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International Law Commission

Seventieth session (first part)

Provisional summary record of the 3394th meeting

Held at Headquarters, New York, on Thursday, 3 May 2018, at 10 a.m.

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Programme, procedures and working methods of the Commission and its documentation

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18-07089 (E)



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Present:

Chair: Mr. Valencia-Ospina

Members: Mr. Al-Marri
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Gómez-Robledo
Mr. Grossman Guilloff
Mr. Hassouna
Mr. Hmoud
Mr. Jalloh
Ms. Lehto
Mr. Murase
Mr. Murphy
Mr. Nguyen
Mr. Nolte
Ms. Oral
Mr. Ouazzani Chahdi
Mr. Park
Mr. Peter
Mr. Petrič
Mr. Rajput
Mr. Reinisch
Mr. Ruda Santolaria
Mr. Saboia
Mr. Šturma
Mr. Tladi
Mr. Vázquez-Bermúdez
Sir Michael Wood

Secretariat:

Mr. Pronto Principal Assistant 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.4/712 and A/CN.4/715)

The Chair invited the Commission to resume its consideration of the fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/715).

Ms. Galvão Teles said that the busy meeting agenda was a sign of the Commission's continuing vitality even as it marked its seventieth anniversary. Few institutions in the history of international relations had attained such longevity, making it crucial for the Commission to take stock of past achievements and also prepare for future challenges. Several upcoming commemorative and side events would present opportunities for meaningful dialogue on issues of common interest between the Commission's members, the Member States and members of academia. The event entitled "Seven Women in Seventy Years", honouring the seven women who had been elected to serve as members of the Commission, would be an occasion to remember the contributions of her Portuguese predecessor in the Commission, Ms. Paula Escarameia.

Subsequent agreements and subsequent practice demonstrated how treaties could evolve over time through continuous interpretation and application. Draft conclusions were the appropriate outcome of the Commission's work on that important topic. She commended the Special Rapporteur for the overall balance he had been able to strike on his final proposals and for remaining as close as possible to the 1969 Vienna Convention on the Law of Treaties, which provided a solid basis for the draft conclusions. The Special Rapporteur had largely succeeded in the challenging task of crafting clear and unambiguous provisions that left States maximum flexibility in their practice. Although the draft conclusions adopted on first reading had clearly met with vast support from Member States, the Commission needed to address the fact that only a small number of Member States regularly commented on the outcomes of its work.

With regard to draft conclusion 5 (Attribution of subsequent practice), the Special Rapporteur's recommendation to modify paragraph 1 stemmed from an understandable concern. She agreed with Mr. Murphy's proposal to move away from the idea of attribution, which normally appeared in the context of State responsibility, not treaty interpretation. However, the alternative wording he had proposed for paragraph 1 could be further clarified by incorporating the words

"in the application of that treaty", based on wording proposed by the Special Rapporteur. The paragraph would thus read: "Subsequent practice under articles 31 and 32 may consist of any conduct of the party to the treaty, in the application of that treaty, whether in the exercise of its executive, legislative, judicial or other functions."

Turning to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), she noted that the wording of paragraph 3 was a compromise that established a presumption against the modification of a treaty through interpretation, without entirely closing the door on that possibility. The third sentence of paragraph 3 (the "without prejudice" clause) could be set apart as a separate paragraph to further emphasize the distinction between interpretation and modification without taking a definitive stance on that sensitive issue. Alternatively, the first sentence of paragraph 3 could be deleted, as had been suggested by Ms. Oral, but in that case the second sentence in that paragraph should also be deleted, leaving only the "without prejudice" clause in place.

With regard to draft conclusion 9 [8] (Weight of subsequent agreements and subsequent practice as a means of interpretation), the suggestion of the Special Rapporteur to insert the words "on its consistency, breadth and" in the second paragraph was to be welcomed. However, the wording that had been proposed by Mr. Murase might set out the ideas of consistency and breadth more clearly. Alternatively, clarification could be provided in the commentary.

Turning to draft conclusion 13 [12] (Pronouncements of expert treaty bodies), she noted that the wording proposed by the Special Rapporteur for paragraph 4 was not intended to imply that the pronouncements of expert treaty bodies amounted to subsequent practice. Instead, the Special Rapporteur sought to acknowledge the significance of such pronouncements, as the International Court of Justice had done in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. The proposed wording was also intended to acknowledge the unique contribution of treaty bodies, which were created by the States parties to the treaties or whose function was recognized by them, and the indirect effect their pronouncements might have on the subsequent practice of the parties with regard to their interpretation of the treaties. She agreed with the Special Rapporteur that the proposal was within the scope of the topic and should be retained. If the proposed addition did not receive wide support, the possible role of the pronouncements of expert treaty bodies in the context of the topic should be explained in the commentary.

She was in favour of referring all the proposed draft conclusions to the Drafting Committee. She also agreed with the proposal of the Special Rapporteur that, once the draft conclusions and the commentaries thereto had been adopted, the Commission should recommend to the General Assembly to take note of the draft conclusions and commend them to the attention of States and all who might be called on to interpret treaties.

Sir Michael Wood said that the Special Rapporteur's report contained an excellent summary of the observations and comments received from States and offered clear recommendations to the Commission. It provided a solid basis for the successful completion of a second reading of the draft conclusions. Although the document produced by the Secretariat, in which the comments of Governments were set out conclusion by conclusion, was very useful, it would also be helpful if the full texts of the comments submitted by States, showing their overall position, could be routinely provided to the members of the Commission ahead of the second reading; the whole was sometimes greater than the parts. Providing the full texts would also allow the Commission members to check that each comment had been correctly identified as addressing solely one specific conclusion or paragraph.

He agreed with almost all the Special Rapporteur's recommendations and with most points made by other Commission members earlier in the debate. Although he had had some doubts early in the process regarding the suitability of the topic at hand for the Commission's consideration, he had been persuaded by the Special Rapporteur that the draft conclusions, together with the commentaries, would prove to be a useful resource for all those called upon to interpret treaties. In particular, they would help to situate subsequent agreements and subsequent practice in their proper place within the rules on treaty interpretation, as reflected in articles 31 and 32 of the 1969 Vienna Convention, and would ensure that the important roles of subsequent agreements and subsequent practice in treaty interpretation were properly understood.

In that connection, the misconception that the general rule of treaty interpretation was set forth only in article 31 (1) of the 1969 Vienna Convention needed to be addressed. Subsequent agreements and subsequent practice were an integral and obligatory part of the general rule of treaty interpretation reflected in article 31, not an optional extra, and they had equal standing to that of other elements of the general rule. All four paragraphs of article 31 needed to be considered together, as was clear from the chapeau of paragraph 3 (a) and paragraph 3 (b). The repetition of

article 31 (1) of the 1969 Vienna Convention in paragraph 2 of draft conclusion 2 [1] (General rule and means of treaty interpretation), separately from the rest of the general rule, might have the unfortunate effect of seeming to support the aforementioned misconception. Similarly, the inclusion of parts of article 31 (3) in draft conclusion 2, paragraph 3, detracted from the unity of the general rule (paragraph 5 notwithstanding) because its elements were not presented together as a single whole. The Drafting Committee might wish to address those points in its review of the draft conclusions. The definition provided in paragraph 3 of draft conclusion 4 (Definition of subsequent agreement and subsequent practice) and other places in the draft conclusions indicated that subsequent practice other than that fulfilling the terms of article 31 (3) (b) might play a role in treaty interpretation as a supplementary means envisaged in article 32. Therefore, no separate reference to "other subsequent practice" was needed or helpful in draft conclusion 2, which should instead focus on the unity of the general rule and could be strengthened by the deletion of paragraphs 2, 3 and 4. An alternative, and less radical, approach would be to take up Mr. Grossman Guiloff's suggestion to restructure draft conclusion 2 and place paragraph 5 earlier in the draft conclusion, so that it preceded paragraphs 2 to 4. The unity of the general rule could be further emphasized in the commentaries. Furthermore, in his view, subsequent agreements and subsequent practice would be better described as "elements" of a single rule than as "means", at least when speaking of the general rule in article 31.

The role of subsequent agreements and subsequent practice as supplementary means of interpretation under article 32 was also sometimes misunderstood. While it was sometimes thought that recourse could be had to such supplementary means only to determine the meaning when the interpretation under the general rule left the meaning ambiguous or obscure or led to a result that was manifestly absurd or unreasonable, article 32 in fact indicated that recourse could also be made to such means in order to confirm the meaning resulting from the application of the general rule. Unlike article 31, article 32 was perhaps best seen as describing not a single rule of interpretation but two closely related rules, namely, the use of supplementary means to determine the meaning and their use to confirm the meaning. The fact that supplementary means could always be used to confirm the meaning should be highlighted more clearly in the draft conclusions and the commentaries. The use of the singular when referring to "the rule on supplementary means" in draft conclusion 2, paragraph 1, was unfortunate, as it obscured the main division of article 32 between the broadly envisaged use

of supplementary means (to confirm the meaning) and the tightly conditioned use (to determine the meaning).

Regarding the scope of the draft conclusions, if, as a number of speakers had suggested, the current topic concerned only treaties between States and did not deal directly with treaties to which international organizations were parties, the Drafting Committee might consider adding the words ‘between States’ at the end of draft conclusion 1 to make that clear. Alternatively, the relationship between the topic and the rules on interpretation set out in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations might be explained in the commentaries.

Turning to draft conclusion 10 [9] (Agreement of the parties regarding the interpretation of a treaty), he agreed with the United States of America that the wording in the first paragraph should reflect the distinction between a subsequent agreement and subsequent practice, on the basis that the latter was evidenced by concordant practice rather than the deliberate adoption of an agreed interpretation. The second sentence in that paragraph should also be reformulated in the following manner: “Such an agreement need not be legally binding and, if not, shall be taken into account nonetheless.”

With regard to draft conclusion 13, while he understood the Special Rapporteur’s wish for the Commission to revisit his proposal for a paragraph addressing in positive terms the contribution of pronouncements of expert treaty bodies, he did not wish to reopen the compromise reached in 2016 and noted that there had been no real call by States to revisit the matter. He did not agree with Mr. Murase’s analysis and appreciated the questions posed by Mr. Tladi and Mr. Murphy the previous day. By not including the Special Rapporteur’s proposal, the Commission would not in any way be downplaying the importance of pronouncements of expert treaty bodies; rather, it would simply be recognizing that the matter did not fall squarely within the scope of the topic.

He agreed with the suggestion by one State that a replacement should be found for the word “pronouncements”. In legal usage, that term was generally reserved for solemn decisions, notably the pronouncement of the sentence of a criminal court, and it was not appropriate for all the various statements of expert treaty bodies. The word “statements” might indeed be the best option. In any case, he hoped that the Drafting Committee would consider that question.

While the term “guidelines” could also be used to describe the Commission’s output on the topic, the word

“conclusions” was appropriate and there was no need to change the terminology at the current stage. He agreed that all the draft conclusions and the Special Rapporteur’s proposals should be referred to the Drafting Committee. He also supported the Special Rapporteur’s proposals with regard to the Commission’s eventual recommendations to the General Assembly.

Mr. Tladi said that Sir Michael Wood had implied that there was a common understanding among the members of the Commission regarding the relationship between article 31 (1) of the 1969 Vienna Convention and the other paragraphs. While the majority of the Commission’s members might well hold that the general rule of treaty interpretation was reflected in the whole of article 31, some members, including himself, considered that, notwithstanding the title of article 31, the general rule was to be found in article 31 (1). That did not mean that article 31 (3) was unimportant or just an optional extra; however, in his view, the purpose of the elements it contained was to help to identify the ordinary meaning of the text in its context and in the light of its object and purpose; in other words the objective was to find the elements contained in article 31 (1).

Mr. Hmoud, noting that the report concluded the excellent work that the Special Rapporteur had started in the Commission more than a decade earlier, reflecting the tremendous effort that he had put into producing a full set of draft conclusions, said that the outcome of the exercise would assist States, courts, interpreters and other practitioners in the process of interpretation and the treatment of subsequent agreements and subsequent practice in the interpretation of treaties.

Recalling that article 31 (3) (a) and (b) and article 32 of the 1969 Vienna Convention had always served as the starting point for work on the topic, he commended the Special Rapporteur and the Commission for not departing from or seeking to amend that Convention. The draft conclusions were in adherence with the Convention while they provided States and practitioners with the necessary flexibility for dealing with subsequent agreements and subsequent practice in relation to interpretation. The draft conclusions set out general rules and could not be read in isolation of the commentaries, which elucidated those rules and put them in context.

Turning to draft conclusion 5, he said that he recognized the concerns of States with regard to the use of the term “attribution”. However the term was descriptive and should not be replaced simply because it was used in the articles on responsibility of States for internationally wrongful acts. Subsequent practice in the

application of the treaty should indeed be attributed to the State; it reflected the exercise of public or governmental authority which was the essence of attribution. However, since the subsequent practice also had to be in the application of the treaty, *ultra vires* conduct would be excluded and acts of lower or local authorities would be viewed as subsequent practice only if they were recognized by the State to have been in the application of a treaty. The conduct of non-State actors obviously did not constitute subsequent practice of the State party, as draft conclusion 5, paragraph 2, made clear. The addition of the words “of the parties” would make it even more explicit.

With regard to draft conclusion 7, he agreed that the topic was not related to the modification of treaties. To that end, the “without prejudice” clause had been included in paragraph 3 to safeguard against the use of the draft conclusions to advocate modification of a treaty through subsequent practice. In that regard, the first sentence of paragraph 3, which stated the presumption that the parties to a treaty did not intend its modification through subsequent agreement or subsequent practice, should be deleted, as it was not necessary in light of the no prejudice clause in the third sentence.

Turning to draft conclusion 8 [3] (Interpretation of treaty terms as capable of evolving over time), he noted that, although there had been some calls to remove the reference indicating that “the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time”, that reference was an important safeguard to ensure that evolutive interpretation was not abused. Furthermore, in its judgment in the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* in 2009, the International Court of Justice had recognized that, while in certain cases it had taken a contemporaneous approach to interpretation, it would take an evolutive approach if the presumed intention of the parties was to give a term used a meaning capable of evolving; that included generic terms such as “comercio”, which the Court had interpreted to include trade in services, even though it had not had that meaning at the time the treaty had been adopted. The current formulation of draft conclusion 8 reflected the rule of international law on evolutive interpretation. Any subsequent agreement or subsequent practice under articles 31 or 32 of the 1969 Vienna Convention should not only assist in determining whether an evolutive approach to interpretation was to be taken but should also be assessed in light of the presumed intention of the parties upon the conclusion of the treaty.

With regard to draft conclusion 9, while he did not object to the possibility of mentioning the criteria of “consistency” and “breadth” as elements to determine the weight of subsequent practice, it might not in fact be necessary to add those terms, as they were implicit in the elements of repetition, contained in paragraph 2, and specificity, contained in paragraph 1. The criteria for the weight of subsequent practice as authentic means and as supplementary means, respectively, should be further distinguished. Examples of the latter could also be provided in the commentary.

Turning to draft conclusion 10, he said he remained of the view that an agreement of the parties regarding the interpretation of a treaty should be legally binding in order to produce legal effects among the parties and in relation to the treaty. Considering the different views on the matter, he suggested that reference should be made to the legal nature of the agreement under article 31 (3) (a) and (b). A common understanding also needed to be accepted by all the parties to the treaty. A reference to “the parties” should be added in the second paragraph to make it clear that the active engagement of a number of parties must lead eventually to agreement of all the parties to the subsequent practice, in line with the language of article 31 (3) (b).

With regard to draft conclusion 11 [10] (Decisions adopted within the framework of a conference of States parties), he continued to hold the view that the value of the decisions of a conference of States parties in giving rise to an authentic interpretation under article 31 (3) depended, *inter alia*, on the consistency of subsequent practice by the States. Divergent practice would undermine the value of the decision, whether for the purpose of article 31 (3) (a) or article 31 (3) (b) of the 1969 Vienna Convention. The reference to consensus in the text was of little value, as consensus was procedural and did not reflect unanimity, which would be a strong element in favour of considering the existence of a subsequent agreement by the parties in interpreting the relevant treaty. He agreed with the proposal to remove the reference to “in substance” in paragraph 3, as article 31 (3) of the 1969 Vienna Convention contained no such qualifying language.

Turning to draft conclusion 12 [11] (Constituent instruments of international organizations), he agreed that there was a need to clarify the distinction between subsequent agreements and subsequent practice of the parties, under articles 31 (3) and 32, that might arise from the practice of an international organization in the application of a constituent instrument and the practice of the international organization itself, which might contribute to the interpretation of that constituent

instrument under articles 31 (1) and 32. The amendment proposed by the Special Rapporteur purported to serve that purpose. Responding to the concerns of some States that a constituent treaty could be modified through the interpretation of the constituent instrument, he drew attention to draft conclusion 7, which reiterated that the possibility of amending the constituent instrument by subsequent practice of the parties was not recognized. Furthermore, draft conclusion 8 allowed for the possibility of an evolutive interpretation of the constituent instrument. In that regard, the presumed intention of the parties to the constituent instrument would have to allow for such a possibility. If such an intention could not be presumed, owing to the fact that the terms used were not capable of evolving over time, then the possibility of evolutive interpretation did not exist. With regard to paragraph 3, it would perhaps be worth indicating in the text, rather than just the commentary, that the agreement of the parties to the practice of an international organization determined its weight. Although the Commission had opted not to use the term “established practice”, it was still pertinent to assert that an agreement by all parties to the practice of the international organization determined its weight in contributing to an authentic interpretation under article 31 (1) of the 1969 Vienna Convention. The rule on attribution of subsequent practice in draft conclusion 5 should apply *mutatis mutandis* to the practice of an international organization. In addition, the rules of the organization played a crucial role in such attribution; that matter could also be reflected in the commentary.

Turning to draft conclusion 13, he said that, while the pronouncements of expert treaty bodies might carry great weight in the interpretation of treaties, as recognized by the International Court of Justice in the *Diallo* case, they did not constitute subsequent practice by the parties in the application of the relevant treaty. If a treaty body had a mandate under the treaty to interpret that treaty, then the value and authority of the pronouncement arose from the treaty rule, as set out in draft conclusion 13, paragraph 2. However, it did not constitute conduct by a party in the application of the treaty. Rather, the value of the pronouncement should be assessed on its own merit. While the Commission had excluded judicial pronouncements from the scope of the topic, it had included the pronouncements of treaty bodies, which might give rise to, or refer to, subsequent practice by the parties under article 31 (3) or other subsequent practice under article 32. It had also ensured, by the no prejudice clause in paragraph 5 [4], that it was not excluding the contribution of pronouncements of expert treaty bodies to the interpretation of a treaty. However, beyond that, there was no basis in international law or precedent for considering that such

pronouncements contributed as subsequent practice to the interpretation of the relevant treaty under article 31 (1) of the 1969 Vienna Convention. In his fourth and fifth reports, the Special Rapporteur had provided no basis for that proposition, but had merely referred to the assessment of the weight to be given to such pronouncements for the purpose of interpretation, which was not part of the current topic. He therefore did not support the proposed new paragraph 4 in draft conclusion 13. Furthermore, no parallel should be drawn between the practice of international organizations that might contribute to the interpretation of a constituent instrument under article 31 and the pronouncements of expert treaty bodies. While the value of the former had been recognized as relevant practice contributing to an authentic interpretation under article 31 (1), pronouncements by expert treaty bodies had not received comparable recognition. Thus, the distinction in treatment, as reflected in draft conclusion 12, paragraph 3, was warranted, taking into account the functions of an international organization and the fact that its conduct was in the exercise of an element of public authority.

Turning to the suggested amendment to draft conclusion 13, paragraph 3, he remained of the view that silence by States following the pronouncement of a treaty body did not create any legal effect outside of what the relevant treaty provided. Given that such pronouncements did not constitute subsequent practice in the context of articles 31 (3) (b) and 32, the lack of a response by a State party was not relevant and was not to be considered acceptance or acquiescence to subsequent practice of the parties, presumed or otherwise. The Special Rapporteur’s proposed amendment did not change the meaning of the original text, although it might be better to refer to “subsequent practice by one or more parties”. That matter could be dealt with in the Drafting Committee.

He agreed with the Special Rapporteur that the final form of the Commission’s work on the topic should be draft conclusions, although he also saw the merit in them taking the form of draft guidelines. The word “conclusion” denoted more of a legal explanation of the rules related to subsequent agreements and subsequent practice and a clarification of the ambiguity of their role in interpretation. He also agreed that the Commission should recommend to the General Assembly to take note of the draft conclusions in a resolution, to annex them to the resolution and to circulate them to States and practitioners.

He recommended sending all the draft conclusions to the Drafting Committee.

Mr. Grossman Guiloff inquired whether, in relation to the current topic, Mr. Hmoud believed there was a general rule that assigned an absolute value to silence in international law irrespective of the circumstances, or whether different contexts could lend different meanings to silence on the part of a State.

Mr. Hmoud said that there was a distinction between silence in response to practice by States and silence in response to pronouncements of expert treaty bodies. Silence in response to the latter was irrelevant because such pronouncements did not constitute practice. When the pronouncement of a treaty body induced practice by other States parties, then a State's silence, and its implication, was pertinent. Small States in particular could not be expected to stay abreast of all pronouncements by international treaty bodies and should not be confronted with obligations under international law of which they had no prior knowledge.

Mr. Šturma said that the report, together with the Special Rapporteur's introductory statement, offered a very good basis for completion of the Commission's work on the topic. He appreciated the Special Rapporteur's excellent work and spirit of compromise and agreed with most of his recommendations; he could therefore be brief in his comments. With regard to draft conclusion 4, while he shared Mr. Park's view that "subsequent practice", as defined in paragraph 2, did indeed mean practice that established the agreement of all the parties, he considered that it did not need to be expressly stated. The agreement of the parties regarding the interpretation of a treaty implied the involvement of all the parties. That could be better explained in the commentary.

Regarding draft conclusion 5, he agreed with other speakers that the wording of paragraph 1 might create a misunderstanding that could not be resolved by shifting the words "in the application of the treaty" to the end of the sentence. While the concept of "attribution" was perfectly in line with the law of State responsibility, where the wrongful act of a State needed to be defined broadly, it might prove to be too broad and inappropriate in the context of subsequent agreements and subsequent practice. Under the law of treaties, the scope of organs able to take part in treaty making and interpretation, including through subsequent agreements and subsequent practice, should be more limited. The wording proposed by Mr. Murphy ("Subsequent practice under articles 31 and 32 may consist of any conduct of the party to the treaty, whether in the exercise of its executive, legislative, judicial or other functions"), which was consistent with draft conclusion 5 of the draft conclusions on the identification of customary international law, was correct because it included any

conduct of organs of the party to the treaty but excluded other grounds of attribution, such as the conduct of other entities, *de facto* organs or organs acting *ultra vires*. Other conduct was, in any case, sufficiently addressed in paragraph 2 of the draft conclusion.

With regard to draft conclusion 6, he agreed with the changes proposed by the Special Rapporteur. As for draft conclusion 7, paragraph 3, although he understood the Special Rapporteur's concern to exclude the possibility of modification of a treaty by reason of subsequent practice alone, he shared the view that it was not appropriate to speak of presumption in the first sentence. With respect to subsequent agreements, such presumption was not justified. There were three possible solutions: to delete the first sentence of paragraph 3, as suggested by Mr. Murphy; to distinguish between the effects of subsequent agreements and those of subsequent practice; or to state simply that the draft conclusions addressed only the effects of subsequent agreements and subsequent practice on the interpretation and not the modification of treaties.

With regard to draft conclusion 10, he supported paragraph 1 but had problems with the second sentence of paragraph 2, according to which "[s]ilence on the part of one or more parties can constitute acceptance of the subsequent practice...". While the phrase "when the circumstances call for some reaction" might satisfy some concerns, it still left open the question whether one or more parties to a treaty having no particular interest in a given matter needed to object to avoid the presumption of their acceptance. In the case, for example, of landlocked States that were parties to the United Nations Convention on the Law of the Sea, the question arose whether the subsequent practice of some other parties regarding the interpretation of rules on the continental shelf might establish an agreement of the parties regarding interpretation of that Convention, even though such practice was limited to particularly interested States, or whether such agreement was virtually impossible. Turning to draft conclusion 12, he said that inclusion of the words "of the parties" in paragraph 2 was helpful in clarifying whether subsequent practice meant the practice of the parties or the practice of an international organization.

The issue of the pronouncements of expert treaty bodies, dealt with in draft conclusion 13, had given rise to divided views in the Commission, concerning in particular the newly reinserted paragraph 4, which was supported by some Commission members, while others considered it useless on the grounds that pronouncements of expert treaty bodies had nothing to do with subsequent practice. As he saw it, the substance of the new proposed paragraph 4 was fully acceptable;

however, he had doubts as to whether it was consistent with the other paragraphs of the draft conclusion or with the topic as a whole, which had evolved from “Treaties over time” to the narrower topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties. Pronouncements of expert treaty bodies could clearly contribute to the interpretation of treaties under their mandates in a similar way to decisions of international courts or tribunals, which were not covered by the draft conclusions. The pronouncements of such bodies were very similar to the decisions of international courts, but not identical, since judicial decisions were legally binding on the parties and constituted, for other States, subsidiary means for the determination of rules of law. By contrast, pronouncements of expert treaty bodies were not binding and were not always recognized as a subsidiary source of law; in addition, the nature of such expert bodies and their pronouncements varied. Such pronouncements were nevertheless more than just recommendations and played an important role in relation to the interpretation and application of the relevant treaties, often being cited not only in legal literature but also by national and international courts. Even more importantly, they could — but sometimes did not — influence the subsequent practice of States. Nevertheless, he did not see why such special treatment should be given to pronouncements of expert treaty bodies and not also to judicial decisions, such as those of the European Court of Human Rights. Moreover, it would be clearer, and thus more acceptable, to specify that such pronouncements did not constitute subsequent practice under article 31 (3) or article 32 of the 1969 Vienna Convention. That could perhaps be done by inserting a new sentence before the current first sentence of paragraph 3, the content of which was obvious. Since reactions of different States to such pronouncements were often different, they did not usually establish an agreement, although they could constitute subsequent practice, at least under article 32. There remained the problem of the internal consistency of draft conclusion 13, namely, the consistency between paragraph 3, which correctly referred to subsequent agreements or subsequent practice under article 31 (3); paragraph 4, which referred to the possible contribution of pronouncements of expert treaty bodies to the interpretation of a treaty under article 31 (1) — probably to be understood as a clarification of the object and purpose of a treaty — or article 32; and the final “without prejudice” clause in paragraph 5. He did not see how a pronouncement could contribute to the interpretation of a treaty other than under one of the hypotheses already covered in paragraphs 3 and 4. He recommended referring all the draft conclusions to the

Drafting Committee and hoped that it would address the important issues he had raised. He also hoped that the Commission would successfully complete the second reading of the topic at its current session.

Ms. Lehto said that she wished to thank the Special Rapporteur for his report and to commend him for the well-structured arguments therein. She had also appreciated his clear oral presentation of the report. The extraordinary research that had been carried out on the topic over the last six years, and even earlier in the context of the Study Group on Treaties over time, had resulted in a full set of draft conclusions accompanied by extensive, in-depth and intellectually rigorous commentaries. She was joining the debate on the topic at the stage of the second reading of the text and therefore intended to be cautious in her comments.

The work on the topic was all but finished; it remained only to make the last few adjustments to the draft conclusions and commentaries in the light of the comments made by States. In that regard, she commended the Special Rapporteur’s decision to take into consideration the comments made by States and international organizations at meetings of the Sixth Committee from 2013 to 2016, in the face of the limited number of written comments received in response to the Commission’s request in 2016. The written and oral comments did not necessitate major amendments to the text since, as the Special Rapporteur and other members of the Commission had pointed out, States were broadly in agreement with the Commission and many of their specific concerns had been or could be addressed in the commentaries.

With regard to draft conclusion 4, paragraph 1, the points raised by Austria and the United Kingdom concerning the legal nature of a subsequent agreement had been adequately addressed in paragraphs (5) and (6) of the commentary. Nevertheless, she supported the proposal by Austria to include in the commentary a reference to the Commission’s work on the topic “Reservations to treaties”, insofar as it related to interpretative declarations.

Turning to draft conclusion 5, she agreed with the Special Rapporteur and other members of the Commission that the point raised by the United States concerning conduct that was attributable to a State but did not constitute consistent State practice, such as actions of a State agent taken contrary to instructions, was valid. However, she did not see how the question would be resolved by moving the phrase “in the application of a treaty” to the end of the sentence, as proposed by the Special Rapporteur. She could accept a number of the solutions that had been proposed but

would caution against removing the concept of attribution from the draft conclusion. As noted by the Special Rapporteur in his second report, the “application” of a treaty did not exclude practices by non-State actors which the treaty recognized as forms of its application and which were attributable to one or more of its parties. She would welcome the introduction of the element of recognition in the draft conclusion, along the lines of the wording in paragraph 46 of the report, in which the Special Rapporteur had stated that, in addition to being attributable, conduct must be undertaken in a recognized application of a treaty in order to be considered subsequent practice for the purpose of treaty interpretation.

The Drafting Committee might wish to reconsider the titles of draft conclusions 5 (Attribution of subsequent practice) and 8 (Interpretation of treaty terms as capable of evolving over time). The title of draft conclusion 5 might be misleading since, according to the text, attribution was only one of the two elements necessary for conduct to be considered subsequent practice. The title of draft conclusion 8 might warrant reconsideration as the draft conclusion did not cover all aspects of the question but only the role that subsequent agreements and subsequent practice might have in helping to determine whether the meaning of a term could evolve over time.

With regard to draft conclusion 9, she supported the current wording of paragraph 2 and did not see a need to add the criteria of consistency and breadth. Such an addition, in particular the inclusion of the concept of breadth, could actually cause confusion, as indicated by Mr. Murphy in his statement. In that regard, it should be noted that paragraph 2 dealt only with subsequent practice, which, according to the definition in draft conclusion 4, paragraph 2, required the agreement of the parties to the treaty. Paragraph 38 of the report and the commentary to the draft conclusion made it clear that the expression was to be understood to require the agreement of all parties.

She considered it appropriate to indicate that any agreement required the awareness and acceptance of the parties, as set out in draft conclusion 10, paragraph 1, for the reasons given in paragraph 87 of the report.

She supported the reference in draft conclusion 12 to articles 31 (1) and 32 of the 1969 Vienna Convention, which should be retained for the reasons set forth in paragraphs (32) to (37) of the commentary to the draft conclusion and the relevant case law cited in the footnotes to those paragraphs.

She saw merit in including the proposed new paragraph 4 in draft conclusion 13, although she

understood the concerns that had been raised about resuming a difficult debate. It should be recalled that the International Court of Justice, in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, had referred to the constant practice of the Human Rights Committee as a means of interpreting certain provisions of the International Covenant on Civil and Political Rights. The *Diallo* case was also relevant. Her understanding, based on the debate that had taken place between Mr. Murase, Mr. Murphy and Mr. Tladi on the matter, was that the main issue was not the advisability of reopening an old debate — there seemed to be a general agreement within the Commission that pronouncements of expert treaty bodies did not, in and of themselves, constitute or create subsequent practice or subsequent agreements — but rather the possible redundancy of the proposed additional paragraph. If that were the case, the parallel between expert treaty bodies and international organizations and the reference made to the practice of international organizations in draft conclusion 12, paragraph 3, provided grounds for including the proposed paragraph.

She agreed with other members of the Commission that the draft conclusions should be referred to the Drafting Committee. She also supported the proposals of the Special Rapporteur concerning the final form of the draft conclusions and the recommendation to be made to the Sixth Committee.

Mr. Al-Marri said that the Special Rapporteur was to be commended for his intensive research and his clear and comprehensive report. It appeared from the comments made by Member States that only minimal changes would now be needed.

With regard to the overall scope of the topic, he recalled that, in accordance with article 31 (1) of the 1969 Vienna Convention, a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Only in the event of ambiguity should such factors as subsequent agreement and subsequent practice be taken into account. Moreover, it should be borne in mind that the purpose of the draft conclusions was to provide practical guidance, rather than to amend the legal provisions in force. It was also important to ensure harmonization between the Commission’s work on the topic and its work on other topics, such as the identification of customary international law. That was particularly true with regard to paragraph 2 of draft conclusion 9 (Weight of subsequent agreements and subsequent practice as a means of interpretation).

Paragraph 3 of draft conclusion 7 stood in need of further review. Because the relationship between the interpretation and the modification of treaties was a vexed one, the paragraph stated that the possibility of amending or modifying a treaty by subsequent practice of the parties had not been generally recognized. However, it did not seem appropriate to avoid a definite conclusion for the sake of consensus. Instead, one might assert a positive fact, namely that there was general consensus that a treaty could not be amended through subsequent practice or the expression of consent. Alternatively, paragraph 3 could be deleted in its entirety, as it did not provide added value.

Paragraph 2 of draft conclusion 10 had been amended to state that silence on the part of one or more parties could constitute acceptance with regard to the interpretation of treaties. Although some concerns had been raised regarding that provision, he believed that it was acceptable in its amended form.

Paragraph 3 of draft conclusion 11 referred to decisions adopted within the framework of a conference of States parties, including those adopted by consensus. That wording was widely used in most international conferences and did not need to be amended.

Ms. Escobar Hernández thanked the Special Rapporteur for his report, which was the culmination of work carried out over more than two quinquennia, taking into account the work of the Study Group on Treaties over time, which he had also chaired. The format of the fifth report was distinct from the previous reports, as the Special Rapporteur had sought to take into consideration the comments of States. She welcomed his decision to include the comments made by States in the Sixth Committee, which were particularly valuable since only a few States had submitted written comments on the draft conclusions adopted on first reading. The low level of response gave cause for concern, but the Special Rapporteur's efforts to fill the gap were commendable and had been extremely useful. She commended his systematic presentation of Member States' comments and his evaluation of their observations.

She supported the Special Rapporteur's proposal to replace the words "*en el sentido del*" with the words "*en virtud del*" in the Spanish version of draft conclusion 2, paragraph 4, in line with the suggestion made by Spain. However, since the proposed change was substantive, not merely linguistic, the other language versions should also be reviewed and amended where necessary.

Turning to draft conclusion 5, she shared the concern expressed by other members of the Commission

about the consequences of using the term "attribution", given its association with the international responsibility of States; the same issue arose in connection with other topics on the Commission's programme of work, including "Immunity of State officials from foreign criminal jurisdiction". She trusted that the Drafting Committee would be able to determine the most appropriate formulation, taking into account the different suggestions put forward by the Special Rapporteur, Mr. Murase and Mr. Murphy. On the matter of non-State actors, the second sentence of draft conclusion 5, paragraph 2, adequately reflected the need to take into account the practice of actors that were not parties to a treaty but whose conduct might nevertheless be of relevance.

Draft conclusion 13 was the one that had provoked the most debate and, seemingly, the greatest divergence of views. The participation of expert treaty bodies in the interpretation and application of treaties was a reality that could not be ignored. The role of such bodies was basically to monitor and supervise the conduct of States in applying the treaties pursuant to which they had been established. Expert treaty bodies were not tasked with applying the treaty but with ensuring that it was applied, in particular by States parties. It followed that, in fulfilling that role, they interpreted the treaty and their interpretation could not be ignored when defining the scope of the treaty. In her view, an interpretation by an expert treaty body must be pertinent, since the States parties themselves had tasked it with interpreting the treaty.

Given the nature of those bodies and the way in which States had granted them powers, the pronouncements of expert treaty bodies could under no circumstances be regarded as mere suggestions or recommendations without legal effect. From a technical legal perspective, it was clear that the pronouncements of expert treaty bodies did have legal effect in relation to the treaties by which they had been established and the application of which they were tasked with monitoring. Any other interpretation of the nature of their pronouncements was incongruous and baseless, unless it were to be believed that States parties to treaties established bodies that were purely ornamental. That argument was not only incoherent but also failed to take into account the importance that States placed on the defence of their own interests in international relations, including in the adoption of treaties and the establishment of mechanisms to settle disputes and monitor the conduct of States in relation to those treaties. Moreover, if the pronouncements of expert treaty bodies had no legal effect, there would be no reason for treaties that established such bodies to

include opt-in or opt-out clauses, which they often did. Similarly, it would be illogical for States to be reluctant to ratify treaties that established expert treaty bodies or, if they did ratify such treaties, to systematically refuse to submit themselves to the competence of those bodies; and yet that situation occurred frequently. Those States were clearly aware of the legal effects arising from the pronouncements of expert treaty bodies and, to protect their legitimate interests, chose to remain outside the supervisory framework centred on such bodies. It was quite simple: the role of expert treaty bodies in interpreting treaties necessarily and logically had legal effect. She recalled that during the debate on the Special Rapporteur's fourth report she had illustrated the same argument by drawing on the examples of the Human Rights Committee established under the International Covenant on Civil and Political Rights and the Commission on the Limits of the Continental Shelf established under the United Nations Convention on the Law of the Sea, examples that also served as a reminder that the question of expert treaty bodies was not limited to expert bodies established under human rights treaties. It was thus clear that an expert treaty body interpreted the treaty under which it was established, and that its interpretation had legal effect. The establishment of such bodies represented a significant advancement in international law over the past century, as they provided a unique means of establishing stable, objective and predictable dispute settlement procedures.

In light of the foregoing, she fully shared the concerns of the Special Rapporteur and other members of the Commission with regard to the consequences that draft conclusion 13 could have on the nature, legal significance and legal effectiveness of the expert treaty body monitoring system. Her reservations concerned the entire system of expert treaty bodies under international law, not only those concerned with human rights. The Commission must exercise much caution in the implementation of its mandate and ensure that it did not adopt decisions that would have a negative impact on other areas of international law. International law was a system that should be considered as a whole, and the Commission should not adopt any decision without taking into consideration its potential systemic effects. Whatever decision the Commission decided to take with respect to draft conclusion 13 must preserve the legal nature of expert treaty bodies and the legal effects of their decisions, including their capacity to authoritatively interpret the provisions of the treaty by which they were established and which they were intended to serve.

That said, the question at hand did not specifically concern those issues, but rather how to define expert

treaty bodies' interpretative role, which in her view, did not fall under the topic of subsequent agreements or subsequent practice. That topic did not refer to all forms of interpretation, which were not precisely defined in the 1969 Vienna Convention, but rather to a particular mechanism for the interpretation of treaties. Given the wide variety of forms of interpretation, there was no basis to conclude that any form of interpretation fell under the categories of subsequent agreement or subsequent practice.

While it was not possible to state absolutely that the work of expert bodies presented no element that might serve to establish the existence of a subsequent agreement or subsequent practice within the meaning of article 13 (3) (a) and (b) and article 32 of the Vienna Convention, the pronouncements of expert bodies, to which draft conclusion 13 referred, clearly did not constitute a subsequent agreement or subsequent practice. Certain aspects of the procedures of such bodies, including their pronouncements, might reflect subsequent practice or subsequent agreement, depending on the nature and structure of the procedure and the content of the pronouncement, but would in any case be attributable to the States themselves and not to those bodies. In other words, while the work of expert bodies might be useful in identifying subsequent agreements and subsequent practice, it could not in itself constitute a subsequent agreement or a subsequent practice.

It was therefore necessary to consider whether draft conclusion 13, especially paragraph 3, adequately reflected that issue, or whether it was necessary to introduce the proposed new paragraph 4. To address in a balanced manner the concern expressed by the Special Rapporteur and other members of the Commission, the draft conclusion would have to cover, at a minimum, four elements. First, it would have to mention the interpretative role of expert treaty bodies. Secondly, it would need to state that the pronouncements or decisions of expert treaty bodies could not, in and of themselves, be considered subsequent agreements or subsequent practice within the meaning of articles 31 (3) and 32 of the 1969 Vienna Convention. Thirdly, it would have to state that subsequent agreements or subsequent practice within the meaning of articles 31 (3) and 32 could be identified or generated in the framework of treaty body procedures. Fourthly, it would need to make it clear that the pronouncements of expert treaty bodies could reflect a subsequent agreement or subsequent practice within the meaning of articles 31 (3) and 32, and could even generate subsequent practice of the parties. As it stood, draft conclusion 13 did not contain all of those minimum elements.

She did not have any objections to the general description of expert treaty bodies in draft conclusion 13, paragraph 1. She also had no problem with the essential content of paragraph 2; however, that paragraph did not make sense and could be misleading if it was not earlier stated that the interpretative role of an expert treaty body derived from the treaty under which that body was established and must not be confused with interpretation on the basis of subsequent agreements or subsequent practice within the meaning of articles 31 (3) and 32 of the 1969 Vienna Convention. Paragraph 4, which in the Special Rapporteur's proposal was the new paragraph 5, did not resolve the problem with paragraph 2, given its location and its formulation as a "without prejudice" clause, although she supported its content. Paragraph 3 and the proposed new paragraph 4 should therefore be amended to include the four elements she had mentioned earlier. As it stood, paragraph 3 did not adequately reflect the different possible manifestations of subsequent agreements and subsequent practice in the procedures and pronouncements of expert treaty bodies. The proposed paragraph 4 also failed to address that issue, and it introduced an element of confusion by referring expressly to article 31 (1) of the 1969 Vienna Convention, which did not fall directly under the scope of the topic. The purpose of mentioning article 31 (1) may have been to include a reference to the object and purpose of the treaty as a criterion for its interpretation, which she supported; however, draft conclusion 13, paragraph 4, was not the appropriate place, and there was already such a reference in draft conclusion 2, paragraph 2. The relationship between paragraph 3 and the proposed paragraph 4 was also unclear.

In sum, she did not oppose the inclusion of a reference in draft conclusion 13 to the need to preserve the significance and legal effectiveness of the interpretation of a treaty by an expert treaty body. However, such a reference must remain strictly within the scope of the topic, in order to avoid confusion, and should appear in the text of the draft conclusion, not only in the commentary. The draft conclusion clearly needed to be reformulated. While she trusted that the Drafting Committee would find the optimum solution, she had drafted a proposal in order to contribute to the Commission's consideration of new wording. She proposed that paragraph 1 as contained in the report by the Special Rapporteur should be retained and that paragraph 2 should read: "An expert treaty body contributes, through its pronouncements, to the interpretation of the treaty under which it was established. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty." [*Un órgano*

de expertos creado en virtud de un tratado, a través de sus pronunciamientos, contribuye a la interpretación de dicho tratado. La relevancia del pronunciamiento de un órgano de expertos creado en virtud de un tratado para la interpretación de un tratado depende de las normas aplicables del tratado.] She proposed that paragraph 3 should read: "The existence of a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or other subsequent practice under article 32, may be manifested or produced in the framework of treaty body procedures, as well as reflected in the pronouncements of the expert treaty body or generated from those pronouncements." [*La existencia de un acuerdo o de una práctica subsiguiente de las partes en el sentido del artículo 31, párrafo 3, y de otra práctica ulterior en el sentido del artículo 32, puede manifestarse o producirse en el marco de los procedimientos que se siguen ante un órgano de expertos, así como reflejarse en los pronunciamientos de dicho órgano o generarse a partir de los mismos.]* The fourth and final paragraph of her proposed version read: "Silence by a party shall not be presumed to constitute its acceptance of subsequent practice by other parties derived from a pronouncement of an expert treaty body in which the expert treaty body is interpreting the treaty." [*No se presumirá que el silencio de una parte constituye su aceptación de una práctica ulterior de otras partes que se derive del pronunciamiento de un órgano de expertos en el que dicho órgano proceda a la interpretación del tratado.]*

With reference to Mr. Šturma's point that international courts and tribunals also performed an interpretative role but were not the subject of a draft conclusion, she said that the capacity of such courts and tribunals to interpret treaties and the legal effect of their judgments had never been in doubt, whereas that was not the case with expert treaty bodies. That situation might justify the inclusion of a draft conclusion on expert treaty bodies.

She recommended that the draft conclusions should be referred to the Drafting Committee and trusted that by the end of the session the Commission would have completed them on second reading. She concluded by thanking the Special Rapporteur for his dedication and skilful work on the topic.

Mr. Reinisch said that, in his report, the Special Rapporteur had rigorously engaged with the comments and observations of States and provided clear explanations of his recommendations. In view of the fairly broad consensus that existed among States and members of the Commission, he was confident that the Commission would be able to conclude the topic during the current session. He fully supported most of the

Special Rapporteur's recommendations. Some of the draft conclusions should nevertheless be revisited, starting with draft conclusion 4. The observation by some States that the agreements defined in paragraph 1 did not have to be treaties within the meaning of the 1969 Vienna Convention, but could also be informal or non-binding agreements, raised the question whether those possibilities should be reflected in the text of the draft conclusion. Since the commentary on paragraph 1 provided the necessary clarification and, as explained by the Special Rapporteur, draft conclusion 10 already addressed those concerns, the Special Rapporteur's preference not to amend the wording of draft conclusion 4 was understandable and had the merit of succinctness; however, the Drafting Committee might consider whether paragraph 1 of draft conclusion 10 should be moved up so that it followed immediately or was integrated into draft conclusion 4, paragraph 1. As the Special Rapporteur's reference to draft conclusion 10, paragraph 1, in his response to State comments on draft conclusion 4 revealed, there was a close connection between the two draft conclusions, which would be made more apparent by such a restructuring.

With regard to draft conclusion 5, paragraph 1, he agreed with the concerns raised by some States. The reformulation recommended by the Special Rapporteur in order to reflect the relationship between attribution under the rules of State responsibility and attribution of acts as subsequent practice in the application of a treaty offered an excellent starting point for discussion in the Drafting Committee. As for draft conclusion 8, while he was in favour of retaining the wording "presumed intention", for the reasons given by the Special Rapporteur in the commentary, he suggested the deletion of the word "used", which did not add any value and the removal of which would make the sentence more concise.

Turning to draft conclusion 11, paragraph 3, he said that he shared the views of some States that the reference to consensus as currently drafted was unclear and could be improved. However, the proposal of some Commission members to end that paragraph with the words "whether by majority or by consensus" would not provide the necessary improvement and might even alter the meaning of the paragraph as it would exclude possible forms or procedures used to adopt decisions other than decisions adopted by majority or through consensus. Wording that did not exclude such other forms or procedures would be preferable. He therefore agreed with the Special Rapporteur that a reference to the role of consensus should be retained in the draft conclusion and welcomed his proposal to put "including by consensus" in brackets.

With regard to draft conclusion 13, he shared the concern expressed by some members that pronouncements of expert treaty bodies might be considered not to fall within the scope of the topic as they did not constitute State practice, as was explicitly acknowledged in the commentary. The commentary and the current wording of paragraph 3 hinted at the value of pronouncements of expert treaty bodies in the context of subsequent practice by suggesting that they could serve as instruments for the identification of subsequent agreements and subsequent practice of States, in the sense that they might give rise to, or refer to, such agreements or practice. One might, however, ask why the pronouncements of expert treaty bodies as a means of identifying subsequent practice should be the subject of a distinct draft conclusion, while other similar means, for instance, through mixed commissions or other treaty bodies composed of representatives of States and having an express or implied mandate to interpret treaties, were not specifically addressed. In his view, however, the draft conclusion contained valid and important clarifications and should be retained in its current form, as one of the provisions on the fringes of the topic. The expert treaty bodies concerned were not organs of international organizations and were thus not covered by draft conclusion 12, nor could they be affiliated with States under draft conclusion 5. That could be used as justification for adopting a distinct draft conclusion for expert treaty bodies if the general rules on identification of subsequent practice were not considered sufficient. The compromise that had resulted in draft conclusion 13 seemed to be a well-balanced and acceptable approach to accommodate all concerns. He looked forward to discussing the final amendments to the draft conclusions within the Drafting Committee and hoped that the Commission would subsequently be able to make the recommendations to the General Assembly that were proposed by the Special Rapporteur in his report.

Mr. Gómez-Robledo, welcoming the decision to hold the first part of the Commission's seventieth session in New York, said that the legal advisers of the various delegations to the General Assembly had thereby been drawn closer to its work; that was essential for fostering a better understanding of the Commission's role. He hoped that the Commission would regularly hold four or five weeks of meetings in New York on each of its subsequent five-year anniversaries, while continuing to be based mainly in Geneva.

He thanked the Special Rapporteur for the painstaking work reflected in his report, which offered a sure path through the labyrinthine world of treaties. Their essentially dynamic interpretation depended on the varied legal interests of States as they adjusted to

changing circumstances and the constant interaction between treaties and other sources of international law. Ultimately, indeed, treaty interpretation could not be dissociated from what Guy de Lacharrière had termed the foreign legal policy of States.

He recalled the lack of agreement among States with regard to the interpretation of article 15 bis (4) and article 121 (5) of the Rome Statute during the negotiations at the sixteenth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, held in New York in December 2017, on the question of the Court's jurisdiction over the crime of aggression. One of the arguments put forward by several States parties to settle the matter of the correct interpretation of the scope of the Court's jurisdiction over that crime was the fact that resolution 6 adopted by the Review Conference of the Rome Statute, held in Kampala in 2010, constituted a subsequent agreement between the parties to the Statute regarding its actual interpretation or the application of its provisions, under article 31 (3) of the 1969 Vienna Convention. If, at the sixteenth session of their Assembly, the States parties to the Rome Statute had had before them the Commission's draft conclusions on the subject, in particular draft conclusion 11 and the commentary thereto, those draft conclusions would doubtless have contributed greatly to the highly technical discussions, in which unilateralism and blackmail had prevailed to the detriment of the Statute's integrity and the will of the parties, expressed unambiguously and without a vote, in other words by consensus, at the Review Conference in Kampala. The draft conclusions would in any case be highly useful to the International Criminal Court if one day it needed to take a decision regarding the extent to which it could exercise jurisdiction over the crime of aggression in a concrete case.

His substantive comments on the Special Rapporteur's report would focus on draft conclusion 13. First, a terminological clarification was in order. Sir Michael Wood had said that the English word "pronouncements" did not fit the context. The word used in the Spanish text, "pronunciamientos", was, however, neutral and appropriate. The Drafting Committee might explore other possibilities: the word "determinaciones" [determinations] would also be acceptable in Spanish.

He supported the inclusion of the four paragraphs of the draft conclusion proposed by the Special Rapporteur but did not share the view expressed in the Special Rapporteur's oral introduction that expert treaty bodies, like international organizations, acted as the agents of States in ensuring the proper application of treaties. That was an overstatement: experts serving in a

body in their individual capacity to discharge the functions entrusted to them under the treaty establishing that body must be distinguished from States parties, which would always have the last word. It was nevertheless undeniable that such bodies did not operate in a vacuum and that, over time, they had all developed their own identity, enabling them to interact with States and contribute in their own specific ways to the interpretation of the treaty. As had been noted, when parties to a treaty established treaty bodies they assigned to them a range of functions that were reflected in decisions; such decisions naturally contained a particular assessment of the scope of a treaty's provisions, in the context of the treaty body's work of monitoring compliance by the parties. That was true not only for the eight quasi-judicial bodies established under human rights treaties, but also for such bodies as the Commission on the Limits of the Continental Shelf.

Such bodies could be said to be vested with the "competence of competence" in respect of the treaty with which they were tasked with monitoring compliance. That was even more obviously true in the case of quasi-judicial bodies such as human rights treaty bodies, which had at least three functions: they monitored States parties' compliance with the treaty through the examination of periodic reports; they could conduct field visits with functions comparable to those of an prosecutorial investigation and make recommendations; like a prosecuting authority, they could also receive and handle individual complaints and petitions. He noted that the new paragraph 4 proposed by the Special Rapporteur made the draft conclusion highly flexible since it clearly stated that such bodies "may" contribute to the interpretation of the treaty, leaving open the possibility of identifying specific cases where they did not.

Recalling that Mr. Reinisch had explained why the provisions of draft conclusion 13 [12] did not fit into either draft conclusion 5 or draft conclusion 12 and had indicated that some other way of incorporating them had to be found, he said that he disagreed with the view put forward by Mr. Murphy and other speakers that the pronouncements of expert treaty bodies were not part of the topic. While those speakers had argued that the topic was confined to the subsequent agreements and subsequent practice of States in relation to the interpretation of treaties, the very wording of its title gave no indication of any such limitation of its scope and, as had been noted by the Special Rapporteur in his report, expert treaty bodies could on occasion contribute to the interpretation of treaties. That was also borne out by international case law.

Several members, including Mr. Reinisch, had also supported the proposal that the words “including by consensus” should be placed in brackets at the end of draft conclusion 11, paragraph 3. The brackets did not worry him, but only what was in them: the term “consensus” was not defined either in the rules of procedure of the General Assembly or elsewhere. Since the term “consensus” was always used to refer to the adoption of a decision without a vote, it would be preferable to say “adopted with or without a vote”. He looked to the Drafting Committee to consider the matter further. In conclusion, he supported all the Special Rapporteur’s proposals, including the proposed new paragraph in draft conclusion 13 and the more nuanced wording that it introduced.

Programme, procedures and working methods of the Commission and its documentation (agenda item 12)

Mr. Vázquez-Bermúdez (Chair of the Working Group on Protection of the environment in relation to armed conflicts) said that the Working Group on Protection of the environment in relation to armed conflicts would be composed of Mr. Cissé, Mr. Grossman Guiloff, Mr. Hmoud, Mr. Jalloh, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Rajput, Mr. Ruda Santolaria, Mr. Saboia and Sir Michael Wood, together with Ms. Lehto (Special Rapporteur) and Ms. Galvão Teles (Rapporteur), ex officio.

The meeting rose at 12.50 p.m.