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Chair: Mr. Biang . . . . . (Gabon)

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18-17542 (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 (A/73/10)

1. **The Chair** invited the Committee to begin its consideration of the report of the International Law Commission on the work of its seventieth session (A/73/10). The Committee would consider the Commission's report in three parts, beginning with the first part, which would cover chapters I to III (the introductory chapters), chapter XIII (Other decisions and conclusions of the Commission), chapter IV (Subsequent agreements and subsequent practice), chapter V (Identification of customary international law) and chapter XII (Commemoration of the seventieth anniversary).

2. **Mr. Valencia-Ospina** (Chair of the International Law Commission) said that the tradition of interaction and collaboration between the Committee and the Commission in the progressive development of international law and its codification was one that the Commission cherished and would like to see fostered. For that reason, he was pleased that the Commission had held the first part of its seventieth session in New York and not at its seat in Geneva and that many members of the Commission were in New York for International Law Week 2018. The seventieth session had been especially intense and productive and had coincided with the Commission's seventieth anniversary, celebrated with events in New York and Geneva.

3. The anniversary, on the overarching theme "70 years of the International Law Commission — Drawing a balance for the future", had offered an opportunity to reflect on the Commission's achievements and prospects. As Chair, he had welcomed the participation of representatives of the Sixth Committee in the half-day meeting with members of the Commission held in New York. He also wished to pay tribute to the legal advisers of States and other international law experts who had participated in another commemorative meeting that had been held in Geneva on various aspects of the Commission's work. None of those commemorative events would have been possible without the contributions of several Governments and one academic institution. He expressed the Commission's gratitude to them all.

4. Further to the invitation of the General Assembly in its resolution 72/119, the Commission had commented on its current role in promoting the rule of law and reiterated its commitment to the rule of law in all its activities. He acknowledged the invaluable assistance of the Codification Division for the substantive servicing of the Commission. In particular, the Commission had expressed its appreciation to the Secretariat for its preparation of a memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710) and requested that the memorandum be reissued to reflect the text of the draft conclusions and commentaries on identification of customary international law adopted on second reading. In addition, the Commission had also requested from the Secretariat a memorandum providing information on treaties which might be of relevance to its future work on the topic "Succession of States in respect of State responsibility".

5. Introducing the first cluster of chapters of the Commission's report, he said that, as shown in chapter II, the Commission had made significant progress during the session: it had concluded the second reading on the topics "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and "Identification of customary international law" by adopting two full sets of draft conclusions and commentaries thereto. It had also concluded its first reading on the topics "Protection of the atmosphere" and "Provisional application of treaties", adopting two full sets of draft guidelines and commentaries thereto. It had continued its consideration of four other topics: "Peremptory norms of general international law (*jus cogens*)", "Protection of the environment in relation to armed conflicts", "Succession of States in respect of State responsibility" and "Immunity of State officials from foreign criminal jurisdiction".

6. A new topic, "General principles of law", had been included in the Commission's future programme of work. Mr. Vázquez-Bermúdez had been appointed Special Rapporteur for the topic, which the Commission would begin considering at its next session. The Commission had also added two new topics to its long-term programme of work: "Universal criminal jurisdiction" and "Sea-level rise in relation to international law". The Commission would welcome views on those two new topics, following which it would be able to decide on the advisability of including them in its active programme of work.

7. In chapter III of the report, the Commission drew attention to specific issues on which the comments of Government would be of particular interest.

8. Introducing the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", contained in chapter IV of the report, he said that the adoption of the draft conclusions and the

commentaries thereto had been the culmination of 10 years of work by the Commission since it decided to include the topic in its programme of work in 2008. After reviewing the text of the draft conclusions adopted in 2016 on first reading in the light of the comments and observations of States, the Commission had amended them slightly and refined the commentaries. In those draft conclusions, which were based on the 1969 Vienna Convention on the Law of Treaties, the Commission sought to explain the role that subsequent agreements and subsequent practice played in the interpretation of treaties, in order to facilitate the work of those who were called upon to interpret treaties, in particular States, international organizations and international and national courts and tribunals.

9. Part One of the draft conclusions, consisting of draft conclusion 1, set out the scope of the draft conclusions. Part Two, which comprised four draft conclusions, dealt with basic rules and definitions. Draft conclusion 2 situated 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 Vienna Convention. The purpose of draft conclusion 3 was to indicate that subsequent agreements and subsequent practice under article 31, paragraph 3, of the Vienna Convention were significant for the interpretation of treaties, since they constituted authentic means of interpretation. Under draft conclusion 4, the Commission provided definitions of subsequent agreement and subsequent practice, while draft conclusion 5 addressed the question of possible authors of subsequent practice under articles 31 and 32 of the Vienna Convention.

10. Part Three, comprising five draft conclusions, dealt with general aspects. Draft conclusion 6 confirmed that subsequent agreements and subsequent practice, as means of interpretation, must be identified. Draft conclusion 7 addressed the possible effects of subsequent agreements and subsequent practice in interpretation and described how such agreements and practice might contribute to clarifying the meaning of a treaty. Draft conclusion 8 focused on the role that such agreements and practice might play in the context of the more general question of whether the meaning of a term in a treaty was capable of evolving over time. Draft conclusion 9 concerned the weight of subsequent agreements and subsequent practice as a means of interpretation; it identified criteria that might help to determine the interpretative weight to be given to a specific subsequent agreement or subsequent practice in the process of interpretation in a particular case. The purpose of draft conclusion 10 was to clarify the meaning of "agreement" as an element distinguishing subsequent agreement and subsequent practice as authentic means of interpretation under article 31 (3) (a) and (b) of the Vienna Convention from subsequent practice as a supplementary means of interpretation under article 32.

11. Part Four, comprising three draft conclusions, dealt with specific aspects. Draft conclusion 11 focused on decisions adopted within the framework of a conference of States parties. It addressed a particular form of action that might result in a subsequent agreement or subsequent practice under article 31, paragraph 3 or a subsequent practice under article 32. Draft conclusion 12 referred to a particular type of treaty, namely constituent instruments of international organizations, and to the way in which subsequent agreements or subsequent practice should or might be taken into account in their interpretation. Draft conclusion 13 concerned the role of pronouncements of expert treaty bodies in the interpretation of treaties.

12. He drew attention to the Commission's recommendation, pursuant to article 23 of its statute, that the General Assembly take note in a resolution of the draft conclusions, annex them to the resolution and ensure their widest dissemination; and that it commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who might be called upon to interpret treaties.

13. Turning to the topic "Identification of customary international law", contained in chapter V of the report, he said that the Commission had concluded its work thereon, with the adoption, on second reading, of a set of 16 draft conclusions and commentaries thereto. In addition to the comments and observations received from Governments and the fifth report of the Special Rapporteur (A/CN.4/715), in which those comments had been analysed and suggestions made on their basis, the Commission had also had before it a memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available (A/CN.4/710). The text of the draft conclusions as adopted was not very different from the text that had been provisionally adopted on first reading, but it had been refined, as had the commentaries thereto, to reflect the views expressed by Governments over the years. The draft conclusions concerned the methodology for identifying rules of customary international law and sought to offer practical guidance on how the existence of such rules and their content were to be determined. They were in seven parts.

14. Part One, comprising a single draft conclusion, dealt with the scope and purpose of the draft

conclusions. Part Two, which contained two draft conclusions, set out the basic approach to the identification of customary international law, referred to as the two-element approach. Under that approach, set out in draft conclusion 2, the identification of a rule of customary international law required an inquiry into two distinct yet related questions: whether there was a general practice and whether it was accepted as law (*opinio juris*). Draft conclusion 3 referred to the assessment of evidence for those two constituent elements and provided general guidance for the process of determining the existence and content of a rule of customary international law from the various pieces of evidence available at the time of the assessment, which reflected both the systematic and rigorous analysis required and the dynamic nature of customary international law as a source of international law.

15. Part Three, which comprised five draft conclusions, offered more detailed guidance on the first of the two constituent elements of customary international law. Draft conclusion 4 specified whose practice was to be taken into account in ascertaining the existence of a general practice for the purpose of determining the existence of a rule of customary international law and the role of such practice. Draft conclusion 5 made it clear that, while in their international relations States acted mainly through the executive branch, State practice consisted of any conduct of the State, irrespective of the functions exercised and the branch concerned. The various forms of practice were addressed in draft conclusion 6, which, through examples, indicated the types of conduct included, stipulating that no form of practice had a priori primacy over another in the identification of customary international law. Draft conclusion 7 concerned the assessment of the practice of a particular State in order to determine the position of that State as part of assessing the existence of a general practice. Draft conclusion 8 referred to the requirement that the practice be general.

16. Part Four, which comprised two draft conclusions, concerned the second constituent element of customary international law. Draft conclusion 9 addressed the nature and function of that constituent element, while draft conclusion 10 concerned the evidence from which acceptance of a given practice as law (*opinio juris*) might be ascertained. It reflected the fact that acceptance as law might be made known through various manifestations of State conduct.

17. Part Five, which comprised four draft conclusions, concerned the significance of certain materials for the identification of customary international law. Draft conclusion 11 clarified how the provisions of treaties and the processes of their adoption and application might shed light on the content of customary international law. Draft conclusion 12 concerned the role that resolutions adopted by international organizations or at intergovernmental conferences might play in determining rules of such law. Draft conclusion 13 referred to the role of the decisions of international and national courts and tribunals as an aid in identifying the rules of customary international law. Draft conclusion 14 made it clear that teachings could serve as a subsidiary means for determining those rules.

18. Parts Six and Seven each comprised a single draft conclusion. Draft conclusion 15 shed light on the persistent objector rule, according to which, when a State had persistently objected to an emerging rule of customary international law and had maintained its objection after the rule had crystallized, that rule was not opposable to it. Draft conclusion 16 dealt with the specific case of rules of particular customary international law that applied only among a limited number of States.

19. He drew attention to the Commission's recommendation, pursuant to article 23 of its statute, that the General Assembly take note in a resolution of the draft conclusions on identification of customary international law, annex the draft conclusions to the resolution and ensure their widest dissemination; commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who might be called upon to identify rules of customary international law; note the bibliography prepared by the Special Rapporteur (A/CN.4/717/Add.1); note the Secretariat memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710); and follow up the suggestions in that memorandum.

20. **Ms. Rivera Sánchez** (El Salvador), speaking on behalf of the Community of Latin American and Caribbean States (CELAC), said that the Community continued to appreciate the important work carried out by the International Law Commission in the progressive development and codification of international law. CELAC again thanked the Commission for deciding to hold part of its seventieth session in New York, thereby providing an opportunity to strengthen the interaction between the Sixth Committee and the Commission. The exchange of views and discussions between the members of the Sixth Committee, as a body composed of government representatives, and members of the Commission, as a body of independent legal experts, had been stimulating and fruitful; CELAC therefore welcomed the initiative and supported its continuation.

21. CELAC was thankful for the work carried out by the Commission at its seventieth session. It took note of the sets of draft conclusions adopted by the Commission on second reading on the topics of subsequent agreements and subsequent practice in relation to the interpretation of treaties and identification of customary international law. It also took note of the adoption on first reading of draft guidelines on protection of the atmosphere and the draft Guide to Provisional Application of Treaties.

22. CELAC took note of the specific issues identified in the report in respect of which the Commission required information from Governments in order to have material on national laws, court decisions, treaties, legal scholarship and diplomatic correspondence; it urged States to cooperate so as to provide better input for the Commission's work.

23. CELAC also took note that the Commission had had before it the third report of the Special Rapporteur for the topic "Peremptory norms of general international law (*jus cogens*)" (A/CN.4/714 and A/CN.4/714/Corr.1), and that it had considered the consequences and legal effects of such norms, together with the 13 draft conclusions proposed by the Special Rapporteur for its consideration; that it had had before it the sixth report of the Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction" (A/CN.4/722), devoted to the procedural aspects of such immunity; that it had considered the first report of the Special Rapporteur for the topic "Protection of the environment in relation to armed conflicts" (A/CN.4/720 and A/CN.4/720/Corr.1), which provided an overview of previous work on the topic and addressed the protection of the environment through the law of occupation, protection of the environment in situations of occupation through international human rights law and the role of international environmental law in situations of occupation; and that it had had before it the second report of the Special Rapporteur for the topic "Succession of States in respect of State responsibility" (A/CN.4/719), which offered a summary of the general approach to the topic, a discussion on the legality of succession and a consideration of the general rules on succession of States in respect of State responsibility.

24. CELAC welcomed the appointment of Mr. Vázquez-Bermúdez as the Special Rapporteur for the topic "General principles of law" and looked forward to his reports. It took note of the inclusion in the Commission's long-term programme of work of two new topics: "Universal criminal jurisdiction" and "Sea-level rise in relation to international law". It commended the Commission for the significant progress it had made in its work and encouraged it to continue to improve its relations with the Sixth Committee so that the General Assembly might benefit from the invaluable outcome of the discussions between them. The Community reaffirmed its steadfast commitment to support that process and to strive towards the common goal of contributing to the progressive development and codification of international law.

25. **Mr. Jaiteh** (Gambia), speaking on behalf of the African Group, said that, while the Commission's report was well-structured and informative, it could be made more user-friendly for better understanding by all delegations. For example, the Commission could simplify the report and provide further information in the chapter containing the summary of its work, without necessarily expanding it inordinately. Being among the delegations that played an active role in welcoming the Commission to New York annually, the African Group proposed that International Law Week be moved to the months of February or March or thereabouts, to attract more active participants than spectators. More active attention needed to be given to the Commission's work and sufficient time should be set aside to stimulate active participation.

26. The African Group attached great importance to the three clusters of topics and commended the Special Rapporteurs for their work and believed that delegations must be given the right opportunity to engage actively with the individual Special Rapporteurs on their reports. It congratulated the Commission on the commemoration of its seventieth anniversary and hoped that events similar to those held in New York and Geneva would be held in other parts of the world as well, in accordance with article 12 of the Commission's statute. The Group also supported the continuation of such events, particularly in New York, to bring the Commission and the Sixth Committee closer together.

27. The African Group welcomed the inclusion of the topic "General principles of law" in the Commission's programme of work, which it hoped would enable the Commission to have worked on all the sources of international law listed in Article 38 of the Statute of the International Court of Justice, following its work on the law of treaties and on the identification of customary international law.

28. The African Group took note of the inclusion in the Commission's long-term programme of work of the two new topics: "Universal criminal jurisdiction" and "Sea-level rise in relation to international law". It reiterated that the Sixth Committee should remain seized of the item "The scope and application of the principle of universal jurisdiction" and related issues.

As for the second new topic, which the international community had not comprehensively addressed from a legal perspective, even though sea-level rise clearly threatened islands and other coastal areas and the livelihood of people within the African Group, the Group welcomed its inclusion in the Commission's long-term programme of work and called upon the Commission to move the topic to its current programme of work so that it might be examined as a matter of urgency. The Group looked forward to interacting with the Commission on that important topic.

29. **Ms. Carey** (Bahamas), speaking on behalf of the Caribbean Community (CARICOM), said that the Community supported the Commission's decision to hold part of its seventieth session in New York and that CARICOM encouraged it to continue reaching out to delegations in New York, including by holding future meetings there, since the legal advisers of many developing countries were not present in Geneva.

30. CARICOM commended the proposal put forward by the Government of the Federated States of Micronesia to include a topic entitled "Legal implications of sea-level rise" in the Commission's long-term programme of work. It agreed with the Commission that the issue of sea-level rise should be addressed more comprehensively and as a matter of priority, given that it would have important direct implications for more than one third of the international community and indirect implications for all Member States. Moreover, the scope of the topic, as proposed in annex B of the Commission's report (A/73/10), should be maintained or expanded.

31. CARICOM noted with concern the limited scope of the topic "Protection of the atmosphere", as set out in the eighth preambular paragraph and draft guideline 2 of the draft guidelines proposed thereon, and encouraged the Commission to avoid narrowing the scope of topics in such a manner, which might negatively affect the relevance and utility of their outcome to Member States. CARICOM welcomed the deeper exploration of other issues, including the legal implications of the inundation of low-lying coastal areas and of islands upon their baselines, upon maritime zones extending from those baselines and upon delimitation of maritime zones, whether by agreement or adjudication; the consequences for statehood under international law should the territory and population of a State disappear; the international law protections enjoyed by persons directly affected by sea-level rise; and whether the principle of international cooperation should be applied to help States scope with the adverse effects of sea-level rise on their population. CARICOM encouraged the Commission to elaborate on the envisaged outcome of the work on that topic, including whether a Special Rapporteur would be appointed upon completion of the preparatory work in the study group format, and hoped that sea-level rise would be the next topic added to the Commission's current programme of work.

32. CARICOM also supported the Commission's decision to include the topic "Universal criminal jurisdiction" in its long-term programme of work, recognizing as it did that certain crimes, including genocide, crimes against humanity, torture and war crimes, posed such a serious threat to the fundamental interests of the international community as a whole that it was the responsibility and moral duty of States to investigate and prosecute, in accordance with international law, those suspected of committing them. CARICOM was aware that there were disparities in the application of international justice and saw universal criminal jurisdiction as an important means of redressing that imbalance by offering a subsidiary basis for promoting accountability, bridging the impunity gap and further developing international justice systems.

33. At previous sessions of the General Assembly, there had been calls for the establishment of guidelines for the scope and exercise of universal jurisdiction, including a possible list of crimes, conditions for its application and its relationship with existing concepts of international law. CARICOM reiterated that the extraterritorial application of domestic law by a State was contrary to the principle of universal jurisdiction, unless permitted under international law, as in cases where the State had the necessary jurisdiction over one of its own nationals. It was therefore important to ensure that the exercise of universal jurisdiction did not generate abuse of or conflict with international law. The fact that for the first time the Commission and a working group of the Sixth Committee would be addressing the same subject matter simultaneously should be used as an opportunity to revitalize the Committee's work through a new form of relationship with the Commission.

34. CARICOM commended the Commission for preparing the draft preamble and 12 draft guidelines on the topic "Protection of the atmosphere" and welcomed, in particular, the recognition in the sixth preambular paragraph and draft guideline 9, paragraph 3, that small island developing States and low-lying coastal areas were especially vulnerable to the effects of sea-level rise. The CARICOM countries could confirm first-hand that sea-level rise was likely to exhibit a strong regional pattern, with some places experiencing significant deviations of local and regional sea-level change from the global mean change.

35. CARICOM supported the Commission's work on criteria for the identification of peremptory norms of general international law (*jus cogens*) and agreed with its use of article 53 of the 1969 Vienna Convention on the Law of Treaties as a good starting place for the identification of such criteria. The notion of "fundamental values" should be further analysed, particularly with regard to the identification of a universal understanding of such values. While caution should be exercised in considering some treaties as part of general international law, that issue also called for further study. CARICOM agreed that treaties must be interpreted in a manner consistent with peremptory norms, pursuant to article 31 of the Vienna Convention; however, where a treaty purported to conflict with *jus cogens* norms, CARICOM would support the formulation of a single draft conclusion, providing a general rule regarding interpretation, which would be applicable to all sources of international law. CARICOM encouraged the Commission to continue examining and exploring that and other aspects of the topic.

36. On the topic "Protection of the environment in relation to armed conflict", CARICOM commended the Special Rapporteur for recognizing that environmental obligations protected a collective interest and were owed to a wider group of States beyond those involved in an armed conflict or occupation. It remained cognizant of situations where international legal provisions in that regard, which were designed for international armed conflicts, did not necessarily apply to internal or national conflicts. CARICOM looked forward to the Commission addressing the extent to which the draft principles proposed by the Special Rapporteur applied to non-international armed conflicts and other matters, including compensation for environmental damage and questions of responsibility and liability.

37. The topic of succession of States in respect of State responsibility was ripe for exploration, even though it could be argued that it currently concerned only a few States. CARICOM supported the Special Rapporteur's view that further codification and development of the topic would allow for gaps to be addressed; it would also support further discussion on obligations arising from wrongful acts.

38. On the topic of immunity of State officials from foreign criminal jurisdiction, CARICOM encouraged the continued exploration and elaboration of procedural issues pertaining to immunity, so as to safeguard the stability of international relations while maintaining respect for the sovereign equality of States. Further consideration needed to be given to the issues of jurisdiction of the forum State, the fight against impunity and the rights of the State official concerned. CARICOM also encouraged the Commission to continue to discuss immunity timing, while maintaining the distinction between immunity *ratione personae* and immunity *ratione materiae*. As immunity issues must be addressed at an early stage of the procedure, clarity must be provided on what was considered to be "an early stage "or "the earliest opportunity", to avoid ambiguity or misinterpretation. Further consideration also needed to be given to; deciding whether the courts of the forum State, the executive, a specifically designated State organ, international courts and tribunals or another organ represented the most appropriate forum for determining whether immunity applied.

39. CARICOM reiterated its appreciation for the opportunity to interface with the Commission in New York and welcomed the Commission's attention to increasing its number of women members and assisting developing States through capacity-building to enable them to better engage with its work. It looked forward to closer collaboration between the Commission and States members of CARICOM, including their regional academic institutions. It encouraged members of the Commission to seek further engagement with small island developing States and called on the General Assembly to assist in capacity-building through a formal internship programme for developing States.

40. **Ms. Kabua** (Marshall Islands), speaking on behalf of members of the Pacific Islands Forum with permanent missions in New York, said that the Commission was to be thanked for including in its long-term programme of work the topic of sea-level rise in relation to international law. Sea-level rise was a subject of increasing importance, particularly for low-lying small island States in the Pacific, where its impacts were more varied and complex than was often assumed. For example, salinization was already threatening crops and livelihoods, while coastal erosion would result in more destructive storm surges and natural disasters. The potential impacts of sea-level rise on maritime areas were also a concern, being a source of significant revenue and cultural connection. The rights of archipelagic States under the law of the sea should be taken into account in that regard.

41. Issues relating to statehood, statelessness and climate-induced migration were also directly relevant to the region, particularly in view of the possibility of whole atolls being entirely submerged. Noting that current legal instruments did not explicitly address cross-border movements of persons resulting from climate change-related harm, the Pacific Islands Forum drew the Commission's attention to relevant

international legal principles and frameworks, including in the areas of international cooperation, disaster risk management and reduction, and climate change.

42. In the coming years, the impacts of sea-level rise, already felt by low-lying islands, would likely be felt by many more States, including continental States with low-lying coastal areas. The Intergovernmental Panel on Climate Change predicted that the average global sea level could rise by nearly one metre by 2100, with some regions of the world such as the Pacific likely to experience sea-level rise sooner and to a greater extent than others during the current century.

43. Leaders of the Forum had recently acknowledged the urgency of securing the region's maritime boundaries as a key issue for its development and security. Action was therefore being taken on maritime boundary delimitation and to resolve outstanding maritime boundary claims. The Forum would report thereon and on other examples of relevant State practice to the Commission once it began its active study of the topic. In conclusion, the Forum called on the Commission to move the topic of sea-level rise in relation to international law to its current programme of work in order to examine the international law implications of sea-level rise as a matter of extreme urgency.

44. **Mr. Gussetti** (Observer for the European Union), noting that the full version of his delegation's statement had been deposited with the Secretariat and referring first to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, said that in the view of the European Union, the draft conclusions adopted by the Commission on second reading were based on the 1969 Vienna Convention and that they did not deal with the relevance of subsequent agreements and subsequent practice in relation to treaties between States and international organizations or between international organizations, and that the practice of international organizations was only addressed to a limited extent in draft conclusion 12, paragraph 3.

45. The European Union noted that it was rightly stated in draft conclusion 2 that the rules in articles 31 and 32 of the Vienna Convention also applied as customary international law. It was its understanding that the limitation of the scope of the draft conclusions would not have an impact on their relevance in cases where the rules in question were applied by international organizations in their treaty practice as a matter of customary international law. Indeed, the Court of Justice of the European Union had recently issued two rulings demonstrating that it relied on the rules of article 31 of the Vienna Convention as reflecting customary international rule when interpreting international agreements to which the European Union was a party.

46. Turning to draft conclusion 12, he said that the European Union emphasized the importance of the principle that, as stated in paragraph 4 of the draft conclusion, the applicability of articles 31 and 32 of the Vienna Convention to constituent instruments of international organizations was without prejudice to any relevant rules of the organization. According to settled case law of the Court of Justice of the European Union, European Union law represented an autonomous legal order; its founding treaties were not like ordinary international treaties. That was reconfirmed by the Court in the recent case of *Slowakische Republik (Slovak Republic) v. Achmea BV*. The European Union therefore appreciated the inclusion in paragraph (42) of the commentary to the draft conclusion of a reference to the specificities of the Union with regard to the application of the rules in articles 31 and 32 of the Vienna Convention to its founding treaties. It also welcomed the reference, in that same context, to a judgment whereby the Court of Justice of the European Union had declined to accept a subsequent agreement between all member States having as an effect the extension of the deadline for fulfilment of an obligation fixed by those treaties.

47. That being said, the Court of Justice had relied on article 31 of the Vienna Convention when interpreting constituent instruments of other international organizations. The European Union therefore welcomed the inclusion in the commentary to the draft conclusion of a reference to the judgment of the Court of Justice in the joined cases of *Europäische Schule München v. Silvana Oberto and Barbara O'Leary*, where the Court had stated explicitly that the constituent instrument of the European Schools should be interpreted within the meaning of article 31, paragraph 3 (b) of the Vienna Convention.

48. With respect to paragraph (13) of that commentary, the European Union wished to clarify that within its legal order, there would be no uncertainty as to the capacity in which member States meeting within the plenary organ of an international organization intended to act. In *European Commission v. Council of the European Union*, the Court of Justice of the Union had stressed the need to follow separate procedures in cases where it might be necessary to have decisions adopted by both the Union and its member States in their independent capacity.

49. Turning to the topic of identification of customary international law, he said that the European Union

welcomed the successful completion of the Commission's work thereon and appreciated the recognition in the draft conclusions of the ever-growing role of international organizations on the international scene. It was especially noteworthy that in draft conclusion 4, paragraph 2, it was explicitly stated that in certain cases, the practice of international organizations also contributed to the formation, or expression, of rules of customary international law; that, in paragraph (7) of the commentary to draft conclusion 6, it was recognized that paragraph 2 of that draft conclusion applied mutatis mutandis to the forms of practice of international organizations in those cases where, in accordance with draft conclusion 4, paragraph 2, such practice contributed to the formation, or expression, of rules of customary international law; and that it was stated in paragraph (7) of the commentary to draft conclusion 10 that paragraph 2 of that draft conclusion applied mutatis mutandis to the forms of evidence of acceptance of law (*opinio juris*) of international organizations.

50. The commentaries to draft conclusions 6 and 10 were particularly relevant as they made it clear that decisions of national courts might be a form of State practice and a form of evidence of acceptance of law. The same might apply to the practice of the Court of Justice of the European Union in certain cases where the practice of international organizations also contributed to the formation, and expression, of rules of customary international law. In that connection and with regard to the role of the judiciary in the formation of customary international law, the European Union wished to draw attention to recent judgments of its Court of Justice which illustrated its frequent reliance on aspects of public international law, including customary international law. The European Union also welcomed the express mention, in paragraph (6) of the commentary to draft conclusion 4, of the practice of international organizations when concluding treaties, as a way for them to contribute to the formation, or expression, of rules of customary international law in those areas. That also reflected the mutual influence and interaction between treaties and customary international law in the case of treaties concluded by international organizations.

51. Lastly, concerning the stipulation in paragraph (4) of the commentary to draft conclusion 4 that in cases where the practice of international organizations themselves was of relevance, references in the draft conclusions and commentaries to the practice of States should be read as including, mutatis mutandis, the practice of international organizations, the European Union understood that to be a way to consider more systematically the contribution of the practice of such organizations, where relevant, to the formation or expression of rules of customary international law.

52. **Mr. Braad** (Denmark), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said the Nordic countries welcomed the definition of subsequent agreement and subsequent practice contained in the draft conclusions on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". Any agreement under article 31, paragraph 3 (a) and (b), of the Vienna Convention required the awareness and acceptance of the parties. It was rightly stated in draft conclusion 9 that the weight of a subsequent agreement or subsequent practice as a means of interpretation depended, inter alia, on its clarity and specificity.

53. The Nordic countries supported the current formulation of draft conclusion 13 (Pronouncements of expert treaty bodies), as the general views expressed in individual cases by treaty bodies consisting of independent experts were important for States' interpretation and implementation of a treaty at the national level. However, such comments and views were not legally binding and should not have the purpose of amending a treaty. They were solely a means of interpretation, and their legal weight depended on their content, quality and persuasiveness. A pronouncement of a treaty body could not in itself constitute subsequent practice establishing the agreement of the parties with regard to the interpretation of the treaty. It was not impossible that, in certain cases, such a pronouncement could give rise to, or refer to, a subsequent agreement or subsequent practice. However, it would have to be established that all parties accepted that pronouncement as a proper interpretation of the treaty, and such agreement could not be inferred from silence.

54. The Nordic countries supported the recommendation that the General Assembly take note in a resolution of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, annex the draft conclusions to the resolution, and ensure their widest dissemination; and commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who might be called upon to interpret treaties.

55. The Nordic countries welcomed the completion of the Commission's work on the topic "Identification of customary international law" and were pleased that their views had been carefully considered. The draft conclusions on the topic represented a balanced outcome. They would act as a useful complement to earlier work and would help systematize international

law on the topic and make it more accessible to practitioners. The Commission had wisely limited itself to the identification of customary international law, rather than attempting to relate the topic to other sources of law or to *jus cogens*. The Nordic countries agreed with the Commission's decision that its work on the topic should take the form of conclusions.

56. It was stated in paragraph 2 of draft conclusion 4 (Requirement of practice) that in certain cases, the practice of international organizations also contributed to the formation, or expression, of rules of customary international law. That modest provision reflected the variety of mandates, memberships and functions of international organizations. The explanation of that provision given in the commentary was balanced. The wording of draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences) was also satisfactory. In its commentary to that draft conclusion, the Commission rightly noted that special attention should be paid to the resolutions of the General Assembly and gave useful guidance regarding how to assess their significance.

57. The events marking the seventieth anniversary of the Commission had provided a valuable opportunity to discuss its role and achievements. With regard to the new topic "Universal criminal jurisdiction", the Nordic countries drew attention to the summary of their statement delivered under agenda item 87 (The scope and application of the principle of universal jurisdiction) at the current session and contained in document A/C.6/73/SR.10. They welcomed the inclusion of the item "Sea-level rise in relation to international law" in the long-term programme of work of the Commission. Given the complexity and the evolving nature of State practice, it would be advisable for the Commission adopt a prudent approach to that topic.

58. **Mr. Tichy** (Austria) said that the work of the Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" brought to bear a profound analysis of State practice, international and domestic case law, and the relevant literature in that field. The Special Rapporteur's determination to situate his work in the framework of the Vienna Convention on the Law of Treaties was commendable. The draft conclusions on the topic adopted by the Commission brought to light the nature of subsequent agreements and subsequent practice as authentic means of interpretation and as evidence of the will and understanding of the parties.

59. Paragraph 1 of draft conclusion 5 (Conduct as subsequent practice) had been amended on second reading to include a reference to the exercise of judicial functions as a form of subsequent practice. However, his delegation would have preferred a specific draft conclusion on the decisions of domestic courts, something that had in fact been suggested by the Special Rapporteur. As the Special Rapporteur had acknowledged, and as was recognized in draft conclusion 5, the decisions of domestic courts could constitute State conduct in the application of a treaty and could thus constitute relevant State practice for the interpretation of a treaty.

60. The succinct draft conclusions on the topic "Identification of customary international law" would provide an extremely useful tool, especially for national courts and practitioners of international law confronted with questions concerning the assessment of the existence and content of customary international law. The Commission had reached an apt compromise in the drafting of draft conclusion 4 (Requirement of practice), paragraph 2 of draft conclusion 10 (Forms of evidence of acceptance as law (*opinio juris*)), and draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences), in order to acknowledge the importance of international organizations, not only as forums in which States could express their *opinio juris*, but also as entities whose acts could contribute to the formation of customary international law. It was correctly noted in draft conclusion 4, paragraph 2, that in certain cases, the practice of international organizations also contributed to the formation, or expression, of rules of customary international law.

61. The current wording of draft conclusion 13 (Decisions of courts and tribunals) preserved a distinction between the decisions of national courts and those of international courts and tribunals. It was stated in draft conclusion 13, paragraph 1, that decisions of international courts and tribunals were a subsidiary means for the determination of rules of customary international law. However, it was merely stated in draft conclusion 13, paragraph 2, that regard could be had to the decisions of national courts for that purpose. Such a distinction ought not to be made; it did not appear in Article 38 of the Statute of the International Court of Justice. Any difference in the weight given to decisions of international or national courts should result only from their persuasiveness and quality.

62. His delegation was pleased that the topic "Universal criminal jurisdiction" had been included in the long-term programme of work of the Commission. There was clearly a need for the topic to be analysed in depth so as to avoid misunderstandings with regard to the exercise of universal criminal jurisdiction. As was rightly stated in the presentation of the topic contained

in annex A of the Commission's report (A/73/10), it was necessary to begin by formulating a definition of the concept and scope of universal jurisdiction.

63. His delegation believed that universal jurisdiction could arise not only from treaties, but also from customary international law. Since there were several kinds of jurisdiction, it welcomed the Commission's decision to restrict the topic to universal criminal jurisdiction. The Commission should examine all the various forms of jurisdiction, including jurisdiction to legislate, adjudicate and enforce, as well as the limitations on those forms of jurisdiction. For example, his delegation believed that jurisdiction to adjudicate should be restricted to trials in the presence of the accused, and that jurisdiction to enforce — including the enforcement of judgments delivered under the jurisdiction to adjudicate — was limited by the sovereignty of other States. The fact that trials should be conducted in the presence of the accused did not, however, prevent the authorities from investigating even in the absence of the accused.

64. The criminal jurisdiction of States should be distinguished from that of international courts and tribunals, and the issue should be kept separate from that of immunity. It was also important to discuss the relationship between universal jurisdiction and the duty to extradite or prosecute, which the Commission had previously examined. His delegation supported the idea that the work of the Commission on the topic of universal criminal jurisdiction should result in the formulation of guidelines.

65. **Mr. Xu** Hong (China) said that, over the previous seventy years, the Commission's work had led to the adoption of numerous international conventions that helped to maintain healthy and stable relations between States. The Commission now faced fresh challenges with regard to its selection of topics, working methods and interaction with States. As a subsidiary body of the General Assembly, the Commission should bear in mind the goal of serving Member States by focusing on questions to which they needed urgent answers. It should base its work on well-established State practice and should seek to strike a balance between codification and progressive development. In tackling sensitive issues on which general consensus had yet to be reached, it should give precedence to clarifying existing law (*lex lata*), as opposed to developing new law (*lex ferenda*). The outcomes of its work should, to the extent possible, show that there was a clear distinction between *lex lata* and *lex ferenda*. When interacting with States, the Commission should show greater commitment to following the positions expressed by Members States in the Sixth Committee and elsewhere, to ensure that the outcomes of its work could best reflect their consensus and needs. The successful adoption on second reading of draft conclusions on the topics "Identification of customary international law" and "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" had been possible because the Commission had addressed the practical needs of States, based its work on general State practice, consulted Member States in earnest, and sought the broadest consensus possible.

66. Having expressed its position on a range of issues covered in the draft conclusions on the topic of identification of customary international law, including the concept of specially affected States and the persistent objector rule, and having contributed constructively to the finalization of the draft conclusions, China wished to re-emphasize that customary international law was an important source of international law and must be identified in a rigorous and systematic manner by examining the general practice of all States, without resorting to selectivity or lowering the threshold in order to favour the interests or needs of certain States. Admittedly, under certain circumstances, it was necessary to take into consideration the resolutions of international organizations, international judicial decisions and the teachings of authoritative publicists in the identification of customary international law; however, State practice retained primary importance at all times.

67. The concept of subsequent practice referred to in the draft conclusions on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" included both subsequent practice as referred to in article 31, paragraph 3, of the Vienna Convention on the Law of Treaties, and the subsequent practice which, while not explicitly mentioned in article 32 of the Treaty, was routinely relied upon as a supplementary means of interpretation. In his delegation's understanding, only subsequent practice that expressed the genuine, common intentions of the parties could be used as authentic means of interpretation of a treaty in accordance with article 31, paragraph 3, of the Convention. Any other subsequent practice could potentially constitute supplementary means of interpretation as referred to in article 32; but a distinction should be preserved between those two situations.

68. In considering the new topic "Sea-level rise in relation to international law", the Commission should focus on the changing circumstances resulting from sea-level rise and discuss how to reconcile those changing circumstances with the existing law-of-the-sea regime. He hoped that the Commission would fully take into

consideration the provisions and spirit of the existing international law, including the United Nations Convention on the Law of the Sea, in its work on the topic, in order to maintain the stability and predictability of the current legal regime and provide legal guidance for the international community to address sea-level rise appropriately.

69. His delegation had repeatedly made clear its position on the topic "Universal criminal jurisdiction" when the issue of universal jurisdiction had been discussed in the Sixth Committee. A significant number of delegations erroneously equated universal jurisdiction with the obligation to extradite or prosecute (*aut dedere aut judicare*) contained in certain multilateral treaties. Over the years, the Committee's deliberations on the topic of universal jurisdiction had yielded no substantive progress, and Member States remained divided. His delegation therefore believed that, under the current conditions, the topic was not ripe for discussion. Its inclusion in the Commission's long-term programme of work did not mean that universal jurisdiction existed as a general rule in cases other than those involving piracy. If the Commission carried out any work on the topic, it should begin by clarifying the concept of universal jurisdiction, analysing *lex lata* in a rigorous manner on the basis of an in-depth survey of State practice, and approach the topic with caution.

70. **Mr. Alabrune** (France) said that the seventieth anniversary of the Commission had provided an opportunity to take stock of its achievements and highlight the challenges that it faced. The Commission's relationship with Member States was a vital factor in ensuring that its work had been successful and had led to the adoption of important international conventions in the past. Conversely, the challenges to that relationship helped to explain the limited nature of the Commission's achievements in recent times.

71. For instance, States had limited capacities to follow and participate effectively in the work of the Commission. It was not enough to attend the meetings of the Sixth Committee during International Law Week, when the Commission's report was considered; delegations needed to prepare thoroughly. However, the large number of topics in the programme of work prevented both delegations and the Commission itself from examining them in detail. Indeed, the inclusion of the topic "General principles of law" in the programme of work had added to what was already a long list. At its most recent session, the Commission had successfully adopted two sets of draft conclusions on second reading. However, it had not been able to consider the topic "Immunity of State officials from foreign criminal jurisdiction", the importance of which had repeatedly been highlighted by members of the Sixth Committee. The Drafting Committee had provisionally adopted several conclusions on the topic "Peremptory norms of general international law (*jus cogens*)", but none of them had yet been discussed or adopted by the Commission in plenary, and no commentaries had yet been provided. The profusion of topics also made it difficult for States to submit the comments that the Commission requested every year. It was therefore essential to return to the Commission's earlier practice of examining only a limited number of topics at each session, which would allow it to analyse the topics in detail and take stock of practice and case law around the world. It would also allow for a more fruitful dialogue with States; it was unrealistic to suppose that all delegations could seriously analyse a report covering a dozen or so topics in only a few weeks.

72. Moreover, the Commission's capacity to capture the diversity of States' practices, cultures and opinions was limited. The Commission should base itself on a thorough assessment of international practice; the greatest risk was that it could be inspired by a single doctrinal vision arising from a single legal culture conveyed in a single language. For that reason, efforts must be made to enable Special Rapporteurs to receive useful information on different legal systems. The method adopted for the Commission's work on the topic "Identification of customary international law" was a model that could be adopted in the future.

73. The selection of topics was another challenge: success depended on choosing topics that were of practical interest and did not elicit strong disagreement. States should believe that an international agreement on the topic was needed, and they should be prepared to conclude one. Since its establishment, the Commission had completed work on a significant number of traditional areas and topics of international law, including diplomatic and consular law, treaty law, State succession, law of the sea, and responsibility of States and international organizations. However, some of the topics added to the programme of work in recent years were of less obvious interest. For example, the topic "General principles of law" did not appear to cater to the practical needs or interests of States.

74. The draft conclusions on the topic "Identification of customary international law" would be useful to practitioners, particularly domestic judges. They should, however, be used flexibly; domestic judges could hardly be expected to examine the practice of all States on a given topic, formulated in a number of languages, without having ample recourse to subsidiary means of determination of international law. It would be useful for that element of flexibility to be highlighted in any

General Assembly resolution taking note of the draft conclusions.

75. More broadly, it would be worth reflecting on the decisions that the General Assembly was called upon to adopt concerning the Commission's output. The practice of recommending that the Assembly merely take note of the output in a resolution could give that output an ambiguous legal status, something that was not conducive to legal certainty or predictability. In order to ensure that their legal authority could be determined in an informed and transparent manner, it would be useful for the Commission's projects to be issued as a publication of the United Nations, accompanied by a summary of the comments made by Member States in the Sixth Committee.

76. **Mr. Tiriticco** (Italy) said that his delegation commended the Commission and the Secretariat for the events marking the seventieth anniversary of the Commission held in New York and Geneva. Delegations had welcomed the opportunity to interact with Commission members, particularly during the meetings held in New York.

77. Without prejudice to its position on previous versions of the draft conclusions on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", his delegation agreed with the Commission's recommendation that the General Assembly take note in a resolution of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, annex the draft conclusions to the resolution, and ensure their widest dissemination; and commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to interpret treaties. His delegation supported the Commission's decision regarding the wording of paragraph 1 of draft conclusion 5 (Conduct as subsequent practice). It agreed that the rules governing attribution of conduct for the purposes of international responsibility should not be confused with those for the purposes of subsequent practice.

78. The wording of paragraph 2 of draft conclusion 9 (Weight of subsequent agreements and subsequent practice as a means of interpretation) was acceptable and the phrase "inter alia" was an improvement over the phrase "in addition to" which had appeared in previous versions. The current wording clearly implied that consistency and breadth of practice were relevant criteria in assessing the weight of subsequent agreements and subsequent practice as a means of interpretation.

79. The Commission had rightly decided to maintain Special Rapporteur's original proposal regarding paragraph 3 of draft conclusion 11 (Decisions adopted within the framework of a conference of States parties). Irrespective of their procedures, conferences and meetings of parties had a role in expressing subsequent agreement or subsequent practice.

80. Regrettably, the Commission had decided not to adopt the Special Rapporteur's proposal concerning paragraph 4 of draft conclusion 13 (Pronouncements of expert treaty bodies). Such bodies played a major role in the interpretation of treaties, especially in the area of human rights, and their pronouncements should be duly considered.

81. The draft conclusions on the topic "Identification of customary international law" would constitute a very useful tool for States and anyone faced with the task of interpreting international law. They were intended to identify the ways in which the existence and content of rules of customary international law were to be determined with respect to the two constituent elements of State practice and *opinio juris*. Given the multiplicity of expressions of State practice that might be relevant, interpreters of international law should be allowed a certain margin of appreciation when assessing the existence and content of customary international law. Moreover, the reasoning and processes underlying the identification of customary rules, along with the principles governing those processes, were intrinsically linked with the identification of customary international law and would inevitably influence any resort to the draft conclusions. His delegation therefore supported the Commission's recommendation that the General Assembly could limit itself to taking note in a resolution of the draft conclusions on identification of customary international law, annex the draft conclusions to the resolution, and ensure their widest dissemination.

82. His delegation took note of the inclusion of the topic "General principles of law" in the programme of work and looked forward to discussing the first report of the Special Rapporteur for that topic. The new topics on the long-term programme of work, "Universal criminal jurisdiction" and "Sea-level rise in relation to international law", were of considerable interest for the international community and met the criteria agreed by the Commission for the selection of new topics. In particular, given that Italy had a longstanding commitment to the fight against impunity for international crimes, his delegation believed that the question of universal criminal jurisdiction, while quite complex in the light of relevant State practice, deserved to be considered within a reasonable time-frame.

83. **Mr. Horna** (Peru) said that the Commission had a crucial role to play in view of the increasing challenges to multilateralism and a rules-based international system. His delegation welcomed the events held in New York and Geneva to commemorate the seventieth anniversary of the Commission. The Secretariat had organized an excellent photographic exhibition, which he hoped could be displayed in other regions, perhaps by virtual means. By meeting in New York, the Commission had enabled members of the Sixth Committee to attend its deliberations. The parallel events on important areas of international law had strengthened cooperation between the Committee and the Commission. It would be useful for the Commission to hold part of its session in New York once every five years, with due regard for article 12 of its statute.

84. Significant progress had been made in reducing the delay in the publication of the *Yearbook of the International Law Commission* in the six official languages of the United Nations. His delegation recognized the increasing regional, linguistic and gender diversity of lecturers for the Audiovisual Library of International Law and appreciated the fact that a team from the Office of Legal Affairs had visited Lima to record Peruvian lecturers.

85. His delegation supported the Commission's recommendation that the General Assembly take note in a resolution of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, annex the draft conclusions to the resolution, and ensure their widest dissemination; and commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to interpret treaties. It also agreed with the recommendation that the General Assembly take note in a resolution of the draft conclusions on identification of customary international law, annex the draft conclusions to the resolution, and ensure their widest dissemination; commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to identify rules of customary international law, particularly domestic judges.

86. His delegation welcomed the inclusion of the topic "General principles of law" in the Commission's active programme of work, as well as the addition of the topics "Universal criminal jurisdiction" and "Sea-level rise in relation to international law" to the long-term programme of work, and hoped that they would soon be moved to the active agenda. The topic "Sea-level rise in relation to international law" was particularly important for States with low coastlines, especially developing island States. Rising sea levels affected a significant number of countries, and the implications of that trend needed to be addressed comprehensively.

87. **Ms. Argüello González** (Nicaragua) said that the draft conclusions on the topic "Identification of customary international law" would be a useful practical guide for anyone involved in applying international law. However, the wording regarding international organizations could have been improved in order to reflect their important role more appropriately. Nicaragua agreed that not all organizations had the same significance; the General Assembly, for instance, had a prominent status. That disparity should, however, have been reflected in the draft conclusions, rather than being confined to the commentaries.

88. It was stated in draft conclusion 8 (The practice must be general) that the relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent. It was then explained in the commentary that to be consistent, the practice should be of such a character as to make it possible to discern a virtually uniform usage. Her delegation did not agree with that understanding of consistency or with the wording of the commentary. It noted, in any event, that the commentary did not have the same status as the draft conclusions.

89. Her delegation did not agree with the interpretations provided in the commentary to the draft conclusion of the concept of specially affected States. The issue of the persistent objector and that of specially affected States had to do with the application of customary law, rather than with the determination of its existence.

90. It was stated in paragraph 2 that provided that the practice was general, no particular duration was required. Although it was pointed out in the commentary that the International Court of Justice had made it clear that some period of time must elapse for a general practice to emerge, and that there was no such thing as instant custom, the wording of that paragraph could be improved. Further investigation would have been useful in order to determine the prerequisites for, and effects of, inaction as a form of practice.

91. Contrary to what was stated in the commentary to draft conclusion 15 (Persistent objector), the persistent objector rule was not widely accepted by States and writers, or by scientific bodies engaged in international law. On the contrary, the few examples given in footnote 778 of the Commission's report (A/73/10) to support that assertion showed not only that few States had invoked the rule, but also that international courts and tribunals had not accepted such invocations. Her delegation also had a reservation with regard to the

assertion in footnote 713 that contradictory or inconsistent practice might suggest the existence of one or more persistent objectors.

92. Her delegation reserved its position and urged caution with regard to the new topic "Universal criminal jurisdiction". The second new topic, "Sea-level rise in relation to international law", would be of vital importance for States, and she hoped that it would be considered in a manner that reflected their needs. On a more general note, she urged the Commission to refer to scholarship from all geographic regions in order to improve the representativeness and quality of its studies.

93. **Ms. Hong** (Singapore) said that her delegation had been honoured to contribute to the commemoration of the seventieth anniversary of the Commission. As a small State with a firm belief in rules-based multilateralism, Singapore was a strong supporter of the Commission's work and its symbiotic relationship with the General Assembly through the Sixth Committee.

94. The draft conclusions on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" represented a valuable compendium and useful practical guide for States. Her delegation supported the recommendation that the General Assembly take note in a resolution of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, annex the draft conclusions to the resolution, and ensure their widest dissemination; and commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to interpret treaties. Specific comments on draft conclusion 5 (Conduct as subsequent practice), draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation) and draft conclusion 12 (Constituent instruments of international organizations) could be found in her written statement, available on the Committee's PaperSmart portal.

95. The draft conclusions and commentaries on the topic "Identification of customary international law" were comprehensive and meticulous and would be of practical importance for all States. Detailed comments reflecting her delegation's position on the draft conclusions could be found in her written statement, available on the Committee's PaperSmart portal. Her delegation supported the recommendations set forth in paragraph 63 of the report and was grateful to the Secretariat for its memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710). It supported efforts to leverage technology in order to make information from diverse States concerning the evidence of customary international law more readily available.

96. Her delegation was pleased that the Commission would start work on the topic "General principles of law" and looked forward to following its progress. It shared the concerns raised by other delegations regarding the number of topics on the Commission's agenda. The agenda for its seventy-first session would include up to five topics, some of which were complex and important but had not been fully considered at the seventieth session. Because of its heavy and varied workload, there was a risk that the Commission might not have time to fulfil its tasks rigorously.

97. Her delegation would welcome clarifications regarding the specific process for Member States to propose topics directly to the Commission, to which reference was made in paragraph 38 of the report; how the Commission decided to move topics from its long-term programme to its current programme of work; and whether it believed that the existing long-term programme of work should be refreshed or consolidated.

98. **Mr. Rychlik** (Poland) said that the seventieth session of the Commission had offered a unique opportunity to take stock of the Commission's achievements and to consider the challenges it faced. One of the priorities of his country, currently a non-permanent member of the Security Council, was to uphold international law. Poland therefore valued the Commission's contribution to strengthening the rule of law in international relations. Although the Commission's current work consisted primarily in the preparation of guidelines rather than the drafting of treaties, that shift should not be considered an indication of the Commission's declining importance in the codification and progressive development of international law. On the contrary, its importance was confirmed with the adoption of draft conclusions and commentaries thereto on the topics of identification of customary international law and subsequent agreements and subsequent practice in relation to the interpretation of treaties. His delegation supported both those projects, which would be extremely useful to national courts and tribunals when called upon to apply international law.

99. With regard to the future work of the Commission, he reiterated the proposal that the Commission's long-term programme of work should include the topic "Duty of non-recognition as lawful of situations created by a serious breach by a State of an obligation arising under a peremptory norm of general international law", which fulfilled the Commission's criteria for new topics for reasons outlined by his delegation at the 20th meeting

of the Committee held during the sixty-ninth session of the General Assembly (A/C.6/69/SR.20). His delegation agreed that the Commission should not restrict itself to traditional topics but should also consider topics that reflected new developments in international law and pressing concerns of the international community as a whole. In that connection, he suggested that the Commission examine the topic of the jurisdiction of States in cyberspace. Poland welcomed the decision of the Commission to include in its programme of work the topic of general principles of law, which was the only source of international law that had not yet been studied by the Commission. The topic should be taken up in a systematic manner in view of the wide array of approaches taken by international courts and tribunals in determining general principles of law. Poland supported the inclusion of the topic of sea-level rise in relation to international law in the Commission's programme of work.

100. **Mr. Nakayama** (Japan) said that the Commission's seventieth session and the attendant commemorative events held in New York and Geneva had provided opportunities for greater interaction between the Commission and the Member States. In line with its mandate under Article 13 of the Charter, the General Assembly, through the Sixth Committee and the Commission, had encouraged the progressive development of international law and its codification with the adoption of articles and conventions in the course of the preceding decades. Despite suggestions that the Commission had completed its work on most fields of international law and that other multilateral forums were playing a larger role in treaty-making, the Commission continued to play a unique and important role by identifying and codifying established and emerging principles of international law deriving from individual norms, thus forestalling the fragmentation of the international legal framework at a time when new rules were constantly being created.

101. The Commission should follow a transparent process in selecting new topics for inclusion in its programme of work and ensure that they reflected the actual concerns of the Member States, which should in turn provide adequate guidance to the Commission. He proposed that the Committee hold a meeting to explore new topics that could be addressed by the Commission. In considering the topic of general principles of law, the Commission should identify the nature and function of that notion by examining State practice, including international and domestic judicial decisions, and the relevant legal theories. An illustrative list of such principles would be useful for courts, tribunals and practitioners of international law. The Commission's work on the new topic of sea-level rise in relation to international law would respond to the needs of the Member States and lead to greater interaction between them and the Commission.

102. Turning to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and the draft conclusions adopted on second reading, he said that draft conclusion 2 (General rule and means of treaty interpretation) reaffirmed that the process of treaty interpretation involved reading both articles 31 and 32 of the Vienna Convention on the Law of Treaties in a single combined operation. As was confirmed in draft conclusion 3 (Subsequent agreements and subsequent practice as authentic means of interpretation), "subsequent agreements" and "subsequent practice", as defined in article 31, paragraph 3 (a) and (b), constituted evidence of the parties' common understanding of the meaning of a treaty and should therefore inform the interpretation of treaties. In that connection, and in accordance with paragraph 3 of draft conclusion 11 (Decisions adopted within the framework of a conference of States parties), a decision of a conference of States parties embodied a subsequent agreement or subsequent practice under article 31, paragraph 3, only insofar as it expressed agreement in substance between the parties regarding the interpretation of the treaty, and should not be used to impose a view of the majority upon a dissenting minority. The balanced wording used in draft conclusion 13 reflected the view of Japan that the pronouncements of expert treaty bodies were not, in themselves, objective evidence of the understanding of the parties as to the meaning of a treaty.

103. Referring to draft conclusion 10, paragraph 1, in which it was stated that an agreement under article 31, paragraph 3 (a) and (b), "may, but need not, be legally binding for it to be taken into account", he said that it was important to draw a distinction between agreements that were legally binding on their own and subsequent agreements for the purpose of treaty interpretation. Although there was a possibility that an agreement might entail both characteristics, it was worth recalling the importance of the general rule regarding the amendment of treaties set forth in article 39 of the Vienna Convention.

104. Japan welcomed the fact that the draft conclusions reflected the Commission's view, as formulated in the commentary to article 27 of the draft articles on the law of treaties adopted in 1966 (A/CN.4/SER.A/1966/Add.1), that a distinction between law-making and other treaties was not necessary for the purpose of formulating the general rules of interpretation. Japan was of the view that a discussion was warranted as to whether the nature

of treaties could have a bearing on the role of subsequent agreements and subsequent practice.

105. Turning to the topic “Identification of customary international law”, he said that its draft conclusions would serve as a practical guide for the identification of rules of customary international law. He also commended the Secretariat on elaborating the memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710), while noting that there was a regional imbalance in the materials for the identification of customary international law collected by the Secretariat. His delegation hoped that the memorandum would be updated in the future.

106. Lastly, his delegation was aware that there had been another debate in the Commission on second reading over the persistent objector rule. The notion continued to be controversial, because substantial questions remained, such as whether the existence of the persistent objector prevented the establishment of such a rule as customary international law, or whether the rule simply prevented the application of the customary rule to the persistent objector. Further deliberation and specific examples of general practice were needed in order to substantiate the rule.

The meeting rose at 1.05 p.m.