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Held at the Palais des Nations, Geneva, on Wednesday, 17 July 2024, at 10 a.m.

Contents

* Reissued for technical reasons on 2 December 2024.

Present:

Chair:	Mr. Paparinskis (First Vice-Chair)
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Ms. Orosan
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Patel
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo

Secretariat:

Mr. Llewellyn	Secretary to the Commission

In the absence of Mr. Vázquez-Bermúdez, Mr. Paparinskis, First Vice-Chair, took the Chair.

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

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

Ms. Mangklatanakul said that the Special Rapporteur's first report on the topic "Non-legally binding international instruments" was well structured and thorough. The topic would be of great relevance and value for States and for the legal advisers who had to advise on the topic on a daily basis. Some 70 per cent of the requests for legal opinions she had received in her former role as Director-General of the Department of Treaties and Legal Affairs of Thailand had been requests from Thai agencies concerning non-legally binding agreements, and that pattern seemed not to be unique to Thailand. In view of the practical relevance and utility of the Commission's work on the topic, the success of the study would be dependent upon adequate attention being accorded to State practice while maintaining a robust academic discipline and a careful balance between clarity on the one hand and the flexibility that was a key benefit of non-legally binding agreements on the other.

International agreements had long been an essential tool for the conduct of foreign relations, providing the framework within which States could work together. The subject matter of such agreements spanned the full spectrum of international relations, including security and economic and social affairs. States selected the types of agreements carefully and purposefully, depending on the level of commitment they wished to assume. Treaties obviously represented the highest level of commitment in that they enshrined legal rights and obligations. Non-legally binding agreements, by contrast, enshrined political commitments, and the level of that political commitment could be further differentiated through the type of vehicle chosen to embody it; a joint statement issued by Heads of Government, for example, expressed a much higher level of commitment than the agreed minutes adopted by a ministerial working group. In view of the diverse methods that States used to conduct their international relations, the Commission should refrain from creating new rules that could potentially limit the flexibility and utility of less formal agreements. She was thus reassured by the Special Rapporteur's express clarification that the aim of the Commission's work on the topic was not to create new rules that might transform the nature of such agreements and she welcomed his proposal that the Commission should focus on the practical aspects of the topic.

With regard to the materials to be studied, like other members of the Commission, she agreed with the Special Rapporteur that the practice examined should be sufficiently representative of different regions and legal systems, should consider a variety of forms of non-binding agreements and the diverse legal issues associated with them, and should take various State practices, including practice in Asia and Africa, into account. Many States, including Thailand, had adopted internal manuals or guidelines for concluding legally binding and non-legally binding agreements that could be particularly useful for ascertaining views and practice. The practice of regional organizations such as the Association of Southeast Asian Nations (ASEAN), which had adopted the Rules of Procedure for Conclusion of Non-Legally Binding Agreements by ASEAN in 2023, would also be useful. Feedback on the experience of adopting and applying such manuals across different States and regions might also prove key to ascertaining the real practical problems that the Commission's study might address. For those reasons, she fully supported the Special Rapporteur's suggestion that manuals and guidelines of that kind should be identified and studied.

On the matter of the terminology and scope of the study, the Special Rapporteur provided several reasons for retaining the term "agreement" in the title of the topic even though several States had suggested that it should be replaced by an alternative term such as "instruments". States' reservations regarding the use of "agreement" did not stem from a belief that the term was exclusively reserved for binding agreements or necessarily implied an intention to create a legally binding instrument, as might have been assumed. In fact, States' legal advisers were well aware that the designation of a document was not a conclusive determinant of its legal status. States' reservations, in her view, stemmed mainly from their daily practice in advising State agencies on how to select titles for their documents that precluded any doubt, however small, as to the legal status of the document in question.

In many countries, including Thailand, State agencies were advised not to use the terms “agree” and “agreement” in documents intended to be non-legally binding since they might be mistakenly interpreted as indicating that the parties intended otherwise. That concern was not unfounded; one of the definitions of an “agreement” provided by the Oxford English Dictionary was “a contract duly executed and legally binding”. It was thus understandable that many States preferred to use terms other than “agreement”. If their explicit preference was to be disregarded, the Commission should provide States with clear and thorough explanations of its choices, all the more so since the Commission had itself used the similar term “non-binding instruments” in its past works. She was raising that point not so as to insist on the Special Rapporteur reconsidering his choice of term but rather to stress the importance of listening and responding carefully to States, as the intended beneficiaries of the Commission’s work. At that early stage of the study, she was able to support the term proposed by the Special Rapporteur subject to the caveat that, as stated in paragraph 95 of the report, the use of the generic term “agreement” was without prejudice to the nature and effects of the agreements examined and the terminological choices that some States might make to guide their own practice.

Her initial support for the use of the term “agreement” was tied to her opinion as to the appropriate scope of the topic. She shared the view, expressed previously by Mr. Asada and Mr. Patel, that expanding its scope to include unilateral acts would excessively expand the range of documents to be considered and would obscure the focus. Unilateral acts raised quite different legal issues, so it was reasonable to exclude them. In the interests of clarity and simplicity, tacit and oral agreements should also be excluded. Assuming that unilateral acts were excluded from the scope of the topic, using the term “agreement” would make clear that the topic’s scope was limited to situations where a convergence of wills between the relevant parties could be identified. With regard to acts adopted by international organizations, she shared Mr. Asada’s view that not all of them were necessarily unilateral in character, and thus there should be no categorical exclusion of such acts. Rather, the circumstances of a given act’s adoption – particularly the negotiating process and the consent required of the organization’s members – should be examined to determine whether the act in question represented a convergence of wills. Similar consideration should be given to acts adopted by intergovernmental conferences that did not have separate legal personalities, as they were even less likely to be unilateral in essence.

Regarding the three broad categories of questions to be addressed by the Commission that were identified in the report, she agreed that, as stated by several States in the Sixth Committee, special attention should be paid to the formulation of a set of criteria for distinguishing non-legally binding instruments from treaties. It was essential to discuss the scope of such criteria at the preliminary stage. A good starting point for such discussions would be the definition of the term “treaty” contained in article 2 (1) (a) of the Vienna Convention on the Law of Treaties (the 1969 Vienna Convention), where a treaty was defined as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”. Two requirements established in that definition were of particular relevance for the distinction between treaties and non-legally binding agreements. Each of those requirements constituted threshold issues that could preclude the need for an examination of whether the parties had had the intention of creating a legally binding agreement.

The first such requirement was for the parties to the agreement to be subjects of international law. Since a significant proportion of non-legally binding international agreements were negotiated and concluded between State agencies, organizations and institutions such as government ministries, a discussion of how the true parties to an agreement should be identified would be of great practical utility. An international agreement entered into between State agencies in their own name, rather than as a representative or agent of the home State or Government, could not be a treaty, since State agencies did not possess international legal personality and, consequently, did not have legal capacity under international law to enter into treaties. The question of the identity of the parties was thus a threshold issue since, if the parties were found not to be subjects of international law, there would be no need to consider whether the parties had had an intention to create international legal obligations.

Given those considerations, the Commission should consider which factors might serve to determine whether an international agreement was truly an agreement between State agencies. A common practice was for agreements, whether or not they were legally binding, to include a definition of the terms “Party” or “Participant” and to indicate in the signature block the entity on whose behalf the signatories were signing. In Thailand, when an agreement was intended to be a treaty, the usual practice was for the term “Party” to be defined as being the respective Governments of the parties and for the signature block to indicate that the signatories were signing “on behalf of” the respective Governments of the parties. In the case of non-legally binding agreements, on the other hand, the terms “Party” or “Participant” were often defined as being the respective State agencies that negotiated the treaty and, correspondingly, the signature block indicated that the signatories were signing “on behalf of” the respective State agencies. Would those facts be sufficient to conclude that the agreement was truly an agreement between State agencies or were there other relevant factors to be considered? For example, could those terms of the agreement be disregarded if each of the State agencies in question had submitted the agreement to their respective Governments for approval prior to its conclusion?

The second key requirement established in the definition of a treaty was the requirement for the agreement to be “governed by international law”. According to the commentary to draft article 2 of the 1969 Vienna Convention, the phrase “governed by international law” served to distinguish between international agreements regulated by public international law and those which, although concluded between States, were regulated by the national law of one of the parties, or by some other national law system chosen by the parties. The Commission should thus also consider which factors it might be relevant to consider in order to determine the law governing an agreement, especially in cases where the agreement did not have a governing law clause. For example, if the agreement included a dispute settlement clause that required disputes to be submitted to the national courts of one of the parties, would that requirement be sufficient to conclude that the agreement was not governed by international law?

As to the question of the approach to be employed to determine whether the parties intended to create a legally binding agreement, she agreed with the Special Rapporteur and Mr. Galindo that an approach where objective indicators were used to determine the parties’ intentions was the most convincing option. 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. For Thailand and, she assumed, its partners in agreements, there was an expectation that such objective indications of intention, taken as a whole, would constitute sufficient grounds to conclude whether the agreement in question was to be regarded as a treaty or not. She looked forward to a detailed elaboration from the Special Rapporteur of the thinking behind his conclusion that that approach reflected current practice and jurisprudence.

With regard to the second of the three broad categories identified by the Special Rapporteur, namely the regime of non-binding instruments, she wished only to register her disagreement with his contention that a final clause in an agreement that indicated that the agreement was not legally binding must, by definition, have some binding legal effect. The effect of such a clause lay in its evidentiary value as a clear expression of the parties’ common intention that the agreement would have no legally binding force. The fact that the clause itself had no legally binding force did not deprive it of its evidentiary value with regard to the parties’ intentions at the time of the agreement’s conclusion.

In relation to the question of the potential legal effects of non-legally binding agreements, she wished to raise an important terminological issue. It should be made clear from the outset that, by their very nature, and as the name suggested, non-legally binding agreements did not and could not create legally binding obligations. They were not a source of international law. As was discussed in paragraph 136 of the report, the intention of States utilizing such agreements was precisely that non-compliance with their provisions did not engage State responsibility. She noted that the Special Rapporteur used the term “legal effect” in the broadest sense to encompass even the well-recognized utility of non-legally binding agreements as a means of interpretation of legally binding agreements. Nonetheless, for some

practitioners, the use of the term “legal effect” could still be misleading, as the term might be seen as being associated with legally binding obligations. To avoid confusion, she suggested that the term “legal implications” might be used instead of “legal effects”.

It was vital to note that States often used non-legally binding international agreements not for legal but for political reasons. As previously noted by Mr. Zagaynov, subjects of international relations were often reluctant to assume legal obligations and many States turned deliberately to non-legally binding agreements precisely because they believed such agreements to be devoid of legal effects, although aware of certain legal implications, especially implications for the interpretation and identification of customary international law. Those States would be both surprised and concerned if the Commission were to suggest that, in fact, such agreements did have legal effects beyond their commonly held knowledge and understanding. It was for that reason that the issue of the potential legal implications of non-legally binding international agreements should be addressed extremely carefully.

Regarding the form that the Commission’s output on the topic should take, like several other members, she supported the Special Rapporteur’s proposal that the final outcome should consist of draft conclusions similar in form to the Commission’s conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. Draft conclusions would help to clarify the current state of international law without prejudging State practice. As States could be expected to continue innovating and adapting their practices to new realities and circumstances, the Commission should be careful to minimize any risk of inadvertently limiting the flexibility and further evolution of less formal agreements.

Mr. Jalloh said that the Special Rapporteur’s first report on the topic “Non-legally binding international agreements” was rich in insights and flagged up the key issues raised by the topic. He particularly appreciated the Special Rapporteur’s flexibility, his readiness to seek guidance from the Commission members regarding the way forward and his efforts to draw on a representative set of materials from different regions and languages. Since locating representative materials for reports was not easy, all members of the Commission would need to contribute to the task in order to ensure a sufficiently diverse set of materials in which all regions, languages and legal systems of the world were represented.

Although initially sceptical about the Special Rapporteur’s decision to present a preliminary report without any concrete textual proposals, he had become convinced in the course of the rich plenary debate that the decision to set forth the conceptual basis for the Commission’s examination of the topic before proposing any text was a good one. He would not advocate that approach for every topic examined but, in the case in hand, he supported the idea of beginning with a general discussion of the topic with a view to better defining its future direction, its scope, the issues to be addressed and the nature of the final output. The practice of preparing a preliminary report without textual proposals for the Drafting Committee was in any case well established within the Commission.

The topic of non-legally binding international agreements was of particular importance at a time when waning State interest in treaties as a primary mode of global law-making was resulting in the increasing use of “soft law” instruments to regulate contemporary international relations. Non-legally binding agreements concluded between States had long been part of international law, as debates within the Commission in the late 1950s had amply demonstrated, but the exponential increase in the use of such agreements – which might or might not be properly equated to soft law, as Mr. Fathallah had argued at the previous meeting – had made them even more important in shaping modern inter-State relations. That discernible change in practice had provided States and other actors in international law with greater flexibility in implementing and adapting norms and standards to cover a wide range of circumstances involving non-binding commitments and undertakings at the international level.

Responding to the changing needs of States, the Commission’s own work had been implicitly characterized by a move away from an inclination to prepare draft articles intended to serve as the basis for hard law instruments such as conventions and towards the greater utilization of softer forms of outputs with a variety of designations, including draft guidelines, draft principles and draft conclusions. However, the turn towards softer instruments should

not be at the expense of the Commission's continued contributions to the codification of international law. The Commission had not yet adopted a one-size-fits-all approach for the wide range of its outputs and, based on its long-standing practice, it was clear that the varied forms of its outputs contained texts with different degrees of bindingness, with some texts containing both hard law and soft law obligations. The Commission might well encounter similar issues when attempting to distinguish binding text from non-binding text, including within the same instrument, in the current topic.

As well as having been underscored by States in the Sixth Committee, the importance and relevance of the topic was evidenced by the increasing accumulation of international court case law on the issue. Pertinent examples included the judgments of the International Court of Justice in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, from 1994, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, from 2017, and *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, from 2018. The International Tribunal for the Law of the Sea had also been called on to adjudicate on the bindingness, or otherwise, of provisions and articles included in international agreements, including, for instance, in *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)* in 2012.

The fact that national guidelines on non-binding agreements had been adopted in numerous countries and that work on the same topic, albeit bearing different titles, had been issued by sister codification bodies further underscored the importance of the topic. Several members of the Commission who had spoken on the topic earlier in the session had drawn attention to the important work on the topic carried out by bodies such as the Institute of International Law and, and more recently, the Inter-American Juridical Committee, as well as the ongoing work being carried out by the Council of Europe's Committee of Legal Advisers on Public International Law. The Commission should take that work carefully into account, while always keeping in view its own universal mandate and the value that its own work on the topic could add.

The Commission's work on the topic should be practical, its purpose being to clarify the nature, regime and potential legal effects of non-legally binding agreements on the basis of a careful analysis of the relevant practice, jurisprudence and doctrine. However, in his reports, the Special Rapporteur might, nevertheless, engage with some of the bigger conceptual or theoretical questions that the topic raised. While there was no need for an in-depth study of legal theory, theoretical considerations drawn from the extensive literature on non-legally binding agreements and soft law would help provide the Commission with both greater conceptual clarity and more conceptual consistency in its approach, equipping it better to address the practical issues on which it needed to focus in the following year's debate on the second report. The risk of taking a purely practical approach – without meaningful reference to the rich theoretical literature addressing complex issues such as the distinction between the legal and the non-legal, the distinction between binding and non-binding law, and the question of different degrees of legal normativity within each of those categories – was that the Commission might focus too quickly on the trees and lose sight of the more complicated forest at the intersection of international law and international relations.

The Commission should avoid taking from States the flexibility and freedom to choose which types of binding or non-binding agreements to enter into. Its work should complement the practices of States, not detract from or undermine them. On a related point, he strongly agreed that there was a need to avoid blurring the line between non-legally binding and legally binding agreements or even questioning the distinction between binding law and non-binding law or creating *de lege ferenda* rules governing or limiting the use of such agreements. The utility of the Commission's work on the topic would be measured not by the number of draft conclusions or draft guidelines that it developed but the extent to which it managed, cautiously, to clarify the circumstances under which non-legally binding international agreements might come under international law.

He found the Special Rapporteur's first report to be clear in general, but thought that the structure of the second half of the report might have benefited from focusing first on the substantive issues before turning to terminological issues. He had initially agreed with the arguments of the Special Rapporteur in favour of keeping the title of "Non-legally binding international agreements", but noted that, in the Sixth Committee, many States had expressed

a preference, based on their practice, for terms such as “instruments” or “arrangements”. Possible difficulties with translation did not justify retaining the current title. He agreed with those members who had suggested using the term “non-binding agreements” or, in order to properly emphasize the international law aspect of the topic, “non-binding international agreements” or, his own preference, “non-binding agreements under international law”.

The scope of the topic, as noted in paragraph 91 of the first report, was intimately tied to the title and the terminology used. He agreed with the Special Rapporteur’s comments in paragraph 100 of the report that the Commission should limit the scope of the topic to “agreements in which States agreed to make a commitment (albeit a non-legally binding one)” and to focus on the “grey area” of agreements that were not treaties but were similar enough to them to make it necessary to find a way to distinguish them from treaties and to identify their possible legal effects. Thus, the routine stuff of diplomacy – the “documents or communications” through which States, whether individually or jointly, stated facts or positions or took “purely operational measures” – would be excluded.

Furthermore, he agreed with the Special Rapporteur that the topic should not be “limited by the degree of formality of the agreement” under consideration but, rather, should cover all written agreements, irrespective of whether they were designated as declarations, memorandums of understanding or codes of conduct, or went by some other name, and whether they were set out in a single instrument or multiple instruments.

As other members of the Commission had said, the topic should exclude oral or tacit agreements as well as bilateral or regional customs, which raised distinct issues, but should cover agreements concluded between States, between States and international organizations, or between international organizations. The scope should also include inter-institutional arrangements, which were agreements concluded between entities at sub-State level in different countries, but only to the extent that they raised questions of public international law. Acts adopted within the framework of intergovernmental conferences should not be covered.

Agreements concluded between States and private parties might raise additional issues that were to some extent unique; they thus needed to be treated with caution, but practice suggested that they sometimes raised consequential issues of public international law and could therefore usefully be clarified by the Commission. For example, in the context of conflicts in various parts of the world, particular difficulties had arisen regarding the binding or non-binding nature of a number of agreements entered into by Governments in the context of ceasefire negotiations with rebel or insurrectional movements or *de facto* Governments. They included the Agreements on a Comprehensive Political Settlement of the Cambodia Conflict of 23 October 1991, signed by 19 States participating in the Paris Conference on Cambodia, on the one hand, and the Khmer Rouge on the other; the Lusaka Protocol of 15 November 1994, signed by the Government of Angola and the National Union for the Total Independence of Angola (UNITA); and the 1999 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone.

In each of those cases, all of which concerned the ending of civil wars, the question had subsequently arisen as to whether the agreements constituted mere political or moral commitments or even internationalized treaties that generated binding legal obligations under international law. Failure to abide by them, usually by the rebel side, had later led the Security Council to invoke Chapter VI of the Charter of the United Nations, on the pacific settlement of disputes, or Chapter VII, on action with respect to threats to the peace, breaches of the peace, and acts of aggression, which provided for the sanctioning of the recalcitrant parties and offered a clear position on the legal nature of such agreements.

In the case of Sierra Leone, following the 2002 agreement between the United Nations and Sierra Leone on the establishment of the Special Court for Sierra Leone to prosecute those who bore the greatest responsibility for crimes committed during the war, two defendants, Morris Kallon and Ibrahim Kamara, had challenged the Court’s jurisdiction to prosecute them, on the basis that, in the earlier 1999 Lomé Peace Agreement, Sierra Leone had granted them a blanket amnesty absolving them of all crimes committed during the war. The Court’s Appeals Chamber had, in an important ruling handed down on 13 March 2004, determined that the agreement between the Sierra Leonean Government and the

Revolutionary United Front was not a treaty or an agreement in the nature of a treaty. It had held that the rights and obligations that the agreement created were to be regulated by the domestic laws of Sierra Leone rather than under international law. As a result, the question of whether the Lomé Peace Agreement was binding on the Sierra Leonean Government did not affect the potential liability of the accused to be prosecuted in an international tribunal for the international crimes enumerated in articles 2 to 4 of the Court's Statute. That case demonstrated the importance of retaining the possibility of examining at least some agreements between States and non-State armed groups.

Regarding chapter VIII of the Special Rapporteur's first report, on "Identification of questions to be examined", he agreed that the Commission's first task was to establish the criteria for distinguishing treaties from non-legally binding international agreements. He also agreed with the more nuanced third approach proposed by the Special Rapporteur in paragraph 120 of the report, which involved the use of objective indicators to determine the intention of the parties. While the preliminary ideas suggested in paragraph 121 of the report on the specific type of criteria or indicators to be used were relevant and helpful, they were not decisive considerations for assessing the binding or non-binding nature of an agreement. In that connection, the Commission might, at the current stage of discussion on the topic, wish to refrain from taking a position on the existence of a hierarchy between those factors.

He also agreed that the fundamental rules of international law that could not be derogated from even by treaty, such as rules of *jus cogens*, would certainly limit the freedom of States to contract through non-binding international agreements. To the extent that such agreements carried any legal effects – or even, for that matter, moral, political or other effects – it would plainly be inconsistent with any view of coherent modern international law to allow to be done through the back door of non-binding legal agreements what was not allowed through the front door of treaties.

One of the thorniest and most sensitive questions concerned the potential legal effects of non-legally binding international agreements, which raised a wide variety of issues, as described in paragraphs 133 to 139 of the first report. While he agreed with some of the Special Rapporteur's preliminary observations, he had doubts about some of the other arguments put forward: the Commission should proceed with caution when addressing those issues.

In respect of the form of the final outcome of the Commission's work on the topic, given that non-binding agreements should not be equated with sources of international law, he believed that the Commission should prepare a set of guidelines rather than draft conclusions, as guidelines, by their nature, were non-binding. Furthermore, he did not think it would necessarily be fruitful to develop model clauses, given the wide variety of non-binding agreements. The Commission should keep an open mind as to the possible addition of elements identifying best practices or recommendations for inclusion in the future draft guidelines.

As to the future programme of work, the plans set out for the following year's first substantive report on the topic were clear and transparent. However, more detailed information would have been appreciated on the Special Rapporteur's plans for the 2026 and 2027 reports, including a possible date for the first reading. Such information would be useful not only for the Commission in its work, but also for States participating in meetings of the Sixth Committee.

The Special Rapporteur's first report was a significant step towards addressing the complex issue of non-binding agreements within contemporary international relations. The Commission's work on the topic should seek to provide much-needed clarity and guidance for States and international organizations, thereby promoting greater legal certainty and effective international cooperation. At the same time, the Commission should adopt a cautious approach, focusing more on its mandate of codification, rather than progressive development, of international law, given the extensive practice of States and international organizations available on the issue.

Mr. Argüello Gómez said that, although the first report was preliminary, the Special Rapporteur had provided a coherent and exhaustive study of the topic that recognized the need for constructive ambiguities in developing non-legally binding international

agreements. In establishing the scope of the topic, the first task was to define the agreements concerned. As the Special Rapporteur noted, the focus should be on those non-binding agreements that could be confused with binding ones – those in "the grey area" of agreements that were not treaties but were similar to them. In practical terms, that meant focusing on non-binding agreements that would in principle have met the requirements to be considered binding if that had been their intention and purpose; others, such as agreements entered into by persons without binding authority to represent the State or agreements whose purposes clearly fell within the framework of domestic law, did not present any special problem.

Although the Special Rapporteur was of the view that the term "non-binding legal agreements" was clearer than the expression "governed by international law" used in article 2 of the 1969 Vienna Convention and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, both aspects needed to be included in the definition of the topic: international agreements that were governed by international law but that were not binding. That definition focused on the practical issue to be addressed, which was the distinction between a binding agreement and a non-binding agreement that resembled a treaty. Consideration of the issue was nothing new, as the ambiguity had been included intentionally in the definition given in the Vienna Conventions.

The second Special Rapporteur for the Commission's work on the law of treaties, Sir Gerald Fitzmaurice, had, in his first report in 1956, defined a treaty as "an international agreement ... intended to create rights and obligations, or to establish relationships, governed by international law". In the final outcome, however, the Commission had ultimately retained only the phrase "governed by international law", omitting any reference to the creation of rights and obligations. That was apparently because the Commission had considered that some treaties did not create rights and obligations.

In his report, the Special Rapporteur gave a very interesting overview of the *travaux préparatoires* for the 1969 Vienna Convention relating to the definition of the term "treaty". He agreed with the Special Rapporteur's conclusion that neither the 1969 nor the 1986 Vienna Convention "set out specific criteria for distinguishing treaties from agreements that do not create either rights or obligations". It should thus be made clear from the outset of the Commission's work that the study addressed international agreements between States that were both governed by international law and of a non-binding nature.

In its work on the topic, the Commission should take into consideration the elements that guaranteed the validity of treaties, reviewing the application, where relevant, of the norms laid out in part V of the 1969 Vienna Convention. The need for the rules to be clear was evident from the examination by the International Court of Justice of claims that the absence of formal requirements in an agreement meant it could not be binding. For example, in the Court's judgment in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, it had dismissed the position of Bahrain that, for the agreement between the two States to be binding, it should have been approved in accordance with the rules of the Bahraini constitution. The agreement under discussion was laid out in the minutes of a meeting; had it been in the form of a traditional treaty, with the attendant formalities, the argument put forward by Bahrain might have met with a different response. That example highlighted the importance of making clear the formal aspects that could distinguish the different types of agreement.

Not all legal experts accepted the need for the agreements in question to be governed by international law. For example, Timothy Meyer, in *The Oxford Guide to Treaties*, expressed the view that: "At the outset, we must ask why binding and non-binding agreements should be considered alongside each other. Precisely because non-binding agreements are not legally binding under international law, a number of scholars have objected that they are not, in fact, part of international law at all … Commentators have worried that conflating the two categories risks undermining the normative pull of binding international law." However, those comments were based on different definitions that could be attributed to the many rules of international law, while perhaps ignoring the fact that even rules of international comity, while not binding, were rules within the scope of law. While such considerations would be addressed as the Commission's work progressed, they could also serve as a stimulus, since they pointed to one of the reasons why representatives of States

sometimes entered into agreements without taking account of all the possible consequences; they believed they were acting outside the scope of international law.

Both the title and the definition of the concept of "non-binding legal agreements" could be reviewed and decided on at a later date. The reluctance that some members and several States had expressed about the word "agreement" might well be down to the fact that the subject had not been extensively studied in the past. Once the work was concluded, there would be no more confusion about the meaning of the word, which, like other words, had a number of meanings: as one commentator on the Spanish Civil Code had pointed out many years previously, the definition of "obligation" in the Code as a "legal bond" was not clear, because the hangman's noose was also a legal bond.

As to the criteria that should be used to distinguish between treaties and non-legally binding international agreements, the issue of how to assess the intentions of the parties or objective indicators of such intentions and any possible hierarchy between them should certainly be considered during the study of the topic, but no further comment was required on that subject at the current stage.

Some comment was, however, called for on the idea expressed by authors such as Jan Klabbers that there might be a presumption that an international agreement was a treaty, in the sense that it contained rights and obligations, and so was binding. The mere suggestion at the current preliminary stage of the Commission's study that it might reach that conclusion was highly sensitive. A contrary presumption that agreements were not binding would have as much, or as little, legal basis, but might be of greater benefit. It was, in any case, worth noting that there were subjects on which there was a clear presumption of the non-binding nature of agreements, as indicated by the International Court of Justice in its 2007 judgment in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*. The Commission should also consider at an early stage of its deliberations the question raised in paragraph 125 of the report as to whether courts had the power to recharacterize as binding an agreement that had been expressly defined as non-binding. That would be as extreme as to argue that a court could change the rules on ratification set out in a treaty. The fact that those two points were even raised in the first report should be enough to worry any State official who was thinking of negotiating a non-binding agreement.

The Special Rapporteur clearly rejected the idea that the law of treaties might apply to non-legally binding international agreements, but then suggested that it might be acceptable for certain rules of the law of treaties to be applied – at least those rules that applied to all sources of international law. Just as the definition of a treaty in the 1969 Vienna Convention had been left open to include some non-binding treaties, there was no reason to exclude the possibility that certain rules of treaty law could apply to non-binding agreements. For example, the sensitive matter of the capacity of a State representative to conclude binding agreements, which was part of the law of treaties, was important in assessing different types of agreement.

The arguments of authors like Anthony Aust, mentioned in paragraph 131 of the report, that the application of certain rules of the law of treaties was "by analogy … obviously sensible", a Cartesian-inspired quotation, were preferable to the Special Rapporteur's more Baconian view, whereby he wished to limit the study to the mere inductive process of examining the relevant practice, jurisprudence and doctrine without resorting to deductions by analogy.

Discussion of the identification of the potential effects of non-binding agreements should be left for a later stage, but some preliminary comments were in order. As indicated in paragraph 139 of the report, although such agreements were considered only as facts, they also had legal effects. It could not be excluded that agreements that were not binding in principle could produce effects of estoppel and acquiescence, as simple silence – or inaction – could also produce those effects.

There was also the question of the possible effect that a non-binding agreement might have on existing treaties. In paragraph 132 of the report, the Special Rapporteur recalled that, in the event of a conflict between a treaty and an agreement considered non-binding, the treaty would prevail. However, such a conflict could only occur if the agreement that was

considered to be non-binding had an objective that must perforce be binding; in the case in question, that objective would be the intention of interpreting it as a treaty. In that case, the new agreement would prevail. Otherwise, there could be no conflict between a non-binding agreement and a binding one.

A last matter for consideration was why, if binding agreements that had the effect of treaties could be oral, the Commission's study of non-binding agreements was to be restricted to written ones.

The decision on the form of the final outcome should be resolved at a later date. As the topic was eminently practical, draft conclusions might be the best option.

Mr. Fife said that, to the casual observer, it might appear strange that the Commission, whose mandate was to contribute to the codification and progressive development of international law, should dedicate time to discussing agreements that were not legally binding. At first blush, bindingness was intricately connected with the notion of law. While the character of a text could indeed be such as to automatically produce the legal effects of a treaty, merely asking whether a text was of such a character was not sufficient to determine whether it could carry legal consequences under international law. The Special Rapporteur's first report on the topic of non-legally binding international agreements diligently and convincingly demonstrated the usefulness of studying the considerable practice that existed in relation to the production and operation of agreements that were not treaties and whose character accordingly did not *per se* trigger legal effects for the parties. Such agreements were connected to international law, but the nature of that connection and the means by which it was established remained to be determined. He therefore extended his most sincere appreciation to the Special Rapporteur for his first report, which was thoroughly researched, elegantly written and admirably concise. It prudently set out a clear objective for the Commission's plenary discussions at the current session and pointed to pertinent issues that might be addressed by the Commission in the future.

The international legal system relied on the autonomy of sovereign States and their largely free choice of means to resolve problems and build solutions for the common good of the international community. In many cases, differences were overcome by the conclusion and operation of treaties, which, simply put, required the expression of consent to be bound by a text under international law, based on procedures and effects tightly regulated by the latter. There was, however, considerable practice among States of problem-solving and solution-building through agreement without the intention of becoming bound by the text concerned under international law. Such agreements could be sought for a variety of reasons, including reasons related to time, practicality, the general nature of performance and delivery on commitments made, the provisional or preliminary nature of the solutions envisaged, an intention not to prejudice the outcome of parallel processes already under way or forthcoming, or an intention to test a solution without prematurely entering into a binding agreement that could later restrict the possibilities for an adjustment of course or the freedom to decide otherwise. The notion of a non-legally binding international agreement could, in some cases, reflect an intention to implement legal rules or give rise to international legal effects without restricting future room of manoeuvre or freedom. Thus, in his view, the notion of soft law was not particularly useful in the context of the topic at hand, as non-legally binding international agreements were not necessarily soft.

Fundamentally, the practice of adopting non-legally binding international agreements was often concerned with overcoming disagreement. It was a practice that fell short of treaty-making but could contribute to the implementation of international law, the settlement of disputes and the establishment of conditions conducive to attaining key objectives of international law. Such agreements could also be closely related to an existing treaty. The topic was situated at the centre of a field where political creativity and legal normativity met. The Commission's decision to study the topic was fully in tune with the dynamic development of the international legal system and the need to consider practical realities and draw up useful background for States. In so doing, the Commission would assist States without prescribing solutions, in order to preserve flexibility. It might be interesting, in that context, for the Commission to provide some structure by drawing up a rough typology of such agreements, without attempting any comprehensive or even indicative classification. Doing so would not contradict the Special Rapporteur's warning against delving into the

reasons or motives of States in developing their practice. The Commission's role should not be to encourage or discourage non-legally binding agreements, but rather to alert States to any legal aspects, difficulties or effects of which they might wish to be aware.

A rough sketch of some examples could help the Commission to visualize the nature of the phenomenon. The Oslo Accords, for one, concluded in the context of the Middle East peace process in 1993, were not treaties but were clearly aimed at performance, had normative elements and were intended to have legal effects. Other examples could be drawn from agreements drawn up in relation to third-party support for peace processes, where sensitive issues relating to recognition could be at stake, non-State actors were included, or where overcoming disagreement had not yet reached the stage of treaty-making. Some agreements that fell short of legally binding treaties could establish standards or benchmarks, timelines, monitoring systems and more. Others could pertain to technical or other forms of support for States but establish limits to responsibility, non-prejudice clauses or other modalities. That was the case of agreements on technical assistance under the United Nations Convention on the Law of the Sea or the Paris Agreement on climate change. Such agreements could relate to key modalities or conditions for the performance of complex technical cooperation, for instance, to combat deforestation or to enable delivery of humanitarian assistance. Yet other agreements concerned the issuance of domestic administrative consent for different purposes under domestic law, including, for example, with regard to the launch of space objects.

One challenge was the risk of blurring key distinctions of an analytical nature by not drawing sufficiently clear conceptual distinctions, where necessary. While the Commission must avoid diluting treaty law or blurring well-established criteria related to it, it would not be appropriate for it to simply reserve the term "agreements" for texts that qualified as "treaties" within the meaning of the 1969 Vienna Convention on the Law of Treaties and to deny to certain other texts that denomination, instead referring to them as mere "arrangements" or "instruments". Those terms could also cover a variety of other phenomena; for example, Indian constitutional history was rife with examples of instruments of association or accession. Moreover, "arrangements" tended to lack normative content or elements and focused on practical performance. The Commission might, in that respect, draw some inspiration from analytical philosophy's concept of "performative utterances", which were made to produce certain effects – in the case at hand, those which were issued jointly, in written form, for a normative and not solely a descriptive purpose. To paraphrase key analytical philosophers of language, the question that might therefore be asked was "What are you doing when you say something?". While excluding commitments without normative or performative content, the Commission should consider agreeing that a text with a performative effect constituted an agreement within the ordinary meaning of the term. Moreover, the term "agreement" encapsulated a key notion that provided substantive focus, as well as other practical advantages, and was compatible with the definition of "treaty" in article 2 of the 1969 Vienna Convention, as the latter implied the existence of other forms of international agreement.

The use of the term "agreement" in the definition of the subject matter of the topic was not simply a question of drafting; it was in fact an eminently substantive question. Nomenclature could, of course, be influenced by the nuances of language, national legal traditions and culture, and dictated by differing considerations of constitutional and administrative law in domestic systems. Some States put more emphasis on consistency and coherence with regard to formal denomination, in order to signal that certain documents required a particular domestic decision-making process. Other traditions, including some of the Nordic ones, did not afford any decisive role to the denomination of documents or certain other formal aspects. "Memorandums of understanding" were an interesting case; the effects of such texts, including the extent to which they could be considered legally binding under international law, depended on their contents. For example, the legal status under international law of a memorandum of understanding between Kenya and Somalia had been analysed by the International Court of Justice in 2017, in the case of *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*. The Court had concluded that the memorandum of understanding was a valid treaty and was binding on the parties under international law, irrespective of its title.

He fully supported the Special Rapporteur's statement in paragraph 96 of the first report that the term "agreement" covered situations in which States or international organizations had agreed on something together, which presupposed a convergence of wills. The term "agreement" represented, in his view, an "Archimedean point", in the sense of being both a fulcrum and a lever long enough to both define and lift the topic and ensure a coherent justification for doing so. It would help the Commission to maintain a clear focus. The notions of "instrument" and "arrangement" fell short of that clarity of focus. They would inadvertently broaden the scope of the topic to other phenomena that had nothing to do with the distinct substantive situation he had just referred to. Limiting the scope of enquiry to "agreements" would not stop the Commission's work from being relevant or of practical use to the consideration of other types of non-legally binding documents. Insights about the legal nature or effects of legally non-binding agreements could improve the general understanding and appreciation of the legal implications of other political documents, such as the non-legally binding resolutions of international organizations or unilateral documents. In anticipation of critical remarks about the use of the word "agreement", it might be appropriate to include an explanation in that regard in the commentaries.

He supported the suggested distinction of the topic from the consideration of legal acts attributable to a single author or adopted within the framework of intergovernmental conferences, as well as the exclusion of agreements with private parties, domestic law agreements and international contracts. However, he was in favour of including in the scope of the study not only intergovernmental or inter-State agreements, but also interministerial agreements, and he would not exclude all inter-institutional arrangements. Such activity constituted a particularly important quantitative, as well as qualitative, aspect of State practice. It could moreover have a bearing on issues of attribution and State responsibility. In some cases, such practice might be key to the implementation of certain international legal obligations incumbent on the State concerned and thus be central to the assessment of the State's compliance with international law. Important governmental competences had been known to be devolved in practice to certain State or sub-State organs. More generally, it could be of practical import to consider ways to enhance the awareness and knowledge of decentralized authorities with respect to international legal aspects.

Whether an agreement entailed a commitment or not was a matter to be decided through the interpretation of the text of the agreement and the circumstances surrounding its conclusion. The Special Rapporteur proposed that the existence of a "normative component" was a criterion for identifying agreements in which States agreed to make commitments. Depending on how that concept was defined, however, it might not suffice if understood in a strict sense. For instance, a joint declaration by two States stipulating that they both agreed on a particular understanding of a specific set of facts or a particular interpretation of a specific treaty obligation was a classic type of declaratory statement, but nevertheless might raise pertinent questions concerning the legal consequences attached to it in terms of committing those States to said understanding or interpretation. Could they walk away from their previous statement if a dispute between them were later to arise?

He strongly supported the approach suggested by the Special Rapporteur in paragraph 109 of the first report to include "the non-binding declarations that are annexed to some treaties" in the scope of the study. The case of final acts adopted at intergovernmental conferences offered by the Special Rapporteur was a pertinent example of such agreements. However, there was also the example of side-arrangements made in the context of bilateral treaties or in the context of the preparation of further bilateral treaties. They could include model texts for future agreements or for an agreed interpretation or establishment of arrangements for the implementation of a treaty based on a model text. An example was provided by the 2006 Agreed Minutes on the procedure to be followed by Norway, Denmark and the Faroe Islands and Iceland with regard to the delimitation of the continental shelf beyond 200 nautical miles in the North Atlantic Ocean, with a view not only to making submissions to the Commission on the Limits of the Continental Shelf, but also to agreeing on the mutual delimitations between the three States, without prejudice to the findings of the Commission, and to be put into effect after issuance of all relevant recommendations by the latter. Side-arrangements to treaties could be formally non-legally binding and easily modified at a later stage, which raised questions regarding their relationship with the main body of the treaty, for example, where there might arise conflicting interpretations.

He was not entirely satisfied with the formulation in paragraph 132 (d) of the first report regarding the potential conflict between a non-legally binding agreement and the provisions of a treaty, where the suggestion was that the treaty provisions would always prevail. In his view, the situation could be more fluid than that, for example, if the treaty specifically referred to a non-binding implementing arrangement that dealt in a more specific manner with a particular issue. Such a circumstance made it more difficult to determine whether the parties intended the solution in the agreement to take precedence or not, because that particular solution might then constitute part of the circumstances surrounding the conclusion of the treaty and, as such, impact on the interpretation of the treaty in line with article 31 (2) and article 32 of the 1969 Vienna Convention.

He commended the Special Rapporteur's focus on identifying as broad an empirical basis as possible to highlight relevant legal aspects of the topic, including in the ways referred to in paragraphs 70, 78, 80 and 83 of the first report. Chapter VIII of the report identified key questions to be examined more in depth. In relation to chapter VIII (B), on the "Regime of non-legally binding international agreements", and particularly the list of issues flagged in paragraph 132, it would have been useful to include a note on the possible relevance of principles embodied in the rules of interpretation as a framework for assessing and interpreting the content of non-binding agreements. Granted, it was far from clear that that specific and tailored regime could be applied *in fine* to a text not constituting a treaty. However, he wondered whether one might not be obliged to apply the general rules of treaty interpretation to determine whether the agreement was in fact a treaty. It was unclear what other framework could be used for that purpose. From there, bridges could be built to more generally or fundamentally recognized principles of international law with regard to the rules of interpretation. The International Court of Justice had found in its advisory opinion in *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* that "the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance" when considering the decisions of political organs of the United Nations, but that specific factors linked to the context in which they were taken had to be taken into account. There was a lot to be said about whether, in addition to the *a priori* relevance of first considering whether a text constituted a treaty pursuant to the 1969 Vienna Convention, there were also fundamental principles applicable to non-legally binding international agreements, irrespective of the Vienna Convention, including the principle of good faith, respect for jus cogens, general principles of interpretation, and some aspects of *pacta sunt servanda*. Irrespective of legal enforceability or justiciability, consequences, including interruption of performance and reciprocity, might arise from the non-respect or breach of non-legally binding agreements.

The topic was timely and of great practical value to States. While non-legally binding agreements were not novel, their use had increased in recent decades, as had the use and application of other forms of non-legally binding texts. One consequence of that increase was a growing need for States to understand how to relate to such documents, including with regard to their relevance in the context of international legal argumentation. As the Special Rapporteur explained in his first report, doctrine had traditionally had a tendency to treat non-legally binding agreements as belonging to the domain of politics, not to the domain of law; so too, had some bureaucratic systems. States had comprehensive policies and constitutional requirements relating to the process of negotiating and entering into treaties, but few States had any overarching control and oversight system for the conclusion of non-legally binding agreements. That situation might have to do with the misleading perception that agreements falling short of treaties could not create rights or obligations and thus did not warrant a particular review grounded in considerations of international law. Thus the outcome of the Commission's work on the topic would promote awareness and coherence in practice.

He supported the proposal of working towards a set of draft conclusions; that goal would be in line with the aims of clarifying the law and of taking a descriptive rather than a prescriptive approach. The Commission's decision to produce draft conclusions on certain sources of international law in the past would not have any deleterious or misleading effect with regard to the current subject matter. The concept of conclusions was neutral. The programme of work proposed in paragraph 143 of the first report offered due time also for gathering comments from States and international organizations. The time frame indicated by the Special Rapporteur was achievable, given the latter's very structured approach to

guiding the Commission's discussions in its plenary debates, which would reduce the need to discuss basic strategy in the Drafting Committee.

The meeting was suspended at 11.40 a.m. and resumed at 12.10 p.m.

Mr. Nesi said that the Special Rapporteur was to be congratulated on his first report, which was particularly clear and provided an overview of the issues on which the Commission should focus when dealing with a subject of such breadth and complexity as non-legally binding international agreements. The subject was highly topical, since non-legally binding agreements were frequently concluded by States that were reluctant to enter into binding obligations, preferring greater flexibility in their mutual relations instead. However, the large number and diversity of instruments concluded to date made it necessary to reflect on the classification of such agreements and their potential legal effects. Despite the non-binding nature of such agreements, various actors, including courts and representatives of States, attached great importance to them and sometimes used them as a basis for international political commitments or to pave the way for binding agreements, which demonstrated the extent to which the boundary between what was binding and what was non-binding in international law was becoming increasingly blurred. The crisis of multilateralism that the international community was currently experiencing was fertile ground for agreements that were not formally binding on States, which found in such agreements a valuable alternative to treaty-making. The trend towards greater flexibility in international legislation should not be seen as a defeat for the international legal system; rather, it should be seen as an opportunity to ensure the survival of certain forms of cooperation within the international community. The prerogative of States to enter into non-legally binding agreements had to be preserved in international relations, since practice had demonstrated how States were more inclined to comply with good practices where they were not strictly legally bound.

With regard to the phrase "non-legally binding agreements", a considerable number of States had questioned the use of the term "agreements", preferring instead terms such as "instruments". Several members of the Commission were similarly hesitant to accept the Special Rapporteur's suggested wording. While acknowledging their concern, he considered the term "instrument" too vague, as it could also be applied to unilateral acts and acts of international organizations that lay beyond the scope of the exercise. However, the word "agreement" had both an ordinary meaning and a strictly legal one. It seemed clear that, with the latter meaning, it was a synonym for "treaty" in the sense of the 1969 Vienna Convention, with the attendant legal effects. In the context of the present topic, he considered that "agreement" should be read in its ordinary sense, meaning an arrangement that did not create rights and obligations and therefore had no binding effect. He therefore supported the Special Rapporteur's suggestion to retain the word "agreement", given that all other proposed options would excessively broaden the scope of the topic.

Understandable concern had also been expressed that the inclusion of "legally" in the term "non-legally binding" could generate confusion, giving the impression that the Commission was emphasizing the legal nature of the agreements under consideration. However, recognizing the legal nature of an agreement did not automatically imply that it was binding. Retaining the formulation proposed by the Special Rapporteur would allow the Commission to qualify certain types of agreement as not being binding in the legal sense. One might be bound to a commitment, for example, but breaching it would not necessarily entail legal consequences: to be "bound" also did not have an exclusively legal meaning. Nevertheless, the Commission was called upon to examine the topic, despite the absence of legal bindingness, because some legal rules might apply to States when they concluded non-binding agreements that could have some indirect legal effects. Consequently, he considered that the double qualification in the title of the topic – "legally" and" non-binding" – should be retained.

The scope of the study should be limited to agreements that were international in nature, in other words, agreements concluded by subjects of international law. For reasons of time, it would be preferable to exclude resolutions adopted by international organizations from the scope of the topic, though he concurred with Mr. Asada's view that, in general terms, such resolutions constituted agreed documents deriving from negotiations among States and, as such, might be examined tangentially. For the same reason, he would be

inclined to include acts of intergovernmental organizations, as an offshoot from the main focus of the topic.

Distinguishing between legally binding and non-binding agreements was vital. In assessing the nature of an agreement between States, the Commission's task was to understand what constituted a binding agreement, meaning the set of characteristics allowing a certain agreement to be qualified as binding. Great importance had historically been attached to two elements: the form of the text, as an objective element determined by conformity with certain procedural norms; and the intention of the parties to the agreement to be bound by it. The latter had traditionally been given more weight, to the point that any legal effect ought logically to have been excluded in the absence of such an intention. While such a notion must be rejected, as the intention not to be bound did not preclude the legal relevance of an international instrument, the large number of non-binding agreements concluded in recent decades had made the identification of criteria for distinguishing them from binding instruments somewhat difficult.

Although form, as an objective criterion, was of some importance in identifying binding instruments, it could not be claimed that all binding instruments had the same form or had been adopted through the same procedure, as illustrated by the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* before the International Court of Justice. The Court had made clear, as it had in other cases, that possible unusual forms of international agreement would not be considered an obstacle to the creation of rights and obligations. A simple exchange of letters, as in the *Maritime Delimitation* case, or a joint communiqué, as in the case concerning the *Aegean Sea Continental Shelf*, might serve as sources of binding obligations. The Court's flexible approach could lead to difficulties in identifying agreed criteria to distinguish between binding and non-binding agreements. While he agreed with the Special Rapporteur's suggestion that the objective and subjective elements in the identification process should be merged, the current reality of international law-making demonstrated that objective criteria – not just the form of an agreement, but any procedural aspect – had become less relevant of late, though it was not the Commission's task to identify a hierarchy among the criteria concerned.

That said, the fact that less importance was being attached to formal and procedural criteria meant that more weight should be given to the subjective element and to all the other criteria from which the intention of the parties to be bound might be inferred, such as the presence of final clauses, the possibility of reservations or, more generally, the content of an agreement. The real issue lay in understanding when the content of an agreement between States could be understood as giving rise to binding rights and obligations, bearing in mind that the word "binding" had an additional meaning. Something was "binding" not only when it created rights and obligations in general, but also when those rights and obligations were such that they could not be legally avoided or excluded. In that sense, the word might limit the Commission's analysis, as the binding nature of an instrument could be inferred from any reference to the consequences of an act that implied the exclusion or avoidance of an obligation laid down therein.

The Commission's discussion should focus more on what elements of the content of a treaty might be used to determine its nature. For most of the instruments that would fall within the scope of the Commission's work, an important element lay in the definition of a political or moral commitment, as opposed to a legally binding commitment. While the binding nature of an instrument based on international law was strictly linked to its international legal nature, a reference to law in non-binding agreements should not be excluded. A clear understanding of what constituted an international legal commitment should be integrated with an analysis inspired by other sciences so as to complement the legal criteria useful for categorizing binding and non-binding agreements with a precise understanding of the content of political and moral commitments.

He agreed with the Special Rapporteur that the issue of the legal regime governing non-binding agreements should be considered separately from the question of their potential legal effects, as the two issues were conceptually different. Did the law of treaties apply to non-legally binding agreements? The definition of a treaty contained in article 2 of the 1969 Vienna Convention did not make reference to the binding character of the agreement in question, but the *travaux préparatoires* of the Convention, the Commission's commentaries

to the draft articles on which it was based and other provisions of the Convention made clear that non-legally binding agreements were not intended to fall within its scope. It would be too simplistic, however, to say that no rule was applicable to non-binding agreements at all. Some fundamental norms, like the prohibition on infringements of *jus cogens*, should apply to non-legally binding agreements. States and international organizations had an obligation not to breach such norms, which must logically stand even when those States or international organizations concluded a non-binding international agreement. The same could be affirmed for the provisions of the 1969 Vienna Convention dealing with the interpretation of treaties. The applicability of the various rules contained in the Convention must be thoroughly ascertained on an individual basis.

He also agreed with the Special Rapporteur that some rules of international law, such as the obligation to settle disputes peacefully pursuant to Article 2 (3) of the Charter of the United Nations, applied to non-legally binding agreements. International law rules relating to fundamental human rights might in some cases restrict the ability to conclude non-binding agreements if those agreements failed to safeguard those rights adequately. For example, a set of memorandums of understanding recently concluded on procedures for the transfer or repatriation of migrants, notwithstanding their lack of bindingness, should not affect fundamental rights or curtail the possibility of redress in the event of non-compliance with human rights law.

It was fundamental for the Commission to further define the extent to which general international law rules and principles applied to non-binding agreements in order to establish a more reliable "regime" governing their creation and functioning. Moreover, more clarity was needed on the rationale behind the application of general international law rules to such agreements: as noted by the Special Rapporteur, a number of scholars supported reasoning by analogy to justify the application of international law rules to non-binding agreements. While such reasoning might be sensible in some cases, the Commission would offer a more structured and valuable contribution if its reasoning was based on relevant State practice and jurisprudence. He therefore agreed with the Special Rapporteur that an overly deductive approach should be avoided.

The issue of the potential legal effects of non-legally binding agreements was a sensitive point that must be approached with caution, given its political implications. While the Commission should avoid any analysis that could create confusion regarding the nature of non-legally binding agreements or blur the line with sources of international law, it was important to distinguish between legally binding force and legal effect, which were not mutually exclusive. Non-legally binding agreements could be useful in interpreting a legally binding treaty under article 31 of the 1969 Vienna Convention, as the Commission had confirmed in its work on subsequent agreements and subsequent practice in relation to the interpretation of treaties, in particular in paragraph (23) of the commentary to conclusion 6 of its conclusions on that topic. Although the term used in the commentary was "instruments", it was fair to infer that "agreements" fell under the umbrella category of non-binding "instruments" referred to in that instance. He therefore agreed with the Special Rapporteur's conclusion that non-legally binding agreements might have some legal effects in that area.

Similarly, the conclusion and performance of a non-legally binding agreement could contribute to some extent to the formation of new customary law, though the Commission should further explore the weight given to non-legally binding agreements and how they might play a role in the crystallization of customary rules of international law, in terms of both State practice and *opinio juris*. The Commission's previous work on customary international law did not specifically address the role of non-legally binding agreements concluded by States in the process of the formation of customary law. Care should be taken to avoid drawing hasty conclusions.

He would prefer not to retain the distinction between direct and indirect legal effects, as it could affect the overall clarity of the Commission's work on the topic. While the distinction was uncomplicated in some cases, it might not be clear-cut in others, preventing the Commission from appropriately considering issues in the grey area in between. Analysing the potential legal effects – direct, indirect and hybrid – without specifically categorizing them might be of greater benefit to the outcome of the Commission's work. The Special

Rapporteur should focus on the legal effects that could be attached to acquiescence, estoppel or even silence with regard to non-binding agreements. The form of the output would be best defined once agreement had been reached on at least part of its content and scope, though at present he supported the suggestion of draft conclusions, which would be in line with the Commission's previous work.

Ms. Orosan, paying tribute to the Special Rapporteur for his first report, which set the framework for the Commission's discussions, and welcoming the opportunity for an initial general debate on the topic, said that the output of the Commission's work should be functional, assisting States to better ascertain the nature of obligations they had assumed or intended to assume through the conclusion of international agreements. It should also help States and responsible officials to clarify, at an early stage, whether the intention behind participation in such agreements was to create rights and obligations governed by public international law, which would turn the instrument concerned into a treaty. In order to fulfil those functions, the Commission's output must focus on practical aspects of a general nature through an analysis of State practice from various regions of the world. The Commission would face some difficulty in finding all relevant State practice, since the benefit of what States considered "non-treaties" lay in their less formal character and the lack of obligation to make such documents public. As the output was intended to be a tool to assist States, they should understand the importance of cooperating with the Commission by providing it with information on their practice. The output must not constitute a new legal regime on non-treaties or leave such instruments devoid of their flexible, less formal nature.

It was important to define the scope of the topic from the outset, which involved considering its title. There were good reasons to continue using the term "agreement", as long as it was understood in its general meaning of "a convergence of wills". Sometimes mutual consent among States underpinned a legal commitment that translated into rights and obligations governed by public international law, in which case the agreements concerned would constitute treaties; in other cases, it did not. The general category of agreements ranged from those that were treaties beyond doubt to those explicitly intended not to produce any legal effect, which, *inter alia*, included agreements between States not to generate rights and obligations governed by public international law. In the grey area between those subcategories, the focus of the Commission's work should be on those agreements having a normative component and sharing similarities with treaties, while not themselves being treaties.

In recent State practice, the term "agreement" had come to be associated with a document having certain legal effects or consequences in the legal realm. In order to avoid such implications, States preferred denominations reflecting common "understandings" or "practical arrangements", having developed a more restrictive understanding of the term "agreement" than that used in the previous work of the Commission. The Commission was not necessarily obliged to alter its usage but should be mindful of such developments. In any case, the use of the term "agreement" in the context of the topic must be without prejudice to the terminology that States might opt to use in accordance with their own practice. What she would not favour, however, was the use of "instruments" instead of "agreements", as that would bring into the scope of the topic almost any document that did not meet the requirements for classification as a treaty and would divert the discussion towards "soft law" in general.

Regardless of nomenclature, the nature and legal effect – if any – of a document must be determined from the intention behind it, based on its content and the context of its conclusion. Characterizing international agreements as non-legally binding seemed an appropriate way of further restricting and defining the scope of the topic. The deliberate inclusion of the word "legally" placed such agreements in contrast to treaties, ensuring that the focus would be on international agreements that the parties applied not as a matter of law or out of any legal obligation. She agreed with the Special Rapporteur that the topic should focus only on non-legally binding international agreements concluded between States, between States and international organizations, or between international organizations. With regard to the first category, she saw some merit in reflecting on international agreements concluded at ministerial level, as such documents were concluded by organs of a State in accordance with the powers conferred upon them and in the exercise of State functions.

On the other hand, she would not favour the inclusion of international documents on cooperation concluded between territorial administrative units of two or more States. The nature of such documents was most often dictated by the distribution of powers between the central and local authorities within the States concerned, with the result that such documents could take a huge variety of forms. In other cases, the format of such cooperation could be governed by a treaty regime to which the relevant states had consented, such as that established by the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities and the protocols thereto.

The Special Rapporteur had identified an extensive list of issues for the Commission to consider. Of those, the potential legal effects of non-legally binding international agreements would be at the heart of the Commission's work.

Establishing criteria to distinguish treaties from non-legally binding agreements would be an important exercise of significant practical value. In the practice of treaty-making, States were particularly attentive to the nature of a document in the initial stages of its negotiation. Clarifying the parties' intention – a critical element in the definition of a treaty under the 1969 Vienna Convention – was helpful in distinguishing between legally binding and non-legally binding agreements. Intention was subjective and might not always be evident or sufficiently clear, so other elements of an objective nature should play a role in determining the intention of the parties. A combination of criteria must be considered in the process of assessing the legal bindingness of an agreement.

Numerous objective elements were already taken into consideration by States and courts in the assessment process. It would be very difficult to establish a hierarchy among them, even if some had greater probative value than others. It might also be a less useful approach for the Commission to take, as a combination of many different objective factors was needed to support any clarification of the subjective element in determining the nature of an agreement beyond reasonable doubt. It was unlikely to be possible to articulate presumptions that would work infallibly in the vast majority of situations. The credibility of the process relied on assessing all relevant criteria in every case, as each document was unique. One presumption which might be inferred with a certain degree of viability concerned the explicit intention of the parties either to create or not to create a legally binding agreement. It could be presumed that national procedures for the conclusion of treaties had not been fulfilled in the case of an express intention not to create a legally binding agreement.

She doubted whether the Commission should reflect on the powers of judicial authorities to categorize an agreement differently from the parties. Rather, its focus should be on the criteria and methodology for distinguishing between agreements, which would also be relevant for the judicial authorities concerned.

Although she opposed the creation of a legal regime applicable to non-legally binding agreements, it might be that rules under the treaty regime could be used in connection with such agreements, most obviously the rules of treaty interpretation. However, that would not signify that non-legally binding agreements were governed by the law of treaties or that they needed a specific regime of their own. At the same time, given that non-legally binding agreements reflected the mutual consent of the parties thereto concerning future conduct, such agreements must be in conformity with the principles of international law. A State could not act in violation of its obligations under international law without being held responsible for its actions. From that perspective, it was the conduct of the State that entailed legal consequences, including with respect to the applicability of an agreement, rather than the agreement itself. The applicable international legal obligations, irrespective of their source, governed the conduct of States at all times and could not be defeated or changed except by norms of a similar nature.

Non-legally binding agreements might nonetheless be relevant in other legal contexts or even have some legal effects, for instance if they formed part of wrongful conduct or of permissible conduct that assisted States in fulfilling their international legal obligations. In any event, the Commission should remain seized of the fact that, when deliberately entering into non-legally binding agreements, States did not intend there to be any legal consequences attached to the agreements in question and therefore did not follow legal procedures that would allow them to make a legal commitment. Even if the Commission embarked on a study

of the potential legal effects identified by the Special Rapporteur, it should not end up imbuing non-legally binding agreements with effects similar to those of legally binding agreements such that they would be indirectly or *de facto* included in the category of treaties, which would significantly undermine their *raison d'être*.

While she understood the Special Rapporteur's preference for draft conclusions as the output of the Commission's work on the topic, she considered that draft guidelines would be more appropriate if the intention was to develop a tool to assist States. They would also be more flexible than draft conclusions, which suggested a firm standpoint, whereas non-legally binding agreements were in essence more volatile. However, even if the Commission opted for draft guidelines, she would not favour providing templates for documents, as that might be perceived as an attempt to introduce a level of rigour more typically reserved for legally binding international agreements. Specific terminology, on the other hand, or even limited model clauses indicating that a particular instrument was non-legally binding in nature, might be of assistance to States.

The meeting rose at 12.45 p.m.