United Nations A/CN.4/772*

General Assembly

Distr.: General
21 June 2024
English
Original: French

International Law Commission
Seventy-fifth session
Geneva, 29 April–31 May and 1 July–2 August 2024

First report on non-legally binding international agreements, by Mathias Forteau, Special Rapporteur**

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* Reissued for technical reasons on 21 June 2024.

** The Special Rapporteur would like to thank Jessica Joly Hébert, Laura Khennouf and Anthony Visini, doctoral students at the Centre de droit international (CEDIN), Université de Paris Nanterre, and Elena Belova, doctoral student at CEDIN and at Université de Lille, for their invaluable help in the preparatory research work undertaken for this report.

24-01871* (E) 100524 210624

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I. Introduction

1. The present report on non-legally binding international agreements is preliminary in nature.[1] As per the approach taken at the start of the Commission's work on many other topics, its aim is to frame the debate, without proposing any draft texts at this stage.[2] The report is intended to enable the members of the Commission to start discussing the topic under review, carve out its precise scope, identify questions and materials to be examined, discuss the form that the project should take, and establish a road map for the work to come. The idea, at this preliminary stage, is not to answer questions of substance, but to ensure that the Commission is in a position to decide, in a collegial manner, on the way forward. On the basis of the debate and any decisions taken at the present session, the Special Rapporteur will be able to propose draft texts on each of the subtopics at future sessions.

2. Non-legally binding international agreements are a significant feature of contemporary international relations. The fact that these agreements are not legally binding does not mean that international law is not likely to apply to them in some respects, or that they do not produce any legal effect. As the question of the nature, regime and potential effects of non-legally binding international agreements arises repeatedly in contemporary international society,[3] it is appropriate to clarify the status of international law on the issue, in an effort to bolster international legal certainty.[4]

3. It should be quite clear that the present topic is not meant to be prescriptive. The goal of the work is not to seek to transform non-legally binding agreements into legally binding agreements,[5] or to call into question the distinction between binding law and non-binding law, or to create *de lege ferenda* rules governing or limiting the use of such agreements. The goal is to *clarify* the nature, regime and potential legal effects of non-legally binding international agreements, in view of existing practice, jurisprudence and doctrine.

4. The Special Rapporteur is fully aware that it is important for the Commission to proceed with the requisite caution when called upon to work on topics that are associated – even if only indirectly – with the sources of international law. This is of course especially true for the present topic, which concerns agreements that are not sources of binding international law as such. In addition, the work of the Commission must remain as practical as possible. This reminder could not have been timelier, as the present topic is likely to raise questions of general theory of law (in particular the distinction between the legal and the non-legal, the distinction between the binding and the non-binding, and the question of degrees of normativity). In the view of the Special Rapporteur, it is imperative that the Commission, in the light of its mandate, focus on the *practical* aspects of the present topic, without getting lost in exclusively theoretical considerations – however interesting they may otherwise be.

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[1] The present report was drafted in French and contains some quotations in English and Spanish.

[2] See, for example, the practice followed for the topics of reservations to treaties, diplomatic protection, protection of persons in the event of disasters, immunity of State officials from foreign criminal jurisdiction, protection of the environment in relation to armed conflicts, identification of customary international law and provisional application of treaties.

[3] See, for example, C. Chinkin, "A mirage in the sand? Distinguishing binding and non-binding relations between States", *Leiden Journal of International Law*, vol. 10 (1997), pp. 223–247, in particular pp. 224 and 225. For the list of questions posed, see chap. VIII below.

[4] In the words of B. Conforti, "the goal is to establish […] to what extent [these agreements] can be made to interact, so to speak, directly with ordinary international law", ("Le rôle de l'accord dans le système des Nations Unies", *Collected Courses of the Hague Academy of International Law*, 1974-II, vol. 142, pp. 203–288, at p. 257).

[5] In other words, the goal is not to seek to use legal techniques or principles as "'caballos de Troya' *que se vuelven contra las intenciones de los que suscriben tales acuerdos*" (F. Jiménez García, *Derecho internacional líquido: ¿Efectividad frente a legitimidad?*, Thomson Reuters/Aranzadi, 2021, p. 146).

5. Having said this, the Special Rapporteur will start by setting out the origins of the present topic (chap. II) and the observations of States on the topic delivered in the Sixth Committee (chap. III). He will then give an overview of the topic (chap. IV), present previous work relating to the topic (chap. V) and then give an initial overview of available material (chap. VI). On the basis of these elements, the Special Rapporteur will then present the scope of the topic (chap. VII) and set out the questions to be examined (chap. VIII), before concluding with details as to the form of the final outcome of the work (chap. IX) and the schedule of work (chap. X).

6. The Special Rapporteur invites the members of the Commission to present their views on all these issues. Nonetheless, for operational reasons, the Special Rapporteur believes that the debate this year should be focused on the proposals formulated in chapters VI to X of the present report, with a view to adopting guidance on the proposals at the current session.

II. Genesis of the topic and its inclusion in the programme of work of the Commission

7. In the report on the long-term programme of work annexed to the annual report of the Commission on its work in 1996, the list appearing in the "general scheme" proposed by the Commission that year included, in the section entitled "Sources of international law", the topic "Non-binding instruments".[6] In the working paper it prepared almost twenty years later, in which it reviewed the list of topics established in 1996 in the light of subsequent developments, the Secretariat, after recalling that proposed topic,[7] noted as follows: "The proposal to consider the question of non-binding principles was made in 1996, during the process of preparing the general scheme. The following year, the Working Group on the Long-term Programme of Work heard a proposal for the inclusion of the topic 'Politically (not legally) binding acts'",[8] but that proposal did not seem to have had any immediate impact.

8. As an extension of that first initiative, a proposal was submitted a few years later to the Working Group on the Long-term Programme of Work on the topic "Inter-State agreements other than treaties". Following successive discussions within the Working Group, the title and scope of the proposal were redefined to focus on the more specific question of non-legally binding international agreements. It was under that title that, following a revision of the draft syllabus, the Commission included the topic in its long-term programme of work in 2022, on the recommendation of the Working Group.[9] The syllabus for the topic was reproduced in annex I to the report of the Commission on the work of its seventy-third session.[10] The General Assembly noted the inclusion of the topic in the Commission's long-term programme of work in its resolution 77/103 of 7 December 2022. Following consultations among its members, the Commission decided, on 4 August 2023, to include the topic of non-legally binding international agreements in its programme of work and to appoint a Special Rapporteur for the topic.[11] The General Assembly took note of that decision in paragraph 7 of its resolution 78/108 of 7 December 2023.

[6] *Yearbook of the International Law Commission 1996*, vol. II (Part Two), annex II, p. 134.
[7] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/679, p. 513, para. 10.
[8] Ibid., p. 514, para. 15.
[9] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 251.
[10] Ibid., annex I.
[11] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 249.

III. Observations of States in the Sixth Committee

9. The States Members of the United Nations had the opportunity to express their views on the present topic on two occasions, in 2022 and in 2023, during the consideration of the reports of the Commission on the work of its sessions for those years by the Sixth Committee. The States had the opportunity to present their views in 2022 after the topic was included in the Commission's long-term programme of work, and again in 2023 after the topic was included in the Commission's programme of work. Overall, the States that delivered statements in the Sixth Committee had a positive reaction to the topic, even though there were calls for caution, and occasionally, a few reservations, from some delegations.

A. Debate held in 2022

10. During the debate held from 25 October to 1 November 2022 in the Sixth Committee, some thirty States as well as the Council of Europe delivered statements on the topic.[12] Three of them (Japan, Sierra Leone and United Kingdom) took note of the inclusion of the topic in the long-term programme of work, while twenty-two others, along with the Council of Europe, were in favour of the topic and welcomed or supported its inclusion in the long-term programme of work.[13]

11. Only Argentina had a dissenting opinion, indicating that it was not in favour of the Commission considering the topic. It also noted that if, however, the Commission were to study the topic, "it should not take into account any unilateral categorization of such an agreement in the domestic law of a State that had signed an agreement of that type. Moreover, caution should be exercised in how such instruments should be designated, given that several treaties referred, for example, to 'arrangements' as binding instruments. In short, it would be preferable to continue leaving that issue exclusively to State practice, given that the criteria for distinguishing binding provisions from non-binding formulations had been established in international case law, and the value of such arrangements would, in any case, depend on the interpretation given by the parties to them on a case-by-case basis, or the opinion of an impartial third party".[14]

12. With regard to the scope of the topic, Norway (on behalf of the Nordic countries) said that the topic proposed in the syllabus was "realistic".[15] The Philippines expressed the hope that the scope of the topic "would not be too restrictive".[16] The Federated States of Micronesia said that they agreed with "the recommendation in the syllabus

[12] See the successive statements of the following delegations: Norway (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/77/SR.21, para. 53); Singapore (ibid., para. 73); Philippines (A/C.6/77/SR.22, para. 25); Austria (ibid., para. 44); Belarus (ibid., para. 81); Brazil (ibid., para. 87); Slovenia, (ibid., para. 140); Slovakia (ibid., para. 97); Estonia (ibid., para. 105); Romania (ibid., para. 112); Czechia (ibid., para. 123); Colombia (ibid., para. 124); Poland (A/C.6/77/SR.23, para. 12); Sierra Leone (ibid., para. 38); Switzerland (ibid., para. 49); Cameroon (ibid., paras. 65 and 66); South Africa (ibid., para. 82); United Kingdom (ibid., para. 85); Kingdom of the Netherlands, (ibid., para.122); Micronesia (Federated States of) (A/C.6/77/SR.24, para. 25); Japan (A/C.6/77/SR.25, para. 10); Argentina (ibid., para. 23); France (ibid., para. 44); Council of Europe (ibid., para. 97); and Jordan (A/C.6/77/SR.29, para. 108). The summaries are accessible at https://www.un.org/en/ga/sixth/77/summaries.shtml.

[13] Austria, Belarus, Brazil, Colombia, Czechia, Estonia, France, Jordan, Kingdom of the Netherlands, Micronesia (Federated States of), Nordic countries, Philippines, Romania, Singapore, Slovakia, Slovenia, South Africa, Switzerland and Council of Europe.

[14] A/C.6/77/SR.25, para. 23.

[15] A/C.6/77/SR.21, para. 53.

[16] A/C.6/77/SR.22, para. 25.

that the Commission should not address the question of the effect of non-binding provisions in treaties, as long as there was an understanding that the presence of such provisions in a treaty did not negate the legally binding nature of the treaty as a whole if there were other provisions in the same treaty that were legally binding". The Federated States of Micronesia also said that they supported "the consideration by the Commission of the legal effect or nature of decisions and other acts adopted by conferences of States parties to treaties, as there remained some controversy in international law and practice as to whether such decisions and acts were legally binding or had some other legal effects in the States parties that adopted and implemented them".[17] The representative of Poland said that the topic was "closely linked to the issue of the definition of the term 'treaty', as proposed by his delegation at the seventy-sixth session (see A/C.6/76/SR.17)" and that it was important "not to equate that issue with the very complex and broad issue of soft law".[18]

13. Several States stressed the practical significance of the topic. The delegation of Singapore said that "[t]he prevalent use of non-legally binding memorandums of understanding or agreements by States illustrated the topic's practical significance", and that it hoped that the Commission "would take into account the rich practice of the States members of the Association of Southeast Asian Nations on the issue".[19] Similarly, the Philippines noted that "[a]n examination of the nature and regime of such agreements was long overdue, in view of the continuing proliferation of non-legally binding agreements in inter-State relations".[20] Austria also said that the topic "was very important for the practical work of legal advisers".[21] In the same vein, Slovenia noted that "the marked increase in State practice in that area was indicative of significant new developments that confirmed the need to address the topic".[22] In the words of Estonia, the topic "would be of particular interest for practitioners".[23] According to Czechia, "[t]he increasing practical relevance of such instruments was confirmed by the fact that a number of other international expert bodies were also examining the subject".[24] For Switzerland, "[t]he discussion on the handling of such soft law instruments was important from both a rule of law and a democracy perspective".[25] South Africa said that there was a "growing trend and practice of States entering into such agreements".[26] The Kingdom of the Netherlands noted that "[t]he practice of concluding non-legally binding international agreements had grown and more clarity on the matter was needed. The legal issues raised by the use of non-binding instruments in the identification and application of international law were pertinent to international practice".[27] According to France, "the topic would be a useful one for the legal advisers of States who, in their daily practice of international law, ever more frequently encountered such instruments, the legal scope of which was often uncertain".[28] For its part, the Council of Europe noted that "[i]n March 2021, CAHDI had decided to follow up on the topic of the practice of States and international organizations regarding non-legally binding agreements and had subsequently distributed a questionnaire on the subject to delegations. Thus far it had received some 20 replies. Depending on the outcome of its first analysis of the results, CAHDI would decide whether the outcome of the exercise would be a glossary of terms, a model memorandum of understanding or another

[17] A/C.6/77/SR.24, para. 25.
[18] A/C.6/77/SR.23, para. 12.
[19] A/C.6/77/SR.21, para. 73.
[20] A/C.6/77/SR.22, para. 25.
[21] Ibid., para. 44.
[22] Ibid., para. 93.
[23] Ibid., para. 105.
[24] Ibid., para. 123.
[25] A/C.6/77/SR.23, para. 49.
[26] Ibid., para. 82.
[27] Ibid., para. 122.
[28] A/C.6/77/SR.25, para. 44.

guidance tool. The outcome could be of interest to the International Law Commission when it began its work on the topic and the Council of Europe would continue to cooperate with the Commission accordingly."[29]

14. Three States suggested that the title of the topic be changed. Austria said that it "was strongly in favour of reserving the word 'agreement' for legally binding texts and changing the title of the topic to 'Non-legally binding international arrangements', to avoid confusion".[30] Cameroon said that "the French version of the proposed topic of non-legally binding international agreements (Accords internationaux juridiquement non-contraignants) should more appropriately [be entitled] 'Actes concertés non conventionnels'";[31] and the United Kingdom advocated using one of the alternative terms identified in the syllabus, such as "instruments" or "arrangements", rather the term "agreement".[32]

15. As for questions to be addressed in relation to the title of the topic, Belarus considered that the priority should be given "to the study of the nature of memorandums of understanding and other non-legally binding international agreements, the ways in which they could be distinguished from legally binding international agreements and other international instruments, and their effects on the formation of international law rules".[33] Similarly, the United Kingdom agreed that "a key question would be how non-legally binding agreements would be distinguished from legally binding agreements".[34]

B. Debate held in 2023

16. During the debate held from 23 October to 2 November 2023 in the Sixth Committee, which took place after the present topic was included in the Commission's programme of work, 33 State delegations (including Denmark on behalf of the Nordic countries), as well as the Council of Europe and the Holy See, delivered statements on the topic.[35] The views expressed largely mirrored those put forward in 2022.

17. Six States (Argentina, Islamic Republic of Iran, Japan, Lebanon, Republic of Korea and United States of America) took note of the inclusion of the topic; two delegations (Sierra Leone and Slovakia) noted with interest the inclusion of the topic; twenty-seven States (Austria, Belarus, Brazil, Chile, China, Colombia, Côte d'Ivoire,

[29] Ibid., para. 97.
[30] A/C.6/77/SR.22, para. 44.
[31] A/C.6/77/SR.23, para. 65.
[32] Ibid., para. 85.
[33] A/C.6/77/SR.22, para. 81.
[34] A/C.6/77/SR.23, para. 85.
[35] See the successive statements of the following delegations delivered at the meetings held from 23 October to 2 November 2023 (the paragraph numbers indicated are those of the advance copy of the summary records in English): Denmark (on behalf of the Nordic countries) (A/C.6/78/SR.23, para. 58); Singapore (ibid., para. 84); Brazil (ibid., para. 100); France (ibid., para. 111); United Kingdom (ibid., para. 117); Belarus (A/C.6/78/SR.24, para. 14); Austria (ibid., para. 29); Poland (ibid., para. 37); Estonia (ibid., para. 47); Hungary (ibid., para. 48); Kingdom of the Netherlands, (ibid., para. 61); United States of America (ibid., para. 72); Portugal (ibid., para. 78); Chile (ibid., para. 101); Iran (Islamic Republic of) (ibid., para. 120); Mexico (A/C.6/78/SR.25, para. 10); Romania (ibid., para. 15); Slovakia (ibid., para. 24); Czechia, (ibid., para. 31); Thailand (ibid., paras. 70 and 71); Russian Federation (A/C.6/78/SR.26, para. 48); Slovenia (A/C.6/78/SR.27, para. 14); Sierra Leone (ibid., para. 32); Colombia (ibid., para. 39); China (ibid., para. 76); Türkiye (ibid., para. 95); Armenia (ibid., para. 100); Argentina (A/C.6/78/SR.28, para. 10); Japan (ibid., para. 11); Republic of Korea (ibid., para. 17); Côte d'Ivoire (ibid., para. 22); Lebanon (ibid., para. 50); Philippines (ibid., para. 71); Council of Europe (ibid., para. 87); and Holy See (A/C.6/78/SR.33, para. 57).

Czechia, Denmark (on behalf of the Nordic countries), Estonia, France, Hungary, Kingdom of the Netherlands, Mexico, Philippines, Poland, Portugal, Romania, Russian Federation, Singapore, Slovenia, Thailand and United Kingdom) as well as the Council of Europe welcomed the inclusion of the topic or said they were prepared to work on it with the Commission. Only Türkiye expressed reservations about the Commission's decision to start work on the topic, on the grounds that it did not see a need for haste in considering the topic, as it did not reflect a pressing concern of the international community, while acknowledging that practice on the topic had grown considerably. Given that the topic is also being examined by other international expert bodies, such as CAHDI of the Council of Europe, Türkiye believed that the Commission could have waited for the outcome of their work before taking up the topic.

18. Several delegations (Belarus, Czechia, France, Hungary, Kingdom of the Netherlands, Portugal, Romania, Russian Federation, Sierra Leone, Slovakia, Thailand and Council of Europe) recalled the practical nature or significance of the topic. Brazil encouraged the Commission to use as an important basis for its work the guidelines on the topic adopted in 2020 by the Inter-American Juridical Committee (on these guidelines, see chap. V, sect. B.2 below).

19. Ten States recommended that the title of the topic be changed and that the term "agreements" be replaced by "instruments" (Argentina, Austria, Brazil, Iran (Islamic Republic of), Poland, Slovakia, Türkiye and United States of America), or by "instruments or arrangements" (China) or by "instruments and arrangements" (United Kingdom), on the grounds that the term "agreement" should be – or was generally – reserved for legally binding agreements or instruments. For its part, the Council of Europe indicated, in relation to its own work on the topic, conducted under the auspices of CAHDI, that the decision had been taken in 2023 to change the title of the work and to replace the term "agreements" with the term "instruments", to better reflect the non-legally binding nature of the texts examined.

20. Chile said that the scope of the topic should be limited to agreements between States, between States and international organizations, or between international organizations that were concluded in writing and whose structure and drafting indicated a concurrence of wills but did not produce binding effects, including agreements of an "uncertain" nature and norms or standards elaborated in informal frameworks. For its part, the Russian Federation said that it agreed with the idea of setting reasonable limits on the scope of the topic, to exclude agreements resulting from the combination of several unilateral acts, agreements concluded with non-State entities and agreements that fell under domestic law, and to include acts elaborated in informal frameworks and those concluded by international organizations. Argentina also said that the topic should be limited to agreements concluded between States and international organizations.

21. With regard to the final form of the project, Armenia said that given the relatively narrow scope of the topic, the most appropriate outcome of the work might be a report, rather than draft conclusions or guidelines.

22. Lastly, it is interesting to note that some of the views expressed by States in October and November 2023 on other topics in the Commission's programme of work could also be relevant to the present topic. During the debate on the topic of settlement of disputes to which international organizations are parties, Austria and Thailand indicated that an instrument that could establish an international organization did not necessarily have to be a legally binding instrument.[36] The Kingdom of the Netherlands pointed out that the topic of subsidiary means for the determination of

[36] See A/C.6/78/SR.29, para. 15 and A/C.6/78/SR.30, para. 4, respectively (the paragraph numbers indicated are those of the advance copy of the summary records in English).

rules of international law was also meant to determine the subsidiary role that non-binding instruments could play; that work on that point could be useful for the present topic; and that "[n]on-legally binding agreements and instruments did not produce legal effects by themselves and could not be considered a formal source of law or of international legal obligations. However, they were capable of producing indirect legal effects or having a direct impact on State practice. They might do so as preparatory acts in connection with a legally binding instrument, as interpretative guidance for such binding instruments, or as subsidiary means for the determination of rules of international law".[37]

IV. Overview of the topic

23. The practical significance of the present topic can be explained by two phenomena. First, as noted not just by States (see chap. III above) but also by authors,[38] non-legally binding international agreements are being used more and more frequently in contemporary international relations. Second, "the focus of international law has shifted somewhat from treaty-making to the interpretation and application of the law"[39] and the international law that is taken into consideration in legal reasoning or for purposes of interpretation is no longer necessarily limited to "binding" international law. The consequence of the combination of these two phenomena is that the determination of the nature and potential effects of non-binding agreements is gaining in importance. Two approaches can be envisaged in dealing with this situation.

24. The first approach is to strive to maintain as much as possible a rigid demarcation between the legal and the non-legal, either by excluding from the legal realm anything that would not be a source of legal obligations,[40] or by maintaining that, to the extent that the law of treaties is becoming less and less rigid, *any* agreement or commitment mutually entered into in writing should be considered a treaty.[41] This approach has the merit of simplicity, which has great legal virtues. The problem is that it is not always of a type to assist practitioners when they are faced

[37] See A/C.6/78/SR.31, paras. 68 and 72 (the paragraph numbers indicated are those of the advance copy of the summary records in English).

[38] See, for example, T. Meyer, "Alternatives to treaty-making - Informal agreements", in D. B. Hollis (ed.), *The Oxford Guide to Treaties*, 2d ed., Oxford, Oxford University Press, 2020, pp. 59 and 60; Jiménez García, *Derecho internacional líquido: ¿Efectividad frente a legitimidad?*, pp. 141 ff.; P. Gautier, "Non-binding agreements", *Max Planck Encyclopedia of Public International Law*, May 2022, paras. 7 ff.; M. Fitzmaurice, "Treaties", ibid., February 2021, para. 29; J. Hill, *Aust's Modern Treaty Law and Practice*, 4th ed., Cambridge, Cambridge University Press, 2023, chap. 3, in particular pp. 42 and 43 and 49 ff.; C. A. Bradley, J. Goldsmith and O. A. Hathaway, "The rise of nonbinding international agreements: an empirical, comparative, and normative analysis", *The University of Chicago Law Review*, vol. 90 (2023), pp. 1289 ff.

[39] G. Nolte, "On recent work and the role of the International Law Commission", in *Souveraineté, sécurité et droits de la personne. Liber amicorum offert en l'honneur du Professeur Mohamed Bennouna*, Paris, Pedone, 2023, p. 88.

[40] See in particular the article by P. Weil, "Vers une normativité relative en droit international?", *Revue générale de droit international public*, vol. 86 (1982), pp. 5–47 (published in English in *American Journal of International Law*, vol. 77 (1983), pp. 413–442); and M. Bothe, "Legal and non-legal norms. A meaningful distinction in international relations?", *Netherlands Yearbook of International Law*, vol. XI (1980), pp. 65–96, at pp. 94 and 95. See also M.E. Villiger, "The 1969 Vienna Convention on the Law of Treaties: 40 years after", *Collected Courses of the Hague Academy of International Law*, 2009, vol. 344, pp. 9–192, at p. 123: regarding article 31, para. 3 (c), of the Vienna Convention on the Law of Treaties, he said that "[t]he term 'applicable' leaves no room for doubt: non-binding rules cannot be relied upon" for the purposes of interpretation of a treaty.

[41] See study by J. Klabbers, "Governance by Academics: The Invention of Memoranda of Understanding", *ZaöRV*, 2020, pp. 35–72, in particular pp. 61–64 and 71 and 72. See also P. Reuter, *Introduction au droit des traités*, 3rd ed. reviewed and updated, Paris, Presses universitaires de France, 1995, p. 30, para. 74.

with something akin to a grey area.[42] Indeed, non-legally binding international agreements come under such a grey area, as confirmed inter alia by the Commission's recent work on the interpretation of treaties.[43] We will return to this point later.

25. A second and more pragmatic approach is to take the state of practice as it is as the starting point and then to strive to provide some clarification thereto, to the extent possible, in order to ensure greater legal certainty in the conduct of international relations. Such an approach entails accepting that the law is not confined to what is legally binding and exploring the extent to which international law operates in respect of non-legally binding international agreements. This is, in essence, the issue at stake with the present topic, and hence the approach to be adopted for its study.

26. This is not a new topic for international lawyers and, as we will see later, it had been clearly envisaged at the United Nations Conference on the Law of Treaties.[44] Authors have long agreed that non-legally binding international instruments can, in certain cases, come under international law.[45] Courts too no longer have a principled reluctance to attribute certain legal effects to non-binding instruments. This is true of certain domestic courts[46] and also of international courts.[47] The fact that a growing number of States also consider it necessary in this day and age to adopt texts in their domestic law to govern their international practice regarding the conclusion of non-legally binding international agreements (see chap. VI, sect. A.2 below) is proof that these agreements are not totally foreign to the legal realm, even if – and this is indisputable – they themselves are not intrinsically binding.

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[42] Klabbers himself notes that memorandums of understanding call for particular attention in that they may not offer the legal protection necessary for the intended addressees of the agreement ("Governance by academics: the invention of memoranda of understanding", pp. 66 and 67). See also M. Donaldson, "The survival of the secret treaty: publicity, secrecy, and legality in the international order", *American Journal of International Law*, vol. 111 (2017), pp. 575 ff., at p. 622 ("In light of ongoing uncertainty about how to distinguish between binding treaties and non-binding agreements, […] use of MOUs entails close attention to both textual indicia and negotiating strategies").

[43] The idea of a "grey area" is at the heart, for example, of the study by R. R. Baxter, "International law in 'her infinite variety'", *International and Comparative Law Quarterly*, vol. 29 (1980), pp. 549–566, and is used for example by A. Székely, "Non-binding commitments: a commentary on the softening of international law evidenced in the environmental field", in *International Law on the Eve of the Twenty-First Century: Views from the International Law Commission/Le droit international à l'aube du XXIe siècle: réflexions de codificateurs*, 1997 (United Nations publication, Sales No. E/F97.V.4), pp. 173–200, at pp. 192 and 193, and A. Pellet, "Article 38", in A. Zimmermann, C. Tams. (eds.), *The Statute of the International Court of Justice. A Commentary*, 3rd ed., Oxford, Oxford University Press, 2019, pp. 862–864, in particular para. 108 and p. 864.

[44] See chap. V, sect. A.1 below. See also I. Roberts (ed.), *Satow's Diplomatic Practice*, 8th ed., 2023, para. 31.19, footnote 43; as well as J. Basdevant, "La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités", *Collected Courses of the Hague Academy of International Law, 1926–V*, vol. 15, pp. 539 ff., at pp. 601 ff.; H. Kraus, "Système et fonctions des traités internationaux", *Collected Courses of the Hague Academy of International Law, 1934-IV*, vol. 50, pp. 311 ff., at pp. 329–331; E. Decaux, "La forme et la force obligatoire des codes de bonne conduite", *Annuaire français de droit international*, vol. 29 (1983), pp. 81–97.

[45] See, among several other studies, G. Abi-Saab, "Cours général de droit international public", *Collected Courses of the Hague Academy of International Law, 1987-VII*, vol. 207, pp. 9 ff. at pp. 205 ff.; P. M. Eisemann, "Le Gentlemen's agreement comme source du droit international", *Journal du droit international*, 1979, pp. 326–348, at pp. 331 ff.; or A. Aust, "The theory and practice of informal international instruments", *International and Comparative Law Quarterly*, vol. 35, No. 4 (October 1986), pp. 787–812, at pp. 796 ff.

[46] In France, for example, it is possible today to challenge, in administrative court, non-binding documents such as recommendations and guidelines, if they "are likely to have notable effects on the rights or the situation" of individuals (Conseil d'État, 12 June 2020, No. 418142, para. 1).

[47] See in particular the judgment of the International Court of Justice in *Whaling in the Antartic (Australia v. Japan: New Zealand intervening), ICJ Reports 2014*, p. 226, at p. 248, para. 46; and the Court's advisory opinion in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, ICJ Reports 2019*, p. 95, at paras. 150–153 and 155. See also, for example, at the regional level, Court of Justice of the European Communities, C-322/88, *Grimaldi*, 13 December 1989, para. 18.

27. To the extent that non-legally binding international agreements may in certain cases come under international law, it is important to identify specifically the circumstances under which that would occur in contemporary practice, with a view to providing some clarifications that would prove useful. That is the raison d'être of the present topic.

V. Previous work related to the topic

28. This is not the first time that work is being undertaken on the present topic. As shown in the present chapter, the Commission itself (see sect. A) and other entities (sect. B) have already carried out some work related to the topic.

A. Previous work of the Commission

29. As noted in the 2022 syllabus, the Commission has had occasion in the past to discuss, but has never conducted a complete or detailed study on, the topic of non-legally binding international agreements.[48] The Commission has examined the topic primarily on two occasions: as part of its work on the draft texts that became the Vienna Convention on the Law of Treaties[49] (1969 Vienna Convention) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 Vienna Convention)[50] (see sect.1), and later as part of its work on subsequent agreements and subsequent practice in relation to the interpretation of treaties (see sect. 2). The topic has also come up occasionally in the Commission's work on other topics (see sect. 3).

1. *Travaux préparatoires* of the 1969 and 1986 Vienna Conventions

30. As noted in paragraph 7 of the 2022 syllabus, the definition of the term "treaty" adopted by the International Law Commission and then taken up in the 1969 and 1986 Vienna Conventions is not perfectly clear.[51] In accordance with article 2 of the 1969 Vienna Convention, the term "treaty" means "an international agreement [...] governed by international law". If this is the sole formulation applied, it would be impossible to determine clearly whether the category of treaties includes non-legally binding agreements, since the phrase could simply mean that the agreement is "governed" by international law in the sense that international law is the law that is applicable to it. However, a number of points help to clarify this ambiguous expression.

31. First, as the Special Rapporteur shows below, there are other provisions of the 1969 Vienna Convention that make clear that a treaty's distinguishing trait is that it creates rights and obligations and is legally binding upon the parties (see chap. VII, sect. B below).

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[48] A/77/10, annex I, paras. 6–10.

[49] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[50] Vienna Convention on the Law of Treaties between States and international organizations or between international organizations (Vienna, 21 March 1986), A/CONF.129/15, *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations,* Vienna, *18 February–21 March 1986*, vol. II, A/CONF.129/16/Add.1 (United Nations publication, Sales No. E.94.V.5), p. 93.

[51] A/77/10, annex I, para. 7. Given also that, in the context of the United Nations, it was decided not to define in the abstract the expression "treaty or international agreement" used in Article 102 of the Charter of the United Nations and to let "experience and practice in themselves aid in giving definition" to the terms of the Charter (Legal opinion of 14 November 1967, *United Nations Juridical Yearbook*, 1967, pp. 332 and 333, para. 2).

32. Second, it follows from the commentaries to the draft articles on the law of treaties adopted by the Commission in 1966 that the phrase "governed by international law" covers more specifically "the intention to create obligations under international law".[52] This conclusion is bolstered by a review of the reports of successive Special Rapporteurs on the law of treaties (see paras. below), as well as by the discussions within the Commission, which show that its members wished to clearly distinguish between treaties, which have binding effects, and agreements that do not create obligations.[53]

33. Third, it is clear from the Commission's work that it had been aware of the existence of agreements that were not binding in nature and that should be distinguished from treaties. In 1950, in his first report, James L. Brierly introduced a distinction between treaties and the broader category of "agreements"[54] and also noted that "it is no doubt the case that States do on occasion conclude 'agreements' which create neither rights nor obligations for the parties [b]ut such 'agreements', howsoever named, are not acts in the law and are therefore of no significance from the point of view of the law of treaties".[55] In 1953, Sir Hersch Lauterpacht was similarly explicit in his first report, observing that there exist "formal international instruments solemnly declared or signed by representatives of States or unilaterally proclaimed by them which, however, are in the nature of statements of policy rather than instruments intended to lay down legal rights and obligations", such as the Atlantic Charter of 1941,[56] and also that "[i]n the event of a dispute on the subject it must properly be a question for judicial determination whether an instrument, whatever its description, is in fact intended to create legal rights and obligations between the parties and as such coming within the category of treaties".[57] In 1956, in his first report, Sir Gerald Fitzmaurice noted that "it may be possible to have certain agreements between States that are not governed by international law" and that such agreements "are not treaties within the meaning of the present Code".[58] In 1959, in his fourth report, he also drew a distinction between a treaty and an "arrangement", which does not involve legal, "but at most moral obligations".[59] In its annual report for that session, the Commission stated that "instruments which, although they might look like treaties, merely contained declarations of principle or statements of policy, or expressions or opinion, or voeux, would not be treaties".[60] In the same vein, in 1965, Sir Humphrey Waldock affirmed, in his fourth report, that the object of the phrase "governed by international law" was "to distinguish treaties from [...] agreed statements of policy not intended to create legal obligations".[61]

34. Fourth, the *travaux préparatoires* of the draft articles adopted by the Commission in 1966 show that the binding nature of treaties has been described using a variety of formulations that are not necessarily strictly identical to one another. According to the Harvard Draft Convention, which had influenced the Commission's work, a treaty establishes or seeks to establish a "relation under international law".[62] Similarly, the term "treaty" was defined in David D. Field's Draft Code as an agreement creating, terminating, or "otherwise affecting an international right or

[52] *Yearbook… 1966*, vol. II, document A/6309/Rev.1, Part Two, p. 195 (para. 6 of the commentary to draft article 2).
[53] See, for example, *Yearbook of the International Law Commission 1950*, vol. II (in English only), document A/CN.4/35, para. 161; ibid., vol. I (in English only), pp. 69, 71, 74 and 81 (Mr. Córdova) and p. 72 (Mr. Hsu); *Yearbook… 1959*, vol. II, document A/4169, p. 96 (para. 8 (b) of the commentary to draft article 2).
[54] A/CN.4/23, pp. 9 and 12–14 (and *Yearbook… 1950*, vol. II, pp. 225–227).
[55] A/CN.4/23, p. 18 (and *Yearbook… 1950*, vol. II., p. 228.
[56] A/CN.4/63, p. 26 (and *Yearbook… 1953*, vol. II (in English only), pp. 96 and 97.
[57] A/CN.4/63, p. 31 (and *Yearbook… 1953*, vol. II, p. 98).
[58] *Yearbook… 1956*, vol. II, document A/CN.4/101, p. 117.
[59] *Yearbook… 1959*, vol. II, document A/CN.4/101, p. 52, para. 7.
[60] Ibid., document A/4169, p. 96, para. 8.
[61] *Yearbook… 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 12.
[62] A/CN.4/23, annex A, p. 62 (and *Yearbook… 1950*, vol. II, p. 243).

relation".[63] James L. Brierly later used the phrase "relation under international law" in his first report,[64] clarifying that it meant to "create rights or obligations in international law".[65] For his part, Sir Hersch Lauterpacht, in his first report, in 1953, set out the idea that a treaty creates rights and obligations and is characterized by its "binding force".[66] Sir Humphrey Waldock took up the phrase "governed by international law"[67] in his first report, in 1962, and defended its use in his fourth report when responding to comments by States which were concerned that the phrase could be interpreted as encompassing agreements that created no legal obligations and which had recommended that said detail (the creation of legal obligations) be explicitly included in the text of the definition.[68]

35. The Commission ultimately concluded, in its commentaries to the 1966 draft articles, that the phrase "governed by international law" referred implicitly and above all else to the creation of rights and obligations. One factor that seemed to have militated in favour of that general phrase was that it was nonetheless necessary to cover

> "every possible case. For instance, some treaties did not create rights and obligations but terminated them, or modified existing ones, or contained merely interpretative provisions. Yet few would deny that such instruments were treaties. The Commission thought that there were so many possible cases that it would in fact be difficult to find any convenient general phrase to cover them all, and that it would be better to omit any reference to the *objects* of the agreement. The Commission also thought that the matter was largely subsumed in the phrase adopted by it in article 2 '... an international agreement ... means an agreement ... governed by international law and ...'".[69]

36. Fifth, the discussions that took place and the amendments proposed at the United Nations Conference on the Law of Treaties, and what became of them, confirm those conclusions.[70]

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[63] A/CN.4/23, annex C, p. 70 (and *Yearbook...1950*, vol. II, p. 245).

[64] A/CN.4/23, pp. 1 and 12 (and *Yearbook... 1950*, vol. II, pp. 223 and 226).

[65] A/CN.4/23, p. 14 (and *Yearbook... 1950*, vol. II, p. 227).

[66] A/CN.4/63, p. 56 (and *Yearbook... 1953*, vol. II (in English only), p. 106); these two elements are mentioned again in his second report, A/CN.4/87, p. 4 (and *Yearbook... 1954*, vol. II (in English only), p. 123).

[67] *Yearbook... 1962*, vol. II, document A/CN.44/144, p. 32.

[68] *Yearbook... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, pp. 10–12. See also the comments by several governments (*Yearbook... 1966*, vol. II, document A/6309/Rev.1, Part Two, annex): Afghanistan, p. 279; Austria, p. 380; Israel, p. 293; Luxembourg, p. 307; and United Kingdom, p. 343.

[69] *Yearbook... 1959*, vol. II, document A/4169, pp. 96 and 97, para. 8. This passage in the Commission's annual report is illuminated by the summary record of the discussions held at the 487th meeting, *Yearbook... 1959*, vol. I, pp. 36 and 37 (exchanges between Mr. Ago, Mr. François, the Chairman and Mr. Padilla Nervo). See also statements by Mr. Briggs and Mr. Tsuruoka at the 777th meeting, *Yearbook... 1965*, vol. I, pp. 10 and 11.

[70] Article 2 of the 1986 Vienna Convention was adopted without discussion on this point: see *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February–21 March 1986 (Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.129/16, United Nations publication, Sales No. F.94.V.5, vol. I), 5th plenary meeting, pp. 10 and 11, paras. 18–21; 1st to 4th meetings of the Committee of the Whole, ibid., pp. 39–55; and its 27th meeting, ibid., pp. 186–194, paras. 3 and 4 and 9–12. The International Law Commission did not revisit this aspect of the definition of treaties in its work on treaties concluded by international organizations. Instead, the Commission focused on determining whether a clearer distinction should be drawn between treaties and contracts, considering that an agreement concluded by an international organization may often be subject to municipal law rather than international law. See, in particular, *Yearbook... 1974*, vol. II (Part One), pp. 294 and 295) (draft article 2, paragraph 2, and commentary thereto). In the end, the definition of treaties set out in the 1969 Vienna Convention was used in the draft articles on the law of treaties between States and international organizations or between international organizations adopted by the Commission in 1982.

37. At the first session of the Conference, held in 1968, two amendments were put forward aimed at making the definition of the term "treaty" more precise. Chile proposed that it should be specified that the term "treaty" means a written agreement between States, governed by international law, "which produces legal effects".[71] The reasoning behind the proposal was that it was essential to "distinguish between agreements between States which produced legal effects and those which did not", because "[i]t often happened that declarations made on the international plane represented, like treaties, a concurrence of wills, but did not produce legal effects", and it would be "dangerous to confuse them with treaties and to make both of them subject to the rules of the Convention, thereby gravely restricting freedom of expression in international affairs".[72] For their part, Mexico and Malaysia proposed amending the definition to specify that a treaty "established a relationship between the parties" and was governed by international law, while regretting that, in its draft, the Commission had omitted "an important element, namely, the intention to create rights and obligations".[73]

38. At the second session of the Conference, held in 1969, Switzerland proposed another amendment to the definition of the term "treaty" that was similar to the proposals made at the first session but was aimed at clarifying them, on the grounds that the phrase "which produces legal effects", defended by Chile, was not deemed sufficiently clear and precise. Switzerland disapproved of the fact that, in its proposed definition of the term "treaty", the Commission "was silent on agreements concluded between States at the international level but not constituting treaties, such as declarations of intent, political declarations and 'gentlemen's agreements' [of which Switzerland cited concrete examples], which played a very important part in international politics and inter-State relations". According to Switzerland, "[s]uch political declarations gave rise to some legal problems and were governed by international law. The definition should therefore be made more precise in order to exclude that kind of agreement". Switzerland therefore proposed adding the words "providing for rights and obligations" to the definition.[74]

39. None of those amendments was adopted. The Drafting Committee rejected proposals that included "a reference to the legal effect of treaties". It considered that such a reference "would be superfluous" and that the expression "agreement … governed by international law" covered "the element of the intention to create obligations and rights in international law".[75] Several delegations noted that the proposed amendments were not objectionable in themselves but were somewhat

[71] A/CONF.39/C.1/L.22, cited in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Conference Documents* (A/CONF.39/11/Add.2, United Nations publication, Sales No. F.70.V.5, p. 111, para. 35; and in ibid., *First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No. *F.68.V.7*), 4th plenary meeting, p. 21, para. 3.

[72] A/CONF.39/11, 4th plenary meeting, p. 21, para. 3. See also ibid., *Second Session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1, United Nations publication, Sales No. F.70.V.6), 87th meeting of the Committee of the Whole, p. 226, para. 24, where Chile expresses a similar concern, noting that if non-binding agreements are not sufficiently distinguished from treaties, States might be "inhibited" and "might hesitate to take a definite stand in writing when expressing their common political views or long-term wishes", whereas "general political declarations were the driving force in the life of the international community". The present Special Rapporteur is acutely aware of that concern.

[73] A/CONF.39/C.1/L.33; cited in A/CONF.39/11/Add.2, p. 111, and A/CONF.39/11, 4th meeting of the Committee of the Whole, p. 23, para. 26.

[74] A/CONF.39/11/Add.1, 87th meeting of the Committee of the Whole, pp. 225 and 226, paras. 13–16. For the text of the amendment, see A/CONF.39/11/Add.2, p. 234, para. 20.

[75] A/CONF.39/11/Add.1, 105th meeting of the Committee of the Whole, p. 346, paras. 21 and 22.

theoretical in character and even stated the obvious.[76] The definition of the term "treaty" was thus approved without those amendments.[77]

40. Sixth, it should be noted that there were a number of critical or dissenting opinions concerning that decision. Some members of the Commission appeared to be of the view that any relation under international law necessarily gave rise to or implied an obligation,[78] which would mean that an agreement could either be binding or have no relation whatsoever to international law, and that there was no intermediate category. Indeed, at the United Nations Conference on the Law of Treaties, the Expert Consultant, Sir Humphrey Waldock, appeared to dissociate himself from the solution agreed by the Commission two years earlier by stating that he had "doubts" regarding the adopted definition. He stated as follows: "in many cases an instrument might have the characteristics of a treaty because of the intention with which it had been drawn up. Certain communiqués now published at the end of important conferences were in fact agreements between ministers and had legal effects".[79] Lastly, the Union of Soviet Socialist Republics "categorically" rejected the proposed amendments, explaining that, in its view,

> "[b]y limiting the notion of a treaty to agreements which provided for rights and obligations, the Swiss amendment unduly restricted the scope of the draft articles by excluding from their sphere of application important international agreements, such as the Atlantic Charter, the Yalta and Potsdam Agreements and many political declarations which not only provided for 'rights and obligations' but also laid down very important rules of international law and had governed international relations since the end of the Second World War. Such political agreements were vitally important sources of contemporary international law, of undeniable legal force and validity and the draft articles could not ignore them. Acceptance of the amendments by Switzerland and Chile would mean that agreements of great importance providing for the struggle against aggression and colonialism would be deprived of their binding force and validity, and that was something that no one could accept".[80]

41. In response to that statement, the United Kingdom noted that "[i]nternational practice had consistently upheld the distinction between international agreements properly so-called, where the parties intended to create rights and obligations, and declarations and other similar instruments simply setting out policy objectives or agreed views" and that indeed, "the views of the USSR representative were not shared by all Soviet jurists," since in the work entitled "International Law", published by the Academy of Sciences of the Soviet Union, the term "treaty" was defined as an agreement regarding the establishment, amendment or termination of rights and obligations.[81]

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[76] A/CONF.39/11, 5th meeting of the Commission of the Whole, p. 25, para. 10 (Greece); pp. 25 and 26, para. 21 (Italy); p. 27, para. 45 (Lebanon); p. 28, para. 63 (New Zealand); p. 30, para. 91 (Union of Soviet Socialist Republics); 6th meeting, p. 32, para. 3 (Mongolia); p. 33, para. 22 (Central African Republic); A/CONF.39/11/Add.1, 87th meeting of the Committee of the Whole, p. 227, para. 30 (Romania); p. 228, para. 42 (Spain). See also the agnostic position of the United Kingdom, pp. 227 and 228, para. 34; and the position of Czechoslovakia in support of the amendments, A/CONF.39/11, 5th meeting of the Committee of the Whole, p. 26, para. 31.

[77] A/CONF.39/11/Add.1, 105th meeting of the Committee of the Whole, p. 347, para. 43.

[78] *Yearbook… 1950*, vol. I (in English only), pp. 69, 71, 74 and 81 (Mr. Córdova); p. 72 (Mr. Hsu); p. 81 (Mr. Hudson, Mr. Sandstrom, the Chairman and Mr. Alfaro).

[79] A/CONF.39/11. 6th meeting of the Committee of the Whole, p. 34, para. 26.

[80] A/CONF.39/11/Add.1, 87th meeting of the Committee of the Whole, p. 226, para. 22.

[81] Ibid., p. 228, para. 35.

42. In the end, neither the draft articles on the law of treaties,[82] nor the draft articles on the law of treaties between States and international organizations or between international organizations,[83] nor the 1969 and 1986 Vienna Conventions set out specific criteria for distinguishing treaties from agreements that do not create either rights or obligations.

2. Work on subsequent agreements and subsequent practice in relation to the interpretation of treaties

43. The decision taken in 1969 to consider treaties to be written agreements that have a binding effect meant that some agreements might not meet that condition and might therefore not be considered treaties. That inevitably led to the recognition of the existence of two categories of agreements: those that are legally binding and those that are not. Still to be determined was whether non-legally binding agreements were excluded outright from the realm of international law, or whether they could still come under it and be attributed some legal effects. The Commission took an explicit step to that end in its work on subsequent agreements and subsequent practice in relation to the interpretation of treaties. As stated in conclusion 10, paragraph 1, of the draft conclusions adopted on second reading in 2018:

> "An agreement under article 31, paragraph 3 (a) and (b) [of the 1969 Vienna Convention], requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. *Such an agreement may, but need not, be legally binding for it to be taken into account*".[84]

44. As stated in the commentary to that provision, the aim is to "reaffirm that 'agreement', for the purpose of article 31, paragraph 3, need not, as such, be legally binding, in contrast to other provisions of the 1969 Vienna Convention in which the term 'agreement' is used in the sense of a legally binding instrument".[85] Furthermore, "subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), even if they are not in themselves legally binding, can thus nevertheless, as means of interpretation, give rise to legal consequences as part of the process of interpretation according to article 31".[86]

45. The second sentence of draft conclusion 10, paragraph 1, was criticized by some members of the Commission. The present Special Rapporteur had opposed it at the time on the grounds that "interpreters should consider" any interpretative agreement concluded by all the parties to a treaty "to be binding", while non-binding commitments came under the supplementary means of interpretation of article 32, and not article 31, of the 1969 Vienna Convention.[87] While some members took a similar position,[88] others supported the wording proposed by Special Rapporteur Georg Nolte.[89] The differences of opinion were further complicated by an equivocal statement by the Chairperson of the Drafting Committee to the effect that "the conduct

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[82] The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook… 1966*, vol. II, document A/6309/Rev.1, Part Two, pp. 177 ff.

[83] The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook… 1982*, vol. II (Part Two), pp. 17 ff., para. 63.

[84] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), p. 75 (emphasis added).

[85] Ibid., p. 77, para. (9) of the commentary to draft conclusion 10 (footnotes excluded).

[86] Ibid., p. 78, para. (11) of the commentary to draft conclusion 10 (footnote excluded).

[87] *Yearbook… 2014*, vol. I, 3205th meeting, p. 36, para. 21. See also 3208th meeting, p. 44, para. 28.

[88] Ibid., 3207th meeting, p. 41, para. 15; and ibid., 3208th meeting, p. 44, para. 29 (Mr. Kamto); pp. 43 and 44, para. 22, and p. 44, para. 31 (Mr. Hmoud). See also ibid., 3208th meeting, p. 45, para. 38 (Sir Michael Wood).

[89] Ibid., 3207th meeting, p. 41, para. 20 (Mr. Šturma); ibid., 3208th meeting, p. 42, para. 3 (Mr. Gómez Robledo); p. 48, para. 7 (Mr. Nolte, Special Rapporteur).

of the parties for the purposes of interpreting the treaty would be taken into account, insofar as that conduct attributed a certain meaning to the treaty and therefore established an agreement regarding its interpretation, but that agreement did not have to be legally binding. That wording disregarded the issue of the politically binding nature which some agreements might have".[90] That prompted several members to restate their doubts[91] and to put forward an amendment to the draft commentary that reflected those doubts.[92] The amendment became paragraph (12) of the commentary to draft conclusion 10 [9] adopted on first reading in 2016, and read as follows:

> "Some members considered, on the other hand, that the term 'agreement' has the same meaning in all provisions of the 1969 Vienna Convention. According to those members, this term designates any understanding that has legal effect[[93]] between the States concerned, and the case law referred to in the present commentary does not contradict this definition. Such a definition would not prevent taking into account, for the purpose of interpretation, a legally non-binding understanding under article 32".[94]

46. That paragraph was not included by the Special Rapporteur in the new version of the commentaries submitted for the second reading of the draft conclusions by the Commission, the composition of which had changed in the meantime, and no comments were made regarding the omission during the Commission's plenary session. The paragraph was thus not included in the draft conclusions adopted on second reading in 2018.

47. A recent study showed that the differences of opinion that emerged within the Commission on that issue have found their way not only into the doctrine but also into international arbitral case law, with some courts and tribunals and authors taking the view that an interpretative agreement concluded by all the parties to a treaty is necessarily binding on courts and tribunals (since any authentic interpretation by the parties would be binding), while others believe that this is not automatically the case and that an interpretative declaration adopted by all the parties to a treaty is not necessarily legally binding on courts and tribunals.[95]

48. In his fifth report, Special Rapporteur Georg Nolte summarized the comments of States on draft conclusion 10 [9] adopted on first reading as follows, before concluding that, in his view, there were no grounds for amending it:

> "The second sentence of paragraph 1 ('Though it shall be taken into account, such an agreement need not be legally binding') was accepted in substance by

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[90] Ibid., 3215th meeting, p. 75, para. 5 (Mr. Saboia).

[91] Ibid., p. 76, paras. 8, 9 and 11 (Mr. Kamto and Mr. Forteau). See also statements by the Special Rapporteur, ibid., 3215th meeting, p. 76, para. 10; and ibid., 3233rd meeting, p. 173, para. 25 (Mr. Nolte).

[92] Ibid., 3240th meeting, pp. 204 and 205, paras. 38–40.

[93] The expression "faisant droit" was used in the original French version of the amendment (see *Yearbook… 2014*, vol. I, 3240th meeting, p. 217, para. 38). The phrase was translated into English as "which is binding upon" and later replaced by "which has legal effect between". Unfortunately, the French text was then amended to paraphrase this English translation, thereby altering the original meaning of the amendment, as "ayant des effets juridiques" does not have the same meaning as "faisant droit".

[94] *Yearbook... 2016*, vol. II (Part Two), p. 126.

[95] See L.C. Alcolea, "States as masters of (investment) treaties: the rise of joint interpretative statements", *Chinese Journal of International Law*, 2023, pp. 479–527, in particular pp. 488 ff.; see also I. Venzke, "Authoritative interpretation", *Max Planck Encyclopedia of Public International Law*, April 2018. These disagreements have led some States to include in the investment treaties that they conclude express wording to the effect that interpretations of such treaties given by way of agreements between the parties are legally binding, including on the competent courts and tribunals (see L.C. Alcolea, "States as masters of (investment) treaties: the rise of joint interpretative statements").

most States. France, however, questioned this sentence on the ground that 'if such an agreement were not legally binding, there would be a risk of purely political acts or decisions being included in that category'. However, the second sentence speaks of 'such an agreement' and thereby refers to the first sentence, which requires 'a common understanding regarding the interpretation of a treaty which the parties are aware of and accept'. Such a 'common understanding' cannot be a 'purely political' act.

Expressing themselves on the assumption that the second sentence of paragraph 1 is agreeable in substance, some States proposed to clarify or improve its language. Greece suggested that 'the distinction between the substance and the form of such an agreement should be more clearly reflected in the text of draft conclusion [10 [9]]'. Similarly, El Salvador proposed that the wording could be improved by referring both to binding agreements and to those which, although not binding, may be taken into account. Finally, Ireland remarked that 'through a slight drafting amendment, the meaning of the final sentence might be made clearer. The use of the word 'though' … might appear to suggest some conditionality or contingency. It would seem that the intent of the sentence, as described in paragraph (9) of the commentary, might be captured by stating, for example, that '[s]uch an agreement need not be legally binding in order for it to be taken into account.''

The proposing States themselves consider that these three suggestions are minor and do not concern the substance of the draft conclusion. The Special Rapporteur is of the view that the second sentence of paragraph 1, if read together with the commentary, is sufficiently clear and should not be changed. Only if a formulation could be found that is both generally acceptable and would reflect the concerns of the different proposals might it be advisable to change the formulation. Perhaps the following formulation might be a possibility: 'Such an agreement may, but need not necessarily be, legally binding for it to be taken into account'".[96]

49. Apart from these few comments, the States Members of the United Nations have not since objected to draft conclusion 10, paragraph 1; it therefore appears to be generally accepted.[97] Indeed, they could not have been fooled as to the meaning of the draft conclusion. Apart from the fact that the wording of draft conclusion 10 is perfectly explicit, the draft conclusions adopted by the Commission (on both first and second readings) include numerous other references to the fact that a non-legally binding agreement may have effects in the context of treaty interpretation. For example, it is stated in paragraph (4) of the commentary to draft conclusion 3 that "notwithstanding the suggestions of some commentators, subsequent agreements and subsequent practice that establish the agreement of the parties regarding the interpretation of a treaty are not necessarily legally binding".[98] Similarly, in paragraph (6) of the commentary to draft conclusion 4, it is stated that, "[w]hile every treaty is an agreement, not every agreement is a treaty. Indeed, a 'subsequent agreement' under article 31, paragraph 3 (a), 'shall' only 'be taken into account' in the interpretation of a treaty. Therefore, it is not necessarily binding".[99] It is also

[96] A/CN.4/715, 2018, paras. 88–90 (footnotes excluded) and para. 96. See also the written comments of States on draft conclusion 10 [9], A/CN.4/712, pp. 23–26.

[97] See also the legal position (based on this conclusion) set out by the United Nations Office of Legal Affairs in its letter of 28 February 2014 addressed to the Executive Secretary of the Convention on Biological Diversity concerning the legal effects of replacing a term used in the Convention in decisions of the Conference of the Parties (United Nations, *Juridical Yearbook 2014* (ST/LEG/SER.C/52), pp. 353–356).

[98] A/73/10, p. 24 (footnotes omitted).

[99] Ibid., p. 29.

stated in paragraph (23) of the commentary to draft conclusion 6 that "[s]ubsequent agreements can be found in legally binding treaties as well as in non-binding instruments like memorandums of understanding".[100]

3. Work on other topics

50. The topic of non-legally binding international agreements has occasionally come up in the Commission's work on other topics. In most cases, the Commission has sidestepped the difficulties raised by these types of agreements.

51. For example, as mentioned in the 2022 syllabus, in the commentary to draft principle 17 of the draft principles on protection of the environment in relation to armed conflicts, adopted on first reading in 2019, the notion of agreement should be understood "in its broadest sense", including "treaties and other types of agreements", but it is not made clear whether (or not) the notion should be understood as including agreements that are not legally binding.[101] That same wording, without additional clarification, was also used in the draft adopted on second reading.[102]

52. Another example is the Commission's discussion at its previous session on the topic of settlement of disputes to which international organizations are parties. At its 3648th meeting, held on 27 July 2023, the Commission discussed whether an international organization could be created by a non-legally binding agreement. A member of the Commission had proposed the addition of the following sentence, relevant for the purposes of the present topic, in the commentary to the definition of the term "international organization": "The reference to an entity 'established by a treaty or other instrument governed by international law' is not intended to exclude the rare cases in which international organizations are established by a non-legally binding instrument".[103] At the same meeting, a discussion took place on the nature of the constituent instrument of the Association of Southeast Asian Nations (ASEAN), described by a member of the Commission as "a document that was not a legally binding treaty".[104] At the next meeting, the proposed amendment was reworded as follows: "The reference to an entity 'established by a treaty or other instrument governed by international law' is not intended to resolve particular questions related to the determination of the existence of international legal personality and the status of certain entities...".[105] Neither of the proposals was adopted. Consequently, at the current stage of its work, the Commission has not indicated whether the reference to treaties and to any "other form of instrument governed by international law", in draft guideline 2, as provisionally adopted in 2023, covers only binding instruments (other

[100] Ibid., p. 50 (footnotes omitted). See also para. (31) of the commentary to draft conclusion 11 (ibid., p. 91), as well as paras. 36–38 of the same commentary (ibid., pp. 92 and 93), in particular para. 37, which contains the following summary of a position expressed in 2011 by the Sub-Division for Legal Affairs of the International Maritime Organization (IMO): "Although the opinion of the IMO Sub-Division for Legal Affairs proceeded from the erroneous assumption that a 'subsequent agreement' under article 31, paragraph 3 (a), would only be binding 'as a treaty, or an amendment thereto', it came to the correct conclusion that even if the consensus decision by a Conference of States Parties embodies an agreement regarding interpretation in substance it is not (necessarily) binding upon the parties" (footnotes omitted).

[101] A/77/10, annex I, p. 356, para. 10. For para. 1 of the commentary to draft principle 17 of the draft principles on protection of the environment in relation to armed conflicts, adopted on first reading, see *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), p. 211.

[102] A/77/10, p. 154 (para. (2) of the commentary to draft principle 18).

[103] Proposal by Mr. Asada (A/CN.4/SR.3648, p. 7 of the English version).

[104] Statement by Ms. Mangklatanakul (ibid., p. 9).

[105] Proposal by Mr. Asada (A/CN.4/SR.3649, p. 8 of the English version).

than treaties) or whether it also covers non-binding instruments, as opposed to treaties.[106]

53. In the same vein, it should be noted that to date, the Commission has not addressed as such the question of the extent to which it is possible to rely on non-legally binding international agreements as evidence of customary international law or as a means of determining the existence or content of a general principle of international law. Such agreements are not expressly mentioned (neither excluded nor included) in the draft conclusions on general principles of law adopted by the Commission on first reading in 2023.[107] In its commentary to draft conclusion 7 (Identification of general principles of law formed within the international legal system), the Commission simply stated that "this analysis must take into account all available evidence of the recognition of the principle in question by the community of nations, such as international instruments reflecting the principle, resolutions adopted by international organizations or at intergovernmental conferences, and statements made by States".[108] It may be assumed that this covers non-binding agreements, but that is not expressly stated. A similar approach was taken in the context of the topic of identification of customary international law. One author has remarked that non-binding agreements "can contribute to the consolidation of customary rules, although, curiously, the [International Law Commission] does not mention it in its work on evidence of custom".[109] Indeed, non-binding agreements are not explicitly mentioned in either the third report of Special Rapporteur Sir Michael Wood,[110] or in the draft conclusions on identification of customary international law adopted in 2018.[111] However, the fact that draft conclusion 12 and the commentary thereto show clearly that "resolutions, decisions and other acts adopted by international organizations or at intergovernmental conferences […] whether or not they are legally binding" may provide evidence for determining the existence of customary international law suggests that the same applies to non-legally binding international agreements.[112]

54. Similarly, the question of whether a non-legally binding agreement can constitute a form of consent to provisional application is not expressly settled in the commentary to guideline 4 of the Guide to Provisional Application of Treaties

[106] In para. (5) of the commentary to draft guideline 2, the Commission instead appears to use the expression "other instrument governed by international law" to refer to decision-making instruments, such as "decisions" taken by conferences of States, yet it explicitly includes the example of the constituent instrument of ASEAN (see A/78/10, pp. 42 and 43). The same ambiguity is found in the commentary to article 2 of the articles on the responsibility of international organizations adopted by the Commission in 2011 (*Yearbook… 2011*, vol. II (Part Two), p. 49 (para. (4) of the commentary)).

[107] A/78/10, pp. 11 ff., paras. 40 and 41.

[108] Ibid., p. 23 (para. (3) of the commentary to draft conclusion 7). The example given in para. (7) of the commentary (the 1986 judgment of the International Court of Justice in *Frontier Dispute (Burkina Faso/Mali)*, which is based on a resolution in support of the principle identified by the Court) suggests that non-legally binding instruments can be invoked to establish an unwritten international rule (A/78/10, p. 23).

[109] A. Pellet, "Le droit international à la lumière de la pratique: l'introuvable théorie de la réalité. Cours général de droit international public", *Collected Courses of the Hague Academy of International Law, 2021*, vol. 414, pp. 9 ff., at p. 203.

[110] *Yearbook… 2015*, vol. II (Part One), document A/CN.4/682.

[111] A/73/10, pp. 119 ff., paras. 65 and 66.

[112] Ibid., p. 147, para. (2) of the commentary to draft conclusion 12. A similar point is made in subsequent paragraphs of the commentary: "... in the context of the present draft conclusion what is relevant is that [these resolutions of international organizations and intergovernmental conferences] may reflect the collective expression of the views of such States", even if they "are normally not legally binding documents" (ibid., p. 147, para. (3)); they have normative value "even if they are not binding", as the International Court of Justice noted in 1996 (ibid., p. 148, para. (5)). "[E]ven when devoid of legal force of their own, [such resolutions] may sometimes play an important role in the development of customary international law" (ibid., p. 148, para. (7)).

adopted in 2021. It is indicated in the guideline that an "agreement" providing for provisional application may take the form of a treaty "or (b) any other means or arrangements, including: (i) a resolution, decision or other act adopted by an international organization or at an intergovernmental conference, in accordance with the rules of such organization or conference, reflecting the agreement of the States or international organizations concerned[...]".[113] It is not indicated in the commentary to the guideline whether the existence of such an agreement is conditional on its being binding.[114] The reference to "any other means or arrangements", including a resolution, as contrasted with a "treaty", suggests that this is not necessarily the case.[115] However, this would appear to be incompatible with guideline 6, which sets out the principle that "[t]he provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof [...]".[116]

55. The Commission took a more explicit position in the context of its work on the protection of persons in the event of disasters. During the debate on the draft articles on that topic, one member proposed that the word "commitment" should be used instead of "obligation", "since State practice mostly consisted of political declarations which did not entail any legal obligation", and because that "would show that draft article 16 [on the duty to reduce the risk of disasters] was based not only on the general principles set forth in paragraph 4, but also on a large number of binding and non-binding instruments".[117] That proposal, endorsed by the Special Rapporteur on the grounds that the term "'commitment' ... covered all initiatives, as well as legal instruments, political declarations, platforms and action plans", was adopted by the Commission.[118]

B. Work by entities other than the Commission

56. A number of (public or private) organizations have previously worked on the topic of non-legally binding international agreements. The work carried out by the Institute of International Law between 1976 and 1983, entitled *"Textes internationaux ayant une portée juridique dans les relations mutuelles entre leurs auteurs et textes qui en sont dépourvus"* (International texts of legal import in the mutual relations between their authors and texts devoid of such import) was a forerunner in this respect (see sect. B.1 below).[119] More recently, the Inter-American Juridical Committee (sect. B.2) and the Committee of Legal Advisers on Public International Law of the Council of Europe (sect. B.3) have also taken up the topic. A number of other recent initiatives on the topic also deserve mention (sect. B.4).

1. Work of the Institute of International Law

57. The scope of the study conducted by the Institute between 1976 and 1983 was broader than what the Special Rapporteur believes should be the scope of the present topic (see chap. VII below). The Institute had set out to examine all international "texts" (not only "agreements"). However, the task was very much the same: to examine the specific nature of texts "devoid of legal import", an expression that is

[113] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), p. 54.
[114] Ibid., pp. 75–77.
[115] In a memorandum it submitted in March 2013 on the *travaux préparatoires* of the 1969 Vienna Convention, the Secretariat noted that the Kingdom of the Netherlands had suggested that "the term 'provisional application' might also be understood to refer to a non-binding form of provisional application", namely the entry into "a non-binding agreement concerning provisional entry into force" (see *Yearbook... 2013*, vol. II (Part One), document A/CN.4/658, paras. 47 and 71).
[116] A/76/10, p. 78.
[117] *Yearbook... 2013*, vol. I, 3191st meeting, para. 15.
[118] Ibid., para. 16.
[119] The Institute's work on this topic has been carried out mainly in French.

broadly equivalent to the expression "non-legally binding", which is analysed below (see chap. VII, sect. B below). That being said, three sets of observations can be made about the Institute's work.

58. First, the study carried out by the Institute was quite broad and detailed. After an exploratory study of the topic submitted by Fritz Münch in September 1976 (following a request for guidance from the Institute's Secretary General the previous year),[120] Michel Virally was appointed rapporteur for the topic. He submitted a preliminary paper in April 1979,[121] accompanied by a questionnaire addressed to the members of the Institute's Seventh Commission,[122] who responded in the form of written comments.[123] On that basis, the rapporteur then submitted a provisional report in July 1981.[124] After receiving additional written comments from members between January and April 1982,[125] the rapporteur submitted a final report in September 1982.[126] Following the debate held at the plenary session in August 1983,[127] the Institute adopted a resolution on the topic on 29 August 1983.[128]

59. Second, the Institute was unable to agree on a substantive text, owing to the "diversity of opinions" on the topic expressed by its members.[129] In the adopted resolution, it simply congratulated the Seventh Commission on the work done; requested the Bureau "to consider in the near future whether further development of practice and more in-depth consideration in the literature on the subject might justify the Institute placing it again on its agenda";[130] and reproduced, "for purposes of information, the conclusions reached by the rapporteur, as amended by him in the light of the debate held in the Institute".[131] Some of those conclusions (1, 2, 3 and 7) are not directly related to the present topic, as they concern the effect of treaty provisions. However, the following conclusions deserve the Commission's attention:

> "4. Texts setting out commitments which States that accepted them understood to be binding solely at the political level and which have all their effects at that level (hereafter referred to as 'purely political commitments') do not constitute international texts of legal import in the mutual relations between their authors, subject to what is stated in paragraphs 5 and 6.
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> [...]
>
> 5. The violation of a purely political commitment is grounds for the aggrieved party to use all means within its power to put an end to, or compensate for, the harmful consequences or drawbacks of that violation, insofar as such

[120] *Yearbook of the Institute of International Law*, vol. 60, Part I (Cambridge session, 1983), *Travaux préparatoires*, pp. 307–327.
[121] Ibid., pp. 283–304.
[122] Ibid., pp. 305 and 306.
[123] Ibid., pp. 258–282 (written comments by Ms. Bastid, Mr. Bindschedler, Mr. Haraszti, Mr. Lachs, Mr. Münch, Mr. Sahovic, Mr. Schachter and Mr. Zemanek).
[124] Ibid., pp. 166–257.
[125] Ibid., pp. 358–374 (written comments by Ms. Bastid, Mr. Bindschedler, Mr. Münch, Mr. Sahovic, Mr. Schachter, Mr. Tunkin, Mr. Weil and Mr. Zemanek).
[126] Ibid., pp. 328–357.
[127] *Yearbook of the Institute of International Law*, vol. 60, Part II (Cambridge session, 1983), pp. 117 to 154.
[128] Ibid., p. 153. For the final text of the resolution (the French text being the authoritative version), see ibid., pp. 284–291. It is also available, in French and English, on the Institute's website at https://www.idi-iil.org/en/sessions/cambridge-1983/?post_type=publication.
[129] The reference to the "diversity of opinions" in the preamble to the resolution was the result of an amendment proposed by Mr. Yankov on the grounds that the resolution did not sufficiently reflect the complexity of the topic and all the work carried out over five years (see *Yearbook of the Institute of International Law*, vol. 60, Part II, pp. 149, 150, 152 and 153).
[130] Ibid. p. 286.
[131] Ibid. p. 284.

means are not prohibited under international law. The parties to disputes arising from such violations may resort to all appropriate means of peaceful settlement and must be resort to a peaceful settlement procedure in the circumstance specified in Article 33, paragraph 1, of the Charter of the United Nations.

6. A State which has entered into a purely political commitment is subject to the general obligation of good faith which governs the conduct of subjects of international law in their mutual relations.

Consequently, it is subject to all the legal obligations that may result from such a commitment, in particular if it has created the appearance of a legal commitment upon which another party has relied and if the conditions required by international law for the creation of such obligations have been fulfilled.

Likewise, it is deemed to have waived the right to invoke any objection to which it may have been entitled under international law (including the *domaine reservé* (reserved domain) exception) against any request for enforcement of its commitment submitted by a party to whom it made the commitment. Consequently, such a request cannot be regarded as unlawful interference.

[…]

8. The legal or purely political character of a commitment set forth in an international text of an uncertain nature depends upon the intention of the parties as may be established by the usual rules of interpretation, in particular by an examination of the terms used to express that intention, the circumstances in which the text was adopted and the subsequent conduct of the parties.

9. International texts that merely set out statements of policy, whereby their authors simply mean to give an indication of their views in relation to a particular issue at the time of drafting the text without wishing to be bound in the future, are devoid of any legal import and are only binding on their authors if they have generated a situation of estoppel.

A policy statement is admissible only if the will not to be bound, as resulting in particular from the terms used, the circumstances in which the statement was made and the subsequent conduct of its author, is perfectly clear.

[...].”[132]

60. Third, while the present preliminary report is not the place for detailed comments on those conclusions and the related debate, it does seem appropriate to mention the most notable elements that could be particularly useful for the Commission’s work.

(a) The work of the Institute of International Law was rooted in the fact that the United Nations Conference on the Law of Treaties had “failed to define the criteria for determining whether a text is ‘governed by international law’”, leaving a gap that would be “of considerable importance”.[133]

(b) The practical implications of the topic were highlighted,[134] beginning with the fact that whether or not a text is legally binding has legal consequences regarding the possibility, for example, of invoking treaty law or the law of responsibility.[135]

[132] Ibid., pp. 288 and 290.

[133] *Yearbook of the Institute of International Law*, vol. 60, Part I, pp. 307, 308, 323 and 324 (exploratory study by F. Münch).

[134] Ibid., p. 166, para. 2 (provisional report by Virally).

[135] Ibid., paras. 230 ff. (provisional report by Virally).

(c) The work revealed that disagreements regarding the binding or non-binding nature of a text could be brought not only before international courts and tribunals but also before domestic courts and tribunals.[136]

(d) The rapporteur also gave a word of caution that is worth bearing in mind: "the temptation of lawyers is to broaden the category of texts that produce legal effects as much as possible [...]. [That] cannot, however, go so far as to give legal value to commitments which their author or authors wanted to make without being legally bound."[137]

(e) The exploratory study by Münch and the reports by Virally have provided a wealth of examples of non-legally binding international texts (including agreements).[138] The rapporteur, who as early as 1981 had noted the increase in such texts in contemporary practice, proposed that texts be classified on the basis of their form and the extent to which they are of a legal character.[139]

(f) The Institute did not address texts emanating from international organizations, but it did consider how final acts of international conferences, which are not always easy to distinguish from agreements, should be treated.[140]

(g) It was felt that there was little agreement on the subject among authors.[141]

(h) It was also noted that, with practice becoming increasingly sophisticated and diverse, it would not be possible to "eliminate all the often-deliberate uncertainties that are found in practice", but that it would be worthwhile, "however, to develop some instruments that would help to reduce them."[142]

(i) A ternary, rather than binary, distinction emerges from the Institute's work, whereby alongside treaties, which are legally binding on the parties, there are, on the one hand, "purely political commitments", to which the parties did not intend to confer any legal status, and on the other, commitments that are not binding but are nevertheless not devoid of any legal import.[143]

(j) A substantial part of the work concerned the criteria for distinguishing texts with legal import from those without legal import.[144] It was stressed that whether or not a text was binding had to be determined "on a case-by-case basis".[145]

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[136] Ibid., pp. 318 and 319 (exploratory study by Münch).

[137] Ibid., p. 225, paras. 137 and 138 (provisional report by Virally). See also ibid., p. 360 (observation by Münch); and ibid., Part II, p. 135 (P. Weil); and, expressing the same caution, W. Wengler, "Les conventions 'non juridiques' (*nichtrechliche Verträge*) comme nouvelle voie à côté des conventions en droit (*Rechtsverträge*)", in *Nouveaux itinéraires en droit. Hommage à François Rigaux* (Brussels, Bruylant, 1993), pp. 637–656, at page 639.

[138] *Yearbook of the Institute of International Law*, vol. 60, Part I, pp. 310–318 (exploratory study by Münch); pp. 189 ff. (provisional report by Virally); and pp. 331–341 (final report by Virally).

[139] Ibid., pp. 331–341 (final report by Virally).

[140] Ibid., para. 174 ff. (provisional report by Virally) and pp. 286 and 287 (preliminary exposé by Virally); p. 305 (questions 4, 5, 6 and 8 of the questionnaire); p. 259 (observation by Ms. Bastid); p. 261 (observation by Mr. Bindschedler); and pp. 263 and 264 (observation by Mr. Haraszti).

[141] Ibid., pp. 321 and 322 (exploratory study by Münch).

[142] Ibid., p. 291 (preliminary exposé by Virally).

[143] Ibid. p. 325 (exploratory study by Münch); and pp. 336 ff. (final report by Virally). See also ibid., p. 364 (observation by Mr. Schachter). In contrast, see the reservations expressed by J. Salmon concerning the notion of "purely political" commitments, ibid., vol. 60, Part II, p. 130.

[144] Ibid., vol. 60, Part I, in particular pp. 291 ff. and pp. 297–299 and 303 (preliminary exposé by Virally), on "les textes infra-conventionnels" (texts devoid of legal import), described as those raising the most difficult issues; pp. 237 ff. (provisional report by Virally); and pp. 341 ff. (final report by Virally).

[145] Ibid., vol. 60, Part II, p. 136 (Mr. Arangio-Ruiz).

(k) It was also useful to determine the potential legal effects of non-legally binding commitments,[146] considering only their effects on the parties thereto and not their effects on third parties.[147]

(l) The question of the potential legal effects of non-binding texts divided the members of the Institute. Several members, such as Oscar Schachter, for whom "some non-legal texts or agreements involve legal effects", accepted the principle.[148] Other members felt that the matter of "agreements of no legal value [...] was best left to politicians"[149] or, conversely, that it would be impossible to conceive of "a commitment that is not legal in nature".[150] A significant part of the debate was spent determining what was meant by the reference to a "text of legal import", which is broader than a "binding text".[151]

(m) The rapporteur had also emphasized the "temporal factor", stating that "the nature of a text, in terms of its legal import, can vary over time".[152]

(n) The potential effects of non-binding texts were examined in relation to good faith and estoppel,[153] as well as to the impossibility of invoking the reserved domain exception once a non-binding international text has been adopted.[154] It was also argued that such a text could be used for the interpretation of another agreement or the identification of customary law.[155]

2. Work of the Inter-American Juridical Committee

61. The Inter-American Juridical Committee worked on the topic of binding and non-binding agreements from 2016 to 2020, culminating in the adoption of a set of guidelines in August 2020.[156] That work is important for three reasons: first, because the guidelines were adopted recently, almost 40 years after the work of the Institute of International Law; second, because it was based on practice that the States of the region made available to the Committee; and third, because it culminated in a concrete outcome designed to assist and guide States in their day-to-day practice. In its resolution CJI/RES. 259 (XCVII-O/20) of 7 August 2020, by which it adopted the guidelines, the Committee stated that the guidelines "can help Member States to have a clearer understanding of the various types of binding and non-binding international agreements that exist at present, and to better anticipate the preparation, application and interpretation of such agreements". To that end, the guidelines provide a set of "definitions, points of understanding, and best practices" that States may use.[157] According to the introduction to the guidelines, their purpose is "to alleviate current

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[146] Ibid., vol. 60, Part I, p. 326 (exploratory study by Münch) and pp. 343–348 (final report by Virally).
[147] Ibid., pp. 172–174 (provisional report by Virally).
[148] Ibid., p. 280 and, for the other members, p. 259 (Ms. Bastid), p. 264 (Mr. Haraszti), p. 270 (Mr. Lachs), p. 274 (Mr. Münch), p. 276 (Mr. Sahovic) and, more cautiously, p. 281 (Mr. Zemanek). See also ibid., vol. 60, Part II, p. 121 (Mr. Skubiszewski), p. 131 (Mr. Schachter) and p. 133 (Mr. Rosenne, according to whom "Final Acts", for example, "might usually in principle lack legal force but this did not mean that they lacked legal significance").
[149] Ibid., vol. 60, Part II, p. 122 (Mr. Wortley).
[150] Ibid., p. 147 (Mr. Sperduti).
[151] Ibid., vol. 60, Part I, pp. 181 ff. (provisional report by Virally).
[152] Ibid., p. 185 (provisional report by Virally). See also vol. 60, Part II, p. 136 (Mr. Arangio-Ruiz).
[153] Ibid., vol. 60, Part I, pp. 182 and 183 (provisional report by Virally); pp. 326 (exploratory study by Münch); and pp. 305 and 306 (question 11).
[154] See in particular ibid., p. 347 (final report by Virally).
[155] Ibid., vol. 60, Part II, p. 124 (Mr. Wengler).
[156] The guidelines of the Inter-American Juridical Committee for Binding and Non-Binding Agreements and the related *travaux préparatoires* are available at https://www.oas.org/en/sla/iajc/themes_recently_concluded_Binding_and_Non-Binding_Agreements.asp.
[157] Resolution CJI/RES. 259 (XCVII-O/20), third and fourth preambular paras. Available at www.oas.org/en/sla/iajc/docs/themes_recently_concluded_Binding_and_Non-Binding_Agreements_RESOLUTION.pdf.

confusion and the potential for conflict among States and other stakeholders" with regard to binding and non-binding agreements.

62. The guidelines were initiated at the request of several legal advisers from the ministries of foreign affairs of States members of the Organization of American States and adopted on the basis of seven reports prepared by Duncan B. Hollis between 2017 and 2020. In August 2017, he submitted a preliminary report (CJI/doc.542/17 corr.1), following which a questionnaire was sent to member States.[158] One of the strengths of that work of the Inter-American Juridical Committee is that it had been based on the practice of the States of the region.[159] In February 2018, in his second report (CJI/doc.553/18), Hollis summarized the first responses that had been received to the questionnaire. In July 2018, in his third report (CJI/doc.563/18), he submitted a proposed draft text of the first three sections of the guidelines (definitions, capacity to conclude different types of binding and non-binding agreements, and methods for identifying types of agreements). In his fourth report (CJI/doc.580/19), issued in February 2019, he included a draft text for the sections on domestic procedures, the legal effects, if any, of concluding different types of international agreements, and training and education programmes. In July 2019, in his fifth report (CJI/doc.593/19), he submitted a proposed first draft of the guidelines, with commentaries. In February 2020, in his sixth report (CJI/doc.600/20), he submitted a revised draft of the guidelines, which reflected in particular the responses to the questionnaire that had been received from Canada. In his final report (CJI/doc.614/20 rev 1 corr. 1), issued in August 2020, Hollis included the final version of the guidelines for binding and non-binding agreements, with commentaries. Following that report, the Committee adopted resolution CJI/RES. 259 (XCVII-O/20) of 7 August 2020, by which it adopted the guidelines contained in the rapporteur's final report, attached them to the resolution and requested that they be promoted and disseminated as widely as possible among the various interested parties.

63. As is evident from the title, the guidelines of the Inter-American Juridical Committee for binding and non-binding agreements have a broader scope than the present topic, in three ways.

64. First, they cover both non-binding and binding agreements, and international as well as transnational agreements. They thus cover four categories of agreements: treaties, political commitments, (inter-State) contracts and inter-institutional agreements (see sect. 1 of the guidelines). While the Special Rapporteur has no doubt that treaties and contracts should be excluded from the scope of the present topic, it would be appropriate for the Commission to decide whether or not it intends to include in the scope of its work, as the Inter-American Juridical Committee had done, "inter-institutional agreements", defined in guideline 1.5 as agreements concluded between State institutions (ministries and subnational territorial units) of several States, rather than by the States themselves. It is highlighted in the commentary to the guideline that such agreements may be binding or non-binding.

65. Second, the guidelines are also intended to provide a framework for or guide the use of political commitments, in a manner that may not be prescriptive but is at least recommendatory (for example, guideline 5.3.1 provides that "States and their institutions should honour their political commitments and apply them"). A number of best practices are proposed in the text, notably with regard to domestic procedures for making agreements (sect. 4) and training and education relating to these agreements (sect. 6).

66. Third, they cover not only the international rules applicable to the agreements in question, but also the domestic procedures for concluding these agreements (see sect. 4).

[158] On this questionnaire, see the final report of August 2020 (CJI/doc. 614/20 rev.1 corr.1), para. 7.

[159] See also, more broadly, the final report, para. 11.

67. That said, it is worth highlighting that the Committee does not claim to address the subject exhaustively in its guidelines. As the rapporteur states in paragraph 3 of his final report, “The guidelines do not aspire to codify or develop international law (although they do note several areas where existing international law is unclear or is unsettled).”

68. Given the very broad scope of the guidelines, some of them are not relevant to the present work, unless a very broad view of the topic is taken, which the Special Rapporteur does not recommend. However, some are directly relevant, in connection with the following four areas:

(a) The definition of the term “agreement” in guideline 1.1 (“mutual consent by participants to a commitment regarding future behaviour”) could provide inspiration to the Commission, as could paragraph 5 of the final report, in which it is stated that “all treaties may be agreements, but not all agreements are treaties.” In the commentary to guideline 1.1, it is stressed that “there are at least two core elements to any agreement: mutuality and commitment”, and that an agreement is “the product of a mutual interchange or communication.” The definition of a “political commitment” as establishing “commitments of an exclusively political or moral nature”, in guideline 1.3, also merits discussion (see chap. VII, sect. A below).

(b) In guideline 2.4, it is stated that “States or State institutions should be able to make political commitments to the extent political circumstances allow.” Whether one agrees with this formulation or not, it has the merit of raising the issue of the extent to which international law does or does not regulate the power to enter into non-legally binding agreements.

(c) The question of the criteria for distinguishing between binding and non-binding agreements is addressed in section 3 of the guidelines, where the Committee contrasts the “intent test” with the “objective test” but does not identify the exact direction in which practice, case law and doctrine are currently headed. The Committee also makes recommendations as to the “indicative” evidence to be given priority by States if there is any doubt as to the nature of an agreement, in particular in the form of a table listing the “language and clauses States should most often associate with treaties as well as those they may most often associate with political commitments” (guideline 3.4), and specifies in fine that in the event of doubt, “the agreement’s status should depend on a holistic analysis that seeks to reconcile both the objective evidence and the participants’ shared intentions” (guideline 3.6). The commentaries to guidelines 3.2 to 3.4 will be particularly useful for the Commission’s work.

(d) The effects of non-binding agreements are addressed in guideline 5.3, where a distinction is drawn between “direct” legal effects and other legal effects. Having a direct legal effect is associated with being “legally binding”. Guideline 5.3.1 concerns the non-legal effects of political commitments, while guideline 5.3.2 addresses the fact that “even if non-binding, a political commitment may still have legal relevance to a State”. It indicates, “for example” (and therefore without any claim to exhaustiveness), that such commitments “may be (a) incorporated into other international legal acts such as treaties or decisions of international organizations; (b) incorporated into domestic legal acts such as statutes or other regulations; or (c) the basis for interpretation or guidance of other legally binding agreements.” Issues not addressed in this guideline include potential participation in the formation of customary law or general principles of law and the potential role of estoppel in this context (estoppel is mentioned in the final paragraph of the commentary to guideline 5.3.2, but the matter is left “open to debate”).

3. Work of the Committee of Legal Advisers on Public International Law of the Council of Europe

69. The Committee of Legal Advisers on Public International Law (CAHDI) also took up the topic of "non-legally binding agreements in international law" in March 2021. Its work on the topic is still in progress and, except for a Chair's summary of an expert workshop held in March 2021,[160] is not publicly accessible. According to the information available on the relevant page of the CAHDI website,[161] the following documents have been prepared and are currently under review: a questionnaire on the practice of States and international organizations regarding non-legally binding agreements (CAHDI (2022) 2); replies of States and international organizations to that questionnaire (CAHDI (2023) 5 prov); a revised analysis of those replies, prepared by the Secretariat on the basis of a previous report by Professor Zimmermann (CAHDI (2023) 17); an option paper prepared by the delegation of Germany on the exchanges of views that have taken place (CAHDI (2021) 17); and a non-paper on possible next steps, prepared by the Secretariat (CAHDI (2023) 18).

70. The Special Rapporteur proposes contacting the Secretariat of the Council of Europe, through the Secretariat of the United Nations, to request, with full transparency, access to the work of CAHDI.

71. In the Chair's summary of the expert workshop held in March 2021, emphasis is placed on the need for a clear delineation between non-binding agreements and treaties. The Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, who spoke at the workshop, said that there was "a demand for conceptual clarification among practitioners" and a need to overcome "the legal risks still associated with the use of non-legally binding instruments".[162] He also noted that even though registering an agreement as a treaty under Article 102 of the Charter of the United Nations "does not confer legal effect in itself, it creates an important presumption in practice that an instrument is indeed a treaty".[163] Other matters discussed included the criteria for distinguishing between binding and non-binding agreements; the potential indirect legal effects that non-binding agreements might have (through cross-referencing or incorporation, by way of estoppel or as evidence of custom); a proposal to draw up an internal manual containing best practices with regard to the use of such agreements; and the need for more information on State practice in that area.

72. It should also be borne in mind that, as the Council of Europe indicated in the Sixth Committee in 2023, CAHDI had decided to replace the word "agreements" with "instruments" in the title of the topic, on the grounds that "instruments" would better reflect the non-legally binding nature of the texts submitted for its consideration (see chap. III, sect. B above). The Council also provided the following information regarding the ongoing work within CAHDI:

> "The first step taken by the CAHDI was to prepare a detailed questionnaire on the practice of States and international organisations regarding non-legally binding agreements. It aimed at establishing an overview of State practice in relation to the substantive and procedural aspects characterising non-legally binding agreements and the rules applicable in this field.

[160] Available at https://rm.coe.int/chair-summary-cahdi-workshop-2021-non-bind-agreemts/1680a25782.
[161] https://www.coe.int/en/web/cahdi/-/65th-meeting?redirect=%2Fen%2Fweb%2Fcahdi%2Fmeeting-documents.
[162] https://rm.coe.int/chair-summary-cahdi-workshop-2021-non-bind-agreemts/1680a25782.
[163] Ibid.

A report analysing the first 22 replies was presented in March 2023. The CAHDI took note of this report. […]

So far, we have received 32 replies to this questionnaire and are awaiting a few more responses. A revised report including comments from states and additional replies was presented at the 65th meeting of the CAHDI last September (28–29 September 2023). It addressed the practice of the responding states and international organisations and included the main trends arising from the replies to the questionnaire.

The CAHDI is considering organising a practically oriented workshop with a view to discussing the existing material, addressing open issues and clarifying what future action could be taken on this topic."[164]

4. Other work

73. The Special Rapporteur considers it appropriate to mention a number of events in which he has taken part, and which reflect the growing attention that States are paying to the present topic and the strongly felt need for legal clarification. He took part in two side events held in New York on the margins of the sessions of the Sixth Committee. The first, on the theme "Non-Legally Binding Agreements and Instruments in International Law", was organized by Brazil, Mozambique and Switzerland and held on 26 October 2022. The second, on the theme "Non-Legally Binding Instruments and their Relationship with International Treaty Law", was organized by the United Kingdom and held on 24 October 2023. The Special Rapporteur was also invited to speak at the second International Institute for the Unification of Private Law (UNIDROIT) high-level dialogue on the theme "Making Sense of Soft Law: Lawmaking, State Responsibility, and the Sources of Law", held in Rome on 14 December 2023. On 29 September 2023, he took part in a conference on the theme "Non-Binding International Agreements: Is There a Need for Greater Transparency and Accountability?", held at The University of Chicago Center in Paris at the initiative of Professor Curtis Bradley. The event was attended by some twenty researchers and practitioners.[165] Professor Bradley also organized a conference on the theme "Non-Binding International Agreements: A Comparative Assessment", which was held on 23 September 2021.[166] The discussions that took place in the context of those initiatives gave the Special Rapporteur better insight into the expectations, difficulties and challenges associated with the present topic.

74. The interest of States in the topic is confirmed by the following information from an article published in 2022: "[there] was a panel discussion called 'Memoranda of Understanding in the light of the Vienna Convention on the Law of Treaties' at the Informal Meeting of Legal Advisers at the United Nations during the International Law Week in October 2018. [...] What was clear [...] was the overall sentiment of excitement among the participants, many of whom are themselves responsible for concluding MoUs in their own ministries. Many participants were surprised to find that the problems and dilemmas they have to face are shared by international treaty lawyers everywhere, yet the amount of international forums to even acknowledge this remains small."[167]

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[164] Statement of the Council of Europe, pp. 2 and 3. Available at https://www.un.org/en/ga/sixth/78/ilc.shtml.

[165] https://www.law.uchicago.edu/events/nonbinding-international-agreements-there-need-greater-transparency-and-accountability.

[166] https://www.law.uchicago.edu/events/non-binding-international-agreements-comparative-assessment.

[167] M. Mändveer, "Non-legally binding agreements in international relations: an Estonian perspective", *Baltic Yearbook of International Law*, vol. 20, No.1 (2022), pp. 7–24, at p. 22.

VI. Initial overview of available material

75. In accordance with its mandate, the Commission should base its work on the available international practice, jurisprudence and doctrine. The following sections provide an initial overview of that material in relation to the present topic. At this preliminary stage of the work, it is not the Special Rapporteur's intention to examine the material and draw any substantive conclusions. The purpose of this chapter is to identify the available material in order to better delimit what needs to be explored for the purposes of the present topic, provide some clarifications concerning methodology in relation to this material and determine what could or should be done to complete it.

A. International practice

76. International practice, and in particular State practice, is composed of three main elements: non-legally binding international agreements themselves (see sect.1); domestic practices relating to such agreements (see sect. 2); and legal positions that States may take at the international level with regard to the nature, regime and effects of those agreements (see sect. 3).

1. Examples of non-legally binding international agreements

77. Given the frequent, and even increasing, use of non-legally binding international agreements, it is not difficult to identify a large number of examples of such agreements, or at least agreements whose true legal nature may be uncertain. Such agreements are concluded regularly at the bilateral, multilateral, regional and universal levels. Of course, neither the Special Rapporteur nor the Commission will be able to identify all existing non-legally binding international agreements.[168]

78. That said, it is important that the (necessarily selective) practice that the Commission will examine be sufficiently representative in terms of: (a) geography and the various legal systems of the world; (b) the various forms that such agreements can take; and (c) the types of legal difficulties that may arise from them. It will also be important to make it clear from the outset that any examples cited are for illustrative purposes only and that the Commission does not intend to take a position on the nature of agreements that would or could be controversial.

79. A number of State practices have been identified thanks to the work carried out by the Inter-American Juridical Committee and CAHDI. A review of all issues of the *Asian Yearbook of International Law* (established in 1991), in particular the sections devoted to the practice of Asian States, and the *African Yearbook of International Law* (established in 1993) provides an initial overview of practice in Africa and Asia. It will be important to identify State practices in different regions of the world more precisely. In that regard, it would be helpful to the Special Rapporteur if States would provide significant examples of their practice, or at least information about it, to supplement the examples that he and the other members of the Commission have already identified, in order to ensure that the Commission carries out an informed examination of the topic. The same applies for agreements concluded by international organizations.

[168] As recent work has shown, it can be difficult and even impossible to identify all existing practice, even at the level of a single country. See Bradley, Goldsmith and Hathaway, "The rise of nonbinding international agreements: an empirical, comparative, and normative analysis", pp. 1281–1364, in particular pp. 1286 ff. and footnote 20.

2. Domestic practices concerning non-legally binding international agreements

80. The Special Rapporteur is of the view that it could be particularly useful to study not only agreements themselves but also regulations or guides adopted by certain States (and international organizations) to provide a framework for and govern the conclusion of treaties and other international agreements by their authorities and which in some cases contain provisions that specifically address the adoption of non-legally binding international agreements. The Special Rapporteur has already been able to identify a number of such domestic regulations and guides. The list will of course need to be expanded, to ensure that it is representative of contemporary trends.[169]

81. These regulations and guides primarily concern the domestic regime applicable to the conclusion of agreements. Nevertheless, an examination thereof could be useful in two respects. First, it could provide relevant insight into how States view non-legally binding international agreements under international law, and into State practice on the subject. Second, if there are significant similarities in national practices, conclusions might be drawn as to the general principles of international law that apply on the subject.

3. Legal positions taken by States with regard to non-legally binding international agreements

82. In addition to the above, any position taken by States with respect to the nature, regime or effects under international law of non-legally binding international agreements will be useful for more properly determining the rules that may apply on these three points. The responses provided by States to the Inter-American Juridical Committee and CAHDI questionnaires are a first step in that direction. Here, too, any information or practical experience that States can share with the Commission will be invaluable.

83. Given the importance of these elements of practice for the purposes of the present topic, the Special Rapporteur recommends that a request for information relating to the topic be specifically addressed to States (and international organizations, if the decision is made to include them in the scope of the work) in the Commission's report on the work of its current session.

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[169] See, for example: (countries of the Americas) second report presented by D. Hollis to the Inter-American Juridical Committee, CJI/doc.553/18, paras. 53–56; (Estonia), Foreign Relations Act, RT I 2006, 32, 248, 15 June 2006; (United States), Department of State, 22 CRF Part 181, "Coordination, Reporting and Publication of International Agreements", 2 October 2023; (France), Prime Minister's circular of 30 May 1997 on the elaboration and conclusion of international agreements, 31 May 1997; (Indonesia), Law Concerning International Accords (No. 24/2000), and the commentary thereto by E. Pratomo and R. Benny Riyanto, in "The legal status of treaty/international agreement and ratification in the Indonesian practice within the framework of the development of the national legal system", in *Journal of Legal, Ethical and Regulatory Issues*, vol. 21, No. 2; (New Zealand), *Guidance for government agencies on practice and procedures for concluding international treaties and arrangements*, September 2021, as well as New Zealand Treaties Online (mfat.govt.nz); (United Kingdom), "Treaties and MOUs: Guidance on Practice and Procedures", March 2022; (Switzerland), *Guide de la pratique en matière de traités internationaux*, 2023; and (European Union), "Arrangements for non-binding instruments", 4 December 2017, 15367/17. See also Bradley, Goldsmith and Hathaway, "The rise of nonbinding international agreements: an empirical, comparative, and normative analysis", pp. 1335 ff.

B. Jurisprudence

84. There is a significant body of international jurisprudence on the question of non-legally binding international agreements, which is set out and commented on in the literature.[170] Relevant decisions, judgments, rulings and advisory opinions will be closely analysed in future reports as each subtopic is examined. The points of convergence and divergence in case law will need to be carefully identified in order to determine what conclusions can be drawn regarding the current state of international law on the question.

85. With regard to inter-State jurisprudence, the International Court of Justice has been faced with the issue of non-binding commitments on several occasions. First, the Court had the opportunity to recall that it was not for it to pronounce on "political or moral duties".[171] In several cases, it has had to determine whether or not international agreements or commitments whose nature was at issue constituted agreements or treaties that were legally binding on the parties.[172] It has considered whether acquiescence, estoppel, legitimate expectations or the cumulative effect of several instruments and acts could be used to confer binding status on such instruments and acts.[173] It has also ruled on the legal effects of an "*entente*" (understanding) that had not yet been "incorporated into a legally binding instrument".[174] Furthermore, it has used non-legally binding agreements to establish an international customary rule[175] and the principle of *pacta sunt servanda*.[176]

86. The International Tribunal for the Law of the Sea and inter-State arbitration bodies have also had to rule on the question of whether or not bilateral declarations

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[170] See in particular P. Gautier, *Essai sur la définition des traités entre États. La pratique de la Belgique aux confins du droit des traités* (Brussels, Bruylant, 1993), pp. 353 ff.; P. Gautier, "Non-Binding Agreements", paras. 11 ff.; Chinkin, "A mirage in the sand? Distinguishing binding and non-binding relations between States"; and Jiménez García, *Derecho internacional líquido: ¿Efectividad frente a legitimidad?*, in particular pp. 165 ff.

[171] International Court of Justice, *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128, at p. 140.

[172] International Court of Justice, *Ambatielos case (jurisdiction), Judgment of 1 July 1952, I.C.J. Reports 1952*, p. 28, at pp. 41–44; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962*, *I.C.J. Reports 1962*, p. 319, in particular pp. 330–332 (as well as the separate opinion of Judge Jessup, p. 387, in particular pp. 401–407, and the joint dissenting opinion of Judges Spender and Fitzmaurice, p. 465, in particular pp. 474–478); *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at pp. 38 ff, paras. 94 ff.; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 112, at pp. 120–122, paras. 21–30; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at pp. 426–431, paras. 252–268; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at pp. 62 and 63, para. 128 (see also pp. 45–47, paras. paras. 61–66); *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3, at pp. 16 ff., paras. 24 ff.; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, I.C.J. Reports 2017*, p. 3, at pp. 21–24, paras. 41–50; and *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, I.C.J. Reports 2018*, p. 507, at pp. 539–552, paras. 91–139.

[173] International Court of Justice, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* (see preceding footnote), pp. 555–559, paras. 149–162, and pp. 562 and 563, pp.172–174.

[174] International Court of Justice, *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 44, at pp. 66–73, paras. 35–59 (in particular p. 71, para. 53, for quotation).

[175] International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 100 and 107, paras. 189 and 204; and *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 437, para. 80.

[176] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 264 and 265, para. 102.

or commitments[177] or multilateral declarations or commitments[178] constitute legally binding agreements, and on the potential legal effects of non-legally binding agreements.[179] The question of the cumulative legal effect of several bilateral declarations that are not themselves binding and the possible invocation of estoppel in relation to such declarations was considered in one of these arbitration cases.[180]

87. Of course, decisions relevant to the present topic issued by other international courts and tribunals will also be taken into account. Examples may include decisions and rulings of the World Trade Organization,[181] and the International Centre for Settlement of Investment Disputes.[182] They may also include but not be limited to decisions of regional courts and tribunals that are competent to hear human rights cases[183] or come under regional integration organizations.[184]

88. It will also be useful to refer, on a complementary or auxiliary basis, to readily available national judicial decisions in which domestic courts and tribunals have had occasion to rule on the nature of non-legally binding international agreements. For example, in its decision of 7 June 2006, the *Conseil d'État* (State Council) of France ruled that the Declaration concerning the aims and purposes of the International Labour Organization of 10 May 1944 was not among the "diplomatic texts" that constitute treaties and could not, therefore, be invoked in support of an appeal before

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[177] International Tribunal for the Law of the Sea (ITLOS), *"Hoshinmaru" (Japan v. Russian Federation), Prompt Release, Judgment, ITLOS Reports 2005–2007*, p. 18, at pp. 46 and 47, paras. 86 and 87; and *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, at pp. 24 ff. paras. 56 ff.; see also *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 4, at pp. 58–65, paras. 169–192. See also ad hoc arbitration between the province of Newfoundland and the province of Nova Scotia, First Phase, 17 May 2001, *International Law Reports*, vol. 128, p. 435, at pp. 449 ff., paras. 3.14 ff.

[178] *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China*, award on jurisdiction and admissibility of 29 October 2015, *Reports of International Arbitral Awards*, vol. XXXIII, p. 1, at pp. 81–98, paras. 197–245.

[179] *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges, Award on the First Question*, decision of 30 November 1992 (revised 18 June 1993), *Reports of International Arbitral Awards*, vol. XXIV, pp. 130 ff., paras. 6.1 ff.; and *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, decision of 24 May 2005, *Reports of International Arbitral Awards*, vol. XXVII, p. 35, at pp. 95–99, paras. 154–158. See also *Timor Sea Conciliation (Timor-Leste/Australia)*, decision on competence of 19 September 2016, *Reports of International Arbitral Awards*, vol. XXXIV, p. 208, at pp. 223–226, paras. 52–58.

[180] *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China* (see footnote 178 above), pp. 99 and 100, paras. 247–251.

[181] See, for example, the references cited in the commentary to draft conclusion 10, paragraph 1, of the draft conclusions of the International Law Commission on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/73/10, pp. 78 and 79, footnote 426).

[182] With regard to arbitral practice concerning the legal scope and binding or non-binding nature of joint interpretative declarations, see in particular Alcolea, "States as masters of (investment) treaties: the rise of joint interpretative statements"; and also United Nations Commission on International Trade Law, Note by the Secretariat on interpretation of investment treaties by treaty parties (A/CN.9/WG.III/WP.191), 17 January 2020, in particular paras. 8, 36, 46, 47, 51, 53 and 56.

[183] Courts and quasi-courts with competence in the field of human rights do not hesitate to use non-binding instruments. However, the instruments used by such bodies are primarily texts adopted by international organizations, rather than non-binding agreements. See L. Hennebel and H. Tigroudja, *Traité de droit international des droits de l'homme* (Paris, Pédone, 2016), pp. 159–184.

[184] See, for example, Court of Justice of the European Communities, case C-126/86, judgment of 29 September 1987, recognizing the interpretative "legal effect" of objectives "in the nature of a programme" (*Reports of Cases* 1987, p. 3716, para. 14); and case C-233/02, 23 March 2004 (non-binding character of guidelines concluded between the United States and the European Community). See also (on gentlemen's agreements or memorandums of understanding) the judgment of 12 February 2009 in case C-45/07 and the judgment of 28 July 2016 in case C-660/13.

the Council.[185] Any additional information on national judicial practice that States can share with the Commission will, of course, be invaluable.

C. Doctrine

89. The 2022 syllabus contains an initial bibliography on the topic. This has since been expanded (and will continue to be expanded as the work progresses). The bibliography essentially contains three main types of studies: general or cross-cutting studies on the topic, studies that provide a national or regional perspective on the topic[186] and studies aimed at identifying the legal nature of a specific agreement in a particular case.[187] In order to gain a more representative view of the literature, for the purposes of the present preliminary report, the Special Rapporteur considered it useful to consult – in addition to the aforementioned reference material specifically addressing the topic – a sample of recent editions of public international law textbooks and also the general courses of the Hague Academy of International Law given over the past 30 years, to see how they addressed the question of non-legally binding international agreements.

90. Based on this initial consultation of the literature (excluding the works of the Institute of International Law presented in chap. V, sect. B.1), several preliminary observations can be made – these will of course merit a fuller and more detailed examination, subtopic by subtopic, later on:

(a) First, it is clear that there is a growing interest in the topic among authors, as shown by recent publications devoted to it;

(b) Non-legally binding international agreements are, moreover, often studied in the general courses organized by The Hague Academy of International Law (published in English or French only, but delivered by authors from various regions

[185] (France) *Conseil d'État*, 7 June 2006, *Association aides et autres*, No. 285576. See also the examples cited by Gautier in "Non-Binding Agreements", para. 10 (in particular the diverging assessments made by the courts of France, Belgium, Singapore and the United States as to the nature of the Inter-Allied Declaration of 5 January 1943 (*Journal officiel de la République française*, 18 November 1943, p. 277)); the examples of decisions of French and Turkish courts provided in M. Forteau, A. Miron and A. Pellet, *Droit international public*, 9th ed. (Paris, LGDJ, 2022), p. 487; and the British judicial practice cited in Hill, *Aust's Modern Treaty Law and Practice*, pp. 67–69.

[186] For example, Mändveer, "Non-legally binding agreements in international relations: an Estonian perspective"; M.N. Samedov, *K probleme vidov mezhdunarodnih dogovorov Azerbaidjanskoy Respubliki* [On the question of distinguishing between different types of international agreements concluded by the Republic of Azerbaijan], *Bakı Universitetinin Xəbərləri: Sosial-siyasi elmlər seriyası*, No. 4 (2008), pp. 45–57; and the work initiated by C. Bradley cited in chap. V, sect. B.4 above.

[187] See the references cited below in para. 118.

of the world)[188] and also covered in many textbooks of international law;[189] this seems to confirm that non-legally binding international agreements are not entirely outside the sphere of international law;

[188] See H. Thierry, "L'évolution du droit international: cours général de droit international public", *Collected Courses of The Hague Academy of International Law, 1990-III*, vol. 222, pp. 9–186, at pp. 44–45 and pp. 74–76; P. Weil, "Le droit international en quête de son identité. Cours général de droit international public", *Collected Courses of The Hague Academy of International Law, 1992-VI*, vol. 237, pp. 9–370, at pp. 231 ff.; F. Capotorti, "Cours général de droit international public", *Collected Courses of The Hague Academy of International Law, 1994-IV*, vol. 248, pp. 9–344, at pp. 116 and 117; I. Brownlie, "International law at the fiftieth anniversary of the United Nations. General course on public international law", *Collected Courses of The Hague Academy of International Law, 1995*, vol. 255, pp. 9–228, at pp. 80 ff.; K. Zemanek, "The legal foundations of the international system. General course on public international law", *Collected Courses of The Hague Academy of International Law, 1997*, vol. 266, pp. 9–336, at pp. 141 ff.; J. A. Pastor Ridruejo, "Le droit international à la veille du vingt et unième siècle: normes, faits et valeurs. Cours général de droit international public", *Collected Courses of The Hague Academy of International Law, 1998*, vol. 274, pp. 9–308, at pp. 49 ff.; S. Sur, "La créativité du droit international. Cours général de droit international public", *Collected Courses of The Hague Academy of International Law, 2012*, vol. 363, pp. 9–332, at pp. 205 ff.; T. Treves, "The expansion of international law. General course on public international law (2015)", *Collected Courses of The Hague Academy of International Law, 2018*, p. 9 ff., at pp. 280 ff.; A. Pellet, "Le droit international à la lumière de la pratique: l'introuvable théorie de la réalité", pp. 200 ff. Other courses do not contain a specific section on non-legally binding international agreements but address them as part of the examination of the definition of treaties (see, for example, S. Rosenne, "The perplexities of modern international law. General course on public international law", *Collected Courses of The Hague Academy of International Law, 2001*, vol. 291, pp. 9–472, at pp. 359 ff.; and P.-M. Dupuy, "L'unité de l'ordre juridique international. Cours général de droit international public (2000)", *Collected Courses of The Hague Academy of International Law, 2002*, vol. 297, pp. 9–490, at pp. 132–135) and reflections on soft law (see C. Tomuschat, "International law: ensuring the survival of mankind on the eve of a new century. General course on public international law", *Collected Courses of The Hague Academy of International Law, 1999*, vol. 281, pp. 9–438, at pp. 349 ff.; C. Dominicé, "La société internationale à la recherche de son équilibre. Cours général de droit international public", *Collected Courses of The Hague Academy of International Law, 2013*, vol. 370, pp. 9–392, at pp. 120 ff.; and R. Wolfrum, "Solidarity and community interests: driving forces for the interpretation and development of international law. General course on public international law", *Collected Courses of The Hague Academy of International Law, 2021*, vol. 416, pp. 9–479, at p. 176). The following general courses do not specifically address non-legally binding international agreements: R. Higgins, "International law and the avoidance, containment and resolution of disputes. General course on public international law", *Collected Courses of The Hague Academy of International Law, 1991-V*, vol. 230, pp. 9–342; A. A. Cançado Trindade, "International law for humankind: towards a new *jus gentium* (II). General course on public international law", *Collected Courses of The Hague Academy of International Law, 2005*, vol. 317, pp. 9–312; M. Bedjaoui, "L'humanité en quête de paix et de développement (II). Cours général de droit international public (2004)", *Collected Courses of The Hague Academy of International Law, 2006*, vol. 325, pp. 9–542; J. Verhoeven, "Considérations sur ce qui est commun. Cours général de droit international public (2002)", *Collected Courses of The Hague Academy of International Law, 2008*, vol. 334, pp. 9–434; A. Mahiou, "Le droit international ou la dialectique de la rigueur et de la flexibilité. Cours général de droit international public", ibid., vol. 337, pp. 9–516; G. Gaja, "The protection of general interests in the international community. General course on public international law (2011)", *Collected Courses of The Hague Academy of International Law, 2012*, vol. 364, pp. 9–186; J. Crawford, "Chance, order, change: the course of international law. General course on public international law", *Collected Courses of The Hague Academy of International Law, 2013*; M. Bennouna, "Le droit international entre la lettre et l'esprit. Cours général de droit international public", *Collected Courses of The Hague Academy of International Law, 2016*, vol. 383, pp. 9–231; D. Momtaz, "La hiérarchisation de l'ordre juridique international. Cours général de droit international public", *Collected Courses of The Hague Academy of International Law, 2020*, vol. 412; and R. Kolb, "Le droit international comme corps de 'droit privé' et de 'droit public'. Cours général de droit international public", *Collected Courses of The Hague Academy of International Law, 2021*, vol. 419, pp. 9–668.

(c) The terminology used to describe non-legally binding international agreements may vary from one author (and also one language) to another;

(d) Authors often give similar examples (in particular, almost all of them refer to the Final Act of the Conference on Security and Cooperation in Europe[190] (Helsinki Final Act));

(e) Some issues are repeatedly raised (such as the criteria for distinguishing non-binding agreements from treaties) and there are divergent views on some matters (in particular the applicability of the principle of good faith or the principle of estoppel). The issues addressed by these authors have been included in the list of questions to be examined, as set out in chapter VIII of the present report.

VII. Scope of the topic

91. The delimitation of the scope of this topic is inseparable from the choice of the terminology to be used. As early as 1983, "the extreme importance of the terminology used" for the present topic had been raised before the Institute of International Law.[191] In the 2022 syllabus, the Special Rapporteur had drawn attention to matters of

[189] See, for example, the following textbooks (a list that might be expanded to include works published in other languages, in particular those that Commission members may invoke in their observations on the present report): B.M. Ashavskiy, M.M. Birukov, V.D. Bordunov and others, *Mezhdunarodnoe pravo* [International law], 5th ed., S. A. Egorov, ed., Moscow, 2016, pp. 70–85 and pp. 267–269; A. Clapham (ed.), *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations*, 7th ed. (Oxford, Oxford University Press, 2012), pp. 302 ff.; D. Carreau, A. Hamann and F. Marrella, *Droit international*, 13th ed., (Paris, Pedone, 2022), pp. 247 ff.; O. Casanovas and A. J. Rodrigo, *Compendio de derecho internacional público*, 8th ed., Madrid, Tecnos, 2019, p. 100; J. Combacau and S. Sur, *Droit international public*, Paris, LGDJ, 2019, pp. 119–125; M. Diez de Velasco Vallejo, *Instituciones de derecho internacional público*, 18th ed., Madrid, Tecnos, 2013, pp. 194 and 195; P.-M. Dupuy and Y. Kerbrat, *Droit international public*, 16th ed., revised and expanded, Paris, Dalloz, 2022, pp. 453 ff.; M.D. Evans, *International Law*, 5th ed., Oxford, Oxford University Press, 2018, pp. 138 ff.; Forteau, Miron and Pellet, *Droit international public*, pp. 480–490; P. Gaeta, J. E. Viñuales and S. Zappalà, *Cassese's International Law*, 3rd ed., Oxford, Oxford University Press, 2020, pp. 201 and 202; I. I. Lukashuk, "Pravo mezhdunarodnykh dogovorov" ['Law of treaties'], in *Kurs mezhdunarodnogo prava v 7 tomah* [International law course in seven volumes]; V. N. Kudriavtsev and others (eds.), vol. 4, entitled "Otrasli mezhudnarodnogo prava" [Branches of international law], Moscow, Nauka, 1990, pp. 5 ff.; I. I. Lukashuk, *Sovremennoye pravo mezhdunarodnykh dogovorov* [Contemporary law of treaties] – *Zakluchenie mezhdunarodnykh dogovorov* (Concluding treaties), vol. I (Moscow, Wolters Kluwer, 2004), pp. 545 ff. and 564 ff.; A. Remiro Brotóns and others, *Derecho internacional. Curso general*, Valencia, Tirant Lo Blanch, 2010, pp. 191–199; D. Ruzié and G. Teboul, *Droit international public*, Dalloz, 2023, p. 29; M. N. Shaw, *International Law*, 9th ed., Cambridge, Cambridge University Press, 2021, pp. 99 ff. Some textbooks that do not contain a specific section on non-legally binding international agreements may still take account of them in other sections, especially those on the definition of treaties: see, for example, D. Alland, *Manuel de droit international public*, 10th ed., Paris, Presses universitaires de France, 2023; J. Crawford, *Brownlie's Principles of Public International Law*, 9th ed., Oxford, Oxford University Press, 2019; A. E. Cassimatis, *Public International Law*, Oxford University Press Australia and New Zealand, 2021; T. Fleury Graff, *Manuel de droit international public*, Paris, Presses universitaires de France, 2022; R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed., Harlow, Longman, 1992; S. Laghmani, *L'ordre juridique international: souveraineté, égalité et logique de l'accord*, Nirvana, 2021; A. Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 9th ed., New York, Routledge, 2022.

[190] Final Act of the Conference on Security and Cooperation in Europe (Helsinki, 1 August 1975), European Coordination Centre for Research and Documentation in Social Sciences, International Social Science Council, *L'Acte final d'Helsinki: texte et analyse*, Wilhelmsfeld, Gottfried Egert, 1990.

[191] *Yearbook of the Institute of International Law*, vol. 60, Part II, p. 126 (M. Arangio-Ruiz).

terminology and their relevance for defining the scope of the topic, and had stated the following to justify the title of the topic:

> "The term non-legally binding 'agreement' ('*accord*' in French) is used in the title of this proposal without prejudice to the meaning that could eventually be appropriate to give it (and bearing in mind that in the practice of some States, the term 'agreement' could refer to binding agreements only). Other terms, in case of need, could be preferred (for example, 'arrangement' or 'understanding' ('*entente*'), or 'instrument', providing that the term eventually adopted corresponds to the scope of the topic [...]). Since the term 'non-binding agreement' was used in previous work of the Commission [...] and in the recent work of the Inter-American Juridical Committee and the CAHDI ..., it has been adopted in the present proposal."[192]

92. It will be important to return in more detail to these matters of terminology, particularly in the light of the comments made by some States in the Sixth Committee regarding the choice of terms to be used.[193]

A. "Agreements"

93. As has just been recalled, the question of the choice of the term "agreement" in the title of the present topic was raised in the 2022 syllabus. Since then, several States have recommended that the term be replaced by "instrument" or "arrangement", since they apparently consider that the term "agreement" is limited to legally binding instruments. That was also the reason behind the recent decision of CAHDI to rename the agenda item that it is considering on the same topic (see chap. III, sect. B above).

94. While fully sensitive to these concerns, the Special Rapporteur has concluded, after careful consideration, that the Commission should retain the term "agreement". This conclusion is guided by several factors.

(a) The definition of treaties deriving from the 1969 Vienna Convention is constructed in such a manner ("'treaty' means an international agreement concluded between States in written form and governed by international law...") as to imply that there are international agreements concluded between States in written form that are not treaties – i.e., those that are not "governed by international law" in the sense that they do not establish rights and obligations. The *travaux préparatoires* are clear in that regard (see chap. V, sect. A.1 above).

(b) The subsequent work of the Commission has confirmed – without encountering widespread opposition from States in the Sixth Committee – that an international agreement between States can be non-legally binding (see chap. V, sect. A.2 above).

(c) While States do not necessarily call the non-legally binding agreements that they conclude "agreements", and often use other terms, the generic expression "non-legally binding international agreements" is now regularly used, both in international practice (as seen in the title of the guidelines of the Inter-American Juridical Committee), and in domestic practice (see chap. VI, sect. A.2 above). The term "agreements" is also used in the literature to refer to non-legally binding

[192] A/77/10, annex I, para. 3.

[193] See chap. III above. The Special Rapporteur wishes to note here that his preliminary research has been conducted in the languages in which he himself is proficient (English, French and Spanish). It will be necessary, drawing on the wide-ranging linguistic expertise of the Commission members, to determine the situation in other languages.

agreements, as shown by the titles of numerous articles, in English, French and Spanish, listed in the bibliography attached to the 2022 syllabus.[194]

(d) In any event, from a pragmatic point of view, the situation encountered in practice is often as follows: in the presence of what appears to be an agreement between States, the question of whether the agreement is, or is not, legally binding may be raised (for example, before a court or tribunal). In other words, the question of determining whether or not an agreement is a treaty is not, in practice, the starting point, but the end point: only after examining the characteristics of the agreement in question will it be possible to determine whether or not it is a legally binding agreement.[195] This point is of particular importance given that States often comply with agreements "without it being possible to say whether they are doing so because they consider themselves to be legally or politically bound".[196] One disadvantage of postulating that an "agreement" would necessarily be binding or that a non-binding "instrument" between several States could not be considered an "agreement" is that it would curb this interplay of constructive ambiguities, which are of practical importance.

(e) The above observation is all the more significant since the term "agreement" or the verb "agree" are expressly used in some bilateral or multilateral instruments that are non-binding or in respect of which the question of whether they are binding or not might at least arise.[197]

(f) Moreover, the alternative terms proposed seem to bring more confusion than clarity. First of all, the term "instrument" poses a problem in that it refers to the container and excludes the content (and therefore does not make it clear that the present topic relates to agreements arising from a convergence of wills). Furthermore, in the definition of "treaty" provided in the 1969 Vienna Convention on the Law of Treaties, reference is made to the term "instrument", *in both the singular and the plural*, it being specified in article 2, paragraph 1 (a), thereof, that an agreement governed by international law is a treaty "whether embodied in a single instrument or in two or more related instruments". The term "instrument" is also used elsewhere in

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[194] It also seems that in Russian the term for "agreement" ("договоренности") is considered appropriate in the context of the present topic (see Lukashuk, *Sovremennoye pravo mezhdunarodnykh dogovorov* [Contemporary law of treaties] - *Zakluchenie mezhdunarodnykh dogovorov* [Conclusion of treaties], p. 548). See also, among many other examples, the editorial in the special issue of *International Community Law Review*, vol. 20 (2018), on the present topic, p. 135 ("non-legally binding agreement"); and J.-P. Jacqué, "Acte et norme en droit international public", *Collected Courses of The Hague Academy of International Law*, *1991-II*, vol. 227, pp. 357 ff., at p. 391 ("*accords internationaux non obligatoires*"); Eisemann, "Le Gentlemen's agreement comme source du droit international", p. 327, footnote 4 ("*accord non contraignant*", "non-binding agreement" and "*accord sans force juridique obligatoire*"); A. E. Boyle, "Some reflections on the relationship of treaties and soft law", *International and Comparative Law Quarterly*, vol. 48 (1999), pp. 901 ff. ("non-binding agreement").

[195] The International Court of Justice followed that approach in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*: it questioned the legal nature of several "bilateral agreements" and it was only after examining those "agreements" that the Court concluded that "the bilateral agreements" invoked did not give rise to legal obligations (see footnote 172 above, pp. 539 and 540, para. 93 and the heading of point 1 preceding para. 94, then, at pp. 551 and 552, para. 139).

[196] J. Salmon, "Les accords non formalisés ou '*solo consensu*'", *Annuaire français de droit international*, vol. 45 (1999), pp. 1–28, at p. 12.

[197] See for example the joint declaration of Argyle for dialogue and peace between Guyana and the Bolivarian Republic of Venezuela, of 14 December 2023, in seven paragraphs of which the verb "agreed" is used (available at https://www.foreign.gov.bb/the-joint-declaration-of-argyle-for-dialogue-and-peace-between-guyana-and-venezuela). See also the unusual case of the "Artemis Accords" of 13 October 2020, where the term "Accords" is used in the official English version (https://www.nasa.gov/artemis-accords/).

the Convention with different meanings, referring to unilateral acts.[198] What is more, the use of the term "instrument" would unduly broaden the scope of the present topic to include all types of official documents of a non-legally binding nature, including resolutions of international organizations and, for example, a document such as the Tallinn Manual on the International Law Applicable to Cyber Warfare.[199] If, on the other hand, the term "instrument" is to be used to refer only to agreements, it would be better, so as to avoid any misunderstanding, to use the latter term.[200] The term "arrangement" meanwhile, is used in many situations to refer to a specific category of agreements, namely, those concluded by the administrative entities of different countries (or international organizations). The term "arrangement" therefore seems ill-suited to refer to the subject of the present topic (see sect. C), although there are some cases in which an "arrangement" is in fact concluded between two States. Similarly, the term "understanding" ("*entente*" in French) seems too connotative (referring to the specific category of memorandums of understanding) to be retained. Terms such as "documents" or "acts" are likely to be too broad and too general for the purposes of the present topic. More sophisticated expressions such as "concerted acts" ("*actes concertés*" in French) or "consensual instruments" ("*instruments consensuels*" in French) might also be considered, but, in addition to the fact that these terms in any case presuppose the existence of an agreement, it is not certain that they would be easily translatable into all languages.

95. In contrast, the term "agreement" offers the advantage of allowing a simple, clear and precise delimitation of the present topic, it being recognized, of course, that nothing prevents the Commission from indicating in its work that the use of the term "agreement" for the purposes of the present topic is without prejudice to (a) the nature of the agreements examined and the effects that they are likely to produce, *or not*, and (b) the terminological choices that some States may make to guide their own national practice with regard to international agreements.

96. The term "agreement" better reflects the fact that the topic covers situations in which States or international organizations have *together agreed* (or have *mutually agreed*) something – that is what could be called the *substantive* aspect of the notion of agreement, which presupposes a convergence of wills.[201]

97. Given this important clarification, legal acts attributable to a single author, in other words, unilateral acts, even if negotiated by States, can be excluded from the present topic. Consequently, the topic should not cover resolutions and other acts adopted by international organizations as such (including, for example, documents such as guidelines adopted by the Office of the United Nations High Commissioner for Refugees or the general comments of the Human Rights Committee).

98. Any agreements that would, by extrapolation, be the result of simply combining several unilateral positions or commitments that do not as such form an identified

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[198] See in particular art. 16 on the exchange or deposit of instruments of ratification, acceptance, approval or accession. See also, among other examples, art. 67 on instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty.

[199] M. N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge, Cambridge University Press, 2013.

[200] For example, in the chapter entitled "Non-legally binding instruments" of his work *Aust's Modern Treaty Law and Practice*, J. Hill in fact considers only agreements. He also points out that "[a] non-binding instrument may, however, still loosely be referred to as an 'agreement' (though this is not advised), *as it represents a deal between states*, albeit one not legally binding in international law" (p. 41, emphasis added).

[201] See Eisemann, "Le Gentlemen's agreement comme source du droit international", p. 345 ("the convergence of wills of the parties, arising after international negotiation").

consensual instrument can also be excluded from the present topic by the term "agreement".[202]

99. The Commission will, however, need to determine how to treat a category of acts whose nature remains ambiguous, namely, acts adopted within the framework of intergovernmental conferences that do not have separate legal personality.[203] In the absence of such autonomous personality, the acts adopted by States at these conferences may be considered to have the nature of agreements.[204] However, taking into account the extensive practice that exists in that regard (in particular that of conferences of parties) and the fact that the acts adopted within the framework of those conferences are very often dependent, both in terms of their means of conclusion and the applicable regime, on the specific institutional context in which they are adopted,[205] the Special Rapporteur is inclined to exclude them from the present topic and to limit the scope of the topic to international agreements concluded outside a multilateral institutional framework. At the same time, the Special Rapporteur is also aware that it could be beneficial to study some of these acts (in particular those taking the form of non-binding broad declarations or global covenants). In short, it would perhaps be advisable not to take too categorical a decision as to their inclusion in or exclusion from the scope of the topic. Such caution seems particularly appropriate given that it might be necessary to draw a distinction between acts adopted "by" these conferences and those adopted "within the framework" of such conferences.

100. It would also be advisable to limit the scope of the topic to agreements in which States agreed to make a commitment (albeit a non-legally binding one),[206] and to exclude all documents or communications through which States, even if jointly, are merely communicating or stating facts or positions, or taking purely operational measures – those countless documents and communications that form part of daily

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[202] 2022 syllabus, A/77/10, annex I, para. 27, (iv). A convergence of wills, i.e. an "agreement", may take various forms in international law. In *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, for example, what the International Court of Justice called the "agreement" between the parties simply arose from a comparison of their oral and written arguments before the Court (see *I.C.J. Reports 2022*, in particular, pp. 635, 640 and 643, paras. 42, 65 and 75).

[203] On the effect of these acts, see, for example, R. R. Churchill and G. Ulfstein, "Autonomous institutional arrangements in multilateral environmental agreements: a little noticed phenomenon in international law", *American Journal of International Law*, vol. 94 (2000), pp. 623 ff., at pp. 638 ff.; L. Delabie, "Gouvernance Mondiale: G8 et G20 comme modes de coopération interétatiques informels", *Annuaire français de droit international*, vol. 55 (2009), pp. 629–663, at pp. 653 ff. See also Forteau, Miron and Pellet, *Droit international public*, pp. 483 and 484, on the ambiguity of the distinction, in practical terms, between resolutions of international organizations and non-binding agreements.

[204] 2022 syllabus, A/77/10, annex I, para. 27, (v). Moreover, according to para. (3) of the commentary to draft conclusion 12 of the draft conclusions on identification of customary international law, unlike resolutions of international organizations, resolutions of intergovernmental conferences emanate from the States members (A/73/10, p. 147). See also draft conclusion 11 on decisions adopted within the framework of a Conference of States Parties, and the commentary thereto, of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/73/10, pp. 82–93).

[205] In paragraph 2 of draft conclusion 11 of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Commission indicated that "the legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure" (A/73/10, p. 82).

[206] See, for example, the African Leaders' Nairobi Declaration on Climate Change and Call to Action of 6 September 2023 (paras. 21 ff.: "we commit to").

diplomatic activity.[207] To put it differently, the present topic must be focused on the grey area of agreements that, while not being treaties, are similar enough to them that it is indeed necessary to determine how to distinguish them from treaties and to identify their possible legal effects. In other words, it is agreements with a normative component (even if they are non-legally binding) that must be at the heart of the Commission's work.[208] However, an agreement, for example, by which two heads of State arrange to meet each other in a month's time (or to cancel a meeting) or a joint statement by two ministers for foreign affairs recalling the relations of friendship and fraternity between their countries or expressing the desire to deepen the relationship of cooperation between them do not constitute the type of agreement that requires attention under the present topic.[209]

101. Lastly, it should be quite clear that the scope of the present topic is not limited by the degree of formality of the agreement. Both a formal agreement and an informal agreement may be legally binding or non-legally binding and the two issues should not be confused. Just as a treaty can be concluded in a more or less formal or simplified form, a non-legally binding agreement can take a variety of forms. All agreements of this type, whatever their form or name, should be studied, provided that they meet the conditions set out in the preceding paragraphs, whether they are called declarations, memorandums of understanding, codes of conduct, or something else.[210]

102. However, it is recommended that the topic be limited to written agreements, given that tacit or oral agreements and bilateral or regional customs raise quite different legal issues that it would not be reasonable or consistent to include in the scope of the present topic.[211]

B. "Non-legally binding"

103. The present topic covers "non-legally binding" agreements. This expression elicits four sets of observations.

104. First, there seems to be no doubt that the expression is clearer and more precise than the expression "governed by international law" used in article 2 of the 1969 and 1986 Vienna Conventions. It is therefore to be preferred. It is all the more necessary given that, in the Commission's work on other topics, the expression "governed by" ("*régi par*" in French) has been used in a different sense from that given to it in the definition of the term "treaty" contained in the Vienna Conventions; in other words,

[207] See, in this regard, the way in which the category of "nonbinding international agreements" is delimited in Bradley, Goldsmith and Hathaway, "The rise of nonbinding international agreements: an empirical, comparative, and normative analysis", pp. 1303 ff.

[208] As noted by Jacqué, the problem arises in practice when an act contains a "model of behaviour" and it is not known whether the act in question is binding or not ("Acte et norme en droit international public", p. 390). Similarly, Gautier defines these agreements as those that contain "political or moral *commitments* but which are not intended to create legal rights and obligations" ("Non-binding agreements", para. 1 – emphasis added). The concept of a "normative component" echoes (at least in some respects) the formula used by the International Court of Justice in the *North Sea Continental Shelf* cases, where, in the context of the determination of customary law, reference is made to the "potentially norm-creating character" of the practice (*I.C.J. Reports 1969*, p. 3, at p. 42, para. 72).

[209] See, in this regard, Meyer, "Alternatives to treaty-making–Informal agreements", pp. 64 ff.

[210] That is without prejudice to the form of the agreement being used as an indicator that allows its legal nature to be determined (see chap. VIII, sect. A below).

[211] 2022 syllabus, A/77/10, annex I, para. 27, (iii).

in the sense of the law applicable to a legal relationship, and not in the sense of its binding nature.[212]

105. Second, in French and English at least, the adjective "binding" ("*contraignant*" in French) (or "legally binding"/"*juridiquement contraignant*") has been used since 1969; there is therefore no reason to depart from it here – even though in French "*contraignant*" could give rise to confusion given that it refers, literally, to the idea of coercion ("*contrainte*") rather than obligation. The term "binding" ("*contraignant*") has been used by the Commission in its work on other topics, including, significantly, in paragraph 1 of conclusion 10 of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, and in guideline 6 of the Guide to Provisional Application of Treaties.[213] It is also the term used in the work of the Inter-American Juridical Committee (see chap. V, sect. B.2 above) and in that of CAHDI (chap. V, sect. B.3), as well as in other recent studies on the topic (chap. V, sect. B.4). In addition, it is a term found in international jurisprudence, with some variations, the term "binding" in English sometimes being translated in French by "*obligatoire*" or "*force obligatoire*" rather than by "*contraignant*".[214] Lastly, it is a term that has specifically been used in recent

[212] See in particular arts. 3 and 55 of the articles on responsibility of States for internationally wrongful acts and the commentaries thereto (*Yearbook… 2001*, vol. II (Part Two) and corrigendum, pp. 36–38 and pp. 140 and 141). Moreover, other provisions of the 1969 Vienna Convention, as shown by the French or Spanish text thereof, use the term "governed" in reference to applicable law and not in reference to the binding nature of the instrument: see art. 40, para. 1, and art. 59, para. 1 (a). Moreover, it should be borne in mind that, in the *Lotus* case, the Permanent Court of International Justice used the term "governs" ("*régit*" in French) in the very general sense of the law applicable to relations among States, declaring that "international law governs relations between independent States" (Permanent Court of International Justice, judgment of 7 September 1927, *P.C.I.J. Series A*, No. 10, p. 18).

[213] A/73/10, p. 75, and A/76/10, p. 78. See also para. (11) of the general commentary on the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, in which the Commission indicates that they "are cast as a non-binding declaration of draft principles" (*Yearbook… 2006*, vol. II (Part Two), p. 60).

[214] In *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, the International Court of Justice uses the expression "binding international agreement" (*I.C.J. Reports 2017* (see footnote 172 above), p. 24, para. 49); in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the Court renders the term "binding" in French sometimes as "*contraignant*" and sometimes as "*obligatoire*" (*I.C.J. Reports 1994* (see footnote 172 above), p. 121, para. 26); in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court uses "binding" and "*force obligatoire*" (*I.C.J. Reports 1996* (see footnote 176 above), p. 254, para. 70). See also, for example, the order on provisional measures of 17 November 2023 in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, in which the Court indicates that the undertakings made are "binding and create legal obligations" ("*contraignants et créent des obligations juridiques*") (General List No. 180, p. 17, para. 62). It should be noted that the term "binding", rendered in French as "*obligatoire*", is used in art. 59 and art. 63, paragraph 2, of the Statute of the International Court of Justice.

practice regarding the negotiation and conclusion of multilateral instruments.[215] The expression "non-binding" (or "*non-contraignant*" in French) also seems to have gained acceptance in national regulations and guidance.[216]

106. Third, it is worth specifying what the expression "legally binding" means, in order to better establish, in contrast, how non-legally binding agreements might be characterized. The expression "legally binding" reflects the fact that an agreement contains provisions entailing rights and obligations, but that is not all. Certainly, the provisions of the 1969 Vienna Convention characterize the legal effect of treaties as giving rise to rights and obligations[217] and the commentary on the principle *pacta sunt servanda* contained in the text of the draft articles on the law of treaties adopted by the Commission in 1966 also points strongly in the same direction.[218] However, as some authors have pointed out, the legal effect of a treaty does not necessarily take the form of provisions giving rise to rights and obligations.[219] That is certainly the reason why in the vast majority of the provisions of the 1969 Vienna Convention, and, in particular, in article 26, the drafters used the more comprehensive expression according to which any treaty is "binding upon" the parties ("*lie les parties*" in French and "*obliga a*" or "*obligarse por*" in Spanish), with wording to that effect appearing almost 40 times in the Convention.[220] This broader expression is justified because, in addition to provisions that establish specific rights and obligations, it also covers all

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[215] See in particular the decisions on the development of an "international legally binding instrument" adopted, respectively, by the United Nations General Assembly on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (resolution 69/292 of 19 June 2015 (A/RES/69/292), para. 1); by the Human Rights Council on transnational corporations and other business enterprises with respect to human rights (resolution 26/9 of 26 June 2014 (A/HRC/26/9), para. 1); and by the United Nations Environment Assembly of the United Nations Environment Programme on plastic pollution (resolution 5/14 of 2 March 2022 (UNEP/EA.5/Res.14), para. 3). See also the "Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development for All Types of Forests" adopted at Rio de Janeiro in 1992 (*Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I, *Resolutions adopted by the Conference* (A/CONF.151/26/Rev.1 and Corr.1, United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex III). See also document A/INB/2/INF./1 of 11 July 2022, with regard to the nature of the agreement on pandemics currently being negotiated within the World Health Organization. See also J. d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*, Oxford, Oxford University Press, 2011, pp. 182 and 183.

[216] See those cited in chap. VI, sect. A.2 above.

[217] See, in that regard, art. 30, para. 1, or art. 34 of the Convention.

[218] *Yearbook… 1966*, vol. II, document A/6309/Rev.1, Part Two, p. 210 and 211 (commentary to draft art. 23). The Commission cites in this regard Art. 2, para. 2 and the third preambular para. of the Charter of the United Nations. See also *South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China* (footnote 178 above), p. 86, para 214; and *Yearbook of the Institute of International Law*, vol. 60, Part I, p. 315, on the practice of the League of Nations, which linked the concept of treaties to the assumption of international obligations (exploratory study by Münch).

[219] See J. Combacau, *Le droit des traités*, Paris, Presses universitaires de France, 1991, pp. 68 and 69; or *Yearbook of the Institute of International Law*, vol. 60, part I, p. 181: "the possible legal import of a text cannot be assessed solely from the perspective of the creation (modification, abrogation) of legal obligations, as is suggested, for example, when reference is made to binding or non-binding texts, or "non-binding agreements". It would be preferable to speak of "legal effects", which can be any effect other than the creation (modification, abrogation) of legal obligations: authorization, attribution of a legal status, confirmation or consolidation of a legal situation" (provisional report by Virally).

[220] See, for example, art. 2 (b), (c), (f) and (g), arts. 7 or 16, or the titles of arts. 11–15 and 17.

provisions with a binding effect for the parties.[221] The Commission reflected this idea in the Guide to Provisional Application of Treaties by mentioning in guideline 6 the existence of a "legally binding obligation to apply the treaty";[222] such wording is broader than referring solely to the fulfilment of any obligation contained in a treaty provision.[223]

107. This idea is also to be found in jurisprudence and in the literature when such expressions as "creates law" ("*fait droit*"), "legal force" ("*force de droit*")[224] or "legally binding" ("*juridiquement obligatoire*")[225] are used. In contrast, a "non-legally binding" agreement refers to an agreement that is not binding upon the parties, in the sense that it does not have binding force or effect in their regard.[226]

108. Fourth, the preceding remarks mean that two issues can be excluded from the scope of the present topic.

109. One, it should not cover the – separate – issue of non-binding provisions found in treaties. Of course, while a treaty may contain both binding and non-binding provisions, it must include at least one binding provision in order to constitute a treaty. The present topic concerns agreements that are not treaties, in that they do not have any binding provisions.[227] There is, however, still the question of how to treat the non-binding declarations that are annexed to some treaties without forming an integral part thereof, as well as the final acts of intergovernmental conferences leading to the adoption of treaties, which are generally considered to have no binding effect but are closely related to the treaties adopted. The Special Rapporteur considers that it would not be appropriate to exclude them a priori from the scope of the topic to the extent that these declarations and acts are formally separate from the treaties to which they relate.[228]

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[221] In the commentary to the draft articles on succession of States in respect of treaties, the term "binding" in English is moreover translated in French as "*ayant force obligatoire*" (see *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, p. 196, para. (1) of the commentary to draft arts. 11 and 12).

[222] A/76/10, p. 78.

[223] Also, in the same vein, see *South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China* (footnote 179), p. 609, para. 1201: the parties "are obliged to comply with the Convention … and to respect the rights and freedoms of other States under the Convention".

[224] See Forteau, Miron and Pellet, *Droit international public* pp. 312 and 313, No. 188, citing the jurisprudence of the Permanent Court of International Justice and the International Court of Justice in this regard.

[225] See M. Fitzmaurice, "Concept of a treaty in decisions of international courts and tribunals", *International Community Law Review*, vol. 20 (2018), pp. 137–168, at p. 143: a treaty is an agreement "that is legally binding on the parties".

[226] In his second report to the Inter-American Juridical Committee, D. Hollis points out that: "all the Member States concurred that this category [of non-binding agreements] is defined in terms of commitments that lack any legal force" (CJI/doc.553/18, para. 11).

[227] 2022 syllabus, A/77/10, annex I, para. 27, (i).

[228] On the specific legal issues raised by final acts, see in particular M. Wood, "Final Act" in *Max Planck Encyclopedia of Public International Law* (April 2021), in particular paras. 8 and 14 (indicating that "depending on its terms a Final Act may contain binding commitments, though this is rare …. It may also contain 'agreed policy guidelines or agreed formulations of concepts to be developed in the future' …; a case-by-case examination of Final Acts is appropriate to determine whether a Final Act includes precise legal commitments"; and Roberts, ed., *Satow's Diplomatic Practice*, para. 31.24. In the United Nations *Treaty Handbook* (revised edition of 2015), it is stated that a Final Act "does not *normally* create legal obligations" (United Nations publication, Sales No. E.02.V.2, glossary, p. 67, emphasis added). Moreover, G. Ténékidès asked in 1974: "Does not a declaration of principles annexed to the treaty have as much value as the principles contained in the preamble to the treaty?" (in Les effets de la contrainte sur les traités à la lumière de la Convention de Vienne du 23 mai 1969", *Annuaire français de droit international*, vol. 20 (1974), pp. 79–102, at p. 91).

110. Two, the present topic does not cover the legal effects of treaties that are not yet in force. Admittedly, while they are not in force or being provisionally applied, they do not bind the parties, but, once they are in force, they are intended to have such legal effect, which makes them radically different from non-legally binding agreements. The topic may also be considered not to include the specific category of model treaties (several of which exist in foreign investment law, for example), since they do not have their own autonomous existence (they are adopted by a State or a group of States just as a possible basis for future negotiations).

C. Additional details concerning the scope of the topic

111. Several additional details would help to better delimit the scope of the topic.

112. First of all, the Special Rapporteur considers it appropriate to limit the scope of the topic to "international" agreements; in other words, agreements that are within the international sphere as understood under public international law. This would allow for the exclusion of domestic law agreements or agreements that come under domestic law, such as (international) contracts. Furthermore, the topic should be limited to agreements concluded between States, between States and international organizations, or between international organizations, and should exclude agreements concluded with or between private parties.[229]

113. There is, however, also the question of how to treat arrangements concluded between substate entities of different countries (sometimes known as inter-institutional agreements or administrative arrangements; such as the agreements, in particular cooperation agreements, that may be concluded by administrative authorities, federated States, or cities or central banks of different countries.)[230] The syllabus left this question open.[231] Given the specific nature of these arrangements and the fact that the domestic institutions that conclude them do not necessarily engage themselves internationally in the name and on behalf of their States, it would seem advisable, at least at first glance, to exclude them from the scope of the present topic, since these agreements give rise to specific difficulties. At the same time, some of these arrangements have been registered pursuant to Article 102 of the Charter of the United Nations; consequently, the question of the distinction between non-legally

[229] A/77/10, annex I, paras. 4 and 27, (vi) and (vii). In its advisory opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the International Court of Justice found that "it is not possible to talk of an international agreement, when one of the parties to it, Mauritius, which is said to have ceded the territory to the United Kingdom, was under the authority of the latter" (see footnote 47, para. 172 above).

[230] See, for example, the Memorandum of Understanding between the European Security and Markets Authority and the Securities and Futures Commission Related to CCPs Established in Hong Kong of 18 March 2022. See also International Court of Justice, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213, at pp. 234 and 235, paras. 40 and 41; and, in relation to climate action, A. Messing, "Nonbinding subnational international agreements: a landscape defined", *The Georgetown Environmental Law Review*, vol. 30 (2017–2018), pp. 173–201.

[231] A/77/10, annex I, para. 27, (viii).

binding international agreements and treaties may also concern them.[232] It is expressly stated in some inter-institutional arrangements that they are not legally binding.[233]

114. It should also be clarified that the present topic is being addressed only from the perspective of public international law. The regime applicable to non-legally binding international agreements *under domestic (constitutional) law* does not, as such, come under the present topic – although national practice in that regard will of course be relevant in order (and only in order) to clarify the status of these agreements *under international law*.[234]

115. It is, however, more difficult to determine whether the scope of the topic should be limited to aspects of *general* international law. An international agreement can be assessed not only under general international law (for example, to determine whether it is a treaty or to identify its potential legal effects) but also under specific provisions. The question might, for example, arise as to whether an international agreement is an agreement *within the meaning of a specific legal provision* (for example, where it must be determined whether an agreement is a maritime delimitation "agreement" within the meaning of articles 15, 74 or 83 of the United Nations Convention on the Law of the Sea,[235] or an "agreement" for the settlement of a dispute within the meaning of articles 281 and 282 of the same Convention.)[236] The question might be asked whether the term "agreement" (or "arrangement", "partnership" etc.) used in a provision of a given treaty refers only to legally binding agreements or also includes those that are not legally binding. The Commission will have to determine whether it intends to cover this type of question or not. In the Special Rapporteur's opinion, it will be difficult not to address the practice and jurisprudence relating to provisions of

[232] See, for example, the Arrangement between the United States Nuclear Regulatory Commission (U.S.N.R.C.) and the Spanish Consejo de Seguridad Nuclear (C.S.N.) for the exchange of technical information and cooperation in nuclear safety matters (Rockville, 11 May 1995, United Nations, *Treaty Series*, vol. 2458, No. 44172, p. 3), and the International Express Mail Agreement between the Postal Administration of Senegal and the United States Postal Service (Dhaka, 5 June 1986, and Washington, 3 July 1986, ibid., vol. 2263, No. 40319, p. 453).

[233] See the example of the memorandum of understanding of 3 April 2018 between the l'Entité étatique des assurances agraires d'Espagne (ENESA) and the Caisse nationale de la mutualité agricole d'Algérie (cited by Jiménez García, *Derecho internacional líquido: ¿Efectividad frente a legitimidad?*, pp. 175 and 176).

[234] 2022 syllabus, A/77/10, annex I, para. 27, (ix).

[235] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1834, No. 31363, p. 3.

[236] Or, as discussed by the Commission a few years ago, an "agreement" within the meaning of art. 31, para. 3 (a) of the 1969 Vienna Convention (see chap. V, sect. A.2 above). To take the example of a recent bilateral agreement, it may be worth considering what types of agreement are covered by art. 4, para. 4, of the *Australia-Tuvalu Falepili Union Treaty* of 9 November 2023, when it provides that "Tuvalu shall mutually agree with Australia *any partnership, arrangement or engagement with any other State* or entity on security and defence-related matters" (https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty, emphasis added); the same question arises in relation to the "provisional arrangements" referred to in art. 61 of the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, open for signature from 20 September 2023 (A/CONF.232/2023/4); or the "multilateral environmental agreements" mentioned in art. 12.6 of the Free Trade Agreement between the European Union and the Republic of Singapore (Brussels, 19 October 2018, *Official Journal of the European Union*, L 294, 14 November 2019, p. 3). There are many other examples (see also those provided in the 2022 syllabus, A/77/10, annex I, para. 18). Aust, meanwhile, gives the example of art. 83 of the Convention on International Civil Aviation (Chicago, 7 December 1944, United Nations, *Treaty Series*, vol. 15, No. 102, p. 295), in which reference is made to "arrangements" that must be registered with the Council of the International Civil Aviation Organization and in respect of which "it would appear from the practice of the parties to the Chicago Convention that the vast majority do not consider the requirements to extend to informal instruments concluded between States" (Aust, "The theory and practice of informal international instruments", p. 790).

this type; it therefore does not seem appropriate to exclude them from the present topic. That being said, the Commission should not seek in its work on the present topic to take a position on the interpretation of those specific clauses, which should be examined only as relevant practice from which general conclusions might be drawn.

116. Lastly, the Commission should indicate, in its work on the present topic, that such work is without prejudice to the non-legal effects of the agreements examined, such effects being outside the Commission's purview.[237]

VIII. Identification of questions to be examined

117. In the light of the foregoing observations, the Special Rapporteur has endeavoured to identify the questions that would merit examination by the Commission under the present topic; they fall into three broad categories.

A. Criteria for distinguishing treaties from non-legally binding international agreements

118. As indicated in the 2022 syllabus, the question of the identification of criteria for distinguishing legally binding agreements (i.e. treaties) from non-legally binding agreements "is crucial, as it determines the effect to be attributed to an agreement […]".[238] This question deserves the Commission's full attention in view of the fact that, in its previous work, particularly that on the law of treaties, which led to the adoption of the definition of treaties found in the 1969 Vienna Convention on the Law of Treaties, the Commission did not determine which criteria would prevail.[239] Yet, this is a question of great practical importance, borne out by the fact that international courts and tribunals are regularly confronted with it (which they must resolve in order to establish their jurisdiction or to rule on the merits) of whether certain agreements invoked before them are binding or non-binding (see chap. VI, sect. B above).

[237] On the political reasons for the use of non-binding agreements and their effects in the political sphere, see, for example, Aust, "The theory and practice of informal international instruments" pp. 788 ff.; C. Lipson, "Why are some international agreements informal?", *International Organization*, vol. 45 (1991), pp. 495–538; Bradley, Goldsmith and Hathaway, "The rise of nonbinding international agreements: an empirical, comparative and normative analysis", pp. 1309 ff.; Gautier, "Non-binding agreements", para. 6; M. Hayashi, "Benefits of a legally non-binding agreement: the case of the 2013 US-Russian Agreement on the Elimination of Syrian Chemical Weapons", *International Community Law Review*, vol. 20 (2018), pp. 252–277, at pp. 262 ff. and pp. 270 ff.; Hill, *Aust's Modern Treaty Law and Practice*, pp. 56 ff.; Meyer, "Alternatives to treaty-making–Informal agreements", pp. 66–73; and D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford, Oxford University Press, 2000 (*passim*).

[238] A/77/10, annex I, para. 12. For an initial exploration of this question, see ibid., paras. 13–20.

[239] According to M. Fitzmaurice, "[t]he vast case-law is proof that the question of definition of treaty remains one of most taxing (and unresolved) problems in the relation between States and in the practice of international courts and tribunals" ("Concept of a treaty in decisions of international courts and tribunals", p. 138).

Similarly, the nature of certain agreements is regularly explored in the literature.[240] This question may arise at different critical points in time (at the time of negotiation or conclusion of an agreement, or only later, when the agreement is actually applied or when a dispute arises) or, in some cases, it may never arise at all (the parties may well be satisfied with an agreement of an ambiguous nature and not feel the need to resolve that ambiguity). Insofar as the legally binding or non-binding nature of an agreement is likely to give rise to disputes between States (or international organizations), or to be brought before domestic courts,[241] it is important to identify, as clearly and through the broadest consensus possible, the criteria that are generally used in practice, in jurisprudence and in the literature, in order to best guide practitioners when a challenge arises.[242]

119. This raises a number of questions that the Commission will need to examine carefully.

120. The first question concerns the nature of the criteria to be used. There are three competing approaches: the first (sometimes referred to as the subjective approach) is to focus on the intention of the parties, while the second is to use a set of objective indicators.[243] A third approach is to view the first two approaches as a single approach,

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[240] See, for example, in addition to numerous studies of the Helsinki Final Act of 1975, J.J. Busuttil, "The Bonn Declaration on International Terrorism: a non-binding international agreement on aircraft hijacking", *International and Comparative Law Quarterly*, vol. 31 (1982), pp. 474–487; (on the Arctic Environmental Protection Strategy of 14 June 1991) Z. Keyuan, "An environmental regime for the Arctic and the Antarctic analogy", *Asian Yearbook of International Law*, vol. 6 (1996), pp. 29–61; M. M. Kenig-Witkowska, "Some remarks on BIMST-EC: a new international legal instrument for co-operation in Asia", *Asian Yearbook of International Law*, vol. 7 (1997), pp. 263–268; P. Gautier, "Accord et engagement politique en droit des gens: à propos de l'Acte fondateur sur les relations, la coopération et la sécurité mutuelles entre l'OTAN et la Fédération de Russie signé à Paris le 27 mai 1997", *Annuaire français de droit international*, vol. 43 (1997), pp. 82–92; M. Reichard, "Some legal issues concerning the EU-NATO Berlin Plus Agreement", *Nordic Journal of International Law*, vol. 73 (2004), pp. 37–67; T. D. Grant, "The Budapest Memorandum of 5 December 1994: political engagement or legal obligation?", *Polish Yearbook of International Law*, vol. 34 (2014), pp. 89–114; M. Asada, "How to determine the legal character of an international instrument: the case of a note accompanying the Japan-India Nuclear Cooperation Agreement", *International Community Law Review*, vol. 20 (2018), pp. 192–219; D. Tamada, "The Japan-South Korea Comfort Women Agreement: unfortunate fate of a non-legally binding agreement", ibid, pp. 220–251; R. Le Boeuf, "La déclaration de cessez-le-feu entre l'Arménie et l'Azerbaïdjan: un nouvel épisode de la lutte pour le Haut-Karabakh", *Annuaire français de droit international*, vol. 66 (2020), pp. 271 ff., at pp. 280 ff.; S.K. Mahaseth, "Binding or non-binding: analysing the nature of the ASEAN Agreements", *International and Comparative Law Review*, vol. 21 (2021), pp. 100–123; Jiménez García, *Derecho internacional líquido ¿Efectividad frente a legitimidad?* pp. 180 ff.; and L. L. Sakaliyski, "The JCPoA and its legal status: if it walks like a treaty, does it quack like a treaty?", *Czech Yearbook of Public and Private International Law*, vol. 13 (2022), pp. 250–264.

[241] See, for example, S.P. Subedi, "When is a treaty a treaty in law? An analysis of the views of the Supreme Court of Nepal on a bilateral agreement between Nepal and India", *Asian Yearbook of International Law*, vol. 5 (1995), pp. 201–210.

[242] The general aspects of this question have been addressed, for example, by J. E. S. Fawcett, "The legal character of international agreements", *The British Yearbook of International Law*, 1953, pp. 381–400, at pp. 387 ff.; Eisemann, "Le Gentlemen's agreement comme source du droit international", pp. 344 ff.; Aust, "The theory and practice of informal international instruments", pp. 800 ff.; Gautier, *Essai sur la définition des traités entre États. La pratique de la Belgique aux confins du droit des traités*, pp. 383 ff.; and "Non-binding agreements", paras. 16 ff.; and Institute of International Law, *Yearbook of the Institute of International Law*, vol. 60, Part I, pp. 291 ff. (preliminary exposé by Virally), and the aforementioned works of the Inter-American Juridical Committee.

[243] On the opposition between these two methods, see, for example, the aforementioned works of the Inter-American Juridical Committee (chap. V, sect. B.2 above); and Meyer, "Alternatives to treaty-making–Informal Agreements" pp. 66 and 79.

with the objective indicators serving to determine the parties' intentions.[244] At this stage, the Special Rapporteur is rather convinced by this third approach, which he feels better reflects current practice and jurisprudence.[245] That being said, it may also be worth considering that there is a particular order for the examination of subjective and objective criteria. Recourse to objective criteria is essentially only necessary when the parties to the agreement have not *expressly* (and unequivocally) indicated in the agreement that they consider it to be legally (non-)binding.[246]

121. The second question concerns the types of criteria (or indicators) to be used. A preliminary examination of the available material reveals that there are many indicators that could be used. At this stage, the Special Rapporteur will only offer an initial idea of the indicators that are most frequently cited in jurisprudence and in the literature: the form of the agreement; the text of the agreement (the terms used, including in the title); the presence of final clauses (and their wording); whether or not the negotiators had full powers; the level of authority of those who concluded the agreement; the context surrounding the conclusion of the agreement (and the *travaux préparatoires*); the mode of adoption at the international level; the fact that the agreement did not follow the domestic procedure for concluding treaties; the possibility of unilaterally revoking the agreement; the fact that reservations were formulated (and their wording); the fact that monitoring or dispute settlement mechanisms were contemplated; the registration of the agreement; and the subsequent practice of the parties.

122. It is understood that, taken individually, none of these indicators is decisive. In each case, it is the combination of indicators and the assessment thereof that are decisive. For example, an agreement entitled "Memorandum of Understanding" may well turn out to be a treaty. Conversely, an agreement registered with the United Nations Secretariat may turn out to be a non-binding agreement.[247]

123. The third question involves determining whether there is a hierarchy between these various indicators.

124. The fourth question concerns the issue of whether any presumptions may exist on the subject (leading to the belief that (a) in the absence of proof to the contrary, an international agreement should be presumed to be a treaty, or that (b) in the absence of proof to the contrary, an international agreement should not be presumed to be

[244] See, for example, Gautier, *Essai sur la définition des traités entre États*, p. 373; and Chinkin, "A mirage in the sand? Distinguishing binding and non-binding relations between States", pp. 230 ff.

[245] It should be noted that, in some respects at least, the question examined here echoes the debates on the distinction between reservations and interpretative declarations, which are distinguished by "the legal effect that its author purports to produce" (see guideline 1.3 and the commentary thereto of the Guide to Practice on Reservations to Treaties adopted by the Commission in 2011 (*Yearbook… 2011*, vol. II (Part Three), pp. 59 and 60). It remains to be seen whether this parallel with the law of reservations to treaties will be worth exploring in more detail as part of the present work.

[246] See the examples given in the 2022 syllabus, A/77/10, annex I, para. 19.

[247] See, for example, Mändveer, "Non-legally binding agreements in international relations: an Estonian perspective", pp. 9 and 13.

legally binding).[248] In the *North Sea Continental Shelf* cases, the International Court of Justice held that "it is not lightly to be presumed that a State [which has not become legally bound], though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way".[249] In subsequent cases, the Court did not base its reasoning on any presumption; it established the nature of various instruments "on the basis of an objective examination of all the evidence".[250] The question of whether a presumption applies will need to be carefully studied. This is all the more important in practice as States and international organizations regularly use the term "agreement" ("*accord*" or "*convention*" in French) in the texts they adopt without specifying whether they necessarily mean to refer to a legally binding treaty.

125. The fifth question is whether judicial bodies have the power to recategorize an agreement in cases where the parties have expressly indicated in the agreement that they consider it binding (or non-binding) but where the examination of the agreement may lead to a conclusion different from their stated intention.[251]

126. It should also be clearly established that the nature of an international agreement under domestic law is without prejudice to its nature under international law.

B. Regime of non-legally binding international agreements

127. In the 2022 syllabus, the question of the regime of non-legally binding international agreements was linked to that of the effects of such agreements.[252] On reflection, this is a stand-alone question, which should be considered in its own right and separately, all the more so because it is undoubtedly on this aspect of the topic where practice and case law will be the least abundant and the Commission will therefore have to decide to what extent or in what way it intends to address it.

128. The questions that follow would be worthy of examination by the Commission.

129. First, there is the question of whether the law of treaties applies to non-legally binding international agreements. The answer here seems obvious, and perhaps bears repeating explicitly: these agreements are not, as such, governed by the law of treaties.

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[248] Authors seem divided on this point. For example, according to Fawcett, "international agreements are to be presumed not to create legal relations unless the parties expressly or impliedly so declare" ("The legal character of international agreements", p. 400; see the critique by Klabbers, "Governance by Academics: The Invention of Memoranda of Understanding", pp. 50 ff.). Conversely, others consider that an international agreement concluded by States should be presumed to be legally binding (for example, Wengler, "Les conventions 'non juridiques' ((*nichtrechliche Verträge*) comme nouvelle voie à côté des conventions en droit (*Rechtsverträge*), p. 646; R. A. Mullerson, "Sources of international law: new tendencies on Soviet thinking", *American Journal of International Law*, vol. 83 (1989), pp. 494–512, at p. 511; and P. Gautier, "Les accords informels et la Convention de Vienne sur le droit des traités entre États", in *Droit du pouvoir, pouvoir du droit. Mélanges offerts à Jean Salmon*, Brussels, Bruylant, 2007, pp. 425 ff., at p. 452). Other authors consider that the examination of the nature of an agreement always consists of a case-by-case analysis, and that it therefore involves a determination that is closely based on the particularities of each case (see Fitzmaurice, "Treaties", para. 2; Jacqué, "Acte et norme en droit international public", pp. 391 and 392), or that there is no need to resort to a presumption (Hill, *Aust's Modern Treaty Law and Practice*, p. 67).

[249] International Court of Justice, *ICJ Reports 1969*, p. 25, para. 28.

[250] International Court of Justice, *Obligation to Negotiate Access to the Pacific Ocean* (see footnote 172 above), p. 539, para. 91.

[251] This hypothesis is raised, for example, by Meyer, "Alternatives to treaty-making – Informal agreements", p. 79, footnote 136.

[252] A/77/10, annex I, para. 25.

130. Second, even if non-legally binding international agreements are not governed as such by the law of treaties, it may be worth considering whether certain rules of the law of treaties, at least those which apply to all sources of international law, are not applicable to such agreements. A specific example in this case is that of the prohibition of the violation of *jus cogens* norms. Insofar as neither treaties nor customary rules nor unilateral acts of States or international organizations cannot violate *jus cogens* on pain of nullity,[253] it seems right to deduce that the same applies to non-legally binding international agreements.[254] Of course, the Commission limited the scope of this nullity, in its draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), which it adopted in 2022, to acts that have "binding effect". However, in its commentary to the draft conclusions, it indicates that that is without prejudice to the effect of *jus cogens* on non-legally binding acts.[255] Beyond the case of *jus cogens*, there is also the question of whether the other grounds for nullity of the law of treaties apply to non-legally binding agreements. Given that such agreements could produce certain legal effects, the question of their possible nullity is not without incidence.

131. Third, it is useful to determine whether, in the absence of the application of the law of treaties, there are (general or special) rules of international law that structure or govern non-legally binding international agreements (as regards their conclusion, interpretation, amendment, suspension, termination, etc.). At first glance, this does not seem to be the case.[256] Some authors believe, however, that the application of certain rules of the law of treaties "by analogy is obviously sensible",[257] but it can also be said that non-binding agreements should not be treated as treaties, even only by analogy, because they are of a different nature. The Special Rapporteur believes, however, that any overly deductive approach to the issue should be avoided.[258] Only an examination of the relevant practice, jurisprudence and doctrine can lead to a conclusion, whatever it may be.

132. There is some evidence to suggest that *certain* rules of international law may limit or govern or apply to non-legally binding international agreements. A few examples are offered below.

(a) First of all, the obligation of the peaceful settlement of disputes reflected in Article 2, paragraph 3, and Article 33 of the Charter of the United Nations may

[253] See draft conclusions 10 to 16 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) (A/77/10, para. 44).

[254] This position was adopted, for example, by Münch at the Institute of International Law, *Yearbook of the Institute of International Law*, vol. 60, Part I, p. 326; and Barberis, "Le concept de 'traité international' et ses limites", *Annuaire français de droit international*, vol. 30 (1984), pp. 239–270, at p. 258.

[255] See in particular para. 5 of the commentary to draft conclusion 15, A/77/10, p. 65; para. 2 of the commentary to draft conclusion 16, ibid, pp. 66 and 67; and para. 2 of the commentary to draft conclusion 22, ibid, p. 88.

[256] See the position of the United States cited by J. H. McNeill, "International agreements: recent U.S.-UK practice concerning the memorandum of understanding", *American Journal of International Law*, vol. 88 (1994), pp. 821–826, at pp. 823 and 824, footnote 9: "[a] 'political' undertaking is not governed by international law and there are no applicable rules pertaining to compliance, modification, or withdrawal".

[257] Aust, "The theory and practice of informal international instruments", p. 793. See also Mändveer, "Non-legally binding agreements in international relations: an Estonian perspective", p. 17.

[258] In the same vein, see the call for a detailed examination of the rules applicable to the termination of agreements made by Bothe in "Legal and non-legal norms. A meaningful distinction in international relations?", p. 89.

well apply to disputes relating to such agreements, given the broad scope of that obligation.[259]

(b) There seems to be no doubt that a non-legally binding international agreement can be revoked at any time by the parties, since the agreement is not binding upon them.[260] It may be worth considering, however, whether that power of revocation is not limited somehow, say by the prohibition of any arbitrary revocation, consistent with the principle of good faith. This was the solution adopted by the Commission in principle 10 of its Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations,[261] although in that case the Commission was referring to unilateral acts that are legally binding and that solution may therefore not be transposable here.

(c) It may be worth considering whether the final clauses of a non-legally binding international agreement do not, exceptionally, have some binding effect (following, by analogy, what article 24, paragraph 4, of the 1969 Vienna Convention provides with respect to the final clauses of treaties not yet in force). To produce any effect, a final clause in an agreement that indicates that the agreement is not legally binding must, by definition, have some legal effect. Similarly, a final clause concerning the publication of a non-legally binding international agreement may not be devoid of any legal effect. Granted, under international law, there is no obligation on the parties to make non-binding agreements public – forcing them to do so would dangerously imperil the need for informal cooperation between States, particularly in certain sensitive areas.[262] It may be worth considering whether, conversely, a party to such an agreement has a right to unilaterally make it public if the other party objects thereto and the agreement had expressly provided that it would remain confidential.

(d) It is also possible that certain rules of international law may, very exceptionally, restrict the right to resort to non-legally binding international agreements, or, more specifically, that rules of international law may make their own application conditional on the conclusion of a legally binding, rather than a non-legally binding, international agreement. This situation could arise in particular

[259] In this regard, see conclusion 5 of the aforementioned conclusions of the rapporteur of the Institute of International Law (chap. V, sect. B.1 above).

[260] See, for example, F. Dopagne, “Observations sur la pratique récente de dénonciation des traités”, *Annuaire français de droit international*, vol. 64 (2018), pp. 131–159, at pp. 138 and 139.

[261] *Yearbook … 2006*, vol. II (Part Two), p. 174.

[262] Bradley, Goldsmith and Hathaway, “The rise of nonbinding international agreements: an empirical, comparative, and normative analysis”, p. 1354.

when the international rights of individuals are not sufficiently guaranteed with the use of a non-binding rather than a binding agreement.[263]

(e) The 2022 syllabus provided more generally that "it can also be said that a non-legally binding agreement may not defeat provisions of a treaty in force".[264] In fact, in the event of conflict between such an agreement and obligations, the obligations will naturally prevail (assuming that it makes sense to reason here in terms of conflicts of norms).

C. (Potential) legal effects of non-legally binding international agreements

133. One of the thorniest and most sensitive questions – given its significant practical and political implications – is determining the extent to which non-legally binding international agreements, or at least some of them, despite their non-binding nature, would produce or be attributed legal effects in international law. It is important to reiterate once again that the starting point of the present work is not at all to posit that such legal effects exist. The aim of the present work is to determine whether such effects exist and, if they do exist, to identify and delimit them and, if they do not exist, to take note of said non-existence.

134. Before proceeding in this section to a preliminary survey of the questions that should be explored in this respect, three observations are in order.

135. First, in view of the Commission's prior work, it should at least be established that the fact that an international agreement is non-binding does not prevent it from producing or being attributed some legal effects.[265] Several authors consider that a non-legally binding agreement can have or generate some legal effects,[266] while also

[263] See, for example, the practice of the Committee against Torture and the Committee on the Elimination of Discrimination against Women cited by Tamada, "The Japan-South Korea Comfort Women Agreement: unfortunate fate of a non-legally binding agreement", pp. 244–247. See also the position of the Office of the United Nations High Commissioner for Refugees, for whom "[a]n important consideration when assessing the compatibility of a proposed bilateral transfer arrangement with refugee protection obligations under international law is whether the transfer of asylum-seekers is governed by a legally binding instrument, challengeable and enforceable in a court of law by the affected asylum-seekers. In the case of the arrangement between the UK and Rwanda, UNHCR notes that the arrangement is currently governed through a MOU, whose terms include express stipulations that the arrangement is not binding in international law and does not create or confer enforceable individual rights" (Office of the United Nations High commissioner for Refugees, 8 June 2022, "UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement, para. 12, available at https://www.unhcr.org/uk/what-we-do/uk-asylum-and-policy-and-illegal-migration-act/migration-and-economic-development). In that connection, see the decision of the Supreme Court of the United Kingdom of 15 November 2023, [2023] UKSC 42, *Re (on the application of AAA (Syria) and others)*, in particular paras. 8–12, 46–48, 52, 61 and 101 and 102. See also Roberts (ed.), *Satow's Diplomatic Practice*, para. 31.22.

[264] A/77/10, annex I, para. 25. In the same vein, see also the statement of the Russian Federation delivered in the Sixth Committee on 25 October 2023, A/C.6/78/SR.26, para. 48.

[265] In 2018, in his second report to the Inter-American Juridical Committee, Hollis indicated that the responses to the questionnaire sent to the States in the region showed that "none of the Member State responses admitted the possibility that a non-binding agreement could have legal effects (e.g., giving rise to a claim of estoppel). On the contrary, the responses addressing the question were uniformly of the view that a non-binding agreement cannot, by definition, generate *any* legal effects" (CJI/doc.553/18, para. 44). However, the five responses cited in the footnote are more nuanced, since some of the States (in particular the Dominican Republic and Peru) simply state that these agreements do not have any binding effects (ibid., footnote 71).

[266] See the authors cited in the 2022 syllabus, A/77/10, annex I, para. 21; and Gautier, "Les accords informels et la Convention de Vienne sur le droit des traités entre États", p. 453.

urging caution on this point.[267] In the same vein, the Commission considered that non-legally binding agreements could be taken into account within the framework of the general rule of treaty interpretation reflected in article 31 of the 1969 Vienna Convention. This amounts to endowing such agreements with a greater interpretative effect than, for example, preparatory work, which is referred to only in the context of supplementary means of interpretation in article 32 of the Convention. Similarly, the Commission's work relating to customary international law strongly suggests, as was noted above by the Special Rapporteur, that such agreements can constitute means of establishing customary international law. It would be worthwhile to re-examine this issue more explicitly.

136. Second, it can be asserted that the violation of a non-legally binding agreement does not engage the responsibility of the violator; there does not seem to be any argument on this point. The articles on responsibility of States for internationally wrongful acts, adopted by the Commission in 2001, and the draft articles on the responsibility of international organizations, adopted in 2011, make clear that responsibility presupposes a breach *of an obligation*.[268] Non-compliance with a non-legally binding agreement cannot therefore justify the adoption of countermeasures by the "victim" State.[269] On the other hand, measures of retorsion (that do not involve the violation of international law) are legally possible.

137. Third, some authors have suggested distinguishing "direct" effects from "indirect" effects; this distinction was taken up in the 2022 syllabus.[270] This same idea could be expressed in a different manner, for example, by making a distinction between the effects *produced by* an agreement and the effects that other rules *make the agreement produce*, or between the effects of the agreement as such and the effects deriving from other norms of international law. In reality, it is difficult to establish a clear-cut, binary boundary between the different types of possible legal effects; at this stage, it seems wiser to list the legal effects that could (potentially) result from the conclusion of a non-legally binding international agreement, without categorizing them.

138. The (potential) legal effects that appear to merit consideration include the following:

(a) It would be useful to examine whether good faith (as a *legal* and not just a moral or political principle or obligation) applies to these agreements.[271] Article 13 of the draft declaration of the rights and duties of States, adopted by the Commission in 1949, limited the exercise of good faith to "obligations arising from treaties and

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[267] See, for example, Aust, "The theory and practice of informal international instruments", pp. 807 ff.; P. Gautier, *Essai sur la définition des traités entre États. La pratique de la Belgique aux confins du droit des traités*, pp. 369 ff.; Forteau, Miron and Pellet, *Droit international public*, pp. 488–490; and Roberts (ed.), *Satow's Diplomatic Practice*, para. 31.23.

[268] See 2022 syllabus, A/77/10, annex I, para. 25. See in particular arts. 2 and 12 ff. of the articles on the responsibility of States for internationally wrongful acts (*Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 35 and 57 ff.). For the draft articles on the responsibility of international organizations, see *Yearbook ... 2011*, vol. II (Part Two), pp. 38 ff., paras. 87 and 88.

[269] See, for example, Bothe, "Legal and non-legal norms. A meaningful distinction in international relations?" pp. 87 and 88; A. Zimmermann and N. Jauer, "Legal shades of grey? Indirect legal effects of 'memoranda of understanding'", *Archiv des Völkerrechts*, 2021, pp. 278–299, at p. 288.

[270] See in particular Zimmermann and Jauer, "Legal shades of grey? Indirect legal effects of 'memoranda of understanding'" pp. 282 ff.; and A/77/10, annex I, paras. 22 and 23.

[271] Since it is also understood that "although the principle of good faith is 'one of the basic principles governing the creation and performance of legal obligations ... it is not in itself a source of obligation where none would otherwise exist'" (International Court of Justice, *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 297, para. 39).

other sources of international law".[272] Since then, the question of whether this should be extended to non-binding commitments has regularly been raised,[273] without that leading to a non-binding agreement becoming a binding agreement;[274]

(b) The same question could be posed in connection with the obligation to cooperate: in a situation (arising in practice) where an institutionalized mechanism for monitoring (or settling disputes resulting from) a non-legally binding international agreement is established, the existence of such a mechanism is likely to generate some legal effects, which should be identified;[275]

(c) It may be worth considering whether the fact that a non-legally binding international agreement was entered into in a given field means that the field in question no longer falls under the exclusive national jurisdiction ("reserved domain") of the State in question;[276]

(d) The extent to which non-legally binding international agreements can be taken into account for the purposes of interpreting other international rules, and more broadly as "applicable law" in the international order, deserves to be examined in detail. In particular, the effects of interpretative agreements and their relationship with the concept of authentic interpretation will need to be explored, as will the legal relationship between non-legally binding agreements and the various means of interpretation (and not just subsequent agreements) of international norms. The legal parameters for (and possible limits on) the use of non-legally binding agreements as a means of interpretation should also be identified, indeed given the non-binding nature of such agreements;

(e) It will also be necessary to re-examine the declarative role that non-legally binding international agreements could play and the legal effects flowing therefrom, whether it is recognizing (or refusing to recognize) a state of affairs (the existence of a dispute, for example),[277] or reflecting or contributing to the crystallization or consolidation of a rule of customary international law or a general principle of international law;

(f) Non-legally binding international agreements could also produce legal effects through a combination with a binding source of international law: as a treaty or unilateral act creating legal obligations may incorporate or refer to a non-legally

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[272] See the text annexed to General Assembly resolution 375 (IV) of 6 December 1949.

[273] See, for example, conclusion 6 of the conclusions of the rapporteur of the Institute of International Law (chap. V, sect. B.1 above); A. E. Boyle, "Some reflections on the relationship of treaties and soft law", p. 902; R. Kolb, *La bonne foi en droit international public*, Paris, Presses universitaires de France, 2000, pp. 390–392; and Hill, *Aust's Modern Treaty Law and Practice*, pp. 60 and 61.

[274] Conforti, "Le rôle de l'accord dans le système des Nations Unies", pp. 266 and 267.

[275] See 2022 syllabus, A/77/10, annex I, para. 22; Baxter, "International law in 'her infinite variety'", pp. 562 and 563; and Zimmermann and Jauer, "Legal shades of grey? Indirect legal effects of 'memoranda of understanding'", p. 288.

[276] 2022 syllabus, A/77/10, annex I, para. 22 *in fine*. See, for example, conclusion 6 of the conclusions of the rapporteur of the Institute of International Law (chap. V, sect. B.1 above); Busuttil, "The Bonn Declaration on International Terrorism: a non-binding international agreement on aircraft hijacking", p. 487; and Gautier, "Non-Binding Agreements", para. 19.

[277] See also, among other examples, International Court of Justice, *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at p. 23, para. 45: "There is nothing prevent the parties from deciding by mutual agreement to consider a certain line as a frontier, whatever the previous status of that line. [...] International conventions and case-law evidence a variety of ways in which such recognition can be expressed."

binding international agreement, the effect of such references or incorporations must be determined;[278]

(g) A recurrent debate among authors concerns the applicability of estoppel and acquiescence (or, more broadly, of all the mechanisms that can be linked to the protection of legitimate expectations) [279] to non-legally binding international agreements;[280]

(h) It is also worth asking to what extent a non-legally binding agreement can suffice to constitute consent precluding wrongfulness under the law of responsibility;

(i) Some authors also recognize that non-legally binding agreements have a permissive or "legality" effect, in the sense that their conclusion would authorize the parties thereto to act in the manner provided for in the agreement – at the very least (although authors are divided as to this limitation) as long as that does not lead them to violate other obligations that are otherwise applicable to them;[281]

(j) The question of knowing the extent to which non-legally binding international agreements could come into play as subsidiary means for the determination of rules of law should, on the other hand, be left to the separate work under way on that topic.

139. The Special Rapporteur is fully aware that, for some of the questions listed above, it is the agreement as a *fact* rather than the agreement itself that is taken into consideration. There is no doubt that, as facts, non-legally binding agreements could (like any other facts) be taken into account in a large number of legal situations, which it would be futile and of little use to enumerate (for example, as evidence in a territorial or maritime dispute). That being said, it is necessary to study the cases where, even when non-legally binding international agreements come into play only as facts, the manner in which international law takes them into account (or not) should be examined in more detail, owing to their particularities (see in particular the case

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[278] See 2022 syllabus, A/77/10, annex I, para. 23 *in fine*; and, for example, Bradley, Goldsmith and Hathaway, "The rise of nonbinding international agreements: an empirical, comparative, and normative analysis", p. 1290 and footnote 31 (with particular reference to the 2015 Joint Comprehensive Plan of Action on the Iranian nuclear programme (Security Council resolution 2231 (2015), annex A)); the exposé by Singapore before the International Tribunal for the Law of the Sea in the climate change case, ITLOS/PV.23/C31/13, 19 September 2023 (afternoon), pp. 4–7 (regarding provisions in the United Nations Convention on the Law of the Sea referring to other agreed norms or practices). See also, concerning a State's "acceptance" of principles set out in a non-binding agreement, the judgment of the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (footnote 175 above), pp. 100 and 107, paras. 189 and 204. See also the examples given in Forteau, Miron, Pellet, *Droit international public*, p. 490.

[279] On these, see in particular E. Bjorge, "Legitimate Expectations", *Max Planck Encyclopedia of Public International Law*, May 2023.

[280] See in particular conclusion 9 of the conclusions of the rapporteur of the Institute of International Law (chap. V, sect. B.1 above); Aust, "The theory and practice of informal international instruments", pp. 810 ff.; Busuttil, "The Bonn Declaration on International Terrorism: a non-binding international agreement on aircraft hijacking", p. 487; Jacqué, "Acte et norme en droit international public", p. 395, footnote 44; Chinkin, "A mirage in the sand? Distinguishing binding and non-binding relations between States", p. 239, footnote 53; Klabbers, "Governance by Academics: The Invention of Memoranda of Understanding", p. 59; Zimmermann and Jauer, "Legal shades of grey? Indirect legal effects of 'memoranda of understanding'", pp. 290–295; Gautier, "Non-Binding Agreements", para. 19; and Hill, *Aust's Modern Treaty Law and Practice*, pp. 64–66.

[281] Conforti, "Le rôle de l'accord dans le système des Nations Unies", pp. 262 ff.; and (in a more nuanced fashion) Baxter, "International law in 'her infinite variety'", p. 563; Busuttil, "The Bonn Declaration on International Terrorism: a non-binding international agreement on aircraft hijacking", pp. 481 and 483 ff.; Gautier, "Non-Binding Agreements", para. 19.

cited above of the possible applicability of the doctrine of estoppel, which has long been of interest to authors).

IX. Form of the final outcome of the work

140. It is indicated in the last paragraph of the 2022 syllabus that the outcome of the present work "should probably take the form of conclusions, or guidelines (or model clauses) if need be".[282] With the hindsight of several months of reflection, the Special Rapporteur believes that draft conclusions would indeed be the most appropriate outcome, for two reasons: (a) the present topic is a continuation of, or is linked with, the Commission's recent work on the sources of international law, for which the form of draft conclusions was chosen; and (b) the objective pursued with the present topic is similar to that pursued with the above-mentioned work: the aim is not to propose substantive norms in a given sector of international social life, or progressively develop the law; rather, the aim is to give an account of how a source of law, a technique or a category of instruments operates in everyday international practice, and how international law is positioned in relation to it. For an exercise such as this, where the primary function is to "facilitate the work" of practitioners by "offer[ing] guidance",[283] the form of draft conclusions is the most suitable. As indicated in the 2022 syllabus, the goal of the current work is "to provide clarification on the nature and possible effects of such agreements under international law".[284]

141. The Commission may wish to consider whether it is appropriate to add best practices, model clauses or other recommendations to the draft conclusions. At this stage of his analysis, the Special Rapporteur is not in favour of doing so. There are three reasons for his reservations. First, the draft conclusions and the commentaries clarifying them will probably suffice to highlight the concrete approaches to be taken to improve or clarify existing practice. Second, it could be risky to seek to shape, by means of recommendations, a practice whose primary virtue is flexibility and minimum formality, and in respect of which it is important for States to retain extensive freedom. Third, since it is largely through the terminology used in agreements that States and international organizations bring more clarity to their practice, it is doubtful that the Commission is in a position to make recommendations that are truly universal in scope. Such recommendations may be appropriate in a regional context involving a small number of official languages.[285] However, that exercise would be difficult to achieve by means of model clauses or other terminological recommendations within the multilingual framework of the United Nations, and even more so within the framework of international law as a whole, where the official languages of treaties vary, and, furthermore, where each treaty, whatever its official language, must be translated into the official language(s) of each country for the purposes of its effective implementation.

142. Similarly, it does not seem appropriate to aim to formulate recommendations concerning the publication or registration of non-legally binding international agreements. In the view of the Special Rapporteur, the reservations expressed with

[282] A/77/10, annex I, para. 28.

[283] A/73/10, p.17, para. (4) of the commentary to draft conclusion 1 of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

[284] A/77/10, annex I, para. 26.

[285] See, for example, the (very useful) "linguistic markers" identified (in English, French, Portuguese and Spanish) in the table under guideline 3.4 of the guidelines of the Inter-American Juridical Committee on Binding and Non-Binding Agreements (available at https://www.oas.org/en/sla/iajc/themes_recently_concluded_Binding_and_Non-Binding_Agreements.asp). See also the "10 commandments" proposed by Remiro Brotóns, *Derecho internacional, Curso general*, pp. 194 and 195.

regard to this point in paragraph 26 of the 2022 syllabus remain relevant: seeking to align the regime of these agreements with that applicable to treaties would be overly ambitious and run the risk of giving these agreements a legal existence or importance which indeed those who concluded them did not agree to give them. It is for States and international organizations to decide, individually or collectively and based on the different types of non-binding agreements, whether or not they intend to establish rules or mechanisms for the publication or registration of such agreements.

X. Organization and schedule of work

143. In the light of the present preliminary report, the Special Rapporteur proposes the following schedule of work.

(a) At the present session, a general discussion on the topic should help to highlight the issues and main thrusts of the topic and enable every member to express his or her initial views on it. This will also allow for a more precise identification of the subtopics to be addressed. The key challenge of this session will be to reach a consensus on the title and scope of the topic, the material to be studied and the form of the work.

(b) The Special Rapporteur intends to propose at the next session, in 2025, on the basis of practice, relevant jurisprudence and doctrine, and any information submitted to the Commission in the meantime by States and international organizations, draft conclusions dealing respectively with: the aim of the present topic; the scope (and possibly the definition of certain terms for the purposes of the present topic, if the provision on the scope is not sufficient); and the criteria for distinguishing between treaties and non-legally binding international agreements (which will be the focus of the second report).

(c) At the two subsequent sessions (2026 and 2027), questions relating to the regime and (potential) legal effects of these agreements will in turn be examined, and draft conclusions will be proposed concerning these two issues.