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Chair: Mr. Danon. . . . . (Israel)
later: Mr. Katota (Vice-Chair) . . . . . (Zambia)

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16-18684 (E)

The meeting was called to order at 10.05 a.m.

Agenda item 145: Administration of justice at the United Nations (*continued*) (A/71/62/Rev.1, A/71/157, A/71/158, A/71/163 and A/71/164)

1. **The Chair** said that informal consultations on the agenda item had included a question-and-answer segment with representatives of the Office of Legal Affairs, the Executive Director of the Office of Administration of Justice, the Office of the United Nations Ombudsman and Mediation Services and the Internal Justice Council. The informal consultations had centred on the legal aspects of the report of the Secretary-General on the administration of justice at the United Nations (A/71/164), the report of the Secretary-General on the activities of the Office of the United Nations Ombudsman and Mediation Services (A/71/157) and the report of the Internal Justice Council (A/71/158), which included annexes containing the memorandum submitted by the judges of the United Nations Dispute Tribunal on systemic issues and the comments submitted by the judges of the United Nations Appeals Tribunal.

2. The Committee also had before it the note by the Secretary-General transmitting the report of the Interim Independent Assessment Panel on the system of administration of justice at the United Nations (A/71/62/Rev.1) and the report of the Secretary-General on the findings and recommendations of the Panel and revised estimates relating to the programme budget for the biennium 2016-2017 (A/71/163).

3. A draft letter from the Chair of the Sixth Committee to the President of the General Assembly had been negotiated during the informal consultations. The draft letter drew attention to issues relating to the legal aspects of the reports discussed and contained a request that it should be brought to the attention of the Chair of the Fifth Committee. He took it that the Committee wished to authorize him to sign and send the draft letter to the President of the General Assembly.

4. *It was so decided.*

Agenda item 78: Report of the International Law Commission on the work of its sixty-eighth session (*continued*) (A/71/10)

5. **The Chair** invited the Committee to continue its consideration of chapters I to VI and XIII of the report of the International Law Commission on the work of its sixty-eighth session (A/71/10).

6. **Ms. Telalian** (Greece), addressing the topic "Identification of customary international law", said that the Special Rapporteur was to be commended for the quality of his four reports; they had paved the way for the swift adoption of draft conclusions on one of the most theoretical topics ever considered by the Commission. The Commission's work provided international lawyers with much needed normative guidance in dealing with the thorny issue of the identification and precise content of customary international law rules.

7. Referring to draft conclusion 6, paragraph 1, of the draft conclusions on identification of customary international law adopted by the Commission (A/71/10, para. 62), she said that practice as a constituent element of customary international law might indeed include inaction, but only under certain circumstances; those were spelled out in paragraph 3 of the commentary as denoting cases of "deliberate abstention from acting".

8. It should be made clear, however, that deliberate abstention referred in particular to States whose rights and interests were especially affected by the action of another State or States. The deliberate inaction of States without an interest at stake was less conclusive than that of interested States. The differentiation, already taken into account in paragraph 7 of the commentary to draft conclusion 10, was also relevant to the conditions that inaction should satisfy, taking also into account that it was already reflected in paragraph 3 of the commentary to draft conclusion 8, albeit with reference to action rather than inaction of States expected or in a position to act.

9. While the decisions of national courts might be a form of State practice, as well as an evidence of *opinio juris*, the distinction made in paragraph 6 of draft conclusion 6 between such decisions as a form of State practice and the same decisions as a subsidiary means for determining the rules of customary law was not

obvious and was difficult to implement in practice. The matter therefore required further elucidation.

10. Regarding draft conclusion 15, 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 Commission's commentary should address the matter, particularly since paragraph (2) of the commentary to draft conclusion 1 already referred to "principles" of international law as having "a more general and fundamental character", thus acknowledging the distinction between the former and mere "rules" of customary international law.

11. 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 that a State might 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 in State practice or in the decisions of international courts. Her delegation would welcome further elaboration by the Commission on the temporal aspect of the 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 353, did not call into question the applicability of the rule over time.

12. Welcoming 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, she said that it might be useful in the context to distinguish between novel particular customs and derogatory particular customs, which required a stricter standard of proof.

13. Turning to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", she said that the draft conclusions provisionally adopted on first reading (A/71/10, para. 75) would provide useful guidance and assistance to all those required to interpret international treaties and would contribute significantly to the promotion of legal certainty and the stability of international relations. Her delegation particularly welcomed the establishment of a presumption in favour of interpretation in draft conclusion 7 and noted, with respect to draft conclusion 8, that the Commission rightfully did not take a position regarding the appropriateness of a more contemporaneous or more evolutive approach to treaty interpretation in general and recognized the need for some caution in deciding, in specific cases, whether to adopt an evolutive approach.

14. With regard to specific aspects of subsequent agreements and subsequent practice (Part Four of the draft conclusions), it was appropriate to specifically address the role of certain forms of treaty practice in relation to the interpretation of treaties. It was important to bear in mind, however, that while decisions adopted within the framework of a conference of States parties might be a direct source of subsequent agreements or subsequent practice, the practice of an international organization as such and the pronouncements of expert treaty bodies did not constitute *per se* subsequent practice within the meaning of article 31, paragraph 3, and article 32 of the 1969 Vienna Convention on the Law of Treaties. Accordingly, they might only have an indirect effect on the interpretation of treaties; that point should be reflected not only in the commentary but also in draft conclusion 13. Caution was in order, in view of the lack of relevant State practice in the field: the legal significance of the pronouncements of expert treaty bodies for the purpose of treaty interpretation within the scope of the aforementioned provisions of the Vienna Convention should not be overestimated.

15. Her delegation welcomed the Commission's decision to recommend for inclusion in its long-term programme of work the topical and challenging topic "The settlement of international disputes to which international organizations are parties". The Commission should deal with the topic comprehensively and review the definition and scope of not only disputes of an international character, such as those identified by the Special Rapporteur (A/71/10, annex A), but also disputes of a private law character involving international organizations, including an assessment of the possibility of waiving immunity in certain specific cases. It was indeed timely for the Commission to study the best means to address such disputes, since different types of disputes could call for different solutions. The possible outcome of the topic could include proposals for strengthening dispute settlement procedures or developing new ones,

together with proposals for model clauses to be included in relevant instruments or treaties.

16. Turning to the topic "Protection of persons in the event of disasters", she said that the draft articles set out in paragraph 48 of the Commission's report were well balanced and offered an important framework for the reduction of risks in disasters. An addition to the last paragraph of the preamble, referring to the sovereign equality of States and the duty of States not to intervene in matters of domestic jurisdiction, might be desirable, however, in the form of an invitation to all States to assist the United Nations and its agencies when providing relief to persons in the event of disasters, since any call for immediate action at such times usually went directly to them. As the content of the draft articles reflected a progressive codification of international law, they should be treated as a package to be adopted through a General Assembly resolution in order to preserve their integrity.

17. **Mr. Galindo** (Brazil) that his Government welcomed the successful conclusion of the Commission's work on the topic "Protection of persons in the event of disasters" and endorsed its recommendation that its outcome should be the elaboration of a convention to be adopted by the General Assembly on the basis of the draft articles on the topic, thereby providing the broader legal framework that was lacking on the issue. The recognition of the centrality of human dignity in international law through a stand-alone article was particularly welcome.

18. His delegation noted the completion of the first reading of the draft conclusions on the topic "Identification of customary international law" and expressed its appreciation for the recent survey on ways and means of making customary international law more readily available. It welcomed the clarification in draft conclusion 15 that the inclusion of the persistent objector rule was without prejudice to any issues of *jus cogens*.

19. On the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", his delegation considered that the debate could benefit from further thought on the current definitions of "expert treaty body" and "international organization", since some regional organizations could be described as neither or both and yet their pronouncements were equally relevant for the purposes of articles 32 and 33 of the Vienna Convention on the Law of Treaties. Noting, in conclusion, the addition of new topics to the Commission's long-term programme of work, he said that the General Assembly could itself submit topics for consideration by the Commission and thereby help to identify areas where useful contributions could be made to the progressive development of international law and its codification.

20. **Mr. Alfday González** (Mexico) reaffirmed his delegation's support for the draft articles on the protection of persons in the event of disasters and for the Commission's decision to submit them to the General Assembly for the elaboration of a convention. They clearly reflected an attempt to strike a balance between the protection of the human rights of victims of disasters and the principles of State sovereignty and non-interference. Draft articles 3, 14, 15 and 17, in particular, met the concerns expressed by a number of delegations in matters of external assistance. In article 11, however, the words "has the duty" might more suitably be replaced by "has the right", in accordance with the principle of State sovereignty set out in the fifth paragraph of the preamble.

21. Mexico welcomed the inclusion of draft article 18 on the non-applicability of the draft articles in cases of armed conflict, which were governed by the rules of international humanitarian law, notwithstanding the recognition in draft article 3 that disasters could be caused by human beings. His delegation considered that the draft articles were a major contribution to the progressive development of international law on the topic and looked forward to continuing to work with the Commission in that area.

22. On the topic "Identification of customary international law", he commended the Special Rapporteur for his extensive analysis and for his draft conclusions, which provided useful guidance in identifying that source of law. It should, however, be spelled out that the practice of international organizations contributed to the identification of the practice of their member States and not, as was currently the case, to the formation or expression of custom, which did not *per se* constitute customary international law; its evidentiary value for the identification of State practice lay solely in the performance of functions transferred by States or

functionally equivalent to their own. That would be consistent with the approach adopted in the draft conclusions, centred on the practice of States and their acceptance of that practice as law.

23. His delegation welcomed the special mention in the commentary of the contribution made by official statements of the International Committee of the Red Cross to State practice; the commentary should, however, be reworded to put that body on the same footing as the entities other than States whose conduct might help to shape State practice, as referred to in the previous paragraph.

24. As for inaction as State practice, caution was in order. Lack of action by a State could constitute practice only in exceptional cases where the State deliberately abstained from action in a circumstance that would require it to react; in that respect, as in other formulations in the draft conclusions, it would be wise to refer specifically to circumstances in which the provision applied. It would also be desirable that only the resolutions of international organizations and intergovernmental conferences and not their practice should be included as evidence of their acceptance as law by States (*opinio juris*), to avoid any contradiction with the previous reference to such practice; moreover, their value as evidence would indeed depend on the existence of other evidence of their providing constituent elements of custom.

25. Clarification would be helpful on the "subsidiary means" for the determination of rules of customary international law (draft conclusion 13, para. 2), including on whether the evidentiary value of the decisions of international courts should carry greater weight than those of national courts. Lastly, and given that it was noted in the commentary to draft conclusion 15 that the inclusion of the persistent objector rule was without prejudice to any issues of *jus cogens*, it would be necessary to clarify the relationship between the two, since there could be no persistent objection to *jus cogens* rules.

26. Turning to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", he said that, while subsequent agreements and subsequent practice were essential in maintaining the effectiveness and guaranteeing the stability of treaties, that had not been sufficiently recognized by those who were called on to apply or interpret treaties. The Commission had done much to release their potential by shedding light on their significance, scope and context, while the work spearheaded by the Special Rapporteur would be of great practical assistance to those required to interpret treaties, at the international or domestic level.

27. His delegation considered that draft conclusion 13 rested on the premise that the pronouncements of expert treaty bodies might give rise to, or refer to, an agreement or might possibly reflect subsequent practice by parties under article 31, paragraph 3 (a) and (b), or other subsequent practice under article 32 of the Vienna Convention. The pronouncements of bodies set up to help ensure the proper functioning of the treaty could provide the parties with useful guidelines for its application or interpretation. Such pronouncements could reflect a subsequent practice or agreement of the parties, in other words, a subsequent practice or agreement that had already arisen between the parties prior to the pronouncement of the expert body, in which case the pronouncement had an added value as a means of identifying the subsequent practice or agreement, subject to the conditions required for the establishment of a subsequent agreement or practice under the Vienna rules, as clarified by the Commission in the draft conclusions. His delegation also concurred that silence by a party did not constitute acceptance of a subsequent practice under article 31, paragraph 3 (b), as States could not be expected to state their position on all the pronouncements of expert bodies.

28. His delegation did not interpret such non-presumption of acceptance, in that particular case, as an exception to the general rule set out in draft conclusion 10, paragraph 2. He suggested that the wording of paragraph 3 of the draft conclusion, which stated that "(S)ilence by a party shall not be presumed to constitute subsequent practice", could be improved to read "(S)ilence by a party shall not be presumed to constitute its acceptance of a subsequent practice". In conclusion, he said that his delegation regretted that there was no draft conclusion on the importance of subsequent practice and subsequent agreements for the work of interpretation of national courts or on the specific role of national courts in contributing to the creation of subsequent practice and subsequent agreements.

29. **Mr. Misztal** (Poland), welcoming the Commission's adoption of the draft instruments under consideration, said that his delegation supported all initiatives, such as interactive dialogues, aimed at strengthening the interaction between the Committee and the Commission and that efforts should continue to focus on making the process of interaction more transparent. In that connection, it would be useful to consider supplementing the document "Topical summary of the discussion held in the Sixth Committee" prepared yearly by the Secretariat with an annex indicating proposals made regarding specific provisions of any draft conclusions, guidelines or articles.

30. The Commission's work on the topic "Protection of persons in the event of disasters" led to the conclusion that sovereignty was the source not only of the rights of States but also of their obligations, including towards their own populations. The draft articles on the topic had the virtue of highlighting the value of solidarity in international relations and contained elements of both the progressive development of international law and its codification, in keeping with the Commission's dual mandate. The question of whether they might result in a convention might best be decided in the light of how they were used in international practice.

31. On the topic "Identification of customary international law", it was unfortunate that neither the draft conclusions nor the commentary went into the question of how the rules of customary international law evolved. His delegation continued to find draft conclusion 12 too restrictive with regard to the role of international organizations in creating customary rules; moreover, that provision did not differentiate between custom that was binding only within an international organization and custom as part of general customary rules.

32. His delegation welcomed the Commission's adoption of a new draft conclusion on the pronouncements of expert treaty bodies under "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". He reiterated the proposal that the Commission's long-term programme of work should include a topic entitled "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". His delegation also supported the inclusion therein of the topic of "General principles of law", as proposed by the Secretariat.

33. **Ms. O'Sullivan** (Ireland) said that her delegation welcomed the adoption of the draft articles on the protection of persons in the event of disasters, which would contribute significantly to the codification and harmonization of that field of law and provide useful guidance to States. On the topic "Identification of customary international law", she said that the draft conclusions, commentaries and bibliography would also serve as a useful resource. Her delegation supported the Special Rapporteur's consideration of the ways in which evidence of customary international law might be made more readily available. The observations set out in the Secretariat's memorandum on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691) provided invaluable insights, particularly the discussion highlighting the increasing reliance on national court decisions in subject areas where domestic judicial practice was especially relevant, such as immunity from jurisdiction, criminal law and diplomatic protection.

34. Her delegation welcomed the explanation in the commentary to draft conclusion 3 of the different aspects to be taken into consideration and the need to assess the two constituent elements separately. It also welcomed the note of caution sounded in the commentary to draft conclusion 6 that only deliberate abstention from acting might serve to count as practice and the clear statement, in the commentary to draft conclusion 10, of the requirements for inaction to have probative value as evidencing acceptance as law. Her delegation considered, however, that the revised draft of conclusion 4 set out in paragraph 32 of the Special Rapporteur's report (A/CN.4/695) lost some of the meaning of the earlier draft, which it would be desirable to retain, particularly with reference to the primary role of State practice in contributing to the creation of customary international law.

35. Turning to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", she welcomed the statement in draft

conclusion 13, paragraph 3, that silence by a party would not be presumed to constitute subsequent practice accepting interpretation of the treaty as expressed in a pronouncement of an expert treaty body and, in the same paragraph, that such pronouncements might refer to a subsequent agreement or subsequent practice rather than that such an agreement or practice might be reflected in a pronouncement. Her delegation supported the Commission's decision to recommend the inclusion of the topic "The settlement of international disputes to which international organizations are parties" in its long-term programme of work, including disputes of a private nature.

36. **Mr. Mandelblit** (Israel), addressing the topic "Protection of persons in the event of disasters", said that his Government supported the Commission's efforts to enhance such protection and that Israeli teams had been at the forefront of countless disaster relief missions around the world. The undertaking to engage in protection missions should not be considered in terms of legal rights and duties. For that reason, the draft articles should be formulated as guidelines or principles for voluntary international cooperation efforts. Accordingly, in draft articles 7, 10, 11, 14, 15, 16 and 17, the language should be altered, for instance by replacing "shall" by "should", so as not to give an impression of asserting new rights and duties.

37. His delegation welcomed the emphasis in draft article 11 on the affected State's responsibility for determining the extent of its national response capacity to cope with a disaster; it concurred with draft article 13 that external assistance could be provided only with the consent of the affected State; and it welcomed the addition of the words "at any time" to draft article 17. While his delegation attached importance to the statement in draft article 18, paragraph 2, that the draft articles did not apply to the extent that the response to a disaster was governed by the rules of international humanitarian law, it noted that, even under international humanitarian law, the consent of the affected State was generally required in circumstances where a third State wished to provide assistance.

38. Turning to the topic "Identification of customary international law", he said that Israel welcomed the Commission's serious examination of State practice and *opinio juris*, which was a requirement in order to identify customary norms; casual references among some academics and State actors to norms as reflecting customary international law that were not based on the accepted process for identifying custom ultimately undermined the integrity of international law and its binding force. His delegation continued nevertheless to have reservations regarding the vagueness of the language and the lack of emphasis on the nature of the rule in question, the overall context and the particular circumstances. Draft conclusion 6, paragraph 2, and draft conclusion 10, paragraph 2, for example, stipulated that "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference" was a form of State practice, as well as a form of *opinio juris*. Usually, however, such conduct had nothing to do with the formation or identification of customary law and was heavily influenced by non-legal and political considerations; it would therefore be more accurate to say that such conduct might be a form of State practice and, at most, might be considered in some circumstances a form of *opinio juris*.

39. His delegation was also concerned that the draft conclusions deviated from existing law in a number of places. Draft conclusion 4, for example, argued that practice by international organizations *qua* international organizations contributed to the formation or expression of custom, which was not so under international law. Similarly, draft conclusion 7 stipulated that varying practice by a State might be given reduced weight, even though variations in practice often indicated that the State did not see itself bound to act in any particular way.

40. **Ms. Hong** (Singapore) said that the topic "Identification of customary international law" was of practical importance for States, particularly small ones, and that her delegation was heartened that the draft conclusions on the topic addressed some of the concerns it had previously raised. She cited the need for caution in assessing the practice of international organizations; the need for a pragmatic approach to the persistent objective principle; and the careful description of the various factors required for ascertaining *opinio juris* from resolutions of international organizations and conferences: all those points were covered by the commentary to each draft conclusion, which in practice should be applied

together with the draft conclusions as an indissoluble whole.

41. Turning to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", she said that, as treaty language was the cornerstone of interpretation, her delegation agreed with paragraph 2 of draft conclusion 13 and its accompanying commentary that any possible legal effect of a pronouncement by an expert treaty body depended, first and foremost, on the specific rules of the applicable treaty itself (para. (7) of the commentary to draft conclusion 13). While it also agreed that such pronouncements could not as such constitute subsequent practice, as stipulated in paragraph (9) of the commentary to draft conclusion 13, paragraph 3, her delegation maintained that their effect and weight also depended on the practice of the parties in the application of the treaty pursuant to any pronouncement. Her delegation appreciated the clarification in paragraph (17) of the commentary to that same paragraph that the expression "may give rise to" specifically addressed situations in which a pronouncement preceded the practice and the possible agreement of the parties. It was understood, moreover, that the expression "may give rise to" did not suggest that it was the pronouncement that created such practice or agreement. Prudence was called for so as to avoid taking short-cuts that would inappropriately circumvent the amendment mechanisms provided for in the constituent document.

42. She reiterated her delegation's strong support for the maintenance of the topic "The fair and equitable treatment standard in international investment law" in its long-term programme of work, noting that over the past few years Member States' work on plurilateral comprehensive economic agreements had marked the development of the relevant law. International investment law was part of public international law and therefore needed to be mainstreamed into the Commission's work. On the topic "Protection of personal data in transborder flow of information", which also remained in the Commission's long-term programme, her delegation would support a revisiting in its next quinquennium of the syllabus prepared thereon 10 years earlier, with attention to whether the topic should be expanded to include other cyberspace-related challenges to public international law. Of the two new topics recommended by the Commission for its next long-term programme of work, Singapore supported the topic "The settlement of international disputes to which international organizations are parties". The law of international organizations had reached a natural turning point, at which a thorough examination of dispute settlement involving them was very much needed.

43. **Mr. Plasai** (Thailand) said that the draft articles on the protection of persons in the event of disasters consolidated existing rules of international law as a useful guide for international cooperation in disaster risk reduction and response. Thailand, along with other countries in Southeast Asia, was engaged in such cooperation, which must always be in accordance with international humanitarian and human rights law, as well as with the principles of independence, sovereignty and non-interference.

44. His delegation supported the two-element approach to the topic of identification of customary international law, namely, an assessment of both general practice and acceptance of that practice as law. Acceptance as law, or *opinio juris*, required careful assessment, as the actual occurrence of the formation of a rule of customary law was what made it distinguishable from mere usage or observed regularities in international conduct. As for the important concept of inaction, it was appropriate that it could not be both a possible form of practice (draft conclusion 6) and evidence of *opinio juris* (draft conclusion 10). The replacement of the term "inaction" in draft conclusion 10 by the more precise words "failure to react over time to a practice" was appreciated.

45. On the topic of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", he said that such agreements and practice were indeed to be considered for the purpose of treaty interpretation only. Subsequent agreements with a view to or with the effect of amending a treaty were subject to article 39 of the Vienna Convention on the Law of Treaties, while the possibility of modifying treaties through the subsequent practice of the parties had long been excluded from the law of treaties. His delegation did not therefore recognize the possibility of amending or modifying a treaty by subsequent agreement or subsequent conduct within the meaning of article 31 of the Vienna Convention and supported the view that the

amendment procedure provided for in a treaty must not be circumvented. Treaties were meant to provide certainty, stability and predictability in international relations.

46. *Mr. Katota (Zambia), Vice-Chair, took the Chair.*

47. **Mr. Morales López** (Colombia) said that his Government would submit detailed written comments on the topics "Identification of customary international law" and "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" by 1 January 2018. His delegation strongly supported the Commission's recommendation that the General Assembly should elaborate a convention on the basis of the draft articles on the topic "Protection of persons in the event of disasters". Over the previous decade, the Commission's practice had been to recommend that the General Assembly take note of draft articles in a resolution, annex the articles to the resolution, and consider, at a later stage, the elaboration of a convention on the basis of the draft articles. In the current instance, the Commission had decided by consensus to depart from that practice. It had done so, after some deliberation, because it was convinced of the importance and timeliness of its work: natural and man-made disasters were increasingly frequent, Hurricane Matthew being only the most recent example. The international community had recently proved willing to conclude legally binding instruments on related matters, such as the Paris Agreement on climate change, and had shown a strong interest in adopting a convention on the topic at hand. Such a convention would also fulfil the perceived need for the systematization of international law regulating humanitarian relief to which the Secretariat had drawn attention when it had first proposed the topic.

48. The draft articles maintained a delicate balance between the principle of sovereignty and non-intervention and the essential needs and rights of persons affected by disasters. They reflected fundamental concepts that had already begun to influence relevant international instruments and documents, such as the Sendai Framework for Disaster Risk Reduction and decisions taken by the Security Council in situations of armed conflict. They had helped to create, and come to embody, the subject of international disaster response law.

49. Lastly, his delegation welcomed the Commission's decision to hold the first half of its seventieth session in New York.

50. **Mr. Nguyen** Vu Minh (Viet Nam), referring to the topic "Identification of customary international law", said that his delegation reiterated its full support for the approach based on two elements, namely State practice and *opinio juris*. For the purposes of draft conclusion 4 (Requirement of practice), States were the primary actors whose practices should be taken into account for the formation or formulation of international law. As was rightly stated in the commentary to draft conclusion 4, paragraph 2, the practices of international organizations should be considered only with great caution and on the basis of certain criteria, for instance, whether the practice of the organization was carried out on behalf of or endorsed by its member States. There was a divergence between the forms of State practice set out in draft conclusion 6 and the forms of evidence of *opinio juris* set out in draft conclusion 10. In order to address the concerns of States and help clarify the matter, clear guidelines and criteria should be established with a view to determining what forms those categories might take. Resolutions adopted by international organizations often did not reflect customary international law, as they could be political or could take the form of non-binding recommendations. It would be useful for that point to be reflected in draft conclusion 6, paragraph 2, draft conclusion 10, paragraph 2 and draft conclusion 12.

51. With regard to draft conclusion 13 [12], his delegation had concerns about the role of the decisions of national courts as subsidiary means for the determination of rules of customary law. National courts varied in their country-specific constraints and the doctrine of precedent in domestic law. It was therefore difficult to argue that they shared the same values as international courts, particularly the International Court of Justice, or that their decisions should have equal weight in international law. Moreover, decisions of national courts could be regarded both as forms of State practice and as forms of *opinio juris*. In order to avoid confusion, the role of such decisions should be clarified.

52. The set of draft conclusions on the topic "Subsequent agreements and subsequent practice in

relation to the interpretation of treaties" had considerably clarified the issues at hand. In particular, his delegation agreed with the findings contained in draft conclusion 7, paragraph 3, namely that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intended to interpret the treaty, not to amend or to modify it, and that the possibility of amending or modifying a treaty by subsequent practice of the parties had not been generally recognized. His Government intended to comment further on the draft conclusions by 1 January 2018.

53. **Ms. Krasa** (Cyprus), referring to the topic "Identification of customary international law", said that her delegation continued to have concerns regarding draft conclusion 15 ("Persistent objector"). International jurisprudence had largely dealt with the matter in obiter dicta and in cases where the rule had not, at the time in question, acquired the status of customary international law. It was therefore premature to develop a draft conclusion on the question. Paragraph 4 of the commentary to the draft conclusion acknowledged that there were differing views on the persistent objector rule; the issue therefore required further elaboration, as it had implications for the authority of the rule.

54. In addition, many delegations felt that the persistent objector principle was inapplicable not only with regard to *jus cogens*, but also with regard to other types of rules of fundamental importance. That issue also called for further reflection. Furthermore, the draft conclusions did not ask whether an objection could be maintained in the long run or, in particular, after an emerging rule had come to be part of the corpus of international law. Many States had abandoned an initial objection in order to accept rules that were moving towards crystallization. In any event, as the draft conclusions made clear, a State invoking the persistent objector rule should be under a duty to present solid evidence of its longstanding and consistent opposition to the rule in question in any given case before its crystallization.

55. Her delegation had been an early and active proponent of the concept of *jus cogens* in international law. States including Cyprus had invoked *jus cogens* even before the adoption of the Commission's draft articles or the Vienna Convention on the Law of Treaties (1969). In the light of articles 53 and 64 of the Convention, which addressed the invalidating effect of *jus cogens*, it would be useful for the current work on the topic to explore further the question of who determined whether a treaty conflicted with that norm. As a general point, her delegation fully agreed that the Commission should avoid any outcome that could result in, or be interpreted as, a deviation from the Convention. It should also be recognized, however, that the scope of the topic extended beyond the law of treaties and included such areas of international law as the responsibility of States for internationally wrongful acts.

56. Her delegation agreed with the proposed timetable for the consideration of the topic and supported the suggestion that the Commission should draft an illustrative list of norms that had already acquired the status of *jus cogens*. It would be sensible to apply the notion of hierarchical superiority to *jus cogens* norms, with the prohibition of force in international relations at the forefront. That idea was supported by the text proposed by the Commission during the negotiations on the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986). In particular, in its commentary to article 53 of the draft convention (A/CONF.129/16/Add.1(Vol.II)), the Commission had noted that the prohibition on the use of armed force in violation of the principles of international law embodied in the Charter was the most reliable known example of a peremptory norm. The proposal was feasible, as the number of *jus cogens* norms to consider was relatively limited. Such a list would be useful given that, according to article 53 of the Vienna Convention, peremptory norms existed only if they were accepted and recognized by the international community of States.

57. **Ms. Saijo** (Japan) said that the Committee and the International Law Commission had, over the previous seven decades, played a major role in developing international law. Some had suggested that the Commission had now exhausted the deliberation of most fields of international law, and that multilateral forums now played a larger role in law-making. Its work was in fact by no means complete; rules were currently being created on an almost daily basis, and international law was increasingly fragmented. It was, however, essential for the Commission to select

practical topics rather than highly theoretical ones. In accordance with article 17, paragraph 1, of the statute of the Commission, States should more actively suggest new topics for the Commission's consideration. For example, in the light of the increasing workload of international tribunals, the Commission should focus on areas of international law in which clarification was sought by Member States facing judicial uncertainty.

58. The Committee and the International Law Commission were the central bodies for the progressive development and codification of international law, and it was crucial that they should cooperate closely. Her delegation therefore welcomed the decision that the Commission would hold the first half of its seventieth session in New York and the second half in Geneva.

59. Given the diversity of international organizations, it might prove difficult to find common legal norms concerning the new topic "Settlement of international disputes to which international organizations are parties". Her delegation hoped that the Commission would continue its deliberations towards that end. The other new topic, "Succession of States in respect of State responsibility", was sensitive and should be approached with caution; given the limited number of cases, it was unclear whether sufficient State practice existed.

60. The topic "Protection of persons in the event of disasters" was of particular interest to Japan in view of its own national experience. Overseas humanitarian assistance could be vital in the event of disasters. The sovereignty of the affected State should be respected, but should not constitute a barrier to humanitarian assistance. The draft articles on the topic preserved the delicate balance between sovereignty and humanitarian requirements. In addition, they gave careful consideration to the widespread practices of States. One example was the concept of disaster risk reduction, which many States had incorporated into treaties and into their national legislation and policy. Her Government was committed to that concept and had hosted the third United Nations World Conference on Disaster Risk Reduction, which had taken place from 14 to 18 March 2015 in Sendai.

61. The topic "Identification of customary international law" had the potential to make a useful contribution to the development of international law. As it inevitably touched upon fundamental questions regarding the nature of international law, it called for a prudent and balanced approach. Her delegation agreed in general with the Special Rapporteur's view that it might be useful for the Commission to consider ways to make the evidence of customary international law more readily available and accessible. The Commission should, however, take into account linguistic and other factors that affected Member States' ability to provide such evidence.

62. Draft conclusion 6 listed both "conduct in connection with treaties" and "conduct in connection with resolutions adopted by an international organization or at an international conference" as examples of State practice. The two categories were then analysed separately in draft conclusions 11 and 12, respectively. Her delegation welcomed that approach. Paragraph (3) of the commentary to draft conclusion 12 rightly pointed out that, unlike treaties, resolutions were normally not legally binding documents and for the most part did not seek to embody legal rights and obligations. While they could sometimes have value in providing evidence of existing or emerging law, resolutions could not be a substitute for the task of ascertaining whether there was in fact a general practice that was accepted as law accompanied by *opinio juris*.

63. Her delegation understood that identifying the existence and content of a rule could well involve considering the process by which it had developed. However, customary international law could be formed in several ways, depending on the subject of the rule or the circumstances. It was not feasible to identify the manner in which the rule was formed or the precise moment at which it came into being. The Commission was therefore justified in arguing that the aim of the topic should be to assist in determining the existence and content of a rule as of a particular time.

64. Turning to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", she said that the Commission had actively debated the significance of the phrase "pronouncements of expert treaty bodies" in the context of article 31, paragraph 3 (a) and (b) and article 32 of the Vienna Convention on the Law of Treaties (1969). While broadly sharing the Commission's definition of the phrase, her delegation had doubts regarding the

suggestion made in paragraph (3) of the commentary to draft conclusion 13 [12] to the effect that the output of a body composed of State representatives was a form of practice on the part of those States, which thereby acted collectively within its framework. As could be understood from paragraph (14) of the commentary to the draft conclusion, the output of conferences of States parties did not necessarily represent the intentions of the parties, unless it was adopted unanimously or, under certain circumstances, by consensus. Moreover, such decisions often contained political agreements that did not necessarily interpret the treaties. It was therefore not appropriate to regard them as sources of subsequent agreement or subsequent practice of States parties in relation to the interpretation of treaties. Her delegation agreed with draft conclusion 13 [12], paragraph 3, on the understanding that while the pronouncements of expert treaty bodies should be given due regard and could give rise to, or refer to, a subsequent agreement or subsequent practice of States parties, they did not in themselves amount to such.

65. **Mr. Dolphin** (New Zealand) said that the topic "Protection of persons in the event of disasters" should focus on practical mechanisms to ensure protection and facilitate immediate assistance in the event of a disaster. A clear framework of rules should be laid out to facilitate international cooperation in practical terms; the approach should be pragmatic, rather than strictly rights-based. His delegation looked forward to discussing whether the draft articles could provide a mechanism to develop guidance for States to assist in managing protection in the immediate aftermath of a disaster.

66. His delegation supported the draft conclusions on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". Draft conclusion 13 [12], in particular, provided a basis for recognizing that, while the text of a treaty took precedence, the pronouncements of expert treaty bodies could contribute to identifying subsequent agreements or subsequent practices. Unless the text of the treaty provided otherwise, such pronouncements were not intended to form subsequent practice. Expert treaty bodies could, however, make observations on best practice or develop minimum standards of compliance. In so doing, they could provide a valuable mechanism for guiding States' implementation of treaties. Their views could be highly persuasive, and could hence influence the practice of States, resulting in a subsequent practice.

67. Lastly, it was important for the Committee and the Commission to have more frequent opportunities to cooperate. His delegation was therefore grateful for the increase in informal briefings provided to the Committee by members of the Commission, and welcomed the latter's decision to hold half of its seventieth session in New York.

68. **Mr. Kamran** (Malaysia) said that his delegation commended the Commission on its adoption of the draft preamble, draft articles and commentaries thereto on the topic "Protection of persons in the event of disasters" and noted that the Commission had taken into consideration his delegation's comments, including those provided during the 66th session of the General Assembly (A/C.6/66/SR.24). States continued to differ as to whether the draft articles were suitable for codification in a legally binding framework. His delegation felt that they should not take that form, because disaster response inevitably required a degree of flexibility. The existing international measures for disaster relief and humanitarian assistance took the form of guidelines. Moreover, a binding convention would result in a range of administrative procedures that could complicate the deployment of aid, and hence prove counter-productive.

69. If the draft articles were to become part of a binding instrument, several of their provisions would become problematic. For instance, draft article 12 stipulated that States had a right to offer external assistance to the affected State, a provision that was in contrast with the principle of State sovereignty. Draft article 13 stipulated that the affected State could not arbitrarily withhold consent to receive external aid. It would be difficult to make that provision binding, as aid requirements varied according to the circumstances, and a one-size-fits-all approach could prove unduly restrictive. States should therefore have the prerogative to decide whether to adopt the draft articles. Even if they decided not to do so, they should be free to refer to them whenever it appeared necessary do to so. The draft articles could thus become an international reference point with regard to disaster relief and management.

70. Valuable progress had been made on the topic "Identification of customary international law". In view of the crucial nature of that topic, it was vital for Member States to reach consensus. At previous sessions of the General Assembly, his delegation had raised concerns about the definition of "international organizations"; about the value of the decisions of national courts and the resolutions of international organizations and intergovernmental conferences in providing evidence of customary international law; and about the need to clarify the phrase "any other function" in the draft conclusion relating to the attribution of conduct. Most of those concerns appeared to have been taken into consideration. His Government was currently examining the draft conclusions and commentaries and would provide comments and observations to the Secretary-General by 1 January 2018.

71. Addressing the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", he said that, to the extent that the relevant draft conclusions restated and reaffirmed the rules set out in the Vienna Convention on the Law of Treaties (1969), they provided a valuable guide to treaty interpretation and the role of subsequent agreements and subsequent practice in that regard. His delegation remained committed to the preliminary views on the topic that it had put forward at the previous three sessions of the General Assembly.

72. Draft conclusion 1 [1a] sought to set out the purpose of the draft conclusions, but did not fully reflect the intent of the Special Rapporteur and the Commission as expressed in the extensive commentary. The draft conclusion should therefore be reconsidered and fleshed out. For instance, it could be re-worded to state that draft conclusions did not address all conceivable circumstances in which subsequent agreements and subsequent practice might play a role in the interpretation of treaties.

73. Draft conclusion 13 [12] sought to recognize that the pronouncements of expert treaty bodies, whether as a form of practice under the treaty or otherwise, might be relevant for its interpretation, either in themselves or in connection with the practice of States parties. While that draft conclusion was an important one, it also raised a number of concerns. It should always be borne in mind that, as stated in paragraph 1, expert treaty bodies did not consist of State representatives; their members acted in a personal capacity. Moreover, such bodies were established under a specific treaty, which determined their competences. In paragraph 2, the term "pronouncement" was used in a somewhat generic manner to subsume various forms of action. Any possible legal effect of such pronouncements depended, first and foremost, on the specific rules of the treaty under which the body had been established.

74. With regard to paragraph 3, it was difficult to establish that all parties had accepted, explicitly or implicitly, that a given pronouncement expressed a particular interpretation of a treaty. While the commentary to the draft article did shed some light on the issue, it would also be useful for the issue to be examined in greater detail in future work, particularly in order to explore other ways of identifying an agreement of the parties regarding the interpretation of a treaty as expressed in the pronouncement of an expert body.

75. **Mr. Fernández Valoni** (Argentina) said that the Commission's work on the topic "Protection of persons in the event of disasters" was outstanding; his delegation supported the recommendation that the General Assembly should elaborate a convention on that basis. With regard to the topic "Identification of customary international law", his delegation had reservations concerning draft conclusion 4, paragraph 2, which stated that the practice of international organizations could also contribute to the formation, or expression, of rules of international law, and the commentary thereto, which stated that practice that was external to the international organization could be particularly relevant. It would be useful to clarify whether the internal acts of such organizations could also be deemed relevant; his delegation believed that they could not, as they were not international in character. It would also be helpful for draft conclusion 4, paragraph 3, to define the circumstances in which the conduct of other actors could be taken into consideration when assessing State practice. Draft conclusion 6, paragraph 1, should specify that inaction could be considered a form of State practice only when it was voluntary; it would be difficult to interpret inaction on any other grounds as evidence of consent that could generate a legal effect. Draft conclusion 12 reflected generally-accepted doctrine, but would benefit from greater precision. In particular, the wording

should clarify whether soft law could crystallize pre-existing rules of customary international law.

76. With regard to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", his delegation welcomed the fact that the draft conclusions analysed the consequences of the conduct of certain non-State actors, including non-governmental entities, international organizations, groups of experts and conferences of States parties to treaties. The draft conclusions 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. Draft conclusion 12 [11] referred to the practice of international organizations, but only with reference to the interpretation of their constituent instruments. It would be useful also to consider their significant role in general international law.

77. Draft conclusion 7, paragraph 3, presumed that the parties' intention was to interpret the treaty, rather than to modify it. In point of fact, when the question had been discussed at the United Nations Conference on the Law of Treaties (1968-1969), his delegation had supported the formulation of an article explicitly allowing the modification of treaties. If treaties were to endure over time, they must be able to keep pace with natural, scientific, technological and even geopolitical changes. Various instances of customary international law and arbitral cases had recognized the modification of treaties. Only the World Trade Organization had failed to do so, something that could be explained by its particular function. Although draft conclusion 7, paragraph 3, did not completely rule out that possibility, it could usefully be re-worded to take a more flexible approach. It could, for example, state that, in principle, the intention was not to modify the treaty unless there existed a concordant, ample and consistent practice and the fundamental provisions of the treaty were not affected.

78. Draft conclusion 4 distinguished between subsequent agreement and subsequent practice, defining the latter as consisting of conduct, including pronouncements, by one or more parties in the application of the treaty. His delegation welcomed that distinction and the comments made in the report of the Special Rapporteur (A/CN.4/660, paras. 66-75). The mere existence of a subsequent agreement was sufficient for it to constitute an authentic interpretation. In the case of a practice, on the other hand, its consistency and the reactions of other States must also be established. Draft conclusion 4, paragraph 3, was somewhat confusing: it appeared to posit two different types of practice, one of which was an authentic means of interpretation and the other merely supplementary. Moreover, article 32 of the Vienna Convention did not refer to subsequent practice as a supplementary means of interpretation. Lastly, paragraph (2) of the commentary to draft conclusion 6 stated that the identification of subsequent agreements and subsequent practices required particular consideration of the question of whether the parties had taken a position regarding the interpretation of a treaty or whether they were motivated by other considerations. It was not clear why such other considerations would be relevant, or what the implications would be.

79. **Mr. Perera** (Sri Lanka), said that the draft articles on the topic "Protection of persons in the event of disasters" reflected a very careful balance between, on the one hand, recognizing the principle of sovereignty and the primary role of the affected State and, on the other hand, strengthening international cooperation and highlighting the fundamental value of solidarity. The new draft preamble reinforced that balance. While the primary focus was rightly on the immediate post-disaster response and the early recovery phase, draft articles 2 and 9 also addressed disaster risk reduction and disaster prevention and mitigation. His delegation welcomed the holistic approach to the disaster cycle. The draft articles recognized that disaster response and mitigation measures should primarily meet the needs of the persons concerned, while also respecting their rights. That approach was preferable to one that might pit those components against one another.

80. Draft articles 4 (Human dignity), 5 (Human rights) and 6 (Humanitarian principles) together formed the core of the humanitarian principles that should guide disaster relief efforts. Draft articles 7 (Duty to protect) and 8 (Forms of cooperation in the response to disasters) were significant in the light of the guiding principles annexed to General Assembly resolution 46/182, which underlined that the magnitude and duration of many emergencies might be beyond the response capacity of many affected countries and also underscored the importance of national and

international law in that context. As the Commission had noted, international cooperation should not be seen as diminishing the primary role of the affected State. Under draft article 10, paragraph 2, the affected State had the primary role in the direction, control, coordination and supervision of relief assistance. The principle of cooperation must be understood as being complementary to the duty of the authorities of the affected State to respond to the needs of affected persons within their jurisdiction. The guiding principles annexed to General Assembly resolution 46/182 stated that the sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. International law had also long recognized the principle that the affected State was best placed to determine the gravity of a situation and frame the response.

81. Draft article 11 reflected a concern to ensure timely and effective relief assistance. In the final analysis, however, it should be left to the affected State to assess the severity of a disaster and the limits of its response capacity. The principle of good faith should be the crucial factor in determining whether the threshold requirements of the draft article applied. Draft article 13 sought to establish a qualified consent regime. The principle that the affected State must give consent was one of the guiding principles annexed to General Assembly resolution 46/182. Paragraph 2 of the draft article stated that consent to external assistance should not be withheld arbitrarily. That provision was essential to the qualified consent regime, but its application relied on striking a delicate balance among a number of factors. The guidance provided in paragraph (8) of the commentary to the draft article was particularly helpful in that regard.

82. With regard to the draft conclusions on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", his delegation welcomed the fact that, under draft conclusion 13 [12], silence should not be presumed to constitute acceptance of the interpretation of a treaty as expressed in a pronouncement of an expert treaty body. Such acceptance could not be lightly presumed, and States parties could not be expected to take a position regarding every pronouncement of a treaty body. Those conclusions should be applied carefully to each specific set of circumstances.

The meeting rose at 1.05 p.m.