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Chair: Mr. Luna (Vice-Chair) . . . . . (Brazil)

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18-17648 (E)

In the absence of Mr. Biang (Gabon), Mr. Luna (Brazil), Vice-Chair, took the Chair.

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. **Mr. Colaço Pinto Machado** (Portugal) said that, in its seventy years of existence, the International Law Commission had contributed greatly to peace, security, justice and the protection and promotion of human rights throughout the world. The Office of Legal Affairs had also contributed, as an inseparable partner of the Commission, to the codification and progressive development of international law. The Commission should hold at least half a session in New York every five years to allow for closer dialogue with the permanent missions to the United Nations there. With regard to its future role, the Commission was an appropriate forum for discussion on how the international legal framework should be adapted to respond to new challenges in a context of increasingly fast-paced international relations. The Commission and Member States no longer had the luxury of waiting for State practice to form over many years before adopting rules of international law.

3. He welcomed the inclusion of the topic "General principles of law" in the Commission's programme of work. Although the content and application of general principles of law were sometimes in dispute, they reflected the basic values of international society and should inform both legal norms and political action. Portugal also welcomed the inclusion of the topics "Universal criminal jurisdiction" and "Sea-level rise in relation to international law" in the long-term programme of work. Solutions that were as fair as possible needed to be found soon to address the phenomenon of sea-level rise, which was the result of climate change and had been accelerated by human activity. He therefore encouraged the Commission to take up that topic at its seventy-first session.

4. Turning to the topic of identification of customary international law, he said that the draft conclusions adopted by the Commission on second reading would be of great practical value to scholars and practitioners alike. With regard to the methodology used, he noted that, although *opinio juris sive necessitatis* was the subjective element of customary international law and was not easy to infer, it must be taken into consideration, as what remained without it was mere practice and not a legal norm. The conviction that non-compliance with a certain practice would result in international responsibility was one good indicator of *opinio juris*.

5. Although both the formation of international customary law and the evidence thereof were important for the topic, particular emphasis should be placed on the study of the process of formation. A description of how international customary law had formed would assist in the identification of current and future norms of that source of law. The study of formation should therefore precede the more practical issue of how evidence of a customary rule was to be established.

6. Extreme caution should be used in considering failure to react as evidence of acceptance as law, as doing so might impose an excessive burden on States which did not have the means to react to certain measures. Despite the latest drafting attempts to qualify the value assigned to the failure to react, its inclusion might nonetheless foster inequality between States with different resources, even if unintentionally.

7. Although some of its concerns had been addressed, Portugal was still of the view that paragraph 1 of draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences) should be deleted, on the understanding that paragraphs 2 and 3 were sufficient to characterize the significance that resolutions of international organizations had for the identification of customary international law. It was his delegation's view that the role played by the decisions and resolutions of international organizations in the formation of customary international law was significant, albeit different from the role of States. The draft conclusions or the commentary thereto should reflect that dimension of State activity, which could be assessed by examining different State actions, including voting in international bodies, delivering statements and complying with international humanitarian law. They should also reflect the contribution of State activity to the development of international customary law by detailing the circumstances in which the resolutions of international organizations might constitute evidence of customary international law or contribute to its development.

8. With regard to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, he commended the Commission for having completed its work on such a dense and complex topic. The draft conclusions testified to the Commission's role in the development and promotion of an international society based on international law and would make a

valuable contribution to treaty interpretation in the future.

9. Portugal noted that draft conclusion 13 (Pronouncements of expert treaty bodies) did not apply to organs of international organizations but applied only to expert treaty bodies, whose members were independent and not subject to instructions from States or international organizations. Such expert treaty bodies could therefore assist in the identification of subsequent practice, since their input could not be perceived as the practice of States parties to a treaty. To claim otherwise would call into question the main characteristics of independent expert treaty bodies and their contributions as autonomous guardians of the treaties in question.

10. **Mr. Smolek** (Czechia), welcoming the completion of the Commission's second reading of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, said that the Special Rapporteur's reports contained a comprehensive analysis of relevant State practice, jurisprudence and doctrine. The draft conclusions would assist States in the application of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties. The Commission had focused on subsequent agreements and subsequent practice as a particular aspect of the interpretation of treaties in the light of treaty practice, which had developed after the entry into force of the Vienna Convention. The resulting draft conclusions did not affect the validity of the relevant provisions of articles 31 and 32 of the Convention nor how they were to be understood in line with the Commission's commentaries on the basis of which they had been adopted. More information on the position of Czechia could be found in its written comments on the draft conclusions adopted by the Commission on first reading.

11. With regard to the selection of topics for the Commission's programme of work, the experience gained from work on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", and other topics such as "Protection of the environment in relation to armed conflicts", should prompt reflection by the Commission and the Sixth Committee on the advantages and disadvantages of considering topics that were not intended for further progressive development and codification. The selective elevation of some aspects of complex and closely interrelated matters already covered by existing legal instruments, primarily for the purpose of their theoretical analysis, could lead to the gradual fragmentation of existing legal regimes, rather than to their further consolidation.

12. Turning to the topic "Identification of customary international law", he said that the draft conclusions would serve as a useful guide for practitioners, in particular judges, who dealt with issues concerning the determination of rules of customary international law in national proceedings. The draft conclusions were succinct and well structured, reflecting the Commission's emphasis on the methodological issues involved in ascertaining the existence of the two constituent elements of customary international law: general practice and acceptance as law. Such an emphasis was important in view of the widespread tendency to allege the existence of a particular rule of customary international law without properly verifying the evidence for both of those elements.

13. Czechia appreciated the detailed response provided by the Special Rapporteur to comments by States on the draft conclusions adopted on first reading. Those comments, and debates in the Commission, indicated that the draft conclusions reflected in large part the consensus of States. However, in view of the different opinions expressed by States concerning such issues as the relevance of the practice of international organizations, the relevance of inaction as a form of practice and the role of specially affected States, the draft conclusions should be viewed as representing the outcome of the Commission's own analysis. In particular, the issue of "non-localized" particular customary international law involving States that did not have a regional relationship was open to debate and required further analysis. Czechia also continued to have reservations with regard to draft conclusion 10, paragraph 3, concerning failure to react as evidence of *opinio juris*. The draft conclusion did not adequately reflect the different ways in which individual States could fail to react and the different significance that those ways might have for the existence or the creation of a norm of customary international law.

14. Czechia welcomed the decision of the Commission to include the topic "General principles of law" in its programme of work. Although that source of international law had been used for more than a century, its nature, scope and methods of identification remained unclear. Czechia expected that the Commission would provide States with practical conclusions and commentaries based on an analysis of State practice, jurisprudence and the views of scholars on the topic. Czechia also supported the Commission's decision to include the topic "Universal criminal jurisdiction" in its long-term programme of work and believed that the Commission was the most suitable forum for conducting a thorough legal analysis of a topic that was related to other topics formerly or currently on its agenda.

15. Czechia had doubts concerning the inclusion of the topic “Sea-level rise in relation to international law” in the Commission’s long-term programme of work. Although climate change posed global dangers, including sea-level rise and its consequences for low-lying coastal States and small island States and their populations, the topic was predominantly scientific, technical and political in character. It should therefore be taken up by the relevant technical and scientific bodies and an intergovernmental forum with a mandate to address the law of the sea, in order to preserve the integrity of the law of the sea regime.

16. **Mr. Bukoree** (Mauritius) said that over the course of its existence the Commission had, in line with its mandate, assisted Member States and the General Assembly in encouraging the progressive development of international law and its codification, pursuant to Article 13, paragraph 1 (a), of the Charter of the United Nations. He commended the Commission’s decision to hold half of its most recent session in New York and asked that it consider holding meetings in other regions as well, in accordance with article 12 of its statute.

17. His delegation was pleased to see the inclusion of the topic “Sea-level rise in relation to international law” in the Commission’s long-term programme of work. The Pacific region was experiencing more drastic sea-level rise than other regions, and coastal flooding caused by sea-level rise was already affecting several Pacific islands. He therefore fully supported the request of the Pacific small island developing States and the Pacific Islands Forum for the Commission to move the topic to its current programme of work so that it could be examined as a matter of urgency. In particular, the Commission should consider the legal implications of sea-level rise for the law of the sea, including maritime baselines, maritime delimitations, the legal status of islands and the legal implications for statehood, human migration and the protection of human rights.

18. With regard to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, there were similarities between draft conclusion 8, which addressed the question of whether or not the presumed intention of the parties to a treaty was to give a term used a meaning which was capable of evolving over time, and the provisions set out in articles 31 and 32 of the Vienna Convention. In general, his delegation welcomed the Commission’s conclusion of the topic and supported its recommendations.

19. Turning to the topic of identification of customary international law, he said that the Commission’s work had the potential to shape future practice. The conclusion of the Commission’s consideration of the topic was welcome, particularly in the light of article 24 of its statute, which required it to consider ways and means for making the evidence of customary international law more readily available. With regard to draft conclusion 6 (Forms of practice) and the commentaries thereto, his delegation agreed that, in the identification of customary international law, no form of practice, whether it comprised diplomatic acts and correspondence or conduct in connection with resolutions adopted by an international organization or an intergovernmental conference, had a priori primacy over another form of practice. As set out in Article 38, paragraph 1, of the Statute of the International Court of Justice, customary international law referred to “international custom, as evidence of a general practice accepted as law”.

20. In line with articles 16, 19, 21 and 22 of its statute, the Commission was required to circulate questionnaires to Governments and collect texts of laws, decrees, judicial decisions and other documents to inform its consideration of the topics on its agenda, and to invite comments on drafts of its work. Such information and feedback was fundamental to its work. In that connection, the Commission should take into consideration the capacity limitations that made it difficult for some Member States, including African States and Pacific small island developing States, to fully engage with its valuable work, ensure the timely compilation of documents and follow up appropriately on its requests. The Commission should also consider providing a concise summary of its bulky annual report, which was usually published in mid-September, when delegations were already busy with preparations for the high-level meetings of the General Assembly, and contained such arcane language and so much detail that it was difficult to grasp the substance of the topics covered therein. Moreover, members of the Commission should organize capacity-building events in New York for delegations of developing countries and find ways to engage with the permanent missions of those countries in Geneva.

21. **Mr. Špaček** (Slovakia) said that, while the Commission had had a very productive seventieth session, completing its work on two topics on second reading, and a further two topics on first reading, sufficient time had not been allocated for the consideration of some other topics. 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 the commentaries thereto. It particularly appreciated the fact that subsequent agreements and subsequent practice were recognized in the draft conclusions as authentic

means of interpretation, on the grounds that they reflected the will of the parties. In that connection, he wished to highlight that subsequent practice and subsequent agreements could be an indicator of whether or not the parties wished to allow the interpretation of a treaty to evolve over time.

22. His delegation considered that the draft conclusions could, in general, provide a useful basis for the interpretation of treaties by complementing articles 31 and 32 of the Vienna Convention, although it had doubts about the added value of draft conclusions 11, 12 and 13, which simply referred to the relevant rules set out in the Convention. Slovakia supported the Commission's recommendation that the General Assembly take note of the draft conclusions in a resolution and ensure their widest possible dissemination.

23. Turning to the topic "Identification of customary international law", he said that the draft conclusions and commentaries thereto adopted by the Commission on second reading fully met his delegation's expectations and would serve as a useful reference for all those concerned with the identification of customary international law, including domestic courts. The draft conclusions had been elegantly drafted and the commentaries were of an appropriate length. His delegation therefore endorsed the recommendation of the Commission that the General Assembly take note of the draft conclusions.

24. His delegation appreciated the consistency of the approach with which the Special Rapporteur had treated the topic, while also giving due regard to the comments made by States. The two-element approach on which the Commission's work on the topic had been based was the cornerstone of customary international law The draft conclusions properly reflected the fact that the two elements, general practice and *opinio juris*, were interconnected but must be considered and examined separately. The Commission had also rightly emphasized the primary role of State practice in the formation and expression of rules of customary international law. While duration had been omitted as a criterion for the identification of a general practice, it was right that the concept of "instant custom" had been rejected. As had been made clear in the commentaries, a certain period of time must elapse for a general practice to emerge.

25. The Commission had, in draft conclusion 16 (Particular customary international law), left open the possibility that there could be rules of customary international law that were not regional or local. However, the commentary did not provide any examples of such rules, which seemed to support his delegation's position that there seemed always to be a geographical link among States applying a rule of particular customary international law.

26. Slovakia welcomed the Commission's decision to include the topic "General principles of law" in its programme of work. Its work on the topic should focus on the role of general principles of law in international law and on ways and means of identifying the elements of those principles; it should not involve any attempt to draw up even an indicative list of such principles.

27. His delegation also welcomed the inclusion of the topic "Universal criminal jurisdiction" in the Commission's long-term programme of work. The reason that the Sixth Committee had made painfully little progress in its consideration of the agenda item entitled "The scope and application of the principle of universal jurisdiction", which the General Assembly had allocated to it nearly a decade earlier, was that the legal aspects of universal jurisdiction had not first been addressed by the Commission.

28. However, Slovakia had many concerns with regard to the inclusion of the topic "Sea-level rise in relation to international law" in the Commission's long-term programme of work. The Commission could certainly consider topics that reflected new developments in international law and pressing concerns of the international community as a whole, but it must not diverge from its established criteria for the selection of new topics. While the topic of sea-level rise might well reflect the needs of some States in respect of the progressive development and codification of international law, Slovakia was not convinced that it was at a sufficiently advanced stage in terms of State practice to permit progressive development and codification. Moreover, legal questions concerning rising sea levels should primarily be addressed within the framework of the United Nations Convention on the Law of the Sea. There was therefore virtually no room for the Commission to engage in codification or progressive development in relation to the topic.

29. His delegation was pleased that the Commission envisaged holding its entire upcoming session in Geneva, in line with long-standing practice. The holding of the first part of the seventieth session in New York had been an exception, directly linked with the events held to commemorate that milestone. The Commission should continue to engage with States primarily during the consideration of its annual report by the Sixth Committee and through written communications, rather than during its own sessions.

30. **Mr.** Elsadig Ali Sayed **Ahmed** (Sudan) said that the identification of customary international law required consistent and detailed analysis, which would enhance the credibility of any resulting judicial decisions. His delegation supported the approach set forth in draft conclusion 2 (Two constituent elements), according to which, in order to determine the existence and content of a rule of customary international law, it was necessary to ascertain whether there was a general practice that was accepted as law. That approach had been confirmed in the case law of the International Court of Justice. His delegation agreed that the presence of only one constituent element did not suffice for the identification of a rule of customary international law; both were required in order to establish the existence of such a rule. Regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question was to be found. That requirement implied that in each case any underlying principles of international law that might be applicable to the matter should be taken into account. Moreover, the type of evidence consulted, and consideration of its availability or otherwise, depended on the circumstances, and certain forms of practice and certain forms of evidence of acceptance as law (*opinio juris*) might be of particular significance, according to the context. The observations made in that regard by the International Court of Justice in the *Jurisdictional Immunities of the State* case were particularly apt. The Court had considered that the customary rule of State immunity derived from the principle of the sovereign equality of States, which, in that context, had to be viewed together with the principle that each State possessed sovereignty over its own territory and that there flowed from that sovereignty the jurisdiction of the State over events and persons within that territory.

31. Paragraph 1 of draft conclusion 4 (Requirement of practice) made clear that it was primarily the practice of States that was to be looked to in determining the existence and content of rules of customary international law. Although, according to paragraph 2 of the same draft conclusion, the practice of international organizations also contributed, in certain cases, to the formation, or expression, of rules of customary international law, the role of international organizations could in no way be compared to that of States. In considering the role of international organizations, priority should be given to the body with the broadest representation within the organization in question. Only international organizations of which States were members should be taken into consideration. In addition, the context and the means by which decisions were taken must not be ignored.

32. With regard to paragraph 1 of draft conclusion 6 (Forms of practice), it was difficult in practical terms to determine when inaction could constitute a form of practice or to see which criteria should be used in order to make that determination. It was important to ensure that the State in question was conscious of refraining from acting and that the situation called for action.

33. Draft conclusion 15 (Persistent objector) required further clarification, and practical examples should be given of the conditions that were required in order for a State to be deemed a persistent objector. Draft conclusion 16 (Particular customary international law) was vague and required a more thorough study and detailed explanation.

34. His delegation noted the Commission's recommendation that the General Assembly ensure the widest dissemination of the draft conclusions and that it note the memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available (A/CN.4/710). His delegation agreed with the recommendation that the General Assembly request the Secretariat to make available the information contained in the annexes to the memorandum through an online database to be updated periodically, based on information received from States and international organizations. The work of compiling the memorandum had been difficult owing to the abundance of evidence and the disparities in available resources across regions. The identification of a rule of customary international law could require a thorough study of the relevant legislative, executive, judicial and other practice of a number of States, a task that was complicated by a number of linguistic, practical and other factors, not to mention the digital divide. Moreover, there was no harmonized classification system to facilitate comparisons among the practices of States and other actors.

35. His delegation believed that the Committee should discuss the Commission's report in a more focused manner. Meetings should be structured so as to concentrate on each of the main topics and lead to a debate on specific topics. Such an approach would improve dialogue between the two bodies. It would be useful to continue strengthening that dialogue, including through informal consultations throughout the year.

36. His delegation took note of the Commission's decision to include the topic "Universal criminal jurisdiction" in its long-term programme of work. There was no consensus on that topic, and discussions in the Sixth Committee had not come to a conclusion. His delegation, along with many others, had therefore objected to the inclusion of the item. Some had

expressed the fear that such a step would hijack a topic that was still under consideration. The Commission's own criteria for the selection of new topics provided that topics should be sufficiently advanced in stage in terms of State practice, something that was clearly not the case. His delegation was concerned that the principle of universal jurisdiction had been invoked unjustifiably and expanded in a unilateral and selective manner by certain domestic courts for political purposes. The principle had thus been brought outside the scope of international law and made into a tool of inter-State conflict.

37. His delegation welcomed the Commission's efforts to improve its working methods. It encouraged the Commission to pursue those efforts, take measures to enhance its effectiveness and productivity, and consider the possibility of submitting recommendations to Member States to that end.

38. **Mr. Bandeira Galindo** (Brazil) said that his delegation deeply appreciated the Commission's decision to hold part of its seventieth session in New York and was proud that a Latin American member of the Commission had chaired its meetings during that session. At one of the side events held in New York, it had been highlighted that just seven women had been elected to the Commission since its founding in 1948; in contrast, gender parity had been achieved at the senior management level in the United Nations. He called on Member States to address the Commission's shortcoming by encouraging women candidates to present their candidacies. The Committee could also consider introducing minimum voting requirements for each gender in the Commission's elections, similar to the procedure used for the election of judges of the International Criminal Court. Article 11 of the Commission's statute, which allowed the Commission to fill vacancies on its own, should be revisited. In the light of article 3 of the statute, which established that its members should be elected by the General Assembly, and bearing in mind that they were elected to sit in their individual capacity, his delegation believed that it should be up to Member States to determine the Commission's composition.

39. As had been highlighted during the events commemorating the seventieth anniversary of the Commission, the relationship between the General Assembly and the Commission needed to be revitalized. To that end, he encouraged delegations to use their statements to clarify their strategic and policy priorities regarding the codification and progressive development of international law, rather than to replicate the Commission's legal debates. Statements by delegations should also not be equated with the written comments that Member States could submit to the Commission. The General Assembly should do more to identify new topics or even mandate their consideration by the Commission, which had recently concluded work on a large number of topics and would soon need to decide which topics to study next.

40. For its part, the Commission should listen attentively to the policy guidance provided by the General Assembly and focus its energy on studies that would address the most pressing needs of Member States. The Commission should also increase the engagement of States by holding meetings more regularly in New York, and should explore ways to build capacity in developing countries and ensure geographically balanced inputs from States, including by strengthening participation in the International Law Seminar. It would be easier to follow the Commission's activities if it circulated its reports earlier, publishing them in parts if needed. Since it was challenging for some countries, especially developing countries, to draft written comments on the Commission's work, the Commission could contribute to increased diversity of inputs when studying a topic if it prepared questionnaires that required simple and direct answers on State practice. Lastly, it would be useful if the Commission's Working Group on methods of work could clarify the taxonomy for the various outcomes of its discussions, whether articles, principles, conclusions or guidelines, including the criteria it applied when deciding on the type of outcome.

41. Brazil welcomed the inclusion of the topic "General principles of law" in the Commission's current programme of work. Work on that topic would build on the Commission's useful work on the sources of international law, help to reinforce the unity of the international legal system and counter fragmentation. The Commission should ensure that the identification of general principles of law was based on all legal systems of the world. The Commission should also take the opportunity to clarify that the word "civilized" contained in Article 38 of the Statute of the International Court of Justice was outdated and did not justify any hierarchy among States or legal systems.

42. Brazil also welcomed the inclusion of the topic "Universal criminal jurisdiction" in the Commission's long-term programme of work and encouraged its early inclusion in the current programme of work in order to enhance synergies between the Sixth Committee and the Commission. If the two bodies were discussing virtually the same issue at the same time, the General Assembly would, for example, be able to request the Commission to conduct a legal analysis of specific issues and to

report back at the following session, rather than taking its traditional multi-year approach.

43. A study of the topic "Sea-level rise in relation to international law", also included in the Commission's long-term programme of work, would necessarily touch on several different areas of international law and should be undertaken with care. Brazil was in favour of moving the topic "Extraterritorial jurisdiction" from the Commission's long-term programme of work to its current one.

44. The Commission's draft conclusions on customary international law offered valuable guidance on the identification of a fundamental source of international law. Brazil agreed with the Commission's recommendation that the General Assembly follow up the suggestions contained in the memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available. An online database of State practice relating to international law, based on information received from States, would constitute a positive step in that regard.

45. In the draft conclusions, the Commission had provided precise guidance to practitioners while leaving room for flexibility. It had clearly reinforced the notion that both constituent elements of custom were equally required, that the requirement of a general practice referred primarily to the practice of States, and that there was no such thing as "instant custom". At the same time, it had not been overly prescriptive in areas where it was harder to find precise answers, such as the weight that should be assigned to the practice of international organizations or the highly controversial notion of specially affected States. In both cases it was vital to ensure that general practice was indeed general, representing a wide range of States from different regions and legal backgrounds.

46. Turning to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", the draft conclusions adopted on second reading were a valuable toolkit, as such an in-depth study had previously been lacking. Brazil was pleased in particular to note the Commission's recognition that the interpretation of a treaty consisted of a single combined operation, which placed appropriate emphasis on the various means of interpretation indicated in articles 31 and 32 of the Vienna Convention. The Commission had also drawn an important distinction in the draft conclusions between the re-interpretation of a treaty and its amendment or modification; that distinction must be preserved given the need for parliaments to approve new legal obligations entered into by their Governments.

47. As stated in draft conclusion 10, paragraph 2, the number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), of the Vienna Convention might vary. However, it was important to qualify the statement contained in the second part of that paragraph, according to which silence on the part of one or more parties might constitute acceptance of the subsequent practice when the circumstances called for some reaction. Since the first part of the paragraph required parties to actively engage in subsequent practice, the case of silence constituting acceptance was an exception and should be interpreted restrictively. In addition, the burden of reaction could not be placed equally on all States when the resources for conducting legal analysis and reacting were distributed unevenly. States could also have legitimate political reasons to remain silent or to react at a different time, which needed to be taken into consideration.

48. **Mr. Mahnič** (Slovenia), expressing his delegation's gratitude to the Commission for its contribution to strengthening the rule of law, said that its seventieth anniversary had been an excellent opportunity for it to take stock of its role in promoting the progressive development and codification of international law and the implementation of international law at the national and international levels. His delegation was also grateful to the Codification Division of the Secretariat for ensuring that the Commission's website, which was an invaluable source of information on the work of the Commission, was regularly updated.

49. The Commission's draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties and the commentaries thereto, adopted on second reading, were robust tools with the necessary degree of authority behind them to assist the smaller Member States, which needed the foundation provided in the commentaries to inform their approach to the complex task of treaty interpretation. With regard to specific issues addressed in the draft conclusions, Slovenia agreed with the general principle, mentioned in the commentary to draft conclusion 4, that an element of good faith was necessary in any subsequent practice in the application of a treaty; indeed, that principle applied generally to any treaty interpretation and implementation and was also important to prevent parties from attempting to amend a treaty by a subsequent reinterpretation of its provisions in a way that would in reality necessitate its amendment. In that connection, his delegation was interested to know whether the draft conclusions could be considered as subsequent agreements or subsequent

practice with respect to the interpretation of articles 31 and 32 of the Vienna Convention and whether any of the Commission's other pronouncements on the Vienna Convention had that status, bearing in mind that the Commission had contributed substantively to its content.

50. Turning to the topic "Identification of customary international law", he said that, in view of its status and mandate, the Commission had emphasized the importance of its own deliberations and pronouncements in its work on that topic. Customary international law remained a prominent source of international law, enabling States and international organizations that were not party to treaties for various political, treaty-related or other reasons to accept and apply certain rules not related to those reasons because the rules had been recognized as customary law. Although the Commission's task had not been to identify specific rules of customary international law — which would in any case have been difficult, if not impossible — its work on the criteria for identifying such rules would be useful. The rules of customary international law were inherently difficult to grasp, yet they were often considered to be part of countries' internal legal orders without explicit approval. The Commission's draft conclusions would therefore facilitate the task of the national courts that were called on to identify such rules.

51. Slovenia welcomed the inclusion of the topic of sea-level rise in relation to international law in the Commission's long-term programme of work. The topic related to the far-reaching phenomenon of climate change, which affected the ways in which human societies were regulated internally and internationally. Universal solutions to that global challenge must be found. In view of the most recent international scientific reports on rising temperatures, which were the cause of sea-level rise, the topic needed to be analysed from the perspective of international law and States needed to agree on future action. He therefore recommended that the topic be moved to the Commission's current programme of work.

52. **Ms. Veski** (Estonia) said that her 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 the commentaries thereto.

53. Given the Commission's recognition that the dividing line between the interpretation and the amendment or modification of a treaty was in practice difficult, if not impossible, to fix, it would have been useful to further develop the commentaries to shed light on the legal consequences that might arise from that lack of a clear distinction. Several of the examples of interpretation or amendment given in the commentaries were not in fact clear-cut. It was important to keep in mind the principle of *pacta sunt servanda* and the stability of treaty relations in general, given the potential for subsequent practice to stray further and further away from the interpretation envisaged by the parties at the time of the conclusion of the treaty.

54. It was disappointing that the Commission had decided not to cover in the commentaries the question of subsequent practice in relation to treaties between States and international organizations or between international organizations, since such treaties were becoming increasingly common. Nevertheless, Estonia supported the wide dissemination of the draft conclusions and the commentaries thereto.

55. Turning to the topic "Identification of customary international law", she said that the balance between precision and flexibility in the draft conclusions was appropriate, given the vast range of situations to which the draft conclusion should apply. At the same time, her delegation agreed with the Special Rapporteur that greater precision was needed with respect to the relevance of the practice of international organizations and commended the suggestions he had made to that effect. Estonia supported the statement in the commentary to draft conclusion 4 (Requirement of practice) that international organizations were entities established and empowered by States to carry out certain functions and often served as arenas or catalysts for the practice of States. The practice of international organizations contributed to the formation of rules of customary international law, and it was appropriate to reflect that fact in the draft conclusions. Excluding such practice would preclude States that directed an international organization to execute in their place actions falling within their own competences from contributing to the creation, or expression, of customary international law.

56. Her delegation supported the wording of draft conclusion 6, paragraph 1, indicating that inaction might "under certain circumstances" be a form of State practice. It was clear from the commentaries that only deliberate abstention from acting could be taken into account and that it could not simply be assumed that abstention from acting was deliberate. A reference to "deliberate inaction" could have been made in the draft conclusion itself, as suggested by the Special Rapporteur; however, the draft conclusions were intended to be read in conjunction with the commentaries.

57. With regard to draft conclusion 13, which closely followed the wording of article 38, paragraph 1 (d), of the Statute of the International Court of Justice, the Commission was right to note in the commentaries that some caution was called for when seeking to rely on decisions of national courts as a subsidiary means for the determination of rules of customary international law. Judgments of international courts and tribunals should be given greater weight, as national courts might lack expertise in international law and might have reached their decisions without hearing arguments by States. Estonia supported the wide dissemination of the draft conclusions and the commentaries thereto.

58. Her delegation noted with appreciation the inclusion of the topic "General principles of law" in the Commission's programme of work. With regard to the long-term programme of work, her Government recognized that the Commission already had a very heavy workload; however, there were pressing reasons for adding the topics "Sea-level rise in relation to international law" and "Universal criminal jurisdiction", both of which met the criteria for the selection of new topics.

59. **Ms. Telalian** (Greece) said that the fifth report of the Special Rapporteur on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties had ably addressed the comments and observations received from States. The draft conclusions and commentaries thereto adopted by the Commission on second reading as the final outcome of its work on the topic made a significant contribution to the codification and progressive development of international law, as they were based on the existing rules of treaty interpretation codified in the Vienna Convention but also took into account recent developments in case law and State practice. Her delegation was pleased that the Commission had sought to complement and clarify the existing provisions on subsequent agreement and subsequent practice contained in articles 31 and 32 of the Vienna Convention and to build upon its relevant prior work, including its 1966 commentaries to the draft articles on the law of treaties. The unity and continuity of the Commission's work was important in the light of its mandate. Nevertheless, the Commission should exercise caution when borrowing from its work on other topics, as certain concepts had been developed for the purposes of specific bodies of law and might thus be limited in scope.

60. Greece shared the Commission's understanding of treaty interpretation as a single combined operation that placed appropriate emphasis on the various means of interpretation indicated in articles 31 and 32 of the Vienna Convention. As highlighted in the commentary, the interpreter must identify the relevance of different means of interpretation and give them appropriate weight.

61. As for draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), her delegation welcomed the establishment of a presumption that the parties to a treaty intended to interpret the treaty, rather than amend or modify it. It also agreed that the possibility of amending or modifying a treaty by subsequent practice of the parties had not been generally recognized. That conclusion, firmly grounded in the jurisprudence of international courts and tribunals, was important for the stability of treaty relations, in particular with respect to certain categories of treaties, such as treaties delimiting a boundary, which might be subject to special rules.

62. Turning to draft conclusion 10, she said that caution should be exercised when determining the significance of silence or inaction in the face of a subsequent practice of a party. The Commission had recognized in the commentary that in cases concerning boundary treaties, there appeared to be a strong presumption that silence or inaction did not constitute acceptance of a practice. Therefore, the draft conclusion might be going beyond what was supported by case law in affirming that silence on the part of one or more parties might constitute acceptance of the subsequent practice when the circumstances called for some reaction. Her delegation would have preferred a different formulation of the draft conclusion, stipulating that mere silence or inaction did not constitute acceptance unless it was clear that the circumstances called for a reaction.

63. Her delegation nonetheless welcomed the adoption on second reading of the draft conclusions and the commentaries thereto, which were of high quality and would make a significant contribution to the understanding of the current state of the law in relation to the interpretation of treaties.

64. Turning the topic "Identification of customary international law", she said that her delegation welcomed the adoption on second reading of the draft conclusions and the commentaries thereto. It particularly appreciated the clarification in paragraph (3) of the commentary to draft conclusion 3 that certain forms of practice or evidence of acceptance as law might be of particular significance in some cases. Such clarification provided the flexibility necessary for the application of the two-element approach.

65. Paragraph 3 of draft conclusion 4 (Requirement of practice) struck the appropriate balance on the delicate

issue of the contribution of non-State actors to the identification of customary international law. It would be difficult to argue that the behaviour of non-State actors to whom international norms were addressed was irrelevant to the formation of customary international law. In such cases, the non-State actor's abidance by certain rules and principles, if accepted by the community of States as reflecting the law, might constitute practice that could be taken into account for the formation of a rule of customary international law, although it would not have the status of State practice.

66. Regarding draft conclusion 15 (Persistent objector), she reiterated her delegation's doubts about the applicability of the persistent objector rule in relation not only to the rules of *jus cogens* but also to the broader category of the general principles of international law whose applicability did not seem to depend on States' consent. The specific character of those general principles justified their exclusion from the scope of application of the persistent objector rule, as it would indeed be odd to argue that a State would not be bound by rules having a fundamental character for the international community; there appeared to be no evidence of such an extended application of that rule even in the decisions of international courts. It was hard to imagine how a State could qualify as a persistent objector to such uncontested general principles of international law as the right of innocent passage, the objective legal personality of international organizations or the principle of sustainable development, even if those rules did not qualify as *jus cogens*. The Commission should have addressed those difficulties in its commentary. Her delegation would also have welcomed further elaboration by the Commission on the temporal aspect of the persistent objector rule, given that the difficulty of preserving a persistent objector status over time, as recognized in paragraph (3) of the commentary to draft conclusion 15, footnote 777, did not call into question the applicability of the rule over time.

67. Reiterating her delegation's support for the clarification in paragraph (7) of the commentary to draft conclusion 16 concerning the stricter application of the two-element approach in the case of rules of particular customary law, in the sense that consistent practice and acceptance as law by all the States involved was required, she said that it might have been useful in the context to distinguish between novel particular customs and derogatory particular customs, which required a stricter standard of proof. The draft conclusions and commentaries as a whole were of high quality and would provide valuable guidance on one of the most theoretical matters ever to appear in the Commission's programme of work.

68. With regard to the future work of the Commission, she said that her delegation had some concerns about the Commission's decision to include the topic of sea-level rise in relation to international law in its long-term programme of work. When adding to its programme of work, the Commission should select areas of law where there was a need for regulatory guidance but also a certain amount of State practice. Otherwise, it risked embarking on an exercise *de lege ferenda*. The topic of sea-level rise was not ready for codification, as State practice was scant and still evolving. Moreover, the International Law Association was already studying the topic. Therefore, her delegation, while recognizing the factual consequences and legal implications of sea-level rise, considered that the Commission would do well to postpone its consideration of the topic for a time. If, however, the Commission were to take up the topic, it should preserve the integrity of the United Nations Convention on the Law of the Sea and safeguard entitlements to maritime zones, the stability of maritime boundaries and the stability of relevant treaties. Any discussion of the speculative scenarios mentioned in the syllabus, such as transfers of sovereignty and mergers, would risk going outside the Commission's mandate. While the Commission was to be commended for having adapted its work to face new challenges, it should focus on topics already on its programme of work, rather than branching out into new areas that might not be consistent with its mandate.

69. **Mr. Eick** (Germany) said that the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission on second reading provided significant clarification and practice-based guidance on a complex topic and represented a significant contribution to the codification of international law. The clarification that a subsequent agreement or subsequent practice might, but need not, be legally binding for it to be taken into account was particularly useful. His delegation encouraged the General Assembly to take note of the draft conclusions and the commentaries thereto and to promote their widest possible dissemination.

70. As for the topic "Identification of customary international law", the draft conclusions and commentaries adopted on second reading, and the accompanying bibliography, would provide welcome and useful guidance for practitioners. His delegation was pleased that the final outcome of the Commission's work had taken the form of draft conclusions rather than draft guidelines, as the term "conclusions" better reflected the strong and substantive effort and analysis that had unpinned the work. Germany also welcomed

the memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available (A/CN.4/710).

71. His delegation reiterated its support for the two-element approach to the identification of rules of customary international law and welcomed the detailed guidance in that regard contained in draft conclusions 4 to 10. The approach must be applied carefully, with reference to each of the two elements separately, in particular when considering verbal acts. Germany also supported the overall careful and cautious approach taken in the draft conclusions to ensure that only rules resulting from general and consistent practice could be identified as customary international law. That approach was particularly important in the light of the debate on the relevance of a State's inaction for the determination of State practice. The clarification in paragraph (3) of the commentary to draft conclusion 6 that only deliberate abstention from acting could constitute a form of practice was welcome in that regard. In line with the commentary, his delegation understood "deliberate" to mean that the State in question needed to be conscious of refraining from acting in a given situation, and it could not simply be assumed that abstention from acting was deliberate. His delegation also supported the idea that inaction might serve as evidence of *opinio juris*, provided that, first, a certain amount of time had passed in order to enable States to become aware of a certain practice and respond to it, and, second, that the circumstances called for some reaction to the practice in question.

72. His delegation strongly supported the reference in draft conclusion 4, paragraph 2, to the contribution of the practice of international organizations to the formation, or expression, of rules of customary international law, and the explicit reference in draft conclusion 12, paragraph 2, to the resolutions of international organizations as evidence for determining the existence and content of a rule of customary international law. Given that the contribution of international organizations to the development of customary international law was particularly important in the case of supranational institutions, his delegation appreciated the explicit reference in the commentary to the significance of the practice of the European Union.

73. The Commission's decision to make the commentaries concise in order to best support legal practitioners was logical and practical. However, the Commission might wish to consider developing a more detailed commentary, containing more references, for the purposes of its future work and the benefit of its academic audience.

74. Germany welcomed the clarification in paragraph (6) of the commentary to draft conclusion 1 that the draft conclusions were without prejudice to questions of hierarchy among rules of international law, including those concerning *jus cogens*. In that connection, it supported the without-prejudice clause in draft conclusion 15 (Persistent objector), which also served to clarify the relationship between the draft conclusions and the Commission's work on the topic "Peremptory norms of general international law (*jus cogens*)".

75. As a whole, the outcome of the work on the topic provided a reliable source for the identification of an important source of international law. The Commission had succeeded in maintaining the high standards needed to ensure continuity in the identification of customary international law without hindering the development of new norms.

76. **Mr. Sharma** (India) said that the set of draft conclusions, together with commentaries thereto, on subsequent agreements and subsequent practice in relation to the interpretation of treaties would serve as useful guidance for States and other entities. His delegation wished to highlight in particular its agreement with a number of elements of the draft conclusions adopted on second reading, including the confirmation in draft conclusion 2, paragraph 1, that the rules set forth in articles 31 and 32 of the Vienna Convention reflected customary international law, the statement in draft conclusion 5 that conduct by non-State actors did not constitute subsequent practice, the stipulation in draft conclusion 6, paragraph 1, that the mere agreement of the parties not to apply a treaty temporarily or to establish a practical arrangement did not amount to taking a position regarding the interpretation of the treaty, the presumption reflected in draft conclusion 7, paragraph 3, that subsequent practice could not amend or modify a treaty, and the statement in draft conclusion 10, paragraph 1, that agreements might, but need not, be legally binding.

77. Turning to the topic "Identification of customary international law", he said that, while customary international law was recognized in the Statute of the International Court of Justice as a source of international law, it was not always easy to identify what constituted applicable customary international law in a given situation. He hoped that the draft conclusions would be a relevant tool for the identification of customary international law, in the absence of authentic guidance.

78. His delegation supported the recommendations of the Commission concerning the draft conclusions on

subsequent agreements and subsequent practice in relation to the interpretation of treaties and the draft conclusions on identification of customary international law.

79. **Mr. Kingston** (Ireland) said that the continuing underrepresentation of women in the Commission was dispiriting. The four women members of the Commission represented a mere 12 per cent of its membership, and women had accounted for only 7 per cent of the candidates put forward at the most recent elections. Moreover, it would be beneficial for the Commission to include members from a variety of international law backgrounds, such as academia, legal diplomacy and private practice.

80. On the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, his delegation welcomed the clarification in the commentary to draft conclusion 6 (Identification of subsequent agreements and subsequent practice) that the second sentence of paragraph 1, which contained examples of conduct that did not constitute subsequent agreements or practice, was merely illustrative. His delegation was also pleased that the second sentence of draft conclusion 10, paragraph 1, had been changed in order to express more clearly that an agreement under article 31, paragraph 3 (a) and (b), of the Vienna Convention did not have to be legally binding.

81. Turning to the topic of identification of customary international law, he said that the memorandum prepared by the Secretariat was a very useful resource. His delegation supported the Commission's recommendation that the Secretariat make available the information contained in the annexes to the memorandum through a periodically updated online database.

82. His delegation welcomed the inclusion of the topic of universal criminal jurisdiction in the Commission's long-term programme of work. The Commission was well positioned to assist States in defining universal jurisdiction, identifying its nature and scope, and considering State practice in its application. The Commission's work should complement future discussions on the issue in the Sixth Committee. As for the new topic of sea-level rise in relation to international law, an in-depth analysis by a study group of existing international law could enhance the international community's understanding of the applicable rules of international law, in particular with regard to the protection of affected persons and the effect of sea-level rise on statehood. More detailed comments reflecting his delegation's position on the aforementioned topics could be found in his written statement, available on the PaperSmart portal.

83. **Mr. Jiménez Piernas** (Spain) said that, while his delegation welcomed the adoption on second reading of the draft conclusions on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", it had a number of concerns about the methodology and focus of the Commission's work. The Commission had once again shown too little ambition and produced another text with insufficient normative value. That said, the draft conclusions were balanced and largely reflected the most representative elements of international practice as a whole. Moreover, his delegation commended the decision to limit the scope of the work to matters related to articles 31 and 32 of the Vienna Convention.

84. His delegation appreciated the distinction drawn in draft conclusion 7 and the commentary thereto between the interpretation and the modification of a treaty, in line with international jurisprudence. It also welcomed the fact that, in the commentary to draft conclusion 11, reference was made to consensus in the context of decisions of conferences of States parties. Furthermore, it commended the balanced approach taken in the draft conclusions, in particular draft conclusion 12 (Constituent instruments of international organizations), to the practice of international organizations.

85. However, Spain continued to have reservations about draft conclusions 6 to 10; as it had previously indicated, they should have been more precise and should have included sufficient normative content. The most glaring example was draft conclusion 8 (Interpretation of treaty terms as capable of evolving over time), the final wording of which rendered it more or less expendable. Similarly, draft conclusion 10 (Agreement of the parties regarding the interpretation of a treaty) did little to shed light on the nature of the agreements in question.

86. In contrast, Spain had no objection to the final version of draft conclusion 13 (Pronouncements of expert treaty bodies), certainly the most controversial of the draft conclusions. The Commission had provided reasonable arguments for its choice of content and terminology, and the approach taken with regard to the question of the nature and scope of the pronouncements of expert treaty bodies seemed to be in line with State practice, which accorded expert treaty bodies a very clearly defined framework for action. The draft conclusion rightly did not contemplate the possibility that the activities of such bodies could result in the adoption of instruments that were legally binding on States.

87. His delegation did not support the restrictive approach taken to the characterization of the conduct of non-State actors in draft conclusion 5 (Conduct as subsequent practice). The commentary to the draft conclusion should have included a reference to the practice of actors with limited, but undeniable, legal personality under international law, such as colonial peoples and national liberation movements.

88. Turning to the topic "Identification of customary international law", he said that his delegation welcomed the Commission's adoption of the draft conclusions on second reading and supported the suggestions contained in the memorandum by the Secretariat concerning the collection of relevant State practice and dissemination of information on the evidence of customary international law. His delegation again had reservations about a text that had no normative value; however, the draft conclusions were balanced, and many of them accurately and unambiguously reflected international practice, which amounted to codification *strictu sensu*. In that connection, Spain commended the two-element approach to the formation of customary international law, the stipulation that the practice must be general, the value accorded to *opinio juris* and the references to the interaction between customary international law and other sources of international law. His delegation also welcomed the important references to the persistent objector rule and particular customary international law, and the Commission's balanced approach to the question of international organizations.

89. However, a number of his delegation's concerns had not been taken into account in the final version of the draft conclusions. It was unfortunate that in draft conclusion 6, paragraph 1, the word "deliberate" had not in the end been included before the word "inaction", as suggested by the Special Rapporteur. It would have been more enlightening to mention intentionality in the text of the draft conclusion, rather than consigning it to the commentary, given its importance in determining whether inaction constituted a form of practice. While his delegation agreed fully with the content of draft conclusion 11 (Treaties), it maintained its position that the word "rule" was used tautologically therein and that the phrase "rule set forth in a treaty" should therefore be changed.

90. By limiting itself to codification, the Commission had missed an opportunity to clarify unresolved questions in order to facilitate modest, reasonable and desirable progressive development of the legal framework concerning the identification of customary international law. In particular, in draft conclusion 12 it had taken a very restrictive approach to the acts of international organizations, disregarding the fact that the practice of such organizations had the potential to influence the process of establishing customary international law in the same way that a treaty did.

91. His delegation was disappointed that in draft conclusion 13 (Decisions of courts and tribunals) the Commission had minimized the role played by case law in the identification of rules of customary law, when in practice it was the usual way in which a relatively authoritative determination of customary international law was attained. Downplaying the importance of case law could lead to the fossilization of customary law. With regard to the persistent objector rule, it was regrettable that it had not been specifically stated in draft conclusion 15 that there could be no persistent objection to peremptory norms of general international law. His delegation also reiterated its view that reference should have been made in the draft conclusions to the issue of burden of proof in the identification and formation of customary international law.

92. **Mr. Metelitsa** (Belarus) said that his delegation supported the proposal made by France for the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties and the draft conclusions on identification of customary international law to be issued as publications of the United Nations, along with summaries of the views expressed by Member States in connection with those texts. His delegation would seek the inclusion of a provision to that effect in the relevant draft resolutions of the General Assembly.

93. With regard to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", referring to the commentary to draft conclusion 2 (General rule and means of treaty interpretation), he said that his delegation took the view that, in order for the practice of a State to establish an agreement, it needed to be accepted by at least one other State. With regard to the commentary to draft conclusion 5 (Conduct as subsequent practice), Belarus was of the view that the conduct of an organ of a State was relevant for purposes of treaty interpretation only if that conduct constituted State practice: if it was annulled by a higher organ it could not be considered relevant State practice.

94. In the commentary to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), draft conclusion 8 (Interpretation of treaty terms as capable of evolving over time) and draft conclusion 9 (Weight of subsequent agreements and subsequent practice as a means of interpretation), reference was made to cases taken up by a number of international courts, international arbitral

tribunals and national courts. However, given that the cases in question concerned the implementation of international treaties at the domestic level, rather than the violation of such treaties by States, the rulings of those courts were not directly relevant to the interpretation of treaties.

95. With regard to paragraph 3 of draft conclusion 11 (Decisions adopted within the framework of a conference of States parties), his delegation agreed that the decision cited in paragraph (33) of the commentary did not constitute a consensus, since one State party in the case in question had clearly entered an objection. Furthermore, it did not believe that, in the case of a decision adopted by a majority regarding the interpretation of a treaty, the position of States that voted against such decision had no effect on the interpretation of that treaty. Such a situation was possible only when it had been expressly provided in the treaty that it could be interpreted by means of decisions requiring only the agreement of a majority of States, as in that situation the objecting State would have acquiesced in advance to the interpretation of the treaty being decided by a majority of States parties.

96. With reference to draft conclusion 13 (Pronouncements of expert treaty bodies), he agreed with a number of delegations, including Denmark, speaking on behalf of the Nordic countries, that such pronouncements did not constitute subsequent agreements or subsequent practice for the purpose of interpretation of treaties. The reaction of States to those pronouncements was of greater relevance; for that reason, also, Belarus supported the publication of the comments of States submitted in response to the Commission's reports.

97. Belarus held similar views regarding the draft conclusions on the topic of identification of customary international law, which reflected the Commission's effort to ensure consistency in its work on the two topics. Paragraph (5) of the commentary to draft conclusion 3 (Assessment of evidence for the two constituent elements) accurately reflected the general principle according to which the action and inaction of the organs of a State must be assessed on a case-by-case basis. Decisions by lower authorities that were overruled by higher authorities did not constitute evidence of State practice. Belarus agreed that practice of a State that went against its interests or entailed costs for it could indicate that the rule being implemented was perceived by the State to be a legal obligation.

98. It was correctly stated in paragraph (8) of the commentary to draft conclusion 4 (Requirement of practice) that the conduct of entities that did not have international legal personality was neither creative nor expressive of customary international law and was relevant only at the domestic level. Belarus therefore agreed with the position expressed by Estonia, among others, in relation to the commentaries to draft conclusion 6 (Forms of practice) and draft conclusion 13 (Decisions of courts and tribunals), that caution was called for in assessing the decisions of national courts, not so much because national judges might lack expertise in international law, but because the cases in question concerned disputes under national law. By the same logic, the decisions of international criminal tribunals dealing with crimes committed by individuals, those of international investment tribunals seeking to protect the rights of individual investors, and those of human rights bodies examining States' fulfilment of their human rights obligations in relation to private individuals, were not directly relevant to public international law.

99. With regard to the Commission's decision to include certain topics in its current or long-term programme of work, Belarus noted the inconsistency in the approaches taken by the Special Rapporteurs for the topics of crimes against humanity and immunity of State officials from foreign criminal jurisdiction, respectively. His delegation therefore hoped that the Commission would not begin work on the topic of universal criminal jurisdiction until such time as work had been completed on the topics of crimes against humanity and immunity of State officials, so as to ensure greater consistency in its work.

100. More detailed comments reflecting his delegation's position on the draft conclusions could be found in his written statement, available on the Committee's PaperSmart portal.

101. **Mr. Oyarzábal** (Argentina), commending the Commission for the thorough manner in which it had addressed the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", said that his delegation was particularly pleased with the way the Commission had taken into account the various actors in international relations. Paragraph 2 of draft conclusion 5 (Conduct as subsequent practice) struck an appropriate balance between the growing participation of non-State actors and the sovereign power of States, while also preserving the consensual and voluntary nature of international law. That voluntary element was also highlighted in draft conclusion 11, in reference to the legal effect of decisions adopted within the framework of conferences of States parties.

102. His delegation supported the content of draft conclusion 13, paragraph 3. The affirmation that pronouncements of treaty bodies might give rise to, or refer to, relevant practice, alongside the stipulation that silence by a State with respect to a pronouncement, or the practice of another State in response to the pronouncement, should not be presumed to constitute acceptance of the interpretation expressed in the pronouncement, struck an appropriate balance between progressive development of international law and the free will of States. However, the approach to silence in the second paragraph of draft conclusion 10 (Agreement of the parties regarding the interpretation of a treaty) was problematic. The idea that silence could constitute acceptance of subsequent practice might impose on States an excessive burden to monitor all practices of other States. That would be a particular challenge for developing countries with fewer resources.

103. Under draft conclusion 7, paragraph 3, it was presumed that the parties' intention was to interpret the treaty, rather than to modify it. The relationship between interpretation and modification had been discussed at the United Nations Conference on the Law of Treaties (1968–1969), at which a proposal had been made to formulate an article explicitly allowing the modification of treaties. On that occasion, the Argentine delegation had expressed its view that a treaty could be modified by subsequent practice, on the understanding that State practice in the implementation of a treaty should carry more weight than its fossilized written wording. If treaties were to endure over time, they must be able to keep pace with natural, scientific, technological and even geopolitical changes. However, that possibility was the exception, not the rule, and must always be subject to the unambiguously expressed sovereign will of States. Draft conclusion 9 (Weight of subsequent agreements and subsequent practice as a means of interpretation) was relevant in that regard, as it highlighted the need to take into account the clarity and specificity of a subsequent agreement or subsequent practice, and the frequency with which a practice was repeated. That lent flexibility to the draft conclusions and rightly promoted a pragmatic approach to the interpretation of treaties.

104. Turning to the topic of identification of customary international law, he said that a number of the draft conclusions expressed relatively uncontroversial concepts. In that regard, draft conclusion 4 (Requirement of practice), paragraph 3, accurately reflected the role of non-State actors in international relations. His delegation also welcomed the clarification in the commentary to draft conclusion 6 that inaction must be deliberate in order to be considered practice.

105. With regard to draft conclusion 4, paragraph 2, it was his delegation's view that the practice of international organizations could also contribute to the formation, or expression, of rules of international law when such practice was external to the international organization, but not when it was internal. It would have been useful if the Commission had clarified that the internal acts of such organizations could not be deemed relevant, as they were not international in character. Furthermore, the references in draft conclusions 4 and 12 to the "formation" and "development" of rules of customary international law in the context of international organizations might be giving those organizations too great a role in the formation of such rules. His delegation supported the reference to the importance of resolutions of the General Assembly of the United Nations in the commentary to draft conclusion 12 but considered that the United Nations General Assembly was the only organ of an international organization that should have a normative role in the development of customary international law, as it was uniquely democratic and representative of the international community.

The meeting rose at 1.05 p.m.