



# Possible indirect legal effects of non-legally binding instruments

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## Why is there an increasing number of non-legally binding instruments?

- MOUs provide for greater flexibility
  - confidentiality since not subject to Art. 102 UN Charter
  - no need for any parliamentary involvement in conclusion
  - no complicated amending/ termination procedure
  - no direct legal effects/ binding force under international law



## Possible *indirect* legal effects of MOUs

- MOUs as preparatory steps/ precursors for binding instruments;
- MOUs as a necessary precondition for a binding instrument ('renvoi');
- MOUs as interpretative guiding tools;
- MOUs and the law of State responsibility;
- MOUs and the issue whether MOUs might obtain legal relevance through the concept of good faith and estoppel;
- MOUs and customary international law





## MOUs as preparatory acts for legally binding instruments

- MOUs may constitute precursors for the conclusion of a future treaty
- they may inform the content of later treaties even while themselves not formally creating legal rights or obligations (yet)
- MOUs may thus exercise a ‘normative pull’
- accordingly, content, and even specific language, of a future treaty might be predetermined by prior MOUs

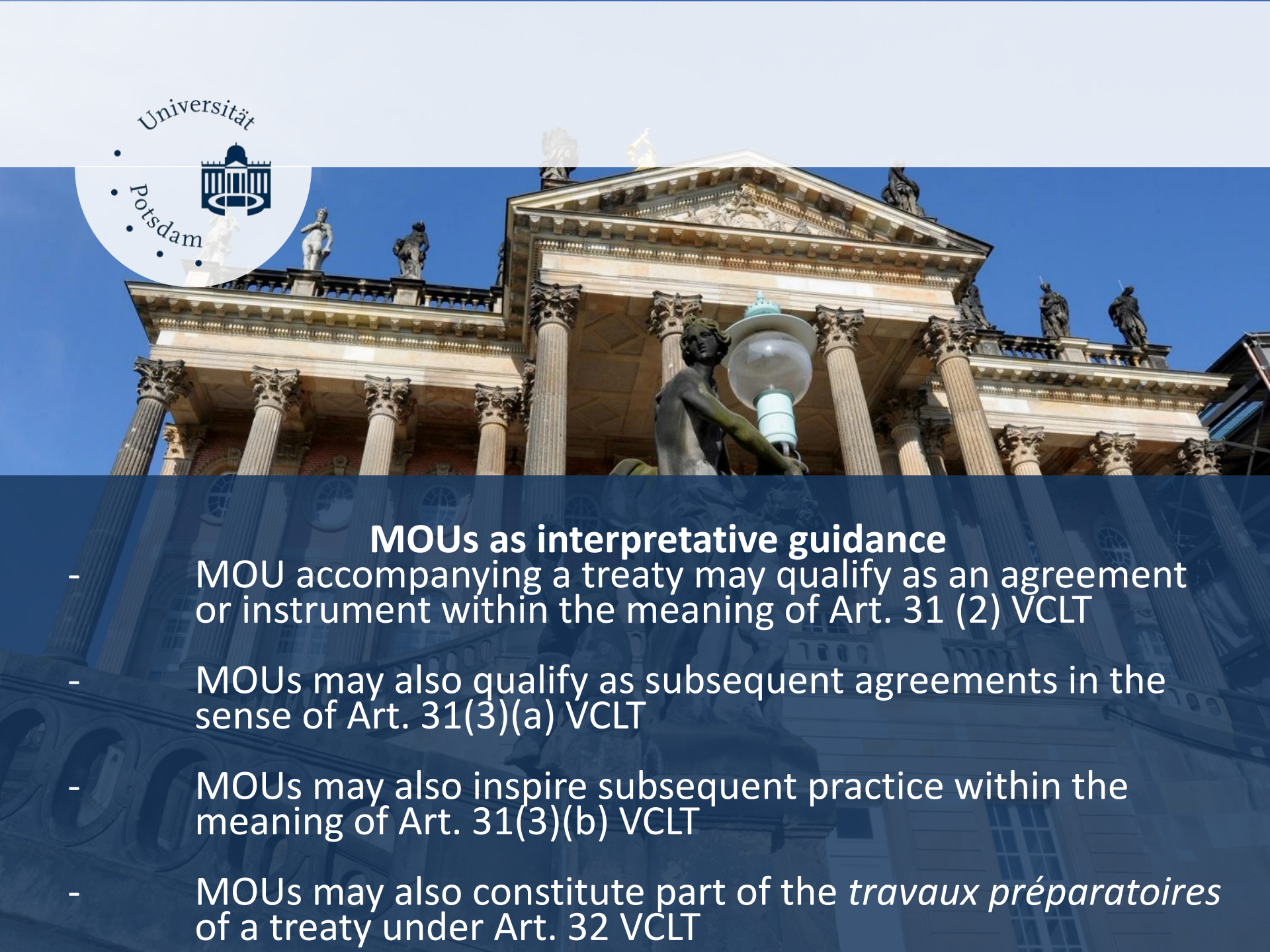




## MOUs as precondition for a legally binding act ('renvoi')

- example of Security Council Resolution 2231 in conjunction with the JCPOA
- but: does the instrument in question contain a true 'renvoi'?
- third parties such as organs of international organizations might use MOUs by way of renvoi even if the 'parties' of the MOU had no such intention



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- ### MOUs as interpretative guidance
- MOU accompanying a treaty may qualify as an agreement or instrument within the meaning of Art. 31 (2) VCLT
  - MOUs may also qualify as subsequent agreements in the sense of Art. 31(3)(a) VCLT
  - MOUs may also inspire subsequent practice within the meaning of Art. 31(3)(b) VCLT
  - MOUs may also constitute part of the *travaux préparatoires* of a treaty under Art. 32 VCLT





## MOUs and State responsibility

- no State responsibility in case of non-fulfillment of MOUs
- but: political sanctions short of countermeasures may be triggered by instances of non-compliance with a MOU
- MOUs may contain some form of an 'enforcement mechanism' on their own





## MOUs, good faith and the concept of *pacta sunt servanda*

- neither the concept of good faith nor that of *pacta sunt servanda* apply to MOUs





## MOUs and the concept of estoppel

- possibility of 'detrimental reliance'?
- not on the basis of a MOU as such
- but: the fact that one side acts in a certain manner (in turn caused by a MOU) may over time give rise to a situation of estoppel
- notably where there exists uncertainty as to whether a given MOU is legally binding or not



## MOUs and customary international law

- acts related to the negotiation and conclusion of MOUs, as well as those related to their implementation, may be part of relevant State practice
- no inference of *opinio juris* from either the conclusion of a given MOU or from the practice arising thereunder
- rather *argumentum e contrario*
- but: loss of status as *persistent objector* as to the rules contained in agreed MOUs?



## Avoiding indirect legal effects of MOUs

- mere use of the term 'MOU' nor avoidance of 'treaty language' do *ipso facto* preclude any form of indirect legal effects
- include in a MOU a formal 'disclaimer' as to *any* form of legal effects?
- avoid perception of acting 'in fulfilment' of 'obligations' arising under a MOU
- avoid uncertainty as to the status of the agreement by a clear and unambiguous formulation of the MOU and emphasize its unequivocal non-legally binding character when acting in accordance with it