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Second report on non-legally binding international agreements

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Contents

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I. Introduction

1. The present report[1] follows on from the Special Rapporteur's first report[2] and reflects the discussions thereon that were held in 2024, first in the Commission[3] and then in the Sixth Committee of the General Assembly.[4] The Special Rapporteur has prepared this report with two objectives in mind, in accordance with the schedule of work set out in the first report.[5] On the one hand, he draws conclusions from the debates on general aspects of the topic, *i.e.* the form of the outcome (chap. II), its purpose, the terminology used, the scope of the project and the matters to be reserved through a without prejudice clause (chap. III). On the other, he embarks on the study of the first substantive issue identified in the first report,[6] namely the distinction between treaties and non-legally binding international agreements (chap. IV). Draft conclusions are proposed on these various points; for the sake of convenience, they are reproduced in an annex to the report.[7] Lastly, the report concludes with a few remarks concerning the organization and schedule of work on the topic (chap. V).

2. The study herein is based on the material presented briefly in the first report (practice, jurisprudence and doctrine),[8] which has since been updated by the Special Rapporteur. The study is also based on the very useful information provided by the delegations that commented on this topic in the Sixth Committee in October 2024[9] and on the replies that some of them subsequently submitted in writing in response to the Commission's request for information.[10] In addition, the report takes into account the replies to the questionnaire on the practice of States and international organizations regarding non-legally binding agreements that was circulated in March 2022 by the Committee of Legal Advisers on Public International Law. These replies were posted on the Committee's website at the end of 2024 and have been publicly accessible since December 2024.[11] Finally, the present report draws on additional research carried out to better identify national practices in this regard.[12]

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

[2] A/CN.4/772.

[3] A/CN.4/SR.3681–3687 and A/CN.4/SR.3699–3701.

[4] See https://www.un.org/en/ga/sixth/79/summaries.shtml and A/C.6/79/SR.21, A/C.6/79/SR.23, A/C.6/79/SR.26, A/C.6/79/SR.28, A/C.6/79/SR.29 and A/C.6/79/SR.30.

[5] A/CN.4/772, para. 143.

[6] A/CN.4/772, paras. 118–126.

[7] These draft conclusions were drawn up in French. The Special Rapporteur also provided the secretariat with an English version of the text.

[8] A/CN.4/772, chap. VI. See also *ibid.*, chap. V, for information on previous work related to the topic.

[9] In October 2024, some 50 delegations referred to this topic in their statements in the Sixth Committee. Their remarks included valuable information on their practice in this regard. Following are the delegations that expressed their views, in the order in which they made their statements: Croatia, China, European Union, Finland (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden), Latvia (on behalf of the Baltic States: Estonia, Latvia and Lithuania), Brazil, Slovenia, Portugal, Poland, Austria, Romania, Armenia, Belarus, Ireland, Singapore, South Africa, Israel, Italy, Kingdom of the Netherlands, Czechia, Australia, Japan, Chile, United States of America, Republic of Korea, Sierra Leone, France, Slovakia, Guatemala, Switzerland, Thailand, Cyprus, Islamic Republic of Iran, United Kingdom of Great Britain and Northern Ireland, Türkiye, Colombia, Malaysia, India, El Salvador, Federated States of Micronesia, Russian Federation, Estonia, Argentina, Greece, Algeria, Sri Lanka, Bulgaria, Philippines, Mexico, Asian-African Legal Consultative Organization.

[10] A/79/10, para. 54. As at the date of submission of the present report (17 February 2025), written information (in English, French, Russian or Spanish) had been received from the following 15 States, listed in chronological order by date of submission: Slovenia, Finland, Austria, Switzerland, Australia, United Kingdom, Argentina, Kingdom of the Netherlands, United States, Mexico, Guatemala, Poland, Ireland, Russian Federation, France. This information is available from the Commission's website.

[11] The questionnaire and replies are available, in English and French, at https://www.coe.int/en/web/cahdi/the-practice-of-states-and-international-organisations-regarding-non-legally-binding-instruments.

[12] These national practices will be examined in particular in chapter IV of the present report.

3. In this study and in formulating the draft conclusions for discussion by the Commission, the Special Rapporteur has proceeded with due caution. As will be noted below, a number of States are in the process of adopting national guidelines on this topic. The Commission's work should thus take account of and work in concert with the current developments in practice, rather than imposing preconceived or definitive solutions. The project must be as collaborative as possible, in keeping with the Commission's methods of work.

II. Form of the outcome

4. During the debates at the preceding session, Commission members expressed differing views on the form that the outcome of the present project should take, albeit with a slight preference for the preparation of a set of draft conclusions.[13] Accordingly, following the debates, the Special Rapporteur "proposed provisionally presenting the work of the Commission as draft conclusions in his next report and revisiting that decision in accordance with the comments from States at the Sixth Committee".[14]

5. As shown by the positions expressed in the Sixth Committee, States agree that the final outcome should not be prescriptive (a point to which the Special Rapporteur will return in chapter III (A) below). On the basis of this fundamental parameter, they expressed a preference for either draft conclusions or draft guidelines. In all, 19 States indicated a preference for draft conclusions.[15] In addition, Armenia expressed openness to this option while noting its preference for the preparation of an analytical report.[16] Austria expressed reservations, noting that the form of draft conclusions had been chosen for topics pertaining to sources of law, which did not include non-legally binding agreements.[17] Four States indicated a preference for draft guidelines,[18] while Japan took the view that this choice would be problematic.[19] Other States did not indicate a preference, so long as the final outcome was not prescriptive.[20] Israel, on the other hand, rejected the idea of draft guidelines, conclusions or recommendations and advocated an outcome in the form of a final report.[21] Some States mentioned the possibility of identifying national best practices in connection with the preparation of draft conclusions,[22] or preparing a list of specific terms or model clauses.[23] Malaysia, however, expressed opposition to those suggestions, arguing that any standardization could limit States' room for manoeuvre.[24]

6. In view of the comments made by States, the Special Rapporteur considers it appropriate to continue to work towards an outcome in the form of draft conclusions. The question of whether such draft conclusions should be accompanied by additional texts (best

[13] A/79/10, para. 297.
[14] A/79/10, para. 299.
[15] Finland (on behalf of the Nordic countries) (A/C.6/79/SR.28, para. 27), Brazil (*ibid*., para. 36), Ireland (*ibid*., para. 101), Australia (A/C.6/79/SR.29, para. 26), Sierra Leone (*ibid*., para. 72), France (*ibid*., para. 82), Slovakia (*ibid*., para. 96), Switzerland (*ibid*., para. 109), Thailand (*ibid*., para. 114), Cyprus (*ibid*., para. 122), United Kingdom (*ibid*., para. 144), Greece (A/C.6/79/SR.30, para. 90), Bulgaria (*ibid*., para. 115), Philippines (*ibid*., para. 123), Mexico (*ibid*., para. 142). Australia and Switzerland reiterated this view in the information they submitted in writing to the Commission.
[16] Armenia (A/C.6/79/SR.28, para. 78).
[17] Austria (A/C.6/79/SR.28, para. 60).
[18] China (A/C.6/79/SR.26, para. 60), Slovenia (A/C.6/79/SR.28, para. 40), Singapore (*ibid*., para. 106) and Islamic Republic of Iran (A/C.6/79/SR.29, para. 135). This also appears to have been the position of El Salvador (A/C.6/79/SR.30, para. 51).
[19] Japan (A/C.6/79/SR.29, para. 30).
[20] Romania (A/C.6/79/SR.28, para. 66), Malaysia (A/C.6/79/SR.30, paras. 41 and 42), Algeria (*ibid*., para. 94).
[21] Israel (A/C.6/79/SR.28, para. 117).
[22] Cyprus (A/C.6/79/SR.29, para. 122), Switzerland (*ibid*., para. 106).
[23] Türkiye (A/C.6/79/SR.30, para. 12). See also the proposal by the Philippines to include, in the outcome, examples of existing texts adopted by States on the topic, including links to those documents, which could be useful for other States wishing to adopt similar texts (A/C.6/79/SR.30, para. 125).
[24] Malaysia (A/C.6/79/SR.30, para. 41).

practices, lists of terms, model clauses) will need to be discussed in due course. As explained below, this question will be raised in the present report in connection with the issue of what indicators can be used to distinguish between treaties and non-legally binding international agreements (see chap. IV (C) below).

III. General elements (introductory provisions of the draft conclusions)

7. The work carried out at the preceding session was aimed primarily at defining the contours of the topic and the general direction of the work thereon.[25] States had the opportunity to present their views on these two issues during the debates in the Sixth Committee. On this basis, the Commission is now in a position to take a decision on the introductory part of the draft conclusions. This introductory part should comprise four provisions dealing, respectively, with the purpose of the draft conclusions (sect. A), the use of terms (sect. B), the scope of the draft conclusions (sect. C) and the matters to be reserved through a without prejudice clause (sect. D).

8. The Special Rapporteur is fully aware that terminology issues are of the utmost importance in relation to this topic. This is especially true of the term "agreement". Questions of terminology are usually dealt with in the introductory provisions of the Commission's outputs only after the provisions relating to their purpose, scope and coverage.[26] In the case of the present topic, terminology issues should be addressed before the scope of the topic is identified, as the use and definition of terms will to some extent dictate the delimitation of the draft conclusions' scope.

A. Purpose

9. It is customary for draft conclusions prepared by the Commission to begin with a provision setting out their purpose in simple terms.[27] Given the nature of the present topic and the particular issues at stake, it seems necessary to draft a provision that is more precisely worded than usual to dispel any ambiguity as to what the Commission is seeking to achieve.

10. In the discussion of the Special Rapporteur's first report, Commission members agreed that the goal of the work should be to "provide legal clarification on relevant issues" and to give States "practical guidance on the considerations they should be aware of as they considered whether or not to conclude non-legally binding international agreements, rather than encouraging or discouraging their use", on the understanding that the Commission "should refrain from creating new rules that could potentially limit the flexibility and utility of less formal forms of agreements".[28] This is also why some members suggested that the term "regime" should not be used in connection with non-legally binding agreements.[29] In summing up the debate, the Special Rapporteur noted that "the Commission should not seek

[25] See, in particular, A/CN.4/772, para. 6, and A/79/10, para. 219.

[26] See, for example, the draft articles on most-favoured-nation clauses, on the status of the diplomatic courier and the diplomatic bag not accompanied by the diplomatic courier, on prevention of transboundary harm from hazardous activities, on the law of transboundary aquifers, on the responsibility of international organizations, on the effects of armed conflicts on treaties, on the expulsion of aliens or on the protection of persons in the event of disasters, or the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. All these texts are available at https://legal.un.org/ilc/texts/texts.shtml. Exceptionally, the draft guidelines on the protection of the atmosphere begin directly with a provision on the use of terms, but it is preceded by a preamble that sets out the general framework of the topic.

[27] See, for example, conclusion 1 of the conclusions on identification of customary international law (*Yearbook of the International Law Commission, 2018*, vol. II (Part Two), p. 91) or draft conclusion 1 of the 2022 draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) (A/77/10, para. 44).

[28] A/79/10, para. 230. See also the first report (A/CN.4/772), para. 3 ("It should be quite clear that the present topic is not meant to be prescriptive").

[29] A/79/10, para. 260.

to be prescriptive. Instead, the goal should be to reduce, as far as possible, the areas of legal uncertainty" in the field.[30]

11. The positions expressed in the Sixth Committee were largely consistent with this approach. The vast majority of delegations stressed the practical significance of the topic, given the growing number of non-legally binding international agreements.[31] They also emphasized the need to avoid limiting the flexibility inherent in the use of non-binding agreements,[32] to refrain from adopting a prescriptive approach and to focus on identifying and clarifying existing practice.[33] In the same spirit, the States that took part in the debate generally supported the proposal by the Special Rapporteur and the Commission to focus on the practical aspects of the topic,[34] with the aim of clarifying existing practice and providing greater legal certainty without hampering international cooperation, to which non-legally binding international agreements make an important contribution.[35] In their written replies to the Commission's request for information, some States reiterated the imperative need to ensure that non-binding agreements were not deprived of their flexibility and informality, which represented their core value, and that the Commission's work was not prescriptive in nature.[36] In the *Aegean Sea Continental Shelf* and *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* cases, the International Court of Justice took care to preserve the role of the agreements at issue, which it considered not to be legally binding.[37]

12. These various elements merit inclusion in the draft provision describing the purpose of the topic.[38] It would also be useful to specify in the same draft conclusion that the draft conclusions do not affect the binding force of treaties or their regime. This would ensure that

[30] *Ibid.*, para. 282.

[31] See Croatia (A/C.6/79/SR.21, para. 122); China (A/C.6/79/SR.26, para. 59); European Union (A/C.6/79/SR.28, para. 13); Finland (on behalf of the Nordic countries) (*ibid*., para. 24); Latvia (on behalf of the Baltic States) (*ibid*., para. 29); Portugal (28th meeting, p. 3 of the written statement available at https://www.un.org/en/ga/sixth/79/summaries.shtml); Poland (A/C.6/79/SR.28, para. 50); Romania (*ibid*., para. 63); Belarus (*ibid.*, paras. 80 and 81); Ireland (*ibid*., para. 98); South Africa (*ibid*., para. 107); Italy (*ibid*., para. 123); Chile (A/C.6/79/SR.29, para. 33); Republic of Korea (*ibid*., para. 60); Sierra Leone (*ibid*., paras. 69 and 70); France (*ibid*., para. 80); Guatemala (*ibid*., para. 100); Switzerland (*ibid*., para. 106); Cyprus (*ibid*., para. 118); Islamic Republic of Iran (*ibid*., para. 132); Malaysia (A/C.6/79/SR.30, para. 35); Greece (*ibid*., para. 86); Sri Lanka (*ibid*., para. 102); Bulgaria (*ibid*., para. 110); Mexico (*ibid*., para. 139).

[32] See, in particular, Croatia (A/C.6/79/SR.21, para. 122); Singapore (A/C.6/79/SR.28, para. 103); Czechia (A/C.6/79/SR.29, para. 12); Chile (*ibid*., para. 34); United States (*ibid*., para. 44); Sierra Leone (*ibid*., paras. 69 and 70); Slovakia (*ibid*., para. 95); Guatemala (*ibid*., para. 101); Switzerland (*ibid*., para. 109); United Kingdom (*ibid*., para. 144); Türkiye (A/C.6/79/SR.30, para. 9); Colombia (*ibid*., para. 20).

[33] Finland (on behalf of the Nordic countries) (A/C.6/79/SR.28, para. 27); Romania (*ibid*., para. 63); Singapore (*ibid*., paras. 103 and 106); South Africa (*ibid*., para. 110); Czechia (A/C.6/79/SR.29, para. 12); Australia (*ibid*., para. 25); United States (*ibid*., para. 44); Switzerland (*ibid*., para. 109); Türkiye (A/C.6/79/SR.30, paras. 9 and 12); Greece (*ibid*., para. 86); Sri Lanka (*ibid*., para. 103).

[34] See, in particular, Slovenia (A/C.6/79/SR.28, para. 39); Austria (*ibid*., para. 56); Armenia (*ibid*., para. 76); Belarus (*ibid*., para. 81); Italy (*ibid*., para. 123); Czechia (A/C.6/79/SR.29, para. 12); Australia (*ibid*., para. 25); Chile (*ibid*., para. 33); United States (*ibid*., para. 44); France (*ibid*., para. 82); Slovakia (*ibid*., para. 95); Türkiye (A/C.6/79/SR.30, para. 9); India (*ibid*., para. 46); Russian Federation (*ibid*., para. 61); Greece (*ibid*., para. 86); Bulgaria (*ibid*., paras. 110 and 115); Mexico (*ibid*., para. 142).

[35] See, in particular, Latvia (on behalf of the Baltic States) (A/C.6/79/SR.28, para. 29); Brazil (*ibid*., para. 36); Ireland (*ibid*., para. 97); Australia (A/C.6/79/SR.29, para. 25); Japan (*ibid*., para. 30); United States (*ibid*., para. 44); France (*ibid*., para. 82); India (A/C.6/79/SR.30, para. 46); Bulgaria (*ibid*., para. 110); Mexico (*ibid*., para. 139).

[36] See the information provided by Australia (para. 11), the United Kingdom (para. 8) and the United States (p. 4); see also the information submitted by France (pp. 1 and 2).

[37] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, I.C.J. Reports 2018*, p. 507, at p. 543, para. 105 ("Although these remarks are politically significant"), and p. 543, para. 107; see also *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at p. 44, para. 108.

[38] The commentary to this draft conclusion could also state that the present project does not deal with the motives or reasons for the use of non-legally binding international agreements in contemporary practice. On these reasons, see A/CN.4/772, footnote 237.

the draft conclusions are not inadvertently misread or misunderstood to mean that treaties are not necessarily legally binding. It would also show at the outset, in the first draft conclusion, that a distinction must be made between treaties and non-legally binding international agreements.

13. In the light of the foregoing, the Special Rapporteur proposes the following draft conclusion. The wording of paragraph 1 mirrors that of previous draft conclusions adopted by the Commission on other topics, while paragraphs 2 to 4 clarify the nature of the work undertaken by the Commission on the topic:[39]

PART ONE. INTRODUCTION

Draft conclusion 1. Purpose

1. The present draft conclusions concern non-legally binding international agreements.

2. The present draft conclusions are not intended to be prescriptive. They are intended to provide elements of clarification with regard to non-legally binding international agreements.

3. The present draft conclusions do not affect the role played by non-legally binding international agreements in international cooperation, and the flexibility that characterizes their negotiation and adoption.

4. The present draft conclusions do not affect the binding force of treaties under the principle *pacta sunt servanda* or their regime.

B. Use of terms

14. In his first report, the Special Rapporteur indicated that the term "agreement" and the expression "non-legally binding" would require clarification and set forth a number of considerations in this regard.[40] As the expression "non-legally binding" does not pose any real difficulty, the Special Rapporteur will begin by defining it (sect. 1) before reverting to the use of the term "agreement" for the purposes of the topic (sect. 2). On this basis, the Special Rapporteur will explain his proposed draft conclusion on the use of the term "non-legally binding international agreement" (sect. 3).[41]

1. "Non-legally binding"

15. The first report includes a substantial discussion of the expression "non-legally binding" and, necessarily, of its exact opposite, "legally binding". Defining these terms is particularly important, as it helps to define the purpose of the topic and is central to the distinction between non-legally binding international agreements and treaties, which will be discussed in chapter IV below.

16. In his first report, the Special Rapporteur noted that the expression "legally binding" is clearer than the phrase "governed by international law" used in article 2 of the Vienna Convention on the Law of Treaties.[42] He went on to observe that the adjective "binding" has been used in practice since 1969.[43] Lastly, he specified that the term "legally binding" "reflects the fact that an agreement contains provisions entailing rights and obligations, but that is not all". Indeed, the characteristic feature of a treaty is its obligatory effect (it "is

[39] For details on the use of the term "agreement" in this draft conclusion, see section B (2) below.

[40] A/CN.4/772, paras. 91–110.

[41] The question remains as to whether the wording in the title of the topic in English should be changed from "non-legally binding" to "legally non-binding". See A/79/10, para. 289.

[42] A/CN.4/772, para. 10. In its work on responsibility of States for internationally wrongful acts, the Commission did not provide any specific explanation of the concept of "obligation", which is nonetheless at the heart of this topic (on the basis of what evidence can a legally binding commitment be considered to exist, the violation of which may give rise to international responsibility?). The commentaries to the 2001 articles on State responsibility are silent on the subject.

[43] A/CN.4/772, para. 105.

binding upon" the parties), which, "in addition to provisions that establish specific rights and obligations … also covers all provisions with a binding effect for the parties" (a treaty defining a border, for example,[44] or a treaty that terminates or modifies an earlier treaty).[45] These explanations were welcomed by the members of the Commission.[46]

17. A review of jurisprudence confirms the soundness of this approach. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the International Court of Justice used a general formula (the question of whether a commitment was "of a legal nature" or had "legal force").[47] In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, it specifically considered whether minutes setting out an agreement "create rights and obligations in international law for the Parties".[48] In *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, the Court considered a bilateral declaration "tracing a boundary" and found it to be "governed by international law", before concluding that this declaration, along with another bilateral declaration of the same type, had to be "considered as binding and as establishing a legal obligation on Nigeria".[49] In *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, the Court took the view that an agreement is a treaty if it "is binding on the Parties under international law".[50] A similar approach was taken in the judgment on the merits in *Obligation to Negotiate Access to the Pacific Ocean*, in which the Court considered whether or not an agreement demonstrated "an intention of the parties to be legally bound",[51] and in particular whether or not it established an obligation.[52] Similarly, the International Tribunal for the Law of the Sea has held that it is necessary to establish whether the text under consideration is "the source of rights and obligations between Parties"[53] or embodies "legal obligations or … commitments" in order to determine whether it is "legally binding".[54] Arbitral practice is consistent with this approach. In the *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges*, the Tribunal contrasted two scenarios, one where a memorandum of understanding was "intended … to create independent legally enforceable obligations" and one where its purpose was "merely recording the understandings of the Parties".[55] The specification "independent" is important. What matters is whether or not the agreement *as such* creates new legal commitments. In the *South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China*, the Arbitral Tribunal considered whether the documents in question "evince an intention to create legal rights and obligations".[56]

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[44] *Ibid.*, paras. 106 and 107.

[45] See Philippe Gautier, "1969 Vienna Convention. Article 2: use of terms", in Olivier Corten and Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford, Oxford University Press, 2011, vol. 1, pp. 33–56, at pp. 43–45.

[46] A/79/10, paras. 240–242.

[47] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 132, para. 261.

[48] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 112, at p. 121, para. 25.

[49] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at pp. 429 and 431, paras. 263 and 268.

[50] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 3, at p. 24, para. 50.

[51] *Obligation to Negotiate Access to the Pacific Ocean* (see footnote 37 above), p. 539, para. 91.

[52] *Ibid.*, pp. 551 and 552, para. 139.

[53] *"Hoshinmaru" (Japan v. Russian Federation), Prompt Release, Judgment, ITLOS Reports 2005–2007*, p. 18, at p. 46, para. 86.

[54] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, at p. 35, paras. 89 and 93.

[55] *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. 3–334, at p. 131, para. 6.8.

[56] *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, pp. 1–152, at p. 97, para. 241, and p. 86, para. 213.

18. The foregoing is corroborated by State practice. For example, in its 2014 law on treaties and other international agreements, Spain states that a "non-normative" international agreement is one that is not a source of international obligations.[57] Moreover, States' answers to the questionnaires circulated by the Inter-American Juridical Committee and the Committee of Legal Advisers on Public International Law describe a non-legally binding agreement as one that is not a source of international obligations and does not, in itself, have any binding legal effects.[58] The Colombian Government's legal handbook on treaties and other instruments similarly states that memorandums of understanding are distinguished by the fact that they do not contain terms that are "imperativos o jurídicamente exigibles".[59] In India, the authorities' guidelines on memorandums of understanding state that the key difference with regard to treaties is that treaties are intended "to create legally binding obligations".[60] Positions along the same lines were expressed in the Sixth Committee.[61]

19. Of course, an agreement need only create a single international obligation in order to constitute a treaty. Thus, for an agreement not to be legally binding under international law, it must not, in itself, create any rights or obligations or have any binding legal effect.

2. "Agreement"

20. The use of the term "agreement" in this context has been a matter of debate in the Commission and the Sixth Committee. Before returning to this debate for the purposes of the present report, the Special Rapporteur wishes to stress the importance of not overstating the issue. The work on the topic must not become mired in matters of terminology. As will be discussed in chapter IV below, terminological indicators are undoubtedly a significant factor in determining whether a given agreement is or is not legally binding. It is important, however, not to conflate the task of describing the general purpose of the work on the topic with the study of its substantive aspects.

21. In his first report, the Special Rapporteur explained why he believes that the use of the term "agreement" in the title of the topic is warranted, in particular because the *travaux préparatoires* of the Vienna Convention on the Law of Treaties make it clear that every treaty is an agreement but not every agreement is a treaty, and because the term "agreement" better delimits the scope of the topic.[62] In 2024 the Commission members' views were divided on the use of this term. Many of them supported it.[63] Others preferred a different term, such as

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[57] Spain, *Ley 25/2014, de 27 de noviembre, de Tratados y otros Acuerdos Internacionales*, art. 43 (for a commentary, see Antonio Pastor Palomar, "Tipos de acuerdos internacionales celebrados por España: al hilo del Proyecto de ley de tratados y otros acuerdos internacionales de noviembre de 2013", *Revista Española de Derecho Internacional*, 2014, pp. 331–337, at pp. 333 and 334).

[58] See the replies to the Inter-American Juridical Committee questionnaire from Argentina, Colombia, the Dominican Republic, Jamaica, Mexico, Peru and the United States, cited in the second report of D. Hollis (CJI/doc. 553/18), 2018, para. 11 and footnote 92 (available at https://www.oas.org/en/sla/iajc/docs/themes_recently_concluded_Binding_and_Non-Binding_Agreements_CJI-doc_553-18.pdf); and the replies to question 4 of the Committee of Legal Advisers on Public International Law questionnaire from Albania, Armenia, Bulgaria, Cyprus, Estonia, Finland, the Netherlands (Kingdom of the), the Republic of Moldova, Romania, Slovenia, Spain, Switzerland, the United Kingdom and the European Union. See also the reply of the Council of Europe to question 5.

[59] See Colombia, Ministerio de Relaciones Exteriores, Dirección de Asuntos Jurídicos Internacionales, *Guía jurídica de tratados y otros instrumentos*, p. 23.

[60] See India, "Guidelines/SoP on the conclusion of International Treaties in India", 16 January 2018, p. 4. See also United States, *Code of Federal Regulations*, Title 22, part 181.4 (b) (1): "An instrument is not a non-binding instrument if it gives rise to legal rights or obligations under either international law or domestic law."

[61] See, for example, China (A/C.6/79/SR.26, para. 60) or South Africa (A/C.6/79/SR.28, para. 107).

[62] A/CN.4/772, paras. 93 ff.

[63] Mr. Lee pointed out that "[r]egarding the translation of 'agreement' into other languages, the concerns expressed by several members did not arise in relation to some of the East Asian languages. In Chinese, Japanese and Korean, the English word 'agreement' was translated differently depending on whether it signified a concurrence of wills or a certain form of treaty that was usually binding. The risk that the term 'agreement' would be misunderstood was therefore much smaller in those languages" (A/CN.4/SR.3685, p. 11).

"instrument" or "arrangement".[64] In any event, it was emphasized that, regardless of the term ultimately chosen, "there would be a need to indicate that the title of the topic was without prejudice to the terminological choices that some States made to guide their practice".[65]

22. Reactions in the Sixth Committee were mixed.

23. Seven States did not take a clear or definitive position, or showed flexibility, on the term to be used in the title of the topic.[66] Among those States, some said that what mattered most was that the term chosen should be without prejudice to the terms used in international and national practice[67] and that the scope of the topic should be clearly delimited.[68] El Salvador took the view that the decision as to which term should be used would depend on how the Commission defined the criteria for establishing whether or not States had intended to enter into a binding commitment,[69] which amounts to advising the Commission to adopt a wait-and-see approach. In fact, the term used at the current stage of the project can evidently be revisited when the draft conclusions are finalized.

24. Fifteen States agreed with – or, in some cases, did not oppose – the use of the term "agreement", which could be accompanied by a without prejudice clause on how the term should be understood.[70] Guatemala uses the term "acuerdos" in its written submission to the Commission.

25. Nineteen delegations stated that they were not in favour of using the term "agreement".[71] The main reason given was that, in practice, States refrained from using the term "agreement" in drafting a non-legally binding instrument to avoid any risk that it might be regarded as constituting a treaty. To speak of "non-legally binding agreements" was therefore a contradiction in terms and could introduce more confusion than clarity into the study of the topic.[72] Some of these delegations noted that, while they agreed that such instruments are indeed mutual agreements or understandings, these terms should be avoided.[73]

26. Among these delegations, there was no consensus on the alternative term to be used. Four suggested the term "arrangement",[74] but France expressed reservations about the use of

[64] On members' views, see A/79/10, paras. 234–237 and 285–289.

[65] A/79/10, para. 238.

[66] Kingdom of the Netherlands (A/C.6/79/SR.29, para. 7); France (*ibid*., para. 81); Slovakia (*ibid*., para. 96); Thailand (*ibid*., para. 115); Islamic Republic of Iran (*ibid*., para. 130); Malaysia (A/C.6/79/SR.30, para. 37); El Salvador (*ibid*., para. 49).

[67] See Kingdom of the Netherlands (A/C.6/79/SR.29, para. 7). See also Singapore on this last point (A/C.6/79/SR.28, para. 104).

[68] See Slovakia (A/C.6/79/SR.29, para. 96).

[69] El Salvador (A/C.6/79/SR.30, para. 49).

[70] Finland (on behalf of the Nordic countries) (A/C.6/79/SR.28, para. 24); Slovenia (*ibid*., para. 39); Romania (*ibid*., para. 64); Armenia (*ibid*., para. 77); Chile (A/C.6/79/SR.29, para. 37); Republic of Korea (*ibid*., para. 61); Sierra Leone (*ibid*., para. 71); Malaysia (A/C.6/79/SR.30, para. 37); Greece (*ibid*., para. 87); Bulgaria (*ibid*., para. 113); Mexico (*ibid*., para. 140).

[71] Croatia (A/C.6/79/SR.21, para. 122); European Union (A/C.6/79/SR.28, para. 14); Portugal (28th meeting, p. 4 of the written statement available at https://www.un.org/en/ga/sixth/79/summaries.shtml); Poland (A/C.6/79/SR.28, para. 50); Austria (*ibid*., para. 57); Belarus (*ibid*., para. 82); Ireland (*ibid*., para. 98); South Africa (*ibid*., para. 108); Israel (*ibid*., para. 112); Czechia (A/C.6/79/SR.29, para. 13); United States (*ibid*., paras. 45–49); Guatemala (*ibid*., para. 101); Switzerland (*ibid*., para. 107); Cyprus (*ibid*., para. 119); United Kingdom (*ibid*., para. 144); Türkiye (A/C.6/79/SR.30, para. 7); Colombia (*ibid*., para. 18); Russian Federation (*ibid*., para. 62); and, apparently, Italy (A/C.6/79/SR.28, para. 123).

[72] See, in particular, European Union (A/C.6/79/SR.28, para. 14); Austria (*ibid*., para. 57); South Africa (*ibid*., para. 108); Israel (*ibid*., para. 112); Czechia (A/C.6/79/SR.29, para. 13); United States (*ibid*., para. 48); Cyprus (*ibid*., para. 119); Türkiye (A/C.6/79/SR.30, paras. 7 and 8). See also the information submitted by Australia (para. 5); the United Kingdom (para. 4); and the United States (p. 2).

[73] See Colombia (A/C.6/79/SR.30, para. 18); Russian Federation (*ibid*., para. 62). See also, on this point, Latvia (on behalf of the Baltic States) (A/C.6/79/SR.28, para. 30).

[74] Belarus (A/C.6/79/SR.28, para. 83); South Africa (*ibid*., para. 108); Israel (*ibid*., para. 112); Russian Federation (A/C.6/79/SR.30, para. 62).

this term, believing that it would not provide much clarity in the debate.[75] Eleven proposed the term "instrument",[76] although two States had misgivings about it, both because it was too broad and because of its procedural meaning in treaty law (for example in references to "instruments of ratification").[77]

27. Also noteworthy is the fact that, in response to the question "In your practice, do you use the term 'non-legally binding agreement'?" in the questionnaire circulated by the Committee of Legal Advisers on Public International Law, 10 States replied in the affirmative,[78] 15 States, the European Union and the Council of Europe replied in the negative[79] and 6 States gave a qualified or non-definitive answer or did not expressly address the question.[80] As for the second question ("If not, what term do you use instead … ?"), a reading of the 33 replies shows that various terms are used and that no single term is used more frequently than the others.

28. The Special Rapporteur is particularly sensitive to the practical argument that the use of the term "agreement" could, from the outset of the project, introduce more confusion than clarity, given that certain national rules (as well as Article 102 of the Charter of the United Nations) use both "treaty" and "international agreement" to mean a legally binding international agreement and that a number of States recommend in their practice to refrain from using this term when concluding a non-binding instrument. Several of the national guidelines transmitted to the Commission or identified thus far by the Special Rapporteur, which will be analysed in greater detail in chapter IV below, recommend that the term "agreement" be avoided when there is no intention to enter into a legally binding commitment and that more neutral terms such as "instrument" or "document" be used.

29. On the other hand, in addition to the points made in the first report and during the Commission's debate at its seventy-fifth session, it can be argued that:

(a) the ordinary meaning of the term "agreement" refers to any mutual commitment or mutual understanding and not only to legally binding agreements;[81]

(b) the *travaux préparatoires* of the Vienna Convention on the Law of Treaties (from the work of the International Law Commission to the United Nations Conference on the Law of Treaties) show explicitly and unequivocally that the existence of non-legally binding agreements is the very reason why the definition of treaties specifies that a treaty is an agreement "governed by international law".[82] As stated in one national legal memorandum,

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[75] France (A/C.6/79/SR.29, para. 81).

[76] Croatia (A/C.6/79/SR.21, para. 122); European Union (A/C.6/79/SR.28, para. 14); Portugal (28th meeting, p. 4 of the written statement available at https://www.un.org/en/ga/sixth/79/summaries.shtml); Poland (A/C.6/79/SR.28, para. 50); Austria (*ibid*., para. 57); Ireland (*ibid*., para. 98); Czechia (A/C.6/79/SR.29, para. 13); Guatemala (*ibid*., para. 101); Switzerland (*ibid*., para. 107); Cyprus (*ibid*., para. 119); Colombia (A/C.6/79/SR.30, para. 18). Slovenia, Finland and Switzerland use the term "instrument" in their written submissions to the Commission.

[77] Armenia (A/C.6/79/SR.28, para. 77); Belarus (*ibid*., para. 83).

[78] Replies to the Committee of Legal Advisers on Public International Law questionnaire from Albania, Armenia, Bosnia and Herzegovina, Bulgaria, Hungary, Poland, the Republic of Moldova, Romania, Spain and Sweden.

[79] Replies to the Committee of Legal Advisers on Public International Law questionnaire from Austria, Cyprus, Estonia, Finland, Georgia, Germany, Greece, Ireland, Italy, Monaco, Norway, Portugal, Slovenia, Switzerland, the United Kingdom, the Council of Europe and the European Union.

[80] Replies to the Committee of Legal Advisers on Public International Law questionnaire from Belgium, Lithuania, Luxembourg, the Netherlands (Kingdom of the), the Republic of Korea and San Marino.

[81] See Kelvin Widdows, "What Is an Agreement in International Law?", *The British Year Book of International Law, 1979*, pp. 117–149, at p. 119: "What, then, is meant by 'international agreement' or 'treaty'? Clearly there is first the element of agreement: consensus ad idem. … To agree can, however, be … to agree on broad guidelines, to agree 'in honour', to agree to consider, … and so on"; the term "agreement" thus covers not only those agreements that produce a "binding obligation in international law".

[82] See A/CN.4/772, paras. 30–42.

> [i]t has long been recognized in international practice that governments may agree on joint statements of policy or intention that do not establish legal obligations. …
>
> These documents are sometimes referred to as non-binding agreements, gentlemen's agreements, joint statements or declarations. …
>
> …
>
> The [International Law] Commission decided against their inclusion [in the draft on the law of treaties] by incorporating in its definition the requirement that an international agreement must be "governed by international law" in order to be a treaty;[83]

(c) presuming from the outset that the term "agreement" necessarily means an agreement that is legally binding would pre-empt the substantive answer to the question of how to distinguish non-legally binding agreements from treaties;

(d) it would not be amiss to signal the crux of the issue in the very title of the topic, namely the fact that an agreement can be legally binding or non-binding, depending on the situation, and that this is precisely why attention must be paid to the manner in which an agreement is drawn up, drafted, adopted and considered; from this standpoint, the expression "non-legally binding international agreements" has the advantage of being explicit about the key point addressed under this topic;

(e) the terminology problem seems to be somewhat circular: if a term other than "agreement" – such as "instrument" – were to be chosen, it would need to be defined for the purposes of the topic. However, insofar as the scope of the topic must exclude unilateral acts in order to focus on mutually agreed instruments (as will be discussed below), the definition will inevitably return, in one way or another, to the idea of "agreement" to characterize such instruments;[84]

(f) research shows in any case that while the word "agreement" is not used to denote a non-legally binding instrument in the practice of some States, the term is used to a substantial extent in international practice concerning such instruments. Examples include the Guidelines of the Inter-American Juridical Committee on Binding and Non-Binding Agreements,[85] the "Rules of procedure for conclusion of non-legally binding agreements by ASEAN" adopted in 2023 by the Association of Southeast Asian Nations (ASEAN),[86] Spanish legislation on "acuerdos no normativos",[87] the 3 October 2024 "joint statement" of the United Kingdom of Great Britain and Northern Ireland and Mauritius on the Chagos Archipelago, which refers to a "political agreement" subject to the finalization of a treaty,[88]

[83] Memorandum by Robert E. Dalton, Assistant Legal Adviser for Treaty Affairs (United States), "International Documents of a Non-Legally Binding Character", reproduced in *American Journal of International Law*, vol. 88 (1994), p. 515.

[84] In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice used the convoluted expression "instrument with legal force, whether unilateral or synallagmatic" (*Military and Paramilitary Activities in and against Nicaragua* (see footnote 47 above), p. 132, para. 261).

[85] See the title of the guidelines (annexed to resolution CJI/RES. 259 (XCVII-O/20) of 7 August 2020), as well as guideline 1 and the commentary thereto (available at https://www.oas.org/en/sla/iajc/themes_recently_concluded_Binding_and_Non-Binding_Agreements.asp). The United States expressed reservations about the guidelines in comments also posted on the Committee's website, on the grounds that the positions of member States had not been sufficiently taken into account. See also Mr. Galindo's comments on this point at the Commission's seventy-fifth session (A/CN.4/SR.3681, p. 7).

[86] Available at https://asean.org/wp-content/uploads/2023/09/Final-RPCA_adopted-by-the-34th-ACC-on-4-Sep-2023.pdf.

[87] Spain, *Ley 25/2014, de 27 de noviembre, de Tratados y otros Acuerdos Internacionales.*

[88] https://www.gov.uk/government/news/joint-statement-between-uk-and-mauritius-3-october-2024.

declarations adopted at international summits,[89] bilateral agreements[90] and legal opinions issued by the United Nations Secretariat;[91]

(g) it may be recalled that this approach was followed by the Commission in its work on subsequent agreements and subsequent practice in relation to the interpretation of treaties, in which the Commission took the view that an "agreement" need not be legally binding;[92]

(h) it is also not uncommon for the expression "binding agreement" to be used in jurisprudence, which could suggest that an agreement is not necessarily binding, as the adjective would otherwise be redundant. In the cases concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Land and Maritime Boundary between Cameroon and Nigeria* and *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, the International Court of Justice seemed to equate the terms "agreement" and "treaty",[93] but in more recent cases it has used the expression "binding international agreement".[94] As noted in the first report, in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean*, the Court examined a series of acts which it described as "agreements", even though it concluded that they were not legally binding.[95] The same approach of considering that an "agreement" can be either legally binding or non-binding was followed by the Arbitral Tribunal in the *Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland*[96] and by the Timor-Leste/Australia Conciliation Commission in its decision on competence.[97] It is also found, for example, in the jurisprudence of the Court of Justice of the European Union.[98]

30. Given this situation, the Special Rapporteur is of the view that the Commission has two available options for defining the purpose of the topic.

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[89] Many of the declarations adopted at BRICS and Group of 20 summits use the verb "agree", for example.

[90] See, for example, the 15 November 2024 Memorandum of Understanding on Survey Cooperation between India and Nigeria, which uses the wording "Have agreed as follows", while specifying in article 9 that it "does not constitute an international agreement that is binding upon the Parties under international law"; or the 26 August 2022 Memorandum of Understanding on strengthening friendly relations between the Republic of Palau and Okinawa Prefecture of Japan, which states that "This memorandum is a non-binding agreement".

[91] See Note 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, pp. 342–345.

[92] See A/CN.4/772, paras. 43–49. Colombia expressed reservations about the automatic reliance, without reconsideration for the purposes of the present topic, on the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, adopted in 2018 (A/C.6/79/SR.30, para. 22).

[93] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 48 above), pp. 120 and 121, para. 23, and p. 121, para. 25; *Land and Maritime Boundary between Cameroon and Nigeria* (see footnote 49 above), p. 429, para. 263; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, at pp. 45 and 46, para. 62.

[94] *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3, at p. 38, para. 90; *Maritime Delimitation in the Indian Ocean* (see footnote 50 above), p. 24, para. 49 (it should be noted that in this judgment the Court also uses the term "instrument" to refer to a memorandum which, it ultimately concludes, constitutes a treaty: see p. 21, para. 41).

[95] A/CN.4/772, para. 94 (d), footnote 195.

[96] See *Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland*, 18 March 2015, *Reports of International Arbitral Awards*, vol. XXXI, pp. 359–606, at p. 538, para. 426: "[w]hile the Tribunal readily accepts that States are free in their international relations to enter into even very detailed agreements that are intended to have only political effect, the intention for an agreement to be either binding or non-binding as a matter of law…".

[97] *Timor Sea Conciliation (Timor-Leste/Australia)*, decision on competence of 19 September 2016, *Reports of International Arbitral Awards*, vol. XXXIV, pp. 205–243, at p. 224, para. 54 ("Australia accepts that this exchange of letters did not constitute a binding agreement … In Australia's view, the exchange of letters was nonetheless an 'agreement'").

[98] See judgment (Grand Chamber) of 28 July 2016, Case C-660/13, *Council v. Commission*, which uses the expression "non-binding agreement" in paragraphs 40, 41, 42 and 43 (see also para. 39).

31. The first would be to use a term other than "agreement". Among the alternatives suggested, "instrument" would undoubtedly be the most appropriate. It would then replace the term "agreements" in the title of the topic and in the draft conclusions, including draft conclusion 1 as proposed above. In that case, however, it would be necessary to provide a precise definition of the term for the purposes of the topic so as to exclude, among other things, unilateral acts, which are dealt with under a different topic (see section C of this chapter below).

32. Arriving at such a definition would by no means be easy, however, as the term "instrument" has a very broad meaning that goes well beyond the scope of this topic.[99] The term is used in different senses in the Vienna Convention on the Law of Treaties,[100] where it appears in the very definition of treaties.[101] One solution might be to use the expression "bilateral or multilateral instruments", but this is hardly satisfactory, since a resolution of an international organization can be described as a multilateral instrument even though it constitutes a unilateral legal act attributable to the organization. Another solution might be to use the descriptive phrase "instruments *between* subjects of international law", with the word "between" serving to denote the mutual rather than unilateral nature of the instruments covered by the topic, but there is no guarantee that readers of the draft conclusions would easily grasp this nuance. The expression "mutual instrument" could be a compromise solution. However, the wording "non-legally binding international mutual instruments" would be somewhat awkward; moreover, it might not be sufficiently clear and easy to translate into other languages.

33. The second option would be to retain the term "agreement" at this stage of the work, without prejudice to a final decision on this term once the full set of draft conclusions has been discussed and is being finalized for adoption on first reading. Under this option, a draft conclusion on the use of terms would appear immediately after draft conclusion 1 to prevent any confusion or misunderstanding as to the use of the term "agreement" for the purposes of the topic.

34. In the light of the foregoing, the Special Rapporteur is of the view that the term "agreement" should be retained at this stage of the work, and thus that the second option should be chosen for the time being.

3. Proposed draft conclusion on the use of terms

35. The provision to be adopted on the use of terms should meet three objectives.

36. This draft conclusion should first of all define, for the purposes of the topic, the expression "non-legally binding international agreement", which is the very object of the draft conclusions. The definition should note that the term "agreement", for the purposes of the draft conclusions, is used in a general sense only,[102] to refer to any mutual commitment

[99] In a 2005 decision, for example, the Federal Court of Australia held that this term "is commonly used to refer to non-binding documents such as general assembly resolutions, draft instruments prepared by the International Law Commission, or non-binding declarations made by groups of states … and treaties not yet in force" (Australia, *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs, Judgment*, [2005] FCAFC 42, ILDC 981 (AU 2005), No N57 OF 2004, (2005) 147 FCR 1, 17th March 2005, Australia; Federal Court [FCA]; Full Court [FCAFC], para. 66). The European Parliament refers to various acts (recommendations, interpretative communications, etc.) as "soft-law instruments" in its resolution of 4 September 2007 on institutional and legal implications of the use of "soft law" instruments (2007/2028(INI)), *Official Journal of the European Union*, C 187 E, 24 July 2008, pp. 75–79.

[100] It is used more than 20 times in the Convention.

[101] Under article 2 of the Vienna Convention on the Law of Treaties, a treaty can be "embodied in a single instrument or in two or more related instruments".

[102] According to Philippe Gautier, the term "agreement" is used in the Vienna Convention on the Law of Treaties definition "in a generic sense", and there may therefore be agreements that are not treaties but political agreements ("Les accords informels et la Convention de Vienne sur le droit des traités entre États", in Nicolas Angelet *et al*. (eds.), *Droit du pouvoir, pouvoir du droit. Mélanges offerts à Jean Salmon*, Brussels, Bruylant, 2007, pp. 425–454, at pp. 430 and 431).

entered into at the international level.[103] The verb "entered into" would signal that only commitments adopted in the form of a joint text (or a joint set of related texts, such as an agreement in the form of an exchange of letters) are covered. The definition would also clarify what is meant by a "non-legally binding" agreement in the light of the explanations given in section B (1) above.

37. The draft conclusion should then state that the use of the term "agreement" for the purposes of the topic is without prejudice to the use of this term and the meaning which may be given to it in the internal law of States. The wording here could be drawn from article 2 (2) of the Vienna Convention on the Law of Treaties, which states that "[t]he provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State".

38. The same draft conclusion should finally specify that the draft conclusions are without prejudice to the meaning given to the term "agreement" in any specific international instrument. This would reserve the question of the extent to which the use (or non-use) of the term "agreement" in a specific instrument is a decisive criterion for determining whether or not it is legally binding. It would also cover situations in which a treaty clause uses the term "agreement" without specifying whether it refers only to legally binding agreements (*i.e.* treaties) or can also include non-legally binding agreements. International tribunals have held, for example, that the term "agreement" within the meaning of article 15 or article 281 of the United Nations Convention on the Law of the Sea necessarily means "a legally binding agreement",[104] a "binding 'agreement'" or a "legally binding agreement".[105] In other situations, the term "agreement" in treaty provisions has been interpreted as referring either to legally binding agreements only or to both treaties and non-legally binding agreements.[106] In its written submission to the Commission, the Kingdom of the Netherlands provides an example of this type encountered in its recent practice.[107]

39. On the basis of the foregoing, the Special Rapporteur proposes the following draft conclusion for discussion:

Draft conclusion 2. Use of terms

1. For the purposes of the present draft conclusions, the term "non-legally binding international agreement" is used in a general sense to refer to any mutual commitment entered into at the international level which, as such, does not create any rights or obligations or has no binding legal effect.

2. The use of the term "agreement" in the present draft conclusions is without prejudice to:

(a) the use of this term and the meaning which may be given to it in the internal law or the practice of a State;

(b) the meaning given to this term in any specific international instrument.

[103] Guideline 1.1 adopted by the Inter-American Juridical Committee defines the term "agreement" as follows: "Although its usage in a text is often indicative of a treaty, the concept may be defined more broadly to encompass mutual consent by participants to a commitment regarding future behavior." The commentary thereto states that "there are at least two core elements to any agreement: *mutuality* and *commitment*".

[104] See *Delimitation of the maritime boundary in the Bay of Bengal* (footnote 54 above), p. 35, para. 89.

[105] See *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China* (footnote 56 above), pp. 86 and 89, paras. 212 and 219; *Timor Sea Conciliation* (footnote 97 above), pp. 224–226, paras. 54–58. 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, pp. 435–504, at pp. 448 and 449, para. 3.13.

[106] For a particularly illustrative example, see Chris Wold, "A History of 'AGREEMENTS' under Article IV.3 and 'agreements' under Article IV.4 in the Convention on Migratory Species", prepared for the 11th Meeting of the Conference of the Parties to the Convention on Migratory Species (UNEP/CMS/COP11/Inf.31), 25 September 2014.

[107] Information submitted by the Kingdom of the Netherlands, pp. 1 and 2.

C. Scope

40. As far as the scope of the draft conclusions is concerned, the positions expressed in the Sixth Committee were largely in line with those expressed in the Commission in 2024. Identifying the scope should therefore pose no particular difficulties.

41. The following points were generally supported in the Commission and the Sixth Committee:

(a) the topic should be limited to written agreements;[108]

(b) it should cover agreements in the international sphere (which excludes contracts governed by internal law and private international law) entered into between States, between States and international organizations, or between international organizations,[109] whether bilateral or multilateral (including regional agreements);[110]

(c) the proposal to include agreements entered into with actors other than States and international organizations, such as rebel or insurrectional movements or non-State armed groups, was not generally supported either in the Commission[111] or in the Sixth Committee.[112] States that indicated only that the topic should cover agreements between States and/or international organizations seem to have thereby excluded agreements with other entities;

(d) the draft conclusions should not cover treaties that have not entered into force or model treaties;[113]

(e) nor should they cover non-binding provisions in treaties,[114] including the case of an annex to a treaty that is not itself legally binding, unlike the treaty concerned;[115]

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[108] See A/79/10, para. 244; European Union (A/C.6/79/SR.28, para. 15); Finland (on behalf of the Nordic countries) (*ibid*., para. 25); Slovenia (*ibid*., para. 40); Singapore (*ibid*., para. 105); Israel (*ibid*., para. 115); Kingdom of the Netherlands (A/C.6/79/SR.29, para. 8); Czechia (*ibid*., para. 12); Chile (*ibid*., para. 35); Slovakia (*ibid*., para. 96); Thailand (*ibid*., para. 116); Cyprus (*ibid*., para. 120); Federated States of Micronesia (A/C.6/79/SR.30, para. 56); Greece (*ibid*., para. 87); Bulgaria (*ibid*., para. 114).

[109] See A/79/10, para. 243; China (A/C.6/79/SR.26, para. 60); European Union (A/C.6/79/SR.28, para. 15); Finland (on behalf of the Nordic countries) (*ibid*., para. 25); Poland (*ibid*., para. 50); Romania (*ibid*., para. 64); Singapore (*ibid*., para. 105); South Africa (*ibid*., para. 109); Chile (A/C.6/79/SR.29, para. 35); Slovakia (*ibid*., para. 96); Switzerland (*ibid*., para. 107); Cyprus (*ibid*., para. 120); Russian Federation (A/C.6/79/SR.30, para. 63); Greece (*ibid*., para. 87); Bulgaria (*ibid*., para. 114); Mexico (*ibid*., para. 141). Latvia (on behalf of the Baltic States) asked for clarification as to which types of non-legally binding international agreements between international organizations would be covered (A/C.6/79/SR.28, para. 30). Slovenia considered that only agreements between States should be included in the study (*ibid*., para. 40). Singapore took the view that agreements between international organizations should be excluded (*ibid*., para. 105).

[110] See A/79/10, para. 293.

[111] See A/79/10, paras. 252 and 294.

[112] See the support for this proposal expressed by Austria and Ireland (which refers in particular to agreements with political parties) (A/C.6/79/SR.28, paras. 57 and 99) and, conversely, the explicit position in favour of excluding such agreements from the scope of the topic expressed by the Kingdom of the Netherlands (A/C.6/79/SR.29, para. 8), Türkiye (A/C.6/79/SR.30, para. 10) and Bulgaria (*ibid*., para. 114).

[113] See A/79/10, para. 244; Israel (A/C.6/79/SR.28, para. 115); Slovakia (A/C.6/79/SR.29, para. 96).

[114] See A/79/10, para. 246; Finland (on behalf of the Nordic countries) (A/C.6/79/SR.28, para. 25); Romania (*ibid*., para. 64); Slovakia (A/C.6/79/SR.29, para. 96); Cyprus (*ibid*., para. 120); Colombia (A/C.6/79/SR.30, para. 21); El Salvador (*ibid*., para. 50); Greece (*ibid*., para. 87). On this issue, see Jean d'Aspremont Lynden, "Les dispositions non normatives des actes juridiques conventionnels à la lumière de la jurisprudence de la Cour internationale de Justice", *Revue belge de droit international*, vol. 36 (2003), pp. 496–520; or Emily Crawford, "Chapter 3: Non-Binding Provisions in Binding Instruments", in *Non-Binding Norms in International Humanitarian Law: Efficacy, Legitimacy, and Legality*, Oxford, Oxford University Press, 2021, pp. 63–83.

[115] See, for example, the Bilateral Security Agreement Between the United States of America and Ukraine of 13 June 2024, which contains an annex stating that it does not give rise to rights or

(f) the topic does not concern unilateral acts attributable to a State[116] or an international organization;[117]

(g) nor does it concern commitments resulting from the combination of two or more separate unilateral acts.[118]

42. Three other points deserve more detailed examination.

43. The first is the question of whether the topic should be limited to agreements with a "normative component" or whether it would be preferable to dispense with this criterion, which could prove difficult to define and implement in practice.[119] In 2024 the Special Rapporteur indicated, in summing up the debate, that "the proposed starting point for the study would be to refer to agreements that included an undertaking to do something and that were not limited to the enunciation of facts or positions".[120] The few States that took a position on this issue in the Sixth Committee expressed similar views.[121] The use of the term "commitment" in the draft conclusion on the use of terms proposed in section B (3) above should suffice to exclude documents merely stating facts or positions from the scope of the topic. That term is also preferable to the expression "normative component", which could be confusing, as it could be understood to refer only to a particular type of commitment, specifically one that entails "norms" in the sense of "general rules".

44. Second is the question of how to treat acts adopted in the framework of an institution that does not have separate legal personality (meaning that such acts cannot be regarded as unilateral acts of international organizations, which are excluded from the topic). At its seventy-fifth session, the Commission recommended a flexible approach on this point.[122] The States that referred to this issue in the Sixth Committee expressed contrasting views. Some

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obligations under domestic or international law. On the specific case of final acts, see A/CN.4/772, para. 109, and recently A. Palma, *La natura degli atti finali dei vertici internazionali*, Naples, Editoriale Scientifica, 2024.

116 See A/79/10, paras. 246 and 296; Finland (on behalf of the Nordic countries) (A/C.6/79/SR.28, para. 25); Austria (*ibid*., para. 57); Romania (*ibid*., para. 64); Belarus (*ibid*., para. 86); Slovakia (A/C.6/79/SR.29, para. 96); Thailand (*ibid*., para. 116); Cyprus (*ibid*., para. 120); Islamic Republic of Iran (*ibid*., para. 131); Colombia (A/C.6/79/SR.30, para. 19); Greece (*ibid*., para. 87).

117 See A/79/10, paras. 246 and 296; European Union (A/C.6/79/SR.28, para. 15); Austria (*ibid*., para. 57); Romania (*ibid*., para. 64); Belarus (*ibid*., para. 86); Singapore (*ibid*., para. 105); Slovakia (A/C.6/79/SR.29, para. 96); Cyprus (*ibid*., para. 120); Islamic Republic of Iran (*ibid*., para. 131); El Salvador (A/C.6/79/SR.30, para. 50); Russian Federation (*ibid*., para. 63); Greece (*ibid*., para. 87); Bulgaria (*ibid*., para. 114). Switzerland expressed more openness on this point (A/C.6/79/SR.29, para. 107). In the view of the Federated States of Micronesia, if the scope of the topic is expanded to include "instruments", such unilateral acts should be included (A/C.6/79/SR.30, para. 55).

118 See A/CN.4/772, para. 98; Slovakia (A/C.6/79/SR.29, para. 96). This situation arose in the maritime delimitation case between Peru and Chile in connection with proclamations adopted unilaterally by each State, which Chile considered to be "concordant unilateral proclamations" (see *Maritime Dispute* (footnote 94 above), pp. 18 ff., in particular paras. 29 and 30). See also principle 9 of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted by the Commission in 2006 (*Yearbook of the International Law Commission, 2006*, vol. II (Part Two), pp. 165 and 166). The United Nations Secretariat includes declarations of acceptance of the optional clause recognizing the compulsory jurisdiction of the International Court of Justice within the scope of treaties and agreements subject to registration under Article 102 of the Charter (*Repertory of Practice of United Nations Organs*, vol. V, *Articles 92–111 of the Charter* (United Nations publication, Sales No. 1955.V.2 (vol. V)), Article 102, paras. 24, 47 and 49; *Maritime Delimitation in the Indian Ocean* (see footnote 50 above), pp. 48 ff., paras. 126 ff.).

119 See A/79/10, para. 245.

120 See A/79/10, para. 294. See also A/CN.4/772, paras. 55 and 100, on the term "commitment".

121 See Czechia (recommending exclusion of documents of a purely operational nature) (A/C.6/79/SR.29, para. 12); Slovakia (agreeing with the approach advocated by the Special Rapporteur) (A/C.6/79/SR.29, para. 96); Cyprus (stating that the scope should be limited to instruments that would qualify as treaties but for their non-legally binding nature) (A/C.6/79/SR.29, para. 120); Federated States of Micronesia (A/C.6/79/SR.30, para. 56); Greece (considering that communications that formed part of daily diplomatic activity should be excluded from the topic) (*ibid*., para. 87). Israel expressed the view that non-legally binding agreements by definition did not have any normative component (A/C.6/79/SR.28, para. 113).

122 See A/79/10, paras. 247, 248 and 296.

believed that the Commission should not be too categorical about excluding such acts;[123] others expressed openness to their inclusion;[124] still others were in favour of their exclusion;[125] and a view was also expressed that the question should be studied before any decision was taken,[126] particularly with regard to the specific nature of acts of conferences of States Parties.[127]

45. This last observation goes to the heart of the difficulty. Insofar as the nature and effects of an act of an international conference are strongly dependent on its institutional framework, it is difficult to analyse them in general, outside that framework.[128] The difficulty is increased by the fact that the differences between international organizations *per se* and more informal modes of institutionalized cooperation are tending to blur.[129] This initially led the Special Rapporteur to express reservations about including acts of international conferences within the scope of the topic.[130] That said, multilateral practice in this regard would be difficult to ignore, given its abundance and variety. On the other hand, reasoning by analogy, the fact that each international organization has its own specific features does not mean that it is impossible to identify general principles applicable to such organizations' resolutions. It should likewise be possible to draw general conclusions applicable to agreements adopted within institutional frameworks lacking separate legal personality, without undermining their specific features. Certain aspects of these agreements could thus be considered under the present topic, with the necessary precautions. For example, the commentary to the draft conclusion on scope could specify, first, that only agreements concluded within the framework of (and not acts adopted by) international conferences fall within the scope of the topic[131] and, second, that they do so subject to any specific rules applicable to such conferences.[132]

46. The third and final question is how to treat "inter-institutional agreements or administrative arrangements" concluded by or between public authorities other than those of the central Government.[133] In view of the Commission's debates at its seventy-fifth session,

[123] Finland (on behalf of the Nordic countries) (A/C.6/79/SR.28, para. 25).

[124] Kingdom of the Netherlands (A/C.6/79/SR.29, para. 8); Federated States of Micronesia (A/C.6/79/SR.30, para. 55).

[125] Singapore (A/C.6/79/SR.28, para. 105); Czechia (A/C.6/79/SR.29, para. 12); Slovakia (*ibid*., para. 96); Islamic Republic of Iran (*ibid*., para. 131); Russian Federation (A/C.6/79/SR.30, para. 63).

[126] Armenia (A/C.6/79/SR.28, para. 77).

[127] Federated States of Micronesia (A/C.6/79/SR.30, para. 55).

[128] See, for example, the approach taken in the context of the World Trade Organization (WTO), Steve Charnovitz, "The Legal Status of the Doha Declarations", *Journal of International Economic Law*, vol. 5, No. 1 (March 2002), pp. 207–211.

[129] See Henry G. Schermers and Niels M. Blokker, *International Institutional Law*, Leiden, Brill, 2018, p. 36, who point out that "the institutional intensity of cooperation may change over time: less structured forms of international cooperation may develop into an international organization". See also Evelyne Lagrange, "La catégorie 'organisation internationale'", in Evelyne Lagrange and Jean-Marc Sorel (eds.), *Droit des organisations internationales*, Paris, LGDJ/Lextenso, 2013, p. 35, at pp. 44 ff.

[130] A/CN.4/772, para. 99.

[131] For example, the African Union adopts decisions and resolutions that are acts adopted "by the Assembly" of the Union, and for this reason they are excluded from the present topic. "Declarations", in contrast, are adopted between and by the member States as such, and would therefore fall within the scope of the topic (see, for example, the second and third declarations adopted at the thirty-seventh summit of the African Union, available at https://au.int/en/decisions/assembly).

[132] This would, all other things being equal, be consistent with conclusion 11 (2) of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, adopted by the Commission in 2018 (*Yearbook of the International Law Commission, 2018*, vol. II (Part Two), pp. 24 ff., paras. 51 and 52, at p. 67). It should also be noted that the item "Statute and Functions of the Conference of the Parties to a Treaty" is on the agenda of the Institute of International Law. See also Guillaume Le Floch, "Instruments concertés non conventionnels et OMC", in Vincent Tomkiewicz (ed.), *Les sources et les normes dans le droit de l'OMC*, Paris, Pedone, 2012.

[133] For recent studies on agreements of this type, in particular non-legally binding ones, see Curtis A. Bradley, "State International Agreements: The United States, Canada, and Constitutional Evolution", *Canadian Yearbook of International Law/Annuaire canadien de droit international*, 2023, pp. 1–23 (in particular pp. 19 ff.); Guillermo J. Garcia Sanchez, "The Other Secret Deals: Uncovering The

the Special Rapporteur had indicated that, "while he had proposed in his report to exclude inter-institutional agreements, several members had supported their inclusion", and considered that "the types of inter-institutional agreements to be covered should be defined more specifically, for example, by limiting the scope to those that were relevant under international law. He also noted that the consideration of such agreements should not be perceived as validating practices that were not necessarily authorized by the national authorities in charge of foreign affairs".[134]

47. In the Sixth Committee, 15 States indicated that they were in favour of including these agreements, or at least some of them, particularly agreements between ministries other than ministries of foreign affairs (as the latter represents the State without having to produce full powers under the rule reflected in article 7 of the Vienna Convention on the Law of Treaties). One of the reasons given for including agreements entered into by ministries or subnational authorities within the scope of the topic was that this was a significant practice that required clarification.[135] Seven States supported their exclusion, either because the practice in this area was too diverse or because their inclusion would widen the scope of the topic too much, at the risk of reducing its relevance for States.[136] Two States called for caution, particularly as these agreements would be understood differently from one country to another.[137] Guatemala, for example, states in its written submission to the Commission that the activities covered by such agreements are subject to national law,[138] but other countries may have a different practice.[139] For example, Mexico, in its written submission to the Commission, states that the rules applicable under Mexican law to treaties and inter-institutional agreements apply only to those that are legally binding.[140] Some of the national guidelines adopted by States indicate that agreements between sub-State authorities create obligations but are not governed by international law.[141]

48. In the light of these factors, the Special Rapporteur is inclined to include this type of agreement in the scope of the topic at the current stage, subject to certain clarifications. Agreements between central authorities (ministries in particular) can be subsumed under the general category of agreements *between States*, and it should suffice to specify this in the

Power of Non-Binding International Agreements", *Fordham International Law Journal*, vol. 48 (2024), pp. 285–351; Aaron Messing, "Nonbinding Subnational International Agreements: A Landscape Defined", *The Georgetown Environmental Law Review*, vol. 30, No. 1 (2017), pp. 173–201.

134 A/79/10, para. 295. For a summary of the debate, see *ibid.*, paras. 250 and 251.

135 Finland (on behalf of the Nordic countries) (A/C.6/79/SR.28, para. 25); Latvia (on behalf of the Baltic States) (*ibid*., para. 30); Brazil (*ibid*., para. 36); Belarus (*ibid*., para. 84); Italy (*ibid*., para. 123); Kingdom of the Netherlands (A/C.6/79/SR.29, para. 8); Thailand (*ibid*., para. 116); Türkiye (A/C.6/79/SR.30, para. 10); Russian Federation (*ibid*., paras. 61 and 64).

136 Poland (A/C.6/79/SR.28, para. 50); Austria (*ibid*., para. 59); Romania (*ibid*., para. 64); Armenia (*ibid*., para. 78); Islamic Republic of Iran (A/C.6/79/SR.29, para. 131); Greece (A/C.6/79/SR.30, para. 87); Mexico (*ibid*., para. 141).

137 Chile (A/C.6/79/SR.29, para. 36); Slovakia (*ibid*., para. 96). See, for example, India, "Guidelines/SoP on the conclusion of International Treaties in India", 16 January 2018, pp. 10–12 (agreements with provinces or cities in other countries); or Viet Nam, Law on International Agreements of the Socialist Republic of Viet Nam, 13 November 2020, arts. 16–26.

138 Information submitted by Guatemala, pp. 2 and 3. See also Ecuador, Ley Orgánica de Tratados y Acuerdos Interinstitucionales Internacionales, 22 February 2022, art. 4 (k).

139 See Estonia, Foreign Relations Act (RT I 2006, 32, 248), 15 June 2006, entry into force 1 January 2007 (available at https://www.riigiteataja.ee/en/eli/ee/517072020002/consolide/current), sect. 3 (3) of which defines an "inter-agency treaty" as an agreement "regulated by international law".

140 Information submitted by Mexico, sect. III. See also the details on their own practice in the information submitted to the Commission by Argentina (sect. II), Finland (p. 1) and the Russian Federation (para. 2).

141 See, for example, Germany, guidelines of the Ministry of Foreign Affairs on treaties under international law (available in German at https://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_05032014_50150555.htm), sect. 4 (3); and Colombia, *Guía jurídica de tratados y otros instrumentos* (footnote 59 above), p. 48.

commentary.[142] Only agreements entered into by sub-State authorities merit specific mention in the draft conclusion on scope, as there are many such agreements in practice.[143] In order to better delimit this category of agreements for the purposes of the topic, it would be advisable to specify that only those adopted "at the international level" are covered, thus excluding those that fall solely within domestic legal systems.[144] Should it emerge in the course of the Commission's work that these agreements are not treated in the same way as agreements between States and/or international organizations, it may be necessary to address them in separate draft conclusions.

49. In the light of the foregoing, and to avoid unduly restricting the scope of the topic (at least at the outset of the work), the draft conclusion on the scope of the project could read as follows:

Draft conclusion 3. Scope

1. The present draft conclusions cover bilateral and multilateral agreements:

(a) in writing;

(b) of an international nature;

(c) between States, States and international organizations or between international organizations.

2. Agreements entered into by sub-State authorities are covered by the present draft conclusions to the extent that they are adopted at the international level.

D. Without prejudice clause

50. States' domestic laws generally include provisions specifically addressing treaties and, in some cases, provisions or guidelines addressing non-legally binding international agreements or instruments. In their statements in the Sixth Committee and their written submissions to the Commission, States shared a substantial amount of information on their domestic law or practice in relation to the present topic.[145] In addition to this information and

[142] See, in this regard, France, *Circulaire du 30 mai 1997 relative à l'élaboration et à la conclusion des accords internationaux*, sect. I, which states that administrative arrangements concluded by ministers with their foreign counterparts are binding on the State (while constituting an unknown category ("*une catégorie inconnue*") in international law). See also *Repertory of Practice of United Nations Organs*, vol. V (footnote 118 above), Article 102, para. 31 (h), concerning "[p]ostal agreements (even though concluded, for example, between the respective postmasters-general)".

[143] See, among other examples, the Memorandum of Understanding between the Survey of India and the Federal Service for State Registration, Cadastre and Cartography (The Russian Federation) of 8 July 2024; the memorandum of understanding between the National Institute of Metrology of the People's Republic of China and the Government of Australia, as represented by the National Measurement Institute, of 12 June 2024; or the Memorandum of Understanding Between The City of London Corporation and Tokyo Metropolitan Government of 4 December 2017.

[144] This distinction among inter-administration agreements according to whether they fall within the international or the domestic order is found in Spain, *Ley 25/2014, de 27 de noviembre, de Tratados y otros Acuerdos Internacionales*, art. 2 (b). See also Peru, *Lineamientos Generales Internos sobre la suscripción, perfeccionamiento interno y registro de los Tratados*, Directiva No. 001-DGT/RE-2013, para. 1.4.3. Another example is article 3 of the 18 December 2000 agreement between the Government of Canada and the Government of the Russian Federation on the principles and basis for cooperation between the provinces and territories of Canada and the subjects of the Russian Federation, which states that: "Understandings concluded between the Provinces and Territories of Canada and the Subjects of the Russian Federation are not international agreements."

[145] See, for example, the information provided by the Russian Federation, which refers to Decision No. 79 of 7 February 2003 approving regulations governing the procedure for the drafting and signing of international intergovernmental acts that are not international treaties of the Russian Federation (decision and regulations available in Russian at https://www.consultant.ru/document/cons_doc_LAW_40980/). "Internal" rules or practices can also be found within international organizations. See, for example, in the European Union, document 15367/17 of 4 December 2017 on the arrangements between Secretaries General on non-binding instruments.

that gleaned from the work of the Inter-American Juridical Committee and the Committee of Legal Advisers on Public International Law, a number of provisions, handbooks and guidelines followed at the national level have been identified. These elements of national practice will be examined in chapter IV below.

51. Some States are in the process of drafting legislation to govern, clarify or guide their national practice with regard to non-legally binding international agreements or instruments. In its written submission to the Commission, Slovenia states, for example, that it is "in the process of drafting a new Act on the conclusion and implementation of treaties and other international instruments, which it plans to adopt in 2025. That Act will *inter alia* further refine the procedure for the conclusion of non-legally binding international instruments."[146] Similarly, in its written submission to the Commission, France states that it is currently preparing a handbook specifically addressing non-legally binding international instruments.[147]

52. In the light of these considerations, it seems appropriate to include, in the introductory provisions, a draft conclusion specifying that the draft conclusions are without prejudice to any rules or practices applicable at the national level in relation to non-legally binding international agreements. The Special Rapporteur therefore proposes the following draft conclusion:

> *Draft conclusion 4. Without prejudice clause to rules or practices applicable at the national level*
>
> The present draft conclusions are without prejudice to any rules or practices applicable at the national level in relation to non-legally binding international agreements.

IV. Distinction between treaties and non-legally binding international agreements

53. As pointed out in the first report, the distinction between treaties and non-legally binding international agreements is of great practical importance and therefore merits detailed examination.[148] At the end of the 2024 debate, the Special Rapporteur noted that this question had even been "identified by some members as the most important aspect of the topic".[149] In order to structure the discussion of the various aspects of this issue, the Special Rapporteur has decided to proceed as follows. The first step will be to identify the approach generally followed to distinguish between treaties and non-legally binding international agreements (sect. A). Once this general approach has been identified, two of its components will be analysed in more detail: cases in which the legally binding or non-binding nature of the agreement is expressly indicated by the parties thereto (sect. B) and cases in which no such express indication exists, so that recourse to other indicators is necessary (sect. C).

54. The elements of jurisprudence, practice and doctrine, including previous codification work, will be systematically examined with regard to these three aspects of the topic. The decision to begin addressing each question by examining relevant jurisprudence is explained by the fact that practice in this field is still being identified, clarified and even constituted, and it therefore seems appropriate to begin by describing how the courts have considered the question thus far, before examining how contemporary practice is taking shape on the subject. As far as doctrine is concerned, while it would be impossible to reflect all the existing literature on the topic in this report, a general overview will be systematically provided on each of the issues addressed.

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[146] Information submitted by Slovenia, p. 2.

[147] Information submitted by France, p. 6. See also the reply of the Republic of Moldova to question 19 of the Committee of Legal Advisers on Public International Law questionnaire and the replies of Bosnia and Herzegovina to question 22 and of Greece to question 38 of the same questionnaire.

[148] A/CN.4/772, paras. 118–126. For a summary of the Commission's debate on this point, see A/79/10, paras. 253–259.

[149] A/79/10, para. 300.

A. General approach

55. In his first report, the Special Rapporteur identified, on a preliminary basis, three possible approaches to determining whether an international agreement is or is not legally binding: the first focuses on the intention of the parties, the second focuses on objective elements and the third combines the first two approaches ("with the objective indicators serving to determine the parties' intentions").[150] The Special Rapporteur also emphasized that "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".[151]

56. In 2024 an initial debate took place in the Commission on this aspect of the topic, from which it emerged in particular that several members believed that the primary criterion should be the intention of the parties;[152] that various objective elements, including the text, the form and the circumstances surrounding an agreement's formation, should also be considered; that a holistic approach taking into account both objective and subjective criteria could be adopted; that each agreement should be assessed on a case-by-case basis; and that no indicator was individually decisive, there should be no hierarchy among the indicators or criteria and all factors should be weighed together on a case-by-case basis.[153]

57. The precise identification of the indicators or factors that can be used will be addressed in section C below. The purpose of this section is to identify the general approach taken in jurisprudence (sect. A (1)), practice (sect. A (2)) and doctrine (sect. A (3)).[154]

1. General approach in jurisprudence

58. Prior to the detailed study of jurisprudence in the following paragraphs, it should be noted at the outset that an examination of jurisprudence leads to four general conclusions, which are not necessarily expressed as such in the cases studied below but can nevertheless be clearly deduced from the way in which the courts have proceeded in these cases. First, the binding or non-binding nature of an agreement is assessed on a case-by-case basis, without the invocation or use of any presumption whatsoever by the courts.[155] Second, the approach differs depending on whether or not the agreement contains an express indication of its specific nature. Accordingly, each of these situations will be examined in greater detail in sections B and C below. Third, the approach employed is specific to the matter under consideration and does not rely on the rules of treaty interpretation – and for good reason, since these rules apply only if the agreement is a treaty, which is precisely the question at issue. Fourth, jurisprudence seems to have gradually evolved in terms of the approach deployed.

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150 A/CN.4/772, para. 120.

151 *Ibid.* On this scenario, see section B below.

152 This is also clear from the *travaux préparatoires* of the Vienna Convention on the Law of Treaties (a treaty requires an intention to create rights or obligations); see A/CN.4/772, in particular paras. 32, 33, 36, 37 and 39.

153 A/79/10, para. 254.

154 In keeping with the non-prescriptive aim of the work on the topic, in the Special Rapporteur's view it is more appropriate to speak of an "approach" rather than a "method" or "methodology".

155 The Special Rapporteur reached this preliminary conclusion in his first report (A/CN.4/772, para. 124). See, on the Commission members' preliminary position on this point, A/79/10, para. 258. The same position (absence of presumption and case-by-case approach) is taken by the Treaty Section of the United Nations Office of Legal Affairs. Regarding "Declarations", the Section's online glossary indicates that this term "is used for various international instruments" that "are not always legally binding. The term is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations. An example is the 1992 Rio Declaration. Declarations can however also be treaties in the generic sense intended to be binding at international law. It is therefore necessary to establish in each individual case whether the parties intended to create binding obligations" (available at https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml#declarations).

(a) International Court of Justice

59. The jurisprudence of the International Court of Justice in this regard seems to have followed the rhythm of a waltz in triple time.

60. Initially, the Court espoused a rather objectivist approach. Whereas, in the *Ambatielos* case, the Court had appeared to rely both on "what both Parties intended" and on more objective textual elements,[156] its judgment in the *Aegean Sea Continental Shelf* case enshrines an approach that "essentially depends on the nature of the act or transaction" and that "must have regard above all to its actual terms and to the particular circumstances in which it was drawn up".[157] The decisive factors are "the context in which" the text "was drawn up",[158] "the terms of [the act under consideration and] the context in which it was agreed and issued".[159] The Court thus analysed diplomatic exchanges prior to or contemporaneous with the adoption of the text as part of its "context".[160] It also assessed these elements in relation to each other, and thus analysed "the terms of the Communiqué" "[w]hen read in that context".[161] In a similar vein (but this time in express relation to intent), in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court examined what was said "in these documents" to deduce whether "any legal undertaking was intended to exist".[162]

61. The Court repeated the approach taken in the *Aegean Sea Continental Shelf* case in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*. It explicitly invoked that precedent, according to which, in examining a text, the Court "must have regard above all to its actual terms and to the particular circumstances in which it was drawn up".[163] Consequently, it examined the terms used in the minutes at issue in the case.[164] On the other hand, it did "not find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar".[165] This last statement seems to exclude any reliance on the parties' intention. It seems, however, that in this context the Court was referring only to intentions expressed *after* the adoption of the text, not those existing at the time of its conclusion.[166] Lastly, while the Court examined elements subsequent to the adoption of the text, such as those relating to the registration of the agreement, it considered that the "intention" that these elements might reveal, "even if shown to exist", could not "prevail over the actual terms of the instrument in question".[167]

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156 *Ambatielos case (jurisdiction), Judgment of 1 July 1952: I.C.J. Reports 1952*, p. 28, at pp. 42–44. The same can be said of the *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962*, p. 319, at pp. 330–332.

157 *Aegean Sea Continental Shelf* (see footnote 37 above), p. 39, para. 96.

158 *Ibid*., p. 41, para. 100 and paras. 101 ff.

159 *Ibid*., p. 44, para. 107.

160 *Ibid*., p. 43, para. 105.

161 *Ibid.*

162 *Military and Paramilitary Activities in and against Nicaragua* (see footnote 47 above), p. 132, para. 261.

163 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 48 above), p. 112 and pp. 120 and 121, para. 23 *in fine*.

164 *Ibid*., p. 121, paras. 24 and 25.

165 *Ibid*., pp. 121 and 122, para. 27.

166 *Ibid.* ("is not in a position subsequently to say"). See, on this point, Masahiko 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, at pp. 207 and 208: "The Court seems to have meant that, in determining whether a particular international instrument is legally binding or not, regard should be had to the circumstances *at the time of its drawing up*. … the Court's contention could be read to mean that in its view, there is no need to *speculate retrospectively* what the intentions of the parties were in the light of the statements made by the signatories later. Such speculation should clearly be distinguished from a statement made upon signature or shortly afterward on the legal nature of the signed instrument"; see also Andrea Mensi, "The Identification of International Non-Binding Agreements Through the Lens of Subjective and Objective Indicators: Fiction or Reality?", *La Comunità Internazionale*, 2024, pp. 413–443, at p. 422.

167 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 48 above), p. 122, para. 29.

62. There was a second phase in which the Court refrained from specifying the approach taken, particularly (and remarkably) avoiding any mention of the 1978 *Aegean Sea Continental Shelf* precedent. For example, no methodology of principle was defined in *Land and Maritime Boundary between Cameroon and Nigeria*. The Court merely noted that "the Maroua Declaration constitutes an international agreement concluded between States in written form and tracing a boundary; it is thus governed by international law and constitutes a treaty".[168] In *Maritime Delimitation in the Indian Ocean*, the Court also made no mention of the *Aegean Sea Continental Shelf* case and refrained from defining a general approach to determining whether the instrument in question "constitutes a treaty in force between the Parties".[169] The Court essentially based its decision on the content of the agreement, the type of clauses it contained and the way in which it had been "considered" with regard to its registration.[170] This approach thus seemed to deviate significantly from the approach defined and implemented by the Court in 1978.

63. In a third phase, the Court defined a more holistic approach that more clearly reconciled the approach based on intention with the one based on objective elements. This new approach can be seen in the 2018 judgment in *Obligation to Negotiate Access to the Pacific Ocean*. The Court recalled the *Aegean Sea Continental Shelf* precedent, but quoted only the passage from the 1978 judgment stating that the question of whether a joint communiqué constitutes a binding international agreement "essentially depends on the nature of the act or transaction to which the Communiqué gives expression".[171] The Court did not, however, repeat the statement (which is nonetheless found in the same paragraph 96 of the 1978 judgment) that the Court "must have regard above all to its actual terms and to the particular circumstances in which it was drawn up".

64. This omission is probably not accidental. The Court in fact took a more general approach no longer confined to an agreement's terms and context. According to the Court, "for there to be an obligation … on the basis of an agreement, the terms used by the parties, the subject-matter and the conditions of the negotiations must demonstrate an intention of the parties to be legally bound. This intention, in the absence of express terms indicating the existence of a legal commitment, may be established on the basis of an objective examination of all the evidence."[172] This approach centres on the parties' intention (in order for "agreements" to have "legal force", "they require an intention of the parties to be bound by legal obligations")[173] and seeks to find evidence of it, either in the terms of the agreement or, "in the absence of express terms", on the basis of "an objective examination of all the evidence" available (at least insofar as it relates to the "terms used", the "subject-matter" and the "conditions of the negotiations", according to the above-cited passage). For example, "the Charaña Declaration is a document that was signed by the Presidents of Bolivia and Chile which could be characterized as a treaty if the Parties had expressed an intention to be bound by that instrument or if such an intention could be otherwise inferred".[174]

(b) International Tribunal for the Law of the Sea

65. The jurisprudence of the International Tribunal for the Law of the Sea seems to have evolved along the same lines as that of the International Court of Justice. In the *"Hoshinmaru" (Japan v. Russian Federation)* case, the Tribunal referred to the above-mentioned *Aegean Sea Continental Shelf* and *Maritime Delimitation and Territorial*

[168] *Land and Maritime Boundary between Cameroon and Nigeria* (see footnote 49 above), p. 429, para. 263. The parties made detailed arguments on this aspect of the dispute: see *ibid.*, p. 426, paras. 252 and 253.

[169] *Maritime Delimitation in the Indian Ocean* (see footnote 50 above), pp. 21 ff., paras. 41 ff. This could be explained by the fact that the parties' arguments concerned both the nature of the agreement and its validity.

[170] *Ibid*., pp. 21 and 22, para. 42.

[171] *Obligation to Negotiate Access to the Pacific Ocean* (see footnote 37 above), p. 549, para. 131.

[172] *Ibid.*, p. 539, para. 91. See also the additional observations made by Judge Robinson in his dissenting opinion, *I.C.J. Reports 2018*, pp. 571–575, paras. 10–19, and by Judge Salam in his dissenting opinion, *ibid*., pp. 599–606.

[173] *Obligation to Negotiate Access to the Pacific Ocean* (see footnote 37 above), p. 540, para. 97.

[174] *Ibid*., p. 548, para. 126.

Questions between Qatar and Bahrain cases and, in particular, to the need to consider the text's actual terms and the circumstances in which it was drawn up.[175] In the *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)* case, the Tribunal referred to the *"Hoshinmaru"* and *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* cases, but without explicitly mentioning the method based primarily on the terms of the text and the circumstances in which it was drawn up.[176] The Tribunal relied instead on a broader standard: in order to determine whether a text is a "legally binding agreement … what is important is not the form or designation of an instrument but its legal nature and content", which must be examined "in the circumstances of the present case".[177] In that instance, the Tribunal took into account not only the terms of the instrument and the circumstances in which it had been adopted, but also other "evidence",[178] thus foreshadowing the more holistic approach later adopted by the Court in *Obligation to Negotiate Access to the Pacific Ocean*.

(c) International arbitration

66. In some arbitration cases, tribunals have not specified their general approach[179] or have not had to decide whether or not an agreement being invoked is legally binding, since the parties are not in dispute as to its nature.[180] In contrast, the arbitral tribunals in the *Chagos* and *South China Sea* cases explicitly laid out their reasoning in this regard.

67. In the *Chagos* case, the Tribunal adopted a position that combined a general approach of the type later adopted by the International Court of Justice in *Obligation to Negotiate Access to the Pacific Ocean* with the more objectivist approach taken by the Court in *Aegean Sea Continental Shelf*. According to the Tribunal, "the intention for an agreement to be either binding or non-binding as a matter of law must be clearly expressed or is otherwise a matter for objective determination. As recalled by the ICJ in *Aegean Sea Continental Shelf*, 'in determining what was indeed the nature of the act or transaction embodied in the [agreement], the [Tribunal] must have regard above all to its actual terms and to the particular circumstances in which it was drawn up'".[181] This amounts to placing objective indicators under the umbrella of the intention that they manifest or evince, which is the approach currently taken by the International Court of Justice and the International Tribunal for the Law of the Sea.

68. The Arbitral Tribunal in the *South China Sea* case followed a similar approach, holding that, "[t]o constitute a binding agreement, an instrument must evince a clear intention to establish rights and obligations between the parties. Such clear intention is determined by reference to the instrument's actual terms and the particular circumstances of its adoption. The subsequent conduct of the parties to an instrument may also assist in determining its nature."[182]

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175 *"Hoshinmaru"* (see footnote 53 above), p. 46, para. 86.

176 *Delimitation of the maritime boundary in the Bay of Bengal* (see footnote 54 above), p. 35, paras. 89 and 90.

177 *Ibid.*, p. 35, paras. 89 and 91. See also the dissenting opinion of Judge Lucky, *ibid*., pp. 249 ff.

178 *Delimitation of the maritime boundary in the Bay of Bengal* (see footnote 54 above), pp. 35–37, paras. 92–99.

179 *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges* (see footnote 55 above), p. 131, paras. 6.6–6.8.

180 *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, pp. 35–125, at p. 98, para. 156 ("The Parties agree that, as a matter of international law, the March 2000 MoU is not a binding instrument"). See also *Timor Sea Conciliation* (footnote 97 above), p. 224, para. 54 ("Australia accepts that this exchange of letters did not constitute a binding agreement"). See also International Court of Justice, *Pulp Mills on the River Uruguay* (footnote 93 above), pp. 61–63, paras. 125–131.

181 *Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland* (see footnote 96 above), p. 538, para. 426.

182 *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China* (see footnote 56 above), p. 86, para. 213. According to the Tribunal, this "test" has been articulated in a number of international cases, including *Aegean Sea Continental Shelf* (see

69. In contrast to the decisions and awards cited above, the Arbitral Tribunal in the *South China Sea* case refers to the need for a "clear intention" in the above-quoted passage. The Arbitral Tribunal in the *Chagos* case uses the words "clearly expressed" only in relation to situations where the text under consideration expressly reflects the intention ("the intention … must be clearly expressed or is otherwise a matter for objective determination").[183] In the other cases, the object is to determine the intention, without qualification as to its clarity. It is not certain that the use of the adjective "clear" in the *South China Sea* case is legally significant, however, given that, in another passage of the award, the Tribunal refers only to the need to establish "*an intention* to create legal rights and obligations".[184]

70. It is also interesting to note that, like the International Court of Justice, the Tribunal in the *South China Sea* case assesses the available evidence as a whole. As a result, it notes that "[e]ven where the statements and reports use the word 'agree', that usage occurs in the context of other terms suggestive of the documents being political and aspirational in nature".[185] This suggests that no single element is decisive (not even the use of the term "agreement") and that only a holistic analysis can lead to the appropriate conclusion in each individual case.

(d) Other decisions and awards

71. The foregoing observations are supported by other court decisions. For example, in a case decided by the full Court, the Court of Justice of the European Communities issued a ruling on a dispute between France and the Commission of the European Communities as to the nature of "guidelines" concluded between the Commission and the United States of America. France took the view that, "[a]mong the indicia which determine classification as an international agreement, considerations relating to the content of the agreement must prevail".[186] The Commission, on the other hand, considered that the guidelines "do not constitute a legally binding agreement, as confirmed by analysis of the intention of the parties, which is the only decisive criterion in international law for the purpose of establishing the existence of binding effect",[187] and stated that this intention emerges from a number of factors, such as the text and structure of the guidelines and the context in which they were concluded.[188] The Court ruled in favour of the Commission: "the intention of the parties must in principle be the decisive criterion for the purpose of determining whether or not the Guidelines are binding", and this intention was expressed by the text of the document itself (and confirmed by the history of the negotiations), which showed that the guidelines "do not constitute a binding agreement".[189]

72. The arbitration between the Province of Newfoundland and the Province of Nova Scotia is a particularly illustrative example of the contemporary trend towards focusing on the parties' intention and using indicators to elucidate it.[190] In this case, the Arbitral Tribunal considered that "[w]hat matters, ultimately, is the intention of the Parties to be bound by the

footnote 37 above), *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 48 above) and *Land and Maritime Boundary between Cameroon and Nigeria* (see footnote 49 above).

183 *Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland* (see footnote 96 above), p. 538, para. 426.

184 *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China* (see footnote 56 above), p. 97, para. 241 (emphasis added).

185 *Ibid*., para. 242.

186 Court of Justice of the European Communities, Case C-233/02, judgment, 23 March 2004, para. 30.

187 *Ibid*., para. 32.

188 *Ibid*., paras. 33–35.

189 *Ibid*., paras. 42–45. In its replies to the Committee of Legal Advisers on Public International Law questionnaire, the European Union refers to the 9 August 1994 judgment of the Court of Justice of the European Communities in Case C-327/91 (para. 15 of the judgment).

190 It should be noted that the arbitration between Newfoundland and Nova Scotia, which will be cited several times in this report, concerned two provinces (of a single State), but the applicable law clause required the Arbitral Tribunal to apply international law between these two provinces as if they were States. See *ad hoc* arbitration between the Province of Newfoundland and the Province of Nova Scotia (footnote 105 above), p. 444, para. 3.1, and p. 453, para. 3.21.

agreement under international law".[191] On the basis of this consideration of principle, the Tribunal then recalled the judgments of the International Court of Justice in the *Aegean Sea Continental Shelf* and *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* cases[192] before stating that "[e]vidently each case has to be considered in the light of its own circumstances and of the contemporary evidence of the intentions of the parties. … such factors may together or separately lead to the conclusion that a statement does not constitute a binding agreement under international law."[193] In another passage of the award, the Tribunal states that "[b]oth Parties agree that 'the question of intent, including the intent of the parties to create binding relations, is a factual question to be considered in the light of the available evidence'";[194] only after the Tribunal had "looked at [the documentary record] as a whole" did it reach its decision as to the nature of the document.[195]

73. National court decisions can shed further light on these issues.[196] Some of them do not explain the basis on which they determine that an international agreement is or is not legally binding.[197] Others do provide such explanations.

74. In its written submission to the Commission, Slovenia draws attention to a recent decision by its Constitutional Court, in which the Court assessed whether a bilateral agreement was a treaty or a non-legally binding international instrument. The Court decided that the agreement was a treaty on the basis of its content, which revealed an intention to create obligations under international law, and on the basis of the terminology used and the negotiations that preceded its conclusion.[198]

75. Austria, in its written submission to the Commission, cites a decision of its Constitutional Court dated 25 June 1998, ruling that a 1996 declaration of intent did not constitute a treaty within the meaning of the Federal Constitution, but rather a legally non-binding commitment. The Court relied on the wording of the declaration itself, which clearly showed that it was not intended to create rights and duties under international law.[199]

76. In its written submission to the Commission, the United Kingdom refers to three examples of recent cases in which British courts dealt with matters involving memorandums of understanding. As the State indicates, the point at issue in each of these cases was not the nature of the memorandums in question (which all parties understood not to be legally binding treaties), but the national decision adopted on the basis of those instruments.[200]

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[191] *Ibid*., pp. 449 and 450, para. 3.15.

[192] *Ibid*., pp. 450 and 451, paras. 3.16 and 3.17.

[193] *Ibid*., p. 451, para. 3.18.

[194] *Ibid*., p. 463, para. 4.16.

[195] *Ibid*., p. 492, para. 7.1.

[196] See the interesting examples cited by Philippe Gautier, *Essai sur la définition des traités entre États. La pratique de la Belgique aux confins du droit des traités*, Brussels, Bruylant, 1993, pp. 331 ff. (differing positions of domestic courts on the nature of the 1943 Inter-Allied Declaration); or Surya 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.

[197] This is true of the two national court decisions cited by France in footnotes 2 and 3 of its written submission to the Commission. See also Sergei Yu Marochkin, "International Law in the Courts of the Russian Federation: Practice of Application", *Chinese Journal of International Law*, vol. 6, No. 2 (July 2007), pp. 329–344, at p. 334: "Sometimes, Courts do not clarify whether the international instrument is a treaty, i.e. whether it is legally binding".

[198] Information submitted by Slovenia, referring to decision No. U-I-71/22 (in Slovenian) of 14 April 2022 (*Official Gazette of the Republic of Slovenia*, No. 59/2022). See the information at https://www.us-rs.si/decision/?lang=en&q=OCCAR&caseId=&df=&dt=&af=&at=&pri=1&vd=&vo=&vv=&vs=&ui=&va=&page=1&sort=&order=&id=117928.

[199] Information submitted by Austria. The decision (in German) is attached to the submission from Austria (available from the secretariat). See para. 2.2 of the decision, pp. 25 and 26.

[200] Information submitted by the United Kingdom, para. 10, referring to the following cases: *Rahmatullah v Ministry of Defence* [2019] Queen's Bench Division [2019] EWHC 3172 (QB) 21 Nov 2019; *Dean (Zain Taj) v Lord Advocate* [2019] HCJAC 31; *R (AAA (Syria) and Ors.) v SSHD* [2023] UKSC 42.

Guatemala, in its submission, states that to date there have been no decisions of national courts on the matter.[201]

77. The "chronicle of foreign jurisprudence involving international law" that is published annually by the *Revue générale de droit international public* lists a number of national judicial decisions in which courts or tribunals have taken a position on how to distinguish between treaties and non-legally binding international agreements on the basis of a case-by-case analysis of the parties' intention, the terms used or the subsequent position of the States concerned.[202]

78. Mention could also be made of the decision of the High Court of South Africa in the *Earthlife Africa* case. Called upon to decide on the nature of an intergovernmental agreement with the Russian Federation, the Court concluded that it was legally binding, basing itself "as a whole" on a combination of the following factors: the text of the various provisions of the agreement; the fact that it had financial implications; its inclusion of a dispute settlement clause and, in particular, a clause to the effect that this agreement would prevail in case of any discrepancy with other agreements concluded under it; the presence of clauses on the entry into force and termination of the agreement; the positions taken by the parties the day after its conclusion in a joint press statement; and a comparison with the text of other agreements.[203]

79. In a decision of 20 February 2012, the Greek Council of State ruled that the 2010 "Statement on the support to Greece by Euro area Member States" was not binding on the grounds that, even though it had been ratified, it did not include mutual commitments or any legal means of compulsory application or sanction for the Greek Government, the parties did not appear to have wished to consider it binding, and it was not subsequently perceived as being legally binding or as creating obligations.[204]

2. General approach in practice

80. When the regulations for the registration of treaties and international agreements with the United Nations under Article 102 of the Charter were drawn up 80 years ago, the Sixth Committee had regard to the "undesirability of attempting at this time to define in detail the kinds of treaty or agreement requiring registration under the Charter, it being recognized that experience and practice will in themselves aid in giving definition to the terms of the Charter".[205] This decision is not unrelated to what has been said above about the need to avoid being prescriptive on the present topic and to avoid undermining the flexibility that characterizes contemporary international cooperation.[206] Since that time, no general

[201] Information submitted by Guatemala, p. 1.

[202] See, for example, on the 24 June 2014 judgment of the Greek Council of State (No. 2307/2014), *Revue générale de droit international public* (RGDIP), vol. 119 (2015), pp. 846–848; on the 7 December 2018 decision of the Federal Constitutional Court of Germany (2 BvQ 105/18 *et al.*), RGDIP, vol. 123 (2019), pp. 1031 and 1032; on the 27 December 2019 decision of the Constitutional Court of the Republic of Korea (2016heonma253), RGDIP, vol. 124 (2020), pp. 748 and 749. See also, on two judgments of the Constitutional Court of Germany issued in 2001 and 1994, Mensi, "The Identification of International Non-Binding Agreements Through the Lens of Subjective and Objective Indicators: Fiction or Reality?" (footnote 166 above), pp. 423 and 424. Regarding the first judgment, Mensi notes that the Court "focused not only on the wording of the instrument but also on 'declarations of intent' and underlined how the nature of an agreement shall be ascertained 'from the circumstances in the individual case'."

[203] *Earthlife Africa – Johannesburg and Another v Minister of Energy and Others (19529/2015)*, [2017] ZAWCHC 50 (26 April 2017), paras. 108–112.

[204] *Greek Bar Association and ors v Minister of Finance and Minister of Labour and Social Security*, First stage, 668/2012, ILDC 3279 (GR 2012), 20th February 2012, Greece, para. 28.

[205] *Repertory of Practice of United Nations Organs*, vol. V (see footnote 118 above), Article 102, para. 20. See also *ibid*., para. 25: "It was considered premature to attempt a precise definition of international agreements; it might be left to gradual development, while various specific instances accumulated."

[206] See the remarks of Michael Brandon, "Analysis of the Terms 'Treaty' and 'International Agreement' for Purposes of Registration under Article 102 of the United Nations Charter", *American Journal of International Law*, vol. 47 (1953), pp. 49–69, at p. 69 (on the absence of a general definition of the

definition other than the one found in the Vienna Convention on the Law of Treaties has been adopted, and the United Nations Secretariat proceeds on a case-by-case basis to determine which texts to register.

81. The positions expressed in the Sixth Committee in 2024 support the considerations outlined above. Some delegations expressly stated that there was no presumption in that regard and that it was necessary to proceed on a case-by-case basis.[207] The case-by-case approach is all the more important in that national practices may differ and an indicator's meaning in one national context may not be the same as in another. For example, if a State publishes only treaties in its domestic system, the publication of an agreement could be a relevant indicator. Conversely, if a State publishes both treaties and non-legally binding agreements in its domestic system, such publication in itself will not be conclusive, unless non-legally binding agreements and treaties are published in separate registers.[208] States also stressed that a fundamental (or the most important) element to be taken into consideration[209] was the intention of the authors of the agreement.[210] Some States seemed to view this intention as an element that was distinct from the objective indicators but that must be evaluated together with those indicators;[211] others took the view that objective indicators revealed the parties' intention.[212] Czechia considered that intention took precedence over other criteria, at least when it was clearly expressed.[213] In addition, some delegations indicated that a holistic approach should be followed.[214]

82. In 1996, the European Union sent its member States a questionnaire on their internal procedures for concluding international agreements approved under a simplified procedure or agreements that are not legally binding. The summary of replies to this questionnaire shows that, in all the countries except Portugal, the approach for distinguishing non-legally binding instruments from legally binding ones is based on the analysis of the intention expressed by the parties or implied by the text of the agreement to give the latter legal force of a non-binding nature. Portugal, for its part, takes account of the political or non-political nature of the agreement and its capacity to produce effects in the domestic legal system. The

terms in Article 102 of the Charter): "The gradual delimitation of the scope of the terms is to be preferred. Flexible adaptations are better than too precise criteria, which might well tend to defeat the purpose of the registration requirements."

207 European Union (A/C.6/79/SR.28, para. 16); Portugal (28th meeting, p. 5 of the written statement available at https://www.un.org/en/ga/sixth/79/summaries.shtml); Cyprus (A/C.6/79/SR.29, para. 121 read as a whole); Russian Federation (A/C.6/79/SR.30, para. 66); Greece (*ibid*., para. 89); Sri Lanka (*ibid*., para. 103).

208 See, for example, Spain, *Ley 25/2014, de 27 de noviembre, de Tratados y otros Acuerdos Internacionales*, art. 48. On the diversity of practice on this point, see, for example, the replies to questions 34 and 36 of the Committee of Legal Advisers on Public International Law questionnaire; see also the information submitted by Ireland, p. 3.

209 Poland (A/C.6/79/SR.28, para. 51); South Africa (*ibid*., para. 107); Czechia (A/C.6/79/SR.29, para. 14); Malaysia (A/C.6/79/SR.30, para. 37).

210 Croatia (A/C.6/79/SR.21, para. 122); China (A/C.6/79/SR.26, para. 60); European Union (A/C.6/79/SR.28, para. 16); Belarus (*ibid*., para. 85); Israel (*ibid*., para. 116); Italy (*ibid*., para. 124); Australia (A/C.6/79/SR.29, para. 26); Cyprus (*ibid*., para. 121); Islamic Republic of Iran (*ibid*., para. 133); Türkiye (A/C.6/79/SR.30, para. 11); Greece (*ibid*., para. 88); Algeria (*ibid*., para. 93); Bulgaria (*ibid*., para. 113). The Russian Federation took the view that it was not for the Commission to examine the criteria for distinguishing treaties from non-legally binding international agreements, since the distinction depended solely on the intention of the parties (*ibid*., paras. 65 and 68).

211 Finland (on behalf of the Nordic countries) (A/C.6/79/SR.28, para. 26); Brazil (*ibid*., para. 35); Slovenia (*ibid*., para. 40); Romania (*ibid*., para. 65); Ireland (*ibid*., para. 100); Malaysia (A/C.6/79/SR.30, para. 38); Mexico (*ibid*., para. 140).

212 European Union (A/C.6/79/SR.28, para. 16); Belarus (*ibid*., para. 85); Latvia (*ibid*., para. 30); Australia (A/C.6/79/SR.29, para. 26).

213 Czechia (A/C.6/79/SR.29, para. 14). See, similarly, Chile (*ibid*., para. 38).

214 European Union (A/C.6/79/SR.28, para. 16); Finland (on behalf of the Nordic countries) (*ibid*., para. 26); Slovenia (recommending the use of both objective and subjective criteria) (*ibid*., para. 40); Portugal (28th meeting, p. 5 of the written statement available at https://www.un.org/en/ga/sixth/79/summaries.shtml); Mexico (A/C.6/79/SR.30, para. 140).

summary of replies specifies that there is in any case no impediment to the standardization of criteria.[215]

83. The information submitted to the Commission and the national guidelines identified to date are in line with the foregoing findings: intention appears to be the key factor in determining whether an international agreement is legally binding.[216] The approaches do not, however, at least at first sight, appear to be entirely consistent as to how intention is related to the other indicators. In some cases, intention seems to be regarded as an indicator in its own right, to be supplemented by other indicators where necessary;[217] in others, intention is presented as the core parameter, which is inferred through the use of indicators;[218] in the latter case, for some States, a holistic approach is required.[219]

84. Nonetheless, the opposition between these approaches is not necessarily significant. They seem to agree, first, that a clearly expressed intention will prevail and recourse to objective indicators is not really necessary unless the intention has not been clearly expressed,[220] and, second, that it is important to draft a mutually agreed text in a way that reflects the intention of its authors.[221] The apparent divergence between the two approaches seems to stem from the use of the term "intention" to mean two different things: either something that needs to be demonstrated or something that encompasses a set of indicators directly connected to the will of the States concerned (such as their conduct during the negotiations). This could explain why "intention" is sometimes seen as one indicator among others and not solely as something that needs to be established.

85. There does not seem to be any support for the existence of any presumption. Switzerland points out that, in the absence of a common intention and depending on the circumstances, if it is found that at least one of the parties did not wish to conclude a treaty, the common intention could be reduced to the least common denominator, *i.e.* a non-legally binding instrument. However, this can hardly be seen as a real presumption.[222] The national practice of France does not appear to include the practice of entering into non-legally binding

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215 Document PESC/SEC 899, 9 August 1996, p. 2.

216 Information submitted by Ireland (p. 1) and by Switzerland (p. 5); *Treaties and Memoranda of Understanding (MoUs): Guidance on Practice and Procedures*, September 2022, Foreign, Commonwealth and Development Office (United Kingdom), para. 5; reply of Bulgaria to question 4 of the Committee of Legal Advisers on Public International Law questionnaire; replies of Monaco and Switzerland to question 5 of the same questionnaire.

217 Information submitted by Mexico, pp. 1 and 2 (stating that it is necessary to analyse the content of the instrument, the terminology used and the intention of the signatories, but also that the terms used denote the intention of the parties ("denota la intención de las Partes")); and by the Kingdom of the Netherlands, p. 1 ("depends mostly on the context and the intention of the parties"); reply of Ireland to question 4 of the Committee of Legal Advisers on Public International Law questionnaire.

218 Information submitted by Argentina (III); by France (p. 4: "le caractère non-contraignant d'un instrument résulte de l'intention de ses signataires. Cette intention se traduit par un faisceau d'indices, analysés conjointement, qui viennent confirmer son caractère non contraignant"); by Ireland (p. 1); and by the United Kingdom (para. 7). See also "Guidance Note: Australia's Practice for Concluding Less-Than-Treaty Status Instruments" (section on "Language"); *Treaties and Memoranda of Understanding (MoUs): Guidance on Practice and Procedures*, September 2022, Foreign, Commonwealth and Development Office (United Kingdom), para. 5; replies of Cyprus to question 4 and of the United Kingdom to question 5 of the Committee of Legal Advisers on Public International Law questionnaire.

219 Information submitted by Australia (para. 8) and by Finland; replies of Bosnia and Herzegovina, Finland and Germany to question 5 of the Committee of Legal Advisers on Public International Law questionnaire.

220 See, for example, the information submitted by the Kingdom of the Netherlands (attached brochure on memorandums of understanding of the Ministry of Foreign Affairs, October 2021, para. 4.1) and by Switzerland, pp. 2 and 3.

221 See, for example, the views from the United States on the Guidelines of the Inter-American Juridical Committee on Binding and Non-Binding Agreements, which refer to the importance of States' drafting written instruments in a manner that reflects as clearly as possible their intentions (https://www.oas.org/en/sla/iajc/themes_recently_concluded_Binding_and_Non-Binding_Agreements.asp, p. 2); and the replies of Bosnia and Herzegovina and Italy to question 4 of the Committee of Legal Advisers on Public International Law questionnaire.

222 Information submitted by Switzerland, p. 5.

commitments (it states that any commitment made on behalf of the Government has the effect of an international agreement creating obligations),[223] yet France has other national guidelines that recognize the existence of mutual commitments of a political nature.[224]

3. General approach in doctrine (including codification work)

86. As indicated in the first report, the Institute of International Law did not reach a consensus on the outcome of its work on the topic "International texts of legal import in the mutual relations of their authors and texts devoid of such import". In its final resolution of 1983, it confined itself to reproducing the conclusions reached by the Rapporteur, as amended by him in the light of the debates.[225] Two of these conclusions are relevant here:

> 8. The legal or purely political character of a commitment set forth in an international text of uncertain character depends upon the intention of the parties as may be established by the usual rules of interpretation, including an examination of the terms used to express such intention, the circumstances in which the text was adopted and the subsequent behaviour of the parties.
>
> 9. International texts that merely formulate declarations of intent, whereby their authors simply mean to give some indication of their views in relation to a particular issue at the time of drafting the text without wishing to be bound for the future, are devoid of any legal import … A declaration of intent is admissible only if the will not to be bound, as resulting in particular from the terms used, the circumstances in which the declaration was made and the subsequent behaviour of its author, proves perfectly clear.[226]

87. Furthermore, it was said during the Institute's deliberations that whether or not a text was binding could only be determined on a case-by-case basis.[227]

88. With regard to the Guidelines of the Inter-American Juridical Committee, which were also presented in the first report,[228] it should be noted that guideline 3 elaborates in detail on the "methods for identifying binding and non-binding agreements".[229] This guideline, and its valuable commentary, cannot be reproduced in full in the present report. The most important elements with regard to the general approach are found in the following extracts from guidelines 3.2 and 3.6 (guideline 3.3 deals with cases where the nature of the agreement is expressly indicated, which will be discussed in section B below):

> 3.2. … The practice of States, international organizations, international courts and tribunals, and other subjects of international law currently suggests two different approaches to distinguishing binding from non-binding agreements.
>
> - First, some actors employ an 'intent test', a subjective analysis looking to the authors' manifest intentions to determine if an agreement is binding or not …
> - Second, other actors employ an 'objective test' where the agreement's subject-matter, text, and context determine its binding or non-binding status independent of other evidence as to one or more of its authors' intentions.
>
> The two methods often lead to the same conclusion. Both tests look to (a) text, (b) surrounding circumstances, and (c) subsequent practice to identify different types of binding and non-binding agreements. … The objective test would prioritize the text and language used in contrast to the intent test's emphasis on what the parties intended. …

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[223] France, *Circulaire du 30 mai 1997 relative à l'élaboration et à la conclusion des accords internationaux*, sect. I.

[224] "Guide des bonnes pratiques en matière de négociation et de conclusion des engagements internationaux de la France", 2020, Ministry for Europe and Foreign Affairs, p. 5.

[225] See A/CN.4/772, para. 59.

[226] *Yearbook of the Institute of International Law*, vol. 60, Part II (Session of Cambridge 1983), p. 291.

[227] *Ibid.*, p. 136 (Mr. Arangio-Ruiz).

[228] A/CN.4/772, paras. 61–68.

[229] Guidelines of the Inter-American Juridical Committee (see footnote 85 above).

> 3.6. … Where evidence indicative of an agreement's status is ambiguous or inconsistent, the agreement's status should depend on a holistic analysis that seeks to reconcile both the objective evidence and the participants' shared intentions.[230]

89. The commentary to guideline 3.2 stresses in particular that "a large number of States, scholars, and international tribunals regard intent as *the* essential criterion for identifying which agreements are treaties",[231] but that some States attach importance only to objective elements. This opposition between an objective and a subjective test (the commentary to guideline 3.4 even refers to "the divide between the intentional and objective methods")[232] does not, however, appear to be entirely consistent with the contemporary jurisprudence presented above, in which objective elements are regarded as evidence of intent and not as elements distinct from it.

90. Guideline 3.4 gives particular weight to cases where the parties to an agreement specify (or "otherwise agree on")[233] its status and indicates that other evidence should be used only in the absence of such specification.

91. An analysis of the literature on this topic leads to three main conclusions.

92. First, authors consider that the legally binding or non-legally binding nature of an agreement must be established on a case-by-case basis.[234] As to whether or not there is any presumption, authors are divided on this point, as was noted in the first report.[235] One author, who appears to be alone in this view, is of the opinion that any agreement (*i.e.* any mutually agreed commitment, including any memorandum of understanding) is in principle a treaty.[236] This view, which rules out the idea that there could be non-legally binding mutual commitments, is not borne out by contemporary practice or jurisprudence. Other authors take the more nuanced view that an instrument's degree of formality entails a kind of presumption: a formal agreement is presumed to be legally binding, while an informal agreement is presumed not to be so.[237] Still other authors put forward the opposite presumption, whereby States are presumed not to intend to create legal relations, so that the existence of such an intention needs to be clearly established.[238]

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230 *Ibid*.

231 *Ibid*.

232 *Ibid*.

233 *Ibid.*

234 See, for example, Malgosia Fitzmaurice, "Treaties", *Max Planck Encyclopedia of Public International Law*, February 2021, para. 12; Jean-Paul Jacqué, "Acte et norme en droit international public", *Collected Courses of the Hague Academy of International Law*, 1991, vol. II, No. 227, pp. 357–417, at p. 391. The position that authors have taken on this point is explained in greater detail at the end of section C of this chapter.

235 A/CN.4/772, para. 124 and footnote 248.

236 Jan Klabbers, "Governance by Academics: The Invention of Memoranda of Understanding", *Heidelberg Journal of International Law*, vol. 80 (2020), pp. 35–72, at pp. 41 ff.

237 See, for example, Jacqué, "Acte et norme en droit international public" (footnote 234 above), pp. 394 and 395 ("dès lors qu'un engagement est contenu dans un instrument formellement conventionnel, la tendance est de présumer qu'il s'agit d'un engagement juridique" (when a commitment is contained in an instrument in the form of an agreement, the tendency is to presume that it is a legal commitment); in such a case, "ce n'est qu'en présence d'indices sérieux d'une volonté contraire que l'on pourrait conclure qu'il s'agit d'un accord ne contenant pas d'engagements" (only when there is substantial evidence of the opposite intent can it be concluded that the agreement does not contain commitments); on the other hand, if a commitment is undertaken by means of an informal act, "ce n'est que dans des cas exceptionnels" (only in exceptional cases) can it be understood to create obligations; see pp. 391 and 392). See also Wilhelm Wengler, "Les conventions 'non juridiques' (nichtrechtliche 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 p. 646; R.A. Mullerson, "Sources of international law: new tendencies in Soviet thinking", *American Journal of International Law*, vol. 83 (1989), pp. 494–512, at p. 511; or Gautier, "Les accords informels et la Convention de Vienne sur le droit des traités entre États" (footnote 102 above), p. 452.

238 See, for example, J.E.S. Fawcett, "The Legal Character of International Agreements", *The British Year Book of International Law, 1953*, pp. 381–400, at pp. 385 ff.

93. What these authors call a "presumption" does not, however, appear to be one in the legal sense of the term. It seems to be, rather, a preliminary starting point from which to establish intent, with the latter being the key element. At any rate, it does not seem to be a position of principle that would obviate the need for any further examination of the nature of the agreement.

94. The fact is that, in all cases, intent must be sought on the basis of the available evidence. No "presumption" is therefore decisive. The most recent studies tend to emphasize the limitations of reasoning in terms of presumptions: since each agreement has to be assessed on a case-by-case basis, what ultimately matters is not so much the existence of any presumption (which would in itself suffice to settle the question) as the need to determine, on the basis of relevant available evidence, the nature of an agreement whose legally binding character is uncertain.[239]

95. Second, authors generally consider that what matters most is the intention of the parties to the agreement.[240] This intention must be established on a case-by-case basis.[241] It is true that some authors have appeared troubled by the evolution of international jurisprudence, in particular the way in which the International Court of Justice approached the question of intent in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*.[242]

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[239] See, for example, Jeremy Hill, *Aust's Modern Treaty Law and Practice*, 4th ed., Cambridge, Cambridge University Press, 2023, p. 67: "In some cases, of course, there will still be ambiguity, but it is still best to resolve this by an assessment of the form, language and intent (and other factors relating to the definition of a treaty or non-binding instrument), rather than by a presumption either way"; Hartmut Hillgenberg, "A Fresh Look at Soft Law", *European Journal of International Law*, 1999, pp. 499–515, at p. 505 ("International law does not seem to contain a general assumption that agreements are of a treaty nature"). See also, as early as 1969, Fritz Münch, "Comments on the 1968 draft convention on the law of treaties. Non-binding Agreements", *Heidelberg Journal of International Law*, 1969, pp. 1–11, at pp. 1 and 2. See also the analysis by Christine 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, at p. 231 and footnote 31; Timothy Meyer, "Alternatives to Treaty-Making – Informal Agreements", in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties*, 2nd ed., Oxford University Press, 2020, pp. 59–81, at p. 80; or Palma, *La natura degli atti finali dei vertici internazionali* (footnote 115 above), pp. 61 ff.

[240] See, for example, Anthony Aust, "The Theory and Practice of Informal International Instruments", *International and Comparative Law Quarterly*, vol. 35 (1986), pp. 787–812, at pp. 794 and 795; Curtis A. Bradley, Jack Goldsmith and Oona A. Hathaway, "The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis", *The University of Chicago Law Review*, vol. 90, No. 5 (September 2023), pp. 1281–1364, at pp. 1296 and 1297; Claire Crépet Daigremont, "Les premières réflexions sur le concerté non conventionnel (Michel Virally)", in Institut des hautes études internationales, *Grandes pages du droit international*, vol. II, *Les sources*, Paris, Pedone, 2016, pp. 87–100, at p. 99; Gautier, *Essai sur la définition des traités entre États. La pratique de la Belgique aux confins du droit des traités* (footnote 196 above), p. 353; Hill, *Aust's Modern Treaty Law and Practice* (footnote 239 above), pp. 45 ff.; I.I. Lukashuk, *Sovremennoye pravo mezhdunarodnykh dogovorov – Zaklyucheniye mezhdunarodnykh dogovorov*, vol. I, Moscow, Wolters Kluwer Russia, 2004, p. 545; Yusuke Nakanishi, "Defining the Boundaries of Legally Binding Treaties – Some Aspects of Japan's Practice in Treaty-Making in Light of State Practice", *International Community Law Review*, vol. 20 (2018), pp. 169–191, at p. 172; Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, 9th ed., London, Longman, p. 1202; Antonio Remiro Brotóns *et al.*, *Derecho internacional: curso general*, Valencia, Tirant Lo Blanch, 2010, pp. 192–194; M.N. Samedov, *K probleme vidov mezhdunarodnih dogovorov Azerbaidjanskoy Respubliki*, *Bakı Universitetinin Xəbərləri: Sosial-siyasi elmlər seriyası*, No. 4, 2008, p. 53; Oscar Schachter, "The Twilight Existence of Nonbinding International Agreements", *American Journal of International Law*, vol. 71, No. 2 (April 1977), pp. 296–304, at pp. 296 and 297; Widdows, "What Is an Agreement in International Law?" (footnote 81 above), p. 121.

[241] See, in particular, Mensi, "The Identification of International Non-Binding Agreements Through the Lens of Subjective and Objective Indicators: Fiction or Reality?" (footnote 166 above), citing on p. 421 the following statement by Sir Michael Wood to the British House of Commons in 2021: "Ultimately, whether a document is binding or not must be assessed on a case-by-case basis to determine whether the negotiating States intended the instrument to be (or not to be) binding under international law."

[242] See section A (1) (a) of this chapter above. See, for example, Malgosia Fitzmaurice, "Concept of a Treaty in Decisions of International Courts and Tribunals", *International Community Law Review*,

The reformulation of the Court's jurisprudence, as seen in particular in its 2018 judgment in *Obligation to Negotiate Access to the Pacific Ocean*, has nonetheless removed any doubt as to the key role of intent.[243]

96. Third, it seems that authors' views are divided on how objective and subjective indicators (or approaches) are related or, in other words, how the search for intention is related to the use of other indicators. As mentioned above, several approaches coexist in the literature. Some authors follow the lead of the Inter-American Juridical Committee in drawing a contrast between an objective approach or objective indicators and a subjective approach or subjective indicators.[244] This contrast is explained in part by the recent development of international jurisprudence.[245] Some of these authors tend to introduce a kind of hierarchy between these subjective and objective elements.[246] Other authors avoid this opposition and prefer to combine the two approaches, arguing that intention is the goal to be achieved (that which needs to be established), while indicators are the means used to achieve it.[247] The role of indicators is thus to "flush out" the intention.[248] This intention may be clearly expressed upon the conclusion of the act, written in the text, or inferred or deduced from other evidence.[249]

97. Today, this last approach seems to predominate. It is systematically followed in scholarly works that examine the nature of a specific agreement. In these studies, the authors

vol. 20 (2018), pp. 137–168, at pp. 162 ff. (stating that case law is "inconclusive" on the role of the parties' intention in determining whether an agreement is a treaty).

243 See section A (1) (a) of this chapter above.

244 See Dai Tamada, "Editorial", *International Community Law Review*, vol. 20 (2018), pp. 135 and 136 (introduction to the special issue on "The Legal Nature of an Agreement in International Jurisprudence and State Practice"); or Meyer, "Alternatives to Treaty-Making – Informal Agreements" (footnote 239 above), pp. 66 and 79.

245 See, for example, Fitzmaurice, "Concept of a Treaty in Decisions of International Courts and Tribunals" (footnote 242 above), p. 152, which contrasts the approach taken by the International Court of Justice in *Maritime Delimitation and Territorial Questions between Qatar and Bahrein* in 1994 with the one taken by the International Tribunal for the Law of the Sea in *Delimitation of the maritime boundary in the Bay of Bengal* in 2012; or the way in which Francisco Jiménez García presents the relevant jurisprudence in *Derecho internacional líquido: ¿Efectividad frente a legitimidad?*, Thomson Reuters, 2021, pp. 165 ff.

246 See, for example, Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*, Oxford, Oxford University Press, 2011, pp. 178 ff.; see also Mensi, "The Identification of International Non-Binding Agreements Through the Lens of Subjective and Objective Indicators: Fiction or Reality?" (footnote 166 above), pp. 440 and 441.

247 Aust, "The Theory and Practice of Informal International Instruments" (see footnote 240 above), pp. 800 ff.; Gautier, *Essai sur la définition des traités entre États. La pratique de la Belgique aux confins du droit des traités* (see footnote 196 above), pp. 353 ff. and the conclusion on p. 373 ("il s'agit de déceler l'intention poursuivie par les auteurs d'un acte. … les indices qui ont été examinés n'ont qu'un rôle probatoire et … ils n'ont de valeur que dans la mesure où ils s'enracinent dans la volonté des États"); Chinkin, "A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations Between States" (see footnote 239 above), pp. 230 ff.; Mensi, "The Identification of International Non-Binding Agreements Through the Lens of Subjective and Objective Indicators: Fiction or Reality?" (see footnote 166 above), p. 424 ("what has been generally described as an objective test represents, in practically terms, an analytical approach where formal tools, such as the text of an agreement, are considered to establish the will of the Parties"); or Dai Tamada, "The Japan-South Korea Comfort Women Agreement: Unfortunate Fate of a Non-Legally Binding Agreement", *International Community Law Review*, vol. 20 (2018), pp. 220–251, at p. 226.

248 Maurice Kamto, "La volonté de l'État en droit international", *Collected Courses of the Hague Academy of International Law, 2004*, vol. 310, pp. 9–418, at p. 115: "Volonté débusquée. La volonté de l'État ne s'offre pas toujours de façon évidente dans toutes les situations juridiques. Tant que la volonté ne prend pas la forme d'un consentement explicite, elle est toujours à découvrir. … L'identification de la volonté se fera, soit à travers les actes, soit à travers les comportements. Dans un cas comme dans l'autre le rôle de l'intention sera déterminant."

249 Pierre Michel Eisemann, "Le Gentlemen's agreement comme source du droit international", *Journal du droit international*, vol. 106 (1979), pp. 316–348, at pp. 344 and 345; or, among other examples, Widdows, "What Is an Agreement in International Law?" (see footnote 81 above), pp. 137 ff.

endeavour to establish the parties' intention by analysing the relevant available evidence.[250] This approach is perfectly consistent with international jurisprudence, which generally focuses on the parties' intention in determining whether they have entered into a legal commitment under international law.[251]

4. Proposed draft conclusion

98. In the light of the foregoing, the following draft conclusion is submitted to the Commission:

> PART TWO. DISTINCTION BETWEEN TREATIES AND NON-LEGALLY BINDING INTERNATIONAL AGREEMENTS
>
> *Draft conclusion 5. Assessment of whether an agreement is legally binding or not*
>
> 1. Whether an agreement is legally binding or not is assessed on a case-by-case basis.
>
> 2. Whether an agreement is legally binding or not depends on the intention of the parties to the agreement. In the absence of any intention by the parties to be legally bound by the agreement, it is not legally binding.
>
> 3. The intention may be expressly stated.
>
> 4. In the absence of any express indication, intention can be established by recourse to the relevant elements identified in draft conclusions [No. XX to XX]. These elements are assessed as a whole.

99. This draft conclusion is intended to cover two situations: one in which negotiators are deciding how to draft the agreement, and one in which the nature of the agreement needs to be determined after it has been concluded. The verb "assessed" in paragraphs 1 and 4 and the phrase "be established by recourse" in paragraph 4 are broad enough to cover both situations. Furthermore, the wording of paragraph 1 should be understood to mean that the general approach identified in the draft conclusion is relevant only if the question arises. It may well be the case that the authors of a given agreement feel no need to specify or determine whether it is legally binding or not, as such specification or determination is not necessarily essential to its implementation.

100. The qualifiers "subjective" and "objective" are deliberately not used in this draft conclusion because of the confusion they create by appearing to place intention on the same footing as "objective" indicators. In reality, the intention and the indicators are not of the same nature. The intention is what needs to be demonstrated and the indicators are the means by which the intention is expressed, it being understood that these indicators may be more or less subjective or objective (relying on the terms used is in a certain sense more objective than discerning the intention of the parties from their diplomatic exchanges during the negotiations, for example). The draft conclusion is structured accordingly: paragraph 1 states that the assessment is carried out on a case-by-case basis, paragraph 2 sets out the key element (the intention of the parties), and paragraphs 3 and 4 specify how this intention is to be established.

101. Paragraphs 3 and 4 should be read in the light of the discussion relating to each of them in sections B and C of this chapter. The passages in square brackets in paragraph 4

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[250] See section C *in fine* of this chapter below. See also, in the same vein, for example, O. Ilyinskaya, *Pravo mezhdunarodnykh dogovorov*, Moscow, Prospekt, 2021, p. 13; I. Lukashuk, "Pravo mezhdunarodnykh dogovorov", in *Kurs mezhdunarodnogo prava v 7 tomakh*; V.N. Kudryavtsev *et al.* (eds.), vol. 4 entitled "Otrasli mezhdunarodnogo prava", Moscow, Nauka, 1990, pp. 9 and 10.

[251] See, for example, International Court of Justice, *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at pp. 267 and 268, para. 45, and *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 457, at p. 473, para. 48: "As the Court said in its Judgment on the preliminary objections in the case concerning the *Temple of Preah Vihear*: 'Where … as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it.' (*I.C.J. Reports 1961*, p. 31.)".

("[No. XX to XX]") will be completed once the Commission has decided how to deal with the question of relevant indicators (see section C of this chapter below).

102. In keeping with the non-prescriptive aim of the project, the verbs used in this draft conclusion are essentially descriptive. For the same reason, it seems preferable to use the terms "indication" and "elements" rather than "criteria" in paragraph 4. Also for this reason, the more neutral terms "indicators", "elements" or "indications", rather than "criteria", will be used in section C below, which concerns their identification.

103. Paragraph 1 indicates that the assessment should be carried out on a case-by-case basis. In principle, this means that there is no presumption in this regard. It is therefore unnecessary to spell this out (the absence of presumption) in paragraph 1. This omission provides a degree of flexibility to take account of the fact that, in the practice of some States, a particular type of agreement or instrument may be presumed to be of a certain nature. For the same reason, it does not seem appropriate to specify at the end of paragraph 4 that no single element is decisive.[252] It may well be the case that, in some instances, owing to the particular practices of the States parties to the agreement, a given indicator carries particular weight.

104. Lastly, paragraph 3 does not specify that the intention may be expressly stated "in the agreement". There is no reason why the intention cannot be expressly stated in a separate act (prior or subsequent to the agreement).[253]

B. Existence of an express indication

105. Insofar as, according to the general approach identified above, intention is the fundamental parameter, special attention should be paid to situations in which the agreement in question contains an express indication of its nature and to cases in which a prior undertaking expressly clarifies this intention in advance[254] or a subsequent act expressly specifies it.[255] This raises a number of questions, in particular what is meant by an "express indication", what effect it has on the nature of the agreement and whether it is decisive in itself. Nonetheless, in view of the foregoing (see section A above), the *absence* of such an express indication does not in itself affect the nature of the agreement.

1. Jurisprudence

106. The jurisprudence identified tends to show that where there is an express indication of the nature of an agreement, it is considered decisive, at least in cases where its very purpose is to state a position on the agreement's legally binding or non-binding nature.[256] In such cases, courts do not appear to consider that they have the power to recategorize the agreement in a manner contrary to the intention expressly stated by all parties thereto.[257]

107. In *Obligation to Negotiate Access to the Pacific Ocean*, the Court held that the intention to be legally bound, "*in the absence of express terms indicating the existence of a legal commitment*, may be established on the basis of an objective examination of all the

[252] See, for example, A/CN.4/772, para. 122.

[253] See section B below for further details.

[254] See, for example, art. 30 (2) of the 16 April 2018 agreement for the reciprocal promotion and protection of investments between the Argentine Republic and the United Arab Emirates: "An interpretation jointly formulated and agreed upon by the State Parties with regard to any provision of this Agreement shall be binding on any Arbitral Tribunal established thereunder."

[255] This scenario is similar to one in which the parties no longer disagree on the nature of the agreement (see, for example, *Maritime Dispute* (footnote 94 above), p. 24, para. 48: "In view of the above, the Court observes that it is no longer contested that the 1952 Santiago Declaration is an international treaty").

[256] In contrast, the "inclusion of a provision addressing the entry into force" of an agreement, for example, is merely "indicative of the instrument's binding character" (*Maritime Delimitation in the Indian Ocean* (see footnote 50 above), p. 21, para. 42).

[257] The question of the possible existence of a power of recategorization was raised in the first report (A/CN.4/772, para. 125). As shown by their preliminary comments, the Commission members tended to doubt the existence of such a power (see A/79/10, para. 259).

evidence".[258] The Court proceeded in this manner in the specific case of the "Acta Protocolizada". It found that "the penultimate clause of these minutes records that the Foreign Minister of Bolivia stated that 'the present declarations do not contain provisions that create rights, or obligations for the States whose representatives make them'. The Chilean Minister Plenipotentiary did not contest this point. *Thus, even if* a statement concerning an obligation … had been made by Chile, this would not have been part of an agreement between the Parties."[259]

108. In the *Chagos* arbitration, the Arbitral Tribunal also stated that the intention for an agreement to be either binding or non-binding as a matter of law must be "clearly expressed or is otherwise a matter for objective determination".[260] The Tribunal thus noted, first, that the parties "did not themselves characterize the status of the 1965 Agreement either at its conclusion or at the moment of Mauritian independence" before, "in turn", examining "objectively" the nature of the agreement.[261]

109. In the aforementioned judgment of the full Court of the Court of Justice of the European Communities, the latter similarly ruled that it was not necessary to consider the specific meaning of the terms of the agreement (in particular the words "should" and "will") (and *a fortiori* other elements) in order to establish its nature, since the intention of the parties "is clearly expressed … in the text of the Guidelines itself, paragraph 7 of which specifies that the purpose of the document is to establish guidelines which regulators of the United States Federal Government and the services of the Commission 'intend to apply on a voluntary basis'." In those circumstances, "it need only be stated that on the basis of that information, the parties had no intention of entering into legally binding commitments when they concluded the Guidelines."[262]

2. Practice

110. The comments made by States in the Sixth Committee show that they tend to attach importance to any clause expressly specifying the nature of an agreement. Some States argued that, where a clear and specific clause was included, it was fundamentally important[263] and outweighed any objective indicators, to which recourse would be unnecessary in such cases.[264] Two States qualified this view by pointing out that such a clause might not, on its own, be entirely determinative.[265] Greece noted that this was due to the growing practice of expressly stating in the agreement that it was non-legally binding, whereas several other elements of the text could lead to a different conclusion.[266] Malaysia and the Russian Federation expressed great reluctance to accept the idea that a court could recategorize an agreement, particularly when it contained a clause expressly indicating its nature.[267]

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[258] *Obligation to Negotiate Access to the Pacific Ocean* (see footnote 37 above), p. 539, para. 91 (emphasis added).

[259] *Ibid.*, p. 543, para. 106 (emphasis added).

[260] *Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland* (see footnote 96 above), p. 538, para. 426.

[261] *Ibid*., para. 427.

[262] Court of Justice of the European Communities, Case C-233/02 (see footnote 186 above), para. 43.

[263] Poland (A/C.6/79/SR.28, para. 51).

[264] Romania (A/C.6/79/SR.28, para. 65); Czechia (A/C.6/79/SR.29, para. 14). See also the somewhat more ambiguous position of the Islamic Republic of Iran (*ibid*., para. 133).

[265] Ireland (A/C.6/79/SR.28, para. 100); Cyprus (A/C.6/79/SR.29, para. 121).

[266] Greece (A/C.6/79/SR.30, para. 89). In one author's view, another reason that national guidelines do not always give decisive weight to express clauses is that the nature of the agreement may change over time in the light of subsequent practice: see Caroline Chaux, "Distinguer les accords juridiquement contraignants des accords juridiquement non contraignants : étude des lignes directrices nationales", RGDIP, vol. 128 (2024), pp. 39–70, at pp. 51–53.

[267] Malaysia (A/C.6/79/SR.30, para. 38) (according to the written version of the statement by Malaysia posted on the website of the Sixth Committee (30th meeting, https://www.un.org/en/ga/sixth/79/summaries.shtml), such reclassification should be rare and only considered in exceptional circumstances where significant ambiguities exist or where the intentions of the parties are clearly at odds with the language of the agreement; if a domestic judicial body were to reclassify an agreement, it could undermine the separation of powers); Russian Federation (A/C.6/79/SR.30, para. 67).

111. These comments are complemented by the information submitted in writing to the Commission. Switzerland states that the existence of a specific clause is the first criterion to be used and that care should be taken to ensure that such a clause is not contradicted by the rest of the text of the instrument. Ultimately, Switzerland tends to conclude that, in the event of doubt as to the nature of an agreement, any interpretation that is contrary to such a clause is not permissible.[268] Some States give examples of specific clauses used in practice.[269] The United Kingdom states that, if the terminology used clearly indicates the status of the instrument, it is not necessary to include an express provision specifying the intention of the parties.[270] The Russian Federation notes that, in its practice, the text of an international act that is not a treaty must include a clause specifying that the act is not a treaty and does not create rights or obligations governed by international law.[271] France indicates that, to further clarify the nature of an instrument that is non-binding, it routinely advocates the inclusion, during the negotiations, of a standard clause stating that the instrument does not create any legal obligations between the signatories;[272] and when France agrees, exceptionally, to conclude a memorandum of understanding, it requests the inclusion of an express provision confirming that the text creates no legally binding obligations.[273]

112. The replies to the Committee of Legal Advisers on Public International Law questionnaire indicate that, in principle, a specific clause is sufficient to settle the question, and examples of this type of clause are given.[274] Other States specify in their national guidelines that it may be advisable, when adopting an agreement, to include a provision that dispels any ambiguity.[275]

113. Contemporary practice attests to the use of such express indications.

114. The very title of the text may provide an immediate and express characterization of its nature. One example is the "Non-legally Binding Authoritative Statement of Principles" on forests adopted at the 1992 Rio Conference.[276]

115. In other cases, this role is played by a provision within the agreement indicating either that it contains binding provisions[277] or that nothing in it is intended to create a binding agreement or rights or obligations.[278]

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[268] See the information submitted by Switzerland, sect. 3 (a).

[269] See the information submitted by Guatemala, p. 2; by Ireland, p. 1; and by the Kingdom of the Netherlands (attached brochure on memorandums of understanding, para. 4.4).

[270] Information submitted by the United Kingdom, para. 7. The same position is expressed by New Zealand in *International Treaty Making: Guidance for government agencies on practice and procedures for concluding international treaties and arrangements* (September 2021), p. 35; and on p. 3 of the views from the United States on the Inter-American Juridical Committee guidelines (footnote 85 above).

[271] Information submitted by the Russian Federation, para. 5, last point.

[272] Information submitted by France, p. 5.

[273] *Ibid*., p. 3.

[274] See the replies to question 5 of the questionnaire from Hungary, Ireland, Italy, the Netherlands (Kingdom of the), Norway, the Republic of Korea and the European Union.

[275] See the information submitted by Poland, p. 3; "Guide des bonnes pratiques en matière de négociation et de conclusion des engagements internationaux de la France" (footnote 224 above), p. 11.

[276] *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 the "Non-legally binding instrument on all types of forests" annexed to General Assembly resolution 62/98 of 17 December 2007 (section II (2) (a) of the instrument states that "The instrument is voluntary and non-legally binding").

[277] See, for example, art. XXII (2) of the Memorandum of Understanding on Establishing the ASEAN-China Centre between the Governments of the Member States of the Association of Southeast Asian Nations and the Government of the People's Republic of China, of 25 October 2009.

[278] See, for example, art. 15 (a) of the Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, of 29 January 2009; art. 16 of the Charter of the Financial Stability Board (2009); para. 7 of the Memorandum of Understanding on the Framework for the Restitution of Illegally Acquired Assets Forfeited in Switzerland to the Benefit of the Population of the Republic of Uzbekistan between the Swiss Federal

116. An agreement may also, more indirectly, state that it is not eligible for registration under Article 102 of the Charter of the United Nations.[279] In still other cases, the type of agreement to be concluded is made clear at the start of the negotiations.[280]

3. Doctrine (including codification work)

117. It seems to follow from certain passages in the work of the Institute of International Law that when the intention is expressly declared in an agreement, it is decisive.[281] In the work of the Inter-American Juridical Committee, guideline 3.3, "[s]pecifying the type of agreement concluded", states that "[t]o avoid inconsistent views on the binding status of an agreement or its governing law, participants should endeavor to specify expressly the type of agreement reached whether in the agreement text or in communications connected to its conclusion", and includes a table with sample text for "specifying" the type of agreement.[282] The commentary to guideline 3.3 gives a few examples, including the clarification in the Helsinki Accords that the agreement is not eligible for registration under Article 102 of the Charter of the United Nations. Guideline 3.4 does not seem to require the use of other indicators except in the absence of such a specification. Guideline 3.6 nevertheless suggests that in the event of ambiguity or inconsistency in the "evidence indicative of an agreement's status", recourse should be had to "a holistic analysis that seeks to reconcile both the objective evidence and the participants' shared intentions",[283] which could mean that an express indication specifying the nature of the agreement might not be decisive in all cases.

118. Authors who have taken a position on this point generally tend to consider that if the drafters of an agreement have taken care to expressly specify its status, this indication is conclusive for establishing their intention[284] or, at the very least, that the intention will not be

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Council and the Government of the Republic of Uzbekistan, of 8 September 2020; the final provision of the Joint Declaration establishing a migration partnership between the Islamic Republic of Mauritania and the European Union, of 7 March 2024; (between ministries) para. 10 of the Memorandum of Understanding on Cooperation in Sports between the Ministry of Youth Affairs and Sports (India) and the Ministry of Culture, Gender, Entertainment and Sport (Jamaica), of 1 October 2024; (between administrative authorities) para. 10 of the memorandum of understanding between the National Institute of Metrology of the People's Republic of China and the Government of Australia, as represented by the National Measurement Institute, of 12 June 2024, or para. 8 of the Memorandum of Understanding between the Survey of India and the Federal Service for State Registration, Cadastre and Cartography (The Russian Federation), of 8 July 2024; (between cities) the Memorandum of Understanding Between The City of London Corporation and Tokyo Metropolitan Government, of 4 December 2017; (between national courts) art. XVII, second paragraph, of the Memorandum of Understanding on Cooperation between the Supreme People's Court of the People's Republic of China and the Supreme Court of the Republic of Singapore on Information on Foreign Law, of 3 December 2021; (between international organizations) sect. H.12 of the Memorandum of Understanding between the World Customs Organization (WCO) and the Intergovernmental Organisation for International Carriage by Rail (OTIF), of 10 July 2017.

279 See, for example, sect. 13 of "The Artemis Accords. Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes" of 13 October 2020. The 1975 Helsinki Final Act, which contains a clause of this type, is generally considered to be non-legally binding for this very reason (even though it contains terms such as "agree" and "express their willingness" and its final clauses are rather formal).

280 See the examples given in the syllabus for the present topic (A/77/10, annex I), para. 19. For a more recent example, see para. 4 of General Assembly resolution 79/128 of 4 December 2024, in which the Assembly "[d]ecides to elaborate and conclude a legally binding instrument on the protection of persons in the event of disasters, without prejudice to the legal effects of any particular provisions contained therein". For an example of a case where uncertainties as to the nature of a "multilateral instrument" remained during its negotiation, see Emmanuel Decaux, "La forme et la force obligatoire des codes de bonne conduite", *Annuaire français de droit international*, 1983, pp. 81–97, at pp. 87–91.

281 See the exploratory study of 15 September 1976 by Fritz Münch, *Yearbook of the Institute of International Law*, 1983, vol. 60, Part I (Session of Cambridge, 1983), pp. 324 and 325.

282 See the Guidelines of the Inter-American Juridical Committee (footnote 85 above).

283 *Ibid*.

284 See, for example, Anthony Aust, "Alternatives to Treaty-Making: MOUs as Political Commitments", in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties*, 1st ed., Oxford, Oxford University Press,

difficult to establish in such a case[285] or that there will be no doubt as to the intention.[286] This was also the view expressed by Hersch Lauterpacht in his first report to the Commission on the law of treaties: "the absence of a legal obligation is not open to doubt when the parties expressly disclaim the intention to assume an obligation of this nature".[287] Some authors, however, seem to take the view that the presence of an express indication is not necessarily decisive in all circumstances, though their positions are not without ambiguity.[288]

4. Proposed draft conclusion

119. In the light of the foregoing, the following draft conclusion is proposed:

Draft conclusion 6. Existence of an express indication

The fact that all the parties to an agreement expressly indicate that it is or it is not legally binding under international law is sufficient to identify their intention.

120. The term "indication" has been chosen rather than "clause" or "provision" to take account of variations in national practice. As has been seen, some States consider that a specific *clause* is not necessary provided that the *terms* used expressly indicate the nature of the agreement. Furthermore, the draft conclusion does not say that the indication must appear "in the agreement", as there is nothing to prevent its being formulated elsewhere. Lastly, the word "generally" could be inserted before the adjective "sufficient" to take account of practice and doctrine, which tend to show that an express indication is not necessarily decisive on its own in all situations.

2012, pp. 46–72, at pp. 50 and 51; Hill, *Aust's Modern Treaty Law and Practice* (footnote 239 above), p. 49; Andrea Spagnolo, "The Conclusion of Bilateral Agreements and Technical Arrangements for the Management of Migration Flows: An Overview of the Italian Practice", *The Italian Yearbook of International Law*, vol. 28 (2018), pp. 211–230, at p. 219.

285 See, for example, R.R. Baxter, "International Law in 'Her Infinite Variety'", *International and Comparative Law Quarterly*, vol. 29 (1980), pp. 549–566, at p. 558; Bradley, Goldsmith and Hathaway, "The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis" (footnote 240 above), p. 1326; d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (footnote 246 above), pp. 183 ff.; Mensi, "The Identification of International Non-Binding Agreements Through the Lens of Subjective and Objective Indicators: Fiction or Reality?" (footnote 166 above), pp. 427–429; Münch, "Comments on the 1968 draft convention on the law of treaties. Non-binding Agreements" (footnote 239 above), p. 3; Meyer, "Alternatives to Treaty-Making – Informal Agreements" (footnote 239 above), p. 79; Nakanishi, "Defining the Boundaries of Legally Binding Treaties – Some Aspects of Japan's Practice in Treaty-Making in Light of State Practice" (footnote 240 above), p. 190; Tamada, "The Japan-South Korea Comfort Women Agreement: Unfortunate Fate of a Non-Legally Binding Agreement" (footnote 247 above), p. 228; Andrea Zimmermann and Nora Jauer, "Legal shades of grey? Indirect legal effects of 'Memoranda of Understanding'", *Archiv des Völkerrechts*, vol. 39, No. 3 (September 2021), pp. 278–299, at p. 297.

286 Aust, "The Theory and Practice of Informal International Instruments" (see footnote 240 above), p. 802 (giving as an example an explicit indication in the preamble of a bilateral declaration); or Philippe Gautier, "Non-Binding Agreements", *Max Planck Encyclopedia of Public International Law*, May 2022, para. 16.

287 A/CN.4/63, p. 27.

288 See, for example, Andrés B. Muñoz Mosquera, "Memorandum Of Understanding (MOU): A Philosophical and Empirical Approach (Part I)", *NATO Legal Gazette*, July 2014, pp. 55–69, and "Memorandum Of Understanding (MOU): A Philosophical and Empirical Approach (Part II)", *NATO Legal Gazette*, October 2016, pp. 34–47, footnote 32, stating that "there is not full guarantee" that such an express indication would prevent a tribunal from attributing legal effects to a memorandum of understanding (which does not necessarily mean that it would therefore be a treaty); as for the reservation expressed by Meyer in "Alternatives to Treaty-Making – Informal Agreements" (footnote 239 above), p. 79, footnote 136, noting that "A statement of intent still might not conclusively resolve an instrument's status in all circumstances", this is based on a remark made by Roberto Ago during the Commission's work on the law of treaties, which concerned the law applicable to the agreement and not its nature (see *Yearbook of the International Law Commission, 1962*, vol. I, p. 52, paras. 18 and 19).

C. Absence of an express indication: relevant indicators

121. In the absence of express terms indicating the character of an agreement, the intention of its authors is established on the basis of an objective examination of other relevant elements, following the general guidelines identified above (see section A and draft conclusion 5 above). An important aspect of the topic is thus the identification of precisely which elements, in the absence of any express indication, are relevant for determining whether an agreement is legally binding or not.

122. Jurisprudence and doctrine, and much of the information provided by States in the context of the discussions on the topic or revealed by their national practices, provide a basis on which to identify and clarify the indicators deemed relevant. The aim of this section is to provide an overview of such indicators. However, the Special Rapporteur did not think it appropriate to propose any draft conclusions on these indicators at the current session, for two reasons.

123. First, as the material on which the Commission's work is based must be as representative as possible (a consideration to which the Commission members and the States in the Sixth Committee attached particular importance during the discussions on the topic),[289] it would be wise to take advantage of an additional year in which to gather more information on national practices with regard to relevant indicators. To this end, it would be useful to renew the Commission's request for information from States and, if possible, to extend it to international organizations insofar as their agreements are covered by the present topic.

124. Second, it seems to the Special Rapporteur that, given the number of such indicators, the clarifications that some of them require and the importance of the role they play in State practices and national guidelines, it would be useful to first hold a preliminary debate in the Commission on how these indicators should be incorporated into the draft conclusions. They could take the form of a very concise draft conclusion that merely provides an indicative list and refers to the commentary for further information. They could also take the form of several draft conclusions that go into more detail on each of these indicators and provide the necessary clarifications on their use. Another possibility would be to include model wording, best practices or, for information purposes, a compendium of existing national guidelines on the subject, bearing in mind that the added value of the Commission's work often consists in identifying, collecting and sharing relevant elements of practice. In the Special Rapporteur's view, the Commission's approach to these indicators should be guided by the aim of producing an outcome that is as useful to States as possible and is not overly general or abstract. A general discussion at the current session on how to structure and formulate the draft conclusions on relevant indicators would enable the Special Rapporteur to propose suitable draft texts in 2026 and to appropriately guide the work to be carried out by the Drafting Committee.

125. Proceeding in this manner is all the more necessary in view of the difficulty of certain questions that arise in practice, which should not be underestimated. The information submitted by Switzerland is telling in this regard. After outlining its practice, Switzerland highlights a number of practical difficulties that arise when the partners' shared intention as to the nature of the instrument remains uncertain, despite the application of the usual methodology. This would be the case in three scenarios: when the instrument is drawn up in legal language but contains wording that states that it is not legally binding; when it is drafted in legal language even though the negotiations or circumstances suggest that the partners did not intend to conclude a treaty; and when the instrument contains no express language in this regard but is worded ambiguously.[290]

126. It should also be noted that the relevant indicators play a dual role and should thus not necessarily, in an outcome intended to be of practical use, be considered or presented in the

[289] See A/79/10, para. 231; and Singapore (A/C.6/79/SR.28, para. 103); Chile (A/C.6/79/SR.29, para. 32); France (*ibid*., para. 82); Thailand (*ibid*., para. 115); Islamic Republic of Iran (*ibid*., para. 132); Malaysia (A/C.6/79/SR.30, para. 36); El Salvador (*ibid*., para. 48); Bulgaria (*ibid*., para. 110); Philippines (*ibid*., para. 124); Mexico (*ibid*., para. 142); as well as Guatemala (A/C.6/79/SR.29, para. 102), Switzerland (*ibid*., para. 106) and Colombia (A/C.6/79/SR.30, para. 21).

[290] Information submitted by Switzerland, pp. 3–5.

same way depending on the role they are called upon to play. These indicators are used both upstream, before a text has been adopted, for the benefit of the negotiators (as elements to be taken into account so that the wording of the agreement will reflect the negotiators' intention to be or not to be legally bound; this is generally the role of guidelines and other guidance drawn up at the national level), and downstream, after a text has been adopted, for the benefit of those who are called upon to apply it (as a means of determining whether the agreement is legally binding or not, should any doubt arise as to its nature after it has been adopted).

127. For this reason, the conclusions drawn from jurisprudence will not necessarily be the same as those drawn from practice, as courts make their rulings after agreements have been adopted and are not called upon to guide their drafting. As a result, the indicators identified in State practice are potentially more numerous, or ordered differently, in comparison to what might be deduced from an examination of jurisprudence alone, which provides only an incomplete picture of the indicators that might be relevant. Furthermore, what a court decides in one case may not necessarily apply in another, given the particular practice of the States concerned in drafting non-legally binding international agreements (with such practice certainly being a parameter to be taken into account in assessing the intention of the parties to the agreement).[291]

128. For informational purposes, the Special Rapporteur has chosen to examine jurisprudence before practice in the following pages, to provide an initial overview of the issue of indicators before turning to the most recent practice in this regard. The presentation of the material in this order does not, of course, affect the substantive conclusions to be drawn from it.

129. In the light of these considerations, the Special Rapporteur will outline the current state of jurisprudence (sect. 1), practice (sect. 2) and doctrine (sect. 3) on the question of relevant indicators. As a reminder, a preliminary overview of this question appeared in the first report, in which the Special Rapporteur noted that there were many indicators that could be used and proposed an initial indicative list;[292] he also raised the question of whether there is a hierarchy between these various indicators.[293] The discussions held on the first report at the Commission's seventy-fifth session enabled members to make preliminary comments on these aspects of the topic.[294]

1. Jurisprudence relating to indicators

(a) Terms used

130. In jurisprudence, an agreement's text or wording is a key indicator for determining its nature. As mentioned above, the International Court of Justice has always had regard (and at one point even stated that it must have regard "above all") to the "actual terms" of the text and the "circumstances in which it was drawn up".[295] In the *Aegean Sea Continental Shelf* case, for example, the Court focused on the way in which the paragraphs of the communiqué were formulated and on the terms used therein.[296] Similarly, in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the Court examined the terms of the 1990

[291] If, for example, two States conclude a bilateral agreement which they decide to call a "memorandum of understanding" and the national practice of both States is to reserve such a title for non-legally binding agreements, this is certainly an indicator to be taken into account.

[292] A/CN.4/772, para. 121.

[293] *Ibid.*, para. 123.

[294] A/79/10, paras. 254–257.

[295] See section A (1) (a) of this chapter above. The Court has also advocated this approach in relation to Security Council resolutions. Thus, in its 1971 advisory opinion on *Namibia*, the Court stated that "[t]he language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 53, para. 114).

[296] *Aegean Sea Continental Shelf* (see footnote 37 above), pp. 39 and 40, para. 97, and p. 43, para. 105.

Minutes and concluded that they created rights and obligations in international law.[297] This approach was followed in other cases as well.[298]

131. The analysis of the terms, the text or the wording of an agreement is aimed at answering two questions: whether any points of agreement have been recorded and whether they have been recorded in the form of legal commitments. The Court notes, for example, in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, that the 1990 Minutes "enumerate … commitments"; they "are not a simple record of a meeting"; "they do not merely give an account of discussions and summarize points of agreement and disagreement".[299] In *Maritime Delimitation in the Indian Ocean*, the Court notes that the memorandum of understanding at issue is a document "in which Somalia and Kenya record their agreement on certain points governed by international law".[300] In contrast, "the terms of the 1974 Agreed Minutes" prompted the International Tribunal for the Law of the Sea, in *Delimitation of the maritime boundary in the Bay of Bengal*, to rule that the Minutes were only "a record of a conditional understanding" and not a legally binding agreement.[301] The same is true of *Obligation to Negotiate Access to the Pacific Ocean*: "the 'Acta Protocolizada' does not enumerate any commitments and does not even summarize points of agreement and disagreement."[302] Similarly, to "refer to an agreement … to be reached in the future" in a joint statement "indicates that no such agreement had been reached".[303] Even where a commitment is made, its terms must still demonstrate the parties' intention to be legally bound. The terms must convey or imply acceptance of a legal obligation.[304]

132. The Arbitral Tribunal in the *South China Sea* case elaborated substantially on drafting and terminology issues, and its decision exemplifies the attention that must be paid to the terms used in a text. According to the Tribunal,

> with respect to its terms, the [2002 China-ASEAN Declaration on the Conduct of Parties in the South China Sea (DOC)] contains many instances of the signatory States simply "reaffirming" existing obligations. For example, in paragraph 1, they "reaffirm their commitment" to the UN Charter, the Convention, and other "universally recognized principles of international law." In paragraph 3, they "reaffirm their respect and commitment to the freedom of navigation and overflight" as provided in the Convention. In paragraph 10, they reaffirm "the adoption of a code of conduct in the *South China Sea* would further promote peace and stability in the region." The only instance where the DOC uses the word "agree" is in paragraph 10 where the signatory States "agree to work, on the basis of consensus, towards the eventual attainment" of a Code of Conduct. This language is not consistent with the creation of new obligations but rather restates existing obligations pending agreement on a Code that eventually would set out new obligations. The DOC contains other terms that are provisional or permissive, such as paragraph 6, outlining what the Parties

297 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 48 above), p. 121, paras. 24 and 25.

298 See, in particular, *Obligation to Negotiate Access to the Pacific Ocean* (footnote 37 above), p. 548, para. 126. See also African Court on Human and Peoples' Rights, *Alex Thomas v. United Republic of Tanzania*, No. 005/2013, judgment of 20 November 2015, para. 136, footnote 29 ("Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort").

299 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 48 above), p. 121, para. 25.

300 *Maritime Delimitation in the Indian Ocean* (see footnote 50 above), p. 21, para. 42.

301 *Delimitation of the maritime boundary in the Bay of Bengal* (see footnote 54 above), p. 35, para. 92.

302 *Obligation to Negotiate Access to the Pacific Ocean* (see footnote 37 above), p. 543, paras. 105 and 106. For further examples, see *ibid.*, p. 550, para. 135, and p. 551, para. 138.

303 *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 4, at p. 65, para. 192. See, in the same vein, *Repertory of Practice of United Nations Organs*, vol. V (footnote 118 above), Article 102, para. 31 (e): "Minutes of meetings between the representatives of Governments, where a majority of items minuted involved observations of fact, explanations, statements of views or notes of matters left for further consideration, were not considered to constitute, in themselves, a treaty or international agreement in the sense of the Charter".

304 *Obligation to Negotiate Access to the Pacific Ocean* (see footnote 37 above), p. 546, para. 118, and pp. 549 and 550, para. 132.

> "may explore or undertake," and paragraph 7, stating that the Parties "stand ready to continue their consultations and dialogues."
>
> On the other hand, some of the terms used in the DOC are suggestive of the existence of an agreement. For example, the word "undertake", used in paragraph 4 ("undertake to resolve their … disputes by peaceful means … through friendly consultations and negotiations by sovereign states directly concerned") and in paragraph 5 ("undertake to exercise self-restraint"). As China mentions, the Court observed in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* that the word "undertake" is "regularly used in treaties setting out the obligations of Contracting Parties" and found the ordinary meaning of "undertake" to be "give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation." However, the Tribunal notes a number of differences between paragraph 4 of the DOC and Article 1 of the Genocide Convention. First, the Court was operating in the context of a treaty, whose legally binding character was not in any doubt. The examples cited by the Court … were also indisputably legally binding treaties. The Court was not seeking to determine whether an agreement on the submission of disputes was binding (as it was in *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* and *Land and Maritime Boundary (Cameroon v. Nigeria)*), but rather whether Article 1 of the Genocide Convention imposed an obligation to prevent genocide that was separate and distinct from other obligations in the Genocide Convention. Notably, the Court looked beyond the ordinary meaning of the word "undertake" to verify its understanding. It thus gave weight to the object and purpose of the Genocide Convention and the negotiating history of the relevant provisions.
>
> When a similar exercise is undertaken with respect to the DOC, it becomes apparent to this Tribunal that the DOC was not intended to be a legally binding agreement with respect to dispute resolution.[305]

133. Comparable reasoning can be found in the award in the arbitration between the Province of Newfoundland and the Province of Nova Scotia, for example on the meaning to be attributed to the word "be" used on its own in a joint statement, where it was necessary to determine whether it meant "should be", "will be", "shall be", "are to be", or simply "are", a point that the Tribunal resolved by analysing the tenor of the statement as a whole.[306] By analogy, a comparable approach (but one that is based on the rules of treaty interpretation and thus also takes other elements into consideration in accordance with those rules) is followed in jurisprudence on the question of whether a given treaty provision creates legal obligations or not. Linguistic markers are also used in such cases.[307]

(b) Form and title

134. Textual indicators could be considered to include the form taken by an agreement and/or the title given to it. In jurisprudence, however, these two indicators (form and title) are not, at least in principle, considered relevant. This appears to be in line with the definition of a treaty in the Vienna Convention on the Law of Treaties, according to which an agreement governed by international law is a treaty regardless of how it is embodied and whatever its designation. In the *South West Africa Cases*, for example, the Court stated that "[t]he fact

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[305] *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China* (see footnote 56 above), pp. 87 and 88, paras. 215–217 (footnotes omitted). For another example, see *ibid.*, pp. 97 and 98, para. 243 (which states that the language used is "suggestive of an aspirational arrangement rather than a legally binding agreement").

[306] *Ad hoc* arbitration between the Province of Newfoundland and the Province of Nova Scotia (see footnote 105 above), p. 465, para. 4.21 and, more broadly, pp. 463 ff., paras. 4.16 ff. and p. 492, para. 7.3.

[307] See, for example (in addition to the reference to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* in the above-quoted extract from the award in the *South China Sea* case), *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 292, at p. 321, para. 92; *Arbitral Award of 3 October 1899 (Guyana v. Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 455, at pp. 475 and 476, para. 72.

that the Mandate is described in its last paragraph as a Declaration [*exemplaire* in the French text] is of no legal significance. … Terminology [meaning that of the title] is not a determinant factor as to the character of an international agreement or undertaking. In the practice of States and of international organizations and in the jurisprudence of international courts, there exists a great variety of usage; there are many different types of acts to which the character of treaty stipulations has been attached." [308] An agreement entitled "Memorandum of Understanding", for example, may be found to be a treaty upon examination of the relevant indicators.[309] In the *Aegean Sea Continental Shelf* case, the Court reiterated that "it does not settle the question [of the nature of the act] simply to refer to the form – a communiqué – in which that act … is embodied".[310] In the same spirit, the Court observed in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* "that international agreements may take a number of forms and be given a diversity of names", and therefore focused on indicators relating to the actual terms and the circumstances in which the 1990 Minutes had been drawn up.[311] In the view of the International Tribunal for the Law of the Sea, "what is important is not the form or designation of an instrument but its legal nature and content".[312]

135. A more nuanced view can nonetheless be taken. The fact that the form and title are not "what is important" or are not "determinant" (to reflect the terms used in the above excerpts from decisions) does not necessarily mean that they are irrelevant. In the *South China Sea* case, the Tribunal held that, "[w]hile it is true that the designation of an instrument is not decisive", it was not without relevance to note that "none of the instruments in question are designated as agreements but rather are in the form of joint press statements and reports of meetings of officials of varying ranks".[313] In another passage of its decision, it notes that "the DOC shares some hallmarks of an international treaty. It is a formal document with a preamble, it is signed … and the signatory States are described in the DOC as 'Parties'".[314] That said, insofar as the other indicators, including the terms used, were not suggestive of a legally binding commitment, the Tribunal did not give decisive weight to these formal elements in this case.[315]

(c) Types of clause

136. The types of clause found in an agreement can be a relevant indicator (particularly final clauses). In their joint dissenting opinion in the *South West Africa Cases*, Judges Spender and Fitzmaurice thus noted that the fact that an adjudication clause "is in the instrument may indeed be a pointer to the character of the latter, may afford some evidence as to the nature of the instrument".[316] The same approach was followed by the Court in *Maritime Delimitation in the Indian Ocean*: the "inclusion of a provision addressing the entry into force of the MOU is indicative of the instrument's binding character".[317] Another example is the position taken by a panel of the World Trade Organization (WTO) Dispute Settlement Body in *Mexico – Measures Affecting Telecommunications Services*. In this case, the fact that an "understanding" was considered not to "give rise to action by Members under dispute settlement under the WTO" weighed in favour of the conclusion that it was not

[308] *South West Africa Cases* (see footnote 156 above), p. 331. See also the separate opinion of Judge Jessup, p. 402.

[309] See, for example, the Court's conclusion in *Maritime Delimitation in the Indian Ocean* (footnote 50 above), p. 24, para. 50. See also, concerning the Maroua Declaration, *Land and Maritime Boundary between Cameroon and Nigeria* (footnote 49 above), p. 429, para. 263.

[310] *Aegean Sea Continental Shelf* (see footnote 37 above), p. 39, para. 96.

[311] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 48 above), p. 120, para. 23.

[312] *Delimitation of the maritime boundary in the Bay of Bengal* (see footnote 54 above), p. 35, para. 89.

[313] *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China* (see footnote 56 above), p. 97, para. 242.

[314] *Ibid*., p. 86, para. 214.

[315] *Ibid*., pp. 87 ff., paras. 215 ff.

[316] *South West Africa Cases* (see footnote 156 above), p. 478.

[317] *Maritime Delimitation in the Indian Ocean* (see footnote 50 above), p. 21, para. 42.

binding.[318] To date, however, jurisprudence has not articulated a general approach to the different types of clause whose analysis would be relevant.

(d) Authorities having negotiated or adopted the agreement

137. The status of the authorities who negotiated or adopted an agreement is also a relevant indicator. As noted in the Vienna Convention on the Law of Treaties, the conclusion of a treaty requires the existence of "full powers" (arts. 7 and 8 of the Convention). The existence of full powers in a particular case could therefore suggest that the agreement concluded is a treaty. Conversely, however, the absence of such powers is not necessarily a sign that the agreement is not legally binding, since a State authority can enter into commitments under international law even without full powers, as shown by the regime governing unilateral acts of States. What seems to be decisive, therefore, is perhaps not so much the formal existence of full powers as the status of the authorities who negotiated and adopted the agreement. Jurisprudence sheds some light on this point.

138. In *Delimitation of the maritime boundary in the Bay of Bengal*, the International Tribunal for the Law of the Sea took account of the absence of full powers in reaching its conclusion that the 1974 Agreed Minutes were not a legally binding agreement. It observed that the head of the Burmese delegation was not an official who could engage his country without having to produce full powers and that "no evidence was provided to the Tribunal that the Burmese representatives were considered as having the necessary authority to engage their country pursuant to article 7, paragraph 1, of the Vienna Convention". It also noted that "this situation differs from that of the Maroua Declaration [in *Land and Maritime Boundary between Cameroon and Nigeria*] which was signed by the two Heads of State concerned", who, as such, had the capacity to engage their countries internationally.[319] Five years later, in *Maritime Delimitation in the Indian Ocean*, the International Court of Justice used the fact that the memorandum of understanding at issue "explicitly states that the two Ministers who signed it were 'duly authorized by their respective Governments' to do so" as a basis for determining its nature.[320]

139. The Arbitral Tribunal in the *Chagos* case found that, prior to the independence of Mauritius and given the provisions of British constitutional law applicable at the time, Mauritius and the United Kingdom "were legally disabled from expressing th[eir] commitment as a matter of international law for such time as Mauritius remained a colony".[321] The decision of the Arbitral Tribunal in the case between Newfoundland and Nova Scotia states that "[a] factor sometimes referred to as indicative of an intention to enter into treaty relations is the status and powers of the negotiators".[322]

140. Of course, the role of this indicator for the purposes of the topic will depend on whether or not agreements concluded between sub-State authorities of different States fall within the scope of the topic (see chap. III (C) above). As far as agreements of this type are concerned, what must be shown above all is not the existence of full powers in the sense of

[318] Report of the Panel (WT/DS204/R), adopted on 1 June 2004, paras. 7.124 and 7.125.

[319] *Delimitation of the maritime boundary in the Bay of Bengal* (see footnote 54 above), p. 36, para. 96. Under the rule contained in article 7 of the Vienna Convention on the Law of Treaties, Heads of State are "considered as representing their State" "without having to produce full powers".

[320] *Maritime Delimitation in the Indian Ocean* (see footnote 50 above), p. 22, para. 43.

[321] *Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland* (see footnote 96 above), p. 537, para. 424. The International Court of Justice endorsed this analysis in its 2019 advisory opinion: "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" (*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, at p. 137, para. 172). Nonetheless, it did not endorse the Tribunal's reasoning that the independence of Mauritius would have had the effect of "transforming the commitments made in 1965 into an international agreement" (*Reports of International Arbitral Awards*, vol. XXXI, p. 538, para. 425).

[322] *Ad hoc* arbitration between the Province of Newfoundland and the Province of Nova Scotia (see footnote 105 above), pp. 451 and 452, para. 3.19.

treaty law, but the actual capacity of the sub-State entities concerned to enter into commitments at the international level.[323]

(e) Circumstances in which the text was drawn up and adopted

141. As mentioned above, international courts attach importance to the circumstances in which a text was drawn up and adopted (following the formula derived in particular from the judgment in the *Aegean Sea Continental Shelf* case) or, to use the more recent formula employed by the International Court of Justice, to the "conditions of the negotiations".[324] This involves examining in particular the diplomatic correspondence that preceded the adoption of the text, as well as the positions taken during meetings or other discussions related to its drafting,[325] to the extent that such evidence is accessible. The circumstances to be considered are not only those that emerge from agreed documents. They can be deduced from a position taken by only one of the two States, in particular when it implies an intention to be bound. In the *Chagos* case, the Arbitral Tribunal relied on "the record of the United Kingdom's approach to the negotiations" as a relevant indicator of that State's intention to be bound.[326] The Arbitral Tribunal in the *South China Sea* case likewise relied on "[d]escriptions from contemporaneous documents leading up to and surrounding the adoption of the DOC" to deduce that "the DOC was not intended by its drafters to be a legally binding document".[327] The approach was the same in the arbitration between Newfoundland and Nova Scotia, where the Tribunal examined "the history of the discussions between the provinces, leading to the *Joint Statement*".[328]

142. In this last case, the Tribunal seems to have taken the view that the circumstances in which the text was drawn up and adopted encompass not only those preceding its adoption, but also those immediately following and directly connected with its adoption.[329] The Tribunal distinguished these circumstances from those which it classifies as "subsequent practice of the Parties" in a separate section of the award (for a discussion of subsequent practice, see section C (1) (i) of this chapter below).[330]

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[323] The position of the United Nations Secretariat on treaty registration is that agreements "where one of the parties does not possess the requisite international treaty-making capacity are neither registered, nor filed and recorded"; for example, the Secretariat "refrained from filing and recording an exchange of letters of 24 April 1986 between the United Nations and the City of Nagoya … since the latter did not have the requisite capacity" (*Repertory of Practice of United Nations Organs, Supplement No. 7*, vol. VI, *Articles 92–105, 108–111 of the Charter, covering the period 1 January 1985 to 31 December 1988*, Article 102, para. 7). This does not necessarily mean, however, that this agreement is not legally binding.

[324] *Obligation to Negotiate Access to the Pacific Ocean* (see footnote 37 above), p. 539, para. 91.

[325] *Aegean Sea Continental Shelf* (see footnote 37 above), pp. 41–43, paras. 100–104.

[326] *Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland* (see footnote 96 above), pp. 536 and 537, para. 423.

[327] *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China* (see footnote 56 above), pp. 88 and 89, para. 217. See also Court of Justice of the European Communities, Case C-233/02 (footnote 186 above), para. 44: "the history of the negotiations confirms that the intention of the parties not to enter into binding commitments was expressly reiterated throughout the negotiations on the Guidelines."

[328] *Ad hoc* arbitration between the Province of Newfoundland and the Province of Nova Scotia (see footnote 105 above), pp. 459 ff., paras. 4.3 ff., and pp. 471 ff., paras. 5.5 ff.

[329] *Ibid*., pp. 477 ff., paras. 5.17 ff.

[330] *Ibid*., pp. 483 ff., paras. 6.1 ff. A similar clarification can be found in the Commission's work on subsequent agreements and subsequent practice in relation to the interpretation of treaties: see paragraph (3) of the commentary to conclusion 4 of the conclusions adopted in 2018: "Article 31, paragraph 2, of the 1969 Vienna Convention provides that the 'context' of the treaty includes certain 'agreements' and 'instruments' that 'are made in connection with the conclusion of the treaty'. The phrase 'in connection with the conclusion of the treaty' should be understood as including agreements and instruments that are made in a close temporal and contextual relation with the conclusion of the treaty. If they are made after this period, then such 'agreements' and agreed upon 'instruments' constitute 'subsequent agreements' or subsequent practice under article 31, paragraph 3" (*Yearbook of the International Law Commission, 2018*, vol. II (Part Two), p. 33, footnotes omitted).

143. The Inter-American Court of Human Rights advisory opinion OC-10/89 of 14 July 1989 is particularly illustrative of the role played by the circumstances in which a text was drawn up and adopted. In this case, the States taking part in the advisory proceedings disagreed on the status of the American Declaration of the Rights and Duties of Man.[331] In response, the Court ruled that the Declaration "is not a treaty as defined by the Vienna Conventions because it was not approved as such". The Court recalled that the Declaration, which "was adopted by the Ninth International Conference of American States (Bogotá, 1948) through a resolution adopted by the Conference itself … was neither conceived nor drafted as a treaty". Although in 1945 it had been proposed that the text should be adopted as a convention, "[i]n the subsequent phase of preparation of the draft Declaration by the Inter-American Juridical Committee and the Ninth Conference, this initial approach was abandoned and the Declaration was adopted as a declaration, without provision for any procedure by which it might become a treaty … Despite profound differences, in the Sixth Committee of the Conference the position prevailed that the text to be approved should be a declaration and not a treaty … This same principle was confirmed on September 26, 1949, by the Inter-American Committee of Jurisconsults, when it said: 'It is evident that the Declaration of Bogotá does not create a contractual juridical obligation'".[332]

(f) Mode of adoption

144. The process followed to adopt an agreement is also a relevant indicator. In fact, it can legitimately be expected that an agreement concluded in accordance with the procedural rules applicable to the conclusion of treaties will be considered as such.[333] The International Court of Justice relied, for example, on the "instruments of ratification exchanged" between the two States to conclude, in the *Ambatielos* case, that a declaration formed part of a treaty and was therefore binding on the parties.[334] In *Maritime Delimitation in the Indian Ocean*, the Court attached importance to the "inclusion of a provision addressing the entry into force" of a memorandum of understanding and to the fact that this provision specified that the memorandum would enter into force "upon its signature" and did "not contain a ratification requirement".[335]

145. Some confusion may nonetheless arise between the question of whether or not an agreement is a treaty (the question of its nature) and that of whether a treaty was concluded without manifest violation of a rule of internal law of fundamental importance (the question of its validity, which is governed by the rule reflected in article 46 of the Vienna Convention on the Law of Treaties). In *Land and Maritime Boundary between Cameroon and Nigeria*, the Court distinguished between the two issues: only after establishing that the Maroua Declaration constituted a treaty did it address the arguments challenging the Declaration's validity on the grounds that it had not been ratified in compliance with the applicable rules.[336] This distinction also appears, albeit less clearly, in *Maritime Delimitation in the Indian Ocean*. On this occasion the Court seems to have analysed "the ratification requirement under Somali law" as part of its examination of the very nature of the memorandum of understanding.[337] In any event, it did not clearly distinguish between the question of the agreement's nature and that of its validity. It considered that "there is no reason to suppose that Kenya was aware that the signature of the Minister may not have been sufficient under Somali law to express, on behalf of Somalia, consent to a binding international agreement".[338]

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331 Advisory opinion OC-10/89, *Interpretation of the American Declaration of the Rights and Duties of Man within the framework of article 64 of the American Convention on Human Rights*, paras. 11–18.

332 *Ibid*., paras. 32–34.

333 Article 5 of the Convention on Treaties concluded in Havana on 20 February 1928 explicitly states that treaties are obligatory only after ratification (*Supplement to the American Journal of International Law*, vol. 29 (1935), pp. 1205–1207).

334 *Ambatielos case* (see footnote 156 above), pp. 42 and 43.

335 *Maritime Delimitation in the Indian Ocean* (see footnote 50 above), p. 21, para. 42, and p. 22, para. 45.

336 *Land and Maritime Boundary between Cameroon and Nigeria* (see footnote 49 above), pp. 429 ff., paras. 263 ff.

337 *Maritime Delimitation in the Indian Ocean* (see footnote 50 above), pp. 22 ff., paras. 45 ff. (to be read in the light of the paragraphs preceding paragraph 45), as well as, in particular, p. 23, para. 47.

338 *Maritime Delimitation in the Indian Ocean* (see footnote 50 above), p. 24, para. 49.

This question of whether the process or procedure followed for the adoption of the text should be regarded as a question of validity rather than an indicator of the agreement's binding or non-binding nature may merit more detailed examination.

(g) Registration, publication (at the international level)

146. Whether or not an agreement has been registered and/or published at the international level may also be a relevant indicator. In the *Ambatielos* case, the International Court of Justice relied on the fact that the official texts of the Treaty of Commerce and Navigation and the Declaration whose nature was in dispute had been transmitted to the League of Nations in Geneva "for registration, which led to their inclusion in the *League of Nations Treaty Series* under a single number" and a single heading referring to the "Treaty … and accompanying Declaration".[339] Similarly, in the *South West Africa Cases*, the Court held that "the fact that the Mandate … embodies a provision that it 'shall be deposited in the archives of the League of Nations' and that 'certified copies shall be forwarded by the Secretary-General of the League of Nations to all Powers Signatories of the Treaty of Peace with Germany', clearly implies that it was intended and understood to be an international treaty".[340] In the same spirit, it noted in *Maritime Delimitation in the Indian Ocean* that Kenya "considered the [memorandum of understanding] to be a treaty, having requested its registration in accordance with Article 102 of the Charter of the United Nations, and Somalia did not protest that registration until almost five years thereafter".[341]

147. Conversely, in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the Court held that non-registration or late registration did not necessarily mean that the 1990 Minutes were not an international agreement that was binding upon the parties, basing its reasoning on validity rather than the nature of the text under consideration.[342]

148. In *Delimitation of the maritime boundary in the Bay of Bengal*, the International Tribunal for the Law of the Sea did "not find it necessary to address the relevance, if any, of the lack of registration of the 1974 Agreed Minutes", as the Tribunal had already concluded that they were not legally binding.[343] This could suggest that this indicator is less important than or secondary to the indicators discussed previously.

149. It may be noted in passing that the same caution seems to characterize the practice of the United Nations Secretariat under Article 102 of the Charter. The Secretariat states that registration of an instrument "does not imply a judgement by the Secretariat on the nature of the instrument" and does not confer on it "the status of a treaty or an international agreement if it does not already possess that status".[344]

(h) Domestic procedure

150. The way in which an agreement is regarded in the parties' domestic legal systems also seems to be a relevant indicator. It is true that, in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the Court appeared to rule out this type of indicator by noting the absence of "anything in the material before the Court which would justify deducing from any disregard by Qatar of its constitutional rules relating to the conclusion of treaties that it did not intend to conclude, and did not consider that it had concluded, an

339 *Ambatielos case* (see footnote 156 above), p. 42.

340 *South West Africa Cases* (see footnote 156 above), pp. 331 and 332.

341 *Maritime Delimitation in the Indian Ocean* (see footnote 50 above), pp. 21 and 22, para. 42.

342 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 48 above), p. 122, para. 29: "Non-registration or late registration, on the other hand, does not have any consequence for the actual validity of the agreement, which remains no less binding upon the parties. The Court therefore cannot infer from the fact that Qatar did not apply for registration of the 1990 Minutes until six months after they were signed that Qatar considered, in December 1990, that those Minutes did not constitute an international agreement. The same conclusion follows as regards the non-registration of the text with the General Secretariat of the Arab League."

343 *Delimitation of the maritime boundary in the Bay of Bengal* (see footnote 54 above), p. 37, para. 99.

344 *Treaty Handbook* (United Nations publication, Sales No. E.12.V1), revised edition of 2013, sect. 5.3.1, available from the Treaty Section website (https://treaties.un.org/Pages/Resource.aspx?path=Publication/TH/Page1_en.xml).

instrument of that kind" and stating that any such intention, "even if shown to exist", could not "prevail over the actual terms of the instrument in question".[345] This passage does not, however, rule out the possibility that the procedure followed domestically may *confirm* the nature of an agreement as revealed by the examination of other indicators. Along the same lines, the International Tribunal for the Law of the Sea considered, in *Delimitation of the maritime boundary in the Bay of Bengal*, that "[t]he fact that the Parties did not submit the 1974 Agreed Minutes to the procedure required by their respective constitutions for binding international agreements is an additional indication that the Agreed Minutes were not intended to be legally binding".[346]

(i) Subsequent practice

151. A final indicator found in jurisprudence is the subsequent practice of the authors of an agreement. Jurisprudence seems somewhat inconclusive as to the role that this indicator can play.

152. First, it should be noted that the International Court of Justice, in setting out the principles underpinning its reasoning, has apparently excluded any consideration of subsequent practice. In the *Aegean Sea Continental Shelf* case, it states that the question "essentially depends on the nature of the act" and that it must "have regard above all" to the communiqué's "actual terms and to the particular circumstances in which it was drawn up",[347] which seems to exclude, or at least minimize, the role of factors subsequent to the instrument's adoption. Furthermore, the dictum in Obligation to Negotiate Access to the Pacific Ocean is not without ambiguity. The Court calls for an examination of "all the evidence" to establish intention, but also states that "the terms used by the parties, the subject-matter and the conditions of the negotiations must demonstrate an intention of the parties to be legally bound".[348] Subsequent factors are therefore apparently excluded from what can be used for this purpose.

153. Nevertheless, this does not mean that subsequent practice cannot be taken into account at least for purposes of confirmation. In the *Aegean Sea Continental Shelf* case, for example, the Court states that "[t]he information before the Court concerning … the diplomatic exchanges subsequent to the Brussels Communiqué appears to confirm that the two Prime Ministers did not … undertake an unconditional commitment".[349] In the *Kasikili/Sedudu Island (Botswana/Namibia)* case, the Court first relied on the documents whose nature was in dispute before invoking subsequent practice, but the weight that it gave to the latter was seemingly equal to or even greater than that of the former. The Court decided that, "[h]aving examined the documents referred to above, the Court cannot conclude therefrom that in 1984-1985 South Africa and Botswana had agreed on anything more than the despatch of the joint team of experts. In particular, the Court cannot conclude that the two States agreed in some fashion or other to recognize themselves as legally bound by the results of the joint survey carried out in July 1985. Neither the record of the meeting held in Pretoria on 19 December 1984 nor the experts' terms of reference serve to establish that any such agreement was reached. *Moreover*, the subsequent correspondence between the South African and Botswana authorities appears to deny the existence of any such agreement".[350]

154. In the *Chagos* arbitration, the Tribunal "concludes" that the 1965 Agreement "became a matter of international law between the Parties"; only after reaching this conclusion does it note that the United Kingdom subsequently repeated and reaffirmed the undertaking.[351] A

[345] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 48 above), p. 122, para. 29.

[346] *Delimitation of the maritime boundary in the Bay of Bengal* (see footnote 54 above), p. 36, para. 97.

[347] *Aegean Sea Continental Shelf* (see footnote 37 above), p. 39, para. 96.

[348] *Obligation to Negotiate Access to the Pacific Ocean* (see footnote 37 above), p. 539, para. 91.

[349] *Aegean Sea Continental Shelf* (see footnote 37 above), pp. 43 and 44, para. 106. See also (albeit ambiguously) *Land and Maritime Boundary between Cameroon and Nigeria* (footnote 49 above), p. 431, para. 267.

[350] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at p. 1091, para. 68 (emphasis added).

[351] *Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland* (see footnote 96 above), p. 538, para. 428.

similar approach can be observed in the award on jurisdiction in the *South China Sea* arbitration, where the Tribunal, after stating that the intention to establish obligations "is determined" by reference to the instrument's actual terms and the particular circumstances of its adoption, notes that "[t]he subsequent conduct of the parties to an instrument *may* also *assist in* determining its nature".[352] Further on, it states that in this case, "[t]he Parties' subsequent conduct further confirms that the DOC is not a binding agreement".[353]

155. The Tribunal in the arbitration between the Province of Newfoundland and the Province of Nova Scotia offered a more detailed analysis of this indicator. In a section of its decision devoted entirely to the "subsequent practice of the Parties",[354] it addresses the arguments put forward by Nova Scotia as follows:

> The evidence Nova Scotia sought to rely on in the present case concerned two distinct legal issues: first, whether the "1964 Agreement" exists as such, and secondly, what line it established to the southeast of Point 2017. The latter could be considered a question of interpretation. As to the former, the question is not one of interpretation but of the conclusion of an agreement in the first place. It is true that evidence subsequent to the adoption of a document may help to establish its status as an agreement under international law. For example, the joint action of parties in registering a communiqué under Article 102 of the *United Nations Charter* would be evidence that they considered it as a treaty, or at any rate as giving rise to binding obligations. The International Court of Justice has taken into account subsequent practice of the parties in determining whether they considered a particular instrument as binding or not. On the other hand, although such evidence is not inadmissible, its probative value will often be limited. It is not enough to show that parties acted consistently with a document claimed by one of them to have the status of a binding agreement, since that may be explicable on other grounds. It would be necessary to show that the conduct was referable to the treaty and was adopted because of the obligations contained in it.[355]

156. A final clarification is in order in relation to subsequent practice. A situation could arise in which more recent non-legally binding agreements are combined with earlier non-legally binding agreements. However, courts and tribunals do not tend to consider that the combination of non-legally binding agreements suffices in itself to render them legally binding. In the *South China Sea* case, the Tribunal ruled out this possibility: "The Tribunal does not accept the argument of China that the bilateral statements mutually reinforce each other so as to render them legally binding. Repetition of aspirational political statements across multiple documents does not *per se* transform them into a legally binding agreement."[356] The International Court of Justice reached a similar conclusion in *Obligation to Negotiate Access to the Pacific Ocean*: "The Court notes that Bolivia's argument of a cumulative effect of successive acts by Chile is predicated on the assumption that an obligation may arise through the cumulative effect of a series of acts even if it does not rest on a specific legal basis. However, given that the preceding analysis shows that no obligation to negotiate Bolivia's sovereign access to the Pacific Ocean has arisen for Chile from any of the invoked legal bases taken individually, a cumulative consideration of the various bases cannot add to the overall result."[357]

2. Practice relating to indicators

157. The practice followed by the United Nations Secretariat with regard to the registration of treaties or international agreements under Article 102 of the Charter provides little insight

[352] *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China* (see footnote 56 above), p. 86, para. 213 (emphasis added).

[353] *Ibid*., p. 89, para. 218.

[354] *Ad hoc* arbitration between the Province of Newfoundland and the Province of Nova Scotia (see footnote 105 above), pp. 483 ff., paras. 6.1 ff.

[355] *Ibid*., pp. 483 and 484, para. 6.3 (footnotes omitted).

[356] *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China* (see footnote 56 above), p. 98, para. 244.

[357] *Obligation to Negotiate Access to the Pacific Ocean* (see footnote 37 above), p. 543, para. 107, and especially p. 563, para. 174.

into the question of relevant indicators (and a review of all volumes of the *Repertory of Practice of United Nations Organs* does not provide much clarification). However, section 5.3 of the Secretariat's *Treaty Handbook* does at least state that "the title and form of a document submitted to the Secretariat for registration are less important than its content in determining whether it is a treaty or international agreement" and that "[a] treaty or international agreement must impose on the parties legal obligations binding under international law, as opposed to mere political commitments. It must be clear on the face of the instrument, whatever its form, that the parties intend to be legally bound under international law."[358]

158. It emerges from the discussions in the Sixth Committee in 2024 that indicators of several types may be taken into account, that in general no single indicator is decisive in itself and that there are some variations in national practice, which may nonetheless turn out to be more apparent than real.

159. The European Union expressed the view that both objective and subjective criteria should be considered. The latter were revealed by the text of the instrument, while the former could include the wording used in the instrument, its form and the circumstances surrounding its formation.[359] Finland (on behalf of the Nordic countries) noted that it was necessary to consider the intention of the parties, the text, form and terminology of the instrument, and the circumstances under which it had been concluded.[360] Latvia (on behalf of the Baltic States) considered that the term used in the title of an instrument was not determinative. An essential criterion should be the intention of the parties, as articulated in the text of the agreement. Non-legally binding instruments typically did not contain certain types of provisions (related to applicable law, registration with the United Nations or dispute settlement).[361] Brazil took the view that the intention of the parties, as reflected in the wording of the agreement, and the form of the instrument should be taken into account.[362] After recalling that intention, as indicated in the text of the instrument, was the key criterion, Poland added that the presence of final clauses, including those dealing with ratification or dispute settlement mechanisms, played an important role.[363] According to Belarus, the intention, as indicated in the text of the document, was sufficient to determine the status of the text, along with the linguistic aspects of the document, its particular structure and the formulation of its provisions. All other elements had a purely assistive role in determining the intention of the parties, where that intention was difficult to identify on the basis of the circumstances surrounding the signing of the document, the declarations of the parties and any correspondence between them, and their practice regarding the fulfilment of their international obligations.[364] South Africa stated that, while intention was the determining factor, its practice with regard to non-legally binding instruments was to use specific terms that it regarded as denoting a non-binding text.[365] The position of Israel was that the intention was reflected and expressed in the text and in the practice of the parties and that it would be preferable to rely on those elements rather than to construe the intention from other objective evidence.[366] Australia, meanwhile, welcomed the indicators identified in the Special Rapporteur's first report, including the text of the instrument, the context surrounding its conclusion, adherence to any applicable domestic treaty processes and contemplation of dispute settlement mechanisms.[367] Algeria took the view that the intention of the parties was reflected in the wording and final form of the text.[368]

160. Portugal recalled that indicators must be assessed on a case-by-case basis and evaluated together, and provided the following clarifications in its written statement:

[358] *Treaty Handbook* (see footnote 344 above), sects. 5.3.2 and 5.3.4.
[359] European Union (A/C.6/79/SR.28, para. 16).
[360] Finland (on behalf of the Nordic countries) (A/C.6/79/SR.28, para. 26).
[361] Latvia (on behalf of the Baltic States) (A/C.6/79/SR.28, paras. 30 and 31).
[362] Brazil (A/C.6/79/SR.28, para. 35).
[363] Poland (A/C.6/79/SR.28, para. 51).
[364] Belarus (A/C.6/79/SR.28, para. 85).
[365] South Africa (A/C.6/79/SR.28, para. 107).
[366] Israel (A/C.6/79/SR.28, para. 116).
[367] Australia (A/C.6/79/SR.29, para. 26).
[368] Algeria (A/C.6/79/SR.30, para. 93).

the primary elements typically qualifying an international instrument as non-legally binding are its *signatories and contents*, not least the use of differentiated terminology and final clauses – while the form, modalities of conclusion and title of the instrument seem to play a more residual role in some cases. Namely a clause noting that the instrument does not constitute a legally binding one and thus does not create new rights nor obligations under international law, and the absence of clauses that are typical of international legally binding instruments (such as provisions on the settlement of disputes and registration with the Secretariat of the United Nations).

When it comes to the use of differentiated terminology from that of international legally binding instruments we note, e.g.: "signatories" instead of "parties", "clause"/"section" instead of "article", use of verbs such as "will" and "decide" instead of "shall" and "agree".[369]

161. The Islamic Republic of Iran specified the following with regard to its practice:

certain expressions and terms typically used when drafting treaties, such as "conclude", "entry into force", "parties", "article" and even the term "agreement", were generally replaced by their non-binding equivalents in order to avoid the incorrect implication that the signatories intended to be legally bound by international law. Furthermore, provision for dispute settlement was limited to references to "consultations and/or negotiations between the two parties". Although the presence or absence of those terms and expressions was not in itself a definitive indication of the intention of the parties involved, it could be an important indicator of such an intention, in the absence of a clear and explicit statement of the intent of the parties. In other words, it was his delegation's view that only the two parties to the instrument had the authority to express their intention as to the nature or legal implications of the instrument, if any.[370]

162. The written version of the statement by Colombia in the Sixth Committee also contains valuable information about its practice:

cuando nos vemos frente a un instrumento de esta naturaleza nos aseguramos de que estos instrumentos:

(a) Estén formulados en términos no exhortativos, de buenas intenciones o de aspiraciones;

(b) No cuenten con disposiciones finales referentes, por ejemplo, a la ratificación o a la entrada en vigor, ya que se entiende que sus efectos, por ser generalmente políticos, se hacen efectivos de inmediato y se producen desde la suscripción; y

(c) No cuenten con un cuerpo de normas que regulen su creación, aplicación, interpretación, modificación, terminación y validez.

…

Así mismo es importante destacar que para el caso colombiano no es el nombre del instrumento el que determina su naturaleza jurídica, sino su contenido. …

… el nombre del instrumento no es definitivo y es solo una indicación de cuál podría haber sido la intención de los firmantes al celebrarlo, es decir, si querían acordar un instrumento vinculante o uno no vinculante.

…

… tanto los tratados como los instrumentos no vinculantes implican alcanzar un acuerdo, es decir, no se trata de una imposición o un contrato de adhesión. Todos estos instrumentos, vinculantes o no, requieren que haya un acuerdo de voluntades entre los celebrantes.

[369] Portugal (28th meeting of the Sixth Committee in 2024, p. 4 of the written statement available at https://www.un.org/en/ga/sixth/79/summaries.shtml).

[370] Islamic Republic of Iran (A/C.6/79/SR.29, para. 133).

> Sin embargo, y para evitar confusiones, la práctica colombiana en la materia ha llevado a preferir referirse siempre a "instrumentos" en lugar de "acuerdos", considerando que el segundo término podría dar a entender que existe un compromiso jurídicamente vinculante para las partes.[371]

163. Malaysia provided similar details in the written version of its statement:

> … The parties' intention is critical in distinguishing such agreements from treaties. However, Malaysia also recognises the limitations of relying solely on intent, as it is not always clearly expressed. This is why Malaysia supports the hybrid approach, which combines both subjective intent and objective indicators to provide a more reliable and nuanced framework for interpreting agreements.
>
> In Malaysia's own drafting practice, specific linguistic cues such as "shall" to denote binding obligations, or "may" and "will" to indicate non-binding commitments, often provide clear indications of whether an instrument is legally binding. Similarly, terms like "agree" are typically used for binding agreements, while "accept" or "decide" are more common in our non-binding instruments. However, Malaysia recognises that other States or parties, across different jurisdictions and legal traditions, may have varied interpretations of such terms. Nonetheless, the key point is that these indicators serve as important tools in understanding the intent behind agreements and in distinguishing between binding and non-binding commitments.[372]

164. The nature of the dispute settlement methods provided for is not necessarily decisive, since

> … even in instances where Malaysia enters into legally binding agreements, amicable dispute resolution mechanisms, such as consultations or negotiations through diplomatic channels, are often favoured over third-party adjudication in international tribunals. This underscores that legally binding force does not always necessitate strict enforcement through judicial means but can also rely on mutually agreeable mechanisms that respect the parties' intent.[373]

165. In addition to the foregoing, the information submitted by States and the other elements of national practice identified so far, which are presented below, provide a basis for drawing the following conclusions at this stage: the potentially relevant indicators are diverse; some are given greater importance in practice (not necessarily in the sense that they outweigh others, but at least in the sense that they merit special attention); and national practices are not formulated in exactly the same way, yet they do not necessarily diverge. Certain major trends emerge clearly and appear to be consistent with the jurisprudence presented above.[374]

166. A number of States indicate that they attach particular importance to the way in which the text is worded,[375] and this can also be inferred from the indication by other States that the parties' intention is deduced from the terms of the agreement.[376] However, the wording of the agreement is not the only indicator taken into account. Some States also refer, for example, to the content and form of the agreement,[377] the circumstances in which it was concluded[378]

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371 Colombia (30th meeting of the Sixth Committee in 2024, pp. 2 and 3 of the written statement available at https://www.un.org/en/ga/sixth/79/summaries.shtml).

372 Malaysia (30th meeting of the Sixth Committee in 2024, paras. 18 and 19 of the written statement available at https://www.un.org/en/ga/sixth/79/summaries.shtml).

373 *Ibid*., para. 25.

374 See also the national jurisprudence cited in section A (1) (d) of this chapter above.

375 See, for example, the information submitted by the United Kingdom, para. 7 ("While terminology of itself may sometimes not be entirely definitive of the instrument's status, it is normally a clear indication of the intention of the parties").

376 See, for example, the information submitted by Mexico, sect. II. See also the replies of Cyprus and Ireland to question 4 of the Committee of Legal Advisers on Public International Law questionnaire.

377 Information submitted by the Kingdom of the Netherlands (attached brochure on memorandums of understanding, para. 4.1).

378 Information submitted by Finland and Guatemala.

or the presence or absence of final clauses.[379] This appears to be the practice of Thailand.[380] Switzerland notes that it uses five main criteria, which it presents in decreasing order of importance.[381]

167. A more detailed analysis of these elements of national practice can be summarized as follows.

168. First, the way in which the agreement is drafted or formulated (or even structured) plays an important role, whether at the time of drafting to ensure that the authors' intention is correctly reflected or after adoption for determining the agreement's nature in case of doubt. Both the information submitted to the Commission and the national practices identified to date attest to the importance of these textual elements.[382] The Asian-African Legal Consultative Organization noted that, at its annual session in September 2024, one State delegation had indicated that "in its State practice, … words such as 'agree', 'conclude', 'entry into force' and 'shall' were normally not used to denote the intention of the parties as to the non-legally binding nature of the instrument".[383] A number of States have likewise formulated specific guidelines for their authorities on the terms to be used or not used, depending on whether they intend to be legally bound.[384] In some countries, such guidance takes the form of glossaries or tables of comparative terminology.[385] It can also be considered

[379] See the replies of Austria and Italy to question 4 of the Committee of Legal Advisers on Public International Law questionnaire.

[380] See A/CN.4/SR.3684, p. 5 (Ms. Mangklatanakul): "That approach was in line with practice in Thailand and with the practice of most of the numerous partners with which it had concluded agreements; all took great care, when deciding on language, clause types and format, to ensure that their intentions as to the legal bindingness of the agreement were adequately reflected."

[381] Information submitted by Switzerland, pp. 2 ff.

[382] Information submitted by Argentina, sect. III; by Australia, paras. 8 and 9; by France (sect. II, which discusses the "structure" of the instrument and the "terminology" used); by Ireland, p. 1; by the Russian Federation, para. 5; and by the United States, pp. 2 and 3; see also Colombia, *Guía jurídica de tratados y otros instrumentos*, (footnote 59 above), p. 23; and the replies *inter alia* of Austria, Belgium, Bulgaria, Cyprus, Estonia, Finland, Georgia, Germany, Hungary, Lithuania, the Netherlands (Kingdom of the), Poland, the Republic of Moldova, Slovenia, Spain and the European Union to question 5 of the Committee of Legal Advisers on Public International Law questionnaire. See also, on the practice of Japan, Nakanishi, "Defining the Boundaries of Legally Binding Treaties – Some Aspects of Japan's Practice in Treaty-Making in Light of State Practice" (footnote 240 above), pp. 186 and 187.

[383] Asian-African Legal Consultative Organization (A/C.6/79/SR.30, para. 149).

[384] Information submitted by Finland; by France (sects. I and II); and by Poland, pp. 2, 3 and 4 (including many details on the structure of the document itself); "Guide des bonnes pratiques en matière de négociation et de conclusion des engagements internationaux de la France" (see footnote 224 above), in particular pp. 10, 11 and 20; "Guidelines/SoP on the conclusion of International Treaties in India", 16 January 2018, pp. 13 ff.; European Union, *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation*, 2015, guideline 2. See also, for an initial summary of practice, Chaux, "Distinguer les accords juridiquement contraignants des accords juridiquement non contraignants : étude des lignes directrices nationales" (footnote 266 above), pp. 45–49.

[385] Information submitted by the Kingdom of the Netherlands (attached brochure on memorandums of understanding, annex 2) and by Switzerland, p. 3. See also Australia, "Guidance Note: Australia's Practice for Concluding Less-Than-Treaty Status Instruments" (section on "Language" and annex 1); Denmark, *Guidance on treaty conclusion*, annex 10, 2023, Ministry of Foreign Affairs (available in Danish at https://um-dk.translate.goog/udenrigspolitik/folkeretten/dk-traktater/bilagsfortegnelse?_x_tr_sl=da&_x_tr_tl=fr&_x_tr_hl=fr&_x_tr_pto=sc); Germany, guidelines of the Ministry of Foreign Affairs on treaties under international law (footnote 141 above), sect. E, para. 41 (2), and annex H, which contains a glossary of terms; New Zealand, *International Treaty Making: Guidance for government agencies on practice and procedures for concluding international treaties and arrangements*, September 2021, pp. 34 ff. and the table on p. 36; Switzerland, Federal Department of Foreign Affairs, *Practice Guide to International Treaties*, 2023, paras. 5 and 6, paras. 18–23 and annex B on terminological suggestions; United Kingdom, *Treaties and Memoranda of Understanding (MoUs): Guidance on Practice and Procedures*, March 2022, Foreign, Commonwealth and Development Office, para. 5, sect. (iv) and the table and glossary; United States, *Guidance on legal determinations under the Case-Zablocki Act* of 1972 (April 2014), p. 2, and *Guidance on Non-Binding Documents* (https://2009-

that a State's use of identical terminology from one agreement to another in its international practice is deliberate and reveals a particular intention.[386]

169. Specifically with regard to the wording of an instrument's title, it is perfectly clear that such wording is not decisive, as a treaty can take any form and have any designation.[387] Even so, some States specify that the title can still be considered as one indicator among others[388] or that certain titles should be avoided in view of their connotations.[389]

170. Certain elements of national practice also indicate that the nature (or wording) of the clauses contained in the agreement is a relevant indicator (such as the presence of dispute settlement clauses, applicable law clauses or, more generally, final clauses or financial commitment clauses).[390] On the other hand, whether or not the document was formally signed does not seem to be of great importance.[391]

171. The nature of the parties involved can be a relevant indicator of the nature of a commitment. Some States' national practices indicate that an agreement cannot be a treaty if the parties are not subjects of international law,[392] or expressly indicate which domestic

2017.state.gov/s/l/treaty/guidance/index.htm); see also, for the United States, "Publication, Coordination, and Reporting of International Agreements: Amendments", *Federal Register*, vol. 88, No. 189 (2 October 2023), pp. 67643 ff., 22 CFR part 181, paras. 181.2 and 181.4. See also Brunei Darussalam, *Treaties and Memorandum of Understanding: Current Trends and Practices* (available at https://www.agc.gov.bn/Law%20Seminar%202021%20Documents/9%20Law%20Seminar%20IAD%20Presentation%20on%20MOU%202021.pdf), p. 5. See also the information submitted to the Commission by Ireland, p. 3 (existence in its national practice of a glossary of recommended terms that compares and contrasts the terms used in binding international agreements and non-legally binding instruments).

386 At the Commission's seventy-fifth session, Mr. Paparinskis noted, for example, that the 50 or so agreements concluded by the Chinese authorities with foreign partners under the Belt and Road initiative (see http://fi.china-embassy.gov.cn/eng/xwdt/201904/t20190429_9889501.htm) "generally used consistent terminology and explicitly provided for a lack of legally binding effect" (A/CN.4/SR.3683, p. 4).

387 Information submitted by Argentina, sect. I; France, "Guide des bonnes pratiques en matière de négociation et de conclusion des engagements internationaux de la France" (see footnote 224 above), p. 15; Germany, guidelines of the Ministry of Foreign Affairs on treaties under international law (see footnote 141 above), para. 4 (1).

388 "Guidelines/SoP on the conclusion of International Treaties in India", 16 January 2018, pp. 2–5. See also the replies to question 3 of the Committee of Legal Advisers on Public International Law questionnaire.

389 Information submitted by Poland, sect. 3. See also France, *Circulaire du 30 mai 1997 relative à l'élaboration et à la conclusion des accords internationaux*, sect. I; New Zealand, *International Treaty Making: Guidance for government agencies on practice and procedures for concluding international treaties and arrangements*, September 2021, pp. 34–36; Switzerland, *Practice Guide to International Treaties*, 2023, paras. 5 and 6.

390 Information submitted by Australia, para. 9 (and "Guidance Note: Australia's Practice for Concluding Less-Than-Treaty Status Instruments", section on "Key Provisions"); by France, pp. 4 and 6; by Guatemala, p. 2; by the Netherlands (Kingdom of the) (attached brochure on memorandums of understanding, para. 4.2); by Poland, p. 3 (on financial clauses) and p. 4 (on various final clauses); and by Switzerland, p. 3. See also the information on the practice of Brunei Darussalam, *Treaties and Memorandum of Understanding: Current Trends and Practices* (footnote 385 above), pp. 9 ff., and the replies of Albania, Belgium, Estonia, Finland, Hungary, Lithuania, the United Kingdom and the Council of Europe to question 5 of the Committee of Legal Advisers on Public International Law questionnaire.

391 See, in particular, the information submitted by France, p. 7, and by Poland, pp. 4 and 5; and the replies to questions 30 and 33 of the Committee of Legal Advisers on Public International Law questionnaire.

392 Germany, guidelines of the Ministry of Foreign Affairs on treaties under international law (see footnote 141 above), para. 4 (7).

authorities may conclude treaties or non-legally binding agreements.[393] Full powers are required in the case of a treaty[394] but not in the case of a non-legally binding agreement.[395]

172. There are also references to other indicators, such as the circumstances surrounding the conclusion of the text and the subsequent practice of the parties.[396]

3. Doctrine (including codification work) relating to indicators

173. The conclusions reproduced in the aforementioned 1983 resolution of the Institute of International Law state that the character of a text depends on the parties' intention, as may be established by methods "including" an examination of "the terms used to express such intention, the circumstances in which the text was adopted and the subsequent behaviour of the parties" (conclusions 8 and 9).[397]

174. The Guidelines of the Inter-American Juridical Committee and the commentaries thereto provide more detail on this question. Guideline 3.2 states that account should be taken of "(a) text, (b) surrounding circumstances, and (c) subsequent practice to identify different types of binding and non-binding agreements", while emphasizing that these factors do not necessarily point in the same direction in every case, which can lead to confusion.[398] Guideline 3.4 complements this as follows:

> 3.4 Evidence Indicative of an Agreement's Status as Binding or Non-Binding: Where agreement participants do not specify or otherwise agree on its status, States should use (or rely on) certain evidence to indicate the existence of a treaty or a non-binding political commitment, including:
>
> (a) the actual language employed;
>
> (b) the inclusion of certain final clauses;
>
> (c) the circumstances surrounding the agreement's conclusion; and
>
> (d) the subsequent practice of agreement participants.
>
> Table 2 lists the language and clauses States should most often associate with treaties as well as those they may most often associate with political commitments.[399]

175. The commentary elaborates on these four elements.[400] In addition, table 2 provides a non-exhaustive list of "linguistic markers" deduced from State practice (in four languages:

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393 See, for example, Spain, *Ley 25/2014, de 27 de noviembre, de Tratados y otros Acuerdos Internacionales*, arts. 44 and 47. See also the information submitted by Ireland (pp. 2 and 3) and the replies of Bosnia and Herzegovina and Hungary to question 4 of the Committee of Legal Advisers on Public International Law questionnaire.

394 Information submitted by Argentina, sect. I.

395 Information submitted by Guatemala, p. 2; "Guide des bonnes pratiques en matière de négociation et de conclusion des engagements internationaux de la France" (see footnote 224 above), p. 10 (see also the information submitted by France, pp. 2 and 7); replies to question 29 of the Committee of Legal Advisers on Public International Law questionnaire (which indicate that there is usually no particular formal procedure to authorize the signature of a non-legally binding agreement but that when such a procedure exists, it does not require the issuance of full powers).

396 See the reply of Finland to question 5 of the Committee of Legal Advisers on Public International Law questionnaire. See also the reply of the Republic of Korea to the same question (stating that the language of the text, the context, the situation and procedures are among the relevant factors).

397 *Yearbook of the Institute of International Law*, vol. 60, Part II (Session of Cambridge, 1983), p. 291.

398 Guidelines of the Inter-American Juridical Committee (see footnote 85 above).

399 *Ibid.*

400 In his second report, which assessed the 10 replies received from member States to the questionnaire, the Rapporteur stated: "If there is any real division of opinion among the Member States in how they differentiate treaties and political commitments it may lie in the weight they assign to the language used in an agreement. Certainly, some of the replies (*e.g.*, Colombia) suggest specific terminology will determine the agreement's status. In contrast, Jamaica and the United States take a holistic view. Jamaica suggested that 'no specific terminology is used to differentiate among various types of binding and non-binding agreements.' And the United States emphasized a contextual approach, where 'the text of any instrument must be interpreted in accordance with the ordinary meaning of its

English, French, Portuguese and Spanish) with regard to the title given to an agreement, the words used to designate its authors, the language of commitment (terms, verbs, adjectives) and the wording of the clauses. Finally, it should be noted that several elements of guideline 3 contain wording of a recommendatory nature.[401]

176. Support for the above considerations can be found in the literature. In order to keep the present report to a reasonable length, the Special Rapporteur will refrain from giving a detailed summary of all the points of view expressed by authors on the question of relevant indicators, as doing so does not seem essential. Rather, it is sufficient to make the following two observations.

177. First, in general studies on the subject, authors discuss a range of indicators comparable to those identified above in jurisprudence and practice, and consider them holistically.[402] The indicators put forward and discussed in this context include:

(a) the text and terms of the agreement;[403]

(b) the context of the agreement and the circumstances in which it was concluded;[404]

terms in their context in order to definitively interpret its meaning and effect.' Thus, for some Member States, structure and terminology may be determinative, whereas for others, the presence of specific verbs, words, or clauses should not supersede the search for the parties' intentions. In other words, the use of the verb 'agree' or an 'entry into force' clause may be enough for some Member States to conclude the agreement must be binding. Other Member States, however, might – notwithstanding such wording – treat such an agreement as non-binding if they and their partner(s) did not intend it to be a binding agreement" (CJI/doc. 553/18, para. 20).

401 See, for example, guideline 3.1.2: "When in doubt, a State should confer with any potential partner(s) to confirm whether a statement or instrument will – or will not – constitute an agreement …"; or guideline 3.2.2: "A State should be open with other States and stakeholders as to the [objective or subjective] test it employs. It should, moreover, be consistent in applying it, not oscillating between the two tests as suits its preferred outcome in individual cases …". See also guidelines 3.1.1, 3.1.3, 3.2.1, 3.2.3 and 3.6, and guideline 6, entitled "Training and Education Concerning Binding and Non-Binding Agreements".

402 See, for example, Pierre Michel Eisemann, "Engagements non contraignants", *Répertoire de droit international*, Dalloz, January 2017, para. 39 (under the heading "indices", the author states that "[s]auf exception, aucun de ces éléments ne constitue à lui seul la preuve que l'on est en présence d'un engagement non contraignant mais ils serviront … à restituer l'intention des participants au moment de l'adoption ou de la conclusion de l'instrument"); Fitzmaurice, "Concept of a Treaty in Decisions of International Courts and Tribunals" (footnote 242 above), pp. 166 and 167; Fitzmaurice, "Treaties" (footnote 234 above), para. 12 ("a whole set of indicators and circumstances is taken into account"); Gautier, "Non-Binding Agreements" (footnote 286 above), paras. 16–18.

403 See, for example, Aust, "The Theory and Practice of Informal International Instruments" (footnote 240 above), pp. 800 ff.; Gautier, *Essai sur la définition des traités entre États. La pratique de la Belgique aux confins du droit des traités* (footnote 196 above), pp. 354–358 and 364 ff.; Hill, *Aust's Modern Treaty Law and Practice* (footnote 239 above), pp. 46 ff.; Martin Mändveer, "Non-Legally Binding Agreements in International Relations: An Estonian Perspective", *Baltic Yearbook of International Law*, vol. 20 (2021), pp. 7–24, at pp. 15 ff.; Mensi, "The Identification of International Non-Binding Agreements Through the Lens of Subjective and Objective Indicators: Fiction or Reality?" (footnote 166 above), pp. 429–434; Spagnolo, "The Conclusion of Bilateral Agreements and Technical Arrangements for the Management of Migration Flows: An Overview of the Italian Practice" (footnote 284 above), pp. 219 and 220; Christian Tomuschat, "The Concluding Documents of World Order Conferences", in Jerzy Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in honour of Krzysztof Skubiszewski*, The Hague, Kluwer Law International, 1996, pp. 563–585, at pp. 570 ff.

404 See, for example, Aust, "The Theory and Practice of Informal International Instruments" (footnote 240 above), pp. 802 and 803; Gautier, *Essai sur la définition des traités entre États. La pratique de la Belgique aux confins du droit des traités* (footnote 196 above), pp. 358 ff.

(c) the existence of full powers[405] or the level of authority of the signatories;[406]

(d) the title or form of the agreement (which do not matter in principle but are nonetheless taken into account among other indicators);[407]

(e) whether or not the agreement is revocable;[408]

(f) whether or not it has been registered with the United Nations Secretariat[409] or with another entity under a different treaty provision;[410]

(g) the presence or wording of provisions such as dispute settlement clauses;[411] and

(h) subsequent practice.[412]

178. Second, the approach taken in scholarly works analysing the nature of particular agreements is generally similar:[413]

[405] See, for example, Spagnolo, "The Conclusion of Bilateral Agreements and Technical Arrangements for the Management of Migration Flows: An Overview of the Italian Practice" (footnote 284 above), p. 220.

[406] On certain aspects of this question, see, for example, M. Loja, *International Agreements between Non-State Actors as a Source of International Law*, Hart, 2022, in particular pp. 112–129.

[407] See Chinkin, "A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations Between States" (footnote 239 above), pp. 229 and 230 and footnote 56; Gautier, *Essai sur la définition des traités entre États. La pratique de la Belgique aux confins du droit des traités* (footnote 196 above), pp. 360 ff.; Hill, *Aust's Modern Treaty Law and Practice* (footnote 239 above), pp. 43 and 44; or Palma, *La natura degli atti finali dei vertici internazionali* (footnote 115 above), pp. 40 ff.

[408] See, for example, Michael Bothe, "Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?", *Netherlands Yearbook of International Law*, vol. XI (1980), pp. 65–95, at p. 89; or Bradley, Goldsmith and Hathaway, "The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis" (footnote 240 above), pp. 1294 and 1311.

[409] See Aust, "The Theory and Practice of Informal International Instruments" (footnote 240 above), p. 803; Chinkin, "A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations Between States" (footnote 239 above), pp. 239 and 240; Fawcett, "The Legal Character of International Agreements" (footnote 238 above), pp. 389 and 390; Gautier, *Essai sur la définition des traités entre États. La pratique de la Belgique aux confins du droit des traités* (footnote 196 above), p. 367; D.N. Hutchinson, "The Significance of the Registration or Nonregistration of an International Agreement in Determining Whether or Not It Is a Treaty", *Current Legal Problems*, vol. 46 (1993), pp. 257–290; Mändveer, "Non-Legally Binding Agreements in International Relations: An Estonian Perspective" (footnote 403 above), p. 13.

[410] See, for example, on registration as an "arrangement" within the meaning of article 83 of the Chicago Convention on International Civil Aviation, Aust, "The Theory and Practice of Informal International Instruments" (footnote 240 above), p. 790 (article 83 seems to be understood in practice as requiring registration only of legally binding agreements).

[411] Aust, "The Theory and Practice of Informal International Instruments" (see footnote 240 above), p. 791; Fawcett, "The Legal Character of International Agreements" (footnote 238 above), p. 388.

[412] See, for example, Chinkin, "A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations Between States" (footnote 239 above), pp. 237–241; Fitzmaurice, "Concept of a Treaty in Decisions of International Courts and Tribunals" (footnote 242 above), p. 167; Mensi, "The Identification of International Non-Binding Agreements Through the Lens of Subjective and Objective Indicators: Fiction or Reality?" (footnote 166 above), pp. 437 ff.

[413] See, for example, Asada, "How to Determine the Legal Character of an International Instrument: The Case of a Note Accompanying the Japan-India Nuclear Cooperation Agreement" (footnote 166 above), pp. 200 ff.; James 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, at pp. 484 ff.; William Edeson, "The International Plan of Action on Illegal Unreported and Unregulated Fishing: The Legal Context of a Non-Legally Binding Instrument", *International Journal of Marine and Coastal Law*, vol. 16 (2001), pp. 603–624, at pp. 608 and 609; Philippe 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, at pp. 85–89; Thomas D. Grant, "The Budapest Memorandum of 5 December 1994: Political Engagement or Legal Obligations?", *Polish Yearbook of International Law*, vol. 34

(a) the studies are carried out on a case-by-case basis;

(b) they endeavour to establish the intention of the agreement's authors;

(c) they do so by means of a holistic assessment of the relevant indicators,[414] even though some indicators may be considered more or less important than others;[415]

(d) among the relevant indicators, those generally considered are the terms of the agreement, the circumstances in which it was concluded, the level of authority of those who adopted it, the presence and wording of final clauses, subsequent practice or the agreement's registration or non-registration with the United Nations Secretariat.

179. To conclude this section on relevant indicators for distinguishing between treaties and non-legally binding international agreements, the Special Rapporteur wishes to reiterate that he does not intend to submit draft texts on this issue at the current session, as it would be desirable to first hold a general discussion on how this question should be dealt with in the draft conclusions.[416]

V. Organization and schedule of work

180. The draft conclusions proposed in the present report are reproduced in the annex below. The Special Rapporteur proposes that they be referred to the Drafting Committee on the basis and in the light of the discussions to be held during the Commission's plenary meetings.

181. The Special Rapporteur plans to devote his third report, to be submitted in 2026, to two questions. First, in the light of this year's debate, he will continue his work on indicators for distinguishing between treaties and non-legally binding international agreements. Second, he will begin to study the legal implications or consequences that could potentially arise from a non-legally binding international agreement.[417]

(2014), pp. 89–114, at pp. 98 ff.; Kazuki Hagiwara, "Enhanced *De Facto* Constraints Imposed by Non-legally Binding Instruments and Interactions with Normative Environment: An Analysis of the Joint Statements for the Conservation and Management of Japanese Eel Stock", *Asian Journal of International Law*, vol. 14 (2024), pp. 293–323, at pp. 299 ff.; Mika 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. 259 ff.; Jiménez García, *Derecho internacional líquido ¿Efectividad frente a legitimidad?* (footnote 245 above), pp. 165 ff.; Jerry Z. Li, "The Legal Status of Three Sino-US Joint Communiqués", *Chinese Journal of International Law*, vol. 5 (2006), pp. 617–645, at pp. 620 ff.; Lyubomir L. Sakaliyski, "The JCPoA and its Legal Status: If it Walks Like a Treaty, Does it Quack Like a Treaty?", *Czech Yearbook of Public & Private International Law*, vol. 13 (2022), pp. 250–264; Tamada, "The Japan-South Korea Comfort Women Agreement: Unfortunate Fate of a Non-Legally Binding Agreement" (footnote 247 above), pp. 223 ff.

414 See, for example, Busuttil, "The Bonn Declaration on International Terrorism: A Non-Binding International Agreement on Aircraft Hijacking" (footnote 413 above), p. 487 ("after weighing all the factors set out above").

415 See, for example, Tamada, "The Japan-South Korea Comfort Women Agreement: Unfortunate Fate of a Non-Legally Binding Agreement" (footnote 247 above), pp. 227 and 228 (suggesting that the terms of the agreement are more important than the circumstances surrounding its conclusion). See also Fitzmaurice, "Concept of a Treaty in Decisions of International Courts and Tribunals" (footnote 242 above), p. 167 (although both the form and the content of the agreement are to be taken into consideration, in the majority of cases, "quite sensibly, *substance* takes precedence over *form*").

416 See introduction to chap. IV (C) above.

417 In accordance with the conclusions drawn from the Commission's debate at its seventy-fifth session (A/79/10, para. 292), the Special Rapporteur here uses the more neutral terms "consequences" and "implications" in place of the terms "regime" and "effects", which were used in the first report.

ANNEX: DRAFT CONCLUSIONS PROPOSED BY THE SPECIAL RAPPORTEUR[418]

PART ONE. INTRODUCTION

Draft conclusion 1. Purpose

1. The present draft conclusions concern non-legally binding international agreements.

2. The present draft conclusions are not intended to be prescriptive. They are intended to provide elements of clarification with regard to non-legally binding international agreements.

3. The present draft conclusions do not affect the role played by non-legally binding international agreements in international cooperation, and the flexibility that characterizes their negotiation and adoption.

4. The present draft conclusions do not affect the binding force of treaties under the principle *pacta sunt servanda* or their regime.

Draft conclusion 2. Use of terms

1. For the purposes of the present draft conclusions, the term "non-legally binding international agreement" is used in a general sense to refer to any mutual commitment entered into at the international level which, as such, does not create any rights or obligations or has no binding legal effect.

2. The use of the term "agreement" in the present draft conclusions is without prejudice to:

(a) the use of this term and the meaning which may be given to it in the internal law or the practice of a State;

(b) the meaning given to this term in any specific international instrument.

Draft conclusion 3. Scope

1. The present draft conclusions cover bilateral and multilateral agreements:

(a) in writing;

(b) of an international nature;

(c) between States, States and international organizations or between international organizations.

2. Agreements entered into by sub-State authorities are covered by the present draft conclusions to the extent that they are adopted at the international level.

Draft conclusion 4. Without prejudice clause to rules or practices applicable at the national level

The present draft conclusions are without prejudice to any rules or practices applicable at the national level in relation to non-legally binding international agreements.

PART TWO. DISTINCTION BETWEEN TREATIES AND NON-LEGALLY BINDING INTERNATIONAL AGREEMENTS

Draft conclusion 5. Assessment of whether an agreement is legally binding or not

1. Whether an agreement is legally binding or not is assessed on a case-by-case basis.

2. Whether an agreement is legally binding or not depends on the intention of the parties to the agreement. In the absence of any intention by the parties to be legally bound by the agreement, it is not legally binding.

[418] These draft conclusions were drawn up in French. The Special Rapporteur also provided the secretariat with an English version of the text.

3. The intention may be expressly stated.

4. In the absence of any express indication, intention can be established by recourse to the relevant elements identified in draft conclusions [No. XX to XX]. These elements are assessed as a whole.

Draft conclusion 6. Existence of an express indication

The fact that all the parties to an agreement expressly indicate that it is or it is not legally binding under international law is sufficient to identify their intention.