

Chapter IX

Non-legally binding international agreements

A. Introduction

377. The Commission, at its seventy-fourth session (2023), decided to include the topic “Non-legally binding international agreements” in its programme of work and appointed Mr. Mathias Forteau as Special Rapporteur.¹⁸¹

378. The General Assembly, in paragraph 7 of its resolution 78/108 of 7 December 2023, subsequently took note of the decision of the Commission to include the topic in its programme of work.

379. The Commission, at its seventy-fifth session (2024), had before it the first report of the Special Rapporteur. The Commission considered the first report of the Special Rapporteur at its 3681st to 3687th meetings, from 10 to 19 July 2024.¹⁸²

B. Consideration of the topic at the present session

380. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/784). In his second report, the Special Rapporteur further examined the subject matter of the topic, the terminology to be used and the scope of the topic. The Special Rapporteur also addressed the first substantive issue related to the topic, as identified in his first report, namely, the distinction between treaties and non-legally binding international agreements. The Special Rapporteur proposed six draft conclusions.

381. As a consequence of the reduction of the length of the present session, the Commission was unable to consider in plenary the second report of the Special Rapporteur. At its 3702nd meeting on 28 April 2025, the Commission decided to establish a Working Group of the Whole on the topic, to allow for a preliminary exchange of views on the second report. At the same meeting, the Commission decided to appoint Mr. Mathias Forteau, Special Rapporteur, as Chair of the Working Group.

382. The Working Group held one meeting, on 21 May 2025.

383. At its 3718th meeting, on 23 May 2025, the Commission took note of the oral report of the Chair of the Working Group. The report of the Working Group is reproduced in section C below.

C. Report of the Working Group

384. At the beginning of the meeting of the Working Group, the Chair briefly introduced the second report, which included an introduction on the general elements, such as the object and the purpose of the topic, the terms used, the scope of the topic, and a possible “without prejudice” clause. Such an approach was taken on the basis of the discussions that had taken place the previous year both within the Commission and the Sixth Committee. The second report also included a study of the first substantive issue of the topic, namely the distinction between treaties and non-legally binding international agreements.

385. The Chair briefly drew the attention of the Working Group to the recent judgment of the International Court of Justice, of 19 May 2025, in the *Land and Maritime Delimitation and Sovereignty over Islands (Gabon/Equatorial Guinea)* case, which appeared to confirm his approach in the draft conclusions proposed in the second report with regard to assessing

¹⁸¹ At its 3656th meeting, on 4 August 2023. The topic had been included in the long-term programme of work of the Commission during its seventy-third session (2022), on the basis of the proposal contained in an annex to the report of the Commission to that session (*Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*, annex I).

¹⁸² A/CN.4/772. For the consideration, see *Official Records of the General Assembly, Seventy-ninth Session, Supplement No. 10 (A/79/10)*, chap. VIII, paras. 215–300.

whether or not a given agreement was legally binding under international law. He recalled that he had proposed, in the second report, four draft conclusions for the introductory part, and two draft conclusions on the general approach to be followed to assess whether an agreement was legally binding or not.

386. The purpose of the meeting was to undertake a preliminary exchange of views on the second report, in particular with a view to helping the Special Rapporteur prepare for the seventy-seventh session, including for purposes of the third report. In particular, the views of members were sought on the best way forward to address the pertinent indicators to distinguish treaties and non-binding agreements, either in the form of additional draft conclusions or other forms of output. The third report would address the second substantive issue of the topic, concerning the possible legal implications under international law of non-legally binding international agreements.

Preliminary exchange of views in the Working Group

387. Members expressed their regret concerning the lack of time for the consideration of the second report at the present session and noted that, while a preliminary debate in the format of the working group was helpful, they would provide their detailed remarks in the plenary meetings at the Commission's next session.

388. Members further expressed general appreciation for the second report, especially for the concise, cautious and non-prescriptive approach taken therein, while taking into account contemporary practice and the views of States. They also reiterated the practical importance of the topic. The main challenge of the topic was to find the right balance between the need to ensure greater legal security in the field and maintaining flexibility.

389. Members welcomed the Special Rapporteur's intention to analyse in the third report the elements contained in the judgment in the case *Land and Maritime Delimitation and Sovereignty over Islands (Gabon/Equatorial Guinea)*, including the indicators for determining whether a document was a treaty or a non-legally binding agreement. Some members expressed the view that the emphasis of the Court on the intention of the parties had provided additional support for the approach taken in the second report and had confirmed some of the proposals on the possible indicators.

390. It was observed that the purpose of the topic was to clarify the features of non-legally binding instruments so as to distinguish them from treaties. Some members expressed the view that the content of draft conclusion 1 on the purpose of the topic could be better addressed in the commentary, and that the aspects of the draft conclusion on the scope of the draft conclusions should be shorter, in line with the usual practice.

391. Concerning draft conclusion 2 on the use of terms and the title of the topic, differing views were expressed about the term "agreements" in the title of the topic. Several members expressed support for the term, in particular in light of the *travaux préparatoires* and the text of the Vienna Convention on the Law of Treaties. Some members were of the view that the term might be misleading and problematic in some languages or legal systems, and urged the Special Rapporteur to remain open to considering other possible terms, such as "instruments". Other members were open to discussing the issue and, while they agreed to retain the use of the term "agreements" on a provisional basis, they reiterated that that would be without prejudice to a final decision once the draft conclusions had been discussed in the Commission and the Sixth Committee had had an opportunity to comment on the Commission's work.

392. It was noted that, if the Commission were to eventually opt for an alternative term, that term ought to be better than "agreement", and should not be an alternative that would present new difficulties. A suggestion was made to refer to the fact that non-binding agreements were not governed by international law. Some proposals were made to adjust the title in English to bring it into conformity with other languages. Clarity was sought about the relationship between non-legally binding international agreements and Article 38 of the Statute of the International Court of Justice.

393. Support was expressed for the scope of the topic to be limited to written instruments between States, between States and international organizations or between international organizations, as stated in proposed draft conclusion 3. Some members were of the view that

further study regarding agreements concluded directly by ministries and sub-State authorities at the international level was necessary, including to better define what the phrase “sub-State authorities” concretely referred to.

394. While some questioned the usefulness of the “without prejudice” clause in draft conclusion 4, other members expressed support for its content.

395. Support was expressed for draft conclusion 5 on the assessment of whether an agreement was legally binding or not, which was considered to be in line with the Vienna Convention on the Law of Treaties and its *travaux préparatoires*. Members found useful the analysis and suggestions of relevant indicators that could be used to distinguish between treaties and non-legally binding international agreements. Support was expressed for including such indicators either in the draft conclusions themselves or in an indicative list as an annex. On the other hand, some members urged caution so as not to be overly prescriptive when developing such a list.

396. In relation to the indicators, members expressed support for the proposal that the intention of the parties should be the essential criterion and that the remaining elements should be considered in context. To stress the importance of the essential criterion of the intention, a suggestion was made to invert the order of paragraphs 1 and 2 of draft conclusion 5. Some members provided comments on specific indicators the which relevance of which needed to be assessed, including the terms used, the circumstances of the conclusion of the instrument, the subsequent conduct of the parties, the presence of final clauses, clauses on the governing law, registration with the United Nations, dispute settlement provisions, and clauses providing expressly that the instrument was non-legally binding. Proposals were made to classify the indicators and to elaborate on the weight to be given to them. Some members cautioned against suggesting a too detailed set of indicators, which could limit the evolution of State practice.

397. With regard to draft conclusion 6, which concerned the scenario where all the parties to an agreement expressly indicated that it was or was not legally binding under international law, a concern was raised that the provision could raise real issues over the status of instruments that did not contain a specific clause identifying the parties’ intention. It was also suggested that the issue be dealt with in the commentary.

398. Several members expressed support for the final output to be in the form of draft conclusions, with some expressing openness to a different form. It was stated that draft conclusions would be useful for States to help get clarification from existing practices. The view was expressed that draft conclusions were not appropriate, as they were reserved for the work of the Commission related to sources of international law. Finally, support was expressed for a renewed call to States to share their practice on the subject.

Conclusion

399. The Chair of the Working Group thanked members for their positive and constructive engagement during the preliminary exchange. He indicated that he intended to present a third report at the seventy-seventh session taking into account the recent judgment of the International Court of Justice, the views of States at the Sixth Committee and the additional materials that become available concerning the practice of States. He noted that he would start addressing in his next report the second substantive issue of the topic, namely the possible legal implications of non-legally binding international agreements. He also stressed that he would take into account all the remarks made in the Working Group, and duly noted that the views expressed in the Working Group were preliminary and without prejudice to more substantial views to be elaborated by members when the second report would be discussed in the plenary at the seventy-seventh session.