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International Law Commission

Seventy-fifth session (second part)

Provisional summary record of the 3681st meeting

Held at the Palais des Nations, Geneva, on Wednesday, 10 July 2024, at 10 a.m.

Contents

Present:

Chair:	Mr. Vázquez-Bermúdez
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Cissé
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Mingashang
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Ms. Oral
	Ms. Orosan
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Paparinskis
	Mr. Patel
	Mr. Reinisch
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Non-legally binding international agreements (agenda item 9) (A/CN.4/772)

Mr. Forteau (Special Rapporteur), introducing his first report on the topic "Non-legally binding international agreements" (A/CN.4/772), said that he wished to sincerely thank the Commission members for entrusting him with the role of Special Rapporteur for the topic. As a firm believer in the importance of the collegial nature of the Commission's work and the virtues of collective intelligence, he intended for his report to be viewed as a preliminary document that, as a starting point and a working tool, would help ensure that members were as well informed as possible of the topic and able to make collective headway towards achieving an outcome commensurate with their level of expertise. He hoped that the plenary debate would be as frank, honest and robust as possible, following the Commission's tradition of intellectual independence, and that, as pointed out by the Commission in 1996 in relation to its methods of work, the plenary debate would provide guidance to the Commission and the Special Rapporteur on directions to be taken on the topic.

He wished to begin by outlining what was not contained in his report. First, he had deliberately refrained from proposing draft texts, which meant that the topic would not be considered by the Drafting Committee in 2024. The purpose of the report was, instead, to enable members to begin a general discussion on the topic, with a view to more precisely determining its scope, the overall direction to be taken, the questions to be examined and the form of the final outcome to be adopted. That approach had been followed for many topics in the past and would, in his view, enable the Commission to make faster progress in the coming years. The initial discussion, for instance, would help members gain an overview of the topic and prepare as effectively as possible to begin the drafting of texts in 2025. Following such an approach would also enable the Commission to include a summary of that discussion in its report to the General Assembly on the work of the current session, thereby affording States, with full transparency, further insight into the direction agreed on by the Commission.

Second, the factors behind the considerable rise in the use of non-legally binding agreements were not addressed in his report. Those factors had already been identified by many authors and included the need for flexibility and efficiency in contemporary modes of international cooperation and, occasionally, the need for confidentiality. He was of the view that it was not for the Commission to pronounce on those factors or to seek to encourage States either to conclude or not to conclude non-binding agreements as opposed to treaties and that its work on the topic should not be prescriptive in nature. The Commission should, rather, seek to identify the legal difficulties that might arise from the use of such agreements and alert States to those difficulties. Moreover, as stated in paragraph 3 of the report, its goal should be to "*clarify* the nature, regime and potential legal effects of non-legally binding international agreements", in view of the increasing calls by many States and international organizations for greater legal clarity with regard to the conclusion of international agreements. The work to provide such clarification, while essential, should not result in the undue limitation of States' freedom to make use of non-binding agreements, as such freedom was necessary for international cooperation in many areas. Accordingly, the Commission should seek to strike the right balance between providing the necessary legal clarity and avoiding an outcome that might rigidify the use of flexible modes of international cooperation.

Third, given that it was essential for the Commission's work to focus on the practical aspects of the topic, theoretical discussions of "soft law" were not explored in his report. The concept had already been widely debated in the doctrine, and he was of the view that it was neither necessary nor suitable for the Commission to consider theoretical discussions in addressing the topic at hand. Non-legally binding international agreements were a reality of contemporary international relations and were giving rise to questions with regard to international law. That premise should be the starting point for the Commission's work, which should subsequently involve the analysis of specific problems in the light of the relevant practice, jurisprudence and doctrine.

Turning to the matter of what was contained in his report, he noted that one of his intentions had been to identify elements that would be of use in the Commission's work. Such was the purpose of chapters III, V and VI, in which he outlined the observations already received from States in the Sixth Committee, set out the previous work on the topic and gave an initial overview of the available material in terms of practice, jurisprudence and doctrine. An additional goal of his first report was to define the parameters of the topic. Accordingly, chapters VII to X contained proposals concerning the scope of the topic and the terminology to be employed, the questions to be examined, the form of the final outcome of the work and the organization and schedule of work.

At the outset, he wished to make three general observations on the content of the report. First, the elements collected for the preparation of the report confirmed the growing use of non-legally binding international agreements, which was giving rise to practical legal questions of an increasingly pressing nature. That trend was reflected in the observations made by States in the Sixth Committee, many of which had stressed the practical importance of the topic. It was also clear from recent jurisprudence; the question of whether an agreement should be classed as a treaty or a non-binding agreement had arisen in a number of international courts. The International Court of Justice, for example, had been confronted with that question in *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* in 2017 and *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* in 2018. Other international courts, in particular those in the field of foreign investment law, were currently asking what effect should be given to interpretative agreements whose binding nature was the subject of debate. Moreover, the practical problems posed by the existence of international agreements that did not create rights or obligations had been brought to light through the Commission's own work on the law of treaties and the deliberations at the United Nations Conference on the Law of Treaties. The practical importance of the topic was further confirmed by the significant number of agreements whose nature and legal effects had been discussed in the doctrine; an illustrative list of such scholarly works was contained in footnote 240 of the report. A number of international institutions, in particular the Institute of International Law, the Inter-American Juridical Committee and the Committee of Legal Advisers on Public International Law, had studied the topic and highlighted the need to provide clear responses to the legal problems that arose in the area. The fact that several States had adopted, at the domestic level, guidelines on the use of non-legally binding agreements also attested to the importance taken on by the topic in recent years. A study on such guidelines had been included in an article that had just been published in the French-language journal *Revue générale de droit international public*.

Second, the preliminary study of the material had unequivocally demonstrated that, even though they lacked binding force, non-legally binding international agreements were well and truly connected to international law. That conclusion was clearly supported by the Commission's previous work on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", as outlined in paragraphs 43 *et seq.* of the report. The task before the Commission was, therefore, to identify the precise nature of the connection between non-legally binding agreements and international law, in addition to the modalities through which that connection manifested itself.

Third, his preliminary reflections on the topic had led him to believe that the Commission's work was beginning at the right time. In recent years, the work of other bodies and of legal scholars had helped improve understanding of the challenges presented by the topic and allowed for the identification of questions to be clarified. Nonetheless, such clarification had not yet been provided for all aspects of the topic at the universal level, which meant that the Commission could certainly make a useful contribution.

He had identified five points on which he would specifically welcome the views of Commission members during the plenary debate. First, paragraphs 78 and 80 of his report highlighted the need for the material examined by the Commission to be as representative as possible. He had sought to draw on doctrine and practice from various regions of the world and in several languages. That said, the contribution of all Commission members would be essential in order to guarantee that the examples cited and the material used were sufficiently diverse and representative. In that connection, he wished to thank Mr. Patel for providing a number of useful references in various languages, including an Arabic-language study that

directly addressed the current topic. It would be helpful if members could support his proposal in paragraph 70 of the report to request the secretariat to put him in touch with the Committee of Legal Advisers on Public International Law, which was currently working on the same topic, to request access to documents that it had not published on its website. He would also welcome support for the proposal in paragraphs 79, 82 and 83 to address a request for information to States and, potentially, to international organizations in the Commission's report on the work of its current session.

Second, he wished to invite Commission members to share their views on the title of the topic. While certain States had proposed replacing the word "agreements" with a term such as "instruments" or "arrangements", he was of the view that, for the reasons provided in paragraphs 93 *et seq.* of the report, the Commission should retain the word "agreements", which more clearly delimited the scope and nature of the work.

Third, Commission members would also need to address a number of questions regarding the scope of the topic, which was the focus of chapter VII of the report. He considered that certain points should pose no difficulties; he was convinced, for instance, that the topic should not cover the issue of non-binding provisions found in treaties and should concern only those agreements that, as a whole, had no binding effect. Other aspects required more discussion, and the Commission should determine a clear direction for addressing those aspects during its plenary debate. It was his opinion that the topic should be limited to "agreements" and should not cover other types of non-binding instruments. Accordingly, acts adopted by international organizations as such should not be included in the topic, as they were unilateral acts rather than agreements. The same was true of "agreements" that were the result of combining two unilateral commitments that did not as such form an identified consensual instrument.

The question of whether the topic should cover acts adopted within the framework of, or by, intergovernmental conferences that did not have separate legal personality was more problematic. His position on the matter was nuanced, and he was of the view that the Commission should refrain from making an overly categorical decision in that regard. He also wished to recommend that the Commission should focus solely on written agreements and should include agreements between States, between international organizations and between States and international organizations. Agreements concluded with private parties should, in contrast, be excluded from the scope of the topic. With regard to whether agreements or arrangements concluded by sub-State entities of different countries should be included, he considered that such agreements should not be covered by the topic, since they were of a very specific nature and gave rise to their own legal difficulties. The topic should, in his opinion, be focused on agreements that were very similar to treaties, to the point where it was sometimes difficult to distinguish them from those instruments. Accordingly, the Commission should limit its focus to agreements concluded by subjects of international law acting as such.

Fourth, the purpose of chapter VIII of his report was to identify the various questions to be addressed as part of the topic, grouping them into three main categories: criteria for distinguishing treaties from non-legally binding agreements; the regime of non-legally binding international agreements; and the (potential) legal effects of non-legally binding international agreements. A list of more specific questions was then set out under each category. That list was exploratory and essentially indicative in nature; in no way did it presuppose the answer to be given to each question. He therefore wished to invite members to share their views on the questions to be added to the list and those that should be excluded from the Commission's work.

Fifth, members were also invited to indicate their positions regarding the form of the final outcome of the work and, in particular, regarding the proposal in chapter IX of the report that the outcome should take the form of a set of draft conclusions.

On the basis of the points of convergence that emerged following the plenary debate, his intention was, from 2025 onward, to follow the programme of work proposed in chapter X of his report and to put forward several draft conclusions on the issues to be addressed in his second report. That proposal would naturally be adjusted depending on the outcome of

the plenary debate at the current session. He wished to thank members for their attention and looked forward to hearing their comments on his first report.

Mr. Galindo said that he wished to congratulate the Special Rapporteur on his excellent first report on the topic "Non-legally binding international agreements". The Special Rapporteur's decision to begin by discussing general issues surrounding the topic and to refrain from proposing draft conclusions at the current stage was commendable and provided members with a unique opportunity to participate in the development of the topic from the beginning.

The topic would be of unique practical relevance to the day-to-day work of State organs, in particular ministries of foreign affairs. Non-legally binding international agreements were a reality of international relations, and it was essential for bodies devoted to the codification and progressive development of international law, such as the Commission, to provide guidance to States on the matter. Such bodies should not, however, pronounce on how to transform non-binding instruments into binding ones. Instead, their contribution should be to put forward elements and criteria that would afford some stability to instruments that were agreed by States but were not characterized as treaties. Accordingly, any solution or pathway identified by the Commission must take into consideration the need to address the topic through the lens of practice. Theoretical and conceptual discussions should be considered only where they were instrumental in the development of feasible recommendations for States.

With regard to chapter V of the report, the Special Rapporteur rightly demonstrated that the word "governed" in the definition of "treaty" contained in article 2 of the Vienna Convention on the Law of Treaties implied the idea of "bindingness". That argument was strongly relied upon in the Convention's *travaux préparatoires* and had hardly been challenged by States' subsequent practice. While some scholars had contested the association between the term "governed by international law" and the concept of bindingness, that argument was not reflected in the position of State organs that regularly crafted instruments that were not considered to be treaties. Certain regional rules on treaties, some of which predated the Convention, associated the idea of obligation towards a treaty not with the treaty's governance by international law, but with the fulfilment of a procedural requirement. Article 5 of the 1928 Havana Convention on Treaties, for instance, made the obligatory character of a treaty contingent on its ratification, stating that treaties were obligatory only after ratification by the contracting States. That article thus appeared to regulate not only the effects of treaties, but also their very character as such.

In paragraphs 45 and 46 of the report, the Special Rapporteur showed that the idea that non-binding agreements could, in some circumstances, be characterized as "subsequent agreements" had been criticized by some members in the discussions on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties. That issue warranted the Commission's full attention, since failure to address it properly could result in impractical solutions, in particular when it was clear, in a given situation, that the States concerned had not intended to produce a binding instrument. In cases where such an intention did not exist, establishing that those instruments were relevant in terms of treaty interpretation could grant their content an indirect binding effect.

Moreover, in paragraph 49 of the report, the Special Rapporteur asserted that, since States had not objected to conclusion 10 (1) of the Commission's conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, they had generally accepted it. The Commission should, however, be cautious about interpreting a lack of reaction from States as implying acceptance of the Commission's conclusions. States had various reasons for not reacting to the Commission's outputs, and he was unsure whether a normative pattern could be discerned on that basis.

In paragraph 53, the Special Rapporteur suggested that the Commission's outputs on the topics "General principles of law" and "Identification of customary international law" recognized, albeit implicitly, that non-binding agreements could provide evidence for determining the existence and content of general principles of law and customary international law. He urged caution in drawing such a conclusion, however, as paragraph (2) of the commentary to conclusion 12 on identification of customary international law, which

the Special Rapporteur had cited as the basis for that finding, referred mainly to instruments, such as resolutions, adopted by States in international organizations. Those instruments could not necessarily be equated with non-binding agreements concluded by States directly. The latter were not concluded through the intermediary of an international body, whereas the former, as a general rule, were created through the channels established by a constitutive instrument, which normally took the form of a treaty.

Although he agreed, in general terms, with the Special Rapporteur's assessment in paragraph 62 of the report that one of the merits of the guidelines on binding and non-binding agreements adopted by the Inter-American Juridical Committee was the fact that they were based on State practice, he wished to point out that most States members of the Organization of American States had not responded to the Committee's questionnaire. Thus, the guidelines provided only a partial overview of the practice of the States members of that organization.

He was strongly in favour of including "inter-institutional agreements" in the scope of the Commission's work on the topic, for several reasons. First, inter-institutional agreements were the most common non-binding agreements concluded by States, outnumbering those concluded on behalf of the State itself; second, they were of great practical relevance to States and posed a number of issues that should be addressed, especially because they were often not concluded under the supervision of the ministries of foreign affairs of the States in question; and third, it was not entirely clear whether such agreements were not governed by international law. For example, inter-institutional agreements sometimes provided for dispute settlement mechanisms under rules of the Permanent Court of Arbitration even though they were not concluded by State authorities with full powers. There was a need for guidance to States in cases where inter-institutional agreements fell into a grey area between bindingness and non-bindingness.

Regarding chapter VI of the report, it was important to stress that many non-binding agreements, despite not being confidential, were not published. Thus, any overview of the practice related to those agreements would inevitably be incomplete, and the agreements' non-publication could, in some circumstances, denote that they were non-binding in nature.

As for chapter VII of the report, he agreed with the Special Rapporteur that the Commission should retain the term "agreements" in the title of the topic. The first reason provided in paragraph 94 of the report was the most important: the definition of a treaty laid down in the Vienna Convention on the Law of Treaties implied that there were agreements concluded between States that were not governed by international law and were consequently non-binding. Nevertheless, as in the case of treaties, the denomination of the agreement was irrelevant or was at least not the only or most important element for distinguishing between binding and non-binding agreements.

The observation made by the Special Rapporteur in paragraph 94 (d) of the report was crucial for laying down the correct approach to distinguishing between binding and non-binding agreements: only after examining the content of an agreement was it possible to conclude whether it was legally binding. That inductive approach clearly showed that at least the operation to determine the bindingness of an agreement was of a legal character. Assuming that the correct approach for identifying the bindingness of agreements was an inductive one could help States to establish that such identification must rely essentially on the competencies of legal advisers and not on the political organs of the State.

He agreed with the Special Rapporteur's conclusion in paragraph 97 that resolutions and other acts adopted by international organizations should be excluded from the scope of the topic. In his view, the fact that they were created through the intermediary of an international organization meant that they followed a different logic. Moreover, he considered that, at the current juncture, the Commission should not address acts adopted within the framework of intergovernmental conferences that did not have separate legal personality. The possibility of an overlap with the Commission's conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties was another reason to be cautious in that regard.

He likewise concurred that documents or communications through which States simply communicated or stated facts or positions should be excluded from the scope of the topic, since they lacked a "normative component", even though such facts and positions

might well derive from binding agreements. He supported the Special Rapporteur's recommendation that the topic should cover only written agreements, as the inclusion of unwritten agreements, which could take different forms and raise different legal questions, would unnecessarily complicate the Commission's work.

While he agreed with the Special Rapporteur that the scope of the topic should exclude non-binding provisions found in treaties, the Commission should not rule out the examination of methods used by States to identify non-binding provisions in both treaties and non-binding agreements, such as linguistic markers.

As he had stated previously, he believed, contrary to the view of the Special Rapporteur, that the Commission should deal with inter-institutional agreements, as their consideration would be of great practical relevance for States. For example, in some countries, authority to bind the State internationally was less strongly centralized, so that an agreement concluded by a State entity could, depending on the circumstances, be attributed to the State itself.

To his mind, the term "agreement" used in a provision of a given treaty did not refer only to legally binding agreements but also included those that were not legally binding. While the issue was admittedly a complex one, addressing it would help the Commission to understand the parameters for distinguishing a binding agreement from a non-binding one.

Concerning chapter VIII of the report, he agreed with the Special Rapporteur that the third of the three competing approaches to distinguishing a binding agreement from a non-binding agreement listed in paragraph 120 of the report, which involved using a set of objective indicators to determine the intention of the parties to the agreement, was the most adequate, not because it was the best option but because it was the only coherent one. When the issue had been raised in the Inter-American Juridical Committee, of which he was a member, his view had been that the intention of the negotiating States could not be dissociated from objective indicators. In practical terms, the crafting of agreements must always rely simultaneously on linguistic markers that revealed, or not, the intention of negotiating States.

He disagreed with the Special Rapporteur's assertion that recourse to objective criteria was necessary only when negotiating States had not expressly indicated that an agreement was non-binding, as an agreement could expressly state that it was non-binding while containing several linguistic markers indicating that the opposite was true. In such cases, there were different objective criteria that might reveal different intentions of the negotiating States.

Regarding the question of whether any presumptions might exist about whether an international agreement was binding, raised in paragraph 124 of the report, he believed that the Commission should exercise caution in affirming the existence of such presumptions. State practice tended to contradict such presumptions and relied much more on a case-by-case analysis of the bindingness of a given agreement.

The question of whether there were rules of international law that governed non-binding international agreements was indeed a thorny one. Analogical reasoning, grounded in the law of treaties, could sometimes assist in determining whether such rules existed. For example, the interpretation of terms in accordance with their ordinary meaning, as established in the general rule of treaty interpretation, was regularly applied in State practice to identify markers of the bindingness of an agreement.

Regarding the question raised by the Special Rapporteur in paragraph 132 (c) of the report, he considered that clauses indicating that an agreement was not legally binding did not have a proper legal effect and merely declared the intention of States not to produce a binding instrument. Such clauses were not a sufficient basis on which to draw conclusions, as they needed to be contrasted with the intention of States found in other agreement clauses.

As for chapter IX of the report, he agreed that draft conclusions could be a feasible outcome for the Commission's work on the topic. While he understood why the Special Rapporteur believed that the topic was not compatible with the proposal of best practices or model clauses, the accompanying commentaries should nevertheless provide States with some guidance regarding the most common terminology found in non-binding agreements.

Although identifying that terminology was admittedly difficult, especially in view of the six official languages of the United Nations, doing so would be of the utmost practical importance to States. The Inter-American Juridical Committee guidelines on binding and non-binding agreements contained a table of terminology associated with each type of agreement that was often referred to by States and negotiators.

Lastly, concerning chapter X of the report, he noted that, according to the schedule of work proposed by the Special Rapporteur, all the questions relating to the topic would be settled by the end of the 2027 session. He wondered whether such a schedule was realistic owing to the complexity of the issues involved.

Mr. Oyarzábal said that the Special Rapporteur was to be commended for his efforts to painstakingly reflect the views of States, doctrine and case law from different regions and legal systems in his well-drafted and well-researched first report on the topic.

By way of general remarks, first, he wished to recall that non-legally binding international agreements were by no means a new phenomenon. Their importance had been discussed extensively in the international arena and they were widely used in practice. Several expert bodies, such as the Institute of International Law, the Inter-American Juridical Committee and the Committee of Legal Advisers on Public International Law of the Council of Europe, had completed valuable work on the topic, on which the Commission could build in its own work. Despite the doubts expressed by some States, notably Argentina, in the Sixth Committee about the Commission's taking up the topic, he agreed that the Commission needed to comprehensively address the subject matter at hand, which, to date, it had only touched on in the context of other more or less related topics.

Second, in taking the topic forward, the Commission must familiarize itself with the practice of States, perhaps to a greater extent than for other topics, as taking the wrong approach could result in a final output that prejudged the will of the parties to an international agreement regarding its binding or non-binding nature and constrained the practice of States, which were making increased use of agreements of that type precisely because of the flexibility they offered.

Third, it followed that, as noted by the Special Rapporteur in paragraph 4 of the report, the Commission must focus on the practical aspects of the topic "without getting lost in exclusively theoretical considerations". It should not lose sight of that objective as it embarked on the process of drafting substantive draft provisions and deciding on the format of its final product.

Fourth, he agreed with the Special Rapporteur that non-legally binding international agreements were not treaties and were not governed by international law. The Commission should therefore exercise extreme caution in borrowing from or drawing parallels with the law of treaties in dealing with non-legally binding international agreements. Treaties were governed by international law and created rights and obligations under that legal system; non-legally binding international agreements were not governed by international law and did not create rights or obligations under international law. They were not "non-legally binding" because they were not enforceable or because they could not form the basis of a claim by one party to such an agreement against another. They were non-legally binding under international law either because they were of a political nature or because they were subject to the domestic laws of the States or entities that were parties to such an agreement.

He thus had reservations about the views expressed in paragraph 138 (d) of the report, where it was suggested that consideration should be given to the potential legal effect of non-legally binding agreements for the purposes of interpreting other international rules, and in paragraph 140 of the report, where it was suggested that draft conclusions would be the most appropriate outcome because the topic "is a continuation of, or is linked with, the Commission's recent work on the sources of international law, for which the form of draft conclusions was chosen". As non-legally binding agreements were not treaties, let alone a source of international law, he wished to reiterate his concern about the drawing of such a parallel. The Commission should avoid creating a legal regime applicable to non-legally binding international agreements that mirrored the treaty regime and, in so doing, accorded non-legally binding international agreements the status of international law or *quasi*-international law.

Fifth, he believed that the Commission's work on the topic should focus on providing guidance to States that might wish to resort to non-legally binding international agreements to avoid entering into a treaty and being bound by international law. While discussing and clarifying the differences between a treaty and a non-legally binding international agreement would be a useful exercise, the Special Rapporteur's proposal to lay down the criteria for distinguishing between treaties and non-legally binding international agreements risked prejudging the binding or non-binding nature of the innumerable agreements concluded worldwide prior to the Commission's current project, whose characterization as treaties or non-legally binding international agreements could only be determined by means of an individual examination of each agreement. The Commission's work should be forward-looking and aimed at providing States with practical guidance as to what issues they should take into account and be aware of as they prepared to conclude an agreement that was not intended to create binding rights and obligations under international law or to trigger their international responsibility in the future. Lastly, in the light of the concerns he had expressed, the Commission should take advantage of the Special Rapporteur's decision not to propose draft provisions for adoption at the current session and should take the time to discuss, whether formally or informally, the future direction of its work on the topic and the related end product.

Regarding chapter VI of the report, on the material to be studied by the Commission, he merely wished to state that, while some consultation of jurisprudence and doctrine might be useful, the focus of the Commission's work should be State practice and the legal positions taken by States regarding non-legally binding international agreements. He therefore supported the Special Rapporteur's proposal to study examples of non-legally binding international agreements, domestic practices relating to such agreements and any positions taken by States with regard to their nature, regime and effects under international law.

As for chapter VII of the report, on the scope of the topic, he could go along with the term "agreements", as it appeared to be the one most generally used in international and domestic practice. The use of the expression "non-legally binding" to qualify "agreements" should allay any concerns about potential confusion between non-legally binding agreements and treaties, which were legally binding under international law. He also agreed that the Commission's work should deal only with "international" agreements of that nature, understood as those concluded between States, between States and international organizations, between international organizations, and between administrative authorities, federated States, or cities or central banks of different countries. The parties to an agreement, not the applicable law, were what made a non-legally binding agreement either international or national, since, as he had mentioned previously, a non-legally binding "international" agreement was not governed by international law but might be subject to the domestic laws of the States in question. Agreements concluded between the domestic entities of a single State should be excluded from the scope of the topic, as they fell within the domestic jurisdiction of that State and were entirely outside the scope of international law. However, he saw no good reason to exclude inter-institutional agreements between sub-State entities of different countries from the scope of the project. Agreements of that type had become commonplace and not including them seemed counter-intuitive, as inter-institutional agreements, which were often negotiated and signed without the agreement or knowledge of the ministries of foreign affairs of the countries concerned, were the type most likely to pose problems. The Special Rapporteur might wish to examine that question by referring to relevant examples in his next report.

Concerning chapter VIII (A) of the report, on the criteria for distinguishing treaties from non-legally binding international agreements, he agreed with the Special Rapporteur that the intention of the parties not to bind themselves under international law, as shown by the text of the agreement, should be the decisive factor. Given that the entire international legal system was based on the principle of State consent, a State could not be bound by an agreement by which it had not intended to be bound. It followed that only the parties to the agreement, not any judicial body, had the power to "recategorize" a non-legally binding agreement as a treaty or *vice versa* once they had agreed on its binding or non-binding nature. That differed from situations where the parties to an agreement disagreed on its binding or non-binding character and the interpretation of the agreement was the subject of judicial proceedings.

Drawing up a list of indicators of the parties' intention to enter into a non-legally binding international agreement would provide States with useful practical guidance, and he strongly encouraged the Special Rapporteur to further examine the practice of States to identify what those indicators might be. However, the Commission should not lose sight of the fact that an international agreement was binding or non-binding depending on the will of the parties to be bound or not to be bound by it under international law. Indicators could not and should not prejudge or override the will of the parties when they entered into such agreements; rather, they should serve as objective means of determining the parties' intentions.

As for chapter VIII (B) of the report, on the regime of non-legally binding international agreements, he wholeheartedly agreed with the Special Rapporteur's assertion in paragraph 129 that non-legally binding international agreements were not governed by the law of treaties, as they were not governed by international law at all. However, that did not mean that States, in concluding or implementing non-legally binding international agreements, could violate international law. International law always imposed limits on the conduct of States, whether they acted unilaterally or jointly with other States. That did not, however, transform non-legally binding international agreements into legally binding agreements under international law.

States were prohibited from violating peremptory norms of general international law (*jus cogens*) when they concluded non-legally binding international agreements, not because article 53 of the Vienna Convention on the Law of Treaties was applicable to such agreements, but because *jus cogens* norms were accepted and recognized by the international community of States as a whole as norms from which no derogation was permitted. The Commission had affirmed the general nature of *jus cogens* norms in its 2022 draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*). States also could not derogate from treaties or customary rules that were binding on the parties through an international agreement that was non-legally binding.

Regarding chapter VIII (C) of the report, on the potential legal effects of non-legally binding international agreements, he shared the Special Rapporteur's view that the assessment of such effects was a thorny and sensitive question on account of its significant practical and political implications. As recalled by the Special Rapporteur in footnote 265, all the States of the American continent had expressed the view, in response to a questionnaire from the Inter-American Juridical Committee, that non-binding agreements could not, by definition, generate any legal effects.

He was willing to discuss the potential legal effects listed by the Special Rapporteur in paragraph 138 of the report, with the exception of subparagraph (d), as he considered that the use of non-legally binding agreements as a means of treaty interpretation was a matter pertaining to the law of treaties and that addressing it in the current context would only create confusion and raise the question of whether a non-legally binding international agreement could in fact be binding in certain contexts. Any consideration of the potential legal effects of non-legally binding international agreements should be based on the responses received from States Members of the United Nations to a questionnaire asking whether a non-legally binding international agreement could have legal effects and, if so, what those legal effects were. He strongly cautioned against entering into a theoretical debate and relying on doctrine and jurisprudence when it was the views and the practice of States that must be the ultimate consideration.

Lastly, concerning chapter IX of the report, on the form of the final outcome of the Commission's work on the topic, he was of the opinion that draft guidelines, not draft conclusions, would be the better option. Contrary to the view of the Special Rapporteur, he considered that States might benefit from the inclusion of best practices, model clauses or other related recommendations in the draft guidelines and encouraged the Commission to consider that possibility.

By way of conclusion, he wished to recall that one of the reasons why States had recourse to non-legally binding international agreements was to avoid creating the rights, obligations and international legal effects that arose from treaties. The Commission would

do well not to deprive States of a flexible tool for the conduct of their international relations; otherwise, the outcome of its work would face outright rejection in the Sixth Committee.

Mr. Nguyen, thanking the Special Rapporteur for his in-depth first report, said that the document usefully shed light on the practical aspects of the topic of non-legally binding international agreements and on previous projects of the Commission that had a bearing on that subject. The fact that the Special Rapporteur had decided not to propose any draft provisions for consideration at the current session reflected his cautious approach to dealing with the complex issues that arose in connection with the Commission's study.

The practical importance of the topic to States was borne out by the two phenomena outlined by the Special Rapporteur in paragraph 23 of the report, namely more frequent recourse by States to non-legally binding international agreements in contemporary international relations and the increased use of non-binding international law in legal reasoning or for the purpose of interpreting the law. In addition, States tended to use non-legally binding agreements to avoid legal obligations or to replace rules enshrined in treaties and custom. Indeed, the overuse of non-legally binding agreements in connection with the now dominant concept of a "rules-based international order" risked undermining the role of peremptory norms of general international law (*jus cogens*). The distinction between binding and non-binding documents was becoming increasingly important in inter-State relations and in jurisprudence.

In the *South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, the parties had held diverging views on the legal status of the Declaration on the Conduct of Parties in the South China Sea, adopted by the States members of the Association of Southeast Asian Nations (ASEAN) and the Government of China on 4 November 2002. One party had considered that the Declaration was a legally binding agreement and that negotiations should be held prior to recourse to Part XV of the United Nations Convention on the Law of the Sea, in accordance with article 281 of the Convention. The other party had considered the Declaration to be a purely political agreement that did not create any new obligations. The Special Rapporteur's intention to draw on the rich practice of Asian and African countries and on judgments in legal cases from those regions was highly appreciated.

He was fully in favour of retaining the term "agreements" in the title of the topic, as proposed by the Special Rapporteur in paragraph 94 of the report. The term "agreement" denoted the result of an exchange, consultations or negotiations and reflected the parties' opinions or attitudes on a political, legal or other matter. Agreements could provide for binding or non-binding measures without necessarily implying that such arrangements would apply to events in the future. Agreements could take the form of one or more instruments. They were a vehicle through which the parties could express their will. The legal character of agreements depended on whether they were binding or non-binding. The expression "non-legally binding agreement" was entirely proportionate to and distinct from the expression "legally binding agreement". They complemented each other and did not give rise to misunderstandings in contemporary international relations. Replacing the term "agreements" with "instruments" or "arrangements" would not reflect any more clearly the non-legally binding nature of the texts in question.

In taking up the topic, the Commission's aim was to distinguish between legally binding and non-legally binding agreements. A non-legally binding agreement might, however, still contain provisions that were binding or that might become so in the future, and thus came within what the Special Rapporteur had aptly described as a "grey area". The national legislation of many countries likewise underlined that feature. For example, article 2 (1) of the 2020 Law on International Agreements of Viet Nam provided that an "international agreement" meant a written agreement on international cooperation between a Vietnamese contracting party, within its functions, tasks and powers, and a foreign contracting party, which did not give rise to, alter or terminate a right or obligation of the Socialist Republic of Viet Nam under international law. While such international agreements created rights and obligations between the contracting bodies, they were not binding on the central Government. Consequently, before international cooperation agreements concluded between sub-State entities of different countries could be excluded from the scope of the

topic, the criteria used to distinguish binding international agreements from non-binding international agreements must first be standardized.

Non-legally binding international agreements were agreements that were within the international sphere; they did not include domestic law agreements or agreements that came under domestic law. They were written commitments that used language different from that used in treaties and conveyed the opinions or intentions of States or international organizations on a general or specific point without entailing any legal obligations. He agreed with Mr. Galindo and Mr. Oyarzábal that non-legally binding international agreements were not international treaties and, as such, were not governed by international law, including the Vienna Convention and other instruments on the law of treaties.

However, the content of non-legally binding international agreements must comply with international law. A non-legally binding international agreement whose content was incompatible with *jus cogens* norms and fundamental principles of international law such as the prohibition of the threat or use of force in international relations was unacceptable in the international sphere. Non-legally binding agreements did not create, modify or abolish the rights and obligations set forth in existing legally binding agreements between subjects of international law. Non-legally binding agreements must not restrict the freedom to conclude international treaties; they could facilitate, but not prevent, the conclusion and implementation of legally binding agreements. However, non-compliance with non-legally binding agreements could spark political reactions and damage the reputation of the offending party.

Although they were not legally binding, non-binding agreements could still produce specific legal effects depending on their functions and the circumstances in which they operated. The role of non-legally binding agreements was to interpret the intentions of the parties, which were among the supplementary means of interpreting treaties and binding agreements on the same subject. Their non-binding nature was consistent with Article 38 (1) (*d*) of the Statute of the International Court of Justice, and they could therefore be accorded the status of a subsidiary means for the determination of rules of law. Non-binding agreements could also serve as a basis for defining rules of customary law or as the premise for formulating a new provision of an international treaty. For example, the non-binding code of conduct that was being negotiated by ASEAN and the Government of China to mitigate the risk of conflict in the South China Sea was based on binding principles enshrined in the Charter of the United Nations and in the United Nations Convention on the Law of the Sea. Such examples raised the question of the relationship between non-legally binding agreements and soft law, as well as the question of the fragmentation of international law.

The final outcome of the Commission's work should be dictated by the needs of States. State practice, surveys on States' opinions, studies, doctrine and legal decisions all indicated that draft articles would not be an appropriate end product. Since it was through the terminology used in individual agreements that States and international organizations could achieve greater clarity in their practice, he had doubts about whether the Commission would be able to make recommendations that were truly universal. To his mind, draft conclusions or recommendations would be the best choice for a topic that was still evolving.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair said that Mr. Cissé, Special Rapporteur for the topic "Prevention and repression of piracy and armed robbery at sea", had signalled his intention to resign from that position, as he had been asked to perform additional ambassadorial duties by the Government of Côte d'Ivoire and would thus be unable to continue to lead the Commission's work on the topic. On behalf of the Commission, he wished to express appreciation for all the work that Mr. Cissé had accomplished as Special Rapporteur. The Bureau would meet in due course to discuss the way forward.

The meeting rose at 11.35 a.m.