

Document:-  
**A/CN.4/3172**

**Summary record of the 3172nd meeting**

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

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

[Agenda item 1]

46. Mr. FORTEAU (Rapporteur), speaking on behalf of the Chairperson of the Drafting Committee, read out the list of members of the Drafting Committee on immunity of State officials from foreign criminal jurisdiction.

*The meeting rose at 11.20 a.m.*

**3171st MEETING**

*Tuesday, 28 May 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 1]

1. The CHAIRPERSON said that, after consultations concerning the possibility of including a new topic on the Commission's programme of work and the appointment of a new special rapporteur for that topic, he had noted that there was a consensus in favour of the topic "Protection of the environment in relation to armed conflicts". He therefore suggested that the topic should be included in the Commission's programme of work and that Ms. Jacobsson should be appointed Special Rapporteur. The topic would also be placed on the agenda.

*It was so decided.*

2. Ms. JACOBSSON thanked the members of the Commission for the trust which they had shown in appointing her Special Rapporteur and said that the following week she would present an informal document prior to drafting a preliminary report on the topic.

3. Mr. CANDIOTI drew attention to the fact that a decision had still to be taken on whether to include the topic "Protection of the atmosphere" in the programme of work, as had been proposed at the sixty-fourth session.

4. The CHAIRPERSON said that he would hold consultations on that matter and inform the Commission of their outcome.

*The meeting rose at 10.10 a.m.*

**3172nd MEETING**

*Friday, 31 May 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, 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 (concluded)\*  
(A/CN.4/660, A/CN.4/L.813)**

[Agenda item 6]

**REPORT OF THE DRAFTING COMMITTEE**

1. Mr. TLADI (Chairperson of the Drafting Committee) said that the Drafting Committee had devoted nine meetings to its consideration of the draft conclusions relating to the topic under consideration and had provisionally adopted five draft conclusions, contained in document A/CN.4/L.813, which read as follows:

*Draft conclusion 1. General rule and means of treaty interpretation*

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law.

2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

3. Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.

5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

*Draft conclusion 2. Subsequent agreements and subsequent practice as authentic means of interpretation*

Subsequent agreements and subsequent practice under article 31 (3) (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

\* Resumed from the 3163rd meeting.

*Draft conclusion 3. Interpretation of treaty terms as capable of evolving over time*

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

*Draft conclusion 4. Definition of subsequent agreement and subsequent practice*

1. A “subsequent agreement” as an authentic means of interpretation under article 31 (3) (a) is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A “subsequent practice” as an authentic means of interpretation under article 31 (3) (b) consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. Other “subsequent practice” as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

*Draft conclusion 5. Attribution of subsequent practice*

1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

2. In draft conclusion 1, the Drafting Committee had chosen to set out the general aspects of the legal framework for treaty interpretation (paras. 1–2), to address the issue of subsequent agreements and subsequent practice (paras. 3–4) and finally to state that treaty interpretation was a single combined operation that placed appropriate emphasis on various means of interpretation (para. 5).

3. The Drafting Committee had opted for the term “means” rather than “elements” of interpretation, since “means” evoked the notion of a tool or instrument and described their function in the interpretation process with greater precision. That term also appeared in the text and title of article 32 of the 1969 Vienna Convention.

4. Paragraph 1 of the draft conclusion started with a sentence that referred to both article 31 and article 32 of the 1969 Vienna Convention, in order to clarify the general context for subsequent agreements and subsequent practice. The second sentence was a reminder that the rules contained in those articles applied as a matter of customary international law. The Drafting Committee had deemed a reference to article 33 of the Vienna Convention to be unnecessary for reasons that would be elucidated in the commentary, which would also discuss the customary status of the provisions on treaty interpretation contained in the Vienna Convention.

5. Draft conclusion 1, paragraph 2, reproduced the text of article 31, paragraph 1, of the 1969 Vienna Convention *in extenso*, given its fundamental importance for the topic. The Drafting Committee had deemed it appropriate to refer to subsequent agreements and subsequent practice, in order to establish that they formed an integral part of the general legal framework of treaty interpretation. The

text of article 31, paragraph 3 (a) and (b) of the Vienna Convention had accordingly been reproduced in draft conclusion 1, paragraph 3. The Drafting Committee had added paragraph 4, containing a reference to subsequent practice in a broader sense, namely as a supplementary means of treaty interpretation under article 32 of the Vienna Convention. The commentary would make it plain that that wider notion was limited to practice followed in the application of the treaty.

6. Paragraph 5 was a reminder that treaty interpretation constituted a single combined operation involving all the means of interpretation referred to in the preceding paragraphs. The text incorporated the Special Rapporteur’s ideas about appropriate emphasis being placed on the different means of interpretation. The Drafting Committee’s lengthy discussion of whether a reference to the nature of the treaty should be included would be reflected in the commentary.

7. The Drafting Committee’s discussions of draft conclusion 2 had focused on the meaning of the phrase “authentic means of interpretation”. The Committee had reworked the text to include a reference to article 31 of the 1969 Vienna Convention and had clarified the meaning of the term “authentic” by referring to subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), as “objective evidence of the understanding of the parties as to the meaning of the treaty”, a phrase taken from paragraph (15) of the 1966 commentary to draft article 27 on the law of treaties.<sup>58</sup> The last part of draft conclusion 2 made it clear that any reliance on subsequent agreements and subsequent practice as authentic means of interpretation must comply with the general rule of treaty interpretation reflected in article 31 of the Vienna Convention.

8. For draft conclusion 3, after a lengthy discussion, the Drafting Committee had decided to focus on the role that subsequent agreements and subsequent practice might play in guiding an interpreter who had to determine whether the meaning of a treaty was static or might evolve over time. It indicated that reliance on subsequent agreements and subsequent practice might assist in determining whether the presumed intention of the parties to the treaty was to give a particular term a meaning that was capable of evolving over time. The commentary would explain that the phrase “presumed intention” referred to the intention of the parties as determined through the application of the various means of interpretation recognized in the 1969 Vienna Convention, and not simply on the basis of the *travaux préparatoires*.

9. The commentary would emphasize that draft conclusion 3 should be read, not as the adoption of a position as to whether a more contemporaneous or a more evolutive approach to treaty interpretation was appropriate, but as an indication that subsequent agreements and subsequent practice were considerations which might help the interpreter to assess whether the meaning of a treaty term, or rule, was capable of evolving over time, depending on the circumstances. The commentary would refer to the relevant case law of various international courts and tribunals which had engaged in evolutive interpretation, albeit in

<sup>58</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, p. 221.

varying degrees, and which appeared to have followed a case-by-case approach in determining, through recourse to various means of treaty interpretation, whether a particular treaty term should be given a meaning capable of evolving over time. Furthermore, the commentary would indicate that this potential function of subsequent agreements and subsequent practice in guiding the interpretation of a term over time was to be regarded as part of the ordinary process of treaty interpretation and not as a separate or distinct method of interpretation.

10. The Drafting Committee had simplified the title of draft conclusion 4 by omitting the phrase “as means of treaty interpretation”. The body of the draft conclusion had been restructured so as to enunciate three definitions that corresponded to articles 31, paragraph 3 (*a*) and (*b*), and 32, of the 1969 Vienna Convention. Those definitions covered only subsequent agreements and subsequent practice arising after the conclusion of the treaty. It would be explained in the commentary that the phrase “conclusion of the treaty” was intended to refer to the moment at which the text of a treaty was established as definitive. The commentary would address the relevance of subsequent agreements and subsequent practice which had emerged between the conclusion of the treaty and its entry into force, including practice that might arise from the provisional application of the treaty.

11. The text of draft conclusion 4, paragraph 1, had been recast in order to establish a clear connection with article 31, paragraph 3 (*a*), of the 1969 Vienna Convention and to link the paragraph with draft conclusion 2. In the original version of draft conclusion 3, the qualifier “manifested” had accompanied the term “agreement” in order to distinguish a subsequent agreement between the parties under article 31, paragraph 3 (*a*), from a less formalized agreement established through subsequent practice by the parties in the application of the treaty under article 31, paragraph 3 (*b*). The Drafting Committee had omitted the qualifier but had inserted the word “reached” in order to signal that, although a “subsequent agreement” under article 31, paragraph 3 (*a*), of the Vienna Convention did not necessarily need to be formal, such an agreement presupposed a common act by the parties in agreeing on the interpretation of the treaty. The commentary would address that point and also provide examples to illustrate the distinction between a subsequent agreement by the parties and an agreement established through subsequent practice by the parties.

12. Draft conclusion 4, paragraph 2, provided a definition of “subsequent practice” under article 31, paragraph 3 (*b*), of the 1969 Vienna Convention. The opening words of that paragraph had been reformulated in order to highlight the distinction between subsequent practice as an authentic means of treaty interpretation and the “other” subsequent practice referred to in paragraph 3. The word “conduct” adequately conveyed the universe of possible subsequent practice, including tacit conduct. Since pronouncements constituted a form of conduct, it was unnecessary to refer specifically to them in the draft conclusion; an appropriate explanation to that effect could be included in the commentary. In order to remain faithful to the wording of article 31, paragraph 3 (*b*), of the Vienna Convention, the Drafting Committee had decided against

using the term “understanding” to distinguish between an agreement arising from subsequent practice and the “subsequent agreements” covered in article 31, paragraph 3 (*a*). The commentary would indicate the possible modalities of an agreement established through subsequent practice and explain how to distinguish between such an agreement and a subsequent agreement under article 31, paragraph 3 (*a*). In addition, the phrase “by one or more parties” had been deleted because the text now provided, not an abstract definition of subsequent practice, but one that was limited to subsequent practice as a means of authentic interpretation which established the agreement of all the parties to the treaty. The commentary would clarify that point. It was sufficient to mention in the commentary that the reference to “the parties” did not cover the possibility of subsequent practice of organs of international organizations in relation to their constituent instruments. At a later stage, the Commission would examine the possible role of those organs in the establishment of subsequent practice for purposes of treaty interpretation.

13. The purpose of the word “other” in draft conclusion 4, paragraph 3, was to indicate that the subsequent practice referred to in that paragraph was distinct from subsequent practice as a means of treaty interpretation within the meaning of article 31, paragraph 3 (*b*), of the 1969 Vienna Convention. The phrase “in the application of the treaty” had been inserted to harmonize draft conclusion 4, paragraph 3, with draft conclusion 1, paragraph 4, and thus qualify the type of conduct which might constitute “subsequent practice” for the purposes of treaty interpretation; the commentary would address that point. Finally, given that paragraph 3 addressed the broader notion of subsequent practice as a supplementary means of treaty interpretation, the Drafting Committee had retained the phrase “by one or more parties”, which indicated that, in order to serve as a subsidiary means of interpretation, a subsequent practice need not involve all parties to the treaty or establish an agreement between all parties regarding its interpretation. Paragraph 3 did not enunciate a specific requirement that the relevant practice should be “regarding the interpretation” of the treaty because, for the purposes of that paragraph, any practice in the application of the treaty that might provide some indication as to the manner in which the parties involved interpreted the treaty might be relevant as a supplementary means of interpretation. The commentary would clarify that point.

14. In draft conclusion 5, paragraph 1, the phrase “under articles 31 and 32” had been inserted to make it clear that that draft conclusion on attribution applied both to subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (*b*), and to subsequent practice as a supplementary means of interpretation under article 32. The phrase “in the application of a treaty” had been introduced for the sake of consistency with the definitions of “subsequent practice” provided in draft conclusion 4, paragraphs 2 and 3. In addition, the phrase “for the purpose of treaty interpretation” had been deleted in order to address concerns that the phrase might introduce an element of circularity into the provision. In response to the doubts expressed as to whether there was a need to establish rules of attribution that differed from those relating to State responsibility, the point had been made that the real question was not one of attribution, but of the relevance

of certain conduct to the process of treaty interpretation. Draft conclusion 5, paragraph 1, therefore referred to “any conduct ... which is attributable to a party to a treaty under international law”, without limiting such conduct to that of the organs of the State. In other words, it was intended to cover cases in which conduct that was not performed by a State organ within the meaning of article 4 of the articles on State responsibility<sup>59</sup> was nevertheless attributable, under international law, to a party to the treaty. By referring to “any” conduct in the application of the treaty which was attributable to a party to the treaty, paragraph 1 did not mean to suggest that such conduct necessarily constituted subsequent practice for the purpose of treaty interpretation. The use of the phrase “may consist” was intended to reflect that point, which would be also addressed in the commentary. That clarification was important in relation to the conduct of lower State organs which might not reflect, or might even contradict, the position of the organs of the State that were competent under internal law to express the position of the State in international relations with respect to a particular matter. Indeed, after an extensive discussion in the Drafting Committee as to whether that provision should specifically refer to the question of whether, or under which circumstances or conditions, the conduct of a lower organ of the State could be attributed to the State for purposes of treaty interpretation, the Committee had decided that the various complex issues and scenarios that could be envisaged would be better addressed either at a later stage of the work, or in the commentary, where concrete examples and appropriate references to relevant case law could be included.

15. Draft conclusion 5, paragraph 2, comprised two sentences. The first indicated that practice by non-State actors did not in itself constitute subsequent practice within the meaning of the 1969 Vienna Convention. The phrase “[o]ther conduct” had been introduced to clarify the distinction between the conduct contemplated in paragraph 2 and that contemplated in paragraph 1. At the same time, the second sentence of paragraph 2 recognized that conduct not covered by paragraph 1 might be relevant when assessing the subsequent practice of parties to a treaty. In paragraph 2, the phrase “assessing the subsequent practice” should be understood to encompass both the identification of subsequent practice and the determination of its legal significance. Appropriate explanations regarding the manner in which conduct that was not attributable to a party to the treaty might be relevant in assessing subsequent practice of the parties, as well as the possible interactions between such conduct and subsequent practice, would be provided in the commentary, together with examples and relevant case law.

16. The reference to “social practice” had been deleted because several members of the Commission had expressed concerns regarding the meaning and relevance of that term. The commentary would provide some indications as to the manner in which “social practice” had been relied upon, particularly in the case law of the European Court of Human Rights, in connection with treaty interpretation.

17. The CHAIRPERSON invited the Commission to adopt the text of draft conclusions 1 to 5, as provisionally adopted by the Drafting Committee on first reading and contained in document A/CN.4/L.813.

*Draft conclusions 1 to 5 were adopted with some minor editorial corrections.*

*The meeting rose at 10.50 a.m.*

### 3173rd MEETING

*Tuesday, 4 June 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*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. Laraba, Mr. Murase, Mr. Murphy, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

#### Organization of the work of the session (*continued*)\*

[Agenda item 1]

1. The CHAIRPERSON drew the Commission members' attention to the programme of work for the first two weeks of the second part of the Commission's session, which would be held from Monday, 8 July to Friday, 9 August 2013.

2. On the Monday afternoon of the first week, Mr. Valencia-Ospina, the Special Rapporteur on the topic “Protection of persons in the event of disasters”, would present his sixth report (A/CN.4/662). The debate on that topic would take place on the mornings of Tuesday to Thursday. The Special Rapporteur would sum up the debate on Friday morning. On Tuesday afternoon, informal consultations would be held on the topic “Protection of the environment in relation to armed conflicts”. On Wednesday morning, the Commission would receive the visit of representatives of the Council of Europe under the agenda item entitled “Cooperation with other bodies”. The Study Group on the most-favoured-nation clause would meet on Wednesday afternoon and the Working Group on the long-term programme of work would meet on Thursday afternoon.

3. During the second week, the Drafting Committee on protection of persons in the event of disasters would meet in the afternoons, from Monday to Wednesday. During the plenary meetings on Tuesday to Thursday morning, the Commission would consider the first report of Sir Michael Wood, Special Rapporteur on the topic “Formation and evidence of customary international law” (A/CN.4/663). The Gilberto Amado Memorial Lecture would take place on Wednesday afternoon. On Thursday morning, the

<sup>59</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 40. The articles on responsibility of States for internationally wrongful acts adopted by the Commission are reproduced in the annex to General Assembly resolution 56/83 of 12 December 2001.

\* Resumed from the 3171st meeting.