

Document:-  
**A/CN.4/3259**

**Summary record of the 3259th meeting**

Topic:  
**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**

Extract from the Yearbook of the International Law Commission:-  
**2015, vol. I**

*Downloaded from the web site of the International Law Commission  
(<http://legal.un.org/ilc/>)*

## 3259th MEETING

Friday, 29 May 2015, at 10.05 a.m.

Chairperson: Mr. Narinder SINGH

*Present:* Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

### Subsequent agreements and subsequent practice in relation to the interpretation of treaties<sup>131</sup> (A/CN.4/678, Part II, sect. B,<sup>132</sup> A/CN.4/683,<sup>133</sup> A/CN.4/L.854<sup>134</sup>)

[Agenda item 4]

#### THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce his third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/683).

2. Mr. NOLTE (Special Rapporteur) said that, in his third report, he addressed the role of subsequent agreements and subsequent practice in relation to the interpretation of treaties that were the constituent instruments of international organizations. The scope of the report was limited to such instruments; it did not cover the interpretation of treaties adopted within an international organization or those concluded by international organizations.

3. Article 5 of the 1969 Vienna Convention provided that the Convention was applicable to treaties that were the constituent instruments of international organizations. At the same time, article 5 suggested, and the case law confirmed, that constituent instruments of international organizations were also treaties of a particular type which might need to be interpreted in a specific way. In particular, the question arose as to which forms of conduct might constitute relevant subsequent practice for the purpose of the interpretation of a constituent instrument of an international organization.

4. The International Court of Justice, other judicial or quasi-judicial bodies and States had recognized that three

forms of conduct might be relevant in that regard. They were: the subsequent practice of the parties to constituent instruments of international organizations which established their agreement regarding the interpretation of such instruments; the practice of organs of an international organization; and a combination of the practice of organs of an international organization and the subsequent practice of the parties to the constituent instrument of that organization.

5. With respect to subsequent practice establishing agreement between the members of an organization, he pointed out that it was not only such practice that was relevant. Other subsequent practice of parties in applying the constituent instrument of an international organization might also be relevant for the interpretation of that instrument. Such constituent instruments were sometimes implemented by subsequent bilateral or regional agreements or practice, for example. Although such bilateral treaties were concluded between only a limited number of the parties to the multilateral constituent instrument concerned, and were therefore not, as such, subsequent agreements under article 31, they might imply assertions concerning the proper interpretation of the constituent instrument itself and, taken together, might be relevant for the interpretation of such a treaty.

6. The International Court of Justice had also sometimes taken into account the practice of organs of an international organization when interpreting that organization's constituent instrument, apparently without reference to the practice or the acceptance of the members of the organization. In particular, the Court had stated that the international organization's own practice might deserve special attention in the process of interpretation. The practice of organs in the application of a constituent instrument should thus, at a minimum, be conceived as being other subsequent practice under article 32.

7. The third possibility was to take into account a combination of the practice of organs of the organization and the subsequent practice of the parties, in particular their acceptance of the practice of organs. For example, in its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the International Court of Justice had arrived at its interpretation of the term "concurring votes" in Article 27 of the Charter of the United Nations as including abstentions primarily by relying on the practice of the organ concerned, in combination with the fact that it was subsequently generally accepted by Member States. In that case, the Court had emphasized both the practice of one or more organs of the international organization and the general acceptance by the Member States, and it had characterized the combination of those two elements as being a general practice of the Organization.

8. The interpretation of treaties which were constituent instruments of international organizations might also be affected by subsequent agreements under article 31, paragraph 3 (a). Two basic forms of subsequent agreements regarding the interpretation of constituent instruments of international organizations could be distinguished:

<sup>131</sup> At its sixty-fifth session (2013), the Commission provisionally adopted draft conclusions 1 to 5 and commentaries thereto (*Yearbook ... 2013*, vol. II (Part Two), pp. 17 *et seq.*, paras. 38–39). At its sixty-sixth session (2014), it provisionally adopted draft conclusions 6 to 10 and commentaries thereto (*Yearbook ... 2014*, vol. II (Part Two) and corrigendum, pp. 107 *et seq.*, paras. 75–76).

<sup>132</sup> Mimeographed; available from the Commission's website, documents of the sixty-seventh session.

<sup>133</sup> Reproduced in *Yearbook ... 2015*, vol. II (Part One).

<sup>134</sup> Mimeographed; available from the Commission's website, documents of the sixty-seventh session.

self-standing agreements between the parties; and agreements between the parties in the form of a decision of a plenary organ of an international organization. Self-standing agreements between the parties regarding the interpretation of constituent instruments of international organizations were rare. While parties mostly acted as members within the framework of the plenary organ, when questions of interpretation arose with respect to such an instrument, they did on occasion act in their capacity as parties. Examples in that regard could be found in the practice of the European Union. Decisions and recommendations of plenary organs of international organizations regarding the interpretation or the application of a treaty provision might also, under certain exceptional circumstances, reflect a subsequent agreement between the parties under article 31, paragraph 3 (a), provided that such acts represented an agreement of the parties themselves to the constituent instrument.

9. In addition to reviewing relevant case law, the report also considered the positions of leading publicists. Differing views had been expressed as to whether the various uses by international courts and tribunals of practice in the application of constituent instruments of international organizations as a means of interpretation merely represented different manifestations of articles 31 and 32 as the basic rules regarding the interpretation of treaties, or whether such uses also reflected a special or additional rule of interpretation which was applicable to such constituent instruments. However, when considered more closely, those views seemed to differ not in substance, but rather in whether they regarded an international organization's own practice as being relevant under article 31, paragraph 3 (b), and article 32, or on an independent basis. Ultimately, judicial bodies and publicists seemed to agree that an international organization's own practice would often play a specific role in the interpretation of constituent instruments under the pertinent rules of the 1969 Vienna Convention. The different explanations of the possible relevance of an international organization's own practice ultimately remained within the framework of the rules of interpretation reflected in the Convention. Those rules made it possible, not only to take into account the practice of an organization which the parties themselves confirmed by their own practice, but also to consider the practice of organs as being relevant for the proper determination of the object and purpose of the treaty or as a form of other practice in the application of the treaty under article 32. The previous work of the Commission was in line with that comprehensive approach under the 1969 Vienna Convention's rules on interpretation.

10. The established practice of the organization was also a means for the interpretation of constituent instruments of international organizations. Article 2, paragraph 1 (j), of the 1986 Vienna Convention and article 2 (b) of the draft articles on the responsibility of international organizations<sup>135</sup> even listed the "established practice of the organization" as a "rule of the organization". That designation implied that such practice might serve as a means of interpretation of the constituent instrument.

<sup>135</sup> General Assembly resolution 66/100 of 9 December 2011, annex. The draft articles adopted by the Commission on second reading and commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88.

11. Commentators had maintained that article 5 of the 1969 Vienna Convention reflected customary law. However, for the purposes of the present topic, it was not necessary to make a precise determination regarding the customary status of article 5. It was sufficient to say that it had been generally recognized that the rules of the 1969 Vienna Convention regarding treaty interpretation were applicable to constituent instruments of international organizations, but always without prejudice to any relevant rules of the organization. The rule that was formulated in article 5 was sufficiently flexible to accommodate all conceivable cases. If it was understood in that broad and flexible sense, it was clear that article 5 reflected customary international law.

12. In conclusion, he proposed that the Commission refer draft conclusion 11, as contained in paragraph 86 of the third report, to the Drafting Committee, with a view to its provisional adoption by the Commission.

13. Mr. FORTEAU said that the central question in the third report was whether the practice of the organs of international organizations in the application of constituent instruments of international organizations represented merely different manifestations of articles 31 and 32 of the 1969 Vienna Convention, or whether such practice also reflected a special or additional rule of interpretation that was applicable to such constituent instruments. Before giving his views on the Special Rapporteur's proposed solutions to that question, as set out in draft conclusion 11, he wished to point out a number of issues on which clarification was needed.

14. First of all, he failed to understand why the Special Rapporteur stated in paragraph 12 of his third report that the report did not concern the interpretation of treaties concluded by international organizations. That statement was contradicted by the report itself, in paragraphs 63 to 66, where the Special Rapporteur examined elements of practice within WTO. The constituent agreements of WTO were covered, not by the 1969 Vienna Convention, but by the 1986 Vienna Convention, given that one of the parties to the agreements, namely the European Union, was an international organization. The draft conclusions and commentaries thereto already adopted by the Commission referred abundantly to the case law of the WTO Dispute Settlement Body and to practice relating to the United Nations Convention on the Law of the Sea—in short, to treaties concluded not only between States but also between States and an international organization. The fact that the present draft conclusions were not limited to treaties concluded exclusively between States should therefore be made explicit.

15. Second, the Special Rapporteur seemed to exaggerate the autonomy of the legal order of the European Union and its approach to treaty interpretation. In paragraphs 28 and 57 of his third report, he stated that, in interpreting the founding treaties of the European Union, the Court of Justice of the European Union did not take subsequent practice by the parties or the organs of the European Union into account. There were two reasons why that statement was not quite accurate. The first was that the case law cited by the Special Rapporteur, in paragraphs 59 and 60, for example, concerned only the practice of the organs

of the European Union, and not the practice of member States acting as interpreters of the founding treaties of the European Union. The second reason was that the case law implied only that the practice of the organs of the European Union could not be used as a basis for modifying the treaties, derogating from them or creating a binding precedent. He was not sure that one could deduce that it prohibited taking into account the practice of those organs for the purposes of interpretation. In that particular connection, it was important not to confuse practice that had the effect of modifying a treaty and practice that served to interpret it. It would be useful to explore European Union case law in greater depth in relation to that point, since, in his view, it was more nuanced than what was suggested.

16. Third, certain examples provided by the Special Rapporteur did not seem to pertain to the question of the interpretation of the constituent instruments of international organizations. For instance, the practice followed in the International Civil Aviation Organization, described in paragraphs 39 to 41, seemed to concern the substantive law of the Organization and not its institutional law. Furthermore, it was difficult to understand how the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, referred to in paragraph 42 of the third report, could be considered relevant practice for the purposes of interpreting that Convention. Was it not actually a supplementary agreement rather than an interpretative agreement? Nor did the example provided in paragraph 50 concerning the International Maritime Organization seem relevant to the topic, inasmuch as it related to the practice of one organization in relation to another organization. In addition, it was unclear what conclusions the Special Rapporteur wished to draw from the example of administrative practice cited in the footnote to paragraph 50. Lastly, he failed to grasp how the decision to admit the United Arab Republic to the International Civil Aviation Organization, in the example provided in paragraph 55, had an interpretative effect on the constituent instrument of that international organization.

17. The categorization of the three forms of conduct described in paragraph 31 of the report could serve as a useful template for organizing the rules corresponding to such conduct and could be extended to include subsequent agreements. Draft conclusion 11 should be restructured on the basis of that categorization, and the resulting three paragraphs should each contain the indication that the rule proposed was valid “without prejudice to any relevant rules of the organization”.

18. The first paragraph of draft conclusion 11, as thus reformulated, could incorporate the current paragraph 1, but also include, in order to avoid any ambiguity, an explicit indication that the subsequent agreements and subsequent practice in question were those “of the parties to the constituent instrument”. The second reformulated paragraph should indicate that those subsequent agreements or that subsequent practice were those “of the parties to the treaty” and could be manifested through the practice or conduct of the organs of an international organization. The Special Rapporteur had split that idea into paragraphs 2 and 4 as they currently stood, but he was not convinced that the distinction was necessary: it would be

better to combine the two into one paragraph. There were two reasons for that.

19. First, he was not convinced that the term “established practice”, which appeared in paragraph 4 of draft conclusion 11, had actually been used in case law to mean an interpretative practice within the meaning of article 31, paragraph 3 (a) and (b). That was not what emerged from paragraphs 81 and 82 of the third report, in any case. Rather, the notion of “established practice” had been devised in order to describe practice as an independent source of an organization’s secondary law, and thus as a source of law, not as a means of interpretation. Second, the Special Rapporteur’s proposed paragraph 2 was not explicit enough with regard to the conditions in which the practice of an international organization could give rise to a subsequent agreement or subsequent practice of the parties to a treaty. In particular, he found it unfortunate that the quite apt expression “general practice of the organization” or “generally accepted practice”, which was explained clearly in paragraphs 52 to 55 of the third report, did not appear in draft conclusion 11. It was a key concept that allowed for making a distinction between the practice of an organization that reflected an agreement or practice of the parties to the treaty and the practice of an organization that reflected only its own will.

20. On that basis, his recommendation would be for the second reformulated paragraph of the draft conclusion to provide that the practice of an organization reflected the subsequent agreement of the parties within the meaning of article 31 of the 1969 Vienna Convention to the extent that it was a “generally accepted” practice. The latter was the formulation used by the International Court of Justice in its 1971 advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, cited in paragraph 52 of the third report. The second reformulated paragraph would complement the first by indicating the conditions in which the practice of an organization could give rise to a subsequent agreement or subsequent practice that was considered to be attributable to the parties to a treaty.

21. The latter point seemed to follow clearly from the Special Rapporteur’s argument in paragraphs 64 and 66 of his third report that a merely hortatory policy recommendation or even an exhortative, rather than dispositive, instrument of an organization could not be considered an agreement within the meaning of article 31. The fact that the Special Rapporteur had come to that conclusion by considering the case law of the WTO Dispute Settlement Body confirmed his own contention that a non-binding agreement could not be an agreement under article 31. Along those lines, he continued to find the formulation of draft conclusion 9, paragraph 1, adopted by the Commission at its sixty-sixth session,<sup>136</sup> to be regrettable. It made it possible for an agreement under article 31, paragraph 3 (a) and (b), to take the form, for example, of a purely political agreement. In his view, the Special Rapporteur’s current analysis of the practice of the WTO Dispute Settlement Body led to a different conclusion: an agreement within the meaning of article 31 was necessarily a binding agreement.

<sup>136</sup> *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, p. 123, para. 76.

22. That left the question of the third reformulated paragraph of draft conclusion 11: what should be done about the practice of an organization that had not been generally accepted by all the parties to its constituent instrument? The Special Rapporteur had taken a rather vague position on that point; he indicated in paragraphs 49 and 51 of his third report that such practice was covered by article 32 of the 1969 Vienna Convention, but that it could have an interpretative effect that went “possibly beyond” article 32.

23. There were two problems with that reasoning. To begin with, to relegate such practice to article 32 was no doubt too simplistic. The supplementary means of interpretation in article 32 were used solely to confirm the meaning resulting from the application of article 31. As it happened, there was reason to believe that the interpretative effect of such practice was a little stronger than what was provided for in article 32.

24. Yet that, in turn, gave rise to the second problem, which was which provision should cover the potentially stronger interpretative effect of such practice. The Special Rapporteur did not cite any specific provision, and it was difficult to see article 31, paragraph 3 (a) and (b), as being applicable. Perhaps it could be viewed as a means of interpretation under article 31, paragraph 3 (c), inasmuch as the practice of an organization could be equated with a rule of the organization provided that it was well established. The third reformulated paragraph could accordingly state that an established practice of an organization could constitute a relevant rule of international law applicable in the relations between the parties under article 31, paragraph 3 (c), and then specify that any practice other than an established practice could constitute practice under article 32.

25. The foregoing would produce a clear gradation of interpretative effect: reformulated paragraph 1 would concern the subsequent practice or subsequent agreements of the parties themselves; reformulated paragraph 2 would indicate that a generally accepted practice of an organization reflected a subsequent agreement of the parties; and reformulated paragraph 3 would indicate that an established practice of an organization could be covered by article 31, paragraph 3 (c), and that any other practice of the organization could be covered by article 32.

26. It would also be useful to make the title of the draft conclusion more specific so as to avoid giving the impression that it dealt with the constituent instruments of international organizations as a manifestation of subsequent agreements or subsequent practice. The title should be: “The interpretation of constituent instruments of international organizations” (*Interprétation des actes constitutifs d’organisations internationales*).

27. In conclusion, he noted that the Special Rapporteur stated in paragraph 76 of his third report that draft conclusion 5, adopted by the Commission at its sixty-fifth session,<sup>137</sup> did not imply that the practice of organs of international organizations, as such, could not serve as subsequent practice under articles 31 and 32 of the 1969 Vienna Convention. Yet, according to his own reading,

draft conclusion 5 clearly excluded the practice of international organizations. It provided that any conduct other than that of the parties to the treaty did not constitute subsequent practice under articles 31 and 32. Accordingly, draft conclusion 5 should be amended by indicating, at the beginning of paragraph 2, that the paragraph was without prejudice to draft conclusion 11. He was in favour of referring draft conclusion 11 to the Drafting Committee.

28. Mr. KITTICHAISAREE said that he was puzzled by paragraph 50 of the third report, which stated that the practice of the organ of one international organization could contribute to the interpretation of the constituent instrument of another, but gave an example that referred only to the International Maritime Organization. Which was the other international organization involved? With reference to the point made by Mr. Forteau that the institutional practice of the organs of the European Union did not necessarily constitute the practice of the member States themselves, he wished to know the name of the organization that had the “administrative practice” mentioned in the footnote to paragraph 50.

29. Mr. HMOUD said that the Special Rapporteur had taken the right approach to the structure of the report and the considerations leading to draft conclusion 11. He had provided ample material on the means of interpreting constituent instruments of international organizations and on the role of subsequent agreements and subsequent practice in that regard, but since the material tended to focus on specific aspects, it produced nuanced results. One difficulty was the dual nature of constituent instruments, which in addition to being inter-State agreements also had a constitutional character, establishing the organizations’ internal legal order. Furthermore, the diversity of the various organizations and their constituent instruments made it difficult to reach uniform results regarding the elements and means of interpretation that distinguished the interpretation of constituent instruments from that of other treaties. In their interpretation of constituent instruments, courts and tribunals had treated the practice of organizations or their organs in different ways, placing differing emphasis on the relevant practice after considering a range of factors associated with practice, such as its consistency, generality and opposability among member States of the organization (or parties to the constituent instrument), as well as the degree of autonomy of the organizations concerned. Despite those difficulties, the third report contained useful guidance for States and practitioners on the process of interpreting constituent instruments and on the role of subsequent agreements and subsequent practice in that regard.

30. Turning to specific comments on the report, he agreed that the scope should be confined to the role of subsequent agreements and subsequent practice in the interpretation of constituent instruments. However, one issue that should have been considered was the weight given to divergent practice of the organs of organizations, which made it impossible for the practice to become well established and play a key role in interpretation. The value of practice that was not well established was directly related to draft conclusion 11, paragraph 3, and would have an impact on the Commission’s assessment of that paragraph, and possibly of paragraph 2 as well.

<sup>137</sup> *Yearbook ... 2013*, vol. II (Part Two), p. 34.

31. One issue that should not come under the scope of the topic was the decisions of judicial bodies entrusted by constituent instruments with interpretation, although the pronouncements of those bodies could be considered as practice of the organs for the purpose of interpretation of the constituent instruments. The question was whether there was practice beyond the special role of such an organ which might be relevant for the interpretation of the constituent instrument and whether there were instances when the authorized interpretation could be overruled by the subsequent practice of other organs or States parties or by an agreement of such parties regarding the interpretation. In his third report, the Special Rapporteur touched on that matter when discussing the case law of the European Court of Justice, but further elaboration in the commentaries might be useful.

32. Paragraph 19 of the third report identified the key areas to be addressed, but the conduct of member States of international organizations and the impact of subsequent agreements of States regarding the interpretation of their constituent instruments, as well as the relationship between the subsequent practice of States parties and of organs, should have been more thoroughly analysed.

33. The phrase “without prejudice to” in article 5 of the 1969 Vienna Convention reflected the flexibility that existed in the relationship between the Convention’s rules and the rules of the organization. It was not a matter of the rules of the international organizations taking precedence over the rules of interpretation, as in articles 31 and 32, but rather of a balancing process that took into account the character of the constituent instruments as treaties and as institutional frameworks. Such flexibility also entailed preserving the prerogative of member States in interpreting constituent instruments, while not infringing the autonomy of the organization and its performance of its functions. Thus, subsequent agreements and subsequent practice by member States (or States parties), as well as their consent to the conduct of organs of international organizations, were key factors in the interpretation of a constituent instrument as long as that was in accordance with the rules of the organization. But what if the rules of the organization did not allow for an interpretation based on those factors? In his view, that depended on the degree of autonomy that the constituent instrument conferred on the organization as well as on the nature of the provision to be interpreted; if the provision concerned the functions and performance of the organization, then the rules should be the determining factor.

34. That flexible approach seemed to be supported by the International Court of Justice in its advisory opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, when it explained that constituent instruments were multilateral treaties whose interpretation was based on the general rules but which took into account certain elements, including the practice of the organization. The question, however, was which practice should be taken into account and whether it qualified as relevant subsequent practice for the purposes of articles 31 or 32 of the 1969 Vienna Convention, or whether it was an established practice that was part of the rules of the organization. The distinction between the different forms of practice would have a direct consequence on the conclusions to be

drawn regarding the interpretation of the constituent instruments. While he considered that the conclusion drawn in draft conclusion 11, paragraph 4, was correct, he stressed that when the practice was disputed or unsettled, it did not qualify as established practice of the organization. In other words, if the practice was opposable by member States or divergent among the various relevant organs, it should not be regarded as established practice.

35. Concerning the practice of an organ of an international organization and its value as a means of interpretation, he was of the view that such practice, whether established or not, could be a supplementary means of interpretation under article 32 of the 1969 Vienna Convention. Nevertheless, the question remained as to what value that practice had in the interpretation of constituent instruments beyond article 32 of the Convention. Some of the pronouncements of the International Court of Justice could be construed as indicating that the practice of an organ was a means for the interpretation of the constituent instrument. However, the presumption that such practice was a separate means of interpretation could not be substantiated. It could either be an element of subsequent practice establishing the agreement of the parties under article 31, paragraph 2 (b), of the Convention, or a supplementary means under article 32. Accordingly, he endorsed the statement in draft conclusion 11, paragraph 2, that the conduct of the organ of an international organization in the application of the constituent instrument of the organization could fall under article 31, paragraph 3 (b), or article 32 of the Convention; however, he questioned the advisability of attributing any additional weight to the practice of the organ, something which might be inferred from paragraph 3 of the draft conclusion.

36. Concerning the general practice of the organization, he wondered whether the draft conclusion could include a reference to general practice as a factor to be taken into account in interpretation. As to what the Special Rapporteur described, in his third report, as a combination of practice of organs of the organization and subsequent practice of the parties, it gave rise to two separate yet interrelated matters: first, combined practice could be general practice that could be considered on its own as a means of interpreting the constituent element; and second, acceptance by members of the organization of the practice of its organs could, depending on the circumstances, amount to an agreement of States parties and qualify as subsequent practice under article 31, paragraph 3 (b), of the 1969 Vienna Convention.

37. On the question of subsequent agreements by the parties as a means of interpretation of the constituent instruments of international organizations, he said the crucial issue was to balance the existence of such an agreement with the rules of the organization, including its established practice. A careful analysis was required of whether the agreement was consistent with the established practice and whether the States were acting in their capacity as members of the organization or as States parties to the constituent instrument. Practice could not be considered as established in relation to the interpretation of a constituent instrument if there was any degree of opposition to it by States parties: such opposition would

lend more weight to a subsequent agreement of the parties as an authentic means of interpretation. Furthermore, while the value of decisions of plenary organs in the interpretation of constituent instruments varied depending on the organization, it could be assumed that such decisions could be authentic means of interpretation under article 31, paragraph 3 (*a*), of the 1969 Vienna Convention. The key factor was whether those decisions established the agreement of all the parties and whether the agreement was explicit or tacit. Also important was whether the State was acting as a member of the organization or as a party to the instrument, although the difference in that context might be more apparent than real.

38. Based on the case law of the International Court of Justice, he agreed that an international organization's "own practice" could play different roles in the interpretation of constituent instruments: either as a supplementary means of interpretation, or as established practice, and thus as a key factor in interpretation. However, the role of the international organization's "own practice" outside those categories had to be substantiated.

39. In conclusion, he recommended that draft conclusion 11 be referred to the Drafting Committee.

40. Mr. TLADI said that while the Special Rapporteur's third report was good, he himself was not sure that the issue it sought to address needed addressing. He feared that by doing so the Commission might be creating law, which was precisely what it had agreed not to do. In trying to avoid simply restating the provisions of the 1969 Vienna Convention, the Commission had already gone beyond the current law. Some of the draft conclusions already adopted appeared to elevate subsequent agreements and subsequent practice to the same (or an even higher) status than the text, context, object and purpose of a treaty.

41. The issues in the third report hinged on article 5 of the 1969 Vienna Convention whose purpose, according to paragraph 22 of the report, was to emphasize that the general rule according to which all treaties between States were subject to the rules of the Convention also applied to constituent instruments of international organizations. The Commission would be treading on dangerous ground if it ascribed extra meaning to article 5 which, in his view, said two things only: the 1969 Vienna Convention applied to constituent treaties; and it did so without prejudice to the relevant rules of the organization. Unless the rules of the organization specified otherwise, articles 31 and 32, as appropriate, should be applied in the context of treaty interpretation. Therefore, in his view, there was nothing "special" about the practice of international organizations. It might well be that particular weight was given to the practice of international organizations on account of the text, context and object and purpose of the treaty, but that was not because the treaty was a constituent treaty.

42. In his third report, the Special Rapporteur cited a wealth of case law from the International Court of Justice to shed light on the issues under the topic. In particular, there were two points worthy of note in the case law cited in paragraphs 24 to 26. The Court did not appear to

have addressed the constituent nature of the Charter of the United Nations: the particular factors it cited were all based on the text, context and object and purpose of that instrument. In other words, any justification for applying the rules of interpretation slightly differently should be deduced from the text, context and object and purpose of an instrument, rather than from the fact that it was a constituent treaty.

43. A related point was that when courts did take into account the practice of international organizations, it very often reflected the practice of States parties to the constituent instrument; consequently, the practice came within the scope of article 31, paragraph 3, of the 1969 Vienna Convention. Decisions made by organs that were generally accepted gave rise to the practice of parties establishing the agreement of the parties regarding its interpretation. An example was the advisory opinion referred to in paragraphs 52 and 78, where a practice by Security Council members appeared to have been accepted by the members of the General Assembly. There was no reason why that could not be described as a form of the practice of the parties. A similar example was the advisory opinion cited in paragraph 43 of the third report. He agreed with Mr. Hmoud that the distinction between members of an organ and the organ itself was possibly more apparent than real.

44. In instances where practice did not reflect agreement—for example, because some States had objected to it—it became relevant as a supplementary means of interpretation under article 32 of the 1969 Vienna Convention. In most of the judgments referred to by the Special Rapporteur, the International Court of Justice had not specifically referred to article 31, paragraph 3 (*a*) or (*b*), of the Convention. In other words, it was plainly cautious about suggesting that the practices in question could be regarded as subsequent practice within the meaning of those provisions—and presumably their effects were not the same as those of subsequent practice. That should be taken into account so as not to create an assumption, when drawing up draft conclusion 11, that different rules applied to the interpretation of constituent treaties because of their constituent nature. Regarding the wording of the draft conclusion, he wondered what difference there was between the conduct of an organ and the well-established or general practice of an international organization.

45. He disagreed with Mr. Forteau that the practice of an international organization that did not reflect the agreement of the parties could fall under article 31, paragraph 3 (*c*), of the 1969 Vienna Convention: it was doubtful that the practice of an international organization could be regarded as a rule of international law applicable between the parties.

46. He was in favour of referring draft conclusion 11 to the Drafting Committee, on the understanding that it must accurately reflect the provisions of the 1969 Vienna Convention.

47. Mr. PARK said that the Special Rapporteur's third report would contribute to the development of treaty law, especially with regard to the interpretation of

international organizations' constituent instruments. He agreed *grosso modo* with the Special Rapporteur that article 5 of the 1969 Vienna Convention confirmed the applicability of articles 31 and 32 to the interpretation of the constituent instruments of international organizations, without prejudice to the relevant rules of the organization. The definition of subsequent agreements and subsequent practice incorporated in draft conclusion 4, provisionally adopted by the Commission at its sixty-fifth session,<sup>138</sup> clearly delineated three separate means of interpretation of treaties. However, there was some inconsistency in the way the Special Rapporteur applied them to the interpretation of the constituent instruments of international organizations. In one instance, for example, a General Assembly resolution was deemed to constitute a subsequent agreement under article 31, paragraph 3 (a), while another General Assembly resolution was categorized as subsequent practice under article 31, paragraph 3 (b), or article 32. The same discrepancy showed up in draft conclusion 11, paragraph 2.

48. The delimitation of the scope of the third report, in paragraphs 13 to 18, seemed somewhat artificial. In paragraph 13, the Special Rapporteur said that the interpretation of decisions by organs of international organizations was not within the scope of the report, yet in paragraph 15, he announced that the effect of such decisions was to be considered. Yet how could the act of interpretation be separated from its effect? Since the 1990s, for example, the Security Council had evolved towards a broader interpretation of a "threat to peace" than in the past. That constituted an act of interpretation of the Charter of the United Nations by an internal organ of the United Nations and could be seen as subsequent practice. Similarly, organs of international organizations often adopted decisions or recommendations under their constituent instrument, but it would be difficult to determine which of those acts should be excluded from, or included in, the scope of the topic.

49. Despite the Special Rapporteur's assurances to the contrary, the third report seemed to deal with the question of whether the manner in which a resolution was adopted by an international organization's plenary organ had any bearing on the resolution's value with respect to the interpretation of the organization's constituent instrument. In paragraph 18, the Special Rapporteur said that the report was not concerned with the decisions of conferences of States parties, yet in paragraph 60, he admitted to the difficulty in determining whether States parties to the constituent instrument of an organization acted in that capacity or in their capacity as members of a plenary organ of the organization.

50. The slight variations in terminology in relation to practice in paragraphs 27, 30, 50, 52, 53 and 79 made it hard to follow the reasoning in the report. Those variations might explain why the Special Rapporteur drew an untenable distinction among the resolutions of international organizations in different cases. In paragraph 49, one resolution was given the status of subsequent practice, whereas another was denied that status in paragraph 54. The Special Rapporteur should have explained precisely

why a given resolution or decision of an international organization constituted subsequent practice or subsequent agreement. For example, why did the decisions mentioned in paragraphs 63 and 64 constitute subsequent agreement rather than subsequent practice?

51. The classification of forms of conduct set out in paragraph 31 was of great importance when determining the value of practice for the interpretation of constituent instruments. One criterion for assessing the weight of acts within an international organization might be the position of member States when voting on a resolution or the reaction, including tacit acceptance or opposition, of other non-voting States. The subsequent practice of the World Health Organization and the Lake Chad Basin Commission could not be deemed to have the same value, because the former had 194 member States and the latter only 6. What did the Special Rapporteur mean by "possibly beyond" in paragraph 51? Similarly, what did "relevant" signify in the penultimate sentence of paragraph 73?

52. He supported draft conclusion 11, paragraph 1, because it was consonant with the 1969 Vienna Convention. Paragraph 2 made no mention of the classification of the three types of conduct. The content of that paragraph should be fleshed out with the addition of some unambiguous criteria along the lines he had just suggested. It would also be necessary to deal with the extent to which the acts of the organs of international organizations could be considered to be subsequent agreements under article 31, paragraph 3 (a), subsequent practice under article 31, paragraph 3 (b), or other subsequent practice under article 32. As it stood, paragraph 2 was too vague to offer any guidance. Paragraph 3, which simply appeared to note a general principle, should be amended by clarifying the meaning of "relevant practice". As the established practice of an international organization was directly related to the "relevant rules" to which reference was made in article 5 of the 1969 Vienna Convention, it would be logical to recast paragraph 4 and to incorporate it in paragraph 1.

*The meeting rose at 12.30 p.m.*

## 3260th MEETING

*Tuesday, 2 June 2015, at 10.05 a.m.*

*Chairperson: Mr. Narinder SINGH*

*Present:* Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

<sup>138</sup> *Ibid.*, pp. 28 *et seq.*