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Panel 1: Exchange On 'Good' Or 'Bad' Practices Between Practitioners

Observations

by Dr Charlotte PIVETEAU, Human Rights Adviser, Office of the Council of Europe Commissioner for Human Rights

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I would like to offer three lessons about what a non-legally binding instrument should include – and one lesson about what it should not. These lessons are based on an analysis of the case-law of the European Court of Human Rights (ECtHR), and of human rights practice more broadly.

The first lesson is: ensure that non-legally binding instruments respect human rights.
It is important to ensure that such instruments are based on human rights principles and that their implementation would not lead to violation of a human rights treaty. Indeed, in the field of migration, some non-legally binding instruments have been criticised by several scholars for leading to violations of the principles of non-refoulement and non-discrimination, but also for lacking references to human rights.

The second lesson is: publish non-legally binding instruments.
Secret instruments, particularly in the context of border controls, have been criticised by the ECtHR because they are not accessible to the public and thus not foreseeable as to their effects.[1] Consequently, a good practice is to publish non-legally binding instruments to ensure transparency.

The third lesson is: non-legally binding instruments need democratic safeguards and periodic review.
We have to be careful not to use these instruments to circumvent the powers of a legislative or democratic body. To ensure proper respect for existing institutions, a good practice is to include democratic safeguards in the creation of these instruments, such as consultative mechanisms. In addition, according to the experts from the Meijers Committee,[2] soft law instruments should themselves provide for a periodic review: it must be possible to review their content at least every four years. Whilst this recommendation concerns soft law instruments under EU law, the principle it contains is relevant to most non-legally binding instruments.

[1] ECtHR, *Khlaifia and others v. Italy* (GC), 15 December 2016, n° 16483/12.
[2] Meijers Committee, Note on the use of soft law instruments under EU law, in particular in the area of freedom, security and justice, and its impact on fundamental rights, democracy and the rule of law, 9 April 2018.

The final lesson is: non-legally binding instruments cannot cover everything.

The case-law of the ECtHR has expressed doubts about the Convention-compliance of regulating certain subjects through non-legally binding instruments, including access to justice and the principle of legality of criminal offences and penalties. In other words, in certain areas, a legally binding instrument is a superior – or even necessary – option. The Court has been most explicit on this in the domain of surveillance, notably in *P.G. and J.H. v. U.K.*[3] Indeed, during its examination of the quality of the law, the Court considered that a non-legally binding instruments could not always provide adequate safeguards against abuse. A similar view was expressed by Judge Pinto de Albuquerque in his separate opinion in *Big Brother Watch v. UK.*[4] Whilst these cases concern unilateral non-legally binding instruments, the reasoning could be applied by analogy to cover bilateral instruments.

In conclusion, it is clear that non-legally binding instruments are an increasingly crucial part of lawmaking in international law. In order to be effective and to promote rights, we can learn from these three 'dos' and one 'don't': do respect rights, do publish, do include safeguards, and don't cover everything.

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[3] ECtHR, *P.G. and J.H. v. U.K*, 25 September 2001, n° 44787/98.
[4] ECtHR, *Big Brother Watch v. UK*, 25 May 2021, n° 58170/13, 62322/14, 24960/15, Partly concurring and partly dissenting opinion of Judge Pinto De Albuquerque.