United Nations A/C.6/73/SR.22

General Assembly
Seventy-third session

Official Records

Distr.: General
3 December 2018

Original: English

Sixth Committee

Summary record of the 22nd meeting
Held at Headquarters, New York, on Wednesday, 24 October 2018, at 10 a.m.

Chair: Mr. Biang . . . . . (Gabon)
later: Ms. Kremžar (Vice-Chair). . . . . (Slovenia)

Contents

18-17732 (E)

The meeting was called to order at 10.10 a.m.

Agenda item 82: Report of the International Law Commission on the work of its seventieth session (*continued*) (A/73/10)

1. **The Chair** invited the Committee to continue its consideration of chapters I to V, XII and XIII of the report of the International Law Commission on the work of its seventieth session (A/73/10).

2. **Ms. Hallum** (New Zealand) said that the overarching theme for the commemoration of the Commission's seventieth anniversary had been drawing a balance for the future. International law was not static. In the face of a range of contemporary challenges that represented pressing concerns for the international community, such as climate change, her delegation looked forward to continued engagement with the Commission on the progressive development and codification of international law. She shared the view that it was important to ensure better representation of women on the Commission. She welcomed the fact that the Commission had held the first part of its seventieth session in New York and invited the Commission to consider a similar arrangement on a regular basis.

3. Her delegation acknowledged the work of the Special Rapporteur for the topic "Identification of customary international law" and welcomed the adoption of 16 draft conclusions, together with commentaries, on second reading. The text would be a helpful reference point for practitioners and others called upon to identify and to apply customary international law. Her delegation appreciated the Commission's efforts to make the draft conclusions concise and accessible. At times, however, that had resulted in general statements that did not always provide clear guidance and did not capture some of the significant qualifications that could be found in the commentaries. For example, her delegation continued to have hesitations about draft conclusion 4, paragraph 2, particularly the proposition that the practice of an international organization could contribute to the formation of customary international law in certain cases. It would be helpful to articulate clearly in the draft conclusion what those cases were; the commentary also contained no guidance on that point beyond the statement that it might be the practice of only some, not all, international organizations that was relevant. Her delegation would also welcome greater clarity in the texts of draft conclusion 6, paragraph 1, draft conclusion 10, paragraph 3, and draft conclusion 15, through incorporation of the important exceptions that were elaborated on in the commentaries. Her delegation supported the Commission's recommendation that the General Assembly take note in a resolution of the draft conclusions on the identification of customary international law, annex the draft conclusions to the resolution and ensure their widest dissemination.

4. Her delegation welcomed the Commission's decision to include the topic of sea level rise in relation to international law in its long-term programme of work, as it reflected the needs of States and the pressing concerns of the international community, particularly given the likely impact of rising sea levels on low-lying islands and coastal communities. It was an issue that was close to home for New Zealand and its Pacific island neighbours, some of which were experiencing sea level rise nine times the global average. The legal questions identified in annex B to the Commission's report were well chosen.

5. In early 2018, her Government had decided to take early and collaborative action on climate-related migration in the Pacific region. It had considered the international legal challenges presented by sea level rise and had confirmed its commitment to working with partners to ensure that, in the face of changing coastlines, the current balance of rights and obligations under the United Nations Convention on the Law of the Sea was preserved. The goal was to find a way, as quickly as possible, to provide certainty to vulnerable coastal States that they would not lose their rights over their marine resources and zones because of rising sea levels. As the Prime Minister of New Zealand had said recently, coastal States' baselines and maritime boundaries should not have to change because of human-induced sea level rise. Pacific Islands Forum leaders had consistently highlighted the fact that settling maritime boundaries in the Pacific was crucial to the security and prosperity of the region, while the Foreign Ministers of Pacific island States had identified the complex legal issues raised by the impact of rising seas on States' baselines.

6. The legal implications of sea level rise raised questions of global significance. Her delegation encouraged the Commission to start work on the new topic as soon as possible. In the meantime, it would be looking for opportunities to work with other States on possible solutions to those pressing legal questions.

7. **Ms. Orosan** (Romania) said that, ever since its inception, the Commission had produced important outputs that had shaped, to a significant extent, the present-day international legal order. The events held in New York and Geneva to commemorate the Commission's seventieth anniversary had offered an opportunity to contemplate the Commission's accomplishments and to look forward to its future

contributions to international law. The Commission's past, present and future relevance was beyond any doubt, given that issues of international concern requiring appropriate regulation were constantly arising. The commemoration had also offered an opportunity to identify ways to improve the Commission's methods of work and to increase its interaction with the Sixth Committee, in order to ensure that State practice was reflected in the Commission's work and that its outputs were put to use. Romania had a long-standing commitment to the enhancement and development of international law, having witnessed in its recent history the application of such important principles as the succession of States and the principle of self-determination.

8. The debates during the Commission's seventieth session had prompted the inclusion in its long-term programme of work of two topical issues in international law, namely universal criminal jurisdiction and sea level rise in relation to international law. With regard to the first topic, she noted that a prudent approach was proposed in the light of the political dimensions of the application of the principle of universal criminal jurisdiction. Her delegation saw merit in furthering the analysis in accordance with the syllabus set out in annex A to the Commission's report and encouraged the Commission to include the topic in its current programme of work.

9. The problems caused by sea level rise, especially for low-lying coastal States and small island States and their populations, were justification enough for the Commission to move that topic to its current programme of work and embark on an in-depth study of the numerous legal issues that it raised. The Commission should not attempt in such a study to modify existing international law but should analyse the way in which the law addressed or adapted to the problems posed by sea level rise, with a view to identifying possible gaps and prompting the international community to address them.

10. On the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, the impressive work done by the Special Rapporteur had enabled the Commission to bring the study of the topic to a successful conclusion. Her delegation was in general agreement with the text of the draft conclusions and the commentaries thereto, which would be of value to all those concerned with treaty interpretation. The approach taken was sufficiently broad to cover situations where the action of international actors other than States was relevant for the interpretation of treaties and for the establishment of the scope of a treaty provision. It also allowed the Commission to take account of relevant developments while respecting articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.

11. Her delegation welcomed the adoption by the Commission, on second reading, of the draft conclusions on identification of customary international law. Although Romania was not a party to the Vienna Convention, it often invoked and applied the rules enshrined in it on the grounds that they reflected customary law. Guidance for identifying rules of customary international law was thus extremely important. The draft conclusions constituted an accurate and comprehensive description of the current state of international law on the matter. In the commentaries, the right balance was struck between the need to accurately and systematically reflect the law on the topic and the need for conciseness and clarity. The document as a whole read easily and was not overburdened with information, which made it a useful tool for international lawyers in cases where they needed to establish whether a customary rule of international law existed and to determine its precise content.

12. The States that had provided comments had taken very different views on some of the issues covered by the draft conclusions, in particular the question of whether or not the practice of international organizations was relevant for the identification of rules of customary international law. Her delegation commended the efforts of the Special Rapporteur to suggest refinements or adjustments to both the draft conclusions and the commentaries in order to accommodate those views. Her delegation considered that such practice could indeed contribute to the identification of customary international law, particularly in cases where States had transferred competences to an international organization. While the primacy of State practice was undeniable, international organizations were international actors in their own right and had separate international legal personality.

13. Her delegation agreed that no form of practice had inherently more probative value than others and that the weight to be given to different forms of practice needed to be assessed in context, on a case-by-case basis. It also welcomed the fact that the Commission had given careful consideration to the circumstances in which State inaction amounted to a practice that was accepted as law, striking the necessary note of caution in that regard.

14. **Ms. Thangsumphant** (Thailand) said that her delegation welcomed the Commission's adoption of two sets of draft conclusions, on subsequent agreements and subsequent practice in relation to the interpretation of

treaties and on identification of customary international law. Subsequent agreements and practice, as referred to in article 31 of the Vienna Convention, were to be considered solely as means of treaty interpretation; any subsequent agreement that had the aim or effect of amending a treaty was subject to article 39 of the Convention, and subsequent practice could never result in amendment of a treaty. Subsequent agreements and subsequent practice under articles 31 and 32, together with the relevant context, mainly helped to shed light on the ordinary meaning of a treaty provision at the time of adoption of the treaty. Therefore, they supported only contemporaneous interpretation.

15. The use of subsequent agreements and subsequent practice for evolutive interpretation should be handled with caution, so as not to create uncertainty regarding treaty obligations or to defeat the object and purpose of the treaty. Evolutive interpretation should be limited to certain circumstances or to certain categories of treaties designed for a specific purpose. A treaty reflected the established intention of the parties through carefully selected wording, notwithstanding how the meaning of such wording might evolve over time. If new developments and new contexts in which a treaty applied were taken into account, a treaty term might be construed as having a meaning broader than its ordinary meaning at the time of its adoption. Her delegation would therefore recommend using subsequent agreements and subsequent practice only to determine whether the intention of the parties was to allow a treaty term to have an evolving meaning.

16. If, however, an evolutive approach was taken, only subsequent agreements and not subsequent practice should be used, since only subsequent agreements could truly reflect the concurring opinion of the parties. By contrast, subsequent practice was subject to assessment by a third party, which could give rise to a new obligation not intended by the State parties and not agreed upon by all the parties concerned. In addition, a subsequent agreement must be used only for the interpretation of ambiguous treaty provisions and not for the interpretation of open-ended provisions. In some cases of investor-State dispute settlement, the most-favoured nation clause had been interpreted to include procedural matters, when in reality the intention of the States parties to the treaty in question might have been not to include such matters. Her delegation therefore appreciated the distinction drawn in draft conclusion 4 between subsequent agreements and subsequent practice as expressions of the parties' intention, which reflected article 31, paragraph 3 (a) and (b), of the Vienna Convention.

17. Her delegation welcomed the Commission's timely decision to include the topics of universal criminal jurisdiction and sea level rise in relation to international law in its long-term programme of work. For the former topic, the Commission should focus on giving clarity to the definition, nature, scope and application of the principle of universal criminal jurisdiction, which needed to be distinct from the obligation to extradite or prosecute (*aut dedere aut judicare*) as well as from the jurisdiction of international criminal courts and tribunals and other bases of jurisdiction, including territoriality and nationality. Thus, universal jurisdiction could be applied only where there was no other applicable basis of jurisdiction. To ensure respect for the principle of sovereign equality of States, the principle of universal criminal jurisdiction should not be an exception to the application of immunity *ratione personae*.

18. As States continued their battle against the impacts of climate change and global warming, her delegation would follow the discussions on the topic of sea level rise in relation to international law with great interest, with particular regard for the legal implications in respect of the law of the sea, statehood and the protection of persons affected by sea level rise.

19. Her delegation congratulated the Commission on the occasion of its seventieth anniversary. The Commission played an indispensable role in continued efforts to make the United Nations relevant. The United Nations must step up its efforts to strengthen the international legal order and advance the rule of law so as to safeguard multilateralism amid the many challenges resulting from the increasing fragmentation and diversification of international law. Those efforts were also crucial to the achievement of the Sustainable Development Goals. The Commission's exemplary role in the codification and progressive development of international law contributed to the common understanding, clarity, predictability and universality of positive law. It was her delegation's hope that the close relationship between the Commission and the Sixth Committee would be further strengthened in the years to come and that their work could be integrated into the wider agenda of the United Nations.

20. **Mr. Alday** (Mexico) said that his delegation welcomed the adoption on second reading of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties and thanked the Special Rapporteur for his efforts. It supported the Commission's recommendation that the General Assembly annex the draft conclusions to a resolution and ensure their widest dissemination to States and all who might be called upon to interpret

treaties. Particularly noteworthy were draft conclusions 2, 4, 5, 6, 7 and 10, in which the Commission promoted a balance between formal and operational means of interpretation and emphasized the importance of agreements among the parties to a treaty and their conduct in respect of its application. Draft conclusion 7 was a general provision on the effects that subsequent agreements and subsequent practice might have in terms of narrowing, widening or limiting the scope of treaties and interpreting the meaning and the scope of their provisions. Draft conclusion 8, in which the Commission confirmed the progressive nature of international law based on the evolution of the meaning of the terms used in international treaties, would undoubtedly be of particular importance. Draft conclusions 11 and 12, covering conferences of States parties and constituent instruments of international organizations, respectively, would be useful for the interpretation of multilateral treaties and the adoption of decisions relating to such treaties, in view of the diversity of practice involved. On the whole, the set of draft conclusions presented by the Special Rapporteur represented a major step forward in the progressive development of international law, particularly with respect to strengthening the role of supplementary means of interpretation.

21. His delegation also commended the Commission for the adoption on second reading of the draft conclusions on identification of customary international law and thanked the Special Rapporteur for his valuable efforts. The text reflected a meticulous and wide-ranging analysis of the subject and would be a useful tool for determining the existence and content of rules of customary international law, which was at times a controversial and complex task. The clarifications concerning forms of evidence for each of the constituent elements of custom and the lists of examples thereof would greatly facilitate the legal analysis of customary rules. His delegation also noted the express statement in draft conclusion 15 (Persistent objector) that the draft conclusion was without prejudice to any question concerning norms of *jus cogens*. His delegation supported the Commission's recommendation that the General Assembly take note of the draft conclusions, annex them to a resolution and commend them to the attention of States and all who might be called upon to identify rules of customary international law.

22. His delegation congratulated the Commission on its seventieth anniversary, which provided an opportunity to reflect on the challenges it faced. Its interactions with Member States should be strengthened through more in-depth ongoing dialogue, including in the Sixth Committee. The part of its session held in New York in 2018 had been a good way of promoting such dialogue, and the Commission should consider meeting there more frequently. The parallel events held during the session had also provided a useful opportunity for dialogue with the Special Rapporteurs. One of the main challenges facing the Commission was the lack of follow-up to the texts that it sent to the Committee. States should accord such texts the serious consideration that they deserved, in view of the fact that the Commission was a technical body and its output was by definition impartial and above politics. His delegation also agreed with those who advocated a better gender balance in the membership of the Commission.

23. The inclusion of two new topics in the Commission's long-term programme of work was welcome. The topic of sea level rise in relation to international law should be placed on the Commission's current programme of work, as it was of critical importance for the international community in view of its enormous implications for, inter alia, environmental law, the law of the sea and cooperation for development. The Commission should also consider placing the topic of universal criminal jurisdiction on its current programme of work, since the technical and legal aspects of the topic deserved substantive analysis.

24. **Mr. Sunel** (Turkey) said that his delegation wished to thank all the members of the Commission, both past and present, for their enormous contributions to the international legal order over the Commission's 70-year history. Nonetheless, it was deplorable that, during that time, only seven Commission members had been women. His delegation was proud that one of the current women members of the Commission was from Turkey. It was to be hoped that the seventieth anniversary would be a turning point. His delegation called on all Member States to take gender balance into consideration in their future nominations, so as to make the Commission's composition a good example to other public bodies.

25. Referring to one of the new topics included in the Commission's long-term programme of work, namely universal criminal jurisdiction, he said that, under the criminal law of Turkey, universal criminal jurisdiction was accepted in respect of certain serious crimes of international concern. The Commission's work on the topic would undoubtedly help to fill the current impunity gap. It would also help to establish the legality of universal criminal jurisdiction, enshrine the principle of non-retroactivity of criminal law provisions, and ensure that a statute of limitations was in place and that civil claims were excluded. All of those factors were of the utmost importance for preventing the abuse of the institution of universal criminal jurisdiction.

26. His delegation welcomed the inclusion of the topic of sea level rise in relation to international law in the long-term programme of work and would be interested to see which dimensions of the issue the Commission would ultimately address: its relationship with global warming or its consequences in various areas such as statehood, human mobility, human rights, geographical conditions and land and maritime boundaries. An excessively broad approach to the topic could be counterproductive and politically sensitive. Therefore, in his delegation's view, the most viable option would be to focus on environmental causes and effects, which were of the highest urgency. The consequences of sea level rise must be tackled through the modification of the current rules of environmental law and the adoption of new ones. The Commission's work in that context would undoubtedly be a driving force for further regulatory efforts.

27. He congratulated the Commission on the adoption of draft conclusions, together with commentaries thereto, on the topics of subsequent agreements and subsequent practice in relation to the interpretation of treaties and identification of customary international law; the texts would prove to be useful resources. However, some of his delegation's views on particular draft conclusions diverged from those of the Commission. Under the first topic, his delegation had the most doubts about the last sentence of draft conclusion 2, paragraph 1; draft conclusion 4; draft conclusion 5, paragraph 2; and draft conclusion 10, paragraph 2. Concerning the second topic, his delegation's views differed from those of the Commission on draft conclusion 4, paragraphs 2 and 3, and certain parts of draft conclusions 11 to 15, although, with regard to draft conclusion 15, he wished to emphasize the importance of the concept of the persistent objector in general international law, including customary international law. The full version of his delegation's comments and concerns could be found on the PaperSmart portal.

28. **Mr. Perera** (Sri Lanka), referring to the draft conclusions on identification of customary international law, said that custom continued to be a vital source of international law, notwithstanding the emergence and growth of the multilateral treaty-making process. As recognized in Article 38 of the Statute of the International Court of Justice, custom and treaties were the two primary sources of international law; though distinct from each other, there was a complex and interactive relationship between them, which was made clear in draft conclusion 11 (Treaties), in particular paragraph 1 (a) and (c) thereof. Customary international law was often invoked to fill gaps in treaty law and to clarify the scope of rights and obligations arising from treaties. Conversely, as observed in the commentary, wider acceptance of a treaty provision by non-States parties could lead to the creation of a rule of customary international law.

29. Turning to draft conclusion 10 (Forms of evidence of acceptance as law (*opinio juris*)), he said that, during the consideration of paragraph 3 as adopted on first reading, some States had urged a degree of caution, suggesting that inaction should not give rise to an automatic presumption of implied consent and that both knowledge of the rule and ability to react on the part of the State should be taken into account in determining whether a State's inaction was intentional and thus could serve as evidence of *opinio juris*. His delegation welcomed the fact that the Special Rapporteur had proceeded on the basis that acceptance as law must not be lightly inferred. Having stated in paragraph 3 that failure to react over time to a practice might serve as evidence of acceptance as law (*opinio juris*) only under certain conditions, he had further elaborated that point in the commentary by including some careful caveats. First, it was essential for a reaction to the practice in question to have been called for, such as when the practice affected the interests or rights of the State failing or refusing to act. Second, the reference to a State being in a position to react meant that the State must have had knowledge of the practice and sufficient time and ability to act.

30. Draft conclusion 15 (Persistent objector), though rooted in the jurisprudence of the International Court of Justice, especially the *Fisheries* case (*United Kingdom v. Norway*), had been the subject of differing views among States as well as among writers. The potential risk of abuse of the principle had been raised by some States, which had contended that the determination that a State was a persistent objector should be context-specific and that consideration had to be given to a number of factors, such as whether in a specific case the State in question had been in a position to express its objection. Some States had questioned the requirement that the objection be maintained persistently, while others had suggested that an objection clearly expressed by a sovereign State during the formation of a customary rule was sufficient to establish its objection and that it did not need to continually maintain that objection, given the practical reality that States tended to remain silent and reacted only in specific instances when their rights or obligations were involved. The Special Rapporteur had sought to address some of those concerns in the commentary, emphasizing the fact that it was necessary to assess in a pragmatic manner whether the requirement that the objection be

maintained persistently had been met, bearing in mind the circumstances of each case. That cautious approach would help to address some of the concerns raised as to the wisdom of including the persistent objector principle – essentially an exception to the application of customary international law – in the draft conclusions.

31. Turning to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, he said that the draft conclusions were supported by rich and comprehensive commentaries reflecting the jurisprudence of international courts and tribunals as well as the practice of States and international organizations. In the draft conclusions, the Commission identified and elucidated relevant aspects of the rules on interpretation set out in articles 31 and 32 of the Vienna Convention and addressed certain questions that might arise when applying them.

32. Draft conclusion 8 was of particular interest, as it related to the general question of whether the meaning of a treaty term was capable of evolving over time. The Special Rapporteur had struck a careful balance between the contemporaneous approach to the interpretation of treaties and the evolutive or evolutionary approach; the draft conclusion reflected the proposition that subsequent agreements and subsequent practice, like any other means of treaty interpretation, could be used to support both approaches. The Special Rapporteur had based the draft conclusion on an extensive analysis of the decisions of international courts and tribunals, which appeared to have followed a case-by-case approach in determining whether or not a treaty term should be given a meaning capable of evolving over time.

33. He commended the Commission and the Special Rapporteurs for concluding the work on identification of customary international law and on subsequent agreements and subsequent practice in relation to the interpretation of treaties; the draft conclusions on those topics constituted a positive contribution to the general corpus of the law of treaties. He agreed with the recommendations that each set of draft conclusions should be annexed to a resolution of the General Assembly and that the widest dissemination of both texts should be ensured.

34. *Ms. Kremžar (Slovenia), Vice-Chair, took the Chair.*

35. **Ms. Zamakhina** (Russian Federation) said that the Commission was a unique body in that its members represented all the world's legal systems; thus all regions had an opportunity to contribute to the formation of new rules of international law. Other important characteristics were the Commission's lack of politicization and its preference for reaching decisions by consensus. Those traditions must be preserved; voting in the Commission was to be avoided. In order to be effective, the rules of international law should reflect the involvement of all countries and regions. Therefore, any rush to adopt a single point of view, even if it was that of a majority, was inappropriate.

36. On the whole, her delegation believed that it would be useful for the Commission to slow down the pace of its work. That would provide States with an opportunity to more carefully analyse its output and would facilitate the elaboration of texts that corresponded to their needs. It was also important for the Commission to take into account the opinions of States. When delegations disagreed with a given provision in a text, their views should be taken seriously, and work on the topic should continue, even if that meant delaying the submission of a text to the Sixth Committee.

37. With regard to the interaction between the Commission and the Sixth Committee, she noted that, in recent years, the texts elaborated by the Commission had not been used as a basis for treaties; the General Assembly had simply taken note of them and drawn States' attention to them. As a rule, the texts were of high quality, but in many cases they did not reflect customary international law; moreover, almost all of them contained debatable provisions with which individual States disagreed. Even so, they were used by national and international courts as a written form of customary law. It might be useful for the General Assembly, in resolutions in which it took note of the Commission's output, to draw attention to the comments made by States, and possibly to publish a compilation of those comments.

38. During its seventieth anniversary year, the Commission had been productive: it had approved on second reading two sets of draft conclusions, on the topics "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and "Identification of customary international law". Concerning the first topic, she expressed gratitude to the Special Rapporteur for his comprehensive and in-depth research. On the whole, her delegation supported the Commission's recommendation that the General Assembly take note of the 13 draft conclusions and draw attention to them and the commentaries thereto. It welcomed the fact that they had been drawn up on the basis of the time-tested rules of interpretation set out in the Vienna Convention.

39. Under the Vienna Convention, the text of a treaty constituted the basis for interpretation in accordance with the ordinary meaning of the terms used therein.

Therefore, if the text was sufficiently clear, other means of interpretation might not be required or would play only a subsidiary role. That applied in particular to the supplementary means of interpretation referred to in article 32 of the Vienna Convention, the use of which was optional.

40. As to draft conclusion 11 (Decisions adopted within the framework of a conference of States parties), the legal effect of such decisions depended not only on the treaty and the applicable rules of procedure – although those were important, given that decisions were sometimes adopted in violation of a conference's mandate or rules of procedure – but also on whether the decision had been taken by consensus or by a small majority of States, even if both types of decision were envisaged in the rules of procedure. In that context, the conduct of States in connection with the adoption of the decision – for example, the provision by them of explanations of vote – was also important.

41. Under draft conclusion 12, subsequent agreements and subsequent practice could arise from the practice of an international organization in the application of its constituent instrument. In that context, it was necessary to distinguish between different types of practice of organizations. For example, the practice of an organ that represented all members of the organization, especially when based on consensus, could constitute a practice or agreement for the purposes of interpreting the constituent instrument of the organization, since in essence such practice was the practice of the States that had established the organization. As to the practice of organs of limited composition or of officials of the organization, it was not the practice itself that was important, but rather the reaction of States members to the practice.

42. Her delegation had some doubts regarding draft conclusion 13, paragraph 3, under which a pronouncement of a treaty body could refer to a subsequent agreement or practice. In that context, too, it was the reaction of States to such a pronouncement that was most important.

43. Turning to the topic "Identification of customary international law", she welcomed the successful completion of a set of draft conclusions that would be of practical benefit in countering the emerging trend in international and national courts of determining the existence of a customary rule on the basis of the opinion of a given international body or the practice of a limited group of States. Her delegation generally supported the Commission's recommendation that the General Assembly take note of the draft conclusions and commend them to the attention of States; it also had no objection to calling on States to publish digests and surveys of their practice. However, more consideration should be given to whether it was appropriate to refer to United Nations publications as providing evidence of customary international law or to create a database of such evidence. That might lead international and national courts to draw customary rules from such publications and databases without additional analysis, which must be avoided. Every court must independently determine whether relevant practice and *opinio juris* existed in a given area rather than draw information from a single source. It might also be useful, in the General Assembly's resolution on the topic, to draw attention to the comments made by States on the draft conclusions.

44. It was stated in the commentary that the Commission had not addressed the relationship between different sources of law, such as customary international law, treaties and rules of *jus cogens*. That approach seemed to be only partially justified. The contemporary international legal system was well developed; it would be hard to find an area of international relations that was not affected by some treaty or rule of *jus cogens*. That was why her delegation had repeatedly stated that the draft conclusions should indicate that practice and *opinio juris* could not establish the existence of a rule of customary international law if such a rule would conflict with an existing rule of *jus cogens* or a treaty rule. If that principle were not applied, establishing the existence of a rule of customary law would be a risky endeavour. The Vienna Convention contained a similar provision referring to the invalidity of a treaty that conflicted with *jus cogens*. Her delegation supported the basic approach used in the draft conclusions and derived from Article 38 of the Statute of the International Court of Justice, namely that a rule of customary international law arose from the general practice of States and *opinio juris*, and agreed that those two elements must be separately ascertained.

45. As to draft conclusion 4 (Requirement of practice), her delegation held that only the practice of States could contribute to the formation of customary law. The practice of international organizations in and of itself could not have the same effect; rather, it was the reaction of States to such practice that was important. Draft conclusion 8, paragraph 2, in which it was stated that a practice did not need to be of a particular duration, was not useful. It would be more correct to indicate that, in order to establish a customary rule, the practice should be settled.

46. Her delegation had some reservations regarding draft conclusion 10, paragraph 3, under which failure to react to a practice could serve as evidence of acceptance as law (*opinio juris*). As was well known, States could

abstain from enunciating their position on a given issue owing to political considerations; that should not be considered a form of *opinio juris*.

47. As to the importance of treaties for the identification of customary international law, which was the subject of draft conclusion 11, it was important not to create the impression that every multilateral treaty with sufficiently wide participation created customary rules. It was well known that a State's compliance with a treaty should not in and of itself be deemed to reflect State practice or *opinio juris* for the purposes of establishing a rule of customary law.

48. Her delegation did not fully agree with the thrust of draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences). A resolution could serve as evidence for determining the existence or content of a customary rule when considered alongside the behaviour of States at the time of its adoption, such as whether they had adopted it by consensus or by a vote and what statements they had made in explanation of vote.

49. Draft conclusion 15 (Persistent objector) constituted an important rule. If a State declared that a given practice accompanied by *opinio juris* did not constitute a customary rule, then even if such a rule was formed in relations among other States, it would not be binding on the objecting State. However, no consideration had been given to the question of whether or not a rule of customary international law could be formed when there were many objector States.

50. Referring to chapter XIII of the report (Other decisions and conclusions of the Commission), she said that the topic "General principles of law", which the Commission had decided to include in its programme of work, undoubtedly held some interest from the standpoint of teachings and practice. Nevertheless, further consideration should be given to the final form of the Commission's work on the topic. The best option would be an analytical report.

51. The issue of general principles of law had been and remained the subject of animated discussion in the literature, mainly in connection with Article 38, paragraph 1, of the Statute of the Permanent Court of International Justice. The understanding of the drafters as recorded in that paragraph was mainly of historical value. The Statute of the International Court of Justice was a different instrument and had been drafted under entirely different historical circumstances. It was not always appropriate to analyse the topic of general principles of law in light of the practice of the Permanent Court of International Justice.

52. General principles of law could be derived from both domestic law and international law; in that sense it was significant that Article 38, paragraph 1 (c), of the Statute of the International Court of Justice contained the phrase "general principles of law" and not "general principles of international law". However, it was also stated in paragraph 1 that the Court's function was to decide in accordance with international law such disputes as were submitted to it. It followed therefrom that the general principles of law applied by the Court were rules of international law. As the Soviet lawyer and judge of the International Court of Justice Vladimir Koretsky had rightly stated, the Court must apply the principles of international law rather than the principles of the domestic law of States. The Commission must therefore analyse the topic in the context of international law.

53. In that connection, her delegation wished to draw attention to the Special Rapporteur's proposed approach, namely to base the study of the topic on an analysis of the judicial practice of States. Naturally, the normative principles of national legal systems influenced the development of international law; they could also provide material for the creation of relevant rules of international law. However, the rules of domestic law could be changed at the discretion of the State in question, and they were binding only within the domestic legal system. As noted by the renowned Soviet academic and former Commission member Grigory Tunkin, even the existence of similar principles in the national legal systems of all States was by no means indicative of their legal force under international law. He had been correct in his view that any rule must be incorporated into international law by treaty or custom in order to be applied at the international level.

54. Under Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, general principles of law were principles that had been recognized by civilized nations. In other words, the application under international law of general principles of law was dependent on their recognition by States as rules under international law, which, as previously stated, were rules that had been established by treaty or custom. For the purpose of recognizing a rule as a general principle of law, it was essential to examine practice in the application of the law. However, her delegation considered it incorrect to use as a source the working methods of international criminal courts and tribunals such as the International Criminal Tribunal for the Former Yugoslavia or the International Criminal Court.

55. With regard to the decision to include in the long-term programme of work the topic "Universal criminal jurisdiction", she said that the Commission's current

programme of work was full; it therefore did not seem appropriate to add that topic to it in the near future. The debates in the Sixth Committee over several years did not give grounds to believe that there were rules of customary law in that area that might be subject to codification.

56. **Ms. Chigiyal** (Federated States of Micronesia) said that her delegation welcomed the Commission's decision to place the topic "Sea level rise in relation to international law" on its long-term programme of work. In January 2018, Micronesia had submitted a written proposal to the Commission expanding on a statement that it had made in the Sixth Committee at the seventy-second session with respect to issues that the Commission could examine, including the implications of sea level rise with respect to the law of the sea, statehood, human rights and human migration. She was pleased to note that the syllabus adopted by the Commission for the topic reflected all those issues and reiterated the call of the Pacific Islands Forum for the Commission to move the topic to its current programme of work as soon as possible.

57. According to the syllabus for the topic, the Commission would conduct its work in the format of a study group. In her delegation's view, that approach was ideal because a study group could carry out comprehensive mapping of the legal implications of sea level rise in relation to the specific issues identified in the syllabus without becoming bogged down in the production of highly technical and potentially contentious draft articles, principles or guidelines. The study group would produce a final report containing the findings of its mapping exercise, and the international community could then decide whether to use any of the findings to pursue initiatives in other forums to address the implications of sea level rise under existing international law.

58. If the Commission's examination of the topic was to be of significant use to the international community, then States must be allowed to participate actively in the work of the study group. Thus the Commission must, among other things, solicit feedback and input from States at regular intervals, including information on relevant State practice. The interaction should not be limited to statements in the Sixth Committee and the submission of comments to the Commission, but could also include briefings, interactive seminars and other informal modes of engagement, with particular consideration for the participation of representatives of small island developing States and other developing States with low-lying coastal areas.

59. While it was undeniable that sea level rise raised serious issues of international law with respect to small island developing States like Micronesia, it was also an issue of relevance to the international community as a whole. For example, sea level rise could alter maritime baselines and maritime boundaries, which could in turn alter the entitlements of coastal States as well as landlocked countries to various maritime zones. Sea level rise could also induce human migration, a matter of concern for all States. A mapping exercise to determine the current state of international law with regard to those matters and others would be of great use. During the current session so far, over 100 States from all the major geographical regions of the world – including coastal States and landlocked countries, continental States and small island States, and developed and developing countries – had spoken in favour of the Commission's studying the topic. That was a testament to its relevance to the international community as a whole, not just to a small group of particularly vulnerable States.

60. According to the syllabus, the scope of the topic was limited: the study group would not consider the protection of the environment, climate change per se, causation, responsibility or liability, and would not propose modifications of existing international law, including the United Nations Convention on the Law of the Sea. Those limitations should be sufficient to address concerns that the scope of the topic might be excessively broad. The study group would discuss and map, but would not supplant, ongoing work in existing legal forums, including intergovernmental treaty bodies. Her delegation trusted that the study group would be able to conduct its work in a careful and comprehensive manner.

61. The Intergovernmental Panel on Climate Change had projected that global sea level rise would average nearly a metre by 2100, that certain regions of the world were likely to experience sea level rise sooner and more extensively than others, and that sea level rise would likely continue beyond 2100, despite the international community's best efforts. The international law implications must be examined in an objective and authoritative manner as soon as possible. The Commission's work was key to that endeavour and should begin with all urgency.

62. **Mr. Tōnē** (Tonga) said that the progressive development of international law should result in the production of texts that could be used to address current and future global challenges. One of the single greatest threats currently faced was climate change, with impacts including sea level rise, as highlighted by Pacific Islands Forum leaders at their annual meeting in September

2018. His delegation therefore noted with appreciation the Commission's decision to include in its long-term programme of work the topic of sea level rise in relation to international law. The consequences of sea level rise prompted a number of important questions relevant to international law, national sovereignty and security, as had been emphasized by his country's Head of State in his recent statement to the General Assembly.

63. His delegation welcomed the proposal that the Commission focus on three main areas, namely the law of the sea, statehood and protection of persons affected by sea level rise, that reflected the legal implications for the constituent elements of the State. It also welcomed the fact that those areas were to be examined together because they were interconnected. It noted the various issues set out in paragraphs 15 to 17 of annex B to the Commission's report and looked forward to their being the subject of in-depth study, with due regard for international instruments, judicial decisions, practice and the concerns of States. It was also important to take into account related issues such as human security, environmental security, resource security and migration and to respect the existing rights and entitlements of States, in particular with regard to maritime boundary delimitation pursuant to the United Nations Convention on the Law of the Sea. The study of the topic would help to bridge diverging views on the relationship between sea level rise and international law. For Tonga and similar countries, the urgency of the situation called for the Commission to move the topic to its current programme of work.

64. In conclusion, his delegation congratulated the Commission on its seventieth anniversary and wished it many more decades of success in the progressive development of international law with a view to addressing contemporary realities. It looked forward to fruitful discussions on the role of the rule of law and international law in ensuring the security, existence and legal recognition of small island developing States in the face of rapidly increasing sea level rise.

65. **Mr. Kessel** (Canada) said that his country attached great importance to considering the implications of sea level rise, a phenomenon driven by climate change. It shared the concerns expressed by vulnerable low-lying coastal States and small island developing States, which were particularly threatened. Canada was also directly affected by sea level rise as a consequence of its geography: it had the longest coastline in the world, portions of which, notably in the north, were vulnerable to the effects of climate change. His delegation therefore strongly supported the Commission's decision to include the topic "Sea level rise in relation to international law" in its long-term programme of work; indeed, the topic should be moved to the current programme of work so that it could be addressed without delay.

66. Sea level rise raised complex questions and could have legal implications in areas such as the law of the sea, statehood and the protection of persons affected by sea level rise. The law of the sea issues listed in annex B to the report included the possible legal effects of sea level rise on the baselines and outer limits of maritime zones, on existing and future maritime delimitation, and on islands and their role in the construction of baselines and in maritime delimitation. Legal certainty and stability regarding maritime zones and entitlements were essential for international peace and security and orderly relations among States and also for the conservation and sustainable use of natural resources. However, the consideration of some of the other issues listed in annex B might lead to the discussion of broader issues, which would unnecessarily complicate the study of the topic. For example, while the Commission should certainly consider the possible legal effects of sea level rise on the status of islands, including rocks, it should do so without entering into a complex debate regarding the specific characteristics of island status.

67. **Mr. Kanu** (Sierra Leone) said that, as a small State, Sierra Leone was deeply committed to multilateralism and a rule-based international legal order. That was also the raison d'être of the Commission's work, which seemed more important today than ever before.

68. His delegation welcomed the report of the Commission and paid tribute to its members and its Special Rapporteurs for the adoption, on second reading, of draft conclusions together with commentaries on subsequent agreements and subsequent practice in relation to the interpretation of treaties and on identification of customary international law. The progress being made on other topics, including protection of the atmosphere and provisional application of treaties, both of which had reached the first reading stage, was also noted with appreciation.

69. The set of 13 draft conclusions and commentaries on subsequent agreements and subsequent practice had clearly been prepared with scholarly rigour and deference to the comments of States. However, the commentary to draft conclusion 2 (General rule and means of treaty interpretation), in which interpreters were encouraged to read articles 31 and 32 of the Vienna Convention together as an integrated framework, gave the impression that subsequent agreements and practice had been elevated to the level of the ordinary meaning, context and object and purpose of the treaty, as referred

to in article 31 of the Vienna Convention. An interpreter was thus at liberty to choose how to apply the different means of interpretation mentioned in articles 31 and 32, notwithstanding the cautionary note against doing so set out in the commentary, which was reinforced by the reference to the lack of uniformity in the decisions of domestic courts in footnote 51 to the report. The clear distinction between articles 31 and 32 of the Vienna Convention should be maintained in the draft conclusions.

70. With reference to draft conclusion 13 (Pronouncements of expert treaty bodies), he said that examples of recognition by States that such pronouncements could constitute subsequent agreements or practice appeared to be limited, notwithstanding the explanations in the commentary. Nonetheless, it was his delegation's view that, to the extent that the views or pronouncements of independent expert treaty bodies generated favourable reactions or practice by States, they could – in some circumstances – constitute subsequent practice in accordance with article 31, paragraph 3, of the Vienna Convention.

71. On the topic of identification of customary international law, his delegation noted the technical rigour and comprehensiveness of the set of 16 draft conclusions. In draft conclusion 6, paragraph 1, inaction was cited as a form of State practice. Despite the explanation given for the use of the qualifying phrase "under certain circumstances", his delegation was of the view that a less ambiguous term, for example "deliberate", could have been employed to qualify inaction. That would also have provided clarity as to the need to meet two important requirements: the State's awareness of the practice, and its conscious refraining from acting as opposed to an assumed deliberate abstention from acting.

72. On the issue of the persistent objector addressed in draft conclusion 15, his delegation agreed with the point made in paragraph (1) of the commentary that rules of general customary international law, by their very nature, must have equal force for all members of the international community, and could not therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour. However, that point and the draft conclusion as a whole seemed to be related to the application rather than the identification of customary international law.

73. On the Commission's other decisions and conclusions, his delegation welcomed the inclusion of the topic "General principles of law" in the programme of work and the appointment of a Special Rapporteur. The importance of the topic was matched only by the complexity of the issues involved. His delegation also welcomed the inclusion of the topics of universal criminal jurisdiction and sea level rise in relation to international law in the long-term programme of work.

74. In a decision adopted in Addis Ababa in July 2012, the African Union Assembly of Heads of State and Government had endorsed the African Union Model National Law on Universal Jurisdiction over International Crimes. The core goal of the model law was to strengthen the domestic capacity of African States to investigate, prosecute and punish the perpetrators of a short list of crimes, especially war crimes, crimes against humanity and the crime of genocide.

75. In paragraph 2 of its resolution 72/120, the General Assembly had stated that consideration in the Sixth Committee of the scope and application of universal jurisdiction was without prejudice to the consideration of the topic and related issues in other forums of the United Nations. At the same time, the consideration of the topic by the Commission did not preclude continued engagement by the Sixth Committee, which had made progress on the topic over the years. In addition, the Secretary-General had catalogued helpful evidence of relevant State practice; his rich reports demonstrated that the principle of universal jurisdiction was recognized and embraced at the domestic level by countries from all regions of the world. Concurrent consideration of the topic by the Commission and the Committee provided a unique opportunity for the two bodies to strengthen their working relationship. He urged other delegations to embrace that opportunity, which also seemed to have been recognized by the Commission itself: in paragraph 26 of annex A to its report, the Commission stated that it should not try to be comprehensive in addressing all the issues where there was a lack of clarity among States and could rather concentrate on a more limited set of legal concerns on which it could, through its work and engagement with the Sixth Committee, provide further guidance. With the recent or imminent completion of its work on several topics, the Commission should move the topic to its current programme of work. As to the outcome of its work, the Commission could consider producing draft guidelines or draft conclusions.

76. Lastly, on sea level rise in relation to international law, he said that Freetown, the capital of Sierra Leone, was only just recovering from an environmental incident in 2017, and 402 kilometres of the country's coastline were exposed to the dangers of rising sea levels. The importance of the topic could therefore not be overemphasized from his country's perspective. One issue that might have to be considered by the proposed

study group was whether it would be suitable to appoint a Special Rapporteur or even joint Special Rapporteurs for the topic. His delegation joined the call for the topic to be included in the Commission's current programme of work; it was the type of pressing issue of concern to the international community that the Commission should be studying in order to enhance its contribution to the progressive development and codification of modern international law.

77. **Mr. Murdoch** (United Kingdom) said that his delegation welcomed the Commission's decision to include the topic "General principles of law" in its programme of work and to appoint Mr. Marcelo Vázquez-Bermúdez as Special Rapporteur. Questions concerning sources of international law were natural topics for consideration by the Commission. A careful and well-documented study, focusing on the third source of international law, as referred to in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, could be of great practical assistance to States and practitioners alike.

78. His delegation likewise welcomed the Commission's decision to include the topic of sea level rise in relation to international law in its long-term programme of work. With regard to the topic of universal criminal jurisdiction, his delegation considered that State practice was not yet sufficiently advanced to enable consideration of the topic by the Commission. His delegation would favour the Commission's taking up the topic of the settlement of international disputes to which international organizations were parties, which had been added to the long-term programme of work in 2016. The topic should include disputes of a private law character, as suggested in paragraph 3 of annex A to the Commission's report on the work of its sixty-eighth session (A/71/10).

79. Concerning the Commission's outputs and the Sixth Committee's treatment thereof, it was important for the Commission to be clear about when it was codifying existing law and when it was suggesting the progressive development of the law or the creation of new law; otherwise, it was difficult for international and domestic courts and tribunals, which often relied on the Commission's texts, to determine what had already been accepted by States as international law and what had not. Whether the Commission's outputs were intended to progressively develop the law or to create new law, on the one hand, or to be clarificatory or to provide non-binding guidelines, on the other, it was crucial that the Commission enabled States to participate fully in the process of determining those outputs and that it accurately and fully considered the observations of States in the Sixth Committee. Such communication between the Commission and States was essential in order to maintain the authority of the Commission's work.

80. His delegation was concerned about the speed at which important topics, with wide-ranging syllabuses, were being dealt with by the Commission. Texts were presented to States at various stages of development: sometimes they were in the usual format of provisions adopted by the Commission together with commentaries, but, in other cases, provisions were proposed by the Special Rapporteur and revised by the Drafting Committee – and subsequently presented to States – before the accompanying commentaries were produced. States had a fuller understanding of draft provisions, and were therefore able to engage more productively with the Commission, when commentaries were produced simultaneously.

81. His delegation welcomed the Commission's adoption on second reading of the 13 draft conclusions, together with commentaries, on subsequent agreements and subsequent practice in relation to the interpretation of treaties, a complex area of treaty law. The text gave helpful guidance to States, international organizations and international and domestic courts. The Special Rapporteur had carried out detailed and rigorous work and had made a significant contribution to the art of treaty interpretation. His delegation particularly welcomed the Special Rapporteur's finding, set out in draft conclusion 10, that subsequent agreements need not be legally binding. It was also pleased that the Commission had confirmed in the commentary that memorandums of understanding did not amount to legally binding agreements.

82. Turning to the topic of identification of customary international law, he said that his delegation welcomed the adoption, on second reading, of 16 draft conclusions, together with commentaries thereto. It particularly welcomed the clarifications made to draft conclusion 4, and the accompanying commentary, regarding the practice of international organizations. With regard to draft conclusion 8 (The practice must be general), he welcomed the addition of a reference in the commentary to specially affected States, since it was indispensable that the practice of such States be taken into account in the identification of customary international law.

83. His delegation appreciated the careful approach taken in the commentaries to the question of the silence or inaction of States. It welcomed the statement, in paragraph (3) of the commentary to draft conclusion 6 (Forms of practice), that it could not simply be assumed that abstention from acting was deliberate, and also the clarification, in paragraph (8) of the commentary to

draft conclusion 10 (Forms of evidence of acceptance as law (*opinio juris*)), that a State might also provide other explanations for its inaction. There were a number of political and other reasons why a State might not react, or might not react publicly, to the practice of another State, and the failure of a State to do so in such an instance should not be taken as an indication of its belief about the legal status of such practice.

84. His delegation remained circumspect regarding the possibility that there might be particular customary law that did not have a geographical nexus. In that regard, it welcomed the cautious statement in paragraph (5) of the commentary to draft conclusion 16 that, while particular customary international law was mostly regional, subregional or local, there was no reason in principle why a rule of particular customary international law could not also develop among States linked by a common cause, interest or activity other than their geographical position, or constituting a community of interest.

85. In his delegation's view, the draft conclusions and commentaries were a valuable and accessible tool for judges and other practitioners who were required to determine whether or not a customary rule of international law existed. Parties to litigation before domestic courts increasingly invoked arguments based on customary international law in a wide variety of contexts. Indeed, the Court of Appeal of England and Wales had relied on the draft conclusions and commentaries in a case in July 2018, stating that it had found them to be a valuable source of the principles on the subject. His delegation commended all the members of the Commission for their excellent collegial work on the text, which would serve as an important guide to the identification of customary international law.

86. **Ms. Durney** (Chile), referring to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", said that the Special Rapporteur was to be congratulated on the precise identification of existing rules and precedents. In draft conclusion 5 (Conduct as subsequent practice), it was rightly emphasized that the conduct in question was that of a party to a treaty and that the conduct must be in the application of the treaty. Other conduct, including by non-State actors, was irrelevant. As indicated in the commentary, the expression "any conduct" in paragraph 1 of the draft conclusion should be understood as referring to subsequent practice that the other parties to a treaty were aware of and could assess, while the use of the expression "may consist" reflected the fact that not all conduct in the application of a treaty constituted subsequent practice, a clarification that was particularly important in relation to conduct of State organs that might contradict an officially expressed position of the State with respect to a particular matter and thus contribute to equivocal conduct by the State.

87. In draft conclusion 6, the Commission correctly identified one of the principal requirements for determining whether a subsequent agreement or subsequent practice was an authentic means of interpretation, namely, whether the parties, by the agreement or practice, had taken a position regarding the interpretation of the treaty. If they were motivated in their conduct by other considerations, then the conduct would not have any effects in respect of the interpretation of the treaty.

88. Under draft conclusion 7, subsequent agreements and subsequent practice contributed, together with other means of interpretation, to the clarification of the meaning of a treaty. As stated in paragraph 3, it was presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intended to interpret the treaty, not to amend or to modify it. If, however, the parties expressly stated, in an agreement on interpretation, that the agreement constituted an amendment of the treaty, then it was article 39 of the Vienna Convention, and not articles 31 and 32, that came into play. The draft conclusion reflected that distinction, which was a well-established rule of treaty law.

89. In draft conclusion 10, the Commission emphasized that, in order to constitute an authentic means of interpretation in conformity with article 31, paragraph 3 (a) and (b), of the Vienna Convention, an agreement must reflect a common understanding of the parties regarding the interpretation of a treaty; such an agreement was based on subsequent practice. By also stating in the draft conclusion that the parties must be aware of and accept the common understanding, the Commission gave appropriate weight to the will of the parties regarding both the purpose of the agreement or understanding – namely, interpretation – and its content. In paragraph 2 of the draft conclusion, it was stated that silence on the part of one or more parties might constitute acceptance of the subsequent practice when the circumstances called for some reaction. That provision was consistent with the pronouncement of the International Court of Justice in the case concerning the *Temple of Preah Vihear (Cambodia v. Thailand)*, in that the Commission made it clear that silence did not constitute practice under article 31, paragraph 3 (b), of the Vienna Convention, but was rather a form of tacit acceptance of a practice. The Commission also made it clear that silence did not in itself imply acceptance, but was deemed to constitute acceptance when objective

circumstances called for some reaction. Thus, a State was not obliged to react to every document or act that might emerge in the international arena. In her delegation's view, that was the right approach to inaction in the context of treaty interpretation.

90. With regard to draft conclusion 13, she agreed with the Commission that the relevance of a pronouncement of an expert treaty body for the interpretation of a treaty was subject to the applicable rules of the treaty. She likewise agreed that a pronouncement of an expert treaty body could not as such constitute a subsequent agreement or subsequent practice under article 31, paragraph 3 (a) or (b), of the Vienna Convention because the experts served in their personal capacity, as was pointed out in paragraph 1 of the draft conclusion; therefore an agreement among the parties, as required under the Vienna Convention, was absent. It might also be stated that inaction by States with regard to the opinions of experts must not be understood as agreement with the content of those opinions.

91. Turning to the topic of identification of customary international law, she commended the Special Rapporteur on the superb job he had done in facilitating the adoption on second reading of a solid set of draft conclusions with commentaries that would henceforth constitute a valuable tool for practitioners in the arduous but necessary task of identifying rules of customary international law.

92. In the text of and commentary to draft conclusion 4, the Commission rightly noted that it was primarily the practice of States that contributed to the formation of customary international law. The practice of international organizations might also count as practice that gave rise to or attested to rules of customary international law, but only those rules whose subject matter fell within the mandate of the organizations and/or were addressed specifically to them. The commentary contained the important clarification that paragraph 2 dealt with practice that was attributed to international organizations themselves, not the practice of States acting within or in relation to them, which was attributed to the States concerned.

93. Her delegation endorsed the wording of draft conclusion 5 and wished to emphasize that, as was pointed out in the commentary, in order to contribute to the formation and identification of rules of customary international law, practice must be known to other States, whether or not it was publicly available.

94. Draft conclusion 6, which was very carefully worded, indicated that the inaction of a State could be considered a form of practice only under certain circumstances. As was made clear in the commentary, only deliberate abstention from acting could serve that purpose, and proof was required; it could not simply be assumed that abstention from acting was deliberate. In paragraph 3, it was clearly stipulated that there was no predetermined hierarchy among the various forms of practice, but, as was rightly pointed out in the commentary, different forms of practice might be given different weight in particular cases.

95. In draft conclusion 8, the Commission listed the requirements for practice to be general, namely that it must be widespread, representative and consistent. However, as was noted in the commentary, contradictory or inconsistent practice must also be taken into account.

96. The wording of draft conclusion 9 (Requirement of acceptance as law (*opinio juris*)) was satisfactory. It did not preclude the possibility that, at least during the process of formation of a customary rule, a given practice might have been undertaken with the conviction that, though merely permitted rather than required by law, the practice nonetheless met a legal need, and thus was undertaken with clear normative intent. That was an important point because, if a conviction of that nature could not provide an initial basis for the formation of *opinio juris*, customary rules would arise only with great difficulty, and it would be almost impossible to modify them.

97. With regard to draft conclusion 12, the Special Rapporteur had taken appropriate account in the text and commentary of the concerns raised by several delegations, including her own, in particular with regard to whether the phrase "may… contribute to its development" meant that the resolutions of international organizations and intergovernmental conferences could lead to the crystallization of a rule of customary international law, which treaty rules could do under draft conclusion 11. More in-depth consideration should be given to that issue. It was necessary to emphasize that such resolutions should have general objectives and that the voting thereon should reflect general agreement.

98. As to draft conclusion 15, which dealt with the controversial issue of the persistent objector, her delegation welcomed the "without prejudice" clause contained in paragraph 3, which would help to ensure consistency with the Commission's work on the topic of peremptory norms of general international law (*jus cogens*) and reflected comments made in the Sixth Committee regarding the applicability of the persistent objector principle to such norms.

99. Lastly, in connection with chapter XIII (Other decisions and conclusions of the Commission), she paid

tribute to the valuable work done by the Commission over the 70 years of its history. The interactions between the Commission and the Sixth Committee had been mutually enriching, and her delegation hoped that the fruitful dialogue would be pursued. Among the challenges facing the Commission was that of improving the gender balance in its membership. Over the past 70 years, only seven women had been members of the Commission, a scarcity by no means due to their lack of interest in its work or to a paucity of women jurists. Governments must nominate more women for membership in the Commission, and the international community must support such nominations.

100. **Mr. Fintakpa Lamega** (Togo), referring to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, said that his delegation congratulated the Special Rapporteur on his tireless efforts, which had culminated in the Commission's decision to adopt the 13 draft conclusions on the topic.

101. His delegation welcomed the adoption on second reading of the draft conclusions on identification of customary international law but shared the concerns expressed in the Commission about the implications of draft conclusion 4 in respect of the practice of international organizations. While it was acknowledged that, in certain cases, such practice could contribute to the creation of rules of customary international law, there was a need to specify what practice was being referred to, at what point it might become relevant to the identification of rules of customary international law and what considerations should be taken into account in assessing the weight of the practice of international organizations compared with that of States. The requirement under draft conclusion 8 that the practice must be general must in no way be construed as a need for complete uniformity in State practice. In that context, a reference to specially affected States in the text of the draft conclusion and not only in the commentary would have been welcome. His delegation noted the Commission's recommendation that the General Assembly commend the draft conclusions and the commentaries thereto to the attention of States and was in favour of requesting the Secretariat to continue to develop and enhance United Nations publications providing evidence of customary international law, including their timely publication. He thanked the Special Rapporteur for his devotion to his task and for the results obtained.

102. His delegation welcomed the events held to commemorate the Commission's seventieth anniversary, in particular the dialogue between the Commission and the Sixth Committee, and hoped that such events would be held more often in the future in order to strengthen the partnership between the Commission and Member States. He also hoped that the planned publication containing the details of the proceedings would be issued as soon as possible in the Commission's working languages.

103. His delegation took note of the Commission's decision to include the topic "General principles of law" in its programme of work. In addition, as a coastal State facing the effects on the oceans of climate change and the alarming advance of the sea on its littoral areas, Togo hoped that the inclusion of the topic "Sea level rise in relation to international law" in the Commission's long-term programme of work would spur an in-depth consideration of that important problem.

104. The Commission had also decided to include in its long-term programme of work the topic of universal criminal jurisdiction, even though the Sixth Committee had been discussing that subject since 2009. The Committee should continue studying the issue from the standpoint of its potential abuse and politicization, as distinct from the legal analysis to be carried out by the Commission.

105. Lastly, his delegation welcomed the holding of the International Law Seminar in July 2018 and encouraged the Commission to continue organizing such seminars, which gave young jurists, often from developing countries, an opportunity to familiarize themselves with the Commission's work.

The meeting rose at 1 p.m.