Provisional

For participants only

3 July 2018
Original: English

International Law Commission

Seventieth session (first part)

Provisional summary record of the 3406th meeting
Held at Headquarters, New York, on Friday, 18 May 2018, at 10 a.m.

Contents

18-08079 (E)

Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	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
	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/L.907, A/CN.4/712 and A/CN.4/715)

Report of the Drafting Committee (A/CN.4/L.907)

The Chair invited the Chair of the Drafting Committee to introduce the report of the Drafting Committee on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" (A/CN.4/L.907).

He had been informed by the Secretariat that the report had been distributed to Commission members in all official languages the previous day, but only the English version had been officially adopted by the Drafting Committee. Consequently, the other language versions did not necessarily correspond exactly to the English version. In keeping with the Commission's practice, the various language groups would later review the texts of the other five language versions to ensure their consistency with the adopted English text. Once they had submitted their approved texts to the Secretariat, the report of the Drafting Committee would be published officially in the other five languages.

Mr. Jalloh (Chair of the Drafting Committee) said that the Committee had had before it the entire set of draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as adopted on first reading, together with the recommendations of the Special Rapporteur contained in his fifth report (A/CN.4/715), the suggestions made during the plenary debate and the comments and observations received from Governments.

The Drafting Committee had held four meetings from 7 to 10 May and had been able to complete the second reading of the set of 13 draft conclusions. It had then decided to submit its report to the plenary Commission with the recommendation that the draft conclusions should be adopted by the Commission on second reading.

He wished to pay tribute to the Special Rapporteur, whose constructive approach, flexibility and mastery of the topic had once again greatly facilitated the work of the Drafting Committee. He also wished to thank the other members of the Committee for their active participation and significant contributions, and the Secretariat for its invaluable assistance.

He would begin by making two general observations. First, the Drafting Committee had agreed with the Special Rapporteur that "conclusions" was the appropriate designation for the outcome of the Commission's work on the topic. That designation emphasized that the work of the Commission rested on conclusions from its observation of practice and various other sources. It was also appropriate, considering that the aim of the project was to facilitate the work of those called upon to interpret treaties and was consistent with the work of the Commission on related topics, in particular "Identification of customary international law".

Secondly, the Drafting Committee had adopted the draft conclusions in English only. However, some suggestions with regard to the French and Spanish versions had been made by the Special Rapporteur as well as by several members of the Commission. The language groups would meet at a later stage to verify the accuracy of the various language versions.

The set of draft conclusions, as adopted by the Drafting Committee, was divided into four parts. The Drafting Committee had retained the title "Introduction" for Part One, which comprised one draft conclusion.

The title of draft conclusion 1, "Scope", reflected a stylistic change with respect to the title that had been adopted on first reading. The aim had been to avoid repeating the word "Introduction", used as the title of Part One, and to align the title of the draft conclusion with other recent projects of the Commission. The Drafting Committee had maintained the text of the draft conclusion as adopted on first reading, on the understanding that the draft conclusions were grounded, in particular, in the 1969 Vienna Convention on the Law of Treaties. The Committee had decided against an explicit reference to the Convention in the text of the draft conclusion, to allow for the "collateral" application of the draft conclusions to situations not covered by the 1969 Vienna Convention, for example, certain situations that fell under the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. That point would be explained in the commentary.

Part Two of the draft conclusions was entitled "Basic rules and definitions". It comprised draft conclusions 2 to 5.

Draft conclusion 2 was entitled "General rule and means of treaty interpretation". Its purpose was to situate subsequent agreements and subsequent practice as a means of treaty interpretation within the framework of the rules on the interpretation of treaties set forth in articles 31 and 32 of the 1969 Vienna Convention. The general rule, contained in article 31, had been emphasized by reference to it separately in the title of

the draft conclusion. The term "means" in the title referred to all means of interpretation referred to in the draft conclusion, each of which served a function within the single combined operation of treaty interpretation. The draft conclusion consisted of five paragraphs.

With regard to paragraph 1, the only change made to the text adopted on first reading was the replacement of the words "rule on" before "supplementary means of interpretation" with the words "recourse to", in order to align it more closely with the text of article 32 of the 1969 Vienna Convention. The use of the plural "rules" in the second sentence emphasized that articles 31 and 32 contained different, though closely interrelated, rules that applied alongside the 1969 Vienna Convention as customary international law.

Concerning paragraph 2, the Drafting Committee had decided to add to the end of the paragraph the words "as provided in article 31, paragraph 1". The reference to article 31 (1) aligned the text with that of the other paragraphs in draft conclusion 2 that referred to specific provisions of the 1969 Vienna Convention. The reference was made at the end of the paragraph, rather than at the beginning, to indicate that the Convention was not the only source of the general rule; rather, it also applied as customary international law, as stated in the second sentence of paragraph 1 of draft conclusion 2. The explicit reference to article 31 (1) was not meant to disturb the close connection between paragraphs 1 and 2 of article 31.

Paragraphs 3 and 4 had been adopted by the Drafting Committee without revision.

In respect of paragraph 5, suggestions had been made to relocate it to paragraph 2, or else to include it as a separate draft conclusion. The Drafting Committee had found, however, that paragraph 5 played an important role in the structure of draft conclusion 2, in that it tied together the various rules of treaty interpretation set out in paragraphs 2 to 4.

Draft conclusion 3 was entitled "Subsequent agreements and subsequent practice as authentic means of interpretation", thus immediately revealing the purpose of the draft conclusion, which was to indicate that subsequent agreements and subsequent practice under article 31 (3) were significant for the interpretation of treaties, since they constituted authentic means of interpretation. The draft conclusion had been adopted without revision of the text adopted on first reading.

Draft conclusion 4 was entitled "Definition of subsequent agreement and subsequent practice" and consisted of three paragraphs. As a general matter, the Drafting Committee had decided to remove the quotation marks around the terms "subsequent agreement" and "subsequent practice" in all three paragraphs, as they were seen as unnecessary.

With regard to paragraph 1, the Drafting Committee had discussed whether to add the word "all" before the words "the parties" to highlight that the agreement of all parties was required under article 31 (3) (a). It had eventually decided that the words "the parties" were sufficiently clear, particularly in contrast to the phrase "one or more parties" in paragraph 3. That was also in line with the text of the 1969 Vienna Convention, which omitted the word "all". It would be emphasized in the commentary that "the parties" referred to all the parties.

Paragraph 2 had been adopted without any revision.

Concerning paragraph 3, the Drafting Committee had decided to delete the word "other" and to replace it with the indefinite article "a". That change had been consistently implemented for stylistic purposes wherever the text adopted on first reading referred to "other subsequent practice under article 32".

Draft conclusion 5 addressed the question of the possible authors of subsequent practice under articles 31 and 32 of the 1969 Vienna Convention. Its title had been modified to read "Conduct as subsequent practice", in order to avoid reference to the concept of attribution. It would be noted in the commentary that the term "conduct" referred to the relevant conduct of the party, in order not to confuse it with the "other conduct" referred to in paragraph 2. It consisted of two paragraphs.

The text of paragraph 1, as adopted on first reading, made reference to the concept of attribution. The Drafting Committee had considered that it would be preferable not to use that term, which was closely associated with the articles on responsibility of States for internationally wrongful acts. In particular, it could be misunderstood as extending the coverage of draft conclusion 5 to include *ultra vires* acts by State officials that were attributable to States under the articles on State responsibility but that should not be understood as subsequent practice in the application of a treaty. At the same time, the Drafting Committee had sought a formulation that covered the conduct of private actors acting under delegated public authority. The text it had adopted therefore focused on the functions of a State, rather than on its organs. The Commission had taken a similar approach in its work on the topic of identification of customary international law, and the

revised formulation was consistent with the text adopted by the Commission on that topic.

Paragraph 2 had been retained as adopted on first reading.

Part Three of the draft conclusions was entitled "General aspects". It comprised draft conclusions 6 to 10.

Draft conclusion 6 was entitled "Identification of subsequent agreements and subsequent practice". Its purpose was to indicate that subsequent agreements and subsequent practice, as means of interpretation, must be identified. It consisted of three paragraphs.

With regard to paragraph 1, the discussion in the Drafting Committee had focused on the second sentence, which was aimed at illustrating situations in which a State had not taken a position regarding the interpretation of a treaty. The Committee had revised the second sentence for stylistic reasons. The illustrative nature of that sentence, which was not meant to exclude other ways in which States could refrain from taking a position, would be clarified in the commentary.

Concerning paragraph 2, the only change had been a stylistic one consisting of the replacement of the word "can" with the word "may".

The text of paragraph 3 had been retained as adopted on first reading.

Draft conclusion 7 was entitled "Possible effects of subsequent agreements and subsequent practice in interpretation". Its purpose was to indicate how subsequent agreements and subsequent practice could contribute to the clarification of the meaning of a treaty. It consisted of three paragraphs.

Paragraph 1 had been adopted without any changes to the text adopted on first reading. The Drafting Committee had considered proposals to replace the word "clarification" in the first sentence with "identification", "confirmation" or even "interpretation". It had eventually agreed to retain the wording adopted on first reading, because the first sentence referred to the process of interpretation, rather than its end result, which was appropriately captured by the word "clarification". The results of the clarification were then spelled out in the second sentence of the paragraph.

With regard to paragraph 2, no changes had been made to the text, apart from the replacement of the term "can" with "may" for stylistic reasons.

Concerning paragraph 3, the Drafting Committee had discussed various aspects of the text. First, it had decided to retain the interpretative presumption set out in the first sentence. Secondly, it had deleted the words "subsequently arrived at", which appeared after "by an agreement" in the first sentence. That had been done to avoid the suggestion that the word "agreement" in that context referred to any agreement, whereas, the agreement must relate to the application of the relevant treaty. A suggestion to use the term "subsequent agreement" there had not been endorsed by the Drafting Committee, since that term was defined in draft conclusion 4 as concerning interpretation, and its use would have effectively prejudged the presumption set out in the first sentence. Thirdly, the Committee had decided not to turn the last sentence of paragraph 3 into a separate paragraph, in order to keep the emphasis of the draft conclusion on the effects of subsequent agreements and subsequent practice.

Draft conclusion 8 was entitled "Interpretation of treaty terms as capable of evolving over time". It addressed the role that subsequent agreements and subsequent practice could play in the context of a more general question of whether the meaning of a term of a treaty was capable of evolving over time. The draft conclusion had been adopted without changes to the text adopted on first reading. It had again given rise to a discussion concerning the word "presumed", which had ultimately been retained, as it served to contextualize the term "intention", in order to avoid it being taken as "original intention", which might be understood as pointing to the *travaux préparatoires*. Rather, the word "presumed" indicated that the intention of the parties must be ascertained at the time of the act of interpretation and in light of all the interpretative means available under articles 31 and 32 of the 1969 Vienna Convention, including subsequent agreements and subsequent practice.

Draft conclusion 9 was entitled "Weight of subsequent agreements and subsequent practice as a means of interpretation". It identified criteria that could be helpful in determining the interpretative weight to be accorded to a specific subsequent agreement or subsequent practice in the process of interpretation in a particular case. It consisted of three paragraphs.

Paragraph 1 had been adopted without any changes.

Concerning paragraph 2, the Drafting Committee had discussed whether to include the words "consistency" and "breadth", as suggested by the Special Rapporteur in his fifth report. The Committee had eventually found that those criteria needed not necessarily be explicitly included in the text of the draft conclusion itself. That being said, the Drafting Committee had acknowledged that, in certain cases,

consistency and breadth could play a role in the determination of the weight of a subsequent practice. The text that had been adopted pointed to that possibility through the use of the term "*inter alia*", which allowed for elaboration in the commentary of the possible role of consistency and breadth in the determination of the weight of a subsequent practice. The Drafting Committee had also added the words "in addition" to the beginning of the paragraph, to indicate that the criteria in paragraph 2 were cumulative to, rather than independent from, those set out in paragraph 1.

No changes had been made to the text of paragraph 3 adopted on first reading.

Draft conclusion 10 was entitled "Agreement of the parties regarding the interpretation of a treaty". Its purpose was to clarify the element of agreement, which distinguished subsequent agreements and subsequent practice as authentic means of interpretation under article 31 (3) (a) and (b) from subsequent practice as a supplementary means of interpretation under article 32. The draft conclusion consisted of two paragraphs.

Regarding paragraph 1, the discussion in the Drafting Committee had focused on two issues. First, a suggestion had been made to replace the words "a common understanding" in the first sentence with the words "the same understanding". The Drafting Committee had decided to retain the term "common" on the reasoning that it could cover situations in which the parties reached the same understanding individually, as well as those in which the parties had mutual awareness of a shared understanding. Those two aspects of the word "common" would be explained in the commentary. Secondly, the Drafting Committee had acted upon a suggestion made by the Special Rapporteur in his report to clarify the wording of the second sentence without changing its content.

Concerning paragraph 2, the only stylistic change made to the text had been to replace the word "can" with the word "may".

Part Four of the draft conclusions was entitled "Specific aspects". It comprised draft conclusions 11 to 16.

Draft conclusion 11 was entitled "Decisions adopted within the framework of a conference of States parties". It addressed a particular form of action that could result in a subsequent agreement or subsequent practice under article 31 (3) or in a subsequent practice under article 32, namely, decisions adopted within the framework of a conference of States parties. The draft conclusion consisted of three paragraphs.

The Drafting Committee had made three changes to paragraph 1. First, it had deleted the word "States" in the phrase "a meeting of States parties", in recognition of the fact that international organizations sometimes participated in those meetings as parties. Secondly, it had deleted the word "pursuant" in the phrase "pursuant to a treaty", because it was not always necessary for treaties to make explicit reference to meetings of States parties for those meetings to take place. Thirdly, the word "if" after "except" had been replaced with "where", for stylistic reasons.

Paragraph 2 had been adopted without any changes.

With regard to paragraph 3, the discussion had focused on the word "consensus". On the one hand, the reference to consensus had been considered warranted, since it was the prevailing method for adopting decisions in the context of a conference of States parties. On the other hand, it had been considered important to emphasize that the meaning of the term "consensus" had changed over time and remained to be defined in all its aspects. The Drafting Committee had decided to insert the term "adoption" after "including" to emphasize the procedural sense in which the word "consensus" was used in that paragraph.

Draft conclusion 12, which was entitled "Constituent instruments of international organizations", referred to a particular type of treaty, namely constituent instruments of international organizations, and the way in which subsequent agreements or subsequent practice were or could be taken into account in their interpretation. It consisted of four paragraphs.

Concerning paragraph 1, the only change made to the text involved the deletion of the word "other" before the words "subsequent practice under article 32". That had been done for the sake of consistency with the wording of the definition adopted in paragraph 3 of draft conclusion 4.

In respect of paragraph 2, the word "other" had been deleted for the same reasons as those given for its deletion in paragraph 1. The Drafting Committee had agreed with a proposal by the Special Rapporteur to insert the words "of the parties" after "subsequent agreement and subsequent practice", in order to distinguish such practice from that of an international organization. However, it had been decided not to insert the words "of the parties" when referring to subsequent practice under article 32, as such practice did not require the participation of all the parties.

Regarding paragraph 3, a discussion had taken place in the Drafting Committee on whether to include a reference to paragraph 1 of article 31 of the Vienna Convention at the end of the paragraph. On the one hand, the reference to paragraph 1 of article 31 had been considered useful in order to avoid the implication that the practice of an international organization could constitute "subsequent practice" under article 31 (3) (b). On the other hand, the Drafting Committee had considered that explicit reference to paragraph 1 of that article would exclude the application of article 31 (3) (c) and (4) when taking into account the practice of international organizations. It had eventually decided to delete the reference to paragraph 1 in the text of the draft conclusion and to specify in the commentary that the practice of an international organization was not a subsequent practice of the parties under article 31 (3) (b).

With regard to paragraph 4, the Drafting Committee had retained its text as adopted on first reading. The text of paragraph 4 tracked article 5 of the 1969 Vienna Convention.

Draft conclusion 13, which was entitled "Pronouncements of expert treaty bodies", addressed the role of the pronouncements of expert treaty bodies. The Drafting Committee had considered the term "pronouncements", which was used throughout the draft conclusion, and various alternatives, such as "determinations", "works" and "views", which had been either found to be too broad, in that they covered any act of an expert treaty body, or too narrow. Concerns had also been expressed about the implications of their equivalents once translated into other languages. The Committee had thus decided to retain the term "pronouncements", as it was considered sufficiently neutral and able to cover all relevant factual and normative assessments by expert treaty bodies.

The text of draft conclusion 13 as adopted by the Drafting Committee consisted of four paragraphs. He would discuss each in turn.

Paragraph 1 defined the term "expert treaty body" for the purposes of the draft conclusions. It explicitly distinguished those bodies from organs of international organizations, which were not addressed in that context. The text as adopted on first reading had not been changed.

With regard to paragraph 2, the Drafting Committee had also retained the text adopted on first reading. It had noted that the words "the treaty" at the end of the paragraph could refer to the treaty establishing the expert treaty body, as well as to the treaty being interpreted. It would be explained in the commentary that those could be two different instruments and that expert treaty bodies could sometimes be authorized to interpret treaties other than those under which they had been established.

Concerning paragraph 3, the only change to the text adopted on first reading had been the deletion, for reasons of consistency, of the word "other" before "subsequent practice under article 32" in the first sentence. The Committee had considered a proposal to align the text of the second sentence with that of paragraph 2 of draft conclusion 10, since both dealt with the role of silence. In the end, the Committee had decided that the proposed changes would have focused on the reaction of other parties to such pronouncements, while the text adopted on first reading rightly focused on a party's reaction to a pronouncement of an expert treaty body.

In respect of paragraph 4, the Drafting Committee had considered a suggestion by the Special Rapporteur to insert a new paragraph 4 on the practice of expert treaty bodies. The proposal had attracted significant support, both in the plenary and in the Drafting Committee, but also opposition. Following a suggestion by the Special Rapporteur, the Committee had considered it appropriate to base its deliberation on the text adopted on first reading. It had decided to revise that text, which contained a "without prejudice" clause. The new text recognized more clearly that the pronouncements of expert treaty bodies contributed to the interpretation of treaties. The insertion of the phrase "under their mandates" reaffirmed paragraph 2, which specified that the relevance of a pronouncement of an expert treaty body for the interpretation of a treaty was subject to the applicable treaty rules under which such bodies had been created or operated.

In conclusion, he said that the Drafting Committee recommended to the Commission the adoption on second reading of the draft conclusions on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

Mr. Hmoud said that he wished to thank the Chair of the Drafting Committee for his excellent introduction of the report. However, with regard to draft conclusion 13 and the Special Rapporteur's proposal to insert a new paragraph 4 on the practice of expert treaty bodies, the Chair of the Committee had stated that that proposal had attracted "significant support … but also opposition". In his view, that assertion by the Chair in his statement had to be balanced and should be amended to read "significant support and significant opposition", or else the word "significant" should be deleted.

The Chair, noting that Mr. Hmoud's observation had not been a general one but had instead referred to a

specific draft conclusion, said that such observations should normally be made when the Commission was considering the adoption of the draft conclusion in question. However, since Mr. Hmoud's observation had been directed to the Chair of the Drafting Committee for the purpose of asking him to clarify a point concerning his statement, perhaps the Chair of the Committee might wish to respond.

Mr. Jalloh (Chair of the Drafting Committee) said that he actually disagreed with Mr. Hmoud that his statement had not fairly captured the situation, and of course, if the Special Rapporteur wished to offer any clarification, and if that would be helpful to Mr. Hmoud, he invited the Special Rapporteur to do so. His reading of the discussion in the plenary, but also in the Drafting Committee, was that there had been a split, and that split had been captured — perhaps not with the most elegant phrasing, if that was what Mr. Hmoud was suggesting — but there had been not only strong opposition but also strong support. He had referred to the support first, which he had thought would be appropriate in that instance, and then, the opposition. Consequently, he believed that it captured the scenario very well, but if Mr. Hmoud and the other members would be happier, he would gladly reconsider the matter.

Mr. Tladi said that upon hearing the Chair of the Drafting Committee read that particular portion, he had had the same thought as Mr. Hmoud. Normally he did not raise such issues, because his sense was that the statement was that of the Chair of the Drafting Committee. Mr. Hmoud's request was perhaps that, before finalizing the statement and placing it on the Commission's website, the Chair of the Drafting Committee might consider using different wording, such as "significant support and significant opposition" or just "support and opposition", since qualifying one as "significant" but not the other disturbed the balance. He believed that that was the point that Mr. Hmoud was making, and he agreed with it, but believed that it was the statement of the Chair of the Drafting Committee and it was up to him to decide how it should read.

The Chair said that he shared Mr. Tladi's opinion that the statement was that of the Chair of the Drafting Committee, and, in his own view, it was entirely in the hands of the Chair of the Drafting Committee. The plenary therefore did not have the authority to change it. However, as he saw it, Mr. Hmoud's and Mr. Tladi's observations, together with the explanation given by the Chair of the Drafting Committee, would be recorded in the summary record of the current meeting, which would, in his view, be sufficient to express the two viewpoints on that issue without it being necessary to continue the discussion on that point or request that Mr. Jalloh should necessarily change the text of his statement.

Mr. Jalloh (Chair of the Drafting Committee) said that he had taken note of Mr. Hmoud's request and Mr. Tladi's comments, and he would respond appropriately in due course.

The Chair said that those views would be reflected verbatim in the summary record of the current meeting.

Mr. Murase said that he very much appreciated the efforts that had been made by the Chair of the Drafting Committee, who had been very efficient and very patient. However, it was regrettable that there had not been enough time to discuss the choice of the designation "conclusions" for the outcome of the Commission's work on the topic, because the other members had been informed that there had been a lunchtime meeting on that issue between Mr. Nolte, Sir Michael Wood and possibly another Commission member. Although he did not wish to insist on that point any longer, he would like for the record to show that he did not consider the designation "conclusions" to be very appropriate for the topic currently under consideration.

The Chair said that note would be taken of Mr. Murase's observation, and it would be recorded in the summary record of the current meeting.

Mr. Rajput said that he had a comment to make, which had emerged from the response that the Chair of the Drafting Committee had given to Mr. Hmoud. He had heard him say that he had made a reference in light of the debate in the plenary and in the Drafting Committee. He was sure that the Chair of the Drafting Committee would be representing only what had happened in the Drafting Committee and was not trying to be influenced in any manner in his statement by what had happened in the plenary. He wished to put that statement on record.

Mr. Jalloh (Chair of the Drafting Committee), responding to Mr. Murase, said he believed that the other person he had had in mind was Mr. Tladi. He understood that there had been a discussion between Mr. Nolte, Mr. Tladi and Sir Michael Wood in light of the nature of the three topics for which they served, respectively, as Special Rapporteur. To the extent that it might be helpful, he wished to point out that he had been very careful in his statement to indicate that the choice of "conclusions" had been made for the particular topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties. Furthermore, he wished to state that he took the mandate of the Chair of

the Commission very seriously, as well as that of the Commission meeting in plenary, when it came to the substantive discussion that Mr. Murase was proposing. Speaking in his personal capacity, he agreed that that was a very important discussion, and Mr. Murase should rest assured that the Commission would revisit that question.

Responding to Mr. Rajput, he said that the point he had raised went without saying, but it was a point well taken in the collegial spirit in which it had been raised. He had merely wished to make the broader point about the level of support in both settings, but his report dealt specifically with the Drafting Committee. He did not wish to tie the hands of future Chairs of the Drafting Committee in any way or depart from existing practice.

Draft conclusions 1 to 11

Draft conclusions 1 to 11 were adopted.

Draft conclusion 12

Mr. Saboia sought clarification on a point concerning paragraph 2. When the Chair of the Drafting Committee had referred to the reasons behind the Committee's interpretation of certain wording in that paragraph, in particular the expression "subsequent practice of the parties", it appeared to him that the meaning ascribed to the words "of the parties" in that paragraph was somehow different than the one ascribed to the same words in a previous draft conclusion, with regard to which it had been explained that the words "of the parties" meant "all the parties". He would appreciate further explanation of that point.

Mr. Tladi said that he had an issue with paragraph 3. The original text of the draft conclusion as provisionally adopted on first reading did not refer to article 31 as a whole but instead referred to article 31 (1). The Drafting Committee had decided, for the reasons given by the Chair of the Drafting Committee, that a reference to paragraph 1 of that article would exclude the application of article 31 (3) (c) and (4), and that was the reason why the reference to paragraph 1 had been excluded. Of course, as he himself had pointed out in the Drafting Committee, the practice of international organizations did not constitute international principles, so, clearly, article 31 (3) (c) did not apply. Subsequently, it was pointed out that, even so, article 31 (4) might apply, and the International Court of Justice's advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* had been given as an example of that. He had since had a look at that advisory opinion and had found that it did not substantiate the application of that article. In that advisory opinion, it was quite clear that it was not just the practice of international organizations that was at issue, but the practice of a specific organ of an international organization, together with the practice of States parties. Consequently, that would, in fact, fall under paragraph 2 of draft conclusion 12. Indeed, that was the sense and, essentially, the basis for the inclusion of that particular paragraph.

In his third report (A/CN.4/683), from paragraphs 52 onwards, the Special Rapporteur had made it clear that it was not just the practice of organs of an international organization that would be considered in that context, but rather the practice of organs of the international organization together with the subsequent practice of States parties of that organization. In light of that, his preference would be to go back and reinsert the reference to paragraph 1 of article 31. As a compromise, he could accept the formulation that had been proposed by at least one member of the Drafting Committee, which he believed had consisted of inserting the words "in other ways" between the words "may" and "contribute" and placing a full stop after the second instance of the word "instrument". He was making that request to the plenary because he was not convinced by any of the arguments that had been given for the deletion of the reference to paragraph 1.

Mr. Nolte (Special Rapporteur), responding to the point raised by Mr. Saboia regarding paragraph 2, said that he had re-read the statement of the Chair of the Drafting Committee, and it did not indicate or imply that the term "subsequent practice" had been used to mean anything in that paragraph other than what it did in the other draft conclusions. The reason for the proposal to insert the words "of the parties" had been to emphasize the distinction between the practice of an international organization on the one hand and the subsequent practice of the parties on the other. And since there were two kinds of subsequent practice that had been distinguished, the one referred to under article 31 (3) (b) had to be "of the parties", because that meant of all the parties, but the subsequent practice under article 32 did not have to be that of all the parties, it could also be that of fewer parties. So that was the explanation of the Chair of the Drafting Committee.

Mr. Jalloh (Chair of the Drafting Committee) said that he agreed completely with the Special Rapporteur. He had just gone back to the specific section referred to by Mr. Saboia, and of course, it was a very lengthy statement, and there was a lot to read, so it was easy to miss something. However, upon re-reading that section, the distinction became clearer, and he agreed that it

captured accurately the reason for the change. For that reason, he did not need to add anything further.

The Chair asked whether Mr. Saboia was satisfied with the explanations given by the Special Rapporteur and the Chair of the Drafting Committee. Since that appeared to be the case, he would consider that point to have been settled. He asked whether Mr. Nolte could address the second point, which had been raised by Mr. Tladi.

Mr. Nolte (Special Rapporteur), responding to the issue raised by Mr. Tladi, noted that Mr. Tladi had referred to the fact that paragraph 1 of article 31 had been "excluded". The reference to paragraph 1 of that article had been deleted from paragraph 3 of the draft conclusion, not in order to exclude paragraph 1, but to include more than paragraph 1. The Drafting Committee had, in a sense, reverted to the usual formulation whereby, when a treaty was applied, it was applied according to articles 31 and 32. Consequently, article 31 (1) was there, it was just not explicitly mentioned.

The reason it had been mentioned in the text adopted on first reading had been in order to preclude the possible misunderstanding of the reference to article 31 as a whole as suggesting that the Commission considered the practice of international organizations to be practice that was covered by article 31 (3), which referred to the subsequent practice of all the parties. That was a concern that the Drafting Committee had not found necessary to pursue because article 31 (3) (a) and (b) explicitly referred to the practice of "the parties" and consequently could not relate to the practice of an international organization.

As a result, the Drafting Committee had reverted to the usual formulation whereby a treaty must be interpreted in accordance with articles 31 and 32, as a whole, in a single combined operation, using all means of interpretation, including articles 31 (3) (c) and (4), and including the practice of international organizations, but not specifically meaning the rules of international law that were set forth in article 31 (3) (c), as such, but together with the other means of interpretation. It was in that sense that the question had been debated in the Drafting Committee, and he would be happy if Mr. Tladi could accept that, and if the Commission could adopt draft conclusion 12 as it was currently worded.

Mr. Murphy said that, in his view, Mr. Tladi had correctly captured the discussion in the Drafting Committee. For his own part, he wished to reiterate that more than one member had noted that it was not the case that article 31 (3) (a) was relevant in that context. The Drafting Committee had indeed been trying to find a way to avoid making a reference to that because some members considered that that was not proper. As a result, the Commission had ended up with the current formulation.

The Commission could leave that formulation as it currently stood, because it referred to both articles 31 and 32. The other possibility was the one that Mr. Tladi had mentioned, which was that the Commission should not refer to articles 31 and 32 in paragraph 3 but should instead include a formulation along the lines of "may contribute in other ways to the interpretation of that instrument", which avoided making claims of any kind about where in the 1969 Vienna Convention the applicable rules were located, and it was probably consistent with the sources that the Commission had uncovered.

Ultimately, that formulation was similar in nature to the solution that had been found to paragraph 4 of draft conclusion 13 in that, in the latter it had also not been considered necessary to call out particular articles of the 1969 Vienna Convention. Admittedly, that paragraph was a "without prejudice" clause and was doing something different; however, if the Commission were to go in the direction with which Mr. Tladi was indicating that he would be comfortable, that would, to a certain extent, be in harmony with paragraph 4 of draft conclusion 13. Just to be clear, he himself was open to leaving the text as it currently stood, but he was also open to supporting the solution that Mr. Tladi had indicated, for the reasons that they had both addressed.

Mr. Jalloh (Chair of the Drafting Committee) said that, first of all, it was Mr. Tladi's right, as a member of the Commission, to raise any concern he had about a particular aspect of a draft conclusion. What he himself wished to emphasize, however, went in the same direction as the Special Rapporteur's suggestion at the end of his response, namely that there had been a fairly good discussion of the issue in the Drafting Committee, and that there had been general agreement that the Committee would move forward on that basis. At that point, he had not anticipated that Mr. Tladi would be raising an objection to that issue at the current stage, and if he had misunderstood the wishes of the Drafting Committee to move forward, he would have to apologize.

Secondly, with regard to the substantive issue, Mr. Murphy had made reference to a possible solution that tied into draft conclusion 13. In that particular scenario, his own approach was to give preference — as far as possible and in line with the Commission's practice — to the views of the Special Rapporteur whenever there had already been a vigorous debate on a

substantive point. For that reason, his own personal preference would be to ask Mr. Tladi if he would be comfortable not standing in the way of the adoption of draft conclusion 12 and without the amendment he had proposed. He would prefer to leave it at that. If there was any way that the Special Rapporteur could address in the commentary some of the concerns expressed by the two Commission members, he would invite him to consider that as a possibility. Obviously, it was his own decision, but perhaps it could be a way forward.

Mr. Tladi said that he would start off by responding to the Chair of the Drafting Committee. He would remind him of exactly what had happened when the Committee had adopted the text in question. He had specifically indicated that he was not happy, and when the Chair had proposed to give him the floor again, he had said that he did not want the floor again, but that he merely wished to express his unhappiness with the outcome, which was, in his view, an indication that he was at least contemplating raising the issue in the plenary. Consequently, there had not been a general agreement on that issue — he had merely preferred not to stand in the way of consensus, and he did not wish to do so at the current time either, but he did think that the plenary must consider the issue.

With regard to the point raised by the Special Rapporteur, he apologized for having used the word "excluded" in reference to paragraph 1 of article 31 when he had meant to say "deleted". In response to the argument that the point of referring to article 31 as a whole was to avoid giving the impression that the other provisions of article 31 were excluded, the question that he had asked in the Drafting Committee and that he wished to repeat had been about any other provision that could be relevant in that context. The answers that had been given had been article 31 (3) (c) and article 31 (4), but, as he had just pointed out, those provisions were not applicable in the particular context in question, thus giving rise to the question as to what other provisions might be relevant in that context. He was not convinced by the arguments made. It was easy to request that all members should simply agree because the Drafting Committee had agreed, but if there were no strong reasons, then the Commission in plenary should at least consider the issue. If it did not wish to adopt his proposal, he would not stand in the way of consensus, but the proposals must at least be considered in a plenary meeting.

The Chair said that the Chair of the Drafting Committee had suggested the possibility of that point being clarified in the commentary, which was a standard practice of the Commission, and the commentary would be adopted by the plenary Commission in Geneva in due course on the basis of a draft presented to it by the Special Rapporteur. Mr. Tladi had not reacted to that suggestion. He asked whether Mr. Tladi preferred that the Commission should proceed without considering that possibility.

Mr. Tladi said that he was essentially making a proposal to the plenary Commission, so it was up to the plenary to take up the matter. If there was no desire to do so, then he would stand by that decision, but he was merely registering that he was not convinced by any of the arguments that had been made for why reference to paragraph 1 had been deleted. There were no substantive arguments that had been made for why, in that particular context, any other provision of article 31 was applicable. He would not stand in the way of the adoption of the text if that was the decision of the plenary Commission, but he wanted to make it clear that he was not convinced. The other members of the Commission did not appear to wish to speak, so that spoke for itself.

The Chair thanked Mr. Tladi for his cooperative spirit, as evidenced by his willingness to accept a decision by the plenary Commission to adopt the draft conclusion as submitted to it by the Drafting Committee, with the explanations given by its Chair, the clarifications provided by the Special Rapporteur, and following a debate in which, with the exception of a few additional elements just offered by Mr. Tladi in the current plenary meeting, the issue had, as he understood it, been the subject of an in-depth discussion.

Recalling that Mr. Tladi's reservations and, to a certain extent, those of Mr. Murphy, would be reflected in the summary record of the current meeting, and as there did not appear to be any other requests for the floor or opposition to the adoption of the draft conclusion, he took it that the Commission wished to adopt draft conclusion 12 as presented by the Drafting Committee.

It was so decided.

Draft conclusion 12 was adopted.

Draft conclusion 13

Mr. Park said that the wording of the paragraph 4 that had been adopted at the end of the Drafting Committee's work, reflected the substance of the new paragraph 4 that the Special Rapporteur had proposed, but which had ultimately been withdrawn. Two changes had been made to paragraph 4 as adopted on first reading. The first was the deletion of the word "may" and the second was the insertion of the expression "treaties under their mandate". In his view, those were substantial changes, and he had lingering doubts about

whether the Commission could draft uniform rules that were applicable to all expert treaty bodies.

The Chair, thanking Mr. Park for his comment, noted that he had not made a concrete proposal to amend the text of draft conclusion 13 but had reiterated his position concerning paragraph 4, which would be reflected in the summary record.

Draft conclusion 13 was adopted.

The Chair said he took it that the Commission wished to adopt on second reading the titles and texts of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as contained in document A/CN.4/L.907.

It was so decided.

The draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as contained in document A/CN.4/L.907, as a whole, were adopted.

Mr. Argüello Gómez said that he had joined the consensus out of a desire not to stand in its way, but he would nevertheless like the summary record to reflect that he had been absent during the first week of the session when the topic had been discussed and had therefore been unable to express his views concerning it.

The Chair said that note would be taken of the comment made by Mr. Argüello Gómez. In keeping with practice, the Commission would formally express its appreciation and pay tribute to the Special Rapporteur following the discussion and adoption of the commentaries in a plenary meeting to be held during the second part of the session, which would take place in Geneva. He would therefore refrain from doing so for the time being and would confine himself to echoing the words of the Chair of the Drafting Committee in congratulating the Special Rapporteur for his accomplishment. It was his understanding that the Special Rapporteur would prepare commentaries to the draft conclusions, for inclusion in the Commission's report to the General Assembly on the work of its seventieth session.

Mr. Nolte (Special Rapporteur) said that he wished to express his gratitude to the Chair of the Commission, the Chair of the Drafting Committee and all the other Commission members for the cooperative and collegial spirit they had shown in finalizing the work on the topic. Although that work would not be complete until the commentaries had been adopted, the Commission had just taken a very important step in that direction. He also wished to thank the Secretariat, in particular the Secretary to the Commission, and Mr. Nanopoulos, both of whom had made excellent contributions to the work on the topic and had provided excellent support to the Commission. It was his hope that the draft conclusions would help those who were called upon to interpret treaties in the future and would make a contribution to international law.

Provisional application of treaties (agenda item 5) (*continued*) (A/CN.4/707 and A/CN.4/718)

Mr. Vázquez-Bermúdez thanked the Special Rapporteur for his report and for giving the Commission an overview of the work already accomplished on the topic. He also thanked the Secretariat for the presentation of its valuable memorandum.

Regarding draft guideline 5 bis, he said that it might be important to deal with reservations in connection with provisional application because of the possibility that such cases might arise in practice. In his fourth report (A/CN.4/699), the Special Rapporteur had started from the premise that nothing would prevent a State, in principle, from effectively formulating reservations as from the time of its agreement to the provisional application of a treaty. The provisional application of treaties produced legal effects and the purpose of reservations was precisely to exclude or modify the legal effects of certain provisions of the treaty on a State or international organization. He had translated that argument into draft guideline 5 bis, indicating that the draft guidelines were without prejudice to the right to formulate reservations.

However, the reference to the right to make reservations was problematic and should be avoided, since under article 19 of the 1969 and 1986 Vienna Conventions on the law of treaties, States and international organizations did have such a right, except in the circumstances specified in subparagraphs (a) to (c) of the article. It should be possible to make a reservation to a treaty or a part of a treaty that was being applied provisionally where reservations were expressly permitted under the treaty or it was otherwise agreed, but also where reservations were permissible within the framework of the reservation regime set out in the Vienna Conventions. Provisional application must not place greater obligations on a State or an international organization than it would have incurred when a treaty entered into force after it had formulated a reservation.

On the other hand, using the "without prejudice" clause obviated the need to include in the draft guidelines a detailed regime on reservations to treaties like those set out in the Vienna Conventions and the Guide to Practice on Reservations to Treaties. Since no

State practice had been identified, any drafting work would have to be based on legal reasoning and analogy with the Vienna regime. It would also be necessary to answer a number of questions like those raised by Ms. Escobar Hernández, such as how to identify the time when a reservation was made and to determine whether the reservation had been accepted, whether there had been any objections to the reservation, and whether there was a need for confirmation of the moment when the treaty entered into force for the State or international organization concerned. An in-depth analysis of those subjects and of the implications of a draft guideline, even one couched in a "without prejudice" clause, would have to be carried out. The Drafting Committee would be the appropriate venue for such an analysis, with specific regard to determining the extent to which such a draft guideline could be of use to States and international organizations.

On draft guideline 8 bis, Mr. Reinisch had shown that theoretically, it must be possible for States or international organizations other than the author of the breach of a treaty to decide to terminate or suspend the provisional application thereof solely with respect to the author of the breach, without suspending the provisional application among them all, or to terminate or suspend the provisional application through a notification of the intent not to become a party to the treaty. The Drafting Committee could consider the implications of including a text like the one proposed in draft guideline 8 bis and, in particular, the procedural aspects of deciding to terminate a treaty owing to a grave breach.

Regarding amendments, and failing a detailed analysis showing the need for a draft guideline on that subject, he would agree with the Special Rapporteur that it was not currently necessary.

The model clauses, on the other hand, could be of use to States and international organizations in their drafting of provisions or agreements on provisional application of treaties. He agreed with Ms. Escobar Hernández, however, that certain requirements had to be taken into account in order to ensure that they were useful, and moreover, the implications of each model clause would have to be carefully analysed.

Draft model clause 5, for example, stated that "[t]he provisional application of this Treaty shall terminate upon its entry into force for a State [an international organization] that is applying it provisionally." However, there could be other States or international organizations for which the treaty had not yet entered into force and which would continue to apply it provisionally in respect of States or international organizations for which the treaty had entered into force. A model clause like the one proposed would have to cover such a situation. The Drafting Committee could obviously consider the addition of the model clauses to the draft guidelines or using the other alternative put forward, namely to add to the draft guidelines a compendium of clauses found in treaties, or using both alternatives.

In conclusion, he thanked the Special Rapporteur for his valuable efforts and supported the referral of the draft guidelines and the model clauses to the Drafting Committee for consideration in the light of the comments made in plenary.

Mr. Cissé thanked the Special Rapporteur for his sustained research and analytical efforts, which after several years had culminated in generally good results. He thanked the Secretariat as well for its memorandum — a formidable working tool.

The interrelationship between customary law and treaties was not covered in the current report on the topic; nevertheless, it merited attention for the various aspects of provisional application to be properly understood. The failure to deal with that interrelationship, if only in the commentaries, was imprudent, because while the provisional application of a treaty, just like the application of a treaty that was in force, might contribute to the formation of a rule of customary international law, the existence of a rule of customary international law might give rise to the formal or informal provisional application of a treaty or some of its provisions. There was a potential for tension in the relationship between those two sources of law, in that the provisional application of a treaty could either clash with or converge with a rule of customary international law. For example, the provisional application of a treaty by a State could, according to article 25 (2) of the 1969 Vienna Convention, be terminated unilaterally by a declaration. However, where a customary norm of international law or *jus cogens* existed, that declaration would be null and void in view of the *erga omnes* and compulsory nature of such sources of international law. It was therefore important for the Special Rapporteur to examine the interrelationship between customary law and treaties. That could certainly be done in the commentaries, but it would not be to unreasonable do so in draft guideline 1.

With regard to the model clauses on State practice, he did not agree with Mr. Murase and Mr. Murphy that they would be more confusing than enlightening for States. Quite the opposite: the whole point of model clauses was to shed light on the often-complex legal issues whose solutions were not readily available. The draft guidelines were more generic than model clauses,

their vocation being to serve as a guide to States and international organizations in their decision-making. They were intended to cover situations that would normally not to be included in treaty provisions, such as the legal effect of the provisional application of a treaty or responsibility in the event of a breach of a treaty provision. In other words, the draft guidelines gave the Commission a wide margin of flexibility in order to offer States a general guide to provisional application, something that model clauses could not do in view of their specificity.

For those reasons, the question of whether to propose model clauses on the provisional application of treaties was not dependent on the existence of relevant State practice or the lack thereof. Given that one of the Commission's tasks was the progressive development of international law, it would not be overstepping its prerogatives if, in response to the needs expressed by States, it succeeded in developing model clauses in the absence or even in the presence of national laws on a given subject, which could well be diverse and thus not conducive to the application of treaties. Indeed, the very absence or scarcity of State practice on provisional application in general and on the question of model clauses in particular should not be an impediment to the Commission's consideration of model clauses: it gave the Commission every reason to do so.

The development of model clauses would give existing practice greater uniformity, assist States during the negotiation and drafting of treaties and facilitate the work of national and international courts and tribunals in the interpretation and application of clauses on the provisional application of treaties. He therefore supported the Special Rapporteur's decision to develop model clauses, all the more so since the idea had gained broad support among States. Such clauses would be aimed at achieving a combination of pragmatism, flexibility and clarity regarding the fulfilment by parties of their treaty obligations as well as the exercise of their rights under treaties in the event of their provisional application. The Drafting Committee should take great care to ensure the best possible wording of the model clauses.

He accordingly had difficulty with Mr. Murphy's proposal to develop, not model clauses, but a set of examples of existing provisions. In view of the ambiguous and divergent nature of such provisions, that proposal was unlikely to be of much benefit. Any such examples could not be systematically applicable without taking account of the constitutional systems of States that created specific relationships between international treaties and national laws. Ms. Galvão Teles had rightly raised the fundamental issue of the constitutional requirements of States. Depending on a State's constitutional system, the provisional application of a treaty could be compromised if one of the provisions subject to such application conflicted with the constitutional regime of that State. Article 27 of the Vienna Convention did not contradict that analysis, for although it was stated that a party could not invoke the provisions of its internal law as justification for failure to perform a treaty, under article 46 of the Convention, a State could not invoke a violation of an internal law provision for not fulfilling a treaty's obligations, unless such a violation "concerned a rule of its internal law of fundamental importance" — a law of fundamental importance being a constitution.

That was another reason why he was anxious to see some discussion, at least in the commentary, of the relationship between international treaties and custom. An international treaty could arise from custom, and vice versa, but in both cases, the incorporation of such sources of international law into national legal systems must take place in accordance with the constitutional order of States. In some instances, such as the law of the sea, the relevant international treaty actually referred to internal law for the implementation of its provisions. Since article 25 of the Vienna Convention made no distinction between a bilateral and a multilateral treaty, it was not legally impossible to envisage the provisional application of a multilateral treaty whose provisions might be based both on custom and on treaty law. How that situation should be handled remained unclear. Similarly, the question of the legal effect of provisional application could not be viewed based on a distinction between internal law and international law. They were certainly different, but they coexisted and were interrelated, even in the context of the provisional application of an international treaty.

With regard to draft guideline 5 bis, he agreed with Mr. Murphy that it was unnecessary and that the subject of the formulation of reservations could be covered in the commentary. While in principle nothing prevented a State from making a reservation to a treaty, reservations could be prohibited in a treaty if such was the will of States: Mr. Murphy had rightly recalled that article 309 of the United Nations Convention on the Law of the Sea stated that "[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention." In such a multilateral treaty, it was the "package deal" technique that disallowed reservations, for the simple reason that the international community had wanted to have a single legal instrument for the integrated management of the seas and oceans. It was for the same reason that article 310 of the Convention stipulated that any interpretative

declaration must not purport to exclude or to modify the legal effect of the provisions of the Convention. Thus, it was necessary to be extremely cautious when dealing with reservations to multilateral treaties.

He saw no need to include a draft guideline on the termination or suspension of the provisional application of a treaty or a part of a treaty as a consequence of its breach, such as the one proposed in draft guideline 8 bis. Mr. Murphy's remarks on that point were quite apt. The draft guideline could create more problems than it solved, unless the reasons for its content were explained in the commentary.

In his view, draft model clauses 7 and 8 were superfluous and should be deleted; if they were retained, they should be the subject of a commentary. It might also be useful to include model clauses on the provisional application of a part of a treaty, something that was not covered in draft model clauses 1 to 6.

Lastly, he again thanked to Special Rapporteur for his excellent report and said he was in favour of referring the draft guidelines to the Drafting Committee.

Mr. Ruda Santolaria thanked the Special Rapporteur for his report and the Secretariat for its memorandum on the topic.

Like Ms. Galvão Teles, Mr Rajput and Mr. Petrič, he wished to emphasize the voluntary nature of the provisional application of treaties: it was an option available to States, but they were not obliged to use it. Whether or not they did would depend on their analysis of what was set out not only in each treaty but also in their own internal regimes, whether based on legislation or on a constitution.

He thought that draft guideline 8 bis represented a novel approach to the subject but was somewhat devoid of practical value. After all, as others had indicated, in order to terminate the provisional application of a treaty, a State that claimed that a breach had occurred might not choose to follow the course envisaged in article 25 (2) of the 1969 Vienna Convention, since contrary to what was stipulated therein, it might actually intend to become a party to the treaty. It might wish to continue the provisional application in respect of other States or to suspend, not terminate, the provisional application in respect of the author of the breach, in order to retain the possibility of resuming the provisional application with it. He agreed with Mr. Murase and Mr. Park that a differentiated analysis of specific bilateral and multilateral treaties that had been provisionally applied should be carried out, with specific reference to multilateral treaties that had entered into force for some States and were simultaneously being applied provisionally by others. In addition, like Mr. Murphy, Sir Michael Wood and Mr. Rajput, he thought the reference to article 60 of the 1969 and 1986 Vienna Conventions was insufficient: the procedural arrangements laid down in section 4 of Part V must also be taken into account.

Regarding draft guideline 5 bis, he endorsed the comments made and questions raised by Ms. Escobar Hernández, Mr. Reinisch and Sir Michael Wood. The use of a "without prejudice" clause was not appropriate, and the scope of the provision was unclear. In his own view, it was appropriate to consider the possible use of reservations to the provisional application of multilateral treaties in cases where such reservations were not prohibited in general or in respect of certain provisions, provided said reservations were not incompatible with the object and purpose of the treaty. In situations when a multilateral treaty was being applied provisionally, he found it logical that a State that had formulated reservations at the time of signature of the treaty would want to invoke such reservations for the purpose of modifying or excluding the legal effects of some of the treaty's provisions; it would be contradictory for the reservations that a State had formulated not to have effects under provisional application, whereas once the treaty entered into force, they would have effects. Nonetheless, there were also valid concerns about the time frame for confirmation of said reservations to a multilateral treaty that had been signed by a State, that was going to be applied provisionally by that State, and regarding which the State had still not expressed its consent to be bound. On the other hand, in the event that the reservation had been expressly authorized by the treaty, subsequent acceptance by other contracting States would not be required under article 20 (1) of the 1969 Vienna Convention, but it was important to consider other scenarios when objections to reservations had to be formulated and what would happen if a multilateral treaty was being provisionally applied in full with no reservations having been made at the time of signature, although reservations were subsequently formulated when parties were expressing their consent to be bound through ratification, acceptance or approval.

Turning to the model clauses proposed by the Special Rapporteur, he commended him on the effort but thought that the way they were organized and some of their content needed to be reconsidered. He agreed with Mr. Jalloh that an explanatory note should precede each clause, and as Mr. Murphy had suggested, it would also be useful to include a compendium of clauses on provisional application that had already been used in treaties, with each clause accompanied by commentary.

He agreed to the referral of the draft guidelines and the model clauses to the Drafting Committee but, with a view to completing the consideration of the text on first reading at the current session, he thought the Commission should focus on analysing and finalizing the draft guidelines; review of the model clauses could be carried out subsequently through a working group to be set up for that purpose.

Mr. Ouazzani Chahdi thanked the Special Rapporteur for his concise and very readable report and commended the Secretariat for producing a memorandum which catalogued a fairly large number of bilateral and multilateral treaties and would be useful for both practitioners and researchers.

The work on the topic was aimed at helping States to make better use of the provisional application of treaties, which formed an exception to the rule on entry into force of treaties and which some authors had characterized as an ambiguous notion. A certain flexibility must therefore be present in the texts being proposed, so as not to clash with State practice under the law of treaties. As the Special Rapporteur had pointed out in paragraph 22 of his report, during the debate in the Sixth Committee, various delegations had referred in their statements to national practice in relation to the provisional application of treaties. The Special Rapporteur had cited the example of dualist States, like India, which had noted that treaties entered into by them did not automatically form part of their domestic law; the provisions of those treaties became applicable only after their acceptance through internal procedures. Even certain monist States could face problems with the time that elapsed between the date a bilateral treaty was signed and that of its ratification, normally performed by the Head of State. The problems became even more acute for certain treaties that required parliamentary authorization before ratification. It was to surmount those problems that some States resorted to the provisional application of treaties, as the memorandum by the Secretariat demonstrated.

He did not wish to reopen the debate as the discussion of the topic was coming to an end, but the Special Rapporteur might want to devote some space to those problems in the commentaries, especially because they could be compounded by matters relating to the validity of the rights and obligations of individuals in the interim periods between signature and ratification of a treaty.

With regard to draft guideline 8 bis, in paragraph 65 of his report, the Special Rapporteur cited an "apparent lack of practice" in that regard. But, *ad cautelam*, as he put it, he had decided to propose a text based on the wording of article 60 of the 1969 and 1986 Vienna Conventions, which could apply to provisional application given that it produced legal effects as if the treaty had actually entered into force. However, as some members of the Commission had stated during the discussion of the fourth report (A/CN.4/699), it was unlikely that a State would apply the procedure set out in article 60 when article 25 (2) offered a less restrictive solution. Under the circumstances, perhaps draft guideline 8 bis should be reformulated to offer States the use of procedures under both article 60 and article 25 (2). The Drafting Committee could take up that task.

As for draft guideline 5 bis, on reservations, since the Special Rapporteur himself had noted that there was a lack of practice in that area, it was doubtful whether such a draft guideline served any purpose, especially given that certain treaties prohibited reservations, and indeed article 19 of the 1969 Vienna Convention did not provide for reservations in the context of provisional application. But since the Special Rapporteur thought there was nothing to prevent the proposal of such a draft guideline, he himself could go along with it, as long as it was reformulated to omit the phrase "without prejudice", as other speakers had emphasized. The moment when States made a reservation and possible objections to the reservation should also be taken into account. As some members of the Commission had noted during the consideration of the fourth report, the formulation of reservations in the context of provisional application raised complex practical issues relating, among other things, to the form, nature and effects of such reservations. Those issues deserved more thorough examination, possibly in the Drafting Committee.

He endorsed the explanations provided by the Special Rapporteur in paragraph 70 of his fifth report to the effect that there was no need to propose a draft guideline on amendments to a treaty that was being provisionally applied.

He congratulated the Special Rapporteur for having proposed model clauses, but he agreed with Mr. Park that they could have both positive and negative effects. They should be put forward merely for information purposes, since States had no lack of expertise in the formulation of such clauses. The flexibility that should be inherent in such clauses conformed well to the Special Rapporteur's idea of producing a guide to practice.

In conclusion, he thanked the Special Rapporteur for the excellent quality of his work and said he had no objection to referring the draft guidelines and model clauses to the Drafting Committee.

Mr. Argüello Gómez thanked the Special Rapporteur for his report, which contained an annex on the practice of the European Free Trade Association and model clauses that were worthy of consideration. He also thanked the Secretariat for the very useful source of information represented by the memorandum. The current topic was useful and practical not only because it was contemplated in article 25 of the Vienna Convention, but also because it would help to energize international negotiations in the current era of instant results. Having joined the Commission only the year before, he had participated in the work of the Drafting Committee on provisional application that year and in its review of the draft guidelines on the topic, with a particular interest in the relevance of internal law in respect of both regular treaty application and provisional application, as encapsulated in draft guidelines 9 to 11.

He had not hoped to take the floor on the current topic because he felt that, just like most of the provisions of the Vienna Convention, the two new draft guidelines before the Commission (5 bis and 8 bis) were relevant and easily adaptable and applicable to provisional application. The principal difference, in his view, between provisional application and the regular application of treaties was that with regular application, treaties were normally approved in conformity with the internal law of the contracting party. In one case, the usual path from the executive branch to the legislature was respected, whereas in the other, the legislature was bypassed. While he understood that the relationship between provisional application and internal law was not directly under consideration, he had decided to ask for the floor after hearing a number of speakers, including Mr. Rajput, Mr. Saboia and Mr. Grossman Guiloff, bring up the issue the previous day, and he wished to give his own views on the matter.

Provisional application was essentially the approval of treaties by the executive branch, whereas under internal law, treaties could only be ratified after additional requirements had been met. Normally, provisional application was not dealt with in the internal law of States, and still less under constitutional regimes. In practice, he had not seen any domestic legal system that clearly regulated the capacity of the executive branch to approve, even provisionally, the application of treaties that normally required legislative approval in order to enter into force. The matter was in all respects exceptional, and the objective was often not simply to facilitate the application of a treaty once all the internal law requirements for approval and ratification were met, but rather to avert a refusal by the legislature to approve it.

The subject of internal law in relation to international obligations concerning the approval and ratification of treaties had stirred up lively debates in 1969, at the time of the adoption of the Vienna Convention, and he was surprised that the same was not true currently, when the Commission was discussing the fulfilment by States of obligations without following the normal procedure for contracting such obligations. Perhaps the reason was that provisional application had demonstrated its usefulness on many occasions, particularly when one or more of the contracting parties knew that although the treaty did not conflict with internal law, it was unlikely to be ratified for political reasons.

However, the main point in the current discussion was how to give effect to a treaty that had not met all the usual internal law requirements for approval. At the start of the consideration of the topic, Mr. Huang had put it very well: “The key was to strike an appropriate balance between provisional application and internal law” (A/CN.4/SR.3186, p. 10). In his own view, the texts so astutely and carefully drafted so far had not achieved an appropriate balance between provisional application and the internal law of States.

Draft guidelines 9 and 11 made it clear that internal law could not be invoked to invalidate an agreement to provisional application of a treaty. Draft guideline 9 stipulated that a State could not invoke internal law as justification for not complying with provisional application. Draft guideline 10 guaranteed respect for internal law “regarding competence to agree to the provisional application of treaties”; accordingly, the provision related, not to internal law in general, but to the rules of internal law applicable to competence to approve an agreement to provisional application. It also incorporated part of the wording of article 46 of the Vienna Convention regarding the procedure envisaged under internal law for concluding treaties.

In 1969, the debate had been about the validity of treaties that had been ratified and had arguably entered into force — the situation with regard to respect for internal law had been clear. The current situation, however, was one in which the formalities required for a treaty to enter into force in conformity with internal law had not been fulfilled. The need for caution was thus all the greater, yet he had not seen any greater guarantees for a State whose executive branch had undertaken to provisionally apply a treaty, with all the attendant obligations. He had some ideas about how to provide such guarantees at the international level for States, but the appropriate time to propose them had apparently not arrived.

Other important subjects that could be discussed were those covered in articles 48 to 52 of the Vienna Convention, namely error, fraud, corruption and coercion. They were especially relevant to provisional application, a system which bypassed legislative control and was put into effect essentially by one person, a representative of the State, who as a single individual was particularly susceptible to corruption or coercion.

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

Mr. Jalloh (Chair of the Drafting Committee) said that the Drafting Committee on provisional application of treaties was composed of Mr. Argüello Gómez, Mr. Aurescu, Ms. Escobar Hernández, Mr. Grossman Guiloff, Mr. Huang, Ms. Lehto, Mr. Murphy, Mr. Ouazzani Chahdi, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Šturma, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Mr. Gómez-Robledo (Special Rapporteur) and Ms. Galvão Teles (Rapporteur), *ex officio*.

Mr. Murphy said he had thought the Commission's practice was to first hear the Special Rapporteur's summing up of the discussion on a topic and then to decide whether to refer any texts to the Drafting Committee, before announcing the membership of the Drafting Committee for a given item.

Mr. Ouazzani Chahdi endorsed those remarks and said that he had not been informed of the formation of the Drafting Committee on the topic but would like to join it.

Mr. Gómez-Robledo (Special Rapporteur) said he regretted that the composition of the Drafting Committee had been announced prematurely and suggested that the announcement should be viewed as provisional until he had summed up the discussion on his report.

The Chair said it was true that the announcement of the composition of the Drafting Committee at the current stage could be interpreted as prejudging a decision to refer to the Drafting Committee the draft guidelines put forward by the Special Rapporteur.

If he heard no objection, he would take it that the Commission wished to postpone the formal constitution of the Drafting Committee on provisional application of treaties until after the Special Rapporteur had summed up the discussion on his fifth report.

It was so decided.

The meeting rose at 1.05 p.m.