law.[55] Two different positions can motivate this stance. On the one hand, positivist lawyers advocate in favour of defending the exclusive place of hard law in the legal realm, and relegate instances of 'soft law' to mere politics. Weil is the leading figure of this position, arguing that the international legal order would only be able to achieve its goals if it could rely on adequate constituent norms adopted in binding form, according to the requirement of traditional sources of international law.[56] Doing otherwise and recognizing a relative 'scale of normativity' would only be accomplished 'at the cost of denying the specific nature of the legal phenomenon.'[57] D'Aspremont follows a similar line of analysis and claims it is a misguided attempt on the part of international lawyers to extend the boundaries of their field.[58]

On the other hand, scholars like Klabbers claim that commitments identified as soft law are already well accommodated within the realm of law so they do not warrant this additional categorization, therefore making the term redundant.[59] He also opposes the

[54] Considering that all norms could potentially have legal effects (which is part of Klabbers' rationale for deeming the term redundant – see next page).

[55] Including d'Aspremont, "Softness in International Law"; Blutman, "In the Trap of a Legal Metaphor"; Klabbers, "The Redundancy of Soft Law"; Raustiala, "Form and Substance in International Agreements"; Weil, "Towards Relative Normativity in International Law?"

[56] Weil, "Towards Relative Normativity in International Law?," 413. See section 1.2 above.

[57] Ibid., 417.

[58] d'Aspremont, "Softness in International Law."

[59] Klabbers, "The Redundancy of Soft Law."

idea of relative normativity, but from the opposite angle: Klabbers suggests that all international commitments should be presumed equally binding, until it may be proven otherwise.[60] Indeed, the term soft law is considered 'misleading and unhelpful', since commitments at times identified as soft law are still law and should not be ascribed varying degrees of bindingness.[61] Yet, it appears that deniers of the usefulness or meaningfulness of the term do so in part because they consider the concept in its broadest meaning, referring to every norm short of binding international law.

As such, scholars like Blutman will consider the term 'meaningless', as 'the phenomenon behind it is nonetheless heterogeneous, and thus it can hardly be suitable for carrying out its denotative functions.'[62] Rather than taking this as a proper reason to eliminate the term, I consider that it only highlights the necessity for scholars of soft law to explicitly disentangle the different possible definitions of the term, and be clear about what it refers to in international life. It may well be that soft law as defined by the third approach, soft law as any norm short of hard law, is not analytically useful or efficient, especially since it overlaps with broader conceptions of merely social norms. But I do believe the concept of soft law carries a useful analytical weight when focusing on the first and second approaches: soft law as provision and soft law as non-binding instrument.

2.4. Combination of approaches

[60] Klabbers, *International Law*, 39.

[61] Ibid., 38. He even makes the point against varying levels of bindingness, noting: 'as if a treaty, properly concluded between state representatives, were more binding than, say, standards developed by the Basel Committee'. I consider that there are reasons that justify such distinction, including the desire of state parties to adopt instruments in various forms. See Abbott and Snidal, "Hard and Soft Law in International Governance"; Koremenos, Lipson, and Snidal, "The Rational Design of International Institutions"; Lipson, "Why Are Some International Agreements Informal?"; Guzman, *How International Law Works*.)

[62] Blutman, "In the Trap of a Legal Metaphor," 610.

To complete this overview, it is worth pointing out that some scholars present the term in ways that combine the three different approaches to defining soft law. Guzman and Meyer belong to this group, as they include in their definition soft law as norm, provision and instrument, covering written and unwritten rules and norms at once. In their view, soft law refers to 'nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct.'[63] Gruchalla-Wesierski's approach (mirrored by Chinkin)[64] is also quite broad. It includes both legal and non-legal norms, making space for instruments adopted in a non-binding form as well as vague legal norms under the soft law umbrella. He admits that within this approach, 'the characteristics of soft law may not distinguish a soft law norm from every other norm in international relations', but considers that they may yet 'describe what various instances of soft law have in common' and therefore contribute to a working definition.[65]

Finally, this overview of definitions would not be complete without surveying one of the prominent approaches to the study of soft law: the legalization approach.[66] Developed by a group of scholars in a special issue of *International Organisation,* it combines all three approaches to defining soft law, yet with a distinct way of establishing such categorizations. In fact, the concept of legalization refers to a particular form of

[63] In this context, 'rules' can be broadly interpreted to include both provisions in a written instrument and broader norms without necessarily a written support. Guzman and Meyer, "International Soft Law," 174.

[64] Chinkin aligns with Gruchalla-Wesierski, with a small caveat as she merges approaches one and two (soft law as instrument and as provision). A treaty which would include *only* vague and unenforceable provisions 'soft obligations', would be considered 'legal soft-law'. This possibility is unlikely in practice. Chinkin, "The Challenge of Soft Law."

[65] Gruchalla-Wesierski, "A Framework for Understanding Soft Law," 44. His definition (focused on economic soft law) is: 'legal or non-legal obligations which create the expectation that they will be used to avoid or resolve disputes. They are not subject to effective third party interpretation, and their subject matter and formation are international in nature'. Ibid.

[66] Goldstein, *Legalization and World Politics*.

institutionalization in international politics, relying (to different degrees) on the use of legal forms to impose constraints on governments in various issue-areas. It apprehends different instruments or institutional forms in the international order by referring to the characteristics that an institution possesses or not, along three particular dimensions: obligation, precision and delegation.[67] All of these dimensions are conceived as continuums, not binary choices, and their position on the spectrum (from low to high) may vary independently from one another.[68]

The multiple combinations of these three dimensions account for a myriad of institutional forms, which can be grouped in broad (and non-hermetic) categories. There emerge, between the two ideal-types of complete legalization and total absence thereof, the categories of hard and soft law.[69] The concept of legalization can apply to soft instruments as a whole, vague or unenforceable provisions within an otherwise hard, legally binding document, or to norms generally; soft law is presented by Abbott as both 'norms that are not legally binding, or that are formally binding but provide opportunities to escape normative strictures or interpret them to one's liking'.[70] This concept (especially in its continuum dimension) is then used to look into preferences in

[67] Obligation (O), as defined by Abbott et al., refers to actors being bound by a given rule or commitment, leading to their behaviour being subject to scrutiny under international law (and, in some cases, also under domestic law). Precision (P) refers to the rules defining with great detail, thus without ambiguity, the behaviour required, authorized or proscribed by a particular arrangement. Delegation (D) refers to the degree to which the authority to implement, interpret and apply rules, along with authority to adjudicate disputes and creating subsidiary rules, is granted to a third party. Abbott et al., "The Concept of Legalization," 401.

[68] Ibid.

[69] In this framework, hard law includes all 'legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law'. Abbott and Snidal, "Hard and Soft Law in International Governance," 421. Soft law emerges in relation to hard law, as soon as an instrument is weakened in one or more of the Obligation, Precision and Delegation dimensions. Abbott et al., "The Concept of Legalization," 422.

[70] Abbott, "Enriching Rational Choice Institutionalism for the Study of International Law," 26.

institutional design, covering behaviour regarding both creation and commitment.[71] As such, I will be returning to it as a starting point for the next chapter, to address challenges of state commitment to soft law.

2.5. In (final) defense of the concept of soft law

In the light of this variety of possible approaches used to define the concept of soft law, it is understandable that some scholars conclude that it is too confusing to be analytically helpful, think of it as a 'misnomer',[72] or argue it should be abandoned altogether. Yet, as covered above, it is far from an ephemeral term and its use in practice is now consecrated. Shying away from addressing it theoretically should not be an option only because it is a complex operation to do so. I consider that the proliferation of the term in scholarly literature and, more importantly, references to its use in practice rather call for an in-depth examination of its multiple dimensions to clarify their meaning and examine the ways in which they might affect states' and other actors' behaviour in the international community.

As presented above, I classify existing definitions of soft law according to the approaches taken by various authors and the type of soft law they described: soft law as provision, soft law as instrument, or soft law as any norm short of hard law. While the third approach – soft law as any norm short of hard law – is, indeed, quite vague and misleading in that it does not necessarily allow for the drawing of boundaries to the

[71] Abbott et al., "The Concept of Legalization"; Abbott and Snidal, "Hard and Soft Law in International Governance"; Abbott and Snidal, "Pathways to International Cooperation."

[72] Dinah Shelton for instance, in a paper titled 'Soft Law', claims that 'it is a misnomer to refer to non-binding instruments as "law," soft or hard'. Yet, she points out that 'many scholars commonly do so and, for reasons of convenience and simplicity, the term is used [t]herein as a synonym for normative statements contained in instruments that are not legally-binding.' It appears somewhat odd to keep using the term for the sake of convenience and simplicity (which denotes a widely shared understanding of the term and its use), and yet declare it a misnomer. Shelton, "Soft Law."

realm of soft law, the first and second approach clearly refer to particular observable instances of a certain type of provision or instrument in international law-making. They are therefore perfectly well suited to study further the development of the international legal order and challenges of contemporary international law-making, looking at how states and other actors behave towards their creation, elaboration, adoption and implementation.

More specifically, since my primary goal is to explore challenges of state commitment to soft law, this project will focus on the only approach for which it is possible to isolate decision-making on commitment to soft law specifically: soft law as instruments. Additionally, since the form of soft law instruments approximates that of traditional international legal instruments (in hard forms),[73] focusing on soft law instruments allows us to uncover the nature of commitment to soft law and the challenges involved in terms of attempting to establish their political and legal value, both at the time of adoption and beyond. The concept of soft law, once properly defined, is highly relevant to contemporary international relations and international law theory and practice.

3. DEFINITION: SOFT LAW AS NON-BINDING INSTRUMENT

The concept of soft law, even when approached restrictively as 'instruments', deserves a more elaborate treatment to be sufficiently precise analytically to serve as working definition. In this project, soft law is defined as referring to *(3.1) international instruments* that are *(3.2) non-binding (3.3) at the time of adoption*. The three core components will now be examined in greater depth. This will be followed by an enquiry

[73] See section 3.1 below.

into the distinctiveness of soft law (3.4), from the angles of the expectations it creates for future behaviour and the possibility for it to carry legal effects.

3.1. International instruments

First, the area of interest of this project is the international legal order. The focus is thus on *international* instruments, notwithstanding instances of 'soft' legal developments in domestic systems.[74] This definition of soft law then refers to a written document, with formal attributes and a distinct adoption process, hence the use of the word 'instrument'.[75] This can refer, for example, to United Nations General Assembly resolutions. Such instruments have an identifiable formal support and come into being through a vote of the Assembly's members, as provided for by the Organisation's Charter and the General Assembly's rules of procedure.[76]

Instruments can equally be created outside of permanent organisational structures. This covers, for instance, formal declarations adopted at the conclusion of international conferences (spearheaded or not by international organisations), such as the Helsinki Final Act,[77] the Vienna Declaration and Program of Action,[78] or the Rio Declaration on Environment and Development.[79] Soft law instruments can also arise from standard-setting bodies or *ad hoc* committees. Such is the case for the Basel Accords, elaborated

[74] See e.g. on Congressional soft law, Posner and Gersen, "Soft Law." On soft law in the European Community, European Union and member states, see e.g. Falkner, *Complying with Europe*; Senden, *Soft Law in European Community Law*. It should be noted that the rest of the definition is likely to be applicable to soft law in a domestic context, but that it simply stands outside the scope of this project.

[75] An instrument is commonly defined as 'a tool or device used for a particular purpose'. In its legal definition, it refers to a 'formal legal document'. Merriam-Webster Dictionary, "'Instrument' - Definition."

[76] UN General Assembly, "General Assembly of the United Nations Rules of Procedures."

[77] Organisation for Security and Co-operation in Europe (OSCE), "Helsinki Final Act."

[78] UN General Assembly, Vienna Declaration and Programme of Action.

[79] UN General Assembly, Rio Declaration on Environment and Development.

and adopted by the Basel Committee on Banking Supervision.[80] In all the cases above, soft law instruments are adopted in written form, on a given support, following the internal adoption procedure of an identifiable body.[81] This confers to soft law instruments their formal existence, and characteristics similar to hard law instruments (written content, identifiable parties), in spite of their non-binding status.

This view is shared with some scholars of soft law, who first and foremost identify the concept as a category of written instruments. For Weiss, soft law refers to 'non-binding instruments'.[82] Shelton also focuses on a document adopted by identifiable parties in what she defines 'primary soft law': 'normative texts, not adopted in treaty form, addressed to the international community as a whole or to the entire membership of the adopting institution or organisation'.[83]

One further element implied in this definition is that soft law is not necessarily created by states. It can originate in state actions, but also through initiatives of intergovernmental organisations or other non-state actors (NGOs, private actors, etc.). This view is coherent with this project's conception of soft law as covering relevant phenomena in the international legal order going beyond traditional/hard sources of international law.[84] It is also consistent with the approach taken by other studies of soft law, including Shelton's 'Commitment and Compliance' project.[85]

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[80] Basel Committee on Banking Supervision, "International Convergence of Capital Measurement and Capital Standards (Basel II)"; Basel Committee on Banking Supervision, "International Regulatory Framework for Banks (Basel III)."

[81] Conference outcome documents would also qualify, albeit to a lesser degree of formalization (since they do not emanate from a permanent body, but still from an identifiable one).

[82] Weiss, *International Compliance with Nonbinding Accords*, 1.

[83] Shelton, "Compliance with International Human Rights Soft Law," 120.

[84] The empirical focus in this project remains predominantly on state behaviour, considering states are still the primary actors in international law-making.

[85] Shelton, *Commitment and Compliance*. See also, Weiss, *International Compliance with Nonbinding Accords*; Shelton, "Compliance with International Human Rights Soft Law.")

3.2. Non-binding

The second component of my definition insists on soft law's non-binding character, at least at the time of adoption. The non-binding character of an instrument means that, unlike hard law, it does not create legally binding obligations for its parties.[86] This does not mean that it is deprived of all possible legal force (as will be explored in the following section), but rather that it does not carry the power of hard legal obligations, does not engage legal responsibility in the same way,[87] and cannot directly give rise to legal claims/legal remedies in the case of non-compliance.[88] The non-binding component of the definition is tied to the previous point on soft law as 'written instrument'. Indeed, most scholars will link both. The non-binding status is often presented as a function of the formal component and adoption procedure: an instrument which does not follow the requirements of the adoption as a formal source of international law will be considered non-binding, and fall in the realm of soft law.

Defining soft law as non-binding (with or without the requirement of a written support) is in accordance with multiple definitions in the literature, including those of Boyle, Weiss and Chinkin.[89] Some limit their definitions to this criterion, however, which diminishes their operational relevance; as surveyed in approaches to soft law as any

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Some prefer restricting soft law-making powers to law-making authorities (e.g. Posner and Gersen, "Soft Law.") to have a clearer definition of soft law. This may be an appropriate strategy for the operationalization of the concept for particular purposes, but not well suited to capture the phenomenon in its entirety.

[86] (and the said parties intend for it to be that way)

[87] Schachter, "The Twilight Existence of Nonbinding International Agreements," 5. As suggested by Schachter, however, this may be more of an empirical observation than an analytical proposition about the nature of soft law.

[88] Consequences for violations will usually not be established in the same way, in part since soft law will not be incorporated into domestic law or open the same channels for domestic remedies in case of violations as hard law would. Abbott and Snidal, "Hard and Soft Law in International Governance," 43–45. See Chapter 3 (comparing hard and soft law) and Chapter 4 (on the effects of soft law, from a legal perspective).

[89] Boyle, "Some Reflections on the Relationship of Treaties and Soft Law," 901; Weiss, *International Compliance with Nonbinding Accords*, 1; Chinkin, "The Challenge of Soft Law."

norm short of hard law, it makes it harder to distinguish soft law from other social norms or political arrangements. Most will also consider the non-binding status as static, which is too limiting and not reflecting the actual creation and evolution of international legal obligations.[90]

3.3. At the time of adoption

This definition also includes a temporal element, as it points out that soft law instruments are non-binding, specifically at the stage of adoption. This is an important distinction to underline, since this project is based on the premise of the possibility of an ulterior change of legal status for soft law or of different legal effects arising from it, beyond the adoption stage. It admits the possibility that an instrument adopted in a soft form, or provisions within it, might harden over time, potentially even to the point of morphing into/creating legally-binding obligations.[91]

This fluidity is essential, I argue, to understand the creation and evolution of international obligations in the international legal order, and the particular challenges of decision-making on commitment to soft law. While it is not restricted to the realm of soft law (since the status of hard legal obligations – especially those of a non-conventional type [92] – can also evolve over time), it raises a particular set of challenges for soft law, where the possibilities or pathways through which legal status can evolve

[90] More on this in Chapter 4, on the pathways from soft law to 'harder' international obligations.

[91] This may happen without a renewal of state consent to be bound; i.e. additional legal effects may arise from an instrument later, without its initial parties' expressing their will to be bound by those new effects. Their initial expression of consent to the instrument in its non-binding form may be extrapolated as new effects are recognized in the interpretation of the initial instrument. See Chapter 4.

[92] As in not treaty based; customary norms or general principles.

have their distinctive features impacting state behaviour towards that form of legalization.[93]

Some scholars have acknowledged this fluidity in terms of soft law's legal status. Weiss, for instance, is open to the possibility that 'the status of a particular instrument may change over time': informal norms may be turned into soft law, and soft law may lead to binding agreements.[94] This possibility is acknowledged, but not made central to the definition.[95]

One exception on the importance of this fluidity in existing scholarship is found in the legalization approach, which insists on the fact that the boundaries between categories of hard and soft law are not fixed. It allows for the categorization of one instrument or provision to change as its attribute changes (along the obligation, precision, delegation axes) over time.[96] The legalization approach has therefore influenced this project's definition of soft law, especially in the addition of a temporal qualification ('at the time of adoption') to its non-binding status. Yet, there are limits to the commonalities between the two. The main difference is that the legalization approach sees this fluidity and possibility of change of soft law's attributes through institutional design revisions (or through third-party action if the initial parties to the agreement have included such high level of delegation), while international legal obligations may arise in a way that challenges such state agency and consent.[97] This will be further explored in the next

[93] See Chapter 4.

[94] Weiss, *International Compliance with Nonbinding Accords*, 5.

[95] Ibid., 3–5. Idem for Shelton, who suggests that soft law provisions may 'harden' over time, without having that included in her definition of soft law as 'any written international instrument, other than a treaty'. Shelton, "Soft Law," 1–3.

[96] On the variability of legalization, see Abbott et al., "The Concept of Legalization," 405.

[97] See note 91 above, and Chapters 3 and 4.

chapter, as the legalization approach will be my starting point to look at state behaviour towards soft law instruments.

3.4. Soft law's distinctiveness: Expectations and effects

In sum, soft law creates particular expectations for behaviour (especially when focusing on soft law instruments, since they rely on identifiable parties and formal support). There is also a possibility for it to have (to different extents) significant legal effects. These two last components are at times included in definitions of soft law. I posit, rather, that they are parts of a description of what soft law's role can be, but do not intrinsically constitute it or define it (since different soft law instruments will exhibit these characteristics to different degrees). Still, it is worth exploring these two dimensions to complete this literature review of the concept soft law and its relevance.

First, considering its relation to the legal sphere, some prefer defining soft law insisting on the fact that it creates particular expectations for future conduct. It does so by creating reasonable expectations of behaviour in themselves or by informing the understanding of binding international obligations and related standards of compliance.[98] For Guzman and Meyer, soft law thus refers to 'nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct'[99] Since it shapes a state's expectations about what

[98] These two dimensions are mentioned by Blutman as the results of arguments based on functionality or proximity with the realm of international law. Blutman, "In the Trap of a Legal Metaphor," 605. For Shelton, soft law 'usually refers to any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behaviour'. The point of it is thus to lay out expectations of behaviour. Shelton, "Soft Law," 3.

[99] Guzman and Meyer, "International Soft Law," 174. See also Posner and Gersen, "Soft Law," 573.: 'Soft law consist of rules issued by law-making bodies that do not comply with procedural formalities necessary to give the rules legal status yet nonetheless may influence the behaviour of other law-making bodies and of the public.'

constitutes compliant behaviour, it is likely to affect a state's behaviour itself.[100] Weiss attributes this partly to the fact that the instrument will usually have 'legitimacy in the international community' and that it conveys a 'common intent or element of commitment […] usually flowing from the process by which the instrument is promulgated'.[101]

Soft law will thus create particular expectations regarding the future behaviour of its parties (minimally)[102]. It does so partly because of its links with hard law: soft law qualifying or complementing a hard law instrument can inform our interpretation of binding norms in the international legal order, in ways that can orient behaviour. Expectations might also arise from the application of general principles of international law regarding unilateral acts made by an actor in the international legal order (e.g. estoppel[103], good faith[104]). As Weiss states, conduct that respects the content of the instrument cannot be deemed invalid.[105] In this way, soft law can define spaces of acceptability/permissibility for a state's course of action, or legitimize it in ways that resemble the impact of commitment to a harder instrument (even if sanctions or remedies in case of non-compliance are not the same).[106]

Second, by establishing such expectations, soft law can produce legal effects. Various legal effects, direct or indirect, can arise as soft law performs different functions in the international legal order. These functions, as well as their possible effects, will be

[100] Guzman and Meyer, "International Soft Law," 174.

[101] Weiss, *International Compliance with Nonbinding Accords*, 4.

[102] It is not impossible for it to have an impact on third parties as well.

[103] MacGibbon, "Estoppel in International Law"; Gruchalla-Wesierski, "A Framework for Understanding Soft Law," 62–63.

[104] Gruchalla-Wesierski, "A Framework for Understanding Soft Law," 62.

[105] Weiss, *International Compliance with Nonbinding Accords*, 4.

[106] Issues may arise, however, if the content of a soft law norm conflicts with existing binding norms.

explored in Chapters 4. Some definitions of soft law raise the expectation of legal effects as a constitutive dimension of the concept's definition. In this sense, Thürer points to soft law's 'special legal relevance'[107] in spite of a non-binding status, and to the fact that it is, 'despite its legally noncommittal quality […], characterized by a certain proximity to the law, and above all by its capacity to produce certain legal effects'.[108] It contributes to distinguish the realm of soft law in those scholars' view and position it above mere political arrangements in the international legal order, closer to the realm of hard law, in spite of its non-binding status.

The possibility to carry legal effects is undoubtedly an important attribute of soft law. Nonetheless, I consider that it does not come from the status of soft law *per se*; legal effects will arise depending on the use of the instruments by various actors and particular circumstances, for which the qualification as soft law is not necessarily essential. Therefore, it is relevant to keep this possibility in mind, but not essential to include it in our definition of soft law as international instruments adopted in a non-binding form.

4. CONCLUSION

In conclusion, this chapter has established the relevance of the concept of 'soft law' in international affairs. It explored its different definitions in existing literature, and settled on 'soft law as international instruments adopted in a non-binding form' as the most appropriate one for the study of state commitment.

[107] This characteristic of soft law as having 'some legal relevance' is also mentioned by Blutman, "In the Trap of a Legal Metaphor," 606.
[108] Thürer, "Soft Law," para. 9.

Soft law as a concept has been on the rise across IR and IL literature since the late-1970s, early 1980s, but its multifaceted character makes it confusing to grasp. As I have shown in this chapter, definitions of soft law can be grouped into three approaches, whether they define soft law as (1) a vague or general provision (often in an otherwise binding instrument), (2) a non-binding instrument, or (3) as any norm short of hard law. While I concur with some of soft law's detractors in concluding that the third approach is too vague to draw the boundaries of the realm of soft law and have clear analytical value in international relations, I argue that defining soft law as provision and soft law as instrument can form the basis of workable definitions of the concept providing clearly identifiable instances of it in international affairs. When aiming to evaluate state behaviour towards soft law in practice, I have established that it is essential to focus on soft law instruments, the only standalone form of soft law. It opens worthwhile paths for enquiry as it makes it possible to isolate state behaviour towards international soft law, from decision-making to negotiation, adoption and implementation. Focusing on soft law instruments is therefore the best approach to study the functions and effects of soft law, as well as its influence on states' and other actors' behaviour in international law-making.

Finally, the last section of this chapter laid out my own definition of soft law as instrument, namely positing it as an 'international instrument which is non-binding at the time of adoption'. This is linked to existing definitions focusing on the written and non-binding character of 'soft law as instruments', with the addition of a crucial temporal marker to open up to a potential change in status or effects over time. This definition sets the scene for the exploration of the effects of soft law and decision-making towards soft law instruments in Part II of this thesis. Prior to that, in Chapter 3, I will complete this review of existing scholarship by turning to literature on state

commitment to international instruments, hard and soft, from an IR rationalist perspective.

Chapter 3

STATE COMMITMENT TO HARD AND SOFT LAW

The goal of this thesis is to elucidate how states make decisions on commitment to soft law. In Chapter 2, I presented a literature review focused on the concept of soft law and its definition, establishing a working definition of soft law as referring to instruments adopted in a non-binding form. This chapter constitutes the second part of this literature review, this time focusing on the concept of commitment. In this project, commitment is used as a generic term for the act through which a state publicly signals that it is joining or adopting an international instrument (regardless of the specific procedure followed, as it may vary between instruments: e.g. a vote in favour of adoption, a unilateral declaration, treaty ratification).

In this chapter, I provide an overview of international relations scholarship on commitment to international instruments, focusing on the different costs/benefits involved from a rationalist approach. Section 1 surveys the different types of costs and benefits involved in commitment to an international instrument in general. I group them in three categories: material, reputational and sovereignty costs and benefits. Section 2 focuses on the cost-benefit trade-offs usually associated with commitment to hard law instruments. Looking at the costs and benefits of commitment to hard law is important, since the remainder of this thesis will look into the possibility for soft law instruments

to harden (beyond the adoption stage) and at the challenges this may raise for decisions on commitment. Section 3 turns to the costs and benefits of commitment to soft law. Commitment to soft law specifically remains to be fully explored in IR literature; its costs and benefits are usually presented in relation to the trade-offs between hard and soft law, and from assumptions extrapolated from existing accounts of commitment to hard law.

Section 4 reflects on the place of the potential costs of soft law in existing rationalist approaches, when applied to commitment to soft law *per se*. It points out that existing approaches focus on the trade-offs between hard and soft law, and on the advantages of soft law in particular contexts in international governance, but do not take into account explicitly enough the costs that could arise from commitment to soft law, especially through its potential hardening. It puts forward this thesis' approach towards a revised rationalist account of state commitment to soft law, based on the potential effects and costs of soft law.

Section 5 finishes the *tour d'horizon* of relevant studies of commitment to international instruments in existing scholarship by looking at empirical analyses of commitment in the field of human rights. It constitutes a very prolific body of scholarship exploring state behaviour towards international instruments through various methods (including large statistical analyses of treaty ratification), and is especially relevant considering that the field of human rights affects the assumptions we can make about costs-and benefits of commitment (specifically in terms of setting reputational costs and benefits for certain courses of action). It also provides useful insights for the specific research question addressed in this project (i.e. why would states oppose human rights soft law), and the core case study explored in Part III.

1. TYPOLOGY OF COSTS AND BENEFITS OF COMMITMENT

The projection of international cooperation objectives into legalized instruments can be considered beneficial as it can, for instance, increase the credibility of commitments[1] and share the material burden of coordination/cooperation problem-solving on the international stage, thus diminishing costs in states' dealings with one another.[2] The creation of and commitment to international legal instruments are not, however, solely beneficial for the actors involved; they also come with their own set of constraints. For instance, basic principles of reciprocity or universal applicability mean that in order to promote a particular goal or orientate the behaviour of other actors, states are likely to have to accept corresponding limitations themselves.[3] The basic rules and principles of legalized interactions in the international legal order thus restrict potential policy options and might impose high costs on states.

As such, legalized institutions emerge as a trade-off in which states are expected to try to keep infringements on their sovereignty and implementation costs as low as possible, while trying to maximize the benefits from institutionalized cooperation. At the same time, the benefits yielded by an agreement will depend in part on the degree of certainty the instrument injects in the dealings between the actors involved: raising it might require higher guarantees of compliance and/or enforcement, and thus greater encroachments on a state's sovereignty.[4]

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[1] Guzman, *How International Law Works*, 12; Abbott and Snidal, "Hard and Soft Law in International Governance," 426–30.

[2] Guzman, *How International Law Works*, 25–33. Doing so through legal forms calls upon the specificities of the legal sphere, i.e. the use of legal discourse and its procedures, as well as its remedies in case of breach of commitment. Abbott et al., "The Concept of Legalization," 409.

[3] Henkin, *How Nations Behave*, 29–30. Guzman, *How International Law Works*, 42–45.

[4] As Abbott and Snidal point out, attempts at increasing future certainty through detailed agreements may raise issues of incomplete contracting, so do not necessarily yield greater benefits. Abbott and Snidal, "Hard and Soft Law in International Governance," 433.

It is necessary to dig deeper into the main categories of costs and benefits entailed when deciding to get involved in the creation of international instruments, hard or soft. Taking into account various propositions in existing scholarship, I consider that these include three types of costs/benefits, which will be addressed in turn: material costs/benefits (negotiation, implementation, cooperation), reputational costs/benefits (reputational costs/benefits internationally, electoral costs/benefits domestically), and sovereignty costs/benefits.

1.1. Material costs and benefits

Material costs and benefits include all costs with direct economic or financial implications. They can be present in three different forms, at various moments in the life of the instrument. First, the creation of a legalized instrument involves negotiation costs.[5] These refer to the resources involved in creating an instrument and agreeing on its content. It can refer to the number of staff members and hours of work involved in the negotiation and bargaining process or to the length of the proceedings before reaching an agreement, but also to specific expenditures such as legal advice and technical expertise. The longer the proceedings, the bigger the team working on it, the higher the level of professional expertise needed, the higher the negotiation costs.

Implementation costs refer to the costs incurred by a state in order to implement the provisions of the instrument domestically. Such costs will vary according to the actual requirements of implementation for a given state, i.e. the distance separating its actual situation from the requirements of the instrument, and the extent of the remedies needed to achieve compliance. (The costs involved in implementation can lead to benefits in

[5] Elsewhere labelled 'contracting costs'. Ibid., 50–52.

other categories – above all cooperation and reputation – but there are no benefits to be made in terms of implementation per se, so no implementation benefits).

Finally, once an instrument is set-up, a state may see changes in its cooperation costs: the costs of subsequent interactions with other parties to the instrument.[6] This can refer to the benefits made in terms of the simplification in relationships and higher predictability in dealings on a given issue or to the costs of enforcing the instrument. Such costs will decrease as certainty increases in the prospects of compliance with the agreement (and enforcement in cases of non-compliance).

1.2. Reputational costs/benefits

Reputational costs and benefits refer to a state or government/decision-maker's reputation in front of other actors, and the consequences this might carry for existing relationships and future dealings.[7]

On the international level, this refers principally to a state's reputation in front of state counterparts, international organisations, or other non-governmental actors (and, perhaps to a lesser extent, the general public/civil society). Reputational costs are usually understood to arise as part of the consequences faced from violating the provisions of an instrument.[8] I consider that this can also extend to the commitment stage, where reputational benefits can be made in joining certain types of instruments or costs incurred in refusing to join, depending on the issue-area, the nature of the

[6] Abbott and Snidal (Ibid., 430.) refer to this category as 'transaction costs of subsequent interactions'. Since the concept of 'transaction costs' could have different meanings (some overlapping with other categories presented here, like negotiation costs), I opted for the label 'cooperation costs' to refer directly to the costs/benefits derived from subsequent interactions.

[7] Guzman, *How International Law Works*, chap. 3; Abbott and Snidal, "Hard and Soft Law in International Governance," 427.

[8] Guzman, *How International Law Works*, 73; Abbott and Snidal, "Hard and Soft Law in International Governance," 427.

instrument and the international consensus on the substantive provisions and norms at play.[9]

These considerations also apply domestically, where reputational costs translate into electoral costs or benefits for decision-makers or governments in front of their domestic audiences.[10] A decision taken towards an international instrument can lead to electoral benefits or costs, depending on the inclination of various domestic constituencies and interests groups. This is valid both for decisions on commitment which can be unpopular domestically and highly contentious on the national scene (e.g. free-trade agreements), as well as for further implementation or compliance measures (enforcing an agreement could be (un)popular domestically and impact prospects of re-election or put pressure on decision-makers in one way or another).[11]

International reputational costs/benefits and domestic electoral costs/benefits, however, may not fluctuate in the same direction; for instance, electoral gains can be made by reneging on an international agreement, which could damage a state's reputation internationally, but may be favourable to a particular government domestically (if reneging on the agreement is likely to benefit the population or is favoured in the public opinion). Likewise, entering an unpopular agreement from the view of domestic publics might allow the state to reap reputational benefits internationally.

[9] This is in line with scholarship in the field of human rights, for instance, where the normative impact of different courses of action in terms of an actor's reputation internationally is at the heart of various mechanisms which may influence behaviour. See e.g. Finnemore and Sikkink, "International Norm Dynamics and Political Change"; Risse-Kappen, Ropp, and Sikkink, *The Power of Human Rights*. For HR scholars who have looked into the importance of reputation at the commitment stage, see section 5.

[10] This point is moving towards liberal theories of IR, as states' considerations for electoral costs/benefits domestically could potentially influence preference formation. Moravcsik, "Taking Preferences Seriously."

[11] This project focuses on democratic states and the interplay of the behaviour of various stakeholders (state and non-state), which is reflected in the assumption made about electoral pressures and benefits. This does not make it inapplicable to autocracies; such pressures would just be less salient (and more easily overridden) in undemocratic regimes.

1.3. Sovereignty costs

Sovereignty costs refer to the impacts of the agreement on a state's sovereignty, i.e. on its power to rule unilaterally and supremely on a given issue. As soon as an international instrument includes participating states' delegating some power to edict new rules or standards in a given field or to adjudicate and arbitrate competing interpretations and claims, a state's sovereignty to rule independently on the issue is affected.[12] In fact, the mere act of concluding an international agreement on a matter is sometimes argued to be enough to internationalize the subject matter,[13] thus practically terminating states' legislative monopoly on the issue.

This can, however, bring benefits: in cases where states could not effectively address a problem or situation individually (collective-action problems)[14] or could otherwise benefit from international cooperation, the pooling and delegation of state sovereignty can be beneficial. I will refer to the opposite of those sovereignty costs as 'internationalization benefits.'

1.4. Reversibility of costs and benefits

It is important to note that for some of these categories, costs and benefits are reversible (i.e. directly and negatively correlated with one another within their own category), meaning that a decrease in costs will mean an equivalent increase in benefits, and vice-versa. This is notably the case for negotiation and cooperation costs. For example, if a state decides to commit to an international instrument, it can lower cooperation costs.

[12] Abbott and Snidal, "Hard and Soft Law in International Governance," 436–41; Abbott et al., "The Concept of Legalization," 415–18.
[13] Gruchalla-Wesierski, "A Framework for Understanding Soft Law," 58.
[14] Olson, *The Logic of Collective Action*.

The diminution in cooperation costs can also be expressed in terms of cooperation benefits of a same value than the savings made on cooperation costs.

For other categories, costs and benefits are not reversible (i.e. directly correlated with one another within their own category). This is the case for reputational costs. One particular type of behaviour can present high reputational costs, but not necessarily entail lower reputational benefits. Conversely, if a state can reap reputational benefits by taking a given course of action, not taking it will not necessarily entail equivalent costs. Each course of action has its own return in terms of reputational credit: e.g. if a state decides to join an international instrument, it can potentially gain reputational benefits on the international stage. Not joining could have no impact, or potentially have an adverse effect on its reputation internationally. In such cases, the costs and benefits work in opposite directions in relation to a state's starting point, and are not equivalent or analytically reversible in the way most material costs can be.

The table below summarizes the different types of costs and benefits which are likely to influence decision-making on international legalization. As surveyed above, they can be grouped in three categories: material, reputational and sovereignty.

	Costs	**Benefits**
Material	- Negotiation - Implementation - Cooperation	- Negotiation - Cooperation
Reputational	- Reputational (for a state) - Electoral (for a government)	- Reputational (for a state) - Electoral (for a government)
Sovereignty	- Sovereignty	- Internationalization

Table 3.1. Typology of the costs and benefits of commitment to an international instrument

Yet, when deciding to order their relations through legalized forms of governance, actors are not facing a binary choice between no instrument and a one-size-fits-all model of hard legalization. Actors can set the parameters of legalization within a variety of possible instruments, ranging from 'hard' heavily legalized forms to 'softer' arrangements.[15] These different forms affect the costs and benefits of institutionalization for the participating states. As with usual expectations in rationalist models, if the benefits of creating and/or joining a particular instrument outweigh the associated costs, a state should be able to (and more likely to) commit to a legalized instrument. Hard and soft law, however, present different costs and benefits. This creates different sets of expectations on state commitment, depending on the form of an instrument (hard or soft). The following sections uncover typical assumptions on the costs and benefits of hard and soft law, along with hypotheses on behaviour towards commitment they are likely to generate.

2. Costs and Benefits of Hard Law

Hard law as an ideal-type is considered binding and gives rise to legal obligations under international law.[16] Since there is no ambiguity within the international legal order concerning its legal status,[17] one of the most prominent features of hard law is its contribution to the reduction of uncertainty as it increases the credibility of commitments.[18] Violation of a hard law instrument by one of the parties to it can entail

[15] Abbott and Snidal, "Hard and Soft Law in International Governance"; Abbott and Snidal, "Pathways to International Cooperation."

[16] Abbott et al., "The Concept of Legalization," 408--409.

[17] I take the view here that hard law's recognition as 'law' is uncontested under international law (/in the international legal order), without consideration for the debates on the contested 'legal' nature of international law. *Cf* Hart, *The Concept of Law*, chap. 10.

[18] Abbott and Snidal, "Hard and Soft Law in International Governance," 426.

legal responsibility and authorize other parties (or a delegated third party) to resort to the sanctions and/or remedies it provides for.[19]

2.1. Material costs/benefits

The use of a hard form of legalization increases the credibility of commitments, which contributes to greater cooperation benefits (i.e. greater reduction of cooperation costs).[20] In this respect, it is usually understood that devising a hard, binding instrument leads to more credible commitments and greater cooperation benefits. For example, the conjunction of the Warsaw and Montreal Conventions (spearheaded by the International Civil Aviation Organisation, or ICAO) establish clear, binding parameters aimed at the standardization of provisions in civil air carriage, an intrinsically transnational activity.[21] Binding conventions in this case give the different state parties involved (and their citizens) guarantees that activities will not be impaired by regulatory differences or unstandardized facilities and procedures.

Such benefits, however, can come at relatively high costs. This is particularly true in terms of the negotiation process leading to the adoption of an instrument. Since hard law instruments are undoubtedly binding, more thought has to be given to creating the instrument or making decisions to commit to it. Bargaining is likely to be more intense as state parties are expected to attempt to tailor the legal obligations to their particular interests and involve more resources in the negotiation process in order to do so. Negotiations leading for example to the conclusion of the Canada – United States free trade agreement, followed by the North American Free Trade Agreement (NAFTA),

[19] Ibid., 427.

[20] Ibid., 430.

[21] However, since the membership of the Montreal Convention is not as high as Warsaw, there is now a double regime. Many would favour greater uniformity. IATA, "A Universal Liability Regime for International Carriage by Air."

respectively spanned the periods between 1985-1989 and 1990-1994.[22] The NAFTA website refers to the agreement as a 'complex and lengthy document that includes eight sections, 22 chapters, and some 2,000 pages,'[23] an endeavour which undoubtedly required significant resources to complete.

Considering the binding nature of hard law and expectations towards compliance, material costs linked to the implementation of a given instrument are also likely to be high (this depends on the specific provisions it contains and the initial situation of a state party; costs could be low if, for example, a state is already complying to the instruments provisions at the time of adoption[24]).

2.2. Reputational costs/benefits

Because of the particular legitimacy granted to legal obligations (as opposed to political commitments)[25] and the importance of *pacta sunt servanda* as foundational principle of international law,[26] there can be high reputational costs associated with failing to respect obligations contained in a hard law instrument.

The treatment of reputational costs in the rationalist literature is often limited to issues of compliance with existing obligations. Guzman, for instance, posits 'reputation' as central to his account of 'how international law works', but mostly in terms of respect

[22] NAFTA, "North American Free Trade Agreement | About."

[23] NAFTA, "North American Free Trade Agreement."

[24] This is where power differentials between parties may be crucial: a powerful actor may be able to shape the content of the agreement closer to its domestic order, and therefore bear less implementation costs. Krisch, "International Law in Times of Hegemony."

[25] On the legitimacy dimension of legal commitments, see: Ellis, "Shades of Grey"; Franck, *The Power of Legitimacy among Nations*; Brunnée and Toope, *Legitimacy and Legality in International Law*.

[26] *Pacta sunt servanda* or "agreements must be kept" is central to the whole edifice of international law, as there must be at least a degree of shared expectations that commitments will be honoured for it to work. Lowe, *International Law*, 2007, 74; Abbott and Snidal, "Hard and Soft Law in International Governance," 428. Yet, Guzman expresses doubts as to its capacity to contribute to an explanation of the workings of international law. Guzman, *How International Law Works*, 15.

for existing legal obligations (hard or soft), to enjoy reciprocity and not to trigger retaliation.[27] I contend that reputational costs/benefits are just as relevant at the commitment stage. A state could, for instance, find itself reaping reputational benefits when taking a position that is deemed appropriate/judged positively in the international community (e.g. committing to a human rights treaty). Benefits can be reaped no matter if the commitment is 'genuine' (made with a view to be implemented and complied with) or just used as a tool of cheap talk. Likewise, depending on the issue area and its normative weight, a decision not to commit to an instrument or to oppose its adoption (or later withdraw) could easily carry adverse reputational effects for a state. Scholarship in the field of human rights that has problematized 'reputation' prior to the implementation and compliance stages will be covered further in section 5.

2.3. Sovereignty costs/benefits

Finally, hard law usually comes with high sovereignty costs. Adopting an instrument in a hard form to increase the credibility of commitment requires that its flexibility be kept relatively low. This may contribute towards cooperation benefits, but does limit parties' future room for manoeuvre to react to changing circumstances or national priorities, as well as their capacity to unilaterally address the issue in the future even if they would wish to do so.[28] Still, the internationalization of an issue, especially in the case of collective-action problems, can bring some benefits that outweigh expected sovereignty costs. This is partly how some of the first international organisations appeared (e.g. Universal Postal Union,[29] International Bureau of Weights and Measures[30]), to regulate

[27] Guzman, *How International Law Works*, 9.

[28] There are, however, ways to input flexibility in a binding agreement, through the inclusion of reservations or escape clauses, or through incomplete contracting.

[29] Universal Postal Union, "The UPU."

[30] Bureau International des Poids et Mesures, "BIPM - History."

issues which had transnational components or impact and generate cooperation benefits overcoming the sovereignty costs involved.

2.4. Summary of costs/benefits analysis

In sum, hard law (as an ideal-type) emerges from a trade-off where high negotiation, implementation, and sovereignty costs are borne in return for expected high cooperation and internationalization benefits. While conventional legal positivist accounts would contend that only harder forms of legalization can give actors the degree of certainty necessary to reap the benefits of international commitment,[31] there are cases in which softer forms of legalization may be privileged as superior institutional solutions.[32] In fact, from a rationalist standpoint, soft law can be a useful alternative to harder instruments since it can offer many of the advantages carried by hard law, avoid some of its costs, and bear some advantages of its own.[33]

3. COSTS AND BENEFITS OF SOFT LAW

As defined in the previous chapter, soft law instruments are international instruments that are non-binding at the time of adoption. Since they are (at least initially) recognized as non-binding, they do not engage states' legal responsibility in the same way hard law instruments do, or they cannot directly give rise to legal claims in the same way. Instead,

[31] As well as the degree of certainty and predictability essential to the preservation of the international legal order itself. Indeed, Weil and Blutman, among others, take the view that the edifice of international law needs clear, identifiable sources and normative boundaries if it is to function as a proper, self-contained legal system. Weil, "Towards Relative Normativity in International Law?"; Blutman, "In the Trap of a Legal Metaphor." See Chapter 2.

[32] Abbott and Snidal support this view, along with Weiss *et al.* in terms of fostering compliance. Abbott and Snidal, "Hard and Soft Law in International Governance"; Weiss, *International Compliance with Nonbinding Accords*.

[33] Abbott and Snidal, "Hard and Soft Law in International Governance," 434–50, 455–56.

they include provisions that impose a lesser burden on participating states in terms of implementation and entail fewer constraints on their autonomy.[34] Soft law instruments, considering their non-binding status, are generally known to remain flexible, adaptable and open to wide interpretation from state parties. It is also usually assumed that states can retain relative control over their commitment to the instrument, through vague commitments or the relative absence of monitoring or enforcement measures. Hence, they are generally presented as good alternatives to hard law in that they provide guidelines for cooperation, while minimizing the sovereignty infringement usually associated with international commitments.[35]

There is limited scholarship devoted to exploring issues of state commitment to soft law specifically. The overview below makes use of the available literature, and applies the logic and assumptions of commitment to hard law (in the legalization approach) to soft law instruments.

3.1. Material costs/benefits

Rational evaluations of a state's decision to create a soft law instrument or to commit to an existing one would assume that, as it does not directly engage a state's legal responsibility, it can be concluded more easily and in less time than for harder instruments.[36] The resources involved in the bargaining and drafting process are also estimated to be less than would be necessary in dealing with a hard law instrument. Soft law (as an ideal-type[37]) is thus considered to carry low negotiation costs. This is also a

[34] Theoretically, at least; see Chapter 4 for an exploration of the effects of soft law and inherent limits to that autonomy.
[35] Thürer, "Soft Law," para. 6; Abbott and Snidal, "Hard and Soft Law in International Governance."
[36] Abbott and Snidal, "Hard and Soft Law in International Governance," 434–36.
[37] This distinction is important considering that it is not always the case in practice; see Chapter 4.

function of the fact that soft law instruments, since they do not qualify as binding treaty mechanisms, are not subject to the same domestic procedures for commitment/ratification. Most can be concluded by a representative of a state's executive branch, and will bypass formal ratification procedures (e.g. approval through a vote of legislative bodies).

Implementation costs are, in theory, equally low since soft law instruments generally remain flexible and provide states with a relative control over the nature of the obligations they commit to and the extent to which they intend to implement it.[38] The usual absence of formal enforcement mechanisms contributes to the low implementation costs.[39] Soft law instruments like conference declarations, for instance, do not usually delegate responsibility for an independent assessment of implementation. In such a context, state parties can decide independently on the extent of their efforts in that direction (thus keeping implementation costs low, or as low as desired). In the case of instruments adopted within an international organisation, e.g. UN General Assembly resolutions, there can be a certain level of oversight from the permanent bureaucracy and relevant agencies. Still, outcomes would theoretically only recommend compliance or further implementation and are not meant to give rise to legal procedures or claims.

Soft law instruments can potentially yield cooperation benefits, since they can provide focal points for coordination and foster cooperation. The *Codex Alimentarius*, overseen by the Food and Agriculture organisation (FAO) and the World Health Organisation (WHO), is a good example. Representatives from governments and other interested parties come together with the objective of 'protecting the health of the consumers and

[38] This can be expressed through the use of a distinct, hortatory vocabulary, stressing aspirations, desires or general orientations – thus keeping flexibility as to implementation.

[39] This does not mean that implementation will not be independently assessed by third parties, including non-state actors (e.g. human rights NGOs).

ensuring fair practices in the food trade [and] promoting coordination of all food standards work undertaken by international governmental and non-governmental organisations.'[40] This is achieved mostly through the elaboration of standards, their publication in the Codex, and their revision as appropriate.[41] These standards have an appeal even if they are not adopted in a binding form. In fact, their flexibility makes them easier to revise or update, a major asset in fields where scientific knowledge evolves rapidly.

The central drawback for soft law instruments is, however, the impossibility to provide the same level of cooperation benefits as hard law, or at least to guarantee them with the same degree of certainty: the substance of a commitment may be vague or hortatory, the standards necessary for compliance may be less explicit, and the absence of measures for monitoring and enforcement may all provide opportunities for states not to fulfil their commitment.[42] The cooperation benefits gained from the soft law instrument may thus be limited.

3.2. Reputational costs/benefits

Reputational costs associated with the non-respect of a soft law instrument are theoretically low, since they are mitigated by the lower degree of obligation of soft law instruments and the underdetermined character of the obligation they impose on parties. In the case of the *Codex Alimentarius*, for instance, a state whose domestic standards do not fully follow the approach suggested by the standard-making body would not necessarily be judged negatively, as the *Codex* constitutes recommendations, not

[40] Codex Alimentarius Commission, "Statutes of the Codex Alimentarius Commission," 4. Art. 1.

[41] These are non-binding 'recommendations for governments.' Codex Alimentarius Commission, "Procedures for the Elaboration of Codex Standards and Related Texts," 26.

[42] Abbott and Snidal, "Hard and Soft Law in International Governance," 446.

obligatory propositions.[43] In terms of the reputational and electoral costs or benefits tied with commitment to one such instrument, it very much depends on the issue-area and on the normative inclinations of the international and domestic communities respectively. Soft law instruments that touch upon topics which are important or sensitive for a community may be tied to electoral costs or benefits for domestic groups.[44] Likewise, if the international community generally favours a certain stance towards a soft law instrument, a state's behaviour towards it may be tied to reputational costs or benefits internationally. This is easily conceivable in fields like human rights, or on sensitive topics such as whaling.[45]

3.3. Sovereignty costs/benefits

As mentioned above under implementation costs, it is usually believed that soft law instruments allow for a great deal of flexibility and provide states with a relative control over the nature of the obligations they subject themselves to when adopting one. As such, sovereignty costs involved in committing to or creating a soft law instrument are considered quite low. There is still a possibility to reap internationalization benefits though, if the internationalization of an issue and its projection beyond the exclusive

[43] Unless not respecting the guidelines led to a food safety crisis in some other country, because of mislabelling or negligence for instance. Still, this would constitute a case of non-compliance, which differs slightly from the situation of a state deciding to keep its own standards in one area instead of using the *Codex*'s.

[44] A state's population may be particularly concerned by one issue, which could raise the salience of political decisions made about a soft law instrument on the matter.

[45] For example: Japan pushed for the St Kitts and Nevis 2006 Declaration of the International Whaling Convention, scaling down the mandate of the organisation. Even if they won their bid within the organisation (they convinced enough delegations to get the Declaration passed with a simple majority vote), members of the international community were very vocal in criticizing it. International Whaling Commission, St Kitts and Nevis Declaration.

This points to the important caveat that soft law is not always meant to be 'progressive'. It can also serve to backtrack on provisions locked in treaties, revising interpretation in a limiting way to give individual actors more flexibility to pursue their own course of action. See Lagoutte, Gammeltoft-Hansen, and Cerone, "Introduction."

domestic realm brings benefits (most likely linked to lower cooperation costs in a given area).

3.4. Summary

Soft law can provide a certain degree of cooperation and internationalization benefits, but not to the same extent as is usually expected from harder instruments. These drawbacks, however, can be compensated for by a lesser degree of sovereignty encroachment and significantly more flexibility for state parties both at the commitment and implementation stage. This translates principally into lower negotiation, implementation and sovereignty costs, and contributes to soft law's attractiveness.

Hence, there is a possibility for soft law to be elaborated as a stepping stone to or as a fall-back from hard law. In many ways, it is also considered to be valuable on its own terms. Soft law arrangements can be preferable, for instance, when dealing with new areas of law-making or areas of great uncertainty where changes are likely to occur or where technological knowledge is not up to par.[46] It can also prove to be an attractive option when sovereignty costs are potentially high and states want to retain greater control over their commitment, both at the adoption stage and later in the process, perhaps to deal with uncertainty.[47] It can constitute a valuable option to send signals or pay lip service to particular ideas and principles within the international community, no matter how far down the implementation road a state is willing or capable to go. Such an approach can be a profitable way to reap the reputational benefits of commitment in

[46] Abbott and Snidal, "Hard and Soft Law in International Governance," 443. Examples include the UNESCO, "Universal Declaration on Bioethics and Human Rights."

[47] Abbott and Snidal, "Hard and Soft Law in International Governance," 441–44.

heavily normative issue-areas (e.g. human rights), while avoiding the level of scrutiny and/or accountability associated with hard binding instruments.[48]

From a rationalist standpoint and the legalization approach specifically, soft law is presented as relatively low-stakes. In fact, Abbott and Snidal posit that 'softer forms of legalization provide alternative and often more desirable means to manage many interactions by providing some of the benefits of hard law at lower cost.'[49] Since soft law is generally vague and non-legally binding (at least not directly), it is believed that a state keeps close to full control over the nature of the obligations it commits itself to when creating or joining a soft law instrument.[50] Costs in joining the instrument are deemed very low (or inexistent), since it does not carry costs of its own: its only drawback is that it cannot bring same benefits as hard law in terms of credibility of commitment and associated cooperation benefits. This makes commitment to a soft law instrument a very likely and favourable endeavour (especially in comparison to hard law), as soon as there are some potential benefits to be made from it.

4. REFLECTIONS ON THE POTENTIAL COSTS OF SOFT LAW

The legalization approach, explored above, has made very valuable contributions towards explaining the particular challenges of commitment to legalized institutions in international relations from a rationalist, cost-benefit perspective. It has done so particularly well with regards to hard law, and to the trade-offs involved in choosing

[48] See section 5.

[49] Abbott and Snidal, "Hard and Soft Law in International Governance," 434.

[50] This rests on the foundational character of state consent to be bound for an obligation to arise under international law, which is, however, increasingly contested. Ellis, "Shades of Grey"; Buchanan, "The Legitimacy of International Law."

between hard or soft forms. I consider, however, that some of the underlying assumptions of its cost-benefit analysis of state commitment are incomplete when applied to commitment to soft law *per se*, and could benefit from greater engagement with the potential costs of soft law.

As presented above, a rationalist approach to commitment would assume that commitment to a soft law instrument should be easy, as long as there are minimal benefits to be made from it, since it does not carry costs in itself (apart from its limitations in the extent of benefits it can ensure, in comparison to hard law). It is able to reach this conclusion, on the basis of the following assumptions:

- Soft law does not carry heavy costs since it does not carry the shadow of legal responsibility. Non-compliance does not open possibilities to seek legal remedy.
- When committing to a soft law instrument, states retain close to full control in interpreting the content of the obligations they commit to and defining the scope of national implementation/incorporation in domestic law.[51]

This is not to say, however, that the very idea of costs associated with soft law instruments is entirely absent from the legalization approach. It is in fact not obliterated, but rather not addressed explicitly in the evaluation of decisions on commitment to soft law specifically. For instance, Abbott and Snidal mention that 'soft forms of legalization can have powerful effects' and briefly raise the possibility that it could contribute to states' learning in subsequent negotiations on soft legalization.[52] It is thus a logical step then to suppose that such effects could entail costs, yet these are not considered in the theoretical account of initial commitment to a soft law instrument and there are no specific indications of ways in which state behaviour would adapt to it over time.

[51] Especially considering the difficulties of monitoring and enforcing it. Abbott and Snidal, "Hard and Soft Law in International Governance," 446.
[52] Ibid., 447.

This is not for a lack of consideration of the potential change in an instrument's value and effects overtime.[53] The legalization approach does cover the possibility of change over time in the nature of the costs involved in legalization and shifts between forms on the soft/hard spectrum. Abbott and Snidal admit that they are carrying 'an exercise in comparative statics', looking at decisions 'to adopt specific institutional arrangements at given points in time' even if they acknowledge dynamic character of soft law. They do intend to 'incorporate these considerations in [their] analysis by examining how actors (imperfectly) evaluate the dynamic consequence of soft law commitments',[54] but I argue that the approach would greatly benefit from more explicit consideration of the current and potential costs of soft law. They also remark that 'states cannot anticipate or limit all of [rules'] possible effects', and that 'legalization can lead to further, often unanticipated sovereignty costs over time'[55] (especially if high degrees of delegation are involved).[56] Yet, beyond the question of controlling for the level of delegation to limit future (potentially unfavourable) developments, which is an issue most important for hard law instruments, the question of future effects of soft law and associated costs is absent from discussions on commitment. This is the case even if the paper laying out the foundations of the legalization approach, "The Concept of Legalization", raises in its treatment of 'obligation' the issue that soft instruments are 'highly problematic', even if 'they should not be troublesome in legal terms, since they do not conform to the established "rules of recognition" of international law.' It points towards the crucial fact that 'in many issue areas the legal implications of soft instruments are hotly contested'.[57]

[53] See Chapter 2, section 3.3.

[54] Abbott and Snidal, "Hard and Soft Law in International Governance," 423.

[55] Ibid., 438.

[56] This is especially relevant for hard law instruments, as high levels of delegation are characteristic of hard (not soft) instruments. Abbott et al., "The Concept of Legalization," 415–18.

[57] Ibid., 412.

These very important acknowledgements must then translate into the analysis of the costs and benefits of soft law instruments, and of the assumptions made on state behaviour regarding commitment to soft law instruments. Thus, this research aims to complement the legalization approach by addressing three major questions left open: 1) what are the effects of soft law, both at the moment of adoption and later in time?; 2) how are these effects impacting the costs of commitment to a soft law instrument?; and 3) how does acknowledging the possibility of effects and potential costs of soft law affect state behaviour on commitment to soft law instruments?

I argue that a thorough account of state commitment to soft law must take into consideration the costs of soft law *per se* at the time of adoption. More crucially, it must consider the potential effects and related costs of the instrument in the future, since the evaluation states will make of these will necessarily influence their initial decision on commitment. This evaluation of the actual and potential costs of soft law can only be done by bringing into the analysis a distinctive legal perspective using insights from public international law. Otherwise, not including the evaluation of actual and potential costs of soft law instruments in decision-making leads the legalization approach to present an incomplete overview of the creation of legalized institutions and of the participation of states and other actors in the process, as it makes it seem sufficient to say that soft forms carry low enough stakes to foster commitment as soon as there are minimal benefits to be made.

5. Further insights from the field of Human Rights

Before concluding this review of existing scholarship on commitment to hard and soft law, it is worth looking into additional insights coming from scholarship in the field of

human rights. Human rights scholarship can bring particular insights into decision-making on commitment; its very nature leads us to specify or revise some of the assumptions made above as it calls upon different trade-offs between the types of costs and benefits surveyed, especially in terms of sovereignty and reputational costs and benefits.

First, the field of human rights is not an intrinsically 'international' matter. It may be covered at the international level through various inter-state agreements, but it deals in large part with the treatment, by a state, of its own citizens. Therefore, the sovereignty costs attached to human rights instruments can be relatively high as it infiltrates a state's domestic sphere.[58]

Second, as alluded to earlier, the field of human rights is one of the areas of international affairs with the greatest normative weight: it refers directly to questions about norms and values the international community should uphold to protect the 'dignity and worth' of individuals and equality between groups.[59] Unlike transactional matters between states (e.g. trade), where there is no universally or intrinsically 'right' equilibrium beyond states' mutually agreed preferences, the field of human rights calls for the identification of an adequate course of action for the international community, in a progressive view of the development of international instruments to achieve the recognition and fulfilment of fundamental rights for all individuals across state boundaries. Therefore, it raises the question of right and wrong in the international community, as a barometer to states' conduct internationally. As such, decisions on commitment to hard or soft instruments in the field of human rights come with much

[58] The actual costs would depend on the content and form of a given instrument, and on the level of delegation provided to a third party. See sections 1.3, 2.3, and 3.3 above.

[59] Preamble, Charter of the United Nations.

heightened reputation costs and benefits. Joining a human rights instrument or initiative (focusing here only on the commitment stage, before looking into prospects of implementation) may be enough for a state to reap reputational benefits.[60] Likewise, opposing the adoption of a human rights instrument can come with much greater reputational costs (in the form of bad press or scolding from states and other actors, both internationally and domestically), than would a decision not to join a legalized instrument in a less normatively-charged issue-area.

This section will therefore survey the conclusions reached by scholarship exploring various issues of commitment to human rights instruments (5.1), before looking at how these insights can be combined to our prior examination of rationalist approaches to commitment generally, to produce specific assumptions regarding commitment to human rights soft law (5.2).

5.1. Commitment to legalized human rights instruments

The literature on commitment to human rights instruments explores the specificities of human rights law in the international legal order, but has not, up to now, paid much attention to soft and hard law distinctions.[61] Nonetheless, human rights scholarship has made significant contributions when looking at commitment to binding instruments, and

[60] These may translate in benefits in other areas too, such as trade. The linkage between non-trade issues and trade agreements is explored in Milewicz et al., "Beyond Trade."

[61] The literature on compliance has made the distinction to present the interesting perspective that, in some situations, non-binding or soft law norms can foster compliance just as well as harder forms. See e.g. Shelton, "Compliance with International Human Rights Soft Law."

In terms of literature focusing on commitment, Cole has come closest to exploring the hard and soft distinction with his paper on "Hard and Soft Commitments to Human Rights Treaties". Yet, this refers to two 'levels' of commitment (ratification vs. signature) of hard treaty instruments only, and does not look into commitment to soft, non-binding instruments. Cole, "Hard and Soft Commitments to Human Rights Treaties, 1966-2000." A similar approach was taken by Dutton, exploring variation in ratification patterns of international human rights treaties depending on their enforcement provisions, distinguishing between soft and hard enforcement mechanisms in binding treaties. Dutton, "Commitment to International Human Rights Treaties," 2012.

some of its main conclusions are worth highlighting as they can contribute to the development of my account of decision-making on commitment to soft law.

First, Wotipka and Tsutsui[62] explored one of the main puzzles about commitment to human rights instruments, particularly the fact that human rights treaties enjoy widespread ratification in spite of the sovereignty costs they might entail. They posit that the legitimacy that comes with ratifying international human rights treaties compensates for its high sovereignty costs, leading many states to ratify in spite of these impediments. While it is recognized that states usually try to limit encroachment on their sovereignty, they also aim to be recognized as 'legitimate actors in the community of states'.[63] Ratification of human rights treaties will be considered positively if they can boost a states' legitimacy within the international community, especially if the said treaties are seen as non-consequential (because of the particular enforcement and monitoring provisions it contains – or lack thereof). As such, the potential reputational benefits to be made in a well-integrated regime (where benefits are fungible across issue-areas in states' international relations) may outweigh the perceived costs of commitment and associated sovereignty costs. Wotipka and Tsutsui focus on formal treaties, but the same logic could be extended to softer instruments: the potential reputational benefits may outweigh the perceived commitment costs, a fortiori when the latter are fairly low (e.g. for a soft law instrument).

Focusing on the costs of commitment to human rights treaties, Hathaway argued that states will evaluate compliance costs by looking at the extent to which their behaviour diverges from the requirements of the treaty (what I label 'implementation costs'),

[62] Wotipka and Tsutsui, "Global Human Rights and State Sovereignty."
[63] Ibid., 736.

coupled with their expectations regarding the likelihood of such costs materializing.[64] This leads to slightly counter-intuitive conclusions: countries with good human rights records (thus facing lower implementation costs to achieve compliance with a human right treaty) and strong internal enforcement (increasing the probability that these costs materialize) may be less likely to ratify a treaty, compared to what would be expected by looking at their human rights practices alone. Conversely, countries with poorer human rights practices (higher implementation costs) and weak internal enforcement (lower probability of these costs materializing) may be more likely to commit than is commonly expected.[65]

In line with these findings, Cole reached the conclusion that 'the costs of ratifying a treaty, considered in terms of its surveillance and enforcement provisions, influence rates of accession more than the specific rights a treaty protects'.[66] The costs associated with the ratification are much more consequential than its substantive content. As such, in situations where the probabilities or capabilities for enforcement are weak, states with bad human rights records might join solely for the symbolic, reputational benefits. Such conclusions were reasserted in a further study,[67] in which Cole looked at the patterns of commitment to different instruments, some similar in content, other similar in terms of enforcement mechanisms. He concluded again that the potential costs of joining a treaty play a greater role than content in states' decisions to join: 'treaties that protect different rights but establish comparable implementation mechanisms exhibit similar patterns of membership, whereas treaties that protect identical rights but establish different

[64] E.g. Hathaway, "Why Do Countries Commit to Human Rights Treaties?"; Hathaway, "The Cost of Commitment."
[65] "The Cost of Commitment," 1836.
[66] Cole, "Sovereignty Relinquished?"
[67] Cole, "Hard and Soft Commitments to Human Rights Treaties, 1966-2000."

implementation provisions exhibit dissimilar patterns of membership'.[68] Also, opening onto the study of the soft/hard distinction in studies of commitment, Cole found that rates of treaty membership differ by level of commitment, as states signing human rights treaties differ from those who ratify.[69]

5.2. Commitment to soft law in the field of human rights

This overview of human rights scholarship focusing on commitment to human rights instruments points to the following four observations. First, it gives weight to the appropriateness of the rationalist approach for the study of commitment, as it confirms that there effectively seems to be a discernible cost-benefit analysis feeding into states' decision-making on commitment to legalized human rights instruments (at least in a hard, binding form). Second, the form of the instrument (i.e. its level of 'bindingness' on a soft to hard scale) seems to matter more than the substantive content of the instrument in decisions to join. Third, reputational costs and benefits can be deemed important enough to compensate for potential sovereignty costs, making reputational costs and benefits more important than sovereignty costs in the decision-making process (here studied, again, in the case of hard law). Finally, the work of scholars surveyed above show that the strength of domestic institutions may play a role in a state's evaluation of future costs of commitment (they increase the risk that potential costs coming from commitment to the instrument will actually materialise).

Combining these insights from the field of human rights to my earlier survey of rationalist approaches to commitment to soft law instruments in general gives extra

[68] Ibid., 563.

[69] In this case, the signature of a treaty (compared to ratification) is not equivalent to committing to a non-binding instrument, but it does constitute a 'softer' form of commitment to a binding instrument, which makes Cole's insights relevant to this project.

weight to a certain set of assumptions regarding state behaviour towards human rights soft law. As surveyed above, from a rationalist standpoint, soft law is presented as an easy type of instrument to deal with. Its non-legally binding character is enough to keep sovereignty costs to a minimum, as it allows states to maintain close to full control over the extent to which they wish to implement and respect the provisions it sets forth. Commitment to soft law instruments is presented as an option bearing close to no costs to states, therefore making it an easy decision as long as there are some benefits (even if very little) to be made from it. Insights from HR scholarship further confirms that the form of the instrument (or level of 'bindingness') may matter more than the norms it contains for decisions to join.

In this context, the field of human rights makes the assessment of the costs and benefits of commitment easier to accomplish, as it accentuates some of the main costs and benefits state face when deciding to join a human rights instrument in a soft form. Indeed, the most important impact of commitment to human rights instruments, at least for hard binding forms, is expressed in terms of sovereignty costs. Yet, we have seen above that those can be trumped by the high reputational benefits that come with joining one such instrument. In the case of soft law, this trade-off is even clearer: there are still reputational benefits to be made from joining a soft instrument (or reputational costs from opposing one), while the soft form keeps the sovereignty costs away, or to a minimal level. Therefore, as there are reputational benefits to be made from joining a human rights soft law instrument, and as it is assumed there are no costs associated with doing so, commitment to human rights soft law should be the expected response from states in the international community (as soon as there is a general agreement in principle with its content).

To sum up, human rights instruments carry a particularly strong normative weight which raises the importance of reputational costs in the evaluation of decisions on commitment, and mitigates the sovereignty costs of commitment. The softer the instrument, the easier it should be for a state to commit to it, and the less its content should matter in decisions on commitment – unless soft law is not always as inconsequential as generally assumed, especially in IR scholarship. Chapter 4 will challenge this claim as it will explore the effects and potential costs of soft law.

6. CONCLUSION

In this chapter, I posited that state commitment to international instruments is best approached through rationalist approaches. Studies such as those led by the proponents of the legalization approach and other rationalist scholars are useful to identify the different costs and benefits involved, which I group under three categories: material, reputational and sovereignty costs/benefits. These approaches are also relevant in identifying trade-offs involved between the various costs and benefits in the case of hard legalization, or in the case of the choice between a hard or soft form. Commitment to soft law per se has yet to be fully explored in the literature, but it is possible to lay out existing assumptions regarding commitment to hard law and extrapolate them to soft law (using what we know about soft law, and about commitment to hard law, as well as the trade-offs between both forms of legalization).

This, however, provides an incomplete account of the challenges of state commitment to soft law. Indeed, it assumes that commitment to a soft law instrument should be easy, as long as there are minimal benefits to be made from it, since it does not carry costs of its own. In the case of heavily normative issue-areas like human rights, the assumption

towards commitment is even greater considering the reputational benefits to be made in the case of commitment, and reputational costs to be borne in the case of opposition.

At the end of this review, therefore, I conclude that current rationalist approaches to commitment to hard and soft law instruments leave areas unexplored, since they assume that soft law is intrinsically costless or nearly so as they do not look into the nature of soft law's effects and how that could impact state behaviour on commitment. In the remainder of this thesis, I will rather argue that soft law can have effects and bear costs currently not explicitly addressed by these approaches, which may impact states' decision-making on commitment in a noticeable way. Part II addresses this point as it presents a revised account of decision-making on commitment, centred on the potential costs and effects of soft law. This revised account will supplement existing approaches by focusing on the costs of soft law, and offer an explanation for deviant cases currently not accounted for: opposition to international human rights soft law.

PART II

THE POTENTIAL COSTS OF SOFT LAW:

A REVISED THEORY OF COMMITMENT

Part II constitutes the main theoretical contribution of this thesis. It does so by presenting, in Chapter 4, an analysis of the effects of soft law, from the time of its adoption and beyond, establishing what kind of costs may arise over time for states committing to a soft law instrument. Building on this, Chapter 5 presents a revised account of decision-making on commitment to soft law that takes into account the potential effects and costs of soft law as a core consideration shaping states final decision on commitment and determining how states will craft commitment to the soft law instrument.

In Chapter 2, I established that soft law is a relevant concept and that it is useful to describe forms of international cooperation through non-binding instruments. As covered in Chapter 3, international relations scholarship (from a rationalist approach) has so far focused on the benefits offered by soft law, identifying its limitations or disadvantages mostly in terms of its incapacity to deliver the same level of certainty as hard, binding instruments. Scholarship on the study of state behaviour on commitment to international instruments has also made relevant contributions to the field, through the study of commitment to hard law specifically, or of the trade-offs between hard and soft law in terms of institutional design choices. Yet, the challenges of state commitment to soft law specifically, as well as the potential costs attached to soft law instruments, have remained unexplored.

Part II aims to complement rationalist approaches and fill this gap by exploring the actual and potential effects of soft law, identifying how they may translate into higher costs over time for states committing to a soft law instrument and how these costs are taken into account by states when making decisions on commitment. More specifically, in Part II, I argue that soft law can have effects – this is grounded in public international

law scholarship on the sources of international law and how obligations may arise in part from commitments initially made in non-legally binding forms. Those effects can bring greater costs to bear than currently assumed in most rationalist accounts, especially if a soft law instrument hardens. I identify three pathways through which it could happen: soft law's incorporation in domestic law, its transposition in a binding treaty, or its recognition as customary international law. These effects may change the usual costs and benefits foreseen for commitment to a soft law instrument, especially by increasing the sovereignty and implementation costs tied to the initial commitment in a soft form.

I further argue that states take these potential effects and costs of soft law into account when making a decision on commitment. This calls for a revised account of the decision-making process towards soft law instruments, with the addition – along all other policy preferences – of the potential costs of soft law as a main consideration to take into account. States will make decisions and craft commitment to a soft law instrument, depending on the costs foreseen (if any). This rests on a two-fold assessment of the costs that could arise, and the likelihood that they materialize through the hardening of the soft law instrument. The result of this revised account of state decision-making is that commitment to soft law instruments may not be as inconsequential as its non-binding status alone suggests. Depending on the potential costs foreseen, states will craft commitment to mitigate such costs or block them from arising. This is made possible when conceiving of commitment to soft law not as a binary decision between joining or not, but as a flexible endeavor where states can craft the outcome of their decision, e.g. through interpretive devices (limiting the substance or form of their commitment). My revised theory of state decision-making on commitment to soft law, by putting the costs of soft law forward, allows to account for deviant cases of state behaviour currently not

explained by rationalist accounts; i.e. opposition to soft law instruments, in spite of reputational benefits to be made in joining (and costs to be borne in opposing).

The remainder of this introduction presents a few additional remarks on the research design and theoretical approach taken in Part II (Section 1), as well as an outline of the next two chapters (Section 2).

1. RESEARCH DESIGN

In Chapter 4, I use legal analysis and doctrinal research to identify and assess the actual and potential effects of soft law in international law (and, in a lesser measure, in domestic law).[1] Doctrinal research is ubiquitous in the legal field.[2] It is defined as 'research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments.'[3] As such, it is 'a two-part process…, first locating the sources of the law and then interpreting and analyzing the text'.[4] In this project, doctrinal research is based on primary and secondary sources: it establishes the existence of rules and norms in the international legal order through international treaties, case law and customary law, as well as official international documents and unilateral declarations by states. Additionally, it relies on further documentary sources,

[1] Cane and Kritzer, *The Oxford Handbook of Empirical Legal Research*; Hutchinson and Duncan, "Defining and Describing What We Do"; Ratner and Slaughter, "Appraising the Methods of International Law."

[2] In fact, 'the doctrinal method is often so implicit and so tacit that many working within the legal paradigm consider that it is unnecessary to verbalise the process.' Hutchinson and Duncan, "Defining and Describing What We Do," 99.

[3] Pearce Committee, 'Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission' in Ibid., 101.

[4] Ibid., 110.

along with scholarly publications and commentaries.[5] The emphasis here is not so much on uncovering new rules or new insights in international law, but using existing insights from legal scholarship on the workings of the international legal order, especially in the creation of international obligations, to identify the actual and potential effects of soft law in international law[6] and how it impacts state decision-making on commitment to soft law instruments.[7]

Thus, one of the distinctive features of this project from an IR perspective is that it does not use law or legalized institutions (hard or soft) as 'dependent variables', meaning that the creation of legal rules or choices among institutional forms are not the outcomes the project aims to explain. Instead, it takes the less common but promising approach of using international legal analysis to establish the potential effects and costs of soft law; those are then used as explanatory factors in states' decision-making on commitment to soft law.[8] I argue that this is the best way to develop a comprehensive account of state behaviour towards soft law instrument.

Legal analysis is essential to understanding the mechanisms through which international obligations arise and to establish the kind of effects and costs that may arise from commitment to an international instrument in soft law form. The effects of soft law are already widely documented in international legal scholarship (even if their existence or

[5] This secondary source is particularly important in international legal analysis, considering that 'the teachings of the most highly qualified publicists' is a subsidiary source of international law in the Statute of the ICJ.

[6] 'Especially as the answers to the questions why and how international law is produced does not necessarily tell us how international law has effects[;…] the effects…may be unintended.' Cane and Kritzer, *The Oxford Handbook of Empirical Legal Research*, 755.

[7] As such, from a legal theory perspective, it could be said to belong to positivism (characterized, in its classic form, by voluntarism – law emanating from expressions of state consent –, distinguishing between the law as it is and the law as should be, and concern for legal validity.) Simma and Paulus, "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View," 304.

[8] Abbott, "IR Theory, IL, and the Regime Governing Atrocities in International Conflicts," 363.

extent of the contribution of soft law to the development of international law remains debated). Chapter 4 aims to use insights from the public international law literature and translate it for the purposes of international relations research. The literature on the potential effects of soft law allows us to produce a richer IR account of the potential costs associated with commitment to soft law, one that is then determinant, in Chapter 5, to a revised account of decision-making on commitment to soft law instruments.

2. PART II OUTLINE

Chapter 4 presents the effects of soft law, actual and potential, to evaluate how they may impact the cost-benefit assessment of commitment. The first section of the chapter gives a brief overview of the different functions played by soft law in the international legal order: standard-setter, complement to hard law, or substitute to it. Section 2 then starts the exploration of soft law's effects, starting with its effects from the time of adoption onwards. Those consist mainly of its political and moral force, as well as limited direct legal effects, and indirect/qualifying legal effects. Section 3 follows with an exploration of soft law's potential effects over time, seeing how greater effects can arise through a hardening of a soft law instrument (or provisions within one). This may happen through three pathways: soft law's incorporation in domestic law, its transposition into a treaty, or its recognition as customary international law. Section 4 identifies how these potential effects could affect the costs of the initial commitment to a non-binding instrument, should hardening occur. The concluding section focuses on the uncertainty surrounding the potential for soft law to harden, and what this means for states approaching decisions on commitment.

Chapter 5 builds on these insights into the potential costs of soft law to put forward a revised account of decision-making of commitment. I argue that the potential costs of soft law are taken into account by states when making decisions on commitment to soft law, in ways that can contribute to shape the final decision on commitment. I present commitment to soft law as a four-step process. Step A consists in a preliminary assessment of the form and function of the instrument. Steps B and C are the core considerations to be evaluated and balanced in the decision-making process. Step B is the distinctive feature of this revised account, as it focuses on identifying the potential costs of soft law. This is a two-fold assessment, through which states evaluate whether there would be costs arising if the instrument were to harden, and how likely it is that a given instrument would harden over time. Step C adds the usual considerations in decision-making, i.e. any policy preferences that may guide states' decisions at a given point in time (including normative or strategic concerns).

Finally, Step D refers to the outcome of the decision-making process: crafting a decision on commitment. It is the step through which states will identify possible policy courses, and settle on the most effective one to maximize benefits and minimize costs. If the costs of soft law are important, this may push states to craft their commitment to mitigate them, or attempt to block them from arising. This can be done through the position taken towards commitment (e.g. voting position) and through the addition of additional interpretive statements including limitations precluding the application of some provisions, or to the possibility of future effects. The chapter addresses each of these steps in turn, and concludes by summarizing expectations for state behaviour in practice, on the basis of this revised account of state commitment to soft law instruments.

Chapter 4

THE EFFECTS AND COSTS OF SOFT LAW

A soft law instrument may be an advantageous tool to advance international cooperation or develop norms internationally, as it presents lower costs compared to creating or amending hard law. It can be agreed upon faster and remain more flexible, both in terms of the ease with which it can be amended (if needed) and of allowing states a greater latitude in terms of implementation. Those purported advantages are mostly stemming from the non-binding status of soft law instruments at the time of their adoption. Yet by no means does the term 'non-legally binding' equate to 'inconsequential' or 'costless' on the international stage. Soft law instruments can have effects, at the time of adoption and beyond. I argue that these effects can bring about costs which are taken into account by states when deciding on commitment.

Soft law instruments can have political and moral effects from the time of their adoption onwards. Additionally – and more importantly in terms of the challenges raised for the decision to commit – over time, soft law instruments can potentially give rise or contribute to the emergence of legal obligations. Through three different pathways (domestic law, treaty and customary law), soft law instruments or provisions contained in one can effectively harden and become more consequential (and potentially costlier) for the parties involved with their adoption. Insights into soft law's potential effects, stemming from international legal analysis on the emergence of new international

obligations, are key to understanding how soft law can effectively carry greater costs than usually assumed.

In this chapter, therefore, I present the actual and potential effects of soft law and establish the impact they may have on the costs of commitment. Before doing so, section 1 offers a brief overview of the functions played by soft law in the international legal order (standard-setter, complement or substitute to hard law). Section 2 then looks at the effects of soft law instruments from the moment of adoption onwards: political and moral force, limited direct legal effects and indirect/qualifying legal effects. Section 3 presents the different pathways through which soft law instruments can harden over time, considering the additional effects brought about by their incorporation into domestic law, replication into a treaty, and contribution to the emergence or recognition of customary international law. Section 4 then identifies the types of costs for states that are affected by an eventual hardening of a soft law instrument. The conclusion highlights the impact of the uncertainty surrounding the possible evolution of soft law instruments post-adoption and its associated costs, opening up the reflection on how that may play a role in states' decision-making on commitment.

1. FUNCTIONS OF SOFT LAW

To understand how states make decisions on commitment to soft law, it is worth uncovering why they might use soft law in the first place; in other words, what functions a soft law instrument may serve in the international legal order.[1] Just as 'soft law' as a concept is defined best in relation to hard law, I consider that its functions and roles are

[1] This account of the functions served by soft law was developed in a parallel project, looking into the use of soft law in the UN Universal Periodic Review mechanism. See Villeneuve, "Soft Law in the UPR." for details and examples of the three functions.

also understood best through their relation to existing hard law (or lack thereof) in a given issue-area. In doing so, three core functions emerge:[2] soft law instruments can serve (1) as complements to hard law, to detail particular dimensions of existing binding obligations; (2) as standard-setters, in the absence of hard law on a given issue; or (3) as substitutes to hard law, when similar provisions also exist in hard law form, but creating a new soft law instrument or invoking a soft law equivalent is preferable.

1.1. Soft law as complement

First, soft law can be developed as a complement to existing hard law. It can be devised and used, both in domestic and international institutions, as interpretive devices for the content of hard instruments. In such instances, soft law instruments tend to be adopted as precise sets of guidelines or principles. They can be very attractive since they may contribute to increased implementation efforts and coordination benefits, without having to go through the difficult (and costly) process of revising or amending the hard instrument they relate to.

1.2. Soft law as standard-setter

Second, soft law instruments can be devised as standard-setters. In that role, soft law instruments provide a platform for the enunciation of new norms or standards not already covered in hard, binding treaties. The choice of a soft law form can help foster consensus and accelerate the conclusion of an agreement on a given issue, without some of the costs usually associated with the negotiation of hard law. It is a good device to open up new fields in international or domestic law. In its role as standard-setter, a soft law

[2] Soft law in IR and IL literature is often ascribed two different functions, being either fundamentally 'norm-creating' or 'norm-filling' Lagoutte, Gammeltoft-Hansen, and Cerone, *Tracing the Roles of Soft Law in Human Rights*. (also at times labelled e.g. 'precursors' or 'complements' to hard law). I posit that this categorization calls for the addition of a third function: soft law as 'substitute'.

instrument can then also constitute a stepping-stone towards hard legal commitments; norms agreed upon in a soft form can eventually be transposed in binding instruments. (This hardening of soft law through the treaty pathway is explored further in section 3.2 below.)

1.3. Soft law as substitute

The third core function served by soft law in the international legal order is as 'substitute' to an existing hard law instrument. In some cases, soft law instruments in one issue area will cohabit on the international scene with binding instruments on very similar matters (if not containing nearly identical provisions). This usually occurs in two types of situations: a soft law instrument can be *created* as a substitute, i.e. as a fallback from, or an alternative to an unpopular pre-existing hard law instrument,[3] or *used* as a substitute to existing hard law in international proceedings (e.g. if a soft law instrument is called upon for states that are not parties to the existing hard instrument on similar matters).

1.4. Summary

In sum, at the time of its creation, it is possible for a soft law instrument to be intended as a complement, standard-setter or substitute, depending on its relationship with existing binding instruments (if there are any). Later, in practice, it will retain its primarily function (as complement, standard-setter or substitute) accordingly, and may be further invoked as substitute in practice, depending on the membership of existing binding instruments or on necessity arising. Functions are therefore not necessarily

[3] If a hard instrument has failed to rally an important number of parties, normative development in an issue-area might be seen as stalled; states and other actors may resort to soft law to 'restart the process', and step back to a consensus building phase through a non-binding instrument.

mutually exclusive. The functions of soft law play a role in how states approach decisions on commitment. As such, they are further addressed in chapter 5 (below).

2. ACTUAL EFFECTS FROM THE TIME OF ADOPTION

Soft law instruments, in their functions as complements, standard-setters or substitutes, are non-binding, yet not deprived of effects. This section explores the effects of soft law instruments in the international legal order from the time of their adoption, i.e. (2.1) political and moral effects, (2.2) direct legal effects, and (2.3) indirect or qualifying legal effects.

2.1. Political and moral force

States and other actors creating soft law instruments will often aim to take advantage of soft law's political or moral force. State representatives often mention, upon adoption of milestone declarations on topics deemed important to the international community, that declarations are valuable for their 'moral impact' or their capacity to constitute 'a basic moral code wherewith to found […] the world of tomorrow',[4] as they are 'a statement of aspirations and moral principles.'[5]

International actors will often push for the soft law instrument to act as a catalyst of the development of new norms or guidelines in the international community, without need or desire to recourse to the shadow of international legal responsibility. Soft law may be preferred to benefit from shorter drafting and negotiating time and fewer resources needed before an instrument's adoption (compared to a binding treaty), or to send a

[4] UN Doc. A/PV.1261, pp. 1-2. (Chile).
[5] Ibid., p. 5. (UK).

strong signal to the international community by reaching consensus upon adoption (an avowed goal for decision-making at the UN General Assembly[6] and other international conferences). The adoption of soft law could also be intended as a tool of 'cheap talk', for states to pay lip service to the norms it contains in order to reap reputational benefits, with no intention to implement it domestically.

Soft law instruments, once adopted, will then often be the focal point in a given issue-area, especially in their role as standard-setters in areas not covered by binding norms, or as complements when guiding states on the implementation of binding instruments they have already ratified.[7] States may then adjust their behaviour in conformity to the soft law instrument for moral or instrumental reasons, without the constraints of international legal obligation. Indeed, because of rationalist cost-benefit analysis or other strategic or normative considerations, states may join in efforts to adopt new soft law instruments for those political effects and impacts, without risking to see their potential violation of the new norms or non-conformity with them sanctioned on the international stage.[8]

Yet, if it were the case that soft law could only be invoked outside of the legal sphere, as a moral or political bargaining chip between states, it would be the end of the story – and the term soft law would probably never have emerged. Instead, if soft law has such a conflicted identity in the international legal order, it is because of its perceived

[6] UN General Assembly, "Functions and Powers of the General Assembly.": 'In recent years, an effort has been made to achieve consensus on issues, rather than deciding by a formal vote, thus strengthening support for the Assembly's decisions.'

[7] This capacity of soft law to serve as a focal point is reinforced by its potential qualifying legal effects (section 2.3) and may contribute to its eventual hardening (section 3).

[8] Yet, even in the absence of compulsory enforcement, 'cheap talk' commitments may still induce compliance or motivate changes in behaviour; through the concept of 'rhetorical entrapment', international norms may lead to increased compliance in spite of initially adverse objectives on the part of states. See e.g. Risse-Kappen, Ropp, and Sikkink, *The Power of Human Rights*; Katzenstein, "Reverse-Rhetorical Entrapment."

potential to cross the line between 'non-law' and 'law' and position itself outside the purely political realm, in close proximity to the 'hard' legal sphere. This starts right from the moment of adoption, with soft law instruments' capacity to carry direct (albeit limited) legal effects and indirect/qualifying legal effects.

2.2. Direct legal effects

As seen above, soft law instruments' distinguishing feature rests on their drafting and adoption in non-binding forms. Yet, there is a possibility for soft law instruments to carry direct legal effects at the time of their adoption, by becoming binding internally for the organisation adopting them or by constituting organisations with international legal personality.[9]

This circumscribed potentiality for direct legal effect is usually contingent on the particular institutional context of an instrument's adoption: a soft law instrument adopted within an international organisation will usually be binding within the organisation itself. It will be part of the legal framework of the organisation and will be considered binding as far as its internal affairs and programming are concerned, even if it is not directly binding for its member states.[10] This is not as trivial as it may seem at first glance. Taking the UN as example, even if the legal effects of a soft law instrument are limited to the organisation's internal affairs (excluding its member states), once an organisation overseeing over 40 specialized agencies and programs and employing over 40 000 employees worldwide[11] adjusts its internal conduct to respect and fulfill non-binding principles in all its activities, the impact can be felt on an important scale in

[9] This section on direct legal effects is partly inspired form Gruchalla-Wesierski, "A Framework for Understanding Soft Law."

[10] Ibid., 52; Johnstone, "Law-Making through the Operational Activities of IOs."

[11] United Nations, "UN Careers."

practice. Additionally, non-binding instruments are often the impetus, within the organisation, for the creation of specialist mandates working towards the development, implementation and monitoring of principles emerging through declarations (such as UN special rapporteurs, working groups, or permanent forums).[12] This binding legal effect internally can then contribute to further influence and clout for a given soft law instrument internationally and domestically in member states' actions, and in turn contribute to the further impact of a soft law instrument, as per the 'hardening' pathways explored below.

Moving away from the United Nations' universe, it is possible for states to create, through a soft law instrument, an international organisation of a 'soft' nature. For example, the Arctic Council displays the usual characteristics of a typical international organisation: it is 'an association of States, established by agreement among its members and possessing a permanent system or set of organs, whose task is to pursue objectives of common interest by means of cooperation amongst its members'.[13] It counts 'eight Member States, six indigenous Permanent Participant organisations, six Working Groups, three Task Forces, one Expert Group, and 32 observers',[14] as well as a secretariat to coordinate its activities. Yet, it describes itself as an 'intergovernmental forum', without the power to implement or enforce its decisions (leaving it to individual member states).[15] More importantly, it was established in 1996 through the Ottawa Declaration – a non-binding document adopted by its eight member-states'

[12] There are currently 57 active mandates for Special Procedures of the Human Rights Council, including special rapporteurs and expert groups (43 thematic mandates and 14 country-specific ones). UN OHCHR, "Special Procedures of the Human Rights Council." Permanent advisory bodies may also be created on a given topic (e.g. UN ECOSOC Res 2000/22 (28 July 2000) established the UN Permanent Forum on Indigenous Issues).

[13] Virally, "Definition and Classification of International Organisations."in White, *The Law of International Organisations*, 1.

[14] Arctic Council's webpage banner. Arctic Council, "Home"; Arctic Council, "About Us."

[15] Arctic Council, "About Us."

representatives (through their executive branch).[16] In such a case, a soft law instrument creates an entity on the international stage. As Klabbers points out, it would be very difficult to argue that such an entity should not be recognized international legal personality (on the basis of the soft law nature of the instrument establishing it) considering it is likely to carry out activities internationally where its responsibility might be engaged.[17] That constitutes another possibility for soft law to give rise to direct legal effects.

2.3. Indirect/qualifying legal effects

Beyond soft law's direct legal effects upon adoption, Gruchalla-Wesierski points to its qualifying effect: 'the meaning soft law gives to subsequent acts', i.e. its possibility to 'give a certain character to actions which they otherwise would not have had'.[18] These indirect legal effects, arising from the moment of adoption, are the internationalization of a subject matter and the contribution of soft law to the legal effects of subsequent acts.

First, the adoption of a soft law instrument on a given topic will usually be sufficient to consecrate the internationalization of the subject matter.[19] This means that a state participating in the adoption of such an instrument and positioning itself with regards to norms and codes of conduct on the issue is effectively accepting that the subject matter is now no longer within its exclusive sovereign purview: it becomes covered by an international instrument, albeit a non-binding one, and could give rise to diplomatic

[16] Arctic Council, "Ottawa Declaration."

[17] Klabbers, "Institutional Ambivalence by Design," 414.

[18] Gruchalla-Wesierski, "A Framework for Understanding Soft Law," 58. His purview on this point is broader, as he includes in soft law's qualifying effects the possibility that 'susbsequent acts may form international law'. These will be covered here in the next section, on pathways towards hardening.

[19] Ibid.

claims or actions with other states. This is not likely to be contested in practice, but is worth mentioning nonetheless, especially as it may raise the sovereignty costs of commitment.

Second, soft law can contribute to the legal effects of subsequent acts. The adoption of a soft law instrument may create expectations, or give additional meaning to subsequent state practice. In such cases, it has a 'legitimizing effect', considering that 'while no act is required to be taken in accord with the soft law, any act which is in fact taken in accord must be described as being in good faith.'[20] It may also delegitimize non-conforming conduct, or raise a challenge to existing binding norms. It is possible, in a similar line of reasoning, that commitment to a soft law instrument may trigger expectations giving rise to estoppel under international law, whereby 'actions by a party not intending to create legal relations [through the adoption of a non-legally binding instrument] do in fact have legal effects for that party'[21] and may 'prevent [it] from denying the truth of a statement' made.[22]

As Schachter notes, 'the conclusion that nonbinding agreements are not governed by international law [in the sense of them not creating legally-binding obligations] does not however remove them entirely from having legal implications.'[23] Hence, soft law instruments have effects from the moment of adoption, in terms of their political and moral force, as well as limited direct and indirect legal effects. But what happens to soft law instruments and the provisions they contain beyond the adoption stage? Do they maintain the same non-binding status eternally, and is their impact on the development

[20] Ibid., 62.
[21] Ibid., 63.
[22] especially if others have acted upon it and a change of position would be detrimental or prejudicial to them. Law and Martin, "Estoppel"; MacGibbon, "Estoppel in International Law."
[23] Schachter, "The Twilight Existence of Nonbinding International Agreements," 301.

of legal obligations as limited as their non-binding status suggests? I argue that, even when taking a (somewhat restrictive) positivist view of international law aligned with the traditional sources doctrine on the creation of international law, there are many ways through which soft law instruments can become more consequential over time, potentially 'hardening' towards binding legal norms, domestically and/or internationally.

3. POTENTIAL EFFECTS: PATHWAYS TOWARDS SOFT LAW HARDENING

There is a possibility that, over time after its adoption, a soft law instrument (or select provisions within it) may become more consequential and feed or morph into legally-binding obligations. This can happen through three pathways towards a hardening of soft law: (3.1) the domestic law pathway, (3.2) treaty pathway, or (3.3) customary international law (CIL) pathway. While the first relies on domestic law-making mechanisms, the last two rely upon traditional sources of international law.[24] For each of these, I will present the process underlying soft law's potential hardening, provide examples of it in practice where relevant, uncover the triggers that may propel a soft law instrument down a given pathway and reflect on its broader implications for state practice.

3.1. Domestic law pathway

The first pathway is one through which soft law can make its way into domestic law. This can happen either through legislative or judicial mechanisms. In the first case, a

[24] According to the traditional sources doctrine, as per article 38 (1) of the ICJ Statute.

state's legislature can incorporate a soft law instrument or some of its provisions in a domestic act, therefore transforming it into binding law on its territory. In that case, it happens through the purposive act of a state's legislative body, whereas the state wilfully binds itself to the content of the instrument domestically (even if it is to remain non-binding under international law). A major example of a soft law instrument providing inspiration for, or being directly incorporated in domestic legislation is the Universal Declaration of Human Rights; it has been entrenched in various states' constitutions and many of its provisions have been replicated in domestic human rights legislation.[25]

In the judicial realm, soft law instruments can penetrate domestic legal systems by assisting judges in the interpretation of domestic legislation. In such cases, judges cannot use the soft law instrument as a direct source of domestic legal obligation (if a state has not directly entrenched it), but can draw from it to flesh out the content of existing domestic law. A challenge that may arise in that context is that states may not wish to see certain soft international standards be applied to the domestic realm (even from instruments they have supported or adopted), but are unable to block this interpretive value entirely in light of judicial independence. State representatives may try, however, to limit it by advancing alternative arguments, pointing out that instruments they have not officially supported should not apply domestically, or arguing in favour of their own version of the interpretation to be given to the instrument.[26]

3.2. Treaty pathway

[25] The ILA has surveyed its influence in various national legal regimes, including many states where it (or provisions replicated from it) have constitutional status. International Law Association, "Final Report on the Status of the UDHR."

[26] Failing that, if the court would indeed use international soft law in a way a state does not entirely agree with, adjustments could be made through subsequent domestic legislation setting out their own interpretation or adopting clear new rules on an issue.

Moving back to the international level, the most obvious pathway for a soft law instrument to lead to binding obligations is through the transposition of all or some of its provisions into a conventional instrument, namely a binding international treaty. Soft law, especially when adopted as a standard-setter, may pave the way for the subsequent adoption of a treaty including similar provisions. Such project may be planned as the end goal to reach even before the adoption of soft law, or it might happen at any point thereafter, once actors establish that they need a greater degree of certainty in their dealings on a given issue or express the desire to fix the development of those norms in legally-binding terms.

There are multiple examples of soft law instruments acting as standard-setters or precursors, and eventually paving the way for harder instruments in the international legal order.[27] This has occurred, for instance, with many UNGA declarations over the past fifty years. On matters of human rights, out of twenty-two UNGA declarations,[28] seven led to the adoption of a binding treaty, including the first and most famous of all: the Universal Declaration on Human Rights.[29] Indeed, a majority of the provisions set out for the first time in the UDHR have subsequently been detailed and formalized through the adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, slightly less than twenty years after the adoption of the non-binding instrument.[30] Similarly, the 1959

[27] This paragraph was first presented in Villeneuve, "Could the Progressive 'Hardening' of Soft Law Impair Its Future Development?"

[28] 97 'declarations' were adopted by the UNGA since 1945, with 33 classified by the UN as related to human rights. United Nations, "Declarations and Conventions." See Appendix 3.

[29] UNGA Res 217 A (III) (10 December 1948).

[30] The obligations included in the two Covenants are usually presenting greater detail than their UDHR counterparts. Still, almost all articles of the UDHR are reflected in one or the other (if not in both) covenants (with the exception of the right to property - art.17 of the UDHR), and almost all provisions of the Covenants are reflected in the UDHR (apart for art.27 of the ICCPR on minority rights).

Declaration on the Rights of the Child[31] was followed by the 1989 Convention on the Rights of the Child. The same pattern was repeated with instruments dedicated to the elimination of racial discrimination,[32] the elimination of discrimination against women,[33] the rights of persons with disabilities,[34] the protection against torture,[35] and the protection against enforced disappearance.[36] Hence, examples of UNGA declarations leading to harder forms within the UN treaty structure are not scarce.

3.2.1. Pathway trigger

At times, the march towards a binding convention following the adoption of a soft law instrument is envisioned from the start, with the soft law instrument clearly identified as a stepping-stone to negotiate provisions that will eventually culminate in a binding instrument. For example, when the Declaration on Territorial Asylum was adopted, the representative from Costa Rica pointed out that his delegation 'will be equally pleased to see the adoption of a convention on territorial asylum … since we realize that declarations express a principle, a hope, but are not binding on nations without a treaty'.[37] In some cases, the work to develop and adopt a declaration on a certain topic progresses alongside the development of a convention, as the relevant committees are tasked with both mandates at once. For example, the Universal Declaration of Human Rights emerged alongside simultaneous efforts to develop a binding treaty on human

[31] UN Doc. A/RES/14/1386 (20 November 1959).

[32] UN Doc. A/RES/18/1904 (20 November 1963) and International Convention on the Elimination of All Forms of Racial Discrimination.

[33] UN Doc. A/RES/12/2263 (7 November 1967) and Convention on the Elimination of All Forms of Discrimination against Women.

[34] UN Doc. A/RES/30/3447 (9 December 1975) and Convention on the Rights of Persons with Disabilities.

[35] UN Doc. A/RES/30/3452 (9 December 1975) and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[36] UN Doc. A/RES/47/133 (18 December 1992) and International Convention for the Protection of All Persons from Enforced Disappearance.

[37] UN Doc A/PV.1631, p. 5 (Costa Rica).

rights, in initiatives to come up with an 'international bill of rights'.[38] In that case, a decision was made prior to the final negotiation blitz on the declaration to postpone work on the convention(s) in order to achieve the adoption of the declaration quicker.[39] The speed at which consensus was established for the unanimous adoption of the declaration contrasted sharply with the time it took then to elaborate and adopt the text of the conventions (in the midst of the unfolding Cold War), which gives weight to the argument that soft law can be a favourable option to achieve quicker agreement in first steps of norm development internationally.

The move from a non-binding declaration to a convention is not, however, always planned ahead in a sequential, step-by-step strategy. It can happen even in cases where a convention was not envisioned to follow the adoption of a non-binding instrument. In one particular case, on the issue of enforced disappearances, a small number of state delegates at the UN Council for Human Rights worked for the adoption of resolutions and the establishment of an experts' group to tackle the issue.[40] At that point, initial proponents of the initiative thought that it would be sufficient, since the issue was already covered by existing instruments on civil and political rights.[41] Yet, advocates and concerned parties continued on the route traced by the establishment of the Experts mechanism and pushed for the adoption of the Declaration on the Protection of All Persons from Enforced Disappearance (unanimously adopted by the GA in 1992) then of a Convention bearing the same name (in 2006).[42] The Convention currently has 57

[38] United Nations Audiovisual Library of International Law, "Universal Declaration of Human Rights."

[39] The UDHR was adopted first, in 1948. Binding covenants emerged later, with the ICCPR and ICESCR opening for ratification in 1966 (and entering into force in 1976). The three instruments are now considered to constitute the said 'international bill of rights'. For details on the UDHR, the impetus for its creation and its drafting process, see Morsink, "The Drafting Process Explained." and Whelan, *Indivisible Human Rights*.

[40] UN CHR Res 20 (XXXVI) (29 February 1980).

[41] Interview with a former Canadian diplomat at the UN, April 2016.

[42] See note 36 above.

state parties,[43] and relies on the Experts Group to push for its implementation around the world, through monitoring and reporting in particular cases.[44] This case highlights the various routes to and from a non-binding instrument and illustrates that, once adopted, an instrument may develop in ways not necessarily foreseen upon its adoption.

3.2.2. Implications

In most cases, there is significant overlap between the content of the instrument adopted in a soft, declaratory form and the final provisions of the hard instrument adopted as a multilateral treaty, in the aforementioned cases, within the UN structure.[45] Therefore, provisions contained in a soft law instrument can play a determinant role in the elaboration of further, binding instruments under international law. At times, the exact wording put forward in the soft instrument is transposed in the subsequent binding convention, albeit with greater detail. State representatives evidently do not start negotiating from a blank slate if there are international instruments on a matter already. In the UN context particularly, resolutions build on one another and particular wording or phrases will crystallize through repetition within the UN bureaucracy, which can be of great consequences at later stages of the process (once instruments are adopted and debates arise as to the nature of the legal and political obligation they raise). This highlights the importance of negotiations on the final text of soft law provisions, as the language set in a non-binding form could subsequently be replicated in harder forms. As put by a former Canadian diplomat,

> 'Most states take the non-binding declarations seriously, because they know that the language in them can still come before their national courts

[43] It also counts 96 signatories. United Nations Treaty Collection, "Convention on Enforced Disappearances - Status."

[44] Discussion with Bernard Duhaime, vice-chair of the Working Group on Enforced or Involuntary Disappearances, April 2015.

[45] Parts of this paragraph were first presented in Villeneuve, "Could the Progressive 'Hardening' of Soft Law Impair Its Future Development?"

> – which they do in Canada – and because after the non-binding declarations pass, there is a certain tradition at the UN to move towards a binding international convention, which draws heavily on the language already adopted. So you really have to be careful in phase one, so that you are not stuck looking at something at phase two that you should have dealt with more seriously.'[46]

Hardening may retroactively raise the stakes of negotiations on the text of the non-binding instrument, which has to be taken into account at the drafting and negotiation stages.

However, for the treaty pathway to be followed and for soft law to 'harden' for a given state, a renewed expression of state consent is required. States who have adopted a soft law instrument will not be bound automatically by a treaty developed subsequently; each state will need to ratify the treaty itself (following the treaty's own ratification procedures, and domestic requirements to that effect). This additional expression of state consent to be bound (in the form of ratification) acts as a safeguard for states in terms of future developments to arise from their acquiescence to the adoption of the soft instrument. No matter if a convention is envisioned or not when states decide on commitment to a non-binding instrument, a state can be assured it will not be automatically bound by any treaty emerging out of the text of the soft law instrument (even if it were – hypothetically – to contain identical provisions throughout) unless the state ratifies the treaty explicitly.

This does not mean a treaty stemming from a soft law instrument will have no impact whatsoever on a state who decides not to ratify it. As mentioned in section 1, a soft law instrument can still act as a substitute, and be called upon to hold a state accountable if it has accepted certain norms in soft law form, even if it did not join the subsequent convention containing similar provisions. In some cases, courts could still resort to the

[46] Interview with a former Canadian diplomat at the UN, April 2016.

non-binding instrument to establish the presence of certain legal obligations, either through the direct legal effects coming from the adoption of a soft law instrument (section 2.2 above) or through its contribution to the emergence of customary international law obligations (section 3.3 below).

In summary, it is possible for a soft law instrument to pave the way for a binding treaty containing similar (if not identical) provisions. For this hardening of the soft law instrument to bind state parties under international law, a renewed expression of state consent to be bound must be obtained, through the ratification of the treaty (notwithstanding a state's position on the adoption of the soft law instrument). Yet, the conclusion of a convention following the adoption of a soft law instrument is likely to have important implications for states (parties or not to the convention), since the language negotiated in the soft law instrument is likely to be replicated in further binding instruments. This may retroactively raise the stakes surrounding the wording fixed in the non-binding form. The conclusion of a treaty following the adoption of a soft law instrument may also contribute in a significant way to the hardening of soft law through the third pathway, the recognition of international obligations under customary international law.

3.3. Customary international law pathway

Soft law instruments – or more specifically, particular provisions within one – can also integrate the realm of hard law and give rise to legal obligations.[47] This can happen if they are recognized as part of the body of customary international law (CIL), itself a

[47] Parts of this section were first presented in Villeneuve, "Could the Progressive 'Hardening' of Soft Law Impair Its Future Development?"

direct source of internationally-binding obligations. As contained in the ICJ status, customary international law arises as a source of international law from 'international custom, as evidence of general practice accepted as law'.[48] It is therefore a body of rules arising out of the collective practice of states. Once a rule of CIL is recognized, it is deemed to apply to all states in the international community.[49]

The International Court of Justice has established that there are two components to recognize and identify the existence of a CIL obligation: state practice and *opinio juris*. As Shaw puts it, the two constitutive elements of custom are 'the material facts, that is, the actual behaviour of states, and the psychological or subjective belief that such behaviour is "law".'[50] State practice constitutes the 'material element' in customary international law. It refers to a consistent body of state practice, across time and between actors, wherein the same behaviour is repeatedly followed and respected. Regularity of state behaviour alone is not enough, however, to recognize a practice or norm as a rule of CIL. There needs to be a belief, on the part of the state actor, that this regular practice or norm is followed not just out of sheer habit or ease, but out of a sense that it is required under international law. This second dimension (the psychological or subjective element) is referred to as '*opinio juris*',[51] the belief that a practice is followed out of a sense of legal obligation.

The third pathway, soft law hardening through customary law, is dependent on the participation of a soft law instrument to the development of a customary practice and its recognition as law. Soft law instruments can contribute to this in three different ways.

[48] *Statute of the International Court of Justice.*
[49] For the rule of the persistent objector as exception to this, see Chapter 5, section 5.3.2.
[50] Shaw, *International Law*, 74.
[51] Accepted short form for '*opinio juris sive necessitatis*'

First, a soft law instrument can foster or generate more consistent state practice, by providing a focal point and establishing common norms in a given issue-area; if states are looking for guidance internationally as to a particular course of action, they might well choose the one laid out in the soft law instrument if no other preference arises to distract them from it. Second, a soft law instrument can provide evidence of *opinio juris*, the belief that the norm conveys a legal obligation; if a state votes in favour of an instrument (hard or soft) laying out particular principles for the international community, it would be hard to argue that it definitely does not see this course of action as an appropriate one to follow internationally. Beyond that, as a third option, soft law can also influence the formation and recognition of CIL by encouraging states to define and formalize the content of existing or emerging customary practices, and incorporate them in the written, non-binding instrument.[52]

On this pathway for soft law to harden through its links with the recognition of CIL, the Universal Declaration on Human Rights, the first UNGA declaration (which also acted as a precursor to binding covenants in the international legal order), constitutes a precedent of a great magnitude. Indeed, even though it has been clearly adopted as a non-binding, aspirational document,[53] some of its provisions have since been increasingly recognized as reflecting the state of customary international law and considered binding even on states that did not necessarily consent to its adoption initially. Furthermore, since the UDHR it is at the heart of the UN human rights system, its provisions contain relatively general mentions of rights which were subsequently detailed in other soft and hard instruments. The argument being made that the UDHR is

[52] By codifying emerging custom, a soft law instrument may accelerate its crystallization and recognition.

[53] For the genesis of the UDHR and further information on the status of UNGA resolutions and declarations, see introduction to Part III.

part of the body of CIL is then sometimes used as basis to claim other documents detail rights which should equally be recognized as customary international law.

The links between UNGA resolutions more generally and the formation and recognition of customary international law have been confirmed in the past by International Court of Justice decisions and advisory opinions. Indeed, there are precedents in the Court's history where it directly considered soft law instruments in its evaluation of the presence of customary international law. In the landmark Nicaragua case, for instance, the ICJ suggested that consensus on a UNGA resolution on a matter can be contribute to prove *opinio juris* and establish the presence of a norm of CIL.[54] Again, the Court established that the consent of member states to a resolution of a declaratory nature can constitute a mark of acceptance of the validity of the substantive rules it contains. In the case of UNGA Resolution 2625,[55] it remarked that 'the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question.'[56] Such views are not uncontestably accepted in the international legal community,[57] but they certainly constitute precedents that show the importance commitment to a soft law instrument may play in the recognition of customary international law obligations. Those precedents also fuel uncertainty regarding the legal status of instruments adopted in a non-binding form.

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[54] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits) [1986] ICJ Rep 14 (Nicaragua), para 188.

[55] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. UN Doc. A/RES/25/2625 (24 October 1970).

[56] ICJ, Nicaragua, note 54, para 191.

[57] Voyiakis reports on criticism of the decision on the grounds that the '*Nicaragua* methodology fails to note that States can support or oppose a given GA Resolution on different grounds and on the basis of very different views as to whether that Resolution reflects or ought to reflect customary international law'. Voyiakis, "Voting in the General Assembly," 213, 220. In the following chapter, I argue that states are actually conscious of this risk and may take it into account in the way they craft commitment to a non-binding instrument (at the UN, this may be dealt with by recording an Explanation of Vote).

3.3.1. Pathway trigger

Customary international law obligations are unwritten by nature – at least as they first arise – since they emerge through practice that states recognize as law. They can later be codified into conventions (something the International Law Commission has a mandate to do), but this progresses very slowly. Questions about the existence and nature of CIL obligations take center stage when a dispute arises on a matter involving a potential CIL obligation. Parties to a dispute in an international setting will, for instance, submit their case to an international or regional court. One side is likely to argue that a rule of customary international law exists, in a way that plays to their advantage in the settlement of the dispute. The other side is likely to argue either that the rule of customary international does not exist, or, come to it, that it does not apply to its situation. Both sides will have to supply to the court evidence as to the existence or not of a consistent body of state practice (either internationally or regionally in the case of regional custom), and of *opinio juris* (statements to the effect that proven existing practice was followed out of a sense of legal obligation).[58] Then, the existence of a (pre-existing or emerging) rule of CIL will be decided by the Court in its decision. Unlike decisions on other factual and conventional (i.e. treaty law) grounds where precedents from international courts are not applicable beyond the case at hand, once an obligation of CIL is identified, it applies to all members of the international community.

3.3.2. Implications:

If, therefore, a court finds that a rule of CIL exists during proceedings on a particular case, all states find themselves bound by the new rule. No additional expression of state

[58] For an overview of the process and its usual sequence, see Green, *The Persistent Objector Rule in International Law*, 63–68.

consent is needed for a state to be bound once the obligation is identified, since in this case consent is implied from state practice[59] and *opinio juris* of a sizeable group of states in the international community. States do not have an additional opportunity to position themselves in favour of or against the CIL obligation when the courts identify it, unlike what they would be able to do when a treaty is drafted (and they can choose whether to ratify).[60] This may play a great role in constraining available policy options for states in certain situations, so it will be explored in greater detail in Chapter 5.

3.4. Summary of actual and potential effects

In sum, even if soft law instruments are adopted under the shared understanding of parties that they are to be non-legally binding, they can bring or trigger a whole range of effects, from moral, political and limited legal effects at the time of adoption, all the way through to an eventual hardening into binding international obligations. Pathways towards a hardening of soft law instruments vary greatly, not only in terms of how they are likely to be triggered, but also in terms of the opportunity granted (or not) to states to express their consent to be bound as the soft law instruments or some of its provisions harden. The table below highlights the main differences between the various effects and pathways, and the core challenge arising from the standpoint of state practice: the level of state consent needed for the hardening of a soft law instrument into binding obligations.

[59] For a discussion of the challenges (and fictional bases) of the requirement of state consent in international law, see Buchanan, "The Legitimacy of International Law."

[60] In such a situation, there is only one way for a state to exempt itself from the newly recognized CIL obligation: claiming the status of persistent objector, demonstrating it has persistently objected to the norm during its formative years prior to its recognition as CIL. Lowe, *International Law*, 2007, 55; Elias, "Persistent Objector"; Green, *The Persistent Objector Rule in International Law*.

	Effects / Pathways	Trigger	Implications for state consent
Effects at time of adoption	Political and moral effects	Automatic, but subjective. moral and political strength will vary	n/a (consent given for adoption of SL)
	Direct legal effects	Automatic, but influence in practice will depend on the IO for whom it is law internally.	n/a (consent given for adoption of SL)
	Indirect/qualifying legal effects	Automatic, but no obligation. Expectations raised will depend on the subject matter, and on subsequent state practice. Change of conditions could be enough to justify change of expectations or practice.	n/a (consent given for adoption of SL)
Pathways towards hardening	Domestic law pathway	Legislative body making decision to incorporate soft law provisions in domestic law. Domestic court interpreting domestic legislation using international soft law standards.	Yes, purposive act of legislature. No (consent given for SL), but possibility for subsequent adjustment through new legislation.
	Treaty pathway	Negotiation of a convention, usually decided by states (parties to SL) or IO where SL is adopted	**Yes**, state consent to be bound required, in the form of ratification of the treaty
	CIL pathway	Recognition of CIL, usually through court decision (when dispute arises) or codification	State consent to binding norm **not** required. Consent to be bound might be inferred from initial decision to adopt SL.

Table 4.1: Summary of the effects of soft law and pathways towards potential hardening

There is plenty of room for state discretion or subjectivity in the interpretation of effects arising at the time of adoption. This acts as a safeguard for states wishing to limit the purview of their non-binding commitment. In the case of pathways, this level of control over the subsequent effects of commitment is more limited. In the domestic law pathway, the legislative track requires a purposive act of the relevant state body (usually the legislature) to incorporate it in domestic law. Soft law may also be partially incorporated through judicial decisions, if international soft law is used to provide guidelines to interpret provisions in domestic law, but in that case the state usually

retains the autonomy to enact legislation to correct or reverse this interpretation if it does not appear satisfactory or optimal. Somewhat similarly, in the case of the treaty pathway, the expression of state consent to be bound by the treaty (should provisions first adopted in a soft form be transposed in a binding convention) is necessary for obligations to arise.

In the case of the CIL pathway, however, initial state consent given to the soft law instrument may serve to crystallize both constitutive elements of custom (state practice and *opinio juris*). This may contribute to the recognition of a new obligation for the state, on the basis of its initial approval of the soft instrument, without an opportunity to qualify its endorsement or reevaluate its commitment and withhold its consent to be bound. The only safeguard in that situation, is the invocation of a persistent objector status, but this possibility is greatly limited by the fact it cannot be improvised, as it requires a sustained record of opposition to the emerging norm.[61] So what does this knowledge about actual effects and potential effects (and about how the latter may be triggered) affect the usual rationalist assumptions about the costs and benefits of commitment to a soft law instrument?

4. THE COSTS OF SOFT LAW HARDENING

If a soft law instrument hardens (potentially even to the point of leading to legally-binding obligations), it certainly changes the cost-benefit assessment made based on its non-binding form. This section explores how those potential effects of soft law may translate into costs for states beyond the commitment stage. It reviews the general

[61] As will be explored further in Chapter 5, it also comes with substantial costs of its own in terms of the resulting self-isolation of a state in the international community.

assumptions of the rationalist account of commitment to soft law to identify the types of costs likely to be raised through its potential hardening: sovereignty and implementation costs.

As a brief summary, we can recall from Chapter 3 that there are three main types of costs and benefits likely to take part in decision-making on the creation/adoption of international instruments: material, reputational and sovereignty costs and benefits. Soft law instruments are understood to bring cooperation and internationalization benefits to their creators and participants, even if not to the same extent provided by hard law. Soft law allegedly compensates this lack of legal certainty and guarantees by offering greater flexibility at the negotiation and implementation stage, therefore carrying lower negotiation, implementation, and sovereignty costs than hard law. In fact, as it is assumed that the lack of legal obligation means that a state can retain control over whether or how far it decides to actually implement the provisions of a soft law instrument, implementation costs can be kept to a minimal (if not non-existent) level. Yet, depending on the subject-matter, there may be an influence in terms of reputational costs and benefits: joining an instrument on a normatively charged topic viewed favourably by the international community (e.g. human rights) may yield reputational benefits, while opposing could bring reputational costs. Overall, as Abbott and Snidal summarized, 'softer forms of legalization provide alternative and often more desirable means to manage many interactions by providing some of the benefits of hard law at lower cost.'[62] In short, in this view, soft law can bring benefits, but does not carry costs *per se*; its only drawback is that it cannot deliver the same level of certainty as hard law instruments. This makes commitment to soft law an arguably easy decision to make, as

[62] Abbott and Snidal, "Hard and Soft Law in International Governance," 434.

long as there are minimal benefits (even if solely reputational, for instance) to be made from it. But what if soft law was to harden, potentially even to the extent of morphing into hard, binding law?

Using insights about potential effects, I re-evaluate these assumptions about the low costs of soft law, and see what kind of costs might be brought forward by soft law's hardening, if it were to happen. Not all assumptions about the costs and benefits of soft law are altered by taking into account its potential effects, at least as far as decision-making on commitment is concerned.[63] The possibility that a soft law instrument hardens and the ways through which this may happen may change the initial/general cost-benefit assessment of commitment to soft law through two types of costs specifically (which are generally considered hallmarks of hard law): sovereignty and implementation costs.

4.1. Sovereignty costs

The hardening of soft law may lead to an increase in sovereignty costs, on two different fronts: it may affect the sovereignty costs attached to the instrument itself and its substantive content, or the sovereignty costs linked to the pathway through which it hardens, and the degree of state input or control over it (and over the creation of new binding obligations). The former rests on the usual account and logic of sovereignty costs; if a soft law instrument hardens and gets closer to the realm of binding law, it may become more intrusive in the domestic affairs of a state and bring higher sovereignty

[63] In the case of negotiation costs, for instance, it is generally understood that they will remain lower for soft law than hard law, notwithstanding soft law's future effects. There may be cases where negotiations of a soft law instrument stretch over a long period of time and end up bringing much higher costs than initially anticipated, but this will be unpredictable, and will not challenge the initial assumption at the start of the process. I.e. it will not and could not have been foreseen at the time of adoption, so cannot feed into decision-making.

costs to bear. The latter requires looking into the three different pathways towards hardening; the sovereignty costs attached to each vary, with the highest costs linked to the CIL pathway.

In the case of the domestic law pathway, soft law's hardening through domestic legislation involves a purposive act of the legislature, keeping sovereignty costs relatively low. If domestic hardening were to happen through the use of soft law by domestic courts (to interpret existing obligations), the soft law provision can integrate the domestic legal realm without further expression of state consent. This would raise sovereignty costs compared to the initial commitment decision to the soft instrument as is. Yet, that situation is not 'unrecoverable'; it would be possible for states in most jurisdictions, to supply competing interpretation or rectify the situation through a subsequent piece of legislation.

In the case of the treaty pathway, sovereignty costs over institutional design decisions would not be affected much either, as a state will not be bound by the treaty unless it ratifies it. This requires a renewed expression of state consent to be bound for the obligation to arise. Still, the non-binding instrument may have fixed a certain wording or interpretation that was then transposed in the treaty, in a way that may restrain states' subsequent margin for maneuver once that transition is made. That could constitute a slight increase in sovereignty costs, but its impact remains limited (unless it also contributes to hardening through the CIL pathway as per below).

The possibility that soft law hardens through the CIL pathway is the scenario with the greatest potential impact on the cost-benefit assessment of commitment. Indeed, as seen above, CIL is recognized on the basis of consistent general state practice, alongside *opinio juris* (the belief that practice is followed because it constitutes a rule under

international law). Many things can feed into the consolidation and crystallization of CIL, either by fostering state practice or providing grounds for *opinio juris*. The adoption of a soft law instrument is one of them, especially as it can act as focal point for practice and constitute the first formalization of a norm in a written instrument. In that context, the CIL pathway means that commitment to a soft law instrument (alongside conforming state practice) may contribute to the recognition of a new international obligation, without a window to express state consent to be bound (or opposition thereto). In such a scenario building on the CIL pathway, the sovereignty costs attached to commitment to the soft instrument would be much higher than anticipated, as a binding obligation could be created and inferred from the consent given in a non-binding form to the norms contained in the soft law instrument. This is a scenario worth considering when making decisions on commitment to soft law instruments.

4.2. Implementation costs

A hardening of soft law is likely to bring greater implementation costs for states, independently of the pathway taken or the associated sovereignty costs. If a consensus forms around soft law provisions, and especially if it hardens to the extent of constituting an international obligation, a state may find itself in a position of having to implement provisions it did not intend to, or to an extent that is greater than what it initially intended to.

Implementation costs represent the necessary resources a state has to deploy in order to implement the provisions of the instrument domestically. As such, they vary according to a state's initial situation prior to contracting the obligation; a state who is already compliant with a soft law instrument and the provisions it contains will not face important implementation costs once (or if) it hardens. For others, implementation costs

will vary according to the resources needed in order to reach compliance with the provisions of the instrument. A prospective evaluation of implementation costs will therefore need to take into account the initial situation a state finds itself in regarding compliance, as well as the evaluation of the likelihood of hardening – if an instrument does not harden, the implementation costs will remain low as the state will maintain control over its implementation efforts.

On the flip-side of implementation costs, states also have the option of non-compliance. After all, international law suffers from a lack of monitoring and enforcement mechanisms in most fields. Yet, this alternative is linked to a different set of trade-offs in the costs/benefits of commitment to the international instrument; non-compliance is likely to bring higher reputational costs to bear. The question of whether or not to bear implementation costs is not a contained decision; costs will arise elsewhere if those are not met.

5. CONCLUSION: UNCERTAINTY IN ASCERTAINING THE COSTS OF SOFT LAW

Using insights from IL scholarship, international precedents and state practice, in this chapter, I surveyed the functions, effects and costs of soft law. I first presented the three functions served by soft law instruments in the international legal order, i.e. standard-setter, complement, or substitute to hard law. I then showed that soft law instruments can have substantial effects from the moment of adoption. They can also 'harden' through different pathways, potentially to the point of feeding or morphing into legally-binding international obligations. These effects of soft law may bring about further costs

and change the initial evaluation of the costs/benefits of commitment, especially by rising the sovereignty and implementation costs of the instrument if it hardens.

There is great variation, however, surrounding these future effects and pathways towards hardening. In some cases, obligations may arise without requiring an additional expression of state consent to be bound; this creates particular challenges in state practice, in light of the potential costs of soft law. Indeed, the effects and pathways explored above highlight the potential fluidity between soft and hard law, and the possibility that the distinctiveness of the former gradually becomes less salient as it gains similar attributes to the latter. In this respect, both categories of 'soft' and 'hard' law could appear 'redundant',[64] and the distinction, useless. There is, however, a major difference warranting the distinctiveness of those categories, and it is rooted in the degree of certainty regarding the legal effects of the instrument; while hard law is (by definition) creating legal obligations, the possibility for soft law to lead to the same outcome is acknowledged, but by no means automatic. The key difference is thus the uncertainty regarding soft law's potential effects. As explored through the diversity of effects upon adoption, and the variety of potential pathways towards a hardening of soft law, the evolution of a non-binding instrument towards greater legal effects (or a legally-binding character) is by no means linear or systematic. From the standpoint of state practice, it is not possible to know with certainty the future effects – and potential costs – of commitment to a soft law instrument. Yet, such an evaluation is essential to the cost-benefit assessment informing decision-making on commitment. This will be the subject of the next chapter

[64] Klabbers, "The Redundancy of Soft Law."

Chapter 5

DECISION-MAKING ON COMMITMENT TO SOFT LAW

Soft law instruments may bring effects which can entail costs over time for the states who commit to them. I argue that consideration for those potential costs feeds into states' decision-making on commitment to soft law. It can have an impact on the outcome of states' decision on commitment, both in terms of their position towards the instrument, and of whether they will craft their commitment further (through substantive or formal limitations).

1. DECISION-MAKING ON COMMITMENT: OVERVIEW

In this chapter, I present a revised theory of decision-making on commitment to soft law that takes its potential costs into account. I posit that states' decision-making on commitment to soft law instruments proceeds in four steps (forming three different stages: A, B/C, D). The first step (A) constitutes a preliminary assessment of the proposed instrument, to determine its form and function (i.e. whether it is meant to be binding, what it aims to do, and how it sits with current international law). The next step shifts focus to the main considerations driving decision-making on commitment, with steps B and C conducted in parallel. Step B is the distinctive feature of this project; it focuses on how states evaluate the potential costs of soft law. At Step C, the focus is on

establishing any other relevant policy preferences or objectives a state may wish to pursue domestically and internationally. This includes the usual assessment of the costs and benefits of soft law in all other dimensions (apart from the costs of its potential hardening), and makes room for normative and strategic considerations. Finally, Step D focuses on determining the outcome: reaching a decision on commitment. This constitutes the result of the assessment made at Step A, followed by a balancing of the considerations identified in steps B and C. At Step D, states will identify their possible policy responses, and settle on a course of action taking into account the costs of soft law (if any are identified at Step B) and other policy preferences.[1] Policy options to mitigate the potential costs of soft law and maximize benefits from joining the instrument include moves to be made prior to the final decision stage, where states may decide whether to get involved in the first place or try to shape the instrument to bring it closer to domestic policy preferences. Commitment to soft law, as final step upon the adoption of an instrument, can be crafted to address the trade-offs states may face between securing benefits from commitment and limiting potential costs to arise from it. As explored in section 5, commitment to soft law is not a binary choice; it allows for flexibility in the form, degree and substance of commitment.

[1] As will be explored below, at this final stage, policy preferences may override the costs of soft law in the final decision, i.e. a state may be willing to bear the costs emerging from the hardening of soft law if it fully supports the instrument and what it aims to achieve. Similarly, the costs of soft law may be important enough to guide the final decision, in spite of countervailing policy preferences.

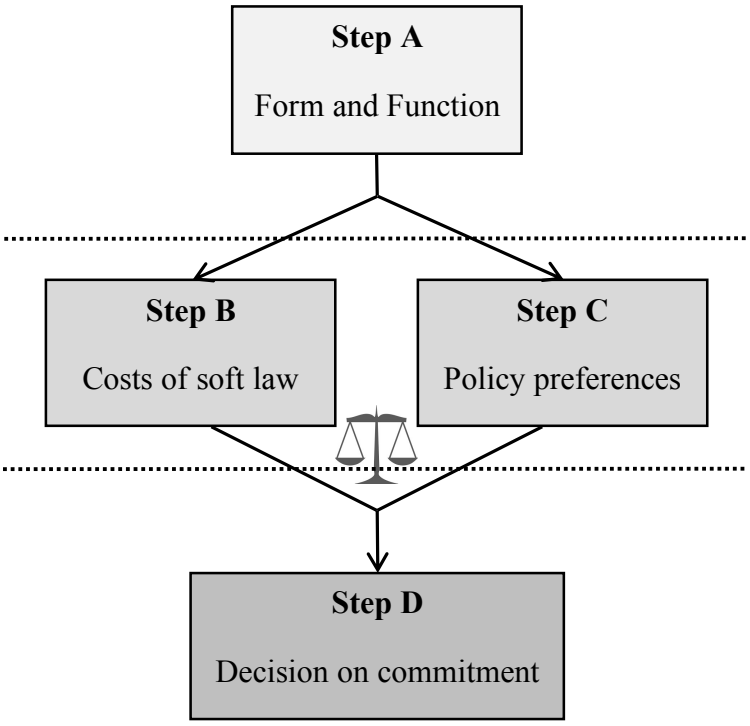

Figure 5.1 Overview of the decision-making process on commitment to soft law

While this framework of decision-making could be said to apply to all international instruments, hard and soft,[2] the peculiarity of decision-making on soft law arises specifically at Step B. As seen in the previous chapter, while it may be possible for a state to evaluate the requirements of hypothetical compliance with the soft law instrument, it is not possible to know with certainty whether or to what extent the instrument may harden into binding obligations. In other words, while a state can assess its current domestic situation and evaluate how it fares compared to the normative best-case scenario advocated in the soft law instrument, the leeway it may retain around those non-binding recommendations in the future is less clear.

[2] Especially since the form (hard or soft) is assessed at Step A.

In that context, evaluating the potential costs of soft law in decision-making calls for a more complex assessment than either simply discounting the possibility of such costs altogether (which is what happens if we focus on the static nature of soft law as non-binding), or evaluating it solely in function of its potential implementation costs (assuming that all soft law instruments have the same potential to harden). Evaluating the potential costs of soft law is a two-fold operation: it involves an evaluation of the costs that would arise should the instrument harden (mostly revolving around implementation costs in relation to a state's domestic situation), and of the foreseen likelihood of hardening in a given case (i.e. the likelihood that potential costs actually materialize).[3] This is explored further in section 2 below.

In sum, this revised theory of state commitment to soft law instruments introduces additional considerations in the decision-making process. It does so especially at Step B, using insights on the effects of soft law from a legal perspective,[4] to evaluate the potential costs that could arise from commitment, in order to balance that with general policy preferences. The next sections of this chapter address each step in the decision-making process in turn,[5] identifying the key questions guiding the assessment of core considerations for each. The conclusion, in section 6, recalls the role the potential costs of soft law play in states' decision-making on commitment to an international soft law

[3] It is outside the scope of this project to look into commitment to hard law in any more detail, but it is worth noting that a similar logic might apply to hard law at the enforcement stage, replacing the likelihood of hardening with the likelihood or expectations of enforcement. Indeed, while in this case, we consider that an obligation arises when soft law hardens (therefore raising the costs of commitment), it seems possible to extrapolate that for hard law, such costs only materialize if there is a certain likelihood of domestic or external enforcement, or particular accountability mechanisms to make it so. Such hypotheses are in line with Woptika and Tsutsui's and Dutton's findings. Wotipka and Tsutsui, "Global Human Rights and State Sovereignty"; Dutton, "Commitment to International Human Rights Treaties," 2012.

[4] See Chapter 4.

[5] The 4-step process presented is more analytical than chronological, especially as far as Steps B and C are concerned. It does not purport to establish an exact sequence followed when making decisions on soft law, but rather to systematize and highlight the most salient considerations taken into account prior to reaching a decision on commitment.

instrument, and the impact they may have on the outcome, i.e. on how states craft commitment to such instruments.

2. STEP A: ASSESSING THE FORM AND FUNCTION OF THE INSTRUMENT

The starting point of the process when states are presented with an international instrument is to assess what kind of instrument it is and what it aims to achieve.[6]

2.1. Form of the instrument

At this initial stage, the focus is to determine if the instrument constitutes a hard, binding commitment under the traditional account of the sources of international law.[7]

[Q0][8] *What kind of instrument is it? Is it meant to be binding or not?*

This may be a straightforward assessment for common instruments devised in usual settings (e.g. binding international conventions, non-binding UN resolutions), but instruments in new or *ad hoc* settings (e.g. international conferences or independent initiatives) may require a more detailed examination. In the USA, for instance, this determination is made by the Office of Treaty Affairs, 'which is responsible by law for

[6] This chapter focuses on states' decisions on commitment to an existing instrument, or one that is being created at the time of their assessment. It does not relate to the initial decision to launch the process to create an international instrument per se (and the related decision to proceed through a soft form), as this is already covered by the literature on institutional design. Yet, this thesis may bring useful insights to that literature, especially in how it explores crafting commitment to soft law as further options or 'flexibility mechanisms' in international cooperation within institutional design in soft forms. See Helfer, "Flexibility in International Agreements."

[7] This refers to the Vienna Convention on the Law of Treaties' (VCLT) definition of 'treaty': 'an international agreement concluded between States in written form and governed by international law […] whatever its particular designation'; VCLT, art. 2. The important criterion is therefore that the parties intend their written agreement to be governed by international law, i.e. that it constitutes a source of obligation for them under international law.

[8] This question is labelled Q0, because it refers to a preliminary assessment of the soft form; it comes before the start of the decision-making process on commitment to soft law specifically.

determining whether a particular document is a binding "international agreement" for purposes of reporting to Congress.' The office therefore 'encourages agencies and offices to share the texts of proposed non-binding documents with them'[9] for assessment. If the parties or participants intend for an instrument to constitute a binding obligation under international law, then the assessment of the implications of commitment proceed through the usual decision-making framework in place within a state.[10]

2.2. Function of the instrument

For an instrument that is not to be qualified as hard binding international law at the moment of adoption, the next step is to assess its function.

[Q1]: What does it aim to achieve?

Looking at what the instrument purports to do and where it sits with current international law refers back to the function of the instrument, as presented in Chapter 4. As pointed out then, the function an instrument is meant to play can send some general signals about the care that may be required in evaluating its content and crafting commitment; soft law instruments adopted as complements may be easier to deal with (since they expand on and detail existing obligations already entered into), while soft law instruments as standard-setters may require additional attention to assess the extent and magnitude of the new norms set forth. Soft law instruments acting as substitutes would also require

[9] '[Their] determination is made on the basis of a number of criteria, including the identity and mutual intention of those entities involved, rather than simply the form or title of the document.' US Department of State, "Guidance on Non-Binding Documents." Similar guidance is contained in other 'treaty-making' guides available online or in governmental archives, e.g. Australia Department of Foreign Affairs and Trade, "Treaties and Treaty-Making: An Official's Handbook"; United Kingdom, "Treaties and MoU: Guidance on Practice and Procedures"; Government of Canada, "Policy on Tabling of Treaties in Parliament"; New Zealand Ministry of Foreign Affairs, "International Treaty Making."

[10] Commitment to hard law is outside the scope of this project. See note 3 above.

more careful evaluation, because of its hybrid character, to uncover the exact relationship of their content with existing norms. Evaluating an instrument's function also involves assessing the direction of the normative developments it sets forth (is it meant to add to the standards in place or replace existing norms, heading in a different or opposite direction).[11]

3. STEP B: EVALUATING THE POTENTIAL COSTS OF SOFT LAW

Evaluating the potential costs of soft law as part of the decision-making on commitment is a two-fold assessment, focused on the costs associated with hardening, and their likelihood.

3.1. Costs associated with hardening

The first costs-related question looks into whether there would be costs for a state if a particular instrument it commits to hardened over time.

[Q2]: Would there be additional costs arising if the instrument hardened?

As explained in Chapter 4, most of the initial costs and benefits associated with an instrument at the time of adoption will not be subject to change over time. What can be affected substantially by a hardening of soft law beyond the commitment stage are sovereignty costs (depending on the pathway followed and resulting effects) and implementation costs (depending on the efforts needed to implement the provisions of the instrument domestically).

[11] Soft law is not intrinsically progressive and may be used to backtrack on normative developments already secured through other instruments (soft and hard). Lagoutte, Gammeltoft-Hansen, and Cerone, *Tracing the Roles of Soft Law in Human Rights*.

For Question 2, states will focus on establishing the impact of future developments arising from the instrument, complementing their initial cost-benefit assessment of the instrument (as it is presented for adoption in a non-binding form) to take into account potential costs arising from its hardening. Here, the importance of sovereignty costs will depend on a state's preferences as to how much of an inconvenience it is not to be able to rule supremely on a given issue, or how much of an encroachment it may tolerate in order to reap other benefits. It will play on sensitivities about institutional design preferences; if a state is ready to consider commitment to an instrument in a soft form, it also needs to evaluate at this stage the impact of an eventual hardening with its associated sovereignty costs. As for implementation costs, it will greatly be dependent on the level of compliance already achieved by a state, and how much resources would be required to bridge the gap fully (if compliance is not already achieved).

The importance of the potential costs of soft law therefore rests predominantly on the prospect of higher implementation costs to arise in the future, depending on a state's particular situation. This variation and relative importance of implementation costs is easy to illustrate. If, for instance, a state has no ties to the issue-area concerned by an instrument or no particular stake in relation to the provisions it contains (e.g. rules on high-sea fishing for a landlocked country without fishing vessels incorporated domestically, or principles relating to decolonization for states who were never affected by colonial structures), the decision on the instrument is likely to be much less consequential. Even if the instrument were to harden, there would be no costs for the state on this file specifically. Likewise, if a state is already fully compliant with the content of a soft law instrument, it can evaluate that there would be close to no implementation costs associated with satisfying its requirements. In all other cases,

implementation costs will vary according to the material needs required to comply with the instrument in substance.

Still, a lack of evident vested interests in a case does not necessarily mean the decision on commitment will be of no concern to a state. The content of the instrument could well have implications beyond its specific issue-area, for the evolution of general principles or legal norms applicable to broader issues. For instance, general environmental principles set forth in an instrument dedicated to endangered marine species may well instruct normative developments for terrestrial ones, and therefore be of interest for landlocked countries as well. This point can also relate to a broader set of cases where general principles of law may be introduced or affected by a new instrument, no matter its subject matter and purported realm of application. A state may therefore have a serious interest in getting involved and weigh its decision on commitment somewhat carefully – in spite of no substantive links to the instrument created – as a way to influence or secure a particular interpretation for the future evolution of certain international norms.

3.2. Likelihood of hardening

The potential costs of soft law identified through the previous question are not to be taken as a given, the way they would in the case of hard law. Indeed, they will only materialize and heighten the stakes of commitment *if* the soft law instrument hardens. Thus, the next question in the decision-making process aims to assess how likely a particular instrument is to harden.

[Q3]: Is it likely that the soft law instrument will harden?

If a state does not foresee strong chances or risks of hardening for the instrument under consideration, the decision on commitment may appear somewhat less consequential; if the instrument is unlikely to harden, the effects arising from it are estimated to be absent or minimal, in a way that preserves the assumption that soft law carries low costs for states joining.[12] But this assessment is not straightforward, as the question gets to the heart of the uncertainty surrounding soft law instruments. It is impossible to establish with much accuracy whether an instrument is likely to harden in the future. Decision-makers can only speculate on the likelihood of hardening for a whole instrument or provisions within one.

In that respect, many factors can inform the decision, or at least point towards an increased risk of hardening. Those are based on precedents in the international legal order, or on the different triggers for hardening pathways. To evaluate an instrument's prospective dissemination and importance internationally, information can be gathered from the type of instrument it is, the function it is meant to serve, the institutional setting it is adopted in and its proposed participants. For instance, the function of the instrument determined at Step A may be informative, as standards-setters and substitutes have greater potential to affect the development of international legal norms in a substantial way. Similarly, the possible dissemination, implementation and longevity of the norms contained in soft law instruments is greater for those adopted through permanent, established organisations. Moreover, the presence of potential triggers for the different hardening pathways can provide clear signals that an instrument has greater chances of

[12] Q3 on likelihood also theoretically encompasses the position of officials who may not consider, as a general rule, that soft law can harden. In this thesis, it is assumed that all decision-makers will have access to providers of legal advice who will take the potential effects of soft law into account. In the final decision, the likelihood of hardening may be evaluated as low (because of such personal predispositions), and it may be readily overwritten by other policy preferences. Yet, evaluating the impact of personal views of soft law (or of international law in general) would warrant further study, including from a psychological perspective (in line with Bayram, "Due Deference.")

hardening. These include plans already under way for the transposition of the instrument into a treaty, prior reference to this instrument (or similar ones) in domestic or international disputes, or previsions that disputes may arise on issues covered by the instrument, especially if it could be on the basis of a provision argued to constitute CIL.

Additionally, the salience of an issue, and the mobilization of civil society organisations and non-state actors (domestically and internationally) may raise the stakes of a decision on commitment and increase the perceived likelihood of an eventual hardening (if only by increasing the prospects that the instrument will remain on the agenda and that those actors may push for its implementation, and request its hardening one way or another).

This evaluation of the likelihood of hardening is again far from an exact science. The pathway triggers will act as the clearest signs of an increased likelihood of hardening, while the presence of a combination of other factors may contribute to the assessment. The answer to the likelihood question will always be a matter of degree, as no matter how likely it is estimated to be, there is no certainty that future developments will conform to the assessment made by states.

3.3. Summary

The two questions at Step B help evaluate whether, and to which extent, the potential costs of a soft law instrument may play a role in decision-making on commitment. How states answer these questions may orient their behaviour when time comes to make a decision on commitment; the care with which they will craft their response will depend on the answers given to Questions 2 and 3 combined. The table below illustrates how

the decision on commitment is likely to be perceived at Step B, depending on the perceived potential costs of soft law.[13]

		[Q2] Costs for the state if it hardens?	
		Yes	No
[Q3] **Likely that instrument will harden?**	Yes	**Decision**: Consequential **Costs**: High risk of high costs	**Decision**: Less consequential **Costs**: None in this case, impact on broader development of IL to be evaluated further
	No	**Decision**: Less consequential **Costs**: Low risks of high costs	**Decision**: Not consequential **Costs**: None in this case, low risks of any impact on other issues

Table 5.2 Summary of the assessment of the potential costs of soft law and their impact on decision-making

The four quadrants' shades refer to the degree of sensitivity of the decision, based on the role of the costs of soft law in the decision-making process (darker for the most consequential, decreasing through shades of gray, and white for the least consequential). As shown in the table, the potential costs foreseen if the instrument were to harden (Q2) are the main determinant of the sensitivity of the decision on commitment for a state. If it is coupled with high foreseen likelihood of an actual hardening, a state will want to look at its decision on commitment much more carefully, as it is more likely to be consequential in the future (top left). It is expected that a state's final stance will take into account the potential costs of soft law and include safeguards against them or mitigation measures where possible (unless the instrument fulfils other state preferences, and costs are borne for other benefits in return – see Step D below).

[13] The table transforms Questions 2 and 3 in binary questions for the sake of analytical clarity, but the answers to these questions would be matters of degrees, with the expected policy response crafted accordingly.

Within the same high level of potential costs foreseen, then, the decision on commitment will be more or less consequential, depending on how likely such hardening is perceived to be. Moving down to the intersect of costs, but low perceived likelihood of them materializing, a state is expected to give less attention to the costs of soft law (since it is viewed as unlikely to harden in the future). Such position is somewhat of a gamble; a state's evaluation that hardening is unlikely does not constitute any protection against it, should it actually happen. The expected behaviour in this case is that the decision will mostly rely on other policy preferences, but a state may consider crafting its commitment with safeguards against future costs (especially if there may be low-cost ways to do so),[14] depending on how confident it is in its assessment that hardening is unlikely.

Moving to the right-hand side of the table, the lack of implementation costs or lack of vested interests in an issue-area covered by an instrument is generally enough to lower the stakes of the decision on commitment; even if hardening were to happen, it would not challenge the usual assumptions on the relatively costless nature of soft commitments for that state. The decision is therefore expected to rely mostly on other policy preferences. There is an important caveat, however: states may keep in mind that provisions hardening in one issue-area may be replicated in other cases, or bring forward principles that may contribute to the evolution of international law more generally. A state can make a decision on commitment with these broader potential developments in mind (especially if it deems hardening likely), and craft specific safeguards to mitigate potential costs arising from the development of general principles or rules applicable to other issue-areas in the international legal order.

[14] See e.g. section 5.2.2 below on Explanation of vote statements.

In sum, at Step B, states will attempt to evaluate the potential costs that may arise from commitment to a soft law instrument, in spite of the uncertainty (or addressing it as best they can). The two questions above allow us to identify in general terms the stakes associated with the decision in a particular case. As per table 5.2, the combination of potential costs foreseen and of the likelihood of hardening provides a general view of how consequential the decision may be for a state in a given case. From there, we can draw expectations about the care with which state will craft their response on commitment, balancing the potential costs of soft law with considerations coming out of a general assessment of policy preferences at Step C.

4. STEP C: POLICY PREFERENCES

The next step before making a decision on commitment moves towards identifying a state's own interests and preferences.[15] This step is akin to the usual costs-benefit assessment guiding decision-making towards most international commitments (in a rationalist perspective), to see what policy course would best serve a state's interests.

[Q4]: What would be the preferred policy course on this issue?

This question aims to identify a state's policy preferences towards a soft law instrument. Policy preferences are defined here as the embodiment of state interests, actionable policy courses and objectives developed by each state to express and accomplish its

[15] At this step, it is assumed that states have a set of interests they wish to project and defend internationally, as well as specific preferences about international and domestic norm development on various issues.

goals internationally. The assessment here, as government officials put it simply, mostly boils down to this: 'Do we like it?'[16]

This leads to a multidimensional assessment based on the traditional cost-benefit assessment explored in Chapter 3, but also on various elements relating to the content and form of the instrument, or other normative or strategic considerations. In term of the instrument's content, there will be an assessment of a state's general preferences in the issue area it covers, and on the wording of its provisions specifically. This ties back to question 1 about the function of the instrument and what it purports to achieve. If a state fully supports the content and goals of the instrument, it may impact the final cost-benefit assessment; a state may be ready to bear greater costs in order to achieve policy objectives it fully supports. To the opposite, a state may identify 'red lines' in terms of the content of the instrument[17] – steps it is not ready to make or provisions it could definitely not endorse (because they contradict state interests or policy goals)[18]. Moreover, states may have preferences in terms of what form an instrument should take (as highlighted in scholarship on institutional design). Some may agree on the need for an international instrument in a suggested issue-area, but may prefer proceeding through the development of a binding convention rather than a non-binding instrument, or vice-versa.

[16] This question frequently featured as part of the decision-making process in interviews with former and current government officials in various states.

[17] This concept of 'red lines' on decisions on commitment was a recurrent theme in interviews with government officials. It highlighted that states have some leeway in terms of balancing between certain preferences, but do draw a line around 'deal-breaker' provisions they cannot accept (notwithstanding agreement with the goal of an instrument or the other provisions it contains).

[18] These red lines can be very visible on normative issues, like women's rights, where conceptions of acceptable provisions for an international instrument (hard or soft) vary between states. See e.g. debates and statements around the adoption of the 2000 UN Political Declaration (UN.Doc.A/RES/S-23/2, meeting records at UN.Doc. A/S-23/PV.10)

Finally, other factors external to the instrument itself may influence policy preferences on decisions on commitment. On top of reputational trade-offs covered in previous chapters, other factors such as the drafting and negotiation process for an instrument may affect states' preferences regarding commitment. States can use opposition or rejection of an instrument as a sanction for a non-cooperative process, or reward good collaboration with the sponsors of an initiative by opting for commitment, even if some substantive disagreements remained about the content of the instrument.[19] Other motives and strategic considerations, such as international partnerships and alliances, may also sway preferences towards certain stances or policy courses on soft law (e.g. a state may lean in favour of commitment to a given instrument at the request of or to stand by a long-term ally, potentially to reap some benefits in other spheres.)

Question 4 is at the core of the decision-making process as it is usually construed. It focuses on establishing a state's policy preferences on commitment in light of the usual cost-benefit assessment made at the time of adoption, with additional considerations based on the content and form of the instrument, as well as normative and strategic concerns. This step is important to establish policy preferences in the abstract as it highlights other costs and benefits of commitment external to the instrument, in terms of domestic and international impacts. Once those are established, it is then possible to couple them with the costs of soft law that may arise from its potential effects in the future, identified from an international law perspective at Step B, to reach the final stage in the decision-making process.

[19] This role for an appreciation of the negotiation process in reaching a decision on was mentioned in interviews with current and former officials, and further evidenced in some EoVs recorded upon the adoption of certain declarations at the UNGA. This thesis posits, however, that such a consideration external to the instrument may drive decisions to commit only if potential costs are deemed to be low.

5. STEP D: OUTCOME – CRAFTING COMMITMENT

This final question focuses on coupling the costs of soft law identified at Step B (Q2,3) with overall policy preferences from Step C (Q4). If a state deems that a given soft law instrument is likely to remain costless for it in a given case, policy preferences alone can guide the decision making on commitment. If there are potential costs tied to the instrument, a state's decision on behaviour towards commitment may be elaborated more carefully to mitigate such costs while still maximizing benefits and fulfilling policy preferences as much as possible.

[Q5] What policy options are available, and what course of action would maximize benefits and minimizing costs (if any) of commitment to a soft law instrument?

The policy options available as outcome of the decision-making process on commitment are not simply a binary choice between joining or not.[20] For most soft law instruments (as for international instruments in general, hard law included) a wide array of policy responses is available, including qualified commitment (through the addition of a public statement or written communication for a state to share certain interpretations of the nature and extent of its commitment). Additionally, states usually have the option not to participate in the final act of adoption, or to abstain on recorded votes. The specificities of organisational structures and rules of procedure in each context (or within each organisation) define what means are available to states when they take position on commitment to a soft law instrument; Step D constitutes this exploration of the possible

[20] It could appear to be the case for instruments arising out of some *ad hoc* international conferences without any permanent institutional support, if the final decision to commit is to be expressed solely in terms of joining the instrument or not (e.g. a Yes/No vote). States still have the possibility to make a unilateral declaration accompanying any public action of the sorts, but it may be more complex if the structures to do so are not in place. In most forums, opportunities to do so are built in the structures where soft law instruments are adopted.

options available, before settling on a given one taken into consideration the insights of Steps B and C.

This notion of 'crafting commitment' to a soft law instrument means it can be tailored beyond the act of adoption itself, in ways that increase states' flexibility (as it is already recognized for hard law, mostly through conventional and customary rules on treaty ratification and interpretation).[21] It is worth pointing out here that literature on institutional design refers to soft law itself as a 'flexibility mechanism' in international cooperation (compared to a hard law commitment). Yet, as this section clarifies, there are further flexibility mechanisms to be found *within* soft law, which states can use to tailor their international commitment to their policy preferences, or to mitigate potential costs which may arise from it in the future. This is crucial in a context where the potential costs of soft law, through its eventual hardening, are taken into account in states' decision-making on commitment.

Section 5.2 below surveys the most common policy options available to states when making decisions on commitment to non-binding international instruments. Given the scope of this thesis, it would be impossible to survey detailed procedures and options available in all international settings or organisations where soft law instruments are adopted.[22] This section will focus on policy options available to states at the UN General Assembly. The UNGA is a prime forum to study commitment to soft law considering that its membership is nearly universal, that it generates an impressive quantity of non-binding international instruments (mostly in the form of resolutions) each year, and that it has been at the forefront of the evolution and development of states' and other

[21] Helfer, "Flexibility in International Agreements."

[22] An remarkable contribution to the coverage of rules of procedure of major international organisations is offered in Blokker and Schermers, *International Institutional Law*.

international actors' practice relating to soft law instruments.[23] Section 5.3 then delves further into the implications of certain policy options (namely consensus voting and persistent objection) for the most sensitive, unpredictable and costly of the pathways towards soft law hardening: the CIL pathway. But first, to deliver a comprehensive account of how states deal with commitment to soft law, it is important to survey the main options available to states wishing to tailor an instrument to their policy preferences or introduce safeguards against potential costs, prior to the commitment stage. This is covered in section 5.1

5.1. Policy options prior to commitment

Before delving into the policy choices states face when the moment comes to decide on commitment to a soft law instrument, it is worth noting that levers are available to states prior to that stage, to orient the shape and form of the commitment to be made. In that regard, the first policy decision states make regarding international instruments is whether or not to get involved in their creation and drafting in the first place. In the case of instruments coming out of *ad hoc* international conferences, it is a matter of deciding to participate in it and send a representative. In the case of international organisations, it may relate to the initial decision to create an instrument, or to the decision to join the core group of states drafting or seconding it (in the UN context, these roles are usually labelled 'sponsors' and 'co-sponsors').[24]

Then, among states deciding to participate in the creation process of an international instrument, there is usually room for negotiation in the drafting of the provisions it

[23] Most importantly, an in-depth exploration of policy options available at the UNGA will set the stage for the empirical part of the thesis. Further notes on the rationale behind case selection can be found in the introduction to Part III.

[24] Sievers and Daws, *The Procedure of the UN Security Council*, 265; Permanent Mission of Switzerland, "The PGA Handbook," 56.

contains. As with any international instrument, hard or soft, the preferred strategy is usually to craft the content and form of the instrument according to one's own preferences, to limit the future costs that can arise (or limit them to those that were willfully accepted).[25] This is common wisdom; yet, the possibilities to achieve that in practice are likely to depend on the resources available to states (both in terms of having the capabilities to get involved in the process, and in terms of exerting influence to steer the process in one's preferred direction).

Once a draft has been produced, states who are not entirely satisfied with it or who have outstanding concerns with some elements in it will try to introduce amendments to move it closer to their own policy preferences, or the status of implementation already achieved domestically. The final draft is almost always the result of extensive compromise amongst participating states. At times, depending on the institutional setting through which the drafting takes place, public debates amongst states in official meetings, amendment proposals, and voting on amendments may be recorded.[26]

5.2. Decisions on commitment to the instrument

Eventually, once the final text of a draft instrument is presented to its potential participants for adoption, states have to make a decision on commitment. As mentioned above, this section will focus on the process in place within the UN General Assembly specifically. When the UNGA is moving to adopt an international instrument, usually in the form of a resolution, the General Assembly Plenary will be voting on a draft presented to it through referral from one of its main committees, or directly from one or a group of member states acting as the draft's sponsors. Those drafts then come to life

[25] See section 4 above.

[26] This has important implications for subsequent interpretation of commitment. See section 5.2.2.

as non-binding international instruments, in the form of UNGA resolutions, if they are adopted by the assembly by a majority vote.[27]

A vote, however, is not always called for. It is an avowed goal of the UNGA to adopt resolutions by consensus, without resorting to a recorded vote.[28] This expresses a higher level of agreement amongst the members of the organisation and may send signals of approval regarding the development of international norms in a given direction.[29] As such, it is often an overt objective of the resolution's sponsors to move for adoption by consensus. Attempts will be made to secure the acquiescence of all states prior to a vote, so that it can be adopted by acclamation, without a recorded vote. Any member state has the right to request a recorded vote if it so desires; but other states may then require to know (to put on the record of proceedings) which member state did so. Requesting a vote can attract attention to a state in an unfavourable way, as it may in effect break an emerging consensus (or at least the consensus the sponsors of a resolution were hoping for).

This may seem like a straightforward process (adoption through consensus or vote). Yet, there are many options for states to express various levels of commitment to a non-binding instrument, like a UNGA resolution, in line with domestic preferences and/or foreseen costs to arise from the instrument. At the UN, these span different recorded positions on the vote itself, as well as the possibility to make an explanation of vote

[27] There is also a possibility for the assembly to declare a certain topic an 'important question' and submit it to a vote with a 2/3 majority threshold, but this is rarely used. UN General Assembly, "General Assembly of the United Nations Rules of Procedures."

[28] Permanent Mission of Switzerland, "The PGA Handbook," 55. See also section 5.3.1.

[29] Consensus in this case does not imply unanimity; unanimity can only be obtained through a recorded vote where all members vote the same way. Permanent Mission of Switzerland, 52.

(EoV) statement for official records. Section 5.2.1 presents the different voting positions, while 5.2.2 looks at the additional option to record an EoV.

5.2.1. Voting positions

When member states take action on a draft resolution through a vote, four different positions may be officially recorded:[30] (1) in favour (2) against, (3) abstention (4) non-voting. They will now be addressed in turn, along with the general trade-offs involved.

(1) Vote in favour

A vote in favour is the way through which states will express their desire to commit to the non-binding instrument presented to them. A state will decide in favour of commitment if the content of an instrument fits with its policy preferences and if benefits to be made from it exceed the actual and potential costs foreseen. Commitment may be preferred if those costs are estimated to be low, if reputational benefits compensate for them, or if other policy considerations are pushing the cost-benefit assessment in favour. If some costs are foreseen but do not constitute an absolute 'deal-breaker', commitment may be accompanied by an EoV to clarify the interpretation given or express reservations towards parts of the text.

(2) Vote against

To the opposite, a vote against signals that a state could not lend its approval to the text. Opposition also means that a state wanted its disapproval to be recorded publicly, usually to preclude any association with the content of the instrument, or to convey its

[30] Voting records are accessible through the UN Bibliographic Information Systems.

disagreement with the sponsors or their conduct of negotiations.[31] In the UNGA context, opposition may prevent some potential costs from arising for the states casting such a vote, but it may do so at the expense of reputational costs at the time of adoption. Costs may arise if a state's opposition clearly stands in the way of building international cooperation on the issue (especially if consensus is emerging), and may be magnified if the issue-area touches upon a normatively-loaded topic (e.g. human rights).

(3) Abstention

As a halfway point between a vote in favour and opposition, a state has the possibility at the UNGA to register an abstention. At times, it occurs in situations where representatives have simply not received voting instructions from their home government in time and do not want to take position without such confirmation. More frequently, it signals either a lack of interest – whereby abstention is used for a state to detach itself from the issue, and leave the deciding votes to those likely to be genuinely affected – or disguised disapproval. In the latter case, abstention may be a preferred option for a state who has some issues with the instrument and its content, but because of some other considerations (reputational or otherwise) does not want to stand in the way of the instrument's adoption by opposing it. Abstention votes are not counted as 'voting members' in the threshold required for a simple majority vote, therefore letting other members of the UNGA decide on the fate of a resolution.

[31] Government officials interviewed have mentioned examples where the content of the instrument was somewhat acceptable, but the negotiation process had not been transparent enough or sufficiently open to their input, prompting opposition. It was highlighted that such actions can be successful in getting sponsors to subsequently change their behaviour.

(4) Non-voting

Beyond these recorded voting positions, there are two further possible avenues for UNGA member states upon voting: a state may decide not to cast a vote on a given question (for motives usually similar to the ones driving abstention), or not to be present at a given meeting at all. These are both indicated as 'non-voting' in the official records.[32] Absence at UNGA meetings can be an involuntary stance taken by a member state. It may for instance be the result of a lack of resources or capacity to have a representative present for the vote.[33] States who are unable to send a representative for an important vote or who find themselves unable to record their vote at the moment it was taken at the GA can subsequently inform the presidency or the secretariat of their voting stance, for it to be put on the official records.[34]

5.2.2. Explanation of Vote statements

Additionally – and crucially, no matter the vote recorded, states usually have the option to take the floor at the UNGA, before or after the vote, to make a statement to explain their position, and specify their own interpretation of the instrument and the provisions it contains. In UN parlance, these are known as Explanation of Vote (EoV) statements, and they play an important role in the development of international norms through non-binding instruments.[35]

[32] Kurtas, "Research Guides."

[33] Planned absence to a UN meeting as a way to boycott a vote and send a signal to that effect to the rest of the membership is most likely a counter-productive move; having a seat at the table to express disagreement is usually preferable to not voicing a position at all.

[34] In such cases, the machine-generated electronic voting record is not automatically amended, but the official records are.

[35] Permanent Mission of Switzerland, "The PGA Handbook," 55.

EoVs can be used as a way to celebrate the adoption of a document and congratulate the actors who have brought it to adoption stage. Yet, they also serve a crucial role in the UN system: it is the main mechanism for states to be able to put on the official records the main motives of their decision, if they so wish, and any interpretive guidelines or limitations they wish to apply to their endorsement of the non-binding instrument. They are the main option at a state's disposal to give context to its voting behaviour, since the record otherwise solely contains its machine-generated vote. In that regard, they are particularly important as they may eventually be relied upon as authoritative accounts of states' positions in international law.[36]

Through EoVs, states have the possibility to further craft their position on commitment. EoVs can be used to qualify acceptance and draw interpretive 'red lines' delimiting the extent of a state's commitment. It can even include what some states themselves at times label 'reservations': limits to the applicability of the instrument to certain dimensions of their domestic or international affairs.[37] EoVs are also made by abstaining or opposing states, as a way to put on the record the motives behind their opposition to a given instrument. Moreover, states may use EoVs to record interpretations or concerns, even if the instrument was adopted without a vote.[38] This is a clever way to express small concerns without breaking the international consensus behind an instrument. EoVs may

[36] In that sense, they play a similar role in interpretation of the instrument and states' commitments as declarations or reservations recorded upon treaty ratification, under the law of treaties. VCLT.

EoVs have become important enough that states were at times replicating their statement in a main committee and the UNGA. Following a rationalization of the rules of procedure of the UNGA, in 1979, it was recommended that 'a delegation should explain its vote only once on the same proposal, in either a Main Committee or a plenary meeting, unless the delegation considers it essential to explain it in both meetings.' UN General Assembly, "Rules of Procedure, Annex IV," para. 76.

[37] The use of the term 'reservations' by states is itself quite surprising, since it comes directly from the international regime dealing with binding treaties interpretation.

[38] In such cases, these are called 'explanations of position' (since no vote is taking place). Permanent Mission of Switzerland, "The PGA Handbook," 55.

also, in extreme cases, be the main vehicle through which a state can express its concerns as to the future effects to arise from an instrument, and try to block those from arising.[39]

In sum, commitment to a non-binding instrument is not necessarily a binary choice. In the UN context, a state may decide to join in an emerging consensus or not, but there is also a myriad of ways through which a state may craft its commitment further, either through voting stances in the case of a recorded vote (in favour, against, abstention) or through a further qualification of the level of its commitment (or lack thereof) by putting on the record additional motives, interpretations or reservations. Explanation of Vote statements make it possible for states to officially qualify their positions, across voting positions, achieving a form of qualified acceptance (introducing particular interpretations or reservations), qualified abstention (mentioning motives precluding a state from commitment) or qualified opposition (usually reaffirming concerns and motives for opposition, while at times trying to flag concerns in terms of future problems, issues or effects to arise from the instrument). These further considerations about the position of a state are recorded in official meeting minutes and may be used for future reference or analysis. This may be of crucial importance if it so happens that a soft law instrument hardens in the future, especially through the soft law to CIL pathway, as will be seen in the next section.

5.3. Implications of policy choices for soft law hardening

Two particular dimensions of commitment (one as an outcome of the process, the other as policy option) have implications for the potential hardening of soft law: adoption by consensus and persistent objection.

[39] See Chapter 6 on the UNDRIP case.

5.3.1. Adoption by consensus

As raised earlier, it is an avowed objective at the UN that non-binding resolutions be preferably adopted through consensus (i.e. without a recorded vote, with tacit approval of the member states).[40] This sends a positive signal on the possibilities for international cooperation within the organisation, but may also accelerate the standardization of practices on the norms put forward and the development of international law in a given direction.

Additionally, as covered in chapter four, it may contribute to greater effects for the soft law instrument, in terms of their magnitude from the time of adoption, and range of potential effects post-adoption. It can first do so by maximizing the moral and political force granted to the instrument. The international consensus expressed through the adoption of a resolution without a vote, at the UNGA, may also send signals about the emergence of international norms to domestic courts (which may take inspiration from it), or to actors hoping to proceed through a hardening of some of the soft law norms by pushing forward the idea of a treaty on the matter. Adoption by consensus may be a contributing factor as well to the hardening of soft law through recognition of some provisions as customary international law, mostly by providing evidence of *opinio juris* and generalized acceptance of the norm, especially as the UNGA boasts a quasi-universal membership. Adoption without a vote highlights the consensual nature of the adoption process and detracts attention from any opposition that may have been voiced earlier in the creation or drafting process.

The potential impact of adoption by consensus has implications for the policy choices states may make in terms of decisions on commitment. Indeed, states in support of a

[40] UN General Assembly, "Functions and Powers of the General Assembly."

draft instrument and its content will have a strong interest in fostering the consensus needed for the adoption without a vote (which sometimes mean making compromise on the text at drafting stage), to later use it as a way to demonstrate widespread acceptance of the instrument and the norms it contains. States who are opposed or have reservations towards all or some of the content of the instrument will, to the opposite, make every effort to highlight that there is no such consensus. This can be done by requesting a recorded vote (therefore practically vetoing the goal of the adoption without a vote) and/or by highlighting divisions amongst member states and differences in interpretation through explanation of vote statements. Those states may attempt to establish a rival interpretation instead, or reassert what they consider should have been added to/removed from the instrument to suit their policy preferences.

5.3.2. Persistent objection

As mentioned in section 3, the soft law to customary international law pathway is the trickiest and potentially costliest of pathways to a hardening of soft law. It may entail high sovereignty costs, considering that no further expression of state consent is needed for a new norm of CIL to be recognized on the basis of a soft law instrument, but also that it may be recognized as binding for a state, subsequent to the recognition of a CIL obligation in an international dispute solely involving third parties (with a dispute acting as the trigger to propel soft law on the CIL hardening pathway). The risk of soft law hardening through CIL is also trickiest for the states who would be likely to face high implementation costs, if provisions accepted in a non-binding form were suddenly recognized as binding.

There exists only one way under international law for a state to effectively exempt itself from the binding character of an emerging norm recognized as CIL: claiming the status

of persistent objector. The rule of the persistent objector in international law says that a state can be exempt from an obligation arising from customary international law if it has objected persistently to the norm during its formative years, prior to the recognition of the obligation in international law.[41] If a state has objected persistently prior to the emergence or recognition of that rule, it will not be bound by it and the rule will not create international obligations opposable towards it.

Green has identified that for the rule to apply, there needs to be an objection formulated to an emerging rule, and the objection has to be formulated publicly, persistently (over time) and in a consistent fashion.[42] The latter requirement points not only to the substantive coherence of the various statements made publicly in opposition to an emerging norm, but also to the coherence of a state's behaviour with its substantive objection. This means, in practice, that a state needs to communicate publicly its objection to the emergence of a new rule (or calls for its recognition) and repeat its objection as often as is deemed necessary (e.g. whenever the issue or the topic is raised in an international forum to which it is participating, for instance).[43] Its behaviour should usually also reflect its objection to the emerging norm.[44]

The rule of the persistent objector is not invoked frequently in international law, unsurprisingly, since states will refrain from publicly claiming a persistent objector status outright if they do not feel the need to do so explicitly (*cf* when a dispute arises).[45] Indeed, as mentioned above, the confirmation of the emergence of a new (or previously

[41] Lowe, *International Law*, 2007, 55; Elias, "Persistent Objector"; Green, *The Persistent Objector Rule in International Law*.

[42] Green, *The Persistent Objector Rule in International Law*.

[43] Ibid., 91..

[44] This is not necessarily essential, but makes for a stronger case when one attempts to prove persistent objection (calling upon what Green identifies as the consistency criterion). Ibid., 107.

[45] Ibid., 63.

unrecognized) obligation under customary international law is usually triggered by a dispute in an international court. The sequence of events and arguments is likely to be as follows: (1) two or more states have conflicting practices, or follow different sets of norms; (2) a dispute arises; (3) through a dispute resolution mechanism (e.g. international court), one side will argue in favour of the emergence of a CIL obligation, while the opposing side will initially argue there is no such obligation; (4) the opposing state will also argue that, should an obligation be recognized, it is not opposable to it, i.e. that it cannot be bound by the norm, since it has always been a persistent objector to the norm and its emergence; (5) the Court would then evaluate the existence of the obligation and whether it needs to be recognized in CIL, as well as whether the opposing state can claim a persistent objector status. Therefore, we are unlikely to see explicit references to the persistent objector status unless a dispute arises publicly, leading to the recognition of a new obligation under CIL against the interests of a state who will then, as a last resort, claims it cannot be bound by it. There would be no reason for a state opposing the existence of a CIL obligation to raise a claim to persistent objector status if they are contesting the very existence of the obligation – doing so would actually give weight to the disputed claim that there is a CIL obligation in the first place.

Hence, making a claim based on the rule of the persistent objector is effectively the only safeguard[46] a state can use to prevent itself from becoming bound by a soft law provision which would later be recognized as customary international law (just like it would be the only safeguard for any norm being recognized as CIL, whether or not it was first adopted in written form in a soft law instrument). Yet, making use of that rule does not come without its own costs and difficulties, as 'persistent objectors face considerable

[46] Or 'escape hatch'. Green, *The Persistent Objector Rule in International Law*.

pressures'.[47] First, it may be hard (and costly) to consistently and persistently oppose emerging norms in certain matters, considering the reputational costs which are attached to it (e.g. in the field of human rights). Claiming persistent objector is also an act through which a state will also explicitly singling itself out as a potentially 'sole' objector to an emerging norm.[48]

Considering that expressions of commitment to soft law instruments can contribute to the recognition of both constitutive elements of CIL, and that voting towards a soft law instrument may (and has been in the past) recognized as an expression of *opinio juris*,[49] the possibility for a state to shield itself from an obligation arising with the hardening of soft law through CIL may depend heavily on its initial decision on commitment to the soft instrument. Voting in favour of an international instrument (hard or soft) and subsequently denying the normative value of the provisions it contains, on the basis that they were meant to remain non-binding, would be a difficult argument to make.

Moreover, resisting the recognition of a norm as CIL, or at the very least subtracting oneself from the arising obligation through the status of persistent objector requires action prior to the crystallization of the norm. The status of permanent objector acts as an emergency exit that must be planned for by a state at the time of setting the foundations of commitment. This will only be done if there is enough doubt or risk foreseen that costs might arise from the hardening of the instrument in the future. [50] It involves an important trade-off: if objection is used consistently, repeatedly and adequately as to

[47] Lowe, *International Law*, 2007, 56.

[48] 'for a state to invoke the persistent objector rule is for it to immediately brand itself as an outsider' Green, *The Persistent Objector Rule in International Law*, 65.

[49] See Chapter 4.

[50] The scope of objection can be limited and target a specific provision for instance. It is not essential that it be made through a wholesale rejection of the instrument a provision is contained in.

constitute grounds to call upon the status of persistent objector, it may indeed limit the potential effects of soft law for a state and exempt it from the application of the emerging norm in CIL should it be recognized, but the reputational costs attached to doing so may be significant (at the start and over time).[51] Policy options aiming to limit the potential costs to arise from the instrument through persistent objection must therefore be gauged against the reputational costs attached to such behaviour.

6. CONCLUSION: CRAFTING COMMITMENT TO ADDRESS THE COSTS SOFT LAW

In conclusion, this chapter has presented a revised account of state commitment to soft law instruments, showing how the costs of soft law infiltrate states' decision-making process (alongside other policy preferences). It has synthesized the decision-making process in four key steps: (Step A) a preliminary assessment of the form and function of the instrument, (B) an evaluation of the potential costs that could arise from the instrument, (C) an identification of policy preferences relevant to the issue-area concerned, to finally (D) explore the policy options available, and craft commitment in a way that maximizes benefits and minimizes costs, balancing considerations from Steps B and C, and including safeguards mitigating for the potential costs of soft law (if any).

Step A: Assessing the form and function of the instrument:

- *Q0 What kind of instrument is it? Is it meant to be binding or not? [Form]*
- *Q1 What does it aim to achieve? [Function]*

Step B: Evaluating the potential costs of soft law:

- *Q2 Would there be additional costs arising if the instrument hardened? [Costs associated with hardening]*

[51] Green, *The Persistent Objector Rule in International Law*, 105.

Q3 Is it likely that this specific instrument will harden [Likelihood of hardening]

Step C: Establishing policy preferences:

Q4 What would be the preferred policy course on this issue? [Policy preferences]

Step D: Crafting a policy response on commitment:

Q5 What policy options are available, and which one would maximize benefits and minimize costs? [Policy options]

Compared to a general account of state commitment to any international instrument, which in a rationalist approach would mostly depend on Step C on policy preferences, the revised theory put forward in this chapter insists on the importance of Step B, to evaluate the potential costs a soft law instrument could impose on states through its hardening over time. This evaluation of potential costs rests on two key questions: establishing whether there could be costs (mostly on the implementation front) and how likely a state considers a given instrument could harden. This assessment is a matter of degree, but may be guided by certain factors increasing the chances (or risks, depending on one's perspective) of hardening.

This chapter has also argued that commitment to soft law is not a binary choice, centered on whether or not a state joins an instrument. Commitment can be crafted further, through voting positions (depending on the setting within which an instrument is adopted), and through the addition of supplementary interpretive or limiting declarations. While soft law is usually seen as a whole as a flexible alternative to hard law, this chapter argued that there are further 'flexibility mechanisms' within commitment to soft law allowing states not only to craft the nature and the extent of their commitment in line with idiosyncratic preferences, but also to mitigate any potential costs they foresee arising from the soft law instrument.

Different policy options are available to states when making decisions to commit or not to a soft law instrument. In the UN system, this spreads over multiple voting position, in addition to the possibility to record an explanation of vote statement, presenting a certain interpretation of the norm the instrument contains, or limitations to the application and applicability of the instrument domestically (in vague interpretative statements or in the form of reservations). These options may come at certain costs, especially considering that the UN functions on a consensus-seeking basis: the greater the strength of the opposition or competing interpretation put forward, the greater the reputational costs attached.

6.1. Expectations for state behaviour in practice

I have posited above that the potential costs of soft law will matter in states' decision-making on commitment to various degrees, depending on whether the state would face additional costs through the instrument's hardening, and how likely it deems that scenario to be. The greater the costs and likelihood foreseen, the more consequential a decision to commit to a soft law instrument can be. Where costs of soft law are taken into account, I argue that states will approach commitment in a more considered way, crafting the outcome decision to mitigate the potential costs of soft law (through the position taken on commitment, and/or the addition of a further interpretive statement). At the same time, because of reputational and other strategic considerations, states are expected to opt for the least oppositional or obstructive policy option that allows them to reap benefits from commitment, while mitigating potential costs.

My central claim is that if a state considers it would face high implementation costs if the instrument were to harden (because it is not already compliant with the provisions of the soft law instrument), and if it deems it likely to happen (thereby bringing such

costs to materialize), it will craft its response on commitment to address and limit such costs – either by mitigating them or attempting to block them from arising (unless it fully agrees to bear them as it aligns with policy preferences).

Yet, it is acknowledged that decision-making in the international realm can be driven by all sorts of motives, including idiosyncratic policy preferences. In the case of commitment to soft law, the decision is expected to be the result of a multifaceted rationalist and normative assessment, combining the assessment of the potential costs of soft law with all other relevant policy preferences; the costs of soft law identified at Step B being only one of the contributing factors in choosing a policy response on commitment to an instrument. The challenge in attempting to determine what role the potential costs of soft law play in states' decision on commitment, then, is that the general account provides a powerful alternative: that idiosyncratic policy preferences alone may do all the explanatory work. As will be argued in the following Part, the influence of policy preferences generally may be isolated by focusing on one field in which they are known to converge: international human rights instruments.

The final part of this thesis (Part III) turns to the empirical assessment of the role potential costs of soft law play in states' decision on commitment. Chapter 6 provides an in-depth case study of a deviant case in the history of UN General Assembly human rights instruments: the opposition of four states to the UN Declaration on the Rights of Indigenous Peoples. It compares the rationale of the opposing states, and the place of soft law within it, with other groups of states (for whom costs could arise or not) who crafted their commitment to the instrument and mitigated its potential costs differently.

PART III

EMPIRICAL ANALYSIS OF STATE COMMITMENT TO SOFT LAW

The final part of this thesis moves to an empirical analysis of state commitment to soft law. I illustrate the role the costs of soft law may play in states' decision-making on commitment through an in-depth case study of a deviant case, the adoption of the UN Declaration on the Rights of Indigenous Peoples.

As argued in Part II, states' decision-making process on commitment to soft law starts with an assessment of the form and function of the instrument (Step A). Then, in parallel, it evaluates the potential costs of the soft law instrument (B) and identifies relevant policy preferences (C). The final decision is the result of a balancing exercise between these two sets of considerations. If potential costs are foreseen, a state will balance them against other policy preferences, and craft their decision on commitment to the instrument to mitigate such costs or block them from arising. This account refines usual rationalist accounts of commitment to international instruments by explicitly including states' consideration for the potential costs of soft law as distinct from other policy preferences. This is important especially as these costs may arise (or not) independently of state consent to be bound and initial rational design plans for in the creation of the instrument.

To illustrate the claim that the potential costs of soft law have a role to play in state's decision-making on commitment, within the parameters laid in the previous chapters, it is essential to isolate as much as possible the influence of idiosyncratic policy preferences.[1] In this thesis, I achieve that by focusing on an area where solid assumptions can be made (on the basis of existing scholarship) that policy preferences converge in a given direction: human rights. Indeed, in the field of human rights, the benefits

[1] Otherwise, in line with usual accounts of decision-making, one could conclude that a certain combination of idiosyncratic preferences explains any outcome in decision-making on commitment to soft law.

associated in joining an instrument (even a hard one) are generally recognized to outweigh its costs.[2] Human rights instruments usually do not have compulsory enforcement mechanisms, allowing the implementation costs to remain low – especially in the case of non-binding instruments – while there are substantial reputational benefits to be made from commitment.[3] Commitment is therefore the expected behaviour, as there are usually reputational benefits to be made from commitment (as long as the instrument is public, and publicized enough), with no material costs to sustain (unless a state decides itself to implement it). Of course, for reputational costs/benefits to be involved, the instrument needs to be public, and publicized to some extent internationally. States would not have much to gain (in terms of reputational impact) from joining obscure independent initiatives, but the calculation is much different when commitment to an international instrument is subject to international attention, like is the case at the United Nations, for instance. Even within the UN system, the reputational costs and benefits of different types of instruments will vary. They are arguably highest for UN General Assembly declarations, as these are recognized as high profile important instruments.[4] In the traditional rationalist account of commitment to soft law, there is no reason to oppose such non-binding, presumably costless instruments, if there are reputational benefits to be made.[5]

[2] As long as its enforcement mechanism remains 'soft'. See Dutton, "Commitment to International Human Rights Treaties," 2012. Chapter 3, section 5.

[3] See Chapter 3. This does not deny that states may consider the political and moral force of their commitment, and that this may pull them towards compliance (even states who were initially not planning on complying – see literature on 'rhetorical entrapment', Chapter 4, note 8). But those are the result of normative pressures, not of costs arising from the instrument per se; the state arguably maintains control over the implementation costs it decides to bear, or cedes for calculations not related to the costs of soft law studied here.

[4] See section 1.1 below.

[5] and those are widely documented in the human rights literature internationally, from liberal, institutionalist and constructivist perspectives.

The voting records on commitment to UNGA declarations seem to generally confirm this account. In the field of human rights, two-thirds of declarations have been adopted by consensus (without a recorded vote), and the others have been adopted with an overwhelming majority of votes in favour, and a few abstentions. Voting against the adoption of a UN declaration in the field of human rights had only scarcely be done, with the USA voting against the UN Declaration on the Right to Development in 1986. That is, up until September 2007, where four states (Australia, Canada, New Zealand and the Unites States of America) voted against the adoption of the UN Declaration on the Rights of Indigenous Peoples.

How then, can we explain opposition to human rights soft law? I argue that the answer lies with the role played by the potential costs of soft law instruments in decision-making. In cases where the hardening of soft law could potentially bring substantial costs to states, high enough to outbalance any reputational benefits to be made in joining and any costs to be borne in opposing, opposition can be states' preferred option – and the only one to offer a solid safeguard against the eventual recognition of a binding obligation opposable to them. In this context, cases deviating from the usual assumptions that commitment to human rights soft law is expected for certain types of instruments (and firm opposition is highly unlikely) offer a testing ground to explore the motives of opposing states, to see whether and to what extent the costs of soft law had a role to play in the decision-making process.[6] The case of the UN Declaration on the Rights of Indigenous Peoples offers such an opportunity, especially from the perspective of states who have originally opposed its adoption.

[6] There is a possibility that deviant behaviour is motivated by a different set of policy preferences, without any link to the potential costs of soft law, but in-depth case studies provide the necessary evidence to evaluate that claim.

Therefore, the final part of this thesis is an empirical analysis of state commitment to soft law in the UNDRIP case. I intend to show that states craft their commitment to soft law – UNGA declarations specifically, in this case – to reap potential benefits (mostly reputational), while laying out necessary safeguards against potential effects and costs. If the potential costs of commitment are significant enough, and a hardening of the instrument seems likely, it may translate into opposition as a preferred policy option, notwithstanding the reputational costs attached to opposing human rights instruments, especially in a consensus-seeking organisation like the UN.

Chapter 6 provides evidence for the place of the costs of soft law in states' decision-making, by looking into the UNDRIP case. It focuses on decision-making by the states who have initially opposed the Declaration and shows that the potential effects and costs of the soft law instrument played a role in motivating opposition from four states (Australia, Canada, New Zealand and the United States of America), as they aimed to put safeguards in place against an eventual hardening of the instrument that could make some of its provisions binding on them without their explicit consent. It will also look into how the potential costs of soft law were acknowledged and addressed by other UN member-states who found alternative ways to craft their commitment to the instrument (with lesser safeguards). The chapter concludes by assessing the distinctiveness of the case, and what dimensions of it may hold lessons for the development of the international legal order more generally.

Prior to moving to that empirical analysis in Chapter 6, in the following sections of this introduction for Part III, I provide additional remarks on the status of the main instruments of interest in this project, United Nations declarations (1), as well as on

research design (2), particularly on case study methods, case selection, and the sources of empirical data used in this project.

1. UN General Assembly Resolutions and Declarations

The charter or founding treaty of international organisations will usually grant one or more of its constitutive bodies (usually a plenary of all its members)[7] the power to adopt hortatory statements and guidelines, either for their internal functioning or directed externally to guide behaviour of actors outside the organisation.[8] These are often labelled 'recommendations'[9] or 'resolutions'. In the United Nations' case, the UN Charter sets out in its Chapter IV the functions and powers of its plenary body, the General Assembly (GA). It establishes that the GA 'may discuss any questions or any matters within the scope of the present Charter […and…] make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.'[10] It is recognized that such recommendations adopted by the General Assembly are generally non-binding for its members.[11] There is much debate, however, as to the definite value of such instruments. Some scholars do not hesitate to present the UNGA as akin to a world legislative assembly, or as close as we have ever been to an international legislature, referring to the legal value of resolutions, or to the UN as a

[7] White, *The Law of International Organisations*, 69–72.

[8] Schermers and Blokker, *International Institutional Law*, para. 1216.

[9] Virally's definition: recommendations are "les résolutions d'un organe international adressées à un ou plusieurs destinataires qui lui sont extérieurs et impliquant une invitation à adopter un comportement déterminé, action ou abstention" M. Virally, La valeur juridique des recommandations des organisations internationales, 2 AFDI (1956), in Schermers and Blokker, para. 1218.

[10] Charter of the United Nations, art. 10.

[11] Except for certain exceptions, such as budgetary matters. Schermers and Blokker, *International Institutional Law*, para. 1204.

legal order per se.[12] The extent of this norm-creating potential was most likely not foreseen at the UN's inception, especially as this 'recommendatory' power granted to the GA by the UN Charter was more limited in scope and legal effect. According to Schachter, the legislative potential of the GA developed over time:

> 'What was not fully realized at first is that the UN political bodies – though denied legislative power – could act like legislatures by adopting lawmaking treaties and declarations of law. Their recommendations did not have to remain merely requests or wishes if the collective will of governments supported more authoritative outcomes.'[13]

Pushing this view further, many are now arguing in favour of a revision of the sources of international law, to include inputs in such forms as UNGA resolutions.[14] How such revision of the sources of international law should be done, and what form it should take, is outside the scope of this project (and has been explored with interest elsewhere)[15]. For the time being, this project takes somewhat of a middle-ground approach (labelled 'orthodox' by some),[16] which does not require a re-engineering of the traditional sources of international law (notwithstanding the desirability – or not – of such initiative). It rather embraces fully the halfway position occupied by non-binding instruments as not legal *per se*, but 'quasi-legal', i.e. international instruments which hover very close to the legal sphere and with very clear pathways granting them potential to evolve into international legal obligations, for the time being through traditional sources of international law.[17] As established in Chapter 4, non-binding instruments like UNGA

[12] Schachter, "The Quasi-Judicial Role of the Security Council and the General Assembly"; Schachter, "United Nations Law"; White, "Lawmaking"; Alvarez, *International Organisations as Law-Makers*; Fassbender, "Rediscovering a Forgotten Constitution."

[13] Schachter, "United Nations Law," 1.

[14] See e.g. White, "Lawmaking"; Hoof, *Rethinking the Sources of International Law*.

[15] Ibid.

[16] White, "Lawmaking," 567.

[17] The New Zealand and Australian governments terminology for such instruments is at times that of 'less-than-treaty status'. New Zealand notes that 'the government and government agencies also frequently conclude arrangements of less-than-treaty-status, which are not legally binding, but have political and moral weight.' New Zealand Ministry of Foreign Affairs, "International Treaty Making," 3. In Australia, 'If the negotiated document seeks to impose a moral and political commitment without

resolutions can have important legal effects and already entertain undeniable links with the traditional sources of international law, potentially projecting them in the legal sphere and transforming their content into fully-fledged international obligations. These links are even stronger for UN declarations, a special type of UNGA resolution.

1.1. UN General Assembly Declarations

In the UN Charter, there are no distinctions or subdivisions to be found amongst the types of recommendations to be adopted by the General Assembly.[18] Very early in the United Nations' history, an important precedent – the Universal Declaration on Human Rights – created a new type of resolution, sitting above regular instruments adopted by the organisation and establishing itself with its own functions and value: the UN Declaration.

There is no formal basis, neither in the UN Charter nor in the GA Rules of Procedures, provided for special resolutions to be adopted as 'declarations'.[19] The term (and later category of resolutions) arose as part of the Commission on Human Rights' first mandate, that of developing an International Bill of Rights. Since the Drafting Committee could not agree on the exact form the Bill should take, and in what order different topics should be addressed, a decision was made to refer to the CHR a draft declaration alongside a draft convention.[20] After lengthy debates at the GA Third

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being legally binding, it will be an arrangement of less than treaty status'. Tasmania, "Tasmania Treaties Handbook," 11.

[18] It has the power to adopt non-binding recommendations, following art. 10-17 of the Charter. (except for budgetary matters, see note 11 above).

[19] Chater of the United Nations, UN General Assembly, "General Assembly of the United Nations Rules of Procedures."This absence of an 'express power to adopt declarations' seems to be common in the constitution of IOs, but is now accepted practice nonetheless. White, *The Law of International Organisations*, 97.

[20] This led to the establishment of distinct working groups for each component, and to the adoption of a revised draft declaration by the CHR at its third session (while discussions on the convention were postponed). The ECOSOC then adopted a resolution in August 1948 containing the draft Declaration (then titled International Declaration on Human Rights), referring its consideration to the General

Committee (Human Rights), the draft declaration was passed over to the General Assembly Plenary, where it was adopted through a vote of 48 member states in favour, and 8 abstentions.[21] In that context, it appears quite clearly that UN Declarations did not arise as part of a purposive manoeuver to produce a different type of resolution with a distinct status. It rather arose in practice, and can be seen as somewhat of a fallback from, or a stepping-stone towards the fully-fledged, legally-binding Bill of Rights which was later to be completed through the adoption of the two Human Rights Covenants[22]. This established 'declarations' as a distinct category of resolutions, with a particular status above regular instruments adopted by the UNGA.

By the 1960s, this special status had been made official to some extent, recognized in a Memorandum from the UN Office of Legal Affairs submitted at the request of the Commission on Human Rights. It was established in that memorandum that 'In United Nations practice, a "declaration" is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated, such as the Declaration on Human Rights [and that] a recommendation is less formal.'[23] It pointed out that there was no difference in UN practice between the two as far as 'strict legal principle' was concerned, but nonetheless established that declarations' 'greater solemnity and significance' may contribute to expectations of compliance, and galvanize state practice leading to a recognition as international custom.[24] It concluded that 'in United Nations practice, a "declaration" is a solemn instrument resorted to only

Assembly. United Nations Audiovisual Library of International Law, "Universal Declaration of Human Rights."

[21] At that point, the resolution adopted was still titled 'International Bill of Human Rights', with its Part A consisting of the 'Universal Declaration of Human Rights' and its part B devoted to a 'Right of Petition', a topic which was referred to the ECOSOC for ulterior consideration.

[22] ICCPR, ICESCR.

[23] United Nations Commission on Human Rights, "Use of the Terms 'Declaration' and 'Recommendation,'" 1.

[24] United Nations Commission on Human Rights, 1–2.

in very rare cases relating to matters of major and lasting importance where maximum compliance is expected'.[25] In sum, 'declarations' in UN practice represent a particular subset of resolutions deemed to have a particular importance (and for which compliance may be expected to a greater extent, from the pull of its moral and political force), but nonetheless not creating legally-binding obligations for member states. However, it is important to note that (as described in Chapter 5) such documents are not entirely deprived of legal effects and can contribute, under certain conditions, to the emergence or recognition of legally-binding international obligations.[26] This makes the body of UN declarations a relevant starting point to evaluate whether and how the potential effects and costs of soft law are taken into account by state in decision-making on commitment to soft law.

2. RESEARCH DESIGN

Building on the revised account of state commitment to soft law instruments elaborated in Part II, using insights from legal doctrinal analysis, the remainder of this thesis moves back to International Relations and an empirical analysis of state commitment to soft law. This section on research design for Part III provides additional information on the use of case study methods and case selection (2.1), sources of empirical data (2.2) and data analysis (2.3).

2.1. Case study methods

[25] United Nations Commission on Human Rights, 2.

[26] This potential for UNGA declarations specifically has been confirmed in certain ICJ judgments (see Chapter 4). UNGA declarations can therefore be said to constitute plausible candidates for inclusion in a list of the 'hardest' soft law instruments.

A case study approach is 'the detailed examination of an aspect of a historical episode to develop or test historical explanations that may be generalizable to other events'.[27] Case study methods are particularly relevant to this project, as they are valuable to achieve goals of theory development (here to fill a gap left by existing rationalist accounts of commitment to soft law), and theory testing to evaluate the scope of this refinement (i.e. how far it can be generalized).[28] Theory developments put forward in this thesis are illustrated and confirmed in Chapter 6 through focusing on a deviant case,[29] the UN Declaration on the Rights of Indigenous Peoples, and state behaviour not fully explained by existing rationalist accounts: opposition to human rights soft law. Then, insights from this deviant case are further evaluated through comparison with the behaviour of other states who have crafted their commitment to UNDRIP differently.[30]

UNDRIP was selected as the central case study in this project because of the atypical state behaviour recorded upon its adoption, making it a deviant case (in the realm of UNGA declarations on HR, at least). As such, the main case study in this project was selected on the basis of its outcome (or on the 'dependent variable'). This was done deliberately, considering how 'studies of single "deviant" cases … can be very useful for heuristic purposes of identifying new theoretical variables or postulating new causal

[27] George and Bennett, *Case Studies and Theory Development*, 5.

[28] George and Bennett, *Case Studies and Theory Development*; Bennett and Elman, "Case Study Methods." As will be explored in section 5, this project achieves much more of the former, with preliminary contributions to the latter.

[29] In case study research, a 'deviant case is that case … in the studied population (or the observed sample) exhibiting the most deviant features'. Gerring, *Case Study Research*, sec. 3.2.. In the set of UNGA declarations on human rights, UNDRIP is a deviant case in terms of the variation observed in state behaviour upon commitment, with the only instance of multiple opposition votes recorded. See Appendix 3.

[30] Developed through 'structured, focused comparison'. George and Bennett, *Case Studies and Theory Development*, 67–72.

mechanisms.'[31] Therefore, it is an extremely valuable case for the purposes of theory development and refinement here.

UN General Assembly declarations are particularly relevant to a study of commitment to soft law instruments. Considering they are adopted by the quasi-universal membership of the UN, and that they constitute instruments of a particular importance within the organisation itself, they may well be the most likely candidates to harden, and eventually pave the way for – or transform into – legally-binding obligations. Yet, IR scholarship has so far not looked into the implications of those potential effects and costs for commitment. UNGA declarations are therefore an appropriate starting point to see what kind of impact the potential costs of soft law may have on states' decision-making on commitment, especially through a study of deviant behaviour not accounted for by existing theories. This will then allow us to draw broader hypotheses for state commitment to soft international instruments in general, keeping in mind that the distinctive character of UNGA declarations as 'most-likely' to harden may mean further hypotheses will have to be qualified or restricted accordingly, awaiting further empirical studies. There are inherent limitations to a single case study chiefly in terms of its limited potential to, in and of itself, produce widely generalizable claims. Here, it is partly alleviated by focusing on the decision-making process of multiple states within the one case, comparing the initial position of the opposing states with states that crafted their position towards UNDRIP differently, as well as with subsequent changes of position away from opposition.

2.2. Sources

[31] George and Bennett, 81.

Primary sources collected to inform this research project include various archival sources, such as UN official meeting and voting records,[32] other archival documents related to the creation of UNDRIP,[33] official governmental documents and declarations.[34] I have also conducted field research in Australia, Canada, New Zealand and at the United Nations (headquarters in New York, USA and offices in Geneva, Switzerland), where I collected empirical information on state decision-making towards soft law in general and on UNDRIP specifically through interviews with government officials, elected representatives, and other actors involved in the creation of UNDRIP.[35] It also draws on insights from participant observation at UN meetings on Indigenous issues, more specifically on the 2014 World Conference on Indigenous Peoples[36] at the UN Headquarters and the 2015 meeting of the Expert Mechanism on the Rights of Indigenous Peoples at the UN in Geneva.[37] Additionally, I also consulted media coverage of different events relating to state behaviour towards soft law and on states' positions towards UNDRIP.

[32] Retrieved on the online archive UNBISnet and the UN Human Rights Council Extranet. United Nations, "UNBISnet - UN Bibliographic Information System"; United Nations Human Rights Council, "Extranet."

[33] Including the Howard R. Berman Papers, 1835-1997, Charles B. Sears Law Library, The State University of New York at Buffalo and the Docip, "Online Documentation Database."

[34] Accessible online through various governmental websites, and through the Wikileaks, "Public Library of US Diplomacy." (PLUSD) online archive of US diplomatic cables. On the use of Wikileaks cables for research, see Egloff, "The Wikileaks Archive"; Michael, "Who's Afraid of WikiLeaks?"

[35] Formal interviews were conducted with government officials in Australia, Canada and New Zealand, and with former UN officials. Informal discussions with state and non-state representatives took place at UN events on Indigenous Peoples rights in New York and Geneva. [A list of interviewees was included as Annex 5 in the Examiners' copy. To preserve the anonymity of the participants, it has been redacted from this Library copy.]

Formal interviews proceeded following a semi-structured method. See Cane and Kritzer, *The Oxford Handbook of Empirical Legal Research*, 937; Aberbach and Rockman, "Conducting and Coding Elite Interviews."

[36] Accepted short form for the 'High-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples'. 22-23 September 2014, UN Headquarters, New York, USA. Observer accreditation obtained through the ECOSOC Civil Society Network (CSO-Net).

[37] Eight session of the Expert Mechanism on the Rights of Indigenous Peoples, 20-24 July 2015, Palais des Nations, Geneva, Switzerland. Observer accreditation obtained with the Oxford Human Rights Hub.

Empirical claims made in this project are supported by secondary sources, including documentary accounts of the negotiation, drafting and voting process leading the adoption of UNDRIP, literature on various cases relating to the creation of non-binding instruments (not uniquely focusing on decision-making on commitment), as well as reports and information published by various non-state actors, such as non-governmental organisations dedicated to Indigenous peoples' rights.[38]

The data gathered through primary sources is subject to the usual caveats; even a combination of official/archival documents, interviews and secondhand accounts of decision-making and events can only ever provide incomplete information about past events and the 'real' rationale behind official decisions. In the case of research into decision-making for the four states opposing UNDRIP, different types of sources or information were more readily available: for some, access to interviews with government officials has been easier, while in others official publications and statements were more numerous.[39] Considering that UNDRIP is relatively recent, and that the issue might still be sensitive in the states visited for fieldwork, access to government officials was limited; where contact was achieved, interviews were mostly given on a non-attributable basis. Additionally, in discussions with governmental legal advisers, the content of legal advice in relation to specific files could not be disclosed.

[38] This project is particularly indebted to Docip (Indigenous peoples' centre for documentation, research and information), IWGIA (International Working Group for Indigenous Affairs), the Minority Rights Group and UPR-Info for extensive databases and documentary resources made available on their respective websites.

[39] Additionally, the United States was not initially planned to have a key part in the UNDRIP case study (considering the US's particular relationship with international law generally; see e.g. Scott, *International Law, US Power*.), so no fieldwork was conducted there; yet the quantity of archival documents available (including diplomatic cables through the Wikileaks-PLUSD archive) made it relevant to include the US in the final analysis.

In this case, the gaps in data left by incomplete official records or inaccurate memory are resolved by the triangulation that went on between information found in official records, interviews and observation, as well as process-tracing. At times, interviewees have suggested and facilitated contacts with other potential informants, as well as opening up access to documents and pointing towards relevant archives. Moreover, obstacles relating to the availability of documents or access to officials are mitigated by the particular importance of official records and public statements for this project. Indeed, the official documents and statements made by states are their primary way of recording their position in relation to potential future effects of soft law. As such, if (as per my hypothesis) the costs of soft law and fear of potential future effects are effectively on states' agendas, these concerns are bound to find their way in official records and declarations. Therefore, in this case, available documents provide valuable material to buttress the conclusions made, especially with the support of corroborating evidence obtained through primary sources.

2.3. Data analysis:

Data analysis proceeded through the use of descriptive statistics, content analysis and process-tracing. The empirical data collected as part of the case study was first compiled through the establishment of two datasets, for general analysis through descriptive statistics. The first one relates to UN member states' ties to the situation of Indigenous peoples and official position on Indigenous peoples' rights.[40] It contains information about the presence of Indigenous populations (and detailed information e.g. about the percentage of Indigenous peoples in the total population, where available), as well as all member states' position on international instruments on Indigenous peoples' rights

[40] See Appendix 2: Indigenous Peoples and UN member states.

(ratification status for ILO Conventions 107 and 169, and vote recorded on UNDRIP). This dataset acts as a reference point in the preliminary analysis of the potential costs of UNDRIP for states committing to it. The second dataset relates to UN declarations. It holds information about each declaration adopted since the UN's inception, along with the type of declaration, the issue-area concerned, the length of the document and a detailed record of state behaviour at voting stage (including the voting record and the number of Explanation of vote (EoVs) statements made).[41] This was created to provide a locus of comparison between UNDRIP and other UN General Assembly declarations adopted over time, to evaluate the potential generalizability of findings and the distinctiveness of the case, as well as to assist with the general analysis throughout.

The analysis of the data collected (especially archival, interview and documentary evidence) also proceeded through content analysis, structured through coding using the NVivo software.[42] This has been used for instance to systematically analyse the content of states' Explanation of Vote statements in the official records of UN meetings where declarations were adopted. The coding recorded which states made an EoV, identified the main topics state representatives insisted upon in their statements, their view of the instrument being adopted (its political and legal value, its general importance, comments on the drafting process), and especially, the function the EoV served: whether it expressed praise for the instrument or the process leading to its adoption, or whether it aimed to consign particular interpretations of provisions contained in it that the state wanted to put on the record.[43] Content analysis was also performed on data collected

[41] See Appendix 3: UN Declarations dataset, with Appendix 4: Declarations Dataset Codebook.
[42] NVivo is a software package for qualitative data analysis. QSR International, "NVivo."
[43] Including mentions of 'reservations'.

through archival research and interviews. Formal interviews and notes from informal meetings were transcribed and coded through NVivo.

Finally, the empirical analysis in the thesis relies on process-tracing to account for states' decision-making on commitment. Process-tracing methods focuses on identifying potential 'intervening causal process – the causal chain and causal mechanism – between an independent variable … and the outcome of the dependent variable'.[44] It allows mapping out 'one or more potential causal paths that are consistent with the outcome and the process tracing evidence in a single case'.[45] As such, it is particularly valuable for situations, like this project, where case study methods are used for theory development; 'process-tracing is especially useful for obtaining an explanation for deviant cases, those that have outcomes not predicted or explained adequately be existing theories', as it 'offers an opportunity to differentiate and enrich the general theory'.[46] In this case, it is particularly useful to cast the net wider in attempting to identify the decision-making process leading to an unusual outcome (opposition to HR soft law at the UN), to identify some of the salient factors in the decision-making process (as well as changes of position), on the basis of hypotheses formulated about the importance of the costs of soft law.

[44] George and Bennett, *Case Studies and Theory Development*, 206.
[45] George and Bennett, 207.
[46] George and Bennett, 209, 215.

Chapter 6

WHEN SOFT LAW BRINGS HARD STAKES: THE UNDRIP CASE

The adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was saluted by most at the UN as a real achievement of the organisation, marking the beginning of a new era in the recognition and promotion of Indigenous peoples' rights. It is, however, an unusual case in the history of the United Nations: while most UN declarations in the field of human rights are adopted without a vote, or at least without any opposition, four states voted against the adoption of UNDRIP. This was an incredibly rare occurrence, running counter to usual assumptions about commitment to soft law instruments, especially in the field of human rights.

Indeed, it is usually assumed in IR scholarship that soft law can be useful to foster cooperation in a variety of issues and lead to tangible benefits. At the same time, its non-binding status is meant to ensure that states adopting a soft law instrument maintain flexibility and autonomy with regards to whether or how far they wish to implement it domestically. Since the instrument itself is meant to carry some benefits, but negligible costs, commitment is likely as soon as there are minimal benefits to be made from joining. In the case of human rights instruments, this assumption is even stronger considering the normative pull of human rights instruments, and the reputational benefits

attached to joining one (which has been confirmed in numerous studies, even for binding instruments).[1]

In this thesis, I argue that the above is an incomplete portrayal of soft law, as it can actually carry substantial costs for states joining. As established in Part II, soft law can have effects and harden in various ways, which could bring potential costs to states involved. I argue that states, when making decisions on commitment, will attempt to evaluate the presence and magnitude of such costs, trying to establish the likelihood that a given instrument will harden, and the extent of the implementation costs involved if it were to harden.

In the UNDRIP case, an extensive instrument about rights for the World's Indigenous peoples, implementation costs could be very substantial for states with recognized Indigenous peoples on their territory. Yet, if there was no chance for the instrument to harden, or if states felt they could remain in control of the interpretation to be given to the instruments' provisions, and remain flexible in their intent to implement it, costs should remain low for all UN member states. Widespread commitment would be expected considering the reputational premium attached to human rights instruments, and there would not be a particular need for states to introduce safeguards against potential costs, considering that none would arise from the soft law instrument.

The final vote on UNDRIP's adoption was significantly different. For the first time, multiple states voted against the adoption of a human rights declaration at the UN, while an important number accompanied their vote with additional interpretive statements. I argue that the variation in state behaviour showcased towards UNDRIP is linked to its

[1] See literature review in Chapter 3, section 5.

potential effects and costs. Indeed, I argue that opposition shows concern for the potential costs of the instrument, and constitutes a clear attempt to introduce safeguards against being bound by it in the future. For the opposing states, this proceeded through opposition and interpretive statements, partly in a bid to be able to claim a persistent objector status if obligations were to arise through customary international law. For others for whom hardening would present lesser costs (or who agreed with the content of the instrument enough to bear the costs associated with commitment), alternative ways of crafting commitment were privileged, introducing minimal safeguards against a potential hardening of soft law, while avoiding the reputational costs attached to opposition. Through the UNDRIP case, it is possible to show that the potential costs of soft law matter in states' decision-making on commitment, and to explore how this may translate into a variety of behaviour on commitment on voting day.

The chapter first provides some contextual information on the UNDRIP case, the process that led to its creation, its content and general state behaviour towards it on voting day (section 1). It then runs through the decision-making process as presented in Chapter 5, to establish the main considerations states take into account to reach a decision on commitment (section 2). Section 3 turns to the roots of the opposition at the UNGA, identifying the place of the potential effects and costs of soft law in the opposing states' official rationales. Section 4 then moves to other UN member states, to see different ways in which other states crafted their commitment to UNDRIP to mitigate the potential costs foreseen. Section 5 draws further conclusions and support for the theory by looking at the subsequent change of position of the four opposing states, in the years following UNDRIP's adoption. The conclusion highlights the main contributions of the empirical analysis to the study of state commitment to soft law, and assesses its generalizability in light of the distinctiveness of the case.

1. THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

In the broad network of international human rights instruments developed since the end of the Second World War, not much had been devoted to the specific realities of Indigenous populations.[2] Prior to the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP, the Declaration), the only international instruments devoted to Indigenous peoples were two conventions of the International Labour Organisation (ILO); the first one was not appropriate to fulfill Indigenous peoples' needs and aspirations, while both have failed to gather widespread support internationally.[3] In that context, mobilization started in the 1970s, at the UN and elsewhere, for the recognition and the development of tailored human rights norms addressing of Indigenous peoples' situation.[4] That eventually culminated with the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. This section looks into the creation and negotiation process leading the Declaration to the UN General Assembly (UNGA) (1.1), the Declaration's content (1.2), and states' behaviour towards it on voting day (1.3).

[2] General human rights instruments were applicable to individuals belonging to Indigenous peoples as individuals, not as Indigenous people(s) *per se*.

[3] "Convention C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107)"; "Convention C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)." ILO107's main objective was not so much the wellbeing and development of Indigenous populations, but their integration in their respective countries. It has since been replaced by the 1989 Indigenous and Tribal Peoples Convention (ILO 169), an instrument taking a more appropriate approach, but with very weak membership (close to 30 years after its adoption, as of 2017, only 20 states have ratified it). ILO, "Ratifications of C169, 1989." See Appendix 2 for ratification.

[4] For an overview of the status of and challenges faced by Indigenous peoples in international law (especially prior to the adoption of UNDRIP), see Anaya, *Indigenous Peoples in International Law*; Thornberry, *Indigenous Peoples and Human Rights*; Henderson, *Indigenous Diplomacy and the Rights of Peoples*.

1.1. The Declaration's path to the UNGA

The UN Declaration on the Rights of Indigenous Peoples was adopted as part of UN General Assembly Resolution 61/295, on 13 September 2007.[5] The creation of this instrument detailing human rights provisions in the particular context of Indigenous peoples was, however, far from an easy process. It was the result of nearly twenty-five years of debate and negotiations among member states of the UN, between member states and Indigenous peoples, and between Indigenous peoples themselves.

The work leading to the adoption of the Declaration can be traced back to the early 1970s, where the issue of Indigenous peoples' rights was first concretely introduced on the UN agenda. It happened primarily within the Sub-Commission on the Prevention of Discrimination and Protection of Minorities[6] ('the Sub-Commission'), recommending to the Commission of Human Rights (CHR) and Economic and Social Council (ECOSOC) the appointment of a Special Rapporteur for the preparation of a study on the problem of discrimination against Indigenous populations. The study was completed by José Martínez Cobo and his report was submitted to the CHR and Sub-Commission in installments between 1981 and 1983.[7] Martínez Cobo concluded that existing human rights instruments were 'not wholly adequate for the recognition and protection of the specific rights of indigenous populations as such within the over-all societies of the countries in which they now live.'[8] The report concluded with a call to fill that gap with the creation of new international instruments, as he suggested that the Sub-Commission

[5] Parts of this section were first presented in my MPhil thesis and in Villeneuve, "Could the Progressive 'Hardening' of Soft Law Impair Its Future Development?"

[6] Sub-Commission of the UN Commission on Human Rights (CHR).

[7] *Study of the Problem of Discrimination Against Indigenous Populations: Final report submitted by the Special Rapporteur, Mr. José Martínez Cobo*. UN Doc E/CN.4/Sub.2/476 (30 July 1981), E/CN.4/Sub.2/1982/2 (10 August 1982), E/CN.4/Sub.2/1983/21 (5 August 1983) (and addendums). United Nations For Indigenous Peoples, "Martínez Cobo Study."

[8] Martínez Cobo Study, Conclusion, E/CN.4 Sub.2 /1983/21/Add.8, para 625.

launched the process 'to prepare a declaration of the rights and freedoms of indigenous populations as a possible basis for a convention on that question'.[9]

Growing preoccupation with the situation of Indigenous peoples worldwide also led the Sub-Commission to recommend the creation of a Working Group on Indigenous Populations (WGIP or 'Working Group'), which came into being in 1982. The mandate bestowed on the WGIP by the ECOSOC was two-fold, to act as both rapporteur and standard-setter.[10] In 1985, more emphasis was given to that second dimension of its mandate, as the Working Group was asked by the Sub-Commission to prepare a UN instrument on Indigenous peoples' rights.[11] It took the shape of a declaration, to be submitted to the UN General Assembly. 1985 marked the official start of the 'systematic and substantive work of drafting standards relating to the recognition and protection of the rights and freedoms of the world's indigenous peoples'.[12] In 1993, the WGIP presented its Draft Declaration, which was then adopted by the Sub-Commission (in 1994) and transferred to the Commission on Human Rights for adoption before the end of the International Decade of the World's Indigenous Peoples.[13]

The Draft Declaration did not get through the Commission on Human Rights as easily as initially hoped by the WGIP. Since the first draft was produced by the WGIP as an

[9] Ibid., para 627. Martínez Cobo presented a potential strategy to achieve such goals, suggesting that the Sub-Commission tasks the Working Group on Indigenous Populations with the drafting of a set of principles, a declaration and a convention. Ibid., para 628.

[10] UN Doc. E/RES/1982/34 (7 May 1982).

[11] UN Doc. E/CN.4/Sub.2/1985/2/Add.2, as referred to by Eide, "The Indigenous Peoples, the WGIP and the Adoption of the UNDRIP," 46. Evidence of earlier drafts of such an instrument, developed through personal initiatives has been found (including one realized by Bertrand Ramcharan and Howard Berman), but it seems like the WGIP started its work from a blank slate, later complemented by input from consultations. (Interview with a former UN official, 13 June 2016, and 'Letter from Bertrand G. Ramcharan to Asbjorn Eide, 3 February 1984' Box 1, Folder 5, Law Spec. Coll. 06, Howard R. Berman Papers, 1835-1997, Charles B. Sears Law Library, The State University of New York at Buffalo.

[12] Daes, "The UNDRIP: Background and Appraisal," 23.

[13] Decade declared by the UN General Assembly on 21 December 1993, to run from 1994 to 2004. UN Doc. A/RES/48/163 (21 December 1993).

appointed expert-body, it now had to be negotiated (re-appropriated, even) and adopted by the states sitting on the Commission. To this end, the Commission established its own Working Group, the Working Group on the Draft Declaration (WGDD),[14] where the draft lingered for over twelve years.[15] In 2006, the WGDD finally adopted its draft and submitted it the Human Rights Council (HRC)[16], who adopted it through a vote[17] and transferred it to the General Assembly, for consideration during its 61st session.

The HRC wished to transfer it directly to the GA Plenary for adoption as a UNGA declaration, but work on the Draft Declaration was re-opened by the General Assembly Third Committee. A group of African states led by Namibia requested, in November 2006, a deferral of the adoption of the document,[18] which was granted in spite of opposition from Indigenous peoples' representatives and governments co-sponsoring the Draft Declaration.[19] The President of the GA subsequently appointed a facilitator[20] to undertake further consultations on the Draft. The latter conducted open-ended informal consultations that lead to compromises and targeted amendments, to the satisfaction of some states[21] (but leaving a small group of states with outstanding

[14] Eide, "The Indigenous Peoples, the WGIP and the Adoption of the UNDRIP," 38.
WGDD was the accepted short form. The official name was 'Working Group established in accordance with Commission on Human Rights resolution 1995/32 1995 to further elaborate and negotiate the Draft of 3 March 1995' Tauli-Corpuz, "How the UNDRIP Got Adopted," 3.

[15] Daes attributes the delay to 'certain delegations of member states and various representatives of indigenous peoples'. Daes, "The UNDRIP: Background and Appraisal," 34.

[16] By the time the WGDD adopted its draft, the CHR had been abolished and replaced by the HRC.

[17] UN Doc. A/HRC/Res/2006/2 (29 June 2006). Voting record: 30 in favour, 2 against (Canada and Russia), 12 abstentions.

[18] Namibia argued that African states needed more time to study the document and present it to their respective capitals. See Namibia's interventions on that matter at the UNGA Third Committee. "Summary record of the 53rd meeting", UN Doc. A/C.3/61/SR.53 (28 November 2006). See also Tauli-Corpuz, "How the UNDRIP Got Adopted," 9.

[19] Once the resolution was amended to postpone discussions, the co-sponsors of the resolution changed drastically (initial sponsors withdrew in protest and abstained on the vote, while new sponsors were added, mostly from the Africa group).

[20] Hilario G. Davide, Jr., the Permanent Representative of the Philippines to the United Nations (See Al Khalifa, "Letter from the President of the General Assembly.")

[21] Especially with the inclusion of remarks on territorial integrity and interpretation to be given to the concept of self-determination (through article 46), mostly at the satisfaction of the African Group.

concerns).[22] The finalization of this last round of consultations with widespread support from an important majority of UN member states finally paved the way for the Declaration's adoption at the UN General Assembly, in September 2007.

1.2. The content of the Declaration

The final text of the Declaration, adopted as an annex to resolution 61/295 of the UN General Assembly, contains twenty-four preambular clauses and forty-six articles.[23] Its substantive provisions include broad statements concerning non-discrimination and the enjoyment of the rights recognized under general human rights law (e.g. art.1,2) and specific articles in matters as diverse as civil and political rights (self-determination, nationality, physical integrity, political representation, etc.), culture, education, media, spirituality, labour, land, resources, development and intellectual property, as well as borders and treaties. It concludes with a section dedicated to the implementation of the Declaration and final provisions (art. 38-46) laying out the role to be played by states and the United Nations in achieving the document's goals.

Some of UNDRIP's articles bear great similarities with existing international human rights and general public international law instruments, but restate them in the particular context of Indigenous populations. For example, article 3 of the Declaration, regarding self-determination, is almost identical to the provisions contained in the International

[22] A group of states (formed by the representatives from Australia, Canada, Colombia, Guyana, New Zealand, Russia and Surinam) concerned by the draft as it stood met with the facilitator and attempted, unsuccessfully, to reopen discussions for a series of amendments on eight thematic areas of concern, referring to sixteen articles. 'Letter to H.E. Hilario G. Davide' in Annex 3, Davide Jr., "Supplement to the Report of the Facilitator." The nature of their substantive concerns will be detailed in the next section. For a detailed account of the negotiation process on the Draft Declaration at that stage, see e.g. Daes, "An Overview of the History of Indigenous Peoples," 18–22.

[23] Full text of the Declaration can be found in Appendix 1.

Covenant on Civil and Political Rights,[24] while article 46 takes its inspiration from UNGA Declaration on the Friendly Relations Among Nations.[25] The influence of the Universal Declaration on Human Rights is also visible throughout UNDRIP.[26]

Some provisions, however, were more contentious than others in the process of the adoption of the Declaration. A few of them could be said to be quite novel and not generally accepted in the international legal order, such as the idea of collective rights, to be claimed and enjoyed by a group, not only by individuals as members of a group.[27] Other provisions referred to rights that were more common in general public international law, but their transposition within an Indigenous rights instrument raised particular concerns for states. The main points of contention in regards to the content of the Declaration related to a definition of 'Indigenous peoples' (absent from the text),[28] the concept of 'self-determination' (art. 3-5, 46), the requirement of free, prior and

[24] They differ only on the fact that art.3 of the UNDRIP refers to 'Indigenous peoples', while art. 1 (1) of the ICCPR refers to 'All peoples'.

[25] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/RES/25/2625 (24 October 1970).

[26] UN General Assembly, Universal Declaration of Human Rights, GA Res. 217 A (III), 10 December 1948.

[27] As the Japanese representative noted in his EoV on the UNDRIP, 'While the Declaration stipulates that some rights are collective rights, it seems that the concept of collective human rights is not widely recognized as a well-established concept in general international law, and most States do not accept it.'. Upon adoption of the UNDRIP, six states (all of whom voted in favour) made statements relating to collective rights. The UK and Slovakia denied their existence, while Sweden and France admitted they existed but noted that they cannot take precedence over individual human rights. Japan squared the circle by stating that some (individual) rights can be exercised by a community, collectively, while Guatemala embraced the concept fully.

UN Doc. A/61/PV.107 and A/61/PV.108.

[28] Establishing a definition of who is indigenous or whether there should be such a definition has always been a complex issue, especially as 'indigenous peoples have often suffered from definitions imposed on them by others'. Daes, "An Overview of the History of Indigenous Peoples," 8. See also Pulitano, "Indigenous Rights and International Law: An Introduction," 11.

informed consent (FPIC) (e.g. art. 10, 19, 29, 32), the related issues of land rights, use of resources and redress, as well as the notion of collective rights (art.1, 7).[29]

1.3. State behaviour on commitment to UNDRIP at voting stage

On voting day, the UN Declaration on the Rights of Indigenous Peoples was presented to the UN General Assembly by the representative of Peru, in the name of the draft's thirty-eight sponsoring member states.[30] The voting record on the Declaration at the UNGA was the following: 144 votes in favour, eleven abstentions[31] and four oppositions. The four opposition votes were cast by Australia, Canada, New Zealand and the United States. Such behaviour was quite a puzzling occurrence within the UNGA history, especially on matters of human rights: only once before in the organisation's history had a member state cast a vote in opposition to the adoption of a declaration in the human rights category.[32] Moreover, a majority of such declarations (twenty-three out of thirty-three) had been adopted by acclamation, signifying consensus among the members of the Assembly.[33]

The overwhelming support for the instrument on the surface also has to be assessed in light of interventions made on the day by various UN member states. Indeed, upon the

[29] The notion of collective rights permeates the entire declaration, since most provisions are couched in the language of rights granted to 'Indigenous peoples' as such. Still, collective rights are specifically and explicitly mentioned at articles 1 and 7.

[30] The whole list of sponsors was presented by Peru, and is recorded in UN Doc. A/61/PV.107. They hailed from all UN regions (14 WEOG, 10 GRULAC, 9 EEG, 4 Asia-Pacific and 1 for the Africa Group (South Africa)). Most are not considered to have Indigenous peoples in their population, except for Finland (1.6%), and the GRULAC group (where 8 out of the 10 do, sometimes representing close to half the total population: 40% in Guatemala, 41% in Bolivia). For a list of UN member states with information on regional groups and Indigenous populations, see Appendix 2.

[31] The 11 abstaining states were Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine. Colombia and Samoa have since changed their position and expressed their support for the UNDRIP.

[32] The Unites States of America, on the UNGA Declaration on the Right to Development, UN Doc. A/RES/41/128.

[33] See Appendix 3 for a list of the UNGA declarations and related voting records.

adoption of UNDRIP, no less than seventy-one member states took part in issuing statements or recording an Explanation of Vote (EoV), the second highest total number of interventions recorded upon the adoption of any UN declaration.[34] This, witnessed alongside the length of the drafting and negotiation process for the instrument, shows that commitment to the UNDRIP was not as simple or straightforward as a quick glance at the voting record (and common assumptions in the field of human rights soft law) would lead us to expect. The next section uses the account of decision-making presented in Chapter 5 to lay out the main considerations that must have played in reaching decisions on commitment to the UNDRIP.

2. DECISION-MAKING ON UNDRIP: SALIENT CONSIDERATIONS FROM STEPS A/B/C

Upon negotiation and voting on the UNDRIP, each UN member states had its own set of state interests and policy preferences to consider and balance before settling on a course of action. This section uses the account of decision-making presented in Chapter 5 and applies it to the UNDRIP case specifically. It runs through the first three steps in the process (A: Form and function, B: Potential costs, C: Policy preferences) to lay out the most salient considerations common to all, as well as the different ways in which

[34] These were grouped in 43 interventions: 37 as Explanation of Vote and 7 additional statements post-adoption, including one recorded by Portugal in the name of 35 states (the EU member states, candidates to membership and others). Some of these states' representatives (Finland, France, Montenegro, Slovakia, Sweden, Turkey, UK) recorded a further individual EoV or statement, in addition to adhering to the collective one made by Portugal. The only one with a higher number was the 2000 Political declaration, with 99 recorded statements (which includes 69 statements made in group EoVs). See Appendix 3.

some considerations may have been more salient to certain groups of states (with a particular focus on the CANZUS group,[35] the four states that opposed the Declaration).

2.1. Step A: Assessing UNDRIP's form and function

The first step when addressing decisions on commitment to an international instrument is to establish, first of all, the form of the instrument, i.e. whether it is meant to be binding in international law (Q0). In this case, as the instrument came in the form of a UN General Assembly declaration, it was common knowledge and uncontested that it was meant to be, upon adoption, a non-binding international instrument. Turkey, for instance, stated that 'the Declaration is not legally binding', but recognized its role as a 'policy tool.' [36]

What was much more ambiguous was to establish the function the instrument was meant to serve (Q1). Indeed, it could be seen as both a substitute to existing international instrument only recasting existing norms (present in ILO conventions and general HR instruments) with an Indigenous peoples' rights focus, or as a standard-setter laying forward new norms and standards in the field. When the representative from Peru presented the draft to the General Assembly, he noted it was part of an effort to 'bridg[e] a significant gap in the area of promoting and protecting human rights: the protection of indigenous peoples'.[37] Most proponents aimed to gather support for the instrument by insisting that it was mostly filling this gap as a substitute, using provisions already in

[35] Shorthand expression to refer to the group formed by Canada, Australia, New Zealand and the United States of America. It is a common reference in UN and academic circles, especially on the issue of Indigenous rights as the views of these four states tended to align quite significantly.

[36] UN Doc. A/61/PV.108, p.5.

[37] UN Doc. A/61/PV.107, p.10.

force in other existing international instruments (some of them binding), only recasting them and clarifying the realm of their application on the specific situation of indigenous peoples. Yet, the result of that process was to put forward norms which could ultimately constitute (if they were to be implemented) quite significant changes to the existing legal and constitutional regimes pertaining to Indigenous peoples' rights in some countries. As such, many provisions in the declaration could easily be seen as standard-setters, the most challenging type of soft law instruments.[38]

This ambiguity surrounding the function of the instrument was not as acute a challenge for all states. That point was raised by the United States, arguing that 'many other countries […] may not be fully aware of what participants intended in its drafting',[39] in an attempt to alert states who may not have participated in the negotiating process to issues arising and how conflicting interpretations of the UNDRIP's standard-setting provisions may affect them substantially. Ambiguity on the function of the instrument have raised the stakes of the decision-making process, making the Declaration worthy of closer attention, considering the chance it may serve a standard-setting role internationally.

2.2. Step B: Evaluating UNDRIP's costs

[38] See Chapter 4. A standard-setting instrument does not imply that costs would necessarily arise from such new standards (costs will be evaluated at the next stage), but as it introduces something 'new', it is crucial for a state to evaluate what it aims to do, and the impact it could have on international and domestic legal orders. We will come back to this at Step D in sections 3-5.

[39] Something the US offered to rectify by 'provid[ing] an understanding of the intent of participating States on the core issues'. United States, "Observations." The extent to which such interpretations of provisions which were challenging for the United States reflected general agreement in the General Assembly is debatable.

Step B then turns to evaluating the potential costs attached to commitment to UNDRIP. While those will vary from state to state, it is possible to draw the following general observations.

2.2.1. Costs of UNDRIP's hardening for a state

An assessment of the potential costs of the instrument starts by evaluating whether there would actually be any costs for member states if UNDRIP hardened (Q2). More than for any other question asked, evaluating the costs attached to potential hardening of the instrument varies greatly according to the specific situation of each member states. Those costs refer mostly to the impact felt if the instrument was to harden; it therefore depends on the link between a state and the issue-area at hand (if any), and on the level of compliance that state can claim in relation to the provisions of the instrument.

In this case, there are indicators helping to evaluate the presence or magnitude of costs for a state if UNDRIP hardened. First, since it is an instrument focusing on Indigenous peoples' rights, the degree of attention or concern a state demonstrates towards commitment to the instrument is greatly influenced by whether or not it counts individuals belonging to Indigenous peoples on its territory, or whether it recognizes them as such.[40] Therefore, we need to distinguish here between states who recognize Indigenous peoples on their territory, states where there are no Indigenous peoples, and those for whom it is contested (states not recognizing Indigenous groups who self-identify and/or are recognized externally).[41]

[40] Some states may not recognize self-identifying Indigenous groups on their territory, either claiming they do not qualify as Indigenous but as 'ethnic groups', or simply not acknowledging their presence.

[41] See table of UN member states and Indigenous peoples, in Appendix 3. Data collected through CIA, "The World Factbook"; IWGIA, "The Indigenous World"; Minority Rights Group, "Directory of Minorities and Indigenous Peoples." and national census data, where available.

UN Member States 2007	Presence of Indigenous peoples			
Regional groups	Yes	No	None recog.	**Total**
Africa	18	30	5	53
Asia-Pac	7	39	8	54
EEG	1	22		23
GRULAC	23	10		33
WEOG	9	20		29
Total	**58**	**121**	**13**	**192**

Table 6.1: Indigenous peoples in UN member-states by region.

If the instrument were to harden and gain a greater legal value under international law, especially if some of its most challenging provisions were to be recognized binding as CIL, the implementation and sovereignty costs for some of those states could be high. This is especially the case for states who do have Indigenous peoples on their territory, but who are not compliant with some of the provisions it sets forth, as implementation costs depend on the degree of compliance achieved by states. Costs could be particularly high for states with a large proportion of Indigenous peoples,[42] or more importantly, for states whose territory could in large part be recognized as land traditionally owned or occupied by Indigenous peoples (considering the importance of land rights and of requirements of free, prior and informed consent in the Declaration). As such the issue of potential costs is most acute in 'settler' colonial states, like the four opposing states, where Indigenous peoples could lay claim to most, if not all, the territory of the 'modern' states established by Western colonial settlers.[43]

[42] A state with an important proportion of IPs in the population would certainly reap electoral benefits domestically from compliance, which may be deemed important enough to compensate for the costs of hardening. That would be part of an evaluation of policy preferences at step C.

[43] Veracini, *Settler Colonialism*. In this case, the four states were established through British rule. Unlike other colonial structures where independence was eventually granted to or achieved by colonized populations (mostly in the 60-70s through decolonization), settler-colonial states were established over lands where original inhabitants were already settled, but where settlers imposed their own legal system and ownership of the land disregarding those prior claims. Independence from imperial rule was later achieved by the settlers, with very little consideration for the rights of original inhabitants.

For states with no Indigenous peoples amongst their population, the decision on commitment may still be consequential, if it is perceived that the Declaration contains principles of international law that could develop to apply more broadly than solely on the topic of Indigenous peoples. For instance, elaborating on the right to self-determination or admitting group rights as human rights may create interpretations that could be reflected or used by ethnic or other minority groups. Potential effects may also be of concern to states who do not currently count Indigenous groups among their populations, but who have historically contributed to the establishment of states on traditional lands in colonial endeavours (e.g. United Kingdom, Spain, the Netherlands).

Finally, for states who do not recognize the presence of (self-identifying or externally recognized) Indigenous peoples on their territory, the salient issue becomes one of definition: no group recognized as Indigenous, no right arising from the Declaration to be claimed domestically. But if some groups claiming to be Indigenous were to see their status confirmed and the Declaration applied to them, costs could arise. Such states may have strong view or interests on the issue of definition, but less on other matters, considering a definition excluding them from the realm of application of the declaration could be sufficient to spare them from costs tied to expectations of implementation. Another preferred avenue for those states could be to steer clear of the Declaration (or of the debates surrounding it) entirely, holding the line that the topic is of no concern domestically.

2.2.2. Likelihood of hardening

The next step is to assess how likely it would be for UNDRIP to harden in ways that could bring greater effects and costs (Q3).[44] In this case, by the time the draft had reached the General Assembly for adoption, there had been plenty of signs that there was a potential for UNDRIP to be used in ways that could bring about greater effects than its aspirational, non-binding status suggested. First of all, amongst all soft law instruments, General Assembly declarations enjoy a particular status, considering they are adopted for matters of particular importance, through an international body with a quasi-universal membership.[45] They are quite likely to act as standard-setters, as illustrated by the numerous UNGA declarations which paved the way to binding treaties, but also by court precedents using them to recognize CIL norms.[46] In this case, the objective of the declaration to pave the way for a convention had been mentioned from the project's inception.[47] This raised the stakes attached to negotiating the wording of the provisions of the UNDRIP, knowing they might well find themselves replicated in a binding instrument in the future. Likewise, the potential for provisions of the UNDRIP to be recognized as CIL (in spite of it never being an avowed objective of the Declaration) was certainly not lost on UN member states attuned to the potential effects of soft law.

On the domestic plane, some states had additional reasons to be alerted to the potential effects of the Declaration and its likelihood of hardening. In Canada, for instance, the Supreme Court, in a 2001 decision, had already quoted the Draft Declaration, prior to its official adoption, as an interpretive aid in a case involving Indigenous Peoples'

[44] In this case, it refers to what we can discern of the opposing states' perception that it would be likely to harden, not of a factual assessment of the probability of it actually happening.

[45] See introduction to Part III, section 1.1 on UNGA declarations.

[46] See Chapter 4, section 3.3. See also, specifically on the UDHR, International Law Association, "Final Report on the Status of the UDHR."

[47] Martínez Cobo Study, Conclusion, E/CN.4 Sub.2 /1983/21/Add.8, para 627. Interestingly, he presented that strategy noting that it had been useful for the creation of principles to address fundamental issues in other UN contexts and circumstances.

rights.[48] While it was not used as a basis for the Court's decision, it signaled that the instrument was already given great weight by domestic actors who were keen to use it, therefore heightening the stakes of the official decision on commitment.

Finally, internationally, there was a strong mobilization of non-state actors at the UN on the Indigenous Peoples' rights file, as well as unprecedented participation of Indigenous peoples and allied NGOs in the drafting and negotiating process behind UNDRIP. [49] Those were additional signals that transnational and domestic actors were paying sustained attention to the instrument and had the intention of using it or pushing for its implementation and progress beyond the commitment stage. The UN's program of work on the issue, and the place of Indigenous peoples on the UN's agenda for decades were further indications that the Declaration could be strengthened post-adoption and eventually harden.[50]

2.2.3. Summary of costs evaluation

Even prior to the instrument's adoption, there were a series of signs in the UNDRIP case that the Declaration could harden in various ways.[51] This evaluation, coupled to the costs for a state if it were to harden, determines whether the potential costs of UNDRIP are

[48] Supreme Court of Canada, Mitchell v. MNR, 2001 SCC 33. This was arguably a questionable move by the Court, as there are no clear legal basis for using such instruments in domestic cases. Yet, it proves the potential of soft law to have important effects domestically, even prior or without formal adoption by a state. The issue is explored by Joanna Harrington in this piece: Harrington, "Incorporating UN General Assembly Declaratory Texts into Domestic Law?" The Court that year had also quoted the UDHR (an instrument Canada had supported) and UN Secretary-General reports. Supreme Court of Canada, United States v Burns, 2001 SCC 7.

[49] Such mobilization was also visible in the Inter-American context, where efforts to draft and adopt an American DRIP have been ongoing since 1989. Organisation of American States, "Preparing a Draft American Declaration on the Rights of Indigenous Peoples."

[50] This focus at the UN is noticeable in part with its dedication of two 'International Decade[s] of the World's Indigenous People', running from 1995-2004 (pursuant to UN Doc. A/RES/48/163) and 2005-1994 (through UN Doc. A/RES/59/174).

[51] This does not mean that all were convinced that it would harden. This evaluation is a matter of degree, which may then influence states responses in trying to boost or limit the chances of the instrument hardening towards greater legal value.

relevant to the rest of the decision-making process. If there are no costs foreseen, then policy preferences alone can guide the decision. If there is a risk of costs, depending on the interpretation to give to the instrument or certain of its provisions, then states' efforts must be focused on crafting commitment in a way that maximizes benefits and minimizes such costs.

In the case of states with Indigenous peoples, the potential costs to arise from the instrument are clear, especially for states whose territory was in large part traditionally owned or occupied by Indigenous groups. For states who are already compliant with the provisions of the Declaration, this does not pose a great problem at commitment stage. For the others, a decision on commitment depends on policy preferences. Some may well be ready to bear great costs if they believe a certain policy is appropriate or in their interest; conversely, if some disagree with the instrument or provisions in substance, they are expected to make every possible move to limit those potential costs and their effects domestically. For the CANZUS states in particular, the second stage in decision-making leads to a plausible recognition that important costs were likely to arise through the adoption of UNDRIP, and that those were to take into consideration when establishing a course of action regarding commitment.

2.3. Step C: State interest and policy preferences

The next step, once the form, function, and potential costs of the instrument have been assessed, is to identify policy preferences. It is a matter for each state to determine its own interests and policy preferences on the file, and whether it aligns with the instrument or not (Q4). These may be idiosyncratic preferences, but overarching considerations are likely to include, for most states, a calculation of reputational costs and benefits (as the UNDRIP is a human rights instrument negotiated under UN auspices), and an

assessment of strategic partnerships and expected behaviour of/from allies within UN membership.

Policy preferences are important, as they are balanced against to the evaluation made of the costs of the instrument, to orient the final decision on commitment. They will guide states in deciding to what extent any costs arising may be willfully and happily borne (if the standards put forth are deemed acceptable, appropriate and important), or whether there should be attempts to mitigate and limit them as much as possible. These different policy options will be further explored below as the following sections account for step D, the decision taken on commitment. I will delve further into the nature of the interests and preferences feeding into particular states' decision on UNDRIP below, when focusing on the outcome of the decision-making process for the opposing states (section 3) and others who have crafted commitment to the instrument differently (section 4).

2.4. Expectations for commitment

This overview of steps A, B and C in the UNDRIP case leads to the following expectations for states decisions on commitment upon adoption. As established in Chapter 5, if the costs of soft law (step B) do not matter in decision-making on commitment, then policy preferences alone may guide the final decision. In this case, the normative pull of human rights instruments and the reputational benefits to be made in joining would lead to widespread agreement in favour and unqualified support from UN member states, perhaps even to adoption without a vote through consensus.

I argue, however, that states who faced the prospect of substantial costs attached to the Declaration took those costs into account in decision-making, and moved away from unqualified support. They crafted commitment to mitigate these costs and introduced safeguards against potential future effects. For the CANZUS states, there were high risks

foreseen of very substantial costs (because of factors surveyed in section 2.2). That pushed them towards the strongest position possible: the rejection of the instrument through opposition, along with an EoV including safeguards in relation to both the content and form of the instrument. This was done in spite of an agreement in principle with the idea of a DRIP and with most of its provisions, to block potential effects and costs form arising, particularly through the CIL pathway. Other states, including some who also recognized the presence of Indigenous peoples on their territories, crafted commitment differently. Some opted for unqualified support and embraced the Declaration fully, either because they agreed with it and intended to implement it, or because they did not foresee any risks of hardening that could have brought greater costs to bear. Others opted for qualified support or abstention, depending on the costs foreseen, the risks of hardening, and other policy preferences and pressures faced.

To substantiate and illustrate the claims and arguments just laid out, section 3 will delve into the opposition of the four CANZUS states to the Declaration and show the clear place the costs of soft law had in the decision to oppose. Section 4 will look at the alternative ways other states have found to craft commitment, introducing varying levels of safeguards to mitigate the potential costs of UNDRIP. Section 5 then looks at the additional evidence supplied by the four CANZUS states' change of position in the years that followed the adoption of the UNDRIP, confirming further the role of the costs of soft law in their initial decision to oppose – and the possibility for them to craft commitment differently a few years later.

3. STEP D FOR THE CANZUS STATES: OPPOSITION TO THE DECLARATION

From the assessment of main considerations in decision-making conducted above, it is clear that the UNDRIP could raise important costs for CANZUS states, if it happened to harden.[52] There were also multiple noticeable factors, even prior to the adoption of the instrument, that it could harden, especially through the use of the Declaration in domestic courts, its planned transposition in a Convention, and its possible recognition as CIL, all those compounded by strong mobilization of Indigenous peoples and allied civil society organisations (domestically and internationally) pushing for its adoption, and future implementation. For those four states, hardening was therefore likely and could have brought significant costs to the fore.

They still had to develop a policy response towards the instrument, based on their own interest and preferences, and any other trade-off internationally and domestically. UNDRIP being a HR instrument at the UN, reputational benefits were tied to its adoption, and costs associated with opposition. Domestic electoral costs and benefits were also to be taken into account, based on the general population's view of the instrument (a great majority of which was non-Indigenous). The appropriateness of the standards set forth and whether it was the proper direction for the development of international law was also at the heart of the matter.

When time came, in September 2007, to make a final decision on commitment to the UNDRIP, the UN did not witness an effort on the part of these four states to develop some flexible interpretation of the instrument as aspirational, in order to lend support to

[52] Parts of this section (especially in 3.2 and 3.3) were first presented in my MPhil thesis and Villeneuve, "Could the Progressive 'Hardening' of Soft Law Impair Its Future Development?".

the initiative. Instead, Australia, Canada, New Zealand and the United States opted for opposition to the adoption of the Declaration, a position barely ever witnessed at the UN on human rights declarations, and a stance going against assumptions on commitment to international instruments, especially in a soft form, on human rights matters.[53] Section 3.2 below looks at the official rationale behind their opposition, to show (at 3.3) that the potential effects of the instruments and costs attached to its potential hardening did play a role in the decision-making and final position on commitment. Opposition was eventually privileged as the clearest signal of those states' intent not to be bound by the provisions of the declaration, as main safeguard towards its potential hardening, especially through an eventual recognition as customary international law (Section 3.4). Before delving into opposition as the final policy decision made, it is worth surveying briefly other options attempted or envisioned prior to voting stage.

3.1. Policy options attempted prior to voting stage

The CANZUS states did not wait idly until the UNGA vote to express their discontent and reservations towards the instrument.[54] In fact, multiple options were contemplated during the drafting process, and their failure contributed to the final decision to oppose UNDRIP's adoption. First, the four states were amongst those who tried to amend the draft at various stages, to change or remove some of the potentially costliest provisions.[55] Removing or watering down such provisions would have effectively mitigated some of the costs foreseen in case of a hardening of the instrument. There are, however, reputational costs attached to such manoeuvers, especially once it became clear that the

[53] See Chapter 3. The only other opposition vote ever recorded to a UN human rights declaration was made by the USA, on the Declaration on the Right to Development.

[54] They also remained involved in the draft, to attempt to steer it in a direction reflecting state interests, rather than leaving others decide of its specific content.

[55] See for instance the letter sent to Hilario Davide by a group of seven states asking for a limited re-opening of the text, note 22 above.

four states had serious issues with the Declaration. The four states seem to have been aware of the impact that a push to amend more than a limited number of provisions would be received with 'skepticism' at best, or 'conspiratorial suspicions' about a hidden agenda to derail the entire process.[56]

Seeing that attempts to change some of the most contentious provisions of the DRIP (from the CANZUS states' perspectives) were not delivering satisfactory results, the CANZUS states also considered delaying the vote further, like had been achieved by the group of African states at Third Committee, or push for the General Assembly to 'take note of' the text rather than adopt it in declaration form.[57] After more than twenty years of negotiations, many states were keen to adopt the text as it was and close the file once and for all, so support for the former option, i.e. further delays before the vote, would have been difficult to secure. As for the latter, it would have changed the form and status of the instrument, making it much less likely to harden since it would have been deprived of its UNGA declaration status. Yet, this could not have been a popular suggestion amongst UN membership (and especially not amongst Indigenous peoples' representatives), since the process from its inception had aimed at the adoption of a declaration and the advantages of a 'declaration' status was not lost on its proponents.

The last option attempted, in the years leading up to the vote, was to try to gather the necessary support for a re-opening of the draft for negotiations, or for delaying the

[56] American officials noted that 'proposals generated by CANZUS will likely be viewed warily, and with a good deal of skepticism. It was suggested that members of CANZUS, to the extent possible, prioritize their objections and establish a limited hierarchy of goals for the negotiations. Anything more than a handful of issues will serve only to confirm conspiratorial suspicions.' Wikileaks, PLUSD, Doc. 07USUNNEWYORK93_a.

[57] Account of a CANZUS meeting by American officials in February 2007: 'In the end, if negotiations do little to salvage the text before the scheduled conclusion of negotiations in August, possible options would be to extend the deadline, or perhaps "taking note of" the declaration as an alternative to what is sure to be a divisive battle over its, adoption.' Ibid.

adoption until progresses were made on the most problematic provisions. As such, Australia, New Zealand and the United States (joined by Canada in mid-2006) went on an international diplomatic campaign to share their concerns with the draft and highlight to other member states the implications of certain contentious provisions (and the costs that could arise) for those other states' domestic situation.[58] In spite of those efforts, the CANZUS states did not secure the necessary support amongst UN member states to re-open the text for negotiations. As such, at the voting stage, they decided to oppose the instrument, in what I argue was partly a move to block any potential effects and costs to arise from the Declaration in the future. The remainder of section 3 will look at the rationale upon which the decision to oppose was based, and how it shows a clear concern for the potential effects and costs of the soft law instrument.

3.2. Opposition: Overview of official rationale at the UN

On voting day at the UNGA, Step D for Australia, Canada, New Zealand and the United States of America culminated in the four states casting a vote against the adoption of the Declaration. All four made a statement in explanation of their vote before draft resolution A/61/L.67 was submitted for the member states' approval.[59] The United States also submitted a separate document to the General Assembly, recording its 'Observations' with respect to UNDRIP.[60] All four states started their interventions on that occasion by insisting on their commitment to Indigenous rights and their long-

[58] Labelled 'tripartite demarche' in US State Department internal memos (e.g. Wikileaks PLUSD Docs 06RABAT1001_a, 06OSLO705_a, 06ALGIERS1080_a, 06ANKARA5868_a and 06WARSAW2197_a). Further evidence is provided in an ANZUS joint statement to the HRC, mentioning that the 'three countries have discussed the Chair's text in many capitals and in all regions'. Human Rights Council, "Joint Statement by ANZUS On the Chair's Text on the DRIP." The strategy was that 'CANZUS believe[d] a continued effort should be made to "educate" delegations on the many flaws of the current document.' Wikileaks PLUSD, Doc. 07USUNNEWYORK93_a.

[59] UN Doc. A/61/PV.107.

[60] United States, "Observations."

standing involvement in the work of the various committees that led to the draft on the Declaration.[61] However, all four claimed that it was not possible for them to vote in favour. In fact, eschewing the options of crafting their commitment in other (qualified) ways or avoiding commitment through abstention, they further claimed that they had to oppose to the adoption of the UNDRIP. They did so for similar reasons, calling upon comparable arguments.

The records of official positions in Explanation of Vote statements are instructive as they include not only the public rationale put forward to justify opposition, but also those four states' interpretations of the value of the instrument and its potential effects.[62] Yet, there is evidently some degree of discrepancy between the official discourse and the underlying reasons motivating the decision to oppose, calling for further analysis. This section starts by reviewing the official positions offered on the record by the four opposing states. I uncover that their official motives to justify opposition revolve around three main poles: the Declaration's content, its drafting process, and its form. Each of these will be explored below, looking how they are tied to (or used to mask) concerns about potential costs to arise from the instrument. This is a useful first step to set the stage for an analysis, in section 3.3, of the place of soft law's effects and costs in their rationale for opposition.

[61] This highlights the normative weight of the issue, and the importance of managing reputational impacts when taking an unusual position on a human rights instruments: there needs to be some level of commitment in principle.

[62] EoVs have a strong interpretive value, providing clear evidence of states' intent and interpretations when making an international commitment. States must therefore be clear and exhaustive in their presentation in case it would be later used in domestic or international court cases or political fora.

3.2.1. Remarks on the Declaration's content

All four countries had strong substantive objections to some of the Declaration's provisions. Unsurprisingly, the substantive provisions they had strong objections to are the ones that would bring about the highest costs for the opposing states, should they have to be implemented fully. The main preoccupations of the quartet were with articles revolving around land rights, resources and redress,[63] particularly the requirements of recognition of Indigenous land rights in spite of other legal rights to land (including claims settled with indigenous populations) in their domestic legal framework. Regarding the use of resources, the states critiqued the Declaration's requirement of 'free, prior and informed consent' of the peoples concerned for a state to make use of Indigenous land or resources contained therein. Canada, New Zealand and the US claimed that it would effectively give Indigenous peoples a veto power over a democratic government's decision,[64] or 'imply different classes of citizenship, where indigenous people have a right of veto that other groups or individuals do not have'.[65]

Another central aspect of the opposition to the Declaration related to the right to self-determination. Australia expressed its 'dissatisfaction' with the references to such a right in the document, as it conceives of self-determination solely in external terms[66] and thus claims that it was inadequate for the UNDRIP.[67] The United States were particularly concerned with the fact that, instead of articulating a new concept of self-determination as self-government within the state, the Working Group took what the US representative dubbed a 'wholly inappropriate approach of reproducing the text of ICCPR and ICESCR

[63] i.e. articles 19, 26, 28 and 32.

[64] Such a veto power could also be extrapolated to all laws 'affecting' indigenous populations, through article 19 requiring free, prior and informed consent in all such instances.

[65] UN Doc. A/61/PV.107, p. 14. (New Zealand).

[66] i.e. self-determination as leading to formal political independence as sovereign state.

[67] UN Doc. A/61/PV.107, p. 12. (Australia).

article 1 in article 3 of the Declaration, with no intention that that both articles mean the same thing or define the same legal obligations'.[68] Such ambiguities were exacerbated by the lack of a definition of 'Indigenous peoples' in the Declaration, a conscious and long-argued choice of the Working Group, but explicitly dissatisfactory to Australia and the United States since it creates uncertainty as to who could claim to be right-bearers domestically.

An additional overarching concern was the incompatibility of the text of the Declaration with these states' domestic frameworks. All four states mentioned it as an integral part of their justification for refusing to support the Declaration. New Zealand, for instance, claimed that the main argument precluding its adoption of the Declaration was that it 'include[d] provisions that are […] fundamentally incompatible with [its] democratic processes, [its] legislation and [its] constitutional arrangements'.[69] The other states coupled the argument about the incompatibility with their domestic frameworks with broader comments on the 'failure' of the Declaration to ensure its meaningfulness, potential for implementation and wide support of the international community,[70] or to become a 'strong' text 'which could have provided practical guidance to all States'.[71]

These four states stressed that their objections to the content of some provisions of the Declaration was at the core of their incapacity to implement it as it stood.[72] Some articles were deemed 'overly broad and unclear and […] susceptible of a wide variety of interpretations' by Canada,[73] while the United States lamented that the text was

[68] United States, "Observations."
[69] UN Doc. A/61/PV.107, p. 14. (New Zealand).
[70] Ibid., p. 12. (Australia).
[71] Ibid., p. 13. (Canada).
[72] New Zealand, for instance, claims that 'This text is […] clearly unable to be implemented by many states, including those that will be voting in favour of its adoption.' UN Doc. A/61/PV.107, p. 14.
[73] Ibid., p.13.

'confusing and risk[ed] endless conflicting interpretations and debate about its application'.[74] Moreover, the US complained that 'the aspirational principles and collective rights described in the declaration [were] typically written in extremely general and absolute terms'.[75] This last point is particularly surprising to find in a discussion on soft law, since broad guidelines and principles are the hallmark of most declaratory, aspirational documents.[76]

For all of the opposing states, however, the opposition to some provisions of the Declaration was expressed along with a commitment in principle to the promotion and protection of Indigenous peoples' rights, including through the development of a declaration. New Zealand, noting that 'indigenous rights are of profound importance' and 'integral to [their] identity as a nation-state and as a people',[77] offered the most unequivocal support to the project (before announcing with 'deep regret' its inability to vote in favour) as it claimed that it 'fully supported the principles and aspirations of the Declaration'.[78] In a less emphatic but supportive way, Australia started its EoV by noting it had 'effectively worked to ensure the adoption of a meaningful declaration'.[79] Canada highlighted in its EoV that it had 'long demonstrated [its] commitment to actively advancing indigenous rights at home and internationally [and] recognize that the situation of indigenous peoples around the world warrants concerted and concrete international action',[80] insisting on its support for the ongoing work of dedicated UN

[74] Ibid., p.15.

[75] Ibid.

[76] As surveyed in Chapter 3, in the legalization approach, for instance, precision is a marker of 'hard' law. The less precise an instrument, the softer it is.

[77] UN Doc. A/61/PV.107, p. 13. New Zealand is the CANZUS state with the greatest proportion of Indigenous people amongst its population; Maori represent around 15% of the total population, while the proportion is less than 5% for all three other states. See Appendix 2.

[78] Ibid., p. 14.

[79] Ibid., p. 11.

[80] Ibid., p. 12.

bodies and progresses made at home and abroad. And even as the United States representative 'regretted' that it must vote against the Declaration, dubbed a 'flawed document', he stressed that the 'Government will continue its vigorous efforts to promote indigenous rights domestically' and internationally.[81] In addition, all four underlined their own initial dedication and contributions to the creation and drafting process of this international instrument.[82]

This commitment in principle to the cause of Indigenous peoples' rights, and in some cases, to the project of an international declaration on the issue stands in marked contradiction with the final voting stance. Indeed, if all four states agreed in principle to the general concept of Indigenous peoples' rights, and to the project of a declaration to lay them out, commitment to an international instrument in a soft law form should not have raised any major issue, if soft law is to be considered a relatively inconsequential endeavour. Substantive concerns should theoretically have been alleviated by the soft form of the instrument, leaving states in control of potential implementation costs, i.e. of the degree to which they intended to implement the instruments' provisions, if at all.

In sum, what transpires from opposing states' EoVs is that the most problematic provisions they pointed out in the declaration are the ones that could come with high costs attached should they be implemented fully: those related to land rights, redress, use of natural resources, or FPIC requirements for matters touching upon Indigenous rights.[83] Likewise, issues surrounding the right to self-determination mostly arise through concerns about a potential interpretation of the right as justifying 'external' self-

[81] Ibid., p.15, United States, "Observations."

[82] United States., UN Doc. A/61/PV.107, pp.11-15.

[83] Those issues are most acute in 'settler' colonial states, like the four opposing states, where Indigenous peoples could lay claim to most, if not all, the territory of the 'modern' states established by Western colonial settlers. See note 43.

determination, sovereign statehood carved out of the existing state's territory for groups who can lay traditional claims to the land, which would directly challenge the basis of existing state sovereignty – a costly aftereffect (if it were ever to materialize) for those four UN member states.

While those substantive objections make sense insofar as we can easily see how high costs could arise from them, it is interesting to note that none of the opposing states opted to mitigate their objections with the usual flexibility characterizing soft law instruments. Often presented as non-binding statements of principle or other instruments putting forward guidelines for behaviour, one would expect that multiple, competing or generous interpretations could be given to the provisions it contains, granting states the required flexibility to join the endeavour if they agree with it in principle while letting them establish clear legislative guidelines as to the specifics of implementation.[84] Rather than use the open-ended, flexible nature of the instrument as a way to get involved in spite of disagreements with the specifics of the provisions put forward, some of the opposing states invoked the instrument's 'vagueness' as a motive to oppose, further compounded by what they expressed as the Declaration's incompatibility with domestic legislative frameworks.

What those substantive concerns highlight, therefore, are the future costs foreseen if those states were to implement the UNDRIP as it stands: it would be 'unworkable',[85] or would impose commitments impossible to meet, or only possible to fulfil at great costs. That said, unless one considers that such costs will materialise, and that an obligation will eventually arise, it should be possible to mitigate such concerns. This already points

[84] This seems to be the approach chosen by states who offered a qualified support to the Declaration. See section 4.

[85] United States, "Observations," 2.

out that the root of the issue is not solely with the content of the Declaration, but with the potential hardening of its provisions (in one particular direction, fixing certain interpretations), which could bring substantial costs to the states involved. Therefore, the core issues at stakes in decision-making in this instance are not with the content as put in the soft instrument; they are with the content adopted in a soft instrument if a state fears it may harden in a way that would entail significant costs domestically. I will return to this point in section 3.3 below.

3.2.2. Remarks on the Declaration's adoption process

As mentioned above, the process leading to the adoption of the UNDRIP was quite novel, even for the UN structure itself. A remarkable feature was the broad range of participants involved, as the draft of the UNDRIP was prepared by the joint efforts of experts and Indigenous representatives within the Working Group on Indigenous Populations. The great involvement of the Chairman-Rapporteur of the WGIP also led to the final modifications of the text submitted to the General Assembly.[86] Thus, opportunities for state-centric bodies to debate, negotiate and amend the text of the Declaration were perhaps limited (in comparison with other UN instruments, especially at the very last stages where consultations were carried and amendments produced outside formal settings). This limited states' policy options upon adoption of the Declaration. Arguments related to the adoption process figured in states' rationale against the adoption of UNDRIP, mainly to the extent that it is tied to concerns with the content of the instrument, especially with its potentially costliest provisions, as the

[86] See note 20 above.

opposing states failed to secure amendments that they deemed essential for their approval of the text.[87]

Process appeared as a major impediment for three of the four opponents to its adoption, Australia, Canada and the United States.[88] Australia led the dance by pointing out that, along with other member states, it 'repeatedly called for a chance to participate in the negotiations on the current text of the Declaration [but were] disappointed that no such opportunity has been afforded'.[89] The United States expressed similar disappointment, claiming that in spite of eleven years of work in Geneva to foster consensus, the final version of the Declaration was 'a text prepared and submitted after the negotiations had concluded', that 'states did not have the opportunity to discuss […] collectively'.[90] Canada further echoed this sentiment, as it pointed out that the 'few modifications presented to the GA at the last minute did not arise from open, inclusive or transparent process and [did] not address key areas of concern of a number of delegation',[91] including theirs. The United States' criticism went even further, affirming that 'the process was unfortunate and extraordinary in any multilateral negotiating exercise and [set] a poor precedent with respect to United Nations practice'.[92] In sum, for those three states, the lack of an open drafting process, where member states would have been able

[87] Since they would have been satisfied and would have supported the DRIP if they could have secured additional amendments, the process itself was not a 'deal-breaker'. It mattered only insofar as it stood in the way of their proposed amendments.

[88] This was expressed by New Zealand as well, but only in a joint statement with the US and Australia (addressed to the GA Third Committee), not in its speech in explanation of vote. New Zealand Ministry of Foreign Affairs and Trade, "Statement by H.E. Ambassador Rosemary Banks on Behalf of Australia, New Zealand and the United States."

[89] UN Doc. A/61/PV.107, p.11.

[90] Ibid., p.15.

[91] Ibid., p.13.

[92] Ibid., p.15.

to negotiate on the final text and propose amendments before the document was presented to the GA, stood as one additional argument for opposition to the final draft.[93]

These negative comments about process relate directly to substantive concerns, compounding worries about the content of the Declaration. Throughout the drafting and negotiation process, states who would have wished to hedge some of the provisions and diminish the constraints they thought parts of the UNDRIP imposed on them felt like they lacked the proper forum to do so, considering the intense presence of indigenous groups and their relative control over the evolution of the text. While the new, more 'open' forum for drafting and negotiation the text was praised by UN officials, Indigenous representatives and other delegates, the CANZUS states did not react positively to this novelty, i.e. a process in which they had lesser control over the content of the new instrument.[94]

That said, the involvement of other groups did not deprive the opposing states of opportunities to modify the text. The presence of Indigenous peoples and their influence on the first drafts produced gathered support from enough states so that at a later stage (after decades of negotiations), few members were ready to re-open the text to secure the support of a few more,[95] notwithstanding their important status on the issue of

[93] Canada explicitly noted that 'by voting against the adoption of this text, Canada puts on record its disappointment with both the text's substance and the process leading to it'. UN Doc. A/61/PV.107, p.13.

[94] Some have described this new process harshly, which begs the question of whether the process itself was really that 'unfortunate', or if it just highlights that the opening of the UN to new actors may play on some traditional state actors' sensitivities. To put it differently, perhaps those states would not have had a problem with the presence and participation of non-state actors in the process, if the outcome would not have been contrary to their own interests. The problem these states had was not with IPs' participation per se, but with a 'terrible draft' that they felt they couldn't change.

[95] At the GA Third Committee meeting, for instance, Bolivia argued 'there was no reason to defer taking decision on the matter after 24 years of work ha[d] gone into it', while Finland considered the draft 'the best achievable outcome'. UN Doc. A/C.3/61/SR.53. This impression was also conveyed in private meetings around the time of the HRC session addressing it; a Norwegian official told ANZUS representatives in a meeting that 'given the time we've spent, this is the best we could get.' Wikileaks, PLUSD, Doc. 06OSLO705_a.

Indigenous peoples' rights.[96] The opposing states have had some opportunities to propose amendments and garner support at the UN,[97] but seem to have failed to secure the support of a majority of member states, and their last initiative came too late to be taken into account by the appointed facilitator.[98] The discontent expressed above therefore seems to stem from their incapacity to secure a final text that accommodated some core state preferences (because of fears of future developments, as per above). Obtaining an amended text would have been the preferred option, but the way the negotiation process was structured and the previous history of the declaration within the UN system closed that door on them.[99]

3.2.3. Remarks on the Declaration's form

Finally, remarks relating to the soft form of the instrument and its potential legal effects (at the moment of adoption or later over time) constituted a substantial part of states' Explanation of Vote statements accompanying their oppositional vote at the UN. In fact, the first point in the US's supplementary observations was to focus on the 'nature of the instrument', showing the level of concern that question raised at commitment stage.[100] This section focuses on remarks made on the form of the instrument at the moment of

[96] Australia, Canada and New Zealand were among a group of seven states who submitted a thematic list of issues with the draft that they wished would be re-opened for negotiation, highlighting their status as 'states with significant indigenous populations'. Non-Paper, UN Doc. A/61/1018.

[97] Including a systematic 'tripartite demarche' pursued by ANZUS, later joined by Canada in 2006. See section 3.1 and note 58 above.

[98] As the appointed facilitator Hilario G. Davide Jr. noted about a meeting held on 16 July 2007, right after the submission of his report, 'the group also mentioned that the Facilitator may wish to consider recommending to the President the possible conduct of a second phase of consultations which could provide a forum to discuss the substantive aspects of the Declaration as they relate to the concerns idenfied', to which he responded that after his mandate had ended with the submission of the report. Davide Jr., "Supplement to the Report of the Facilitator," para. 5.

[99] Australia, Canada and New Zealand were part of a group advocating a 'limited re-opening of the text', claiming that 'only through amendments to the text of the Declaration, which address our most significant concerns, will it be possible for us to consider supporting the Declaration'. Davide Jr., "Supplement to the Report of the Facilitator."

[100] United States, "Observations."

adoption. (Further remarks related – explicitly or implicitly – to soft law's potential effects and costs are presented in section 3.3.)

When looking at the form of the instrument, it is important to recall that, like other UNGA resolutions, the UNDRIP was widely recognized by the UN member states (across voting positions) as a non-legally binding, aspirational document. Among its opponents, Australia, Canada and the United States unequivocally agreed on that point. Australia stated that 'it [was] the clear intention of all states that it be an aspirational declaration with political and moral force, but not legal force',[101] a point echoed in identical form by the United States in its supplementary observations[102] and equally shared by Canada.[103] New Zealand adopted a more nuanced and principled stance, as it did not clearly deny all legal value for the instrument. Instead, it insisted on the importance to be conferred to the document, in contrast to other actors stressing its aspirational nature. It contended that 'it [could] not accept that a state [could] responsibly take such a stance [focusing on a merely aspirational nature] towards a document that purports to declare the contents of the rights of indigenous people'.[104] The fact that it took the Declaration 'very seriously', coupled with disagreements regarding its content, served as central justification for its opposition. This alludes to a greater value granted to the instrument, compared to what its counterparts were ready to admit.

[101] Ibid., p.12.

[102] The exact wording of the Australian statement is part of the United States' supplementary observations (United States, "Observations.").

[103] 'For clarity, we also underline our understanding that this Declaration is not a legally-binding instrument'. UN Doc. A/61/PV.107, p.13.

[104] Ibid.

The soft form and lack of legal value of the instrument occupied a central place in these four states' decision to oppose its adoption. Highlighting the potential confusion on the form and the risks that the declaration could be misinterpreted as having a greater legal value than its aspirational, non-binding status was central to the opposing states' statements. This will be explored further, beyond the status of the instrument at the time of its adoption, in the next section (3.3).

3.3. Effects and costs of soft law in rationale for opposition

The CANZUS states did not only oppose the adoption of the Declaration in the recorded vote; they also used the EoV opportunity to put on the record their own interpretation of the instrument, and their own vision of its possible value and effects, both in political and legal terms. This was established as a way to craft commitment to limit potential costs and future effects. Their attempt to block future effects of the soft law instrument in international law, linked to worries about potential future costs, becomes evident when looking at the treatment of such potential effects in their statement. Indeed, what catches the eye of scholars of soft law looking at EoVs upon adoption of UNDRIP is that the four opposing states' statements list and address all potential effects that could arise from a soft law instrument,[105] only for the purpose of minimizing all actual effects, and denying those that could lead to a hardening of its provisions.

As covered in Chapter 4, soft law is known to have political and moral force, as well as limited direct legal effects from the time of adoption onwards. Then, it is possible for soft law to harden over time, through three different pathways: with its incorporation in domestic law (through legislation or judicial interpretation), its transposition in the text

[105] As explored and listed in Chapter 4.

of a binding treaty, or its recognition as customary international law or general principles of law. All these effects may change the usual cost-benefit assessment made for soft instruments; if an instrument is likely to gain greater effects in the future through hardening, then the costs associated for state parties may rise greatly, especially in terms of implementation and sovereignty costs.[106] This section highlights what the opposing states decided to put on record about the actual and potential effects and costs of UNDRIP, on the occasion of the soft law instrument's adoption.

3.3.1. Political and moral force

First, before looking into soft law's potential legal effects, the four opposing states attempted to minimize the Declaration's political and moral force, and objected to the possibility that the UNDRIP could become the new reference point in terms of Indigenous peoples' rights. They attempted to stress the disagreement (or at least, the lack of consensus) around the instrument to undermine its legitimacy, claiming for example that it '[could] not enjoy universal support to become a true standard of achievement'.[107] By insisting on the lack of consensus as fundamental shortcoming of the document, the opposing states tried to limit its possible political impact just as much as its (potential) legal value.

In fact, Australia acknowledged that it was the common intention of member states that it be an 'aspirational declaration with political and moral force but not legal force'. Yet, it also noted that the instrument's drafters wanted it to act as a focal point on the issue in the future, but Australia attempted to diminish that potential by flagging the issues

[106] See Chapter 4, section 4.
[107] United States, "Observations," 15.

with implementation and the lack of international consensus.[108] The United States equally insisted on the divisive context surrounding the drafting process and adoption of the Declaration, noting specifically that its application 'risks conflicting interpretations and debate'.[109]

3.3.2. Domestic law pathway

Moving to the potential effects, and pathways towards hardening, Australia, Canada and the United States explicitly denied that the instrument could have any impact domestically. On top of setting out that the Declaration would have no legal effects in their domestic regimes, it also established it could not form the basis of legal actions or claims. This constitutes an attempt to preclude domestic court cases with claims brought on the basis of the Declaration, or at least a safeguard to be able to claim it as inapplicable should litigants raise it. The four states insisted on mentioning their own domestic and constitutional legal framework covering Indigenous rights domestically, as distinct from the norms and standards put forward by the Declaration. Therefore, it shows that the four opposing states are not contemplating any hardening of the instrument through either judicial decisions or legislative means. The latter rests on a decision of the legislative branch, often aligned with the executive in those countries, but the former rests on judicial interpretation. Their remarks in that respect are therefore not a solid guarantee that domestic courts will refuse to hear any points resting on the text of the declaration if it is raised domestically. Yet, states' official interpretive statements to the effect that it should not apply domestically would make it much harder

[108] '[they] were aware that its aspirational content will be relied on in setting standards by which States will be judged in their relations with indigenous peoples.' UN Doc. A/61/PV.107, p.12
[109] UN Doc. A/61/PV.107, p.15

for the judiciary or other actors to raise the Declaration or justify its use in judicial proceedings.

3.3.3. Treaty pathway

Second, thinking of the potential of soft law to act as a stepping stone towards other instruments, including harder forms like conventional treaty obligations, Australia made it clear that the UNDRIP could not 'provide a basis for the elaboration of other international instruments, whether binding or non-binding'.[110] This is something that a single state cannot control or limit in any way, as international instruments following up on the Declaration could be created by any actor independently. This is especially true for non-binding forms since there are no rules or requirements about who can launch such a process. A state wishing to block such developments could lobby partners and other actors not to join it, thereby limiting its impact and value in international law, but a statement like Australia's cannot achieve much more than signalling pre-emptively that the state would disagree with such an initiative. It signals a concern with limiting all possible future effects for the UNDRIP and its diffusion.

The other opposing states did not explicitly express their will that the text not be used in any other instruments or settings, but their harsh rejection of some of its provisions, and their overall disapproval of the text as 'unworkable' or 'flawed' show they would probably oppose, should another initiative arise building on or taking parts of the text of the Declaration as an inspiration.

[110] UN Doc. A/61/PV.107, p.12.

3.3.4. CIL pathway

On another level, states' declarations showed a strong insistence on denying any possibility that the UNDRIP is or would eventually be linked to customary international law. As Australia put it: 'this declaration does not describe current state practice or actions states consider themselves obliged to take as a matter of law, it cannot be cited as evidence of the evolution of customary international law'.[111] Once again, it echoed a comment made by the United States in its supplementary observations.[112] It is easy to identify in this statement claims denying the presence of both constitutive elements of customary international law, state practice and *opinio juris*.[113] The United States further rejected 'any possibility that this document is or can become customary international law'[114]. New Zealand made a similar statement, claiming that the Declaration 'does not state propositions which are reflected in State practice or which are or will be recognized as general principles of law'.[115]

There is no ambiguity in the four actors' statements: they clearly and explicitly opposed the fact that the Declaration could form CIL, as well as the idea that it could evidence any constitutive aspect of CIL (state practice and *opinio juris*). To this end, they even highlighted the fact that they opposed the current text of the Declaration since the early stages of its drafting. What such insistence reveals is a clear concern on these states' part that the provisions of the UNDRIP could be recognised as customary international law

[111] Ibid.

[112] United States, "Observations."

[113] And it is somewhat telling that those exact words are not used directly; there is an attempt to preclude such recognition from arising by putting a statement on the record, while trying to conceal the move by not using the exact terms one is referring to.

[114] United States, "Observations."

[115] UN Doc. A/61/PV.107, p.15.

and, should recognition happen, their intention not to be bound by the new customary provisions.

This insistence and the content of the CANZUS group's statements on that point definitely rings a 'persistent objector' bell. Indeed, as we recall from Chapter 6, the rule of the persistent objector posits that a new norm of customary international law 'will not be binding on persistent objectors who have demonstrated their unwillingness to be bound by it before the rule becomes established'.[116] It requires repeated objection at relevant moments in the emergence of the norm, and consistency over time and in state practice.[117] Since those four states' rejection of the Declaration came with a general agreement with its overarching purpose in principle, states had to clearly distance themselves from the Declaration in practice, especially in cases where they could be seen as abiding by it domestically.

All mentioned that the Declaration or key provisions within it were not reflective of state practice (notwithstanding whether there were similarities with their own domestic practices). Australia and the United States achieved that by recalling their own domestic frameworks applicable to indigenous peoples as distinct from that put forth by the Declaration, while New Zealand stressed the incompatibility of certain key provisions of the Declaration with its domestic legal order.[118] As for Canada, while asserting that the state would continue to take action in favour of indigenous peoples rights 'at home and abroad' based on other existing commitments, it stated that 'such effective action,

[116] Elias, "Persistent Objector."

[117] See Chapter 5, section 5.3.2 and Green, *The Persistent Objector Rule in International Law*.

[118] In fact, New Zealand advanced a slightly ambiguous approach with regards to state practice. While in one part of its EoV, it expressed that it 'fully supports the pricniples and aspirations of the Declaration' and that it 'has been implementing most of the standards of the Declaration for many years', it later expressed unequivocally that 'this text, particularly in the articles to which [they had] referred, does not state propositions which are reflected in state practice or which are or will be recognized as general principles of law'. UN Doc. A/61/PV.107.

we must be clear, would not be undertaken on the basis of the provisions of this Declaration'.[119] In other words, Canada stressed that it was not following the Declaration or taking it as relevant guide for state practice and denying it any legal value, even in cases where its practice would coincidentally give effect to provisions contained in the Declaration.[120]

3.4. Opposition as clear signal of intent not to be bound

Since there were indications that UNDRIP could harden post-adoption, and that it could be costly for the four CANZUS states if it were to happen, they approached commitment very carefully, to limit those potential costs and the possibilities for them to arise. It is shown in their Explanation of Vote statement recorded before the vote on the Draft Declaration. While they claimed the content of the Declaration and its adoption process were the main grounds that led to their opposition, it is clear that they took great consideration of the potential costs of the instrument through future effects and a potential hardening. They all dedicated a significant part of their statements to address clearly each of the actual and potential effects that could arise from a soft law instrument, only to diminish the strength of political/moral effects, and the possibility and likelihood of potential hardening. This cannot be mere coincidence. It shows a belief in or consideration of both the potential effects of provisions contained in a soft law instrument and its associated costs.

Holding that stance led those four states to craft their commitment with the strongest safeguards possible against a hardening of the instrument, or its impact on them in the

[119] UN Doc. A/61/PV.107

[120] Subsequent events provided additional evidence that the CANZUS opposition to UNDRIP was rooted in a strategy to have safeguards in place should they need to invoke a persistent objector status in the future. See section 5.3 below.

future, through recording a 'No' vote. The opposing vote alone was insufficient for these states to express their positions. They also put on the record their view of the instrument and of the interpretation to be given to many of its provisions through an Explanation of Vote statement. This was used to show a strong intent for those four states not only to distance themselves from the text as adopted, but also to attempt to shape and limit future developments to arise from the non-binding instrument.

As mentioned above, there are particular trade-offs attached to opposition, especially to a human rights soft law instrument where it is most felt in terms of reputational costs internationally. In this case, it was certainly believed that the priority was to block potential costs that could arise from UNDRIP, and that those potential costs would be much greater than the reputational costs attached to a single vote at the UN. That said, opposition was not the only option available. Abstention, for instance, would have allowed those states to express concerns about the instrument and eschew commitment, with much less attention and avoiding a reputational backlash. The trade-off here would have been a much less clear-cut position, making it much harder to explain the implications of this non-commitment to domestic and international publics. In this case, the high costs UNDRIP could have raised and the likelihood of its hardening (especially through CIL) seem to have pushed for the more forceful and clearest option.

Voting against UNDRIP was the strongest option available to the CANZUS states to record their disagreement with it. This can be tied to the goal of blocking emerging CIL.[121] There is a discernible concern in their official positions towards UNDRIP that future claims may arise for the recognition of UNDRIP provisions as customary

[121] At the UN, on human rights issues, the signal is even greater considering how unusual such position has been in the history of the organisation.

international law – something they rejected outright. If such cases were to arise and provisions eventually recognized as CIL (even through third-party disputes), the only way for those four states to claim that the emerging or newly-recognized CIL norm was not opposable to them would be to establish their status as persistent objectors. In this case, their official positions towards UNDRIP definitively lays the foundations for that future 'emergency exit', if the need ever arose.[122] Since the CANZUS states were considered by many as 'specially affected states' on the issue, the impact of their position on the matter carries greater weight in the development of CIL. It must have been hoped that unquestionable opposition would also contribute further to stall emerging custom. In any case, opposition and the content of their EoVs was a clear signal of these states' intent not to be bound, if the declaration was to harden through a soft law to CIL pathway.

4. STEP D FOR OTHER UN MEMBER STATES: ALTERNATIVE WAYS TO CRAFT COMMITMENT

If the CANZUS states opposed the adoption of UNDRIP in part because of the potential costs it could have raised in case of hardening, it begs an important question: why did no other state oppose the adoption of the Declaration, including those counting Indigenous peoples on their territory? In line with the account of decision-making presented in Chapter 5, I argue that they dealt with commitment in different ways: embracing the Declaration (either because they were ready to bear the costs attached to it or because they were confident it would remain soft and costless), or introducing

[122] Even if it does not mention it outright, which is unsurprising since it would constitute a state's acknowledgement of emerging custom. Additional evidence on this point came through a Canadian change of position in 2016. See section 5.3.

safeguards to mitigate the potential costs that could arise in the future (making alternative options, beyond opposition, feasible and appropriate).

4.1. Policy preferences and strategic considerations

In terms of major policy preferences that could have played a role in the final decision-making on commitment (pushing states towards commitment in spite of the potential costs involved), the most salient points to each state's domestic situations in relation to the presence of Indigenous peoples, and the level of recognition of Indigenous peoples' rights. In the case of Latin American countries, for instance, much greater proportions of Indigenous populations and the status of their recognized rights domestically have certainly weighed in the balance. Not only does this determine potential costs if the Declaration was to be implemented, but it also influences the pressure on governments domestically. [123]

Some states were probably more likely to support the Declaration because of prior commitment to the norms contained in the instrument, and/or the level of implementation already achieved. While this would be difficult to evaluate on the ground, for each provision of the Declaration in each state, the ratifications of ILO convention 169 offers a useful indication; if states were ready to commit to similar

[123] Most of the opposing states had very small percentages of their populations identifying as Indigenous, making domestic political calculations leaning towards options more easily explained or palatable to the non-Indigenous majority (with the exception of New Zealand who has a more important Indigenous population, and dedicated political representation).

There is evidence that electoral and political pressures domestically were a concern for many Latin American states. A memo from the ANZUS-led demarche in the lead up to the HRC vote notes that Ecuador representatives' emphasized it would be difficult for Ecuador to change its position citing political realities, the country's current electoral climate and the interest with which Indigenous groups were following the declaration's progress.' (Wikileaks, PLUSD, Doc. 06QUITO1386_a). Chile had noted similar concerns about domestic and international pressures. (06SANTIAGO1092_a). Mexico insisted on the importance of its domestic Indigenous population as core argument in favour of support for both the DRIP and its Inter-American equivalent, noting that the situation was similar for many Latin American countries (07MEXICO2886_a).

norms in binding form, commitment to a non-binding instrument should have presented less of a challenge (regardless of whether the Convention was ratified as a tool of cheap talk or in good faith working towards compliance).[124] The fact that nearly all states who have ratified ILO 169 voted in favour of UNDRIP confirms this.[125]

UN Member States 2007	Ratification status ILO 169		
UNDRIP vote recorded	Yes	No	**Total**
Yes	19	125	144
No		4	4
Abstention	1	10	11
Non-voting	*1*	*32*	*33*
Total	**21**	**171**	**192**

Table 6.2 UNDRIP voting record and ILO 169 ratifications

Then, in terms of strategic considerations, there is some evidence that UN regional groupings have been instrumental in states' individual voting positions on the Declaration. During the negotiations, the GRULAC group (Latin American and Caribbean states) had been pushing the Draft Declaration forward at key steps of its drafting, and fought against attempts to delay its adoption or re-open negotiations. To the opposite, the Africa group became involved in the process quite late, but from 2006 onwards took a clear leadership in advocating for a re-opening of the draft, and negotiating last minute amendments.[126] From a block resistance to the Declaration,

[124] A similar approach is taken by Lightfoot, "Emerging International Indigenous Rights Norms and 'Over-Compliance' in New Zealand and Canada.".

[125] Out of 21 parties to the Convention, 19 recorded votes in favour. The two exceptions are Fiji (who did not participate in the recorded vote but was a sponsor of the resolution), and Colombia, who abstained.

[126] The influence of that regional groupings is evidenced e.g. in the American account of a meeting with Egyptian representatives, reporting that 'Egypt's position would be guided strongly by the African Group's consensus position'. Wikileaks, PLUSD, 06CAIRO6308_a.

states in the Africa group moved in large part towards UNDRIP's adoption over the final year of negotiations.[127]

UN Member States 2007	UN regional group					
UNDRIP vote recorded	Africa	Asia-Pac	EEG	GRULAC	WEOG	**Total**
Yes	35	37	18	30	24	144
No					4	4
Abstention	3	3	4	1		11
Non-voting	*15*	*14*	*1*	*2*	*1*	*33*
Total	**53**	**54**	**23**	**33**	**29**	**192**

Table 6.3 UNDRIP voting record by UN regional group

Strategic and reputational concerns may have also pushed some states to craft commitment in creative ways in spite of potential costs, to avoid having to bear responsibility (and reputational costs) for the UN's failure to adopt the Declaration in the established timeframe (before the end of the 61st session).[128] This seems to have played in the decisions made by some states in the African group and Russia.[129] Opposing states were apparently satisfied to oppose when surrounded by like-minded partners in the CANZUS group (or ultimately considered that the potential costs of UNDRIP trumped reputational impacts of opposition). At some point in the process, states also expressed worries about the impact the adoption of a highly divisive

[127] A sizeable portion did not participate in the vote. This will be explored below at 4.3. For details of the process and possible motives for this Africa group's change of mind (including an exploration of the links between the Declaration and supranational African instruments, e.g. ACHPR), see Crawhall, "Africa and the UN Declaration on the Rights of Indigenous Peoples"; Barume, "Responding to the Concerns of the African States."

[128] UNDRIP was the penultimate resolution to be adopted by the GA at its 61st session, only a few days before the start of the 62nd.

[129] Barume, "Responding to the Concerns of the African States," 177.

Notes from a meeting of the ANZUS group with a Russian representative in 2006 claim that 'Russia would likely vote against the draft if it were brought to a vote, but […] Russia was not looking to assume the lead in opposing DRIP.' Wikileaks, PLUSD, 06MOSCOW5741_a.

document would have on the newly created Human Rights Council, since the Declaration was on the agenda of its very first session in 2006.[130]

Surely, these policy preferences and cost-benefit calculations have contributed to the decision on commitment taken by UN member states on the UNDRIP. Yet, I argue that these additional considerations did not make the potential costs of UNDRIP disappear. What makes for different behaviour at voting stage then, is the alternative ways some states have privileged to craft commitment to mitigate the potential costs of UNDRIP in accordance with the risks foreseen.

4.2. Crafting commitment to mitigate the risks of potential costs

Considering that the UNDRIP was a human rights instrument presented at the UNGA, there were reputational benefits to be made in joining. Those may have been sufficient to foster commitment from those member states for whom the instrument did not bring costs, or those who were confident costs were unlikely to arise over time (i.e. that the instrument was unlikely to harden), in accordance with conventional assumptions about soft law instruments.[131] For the others, those for whom there could be costs attached to a hardening of the instrument, I argue that those costs were taken into account, but strategies were developed to mitigate them by crafting commitment, i.e. adding interpretive remarks in an Explanation of Vote statement, withholding full support through abstention (instead of full-fledged opposition), or both.

Here, the presence of indigenous peoples on member states' territory is used as an indicator of their link to the subject matter, and for whether or not the instrument could

[130] At the UNGA Third Committee, Fiji and Ukraine mentioned that concern in their statements. UN Doc. A/C.3/61/SR.53.
[131] See Chapter 3.

bring costs if it were to harden. States can be grouped in three categories: those with indigenous peoples, those without, and those who do not recognize the presence of (self-identifying) indigenous peoples on their territories. Below is a look at the ways states in these three groups approached commitment, and an overview of the ways in which some states decided to craft it with additional safeguards.

UN Member States 2007	Presence of Indigenous peoples on member state territory			
Vote recorded	Yes	No	None recog.	**Total**
Yes	45	88	11	144
No	4			4
Abstention	3	6	2	11
Non-voting	*6*	*27*		*33*
Total	**58**	**121**	**13**	**192**

Table 6.4. UNDRIP vote recorded and the presence of IPs on member state territory.

4.2.1. States with Indigenous peoples on their territories

In accordance with the account developed in Chapter 5 that potential costs matter in decision-making on soft law instruments, the states with Indigenous peoples on their territories (those likely to face the highest costs if the instrument were to harden) form the group with the largest spread/diversity of voting behaviour. Out of fifty-two states in that category[132] a majority voted in favour of the adoption of UNDRIP (forty-five), four voted against (the CANZUS states, as explored in section 3) and three abstained.

Full or unqualified support

Out of the states who voted in favour, twenty-six out of forty-five did so without the addition of an EoV, and seven made an EoV containing solely praise for the

[132] See Appendix 2.

instrument.[133] These two categories constitute what I label 'full or unqualified support'. In this case, three types of rationales can explain this behaviour: if a state embraces the instrument and its provisions as a matter of policy and is ready to bear the costs it may raise in the future, if a state believes it already has adequate safeguards in place,[134] or if it simply does not believe such potential costs will materialize, and therefore chooses to support UNDRIP for the reputational benefits or fulfillment of other strategic considerations.[135] States in the latter category are most likely to vote in favour without any additional EoV or statement, as they probably do not wish to attract attention upon themselves and elaborate on the implications of an affirmative commitment if it does not intend on following through with implementation. This claim is confirmed when we observe that those who made statements of praise for the instrument after the vote were all parties to ILO Convention 169 or sponsors of the instrument (or both), therefore showing a stronger commitment to the instrument in substance.[136] Some even called for the prompt implementation of the Declaration.[137]

Qualified support

In the group of states with Indigenous peoples who have voted in favour, some were explicitly concerned by the effects that could arise from various interpretations of some

[133] Summary charts of Explanation of Vote statements are reproduced at Appendix 2 for UNDRIP, and Appendix 3 for all UN declarations on HR topics.

[134] Eventually, the Africa group apparently felt that appropriate legal safeguards were in place, after confirmation from the African Commission and its committees on human and peoples' rights; according to Barume, African states have only belatedly realized the level of concordance between the Declaration and the African Charter. Barume, "Responding to the Concerns of the African States," 178.

[135] A Chilean representative had mentioned in a 2006 meeting with ANZUS representatives that some states were perhaps not sufficiently aware of the costs: 'Esquivel said some countries with larger indigenous populations were not taking seriously concerns about the language on autonomy, reparations and property rights. Wikileaks, PLUSD, 06SANTIAGO1092_a.

[136] Out of those who did not make any statements, and who were not parties to ILO 169 or sponsors of the instrument, there are 9 states for the Africa group, 5 for GRULAC and 4 for Asia-Pacific.

[137] Benin and Sweden (A/61/PV.107), as well as Cuba, Ecuador and Finland (A/61/PV.108).

provisions in the Declaration. To address those, they crafted commitment with the addition of an Explanation of Vote statement[138] that set their own interpretation on the record for future reference.

Two-thirds of them focused uniquely on substantive points, i.e. on the interpretation to be given to the content of the Declaration in its application. They revolved mostly around clarifications of the extent of the right to self-determination, in accordance with territorial integrity and sovereignty of the member states, as well as interpretation of land rights, FPIC and the recognition of collective rights, or of individual rights to be exercised collectively, in accordance with domestic constitutions and legal orders. Norway alone introduced what could be seen as a limitation to the application of the Declaration, aimed at art. 30, regarding the use of lands by government for military activities if required for the public interest.[139] For these states, substantive safeguards in terms of the interpretation to be given to certain potentially costly provisions were sufficient to secure commitment and vote in favour.

Four of them, however, added to their substantive concerns remarks about the form of the instrument, directly acknowledging the potential for future legal effects and establishing safeguards in relation to the form of the instrument and its eventual hardening. Surinam stressed at the end of its intervention that the Declaration was a 'political document to express and demonstrate the goodwill of states', circumscribing the role of the Declaration as one to raise awareness and act as reference point on the issue.[140] Likewise, Nepal added to this that the Declaration was a 'collective reflection

[138] Or a statement in explanation of position, in the case of Sweden, a sponsor. Sponsors cannot make Explanation of Vote statements according to the UNGA's rules of procedures (Rule 88). UN General Assembly, "General Assembly of the United Nations Rules of Procedures.", UN Doc. A/520/Rev.18.
[139] UN Doc. A/61/PV107, p.22.
[140] UN Doc. A/61/PV107, p.27.

of good intentions', but specified that as such, it did 'not create any binding legal or political obligations on the part of states that voted for it.'[141] Namibia, who had to justify its role in deferring the consideration of the instrument by the GA,[142] explained it in relation to the potential legal effects of the instrument. The Declaration presented 'a number of legal problems for Namibia' but 'the argument that the declaration is not binding did not appeal to [them]'.[143] Since they claimed to take their commitments seriously, the final round of amendments had been essential to alleviate some of their most acute concerns to secure their vote in favour. Their EoV specified further the grounds of their interpretation of those legally problematic provisions for them, mostly around self-determination.

The last state to have addressed the form and effects of the instrument was Guyana. It went much further in crafting its commitment with an open exit strategy, by introducing what could almost seem like a blanket reservation. It noted that the 'Declaration is political in character, as opposed to being a legally binding document, though not without potential legal implications'. Mentioning the risk of 'interpretations and expectations that may be out of consonance with its spirit and intent', it went on to record that: 'My delegation therefore wishes to reserve its position on provisions of the Declaration that we view as unclear or at variance, in effect or interpretation, with our Constitution and laws'. In sum, these countries voted in favour of the Declaration, but not without introducing safeguards in relation to the form of the instrument, its future legal values, and its relationship with domestic law and constitutional provisions.

[141] UN Doc. A/61/PV108, p.3.

[142] It had taken the leadership of the efforts to defer consideration of the UNDRIP at the UNGA Third Committee, as representative of the Group of African states. UN Doc. A/C.3/61/SR.53.

[143] UN Doc. A/61/PV108, p.3.

Abstention

Three states with Indigenous Peoples on their territories opted for abstention. Two of them, Colombia and Russia, recorded an EoV, allowing us to look into the rationale for their position.[144] In Colombia's case, the choice to abstain was based on a few 'legal incompatibilities' between the Declaration and its domestic legal framework.[145] Colombia put on record some of the most salient ones, especially with respects to the use of land for military purposes, FPIC and land rights. Colombia's case may seem surprising since it has ratified ILO Convention 169, and itself recognizes that 'the Colombian constitution and body of law, as well as the international instruments ratified […] conform with most provisions of the Declaration'. Yet, the costs arising from the legal incompatibilities seem to have pushed it away from adopting the Declaration, opting for abstention rather than opposition. Just like the opposing states, it felt the need to add to its statement further safeguards against the hardening of the instrument (through treaty and CIL pathways), stating: 'the Declaration is not a legally binding norm for the State and in no way constitutes the establishment of conventional or customary provisions that are binding for Colombia'.[146]

As for Russia, its comments centered on what it dubbed its 'responsible approach' throughout the development of the instrument. It stressed that the document should have been a 'balanced, carefully weighed and authoritative international text'; in spite of having benefited from last-minute amendments that were satisfactory to Russia, the state

[144] In the case of the third abstaining state, Burundi, there is no information available to discern its rationale on the UNDRIP vote. It has not recorded a statement at the time of the vote, nor has it ever taken the stand in any UN forum on Indigenous issues (according to the DoCIP database). An hypothesis is that it may have wanted to follow the general direction of African states pushing for the Declaration, but had domestic issues of its own making it difficult, so it abstained.

[145] UN Doc. A/61/PV107, p.16-18.

[146] UN Doc. A/61/PV107, 17.

was still firmly opposed to some provisions on the topics of land rights and redress. It did not offer further indications about the reasons for its abstention, or introduce additional safeguards beyond noting its disagreement with a limited set of provisions. It should be noted, however, that Russia was one of the two states to have opposed the adoption of the draft Declaration at the Human Rights Council. Its final stance towards abstention constitutes a softening of its position earlier in the negotiations of the DRIP. It appears that Russia had long considered opposing because of its substantive concerns, but eventually decided not to.[147] This could be because of reputational concerns tied to opposing a UN human rights instrument, and/or because of a belief that future effects were unlikely to make the instrument costly (in this respect, Russia's situation differs from Colombia's, since it counts a lesser proportion of its population identifying as Indigenous).[148]

Overview

Analysis of the behaviour of those other UN member states who have Indigenous peoples on their territories show that a good number had similar concerns as the states who opposed UNDRIP. Yet, they decided to address them differently, by crafting their commitment in ways that alleviated such concerns about the substance or form of the instrument, either through qualified support, abstention, or the inclusion of a blanket reservation for future domestic interpretation.

Amongst those who gave unqualified support to the Declaration, it is likely that many were committed and supportive of it in substance (especially the Declaration's sponsors,

[147] A Canadian official who worked on the file mentioned that Russia was expected to oppose, but changed position at the last minute, which was interpreted as them 'running for cover'. See also Wikileaks, PLUSD, 06MOSCOW5741_a.

[148] Less than 0.5% of its population, compared to 3.4% for Colombia. IWGIA, "The Indigenous World."

and others who had previously ratified ILO 169). Others may have simply deemed that costs were unlikely to arise as there was little risk the instrument would harden. States adopting such approach would not have recorded a statement in support of their position. It is not possible to distinguish with great certainty amongst those two groups, considering that they did not record statements through which we could identify a role for the costs of soft law and their perception of it.

Those who seemed to have been the most concerned by the potential costs of soft law, especially by substantive provisions they did not agree with, are Colombia and Russia. Their concerns were acute enough to move away from supporting the instrument, but they decided to abstain instead of opposing it outright. For Colombia, this seemed to be a way to show a certain respect to a Declaration they were mostly compliant with.[149] In Russia's case, it rather seemed to be a step away from opposition as their alternative preferred position, in a bid to avoid attracting international opprobrium. In that respect, their approach seems to have succeeded as the focus of attention post-adoption fell more intensely on the opposing states.

4.2.2. States without Indigenous peoples on their territories

For the UN member states without indigenous peoples on their territories, the connections to the substantive issues addressed in the declaration are much weaker, so the expectation is that there is not as much of a need for crafting commitment with the inclusion of particular substantive or form safeguards. That said, for states who consider that UNDRIP could likely harden, their evaluation of the potential costs needs to take into account other indirect costs – those that could arise through the development of

[149] See statement to this effect in its EoV, UN Doc. A/61/PV.107, pp.16-18. Colombia has also ratified ILO 169.

international law more generally, or those that could challenge their view of the Declaration as not applicable to them.

Out of the group of states without Indigenous peoples on their territory, eighty-eight voted in favour and six abstained, which is consistent with greater support (or lack of opposition) to be found amongst states who would not be facing costs. Amongst the supporters, eighty offered full or unqualified support (i.e. forty-nine voted in favour without an EoV, and thirty-one made or were part of a statement containing only praise for the instrument and no interpretation or limitation). This group encompasses both those who have a genuine commitment to the instrument and the general cause of Indigenous peoples' rights, and those who lent their support on the basis of other policy preferences or expectations, e.g. reputational benefits to be made from participating in a human rights initiative.

Qualified support

When looking into the statements made to qualify the support given by those member states without obvious links to Indigenous peoples' issues, we get further confirmation that the potential costs of soft law can play a role in decision-making. Indeed, eight states made statements to put on the record their interpretation of the instrument. This was done to place safeguards against indirect costs to arise from the instrument in two distinct sets of circumstances: clarifying broader principles of international law upon which the declaration could have an impact, or clarifying the realm of (in)application of the Declaration to the particularities of one's domestic context.

On the former point, most states put on the record the importance of interpreting the content of the Declaration (especially with regards to land rights and self-determination) in accordance with sovereignty and territorial integrity. Slovakia and the United

Kingdom also specified that they did not accept the concept of collective rights to supersede or be claimed alongside human rights. These remarks are not linked to the potential costs for these states of UNDRIP per se, but rather to the development of underlying principles in international law generally, which could be an indirect effect of the adoption of the Declaration. In that context, those states are placing interpretive safeguards against the development of those general norms and principles (self-determination, collective rights), in case it would develop in ways that could prove costly in other fields in international law.[150]

Relatedly, on the latter point, five states excluded themselves from the application of the Declaration by putting on the record that they did not have Indigenous peoples domestically.[151] In addition to that, the UK further specified that it did not have jurisdiction over museums and other private entities to enforce provisions related to redress and repatriation of cultural artifacts, as well as further excluded itself from the application of the Declaration by pointing out that it 'does not propose to have any retroactive application on historical episodes'.[152] This was linked to a statement on the form of the instrument, asserting that it was 'not legally binding'. A hardening of the Declaration in this case could increase the chances that the UK would face costs on the issues above, warranting perhaps the addition of a statement to introduce safeguards linked to the form of the instrument. In this case, since most states would not face costs

[150] For the UK, issues with both self-determination and collective rights are most likely rooted in the domestic situation of some of its 'national minority groups and other ethnic groups within the territory of the UK and its overseas territories', as it went on to exclude them from the applicability of the Declaration.

[151] Turkey, the UK and Slovakia explicitly put on the record that they had no Indigenous peoples domestically to whom the Declaration could apply. Pakistan specified its understanding that IPs would be defined as per ILO169, while Iran mentioned in passing that it did not have IPs on its territory.

[152] UN Doc. A/61/PV.107, pp.20-22. Interestingly, no other state with colonial history introduced similar safeguards. Perhaps others felt like the relationships with Indigenous peoples are strictly with successor sovereign states, while the UK has concluded agreements with Indigenous peoples on the four opposing states' territories which are still in force today.

if the declaration were to harden – especially with the additional safeguard of a statement specifying it does not apply to them – it is not surprising to see minimal substantive interpretive remarks, and barely any comment on the form of the instrument.[153]

Abstentions

Six states that do not have Indigenous peoples on their territory abstained on the vote adopting the UNDRIP: Azerbaijian, Bhutan, Georgia, Nigeria, Ukraine and Samoa. Nigeria alone has recorded an Explanation of Vote statement, leaving us to speculate about the motives of others. Azerbaijan, Bhutan, Georgia and Ukraine all have unresolved issues with irredentist or minority groups domestically; abstention may have been used as a safeguard to avoid granting support to a Declaration including (and potentially broadening) principles of self-determination, as per the analysis above for states who voted in favour. Considering the lack of additional contextual information surrounding the vote itself, it cannot be ruled out that other policy concerns drove the final decision, or that some of these states simply did not feel concerned or did not have strong views on the Declaration.

As for Nigeria, it directly stated 'concerns critical to the interests of [the] country',[154] revolving around territorial integrity, self-determination, land rights and treaty rights as a motive driving abstention. In spite of Nigeria not having clearly recognized indigenous peoples, it was evaluated that the principles put forward could affect and conflict with the domestic legal regime surrounding minority ethnic groups. The impacts of some provisions of the Declaration on broader principles of law were therefore feared to entail

[153] Turkey is the only other state who mentioned it, noting that the 'Declaration is not legally binding', but acknowledging that it can constitute an important policy tool for those States that recognize Indigenous peoples within their national territories'. UN Doc. A/61/PV.108, p.5.
[154] Ibid., p.6.

costs for the Nigerian state, and these were dealt with (i.e. their impact was limited) through abstention.

4.2.3. States that do not recognize Indigenous peoples

The last category consists of those states who do not recognize the presence of Indigenous peoples on their territories, while some groups self-identify as Indigenous and are documented as such by international rights groups. Amongst thirteen states in that situation,[155] eleven have voted in favour of the Declaration and two abstained. For those who voted in favour, the critical issue is one of definition; the application of the Declaration depends on domestic recognition of Indigenous peoples. This may require making clear, on official international records, that the commitment is made excluding the applicability of the Declaration at home. Yet, contrary to expectations many did not take that step, perhaps assuming that their stance on classifying their minority groups as ethnic groups, rather than Indigenous was already clearly established.

Qualified support

Amongst the eleven states who voted in favour, four made Explanation of Vote statements: India, Indonesia, Thailand and Myanmar. Most made remarks relating to interpretations to be given to the right to self-determination. Thailand insisted that the declaration did not create any new rights, and that all Thai enjoyed the same rights, while Myanmar put an emphasis on the recognition in the Declaration of regional specificities and the importance of flexibility and adaptability in its implementation. Both India and Indonesia stressed definitional issues, regretting the lack of a definition of 'Indigenous' in the Declaration, but aligning themselves with the one contained in ILO169 to attest

[155] Five African states, and eight from the Asia-Pacific UN group. See Appendix 2.

that their entire population were Indigenous, and no group could claim special rights on the basis of the Declaration.

Abstention

Two states who do not recognize indigenous groups domestically abstained: Bangladesh and Kenya. Only Bangladesh recorded an EoV. It deemed that the lack of a definition infused the Declaration with ambiguity, and used this – coupled with the lack of consensus – as core motive for its abstention.[156] It has itself struggled with definitional issues in its domestic legal order and does not recognize some minority ethnic groups as Indigenous, so it opted to mitigate potential costs to arise from the Declaration by remaining out of its realm of application through abstention.[157] In the case of Kenya, they did not explain their position on that occasion, but had been on the record at the UN previously to the effect that 'all Kenyans of African origins are indigenous', and that 'to refer to some communities as indigenous to the exclusion of others is in itself discriminatory and could lead to disastrous consequences, which may not have been intended'.[158] In this case, abstention has probably served as a shield to avoid taking a clear position on the Declaration because of domestic factors, while not standing in the way of the majority position taken by the Africa group.

Summary

Close to half the UN member states who do not recognize Indigenous peoples on their territories have crafted their commitment through an EoV, abstention, or both. Others must have felt it unnecessary since they consider self-identifying or externally

[156] UN Doc. A/61/PV.108, pp.22-23.

[157] Bangladesh had ratified ILO 107, but has not ratified ILO 169, and has issues with some populations in the Chittagong Hills, recognized as Indigenous by international NGOs. IWGIA, "Bangladesh."

[158] Kenya, "Statement at the HRC."

recognized Indigenous groups on their territories as ethnic minorities. For those who made an EoV, it was in most cases used to reiterate concerns with the lack of a definition in the Declaration, and establish their own or clarify their understanding that it was not to apply to their domestic context. Contrary to initial expectations, there is not a marked difference between this group and those states that do not have Indigenous peoples on their territories. It could be that they are confident the Declaration will simply not apply to them (in spite of contestation from groups self-identifying as Indigenous), or because they are confident that the instrument will not harden, and therefore will not bring costs to the fore.

4.3. Staying clear of the debate: Implications of not voting

The official UN voting record shows an overwhelming support for the Declaration, along with a few abstentions and four opposing votes. That is not, however, the full picture: thirty-three states were either absent at the moment of the vote, or present but decided not to record one. Twenty-seven of them did not have Indigenous peoples on their territories, while the remaining six did. There seemed to be a regional group pattern in their identities. Besides the non-voting status of Israel (WEOG), Romania (EEG), as well as Grenada and Saint Kitts and Nevis (GRULAC), the remaining states who did not participate in the vote were mostly from the group of African states (fifteen) and the Asia-Pacific group (fourteen states, mostly Central Asian states and small island states of the Pacific).

In the case of the Africa group, the points of view towards the Declaration differed during the negotiation and drafting process within the group itself.[159] When time came

[159] See note 21 above.

to make a decision on the final document, the support of the Africa group was given after the final round of amendments. It could be that some states with outstanding concerns decided to remain out of it rather than publically challenge the consensus. In the case of small island states, it may well be a matter of human resources or little importance of the file on their own agenda (especially as it happened at the very end of the 61st session, while preparations were certainly underway for the start of the 62nd).

It is also possible that non-voting be used as a way to deal with potential costs arising from the instrument. For states in difficult situations with domestic minorities (Indigenous or ethnic minority groups), not voting certainly constituted a way to stay below the international community's radar, and avoid giving weight to international norms that they would not want to embrace domestically.[160] That said, this approach comes at a cost, that of not being able to record their views and craft more tailored safeguards in the form of Explanation of Vote statements.

4.4. Section conclusion

The potential effects and costs of UNDRIP which could arise through an eventual hardening were a concern for more than just the four states who opted for opposition. Indeed, costs could be foreseen by other states with Indigenous populations on their territories, as well as by states who did not recognize any, but for whom some provisions of the Declaration could have an impact on the development of other norms of international law which could prove costly domestically. The reason there were not more opposition votes cast against the Declaration is because other states found different

[160] It could have been the case of Morocco for instance, where American reports note that their position on UNDRIP would be established 'with the Western Sahara in mind.' Wikileaks, PLUSD, 06RABAT1001_a.

strategies to balance the requirements of commitment with other sets of state interests and preferences.

Some states with Indigenous peoples domestically seem to have embraced the Declaration fully and accepted to bear additional costs it could bring, if any. (This level of support was most clear from sponsors of the Declaration and parties to the ILO Convention 169.) Others may have adopted it as a tool of 'cheap talk', thinking – or betting – that the non-binding instrument would never harden in a way susceptible of bringing costs. Alternatively, many states who could foresee costs mitigated them (or the risk of seeing them materialize) by crafting commitment through their voting stance and/or the issuance of an Explanation of Vote statement alongside it. As expected, this was more frequent coming from states who had Indigenous peoples domestically. Making interpretive statements allowed them to mitigate substantive concerns by putting on the record the way in which they saw its application domestically and the extent to which it was likely to affect domestic legal frameworks or not. Some states also focused on making interpretive statements with regards to the form of the instrument, to attempt to preclude it from hardening, just like the chosen strategy of the four states who opposed. Abstention constituted a middle way and became a privileged choice to stay somewhat under the radar, while still making their interpretation and concerns known on the record.

Most of the votes cast in favour of the Declaration at the UNGA were made without an accompanying EoV, so we do not have access to further contextual information about the underlying rationale. Yet, for a great majority of states, the voting record followed the usual assumption that commitment may be an easy business when there are no costs involved, something that holds particularly true in the human rights space.

In sum, apart from the four opposing states, other UN member states found alternative ways to craft their decision on commitment to mitigate some of the costs of soft law. It allowed them to take a position towards the Declaration that was less extreme – and less confronting in UN consensus-seeking dynamics – than opposition while still putting safeguards in place not to be bound against their consent in the future to interpretations or effects they disagreed with. Those included remarks on limiting the form of the instrument to its non-binding character or limiting its application or the interpretation to be given to some of its provisions in accordance with member states' interests. Considering that opposition itself comes at a (reputational) cost, states used the least oppositional option they can to craft commitment with the appropriate safeguards to limit potential costs to arise from the instrument. It seems adequate to say, in this case, that no other state saw the risks of potential hardening or the magnitude of the impact this could have in terms of effects and costs as important as the four opposing states did at the moment of voting.[161]

That said, within four years of their initial decision, the CANZUS states had themselves reviewed their position and re-crafted their commitment through statements of qualified support. It is worth looking into the motivations and implications of that change in behaviour in the four years that followed the adoption of UNDRIP, and what it can tell us about the role played by the costs of soft law in decision-making on commitment.

[161] Territorial concerns, ongoing disputes on land claims and use of resources, as well as the mobilization of civil society domestically seem to be determinant factors here.

5. CANZUS STATES' CHANGE OF POSITION ON UNDRIP

The opposition to the Declaration by Australia, Canada, New Zealand and the United States was an unusual occurrence in the history of UN declarations on human rights issues, but so were the events to follow.[162] Over the course of four years, all initial opponents of the Declaration reverted their decision and made unilateral declarations expressing their support towards UNDRIP.[163]

Manifestly, the paths these four states followed leading them to accept the Declaration were contingent upon their domestic legal and political situation. The specificities of decision-making processes within each government, as well as the identity and strategies of particular actors (domestic, international or transnational) that effectively lobbied for such a change of position in each of the four cases would certainly be worth investigating further.[164] In the interim for instance, Australia, New Zealand and the United States all had elections which led to a change of government. Notably, the New Zealand government was formed of a coalition that included representation from the Maori Party, and support for the UNDRIP had been included as a condition of a 'confidence and supply' agreement to secure the participation of the Maori Party in a coalition. [165] For

[162] Parts of this section were first presented in MPhil thesis and Villeneuve, "Could the Progressive 'Hardening' of Soft Law Impair Its Future Development?"

[163] Australia approved it on 3 April 2009. (Australia, "Statement of Support to the UNDRIP.") Canada did so on 12 November, 2010 (Aboriginal Affairs and Northern Development Canada, "Canada's Statement of Support on the UNDRIP.") New Zealand on 20 April 2010 (New Zealand Ministry of Foreign Affairs and Trade, "Statement by Hon Dr Pita Sharples.") and the United States approved it on 16 December 2010 (The White House, "Remarks by the President.")

Two other states who had initially abstained have also changed their position to support the Declaration: Colombia and Samoa. In the case of Colombia, it is perhaps not surprising as it was probably the state with the greatest record of compliance with the Declaration upon its adoption amongst those who had not supported it. It was the only voting member who was a party to ILO169 not to support the Declaration, and stood almost alone in that respect amongst Latin American states.

[164] See e.g. Levangie, *Globalized Native Politics*.

[165] New Zealand is the only one of the four states where Indigenous peoples have formal political parties representing them in national elections.

the others, the change of position occurred through declarations of the government in place.

5.1. Change and continuity in rationale for decision to support

After a 'thorough review' process,[166] all states re-evaluated their positions and concluded that it was possible to craft commitment in alternative ways, and make qualified statements of acceptance interpreting the provisions of the Declaration within the boundaries of their own domestic constitutional, legal and political frameworks. At the forefront of these outstanding concerns were, still, the right to self-determination, requirements of free, prior and informed consent, land rights, resources and redress.

Canada limited its intervention related to the content of the UNDRIP to passing mentions of the provisions it was not entirely comfortable with, stressing that these concerns were now on record and did not necessarily impede adoption of the document.[167] New Zealand made a similar statement, explaining its initial negative vote because of fears of inconsistency with 'domestic arrangements and democratic processes', but stressing that after governmental review and acknowledgement that such areas are still difficult and challenging, it affirmed the possibility of making progress on these fronts within the boundaries of the domestic legal system.[168] Australia and the United States decided to deal with the most salient of these substantive issues in more extensive and explicit ways, alleviating their initial fears about the interpretation of particular provisions with a qualifying statement.

[166] US Department of State, "UNDRIP Review," 1.

[167] Aboriginal Affairs and Northern Development Canada, "Canada's Statement of Support on the UNDRIP."

[168] New Zealand, "National Government to Support Declaration."

The four states were also more flexible in their approach to the form and legal value of the instrument. They remarked the non-binding character of the instrument, but they all insisted, to a certain extent, on the recognition of its links with existing binding commitments. They restated that the adoption of the Declaration did not carry direct legal effects in their domestic legal order and did not change their existing constitutional frameworks, but showed greater openness to revise them, if required.[169] New Zealand insisted on continual progress towards the declaration's aspirational goals within its domestic framework, priding itself, when expressing its support, on the levels of compliance already achieved. Canada's statement of support, however, was more limited; it saw its endorsement as 'the opportunity to reiterate [its] commitment to continue working in partnership with Aboriginal peoples in creating a better Canada,'[170] but insisted that the domestic framework would stay unchanged. Instead, it deemed itself 'confident' that it could interpret the Declaration in a manner consistent with its 'unique' domestic framework.[171]

5.2. Effects and costs of soft law through the change of position

The CANZUS states found themselves under pressure, domestically and internationally, following their opposition to UNDRIP. The reputational costs of that policy option, at home and abroad, may have been higher than initially expected. At the same time, it may have appeared over the following couple of years that the effects foreseen or the potential hardening of the instrument were less likely or less important than initially feared. In that context, compared to their initial assessment, they faced greater reputational costs, but lower potential implementation costs linked to the instrument

[169] This was made particularly explicit by Australia and the United States. See note 163.
[170] "Canada's Statement of Support on the UNDRIP."
[171] Aboriginal Affairs and Northern Development Canada.

itself. Additionally, the example set by other UN member states, including some with Indigenous peoples on their territory, must have been instructive as to alternative ways to mitigate such costs through carefully crafted commitment.[172] Therefore, as Canada put it: 'after careful and thoughtful consideration, [it was] concluded that it is better to endorse the UNDRIP while explaining its concerns, rather than simply rejecting the overall document.'[173]

This shows that commitment can indeed be crafted in a variety of ways to address different costs and benefits of commitment. This re-engineering of commitment mitigates the costs of UNDRIP in a different way, showing that the costs of this soft law instrument were a continuing concern in the decision-making process, even upon expressing qualified support years after the initial vote for its adoption.[174]

5.3. Canada's second change of position and the persistent objector status

In 2016, Canada publically announced an additional change to its position on UNDRIP. In the process, it confirmed some elements of the CANZUS states' initial strategy and the importance of the potential effects and costs of soft law in decisions on commitment. Indeed, it unveiled and confirmed that Canada had actually put initial safeguards in place to invoke a persistent objector status if some UNDRIP provisions were to be recognized as CIL.

Canada had had the same leader and party forming government from 2006 to 2015. That government was responsible from the initial decision to oppose UNDRIP, and for the

[172] Canada explicitly mentioned having 'learned from the experience of other countries.' Aboriginal Affairs and Northern Development Canada.

[173] Aboriginal Affairs and Northern Development Canada, "FAQ : UNDRIP."

[174] It may also signal that abstention might have been preferable, at least in terms of the reputational costs attached to their public and publicized opposition. Abstention remains a hard sell for domestic publics, however, so there are clear limits to the conclusions to be drawn from this counterfactual.

half-hearted statement of support issued when it appeared that the country would be isolated in its opposition (as the three other members of the CANZUS group had or were planning to support the Declaration). In 2014, at the UN World Conference on Indigenous Peoples, it was the sole member state to make a statement after the adoption of the Outcome Document (without a vote), in which it reiterated its oft-mentioned concerns with the instrument.[175] In 2015, a new government led by the Liberal party took power and vowed to renew the relationship with Canada's Indigenous peoples. In 2016, it announced at the UN Permanent Forum on Indigenous Peoples that it would change its position on UNDRIP; Canada announced that it would 'remove its permanent objector status' to the Declaration, by which they most likely meant 'persistent objector'.[176]

This move was curious for a variety of reasons, including that it is usually not a status one 'has' or can claim unless one calls upon it, which usually only happens once a norm of CIL has been recognized and a state wishes not to be bound by it. Yet, by declaring that it was 'removing its permanent objector status', Canada supplied clear evidence that those safeguards were effectively in place from the moment of the Declaration's adoption, and were guiding policy decisions on commitment.[177] This belated full embrace of the Declaration by Canada therefore provided additional proof that they recognized the potential effects and costs of soft law, and the risks, in the UNDRIP case,

[175] This was met with vocal expressions of disappointment in the UN General Assembly room where Indigenous representatives and observers from civil society organisations were assembled.

[176] Permanent objection could not be changed, if it were permanent. The term is also unheard of in international law and politics, while 'persistent objector' is the commonly accepted one.

[177] Arguably, the other CANZUS state pursued the same strategy, at least with respect to some provisions of the Declaration for which they had expressed ongoing and persistent concerns. The author of the most in-depth study of the concept, James A. Green, has also identified that as a strategy pursued jointly by the CANZUS states on that file. Green, *The Persistent Objector Rule in International Law*. , and more specifically Green, "Pipelines and Persistent Objection." It is possible that Australia, New Zealand and the United States still maintain safeguards against being bound by certain provisions of UNDRIP, should they be recognized as customary. The Canadian 2016 statement, in that case, would make it more difficult, as it would surely give weight to the recognition of an emerging norm in CIL.

that it would contribute to emerging customary international law, therefore requiring the strongest safeguards possible against its hardening, in the form of opposition.[178]

6. CONCLUSION

The UNDRIP offers an unrivalled opportunity to study the role of the potential effects and costs of soft law in states' decision-making on commitment. As a non-binding declaration in the human rights sphere, the general expectation would be in favour of state commitment, either because of states' agreement with it in substance, or because of states' aim to reap reputational benefits by committing to a flexible instrument they can choose to implement or not. The focus of the Declaration on the rights of Indigenous peoples also allows us to distinguish between those states who are likely to face great costs, should the Declaration harden, and those for whom it would be less consequential.

6.1. Summary of insights from the UNDRIP case study

What the study of commitment to UNDRIP revealed above is that states recognize in practice the potential effects and costs of soft law. If there would be costs to a state, and if it is estimated that the instrument would likely harden, states may then craft their response on commitment to mitigate such costs, through voting and recording additional interpretive statements. The result is a range of behaviour encompassing a spectrum from unqualified support to qualified support (with interpretive limitations or reservations), all the way to outright opposition, with the addition of interpretive statements recording the reasons behind it.

[178] It is worth noting that the rule of the persistent objector does not necessarily require opposition at voting stage. It could be possible for a state to maintain this status with regards to specific provisions, while providing qualified support to the instrument as a whole.

In the case of the four states who initially opposed the adoption of UNDRIP, their official position as they decided to record it at the UN shows a predominant concern for the potential effects of soft law, and clear attempts to block the pathways towards its eventual hardening. This was made, I argue, in an attempt to have safeguards in place not to be bound by any obligation arising from the UNDRIP in the long run, especially by establishing the bases to call upon the status of persistent objector if the Declaration was to give rise to new norms of CIL. Other states, including some who recognize the presence of Indigenous peoples on their territories, found alternative ways to craft their commitment to place minimal safeguards against particular effects, mostly through interpretive remarks to avoid UNDRIP's contribution to the development of international law on targeted issues. For those without Indigenous peoples, most would not face any costs arising from the Declaration, and therefore supported it without seeing the decision as very consequential. Yet, some states saw in UNDRIP a potential for it to impact the development of international law more generally, in areas going beyond the strict purview of Indigenous peoples (i.e. self-determination) and introduced targeted interpretive safeguards to address it.

The four opposing states' change of position, within the four years following UNDRIP's adoption highlighted three main claims of this project. First, it showed that opposition comes with much higher reputational costs, and attracts attention in a way that may contribute to keeping an issue on the agenda. While a UN vote may seem like a closed file once the instrument has been adopted, the opposing states surely found that their vote against the adoption of UNDRIP kept its supporters (especially non-state actors, like NGOs and Indigenous peoples' representatives) mobilized to pressure the CANZUS states domestically and internationally. Second, through their change of position, the CANZUS states showed that the potential effects and costs of soft law were at the heart

of their initial concerns leading to opposition. Indeed, they managed to support it a few years later, in a context where the content of the Declaration and process leading to UNDRIP's adoption had not changed. What had changed or was analysed in a new light was the reputational costs attached to their opposition (still high years later), while the experience of other states and developments since UN adoption minimized the foreseen risks of costs arising from UNDRIP's hardening. Finally, Canada's second change of position exposed clearly that the root of its initial strategy was to oppose UNDRIP with a view of claiming a persistent objector status, if the Declaration or provisions within it were to be recognized as customary international law after its adoption.

6.2. Contributing factors and distinctiveness of the case

As instructive as the UNDRIP case may be on the ways in which the costs of soft law may influence decisions on state commitment to non-binding international instruments, it remains a deviant case in UN history. Therefore, it is worth examining its particularities, to evaluate how different or similar it may be to other UN General Assembly declarations, and to what extent it may be replicated in the future. In this instance, the distinctiveness of the case rests on the actors involved in the process (its right-bearers as drafters), the types of rights it included (especially collective rights), existing domestic disputes on issues covered by the Declaration, and the challenged it posed to the foundations of state sovereignty.

6.2.1. Actors involved in the process

First, one of the most remarkable features of the process leading up to the adoption of the Declaration was the broad range of participants involved in it and, more importantly, the representation of the beneficiaries of the rights set forth in the instrument. Indigenous peoples and their representatives were involved in the process since the very start,

occupying an increasing place within the Working Group on Indigenous Populations. While the UN structure usually granted observer status only to NGOs recognized by the ECOSOC, the decision was made by the first Chairman of the WGIP to open up the doors of the Working Group to representatives of Indigenous peoples.[179] The decision was justified by the desire to include within the WGIP the 'best experts present' and the recognition that such experts on the matter were Indigenous peoples themselves. Hence, not only were they granted the possibility to attend, but they could prepare working papers, take the floor and make formal propositions.[180] Many took that opportunity and the numbers of participants from Indigenous communities grew over the course of the group's work, peaking at as many as 600 representatives.[181] This particular context within the 'experts' Working Group was hard to translate into other, more state-centric fora and was met with a certain resistance.[182] It is increasingly common to see organized advocacy and lobbying efforts at both the national and transnational stages to achieve progress in the development and implementation of international human rights norms. The main difference, in this case, was that the advocacy network was formed by the right-bearers themselves, and their unique status as 'peoples' as helped them secure greater participation within the walls of the UN.

6.2.2. Court cases and ongoing disputes

Second, UNDRIP may have seemed more consequential than other similar instruments because of its potential to be called upon in upcoming court cases. The likelihood of a

[179] Eide himself reflects on that decision as having had 'far greater consequences' then he first realized. He considers that it paved the way for the emergence of a global indigenous movement. Eide, "The Indigenous Peoples, the WGIP and the Adoption of the UNDRIP," 34.

[180] Ibid., 36.

[181] Tauli-Corpuz, "How the UNDRIP Got Adopted," 2.

[182] That was the initial plan when the CHR set up the Working Group on the Draft Declaration. However, a powerful political manoeuver by indigenous representatives led to the acceptance of their presence by the participating states. Ibid., 3–4.

dispute arising between the states and domestic stakeholders and the possible submission of the case to a domestic or international court raises the stakes associated to commitment to a soft law instrument, as they are a direct signal that the subject matter may raise to prominence domestically and that international standards the state has acquiesced to may be used as interpretative devices domestically or used to galvanize support for interest groups' claims. This concern must have been more obvious or acute in the case of Indigenous peoples' rights, for states facing ongoing domestic disputes or unresolved land claims to settle, in a way that would not have arisen with other human rights instruments related to the protection of marginalized groups for instance.

6.2.3. Type of rights contained

Finally, UNDRIP is at times presented as a peculiar Declaration as it puts forward rights to be exercised collectively, by peoples. As covered in section 1.3, this was accepted by some states, but challenged by others who held that the concept of human rights was referring to individual rights, in spite or their exercise collectively with other right-bearing individuals. This may have appeared problematic to some states in the Indigenous rights' declaration process, especially in conjunction with provisions on self-determination, for instance. Yet, it can also be seen as part and parcel of a second wave of human rights, like social and cultural rights, which are already collective in nature, or other international regimes against genocide, for instance, which would not make sense without its collective component. Therefore, while many have posited the concept of 'collective rights' as a distinct feature of the Declaration, it may not be something revolutionary in the Declaration per se, but only a vision that brings much greater potential costs when to be recognized to a 'people' along with a (limited) right to self-determination.

What is truly distinctive about UNDRIP, however, is the way in which some of the rights put forth challenge the very core of state sovereignty in settler-colonial states. Recognition of land rights, provisions on redress for injustices, and self-determination (even if solely in internal terms) directly cut into states' monopoly and right to rule supremely upon the whole territory recognized as their official borders under international law. It is clearly the case that such sovereignty has been established and asserted centuries ago at the expense of Indigenous peoples already present on the territory. Yet, adopting and implementing the Declaration requires addressing this heritage in a complex (and potentially very costly) way, which no doubt touches the core of a state's identity and sovereignty. This in itself may have contributed to the resistance noticed on the adoption of UNDRIP from the four states.[183]

6.3. Concluding remarks on UNDRIP case

Four states opposed the adoption of UNDRIP in part for concern for the potential effects and costs of soft law, while others introduced safeguards to mitigate such costs in the future. What seems to have been the distinctive feature in that case, especially for the opposing states, were the implementation and sovereignty costs that a hardening of the Declaration could raise domestically (especially with the prospect of ongoing disputes, and organized advocacy groups as well as right-bearers mobilized to use it to boost their claims domestically). In some respects, therefore, the UNDRIP could be seen as a total outlier in the realm of UNGA declarations, especially as it challenges the core of state

[183] While I argue it is due to the costs of addressing it, Lightfoot develops an argument combining states' international commitments with their level of compliance, and concludes that 3 of the 4 opposing states are over-compliant, a status they reached by making concessions on less consequential rights (what she labels soft rights – those with lesser costs attached – cultural and language rights, for instance), while opposing developments or challenges to their domestic regimes of more consequential rights (hard rights for Lightfoot, or those with high associated costs in this project: e.g. land rights, redress). Lightfoot, "Emerging International Indigenous Rights Norms and 'Over-Compliance' in New Zealand and Canada."

sovereignty in a very particular way (affecting territory, dominion and governance). Yet, at the same time, many of its distinctive features may be seen to reflect broader changes in the dynamics of international law-making (new forms of normative development taking hold, with the involvement of new actors, along with increased mobilization of non-state actors domestically and transnationally). As such, it could well be representative of future trends in international law-making, especially in soft forms.

The UNDRIP signals that casting an issue in terms of 'human rights' may not necessarily foster unquestioned support and widespread commitment. Once it is recognized that soft law instruments, like UNGA declarations, have the potential to harden and act as stepping-stones towards the development of international binding obligations, proponents of new developments in human rights standards may start with soft law in the hopes of it hardening. Yet, states are equally aware of it (perhaps increasingly so), and will not commit to new human rights instruments solely on the premise that they are non-binding and could bring reputational benefits, especially if substantial costs may arise through a potential hardening. What the UNDRIP case showed, therefore, for close to the first time in UN history, was that actors on both sides are ready to fight about the form and (legal) value of UNGA declarations, depending on their level of acceptance of future effects and costs.

Chapter 7

CONCLUSION

This thesis explored how states make decisions on commitment to soft law, defined as international instruments adopted in a non-binding form. It fills a gap in rationalist approaches to the creation of international instruments by showing that soft law, in addition to its advantages as a flexible and low-cost mechanism for international cooperation, can have important effects and bring about substantial costs for states – especially in terms of potential sovereignty and implementation costs – depending on the instrument's evolution over time. Using insights from public international law, I showed that this may happen with the instrument (or some of its provisions) hardening through three different pathways: its incorporation in domestic law (through legislation or judicial interpretation), its transposition in an international treaty, or its recognition as customary international law.

I further argued that these effects and costs are taken into account by states when making a decision on commitment to soft law. Looking into the potential costs that may arise from soft law allowed me to provide an answer to the question 'why would states oppose the adoption of human rights soft law?' This is not accounted for by existing rationalist accounts, especially in the case of high profile international instruments (such as UN declarations) where there are reputational benefits to be made by joining, and costs tied to opposition. I also showed that commitment to soft law is not a binary decision,

choosing between joining or not; states can actually craft their commitment, depending on the importance and likelihood of the potential costs foreseen for a soft law instrument, to mitigate costs or block them from arising. I illustrated the role the costs of soft law may play in states' decision-making on commitment looking at the case of the UN Declaration on the Rights of Indigenous Peoples, focusing on the rationale behind initial opposition from the CANZUS states, and ways in which other states have crafted commitment to introduce safeguards against potential costs through less disruptive means.

In this conclusion chapter, I first review the core arguments developed throughout the thesis. I then assess the main contributions of the thesis (alongside its limitations), in terms of the theoretical approach taken, the core arguments made and their ties to IR theory, as well as the thesis' policy-relevance in international relations and law. Finally, I present avenues for further research, some complementing the current project (looking further into domestic preference formation on soft law and the factors contributing to its likelihood hardening), and others expanding beyond it (looking at challenges raised by the use of legal mechanisms in crafting commitment to soft law, as well as by the involvement of non-state actors in the creation of soft law as a way to integrate international law-making).

1. THE (POTENTIALLY) HARD STAKES OF SOFT LAW

In this thesis aiming to explore state behaviour towards soft law instruments, I first delved into the concept of soft law itself (Chapter 2). Through a thorough literature review of existing definitions, I posited that soft law is usually defined in one of three ways: as a vague or unenforceable provision in an otherwise binding treaty, as a non-

binding instrument, or as a norm generally. I established that soft law as instrument is the most useful approach for the study of international cooperation through international instruments, and is most relevant to focus on questions of state behaviour towards soft law, especially at the commitment stage.

Looking at existing rationalist accounts of commitment, it was apparent that international relations scholarship has made great contributions in explaining the trade-offs associated with commitment to hard binding law, or with institutional design choices between hard and soft instruments. In such accounts, soft law is perceived as a flexible, low-cost alternative to hard law, useful to build consensus and establish cooperation, especially – but not uniquely – as a first step in international standard-setting. Soft law has also been studied from the lenses of compliance. Yet, how states behave towards soft law and make decisions on commitment to a soft law instrument has been underexplored. The assumptions that could be drawn from existing scholarship (on commitment to hard law, and trade-offs between hard and soft law, especially using the legalization approach) paint commitment to soft law as a relatively inconsequential decision (considering it is not legally binding), and a likely outcome if there is a general agreement with its substance and benefits (even if only reputational) to be made from it.

I argued that this view needs to be complemented by taking into account the potential costs of soft law, not only at the time of adoption, but also over time through its potential hardening. Indeed, a study of commitment to soft law from a rationalist IR approach must incorporate insights from public international law, especially on the way in which international obligations may arise (sometimes distinctly from the consent of states bound by them) and the ways in which commitment to soft law may contribute to it.

I showed in Chapter 4 that soft law instruments can have effects from the time of their adoption and beyond. At the time of their adoption, soft law instruments are mostly known for their political and moral force, which are the usual effects recognized to them. These have been explored in IR scholarship, especially through the lenses of their impact on compliance (how soft law instruments or political commitments can prompt changes in state behaviour towards compliance, through international norm diffusion mechanisms or rhetorical entrapment, for instance). Beyond that, based on legal doctrinal analysis and established precedents, I explored the ways in which soft law's status may change after adoption, and potentially 'harden' towards binding international obligations. This can happen through three different pathways: through its incorporation in domestic law (either through its integration to domestic legislation or through judicial interpretation), its transposition into international treaties, or its recognition as customary international law. These different pathways come with different implications in terms of the level of control a state maintains and the requirements of state consent to be bound for an international obligation to arise. If soft law hardens, it can retroactively affect the costs and benefits associated with commitment to the non-binding instrument, and raise the stakes of the initial decision to commit (especially by hiking sovereignty and implementation costs).

This reasoning also permeates international practice towards commitment, beyond the strict realm of international legal theory and precedents. I argue that the costs of soft law effectively play a role in states' decision-making on commitment. This is evident when recast in the following way: once we admit that soft law can harden, it should effectively elicit levels of attention and concern closer to what one expects of decisions on commitment to hard law. The main difference, in the case of soft law, is the uncertainty surrounding whether or not the instrument will harden and bring greater costs in the

future, beyond the commitment stage. In that context, Chapter 5 laid out my revised account of decision-making on commitment to soft law instruments. I presented it as a four-step process in which states first assess the form and function of the instrument (to establish what kind of commitment they are facing), before moving to a balancing act between the costs of soft law and other policy preferences (including normative and strategic considerations). In this model, the evaluation of the costs of soft law is two-fold; states will identify the costs of soft law through an assessment of the costs arising if the instrument hardened (especially sovereignty and implementation costs), and the likelihood of such hardening (whereby such costs would materialize). Evaluating the likelihood of hardening is an assessment that can be based on various factors pertaining to the instrument itself, or the domestic and international context (e.g. the form and function of the instrument, the salience of an issue domestically, international precedents involving a similar instrument or on a similar topic, the mobilization of non-state actors internationally and domestically).

At the final stage in the process, states make their decision on commitment through balancing the costs of soft law (if any) with other policy preferences. Potential costs arising may be willfully borne if the state fully supports the instrument and its content, as the appropriate direction to follow at the time. If, however, the alignment between the instrument and policy preferences is not perfect, or if the costs foreseen are too high, I argue that states will attempt to craft commitment to mitigate such costs (while reaping the instrument's benefits, as much as possible) or attempt to block costs from arising. This is made possible by the fact that one can craft commitment to most soft law instruments, in a relatively flexible way, through their position on commitment per se and the addition of interpretive statements. This refines our usual understanding of commitment to soft law; while rationalist approaches present soft law per se as a

flexibility mechanism to craft commitment to international norms, I explore other flexibility mechanisms within commitment to soft law itself, in ways that bring it much closer to the mechanisms states use to craft their commitment to binding instruments.

In the UN context, crafting commitment to mitigate or prevent the costs of soft law occurs through a combination of voting positions and explanation of vote statements. Depending on the subject matter involved and other contextual elements (e.g. what type of instrument it is, and how high profile the issue is, i.e. how much attention is paid to it internationally), there may be costs and benefits tied to certain positions upon commitment (e.g. reputational benefits for commitment and costs for opposition in the human rights realm). I argue that states will craft commitment through the least obstructive or damaging mechanism they can to limit the potential costs of soft law. Yet, if costs are potentially very high, the best safeguard against being bound under international law rests on preparing to claim the status of persistent objector, through repeated opposition to an emerging norm (including through a soft law instrument).

In Part III of this thesis, I gave empirical evidence that the costs of soft law do play a role in states' decision-making on commitment to soft law through the in-depth case study of the adoption of the UN Declaration on the Rights of Indigenous Peoples. This stands as a deviant case in the field of human rights internationally, as four states opposed its adoption, a position barely ever witnessed to human rights declarations at the UN. My revised account of commitment to soft law, complementing existing rationalist approaches with insights from international law to expose the potential costs of soft law, is able to account for this deviant case by grounding the explanation of the CANZUS states' opposition in the perceived potential costs of the soft law instrument, especially in concerns about its potential hardening.

I established the role played by the costs of soft law in their decision to oppose by looking at their rationale as consigned in official documents, and confirmed through interviews and archival sources. This is further confirmed by the particular position of these states in relation to Indigenous peoples on their territories, the costs they would face if the Declaration were to harden, and the indications already pointing (prior to their decision on commitment) to the likelihood of hardening in this case (e.g. through the salience of the issue domestically, the strong mobilization of right-bearers and civil society allies for the Declaration's implementation domestically and internationally, as well as court precedents involving similar instruments, or even a prior draft of the Declaration). In such a case, the only safeguard against being bound was to oppose, and record an explanation of vote to assert that the effects of the soft law instrument would not apply domestically or be recognized internationally – in what had every appearance of a persistent objector strategy (especially in the case of Australia, Canada and the USA).

I extended the empirical analysis beyond the states that opposed UNDRIP, to explore (in a within-case comparison) how other states crafted their commitment to mitigate the costs of soft law, without resorting to full-fledged opposition. It highlighted that abstention or qualified support (putting interpretive safeguards in place to ensure the instrument would not be used in ways running too far against policy preferences) appeared like a better strategy upon adoption for other states who could have faced costs form commitment to the Declaration. I also compared the initial position of the four opposing states to their revised stance, a few years later. The change of position revealed that these states modified their approach to commitment, and dealt with their persisting substantive issues with the text (those provisions that could have brought high costs to bear) through crafting commitment differently; they modified their position (to a more

'acceptable' support, especially in reputational terms), while making interpretive declarations to limit its application or establish clear bound for it. Additionally, Canada's second change of position provided further clear evidence that their initial position was rooted in a desire to craft commitment in way that would have allowed claiming persistent objector status, if the instrument hardened through customary international law.

In sum, I showed that commitment to soft law instruments may bring important effects, and potential costs to bear. These costs play a role in states' decision-making on commitment; if they are deemed too important, they may push states' towards opposition, in spite of other benefits to be made. This is an important step in accounting for deviant cases, such as the opposition witnessed to the UN Declaration on the Rights of Indigenous Peoples, where opposing states' decision was rooted in concerns about the potentially very high costs of commitment if the instrument (or parts therein) were to harden in the future.

2. MAIN CONTRIBUTIONS

This section presents the core contributions of the thesis (and their corresponding limitations), in relation to the general theoretical approach taken, the main arguments it puts forth, and its policy relevance (i.e. its potential contributions to practice in the fields of international politics and international law).

This thesis bridges the fields of international relations and international law, in a way that contributes to both. The interdisciplinary approach, on the one hand, allows me to complement existing IR rationalist approaches with insights from international law,

especially in relation to the dynamic evolution or emergence of international obligations beyond the projected fate of an instrument through its initial institutional design. On the other hand, advancing knowledge on states' behaviour towards soft law is informative for the study of international law, especially on the initial steps of normative developments through the creation of soft international instruments, and how states perceive changes at the margins of the international legal order, in this grey zone that soft law occupies. This is particularly important in the contemporary legal order, where a multiplicity of actors are increasingly involved in international law-making, especially through the relaxed strictures of soft law, posing an increasing challenge to the traditional account of the sources of international law. The scope (and length) of the thesis means I have necessarily been selective in the body of work to which I have referred, not giving each discipline the full coverage it would have otherwise warranted. Yet, this thesis makes relevant contributions as it focuses on the particular zone of overlap between the two bodies of scholarship as established through its research design.

Insofar as the legal realm and legal research methods are concerned, in this thesis, I take a conventional positivist approach to international legal rules. This is warranted by a practice-oriented approach, which is valuable to uncover how public international lawyers, international court judges and other international governance practitioners evolving in the legal sphere recognize and interpret rules and obligations. That means, however, that competing theoretical approaches about international law (or theories of law and obligation in general) have not been explored; the project does not challenge the basic rules or conventional knowledge surrounding how obligations arise in the international legal order (even if it would be fruitful to do so when thinking further about the roles of soft law and its place in the international legal order, from a normative and policy perspective).

From an IR perspective, I build strongly on rationalist approaches in the field, in order to identify their limits and contribute to it from within. This is most visible in the approach taken to see decision-making on commitment through the lenses of cost-benefit assessments. This theoretical focus is there by design, for the sake of coherence and parsimony, to offer a glimpse of the conscious decision-making process as the actors themselves present or structure it. It does not assume full rationality of the actors,[1] and does not deny that actors are themselves embedded in broader dynamic structures and practices.[2] This project uncovers how, within existing structures and practices at one given point in time, different policy options are evaluated with regards to soft law, and what consequences (costs vs. benefits) are perceived for each. I argue that these are questions which are best initially addressed from the standpoint of a rationalist approach and that there are relevant contributions made in doing so. There are evident theoretical limitations attached to that, but those are circumscribed as I open up the cost-benefit assessments themselves to insights from other IR theories. I enrich the rationalist institutionalist account (used as a starting point), especially with insights from liberal and constructivist perspectives, recognizing the influence of domestic and normative factors on state behaviour. These are integrated with my revised rationalist account of decision-making on commitment insofar as they inform the decision-making process from states' perspectives, and still assuming unity of interest/preferences within the state at the end of internal deliberations.

It is worth elaborating further on the main contributions of this thesis to IR theory and to an understanding of state behaviour on soft law more specifically. First, in Chapter 2,

[1] Still, it aims to uncover the decision-making process and the factors that actors will choose to weigh as they aim to make such decisions, in spite of imperfect information or limited capacities to compare all implications of various courses of action. Kinder and Weiss, *In Lieu of Rationality*.

[2] Adler and Pouliot, *International Practices*.

I present the findings of my research on the origins and evolution of the concept of soft law, tracing its emergence and consolidation in the vocabulary of international governance. The literature review of existing definitions also makes relevant contributions to the field, disentangling the most frequent meanings of the term and asserting the definition of soft law as non-binding instrument as the most useful for the study of state behaviour towards soft law.

As presented above, my main contributions to the field through this thesis were to expose the potential costs of soft law, and show how they play a role in states' decision-making on commitment to soft law instruments. In that sense, it complements existing rationalist accounts of commitment; while most accounts of decision-making or patterns of commitment focus on hard law, this thesis offers the only account presenting the process and challenges of decision-making to soft law specifically. In doing so, it also refines the understanding of the trade-offs between hard and soft law, and the limits of soft law's advantages over hard law in international governance.

In exploring the effects of soft law using insights from public international law, I point out refinements to our understanding of the rational design of international institutions. I highlight that, with soft law instruments especially, participating states may not retain control over the future evolution, effects and costs of international institutions they establish (even when low levels of delegation are involved). I further bridge the fields of IR and IL by establishing how legal effects and soft law hardening may translate in particular types of costs for states to bear in an IR rationalist perspective. These are crucial to develop a comprehensive account of states' decision-making on international instruments that considers the uncertainty surrounding the future evolution of soft law instruments, and their potential costs. In that sense, the revised account provided here

allows answering a research question that has to date constituted a puzzle for rationalist approaches (when the costs of soft law are not explicitly acknowledged): opposition to high-profile human rights soft law.

Finally, from a practice-oriented point of view, my findings in this thesis confirm the important role soft law plays in international law-making, and international governance generally, especially for consensus-building purposes and for the development of norms internationally. This consecrates soft law's importance in practice, as it illustrates that it is now a common feature of international governance, but one that remains at times difficult for states to handle. Approaches on behaviour towards soft law are still in flux, as was illustrated through the UNDRIP case. States are still experimenting with different ways to approach commitment and deal with the uncertainty injected by soft law in the international legal order. In this thesis, I highlighted the challenges soft law form could pose to states, especially at the commitment stage, by focusing on establishing the factors contributing to that uncertainty about potential effects and costs.

In my research design for this thesis, I took insights from practice and practitioners' perspectives to shed light on how decisions on commitment occur. This was a way to ensure that existing theories reflect how states actually address the challenges surrounding commitment to soft law in practice. At the same time, the findings can contribute to decision-makers' understanding of soft law, since they lay out the whole range of the possible effects for soft law post-adoption, and point out to factors that may trigger hardening or make it more likely. It also surveys the flexibility mechanisms available in crafting commitment to soft law to mitigate potential costs, and ways in which those different options have been explored in the UNDRIP case with varying results. Finally, I have highlighted that soft law is now the entry point for non-state

actors and international organisations to expand the boundaries of the international legal order, pushing their own agendas forward and forcing states to take position on those issues. This ties back to literature on non-state actors' involvement in international law (especially on aspects of agenda-setting), as well as on international norm diffusion, and has great implications for practitioners on states' side, in evaluating the best policy response to keep as much control as possible on the direction in which international law evolves.

3. FURTHER AVENUES FOR RESEARCH

Evidently, pushing the boundaries of knowledge regarding state behaviour towards soft law instruments also uncovers multiple further avenues for future research. This section first presents two areas which are left unexplored by the current research design but could further strengthen and refine its core claims, followed by two new areas expanding the scope of this thesis.

3.1. Areas for further research in current project

Two further areas of research, left unexplored by the restricted scope of this thesis, would be most relevant to complete and refine the core claims I argued here. First, with a rationalist approach and focus on decision-making by a (ultimately) unitary state actor, I do not, in this thesis, fully explore the important implications of state interest and policy preference formation domestically. The next step would be to unpack it further, especially to see whether or how far an understanding of the potential costs of soft law permeates the decision-making process or the competition between policy-making bodies domestically, i.e. whether knowledge about the effects and costs of soft law

seems to rest solely with legal advisors, or if there are similarities between how legal and policy departments approach decisions on commitment to soft law.[3]

Similarly, in this thesis, I offered preliminary observations on the factors that may increase the perceived likelihood of hardening for a given soft law instrument, both domestically and internationally. These have been identified and illustrated mostly in relation to the in-depth case study of UNDRIP. Further research would be extremely valuable to refine this account of factors contributing to or indicating an increased likelihood of soft law hardening, especially looking at other declarations, beyond the human rights realm, and at a much broader universe of cases. This could be supplemented by further research in different types of soft law instruments, to establish a more developed account (or ordering, perhaps) of soft law instruments' degree of 'bindingness'. Indeed, it was assumed here, and supported by evidence in practice, that 'UN declarations' have a particular status above 'UN resolutions', for instance. It would be interesting to evaluate (as part of an assessment of factors contributing to a likelihood of hardening) what attributes of an instrument make it more consequential, and more likely to harden, especially outside the UN system.

3.2. Agenda for future research beyond this project

One important contribution of this thesis was to present commitment to soft law as a flexible endeavor, since states' have some degree of flexibility in the ways in which they decide to craft their response. What it highlighted is that the means states use to craft commitment are mostly legal tools and mechanisms; states will attempt to craft their

[3] This could be further complemented by studies in line with the emergence of psychological research in the IR/IL field and a resurgence of the individual in IR, aiming to uncover how personal views or beliefs about international law and norms, for instance, may influence state-level decision-making. See e.g. Hafner-Burton, LeVeck, and Victor, "How Activists Perceive the Utility of International Law"; Bayram, "Due Deference."

commitment and mitigate the potential costs of soft law or block certain legal effects from arising, by using the usual legal mechanisms associated with treaty interpretation.[4] Further research should be done in this use of concepts such as 'interpretive declarations' and 'reservations' (a word some states will use themselves in EoVs at the UN) which refer to means of interpretation directly taken from the law of treaties, and how that may affect the resulting legal value (or perception of legal value) for the soft instrument. While some states, when dealing with soft law instruments, shy away from any word that could be too closely associated with binding commitments (e.g. preferring 'participants' to 'parties', 'giving effect to' rather than 'implement'), others' use of terms such as 'reservations' confirm soft law's proximity to hard binding commitments, the lack of clear mechanisms to deal with commitment to international instruments outside of the rules of treaty interpretation, and the risks that crafting commitment to soft law to avoid some of its costs through such means may contribute to its future hardening and greater legal value.

Finally, this thesis focuses principally on the challenges of decision-making on soft law for state actors, leaving largely out of bounds the role of non-state actors (NSAs). Yet, non-state actors emerge in this project as one of the main reasons behind the challenges posed by soft law for states. Evidence from the case study in this thesis showed that the erosion of states' monopoly over international law-making – brought about, or at the very least accelerated by soft law – and the general involvement of NSAs at multiple steps in the life of soft law instruments are major concerns increasing the uncertainty about the potential future effects and costs of soft law. Further research into the role of NSAs, as well as their potential impact on the decision-making process on soft law and

[4] E.g. as per the Vienna Convention on the Law of Treaties, 1969, and related regime.

the creation of international norms would be warranted, evaluating how far it generalizes outside the UN realm and beyond the human rights sphere.

In the UNDRIP case, it seems like the soft law route was attempted as a fallback from an unpopular binding instrument (ILO Convention 169), in a forum (the UN) which gave the right-bearers space for an unprecedented contribution to the drafting of a human rights instrument. Even if it was a much longer and arduous process than initially anticipated, the final result was something to be celebrated: adoption by consensus at the UN, and an international mobilization that was seemingly strong and persistent enough to lead four major states to change their positions on the file after only a few years.

Since UNDRIP's adoption, many states (especially in Latin America) have given it some degree of recognition in domestic law. It has been cited in domestic and international court cases (especially at the Inter-American Court of Human Rights), and commentators are already evaluating that some provisions are or should be recognized as customary international law.[5] It therefore seems like the instrument is hardening through at least two of the pathways identified in this project. The more it does so, the more it will be considered a victory for the world's Indigenous peoples and their allies, and the more it will constitute a prime example of how non-state actors can push the boundaries of the international legal order to directly contribute to international law-making

[5] International Law Association, "Rights of Indigenous Peoples."

BIBLIOGRAPHY

Works cited

Abbott, Kenneth W. "Enriching Rational Choice Institutionalism for the Study of International Law." *U. Ill. L. Rev.*, 2008, 5.

———. "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts." *The American Journal of International Law* 93, no. 2 (April 1999): 361. doi:10.2307/2997995.

Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal. "The Concept of Legalization." *International Organisation* 54, no. 3 (July 1, 2000): 401–19.

Abbott, Kenneth W., and Duncan Snidal. "Hard and Soft Law in International Governance." *International Organisation* 54, no. 3 (2000): 421–456.

———. "Pathways to International Cooperation." In *The Impact of International Law on International Cooperation: Theoretical Perspectives*, edited by Moshe Hirsch and Eyal Benvenisti. Cambridge University Press, 2004. http://papers.ssrn.com/abstract=730908.

Aberbach, Joel D., and Bert A. Rockman. "Conducting and Coding Elite Interviews." *PS: Political Science & Politics* 35, no. 4 (December 2002): 673–76. doi:10.1017/S1049096502001142.

Adler, Emanuel, and Vincent Pouliot, eds. *International Practices*. Cambridge : New York: Cambridge University Press, 2011.

Alvarez, José E. *International Organisations as Law-Makers*. Oxford University Press Oxford, 2005.

Anaya, S. James. *Indigenous Peoples in International Law*. 2nd ed. / S. James Anaya.. Oxford ; New York: Oxford University Press, 2004.

Aspremont, Jean d'. "Softness in International Law: A Self-Serving Quest for New Legal Materials." *European Journal of International Law* 19, no. 5 (November 1, 2008): 1075–93. doi:10.1093/ejil/chn057.

Barume, Albert K. "Responding to the Concerns of the African States." In *Making the Declaration Work*, edited by Claire Charters and Rodolfo Stavenhagen, 170–82. Copenhagen: IWGIA, 2009.

Baxter, R. R. "International Law in 'Her Infinite Variety.'" *International and Comparative Law Quarterly* 29, no. 4 (1980): 549–66. doi:10.1093/iclqaj/29.4.549.

Bayram, A. Burcu. "Due Deference: Cosmopolitan Social Identity and the Psychology of Legal Obligation in International Politics." *International Organisation* 71, no. S1 (April 2017): S137–63. doi:10.1017/S0020818316000485.

Bennett, Andrew, and Colin Elman. "Case Study Methods," August 14, 2008. doi:10.1093/oxfordhb/9780199219322.003.0029.

Berman, Ayelet, Sanderijn Duquet, Joost Pauwelyn, Ramses A. Wessel, and Jan Wouters. *Informal International Lawmaking: Case Studies*. Torkel Opsahl Academic EPublisher, 2012. http://dare.uva.nl/document/2/119310.

Blokker, N. M., and H. G. Schermers. *International Institutional Law*. Brill, 2011. http://booksandjournals.brillonline.com/content/books/9789004187979.

Blutman, László. "In the Trap of a Legal Metaphor: International Soft Law." *International and Comparative Law Quarterly* 59, no. 03 (August 3, 2010): 605–24.

Boyle, A. E. "Some Reflections on the Relationship of Treaties and Soft Law." *International & Comparative Law Quarterly* 48, no. 04 (1999).

Brunnée, Jutta, and Stephen J. Toope. *Legitimacy and Legality in International Law: An Interactional Account*. Cambridge University Press, 2010.

Buchanan, Allen. "The Legitimacy of International Law." In *The Philosophy of International Law*, by Samantha Besson and John Tasioulas. OUP Oxford, 2010.

Byers, Michael. "International Law." In *The Oxford Handbook of International Relations*, edited by Christian Reus-Smit and Duncan Snidal. Oxford University Press, 2008.

———, ed. *The Role of Law in International Politics: Essays in International Relations and International Law*. Oxford University Press, USA, 2001.

Cane, Peter, and Herbert Kritzer. *The Oxford Handbook of Empirical Legal Research*. OUP Oxford, 2012.

Cerone, John. "A Taxonomy of Soft Law." In *Tracing the Roles of Soft Law in Human Rights*, edited by Stéphanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone. Oxford University Press, 2016.

Chinkin, Christine M. "The Challenge of Soft Law: Development and Change in International Law." *International and Comparative Law Quarterly* 38, no. 04 (1989): 850–866.

CIA. "The World Factbook." Accessed March 11, 2013. https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html.

Cole, Wade M. "Hard and Soft Commitments to Human Rights Treaties, 1966-2000." *Sociological Forum* 24, no. 3 (September 2009): 563–88.

———. "Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966-1999." *American Sociological Review* 70, no. 3 (June 1, 2005): 472–95.

Crawhall, Nigel. "Africa and the UN Declaration on the Rights of Indigenous Peoples." *The International Journal of Human Rights* 15, no. 1 (January 1, 2011): 11–36. doi:10.1080/13642987.2011.529687.

Daes, Erica-Irene A. "An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations." *Cambridge Review of International Affairs* 21, no. 1 (March 2008): 7–26. doi:10.1080/09557570701828386.

———. “The UN Declaration on the Rights of Indigenous Peoples: Backgroung and Appraisal.” In *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, edited by Steve Allen and Alexandra Xanthaki. Oxford: Hart, 2011.

Davide Jr., Hilario G. “Supplement to the Report of the Facilitator on the Draft Declaration on the Rights of Indigenous Peoples,” July 20, 2007. http://www.ohchr.org/Documents/Issues/IPeoples/ReportSupplement20July07.pdf.

Docip. “Online Documentation Database.” Accessed September 14, 2017. http://cendoc.docip.org/cgi-bin/library.cgi.

Dunoff, Jeffrey L., and Pollack, Mark A., eds. *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*. Cambridge University Press, 2013.

Duplessis, Isabelle. “Le Vertige et La Soft Law: Réactions Doctrinales En Droit International.” *Revue Québécoise de Droit International* (Hors-Série) (2007).

Dupuy, René-Jean. *Droit Déclaratoire et Droit Programmatoire: De La Coutume Sauvage à La “Soft Law.”* Société française pour le droit international, 1974.

———. “Declaratory Law and Programmatory Law: From Revolutionary Custom to ‘Soft Law.’” *Declarations on Principles, a Quest for World Peace*, 1977, 248.

Dutton, Yvonne M. “Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms.” *U. Pa. J. Int’l L.* 34 (2012): 1.

Egloff, Florian. “A Note on Sources: The Wikileaks Archive,” 2017. On file with the author.

Eide, Asbjorn. “The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples.” In *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, edited by Claire Charters and Rodolfo Stavenhagen, 32–46. IWGIA, 2009.

Elias, Olufemi. “Persistent Objector.” *Max Planck Encyclopedia of Public International Law*, 2009.

Elias, Olufemi, and Chin Lim. “‘General Principles of Law’, ‘Soft’ Law and the Identification of International Law.” *Netherlands Yearbook of International Law* 28 (1997): 3–49.

Ellis, Jaye. “Shades of Grey: Soft Law and the Validity of Public International Law.” *Leiden Journal of International Law* 25, no. 02 (March 26, 2012): 313–34. doi:10.1017/S0922156512000052.

Eurofound. “Soft Law.” Accessed February 2, 2017. http://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/soft-law.

Fajardo, Teresa. “Soft Law,” January 30, 2014. http://www.oxfordbibliographies.com/display/id/obo-9780199796953-0040.

Falkner, Gerda. *Complying with Europe: EU Harmonisation and Soft Law in the Member States*. Cambridge University Press, 2005.

Fassbender, Bardo. “Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order.” *Ruling the World*, 2009, 133–148.

Finnemore, Martha, and Kathryn Sikkink. “International Norm Dynamics and Political Change.” *International Organisation* 52, no. 4 (1998): 887–917.

Fitzmaurice, Malgosia. *Recueil Des Cours, Collected Courses 2001*. Martinus Nijhoff Publishers, 2002.

Fitzmaurice, Malgosia, and Olufemi Elias. *Contemporary Issues in the Law of Treaties*. Eleven International Publishing, 2005.

Franck, Thomas. *The Power of Legitimacy among Nations*. Oxford University Press, 1990.

George, Alexander L., and Andrew Bennett. *Case Studies and Theory Development in the Social Sciences*. MIT Press, 2005.

Gerring, John. *Case Study Research: Principles and Practices*. Cambridge University Press, 2016.

Goldstein, Judith. *Legalization and World Politics*. Vol. 53. MIT Press, 2001.

Google Books. “Google Ngram Viewer - Total Counts.” Accessed February 15, 2017. http://storage.googleapis.com/books/ngrams/books/datasetsv2.html.

———. “Google Ngram Viewer: Soft Law, 1930-2008.” Accessed February 6, 2017. goo.gl/AAgQZ9.

Green, James A. “Pipelines and Persistent Objection: Indigenous Rights in Justin Trudeau’s Canada.” *OUPblog*, December 12, 2016. https://blog.oup.com/2016/12/persistent-objection-trudeaus-canada/.

———. *The Persistent Objector Rule in International Law*. Oxford University Press, 2016.

Gruchalla-Wesierski, T. “A Framework for Understanding Soft Law.” *McGill Law Journal* 30 (1984): 37.

Guzman, A. T., and T. L. Meyer. “International Soft Law.” *Journal of Legal Analysis* 2, no. 1 (2010): 171–225.

Guzman, Andrew. *How International Law Works*. Oxford University Press, 2008.

Hafner-Burton, Emilie Marie, Brad L. LeVeck, and David G. Victor. “How Activists Perceive the Utility of International Law.” *Forthcoming in the Journal of Politics*, 2016. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2685381.

Harrington, Joanna. “Incorporating UN General Assembly Declaratory Texts into Domestic Law?” *EJIL: Talk!*, February 4, 2013. http://www.ejiltalk.org/incorporating-un-general-assembly-declaratory-texts-into-domestic-law/.

Hart, H. L. A. *The Concept of Law*. 2nd ed. Oxford: Clarendon Press, 1994.

Hathaway, O. “The Cost of Commitment.” *Stanford Law Review* 55 (2003).

———. “Why Do Countries Commit to Human Rights Treaties?” *Journal of Conflict Resolution* 51, no. 4 (August 1, 2007): 588–621.

Helfer, Laurence. "Flexibility in International Agreements." In *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, edited by Dunoff, Jeffrey L. and Pollack, Mark A. Cambridge University Press, 2013.

Henderson, James Youngblood. *Indigenous Diplomacy and the Rights of Peoples : Achieving UN Recognition*. Saskatoon: Purich Pub, 2008.

Henkin, L. *How Nations Behave: Law and Foreign Policy*. 2nd Revised edition. Columbia University Press, 1979.

Hoof, Godefridus J. H. *Rethinking the Sources of International Law*. Brill Archive, 1983.

Hutchinson, Terry, and Nigel Duncan. "Defining and Describing What We Do: Doctrinal Legal Research." *Deakin L. Rev.* 17 (2012): 83.

International Law Association. "Final Report on the Status of the Universal Declaration of Human Rights in National and International Law." *International Law Association Reports of Conferences* 66 (1994): 525–99.

———. "ILA Final Report on the Rights of Indigenous Peoples." *International Law Association Reports of Conferences* 75 (2012): 503–53.

IWGIA. "Bangladesh." Accessed September 30, 2017. https://www.iwgia.org/en/bangladesh.

———. "The Indigenous World." Accessed July 20, 2017. http://www.iwgia.org/regions.

Jennings, Robert Y. "An International Lawyer Takes Stock." *International and Comparative Law Quarterly* 39, no. 03 (1990): 513–529.

Johnstone, Ian. "Law-Making through the Operational Activities of International Organisations." *Geo. Wash. Int'l L. Rev.* 40 (2008): 87.

JSTOR. "Data For Research." Accessed February 13, 2017. http://dfr.jstor.org/.

Katzenstein, Suzanne. "Reverse-Rhetorical Entrapment: Naming and Shaming as a Two-Way Street." *Vand. J. Transnat'l L.* 46 (2013): 1079.

Keohane, Robert O. "International Institutions: Two Approaches." *International Studies Quarterly* 32, no. 4 (1988): 379–96. doi:10.2307/2600589.

Kinder, Donald R., and Janet A. Weiss. *In Lieu of Rationality: Psychological Perspectives on Foreign Policy Decision Making*. JSTOR, 1978. http://www.jstor.org/stable/173698.

Klabbers, Jan. "Institutional Ambivalence by Design: Soft Organisations in International Law." *Nordic Journal of International Law* 70, no. 3 (2001): 403–421.

———. "The Redundancy of Soft Law." *Nordic Journal of International Law* 65, no. 2 (February 1, 1996): 167–82. doi:10.1163/15718109620294889.

———. *International Law*. New York: Cambridge University Press, 2013.

———. *The Concept of Treaty in International Law*. Vol. 22. Martinus Nijhoff Publishers, 1996.

Koremenos, Barbara, Charles Lipson, and Duncan Snidal. “The Rational Design of International Institutions.” *International Organisation* 55, no. 4 (October 1, 2001): 761–99. doi:10.2307/3078615.

Kurtas, Susan. “Research Guides: UN Documentation: General Assembly: Voting Information.” Research guide. Accessed June 18, 2017. http://research.un.org/en/docs/ga/voting.

Lagoutte, Stéphanie, Thomas Gammeltoft-Hansen, and John Cerone, eds. “Introduction.” In *Tracing the Roles of Soft Law in Human Rights*. Oxford University Press, 2016.

———. *Tracing the Roles of Soft Law in Human Rights*. Oxford University Press, 2016.

Law, Jonathan, and Elizabeth A. Martin. “Estoppel.” *A Dictionary of Law*. Oxford University Press, n.d. http://www.oxfordreference.com/10.1093/acref/9780199551248.001.0001/acref-9780199551248-e-1391.

Levangie, Shelagh. *Globalized Native Politics: Negotiating the United Nations Declaration on the Rights of Indigenous Peoples*. Saarbrücken: AV Akademikerverlag, 2012.

Lightfoot, S. R. “Emerging International Indigenous Rights Norms and ‘over-Compliance’ in New Zealand and Canada.” *Political Science* 62, no. 1 (August 12, 2010): 84–104.

Lipson, Charles. “Why Are Some International Agreements Informal?” *International Organisation* 45, no. 04 (1991): 495–538. doi:10.1017/S0020818300033191.

Lowe, Vaughan. *International Law*. Oxford ; New York: Oxford University Press, 2007.

MacGibbon, I. C. “Estoppel in International Law.” *International and Comparative Law Quarterly* 7 (1958): 468.

McNair, Arnold D. “The Functions and Differing Legal Character of Treaties.” *British Year Book of International Law* 11 (1930): 100–118.

Merriam-Webster Dictionary. “‘Instrument’ - Definition.” Accessed May 11, 2015. http://www.merriam-webster.com/dictionary/instrument.

———. “‘Provision’ - Legal Definition.” Accessed September 2, 2017. https://www.merriam-webster.com/dictionary/provision.

Michael, Gabriel J. “Who’s Afraid of WikiLeaks? Missed Opportunities in Political Science Research.” *Review of Policy Research* 32, no. 2 (March 1, 2015): 175–99. doi:10.1111/ropr.12120.

Milewicz, Karolina, James Hollway, Claire Peacock, and Duncan Snidal. “Beyond Trade: The Expanding Scope of the Nontrade Agenda in Trade Agreements.” *Journal of Conflict Resolution*, September 23, 2016, 0022002716662687. doi:10.1177/0022002716662687.

Minority Rights Group. “Directory of Minorities and Indigenous Peoples.” *Minority Rights Group*. Accessed September 26, 2017. http://minorityrights.org/directory/.

Moravcsik, Andrew. "Taking Preferences Seriously: A Liberal Theory of International Politics." *International Organisation* 51, no. 04 (September 1997): 513–553.

Morsink, Johannes. "The Drafting Process Explained." In *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*. University of Pennsylvania Press, 1999. http://www.jstor.org.ezp.lib.unimelb.edu.au/stable/j.ctt3fhrpm.

Olson, Mancur. *The Logic of Collective Action*. Harvard University Press, 2009.

Pauwelyn, Joost, Ramses Wessel, and Jan Wouters. *Informal International Lawmaking*. Oxford University Press, 2012.

Posner, E., and J. Gersen. "Soft Law: Lessons from Congressional Practice." *Stanford Law Review* 61, no. 3 (December 1, 2008): 573.

Pulitano, Elvira. "Indigenous Rights and International Law: An Introduction." In *Indigenous Rights in the Age of the UN Declaration*, 1–30. Cambridge: Cambridge University Press, 2012.

QSR International. "NVivo." Accessed September 12, 2017. http://www.qsrinternational.com/nvivo-product.

Ratner, Steven R., and Anne-Marie Slaughter. "Appraising the Methods of International Law: A Prospectus for Readers." *The American Journal of International Law* 93, no. 2 (1999): 291–302. doi:10.2307/2997990.

Raustiala, Kal. "Form and Substance in International Agreements." *The American Journal of International Law* 99, no. 3 (July 1, 2005): 581–614. doi:10.2307/1602292.

Risse-Kappen, Thomas, Steve C. Ropp, and Kathryn Sikkink. *The Power of Human Rights : International Norms and Domestic Change*. Cambridge: Cambridge University Press, 1999.

Robilant, Anna Di. "Genealogies of Soft Law." *The American Journal of Comparative Law* 54, no. 3 (July 1, 2006): 499–554.

Röling, Bernard Victor Aloysius, Robert J. Akkerman, Peter J. van Krieken, and Charles O. Pannenborg. *Declarations on Principles : A Quest for Universal Peace*. Leyden: Sijthoff ; Groningen, postbus 66, 1977.

Schachter, Oscar. "The Twilight Existence of Nonbinding International Agreements." *The American Journal of International Law* 71, no. 2 (1977): 296–304.

———. "The Quasi-Judicial Role of the Security Council and the General Assembly." *The American Journal of International Law* 58, no. 4 (October 1, 1964): 960–65. doi:10.2307/2196038.

———. "United Nations Law." *American Journal of International Law* 88 (1994): 1.

Schermers, Henry G., and Niels M. Blokker. *International Institutional Law: Unity within Diversity*. Martinus Nijhoff Publishers, 2011.

Scott, Shirley V. *International Law, US Power: The United States' Quest for Legal Security*. Cambridge University Press, 2012.

Senden, Linda. *Soft Law in European Community Law*. Bloomsbury Publishing, 2004.

Shaw, Malcolm N. *International Law*. 6th ed. Cambridge: Cambridge University Press, 2008.

Shelton, Dinah. *Commitment and Compliance*. Oxford University Press, 2003.

———. "Compliance with International Human Rights Soft Law." In *International Compliance with Nonbinding Accords*, edited by Edith Brown Weiss. Studies in Transnational Legal Policy 29. American Society of International Law, 1997.

———. "Soft Law." In *SSRN ELibrary*, Vol. Handbook of International Law. Routledge, 2008. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003387.

Sievers, Loraine, and Sam Daws. *The Procedure of the UN Security Council*. OUP Oxford, 2014.

Simma, Bruno, and Andreas L. Paulus. "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View." *American Journal of International Law* 93, no. 2 (1999): 302–316.

Simmons, Beth A., and Richard H. Steinberg. *International Law and International Relations: An International Organisation Reader*. Cambridge University Press, 2007.

Slaughter, Anne-Marie, Andrew S. Tulumello, and Stepan Wood. "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship." *The American Journal of International Law* 92, no. 3 (July 1998): 367. doi:10.2307/2997914.

Tauli-Corpuz, Victoria. "How the UN Declaration on the Rights of Indigenous Peoples Got Adopted," October 13, 2007. http://www.tebtebba.org/index.php/resource-center/7-magazine/125-how-the-un-declaration-on-the-rights-of-indigenous-peoples-got-adopted. http://www.tebtebba.org/index.php/all-resources/category/20-un-declaration-on-the-rights-of-indigenous-peoples.

Thornberry, Patrick. *Indigenous Peoples and Human Rights*. Manchester: Manchester University Press, 2002.

Thürer, Daniel. "Soft Law." *Max Planck Encyclopedia of Public International Law*, 2009.

Veracini, L. *Settler Colonialism: A Theoretical Overview*. Springer, 2010.

Villeneuve, Léticia. "Could the Progressive 'Hardening' of Soft Law Impair Its Future Development?" In *Tracing the Roles of Soft Law in Human Rights*, edited by Stéphanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone. Oxford University Press, 2016.

———. "Soft Law in the UN Human Rights Council's Universal Periodic Review." International Studies Association Annual Convention, New Orleans, USA, 2015.

Virally, Michel. "Definition and Classification of International Organisations: A Legal Approach'." In *The Concept of International Organisation*, edited by Georges Abi-Saab, 1981.

Voyiakis, Emmanuel. "Voting in the General Assembly as Evidence of Customary International Law?" In *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, edited by Steve Allen and Alexandra Xanthaki, 209–23. Oxford: Hart, 2011.

Weil, Prosper. "Towards Relative Normativity in International Law?" *The American Journal of International Law* 77, no. 3 (July 1, 1983): 413–42.

———. *Vers Une Normativité Relative En Droit International?* Editions A. Pedone, 1982.

Weiss, Edith Brown. *International Compliance with Nonbinding Accords*. Studies in Transnational Legal Policy 29. American Society of International Law, 1997.

Whelan, Daniel J. *Indivisible Human Rights: A History*. University of Pennsylvania Press, 2011.

White, Nigel D. "Lawmaking." In *Oxford Handbook of International Organisations*, edited by Jacob Katz Cogan, Ian Hurd, and Ian Johnstone. Accessed June 23, 2017. http://opil.ouplaw.com/view/10.1093/law/9780199672202.001.0001/law-9780199672202-chapter-26.

———. *The Law of International Organisations*. Manchester University Press, 1996.

Wikileaks. "Public Library of US Diplomacy." Accessed September 14, 2017. https://wikileaks.org/plusd/.

Wotipka, Christine Min, and Kiyoteru Tsutsui. "Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965-2001." *Sociological Forum* 23, no. 4 (December 2008): 724–54.

Treaties (in chronological order of adoption)

Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

Statute of the International Court of Justice, 1945 (adopted 26 June 1945, entered into force 24 October 1945) Annex to the Charter, 1 UNTS XVI.

International Labour Organisation, *Indigenous and Tribal Populations Convention, 1957 (No. 107).* (adopted 26 June 1957, entered into force 2 June 1959) 328 UNTS 247.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195.

Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

International Labour Organisation, *Indigenous and Tribal Peoples Convention, 1989 (No. 169)* (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383.

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2715 UNTS.

Court cases

International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14.

Supreme Court of Canada, Mitchell v MNR, 2001 SCC 33.

Supreme Court of Canada, United States v Burns, 2001 SCC 7.

Governmental documents and resources

Aboriginal Affairs and Northern Development Canada. "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples," November 12, 2010. http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142.

———. "FAQ: UNDRIP," n.d. http://www.aadnc-aandc.gc.ca/eng/1309374807748/1309374897928.

Australia. "Statement of Support to The United Nations Declaration on the Rights of Indigenous Peoples (The Hon Jenny Macklin MP)," April 3, 2009. http://jennymacklin.fahcsia.gov.au/node/1711.

Australia Department of Foreign Affairs and Trade. "Signed, Sealed and Delivered. Treaties and Treaty Making: An Official's Handbook. 6th Edition.," 2005. https://web.archive.org/web/20090714012505/http://www.dfat.gov.au/treaties/treaties_handbook.pdf

Government of Canada, Foreign Affairs Trade and Development Canada. "Policy on Tabling of Treaties in Parliament." Accessed May 11, 2015. http://www.treaty-accord.gc.ca/procedures.aspx.

New Zealand. "National Government to Support UN Rights Declaration (Statement by PM John Key)," April 20, 2010. http://www.beehive.govt.nz/release/national-govt-support-un-rights-declaration.

New Zealand Ministry of Foreign Affairs. "International Treaty Making: Guidance for Government Agencies on Practice and Procedures for Concluding International Treaties and Arrangements," 2014. https://www.mfat.govt.nz/assets/_securedfiles/Treaties/International-Treaty-Making-Guide-2014.pdf.

New Zealand Ministry of Foreign Affairs and Trade. "Statement by H.E. Ambassador Rosemary Banks on Behalf of Australia, New Zealand and the United States," October 16, 2006. http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2006/0-16-October-2006b.php.

———. "Statement by Hon Dr Pita Sharples, Minister of Maori Affairs, Ninth Session of the United Nations Permanent Forum on Indigenous Issues," April 19, 2010. http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2010/0-19-April-2010.php.

Tasmania. "Tasmania Treaties Handbook," 2014. http://www.dpac.tas.gov.au/__data/assets/pdf_file/0009/228987/Treaties_-_Policy_and_Procedures_Manual.pdf

The White House. "Remarks by the President at the White House Tribal Nations Conference," December 16, 2010. http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference.

United Kingdom. "Treaties and MoU: Guidance on Practice and Procedures," 2014. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/293976/Treaties_and_MoU_Guidance.pdf.

United States. "Observations of the United States With Respect to the Declaration on the Rights of Indigenous Peoples," September 13, 2007.

US Department of State. "Guidance on Non-Binding Documents," 2017. https://www.state.gov/s/l/treaty/guidance/.

———. "UN Declaration on the Rights of Indigenous Peoples Review," December 16, 2010.

UN Documents

UNGA Declarations[1] (in chronological order of adoption)

Universal Declaration of Human Rights, UNGA Res 217 A (III) (10 December 1948).

Declaration on the Rights of the Child, UNGA Res 14/1386, UN Doc. A/RES/14/1386 (20 November 1959).

United Nations Declaration on the Elimination of all Forms of Racial Discrimination UNGA Res 18/1904, UN Doc. A/RES/18/1904 (20 November 1963)

[1] For more information on UN Declarations, as well as additional references to UN documents leading to their adoption (meeting records), see Appendix 3.

Declaration on the Elimination of Discrimination Against Women, UNGA Res 12/2263, UN Doc. A/RES/12/2263 (7 November 1967)

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res.25/2625, UN Doc. A/RES/25/2625 (24 October 1970).

Declaration on the Rights of Disabled Persons, UNGA Res 30/3447, UN Doc. A/RES/30/3447 (9 December 1975)

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res 30/3452, UN Doc. A/RES/30/3452 (9 December 1975)

Declaration on the Right to Development, UNGA Res 41/128, A/RES/41/128 (4 December 1986).

Declaration on the Protection of All Persons from Enforced Disappearance, UNGA Res 47/133, A/RES/47/133 (18 December 1992)

Political Declaration, UN Doc. A/RES/S-23/2 (10 June 2000)

United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295, UN Doc. A/RES/61/295 (13 September 2007).

***UN Resolutions* (in chronological order of adoption)**

Study of the problem of discrimination against indigenous populations. ECOSOC Res. 1982/34, UN Doc. E/RES/1982/34 (7 May 1982).

Study of the Problem of Discrimination Against Indigenous Populations: Final report submitted by the Special Rapporteur, Mr. José Martínez Cobo. UN Doc E/CN.4/Sub.2/476 (30 July 1981), E/CN.4/Sub.2/1982/2 (10 August 1982), E/CN.4/Sub.2/1983/21 (5 August 1983) (and addendums).

International Decade of the World's Indigenous People, UNGA Res. 48/163, UN Doc. A/RES/48/163 (21 December 1993).

Establishment of a Permanent Forum on Indigenous Issues. ECOSOC Res 2000/22, UN Doc. E/RES/2000/22 (28 July 2000).

Second International Decade of the World's Indigenous Peoples, UNGA Res 59/174, UN Doc. A/RES/59/174 (20 December 2004).

Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994, HRC Res. 1/2,UN Doc. A/HRC/Res/1/2 (29 June 2006)

UN documents

Al Khalifa, Haya Rashed. "Letter from the President of the General Assembly," June 6, 2007.

http://www.ohchr.org/Documents/Issues/IPeoples/LetterPresidentGA_06062077.pdf.

Permanent Mission of Switzerland. "The PGA Handbook: A Practical Guide to the United Nations General Assembly," n.d. http://www.unitar.org/ny/sites/unitar.org.ny/files/UN_PGA_Handbook.pdf.

UN General Assembly, Official records, 1261st Plenary Meeting, UN Doc A/PV.1261 (20 November 1963).

UN General Assembly, Official records, 1631st Plenary Meeting, UN Doc A/PV.1631 (14 December 1967).

UN General Assembly, Official records, 57th meeting, 39th session, UN Doc A/39/PV.57 (12 November 1984).

UN General Assembly Third Committee, *Summary record of the 53rd meeting,* UN Doc. A/C.3/61/SR.53 (28 November 2006).

UN General Assembly, Official records, 10th meeting, 23rd special session, UN Doc. A/S-23/PV.10 (9 June 2000).

UN General Assembly, *Letter dated 2007/07/20 from the Permanent Representative of the Philippines to the United Nations addressed to the President of the General Assembly*, UN Doc. A/61/1018 (9 August 2007).

UN General Assembly, Official records, 107th meeting, 61st session, UN Doc A/61/PV.107 (13 September 2007).

UN General Assembly, Official records, 108th meeting, 61st session, UN Doc A/61/PV.108 (13 September 2007).

UN General Assembly, Rules of procedure of the General Assembly, embodying amendments and additions adopted by the General Assembly up to September 2016, UN Doc. A/520/Rev.18 (21 February 2017).

UN General Assembly. "Functions and Powers of the General Assembly." Accessed September 24, 2017. http://www.un.org/en/ga/about/background.shtml.

———. "General Assembly of the United Nations Rules of Procedures," n.d. http://www.un.org/en/ga/about/ropga/intro.shtml.

———. Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (Vol.I) § (1992). http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

———. "Rules of Procedure, Annex IV." Accessed September 24, 2017. http://www.un.org/en/ga/about/ropga/anx4.shtml.

———. Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 § (1993). http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx.

United Nations Commission on Human Rights. "Use of the Terms 'Declaration' and 'Recommendation': Memorandum by the Office of Legal Affairs." UN Docs E/CN.4/L.610. Accessed January 11, 2017. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N62/071/12/PDF/N6207112.pdf.

United Nations Human Rights Council. "Extranet." Accessed September 14, 2017. https://extranet.ohchr.org/_layouts/OHCHR.CustomLogin/OHCHRLogin.aspx

?ReturnUrl=%2fsites%2fhrc%2f_layouts%2fAuthenticate.aspx%3fSource%3d%252Fsites%252Fhrc&Source=%2Fsites%2Fhrc.

United Nations Human Rights Council, Kenya - "Statement by Ambassador Philip R. O. Owade at the Fourth Session of the Human Rights Council," March 20, 2007. http://cendoc.docip.org/collect/cendocdo/index/assoc/HASH016d/9e91554f.dir/Kenya.pdf.

United Nations Human Rights Council. "Joint Statement by Australia, New Zealand and the United States of America On the Chair's Text on the Declaration on the Rights of Indigenous Peoples," June 27, 2006. http://cendoc.docip.org/collect/cendocdo/index/assoc/HASH0150/793f38a2.dir/cddh1_22.pd

UN OHCHR. "Special Procedures of the Human Rights Council." Accessed December 1, 2016. http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx.

United Nations. "Declarations and Conventions Contained in General Assembly Resolutions - Human Rights," n.d. http://www.un.org/documents/instruments/docs_subj_en.asp?subj=32.

———. "Growth in United Nations Membership, 1945-Present." Accessed February 6, 2017. http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html.

———. "UN Careers." Accessed December 1, 2016. https://careers.un.org/lbw/home.aspx?viewtype=VD.

———. "UNBISnet - UN Bibliographic Information System." Accessed September 14, 2017. http://unbisnet.un.org/.

United Nations Audiovisual Library of International Law. "Universal Declaration of Human Rights." Accessed December 2, 2016. http://legal.un.org/avl/ha/udhr/udhr.html.

Other international organisations documents

Arctic Council. "About Us." Accessed December 1, 2016. http://www.arctic-council.org/index.php/en/about-us.

———. "Home." Accessed December 1, 2016. http://www.arctic-council.org/index.php/en/.

———. "Ottawa Declaration," September 19, 1996.

Basel Committee on Banking Supervision. "International Convergence of Capital Measurement and Capital Standards (Basel II)," June 2006. http://www.bis.org/publ/bcbs128.htm.

———. "International Regulatory Framework for Banks (Basel III)," June 2011. http://www.bis.org/bcbs/basel3.htm?m=3%7C14%7C572.

Bureau International des Poids et Mesures. “BIPM - History.” Accessed May 15, 2015. http://www.bipm.org/en/measurement-units/history-si/.

Codex Alimentarius Commission. “Procedures for the Elaboration of Codex Standards and Related Texts.” Accessed May 13, 2015. http://www.fao.org/3/a-i1400e.pdf.

———. “Statutes of the Codex Alimentarius Commission.” Accessed May 13, 2015. http://www.fao.org/3/a-i1400e.pdf.

IATA. “A Universal Liability Regime for International Carriage by Air,” 2013. https://www.iata.org/policy/Documents/Position%20Paper%20mc99.pdf.

ILO. “Ratifications of C169, 1989.” Accessed November 29, 2016. goo.gl/9e3twG.

International Whaling Commission. St Kitts and Nevis Declaration, 58/16 § (2006).

NAFTA. “North American Free Trade Agreement.” Accessed May 15, 2015. http://www.naftanow.org/agreement/default_en.asp.

———. “North American Free Trade Agreement | About.” Accessed May 15, 2015. http://www.naftanow.org/about/default_en.asp.

Organisation for Security and Co-operation in Europe (OSCE). “Conference on Security and Co-Operation in Europe : Final Act of Helsinki,” August 1, 1975. http://www.osce.org/mc/39501.

Organisation of American States. “Preparing a Draft American Declration on the Rights of Indigenous Peoples.” Accessed August 20, 2017. http://www.oas.org/dil/indigenous_peoples_preparing_draft_american_declaration.htm.

UNESCO. “Universal Declaration on Bioethics and Human Rights,” 2006.

Universal Postal Union. “The UPU.” Accessed May 15, 2015. http://www.upu.int/en/the-upu/the-upu.html.

Wikileaks PLUSD archive (chronological order)

‘Tripartate [sic] Demarche on Declaration on the Rights of Indigenous Peoples’. Wikileaks, PLUSD, Doc. 06SANTIAGO1092_a (23 May 2006).

‘Tripartite Demarche Request on the UN Declaration on the Rights of Indigenous Peoples’. Wikileaks PLUSD Docs 06RABAT1001_a (24 May 2006).

‘Russia Shares Trilateral Concerns About UN Declaration on the Rights of Indigenous Peoples’. Wikileaks, PLUSD, Doc. 06MOSCOW5741_a (31 May 2006).

‘Norway will support UN Draft on Indigenous Peoples’. Wikileaks, PLUSD, Doc. 06OSLO705_a (1 June 2006).

‘GOE Inclined to Support UN Indigenous Declaration’. Wikileaks, PLUSD, Doc. 06QUITO1386_a (6 June 2006).

‘Demarche Delivered: Tripartite Demarche Request on the UN Declaration on the Rights of Indigenous Peoples’. Wikileaks, PLUSD, Doc. 06ALGIERS1080_a (14 June 2006).

‘Egypt Undecided on UN Declaration on Rights of Indigenous Peoples’. Wikileaks, PLUSD, Doc. 06CAIRO6308_a (11 October 2006).

‘Tripartite Demarche on the UN Delclartion [sic] on the Rights of Indigenous Peoples Delivered’. Wikileaks, PLUSD, Doc. 06ANKARA5868_a (11 October 2006).

‘Delivery of Tripartite Demarche Request on the Un Declaration on the Rights of Indigenous Peoples’. Wikileaks, PLUSD, Doc. 06WARSAW2197_a (13 October 2006).

‘Declaration on the Rights of Indigenous Peoples: Negotiations Slowly Coming to Life’. Wikileaks PLUSD, Doc. 07USUNNEWYORK93_a (2 February 2007).

‘Human Rights Talks Reveal Areas of Agreement, Discord on OAS Agenda’ Wikileaks, PLUSD, Doc. 07MEXICO2886_a (4 June 2007).

Other archives

‘Letter from Bertrand G. Ramcharan to Asbjorn Eide, 3 February 1984’ Box 1, Folder 5, Law Spec. Coll. 06, *Howard R. Berman Papers, 1835-1997*, Charles B. Sears Law Library, The State University of New York at Buffalo. Consulted in person in June 2016.

Law Spec. Coll. 06, *Howard R. Berman Papers, 1835-1997*, Charles B. Sears Law Library, The State University of New York at Buffalo. Consulted in person in June 2016.

APPENDIX 1

THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

General Assembly

Distr.: General
2 October 2007

Sixty-first session
Agenda item 68

Resolution adopted by the General Assembly on 13 September 2007

[*without reference to a Main Committee (A/61/L.67 and Add.1)*]

61/295. United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,[1] by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

107th plenary meeting
13 September 2007

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

[1] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 53* (A/61/53), part one, chap. II, sect. A.

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights[2] and the International Covenant on Civil and Political Rights,[2] as well as the Vienna Declaration and Programme of

[2] See resolution 2200 A (XXI), annex.

Action,[3] affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights[4] and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

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[3] A/CONF.157/24 (Part I), chap. III.

[4] Resolution 217 A (III).

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(*a*) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(*b*) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(*c*) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(*d*) Any form of forced assimilation or integration;

(*e*) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the

community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

APPENDIX 2

UN MEMBER STATES, INDIGENOUS PEOPLES AND INTERNATIONAL INSTRUMENTS ON INDIGENOUS PEOPLES' RIGHTS

UN member	UN group	IP (yes/no)	Ratif ILO107	Year	End	Ratif ILO 169	Year	Sponsor UNDRIP	UNDRIP vote	EoV	Statement
Afghanistan	Asia-Pac	No	No			No		No	Y	0	0
Albania	EEG	No	No			No		No	Y	0	1
Algeria	Africa	Yes	No			No		No	Y	0	0
Andorra	WEOG	No	No			No		Yes	Y	0	0
Angola	Africa	Yes	Yes	1976	In force	No		No	Y	0	0
Antigua and Barbuda	GRULAC	No	No			No		No	Y	0	0
Argentina	GRULAC	Yes	Denounced	1960	2001	Yes	2000	No	Y	1	0
Armenia	EEG	No	No			No		Yes	Y	0	1
Australia	WEOG	Yes	No			No		No	N	1	0
Austria	WEOG	No	No			No		Yes	Y	0	1
Azerbaijan	EEG	No	No			No		No	A	0	0
Bahamas	GRULAC	No	No			No		No	Y	0	0
Bahrain	Asia-Pac	No	No			No		No	Y	0	0
Bangladesh	Asia-Pac	None recog	Yes	1972	In force	No		No	A	1	0
Barbados	GRULAC	No	No			No		No	Y	0	0
Belarus	EEG	No	No			No		No	Y	0	0
Belgium	WEOG	No	Yes	1958	In force	No		Yes	Y	0	1
Belize	GRULAC	Yes	No			No		No	Y	0	0
Benin	Africa	No	No			No		No	Y	1	0
Bhutan	Asia-Pac	No	No			No		No	A	0	0
Bolivia	GRULAC	Yes	Denounced	1965	1992	Yes	1991	Yes	Y	0	1
Bosnia and Herzegovina	EEG	No	No			No		No	Y	0	0
Botswana	Africa	Yes	No			No		No	Y	0	0
Brazil	GRULAC	Yes	Denounced	1965	2003	Yes	2002	No	Y	1	0
Brunei Darussalam	Asia-Pac	No	No			No		No	Y	0	0
Bulgaria	EEG	No	No			No		No	Y	0	1
Burkina Faso	Africa	None recog	No			No		No	Y	0	0
Burundi	Africa	Yes	No			No		No	A	0	0
Cabo Verde	Africa	No	No			No		No	Y	0	0
Cambodia	Asia-Pac	Yes	No			No		No	Y	0	0
Cameroon	Africa	Yes	No			No		No	Y	0	0
Canada	WEOG	Yes	No			No		No	N	1	0
Central African Republic	Africa	Yes	No			Yes	2010	No	Y	0	0
Chad	Africa	Yes	No			No		No	NV	0	0
Chile	GRULAC	Yes	No			Yes	2008	No	Y	1	0
China	Asia-Pac	None recog	No			No		No	Y	0	0
Colombia	GRULAC	Yes	Denounced	1969	1992	Yes	1991	No	A	1	0
Comoros	Africa	No	No			No		No	Y	0	0
DRCongo	Africa	Yes	No			No		No	Y	0	0
Congo	Africa	No	No			No		No	Y	0	0
Costa Rica	GRULAC	Yes	Denounced	1959	1994	Yes	1993	Yes	Y	0	1
Côte d'Ivoire	Africa	No	No			No		No	NV	0	0
Croatia	EEG	No	No			No		Yes	Y	0	1
Cuba	GRULAC	No	Yes	1958	In force	No		Yes	Y	1	0
Cyprus	Asia-Pac	No	No			No		Yes	Y	0	1
Czech Republic	EEG	No	No			No		No	Y	0	1
Denmark	WEOG	No	No			Yes	1996	Yes	Y	0	1
Djibouti	Africa	No	No			No		No	Y	0	0
Dominica	GRULAC	Yes	No			Yes	2002	No	Y	0	0
Dominican Republic	GRULAC	No	Yes	1958	In force	No		Yes	Y	0	0
Ecuador	GRULAC	Yes	Denounced	1969	1999	Yes	1998	Yes	Y	0	1
Egypt	Africa	No	Yes	1959	In force	No		No	Y	1	0
El Salvador	GRULAC	Yes	Yes	1958	In force	No		No	Y	0	0
Equatorial Guinea	Africa	No	No			No		No	NV	0	0
Eritrea	Africa	No	No			No		No	NV	0	0
Estonia	EEG	No	No			No		Yes	Y	0	1
Ethiopia	Africa	Yes	No			No		No	NV	0	0
Fiji	Asia-Pac	No	No			Yes	1998	Yes	NV	0	0
Finland	WEOG	Yes	No			No		Yes	Y	0	2
France	WEOG	Yes	No			No		Yes	Y	0	2
Gabon	Africa	Yes	No			No		No	Y	0	0
Gambia	Africa	No	No			No		No	NV	0	0
Georgia	EEG	No	No			No		No	A	0	0
Germany	WEOG	No	No			No		Yes	Y	0	1
Ghana	Africa	No	Yes	1958	In force	No		No	Y	0	0
Greece	WEOG	No	No			No		Yes	Y	0	1
Grenada	GRULAC	No	No			No		No	NV	0	0
Guatemala	GRULAC	Yes	No			Yes	1996	Yes	Y	0	1
Guinea	Africa	No	No			No		No	Y	0	0
Guinea-Bissau	Africa	No	Yes	1977	In force	No		No	NV	0	0
Guyana	GRULAC	Yes	No			No		No	Y	1	0

UN member	Praise	Praise (Y/N	Interpretat	Interp (Y/N	Concern-R	Concern (Y	Reservatio	Reserv (Y/I	Group EoV
Afghanistan	0	No	0	No	0	No	0	No	0
Albania	2	Yes	0	No	0	No	0	No	1
Algeria	0	No	0	No	0	No	0	No	0
Andorra	0	No	0	No	0	No	0	No	0
Angola	0	No	0	No	0	No	0	No	0
Antigua and Barbuda	0	No	0	No	0	No	0	No	0
Argentina	2	Yes	0	No	2	No	0	No	0
Armenia	2	Yes	0	No	0	No	0	No	1
Australia	0	No	9	Yes	9	Yes	0	No	0
Austria	2	Yes	0	No	0	No	0	No	1
Azerbaijan	0	No	0	No	0	No	0	No	0
Bahamas	0	No	0	No	0	No	0	No	0
Bahrain	0	No	0	No	0	No	0	No	0
Bangladesh	1	Yes	0	No	3	Yes	0	No	0
Barbados	0	No	0	No	0	No	0	No	0
Belarus	0	No	0	No	0	No	0	No	0
Belgium	2	Yes	0	No	0	No	0	No	1
Belize	0	No	0	No	0	No	0	No	0
Benin	2	Yes	0	No	0	No	0	No	0
Bhutan	0	No	0	No	0	No	0	No	0
Bolivia	2	Yes	0	No	1	No	0	No	0
Bosnia and Herzegovina	0	No	0	No	0	No	0	No	0
Botswana	0	No	0	No	0	No	0	No	0
Brazil	4	Yes	1	Yes	0	No	0	No	0
Brunei Darussalam	0	No	0	No	0	No	0	No	0
Bulgaria	2	Yes	0	No	0	No	0	No	1
Burkina Faso	0	No	0	No	0	No	0	No	0
Burundi	0	No	0	No	0	No	0	No	0
Cabo Verde	0	No	0	No	0	No	0	No	0
Cambodia	0	No	0	No	0	No	0	No	0
Cameroon	0	No	0	No	0	No	0	No	0
Canada	0	No	3	Yes	9	Yes	0	No	0
Central African Republic	0	No	0	No	0	No	0	No	0
Chad	0	No	0	No	0	No	0	No	0
Chile	2	Yes	0	No	0	No	0	No	0
China	0	No	0	No	0	No	0	No	0
Colombia	0	No	1	Yes	6	Yes	0	No	0
Comoros	0	No	0	No	0	No	0	No	0
DRCongo	0	No	0	No	0	No	0	No	0
Congo	0	No	0	No	0	No	0	No	0
Costa Rica	1	Yes	0	No	0	No	0	No	0
Côte d'Ivoire	0	No	0	No	0	No	0	No	0
Croatia	2	Yes	0	No	0	No	0	No	1
Cuba	5	Yes	0	No	0	No	0	No	0
Cyprus	2	Yes	0	No	0	No	0	No	1
Czech Republic	2	Yes	0	No	0	No	0	No	1
Denmark	2	Yes	0	No	0	No	0	No	1
Djibouti	0	No	0	No	0	No	0	No	0
Dominica	0	No	0	No	0	No	0	No	0
Dominican Republic	0	No	0	No	0	No	0	No	0
Ecuador	4	Yes	0	No	0	No	0	No	0
Egypt	1	Yes	1	Yes	0	No	0	No	0
El Salvador	0	No	0	No	0	No	0	No	0
Equatorial Guinea	0	No	0	No	0	No	0	No	0
Eritrea	0	No	0	No	0	No	0	No	0
Estonia	2	Yes	0	No	0	No	0	No	1
Ethiopia	0	No	0	No	0	No	0	No	0
Fiji	0	No	0	No	0	No	0	No	0
Finland	7	Yes	0	No	0	No	0	No	1
France	6	Yes	3	Yes	0	No	0	No	1
Gabon	0	No	0	No	0	No	0	No	0
Gambia	0	No	0	No	0	No	0	No	0
Georgia	0	No	0	No	0	No	0	No	0
Germany	2	Yes	0	No	0	No	0	No	1
Ghana	0	No	0	No	0	No	0	No	0
Greece	2	Yes	0	No	0	No	0	No	1
Grenada	0	No	0	No	0	No	0	No	0
Guatemala	7	Yes	0	No	0	No	0	No	0
Guinea	0	No	0	No	0	No	0	No	0
Guinea-Bissau	0	No	0	No	0	No	0	No	0
Guyana	2	Yes	2	Yes	2	Yes	1	Yes	0

UN member	UN group	IP (yes/no)	Ratif ILO107	Year	End	Ratif ILO 169	Year	Sponsor UNDRIP	UNDRIP vote	EoV	Statement
Haiti	GRULAC	No	Yes	1958	In force	No		No	Y	0	0
Honduras	GRULAC	Yes	No			Yes	1995	Yes	Y	0	0
Hungary	EEG	No	No			No		Yes	Y	0	1
Iceland	WEOG	No	No			No		No	Y	0	0
India	Asia-Pac	None recog	Yes	1958	In force	No		No	Y	1	0
Indonesia	Asia-Pac	None recog	No			No		No	Y	1	0
Iran	Asia-Pac	No	No			No		No	Y	1	0
Iraq	Asia-Pac	Yes	Yes	1986	In force	No		No	Y	0	0
Ireland	WEOG	No	No			No		No	Y	0	1
Israel	WEOG	Yes	No			No		No	NV	0	0
Italy	WEOG	No	No			No		Yes	Y	0	1
Jamaica	GRULAC	No	No			No		No	Y	0	0
Japan	Asia-Pac	Yes	No			No		No	Y	1	0
Jordan	Asia-Pac	No	No			No		No	Y	1	0
Kazakhstan	Asia-Pac	No	No			No		No	Y	0	0
Kenya	Africa	None recog	No			No		No	A	0	0
Kiribati	Asia-Pac	No	No			No		No	NV	0	0
DPRK	Asia-Pac	No	No			No		No	Y	0	0
Kuwait	Asia-Pac	No	No			No		No	Y	0	0
Kyrgyzstan	Asia-Pac	No	No			No		No	NV	0	0
Laos	Asia-Pac	None recog	No			No		No	Y	0	0
Latvia	EEG	No	No			No		Yes	Y	0	1
Lebanon	Asia-Pac	No	No			No		No	Y	0	0
Lesotho	Africa	No	No			No		No	Y	0	0
Liberia	Africa	No	No			No		No	Y	0	0
Libya	Africa	Yes	No			No		No	Y	0	0
Liechtenstein	WEOG	No	No			No		No	Y	1	0
Lithuania	EEG	No	No			No		Yes	Y	0	1
Luxembourg	WEOG	No	No			No		Yes	Y	0	1
Macedonia	EEG	No	No			No		Yes	Y	0	1
Madagascar	Africa	No	No			No		No	Y	0	0
Malawi	Africa	No	Yes	1965	In force	No		No	Y	0	0
Malaysia	Asia-Pac	Yes	No			No		No	Y	0	0
Maldives	Asia-Pac	No	No			No		No	Y	0	0
Mali	Africa	None recog	No			No		No	Y	0	0
Malta	WEOG	No	No			No		Yes	Y	0	1
Marshall Islands	Asia-Pac	No	No			No		No	NV	0	0
Mauritania	Africa	No	No			No		No	NV	0	0
Mauritius	Africa	No	No			No		No	Y	0	0
Mexico	GRULAC	Yes	Denounced	1955	1991	Yes	1990	No	Y	1	0
Micronesia	Asia-Pac	No	No			No		No	Y	0	0
Monaco	WEOG	No	No			No		No	Y	0	0
Mongolia	Asia-Pac	No	No			No		No	Y	0	0
Montenegro	EEG	No	No			No		No	Y	1	1
Morocco	Africa	Yes	No			No		No	NV	0	0
Mozambique	Africa	No	No			No		No	Y	0	0
Myanmar	Asia-Pac	None recog	No			No		No	Y	1	0
Namibia	Africa	Yes	No			No		No	Y	1	0
Nauru	Asia-Pac	No	No			No		Yes	NV	0	0
Nepal	Asia-Pac	Yes	No			No	2007	No	Y	1	0
Netherlands	WEOG	No	No			Yes	1998	No	Y	0	1
New Zealand	WEOG	Yes	No			No		No	N	1	0
Nicaragua	GRULAC	Yes	No			Yes	2010	Yes	Y	0	0
Niger	Africa	Yes	No			No		No	Y	0	0
Nigeria	Africa	No	No			No		No	A	1	0
Norway	WEOG	Yes	No			Yes	1990	No	Y	1	0
Oman	Asia-Pac	No	No			No		No	Y	0	0
Pakistan	Asia-Pac	No	Yes	1960		No		No	Y	1	0
Palau	Asia-Pac	No	No			No		No	NV	0	0
Panama	GRULAC	Yes	Yes	1971		No		Yes	Y	0	0
Papua New Guinea	Asia-Pac	No	No			No		No	NV	0	0
Paraguay	GRULAC	Yes	Denounced	1969	1994	Yes	1993	No	Y	1	0
Peru	GRULAC	Yes	Denounced	1960	1995	Yes	1994	Yes	Y	0	0
Philippines	Asia-Pac	Yes	No			No		No	Y	1	0
Poland	EEG	No	No			No		No	Y	0	1
Portugal	WEOG	No	Denounced*	1960	2009	No		Yes	Y	0	1
Qatar	Asia-Pac	No	No			No		No	Y	0	0
Republic of Korea	Asia-Pac	No	No			No		No	Y	1	0
Republic of Moldova	EEG	No	No			No		No	Y	0	1
Romania	EEG	No	No			No		No	NV	0	1
Russian Federation	EEG	Yes	No			No		No	A	1	0

UN member	Praise	Praise (Y/N	Interpretat	Interp (Y/N	Concern-R	Concern (Y	Reservatio	Reserv (Y/I	Group EoV
Haiti	0	No	0	No	0	No	0	No	0
Honduras	0	No	0	No	0	No	0	No	0
Hungary	2	Yes	0	No	0	No	0	No	1
Iceland	0	No	0	No	0	No	0	No	0
India	1	Yes	3	Yes	0	No	0	No	0
Indonesia	1	Yes	3	Yes	1	Yes	1	Yes	0
Iran	1	Yes	1	Yes	1	Yes	0	No	0
Iraq	0	No	0	No	0	No	0	No	0
Ireland	2	Yes	0	No	0	No	0	No	1
Israel	0	No	0	No	0	No	0	No	0
Italy	2	Yes	0	No	0	No	0	No	1
Jamaica	0	No	0	No	0	No	0	No	0
Japan	0	No	3	Yes	0	No	0	No	0
Jordan	0	No	1	Yes	0	No	0	No	0
Kazakhstan	0	No	0	No	0	No	0	No	0
Kenya	0	No	0	No	0	No	0	No	0
Kiribati	0	No	0	No	0	No	0	No	0
DPRK	0	No	0	No	0	No	0	No	0
Kuwait	0	No	0	No	0	No	0	No	0
Kyrgyzstan	0	No	0	No	0	No	0	No	0
Laos	0	No	0	No	0	No	0	No	0
Latvia	2	Yes	0	No	0	No	0	No	1
Lebanon	0	No	0	No	0	No	0	No	0
Lesotho	0	No	0	No	0	No	0	No	0
Liberia	0	No	0	No	0	No	0	No	0
Libya	0	No	0	No	0	No	0	No	0
Liechtenstein	2	Yes	1	Yes	0	No	0	No	0
Lithuania	2	Yes	0	No	0	No	0	No	1
Luxembourg	2	Yes	0	No	0	No	0	No	1
Macedonia	2	Yes	0	No	0	No	0	No	1
Madagascar	0	No	0	No	0	No	0	No	0
Malawi	0	No	0	No	0	No	0	No	0
Malaysia	0	No	0	No	0	No	0	No	0
Maldives	0	No	0	No	0	No	0	No	0
Mali	0	No	0	No	0	No	0	No	0
Malta	2	Yes	0	No	0	No	0	No	1
Marshall Islands	0	No	0	No	0	No	0	No	0
Mauritania	0	No	0	No	0	No	0	No	0
Mauritius	0	No	0	No	0	No	0	No	0
Mexico	2	Yes	1	Yes	0	No	0	No	0
Micronesia	0	No	0	No	0	No	0	No	0
Monaco	0	No	0	No	0	No	0	No	0
Mongolia	0	No	0	No	0	No	0	No	0
Montenegro	3	Yes	0	No	0	No	0	No	1
Morocco	0	No	0	No	0	No	0	No	0
Mozambique	0	No	0	No	0	No	0	No	0
Myanmar	1	Yes	3	Yes	0	No	0	No	0
Namibia	2	Yes	5	Yes	0	No	0	No	0
Nauru	0	No	0	No	0	No	0	No	0
Nepal	2	Yes	1	Yes	0	No	0	No	0
Netherlands	2	Yes	0	No	0	No	0	No	1
New Zealand	1	Yes	5	Yes	9	Yes	0	No	0
Nicaragua	0	No	0	No	0	No	0	No	0
Niger	0	No	0	No	0	No	0	No	0
Nigeria	1	Yes	0	No	1	Yes	0	No	0
Norway	1	Yes	5	Yes	0	No	0	No	0
Oman	0	No	0	No	0	No	0	No	0
Pakistan	2	Yes	2	Yes	0	No	0	No	0
Palau	0	No	0	No	0	No	0	No	0
Panama	0	No	0	No	0	No	0	No	0
Papua New Guinea	0	No	0	No	0	No	0	No	0
Paraguay	1	Yes	1	Yes	0	No	0	No	0
Peru	0	No	0	No	0	No	0	No	0
Philippines	0	No	2	Yes	0	No	0	No	0
Poland	2	Yes	0	No	0	No	0	No	1
Portugal	2	Yes	0	No	0	No	0	No	1
Qatar	0	No	0	No	0	No	0	No	0
Republic of Korea	4	Yes	0	No	0	No	0	No	0
Republic of Moldova	2	Yes	0	No	0	No	0	No	1
Romania	2	Yes	0	No	0	No	0	No	1
Russian Federation	2	Yes	0	No	5	Yes	0	No	0

UN member	UN group	IP (yes/no)	Ratif ILO107	Year	End	Ratif ILO 169	Year	Sponsor UNDRIP	UNDRIP vote	EoV	Statement
Rwanda	Africa	Yes	No			No		No	NV	0	0
Saint Kitts and Nevis	GRULAC	No	No			No		No	NV	0	0
Saint Lucia	GRULAC	No	No			No		No	Y	0	0
Saint Vincent and the Grenad	GRULAC	Yes	No			No		No	Y	0	0
Samoa	Asia-Pac	No	No			No		No	A	0	0
San Marino	WEOG	No	No			No		No	Y	0	0
São Tomé and Príncipe	Africa	No	No			No		No	NV	0	0
Saudi Arabia	Asia-Pac	No	No			No		No	Y	0	0
Senegal	Africa	No	No			No		No	Y	0	0
Serbia	EEG	No	No			No		Yes	Y	0	1
Seychelles	Africa	No	No			No		No	NV	0	0
Sierra Leone	Africa	No	No			No		No	Y	0	0
Singapore	Asia-Pac	No	No			No		No	Y	0	0
Slovakia	EEG	No	No			No		No	Y	1	1
Slovenia	EEG	No	No			No		Yes	Y	0	1
Solomon Islands	Asia-Pac	No	No			No		No	NV	0	0
Somalia	Africa	No	No			No		No	NV	0	0
South Africa	Africa	Yes	No			No		Yes	Y	0	0
Spain	WEOG	No	No			Yes	2007	Yes	Y	0	1
Sri Lanka	Asia-Pac	Yes	No			No		No	Y	0	0
Sudan	Africa	No	No			No		No	Y	0	0
Suriname	GRULAC	Yes	No			No		No	Y	1	0
Swaziland	Africa	No	No			No		No	Y	0	0
Sweden	WEOG	Yes	No			No		No	Y	1	1
Switzerland	WEOG	No	No			No		Yes	Y	0	0
Syrian Arab Republic	Asia-Pac	No	Yes	1959	In force	No		No	Y	0	0
Tajikistan	Asia-Pac	No	No			No		No	NV	0	0
Tanzania	Africa	None recog	No			No		No	Y	0	0
Thailand	Asia-Pac	None recog	No			No		No	Y	1	0
Timor-Leste	Asia-Pac	No	No			No		Yes	Y	0	0
Togo	Africa	No	No			No		No	NV	0	0
Tonga	Asia-Pac	No	No			No		No	NV	0	0
Trinidad and Tobago	GRULAC	Yes	No			No		No	Y	0	0
Tunisia	Africa	Yes	Yes	1962	In force	No		No	Y	0	0
Turkey	WEOG	No	No			No		No	Y	1	1
Turkmenistan	Asia-Pac	No	No			No		No	NV	0	0
Tuvalu	Asia-Pac	No	No			No		No	NV	0	0
Uganda	Africa	Yes	No			No		No	NV	0	0
Ukraine	EEG	No	No			No		No	A	0	0
United Arab Emirates	Asia-Pac	No	No			No		No	Y	0	0
United Kingdom	WEOG	No	No			No		No	Y	1	1
United States	WEOG	Yes	No			No		No	N	1	0
Uruguay	GRULAC	Yes	No			No		No	Y	0	0
Uzbekistan	Asia-Pac	No	No			No		No	NV	0	0
Vanuatu	Asia-Pac	No	No			No		No	NV	0	0
Venezuela	GRULAC	Yes	No			Yes	2002	No	Y	0	0
Vietnam	Asia-Pac	None recog	No			No		No	Y	0	0
Yemen	Asia-Pac	No	No			No		No	Y	0	0
Zambia	Africa	No	No			No		No	Y	0	0
Zimbabwe	Africa	None recog	No			No		No	Y	0	0

UN member	Praise	Praise (Y/N	Interpretat	Interp (Y/N	Concern-R	Concern (Y	Reservatio	Reserv (Y/I	Group EoV
Rwanda	0	No	0	No	0	No	0	No	0
Saint Kitts and Nevis	0	No	0	No	0	No	0	No	0
Saint Lucia	0	No	0	No	0	No	0	No	0
Saint Vincent and the Grenad	0	No	0	No	0	No	0	No	0
Samoa	0	No	0	No	0	No	0	No	0
San Marino	0	No	0	No	0	No	0	No	0
São Tomé and Príncipe	0	No	0	No	0	No	0	No	0
Saudi Arabia	0	No	0	No	0	No	0	No	0
Senegal	0	No	0	No	0	No	0	No	0
Serbia	2	Yes	0	No	0	No	0	No	1
Seychelles	0	No	0	No	0	No	0	No	0
Sierra Leone	0	No	0	No	0	No	0	No	0
Singapore	0	No	0	No	0	No	0	No	0
Slovakia	2	Yes	1	Yes	1	Yes	1	Yes	1
Slovenia	2	Yes	0	No	0	No	0	No	1
Solomon Islands	0	No	0	No	0	No	0	No	0
Somalia	0	No	0	No	0	No	0	No	0
South Africa	0	No	0	No	0	No	0	No	0
Spain	2	Yes	0	No	0	No	0	No	1
Sri Lanka	0	No	0	No	0	No	0	No	0
Sudan	0	No	0	No	0	No	0	No	0
Suriname	2	Yes	5	Yes	0	No	0	No	0
Swaziland	0	No	0	No	0	No	0	No	0
Sweden	4	Yes	8	Yes	0	No	0	No	1
Switzerland	0	No	0	No	0	No	0	No	0
Syrian Arab Republic	0	No	0	No	0	No	0	No	0
Tajikistan	0	No	0	No	0	No	0	No	0
Tanzania	0	No	0	No	0	No	0	No	0
Thailand	1	Yes	3	Yes	1	Yes	0	No	0
Timor-Leste	0	No	0	No	0	No	0	No	0
Togo	0	No	0	No	0	No	0	No	0
Tonga	0	No	0	No	0	No	0	No	0
Trinidad and Tobago	0	No	0	No	0	No	0	No	0
Tunisia	0	No	0	No	0	No	0	No	0
Turkey	3	Yes	2	Yes	0	No	1	Yes	1
Turkmenistan	0	No	0	No	0	No	0	No	0
Tuvalu	0	No	0	No	0	No	0	No	0
Uganda	0	No	0	No	0	No	0	No	0
Ukraine	0	No	0	No	0	No	0	No	0
United Arab Emirates	0	No	0	No	0	No	0	No	0
United Kingdom	9	Yes	10	Yes	1	Yes	0	No	1
United States	0	No	2	Yes	5	Yes	0	No	0
Uruguay	0	No	0	No	0	No	0	No	0
Uzbekistan	0	No	0	No	0	No	0	No	0
Vanuatu	0	No	0	No	0	No	0	No	0
Venezuela	0	No	0	No	0	No	0	No	0
Vietnam	0	No	0	No	0	No	0	No	0
Yemen	0	No	0	No	0	No	0	No	0
Zambia	0	No	0	No	0	No	0	No	0
Zimbabwe	0	No	0	No	0	No	0	No	0

APPENDIX 3

UN DECLARATIONS DATASET

UNRef	UNRef-PV	UNRef-Draft	Date	Year	ColdWar	Title	Type	HR (HR/N
A	B	C	D	E	F	G	I	J
A/RES/217 (III)	A/PV.183	A/777 (USSR Alternat	10-Dec	1948	CW	Universal Declaration of Human Rights	UNGADecl-Uni	HR
A/RES/1386 (XIV)	A/PV.841	A/4249 App.1	20-Nov	1959	CW	Declaration of the Rights of the Child	UNGADecl	HR
A/RES/1514 (XV)	A/PV.947	A/L.323	14-Dec	1960	CW	Declaration on the Granting of Independence to Colonial Countries and Peoples	UNGADecl	HR
A/RES/1653 (XVI)	A/PV.1063	A/4942/ Add.3 [draft	24-Nov	1961	CW	Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons	UNGADecl	Non-HR
A/RES/1837 (XVII)	A/PV.1197	A/5344	18-Dec	1962	CW	Declaration on the conversion to peaceful needs of the resources released by disarmament	UNGADecl	Non-HR
A/RES/1904 (XVIII)	A/PV.1261	A/5603 and Corr.1-2,	20-Nov	1963	CW	United Nations Declaration on the Elimination of All Forms of Racial Discrimination	UNGADecl-UNI	HR
A/RES/1962 (XVIII)	A/PV.1280	A/5515	13-Dec	1963	CW	Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space	UNGADecl	Non-HR
A/RES/2131 (XX)	A/PV.1408	A/6220	21-Dec	1965	CW	Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty	UNGADecl	Non-HR
A/RES/2037 (XX)	A/PV.1390	A/6120	07-Dec	1965	CW	Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples	UNGADecl	Non-HR
A/RES/2263 (XXII)	A/PV.1597	A/6880	07-Nov	1967	CW	Declaration on the Elimination of	UNGADecl	HR
A/RES/2312 (XXII)	A/PV.1631	A/6912	14-Dec	1967	CW	Declaration on Territorial Asylum	UNGADecl	HR
A/RES/2542 (XXIV)	A/PV.1829	A/7833, para 530	11-Dec	1969	CW	Declaration on Social Progress and Development	UNGADecl	Non-HR
A/RES/2734 (XXV)	A/PV.1932	A/8096	16-Dec	1970	CW	Declaration on the Strengthening of International Security	UNGADecl	Non-HR
A/RES/2749 (XXV)	A/PV.1933	A/8097	17-Dec	1970	CW	Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction	UNGADecl	Non-HR
A/RES/2625 (XXV)	A/PV.1883	A/L.600	24-Oct	1970	CW	Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations	UNGADecl	Non-HR
A/RES/2627 (XXV)	A/PV.1883	A/L.600, IV	24-Oct	1970	CW	Declaration on the Occasion of the Twenty-fifth Anniversary of the United Nations	Anniv/Comme	Non-HR
A/RES/2856 (XXVI)	A/PV.2027	A/8588	20-Dec	1971	CW	Declaration on the Rights of Mentally Retarded Persons	UNGADecl	HR
A/RES/2832 (XXVI)	A/PV.2022	A/8584	16-Dec	1971	CW	Declaration of the Indian Ocean as a Zone of Peace	UNGADecl	Non-HR
A/RES/3201 (S-VI)	A/PV.2229	A/9556	01-May	1974	CW	Declaration on the Establishment of a New International Economic Order	UNGADecl	Non-HR
A/RES/3318 (XXIX)	A/PV.2319	A/9948	14-Dec	1974	CW	Declaration on the Protection of Women and Children in Emergency and Armed Conflict	UNGADecl	HR
A/RES/3447 (XXX)	A//PV.2433	A/10284/Add.1	09-Dec	1975	CW	Declaration on the Rights of Disabled Persons	UNGADecl	HR
A/RES/3452 (XXX)	A//PV.2433	A/10408	09-Dec	1975	CW	Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	UNGADecl	HR
A/RES/3384 (XXX)	A/PV.2400	A/10330	10-Nov	1975	CW	Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind	UNGADecl	Non-HR
A/RES/32/105M	A/32/PV.102	A/32/L.32	14-Dec	1977	CW	International Declaration against Apartheid in Sports	IntlDecl	HR
A/RES/32/155	A/32/PV.106	A/32/451	19-Dec	1977	CW	Declaration on the Deepening and Consolidation of International Detente	UNGADecl	Non-HR
A/RES/S-9/2	A/S-9/PV.15	A/S-9/11	03-May	1978	CW	Declaration on Namibia	UNGADecl	HR
A/RES/33/73	A/33/PV.85	A/33/486	15-Dec	1978	CW	Declaration on the Preparation of Societies for Life in Peace	UNGADecl	Non-HR
A/RES/34/93O	A/34/PV.100	A/34/L.36 Rev.1	12-Dec	1979	CW	Declaration on South Africa	UNGADecl	HR

Title	Drafting body	Topic [UNGA]	Stand. or Appx	#DeclPreamb	#DeclActionCla	#DeclArticles
G	K	L	M			R
Universal Declaration of Human Rights	GA3rd	Human Rights	Standalone	7	1	30
Declaration of the Rights of the Child	GA3rd	Children, Human Rights	Standalone	5	1	10
Declaration on the Granting of Independence to Colonial Countries and Peoples	GAPlen/State-led	Human Rights	Standalone	11	1	7
Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons	GA1st	International Security, Nuclear Weapons	Standalone	5	2	4
Declaration on the conversion to peaceful needs of the resources released by disarmament	GA2nd	Disarmament	Standalone	9	9	n/a
United Nations Declaration on the Elimination of All Forms of Racial Discrimination	GA3rd	Human Rights	Standalone	11	3	11
Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space	GA1st	International Law, Outer Space	Standalone	7	1	9
Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty	GA1st	International Security	Standalone	10	1	8
Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples	GA3rd	Peace	Standalone	10	1	6
Declaration on the Elimination of	GA3rd	Human Rights, Women	Standalone	8	1	11
Declaration on Territorial Asylum	GA6th	Human Rights	Appendix	4	1	4
Declaration on Social Progress and Development	GA3rd	Development, Social Development	Standalone	14	1	27
Declaration on the Strengthening of International Security	GA1st	International Security	Standalone	6	27	n/a
Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction	Committee	Environment, Seabed	Standalone	6	1	15
Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations	GAPlen	International Cooperation, International Law	Appendix	18	3	7
Declaration on the Occasion of the Twenty-fifth Anniversary of the United Nations	GAPlen	Anniversaries	Appendix	0	1	12
Declaration on the Rights of Mentally Retarded Persons	GA3rd	Disabled, Human Rights	Standalone	6	1	7
Declaration of the Indian Ocean as a Zone of Peace	GA1st	International Security, Peace	Standalone	6	5	n/a
Declaration on the Establishment of a New International Economic Order	SpecialSession	Economic Development	Appendix	2	1	7
Declaration on the Protection of Women and Children in Emergency and Armed Conflict	GA6th	Armed conflicts, Children, Human Rights, Women	Standalone	9	1	6
Declaration on the Rights of Disabled Persons	GA3rd	Disabled, Human Rights	Standalone	7	1	13
Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	GA3rd	Human Rights, Torture	Appendix	n/a	n/a	12
Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind	GA3rd	Peace	Standalone	9	1	9
International Declaration against Apartheid in Sports	Committee	Africa, Apartheid, Human Rights	Appendix	22	1	18
Declaration on the Deepening and Consolidation of International Detente	GA1st	International Security	Appendix	13	1	10
Declaration on Namibia	SpecialSession	Africa, Apartheid, Human Rights	Standalone	7	1	45
Declaration on the Preparation of Societies for Life in Peace	GA1st	International Security, Peace	Standalone	13	5	8
Declaration on South Africa	Committee	Africa, Apartheid, Human Rights	Appendix	n/a	n/a	7

Title	#DeclTotal	LabelProvisions	Conser	In fav	Again	Abste	Total	Non-v	Total	Total#EoVs	EoV befo	EoV afte	Group EoV
G	S	T	U	V	W	X	Y	Z	AA	AB	AC	AD	AE
Universal Declaration of Human Rights	38	"Articles"	No	48	0	8	56	2	58	33	33	0	0
Declaration of the Rights of the Child	16	"Principles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on the Granting of Independence to Colonial Countries and Peoples	19	Numbers	No	89	0	9	98	1	99	17	0	17	0
Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons	11	Letters	No	55	20	26	101	2	103	10	9	1	0
Declaration on the conversion to peaceful needs of the resources released by disarmament	18	n/a	Yes	n/a	n/a	n/a	n/a	n/a	n/a	1	0	1	0
United Nations Declaration on the Elimination of All Forms of Racial Discrimination	25	"Articles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	30	0	30	5
Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space	17	"Principles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty	19	Numbers	No	109	0	1	110	7	117	14	5	9	0
Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples	17	"Principles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	5	0	5	0
Declaration on the Elimination of	20	"Articles"	No	111	0	0	111	11	122	16	6	10	0
Declaration on Territorial Asylum	12	"Articles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	7	0	7	5
Declaration on Social Progress and Development	42	"Articles"	No	119	0	2	121	5	126	11	6	5	0
Declaration on the Strengthening of International Security	33	Numbers	No	120	1	1	122	5	127	10	9	1	0
Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction	22	Numbers	No	108	0	14	122	5	127	4	0	4	0
Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations	36	"Principles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on the Occasion of the Twenty-fifth Anniversary of the United Nations	14	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on the Rights of Mentally Retarded Persons	14	Numbers	No	110	0	9	119	13	132	0	0	0	0
Declaration of the Indian Ocean as a Zone of Peace	11	Numbers	No	61	0	55	116	16	132	0	0	0	0
Declaration on the Establishment of a New International Economic Order	11	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	47	0	47	9
Declaration on the Protection of Women and Children in Emergency and Armed Conflict	16	Numbers	No	110	0	14	124	14	138	0	0	0	0
Declaration on the Rights of Disabled Persons	21	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	17	"Articles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind	19	Numbers	No	97	0	20	117	25	142	0	0	0	0
International Declaration against Apartheid in Sports	49	"Articles"	No	125	0	14	139	10	149	27	15	12	14
Declaration on the Deepening and Consolidation of International Detente	25	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	5	0	5	0
Declaration on Namibia	53	Numbers	No	119	0	21	140	9	149	n/a	n/a	n/a	n/a
Declaration on the Preparation of Societies for Life in Peace	26	"Principles"	No	139	0	2	141	9	150	4	0	4	0
Declaration on South Africa	19	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	7	2	5	0

Title	#ofgroupsal EoVInt		Eov-Praise	Interpreta	v-Reservati
G	AF	AG	AH	AI	AJ
Universal Declaration of Human Rights			72	15	8
Declaration of the Rights of the Child			n/a	n/a	n/a
Declaration on the Granting of Independence to Colonial Countries and Peoples			22	19	2
Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons					
Declaration on the conversion to peaceful needs of the resources released by disarmament					
United Nations Declaration on the Elimination of All Forms of Racial Discrimination	1		51	9	12
Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space					
Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty					
Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples					
Declaration on the Elimination of			29	6	2
Declaration on Territorial Asylum			9	8	0
Declaration on Social Progress and Development					
Declaration on the Strengthening of International Security					
Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction					
Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations					
Declaration on the Occasion of the Twenty-fifth Anniversary of the United Nations					
Declaration on the Rights of Mentally Retarded Persons			n/a	n/a	n/a
Declaration of the Indian Ocean as a Zone of Peace					
Declaration on the Establishment of a New International Economic Order					
Declaration on the Protection of Women and Children in Emergency and Armed Conflict			n/a	n/a	n/a
Declaration on the Rights of Disabled Persons			n/a	n/a	n/a
Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment			n/a	n/a	n/a
Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind					
International Declaration against Apartheid in Sports	2		1	8	1
Declaration on the Deepening and Consolidation of International Detente					
Declaration on Namibia			n/a	n/a	n/a
Declaration on the Preparation of Societies for Life in Peace					
Declaration on South Africa			0	5	4

UNRef	UNRef-PV	UNRef-Draft	Date	Year	ColdWar	Title	Type	HR (HR/N
A	B	C	D	E	F	G	I	J
A/RES/34/88	A/34/PV.97	A/34/756 para 6	11-Dec	1979	CW	Declaration on International Cooperation for Disarmament	UNGADecl	Non-HR
A/RES/35/46	A/35/PV.79	A/35/664	03-Dec	1980	CW	Declaration of the 1980s as the Second Disarmament Decade	NamingDecl	Non-HR
A/RES/36/55	A/36/PV.73	A/36/684	25-Nov	1981	CW	Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief	UNGADecl	HR
A/RES/36/103	A/36/PV.91	A/36/761	09-Dec	1981	CW	Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States	UNGADecl	Non-HR
A/RES/36/100	A/36/PV.91	A/36/759, para 10	09-Dec	1981	CW	Declaration on the Prevention of Nuclear Catastrophe	UNGADecl	Non-HR
A/RES/37/10	A/37/PV.68	A/37/590 para 10	15-Nov	1982	CW	Manila Declaration on the Peaceful Settlement of International Disputes	PlaceDeclConf	Non-HR
A/RES/37/63	A/37/PV.90	A/37/676	03-Dec	1982	CW	Declaration on the Participation of Women in Promoting International Peace and Cooperation	UNGADecl	HR
A/RES/39/29	A/39/PV.83	A/39/L.22	03-Dec	1984	CW	Declaration on the Critical Economic Situation in Africa	UNGADecl	Non-HR
A/RES/39/11	A/39/PV.57	A/39/L/14	12-Nov	1984	CW	Declaration on the Right of Peoples to Peace	UNGADecl	HR
A/RES/39/142	A/39/PV.101	A/39/710	14-Dec	1984	CW	Declaration on the Control of Drug Trafficking and Drug Abuse	UNGADecl	Non-HR
A/RES/40/144	A/40/PV.116	A/40/1007	13-Dec	1985	CW	Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live	UNGADecl	HR
A/RES/40/34	A/40/PV.96	A/40/881	29-Nov	1985	CW	Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power	UNGADecl	HR
A/RES/41/128	A/41/PV.97	A/41/925	04-Dec	1986	CW	Declaration on the Right to Development	UNGADecl	HR
A/RES/41/85	A/41/PV.95	A/41/898, para6	03-Dec	1986	CW	Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally	UNGADecl	HR
A/RES/42/22	A/42/PV.73	A/42/766	18-Nov	1987	CW	Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations	UNGADecl	Non-HR
A/RES/43/51	A/43/PV.68	A/43/886	05-Dec	1988	CW	Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field	UNGADecl	Non-HR
A/RES/S-16/1	A/S-16/PV.6	A/S-16/4	14-Dec	1989	CW	Declaration on Apartheid and Its Destructive Consequences in Southern Africa	UNGADecl	HR
A/RES/S-18/3	A/S-18/PV.11	A/S-8/14	01-May	1990	CW	Declaration on International Economic Cooperation, in Particular the Revitalization of Economic Growth and Development of the Developing Countries	UNGADecl	Non-HR
A/RES/45/62	A/45/PV.54		04-Dec	1990	CW	Declaration of the 1990s as the Third Disarmament Decade	NamingDecl	Non-HR
A/RES/46/59	A/46/PV.67	A/46/690	09-Dec	1991	CW	Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security	UNGADecl	Non-HR
A/RES/47/133	A/47/PV.92	A/47/678/ADD.2	18-Dec	1992	PostCW	Declaration on the Protection of All Persons from Enforced Disappearance	UNGADecl	HR
A/RES/47/135	A/47/PV.92	A/47/678/ADD.2	18-Dec	1992	PostCW	Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities	UNGADecl	HR
A/RES/47/5	A/47/PV.42	A/47/L.5/Rev.1	16-Oct	1992	PostCW	Proclamation on Ageing	Proclamation	Non-HR
A/RES/48/104	A/48/PV.85	A/48/629	20-Dec	1993	PostCW	Declaration on the Elimination of Violence against Women	UNGADecl	HR
A/RES/49/60	A/49/PV.84	A/49/743	09-Dec	1994	PostCW	Declaration on Measures to Eliminate International Terrorism	UNGADecl	Non-HR

Title	Drafting body	Topic [UNGA]	Stand. or Appx	#DeclPreamb	#DeclActionCla	#DeclArticles
G	K	L	M			R
Declaration on International Cooperation for Disarmament	GA1st	Disarmament, International Cooperation	Standalone	14	5	18
Declaration of the 1980s as the Second Disarmament Decade	GA1st	Disarmament	Appendix	n/a	n/a	25
Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief	GA3rd	Human Rights	Standalone	9	1	8
Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States	GA1st	International Security	Appendix	9	1	6
Declaration on the Prevention of Nuclear Catastrophe	GA1st	International Security, Nuclear Weapons	Standalone	4	1	5
Manila Declaration on the Peaceful Settlement of International Disputes	Committee	Dispute Settlement, International Security	Appendix	11	5	19
Declaration on the Participation of Women in Promoting International Peace and Cooperation	GA3rd	Human Rights, Peace, Women	Appendix	n/a	n/a	14
Declaration on the Critical Economic Situation in Africa	GAPlen/State-led	Africa, Economic Development	Appendix	n/a	n/a	27
Declaration on the Right of Peoples to Peace	GAPlen/State-led	Human Rights, Peace	Appendix	6	4	0
Declaration on the Control of Drug Trafficking and Drug Abuse	GA3rd	Crime, Narcotic Drugs	Appendix	7	1	5
Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live	GA3rd	Human Rights	Appendix	7	1	10
Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power	GA3rd	Administration of Justice, Crime, Human Rights	Appendix	n/a	n/a	21
Declaration on the Right to Development	GA3rd	Development, Human Rights	Appendix	16	1	10
Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally	GA3rd, GA6th	Children, Human Rights	Appendix	9	1	24
Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations	Committee, GA6th	International Security	Appendix	21	4	33
Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field	GA6th, Committee	Dispute Settlement, International Security, Peace	Appendix	12	3	25
Declaration on Apartheid and Its Destructive Consequences in Southern Africa	SpecialSession	Africa, Apartheid, Human Rights	Appendix	16	1	10
Declaration on International Economic Cooperation, in Particular the Revitalization of Economic Growth and Development of the Developing Countries	Committee	Developing Countries, Economic Development	Appendix	n/a	1	38
Declaration of the 1990s as the Third Disarmament Decade	GA1st	Disarmament	Appendix	n/a	n/a	7
Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security	GA6th, Committee	International Security, Peace	Appendix	8	1	31
Declaration on the Protection of All Persons from Enforced Disappearance	GA3rd	Human Rights	Standalone	11	2	21
Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities	GA3rd	Human Rights, Minorities	Appendix	10	1	9
Proclamation on Ageing	GAPlen/Conference	Ageing	Appendix	14	3	27
Declaration on the Elimination of Violence against Women	GA3rd	Human Rights, Women	Standalone	12	1	6
Declaration on Measures to Eliminate International Terrorism	GA6th	Terrorism	Appendix	14	1	12

Title	#DeclTotal	LabelProvisions	Conser	In fav	Again	Abste	Total	Non-v	Total	Total#EoVs	EoV befo	EoV afte	Group EoV
G	S	T	U	V	W	X	Y	Z	AA	AB	AC	AD	AE
Declaration on International Cooperation for Disarmament	37	Letters	No	116	0	27	143	9	152	3	0	3	0
Declaration of the 1980s as the Second Disarmament Decade	28	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief	18	"Articles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	13	0	13	10
Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States	26	Numbers	No	120	22	6	148	9	157	3	1	2	0
Declaration on the Prevention of Nuclear Catastrophe	10	Numbers	No	82	19	41	142	15	157	3	0	3	0
Manila Declaration on the Peaceful Settlement of International Disputes	45	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	20	0	20	11
Declaration on the Participation of Women in Promoting International Peace and Cooperation	28	"Articles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on the Critical Economic Situation in Africa	38	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	31	0	31	24
Declaration on the Right of Peoples to Peace	14	OpClauses	No	92	0	34	126	33	159	12	11	1	10
Declaration on the Control of Drug Trafficking and Drug Abuse	16	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live	20	"Articles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	4	4	4	0
Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power	33	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on the Right to Development	29	"Articles"	No	146	1	8	155	4	159	7	2	5	4
Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally	38	"Articles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations	66	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	3	0	3	0
Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field	48	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on Apartheid and Its Destructive Consequences in Southern Africa	28	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Declaration on International Economic Cooperation, in Particular the Revitalization of Economic Growth and Development of the Developing Countries	40	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	28	1	27	18
Declaration of the 1990s as the Third Disarmament Decade	21	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security	49	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	14	0	14	14
Declaration on the Protection of All Persons from Enforced Disappearance	34	"Articles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	1	1	0	0
Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities	36	"Articles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Proclamation on Ageing	46	Letters	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on the Elimination of Violence against Women	19	"Articles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	4	0	4	0
Declaration on Measures to Eliminate International Terrorism	37	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	22	0	22	18

Title	#ofgroups	al EoVInt	Eov-Praise	Interpreta	v-Reservati
G	AF	AG	AH	AI	AJ
Declaration on International Cooperation for Disarmament					
Declaration of the 1980s as the Second Disarmament Decade					
Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief			5	3	2
Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States					
Declaration on the Prevention of Nuclear Catastrophe					
Manila Declaration on the Peaceful Settlement of International Disputes	2				
Declaration on the Participation of Women in Promoting International Peace and Cooperation			n/a	n/a	n/a
Declaration on the Critical Economic Situation in Africa	3				
Declaration on the Right of Peoples to Peace			0	0	1
Declaration on the Control of Drug Trafficking and Drug Abuse					
Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live			2	4	2
Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power			n/a	n/a	n/a
Declaration on the Right to Development			5	18	17
Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally			n/a	n/a	n/a
Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations					
Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field					
Declaration on Apartheid and Its Destructive Consequences in Southern Africa			n/a	n/a	n/a
Declaration on International Economic Cooperation, in Particular the Revitalization of Economic Growth and Development of the Developing Countries	3				
Declaration of the 1990s as the Third Disarmament Decade					
Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security					
Declaration on the Protection of All Persons from Enforced Disappearance			0	0	0
Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities			n/a	n/a	n/a
Proclamation on Ageing					
Declaration on the Elimination of Violence against Women			6	0	0
Declaration on Measures to Eliminate International Terrorism					

UNRef	UNRef-PV	UNRef-Draft	Date	Year	ColdWar	Title	Type	HR (HR/N
A	B	C	D	E	F	G	I	J
A/RES/49/57	A/49/PV.84	A/49/741, para 17	09-Dec	1994	PostCW	Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security	UNGADecl	Non-HR
A/RES/50/5	A/50/PV.33	A/50/L.3	18-Oct	1995	PostCW	Declaration in Commemoration of the Fiftieth Anniversary of the End of the Second World War	Anniv/Commer	Non-HR
A/RES/50/6	A/50/PV.40	n/a	24-Oct	1995	PostCW	Declaration on the Occasion of the Fiftieth Anniversary of the United Nations	Anniv/Commer	Non-HR
A/RES/51/191	A/51/PV.86	A/51/601, para 24	16-Dec	1996	PostCW	United Nations Declaration against Corruption and Bribery in International Commercial Transactions	UNGADecl-UNI	Non-HR
A/RES/51/210	A/51/PV.88	A/51/631, para 11	17-Dec	1996	PostCW	Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism	UNGADecl	Non-HR
A/RES/51/60	A/51/PV.82	A/51/610	12-Dec	1996	PostCW	United Nations Declaration on Crime and Public Security	UNGADecl-UNI	Non-HR
A/RES/51/122	A/51/PV.83	A/51/590, para 13	13-Dec	1996	PostCW	Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of all States, Taking into Particular Account the Needs of Developing Countries	UNGADecl	Non-HR
A/RES/53/144	A/53/PV.85	A/53/625/Add.2	09-Dec	1998	PostCW	Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms	UNGADecl	HR
A/RES/S-20/2	A/S-20/PV.9	A/S-20/11, para 23	10-Jun	1998	PostCW	Political Declaration	PolDecl	Non-HR
A/RES/S-20/3	A/S-20/PV.9	A/S-20/11, para 23	10-Jun	1998	PostCW	Declaration on the Guiding Principles of Drug Demand Reduction	UNGADecl	Non-HR
A/RES/53/2	A/53/PV.29	A/53/L.5	06-Oct	1998	PostCW	Declaration on the Occasion of the Fiftieth Anniversary of United Nations Peacekeeping	Anniv/Commer	Non-HR
A/RES/53/243	A/53/PV.107	A/53/L.79	13-Sep	1999	PostCW	Declaration and Programme of Action on a Culture of Peace	UNGADecl	Non-HR
A/RES/S-22/2	A/S-22/PV.5	A/S-22/9	28-Sep	1999	PostCW	Declaration and State of Progress and Initiatives for the Future Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States	UNGADecl	Non-HR
A/RES/S-23/2	A/S-23/PV.10	A/S-23/10/Rev.1	10-Jun	2000	PostCW	Political declaration	PolDecl	HR
A/RES/55/2	A/55/PV.8	A/55/L.2	08-Sep	2000	PostCW	United Nations Millennium Declaration	UNGADecl-UNI	HR
A/RES/55/59	A/55/PV.81	A/55/593	04-Dec	2000	PostCW	Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century	PlaceDeclConf	Non-HR
A/RES/55/153	A/55/PV.84	A/55/610, para 7	12-Dec	2000	PostCW	Nationality of Natural Persons in Relation to the Succession of States	UNGADecl*	Non-HR
A/RES/S-25/2	A/S-25/PV.6	A/S-25/AC.1/L.2	09-Jun	2001	PostCW	Declaration on Cities and Other Human Settlements in the New Millennium	UNGADecl	Non-HR
A/RES/S-26/2	A/S-26/PV.8	A/S-26/L.2	27-Jun	2001	PostCW	Declaration of Commitment on HIV/AIDS	UNGADecl	Non-HR
A/RES/S-27/2	A/S-27/PV.6	A/S-27/L.1	10-May	2002	PostCW	A world fit for children	UNGADecl	Non-HR
A/RES/57/2	A/57/PV.11	A/57/L.2/Rev.1	16-Sep	2002	PostCW	United Nations Declaration on the New Partnership for Africa's Development	UNGADecl-UNI	Non-HR
A/RES/59/280	A/59/PV.82	A/59/516/Add.1	08-Mar	2005	PostCW	United Nations Declaration on Human Cloning	UNGADecl-UNI	Non-HR

Title	Drafting body	Topic [UNGA]	Stand. or Appx	#DeclPreamb	#DeclActionCla	#DeclArticles
G	K	L	M			R
Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security	GA6th, Committee	International Cooperation, International Security, Peace	Appendix	13	1	12
Declaration in Commemoration of the Fiftieth Anniversary of the End of the Second World War	Committee	Anniversaries	Appendix	n/a	n/a	6
Declaration on the Occasion of the Fiftieth Anniversary of the United Nations	GAPlen/State-led	Anniversaries	Appendix	n/a	n/a	17
United Nations Declaration against Corruption and Bribery in International Commercial Transactions	GA2nd	Corruption, International Trade	Appendix	3	1	12
Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism	GA6th	Terrorism	Appendix	9	1	8
United Nations Declaration on Crime and Public Security	GA3rd	Crime	Appendix	1	1	11
Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of all States, Taking into Particular Account the Needs of Developing Countries	Committee, GA4th	Developing Countries, International Cooperation, Outer Space	Appendix	n/a	n/a	8
Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms	GA3rd	Human Rights	Appendix	8	1	20
Political Declaration	SpecialSession	Narcotic Drugs	Appendix	1	20	0
Declaration on the Guiding Principles of Drug Demand Reduction	SpecialSession	Narcotic Drugs	Appendix	n/a	n/a	20
Declaration on the Occasion of the Fiftieth Anniversary of United Nations Peacekeeping	GAPlen/State-led	Anniversaries, International Security	Appendix	n/a	n/a	n/a
Declaration and Programme of Action on a Culture of Peace	GAPlen/State-led	Culture, Peace	Standalone	9	1	9
Declaration and State of Progress and Initiatives for the Future Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States	SpecialSession	Developing Countries, Sustainable Development	Appendix	11	9	47
Political declaration	Committee	Human Rights, Women	Appendix	0	10	0
United Nations Millennium Declaration	SpecialSession	Anniversaries, Africa, Development, Disarmament, Economic Development, Environment, Health, Human Rights, International Security, Peace, Social Development, Sustainable Development	Standalone	0	1	32
Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century	GA3rd	Crime	Appendix	6	1	29
Nationality of Natural Persons in Relation to the Succession of States	GA6th	International Law	Appendix	8	0	26
Declaration on Cities and Other Human Settlements in the New Millennium	SpecialSession	Economic Development	Appendix	1	68	0
Declaration of Commitment on HIV/AIDS	SpecialSession	AIDS, Health	Appendix	35	1	66
A world fit for children	SpecialSession	Children	Appendix	n/a	n/a	62
United Nations Declaration on the New Partnership for Africa's Development	SpecialSession	Africa, Sustainable Development	Appendix	n/a	n/a	7
United Nations Declaration on Human Cloning	GA6th, ECOSOC	Cloning	Appendix	8	1	6

Title	#DeclTotal	LabelProvisions	Conser	In fav	Again	Abste	Total	Non-v	Total	Total#EoVs	EoV befo	EoV afte	Group EoV
G	S	T	U	V	W	X	Y	Z	AA	AB	AC	AD	AE
Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security	35	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration in Commemoration of the Fiftieth Anniversary of the End of the Second World War	9	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	1	1	0	0
Declaration on the Occasion of the Fiftieth Anniversary of the United Nations	18	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
United Nations Declaration against Corruption and Bribery in International Commercial Transactions	32	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	18	0	18	15
Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism	47	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	5	2	3	0
United Nations Declaration on Crime and Public Security	19	"Articles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of all States, Taking into Particular Account the Needs of Developing Countries	18	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms	35	"Articles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	27	27	0	27
Political Declaration	22	OpClauses	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on the Guiding Principles of Drug Demand Reduction	21	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on the Occasion of the Fiftieth Anniversary of United Nations Peacekeeping	1	Text	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration and Programme of Action on a Culture of Peace	19	"Articles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration and State of Progress and Initiatives for the Future Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States	68	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Political declaration	11	OpClauses	Yes	n/a	n/a	n/a	n/a	n/a	n/a	99	44	55	64
United Nations Millennium Declaration	33	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century	38	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Nationality of Natural Persons in Relation to the Succession of States	44	"Articles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on Cities and Other Human Settlements in the New Millennium	70	OpClauses	Yes	n/a	n/a	n/a	n/a	n/a	n/a	4	0	4	0
Declaration of Commitment on HIV/AIDS	103	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	1	0	1	0
A world fit for children	63	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	25	0	25	15
United Nations Declaration on the New Partnership for Africa's Development	8	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
United Nations Declaration on Human Cloning	17	Letters	No	84	34	37	155	36	191	25	0	25	0

Title	#ofgroups	al EoVInt	Eov-Praise	Interpreta	v-Reservati
G	AF	AG	AH	AI	AJ
Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security					
Declaration in Commemoration of the Fiftieth Anniversary of the End of the Second World War					
Declaration on the Occasion of the Fiftieth Anniversary of the United Nations					
United Nations Declaration against Corruption and Bribery in International Commercial Transactions					
Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism					
United Nations Declaration on Crime and Public Security					
Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of all States, Taking into Particular Account the Needs of Developing Countries					
Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms	1		0	208	78
Political Declaration					
Declaration on the Guiding Principles of Drug Demand Reduction					
Declaration on the Occasion of the Fiftieth Anniversary of United Nations Peacekeeping					
Declaration and Programme of Action on a Culture of Peace					
Declaration and State of Progress and Initiatives for the Future Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States					
Political declaration		#REF!	269	79	27
United Nations Millennium Declaration			n/a	n/a	n/a
Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century					
Nationality of Natural Persons in Relation to the Succession of States					
Declaration on Cities and Other Human Settlements in the New Millennium					
Declaration of Commitment on HIV/AIDS					
A world fit for children					
United Nations Declaration on the New Partnership for Africa's Development					
United Nations Declaration on Human Cloning					

UNRef	UNRef-PV	UNRef-Draft	Date	Year	ColdWar	Title	Type	HR (HR/N
A	B	C	D	E	F	G	I	J
A/RES/60/1	A/60/PV.8	A/60/L.1	16-Sep	2005	PostCW	2005 World Summit Outcome	UNGAConfOut	HR
A/RES/60/262	A/60/PV.87	A/60/L.57	02-Jun	2006	PostCW	Political Declaration on HIV/AIDS	PolDecl	Non-HR
A/RES/61/1	A/61/PV.9	A/61/L.2	19-Sep	2006	PostCW	Declaration of the high-level meeting of the sixty-first session of the General Assembly on the midterm comprehensive global review of the implementation of the Programme of Action for the Least Developed Countries for the Decade 2001-2010	UNGAConfOut	Non-HR
A/RES/61/295	A/61/PV.107	A/61/L.67	13-Sep	2007	PostCW	United Nations Declaration on the Rights of Indigenous Peoples	UNGADecl-UNI	HR
A/RES/62/88	A/62/PV.73	A/62/L.31	13-Dec	2007	PostCW	Declaration of the commemorative high-level plenary meeting devoted to the follow-up to the outcome of the special session on children	Anniv/Commer	HR
A/RES/63/116	A/63/PV.65	A/63/L.54	10-Dec	2008	PostCW	Declaration on the Sixtieth anniversary of the Universal Declaration of Human Rights	Anniv/Commer	HR
A/RES/63/1	A/63/PV.4	A/63/L.1	22-Sep	2008	PostCW	Political declaration on Africa's development needs	PolDecl	Non-HR
A/RES/63/2	A/63/PV.19	A/63/L.3*	03-Oct	2008	PostCW	Declaration of the high-level meeting of the sixty-third session of the General Assembly on the midterm review of the Almaty Programme of Action	UNGAConfOut	Non-HR
A/RES/63/239	A/63/PV.74	A/63/L.57	24-Dec	2008	PostCW	Doha Declaration on Financing for Development: outcome document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus	PlaceDecl-Conf	Non-HR
A/RES/63/303	A/63/PV.95	A/63/L.75	09-Jul	2009	PostCW	Outcome of the Conference on the World Financial and Economic Crisis and Its Impact on Development	UNGAConfOut	Non-HR
A/RES/66/137	A/66/PV.89	A/66/457	19-Dec	2011	PostCW	United Nations Declaration on Human Rights Education and Training	UNGADecl-UNI	HR
A/RES/66/3	A/66/PV.14	A/66/L.2	22-Sep	2011	PostCW	United against racism, racial discrimination, xenophobia and related intolerance (subtitle: Political declaration of the high-level meeting of the General Assembly to commemorate the tenth anniversary of the adoption of the Durban Declaration and Programme of Action)	PolDecl-ConfO	HR
A/RES/66/2	A/66/PV.3	A/66/L.1	19-Sep	2011	PostCW	Political Declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases	PolDecl-ConfO	Non-HR
A/RES/66/71	A/66/PV.81	A/66/425, para 11	09-Dec	2011	PostCW	Declaration on the Fiftieth Anniversary of Human Space Flight and the Fiftieth Anniversary of the Committee on the Peaceful Uses of Outer Space	Anniv/Commer	Non-HR
A/RES/67/1	A/67/PV.3	A/67/L.1	24-Sep	2012	PostCW	Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels	UNGAConfOut	Non-HR
A/RES/68/4	A/68/PV.25	A/68/L.5	03-Oct	2013	PostCW	Declaration of the High-level Dialogue on International Migration and Development	UNGAConfOut	Non-HR
A/RES/68/196	A/68/PV.70	A/68/458	18-Dec	2013	PostCW	Lima Declaration on Alternative Development / United Nations Guiding Principles on Alternative Development	PlaceDecl-Conf	Non-HR

Title	Drafting body	Topic [UNGA]	Stand. or Appx	#DeclPreamb	#DeclActionCla	#DeclArticles
G	K	L	M			R
2005 World Summit Outcome	SpecialSession	Anniversaries, Development, Economic Development, Environment, Health, Human Rights, International Security, Peace, Social Development, Sustainable Development	Standalone	0	1	178
Political Declaration on HIV/AIDS	SpecialSession	AIDS, Health	Appendix	n/a	n/a	53
Declaration of the high-level meeting of the sixty-first session of the General Assembly on the midterm comprehensive global review of the implementation of the Programme of Action for the Least Developed Countries for the Decade 2001-2010	SpecialSession	Developing Countries	Standalone	2	1	13
United Nations Declaration on the Rights of Indigenous Peoples	HRC, GA 3rd	Human Rights, Minorities	Appendix	23	1	46
Declaration of the commemorative high-level plenary meeting devoted to the follow-up to the outcome of the special session on children	SpecialSession	Children	Standalone	0	1	6
Declaration on the Sixtieth anniversary of the Universal Declaration of Human Rights	GAPlen	Human Rights	Standalone	0	0	6
Political declaration on Africa's development needs	SpecialSession	Africa, Development, Economic Development	Standalone	1	1	39
Declaration of the high-level meeting of the sixty-third session of the General Assembly on the midterm review of the Almaty Programme of Action	SpecialSession	Developing Countries, Development, Economic Development	Standalone	11	32	0
Doha Declaration on Financing for Development: outcome document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus	GA2nd-WithoutRef	Development	Appendix	n/a	n/a	90
Outcome of the Conference on the World Financial and Economic Crisis and Its Impact on Development	SpecialSession	Developing Countries, Development, Economic Development	Appendix	0	0	59
United Nations Declaration on Human Rights Education and Training	GA3rd	Human Rights	Appendix	8	1	14
United against racism, racial discrimination, xenophobia and related intolerance (subtitle: Political declaration of the high-level meeting of the General Assembly to commemorate the tenth anniversary of the adoption of the Durban Declaration and Programme of Action)	SpecialSession	Human Rights	Standalone	1	12	0
Political Declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases	SpecialSession	Health	Appendix	0	65	0
Declaration on the Fiftieth Anniversary of Human Space Flight and the Fiftieth Anniversary of the Committee on the Peaceful Uses of Outer Space	GA4th, Committee	Anniversaries, Outer Space	Appendix	0	16	0
Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels	SpecialSession	n/a	Standalone	1	0	42
Declaration of the High-level Dialogue on International Migration and Development	SpecialSession	Development	Standalone	0	34	0
Lima Declaration on Alternative Development / United Nations Guiding Principles on Alternative Development	GA3rd	Development	Appendix	11	4	18

Title	#DeclTotal	LabelProvisions	Consen	In fav	Again	Abste	Total	Non-v	Total	Total#EoVs	EoV befo	EoV afte	Group EoV
G	S	T	U	V	W	X	Y	Z	AA	AB	AC	AD	AE
2005 World Summit Outcome	179	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	4	1	3	0
Political Declaration on HIV/AIDS	54	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	1	0	1	0
Declaration of the high-level meeting of the sixty-first session of the General Assembly on the midterm comprehensive global review of the implementation of the Programme of Action for the Least Developed Countries for the Decade 2001-2010	16	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
United Nations Declaration on the Rights of Indigenous Peoples	73	"Articles"	No	143	4	11	158	34	192	78	7	69	35
Declaration of the commemorative high-level plenary meeting devoted to the follow-up to the outcome of the special session on children	7	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	1	0	1	0
Declaration on the Sixtieth anniversary of the Universal Declaration of Human Rights	7	Paragraphs	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Political declaration on Africa's development needs	41	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration of the high-level meeting of the sixty-third session of the General Assembly on the midterm review of the Almaty Programme of Action	45	OpClauses	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Doha Declaration on Financing for Development: outcome document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus	93	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Outcome of the Conference on the World Financial and Economic Crisis and Its Impact on Development	61	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	2	0	2	0
United Nations Declaration on Human Rights Education and Training	26	"Articles"	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
United against racism, racial discrimination, xenophobia and related intolerance (subtitle: Political declaration of the high-level meeting of the General Assembly to commemorate the tenth anniversary of the adoption of the Durban Declaration and Programme of Action)	14	OpClauses	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Political Declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases	66	OpClauses	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on the Fiftieth Anniversary of Human Space Flight and the Fiftieth Anniversary of the Committee on the Peaceful Uses of Outer Space	65	OpClauses	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels	44	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration of the High-level Dialogue on International Migration and Development	35	OpClauses	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Lima Declaration on Alternative Development / United Nations Guiding Principles on Alternative Development	46	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0

Title	#ofgroups	al EoVInt	Eov-Praise	Interpreta	v-Reservati
G	AF	AG	AH	AI	AJ
2005 World Summit Outcome			3	2	2
Political Declaration on HIV/AIDS					
Declaration of the high-level meeting of the sixty-first session of the General Assembly on the midterm comprehensive global review of the implementation of the Programme of Action for the Least Developed Countries for the Decade 2001-2010					
United Nations Declaration on the Rights of Indigenous Peoples	1	#REF!	150	87	4
Declaration of the commemorative high-level plenary meeting devoted to the follow-up to the outcome of the special session on children			1	1	0
Declaration on the Sixtieth anniversary of the Universal Declaration of Human Rights			n/a	n/a	n/a
Political declaration on Africa's development needs					
Declaration of the high-level meeting of the sixty-third session of the General Assembly on the midterm review of the Almaty Programme of Action					
Doha Declaration on Financing for Development: outcome document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus					
Outcome of the Conference on the World Financial and Economic Crisis and Its Impact on Development					
United Nations Declaration on Human Rights Education and Training			n/a	n/a	n/a
United against racism, racial discrimination, xenophobia and related intolerance (subtitle: Political declaration of the high-level meeting of the General Assembly to commemorate the tenth anniversary of the adoption of the Durban Declaration and Programme of Action)			n/a	n/a	n/a
Political Declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases					
Declaration on the Fiftieth Anniversary of Human Space Flight and the Fiftieth Anniversary of the Committee on the Peaceful Uses of Outer Space					
Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels					
Declaration of the High-level Dialogue on International Migration and Development					
Lima Declaration on Alternative Development / United Nations Guiding Principles on Alternative Development					

UNRef	UNRef-PV	UNRef-Draft	Date	Year	ColdWar	Title	Type	HR (HR/N
A	B	C	D	E	F	G	I	J
A/RES/69/283	A/69/PV.92	A/69/L.67	03-Jun	2015	PostCW	Sendai Declaration (adopted as part of the Sendai Declaration for Disaster Risk Reduction 2015-2030)	PlaceDecl-Conf	Non-HR
A/RES/69/277	A/69/PV.86	A/69/L.60	05-May	2015	PostCW	Political Declaration on strengthening cooperation between the United Nations and regional and subregional organizations	PolDecl	Non-HR
A/RES/70/3	A/70/PV.38	A/70/L.4	23-Oct	2015	PostCW	Declaration on the occasion of the seventieth anniversary of the United Nations	Anniv/Commer	Non-HR
A/RES/70/174	A/70/PV.80	A/70/490, para 35	17-Dec	2015	PostCW	Doha Declaration on Integrating Crime Prevention and Criminal Justice	PlaceDecl-Conf	Non-HR
A/RES/70/57	A/70/PV.67	A/70/460, draft XXX	07-Dec	2015	PostCW	Universal Declaration on the Achievement of a Nuclear Weapon-Free World	UNGADecl-Uni	Non-HR

Title	Drafting body	Topic [UNGA]	Stand. or Appx	#DeclPreamb	#DeclActionCla	#DeclArticles
G	K	L	M			R
Sendai Declaration (adopted as part of the Sendai Declaration for Disaster Risk Reduction 2015-2030)	GAPlen/Conference	n/a	Appendix	0	0	4
Political Declaration on strengthening cooperation between the United Nations and regional and subregional organizations	GAPlen	International Cooperation	Standalone	0	13	0
Declaration on the occasion of the seventieth anniversary of the United Nations	GAPlen	Anniversaries, International Cooperation	Standalone	0	1	8
Doha Declaration on Integrating Crime Prevention and Criminal Justice	GA3rd	Crime	Appendix	1	1	14
Universal Declaration on the Achievement of a Nuclear Weapon-Free World	GA1st	Disarmament, Nuclear weapons	Appendix	0	0	19

Title	#DeclTotal	LabelProvisions	Conser	In fav	Again	Abste	Total	Non-v	Total	Total#EoVs	EoV befor	EoV afte	Group EoV
G	S	T	U	V	W	X	Y	Z	AA	AB	AC	AD	AE
Sendai Declaration (adopted as part of the Sendai Declaration for Disaster Risk Reduction 2015-2030)	7	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	5	0	5	0
Political Declaration on strengthening cooperation between the United Nations and regional and subregional organizations	16	OpClauses	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Declaration on the occasion of the seventieth anniversary of the United Nations	9	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Doha Declaration on Integrating Crime Prevention and Criminal Justice	45	Numbers	Yes	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0	0
Universal Declaration on the Achievement of a Nuclear Weapon-Free World	30	Numbers	No	133	23	28	184	9	193	0	0	0	0

Title	#ofgroups	al EoVInt	Eov-Praise	Interpreta	v-Reservati
G	AF	AG	AH	AI	AJ
Sendai Declaration (adopted as part of the Sendai Declaration for Disaster Risk Reduction 2015-2030)					
Political Declaration on strengthening cooperation between the United Nations and regional and subregional organizations					
Declaration on the occasion of the seventieth anniversary of the United Nations					
Doha Declaration on Integrating Crime Prevention and Criminal Justice					
Universal Declaration on the Achievement of a Nuclear Weapon-Free World					

APPENDIX 4

UN DECLARATIONS DATASET – CODEBOOK

Col.	Category of value	Column Title	Content
A	**Basic Info**	**UNRef**	UNBISnet document reference for declaration
B		**UNRef-PV**	UNBISnet document reference for meeting minutes where declaration adopted
C		**UNRef-Draft**	UNBISnet document reference for draft resolution/declaration
D		**Date**	Date of adoption of the declaration
E		**Year**	Year of adoption of the declaration
F		**CW/Post-CW**	Adopted during the CW period or post-CW (before or on/after 1992)
G		**Title**	Title of the declaration, as adopted
I	**Type of doc**	**Type**	Type of document (with ref to title) [values:see codebook]
J	**Topic**	**HR**	Topic includes HR or not (even if HR is one topic among many) [values:"HR" or "Non-HR"]
K		**Drafting body**	Who came up with the draft, or referred it to the GA (e.g. GA6, GA3, ILC)
L		**Topic [UNGA]**	Topic of the declaration, as classified by the UNGA website
M	**Resolution Format**	**Stand. or Appx**	Standalone declaration (constituting whole of resolution) or appendix to resolution
P		**#DeclPreamb**	Number of preambular clauses in declaration (if it is built like a resolution)
Q		**#DeclActionClauses**	Number of action clauses in declaration (if it is built like a resolution)
R		**#DeclArticles**	Number of 'articles' in the declaration (if the declaration contains 'articles' rather than clauses)
S		**#DeclTotal**	Number of total articles contained in the Declaration, Pream, Action and Articles
T		**LabelProvisions**	Type of label used for the declaration's provisions [values: n/a, numbers, "articles", "principles"]
U	Vote	**Consensus**	Adoption without a vote [Y/N]
V		**In Favour**	Number of votes in favour (if recorded vote taken)
W		**Against**	Number of votes against (if recorded vote taken)
X		**Abstention**	Number of abstentions (if recorded vote taken)
Y		**Total Votes**	Total number of voting members (if recorded vote taken)
Z		**Non-Voting**	Number of non-voting members present
AA		**Total Membership**	Total membership at that moment in time
AB	EoVs	**Total EoVs**	Total number of members who made an Explanation of Vote statement (group statements multiplied by number of delegates represented)
AC		**#EoVs before**	Number of EoVs before the vote
AD		**#EoVs after**	Number of EoVs after the vote
AE		**Group EoV**	Number of EoVs made as part of a group statement (number of individual countries included)
AF		**#Groups**	Number of group statements made
AG		**TotalInterv**	Total number of interventions made in EoVs (groups count for 1) = #of speeches made
AH		**EoV-Praise**	Segment of an EoV praising the declaration, its content or adoption process
AI		**EoV-Interp**	Segment of an EoV providing interpretation of a declaration's provision
AJ		**EoV-Reserv**	Segment of an EoV putting a 'reservation' on the record, limiting application or interpretation of a provision, excluding the state from it (using word 'reserve' or 'reservation')
AK			
AL			

Type of doc: Values	
Anniv/Commem	Declaration to mark an anniversary or commemorate event
ConfOutcome	Conference Outcome Document (not at GA even if sponsored by GA or outcome re-adopted at GA)
IntlDecl	Declaration titled 'international declaration'
NamingDecl	Declaration to assign or name an event or period (e.g. 'Second disarmament decade')
PlaceDeclConf	Declaration named with specific place where conference was held (e.g. Vienna Declaration on…)
PolDecl	Declaration titled 'Political Declaration', adopted at the UNGA
PolDecl-ConfOutcome	Declaration titled 'Political Declaration', adopted at a conference or special meeting
Proclamation	Declaration titled 'Proclamation'
UNGAConfOutcome	Declaration adopted at a special GA meeting not titled 'declaration' (e.g. outcome document of high-level plenary meeting)
UNGADecl	UNGA declaration, titled 'Declaration'
UNGADecl-ConfOutcome	UNGA declaration, titled 'Declaration', adopted at a conference or special GA meeting
UNGADecl-UNDecl	UNGA declaration, titled 'United Nations Declaration'
UNGADecl-UNDecl-ConfOutcome	UNGA declaration, titled 'United Nations Declaration', adopted at conference or special meeting (e.g. UN Millenium Declaration)
UNGADecl-UnivDecl	UNGA declaration, titled 'Universal Declaration'