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Held at the Palais des Nations, Geneva, on Wednesday, 25 May 2016, at 10 a.m.

Contents

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Present:

Chairman:	Mr. Comissário Afonso
Members:	Mr. Caflisch
	Mr. Candioti
	Mr. El-Murtadi
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Gómez-Robledo
	Mr. Hassouna
	Mr. Hmoud
	Ms. Jacobsson
	Mr. Kamto
	Mr. Kittichaisaree
	Mr. Kolodkin
	Mr. Laraba
	Mr. Murase
	Mr. Murphy
	Mr. Niehaus
	Mr. Nolte
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Saboia
	Mr. Singh
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (agenda item 4) (*continued*) (A/CN.4/694)

The Chairman invited the Commission to resume its consideration of the fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/694).

Mr. Murase said that he wished to thank the Special Rapporteur for his excellent fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, and recalled that, in his view, the outcome of the topic should take the form of guidelines rather than conclusions.

With regard to new draft conclusion 1a, it was a good idea to begin with a provision on the scope of application. However, it would be better to delete the word "significance", which could give the impression that the draft conclusions predetermined the importance of subsequent agreements and subsequent practice relative to other means of interpretation. It was clear, as stated in paragraph (3) of the commentary to draft conclusion 1, that all means of interpretation were part of "an integrated framework for the interpretation of treaties" and that the weight accorded to a particular means of interpretation varied in each case.

Turning to draft conclusion 12, he noted that the legal significance of the pronouncements of expert bodies varied depending on the nature of the body, the context in which the pronouncement was issued and other factors. For example, the pronouncements made by the United Nations Human Rights Committee, including "concluding observations" on State party reports, "views" in response to individual communications and "general comments", which shared the characteristic of being non-binding, were not all of the same relevance to the interpretation of the International Covenant on Civil and Political Rights. The variety of those pronouncements should be noted, at least in the commentary. The distinction drawn in paragraph 1 of the draft conclusion between expert bodies and organs of an international organization was not sufficiently clear, partly because the term "organ of an international organization" was not defined in draft conclusion 11 or in the commentary thereto. He did not understand why an expert body that happened to be an organ of an international organization should be treated differently to an expert body that was not an organ of an international organization if the two bodies performed the same function. There were organs of an international organization whose members served in their individual capacity. As noted by the Special Rapporteur in footnote 26 of the report, and as he had alluded to in his oral presentation, the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization (ILO) was an organ of an international organization whose role was to provide an impartial and technical evaluation of the legislative conformity of national laws and regulations with the requirements of ratified ILO conventions. The Committee of Experts clearly played a significant role in the interpretation of treaties based on subsequent practice; he would return to that matter later.

There were other examples of expert bodies that were also organs of international organizations, such as the Independent Advisory Committee and the technical expert groups established under the auspices of the World Health Organization. If the Special Rapporteur's intention was to exclude those expert bodies from the scope of draft conclusion 12 — which should be avoided — he would need to explain in the commentary why those bodies were treated differently. He himself had doubts about the advisability of taking into consideration the Compliance Committee under the Kyoto Protocol. Although article 18 of the Protocol established that "any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol", the establishment of the Compliance Committee, which entailed binding consequences for the parties, had come about not by way of an amendment but by a 2005 decision of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol.

Draft conclusion 12 (2), which was the core of the draft conclusion, caused concern for two reasons. First, while he did not disagree with the Special Rapporteur that

subsequent agreements and subsequent practice might "be reflected in" the pronouncements of expert bodies, he wished to stress that it was the independence of those bodies that gave them special authority and that, as a corollary, it was because of their independence that their pronouncements were often criticized by States parties as not reflecting the intent of those States parties. It should thus be clarified in the commentary under what circumstances it might be assumed that subsequent agreements and subsequent practice were reflected in a particular pronouncement. More importantly, it seemed that, in draft conclusion 12 (2), the pronouncements of expert bodies and the reactions of States thereto were conflated, despite the warning in paragraph (10) of the commentary to draft conclusion 2 to the effect that subsequent agreements and subsequent practice as authentic means of treaty interpretation were not to be confused with interpretations of treaties by international courts, tribunals or expert treaty bodies in specific cases. To support his position, the Special Rapporteur cited the report of the sixty-fifth session of the International Law Commission, the statement made by the representative of the United States of America to the Sixth Committee on 3 November 2015 and the Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies, which had been adopted in 2004 by the International Law Association. However, those sources merely referred to the reactions of States to the pronouncements of expert bodies and not to the pronouncements themselves. He did not deny that there were cases in which such pronouncements triggered actions by States that led to a subsequent agreement or subsequent practice, but, even in those cases, the pronouncements of expert bodies gave rise to a subsequent agreement or subsequent practice only indirectly, through the reactions of States. It should therefore be made clear that it was the reactions that resulted in subsequent agreements and subsequent practice.

Draft conclusion 12 (4) did not appear to be consistent with draft conclusion 9 (2), which provided that "silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction". On the subject of silence, he wished to draw members' attention to a recent controversy over the role of the ILO Committee of Experts on the Application of Conventions and Recommendations, which, as members were aware, had for the past 30 years interpreted the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) as protecting the right to strike. In 2012, the Employers' Group had objected to that interpretation and had decided to refuse to participate in the consideration of any case of serious non-compliance with the Convention by a State party. In a statement delivered in 2015, the Government Group had temporarily resolved the dispute by occupying the middle ground, recognizing that the right to strike was a fundamental principle, but also asserting that it was not an absolute right. He wondered whether, in that case, the decades-long silence of States constituted their acceptance of the interpretation of a treaty as expressed in the pronouncement of an expert body. In a recent article, Hofmann and Schuster argued that the fact that the rulings of the ILO supervisory bodies had gone unchallenged for decades could be regarded as a subsequent practice within the meaning of article 31 (3) (b) of the Vienna Convention on the Law of Treaties.

He had no particular objection to the revised version of draft conclusion 4 (3), though the unqualified term "official conduct" was perhaps a little abrupt. He therefore proposed returning to the previous version and adding the words "or by expert bodies" after "conduct by one or more parties". Lastly, he wished to stress that he was not in any way underestimating the relevance of the pronouncements of expert bodies to the interpretation of a treaty. He fully agreed with the Special Rapporteur that the legal significance of such pronouncements had been acknowledged by the International Court of Justice, among others. In many cases, however, the legal significance of the pronouncements had been acknowledged not because they constituted "subsequent practice" but for other reasons.

Concerning draft conclusion 13, he broadly agreed with paragraph 1 but had some doubts about paragraph 2. The draft conclusions as a whole were intended to serve as guidance not only for domestic courts but also for international courts and other treaty interpreters. It seemed odd, therefore, to have special guidelines only for domestic courts. In addition, subparagraphs (a) and (c) of paragraph 2 simply repeated what was said in the preceding draft conclusions, and subparagraph (b) added nothing. If the Special Rapporteur considered that special guidelines should be given to domestic courts, those guidelines

could perhaps be set out in the commentary. To conclude, he supported the referral of the draft conclusions to the Drafting Committee.

Mr. Hmoud said that he wished to thank the Special Rapporteur for his fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties. The report, which was well researched and comprehensive, provided a thorough analysis of the case law of international and national courts, and conclusions that tended to reflect the state of the law in relation to the relevance of the pronouncements of expert bodies and national courts to the interpretation of treaties. Before turning to the draft conclusions, he wished to make some general comments. In his opinion, the Special Rapporteur, having noted the scarcity of practice and of pronouncements by States and international courts and tribunals on the relationship between the pronouncements of expert bodies and subsequent agreements and subsequent practice as means of interpretation, had adopted a deductive approach. He had thus drawn analogies without necessarily basing his conclusions on established practice or even on settled positions on the legal value of the pronouncements of expert bodies in relation to the interpretation of treaties in the context of subsequent agreements and subsequent practice. The report in general and draft conclusion 12 in particular seemed to extend the scope of the topic, in that they dealt not only with the relationship between such pronouncements and subsequent agreements and subsequent practice but also with the relevance of the pronouncements according to the rules of interpretation of the Vienna Convention on the Law of Treaties. In that regard, too, the Special Rapporteur based his analysis on a limited number of sources that referenced the views of a few States or the isolated findings of courts in certain countries. While he understood the constraints deriving from the scarcity of practice and case law, it was essential for the Commission to base its conclusions on *lex lata*. The link between the Special Rapporteur's analysis and the outcome sought was not always very clear, and his observations were sometimes difficult to connect to article 31 (1) or (3), or article 32, of the Vienna Convention on the Law of Treaties. That connection was, however, essential to the preparation of relevant draft conclusions, particularly on the pronouncements of expert bodies.

He agreed with the Special Rapporteur that the pronouncements of treaty bodies comprising State representatives and those of organs of international organizations fell outside the scope of draft conclusion 12. Since the conduct of such bodies was attributable to States and to international organizations, respectively, one might question the usefulness of having a separate draft conclusion on the specific category of bodies of experts who served in their individual capacity and who were tasked with contributing to the "proper" application of the relevant treaties. That definition was not specific enough and could be interpreted broadly. The draft conclusion should relate only to bodies whose function was to interpret the treaty under which they had been established and not merely to contribute to its proper application. It was not specified in the report how contributing to the proper application of a treaty was linked to subsequent agreements and subsequent practice under articles 31 and 32 of the Vienna Convention. Moreover, if the body in question was explicitly or implicitly tasked with interpreting the provisions of the treaty under which it had been established (by applying the rules of interpretation), the value of its pronouncements might be determined by article 32, but not by its "conduct". It followed that the value of the pronouncements of expert bodies in relation to interpretation could be assessed only on a case-by-case basis. To consider as subsequent practice the pronouncement of a body that contributed to the proper application of a treaty but that had no direct or indirect power to interpret it would be to attach more value to that pronouncement for the purpose of interpretation than it actually had. The cases cited in that connection in the report served only to underline the assertion that such views, comments or recommendations had an interpretative value not because they were the pronouncements of bodies tasked with contributing to the proper application of a treaty but because they were the pronouncements of bodies that performed some kind of interpretative function. That was not to say that the bodies had to be judicial or quasi-judicial in nature, or that their pronouncements had to be binding. Consequently, he proposed inserting, in the definition of expert bodies, a reference to their interpretative function in addition to the reference to their contribution to the proper application of treaties. The scenario in which the pronouncement of an expert body interpreted a treaty provision that was not in the part of

the treaty that the body was tasked with interpreting should be addressed either in the definition of expert bodies or in a separate paragraph.

He agreed with the Special Rapporteur that the pronouncements of expert bodies could not constitute subsequent practice within the meaning of article 31 (3) (b). However, they could not constitute subsequent practice within the meaning of article 32, either, because that would put them on the same level as the practice of States and international organizations despite there being insufficient legal grounds to do so. In addition, that assertion would not prevent such pronouncements from being interpreted as constituting subsequent practice in the application of a treaty that might establish the agreement of the parties. It would thus be helpful to add a paragraph to draft conclusion 12 excluding the pronouncements of expert bodies from the scope of subsequent practice under article 31 (3) (b), which the current wording of paragraph 2 did not do.

The issue of human rights treaty bodies was worth commenting on in several respects. First, while the Commission had rightly discussed the legal value of the views expressed by such bodies in their work on reservations to treaties, it did not seem necessary to place special emphasis on the matter in the context of the topic under consideration. The Commission was free to discuss the interpretative value of the views expressed by such bodies on the human rights treaties under which they had been established, but not in the context of subsequent agreements and subsequent practice. The Special Rapporteur should not attempt to distort the rules of interpretation based on subsequent agreements and subsequent practice to accommodate the special character of treaty monitoring bodies and their pronouncements. The analysis of the pronouncements of human rights treaty bodies should substantiate the content of draft conclusion 12 and not the other way around. The argument in the 2004 report adopted by the International Law Association that the pronouncements of human rights treaty bodies could amount to subsequent practice was not convincing. In draft conclusion 12, the Commission should not place on the pronouncements of such bodies a value that they did not have by considering them to be a form of subsequent practice in the interpretation of treaties. There was no evidence in the report to substantiate that view and, even though examples were given of cases in which such pronouncements had been viewed as anything from worthless to authoritative, the value of the pronouncements should be judged on a case-by-case basis. Again, such pronouncements could not be regarded as subsequent practice under articles 31 and 32 of the Vienna Convention on the Law of Treaties, because there was no evidence to that effect in the report, except maybe the judgment referred to in paragraph 30. Other examples given in footnotes 84 and 85, and in chapter III, illustrated the weight that some domestic courts had attached to the pronouncements of treaty bodies, but did not show that the pronouncements constituted subsequent practice; the courts in question could have determined that to be the case, but had not done so. Moreover, as noted in paragraph 35 of the report, “domestic courts have only rarely attempted to explain the legal basis for their assessment that such pronouncements … should or need to be taken into account”. Indeed, in the *Ahmadou Sadio Diallo* case, the International Court of Justice had found that pronouncements of the Human Rights Committee were relevant for the purpose of the interpretation of the International Covenant on Civil and Political Rights, and that it should give them “great weight”. Even so, it had stated not that they amounted to subsequent practice in the application of a treaty, but that they were one of several means of interpretation. In addition, the International Court of Justice and national courts were more concerned with the binding nature of the interpretations of treaty bodies than with determining whether the pronouncements of such bodies could amount to subsequent practice or whether they fell under articles 31 or 32 of the Vienna Convention. In fact, most of the sources cited in the report essentially referred to the weight of the pronouncements of treaty bodies, but not to whether those pronouncements constituted subsequent practice.

In his presentation, the Special Rapporteur had stated that the distinction between an obligatory “taking into account” of such pronouncements and a discretionary “taking into account” echoed the distinction made between means of interpretation in articles 31 and 32 of the Vienna Convention. Again, there was no evidence to support drawing such a parallel. Moreover, the claim that the duty of States to cooperate with treaty bodies implied a duty to consider and take into account their pronouncements did not mean that such

pronouncements constituted subsequent practice or, in other words, a means of interpretation under article 31.

The arguments put forward by the Special Rapporteur in paragraphs 49 to 57 of the report to support the wording of draft conclusion 12 (3) related to the legal weight of the pronouncements of expert bodies and not to their relevance to article 31 (1) of the Vienna Convention. To put it differently, it was not explained in the report how such pronouncements could be factored into the application of article 31 (1): did they contribute to clarifying the meaning of the treaty, or its object, purpose or context? That was not what emerged from the report, and the Commission certainly could not associate the potential legal value of such pronouncements with article 31 (1).

As to the contribution of the pronouncements of expert bodies to interpretation under article 32, he could agree that such pronouncements constituted a supplementary means of interpretation, but there was nothing to suggest that they amounted to subsequent practice. Regarding the other aspect of the pronouncements of expert bodies, namely whether subsequent agreements and subsequent practice under article 31 (3), and article 32, of the Vienna Convention could arise from, or be reflected in, those pronouncements, he supported the wording of draft conclusion 12 (2), which was sufficiently flexible and did not prejudge the legal value of the pronouncements or their relationship with the subsequent agreements and subsequent practice of the parties to the treaty concerned or of relevant actors. Nevertheless, it was important to include in the commentaries to the draft conclusions examples of how such pronouncements had given rise to agreements of the parties under article 31 (3) of the Vienna Convention or had been viewed as constituting subsequent practice.

He was not at all sure that there was any legal basis for considering that silence on the part of States with regard to the pronouncements of expert bodies would create any legal effect, unless the treaty in question provided otherwise. That exception aside, there was no rule according to which silence on the part of a State party with regard to the pronouncements of an expert body had to be seen as acquiescence, presumed or otherwise, to subsequent practice in the context of article 31 (3) (b) of the Vienna Convention, even if the circumstances warranted a reaction. The Special Rapporteur's assertion that it could not be excluded, however, that a particular pronouncement or practice might exceptionally "call for some reaction" was not substantiated in law.

While the Special Rapporteur's proposed modification of draft conclusion 4 (3) seemed necessary in order to adapt the draft conclusions to accommodate the practice of international organizations and the pronouncements of expert bodies, it should be stressed that, although the interpretative value of the practice of international organizations and their organs had been recognized, the same could not be said for the pronouncements of expert bodies, for the reasons explained earlier. There was no relationship between the acts of an organization, which could be official because they were performed "in the exercise of an element of public authority", and such pronouncements, even when issued by bodies whose function was to interpret the treaty under which they had been established. It could be argued that expert bodies acted, through their pronouncements, on behalf of States parties, but in reality, that depended on the provisions of each treaty. While the pronouncements of expert bodies could indeed be supplementary means of interpretation under article 32, he doubted that they could be categorized as subsequent practice.

Regarding draft conclusion 13, it should be noted that only a limited number of national court decisions were studied in assessing the treatment of subsequent agreements and subsequent practice in the interpretation of treaties and the value of such decisions as subsequent practice. It should also be emphasized that double value could unintentionally be placed on the decisions of national courts as an authentic means of interpretation under article 31 (3) (b) of the Vienna Convention and as a supplementary means of interpretation under article 32. In that connection, it might be useful to clarify in the commentary that a single example of subsequent practice could not be used for both. As to the possibility that national court decisions, as a subsequent practice, could establish the agreement of the parties under article 31 (3) (b) of the Vienna Convention, he agreed with the Special Rapporteur that a "judicial dialogue" would be insufficient to establish that agreement. That

should be made clear in the commentary, where it should also be specified that, in that situation, the agreement of the parties had to be established by other means.

Concerning draft conclusion 13 (2), he agreed with the Special Rapporteur that the decisions of domestic courts had not been uniform with regard to the relative weight attached to subsequent agreements and subsequent practice, but he saw no need to provide guidance in that respect. The draft conclusions as a whole were intended to, *inter alia*, provide practitioners, States, international organizations, international courts and other actors with guidance on subsequent agreements and subsequent practice in relation to the interpretation of treaties. One might therefore wonder why specific guidelines should be laid down for national courts — particularly as the content of the guidelines in draft conclusion 13 (2) mirrored the other draft conclusions — and why the same should not be done for other actors. To conclude, he recommended the referral of the draft conclusions to the Drafting Committee.

Mr. Kittichaisaree said that he would like Mr. Murase to clarify his comments on draft conclusion 12 (3), as he appeared to have concluded that the reactions of States to the pronouncements of expert bodies constituted an interpretation of treaties, but that the pronouncements themselves did not. However, he himself understood that, in paragraphs 109 to 111 of its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice had recognized that expert bodies contributed to the interpretation of treaties, which was in line with draft conclusion 12 (3).

Mr. Tladi said that he would make a few general comments about certain aspects of the report before turning to the proposed draft conclusions. First, it was not clear to him why the Special Rapporteur initially drew a distinction between expert bodies under human rights treaties and other expert bodies. It was particularly surprising since, in paragraph 15 of the report and then again in paragraph 67, it was correctly stated that the legal effect of pronouncements had to be determined "by way of applying the rules on treaty interpretation" according to the Vienna Convention. Thus, it was not the type of treaty, or rather the subject matter of the treaty, that determined the legal effect of pronouncements, but the provisions under which the expert body operated. The meaning of the relevant provision, as correctly noted in the report, should be determined by an interpretation of that provision based on the generally agreed rules of interpretation, which included subsequent agreements and subsequent practice as defined by the Commission.

With regard to the statement in paragraph 41 of the report that the Commission had left the question open as to whether it should refer to the nature of a treaty, the Commission had, as he recalled, in fact decided not to consider the "nature" of a treaty to be a decisive factor, and the conclusion that articles 31 and 32 were sufficient was testament to that. Ultimately, that distinction was of little consequence, since it was concluded in the report that those "other bodies" were not intended to play a role in the interpretation of treaties. However, even that conclusion was doubtful. Based solely on the report itself, it appeared that, rightly or wrongly, those bodies did interpret the treaties under which they had been established. In paragraph 92, the Special Rapporteur gave examples of the way in which the International Narcotics Control Board seemingly interpreted the conventions whose implementation it was tasked with monitoring. At any rate, to ensure the execution and implementation of those conventions, the Board had to interpret to some extent. Similarly, the treatment of the Compliance Committee under the Aarhus Convention and the Compliance Committee under the Kyoto Protocol revealed that those expert bodies also interpreted the treaties under which they had been established.

Regarding the treatment of the Commission on the Limits of the Continental Shelf, while he agreed to a large extent with the Special Rapporteur, in reality, the "recommendations" submitted to a State party, though based on the interpretation of treaties, did not in themselves constitute interpretation. In fact, it was the Scientific and Technical Guidelines of the Commission that constituted an interpretation of article 76, an interpretation that formed the basis of the recommendations submitted to the State party. While the Guidelines were not legally binding, either, States generally followed them when drafting their submissions to the Commission, even if they did sometimes voice their disagreement with certain interpretations. Nevertheless, it would have been interesting for

the Special Rapporteur to consider the attitudes of States and other entities towards the Guidelines, with a view to determining the potential role of the Guidelines in establishing subsequent agreements and subsequent practice.

With regard to the treatment of expert bodies under human rights treaties, the Special Rapporteur mentioned a number of sources and spared no effort in establishing the non-binding nature of the pronouncements of such bodies. The key issue, however, was not whether those pronouncements were legally binding, but what role, if any, they played in terms of interpretation, particularly with regard to subsequent agreements and subsequent practice. What mattered for the purposes of the topic at hand was whether those pronouncements could constitute subsequent agreements and subsequent practice for the interpretation of treaties. On that question, he broadly subscribed to the Special Rapporteur's conclusion. He raised the point only because, in the report, there seemed at times to be a conflation of the role of the pronouncements of expert bodies as means of interpretation and their binding or non-binding character. For example, in paragraph 29, after a discussion of the report of the International Law Association citing the *Ahmadou Sadio Diallo* case before the International Court of Justice, it was stated that the International Law Association and regional human rights courts had adopted the same approach as the Court and had treated the pronouncements of expert bodies "as a possible source of inspiration, but they have not treated them as binding". That conflation was even more evident in the discussion of how domestic courts treated the pronouncements of expert bodies, particularly in paragraph 33. It was clear, from reading the report as a whole, that the Special Rapporteur himself did not conflate those two distinct concepts, as evidenced by the proposed draft conclusion, but the treatment of the issue in the report gave a different impression.

The oral presentation of the report by the Special Rapporteur had led him to wonder whether those issues were raised in order to determine the "interpretative weight, if any," of such pronouncements, and thus whether they were legally binding, or whether they should merely be taken into account. In his view, such considerations did not fall within the scope of the topic, which concerned not the interpretation of treaties in general, including the weight to be accorded to various elements, but subsequent agreements and subsequent practice. In the same vein, the conclusions on the relevance of the pronouncements of expert bodies for the purposes of article 38 (1) (d) of the Statute of the International Court of Justice did not seem necessary as they also fell outside the scope of the topic. Even though the report did not contain any proposed draft conclusions on the subject, there was no reason why the issue should be dealt with at that time.

As a final general comment, he wished to commend the Special Rapporteur for his conscious decision to go off the beaten track by exploring jurisprudence from outside Europe and the Americas, even though the geographical scope of his work could have been extended. He wished to make a few comments about South African jurisprudence. First, in footnote 119 of the report, reference was made to "South Africa", but the footnote appeared to concern the *Bon Vista Mansions* case. Secondly, the footnote contained a reference to the *Treatment Action Campaign* case, presumably as a source regarding the non-binding nature of the pronouncements of human rights treaty bodies. In that case, however, the Constitutional Court had refused to apply the pronouncement on "minimum core obligations" not because it was not authoritative — indeed, its decision was not at all based on the role of the pronouncements of the Committee on Economic, Social and Cultural Rights — but because, regardless of the Committee's interpretation, the doctrine of "minimum core obligations" was not part of the South African constitutional fabric. There were, of course, countless other decisions of the Constitutional Court that shed light on its approach towards the pronouncements of treaty bodies, notably in the *Makwanyane* case, in which it relied on pronouncements of the Human Rights Committee, and in *Carmichele v. Minister of Safety and Security,* and *Gay and Lesbian Equality v. Minister of Justice*.

Turning to the draft conclusions proposed by the Special Rapporteur, he had no objection to draft conclusion 12, but wished to make a few observations. While he did not disagree with paragraph 2, he was not sure that it was needed. The point that was really being made was that the pronouncements of expert bodies could give rise to subsequent agreements and subsequent practice, or that, once subsequent agreements and subsequent

practice as defined had been established, the pronouncements of expert bodies could capture them. Thus, those pronouncements could be the reason for, or the repository of, subsequent agreements and subsequent practice. That statement of fact was absolutely true, but its normative value was somewhat limited, though that had not prevented the Commission from adopting, on first reading, a similar draft conclusion concerning the practice and agreements of international organizations. The observations made by Mr. Murase and by Mr. Hmoud about draft conclusion 12 related to editorial, rather than substantive, issues. As to paragraph 3, as he had noted at the previous session with regard to international organizations, such subsequent practice was more valuable in contributing to the application of article 31 (1) of the Vienna Convention. In other words, he doubted that such pronouncements constituted subsequent practice. There was one major difference between articles 31 and 32 of the Vienna Convention that the Special Rapporteur and the Commission might wish to consider: the application of article 32 was relevant only in limited cases, namely cases of ambiguity or absurdity.

Regarding draft conclusion 13, the proposition in paragraph 1 was correct, but the Special Rapporteur could perhaps find an appropriate qualifier to clarify which decisions of domestic courts qualified as subsequent practice under article 31 (3) (b), in order to determine whether they met the criteria laid down in draft conclusion 4 (2) as provisionally adopted in 2013. He had the same reservations about paragraph 2 as Mr. Murase and Mr. Hmoud. He considered that the draft conclusions as a whole were directed at domestic courts, too, so he did not understand why specific guidelines should be developed with regard to the decisions of those courts, unless there was a suggestion that the guidelines in question applied only to domestic courts, and that international courts and tribunals could ignore them. At the same time, he fully supported some of the conclusions in paragraph 2, but would prefer them to be of a general nature rather than directed at domestic courts. Lastly, as Mr. Hmoud had rightly noted, some of the provisions were already to be found in the draft conclusions that had been adopted. The concern expressed by Mr. Murase did not appear to be well founded, since draft conclusion 13 (2) (d) and draft conclusion 12 (4) seemed rather to be mutually reinforcing.

To conclude, he supported the referral of the draft conclusions to the Drafting Committee.

Mr. Forteau said that, as in previous years, the Special Rapporteur's report was based on extensive research and a very thorough analysis of the material available. From a theoretical standpoint, the Special Rapporteur addressed some particularly interesting issues, on which he shed new light. Since the Commission had started working on the topic, there had been a question mark over how to deal with expert bodies and domestic courts, and fortunately, thanks to the fourth report, the Commission was now able to take a position on the two issues and to adopt the draft conclusions as a whole on first reading. To that end, in chapters IV and V of the report, the Special Rapporteur made some proposals for the final "clean-up", which it would be up to the Drafting Committee to consider.

At the present juncture, he wished to make three comments on those proposals. First, he was not sure that it was right to state, as the Special Rapporteur did in paragraph 115 of his report, that the issue of treaties between States and international organizations had not been addressed in relation to the topic at hand. Indeed, many of the commentaries to the draft conclusions adopted at previous sessions contained references to practice in relation to treaties to which States, but also at least one international organization, were parties. That was the case with the practice in relation to World Trade Organization agreements and to the United Nations Convention on the Law of the Sea, to which the European Union was a party. Secondly, while the introductory draft conclusion proposed by the Special Rapporteur in paragraph 117 of the report seemed useful and in line with the Commission's established practice, he was not sure that he fully understood what was meant by the word "significance" in that context. Lastly, he agreed with the Special Rapporteur that draft conclusion 4 (3) needed to be revised to reflect the conclusions that had already been adopted, but only to take into account the practice of an international organization in the application of its constituent instrument. He did not believe, on the other hand — for reasons that he would set out later — that it was necessary to include the practice of expert bodies in the draft conclusion. In his view, it would thus be sufficient to state, in draft

conclusion 4 (3), that other subsequent practice consisted of "conduct in the application of the treaty".

With regard to the fourth report, in which the Special Rapporteur, after very thorough consideration, proposed two new draft conclusions, it seemed to him that neither of the draft conclusions was necessary, and he was inclined to think that there was no reason to refer them to the Drafting Committee. That was not to say that the Special Rapporteur's analyses on the matter were of no value. They were, but only as a means of confirming the commentaries to the draft conclusions that had already been adopted by the Commission. They did not justify the adoption of two new draft conclusions for the following reasons. First, concerning the pronouncements of expert bodies, which would be better translated in French as "*prononcés*", he would not comment on the wording of draft conclusion 12, which, as highlighted by Mr. Murase and Mr. Hmoud, raised several questions, because, more fundamentally, he did not think that it was possible to regard the pronouncements of such bodies as subsequent "practice" within the meaning of that term for the purposes of the interpretation of treaties or for the purposes of the present topic. Such pronouncements were more akin to international court decisions that stated the law rather than implementing it. As very rightly recalled by the secretariat in the memorandum that it had prepared on treaty-based monitoring mechanisms for the purposes of the topic of crimes against humanity, the role of such mechanisms was not to implement treaties — in other words, to execute or give effect to the rights and obligations that they enshrined — but to "monitor" their implementation or application. One could not, therefore, speak of practice in the proper sense of the term.

He was surprised that Mr. Hmoud, having made the same comments, had nevertheless recommended the referral of draft conclusion 12 to the Drafting Committee. The fact that the pronouncements of expert bodies were not a form of practice within the meaning of the draft conclusion was clear from the jurisprudence of the International Court of Justice. In 2010, in the *Diallo* case, the Court had taken into consideration the pronouncements of expert bodies not as a form of "practice" but as quasi-judicial "precedents" or as "case law". In that regard, it had been absolutely right to refer to the "interpretative case law" of the Human Rights Committee. Similarly, in its general comment No. 33, which was cited by the Special Rapporteur in paragraph 20 of his report, the Committee itself recalled that "the Views issued by the Committee under the Optional Protocol exhibit some of the principal characteristics of a judicial decision", specifically an international judicial decision. In the *Diallo* case, the Court also equated the case law of the Human Rights Committee with that of the African Commission on Human and Peoples' Rights, and, in the following paragraph of its judgment, that of the European Court of Human Rights and that of the Inter-American Court of Human Rights. The Commission, too, treated the pronouncements of expert bodies and the decisions of international courts as parts of a single whole in its Guide to Practice on Reservations to Treaties, as recalled by the Special Rapporteur in paragraphs 36 to 40 of his report.

That was why he strongly disagreed with the Special Rapporteur when, for example, he stated in paragraph 16 of his report that the pronouncements of expert bodies might be relevant for the interpretation of a treaty as "a form of practice subsequently arrived at under the treaty". Such pronouncements did not amount to a "practice", but to international "case law" or, if one preferred, to "subsidiary means" for the interpretation of rules of law, which was entirely different to subsequent practice as a means of interpretation. In the context of its work on customary international law, the Commission had clearly drawn a distinction between, on the one hand, judicial decisions that were an element of practice (which covered domestic court decisions and nothing else) and, on the other, decisions that were merely subsidiary means for the determination of rules of law, namely any international judicial or quasi-judicial decision and, in certain cases, some domestic court decisions. That did not mean, however, that the pronouncements of expert bodies were not relevant for the interpretation of treaties. The Special Rapporteur was quite right to state, in paragraph 32 of his report, that "such pronouncements … deserve to be given considerable weight in determining the meaning" of a treaty, as recalled by the Court in the *Diallo* case when it stated that it should "ascribe great weight to the interpretation adopted by" the Human Rights Committee. The Special Rapporteur was also right to state that such pronouncements were a "relevant means of interpretation", but, once again, the fact that the

pronouncements of expert bodies were a means of interpretation did not make them a form of practice. Care should be taken not to conflate the genus and the species: while the pronouncements of expert bodies belonged to the general category of means of interpretation, they did not belong to the specific category of subsequent practice.

The fact that the pronouncements of expert bodies were a supplementary means for the interpretation of the law rather than a form of subsequent practice meant that none of what was said in draft conclusion 12 was specific to expert bodies. The Commission could adopt the same text with the words "of expert bodies" replaced by "of the International Court of Justice", since a practice could arise from, or be reflected in, a decision of the Court, which could also contribute to the interpretation of treaties. For example, the Court's interpretation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in *Belgium v. Senegal* in 2012 could give rise to a certain form of subsequent practice. That the ruling of an international court should have that effect clearly did not, however, make it a form of practice within the meaning given to the term in the draft conclusion. In that regard, draft conclusion 12 and, in particular, paragraph 64 of the Special Rapporteur's report, were, in his view, based on a misinterpretation of the legal nature of the pronouncements of expert bodies. Since such pronouncements did not constitute a form of practice, there was no reason to devote a whole draft conclusion to them in a set of draft conclusions focusing solely on subsequent agreements and subsequent practice, and which did not concern other means of interpretation.

He did not see the usefulness of draft conclusion 13, either. He fully accepted, of course, that the decisions of domestic courts were indeed a possible form of subsequent practice in relation to the application or interpretation of a treaty, but, on the one hand, that was true of the conduct of all State organs, not only that of domestic judicial bodies, and, on the other, the Commission had already adopted draft conclusion 5, paragraph 1 of which provided that "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". It was thus difficult to understand why it was necessary to repeat that principle of attribution in a new draft conclusion. It was true that the Special Rapporteur complemented the general reminder with a number of clarifications in draft conclusion 13 (2), but it was not clear why those clarifications were useful and, in that regard, he aligned himself with the comments made by Mr. Murase. The aim of the clarifications was to regulate the conduct of domestic courts by recommending that they should follow certain guidelines when applying a treaty, but it was hard to understand why the guidelines were expressed using the verb "should", since domestic courts were required, as organs of the State, to follow the international law principles of treaty interpretation. In any event, and like Mr. Murase and Mr. Hmoud, he was not sure why such recommendations should be made to domestic courts but not to the executive or legislative authorities. There was nothing to justify that distinction. If the objective was to guide the practice of State organs, it should be done in a consistent manner by addressing recommendations to every kind of organ, not just judicial bodies. Moreover, even if there were a need to coordinate domestic practice, as maintained by the Special Rapporteur, that need related mainly to the practice of the executive authorities, which was far more extensive than judicial practice.

Lastly, and in any case, he did not think that it would be appropriate for the Commission to adopt such guidelines. Given that States were bound by the rules of interpretation embodied in articles 31 and 32 of the Vienna Convention on the Law of Treaties, all State organs were expected to follow those rules, and it was enough to read draft conclusions 1 to 11 to determine how to take into account subsequent agreements and subsequent practice. There was therefore no need to repeat, in draft conclusion 13, what flowed from the draft conclusions that had already been adopted. In that connection, all the material presented by the Special Rapporteur in paragraphs 95 to 111 of his report would prove very useful in supplementing the commentaries to draft conclusions 1 to 11, whose substance was thus corroborated. It was, however, important to be fair to the Special Rapporteur. As the Special Rapporteur had noted in his oral presentation, the Commission itself and some delegations to the Sixth Committee had asked him to examine the specific issues of the pronouncements of expert bodies and the decisions of domestic courts, and it was worth recalling that, at the previous session, the Commission had submitted questions on those matters to States. The Special Rapporteur could thus not be criticized for

considering the issues in his fourth report, but the conclusion that emerged from that consideration was nevertheless that separate draft conclusions should not be devoted to the issues.

To conclude, he recommended the referral of the introductory draft conclusion and of revised draft conclusion 4 to the Drafting Committee. Subject to a final "clean-up" of the draft conclusions that had already been adopted, the Commission should be in a position to adopt, on first reading, draft conclusions 1 to 11 and an introductory draft conclusion, as proposed by the Special Rapporteur.

Mr. Tladi said that he wished to know whether Mr. Forteau was arguing that paragraphs 2 and 3 of draft conclusion 12 were not necessary or that their content was inaccurate. He agreed with Mr. Forteau, Mr. Hmoud and Mr. Murase that the pronouncements of expert bodies did not amount to practice, but there was nothing in the draft conclusions to indicate that they did. He would therefore like to know in what way draft conclusion 12 suggested that the pronouncements of expert bodies constituted practice.

Mr. Forteau said that either the pronouncements of expert bodies were a form of practice, in which case the same kind of draft conclusion should be used for the decisions of any international court — one might wonder, in that regard, whether an interpretation adopted by the International Court of Justice in a case involving two States could establish a practice that could be relied on against the other States parties to the convention in question — or, as he saw it, they were not a form of practice, in which case he questioned the usefulness of such a draft conclusion in the context of a topic that focused solely on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

Mr. Murphy said that chapter II of the Special Rapporteur's fourth report was devoted to the "pronouncements of expert bodies", but that, since most of the bodies in question were "expert treaty bodies", it would perhaps be best to employ that term in the draft conclusions and the commentaries thereto. Moreover, if the topic was indeed expert treaty bodies, examples to support a draft conclusion on the issue should not be drawn from the practice of other kinds of bodies. For example, the Working Group on Arbitrary Detention, which was referred to in footnote 24, was a special mechanism of the Human Rights Council and not an expert treaty body. Similarly, the Committee on Economic, Social and Cultural Rights, which was referred to in paragraph 45 of the report, had been established by the United Nations Economic and Social Council. In addition, it was stated in paragraph 10 of the report under consideration that the members of such expert treaty bodies served in their "individual" capacity. It would probably be better, in the English text, to describe them in the same way as in the treaties in question, namely as serving "in their personal capacity".

In paragraph 14, the Special Rapporteur listed different kinds of statements by expert treaty bodies, as though the bodies were all of the same nature. It would be useful, however, to analyse the actual competence assigned to each body and then for what purpose they issued "pronouncements", with a particular focus on whether their mandate was to interpret the treaties under which they had been established. For example, with regard to the International Covenant on Civil and Political Rights, the term "general comments" was expressly used in the Covenant to describe the views expressed by the Human Rights Committee in the context of its consideration of the periodic reports submitted by States parties on their implementation of the Covenant, not in the context of interpreting the Covenant. The term "concluding observations and recommendations" appeared nowhere in the Covenant, but had emerged from the Committee's practice. The "views" that the Committee might issue were in response to individual communications alleging human rights violations under the first Optional Protocol to the Covenant. Care was needed, in that respect, to avoid the inappropriate use of terms. Thus, it was asserted in the fourth report that the expression "findings" might be "misunderstood as being limited to factual determinations", but in fact, in the Covenant, which was referenced in footnote 46, "findings" concerned only "findings of fact" and hence could not be viewed as "pronouncements" relevant to the interpretation of the Covenant. In paragraph 14 of the report, it was stated that "the work of expert bodies often consists of action which is, explicitly or implicitly, declaratory (of law)", but no support could be found for that statement in the report and certainly not in the relevant treaties themselves. In his view, the

statement was incorrect and should not be included in the commentary. At best, one could say that the work of expert treaty bodies often consisted of advisory action that was, explicitly or implicitly, declaratory of their interpretation of applicable obligations. It was further stated in the same paragraph that it was "usually" not the case that the action of an expert body possessed "a judicial quality", whereas that was clearly never the case, unless the Special Rapporteur considered international courts to be expert treaty bodies.

He was not sure why, in paragraph 19 of the report, the Special Rapporteur singled out the views of the Government of the United States of America. In fact, a substantial number of governments had commented on draft general comment No. 33, and many of them had disagreed with the Committee's initial position. Similarly, he was not sure why the Special Rapporteur did not cite all three paragraphs of the general comment that were relevant to the function and authority of the Committee, notably paragraph 12. Lastly, if mention was to be made of the general comment, why did the Special Rapporteur not discuss the reactions of States to the final version, given that those reactions appeared to be equally relevant?

In paragraph 26 of the report, the Special Rapporteur referred to an "approach" adopted by a committee of the International Law Association whereby the pronouncements of expert treaty bodies were viewed as falling under article 31 (3) of the Vienna Convention. He did not think that the approach should be mentioned in the Commission's commentaries. At the same time, one might conclude that the only reason to advance such highly strained arguments was precisely that the treaties at issue did not accord to those bodies an express power of interpretation.

Paragraph 46 of the report seemed highly problematic in that it suggested that a "general comment" of the Human Rights Committee could reflect an agreement of the States parties to the International Covenant on Civil and Political Rights as to the interpretation of the treaty simply because the Committee asked States for their views before publishing the final version of the general comment. The problem was that States parties typically made observations opposing, and not agreeing with, the position taken by the Committee, which then often dismissed the observations in whole or in part. Moreover, while the views of States parties were typically posted on the Committee's website during the comment period, they were rarely left on the website thereafter, which could give the impression of acceptance of the Committee's position. Consequently, it was not logical to say that a general comment by the Human Rights Committee reflected an agreement of the States parties merely because the final version thereof was established after the Committee had received observations from those States. Indeed, he seriously doubted that one could find a single instance in which unanimity among States parties could be gleaned from the observations that they submitted to an expert treaty body. If anything, the existence of observations from States that opposed the Committee's position was evidence of disagreement with the Committee's views rather than acquiescence, let alone agreement.

In addition, he did not think that the analysis in paragraph 51 of the report under consideration, which the Special Rapporteur had highlighted at the previous meeting, accurately captured the Commission's 2011 Guide to Practice on Reservations to Treaties. As correctly noted in paragraphs 37 and 38 of the report itself, the relevant guideline from the Commission provided that States and international organizations "shall give consideration to" the expert treaty body's assessment of the permissibility of the reservations. That was the language used in the guideline, but not in paragraph 51, in which the Special Rapporteur quoted from the 2011 commentary. Moreover, it was made clear in the commentary that the expression "shall give consideration to" was simply setting out a general duty of States to cooperate with treaty monitoring bodies in the context of making reservations to a treaty. Nothing in the Commission's guideline or commentary concerned the interpretation of treaties; the matter was simply not addressed, either expressly or implicitly. He did not find it credible, therefore, to say that the Commission "appears to designate such pronouncements as a means of interpretation which needs ('shall') be taken into account, as under article 31". Furthermore, the assertion at the end of paragraph 52 that the Guide to Practice "does not exclude" a particular assertion was beside the point; it did not exclude many potential assertions, but that was not to say that those assertions were correct.

He did not follow the logic in the first sentence of paragraph 56, either, according to which "an individual pronouncement [of an expert treaty body] normally carries less weight than a series of pronouncements or a general comment reflecting a settled position on a question of interpretation". The Special Rapporteur did not provide any evidence of State practice or case law to support that proposition. The International Court of Justice did indeed refer to a "constant" practice, but said nothing about the relative weight to be accorded to a series of pronouncements as opposed to an individual pronouncement. Furthermore, the assertion later in the paragraph that "the level of acceptance of a particular pronouncement … by States parties" was an important factor was not explained and unhelpful; how exactly was such "acceptance" to be determined? If one or more States rejected the view of the expert treaty body, did that mean that there was no acceptance?

With reference to paragraph 58 onwards, it was unsustainable to regard the pronouncements of expert treaty bodies as "subsequent practice" within the meaning given to the term in the context of the topic. The Commission's work on the topic was built on the understanding that "subsequent agreements" and "subsequent practice" referred to the agreements and practice of parties to treaties. Using those terms to refer to the actions of other entities risked confusing the reader as to the nature of the pronouncements of expert treaty bodies, which were certainly not parties to treaties. Perhaps the Special Rapporteur felt the need to characterize the pronouncements of those bodies as "subsequent practice" in order to justify the draft conclusions that he devoted to them, but those conclusions were simply not necessary. In 2015, in draft conclusion 11 (3) and in the commentary thereto, the Commission had addressed the practice of international organizations as contributing to the interpretation of their constituent instruments. In so doing, it had consciously and carefully referred to such practice not as "subsequent practice", but simply as "practice". It could do the same with regard to the pronouncements of expert treaty bodies. He therefore strongly opposed revisiting draft conclusion 4 (3) for the purpose of including in the definition of "subsequent practice" a practice other than that of parties to treaties. During the debate on the advisory opinion of the International Court of Justice, Mr. Kittichaisaree had asserted that expert treaty bodies could contribute to the interpretation of treaties, but that was not relevant to the question under consideration, which was whether the pronouncements of those bodies could be labelled as "subsequent practice" within the meaning given to the term in the context of the topic; he did not think that they could.

The analysis in paragraph 60 of the report was unpersuasive. In particular, the Special Rapporteur asserted that the pronouncements of expert treaty bodies "are 'official statements regarding [their treaty's] interpretation' even if they are not binding". As noted by other members of the Commission, that assertion was wholly unsubstantiated. He did not see how one could assert that such pronouncements were "official" without analysing the specific mandate of the expert treaty body at issue, let alone assert that they were official statements "regarding treaty interpretation". When, in 2013, the Commission had addressed the issue of official statements regarding treaty interpretation, it had listed a series of actions taken by States, but had in no way indicated that actions taken by other entities constituted official statements. Similarly, it was stated in paragraph 62 of the report that the purpose of the pronouncements of expert treaty bodies was "to contribute to [the treaty's] proper application" and to "contribute to [the treaty's] interpretation". Again, there was a need to analyse the mandates of the bodies concerned in order to support such an assertion, but he believed that the mandates of most, if not all, expert treaty bodies assigned no such purpose to pronouncements.

In paragraph 63 of the report, it was claimed that such pronouncements might exhibit some of the characteristics of the subsidiary means referred to in article 38 (1) (d) of the Statute of the International Court of Justice. He had doubts about that assertion, but, in any event, an analysis of that provision of the Court's Statute fell outside the scope of the topic and should thus not be included in any commentary that the Commission might prepare.

Paragraphs 69 to 76 of the report contained an in-depth analysis of the Commission on the Limits of the Continental Shelf. There, too, caution was needed. Paragraph 70 gave the impression that the establishment by a coastal State of the outer limits of its continental shelf was final and binding on "all parties" to the United Nations Convention on the Law of

the Sea so long as that coastal State accepted the recommendation of the Commission on the Limits of the Continental Shelf. It was not quite right, however, to speak of the coastal State "accepting" the recommendation; rather, if the coastal State established the outer limits of its continental shelf "on the basis" of a recommendation by the Commission, those limits would be final and binding, which was not the same. Moreover, the issue of whether or not those limits were binding on "parties" to the Convention was controversial, and it would perhaps be advisable for the Commission not to take a position on it in the context of the topic under consideration. In paragraph 71, the Special Rapporteur seemed to underemphasize the core function of the Commission on the Limits of the Continental Shelf, which was to interpret article 76 of the Convention, and to overemphasize the ancillary issue — which had also been disputed to a degree — of the Commission's lack of competence to interpret article 121 of the Convention. In addition, the reference in paragraph 74 to the Guide to Practice on Reservations to Treaties was confusing in that context, given that the United Nations Convention on the Law of the Sea did not permit reservations and that the role of the Commission on the Limits of the Continental Shelf had nothing to do with them. In any event, the description of the functions of that Commission in paragraph 74 was somewhat misleading. Under article 3 of annex II to the Convention, the Commission on the Limits of the Continental Shelf was assigned two functions: first, to consider submissions and make recommendations concerning the outer limits of the continental shelf (article 3 (1) (a)); and, secondly, to provide scientific and technical advice (article 3 (1) (b)). The first function was the core one and should be emphasized. To his knowledge, the Commission on the Limits of the Continental Shelf had never exercised the second, at least not as a body.

In the interests of time, he would not comment on the part of the report devoted to expert bodies established under treaties other than human rights treaties, such as the Kyoto Protocol and other conventions, but he did think that paragraph 93 of the report, which came at the end of that part, was unclear: did the Special Rapporteur consider that the pronouncements of those other bodies were not relevant for the purposes of the interpretation of treaties?

While the issue of the decisions of domestic courts, which was addressed in chapter III of the report, was interesting inasmuch as it could contribute to the discussion of other aspects of the topic, he, like Mr. Murase, Mr. Hmoud and Mr. Forteau, did not see the need for a draft conclusion on the matter. Domestic and other courts should of course take into account the draft conclusions as a whole, but he saw no point in synthesizing the draft conclusions in a single draft conclusion intended for a particular "consumer". Moreover, the synthesis in proposed draft conclusion 13 was incorrect. While paragraph 1 was unobjectionable, paragraph 2 gave the impression that the process by which domestic courts should interpret a treaty was different to that followed by other entities, which, from the standpoint of international law, was not correct. In addition, the specific provisions of subparagraphs (a) to (e) seemed unnecessary and potentially confusing or misleading.

As to the draft conclusions proposed by the Special Rapporteur, he was in favour of sending new draft conclusion 1a to the Drafting Committee, although he, like other members, considered that the word "significance" should be reviewed. He had doubts about draft conclusion 12 and thought that Mr. Forteau had put forward some very convincing arguments against referring it to the Drafting Committee. Moreover, for the reasons that he had stated, he opposed sending proposed revised draft conclusion 4 and draft conclusion 13 to the Drafting Committee. Lastly, he supported the Special Rapporteur's proposal to move draft conclusion 3, on the "Interpretation of treaty terms as capable of evolving over time", and the Special Rapporteur's decision to retain the focus of the draft conclusions on the rules associated with the 1969 Vienna Convention, which was consistent with the approach taken so far and with relevant State practice, jurisprudence and doctrine.

Mr. Gómez-Robledo said that the members of the Commission should exercise caution when deciding whether or not to refer certain draft conclusions proposed by the Special Rapporteur in his fourth report to the Drafting Committee. Irrespective of the arguments presented at the current meeting, it was essentially a matter of determining the nature of many expert bodies, including those established under human rights treaties. Such bodies performed a quasi-judicial role, increasingly perceived themselves to be genuine

courts and acted as such. A distinction should be drawn between the powers emanating from the general competence granted to those bodies and the optional competence that they had when States accepted the individual complaints procedure. Many matters still needed to be examined, and the Commission should be wary of making decisions too hastily. In his view, the draft conclusions proposed by the Special Rapporteur could be sent to the Drafting Committee *ad cautelam*.

Mr. Kittichaisaree said that he had made a mistake in his earlier statement about Mr. Murase's comments: he had meant to refer to paragraph 2 of draft conclusion 12, not paragraph 3, and that was why Mr. Murase had been unable to provide a response, though Mr. Murase had subsequently and privately offered all the necessary explanations. Secondly, since several members of the Commission were of the opinion that some of the draft conclusions proposed by the Special Rapporteur in his fourth report should not be sent to the Drafting Committee, he wished to know how the Commission should proceed: should it request the Special Rapporteur to revise those draft conclusions and to submit them to the Commission in plenary before it made a decision, or should it continue the discussion and, once that was over, vote on whether to refer the draft conclusions to the Drafting Committee?

Mr. Saboia said that Mr. Gómez-Robledo had been right to draw attention to some important aspects of the issue of expert bodies, whether they were treaty bodies or entities that had been established within international organizations and that liaised with States. Some of those bodies had expanded their competence and, as part of their practice, had opened a dialogue with States, a dialogue that had played a very important role in the development of human rights and in other areas. Some might argue that the issue fell outside the scope of the topic, but he considered that it would be useful for the Commission to take a position on the significance and importance of the pronouncements of expert bodies in a draft conclusion like proposed draft conclusion 12. It would therefore be premature to request the Special Rapporteur to rephrase the draft conclusions or to decide against sending them to the Drafting Committee.

Mr. Kamto, agreeing with the observations of Mr. Gómez-Robledo and Mr. Saboia, said that many members of the Commission had not yet spoken on the topic and that it would thus be more than premature at that stage to decide whether or not to refer the draft conclusions proposed by the Special Rapporteur in his fourth report to the Drafting Committee.

Mr. Park said that he wished to thank the Special Rapporteur for his fourth report, in particular for his thorough examination of the pronouncements of expert bodies and the decisions of domestic courts, and for his analysis of the doctrine regarding the interpretation of treaties, which was a particularly complex subject matter. Noting, as Mr. Forteau had done, that the term "pronouncements" had been rendered in French as "*décisions*", he too considered that it would be preferable to translate the word differently.

In his report, the Special Rapporteur gave prominence to "expert bodies under human rights treaties". The fourth part of chapter II, which was devoted to those bodies, was 20 pages long — equal to two fifths of the report — whereas the fifth part of that chapter, which dealt with "other expert bodies", was a mere 7 pages long and addressed only four bodies. One might therefore question whether there was an imbalance between the attention devoted to human rights bodies and that given, to a lesser extent, to other bodies. In the circumstances, questions remained over the general applicability of draft conclusion 12, which appeared to be based on a specific category of expert bodies.

With regard to draft conclusion 12, according to the Special Rapporteur, the use of the words "may arise" in paragraph 2 was intended to cover, on the one hand, cases in which the pronouncements of expert bodies constituted subsequent agreements and subsequent practice, and, on the other, cases in which subsequent agreements and subsequent practice resulted from the reactions of States parties to those pronouncements. While he agreed with the Special Rapporteur on that matter, he, like Mr. Murase, feared that the use of the expression "may arise" might suggest that subsequent agreements and subsequent practice could flow directly from the pronouncements of expert bodies, without the involvement of States parties. It would be preferable to amend the wording.

Regarding draft conclusion 12 (3), which dealt with the impact of the pronouncements of expert bodies on the interpretation of treaties, it seemed that, rather than the interpretation of treaties through the pronouncements of expert bodies, the issue addressed was that of the interpretation of treaties in general, which fell outside the scope of the topic. Indeed, the Commission should limit itself to clarifying the role of subsequent agreements and subsequent practice in the interpretation of treaties; its mandate was not to examine the legal significance of the pronouncements of expert bodies in relation to the interpretation of treaties. Moreover, it was not clear how paragraph 3 differed from paragraph 2, apart from the fact that one of them — paragraph 2 — focused on subsequent agreements and subsequent practice, while the other dealt with the pronouncements of expert bodies as they related to subsequent agreements and subsequent practice. The phrase "when applying articles 31, paragraph 1, and 32" also raised issues. It was worth recalling, in that regard, that in 2015, in the Sixth Committee, some States had been opposed to draft conclusion 11 (3), with the United States of America arguing that, *inter alia*, article 31 (1) of the Vienna Convention did not concern subsequent practice. It would therefore be preferable to amend draft conclusion 12, either by dealing with article 32 separately from article 31 or by rewording paragraphs 2 and 3, the former of which could stipulate a general principle and would read: "A pronouncement of an expert body cannot, as such, constitute subsequent practice under article 31 (3) (b)." The latter could provide for an exception to paragraph 2 and would read: "Pronouncements of expert bodies may, however, reflect or give rise to a subsequent agreement or a subsequent practice by the parties themselves which establish their agreement regarding the interpretation of the treaty under article 31 (3) (a) and (b)."

As to draft conclusion 12 (4), it would again be preferable to amend the wording to read: "The weight that should be given to such pronouncements in each case depends on specific considerations which include the cogency of their reasoning, the character of the treaty and of the treaty provisions in question, the professional composition of the responsible body, the procedure and other factors." Paragraph 4 would thus define the scope of draft conclusion 12. The impact and meaning of silence on the part of a State party varied according to the nature of the pronouncement of the expert body. Such a pronouncement could, for example, be addressed to all the States parties to a treaty in the form of a "general comment", or to only some States parties in the form of "views". That distinction should be borne in mind when interpreting silence on the part of a State party.

With respect to draft conclusion 13, in paragraph 96 of his report, the Special Rapporteur gave two reasons for dealing with the decisions of domestic courts. The first corresponded to the content of draft conclusion 13, whereas the second, namely that domestic courts should properly assess subsequent agreements and subsequent practice, constituted the ultimate aim of the topic under consideration by the Commission. The very purpose of the Commission's work was to provide guidance to domestic courts and States for the purposes of the interpretation of the treaties to which they were parties. There was thus no need to say so in draft conclusion 13 (2), which should focus primarily on the legal value of the decisions of domestic courts, as a subsequent practice, in the interpretation of treaties. It was also unclear why the Commission should retain subparagraphs (a) and (c) of paragraph 2, which merely repeated what was already explained in the commentaries to other draft conclusions. In the same way, subparagraphs (b), (d) and (e) were only restatements of other draft conclusions adopted by the Commission; for example, subparagraph (b) contained wording similar to that of draft conclusion 7, with the added fact that it was limited to describing the current conduct of domestic courts and did not, therefore, guide those courts in the interpretation of treaties. Consequently, it would be preferable, as proposed by other members, to keep paragraph 1 and to delete or extensively modify paragraph 2, subparagraph (b) of which could, for example, be moved to the commentaries. One might also wonder whether draft conclusion 13, as proposed by the Special Rapporteur, was applicable in all cases, including in the event of a conflict between the decision of a trial court and that of an appeals court.

With regard to new draft conclusion 1a, he, like Mr. Murase and Mr. Forteau, wondered whether the word "significance" was the most appropriate. He also thought that it would be better to confine the scope of the draft conclusion to article 31 (3) (a) and (b) of the Vienna Convention and, possibly, article 32 thereof.

Revised draft conclusion 4 seemed to be incomplete, and it would be advisable, in order to understand to whom the Special Rapporteur was referring when he used the term "official conduct", to specify that it encompassed the official conduct of some States parties to a treaty, of international organizations and of expert bodies. In paragraph 121 of his report, the Special Rapporteur proposed that such clarification should be given in the commentary, but he himself considered that it should be included in the draft conclusion itself; the commentary, meanwhile, could contain the required list of examples of what fell within the scope of that conduct. Lastly, he agreed with the future programme of work as proposed by the Special Rapporteur.

Mr. Kolodkin said that he, like other members, was not entirely convinced of the need for draft conclusions 12 and 13 as proposed by the Special Rapporteur. Why should special attention be paid to the decisions (or pronouncements) of expert bodies established under international instruments? The decisions of international organizations, which were far more numerous and which played a much more prominent role in the interpretation of international instruments, particularly in the context of subsequent practice, were not the subject of a draft conclusion. Only one sentence was devoted to the practice of international organizations, in draft conclusion 11, which dealt solely with the capacity of that practice to contribute to the interpretation of the constituent instruments of international organizations, even though it played a crucial role in the interpretation of other international instruments.

It could not be deduced from draft conclusions 4 and 5 as adopted by the Commission that the decisions of non-State actors constituted subsequent practice under articles 31 and 32 of the Vienna Convention. Paragraph 1 of draft conclusion 5 provided that "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", and paragraph 2 established that "other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32". Could it be considered, however, that the decisions of a body established under an international instrument and composed of independent experts were attributable to the States parties to that instrument? And could it be said that the pronouncements of expert bodies did not constitute the conduct of non-State actors mentioned in paragraph 2 of the draft conclusion? As a rule, it was unlikely that one could respond affirmatively to those questions. Moreover, it was stated in the commentary to draft conclusion 5 (2) that "other conduct" might be a pronouncement by a treaty monitoring body in relation to the interpretation of the treaty concerned. The Commission had thus chosen to cite the pronouncements of expert bodies as an example of "other conduct" that did not constitute subsequent practice under articles 31 and 32 of the Vienna Convention.

In his fourth report, the Special Rapporteur asserted — and he agreed — that the pronouncements of an expert body could not, as such, constitute subsequent practice under article 31 (3) (b). The Special Rapporteur also stated, however, that it was sufficient to consider those pronouncements to be "other subsequent practice" under article 32: based on that premise — which, again, he did not object to — it would be necessary, to avoid misleading the reader, to modify not only draft conclusion 1 (4) and draft conclusion 4 (3), as proposed by the Special Rapporteur, but also draft conclusion 5 and the corresponding paragraphs of the commentaries thereto. One nevertheless had to question, once again, whether the pronouncements of expert bodies warranted such treatment, especially as the Commission had paid little attention to the practice of international organizations. In his view, there was no justification for devoting a separate draft conclusion to the pronouncements of expert bodies, which could be adequately addressed in a few lines in a commentary. In any event, such pronouncements remained a supplementary means of treaty interpretation under article 32 of the Vienna Convention.

Should the Commission decide to devote a draft conclusion to those pronouncements after all, he wished to make two remarks about draft conclusion 12: first, it would be a good idea to include a provision similar to the first sentence of paragraph 15 of the report, which established that "the legal effect of pronouncements by an expert body depends, first and foremost, on the applicable treaty itself"; secondly, the draft conclusion should contain an express reminder that the pronouncements of expert bodies fell within the scope not of article 31 of the Vienna Convention, but of article 32 only. It would also be

advisable to clarify the meaning of paragraph 3, which was rather obscure, as was draft conclusion 11 (3), according to some States.

Lastly, with regard to draft conclusion 13, it was unclear why the Special Rapporteur had chosen to highlight that specific aspect of the subsequent practice of States rather than another in relation to the interpretation and application of treaties. Was the conduct of the executive branch, for instance, less important? And would it not be better to deal with the issue covered in paragraph 1 in the commentary to draft conclusion 4? Moreover, paragraph 2, which was written in a different style to that found in the rest of the draft conclusions, was incongruous. It brought together a set of guidelines for domestic courts, which was something that the Commission had never set out to do, and one might well wonder why such guidelines should be addressed only to domestic courts. As useful as it might be, the development of such guidelines was not part of the Commission's mandate, particularly in view of the fact — emphasized by several members — that the draft conclusions were supposed to be addressed to all parties involved in the application and interpretation of international instruments.

Organization of the work of the session (agenda item 1) (*continued*)

The Chairman invited the Chairman of the Drafting Committee to announce the composition of the Drafting Committee on the identification of customary international law.

Mr. Šturma (Chairman of the Drafting Committee) said that the Drafting Committee was composed of Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Hmoud, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. McRae, Mr. Murphy, Mr. Nolte, Mr. Petrič, Mr. Tladi, Mr. Vázquez-Bermúdez, together with Sir Michael Wood (Special Rapporteur) and Mr. Park (Rapporteur), *ex officio*.

The meeting rose at 1 p.m.