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Summary record of the 3261st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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(para. 19 of the advisory opinion). That opinion also addressed the question of whether it could be said that the World Health Organization had received a mandate under its Constitution to address the legality of the use of nuclear weapons (para. 27 of the advisory opinion). In its judgment in the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court had found that the Lake Chad Basin Commission was an international organization exercising its powers within a specific geographical area, but that its purpose was not the settlement at a regional level of matters relating to the maintenance of international peace and security and thus did not fall under Chapter VIII of the Charter of the United Nations (para. 67 of the judgment).

70. In the Court's advisory opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations*, the main issue was precisely the competence of the General Assembly. In its advisory opinion on *Certain Expenses of the United Nations*, the Court had made it clear that "each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute 'expenses of the Organization'" (p. 168 of the advisory opinion).

71. Thus, regardless of the term used—"competence", "function", "power", "jurisdiction", "mandate" or "authorization"—the Court always considered the competence of an organ or an organization to be the determining factor in the interpretation of the constituent instrument of the international organization in question. The Special Rapporteur might have thought that "competence" was covered by the expression "own practice" of an international organization. However, given that the Court referred to both "function" and "own practice" in its advisory opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, he believed that it was necessary to address them both. He therefore proposed adding the phrase "provided that this conduct is within the competence of the organization" at the end of draft conclusion 11, paragraphs 2 and 3. Lastly, he did not consider the term "conclusions" appropriate to refer to the final outcome of the Commission's work on the topic. While the term might be used to refer to the "common understanding" reached by the members of a study group, it was not suitable for the Commission's work, which was intended to give guidance to practitioners, experts, researchers and students. For that reason, he would suggest using the term "draft guidelines", which had been used in the Guide to Practice on Reservations to Treaties.[143]

The meeting rose at 12.50 p.m.

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[143] The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Three) and corrigenda 1–2, pp. 23 *et seq*. See also General Assembly resolution 68/111 of 16 December 2013, annex.

3261st MEETING

Wednesday, 3 June 2015, at 10 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caflisch, 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. 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 (*continued*) (A/CN.4/678, Part II, sect. B, A/CN.4/683, A/CN.4/L.854)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

2. Mr. MURPHY said that he endorsed the Special Rapporteur's decision in his third report not to address the interpretation of treaties concluded by international organizations. However, he disagreed with the prediction in paragraph 12 that the rules on interpretation set forth in the 1986 Vienna Convention would someday be regarded as customary international law. Given the lack of analysis or substantiation of that prediction, he presumed that it would not be included in the commentary to the draft conclusions.

3. He had understood that, in its work on the topic, the Commission was explaining the rules set forth in article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention. He therefore had doubts about expanding the scope of the topic to include article 31, paragraph 3 (*c*), or any other part of article 31. In addition, since the 1969 Vienna Convention applied only to treaties between States, draft conclusion 5 on attribution of subsequent practice was accurate and did not need to be revisited.

4. With regard to the organization of the third report, he proposed that the Special Rapporteur's cautionary notes in paragraphs 8 to 11 be included in the commentary to the draft conclusions. However, the tripartite approach described in paragraph 31 was somewhat artificial and not obvious from the cases cited, and the lines between the three categories were less sharp than what was suggested. The resulting draft conclusion 11 neither reflected that tripartite approach nor separated subsequent practice from subsequent agreements, thereby making it difficult to evaluate the four paragraphs of draft conclusion 11 as sustainable propositions of law.

5. Draft conclusion 11, paragraph 1, referred to a treaty that was the constituent instrument of an international organization, thus mirroring article 5 of the 1969 Vienna Convention. Yet article 5 also provided that the Convention applied to any treaty adopted within an international organization. If it was considered important for a draft conclusion to affirm the application of articles 31 and 32 to any treaty that was the constituent instrument of an international organization, then the same should be done with respect to any treaty adopted within an international organization. Otherwise, it would appear as if the Commission was abandoning a part of article 5. He proposed that draft conclusion 11, paragraph 1, be amended accordingly. Moreover, the Special Rapporteur should clarify whether the phrase "any relevant rules of the organization" referred solely to rules contained in the constituent instrument of an international organization or also to rules developed thereafter by the organization, such as rules of procedure. The second sentence did not seem necessary, since it somewhat awkwardly paraphrased article 31, paragraph 3 (*a*) and (*b*), and merely repeated what was stated elsewhere in the draft conclusion.

6. In draft conclusion 11, paragraph 2, the subsequent agreement or subsequent practice in question was that of the parties to the treaty; it was not the conduct of an organ of the international organization itself. He therefore proposed reformulating paragraph 2 to read: "Subsequent agreements and subsequent practice under article 31, paragraph 3 (*a*) and (*b*), as a means for the interpretation of the constituent instrument of an international organization, may arise through the conduct of the parties to the constituent instrument, either within the international organization or in their reaction to the conduct of the international organization." All of the cases mentioned in paragraphs 33 to 42 and 52 to 67 of the third report supported that proposition. He shared the view that there might be value in capturing the point that subsequent agreements or subsequent practice arose only when they were supported by all the States parties to the constituent instrument without dissenting votes or opposition, as had been stressed in the *Whaling in the Antarctic* case and in the advisory opinion on *Certain Expenses of the United Nations*.

7. Draft conclusion 11, paragraph 3, focused solely on the conduct of an organ of an international organization. Yet, on its own, such conduct was not relevant under article 31, paragraph 3 (*a*) or (*b*). None of the cases or examples cited in paragraphs 43 to 51 of the third report made any reference to article 31, and none of the authors quoted regarded such practice as falling under that article. Nor did paragraph 3 make any reference to any other provision of the 1969 Vienna Convention, such as article 32. The conduct of an organ of an international organization did not, of itself, constitute the kind of subsequent agreement or subsequent practice of parties to a treaty that, by failing to qualify as relevant under article 31, must be relegated to article 32. In short, he was not persuaded that paragraph 3 had anything to do with the current topic.

8. It was unclear whether the practice of international organizations as a means of interpretation under the 1969 Vienna Convention was best covered by article 31, paragraph 1; article 31, paragraph 3 (*c*); article 32; or by the relevant rules of the organization to which the Convention was without prejudice. He shared Mr. Tladi's concern that the Commission was in danger of creating new law in that regard. He also worried that the inclusion of the practice of international organizations in the current topic, especially in the vague terms of paragraph 3, might give the impression that the Commission considered it possible for such practice to fall within the scope of article 31, paragraph 3 (*a*) and (*b*), when in fact no court or publicist appeared to have taken such a position.

9. The focus of draft conclusion 11, paragraph 4, was on the established—not subsequent—practice of an international organization as a whole, not of an organ of an international organization. The structure of the report made it difficult to understand the legal basis of that paragraph and how exactly it was to be distinguished from paragraphs 2 and 3. Furthermore, the distinctions drawn in paragraphs 77 to 82 of the third report were unclear. The bottom line seemed to be an assertion that the established practice of the organization might serve as a means for interpreting a constituent instrument of an international organization. Even if that was true, it did not constitute a subsequent agreement or subsequent practice of the parties to a treaty that fell within the scope of the current topic. He was therefore not convinced that paragraph 4 was part of the current topic. Moreover, if the Commission were to define the phrase "established practice of the organization" as organizational practice accompanied by State practice, paragraph 4 did not seem to include anything more than what was already in paragraph 2.

10. Provided that those concerns were taken into account, he supported sending draft conclusion 11 to the Drafting Committee.

11. Mr. McRAE said he had some questions about the analysis on which the Special Rapporteur had based draft conclusion 11. Those questions primarily concerned whether the material included in the third report actually said as much as the Special Rapporteur suggested it did about subsequent agreements and subsequent practice in relation to the interpretation of the constituent instruments of international organizations. His first query was on the Special Rapporteur's definition of constituent instrument, contained in paragraph 23 of the third report. In the two examples furnished in that paragraph, relating to the United Nations Convention on the Law of the Sea and the Marrakesh Agreement Establishing the World Trade Organization, the interpretation of many provisions by the two bodies had little to do with the respective treaties as their constituent instruments. That gave rise to the question of whether the Special Rapporteur was not forcing some kinds of interpretative practice into the category of the interpretation of the constituent instrument of an international organization, when in fact they were merely examples of treaty interpretation in a different context.

12. His second question concerned the Special Rapporteur's rationale for the inclusion, in paragraph 28 of his third report, of the practice of the Court of Justice of the European Union in interpreting the founding treaties. The Court had explained that it had developed its own approach as a consequence of its interpretation of such founding treaties of the European Union as creating a new

legal order. Yet, the rationale for that approach did not provide any guidance on the interpretation of treaties that constituted the constituent instruments of international organizations more generally; rather, it was because those founding treaties created a new legal order that the interpretative approach had been adopted.

13. His third question concerned the Special Rapporteur's reliance on the decision of the WTO Appellate Body in the *United States—Measures Affecting the Production and Sale of Clove Cigarettes* case. Although that decision represented an interesting interpretation of the concept of subsequent agreements, it was debatable whether it was relevant to the interpretation of the constituent instrument of an international organization. If, on the other hand, the decision was considered to be an application to the constituent instrument of an international organization of the 1969 Vienna Convention rules on subsequent agreements, then the question of compliance with article 5 of the Convention arose. Article 5 applied the rules of the 1969 Vienna Convention to the constituent instruments of international organizations "without prejudice to any relevant rules of the organization", a phrase taken to mean that the rules of the organization took priority over the 1969 Vienna Convention rules. The *United States—Measures Affecting the Production and Sale of Clove Cigarettes* case raised the interesting question of whether article 31, paragraph 3 (*a*), of the Convention could be applied in a way that circumvented the rules of the organization, since in effect, the 1969 Vienna Convention rule was allowed to override the rule in article IX of the Marrakesh Agreement Establishing the World Trade Organization. Accordingly, the *United States—Measures Affecting the Production and Sale of Clove Cigarettes* case appeared to be contrary to article 5 of the 1969 Vienna Convention.

14. Clearly, the WTO example required further explanation than what was found in the Special Rapporteur's third report: either it was not an example of the interpretation of the constituent instrument of an international organization, or it was a questionable application of article 5 of the 1969 Vienna Convention. Perhaps in a future report, the Special Rapporteur could address the question of the use of subsequent agreements the effect of which was to circumvent or evade the express terms of the constituent instrument of an international organization.

15. In his own view, draft conclusion 5 had to be revisited in the light of the third report. As it currently stood, it failed to do justice to the practice of States in the application of the constituent instruments of international organizations, whether as States acting alone or in the context of an organ of an international organization.

16. Mr. McRae was not convinced that, as currently worded, draft conclusion 11 covered all that had emerged from the Special Rapporteur's third report. In particular, it was difficult to see how the three categories of practice enumerated in paragraph 31 of the report related to the various paragraphs of draft conclusion 11. Further clarification was needed and an explanatory provision should perhaps be inserted in the text. In conclusion, he recommended referring draft conclusion 11 to the Drafting Committee.

17. Mr. KOLODKIN said that he endorsed much of the third report and the referral of draft conclusion 11 to the Drafting Committee. The report was based mainly on a study of the practice of international courts and to a lesser extent that of international organizations. There was scant reference to the practice and views of member States, and no analysis of the constituent instruments that reflected the views of States on the role of the organs established by them. Nor did the Special Rapporteur, in his third report, give examples of how member States, through their representatives, assessed the impact of the practice of international organizations on the interpretation of constituent instruments.

18. In principle, the "ultimate authority" for the interpretation of an international organization's constituent instrument, unless there were special provisions to the contrary, were the parties to the treaty and their agreement, as established in the constituent instrument or by subsequent agreement. That was borne out by article 5, in conjunction with articles 31 and 32, of the 1969 Vienna Convention. However, since there was virtually no analysis in the third report of the views of the parties to constituent instruments, the Commission was confronted with a paradox: it was analysing the role of the practice of States and of international organizations for the purpose of the interpretation of constituent instruments essentially without considering State practice at all.

19. Referring to the case law mentioned in paragraph 37 of the third report, he said that it was important to differentiate between the object and purpose of an organization's constituent instrument and the purpose of the organization *per se*. Those differences were particularly noteworthy when only some of the instrument's provisions related to the establishment of the organization. The argument made in paragraph 23 of the report that an organization's constituent instrument might contain certain provisions unrelated to the competences and functions of the organization warranted elaboration. There were indeed constituent instruments whose provisions did not relate to the establishment of the organization but conferred on it the authority to implement such treaties, such as the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction. All that raised several issues on which he would be interested to hear the Special Rapporteur's views. Did the practice of the organs of an international organization established on the basis of such a treaty have an effect on the interpretation of provisions that did not relate to the establishment of the organization? Did the differences he had mentioned have any implications for the various forms of subsequent practice listed in paragraph 31 of the report? Did the variations among constituent instruments have any bearing on the study of the topic as a whole?

20. In his view, there was a link between the different types of provisions in constituent instruments and the fact that States could be acting either as members of the organization or as parties to the constituent instrument when they reached agreement on treaty interpretation. In order to reach agreement on the interpretation of an instrument's institutional provisions, States merely had to act in their capacity as members of the organization. However, in order to reach agreement on the interpretation of

provisions that did not relate to the activities of the organization, States must be acting as parties to the instrument. Nevertheless, as the Special Rapporteur had rightly pointed out, it was often difficult to distinguish in which capacity States were acting.

21. He questioned the appropriateness of the example of subsequent practice given in paragraph 41 of the third report, namely bilateral agreements concerning article 5 of the Convention on International Civil Aviation, which in his view did not constitute an interpretation of article 5. Indeed, it was difficult to imagine such an interpretation: it would be in direct contradiction to what had been agreed by the parties when concluding the treaty. He maintained that in article 5 of the Convention, the parties had formulated a general rule that allowed for several parties to depart from it, with the consent of the parties concerned. Article 5 was also an example of a constituent provision that did not relate to the establishment of the organization. It regulated, not the vertical relations between the members and the organization, but the horizontal relations among members outside the framework of the organization.

22. By far the most interesting aspect of the third report was the part on the role of the practice of organs of international organizations in the interpretation of their constituent instruments. Yet, there again, the Special Rapporteur's treatment of the matter, starting at paragraph 43 of the third report, started with an analysis, not of State practice or of the provisions of constituent instruments, but of the decisions of international courts. The Special Rapporteur offered hardly any examples of provisions establishing the competences and functions of organs of international organizations that would have shed some light on the matter.

23. He agreed with the statement, in paragraph 73, that an international organization's "own practice" might be considered as a form of "other practice" in the application of the treaty under article 32 of the 1969 Vienna Convention. However, he was not sure how that tied in with draft conclusion 5, as suggested in paragraph 76. He failed to understand how it followed from draft conclusion 5 that the practice of organs of international organizations, as such, could constitute subsequent practice under articles 31 and 32 of the 1969 Vienna Convention; moreover, the commentary to the draft conclusion did not clarify matters. He expressed the hope that draft conclusion 5 might be reviewed at some point in the future.

24. In paragraph 77 of the report, reference was made to the Commission's commentary on article 2, paragraph 1 (*j*), of the 1986 Vienna Convention, in which it asserted that the weight of a particular practice of organs might depend on the particular rules and characteristics of the respective instrument, as expressed in its constituent instrument. In addition, paragraphs 78 to 80 highlighted the importance of the attitude of States to the practice of organs as a factor influencing the weight of such practice and its relevance for the purpose of the interpretation of constituent instruments. The Commission might wish to consider adding a general provision to the effect that the weight or relevance of the particular practice of the organs of international organizations depended on such characteristics.

25. Mr. LARABA said that the discussion of the topic held in the Sixth Committee showed that the theme proposed for the third report had elicited approbation, although some Member States had warned against going beyond the central concern, which was subsequent agreements and subsequent practice as they related to the 1969 Vienna Convention.

26. Some of the basic ideas in the third report were treated in a rather repetitive fashion. A case in point was the applicability of article 5 of the 1969 Vienna Convention to the interpretation of constituent instruments of international organizations, which was covered in paragraphs 8, 10, 19 to 23 and 26 of the report in very similar but not identical terms. Another ambiguous reiteration of the same point was in paragraphs 22 and 26, where constituent instruments were described as having "special characteristics" and being of a "particular type", without any clear explanation of the consequences of those characteristics for the interpretation of constituent instruments. Such ambiguity sometimes made it difficult to grasp the Special Rapporteur's point of view.

27. Certain passages in the third report might well give rise to confusion. One example was the statement in paragraph 8 that while article 5 provided that the Convention was applicable to constituent instruments, it also recognized that it "might" raise specific questions regarding their interpretation. That seemed to imply that the opposite could also be true. He requested clarification on that point.

28. In three places, the report used cautious, even hesitant, wording in indicating that the rules of the 1969 Vienna Convention applied "in principle" or "as a general rule" to the interpretation of the constituent instruments of international organizations. If that wording was intended to convey the idea that an international organization's constituent instrument could establish provisions to the contrary, as was suggested in three paragraphs of the third report, it would have been better to state plainly at the outset, for example in paragraph 8, that the rules of interpretation of the 1969 Vienna Convention applied to the constituent instruments of international organizations save when the constituent treaty provided otherwise. Sections A and B of chapter II therefore appeared to be somewhat superfluous. Moreover, the reasoning in paragraphs 28 and 29 of the third report relied too heavily on the practice of the Court of Justice of the European Union.

29. Sections C and D of chapter II formed the crux of the third report. Section C could have been improved by using a wider range of examples drawn from the practice of a greater number of international organizations. Some of the examples of State practice, including those in paragraphs 38 to 41, were of no relevance when deciding whether such practice constituted a means of interpreting the constituent instruments of international organizations. The fact that, in paragraph 38, the Special Rapporteur had not identified bilateral implementing agreements as subsequent agreements under article 31, paragraph 3 (*a*), while in paragraph 41 he had done so, highlighted the complexity of the issues addressed. The three forms of conduct listed in paragraph 31 might be inadequate to encompass all existing forms of conduct.

Drawing a distinction between the subsequent practice of parties and the practice of organs might prove difficult. The Special Rapporteur seemed indirectly to recognize that difficulty by referring in paragraph 31 (*c*) to a combination of the practice of organs and the subsequent practice of parties.

30. Paragraph 19 of the advisory opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, cited by the Special Rapporteur in paragraph 24 of the report and elsewhere, raised the question of whether the relevant practice for the purpose of interpretation of a constituent instrument was that of the organs of the organization or the subsequent practice of the parties. As the Special Rapporteur noted in paragraph 69 of the third report, legal writers were divided on that point. Another question raised by paragraph 19 was whether an international organization's own practice was relevant under article 31, paragraph 3 (*b*), or on an independent basis.

31. He was in favour of referring draft conclusion 11 to the Drafting Committee.

32. Mr. FORTEAU said that, in the light of the debates in plenary meetings, he had altered his position on draft conclusion 11, paragraphs 3 and 4. He had now come round to the view that they should take the form of "without prejudice" clauses. As had been pointed out, the adoption of draft conclusion 11 would presuppose the amendment of draft conclusion 5. In fact, it would also presuppose the amendment of draft conclusion 4, paragraph 3, and draft conclusion 6, paragraph 3, which defined subsequent practice under articles 31 and 32 of the 1969 Vienna Convention solely in terms of the subsequent conduct of the parties to the treaty.

33. Ms. JACOBSSON said that the Special Rapporteur had aptly delimited the scope of the topic and had made clear why he had chosen not to address certain aspects. However, she would have liked him to discuss how acts by one organization related to acts by another in the interpretative process. She was thinking of how the United Nations and the Organization for the Prohibition of Chemical Weapons (OPCW) had dealt with the chemical weapons in the Syrian Arab Republic through a series of extraordinary decisions, some of which had a clear bearing on the interpretation of the constituent instrument of OPCW. At what stage, if any, could such practice, created in the form of decisions, become a means of interpretation of the constituent instrument of OPCW?

34. She supported draft conclusion 11, paragraph 1, although the "without prejudice" clause might require further discussion and clarification. Did that paragraph offer clear enough guidance if read alone, without reference to the commentaries? She remained unconvinced of the value of adding a "without prejudice" clause to all the paragraphs of the draft conclusion. The wider the scope of such clauses, the less practical value the conclusion would have.

35. Draft conclusion 11, paragraph 2, seemed to shift the focus from what constituted subsequent agreements and subsequent practice for the purposes of interpreting constituent treaties to how those agreements and practice might give rise to the subsequent agreement or subsequent practice of the parties. It might therefore be wise to make it a separate draft conclusion.

36. In draft conclusion 11, paragraph 3, it was necessary to discuss how to deal with the weight to be given to divergent practice among the organs of an international organization. Paragraph 4 of that draft conclusion was of central importance. If the organization had established a generally accepted practice to meet new and unforeseen situations, it would be paradoxical not to allow that practice to be taken into account for interpretative purposes, so long as it was in line with the object and purpose of the treaty.

37. She recommended the referral of draft conclusion 11 to the Drafting Committee.

38. Mr. PETER said that, in dealing with the topic, it must be kept in mind that States and international organizations were very different actors in international law, the former being a subject and the latter an object of international law. States had specific characteristics, such as their sovereignty, that could not be attained by international organizations, no matter how powerful or influential the latter might be. Perhaps the most controversial aspect of the third report was its discussion of why one could look to the conduct of international organizations for the purposes of interpretation. In his third report, the Special Rapporteur gave a clear picture of the opposing positions taken in the literature on that subject.

39. In the context of how subsequent agreements were recognized and what effect they had on treaty interpretation, the third report was particularly strong in discussing self-standing agreements between the parties to constituent instruments. However, more light needed to be shed on agreements between the parties in the form of a decision of a plenary organ of an international organization. It was not clear, for example, how to know when parties were acting within such a plenary organ in their capacity as States parties or as members of the organ concerned. Was it the character of the meeting itself that was decisive in determining whether States were acting in one capacity or the other? Or could different States act in different capacities at the same meeting of a plenary organ of an international organization?

40. With regard to the role played by the established practice of an international organization in the interpretation of the latter's constituent instrument, he said that such practice was best seen as a substantive rule of the organization, not primarily as a means of interpretation. Draft conclusion 11, paragraph 4, seemed problematic in that connection. If it was intended merely to mean that an organization's established practice was a relevant but subsidiary factor to consider in interpreting its constituent instrument, then it might be inadequate in a case where an organization had an established practice regarding the interpretation of its own constituent instrument. If, on the other hand, it was intended to suggest that an organization's established practice might shed light on how best to interpret its constituent instrument, then it was not clear how it differed from draft conclusion 11, paragraph 3. Paragraph 4 should therefore be deleted.

41. Draft conclusion 11 lacked clarity on the question of the weight to be given to the conduct of an organ of an international organization for the purpose of the interpretation of its constituent instrument. That was due in part to the fact that the case law of the International Court of Justice on which the report mainly relied seemed to offer no clear answer. Draft conclusion 11 should clearly set out why, under article 31 of the 1969 Vienna Convention, the conduct of organs of international organizations was relevant to the interpretation of their constituent instruments. Draft conclusion 11, paragraph 3, which dealt most directly with the matter, derived in large part from the observation made in paragraph 49 of the third report that the effect which the International Court of Justice had ascribed to the practice of organs seemed to go further than the conditions and effects contemplated in article 32 of the 1969 Vienna Convention. While that appeared to be an accurate restatement of the Court's view in its advisory opinion on *Certain Expenses of the United Nations*, the conclusion formalized a category of subsequent practice whose place within the Vienna rules of interpretation was uncertain.

42. The third report drew on the Court's advisory opinions on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* and on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* to describe how some conduct of the United Nations could be said to have met with the general acceptance of member States. It finessed the issue of how to identify acquiescence by States parties to the conduct of an international organization by saying that the relevant practice would usually be that of those on whom the obligation of performance fell. In other words, when an international organization was obliged to do something, and did it, State practice would probably only be identified as acquiescence. While that observation was a useful insight, it did not address the question of why and to what extent the practice of an international organization had independent weight.

43. If the strength of the link between the conduct of an organization and the practice of States was not a critical factor in determining the weight to be given to such conduct, that raised two possibilities. First, a special rule might apply when interpreting the constituent instrument of an international organization. Second, all conduct of international organizations might be significant, inasmuch as such conduct tended to clarify the object and purpose of the constituent instrument in question. Such a view might help place a flexible approach towards organizational practice squarely within the terms of article 31 of the 1969 Vienna Convention.

44. His concern was that draft conclusion 11, paragraphs 2 and 3, sought to incorporate from the Vienna regime a hierarchy of interpretative weight which might not exist in the case law, and that the significance which paragraph 3 ascribed to certain conduct of international organizations was not apparent within either article 31 or article 32 of the 1969 Vienna Convention.

45. The Special Rapporteur might wish to give careful consideration to the arguments put forward in the course of the debate to the effect that there was some conflict between draft conclusion 11 and draft conclusion 5.

46. In conclusion, he said that while the conduct of international organizations was relevant to the interpretation of constituent instruments, it would be wrong to equate it with State practice; its place within the framework of the 1969 Vienna Convention should be stated more clearly. Notwithstanding his reservations concerning parts of draft conclusion 11, he recommended its referral to the Drafting Committee.

47. Mr. NIEHAUS said that, in his third report, the Special Rapporteur had provided a thorough analysis of a highly technical topic which was of great importance for international law in general and treaty law in particular. It was regrettable that only a small number of States and international organizations had responded to the Commission's request to provide examples of practice and acts relevant to the present topic. In view of the potential importance of such examples for the Commission's work, it would perhaps be worth repeating the request to States.

48. As to the scope of the third report, he agreed with Mr. Murphy's comment concerning the prediction that the rules on interpretation as replicated in the 1986 Vienna Convention would come to be regarded as stating customary law.

49. Referring to paragraph 31 of the third report, he said that he had some difficulty in understanding what was meant by "a combination of practice of organs of the international organization and subsequent practice of the parties" and would be grateful if the Special Rapporteur could provide clarification.

50. Turning to draft conclusion 11, he said that, provided that the point he had just raised was adequately clarified, he had no problem with the first paragraph. As to the second paragraph, he endorsed Mr. Šturma's comment regarding the need to describe in greater detail the organ concerned. It was important that there be a clear indication as to the type of organ that could perform the conduct in question; a relatively general description along the lines of "major organ" or "principal organ" would suffice. Similarly, in the interests of clarity, the term "articulate" should be replaced with a word or phrase that more accurately reflected what was meant. Sir Michael had made several suitable suggestions in that regard. He was quite happy with paragraph 3 as it stood. With regard to paragraph 4, he did not agree with Mr. Forteau that the phrase "established practice" be replaced with "generally accepted practice". The disadvantage of Mr. Forteau's proposal was that it would suggest that acceptance was widespread but not total. He did not support Mr. Murase's proposal to add a proviso to paragraphs 2 and 3 to the effect that the conduct of an organ should occur in the context of the competence of the organization. Such an addition would add nothing to the current meaning. Furthermore, he saw no good reason, at the current stage of consideration of the topic, to replace the term "draft conclusion" with "draft guideline", as had been suggested by Mr. Murase.

51. Several members had proposed revisiting and revising draft conclusions that had already been adopted by the Drafting Committee. In his view, it would be more logical to seek to bring the current work on the topic into line with what had already been agreed. If any changes were to be made to previously adopted draft conclusions, it would be more appropriate to do so during the second reading. To proceed in a disorderly fashion would only create uncertainty for both the Special Rapporteur and for the Commission as a whole.

52. In conclusion, he was in favour of sending draft conclusion 11 to the Drafting Committee.

Organization of the work of the session (*continued*)[*]

[Agenda item 1]

53. Mr. FORTEAU (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" would be composed of Mr. Kittichaisaree, Mr. Kolodkin, Mr. McRae, Mr. Murphy, Mr. Park, Mr. Šturma, Mr. Tladi and Sir Michael Wood, together with Mr. Nolte (Special Rapporteur) and Mr. Vázquez-Bermúdez (Rapporteur, *ex officio*).

The meeting rose at 12.50 p.m.

3262nd MEETING

Thursday, 4 June 2015, at 10 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, 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 (*continued*) (A/CN.4/678, Part II, sect. B, A/CN.4/683, A/CN.4/L.854)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited Mr. Nolte, Special Rapporteur on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", to summarize the debate on his third report (A/CN.4/683).

2. Mr. NOLTE (Special Rapporteur) said that the debate had been very rich and that he would do his best in his summary to respond to the various points that had been raised. While he was pleased that all the members who had spoken had agreed to the referral of draft conclusion 11 to the Drafting Committee, he had also taken note of the concerns that had been raised. He wished to reassure Mr. Tladi, who had expressed concern that the Commission's work might take it in a direction that it had specifically decided not to take, namely the creation of new law. He had no intention of ascribing extra meaning to article 5 of the 1969 Vienna Convention; on the contrary, he was merely restating the most important elements of the pertinent jurisprudence, in particular that of the International Court of Justice. It was the Court, not he himself, which had established that constituent instruments of international organizations were "treaties of a particular type". The case law of the Court showed that it had not limited its analysis to the constituent instrument of an international organization in a particular case, but that it had regularly invoked and taken into account certain features common to most international organizations. It was therefore not imprudent of the Commission to restate the widely accepted case law of the International Court of Justice that was relevant for the purposes of the topic. He also reassured Mr. Tladi and Sir Michael that neither the previous draft conclusions nor draft conclusion 11, as set out in the third report, were intended to accord greater importance, for the interpretation of treaties, to subsequent agreements and subsequent practice than to text, context and object and purpose. It was hard, however, to see how to satisfy Sir Michael, who emphasized both the need to consider subsequent agreements and subsequent practice in the context of the general rules of treaty interpretation and the importance of not broadening the Commission's work to include more general questions of treaty interpretation. Apart from Mr. Tladi and Sir Michael, no other member of the Commission had voiced that concern, which he hoped would be resolved in the course of further work. In any case, he agreed with Mr. Šturma that, while constituent instruments of international organizations were treaties of a particular type, that particularity should not be overestimated.

3. It was true, as Mr. Kolodkin had noted, that the third report was based more on the case law of international courts than on State practice relating to international organizations. It was regrettable, as Mr. Niehaus had indicated, that only a few States and one international organization had provided the Commission with relevant examples. He had been aware of the issue when he had prepared the report and he had come to the conclusion that particular statements or examples of State practice would be less authoritative than widely accepted pertinent decisions of the most important international courts.

4. With regard to the scope of the third report, members had generally agreed with the limitations proposed, although some members seemed to have misunderstood that they applied to the topic as such. Sir Michael and Mr. Murphy had questioned the advisability of dealing with the practice of international organizations as such, since that would not fall under article 31, paragraph 3, of the 1969 Vienna Convention. In that regard, he recalled that the scope of the topic was defined by its title and the

[*] Resumed from the 3257th meeting.