Annex I

Non-Legally Binding International Agreements/ *(Les Accords Internationaux Juridiquement Non-Contraignants)*

by Mathias Forteau[1]

1. Introduction

1. The practice of non-legally binding international agreements (also called in the literature "Gentlemen's agreements", "political agreements", "informal agreements" or in French "*instruments (ou actes) concertés non conventionnels*") is an old practice, which has been the subject of multiple doctrinal studies since 1945.[2] These studies, in particular the one conducted by the Institute of International Law in the early 1980s,[3] provide relevant insights on this practice. They have not however clarified all contentious aspects relating to the nature and regime of such agreements.

2. Moreover, the practice of non-legally binding international agreements has considerably grown and has become more complex and diversified in the last decades; it is therefore the subject of increased attention and of significant concern, in the literature and in State practice. Notably, it was the subject of a study and of guidelines from the Inter-American Juridical Committee in 2020, which sought in particular to shed light on the definitions for binding and non-binding agreements and the methods for identifying them, the capacity to conclude them, and their legal effects, while at the same time indicating that "in several places [the Guidelines] note areas where existing international law is unclear or disputed" and that "The Guidelines leave such issues unresolved".[4] This topic is also since 2021 on the agenda of the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI), where the "rising importance of non-legally binding agreements in international law" has been stressed.[5] Recent developments in some national legal systems also demonstrate the relevance of this topic today.[6] These different elements

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[2] On terminology, see *infra*, para. 3.

[3] See, in the selective bibliography attached, references to the work of the Institute of International Law on *International Texts of Legal Import in the Mutual Relations of their Authors and Texts Devoid of Such Import*.

[4] Inter-American Juridical Committee, *Guidelines on Binding and Non-Binding Agreement* (resolution and final report (77 p.) by D. Hollis), August 2020, accessible online (original version of the resolution in Spanish and of the report in English).

[5] Committee of Legal Advisers on Public International Law (CAHDI), Expert Workshop on "Non-Legally Binding Agreements in International Law", 26 March 2021, Chair's Summary, p. 1. See also p. 4: "a significant number of CoE Member States had expressed their support to assemble a more detailed account of their practice on non-legally binding agreements".

[6] In France, for example, it was suggested by the *Conseil d'Etat* that a circular expressly provides that the Ministry of Foreign Affairs ensures a certain control over non-legally binding agreements before their conclusion, to make sure that "*la rédaction ne laisse pas d'ambiguïté sur le caractère juridiquement non contraignant*" ["the drafting does not leave any ambiguity on the non-legally binding nature"] and that these agreements be in principle published (see Conseil d'Etat, *Le droit souple*, Etudes et documents, 2013, pp. 168–170). See also in Spain, Law 25/2014 of 27 November 2014 on treaties and other international agreements, which contains provisions on "non-normative" ("no normativos") international agreements ([https://www.boe.es/buscar/act.php?id=BOE-A-2014-12326]). On the Canadian practice, see for example [https://treaty-accord.gc.ca/procedures.aspx?lang=fra], point 8 and Annex C. On the United Kingdom's practice, see for example "The Scrutiny of International Treaties and other international agreements in the 21st century inquiry", Written evidence from Sir Michael Wood (SIT 03) to the Public Administration and Constitutional Affairs Committee of the House of Commons, accessible online [https://committees.parliament.uk/writtenevidence/36775/pdf/]. See more broadly, on current developments in national practices, C. Bradley, J. Goldsmith, O. Hathaway, "The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis", 2022, accessible

show that there is a need for more clarity and increased legal certainty at the universal level on the topic of non-legally binding agreements,[7] particularly given the "legal risks still associated with the use of non-legally binding instruments".[8]

3. Considering that one of the key points is to determine how these instruments can be distinguished from legally binding agreements, terminology and form play an important role because they may provide significant indications on the intent of those who adopt the act.[9] The term non-legally binding "agreement" ("*accord*" in French) is used in the title of this proposal without prejudice to the meaning that could eventually be appropriate to give it (and bearing in mind that in the practice of some States, the term "agreement" could refer to binding agreements only). Other terms, in case of need, could be preferred (for example, "arrangement" or "understanding" ("*entente*"), or "instrument", providing that the term eventually adopted corresponds to the scope of the topic – on which see *infra,* para. 27). Since the term "non-binding agreement" was used in previous work of the Commission (see *infra*, para. 8) and in the recent work of the Inter-American Juridical Committee and the CAHDI (see *supra*, para. 2), it has been adopted in the present proposal.

4. Consistent with the above, and as explained below at paragraph 27, this topic does not address the law and consequences arising with respect to treaties, with respect to agreements between States (or international organizations) that are governed by national law, or with respect to agreements between private actors. Further, it does not address legally binding international agreements that contain within them provisions that have combination of legally binding and non-legally binding effects.

2. The proposed topic and the criteria for selecting new topics

5. The practice related to non-legally binding international agreements raises an important number of legal issues which are of great and concrete importance in international relations. As such, these issues fulfill the criteria fixed by the International Law Commission for the selection of new topics.[10]

(i) The topic is one that can respond to "the needs of States" by providing them with useful clarifications and, if deemed appropriate, guidelines with regard to the nature and potential legal effects of these agreements.

(ii) The topic is "sufficiently advanced in stage in terms of State practice", given the density of recent practice and the fact that it has been explored in detail in the literature for several decades.

(iii) The topic is also undoubtedly "concrete and feasible", on the one hand because it fully corresponds to the field of expertise of the International Law Commission, which has undisputed experience and authority on the sources of international law, and on the other hand because it is a topic of reasonable scope and is sufficiently focused.

(iv) Finally, while some might consider that the topic does not correspond to "new developments in international law and pressing concerns of the international community as a whole", it remains important for the Commission to continue to deal with classical topics which are of critical importance in the daily practice of States.

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online; O. Hathaway, "Non-Binding Agreements and International Law", ASIL, *International Law Behind the Headlines*, Episode 33, 2022, [https://soundcloud.com/americansocietyofinternationallaw/international-law-behind-the-headlines-episode-33].

[7] The concern was recently expressed by the OECD in the *Recueil de pratiques d'organisations internationales. Œuvrer à l'élaboration d'instruments internationaux plus efficaces/Compendium of International Organisations' Practices. Working Towards More Effective International Instruments*, 25 February 2022, accessible online.

[8] Statement of the Legal Adviser of the United Nations, as cited by CAHDI Chair's Summary, cited above, p. 1.

[9] See *infra*, paras. 12–20. See also A. Aust, *Modern Treaty Law and Practice*, 3rd ed. (CUP:2013), Chapter 3.

[10] *Yearbook … 2011*, vol. II (2), p. 175, para. 366.

> During the debates of the Sixth Committee in 2021 on the programme of work of the International Law Commission, the Netherlands accordingly stressed its wish that the Commission focus on topics that are "more pertinent for international practice, such as the use of non-binding instruments in the identification and application of international law".[11]

3. Non-legally binding international agreements in the past work of the Commission

6. The Commission has had the occasion in the past to discuss the question of non-legally binding international agreements, but has never conducted a complete study on the topic.

7. In the context of its work on the *Law of Treaties*, the Commission had to determine which agreements correspond to the notion of treaty, and by contrast, which ones do not come under the law of treaties because of their non-legally binding character. One has to admit that the 1966 draft of the Commission on the law of treaties was not perfectly clear in that regard. It adopted a definition – which was taken up in the 1969 Vienna Convention on the Law of Treaties between States and the 1986 Vienna Convention on treaties concluded by international organizations – of the term "treaty" that was of a very broad nature, "covering all forms of international agreement in writing concluded between States", provided that the agreement must be "governed by international law". But the definition given by the Commission of this latter expression is equivocal:

> "The phrase 'governed by international law' serves to distinguish between international agreements regulated by public international law and those which, although concluded between States, are regulated by the national law of one of the parties (or by some other national law system chosen by the parties). The Commission examined the question whether the element of 'intention to create obligations under international law' should be added to the definition. Some members considered this to be actually undesirable since it might imply that States always had the option to choose between international and municipal law as the law to govern the treaty, whereas this was often not open to them. Others considered that the very nature of the contracting parties necessarily made an inter-State agreement subject to international law, at any rate in the first instance. The Commission concluded that, in so far as it may be relevant, the element of intention is embraced in the phrase 'governed by international law', and it decided not to make any mention of the element of intention in the definition."[12]

8. In the conclusions on the *Subsequent agreements and subsequent practice in relation to the interpretation of treaties* adopted in 2018, the Commission considered that non-legally binding agreements are "agreements" that shall be taken into account to interpret treaties for the purpose of Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties. According to conclusion 10, paragraph 1,

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

The commentary on this draft conclusion specifies, in particular, that "[t]he aim of the second sentence of paragraph 1 is to reaffirm that 'agreement', for the purpose of article 31, paragraph 3, need not, as such, be legally binding, in contrast to other provisions of the 1969 Vienna Convention in which the term 'agreement' is used in the sense of a legally binding instrument."[13]

9. Along the same lines, guideline 4 of the *Guide to Provisional Application of Treaties* of 2021 provides that the provisional application of a treaty "may be agreed […] through […] (*b*) any other means or arrangements". The commentary on this provision indicates that this

[11] A/C.6/76/SR.18, para. 50.

[12] Para. 6 of the commentary on draft Article 2, *Yearbook… 1966*, vol. II, p. 189.

[13] *Official Records of the General Assembly, Seventy-third session Supplement 10* (A/73/10), para. 9 of the commentary on conclusion 10.

formula “broadens the range of possibilities for reaching agreement on provisional application” and “is in accordance with the inherently flexible nature of provisional application”.[14]

10. It should also be noted that in the draft adopted at first reading in 2019 on the *Protection of the environment in relation to armed conflicts*, it is indicated in the commentary of draft Principle 17 on the designation by agreement of protected zones that the notion of agreement “should be understood in its broadest sense as including mutual as well as unilateral declarations accepted by the other party, treaties and other types of agreements”.[15] Similarly, the commentary of draft Principle 23 on peace processes indicates that it “aims to cover all formal peace agreements, as well as other instruments or agreements concluded or adopted at any point during the peace process […]”, which “agreements and instruments may take different forms”.[16]

11. The preceding elements demonstrate the potential value of a comprehensive study by the International Law Commission of existing international law on non-legally binding international agreements. Two series of questions would in particular deserve to be studied in the context of this topic: the criteria for identifying non-legally binding international agreements (*infra*, 4) and the potential legal effects of such agreements (*infra*, 5).

4. The criteria for identifying non-legally binding international agreements

12. The first series of questions concerns the identification of criteria to distinguish, in international law, non-legally binding agreements from those that are legally binding. This distinction is crucial, as it determines the effect to be attributed to an agreement – in particular the question of whether it is subject to the law of treaties starting with the principle *Pacta sunt servanda*, and whether it has to be registered by the United Nations under Article 102 of the Charter (bearing in mind that it is not because an agreement is not registered that it is not necessarily a treaty), or if it is a simple declaration of intent, or an agreement of an exclusively political nature.[17] In this spirit, Poland declared, during the debate of the Sixth Committee in 2021, that “the Commission had conducted useful work to clarify various provisions of the Vienna Convention and suggested that it consider carrying out similar work on other provisions of the Convention, such as those concerning the definition of the term “treaty” (…)”.[18]

13. In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the International Court of Justice decided that the 1990 Minutes “are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.”[19]

14. The question of the distinction between treaties and non-legally binding international agreements has arisen more recently in the case law, notably in the case concerning *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* and in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*.

15. In the first case, the Court had to determine whether what was formally presented as a “Memorandum of Understanding” (MOU) constituted a treaty or not. The Court concluded that it was indeed a treaty, on the basis of a certain number of elements, in particular some elements of form, namely “[t]he inclusion of a provision addressing the entry into force of the MOU [which] is indicative of the instrument’s binding character” and that “Kenya

[14] *Ibid*., seventy-sixth session (A/76/10), para. 5 of the commentary on Guideline 4.
[15] *Ibid*., seventy-fourth session (A/74/10), para. 1 of the commentary on draft Principle 17.
[16] *Ibid*., para. 6 of the commentary on draft Principle 23; see also about the “documents” considered as “peace agreements” in the United Nations peace agreements database, *ibid.*, footnote 1359.
[17] On the related practice of the Treaty Section of the United Nations, see particularly *Treaty Handbook*, United Nations, section 5.3.
[18] A/C.6/76/SR.19, para. 19.
[19] Judgment of 1 July 1994, *I.C.J. Reports 1994*, p. 121, para. 25.

considered the MOU to be a treaty, having requested its registration in accordance with Article 102 of the Charter of the United Nations, and Somalia did not protest that registration until almost five years thereafter".[20]

16. In the second case, the Court held that the agreements or declarations invoked by the Applicant did not carry legal obligations, even though the declarations in question were "politically significant",[21] based primarily on the search for the "intention" of the Parties to these instruments to be bound by legal obligations. According to the Court, this intention must appear "[i]rrespective of the form that agreements may take",[22] and "in the absence of express terms indicating the existence of a legal commitment, [it] may be established on the basis of an objective examination of all the evidence".[23]

17. For its part, and without being exhaustive, the International Tribunal for the Law of the Sea has held that the term "agreement", within the meaning of Article 15 of the United Nations Convention on the Law of the Sea on the delimitation of the territorial sea between States with opposite or adjacent coasts, means "in light of the object and purpose of article 15 of the Convention, […] a legally binding agreement. In the view of the Tribunal, what is important is not the form or designation of an instrument but its legal nature and content."[24] The question was equally raised whether the reference to agreements in Article 281 of the UNCLOS covers binding agreements only or also non-binding ones.[25]

18. In many situations nowadays, doubts can arise with regard to the nature of an agreement, which lead to very concrete consequences. The works of the Institute of International Law, in addition to the academic writings, have identified a large number of such agreements, including for example, the agreement of the Yalta Conference and the Helsinki Final Act of 1975.[26] The 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses provides for instance, in its Article 3, for the conclusion of "agreements" of watercourses without specifying whether these agreements must be legally binding.[27] Guidelines on the conclusion of agreements concerning water may have maintained a certain ambiguity in this respect, either because they use equivocal terms such as "arrangement",[28] or because they define these terms in a way that seems to be inclusive of both binding and non-binding agreements.[29] Similarly, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 provides, among other examples in other provisions, in its Article 7, paragraph 20, that "The

[20] Judgment of 2 February 2017, preliminary objection, *I.C.J. Reports 2017*, pp. 22–25, paras. 41–50 (para. 42 for the quote).

[21] Judgment of 1 October 2018, *I.C.J. Reports 2018*, p. 543, para. 105.

[22] Judgment of 1 October 2018, *I.C.J. Reports 2018*, p. 540, para. 97.

[23] Judgment of 1 October 2018, *I.C.J. Reports 2018*, p. 539, para. 91. See pp. 543 and *ff*., paras. 105 and *ff*., for the examination, one by one, of the agreements invoked by the Applicant in this case.

[24] Judgment of 14 March 2012, in the case concerning the *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Rep. 2012*, p. 35, para. 89.

[25] See in particular on this point the decision of the Conciliation Commission between Timor-leste and Australia dated 19 September 2016, paras. 55 ff. [https://pcacases.com/web/sendAttach/10052].

[26] See for example the agreements identified by O. Schachter, "The Twilight Existence of Nonbinding International Agreements", *American Journal of International Law*, 1977, pp. 296–304; Ph. Gautier, *Essai sur la définition des traités entre Etats. La pratique de la Belgique aux confins du droit des traités*, Bruylant, Bruxelles, 1993, pp. 312–375 and particularly pp. 323 and ff. for the practice; M. Forteau, A. Miron, A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, LGDJ-lextenso, Paris, 2022, No. 304 and ff. See also the analysis of the Founding Act on NATO/Russia Relations of 1997 by Ph. Gautier in *Annuaire français de droit international*, 1997, pp. 82–92.

[27] The commentary on Article 3 of the corresponding 1994 ILC draft does not contain further details on this point. See *Yearbook…, 1994*, vol. II (2), pp. 92–95.

[28] See the *Guide to reporting under the Water Convention and as contribution to SDG indicator 6.5.2 of the UNECE*, United Nations, Geneva, 2020, Section 2, pp. 13–15.

[29] See for example the *Step-by-step monitoring methodology for SDG indicator 6.5.2 version "2020"*, p. 3 ([https://www.unwater.org/app/uploads/2020/02/SDG_652_Step-by-step_methodology_2020_ENG.pdf]): "Arrangement for water cooperation refers to: a bilateral or multilateral treaty, convention, agreement or other arrangement, such as memorandum of understanding, between riparian States that provides a framework for cooperation on transboundary water management".

Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this article."

19. Of course, the inquiry into the nature of the agreement is in principle facilitated when it contains a clear and unambiguous provision on the question. This is the case, among numerous examples, of Article 16 of the Financial Stability Board Charter.[30] One can also cite the "Non-legally binding authoritative statement of principles" on forests adopted at the 1992 Rio Conference.[31] Conversely, parties to a negotiation may set themselves the explicit objective of concluding a "legally binding" instrument.[32]

20. In the absence of such a clause, or when its meaning or scope is uncertain, it is necessary to be able to rely on general criteria. Available studies tend to show that there is a diversity of possible criteria. Some emphasize the intention of the parties to the agreement, which can also be revealed by the content of the instrument or the practice surrounding it; more objective elements may also be highlighted, such as the form of the instrument, the type of language used, or the modalities related to its registration or publication.[33] The criteria that are currently considered to be favoured in practice, the case-law and academic works, and how those criteria should be applied, must be identified in order to define more clearly what separates treaties from non-legally binding agreements.

5. The potential legal effects of non-legally binding international agreements

21. A second series of questions relates to the potential legal effects of non-legally binding agreements – in comparison with those, better identified, of legally binding agreements. International law cannot be reduced today to binding obligations alone. As it has been rightly said, even if it is not for international courts and tribunals "to pronounce on the political or moral duties",[34] "[t]hat an instrument does not constitute a treaty does not mean that it does not have legal effect"[35] and "[t]he conclusion that nonbinding agreements are not governed by international law does not however remove them entirely from having legal implications"[36] Other "legal effects" may also exist and will need to be identified. Nothing indicates that the study will ultimately lead to the conclusion that such effects exist, or if they exist, that there are many of them. But if they do exist, it is important that the Commission identify and define them, on the basis of existing practice, case-law and literature.

22. Some of these legal effects may be of a *direct nature*. Such is in particular the case of the interpretative role of non-legally binding agreements as identified by the Commission in 2018 in its conclusions on subsequent agreements and practice (see *supra,* para. 8). Some also consider that such agreements would be subject to the legal principle of good faith in their application. Mention may also be made here of the monitoring or control of compliance with non-legally binding agreements that can be instituted by an international organization,

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[30] Article 16: "This Charter is not intended to create any legal rights or obligations" ([https://www.fsb.org/wp-content/uploads/r_090925d.pdf?page_moved=1]).

[31] Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests, 21 April 1992, A/CONF.151/6 ([https://digitallibrary.un.org/record/144461?ln=en]).

[32] See for example United Nations General Assembly Resolution 69/292 of 19 June 2015 which plans for the development of such an instrument on marine biological diversity of areas beyond national jurisdiction.

[33] See in particular A. Aust, "The Theory and Practice of Informal International Instruments", *International and Comparative Law Quarterly*, 1986, pp. 796 and ff.; Ph. Gautier, *Essai sur la définition des traités entre Etats. La pratique de la Belgique aux confins du droit des traités*, Bruylant, Bruxelles, 1993, pp. 353 and ff., especially pp. 352–352 on the doctrinal debates on the relevant criteria.

[34] ICJ, *International Status of South-West Africa*, Advisory Opinion, *I.C.J. Reports 1950*, p. 140.

[35] *Oppenheim's International Law*, Vol. 1, Parts 2 to 4, Longman, 1992, pp. 1209–1210, note 8.

[36] See O. Schachter, "The Twilight Existence of Nonbinding International Agreements", *American Journal of International Law*, 1977, p. 301. See also M. Forteau, A. Miron, A. Pellet, *Droit international public*, cited above, No. 304: non-legally binding agreements *"sont aux traités ce que les recommandations sont aux décisions des organisations internationales"* ["are to treaties what recommendations are to decisions of international organizations"].

and which implies that a certain legal effect is granted to these agreements.[37] At the very least, one can safely assume that the fields covered by these agreements can no longer be considered as falling exclusively within the exclusive domestic jurisdiction of each party concerned.

23. Other effects could be of an *indirect nature*.[38] Non-legally binding agreements could in particular play a role in the formation of other sources of international law, starting with customary international law, or be invoked within the framework of the theory of estoppel, or even as a form of waiver, as a presumption, or as evidence in favour or against a given claim. There is also the question of the relationship between agreements that are not legally binding and those that are. In particular, it is necessary to determine whether or to what extent such agreements could modify or amend a legally binding agreement, considering that the criterion laid down by the ILC and the Vienna Convention with regard to treaty modification is that of the "consent" of the parties to the treaty.[39] The question of the regime applicable to termination of treaties or to withdrawal by "consent of the parties" was the subject of important debates at the time of the codification of the law of treaties.[40] One can also wonder whether an initially non-binding agreement may not subsequently become binding, either by virtue of an acceptance – possibly unilateral – of one or more parties to the agreement, or by virtue of the practice related to it after its conclusion or of an act of an international organization or conference.[41]

24. Likewise, it has to be ascertained whether, or to what extent, a non-legally binding agreement could be given legal effect as a result of a direct or indirect reference thereto in a treaty or another legally binding act. For example, under Article 207 of the UN Convention on the Law of the Sea, "States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures".[42] Similarly, it is to be noted that the United Nations have considered the Conference on Security and Co-operation in Europe (CSCE) to be a "regional agreement" within the meaning of Chapter VIII of the Charter.[43]

25. In order to better identify the legal effect of non-legally binding international agreements, it will also be necessary to determine the rules, if any, regulating such agreements and ask, in particular, whether – or to what extent – rules pertaining to the law of treaties governing the capacity to conclude treaties, the process of conclusion, the application, suspension, amendment and modification, termination or invalidity of treaties apply to these agreements.[44] For example, it has been argued that States "*ne peuvent conclure un accord qui soit contraire au* jus cogens *sous prétexte qu'il s'agit d'un accord non obligatoire*" ["*cannot*

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[37] See for example United Nations General Assembly Resolution 47/191 of 22 December 1992 putting in place "institutional arrangements to follow up the United Nations Conference on Environment and Development".

[38] See recently on the topic, A. Zimmerman, N. Jauer, "Legal Shades of Grey? Indirect Legal Effects of 'Memoranda of Understanding'", *Archiv. des V.*, 2021, pp. 278–299.

[39] See para. 3 of the commentary on Article 51 of the ILC draft on the law of treaties: *Yearbook …, 1966*, vol. II, p. 249: "The theory has sometimes been advanced that an agreement terminating a treaty must be cast in the same form as the treaty which is to be terminated or at least constitute a treaty form of equal weight. The Commission, however, concluded that this theory reflects the constitutional practice of particular States and not a rule of international law. In its opinion, international law does not accept the theory of the '*acte contraire*'. The States concerned are always free to choose the form in which they arrive at their agreement to terminate the treaty. In doing so, they will doubtless take into account their own constitutional requirements, but international law requires no more than that they should consent to the treaty's termination."

[40] See in particular *Yearbook … 1963*, vol. II, pp. 202–203, and 1966, vol. II, pp. 28–31.

[41] See J. Barberis, "Le concept de 'traité international' et ses limites", *Annuaire français de droit international*, 1984, p. 259.

[42] See also, e.g, UNCLOS Art. 60, para. 5.

[43] See the United Nations General Assembly Resolution 47/10 of 28 October 1992.

[44] The Court of Justice of the European Union, for example, ruled that the European Commission had not been given the power under the European Union treaties to sign non-legally binding agreements with a third State without the prior authorization of the Council: see CJUE, *Council v. Commission*, 28 July 2016, C-660/13, para. 38.

enter into an agreement which would be contrary to jus cogens under the pretext that the agreement is a non-binding one"].[45] It can also be said that a non-legally binding agreement may not defeat provisions of a treaty in force.[46] Also, if there is no doubt that the breach of a non-legally binding agreement may not, as such, engage international responsibility,[47] one may wonder whether in some cases, such an agreement could lead to a certain form of liability if it constitutes aiding or assisting the commission of a wrongful act.[48]

26. The issue relating to the transparency and publication of non-legally binding agreements could also be addressed, possibly in the form of recommendations or best practices. Great care must be taken, however, not to give non-legally binding agreements – which are precisely concluded with the intention of not binding legally their parties – a scope or legal effects that the said parties did not intend or which they did not consent to. On a more general level, it must clear that the purpose of the present topic would not be to impose limitations on the freedom of States to conclude, in a flexible manner, non-binding agreements, which are essential to international cooperation and dialogue between States. Its aim is rather to provide clarification on the nature and possible effects of such agreements under international law.

6. The scope of the topic

27. The scope of the topic would be as follows (see also *supra,* paras. 3 and 4):

(i) The topic should focus only on non-legally binding international *instruments* and leave out the separate question of the effect of non-binding *provisions* that may be found in certain treaties.[49]

(ii) It will be necessary to delimit the types of instruments to be considered by limiting the study to "agreements", which by definition excludes non-consensual acts, such as a unilateral act of a State or of an international organization as such.

(iii) It would be appropriate to limit the study to *written* agreements (excluding tacit or oral agreements, or bilateral customs).

(iv) It would also be appropriate to limit the study to agreements which take the form of a single instrument or a single set of instruments (an exchange of notes that would be non-binding, for example) and to exclude from the scope of the study "agreements" resulting from the combination of two or more unilateral acts, such as optional declarations recognizing the jurisdiction of the International Court of Justice as compulsory under Article 36 of the Statute of the Court, or that manifest "consent" as a circumstance precluding wrongfulness as contemplated in Article 20 of the ILC Articles of 2001.[50]

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[45] J. Barberis, "Le concept de 'traité international' et ses limites", *Annuaire français de droit international*, 1984, p. 258.

[46] See for example, Court of Justice of the European Union, *Commission v. Greece*, 12 February 2009, C-45/07, para. 29.

[47] See O. Schachter, "The Twilight Existence of Nonbinding International Agreements", *American Journal of International Law*, 1977, p. 300: "[…] a nonbinding agreement, however seriously taken by the parties, does not engage their legal responsibility".

[48] See Articles on State Responsibility, Art. 16.

[49] See for example ICJ, *Oil Platforms*, Judgment, 12 December 1996, *I.C.J. Reports 1996*, p. 815, para. 31: "In the light of the foregoing, the Court considers that the objective of peace and friendship proclaimed in Article I of the Treaty of 1955 is such as to throw light on the interpretation of the other Treaty provisions, and in particular of Articles IV and X. Article I is thus not without legal significance for such an interpretation, but cannot, taken in isolation, be a basis for the jurisdiction of the Court"; compare with *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France),* Judgment, 4 June 2008, *I.C.J. Reports 2008*, pp. 215–216, para. 101, and p. 216, para. 104. See also J. d'Aspremont, "Les dispositions non normatives des actes juridiques conventionnels à la lumière de la jurisprudence de la Cour internationale de Justice", *RBDI* 2003, pp. 496–520.

[50] In the articles adopted on State responsibility at first reading in 1996, the Commission considered that "[t]he case covered by the article therefore comprises, first, the request of a State to be permitted to act in a specific case in a manner not in conformity with the obligation and, secondly, the expression

(v) The question will inevitably arise as to whether the topic should include legal acts of an uncertain or debated nature such as acts adopted by conferences of States parties that are not attributable to an autonomous subject of international law and could be considered to possess a conventional nature, or concluding reports of conferences incorporating "agreed conclusions" [51] or even certain "codes of conduct".[52] Norms or standards elaborated in informal frameworks such as those existing in the field of control of imports and exports of dual-use materials (for example, the Wassenaar Arrangement) or in the field relating to the fight against money laundering or the financing of terrorism, should be included in the study.[53]

(vi) It will also be necessary to specify whether the topic concerns only agreements concluded by States or also those concluded by international organizations. At first glance, there seems to be no particular reason to exclude the latter from the scope of the topic.[54] On the other hand, it is recommended not to include agreements concluded with or by non-State entities, which fall into a genre that would be too different.[55]

(vii) Similarly, inter-State agreements or arrangements which are not covered by international law should be excluded from the topic.[56]

(viii) On the other hand, agreements between sub-States actors – or State authorities not vested with the power to engage the State internationally – of different countries would presumably fall under the scope of the topic to the extent that they are not covered by domestic law only.

(ix) Finally, it will be certainly advisable to limit the study to aspects of public international law and not to address – in any case, not as such – aspects of the topic which come under domestic law, including under "foreign relations law".[57]

7. The possible form of the work of the Commission

28. The work of the Commission should probably take the form of conclusions, or guidelines (or model provisions) if need be. A preliminary examination of the topic could also lead, if necessary, to the use of a study group, provided that its work is fully transparent. It will also be up to the Commission to decide in due time on the final outcome of the project, in accordance with the direction it will decide to give to it and its content.

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of consent, by the State benefiting from the obligation, to such conduct by the first State. It is the combined effect of these two elements which results in an agreement that, in the case in point, precludes the wrongfulness of the act." (*Yearbook of the ILC*, 1979, vol. II, pp. 109–110, Article 29 on consent, commentary, para. 3). See more broadly on the question J. Salmon, "Les accords non formalisés ou *solo consensu*", *Annuaire français de droit international*, 1999, pp. 1–28.

[51] *Oppenheim's International Law*, vol. 1, Parts 2 to 4, Longman, 1992, p. 1189.

[52] *Ibid*., p. 1202, note 18.

[53] See especially A. Rodiles, *Coalitions of the Willing and International Law. The Interplay between Formality and Informality*, CUP, 2018.

[54] For example, on the practice of the European Union, see R. Wessel, "Normative Transformations in EU External Relations: The Phenomenon of 'Soft' International Agreements", *West European Politics*, 2021, pp. 72–92.

[55] The Secretariat of the ILC recommended making it a separate topic (see Long-term programme of work, International Law Commission, A/CN.4/679/Add.1 to 3, 31 March 2016, paras. 13 and *ff*.).

[56] The Inter-American Juridical Committee chose to include them in its study. The question of the international or domestic nature of an inter-State agreement referring to domestic law as the applicable law has been discussed for example in the case *Loan Agreement between Italy and Costa Rica, RIAA*, vol. XXV, p. 61, para. 37 (the Tribunal concluded that it was an international agreement).

[57] On this point, see *supra*, para. 2.

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