THE GROWING SIGNIFICANCE OF NON-LEGALLY BINDING INSTRUMENTS FOR THE INTERNATIONAL LEGAL ORDER

Helmut Philipp Aust*

Keynote address at the 2nd practitioners' workshop of CAHDI on non-legally binding instruments

Vienna, 18 September 2024

1 Introduction

One of the virtues of non-legally binding instruments is their alleged informality.[1] Informality need not mean that non-legally binding instruments are casual in form. Rather, informality relates to the place that such instruments may or may not have in the international legal order. Now, lawyers in general and international lawyers in particular have a special relation when it comes to formalism. Whereas some view formalism as something to be overcome, others insist that formalism protects international law against undue political manoeuvres.[2] Striving for formality may come at a price, however. As states represented in the UN Security Council became disenchanted with formal Council meetings, they initiated an additional informal format. Over time, however, the informal sessions became increasingly formalized too. The result was that in addition to formal and informal meetings there would also be "informal interactive dialogues", sometimes also jokingly called "informal informal meetings".[3]

Now, is a similar development conceivable also with respect to non-legally binding instruments? Could it be that inasmuch as non-legally binding agreements are more and more formalized, states would seek other alternatives, push informality a few steps further, and opt for even more non-binding commitments than we know today? And does the engagement with and growing attention for non-legally binding instruments in international law circles contribute to this development? It is impossible for me to predict whether this might be a consequence of a sustained engagement of CAHDI and other actors and institutions with the topic. But I think that the topic is here to stay, at least for a couple of years. In some Council of Europe member states, there are debates on how the legislature should be involved in processes bringing about non-legally binding instruments.[4] And at the end of 2022, US domestic legislation was amended so as to provide for reporting obligations to the Senate for "qualifying non-legally binding agreements".[5]

---

* Dr. iur., Professor of Public and International Law, Freie Universität Berlin. Contact: helmut.aust@fu-berlin.de.

[1] Jeremy Hill, *Aust's Modern Treaty Law and Practice* (4th edn., Cambridge: CUP, 2023) 58.

[2] This is also the gist of the "culture of formalism" argument: Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge: CUP, 2001), 500 et seq.

[3] See further Konrad Bühler, 'Article 29' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds.), *The Charter of the United Nations – A Commentary* (4th edn., Oxford: OUP, 2024) paras. 43-52 and Alejandro Rodiles, 'Article 30' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds.), *The Charter of the United Nations – A Commentary* (4th edn., Oxford: OUP, 2024) paras. 60-61; the "informal informal meetings" characterisation is also owed to Alejandro Rodiles.

[4] See, for example, Anna Petrig, 'Democratic Participation in International Lawmaking in Switzerland after the "Age of Treaties"', in Helmut Philipp Aust and Thomas Kleinlein (eds.), *Encounters between Foreign Relations Law and International Law – Bridges and Boundaries* (Cambridge: CUP, 2021), 180-212, at 202-205.

[5] Adopted as part of the H.R. 7900 – National Defense Authorization Act for Fiscal Year 2023.

Today is not the first time that CAHDI directs its attention to the topic.[6] Since its first expert seminar on the topic in 2021, the UN International Law Commission (ILC) has begun its work on a new project on non-legally binding agreements, about which we will hear more later today from the ILC's Special Rapporteur, Professor Mathias Forteau. In his first report, he has made it clear that the work of the Commission will benefit enormously from cooperation by state governments.[7] Many salient aspects of national practice are not widely publicized. While it may be in the interest of governments that not all non-legally binding instruments are publicly available, some of them are announced to the public with significant communicative efforts. It may likewise be in the interest of states that some elements of their practice are available to other states, international organizations and other relevant actors. Engaging with the ILC work can help make Council of Europe member states' practice more visible in a context which, so far, has been driven by developments from outside of Europe.[8] Council of Europe states might find it useful to take this opportunity to identify, for instance, where and to what extent their preferences align with the work of the Inter-American Juridical Committee which has formulated a set of guidelines under the stewardship of Professor Duncan Hollis.[9]

In my following remarks, I would like to first focus on a specific case study. It concerns the variety of bilateral security instruments and agreements that Ukraine has concluded with now 20 partners. Almost all of these agreements are supposedly non-legally binding – with the exception of the agreement entered into with the United States (section 2). I will then offer some reflections on some of the legal questions which derive from this set of agreements/instruments (section 3).

2 Binding and Non-Binding Bilateral Security Agreements between Ukraine and its Partners

The Russian war of aggression against Ukraine falls squarely within the scope of application of hard and binding international law. As it has been rightly emphasized, support for Ukraine's self-defence is also support for the defence of the international legal order.[10] The most recent efforts within the Council of Europe to establish a Special Tribunal for the Prosecution of Aggression can be understood as a particular attempt to strengthen the normative authority of one, if not *the* cornerstone of the international legal order, i.e., Article 2, para. 4 of the UN Charter.[11] In this context, however, also non-binding instruments have an important role to play.

[6] See the first expert meeting of 26 March 2021, https://www.coe.int/en/web/cahdi/non-legally-binding-agreements-in-international-law; Professor Andreas Zimmermann prepared a study in preparation of this meeting. See further in this connection Andreas Zimmerman and Nora Jauer, 'Legal Shades of Grey? Indirect effects of "Memoranda of Understanding"', *Archiv des Völkerrechts* 59 (2021), 278-299.

[7] UN, ILC, First report on non-legally binding international agreements, by Mathias Forteau, Special Rapporteur, UN Doc. A/CN.4/772, 23 April 2024.

[8] A particularly influential article, also summarising relevant domestic legislative developments in the US, is Curtis A. Bradley, Jack Goldsmith and Oona A. Hathaway, 'The Rise of Nonbinding International Agreements: An Empirical, Comparative and Normative Analysis', *Chicago Law Review* 90 (2023), 1281-1364.

[9] OAS, Inter-American Juridical Committee, 97th Regular Session, Binding and Non-Binding Agreements: Final Report (Presented by Professor Duncan B. Hollis), QEA/Ser. Q, CJI/doc. 614/20 rev. 1 corr. 1, 7 August 2020.

[10] See, for instance, Ingrid (Wuerth) Brunk and Monica Hakimi, 'Russia, Ukraine, and the Future World Order', *American Journal of International Law* 116 (2022), 687-697; Christian Walter, 'Der Ukraine-Krieg und das wertebasierte Völkerrecht', *JuristenZeitung* 77 (2022), 473-482.

[11] See the Declaration of the Ministers of Justice of the Council of Europe, adopted on 5 September 2024 in Vilnius, https://rm.coe.int/final-vilnius-declaration-en-eu-note/1680b17523.

2.1 Overview of the bilateral security agreements

So far, Ukraine has signed 20 bilateral security agreements with a broad range of partners, including all G7 member states, a number of other Council of Europe member states and, separately, the European Union.[12] A first question is what legal nature these agreements have. The natural starting point in this regard is Article 2, para. 1, lit. a) of the Vienna Convention on the Law of Treaties.[13] Accordingly, for the purposes of the Vienna Convention, a treaty is defined as "an international agreement concluded between States in written form and governed by international law (…)." Different schools of thought exist with respect to the formulation "governed by international law". Arguably, a combination of subjective and objective approaches yields the best results.[14] At times, states will be explicit about their intent for or against bindingness, but at other times this will be left open.

I am lacking the time to go into the details of the bilateral security agreements here but looking at their structure, wording and context, it seems safe to hold that almost all of them are non-legally binding. If we take, by way of example, the instruments which France and Germany respectively concluded with Ukraine on 16 February 2024[15],

- they do not refer to their opening passages as a preamble,
- they also do not include numbered articles,
- they speak of participants instead of parties and
- they do not include a provision on the entry into force of these instruments but rather set out that they take immediate effect and are "valid for ten years from the date of (…) signature".

In terms of their content, these agreements contain provisions on security cooperation in its various dimensions:

- Almost all of these contents are phrased so as to exclude that hard, legally-binding obligations are set forth.[16]
- Language used is often indicative and refers to one the participants that will continue to act in a certain way.
- In addition, developments are welcomed and certain points are reaffirmed.
- Conspicuously absent is language which is often associated with creating binding obligations like "shall", "agree" and the like.

[12] For an overview see Mykhailo Soldatenko, Getting Ukraine's Security Agreements Right, Carnegie Endowment for Peace, 8 July 2024, available at https://carnegieendowment.org/research/2024/07/getting-ukraines-security-agreements-right?lang=en.

[13] Vienna Convention on the Law of Treaties of 23 May 1969, entry into force on 27 January 1980, 1155 UNTS 331.

[14] See also Kirsten Schmalenbach, 'Article 2' in Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties – A Commentary* (2nd edn., Berlin: Springer, 2018) para. 34.

[15] Agreement on security cooperation and long-term support between the Federal Republic of Germany and Ukraine, 16 February 2024, available at https://www.bundesregierung.de/resource/blob/2008726/2260158/d84fa168bdd3747913c4e8618bd196af/2024-02-16-ukraine-sicherheitsvereinbarung-eng-data.pdf?download=1; Agreement on security cooperation between France and Ukraine, 16 February 2024, available at https://www.elysee.fr/en/emmanuel-macron/2024/02/16/agreement-on-security-cooperation-between-france-and-ukraine.

[16] On the choice of language in non-binding instruments see further Hill (note 1), 46-47.

Yet, it is clear that the instruments are not completely detached from the international legal order. International law as well as the purposes and principles of the UN Charter are taken into account as reference points. And, more importantly, the instruments reaffirm the commitment of the participants to ensure that Russia's wrongful conduct will entail reparation and must be met with accountability. In a non-legally binding way, the instruments hence relate to the *defence* as well as the *development* of international law. Here, we can see that these instruments might fulfil a similar function as it is often ascribed to soft law – paving the way for normative developments which might crystallize later on.[17]

A noteworthy feature of the conclusion of these various bilateral security instruments is their "serial" nature. Serial bilateralism is a concept which was developed in the literature to describe how states would, for various reasons, at times prefer bilateral agreements over multilateral endeavours.[18] In our case study, we are not faced with isolated, one-off and non-binding attempts at bolstering individual bilateral relationships. Rather, the instruments together form a pattern and are also embedded into a more collective process organized in the context of NATO, the G7, the EU and the Council of Europe. Taken together, the instruments form a web of commitments which may bolster their impact on the further development of international law. The most recent developments with respect to the creation of a Special Tribunal can be seen as implementation steps of the roadmap towards a just peace for Ukraine as the bilateral agreements refer to the creation of such a tribunal.[19]

The highly political nature of the instruments sets them apart from some of the other practical examples for non-legally binding instruments. It is noteworthy that at least in one Council of Europe member state, this highly political nature has also had repercussions on the domestic level. After the conclusion of the French non-binding agreement with Ukraine, it was subject to a debate and vote in the *Assemblée Nationale*.[20] So far, it is an open question whether this parliamentary engagement with a non-binding agreement will pave the way for a more general parliamentary practice or whether it was an isolated, one-off initiative owed to a particular context.

2.2 The US-Ukraine Agreement as an Outlier?

One of the Ukrainian security agreements is standing apart, however. The US-Ukrainian agreement of 13 June 2024 has all the characteristics which are typically associated with a treaty in the sense of the Vienna Convention. It features

- a preamble,
- speaks of parties,
- includes numbered articles,

[17] See first Jorge Castañeda, *Legal Effects of General Assembly Resolutions* (Columbia UP 1970); further and with an overview of the debate Daniel Thürer, 'Soft Law', in Anne Peters (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: OUP, online edn.) para. 32.

[18] On serial bilateralism see Eyal Benvenisti and George W. Downs, 'The Emperor's New Clothes: Political Economy and the Fragmentation of International Law', *Stanford Law Review* 60 (2007), 595-632, at 610-611; on *informal* serial bilateralism Alejandro Rodiles, *Coalitions of the Willing and International Law – The Interplay between Formality and Informality* (Cambridge: CUP, 2018) pp. 137 et seq.

[19] See Declaration of the Ministers of Justice of the Council of Europe, 'On the Occasion of the Informal Conference "Towards Accountability for International Crimes Committed in Ukraine"', 5 September 2024, Vilnius, https://rm.coe.int/final-vilnius-declaration-en-eu-note/1680b17523.

[20] Journal officiel de la République française, Assemblée nationale, Session ordinaire de 2023-2024, 144e séance, 2e séance du mardi 12 mars 2024, Année 2024. – No 26 [2] A.N. (C.R.), 1837 et seq.

- contains a provision on its entry into force and
- provides for registration with the United Nations under Article 102 of the UN Charter.[21]

If we are looking for a text book example of how to distinguish a non-binding from a binding agreement, it is instructive to put the US-Ukraine agreement side by side with the instruments concluded between Ukraine and France and Germany respectively.

The internal structure of the US-Ukraine agreement merits further attention. It contains a main part and an annex. The Annex spells out various forms of security cooperation in greater detail than the main part of the agreement. Most importantly for our discussion here, it is provided that nothing within the Annex "is intended to give rise to rights or obligations under domestic or international law." The fact that this is clearly indicated in the Annex underlines that the Agreement as such is considered to be binding.

It is not unusual that international agreements contain a mix of binding and non-binding provisions. The Paris Agreement on Climate Change[22] is a case in point, being legally binding and "hard law" as such, but containing more hortatory provisions which leave it to the states parties how these provisions are to be implemented.[23] The bilateral security agreement between the US and Ukraine is hence not an outlier, but its regulatory technique is intriguing nonetheless: the language of the legally binding part of the agreement is kept rather open-ended, whereas the explicitly non-binding provisions in the Annex are in comparison more specific.

With respect to the internal dimension, the agreement was not subject to the procedure of seeking advice and consent by the US Senate. Rather, it was apparently concluded as a so-called sole executive agreement[24], i.e., without the type of involvement of Congress which has developed over time for congressional executive agreements.[25] Also on the Ukrainian side, it was not subject to parliamentary approval.[26]

The circumstances of its conclusion do not deflect, however, from the fact that it is a fully-fledged treaty in the sense of the Vienna Convention on the Law of Treaties. While I am not in a good position to assess the reasons why in this case a legally binding agreement was chosen, the comparison between this case and all the other non-binding bilateral instruments concluded between Ukraine and its partners highlights that the choice of form of an instrument may depend on a variety of different political considerations which find expression in the forms of engagement with international law that the respective foreign relations law of a country

[21] Bilateral Security Agreement Between the United States of America and Ukraine, 13 June 2024, available at https://www.whitehouse.gov/briefing-room/statements-releases/2024/06/13/bilateral-security-agreement-between-the-united-states-of-america-and-ukraine/.

[22] Paris Agreement of 12 December 2015, entry into force on 4 November 2016, 3156 UNTS 79.

[23] Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations', *Journal of Environmental Law* 28 (2016), 337-358; mixing binding and non-binding elements in one instrument was also the approach taken for the "Joint Comprehensive Plan of Action" (JCPOA, or "Iran deal") which consisted of non-binding agreements, partly "hardened" by a UN Security Council Resolution, see UN Doc. S/RES/2231 (2015) of 20 July 2015.

[24] See Jack Goldsmith, 'Some Thoughts on the Weak U.S.-Ukraine Security Agreement', *Lawfare*, 14 June 2024, https://www.lawfaremedia.org/article/some-thoughts-on-the-weak-u.s.-ukraine-security-agreement.

[25] On these categories and their relationship to each other see Jean Galbraith, 'International Agreements and U.S. Foreign Relations Law' in Curtis Bradley (ed.), *The Oxford Handbook on Comparative Foreign Relations Law* (Oxford: OUP, 2019) 157-171, at 162-163.

[26] See further Soldatenko (note 12).

provides for.[27] It does not necessarily imply that some questions can only be addressed via a binding agreement or contrariwise by a non-binding instrument.

3 Reflections on the Relationship between Binding and Non-Binding Instruments

What are the take-aways from this case study of the various bilateral security agreements concluded between Ukraine and its partners for today's deliberations?

The agreements demonstrate that a critique in the literature which argues that there is no need for international law to differentiate between legally binding and non-legally binding agreements cannot convince.[28] Doing away with this distinction would not do justice to the intent of states, a key criterion for identifying whether an agreement is "governed by international law".[29]

The agreements highlight the at times intricate relationship between these non-binding documents and the world of formally binding international law. I already mentioned that the non-binding instruments seek to reinforce various rules of international law which are binding on the parties/participants. At the recent NATO summit in Washington, D.C., the Declaration of the NATO-Ukraine Council explicitly stated that the "bilateral long-term security commitments" entered into by NATO member states with Ukraine would be "mutually reinforcing".[30] This indicates that in some way, the whole of these agreements and instruments is larger than the sum of its parts. While it remains to be seen which impact the agreements will have on lawmaking and norm-setting practices, they can be seen as a coordinated attempt to shape the future development of international law.

The collective set of bilateral security agreements/instruments certainly offer a lot of food for thought for us today here, in particular when it comes to understanding how a set of different agreements and instruments, some of them binding, some not, interact and influence each other. By way of example and already with an eye towards our discussion, let me put the following questions on the table:

- To what extent can the effects of the non-binding instruments be limited to a purely political dimension?
- What role does it play that in a cluster of non-legally binding and binding instruments one of them is legally binding?
- Does the application and interpretation of the legally binding agreement have potential implications for the other agreements? How does, for instance, subsequent practice in the
- application of the legally binding agreement reflect on the future dynamics of the non-binding instruments?

[27] Galbraith (note 25).

[28] For this critique see, for instance, Jan Klabbers, 'Governance by Academics: The Invention of Memoranda of Understanding' *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 80 (2020), 35-72.

[29] See also Schmalenbach (note 14) para. 34.

[30] Statement of the NATO-Ukraine Council issued by the Heads of State and Government participating in the meeting of the NATO-Ukraine Council in Washington, D.C., 11 July 2024, available at https://www.nato.int/cps/en/natohq/official_texts_227863.htm.

- Furthermore: is it conceivable that some of the agreements change their character over time, i.e., harden into binding commitments, potentially also through something akin to subsequent practice in the application of the instrument?
- And what would be the legal basis for such a legal assessment? Can, for instance, some rules of the Vienna Convention on the Law of Treaties on the interpretation of treaties be applied by way of analogy to non-legally binding instruments?

In a nutshell, there is ample need for more clarity with respect to these points. This does not mean to pigeon-hole non-legally binding instruments in a way which will deprive them of their attractiveness for practice. A balance needs to be struck between a maintenance of their virtues in terms of flexibility and informality and an approach which then also does justice to the claim of the Ukrainian President Zelensky that these agreements are "new pillars for the rules-based international order".[31]

These agreements offer a powerful example that the "rules-based international order" is a term which includes public international law as well as other normative elements.[32] At times, non-legally binding instruments are built around hard and binding international law in order to support it. One task before us is to conceptualize how the legally binding as well as non-legally binding elements of the rules-based international order interact with each other.[33]

4 Conclusion

Let me briefly summarize my main points:

First, in the light of the commencing ILC work on non-legally binding agreements further CAHDI work on today's topic would be particularly welcome. It could lend considerable support to the work of the ILC, but also help to make European practice more visible in this field.

Second, an assessment of the various bilateral security agreements concluded between Ukraine and its partners demonstrates the need to clearly distinguish between legally binding and non-legally binding instruments.

Third, the overall complex of these bilateral instruments indicates that work remains to be done when it comes to assessing the interrelationship between such instruments, how they connect with binding international law and which function they can fulfil not just for the rules-based international order, but also – as demonstrated in the concrete case of Ukraine – the defence and the development of international law.

[31] Quoted in Soldatenko (note 12).

[32] Critical with respect to this term John Dugard, 'The choice before us: International law or a "rules-based international order"?', *Leiden Journal of International Law* 36 (2023), 223-232; Malcolm Jorgensen, 'The Jurisprudence of the Rules-based Order: The Power of Rules Consistent with but Not Binding under Internatinal Law', *Melbourne Journal of International Law* 24 (2021), 221-258.

[33] See further Rodiles (note 18), pp. 148 et seq. (with special emphasis on some of the dangers that informal elements can pose for international law).