



Statement on behalf of the European Union and its Member States

By

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at the General Assembly Sixth Committee

on

Item 83

"Identification of customary international law"

United Nations

New York

4 November 2015

- CHECK AGAINST DELIVERY -

I have the honor to speak on behalf of the European Union and its Member States.

The Candidate Countries the former Yugoslav Republic of Macedonia*, Montenegro*, Serbia*, the country of the Stabilisation and Association Process and potential candidate Bosnia and Herzegovina, as well as Armenia and Georgia, align themselves with this statement.

1. It is an honour for the European Union to address the work of the International Law Commission (ILC) concerning the topic of customary international law. We are grateful to the ILC and in particular to the Special Rapporteur, Sir Michael Wood, for their commendable efforts.

2. The Special Rapporteur's Third Report is again evidence of the high quality of work that we have seen already last year. It excels in combining the wealth of learnedness and experience

* *The former Yugoslav Republic of Macedonia, Montenegro, Serbia and Albania continue to be part of the Stabilisation and Association Process.*

with a determined pursuit of a practical project, the outcome of which should guide and assist practitioners in the task of identifying customary international law. The European Union believes that the ILC has all the potential to succeed in its endeavour.

3. The European Union's comments will be focused on the aspects of the Report concerning international organisations.

4. Firstly, the EU concurs with the rapporteur that the ever growing role and relevance of international organisations in international relations make it only natural to expect that, depending on their particular functions and powers conferred by their founding treaties, international organisations are taken into account also when considering contributions for identifying customary international law.

5. Secondly, it is a fact, as the Special Rapporteur points out, that there is a great diversity of international organisations. It is also a fact that such variety is reflected in their functions and powers which constitutes a challenge for the purposes of considering and weighing their contribution to the formation of customary international law. In this respect, the European Union considers that relying only on the formal notion of international organisation would not be helpful, but it is rather necessary to take a closer look at the organisations – or categories of organisations - concerned. The EU thus welcomes the approach of the Special Rapporteur (in para 77 of his Report) that the contribution of international organisations to the formation of rules of customary international law depends on the competences that States have conferred to them and on the powers that the States have provided the international organisation with in order to attain the objectives set out in the constituent Treaty. Indeed, in so far as the exercise of the competences and the powers used produce a practice where the international organisation supplants in whole or in part that of its Member States, such practice may be equated with the practice of States for the purpose of the Report. This makes both practical and legal sense as otherwise, as the Special Rapporteur points out, it would mean that not only would the organization's practice not be taken into account, but its Member States would themselves be deprived or reduced of their ability to contribute to State practice, an incongruous conclusion to be drawn.

6. Thirdly, the EU considers that that the notion of international organisation should not be dealt with in complete isolation from the other relevant headings, and in the case of the EU in particular concerning the aspects relating to treaties and judicial decisions, which are part of the EU's competences conferred by the founding treaties to the EU and normal practice. This should be reflected in an appropriate way in the context of the conclusions and the commentary.

7. In the case of the EU, the competences that Member States have conferred to the organisation and the related international responsibility are in fact born out in its treaty practice. This was recently acknowledged for instance in the paragraph 5 of the *Advisory Opinion No 21* of the International Tribunal of the Law of the Sea (2 April 2015). This shall mean that, in so far as

Treaty law can contribute to the formation and identification of customary law, this inevitably should also cover treaty practices of an international organisation such as the EU.

8. The same basic observations are applicable to the role of the judiciary. It is far from exceptional or rare for the EU judiciary to deal with public international law related issues. As a fairly recent example relevant to the present topic, one may refer to the judgment of the Court of Justice of the European Union of 11 March 2015 in joined Cases C-464/13 and C-465/13, *Europäische Schule München v Silvana Oberto and Barbara O'Leary* in which the Court has affirmed that "*The international law of treaties was consolidated, essentially, in the Vienna Convention. Under Article 1 of that convention, the latter applies to treaties between States. However, under Article 3(b) of that convention, the fact that it does not apply to international agreements concluded between States and other subjects of international law is not to affect the application to such agreements of any of the rules set forth in the Vienna Convention to which they would be subject under international law independently of that convention. It follows that the rules laid down in the Vienna Convention apply to an agreement concluded between the Member States [of the EU] and an international organisation, such as the Convention defining the Statute of the European Schools, in so far as those rules are an expression of general international customary law. Consequently, that convention must be interpreted in accordance with those rules (see, to that effect, judgment in Brita, EU:C:2010:91, paragraph 41).*"

9. In another recent Case, *C-366/10 Air Transportation Association of America and Others v. Secretary of State for Energy and Climate Change*, the Court had similarly to examine the state of customary international law relevant to aviation and the law of the sea and draw appropriate conclusions under EU law.

10. These examples of treaty and judicial practice confirm that the formation and identification of customary international law are effected through different sources. The use of the notion of international organisation – taken on its own in isolation of the specific competences conferred by its founding treaties – does not reflect appropriately the treaty-making, legislative and judicial powers of an organisation like the EU within the wide variety of organisations. It would be desirable to introduce appropriate language for that purpose in the context of the ILC conclusions or, if not possible, in the commentary so as to constitute a practical help for practitioners for the identification of customary international law.

11. The draft conclusions deal with international organisations to some extent, but not (yet) in a way that is entirely consistent. It could in particular be clarified that the references to forms of State practice may also extend to the corresponding practice of an international organisation. This can be achieved in different ways. The European Union suggests that for instance in the end of draft conclusion 5, concerning the conduct of the State as State Practice, be added new language along the following lines: "Same applies mutatis mutandis to an international organization in so far as the organization exercises such functions on the basis of competences conferred on it by its member States in the founding treaties". Likewise, the EU considers that, in case of court

decisions, it would be appropriate to add after "decisions of national courts" (conclusions 6(2), 10(2), 13(2)) "and other judicial decisions", so as not to exclude a judicial body such as the Court of Justice of the European Union which regularly pronounces itself on the relevant matters.

Thank you for your attention.



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

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I have the honor to speak on behalf of the European Union and its Member States.

The Candidate Countries Turkey, the former Yugoslav Republic of Macedonia*, Montenegro*, Serbia* and Albania*, the country of the Stabilisation and Association Process and potential candidate Bosnia and Herzegovina align themselves with this statement.

1. The European Union has the honor to address the 6th Committee on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, considered by the International Law Commission (ILC).

2. At the outset the European Union would like to express its appreciation of the excellent work of the Special Rapporteur Mr. Georg Nolte on this topic and of the high quality of his third report. The

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matter of subsequent agreements and subsequent practice in relation to the interpretation of treaties is of great importance and the international community could only benefit from a profound study of all its aspects. The European Union has supported the work of the ILC on this topic and will continue to be engaged in its future consideration.

3. The third report of the Special Rapporteur is focused on the role of subsequent agreements and subsequent practice in relation treaties which are constituent instrument of international organizations. As the Report takes up in this context also the Founding Treaties of the European Union, the Union is pleased to make the following observations, which address the matter from the viewpoint of European Union and add to the comments already submitted by the Union earlier this year in its written contribution.

4. The European Union could, in principle, concur with the text of draft conclusion 11 provisionally adopted by the ILC. The Union, however, stresses the importance of the principle that, as stated in paragraph 4 of the draft conclusion, the applicability of Articles 31 and 32 of the Vienna Convention on the Law of Treaties to constituent instruments of international organizations, is "without prejudice" to any relevant rules of the organization.

5. The Union welcomes that the Special Rapporteur has presented in his third report certain specificities of the European Union regarding the subsequent agreements and subsequent practice in relation to the interpretation of its Founding Treaties. The Union would appreciate if these specificities are reflected in an appropriate way also in the commentaries to the draft conclusion.

6. The Union notes that the Special Rapporteur in his report, as well as the commentaries to draft conclusion 11, make some references to a particular situation, namely, to a difficulty to determine if a decision is taken by an organ of an international organization or by the Member States in their individual capacity while "meeting within a plenary organ of an international organization"ⁱ. In that respect it is pointed to case-law of the Court of Justice of the European Union dealing with the matter.

7. The Union takes this opportunity to bring to the attention of the Special Rapporteur and the ILC a very recent judgment of the Court of Justice of the European Union where there Court has considered some aspects of that issueⁱⁱ. In this Judgment, the Court has stressed the importance to follow separate procedures in cases, where it might be necessary to have decisions adopted by both the Union and by its Member States in their independent capacity.

8. The European Union also brings to the attention another recent Judgment of the Court of Justice of the European Union, which may be of interest to the ILC as it interprets the constituent instrument of another international organization, namely the so-called "European Schools" established by the Convention defining the Statute of the European Schoolsⁱⁱⁱ. In this case the Court of Justice of the European Union explicitly referred to and relied on Article 31(3)(b) of the Vienna Convention. The practice, which the Court took into account, is the case-law of the Complaints Board of the European Schools, which, according to the Court, "*should be considered to be a subsequent practice in the application of the Convention defining the Statute of the European Schools within the meaning of Article 31(3)(b) of the Vienna Convention*"^{iv} and "[t]he practice has never been the subject of challenge by the

parties to that convention. The absence of any challenge by those parties must be regarded as reflecting their tacit agreement to such a practice^v. The Court also relied on ICJ case-law to conclude that “*as is clear from the case-law of the International Court of Justice, the subsequent practice followed in the application of a treaty may override the clear terms of that treaty if that practice reflects the parties’ agreement*”^{vi}. It should be stressed again that this is a special case, given that the European Schools are an international organization distinct from the European Union and this judgment does not affect the case-law of the European Court of Justice regarding the method of interpretation of the Founding Treaties of the Union, as already explained in our written contribution on the matter and recognized by the Special Rapporteur in his report.

9. In conclusion, the European Union once again expresses its interest in the topic and its intent to continue its involvement into its future consideration. In particular, it stands ready to further support the Special Rapporteur in providing additional information, if need be.

Thank you for your attention.

ⁱ See para. 13 of the draft Commentaries (“*It is sometimes difficult to determine whether “Member States meeting within” a plenary organ of an international organization intend to act in their capacity as members of that organ, as they usually do, or whether they intend to act in their independent capacity as States parties to the constituent instrument of the organization*”).

ⁱⁱ Case C-28/12, European Commission v. European Council, ECLI:EU:C:2015:282.

ⁱⁱⁱ Joint cases C-464/13 and C-465/13, Europäische Schule München v. Silvana Oberto (C-464/13), Barbara O’Leary (C-465/13), ECLI:EU:C:2015:163.

^{iv} Joint cases C-464/13 and C-465/13, Europäische Schule München v. Silvana Oberto (C-464/13), Barbara O’Leary (C-465/13), ECLI:EU:C:2015:163, para.65.

^v *Id.*, para.66.

^{vi} *Id.*, para 61.