Presentation by Professor Forteau

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I was invited to make a presentation of the ILC's work on non-legally binding international agreements. I would like, first of all, to explain where we are at this point before turning to what you will find in my second report, which I submitted about a month ago, which should be released in June and which should be examined next summer (if we have a 12-week session, as provided by the United General Assembly, which is not certain due to the UN current liquidity crisis).

To begin with, I would like to recall that the topic was placed on the agenda of the Commission in 2023. I submitted a first, preliminary report in 2024 with the aim of defining and circumscribing the topic, identifying the questions and issues to be addressed. This initial report also focused specifically on questions of terminology.

Last year, in July, the Commission had a first exchange of views on that report. The ILC debate, as summarised in the Commission' annual report, provided an opportunity for delegations in New York to offer in October detailed comments. The debates in the Sixth Committee were extremely rich—approximately fifty delegations took the floor, including CAHDI Member States. These interventions included detailed input on national practice as well as constructive proposals. I personally found the contributions to be extremely valuable, and I believe they demonstrated real and growing interest in the topic, which is very much in line with clearly identified needs.

Since the autumn, I have continued additional research on the same subject, with the aim of identifying as many examples of state practice as possible, along with relevant case law. In this connection, I would like to thank CAHDI for submitting replies to the questionnaire—their responses were extremely helpful, and I studied them closely. When my second report is published, I am confident you will see that many of the replies that CAHDI provided were taken into account.

During the course of my research, I also discovered that as early as 1996, the European Union had developed a questionnaire on international (non-legally binding) agreements. I was able to locate the document, but unfortunately, I have not yet had access to the replies submitted by EU Member States at that time.

Since last summer, I have also focused my work on analysing state practice. So far, around 15 states have submitted written information on their practices to the International Law Commission, and these submissions are now available on our website. Many interventions in the Sixth Committee also provided useful information in this regard. Furthermore, I looked at national guidelines that exist in this area, identifying approximately twenty states—such as Australia, New Zealand, the United Kingdom, France, the United States, Colombia, Vietnam, or Spain—which have adopted guidelines. Several other states, including Slovenia and France, have informed the Commission that they are currently in the process of drafting such national guidelines.

In view of this, I felt it was important to emphasise in my report that the Commission's work should be conducted in a collaborative manner with Member States. It is not about imposing ready-made solutions but rather accompanying existing national practices.

In terms of case law, in addition to international case law—which is well known—I also reviewed regional jurisprudence, such as decisions from the Inter-American and European systems. I identified some relevant national case law as well, including a particularly interesting 2017 decision from a South African court directly addressing this topic.

I also continued reviewing the available scholarly literature.

In light of our upcoming discussions on terminology, I think it is important to emphasise that as Special Rapporteur of a UN body, I am expected to reflect the practices of all regions of the world. Accordingly, I made a point of consulting websites from, for instance, countries such as India, China, and members of ASEAN to ensure that my analysis was regionally representative, since it would not be appropriate to focus solely on Europe. Additionally, linguistic diversity must be taken into account, as terminology is crucial and inclusiveness is key.

As mentioned, I submitted my second report to the Secretariat of the Commission in French about a month ago, so it could be translated into the six UN official languages. The report is expected to be circulated in June and discussed in July. I say "expected" because, as you are aware, the United Nations is currently experiencing a serious financial crisis, and the Commission may not have the number of meeting weeks it had originally anticipated. Our session is supposed to start in about a month, but we still do not know whether or when it will go ahead.

That said, I am pleased to be able to share with you the substance of my second report. I wish to underline that the report represents my personal work and proposals and does not in any way prejudge what the Commission may ultimately decide. It is important to respect the Commission's working methods. The process must be followed correctly: first, the Commission must deliberate on the report over the summer, and only then will states have an opportunity to comment in the Sixth Committee in the autumn. This sequence is essential to maintaining the Commission's independence.

The second report consists of two major components: first, drawing conclusions on general aspects from last year's discussions; and second, addressing the distinction between treaties and non-legally binding agreements.

Regarding the first component, I recommend that the outcome of our work takes the form of draft conclusions, with one nuance: when it comes to criteria or indicias to help distinguish treaties from non-legally binding agreements, we may need to consider something more operational for Member States to use. This is something we will need to examine further.

The introductory section of my second report includes four proposed conclusions:

The *first conclusion* addresses the purpose of the Commission's work. It emphasises that the draft conclusions are not binding or prescriptive. The objective is simply to clarify the existing state practice. It also explicitly states that the work does not detract from the importance of treaties or from the flexibility required in international negotiations.

The *second conclusion* addresses terminology. It provides definitions for the expressions "legally non-binding"—meaning there is no obligation, no duty created, and no binding legal effect—and "agreement." I propose that the term "agreement" should be retained in the title of the topic, rather than "instrument." However, this point is open for discussion.

The *third conclusion* addresses scope. It limits the analysis to bilateral and multilateral agreements that are in writing, international in character, and concluded between States, between States and international organisations, or between international organisations. It also

considers the inclusion of agreements concluded by sub-national entities, under the condition that such agreements are approved at the international level.

The *fourth conclusion* clarifies that the Commission's work does not affect domestic legal rules governing non-legally binding agreements. Flexibility at the national level must be preserved.

The second major component of the report addresses the distinction between treaties and non-legally binding agreements. This section is divided into two parts: (i) identifying the general approach, and (ii) identifying possible criteria or indices to draw the distinction.

From my review of state practice, case law, and doctrine, I derived two additional draft conclusions: The *fifth and sixth conclusions* state that the legally binding or non-binding nature of an agreement must always be assessed on a case-by-case basis. They also assert that this legal character depends on the intention of the parties. That intention may be expressly stated in the agreement or in another related instrument. If it is not expressed, the intention may be inferred from a range of elements, which must be considered as a whole. Where all parties expressly agree that the instrument is non-binding, that is sufficient evidence of intent; no further elements are needed.

This is the approach I propose in the report: a sequence involving a case-by-case analysis, examining the parties' intention, and if the intention is not explicitly expressed, looking at indicators that may demonstrate it.

On the matter of these indicators or criteria, I reviewed case law, national practice, national guidelines, and scholarly literature to draw up a non-exhaustive list of relevant elements. These include the terminology used by the parties, statements made during negotiations, and other contextual factors. However, I do not propose any hierarchy or prioritisation among these elements at this stage.

And I do not yet propose a draft conclusion on these indicators, for two reasons:

First, because the information currently available is still not sufficiently representative of global state practice. I will need at least one more year to collect and analyse more data.

Second, because the Commission still needs to determine the most appropriate format. It might opt for a single draft conclusion listing the criteria, multiple conclusions discussing different elements, or even a glossary of terms used in non-legally binding instruments.

All of this will need to be examined during our discussions this summer before a decision can be made on a final conclusion.

Finally, let me point out one challenge I had not fully anticipated at the outset of this work. In reality, we are dealing with two distinct issues:

First, how to assist states in drafting non-binding agreements, i.e. identifying best practices and guidance for negotiators.

Second, how to assist interpreters, such as judges or arbitrators, in determining whether an agreement is binding or non-binding.

At present, the available elements may not yet be clear or complete enough to serve either function fully. That is another reason why I think a detailed discussion within the Commission this year is warranted.

The second report should be made public around mid-June, subject to the availability of resources for translation. If all goes according to plan, the Commission will hold a plenary

session in July, followed by several meetings of a drafting committee to begin work on the conclusions in the second report.

But I stress once again: for the time being, everything I have presented today represents only my own views and proposals, and not those of the Commission.

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