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**Summary record of the 3207th meeting**

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

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## 3207th MEETING

Tuesday, 20 May 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

*Present:* Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kitichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, 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.4/666, Part II, sect. A, A/CN.4/671, A/CN.4/L.833)

[Agenda item 6]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission members to pursue their consideration of the second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/671).

2. Ms. ESCOBAR HERNÁNDEZ said that while article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention distinguished between the interpretation and the application of a treaty, as Mr. Murphy had noted, the Special Rapporteur assumed that every application of a treaty presupposed its interpretation, because States parties had to adopt a position on the matter. That statement seemed simplistic given all the situations that could arise in practice. States often automatically or mechanically applied a treaty provision without it being possible to identify in that application any of the characteristic elements of the logical process implied by the interpretation of a rule. On other occasions, they developed some of the treaty's provisions through subsequent practices or subsequent agreements that could not be considered an interpretation of the treaty, but rather an application, or even a modification thereof. Therefore, the assertion in the final sentence of paragraph 5 of the second report did not seem to be sufficiently substantiated.

3. The Special Rapporteur constantly placed article 32 on the same level as article 31, paragraph 3, although at its previous session the Commission had accepted the principle that subsequent practice which did not fall within the scope of article 31 could be deemed to fall within that of article 32.<sup>97</sup> Several members, including herself, had highlighted the differences between those two types of practice; hence draft conclusion 1 dealt with each category separately, in paragraphs 3 and 4. That distinction, which was well founded, must be maintained. The

Drafting Committee should therefore carefully review the proposed draft conclusions, in particular draft conclusions 6, 7 and 10.

4. The Special Rapporteur sometimes used a very broad notion of practice that included the practices of some non-State actors. She was, however, uncertain whether it was always true that, as paragraph 6 of the second report stated, that the concept of "application" did not exclude practices by non-State actors which the treaty recognized as forms of its application and which were attributable to one or more of its parties. For example, while the practice of the International Committee of the Red Cross (ICRC) regarding the repatriation of prisoners of war, the subject of paragraphs 16 to 18 of the second report, apparently illustrated that contention, another, perhaps more accurate, interpretation might be that it was an instance of conduct on the margins of the treaty through which the parties accepted a condition to which a third party made its co-operation subject, without conferring any legal effects on the practice. Moreover, the practice of ICRC could not be considered either a practice by a party to the treaty, because ICRC was not such a party, or a non-State practice which could be attributed to one or more parties to the treaty.

5. In addition, the report of the Special Rapporteur seemed to be slipping towards issues that were not within the scope of the topic, in particular the question of the modification of treaties, which the Commission had agreed, after a lengthy debate, to leave outside of the scope of its work. Nor did it seem necessary to address the matter of the modification of a treaty by subsequent agreement or by subsequent practice in chapter VI of the second report, because that issue did not fall within the scope of the topic under consideration. In that regard, Ms. Escobar Hernández noted that in paragraph 15 of the report, the Special Rapporteur held that the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 was aimed at influencing the interpretation of that Convention. Not only was that argument difficult to defend, particularly in light of article 4, paragraph 1, of the Agreement, it was also likely to create confusion as to the nature of that instrument which, despite its title, was an agreement amending the Convention, the clear purpose of which was the modification of the latter's provisions, rather than its interpretation or application.

6. As Mr. Forteau had noted, the rather general and sometimes imprecise and ambiguous nature of some phrases in the draft conclusions was inconsistent with the rigour of the second report. If the Commission wished to propose an instrument that would be useful to States, it must draft precise, unambiguous texts and commentaries. Similarly, the systematic nature of the draft conclusions made it impossible to move from the general to the more specific, contrary to the Commission's decision at its previous session<sup>98</sup> and the Special Rapporteur's statement when he presented his second report,<sup>99</sup> and it gave rise to repetitions that should be avoided, perhaps by reviewing the systematic approach itself.

<sup>97</sup> *Yearbook ... 2013*, vol. II (Part Two), p. 20, para. (9) of the commentary to draft conclusion 1.

<sup>98</sup> *Ibid.*, para. (12) of the commentary to draft conclusion 1.

<sup>99</sup> See the 3205th meeting above, p. 33, para. 2.

7. While she subscribed to the idea underpinning draft conclusion 6—namely the importance of the will of the parties to a treaty regarding the meaning that they wished to assign to an agreement or practice in order to interpret the treaty—she thought that its wording, which was too descriptive and vague, should be reviewed and its title, which did not reflect its content, should be amended. Draft conclusion 7, paragraph 1, treated subsequent agreements and subsequent practice under article 31 and subsequent practice under article 32 of the 1969 Vienna Convention as if they were a single issue, whereas it would be preferable to consider them separately in two different draft conclusions, or, better still, to insert a new paragraph. In paragraph 2, while she had no preference for either “value” or “weight”, it would be wise to clarify the meaning of the term chosen in the commentary. On the other hand, she considered that the phrase *inter alia* was of little use.

8. The use of the word *acuerdo* with two different meanings in the Spanish version of draft conclusions 8 and 9 was likely to cause confusion. Given that subsequent agreements and subsequent practice did not have an identical meaning in article 31, paragraphs 3 (a) and (b), of the 1969 Vienna Convention, it would be better not to deal with them together in draft conclusion 9, even though, in both cases, a shared will (or agreement) among States had to be identified. In that respect, she was pleased to note that the Special Rapporteur had considered silence to be a possible form of expressing that agreement, but it would be preferable to move paragraph 2 of draft conclusion 9 to draft conclusion 8. With regard to paragraph 3, which should be inserted into draft conclusion 7, she wondered whether the reference to temporary non-application was appropriate; further consideration should be given to its possible interpretation as a way of effecting the suspension of a treaty, which was covered by specific rules in the 1969 Vienna Convention.

9. As far as draft conclusion 10 was concerned, she drew attention to the use in the Spanish version of the expression *acuerdo sustancial* (“agreement in substance”). She feared that this expression, which appeared for the first time in paragraph 3, raised doubts as to whether that agreement differed from the “common agreement” (*acuerdo común*) mentioned in other provisions, and she proposed its deletion because it did not seem to be of any additional value. It would, however, be advisable expressly to mention the term “consensus” and to explain its meaning in the context of interpreting a treaty, because that was the concept most likely to cause difficulties for the national legal institutions responsible for interpreting international treaties.

10. Lastly, with regard to draft conclusion 11, which duplicated provisions found in other draft conclusions, paragraph 1 should be included in draft conclusion 7 and paragraph 2 in draft conclusion 6. The reference to modifying a treaty should also be deleted. In conclusion, she was in favour of referring all the draft conclusions to the Drafting Committee.

11. Mr. TLADI said that, while it was indeed difficult to imagine that the application of a treaty would not require its prior interpretation, the final sentence of paragraph 5 of the second report seemed too much like a reinterpretation of the 1969 Vienna Convention, a step which the

Commission had expressly agreed to avoid. It was necessary to clarify the idea that the concept of application did not exclude practices by non-State actors, particularly having regard to draft conclusion 5, paragraph 2, which had been adopted at the previous session.

12. Some provisions of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, particularly those contained in annex IV, concerning section 3, could not be considered a form of subsequent practice *regarding* the interpretation of the 1969 Vienna Convention. The practice of ICRC could not be deemed State practice either. With reference to chapter II of the second report, he observed first that the possible effects of subsequent conduct varied according to whether it was “in application” or “regarding the interpretation” of the treaty and whether it established the agreement of the parties as to its interpretation, and, second, that those effects also depended on the relationship of the practice or agreement with the text, context, object and purpose of the treaty in question. The Commission had already determined that article 31, paragraph 3, of the 1969 Vienna Convention was part of the general rule of interpretation.<sup>100</sup> In his opinion, that provision constituted part of the general rule in that it helped to determine the meaning of the terms of the treaty, in good faith, in their context and in light of the treaty’s object and purpose, or else it facilitated that determination. The consequences of subsequent practice and subsequent agreements were therefore inextricably linked to the means of interpretation established by article 31, paragraph 1. Similarly, while in paragraph 33 of his report, the Special Rapporteur suggested that the scope of a provision was modified by subsequent practice, in reality, as subsequent practice had confirmed, the specific interpretation that he quoted as an example could be explained by the application of article 31, paragraph 1, of the 1969 Vienna Convention, namely interpretation “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”.

13. He wished to know why, in paragraph 27 of his second report, the Special Rapporteur had stated that article 31, paragraph 1, accorded the object and purpose of a treaty importance, “but not an overriding importance”, but had not applied that qualifier to the other elements of the general rule. Although it was perhaps true that, as noted in paragraph 73 of the second report, an agreement between parties under article 31, paragraph 3 (a) and (b), could come to an end or another agreement could replace it as a means of interpretation, caution should be exercised in assessing the weight to be accorded to those successive subsequent agreements. The acceptance of different, or even contradictory, successive practices or agreements as being equally as probative as authentic means of interpretation might suggest that treaties lacked objective content and that their meaning shifted according to the short-term interests of States. A clear distinction should therefore be drawn between the consequences of subsequent practice and subsequent agreements for the interpretation of treaties and other possible effects. It might well be that parties agreed not to apply a provision, or

<sup>100</sup> *Yearbook ... 2013*, vol. II (Part Two), pp. 19–20, para. (8) of the commentary to draft conclusion 1.

to apply it with a twist. However, if that twist departed markedly from the text, context, object or purpose of the treaty, it might be something other than treaty interpretation. Lastly, the question of treaty modification did not fall within the scope of the topic under consideration.

14. In conclusion, although it was tempting to rely on the case law of the European Court of Human Rights, which was often very progressive, in the context of treaty interpretation it was essential to determine whether the Court used subsequent practice in the same sense as in article 31, paragraph 3, of the 1969 Vienna Convention or for some other purpose. Subject to those reservations, he was in favour of referring the draft conclusions to the Drafting Committee.

15. Mr. KAMTO said that although most of the proposed draft conclusions were well founded, the Special Rapporteur's approach to some aspects of subsequent practice was problematic. For example, he did not share the opinion that an "agreement" under article 31, paragraph 3, "need not necessarily be binding". That was the complete opposite of what had been said in paragraphs 67 and 68 of the judgment of the International Court of Justice in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*. Acceptance that a subsequent agreement within the meaning of article 31, paragraph 3 (a), or resulting from subsequent practice within the meaning of article 31, paragraph 3 (b), might not be binding would be tantamount to introducing a new category into the law of treaties that had no basis in either the 1969 Vienna Convention or, more generally, in international law. It would be best to disregard that possibility, which, in any case, as other speakers had noted, fell outside the scope of the topic, especially if the view were taken that subsequent practice could have the effect of modifying a treaty.

16. He welcomed the fact that the second report dealt with the issue of silence, which was currently considered to be a legal act in some circumstances and under certain conditions. He personally had unsuccessfully recommended that it be taken into consideration during the Commission's work on unilateral acts. He therefore invited the Special Rapporteur to carry out an in-depth study of acquiescence, estoppel and the parties' awareness of their agreement, a matter which had been touched on too briefly, because in his opinion those two essential elements were what gave silence normative authority.

17. Draft conclusion 6 was confined to generalities. It would be more useful to list the identification criteria, which could be drawn for example from the case law of the International Court of Justice, in particular from the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*. He proposed the deletion of paragraph 1 from draft conclusion 9 and the referral of paragraphs 2 and 3 to the Drafting Committee, which should review their wording. The definition of a conference of States parties set forth in draft conclusion 10, paragraph 1, raised several questions, in particular, that of the difference between the "reviewing" and the "implementing" of a treaty. Furthermore, it would be helpful to indicate in paragraph 2 that the "applicable" rules were those of the conference of States parties and to specify the circumstances in which the decision of such a conference could constitute a subsequent agreement under

article 31, paragraph 3 (a). In order to avoid the suggestion that such a decision could also be imposed on States that had not supported it, or that had abstained, it could be specified that the agreement in question was between "States parties that expressed support for the decision". What was said in draft conclusion 11, paragraph 2, might apply to subsequent practice, but not to subsequent agreements. In principle, he was opposed to the possibility of modifying the treaty by means of subsequent practice, but if the Commission were to tackle that issue in the context of the topic under discussion, it should be extremely cautious and strictly limit that possibility, because it stretched the formal review procedure provided for in all treaties. Subject to those comments, he approved of the referral of draft conclusions 6 to 11 to the Drafting Committee.

18. Mr. ŠTURMA said that the nature of the subject called less for articles and guidelines than the drafting of conclusions which, even if essentially descriptive, would be useful for interpreters of treaties. It was indeed tempting and in accordance with the Commission's mandate to draw up normative conclusions, but caution was required for at least two reasons. First, the inherent flexibility of article 31, paragraph 3, must be preserved, as some members had emphasized, even if a certain degree of precision was vital. Second, the debate during the plenary meeting at the previous session had shown that most members believed that the draft conclusions must not depart from the 1969 Vienna Convention, either in content, or in their terms. As for the question of whether the Commission should focus on subsequent agreements and subsequent practice under article 31 or, on the contrary, adopt a broader approach, he thought that although caution was appropriate, it should not be excessive. Thus, instead of confining itself to article 31, it would be better for the Commission to analyse all the possible roles that subsequent agreements and subsequent practice could play in the interpretation of a treaty.

19. With regard to the controversial issue of subsequent agreements the object of which was not to interpret a treaty, but to amend it, while it might be interesting to attempt to draw a clearer distinction between the interpretative and modifying effects of subsequent agreements and subsequent practice, it was necessary to remain within the scope of the topic, namely the interpretation of treaties.

20. Although they were descriptive in nature, draft conclusions 6 and 7 were useful because they reflected State practice and international jurisprudence. The issues of the form of subsequent practice and its value, or weight, should perhaps be treated separately, rather than together as they were in the current draft conclusion 8. Draft conclusion 9 correctly stated that a subsequent agreement under article 31 need not necessarily be binding as such, but it did not state whether a non-binding agreement carried less weight than a binding agreement—which was certainly the case. Lastly, draft conclusion 10 was acceptable as it stood, since it indicated sufficiently clearly that the effect of a decision adopted within the framework of a conference of States parties depended primarily on the treaty and the applicable rules of procedure.

*The meeting rose at 11 a.m.*