

Document:-
A/CN.4/3262

Summary record of the 3262nd 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/>)*

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.

original proposal for the topic as it had been accepted by the Commission. When, in 2012, the Commission had decided to change the format of the topic “Treaties over time” and to appoint a special rapporteur for the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”, it had agreed for the purposes of the definition of the project that “one or two further reports should be submitted, as it had been envisaged in the original proposal of the topic, on the practice of international organizations and the jurisprudence of national courts (see the report of the Commission on the work of its sixtieth session (2008))”.¹⁴⁴ Thus, since the beginning of the work on the topic, it had been made perfectly clear that the practice of international organizations would be part of it. The Commission had also recognized, in its commentary to draft conclusion 5, that the practice of international organizations could constitute a means of interpretation in its own right. The role played by an international organization’s “own practice”, including that of its organs, was precisely the aspect of the topic that needed to be clarified on the basis of the well-established case law of the International Court of Justice and other courts. For the purposes of such an approach, which had been supported by most members, in particular Mr. Šturma, the term “subsequent practice” was understood as a generic term which was not limited to the particular form of practice mentioned in article 31, paragraph 3 (b), of the 1969 Vienna Convention, but which also included other practice in the application of a treaty that might be relevant for its interpretation, without prejudice as to whether the practice in question was actually relevant and what weight it might possess in a particular case. He asked Mr. Murphy, who had expressed concern in that regard, for his understanding for leaving out, for reasons of convenience and for the time being, treaties adopted within an international organization, on the understanding that such a limitation was not definitive.

5. The fact that the third report was limited to the treaties referred to in article 5 of the 1969 Vienna Convention did not in any way affect the scope of the topic. Mr. Forteau had suggested that the report did not respect that limitation, since it referred to case law relating to treaties, which, in his view, fell under the 1986 Vienna Convention, not the 1969 Vienna Convention. While it was true that the Marrakesh Agreement Establishing the World Trade Organization, including the various agreements annexed thereto, constituted a treaty in the sense of article 1 of the 1986 Vienna Convention, the Agreement also fell under article 5 of the 1969 Vienna Convention by virtue of article 3 (b) of that Convention and article 73 of the 1986 Vienna Convention. That was also the understanding of the WTO dispute settlement bodies, which had applied articles 31 and 32 of the 1969 Vienna Convention when interpreting the WTO agreements, even as applied to the European Union. As Sir Michael had suggested, that point could be made clear in the commentaries. The Commission could, however, if that was what Mr. Forteau proposed, not confine itself to the treaties referred to in article 5 of the 1969 Vienna Convention and recognize that the same rules of interpretation applied to the treaties mentioned in the 1986 Vienna Convention and under customary international law.

6. Mr. Hmoud and other members had agreed that, as had been proposed in the third report, the Commission should not address the question of the interpretation of decisions by organs of international organizations as such. In that connection, Mr. Park had raised the legitimate question of how to distinguish between the interpretation of such decisions and the identification of the relevant conduct of the organization for the purposes of the interpretation of its constituent instrument. While that distinction could not always be drawn with certainty, it could be considered that it was not necessary in the context of the topic at hand, inasmuch as the decisions concerned were clear enough to permit an assessment of their role in the interpretation of a constituent instrument.

7. In response to the concern raised by Mr. Park regarding the difficulty of distinguishing between conferences of States parties established by a constituent instrument of an international organization and those which were not, he said that in his view, the question of whether a conference of parties was created by a constituent instrument should be resolved on a case-by-case basis, and that it was not the aim of the current topic to establish criteria for that purpose.

8. Mr. Park had also made the point that the weight of a particular practice could not be sharply distinguished from its relevance for the purpose of interpretation. He himself considered that the two aspects were very closely related and he agreed with Messrs. Park, Kolodkin and Peter, in particular, that the reaction of the member States was an important criterion for the interpretative weight to be attributed to an organization’s “own practice”. While it was not easy, as Mr. Kamto had rightly pointed out, to decide the interpretative weight to be given to different forms or aspects of subsequent agreements and subsequent practice, it was nevertheless not impossible, as the Commission had previously demonstrated. As had been proposed by Mr. Kolodkin and Ms. Jacobsson, that question could be made the subject of another generic draft conclusion, which would also take into account the specific characteristics of the various constituent treaties.

9. Mr. Hmoud and other members had agreed that the Commission should not consider decisions by courts or tribunals which were authorized by the constituent instrument of an international organization to adjudicate questions regarding the interpretation of such an instrument as a form of relevant “subsequent practice”. Mr. Hmoud had, however, proposed that future commentaries indicate whether interpretations by such authorized bodies could be overruled by a subsequent agreement or subsequent practice of other bodies or by States parties. That was an interesting question, which in part touched upon the issue addressed by the Commission in paragraph 3 of draft conclusion 7, namely the possible modificatory effect of subsequent practice, a question that could be addressed on second reading.

10. Several members had commented on recent developments regarding constituent treaties of the European Union legal order and the practice of the parties and organs of the European Union. Mr. Forteau had expressed the view that he had exaggerated the autonomy of the legal order of the European Union, in particular when

¹⁴⁴ *Yearbook ... 2012*, vol. II (Part Two), p. 79, para. 238.

he had stated that the Court of Justice of the European Union did not take subsequent practice by the parties or the organs of the Union into account. It should be noted in that regard, however, that the report was based not only on his research as Special Rapporteur, but also on a statement by the European Union itself. Sir Michael and Mr. McRae, on the other hand, had emphasized the special character of the legal order of the European Union, which they compared to that of a State. Both Mr. Forteau and Sir Michael were right in that the case law of the Court of Justice of the European Union needed to be approached with caution. The approach of the Court to subsequent agreements and subsequent practice should perhaps be considered as a form of “rule of the organization” in the sense of article 5 of the 1969 Vienna Convention. However, that should not imply, as Mr. McRae seemed to suggest, that the mere declaration by a court that a particular constituent treaty created a “new legal order” was enough to render inapplicable article 5 of the 1969 Vienna Convention or even the Convention as a whole, a conclusion which several members, including Mr. Šturma, had rejected with good reason.

11. He agreed with Mr. Forteau that certain formulations in decisions by the Court of Justice of the European Union could be interpreted as merely excluding the possibility that subsequent practice could amend the founding treaties. Nevertheless, nothing in the jurisprudence of the Court had positively established that the practice of organs or of member States should or could be taken into consideration for the purposes of interpretation. The example relating to the European currency unit which was cited in paragraphs 59 and 60 of the third report and which, in Mr. Forteau’s view, tended to prove the contrary, was not a case in which the Court of Justice of the European Union was “competent to interpret the founding treaties of the European Union”. It was, of course, possible that the Court would in the future take the practice of the member States, and possibly even that of the organs of the European Union, more into account, and such a possibility should be reflected in the commentary. But it seemed that, for the time being, the normal procedure of the Court was to interpret the constituent instrument of an international organization without taking account of the subsequent agreements and subsequent practice of the organs or the parties. At the same time, it should be borne in mind that, to borrow Mr. Šturma’s expression, the institutions of the European Union were the guardians of the founding treaties, but the member States were their masters.

12. Some members had questioned the relevance of some of the examples cited in the third report. Mr. Forteau, for example, had considered that the practice followed within the International Civil Aviation Organization related to the substantive law of that Organization rather than to its institutional law. Sir Michael had even gone so far as to say that only certain provisions of the United Nations Convention on the Law of the Sea could be viewed as a constituent instrument because most of the other provisions were concerned with the substance of the law. Mr. McRae had made a similar point with respect to a case relating to WTO law. All those comments addressed a more general question, which had also been raised by Mr. Kolodkin, namely the scope of article 5 of the 1969 Vienna Convention.

13. Article 5 of the 1969 Vienna Convention referred to the constituent instruments of international organizations in general, without making a distinction between the different kinds of provisions that were contained in such instruments. It was true that constituent instruments contained many provisions relating to substantive obligations rather than to the institutional structure of the organization concerned, but they were nonetheless “constituent instruments” that came within the scope of article 5 of the 1969 Vienna Convention. Furthermore, there were good reasons why article 5 did not distinguish between institutional and substantive provisions. International organizations and their organs were generally entrusted with the interpretation and application of the substantive rules that governed their role. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,¹⁴⁵ for example, referred to the substantive law of the Charter of the United Nations, which did not preclude it from being generally considered, as a constituent instrument of an international organization, to be an important element for the interpretation of the Charter of the United Nations. Similarly, the organs of WTO were responsible for applying and interpreting the Marrakesh Agreement Establishing the World Trade Organization and its annexes, which were considered to be a single undertaking under article II, paragraph 1, of the Agreement. The unity of the provisions of a constituent treaty was also demonstrated by article 20, paragraph 3, of the 1969 Vienna Convention, which required the acceptance, by the competent organ of the organization in question, of reservations relating to the constituent instrument of that organization, regardless of whether the provision concerned was substantive or institutional. All those examples showed that substantive and institutional rules were very closely interrelated and that they should not be artificially distinguished. The situation might be different in the case of international organizations that were not competent to act with regard to certain provisions of their constituent instrument, such as the International Seabed Authority with regard to the provisions of the United Nations Convention on the Law of the Sea, other than those contained in Part XI.

14. Mr. Forteau had questioned the relevance of the reference in the third report to the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, which, in his view, was a complementary agreement. While that characterization was certainly correct, it did not clarify the exact legal significance of the Agreement for the purposes of interpreting that Convention. The Agreement bound all the States that were parties to it, but it was not a subsequent agreement to the United Nations Convention on the Law of the Sea within the meaning of article 31, paragraph 3 (a), of the 1969 Vienna Convention because it did not apply to the States parties to the United Nations Convention on the Law of the Sea. Unlike Sir Michael, who had expressed the view that the Agreement was in substance an agreement amending the 1982 United Nations Convention on the Law of the Sea, he could not see how that Agreement could have such an effect when it had not been made between

¹⁴⁵ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

all the States parties to the United Nations Convention on the Law of the Sea and when the amendment procedure that had been provided for had not been used. It would be safer and more reasonable to say that the Agreement purported to interpret the United Nations Convention on the Law of the Sea in a way that might be applicable to the parties to the Convention that were not parties to the Agreement. That implied recognizing the Agreement as being a form of subsequent practice that was followed by certain parties to the United Nations Convention on the Law of the Sea that could be taken into account, without necessarily being determinative, for the purposes of interpreting that Convention. Numerous examples, both in practice and in the literature, supported such an approach. That did not necessarily mean that this example should be referred to in the commentary, but he had wanted to raise the point with the members of the Commission.

15. Mr. McRae had questioned the weight given in the third report to the decision of the WTO Appellate Body in the *United States—Measures Affecting the Production and Sale of Clove Cigarettes* case. While he had conceded that, on the face of it, that decision appeared to provide an interesting interpretation of the concept of subsequent agreements, he had expressed the opinion that in that case a provision of the Marrakesh Agreement Establishing the World Trade Organization had been disregarded, first by an organ of the Organization and ultimately also by the WTO Appellate Body itself, inasmuch as it had accepted the violation of the Agreement committed by that organ. However, he himself was not convinced that the decision of the Appellate Body had violated the Marrakesh Agreement Establishing the World Trade Organization and that the Commission could therefore not rely on it. In fact, good arguments could be made to show that in that case the procedure provided for in the Agreement had not been circumvented or disregarded. Experts in WTO law, such as Mr. McRae, might argue the contrary, but the Commission should be cautious about asserting that the WTO Appellate Body had rendered a clearly erroneous decision.

16. Furthermore, Mr. Forteau, while reiterating his reservations with respect to the subject of paragraph 1 of draft conclusion 9, which the Commission had adopted at its previous session, had stated that the decision of the WTO Appellate Body in the *United States—Measures Affecting the Production and Sale of Clove Cigarettes* case appeared to support his argument. Although he himself did not think that it was necessary or appropriate at the current stage to reopen the question, which could be reconsidered during the second reading, he did not consider that the decision of the WTO Appellate Body established a distinction between “hortatory” and “binding” understandings—indeed the Appellate Body did not use the terms “binding” or “having legal effect” anywhere—but rather a distinction between an understanding “with regard to the meaning” of a term, which was not necessarily binding, and a merely “hortatory” understanding. If it were otherwise, every subsequent agreement within the meaning of article 31, paragraph 3 (a), would be binding on the parties, and that would result, as Mr. Tladi feared, in a means of interpretation that would elevate subsequent agreements to a higher status than text, context and object and purpose for interpretation.

17. Some other examples had been questioned by members but, in the interests of time, they would be addressed informally or at a later stage of the work.

18. The distinction drawn in the third report between the three forms of subsequent practice and conduct that might be relevant for the interpretation of constituent instruments of international organizations had been found to be helpful by most members of the Commission. However, some members, in particular Messrs. Forteau, Park and McRae, had been of the view that those three forms of conduct were not sufficiently reflected in draft conclusion 11. That impression had perhaps arisen from the fact that draft conclusion 11 contained four, not three, paragraphs and that, in addition, those four paragraphs did not follow the sequence of the three forms of practice presented in the third report. If that was the case, he was not opposed to the Drafting Committee rearranging or merging some paragraphs. From a substantive point of view, the reason why the third category, namely the combination of the practice of organs and the practice of the parties, was not dealt with in a separate paragraph of the draft conclusion was—as Sir Michael had rightly pointed out—that the two forms of practice might in principle both be considered in a particular case, but that did not necessarily mean that they coalesced to form a third category. It therefore seemed more prudent to proceed from two forms of relevant practice and to explain, in a separate paragraph, in the commentary or by way of the formulation of the draft conclusion, that the two forms of practice might often need to be assessed together. That would also meet the concerns expressed by Messrs. Laraba, Niehaus and Peter, who had found the third category hard to grasp.

19. Pursuing a related point, Mr. Peter had asked for more clarification as to when States acted in their capacity of members of an organization and its organs, and when they acted as parties. In that connection, in his third report, the Special Rapporteur had provided what might be a helpful reference to the practice of the European Union, and the Drafting Committee might at some point consider recognizing a presumption that States, in case of doubt and subject to the rules of the organization, acted as members.

20. Some members of the Commission had asked why the concept of “established practice” had been used in draft conclusion 11, in preference to other concepts which could be found in the case law of the International Court of Justice. Mr. Park, in particular, had pointed out that only some of the various similar concepts used in the third report had been taken up in draft conclusion 11. There were various reasons for that. First, the use of the expression *pratique établie*—instead of *pratique bien établie*—for the English expression “established practice” was a translation error. Another reason was that, although in the report he had restated the various terms that had been used in the case law, in particular that of the International Court of Justice, some of those terms that had been mentioned for explanatory purposes, such as the expression “the organization’s own practice”, were not intended for inclusion in the draft conclusion. A third reason for the choice of terminology was substantive. Like Mr. Park, Mr. Forteau had asked why he had chosen to speak of

“established practice” and not “generally accepted practice”, a term which he would have preferred. In fact, the concept of “established practice” was used in article 2, paragraph 1 (j), of the 1986 Vienna Convention and had been recognized by the Commission itself in its draft articles on the responsibility of international organizations.¹⁴⁶ Furthermore, the concept of “generally accepted practice” was not totally unambiguous, inasmuch as it was used in the context of the identification of customary international law to refer to a practice that was widely accepted, but not necessarily by all States. He had therefore been concerned that using the expression could give rise to the misunderstanding that the interpretation of the constituent instrument of an international organization took place in a way that was comparable to the identification of customary international law. He would nevertheless defer to the Commission if it considered that the expression “generally accepted practice” should be used in the draft conclusion.

21. Ms. Jacobsson and other members of the Commission had agreed that the preceding considerations should not exclude the use of the expression “established practice of the organization” in that context. While it was true that the expression had not yet played an important role in the case law, it was nevertheless generally recognized. It might well be the case, as Mr. Forteau had said, that the primary function of that concept was to refer to an informal source of the secondary law of the organization. That informal secondary law, if it was “established” could, however, also serve as a means of interpretation of the constituent treaty, in addition to its primary function as a “rule of the organization”. But, as Sir Michael and Mr. Peter had said, the fact that a separate paragraph was devoted to that point, in addition to a reference to the role of the organization’s “own practice”, might be confusing. In any case, as Mr. Hmoud had said, any draft conclusion on that point should indicate that divergent practice among different organs or opposing statements by member States precluded the formation of “established practice”.

22. Mr. Forteau had proposed that paragraph 3 of draft conclusion 11 refer to the “established practice of the organization” and recognize it as a “relevant rule of international law applicable in the relations between the parties” in the sense of article 31, paragraph 3 (c), of the 1969 Vienna Convention. He had to confess that he had always considered that this article referred to rules whose source was outside and independent of the treaty which was to be interpreted. He had also thought that the purpose of article 31 was the “systemic integration” of treaties within the larger context of international law. Furthermore, as Mr. Forteau himself had said, the “established practice of the organization” was a form of secondary law, which was derived from its constituent instrument, and the source of the rules which it established was thus not outside the treaty. Those rules might even, as such, not be applicable between the parties in the strict sense of the term, but rather only indirectly as an element of the law of the separate legal entity that was the international organization

concerned. He could therefore agree with Mr. Forteau that the “established practice of the organization”, as a rule of the organization, was in some sense “applicable between the parties”. However, if such a rule, which was “internal” to the treaty, did indeed fall under article 31, paragraph 3 (c), one might ask how Mr. Forteau would explain the existence of subsequent agreements between the parties regarding the interpretation of the treaty within the meaning of article 31, paragraph 3 (a). Since he himself interpreted such agreements as having to be legally binding, such agreements would also have to fall under article 31, paragraph 3 (c), which would then raise the question as to why it was necessary to draw a distinction between subparagraphs (a), (b) and (c) of article 31, paragraph 3.

23. Like Mr. Forteau, he was seeking to explain the relevance of the conduct of the organization itself as a means of interpretation of a constituent instrument of an international organization. If that could not be done by reference to article 31, paragraph 3 (c), and article 32 did not fully explain, in the light of the established case law, the relevance of the conduct of the organization, then perhaps the way forward would be to take such practice into account in the identification of the object and purpose of a rule under article 31, paragraph 1. Mr. Laraba had expressed an interest in that solution, which was proposed in the third report. While that might not be very precise, as Mr. Kolodkin and Mr. Park had, for their part, correctly remarked, it might be difficult to be more explicit, and it would at least give the interpreter some orientation. That was not engaging in the creation of new law, as Mr. Murphy had suggested. But it was important to alert the interpreter to the fact that international courts, in particular the International Court of Justice, had recognized the organization’s “own practice” as a means of interpretation, even if the courts had not always explained that use by pointing to a particular element in the rules of interpretation, as Mr. Kamto would have liked. Given the situation, it would be useful if the Commission could provide him (the Special Rapporteur) with some orientation as to how that practice fitted in with the traditional categories.

24. As to the various drafting proposals which had been made with regard to draft conclusion 11, only some of which could be addressed in the summary, he welcomed Mr. Forteau’s proposal, which had been supported by Sir Michael and Ms. Jacobsson, to make it clear that the whole draft conclusion was “subject to the rules of the organization”. In addition, he was not wedded to retaining the expression “conduct of an organ” of an international organization in paragraph 2. He did, however, consider that the case law supported the proposition that such conduct might “give rise” to a subsequent agreement or subsequent practice in the sense of article 31, paragraph 3, while recognizing that the provision could be reformulated—in any case, that was not intended to mean, as Mr. Šturma seemed to think, that practice, in itself, would or could create a relevant agreement of the States.

25. Mr. Kolodkin and Mr. Murase had suggested that emphasis should be placed on the “competence” of the international organization and its organs. That did not

¹⁴⁶ 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.

seem necessary, since it was a clear and well-established general principle of the law of international organizations that those organizations could validly act only within their sphere of competence. He was nevertheless prepared to meet that concern by using the expression “competent organ” in the context of the practice of the organization. However, he was not sure that it was necessary, as Mr. Murphy had proposed, to include a reference to “rules of procedure”, since, in contrast to the rules of procedure of conferences of States parties, the basic rules of procedure for international organizations were contained in their constituent instruments.

26. Messrs. Forteau, McRae, Kolodkin, Peter and Murphy had expressed the view that paragraph 2 of draft conclusion 5, which had been provisionally adopted,¹⁴⁷ could be read as excluding the practice of international organizations. They had therefore suggested that draft conclusion 5 should specify that it applied only “subject to draft conclusion 11”. While, as Mr. Niehaus had pointed out, that might indeed be a useful clarification, it should be made either at the end of the first reading or during the second reading of the draft conclusions. That point, which had already been flagged in the commentary to draft conclusion 5, could be further explained in the commentary to draft conclusion 11. Similarly, Mr. Forteau’s proposal to revisit draft conclusion 4, paragraph 3, and draft conclusion 6, paragraph 3, could also be considered at a later stage, if necessary.

27. He noted that Mr. Murase wished to alter the designation of the final product of the Commission’s work, but it was his understanding that the term “conclusions” referred not only to purely factual statements but that it might also include normative statements. Like Mr. Niehaus, he considered, therefore, that it was not necessary to reopen the debate on that point or, for that matter, the debate on the outcome of the Commission’s work on the identification of customary international law.

28. In conclusion, he said that the statements of many of the members of the Commission who had taken the floor seemed to reflect an underlying concern that he wished to diminish the primary role of States in the interpretation of treaties and to elevate the role of international organizations to an inappropriate level. Those concerns were somewhat surprising because he had been careful in trying to adhere strictly to the case law of international courts, in particular that of the International Court of Justice. Furthermore, he had refrained from adopting a “constitutionalist” approach to the interpretation of the constituent instruments of international organizations or any other theoretical approach that was not well established. He reaffirmed the primary role of States in the proper interpretation and development of constituent instruments of international organizations and expressed the hope that the members of the Commission would take a balanced approach which took full account of the accepted judicial practice.

The meeting rose at 10.45 a.m.

3263rd MEETING

Friday, 5 June 2015, at 10 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, Mr. Kolodkin, Mr. Laraba, 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.

Crimes against humanity (*concluded*)* (A/CN.4/678, Part II, sect. I, A/CN.4/680, A/CN.4/L.853)

[Agenda item 10]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. FORTEAU (Chairperson of the Drafting Committee) introduced the titles and texts of the draft articles on crimes against humanity, as adopted by the Drafting Committee, and as contained in document A/CN.4/L.853, which read:

CRIMES AGAINST HUMANITY

Draft article 1. Scope

The present draft articles apply to the prevention and punishment of crimes against humanity.

Draft article 2. General obligation

Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.

Draft article 3. Definition of crimes against humanity

1. For the purpose of the present draft articles, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation or forcible transfer of population;
- (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) torture;
- (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes;

¹⁴⁷ *Yearbook ... 2013*, vol. II (Part Two), p. 34.

* Resumed from the 3258th meeting.