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Report of the International Law Commission
on the Work of its 67th Session
Statement by Stephen Townley, Counselor
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Identification of Customary International Law, Crimes Against Humanity, Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties

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Identification of customary international law

Mr. Chairman, with respect to the topic "Identification of customary international law," the United States thanks the Special Rapporteur, Sir Michael Wood, for yet another very impressive report. As with Sir Michael's previous work, the third report makes substantial contributions to this important topic. We also thank the Drafting Committee for the Draft Conclusions provisionally adopted this year based upon Sir Michael's work.

While we believe that the Special Rapporteur and Drafting Committee have very successfully addressed many aspects of this important topic, the United States has a number of remaining concerns. We would like to comment on our primary concern and mention two others today.

Mr. Chairman, the United States remains particularly concerned about Draft Conclusion 4 and its discussion of the role of the practice of international organizations in contributing to the formation or expression of customary international law. We are concerned that it may be interpreted to say that the practice of international organizations may serve as directly relevant practice, i.e., play the same role as State practice, in the formation and identification of customary international law, at least in some circumstances.

We have two points regarding that conclusion.

First, the United States does not believe that the case law or that the views expressed by States themselves have generally recognized that the actions of international organizations "as such" – in other words, as distinct from the practice of their member States – contributes directly to the formation of customary rules. The report of the Special Rapporteur provides very little support for this proposition, notwithstanding the existence of international organizations for more than a century. Therefore, we believe that the treatment of the role of international organizations in paragraph 2 of Draft Conclusion 4 needs to be reconceived in order to avoid misleading users of the final product, including the judges and lawyers who may not be particularly well-versed in public international law and for whom the Draft Conclusions are largely intended.

In our view, international organizations can play important, indirect roles in the process by which the practice of States generates custom, including as the fora in which State practice and *opinio juris* may develop or be articulated and, in many fields, as the key actors to which States respond in ways that may generate State practice or evidence of *opinio juris*. This, however, is not the same thing as saying that the practice of the international organization itself constitutes practice that should be counted along with State practice when determining the existence of a customary rule.

One possible exception to this division of roles between States and international organizations may be the European Union, and perhaps other organizations that might now or in the future exercise similar competences. However, even if such organizations "as such" contribute directly to the formation of custom in some areas, we do not believe that such a limited, exceptional role for certain international organizations supports the broad language of paragraph 2 of Draft Conclusion 4.

Second, if the International Law Commission believes that it is important to address the role of international organizations in the identification of customary rules, the United States believes that it would be better for the role of international organizations to be considered separately from that of States. By addressing international organizations separately, the Commission would be able to recognize and address the fact that international organizations include a great variety of entities, with differing roles, competences, and practices. Doing so would also allow the Commission to identify the specific cases in which the Commission believes that the practice of international organizations is directly relevant for the purposes of the creation of customary rules and explain how their practice would be "counted". For example, it could consider whether the practice of one or more international organizations could result in the creation of a new customary rule despite there being insufficient State practice, or whether the practice of international organizations could block the creation of a customary rule even when State practice in favor is otherwise sufficient. The United States believes that a discussion of a role for the practice of international organizations in the creation and identification of custom needs to address these issues to avoid the suggestion that international organizations are like States in these respects.

Mr. Chairman, before we conclude, we would like to make two additional points. The first involves the tenor of the Draft Conclusions as a whole. Our concern here is that the Draft Conclusions – by inviting readers to find evidence of customary international law in a wide variety of sources – may be understood to suggest that customary international law is easily created or inferred. We do not believe that it is the case and, therefore, hope that the commentary will underscore that only when the strict requirements for extensive and virtually uniform practice of States, including specially affected States, accompanied by *opinio juris* are met is customary international law formed.

Similarly, we continue to be concerned that the draft conclusion on "particular custom" does not adequately articulate when such custom is and is not created. We hope that will be clarified in the commentary or future revisions of the draft conclusions.

Mr. Chairman, once again, we heartily thank Sir Michael Wood and the Drafting Committee for their important work on this topic. We have taken note of the Special Rapporteur's ambitious plan to draft commentary to all of the Draft Conclusions by next summer for adoption by the Commission and look forward to studying it.

Crimes against humanity

Mr. Chairman, on the topic of "crimes against humanity," the United States is following the Commission's work with great interest. Special Rapporteur Sean Murphy has brought tremendous value to bear in the Commission's work on this topic, including the difficult questions that this topic implicates.

The commentary's description of the lineage of the concept of crimes against humanity - from the Charter of the International Military Tribunal at Nürnberg through the statute of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda - is a sober reminder of the importance of this topic. It is also a testament to the important role the development of the concept of "crimes against humanity" has played in the pursuit of accountability for some of the most horrific episodes of the last hundred years.

As the description of this topic noted, the widespread adoption of certain multilateral treaties regarding serious international crimes – such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide – has been a valuable contribution to international law. Because crimes against humanity have been perpetrated in various places around the world, the United States believes that careful consideration and discussion of draft articles for a convention on the prevention and punishment of crimes against humanity could also be valuable.

As we have previously noted, this topic's importance is matched by the difficulty of some of the legal issues that it implicates, and we expect that under Sean Murphy's stewardship, these issues will continue to be thoroughly discussed and carefully considered in light of States' views as this process moves forward. We are continuing to study the ILC's work on this topic carefully, as it presents a number of complex issues, on which we are still developing our views. We are deeply grateful to Special Rapporteur Murphy and to the other members of the Commission for their work on a topic of such importance, and we eagerly look forward to their continued efforts.

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

Mr. Chairman, turning to the topic of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", we would like to thank the Special Rapporteur, Georg Nolte, and the Commission for their perceptive and insightful work on this topic, including on the important issue of the role of the practice of international organizations in the interpretation of treaties.

We have studied with great interest Draft Conclusion 11 and commentary as provisionally adopted by the Commission this past summer and agree with much of the analysis. In particular, we agree that the rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties apply to the constituent instruments of international organizations, as stated in Draft Conclusion 11, paragraph 1. We also agree that a subsequent agreement or subsequent practice by the parties to a treaty may arise from or be expressed in the practice of an international organization in the application of its constituent instrument, as stated in Draft Conclusion 11, paragraph 2. For example, the parties may instruct the international organization to engage in a certain practice or react to the activities of the international organization in a way that constitutes subsequent practice of the parties.

However, we have doubts about Draft Conclusion 11, paragraph 3, which says the "[p]ractice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32."

The draft commentary explains that the purpose of this provision is to address the role of the practice of an international organization "as such" in the interpretation of the instrument by which it was created. The Commission apparently recognized -- correctly in the view of the United States -- that the practice of that international organization is not "subsequent practice" for the purposes of the rule reflected in Vienna Convention, Article 31, paragraph 3b, because the international organization itself is not a party to the constituent instrument and its practice as such, therefore, cannot contribute to establishing the agreement of the parties.

However, faced with the inapplicability of paragraph 3b of Article 31, the Commission has proposed instead that consideration of the international organization's practice is appropriate under paragraph 1 of Article 31 and Article 32 of the Vienna Convention.

Mr. Chairman, paragraph 1 of Article 31 is not relevant in this context. Paragraph 1 reads: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of its object and purpose." The factors to be considered pursuant to Article 31, paragraph 1 – "ordinary meaning," "context" and "object and purpose" -- do not encompass consideration of subsequent practice regardless of whether the actor is a party or the international organization. The Commission provides no evidence from the *travaux préparatoires* of the Vienna Convention, including the Commission's own work, in support of using Article 31, paragraph 1, in this highly unusual way. Moreover, none of the very few cases cited by the Commission in support of this proposition appear to rely on Article 31, paragraph 1, of the Vienna Convention.

Article 32 of the Vienna Convention may potentially provide a basis for considering the practice of an international organization with respect to the treaty by which it was created, particularly where the parties to the treaty are aware of and have endorsed the practice. We believe that circumstances in which the practice of the international organization may fall within Article 32, however, should be explained in the commentary.

Mr. Chairman, before concluding on this topic, we would like to make two final points. First, as the United States has noted previously, we welcome the situating of this topic in the framework of the rules on treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention. For this reason, we have questions about discussions, in the commentary to Draft Conclusion 11, of interpretative rules that may be inconsistent with those reflected in Articles 31 and 32, such as the commentary's reference in paragraph 35 to a "constitutional interpretation".

Finally, we note that the Commission indicated an interest in "examples where pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty." The United States believes it is important that the Commission make clear that the actions or views of treaty bodies consisting of independent experts do not, in and of themselves, constitute a "subsequent agreement" or "subsequent practice" for the purposes of paragraph 3 of Article 31

of the Vienna Convention, as they are neither agreements "between the parties" nor practice that establishes such an agreement. However, the views of treaty bodies composed of independent experts may be relevant indirectly. For example, States parties' reactions to the pronouncements or activities of a treaty body, in some circumstances, may constitute subsequent practice (of those States) for the purposes of Article 31, paragraph 3.

In conclusion, we again thank the Special Rapporteur and the Commission for their valuable work on this important topic and look forward to further refinement of Draft Conclusion 11 and its commentary as this topic progresses.

Thank you, Mr. Chairman.